IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 05413

IN CHAMBERS

BETWEEN	ROSE HALL RESORT, L.P.	CLAIMANT
AND	THE RITZ-CARLTON HOTEL COMPANY OF JAMAICA LIMITED	DEFENDANT

Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the Claimant
Vincent Nelson Q.C and Maliaca Wong instructed by Myers Fletcher and Gordon for the Defendant

HEARD: November 24, 2009 and March 29, 2010

JONES J.

[1] The Ritz-Carlton Rose Hall Resort in Jamaica is unquestionably a good approximation of paradise. Turquoise coloured water lap around warm white sand beaches shaded by palm trees. In the distance, a line of jungle-covered hills rise up to a cloudless sky, and smiling "Ladies and Gentlemen" hold out glasses of rum punch, to dull the minds of thankful guests. The hotel section of the property has 427 guestrooms, 52 suites, upscale convention facilities, and an award winning championship golf course.

[2] But, appearances deceive. The owners of the property, Rose Hall Resort L.P (hereafter called Rose Hall) terminated the Operating Agreement with its manager, Ritz-Carlton Hotel Company of Jamaica

Limited (hereafter called Ritz-Carlton. The Operating Agreement is governed by the laws of the State of Georgia, United States of America, and contractual disputes arising from the Operating Agreement are subject to an arbitration clause. The site of the arbitration is stipulated to be in Washington D.C. U.S.A. It is common ground between the parties that Rose Hall has effectively terminated the Operating Agreement for the reasons stated in their Notice of Termination.

[3] Section 3 of **The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** which gives effect to the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** usually known as the New York Convention hereafter called (the Convention) provides that it shall have the force of law in Jamaica. The Convention applies to any difference between the parties arising from any legal relationship which is commercial. **Article II (3) of the Convention** requires the Court to refer to arbitration any matter which is capable of being settled by arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed. Under an Operating Agreement Rose Hall the owner allowed Ritz-Carlton to operate and manage the hotel known as The Ritz-Carlton Golf & Spa Resort, Rose Hall, Jamaica (hereafter called "the Resort") and the adjacent golf course for Rose Hall providing personal services for a fee.

[4] Rose Hall contends that Ritz-Carlton defaulted by failing to manage the Resort properly. Accordingly, on September 3, 2009, they terminated the Operating Agreement requiring Ritz-Carlton to vacate the Resort by October 1, 2009. Rose Hall also applied for an interim injunction in this court requiring Ritz-Carlton to deliver up possession of the Resort. Ritz-Carlton applied for a stay of the injunction on the basis that an application to the court at this time is in breach of their agreement to arbitrate any difference arising from their legal relationship in accordance with Section 3 of **The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II(3) of the Convention**.

Issues

[5] Is this court constrained under **the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II(3) of the Convention** to:

i) Stay the injunction brought by Rose Hall and allow the foreign arbitration to proceed?

ii) If yes. Would this court recognize or enforce an award by the foreign arbitrators with respect to the possession of Jamaican land?

iii) Is the action brought by Rose Hall within the scope of the arbitration clause under the laws of the State of Georgia?

Background Facts

[6] The background to these proceedings can be set out briefly. By way of an Operating Agreement dated July 6, 1998, between Ritz-Carlton and Rose Hall, Ritz-Carlton went into possession of the Resort owned by Rose Hall for a fee and on terms that all disputes under the agreement were to be subject to arbitration. The Operating Agreement was for 25 years beginning August 1, 2000, unless earlier terminated, with an option to extend for up to four additional periods of 10 years each.

[7] Ritz-Carlton manages the Resort and as a result hires and supervises on behalf of Rose Hall hundreds of employees at the Resort, creates obligations on Rose Hall's behalf by entering into service contracts for the supply of goods, leases, licenses and other agreements in Rose Hall's name. Ritz-Carlton also, services all of Rose Hall's customers, and deals with all revenues arising from the operation of the Resort. In addition they maintain operating accounts where deposits are made for the account of Rose Hall.

[8] Rose Hall pays all the operating expenses, and accepts all the risk arising from any financial failure. For this service Ritz-Carlton receives a base fee together with an incentive fee where applicable. Ritz-Carlton

is also reimbursed for the cost of providing certain services that are generally provided to Ritz-Carlton properties.

