

Jersey & Guernsey Law Review – October 2008
GUERNSEY'S PRIVATE INTERNATIONAL LAW RULES FOR TRUSTS –
MODEL OFFSHORE SOLUTION OR RECIPE FOR CONFLICT ?

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INTRODUCTION

1 In the aftermath of Jersey's controversial reform of its private international law rules for trusts, Guernsey has now followed suit. The Trusts (Guernsey) Law 2007 ("the 2007 Law") came into force on 17th March 2008.¹ Guernsey has clearly been greatly influenced by the Trusts (Amendment No. 4) (Jersey) Law 2006.² But it is clear that its private international law rules are more extensive, and much better drafted, than those of Jersey; and that Guernsey has been able to learn from the errors that the Jersey legislators made. Nonetheless, the Guernsey rules are also so far reaching, particularly in preventing recognition of foreign judgments, that it is questionable how desirable the practical effects of the legislation will be.

SECTION 14 OF THE TRUSTS (GUERNSEY) LAW 2007

Application of Guernsey law

2 Section 14 of the 2007 Law contains the equivalent provision to article 9 of the Jersey Trusts Law, dealing with the application of local law to Guernsey trusts and the exclusion of foreign laws. Section 14(1) contains a set of choice of law rules, which provide that all questions arising in relation to a Guernsey trust shall be governed only by Guernsey law.³ It states as follows -

"(1) Subject to the terms of the trust,⁴ all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust, including (without limitation) questions as to –

- (a) the capacity of the settlor,
- (b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,

¹ The Law received Royal Assent on 12th February, and was registered on the records of the Island on 18th February.

² On which, see Harris *Jersey's New Private International Law Rules for Trusts - a Retrograde Step?* (2007) 11 Jersey and Guernsey Law Review 9; Hochberg, *Jersey's New Private International Law Rules for Trusts - a Response* (2007) 11 Jersey and Guernsey Law Review 20.

³ According to section 14(1), "the law of Guernsey" excludes Guernsey's rules of private international law, except those set out in this section. This rather inelegant provision presumably means that Guernsey's choice of law rules for trusts in the Law prevail over its choice of law rules in overlapping areas, such as property law and succession. It cannot be a reference to the doctrine of *renvoi*, since section 14(1) only stipulates where Guernsey law is applicable and does not refer to the application of foreign law. Nothing is said about the application of that doctrine. The provision could be better drafted; but is, at least, much better than the perplexing exclusion of Jersey's private international law rules in article 9(3)(b) of The Jersey Trusts Law: see Harris *ibid* pages 12-13.

⁴ This appears to suggest that the settlor can stipulate that a different law applies to a particular issue. This possibility of splitting the governing law is preserved in article 9 of the Hague Convention, which provides that, "In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law."

- (c) the administration of the trust, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers,
- (d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,
- (e) the distribution of trust property,

are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.”

3 Immediately, this gives rise to certain questions. Many of the matters listed in section 14(1) are duplicative of what is already part of Guernsey law by virtue of the 1985 Hague Convention on the Law applicable to Trusts and on their Recognition (“the Hague Convention”) and, in particular, article 8 thereof. For instance, article 8(1) states that the law applicable to the trust “shall govern the validity of the trust, its construction, its effects, and the administration of the trust.” The “appointment, resignation and removal of trustees” is already governed by the law applicable to the trust by virtue of article 8(2)(a) of the Convention; “the power of trustees to administer or to dispose of trust assets” by article 8(2)(d); “the distribution of the trust assets” by article 8(2)(i); and “the variation or termination of the trust” by article 8(2)(h).

4 However, other provisions of article 8 are not reproduced in section 14 of the Guernsey law, such as “the rights and duties of trustees among themselves” (article 8(2)(b)); “the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers” (article 8(2)(c)); “the powers of investment of trustees” (article 8(2)(e)); “restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust” (article 8(2)(f)); “the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries” (article 8(2)(g)); and “the duty of trustees to account for their administration” (article 8(2)(j)). What one is to make of the exclusion of such provisions is not clear. Perhaps section 14 is just reproducing what are considered the most important provisions of article 8 of the Convention; but this incomplete duplication of what is already the law in Guernsey is a little curious.

5 That said, section 14(1) also goes beyond the confines of the Hague Convention in some respects, and includes issues not falling within its scope. In particular, it is notable that the capacity of the settlor to create a trust is governed by Guernsey law, even though this issue is thought to be excluded from the scope of the Hague Convention by article 4, which states that - “The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.”

6 It is, of course, a very thorny question which choice of law rule should apply to this matter.⁵ The desire to permit settlor autonomy, and so apply the governing law of the trust, must be weighed against the fact that a transfer to a trustee also constitutes a disposition of legal title;⁶ and the fact that questions of capacity may be seen as bound up with a person's "home" jurisdiction. Von Overbeck observes in the Official Report to the Convention that: "in the end the Commission did not expressly exclude general capacity, although a consensus emerged that this was not to be governed by the Convention, while the specific capacity to become a trustee was to be so governed."⁷ The difficulty of formulating a choice of law rule with which all States would have been content was a key reason for excluding the settlor's capacity from the Hague Convention.

7 Guernsey, however, has followed the lead of Jersey⁸ and taken the pragmatic course of choosing the governing law of the trust to apply to the settlor's capacity to create a Guernsey law trust. Application of Guernsey law may permit a settlor to transfer property located in State A to a trustee to hold for X, even though, had the "settlor" instead sought to transfer the property to X absolutely, the choice of law rules in property might have led to the conclusion that he lacked capacity to make the transfer. But even though application of the governing law of the trust may allow circumvention of any incapacity that the "settlor" might otherwise have had, it is undoubtedly the most pragmatic and attractive law for would be investors in Guernsey; and it is the demands of clarity and expediency that prevail here.

8 Guernsey law is then stated to apply *without reference to the law of any other jurisdiction*. This, alongside the provisions in section 14(3), considered below, on the exclusion of foreign laws, seeks to ensure the exclusive application of Guernsey law to Guernsey trusts.⁹ Although similar provisions are commonplace in offshore jurisdictions, it is worth reflecting upon how such provisions can be squared with article 15 of the Hague Convention, which preserves the application of the mandatory rules of the forum in areas of law related to trusts, such as succession law, the transfer of property and matrimonial property. Article 15 provides that -

"The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters –

- a) the protection of minors and incapable parties;
- b) the personal and proprietary effects of marriage;

⁵ See Harris *Launching the Rocket - Capacity and the Creation of Inter Vivos Transnational Trusts*, in J Glasson and G Thomas (eds), *The International Trust* (2nd ed, Jordans, 2006), chapter 2; Matthews, *Capacity to Create a Trust: The Onshore Problem, and the Offshore Solutions* (2002) 6 Edinburgh. Law Review 176.

