COMITY OVERCOMES STATUTORY RESISTANCE: IN THE MATTER OF THE B TRUST

Jonathan Harris

Synopsis

1 In an earlier article,¹ the author discussed the new private international law provisions introduced by article 9 of the Trusts (Amendment No 4) (Jersey) Law 2006 and suggested that they were beset with serious difficulties of scope, interpretation and application. Alas, we have not had to wait long for these difficulties to be highlighted in the Royal Court.

2 In In the Matter of the B Trust,² the Royal Court was faced with an English order varying a Jersey law trust pursuant to what the English court considered to be a post-nuptial settlement. The trustees, who had submitted to the English proceedings, sought directions in the Royal Court as to whether, and if so, to what extent they should comply with the English order. In the course of the Bailiff’s judgment, he rightly pointed out the obscurity of certain provisions of the new article 9. Nevertheless, he felt able to circumvent these and give substantial effect to the order. Unfortunately, it is suggested that the Royal Court’s reasoning was itself beset by serious error and, accordingly, adds to the catalogue of concerns and uncertainties about the meaning and effect of the legislation.

Facts

3 The B trust was established in 1988 by a settlor domiciled in Jersey for S (“the husband”) and various members of his family. Mourant & Co Trustees Limited succeeded to the office of trustee in 2003. The trust fund was composed of issued share capital of a Jersey company which held immovable property in England. The trust was governed by Jersey law. On 6th February 2006, the Family Division of the English High Court granted an order for the variation of the B trust in matrimonial proceedings between the husband and J (“the wife”). The variation order required the settlement of £1,500,000 into a sub-trust and the award of a life interest in the sub-trust funds to the wife, with a power of advancement in her favour. The sub-trustees were required to account in various ways to the trustees.

The position prior to the Trusts (Amendment No 4) (Jersey) Law 2006

¹ Harris, Jersey’s new private international law rules for trusts- a retrograde step? (2007) 11 Jersey and Guernsey Law Review 9. Hochberg, Jersey’s new private international law rules for trusts- a response (2007) 11 Jersey and Guernsey Law Review 20, has helpfully attempted to overcome some of the difficulties of construction in article 9. His arguments do not, however, alter this author’s views, or concerns about the very considerable problems attached to the legislation.

4 The Bailiff was of the view that the English order would have been recognised under the "old" law in article 9 of the Trusts (Jersey) Law 1984 ("the 1984 Law"). It was a judgment of a court to which the trustee had submitted. The Bailiff cited the following statement of Birt, Deputy Bailiff in In the Matter of the H Trust:

"[T]he significant factor, from the point of view of whether the trustee should submit to the jurisdiction of the overseas court, is that it will remain a matter of discretion for this court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits."

5 This statement is in line with the orthodox position in private international law. By virtue of the trustee's submission, the English court was rendered jurisdictionally competent over it in the eyes of Jersey law. A judgment of a court to which the defendant submits should be recognised without any review as to the substance, since the defendant has waived any objections to the jurisdictional competence of the foreign court.

A change in legislative regime

6 Matters were complicated, however, by the fact that the Trusts (Amendment No 4) (Jersey) Law 2006 had entered into force at midnight on 26th October 2006 and the application before the Royal Court for directions was heard on 27th October. The lack of transitional provisions in this respect is somewhat unfortunate. It meant that a trust that had been created before the amendment had been drafted, and had been varied by the English court prior to its entry into force, was subject to what was a very much different and, arguably, much more restrictive set of rules on the recognition of foreign judgments. This was particularly unfortunate when the English court acted with the reasonable expectation, consistent with Jersey authority on the "old" law, that the order was likely to be recognised and enforced in Jersey because the trustee had submitted to the English proceedings.

The choice of law rules in the Trusts (Amendment No 4) (Jersey) Law 2006

7 Article 9(1) of the Trusts (Jersey) Law 1984, as amended, subjects a number of issues exclusively to the law of Jersey. Like this author, the Bailiff struggled to make sense of article 9(3), as amended, and its statement that "the law of Jersey relating to… (b) conflicts of law" shall not apply to the determination of any question mentioned in...
paragraph 1 unless the settlor is domiciled in Jersey”. He described the provision as “obscure” and “circular because the rules set out in paragraph (1) must themselves be conflicts rules”. This is indeed correct. It seems to suggest that the entirety of article 9(1) applies only to settlors domiciled in Jersey.  

