

SHE SELLS SANCTUARY

An overview of the current state of Bermuda's firewall legislation and its recent trust law reforms

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ABSTRACT

- *To what extent are assets in trusts existing under the laws of an 'offshore' international financial centre (IFC) sheltered from claims made under other jurisdictions' laws against settlors, beneficiaries, trustees or trust property? Many IFCs have experienced challenges drafting clear, effective and appropriate firewall legislation.*
- *This article considers factors relevant to the protection that firewall legislation provides to trust property; primarily from the perspective of Bermuda, which recently updated the firewall provisions contained in the Trusts (Special Provisions) Act 1989 (the Act).¹*
- *The article also outlines competing policy considerations and practical realities that legislatures weigh up when developing, and courts consider when applying, IFC firewall legislation.*

WHAT IS AN ASSET PROTECTION TRUST?

A trust is not a legal person. An 'express trust' refers to the legal relationship created, either *inter vivos* or on death, by a person (the settlor) when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.²

There is no legal definition of an asset protection trust under Bermuda law or under the laws of most other jurisdictions. An asset protection trust might be described as an express trust with specific terms that aim to protect the trust property from claims brought against the trust's settlor or beneficiaries. The asset protection qualities of the trust are also impacted by conflict of laws rules of the governing law of the trust and fraudulent transfer legislation. However, asset protection is rarely the sole reason a person might wish to form a trust. One might say that the primary reason trusts remain attractive to most private clients is the flexibility they provide for long-term succession planning.

¹ Amendments to the firewall provisions in ss.10 and 11 of the Act were made by the Trusts (Special Provisions) Amendment Act 2020 that became operative on 5 August 2020.

² See s.2 of Bermuda's Trusts (Special Provisions) Act 1989

CONFLICT OF LAWS

Conflict of laws rules are procedural rules applied by a court (the Domestic Court) that has jurisdiction to determine an issue having a connection with another jurisdiction (a foreign jurisdiction) to ultimately determine whether to apply the substantive laws (i.e., a jurisdiction's laws without reference to its procedural, including conflict of laws, rules) of:

- the jurisdiction in which the Domestic Court is situated (Domestic Laws); or
- a foreign jurisdiction (Foreign Laws).

The connecting factor with a foreign jurisdiction might be, for example, that the defendant is resident or domiciled in a foreign jurisdiction or that the property (which is the subject of the issue or dispute) is situated in a foreign jurisdiction.

In common-law jurisdictions, the source of conflict of laws rules is the common law (including customary law where applicable, such as in Guernsey and Jersey) as reiterated, clarified or varied by domestic statutes and international conventions and statute, including, where applicable, EU law.

THE RELEVANCE OF THE HAGUE TRUSTS CONVENTION

The Hague Conference on Private International Law (HCCH) developed a multilateral treaty known as the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (the Convention) to address issues concerning the non-recognition of the concept of trusts in civil-law jurisdictions and paucity of clear and appropriate conflict of laws rules in relation to trusts.

Thirty-one of the 87 HCCH Member States have approved the Convention, but only a small number of Member States have ratified it or enacted legislation to introduce some or all of the Convention's provisions into Domestic Law.

The Convention represents a positive step towards developing consistent conflict of laws rules applicable to trusts. In summary, it provides that once a trust is validly established, the existence and governing law of the trust will be respected. However, it does not deal with the law that is to apply to questions concerning the governing law applicable to the formation and transfers into the trust.

‘In some instances, firewall legislation might be regarded as inconsistent with the Convention if not ‘manifestly incompatible’ with matrimonial property regimes or decisions of Member States’

Further, even if a Member State has ratified the Convention, this does not necessarily mean that the provisions have been included verbatim into its Domestic Law, or included at all.³ Article 18 of the Convention provides that a Member State is not required to apply provisions of the Convention to the extent that doing so would be ‘manifestly incompatible’ with the public policy in the Member State. Further, each Member State's court may have different levels of experience in trust cases and may not interpret or apply the Convention's provisions in the same way.

