TAKING OVER
How family businesses can make a success out of succession

THE FINEST EDUCATION MONEY CAN BUY
Why places at Britain’s élite boarding schools are so in demand amongst wealthy Asian families

ESTATE PLANNING
100 Years’ experience, at your disposal

BETTER THAN GOLD
Investing in classic cars
Welcome

One of the most enjoyable aspects of being Managing Partner of Withers has been the opportunity to meet many of the firm’s fascinating clients.

This magazine is intended to highlight a number of the challenges and issues facing our clients both personally and professionally. We discuss not only legal issues, but also other topics that we know matter to our clients. Ultimately it’s not just about what we know at Withers but who we know. So whatever your needs we can help.

We are proud to have been advising individuals, families, businesses and charitable organisations for over one hundred years. Our clients trust us to help them navigate the many challenges they face and to protect and enhance their interests in difficult, as well as in good times.

One challenge that has dominated in recent years has been the increased globalisation of our clients’ affairs, both on a professional and personal level. Whether it is their businesses or their philanthropic endeavours that now operate internationally, or the increased number of their family members living, working and being educated abroad, the need for joined-up cross-border advice has never been greater.

As one client said to me recently, “Being a global citizen certainly makes my life more interesting but it also makes it a lot more complicated”.

I hope you enjoy reading the first issue of ‘With...us’ and find the content interesting.

If you have any questions or observations I’d be delighted to hear from you.

Best wishes

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In October 2012 the firm opened its tenth international office in Singapore, so as to provide on-the-ground US and UK legal services to clients and intermediaries in South East Asia.

The launch party, held at the prestigious Fullerton Bay Hotel, attracted over 250 guests, with Sat Pal Khattar, founder of top Singapore law firm Khattar Wong & Partners, being the guest speaker.

Art Law: The Guide for Collectors, Investors, Dealers & Artists, written by Withers’ US attorneys Ralph Lerner and Judith Bresler is commonly acknowledged as the definitive text for anyone who buys, sells, collects, creates, appraises, authenticates, exhibits, restores, invests, or advises in the art field.

Currently in its fourth edition, ‘Art Law’ provides readers with helpful suggestions from tax-advantaged strategies for collectors and artists to model agreements that define the rights and obligations of the parties involved.

To celebrate the completion of the new edition, the firm hosted a party at New York City’s Gagosian Gallery. More than 200 VIPs in the art community attended.

The Gallery was an especially fitting location as Withers represents Larry Gagosian, famed art dealer and owner of the Gagosian Gallery chain. During the reception, the Gallery displayed the last eight paintings by Cy Twombly, whose estate and foundation have been advised on by the firm.

In 2012 Withers advised on 25 percent of all London residential properties sold for over £5 million, with the majority of buyers from Asia and the Middle East. Most commentators forecast this trend to continue as London is still regarded as a long-term secure and profitable investment.

The US Withers real estate team is also experiencing strong interest in US property, particularly commercial investment. Increasingly property funds are being used, especially by Asian buyers.

For example the team have advised a Singaporean syndicate of investors and developers on structuring and acquiring the site for the creation of a new $140 million luxury residential project in Manhattan’s fashionable High Line district.
Withers Consulting Group

Withers launches non-legal consultancy to help families and entrepreneurs with their strategic planning

Withers Consulting Group (WCG) is a brand new non-legal consultancy created to help families and entrepreneurs decide what future success means for them and how best to organise and run their affairs to achieve that success.

The consultancy is run by two acknowledged leaders in the consulting field, Kenneth McCracken and Amelia Renkert-Thomas. They provide non-legal strategic advice that assists with the long-term challenges that arise for the stewards of family wealth as well as the critical shorter-term needs of entrepreneurs in the wealth creation phase.

This can range from articulating a family’s shared purpose or developing a comprehensive governance design to guiding entrepreneurs through the initial development and structuring of their business interests.

WCG uses a sophisticated consulting framework that brings together governance, family dynamics, organisational development and business strategy.

The consultancy builds on Withers’ vast experience as a trusted advisor to families and their businesses for over 100 years. Ultimately, WCG is about helping clients resolve issues that could potentially undermine the future success and harmony of both their businesses and the family itself.

The following statements are actual client issues that WCG consultants have helped address and resolve:

- How will we divide responsibilities and control of our business and investments amongst family members? What’s fair?
- I’ve now secured funding for my new business but what profit-sharing arrangements should I have with my new business partners?
- How do we make sure our family and business values are passed to the next generation?
- Should I give my business to my children and if so how?

For more information on WCG please visit www.withersconsulting.com

Estate Planning

100 years’ experience, at your disposal

Almost two-thirds of US citizens will die without having made a will. It’s a sobering statistic, bearing in mind the consequences of intestacy – financial and administrative – for the families they leave behind. Ivan Sacks, partner and managing director of the firm’s New York office, explains: “Prudent estate planning is essential. Without it, your estate’s administration will be left to the vagaries of state law, and punitive tax charges may also apply. Moreover, without planning, you may unintentionally create heartache, family disputes and financial loss for your loved ones.”

Withers has been advising clients on their estate planning issues for over 100 years. Today, as the largest law firm devoted to private client work, its experience, resources and know-how in this area are unrivalled. Until now, however, the benefits of this knowledge have been available principally to ultra-high-net-worth families, some of whom have built relationships with the firm stretching back generations.

Now the firm is leveraging its leadership experience in estate planning to make it easier for a broader spectrum of clients to obtain estate plans from Withers at a fixed cost, and with enhanced value compared to traditional alternatives.

Ivan goes on to explain: "We’ve always made substantial ongoing investments in our forms, training, research and professional development. What we’ve done now is to enable our lawyers to package price all the benefits of our experience and investment to individuals and families on a sliding scale, so that clients of different levels of wealth can get an outstanding estate plan at a price they consider affordable. It’s not about supplying a commoditised service. That doesn’t apply in estate planning. It’s about working with individual families to identify their particular needs, and then tailoring an affordable, personalised service that matches those needs.

INTRODUCING VALUE INTEGRATED PLANNING (VIP)

The concept of our VIP service is all about creating interlinked products and services that deliver bespoke yet predictable and secure experiences for individuals and their families. For many people, the uncertainty and cost of accessing experienced estate planning advice can be daunting. Some rely instead on ‘off the shelf’ packages or make do with basic advice – neither of which can accommodate anything but the most simple requirements. Others procrastinate and do nothing.

Continued over >
Recognising this vacuum in the market for skilled, experienced estate planning services at an affordable price, Withers has designed Value Integrated Planning (VIP). Developed as a modular offering, VIP allows clients to choose not only the documents they need prepared in consultation with our attorneys, but also how long they want the process to take and how much after-service they want included (such as annual consultations from three years afterwards, up to the life of the estate plan). Typical costs for a complete estate plan – often including a will, revocable trust, health-care proxy, living will and durable power of attorney – may vary from US$7,500 or less, up to US$25,000, depending on the level of enhancements they need to choose and their level of wealth.