**Article 9(4), as amended: scope and legal basis**

8 It is one thing to subject Jersey law trusts exclusively to Jersey law on a number of key matters, as articles 9 (1)-(3) seek to do. This is a highly protective, if rather insular, set of choice of law rules. It is, however, very much more controversial for legislation then to provide that any foreign judgment that does not reach a conclusion that is consistent with the application of Jersey law shall be denied recognition in Jersey. Article 9(4) states 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.”

9 Although this might be said to complete the protection of the forum’s choice of law rules, it is an approach that is anathema to the conflict of laws, involves routine review of foreign judgments as to their substance and is a recipe for conflict as to the legal situation between states, which could place the parties to litigation, and the trustee, in particular, in an impossible position. Since variation is one of the matters on which Jersey trusts are subjected exclusively to Jersey law by article 9(1)(e), the meaning and effect of article 9(4), as amended, must be that any foreign court’s order which reaches a different conclusion to that which the Jersey courts, applying Jersey law, would have reached, shall not be enforced in Jersey.

10 The legal basis of article 9(4) is also highly questionable. In Jersey, the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 applies to judgments delivered in the United Kingdom, the Isle of Man and Guernsey. It may be extended to countries providing reciprocal treatment to Jersey judgments. Its basis, in other words, is reciprocity and...
respect between states. The Law lays down substantive grounds for recognition of foreign judgments. These are rules of law, not discretionary provisions. This author has already pointed out that it is extremely hard to reconcile article 9(4) of the Trusts (Jersey) Law 1984, as amended, with the terms of the 1960 Law, which appear to require the Jersey court to recognise a judgment of a court to which the defendant submitted. Article 6(2)(a)(i) of the 1960 Law provides that a foreign court shall be considered jurisdictionally competent in the eyes of Jersey law "if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings…" This leads to serious concern about the legality, as well as the desirability, of the rules in article 9(4).

11 The B Trust case was an ideal and necessary occasion for the Royal Court carefully to explore the meaning of article 9(4) of the Trusts (Jersey) Law 1984, as amended, and to establish its relationship to the general rules on the recognition and enforcement of foreign judgments in force in Jersey. Unfortunately, the Court did not do so and appeared not to appreciate that it was necessary to do so.

Comity: a residual basis for the recognition of foreign judgments?

12 Anxious to give some effect to the English order, the Bailiff turned to consider the argument that, irrespective of the wording of article 9(4) and its meaning, the English order should be given effect on the grounds of "comity". He appeared to think that it was clear that foreign judgments should be given effect on that basis and regarded the suggestion that this basis for recognition had been excluded by article 9(4) as "a bold submission". With respect, the Royal Court fell into serious error and confusion at this point.

13 The rules of recognition and enforcement of judgments are contained either in statutes or in the substantive rules derived from English common law. Those provisions are characterised by being rule based. It may, of course, be that underlying those substantive rules on recognition of foreign judgments are policy factors which explain the rules that have developed. But those policies are not rules of law in themselves, and cannot themselves be applied to determine the outcome of cases. To suggest that comity is a rule for the recognition of foreign judgments, as the judge appeared to think, is like suggesting that freedom of contract is a term of a contract, or testamentary freedom a term of a will.

criminal orders would not normally be enforceable, as it is a basic principle of private international law that foreign penal laws are not enforced; they might only be enforced if they award damages by compensation and so are not punitive (See further Dicey, Morris and Collins, The Conflict of Laws, 14th ed (2006), Rule 3, p 100). Even if Hochberg’s construction were correct, however, it would not change the author’s views expressed in his earlier article. The scope of the 1960 Law would still encompass any action against the trustee seeking compensation for breach of trust and the relationship between the 1960 Law and the Trusts (Amendment No 4) (Jersey) Law 2006 needs properly to be worked out. Moreover, even if the 1960 Law were not applicable in the present case, one would expect the almost identical, rule based general provisions on the recognition of foreign judgments to lead to the same result.


