Finance, Property and Business Litigation in a Changing World

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SINGAPORE ACADEMY OF LAW

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Finance, Property and Business Litigation in a Changing World

Plenary Session 1: Finance Litigation

Chairperson

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Speakers

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Mr Hri Kumar Nair SC, *Drew & Napier LLC*

FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

A JOINT CONFERENCE OF THE SINGAPORE ACADEMY OF LAW AND THE CHANCERY BAR OF ENGLAND AND WALES

25 & 26 April 2013
Supreme Court
Singapore

FINANCIAL DERIVATIVES LITIGATION

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Essex Court Chambers

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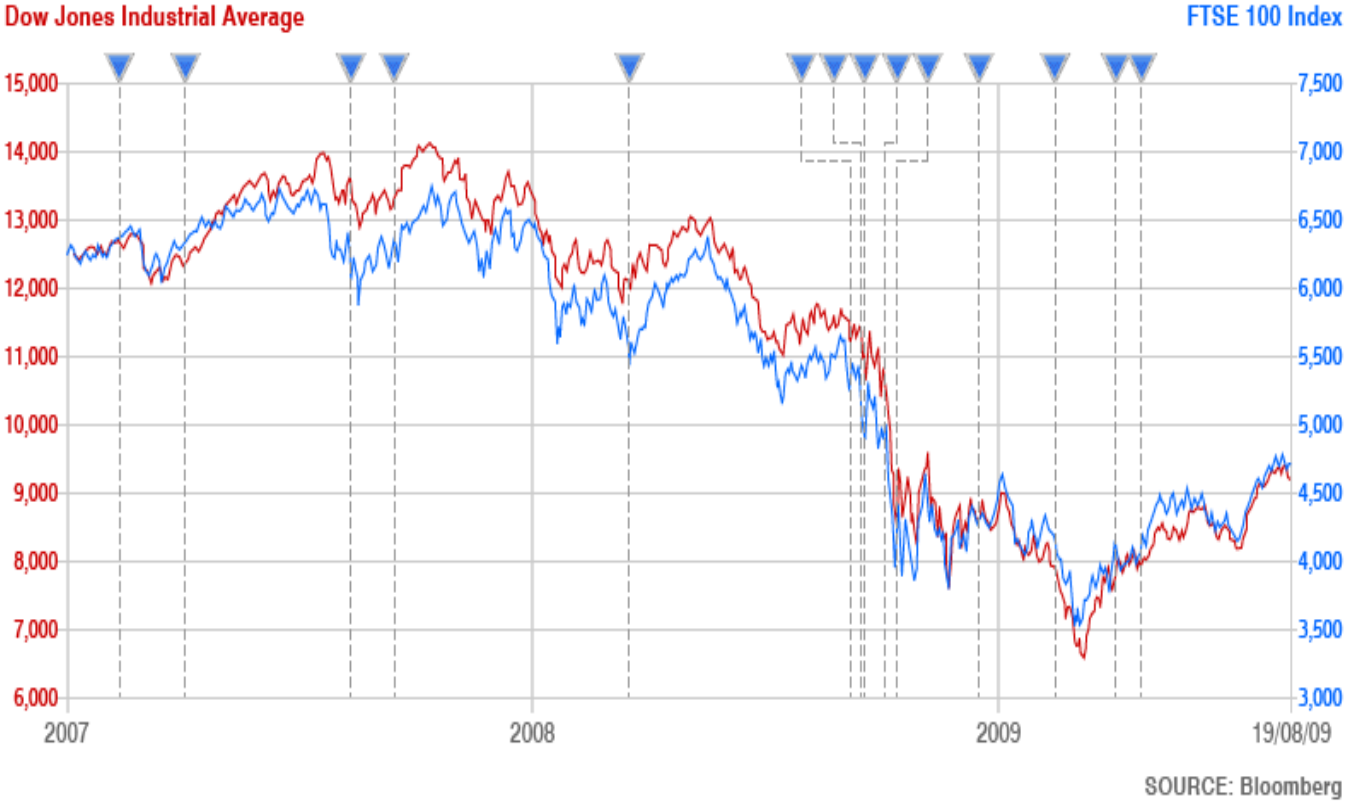
The 2008 financial crisis



Sept-Oct 2008 – the eye of the storm

- **7th Sept** - Freddie Mac and Fannie Mae effectively nationalized by US Government.
- **14th Sept** - Merrill Lynch shotgun wedding to Bank of America amidst fears of liquidity crisis
- **15th Sept** - Lehman Bros filed for Chapter 11 Bankruptcy protection. Periodically thereafter various of its subsidiaries did the same, including, on 3 Oct, LBSF, the dedicated subsidiary for derivative transactions.
- **17th Sept** - AIG, the USA's largest insurer, was bailed out by US Govt with a loan of $85bn (insufficient funds to meet its CDS insurance obligations)

Sept-Oct 2008 – the eye of the storm

- **17th Sept** – Lloyds TSB takes over HBOS following a run on HBOS shares
- **25th Sept** – Washington Mutual sold to JP Morgan Chase for $1.9bn.
- **3 Oct** – US Congress approves 700bn bailout of the banks – the biggest financial rescue in US history.
- **6-10 Oct** - The worst week for the global stock market for 75 years. The Dow Jones index lost 22.1%, its worst week on record.

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Sept-Oct 2008 – the eye of the storm

- **7 Oct** - Icelandic banking system collapses
- **11 Oct** Highest volatility day recorded in the 112 year history of the Dow Jones Industrial Average.
- **13 Oct** – UK Govt rescues RBS and Lloyds-HBOS in wake of collapse of financial markets
- **14 Oct** - US Govt rescues major banks (including Goldman Sachs and JP Morgan Chase) with an injection of $250 million of public money (from the $700 billion emergency bailout fund) in return for equity stakes and agreement by the banks to submit to certain restrictions/regulation. This in effect spells the end of pure investment banking.

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Sept-Oct 2008 – the eye of the storm

- **15 Oct** - Dow Jones falls 7.87% in one day
- **21 Oct** – US Federal Reserve commits $540 billion to purchase short-term debt from money market mutual funds in order to help unfreeze the credit markets. Stock market continues downward spiral.
- **17 November** – US Treasury gave $33.6 billion to 21 banks in a second round of disbursements from the bailout fund
- **24 November** – US Govt rescued Citigroup after its stock has plunged 60% in a week
- **25 November** – US Federal Reserve bought $600bn of mortgage bonds issued or guaranteed by Fannie Mae, Freddie Mac and Federal Home Loan Banks

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Claims by Banks

- Claims for settlement of accounts (including claims in liquidation/administration of insolvent counterparties); claims against advisors
- Claims against counterparties for settlement/early termination of derivative transactions under the ISDA Master Agreement
- Claims against private banking clients for money due on close-out of trading accounts and/or loan facilities.

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Claims against Banks

- Claims by counterparties (or their administrators or liquidators) on settlement of accounts;
- Claims by traders/investors/private banking clients for:
  - Breach of contract
  - Negligence, negligent misstatement
  - Misrepresentation
  - Breach of statutory duty
  - Fraud

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Types of dispute

Broadly 3 categories of dispute :

- Disputes between private investors and banks (claims for mis-selling, fraud, negligence, breach of statutory duty, failure to follow instructions and other breaches of contract). These tend to litigate rather than arbitrate.
- Disputes between parties and counterparties when the transaction turns sour: these are often subject to arbitration.
- Disputes arising from the insolvency of one of the parties – e.g. Lehman Bros. Can be either litigated or arbitrated; often involve interpretation of the terms of the ISDA Master Agreement.

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Banks currently have the upper hand

- Most reported cases in England concern the validity and scope of clauses in the agreement that protect the banks from claims in tort – especially for misrepresentation. In this context, the English CA has upheld and enforced the principle of contractual estoppel to preclude such claims:
- Springwell Navigation v JP Morgan Chase Bank and others [2010] EWCA Civ 1221, is the leading case, applied in numerous subsequent first instance decisions including:
- Bank Leumi (UK) Plc v Wachner [2011] EWHC 656 (Comm)
- Casa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm).

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Banks currently have the upper hand

A further potential blow to investors was struck by Gloster J in Euroption Strategic Fund Ltd v Skandanivaviska Enskilda Banken AB [2012] EWHC 584 (Comm).

- The claimant, E, was an investment fund whose options trading portfolio was subject to a forced close-out by the bank. S (its clearing broker) after it was subject to a margin call. S had a contractual entitlement to close out the portfolio in such circumstances without further reference to E.
- E argued that S had negligently delayed the close-out and conducted it incompetently.
- The judge held that S had not delayed but in any event it owed no tortious duty of care to E. Imposing such a duty would expand the law of negligence into a new context and involve a new type of loss, namely, loss of investment opportunities.

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Banks currently have the upper hand

- E also argued unsuccessfully that there was an implied term of the mandate that S would conduct the close-out using reasonable care and to a suitably professional standard.
- The judge held that it was not necessary to imply such a term to give business efficacy to the contract.

- She also held that although the mandate was a contract for the supply of services within the Supply of Goods and Services Act 1982, the implied term in s.13 of that Act only applied to services contemplated by the mandate and closing out of the portfolio was not a service that S had agreed to carry out under the mandate.

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Dispute resolution mechanisms

- The default position under Cl 13 of the ISDA Master Agreement is that disputes are to be submitted to the jurisdiction of either the Courts of England and Wales (if the chosen proper law is English law) or the Courts of the State of New York (if the chosen proper law is New York law)
- This is subject to contrary agreement in the Schedule. Where the counterparty is another bank or a large corporation, one frequently finds a provision for arbitration inserted in the Schedule.
- There is a possibility of inconsistent approaches to the same issue in different jurisdictions. The confidentiality of arbitrations tends to mask this problem.

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Dispute resolution (cont'd)

For example, US insolvency law (of critical importance regarding the collapse of the Lehman group of companies) may answer some questions differently from the way in which they would be answered in England or other common law jurisdictions such as Singapore.

One particular problem with which the English courts have grappled relates to the application of the "anti-deprivation" rule, i.e. the principle that

"One cannot contract out of the provisions of the insolvency legislation which govern the way in which assets are dealt with in a liquidation"

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Lomas and others (Administrators of Lehman Bros) v JFB Firth Rixon and others ISDA intervening

[2010] EWHC 3372 (Ch). [2012] EWCA Civ 149.

The case concerned s.2(a) of the ISDA Master Agreement:

(i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

(ii) Payments under this Agreement will be made on the due date for value on that date...

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default.. with respect to the other party has occurred and is continuing (2) the condition precedent that no Early Termination Date has occurred or been effectively designated and (3) each other applicable condition precedent specified in this agreement.

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Lomas v JFB Firth Rixon and others (continued)

- When the group holding company in Lehman Bros went into Chapter 11 administration on 15 September 2008 that was an " Event of Default " under the ISDA Master agreement. Counterparties then had a right to terminate ongoing swaps transactions.
- It was already settled law that if the non-defaulting party did not elect for early termination, then on maturity, he would not have to pay because a condition precedent (solvency of the payee) would not be fulfilled.
- The main issue in this case was whether the right of the non-defaulting party under s.2(a)(iii) of the 1992 ISDA Master Agreement to avoid payment of what would otherwise have been its obligations on maturity of the transaction because of non-fulfilment of an express condition precedent, by electing not to terminate early, offended against the anti-deprivation rule.

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Lomas v JFB Firth Rixon and others (continued)

- The judge (Briggs J) held that Section 2(a)(iii) did not offend the anti-deprivation rule. If the asset of the insolvent company is a chose in action representing the *quid pro quo* for something yet to be done by the company at the time of insolvency, the other contracting party may terminate or adjust the ongoing contractual relationship with impunity.

- The CA (Longmore, Patten and Tomlinson LJJ) upheld that decision. In the course of doing so, it also determined a number of important questions of construction of the standard terms (and, crucially, did so in a manner that reflected market practice and understanding).

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Lomas v JFB Firth Rixon and others (continued)

- The CA held that the payment obligation of the non-defaulting party was *suspended* rather than extinguished during the currency of an Event of Default and would revive if the matter was cured before the transaction terminated. The suspension was indefinite because there was no express or implied term in the Master Agreement that provided for cessation of an obligation by effluxion of time.

- The conclusion that the obligation was suspended was driven by the fact that defined Events of Default were so many and various that to treat the payment obligation as extinguished was too drastic a remedy in favour of the non-defaulting party.

- Though the notion of indefinite suspension might be regarded as "imperfect" it was not uncommercial and thus the anti-deprivation principle was not engaged (applying Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383).

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Lomas v JFB Firth Rixon and others (continued)

- The decision is important because it finally put paid to the argument that a non-defaulting party did not have to give credit by way of netting under s.2(c) of the ISDA Master Agreement for an amount that was not "payable" because of an Event of Default.

- The argument had given rise to conflicting first-instance decisions: Marine Trade SA v Pioneer Freight Futures Co Ltd BVI [2010] 1 Lloyd's Rep 631 and Pioneer Freight Futures v TMT Asia Ltd [2011] EWHC 1888.

- Since the payment obligation was not extinguished upon maturity of the transaction, but only suspended, if the Agreement provided for automatic "early termination" it was possible for this to occur after the maturity date.

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Lomas v JFB Firth Rixon and others (continued)

- It followed that obligations that had arisen before the occurrence of automatic early termination were subject to "close-out netting" – the automatic netting process which set off the aggregate or gross amounts that were due from each party to the other in respect of settlement sums payable in the same currency on the same date in respect of all transactions across the board.

- The CA upheld the reasoning of Gloster J in Pioneer Freight Futures v TMT Asia Ltd refusing to follow the approach of Flaux J in Marine Trade SA v Pioneer Freight Futures Co Ltd BVI. The latter decision (which was extremely unpopular in the market) was expressly overruled.

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Evaluation of Loss

Another aspect that has exercised the Courts and will continue to do so relates to the appropriate calculation of loss under the Master Agreement in the event of early termination, by one of the two permitted methods, Market Quotation or (if that does not produce a commercially reasonable result) the non-defaulting party's Loss.

- How could one ever apply the "Market Quotation" method of evaluation in the circumstances of the market meltdown?
- What is the appropriate method of valuing some of the more complex structured derivative products (particularly if they need to be "unwound"?

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Anthracite Rated Investments v Lehman Bros [2011] 2 Lloyd's Rep 538

One of the issues that Briggs J had to deal with in this case concerned the way in which the non-defaulting parties measured their losses. The defaulting party challenged this as giving rise to a windfall gain. Briggs J. summarized the principles set out in previous authorities on the interpretation and application both of Loss and Market Quotation under the 1992 ISDA Master Agreement as follows:

- Although the formulae are different they are aimed at achieving broadly the same result and outcomes derived from one may be usefully tested by way of cross-check against the other;

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Lehman Bros International (Europe) v Lehman Bros Finance SA [2013] EWCA Civ 188

- This case involved transactions between two Lehman entities under a contract which modified the 1992 ISDA Master Agreement to include the provisions of the 2002 Master Agreement dealing with the consequences of termination.
- The CA decided that what Briggs J said in Firth Rixon (and Anthracite) about the "value clean" principle in the context of the 1992 ISDA Master Agreement did not apply to the 2002 Master Agreement and that the judge was wrong to decide that it did.
- The "value clean" principle produced a result that offended business common sense by over-compensating the non-defaulting party on the ascertainment of the Close out amount. There was to be no assumption that all conditions precedent had been fulfilled. This meant that the terms of a side letter (which provided for automatic termination of certain transactions in certain circumstances) had to be taken into account as a "material term" of the inter-company transactions.

