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OVERSEAS CHAMBERS OF PETER HARRIS

Analysing the corporate vehicle.
Civil Law Jurisdictions:
❖The Continental European perspective

Time : 14.30 – 15.00

Monday 6th September 2010

Presented by Peter Harris

Analysing the corporate vehicle.
The Continental European perspective: Outline

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- The Present;
  - What does the term « corporate » entail?
- The Past;
  - What is the source of the notion?
  - How did it develop?
- The Present «refreshed»;
- How does that assist our current understanding?
- The Future.
- What may already be in store.

The Present

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- The variety of present forms which could be treated or classified as "corporate" (in English) :
  - e.g. *AG*s, *SA*s, *SAS*s, *Sarl*s, *Eurl*s, *Selarl*s as opposed to
  - PLCs, Ltds, ...
- Those which may certainly not be:
  - *Fonds commun de placement*;
  - *Tontine* arrangements;
- Those which might or might not be:
  - *Sociétés civiles, universelles* or *de tous biens présents, Selarls*; as opposed to
  - Partnerships, Limited Partnerships, and LLPs.

➢The flaws in any attempt at absolute conceptual classification begin to appear ...

The Past

(to about 800 AD)

The law of Continental Europe is inevitably sourced in Roman law, and its subsequent development and fragmentation. *Circa* 100 BC:

- Succession/estate model evolves partly into *societas*;
  - Partnership or Corporate : was the distinction then meaningful?
  - *Socii* or associates; although some public bodies existed with separate personality;
- Automatic "dissolution" on dispute: no identifiable development of an internal « law » inside the *societas*, until later.
- Strong initial distinction between the « being » in relation :
  - to its legal environment; and
  - to the family core, which remains private.
- Associations or Foundations:
  - Library at Alexandria, Plato's Academy?
  - Civil projects and amenities in the Roman Empire;
  - The later emergence of juridical / legal personality to hold property;
  - Distinguish purposes, objects, or mere association.

Lessons from Past development

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- Contractual or purposive; law of contract or law of property?
- No limitation of liability: only a full commercial reality in France and then the United Kingdom *circa* 1800 AD, when the *action* or share developed, then later, a hybrid *part* with a lesser limitation of liability;
- Aggregation of external or social/legal responsibility into the entity: "sue the body" first and then the proprietors: Transparency against opacity;
- Aggregation of rights into *parts* or member's rights, where the body was « associative », evolving into *actions* or shares: *sociétés de capitaux*;
- Where purposive, e.g. Germanic Foundation, the legal entity created retained liability; where associative, the members could be liable;
- Which law governs and taxes the corporate entity? Where is its corporate seat: is that the *Siège réel*, or *siège social* ? Can one State impose its laws over another's?

Developments in the recent past

- Uniquely contractual, saving "personality" (*quare* purposive Foundations):
- No concept of trust or equitable ownership in European property law.
- Total mismatch of conception of beneficial owner and *ayant droit économique* also eroded by extra-legal considerations (OECD etc);
- Continental tendency still to assimilate a trust to a juridical entity akin to a purposive Foundation, and then tax it as a corporate body;
- Evolution from transparency to opacity of obligation; some hybrid combinations in the form of limitation of liability for passive associates, and full liability for managing associates;
- Distinction in associative entities between:
  The non-negotiable *part*, where the *associés* retained liability, and could only transfer rights under unanimous agreement; and
  the negotiable *action*, where the holder's liability was limited, and was independently transferable.

The Present .....

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- Each European jurisdiction has its own laws and definitions: no Code rather deconsolidation and increase in number of forms;
- Each jurisdiction retains potentially disparate notions and methods of internal and external regulation:
  - does the *siège réel* or the *siège statutaire* determine what is the law, and incidentally the tax law governing the entity?
  - EU harmonisation and approximation has not and was never intended to produce a standard vehicle for all seasons: Differences count, legally and economically;
- Each jurisdiction is enforcing repatriation of offshore assets into its own area of the Euro, or currency, by fiscal means or foul in order to prop up its responsibility for its “share” of the Euro, or currency.

