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Hong Kong—Civil Justice Reform—An Update on Freezing Injunctions

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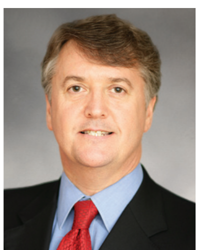

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As a result of the introduction of the Civil Justice Reform, the Hong Kong Courts have had new statutory powers since April 2009 to grant interim injunctions against parties having assets located in Hong Kong, whether or not the substantive dispute has a nexus with Hong Kong and whether or not the defendant is domiciled or present here. Accordingly, a claimant may now apply to the Courts in Hong Kong for a freezing order / "Mareva" injunction to restrain a party from dealing with or disposing of its assets—such assets usually being monies in bank accounts, goods or real estate.

Now, over a year after this radical change, we are pleased to report that Hong Kong has become an attractive jurisdiction for parties seeking security for a claim. We comment below on several trends that have emerged in the past year or so.

Real Risk of Dissipation of Assets

The main purpose of a freezing injunction is to prevent a defendant from defeating a judgment by taking steps to dispose of its assets or removing them from the Court's jurisdiction. When an applicant fails to show a real risk of dissipation, this generally means the end of the application. Yet, it is quite often very difficult for an applicant to gain intimate or detailed knowledge of another party's financial position or activities. The current trend, therefore, is for an applicant to argue that the defendant's conduct exhibits a "low standard of commercial morality" to justify an inference that there is real risk of dissipation.

This argument took hold in *Honsaico Trading Ltd.*[1] The defendant entered into contacts with the plaintiff for the purchase of 100,000 metric tonnes of rice. The defendant subsequently purchased the rice from another party. The reason for this was unclear, but it was sufficient for

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issuance of the injunction that the defendant not only breached the contract, but also intended to allege in proceedings–wrongfully–that the plaintiff was unable to perform its part of the contract and that the defendant was thus forced to terminate the contract.

The plaintiff commenced legal proceedings and applied for a *Mareva* injunction. Godfrey J., in determining the application to continue the injunction, stated that:

> "I'm not here to punish the defendant because I disapprove of its conduct; that is not the purpose of a *Mareva* injunction…I have, however, come to the conclusion that the defendant has exhibited an unacceptably low standard of commercial morality in its dealings with the plaintiff; and this drives me to conclude that there is a danger that if the defendant thought it was in its best interests to do it, it would not shrink from attempting to defeat the interests of the plaintiff under any judgment the plaintiff might obtain here."

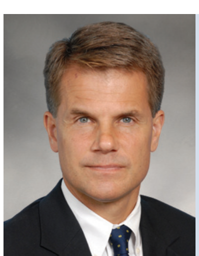
This reasoning was confirmed by the Hong Kong Court of Appeal and has been followed by the Hong Kong Courts in several other cases.

In *Silver Art Limited,* Deputy High Court Judge Saunders went as far to say that "where dishonesty is alleged, it is not necessary to establish risk of dissipation…". This was echoed by what Sir Nicolas Browne-Wilkinson V-C said in *Guinness Plc* that:

> "In my judgment dishonest behaviour is relevant to Mareva relief not by reference to what is pleaded but by reference to the possibility or likelihood of it existing. Whether or not pleaded, if there is dishonesty or suspicion of dishonesty, that will be an important ground on which Mareva relief can be obtained."

In *Hornor Resources. v. Savvy Resources Ltd.,*[2] the plaintiff's case on risk of dissipation was based mainly on the conduct of the defendant. The plaintiff buyer said that the defendant seller had acted dishonestly and had given false or misleading information to the plaintiff about the shipment and delivery under the contract. The defendant, as the seller, had no regard for its contractual obligations and had resold the products to take advantage of a rising market. It was also said that the defendant deliberately concealed from the plaintiff its intention not to make delivery to the plaintiff under the contract and further gave untrue explanations for its failure to make delivery.

The defendant's explanation for the failure to make delivery was that there was a delay in the delivery by its own supplier, but on the evidence put forward to the Court, Chu J. said this assertion was directly at odds with the contemporaneous emails that had been filed in the proceedings. Chu J. found that there were good arguable grounds for the plaintiff asserting that the defendant was dishonest in its dealings with the plaintiff, and that it deliberately concealed from the plaintiff its breach of contract and knowingly misled the plaintiff to believe that it was performing its contractual obligations. The Judge also found that the defendant was a BVI company incorporated in 2007 and did not seem to have an established place of business address, whether in Hong Kong or elsewhere. The plaintiff observed that since the defendant's management was said to have over 20 years of experience in the raw materials business, it would not be difficult for the defendant's management to operate the business under another corporate identity. Chu J. accepted that the Court should examine with care allegations that the defendant had acted dishonestly and should not too readily infer a real risk of dissipation from the conduct or commercial morality of a defendant. It was important to bear in mind that ultimately



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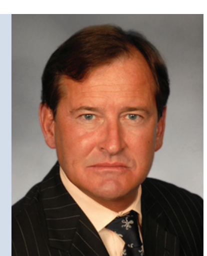
From the Editors: W. CAMERON BEARD (PARTNER, NEW YORK) AND JEREMY J.O. HARWOOD, M.A. (OXON) (PARTNER, NEW YORK)

Blank Rome's international practice continues to grow, just as the firm itself continues to expand both internationally and within the U.S. In this issue we present articles on international themes authored by lawyers from various departments within our firm, as well as articles by lawyers from our international litigation practice group. We would welcome your comments.