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Lehman Bros International (Europe) v Lehman Bros Finance SA [2013] EWCA Civ 188

The CA's approach was heavily influenced by the User's Guide to the 2002 ISDA Master Agreement which suggested that changes to the Master Agreement were regarded as more important than the preservation of the "value clean" principle in the form in which it existed in the 1992 Master Agreement.

It follows that, at least until the matter reaches the Supreme Court, the way in which the close-out amount is to be ascertained or computed may vary considerably depending on whether the Master Agreement is the 1992 or 2002 version or a combination of the two.

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BANK MIS-SELLING LITIGATION

Peter de Verneuil Smith
3 Verulam Buildings

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Overview

A. Typical mis-selling claims.
B. Typical mis-selling defences.
C. The recent English evolution of claims.
D. Three answers to contractual estoppel.

A. Typical mis-selling claims

- Unsuitable product recommended by bank.
- Risk/break clauses not adequately explained.
- Presentation of product was not fair and was misleading.
- Claims for:
  - Breach of statutory duty (s 150 FSMA).
  - Negligent advice.
  - Misrepresentation

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B. Typical mis-selling defences

(1) The product was suitable.

(2) No advisory relationship on the facts.

(3) Contractual estoppel.

  (a) No advisory relationship.

  (b) No representations.

  (c) No reliance.

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(1) Suitable products

- Sophisticated clients will struggle to establish unsuitability of structured products (Al Sulaiman v Credit Suisse [2013] EWHC 400 (Comm) Cooke J).
- Process failures don't matter if the product is suitable (Zaki v Credit Suisse [2013] EWCA Civ 14).

(2) No relationship on the facts

- Distinction between giving advice and assuming responsibility for advice (Standard Chartered Bank v Ceylon Petroleum [2011] EWHC 1785 (Comm) Hamblen J.
- Bank documents which refer to "advisory role" and "trusted financial advisor" are not conclusive.
- Absence of a written advisory agreement points against a duty in tort (JP Morgan v Springwell [2008] EWHC 1186 (Comm) Gloster J §440).

(3) Contractual Estoppel

- Peekay v ANZ [2006] 2 Lloyds Rep 511 in which Moore-Bick LJ said:
  "Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed..."
- Neutralizes negligence claim and misrepresentation claim.
- Such terms which define the relationship are outside UCTA (JP Morgan v Springwell [2008] EWHC 1186 (Comm) §602 Gloster J and Grant Estates v RBS [2012] CSOH 133).

C. Recent English evolution of claims

(1) Failure to provide specific details as to potential break costs.

(2) Implied representations regarding LIBOR.

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(1) Particulars of break costs

- **Failure to provide specific details as to potential break costs.**
  - **This argument failed in Green v RBS Plc [2012] EWHC 3661 (QB) HHJ Waksman QC.**
  - **Substantial break costs were a "theoretical risk" as the 2008 rate collapse was unforeseeable.**
  - **Breaking the swap was "remote" because clients intended to keep the loans for the duration of the swap.**
- **No seminal decision on non-sophisticated IRS as yet.**

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(2) Implied LIBOR representations

- **Implied representation that Libor was or would not be "fixed".**
  - **Amendment permitted (Graiseley Properties Limited v Barclays Bank Plc [2012] EWHC 3093 (Comm) per Flaux J)**
  - **Amendment denied Deutsche Bank AG v Unitech [2013] EWHC 471 (Comm) per Cooke J).**
- **No decision on full merits as yet.**

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D. Answers to contractual estoppels

(1) Reverse Estoppel.
(2) Unilateral mistake
(3) S3 Misrepresentation Act.

(1) Reverse Estoppel

- The parties to the transaction share an assumed state of facts or law (Republic of India v India Steamship [1998] AC 878).
- Prevented by entire agreement clause?
- Failed on the facts in Standard Chartered Bank v Ceylon Petroleum at §539.

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(2) Unilateral Mistake

- If the bank knows the customer has no independent advice and is relying upon the bank does that constitute unilateral mistake?
- Must be a mistake as to the terms of the contract.
- Bank must know the customer is mistaken.
- A wider doctrine (bank unwittingly induces a mistake) was rejected in Deutsche Bank v Khan [2013] EWHC 482(Comm) Hamblen J at §267.

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(3) s3 Misrepresentation Act

S3 of the Misrepresentation Act 1967:

"If a contract contains a term which would exclude or restrict –

(a) any liability to which a party to a contract maybe subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a representation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977…"

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s3 Misrepresentation Act

- **Entire agreement/no representation clauses are outside s3 of Misrepresentation Act 1967 (Raiffeisen v RBS [2010] 1 Lloyds LR 123 Christopher Clarke J).**
- **Is this correct?**
- **S11(3) of UCTA does require a "but for test" (Smith v Bush [1990] 1 AC 831) why should s11(1) be different?**

s3 Misrepresentation Act

- **Bridge LJ in Cremdean Properties v Nash [1977] 2 EGLR 80:**

"Supposing the vendor included a clause which the purchaser was required, and did, agree to in some terms as "notwithstanding any statement of fact included in these particulars the vendor shall be conclusively determined to have made no representation within the meaning of the Misrepresentation Act 1967", I should have thought that that was only a form of words the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such ingenuity in the form of language to defeat the plain purpose at which section 3 is aimed."

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The Gloss

- **In Raiffeisen the Judge introduced a gloss at §314: "*In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or parts company with reality.*"**
- **Approved by Aikens LJ in Springwell ([2010] EWCA Civ 1221) at §181 "*...may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before and in substance be an attempt to exclude or restrict liability*".**
- **Therefore claimants can require a full factual investigation into "*what has gone before*".**

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THE BANKER-CUSTOMER RELATIONSHIP – A REBALANCE?

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Overview

A. Power of the Written Word
B. The Search for a Balance
C. The Future?

A. The Document Defences

- **Customer bound by Bank's terms and conditions:**
  - **Immaterial whether he has read or was given the terms**
  - **Knowledge of the existence of the terms would be sufficient**
  - **Signature Rule**

  (see *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518 & *RBS Coutts Bank Ltd v Shishir Tarachand Kothari* [2009] SGHC 273)

  - **No requirement to call onerous / unusual terms to customers' attention in a signed contract**

  (see *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712, applied in *Nitine Jantilal v BNP Paribas Wealth Management* [2012] SGHC 28)

  - **Exclusion clause not unreasonable as a customer can take his account to another bank**

  (see *Ri Jong Son v Development Bank of Singapore Ltd* [1998] 1 SLR(R) 824)

- **Conclusive Evidence Clauses:**
  - **Bank Statements and Confirmation Notes which oblige customer to check and highlight any discrepancy within a time period, unchallengeable after the expiry of time limit**

  (see *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195)

  - **Certificate of Indebtedness is conclusive of both liability and quantum in the absence of fraud or manifest error**

  (see *Bangkok Bank Ltd v Cheng Lip Kwong* [1989] SLR(R) 660)

- **Orient Centre Investments Ltd and anor v Societe Generale [2007] 3 SLR(R) 566 (CA)**

  - **Plfs appealed against decision of HC to strike out their claim for breach of representations, fiduciary and other duties, and for negligence in relation to investments in structured products.**

  - **Plfs had entered into SG's std terms & conditions, as well as specific terms applicable to the relevant structured products. These terms contained the std non-reliance and exclusion clauses & warranties**

- **Orient Centre Investments Ltd and anor v Societe Generale [2007] 3 SLR(R) 566 (CA)**

  - **CA found that many of the material clauses in the agreements are in the nature of representations and warranties, which were relied upon by SG:**

"the combined effect of the express general and specific terms and conditions applicable to the structured products provide an insuperable obstacle to any claim by the appellants against SG based on the alleged breach of representations or duties, fiduciary or contractual or negligence on the part of Goh. In the face of Orient's own representations and warranties with respect to each of the structured products, it is not possible for the appellants to argue that Orient had relied on any alleged representation on the part of Goh that he would ensure that the appellants' capital would be preserved and that it would earn a return of 10% per annum on each deposit"

- **Orient Centre Investments Ltd and anor v Societe Generale [2007] 3 SLR(R) 566 (CA)**

  - **CA also held that:**

"*even if Goh had made the representation concerning capital preservation and income return, it would not have assisted the appellants in relation to the structured products, as they have represented and warranted that they did not rely on any representation given by any of SG's officers. Moreover, Teo could not have misunderstood the clear and specific terms governing the structured products*"

- **Orient Centre Investments Ltd and anor v Societe Generale [2007] 3 SLR(R) 566 (CA)**

  - **CA relied on the English CA decision of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 ("Peekay") to find that pre-contractual representations are superseded by express contractual terms.**

B. Search for a Balance

- ***Standard Chartered Bank v Neocorp International Ltd*** **[2005] 2 SLR(R) 345**
  - **HC considered *Bangkok Bank* and found that CA was only construing the clause in question, and not stating a general principle that conclusive evidence clauses are conclusive of liability and quantum. The effect of such clauses depend on its proper construction.**
  - **HC held that conclusive evidence clauses does not preclude the court from reviewing the legal basis of any claim made in reliance on such clauses.**

- ***Jiang Ou v EFG Bank AG*** **[2011] 4 SLR 246**
  - **In *Jiang Ou*, the HC reiterated that the effect of conclusive evidence clauses is an issue of construction. It noted that historically, such clauses were used to transfer the risk of erroneous transactions, but acknowledged that such clauses may be drafted widely to also transfer the risk of forgery or unauthorised transactions.**
  - **HC distinguished cases which held that such clauses were conclusive evidence that transactions were authorised, even though the clauses in those cases did not expressly transfer risk for forgery or unauthorised transactions to the customer on the basis that:**
    (a) the bank acted in good faith (see *Consmat*)
    (b) the transactions were authorised on the facts (see *Kothari*)

- ***Jiang Ou v EFG Bank AG* [2011] 4 SLR 246**

  - **HC drew a red line – conclusive evidence clauses cannot be relied upon to exclude fraud by the bank's employees.**

  - **Any attempt to rely on conclusive evidence clauses to exclude fraud would be void under UCTA and/or contrary to public policy.**

- ***Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559**

  - **CA found that the bank owed a duty of care to its customer in tort.**

  - **However, it took into account the customer's investment experience, the unique circumstances of the 1997 Asian Financial Crisis and the contractual framework entered into, and found that the standard of care owed by the bank was not a high one.**

- ***Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559**

  - **Significantly, CA found that banks may contract out of a tortious duty of care:**

"It was clear from the actual decision in Hedley Byrne ([32] supra) itself that an express disclaimer of responsibility could prevent a tortious duty of care from arising, by negating the proximity sought to be established by the concept of an 'assumption of responsibility'. Where such a disclaimer takes the form of a contractual exclusion clause, such a term would not be subject to [UCTA]…In Goldman Sachs ([15] supra), Springwell and Titan Steel ([15] supra), the material terms of the contracts governing the banking relationship were highly detailed and…the relevant terms made it abundantly clear that the banks were not accepting or assuming any responsibility to take care, and/or that the client was not relying on such care being taken. In such circumstances, it was inevitable that no duty of care in tort was found to be owed by the banks in those cases"

- ***Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559**

  - **The CA considered that against the backdrop of the Asian Financial Crisis and the 2008 global financial crisis, it would be anomalous not to find that banks owed a duty of care to its customers. However, it concluded at [44]:**

"In our view, it was always open to banks and other providers of financial services to exclude or limit their duty of care via disclaimers or exclusion clauses, subject of course to the controls of the UCTA and/or the common law. The absence of such measures, coupled with the factual circumstances of this case, led us to the conclusion that a duty of care was owed"

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- ***Soon Kok Tiang and ors v DBS Bank Ltd and anor matter* [2012] 1 SLR 397**

  - **The CA dismissed a claim by 21 investors in derivative credit-linked notes where Lehman was a Reference Entity.**
  - **The CA observed at [63]:**

"*In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract, a person who signs a contract which is set out in a language he is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by. The principle of caveat emptor applies equally to literates and illiterates in such circumstances*"

- ***Als Memasa and anor v UBS AG* [2012] 4 SLR 992**

  - **CA held that non-reliance clauses are intended to immunise banks from liability for post-contractual representations, but not unauthorised transactions.**
  - **CA accepted that a party is bound by his signature on a contract even if he is not aware of the existence or effect of some term in the contract, unless he can establish *non est factum*.**
  - **However, CA queried whether in light of the many allegations of 'mis-selling' of complex financial products to linguistically and financially illiterate customers, it may be desirable for the courts to reconsider whether non-reliance clauses should immunise banks for such 'mis-conduct', where their unsophisticated customers might not understand the legal effect of such clauses.**

- *Deutsche Bank AG v Chang Tse-Wen* [2012] 4 SLR 992
  - HC found DB breached a pre-contractual duty of care to advise its customer on managing his new wealth.
  - HC distinguished *Titan Steel* and *Springwell* on the ground that there was a "*complete asymmetry of commercial sophistication and experience*" between its customer and DB such that DB's terms and conditions "*would not necessarily exclude a concurrent duty of care*".
  - HC found that DB's non-reliance clauses did not operate as an estoppel. HC held that DB failed to establish the customer intended DB to act on these clauses, because there was no evidence that these clauses were brought to its customer's attention.
  - HC also distinguished *Orient Centre* on the ground that, *inter alia*, DB knew that its customer was financially inexperienced.

C. The Future?

- Issues arising from recent decisions
  - Does the law apply differently to vulnerable / inexperienced customers?
  - How to define "vulnerable" or "inexperienced"?
  - What should banks do to identify such customers?
  - How should these customers be treated?
  - Is it enough to just show non-reliance and exclusion clauses to customers?
  - Is there a requirement to ensure customers understand terms?
  - Are banks special defendants?
  - Is there no room for personal responsibility?

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A JOINT CONFERENCE OF THE SINGAPORE ACADEMY OF LAW AND THE CHANCERY BAR OF ENGLAND AND WALES

25 & 26 April 2013
Supreme Court
Singapore

THE BANKER-CUSTOMER RELATIONSHIP – A REBALANCE?

Hri Kumar Nair *S.C.*
Drew & Napier LLC

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Finance, Property and Business Litigation in a Changing World

Concurrent Session 1A: Cross-Border Insolvency

Chairperson

Mr Richard Morgan QC, *Maitland Chambers*

Speakers

Mr Michael Green QC, *Fountain Court*

Mr Glen Davis QC, *South Square*

Mr Andrew Chan, *Allen & Gledhil LLP*

Assistant Professor Wee Meng Seng, *Faculty of Law,*

National University of Singapore

For this relief, much thanks[1] – but what relief?

Glen Davis QC

When the English court[2] has recognised a foreign insolvency proceeding under the UNCITRAL Model Law, it has a discretion to grant "*any appropriate relief*". But when will it recognise foreign proceedings, and when it has done so, how far will (and how far should) it go in granting further relief?

The Cross-Border Insolvency Regulations 2006[3] ("CBIR") implement for Great Britain[4] the UNCITRAL Model Law on cross-border insolvency[5] in the form set out in Schedule 1 CBIR, and provide a convenient route to recognition for foreign insolvency proceedings where the effect of a foreign insolvency is not automatic under the EC Insolvency Regulation[6] ("ECIR") or one of the regimes applicable to institutions excluded from the ECIR[7]. Reg 2 CBIR permits the court when interpreting the Model Law to have regard to the original UNCITRAL Model Law, to UNCITRAL's preparatory documents and to the *Guide to Enactment*.

A *foreign representative* can apply to the English court as of right under Art 15(1) Model Law for recognition of the *foreign proceeding*[8] in which they have been appointed, and can rely on a statement in the decision or "certificate" (usually, a copy of the order by which they have been appointed) that the proceeding is within Art 2(i) of the Model Law and the foreign representative is a person within Art 2(j)[9] to raise the presumption under Art 16(1) Model Law. Applications for recognition are almost always without notice to any other party, and rarely opposed; the court rarely has need to look any further.

