

Jersey & Guernsey Law Review – February 2007

JERSEY'S NEW PRIVATE INTERNATIONAL LAW RULES FOR TRUSTS – A RETROGRADE STEP?

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Background

1 The Trusts (Amendment No 4) (Jersey) Law 2006, which entered into force on 27 October 2006,¹ replaces the provisions of article 9 of the Trusts (Jersey) Law 1984 (“the 1984 Law”)² and effects significant changes to the conflict of laws rules applicable to trusts in Jersey. The Law has been heralded in the report accompanying the legislation as providing “... the most significant updating of the Trusts Law since it was first introduced over 20 years ago.”³ Amongst its principal aims are to extend the scope of protection provided to Jersey law trusts from attack, and to improve Jersey’s position in a highly competitive marketplace.⁴

2 The amendments are introduced “...with a view to clarifying matters which are uncertain, simplifying areas which had previously required delicate drafting and removing barriers to work coming to the Island.”⁵ The amendments to article 9 of the 1984 Law on conflict of laws, in particular, seek “...to clarify the extent to which matters relating to the validity of a Jersey trust should solely be determined by Jersey law. This is a key provision to strengthen Jersey trusts and to protect them from attack from foreign courts.”⁶ The burden of this article is to suggest, however, that the rules are beset with a number of serious errors, that their relationship to existing legislation is not sufficiently clear and that, as a result, the rules may cause serious harm to the Jersey law trust industry and may even be considered a retrograde step from existing legislation.⁷

The new statutory provision

3 The new article 9 of the 1984 Law provides as follows -

“Extent of application of law of Jersey to creation, etc of a trust.

(1) Subject to paragraph (3), any question concerning-

¹ It was adopted by the States of Jersey on 25 April 2006 and subsequently sanctioned by Order of the Privy Council on 10 October 2006. It was registered by the Royal Court on 20 October and entered into force seven days later.

² The article was renumbered in the revised edition of the Jersey laws which entered into force on 1 July 2005. Article 9 of the Law was previously numbered 8A.

³ Para 3.1.

⁴ *Ibid*, para 2.2.

⁵ *Ibid*, para 2.3

⁶ *Ibid*, para 2.5.1.

⁷ See also the discussion of the legislation by the Royal Court of Jersey in *In the Matter of the B Trust*, [2006] JRC 185. The case concerned an application by a trustee for directions, following the variation of a Jersey law trust by an English court. The judgment came too late for detailed discussion in the present article, although brief references are made to it.

- (a) the validity or interpretation of a trust;
- (b) the validity or effect of any transfer or other disposition of property to a trust;
- (c) the capacity of a settlor;
- (d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal; or
- (e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers;

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.

- (2) Without prejudice to the generality of paragraph (1), any question mentioned in that paragraph shall be determined without consideration of whether or not –
 - (a) any foreign law prohibits or does not recognise the concept of a trust; or
 - (b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action to intended to recognize, protect, enforce or give effect to any such rights, claims or interests.
- (3) The law of Jersey relating to-
 - (a) *légitime*; and
 - (b) conflicts of law,

shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

- (4) No foreign judgement with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law.

(5) The rule *donner et retenir ne vaut* shall not apply to any question concerning the validity, effect or administration of a trust, or a transfer or other disposition of property to a trust.

(6) In this Article –

‘foreign’ refers to any jurisdiction other than Jersey;

‘heirship rights’ means rights, claims or interests in, against or to property of a person arising or accruing in consequence of his or her death, other than rights, claims or interests created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of his or her property;

‘*légitime*’ and ‘*donner et retenir ne vaut*’ have the meanings assigned to them by Jersey customary law;

‘personal relationship’ includes the situation where there exists, or has in the past existed, any of the following relationships between a person and the settlor

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- (a) any relationship by blood, marriage or adoption (whether or not the marriage or adoption is recognised by law)
- (b) any arrangement between them such as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife; or
- (c) any personal relationship between the person or the settlor and a third person who in turn has a personal relationship with the settlor or the person as the case may be.

(7) Despite Article 59, this Article applies to trusts whenever constituted or created.”

