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Choosing a New Governing Law for a Trust with Mainly English Elements: How Capacious Is the Wiggle Room in Terms of Its Implementation in an English Court?

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Abstract

When a trust is established, matters relating to governing law may not be at the heart of the consideration of the settlor, yet the questions relating to governing law are becoming an increasingly controversial challenge for the courts when a dispute arises. The article here walks through the current legal foundations of the issues associated with governing law before looking at how the courts have tackled these issues in recent years. Ultimately the article then notes that there should be changes to the approach to determining governing law to more accurately reflect the modern approach and the judicial lessons learnt over recent years.

Keywords

Trust, Governing, Law, Jurisdiction, English, Equity, Settlor

1. Introduction and the History and Evolution of the Governing Law Clause in a Trust

In previous decades, trust law practitioners have been able to focus almost exclusively on English law on the application of English trusts within the English courts. However, it has become increasingly the case that jurisdictional issues and choices of governing law have become much more controversial and have had a direct impact on those who would otherwise be beneficiaries or, indeed, those involved in the administration of trusts. The purpose of this article is to consider the way in which the choice of governing laws for a trust has evolved

over the years and the real challenges that are being faced in the application of English trust law when there is a change in governing law dispute. Such an event would arise where an English trust, held by English individuals and managed by English law get triggered by the change in the governing law clause (Goldsworth, 2001).

Before looking at the evolving challenge in the way in which the courts have dealt with difficulties associated with governing law, it is helpful to have a brief understanding of what English trust law says about the content of the trust and how a trust is made up with reference specifically to points that will be relevant to jurisdiction and what this could mean to individuals who may be beneficiaries of the trust as well as those involved in the administration and setting up of trusts (Lloyd and Lawrance, 2003). The method taken here to test this argument is based on case analysis and the doctrinal approach which is applicable to gaining the necessary rigour of analysis within English trust law.

English trust law looks at the way in which assets are protected and is part of the wider way in which entities may seek to ring fence or protect property and ensure that property disputes can be managed in an equitable manner, potentially splitting the legal and equitable title in property and requiring one person to behave in a certain way towards assets that are beneficially owned by another. It is helpful, at this juncture, to take a whistles top tour through the evolution of English trust law and identify why governing law may be a challenge at all. Once this understanding has been achieved, the issue of governing law will be looked at in more detail taking reference to why the choice of governing law has become an issue at all in the context of the trust, as well as looking at the way in which the courts have developed their understanding of governing law disputes and what this means for those individuals who may be seeking to rely upon the existence of an English trust.

This analysis from the latter section of the article will look at recommendations for future developments and the way in which it is suggested from the analysis that English trust law should deal with increasing challenges of governing law. Further consideration is given as to whether the approach taken by the court has ultimately led us to be in an unsatisfactory position and whether it is time for legislative intervention or whether the evolution within the courts is, in fact, an appropriate mechanism to deal with an ever-changing situation.

2. Evolution of the English Trust

When trusts are referred to, there is often a perceived complexity attached to the legal structure of the trust, which means that individuals do not see the relevance to their own day-to-day life (Wheeler, 2015). However, it is argued here that the establishment of English trusts has begun to permeate every aspect of every individual's life and that far from being a complex structure that is best reserved for the top tax practitioners seeking to advance the position of their wealthy clients, trust or is something that can potentially impact all individuals and needs

to be viewed through different lenses (Allnutt v Wilding).

Trusts were established as part of equitable development and a body of principles that emerged from the court of Chancery. The ultimate aim of establishing equity and trusts as an instrument within equity was to counteract some of the strictness of the rules which had evolved. It was part of this evolution that illegal ownership and beneficial ownership seemed to be split where the court felt that although one individual may legally hold the asset, it was fair and reasonable to allow another individual to have the beneficial interest and to determine that the individual holding the legal title is required to behave in a certain way towards the equitable assets. Although these two distinct legal approaches remained separate for some time, they did merge in 1873 through the Judicature Act and it was at this point that there was a need to fully understand the way in which trusts could be governed and integrated into the overall legal structures.

In the modern contexts, trusts now play important roles in several aspects of day-to-day life as well as when it comes to financial investments; in particular, there is a large volume of pension trusts in existence where individuals who are saving into a pension will have the money managed by fund manager under the terms of a trust. Therefore although there may be a perception that trusts for financial instruments are used by the wealthy to seek to minimise their tax requirements (Day v Day), in reality, almost everybody who was involved in any form of financial planning will have a trust in place and will be impacted upon by any decisions that are made in relation to governing law of trusts for example. The body of legislation that has emerged as a result of this has largely focused on protecting beneficiaries, particularly where they may not have a direct link or even be directly aware of those who are involved in managing the trust. In particular, legislation such as the Trustee Act 1925, The Recognition of Trusts Act 1987, the Trustee Act 2000, and the Pensions Act 2004.