[9] Rose Hall contends that Ritz-Carlton defaulted in its duties under the Operating Agreement, by failing properly to operate and manage the Resort for Rose Hall's account. Rose Hall served four Notices of Default upon Ritz-Carlton for those breaches. The Notices of Default were dated, May 20, 2008, February 13, 2009, April 30, 2009 and September 8, 2009.

[10] On July 1, 2009, Rose Hall submitted a Demand for Arbitration in Washington D.C. seeking damages of not less than US$145,000,000. Two months later, Rose Hall terminated the Operating Agreement with immediate effect by serving a Termination Notice in accordance with the Operating Agreement. The Notice of Termination required Ritz-Carlton to vacate and deliver up possession of the Resort to Rose Hall by 12:01am on October 1, 2009. The Notice of Termination was in accordance with clause 3.3.1(a) of the Operating Agreement, which provides as follows:

> "Subject to the provisions of Section 3.3.3, this Agreement may be terminated prior to the expiration of the then effective Operating Term upon the occurrence of one or more of the following events:
>
> (a) upon any Event of Default, at the option of the non-defaulting party exercised by written notice to the defaulting party prior to the cure of such Event of Default."

[11]The Operating Agreement provides that the relationship between the parties is governed solely by the laws of the State of Georgia, United States of America.

[12]Ritz-Carlton has not vacated the Resort on the date set out in the Notice of Termination and remains in possession of the Resort, and accordingly, Rose Hall has applied to the court for an interim injunction requiring Ritz-Carlton to vacate the Resort. On the other hand, Ritz-Carlton has applied for a stay of the injunction on the basis that the difference between the parties is subject to **The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II(3) of the Convention.**

The Relevant Sections of the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001

[13]Sections 2 and 3 of the Act provide as follows:

> "2. In this Act:
>
> the Convention" means the Convention on the recognition and Enforcement of Foreign Arbitral Awards, done in New York on the 10th day of June 1958
>
> 3. (1) Subject to sub-section (2), the Convention shall have the force of law in Jamaica.
>
> (2) The provisions of the Convention shall apply –
>
> (a) To any award where reciprocal provisions have been made in relation to the recognition and enforcement of such an award in the territory of a State party to the Convention; and

(b) To any difference which may arise out of any legal relationship, whether or not contractual, which in Jamaica is a commercial relationship."

(3) The text of the Convention is set out in the Schedule."

[14] The Schedule to **The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** is the same as **Articles II and V** of the Convention. Article II provides that:

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

[15] **Article V of the Convention** provides that:

"Recognition and enforcement of the arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country, or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country"

[16] I accept that through this statute Jamaica has given legal recognition to its international obligation to recognize and implement non-domestic arbitration agreements. These agreements are in foreign countries and are decided according to the laws of that country or between persons, one of whom is not a national of Jamaica

Issue One:

> ***Is this court constrained under the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001 and Article II(3) of the Convention to stay the injunction brought by Rose Hall and allow the foreign arbitration to proceed? If yes. Would this court recognize or enforce an award by the foreign arbitrators with respect to the possession of Jamaican land?***

The First Argument

[17] Dr Lloyd Barnett "hereafter called Counsel for Rose Hall" concedes that the arbitration agreement is valid. However, he raises three ambitiously intricate arguments. In the first argument, he contends that the **Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** which recognizes each Contracting State's obligation to recognize arbitration agreements only extends under Article II to differences between parties to an arbitration agreement "in respect of a defined legal relationship". He submits that in this case, there is no legal relationship in the Operating Agreement between Rose Hall and Ritz-Carlton, which gives Ritz-Carlton any right to possession of the property of Rose Hall. In essence there is no expressed or implied right

of Ritz-Carlton to remain in possession of the Resort against the will of Rose Hall. On the basis, he submits that the claim of Rose Hall to possession does not raise any dispute capable of settlement by arbitration within the meaning of **Article II of the Convention**.

[18] Counsel for Rose Hall submits further that the right of Rose Hall as the owner to the possession of Jamaican land an issue within the sole jurisdiction of the courts in Jamaica and are matters of Jamaican law. The case brought by Rose Hall he contends is only for recovery of its property and so cannot be part of the Operating Agreement and therefore subject to arbitration.