15 It is true that article 6(1)(v) of the 1960 Law states that the registration of the judgment might be set aside if it would be contrary to the public policy of Jersey to recognise it. At no stage, however, did the trustee suggest that the English order offended Jersey’s public policy and the Bailiff certainly did not suggest that it did either.

16 Para 16.
In fact, comity has been helpfully defined by the Supreme Court of the United States in *Hilton v Guyot* thus -

“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

Furthermore, comity is not even the theoretical basis which underpins the recognition of foreign judgments. That theory was displaced by the theory of obligation in the nineteenth century. The “modern” basis for recognition was famously stated by Blackburn J in *Schibsby v Westenholz* thus -

“The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce.”

Blackburn J then went on to refuse to recognise a French judgment where the French court had taken jurisdiction on grounds which, had the facts occurred in England, would have led the English courts themselves to take jurisdiction. He observed that -

“…if the principle on which foreign judgments were enforced was that which is loosely called ‘comity’, we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment in France; but it is quite different if the principle be that which we have just laid down.”

Furthermore, it is quite clear that a judgment of a foreign court of competent jurisdiction must be recognised as a matter of law, not discretion. That principle, established in English law, is equally applicable in the law of Jersey. In *Showlag v Mansour*, a Privy Council case on appeal from the Court of Appeal of Jersey, Lord Keith of Kinkel observed as follows -

“In *Owens Bank Ltd. v Bracco* [1992] 2 AC 443, 484 Lord Bridge of Harwich said: ‘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 in 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 which have been

---

14 (1895) 159 US 113 at 163-164  
15 (1870) LR 6 QB 155.  
20 *Ibid*, at 159.  
decided against him by the foreign court.’

*That statement holds good in Jersey as it does in England.*

18 It followed that there was binding authority on the Jersey courts to support the axiomatic principle that foreign judgments are recognised by virtue of rules of law, and not on a residual, discretionary basis.

19 The Court appeared not to appreciate the significance of these authorities and principles. Instead, it relied on cases drawn from the law of *forum non conveniens* which stress the importance of comity. That, however, is to wrench quotations from a different context, where the issue is whether a local court should stay its own proceedings. It is clear that the Jersey court’s own rules on jurisdiction are quite different to the question whether to recognise and enforce a foreign judgment. *Schibsby v Westenholz* itself established this principle, which has never been doubted. Moreover, comity is considered in the context of *forum non conveniens* because the latter is a discretionary doctrine derived from case law, applied to determine whether, taking all factors into account, it would be more appropriate for litigation to take place overseas. In the present case, the judge was faced with the words of a statute, article 9(4) of the Trusts (Jersey) Law 1984, as amended, which lays down rules of law as to the recognition of foreign judgments, and needed to construe the meaning of that statute, and its relationship to other statutory provisions of Jersey law. The analogy to *forum non conveniens* was not a sound one.

20 Without doubt, the non-recognition of the judgment would have led to most unattractive consequences for the trustees. As the Bailiff observed: “Counsel very candidly stated that, notwithstanding the facts that the trustee had submitted to the jurisdiction and that all relevant parties had been heard before the High Court, the wife would have to return to the English court to report that effect could not be given to the English order.”

He continued: “If the purpose of the amended article 9 really is to protect trust assets to the extent that a manipulative spouse can evade the enforcement of a carefully considered judgment designed to do justice between husband and wife on divorce, that would seem to us to be a very unhappy state of affairs.” This powerful illustration of the problems of non-recognition led the judge to believe that article 9(4) could not possibly be intended to achieve this result. This view was only strengthened by the fact that the trustee had submitted to the English proceedings and the trust itself involved real property situated in England, over which the English courts might reasonably have thought it proper to exercise control. But whilst one can readily sympathise with the judge’s concerns, the problem lies with article 9(4) itself, which quite explicitly says that the judgment should not be recognised.