Certain provisions of the Convention were introduced into the laws of Bermuda, the British Virgin Islands and certain other British Overseas Territories by the UK's *Recognition of Trusts Act 1987 (Overseas Territories) Order 1989*,⁴ made under the *Recognition of Trusts Act 1987*.

In some instances, firewall legislation might be regarded as inconsistent with the Convention if not ‘manifestly incompatible’ with matrimonial property regimes or decisions of Member States. For example, the power of the Family Division of the England and Wales High Court to vary and make orders, in respect of trusts governed by laws of other jurisdictions, may be directly at odds with art.8 of the Convention,⁵ which provides that the governing law of the trust ‘shall govern the validity of the trust, its construction, its effects,

³ See for consideration of an example, Toby Graham, ‘The Hague Trusts Convention Five Years On: The Swiss Federal Supreme Court's decision in *Rybolovlev v Rybolovleva*’, *Trusts and Trustees*, 18:8 (September 2012), pp.746-755
⁴ 1989/673

⁵ Under s.24(1)(c) of the *Matrimonial Causes Act 1973*

and the administration of the trust', but justified in England and Wales on public policy grounds.

WHAT IS THE OBJECTIVE OF FIREWALL LEGISLATION?

The objective of firewall legislation, in summary, is to clarify, reiterate or vary Domestic Law conflict of laws rules applicable to trusts governed by Domestic Law (Domestic Law Trusts) to:

- require that Domestic Law shall apply to determine certain questions relating to the formation, validity and administration of Domestic Law Trusts; and
- prevent the recognition or enforcement of orders made by courts other than the Domestic Court (i.e., a foreign court) and in some jurisdictions, including Bermuda, awards of arbitrators or tribunals in a foreign jurisdiction (collectively, Foreign Orders) in relation to property held pursuant to Domestic Law Trusts where they are inconsistent with Domestic Law firewall legislation.

WHAT IS THE OBJECTIVE OF FRAUDULENT TRANSFER LEGISLATION IN A TRUST CONTEXT?

In relation to trusts, the objective of fraudulent transfer legislation is to require the Domestic Court to apply Domestic Law to determine:

- whether a creditor is eligible to have transfers (i.e., dispositions) into a Domestic Law Trust made at an undervalue set aside;
- limitation periods within which eligible creditors may bring claims to set aside such transfers; and
- rights of trustees, beneficiaries and others who received transfers or distributions in good faith.

As with firewall legislation, the location of the property that has been transferred into the trust or distributed from it will impact on how successfully Domestic Law may be able to resist enforcement of Foreign Orders in relation to such property.

The historical basis of many common-law jurisdictions' fraudulent transfer legislation is the *Fraudulent Conveyances Act 1571*,⁶ also known as the Statute of Elizabeth. Bermuda's fraudulent transfer legislation is contained in s.36A-G of

the *Conveyancing Act 1983*. Guernsey and Jersey have not included provisions from the Statute of Elizabeth into their legislation and do not have fraudulent transfer legislation. Creditors may explore whether they may set aside transfers into a Guernsey or Jersey law trust by bringing a 'Pauline action', which is derived from Roman law as developed by French customary law.

JURISDICTION

The question of forum or jurisdiction is intimately related to conflict of laws rules. A court might determine, based on its conflict of laws rules (being procedural rules) or its interpretation of an exclusive jurisdiction clause in a contract or deed, that it does not have jurisdiction to determine the issue or dispute in question. However, if a court does determine that it has jurisdiction, a court in a common-law jurisdiction will apply its conflict of laws rules and determine whether to apply substantive Domestic Law or substantive Foreign Law to determine a question. In circumstances where a court determines to apply substantive Foreign Law, expert evidence would ordinarily be required by the Domestic Court in respect of how the Foreign Law ought to be applied to the relevant facts.

