CONFLICT OF LAWS AND TRUSTS OF MOVABLES IN CANADA: DETERMINING THE APPLICABLE LAW FOR ESSENTIAL VALIDITY AND ADMINISTRATION

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TABLE OF CONTENTS

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1. Introduction

(1) The Role of Conflict of Laws

The role of conflict of laws has been described as follows:

> The choice of the system of law to be applied to cases or disputes that come before the courts for decision when they contain one or more legally relevant foreign elements. This is called choice of law. The principles and rules of choice of law enable the court to choose the law of one of the legal units, foreign or domestic, connected with the case and apply it to the relevant issues. In other words, choice of law rules determines the extent of the application of different laws, be it the law of the court where the case is pending or some other.[1]

Because in Canada each of the provinces and territories is itself a separate legal unit, each has its own rules to address conflict of laws issues. Consequently, any element external to a province, even if it is another province, would be considered "foreign" in terms of engaging

1. J.-G. Castel, *Conflict of Laws: Cases, Notes and Materials*, 6th ed. (Toronto: Butterworths, 1987), Chapter 1-3 E, as quoted by Haley J. in *Granot v. Hersen* (1998), 21 E.T.R. (2d) 153 at para. 30 (Ont. Ct. (Gen. Div.)), vard 173 D.L.R. (4th) 227, 43 O.R. (3d) 421, 26 E.T.R. (2d) 221 (C.A.).

conflict of laws rules and principles. These rules and principles, depending on the nature of the matter being addressed, will be found either in the province's legislation or in its jurisprudence.

Conflict of laws principles and rules will therefore apply in a trust situation where there is any "foreign" element associated with the trust, be it linked to another province or to an international jurisdiction. The conflict rule will give the trustee the correct law (or system of law) to apply to a particular trust issue being considered. Failure to apply the correct law may lead the trustee to commit a breach of trust if, for example, an action or omission is so considered under the actual law governing the matter. The issues that may arise requiring resolution could relate to different aspects of a trust including, for example, its essential validity, construction or administration. The rules that apply may result from legislation in those jurisdictions where a statute addresses the particular conflict or, in the absence of same, from common law principles.

This article will review some of the Canadian conflict of laws rules relating to trusts of movables. While it will concentrate on trusts of movables, brief reference to trusts of immovables will be made to illustrate the potential distinction in terms of applicable conflict of laws rules. Although there are a number of factors or aspects that play a role in the establishment and operation of a trust, this article will focus on the conflict of laws rules relating to essential validity and administration for trusts of movables. It will become evident that, despite certain legislative enactments, the common law may continue to play a role in most Canadian provinces in supplying choice of law rules in certain situations. Also examined will be whether the uncertainty created by the law can be mitigated or resolved by drafting provisions within the trust instrument. For the purposes of the article, it will be assumed that certain "preliminary"[2] or "framework" aspects

2. "Preliminary" aspects is meant here to refer to those matters or issues involving the necessary framework to create the trust in an external sense. These can include issues involving the transfer of property to the trust (including, for example, capacity of a testator to create a will or of a settlor to transfer property to a trust, as well as constraints — such as "forced heirship" rules — on transferring property) and issues involving the formalities for creating the vehicle evidencing the trust (*i.e.*, "formal validity"), such as witnessing requirements on wills. Another way of looking at some of these preliminary issues is by using an analogy described by D. Hayton when he refers to the "rocket" and the "rocket launcher" (see D. Hayton, "International Recognition of Trusts", in *The International Trust*, ed. by J. Glasson (Bristol: Jordan Publishing Ltd., 2002), at pp. 126-7). Using this analogy, one can consider the preliminary issues as involving the "launcher" (*i.e.*, the validity of the will or trust instrument itself) from which the trust "rockets" forth into being. The validity of the trust itself

of the trust are not in contention, so that reference to validity, unless otherwise noted, refers to essential validity or the validity of the substantive provisions of the trust itself, rather than to formal validity or to the validity of the trust instrument. Administration refers to matters involving the management of the trust, including matters such as the powers and duties of trustees, permissible trust investments and the liability of trustees for breach of trust.[3]

While it is beyond the scope of this article to discuss the conflict of laws rules around such matters as formal validity and capacity, or the construction or interpretation of a trust, the reader who is interested can refer to other sources for a discussion of these rules.[4]

(2) The Canadian Problem

The law relating to conflict rules for trusts is complex and generally unsettled.[5] There is relatively little Canadian jurisprudence on the matter, so reliance for certain propositions requires an examination of judicial decisions in other jurisdictions. However, in doing so, one must be careful in assessing whether that jurisprudence may be influenced by legislative developments that specifically address conflict of laws rules for trusts. As will be described in greater detail later in this article, while a settlor or testator generally ought to be able to select a jurisdiction's internal law — that is, excluding its conflict of laws rules — to govern a trust of movables, where such a provision does not exist, or where other trust types are involved, identifying the relevant law may become more problematic for trustees in Canada. Absent

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comes under the category of "essential validity" and is described in more detail later in the article. This analogy is also described by A.E. von Overbeck, "Explanatory Report on the 1985 Hague Trusts Convention" (HCCH Publications: 1985), at para. 53, found on the Hague Conference's website at http://hcch.e-vision.nl/index_en.php?act=text.display&tid=1. For further discussion, see J. Harris, "Launching the Rocket — Capacity and the Creation of Inter Vivos Transnational Trusts", in Glasson, *ibid*., Chapter 2.