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the question is whether on the evidence, which includes evidence of the defendant's conduct in his dealings with the Plaintiff, a refusal of injunction would involve a real risk that a judgment in favour of the plaintiff would remain unsatisfied. Chu J. was of the view that the Plaintiff had made out the case of real risk of dissipation.

While the Hong Kong Courts appear to be exercising caution when applying the concept of "low standard of commercial morality," they appear to be taking a more open approach in granting injunctions on this basis.

Injunctions Affecting Assets in the Hands of Third Parties

It is trite law that a *Mareva* injunction can be enforced only against the assets of a defendant, *i.e.,* against assets belonging to the defendant and not to a third party.[3] It is also established, however, that a *Mareva* jurisdiction can be exercised against a third party where there is good reason for supposing that the assets are in fact the assets of the defendant.[4] Nevertheless, in order to protect innocent third parties, the test of "good reason" with respect to the ownership of assets requires a higher standard of proof or threshold than the test of a "serious issue to be tried."[5]

In *Hui Chi Ming*[6], the plaintiff applied to extend the scope of the *Mareva* injunction to encompass a discretionary trust, of which the defendant was an eligible beneficiary. The defendant's mother was the settlor and the trust was managed by a third party professional trustee company. However, the defendant's injection of his assets into the trust made the defendant a "notional settlor."

Prior to the determination of the plaintiff's application, the issue was whether it was necessary for the plaintiff to show that the assets held by the third party were the defendant's assets and that the assets were available to satisfy a judgment by way of execution. The Hong Kong Court of First Instance said it was not necessary for the plaintiff make this showing at the interlocutory injunctive stage. The Court followed the English Court's decision in *Dadourian Group International Inc.*[7] that the main issue is whether the defendant has "substantive reality of control." It was thus not necessary to establish the defendant's beneficial ownership of the trust in a strict trust law sense. Nevertheless, after considering the factors put forward by the plaintiff, the Court determined there was no good reason to suppose that the defendant had substantive reality of control of the trust. The plaintiff's application was therefore dismissed.

It is quite common for wealthy families to set up discretionary family trusts to protect family assets and to provide a source of future funds for family members, particularly young children. As the head of the family is usually the settlor of this type of trusts, there is a great temptation for that person to retain control, directly or indirectly, over the trust. Such control may constitute "substantive reality of control" in the context of *Mareva* injunctions. Whether or not the plaintiff can successfully apply the trust assets to satisfy a judgment by way of execution is a separate issue.

Loss—What Does It Mean in the Context of an Undertaking?

Where a *Mareva* injunction is granted on an *ex parte* basis, the applicant is generally required to give an undertaking in the following form:

> "If the Court later finds that this Order has caused loss to any of the Respondents [or any other parties], and decides that any of the Respondents should be compensated for that loss, the Petitioners will comply with any Order the Court may make."

But what does the term "loss" actually mean?

In *Re. The New China Hong Kong Highway Ltd.*[8], the petitioners obtained an injunction order against the defendants upon giving an undertaking of the type described above. The petitioners supported the undertaking by making a payment of HKD2,000,000 into court. The order was subsequently discharged and the petitioners applied to the Court to release the money paid into court. The respondents objected on the ground that the undertaking should cover the legal costs incurred by the respondents in contesting the order.

Harris J. stated that the starting point is what the petitioners must reasonably have understood themselves to be undertaking. That is, when being asked in the hearing, whether the judge and the petitioners' counsel would have agreed that the undertaking extended to cover the legal costs of discharging the order? The Judge answered this in

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negative and ruled that "the undertaking cannot fairly be read as extending to cover the legal costs of the application to set aside the order." The Judge refused to extend the scope of the undertaking, finding that the petitioners should not be treated as giving an undertaking that as a matter of fact they did not give.

Although it had generally been believed, prior to the *New China Hong Kong Highway* case, that the term "loss" did not cover legal costs, there had been no Hong Kong authority or text on this issue. We now finally have a case confirming the point.

