



TRUST SERVICES, S.A.

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Hats and Watches

In this newsletter's last issue (June) I wrote about fiduciary responsibility. To my mind, the word fiduciary is one of the most misunderstood words in the dictionary and by extension so are trust companies which have become one of the prime targets of international regulators and in many offshore centres trust companies have become an endangered species. I am acutely aware of this, having been a professional trustee since 1971.

Unfortunately, past laissez-faire attitudes of some governments enabled trust companies to be left to their own devices – or should I say, in some instances, vices. But now the regulatory pendulum has swung too far and it has done so with a vengeance as the gap between the wealthy and those in want widens, with no clear signs of it narrowing. I agree with the view that although offshore standards continue to improve, offshore reputations continue to decline,

spurred on by the “tax haven scandals” and their link to the very real inequality in the world.

Trust companies are often the preserve of rich families and successful businessmen. Offshore tax havens hosting trust companies have become a flashing red light, despite the toughest supervisory and due diligence rules being faced today are those offshore. On the other hand, Switzerland has scant regulatory controls in place for trust practitioners so one should not assume that its prowess in the fiduciary field matches its precision in watchmaking. Yet it enjoys a far better reputation (although this is slowly eroding) than its Caribbean counterparts do. It is as misleading as assuming that the Panama hat comes from there (see June newsletter).

Regardless of location or nationality, however, trust companies need to meet certain criteria. In addition to financial stability, a trust company must have a reservoir of technical ability. It has been said that the common law knows no greater duty than that of

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trustee and, certainly, the principles behind the office have been pervasive throughout commercial activities. It is worth noting, for instance, that although the function of a company director is, by contrast, a creation of statute, the duties stem from the precepts of trustee law. The word fiduciary, in other words, both in business and one's personal affairs in general, has a very wide application. That said, central to the management of trusts themselves is the capacity to understand clearly the provisions of each trust deed – not only what is said, but what is not. One needs in equal proportions a knowledge of common law (commentary on those trusts under civil law and, indeed, also on foundations – distant cousin of the trust – is for another time) and the ability to exercise common sense. Importantly, because of the lineage of the trust principle it enjoys centuries of precedent. It is a history with antecedents preceding time immemorial, that date determined in the Middle Ages as the limit of legal memory (which was, in fact, 3rd September, 1189 - almost 830 years to the day - when the reign of King Richard in England began). Unfortunately, today we live in the muddle ages.

Rome gave us the will and not today's trust, but there is clear evidence that even in the Roman law of contract, in force during Cicero's time, there existed a form of pact by which a transferee of property would promise (what I would consider a fiduciary responsibility) to fulfill an obligation after transfer (even if, perhaps, the obligation would create only an in personam claim rather than one enforceable by the courts).

In England the trust's predecessor, the Use, began to feature in law in the second half of the 14th century. Even then, one of the objectives of the Use was to avoid taxes, much to the chagrin of the Crown. Nothing's changed. It was eventually replaced by the trust in the early part of the 17th century, which, as we all know, made the matter of taxes even more vexatious, and to this day continues – to a far greater degree - to do so, as the wealth gap grows.

Play It Again, Sham

There is also, crucially, the matter of whether the trust being managed is genuine in that only the

trustee, and neither the client nor a third party, can usurp his powers. On this point alone, a vast number of offshore trusts are void ab initio. This is not to be confused with the controlling person definition found under the Common Reporting Standard which is hostage to several interpretations, and thus there is nothing common about it.

I personally classify trusts as either placebo (not the real thing) or Casablanca (the fundamental things apply, as the memorable tune from the classic film, Casablanca, assures us). There is a growing source of sham trust precedents (requires the trustee also to be complicit) and if you are administering one, then be aware of your role as merely that of a bare trustee and make sure that your client also understands the position. Wisely, you might decide to either radically adjust or resign your role. Sadly, cases (although less now than before) exist where, because of unschooled trust managers, neither party realises the reality of the situation. Good trust officers are not always easily found but they are worth their weight in gold. It is foolish indeed to assume that a basic trust background can be supplemented by learning-on-the-job, unless the time spam runs into years.

So there is much to think about before and after one becomes involved in the business of professional trust management. It is a field where ignorance is never bliss and it is folly not to be wise. I am reminded of Alexander Pope: "A little learning is a dangerous thing, drink deep, or taste not the Pierian Spring". Those wishing to administer trusts as a profession need to acquire a real thirst for the work. They should not just drink, but think, deep.