3. D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), at pp. 1124-5.
4. For example, J.-G. Castel and J. Walker, *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2002), Chapter 28, "Trusts". This article will address conflict of laws and administration of trusts of movables. To determine the law governing matters of construction in relation to administration, as opposed to other matters, Castel and Walker, *ibid*., at p. 28.4, indicate that, where there is no evidence of intention by the settlor or testator to designate a law, the trust instrument should be construed "in accordance with the rules of construction of the place whose internal law governs the administration of the trust".
5. See Castel and Walker, *ibid*., Chapter 28, for a general overview of conflict of laws rules in the context of trusts.

legislation or evidence of intention, it appears courts in Canada must first characterize or identify the issue requiring resolution, in order to determine the correct conflict rule that will lead to the correct system of law to be applied. This requires a determination, not always easily made, as to whether an issue is one of administration, essential validity or something else. Also, it may be necessary to distinguish between *inter vivos* and testamentary trusts and between trusts of movables and immovables. This makes it difficult for the Canadian trustee to know, with any degree of certainty, whether he or she has applied the correct legal regime to a particular matter.

Where a corporate executor and trustee is appointed in a will, the difficulty is compounded. Aspects of the administration of the estate of the deceased relating to succession, for example, may be governed by the law of the testator's domicile at death. However, because the ongoing administration of a trust created by the will may occur in another jurisdiction (for example, where the corporate trustee has an office responsible for trust administration), the law governing that trust's administration may, depending on the rules applied, be different from the law governing aspects of the estate's administration or the trust's essential validity. This may not have been what the testator would have wanted, had he or she been able to address the issue in the will.

The problem is further complicated if one is evaluating the matter using common law or civil law principles. In fact, the concept of the trust is not well known within certain civil law jurisdictions because the trust was really an outgrowth of the English Courts of Equity or Chancery (and is now a commonly accepted concept in common law jurisdictions).[6] It may therefore be difficult to resolve conflicts issues involving trusts with certain civil law connections.[7]

Finally, the topic of conflict of laws and trusts is further muddled by the potential for *renvoi*. *Renvoi* may occur where a jurisdiction's conflict of laws rules dictates that an issue is to be governed by a foreign jurisdiction's laws and that foreign jurisdiction's laws contain conflict of laws rules that refer the matter back to the original referring jurisdiction, or perhaps even to a third jurisdiction's laws.[8] A discussion of the concept of *renvoi* is beyond the scope of this article, and the reader is referred to other sources in this regard.[9] Suffice it to say that

6. For a summary of the history and background of the concept of the trust, see E.E. Gillese, *The Law of Trusts* (Concord: Irwin Law, 1996), at pp. 6-9.
7. For a discussion of the trust in a civil law setting, see Waters, *op. cit*., footnote 3, at pp. 1089-96.
8. A. Duckworth, "Forced Heirship and the Trust", in Glasson, *op. cit*., footnote 2, at p. 165.
9. See, for example, Castel and Walker, *op. cit*., footnote 4, Chapter 5, "Renvoi", and, at p. 5.5, fn. 1, listing references that address *renvoi*.

renvoi can take a number of forms, depending on the jurisdiction and, possibly, on the issue in question. The Hague *Convention on The Law Applicable to Trusts and on Their Recognition* (July 1, 1985)[10] (the "Trusts Convention"), which will be discussed in greater detail later in this article, provides in art. 17 that the word "law" means the rules of law in force in a State, other than its rules of conflict of laws. Thus, under the Trusts Convention *renvoi* is not an issue. *Renvoi* has been criticized and has been effectively rejected in at least one Canadian common law case relating to a contract.[11] It is excluded in Quebec under the circumstances described in art. 3080 of the *Civil Code of Quebec*.[12] However, it may still play a role in some provinces in relation to conflict of laws and trusts, absent legislation or jurisprudence to the contrary. Arguably, the problems raised by *renvoi*, including the cost in time and money to litigate properly, suggest that courts in Canada may decide, as a general proposition, that a reference to a foreign law means its internal or domestic substantive law and not its conflict of laws rules.[13]

As will be described below, current English law suggests that there is only one law that, once determined, will govern most issues relating to a trust. This follows a modern trend of treating a trust as being governed by one "proper law", determined to be the law with which the trust has the closest and most real connection (see the next section, "'Proper Law' of the Trust"). However, the limited Canadian common law experience suggests that, absent evidence of intention or provincial legislation addressing choice of law for trusts, there may be more than one law governing different aspects of a trust of

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10. See the "Explanatory Report" by von Overbeck, *op. cit*., footnote 2, where the author discusses the development of the work done in respect of the Convention by the Hague Conference on Private International Law, and where, at para. 10, he explains that: "The draft Convention in its entirety was adopted unanimously during the plenary session of 19 October 1984 and the Final Act, containing the draft Convention, was signed on 20 October 1984".
11. See Castel and Walker, *op. cit*., footnote 4, at pp. 5.1-5.2, citing *Rosencrantz v. Union Contractors Ltd. and Thornton* (1960), 23 D.L.R. (2d) 473, 31 W.W.R. 597 (B.C.S.C.).
12. S.Q. 1991, c. 64.
13. In *Rosencrantz v. Union Contractors Ltd. and Thornton*, *supra*, footnote 11, Wilson J. cites as a general proposition the following from *Cheshire, Private International Law*, 4th ed., at p. 90:

    > The conclusion is that in general a reference made by an English rule for the choice of law to a foreign legal system is to the internal law, not to the private international law, of the chosen system, but that this general principle is subject to the following exceptions.

    In the circumstances, the judge determined that the exceptions did not apply to the case under consideration.

movables in certain cases. That determination may not necessarily be based on the "closest and most real connection" rule. This is especially true in considering the governing law of administration of a trust of movables. In the Ontario decision of *Branco v. Veira*,[14] the residence of the trustees was considered to be of "special significance" in determining the governing or proper law relating to the administration of the alleged trust at issue. This could be interpreted as implying that, in the absence of any choice of law evidenced by the settlor, other rules or criteria may apply to determine the relevant law(s) governing other aspects of a trust of movables. If so, this result appears to reflect some earlier English authorities that predate the current English view that one proper law generally governs all aspects of a trust.