So what can clients expect? Ivan explains: “The exciting thing is that we believe we have created something where clients at every level of wealth serviced by us will get more value for the same or a lower price. At the Silver end of the scale that means clients receive somewhat standardised drafts quickly and agree to a 45-day project timeline for information delivery, drafts and decisions. This timeline incorporates two meetings with Withers lawyers to discuss requirements, a scheduled telephone or personal consultation to review draft documents, along with interim calls with our draughtsmen as needed. We set a time limit because we’re working to a fixed price, and this is the best way of ensuring we can provide a great product, at an affordable price point.”

At the Gold and Platinum levels, the agreed project timeline extends to 90 days, with unlimited consultations, and more time for changes and decision-making, which is more suitable at levels of wealth or complexity that demand a longer timetable. Both levels also include annual update meetings with Withers lawyers to review documents and, where necessary, agree amendments. These are essential to take account of inevitable changes in circumstances – from births and deaths to changes in law and family wealth.

Ivan continues: “This gives certainty on cost and process – a key concern for clients. Once we’ve agreed how long the lifecycle needs to be, we provide a detailed schedule setting out exactly what we’ll do within the agreed fee. Particularly where joint estate plans are being prepared, it’s not unusual for couples to procrastinate during the will drafting process. Difficult issues can arise. For instance, who should have care of the children if both parents die? We’ll help you reach those decisions within the agreed timeframe. Our approach ensures that everyone knows exactly what they’re getting from the outset.”

THE VIRTUAL VAULT

An innovative new service developed by Withers and available for all VIP clients is called the ‘Virtual Vault’. This provides secure, confidential storage for true digital copies of all the documents and information needed for effective estate planning and wealth protection. Ivan explains: “This service is at the foundation of the estate planning pyramid. Information overload is a fact of life.

Everyone today needs to keep track of more and more documents and information – from wills and deeds, to trusts, insurance policies, bank details, marriage certificates and proofs of citizenship. But with so many concerns around privacy and cyber security, it’s often hard to know where to store these vital records.”

Withers works with clients to identify, collect and place digital copies of this information in its virtual vault system. Based on its experience in estate and wealth planning, the firm knows the basic instruments and information that all individuals need to preserve. It also knows how hard it can be to track them down when a family member dies without having already gathered them in one place. As Ivan goes on to say: “As a trusted adviser to families around the world, we’re professional ‘secret keepers’, under the cloak of attorney/client privilege and bound by law and our professional ethics to secure confidential information.

“We’re also estate planning lawyers, so we know exactly what information clients need to collect for their family’s welfare or for their own lifetime personal planning and wealth management in case of need. That’s why we’re uniquely placed to offer this service to our clients.”

As an international law firm with servers in different offices around the world, the firm backs up documents every 24 hours to another location, providing disaster recovery benefits to the service. Retrieval of the documents is simple. Clients simply ask their lawyer or identified data steward, by voicemail or email, for copies of the documents they need, and these are delivered in an agreed format – via encrypted email, or in physical media, from flash drives to printed documents. Customised passwords and protocols are agreed with clients so they can access documents direct when needed.

Ivan sums up: “By organising their most important documents with us in electronic storage, clients get peace of mind. They know a trusted adviser is holding the information. They know the information is all in one place, and readily accessible. And they know they can get advice on the legal implications of this information whenever they need it. It’s all part of our VIP service.”
Taking over: How family businesses can make a success out of succession

Family business succession planning

The failure to plan for and manage intergenerational change is the greatest threat to the survival of a family-owned enterprise. Withers develops and implements customised succession plans for families striving to keep their businesses in the family across multiple generations. Each plan is carefully co-ordinated with the company’s business objectives, as well as the family’s estate plan. Key elements include:

- An ownership structure that enables the family to maintain control of the business through generational change, whether by direct ownership through trusts or other entities
- Regulation of share ownership through shareholders’ agreements, typically including restrictions on transfer, voting agreements and a mechanism for the purchase of shares from family members with liquidity needs, or those who exit the family business
- Corporate governance, including a strong board of directors and, where appropriate, one or more independent directors and/or advisors
- A family governance framework through which each family member (or group of family members) can assert their legitimate interests in order to promote and maintain harmonious family relations and enable each generation to focus on its shared responsibilities
- Contingency planning to mitigate the risk of the unexpected death or disability of a key family business leader (or potential successor)

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With the Family Firm Institute estimating that only 30 percent of US family firms survive the shift to the second generation (just 12 percent are still viable by the third generation), there is an urgent need to answer the question: how can family businesses make a success out of succession planning?

‘Planning’ is the operative word. Effective succession plans map out what criteria should be used to assess and select the successor, how transition will take place and, crucially, how to deal with the tensions that are often inevitable along the way.

The example of one US-based family business shows what can be achieved. Founded in 1922, Arkay Packaging – now in its ninth decade – provides added-value packaging to companies in the health and beauty industry, including Estée Lauder, Procter & Gamble, and L’Oréal. With 200 employees and annual sales of US$50 million, the company rode out the worst of the recession and continues to adopt new technologies, increase sales, and expand. Without a successful transition from second to third generation ownership, however, the outcome could have been very different.

Mitchell Kaneff, Arkay’s chairman and CEO, takes up the story: “One of the key lessons I’ve learned is that succession planning needs to start early. For me, it started when I was just 18 years old. That’s when, at my father’s request, our lawyers invited me to their offices to sign a will. It made me understand what I was a part of – and it forced me to take on some responsibility.”

Having stepped up as president of the company in 1997, Mitchell realised that his ideas for Arkay were not necessarily the same as his father’s: “My father had his plan. Mine was to try and change it!” To flush out the issues that needed to be confronted, in 2004 Mitchell introduced an industrial psychologist into the equation – a move he believes helped him and his father, Howard Kaneff, achieve real progress personally, as well as for Arkay.

“Being in business creates a whole range of emotional challenges,” Mitchell explains, “but when it’s a family business, those challenges are even more pronounced. That’s why it was so important for an outside professional to come in and mediate. He made us question what we wanted from the business – and how we planned to achieve those objectives.”

As a result, Mitchell and his father were able to develop a set of rules and guidelines detailing how they would work together. But with low revenue, high overhead, and significant debt, the operating environment at Arkay was becoming increasingly unstable – and tensions within the business were mounting. Circumstances came to a head when, following a disagreement with Howard, Arkay’s highly esteemed and experienced COO tendered his resignation.

“That was a catalyst for me,” remembers Mitchell. “I’d always believed that being proactive meant decisively confronting and managing the issues at hand – and on this occasion that meant asking my father to step down. These were demanding times and there simply wasn’t room for two quarterbacks on the same field.”

Howard Kaneff continues: “Mitchell rescued me. I could have gone right on through to the end. It was very comfortable sitting on the throne and moving the chess pieces around – but it wasn’t right for the business.”

Mitchell recently authored a book based on his hands-on experience of succession, Taking Over: Insider Tips from a Third-Generation CEO.” As he puts it: “I realised what I’d needed back then was a guide similar to ‘What to Expect When You’re Expecting’. I’d needed back then was a guide similar to ‘What to Expect When You’re Expecting’. I wasn’t having child, but I was taking over 200 employees and two plants – and back then, there was no guide of any kind. So I wrote one!”
DEPART SMART

With job security a rarity, even for top-flight executives, it pays to prepare in advance for a possible future exit – whether you decide it is time to move on, or your employer makes that decision for you.

