

“GIMME SHELTER!” OFFSHORE ASSET PROTECTION TRUSTS AND FIREWALL AND FRAUDULENT TRANSFER LEGISLATION

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To what extent are assets in offshore trusts sheltered from claims made under other jurisdictions' laws against settlors, beneficiaries, trustees or trust property? Many offshore jurisdictions have experienced challenges drafting effective and appropriate firewall legislation. Consequently, many jurisdictions have recently updated key aspects of their firewall legislation. In contrast, the concept of asset protection trusts and fraudulent transfer legislation may have received less attention recently. From the perspective of Bermuda, this article considers factors relevant to protecting trust property from creditors' claims and further examines how conflict of laws rules work and the competing policy considerations and practical realities that offshore legislatures weigh up when developing conflict of laws rules applicable to trusts.

WHAT IS AN ASSET PROTECTION TRUST?

A trust is not a legal person. An express trust is a fiduciary relationship whereby a person, the settlor, transfers property a trustee to hold and apply for the benefit of one or more persons or purposes in accordance with the trust's terms.

There is no legal definition of an asset protection trust under the law of Bermuda or in most other jurisdictions. An asset protection trust may 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 may also be influenced by the conflict of laws rules under the governing law of the trust.

However, asset protection is rarely the sole reason why a person might wish to form a trust. Arguably, the overriding reason why trusts remain attractive to private clients is the flexibility that they provide for long term succession planning.

Most jurisdictions permit trusts to last for many years. Aside from trusts over Bermuda land, Bermuda law trusts established on or after 1 August 2009 can have an indefinite duration if the trust instrument permits it. As people are living longer, problems increasingly arise when individuals lose mental capacity and are for example, unable to exercise or properly exercise voting or other rights in relation to their assets, which may include controlling shareholdings in the family business. Serious delays may occur in circumstances where an individual's vote is required before the business can enter into an important transaction.

Trusts that provide trustees with discretionary dispositive and management powers can facilitate continuity when transitioning from one generation to the next. Trusts may provide flexibility to adapt to unforeseen circumstances without having to, for example, dispose of the assets or apply to a court for the appointment of a guardian, receiver, administrator or executor of an individual or an individual's estate.

Trusts can also facilitate efficient tax planning. For example, persons whose family members may be moving from one jurisdiction to another might wish to ensure they do not unwittingly expose existing capital and future income and gains on such capital to taxation in the jurisdiction where they intend to become resident. However, on occasions, depending on the settlor's tax residency and other circumstances, forming a trust may be unattractive for tax purposes.

Back to asset protection. The nature of the claims with which a trust settlor may be concerned when considering whether to form a trust may include (among others):

- breach of contract or negligence claims from persons with whom the settlor or beneficiaries have transacted business;
- forced heirship claims from the executors or administrators of the settlor or a beneficiary's estate, or from the settlor's spouse or children;
- family provision or inheritance claims brought by a spouse, former spouse, child or other dependent of the settlor or spouse;
- claims brought by a former spouse of the settlor or beneficiaries based on community property rules;
- divorce or separation proceedings from a former spouse of the settlor or a beneficiary; and
- claims brought by a bankruptcy receiver in connection with the winding up of an insolvent settlor's or beneficiary's estate.

The following non-exhaustive list of factors is relevant to the asset protection qualities of a trust:

- The settlor should clearly intend to establish and the terms of the trust instrument should reflect the intentions of the settlor in respect of how the trust property is to be managed and distributed;

- A trust that appears valid on its face may be at risk of being set aside if the trustee and the settlor had in fact intended for the trust to be managed and distributed in accordance with the directions of the settlor from time to time rather than in accordance with the trust instrumentⁱ;
- the governing law of the trust: applicable perpetuity periods; and applicable conflict of laws rules including *firewall legislation* and *fraudulent transfer* legislation;
- the settlor's financial position- a settlor who is insolvent or intends to transfer property into a trust to defeat the interests of creditors are vulnerable to being set asideⁱⁱ;
- the nature of the property intended to be held in trust (e.g. movable or immovable) and the jurisdiction where the property is situated;
- the mental or other capacity of the settlor to transfer property into a trust;
- the capacity of a settlor to transfer of property into a trust made during the settlor's life time (i.e. an *inter vivos* transfer) may be treated different from testamentary transfers under applicable legislation;
- is the trust property *community property* and does the settlor own or have capacity to transfer community property without the consent of his or her spouse under the applicable law;
- selection of an independent trustee in a jurisdiction other than where movable trust property is situated may make it more difficult for creditors to successfully access trust property to satisfy claims;
- transfers by settlors directly to underlying companies of trusts are less likely to benefit from firewall legislationⁱⁱⁱ;
- whether the applicable legal formalities to complete a transfer of property into the trust are complied with;
- the types of claims that may be recognised and enforced under the laws of the jurisdiction where the trustee or trust property is situated;
- the types of claims the settlor or beneficiaries may most likely be exposed to in the jurisdictions in which they are resident or otherwise connected;
- limitation periods in those jurisdictions in which a claim may be made against the trustee, beneficiaries or trust property;
- the nature of the interests granted to beneficiaries or objects e.g. fixed, defeasible, contingent, discretionary- creditors generally have better prospects of accessing trust property of the beneficiary holds an indefeasible fixed interest^{iv};

- the nature of any powers and interests granted to the settlor, beneficiaries and other persons under the terms of the trust- creditors generally have greater prospects of accessing trust property if the defendant holds a power to revoke or general power powers of appointment or other unlimited personal powers^v; and
- insolvency laws in the jurisdiction where the trustee or trust property is situated, including mutual assistance provisions that may provide the applicable court power to facilitate foreign courts by granting disclosure orders in respect of a trust.^{vi}

WHAT ARE CONFLICT OF LAWS RULES?

Conflict of laws rules are procedural rules applied by a court (the domestic court or the forum) 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 of:

- the jurisdiction in which the domestic court is situated (i.e. that domestic jurisdiction's laws without reference to its conflict of laws rules) (domestic laws); or
- another (i.e. foreign) jurisdiction (**foreign laws**).

The connecting factor with another 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 Jersey and Guernsey) as reiterated, clarified or varied by domestic statutes and international conventions and statute, including, where applicable, European Union law.

The question of forum or jurisdiction is intimately related to conflict of laws rules. A court might determine, based on its 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 would apply its conflict of laws rules and determine to apply foreign law. In those circumstances, the domestic court may require expert evidence as to how the relevant foreign law is to be applied on the facts of the case.

WHAT IS COMITY?

Dicey Morris and Collins^{vii} describe *comity* 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.”

Comity has at times been described as a policy underlying conflict of laws rules or a way of explaining them.

Principles of comity may include that generally :

- the facts of a case should have sufficient connection with the domestic jurisdiction before a domestic court should interfere with a foreign judgment; 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.

Comity is not itself a rule of law that common law courts are bound to apply in order to recognise and enforce foreign judgments. Further, in at least England and Jersey, comity has been rejected as a basis for recognising and enforcing foreign judgments. It is suggested that it is likely that this approach would be applied in other common law jurisdictions.

It is generally accepted that the modern common law rule underpinning domestic courts' recognition of foreign judgments is the law of obligations. In *Owens Bank Ltd. v Bracco* the English Court of Appeal expressed that:

“A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced by an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law decided against him by the foreign court.”

The scope of application of the law of obligations in common law jurisdictions may be developing beyond money judgments (i.e. judgments requiring a party to pay another a sum of money, as opposed to orders to vary a trust or require a party to take, or refrain from taking, a certain action). However, it may be inappropriate to rely on comity as a basis for extending the scope of the common law in this context. For a court to apply comity as a basis for court decisions may be akin to a court exercising its discretion to apply the applicable substantive foreign law. Such an approach may be criticised because it may not provide international clients with certainty. Arguably, the nature of conflict of laws rules is such that certainty of clear rules of law (which are of their nature mandatory) ought to be applied rather than vague notions or concepts of comity. The law of obligations is an example of a rule of law.

Common law conflict of laws rules, of course, remain subject to domestic legislation, including firewall legislation, that overrides the common law.

WHAT IS RENVOI?

An examination of renvoi highlights the ambiguity that may arise when simply referring to the laws of a jurisdiction or domestic law. Does such a reference include the jurisdiction's conflict of laws rules and how the doctrine of renvoi is applied in that jurisdiction (if renvoi is applied in that jurisdiction at all)?

The doctrine of renvoi (which in English means sending back or return unopened) describes the procedural rules that a domestic court applies in circumstances where :

- As a result of a connecting factor with a foreign jurisdiction, the domestic court (i.e. the forum where the proceedings have been brought) determines to apply foreign law (including the conflict of laws rules of the foreign jurisdiction); and
- The foreign jurisdiction's conflict of laws rules would apply the laws of the domestic jurisdiction (i.e. remit jurisdiction back to that of the domestic jurisdiction) or apply the laws of a third jurisdiction (i.e. transmit jurisdiction to a third jurisdiction).

The aim of renvoi, consistent with the aim of conflict of laws rules, is for courts in different jurisdictions to insofar as possible apply the same substantive law to a set of facts with connecting factors in different jurisdictions and reach the same outcome, thereby removing the temptation for litigants to engage in forum shopping.

In circumstances where the domestic law applies a system or doctrine of single renvoi (also known as partial renvoi or continental renvoi):

- Domestic court A would consider the laws of foreign jurisdiction B, including foreign law B's conflict of laws rules (but excluding the application of any system of renvoi existing under foreign law B);
- If domestic court A determines that foreign law B would apply domestic law A, domestic law A would accept the renvoi and apply the substantive law of domestic law A to determine the matter's substantive issues;
- If foreign law B would apply foreign law B (excluding any doctrine of renvoi applicable under foreign law B), then domestic court A would apply the substantive law of foreign law B to determine the substantive issues; and
- If foreign law B would apply foreign law C (excluding any doctrine of renvoi applicable under foreign law C), then domestic court A would likely apply the substantive law of foreign law C to determine the substantive issues irrespective of the foreign law C's conflict of laws rules.

