"FORUM FOR THE ADMINISTRATION" CLAUSES IN TRUST DEEDS – THE SINGAPORE APPROACH

Trusts are a valuable and important tool for asset management around the world. Within such deeds, it has become increasingly common for drafters to include clauses stating the "forum for the administration" – but what does this exactly entail? This article aims to explore the meaning and relevance of such clauses, with a keen focus on two Singapore cases.

Introduction

Trust deeds are a legal instrument which gives a third party (namely, the trustee) legal title of a property. Often described as a unilateral undertaking by the trustee, a deed is an important document detailing the specific rights and obligations of the appointed trustee. In the last century, trusts draftsmen began to include express provisions which detailed the governing law and the "forum for the administration" of a trust.[1] While a "forum for the administration" could be capable of being a jurisdiction clause, this is not always the case.

Several courts in the common law have sought to determine the meaning and implication of "forum for the administration" clauses, of which Singapore is no exception. This was extensively discussed by the Court of Appeal in *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] SGCA 62 ("***Ivanishvili***"),[2] and applied in the recent High Court case *Sir Cornelius Sean Sullivan v Hill Capital Pte Ltd and another* [2024] SGHC 157 ("***Sullivan***").[3]

Brief facts of *Ivanishvili*

In 2005, the first appellant had settled part of his personal wealth on a discretionary trust domiciled in Singapore called the Mandalay Trust, with the beneficiaries being himself and the other appellants, namely his wife and children. The respondent was appointed as the trustee, while the assets of the Mandalay Trust were managed and invested by a Swiss bank.[4]

The Mandalay Trust included a forum for administration clause (hereby referred to as "cl 2") as reproduced below:[5]

PROPER LAW AND POWER TO CHANGE PROPER LAW

2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and the Courts of the Republic of Singapore shall be the forum for the administration hereof.

(b) The Trustees may at any time or times and from time to time during the Trust Period by deed declare that the Proper Law shall from the date of such deed or from such other date as is specified therein or upon the occurrence of such circumstances as are specified therein be the law of some other jurisdiction (not being a jurisdiction under the law of which (i) any of the trusts, powers and provisions herein declared and contained would not be enforceable or capable of being exercised and taking effect or (ii) this Declaration would be capable of being revoked) and that the forum for the administration thereof shall thenceforth be the courts of that jurisdiction but subject to the power conferred by this clause and until any further declaration be made hereunder and the Trustees shall have power so often as any such declaration as aforesaid shall be made to make such consequential alterations or additions in or to the trusts, powers and provisions hereof as the Trustees may consider necessary or desirable to ensure that the trusts powers and provisions hereof shall (mutatis mutandis) be as valid and effective as they are under the laws of the Republic of Singapore.

The first sub-clause (cl 2(a)) prescribes the initial proper law of the Mandalay Trust upon establishment as the law of Singapore and the Singapore courts as the "forum for the administration" of the trust.[6] The second sub-clause (cl 2(b)) grants the trustee the power to change the proper law at its discretion and that if it does so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust.[7]

Towards the end of 2015, the appellants discovered that the Mandalay Trust had suffered tremendous losses allegedly hidden from them – which led to the conviction of one of the bank's employees on embezzlement, misappropriation, and forgery in Switzerland.[8] Later in 2017, the appellants sued both the bank and trustee in Singapore for the loss sustained by the Mandalay Trust. In response, the bank and trustee applied to stay on the ground that Switzerland was the more appropriate forum. This stay was granted. The appellants' appeals against this decision were dismissed by the High Court in *Ivanishvili, Bidzina and others v Credit Suisse and another* [2019] SGHC 6,[9] which led them to file further appeals to the Court of

"...[T]wo closely related questions are raised by a forum for administration clause: first, whether the clause is intended to confer jurisdiction on a court (whether exclusively or otherwise); and second, the scope of the clause and therefore the kinds of it applies to."

- Judith Prakash JA (delivering the judgment of the majority) in *Ivanishvili*

Appeal. However, the appellants subsequently withdrew their appeal in their action against the bank by amending their statement of claim. This left the trustee as the sole defendant. Accordingly, the main issues on appeal were first, whether the amended statement of claim was permissible; and second, whether the suit should be stayed in light of cl 2. The latter will be the focus of this discussion.

The Court of Appeal identified two key areas to be addressed: first, whether the clause is intended to confer jurisdiction on a court; and second, the scope of the clause and the kinds of disputes it applied to.[10]

(1) Jurisdiction clause?