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Depart smart

V

isibility in the workplace is a fact of life nowadays and no executive is immune from circumstances that can change overnight and derail an otherwise stellar career. Sudden market shifts, mergers or other changes in control, and unforeseen trading events, profit warnings or missed targets are examples of events that can trigger swift and career-changing shifts in an executive’s employment status and career. Executives, no matter how talented, should be knowledgeable about their employment rights and how to protect them. The top-line advice is ‘be prepared.’ For executives working on secondment or under dual contracts, informed awareness of any likely cross-border considerations is essential. Lack of preparation and knowledge of your rights can have a major impact on your financial position and future employability when you change jobs and/or relocate.

A PRE-DEPARTURE CHECKLIST

Experience has shown that executives who have taken the time to prepare before any employment decision is taken are better able to maximize their economic and reputational position in an exit. Though each departure is unique, there are a number of steps departure-savvy executives can take now to manage risk and preserve important rights, so they are ready when termination becomes inevitable.

1. Maintain a complete set of all current employment documents. Whether you are planning to make a move, or you believe your current position may be at risk, make sure you have copies of all current employment documentation (employment agreements, amendments, severance, equity and benefit plans, employment handbooks, etc.) before you lose or relinquish access to your computer. These materials are essential in assessing your rights and post-termination obligations in various exit scenarios and under applicable law. While there is a risk that requesting these materials from human resources may alert your employer to your planned departure, employees are legally entitled to copies of their employment documentation, and there are ways to manage this risk thoughtfully.

2. Observe confidentiality obligations. Care also should be taken to abide by any contractual or other limitations on your right to access information from company premises, so that you do not undermine your exit position with a claim by your employer that you stole company information without permission. As these obligations often turn on fine-line distinctions, advice should be obtained in advance of any ‘document hunting’ to ensure that you comply with the terms of your employment contract (and applicable laws).

3. Manage your reputation. How you position your departure, both internally and externally, can have a significant impact on future career opportunities. Resigning in the heat of the moment may seem like a good idea from a reputational perspective, but it can prove extremely costly – economically and in terms of lost leverage to get the protections you need to preserve your reputation. Developing a reasoned approach with input of counsel before formalizing any exit plans will enhance your ability to have meaningful input on a consistent and agreed strategy with your employer over the context and timing of all internal and external announcements and press releases, particularly the stated reason for your departure.

4. Consider the impact of equity rights. A termination of employment, whether voluntary or not, can result in forfeiture of unvested equity grants. A careful review of plan documents and vesting schedules should be undertaken when setting a departure date, or in negotiating the terms of an involuntary exit, so as to preserve valuable equity rights to the fullest extent possible. The degree to which equity will be forfeited can also feed into discussions with a new employer, in terms of planned start dates and how much forfeited equity (if any) they are willing to buy out.

5. Assess the impact of regulatory filings. Often, where employees are terminated without cause or made redundant, they assume that the impact of any associated regulatory filings will be minimal. This can be a costly mistake. Proactive steps should be taken before you depart or sign any exit documentation to ensure, where possible, that all information is filed by your employer will be accurate. Attempting to correct inaccuracies or unfavorable filings after the fact is not possible in some jurisdictions, and in others, an expensive and protracted process, with short deadlines for challenging a filing, limited discovery, and absolute immunity, even if the filings are false and delaminatory.

6. Consider pre-emptive action. Executives who have a good faith basis to believe they are being subjected to discriminatory practices or a hostile work environment may wish to protect their position should an exit become inevitable by documenting any concerns early on (either through a formal grievance process outlined in an employee manual or more informally with superiors). A credible, well-written record may help to improve an employer’s negotiating position in a later departure, therefore making the content and timing of concerns critical.

7. Do not use company email to communicate. Different rules on privilege and privacy apply depending on the jurisdiction (or state) where the executive primarily works. As a general precaution, assume that your employer can and will access any emails sent via work (including communications with your lawyer). Companies often have policies that entitle them to review and monitor all emails sent via the company server – and that may include emails sent from a personal email account opened on a company computer.

8. Consider tax and visa implications. If you are on secondment and your visa is tied to your employment, you may not be entitled to stay in the country once the job has ended. The more senior the executive, the easier it may be to persuade your new employer to take over your visa. But never assume they will, or that the process will be concluded as quickly as you may hope. Consideration of the tax implications of your termination and any exit package should be given, as there may be opportunities for constructive tax planning around your departure. 

With job security a rarity, even for top-flight executives, it pays to prepare in advance for a possible future exit – whether you decide it is time to move on, or your employer makes that decision for you.
The global media is hungry for gossip about successful international families, high-profile individuals and celebrities. And today, with information online, stories are instant and ubiquitous. News has never travelled faster – nor to so many people. Although reputations have always been fragile commodities, they can now be wrecked in seconds.

While positive and accurate media coverage is welcome, it is not unusual for any high-profile individual (or business) to encounter difficulties with the media. This can all too often undermine a positive brand image or reputation. Above all else, you want to stay in control.

A few common-sense tips can make all the difference between a successful relationship with the media – and a potentially disastrous difference of views:

**DON'T IGNORE A MEDIA CALL:**
Use this opportunity as a fact-finding mission. If possible, ask questions rather than answer them. Try to ascertain what they intend to publish; a responsible journalist and publisher should provide this information. Like a dog with a bone, any journalist worth their salt will not give up on a good story simply because you don’t return the call. They are more likely to think that you have something to hide and will dig a little deeper.

**DON'T SPEAK BEFORE YOU THINK**
Reporters will do their best to obtain information from you – that’s their job. Always remember, information is power. Don’t give it away. Don’t leap in unprepared and without advice with an initial reactive response. You may well see it in tomorrow’s newspapers. Decide on the key points you want to get across to the reporter. Find out what the reporter already knows in order to better consider your options and fully brief your advisers. Buy time if you need to, but ensure you find out deadlines.

**DON'T LOSE CONTROL**
Up against deadlines, the reporter at the end of the phone may be demanding and persistent. The photographer and cameraman outside your office may be irritating. Each may be asking for a response. Don’t let them have it. Keep calm. Any outburst will simply give the reporter a headline, and TV footage of an angry and reluctant interviewee swinging at the camera is far from perfect PR. Crucially, retain your composure whatever the level of provocation or frustration – remember Benjamin Franklin’s advice: “Glass, china and reputation are easily cracked and never well mended.”

**KEEP SIGHT OF THE LEGAL AND REPUTATION MANAGEMENT ISSUES**
By speaking to one journalist, you could be speaking to hundreds of thousands, even millions of people. That could be a fantastic opportunity or a huge disaster – largely depending on whether you keep in mind the reputation management and legal issues that can be involved – from defamation, breach of confidence, invasion of privacy and contempt of court to regulatory matters, intellectual property and data protection.

Don't hide behind "no comment". If you cannot ignore the media or chat with them, the best option must surely be "no comment" – it is not.

By keeping a cool head in your interactions with the media, you’ll be doing your reputation a favour.