⁶ Compare the solution in s83A(7)-(10) of the British Virgin Islands' Trustee (Amendment) Act 2003.

⁷ *Von Overbeck Report*, para 59, p 382.

⁸ In article 9(1)(c) of the Trusts (Amendment No. 4) (Jersey) Law 2006.

⁹ Save as provided in section 14(2), considered below.

- c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- d) the transfer of title to property and security interests in property;
- e) the protection of creditors in matters of insolvency;
- f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means”.

9 In this respect, Guernsey is only the latest offshore jurisdiction apparently seeking to limit, or override, the wording of article 15. Whether the drafters of the Guernsey legislation had regard to the full implications of article 15, one cannot say. But in any event, it may be argued that the phrase “does not prevent the application of the law designated by the conflicts rules of the forum” in article 15 is permissive, rather than requiring reference to such laws. Hayton, however, takes the view that relevant mandatory rules *must* be applied.¹⁰ Koppenol-Laforce agrees, and argues that a court must apply article 15 of its own motion and that, “In no specific case does the court have the option of not applying art. 15.”¹¹ In contrast, Gaillard and Trautman state that “the Convention calls for... reference, *on an optional* basis, to the domestic mandatory rules of the jurisdiction dictated by the forum’s choice of law rules.”¹² In the United Kingdom, section 1(3) of the Recognition of Trusts Act 1987 states that “in accordance with Articles 15 and 16 such provisions of the law as are there mentioned *shall*, to the extent there specified, apply to the exclusion of other provisions of the Convention.” This might appear to impose a duty on the court; but it may be that section 1(3) merely explains what *effects* are given to a mandatory rule where the judge *elects* to invoke it, and makes clear that such a rule will then be superimposed on to the trust. It is hard to see how an article which “does not prevent” the application of mandatory rules can be construed to mean that a judge is required to apply such rules. Moreover, since article 15 is designed to limit the unwanted excesses of applying the law applicable to a trust in civilian states, it is difficult to see why a trust state which is happy to apply the law applicable to a trust in its entirety on the facts of a given case should be prevented from so doing.

Derogations in favour of foreign law

10 Were the scope of 2007 Law to remain completely unchecked, then section 14(1) would lead to some surprising results, not least because it also applies Guernsey law to the preliminary question of “any disposition of property to or upon [a Guernsey law]... trust”. This is a matter which is excluded from the ambit of the Hague Convention, since it

¹⁰ Hayton in J Glasson (ed) *International Trust Laws*, chapter C3, p 14. The same view is expressed by J Schoenblum, (1994) 3 J Int Corp P 5, 18, f/n 74.

¹¹ M Koppenol-Laforce, *Het Haagse Trustverdrag*, 270.

¹² Gaillard and Trautman, *Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts* (1987) 35 Am J Comp Law 307, 337. Emphasis added.

relates to the transfer of legal title in property and is not a trusts-specific issue. This could mean that even questions as to, for example, the validity of the will of a foreign testator in which a Guernsey trust is contained, or the vesting of legal title in the trustee to an interest in land situated overseas, would be decided by Guernsey law alone.

11 But in marked contrast to the provisions of Jersey law, which slam the door firmly shut on the application of foreign law, section 14(2) of the 2007 Law properly recognises that there may be a role for foreign laws in relation to the creation of Guernsey law trusts.¹³ In this respect, it is a refreshing and well thought out provision. It contains no fewer than seven derogations in favour of other laws. Indeed, so generous is this deference to foreign law that one is tempted to observe that its philosophy is in marked contrast to the extremely broad provisions against the recognition and enforcement of foreign judgments in section 14(4) of the 2007 Law (which we shall consider below).

12 It is provided first in section 14(2)(a) that section 14(1) “does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor.” Hence, choice of law rules for property law will be preserved on the question of whether the settlor is the owner of the property and/or has the power to alienate the property. But curiously, although this provision determines whether the settlor had title to pass in the property, it does not extend to the question of whether legal title to the property has actually vested in the trustee. Moreover, it is not clear if the “power of disposition” referred to in section 14(2) could extend to the settlor’s *capacity* to transfer legal title in the property to a third party. If not (and the natural meaning of section 14(2)(a) does not seem to extend to capacity), then the effect will be that the settlor has capacity to transfer property to X to hold on Guernsey law trust for Y, even if the settlor and the property in question are in State A, by which law the settlor has no capacity to effect the transfer.

13 Section 14(2)(b) states that the 2007 Law “does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power”. This is a curious provision. It appears to be duplicative of section 14(2)(a), in that all it can possibly do is to give effect to the law of the country which is designated by virtue of Guernsey’s choice of law rules. In this context, the term “recognition” is really a misnomer. It can only mean that insofar as Guernsey’s rules on ownership of property and powers of disposition point to a particular foreign law, that law is to be applied. There can be no question of “recognition of the law of any *other* jurisdiction” on the question of ownership, regardless of whether Guernsey regards that foreign law as applicable by virtue of Guernsey’s choice of law rules for property matters. In that sense, it would have been preferable for sections 14(2)(a) and (b) to have been rolled into a single provision; and it is less than clear what benefit section 14(2)(b) actually provides.

¹³ This appears to be somewhat more in harmony with the provisions of article 15 of the Hague Convention, considered above, which preserve the application of the mandatory rules of the applicable law in areas of law related to trusts.

14 In section 14(2)(c), it is stated that the application of Guernsey law to Guernsey trusts is “subject to any express provision to the contrary in the terms of the trust or disposition.” At first sight, this is a rather curious provision. It is one thing for Guernsey’s choice of law rule to be that only its own law applies to Guernsey trusts under section 14(1); it is another to say that the settlor *can change that very choice of law rule itself*. A better interpretation of section 14(2)(c) is that it can apply in two circumstances. The first relates to the substantive terms of the trust, as where the settlor states that the trust *will* be without prejudice to the rights of forced heirship of his family. The second is where the settlor does not choose Guernsey law to apply to the entire trust, but instead chooses to “split” the trust. The settlor might, for instance, state that Guernsey law governs the trust; but that matters of variation are to be governed by English law. This is consistent with article 9 of the Hague Convention, which states that - “In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.”