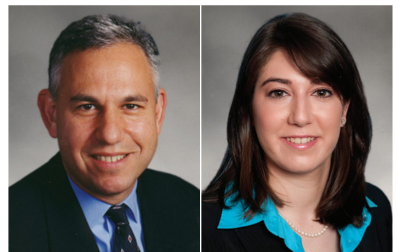
Conclusion

Case law concerning preliminary injunctive relief continues to develop in Hong Kong, but the general trend clearly demonstrates that the Hong Kong Courts are willing to grant such relief under an increasingly broad set of circumstances, while exercising caution not to infringe on the rights of third parties. ■

1. *Honsaico Trading Ltd. v. Hong Yiah Seng Co. Ltd.* [1989] HKCFI 336; HCCL 116A/1989, 31 October 1989.
2. *Honor Resources International Co. Ltd. v. Savvy Resources Limited* [HCA335/2010].
3. *Federal Bank of the Middle East Ltd. v. Hadkinson* [2001] 1 WLR 1695.
4. *S.C.F. Finance Co v. Masri* [1985] 1 WLR 876.
5. *Allied Arab Bank v. Taj El Arefin Hajjar and others, unrep., The Times,* 11 January 1988.
6. *Hui Chi Ming v. Koon Wing Kee and others* [2010] HKCFI 371; HCA 1479/2009, 1 April 2010.
7. *Dadourian Group International Inc v. Azuri Ltd.* [2005] EWHC 1768 (Ch).
8. [2010] HKCFI 192; HCCW 550/2009, 2 March 2010.

Internal Revenue Service May Pursue Foreign-Owned Businesses Operating on Outer Continental Shelf[1]

BY JOSEPH T. GULANT (PARTNER, NEW YORK) AND JENNIFER L. BELL (ASSOCIATE, NEW YORK)



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In the aftermath of Hurricane Katrina and the *Deepwater Horizon* incident, an increasing number of foreign vessels and businesses have engaged in construction and repair activity on the U.S. Outer Continental Shelf ("OCS") in the Gulf of Mexico. These and other foreign-owned businesses already operating on the OCS, however, should take heed. The Internal Revenue Service ("Service") has fired a shot across the bow of foreign owned businesses in an attempt to eliminate perceived competitive advantages (*i.e.,* lower tax rates) over U.S. owned businesses operating on the OCS.

On October 28, 2009, the Service issued an Industry Directive ("Directive") in which it announced that it will target foreign vessels that are engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS that may not (in its view) be complying with U.S. tax filing requirements.

Pursuant to the Directive, the Service is aggressively increasing its enforcement activities with respect to foreign taxpayers engaged in certain activities on the OCS. The results are often unanticipated and counterintuitive, and the Service has identified the following categories of foreign taxpayers as engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS that it believes fall into the U.S. tax net:

1. contractors that perform services on the OCS (such as testing, drilling, repair, and salvage work);
2. vessel operators that transport supplies and personnel between U.S. ports and locations on the OCS; and
3. owners and/or operators of foreign-registered vessels that bareboat or time charter vessels to persons that are engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS.

In short, a foreign contractor that provides services on the OCS that relate to the exploration and exploitation of natural resources is generally considered to perform those services in the U.S. and derive U.S. source income. In addition, the foreign contractor may be engaged in a U.S. trade or business for purposes of the tax laws, and therefore subject to tax on a net basis at graduated rates.

A foreign corporation that derives income from transporting cargo and crew to locations on the OCS (to the extent that activities are related to the exploration or exploitation of natural resources) also derives U.S. source income if the transportation begins and ends within the U.S. As a result, the foreign corporation may be subject to U.S. federal income tax at a flat rate of 30 percent on the gross amount of its U.S.-source passive investment income (in the absence of a reduction or exemption pursuant to an applicable Treaty) that is not effectively connected with a trade or business in the U.S. The foreign corporation will also likely be subject to income tax withholding. Alternatively, the foreign corporation may be engaged in a U.S. trade or business, provided its activities are regular and continuous; consequently, the foreign corporation may have U.S. tax return filing obligations. If the foreign corporation does not file its U.S. tax return, it will generally be denied otherwise allowable deductions.

A foreign corporation that charters vessels on either a bareboat or time charter basis also generally derives income from activities within the scope of these rules for the period of time during which the vessels are engaged in the exploration for, or exploitation of, natural resources on the OCS. It is the Service's position that revenue from time and bareboat charters should be characterized as rental income and, therefore, should be sourced based on where the vessel is used. Consequently, it is the Service's view that such income should be sourced to the U.S. for the period of time during which the activities are performed domestically and/or on the OCS since the OCS is treated as part of the U.S. for these purposes.

Both time charterers and bareboat charterers must keep potential U.S. income taxes in mind when negotiating the terms of their charters. For example, it may be appropriate for such entities to negotiate tax gross-up provisions in their leasing arrangements to cover the potential incidence of U.S. taxation and thereby preserve their anticipated after-tax economic returns from the leases.