Scope of application

4 Jersey, like other offshore centres, is naturally anxious to offer highly pragmatic and attractive conflict of laws rules, which safeguard settlor autonomy and which do not leave trusts subject to attack from foreign laws and foreign courts. The new legislation was perceived as building on, and extending the scope of Jersey’s rule, to provide a more comprehensive package of provisions. But unfortunately, it is highly debatable whether it achieves that goal.

5 A first difficulty concerns the scope of the legislation. The new article 9 will apply to trusts governed by Jersey law only. Those that, for example, own property located in Jersey but whose settlors wish to subject it to a foreign law trust, are not covered by these

provisions. More seriously, the conflicts provisions of the previous version of article 9 had applied only to those domiciled *outside* Jersey, as they sought to clarify the position for foreign would-be investors on the Jersey market.⁸ However, the new article 9(3) states that “The law of Jersey relating to... conflicts of law⁹ shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled¹⁰ in Jersey”. This is a highly opaque provision. Presumably, it was aimed primarily at excluding conflict of laws rules of Jersey in other areas of law *related* to trusts, which might otherwise undermine the trust. However, there can be not the slightest doubt that article 9(1) is *itself* a conflict of laws rule of Jersey.¹¹ It is a set of choice of law rules specifying when the law applicable to a particular matter is the law of the forum. Read literally (and it is very difficult to read it any other way) the effect of article 9(3) must be that that the provisions of article 9(1) itself will apply now *only* where the settlor is domiciled in Jersey.¹² This means that the legislation will apply *only* to the rather narrowly defined group of Jersey settlors who created trusts governed by Jersey law. It follows that those settlors domiciled outside Jersey who wish to transfer their property to Jersey law trusts, and thus to insulate them from the claims of forced heirs, are now no longer the subject of any legislative provisions in this area. This is a very unfortunate outcome, since it is clear from the public consultation document which led to the legislation¹³ that one of its purposes was to extend the ambit of the legislation to both Jersey and non-Jersey domiciliaries.¹⁴ This is also obviously a serious cause for concern in attracting investors from outside Jersey to Jersey law trusts.

Matters governed by Jersey law

6 Where the new article 9(1) is applicable,¹⁵ it specifies matters which shall be determined exclusively by the law of Jersey. One such matter is the capacity of the settlor. Given the literal construction of article 9(3) above, this amounts to saying that the capacity of a settlor domiciled in Jersey who creates a Jersey trust is governed by Jersey law. The law applied is both the governing law of the trust and the law of the settlor’s domicile. Again, however, it is questionable how effective such a rule would be in respect of trusts of property located outside Jersey; and in particular in relation to trusts of immovables. If S transfers land in State X to T to hold on trust for B under a Jersey law trust and, according to the law of State X, S had no capacity to make the transfer, problems may inevitably

⁸ Article 9(2) of the 1984 Law, now repealed, provided, - “If a person domiciled outside Jersey transfers or disposes of property during the person’s lifetime to a trust – (a) the person shall be deemed to have had capacity to do so if the person is at the time of such transfer or disposition of full age and of sound mind under the law of the person’s domicile; and (b) no rule relating to inheritance or succession (including, but without prejudice to the generality of the foregoing, forced heirship, *légitime* or similar rights) of the law of the person’s domicile or any other system of law shall affect any such transfer or disposition or otherwise affect the validity of such trust.”

⁹ *Sic*. Article 9(3) also applies to Jersey rules on *légitime*, which are applicable only where the settlor is domiciled in Jersey.

¹⁰ One would not normally expect a connecting factor such as domicile to be accorded such prominence in the context of *inter vivos* transfers.

¹¹ “This seems rather circular because the rules set out in paragraph (1) must themselves be conflicts rules.” *per* Sir Philip Bailhache, Bailiff, in *In the Matter of the B Trust*, [2006] JRC 185, para 17. He went on to describe article 9(3) as “rather obscure” (para 18).

¹² If this had been the intention of the legislature, this would have been a tortuous way to achieve the result of excluding non-Jersey domiciliaries from the scope of the legislation.

¹³ Para 2.1.5.

¹⁴ The wording of article 9(3), however, does not achieve this result.