On the first point, the Court noted that the expression "forum for the administration" does not hold any established technical significance; ultimately, contextual interpretation is required to determine its effect. The Court further went on to analyse the English case of *Crociani and others v Crociani and others* [2014] UKPC 40 ("***Crociani***"),[11] where the Privy Council found that the clause in question was not a jurisdiction clause as it only referred to the *country* as the forum for administration.[12] Distinguishing *Crociani* from the present case, cl 2 referred to the Singapore *courts* as the forum for administration, and accordingly, was held to be a jurisdiction clause.[13]

(2) Scope of clause

After establishing that cl 2 was a jurisdiction clause, the scope of cl 2 had to be determined. On this point, the Court was persuaded that such "forum for the administration" clauses intend to refer to the court which settles questions arising in the day-to-day administration of the trust, as opposed to functioning as exclusive jurisdiction clauses for the settlement of disputes between the trustees and beneficiaries.[14] The Court bolstered this view by going back to the main function of trust deeds, which are ultimately a unilateral undertaking by the trustee to properly manage the settlor's assets.[15] Hence the trustee, when drafting the trust deed, would likely be focusing on running the trust rather than on potential disputes with beneficiaries over future breaches of trust.[16]

Given that cl 2 was not an exclusive jurisdiction clause, the appellants could not rely on cl 2(a) to subject the trustee to the jurisdiction of the Singapore courts as the only courts to determine their claims. As such, the Court

"The two-stage *Spiliada* test well illustrates [a] two-fold objective of judicial discretion. In the first stage, the court examines a case to find logical rationale for its jurisdiction. Having failed to do so, to ensure no injustice, the court, prior to sending a suit away, satisfies itself that there is no special reason that ought to oblige it to hear the suit in order to do justice between the parties."

- Valerie Thean JC (as she then was) in *Sanjeev Sharma s/o Shri Sarvjeet Sharma v Surbhi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] SGHC 104

turned to the doctrine of *forum non conveniens* to determine the appropriate forum for the case to be tried.

Spiliada test

The Court proceeded to apply the *Spiliada*[17] test to determine whether a stay of proceedings was to be granted on the ground of *forum non conveniens*.[18] This involved a two-stage inquiry. First, the court would look at whether there is some other available forum which is more appropriate for the case to be tried.[19] If this was so, a stay would ordinarily be granted unless under the second stage, the court finds that there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.[20]

Under the first stage of inquiry, the Court considered a range of connecting factors which linked the dispute with the competing jurisdictions, Singapore and Switzerland. These included the availability of witnesses and documents, the shape of the litigation, the governing law, and risks of overlapping proceedings.[21] Ultimately, the majority held that while the availability of documents pointed in favour of Switzerland as the appropriate forum, it was a weak point as there was nothing which suggested that the trustee was unable to obtain the relevant documents from the Swiss bank. Conversely, the shape of the litigation and governing law pointed in favour in Singapore.[22] There were also no further circumstances which by reason of justice would require a stay at the second stage at the *Spiliada* test.[23]

Accordingly, the Court allowed the appeal. Though the dispute fell outside the ambit of cl 2, Singapore was still found to be the more appropriate forum for proceedings to take place.

Brief facts of *Sullivan*

The recent High Court case of *Sullivan* likewise dealt with a "forum for the administration" clause, though centering around slightly different issues. The applicant was Sir Sean Cornelius Sullivan, a purported beneficiary of a trust created by his late father Mr Joseph Sullivan. In 1995, Mr Joseph Sullivan created The Anchor Trust and The Anchor Two Trust. The beneficiaries of The Anchor Trust were Mr Joseph Sullivan and The Anchor Two Trust, and the beneficiaries of the Anchor Two Trust were Mr Joseph Sullivan and his issue. Both trusts were established in the Isle of Man. The trust deeds of The Anchor Trust (hereby referred to as the "AT Deed") and The Anchor Two Trust (hereby referred to as the "A2T Deed") contained

identically worded clauses on the proper law and forum for the administration of the trust (hereby referred to as "the Clause"), as reproduced below:[24]

PROPER LAW

2. (a) This Settlement is established under the laws of the Isle of Man and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law of this Settlement and to any change in the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the Proper Law of this Settlement shall be the law of the Isle of Man the Courts of which shall be the forum for the Administration thereof;

(b) If at any future date in the opinion of **THE TRUSTEES** it is desirable for the protection of the Trust Fund or Trust Funds and/or for the proper administration of the Trusts hereby created to appoint a new Trustee outside the Isle of Man and/or to remove the forum for the administration of the Settlement from the Isle of Man for any reason whatsoever any Trustee may at any time or times thereafter by deed resign as Trustee and/or remove any Trustee or Trustees hereof resident in the Isle of Man from the office of Trustee and may appoint any person or persons or corporation to be the new Trustee or Trustees in place of the Trustee or Trustees so resigned and/or removed;