Finally, the employer of a foreign individual that may wittingly or unwittingly become a U.S. tax resident as a result of work performed in the OCS over an extended period may be liable for certain income and employment taxes.

In light of the recent sabre rattling by the Service relative to tax enforcement activities with respect to the exploration for, or exploitation of, natural resources on the OCS and the up-tick in U.S. protectionist tax policies, the tax risks raised by the abovementioned rules are likely to become much more than a theoretical concern. In fact, the Service has already begun contacting certain foreign companies with respect to these issues, and the Service's activity is likely to increase as a result of the creation of the OCS Task

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Foreign-Owned Businesses (continued from page 5)

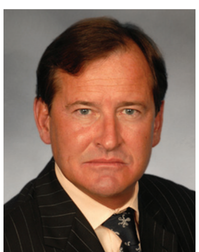
Force. U.S. and foreign companies engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS would be well advised to have their operations reviewed to determine whether they are in compliance with these onerous and counterintuitive tax provisions.

To ensure compliance with IRS Circular 230, you are hereby notified that any discussion of federal tax issues in this article is not intended or written to be used, and it cannot be used by any person for the purpose of: (A) avoiding penalties that may be imposed on them under the Code, and (B) promoting, marketing or recommending to another party any transaction or matter addressed herein. This disclosure is made in accordance with the rules of Treasury Department Circular 230 governing standards of practice before the Service. ■

1. Disclaimer: This article is prepared and published for informational purposes only and should not be construed as legal advice.

Money Judgment and Arbitral Award Enforcement in New York: Yes We Can![1]

BY JEREMY J.O. HARWOOD, M.A. (OXON) (PARTNER, NEW YORK)



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New York State's highest court, the Court of Appeals, recently decided a case of major importance to parties seeking to enforce and collect on money judgments or arbitration awards.[2] The question that the Court was asked to decide under the governing New York law, as certified to it by the Second Circuit Court of Appeals, was:

> . . . whether a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to CPLR article 52, when those stock certificates are located outside New York.

The Court of Appeals answered the certified question in the affirmative.

The Facts

The background facts were, briefly, that the judgment creditor had obtained a judgment that he then sought to have recognized in New York and to enforce by bringing a separate action against the Bank of Bermuda by serving a restraining order on its branch in New York. The bank finally consented to personal jurisdiction, but claimed that the share certificates pledged by the judgment debtor were physically located in Bermuda. In the interim, the obligations for which the share certificates had been pledged were satisfied and, despite the turnover order served on it in New York, the share certificates were transferred by the Bank to a Bermudian company existing for the judgment debtor's benefit. The Bank argued:

> where a judgment debtor is not within the New York Court's personal jurisdiction the Court's authority is based on *in rem* jurisdiction over debtor's property (*i.e.,* not "extraterritorial") even if personal jurisdiction exists over the garnishee.

The Ruling

The Bank's argument was rejected. The majority held:

1. "Enforcement proceedings and attachment proceedings . . . differ fundamentally in respect to a court's jurisdiction";
2. "Pre-judgment attachment" requires jurisdiction over *property (i.e., in rem);*
3. There is no "express territorial limitation barring the entry of a turnover order to transfer money or property into New York from another state **or country**" (emphasis added);
4. the Court's authority is not based on *in rem* jurisdiction but *in personam* jurisdiction over the judgment debtor or garnishees; and
5. a New York court may order the turnover of out-of-state assets held by the judgment debtor and/or garnishees over whom it has personal jurisdiction.

Practical Application

The practical application of this decision is well expressed by the Dissent:

