



Fingers and toes

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Herman Hufeld (more later) and I agree: fundamentals do not change despite man's continual attempt to prove otherwise. Which brings me to the matter of trusts and the news that in August Panama ratified the Hague Convention on the Law Applicable to Trusts and their Recognition. Since the Second World War attempts had been made to encourage discussions about the international adoption or recognition of the trust concept but nothing concrete materialised until the 1980s. The Trusts Convention was eventually adopted back in 1984 following two years of discussions, involving more than 25 countries.

Panama has had a trust law since 1925; the country, in fact, was the first in Latin America (a bold step) to incorporate the trust into its civil-law system. I know that in the March column (Privacy and Potatoes, Issue 224) I wrote about how my trust work had been routine before I moved offshore, but Panama's trust law, with its unadorned features, despite modifications, operates along simple lines like the country's gravity-powered canal locks that lift ships 85 feet above sea level to effect transits; so there's no trust "apps", as it were, such as Caribbean Vista or Star trusts.

I am an advocate of avoiding complexity whenever possible and it was this belief that influenced my drafting of the Turks & Caicos islands Trusts Ordinance back in 1989; I understand that moves are afoot to bring in a new law and I can only hope that any improvements made are not accompanied by pages of provisions which invite interpretation and very large legal bills. Take the thorny question of a trustee's negligence under English law as an example and which has prompted the question as to whether or not there are species of negligence; the position has so far been that there is no distinction between negligence and gross negligence. The Turks & Caicos Islands Trusts Ordinance makes any term of a trust invalid if "it purports to relieve a trustee from liability arising from ... negligence", pure and simple, regardless of its degree. Under English law at present, however, according to the Court of Appeal (*Amirtage v Nurse and Others*), an exoneration clause in a trust deed "permissibly may extend to gross negligence", in the words of Mr. Justice Robert Hildyard. In the case cited the clause's operative words were "...from any cause whatsoever..." other than fraud. It is a debate that shouldn't have to take place.

Certainly, we are moving increasingly further away from what George Orwell referred to as firmness in writing. In Panama there are some 200 species of orchids and I certainly hope that we are not developing a "species" (Justice Hildyard's word) of negligence set to multiply. In this context, now that the word "aggressive" has been applied to some tax planning strategies, will we eventually have gross, not just plain, aggressive planning? And if so, when is the line crossed? Those in control can always, like Humpty Dumpty, choose what a word means, "neither more nor less". The last word on the subject, as far as I am concerned, comes from Henry David Thoreau: "Our life is frittered away by detail. An honest man has hardly need to count more than his ten fingers, or in extreme cases he may add his ten toes, and lump the rest. Simplicity, simplicity, simplicity!"

I don't expect, however, that the Panamanian courts will be flooded by trust cases, because the fact remains that with the introduction of a foundations law in 1995, the likelihood of the English type trust ever being regarded in Panama as anything other than an appendage of the body of civil law looks even more remote. I just wish its trust law referred only to "negligence" without adding the word "gross" in reference to exoneration clauses in trust deeds.

Panama may be lukewarm on trusts, but it is most certainly not about UK enterprise, despite the focus on Asia (*The Promise of Panama*, Issue 223). The United Kingdom is the



biggest investor in Panama and a British Chamber of Commerce has now been officially created (successor to the Panama-British Business Association) which highlights the growing importance of British business. Last month was another first in Panama when the UK's Kings College, already with a strong presence in Europe (including five schools in Spain), enrolled its first students, offering a British academic curriculum.

Unlike traditional offshore financial centres on islands in the region, the country has many strings to its bow: mining and tourism in particular are developing apace, adding to the sources of employment for a population of just over 3.5 million (of which around 1 million live in Panama's capital). The country is modernising rapidly but that said, there is no need, in my view, for government to emulate Panama's Irving Jahir Saladino Aranda (who won gold for the Long Jump at the 2008 Olympic Games) by jumping too far at once; measured and steady steps make sense. Although Panama won no gold medals at this year's Olympics, there is one golden rule to be learned from the London Organising Committee of the Olympic and Paralympic Games: "simplicity and clarity", to quote the Committee's Paul Deighton who stressed the importance of that strategy. Certainly, Panama's business legislation should reflect this advice and it's no coincidence that key to Panama's local banks weathering the West's banking crisis so well has been a policy promoting fundamental, rather than innovative, banking.

The International Monetary Fund has recognised the country's success in establishing a strong banking centre which has made it an important regional hub. Additional laws passed in 2003 have strengthened Panama's defences against financial crimes, money laundering and terrorism such that the IMF in a 2011 report, as part of its Financial Sector Assessment programme, states: "For the most part, banks follow a fairly traditional business model..." and that, in its view, the financial system is sound, adding that it would remain adequately capitalised even if external conditions are challenging. By the end of 2011, total consolidated assets in the banking sector reached USD82 billion with the majority of those assets being domestic.

As with traditional banking – now valued in the West as never before – I hope that Panama continues to follow the orthodox trust route. In my firm's September quarterly newsletter I quoted the late Sir Dennis Weatherstone, a former chairman and chief executive officer of JP Morgan, who said: "There is no banking industry. The label means nothing". If bankers have lost their way, then are we in danger of seeing professional trustees losing theirs? Some 15 years ago I read "The Institution of the Trust in Civil and Common Law" by Donovan Waters QC in which the origins of the trust were examined in a clinical, clear and challenging way by a man whose expertise in the field is renowned. But writing in the third edition of "The International Trust" he wonders what are the trust's limits before, as he puts it, the concept becomes "a jumble of ideas that has no convincing conceptual shape" (he could have been talking about international banking) and he asks the legal profession not to allow the integrity of the concept to be corrupted.

Offshore jurisdictions continue to create custom-designed legislation. Perhaps, like it has for consumer goods groups (after concentrating on developing, for example, more varieties of shampoo and chocolate bars), it will eventually dawn on everyone that it's time to reduce the range (especially where the advantage is superficial) and make life less confusing for the consumer. In moving from black and white in the field of trusts we have entered a grey zone, where a jurisdiction's model of a trust may have not been tested beyond its own borders and potentially may invite reams of opinion and wig-scratching in the future. Will we eventually end up with a Vague Convention on Trusts?

Oh, and about Herman Hupfeld; fans of the classic film, "Casablanca", will remember the song, "As Time Goes By", immortalised in it and which he wrote. It was written during the Great Depression, as opposed to our Great Recession, but the refrain "the fundamental things apply as time goes by" has equal application 82 years after it was composed. I say we need more "casabankers" as well as tried and true trusts. Innovation, yes; disintegration, no.

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