Cases in recent years have considered whether and to what extent statutory provisions and specific provisions in trust instruments may mandate jurisdiction to a particular court. The decision of *Crociani v Crociani* largely turned on a construction of the 'forum for administration' clause in the trust instrument.⁷ The clause was determined not to confer exclusive jurisdiction on a particular court.⁸ However, the court also notably held that:

- an exclusive jurisdiction clause in a trust instrument is not binding on a court; and
- it will be easier for a beneficiary (who would not ordinarily be a signatory to the trust instrument) to resist enforcement of an exclusive jurisdiction clause in a trust instrument than it would be for a party to a contract to resist enforcement of a contract exclusive jurisdiction clause.⁹

⁶ (13 Eliz 1, c 5)

⁷ [2015] WTLR 975/2014 UKPC 40

⁸ As above, see para.30

⁹ As above, at para.35

‘An applicant is no longer required to seek the leave of the Bermuda court for service of claims involving Bermuda trusts on respondents that are not physically in the jurisdiction, even where the act giving rise to the claim occurred outside of Bermuda’

Those conclusions were reiterated recently in *In the matter of a trust known as the Stingray Trust* in the Grand Court of the Cayman Islands.¹⁰ The *Stingray Trust* case also held that s.90 of the *Cayman Islands Trusts Law (2020 Revision)* did not of itself confer exclusive jurisdiction on the courts of the Cayman Islands to adjudicate all issues that s.90 expressly requires to be determined under Cayman Islands law.¹¹ In *Stingray Trust*, the Cayman court held that the Milan court was the most convenient and appropriate forum for determination of issues concerning the validity of the Cayman law trust, subject to the Milan court applying Cayman law to determine those issues.¹² The Cayman court’s decision was influenced by various factors, including:

- the trustee’s delay in bringing the proceedings in the Cayman Islands;
- the trustee having already submitted to the jurisdiction of the Milan court;
- the advanced status of the Milan proceedings; and
- the consequent likelihood of duplication and wasted costs.¹³

Notwithstanding that a foreign court (e.g., the Milan court in *Stingray Trust*) may apply Domestic Law (e.g., Cayman law in *Stingray Trust*), a

concern remains as to whether the foreign court (particularly one in a civil-law jurisdiction) would apply Domestic Law in the same manner that a Domestic Court would.¹⁴

Although it is not a statutory exclusive jurisdiction provision, s.9 of the Bermuda *Trusts (Special Provisions) Act 1989* (the Act) now operates to provide that, by default, the Bermuda Supreme Court has jurisdiction to determine any claim concerning the validity, construction, effects or administration of:

- Bermuda law trusts;¹⁵ and
- certain trusts not governed by Bermuda law.¹⁶

The above applies whether or not the respondents of the claim are located in Bermuda or facts relevant to the claim occurred in Bermuda. An applicant is no longer required to seek the leave of the Bermuda court for service of claims involving Bermuda trusts on respondents that are not physically in the jurisdiction, even where the act giving rise to the claim occurred outside of Bermuda. The Bermuda court may, nevertheless, choose not to exercise that jurisdiction if, for example, the defendant successfully demonstrates that a foreign court is the more appropriate forum.¹⁷

DOES COMITY CONTINUE TO UNDERMINE FIREWALLS?

In the 15th edition of *Dicey & Morris*,¹⁸ comity is described as:

‘a term of very elastic content. Sometimes it connotes courtesy or the need for reciprocity; at other times it is used as a synonym for the rules of public international law’.

¹⁴ See Toby Graham, ‘The Hague Trusts Convention Five Years On: The Swiss Federal Supreme Court’s decision in *Rybolovlev v Rybolovleva*’, which considers issues of this nature. The approach of the Act to Foreign Orders that are ‘inconsistent’ with the Act’s firewall provisions is discussed later in the article.

¹⁵ Section 9 of the Act provides, among other things, that the Bermuda courts have jurisdiction when ‘the trust instrument contains a jurisdiction clause in favour of the courts of Bermuda’, which reflects a simpler approach than that which may have been adopted in other IFCs’ trust statutes.