Therefore, courts in the Canadian provinces may, in certain situations, determine that the law governing the administration of a trust of movables is different from that governing matters of essential validity or construction. Many provinces have adopted legislation to determine the appropriate choice of law where an international element exists,[15] other than British Columbia and New Brunswick,[16] however, it is doubtful that such legislation applies in the context of interprovincial trust conflicts. Consequently, unless the rules applied to international conflicts are utilized to address interprovincial trust conflicts, for most provinces and territories the Canadian common law rules may continue to apply to resolve certain domestic trust conflict of laws issues. This will be particularly true in Ontario, Nova Scotia, Nunavut and the Northwest Territories, where no legislation to deal with either domestic or international trust conflicts appears to exist. The Yukon's status in this regard will change once certain provisions contained in *An Act to Amend the Trustee Act* come into force. However, as will be noted later in this article, there are provisions in the "wills" legislation of most provinces that specifically address the rule for determining the law that governs the essential validity and effect of a will. A question remains as to whether these provisions extend so as to apply to the essential validity of testamentary trusts.

14. (1995), 8 E.T.R. (2d) 49 (Ont. Ct. (Gen. Div.)).
15. See discussion under the heading, "Scope of Trusts Convention", later in this article.
16. And the Yukon, once Part 5 (ss. 75 to 82) as set out in s. 13 of *An Act to Amend the Trustee Act*, S.Y. 2001, c. 11, comes into force, which will add Part 5 and the related ss. 75 to 82 to the newly renamed *Yukon Trusts Act* (by virtue of s. 2 of *An Act to Amend the Trustee Act*, not yet in force), thereby providing conflict of laws rules for trusts (that can apply to solely interprovincial trust conflicts).

2. "Proper Law" of the Trust

(1) General

As alluded to earlier, there is a concept in conflict of laws known as the "proper law". The modern trend[17] (as expressed by certain legislative reforms and off-shore judicial decisions) is to consider the "proper law" as being that system of law which governs the validity, interpretation (or construction), effect and administration[18] of a trust — particularly, it would seem, a trust of movables.[19] Absent any express

17. In the past, the prevailing view in the English jurisprudence was apparently to distinguish between matters of administration and matters of validity, interepretation and effect (see D. Brownbill, "Anatomy of a Trust Deed" (1994), 3:3 J. of Int'l Trust and Corporate Planning 167). This could result in matters of administration being governed by a different system of law from that of the "proper law" as generally determined. However, this view was criticized by Scott J. *in obiter* in the English case of *Chelleram v. Chelleram*, [1985] 1 Ch. 409 (hereinafter "*Chelleram (No. 1)*"). See also Hayton, *op. cit.*, footnote 2, at p. 143, and the discussion of legislative developments under the heading, "Trusts Convention and Canadian Legislation — Effect on Common Law Rules", later in this article.

18. See, for example, Brownbill, *ibid.*, at p. 167. However, see P. Matthews, *Trusts: Migration and Change of Proper Law* (London: Key Haven Publications PLC, 1997), at p. 55, para. 14.2, where the author seems to suggest that the term "proper law" may be limited to that system of law that governs only questions related to the effect of particular substantive trust dispositions (referred to as the "third aspect above" in the following quotation):

    > 14.2 The system of law which governs the third aspect above is usually called the trust's governing law or 'proper law of the trust', at all events when the trust is one of movables. As the Court of Appeal put it in *Duke of Marlborough v A-G* (No 1) [1945] Ch 78, 83, the proper law was:
    >
    > > 'the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities'
    >
    > In some circumstances, the proper law of the trust may govern other aspects of the trust . . .

    However, in para. 14.3, the author does state that before the enactment of the United Kingdom *Recognition of Trusts Act 1987* (U.K.), c. 14, the Eleventh Edition of *Dicey and Morris on Conflict of Laws*, 11th ed. (London: Sweet and Maxwell, 1987), defined the role of the proper law as:

    > "The validity, interpretation, effect *and administration* of a trust of movables are governed by its proper law, that is, in the absence of an express or implied selection of the proper law by the settlor, the system of law with which the trust has its closest and most real connection" (Rule 157 at 1072). [Emphasis added.]

19. Matthews, *ibid.*, at p. 56, notes that matters relating to the administration of a trust of immovables and the effect of the trust's substantive provisions had been indicated by at least one earlier authority as being governed by the *lex situs* which, as Matthews states: "might in some cases be governed by the proper law, but there was no binding English authority". He does suggest, however, that the term

or implied selection of applicable law by the settlor of the trust, the "proper law" is determined by identifying that system of law with which the trust has the "closest and most real connection".[20] In other words, the proper law is ascertained by answering the question: Where is the "centre of gravity" of the trust? One noted authority has written that to determine the "proper law" for a trust at common law (absent any express or implied intention), the courts will consider various relevant factors, including, for example, the location of the trustees and trust assets, the place where the trust instrument was prepared and executed, and the respective domiciles and habitual residences of the settlor and beneficiaries.[21] The place of the trust's administration could also be one of these factors.[22] This would appear to be the rule in relation to trusts of movables.