To accept a renvoi means that the applicable court would accept a remission e.g. domestic court A may be said to accept a renvoi from foreign law B in circumstances where domestic court A would apply domestic law A if foreign law B's conflict of laws rules would require that the issue be determined under domestic law A.

A jurisdiction that applies single renvoi would accept a remission (ie. referral) under foreign law B but would not accept a remission under foreign law C if foreign law B's conflict of law rules provided that foreign law C's law applies and foreign law C's conflict of laws rules would apply domestic law A. In that scenario, domestic law A would likely apply foreign law C's substantive law.

Under single renvoi, domestic law A is essentially just substituting foreign law B's conflict of laws rules (excluding any renvoi system applied by foreign law B) for its own. *Re Askew* held that English courts do not apply single renvoi. It is suggested that Bermuda and most common law offshore jurisdictions also would not apply single renvoi. However, single renvoi is generally applied in certain jurisdictions including, it is understood, in Italy, Luxembourg and Spain. Particular complexities may arise when there are referrals between jurisdictions that apply different systems of renvoi or if one of the jurisdictions does not apply renvoi at all.

In circumstances where a domestic law applies double renvoi (otherwise known as total renvoi):

- Domestic court A would consider the laws of foreign law B, including foreign law B's conflict of laws rules (and including the application of any system of renvoi existing under foreign law B)- in this way domestic court A is essentially determining the conflicts of law questions just as foreign court B would;
- If foreign law B would apply domestic law A then domestic law A would accept the renvoi and apply its own substantive laws to determine the substantive issues (just as with single renvoi);
- If foreign law B would apply the substantive laws of foreign law B, then domestic court A would apply the substantive laws of foreign law B to determine the substantive issues of the matter (just as with single renvoi);

- However, if foreign law B would apply the law of foreign law C and foreign law C would apply domestic law A, then domestic law A would accept the referral and apply the substantive law of domestic law A to determine the substantive issues of the matter; and
- If foreign law C would apply foreign law D, then domestic court A would likely apply the substantive laws of foreign law D to determine the substantive issues irrespective of foreign law D's conflict of laws rules or system of renvoi.

As suggested above, in a double or total renvoi system, there can no more than two referrals (whether in the form of remissions or transmissions).

English courts have applied total renvoi in relation to certain issues, for example, to determine in which country a Will was deemed to be made, to determine the validity of a marriage or divorce and in relation to succession, but not in cases involving contracts or torts.

In some instances, questions may arise as to whether an issue is a procedural law issue or a substantive law issue.

The EU Regulation on Succession (No. 650/2012) became effective in respect of deaths on or after 17 August 2015 (EU Succession Regulation) and has impacted the application of renvoi in respect of succession issues in respect of member states and those third party states that did not opt out. Bermuda is not a member state or a third party state and is not bound by the EU Succession Regulation. A detailed consideration of the EU Succession Regulation is outside the scope of this article.

British Virgin Islands firewall legislation expressly excludes the application of renvoi to issues that its firewall legislation requires be determined under the laws of a particular jurisdiction. It is suggested that this approach may be implicit given the nature of firewall legislation. Consequently, it is suggested that courts of most other common law offshore jurisdictions' may also exclude the application of renvoi in relation to matters covered by the applicable jurisdiction's firewall legislation.

WHAT IS THE OBJECTIVE OF FIREWALL LEGISLATION?

The objective of firewall legislation is to clarify, reiterate or vary domestic law applicable to a domestic law trust to:

- require that domestic law shall apply to determine certain questions relating to the formation, validity and administration of the trust; and
- prevent the recognition or enforcement of judgments of foreign courts (and in some jurisdictions, awards of arbitrators or tribunals) in relation to the property held pursuant to the terms of a domestic law trust.

WHAT IS THE OBJECTIVE OF FRAUDULENT TRANSFER LEGISLATION IN THE CONTEXT OF TRUSTS?

In respect of trusts, the objective of fraudulent transfer legislation is to require domestic courts law to apply domestic law to clarify the:

- circumstances in which transfers (i.e. dispositions) into a trust made at an undervalue may be set aside;
- limitation periods within which creditors may bring claims to set aside transfers into the trust; and

- rights of trustees and where applicable, beneficiaries, who received transfers or distributions in good faith.

The location of the property which is the subject of the transfer will impact on how successfully domestic law may be enforced in relation to such property.

The historical basis of many offshore common law jurisdictions' fraudulent transfer legislation is the Fraudulent Conveyances Act 1571 (13 Eliz 1, c 5), also known as the Statute of Elizabeth. Jersey and Guernsey 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 Jersey or Guernsey law trust by bringing a Pauline action- derived from Roman law as developed by French customary law. The application of Pauline actions are outside the scope of this article.

WHAT IS THE HAGUE CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION?

The:

- complexity and problems arising from the non-recognition of the concept of trusts in civil law jurisdictions; and
- apparent paucity in clear and appropriate conflict of laws rules in civil law (in particular) and also common law jurisdictions in relation to trusts,

influenced member states of the Hague Convention on Private International Law to develop a multi-lateral treaty to address these issues. The treaty became known as the Hague Convention on the Law Applicable to the Recognition of Trusts (Hague Trusts Convention).^{viii} The need for such a treaty was driven by the apparent increase in numbers of settlors and beneficiaries resident or domiciled in civil law jurisdictions and trust property located in civil law jurisdictions. This trend has gathered momentum with the increasing rate of globalisation and the corresponding increase in mobility of people and capital.

On 31 July 1985 31 member states approved the The Hague Trusts Convention. The Hague Trusts Convention:

- identifies the types of trusts it covers (i.e. express trusts)^{ix};
- the characteristics of such trusts and the recognition of such trusts by member states^x;
- identifies criteria to establish the governing law of the trust^{xi};
- provides that a member state may not apply its laws in relation to the administration of a trust governed by the laws of another member state (e.g. in relation to trustee duties, trust distributions, trust investments, changing trustees, beneficiaries' entitlement to information and a variation of a trust's terms)^{xii}; and
- confirms registration of trust assets in the trustee's name of itself shall not be deemed to result in those assets being deemed to be part of the trustee's personal estate as a consequence of such registration (and thereby available to the trustee's personal creditors as consequence)

However the Hague Trusts Convention does not deal with the complex conflict of laws issues relating to formation of the trust, being preliminary issues often described as launching the rocket. For example, did the settlor own, have the power and capacity to transfer it into the trust?

A relatively small of member states have:

- ratified the Hague Trusts Convention (approximately 12 but this number does not include those overseas territories and dependencies that have had all or parts of the Hague Trusts Convention imported into their law); and
- enacted legislation to introduce some or all of the Hague Trusts Convention's provisions into the domestic law and, in the case of UK, into the law of a number of its overseas territories and dependencies.

The Hague Trusts Convention represents a positive step towards developing consistent conflict of laws rules applicable to trusts. However, just because a civil law jurisdiction has ratified the Hague Trusts Convention and introduced its provisions into domestic law, does not necessarily mean that the civil law jurisdiction's courts will necessarily adopt the same approach and reach the same conclusions that a common law court would in relation to conflict of laws issues relating to trusts.^{xiii}

The Hague Trusts Convention was introduced into the laws of Bermuda, British Virgin Islands and certain other territories by UK's Recognition of Trusts Act 1987 (Overseas Territories) Order 1989/673 (Order) made under the Recognition of Trusts Act 1987. Many other offshore common law jurisdictions have since become bound to, or their courts have taken judicial notice of, the Hague Trusts Convention. Perhaps surprisingly, Cayman Islands is not one of the jurisdictions bound by the Order.

The Hague Trusts Convention provides that a member state is not required to apply provisions of the Hague Trusts Convention to the extent doing so would be manifestly incompatible with the public policy in the member state.^{xiv}

Offshore firewall legislation expands upon and addresses matters not covered by the Hague Trusts Convention.^{xv} Few jurisdictions, other than Gibraltar and the BVI, have sought to expressly clarify in their firewall legislation the relationship between the Hague Trusts Convention and domestic firewall legislation.

In some instances firewall legislation might be regarded as inconsistent with the Hague Trusts Convention^{xvi} or, if not, nonetheless manifestly incompatible with matrimonial property regimes or decisions of member states. For example, the power of the Family Division in the English High Court to vary and make orders in respect of trusts governed by laws of other jurisdictions may be directly at odds with Article 8 of the Hague Trusts Convention but justified in England on public policy (or other^{xvii}) grounds.

WHAT IS RECIPROCAL ENFORCEMENT OF JUDGMENTS LEGISLATION AND HOW IS IT RELEVANT?

Many jurisdictions have enacted legislation that enables a successful litigant in foreign proceedings (e.g. court proceedings in a foreign court) to register a foreign court's money judgment with the domestic jurisdiction's courts (i.e. domestic courts) provided certain pre-conditions are satisfied. Registration enables the foreign judgment to be enforced as a domestic judgment without having to further argue the merits (questions of fact or law) that have already been determined by the foreign proceedings.

The preconditions generally are that the:

- foreign judgment is a final judgment; and

- defendant, who is subject to the domestic jurisdiction, is present in, has agreed to be subject to or has otherwise submitted to the foreign court (i.e. the foreign court is regarded by the domestic court as a court of competent jurisdiction).

Reciprocal enforcement legislation may be relevant in a trust dispute where, for example, a trustee has submitted to the jurisdiction of a foreign court and the foreign court has subsequently ordered the trustee to pay a sum of money to the plaintiff in the foreign proceedings.

Under common law, foreign judgments may be enforced (i.e. used a platform to begin an original action in the domestic court to obtain a domestic judgment which is then enforced) by a claimant by:

- commencing proceedings in the domestic jurisdiction; and
- persuading the domestic court that, because the defendant judgment has been made by a foreign court of competent jurisdiction, the defendant should be precluded (e.g. estopped) from defending the domestic proceedings and the domestic court therefore ought to award the plaintiff a summary judgment against the defendant. This situation is known as a *res judicata* (in English, meaning a matter already decided).

WHAT ARE FORCED HEIRSHIP RIGHTS?