15 Section 14(2)(d) states that sub-section (1) “does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation.” At first sight, this seems perfectly sound; a company is a legal person, and should be subject to the law of the country where it is incorporated. If, pursuant to that law, it lacks capacity, then one can see why one might not wish to permit it to settle property on trust. The company’s capacity to act may also be restricted by the terms of its constitution. But, as against this, a number of points need to be made. First, it is somewhat curious that the capacity of a natural person located in State A to create a Guernsey law trust is unrestricted by the application of foreign law; whereas that of a company incorporated in State A is restricted. Companies are artificial entities, subject to a legal system of their choice; an individual’s connections to his “home” legal system may be far greater and more enduring. Secondly, the provision is curiously not limited to the company’s capacity to act as a settlor; presumably, it applies to its capacity to act as trustee or beneficiary too. It is, perhaps, regrettable that, if this is the case, the section does not say so in terms.¹⁴ If it is the position, it is again somewhat surprising, since a trustee’s capacity is dealt with by article 8(2)(a) of the Hague Convention and governed by the law applicable to the trust. The justification must be article 15 of the Convention. But article 15 applies to *mandatory* rules in related areas of law.¹⁵ Here, the loose wording “does not affect... the recognition” is much weaker; and suggests that the application of the law of the place of incorporation may be discretionary. Once again, it suggests that the common problem of failure in offshore jurisdictions fully to consider, and reconcile, the Hague Convention with local legislation, may have surfaced in Guernsey.

16 Indeed, perhaps the most serious problem with section 14(2)(d) is as to what it actually means. It is easy to feel instinctively that the law of the place of incorporation should be given some role in relation to companies. But what is that role that is envisaged

¹⁴ Contrast section 14(1)(a), considered above, which refers to the capacity of the settlor.

¹⁵ Subject to what is said above about article 15.

by the language of section 14(2)(d)? Are the courts *required* to apply the law of the place of incorporation and ensure that the company has capacity by that law and by Guernsey law? If so, why did the legislature not simply provide that the law of the place of incorporation shall be applied in addition to Guernsey law. If not, is the application of the law of the place of incorporation *discretionary*? And if so, on what basis should a Guernsey court decide whether to apply it? And why refer cryptically to the “recognition” of such law? Either this is a choice of law rule or it is not. Accordingly, upon closer inspection, what looks to be a perfectly sensible provision begins to look distinctly uncertain.

17 Section 14(2)(e) states that subsection 1 “does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property”. Once again, it is not clear why the language of “recognition” is used. Nor is it clear what this really means, and whether it imposes an obligation to apply a particular country’s formality rules. The sub-section cannot possibly mean that the law of *any other jurisdiction* can be applied. It must mean, and should have stated, that the application of the law designated by Guernsey’s choice of law rules for the formal validity of dispositions of property is preserved. Insofar as this maintains the application of formal validity rules for wills, or for the transfer of legal title to property, then the exception is to be welcomed, particularly where such property as immovables, or shares, is being transferred. That said, the choice of law rules for the formal validity of wills applied in most states are exceedingly liberal;¹⁶ and the need specifically to defer to them may be limited. Furthermore, in respect of lifetime transfers of movable property on trust, it seems curious that the rules of formal validity of another law are preserved; and yet the rules of the law of the *situs* on whether the transfer itself was otherwise effective to vest property in the trustee¹⁷ are nowhere mentioned in section 14(2).

18 Subsection 14(2)(f) states that section 14(1) “subject to subsection 3, does not validate any trust or disposition of real property¹⁸ situate in a jurisdiction other than Guernsey which is invalid under the law of that jurisdiction.” Insofar as this provision applies to the *disposition on trust*, it is eminently desirable. Guernsey courts have little control over immovable property located outside the jurisdiction. A transfer of legal title to the trustee that is ineffective by the law of the *situs*, State A, can scarcely be upheld or registered in State A. Indeed, were the property to have been disposed of outright, rather than transferred to a trustee to hold on trust, it is self-evident that the law of the *situs* would have needed to be satisfied. The wording used is much better than that in earlier

¹⁶ Section 1 of the Wills Act 1963 of the UK states that “A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator’s death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.” In other words, the will need satisfy only one of seven possible laws. This provision is based upon the Hague Convention on the Conflicts [sic] of Laws relating to the Form of Testamentary Dispositions 1961 and has been widely adopted: see Collins (gen ed), *Dicey, Morris and Collins, the Conflict of Laws*, (14th ed, 2006), para 27-029, note 51.

¹⁷ I.e. the essential validity of the transfer.

¹⁸ It is, perhaps, a little surprising that the term “real property” is used here (particularly in Guernsey). The more commonly used distinction for choice of law purposes is between movable and immovable property: see L Collins (gen ed), *Dicey, Morris and Collins, the Conflict of Laws*, (14th ed, 2006), chapter 22.

sub-sections which refer much more enigmatically to the “recognition” of foreign laws; here, there is no room for doubt that the transfer must be valid by the law of the *situs*.¹⁹

19 But less obvious is the reference in section 14(2)(f) to the *trust itself* having to comply with the law of the place where the immovable property is located. There is, admittedly, a good argument in principle for such a provision. A beneficiary of a bare trust governed by Guernsey law of immovable property located in State A is likely to find it very difficult to enforce his rights over the land in State A; or to be able to terminate the trust and claim the property absolutely. But on the other hand, other offshore jurisdictions have managed without a derogation in favour of the *lex situs* in respect of the trust itself. Furthermore, the Hague Convention envisages that a trust may be governed by its chosen law without imposing an obligation on a state to refer to the law of the *situs*.²⁰ Moreover, the most serious problem in relation to land situated in a non-trust state, that the state may simply not recognise the concept of a trust, is averted by the fact that section 14(2) is expressly subject to section 14(3)²¹ under which no Guernsey trust can be invalidated by reason that a foreign law does not recognise the trust concept.

20 Finally, section 14(2)(g) states that Sub-section (1) “does not validate any testamentary disposition which is invalid under the law of the testator’s domicile at the time of his death”. As with section 14(2)(f), this is expressly subject to section 14(3). Whilst section 14(2)(g), quite sensibly, preserves the rules on the validity of any will in which trusts are contained, the provision is not without its problems. A first point is that this provision applies the law of the testator’s domicile in respect of both movable *and* immovable property. Yet, section 14(2)(f) *also* requires that the rules of the law of the *situs* be satisfied for immovable property. This seems to mean that a disposition on a Guernsey testamentary trust of immovable property located in State A, by a testator who dies domiciled in State B, may need to comply with the rules of validity of both State A and State B. That would be a most surprising result; and impose more restrictions on the validity of the trust than onshore trust jurisdictions would do. The relationship of sub-sections 14(2)(f) and (g) may not have been given the necessary consideration. Furthermore, it is curious that the essential validity²² of testamentary transfers of movable property on trust is subject to the application of the choice of law rule for succession to movables; but that where there is a transfer of movable property to a trustee to hold on *inter vivos* trust, there is no requirement imposed that that transfer of legal title be essentially valid by the law of the *situs*, or any other law other than Guernsey law. There is something of a lack of symmetry in this respect.