(2) English Common Law Experience

This concept of one "proper law" has roots in English common law jurisprudence. Scott J. *in obiter* in the English case of *Chelleram (No. 1)*,[23] referring to an earlier rule in *Dicey and Morris on Conflicts of Law* that has since been abandoned, suggested that there should not be different systems of laws governing different aspects of a trust. The judge stated:

> As a matter of principle, I find myself unable to accept the distinction drawn by rules 120 and 121 in *Dicey & Morris* between "validity, interpretation and effect" on the one hand and "administration" on the other hand. The rights and duties of trustees, for example, may be regarded as matters of administration but they also concern the effect of the settlement. The rights of the trustees are enjoyed as against the beneficiaries; the duties of the trustees are owed to the beneficiaries. If the rights of the

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"proper law" could reasonably be used in the context of trusts of immovables if it was understood to refer to the *lex situs*. This suggests, however, that the rule of closest and most real connection would be replaced in favour of a rule of the *lex situs* as providing the "proper law" for trusts of immovables.

20. Brownbill, *op. cit.*, footnote 17, at p. 168.
21. Hayton, *op. cit.*, footnote 2, at p. 145. The question, though, is whether this test applies to both *inter vivos* and testamentary trusts, or only to the former.
22. However, in *Chellaram v. Chelleram*, [2002] 3 All E.R. 17 (Ch. D.) (hereinafter "*Chelleram (No. 2)*"), Collins J. at pp. 49-50 expressed doubt that, in the context of that case, the fact that some of the trustees were located in London and that it was contemplated that administration would initially be in London, would have been sufficient to make English law the law with the closest connection, as other factors, including the fact that the trusts were drafted in India, pointed to Indian law as the law with which the trusts were most closely connected.
23. *Supra*, footnote 17.

> beneficiaries are to be ascertained by applying the proper law of the settlement, I do not understand how the duties of the trustees can be ascertained by applying a different law, and vice versa. In my judgment, a conclusion that the law of the place of administration of a settlement governs such matters as the rights and duties of the trustees, can only be right if that law is the proper law governing the settlement.[24]

Chelleram (No. 1) was primarily a case about whether a stay of proceedings should be granted by the English court in relation to proceedings by certain plaintiff beneficiaries requesting the removal of the defendant trustees of discretionary settlements made by two Indians. Scott J. refused the stay. The trusts in question were *inter vivos* trusts of movables, the trust property consisting of shares in Bermudan holding companies. Therefore, Scott J.'s comments may be limited to such trusts. Although the issue of the proper law of the settlements was raised, Scott J. determined that it was not necessary for him to decide whether English law or Indian law governed, finding that for a number of reasons explained in the judgment, the English court was an appropriate forum in which to continue the litigation, regardless of the appropriate law governing the trust.

Nevertheless, it is interesting to note that Scott J. indicated his initial inclination to regard the law of India as the obvious proper law of the settlements, though he became less certain as the matter progressed. He based his initial view on the fact that the beneficiaries were of an Indian family, the trustees were Indian in origin, the settlements were drawn up in India by an Indian lawyer and the settlors were Indian in origin and domiciled in India at the date of the settlement.[25] His doubts as to the appropriate governing law stemmed from a number of factors: the trust property was Bermudan; the assets were situated outside of India; and the purpose of the settlements was, apparently, in part to avoid Indian taxation and Indian exchange control regulations. Most important for Scott J. was the identity of the three original trustees, two of whom were permanently resident in England, the third also seemingly having had the closest connections with England.[26] According to Scott J.: "The inference is inescapable that the parties to the settlements contemplated that administration thereof would take place in London".[27]

One wonders how Scott J. would have ruled on the applicable governing law in relation to distinct aspects of the trust — such as

24. *Supra*, at p. 432.
25. *Supra*, at p. 425.
26. *Supra*, at p. 425.
27. *Supra*, at p. 425.

administration, on the one hand, and essential validity, on the other hand — given his refusal to accept any such distinction, the inference being that only one proper law should govern. Although he refers to authorities citing the "closest and most real connection" rule, Scott .J. does state that the parties' contemplation of an English administration seemed to him to "point strongly in favour of an English proper law".[28]

In England, the "proper law" concept is now captured in the *Recognition of Trusts Act 1987* (the "1987 Act") that in large part adopts the rules expressed in the Trusts Convention.[29] Since the Trusts Convention does not distinguish between trusts of movables and trusts of immovables, the rules propounded by it presumably apply to both. However, the 1987 Act contains a provision that prevents the Trusts Convention from affecting the law to be applied in relation to anything done or omitted before the 1987 Act came into force on August 1, 1987.[30] Nonetheless, the statutory rules are considered in England merely to reflect the existing common law position, at least with respect to trusts of movables.[31] In *Chellaram (No. 2)*[32] a decision of the English High Court of Justice, Chancery Division, Collins J. suggested that the rules prior to the legislation were in fact similar:

> The position prior to the 1987 Act, which is reflected in the judgment of Scott J in *Chellaram v. Chellaram (No 1)*, was that in the absence of an express or implied choice a trust was governed by the system of law with which it had its closest and most real connection (see *Chellaram v Chellaram* [1985] 1 All ER 1043 at 1051-1052, [1985] Ch 409 at 424-425; and cf *Duke of Marlborough v A-G (No 1)* [1945] 1 All ER 165 at 168, [1945] Ch 78 at 83 ("the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities"); *Iveagh v. IRC* [1954] 1 All ER 609 at 612, [1954] Ch 364 at 370. In *Chellaram v. Chellaram (No 1)* Scott J expressed the view that the rights and duties of the trustees were governed by the proper law of the settlement (and not by the law of the place of administration if different); and that if the court had personal jurisdiction over the trustees

28. *Supra*, at p. 425.
29. Discussed in greater detail under the heading, "Trusts Convention and Canadian Legislation — Effect on Common Law Rules", later in this article.
30. *Chelleram (No. 2), supra*, footnote 22, at p. 46, *per* Collins J. In *Dicey and Morris on Conflict of Laws*, 12th ed. (London: Sweet and Maxwell, 1993), vol. 2, at p. 1089, it is stated that the 1987 Act has been extended to include trusts created orally under the law of any part of the United Kingdom and not evidenced in writing.
31. See Matthews, *op. cit.*, footnote 18, at p. 56, para. 14.4, for a discussion of the distinction between trusts of movables and trusts of immovables, prior to the *Recognition of Trusts Act 1987*.
32. *Supra*, footnote 22.

