**Minutes of GGI's Trust and Estate Planning Practice Group Meeting**

**GGI World Conference- Friday 19 October 2012**

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| Held: | Parco Dei Principi, Rome, Italy |
| Chair: | Steven Cantor (SC) |
| Presentations: | Robert Christensen, Managing Director, Volaw Trust Company, Jersey, Channel Islands |
| | Guy Wiltcher, Partner, Greystone Trust Company Limited, Isle of Man |
| | Georges Troy, Founder, Troy & Associes, Paris, France |
| | Denis Nerland, Partner, Shea Nerland Calnan LLP, Calgary, Canada |
| | Steven Cantor, Managing Partner, Cantor & Webb PA, Miami, Florida |

**Opening**

SC opened the meeting by thanking everyone for attending. He then went through the slides identifying the leadership team for this Practice Group. He confirmed that this was the first meeting of the Practice Group and went through the slide on "purpose and objectives" for the Group.

SC confirmed that the Group was interested in advising wealthy families in relation to their succession planning. It is customary for wealthy families to have assets in many different jurisdictions. Tax planning and succession planning is on their minds as governments struggle to raise revenue through the imposition of more and more taxes. It is against this background that the use of trusts, both onshore and offshore, is becoming ever more important.

SC also confirmed that the nature of the Group required a cross-border, cross-practice and cross-disciplinary approach – the Group is made up of attorneys, accountants and bankers all being key advisers to wealthy families.

Topics that will engage the Group include: tax planning, succession planning and how to deal with dysfunctional families.

The agenda for the inaugural meeting is the use of trusts both onshore and through offshore jurisdictions. SC introduced those who were giving the presentations. The attendees all confirmed that they had received the slides that were to be gone through during the meeting.

**Presentations**

1. Robert Christensen – Jersey

   Robert confirmed that he was going to give an overview of the sort of trust structures that were created under Jersey law, what challenges they are facing in relation to the changing

tax regime, the requirement for transparency, assets held in many jurisdictions and what happens on the death or divorce of settlors.

Robert confirmed that use of a Jersey trust was not designed to hide wealth and this had been the case under Jersey law for some considerable time. Trust structures have to be transparent from a tax point of view now.

Having set up a trust structure, Robert confirmed that it was very important to keep the structure under review because of law changes and because the circumstances of the family may change.

The key structures in Jersey include trusts (including trusts with PTCs as trustees), limited partnerships and, particularly for Middle Eastern clients, foundations. Jersey has requirements in relation to "KYC" and "AML". It may also be necessary to obtain regulatory consents and to register the trust structure.

When considering the setting up of a trust structure, it is important to consider:

(i) regulatory requirements;
(ii) the reputation of the jurisdiction – Jersey is well regarded by the OECD as it has an established rule of law and statutory laws on trusts. The courts of Jersey have great experience in relation to trusts which is important as, during the lifetime of a trust, there are likely to be disputes;
(iii) management and control – it is important to have trustees who are experienced and who therefore have the gravitas to take an independent view. This is necessary to avoid allegations of sham trusts; and
(iv) segregation of assets – it is advisable to separate out business assets from family homes and homes from yachts and planes.

Robert then went on to "managing the structure" – he stressed that consideration needs to be given in relation to the consequences of transferring assets into the structure (tax implications, tax reporting implications and regulatory and/or competition authority consents). Could the transfer of assets affect rights under a joint venture agreement? (Robert gave the example of a situation he encountered when the transfer of assets into a trust nearly triggered an option to buy-out the person transferring the assets in relation to a joint venture that he was a party to).

Consideration should be given, at the outset, to the consequences of extracting assets from the structure – tax implications, tax reporting implications, regulatory and/or competition authority consent.

It is also necessary, at the outset, to plan for future breakdown in relation to family and/or business relationships.

Robert then ran through a "***typical structure***" for a Jersey trust – a purpose trust with a purpose trust corporation and then subsidiary trusts. In such a structure, the makeup of the Board of Trustees is vital. Consideration should be given to having key advisers on the Board and perhaps a family member. There also needs to be a succession plan to be in place.

Careful consideration needs to be given to the authority of the Board members. Also, if there is an underlying purpose trust corporation and some family members are on the Board of that corporation and receive remuneration, will that cause problems with other family

members who do not sit on the board and therefore do not gain any remuneration from the trust?

An alternative structure would be the use of an LLP and again a family member could be a member of the LLP and gain a favourable or more favourable tax position.

Challenges for structures are that there are likely to be cross-border tax issues in that beneficiaries may live all over the world and the family may have assets in various jurisdictions. For example, if a family member becomes resident in the US, it may be sensible to carve out a separate sub fund for that individual or even create a separate trust. Trustees have to be aware of rule changes – e.g. what is currently happening in France. Trustees need to know when they need to get specialist advice; they need to know what they don't know and take appropriate advice.