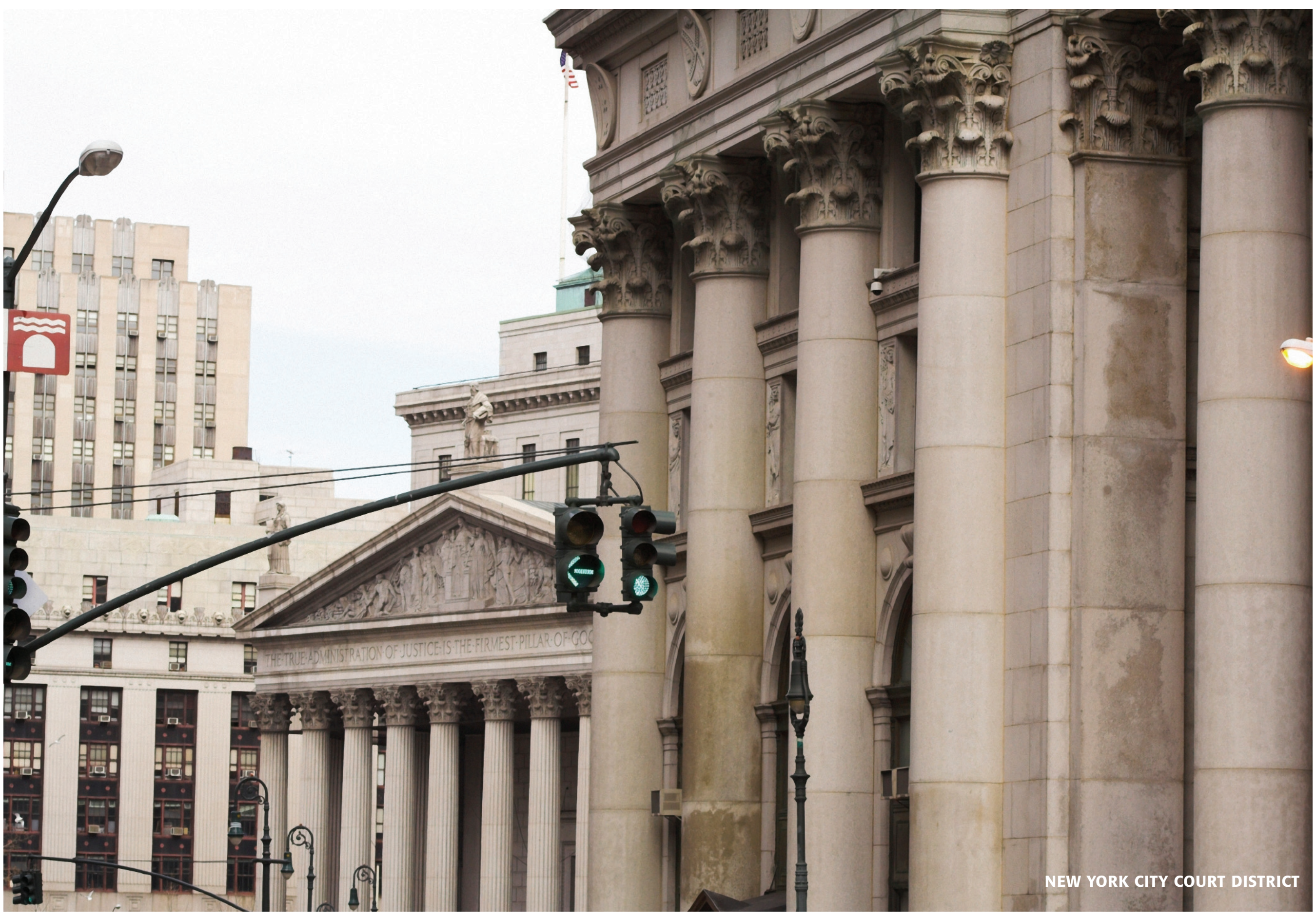
> The majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach

an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world. If the bank has a New York branch—either one that is not separately incorporated, or a subsidiary with which the parent's relationship is close enough to subject the parent to New York jurisdiction—the judgment creditor, having registered the judgment in New York, can obtain an order requiring the asset to be delivered here. It is, apparently, irrelevant whether New York has any relationship with the judgment creditor, the judgment debtor or the dispute between them—indeed, in this case, so far as the record shows, no such relationship exists.

Conclusion

- Enforcement of foreign money judgments/awards through proceedings against banks as garnishees is readily available in New York.
- Personal jurisdiction in New York over banks that might hold the assets of the foreign judgment debtor, in accounts anywhere in the world, is an option to explore.
- Dozens of foreign banks are potentially subject to personal jurisdiction, through their branches in New York. *See* www.chips.org/about [customers] (49 participants); *See also* www.banking.state.ny.us/supinst.htm (listing 83 "foreign branches").
- Enforcement is available by:
  1. Information Subpoenas and Restraining Notices.
  2. Turnover Orders on garnishees affecting all property in which the judgment debtor has an interest at the time of service and coming into the garnishees' possession or custody after service (continuous service is not required after the initial service). ■

1. *Koehler v. Bank of Bermuda Ltd.,* 883 N.Y.S.2d 763 (2009).



NEW YORK CITY COURT DISTRICT

Divorce and Off-Shore Trusts; A Cautionary Tale

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One thing a matrimonial lawyer learns early in his or her career is that a motivated spouse will go to great lengths to gain a financial advantage through creative pre-divorce financial planning. One device used in an effort to circumvent required distribution of assets between spouses upon termination of a marriage is a trust funded by one spouse with marital assets.[1] In this regard, "off-shore" trusts and similar devices have become increasingly popular in recent years. However, such structures can be successfully challenged where it is clear that there has been an effort by a spouse to avoid the required distribution of marital assets.

In New York, upon divorce, the parties' "marital property" is equitably distributed between them. Marital property (simply stated) is property acquired by either of the spouses during the marriage and owned at the time the divorce action is commenced. Which party holds title to an asset is not relevant in determining whether or not the property is marital property. If it is owned by either one, or both of the parties, it is marital property.

