

HARNEYS



Guide to Conflicts of Laws

CONFLICT OF LAWS

New BVI conflict of laws rules relating to trusts

Background: the need for conflict of laws rules

Given that trusts governed by the laws of the BVI usually have significant legal links with the law of one or more other jurisdictions, it is essential for the BVI to have adequate rules for resolving “choice of law” questions relating to trusts. Although the majority of the provisions of the English Recognition of Trusts Act 1987 (incorporating as it does most of the provisions of the Hague Trusts Convention) have been extended to the Territory, so ensuring a certain amount of certainty in relation to many of the relevant conflict of law rules relating to trusts, specified matters are expressly excluded from that Act, meaning that it is essential for these rules to be reinforced by additional statutory provisions.

Section 83 of the Trustee Act

In 1993 the BVI introduced legislation which was intended to deal with various issues which were expressly excluded from the Hague Trusts Convention, article 4 of which stated that the Convention “does not apply to preliminary issues relating to the validity of wills or other acts by virtue of which assets are transferred to a trustee”. Section 83 of the Trustee Act (which also included the Territory’s anti-forced heirship provisions which are referred to below, and which was based on wording contained in a Jersey statute) was designed to plug this gap in the Convention by providing that “if a person transfers or disposes of personal property to a trustee of a trust he shall be deemed to have capacity to do so if he is at the time of such transfer or disposition of full age and sound mind under the law of his domicile”.

Forced heirship

Certain countries, notably civil and Muslim states, have laws under which surviving relatives of a deceased (eg his children) can claim a fixed share of his estate. In common with the laws of most other offshore centres, the BVI has also passed legislation expressly preventing “forced heirship” claims from being made against lifetime trusts. Prior to 1 March 2004, the BVI’s statutory provisions

outlawing forced heirship claims were also to be found in section 83 of the Act. However, for a number of reasons, particularly when reviewed in the light of the relevant laws of certain other offshore trust jurisdictions, these provisions were not considered to have been sufficiently watertight.

Overhaul of section 83 of the Trustee Act

With the assistance of Professor Jonathan Harris of Birmingham University in the UK, the eminent academic who specialises in this area of the law, the provisions of section 83 of the Act were recently analysed in conjunction with the corresponding provisions of other offshore jurisdictions' legislation with a view to replacing this section by a new section containing a much more comprehensive set of statutory conflict of laws rules for trusts.

Since certain commentators had pointed out that the corresponding laws of many offshore trust jurisdictions were deficient in that they did not deal with preliminary issues relating to the validity of *all* trusts, a further objective of the review was to establish conflict of laws rules which apply to trusts generally, rather than merely to those which are governed by BVI law.

Furthermore it was recognised, when carrying out the review, that offshore trust jurisdictions' conflict of laws rules were somewhat inadequate in that they made no distinction between what are now generally regarded as two separate preliminary issues of capacity, namely (1) capacity to make the disposition and (2) capacity to subject the property disposed of to a trust.

Another very significant aim of the review was to set up a regime which was, perhaps in contrast to the laws of many of the other offshore trust jurisdictions, likely to command a substantial degree of international recognition. Those of the rules dealing with matters which are excluded from the Hague Trusts Convention which are summarised below have therefore been drawn up with the objective of reflecting current common law trends. Whilst it cannot be guaranteed that these rules will necessarily correspond exactly with case law as it eventually develops in other common law jurisdictions, they are rules which are likely to command a certain degree of academic support. For that reason these rules should be seen by the courts of other jurisdictions as a legitimate and rational approach. In contrast there probably exists the danger that the laws of certain other jurisdictions, which provide, in effect, that the internal laws of those jurisdictions apply (with certain qualifications) to *all* relevant preliminary issues relating to the validity of trusts, would, were they to be considered by foreign courts, face rejection.

Finally, a further important objective of the review was to include in the Trustee Act some additional provisions which are significantly more robust in their defence of potential forced heirship claims.

The new section 83 A of the Trustee Act

The Trustee (Amendment) Act, 2003, which came into effect on 1 March 2004, repealed section 83 of the Trustee Act in relation to trusts established after that date and replaced that section by a new set of conflict of laws rules which are now contained in section 83 A of the Trustee Act.

The provisions of the new section 83 A may be summarised as follows:

- The formal and essential validity of a disposition of immovable property, or tangible movable property, will be determined in accordance with the law of the State in which the property is situated at the time of the disposition; capacity to make such a disposition will be similarly determined.
- The formal and essential validity of a disposition of intangible movable property will be determined in accordance with choice of law rules which are specified in a new Schedule to the Act (and in section 83A (8)).
- Capacity to subject property to a trust (as distinct from capacity to dispose of the property) will be determined in accordance with the law governing the essential validity of the trust.
- Where a person declares a trust of his own property, there will be no requirement for compliance with the rules on formal or essential validity applicable to a disposition of property.
- Where, pursuant to the above rules, an issue falls to be determined by BVI law, the doctrine of “renvoi” will not be applicable.
- Subject to the above rules, all questions arising with regard to the validity, construction, effect or administration of a trust, including powers, obligations, duties, liabilities and rights of trustees, and the existence and extent of powers, will be determined by the proper law of the trust.
- The above rules for determining the “preliminary” issues which are excluded from the Hague Trusts Convention will apply to trusts generally (other than testamentary trusts) and will not be confined in their operation to trusts governed by BVI law.
- The new section contains robust, comprehensive and carefully crafted provisions protecting BVI trusts (and dispositions to their trustees) against “forced heirship” claims. These provisions, which have been modelled largely on the equivalent laws of the Cayman Islands, the Isle of Man and The Bahamas (but subject to a number of improvements and modifications

to reflect the Territory's other laws), will also prevent foreign judgments based on such forced heirship claims from being recognised or enforced in the Territory. The Act provides that these new rules will apply notwithstanding those of the other provisions of section 83 A which are summarised above.

- Subject to one minor exception, section 83 A only applies to trusts created on or after 1 March 2004, with the result that section 83 of the Trustee Act will continue to apply to trusts created before that date. (The exception relates to trusts created before 1 March 2004, but the proper law of which is changed to that of the Territory on or after that date.)
- The above rules apply solely to trusts.

In relation to trusts, it is now believed that the Territory not only has in force an anti-forced heirship regime which is as robust as that of any other offshore trust jurisdiction, but probably also has the most refined and comprehensive set of conflict of laws rules in the world.

Jurisdiction of the BVI court

Section 82 of the Trustee Act provides that the BVI court has jurisdiction inter alia where the proper law of the trust is that of the Territory, where the trustee is resident or incorporated in the Territory, where the administration of the trust is carried out in the BVI and in respect of trust property situated in the Territory. Subsection (f) also provides that it has jurisdiction where it "thinks it appropriate". Following advice from Professor Harris, however, the Trustee (Amendment) Act 2003 has repealed subsection (f), on the grounds that it is too loose, and this has been replaced by three further subsections, giving the Territory's courts jurisdiction to resolve trust disputes where they are the natural forum for the litigation, where the parties submit to the court's jurisdiction and where the trust instrument contains a provision referring all disputes to the Territory's courts. These amendments also came into effect on 1 March 2004.

If you would like further information on the subject matter of this Guide please contact Zac Lucas at zac.lucas@harneys.com or Sheila George at sheila.george@harneys.com or your usual contact at Harneys. Alternatively, you can visit our website at www.harneys.com

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