

Trust disputes under the Lugano Convention

Julie Wynne reviews the rules on court jurisdiction and enforcement of judgements applying to trust disputes under the revised Lugano Convention



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As from 1 January 2011, issues on court jurisdiction and enforcement of judgements in Switzerland are subject to the revised Convention on the Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters of 30th October 2007 ('the Convention').

To date, the contracting States of the Convention include the member States of the European Union and the European Free Trade Association (EFTA), but not the Channel Islands of Jersey and Guernsey, the Isle of Man and the dependent or associated territories in the Caribbean.

The Convention provides uniform jurisdiction rules for contracting States in civil and commercial matters. It does not apply, however, to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions or to bankruptcy matters.

With regard to trusts, the Convention serves to determine whether courts have jurisdiction in cross-border trust disputes and whether they will enforce foreign trust judgements. It is worth mentioning that the Convention only applies to trusts created by statute, by written instrument, or created orally and evidenced in writing, and not to so-called 'constructive' or 'implied' trusts¹.

As the Convention does not apply to wills and succession, it is not clear on a literal interpretation of the text of the Convention whether a testamentary trust is subject to it or

not. However, from a teleological perspective, it seems that the Convention can only exclude issues regarding the validity of the will creating the trust², but not issues regarding a trust once the will has been judged to be valid and effective³, as for instance when a beneficiary of a testamentary trust sues a trustee for a breach of trust many years after the testator's death.

General jurisdiction rule

The general jurisdiction rule is that a person, whatever their nationality, can be sued in the courts of their State of domicile.

In order to determine whether a party is 'domiciled' in the State whose courts are seized of a matter, the court must apply its internal law.

Under Swiss law, a natural person is domiciled in the State in which they reside with the intention of remaining permanently.

Special jurisdiction rule on trusts

There are some special jurisdiction rules in the Convention, which, if certain conditions are met, enable the plaintiff to sue a person domiciled in a contracting State in another contracting State.

With regard to trusts, a defendant can be sued in their capacity as settlor, trustee or beneficiary of a trust in the courts of the contracting State where the trust (as opposed to the trustee) is domiciled (the special jurisdiction rule on trusts).

To determine the domicile of the trust, the court must apply its internal law. Under Swiss law, the trust's seat, designated by the terms of the trust in writing or in another form that can be evidenced in writing, is deemed to be its domicile. In the absence of such designation, the seat is the place where the trust is administered in fact; in such a case,

criteria such as the administrative centre of the trust, the place of residence of the trustees, the situs of the assets of the trust, the nature of the trust purposes and the place where these are to be fulfilled can be taken into account.

To ascertain whether the issue at play falls within the special jurisdiction rule on trusts, it is necessary to analyse the nature of the trust issue as well as in which quality the parties involved appear. Determining whether the claim at hand involves rights or obligations under the trust requires examination of the kind of (internal or external) legal relationship involved in the trust.

Claims that may be considered as 'involving rights or obligations under the trust' are the ones that may arise in connection with the internal relationships of a trust. These may be between the trustees themselves, between persons claiming the status of trustees, between the settlor and other parties involved in the trust and, above all, between trustees on the one hand and the beneficiaries of a trust on the other⁴.

It is important to note that, because the special jurisdiction rule on trusts constitutes a derogation from the basic principle of domicile, its provisions must be construed restrictively. In *Gomez v Gomez-Monche Vives*, it was therefore held that the power to sue a trustee domiciled in a contracting State does not authorise a suit against a person in their capacity as an appointor, although the power to appoint under the trust was of a fiduciary nature. The special jurisdiction rule on trusts would therefore apply neither to protectors nor to any other person enjoying fiduciary powers who does not come within the normal meaning of the expression 'trustee'.

Claims that may be considered as 'not involving rights or obligations under the

trust', and that consequently fall outside the scope of the special jurisdiction rule on trusts, are the trust disputes involving the external relationships of the trust. It is in particular the case when the trustee acts towards third parties as any legal person by disposing of and acquiring rights, entering into commitments binding on the trust and acquiring rights for its benefit⁵. In such cases, the general rules governing the specific external relationship (e.g. contractual, matrimonial or successional) are applicable, as they would be in any ordinary dealing between persons who are not acting as trustees, settlors or beneficiaries of a trust.