¹⁶ Section 9(2) provides that the Bermuda Supreme Court has jurisdiction in respect of trusts not governed by Bermuda law in circumstances where:

- (a) the trust instrument contains a clause conferring jurisdiction on the courts of Bermuda;
- (b) all or part of the administration of the trust is carried on in Bermuda;
- (c) a trustee is incorporated in Bermuda; or
- (d) trust property is situated in Bermuda (but only in relation to a claim concerning that property).’

¹⁷ See Andrew Holden TEP, *Bermuda’s 2020 Trust Law Reforms: A commentary* (24 February 2021)

¹⁸ Sweet & Maxwell, 2017, vol. 1, paragraph 1-008

¹⁰ Also known as *In the matter of the Geneva Trust Company (GTC) SA v IDF et al* FSD 248 of 2017, at para.64

¹¹ As above, in particular see paras.28–37 and 54

¹² As above, see para.81

¹³ As above, see para.81

Lord Justice Diplock described comity as the:

‘accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself’.¹⁹

Comity may be described as a policy underpinning conflict of laws rules and approaches to questions of jurisdiction or ‘a tool for applying or reshaping the rules of conflict of laws’.²⁰

Principles of comity include that, generally, a Domestic Court will substantively recognise and give effect to orders of a foreign court (Foreign Orders), provided they are not:²¹

- contrary to the domestic jurisdiction’s public policy;
- in contravention of the fundamental standard of procedural fairness;
- based on fraud/unfairness; or
- giving effect to foreign penal laws.

Further, applying principles of comity would ordinarily require that:

- the facts of a case should have sufficient connection with the domestic jurisdiction before a Domestic Court will not recognise a Foreign Order; and
- a Domestic Court should not purport to affect the:
 - title to property situated in a foreign jurisdiction; or
 - rights of persons not subject to the personal jurisdiction of the Domestic Court.

However, comity is not a rule of law that common-law courts are bound to apply in order to recognise and enforce Foreign Orders.²² In England and Wales and Jersey, comity has been rejected as a basis for recognising and enforcing Foreign Orders, such now being based upon the principle that a legal obligation arises to satisfy a judgment of a court of competent jurisdiction.²³

In *Owens Bank v Bracco*, it was observed:²⁴

‘At first, the basis for enforcing the foreign judgment by action in this country was thought to be the doctrine of comity but that was later replaced by the doctrine of obligation, namely, that the judgment of a court of competent jurisdiction over the defendant imposed on him an obligation to pay the sum for which a judgment had been given.’

The scope of the doctrine of obligations in common-law jurisdictions may be developing or gaining recognition as applying beyond money judgments, thereby having greater scope than most jurisdictions’ reciprocal of enforcement legislation.²⁵ Courts’ application of relatively more vague principles of comity, as opposed to rules of law, as a basis for or to extend the scope of common-law conflict of laws rules might not provide litigants sufficient certainty.

Common-law conflict of laws rules can, of course, be overridden or reinforced by applicable domestic legislation, including firewall legislation. However, in the Jersey case of *Re B Trust*,²⁶ one of the first notable cases in which international financial centre (IFC) firewall legislation was tested, it was held that then-art.9 of the *Trusts (Jersey) Law 1984* (the Law) did not contain the ‘very clear and express words’ required to displace the application of principles of comity.²⁷ The Royal Court of Jersey (the Jersey Court) took those principles into account when providing the trustee (who had submitted to the jurisdiction of the English court) directions under art.51 of the Law to give substantial effect to the English and Welsh order by the trustee exercising powers available to it under the trust instrument.²⁸ The Jersey Court’s conclusion that foreign judgments should be given effect on grounds of comity has been described as a ‘serious error’.²⁹ Article 9 has subsequently been amended with a view to, among other things, more specifically requiring the Jersey Court to apply

19 *Buck v Attorney General*, [1965] Ch. 745, 770 (CA)

20 As above, at para.1-009

21 ‘Comity and the Court’s Inherent Jurisdiction – Application and effects’, bit.ly/3gnDgJ2 (accessed 10 March 2021)

22 Professor Jonathan Harris, ‘Comity Overcomes Statutory Resistance: In the matter of the B Trust’, *Jersey & Guernsey Law Review* (June 2007), para.13