[19] In support of his first argument, Counsel for Rose Hall cites the Canadian case of ***Duke v Andler*** **[1932] S.C.R. 734.** In delivering the judgment of the court Smith J had this to say:

> "The courts of a country have no jurisdiction to adjudicate upon the title or the right to possession of immovables situate in another country. Not only must such a dispute be decided according to the lex situs; it must be adjudicated upon by the courts of the country of the situs. The line of cases in England, in which it has been laid down that the English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract fraud or trust and the Defendant resides in England, are all limited to the exercise of jurisdiction in personam, and the courts in those cases did not purport to adjudicate upon questions of title."

[20] Counsel for Ritz-Carlton on the other hand, submits that there is an "opt-out" provision in the Convention with respect to immovable property and that this provision has not been exercised by either

Jamaica or the USA. On this basis, he argues that where the Convention applies unless there are express words in an arbitration clause, all disputes involving immovable property are subject to arbitration and the decision of the arbitrators in relation to the property is enforceable under the provisions of the **Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001**. The logical extension of this argument, he submits, is that foreign arbitrators have the power to grant injunctive relief in respect of immovable property in Jamaica, and further that this is enforceable under **Article I, II and III of the Convention** by the Courts of Jamaica.

[21] Sir Michael Mustill (Later Lord Mustill, of the House of Lords) and Stewart Boyd, the learned authors of **The Law and Practice of Commercial Arbitration in England** 2nd Edition at page 149 deals with the issue of what matters are capable of settlement by arbitration in this way:

> "This question may arise at different stages of the arbitration. At the outset it may be relevant to the question whether the court will enforce the arbitration agreement by staying proceedings brought in breach of it, or by other means at its disposal. And at the conclusion of the arbitration it may be relevant to the question of whether the court will enforce the award...In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award...the general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration. This principle is subject to certain reservations."

[22] Amongst the reservations listed by the learned authors are the following:

> "...the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State...nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order etc."

[23] The learned authors then go on to make the following point:

> "It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration..."

[24] Lord Hoffman in **Fiona Trust v Privolov 2007 All ER (D) 233** has set out the modern approach to construing arbitration clauses. The following passage is taken from the judgment:

> "In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction ... In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should

> be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ. remarked ... "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

[25] In **Channel Tunnel Group Ltd v Balfour Beatty Construction [1993] 2 W.L.R. 262, 276** Lord Mustill in delivering the leading judgment of the court made it clear that the courts will be inclined to grant a stay and against an interim injunction where the parties are awaiting arbitration proceedings and the applicant is merely seeking from the court what the arbitrator is asked to decide. He said:

> "The parties here were large commercial enterprises, negotiating at arms length in the light of a long experience of commercial contracts, of the types of disputes which typically arise under them, and of the various means which can be adopted to resolve such disputes. It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognized the potential weaknesses of the two-stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take the their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point..."The purpose of interim measures of protection...is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is

what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration...Amidst all these assumptions, there is one hard fact which I believe to be conclusive, namely that the injunction claimed from the English court is the same as the injunction to be claimed from the panel and the arbitrators, except that the former is described as an interlocutory or interim. In reality its interim character is largely illusory, for as it seems to me an injunction granted in November 1991, and an injunction granted today, would largely pre-empt the very decision of the panel and arbitrators whose support forms the raison d'etre of the injunction...In these circumstances, I do not consider that the English court would be justified in granting the very far-reaching relief which the appellants claim. It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief...There is always tension when the court is asked to order, by way of interim relief in support of arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that the panel and the arbitrators can decide whether to order a final mandatory injunction. If the court now orders an interlocutory mandatory injunction, there will be very little for the arbitrators to do. Any doubts on this score are to my mind resolved by the choice of the English rather than the Belgian courts as the source of interim relief. Whatever exactly is meant by the words "competent judicial authority" in article 8.5 of the I.C.C. Rules, the Belgian Court must surely be the natural court for the source of the interim relief. If the appellants wish the English court to prefer itself to this natural forum it is for them

> to show the reason why, in the same way as a plaintiff who wishes to pursue a substantive claim otherwise than in a more convenient foreign."

[26] It is common ground between the parties that the arbitration clause in the Operating Agreement is valid; Rose Hall itself has invoked the provision. The issue raised by Rose Hall in these proceedings is whether any arbitrator can appropriately settle an issue involving possession of immovable property in Jamaica. You may recall that Section 3 of **the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II (1) of the Convention** provides that each Contracting State shall recognize an arbitration agreement in writing in which differences have arisen in the subject matter that "must be capable of being settled by arbitration".

