

# Man, Angels and Brazil

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**T**hey are going wild in Brazil this month. Maybe some people in Delaware in the United States of America are also, but for different reasons which I will get to in a minute. As for Brazil, it is Carnival (Carnival in English) and the country becomes one big party when perhaps a million or more tourists join Brazilians who, for four days just ahead of the Holy Season of Lent, celebrate this huge country's diverse culture, history and music.

Doubtless there will be many people living in Delaware who do not know (and even if they did they wouldn't care) that Brazil's National Congress decreed, in the middle of last year, that, for the purposes of a new law which became effective at the beginning of January 2009, this tiny US state, once described as a "little community of truck-farmers and clam-diggers", is a tax haven. Any song and dance caused by this decision in either Dover, Delaware's capital, or in the nation's capital, will have nothing to do with celebration.

Brazil has broadened the definition of what is considered a company located in a tax haven to include those jurisdictions that have maximum tax rates at less than 20% or whose authorities or registries do not disclose the stockholders, shareholders or members of the entity to the public. This new definition could apply to some other US states as well. A formal new blacklist of havens has, at the time of writing, not been issued by the Brazilian tax authorities but once it is the new legislation will be implemented, effective for fiscal years beginning January 2009.

This development comes at a time when the US government is hammering home the need for transparency of ownership offshore, whilst, at the same time, unwittingly highlighting the hypocrisy of the standards that are being applied. Unfortunately, Delaware has fallen victim to unintended consequences and although John Milton, the 17th century English poet may have observed that "neither man nor angel can discern hypocrisy, the only evil that walks invisible", its presence is palpable today in the case of mainland attitudes towards offshore jurisdictions.

A book written by Vernon K. Jacobs and J. Richard Duke, both of whom I am acquainted with professionally, and entitled *Offshore Tax Strategies* (its lengthy subtitle is excluded), was reviewed by *Offshore Investment's* Editor-in-Chief, Professor Charles A. Cain, in October 2008 (Issue 190). Like Professor Cain I have been both involved at a senior level with trust companies and undertaken work for US citizens since the 1970s and I fully endorse the comments he made about the difficulties one is confronted with in the US – especially standards and double standards.

At the forefront of the US tax crusade is Senator Carl Levin, Chairman of the US Senate sub-committee that has been investigating tax abuses by US taxpayers. Colourful language has been employed during the investigations and in one example Senator Levin was certainly in top form: "Tax havens are engaged in economic warfare against the United States... The iron ring of secrecy around tax haven banks and their deceptive banking practices enable and encourage tax cheats to hide assets". Not to be outdone, the sub-committee's ranking Republican, Senator Norm Coleman, declared that foreign banks were acting as "Al Capone safe houses for evading taxes".

Another American's words, however, spring to mind: "Get your facts first and then you can distort them as much as you please" (it was that savant of the South, Mark Twain). And as for deceptive banking practices and questionable ethics, let us not dwell on those perpetrated onshore and touched upon in my last column ("Central

Issues” – Issue 192). In or out of safe houses, Al Capone’s bootleggers have been rivalled by some of today’s bankers.

But putting double standards aside, does Brazil have a case against Delaware over lack of disclosure or is South America’s largest country just flexing its muscles? In a recent Offshore Pilot Quarterly, my newsletter for clients, I went into more detail and had an American give the answer, namely, US Department of Homeland Security Secretary, Michael Chertoff: “In countless investigations where the criminal targets utilise shell corporations, the lack of law enforcement ability to gain access to true beneficial ownership information slows, confuses or impedes the efforts by investigators to follow criminal proceeds”. He’s talking about American companies – and not just those located in Delaware.

Companies in different parts of the US have been involved in the laundering of some USD36 billion from the former Soviet Union; that is an amount that could finance the present Panama canal expansion project at least six times over. Russian officials, in another case, had used companies to unlawfully divert USD15 million in international aid meant to fund a safety upgrade of former Soviet nuclear power plants and in another example an individual had set up more than 2000 companies, established bank accounts for them without disclosing identities, and then passed some USD1.4 billion through the accounts. It turned out, in fact, that one of those companies had received over 3,700 suspicious wire transfers which, during a two-year period, added up to just over USD81 million. But the authorities could not pursue this case because they were unable to discover who owned the company.

Those 2000 companies were set up in Delaware and the Russian revelations involved companies registered in Nevada and Pennsylvania. A 2006 report on money laundering issued by the Financial Action Task Force (FATF), an inter-governmental body established in 1989, had already criticised the US for failing to be able to obtain beneficial ownership information. The FATF had asked the US to remedy the situation by last July.

You can deal with facts, however unpalatable, whereas questioning your perceptions is another matter. My last column also, for example, pointed out the risky situation many banks in the US in particular found themselves in when compared with domestic banks in Panama; the notion that this could be so, say,

ten years ago would have been met with loud laughter in New York. How the Delaware débâcle will develop in Brazil remains to be seen but I have a lot of professional respect for this little state. In 18th century America, some states abandoned their Chancery Courts during the colonial period or at the time of the American Revolution and in other cases a separate Court of Chancery was never established. Whilst Puritans from England settled in Virginia and Royalists from Southern England went to Virginia, immigrants from the English Midlands, as well as Wales, and whose numbers included Quakers, settled in Delaware. It was this influence that played its part in Delaware’s case and whereas following independence it is true to say that most states consolidated the judiciary such that some judges would sit in equity and law, Delaware stuck to tradition. It is a state in the US that has my vote for its corporate and trust laws and, in the case of the latter, there is no fear of the courts not understanding that trusts are a human relationship, unlike the position with the US Internal Revenue Service.

It is the leading corporate domicile in the US (Panama modelled its own company law on Delaware’s) with at least half of the Fortune 500 companies registered there and it is also a leading trust jurisdiction for non-residents. Its Court of Chancery (created in 1792) has never become trapped in a mire of either procedural technicalities or constraining legal doctrines; sadly, its inspiration, the High Court of Chancery in the United Kingdom, no longer exists. Delaware has remained, unlike many other US states, true to the primary purpose of a court of equity and in doing so has extended equitable principles which recognise (although many who hold the position do not) the fiduciary duties of directors. Its courts have rendered some landmark decisions in the US corporate field concerning some of the more than 600,000 companies registered there (the population is estimated to be less than 900,000).

Carnival in Brazil ends on 24th February after unquestionably providing entertainment for an international audience. I rather suspect that Delaware is providing entertainment of a different sort this month for an international audience of professionals in the offshore financial services industry.

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