3 STONE BUILDINGS

Offshore Edition
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3 Stone Buildings is, more than ever, involved in offshore jurisdictions. Members of Chambers have appeared or advised in the last year in cases in Bermuda, Cayman, the BVI, Brunei, Singapore, Hong Kong, Malaysia, and Jersey.

In October 2007, 10 members of Chambers travelled to the BVI to present a seminar for the BVI legal community. It was very well received and we plan to run seminars in other offshore jurisdictions in the coming year.

We also welcome Anna Dilnot, who has just joined Chambers, having become a barrister. She was previously a solicitor at Simmons & Simmons. We are sure that she will quickly build a substantial commercial and Chancery practice at 3 Stone Buildings.

American Discovery for Foreign Proceedings

28 USC Section 1782 is a US federal statute that permits the use of US discovery procedures to obtain evidence in aid of foreign proceedings. In many disputes concerning offshore trusts it is an important weapon to keep in mind, particularly if it is thought that the trust includes US assets.

The §1782 procedure is much less cumbersome than other available mechanisms, such as The Hague Evidence Convention, which allows a court to request a foreign court to enforce requests for evidence to be used in the requesting country at trial. Furthermore, US judges are much more amenable to approaches under §1782 than by alternative means, although the statute gives them a very wide discretion.

28 U.S.C. §1782 provides that:

"[t]he district court of the district in which a person resides or is found may order him to ... produce a document ... for use in a proceeding in a foreign or international tribunal.... To the extent that the order does not prescribe otherwise, ... the document ... [shall be] produced, in accordance with the Federal Rules of Civil Procedure."

The basic tests that need to be satisfied for the operation of §1782 are that

1. The person or entity from whom the discovery is sought must reside or be found in the judicial district in which the application is made;
2. The requesting party must be a foreign or international tribunal or an interested party; and
3. The requested discovery must be for use in proceedings in a foreign or international tribunal.

The first requirement is the easiest to satisfy. A "person" includes any individual, corporation, or company that resides or is based in the district court's jurisdiction. The classification includes both parties and *nonparties* to the foreign proceeding. Even individuals found *temporarily* in the district are subject to the jurisdiction under §1782. Where property is situated in the US, any person or entity with information about that property can be the subject of an application for discovery under §1782.

As to the second requirement, the Supreme Court held in *Intel Corp. v Advanced Micro Devices, Inc.* 542 U.S. 241, 124 S.Ct. 2466 U.S. 2004 that a foreign or international tribunal within the statute included any decision-making body. Proceedings do not have to be under way or imminent for an application to be granted. The only requirement is that a dispositive ruling is within reasonable contemplation.

The Supreme Court in *Intel* followed the trend towards a broad interpretation of an interested person. It ruled that the category of interested persons, who qualified for §1782 assistance, was broader than litigants, foreign

sovereigns, and agents of foreign sovereigns. In that case, even though Advanced Micro Devices ("AMD") was not a litigant in the foreign proceeding, AMD qualified as an interested person because it possessed "a reasonable interest in obtaining [§ 1782] assistance."

No Foreign Discoverability Requirement under §1782

Prior to *Intel*, courts were split on whether §1782 contained a threshold requirement that evidence sought under §1782 must also be discoverable under the laws of the foreign jurisdiction. The U.S. Supreme Court held in *Intel* that §1782 did not contain any foreign-discoverability requirement. In other words, it is no bar to an order for discovery under §1782 that the documents sought would not be disclosable in the foreign jurisdiction.

The Court also ruled that an applicant is not required to prove that U.S. law would allow discovery in domestic proceedings analogous to the litigation taking place (or contemplated or pending) in the foreign tribunal.

Teresa Rosen Peacocke

Trusts and International Comity

WHAT IS COMITY?

The notion of comity has proved historically difficult to pin down. The word has on occasion been used as a synonym for the entire system of public international law, but the sense we are interested in has a narrower meaning, particularly significant in relation to the enforcement by courts of judgments and orders of foreign jurisdictions, and which is perhaps best described as the gentlemanly arm of international law: as described by Diplock LJ in *Buck v Attorney General* [1995] Ch 745 (at 770) comity is:

"the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself"

In other words, the notion of comity contains an element of good manners, judicial courtesy and self restraint, something one might expect the English courts, if English judges were to follow their national stereotypes, to be particularly good at.