There has been a broad range of legislative provisions which have, on the whole, been established to deal with specific needs within the overall structure of the trust. Despite this, there remain general principles such as the need for a settlor to give an asset to a trustee in order to use it for the benefit of beneficiaries remains consistent throughout the English trust. There is a need for certainty in this action both in terms of the intention to have created a trust at all as well as the way in which the trust should be operated and for whom. Where there are challenges to the operation of the trust or even the existence of the trust, the courts are left with a potentially difficult situation, particularly where there may be jurisdictional issues also arising, and it is this latter point that is the focus of the paper here suggesting that there is a need to review trust law in its entirety and that the modern trust is a far cry from its historic roots. It is time for reform.

3. Rules of Governing Laws of Trusts

Although the establishment of trusts was done on equitable principles, it is not surprising that astute financial institutions and individuals have also sought to

use trusts as a means of reducing tax payments or securing assets in countries outside of the UK. The Hague Convention on the Law Applicable to Trusts and their Recognition is referred to as the Convention and was enacted into English law through the Recognition of Trusts Act 1987. This legislation and the Convention underpinning the legislative requirements is one of these central ways in which the governing law of trusts is managed, and rules set out to assist in offering certainty as to when an English trust is going to be viewed as being governed by a new outside of the UK. When seeking to determine which governing law applies to the trust, the starting point of interpretation is to look at the intentions of the settlor as per Article 6 of the Convention. Where a settlor has not made a choice of jurisdiction in the trust documentation, then the Convention steps in to state that the trust will be governed by the law which is most closely connected in accordance with article seven.

Although the focus here is on the arguments presented and the approach taken in the courts in terms of establishing English jurisdiction it is certainly worth noting that there may be alternative arguments being presented. Individuals dealing with jurisdiction disputes are likely to find themselves 'jurisdiction shopping' to look for the best options available to them based on their own position. For example, the rule against perpetuity that is present in England is not necessarily present in other jurisdictions and this may result in individuals seeking to move away from England and argue for an alternative jurisdiction. Jurisdiction shopping presents challenges and alternative viewpoints that can lead to disputes both for and against establishing an English jurisdiction with individual needs of settlors having a direct impact on the way that the arguments are presented to the courts.

Arguably, therefore, although the academic position when it comes to governing the law of trusts is relatively straightforward, it is in the omissions that are not contained within the Convention that the real challenges lie. For example, the Convention doesn't deal with any preliminary issues such as the validity of the wills or any other validity questions when it comes to the trust documentation. Arguably, it is often going to be the case that where there is a dispute related to jurisdiction or governing law, there are also going to be other underlying battles, and it is unlikely that there was going to be purely an argument based on jurisdiction without there being some other underlying challenge in existence.

In order for the Convention to be considered applicable, there is a need for there to be a conflict as to which rules would apply, and it is recognised that if there is no conflict, then it is unlikely that the Convention will have any impact on the operation of the trust. Some of the key provisions of that Convention include the fact that each party would need to recognise that there is the existence of a valid trust with the Convention only relating to the trust where it is established through a written instrument. Therefore without a written comment valid trust document, the rules related to conflict establishing the Convention would have no impact. Looking in more detail at what article 6 and 7 says about applicable law, the Convention provides an arguably robust set of rules. Article 6, as

noted above, states that where the settlor has selected a governing jurisdiction, then this will be dominant, and in many cases, professional advice would have been obtained when establishing the trust. The real challenge arises where Article 7 needs to be applied. The statement in the article is that the Convention will select the law which the trust is most closely connected to. In applying this rule, there are four connecting factors that may be taken into consideration and an understanding of these will give a strong idea of how the courts are then going to deal with conflicting situations when it comes to jurisdiction. Firstly, it will be necessary to look at the place where the trust has been administered, this is a naturally robust starting place, and if the trust is being administered in a particular location, then this would, prima facie, be the logical governing jurisdiction. Secondly, it will be necessary to look at the location of the assets, which is unlikely to be helpful where assets are movable or abstract in nature, for example, where they're shares. Where the trust asset is fixed property, this factor can be indicative and assists in developing an understanding of jurisdiction. One way of stripping this requirement down is to consider where a court order would be enforced in the event that the assets were subject to such a court case (Re Z Trust Ltd). Thirdly the place where the trustee is resident or most commonly resident will be considered as this would be the location that they undertake their business and equally would be the laws to which they are most commonly working with and understood, adding to the practical application of the rules (In the Matter of the D Retirement Benefit Trust). Finally, consideration will be given to the location where the purpose of the trust is likely to be fulfilled.

