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Trusts and jurisdiction clauses - Crociani revisited: Ivanishvili, Bidzina and Others v Credit Suisse Trust Ltd [2020] SGCA 62

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Trusts and jurisdiction clauses—Crociani revisited Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd [2020] SGCA 62

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Abstract

In the recent Singapore Court of Appeal decision of Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd, the court analysed the effect of a forum administration clause in the trust context, holding that while the clause in question was a jurisdiction clause, it was not an exclusive jurisdiction clause governing the dispute between the trustees and beneficiaries.

Introduction

What is the effect of a forum administration clause in the context of a trust? Is it a jurisdiction clause, and if so, what kinds of disputes does it apply to? In Crociani, the Privy Council held that a forum administration clause was not a jurisdiction clause. And even if it was a jurisdiction clause, it would not be accorded the same weight as one found in a contract. This issue was revisited in Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd ("Ivanishvili").[1] The Singapore Court of Appeal held that the forum administration clause in question was a jurisdiction clause, however, it did not apply to disputes between the trustees and beneficiaries.

Facts

The facts are as follows. The first appellant, former prime minister of Georgia, Bidzina Ivanishvili, had settled part of his personal wealth on a discretionary trust domiciled in Singapore (the "Mandalay Trust"). Assets of the Mandalay Trust were managed and invested by the Geneva branch of Credit Suisse AG (the "Bank"). The respondent was the Trustee, Credit Suisse Trust Ltd. At the end of 2015, the appellants discovered that the Mandalay Trust had suffered enormous losses, and alleged that these losses had been hidden from them. Mr Lescaudron, one of the Bank's employees who managed the Mandalay Trust at the time, was convicted in Switzerland on charges of embezzlement, misappropriation, and forgery.

Subsequently, the appellants sued both the Bank and the Trustee in Singapore, seeking to make both liable for losses sustained by the Mandalay Trust. The Bank and Trustee applied to stay the suit. Their stay application was granted. The High Court rejected the appellant's appeals against the decision, reasoning that while forum administration clauses such as the one in the present case (cl 2(a)) were relevant for some kinds of disputes arising out of the trust, it did not serve as an exclusive jurisdiction clause for all disputes relating to the trust. Here, cl 2(a) could not bind the Bank because the allegations went beyond the Mandalay Trust.[2] Subsequently, on appeal, the appellants decided to proceed only against the Trustee, applying to amend their statement of claim and dropping their suit

[1] 2020] SGCA 62 ("Ivanishvili").
[2] Ibid, at [21].

against the Bank. Two issues, therefore, arose before the Court for consideration: a) whether the amendment of the statement of claim should be allowed and b) whether the suit should be stayed. For the purposes of this note, we focus on the second issue, viz, the court's discussion and ruling on the forum administration clause.

The scope and effect of cl 2(a)

Whether cl 2 could be construed as an exclusive jurisdiction clause was one of the key issues on appeal.[3] If cl 2 was a jurisdiction clause that governed the dispute at hand, the Trustee had to show strong cause,[4] otherwise, all that the Trustee needed to show was that there is a more appropriate forum, applying the Spiliada test.[5]

The Court of Appeal held that cl 2 was a jurisdiction clause.[6] The present case differed from Crociani because cl 2(a) referred the Singapore Courts as being the forum for administration whereas, in Crociani, the clause merely referred to the country as being the forum for administration. The court's finding, in this case, was fortified by cl 2(b) which provided that when the governing law changed, the relevant court would also change to the courts of the jurisdiction of the proper law.[7] This indicated that the draftsman intended that any legal question that arose in the running of the Mandalay Trust should be resolved by the courts of the jurisdiction of the proper law because these courts would be best placed to interpret the laws of that jurisdiction as applied to affairs of a trust governed by those laws.

However, despite finding that cl 2 was a jurisdiction clause, the court held that it was not an exclusive jurisdiction clause governing the settlement of disputes between trustees and beneficiaries.[8] Three reasons were given.

First, trust deeds such as the present one outlined the responsibilities and rights of the trustee for the duration of its management.[9] Given that the trustee usually drafts the trust deed, specifying terms on which it was willing to undertake onerous duties qua trustee, care would be taken to specify the law under which those obligations are to be discharged. In selecting the system of law, the trustee is concerned with the running of the trust rather than potential disputes with beneficiaries over future breaches of trust.

Second, the trust deed differs from a contract. There is little negotiation between parties unlike pre-contractual discussions. A trust deed is a unilateral undertaking by a trustee. Generally, beneficiaries have little say in setting up the trust.[10]

Third, the proper law of the Mandalay Trust could change with a change of trustee.[11] In order to obtain the services of the subsequent trustee which may be incorporated in a different jurisdiction, the proper law of the trust would have to change. This reinforced the fact that in specifying the courts of Singapore as the forum for administration, the drafters meant to designate the Singapore courts as supervisory courts for general administration, not for the settlement of contentious disputes.