The doctrine of recognition of foreign judgments on the basis of this gentlemanly notion of 'good form' has been overtaken since Diplock LJ's words by what has been termed the doctrine of obligation. In *Adams v Cape Industries Plc* [1990] Ch 433 the Court of Appeal expressed the view that some notion of comity lay behind the recognition of foreign judgments but held that at common law judgments were enforced not on the basis of comity but on the basis of the principle that the judgment of a foreign court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to comply with the judgment, which the domestic court is bound to enforce[1].

However, the notion of comity as inter-jurisdictional courtesy has not been entirely abandoned, and the need for

good manners in dealing with foreign jurisdictions can be seen in a recent disagreement between the courts of England and Wales which led to legislative reform in Jersey and which may well affect inter-jurisdictional attitudes to dealings with trusts in other jurisdictions around the world.

MINWALLA V MINWALLA AND THE FOUNDATION TRUST

CI Law Trustees Ltd v Minwalla [2005] JRC 099 was brought in the Jersey Royal Court by the trustee of a Jersey trust, the Fountain Trust, for directions as to how to respond to a judgment of the Family Division of the High Court of Justice in England and Wales setting aside the Fountain Trust as a sham.

In so holding Singer J's judgment in the English case, *Minwalla v Minwalla*, made no reference at all to the laws of Jersey, despite the facts that the trust deed expressed itself to be governed by Jersey law, it was administered by trustees in Jersey and it clearly had its closest connection with Jersey. Significantly, Singer J did not consider whether the trust was a sham under Jersey law, and the Jersey court took objection to this on two grounds.

Firstly the Jersey Court considered that Singer J had not even applied English law correctly on sham, not having been referred to the most recent authorities on the matter. However, this was not the Royal Court's only concern regarding the judgment in *Minwalla v Minwalla*, and the court laid down a clear marker to the English court that it had overstepped the bounds of comity in declaring the Fountain Trust a sham:

"As a matter of generality, we would regard an assumption of jurisdiction by a foreign court to declare a Jersey Trust a sham to be exorbitant, and we would be reluctant to enforce any judgment based on such an assumption".

In other words, the Jersey court was saying, if you persist in trespassing in our jurisdiction we will simply refuse to enforce your orders.

EFFECT ON TRUSTEES

The Jersey court did however reluctantly give effect to the English court's declaration in *Minwalla v Minwalla*, and ordered the trustees of the Fountain Trust to make a payment to the wife out of the Trust assets, concluding that in the *"unusual and particular circumstances of this case, notwithstanding the reservations which we have expressed earlier in this judgment, it would be fair, in the interests of comity, to recognise and enforce the judgment of Singer J at least in part".*

One of the factors to which the Jersey court gave weight in coming to this conclusion was that the Jersey trustee had been party to the English proceedings. Rejecting the beneficiaries' contention that they had not been able to make submissions in the English proceedings the Jersey court held that:

"the trustees did submit to the jurisdiction of the English court and participated in the proceedings..."

And later, *"In our judgment no unfairness arises from holding, as a matter of comity, that in the particular circumstances of this case, the judgment should be enforced against the trustees. It would be a very different situation if the trustees had not submitted to the jurisdiction".*

More seriously for the trustees, the court went on to say that:

"the trustees were party to the proceedings and had the opportunity, even if they chose not to take it, to make submissions on the sham trust issue. To the extent that, having submitted to the jurisdiction, they failed to protect the position of beneficiaries, it is possible that they may be liable for breach of trust".

It is therefore clear that the decision of trustees to participate in proceedings in a foreign jurisdiction could be of the utmost importance, not just affecting the enforceability of the foreign judgement in relation to the trust, but possibly laying the trustees open to claims in breach of trust if they do submit but fail to defend the beneficiaries' position sufficiently forcefully.

In *Re M Trust, Nearco Trustee Company (Jersey) Trustee Ltd v AM & Others* [2003] WTLR 491 the trustee of two discretionary trusts applied to the Jersey court for directions as to whether they should take part in the Illinois proceedings. The court held that it should not, recognising that *"if it does so, it will clearly be bound by the rules of that Court and will have to comply with any orders for disclosure of documents and so on"*.

It should not be forgotten, however, that in certain situations it would be in the interests of trustees to submit to a court of foreign jurisdiction: where, for example the trustees themselves or assets of the trust are physically within the foreign jurisdiction the considerations will be very different. In addition there might be circumstances where it would be beneficial for the trustees to become involved in foreign proceedings as where, for example, the foreign jurisdiction is one which does not recognise the law of trusts and guidance from the trustees would therefore be advisable.