Forced heirship rights typically seek to restrict a person from, in his or her Will, within a period before his or her death or otherwise during the person's lifetime, making gifts from his or her estate in a manner that would defeat fixed entitlements to the deceased's estate granted to the deceased's spouse and children under the jurisdiction's laws. These laws may also provide for gifts made contrary to the forced heirship rules to be set aside and the property transferred clawed back into, or deemed to form part of, the settlor's estate for distribution to the forced heirs in their fixed entitlements.

Forced heirship rights, in their various forms, are most often found in civil law jurisdictions, including those in most of Europe including Russia and Latin America, the People's Republic of China (PRC), Middle Eastern and jurisdictions that otherwise apply sharia law. Louisiana, in the United States, also applies a form of forced heirship.

Bermuda's first firewall legislation was contained within the Trusts (Special Provisions) Act 1989 (TSPA) which became operative on 1 January 1990. The firewall provisions contained in section 11 TSPA were amended in 2004 to, among other things, include the following definition:

"heirship right means any right, claim or interest in, against or to property of a person arising, accruing or existing in consequence of, or in anticipation of that person's death, other than any such right, claim or interest created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of the property of such person."

The scope of the definition appears sufficiently wide to cover not only most forms of forced heirship claims under civil law jurisdictions, but potentially inheritance or family provision claims that are most frequently seen in common law jurisdictions. The inclusion of this definition considerably clarified the scope of the protection afforded by Bermuda law to Bermuda law trusts against forced heirship claims. This definition, based on that first introduced by in the Cayman Islands Foreign Elements Law 1987 (as it then was) has stood the test of time and, recently, was substantially reflected in section 2 of Gibraltar's Trusts (Private International Law) 2015 with a carve-out for rights arising under Gibraltar law. Bermuda's firewall legislation contains a similar exception that is not contained in the definition of heirship rights but in section 10(3) TSPA.

Offshore jurisdictions' firewall legislation seek to restrict the ability of a claimant to claw trust property back into the deceased settlor's estate for distribution in accordance with foreign forced heirship laws. The policy being that heirship rights are inconsistent with the policy of testamentary freedom that has long been reflected in common law jurisdictions .

WHAT ARE COMMUNITY PROPERTY RIGHTS?

Community property rights (also known as matrimonial property rights) in their various forms are also most frequently found in many civil law jurisdictions. Community property rights are an example of property rights granted to persons as a result of having a certain type of personal relationship with another person.

Depending on the jurisdiction, community property rules may provide, among other things, that upon marriage, property legally owned by either spouse shall be deemed to be owned by the spouses in equal shares. In other words, in such jurisdictions, the spouses' property rights in the community property vest upon marriage. In some jurisdictions, such as the PRC, Peru and Russia, for example, it is understood that one spouse may not validly transfer community property into a trust or otherwise without the consent of the other spouse. It may be said, in these circumstances, one spouse alone does not own, or have a power or capacity to transfer, such vested or pre-existing community property. Consequently, a purported transfer of community property into a trust in these circumstances may be invalid under the applicable foreign law and may not be protected by most offshore jurisdiction's firewall legislation. It may be particularly onerous for an offshore trustee to ascertain the nature of the community property regime in place and whether or not the purported settlor owns and has the power and capacity to transfer such property into an offshore trust without the consent of their spouse.

Most offshore jurisdictions' firewall legislation specifically provide that the question of whether a settlor owns or has the power to make lifetime transfer into an offshore trust of movable property is not affected by foreign forced heirship laws. Part of the rationale for this different treatment of forced heirship rights verses the type community property rights described above may be that the relevant property may not have vested in the forced heir at the time of the transfer into the trust.

Not all jurisdictions that have community property laws have regimes that result in the vesting of spouses' community property rights upon marriage. For example, a spouse's community property rights may not vest until death, divorce or separation and under those community property regimes, a spouse might not require the consent of the other spouse in order to validly transfer the community property.

It is open for offshore jurisdictions, particularly in respect of movable property, to amend their firewall legislation to not only refuse to recognise, enforce or give effect to community property rights vesting after the transfer of property into the offshore trust but community property rights arising before (i.e. being rights which have vested or pre-exist) such transfer.

RIGHTS ARISING DUE TO A PERSONAL RELATIONSHIP WITH A SETTLOR OR BENEFICIARY

Community property rights are one example of rights granted to, or claims that may be made by, a person based upon their personal relationship to another person. Other examples include rights a:

- spouse, child or dependents of a deceased person may have to bring a claim for provision out of the deceased's estate (for example, under the Inheritance Act 1975 in the UK or the Family Provision Act 1975 in New South Wales^{xviii}, Australia and other comparable legislation in common law jurisdictions) and court orders consequently made in such claimant's favour; and

- divorced spouse may have to bring a claim against a former spouse for financial provision (for example, under the Matrimonial Causes Act 1973 in the UK) and court orders consequently made in the claimant spouse's favour.

Following the amendments made in 2004, section 11(3) TSPA now includes the following definition:

"Personal relationship includes every form of relationship by blood or marriage, including a previous marriage, and in particular a personal relationship between two persons exists if:

- (a) one is the child of the other, natural or adopted, legitimate or born out of wedlock;
- (b) one is married to the other; or
- (c) one cohabits with the other or so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife."

This definition has served to significantly widen the class of persons whose claims against the trust property of a Bermuda trust might not be recognised or enforced under Bermuda's firewall legislation, particularly once the property has been validly transferred into the trust. Certain jurisdictions' definitions of personal relationship expressly extend, further to former spouses of settlors, and to :

- civil partners of settlors and beneficiaries;
- former civil partners of settlors or beneficiaries
- spouses and civil partners of former spouses of settlors or beneficiaries; and
- any other personal relationships of settlors or beneficiaries that have ceased.

Gibraltar and Jersey's firewall legislation clarifies that all of the personal relationships described in their definitions of personal relationship will be respected notwithstanding that a law of a foreign jurisdiction may not recognise the validity of the personal relationship. This construction may also be implicit under paragraph (c) of the definition of personal relationship in section 11(3) TSPA. However, Bermuda may wish to take an opportunity to express this intention in any amendments to its firewall legislation.

THE CHALLENGES INHERENT IN DRAFTING FIREWALL LEGISLATION

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 construction of particular words and phrases. The structure of firewall legislation and the various cross-referencing that may be required to construe the impact of derogations (and derogations from derogations) may further add to the complexity of offshore firewall legislation. Consequently, it may be difficult to summarise firewall legislation without losing some of the nuances upon which protection of trust property may turn. Perhaps, in part as a consequence of these characteristics and challenges, the content of offshore jurisdictions' firewall legislation in certain jurisdictions has received a considerable level of criticism from academics, the legal profession and courts.

Courts have also experienced challenges applying offshore firewall legislation, particularly in circumstances where a literal construction could potentially lead to unanticipated and unsatisfactory outcomes. These challenges were perhaps most evident in *Re B Trust* when the Jersey Court sought to rely on comity in an attempt to reconcile its apparent inability under statute to enforce a foreign judgment in circumstances where

the trustees had submitted to the jurisdiction of the foreign court. Similar issues appear to have been resolved, without reliance upon comity, by the Jersey Court in *In the matter of IMK Trust* and in subsequent cases.

POLICY AND OTHER CONSIDERATIONS WHEN MAKING FIREWALL LEGISLATION

Most offshore jurisdictions legislatures tend to consider the following factors when formulating policy in relation to firewall legislation:

- The extent that the policy choices deviate from existing common law conflict of laws rules and may or may not be within the reasonable expectation of courts, legislatures and legal practitioners in domestic and foreign jurisdictions, as the case may be;
- How the policy, if implemented, may impact on the offshore jurisdiction's relationships with foreign jurisdictions and the approach that such foreign courts might be consequently be tempted to take regarding the enforcement of offshore jurisdictions' domestic judgments;
- The impact of non-recognition of foreign laws and judgments on the tax revenue and government resources of foreign jurisdictions;
- Whether persons in personal relationships should be able to utilise trusts to defeat orders made in foreign matrimonial or comparable proceedings;
- The nature of the property subject to the transfer or trust, e.g. whether it is (movable: tangible or intangible; or immovable: such as land) ;
- The jurisdiction where trust property is situated; and
- Whether the transfer of property into a trust by a settlor is by an inter vivos or a testamentary gift.

Firewall legislation in offshore jurisdictions tends to be structured, firstly, to preclude the domestic court from having the power to:

- apply foreign law to a domestic law trust and trust property; and
- recognise or enforce foreign judgments (some jurisdictions expressly preclude recognition or enforcement of arbitration and tribunal awards) some which include orders or declarations in relation to the trust to a domestic law trust- for example, to vary its terms, or grant a claimant an interest in trust property or declare the trust or transfers of property into the domestic law trust invalid.

The broad exclusion of application of foreign law and foreign judgments to domestic law trusts (i.e. the Firewall) is then made subject to certain conditions (i.e. carve-outs or exceptions) (Derogations) where foreign law may be applied or a foreign judgment may be recognised by the domestic court. The Derogations are themselves then generally subject to exceptions that restrict the impact of the Derogation. This structure of firewall legislation may contribute to its complexity. Often, part of the challenge for the reader of the firewall legislation is working through how its various parts interact. Perhaps another approach to the structure of firewall legislation could be considered and implemented.

BERMUDA'S FIREWALL LEGISLATION- AN INTERPRETATION AND COMPARISON

Bermuda's original and current (i.e. post 2004) firewall legislation is included in the appendix to this article. The amendments to the TSPA in 2004 were heavily influenced by Cayman Islands' firewall legislation.

It was considered that the amendments to Bermuda's original firewall legislation were required in 2004 to:

- clarify the circumstances where a foreign law may apply or a foreign judgment may be enforced to set aside a transfer into a Bermuda law trust in circumstances where Bermuda has "corresponding laws or public policy rules";
- by the inclusion of a definition of "personal relationship" in section 11 TSPA, further clarify the types of rights which were specifically not intended to be recognised or enforced to set aside a transfer of property into a Bermuda law trust;
- inclusion of the definition of "heirship rights" for clarity; and
- clarify whether a claimant seeking to enforce foreign heirship laws rights to set aside a transfer into a Bermuda trust could be an "eligible creditor" under Bermuda's fraudulent dispositions law.

