

Trusts (Recognition) Act 1989

Principal Act

Act. No. 1989-16

Commencement (LN.1989/066)

1.9.1989

Assent

10.8.1989

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement.
2. The Crown to be bound.
3. Application of Convention.

SCHEDULE

CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR
RECOGNITION.

AN ACT TO MAKE THE LAW OF GIBRALTAR RELATING TO TRUSTS ACCORD WITH THE PROVISIONS OF THE CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND THEIR RECOGNITION.

Short title and commencement.

1. This Act may be cited as the Trusts (Recognition) Act 1989 and shall come into operation on such day as the Governor may by notice published in the Gazette appoint.

The Crown to be bound.

2. This Act shall bind the Crown.

Application of Convention.

3.(1) The provisions of the Convention on the Law applicable to trusts and on their Recognition agreed at The Hague on 20 October 1984, set out in the Schedule hereto, shall have the force of law in Gibraltar.

(2) Those provisions shall, so far as applicable, have effect not only in relation to the trusts described in Articles 2 and 3 of the Convention but also in relation to any other trusts of property arising under the law of Gibraltar or by virtue of a judicial decision whether in Gibraltar or elsewhere.

(3) In accordance with Articles 15 and 16 such provisions of the law as are therein mentioned shall, to the extent therein specified, apply to the exclusion of the other provisions of the Convention.

(4) In Article 17 the reference to a State includes a reference to any country or territory (whether or not a party to the Convention) which has its own system of law.

(5) Article 22 shall not be construed as affecting the law to be applied in relation to anything done or omitted before the coming into operation of this Act.

SCHEDULE.

Section 3

CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR
RECOGNITION.

CHAPTER I-SCOPE.

Article 1.

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2.

For the purposes of this Convention, the term "trust" refers to the legal relationship created-inter vivos or on death-by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics-

- (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3.

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4.

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Article 5.

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

CHAPTER II-APPLICABLE LAW.

Article 6.

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 7.

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to-

- (a) the place of administration of the trust designated by the settlor;
- (b) the situs of the assets of the trust;
- (c) the place of residence or business of the trustee;
- (d) the objects of the trust and the places where they are to be fulfilled.

Article 8.

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects and the administration of the trust.

In particular that law shall govern-

- (a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
- (b) the rights and duties of trustees among themselves;
- (c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;

- (d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
- (e) the powers of investment of trustees;
- (f) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust;
- (g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- (h) the variation or termination of the trust;
- (i) the distribution of the trust assets;
- (j) the duty of trustees to account for their administration.

Article 9.

In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law.

Article 10.

The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of the trust may be replaced by another law.

CHAPTER III-RECOGNITION.

Article 11.

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust.

Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

In so far as the law applicable to the trust requires or provides, such recognition shall imply in particular-

- (a) that personal creditors of the trustee shall have no recourse against the trust assets;
- (b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;

- (c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death;
- (d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

Article 12.

Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do in his capacity as trustee or in such other way that the existence of the trust is disclosed.

Article 14.

The Convention shall not prevent the application of rules of law more favourable to the recognition of trusts.

CHAP'TER IV-GENERAL CLAUSES.

Article 15.

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters—

- (a) the protection of minors and incapable parties;
- (b) the personal and proprietary effects of marriage;
- (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- (d) the transfer of title to property and security interests in property;
- (e) the protection of creditors in matters of insolvency;
- (f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

Article 16.

The Convention does not prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws.

Article 17.

In the Convention the word 'law' means the rules of law in force in a State other than its rules of conflict of laws.

Article 18.

The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy.

Article 22.

The Convention applies to trusts regardless of the date on which they were created.