Each of these four factors is deemed relevant however, it is also recognised that it is unlikely that when we are looking at these four factors, the jurisdiction of the trust will neatly fall into one location or another, and it will be necessary to look at the broad fact patterns associated with the trust in question. For example, it would be necessary to consider issues such as the distribution of assets and where there are attempts to evade tax; this is likely to have an impact on jurisdictional decisions. It is noteworthy that the trust was developed for equitable reasons. Therefore, allowing matters relating to determining jurisdiction to be treated in a way that would not be viewed as fair and reasonable would be illogical.

As well as relying on the Convention, there are likely to be other rules which will be taken into account when it comes to determining the jurisdiction within which the trust operates; for example, in accordance with English conflict laws, title to any movable object would be established based on the jurisdiction that the property was in at the point at which title was transferred. A further rule of application can be seen in the case of the Insolvency Act 1986 where if the court issues a winding-up order, then the transfer of shares made after that winding-up order has commenced would be deemed to be void regardless of the jurisdiction in which those shares then sat. It is evident, even from a cursory look at the rules associated with the Convention and other legislative provisions, that matters relating to the governing law of a trust are far from simple and are likely to lead to matters being considered on a case-by-case basis which although nec-

essary can also lead to lack of consistency. It is therefore argued that by looking at the way in which the courts are dealing with these issues, this article can support the concept that there needs to be an entire overhaul when it comes to dealing with jurisdiction and trusts (Gruson, 2003).

4. Judicial Approach—Through the Lenses of the Case of Akers

One of the leading cases that deals with this issue of jurisdiction and suitably indicates the challenges that are being faced by the courts is that of Akers (A) v Samba Financial Group (S). In this case, A was an undisputed resident and citizen of Saudi Arabia. As part of his day-to-day work, he was very heavily involved with a company called Saad Investments Co which was resident in the Cayman Islands.

As previously noted the interests of the individual parties are going to be fundamental in terms of determining the arguments that are going to be presented. The position, in this case, was complex and is a clear indication of how the jurisdictional challenge emerged. The investment company went into liquidation, and the insolvency proceedings were subject to having been recognised by order within the English courts despite the fact that the company itself was based in the Cayman Islands, with the individual involved in the company being resident in Saudi Arabia. As well as being involved in this liquidated Cayman company was also a legal owner of multiple different shareholdings across five large Saudi Arabian banks with a total value of approximately $310 million. It was claimed by the liquidators for the investment company that was holding these shares in trust for the investment company, and this was evidenced by several transactions that had been documented in writing where it was alleged that A had agreed to hold the shares in trust for the investment company. Towards the end of 2009, A had transferred all of the shares that he held in Saudi Arabian banks to a Financial Group referred to as samba suggesting that this was in exchange for discharging several of his own personal liabilities towards the Financial Group. The transfer took place in Saudi Arabia, where the concept of a trust is not recognised, and there is no distinction between legal and equitable interests. Therefore, there is no reason for the Financial Group to believe that there was any distinction between Mr. A as the legal owner and any other party as the equitable owner (Hayton, 2015).

The courts were then asked to unpack the facts in the context of determining jurisdiction. The investment company liquidation, therefore, began an action against Mr. A in the English courts, having established that they had jurisdiction to do so by serving the action on the London branch of the financial group. It was argued in the case presented by the investment company that transferring the shares had been void in accordance with the Insolvency Act 1986 and that the shares, therefore, beneficially belonged to the investment company and should be used for the creditors (Trautman, 1983).

The financial group initially made an application to stay proceedings on the

basis that they felt Saudi Arabia was the more appropriate forum in which the claim should be determined. It was argued by the Financial Group that the shares were held under trust and that this was to be governed by Saudi Arabian law, which wouldn't then have recognised the proprietary interest alleged by the investment company. In the hearing initially, the High Court did grant the stay and argued that Saudi Arabian law did apply in accordance with article 15 of the Convention. In coming to this decision, the High Court argued that under English conflict laws, then it would be the law of the location in which the shares were that applied in order to determine issues relating to the transfer of title or the transfer of property. An alternative argument was also presented in accordance with article seven of the Convention that stated that even if the English conflict laws (Ogden v Trustees of the RHS Griffiths 2003 Settlement) did not apply, the application of articles server would mean that it was necessary for the courts to consider where the trust was most closely connected and there was much stronger argument start the trust was connected to Saudi Arabia then to England will stop so why are you the century the High Court did not need to make a differential between the English rules relating to conflict and the Convention as both would have resulted in the same decision that the correct forum would be Saudi Arabia. Unsurprisingly the matter went to appeal.