**DON'T SPEAK "OFF THE RECORD"**
“Off the record” is a dangerous place. If you don’t want to read it in the paper over breakfast – don’t say it. Always exercise caution. If you have a tried and tested relationship with a journalist, then you may feel comfortable speaking to them on a “not for attribution or publication” basis – make sure they agree to this before you continue. But if you work on the basis that whatever you say may be reported, you won’t go far wrong.

**ALWAYS BE PREPARED**
Don't go ‘cold’ into a media interview… you may waste a valuable opportunity. And don’t be lulled into a false sense of security and relax too much. Where possible, try to anticipate questions. By doing your homework, you’ll give yourself an opportunity to collect your information and your thoughts. Try to prepare answers and remain at ease. Prepare for the worst, and achieve the best result you can.

**AND LAST, BUT CERTAINLY NOT LEAST, DON'T MAKE THREATS:**
The media is not your enemy unless you make it so – and an unjustified threat may do just that. Remember that a threat not carried through will leave you entirely exposed as a soft target and could potentially ruin your reputation with that media organisation. So don’t ‘cry wolf’. And remember, always take legal advice before getting confrontational.
THE FINEST EDUCATION MONEY CAN BUY

Getting your children into the right school can make all the difference between a very good education, and an outstanding one. That’s why places at Britain’s élite boarding schools are so in demand amongst wealthy Asian families.

By aiming to place students at the schools that best suit their needs, personalities and ambitions, BE Education’s consulting services help to ensure that they perform to their best potential...

William Vanbergen
BE Education
www.behk.org

British may not feature amongst the top 10 holiday destinations for China’s super-rich. But its top boarding schools are already established as the number one choice for their children’s education.

According to the Independent Schools Council, students from Hong Kong and China now make up nearly one-third of the 30,000 plus non-British students attending British boarding schools. And competition for places is rising all the time.

Attracted by the heritage of iconic schools such as Eton, Harrow, Winchester and Westminster, the breadth and depth of education on offer and the international recognition enjoyed by A-level and IGCSE qualifications, wealthy Asian families see the British system as a proven route to their children’s development.

British entrepreneur, and Old Etonian, William Vanbergen identified this fast-growing demand as far back as 2003. That was the year he first flew out to Shanghai to set up British Education Ltd that would later become known by the initials ‘BE Education’ as they mean ‘must add value’ when translated into Chinese characters.

He explains: “I founded BE with the aim of helping Chinese students to gain entry to the most reputable schools in the United Kingdom. Since then, the business has grown large and we now have offices in Shanghai, Beijing, Chengdu, Shenzhen and Oxford in the UK, all preparing China’s future leaders for success in an increasingly interconnected world.”

BE Education now has over 150 schools on its books, each one taking up to three Chinese students a year. And with over 1,000 BE students placed in schools abroad, the company is continuing to focus on expansion, currently building the largest international school in China on the banks of the West Taihu lake just outside Shanghai that will feature rowing, sailing and kayaking as well as traditional sports like rugby, golf and tennis.

BE Education, run by William and his wife Emma, provides four core services. Its Education Consulting Services help students to gain admission to top schools abroad, providing one-on-one and small group tutoring, student assessment and personal statement counselling. Once they are studying abroad, BE continues to track their progress at schools, supporting university applications and helping them to find work placements and internships during the school holidays.

By aiming to place students at the schools that best suit their needs, personalities and ambitions, BE Education’s consulting services help to ensure that they perform to their best potential and ability to build upon that success in a socially beneficial and responsible way.

In a country where enormous competition is a fact of life, education fulfils a vital role – as William Vanbergen sums up: “As they say in China, if you’re one in a million, there’s more than a thousand people here just like you! What we’re doing is helping students to stand out from the crowd by providing them with the best education money can buy. An education that will allow families not only the opportunity to pass on their success to their next generation, but also give that generation the confidence and ability to build upon that success in a socially beneficial and responsible way.”
Establishing the year’s residence needed to Britain with one goal in mind – some potential divorcées are moving so substantial, the article continues, that an international breakdown involving foreign nationals now accounts for a sixth of all cases. According to the April 2012 article, marriage breakdown occurs, a succession of widely reported and generous pay-outs usually in the wife’s favour mean that the English divorce courts are very much in the spotlight.

A recent report in The Times newspaper puts this into perspective. According to the April 2012 article, divorce is usually a traumatic emotional experience for spouses and their dependents. And when marriages break down, it can be hard to focus on tactical considerations. But, warns Mark Harper, family law partner at Withen, this is exactly what both parties need to do. Particularly for spouses in international marriages, early access to legal advice is essential. That’s because the stakes in these cases are often incredibly high. Selecting the optimum forum for the divorce hearing, and being first to file, are critical to securing the best possible outcome."

DIFFERENT RULES APPLY

Within the EU, a set of uniform rules apply to the jurisdiction, recognition and enforcement of judgments in matrimonial matters. Introduced in 2002 by the Brussels II Regulation, these rules usually mean that the divorce will be heard in the country where the couple both live – unless they share nationality in another country. A rigid ‘first in time’ rule applies. Whoever files for divorce first wins the battle on jurisdiction.

The English courts stand out for the generosity (and scope) of their awards. In Continental Europe (and the US), the rules that apply are usually very different, as Mark explains: “In the rest of Europe, as a general rule, assets brought into a marriage are not taken into account on divorce. The courts focus solely on assets accumulated during the course of the marriage. In direct contrast, the English courts must take into account all assets of any source, whether marital, pre-marital or received during the marriage via gift or inheritance.”

Partly as a result, awards outside Britain are generally much less generous, with only modest levels of spouse maintenance. For example, in France, although compensatory payments are awarded, they have never exceeded €100,000.

Another key difference, Mark points out, is the legal recognition of marriage contracts: “Outside Britain, in the rest of Europe, including Russia and the CIS, most wealthy couples agree these contracts, which are similar to pre-nups, at the start of the marriage. And on divorce, they are recognised and upheld by the courts. If no contract has been agreed, a rigid 50/50 split is imposed. International couples divorcing in the English courts will not be able to have these agreements taken into account. Neither pre-nups nor marriage contracts are legally binding here.”

A 2011 case, Z v Z, underlines the impact this can have. In this widely reported decision, a London-based French couple was divorcing in the English courts. Because their marriage contract was not recognised, the wife was awarded 40 percent of the £16 million assets. In the French courts, she would have received a maximum 20 percent in compensatory payments.

Last, but not least, judges in the English courts take an aggressive approach towards trust interests, as Mark says: “This means trusts can be attacked on divorce. By contrast, in many Continental European jurisdictions trust interests are ignored completely, and the same applies in a number of US states.”

NZS, in a number of US states.

And why being ‘first to file for divorce’ can often make all the difference

The rules for asset division on divorce vary significantly between the English courts and those in the US and Continental Europe. As a result, prompt and experienced advice on when and where to file for divorce can transform the eventual outcome for spouses in British-based international couples.

The past 10 years have seen London emerge as a leading centre for international wealth – and a magnet for high-value divorces involving foreign nationals. These two trends are a global financial centre means that London is best for saving a marriage is worst for forum shopping: “You need to file fast, and it can still be influential. These are all vitally important issues.”

