La Corte per il trust e i rapporti fiduciari

in composizione collegiale

- Presidente Maurizio Lupoi, Giudice Paul Matthews -

ha pronunciato la seguente

ORDINANZA

nella causa n. 2 del 2018

su ricorso di **AMB Private Trustees S.A.**, società di diritto svizzero, con l'avv. Andrea Vicari

con l'intervento dell'avv. **Anna Maria Lonfernini**, curatore degli interessi dei beneficiari minori e dei beneficiari non nati.

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## 1. The facts.

By an application dated 5 July 2018, AMB Private Trustee SA, a Swiss company based in Lugano, as trustee of the Gavi Trust, seeks directions from the court. The directions sought relate to the trustee's expressed wish to comply with the request made by the adult beneficiaries to terminate the trust and to pay the entire trust fund to certain of them (the settlor and her two siblings), whilst setting aside a modest fund to be held for the benefit of certain minor beneficiaries. The trustee is concerned to be protected from any claim in future by any beneficiary that in terminating the trust it acted in breach of trust.

The form of the present proceedings is not litigation, in which a dispute between the parties is to be decided. Instead, it is a unilateral application by the trustee, who is the only party.

The trust was instituted by written instrument on 29 January 2013. The settlor was Gabriella Nardo. The beneficiaries were stated to be the settlor, her two siblings Paola Maria Nardo and Carlo Nardo, and their respective issue. To date the settlor has no issue, Paola Maria has two children and two grandchildren, and Carlo has one child. All the beneficiaries are adults except the two grandchildren, who are minors. The class of beneficiaries is not closed, and further beneficiaries may come into existence during the life of the trust.

The original trust instrument by clause 8.1 stated that the trust was to be governed by the law of Jersey, but article 8(2)(a) conferred power on the trustee to substitute a different law, and articles 8.2(b) and 12.1 conferred power on the trustee to vary the terms of the trust. A supplemental instrument dated 17

October 2017 provided that the trust should be governed instead by the law of San Marino, and also varied the terms of trust to a limited extent.

The variation did not however alter the provisions contained in article 9 relating to jurisdiction of the courts. This article stipulates that any dispute relating to the institution, validity or effects of the trust, the rights of the beneficiaries or the obligations of the trustee are subject to the exclusive jurisdiction of the courts of Lugano in Switzerland (article 9.1). and that any application for the appointment of a trustee or for directions to be given to the trustee is likewise subject to the exclusive jurisdiction of the same courts, although (in relation to such an application) if those courts decline jurisdiction then such application is to be subject to the jurisdiction of the courts of the state whose law regulates the trust (article 9.2). There is no evidence before the court in the present case that any application has been made to the courts of Lugano, or that such courts have declined to accept jurisdiction.

By decree dated 17 July 2018, the President appointed a special curator to protect the interests of the minor and unborn beneficiaries of the trust. The applicant's advocate and the special curator, having already submitted written arguments, were heard orally by the court on 17 September 2018. Following the hearing, both the applicant's advocate and the special curator submitted further written arguments, particularly on the question of jurisdiction, which was considered during the oral arguments. That of the curator was dated 27 September 2018, and that of the trustee was dated 2 October 2018.

## 2. The court's jusrisdiction.

Jurisdiction is a matter of law. If the court has jurisdiction, it *must* exercise it (unless the law gives a discretion to the court not to exercise it, as in the English doctrine of *forum non conveniens*). If the court has no jurisdiction, it cannot act. Jurisdiction therefore involves compelling the court to do or not to do a thing. This means that in principle the parties to a dispute cannot confer jurisdiction on the court by agreement amongst themselves, because that would impose on the court an obligation to act.

According to law 42/2010 ("the Trust Law"), article 5.1, the jurisdiction of the court depends on one of the following: the defendant is based in San Marino, the trust is administered in San Marino, the law of the trust is that of San Marino, or the parties to a dispute ("*controversia*") have agreed to submit it to the court. At least one of these conditions is satisfied (the law of the trust is now that of San Marino, following a change from that of Jersey). However, article 5.2 of the Trust Law provides that the jurisdiction of the court may be derogated from in favour of a foreign court where so provided in the trust instrument or this is otherwise agreed in writing.

As already stated, the trust instrument by article 9.1 gives *exclusive* jurisdiction to the courts of Lugano in Switzerland in relation to disputes as to the validity and effects of the trust, the rights of the beneficiaries and the obligations of the trustee. By article 9.2 the trust instrument gives *exclusive* jurisdiction to the courts of Lugano for any proceeding having as its object the appointment by the court of the trustee or the giving of directions to the trustee, although in the event that the courts of Lugano decline to rule then such jurisdiction is given to the courts of the state whose law governs. As already stated, the courts of Lugano have not declined to rule. They have not even been asked.

Article 9 of the trust instrument is a clear derogation from the jurisdiction that might otherwise exist under article 5 of the Trust Law. Article 5.2 of that law permits the settlor to impose his will on the question of jurisdiction. The extent of the derogation must depend upon the terms of the trust instrument. In the present case, it is a complete derogation, because article 9 confers an *exclusive* jurisdiction on the courts of Lugano.