Lessons from the Past

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- Contractual or purposive; law of contract or law of property?
- No limitation of liability: this only came into full commercial reality in France and then the United Kingdom *circa* 1800 AD, when the *action* or share developed, and later a hybrid *part* with a lesser limitation of liability;
- Aggregation of external legal responsibility into sue the body first and then the proprietors;
- Aggregation of rights and obligations into *parts* or member's rights, where the body was « associative »;
- Where purposive, e.g. Germanic Foundation, the legal entity created retained liability;
- Audit: French *Commissaire aux comptes* does not act exclusively for the members, but responds to the State;
- Which law governs and taxes the corporate entity? Where is its corporate seat: *siège réel*, or *siège social* ?

The Present, « Refreshed »

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- Increasing variety of different vehicles available, very different legal and economic models of how a corporate can work;
- Differences in accounting methods, member's or associate rights and liabilities are to be exploited;
- Distinction between a Member State entity and the *Societas Europaea : Council Regulation (EC) No. 2157/2001 of 8 October 2001;*
- The differences in corporate internal functions and organs between States;
- Mergers, acquisitions, scissions and liquidations in Europe can therefore be achieved in many ways.

The Future:
Plus ça change, plus c'est la même chose

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- Regulatory and fiscal dichotomies:
  - Beneficial ownership and *ayant droit économique*;
  - Transparency / *translucidité* and opacity;
- Contractual methods of mitigating corporate law obstacles or regulating lack of external regulation;
- When is a « corporate » insolvent, is it the « corporate » itself or its associates that are unable to meet liabilities;
- States preferring associative models rather than purposive models: members are easier regulatory and fiscal targets;
- Will fiscal "expedients" such as threats of 50% withholding or non-deductibility of payments to non-compliant jurisdictions be treated as what they are, exchange control, or not?
- Will « overseas » centres and their vehicles within a given currency/financial services area still be recognised or protected by the governing Treasury?

Some « present » examples between the British Islands and France

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- A Trust:
  - Is sometimes deliberately travestied as being akin to a purposive foundation and as having a juridical existence in its own right (OECD fallacies, FATA incoherences and TIEAs);
  - *Fonds commun de placement* (a mass of assets subject to contract), compared to a unit trust (subject to the law of property).
- A Partnership :
  - Is not *a société civile*, as it does not have personality (unless Scottish or statutory) but is frequently assimilated to one by its utilisation and initial form;

Some « present » examples between the British Islands and France: II

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- A Limited Partnership:
  - Is not a *société en commandite,* or a *société civile*;
- A Limited Liability Partnership
  - Is treated as a *société limitée par actions* and is not considered to be a transparent or translucid *société en commandite simple* or *en commandite par actions*, as yet....
- A Foundations: where next?
  - Jersey hybrid corporate model not a property law model ? Choice of purposive, non associative model retaining qualities from both
  - *Cf* Liechtenstein, *quare* Jersey TIEA ..... Are either "Beneficial ownership" or *ayant droit économique* notions in play, probably not ;
  - Historic treatment of Liechtenstein foundations as against Austrian and Swiss models

Some linked considerations

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- How does the foreign environment into which an entity invests consider the fundamental economic issue of the exemption of capital that may be implicit: will it temper the taxation according to the nature of the vehicle used?

- Is capital investment from abroad through such entities encouraged, channelled, or discriminated against? -Distinguish political rhetoric, administrative tolerances and fact.

- If a State or its administration taxes its own savings, will it agree to leave foreign capital untaxed to alleviate the inherent inflationary tendency, devaluation of currency and its issued bond finance that taxation of capital investment inevitably entails, or is this just another means of a Treasury capturing capital and lessening the pain of its repayment?

Conclusion

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❖ The term “corporate” even if translatable, means different things in different jurisdictions: a “sliding scale”. Be aware of the edges, and the gaps between the law of property and of contract, and the differing areas of application of those classifications in each Jurisdiction. Contract can cover Property and vice versa;

❖ In today’s and tomorrow’s environment, it is increasing important to know the historic source and evolution of the concepts employed if the entity or its « owners » are to be correctly analysed and treated, whether this be in exchange control, fiscal, financial services or other regulatory areas;

❖Will we see a reversion to a Banque de France currency model, with regulators using expert programmes analysing entities’ issued paper risk to ensure that a currency and an economy remains stable, rather than relying on market self-regulation?

❖ The emergence of the counter-current of Administrative Regulation *e.g.* “compliance”, renders understanding an “entity’s” legal and conceptual framework crucial for both the client, the adviser, and the overseas regulator, let alone the onshore financial environment into which it is introduced.

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