Trusts and Asset Protection BY TEY TSUN HANG [Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010. 80 pp. Hardcover: S$30.00]

Trusts and Forced Heirship BY TEY TSUN HANG [Singapore: Centre for Commercial Law Studies, Faculty of Law, National University of Singapore, 2010. 62 pp. Hardcover: S$25.00]

I. TRUSTS AND ASSET PROTECTION

The law of trusts today is an area of law which is characterised by fluidity and dynamism. This can be partially attributed to the modern tendency in equity to place more emphasis on the principles underlying detailed rules formulated in cases rather than on the rules themselves, treating these rules more like guidelines which a court can refer to in applying the principles.

One of the most important and intriguing trends has been the rise in prominence of the Offshore Asset Protection Trust ("OAPT"), which has contributed significantly to the increasing fragmentation of the traditional trust by the devolution of the powers historically held by the trustee. The rise of the OAPT appears to be an inevitable consequence of the insatiable quest of settlors to seek better and more innovative ways of preserving their wealth and providing protection against creditors. In many onshore jurisdictions such as the U.K. and the U.S.A., there are specific 'pro-creditor' legal provisions which prevent one from transferring or disposing of one's assets in order to defeat or even defraud the claims of one's creditors, or to enable one's creditors to set aside any dispositions carried out for the foresaid reason. In contrast, the OAPT so prevalent today in offshore jurisdictions is deliberately designed to be 'pro-debtor', and it aims to provide settlors with a high degree of protection from or against claims by future unidentified creditors.

Although OAPTs have since been attacked for being unacceptable and/or unworkable by many commentators, it is notable that there remains a minority group of commentators who adopt a contrary position. Leveraging on his expertise in this niche area of the law, Professor Tey attempts to strike a *modus vivendi* between the two conflicting camps of thought in *Trusts and Asset Protection* by exploring certain

important themes such as the theoretical conception of trusts and established legal rules and doctrine both onshore and offshore, before concluding that the OAPT is neither a holy grail in light of its vulnerabilities nor wholly useless in light of its general workability and acceptability.

Part I begins with the argument that the trust is essentially nothing more than a transformative institution which is founded on pragmatism rather than theoretical idealism. This theoretical perspective is certainly in line with the general view in the commercial world that the trust is a very flexible and useful device which uses are as unlimited as the imagination of lawyers could take it in the process of accommodating the wishes of their commercial clients such as bankers, financiers and businessmen. With this theoretical perspective in mind, Professor Tey then attempts to assess the frailty and workability of OAPTs in the latter parts of the monograph.

In Part II, there is a very helpful comparison between onshore and offshore asset protection jurisprudence which ultimately substantiates the common belief that offshore jurisdictions largely favoured the settlors of asset protection trusts ("APTs"). What is enlightening, however, is that the same may not hold true for the trustees of APTs. More importantly, it is argued that the variances observed in the offshore jurisdictions (as compared to their onshore counterparts) are generally protectionist only to the extent that the settlor seeks to keep his assets segregated from his personal estate.

Part III considers the workability of OAPTs via an examination of two main angles of attack on OAPTs, *i.e.*, going towards the validity of the incipient OAPT and going against the validity of disposition of property, in order to assess their workability. Although these angles of attack highlight the frailty of OAPTs, it is argued that this does not mean that OAPTs are therefore unworkable in practice. This is because the frailty of OAPTs is not innate, but generally emanates from some wrongdoing on the part of the settlors. Hence, assuming proper conduct on the part of the settlors of OAPTs, they would actually be workable in practice.

In Part IV, Professor Tey identifies the area of law as being most affected by the offshore regimes as the law on fraudulent dispositions. He acknowledges that offshore jurisdictions have generally raised the bar for settlors' liability in areas such as the conservative meaning of 'intent to defraud' creditors and the narrower definition of creditors eligible for appropriate legal remedies, but submits that those changes cannot be said to be entirely radical and reprehensible.