Robert then went on to look at a couple of situations in which there are changes in relation to the family:

(i) **Divorce** – over the last 20-30 years, family wealth has been put into trusts. When the settlor or beneficiary of a trust gets divorced, this can cause significant tension in that a Divorce Court is likely to treat assets held in trust as part of the matrimonial assets.

Difficult questions arise in relation to whether or not an offshore trustee should submit to the jurisdiction of the relevant court hearing the divorce proceedings. Should the trustee provide information to a divorce court? Should the offshore trustee agree to exercise powers to give effect to an order made by the court?

In 2006, the Supreme Court of Jersey gave guidance that trustees should not submit to the jurisdiction of a Family Court unless there are trust assets within the jurisdiction of the particular Family Court leading to a risk that the court may make an order that the assets in the trust form part of the matrimonial estate because the trust is just a mechanism for trying to hide assets. (Robert gave the example of a case involving Cayman Island Trustees who did not consent to the jurisdiction of the Hong Kong Family Court. The Hong Kong court ruled that the trust assets were part of the matrimonial estate and that the trust was simply being used as a mechanism to try and hide assets).

(ii) **Death** – Robert stressed the point that, on the death of a settlor, if there are minors as beneficiaries, then the trustees have an onerous duty in that they act in loco parentis for those minors.

2. Guy Wiltcher – Isle of Man

Guy explained that Greystone Trust Company Limited is a chartered tax adviser and trust company.

The agenda for his talk was as follows: the future of trusts; nominee arrangements and equitable set off; developments regarding buying or owning a home in London; and aircraft acquisition, registration and VAT planning.

***The future of trusts*** – confidentiality and secrecy is being called into question. Even client attorney privilege is being questioned.

The Isle of Man has rushed through 34 "Tax Information Exchange Agreements" in order to avoid the OECD blacklist. Guy said that Greystone had recently been the subject of a request for information from the US. It is a very laborious process. When disclosing accounts, there is the issue in relation to the notes to the accounts and any documentation that may be referred to or traceable via the notes. All this information has to be reviewed before it is handed over. In this particular case, Guy was aware that the IRS had spent over $1,000,000 with lawyers in order to conduct the investigation.

Guy also reminded us that the trust structure is a *multi-generational tool* and it is very important, therefore, for the trustees to know the personalities of the settlors and beneficiaries. It is very easy for trustees to become embroiled in litigation these days and it is therefore prudent to consider whether independent tax and/or legal advice should be given to settlors.

Trusts must be careful that they are not making any secret profit – trust companies sometimes take kickbacks from insurance brokers and trust companies build up a big portfolio with a view to selling the business on. Arguably, such a sale may be open to challenge as a secret profit.

The Isle of Man is a common law system, similar to the UK. UK cases can be quoted and will have persuasive effect.

***Nominee arrangements*** – Guy referred to the case of Elle Macpherson. She had used a nominee company for privacy reasons in order to obtain a loan to buy a property. Macpherson also had money on deposit with the bank making the loan and gave personal guarantees to the bank to secure the loan to the nominee company. She did this under a typical declaration of trust. When the lending bank collapsed, the liquidators sought full repayment of the loan from the nominee company without offsetting the personal cash deposit in the collapsed bank.

The Isle of Man Court found that equitable set off should apply – partly because the documentation in the case was exceptional. The bank making the loan accepted the nominee arrangement because it was made quite clear to the bank. Had there not been a nominee arrangement, the company would have been insolvent and that was a concern on the part of Greystone as they were directors of the nominee company. The decision of the court was reversed on appeal and Macpherson now has leave to appeal to the Privy Council.

The cases goes to show that nominee arrangements are being scrutinised in detail.

***Buying homes in London*** – historically, non-doms have purchased houses in London using offshore companies in order to mitigate UK inheritance tax risks. The UK government has made changes and has proposed further changes from 1 April 2013 to encourage the removal of properties from these offshore structures and to discourage the purchasing of homes through offshore companies.

The mechanism is to impose punitive stamp duty on properties valued in excess of £2,000,000 which are acquired or held by "*non-natural*" persons – stamp duty at 15% on purchase and an escalating annual charge on high value UK residential property and the extension of capital gains tax on the disposal of UK residential property by the "non-natural" person.

Accordingly, clients owning a UK home worth nearly £2,000,00 via a company should keep developments under review and consider whether or not such a structure remains fit for purpose.

Alternatives are to rely on spouse exemption or get insurance cover for IHT risk.