[27] So which is it to be: is the subject matter of the arbitration agreement, capable of being settled by arbitration or incapable of being settled by arbitration? As a general proposition disputes which affect the rights of third parties or rights which are enforceable against the world; or involve issues of criminal liability are incapable of settlement by arbitration.

[28] In this case, however, there is a difference which Counsel for Rose Hall has not addressed. In my view the subject matter of the arbitration is not possession of Jamaican land (in rem) as claimed by Counsel for Rose Hall, but the rights as between the parties (in personam) in the

arbitration to the possession of Jamaican land. Counsel for Rose Hall has sought to equate the determination of possession of the Resort as between the parties to the arbitration with an order in rem by a foreign arbitrator, which I hold to be incapable of recognition in Jamaica.

[29] In ***Catania v Giannattasio* [1999] I.L.Pr. 630** the Ontario Court of Appeal in dealing with the right of the Canadian Court to make orders in relation to property overseas had this to say:

> It is a general rule of Canadian law that courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country. By way of exception, Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if those rights are based on contract, trust or equity and the Defendant resides in Canada. They will, however, only exercise this exceptional in personam jurisdiction if four criteria are met: (1) the court must have in personam jurisdiction over the defendant; (2) there must be some personal obligation between the parties; (3) the jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment; and (4) the court will not exercise jurisdiction if the order would be of no effect in the situs.

[30] More recently, in ***Pattni v Ali* [2006] UKPC** Lord Mance in delivering the judgment of the Board made it clear at paragraphs 25 and 26 that

> "An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the lex situs of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rules 120 and 124 in Dicey, Morris &

> Collins. Immovables fall into a different and special category in private international law... Even so, it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of immoveable property situate in a foreign country: see Dicey, Morris & Collins rule 122(3).

[31] Applying the approach of Lord Hoffman in **Fiona Trust** any court considering the interpretation of an arbitration agreement "should start on the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal". He went on further to point out that the court should construe the clause "in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".

[32] In my judgment the issues raised in the arbitration are capable of being settled by arbitration as it involves only the rights as between the parties in the arbitration to the possession of Jamaican land being the Resort. Whatever the result of the foreign arbitration, it cannot affect the rights of third parties involving the Resort or any rights which are enforceable against the world.

The Second Argument

[33] The main point raised here by Counsel for Rose Hall is essentially the first argument under a separate sub-section of the Convention. It is that the arbitration agreement itself is "incapable of being performed" as the subject matter of the arbitration is Jamaican land and that this is not capable of settlement by arbitration. As I have already noted the point is connected to the first argument but raises the objection under **Article II (3) of the Convention.**

[34] The essence of the argument is that any reference under **Article II(3)** must fail as any agreement to refer the right of Rose Hall to possession of Jamaican land to foreign arbitration would be "inoperative or incapable of being performed" because the Jamaican courts would not recognize or enforce such an order. Counsel for Rose Hall submits that a contrary interpretation would require unambiguous language in the statute or failing that necessary implication.

[35] This court takes the view that where the action brought by Rose Hall is within the terms of the arbitration provisions, (as I have found) **Article II (3) of the Convention** is clearly relevant. **Article II (3)** requires the court to "refer the parties to arbitration" in respect of a matter which falls within the Article. Where this is so, a stay on any other proceeding brought by either party is obligatory. To evade the statutory process, Rose Hall (the party in this case resisting the stay) would have to show

that the "agreement is null and void, inoperative or incapable of being performed". If they were able to establish this, then a stay would be refused by the court.

[36] I accept the submission of Vincent Nelson Q.C (hereafter called Counsel for Ritz Carlton) that as Rose Hall started the arbitration process by invoking the arbitration clause and demanding arbitration; they cannot now say that the arbitration clause is "incapable of being performed". Furthermore, "incapable of being performed" has a special meaning, The learned authors of **The Law and Practice of Commercial Arbitration in England** (referred to earlier) make the point that:

> "'Incapable of being performed' connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. There must be some obstacle which cannot be overcome even if the parties are ready, willing and able to perform the agreement...for example where the mechanism for constituting the tribunal breaks down in a way which the court has no ability to repair, or where the sole arbitrator named in the agreement cannot or will not act..."