Exclusion of foreign law

21 Section 14(3) contains the common offshore provision against the application of foreign laws which impugn or undermine a Guernsey law trust. It states as follows -

¹⁹ Unless the reason for the invalidity is one set out in sub-section 3.

²⁰ Save as laid down by the forum’s choice of law rules in article 15.

²¹ Considered below.

²² Where the issue relates to formal validity of a will, section 14(2)(e), considered above, may also be relevant.

“No Guernsey trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, enforcer, trust official or beneficiary to be questioned, nor is any settlor, trustee, enforcer, trust official, beneficiary or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that -

(a) the laws of any other jurisdiction prohibit or do not recognise the concept of a trust, or

(b) the trust or disposition -

(i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person -

(A) by reason of a personal relationship to a settlor or any beneficiary, or

(B) by way of foreign heirship rights, or

(ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.”

22 The 2007 Law contains a particularly long and impressive list of parties against whom the application of such foreign laws is excluded. So, the opening provisions of section 14(3) protect against cases where the capacity of the settlor is impugned by a foreign law; but it goes further than this and excludes foreign laws restricting the capacity of the trustee, enforcer, trust official or beneficiary. This may be particularly attractive in extending to protect the interests of beneficiaries of trusts, such as spouses, from claims by the other spouse. The law also protects all these parties from being subjected to any obligation or liability or being deprived of any right, claim or interest. As if this were not wide enough, the law also protects any “third party” against such claims. Hence, a third party recipient of property held on a Guernsey trust could not be subjected to liability by virtue of a matrimonial claim against the settlor or beneficiary. This is an unusually wide and protective provision.

23 As to the substance of sub-section (3), much of the structure of sub-subsections (a) and (b) looks very familiar. So, section 14(3) provides protection against the application of foreign laws which prohibit or do not recognise the trust concept. It also states that the trust shall in no way be impugned by the fact that it avoids or defeats²³ rights, claims, interests, obligations or liabilities conferred or imposed by the law of another jurisdiction by reason of a personal relationship. However, whereas most jurisdictions only provide protection where such a relationship exists with the *settlor*, Guernsey law goes further and, crucially, extends its protection to personal relationships with a *beneficiary*. This,

²³ Or potentially does so.

then, would protect a beneficiary against a claim that his or her spouse might make. Furthermore, it would allow a person expecting to receive assets to ask that they be settled on trust for him as a beneficiary, and ensure that he was protected against the application of foreign law. Such a rule is likely to be highly attractive to beneficiaries of trusts, and is an extremely significant selling point of the Guernsey law.

24 It is true that Jersey law also appears to provide some form of protection to parties other than the settlor as well; but it does so in a form that is highly opaque. Article 9(6) of the Jersey Trusts Law defines “personal relationship” as follows -

“‘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-

- (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.”²⁴

25 The meaning of this last provision is not clear. It appears to suggest that if there is a personal relationship between the person claiming the interest and a third person, then article 9(2) of the Jersey Trusts Law is triggered. Whether that “third person” could be a beneficiary is not clear; though arguably it could be. But the Jersey law makes little obvious sense- as well as saying that the person claiming the interest must have a personal relationship with the third party, there is an oblique further requirement that that person have a personal relationship with the settlor or person claiming the interest. Sub-paragraph (c) is distinctly clumsy. It is also a very odd way to describe a beneficiary as a “third person”. An investor seeking to protect against claims by someone with a personal relationship to the beneficiary, could, accordingly, have little confidence that the Jersey Trusts Law would provide the requisite protection. The 2007 Law, in contrast, does so in express terms.

26 Nonetheless, the 2007 Law on the issue may have startling results. Suppose that a person is a beneficiary of a Guernsey law trust, which constitutes his major asset. The effect of the Guernsey provision is that any rule of, for example, English law that confers rights upon the beneficiary’s spouse to share in the trust assets upon divorce will be ineffective in Guernsey law. That is, on any view, a draconian provision. It makes one wonder if, in the rush to extend the protection of Guernsey law and make it more attractive

²⁴ Emphasis added.

to investors than the next offshore jurisdiction, the balance has swung too far in favour of the beneficiary; and against the interests of his spouse or children.

27 Section 14(3) also protects against the application of forced heirship rules. What is, perhaps, curious, is that, unlike the provision on personal relationships, this provision does not state against whom the forced heirship claim must arise. One possibility is to assume that, since the first part of section 14(3) extends its protection against the imposition of liabilities or obligations to settlors, trustees, enforcers, beneficiaries and third parties, the forced heirship claim could arise against any of these. But this cannot be correct, since: (i) if this were so, there would be no need for the personal relationships provision in section 14(3)(b)(i)(A)²⁵ to state that it applies to relationships to the settlor or beneficiary (only); and (ii) the existence of a forced heirship claim against the personal assets of the trustee or a third party (as opposed to against the trust assets) seems of little relevance. One might, accordingly, surmise that the protection in section 14(3)(b)(i)(B) extends only to forced heirship claims against the settlor, which is the typical form of protectionist provision; and that the preamble to section 14(3) protects the officers of the trust from liability to account in any way in respect of claims brought by the forced heir of the settlor. But it is a little curious that the effect should be that section 14(3)(b)(i)(A) protects against matrimonial and ancillary relief claims against the beneficiary; but that section 14(3)(b)(i)(B) does not protect against forced heirship claims against the beneficiary.

28 Whilst foreign rules of forced heirship are denied effect in relation to a Guernsey law trust, it is possible that Guernsey law will itself confer rights upon a forced heir by virtue of its rules of *légitime*. Section 14(6) of the Law states that “In relation to a Guernsey trust or any disposition of personal property²⁶ to or upon such a trust, the law of Guernsey relating to *légitime* and the rights of a surviving spouse apply only where the settlor is domiciled there at the time of his death.” So, the Guernsey law rules will apply to a settlor domiciled in Guernsey creating a Guernsey law trust of movable property; but would be inapplicable to a foreign domiciliary.²⁷

29 Section 14(3)(b)(ii) seeks to extend the protection against the application of foreign law to Guernsey trusts by stating that any “rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any... rights, claims, interests, obligations or liabilities” described in 14(3)(b)(i) arising by virtue of a personal relationship or forced heirship shall not be given effect. Insofar as this provision refers to refusal to give effect to “judgments”, it seems essentially to duplicate the provisions in section 14(4), considered below, against the recognition of foreign judgments. Insofar as it refers to foreign “laws”, section 14(3)(b)(i) already provides sufficient protection. This leaves one wondering what could possibly be added by section 14(3)(b)(ii). It appears to be a redundant provision.