Ultimately Bermuda's legislature discarded use of the expression "corresponding laws or public policy rules" and provided that a foreign judgment shall not be recognised, enforced or give rise to any estoppel "insofar as it is inconsistent with this section".

Sections 10 (Capacity to create a trust) and 11 (Application of foreign laws) of the TSPA contain the core provisions of Bermuda's conflict of laws legislation in relation to Bermuda law trusts.

The intent and effect of Bermuda's firewall legislation is that once a Bermuda law trust is properly formed and constituted (i.e. the rocket has been launched) in accordance with:

- clause 10(1) TSPA (Capacity Rules); and
- the Derogations in section 10(2)(a) to (f) TSPA, one Derogation of which itself is subject to a carve-out in section 10(3) (Derogation Qualification),

then:

- Bermuda law shall apply to determine the validity of the trust and the construction and variation of its terms and the trust's administration; and
- foreign judgments applying foreign law this is inconsistent with Bermuda's firewall legislation which impact upon trust property validly transferred into the Bermuda trust shall not be recognised or enforced in Bermuda.

The Capacity Rules contained in clause 10(1) TSPA provide that a settlor has capacity to create a Bermuda law trust (i.e. transfer property to a trustee of a Bermuda law trust or declare that it holds property pursuant to the terms of a Bermuda law trust) in the following cases:

Movable Property

In circumstances where a settlor is creating the trust:

- during his or her settlor's lifetime (i.e. an inter-vivos transfer), if the settlor has capacity to under Bermuda law (section 10(3) TSPA indicates that he or she will be deemed to have capacity irrespective of any foreign law forced heirship rights); and
- in the settlor's Will (i.e. by a testamentary transfer), if the settlor has capacity under the laws of his or her domicile (i.e. in this scenario a foreign law forced heirship rights impacting on that property shall be recognised and enforced in Bermuda).

Immovable property

Under Bermuda's firewall legislation, a settlor will have capacity to create a trust over immovable property if the settlor has capacity under the law where the property is situated (i.e. the property's *lex situs*). Consequently, foreign forced heirship rights affecting immovable property situated outside of Bermuda will be recognised in Bermuda. Therefore, under Bermuda law, one must consider the nature of the property and whether it is a lifetime or testamentary transfer to determine whether forced heirship rights (granted under foreign laws) may apply. This approach is consistent with the approach of most, if not all, offshore jurisdictions that have introduced firewall legislation.

The reality may be that a foreign court will inevitably assume jurisdiction over immovable property situated within its jurisdiction and will apply its own law to make and enforce its judgments (*in rem*) in relation to such property. It would seem impractical or fruitless for a Bermuda Court to make orders or declarations in relation to immovable property situated in a foreign jurisdiction which the judgment creditor will be unable to enforce.

However, a party to proceedings in a foreign court may have considerable difficulty enforcing a judgment or other order:

- against a trustee (i.e. *in personam*) without the court in which the trustee is resident or domiciled being prepared to recognise and enforce the judgment or other order;
- over movable or immovable property (i.e. *in rem*), situated outside the foreign jurisdiction, without a court in which the property is situated being prepared to recognise and enforce the foreign judgment or order.

Although contained within the Derogations, section 10(2)(c) has the effect that the capacity of a corporation (i.e. to transfer movable or immovable property wherever situated) is determined by the laws in which it is incorporated.

The above Capacity Rules are subject to Derogations which are set out in clause 10(2)(a) to (f) of the TSPA. The impact of a particular Derogation is itself restricted by the Derogation Qualification.

The Bermuda Firewall

Section 11 TSPA contains Bermuda's firewall provisions i.e. the provisions which require Bermuda Courts to apply Bermuda law to certain questions in respect of Bermuda law trusts and not recognise or enforce foreign judgments that are inconsistent with those provisions. It is important to remember that the Firewall is subject to the Capacity Rules and the Derogations which, in particular, have impact on the validity of transfers of foreign immovable property and foreign testamentary transfers (whether of movable or immovable property).

The opening paragraph of section 10(2) TSPA provides that all questions arising in regard to:

- the capacity of the settlor; and
- any transfer into the trust,

shall be determined in accordance with Bermuda law without reference to foreign law, irrespective of whether the trust may have a connection with a foreign jurisdiction.

The effect of section 10(3) TSPA is that foreign heirship rights shall not:

- affect a determination by a Bermuda Court of whether the settlor had ownership or a power over land in Bermuda or movable property wherever situated in order to transfer the property into a trust; and
- be recognised or enforced in Bermuda to invalidate or set aside a transfer of land in Bermuda or movable property, wherever situated, into a trust.

Section 11(1) TSPA further provides, among other things, that (i.e. subject to the Capacity Rules and Derogations):

- a Bermuda law trust and transfers of property into a Bermuda law trust shall not be invalid;
- a settlor's capacity regarding transfers property into the trust shall not be questioned; and
- neither the trustee, a beneficiary or any other person shall be subjected to any liability or deprived of any rights,

by reason that:

- (i) a foreign law prohibits or does not recognise the concept of trusts;
- (ii) the trust defeats rights conferred on a person by a foreign law by reason of (i) a person's *personal relationship* to the settlor or beneficiary or (ii) *forced heirship rights*, that may have otherwise result in gifts into a trust being set aside under that foreign law; and
- (iii) the trust defeats foreign law rights granted to creditors in respect of a settlor or beneficiary's insolvency.

WHEN IS A JUDGMENT OR AWARD INCONSISTENT WITH OFFSHORE FIREWALL LEGISLATION?

As previously mentioned, section 11(2) TSPA provides that a "foreign judgment shall not be recognised or enforced or give rise to any estoppel insofar as it is inconsistent with section 11" (Author's emphasis). Gibraltar and Jersey have extended the protection offered by similar legislative provisions in their firewall legislation to cover foreign arbitration and other tribunal determinations i.e. so the protection is not just provided against inconsistent foreign judgments made by a foreign court. It is anticipated that Bermuda will similarly expressly extend the protection of its firewall legislation in amendments contemplated in the near future.

It may not be clear whether section 11(2) TSPA applies to foreign legislation or law to be expressly or fundamentally inconsistent with the application of Bermuda's firewall legislation or if it requires the Bermuda

Court to, in effect, consider the merits of the foreign judgment to determine if it would have reached a consistent conclusion to that reached by the foreign court. This question has also been left open by most other offshore jurisdictions' firewall legislation. A requirement that the foreign judgment be determined to be consistent with that which the Bermuda Court would have reached may essentially require a re-trial of the relevant issues considered in the foreign proceedings in Bermuda. This may result in uncertainty for international litigants seeking to enforce a foreign judgment in Bermuda. However, such an approach may 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 judgment. Bermuda will have to consider these competing policy objectives when revisiting its firewall legislation.

Substantively different: Gibraltar's approach

Section 4(5) of Gibraltar's Trusts (Private International Law) Act 2015 has sought to clarify the position by providing that a decision is not inconsistent unless the:

"... order of a foreign court or decision of any other foreign tribunal (whether in an arbitration or otherwise) with respect to a Gibraltar trust shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that the foreign court or tribunal applied a foreign law or laws whose relevant provisions are substantively different to those which would be applicable by virtue of the choice of rules in this section. The burden of demonstrating that there is no such substantive difference shall lie on the party seeking recognition or enforcement of the foreign judgment or order.

The above criterion may enable a foreign judgment or award to be enforced in a Gibraltar Court in respect of a Gibraltar trust if the foreign law applied by the foreign court or tribunal was not substantively different to the equivalent law in Gibraltar. However, there are some concerns whether this criterion may permit orders made by the English Family Court because the UK's Matrimonial Causes Act may not be substantively different to Gibraltar's Matrimonial Causes Act.^{xix}

Court's discretion: Guernsey and Isle of Man's approach

Guernsey^{xx} and Isle of Man's^{xxi} firewall legislation expressly provides their courts the power to refrain from recognising, enforcing or giving effect to a foreign judgment, even if the foreign judgment is *consistent* with their firewall provisions, provided that the Court determines that to do so would protect the interests of the beneficiaries or ensure the proper administration of the trust. These powers are, of course, only exercisable in respect of trusts governed by the laws of those respective jurisdictions. It is understood that Gibraltar consciously refrained from adopting this approach perhaps because to do so may create uncertainty in the law for international litigants and may be inconsistent with the principle that enforcement of foreign judgments should be based on application of rules of law as opposed to exercise of judicial discretion.^{xxii} Guernsey and Isle of Man's approach may further encourage litigants to bring variation proceedings in those jurisdictions in the first instance rather than by the indirect route of first obtaining a foreign judgment with orders to vary the trust and then seeking to enforce those orders in Isle of Man or Guernsey, as the case may be. Guernsey and Isle of Man's approach might also be inconsistent with the *law of obligations* discussed earlier in this article. The difference in approach exemplifies that different jurisdictions may implement different firewall provisions depending on where they stand on certain policy issues.

Lessons from Jersey: Re B Trust and In the matter of IMK Trust

At the time of *Re B Trust*, Article 9(4) Trusts Jersey Law 1984 (TJL) provided that:

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

In contrast to the approach of the Jersey Court in *Re B Trust, In the matter of IMK Trust* the Jersey Court determined that Article 9(4) TJL prevented it from enforcing or recognising the orders of the English Court that purported to vary a Jersey law trust to, *inter alia*, require payments to be made from the trust fund. To do so would be inconsistent with Article 9(4) TJL.

In *Re B Trust* and *In the matter of IMK Trust*, the Jersey Court went to great lengths to stress that, as a matter of policy, the Jersey Court should not assist recalcitrant spouses who seek to use Jersey law trusts in order to avoid their obligations under English ancillary proceedings for division of property between former spouses. It may be that the policy of the Jersey judiciary differs from that of the Jersey legislature on this issue- the focus of the Jersey legislature being to make Jersey trust law more attractive for wealthy foreign settlors thereby attracting trust business to Jersey.

Article 9(4) TJL may be inconsistent with the approach taken in reciprocal enforcement legislation in most Commonwealth jurisdictions and under the common law- both of which appear to facilitate judgment creditors' enforcement of foreign money judgments in the domestic jurisdiction against a defendant who had *submitted* to the jurisdiction of the foreign court. The approach in Article 9(4) TJL (even following amendments in 2012^{xxiii}) and in other comparable offshore firewall legislation in Bermuda and elsewhere, may result in a trustee being subjected to conflicting judgments in different jurisdictions- even if the offshore trustee had submitted to a foreign court, as was the case in *Re B Trust*.