---

22 Emphasis added.
23 For further criticism, see Matthews, *No black holes, please, we’re Jersey* (1997) 1 Jersey Law Review 132, 140-141.
24 Para 16. See *The Abidin Daver*, [1984] 1 All ER 470, 476, per Lord Diplock: “Judicial chauvinism has been replaced by judicial comity.”
25 (1870) LR 6 QB 155.
26 Para 13.
27 Ibid.
Somewhat remarkably, the Royal Court decided that it did not need to decipher the meaning of article 9(3) or 9(4), since “We are quite clear what they do not mean and that they do not exclude the application of the doctrine of comity”. Alas, the Court’s confidence and clarity were clearly misplaced. Article 9(4) patently does exclude other bases for the recognition of foreign judgments, even if comity were a ground for recognising foreign judgments. Moreover, the Bailiff said that it would take “very clear and express words to persuade us that the legislature intended to deprive this Court of the flexibility to do justice in a wide range of cases on the basis of a principle of almost universal applicability [i.e. comity].”

With due respect, this makes little sense as a proposition of law for several reasons. First, as already explained, comity is not in itself a substantive ground for recognition of foreign judgments. Secondly, recognition of foreign judgments is based on legal rules, not on some form of broad, discretionary notion of justice. This has never been a basis of recognition and it cannot become so now. Thirdly, and most importantly, even if comity were a residual ground in and of itself to recognise foreign judgments where there is no inconsistent statutory provision, it is extremely difficult to see how the judge reached his conclusion that the judgment could be recognised on that basis consistently with article 9(4). The wording of article 9(4) on that point could hardly be clearer: “no foreign judgment 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”. Moreover, on the Bailiff’s own reasoning, comity is an “applicable law relating to conflict of laws”; and, as such, it is required by article 9(4) to give way to the statute’s provisions. It follows from the wording of article 9(4) that a judgment must not be recognised if it is inconsistent with the provisions of article 9(1)-(3). Regrettably, the Royal Court’s approach represents a level of judicial creativity that was simply not available to it as a matter of law.

Was the English order inconsistent with Jersey law?

The task of the judge, then, should have been to address article 9(4) head on. Taken at face value, article 9(4) appears to state that a judgment of a foreign court that reaches an outcome that is inconsistent with that which a Jersey court, applying articles 9(1)-(3), would have reached, shall not be recognised. This, in turn, would require a Jersey court effectively to retry the matter, in order to decide if the foreign court’s findings are consistent with those that the Jersey court would have reached. Article 9(4) may be a most unfortunate rule; but its meaning on this point appears to be clear.

In that respect, a first difficulty for the Royal Court should have been to determine whether the English order, which had been granted on the basis that the court was varying...
a post-nuptial settlement, was also such a settlement in the eyes of Jersey law. It appeared that English and Jersey law were at loggerheads on this point. The Bailiff cited an extract from the judgment of Lord Nicholls in Brooks v Brooks, where his Lordship favoured a broad interpretation of section 24 of the English Matrimonial Causes Act 1973, so as to allow the court to make appropriate financial provision for the parties. In contrast, the provisions in article 27 of the Matrimonial Causes (Jersey) Law 1949 were more narrowly drawn. In J v M, the Royal Court noted that, in Jersey law, a post-nuptial settlement must confer benefits on the beneficiaries as husband and wife, rather than simply being for the benefit of blood relatives.

25 In In the Matter of the B Trust, the Bailiff inclined to the view that the trust was not a post-nuptial settlement in Jersey law. That, in turn, should have led to questions as to whether the English court had acted in a manner inconsistent with Jersey law. The judge, however, found that “It is unnecessary… for us to make a finding in this respect…” It is, accordingly, difficult to understand Hochberg’s assertion that “The Bailiff’s view in In the Matter of the B Trust, which may be characterized as a moderate application of article 9 (as amended) turns on discerning whether there are inconsistencies between the substance of the English judgment, and the substance of the directions contained in the Royal Court’s order”. This is the very comparison that the Royal Court should, but notably did not undertake. If it had done so, and had found the English order to be incompatible with Jersey law, it is hard to see how article 9(4), as amended, does anything other than compel the non-recognition of the English judgment.