Of particular interest is Professor Tey's examination of the impact of OAPTs on creditors (at pp. 65-78), and his conclusion that OAPT laws have different impact on different categories of creditors and that creditors' rights and remedies, in general, have not been rendered illusory by offshore trust legislation. This can be contrasted to the view held by the majority of commentators in this field, which is that while OAPTs do not necessarily 'immunise' assets from the attacks of creditors completely, they make life very difficult for the creditors by discouraging and hindering any claims which they might make, thereby encouraging early settlement on terms favourable to the debtor.

Part IV questions the basis of the majority view by demonstrating that the common view that onshore trust regimes are more desirable as compared to their offshore counterparts might be off the mark, given that the latter's circumscription of the scope of their laws akin to the Elizabethan Statute as regards unsecured future creditors is

in fact a more nuanced and guarded application of the policy rationale of fair justice. Moreover, it is pointed out that only the positions of the unsecured creditors are susceptible to any departures by the offshore jurisdictions from their onshore counterparts. However, it is argued that what the offshore trust regimes have essentially done is to redefine the scope of the expression 'intent to defraud' so as to favour the settlors of OAPTs more than creditors, and that this in no way renders creditor protection illusory.

In the final analysis, Professor Tey is of the view that it is impossible to label the OAPT as a holy grail or being wholly useless, given that there are valid arguments for each proposition. Instead, OAPTs are best left understood as "yet another manifestation of the transformative trust institution in the nature of which any stereotypical characterisation would be inessential, unnecessary and untenable" (at p. 80).

II. Trusts and Forced Heirship

The concept of forced heirship, which roots can be traced to the classic civil law systems, is that there is no freedom of testation except with respect to the disposable part of a testator's patrimony. Usually, the heirs of the testator, *i.e.*, those who share some close familial relationship with the testator, will be entitled to an indefeasible share in the testator's estate upon his demise. In recent years, there has been a steady trend whereby settlors from forced heirship regimes have set up *inter vivos* trusts of moveable property in offshore anti-forced heirship regimes. The various models of anti-forced heirship legislation in these offshore financial centres have brought about a significant impact on the operation of forced heirship laws, and pose a number of serious concerns. This recent development has also led to the question of whether offshore anti-forced heirship trusts can survive challenges to their terms, especially if those terms are incompatible with that of the forced heirship regime which the settlor comes from.

In light of the above, *Trusts and Forced Heirship* sets out to discuss the serious concerns posed by many offshore regimes' adoption of anti-forced heirship laws to onshore forced heirship jurisdictions, to examine the survivability issues with respect to offshore anti-forced heirship trusts, and to propose possible reforms.

Part I begins with a discussion on dispositive freedom, in particular the types of dispositive freedom, and also the distinction between the civil law and common law ideas of dispositive freedom. While the common law system is generally more liberal with respect to the dispositive freedom of an individual, it does not mean that the concept of forced heirship does not exist in the common law. Instead, it is pointed out that the common law system falls under the category of forced heirship by judicial adjustment, with the other two categories of forced heirship regimes being those of strict forced heirship and forced heirship by indefeasible shares. What unites the different forced heirship regimes is the provision for a claw-back of assets regardless of the applicable regime. Part I ends with a useful summary of the Islamic inheritance law in Singapore, which is an example of a liberal forced heirship regime that promotes compliance with rather than circumvention of the law. The Islamic inheritance law also forms the basis for Professor Tey's suggestion for reform in certain onshore jurisdictions which have insisted on strict forced heirship regimes in the later parts of the monograph.

In Part II, Professor Tey examines various offshore trust jurisdictions and their anti-forced heirship legislation to determine the impact of offshore trusts on forced heirship rights. The use of offshore trusts is demonstrated to be a viable means of circumventing domestic forced heirship laws as these offshore trusts generally share three vital characteristics: (1) immunisation from foreign laws; (2) the extension of such immunity to dispositions of property into the offshore trust; and (3) the deemed capacity of an individual to dispose of property into an offshore trust.

