

# Feather dusters and sledgehammers

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**I**n the maelstrom that is anti-money laundering and customer due diligence regulation, the regulators have continued to sharpen their knives, wielding them on occasion in a rash manner where lightness of touch, as opposed to heavy-handedness, is called for.

Former Russian Prime Minister, Sergei Kiriyenko, tells the story about an inventor who goes to the patent office with a new mechanical shaving apparatus and is asked to describe it. “It is very simple”, he tells the patent officer. “You drop a coin in the box and put your face in the oval aperture. Then two mechanical blades come up and shave you according to a standard template.” The perplexed patent officer exclaims: “but every man’s face is different”. The inventor replies, “that is certainly true. But only until the first shave”. I have on many occasions used the story as a simile when arguing the point that regulation has to be flexible to be fair; standard templates don’t always work. Sometimes a feather duster, not a sledgehammer, is all that’s needed.

Panama has appointed a Superintendent of Insurance and Reinsurance and a thorough review and analysis of the regulatory framework for reinsurance in particular is to be examined. Presently there is just a handful of local reinsurers and the aim is to attract more of them; guidance from Europe and the United States of America is being sought. The country’s insurance and reinsurance market grew rapidly last year and at the end of 2014 the insurance industry was worth USD2 billion (representing a rise of just over 8% compared with 2013).

Where laws require regulations, such as insurance, it becomes just as important to get them right. Ill-defined procedures, vagueness versus clarity, leading to interpretation (perhaps by a court) is one risk that no insurance company wants to carry. In October, 2005 (Issue 160), Jonathan Katan, an attorney in the Turks and Caicos Islands, wrote about insurance there (“Quietly doing business in the Turks & Caicos Islands”). He mentioned that the jurisdiction was recognised as a market leader in producer-owned reinsurance companies and I suspect that this is probably still the case, after reading his subsequent article (Issue 257) in June this year (“Captive Insurance in the Turks and Caicos Islands – a niche product in a niche jurisdiction”) which mentions that 924 such reinsurance companies were registered last year. Where does the answer to this success lie?

Obviously, credit must first go to the skills of the practitioners, but Professor Avinash Persaud, formerly chairman of the Regulatory sub-committee of the United Nations Commission on Financial Reform, in addressing issues related to adapting to the changed international regulatory regime, brings up something else. He suggests that small states should find specific areas in which they could excel and “invest continually in defending and developing that niche”. This would seem to be the case in the Turks and Caicos Islands and I hope the jurisdiction sticks to its guns whilst quietly conducting its business.

In 1989 I was asked to draft a Captive Insurance law, and its accompanying regulations, for the Turks and Caicos Islands which I did, even before taking up my duties there as the first financial services regulator. In framing the law, I applied common sense and experience in the same way as I have done in the private sector. At that time there were not enough cooks to spoil the broth: life was simpler (as we know) before the new century heralded a shake-up of the old offshore order, which has struck like a tidal surge. Alas, as the writer L.P. Hartley wrote in his masterpiece, *The Go-Between*, “The past is a foreign country: they do things differently there”. I just hope that any assistance Panama gets from Europe and the US for its insurance law will be weighted heavily in favour of practitioners who understand the business, leading to a law and regulations that, besides clarity, will have different levels of control that are risk-based.

One thing, however, it does appear that Panama has already got right, without consulting any outside sources, is its approach to the free exchange of information in pursuit of international tax dodgers. President Juan Carlos Varela in a speech to the United Nations at the end of September stated that his country "is committed to expanding its international co-operation in the field of fiscal transparency and advancing towards the automatic exchange of financial information on tax matters on a bilateral basis". All well and good, but the undertaking is subject to certain conditions, being, it will be done bilaterally and within the framework of a negotiated agreement with each country. The approach is diametrically different in principle to the agreements promoted by the Organisation for Economic Co-operation and Development, known as the Common Reporting Standard, which over 90 countries worldwide have signed up for. The president's circumspection is on firm ground.

It's not what is gained by transparency that governments should contemplate; it's what will be lost. I have intimate knowledge of Africa and Central and South America and I can assure you that free exchange of information as advanced by the OECD becomes precarious. Unlike much of Europe, the standards of due diligence regarding protection of data held in electronic databases varies considerably. Even in the case of countries where the systems are sound, all of us are aware of human error where laptops, as an example, with sensitive data, are lost. This is before we take into consideration the international blight of hacking and the actions of unscrupulous governments. Supplemental to this is the idea of public registers that could expose people to grave risks, such as fraud, kidnapping, blackmail, violence or intimidation.

None of this leaves the ordinary Latin American feeling comfortable. Since 1995 when the first Latinobarómetro annual survey of public opinion was conducted, the poll has shown only three groups that at least half of those surveyed say they trust: family (80%) the church (70%) and neighbours (60%). On the other hand, other groups are not so well received, such as the state (under 40%), parliament (just over 20%) and political parties (20%).

One can understand the president of Panama's caution in agreeing to a carte blanche exchange of information with other governments.

But is this not taking a spade to a soufflé anyway? Never before have such universal controls covering due diligence, money laundering and transparency been put in place. There are already global double-tax agreements as well as an existing network of tax information exchange agreements. Also, the numerous tax scandals that have put the spotlight on financial institutions, especially private banks, ensnaring many tax-evading customers, has well and truly placed the new heresy of tax evasion centre stage; it can put you in prison and governments worldwide are becoming more adept at detecting it.

Michel de Montaigne, arguably the most significant philosopher of the Renaissance, wrote: "A man must keep a little back shop where he can be himself without reserve. In solitude, alone can he know true freedom". That enjoyment should extend to the privacy of one's financial affairs. It is why there are data protection laws and why privacy became a right which was recognised internationally as such in 1948, as set down in article 12 of the United Nations Universal Declaration of Human Rights. It should only be compromised in special circumstances by governments, and certainly the risk to innocent people has to be considered. Today the European Union is in conflict with the US over the extent of protection of data from prying eyes.

"The best swordsman in the world doesn't need to fear the second best swordsman in the world; no, the person for him to be afraid of is some ignorant antagonist who has never had a sword in his hand before; he doesn't do the thing he ought to do, and so the expert isn't prepared for him; he does the thing he ought not to do; and often it catches the expert out and ends him on the spot." Mark Twain is right, and I am not so sure that in these heady days of exposure the unintended consequences have been sensibly analysed. You cannot reverse the flow once the floodgates have been opened.

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ISSN 0954-0628 US PS 002-273.

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US POSTMASTER: Send address changes to Offshore Investment, c/o Worldnet Shipping Inc., 156-15, 146th Avenue, 2nd Floor, Jamaica, NY 11434, USA. Subscription records are maintained at European Magazine Services Ltd, 12-16 Castle Lane, Belfast BT1 5AF, United Kingdom. Air Business Ltd is acting as our mailing agent.

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