Discretion, article 51 of the Trusts (Jersey) Law 1984 and the recognition of foreign judgments

26 The Bailiff, having freed himself from any legal constraints to recognising the English order, set about determining the effect to give to it. He cited the comments of Birt, Deputy Bailiff In the Matter of the X Trust to the effect that the Family division’s role is to do justice between the spouses in the matrimonial context, whereas the Jersey court in its supervisory jurisdiction must approve decisions in the interests of all beneficiaries. He found that the interests of the various parties in this case could, however, largely be reconciled and that “we see no reason why, in the interests of comity, substantial effect should not be given to the judgment of Bennett J”. He noted that the trustee submitted to the English jurisdiction and that all parties were given the opportunity to be heard in England. That, in his view, made it “fair” to give substantial effect to the order. Whether

33 “…[I]t is at least arguable that certain variations to Jersey settlements under s 24(1)(c) of the MCA 1973 (for instance as to the administration of the trust or the powers conferred) would, to be enforceable in Jersey, require the application of Jersey law…”; Hanson and Renouf, Divorce: maintaining your trust in Jersey [2006] (Sept) IFL 135, 138.
36 Para 11.
37 Ibid.
40 Para 25.
41 Ibid.
42 In this respect, he drew support from In the Matter of the H Trust [2006] JRC 057, where the Deputy Bailiff observed that where a foreign court had carefully sought to achieve a fair allocation between the spouses “[T]he interests of comity as well as
it was or was not “fair” is not, however, relevant in the face of the wording of a statute. The Court appeared to consider itself free to decide on a purely discretionary basis what effect to give to the English order. Nor did it explain what, in its view, the doctrine of comity required, or give any guidance, or draw from any authority, as to how this discretion might be exercised.

27 The Bailiff noted that article 51 of the Trusts (Jersey) Law 1984 (“the 1984 Law”) gave the judge a broad discretion to give directions to the trustee. However, it is important to appreciate that the broad discretion available to the court generally to give directions to the trustee cannot affect the law on whether the Jersey courts are legally bound to recognise and enforce a foreign judgment. In so far as the judge considered himself free under article 51 to chop and change the English order at his discretion, he was mistaken. If a foreign judgment meets the statutory requirements for recognition in Jersey, it must follow that the trustee is required to follow it; if it does not, then he cannot be required to do so. It is an all or nothing process. A judgment which is entitled to recognition between the parties is, by definition, res judicata between them.

28 For this reason, this author cannot accept Hochberg’s attempt to reconcile the amended article 9(4) with article 51 of the 1984 Law. He suggests that the court can use article 51 to determine “what was in the best interests of the beneficiaries” and that the existence of an English judgment would be but one relevant factor “that might or might not result in the trustee being directed to act in a way which was consistent with the judgment of the English Court”. There is nothing in the law on the recognition of foreign judgments, or in article 9(4), which justifies a discretionary approach to the recognition of foreign judgments. The court cannot use its discretionary powers to give directions under article 51 to override, or affect, its obligations under the statutory law on the recognition and enforcement of foreign judgments. The judge may have a discretion to give directions as to what steps to order the trustees to make to ensure that the terms of that foreign judgment, which is entitled to recognition, are properly and expeditiously enforced; but article 51 cannot affect the fundamental and prior question as to whether the judgment itself is entitled to recognition, or to circumvent the law in that area.

29 The Royal Court then proceeded, again without regard to the wording of article 9(4) of the Trusts (Jersey) Law 1984, as amended, to give directions to the trustees to comply with most of the provisions of the English order but to reject the decree of the English court that there be a different trustee of the sub-trust and that the power of appointing the sub-trustee(s) be vested in the wife. The judge felt that the trustee of the B trust, a professional company, was perfectly competent to act in the best interests of the wife and that “we do not think it right to give effect to that part of the judgment of Bennett J”. 47
He concluded that the interests of the wife and the beneficiaries of the B trust were best reconciled by appointing the same trustee for the main and sub-trust and vesting the power of appointment of a new sub-trustee in the trustee. He then proceeded to modify the Deed of Addition and Appointment.\footnote{Ibid.}

30 Factually, the Royal Court may well have been correct about how best to reconcile the interests of the various parties. Where, though, was the legal basis for this decision? Was it to be found somewhere in article 9(4), and the fact that the Jersey courts would have acted differently in some respects to the English courts?\footnote{This does not seem to be the case as the Court was prepared to accept that the English courts may have reached a different conclusion to that which the Jersey courts would have reached without this precluding \textit{per se} the recognition of the English judgment.\footnote{Itself an erroneous basis for recognising the English order.} } Was it because comity\footnote{Para 15.} did not, after all, require this part of the English order to be recognised? If not, why not? What are the limits of the doctrine of comity?