²⁵ The numbering system is less than elegant here.

²⁶ Again, the legislation uses the distinction between real and personal property, rather than the usual private international law distinction between movable and immovable property.

²⁷ Nothing is said in this sub-section about immovable property.

Non-recognition of foreign judgments

30 Arguably the most significant, and most controversial rule in section 14, is that against the recognition and enforcement of foreign judgments in section 14(4). It states that -

“Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that -

- (a) it is inconsistent with this Law, or
- (b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders.”

31 The inspiration for this provision is article 9(4) of the Jersey Trusts Law. The Jersey provision is extremely stark in preventing the enforcement of judgments which contravene the provisions contained in article 9 of its Law. Jersey courts have, despite this, declined to give article 9(4) its clear meaning; no doubt fearing the insularity of routinely refusing to give any effect to foreign orders, and, in particular, to English matrimonial orders in respect of Jersey law trusts.²⁸

32 But the 2007 Law goes considerably further again than the Jersey law. In the first place, section 14(4) contains a provision that “notwithstanding any legislation or other law for the time being in force in relation to the recognition or enforcement of judgments”, the new trusts provisions take priority. This is a welcome attempt to deal with the problem, overlooked in the Jersey legislation, of Guernsey being bound by the terms of the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957, which requires the enforcement of foreign judgments where the defendant was resident in the jurisdiction where judgment was given, or submitted to the courts of that state, subject to certain limited exceptions in that Law. The later, trusts-specific legislation is stated to prevail over the earlier, general law. Even so, it is not wholly clear that such an approach is justifiable. The 1957 Law operates on the basis of a reciprocal recognition and enforcement scheme with other states with which a treaty has been made. The United Kingdom, for instance, has the Foreign Judgments (Reciprocal Enforcement) Act 1933, pursuant to which it is obliged to enforce Guernsey judgments.²⁹ The trusts legislation in Guernsey arguably infringes the mutuality of the agreement.

33 A further crucial point is that the Jersey legislation only actually states that it prevents the *enforcement* of foreign judgments that are inconsistent with its law. This leaves room for argument that a foreign judgment can nonetheless be *recognised*, as

²⁸ See *Re the B Trust* 2006 JLR 562; *Re the H Trust* 2007 JLR 569.

²⁹ SI 1973/610.

where, for example, it is purely declaratory in nature; or where it is relied upon by the successful defendant in the foreign proceedings by way of a defence to litigation in Jersey, either as creating a cause of action or an issue estoppel. Indeed, the fact the judgment arguably can, consistently with its literal wording, be recognised in Jersey means that it is not necessarily wholly without legal effect there; and may offer some justification for Jersey courts continuing to issue directions to trustees to comply with English orders.³⁰

34 The Guernsey law, by contrast, states that no “judgment or order of a court of a jurisdiction outside Guernsey shall be *recognised or enforced* or give rise to any right, obligation or liability or raise any estoppel”. This makes it absolutely clear that the foreign order is not to be recognised either. It must, accordingly, be *entirely without legal effect in Guernsey*. No action can be brought to enforce a foreign order inconsistent with this law. Moreover, the foreign judgment cannot give rise to an estoppel. The legislation applies even if the trustee³¹ submitted to the English jurisdiction.

35 The question that then arises is this: could the Guernsey court, consistently with the legislation, issue directions to trustees to comply with an English order that was inconsistent with Guernsey law? Section 68 of the 2007 Law states that “A trustee may apply to the Royal Court for directions as to how he should or might act in any of the affairs of the trust, and the court may make such order as it thinks fit.” The argument from the Jersey cases of *Re B*³² and *Re H*³³ would be that the court, when issuing directions, is not deciding what effect to give to the English judgment; and that its discretion to issue directions is unfettered by the terms of section 14(4).

36 In *Re B*, the Royal Court regarded article 9(4) of the Jersey Trusts Law as irrelevant to an application for directions. It observed that “It is immaterial that the English court applied English law in matrimonial proceedings before it in order to arrive at what it considered to be a just conclusion. Our function is different; it is to decide whether, and if so to what extent, to give effect to the conclusions at which the English court arrived. In doing so, and in exercising our jurisdiction to give directions under art. 51, we will naturally apply the law of Jersey.”³⁴ In this author’s view, the reasoning in *Re B* and *Re H* was erroneous as a matter of Jersey law.³⁵ Upon the application for directions, the Jersey court in *Re B* instructed the trustees to comply with a foreign order; even though the Jersey legislature had decreed in article 9(4) of its Law that the self same English order would not then be enforced in Jersey. At best, it is surprising that the court should direct trustees to comply with a foreign order which the legislature has stated to be unenforceable in Jersey; at worst, it may be considered flatly inconsistent with the Jersey Law.

³⁰ But too much should not be made of this point. The Jersey legislation was not drafted with sufficient precision to enable one to conclude that the omission of the word “recognition” was deliberate. Indeed, since a judgment which is to be enforced must also be recognised, the word “enforceable” in article 9(4) could be seen as shorthand for precluding both recognition and enforcement in Jersey.

³¹ Or other defendant.

³² 2006 JLR 562; see Harris, *Comity Overcomes Statutory Resistance: in the Matter of the B Trust* (2007) 11 Jersey and Guernsey Law Review 184.

³³ 2007 JLR 569.

³⁴ 2006 JLR 562 at para 15. This principle was reiterated in *Re the H Trust* 2007 JLR 569 at paras 42 and 43.

³⁵ For a fuller discussion, see Harris, (2007) 11 Jersey and Guernsey Law Review 184, at 194-197.

37 But the argument that the freedom to direct trustees to comply with a foreign order is unconstrained is even less convincing in Guernsey than it was in Jersey in *Re B* and in *Re H*. The effect of section 14(4) of the 2007 Law must be that any foreign order that is inconsistent with Guernsey law *shall be without any legal effect in Guernsey*, since it cannot be recognised or enforced there. It makes little sense for a Guernsey court to direct a trustee to comply with an English ruling that is considered, as a matter of Guernsey law, to have no legal effect at all. Arguably, this would be flatly inconsistent with section 14. Even if it is not, there would be very mixed messages emanating from the legislature and the courts if the Guernsey courts were to order a trustee to comply with a foreign order that Guernsey's legislature has decreed to be without legal effect in Guernsey.