23 As above, at para.1-010

24 *Owens Bank Ltd v Bracco*, [1992] 2 A.C., at para.457

25 See Professor Adrian Briggs, ‘The Common Law Flexes its Muscles’, *Trust & Trustees*, 17:4 (May 2011), pp.328–333

26 [2006] JLR 562, [2007] 9 ITEL 783

27 Article 9(4) then provided that ‘No foreign judgment shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law’.

28 In *In the matter of the IMK Trust* [2008 JLR 250], at para.51 the Jersey Court observed ‘... a close reading of the judgment makes it clear that what the court had in mind was the exercise of its jurisdiction under art. 51 of the 1984 Law to give directions to the trustee and that in doing so it could, in the interests of comity, give substantial effect to the English judgment’.

29 See Professor Jonathan Harris ‘Comity Overcomes Statutory Resistance: In the matter of the B Trust’, above citation, para.12

‘It appears that, particularly from *J v K*, principles of comity may continue to have some latent influence on courts’ approach to letters of requests ...’

conflict of laws rules contained in Jersey’s firewall legislation, as opposed to principles of comity, and extend its application beyond foreign judgments to arbitration and other Foreign Orders.

Despite the above criticisms, in *J v K* the Jersey Court compelled a Jersey trustee of a Jersey law trust to reveal otherwise confidential trust information to a Missouri matrimonial court that had issued it a letter of request for the information determining that ‘the public interest in giving comity to the foreign letter of request outweighs the public interest in maintaining confidentiality of trust documents’.³⁰ The decision was made in spite of the fact that the:

- wife, who sought the information, was not a beneficiary of the trust (the husband was);
- trustees did not consider the disclosure to be in the beneficiaries’ best interests and objected to the disclosure;
- Jersey Court considered that the wife may have had slim prospects of success if an application had been to the Jersey Court for directions under art.51 of the Law, where a different test would have been applied; and
- policy of the Jersey legislature was evident in Jersey’s firewall legislation.

Interestingly, in *Jennings v Jennings*,³¹ following its receipt of a letter of request from an English matrimonial court, Bermuda’s Supreme Court ordered a Bermuda-resident trustee to provide information in respect of Cayman Islands law trusts it administered. Comity was not mentioned in the judgment. However, Justice Bell took into account that the:

- Bermudian statutes governing taking evidence for a foreign court and matrimonial proceedings were substantially the same as those in English and Welsh legislation; and
- principles to determine an application for the

grant of outgoing letters of request were the same as those governing incoming requests.

Bell J determined that s.90 of the Cayman Islands *Trusts Law (2009) Revision*, which required all questions regarding the administration of Cayman law trusts to be determined in accordance with Cayman Islands law, did not:³²

- require the question of provision of trust information in this case to be determined under Cayman law, as there were ‘no questions which arise in relation to the administration of the trust per se’; or
- confer the Cayman Islands court with exclusive jurisdiction to determine whether the trustee is required to provide the information.

It appears that, particularly from *J v K*, principles of comity may continue to have some latent influence on courts’ approach to letters of requests, but that possible exception aside, comity does not appear to have any ongoing influence on the application by IFCs’ Domestic Courts of firewall legislation contained in Domestic Law.

SIMPLIFICATION OF STRUCTURE OF BERMUDA’S FIREWALL LEGISLATION

The Bermuda Trust Law Reform Group and the Bermuda legislature recently took the initiative to materially simplify and extend Bermuda’s firewall legislation.³³ The *Trusts (Special Provisions) Amendment Act 2020* amended the Act and became operative on 5 August 2020.

It has proven to be a challenge for legislative draftspersons to produce clear and comprehensive firewall legislation that adequately addresses competing policy considerations. The protection offered by firewall legislation is prone to turn on a careful

³⁰ [2016] JRC 110

³¹ [2009] SC (Bda) 62 Civ

³² As above, para.25

³³ With the benefit in particular of input from David Brownbill QC and Andrew Holden (each of XXIV Old Buildings in London).