> the inherent jurisdiction of the court to remove and appoint trustees was a matter of machinery for English law as the lex fori, and could be exercised regardless of the governing law of the trust or the law governing the administration of the trust (see [1985] 1 All ER 1043 at 1056-1057, [1985] Ch 409 at 481).[33]
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> . . . . .
>
> By art. 7 of the Hague Convention, in the absence of a choice of the applicable law, a trust is governed by the law with which it is most closely connected. In ascertaining that law reference is to be made 'in particular' to (a) the place of administration designated by the settlor — no such place was designated; (b) the situs of the assets of the trust — this was Bermuda if account only is taken of the shares in Kaycee and Chellsons which were settled, but many other countries (especially in Asia and Africa) if the underlying assets are taken into account; (c) the place of residence or business of the trustees — Mr Rupchand and Mr Bharwani were resident in London at the date of the settlements, and the evidence of Ram's residence was inconclusive, although he then had substantial London connections; (d) the objects of the trust and the places where they were to be fulfilled — there was no one place to which these factors could point. *In the light of the paucity of authority at common law, I doubt if there is any significant difference between the art 7 and the likely approach at common law*.[34]

(Emphasis added.)

Despite the suggestion that the 1987 Act merely reflects the accepted common law rule that existed before that statute came into force[35] there are indications that different "governing" laws may have been considered to govern different aspects of the trust, especially in relation to matters of administration. It has been stated that, in the past, the prevailing view in English legal thought had been to distinguish between administration matters and matters of validity, interpretation and effect. The proper law was still said to govern the latter, but the place of administration was said to govern the former.[36]

Chelleram (No. 2) was also a case dealing with *inter vivos* trusts. The proceedings had originally involved four settlements, two of which had used trust moneys to purchase real property (referred to as the "1943 and 1946 trusts"), though the claimants had discontinued the

33. *Supra*, at p. 45.
34. *Supra*, at p. 49.
35. With the inference that this was the rule of one proper law governing most aspects of a trust of movables including administration and was determined by a "most closely connected" test.
36. Brownbill, *op. cit.*, footnote 17.

proceedings with respect to these trusts. The assets of the other two trusts (referred to as the "1975 trusts") consisted of shares of businesses.[37] English common law experience with the concept of "proper law" as determined above appears to have been primarily concerned with *inter vivos* trusts (rather than with testamentary trusts)[38] relating to movables. However, in the commentary to Rule 153 in *Dicey and Morris on the Conflict of Laws* it is stated that: "Although Rule 153 uses the language of the 1987 Act, it is submitted that it also states the effect of what limited authority exists as to the position at common law".[39] The 1987 Act applies to both testamentary and *inter vivos* trusts. The quotation suggests that the principles embodied in the 1987 Act that adopted the Trusts Convention merely reflected the common law principles already in play. If this is true, then since the Trusts Convention applies the concept of the proper law to both *inter vivos* and testamentary trusts, it would appear that what *Dicey and Morris* is proposing is that the common law also considered the concept of the "proper law" to apply to testamentary trusts. However, the evidence does not appear to be quite so clear.[40]

Although at common law the concept of the "proper law" is often used in the context of *inter vivos* trusts of movables and is generally understood to be that system of law with which the trust has its closest connection, one wonders whether for testamentary trusts of movables the "proper law" might be described as the law of the domicile of the testator at death? In *Marlborough (Duke) v. Attorney-General (No. 1)*,[41] Lord Greene M.R. stated: "There is, as it seems to us, a precise analogy between the law of the domicile in the case of wills and what is conveniently called 'the proper law' of the settlement in the case of marriage settlements". However, in that case the issue involved whether succession duty attached to settled funds (*i.e.*, an *inter vivos* settlement). The judgment indicated that it would attach, if the law which conferred

37. These trusts had already been the subject of litigation in *Chelleram (No. 1)*, *supra*, footnote 17.
38. See, for example, the cases cited in Dicey and Morris, *op. cit*., footnote 30, at p. 1091.
39. Rule 153 states that:

    > The validity, construction, effects and administration of a trust are governed by the law chosen by the settlor or, in the absence of any such choice, by the law with which the trust is most closely connected.

40. The commentary on the rule refers to the Trusts Convention which is described as applying to both *inter vivos* and testamentary trusts and also refers to the 1987 Act that gave effect to the Trusts Convention. The quotation found at p. 1089 of Dicey and Morris, *op. cit*., footnote 30, is supported by reference to several cases, but they appear to relate to *inter vivos* trusts.
41. [1945] 1 Ch. 78 (C.A.), at p. 83.

title was English (or Scottish) and that the answer was to be found by reference to the law governing the settlement (or the "proper law"). In other words, the judgment appears to be concerned with finding the proper law for the purpose of identifying the law that conferred title, so as to determine whether succession duty applied. The court stated that the law under which title is claimed for a marriage settlement is the law which governs the settlement, while for a will situation, it is the law of the domicile.[42] It is therefore arguable that the statement about an analogy between the proper law and the law of the domicile may be restricted to matters involving the law under which a beneficiary claims title, as opposed to the law which governs all matters.