What is clear is that in submitting to the jurisdiction but failing to make submissions as to the validity of the trust in *Minwalla v Minwalla* the Jersey trustees took the worst of both options, laying themselves open to a potential claim in breach of trust in the process. The moral of the Fountain Trust story for trustees must be that if they are to become involved in foreign proceedings they must do so thoroughly. On the whole, the most sensible option may be for trustees to follow the trustee in *Re M Trust* and seek a ruling of the domestic court as to whether to engage in the foreign proceedings.

VARIATION OF TRUSTS

Compass Trustees v McBarnett

One issue that trustees should be watchful for is judgments by foreign courts that purport to vary trusts, rather than declare them invalid, since it appears that domestic courts will be far more prepared to accept orders of this type, particularly where the foreign court does not move to vary the trust itself, but indicates to the domestic court that the variation should be made. In *Compass Trustees v McBarnett* the judge held in divorce proceedings before the English High Court that *"it is necessary to vary the settlement to do justice to wife's case. Only the Royal Court in Jersey will vary but I am led to believe that they will as the Jersey advocate has advised"*.

The Jersey court turned out to be prepared to do so, merely noting that *"in reading this the Court takes the view that where the learned Judge says: 'only the Royal Court in Jersey will vary…' what was meant was, not will in the sense of 'must', but rather in the sense of 'is capable of' or 'is able to'; and in passing it is right to say that on this interpretation no possible offence can be taken"*.

The Royal Court had *"no hesitation"* in ordering that the Trust be varied in accordance with the English court's judgment.

A RESURGENCE OF GOOD MANNERS?

Despite the eventual enforcement of the order of the English court in *Minwalla v Minwalla* it is clear that the Jersey court was not pleased at the incursion into its jurisdiction, and that case was almost certainly one of the factors which led to the enactment by the Jersey Legislature of the new article 9 of the Trusts (Jersey) Law 1984. Article 9(1) of the new law provides that:

"… any question concerning-

(a) the validity and interpretation of a trust;

(b) the validity of effect of any transfer or other disposition of property to a trust;

(c) the capacity of a settlor;

(d) shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question".

Controversially, the new article 9(4) then goes on to say that:

"No foreign judgment with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law".

The new Article 9 has come in for stringent criticism[2] but it is clear that it will give the Jersey court statutory basis in future for refusing to enforce foreign judgments which misapply, or fail to apply, Jersey law to Jersey trusts.

The new Article 9 is not dissimilar in approach to that taken in other offshore jurisdictions (see ss 90-91 of the Cayman Islands Trusts Law 2001; s 4(2)(b) and s 5 of the Isle of Man Trusts Act 1995; British Virgin Islands Trustee Ordinances 83A(7) and 13(b) and the Bahamaian Trusts (Choice of Governing Law) Act.

Had a similar clause been available to the trustees of the Fountain Trust in 2005 it seems they might well have been able to prevent the enforcement of the judgment in *Minwalla*. The recent amendments to the Trusts (Jersey) Law are thus perhaps not so dramatic as some commentators have believed, and might be better viewed as Jersey bringing its legislation into line with the prevailing trend in other offshore jurisidictions. It is questionable whether the controversial new clause 9(4) of that Act really adds anything to the law already available to trustees and settlors of trusts in other jurisdictions.

In any event, it seems that the English courts have taken notice of the reprimand delivered to them in the *Fountain Trust case*. In the recent decision of the English High Court in *A v A v St George's Trustees Ltd* [2007] EWHC 99 (Fam) allegations of sham were again made against a Jersey trust by the wife in divorce proceedings. Munby J rejected the argument of sham and, in so doing, commented that:

"even in the Family Division, a spouse who seeks to extend her claim for ancillary relief to assets which appear to be in the hands of someone other than her husband must identify, and by reference to established principle, some proper reasons for doing so. The court cannot grant relief merely because the husband's arrangements appear to be artificial or even 'dodgy'".

Munby J went on to say that the court would not *"ride roughshod over established principle, least of all where there are, or appear to be third party interests involved"*.

It therefore seems that the attitude taken by the Royal Court of Jersey may have delivered an effective reprimand to the English courts and that the Family Division of the High Court will take a far more cautious line in future. It might even be possible to go so far as to say that good manners all round have been restored.