Art 17(1) Model Law provides that the 'foreign proceeding' *shall be recognised* if it is a proceeding within Art 2(i) of the Model Law and the foreign representative is a person within Art 2(j), and the other procedural conditions are met, and Art 17(2) provides that it *shall be recognised* as a 'foreign main proceeding' if it is taking place in *the State where the debtor has the centre of its main interests*[10], and as a 'foreign non-main proceeding' if the debtor has a *establishment*[11] in that foreign state. In some jurisidictions, the use of 'shall' is regarded as imperative, and there have been comments to that effect in some unopposed first instance decisions in England[12] but the better view is that the duty is imposed on a court which always has a discretion as to whether or not it is appropriate, in all the circumstances of the case, to grant the recognition requested[13]

As the Supreme Court observed in *Rubin v Eurofinance*[14], the Model Law shares with the ECIR the approach (ultimately derived from the civil law concept of a trader's domicile) that the jurisdiction which is treated as having international competence in respect of an insolvency is that of the country of the debtor's centre of main interests ("COMI"). This choice was deliberate, looking to harmonise the emerging concept of a main proceeding[15]. As the Supreme Court also observed in *Rubin*, the expression *centre of main interests* is "an expression not without its own difficulties". But before an English Court, at least, the approach to COMI under the ECIR and the Model Law will be the same[16]; it is where a company regularly conducts the management of its interests in such manner as to be objectively ascertainable by third parties[17].

In practice, the foreign court can also certify that the debtor has its COMI in the state where proceedings are opened, and the English court is likely to defer to such a finding by the court first seised, or at the very least (and even in cases where it has not been necessary for the

original court to consider the question of COMI) rely on the presumption in Art 16(3) Model Law that, in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's COMI[18].

There is power to grant provisional relief from the time of filing an application for recognition[19]. When the English makes an order recognising a foreign proceeding, that order then has effect throughout Great Britain[20].

The first and most obvious relief which would be sought on recognition is a protective stay on proceedings, both to prevent administration of the estate being distracted by the costs of defending multiple proceedings, and to prevent local actions proceeding to judgment. Where the proceeding recognised is a foreign main proceeding, there is an automatic stay under Art 20(1) of the Model Law, which for a corporate debtor is the equivalent of the stay which would apply on domestic winding-up[21]. That is to say:

no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose[22]

This form of stay enables the court to impose a condition that, for example, an arbitration or action may proceed to judgment which is only to be enforced by proof in the foreign liquidation. It does not prevent enforcement of security[23] or repossession of property under a hire-purchase or retention of title agreement[24].

The purpose of this automatic and mandatory stay is explained in the Guide to Enactment:

The stay of actions or of enforcement proceedings is necessary to provide breathing space until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor.

Upon recognition of foreign insolvency proceedings – whether main or non-main – Art 21(1) of the Model Law gives the court discretionary jurisdiction to grant in addition *any appropriate relief* at the request of the foreign representative *where necessary to protect the assets of the debtor or the interests of the creditors*. There are examples in sub-Articles (a) to (g), but these are introduced by the word "including" so these are clearly intended to be a non-exclusive list. The examples are:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 of article 19; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

In practice, the English judges readily act under this power to extend the stay on recognition into the form of moratorium which is available in England where a company is in administration[25]. This prevents enforcement of security, repossession of property under a hire-purchase or retention of title agreement, or re-entry by a landlord without the consent of administrators or the permission of the court, and there are now numerous examples (many of them unreported) of them doing so[26]. Courts in other jurisdictions take a similar approach[27]

Under Art 20(2), the court has a discretion to entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person, provided it is satisfied that the interests of creditors in Great Britain are *adequately protected*. It is not surprising that the English court will exercise its powers under Art 21(2) to direct liquidators in a non-main proceeding to remit assets to be distributed in the foreign main proceeding, as it did in *Re Swissair*[28]. The English court (and the courts of other common law jurisdictions) have since at least the late 19th century[29] considered that they had jurisdiction to direct the liquidator in an ancillary English liquidation to remit assets to a foreign liquidator to be distributed in accordance with the law applicable to that foreign liquidation at least where there would be a pari passu distribution among unsecured creditors[30], and more recently even where the foreign proceeding gives priority to a particular class of creditor[31] (as European jurisdictions now do in the case of insurance insolvency).

Similarly, it would be surprising if the court was not prepared to grant relief under Art 21(1)(d) in most cases, enabling the foreign representative to take evidence concerning assets and liabilities of the debtor, and making orders in support of the foreign proceedings where necessary to facilitate the taking of such evidence.

The real question, to which we do not yet know the answer, is how much further the court will (and should) be prepared to go.

The *Guide to Enactment* anticipates that there will be very wide powers available to the court to grant discretionary relief under Art 21; it refers to *any other relief that may be available under the laws of the enacting State*.

By Mr Glen Davis QC
South Square

The scope of Art 21 was recognised by Lindgren J in the Federal Court of Australia in *Tucker, In the Matter of Aero Inventory (UK) Limited (No 2)*[32]: *It will be recalled that Article 21(1) empowers the Court to "grant any appropriate relief" – a power not confined to the forms of relief described in the lettered paragraphs (a) to (g) of Article 21(1)*. In that case, the Judge granted the applicant foreign representatives the same protections with respect to charges, liens and pledges and leased property as he said the voluntary administrator of an Australian company would enjoy as a matter of course, saying that this approach promotes consistency and gives effect to the objectives set out in the preamble to the Model Law.

One boundary is now charted by the decision of the Supreme Court in *Rubin*; the Model Law does not permit enforcement of an *in personam* judgment against a person who has not submitted to jurisdiction in the state of the foreign main proceeding. But what about other boundaries?

To keep this article within manageable bounds, I would like to take just one example, but one with potentially profound consequences; the effect of a foreign main proceeding on a contract governed by English law.

As a starting point, it is a familiar proposition of common law that a contract can be, and can only be, discharged under its proper law[33] (although submitting to a foreign insolvency proceeding and accepting a benefit in that proceeding may give rise to what is in effect an estoppel).

It has long been recognised that it may be necessary to suspend or affect contract rights in order to achieve a reorganisation or a cost-effective liquidation. One example is the power given to a liquidator under the English Insolvency Act[34] to disclaim contracts as a species of onerous property, converting executory obligations on the part of the debtor company into a provable damages claim on the part of the counterparty. An Australian liquidator has similar powers under Australian insolvency legislation.

Let us suppose that there is an Australian company in liquidation, some of whose contracts are subject to English law, and it is "necessary in the interests of the creditors" (the test under Art 21) for the liquidator to disclaim them. Australia is a designated territory for the purposes of section 426 of the Insolvency Act, and so there is the possibility that the Australian liquidator can apply for recognition under that section, and under section 426(5) of the Insolvency Act the English court can apply either English or Australian law. The English Court can by either route give effect to the necessary disclaimer – either by applying Australian law through the prism of section 426(5) or by applying English insolvency law to the English law contracts[35].

Similarly, although disclaimer as such may not be available within the insolvency regimes of other EU Member States, the automatic effect of the ECIR when the COMI of a company is in another Member State is that it is the law of the State where the main proceedings are opened which governs effects of those proceedings on a current contract to which the debtor is a party[36].

By Mr Glen Davis QC
South Square

So the position as a matter of English law is that a European insolvency will have automatic effect on a contract governed by English law[37], and an insolvency in a State designated for the purposes of section 426 of the Insolvency Act can have effect on such a contract, but we are still in the very early days of exploring just how wide a jurisdiction confers on the English courts to make appropriate orders in support of a foreign insolvency.

Art 6 of the Model Law provides that nothing in the Model Law prevents the court from refusing to take an action governed by the Model Law if the action would be "*manifestly contrary*" to the public policy of Great Britain or any part of it. While this "public policy" Exception may be invoked in an extreme case, if is difficult to see how it could be contrary to public policy for the court to grant as relief under the Model Law any provision which would automatically apply by operation of the ECIR.

A version of this article will appear in a prospective edition of the South Square Digest

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April 2013

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1 Hamlet, Act 1, sc 1

2 Jurisdiction is allocated to the Chancery Division of the High Court as regards England and Wales by Art 4(1) Model Law

3 SI 2006/1030

4 "Great Britain" refers to England, Wales, and Scotland (the term is derived from section 1 of the Union with Scotland Act 1706)

5 The *UNCITRAL Model Law on cross-border insolvency* was adopted by the United Nations Commission on International Trade Law on 30 May 1997. References in this article to the Model Law are to the form in which it appears in Schedule 1 CBIR unless otherwise specified.

6 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; where the Model Law conflicts with an obligation under the ECIR, Art 3 Model Law provides that the requirements of the ECIR prevail.

7 *The Insurers (Reorganisation and Winding Up) Regulations 2004*, SI 2004/353 "the Insurers Regulations"); *The Credit Institutions (Reorganisation and Winding Up) Regulations 2004*, SI 2004/1045 ("the Credit institutions Regulations"); entities to which these regimes would apply, and companies which are subject to certain "Special administration" regimes in the UK, are excluded from the operation of the Model Law as implemented in Great Britain by para 2 of Schedule 1 CBIR.

By Mr Glen Davis QC
South Square
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8 By Art 2(i), a "foreign proceeding" for the purpose of the Model Law means *a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*

9 equating to Arts 2(a) and (d) of the original text of the Model Law

10 There is no definition of this expression in the Model Law, as the Court of Appeal noted in *In Re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] Ch 33

11 defined in Art 2(e): *any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services*

12 eg per Morgan J in *Re Samsun Logix Corporation, Samsun Logix Corporation v DEF* [EWHC] 576 (Ch), [2009] BPIR 1502 at [5]

13 cf *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] BCC 921 CA

14 [2012] UKSC 46, [2013] 1 AC 236 per Lord Collins at [13]

15 see the UNCITRAL *Guide to Enactment* at [31], and *In Re Stanford International* (fn 10 supra) at [37]

16 decision of the Court of Appeal in Re Stanford International (fn 10 supra)

17 Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813; Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*

18 eg *Re Bud-Bank Leasing SP zo.o* [2010] BCC 255

19 Art 19

20 Reg 7 CBIR;

21 Art 20(2)

22 section 130(2) of the Insolvency Act 1986

23 Art 20(3)(a)

24 Art 20(3)(b); the Article refers to a 'hire-purchase agreement' but this term is defined in Art 2(k) to include: *a conditional sale agreement, a chattel leasing agreement and a retention of title agreement*

25 under paragraph 43 of Schedule B1 of the Insolvency Act 1986

26 eg *Re Samsun Logix* (fn 12 supra); *Re Pan Oceanic Maritime Inc* [2010] EWHC 1734 (Ch) ; *Re Transfield ER Cape Limited* [2010] EWHC 2851 (Ch);

27 eg *Hur v Samsun Logix* [2009] FCA 372, in which Jacobson J in the Federal Court of Australia granted the foreign representative of Samsun Logix an extended form of stay

28 *Re Swissair Schweizerische Luftverkehr-Aktiensgesellschaft* [2009] EWHC 2099 (Ch), [2010] BCC 667

29 *Re Matheson Bros Ltd* (1884) LR 27 Ch D 225

30 *Re BCCI (No 10)* [1997] Ch 213

31 *Re HIH Casualty & General Insurance Limited* [2008] UKHL 21, [2008] 1 WLR 852

32 [2009] FCA 1481

33 *Anthony Gibbs & Sons v La Société Industrielle et Comercielle des Métaux* (1890) 25 QBD 359 CA; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147; *Joint Administrators of heritable Bank plc v Winding Up Board of Landsbanki Islands HF* [2013] UKSC 13, [2013] 1 WLR 725

34 section 178

By Mr Glen Davis QC
South Square

35 This is not an entirely hypothetical example – the English High Court recently applied Gibraltar law through section 426(5) of the Insolvency Act to give a liquidator's disclaimer under Gibraltar law effect on contracts of insurance and reinsurance governed by English law: *Re Lemma Europe Insurance Company Limited*, unreported 14 February 2013

36 Reg 4(2)(e)

37 where the ECIR applies, or where the Insurers Regulations or the Credit Institutions Regulations have implemented the relevant Directives which include provisions to the same effect

By Mr Glen Davis QC
South Square

CROSS-BORDER INSOLVENCY

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Cross-Border Insolvency

Chair: Richard Morgan QC, Maitland Chambers

Panel

- **Glen Davis QC, South Square**
- **Michael Green QC, Fountain Court**
- **Andrew Chan Chee Yin, Allen & Gledhill LLP**
- **Prof Wee Meng Seng, Nat Univ of Singapore**

Recognition and Assistance in England

Glen Davis QC
South Square

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Common Law Recognition

- **INSOLVENCY: liquidation in place of incorporation**
- **CONTRACT: can only be modified or discharged under its proper law**
- **JUDGMENT: a final or conclusive judgment in personam given by a foreign court with jurisdiction**

Recognition in England

- Insolvency Act 1986
- European Law
- UNCITRAL Model Law
- Common Law

Glen Davis QC, *South Square*

Insolvency Act 1986

- S426(4)

The court…shall assist….

Glen Davis QC, *South Square*

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Insolvency Act 1986

- **S426(5)**

…a request made ….by a court…in a relevant country or territory is authority for the court to which the request is made to apply…the insolvency law which is applicable by either court….

Glen Davis QC, *South Square*

Insolvency Act 1986

Co-operation of Insolvency Courts(Designation of Relevant Countries) Orders

- **Australia (1986)**
- **Hong Kong (1986)**
- **Tuvalu (1986)**
- **Malaysia (1996)**
- **Brunei Darussalam (1998)**

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European Law

EC Insolvency Regulation 1346/2000/EC

- **EU (not Denmark)**
- **MAIN PROCEEDINGS Centre Of Main Interest**
- **Secondary proceedings only if *establishment***

European Law

COMI

- **Art 3(1) *the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary***

European Law

COMI

- *Re Eurofood IFSC Ltd (Case C-341/04)*
- *Interedil Srl*

- **Objective factors which are ascertainable by third parties**

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European Law

- **Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings**

- **Directive 2001/24/EC on the reorganisation and winding-up of credit institutions**

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UNCITRAL Model Law

Art 2(a): FOREIGN PROCEEDING

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation

Glen Davis QC, *South Square*

UNCITRAL Model Law

Art 2(b): FOREIGN MAIN PROCEEDING

a foreign proceeding taking place in the State where the debtor has the centre of its main interests

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FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

UNCITRAL Model Law

Cross-Border Insolvency Regulations 2006

- **Art 15: application for recognition**
- **Art 19: interim relief**
- **Art 20(1): on recognition of *foreign main proceeding*, automatic stay**
- **Art 21: *any appropriate relief***

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UNCITRAL Model Law

- ***Re Samsun Logix Corp***
- ***Re Daewoo Logistics Corp***
- ***Re Pan Oceanic Maritime Inc***
- ***Re Transfield ER Cape Limited***
- ***Re Korea Line Corporation***
- ***Re Sanko Steamship Co., Limited***

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Common Law

- ***Re HIH Casualty & General Insurance***

…the principle of **(modified) universalism**, which has been the golden thread running through English cross-border insolvency law since the 18th century. … requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

- ***Cambridge Gas***
- **but since *Rubin v Eurofinance?….***

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FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

Recognition and Assistance in England

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Overview of state of Singapore law relating to recognition/assistance in Singapore of foreign insolvencies

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1. At common law, does Singapore recognise foreign insolvencies?