Professor Tey submits that one must be careful not to over-generalise and label anti-forced heirship legislation and regimes as being moral-less, because there appears to be some spirit of moderation in at least four respects in some offshore jurisdictions (at pp. 24-28). This is an interesting assertion and it would be good if those four respects in which some offshore jurisdictions have displayed a spirit of moderation could be expanded in the next edition and supported with more 'live' examples. Moreover, although the public policies of certain offshore jurisdictions such as Bermuda and Guernsey appear to suggest that there is a spirit of moderation in those jurisdictions, it would be helpful if concrete examples of how the particular public policy provision operates in practice are provided, given that it is recognised that "it is not always clear what the relevant domestic law of any given offshore jurisdiction precisely entails" (at p. 27). Although the very existence of such provisions acts as a rebuttal to the argument that anti-forced heirship legislation and regimes are moral-less, positive examples of how such provisions operate in reality to ensure that anti-forced heirship legislation and regimes are not immoral would go a long way towards strengthening the argument that there is indeed a spirit of moderation in some offshore jurisdictions.

Part III undertakes a delicate examination of the concerns associated with forced and anti-forced heirship regimes by looking at arguments in support of forced heirship and arguments in defence of anti-forced heirship regimes. Of particular interest is the analysis of the doctrinal concept of a claw-back in forced heirship (at pp. 33-39). It is argued that the preferred view is that the claw-back does not affect the pre-disposition proprietary entitlements of the disponor's *sui heredes* in his lifetime, but merely vindicates the *sui heredes'* succession rights upon the disponor's death. One doctrinal explanation for this view is that it reflects a compromise between the individual and family ownership and ensures that the disponor would still be entitled to the bundle of rights that comes along with good title to his property. The Privy Council decision of *Commissioner of Stamp Duties* (*Queensland*) *v. Livingstone* [1965] A.C. 694 is also examined, in particular the untenable anomaly which it creates in the understanding of the relative strengths of interests and rights between the prospective forced heirs and residuary legatees.

In Part IV, further reasons are set out as to why the general perception of offshore anti-forced heirship trusts as being objectionable may be wide off the mark, by assessing the survivability of such trusts as a matter of private international law and trust doctrine. With respect to private international law, Professor Tey argues that the *Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985, 1664 U.N.T.S. 311 (entered into force 1 January 1992) and the *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, 1 August 1989, 28 I.L.M. 146 [*Hague Convention on Succession*] are in 'transitory' states and are ineffective in addressing the serious concerns posed by anti-forced heirship

regimes. With respect to trust doctrine, it is submitted that the very existence of a sham doctrine is evidence of the vulnerability of anti-forced heirship trusts.

Part V is one of the most important chapters in this monograph. In light of the serious concerns posed by anti-forced heirship trusts and the uncertain state of the law with respect to international trusts and forced heirship rights in general, Professor Tey submits that only "a true and effective harmonisation effort" can "resolve most, if not all, of the problems inherent in this complicated area of law" (at p. 55). What this necessitates is that there must be reforms at both the micro and macro levels. At the micro level, a possible reform would be the promulgation of a specific and inclusive *Hague Convention on Succession*, while at the macro level, possible reforms would include redefining and enunciating a clearer principle on the claw-back mechanism; softening forced heirship regimes in a coordinated fashion; and abandoning the model of strict forced heirship regime (especially in onshore jurisdictions).

III. Conclusion

The two books reviewed above provide a useful overview of asset protection and forced heirship in the context of the offshore trust regimes. They touch on a number of important offshore trust jurisdictions and contain detailed discussions on a number of important areas that a trust practitioner may come across and find extremely helpful in his daily practice, especially if it pertains to OAPTs and forced heirship.

The aims of *Trusts and Asset Protection* and *Trusts and Forced Heirship* as clearly set out in the Introduction to each monograph have, to a very great extent, been met. It would be impossible to deliver a full account of OAPT and forced heirship laws in a little over 140 pages, but much credit must be given to Professor Tey for providing his readers with his insight into some of the most crucial issues with respect to OAPT and forced heirship laws. In doing so, he has provided both practitioners and students with a solid platform from which to launch a greater consideration of these two niche areas in the law of trusts.

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