¹⁵ It applies “to trusts whenever constituted or created” (article 9(7)).

arise as to the recognition of T as legal owner of the property in State X. Moreover, the same approach is taken to “the validity or effect of any transfer or other disposition of property to a trust”,¹⁶ thereby eschewing the application of the *lex situs* for *inter vivos* transfers of property used in England and again creating the potential for problems of enforcement in the courts of the *situs*.¹⁷ The law of State X may not consider the transfer by S to T to be valid and effective; and/or it may not recognise the rights of B as beneficiary. These problems will be greatly exacerbated if State X is the law of a non-trust state which does not recognise the concept of legal ownership of property which does not form part of one’s private patrimony.

7 Jersey law also applies, pursuant to article 9(1)(a) and (e) respectively, to the validity or interpretation of the trust, and to the existence and extent of powers conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers. To a large extent, this reiterates the position under article 8 of the *Hague Trusts Convention*,¹⁸ which specifies the scope of the law applicable to the trust; although the list in the amended article 9 is incomplete. These provisions do no obvious harm, and may even act as an *aide memoire* as to the provisions of article 8 of the Hague Trusts Convention. Nonetheless, it is a little curious to find such piecemeal duplication here.

8 More controversially, Jersey law alone applies to “the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal”.¹⁹ This is not at all easy to reconcile with article 9 of the *Hague Trusts Convention*, which expressly confers the right on settlors to “split” the trust and, in particular, to select a different law to govern the administration of the trust from that which otherwise governs the trust. Yet this provision seems to say that where a trust is governed by Jersey law (that is, where Jersey law applies to the trust’s validity), Jersey law alone applies to the administration of the trust *even if the settlor has expressly chosen another law to govern this issue*. This could only be reconciled with the *Hague Trusts Convention* if this were treated as an overriding rule of the forum pursuant to article 16 of that Convention. But it is difficult to see why one would want to do this, not least when it has the effect of restricting settlor autonomy in a marketplace where freedom of choice is valued very highly. The problem might have been avoided had the provision been prefaced with the words “unless otherwise stipulated by the settlor”. Even then, it would scarcely have added to article 9 of the *Hague Trusts Convention*.

9 Article 9(2) then states that the provisions of article 9(1) will be applied without consideration of the fact that a foreign law does not recognise the trust concept. Similarly, the fact that the trust defeats interests conferred by reason of a personal relationship to

¹⁶ Article 9(1)(b).

¹⁷ See also Matthews, *Choice of law in property transactions in Jersey law* (2005) 9 JL Review 187.

¹⁸ *Convention on the law applicable to trusts and on their recognition* (“*Hague Trusts Convention*”) www.hcch.net.

¹⁹ Article 9(1)(d).

the settlor or by way of heirship rights is not relevant. Such provisions are quite to be expected. They are a key part of the insulation of Jersey law trusts from attack and are permitted by the mandatory rule provisions of articles 15²⁰ and 16²¹ of the *Hague Trusts Convention*. These provisions should prove effective in Jersey courts. Nonetheless, problems of forced heirship and of the non-recognition of trusts cannot, of course, be wholly avoided in practice if the trust has connections with a foreign state, as where, for example, the trust assets or parties are located in a non-trust state and/or a state which has rules of forced heirship. A foreign court may be expected to differ as to the effects of a Jersey law trust in such circumstances.

Non-recognition of foreign judgments

10 There then follows a highly controversial provision in the new article 9(4), which states that: "No foreign judgement with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law." This provision is in part a response to the inclination of foreign courts, and in particular English courts, to intervene in relation to the operation of trusts governed by Jersey law.²² For example, in *Charalambous v Charalambous*,²³ the English Court of Appeal held that the power in section 24(1)(c) of the Matrimonial Causes Act 1973 to vary a trust governed by Jersey law and subject to a Jersey jurisdiction clause should nevertheless be exercised in accordance with English law as part of the whole range of powers exercisable in the context of such proceedings. Section 24 of the 1973 Act was treated as a mandatory rule of the English law relating to matrimonial causes, applicable irrespective of the law applicable to the trust. In *Minwalla v Minwalla*,²⁴ the English court, in ancillary relief proceedings, declared a Jersey law trust to be a sham, even though the trust was administered in Jersey and was most closely connected to Jersey. Although the Jersey court did recognise the English judgment,²⁵ as the trustee had submitted to the English proceedings, the Royal Court expressed the view that such jurisdiction would normally be considered unacceptable.²⁶ This shows an acute clash of interests: the English courts' interest in dealing finally with all matters in divorce proceedings; and the Jersey courts' interest in seeing that Jersey law trusts are not undermined by foreign courts, or at least by foreign courts applying foreign law.