Yes, see:

- *Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 MLJ 409 ("**China Underwriters**")
- *Re China Sun Bio-Chem Technology Group Co Ltd* (OS 762/2010/K, 5 Aug 2010) (no grounds of decision) ("**China Sun**")
- *RBG Resources plc (in liq.) v Credit Lyonnais* [2005] SGHC 204 ("**RBG**")
- *Re Aero Inventory UK Ltd* (OS 127/2011/X, 11 Apr 2011) (no grounds of decision) ("**Re Aero**")
- *Beluga Chartering GmbH (in liq.) v Beluga Projects (SG) Pte Ltd (in liq.) and another* [2013] SGHC 60 ("**Beluga**")

2. Can a Singapore court grant assistance to foreign insolvencies?

- **Doubts in *China Underwriters***
  See also Chan Sek Keong, **"Cross-border insolvency issues affecting Singapore"** (2011) 23 SAcLJ 413
- **Suggest that the answer is yes:**
  - *China Sun*
  - *RBG*
  - *Re Aero*
  - *Beluga*
- **See also s43 of EA**

2. Can a Singapore court grant assistance to foreign insolvencies?

Relevancy of certain judgments in probate, etc., jurisdiction

43.—(1) A final judgment. . . of a competent court [*incl. a foreign court*], in the exercise of. . . bankruptcy jurisdiction, which confers upon. . . from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant. . .

(2) Such judgment, order or decree is conclusive proof —

(a) that any legal character which it confers accrued at the time. . .;
(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time. . .;
(c) [. . .]; and
(d) that anything to which it declares any person to be so entitled was the property of that person at the time. . .

Kamla v Harilela [2000] 2 SLR(R) 801 and Sarkar on Evidence, 16th ed. citing *Kanhya Loll v Radha Churn* 7 WR 338 (1867) FB and Report of the Select Committee in the Gazette of India, 1 July 1871

Andrew Chan, Allen & Gledhill LLP

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3. To what extent will the Singapore courts give assistance?

- Assistance extends to remedies available under domestic insolvencies. See para [22] ***Cambridge Gas***:

  "the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency."

- Q: What if the domestic insolvency procedure is not available to foreign entities?
  - Suggest assistance may still be possible:
    Re Aero, Re African Farms Ltd **[1906] TS 373**

3. To what extent will the Singapore courts give assistance?

- Assistance should, to an extent, take into account the interests of local creditors. See ***African Farms***
- Take into account local applicable statutes
  - See ***Beluga***
  - s377(3), Companies Act (Cap. 50)
- Others - Monetary Authority of Singapore Act (Cap. 186)
  Bill No. 3/2013 passed in Parliament on 15/3/13 containing resolution powers in insolvencies of specified financial institutions – contains limited provisions for assistance

Andrew Chan, Allen & Gledhill LLP

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FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

Enforcement of Foreign Avoidance Orders in England, post Rubin

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Non-Common Law Enforcement methods

(1) English Statutes – Administration of Justice Act 1920 ("1920 Act"); Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act"); Civil Jurisdiction and Judgments Act 1982 ("CJJA 1982")
(2) Chapter III of Council Regulation (EC) 44/2001 ("the Judgments Regulation")
(3) Council Regulation (EC) 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation")
(4) S.426(4) and (5) of the Insolvency Act 1986
(5) UNCITRAL Model Law

(1) English Statutes

(a) 1920 Act:
- Applies to money orders - does not exclude common law
- Includes smaller Commonwealth countries, including Singapore

(b) 1933 Act:
- Ousts the common law; dependent on bilateral treaties
- Larger Commonwealth countries – Australia, Canada, India, Pakistan and includes Israel, Suriname, Tonga and Norway
- Used to include European countries but these now excluded by the Judgments and Insolvency Regulations

(c) CJJA 1982
- Very limited application enacting the Lugano Convention
- Only Gibraltar, Iceland and Switzerland

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(2) European Regulations

(a) <u>Judgments Regulation</u>
- Whole of EU including Denmark
- Bankruptcy exception
- Avoidance orders cannot be enforced by it

(b) <u>Insolvency Regulation</u>
- EU, except Denmark
- Dovetails with Judgments Regulation – so no scope for common law
- However where there is no dovetailing (ie for Denmark and Iceland, Switzerland and Gibraltar) the common law will be only way avoidance orders can be enforced

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(3) Section 426(4) and (5) Insolvency Act 1986

- Court of Appeal in *Re New Cap Reinsurance Corporation Ltd* [2011] EWCA Civ 971 held that s.426 could be used
- Lord Collins (and a unanimous Supreme Court on this) decided s.426 is not available in this context (paras. 145-155)
- Any such "relevant countries" likely to be within the 1920 or 1933 Acts

(4) UNCITRAL Model Law

- Court of Appeal in *Rubin* left open whether Articles 21, 25 and 27 are apt to cover recognition and enforcement of foreign insolvency judgments
- But Lord Collins, again with an apparently unanimous Supreme Court, completely rejected the use of the Model Law in this area (paras.133-144)

Common Law Enforcement

- **Foreign Court Orders divided between *in personam* and *in rem***
- **Transaction avoidance claims are *in personam* (*pace* Lord Clarke)**
- **Traditional "Dicey Rule" lists four cases where a foreign *in personam* judgment will be capable of enforcement or recognition in England if the person against whom the judgment was given:**

(1) was, at the time the proceedings were instituted, present in the foreign country;
(2) was claimant, or counterclaimed, in the proceedings in the foreign court;
(3) submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
(4) had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country

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Rubin and *New Cap*

- ***Rubin* – concerned default and summary judgment made by the US Bankruptcy Court for the Southern District of New York to recover payments which were the US equivalent of transactions at undervalue**
- ***New Cap* – the New South Wales Supreme Court made an order on the application of New Cap's liquidator against a Lloyds Syndicate requiring repayment of the Australian equivalent of a preference**

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Supreme Court Judgment

(1) By a 4-1 majority (Lord Clarke dissenting) overturned the Court of Appeal in *Rubin*, deciding there is no special rule for the enforcement of foreign insolvency judgments and the Dicey rule applied.
(2) By a 4-1 majority, that a foreign judgment registrable under the 1933 Act (ie *New Cap*) could be set aside if the defendant had not submitted to the jurisdiction or was not present in the foreign jurisdiction when the proceedings were started.
(3) Unanimously, that neither s.426 nor the Model Law covers this issue.
(4) Unanimously, that the defendants in *New Cap* had submitted to the foreign jurisdiction.
(5) By a 3-2 majority (Lords Mance and Clarke dissenting) that *Cambridge Gas* was wrongly decided.

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Submission to the Jurisdiction

- Lord Collins espoused an extremely broad (and radical) test for submission (by contrast with his conservative approach to enforcement generally)
- Because defendant had submitted proofs of debt and attended creditors' meetings – "*it should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding*" (para.167)
- Also a suggestion that the *Rubin* defendants had submitted (paras. 168-169)
- Paradoxical that this approach treats insolvency proceedings as one unified set of proceedings, so that submission for one purpose is treated as submission for all
- Creditor in difficult position when not present in foreign jurisdiction
- Compare Lord Clarke's approach of leaving it to the discretion of the Court

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The end of the Golden Thread of Modified Universalism?

- **Without argument on it, Lord Collins decided *obiter* that "*Cambridge Gas* was wrongly decided" (para. 132)**
- **He could easily have just distinguished it, as Lord Mance did**
- **Is *Rubin* going to be treated as deciding a very narrow issue on enforcement of judgments?**
- **Or will it be treated as bringing to an end Lord Hoffmann's attempts (in *Cambridge Gas* and *HIH*) to establish Modified Universalism in the common law (described by Lord Collins as "*a trend, but only a trend*" – para. 16)?**

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The end of the Golden Thread of Modified Universalism?

- ***Picard v Primeo* (Jan 2013), Cayman Islands case on Madoff, distinguished *Rubin* and applied *Cambridge Gas*.**
- **Unfortunately, as a matter of precedent, the situation is:**
  (a) the *Cambridge Gas* principles are probably not now applicable in England (even though Lord Collins was speaking *obiter*);
  (b) they remain good law for those countries with appeals to the Privy Council;
  (c) other common law jurisdictions who look to England, can decide to follow the Supreme Court or the Privy Council!
- **Perhaps it is of less significance for England with the Model Law**
- **But para. 132 is an unhelpful (and unnecessary) "*incidental observation*" that leaves the law in a state of uncertainty**

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Enforcement of Foreign Avoidance Orders in Singapore, post *Rubin*

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Enforcement of Foreign Avoidance Orders in Singapore, post *Rubin*

- Common law recognition and assistance should still be available to foreign insolvencies at the place of incorporation
- S 43 EA may be a guiding point for common law
- See also S 44 and 45 EA, which limit applicability of other judgments

English and Singaporean lessons on the development of cross-border insolvency laws

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Assistant Professor
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Some objectives of cross-border insolvency law

- Most persuasive reason is market symmetry, that in order for bankruptcy law to work effectively, its coverage must be co-terminus with the market within which the bankrupt person or entity has been operating: Jay Westbrook.
- Sir Peter Millett: `Legal theory, based on the territorial jurisdiction of the courts of the national state, has parted company with commercial reality and the needs of modern business.'
- A more universalist approach will help to maximise recoveries and enhance the prospects of business rescue.
- But universalist approach should take into account legitimate local interests.
- Chan CJ: Need to protect local creditors in poorer and smaller economies.
- Difficult question is how and where should the balance be struck?

Same roots but divergent developments

- Singapore and England share the same roots but developments in their cross-border insolvency laws have diverged significantly in recent years.
- England has no corresponding provision to Singapore's s377(3), Companies Act.
- Singapore has no corresponding provision to England's s426 Insolvency Act 1986, nor is it a designated state under that law.
- Singapore has not adopted the UNCITRAL Model Law, and the EC Insolvency Regulation (ECIR) certainly does not apply.
- Despite their very different laws, they share a very important common lesson: Except where there is a convention or community law, generally common law is still the most important, and the shape of common law depends on the judge's conception of their role in moulding it.

Wee Meng Seng, *NUS*

Lessons of Singapore's development

- Before *Beluga*, it was thought that s377(3) requires ring-fencing of local assets for debts incurred locally for registered foreign companies but it does not apply to foreign companies that fail to register.
- *Beluga* gave a creative reinterpretation of s377(3).
- But remission of assets is only an aspect of judicial assistance.
- No explicit statutory provisions governing other aspects. Depends on common law.
- Lessons: Though statutory scheme is paramount, *Beluga* shows that a determined judge may still do much to broaden the scope of judicial discretion, paving the way to mould the law in the direction of modified universalism.

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Lessons of English developments - ECIR

- In theory and practice, the most significant is the ECIR.
- Where there is no secondary proceeding, the main proceeding has universal effect in the EC, subject to special choice of law rules governing particularly significant rights and legal relationships (eg, rights in rem, set-off and contracts of employment).
- Where there is a secondary proceeding, it has effect within the state where it is opened: a concession to local interests, especially local creditors. Nevertheless, various provisions ensure there is some unity of estate: "hotchpot" (Art 20), right of creditors to participate in all proceedings, (Art 32(1)), duty of liquidators to lodge claims in other proceedings if the interests of creditors are served thereby (Art 32(2)).
- Lessons: A regional initiative may give a big boost to universalism, but a high level of mutual trust and an apex court are required.

Wee Meng Seng, *NUS*

Lessons of English developments – Section 426

- Enacted after recommendation of Cork Report. Based on earlier provision in s122, Bankruptcy Act 1914.
- Where it applies, English court may assist a foreign court which requests assistance, and may even apply foreign insolvency laws.
- Lessons: If there is clear legislative provision and requisite executive decision, even though there is no convention or treaty, judges are able and willing to interpret it to develop law in the direction of universalism.
- But impact of s426 is limited as it applies only to designated territories, and insolvency law is given a restrictive definition and would not include a scheme of arrangement (s899 Companies Act 2006, s210 Companies Act (Cap 50)).

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Lessons of English developments – Model Law

- Model Law borrows some concepts from the ECIR, but they are very different.
- Aims of Model Law are modest. Most provisions deal with procedural aspects of cross-border insolvency law; for eg, on office-holder's right of direct access and participation, rules on application for recognition, communication, etc. Substantive effect still depends on the national laws of the enacting state.
- Limitation of Model Law was vividly illustrated in *Rubin*.
- Lessons: Model Law may help in some procedural aspects to improve efficiency of cross-border insolvency laws, but substantive aspects still depend on the common law.

Wee Meng Seng, *NUS*

Lessons of English developments – Common law

- Two opposing interpretations.
- Lord Hoffmann in *HIH* argues that modified universalism is the golden thread of English cross-border insolvency law as developed by the judges.
- But Lord Scott and Lord Neuberger are far more cautious. They argue that the statutory scheme does not admit easily the ancillary liquidation doctrine.
- Lessons: Shape of common law depends on what the judges think of their role: to move the law in the direction of modified universalism but protect local interests by exercising a broad discretion based on justice and policy, or to hold that judges have little discretion to exercise in view of existing statutory scheme.

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Lessons

- No current initiative to adopt something similar to ECIR between Singapore and its neighbours or trading partners.
- ECIR is probably unique to the EU.
- Singapore may consider enacting something similar to s426 and Model Law. English experience with them shows that they deliver benefits without compromising local interests.
- Singapore should repeal s377; ring-fence only where it is genuinely needed, eg, banks and insurance companies. This will free the judges to develop the common law. *Beluga* has demonstrated the potential.
- Repeal of s377 does not necessarily mean victory for universalism.
- English move towards universalism seems to have retreated, while *Beluga* has created possibilities for it, despite s377.
- Common Singapore and English lessons: shape of common law depends on judge's conception of their role.

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FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

English and Singaporean lessons on the development of cross-border insolvency laws

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Finance, Property and Business Litigation in a Changing World

Concurrent Session 1B: Remedies and Enforcement

Speakers

Mr Stephen Smith QC, *New Square Chambers*

Ms Elspeth Talbot Rice QC, *XXIV Old Buildings*

Mr Stephen Moverley Smith QC, *XXIV Old Buildings*

Mr Harpreet Singh Nehal SC, *Cavenagh Law LLP*

Ms Aurill Kam, *Attorney-General's Chambers*

REMEDIES AND ENFORCEMENT

FREESTANDING INJUNCTIVE RELIEF

HARPREET SINGH NEHAL SC
CLIFFORD CHANCE ASIA

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Does Singapore law permit:-

(1)Grant of a free-standing injunction (e.g. a freezing order) in support of foreign Court proceedings?

(2)Grant of a free-standing injunction in support of foreign arbitration proceedings?

IN ENGLAND

Free-standing injunctive relief previously not possible

The Siskina

- **An injunction cannot stand on its own**
- **An injunction is ancillary to a pre-existing cause of action**
- **Thus, the need to establish**

  – ***Invasion of some legal or equitable right belonging to the plaintiff in England*; and**

  – ***Enforceable in England by a final judgment for an injunction***

Harpreet Singh Nehal SC, Clifford Chance Asia

IN ENGLAND

Lord Diplock, *The Siskina*

> … A right to obtain an **interlocutory injunction is not a cause of action. It cannot stand on its own. It is *dependent upon there being a pre-existing cause of action* against the defendant *arising out of an invasion*, actual or threatened by him, *of a legal or equitable right of the plaintiff*** for the enforcement of which the defendant is amenable to the jurisdiction of the court. ***The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.*** It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction. …[T]he thing that it is sought to restrain the foreign defendant from doing in England must amount to the invasion of some legal or equitable right *belonging to the plaintiff in this country* and *enforceable here* by a final judgment for an injunction.

