Case: Akers & Ors (as joint official liquidators of Saad Investments Company Limited) v Samba Financial Group, [2014] EWCA Civ 1516, CA, 4 December 2014

Synopsis: The effect of art 4 of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to apply the lex situs only to acts by virtue of which assets are transferred to the trustee, not to the trust itself or its validity and effect. It was not appropriate on an interlocutory application to stay proceedings, in the absence of full expert and other evidence, for the court to determine the law applicable to a trust.

Topics covered: Trusts; Hague Convention on Trusts; Recognition of Trusts Act 1987; interlocutory application

The Facts

The liquidators of Saad Investments Company Limited (SICL) appealed the judgment of the Chancellor (reported in technical bulletin 559) where he had stayed proceedings brought by the liquidators of SICL under s127 IA 1986 in respect of the transfer of shares in Saudi Arabian companies (which the liquidators argued were beneficially owned by SICL), to Samba. The background is set out in that technical bulletin. In short, the shares in five publicly quoted Saudi Arabian companies had been held by and registered in the name of Mr A, who had entered into six declarations of trust in favour of SICL. The Chancellor decided that each of the relevant trusts was governed by either Saudi Arabian law or Bahraini law, neither of which will enforce foreign laws or recognise any division of the legal and beneficial interests in shares. He held that the proceedings should be stayed on the grounds that the courts of Saudi Arabia were clearly and distinctly a more appropriate forum. The effect of that decision was to bring an end to these proceedings and to any future challenge to the validity of the transfer that lay at the heart of these proceedings.

The Decision

The CA allowed the liquidators’ appeal and lifted the stay on the continuation of the English proceedings.

The argument before the CA was “markedly different” from that before the Chancellor and the focus on appeal was on the meaning and effect of art 4 of the Hague Convention on the Law Applicable to Trusts and on their Recognition (given statutory effect in the UK by the Recognition of Trusts Act 1987) (the Convention).

(a) Art 4

Art 4 of the Convention provides that the Convention “does not apply to preliminary issues relating to the validity of ...acts by virtue of which assets are transferred to the trustee”. The questions were (i) at what stage does the Convention “kick in”, and (ii) whether art 4
excluded from the scope of the Convention the purported transfers of the beneficial interest from Mr A to SICL. Such exclusion would result in applying usual conflict rules instead of the Convention, hence applying Saudi Arabian law as the lex situs of the shares and preventing SICL from obtaining any proprietary interest in the shares under the declarations of trust. The liquidators argued that art 4 was only concerned with the capacity of a settlor to alienate property by transferring assets to the trustee. Samba argued that art 4, and hence the lex situs, extended to cover the validity of the declaration of the trust itself.

In the Scottish case of Rangers Football Club (technical bulletin 409), Lord Hodge said that “...[the Convention] does not have the effect of making the law chosen by the settlor the governing law of the steps needed to create the trust. Were it otherwise, the results would be startling as a settlor would be able to alienate property which he could not dispose of under the lex situs...” The CA considered at some length academic commentary on this dictum and on the scope of art 4. In the CA’s view, art 4 should be construed as “meaning what [it says], namely that the article is concerned with “preliminary issues”...relating to acts by virtue of which “assets are transferred to the trustee”...Adopting the most purposive possible construction, one is forced to the conclusion that the line is to be drawn once the assets have been transferred to the trustee...Once it is clear that the trusts property can be alienated in some form according to the lex situs, that law cannot govern the trust or its validity or effects. All that must be a matter for the law identified by Chapter II of the Convention” [50-51]

Applying that conclusion to the present case, the declarations of trust were not excluded from the scope of the Convention by art 4. Whilst in the present case it was not possible under Saudi Arabian law to divide the equitable and legal interests in the shares, the declarations of trust might give SICL rights under the trust. That was a matter to be determined by the law of the trust, and would have to be worked out at the next stage of the litigation. Assuming that, as the liquidators contended, the governing law of the trusts was Cayman Islands law, that law would govern the capacity of Mr A to alienate an interest in the shares by way of declaration of trust and the transfer of the beneficial interest to SICL under those declarations.

(b) Other provisions of the Convention and forming a view on a stay application?

Arts 6 and 7 of the Convention make provision for the determination of the law applicable to a trust, which, under art 8, then governs its validity, construction, effect and administration. At first instance, it was under art 7 that the judge had determined that the trusts were governed by Saudi Arabian law (even though the latter did not recognise trusts). The CA did not agree that the exercise under arts 6 and 7 would automatically result in the Saudi Arabian law applying to the declarations of trust. It was arguable that Cayman law applied, at least to the later transactions. But in any event, that could not be determined in the absence of full evidence and cross-examination as to the circumstances in which the transactions came about.

Art 15 provides that the Convention does not prevent the application of mandatory provisions of the law designated by the conflicts rules of the forum, relating amongst others to “the transfer of title to property...” (an example given by the CA being any formal requirements for the conveyancing of real property: the law of the trust could not be used to say that such formalities did not need to be complied with in order to transfer property in a country with such mandatory rules). Samba argued that certain mandatory rules under
Saudi Arabian law were applicable under art 15, including the rule that foreigners cannot own shares in Saudi Arabia (with fronting arrangements being illegal). The problem for the CA was that there had been no expert evidence before the Chancellor as to whether any of these rules were in fact mandatory. Like the issue of the law applicable to the trusts under arts 6 and 7, it was not satisfactory on a stay or summary judgment application to determine such questions.

**Comment**

As noted in the comment to bulletin 559 on the first instance decision, it was unusual for the judge to have determined the substantive issue of the governing law of the trusts on a stay application. The CA has confirmed that such approach was not correct.

On the wider issue, as the CA noted, the case raises important questions as to the law applicable to, and the validity and effect of trusts of shares registered in civil countries whose laws do not themselves recognise either the trust concept or the division of a legal and beneficial interest. It remains to be seen how the litigation will progress, but any subsequent judgment on the substantive issues will be of interest to those involved in advising in relation to cross-border trusts, whether of shares or other assets.