‘The simplification of Bermuda’s firewall legislation has been achieved by providing an exclusion of Foreign Law where appropriate, as opposed to a blanket application of Bermuda law subject to derogations’

construction of particular words and phrases in it. Firewall legislation in most jurisdictions is structured along the following lines:

- a broad exclusion of application of Foreign Law and Foreign Orders to Domestic Law Trusts (i.e., the firewall);
- the firewall is then made, subject to certain exceptions (derogations) where Foreign Law may be applied, or a Foreign Order may be recognised by the Domestic Court; and
- the derogations are themselves generally subject to further exceptions that restrict their impact.

This structure of firewall legislation may further contribute to its complexity and the difficulty in applying it. Often, part of the challenge for the practitioners is working through how the various parts of firewall legislation interact.

The simplification of Bermuda’s firewall legislation has been achieved by providing an exclusion of Foreign Law where appropriate, as opposed to a blanket application of Bermuda law subject to derogations. This is accomplished by specifying the circumstances under which any Foreign Law shall be excluded from application to a Bermuda trust,³⁴ reinforcing and extending specific exclusions of the application of Foreign Laws that conflict with Bermuda’s public policy. To the extent that Foreign Law is not excluded, Bermuda’s ordinary conflict of laws rules apply. Such conflict of laws rules have been developed by the common law and largely, if not entirely, reflect those applicable in England and Wales.

EXTENSION OF BERMUDA’S FIREWALL

Section 10 of the Act excludes the application of a Foreign Law and a Foreign Order:

‘... if it creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any persons, by virtue or in consequence of, or in anticipation of:

- (a) the death of a person (other than as a result of a voluntary disposition, whether testamentary or otherwise), by the deceased.
- (b) the creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familial relationship, whether by blood or adoption; and
- (c) bankruptcy, liquidation or an analogous insolvency process, including a provisional process or a process for the restructuring of debts.’

Consequently, s.10(2) now extends the Act’s firewall provisions to exclude Foreign Law-based rights (and consequent Foreign Orders) in respect of a Bermuda trust that may be granted to any person:

- arising from the death of any person (i.e., not just the death of the settlor or beneficiary as previously);
- arising from a personal relationship with another person (i.e., not just a personal relationship with the settlor or beneficiary as previously and now expressly includes claims arising from domestic and analogous partnerships and other familial relationships); and
- in respect of provisional processes or restructuring of debts (whereas previously it may have been unclear whether the Act’s firewall recognised such Foreign Law rights).

The inherent nature of firewall legislation would appear to override any application of the doctrine of *renvoi*,³⁵ insofar as the applicable firewall

³⁴ Section 1A(1) now includes a definition of ‘Bermuda trust’ as ‘a trust governed in whole or in part by the law of Bermuda’. This definition takes into account that under s.8 of the Act ‘a severable aspect of a trust, particularly matters of administration, may be governed by a different law’.

³⁵ *Renvoi* may be described as a subset of conflict of laws rules and may be applied whenever a Domestic Court is required to consider conflict of laws rules under Foreign Law to determine which jurisdiction’s substantive law shall apply to determine the substantive issues in question.

legislation provides for the court to apply Domestic Law to determine an issue. Section 10(4) of the Act makes explicit that the doctrine of *renvoi* does not apply by providing that:

‘If and to the extent that this section excludes the application of foreign law, to the extent the court shall apply instead the law of Bermuda excluding rules of conflict of laws (save for those set out herein).’

Section 10(5) of the Act provides that Bermuda’s firewall:

‘shall not apply to the determination of any question to the extent that the question:

- (a) concerns immovable property outside Bermuda;
- (a) relates to a severable aspect of a Bermuda trust governed by foreign law.’

Subject to that, s.10(3) of the Act provides that:

‘No foreign law shall apply to the determination of any question concerning the validity, construction, effects or administration of a Bermuda trust...’

Bermuda has done away with the complex and potentially limiting definitions of ‘personal relationship’ and ‘heirship rights’ that exist in a number of IFCs’ firewall legislation.