In the present case, the trustee in its *memoria* of 2 October 2018 relies on an agreement now entered into dated 21 September 2018 between the adult beneficiaries of the trust. But this agreement was made only *after* these proceedings were instituted, indeed, only after the hearing before the court at which the question of jurisdiction was raised. There is no sufficient evidence before the court of any other express agreement between the parties. (The question of an implied agreement by tacit consent is discussed below.)

Importantly, that agreement on its face is not concerned with any *dispute* between the beneficiaries. Instead, it arises in relation to these present proceedings, brought by the trustee for directions from the court protecting the trustee against complaints by beneficiaries in the future. It is also to be noted that the parties to this agreement do not include the minor or unborn beneficiaries of this trust. Indeed, their curator opposes it, considering it not to be in their interest: see her *memoria* of 27 September 2018.

As already stated, the trust was varied in October 2017. So the settlor and the trustee at that time had the opportunity to insert a jurisdiction clause in favour of the courts of San Marino. Yet on that occasion they did not do so, and the provisions contained in article 9 relating to jurisdiction of the courts remained unaltered. That must be taken to mean that they were content with Lugano.

The question of jurisdiction of the San Marino court is to be considered as at the time that the proceedings were instituted. As at that time, this agreement did not exist. It must therefore be irrelevant to the question of jurisdiction. Even if it were relevant, the agreement still would not fall within the scope of article 5.1 of the Trust Law, because it does not relate to any *dispute* between the parties, and on that basis it could not have the effect of conferring jurisdiction. The court's decree of 17 July 2018 does not change that. The proceeding clearly has effects

on third parties, and to that extent is, as the President said, similar to a dispute between parties. But now the court is construing the terms of the agreement between the parties who have signed it, and it is considering whether that agreement falls within the scope of article 5.1 of the Trust Law. The agreement does not refer to a dispute (and the parties to it are not in dispute with each other at all; indeed, they all agree), but article 5.1 is confined to cases of dispute (*controversia*) between the parties.

Finally, even if the agreement did fall within article 5.1, and could otherwise be treated as conferring jurisdiction, "the parties" in article 5.1 means "*all* the parties". But here, the minor and unborn beneficiaries are not parties, and have not agreed, and their representative by her *memoria* actively opposes the exercise of the court's jurisdiction. Therefore it would be ineffective as such an agreement within article 5.1.

The trustee says that article 5.1 must be interpreted in the light of the *ius commune*, which it says includes the principle that the parties' consent can confer jurisdiction on the court. In fact the texts relied on show only that this can be so if the judge would otherwise have jurisdiction. Here article 5 is the source of that jurisdiction, and the parties' consent therefore cannot widen it.

To put the matter another way, it must be competent for the legislator to make different provision, enlarging or restricting the application of that principle of the *ius commune* accordingly. In article 5.1 of the Trust Law, the legislator has made narrower provision than the generality of the trustee's proposition. That must mean that the wider form of the proposition does not apply to proceedings in the trust court, even if it applies elsewhere. Here, article 5 sets out the limits of the law on jurisdiction.

The trustee however says further that the minor and unborn beneficiaries have given tacit consent to the jurisdiction of the court by not objecting through their representative. Where a party to litigation takes positive steps to advance that litigation, for example by seeking an order that another party produce a document relevant to the merits or that a particular witness be examined to give evidence so relevant, it may be possible to infer that that party must have agreed in substance to the jurisdiction of the court. But where, as here, no substantive step has been taken by the minor and unborn beneficiaries, and the question of jurisdiction of the court is raised at the first hearing, there is no such tacit agreement as could confer jurisdiction on the court.

In any event, and as already stated, the present unilateral application is not litigation between disputing parties, and the rules which apply to parties not objecting to jurisdiction have no application to it. The presence of the curator before the court is required to protect the public interest. It does not make the minor and unborn beneficiaries parties to the application.

The trustee also refers to English academic writings and a decision of the Privy Council (on appeal from Jersey) to support the view that a contractual agreement to confer jurisdiction on a particular court should prevail over a clause in the trust instrument attributing jurisdiction to another court. But here the court is not dealing with a simple contest between a contractual agreement and a clause in the trust instrument. Instead, it is considering and interpreting article 5 of the Trust Law, a provision which gives a role to agreements between the parties in certain circumstances. It is not necessary for the court to go any wider than that. In particular, the court is not balancing the experience of one court against other. It is simply a question of locating jurisdiction by reference to the Trust Lawand the documents in the case. The position in Jersey law (or English law) cannot govern the position in San Marino law.

The conclusion is that, as things stand, the San Marino court has no jurisdiction to deal with the proceeding or to give the directions sought. The application must therefore be dismissed.

**PER QUESTI MOTIVI**

La Corte rigetta il ricorso e dispone che il ricorrente corrisponda al Curatore speciale, il quale non ha presentato notula, la somma di euro 2.500,00 oltre accessori a titolo di onorario.

Dispone che l'ordinanza sia pubblicata senza indugio mediante inclusione nel fascicolo telematico, dandone avviso alla procura costituita e al Curatore speciale.

Borgo Maggiore, 12 novembre 2018

Maurizio Lupoi

Paul Matthews

REPUBBLICA DI SAN MARINO
CORTE PER IL TRUST E I RAPPORTI FIDUCIARI

**REPUBBLICA DI SAN MARINO**
Via 28 Luglio, 194 - 47893 Borgo Maggiore
T +378 (0549) 882 991
cancelleria.cortefiducia@istituzioni.sm