

3. A HAPPY MEDIUM?



British Virgin Islands- Trustee (Amendment) Act, 2003 ("11/2003").

83A. ...

(7) The formal and essential validity of a disposition, not being a testamentary disposition, of immovable property or tangible movable property, and the capacity to make the disposition, shall be determined according to the law of the State in which the property is situated at the time of the disposition.

(8) The formal and essential validity of a disposition, not being a testamentary disposition, of intangible movable property, and the capacity to make the disposition, shall be determined in accordance with the First Schedule, or, in the case of intangible movable property not provided for in the First Schedule, in accordance with the law under which the property came into existence.

(9) The capacity to subject property to a trust, not being a testamentary trust, as distinct from the capacity to dispose of that property, shall be determined in accordance with the law governing the essential validity of the trust.

*(Orthodox)
application
of lex situs
for transfers
on trust and
capacity to
effect such
transfers.*

*Applies lex
situs to
intangibles,
but certainty
demanded
clarity of
definition: see
First Schedule.*

*Legislation
identifies 2
types of
capacity:
1) Capacity to
transfer legal
ownership of
property;
2) Capacity to
create a trust,
which respects
party autonomy*

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Settlor need only satisfy trust – specific requirements – so chosen law governs.

(10) Where a person declares a trust of his own property, there shall be no requirement for compliance with the rules on formal or essential validity or capacity applicable to a disposition of that property or of any interest in it.

Largely excludes renvoi.

First Schedule.

(11) Where, under subsections (6) to (10) and the First Schedule, an issue falls to be determined by the law of the Territory, the choice of law rules of the Territory shall designate the internal law of the Territory to determine the issue.

First Schedule.

(12) Subject to subsections (6) to (11) and the First Schedule, all questions arising in regard to the validity, construction, effect or administration, whether the administration is conducted in the Territory or elsewhere, of a trust including

Makes express reference to HTC, and promotes clarity on scope of chosen law.

- (a) questions relating to any of the following matters, being matters specified in Article 8 of the Hague Trusts Convention
 - (i) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
 - (ii) the rights and duties of trustees among themselves;
 - (iii) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
 - (iv) the powers of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
 - (v) the powers of investment of trustees;

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- (vi) restrictions upon the duration of the trust, and upon the power to accumulate, the income of the trust;
- (vii) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
- (viii) the variation or termination of the trust;
- (ix) the distribution of trust assets;
- (x) the duty of trustees to account for their administration; and
- (b) to the extent that they do not fall under paragraph

questions as to

- (i) the fiduciary or non-fiduciary powers, obligations or duties of the trustees or to the liabilities or rights of the trustees;
- (ii) the existence and extent of powers conferred or retained, including powers to vary or revoke the trust and powers of appointment, and questions as to the validity of any exercise of any such power,

are to be determined by the proper law of the trust or, where there are different proper laws for different aspects of the trust, the proper law applicable to the area in which the question falls.

(13) Subject to any express provision to the contrary in the trust or disposition, no Virgin Islands trust, and no disposition of property to be held upon the trusts of such a

Express provision for fiduciary duties.

Protects British Virgin Islands from attack by foreign law.

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trust, is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor in relation to the trust or disposition to be questioned, nor is the trustee or any beneficiary or other person to be subjected to any liability or deprived of any right, by reason that

As in Jersey.

- (a) the law of any foreign jurisdiction prohibits or does not recognise the concept of a trust, or
- (b) the Virgin Islands trust or the disposition
 - (i) avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights; or
 - (ii) contravenes any rule of foreign law or any foreign judicial or administrative order or arbitration order or action intended to recognise, protect, enforce or give effect to such a right, claim or interest.

Detailed rules to protect from claims of forced heirs.

(14) Heirship rights conferred by foreign law in relation to the property of a living person shall be disregarded when determining rights of ownership of property subject to, or claimed to be subject to, a Virgin Islands trust.

(15) Heirship rights conferred on persons by foreign law shall not be taken to constitute those persons creditors for the purposes of section 81 of the Conveyancing and Law of Property Ordinance, nor to constitute those persons “creditors or others” for the purposes of the Act against Fraudulent Deeds, Gifts, Alienations, etc. to the extent, if any,

Cap. 200.

13 Eliz 1, c.5.

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that that Act has any application in the Territory.

(16) Subject to subsection (17), the law designated as applicable to succession by virtue of the Territory's choice of law rules shall apply to a Virgin Islands trust, not being a testamentary trust, only to the extent that it does not contain rules conferring any right, claim or interest upon any person by reason of a personal relationship to the settlor or by way of heirship rights.

(17) Subsection (16) shall not apply where the law so designated is that of the Territory.

(18) In the case of a conflict between any of the provisions of subsections (13) to (17) and any of the provisions of subsections (6) to (11) and the First Schedule, the provisions of subsections (13) to (17) shall prevail.

(19) To the extent that it is inconsistent with subsections (13) to (18), a foreign judgment shall not be recognised or enforced or give rise to any estoppel, and both its recognition and its enforcement shall be regarded as contrary to the public policy of the Territory.

(20) Subsections (6) to (12) apply only to trusts created on or after the date on which this section comes into force.

Provides for non – recognition of judgments, but only where foreign court has invoked forced heirship rules or does not recognise the trust concept. Introduces express public policy justification.

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11/2003.

FIRST SCHEDULE.

(Section 83A)

Type of Intangible property	Law to determine questions of essential and formal validity and capacity
1. Shares in a body corporate.	The law of the State of incorporation (and in the case of a corporate body whose place of incorporation has changed, the law of the State of incorporation at the time of the disposition)
2. Rights of all descriptions arising from a contract (not being rights attaching to shares in a body corporate).	The law governing the essential validity of the contract.
This category includes, in particular	
(a) rights to subsisting contractual debts;	
(b) rights to payments under a contract that might fall due in the future;	
(c) rights, subsisting or future, under policies of insurance or assurance.	
3. Rights to non-contractual debts.	The law under which the debt was created.
4. Interests in trusts and other equitable interests.	(A) As regards disposability, the law governing the essential validity of the trust or interest. (B) As regards the disposition itself, the law of the State in which the equitable interest is situated.
5. Patents, trademarks, designs, and similar rights, required to be deposited or registered.	The law of the State in which the deposit or registration has been applied for, or has taken place or is under the terms of an international convention deemed to have taken place.

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| 6. | Intellectual property falling within item 5. | not | The law under which the property came into existence. |
| 7. | Claims in tort. | | The law of the State in which the tort occurred. |