1 Adopting a test formulated by Blackburn J in *Goddard v Gray and Schibsby v Westenholtz* (1870) LR 6 QB

2 See, for example, Jonathan Harris, *Jersey's New Private International Law Rules for Trusts – A Retrograde Step?* (2007) J&GLR 9

Andrew Child

Arbitration and ADR in the US and UK

Arbitration Clauses and Judicial Review

Can parties by agreement expand the scope for judicial review of arbitral awards? The First, Third, Fourth, Fifth and Sixth Circuits have held that they can. The Ninth and Tenth have said they cannot. Dicta in the Seventh and Eighth Circuits also tends towards this view.

In the Second Circuit the question is likely to be determined in *Taylors International Services Ltd v Esso Exploration Production Chad Inc Ltd*, a case presently under appeal and in which Teresa Rosen Peacocke of 3 Stone Buildings acts. The New York office of 3 Stone Buildings regularly acts on the instructions of English solicitors in international commercial arbitrations in New York, whether under English law or New York law (or, indeed, arbitrations conducted in England under New York law.)

This issue arises against the background of the recent Supreme Court decision in in *Hall Street Associates, LLC v Mattel, Inc.* (No. 06-989, 2008 WL 762537 (Mar. 25, 2008). In that case the Supreme Court had granted certiorari on 29 May 2007 "to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive."

The Court (Stevens and Kennedy JJ and Breyer J dissenting) held that the extremely narrow statutory grounds for vacating or modifying an arbitration award contained in sections 10 and 11 of the Federal Arbitration Act (FAA) are exclusive.

However, the Court allowed for the possibility that heightened review of arbitration awards may be available outside of the FAA, for instance under state law.

Further, the Court's decision leaves it open to parties to guard against legal error in arbitration awards so long as they do so within the statutory framework of the FAA.

One means of providing for redress against an arbitrator's errors of law may be by stipulating in the arbitration agreement that the arbitrator must apply the law applicable to the contract or the dispute. Judge Posner recently distinguished this method of obtaining heightened review from the one at issue in the *Mattel* case. In *Edstrom Industries, Inc. v Companion Life Insurance Co.*, 516 F.3d 546, 550 (7th Cir. 2008) he said "The question in our case is different [from the question in *Mattel*]. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application".

TRUSTS, PROBATE AND ADR IN THE US AND UK

Most US states expressly provide for mediation and/or arbitration in trust and probate disputes. A typical provision might provide that "the court may submit [disputes] to mediation, case evaluation, or other alternative dispute resolution process" or, even more generally, that the parties "explore the use of alternative dispute resolution processes".

In a number of states the process may be imposed on the parties. Washington State's Trust and Estate Dispute Resolution Act for example can be used to effectively compel binding arbitrations. Hawaii has a specific mediation process for probate, trust and guardianship issues where a beneficiary has the authority to motion the court for mediation or the court may mandate mediation on its own motion. In the latter case, mediation is mandatory.

A related issue is the ability of the Federal Arbitration Act to bind beneficiaries to arbitral agreements. It was held In *re Blumenkrantz* 824 N.Y.S.2d 884 (Surrogate's Court Nassau Country, New York, 2006) that a state law requirement that a delegee submit to the jurisdiction of the state's courts was pre-empted by the Federal Arbitration Act. Accordingly, where a trustee had delegated his investment authority to an adviser under an agreement with an arbitration clause, a beneficiary of the trust was bound by that clause.

The position in the UK is markedly different. The Court of Appeal in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 said that Court ADR orders should only encourage and not mandate ADR; moreover a court ordered mediation was likely to be a violation of the right of access to courts provided by article 6 of the European Convention on Human Rights. An unreasonable refusal to participate in ADR might well, however, attract a costs sanction.

Two relatively recent decisions in this area may be noted. In *Hickman v Blake Lapthorn* [2006] EWHC 12 a defendant had refused an early offer to settle on the basis of counsel's advice. At trial the claimant was awarded an amount *lower* than the original offer to settle. However the costs of the proceedings were *much greater* than the settlement offer. This led to an application that *counsel* be made responsible for a large proportion of those costs. The court dismissed the application on the basis that parties could not be made to feel bound to pay more than the claim was worth simply to avoid being vulnerable on costs at a later date. In *Chantrey Vellacott v Convergence Group plc* [2007] EWHC 177 (Ch) the Court was prepared to use otherwise privileged materials in order to award costs of a failed mediation in favour of the claimant in that proceeding.