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[3] The other being whether there was evidence that was important for the Trustee's defence which would be available in proceedings in Switzerland.
[4] See Donohue v Armco Inc [2001] UKHL 64; Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd [2018] 2 SLR 1271 (CA).
[5] See Spiliada Maritime Corp v Cansulex [1987] AC 460.
[6] Ivanishvili, at [60].
[7] Ibid, at [59].
[8] Ibid, at [76].
[9] Ibid, at [77].
[10] Ibid, at [78].
[11] Ibid, at [79].

Therefore, given that cl 2 was not an exclusive jurisdiction clause covering contentious disputes between the trustee and beneficiaries, the court proceeded to apply the Spiliada test.

Application of Spiliada

Applying the Spiliada test, the court concluded that in totality, the factors, viz, availability of evidence, shape of litigation, governing law and risk of overlapping proceedings, pointed to Singapore as the more appropriate forum. There were also no further circumstances which indicated that a stay should be allowed for reasons of justice. The sole dissent from Chao Hick Tin SJ related only to the application of the Spiliada test. Chao SJ opined that on an overall assessment of the facts, the action had a greater connection with Switzerland than Singapore.[12] While the claim in Singapore only proceeded against the Trustee, events that occurred at the Bank in Geneva also had to be considered, and to that end, most of the people involved, including documentary evidence were located there. The only connection with Singapore, in Chao SJ's opinion, was the governing law of the trust.[13]

Observations

One might observe that the court's judgment rested on the assumption that cl 2 was binding on the beneficiary. However, the facts of Ivanishvili are somewhat unique. In a typical situation, the beneficiary would seek to sue in the jurisdiction in which they are resident. This is likely to be a different one from where the trust is domiciled.[14] However, in this case, it was the beneficiary who brought the suit in the very place that the trust was domiciled. So perhaps in this case, whether cl 2 was binding on the beneficiary was a non-starter. In that regard, Ivanishvili does not provide clarity as to whether a dispute resolution clause in a trust instrument is binding on a beneficiary.

As to the ease of resisting an exclusive jurisdiction clause in a trust deed, Ivanishvili also seems to represent a marked departure from Crociani. The court in Crociani opined that whilst a trustee was prima facie entitled to enforce an exclusive jurisdiction clause in a trust deed, a beneficiary would find it easier to resist the enforcement of the clause compared to parties in a contractual scenario.[15] However, in the present case, the manner in which the court framed the substantive appeal suggested that had it found that cl 2 was an exclusive jurisdiction clause, the strong cause test would apply.[16] Given that there was no discussion as to whether the strong cause test should apply in the context of a trust deed, this suggests that resisting the enforcement of the clause in the context of a trust deed would be no easier than it was in a contractual scenario.

However, Ivanishvili affirms observations made elsewhere that unless the clause specifically refers to the courts of a particular country, it will be difficult to argue that a forum for administration clause is a jurisdiction clause.[17] The fact that cl 2(a) did make specific reference to the Singapore courts as being the forum for the administration of the trust was sufficient for it to be construed as a jurisdiction clause.[18] Ivanishvili further affirms the view that even if the clause does refer to the courts of a particular country, it has no application to contentious disputes between trustees and beneficiaries.[19]

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[12] Ibid, at [154].
[13] Ibid.
[14] Adam Hofri-Winogradow, "Trust jurisdiction clauses: their proper ambit" (2017) 13(3) Journal of Private International Law 519, 522.
[15] Crociani v Crociani [2014] UKPC 40 at [37].
[16] Ivanishvili, at [49]
[17] RY Tan, "Jurisdiction Clauses in Trust Instruments" (2015) LMCLQ 278, 280.
[18] Ivanishvili, at [50] and [60].
[19] RY Tan, "Jurisdiction Clauses in Trust Instruments" (2015) LMCLQ 278, 280; Ivanishvili at [76]–[80].

In the present case, the court's reasoning suggests that absent clear language providing that the jurisdiction clause in the trust deed extends to disputes, and evidence of the beneficiary's involvement in the jurisdiction clause,[20] it may be difficult to argue that this is indeed the case. This is because the court reasoned that the trustee is usually the one drafting the trust deed, all the more so in the case of a professionally managed trust.[21] In that regard, it is the trustee's intentions behind drafting the jurisdiction clause that takes centre stage in the analysis of its scope and the inference is that given the onerous duties of a trustee, the jurisdiction clause would be drafted with a view towards administration of the trust, not the settlement of contentious disputes.

Conclusion

While Ivanishvili clarifies how a jurisdiction clause in the context of a trust deed may be drafted and suggests how the scope of such a clause can be extended to contentious disputes between trustees and beneficiaries, some questions remained answered. Pertinently, questions of whether such clauses are binding on trustees and whether the strong cause test applies, sans modifications in the trust context still await clarification.

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Notes

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[20] Ivanishvili, at [77]. The court noted that Ivanishvili had little or no involvement in the selection of Singapore as the original domicile for the Mandalay Trust.
[21] Ivanishvili, at [77].