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IN ENGLAND

Free-standing injunctive relief now made possible

The *Siskina* requirement has been effectively reversed by statute:

- Section 25, Civil Jurisdiction and Judgments Act 1982 (in relation to proceedings in Brussels Convention territories)
- Civil Jurisdiction and Judgments Act 1991 (in relation to proceedings in Lugano Convention territories)
- Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (extends s 25 of all foreign proceedings)

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SINGAPORE

Free-standing injunctive relief not possible

Recall *The Siskina* – the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right which usually, but not invariably, takes the shape of a cause of action.

This was cited with approval by the Singapore Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 at [37].

The Court of Appeal in *Wu Yang Construction Group Ltd v May Yong Hui and another* [2008] 2 SLR(R) 350 at [28]:

> ***The law is clear. If no substantive relief is claimed against a party, a freezing order cannot be issued against that party****: see Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR(R) 629 and Fourie v Le Roux and others [2007] 1WLR 320. The freezing order should have been discharged on this ground alone.*

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SINGAPORE

Free standing *Mareva* Relief Arguably Not Possible

Recall *Mercedes Benz v Leiduck* [1996] 1 AC 284, dicta of Lord Nicholls (dissenting) – a Mareva injunction can be granted in support of prospective foreign judgments in a jurisdiction in which the foreign judgment would be recognised and enforceable.

The Court of Appeal in *Karaha Bodas* at [42] expressly discussed and disapproved of Lord Nicholls' position in favour of the majority view in the *Mercedes* case:

> *42 **There was a minority opinion in Mercedes Benz, that of Lord Nicholls of Birkenhead.** He held that O 11 r 1(1)(b) would apply to a claim for a Mareva injunction when it comprised the sole relief sought. **His opinion was that there was nothing exorbitant about this jurisdiction provided the anticipated judgment was one which would be recognised and enforceable in the forum. We could not accept that decision. We found Lord Mustill's interpretation of O 11 r 1(1)(b) to be persuasive.** We agreed that the language of O 11 indicated that it was confined to originating documents which set in motion proceedings designed to ascertain substantive rights. This was borne out by the reference in O 11 r 1 of our Rules to an injunction being sought in "the action" and the fact that O 11 r 2(1)(b) requires a plaintiff to state that he believes he had a "good cause of action". To us, as it did to Lord Diplock, that language implied that there must be a pre-existing cause of action to which the injunction was merely ancillary.*

The Court of Appeal in *Swift-Forune v Magnifica Marine SA* [2007] 1 SLR(R) 629 also narrated the different views in the *Mercedes* case and chose not to adopt Lord Nicholls' approach.

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SINGAPORE

A Potential Loophole?

- *The Siskina:* an applicant for *Mareva* relief must have a valid cause of action which is enforceable in this country by a final judgment
- Is this requirement satisfied if the facts could give rise to an actionable claim in Singapore, but the suit is in fact commenced abroad?
- 2 conflicting High Court decisions

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SINGAPORE

Petroval SA v Stainby Overseas Ltd [2008] 3 SLR(R) 856

Tay Yong Kwang J held that the Singapore Courts do not have the jurisdiction to grant a *Marava* injunction on the basis of the potential justiciability of the claim in Singapore where the claim is being pursued abroad.

- the *Siskina* requirement is not satisfied even though facts give rise to a cause of action in Singapore, if proceedings are not commenced here; and

- the requirement is not satisfied even if an action is commenced in Singapore, if the action is then stayed on account of proceedings elsewhere.

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SINGAPORE

Multi-code Electronics Industries (M) Bhd v Toh Chun Toh Gordon [2009] 1 SLR(R) 1000

The plaintiffs commenced an action in Malaysia against five defendants and obtained a worldwide *Mareva* injunction against the first and fourth defendants. Shortly afterwards, the plaintiffs commenced proceedings against the first, third and fourth defendants and obtained a *Mareva* injunction against them in respect of Singapore assets. Chan Seng Onn J stayed the Singapore proceeding but permitted the continuation of the *Mareva* injunction.

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SINGAPORE

***Multi-code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000**

•The Court has the residual discretion over the underlying cause of action in that there is a substantive justiciable claim which would have been tried by a Singapore court if no stay had been granted.

•Whether or not the case would be heard in Singapore (and so terminate in a Singapore judgment) is not a concern in granting injunctive relief.

•The rationale: if the stay is subsequently lifted, the Singapore action would be revived with the effect that there would be assets against which the judgment of the Singapore Court could be enforced. Injunctive relief in these circumstances would support the plaintiff's position in the residual context of the Singapore proceedings.

Harpreet Singh Nehal SC, Clifford Chance Asia

SINGAPORE

***Multi-code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000**

However, Chan J was quick to qualify that this was not free-standing injunctive relief. The relief was given to provide residual support to the stayed Singapore action, and not the foreign proceedings (at [116(e)] of His Honour's judgment).

This is arguably no different in practical terms from free-standing *Mareva* relief, notwithstanding this conceptual difference. Therefore, adoption of Chan J's approach may be an indirect way of obtaining injunctive relief in support of foreign litigation.

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SINGAPORE

What about foreign-seated arbitrations?

Harpreet Singh Nehal SC, Clifford Chance Asia

SINGAPORE

What about foreign arbitrations?
Section 12A, International Arbitration Act (Cap 143A)

> ***Court-ordered interim measures***
> *12A.—(1) This section shall apply in relation to an arbitration —*
> *(a) to which this Part applies; and*
> *(b) irrespective of whether the place of arbitration is in the territory of Singapore.*
>
> *(2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1),* ***the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(c) to (i) as it has for the purpose of and in relation to an action or a matter in the court.***
> *…*

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SINGAPORE

- Section 12A, IAA: the Court has the same power to grant injunctions in aid of foreign seated arbitrations as the Court has "*for the purpose of and in relation to an action or a matter in the court*".

- Query: if the Court has no power to grant an injunction in aid of foreign Court litigation for want of a cause of action in Singapore, can it do so in the case of a foreign-seated arbitration?

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THE END

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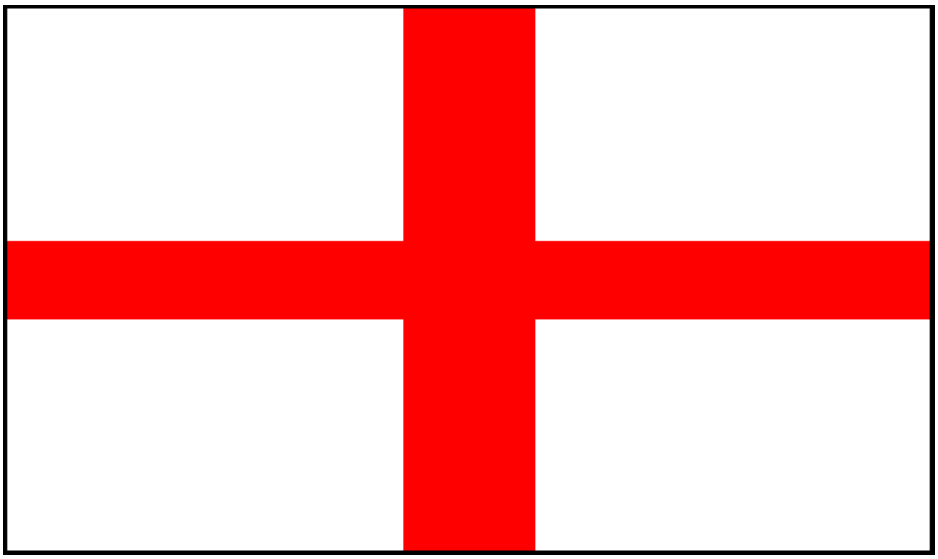
REMEDIES AND ENFORCEMENT
INJUNCTIONS OFFSHORE

ELSPETH TALBOT RICE QC
XXIV OLD BUILDINGS, LINCOLN'S INN

CHANCERY BAR | SINGAPORE ACADEMY OF LAW

- **Can the Court grant a free standing freezing injunction in support of foreign proceedings?**
- **If so, can it make such an order against a person outside its jurisdiction?**

ENGLAND



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ENGLAND

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IN ENGLAND

Free standing freezer:

The Siskina – the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right which usually, but not invariably, takes the shape of a cause of action.

Channel Tunnel v Balfour Beatty [1993] AC 334 -

The English Court can grant an injunction where the action is elsewhere in the world in support of that action

Mercedes Benz v Leiduck [1996] 1 AC 284, dicta of Lord Nicholls (dissenting) – a Mareva injunction can be granted in support of prospective foreign judgments in a jurisdiction in which the foreign judgment would be recognised and enforceable.

Credit Suisse v Cuoghi [1998] QB 818 CA – English Court can grant freezing injunction against defendant in England notwithstanding that another court has substantive jurisdiction and that those courts do not have power to give such relief

Also ***Fourie v Le Roux*** [2007] 1 WLR 320 paras 29, 30

IN ENGLAND

Establishing in personam jurisdiction – service within the jurisdiction, or permission to serve outside it:

CPR Practice Direction 6B para 3.1

(2) *A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction*

(3) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982

Mercedes Benz v Leiduck [1996] 1 AC 284 – Absent a claim based on a legal right which the defendant can be called upon to answer of a kind falling within Ord 11 r.1(1), the court has no right to authorise the service of the document on the foreigner, or to invest it with any power to compel him to take part in proceedings against his will. (per Lord Musthill, ***cf*** Lord Nicholls dissenting judgment)

WHAT ABOUT OTHER JURISDICTIONS?

- Jersey
- Guernsey
- Isle of Man
- BVI
- Cayman
- Bermuda
- Bahamas

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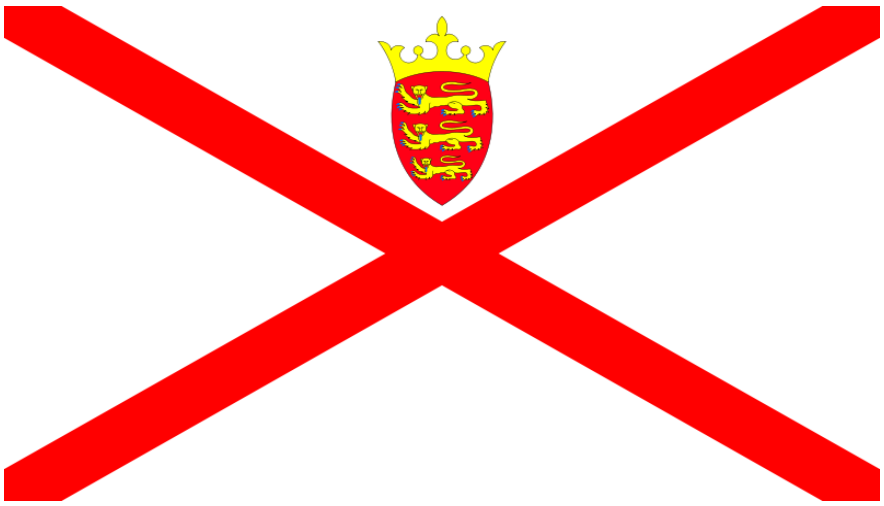
JERSEY



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JERSEY

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JERSEY

Solvalub Ltd v Match Investments Ltd [1996] JLR 361 – Jersey Court of Appeal approved and developed Lord Nicholls' dissenting speech in *Mercedes Benz* and held that the Royal Court of Jersey does have power to grant a *Mareva* injunction in aid of foreign proceedings, even if there were no proceedings before the Jersey Court (other than those seeking the *Mareva)*.

"If the Royal Court were to adopt the position that It was not willing to lend its aid to courts of other countries by temporary freezing of assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of duty of comity which courts in different [jurisdictions] owe to each other"

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JERSEY

- ***Krohn GmbH v Varna Shipyard*** [1997] JLR 194 – the Royal Court held that under Rule 7(b) of the Service of Process (Jersey) Rules 1994, it had power to order service of its process on a defendant outside Jersey where an injunction is sought (and where the only relief sought is a freezing injunction) and the injunction orders the defendant to do or refrain from doing anything within the jurisdiction.
- Also ***Yachia v Levi*** 26th March 1998 and ***State of Qatar v Al-Thani*** [1999] JLR 118

GUERNSEY

GUERNSEY

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GUERNSEY

- **s.1(7) Law Reform (Miscellaneous Provisions (Guernsey) Law 1987** *"An injunction may in exceptional circumstances be granted notwithstanding that proceedings have not been and are not to be instituted before the Court"*
- **Garnet Limited v BNP Paribas SA, Government of Indonesia Intervening** [2009 - 2010] GLR 1 Guernsey Court of Appeal: "*Guernsey as an offshore financial centre, will wish to be able to grant freezing injunctions in aid of proceedings elsewhere, but section 1(7) requires that the Court exercise appropriate caution before doing so*"

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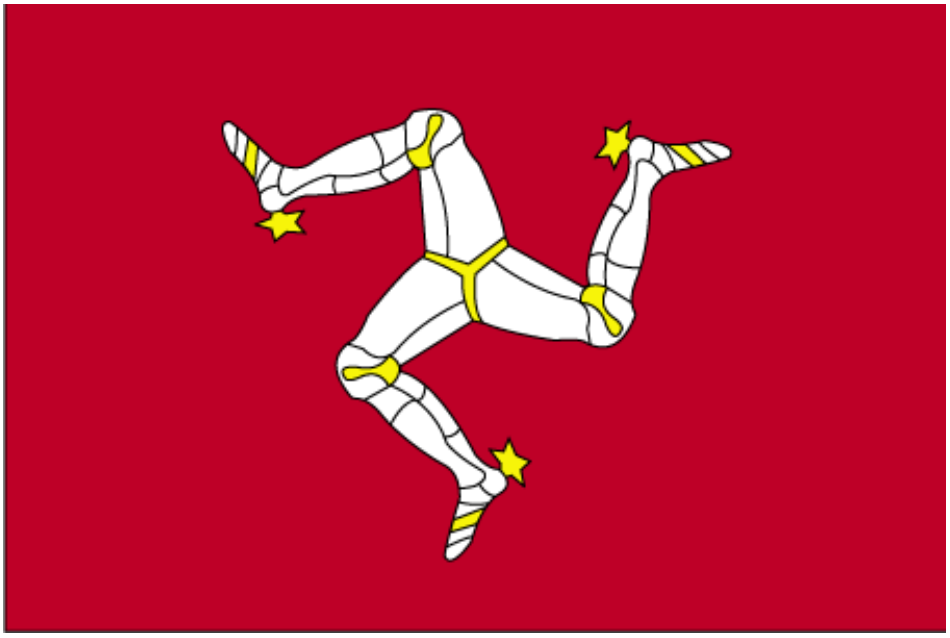
FINANCE, PROPERTY AND BUSINESS LITIGATION IN A CHANGING WORLD

ISLE OF MAN



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ISLE OF MAN

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ISLE OF MAN

- Position enshrined in statute - ***Section 56B(1) of the High Court Act 1991***

  "The High Court shall have power to grant interim relief where proceedings have been or are about to be commenced in a country or territory outside the Island."