38 A further question is as to what is meant in section 14(4) by the phrase "inconsistent with this Law". This appears to suggest that if the result of the foreign decision is different to that which a Guernsey court would have reached, the judgment should be denied recognition. Of course, the Jersey courts have refused to engage in such a comparative exercise;³⁶ but the extent of the 2007 Law, which requires that a foreign order inconsistent with Guernsey law has no legal effect in Guernsey, seems to leave a Guernsey judge with little choice but to do so. This requires the Guernsey court to determine what the outcome of the proceedings would have been had they taken place in Guernsey. This is a distinctly time consuming and unattractive exercise. On another view, section 14(4) goes even further and requires the court to refuse to recognise a foreign judgment where the foreign court has applied choice of law rules different to those laid down in the Guernsey law. So, if, for instance, an English court has applied English law to determine whether to vary a Guernsey law trust on divorce,³⁷ this would, in and of itself, be "inconsistent" with section 14; and so prevent the recognition of the English judgment. This does, at least, remove the need to second guess the outcome of substantive proceedings in Guernsey; but it means that the foreign judgment is denied legal effect even if the English law does not differ from Guernsey law on the substance. This will inevitably result in wasteful and duplicative litigation.

39 But if section 14(4) were not already radical enough, it goes on to provide that a foreign judgment will also be denied recognition or enforcement if the Royal Court "for the purposes of protecting the interests of the beneficiaries or in the interests of the administration of the trust, so orders." This is an extraordinary provision. First, it requires the court to consider a situation where the foreign court has applied rules which are *consistent* with Guernsey's own law but where it is nonetheless warranted to deny any effect to that foreign ruling. Secondly, it is not entirely clear what situations section 14(4)(b) has in mind. Section 14(4)(a) will already protect the beneficiary very greatly, since we have seen that section 14(3) of the Law provides protection to the beneficiary against any liabilities arising under a foreign law by virtue of a person's personal

³⁶ Even though, in *Re the B Trust* 2006 JLR 562, paras 9-11, the Royal Court inclined to think that the settlement made by the English court would not have been a post-nuptial settlement as a matter of Jersey law. See further Harris, (2007) 11 Jersey and Guernsey Law Review 184, at 193-194.

³⁷ As it will inevitably do: see *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2005] Fam 250.

relationship to the beneficiary. Thirdly, this amounts to the *discretionary* non-recognition of foreign judgments. In this respect, this is a most unusual provision. In extending its protection so far, the result must be to *encourage* litigation in Guernsey by a party who is dissatisfied with the outcome of the proceedings abroad, since there is always the possibility that the judge might exercise his discretion in the applicant's favour. Fourthly, far from encouraging confidence in Guernsey as an investment centre, it might undermine it, in that it means that there can rarely be any certainty that a foreign judgment in relation to a Guernsey trust will be given the slightest effect in Guernsey. Fifthly, it is contemplated that a foreign order may also not be given effect "in the interests of the proper administration of the trust". Again, it is not immediately clear what scenarios the legislation has in mind; and this may lead to uncertainty. Moreover, this is a negative and not a positive provision. Nowhere is the power given to the court to direct that, in the interests of the sound administration of trusts, the trustees *should* comply with the terms of a foreign order.

40 Overall, section 14(4) is a remarkably broad provision, that goes much further than the very radical article 9(4) of the Jersey Trusts Law. Its admirers would say that it provides an extremely impressive level of protection and makes Guernsey one of the most attractive offshore jurisdictions in the world in which to invest trust money safe from the application of foreign laws incompatible with local law. There are, however, several things to be said against section 14(4). First, it is extraordinarily inward looking. The effect is almost inevitably to reduce cooperation between states to such a degree that: inconsistent decisions will result; trustees will be placed in an invidious position; and that beneficiaries may be unclear as to the precise nature of their rights, and as to whether any foreign order in their favour will be of any true value to them. The fact is that, even if onshore jurisdictions rein in their inclination to vary foreign law trusts,³⁸ it is inevitable that they will continue regularly to do so in ancillary relief proceedings. It is difficult to see how an offshore jurisdiction can on the one hand call for properly exercised restraint by English courts;³⁹ but on the other hand, adopt extremely radical legislative provisions that refuse to countenance even the possibility that it might be expedient and appropriate for an English court, before which the trustees may have submitted, and which may be hearing an ancillary relief application involving two English domiciliaries, sometimes to vary a Guernsey law trust and ensure a one-stop resolution of issues arising upon divorce. If the Guernsey legislation is a reaction to the overstepping of the mark by English courts, then it is arguably an overreaction that may ultimately do more harm than good.

Overriding nature of section 14

41 Section 14(5) states that section 14 overrides any other provisions of the 2007 Law. This emphasizes yet further that the protection in section 14 is absolute and unequivocal. The legislation also applies "whenever the trust or disposition arose or was made".⁴⁰

³⁸ See the comments of Holman J in *Mubarak v Mubarak* [2007] EWHC 220 (Fam), at para 146.

³⁹ As the Royal Court of Jersey did in *Re the B Trust* 2006 JLR 562, at para 30.

⁴⁰ See also the transitional provisions in section 83.

Although the parties to a trust are unlikely to object to Guernsey law providing them with extra protection against foreign laws and the decisions of foreign courts, this does, of course, mean that the legal regime applicable to the trust will have changed considerably. It could, in particular, significantly increase the problems for a trustee in deciding whether to comply with the terms of an English order made in respect of a Guernsey law trust before the 2007 Law entered into force.

Trust in Guernsey's Trusts Law?

42 Notwithstanding the forcefulness of section 14 of the Guernsey provisions, and sections 14(3) and (4) in particular, would-be investors in Guernsey face an obvious problem entirely outside the makings of the Guernsey legislature. This arises because the Jersey courts have refused to give their legislation its plain meaning. Rather, the Royal Court in *re the B Trust* purported to give effect to the English judgments on the wholly spurious and vague grounds of comity.⁴¹ There must be a risk that notwithstanding the forcefulness of section 14(4) of the 2007 Law, the Guernsey courts will do the same as the Jersey courts. It has been noted that -

“...Guernsey's court usually consider Jersey authorities highly persuasive and is likely to cooperate with the courts of England and Wales unless it is absolutely clear that the legislature's intention is to the contrary. It therefore remains to be seen what level of protection the provisions of the 2007 Law will afford Guernsey trusts when the issue comes before the court.”⁴²

43 It is, perhaps, unfortunate that confidence in Guernsey's laws should be dented by the approach of the Jersey courts. But this seems inevitable.

44 That said, the Guernsey legislation is a vastly more polished product than the Jersey Trusts Law. It is much better drafted. The drafters have clearly reflected upon the serious faults in the Jersey Law. With full knowledge of the Jersey court's reactions in *Re the B Trust*, the Guernsey legislature proceeded to enact legislation that is considerably more far reaching than the Jersey Law. It may be said that this shows a clear intention not to recognise foreign judgments which interfere with Guernsey law trusts; and that the courts are bound to interpret the legislation accordingly.

