CONCLUSION

There is no doubt that a trust, properly implemented and administered, provides a flexible and valuable means of safeguarding assets and providing continuity for family assets without the disruption that the death of the head of the family can cause. Nevertheless, the requirements of the trust concept must be more clearly understood than has been the case over the last three decades. Attempts to achieve ends which are inconsistent with the fundamentals of a valid trust should be resisted, however great the commercial pressure to distort them. Where possible, existing family trust structures should be reviewed regularly to ensure that those involved understand what is required of a valid trust. While there are ways in which a settlor can continue to have some indirect influence over the administration of trust assets by trustees, the ultimate control must always remain with the trustees. It should be recognised that this is so as a matter of substance and not form alone.

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The selection of arbitrators

by Charles Molineaux

The January 1999 issue of Amicus Curiae carried an article by David Winter on 'The Selection of Arbitrators', to which a response by Dr K V S K Nathan ('The selection of arbitrators: another view') was published in Issue 17, May 1999. The following letter by Charles Molineaux has been received by the editor.

These articles consider a very important aspect of international arbitration. While there are valuable points in Dr Nathan's article, two comments are controversial indeed.

First, Mr Winter had made the observation that a most important point in relation to the selection of arbitrators is that an arbitrator must be 'psychologically comfortable' with parties from other countries, understanding their culture and method of presentation. This comfort, he suggests, might be evidenced by travel and an interest in other cultures.

Surprisingly, Dr Nathan responds by saying that 'most Europeans' when they live abroad tend to interface with the locals only 'infrequently at formal occasions if at all'. He continues: 'Those who have lived abroad can develop a strong bias against the indigenous people. Generally they do not trust them … '. Then, escalating the rhetoric, he makes the accusation that there is a 'higher standard of proof often demanded by international arbitrators from a party and witnesses from a developing country'.

Perhaps this charge is too outrageous to warrant discussion. On its face it urges that one-time colonial attitudes toward the natives are not a thing of the past, but of the present. If it were taken seriously, which it should not be, it would mean that the growth of international arbitration, to facilitate development and trade, is misconceived and based on a false expectation of an honourable effort to search for truth and resolve disputes according to law.

(As an anecdotal comment, this writer participated in two substantial cases just within the past year in which unanimous awards in favour of the developing country entities were rendered by Western, or first-world-dominated tribunals.)

The other point warranting discussion is the charge by Dr Nathan that the use of a list of arbitrators as a basis for tribunal selection to be agreed to by both parties (as contrasted with the party-appointed arbitrator approach) is 'an attempt to weaken the autonomy of the parties'. This is simply silly. The parties are free to write up whatever procedure they like. One distinct advantage of a list procedure (as set forth, for example, in the new international rules of the American Arbitration Association) is that both parties have a voice in the selection of all three arbitrators. Assuming a carefully-developed list, prepared by the arbitral institution or by the parties themselves, and assuming that counsel for the parties do their job in vetting that potential arbitrator list, this is a procedure which can instil more confidence in the parties in the arbitral process generally and in the tribunal itself in particular. Nor is there any basis for the further charge that a list procedure 'enables the stronger party in terms of power and influence to prevail in the selection of arbitrators'. How this would happen is not explained.

The list procedure avoids the problem of defining the attitude of the party-appointed arbitrator (i.e. is he to be truly neutral or a second-tier advocate for the party appointing him?), avoids the problem of the proper scope of the 'interview' or 'beauty contest' conducted by the party to select the party-appointed arbitrator, and avoids the possibility of leaks, or the suspicion of leaks, to the appointer during the process.

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