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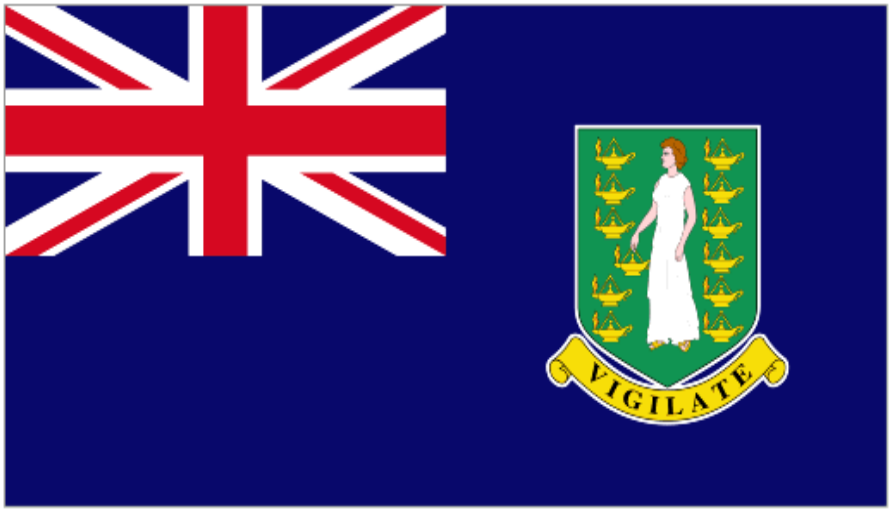
BRITISH VIRGIN ISLANDS



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BRITISH VIRGIN ISLANDS

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BRITISH VIRGIN ISLANDS

Siskina apparently alive and well:

Alfa Telecom Turkey v Telisonera HCVAP 2008/12

Sibir Energy Plc v Gregory Trading SA BVIHCV 2005/174

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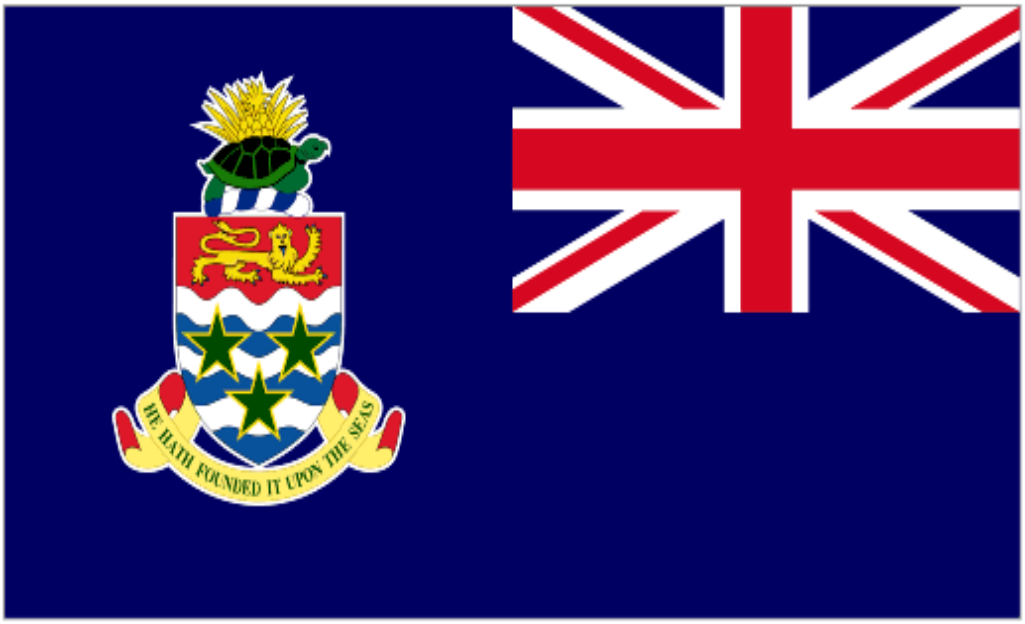
BRITISH VIRGIN ISLANDS

Free standing injunctions arrive:

- ***Black Swan Investment ISA v Harvest View*** 23rd March 2010 BVIHCV 2009/399 *"Given the lacuna in the authorities to which I have referred, I propose to fill it in this jurisdiction by respectfully adopting this reasoning of Lord Nicholls in* ***Mercedes Benz****. I hold accordingly that I have jurisdiction not only in the strict but also in the broad sense to continue the injunction originally granted .."*
- ***Yukos CIS Investments Ltd v Yukos Hydrocarbons Investments Ltd*** 26th September 2011, Court of Appeal confirms the jurisdiction
- Also ***Gudavadze v Carlina Overseas Corp*** (High Court, unreported, June 2012

CAYMAN ISLANDS



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CAYMAN ISLANDS

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CAYMAN ISLANDS

No power to grant a *Mareva* injunction against a defendant in the absence of a substantive cause of action against him in the Cayman Islands:

- ***Bass v Bass*** [2001] CILR 317 Sanderson J *"The law of the Cayman Islands is presently that it cannot grant a free-standing Mareva injunction absent a cause of action in the Cayman Islands"*
- ***Telesystem International Wireless Inc v CVC/Opportunity EquityPartners LP*** 2002 CILR Note 22, Court of Appeal

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CAYMAN ISLANDS

The tide turns:

•***Smith v Smith*** 10th May 2011 – freezing injunction granted in support of Canadian ancillary relief proceedings – cause of action = claim to give effect to Canadian court's injunction; *Mareva* injunction final, not interlocutory

• ***Deloitte & Touche Inc v Felderhof*** unrep 12th July 2011 (cause no 845 of 1997), Court of Appeal – the question should be not whether the foreign cause of action was justiciable in the Cayman Islands, but whether a judgment against the defendant in the foreign proceedings could be enforced against him in the Cayman Islands

• ***VTB Capital v Malofeev*** unrep 28 September 2011, Grand Court, Cresswell J, affirmed by CA 30 November 2011– *Mareva* injunction interlocutory, not final, so no power to serve out under Ord 11 rule 1(1)(b); see also Cresswell J, 13 December 2011 and 10 January 2012 - *Mareva* in support of foreign proceedings available against defendants amenable to the Grand Court's personal jurisdiction if the Cayman proceedings includes a substantive cause of action against a Cayman defendant, but not otherwise.

CAYMAN ISLANDS

•**Grand Court Rules Order 11, rule 1(1)(b):** service out of the jurisdiction can be permitted by the Grand Court if, in the action begun by the writ,

"an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing) ***provided that a claim for an interlocutory injunction shall not of itself be a sufficient ground for service of a writ of the jurisdiction***" (emphasis added)

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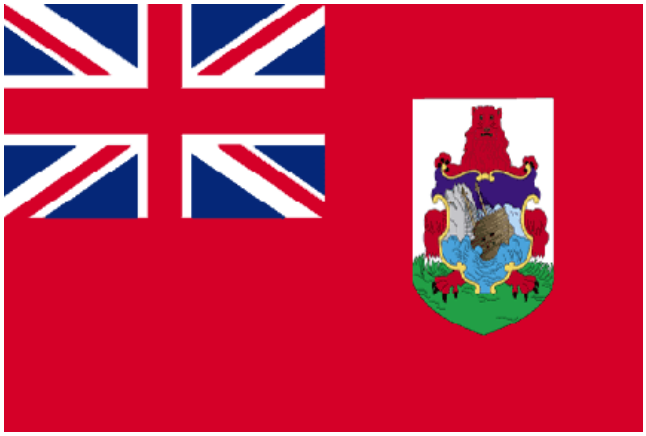
BERMUDA



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BERMUDA

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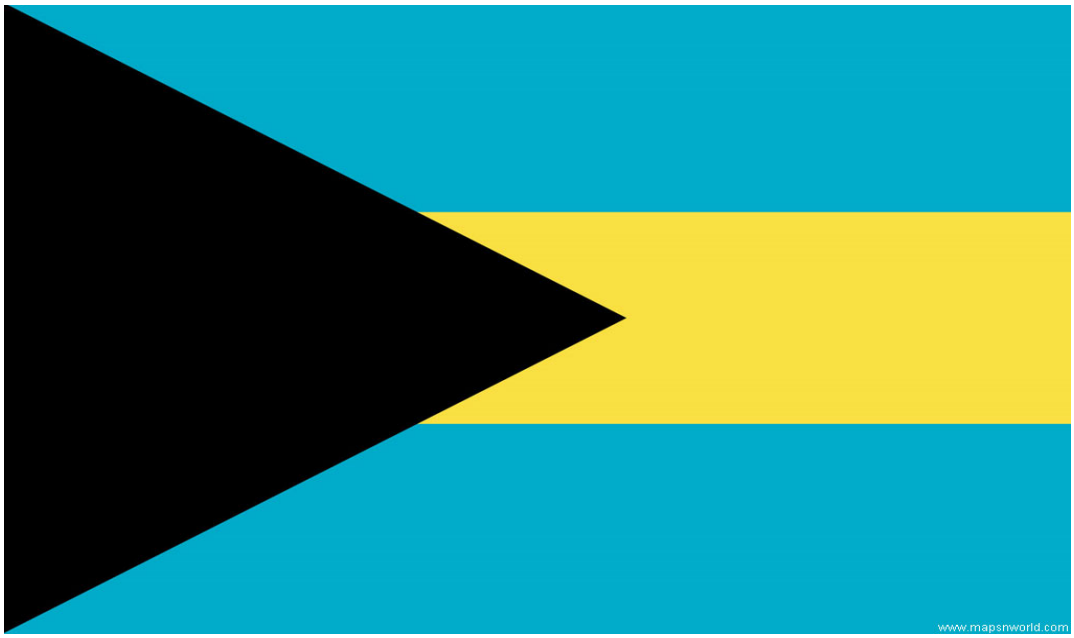
BERMUDA

- ***E.R.G Resources LLC v Nabors Global Holdings II Ltd*** [2012] SC (Bda) 23 Com. (5th April 2012) – Kawaley CJ confirmed interim injunctive relief in support of foreign proceedings can be granted where the Bermuda court has jurisdiction over the defendant.

BAHAMAS



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BAHAMAS

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BAHAMAS

- ***Meespierson (Bahamas) Ltd v Grupo Torras SA*** (1998/1999) 2 OFLR 16; (1999) BHSJ No 31 – the Court of Appeal held that *The Siskina* was to be preferred to Lord Nicholls' dissenting speech in *Mercedes Benz v Leiduck*, and therefore that a Mareva injunction would not be granted in a Bahamian court in support of proceedings on the merits in another country.

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25 & 26 April 2013
Supreme Court
Singapore

INJUNCTIONS OFFSHORE

ELSPETH TALBOT RICE QC

XXIV Old Buildings, Lincoln's Inn

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STEPHEN MOVERLEY SMITH QC

XXIV OLD BUILDINGS

RECEIVERSHIP

the radical alternative?

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THE BENEFITS OF RECEIVERSHIP

- direct control and supervision of assets
- assets vest in receiver
- receiver an officer of the court
- obstruction or interference with receiver a contempt of court
- exercise of parent company's voting rights to change boards of subsidiaries
- receivers may obtain information which may bolster Claimant's case

JURISDICTION

- s. 37 Senior Courts Act 1981 (UK)
- s. 21L High Court Ordinance (Hong Kong)
- s. 4(10) Civil Law Act (Singapore)
- s. 11(1) Grand Court Law (2008 Revision) (Cayman Islands)
- s. 24(1) West Indies Associated States Supreme Court Ordinance (BVI)
- not available in Guernsey or Jersey

REQUIREMENTS

- *"just and convenient"*
- higher hurdle : draconian – far more intrusive:

  Norgulf Holdings v Michael Wilson & Partners Civil App. 8/2007
- *prima facie* requires a case of fraud to be made out

FORM OF APPOINTMENT

- powers defined by order
- typically similar to provisional liquidator's powers
- obligation to report to court
- vesting of assets in receiver – s. 39 Senior Courts Act 1981 (UK)

RECOGNITION

- appointment may not be recognised in foreign courts
- application by receivers to be appointed in local jurisdiction
- change of directors: does not require recognition

PITFALLS

•problems with exercising powers in foreign jurisdictions:

- Switzerland : Article 271 – criminal offence
- China : violation of China's sovereignty

•provision of information may be a criminal offence

- France : Loi no. 68-678 : the French blocking statute

CASE STUDY : DANONE v WAHAHA

- receivers appointed *ex parte* in BVI over BVI companies
- mirror *ex parte* application in Samoa over Samoan companies
- BVI receivers applied *ex parte* in Hong Kong to be appointed over Hong Kong companies
- receivers fined by Chinese courts for actions taken in China which breached its sovereignty
- BVI *ex parte* order discharged : (1) no good cause of action in the BVI (2) non-disclosure – a year later!

CASE STUDY : TMSF v MERRILL LYNCH

- proceedings to enforce Turkish judgment in Cayman Islands
- defendant debtor settlor of Cayman Islands trust
- judgment in Cayman Islands
- application to enforce judgment by appointment of receiver over settlor's power of revocation
- application rejected at first instance and in the Court of Appeal
- successful appeal to Privy Council :
- *"the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations"* – Lord Collins

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COMMITTAL, DEBARMENT & OTHER RELIEF FOR BREACH OF A COMMERCIAL INJUNCTION

STEPHEN SMITH QC

Chapters in the BTA Bank Saga

1. JSC BTA Bank v. Ablyazov [2010] EWCA 1141 (CA)
2. [2011] EWHC 1522 (Comm Ct)
3. [2011] EWHC 2908 (Comm Ct)
4. [2012] 1 WLR 350 (CA)
5. [2012] 1 WLR 1988 (CA)
6. [2012] EWCA 639 (CA)
7. [2012] EWHC 648 (Comm Ct)
8. [2012] EWHC 2543 (Comm Ct)
9. [2012] EWHC 237 (Comm Ct)
10. [2012] EWCA 1441 (CA)

Timing of application

Do not need to wait until after trial of substantive issues

- **see BTA (5)**

Even if means determining issues which will be central at main trial

- **see Daltel Europe v. Makki [2005] EWHC 749**

And irrespective of whether contempts described as "criminal" or "civil"

Stephen Smith QC

Relief available

Committal to prison

Fine

Sequestration

Receivership

Further injunction

Refusal to hear

Debarment

Unless order

Stephen Smith QC

Fine

- unlikely to be of interest in a commercial case

Sequestration

Receivership

- of assets
- see BTA (1)

- or to take action?
- see BTA (7)
- but note doubts expressed by BVI High Court

- difficulties of recognition

Stephen Smith QC

Further order

- eg to reverse a transaction and/or to intervene in proceedings abroad or take a particular position in those proceedings if already a party
- see BTA (8)

Refusal to hear further applications

- eg permission to appeal
- see BTA (6)

- or to grant security for costs of the proceedings
- see BTA (2)

Stephen Smith QC

Committal

Phillimore Report (1974)

- problem with obdurate contemnors

Contempt of Court Act 1981 s. 14(1): 2 year statutory maximum

- in respect of "any occasion"

Further statutory erosion by Criminal Justice Act 2003 s. 258: a "2 year" sentence actually means only 1 year is to be served

Length of sentence

- Lightfoot v. Lightfoot [1989] 1 FLR 414
  - 2 years?

Committal

- BTA (3)
  - 18 months

- BTA (4)
  - 21 months
  - 9 months minimum/punitive

- BTA (9) & (10)
  - 22 months
  - 12 months minimum/punitive

See too B(Algeria) v. Sec of State [2013] 1 WLR 435

- sentence may be justified even where has no coercive effect

Debarment/unless order

Debarment

- see Derby v. Weldon (3 & 4) [1990] Ch 65

Unless order

- see BTA (10)

Enforceable abroad

- receivers "by way of equitable execution"
- see Masri v. CCI [2009] QB 450

Stephen Smith QC

REMEDIES AND ENFORCEMENT

ANTI SUIT INJUNCTIONS
In Aid of Arbitration

AURILL KAM
Attorney – General's Chambers

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Credit & Disclaimer

My thanks to Ms Allison Phua (AGC) for her very able assistance in the research used for this presentation.

The views and opinion expressed in this presentation are entirely those of the presenter's. They do not in any way represent the views or opinion of the Attorney-General's Chambers.