In contrast to *Re B Trust*, in *In the matter of IMK Trust*, the Jersey resident trustee had not submitted to the jurisdiction of the English Court. Notwithstanding this, and the Jersey Court's construction of Article 9(4) TJL, in *In the matter of IMK Trust*, the Jersey Court determined that:

- a court exercising its supervisory jurisdiction^{xxiv} could give directions to a trustee to vary the terms of a trust to give effect to a foreign judgment provided the trustee had the powers under the terms of the trust to make the variation.
- a court could not, exercising its supervisory jurisdiction or otherwise^{xxv}, give directions to a trustee to vary the terms of the trust to give effect to a foreign judgment if the trustee did not have the powers under the terms of the trust to make the variation. Such a variation was described as an alteration; and
- it was able to provide consent on behalf of minor, unascertained or unborn beneficiaries under the principles in *Saunders v Vautier*^{xxvi} and under Article 47 TJL in circumstances where all adult beneficiaries consented to the alteration. A similar approach might be taken in Bermuda under section 47 and section 48 of Bermuda's Trustee Act 1975.

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

The Mubarak divorce proceedings in England, from which the Jersey proceedings in respect of the IMK Trust arose, had lasted the best part of a decade and were regarded as colossal and the former husband had taken extreme steps to resist or ignore orders of the English Courts. Again, as a matter of policy, the approach of the Jersey Court may have been influenced by its view of the former husband's attempts to thwart his former wife's enforcement of the judgments of the English Courts against him.

In respect of a variation of trust that does not constitute an alteration, courts have noted that a trustee is under a duty to properly consider all relevant factors when considering the exercise of its powers and a foreign judgment impacting on beneficiaries, the trustee or trust property is a relevant consideration.^{xxvii} 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 implementing a decision to materially vary the terms of the trust or make a substantial payment out of the trust fund particularly when doing so might be regarded as, even if indirectly, wholly or partially as giving effect to a foreign judgment.

The Derogations

Section 10(2)(a)(f) TSPA contains the Derogations and have the effect that the Capacity Rules and the Firewall:

- do not validate any transfer of property which is neither owned by, nor subject to a power of, the settlor (note that this Derogation is subject to the Derogation Qualification);
- take effect subject to the terms of the trust;
- take effect subject that the determination of the capacity of a company shall be made in accordance with the laws of the jurisdiction in which the company is incorporated;
- shall take effect subject to foreign laws which prescribe the formalities for transferring property situated in the foreign jurisdiction;
- does not validate any trust or transfer of immovable property situated in a foreign jurisdiction which is invalid in accordance with the applicable foreign law; and
- does not validate any testamentary gift (including a testamentary trust) which is invalid under the laws of the testator's domicile.

The nature and effect of some of the Derogations have been discussed earlier in this article.

The Derogation Qualification

As mentioned above, the Derogation Qualification in clause 10(3) TSPA provides that, for the purposes of the Derogation in section 10(2)(a) TSPA, the question of whether an *inter vivos* transfer of Bermuda land or *movables* wherever situated is *owned* by, or subject to a *power of*, the settlor shall be determined without regard to foreign heirship rights. Bermuda law therefore applies in these circumstances irrespective of any foreign heirship rights that may purport to invalidate transfers made during the years prior to a settlor's death.

What is the Statute of Elizabeth and does it remain relevant?

The English Fraudulent Gifts Act of 1570 (known as the **Statute of Elizabeth**)^{xxviii} continued to have force in many territories (e.g. common law offshore jurisdictions) prior to the introduction of modern fraudulent transfer legislation if it had not been repealed expressly or by implication. The Statute of Elizabeth broadly provided that:

- any voluntary transfer of assets to defraud creditors (including, significantly, any actions taken to disturb, delay or hinder any creditors) was absolutely void; and
- there was no express limitation period within which an application had to be made to declare a transaction void.

The Statute of Elizabeth was historically construed widely by the courts^{xxxix} and extended to what many describe as unfair preferences.^{xxx}

The case of *Re Butterworth*^{xxxi} is often used to indicate how the Statute of Elizabeth may have disproportionately favoured creditors. In this case a successful baker opened a separate grocery business. Before doing so, he established a trust over a substantial portion of his property. He subsequently sold the grocery business, without loss or indebtedness. Ultimately however, after many successful years of trading, the original bakery business failed. The trust was declared void by the English court which determined the trust had been established with the view to putting the settlor's property beyond the reach of future creditors. This judgment was made notwithstanding the settlor was solvent at the time he formed the trust and may have intended to establish the trust to protect his property from potential creditors of the grocery business (of which there were none).

The Statute of Elizabeth has long been replaced in England and the UK's current fraudulent transfer legislation is set out in section 423 of the Insolvency Act 1986.

The background to offshore fraudulent transfer legislation

Interest in fraudulent transfer legislation spiked during the late 1980s when many entrepreneurs, professionals and other business owners, in the United States of America (**U.S.**) in particular, were concerned by a:

- legal system which many considered did little to discourage claimants' from making speculative claims; and
- difficulty in obtaining affordable insurance that would adequately respond to those claims.

In the U.S, it is more common for lawyers to receive contingency fees, claimants to be awarded punitive damages and for juries to be used in civil cases to quantify damages. In contrast, Commonwealth jurisdictions, including common law offshore jurisdictions, generally require litigants to pay their own fees and courts are generally provided considerable discretion to make orders for provision of security for costs and payment of costs. Asset protection has also been an objective for Latin American clients because of the incidence of crimes such as kidnapping and fears of confiscation of assets by governments. Clients from many jurisdictions in Asia may consider use of trusts as a means of protecting assets against currency fluctuations and political instability.

The Cook Islands was one of the first jurisdictions to focus upon legislation specifically intended to restrict creditors' ability to recover property contained within a trust established under its laws. Soon thereafter, many other offshore common law jurisdictions began to consider introducing legislation dealing with these issues. The policy choices made in relation to balancing the interests of creditors, on the one hand, and settlors and beneficiaries, on the other, has varied between jurisdictions.

Cook Islands amended its International Trust Act 1984 (**ITA**) in 1989 to include provisions that severely restrict the rights of creditors to recover assets transferred by a settlor into an "*international trust*"^{xxxii} under Cook Islands law. Bahamas and Nevis' appear to have substantially modelled their fraudulent transfer legislation on the ITA. The severity of the restrictions on creditors, including the onus of proof, short limitation periods and

almost complete exclusion of rights of future creditors, has been met with criticism in some international circles.^{xxxiii} The use of these jurisdictions by certain controversial high profile individuals may have had an impact on the international reputation of those jurisdictions.^{xxxiv}

Bermuda's fraudulent transfer legislation- An interpretation and comparison

Part IV A of Bermuda's Conveyancing Act 1983 (**Conveyancing Act**) consists of sections 36A-G inclusive and constitutes Bermuda's *fraudulent transfer legislation*. Part IV A was introduced into in 1994 by way of an amendment to the Conveyancing Act. These provisions apply to transfers of property to any Bermuda law entity. However, this article focuses on transfers to trustees of Bermuda law trusts.

Bermuda has taken a relatively conservative approach to its fraudulent transfer legislation endeavouring to establish a sustainable balance between the interests of the well-intentioned settlor and those of the settlor's legitimate creditors. This has generally led to Bermuda's fraudulent transfer legislation being regarded as fair and sensible in international circles and may mandate the selection of Bermuda as a reputable jurisdiction for legitimate estate planning.

Bermuda's fraudulent transfer legislation contains some noteworthy deviations from the approach in:

- section 423 of the UK's Insolvency Act 1986 and related provisions; and
- many jurisdictions in the U.S.

Bermuda's fraudulent transfer legislation makes even more significant deviations from the approach reflected in the Statute of Elizabeth. Notably, Bermuda's and many other common law offshore jurisdictions' fraudulent transfer legislation do not provide creditors rights to set aside a trust a transfer into a trust only because the transfer may have had the effect disturbing, delaying or hindering creditors.

In contrast to international trusts in the Cook Islands and trusts in some other offshore jurisdictions, a settlor is not required by law to file an affidavit of solvency, register the trust or exclusively have non-resident beneficiaries in order for Bermuda's fraudulent transfer legislation to apply.^{xxxv}

The provisions of Part IV A of the Conveyancing Act are fully set out in the appendix to this article. The key features of Bermuda's fraudulent transfer legislation may be summarised as follows:

Definitions

This paragraph includes a summary of key terms defined in section 36A of the Conveyancing Act.

- An **Eligible Creditor** means a person to whom:
 - on, or within 2 years after, the date on which the disposition (e.g. transfer) was made, the transferor (e.g. the settlor) owed an Obligation and on the date of the action to set aside the transfer that Obligation remains unsatisfied;
 - on the date of the transfer, the transferor owed a contingent liability and since the date of the transfer the contingency giving rise to the Obligation has occurred and on the date of the action to set aside the transfer, that Obligation remains unsatisfied; or

- on the date of the action to set aside the transfer, the transferor owes an Obligation as a result of a claim made by that person against the transferor, arising from a cause of action which accrued prior to, or within 2 years after, the date of the transfer.

- A **Creditor** includes a person who the Court is satisfied was, at the time of the transfer, reasonably foreseeable to the transferor to whom an Obligation might become owed by him.
- **Obligation** means any obligation or liability (other than a contingent liability) to pay a sum of money or to transfer property.
- **Undervalue** means a gift or a transfer at less than market value or money's worth.
- **Requisite Intention** means an intention to make a transfer, the dominant purpose^{xxxvi} of which is to put the property beyond the reach of a person (or class of persons) who is making, or may (subject to the above limitation period) make a claim.

The test reflected in the definition of Requisite Intention appears to contain a higher threshold than that imposed under section 423(3) Insolvency Act 1986 UK which appears to require that that just be a purpose, and not the dominant purpose. Section the Cook Islands' ITA which provides that a trust shall not be deemed settled with the intent to defraud a creditor if settled after 2 years from the date the cause of action arose or, if within 2 years, the creditor does not commence proceedings within one year of the trust's formation.

