



THE SECOND MOUSE

One wonders if the British Virgin Islands should be protecting the term “a BVI”, regarding it as exclusive intellectual property. Certainly, for Chinese businessmen it is shorthand for an offshore company even although the BVI is not the only jurisdiction which can provide one and neither did it create the concept; much like the Panama hat, it hails from elsewhere. Montecristi, in the hills of Ecuador near the Pacific Ocean, is the 17th-century birthplace of this famous straw hat which is made by hand from local toquilla straw; but I doubt many people ask for a Montecristi. Nonetheless, the Ecuadorian Intellectual Property Institute is seeking protected designation-of-origin status for the famous hat in trade negotiations with the European Union.

Surrounding islands in the Caribbean will reluctantly have to grin and bear the popularity of BVI as a corporate centre, without recourse. If, however, Panama has stolen Ecuador’s glory, it is also on track to do the same to Liechtenstein, home of the modern foundation, an instrument of civil law which Panama practices and so, rather than the import it has become in the offshore common-law jurisdictions, where, in varying degrees, its status can

best be described as vague, it remains in its natural environment; only the language and the name (stiftung) are different.

Panama has had trust legislation since the early part of the last century, but it is a common-law import and, frankly, its own local status, like the exported foundation, can be uncertain at times. Its civil code was inspired by Napoleon, who despised the trust concept; at the time of the Revolution it is said that 80% of the nation's wealth was held by 200 families, many of whom used trusts. The far colder, less sympathetic, continental reception which the trust has received in Panama is reflected by the much tighter rein which has been kept on its flexibility.

My May blog mentioned compelling reasons for Americans to still have offshore estates, irregardless of tax considerations, and for some nearby Panama could be the ideal destination. If the Panama can protect you from the glare of the sun, the Panama foundation can do the same for other forms of exposure. You might say at this point that this applies equally to the trust and, dependent on circumstances, you would be right. In seeking to protect legitimate assets, however, free from the taint of fraudulent conveyance, it is a fact that the more foreign the locale where management takes place, the better.

Just as the English trust was devised to defeat the aims of King Henry, so the continental campaign against trusts spawned the foundation, as we know it today, in Liechtenstein in 1926. Panama has built upon that success, fine tuning its own 1995 law such that I believe it is, in the words of one academic, the main contender to Liechtenstein's historical primacy. Being a late-comer to the party often gives substance to the view that, as with a trap, it is the second mouse that eats the cheese.

Laughing in Court

Under the law the Panamanian foundation is a juridical person, unlike a trust, and so the sham trust argument, often brought up in common-law courts, does not exist. Neither the beneficiaries nor its creator has any legal claim on the assets and equity in Panama is a term that is found in a company's set of accounts. Additionally, the assets are not subject to the debts of the founder (settlor), beneficiaries or the foundation's management.

Importantly, because civil law can trace its ancestry to Roman law, it is based on a system of codes and judges apply, rather than interpret through existing precedents (unlike English trusts), the law as it is written. Such law drew Aristotle to observe that "the law is reason, free from passion". There are no juries who can be driven by emotion rather than rational logic, not something that can be said particularly of courts in America. Or to put it another way, as H. L. Mencken, curmudgeon and master of mot juste, did: "The penalty for laughing in the courtroom is six months in jail; if it were not for this penalty, the jury would never hear the evidence".