11 As the Royal Court put in *In the matter of the H Trust*²⁷ -

"The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair

²⁰ This applies only where Jersey law is the law applicable to a particular area of law related to the trust, such as where it is the law applicable to succession and forced heirship rights are in issue.

²¹ Which applies to overriding mandatory rules of the forum.

²² See also C Gothard, (2006) 12(3) *Trusts and Trustees* 8; J Winfield (2006)12(6) *Trusts and Trustees* 6; T Hanson and M Renouf, *Divorce: maintaining your trust in Jersey* [2006] (Sept) IFL 135.

²³ [2004] EWCA Civ 1030, [2005] Fam 250.

²⁴ [2004] EWHC 2823 (Fam), [2005] 1 FLR 771.

²⁵ [2005] JRC 99.

²⁶ See also *Compass Trustees v McBarnett* 2002 JLR 321; T Hanson and M Renouf, [2006] (Sept) IFL 135, 136.

²⁷ *Per Birt*, Deputy Bailiff [2006] JRC 057 at paragraph 14; considered by M Renouf and T Hanson, *The interface between divorce and Jersey trusts* [2006] PCB 310.

allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trusts involved. Conversely, this Court is sitting in its supervisory role in respect of trusts as is regularly done in the Chancery Division of the English High Court. This Court's primary consideration is to make or approve decisions in the interest of the beneficiaries. It has therefore a very different focus from the Family Division."

But the result is a recipe for a conflict between English courts and Jersey courts, especially as it can by no means be gainsaid that the new article 9(4) will make English courts slower to intervene in relation to Jersey law trusts. If the overall result is a variation of trust which is valid in England but invalid in Jersey, this may not be such an attractive result for the parties, and may put the trustees in an almost impossible position in deciding how to act. Indeed, there is presumably nothing to stop the parties from suing afresh in the courts of Jersey if an English judgment is not recognised; and, by definition, if article 9(4) is triggered, the result will be irreconcilable judgments on the merits in Jersey and overseas.

12 More generally, one can see the pragmatic attractions of article 9(4), which protects Jersey trusts from being undermined "through the back door" by a party suing overseas and then seeking to have the judgment enforced in Jersey. However, this approach could scarcely be described as becoming to comity.²⁸ More significantly, it is not explained how this provision fits with Jersey's obligations under the "general" rules on the recognition and enforcement of foreign judgments. In particular, the rules on recognition in the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, which may be extended to countries providing reciprocal treatment to Jersey judgments,²⁹ do not permit the wholesale review of a foreign judgment on the basis of its substance.³⁰ In principle, where a foreign court had jurisdiction in the eyes of the Jersey court, the judgment should be recognised and enforced.³¹ However, article 9(4) of the new Law does not address the question of whether the foreign court properly took jurisdiction in the eyes of Jersey law at all. Presumably, this jurisdictional objection, which is normally the fundamental basis for rules on the recognition and enforcement of foreign judgments, should continue to be applied as part of the "general" law on the recognition and enforcement of foreign judgments in Jersey.

13 The defences to recognition of foreign judgments are stipulated in Article 6(1) of the 1960 Law, and do not provide for non-recognition simply on the basis that the foreign judgment differs as to its substance to that which a Jersey court would have delivered. Although there is a public policy derogation in Article 6(1)(v) of the 1960 Law, it would be stretching this notion beyond any previously understood meaning to argue that it is

²⁸ "If the purpose of the amended article 9 really is to protect trust assets to the extent that a manipulative spouse can evade the enforcement of a carefully considered judgment designed to do justice between husband and wife on divorce, that would seem to us to be a very unhappy state of affairs." *Per* Bailhache, Bailiff, in *In the Matter of the B Trust*, [2006] JRC 185, para 13. He went on to find that article 9(4) did not necessitate such a conclusion.

