



# The tortoise and the hummingbird

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**R**ats and betrayal. Words that often go hand in glove with each other, as do ratification and Tax Information Exchange Agreement (TIEA) such as the one between Panama and the United States of America. Some Panamanians, however, associate ratification in this instance with the rodent, feeling a strong sense of betrayal because of this development. The presidents of Panama and the US are hopeful that the TIEA (see my February column, Panama and the US Tax Man, Issue 213) will smooth the way for a trade agreement between both countries later this year. In my view, whether or not a trade agreement is signed (and, here again, not all Panamanians are happy about one) addressing tax issues with the US, not to mention other countries, is a step in the right direction. One or two ambitious governments have gone as far as to want automatic exchange of information but Panama has flatly refused such a proposal.

It is difficult to predict how effective the TIEA might be and, of course, as many commentators have already pointed out, with no fishing expeditions allowed, the US Internal Revenue Service first has to know what it is looking for before it can ask for it. Interestingly, Jersey, in the Channel Islands, which is well above Panama's ranking as an international finance centre (IFC) had only four requests from the US in one recent year, and it was the first country that Jersey signed a TIEA with.

But let's talk about torture, only this time in the context of tort and while that, too, can cause similar anguish and torment, unlike the rack, it is often one's mental endurance that is stretched by the legal process. It is easy to forget that IFCs are frequently sanctuaries, especially for Americans, running from civil law suits (many of them frivolous and baseless) rather than taxes, providing lawful protection by proper structuring. To be clear, I am aware of the need to exact recompense when justified; but in the ideal world I am equally aware that banks are expected to protect depositors' money by prudent lending practices whereas in both instances sometimes it just ain't so, as the Oklahoman oracle and sage, Will Rogers, once put it. The good intentions behind tort remind one of Greek mythology and Prometheus who stole fire from heaven to give it to mankind in his desire to do good; but in doing so he was punished by the gods for giving mankind power and with it the power of choice. Today, more and more Americans are choosing to sue.

There seems to have been a general acceptance, endorsed by US court decisions, that the likelihood of someone being completely responsible for his or her actions is only just slightly more feasible than Martians landing on Earth. The consequences of this litigation epidemic in America has, like internet spam, hampered the smooth flow of commerce; it has made businessmen fearful in some cases and overly cautious in others. Several years ago in my client newsletter, *Offshore Pilot Quarterly*, I made the observation that no wonder the Statue of Liberty was offshore: because it is sometimes where many enterprising people have to look to enjoy greater freedoms and certainly civil lawsuits give resonance to my contention.

Some 80 years ago things were decidedly different in America and individual responsibility mattered. In 1928, Helen Palsgraf was waiting for a train to Rockaway Beach, Long Island, New York, when a man dropped a packet of fireworks on the railway track. A passing train caused the packet to explode which then made a weighing machine fall on Mrs Palsgraf who then sued the railroad. An appeals court decided, however, that the responsibility for Mrs Palsgraf's injuries did not "reach" the railroad and as a consequence of the ruling, *Palsgraf v Long Island Railroad* became a precedent. The judge, literally, weighed both sides of the argument fairly.

McDonald's, however, the pervasive purveyor of hamburgers, reveals how things have

changed since then. Weighing machines, by an odd coincidence, were again at the centre of the controversy only this time, just because of what they reveal when you stand on one, rather than when one falls on you. The 2002 case of *Pelman v McDonald's* (the suit was unsuccessful) accused the fast-food company of being responsible, *inter alia*, for the size of a 270 lb. child in New York City because its French fries and hamburgers did not come with warnings that they can materially (no pun intended) cause obesity.

Sometimes it seems to foreigners that the US is a parallel planet in stark contrast, for example, with another closely-related English-speaking nation, the United Kingdom. An English comedian once said that Americans think that irony is a metal while the British think that irony is one of life's essentials. But what would Americans say about All Souls College, Oxford, where there is a hunt for a mallard duck every 100 years, commemorating the finding of a duck that was hiding when the college was being built in 1437? Further afield, China, a name on everybody's lips, believes that it is the rule of man, rather than the law, which prevails and relationships, rather than rules, are the key in business matters. The Chinese refer to such relationships as *guanxi*, a key ingredient in all commercial transactions. The West may have known contract law since the 16th century, but it is not a feature in Chinese business where the written word is not inviolate. All of this, of course, sends mixed signals to Westerners doing business in China. Literally. Travellers have encountered the sight of traffic lights turning green, amber and red and yet the traffic policeman on duty at the junction is giving the traffic conflicting hand signals which results in confused drivers often crashing. Two professors at the University of Hong Kong explain this phenomenon by identifying the traffic policeman as having a physical *guanxi*-like relationship with the drivers as opposed to the robotic traffic signals which represent an inanimate rule-based approach. China and the US are presently at the crossroads over the value of their respective currencies and both seem to be giving each other mixed signals.

In Japan there is *wa* which represents harmony in relations and foreign businessmen need to understand its importance. Japanese

business meetings, therefore, strive to emphasise areas of agreement in a conflict in the hope that from the positive will flow a resolution of the problematic. Perhaps this explains why Japan, with an estimated population of just over 127 million and, I should add, with over 3,500 McDonald's restaurants, had only 28,791 lawyers up to July 2010, according to a study by Japan's Osaka University.

All nations are different and we need to exercise tolerance. Even so, our perceptions of foreign lands, with their uniqueness and varied traditions, have surely been jolted in one respect: if it was once thought that the principal repositories of greed, corruption, vested interests, dishonesty and incompetence were developing countries (especially those in Latin America) surely the recent Great Recession has dispelled that theory?

The peddlers of pessimism and those with tunnel vision predict that Panama's tax agreements with countries are the kiss of death to its IFC ambitions because confidentiality has been compromised by the tax imperative. They forget about asset protection as well as a degree of expertise and efficiency often lacking onshore in respect of international investment management and estate planning. This, of course, applies equally to similar jurisdictions and in all of this one certainty remains: the offshore world has weathered several storms of adversity in the past few decades but has kept its instinct for survival in the same way that Zeno's tortoise always kept ahead. Zeno, the ancient Greek philosopher, devised a mathematical paradox in which a tortoise, which is given a head start, beats Achilles in a running race; even although the distance between the two narrows, Achilles cannot overtake the tortoise.

Predictions, like assumptions, can be dangerous, as Senator Morris Sheppard discovered during America's prohibition when he said that re-legalisation of alcohol sales was as likely as a hummingbird flying to the planet Mars "with the Washington Monument tied to its tail". Three years later prohibition was repealed. I suggest, particularly in the case of Panama, that one shouldn't repeat the monumental mistake made by Senator Sheppard.

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