Other factors must be considered in transatlantic divorces. For one thing, pre-nups are legally binding in the New York courts. For another, assets brought into, or acquired, during a marriage are separate and cannot be shared. Additionally, New York judges have moved towards a less generous stance on spouse maintenance (in terms of the size of the awards and their duration).

The differences in the Californian courts are even starker. There, whatever assets have been accumulated during the marriage will automatically be divided equally between the parties (whereas in the English courts the husband will, in most cases, be permitted to retain more than half).

THE RACE TO FILE

With so many fundamental differences between Britain, the rest of Europe and the United States, the importance of early, experienced legal advice cannot be overstated. Because being first to file is often decisive – and always influential – spouses cannot afford to delay this crucial first step. Sadly, as Mark points out, what is best for saving a marriage is worst for forum shopping: “You need to file fast, and it’s essential that you don’t let your spouse know. This makes reconciliation much less likely – so it’s important to be sure that the marriage has broken down irretrievably before taking this step.”

Illustration: Michel Streich

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Coming In from the cold

**COMING IN FROM THE COLD**
**WHY VOLUNTARY DISCLOSURE CAN OFTEN MAKE SENSE**

If you’ve filed incorrectly, or failed to file, and you want to clear your tax position, then this enables you to do so – provided you’re not under order and it’s done on a voluntary basis...

Under mounting government pressure to collect the right amount of tax, the Internal Revenue Service (IRS) and HM Revenue & Customs (HMRC) are more vigilant than ever before. And as the powers of both agencies continue to increase, people from all walks of life are likely to find themselves on the receiving end of an intrusive, potentially ruinous investigation.

The facts speak for themselves. Despite cutbacks, the UK government has found an additional £900 million to put towards tax compliance and HMRC has recruited or repositioned 200 new inspectors for the same purpose. Special investigation teams like the new Offshore Co-ordination Unit now target high-net-worth individuals, owners of overseas property and even relatively frequent home-movers.

Meanwhile in the US, ongoing announcements from the government and the IRS underline the relentless commitment to combating international tax evasion. Whether through the IRS’s rolling series of offshore programmes, the imminent impact of FATCA (the Foreign Account Tax Compliance Act) or the sustained campaign to boost Swiss banking transparency, the drive towards financial probity is accelerating all the time.

To be continued over...

Illustration: Neil Webb
COMING IN FROM THE COLD
WHY VOLUNTARY DISCLOSURE CAN OFTEN MAKE SENSE

Wiping the slate clean: the Liechtenstein Disclosure Facility

In this challenging environment, increasing numbers of individuals are taking advantage of opportunities for making voluntary disclosures of their financial affairs to the tax authorities. Best broached through lawyers (who can provide client privilege throughout what is often a delicate process), these disclosures can be used to wipe the slate clean – as well as ensuring immunity from prosecution and favourable tax treatment.

There has arguably never been a better time to consider this route. Although UK taxpayers have been making voluntary disclosures since at least 1920, two developments have turned the spotlight on this area. Most recently, at the start of 2012, HMRC announced a radical overhaul of the way it deals with Code of Practice 9 (CoP9) investigations (where tax fraud is suspected). A new Contractual Disclosure Facility (CDF) has been introduced, imposing a contractual framework within which future CoP9 enquiries will operate and formalising the process for co-operating with HMRC while the matter is resolved.

The new CDF includes a written undertaking by HMRC not to pursue a criminal investigation in exchange for full disclosure of tax frauds and continuing co-operation by the taxpayer during the disclosure process.

The other (even more favourable) route is the Liechtenstein Disclosure Facility (LDF). Agreed by the UK and Liechtenstein governments in 2009, the LDF has, in many cases, trumped other avenues of voluntary disclosure as an opportunity for disclosing unpaid taxes on extremely favourable terms.

Offering immunity from prosecution, relatively lenient tax exposure (liabilities are not tracked back beyond April 1999 and a flat rate penalty of 10 percent in most cases on unpaid tax for most of the period covered), the LDF applies to unpaid UK liabilities irrespective of where assets or funds may exist worldwide.

To qualify under the LDF, taxpayers must first establish a ‘meaningful connection’ e.g. by opening an account with a bank in Liechtenstein. An approach can then be made to HMRC and, once an LDF Registration Number is obtained, voluntary disclosure can move ahead. If any imminent action is anticipated, speed is essential.

LDF applications cannot be made once a CoP9 investigation or a criminal investigation has been notified. UK tax partner, Maurice Martin, sums up: “No surprise – bearing in mind the treaty signed between the UK and Swiss governments in October 2011 (obliging all 300-plus Swiss banks to calculate and pay tax on their UK taxpayer accounts) – that the LDF is now increasingly in demand.”

Stateside approaches

The US drive towards financial transparency is gathering pace. Additional information on US account-holders is being obtained all the time.

Whether through indictments of bankers, negotiations with 11 leading Swiss banks (soon to be extended to 300-plus cantonal banks) or theft and disclosure of private banking details, there is no questioning the escalating risk of exposure and prosecution by the IRS.

Voluntary disclosure in the US has been available for at least 50 years. US tax partner, Paul Behling, explains: “If you’ve filed incorrectly, or failed to file, and you want to clear your tax position, then this enables you to do so – provided you’re not under order and it’s done on a voluntary basis.”

“The way in which disclosures are handled can dramatically impact the eventual outcome. This is a complex and fast-changing area. Before coming in from the cold it makes sense to check whether the reception will be warm.”

Behling puts this into context: “On January 9 this year, the IRS issued its 2012 programme. This applies to eight years of accounts, and raises the penalty to a maximum 27.5 percent of assets held in offshore accounts. No end date has been set for this latest programme and the IRS reserves the right to adjust its penalties at any time.”

For many clients, Behling sums up, these programmes provide welcome relief. “Of course, it all depends on people’s appetite for risk – or their desire for certainty and closure. But particularly where US taxpayers have inherited offshore accounts, and have not been actively involved in their management, voluntary and prompt disclosure is likely to be a prudent option.”

Looking ahead with confidence

For US and UK taxpayers, the attractions of voluntary disclosure are only likely to increase. Certainly, the opportunity to draw a line under previous financial affairs and face the future with confidence is a major attraction. But, cautions Martin, precipitate approaches can prove disastrous: “The way in which disclosures are handled can dramatically impact the eventual outcome. This is a complex and fast-changing area. Before coming in from the cold it makes sense to check whether the reception will be warm.”

With the US and UK tax authorities increasingly well equipped to probe potential financial irregularities and impose tough penalties, taxpayers on both sides of the Atlantic are subject to unprecedented scrutiny.

“Of course, it all depends on people’s appetite for risk – or their desire for certainty and closure.”
Withers women lead the way

Diversity in the law is a hot topic nowadays. Most firms actively pursue and promote their diversity policies and the issue is increasingly highlighted in the press.

Withers has long had a high proportion of female lawyers, especially in its private client and family practices and this extends to the global partnership, where 33 of the 109 partners are women, including the Managing Partner.

What really stands out, however, is the way in which four women head up the firm’s key practices in continental Europe – a region where the large majority of professional services firms continue to be led by men.