In a trust, the property held by the trust is "owned" by the trustee for the benefit of the beneficiaries. So long as the party funding the trust (the "grantor") is not a trustee or beneficiary of that trust, the property in the trust is not owned by the grantor. It follows that if a grantor spouse were to create a trust in which he or she were neither a trustee nor a beneficiary, the trust assets would not be considered marital property.

Yet, there are some obvious problems that make using a standard trust unattractive as a pre-divorce financial tool. First, the funding spouse loses legal control of the asset and this is generally not desirable. Second, if a trust is established within a short time prior to the commencement of the divorce action, the trust structure may be ignored by the judge overseeing the divorce proceedings. In such a case, the corpus of the trust could be deemed marital property and the value deemed distributed to the funding spouse. As a result of such limitations, and consistent with what *New York Times* editorial writer and author Thomas Friedman describes as the "flattening of the world," creative spouses in recent years have turned with increasing frequency to the use of "off-shore" trusts and similar devices.

What makes off-shore structures appealing—at first glance—is that some operate very differently from the typical

American trust. Often, someone other than the trustee controls the trust corpus and someone other than a named beneficiary may in fact benefit from distributions—including the funding spouse. Add to this: (i) possibly favorable tax treatment, (ii) the placement of assets beyond the jurisdiction of the court, and (iii) disclosure rules that make it very difficult for the other spouse to obtain financial information or documentation concerning the trust or similar structure, and the appeal to the spouse considering such creative financial planning is apparent. Some popular jurisdictions with favorable law in this area are the Channel Islands (Jersey and Guernsey), the Cook Islands, and Liechtenstein. However, as with most things that sound too good to be true, off-shore devices do not always serve their intended purpose.

Consider the case of the divorcing Riechers (*Riechers v. Riechers,* 267 A.D.2d 445; 701 N.Y.S.2d 113 [2d Dep't 1999]). Mr. Riechers took $4,000,000 of marital property to create an off-shore trust in the Cook Islands two years before the commencement of the divorce action. Mr. Riechers argued that the trust was not marital property since it was not owned by the parties. Mrs. Riechers argued that the property that funded this off-shore trust was marital property and that those assets should thus be subject to equitable distribution. After a trial at which substantial evidence was presented, the court agreed with Mrs. Riechers and directed Mr. Riechers to pay her $2,178,865, one-half the value of the off-shore trust. That finding was upheld on appeal.[2]

Also worth considering is the possibility that a spouse who has established an off-shore trust could be sent to prison for contempt of court if the judge were to find that the spouse has the ability to repatriate funds from the foreign trust but refuses to do so.

Despite the fact that off-shore structures present substantial risks for the funding spouse, they remain a popular tool for those seeking to avoid the required distribution of marital assets. Aggressive and thorough lawyering is required to discover and expose the relevant facts, and to ensure that each spouse receives the marital property to which he or she is entitled. ■

1. Of course, there are many legitimate estate planning reasons for the creation of trusts. Those "legitimate trusts" are not the focus of this article.
2. Blank Rome LLP is the successor firm to Tenzer Greenblatt LLP, the law firm that represented Mrs. Riechers.

Sovereign Immunity—*FG Hemisphere Associates LLC v. Democratic Republic of Congo & Others*

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The issue of sovereign immunity was recently considered by the Hong Kong Court of Appeal in the context of the enforcement of an arbitral award. Judgment was handed down in February 2010.

The Court had to consider whether a foreign state that is not a party to the New York Convention waives state immunity by referring a dispute to arbitration in a country that is a signatory to the New York Convention.

The Court also addressed whether Hong Kong, a Special Administrative Region of the People's Republic of China ("PRC"), follows the general common law approach to the doctrine of state immunity from jurisdiction and execution (known as the "restrictive doctrine") or the PRC approach, which is that states are entirely immune from the jurisdiction of the courts of other states ("absolute immunity").

Background

During the 1980s, a Yugoslav company, Energoinvest, entered into contracts in the Democratic Republic of Congo ("DRC") to construct a hydro-electric facility and high-tension electric transmission lines in the DRC. The DRC entered into credit agreements with Energoinvest whereby the DRC was financed by Energoinvest for a substantial percentage of the cost of the works. The credit agreement incorporated ICC arbitration clauses. The DRC subsequently defaulted on its repayment obligations.

The parties agreed to refer disputes to a court appointed in accordance with the Rules of the International Chamber of Commerce in Paris (the ICC Rules). Article 28(6) of those Rules reads:

> "Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

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Subsequent arbitrations culminated in two final awards in the sums of US$11.725 million and US$22.525 million, respectively, plus interest.