31 In fact, the Court’s approach has the regrettable feeling of purely discretionary decision making about what was the in the best interests of all the beneficiaries, freed from legal constraints. The law of the recognition of foreign judgments does not work in this manner and the fact that this was an application for directions did not justify the Royal Court in so acting. Whatever else article 9(4) might require, it is absolutely plain that it does not give a judge \textit{carte blanche} to decide which foreign judgments he thinks, in his discretion, ought to be recognised, and to what extent. Indeed, the consequences of such an approach could be most undesirable in commercial terms. A would-be investor in Jersey will scarcely be comforted to know that a Jersey court may or may not give effect to a foreign order, and will decide purely in its discretion to what extent it wants to give effect to it. Ironically, in deciding, ostensibly in the name of comity, simply to give effect to those parts of the English order which the Court found satisfactory, the judge was arguably undermining confidence in the Jersey law and practice on the recognition of foreign trusts judgments.

**English orders varying Jersey law trusts: the future**

The Bailiff also commented that he found it -

“altogether unsurprising that the English court should have applied English law in the exercise of a statutory jurisdiction conferred in matrimonial proceedings to vary the terms of a trust in order to do justice between the parties. Nothing in the law of Jersey could oust such a jurisdiction which is in conformity with the Hague Convention on the law applicable to trusts and on their application; and we take judicial notice of the fact that the Hague Convention has been extended to Jersey”.\footnote{Para 15.}
England. Nevertheless, article 8(2)(h) of the Hague Trusts Convention in terms states that variation is a matter for the governing law of the trust. In other words, variation of a Jersey law trust is, first and foremost, a matter for the law of Jersey. Article 8(2)(h) of the Hague Trusts Convention can be displaced under article 15 or 16 of the Convention, if the English Matrimonial Causes Act 1973 is construed as a mandatory rule of English law. It was so construed by the Court of Appeal in Charalambous v Charalambous. But it has been pointed out that that decision is itself of dubious correctness. There seems, in particular, no pressing reason why an English court cannot and should not apply the governing law of the trust to a question of variation; and no reason why the English statute need apply in all cases. If application of the governing law of the trust is wholly unacceptable to the English courts, the option remains for them to disapply it on public policy grounds under Article 18 of the Hague Trusts Convention.

33 The Bailiff expressed the hope “with some diffidence” that the English courts might exercise greater restraint in future in varying trusts governed by Jersey law. He noted that before the advent of the Trusts (Amendment No 4) (Jersey) Law 2006, the Jersey courts had shown their concern about English interference with Jersey law trusts. He cited the following well known passage from re Rabiotti 1989 Settlement -

“The court regards it as unlikely that an English court would so exceed the normal bounds of comity as to purport to vary a settlement governed by Jersey … law administered in Jersey by Jersey trustees, and which had no connection with England save that some of the beneficiaries resided there.”

He also considered the statement of the court in re The Fountain Trust that -

“We agree with counsel that as a general rule, … it would be an exorbitant exercise of jurisdiction for a foreign court to purport either to vary the terms of a Jersey settlement or to declare such a settlement to be a sham.”

34 These views are inherently reasonable. After all, article 8(2)(h) of the Hague Convention instructs the English courts to apply the law applicable to the trust, not the law of the forum, to the question of variation. If English courts insist upon treating the Matrimonial Causes Act 1973 as an overriding rule of English law and applying it to foreign law trusts, then one should at least expect circumspection in its application. There was,

---

54 Para 30.
56 Ibid.
57 In that context, of course, the reference to comity makes sense, since the English courts do have the discretion to refuse to exercise their jurisdiction to vary a foreign law trust.
58 2005 JLR 359.
59 Albeit that the present case is one where there were arguably sufficient connections to England for the English court properly to have exercised that jurisdiction.
however, a certain irony in the judge’s caution to the English courts in the B Trust case. This was a trust that had been varied in England prior to the much more restrictive and inward looking Trusts (Amendment No 4) (Jersey) Law 2006 entering into force, in circumstances where the trustee had submitted to the English jurisdiction. Moreover, the wording of article 9(4), which the Royal Court eschewed, is much more exorbitant in routinely denying recognition to foreign judgments which lead to a result differing to that which a Jersey court would have reached. A jurisdiction which refuses to give effect to foreign laws and to foreign judgments on the basis that they affect the operation of Jersey law trusts, and thereby lead a foreign court to reach a decision which differs from that which Jersey law stipulates, can, perhaps, only expect that it will encounter increasingly regular conflicts with the approaches of other jurisdictions.