With offices in Milan, Geneva and Zurich, Withers’ continental European business is a key part of the firm’s international network. Each of these offices is led by a woman – and their varied experiences provide an interesting insight into what it takes to build a practice, and lead a business, in this fast-changing environment.

From left to right
Olga Boltenko – Zurich
Judith Ingham – Zurich
Roberta Crivellaro – Milan
Justine Markovitz – Geneva

With four women lawyers leading key practices across continental Europe, Withers is different from your average male dominated Continental European law firm.

Olga Boltenko,
Co-head Russia/CIS practice, Zurich

An experienced tax lawyer, Olga joined Withers’ Zurich-based private client team in late 2010. Now co-heading the firm’s Russia/CIS practice, much of her time is spent advising high-net-worth individuals from that region as they expand into the corporate space. With 12 partners actively involved in CIS work, Withers is an established market leader in this field and, as she explains, Zurich makes a convenient base: “I’m trying to travel rather less than I did, but that said, London, Cyprus, Moscow, Kiev and Armenia are all on my schedule over the next few weeks.”

Building the firm’s reputation in this field has often been a full-time commitment. On top of the ‘day job’, Olga speaks at up to 50 events a year, as well as hosting quarterly Russia/CIS breakfast seminars in Switzerland and London and chairing private client events in Zurich. She uses her own network to identify new talent to bring into the team: “My practice is cross-disciplinary and I need to find lawyers who can be generalists – that’s to say Russian speakers with UK qualifications, on top of the private client and tax experience we need.”

Living a few minutes outside Zurich with her husband and 14-year old daughter, she jokes: “I’m lucky to have a husband who thinks he is a priority. He always does his best to make sure I’m home for dinner!”

Continued over >
**Roberta Civellaro**

*Head of Italian practice, Milam*

Having spent five years in the UK with an Italian law firm, Roberta joined Withers in 2005. Three years later she was the first female Italian lawyer to become a partner in a City firm. By 2009, she was on her way back home, tasked with launching the firm’s Italian law practice, as she says: ‘We already had a strong Italian practice in London with around 10 lawyers, as well as an office in Milan. But we saw a great opportunity to build on that by also becoming an Italian law firm.’

Roberta led the drive to establish this new business, recruiting Italian lawyers and assimilating them into Withers. ‘Some challenges need to be overcome. There are obviously cultural differences between Italian and UK law firms,’’ she explains. ‘Italian lawyers follow more individualistic career paths, whereas the structure in City firms tends to be more collegiate.’

After a year, she had successfully assimilating them into Withers: ‘Some challenges needed to be overcome. There are obviously cultural differences between Italian and UK law firms.’

From Milan, Roberta also manages a network of Italian desks based in the Withers offices in the US, UK, Switzerland and Asia.

Roberta’s own practice focuses on cross-border transactional work, helping Italian businesses to expand abroad, as well as advising on inbound investments. Recent matters include helping a large privately-owned Italian wine producer to set up in the US, and working with a Russian investor structuring many corporate entities in Italy.

Married to a scientist, with two children, she lives between Milan, Padova and London. ‘With so much going on, she admits it can sometimes be tough to achieve the right work-life balance.’ There’s a question of efficiency – and flexibility. Women are used to operating families, and that helps them run businesses. The key thing at home and at work is always to have a Plan B if one fails!’

Judith Ingham

*Managing partner, Zurich*

‘Withers has been a friendly, familiar firm for years. Because we had women in senior and managing partner roles from early on, I think that’s helped to create the culture we’ve got today. It was something I noticed right from the start,’ Judith explains.

After joining the firm’s private client practice in 1991, Judith moved out to Withers’ Geneva office in 2009, before helping to launch the Zurich office in 2011. ‘It was clear post-2008 that the UK economy was slowing down. That coincided with the obvious potential for new work in Switzerland. My move was a great way to fit in with the firm’s strategy, and extend my career abroad,’ she says.

Her private client practice in Switzerland involves advising individuals: ‘That’s a fascinating aspect of what I do,’ she continues. ‘Getting to know clients as individuals and understanding their particular needs and objectives.’

Currently, this often means helping people declare income and gains for UK tax purposes: ‘There can be a tension between what people know they need to do to comply, and what their families have always done.’

As she points out, being a woman lawyer is particularly helpful in this capacity: ‘It is often the women who are most aware of the moral dilemma in breaking the family tradition. Many of our clients are elderly women who want to resolve financial issues before passing on assets to their children, often through the Liechtenstein Disclosure Facility (LDF).’

Opening the Zurich office, which focuses on providing US and UK tax and trust law advice as well as on Russian/CIS work, was ‘an interesting challenge’, Judith laughs. ‘It was great to have the Withers infrastructure behind us all the way, with training, know-how and supportive colleagues round the world. And for our people, the extra autonomy here has been a real bonus, meaning they get exposed to bigger issues than they might at the same stage in their careers elsewhere.’

Clearly, the business is going well. Withers’ Swiss offices were awarded ‘Company of the Year’ in 2011 by the Geneva and Zurich chapters of the British Swiss Chamber of Commerce. And as for the Swiss lifestyle, Judith is a big fan, with just one reservation: ‘You need a PhD in when to put out the rubbish, and how! Otherwise it’s a great environment in which to live and work.’

Justine Markowitz

*Head of Swiss Operations, Geneva*

‘Particularly in the Swiss market, which remains relatively traditional, it’s very unusual to have women leading the firm,’ says Justine, ‘and when I started out here, aged 35, it was even more unusual to have a relatively young woman in charge.’

However, although she initially wondered how this would play out, seven years later it is clear that the only impact has been positive: ‘Having female partners here has helped us stand out from the crowd – and that’s a benefit in attracting clients, as well as in recruitment terms, because people see us as a refreshing different place to work. Swiss law firms are still quite hierarchical, whereas we’ve deliberately established a much flatter, more inclusive structure.’

This is borne out in practice. Withers’ Swiss offices give their staff scope to change roles, as Justine explains: ‘We’ve had people join us as secretaries, who’ve gone on to become our office and HR managers. That’s quite unusual in Switzerland.’

When Justine arrived in 2005 to launch the Swiss business, she was, as she says, ‘pretty much starting from scratch. I had no network of contacts to speak of. So I used the Geneva office launch party to collect business cards and build up from there. It’s all been about working hard to get to know people.’

With no on-the-ground track record, her six-strong team had to move fast to carve out a niche for themselves – while simultaneously making sure they did not offer local law firm sensitivities: ‘Some firms felt threatened by us when we first arrived,’ Justine recalls, ‘but we’ve successfully proved that we can work well alongside the established profession.’

Today, the Geneva office concentrates on three core areas – tax, trust planning and governance. Justine’s particular area is in UK direct tax and trust planning, as well as governance for family and corporate businesses. In her view, ‘the latter category that holds out some of the most exciting mid-term potential: “Right now, we’re extremely busy dealing with voluntary disclosures. But with the LDF ending in 2016, we need to have our sights set on the future. Succession and governance are set to be major growth areas for us, we believe.”

Frankly admitting that, with so much on her plate, it can be a struggle to get the right work-life balance, she says there are some very attractive compensatory factors, not least the 20-minute commute into work, and the fact that her twins have been able to integrate with local families from an early age (as well as learning to ski as part of the school curriculum). ‘All in, it’s a great place to be,’ she sums up, ‘and the years ahead look like being even more exciting.’