(c) In addition to the power conferred by sub-paragraph (b) hereof **THE TRUSTEES** shall have power simultaneously with or at any time after exercising the power under sub-paragraph (b) by deed to declare that the forum for the administration of the trusts hereby constituted be thenceforth some place outside the Isle of Man and that the trusts hereof be administered in accordance with the law of that place or of any other place specified in such deed and the trusts hereby constituted be thenceforth administered from the place and in accordance with the law so specified;

…

[emphasis in original]

The trustees of the two trusts changed several times. On 23 May 2011, the then-trustee of both trusts retired and the first respondent, Hill Capital Pte Ltd, was appointed as the new trustee of both trusts.[25] The second respondent is the sole shareholder and director of the first respondent. As the new trustee, the first respondent changed the proper law and forum for administration of both trusts to Singapore law and Singapore respectively.[26]

Between June and July 2023, the applicant claimed that he wrote to the respondents seeking accounts of both trusts and the provision of other documents pertaining to the trusts. However, they were deemed to be unsatisfactory for the applicant. On 18 July 2023, the first respondent retired as the trustee of the Anchor Two Trust. In turn, Fivehill Trustees Limited, a company incorporated in Cyprus, was appointed as the new trustee. On the same day, Fivehill Trustees Limited changed the governing law and forum for administration of the Anchor Two Trust to Cyprus law and Cyprus respectively.[27]

On 15 August 2023, the applicant commenced an action against the respondents. He ordered for, *inter alia*, a detailed account of both trusts and all documents which had the effect of modifying the AT Deed and A2T Deed for the period from 23 May 2011 to present for the Anchor Trust, and from 23 May 2011 to 18 July 2023 for the Anchor Two Trust.[28] In response, the respondents filed to stay proceedings on the ground that any legal question arising in the running and administration of The Anchor Two Trust was to be resolved by the Cyprus court, and that in the alternative, Cyprus was the more appropriate forum for the determination of the claims.[29] The Assistant Registrar ("AR") dismissed the respondents' application, which led to the respondent's appeal.

Applying the two key areas outlined in *Ivanishvili,* the High Court first looked at whether the Clause intended to confer jurisdiction on a court, and if so, the scope of the Clause to determine the kinds of disputes it applied to. Since the Clause was similarly worded to cl 2 in *Ivanishvili,* it was common ground before the AR that the Clause was a jurisdiction clause.[30] Further, the Clause intended to refer to the court which would settle questions arising in the day-to-day administration of the trust, denoting the supervisory and authorising court for actions the trustee might need to take.[31] The Clause was not intended to be an exclusive jurisdiction clause for the settlement of contentious disputes between trustees and beneficiaries.

"In our view, the intention of the draftsman in indicating the courts of the jurisdiction of the proper law to be the forum for administration, was to make crystal clear that if any legal question arose in the running of the Mandalay Trust, that question should be resolved by the courts of the jurisdiction of the proper law *at the time the question arose* [emphasis added]."

- Judith Prakash JA (delivering the judgment of the majority) in *Ivanishvili*; cited in *Sullivan*

(1) Singapore law or Cyprus law?

A more contentious issue on appeal was determining the proper law and forum for administration applicable to the claims relating to the Anchor Two Trust, given how the proper law and forum for administration were changed from Singapore law and Singapore to Cyprus law and Cyprus respectively on 18 July 2023. The High Court referred to *Ivanishvili* which states that any legal question pertaining to the running of the Trust "should be resolved by the courts of the jurisdiction of the proper law *at the time the question arose* [emphasis added]".[32] The respondents submitted that the phrase "at the time the question arose" refers to when legal proceedings commenced, namely 15 August 2023.[33] Accordingly, they submit that the proper law and forum for administration should be Cyprus law and Cyprus.

The High Court disagreed with the respondent's submission and affirmed the AR's judgment that firstly, *Ivanishvili* did not stand for the proposition

that an amended proper law would apply retroactively to the duties and responsibilities of a trustee or a previous trustee before the amendment took effect; and secondly, the phrase "at the time the question arose" referred to the time where the issues first arose, regardless of whether a claim was commenced.[34] The Court further highlighted how a trustee would have conducted himself on the basis of the proper law and forum for administration that were applicable to him then; hence, it would make no sense for the trustee to question as to whether his conduct was wrongful subject to a proper law and forum for administration that was unknown to him and to be decided in the future.[35] Accordingly, the claims relating to the Anchor Two Trust were for the period from 23 May 2011 to 18 July 2023, which was before the proper law and forum changed to Cyprus law and Cyprus respectively. Thus, the Court held that the proper law and forum for administration relating to the claims was Singapore law and Singapore respectively, dismissing the respondent's appeal.