In the case of *Re Fitzgerald, Surman v. Fitzgerald*,[43] it was noted in argument that the gift in question was made by contract and not by will, but if it had been the latter, it might "perhaps be governed by law of the testator's domicil"[44] suggesting that a possible view for a "proper" law governing a trust in a will is the law of the testator's domicile at death. This could then lead to a view under the modern notion of a "proper law" determined by "connecting factors" that the testator's domicile at death should be the primary "connecting" factor.

That the law of the testator's domicile at death, in the case of wills, is a default "proper law" for all matters relating to a trust of movables is an attractive suggestion for its simplicity. However, this view does not appear to be universally held.[45] In any case, subject to limited exceptions,[46] the apparent English common law concept of "proper law" is also the accepted rule in certain Canadian statutory schemes, which generally apply to both testamentary and *inter vivos* trusts.[47]

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42. *Supra*, at p. 83.
43. [1904] 1 Ch. 573 (C.A.).
44. *Supra*, at p. 582.
45. See, for example, Waters, *op. cit*., footnote 3, at p. 1129, where the text cites Dr. Morris and his views on the law governing essential validity for testamentary trusts and states: "In such a case he is of the view that normally such a trust would be governed by its proper law, which is usually the law of the place of administration", suggesting that the "proper law" for testamentary trusts may be the law of the place of adminstration, rather than the testator's domicile at death. However, *cf.*, P.E.N. Croucher, "Trusts of Moveables in Private International Law", [1940] Mod. L. Rev. 111, at pp. 113-14, where reference is made to the American authority, Beale, who, in relation to the law governing the administration of a testamentary trust, appears to favour the *lex rei sitae*, stated to be generally the domicile of the testator (though an exception may exist in the case of a foreign corporate trustee).
46. All of the statutory schemes described in footnote 47, *infra*, contemplate that severable aspects of a trust may be governed by different laws.
47. See, for example, British Columbia's *Conflict of Laws Rules for Trusts Act*, R.S.B.C. 1996, c. 65, and New Brunswick's *Conflict of Laws Rules for Trusts Act*,

(3) Canadian Common Law Experience

For trusts of movables in Canada, the concept of one "proper law" governing most aspects of such a trust does not, absent legislation to the contrary, appear to be the generally accepted position. Though there is relatively little Canadian jurisprudence on point, the conflict rules applied by Canadian courts to determine issues affecting such a trust suggest that, at common law, different aspects of the trust may be governed by different systems of law particularly in relation to questions of administration. Therefore, it would be difficult to argue at this time that all aspects of such a trust can be resolved by looking to one "proper law".[48]

Courts in Canada may in certain circumstances determine that the applicable law governing the administration of a trust of movables, whether testamentary or *inter vivos*, may be different from the law(s) that govern other aspects of the trust or from a "proper law" as may otherwise be determined. Absent evidence of intention or legislation, a court in Canada may be inclined to determine the governing law of administration for such a trust by referring to the "law of the place of administration" rather than the law of the place with which the trust has the "closest and most real connection".[49]

S.N.B. 1988, c. C-16.2. Reference in these statutes is to "governing law", but it is likely that this is synonymous with "proper law". However, Brownbill, *op. cit.*, footnote 17, at p. 167, in fn. 2, suggests that where the Trusts Convention applies, the term "governing law" may have a wider import than the term "proper law". See also footnote 147, *infra*, for a list of provincial statutes adopting the Trusts Convention.

48. However, if we were to assume that the modern view of the "proper law" could apply equally to all trusts, Canadian courts operating in a common law environment might incline towards a "presumption" that the "proper law" — as determined by the "closest and most real connection" test — would govern all aspects of the trust, including administration (and that this presumption should be departed from only if there are cogent reasons for doing so). The concept of one system of law governing all aspects of a trust follows the reasoning in *Chelleram (No. 1)*, *supra*, footnote 17. The Trusts Convention (described in more detail later) also supports this policy of treating the trust as a single unit and asserting that the trusts of all of the property comprised therein should be governed by a single system of law. However, the Trusts Convention also acknowledges the possibility of dépeçage because art. 9 provides that a severable aspect of the trust, particularly a matter of administration, may be governed by a different law, while art. 10 provides that 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. See the discussion later in this article under the heading, "Severable Aspects may be Governed by Different Laws (Trusts Convention and Common Law)".

49. See, for example, *Re Nanton Estate*, [1948] 2 W.W.R. 113, 56 Man. R. 71 (K.B.), and *Branco v. Veira*, *supra*, footnote 14. In some cases the "proper law" will be

3. Essential Validity versus Administration

Whether a trust is considered to be valid by its terms is a matter of essential validity. Essential validity here refers to the validity of the trust provisions, not the validity of the will as a testamentary disposition (the testamentary trust being a provision within the will) or of the trust instrument evidencing the creation of an *inter vivos* trust. The validity of the will or trust instrument (in terms of complying with necessary formalities) may be referred to as "formal validity". There is still some doubt as to whether certain issues affecting a trust are more properly characterized as issues of administration or issues of essential validity. For example, do the rules against perpetuities and accumulations fall under issues of administration or essential validity?[50] The distinction has been described as perhaps being "concerned with the difference between matters of management and administration on the one hand and the nature and quantum of beneficial interests"[51] on the other.[52] If the law governing essential validity determines that the trust in relation to its terms is invalid at the outset, there can be no question arising as to the governing law of administration, simply because there is no trust.

(1) Common Law

For testamentary trusts of movables, it is said to be possible for the testator to designate (either expressly or by implication) the internal law that is to govern matters of essential validity, provided that the designation is not contrary to the public policy of the last domicile of the testator.[53] Similarly, it has been stated that so long as a designation is not intended to avoid the mandatory provisions of the place to which the trust is most closely and really connected, a settlor of an *inter vivos* trust of movables should be able to designate (either expressly or by

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the same as the law of the place of administration, simply because most of the connecting factors of the trust (of which the place of trust administration is one) will be located in the same legal jurisdiction.