Forum selection clause

The special jurisdiction rule on trusts applies unless the trust instrument contains a forum selection clause. Interestingly, there is no requirement of a link between the dispute and the State chosen in the forum selection clause; the only requirement is that at least one of the parties is domiciled in a contracting State.

Further, one should remember that the trust's forum selection clause takes precedence over the other jurisdictional provisions of the Convention, except the exclusive jurisdiction rules provided by the Convention. A forum selection clause may thus exclude the Swiss courts' jurisdiction, especially in cases where forced-heirship rules may interfere unfavourably with the terms of the trust.

Implied prorogation of jurisdiction

Apart from an express forum selection clause, one should not forget that courts can also become competent by implicit prorogation. This means that a court, which may otherwise not enjoy jurisdiction, has to entertain a dispute if the defendant appears before it without objecting to the court's jurisdiction.

Multiple defendants

A person domiciled in a contracting State may also be sued where he/she is one of a number of defendants, in the courts of the State where any one of them is domiciled.

It is worth mentioning that the court of a contracting State does not have power to stay its proceedings in favour of a non-contracting State on the basis of forum non conveniens. Therefore, where a number of defendants are sued in a contracting State

but only one of them is domiciled there, the court of that contracting State will not stay proceedings, even if the natural forum lies in a non-contracting State, or even if the principal defendant is domiciled in a non-contracting State. Such a defendant may so be sued in a contracting State, even where neither he/she nor the subject matter of the proceedings has any material connection to such contracting State⁶.

Provisional measures

Finally, Swiss courts may grant provisional, including protective, measures even if they do not otherwise have jurisdiction over the matter. For example, a Swiss court may thus seize the assets of a Gibraltar trust located in Switzerland, even though substantive jurisdiction lies with the Gibraltar courts.

Enforcement of foreign trust decisions

Insofar as the Convention applies, the rule is that an enforceable judgement concerning a trust dispute and rendered in a contracting State will be enforced in any other contracting State once it has been declared enforceable there.

Foreign provisional measures relating to trusts may thus be recognised and enforced in Switzerland under the Convention. For instance, an English freezing order must be recognised and enforced in Switzerland, once the defendant has been heard or has had the opportunity of being heard before an English court⁷.

A foreign judgement will not be enforced, however, if, among others, it was given in default of appearance or its recognition is contrary to Switzerland's public policy. Under Swiss law, abuse of law and good faith principles are part of Swiss public policy but not Swiss forced-heirship rules. A foreign judgement giving effect to a testamentary trust attributing the deceased's entire estate to his second wife and nothing to the children of the first wife would thus be held enforceable in Switzerland.

Debt-collection forum in Switzerland

With respect to trusts, if the trust's designated seat is located in Switzerland or if the trust is effectively administered there, a debt-collection forum exists for proceedings in Switzerland. Pursuant to the

revised Convention, the *Swiss Federal Act on Debt Collection and Bankruptcy (1889)* now allows creditors who hold a definitive award to seek a pre-trial attachment order, regardless of the debtor's place of residence. Previously, creditors holding such an award could only seek a pre-trial attachment if the debtor was not resident in Switzerland.

Conclusion

Considering the Convention rules, it is recommended to always provide for forum selection clause in trust instruments to avoid potential investigation and issues on the effective place of management of the trust and to avoid any uncertainty regarding the competent jurisdiction in a potential future dispute.

Moreover, with respect to determining jurisdiction for cross-border trust disputes, it is important to remember that the prorogation of jurisdiction will take effect under the Convention trust rules only if the trust issue under scrutiny constitutes a claim filed against settlors, trustees or beneficiaries of a trust involving rights or obligations under the trust. All other claims will be subject to ordinary jurisdiction rules, either under the Convention or under private international law rules. ■

1. Report by Professor Peter Schlosser of 9 October 1978 on the Convention on the Association of Denmark, Ireland, the United Kingdom to the Brussels Convention, published in O. J. 1979 C. 59 p. 71, § 117 (Schlosser report); *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065, [2008] WLR (D) 305.
2. Taking into account, in particular, forced-heirship rules.
3. Professor David Hayton, 'The Need for Harmonisation of Private International Law Rules on Succession: Topicality in view of the European Commission Green Paper', http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_ls_appc_en.pdf.
4. Schlosser report, § 111.
5. Schlosser report, § 110.
6. Case C-281/02, *Owusu v Jackson and others* [2005] ECR I-1383.
7. *Uzan v Motorola Credit Corp.*, ATF 129 [2003] III 626.