45 So what, then, is the message to foreign courts in general, and to English courts in particular? Presumably, one message is that, if they are to vary, or in any way interfere with a Guernsey law trust, they must do so by applying Guernsey law. But since the legislation goes even further, and contemplates the non-recognition of foreign judgments in other circumstances so as to protect the beneficiaries or the proper administration of the

⁴¹ In *Re the B Trust* 2006 JLR 562 at para 18, the Royal Court said of article 9(3) and (4) of its legislation that “We are quite clear what they do not mean and that they do not exclude the application of the doctrine of comity.” This makes very little sense, since comity is an ideology, not a substantive rule of law; and, in any event, the wording of article 9(4) could scarcely be more emphatic in stating that a foreign judgment inconsistent with Jersey law shall not be enforced in Jersey. See further Harris, (2007) 11 Jersey and Guernsey Law Review 184, at 189-193.

⁴² C Hay and G Bell, *The Lawyer*, 5 November 2007.

trust, the deterrent aim is presumably wider than this: it is, as the Jersey court indicated in *Re the B Trust*, to discourage English courts from interfering with such trusts at all. In other words, it seeks to ensure that any such proceedings occur in the Guernsey jurisdiction. In this respect, section 14 of the Guernsey law is not just a choice of law provision⁴³ but a jurisdictional one too.

OTHER PRIVATE INTERNATIONAL LAW PROVISIONS

Jurisdiction of the Guernsey courts

46 That being so, one might expect the Guernsey legislators to be equally concerned to have wide bases of jurisdiction in trusts matters. This enables investors whose assets are held in a Guernsey law trust, or located in Guernsey, or whose trustees are resident in Guernsey, to be confident that they can bring proceedings before the Guernsey courts. However, section 4 of the Law is, substantively, essentially unchanged from the previous law. It states that -

“(1) The Royal Court sitting as an Ordinary Court ("the Royal Court") has jurisdiction in respect of –

(a) a Guernsey trust, and

(b) any other trust –

(i) a trustee of which is resident in Guernsey,

(ii) any property of which is situated or administered in Guernsey, or

(iii) the terms of which provide that the Royal Court is to have jurisdiction.

(2) For the purposes of subsection (1)(b)(iii), where the terms of a trust provide, in whatever terms and without further particularity, that the courts of the Bailiwick, or the courts of Guernsey, are to have jurisdiction, the terms of the trust shall be deemed to provide that the Royal Court is to have jurisdiction.”

47 This is, nonetheless, a wide jurisdiction rule. It ensures that Guernsey courts will always have jurisdiction in respect of Guernsey law trusts. It also confers jurisdiction in respect of other trusts where a trustee is resident in Guernsey or there is any property there. Section 4(1)(b)(iii) makes it clear that a jurisdiction clause for the Royal Court of Guernsey is effective. The inserted provision in section 4(2), clarifies the meaning of section 4(1)(b)(iii), in slightly cumbersome terms. The effect of section 4(2) is that a clause simply conferring jurisdiction on the courts of Guernsey, or on the courts of the Bailiwick, is deemed to confer jurisdiction upon the Royal Court.

⁴³ As well, of course, as containing rules on the recognition of foreign judgments.

48 The jurisdiction provisions still do not, in some respects, go quite as far as they might. For instance, the British Virgin Islands Trustee Ordinance, as amended, also confers jurisdiction under section 82(c) “in the case of a corporate trustee or any trusts, [where] it is incorporated or registered to do business in the Territory”; where “the parties submit to the jurisdiction of the Court” (section 82(g)); and where “the Court is otherwise the natural forum for the litigation”. One can only observe that it is a little surprising that offshore jurisdictions often appear to devote much more attention to having brand leading rules that prevent the recognition of foreign judgments than they do to the rules which determine their own jurisdictional competence.

The proper law of the trust

49 There is also provision in section 3 of the 2007 Law as to the proper law of the trust. This is a slightly expanded version of its predecessor; but essentially does no more than restate articles 6 and 7 of the Hague Convention on express choice, implied choice and absence of choice. It also explains that a choice of the law of the Bailiwick of Guernsey without qualification shall be deemed to be a choice of Guernsey law.

50 The whole of section 3 is stated to be subject to sections 51-57. Section 51 is a provision on changing the governing law from Guernsey law to that of another jurisdiction. It states that: “The terms of a trust may provide for the proper law of the trust to be changed from the law of Guernsey to the law of any other jurisdiction.” This accords with article 10 of the Hague Convention, which states that: “The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law”. Section 51 makes it clear that an express power to change the governing law which is contained in the terms of the trust will be permitted. But it is silent about whether this is the only permissible way of changing the governing law from Guernsey law to another law. For instance, it is not stated whether the governing law could be changed impliedly, as where the trust assets and the administration of the trust are moved from Guernsey to another jurisdiction. It is also silent upon the question whether a change from a foreign governing law to the law of Guernsey may be made. This is perhaps because article 10 of the Hague Convention does not deal with this issue either.

51 As to sections 52-57, these cover: failure of trusts or lapses of interests;⁴⁴ termination of trusts;⁴⁵ appointment of trustees;⁴⁶ power to relieve trustees from personal liability;⁴⁷ power to make beneficiaries indemnify;⁴⁸ and variation of trusts on behalf of minors.⁴⁹ It is very hard to make sense of how and why section 3 on the proper law of the trust is made subject to these sections. After all, section 3 gives effect to what is already the law of Guernsey by virtue of the Hague Convention. The governing law of a trust is

⁴⁴ Section 52.

⁴⁵ Section 53.

⁴⁶ Section 54.

⁴⁷ Section 55.

⁴⁸ Section 56.

⁴⁹ Section 57.

determined by the rules in articles 6 and 7 of the Convention. Moreover, article 8 of the Convention specifies the matters to which the governing law applies. These include: the appointment of trustees (article 8(2)(a)); the powers of trustees (articles 8(2)(b), (d) and (e)); the relationship between the trustees and the beneficiaries (article 8(2)(g)); and the variation and termination of the trust (article 8(2)(h)). If a trust is governed by a foreign law, it is not at all clear how the substantive law provisions of the 2007 Law in sections 52-57 might override that law. It is, presumably, possible that the entirety of these sections constitute mandatory rules of Guernsey trusts law applicable regardless of the governing law. If so, a Guernsey court could apply them, even in respect of a foreign law trust, by virtue of article 16 of the Hague Convention, which gives the court the power to apply such overriding rules.⁵⁰ But article 16 is to be used in exceptional cases only, where there is an overwhelming policy need to apply the provisions of the law of the forum to override the governing law of the trust. It is very difficult to believe that such a policy exists here. The result would be very much to undermine the spirit and intendment of the rules on the governing law in the Convention. It would also be rather ironic, given the antipathy of offshore jurisdictions to the question of variation being decided by foreign courts using their own law, if the effect of section 57 were to make Guernsey rules on variation of trusts on behalf of minors applicable even in respect of foreign law trusts. It would also be rather unfortunate for Guernsey law so greatly to restrict the impact of the governing law chosen by the settlor, when section 14 of the 2007 Law extensively protects against the application of foreign law in the converse case where Guernsey law governs the trust. It is, as a result, hard to know what the reference in section 3 of the Law to its being subject to sections 51-57 really means.