²⁹ Judgments (Reciprocal Enforcement) (Jersey) Law 1960, Article 3(1). It applies to judgments delivered in the UK, Isle of Man and Guernsey.

³⁰ The common law rules are very similar in relation to the substantive criteria for recognition.

³¹ Article 6(2) of the 1960 Law.

contrary to Jersey public policy to recognise any trusts judgment which differs to that which a Jersey court would have given. The public policy defence is concerned with the recognition of the judgment itself in Jersey, not with the substance of the decision. Moreover, the 1960 Law has at its heart reciprocal rules of enforcement between Jersey and other states. Yet, there being no reason presently to expect routine non-refusal to recognise Jersey judgments abroad, it is difficult to see how the new Law can meet these obligations. It does, however, threaten to create reciprocal problems in due course of foreign courts being unwilling to recognise Jersey judgments in relation to foreign law trusts, even if one or more of the parties is domiciled in Jersey, and even if trust property is located in Jersey.

14 Furthermore, the exact ambit of the new article 9(4) is unclear.³² It appears to have the effect that an English order might be denied recognition, even if the trustee³³ submitted to the English jurisdiction.³⁴ It also appears to mean that if the *result* of the English decision is different to that which a Jersey court would have reached, the judgment should be denied recognition. But, in practice, this requires the Jersey court to second guess the outcome of the proceedings if they had taken place in Jersey, in order to determine this matter. It also means that wherever another state party to the Hague Trusts Convention has applied its own mandatory rules or public policy according to articles 15, 16 or 18 to a Jersey law trust, the judgment will have no effect in Jersey.³⁵

15 On another view, section 9(4) is even more radical. It arguably requires a Jersey court to refuse to recognise a foreign judgment wherever different choice of law rules have been applied overseas to a Jersey trust to those which a Jersey court would have invoked. On this view, if an English court were to vary a Jersey trust and were to do so by applying English law (which English courts have shown themselves apt to do), the judgment should not be recognised *even if the English law does not differ from Jersey law on the substance* and the result would have been the same in Jersey proceedings.³⁶ Such a provision does at least avoid the need to second guess whether the outcome would have been the same in Jersey; and acts as a clear signal for foreign courts to stay away from Jersey trusts. But its extremely broad scope will potentially result in wasteful litigation overseas and the need for duplicated litigation in Jersey without obviously sufficient reason.

Conclusion

16 Overall, these rules purport to cover a broader range of issues than the previous legislation. But the provisions are of highly questionable success. In this author's view, they do not sit well in comparison to attempts elsewhere to marry the needs of the trust

³² M Renouf and T Hanson, [2006] PCB 310, 317. See also *In the Matter of the B Trust*, [2006] JRC 185, para 18.

³³ Or other defendant.

³⁴ See also *In the Matter of the B Trust*, [2006] JRC 185, paras 13 and 25.

³⁵ This conclusion did not appeal to the Bailiff in *In the Matter of the B Trust*, *ibid*. He was prepared to give "substantial effect" to an English order varying the terms of a Jersey law trust (para 25). The Bailiff's reasoning, which rests on the doctrine of comity and appears to suggest that this might provide a legal basis for recognition of foreign judgments separate from the express terms of the statute itself, is not easy to follow.

³⁶ See also T Hanson and M Renouf, [2006] (Sept) IFL 135, 138.

industry with conflict of laws doctrine, and with existing legal obligations.³⁷ Some of the provisions are already covered by the Hague Trusts Convention; others are difficult to reconcile with the Hague Trusts Convention, or with the rules on recognition and enforcement of foreign judgments. Moreover, the scope of the legislation is different to its predecessor, and arguably narrower, as it does not apply to settlors domiciled outside Jersey; and so leaves such settlors wishing to create Jersey law trusts in an uncertain predicament. The result is a regrettably uncertain and unsatisfactory set of conflict of laws rules which have the potential to damage the Jersey trust industry. Other offshore jurisdictions, including Guernsey, would be advised to think extremely carefully before enacting similar provisions.

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[Return to Contents](#)

³⁷ See, for example, the approach in the British Virgin Islands' Trustee Ordinance 1961 (as amended; see in particular, the BVI Trustee (Amendment) Act 2003), section 83A.

[Return to Contents](#)