***VAT planning*** – Guy said that the Isle of Man has a friendly VAT system. VAT registrations can be obtained within 10 days and the registration services for yachts and planes is user friendly. That said, however, it is getting harder to claim VAT back on yachts. In relation to aircraft, those that service group companies or businesses, still have a chance to get VAT back.

3. Georges Troy – France

Georges gave the statistic that 80% of properties worth €8,000,000 or more, are owned by non-residents in France.

Georges said that it was important to know the purpose of the investor – did the investor intend to keep the property long-term or buy it and sell it on to get a profit as quickly as possible?

***Long-term ownership*** – Georges suggested the use of an LLC structure.

Georges explained that the LLC would be a Delaware registered LLC. The US LLC would own the residential property in France. The property should not be let and should be available to the client.

The French tax authorities examine the purpose of the LLC and whether or not the LLC is public or secret. Georges said that the constitution of the LLC, setting out its purpose, should have tight/restricted wording and that it must be prepared to produce a certificate of formation to the French authorities. It is also important that the LLC, as a private entity, should not be able to sell the underlying property assets.

The French authorities also expect to see the partners in the LLC as being liable for the debts of the LLC. (NB: see Q&A in relation to this point).

If the structure is set up correctly, it should avoid French corporation tax. If it goes wrong the French authorities will assess a rental income from the property – for example, on a property worth €4,000,000, rent assessed at 4% of the value and this will be charged to corporation tax in France at 33%.

***Property held for a short time and sold on*** – Georges drew attention to the fact that France has asked Luxembourg to renegotiate the existing double tax treaty and this seems to have been accepted. It seems as though the amended treaty will come into force on 1 January 2013.

Prior to the change, property could be owned in France by a Luxembourg company and a French company (a joint stop company). The Luxembourg entity sells the shares of the French company and this would trigger no tax liability in France and also no tax liability in Luxembourg because the participation exemption regime applies.

As a result of the proposed change which will allow French tax authorities to be able to claim that the sale of shares in a company that holds predominantly real estate assets, will be moveable property and so outside of the treaty and subject to French tax law.

The way round this change will be to have 2 Luxembourg companies – Lux Co 1 will own the shares in Lux Co 2 and Lux Co 2 will own the property in France. On a disposal by Lux Co 1 of its shares in Lux Co 2, the relevant tax legislation will be that of Luxembourg, not France. Under Luxembourg tax law, the participation exemption regime applies so that Lux Co 1 is not taxed on the sale of the shares in Lux Co 2 in Luxembourg.

4. Denis Nerland – Canada

Denis explained that under Canadian law, the Canadian Revenue Authority (CRA) levies taxes as follows:

(i) residents are taxed on their worldwide income; and
(ii) non-residents are taxed only on income from a Canadian source and income that is not subject to treaty protections.

That said, residents can access the non-resident regime by the use of trusts.

There is no legislation in relation to the concepts of resident and non-resident trusts; status is a matter for the common law of Canada.

***The case of Mr Thibodeau*** – Mr T set up and ran a very successful trucking company. He set up an irrevocable discretionary trust with family beneficiaries. Mr T was a trustee, together with 2 Bermudan trustees. The trust document provided for majority rule. Mr T sold a third of the shares in the company to the trust.

When the business was later sold, there was a capital gain. Mr T tried to argue that the trust was resident in Bermuda. The CRA said that the trust was resident in Canada because it was effectively run by Mr T.

On appeal, the Federal Court of Appeal held that the trust was resident in Bermuda because:

(i) a trust has to be resident somewhere;
(ii) a trust cannot be resident in two places at once; and
(iii) the majority of trustees were in Bermuda.

Trustees cannot delegate authority. The majority rule clause meant that, in reality, Mr T could not control the trust.

This case gave rise to the proposition that the residence of a trust is determined by the residence of a majority of the trustees ( where there are multiple trustees) or where the sole trustee resides.

The Thibodeau case can, however, no longer be relied upon because of the decision of the Supreme Court in ***the case of Garron***.

In this case Mr Garron and his business partner Mr Dunin took tax planning measures in 1998 pursuant to which the shares in their company were sold to a trust established in Barbados. At the time the value of the company was $82,000,000.

The company was subsequently sold and generated capital gains of $217,000,000 for Mr Garron's trust and $240,000,000 for Mr Dunin's trust. Both trusts claimed their respective capital gains were exempt from Canadian tax by virtue of the double tax treaty with Barbados. The exemption under the treaty was only available if the trusts were resident in Barbados.

The CRA said that the trusts were not resident in Barbados, rather they were resident in Canada. In reaching this conclusion, the CRA applied *a central management and control test*. Under this test, a corporation is resident in the place where the highest level of decision making occurred and this would usually be the jurisdiction in which the Board of Directors meet to exercise its decision making powers on behalf of the corporation.