In 2004, Energoinvest assigned to FG (a company specialising in investing in emerging markets and distressed assets) the entire benefit of principal and interest payable by the DRC under the awards. FG recovered US$2.783 million through enforcement proceedings in other jurisdictions.

FG became aware that as part of a major investment program in the DRC by Chinese state-owned companies, those companies would acquire mineral exploitation rights for which entry fees were payable by them to the Government of the DRC. By this time, the sum sought exceeded US$100 million, including accumulated interest. In 2008, FG commenced proceedings in Hong Kong seeking leave to enter a judgment to enforce the arbitral awards; the appointment of receivers by way of equitable execution against sums said to be contingently payable by the consortium of Chinese enterprises to the DRC; and an injunction to prevent payment of those sums to the DRC. The second, third, and fourth defendants were companies incorporated in Hong Kong with limited liability, each being a subsidiary of the China Railway Group Limited a company incorporated in the PRC.

Decisions

In the Court of First Instance, the issues before Reyes J. were:

1. whether absolute immunity or the restrictive doctrine applied;
2. if the restrictive doctrine applied, into which category the relevant state actions in this instance fell; and
3. if immunity was absolute, whether the DRC had waived immunity by submitting itself to arbitration.

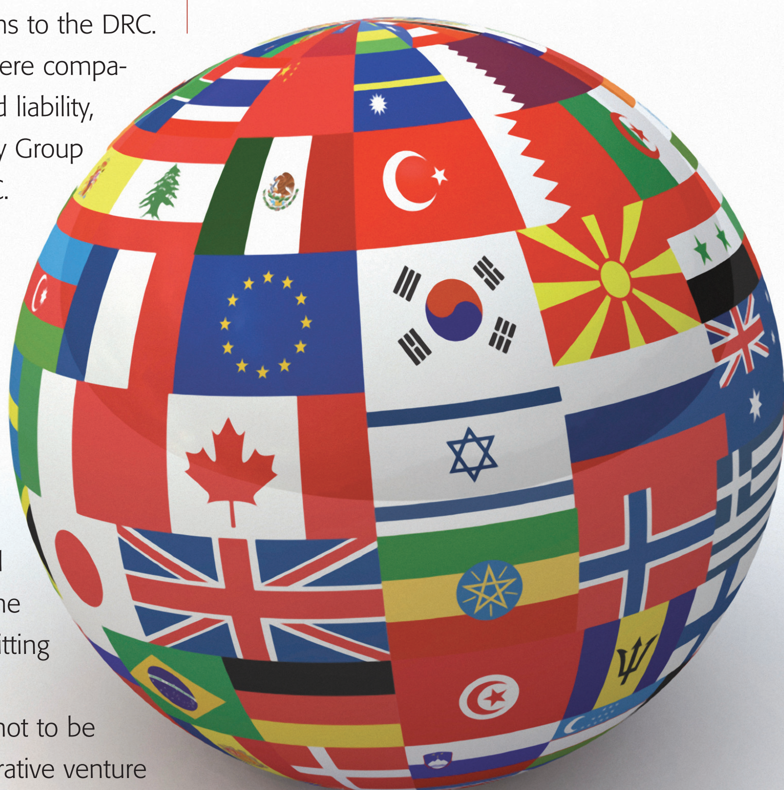
Reyes J. found the relevant transaction not to be of a commercial nature, but rather a cooperative venture between two sovereign states. As such, he considered it unnecessary to determine the issue of immunity, although he expressed a preference for the restrictive doctrine.

The Court of Appeal held, by a majority of 2-1, that the common law of Hong Kong as of June 30,1997 recognized the doctrine of restrictive immunity, and that this principle remained the position in Hong Kong. The Court also found that whilst the matter had not yet been fully determined, there was evidence that part of the fees when paid were intended for commercial purposes.

The Court held unanimously that the submission of the DRC to the ICC arbitration did not constitute waiver to the jurisdiction of the Hong Kong courts to consider an application for leave to enforce those awards, or waiver against execution.

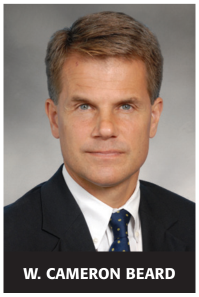
The decision has been appealed and is likely to be heard by the Court of Final Appeal in late 2010 or early 2011.

Pending a decision by the Court of Final Appeal, the case clarifies the common law position of restrictive immunity in Hong Kong, but is also important in highlighting the need to obtain clear and unambiguous waivers of sovereign immunity when contracting with states. ■



Obtaining Evidence in the United States for Use in Foreign Private Arbitrations

BY W. CAMERON BEARD (PARTNER, NEW YORK)



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Although it has become easier in recent years to obtain evidence in the U.S. for use in foreign court proceedings, the same cannot be said with respect to evidence for use in foreign private arbitrations. There is as yet no uniform rule in this area—much may depend on where in the United States such evidence is located.