The exclusion of Foreign Law in respect of the above matters extends to questions in respect of the creation of Bermuda trusts, such as:

- the capacity of a settlor to dispose of property upon the trusts of a Bermuda trust;
- any rights or interest in or to property disposed upon the trusts of a Bermuda trust;
- the validity of a disposition upon the trusts in respect of property of a Bermuda trust, including whether any such disposition should be declared void or invalid, rescinded, set aside, varied or amended; or
- any obligation or liability of a settlor, trustee or beneficiary of a Bermuda trust.

WHEN IS A FOREIGN ORDER ‘INCONSISTENT’ WITH THE FIREWALL LEGISLATION?

After s.10 of the Act sets out the questions in respect of which a court is specifically required to apply Bermuda law to Bermuda law trusts, s.11 of the Act provides:

- ‘11(1) The court shall not give effect to any foreign order that is inconsistent with section 10.
- (2) In this section, to give effect to a foreign order means to recognise, enforce, or otherwise give effect directly or indirectly to that foreign order, including by the conferral of any right, the imposition of any obligation or liability, or the raising of any estoppel.’

Section 11 of the Act, therefore, requires the Bermuda court to consider the merits of the Foreign Order to determine if, applying s.10 of the Act, the Bermuda court would have reached a conclusion consistent with that reached by the Foreign Court. Doing so may essentially require a retrial of the relevant issues considered by the Foreign Court. This may result in uncertainty for international litigants seeking to enforce a Foreign Order in Bermuda. However, this also reflects a conscious policy choice by the Bermuda legislature to encourage litigants to bring trust variation or other proceedings in Bermuda in the first instance rather than by the indirect route of enforcement of a Foreign Order.

Other IFCs may not adopt the same approach as clearly, or at all, and, consequently, may require their courts only to determine whether the Foreign Law applied by the Foreign Court was consistent or, in the case of Gibraltar, substantively different to those that would apply in Gibraltar by virtue of its firewall legislation.³⁶ However, this criterion may authorise the Gibraltar court to give effect to, for example, orders made by the England and Wales family court, because relevant provisions of the UK *Matrimonial Causes Act* (which provide its courts wide jurisdiction to vary trusts) may not be substantively different to Gibraltar’s *Matrimonial Causes Act* or, indeed, those of other IFCs.

³⁶ See s.4(5) of the *Trusts (Private International Law) 2015*

Common-law jurisdictions generally provide their courts inherent supervisory jurisdiction over the administration of trusts. This jurisdiction empowers a Domestic Court to, for example, provide directions to trustees who seek guidance on whether to submit to the jurisdiction of the foreign court or may wish to apply powers under the trust instrument in a manner that may go some way to implementing orders of the foreign court. How can this be reconciled with firewall legislation that, as it often does, expressly prohibits the Domestic Court from directly or indirectly giving effect to a Foreign Order that is inconsistent with a correct application of firewall provisions in Domestic Law?

Notably, in *In the matter of the IMK Family Trust*, the Jersey Court distinguished proceedings where a trustee seeks directions from Foreign Orders from situations where an applicant applies seeking orders from the Domestic Court on a foreign judgment.³⁷

‘We consider that “enforcement” of a foreign judgment means the situation where the judgment creditor comes to this court and requests that this court give effect to the judgment in Jersey, either by registration ... or by giving a judgment without reconsidering the merits, which then be enforced against a debtor here in Jersey.’³⁸

This appears to be widely regarded as the correct interpretation of provisions in firewall legislation that expressly prohibits the Domestic Court from giving effect directly or indirectly to Foreign Orders that may be regarded as inconsistent with Domestic Law.