It is noted when considering matters relating to the jurisdiction or the lex situs rules associated with the law of the place where the object is situated is such that it should look to accord with the "natural expectations of reasonable men and facilitate business" (Glencore International AG v Metro Trading International Inc).

A further background case of relevance is that of the Clark and Whitemouse case where much greater emphasis was placed on the role of article 4. At the High Court, in the case of A, Article 4 was largely ignored and held not to apply. Article 4 states that the Convention would not apply where preliminary issues are under discussion, such as the validity of wills for any other acts that involved the transfer of assets to a trustee, and it was here that the debate shifted during the discussion of the Court of Appeal.

The Court of Appeal dealt with some of the key issues and is a real indication of the approach being taken when tackling governing law disputes. By breaking down the elements of the decision that was then brought about by the Court of Appeal, it is possible to see where the weaknesses are in the current regulation of governing law and also to identify areas that could lend themselves to legislative reform in the future. The essence of this article is to consider whether the approach taken by the court has become capricious and, if so, in what ways and what could potentially be done through the reform agenda (Gallanis, 2017).

In this case, when the matter went to the Court of Appeal, the appeal was unanimously upheld with the stay of proceedings lifted. The court justified this based on taking a purposive construction of the Convention; in doing this, it was deemed inappropriate for the court to determine on an application for a stay or on an application for a summary judgement as to whether Article 15 applied. It

was necessary for the issue of determining governing law to be looked at as part of a full evidential hearing, given the importance of the issue. The actual decision in terms of whether Saudi Arabian law is applied and picked through the application of articles 6, 7, and 15 is not necessarily required in terms of using what the logic taken by the courts is coherent or whether the piece-by-piece judgments have created challenges to interpretation. When looking at this case, the very essence and purpose of the Convention came into question, and it shows that the key aim of the Convention was to establish the law that is applicable to the trust in question (Liew, 2021a, 2021b), something which the Court of Appeal identified and then sought to apply in this case (Harris, 2018). However, the very fact that it was possible to stay the proceedings on the grounds of lack of jurisdiction results in a particularly circular argument that could lead to the question of jurisdiction never making it before the court in the first place (Waters and Grozinger, 2014). It was argued by the parties before the Court of Appeal that the decision on allowing a stay of proceedings, in this case, could have 'monumental consequences', a contention that is agreed upon within this article. Given the importance of this point, it is now argued that determining the governing law of a trust should be given its own area of legal analysis and importance and not simply be something that is left to the court in any individual case to take the matter on a case by case basis (Giles v RNIB).

Taking this matter into a broader context, it is noted here that there are likely to be a large and increasing number of trusts that have been established under common law jurisdictions but have registered shares in civil law countries. When considering the situation that was analysed here, this could lead to some assets being in jurisdictions where the concept of the trust and the ability to distinguish between legal and beneficial ownership is simply not recognised (Langbein, 1995). It is, therefore, entirely possible to see how these types of cases could create a situation where only personal remedies were available within that jurisdiction full stop; there's been no specific error in either of the jurisdictions; they simply do not match in terms of the rights offered to the individuals involved (Hayton, 2016). Where this type of scenario emerges, the Convention arguably falls down, and the decisions from the courts become inconsistent, making it difficult for those involved in the establishment of trust, so those seeking to rely upon trusts selected to determine how jurisdictions are likely to be tackled in the event of the dispute, particularly where there is an insolvency and the tracing of assets becomes even more important for those individuals involved (Liew, 2021a, 2021b).

5. Conclusion

The article here seeks to address some of the key challenges that have been faced by governing law within the context of trusts and recognise that there are increased complexities being experienced where trusts are held over assets that may be in different jurisdictions with different governing rules (Lupoi, 2000).

It is argued here that international trusts must be looked at in an entirely dis-

tinct way without necessarily focusing on jurisdictional arguments between the various different countries that may be able to assert control over the assets but rather to look at the purpose of the Convention and the purpose underpinning the transaction that led to the establishment of the trust in the first place. It was recognised in this analysis that trusts are set up largely for financial purposes, and therefore it is possible to take a commercial and purposive approach to unpick the nature of the transaction and to look, in more detail, at what the intention was to the underlying transaction. In doing this, it becomes much easier to trace the governing law of that trust and to ensure that the correct laws are applied. Allowing certain cases to be staged based on the Convention and the argument that Article 4 applies would mean that these discussions simply did not come before the courts. This omission cannot be the intention of the Convention, and it is recommended here that the interpretation of the conventions on its application is reviewed in light of the current challenges with jurisdiction and governing law being tackled as a matter of course at the outset of any debate relating to trusts which transcend several borders.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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