A Place of Safety

Both the quotes from Irishman, more so Frenchmen, I often find are apposite (see June newsletter). Another Frenchman in the 17th century said: "The advice I give to all adventurers is to seek a place where they may sleep in safety." That could be said of those choosing a trustee, whether or not they are adventurers. The comments come from Samuel de Champlain, a colonist, navigator, soldier, diplomat and explorer who founded Quebec; his emphasis was



more on safety rather than being far from the madding crowd. One, of course, seeks and hopes to find a safe place, and Panama now appears on the American list of “safe third countries” for receiving refugees in transit – especially from the United States. Panama never presented an illegal immigration threat for America; quite the opposite from one perspective, with the number of mass shootings in America having exceeded the number of days, up to July, in 2019. I suppose, like many definitions, one has one’s own view; I am not sure how to classify America as either a safe first, second or third country.

Panama is one of Latin America’s bright spots with a GDP per person that has grown significantly faster than that of America in this century. Foreign Direct Investment increased by 36 per cent in 2018. No other country in Central America came close. Panama, however, is no bed of roses and like the rose does have its thorns. Some of us, however, in our search for Utopia suffer from myopia, never realising that it all becomes a balancing act to be weighed by the individual. The well-travelled Samuel de Champlain would have agreed. To apply the historian David Gilmour’s comment about history, in order to start to understand a country you have had to have “walked, observed, smelt, drunk” it.

Shell Shock

In last quarter’s newsletter I mentioned America’s lack of adherence to the money laundering code that has become the norm in the West (“Spoken in Whispers”). The problem is that the subject has become political both in Europe and America where governments have made traditional, palm-fringed offshore financial services centres their whipping boys while it is beyond any doubt that what is sauce for the goose is not necessarily sauce for the gander. A former US congressman and regular reader has written to me and said that “Knowing you as I have been privileged to do, I greatly enjoyed “Spoken in Whispers”—a perspective few alive today are qualified to relate”, adding that “You have successfully practiced and perfected what Kipling

called ‘the power of observation ...’ to the delight of many.”

Investigations in Europe have shown the ease with which major financial institutions move illicit funds across the continent. The European Council on Foreign Relations has revealed that the single market, apparently, is wide open to not only the world’s criminal elite, but anyone who knows how to set up a company for nefarious use (commonly called a shelf company). One scheme which recently came to light involved Danske Bank which allegedly saw 200 billion euros pass through its books, mostly coming from Russians. Since the onset of the 2007 – 2008 financial crisis, 18 of Europe’s 20 largest banks have been fined for money laundering. One thing, it has to be said, that is compounding the problem is Europe’s hodgepodge of regulations, directives, and practices. One financial commentator has described London as a sink for illicit funds.

And in America, Goldman Sachs has become entangled in a web of duplicity, concerning its role in the money laundering scandal surrounding the insolvent Malaysia Development Berhad, involving over US\$250 billion in illicit funds. In many cases, counterfeit, or shell, companies were involved.

Shell companies are big business in America where a recent study found that in all 50 states more personal information is likely to be needed to get a library card than to register a company. In some states, such as Kentucky, registration can be done without giving any contact details. A study of international corruption cases in 2012 found that more American shell companies were involved than from anywhere else. I will not detail the shocking revelations found in the company registry in the United Kingdom which suffers from similar issues.

But perhaps things are changing, at least in America, and a bill has been approved by the US House Financial Services Committee - the first time a law such as this has reached that stage. A similar bill has been introduced in the Senate. The proposal, however, will not include a public register, although companies would be required to disclose their beneficial owners to the Financial Crimes

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Enforcement Network, a Federal agency. Importantly, and for once, Delaware, the capital of American shell companies, with more shells than are to be found on a stretch of beach, is behind the move. The regulatory tide, however, is still out and is unlikely to reach the shore any time soon. Even if it does, as it stands, there are still ways to successfully circumvent ownership disclosure.

History and Man

“What has been will be again, what has been done will be done again; there is nothing new under the sun.” Ecclesiastes 1:9 declares this. Victor Hugo, the French poet, novelist and dramatist, and with similar conviction, declared in public 140 years ago that “In the 20th century war will be dead, the scaffold will be dead, animosity will be dead, royalty will be dead, and dogmas will be dead; but Man will live”. His

predictions proved wrong, but Man has indeed lived; therein lies the root of the problem and why the pattern of history will never change.

The last word should go to one of France’s most famous sons who reinforced Hugo’s sentiments by assuring us that history never repeats itself, but Man always does. Francois Marie Arouet was born in 1694 and became the voice of the French Enlightenment. A complex character, he was a satirist, swindler, spy, poet, playwright and provocateur. When he was 24 years of age he changed his name to become known to the world as Voltaire. He believed that one must strive to overcome adversity and not passively accept problems, never accepting that all is for the best in “the best of all possible worlds.”

Those in the offshore world, however, might more readily identify with Victor Hugo’s historical novel “Les Miserables”, believing perhaps that they are living in the worst of all possible worlds.



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Engaging an offshore representative is an important decision and we advise all persons to seek appropriate legal and tax advice from professionals licensed to render such advice in the appropriate jurisdiction before making offshore commitments.