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Understanding Bandone V. Sol Properties

Law360, New York (October 30, 2009) -- The Cayman Islands has long enjoyed its status as one of the world's principal offshore financial centers, providing a stable and tax-neutral platform for conducting business and facilitating transactions between participants from around the globe.

As is the case in all business transactions, disputes will arise from time to time, and investors and businesses using the Cayman Islands do so with the knowledge that the professional excellence available in the Cayman Islands extends to its capabilities in dispute resolution.

Such disputes inevitably have an international component, having regard to the international characteristics of the business conducted in the Cayman Islands and cross-border litigation frequently involves an interplay of the judicial process and judgments from multiple jurisdictions. The needs of business require that the interplay be effective and timely.

It has always been possible to domesticate a foreign money judgment into the Cayman Islands, for the purpose of enforcing against local assets, by suing on the basis of the debt proven by the money judgment and bringing a summary judgment application thereon.

However, nonmoney judgments have proven more difficult to enforce under common law in other jurisdictions. In a recently-reported decision by the Grand Court of the Cayman Islands in the case of *Bandone Sdn Bhd v. Sol Properties Inc.*[1], this impediment has been substantially reduced.

Prior to *Sol Properties*, enforcing foreign nonmoney judgments in the Cayman Islands faced the restrictions described in Rule 35 of *Dicey Morris and Collins' The Conflict of Laws*[2], which has been adopted by courts throughout the common law world ("Rule 35"):

"... a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment ... may be enforced by a claim or counterclaim for the amount due under it if the judgment is (a) for a debt, or a definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or the penalty); and (b) final and conclusive, but not otherwise." [3]

Rule 40(1) can also be a further impediment regarding nonmoney judgments, in that:

"A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition ... if the subject matter of the proceedings wherein that judgment was given is immovable or movable property which was at the time of the proceedings situate in that country."

The facts in *Sol Properties* involved a classic case of a nonmoney judgment falling foul of Rule 35: a claim for specific performance of a contract for the transfer of shares.

HRH Prince Jefri of Brunei held shares in *Sol Properties Inc.*, a Cayman company, which in turn owned significant assets. Prince Jefri had agreed to transfer those shares to the Brunei Investment Agency (BIA), however a dispute arose in respect of that agreement and Prince Jefri did not transfer the shares pending resolution of the dispute.

The BIA then obtained an order for specific performance in the High Court of Brunei, directing Prince Jefri to transfer the *Sol Properties* shares to the BIA's nominee Bandone. Prince Jefri again declined to do so on the grounds that his dispute had yet to be resolved.

The BIA then obtained a further order pursuant to which the Registrar of the High Court of Brunei executed certain instruments purportedly transferring the *Sol Properties* shares to Bandone. An application was brought by Originating Summons in the Cayman Islands for rectification of the Register of Members of *Sol Properties* to reflect the purported transfer of the shares to Bandone.

The BIA's application appeared to fall squarely within the prohibition against the enforcement of nonmoney judgments set out in Rule 35, as well as (arguably) the prohibition against the Brunei court giving a judgment in rem in respect of movable property situate in the Cayman Islands under Rule 40.

The Grand Court dealt with the Rule 40 objection on the basis that the Brunei orders did not in fact purport to pass legal title from Prince Jefri to Bandone, which could only take place in the Cayman Islands, but merely determined the rights between the parties with regard to the shares (accepting the reasoning of the Privy Council in *Pattni v. Ali* [4] and the House of Lords in *Castrique v. Imre* [5]).

The first order was therefore held to be an order in personam for specific performance; the second order was held to be entirely ancillary to the earlier order and made only for the purpose of perfecting it and was also made in personam.

In deciding the fate of Rule 35 in the Cayman Islands, the Grand Court noted that the issue had been previously touched upon by the court in *Miller v. Gianni*[6].

There it was held for the purposes of an amendment to pleadings that it was at least arguable that a foreign nonmoney judgment might be held to be enforceable in the Cayman Islands, having regard to recent decisions by the Privy Council on appeal from the Isle of Man in *Pattni v. Ali* and also by the Supreme Court of Canada in *Pro Swing Inc. v. Etna Golf Inc.*[7]. These decisions respectively sought to restrict application of, or departed altogether from, Rule 35.

Sol Properties definitively decided that foreign nonmoney judgments are enforceable in the Cayman Islands. The Grand Court removed all doubt on that point, holding that:

“The ability to enforce directly foreign judgments and orders made in personam is no longer confined in the Cayman Islands to judgments for a debt or a definite sum of money.”

Notably however, the Grand Court also held that it retained a judicial discretion regarding such enforcement so as to ensure that such enforcement would not disturb the structure and integrity of the Cayman Islands’ legal system. It considered that there is a need for balance and restraint and a careful and nuanced approach in accepting such enforcement.

The Grand Court further held that, in addition to the traditional requirements that the judgment be final and conclusive and be rendered by a court of competent jurisdiction with jurisdiction over the parties, it also must be of a nature which the principle of comity requires the court to enforce.

In this respect the Grand Court specifically noted that comity does not require the Cayman Islands to extend greater judicial assistance to foreign litigants than it does to its own litigants.

Further, the discretion which underlies equitable orders can also be exercised when deciding whether or not to enforce one. The Grand Court accepted the broad proposition that general considerations of fairness are relevant in this exercise.

In its judgment the Grand Court ultimately directed the immediate variation of the Register of Members of Sol Properties Inc. without any further proceeding.

Importantly, however, in doing so it fully considered the arguments Prince Jefri intended to bring to bear against the BIA were full writ proceedings to have been initiated.

The court considered that the rights and obligations between the parties had been previously adjudicated to a final conclusion in Brunei, and found nothing in the circumstances requiring it to exercise its discretion to refuse the application.

The result of the Sol Properties decision for the Cayman Islands is that judgments determinative of the rights and obligations of foreign litigants can be effectively and rapidly recognized and enforced in the Cayman Islands without the need for full fresh proceedings.

This of course enhances the effectiveness of the Cayman Islands in its role as an international financial centre, and increases the ability of businesses structured in the Cayman Islands to have disputes that are adjudicated in other jurisdictions brought to the Cayman Islands for implementation on a cost-effective basis — albeit subject to principles of fairness and equity in doing so.

That result naturally has the effect of increasing the ability of business participants with Cayman Islands-based structures to resolve their disputes effectively and without the need to be concerned for the limitations which remain in effect for other jurisdictions that still follow Rule 35 as part of their domestic law.

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Disclaimer: Appleby represented HRH Prince Jefri in the case of Bandone Sdn Bhd v. Sol Properties Inc.

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[1] [2008] CILR 301

[2] 14th Ed. Sweet & Maxwell 2006

[3] Ibid. page 574-5.

[4] [2006] UKPC 51

[5] (1870) LR 4 HL 414

[6] [2007] CILR 18

[7] [2007] 3 LRC 338