Statute of Limitations on challenging a transfer into a Bermuda law trust

An action to bring a claim (e.g. to set aside the disposition (i.e. transfer) of property to a Bermuda trustee) must be brought within 6 years of either the date of the transfer or the date the cause of action accrued (whichever is the later).^{xxxvii}

In contrast, under the Cook Islands' ITA a creditor's claim a settlement or transfer to an *international trust* generally needs to be made within 2 years of the creditor's cause of action having accrued or, if settlement or transfer takes place within 2 years from the date that the creditor's cause of action accrued, before the expiration of 1 year from the date such settlement or transfer.^{xxxviii}

Generally

- As far as the relationship between Bermuda's firewall legislation and fraudulent transfer legislation is concerned, the effect of section 36G of the Conveyancing Act is that Part IV A Conveyancing Act (i.e. Bermuda's fraudulent transfer legislation) will not enable a creditor's claim if it the claim is precluded by section 11 TSPA (i.e. Bermuda's firewall legislation).
- Every transfer made at an Undervalue with the Requisite Intention shall be voidable at the instance of an Eligible Creditor. Note that the Cook Islands ITA goes further by requiring that the settlor must have been insolvent (in accordance with the test set out in ITA) at the time or as a result of the transfer.^{xxxix}

- Bermuda's fraudulent transfer legislation does not validate the transfer of any property not owned by the transferor.
- Where a transfer is set aside, a transferee (for example, a trustee who receives a transfer from a settlor) has a first charge over the property transferred plus an amount to reimburse the transferee for all costs properly incurred by the transferee, provided the transferee has acted in good faith.
- In ordering that a transfer into a trust be set aside, the Bermuda Court is authorised only to set it aside to the extent necessary to satisfy the Obligation.
- A beneficiary of a trust may in good faith retain any distribution from the trust made by a trustee properly exercising its powers prior to the Bermuda Court order setting aside a transfer.

Burden of proof

Under Bermuda's fraudulent transfer legislation, the burden of proof is on the Eligible Creditor to prove to the Bermuda Court on the *balance of probabilities* that the transfer was made with the Requisite Intention and that it was at an Undervalue. In contrast, in certain circumstances^{xi}, under the Statute of Elizabeth and cases that have applied it, the burden of proof shifts to the debtor (i.e. the transferor such as the settlor). In contrast, Cook Islands' ITA requires the creditor to establish *beyond reasonable doubt* that the settlor made the transfer with the *principal intent* to defraud that particular creditor and that the transfer rendered the settlor *insolvent* (under the test set out in the ITA).^{xii}

Offshore fraudulent transfer legislation may operate to protect trust property and deter creditors from pursuing trust property to varying degrees. However, such legislation generally does not prevent a foreign court which has jurisdiction over insolvent settlors and beneficiaries from making orders^{xiii}:

- to exercise any powers they may have under the trust instrument to procure a distribution of property so the trust property with the result that becomes available to creditors;
- in the case of the settlor, to require the settlor to exercise any powers the settlor may have to revoke the trust or exercise a general power of appointment;
- to require a beneficiary to request the trustee for distributions from the trust fund;
- requiring them to report any trust distributions or benefits received by them or their family to a bankruptcy trustee or the foreign court; and
- holding them in contempt if they fail to comply with orders such as the above.

What factors influence a settlor's choice of governing law for a trust?

Aside from firewall and asset protection legislation, settlors' choice of the jurisdiction(s) in which to establish trusts and underlying entities is increasingly based upon a jurisdiction's:

- reputation (which is affected by its historic and current policy decisions) and the view in the international market of the types of clients who establish structures under the laws of the jurisdiction;
- infrastructure including the breadth and depth of the legal profession, and trust and corporate service providers;
- accessibility of the jurisdiction from key onshore centres;
- the ability of the jurisdiction's legislature and regulator to independently and efficiently assess and respond to international pressures;
- simplicity and unique features of its laws relating to trusts, funds, insurance and other asset holding and investment structures and regulations;
- privacy and data protection laws;
- ability to keep up with other jurisdictions or, where appropriate, take the lead on legislation which satisfies the objectives of globally mobile settlors and beneficiaries;
- approach to implementation of international reporting regimes such as those known as FATCA and the CRS;
- response to initiatives of the Organisation for Economic Co-operation and Development to other bodies in respect of private and public registers of beneficial ownership; and
- ability to effectively communicate its strengths.

Bermuda cases

Bermuda's asset protection legislation described in this article has only been considered in a small number of cases, none of which appear to have been required to apply the legislation in the particular circumstances.

Garner v BTC and Schindler

In *Garner v Bermuda Trust Company Limited and Schindler*^{xliii} the settlor's transfer of trust property into the Bermuda law trust occurred in 1979, well prior to the introduction of Bermuda's firewall legislation became operative. However, the Bermuda Court held that Bermuda's firewall legislation which had subsequently come into force was declaratory of the common law position in Bermuda.

The claimant, a nephew of the settlor, claimed for maintenance on the settlor's deceased estate under Mexican law and asserted that, by transferring assets into the Bermuda trust, the settlor sought to remove from her ownership and her estate (though not from her control during her lifetime) a large fund which ought to have been available to satisfy the nephew's claim under Mexican law. The nephew maintained that such a deliberate

avoidance of the intent of Mexican legislation was sufficient grounds for the Bermuda Court not to give effect to the trust.

The terms of the trust provided the settlor the power to direct payments of trust capital to herself during her lifetime and that, following her death, the trust was to benefit the claimant. The claimant advised that under Mexican law, the trust was deemed to be a testamentary disposition from the deceased to the claimant.

The Bermuda Court acknowledged that the settlor appeared to have the intention of defeating the nephew's claim against her estate because she expressly left him one dollar in her Will with a proviso that, if he contested her Will, he should receive nothing. However, the Bermuda Court, applying the common law, held that the claimant's claim was not recognisable or enforceable in Bermuda and therefore could not set aside the transfers into the trust. The claimant subsequently appealed, yet the appeal was also dismissed. Notably, Bermuda's Court of Appeal observed that:

"It would be strange if a trust which it is not contended could have been impugned when it was created could be set aside in support of a claim, arising at a subsequent date and that the granting of which is apparently discretionary, against an estate which at that date did not include the trust fund."

BTC v Ellefson

Bermuda Trust Company v Ellefson^{xliv} also does not provide a detailed analysis of Bermuda's firewall or fraudulent transfer legislation. The background was that a former spouse of the settlor and a beneficiary of a discretionary trust had obtained against the settlor (also a beneficiary of the trust) an order for a payment of a lump sum in New Hampshire, in the United States, in divorce proceedings. She successfully obtained an order in Bermuda to enforce the New Hampshire judgment against the settlor. The claimant subsequently brought several claims in Bermuda in relation to the trust fund asserting that:

- she was beneficial owner of 40% of the shares in a company which the settlor had procured her to transfer into the trust fund by undue influence;
- the settlor's transfer of shares in a company into the trust fund were made with the dominant purpose of defeating creditors' claims within the meaning of section 37 of the Conveyancing Act;
- the assets of the trust should be treated as the settlor's assets for the purpose of the enforcement of the claimant's lump sum judgment.

The trustee brought an application to the Bermuda Court for directions. The Court treated the application as a normal *Re Beddoes* application, granting the trustee leave to defend the claimant's hostile proceedings in relation to the trust fund. It is understood that the proceedings did not continue further and it is unclear whether a confidential settlement was reached.

Charman and Charman

The Bermuda proceedings in connection with the English case of *Charman and Charman*^{xlv} did not involve the application of Bermuda's firewall legislation. However, the case is worth mentioning, not least because of the size of the judgment ultimately made in the former wife's favour by the English Court, but because it considered the question of how a Bermuda Court should respond to letters of request for documents and assistance from English Courts hearing financial relief claims between divorced spouses.

Upon the Bermuda trustee's application, the Bermuda Court set aside an order for document production in respect of a Bermuda law trust, made pursuant to a letter of request from the English Family Court which had been upheld by the English Court of Appeal. The Bermuda judgment was unpublished. However, it is understood that Bell J sets aside the document request on the grounds that the party requesting the documents failed to establish the documents sought in the letter existed.^{xlvi}

Jennings and Jennings

In *Jennings v Jennings*^{xlvii}, when responding to a letter of request^{xlviii} from English Court in a similar context to the Bermuda *Charman* proceedings, Bell J indicated his decision in *Charman* had been wrong. Consequently, in *Jennings*, Bell J refused to set aside the document production order.

Bell J had regard to the fact that Bermuda statutes governing taking of evidence from a foreign court and matrimonial proceedings were taken from, and substantially in the same terms of, English legislation. Consequently, he considered that the decision of the English Court of Appeal in *Charman* in respect of the letter of request ought to have been persuasive and followed by the Bermuda Court. The English Court of Appeal considered that the approach towards inward and outward letters of request are the same and that an English Court would have accepted the letter of request had it been made by the Bermuda Court to the English Court. Bell J also noted that trust accounts are not *conjectural* documents in that they ought to be in existence because in Bermuda a trustee is under a legal obligation to maintain trust accounts.

The Bermuda proceedings in *Jennings and Jennings* reveal that firewall legislation may go some way to preventing enforcement of foreign judgments that are *inconsistent* with the applicable firewall legislation, but may not preclude litigants in foreign proceedings from accessing trust records via letters of requests for the purpose of foreign proceedings.

Concluding thoughts

Whether by good fortune, the deterrent effect of firewall legislation or otherwise, unlike certain other jurisdictions, Bermuda has not experienced court cases that expose any potential flaws with its firewall legislation. Bermuda is exploring amending its firewall legislation to further simplify the expression of its policy choices and provide more robust protection where appropriate. It will be particularly interesting to see what approach Bermuda adopts to questions regarding the circumstances in which:

- community property rights that have vested prior to the transfer of the community property into a Bermuda law trust ought to impact on questions regarding the ownership of and the power of the settlor to transfer such property; and
- a foreign judgment may be regarded as inconsistent with Bermuda's firewall legislation.