35 Be that as it may, there is recent evidence that the antipathy in Jersey to the variation of its trusts by English courts is permeating into the consciousness of English judges. In Mubarak v Mubarak, Holman J varied a trust in ancillary relief proceedings to allow a wife to recover assets where the husband had, over many years, failed to pay sums due her. The trust was governed by Jersey law and administered in Jersey by Jersey trustees. Nevertheless, the facts were markedly more connected with England than in the Matter of the B Trust. Holman J was confronted with arguments that any order that he might make would be unenforceable pursuant to article 9(4) of the amended Jersey law. He refused to be drawn on the meaning and scope of the Jersey legislation, or to allow it directly to affect his decision to vary. Nevertheless, he considered the Rabiotti case and the words of caution to the English courts in In the Matter of the B Trust and made it quite clear that he accepted their central tenet. He was “very respectful indeed of the sovereignty of the foreign State and of the jurisdiction of the foreign court”. Although Holman J felt compelled to vary the trust in order to secure payment by the recalcitrant husband on the facts, he said that he did “deeply appreciate that ‘as a general rule it will be an exorbitant exercise of jurisdiction for this court to purport to vary the terms of a Jersey settlement.’” He emphasised the need to show judicial restraint and hoped that, if such caution were shown, Jersey courts would give effect to English variation orders.

36 Holman J’s approach, and that of the Bailiff in In the Matter of the B Trust, are encouraging signs of common ground emerging between the English and Jersey courts in the thorny area of variation of trusts in divorce proceedings. It is particularly unfortunate that article 9(4), properly considered, clearly points in a quite different direction which requires non-recognition of English variation orders which lead to different results to the application of Jersey law. This is a recipe for conflict between the approaches of the English and the Jersey courts.

---

48 [2007] EWHC 220 (Fam). See also A v A [2007] EWHC 99 (Fam), in which Munby J declined to rule that a trust governed by English law, but with substantial connections with Jersey, was a sham. The case is considered by T Hanson and J-M Renouf, [2007] Fam Law 340, 342.
49 Para 142.
50 Para 146.
51 Para 159.
Conclusion

37 Ultimately, it is easy to see that the Royal Court, faced with an uncompromising and unhelpful statutory reform, was anxious not to have to use it to lead to the unattractive result of refusing to give any effect to the English order, thereby leaving the trustee in an invidious position of facing conflicting directions in different courts. In a sense, the unsatisfactory nature of article 9 of the Trusts (Amendment No 4) (Jersey) Law 2006, and article 9(4) in particular, drove the Bailiff to create such a solution. Alas, that solution seems wholly inconsistent with the wording of the Amendment Law, unwarranted by recognised conflicts principle and lacking in analytical clarity.

38 More generally, the Jersey legislature urgently needs to reconsider the drafting, legality and effects of article 9(4), and its relationship to existing provisions on the recognition of foreign judgments. A much more coherent way forward is to accept that, in principle, a Jersey court must recognise a foreign judgment when, in the eyes of Jersey law, that foreign court was jurisdictionally competent to grant an order. To the extent that the order of the foreign court is wholly unacceptable to the Jersey courts, the proper way to deal with that objection is by defining the contours of the public policy defence to recognition. That solution, however, requires reform of the new article 9 introduced by the Trusts (Amendment No 4) (Jersey) Law 2006. The present situation is, unfortunately, characterised by profound uncertainty as to the meaning and impact of article 9(4), excessive and unwarranted discretion being exercised by the courts, and confusion as to legal basis. This confusion must be addressed before it seriously harms Jersey’s position in the offshore trusts marketplace.

Jonathan Harris is Professor of International Commercial Law at the University of Birmingham and a barrister at Brick Court Chambers, London.

Return to Contents

64 See article 6(2) of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.