Breaking Mould Awards 2013

We have been awarded the Financial Mail’s Breaking the Mould Award 2013 for the Professional Services category, beating stiff competition from KPMG, Ernst and Young and ReedSmith. The award recognises the firm’s forward thinking attitude to gender equality.
At a time when governments the world over are having to cut back expenditure, the role of the philanthropist has become increasingly important. And although the high-net-worth community may have been affected by the recession as much as everyone else, it appears that high value philanthropy has not been affected as much as might have been expected.

Most philanthropists have a whole range of motivations for giving, many deeply personal. But a common motivation is often simply that it feels good. Precisely what this will mean will vary from donor to donor – one will get deep satisfaction from the relationships they develop through their philanthropy; another may have personal or first-hand experience of poverty, social issues or illness and want to ‘give something back’. Others give from a philosophical or religious conviction that it is the ‘right thing to do’.

Strange as it may seem, another major driver – especially for those who have built their own wealth – can be to reduce the amount their heirs will inherit.

Like Warren Buffett, many wealthy donors want their children to have enough money to do anything they want, but not enough to do nothing. These donors frequently recognise that leaving their children immense riches might hinder their growth and prevent them from being grounded ‘in the real world’. Establishing a foundation – in which the next generation can play a role, absorb important values and develop financial nous – is an attractive solution for parents worried about the impact their wealth will have on their descendants.

Whatever the donor’s motivation for giving, philanthropy is a force for good in the world. In support of the ‘Spears 1 Per Cent Campaign’ – which hopes to inspire readers to give time, knowledge and money to a cause they feel a connection with – we have written a Guide to Giving. The Guide will give those interested in establishing a philanthropic programme an overview of the key issues to be considered initially, from the merits of establishing a foundation over ad hoc giving, to how to maximise the value for your chosen cause. You can read the guide at tinyurl.com/bv6bnun.
The first prosecution under the Bribery Act took place very shortly after the new law came into force. A magistrates court clerk was filmed by the Sun newspaper accepting a £500 bribe for making a traffic offence ‘disappear’. He was sentenced to three years. Since then however there have been very few convictions under the Bribery Act.

The reasons for this can be explained in practical terms. It can take a long time for law enforcement to gather sufficient evidence to have a reasonable prospect of securing a conviction. Prosecutions for bribery offences inevitably rely on testamentary evidence, and witnesses can be reluctant to come forward to provide such evidence where (as may often be the case) they were party to the corrupt activity themselves.

Furthermore there may be an issue of adequate resources: the Serious Fraud Office (SFO) is the body responsible for policing and prosecuting offences under the Bribery Act. The SFO is a famously stretched organisation, with limited resources (its annual budget for 2011-12 was just £36 million).

However, the SFO’s director, David Green QC, the former head of the Crown Prosecution Services’ central fraud group, has announced the SFO’s commitment to pursue Bribery Act investigations and apparently there are already “several in the pipeline”.

Businesses should not therefore take the small number of prosecutions to date as a sign that they can return to ‘business as normal’, that all the interest in the Bribery Act was just a storm in a tea-cup, and that all the training sessions attended and new policies put in place were time and money wasted. This may well be the calm before the storm. David Green QC will be looking for big prosecutions and to make examples of those who flout the new law.
HATLAPA has to offer. In what the vintage car market investors worldwide are taking and global equities for 2012, gold's performance for 2011 return from classic cars beating with annualised rates of CARS IN CLASSIC INVESTING BETTER THAN GOLD: INVESTING IN CLASSIC CARS

Dietrich Hatlapa's background has served him extremely well. Twenty years working as an Asia and emerging markets specialist gave him the experience he needed to turn a passion into a business – creating a new, highly attractive investment segment along the way.

"During my time in the City, I started buying vintage cars. That’s where this all began" says Dietrich Hatlapa, founder of the Historic Automobile Group and one of the creators of the HAGI index, the investment index that has turned classic cars into a closely watched investment class.

"Although prices were high, and collections were clearly appreciating in value, it struck me that there was very little analysis available. You could get price guides from magazines, or from those with vested interests, but that was all. There was no historic information that would enable an investor to analyse market trends and make informed decisions on that basis."

INVESTMENT VEHICLES

Hatlapa began to think seriously about mapping this market segment. Along with some fellow enthusiasts, among them Bruce Johnson, the former head of global research at ING-Barings, he started to collect detailed price information for the period 1980-2008, before conducting a back test (a retrospective analysis using past data). "Although less statistically valid for equities," he explains, "that type of analysis is quite valid for classic cars. While companies can merge, restructure or go out of business, once a classic car becomes collectable, it stays collectable."

Having completed that first stage to their satisfaction, Hatlapa and his partners started to calculate the new index continuously from January 2009, publishing monthly results. In mid-2009 they went public with their findings. "The financial times liked what they saw," recalls Hatlapa. "They tested our methodologies and wrote us up – as a front-page story. That was a great start."

DRIVING AHEAD

For many decades, classic cars have been solely for storing and transferring wealth. Driving the shift from niche collector interest to a wider investment market required huge amounts of groundwork – but the effort is paying off.

Supported by Withers IP and corporate teams, the Historic Automobile Club licenses its HAGI index to commercial parties for index tracking and portfolio valuation measurement. Clients now include car manufacturers (within the ‘classic’ bracket), high-net-worth individuals and, increasingly, institutional investors. The business also helps to structure products – for example by building portfolios on behalf of single, or multiple investors – as well as advising clients on their vehicle maintenance and storage needs.

"The business has really taken off over the past two years and we’re seeing a lot of interest from countries across the world, including India, China, Latin America, Eastern Europe and the Middle East. But the core markets for classic car investment are still Europe and the US. That’s where most of the infrastructure for this sector is based, and that’s where most investors actually choose to store their collections."

THE INDEX IN FOCUS

Hatlapa and his team have defined 15 parameters that determine which marques and models are included in the HAGI Index. An Index Committee has the final say on inclusion. These parameters include the number of cars made (set at 1,000 per model or less), the number still surviving and the current value (minimum £100,000).

In other words, cars that make the grade have to be very desirable indeed. The Bentley R-Type Continental Fastback is a perfect example. With just 200 being built between 1952 and 1955 and valued at anywhere up to £1,000,000, it’s been an index member from the start.

Based on these parameters, the HAGI Index measures the performance of 50 collectable classic cars. Long-term returns on this segment are impressive. The HAGI Index shows over 12 percent IRR, on an annualised basis (gold’s compound annual growth rate over the same period has been just over two percent). Or to put it another way, the value of the key classic cars that make up the index has increased 30 times in the past 30 years.

TAKING THE PORTFOLIO FOR A SPIN

One of the attractions of classic cars is that – like antiques or paintings – these are non-correlating assets. As such, they move independently of other assets and provide investors with useful diversification (by way of example, the classic car segment performed strongly throughout the financial crisis).