50. See Castel and Walker, *op. cit.*, footnote 4, at p. 28.1, and fn. 40, at p. 27.13, where *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461, and *Fordyce v. Bridges* (1848), 2 Ph. 497, are cited. Castel and Walker indicate that, in the latter decision, it was held that the law of the place of administration of the trust governs whether a gift infringes the rule against perpetuities.
51. Hayton, *op. cit.*, footnote 2, at p. 144.
52. But see *Re Nanton Estate*, *supra*, footnote 49, where the issue of whether income from a trust could be paid to a father for the education and maintenance of his children who were beneficiaries under the trust appears to have been characterized as a matter of administration.
53. Castel and Walker, *op. cit.*, footnote 4, at p. 28.3.

implication) the internal law of a place to govern matters of the trust's essential validity.[54]

Where there is no explicit or implicit designation, or where the designation is one to which legal effect will not be given, the Supreme Court of Canada's decision in *Jewish National Fund, Inc. v. Royal Trust Co.*[55] supports the proposition that the law of the testator's domicile at death determines the essential validity of a trust of movables created by will.[56] In *Jewish National Fund*, an appeal from a decision of the British Columbia Court of Appeal, the testator died in British Columbia, where he was also domiciled. His will appointed the Royal Trust Company as executor. After providing for several legacies to charities and relatives, he directed the sale of the residue following which the net proceeds were to be paid to the Jewish National Fund of New York, U.S.A.:

> ". . . to be used by the trustees of the said Jewish National Fund as a continuing and separate trust . . . for the purchase of a tract or tracts of the best lands obtainable, in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies . . ."[57]

The testator's next-of-kin questioned the validity of this residuary bequest, arguing in the lower courts that the residuary clause was void for uncertainty and, alternatively, created a perpetual trust which, not being charitable, was void. Although at first instance, the gift was held to be a valid charitable disposition, a unanimous appellate court came to the opposite conclusion. Conflict of laws was not argued in the lower courts. However, on further appeal to the Supreme Court of Canada, the appellant argued that the law of British Columbia was that the rule against perpetuities is based on considerations of internal policy and does not apply to invalidate a trust of movables that has been created by a testator domiciled in British Columbia but is to be administered outside of British Columbia. Since the trust was to be administered in New York, the appellant argued that the trust was charitable and valid by that law.

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54. *Ibid*., at p. 28.3. See also footnote 75, *infra*, for Carnwath J.'s discussion of intent in *Branco v. Veira*, *supra*, footnote 14.
55. (1965), 53 D.L.R. (2d) 577, [1965] S.C.R. 784, 52 W.W.R. 40 (S.C.C.), affg 43 D.L.R. (2d) 417, 46 W.W.R. 577 (B.C.C.A.), revg 37 D.L.R. (2d) 433, 41 W.W.R. 392 (S.C.).
56. In *Chelleram (No. 1)*, *supra*, footnote 17, at p. 431, Scott J. also stated: "It is well-established English law that the essential validity of a testamentary trust of moveables is governed by the law of the testator's domicile".
57. *Jewish National Fund*, *supra*, footnote 55, at p. 787.

Cartwright J., for the majority, reviewed a number of authorities for a discussion of the applicable conflicts rule, citing *Dicey's Conflict of Laws*, 7th ed., for the general rule that the "material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death".[58] However, Cartwright J.'s decision also refers to another quotation from *Dicey* that there is some authority for the proposition that where a testamentary trust of movables would be void for remoteness under the rule against perpetuities in force in the country of the testator's last domicile, but the movables are situated and the trust is to be administered in another country whose law would consider the trust valid, the law of the place of administration should govern and the trust should be valid.[59]

Nonetheless, the majority held that a trust of movables that was void under the laws of the testator's domicile and under the laws of other countries in which the trustees were authorized to carry out the trust could not be rendered valid simply because the terms permitted, but did not require, the trustees to carry it out in a jurisdiction where it would be valid. In *obiter dicta*, Cartwright J. suggested, without finally deciding, that he would have been prepared to assume that the validity of the clause should be determined by the law of the State of New York if the testator had directed that the residuary estate be paid to the appellant, to be used by its trustees for the purchase of land obtainable in the State of New York. This suggests that the majority might have permitted the trust to stand if the law of the situs had considered the trust to be valid.

Cartwright J. indicated that, unless the contrary was alleged and proved, the law of all the other countries in which the trustees might have decided to purchase land was presumed to be the same as that of British Columbia under which law he had already indicated that the bequest would be invalid. The majority dismissed the argument that the law of the place of administration should govern in these circumstances. Cartwright J. agreed that the place of administration of the trust would be the country in which the lands were purchased and managed, and that the place of residence of the trustees would be irrelevant:[60]

> To hold that the validity of a trust of personalty to be laid out in the purchase of land created by the will of a testator should be determined not

58. *Dicey's Conflict of Laws*, 7th ed. (London: Stevens, 1958), at p. 609.
59. *Ibid*., at p. 610.
60. *Jewish National Fund, supra*, footnote 55, at p. 791.