Foreign law trusts

52 There is, in any event, a separate section which provides the requisite protection against the application of the foreign governing law of a trust where it would be unacceptable to Guernsey law. Section 65 states that⁵¹ -

- “(1) Subject to subsection (2), a foreign trust is governed by, and shall be interpreted in accordance with, its proper law.
- (2) A foreign trust is unenforceable⁵² in Guernsey to the extent that-
 - (a) it purports to do anything contrary to the law of Guernsey,
 - (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey, or

⁵⁰ Article 16(1) of the Hague Convention states that: “The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.”

⁵¹ Curiously, it is headed “enforceability of foreign trusts”; though it seems doubtful that the provision is intended to be limited to cases where the Guernsey courts are asked to enforce the trust. One might expect that a trust that is contrary to the law of Guernsey would be entirely without legal effect in Guernsey.

⁵² Query whether it can be given any legal effect at all. See the previous footnote.

(c) the Royal Court declares that it is immoral or contrary to public policy.”

53 It might be thought that this provides adequate protection against the application of the proper law of the trust; without the need to restrict the proper law any further by making it subject to sections 51-57.

Structure of the legislation

54 The structuring of the private international law provisions in the Law could be improved. They are rather unnecessarily scattered around the Law. The provisions on proper law and on jurisdiction appear right at the start in section 3; but the key section preventing the recognition or enforcement of foreign laws or judgments affecting Guernsey trusts does not appear until section 14. When it does, it is indexed under the sub-category “creation, validity and duration of Guernsey trusts”; and section 14 is labelled, rather opaquely, “Application of Guernsey law to questions of validity”. The heading makes no reference to the exclusion of foreign laws and judgments, which is the principal purpose of the section; and might even escape the attentions of the casual reader altogether. One finds a further conflicts provision, on change of the proper law, sitting in isolation in section 51 in a category labelled “protective trusts, class interests and certain powers”; again, this hardly seems desirable and it would be more sensible if the issue of change of the proper law were considered proximately to the proper law itself. One then has to wait again until section 65 to find the remaining conflicts provisions, restricting the application of foreign proper laws in certain circumstances. This time, it appears under the again rather opaque heading of “Enforceability of foreign trusts”. Whilst it is accepted that there may sometimes be justification for other methods of classification in the legislation than simply putting all conflicts provisions together, this does nonetheless seem an unnecessarily fragmented and unclear structure.

CONCLUSIONS: IS THERE SUCH A THING AS TOO MUCH PROTECTION?

55 These, however, are rather minor points. The important fact is that section 14 of the legislation succeeds in creating what is likely to be one of the most attractive laws in the offshore world against the application of foreign laws and foreign judgments in respect of Guernsey trusts. It offers particularly impressive protection for the beneficiary of a Guernsey law trust against claims arising under foreign laws. If⁵³ the Guernsey courts give the section its express meaning, rather than following the lead of the Royal Court of Jersey, then this will provide an extremely high level of protection.

56 Some people, however, might argue that the protection in the Guernsey legislation goes too far. Section 14(4) is anathema to the philosophy of the “general” law on the recognition of foreign judgments. If the legislation is given its literal meaning, then the concerns of comity, so important to the Royal Court of Jersey in *Re the B Trust*⁵⁴ will be

⁵³ And it must be a big “if”.

⁵⁴ 2006 JLR 562. Indeed, it was so important in that case that the Royal Court of Jersey invented a misconceived legal basis to circumvent the wording of article 9(4) of their legislation.

totally disregarded in Guernsey law. It is difficult to believe that such an aggressive piece of legislation will be enough to convince the courts of England, or elsewhere, not to exercise their jurisdiction over Guernsey law trusts, especially in ancillary relief proceedings. The English courts will remain just as concerned to ensure a fair division of assets between the parties; and a one stop forum for ancillary relief disputes. The 2007 Law may be seen as too forceful a response to the inclination of English courts to vary offshore trusts on divorce.

57 More importantly, very inward looking legislation such as now exists in Guernsey may not end up meeting the needs of clients after all. A settlor or beneficiary of a Guernsey law trust must contemplate the possibility that they may at some stage be embroiled in ancillary relief proceedings, or other proceedings, in which the question of the availability of the trust assets to the claims of a spouse or other party may be in issue. If that person is domiciled in England, then the likelihood that any such proceedings would take place in England is very considerable. The English court may well find that the assets should be made available to the spouse or other party. The settlor or beneficiary will be subject to the jurisdiction of the English court and obliged to comply with its ruling. The trustee, who may have submitted to the jurisdiction of the English court, will equally be bound to do so. But, in Guernsey, the English order will be without legal effect; and the settlor or beneficiary will be under no obligation to share the trust assets with his spouse. Equally, the trustee, finding that, pursuant to section 14 of the 2007 Law, the English order has no legal effect in Guernsey, must fear that he will be liable for breach of trust if he complies with the English order, since he has acted contrary to Guernsey law. The parties are placed in a most unsatisfactory and almost impossible position; and duplicative litigation and legally irreconcilable judgments will result. What the courts of a third jurisdiction in which any assets of a Guernsey law trust might be located would make of the matter is a still more uncertain prospect. The result, in the end, will be more uncertainty, more conflict, more litigation and more cost. We may well see considerably more litigation in offshore jurisdictions as to the enforceability of English⁵⁵ ancillary relief orders in respect of offshore trusts. Not every would-be investor is likely to be attracted to a particular offshore jurisdiction because its conflicts rules are so wide-ranging and self-protective. Clearly, there is a tense and difficult battle to be fought between, in particular, the English courts and the offshore jurisdictions. Although there is much to admire in the Guernsey legislation, it is not certain that the Guernsey approach, which comes close to all out war on foreign jurisdictions which vary Guernsey trusts, is necessarily the way to work towards a sensible and satisfactory resolution of the deadlock.

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⁵⁵ Or, of course, ancillary relief orders made in other jurisdictions.