Of course, this is also a highly specialised, unregulated market and investors need to exercise caution. And there are high barriers to entry, in terms of the stellar prices commanded by some of these vehicles. Hatlapa sums up: "There are certainly risks involved. You need to be very careful about what you buy, and you have to be prepared to take a long-term view. Investors can’t trade in and out like they can in the stock market. The best approach is to view classic cars as investments that complement the other assets in your portfolio – and enjoy them whenever you can."

With annualised rates of return from classic cars beating gold’s performance for 2011 and global equities for 2012, investors worldwide are taking an increasingly serious interest in what the vintage car market has to offer.

Dietrich Hatlapa
Historic Automobile Group
historicautoagroup.com
I work with a number of leading family businesses and I can say without doubt that their use of psychologists and other third parties is increasing as knowledge of the benefits they can provide spreads. Family businesses face a multitude of complex issues that don’t come into play in other businesses, and psychologists often possess the skillset required to resolve these.

Leadership development is a focal point in any family business’ future and is an area in which third parties are increasingly helping out. Psychologists are skilled in recognising leadership qualities and can often identify the best of the next generation when it comes to transition.

An independent third party can also help to rationalise choices made to other departed family members who may not have made the cut, often helping to counter claims of favouritism that can poison a working relationship in future years. We are finding, more and more, that the very best generational transitions are now facilitated by an outsider.

Business psychologists

Patricia Milner comments:

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Sibling rivalries are a helpful example of where family businesses are different. They are personal by nature and tend to be burdened with family issues that sometimes affect the running of the business. Families are often not good at confronting relationship issues at the best of times – let alone solving them – and this is an area where an independent psychologist can add real insight and develop workable solutions or improve understanding.

One other area in which family businesses are increasingly using psychologists is in the development and adoption of a family governance structure such as a “family creed”. They can provide the focus and values that can help guide a business to success. Many are now bringing in facilitators right from the start of the development process so that problems are identified at the outset and workable solutions are reached.

It’s issues like this that have led us to co-found the Withers Consulting Group with family consultants Ken McCracken in the UK and Amelia Renkert-Thomas in the US.

This independent non-legal consultancy addresses some of the most difficult and central issues families and entrepreneurs face, such as:

- How do we protect and share our family wealth – fairly?
- When will the senior generation decide what they want?
- When will the next generation tell us what they want to do?
- I’m worried about what happens when I’m gone

Working with a range of experts – including psychologists – Ken and Amy help clients define what future success looks like to them and how best to organise themselves to achieve that.

In summary, successful family businesses are very good at dealing with the hard commercial side of things, but often need help with the softer, more relationship-based, issues. Psychologists are working to bridge this gap and the best ones are sure to see further demand for their skills.
VISTA OF OPPORTUNITY

Seeking to maintain control over their assets and ensure tight succession planning, increasing numbers of Hong Kong and mainland China-based families and family businesses are choosing to set up VISTA trusts in the British Virgin Islands.

The link between Hong Kong and the British Virgin Islands (BVI) goes back many years, with BVI-incorporated companies firmly established as popular offshore vehicles historically because they were cheaper to set up than Cayman or Bermuda-based alternatives.

Until Hong Kong abolished estate duty in 2006, many families there chose to wrap up their properties in BVI companies. More recently, BVI companies have proved to be extremely attractive corporate structures, particularly for inbound China joint ventures. This is borne out by the statistics. For the past two years, the BVI has been China’s second largest source of foreign investment.

A RELATIONSHIP BUILT ON TRUST

Having grown accustomed to BVI companies, the increasing interest in BVI trusts amongst Hong Kong and mainland China-based families and family businesses is a natural progression. And this trend is rapidly gaining momentum.

There are a number of reasons for this. Underpinned by robust regulation, the BVI is on the OECD’s ‘White List’ of offshore jurisdictions and has signed up to many international tax disclosure agreements. And experienced, reliable trustees are available in depth – either in the BVI-based offices of global banks, or on an independent basis. Both these are reassuring features, particularly so at a time when financial probity and international tax compliance are under such intense scrutiny. But the key attraction is proving to be the unique qualities of the BVI VISTA trust.

TARGETING THE NEEDS OF FAMILY BUSINESSES

Patrick Hamlin, a counsel in Withers’ Hong Kong office, explains: ‘First created in 2004, VISTA trusts specifically address the needs of family businesses in particular the importance to the directors of maintaining control over their business, rather than ceding that control to trustees.’

While trusts have always been used as succession vehicles, their suitability for holding shares in family companies has been limited by the ‘prudent man of business’ rule. This is designed to preserve the value of trust investments by obliging trustees to monitor the conduct of the directors – and intervene where necessary. It also imposes a duty on trustees to exploit the shareholding to maximum financial advantage.

This might mean accepting a financially attractive takeover bid for the company, even where doing so is against the wishes of the business owners – or selling assets in the company to spread financial risk through diversification.

Where families are considering setting up a VISTA trust, the following points should all be borne in mind:

- Select trustees that match the particular needs of your business. VISTA trusts are often used to control younger family members’ access to business assets and information. Make sure you stipulate any requirements clearly in the trust instrument.
- Seek experienced professional advice. While you can buy an ‘off the shelf’ VISTA trust as a standard product, in most cases something more bespoke will be needed. In these circumstances, legal advice is essential.
- Think about investment policy. Is the trust mainly being established as a holding vehicle, or will it be a core tool for succession planning, with multiple diverse assets under management? How much power should the trustees be allowed?
- Decide how the rights of beneficiaries should be limited. VISTA trusts are often used to control younger family members’ access to business assets and information. Make sure you stipulate any requirements clearly in the trust instrument.

Continued over >
VISTA of opportunity

KEEPING THE BUSINESS OWNERS IN CONTROL

Trustees have a duty to be prudent. And companies need to take risks and make quick decisions to remain competitive. Patrick Hamlin continues: “VISTA trusts tackle this inherent conflict head-on by expressly removing the trustees from any management of the business. The trust holds the BVI company, which in turn holds the family business, usually via shares. This ensures that the owners of the BVI company and the underlying family business keep control. The BVI trustee has very limited responsibility.”

This has proved particularly attractive in Hong Kong and mainland China, where so many businesses are family owned. VISTA trusts are also ideally suited to deal with the succession planning issues arising from changing demographics and longer life expectancies. As Patrick Hamlin points out: “With people living longer, we’re seeing a far greater incidence of mental incapacity in old age. This is quite a new development here in Hong Kong. VISTA trusts provide continuity and ensure that assets are properly looked after where the patriarch of the business is no longer capable of making decisions, perhaps because of the onset of Alzheimer’s.”

SELECTING THE RIGHT APPROACH

As well as ensuring seamless succession planning, VISTA trusts are increasingly being used to protect assets in divorce. There is also escalating interest from mainland Chinese families in these structures – for example, where the family business lists on the Hong Kong Stock Exchange and the family is seeking to identify optimum offshore structures for the significant dividends that arise on IPO.

For all these reasons, VISTA trusts look set to be in increasing demand amongst wealthy Asian families – in Hong Kong, mainland China and elsewhere across the region. Patrick Hamlin sums up: “We’re seeing much more interest in these structures. And with offices in Hong Kong and the BVI, we’re ideally positioned to provide experienced advice on the right approach.”