"It seems to me that to use the expression…''forum for administration'' in trust instruments is to invite misconstruction… In my view, it would be better if the expression ''exclusive jurisdiction'' were reserved for cases where it is genuinely intended to confer exclusive jurisdiction over all trust disputes on the courts of a particular country; and better if the expression ''forum for administration'' were abandoned altogether."
- Martin JA in the Court of Appeal; cited in *Jurisdiction clauses in trusts, Trusts &* Trustees, 2015

(2) Is Cyprus the more appropriate forum in any event?

In response to the respondent's alternative submission, the High Court reiterated that the present dispute fell within the scope of the Clause. Hence, there was no need to consider the doctrine of *forum non conveniens* by applying the *Spiliada* test. The Court further held that in any event, the respondents had not shown that Cyprus was the more appropriate forum as the first and second respondent were a Singapore company and Singapore national respectively.[36] Fivehill Trustees Limited, while incorporated in Cyprus, was not a necessary party to the current proceedings.

Conclusion

The phrase "forum for the administration" *per se* does not have any inherent meaning to it, nor any technical significance attached.[37] Further, the Court of Appeal has affirmed *Crociani* which states that the forum for the administration could not only refer to the court that is to enforce the trust, but also the place where the trust is administered in the sense of its affairs being organised.[38] In the latter scenario, the clause is unlikely to be a jurisdiction clause. Considering such ambiguity, some academics have argued that there are clearer ways of stating that a trust is domiciled and administered in a particular place and suggest abandoning the phrase "forum for the administration" altogether.[39] While Singapore's position on this is yet to be addressed,

cases like *Ivanishvili* and *Sullivan* reflect the two-step inquiry taken by a court when faced with such a clause – to first analyse whether it is a jurisdiction clause, and next determine the scope of the clause and whether the current dispute falls within it.

At **Infinity Legal LLC**, we assist clients on all issues relating to trust law, including advising and representation.

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[1] Rajah, E., & Robinson, A. (2015). Jurisdiction clauses in trusts. Trusts & Trustees, 21(5), 557. https://doi.org/10.1093/tandt/ttv027
[2] *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] SGCA 62 ("***Ivanishvili***").
[3] *Sir Cornelius Sean Sullivan v Hill Capital Pte Ltd and another* [2024] SGHC 157 ("***Sullivan***").
[4] *Ivanishvili* at [2]-[3].
[5] *Ivanishvili* at [50].
[6] *Ivanishvili* at [51].
[7] *Ivanishvili* at [51].
[8] *Ivanishvili* at [14].
[9] *Ivanishvili, Bidzina and others v Credit Suisse AG and another* [2019] SGHC 6.
[10] *Ivanishvili* at [52].
[11] *Crociani and others v Crociani and others* [2014] UKPC 40 ("***Crociani***").
[12] *Crociani* at [19].
[13] *Crociani* at [59].
[14] *Ivanishvili* at [76]; "What is a trust jurisdiction clause?" (2003) Jersey Law Review 232 at para 20.
[15] *Ivanishvili* at [77].
[16] *Ivanishvili* at [77].
[17] *Spiliada Maritime Corporation v Cansulex* Ltd *(The Spiliada)* [1987] AC 460.
[18] *Ivanishvili* at [81].
[19] *Sanjeev Sharma s/o Shri Sarvjeet Sharma v Surbhi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] SGHC 104 at [55].

[20] *Sanjeev Sharma s/o Shri Sarvjeet Sharma v Surbhi Ahuja d/o Sh Virendra Kumar Ahuja* [2015] SGHC 104 at [55].
[21] *Ivanishvili* at [115].
[22] *Ivanishvili* at [102].
[23] *Ivanishvili* at [115].
[24] *Sullivan* at [15].
[25] *Sullivan* at [6].
[26] *Sullivan* at [7].
[27] *Sullivan* at [24].
[28] *Sullivan* at [12].
[29] *Sullivan* at [13].
[30] *Sullivan* at [16].
[31] *Sullivan* at [16].
[32] *Ivanishvili* at [59].
[33] *Ivanishvili* at [27].
[34] *Sullivan* at [28].
[35] *Sullivan* at [29].
[36] *Sullivan* at [43].
[37] *Ivanishvili* at [53].
[38] *Crociani* at [17]; cited in *Ivanishvili (CA)* at [56].
[39] Rajah, E., & Robinson, A. (2015). Jurisdiction clauses in trusts. Trusts & Trustees, 21(5), 564. https://doi.org/10.1093/tandt/ttv027