It is likely that firewall legislation will be tested more frequently with ever-increasing use of trusts in Bermuda by settlors from civil law jurisdictions.

Going forward, it will also be interesting to see:

- whether the UK's Colonial Validity Act 1865 may ultimately be successfully deployed by a claimant seeking to enforce a judgment of an English Court to vary a trust governed by the laws of a "Colony" in the jurisdiction of the Colony.
- the lengths foreign courts may go to in the future to compel enforcement of their judgments against offshore trustees and settlors. For example will foreign courts increasingly, as in the Anderson case, consider steps such as arresting settlors for contempt of court orders? Will foreign courts consider taking similar steps against trustees or directors of trust companies who have failed to comply with foreign court orders?

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. This balanced approach has generally been well received internationally and contributed to Bermuda's strong reputation internationally.

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ⁱ i.e. the trust is a sham. See *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786 and *A v A* [2007] EWHC 99 which confirmed that, in a bilateral trust, the trustee needs to be parties to the sham at the outset. This can be difficult to establish, particularly when professional and licensed trustees were the original trustees.

ⁱⁱ Note, for example, section 339 of UK's Insolvency Act 1986 provides that creditors may bring claim to set aside a transaction (including a transaction made at an undervalue within 5 years prior to the presentation of a bankruptcy petition against the debtor (e.g. settlor.). It would appear however that a Bermuda Court would require a UK bankruptcy receiver to establish that it is or represents Eligible Creditors under Part IV A Conveyancing Act 1983 and that the transfer was at an Undervalue for the dominant purpose of defeating the class of creditors represented by the bankruptcy receiver. A UK bankruptcy receiver might not need to bring proceedings in Bermuda if the assets are situated in the UK.

ⁱⁱⁱ See also *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415.

^{iv} See *Blight v Brewster* [2012] EWHC where a defendant who became entitled to take a lump sum from his pension was ordered to delegate the power to claim the lump sum to the creditors' solicitor so the lump sum could be made subject of a third party debt order.

^v See *TMSF v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17 where a receiver was appointed over a power of revocation reserved to a settlor. See also A. Fife, 'If it quacks like a duck?... The classification and duties of non-trustee power-holders, IFC Review, 1 January 2016, <http://www.ifcreview.com/restricted.aspx?articleId=10150>

^{vi} E.g. section 426 Insolvency Act 1986 in UK; Article 49 Bankruptcy (Desastre) (Jersey) Law 1990; section 467 Insolvency Act 20013 BVI.

^{vii} 15th edition, Sweet & Maxwell, 2017, vol. 1, p 1-008.

^{viii} Professor David Hayton, 'The Hague Convention on the Law applicable trusts and on their recognition' International & Comparative Law Quarterly, 1987.

- ^{ix} Article 3 Hague Trusts Convention provides that it only applies to trusts created voluntarily and in writing.
- ^x Articles 2 and 11 Hague Trusts Convention.
- ^{xi} Articles 6 and 7 Hague Trusts Convention.
- ^{xii} Article 8 Hague Trusts Convention, which *inter alia* includes variation of the trust and trust distributions.
- ^{xiii} T Graham, 'The Hague Trusts Convention five years on: the Swiss Federal Supreme Court's decision in *Rybolovlev v Rybolovleva*', *Trusts & Trustees*, Vol. 18, No. 8, September 2012, pp. 746–755. In the context of a matter requiring determinations in respect of matrimonial property, the Swiss Federal Court invoked Article 15 of the Hague Trusts Convention when there seems to be some basis for doubting whether this article was engaged. The Federal Court applied concepts of Swiss law that relate to companies in respect of piercing the veil of the trust, but the Jersey Royal Court's decision in *Re Esteem* suggests that these have no application to trusts. The Federal Court also appeared to give little regard to the interest of third parties, such the trustees or the other beneficiaries of the trusts.
- ^{xiv} Article 18 Hague Trusts Convention.
- ^{xv} See Article 15 Hague Trusts Convention.
- ^{xvi} For example, to the extent the firewall legislation does not respect mandatory succession or other mandatory laws in force in other member states.
- ^{xvii} For example, the argument that firewall legislation enacted in "Colonies" (i.e. "all of Her Majesty's Possessions abroad in which there shall exist a legislature...except the Channel islands, the Isle of Man, and such Territories as may for the time being be vested in Her Majesty under or by virtue of an Act of Parliament for the Government of India") is repugnant to the law of England and therefore invalid and inoperative. Colonies' firewall legislation might be regarded as repugnant English legislation to the extent they purport to preclude the courts of the Colony from given effect to orders that may be made by English Courts in relation to trusts governed by the laws of such Colonies.
- ^{xviii} The author's State of origin.
- ^{xix} See presentation by Nicholas Le Poidevin QC, 'New Square Chambers, 'Challenges to trusts internationally and firewalls'', <http://www.chba.org.uk/for-members/library/overseas-seminars/challenges-to-trusts-international-and-firewalls>, downloaded on 28 August 2016.
- ^{xx} See section 14(4) Trusts (Guernsey) law 2007.
- ^{xxi} See section 5(2) Trusts Act 1995, Isle of Man.
- ^{xxii} Professor Jonathan Harris; and in 'A higher firewall', *STEP Journal*, December 2015.
- ^{xxiii} See note 52.
- ^{xxiv} In Jersey's case and/or under Article 51 of TJL which sets out many of the Jersey Court's supervisory powers.
- ^{xxv} In Jersey's case and/or under Article 51 of TJL which sets out many of the Jersey Court's supervisory powers.
- ^{xxvi} [1841] 4 Beav. 115, i.e. all ascertained beneficiaries may agree to vary the terms of the trust.
- ^{xxvii} *Re B*, Cayman Islands, 26 November 2010, *In the matter of IMK Trust* [2008] JRC.
- ^{xxviii} 13 Eliz. Ch 5 (1570)(Eng).
- ^{xxix} In *Ideal Bedding v Holland* [1907] 2 Ch 157 Kekewich J note that in England, the potential relief available to creditors, the State if Elizabeth had come to be applied in a wide variety of circumstances to broaden its application by creating many more avenues for creditors' relief which might potentially be hindered by a transaction.
- ^{xxx} *Alderson v Temple* (1746-1779) 1 Black W 660, 96 ER 384.
- ^{xxxi} 19 Ch. D. 588 (1882). See also *Mackay v Douglas* 14 L.R.Eq. 106 (1872).
- ^{xxxii} Section 2 ITA as amended provides that "International Trust" means a trust ... which is registered under this Act and in respect of which:
- (a) at least one of the trustees, including a custodian trustee, or in the case of a disposition granting powers of appointment, maintenance or advancement, at least one of the donors or holders of the power of appointment or power of maintenance or power of advancement is either:
 - (i) a registered foreign company; or
 - (ii) a international company; or
 - (iii) a trustee company; and
 shall include, where the context so permits, a trust which is established or settled under the laws of another jurisdiction but which, subject to paragraph (a) and (b) of this definition, is registered as an International Trust under this Act;
 - (b) the beneficiaries are at all times non-resident;
- ^{xxxiii} See for example, Peter Willoughby, *Misplaced Trust*, Gostick Hall Publications, 1999.
- ^{xxxiv} For example, reports indicate that those who have settled Cook islands' trusts R. Allan Sanford who was convicted in the United States in connection with the operation of a Ponzi scheme which allegedly held in excess of US\$7 million in assets; Kevin Trudeau in respect of who the U.S Federal Trade Commission, was awarded a \$37.5 million judgment in connection with Trudeau's airing of deceptive infomercials for his diet book *The Weight Loss Cure* Dr. James Naples, a Texas podiatrist who pleaded guilty in 2004 to U.S. federal charges of obstructing justice in connection with treating cancer patients with a

pesticide and then billing Medicare and insurance companies; and Dr. Richard Edison, a Fort Lauderdale, Fla., plastic surgeon, called *Dr. Dread*, who was sued after five patients at his Florida plastic surgery clinic died and he left a medical sponge in a woman's breast- after the 2004 death of a patient, the Florida health department restricted his medical licence; see *Cook Islands: A paradise of untouchable assets*, Leslie Wayne, http://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html?_r=014 December 2013, downloaded on 28 August 2016.

^{xxxv} See ITA, section 15 in relation Note the registers in the Cook Islands and elsewhere are not available to the public.

^{xxxvi} Note section 13B(1) ITA provides that a claimant creditor must prove beyond reasonable doubt that the settlor made the transfer into the trust with the principal intent to defraud the claimant.

^{xxxvii} Section 36C(3) Conveyancing Act.

^{xxxviii} Section 13B(3) ITA.

^{xxxix} Section 13B(1) ITA.

^{xl} See Toby Graham, 'Settlor Insolvency: the enduring legacy of the Statute of Elizabeth' *Trusts & Trustees*, Vol. 16, No. 2, March 2010, p93. These circumstances are often referred to as *badges of fraud*, and are expressed in the aforementioned article to include: i) The fact that the alienation included all (or substantially the whole) of the settlor's property; ii) The fact that the settlor continued in possession of the property he had purported to alienate when such continuance in possession was not in accordance with the tenor and object of the alienation. Reservation by the settlor of a power of revocation has been considered an indicator of fraudulent intent; iii) The secrecy of the disposition; iv) The fact that the disposition was made when litigation was pending; v) The fact that the transfer was into trust and the settlor is within the beneficiary class; vi) Unusual recitals or statements in instruments of disposition declaring that it was made in good faith or without fraudulent intent.

^{xli} Section 13B(1) ITA.

^{xlii} See *FTC v Affordable Media LLC*, 179, F. 3d 1228 (9th Circuit 1999), also known as *the Anderson case* and *United States of America v. Arline Grant* United States District Court, S.D. Florida, 25 March 2013 and April 22, 2013 where the offshore trusts were governed by Jersey law and Bermuda law respectively.

^{xliii} [1992] Bda LR 34.

^{xliv} [1995] Bda LR 61.

^{xlv} *Charman v Charman* [2007] EWCA Civ 503.