In seeking such evidence, a party cannot resort to the Hague Convention for the Taking of Evidence Abroad in Civil or Commercial Matters. That convention assumes pending judicial, rather than arbitral, proceedings. Rather, the appropriate legal device would be a federal statute, 28 U.S.C. § 1782 ("section 1782"), which allows a federal court to order a witness within the court's geographical jurisdiction to provide testimony or documents for use in a proceeding before a foreign or international tribunal.

The currently open question is whether a foreign private arbitration or arbitral panel is a "tribunal" within the meaning of section 1782.

Prior to 2004, several federal appellate courts had determined that foreign private arbitrations were not tribunals within the meaning of the statute. However, in 2004, the United States Supreme Court issued its decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in which it interpreted section 1782 fairly broadly in a number of areas, among these being the scope of the term "tribunal." Although *Intel* did not specifically take up the question whether foreign private arbitrations constituted tribunals for purposes of section 1782, *dictum* in the decision suggested that such arbitrations might in fact fall within the meaning of the term.

In the wake of the Supreme Court ruling, therefore, several district courts questioned the validity of the pre-*Intel* appellate decisions prohibiting use of section 1782 for collection of evidence in the U.S. for use in foreign private arbitrations. Those early decisions have been called into question, however, by two recent appellate court decisions, as well as several district court decisions, hewing to the old rule. Nevertheless, and despite such contrary rulings, various district courts have continued to maintain that the effect of *Intel* was to allow collection of evidence in the U.S. for some or all foreign private arbitrations.

At present, the situation can be fairly summarized as follows. Applications to a district court for evidence for use in a foreign private arbitration are unlikely to be successful in the federal Fifth Circuit (comprising the federal districts within the states of Louisiana, Mississippi, and Texas) or Third Circuit (comprising the federal districts within the states of Delaware, New Jersey, and Pennsylvania). Similarly, there are unfavorable decisions for the party seeking such evidence in the Middle District of Florida and the Northern District of Illinois. Conversely, district court decisions in Massachusetts, Minnesota, Connecticut, New York, and Georgia suggest that such applications might be more favorably received there. That said, some but not all of the pertinent cases suggest that while an arbitration conducted under UNCITRAL rules and/or pursuant to treaty obligations might constitute a "tribunal," a truly private arbitration would not. The situation is currently quite fluid. Accordingly, any decision to seek evidence in the U.S. for use in a foreign arbitration should be considered carefully, in consultation with counsel and with reference to the rapidly-changing case law. The question whether section 1782 does or does not permit the collection of evidence in the U.S. for use in a foreign private arbitration will only be determined conclusively when the U.S. Supreme Court weighs in on the issue. ■

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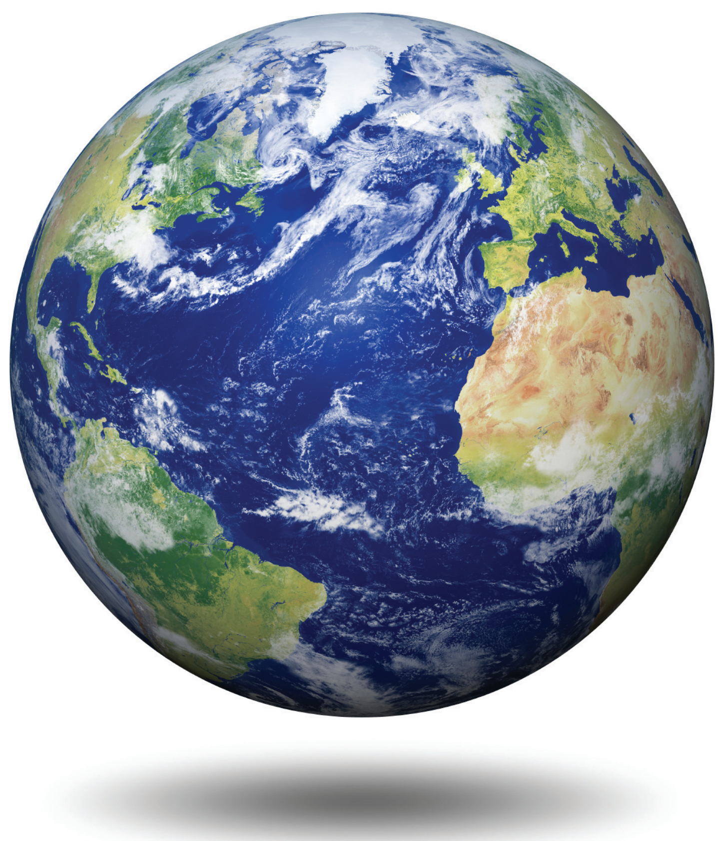

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