The Questions

- Attitude of the Singapore Courts to anti suit injunctions ("**ASI**") in aid of arbitration

- Some outstanding issues post 2010 amendments to the International Arbitration Act (Cap 143A) ("**IAA**")

The Scenario

- Arbitration agreement embodied in a contract made between A (Indonesian Company) and B (Singapore Company). A has assets in Singapore. Its principal officers travel frequently to Singapore.

- Arbitration agreement provides for arbitration in Singapore in accordance with SIAC Rules.

The Scenario

- A commences suit against B in Jakarta, Indonesia.
- B serves notice of arbitration on A and files notice with SIAC.
- Pending constitution of arbitral tribunal, B seeks ASI from the Singapore High Court.

The Statutory Provisions

- Section 5(2), IAA
- Section 12A (2), IAA
- Section 12(1) (c)-(f), IAA

The Governing Principles

Kirkham v Trane [2009] 4 SLR(R) 428 at [24]-[29]

- Reiteration of principles enunciated in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871
  - When "ends of justice" require it
  - Directed at the party (ies), not the foreign court
  - Person must be amenable to the jurisdiction of the court
  - This jurisdiction must be exercised with caution

The Governing Principles

- Balance of justice – Would pursuit of proceedings in foreign court be vexatious or oppressive ? Injustice to D if P's proceedings are allowed *vs* injustice to P if the proceedings are disallowed.

- See also *Evergreen International SA v Volkswagen Group Singapore* [2004] 2 SLR (R) *457*

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The Governing Principles

- There should be no diffidence in granting ASI where foreign proceedings are brought in breach of agreement between the parties.
    - *The Angelic Grace* [1995] 1 Lloyd's Rep 87 applied

The Governing Principles

Pro arbitration stance

- *WSG Nimbus Pte Ltd v BCCSL* [2002] 1 SLR(R) 1088 at [90], [91]
    - "promote Singapore as an international centre for arbitration by facilitating arbitrations … held here "
    - "the courts must do their part by taking a robust approach when faced with applications under s 12(6)"
    - "duty to uphold arbitration agreements"

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What if…

Agreement provided for arbitration in London (instead of Singapore)

- Section 12A (1), IAA
- Statutory reversal of *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629

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What if, in addition…

B is not Singapore incorporated; A has no assets in Singapore and it's officers are not known to travel to Singapore.

- s. 12A (3), IAA – Court may refuse to make order if " inappropriate".
- Hansard (2nd Reading) cites English examples of inappropriateness – no substantial assets within jurisdiction, absence of link to foreign arbitration

Aurill Kam, *Attorney-General's Chambers*

What if, in addition…

- Note academic criticisms of the s.12A (3), IAA *inappropriateness* test:
  - Mohan Mahdev, Tay Eu – Yen, 'The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune –up ?' *Singapore Academy of Law Journal* [2010] 22 SAcLJ 299
  - Wong Ronald, 'Interim Relief In Aid of International Commercial Arbitration – A critique on the International Arbitration Act' *Singapore Academy of Law Journal* (2012) 24 SAcLJ 499

Aurill Kam, *Attorney-General's Chambers*

What if, in addition…

Arbitration agreement contained an ouster clause precluding "legal proceedings"

- s12A (2), IAA *contra* ss 12 (2) and (3), IAA
- s12A (2), IAA similar to s.12(6), English Arbitration Act 1950 (now replaced by s 44, English Arbitration Act 1996

Tension: party autonomy vs the imperative to develop a world class ecosystem for arbitration ?

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25 & 26 April 2013
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REMEDIES AND ENFORCEMENT

ANTI SUIT INJUNCTIONS
In Aid of Arbitration

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Application of Part II

5. —(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

(2) Notwithstanding Article 1(3) of the Model Law, an arbitration is international if —

(*a*) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or

(*b*) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(*c*) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(3) For the purposes of subsection (2) —

(*a*) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(*b*) if a party does not have a place of business, a reference to his place of business shall be construed as a reference to his habitual residence.

(4) Notwithstanding any provision to the contrary in the Arbitration Act (Cap. 10), that Act shall not apply to any arbitration to which this Part applies.

Powers of arbitral tribunal

12. —(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —

(*a*) security for costs;

(*b*) discovery of documents and interrogatories;

(*c*) giving of evidence by affidavit;

(*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;

(*g*) securing the amount in dispute;

(*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(*i*) an interim injunction or any other interim measure.

[38/2001]

(2) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to administer oaths to or take affirmations of the parties and witnesses.

(3) An arbitral tribunal shall, unless the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed to the contrary, have power to adopt if it thinks fit inquisitorial processes.

(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1)(*a*) shall not be exercised by reason only that the claimant is —

(*a*) an individual ordinarily resident outside Singapore; or

(*b*) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.

[38/2001]

(5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings —

(*a*) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court;

(*b*) may award simple or compound interest on the whole or any part of any sum in accordance with section 20(1).

[Act 12 of 2012 wef 01/06/2012]

(6) All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.

Show Versions

Court-ordered interim measures

12A. —(1) This section shall apply in relation to an arbitration —

(*a*) to which this Part applies; and

(*b*) irrespective of whether the place of arbitration is in the territory of Singapore.

(2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*i*) as it has for the purpose of and in relation to an action or a matter in the court.

(3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.

(4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.

(5) If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.

(6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(7) An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2).

[26/2009 wef 01/01/2010]

Finance, Property and Business Litigation in a Changing World

Concurrent Session 1C: Trustees' Decision Making

Speakers

Professor Tang Hang Wu, *School of Law, Singapore Management University*

Mr Nicholas Le Poidevin QC, *New Square Chambers*

JOINT CONFERENCE OF THE SINGAPORE ACADEMY OF LAW AND THE CHANCERY BAR OF ENGLAND AND WALES

Session 1C, Thursday 25 April, 2013

TRUSTEES' DECISION-MAKING

Professor Tang Hang Wu
School of Law
Singapore Management University

Nicholas Le Poidevin, Q.C.
New Square Chambers
Lincoln's Inn, London

Problem for discussion

The trust

1. The trust was created in 2003 by Seng. Seng was married to Dina, who died in the 1990s. Seng and Dina had five children, Eng Wah and four others. Seng married Fangxi as his second wife in 2002.

2. Salient features of the trust are:
   - The governing law is Singaporean law.
   - The assets are held on trust for sale, with power to postpone sale.
   - Seng is entitled to receive the income for his life.
   - Upon his death, there is a wide discretionary trust for the benefit of a class of Beneficiaries, including Seng's widow and his issue.
   - The trustee has broad powers to pay or apply any of the trust assets to or for the benefit of any of the Beneficiaries. There is also a power to allow any of the Beneficiaries to occupy any property held by the trust.

3. The original trustees were (i) Seng, (ii) Seng's business adviser, Peter, and (iii) Seng's eldest child, Eng Wah.

4. The assets put into trust consisted of a portfolio of investments and the family home, now worth some $4 million. Seng, Fangxi and the children continued to live in it.

Seng

5. During Seng's life, the trustees pay him the gross income of the trust. All the (substantial) expenses – Peter's remuneration for acting as trustee, preparation of income figures for Seng's tax return and the fees of investment advisers – are paid out of capital, not income. Peter and Eng Wah agree that it would be unfair for Seng, the source of the trust funds, to have his income diminished by expenses.

6. In 2005 Seng signs a non-binding letter of wishes asking the trustee to ensure that Fangxi is comfortably provided for after his death and then to act as they think fit.

7. Seng dies in 2009. His estate is modest.

Fangxi

8. After Seng's death, Fangxi declares that she does not want to live in the family home and moves away.

9. Peter and Eng Wah, the surviving trustees, begin to make substantial capital payments to Fangxi, amounting to some $5 million to date. They have made no enquiries about any of Seng's family. Fangxi is in fact rich from two previous marriages to elderly millionaires who predeceased her.

The family home

10. After Fangxi's departure, the children one by one move out of the family home, until only Eng Wah is left. His siblings ask the trustees to sell it and distribute the proceeds but Eng Wah, backed by Peter, refuses, since it will continue to increase in value and he wishes to continue to live there. Two of Eng Wah's siblings are students, getting by with part-time jobs.

The dispute

11. Eventually, the siblings instruct lawyers, who say:
    - The trustees were wrong to pay all expenses out of capital and they are liable for the contribution which they should have deducted from the income they paid to Seng.
    - The decision to make the large capital payments to Fangxi was wrong, because Fangxi was comfortably off without those payments and the trustees made no proper enquiries.
    - The refusal to sell the house is wrong, because most of the siblings want a sale and Eng Wah is refusing merely in his own interests.

Questions

1. Was unfairness to Seng a good reason for not deducting any contribution to expenses from income?

2. Are the trustees liable? Is there a limitation problem?

3. Are the payments to Fangxi defensible by reference to Seng's letter of wishes?

4. If not, what remedies have the siblings got?

5. Is the decision not to sell the house defensible?

6. If not, what remedies have the siblings got?

Verbatim Transcript of Concurrent Session 1C: Trustee's Decision Making

After greetings and formalities:

THW: Before I pass the microphone to Nicholas, a word on Singapore Law. I think a common refrain and complaint I often hear is whether Singapore a proper jurisdiction to deal with complex trust issue. I think that it is a misplaced fear. Our courts have had experience dealing with very complex trust issues, and such disputes should not be outside the sphere of our jurisprudence.

THW: For the benefit of our friends here, the sources of Trust law in Singapore include our statutes, such as the Trustees Act. Barring the specific case law, the Singapore courts do consider authority from the commonwealth and they are of persuasive value. Increasingly, our courts have relied on secondary literature too.

Nicholas: I thought I will say something about a case that is pending in the UK Supreme Court, namely Pitt v Holt. We don't get huge number of cases regarding trust in the Supreme Court and this is a major one. It concerns trustees' decision making. Trustees make decisions that turn out badly from time to time, particularly when there are unexpected tax consequences. The ordinary law of mistake does not really help because you can't set aside transactions on the basis of their effects, rather on their consequences.

Trustees frequently say they knew what they were doing, but wouldn't have done it if they had known of the consequences. In England, we have the case of Re Hasting-Bass; that trustees could set aside a transaction if they had not taken relevant considerations or considered irrelevant considerations when making the decision. The tax authorities didn't like this very much, and have recently challenged the law. In Pitt v Holt, the court stated that you can't challenge a decision just because it has unfortunate consequences unless the trustees have breached their fiduciary duties. In any case, even if trustees can invoke the rule in Hasting-Bass, the transaction is not void but only voidable.

The Supreme Court will, in the coming months, give their decision and discuss, inter alia, the scope of duties trustees have in these circumstances and how they will be breached. What the Supreme Court says what definitely have some influence here in Singapore.

Next, group discussions:

Facts deal with a trust for sale as well as settlor's letters of wishes. Salient features of the trust:

- *The governing law is Singaporean law.*
- *The assets are held on trust for sale, with power to postpone sale.*
- *Seng is entitled to receive the income for his life.*
- *Upon his death, there is a wide discretionary trust for the benefit of a class of Beneficiaries, including Seng's widow and his issue.*
- *The trustee has broad powers to pay or apply any of the trust assets to or for the benefit of any of the Beneficiaries. There is also a power to allow any of the Beneficiaries to occupy any property held by the trust.*

Questions:

1. Was unfairness to Seng a good reason for not deducting any contribution to expenses from income?

Participant A: Fairness or unfairness does not come in if the life interest just concerns the net income?

Participant B: There's a question of how these expenses are going to be paid out of the income anyway?

Participant C: There is no trustee discretion to pay extra. To the extent that expenses are to be paid out of income, they have no discretion. But might there be a discretion for the trustees to decide what and what is not income or capital?

Participant D: But this "power" should be void because it oust the jurisdiction of the court.

2. Are the trustees liable? Is there a limitation problem?

S 6 and s 22 of the Limitation Act are relevant here.

Participant E: I would suggest that claimant is statute-barred in relation to expenses. My understanding of the way of how s 22 works is the prima facie 6 years limitation with exceptions. If that's the case, it has to be statute-barred.

Participant F: Perhaps s 22(1)(a) could apply? But claimant will have to show that trustees are fraudulent.

THW: In De Beers, time bar for s 6 does not apply to unjust enrichment claims. But another case has suggested that s 6 operates on unjust enrichment claims.

Nicholas: Armitage v Nurse says fraudulent behaviour entails dishonesty.

Furmston: But what is dishonesty? On the facts, the trustees may not know that what they're doing is wrong. The potential beneficiaries have no knowledge of what is going on too.

3. Are the (very large) payments to Fangxi defensible by reference to Seng's letter of wishes?

Participant G: In Singapore we have 3 kinds of letters of wishes – legally binding, legally significant and morally binding only. For the 2nd category, the trustees need only consider the letters and need not follow them. On the facts, the letters are not binding, so they must be in the last 2 categories.

Nicholas: Fangxi is actually already comfortably provided for, having inherited assets from her past marriages. Thus, there is really no need to pay her such large sums since she is already comfortably provided. Should this be a relevant consideration for the trustees?

Participant H: Even though she may already be living comfortably, there is no legal limitation against her being even better off.

Participant I: There is nothing wrong with providing for an already rich Fangxi, but trustees have to take all relevant matters into account. On the facts, it seems that they have not considered the other beneficiaries too.

Participant J: The letters here are given in 2005 while the trust was set up in 2003. Thus, the letters are actually legally weaker and the trustees should have attached less weight to the letter?

THW: On what is relevant and irrelevant factors to consider – Perhaps it is better to analyse it based on whether the trustee has exercised his discretion on a "proper basis" vs. "improper basis", which is hinted in Pitt v Holt although the court did not explicitly state so.

4. If not, what remedies have the siblings got?

THW: They have two options – 1: against the trustee; 2: against Fangxi

Participant K: One problem is that even if the disposition to Fangxi is set aside, how much can they claim? Can they claim all the $5m? That will be like arguing that they should have been paid exactly $5m too, but the problem is the amount given to any beneficiary is the discretion of the trustees.

Participant L: Just claim for reconstitution of the trust fund (against the trustees), there is no need to argue that the beneficiaries are entitled to the $5m.

THW: Another option is to ask the trustees to sue Fangxi.

5. Is the decision not to sell the house defensible?
6. If not, what remedies have the siblings got?

Participant M: In Singapore, it is all about balancing of interests and duties. The courts have in some cases compelled the trustee to sell the property because otherwise it would be depriving the other beneficiaries their shares. However, in this case, a problem is that the trustee has not exercised his discretion to appoint the property to the beneficiaries. Thus, the beneficiaries are technically not entitled to the property yet.

Nicholas: But this is a trust for sale! The property has to be sold sooner or later. It is just a question of when.

Participant N: If you see the property as an investment, the trustee's decision to delay sale of the property shouldn't be bad since the property market is rising.

Finance, Property and Business Litigation in a Changing World

Concurrent Session 1D: Singapore and Offshore Trusts

Speakers

Mr Christian Hay, *Collas Crill*

Mr Marcus Hinkley, *Collas Crill*

Verbatim Transcript of Concurrent Session 1D: Singapore and Offshore Trusts

Christian Hay:

The topic of this conference is litigation trends in a changing world but the focus of this session is going to be how to avoid potential disputes by choosing the right trust structure in the first place to house the vast amount of wealth being generated in this side of the world. Marcus is going to talk about Singapore, I'm going to talk about channel island trusts and then pass over to Marcus for some of the details.

Intro to the case study: example of how things can go wrong if you don't choose the right structure

Marcus Hinkley:

Hope to do is run through the growth of SG as a financial Centre. Lived in a few different jurisdictions and have a feel for how they do things.

Growth of Singapore:

Ten years on, from unknown story to being global top 4, could well be number 1 or 2 in the next 5 years.

