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Collas Crill explains... Changing the proper law of a Guernsey trust

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This is part of a series of guides in which we examine areas of law that frequently arise in practice. Further guides will be released weekly; click here to subscribe to receive Collas Crill news and insights by email.

This week's guide covers the proper law of a trust – what it is, how it can be changed and what to consider when changing it.

What is the proper law of a trust?

In simple terms, the proper law is the law of a jurisdiction that governs the trust. It is sometimes referred to as the "governing law". All questions arising in relation to the trust would be determined in accordance with the selected proper law.

Section 3(1)(a) of The Trusts (Guernsey) Law, 2007 (**Trust Law**) states that the "*proper law*" of a trust is the law chosen by the settlor to be the proper law, the choice being expressed or implied in the terms of the trust. This note only discusses express proper law provisions. Where there is no express election of proper law in a trust instrument, the test in section 3(1)(b) of the Trust Law can be applied to determine the proper law.

Trust instruments prepared by Guernsey trust practitioners, that are intended to be governed by Guernsey law, should always contain an express declaration that the trust is governed by Guernsey law to ensure that the trust is therefore a "*Guernsey trust*". This express provision creates certainty and prevents any questions as to which law should govern the trust.

A Guernsey trust will be subject to Guernsey law. Section 14 of the Trust Law (often referred to as the 'firewall' provisions) states that all questions arising in relation to Guernsey trusts or dispositions of property to or upon a Guernsey trust are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

Can the proper law of a Guernsey trust be changed?

The Trust Law confirms that the terms of a trust can provide for the proper law to be changed from the law of Guernsey to the law of any other jurisdiction.[1]

In practice trust instruments should, as well as confirming the proper law of the trust, contain an express provision that will allow the proper law of the trust to be changed. This should confirm who has the power to

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change the proper law (for example, the trustee or the settlor) and may impose conditions or requirements for that power to be exercised.

What if there is no express power to change the proper law in the trust instrument? The Trust Law provides[2] for the variation of trusts by the Royal Court on the application of certain persons on behalf of minors etc. Such variations can include a change of proper law of the trust. Alternatively, if the trust instrument itself contains an express power of amendment, this may be used to amend the trust instrument to add in an express provision to permit changing the proper law.

Section 51(3) of the Trust Law clarifies that a change in the proper law of a trust does not affect the legality or validity of, or render any person liable in respect of, anything done before the change.

Considerations relating to changing the proper law

There are a number of points to consider when changing the proper law of a trust. We have listed below a few of the main considerations:

Power holder consents – if the trust in question is a reserved powers trust or has a protector, there may be an obligation to obtain consent from a third party (eg settlor or protector) before the trustee can exercise the power to change the proper law.

Continued validity and enforceability – the power to change the proper law of a trust will normally always require that the intended new proper law and jurisdiction of the trust should continue to recognise the validity of the trust and that the trust would continue to be enforceable once governed by that new law. This type of provision would prevent a trust from being 'moved' to a non-trust jurisdiction (such as Brazil).

Consequential amendments – most provisions that allow for the proper law to be changed also allow consequential amendments to be made to the trust instrument when the power to change the proper law is being exercised. This power to make consequential amendments is normally only exercisable in conjunction with the power to change the proper law and usually operates to permit alterations or additions to the trusts, powers and provisions of a trust as are considered to be 'necessary or desirable' to ensure that the trust shall continue to be valid and effective. This means that new and more beneficial powers or protections for the trustee (for example) cannot be inserted into the provisions of the trust using the power to make consequential amendments. The amendments can only be made to ensure continued validity and enforceability of the trust (eg to shorten the trust period should the rule against perpetuities apply in the 'new' jurisdiction - see below).

The power to make consequential amendments is also useful to remove statutory references to the old proper law of the trust and to replace them with references to the new jurisdiction's equivalent statutory provisions (for example, removing references to "*The Trusts (Guernsey) Law, 2007*" and replacing them with references to the "*Trusts (Jersey) Law, 1984*").

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Trust periods – post-2007, Guernsey law allows trusts to be perpetual (ie there is no limit on the period for which a trust may continue to be valid and enforceable and no rule against perpetuities applies)[3]. However, some jurisdictions have a maximum amount of time that a trust can exist for, for example Cayman law has a statutory period of 150 years for a 'regular' trust [4]. Therefore, if a trustee wishes to change the proper law of a Guernsey trust to that of the laws of the Cayman Islands, the trust period of the trust will need to be adjusted in order to comply with the rule against perpetuities in Cayman law.

Tax position – the trustee (or other key persons involved in changing the proper law) should seek tax advice prior to changing the proper law to make sure the change does not adversely impact the trust or the beneficiary(ies) position under it. An example would be changing the proper law from Guernsey to England and Wales (and "on shoring" the trust), which might have significant consequences.

Practical drafting considerations

As a change to the proper law of a trust requires expertise in two jurisdictions (the 'outgoing' jurisdiction and the 'incoming' jurisdiction), normally two sets of lawyers will be required to prepare an instrument to action a change to the proper law.

The instrument effecting the change of proper law would be governed by the existing proper law. For example, if a Guernsey law trust is changing its proper law to that of Jersey, the instrument changing the proper law would be governed by Guernsey law (as the proper law does not change until the instrument is executed), so would be drafted by Guernsey counsel. Jersey counsel would be enlisted to review the Guernsey law trust instrument for compliance with Jersey law and set out any consequential amendments required for the trust to be valid and effective once it lands in Jersey.

Therefore, where possible, it is helpful (and often more efficient and cost effective) to use a firm of lawyers that has teams in both jurisdictions.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

[1] Section 51(1) Trusts (Guernsey) Law, 2007

[2] Section 57 Trusts (Guernsey) Law, 2007

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[3] Section 16 Trusts (Guernsey) Law, 2007

[4] Cayman STAR trusts (a special statutory non-chartable purpose trust unique to the Cayman Islands) are not subject to any rule against perpetuities and can exist indefinitely.

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COLLAS CRILL

For more information please contact:



Cerisse Fisher

Group Partner*^ | Guernsey

t: +44 (0) 1481 734882 | **e:** cerisse.fisher@collascrill.com

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