The Supreme Court of Canada, analysing the facts of the case, concluded that the *central management and control of the trusts* resided in Mr Garron and Mr Dunin, both of whom were Canadian residents and controlled their respective trusts from Canada. Although there was a trust corporation in Barbados which, on paper, had broad powers and discretions, the Court found that the trusts were run by Mr Garron and Mr Dunin – the trust corporation did what they were told to do by these gentlemen. The directing minds of the trust corporations were in Canada – Mr Garron for his trust and Mr Dunin for his – and the Barbadian trustee simply executed documents and did not exercise the decision making powers and discretions that are required of independent trustees.

Denis made two points:

(i) The CRA carried out a very detailed investigation in relation to the background of the trusts in the Garron case – the trustees received questionnaires in relation to banking, financing, trust accounts, beneficiary communications, all minutes, correspondence, emails etc. Accordingly, if the CRA want information, they will get it.

(ii) Canada has anti-avoidance laws but it is still a jurisdiction which recognises form over substance. Accordingly, if you get the governance of a trust structure correct, the planning can still work.

   Tips for good governance are:

   (a) A proper governing law clause and jurisdiction clause.
   (b) Ensure the trustees (or the majority of the trustees) reside in the desired jurisdiction i.e. the jurisdiction under which law of the trust instrument is governed.
   (c) Make investment and distribution decisions in the desired jurisdiction.
   (d) Banking and accounting should be done in the desired jurisdiction, as should the signing of trust resolutions etc.
   (e) Ensure that decisions are properly documented so that the trustees are seen to have an active role in managing the trust property.
   (f) Trustees should be experienced professionals so that allegations of bullying can be rejected – trustees should not be puppets.
   (g) Canadian resident beneficiaries may make recommendations to trustees but these should be worded and seen to be recommendations only. Trustees' responses to these recommendations should be documented, especially where they are not followed.

Denis handed out a paper that he had prepared for the meeting.

5. Steven Cantor – United States

Steven said that there was not really time for his presentation which may be the subject of a separate Group meeting.

That said, Steven warned that when a US person is either the settlor or beneficiary of a trust, the trustees need to take account of this fact. In relation to a US person, there are no shades of grey. Having a US person involved, will result in the trust having both *tax* and *reporting* obligations.

Steven circulated a pamphlet on his firm's systemised approach to trust audit in the US. His starting point is a letter that points out the tax and filing obligations based on the structure and advice on tax efficiency.

Revocable trusts can be amended relatively easily; irrevocable trusts are harder to amend. You can either move property into another trust (decanting) or change the provisions of the existing trust.

**Questions and answers**

Steven was asked to go into a little bit more detail about decanting.

Steven explained that this was a way of moving assets from an irrevocable trust into a revocable one. It was possible by court order or by virtue of a power in the trust documents or because it was lawful in accordance with the laws of the jurisdiction under which the trust was made.

The purpose would be to move assets so as to form a separate trust with more favourable provisions or, if the assets are in a revocable trust, revoke the trust and start again or form a new trust and move the assets over.

It is possible to ask the court for guidance on decanting.

Steven confirmed that US tax laws are skewed against accumulations in a trust. If accumulations are built up and then distributed, under US law, there can be a *throwback* so that tax is levied when the distribution should have been made. There are also interest charges (3% compound) but the maximum amount is capped at 100% of the value of the trust asset. Steven confirmed that it was not possible to use the decanting mechanism as a way to avoid accumulations.

Robert made the point that when a trust is set up, it should be assumed that it will be investigated at some point and therefore the client should be told and all minutes and communications should be written on the basis that they will be read by a tax investigator in due course.

A point was also made in relation to fees and resources – perversely, if fees are nominal, this may lead to a questioning of the discretionary status of a trust. If a trust is truly discretionary and the trustees exercise that discretion, this imposes obligations in respect of which fees need to be incurred. The trust may, for example, incur the fees of a distribution adviser.

Steven then raised the question on ***the LLC structure*** described by Georges.

Steven made the point that under US law, a single member LLC is a disregarded entity. If the LLC has more than one member, it is treated as a partnership and has to file a US tax return as a partnership. It has to make the filing even if it is not earning any income.

For US tax purposes, there is a box that needs to be checked as to whether or not the entity will be treated as a partnership or a corporation.

However, the point Steven was making is that there will still need to be filings even if there is no tax liability at the end of the day.

There was then a debate in relation to the fact that, under the model that Georges explained, partners in the LLC were expected, under French law, to accept personal liability. This runs completely contrary to the purpose of a Limited Liability Corporation – by confirming that the partners bear personal liability, this could invalidate the entire structure.

The meeting closed with the usual show of appreciation for those that had presented their papers.