Asia clear leader of global growth, contrasted against slow European/north American slow growth. Being int his area is beneficial to sg. World bank report: 3.37m high net worth people in asia, surpassing north America. Trend not slowing. Asia going to be key jurisdiction in future

Singapore came out relatively unscathed from subprime. Rapid growth, many cooling measures on housing markets. 'mid-shore' jurisds like Luxembourg, etc, coming to the fore. Enormous amount of pressure by cashstrapped onshore jurisd against offshores. Whether that's right or wrong is debate for another time. These [x] jurisdictions are able to offer advantages like tax advantages. HNIs can come to sg, set up businesses, employ people, offshores can't. pressure brought to bear on offshores, uk cracking down on offshores.

Singapore benefiting from location. Hub for business. Easiest place to do business in world, until recently very friendly immigration. Stable infra, good judiciary, arbitration, Singapore is a magnet for dispute resolution in a region where rule of law is questionable. Really fast trend that as there is more wealth in this region, we're eeing trust companies, private banks, coming into the region. Significant English private client firms. Offshore firms are coming in as well. Remarkable diversity of wealth service providers in the way the offshores can't.

In 2002 sg government wanted to promote being an offshore centre. 12 years later, #4.

Who's using Singapore and why?

ASEAN region is a buzz of activity. Myanmar, Vietnam, Indonesia is huge. All these countries looking to sg to provide assist. Also china india. The Chinese have typically gone to hong kong. but hong kong is a little bit to close and they'd prefer to Singapore. So a lot of firms benefited from that. All very well having expats coming in to the market, but important to have local people. If you're going into asia very important to have local people working in. what I find very interesting about Asian trusts are nuances differences between reasons why westerner and Asian would set up a trust. Motivations slightly different. Main theme is that uk, traditional common law, trust relationship is trust relationship between trustee and settlor. Discretions given to trustees. Out here when I discuss trusts with Asian firms, trust relationship very difficult to get across. Here it's more limited. Settlor has a lot of control, constant dialogue with trustees. Essentially want to tell trustees what to do. Enormously significant. Consequence is a lot of trusts with very limited powers by trustees. Essentially how it's mapped out here is that settlor can be directors of underlying companies without trustee interfering. Asian families, difficult to talk about successor generations. Patriarchal business, first general business. Don't want to talk about succession, "I'm going to give this to x", looking for ways to maintain control. Tax minimisation not high on agenda, but asset protection is growing. Matrimonial disputes very common, matrimonial problems and probate disputes, spoke to a senior lawyer yesterday who sees a trend of such disputes going to court of appeal. If you're a Singaporean and own one or two properties, prices shot up incredibly. As consequence you're sitting on significant amount of money. Not uncommon for multimillion challenge to will, matrimonial claim. Certainly prime location for trusts.

Trust turned into an agreement-based relationship.

Feature of sg market is that private banks are gatekeepers. I'm not used to it, I'm used to individuals coming to lawyers first. But here the private bankers rule. Few features that come out with that. Until recently, private banks had very unsophisticated [trust] products. Just gathering assets. Trust is a device to make the assets sticky. In that respect, discussion about jurisds, types of trusts, sitting down with client and family, not that common in sg. Lawyers not involved a lot of the time, private bankers sort it out. Few private client lawyers, few experienced ones. A lot of lawyers from different disciplines who turned to the subject. Only one or two significant firms have private client department. Quite surprising. Consequence of that is dearth is sophistication. Little requirements for tax advice.

As far as future is concerned, on the cusp of making this market, asia more sophisticated. Big English firms are coming in, offshore firms coming in. lawyers no interest in keeping market in shortterm trusts. Want more complex structures, want to be able to advise. With that will come more needs for expertise. Few years away before we see this. One other interesting feature, banks themselves under pressure to get out of trust business, limit scope of what they should do. Independent trustees flocking around mopping up clients who would have gone to banks. This trend will continue, heard anecdotally that banks are getting out of industry.

As a lawyer this is good, but also good for the clients, can get experts.

Talking to client: $70m wealth. Can use limited trust, but has opportunity to create intergenerational tool to create succession. Opportunities to do other things – for example for daughter not to marry someone who takes the money.

So opportunities for clients+lawyers. Vast amounts of money.

Question: local clients want different things out of trusts. Lack of understanding of trust structure, or just different motivation i.e. protect assets but maintain control?

Answer: clients don't want a trust for the sake of a trust. Want trust structures for specific trust benefits. Usually private bankers suggest – specific investments, put them in a trust. My guess is that in investments it's similar, people want to keep control of their investments too. One leading English lawyer thinks market will go to private trust companies because of this control feature. Asian market will look v different from uk market. At the moment foreigners coming in and making offerings, do you want it. While in future needs to have appreciation in what is really wanted. Move towards reserve powers etc.

Q: disputes between trustees and settlors? Not doing what settlors wants to do even though it's allowed?

A: not a lot of leeway for trustees, they have to grapple with that.

Q (another audience): has anyone asked whether these are actually trusts at all? Or are these just things called trusts. Reminds me of channel islands in the 70s, settlor is a client. Settlor's not giving up control.

A: R&T is dealing with a matter where the settlor is alleging that his own trust is a shadow trust.

A: same issues with channel islands will crop up in Singapore.

Q: professionals selling trusts as a product? Agreement between trustee and client? What are they telling them that they're going to get?

A (M): Singapore is behind HK in private wealth. Starting to see disputes in hong kong over this very thing. Wouldn't be surprising if problems happen here too.

A(C): not surprising when the selling is done by banks.

A(M): no desire from the client for legal advice, just from the bank. Need for lawyer is a question. Reluctance, especially with fees – cutthroat market. One has to justify what one's doing, time spent, to client. Some trust companies/private banks require settlors to take legal advice. But that's not the norm here. Then there's the cultural, language difficulties. Sg will have similar problems to HK.

Limitations of SG

As far as sg has come, this is still new. Very few private client lawyers. Offshore centres still doing good business. Sg has own trust laws of course but offshores have the experience and reputation.

Christian Hay:

Channel islands: significant banking, trusts, funds, insurance etc. very similar to Singapore statistics, but difference is that Singapore is growing significantly while channel islands if anything shrinking. Looking at the trust regime, most commonly used words to describe are modern and user-friendly. Easy to comprehend statutes that set out the laws governing trusts. Based on English trust principles supplemented by offshore provisions. Very permissive, wide reserved powers for settlors, quite palatable for settlors. Strict confidentiality. Codification of beneficiaries' right to information. Unclear in some jurisd, but very clearly set out in channels. No requirement for local trustees. Can have a foreign trustee carrying out business from elsewhere. But for SG need at least one SG trustee, so limits utility of Singapore worldwide trust. Also a strong, accessible body of trust caselaw in channels.

Marcus:

The SG trust: Also modern and user friendly, trustee act takes some offshore innovations. Why I describe sg as midshore – midway between trad uk position and channel islands. Reserved powers, but more moderate. Duties of care.

Virtues of using offshore trusts

Virtues are really the legislative innovations. Bahamas, caymans, etc. summarising: reserve powers (hugely important in sg), the vista trust, the star trust (cayman islands) not so used here ecause you must have cayman islands trustee.

purpose trusts which MAS has considered but SG doesn't have them, so offshores still advantaged there. Interesting academic discussion as to whether Singapore base trustee can be a trustee of a purpose trust. So in theory have a Singaporean trustee who's trustee of a jersey purpose trust. Some academic discussion about whether it's good. But is it out of the scope of a sg trust license because sg doesn't have purpose trusts? Also perpetual trusts.

Asset protection: getting around forced heirship. Interesting how trusts will be viewed by the sharia courts here.in case study, is it appropriate to set up a sg trust when there are sharia issues involves? Would the fact that there is a sharia court here give beneficiaries an additional claim here? Untested area.

Verbatim Transcript of Concurrent Session 1D: Singapore and Offshore Trusts

Christian

Case study: Married Indian Muslim couple, filthy rich, family company in SG, petrochemicals. Own cricket team, etc. Three children. Problem: daughters working in the family business, but son gambling money. Want to set up trust since son will get 'too much'.

Audience: Channel islands legislation to give court jurisdiction over challenges to existence of trust. Is that helpful in defeating sharia-based challenges?

Audience: if trustees are sg, can you get an in personam judgment against them? Sinapore judgment, assets. Even though it's a jersey trust.

Q: client was advised to set up jersey trust. Trust company in jersey issued power of attorney to client, giving settlor power.

Answer: hugely dangerous! Creates opportunities for misuse.

Q: settlors who want to retain control are put off by the idea that they owe fiduciary relationships to beneficiaries. So trust companies important, useful compromise.

A: one problem with private trust companies, talking to client relatively uneducated about trusts, importance of good record keeping etc, and saying, you still want control, but we create this private trust company for you. The problem is that they might not keep good records.

Q: Singapore alternative disputes, arbitration – does that include trust arbitrations? I'm trying to extend trust arb in England, what's the experience here? Common for arb clauses?

A: very limited – didn't know about it. Not common to put arb clauses in.

Q: problem in uk – declaration of human rights, people's interests have to be heard publically. So arbitration is problematic

SINGAPORE AND OFFSHORE TRUSTS

Advocate Christian Hay
Head of Dispute Resolution
Collas Crill (Guernsey)

CHANCERY BAR | SINGAPORE ACADEMY OF LAW

Overview

- The Channel Islands
- Channel Islands' Trust Laws and regulation
- Key Benefits

The Channel Islands, at a glance…

- Jersey and Guernsey are the two largest islands. Other smaller islands form the "Bailiwick" of Guernsey
- 'Constitutionally' part of Britain, but not part of the UK
- There is a question over whether the UK Parliament can legislate for the Channel Islands – in practice each of Jersey and Guernsey's domestic legislatures approves draft laws for the consent of the Monarch via her Privy Council
- Both Jersey and Guernsey maintain separate independent customary law (adversarial) judicial systems
- Courts are comprised of a permanent roster of local judges, supplemented by a number of senior commonwealth practitioners (e.g. English QCs)
- Both on the OECD white list of co-operative offshore jurisdictions

Advocate Christian Hay, Collas Crill

A History Lesson…

- Constitutions of King John, circa 1204
- "duodecim optimatos juratos" – 12 good men
- Independence of Guernsey/Jersey
- Charter of Elizabeth, 27 June 1562 – confirmed autonomy and authority of Royal Court of Guernsey

Advocate Christian Hay, Collas Crill

The Channel Islands now...

- Banking - £240bn and 74 licensed banks
- Fiduciary – 1,046 regulated trust entities
- Funds - £470bn under administration: £100bn under investment management; 2,260 domiciled funds
- Insurance – largest captive domicile in Europe; 930 licensed insurance entities

Advocate Christian Hay, Collas Crill

Modern and User-friendly

- Trusts (Guernsey) Law 2007, and Trusts (Jersey) Law 1984 (as amended)
- English trust law principles with modern offshore innovations
- Permissive
- Wide reserved powers
- Strict confidentiality
- Codification of beneficiaries' rights to information
- Unlimited duration
- No requirement for local trustee
- Strong and accessible body of case law

Advocate Christian Hay, Collas Crill

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Well Regulated Jurisdictions

- A web of regulation and governance
- General Fiduciary Duties and the trust laws
- Codes of Practice for Trust Service Providers
- Codes of Corporate Governance
- Criminal Justice (Proceeds of Crime) Laws
- Anti-money laundering handbooks

Advocate Christian Hay, Collas Crill

Key Benefits of using Channel Islands' Trusts

- Recognised leading jurisdictions in trust law
- Recognised service provider leaders (STEP Private Client Awards)
- Modern laws, ease of use
- C I Innovations – purpose trusts, foundations, private trust companies
- Robust asset protection jurisdiction
- Control
- Robust anti forced heirship regime

Advocate Christian Hay, Collas Crill

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SINGAPORE AND OFFSHORE TRUSTS

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The Growth of Singapore as a Financial Centre

- Singapore 10 years on – from unknown to global top 4
- Reasons:
  - Relatively unscathed from sub-prime financial crisis
  - "Move to compliance" and the rise of the "midshore" jurisdictions
    - Regulation
    - DTAs, TIEAs and substance

The Growth of Singapore as a Financial Centre cont'd…

- Location, Location, Location
  - Traditional hub for trade/business
  - Stable infrastructure
  - Good judiciary (nb: arbitration centre)
  - Rapidly growing Asian wealth
  - Inbound private wealth providers
  - Pragmatic regulation
- Avoiding scandals (so far…)

Marcus Hinkley, Collas Crill Singapore

The Singapore Market

- Who is using Singapore and why?
- Present
  - Mainly Asians, Indians, some Europeans, Latin American, "Western" expatriates
  - Locals and Chinese speakers extremely important
  - An Asian Settlor's motives for setting up a Trust:
    - concerned about himself and his immediate family;
    - for tax minimisation and asset protection;
    - Suspicious of giving up control;
    - the Trust has becoming an agreement-based relationship between the trustee and Settlor.

Marcus Hinkley, Collas Crill Singapore

The Singapore Market cont'd…

- Private Banks are the gatekeepers
  - Unsophisticated structures because:
    - ❖ Limited scope for lawyer involvement
    - ❖ Few private client lawyers
    - ❖ Emphasis on asset gathering
    - ❖ No requirement for tax advice
    - ❖ First generation wealth
    - ❖ Reluctance to plan for succession and give up control
- Future
  - The opportunity has lead to influx of Big Private Client English and Offshore names. Will this increase sophistication?
  - Private Banks selective about new business – giving independent trustees a chance

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The Singapore Trust

- Report of the Law Reform Committee of the Singapore Academy of Law
- '*Reform of Certain Aspects of the Trustees Act*' 30 March 2003
- Trustees Act (Chapter 337) (Revisions from December 2004)
- Innovations
  - Reserved Power of Investment
  - Private Trust Companies
  - Statutory Duty of Care
  - Exclusion of Duty of Care

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The Singapore Trust cont'd…

- General Power of Investment
- Widening the Power to Insure
- Fixed Perpetuity Period of 100 years
- Trusts Created to Defraud Creditors
- Forced Heirship

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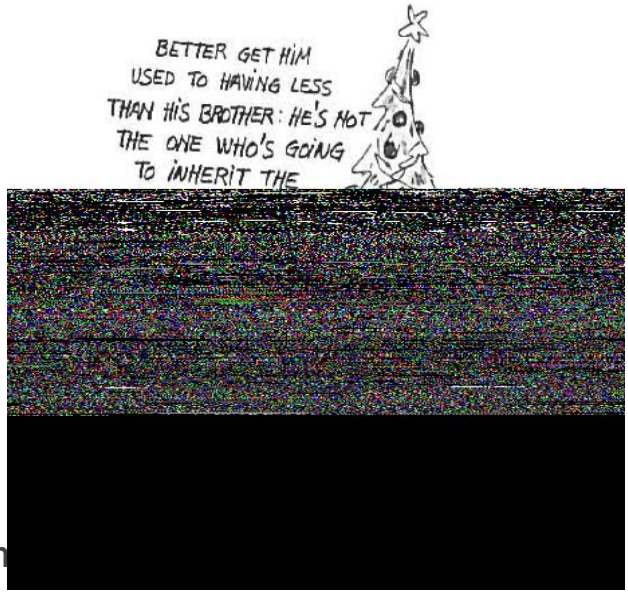
The "Virtues" of the Offshore Trust Industry

- Reserved Powers
- VISTA
- STAR
- Purpose Trusts
- Perpetual Trusts
- Private Trust Companies
- Asset Protection
  - ❑ Creditor Claims
  - ❑ Forced Heirship
  - ❑ Matrimonial Property Claim



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