^{xlvi} There is a discussion of the Bermuda Court's decision in *Charman v Charman* [2007] EWCA. See also J Riihiluoma, '*Jennings v Jennings* [2009] SC (Bda) 62 Civ', *Trusts & Trustees*, Vol. 16, No. 5, June 2010, pp344-345.

^{xlvii} [2009] SC (Bda) 62 Civ.

APPENDIX

SECTIONS 10, 11 TRUSTS (SPECIAL PROVISIONS) ACT 1989 (FOLLOWING AMENDMENTS IN 2004)

Capacity to create trust

- 10 (1) Subject to subsection (2), a person has a capacity to create a trust in the following cases:
- (a) where the trust property is movable—
 - (i) in the case of an inter vivos trust, if he has the capacity to create a trust of movable property by the law of Bermuda;
 - (ii) in the case of a testamentary trust, if he has the capacity to create a trust of movable property by the law of his domicile
 - (b) where the trust property is immovable, if he has the capacity to create a trust by the lex situs of the immovable.

(2) All questions as to the capacity of any settlor arising in regard to a trust which is for the time being governed by the law of Bermuda or in regard to any disposition of property upon the trusts thereof are to be determined according to the law of Bermuda without reference to the law of any other jurisdiction with which the trust or disposition may be connected except that this subsection—

- (a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this subsection affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such power;
 - (b) does take effect subject to any express contrary term of the trust or disposition;
 - (c) does not, as regards the capacity of a corporation, affect the recognition of the laws of its place of incorporation;
 - (d) does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;
 - (e) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Bermuda which is invalid according to the laws of such jurisdiction;
 - (f) does not validate any testamentary trust or disposition which is invalid according to the laws of testator's domicile.
- (3) An heirship right conferred by the law of another jurisdiction in relation to the property of a living person shall not be recognised as affecting the ownership of land in Bermuda or movable property wherever situate for the purposes of subsection (2)(a).

[Section 10 subsection (3) inserted by 2004:35 s.2 effective 17 December 2004]

Application of foreign laws

11 (1) Subject to section 10(2)(a) to (f), where a trust is validly created under the laws of Bermuda, the court shall not vary it or set it aside and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective for any reason, nor is the capacity of any settlor to be questioned, nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any rights, by reason that—

- (a) the law of any another jurisdiction prohibits or does not recognise the concept of a trust;
 - (b) the trust or disposition avoids or defeats rights, claims or interests conferred by the law of another jurisdiction upon any person by reason of a personal relationship to the settlor or to any beneficiary or by way of heirship rights, or contravenes the law of another jurisdiction or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests; or
 - (c) the trust or disposition avoids or defeats rights, claims or interests conferred by the law of another jurisdiction upon any person in respect of the protection of creditors in matters of insolvency.
- (2) A foreign judgment shall not be recognised, enforced or give rise to any estoppel insofar as it is inconsistent with this section.
- (3) In this part:

“heirship right” means any right, claim or interest in, against or to property of a person arising, accruing or existing in consequence of, or in anticipation of that person's death, other than any such

right, claim or interest created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of the property to such person;

“personal relationship” includes every form of relationship by blood or marriage, including a previous marriage, and in particular a personal relationship between two persons exists if—

- (a) one is the child of the other, natural or adopted, legitimate or born out of wedlock;
- (b) one is married to the other; or
- (c) one cohabits with the other or so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife.”

[Section 11 substituted by 2004:35 s.3 effective 17 December 2004]

SECTION 11 TRUSTS (SPECIAL PROVISIONS) ACT 1989 (PRIOR TO 2004 AMENDMENTS)

11. Where a trust is validly created under the law Bermuda, the Court shall not vary it or set aside pursuant to the law of another jurisdiction in respect of-

(a) *the proprietary effect of marriage;*

(b) *succession rights, testate and intestate, especially the infeasible shares of spouses and relatives,*

(b) the protection of creditors in matters of insolvency,

unless the law of Bermuda has corresponding laws or public policy rules."

PART IV A CONVEYANCING ACT 1983

PART IV A

PROVISIONS AGAINST DISPOSITIONS WITH REQUISITE INTENTION

Interpretation

36A (1) In this Part—

“appointed day” means the date on which this Part comes into operation;

“disposition” means any disposition or series of dispositions of property of any nature whatsoever and however effected, and, without limiting the generality of the foregoing, includes any exercise of a power of appointment, any trust, gift, transfer, sale, exchange, demise, assignment, assurance, grant, lease, surrender, conveyance, reconveyance, release, reservation, any purchase or other acquisition, any covenant, contract or option and any compromise or other dealing or arrangement;

“eligible creditor” means a person to whom—

- (a) on, or within two years after, the material date the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied;

- (b) on the material date the transferor owed a contingent liability and since that date the contingency giving rise to the obligation has occurred and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied; or
- (c) on the date of the action or proceeding to set aside the relevant disposition, the transferor owes an obligation in consequence of a claim, made by that person against the transferor, arising from a cause of action which accrued prior to, or within two years after, the material date.

“material date” means the date on which a relevant disposition is made;

“obligation” means any obligation or liability, other than a contingent liability, to pay a sum of money or to transfer property;

“property” includes money, goods, things in action, land and every description of property wherever situated and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;

“relevant disposition” means a disposition to which section 36C applies;

“requisite intention” means an intention of a transferor to make a disposition the dominant purpose of which is to put the property which is the subject of that disposition beyond the reach of a person or a class of persons who is making, or may at some time make, a claim against him;

“transferor” means a person who directly or indirectly makes a relevant disposition or causes it to be made;

“transferee” means the person to whom a relevant disposition is made and includes a successor in title of such person;

“trust” includes a settlement;

“undervalue”, in relation to a disposition of property, means a disposition in respect of which—

- (a) no consideration is given; or
- (b) the value of the consideration given is, in money or money’s worth, significantly less than the value, in money or money’s worth, of the property.

[Section 36A inserted by 1994:21 effective 13 July 1994]

Application

36B (1) Subject to subsections (2) and (3), with effect from the appointed day the provisions of this Part shall apply to every disposition of property made by any person whether that disposition was made before or after the appointed day and whether or not the property, the subject of the disposition, is situated in Bermuda or elsewhere.

(2) Notwithstanding subsection (1), where—

- (a) prior to, or within six months after, the appointed day; and
- (b) pursuant to a conveyance of property to which section 37 of the Conveyancing Act 1983 applies, any action or proceeding has been commenced, this Part shall have no application, and the provisions of the said section 37 shall have effect as if this Part had not been enacted.

(3) This Part shall not affect the operation of a disentailing assurance or the law of bankruptcy for the time being in force.

[Section 36B inserted by 1994:21 effective 13 July 1994]

Avoidance of dispositions made with the requisite intention, etc

36C (1) Subject to subsection (2) and the provisions of this Part, every disposition of property made with the requisite intention and at an undervalue shall be voidable at the instance of an eligible creditor thereby prejudiced.

(2) Where a person seeking to set aside a relevant disposition was not, on the material date, a person to whom an obligation was owed by the transferor, the Court shall not set aside that disposition unless the Court is satisfied that that person was, on the material date, reasonably foreseeable by the transferor as a person to whom an obligation might become owed by him.

(3) Subject to subsection (4), no action or proceeding to set aside a disposition shall be commenced pursuant to this Part unless such action or proceeding is commenced—

(a) in the case of an eligible creditor referred to in paragraph (a) of the definition of that expression, within six years after the material date or within six years after the date when the obligation became owed, whichever is the later date;

(b) in the case of an eligible creditor referred to in paragraph (b) of that definition, within six years after the material date;

(c) in the case of an eligible creditor referred to in paragraph (c) of that definition, within six years after the material date, or within six years after the date when the cause of action accrued, whichever is the later date.

(4) Except as provided in subsection (3), nothing contained in this section shall be construed as in any way affecting the operation of the Limitation Act 1984.

(5) For the avoidance of doubt it is hereby declared—

(a) that a disposition to which this Part applies shall not, by reason only that it was made at an undervalue, be set aside by the Court; and

(b) the Court shall, for the purpose of setting aside such a disposition determine, on a balance of probability, whether it was made with the requisite intention.

[Section 36C inserted by 1994:21 effective 13 July 1994]

Savings of certain rights

36D (1) Where, pursuant to this Part, a relevant disposition is set aside and the Court is satisfied that the transferee has acted in good faith, then,—

(a) the transferee shall have a first and paramount charge over the property, the subject of the relevant disposition, for an amount equal to all costs (and not only such costs as the Court might otherwise allow) properly incurred by the transferee in the defence of the action or proceeding to set aside that disposition;

(b) the relevant disposition shall be set aside subject to all fees and costs properly incurred and subject also to any pre-existing rights, claims and interests of the transferee and of any person through whom the transferee claims and who has acted in good faith; and

- (c) in the case of a trust, the relevant disposition shall only be set aside subject to the right of a beneficiary to retain any distribution made consequent upon the prior exercise of a trust, power or a discretion vested in the trustee of such trust or any other person, and otherwise properly exercised.

(2) The burden of proving that a transferee or any person through whom the transferee claims has not acted in good faith shall be upon the person making the allegation.

[Section 36D inserted by 1994:21 effective 13 July 1994]

Extent of avoidance of relevant disposition

36E Subject to section 36D, a relevant disposition shall be set aside pursuant to this Part only to the extent necessary to satisfy the obligation owed to the eligible creditor at whose instance the disposition has been set aside.

[Section 36E inserted by 1994:21 effective 13 July 1994]

Part not to validate certain dispositions

36F Nothing contained in this Part shall be construed as -

- (a) validating any disposition of property which is neither owned by, nor is the subject of a power of disposal with respect thereto vested in, the transferor;
or
(b) affecting the recognition of a foreign law in determining whether the transferor is the owner of such property or the holder of such power.

[Section 36F inserted by 1994:21 effective 13 July 1994]

Relationship with Trusts (Special Provisions) Act 1989

36G Nothing in this Part shall be construed as creating or enabling any right, claim or interest on behalf of a creditor or person which right, claim or interest would be avoided or defeated by section 11 of the Trusts (Special Provisions) Act 1989, (which prohibits the variation or setting aside of trusts validly created under the Law of Bermuda).

[Section 36G inserted by 1994:21 effective 13 July 1994]