[37] To give an example. Even if one were to accept that the result of the foreign arbitration may not be recognized or enforced by the courts in Jamaica that does not make the arbitration agreement "incapable of being performed". In this case, Rose Hall -- as the party resisting the application for the stay -- has failed to establish any circumstances which would rule out a compulsory stay on their action. Consequently, I hold that the arbitration clause in the Operating Agreement is not

only valid but is subject to Section 3 of **The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** (the "Act") and **Article II(3)**, which imposes a mandatory stay on the proceeding for an injunction brought by Rose Hall.

The Third Argument

[38] The contention here is that this court should refuse recognition or enforcement of a foreign arbitral award dealing with the possession of Jamaican land as to do so would be contrary to public policy. This point is also connected to the first argument but raises the objection under **Article V of the Convention**.

[39] This argument can be disposed of quickly. Firstly, for the other reasons given, the foreign arbitration can only relate to the rights between the parties to the arbitration to the possession of the land. Secondly, I agree with Counsel for Ritz-Carlton that it a matter of public policy that Jamaica should comply with its international obligations. I go further to say that it is a matter of public policy that the Jamaican courts should recognize awards of foreign arbitral tribunals unless the awards are contrary to conceptions of morality and fairness. That is clearly not the case here. Thirdly, objections to the award of a foreign arbitral tribunal is available under the **Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article V of the Convention** at the

enforcement stage, not prior to the award as Rose Hall is attempting here.

Issue Two:

Is the Action Brought by Rose Hall Within the Scope of the Arbitration Clause Under the Laws of the State of Georgia?

[40] As I have said before, the Operating Agreement provides that the relationship between the parties is governed solely by the laws of the State of Georgia, United States of America. Rose Hall contends that under Georgia law Ritz-Carlton has no right to remain in occupation of the Resort. The expert evidence given to the Court on that issue has not been helpful as it conflicts in important areas. In any event, as Counsel for Rose Hall says, proof of foreign law is evidential and is to be treated as fact, not law.

[41] Counsel for Rose Hall argues that where there is doubt as to what foreign law says this Court should presume that the foreign law is the same as Jamaican law. On this basis, he has asked this court to hold that Ritz-Carlton has no proprietary interest in the Resort and must leave on the demand of Rose Hall.

[42] I disagree for two reasons. First, the parties have agreed to arbitration in accordance with Georgia law, so there cannot be any doubt that the construction of the arbitration agreement and issues arising from it are to be settled by applying that law. Second, on October 29, 2009,

the Superior Court of Gwinnett County, State of Georgia, stayed Rose Hall's Complaint and ordered as follows:

> "The underlying agreement between the parties at paragraph 13.6 requires the parties to submit to arbitration any dispute, controversy, or claim arising out of or relating to the agreement. It is undisputed that Plaintiff made its demand for Arbitration on July 1, 2009. Defendant Ritz Carlton Jamaica does not dispute that the matter should be properly decided in arbitration in accordance with the underlying agreement.
>
> As the claim(s) raised in this Complaint and/or Amended Complaint, filed October 19, 2009, involve a dispute, controversy, or claim arising out of or relating to the underlying agreement, the Motion to Compel Arbitration is HEREBY GRANTED, and the above-styled civil action file is HEREBY STAYED during the pendency of that arbitration.
>
> If there are matters raised in the instant Complaint not resolved at the conclusion of the arbitration proceedings, and for good cause shown, either party may petition the Court to reopen this matter at that time".

[43] Consequently, without minimizing the volumes of expert evidence on Georgia law submitted by the parties, it is my view that the decision of the Superior Court of Gwinnett County in the State of Georgia is the best indication of what Georgia law is and how it should be applied on the issue here. I so hold.

Conclusion

[44] In summary then, this court holds that:

i) The injunction brought by Rose Hall is subject to an arbitration agreement in writing to submit to arbitration all or any

differences which have arisen or may arise under the Operating Agreement;

ii) The arbitration agreement is to be interpreted under the laws of the State of Georgia;

iii) The subject matter of the arbitration is capable of being settled by arbitration within the meaning of **Section 3 of The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II (2) of the Convention** as it involves the rights (in personam) as between the parties in the arbitration to the possession of Jamaican land.

iv) The arbitration agreement is subject to **Section 3 of The Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001** and **Article II(3) of the Convention**, which imposes a mandatory stay on the proceedings for an injunction brought by Rose Hall.

[45] For all these reasons the application for an injunction brought by Rose Hall is stayed pending the completion of the arbitration proceedings between itself and Ritz-Carlton. Costs in the cause.