In contrast to *Re B Trust*, in *IMK Trust*, the Jersey-resident trustee had not submitted to the jurisdiction of the English and Welsh court. Notwithstanding this, and the Jersey Court’s construction of art.9(4) of the Law, in *IMK Trust*, the Jersey Court distinguished between a variation of trust (that was within the trustee’s powers under the trust instrument) and an alteration of a trust’s terms (that was not within the trustee’s powers

under the trust instrument). The English and Welsh court had acknowledged that, ordinarily, making orders to alter a Foreign Law trust might be regarded as an exorbitant exercise of its jurisdiction, but justified it to some extent on the husband’s extraordinary conduct. The Jersey Court determined that:

- The court exercising its supervisory jurisdiction could give directions to a trustee to vary the terms of a trust to give effect to a foreign judgment,³⁹ provided the trustee had the powers under the terms of the trust to make a variation, but not an alteration, to the trust’s terms.⁴⁰
- It was able to provide consent on behalf of minor, unascertained or unborn beneficiaries under the principles in *Saunders v Vautier* and under art.47 of the Law in circumstances where all adult beneficiaries consented to an alteration of the trust.^{41,42}

The reliance of the Jersey Court on art.47 of the Law and the principles of *Saunders v Vautier* to alter the terms of the trust and substantially give effect to the English and Welsh judgment might be viewed as the court taking an expansive view of the powers available to it in this context.

A similar approach might be taken under variation of trust provisions in other common-law jurisdictions. The likelihood of this occurring may be tempered by views that the decision in *IMK Trust* may have been influenced by its exceptional facts and that, more recently, the England and Wales family court’s willingness to assert such exorbitant jurisdiction may be moderating. Notably, s.47 of Bermuda’s *Trustee Act 1975* enables the Bermuda court to authorise transactions relating to trust property (including alteration of a trust’s terms) if the court determines it expedient to do so and irrespective of whether all beneficiaries have agreed. That said, it may be novel for an application to alter a trust under s.47 to be brought following Foreign Orders in matrimonial proceedings and in circumstances where a beneficiary objects to the application.

In respect of a variation of trust that does not constitute an alteration, a trustee is under a duty to properly consider all relevant factors

³⁷ [2008] JLR 250

³⁸ As above, at para.62; see also *In the matter of the R trust* [2015] JRC 267A

³⁹ And its powers under art. 51 of the Law.

⁴⁰ *In the matter of IMK Family Trust* at para.76

⁴¹ 41 E.R. 482

⁴² *In the matter of IMK Family Trust*, at 88–89

when exercising its powers, and a Foreign Order impacting on beneficiaries, the trustee or trust property must be a relevant consideration in this context. In order to minimise the potential of a successful breach of trust claim against them, trustees may ordinarily seek the Domestic Court's approval before submitting to the jurisdiction of a foreign court implementing a decision to materially vary the terms of the trust or make a substantial payment out of the trust fund,⁴³ irrespective that firewall legislation (including that of Bermuda) will still be required to apply Domestic Law in respect of the issue determined by a Foreign Order that is within the firewall.

CONCLUSION

The recent amendments reflect the third reincarnation of Bermuda firewall legislation. Whether by good fortune, the deterrent effect of its firewall legislation, the approach of the Bermuda courts in trust cases generally or otherwise, there are few cases in which claimants have sought to enforce Foreign Orders that purport to vary Bermuda trusts. However, the Bermuda legislature and those who have had input into the drafting of the restated firewall provisions in the Act have considered cases in other jurisdictions where

firewall provisions have been tested and observed the evolution of such provisions in other IFCs. This has greatly assisted Bermuda's legislature to reflect on its position on relevant policy questions and influenced its decision to simplify the structure of and extend the firewall protections offered by Act.

Bermuda has also taken a balanced approach to protecting trust property against other creditors who were not specifically reasonably foreseen by settlors at the time the settlors transferred property into Bermuda law trusts.

Although important, firewall and fraudulent transfer legislation are not the panacea for protecting property held in Domestic Law Trusts from Foreign Orders. The nature of the settlors' powers, beneficial interests and location of the trust property, settlors and beneficiaries all must be taken into account when considering how a Domestic Law Trust might be best structured to protect trust property from Foreign Orders. It should also be remembered that firewall legislation ordinarily does not seek to protect against orders to vary a Domestic Trust made by a Domestic Court in matrimonial or other proceedings brought under Domestic Law.

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⁴³ See, for example, *In re H Trust*, 2006 JLR 280