> by the law of his domicile or by the law of the situs of the land directed to be purchased (or perhaps by the application of both) but by the law of the residence or the domicile of the trustees appointed to make the purchase would, in my opinion, be contrary to authority and productive of uncertainty and inconvenience in the administration of estates.[61]

Interestingly, Cartwright J. supports his statement about this uncertainty by posing this question: What result would apply where the trustee at the testator's death resides in one jurisdiction under whose laws the trust was invalid, but a year later moves to a jurisdiction where the trust would be valid under its laws? Unfortunately, this premise suggests that the law governing the trust's essential validity might change simply by a change in the trustee's residence. As will be described in greater detail later, this is not generally a concern in relation to administration, as the law that governs the administration of a trust of movables is generally fixed at the trust's inception. Likewise, this result should apply to the law governing a trust's essential validity, if different from the law governing its administration.

It is to be noted that Judson J., for the minority, would have allowed the appeal on the basis that the trust sought to be established was a foreign trust administered in a jurisdiction where, according to evidence, it was a valid charitable trust. Even if there might be administration difficulties outside the boundaries of that jurisdiction, they were not the concern of the court of domicile. His view was that the administration of the trust from then on was governed by the laws of a jurisdiction which recognized its validity.

Where there is no designation of the applicable law, or where the designation is ineffective, the law of the place with which an *inter vivos* trust of movables has its most significant relationship or its closest and most real connection, is said to govern matters of essential validity.[62] For testamentary or *inter vivos* trusts of real property or immovables, the law of the *situs* of the immovable is said to govern matters of essential validity.[63]

(2) Statute: Essential Validity for Wills

Many of the provinces and territories have provisions in their "wills" legislation that address conflict of laws rules in relation to the intrinsic validity and effect of a will of movables and immovables

61. *Supra*, at p. 792.
62. Castel and Walker, *op. cit.*, footnote 4, at p. 28.3.
63. *Ibid*., at p. 28.6.

("Wills Act provisions"). A typical example is s. 39 of Alberta's *Wills Act*[64] that provides in part:

> 39(2) Subject to this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is situated.
>
> (3) Subject to this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of the testator's death.

Section 36 of Ontario's *Succession Law Reform Act*[65] substitutes the word "essential" for "intrinsic". What does "intrinsic" or "essential" validity for a will mean? Surely it includes preliminary constraints imposed by the applicable law on the ability of a testator to gift property according to his or her intentions. An example would be "forced heirship" rules.[66] While matters of succession appear to be contemplated, do the provisions also apply to "post" estate administration issues, so as to supply the applicable law to determine the essential validity for a continuing testamentary trust? It seems possible, at least with respect to certain matters that could come under the definition or concept of essential validity for trusts, such as perpetuity rules. In *Macdonell*,

64. R.S.A. 2000, c. W-12.
65. R.S.O. 1990, c. S.26.
66. In *Granot v. Hersen Estate* (1998), 21 E.T.R. (2d) 153 (Ont. Ct. (Gen. Div.)), vard 173 D.L.R. (4th) 227, 43 O.R. (3d) 421, 26 E.T.R. (2d) 221 (C.A.), the deceased, a citizen of both Canada and Switzerland, died domiciled in Ontario and owning a condominium in Switzerland. The deceased's will purported to make a gift of the residue of his estate, which included the condominium, to his daughter. The will also gave his son a cash legacy and some real property in Ontario. The deceased had another son who predeceased him but who had two children alive at the deceased's death. Swiss law provided for certain forced heirship rights whereby the son, the daughter and the two grandchildren would become entitled to an automatic share of the condominium if Swiss law applied, regardless of the terms of the will. In the lower court decision in relation to the conflict of laws issues, Haley J. stated at p. 158:

> I am satisfied: that the issue in this case is one of essential validity and effect coming within the example of 'whether a proportion of the estate has to be left to the children or to a surviving spouse'; that it is not a case where the intention of the testator can be given predominance; and that section 36(1) of the Succession Law Reform Act applied. That section requires that the essential validity of a will relating to an interest in land be determined by the internal law of the place where the land is situated.

Although the case was successfully appealed, this conflict of laws issue was not further addressed.

Sheard and Hull on Probate Practice, the text cites the following from the 12th Edition of *Dicey and Morris on the Conflict of Laws*:

> It is well settled that the material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the date of his death. That law determines such questions as whether the testator is bound to leave a certain proportion of his estate to his children or widow, whether legacies to charities are valid, to what extent gifts are invalid as infringing the rule against perpetuities or accumulations, whether substitutionary gifts are valid, whether gifts to attesting witnesses are valid, and so on.[67]

Happily, the legislation, if applicable, produces the same result for testamentary trusts of movables as would the common law, by virtue of the decision in *Jewish National Fund*.[68] For testamentary trusts of immovables, the legislation merely confirms the precedence of the situs.

The extent to which such legislation can, in certain circumstances, be construed to address the law governing essential validity for a testamentary trust is not entirely clear, especially since, as indicated later, many of the provinces that have these statutory provisions also have legislation that implements the Trusts Convention. As noted earlier, the Trusts Convention provides rules for determining the law governing aspects including essential validity of both testamentary and *inter vivos* trusts where an international element is involved. As will be discussed, both British Columbia and New Brunswick have additional legislation in the form of a *Conflict of Laws Rules for Trusts Act* that addresses interprovincial conflict of laws issues and supplies the rules for determining the governing law for trusts, including matters of essential validity. Both of these latter statutes provide that, if there is a conflict between a provision of the *Conflict of Laws Rules for Trusts Act* and the provisions of the province's Wills Act with respect to the law governing a trust created by a will or a severable aspect of such a trust, the trust conflicts statute will prevail.[69] While the precise scope and nature of these Wills Act provisions is not certain if they conflict with provisions of the Trusts Convention implementing

67. R. Hull, and I.M. Hull, eds., *Macdonell, Sheard and Hull on Probate Practice*, 4th ed. (Toronto: Carswell, 1996), at p. 278, quoting Dicey and Morris, *op. cit.*, footnote 30, at p. 1035.
68. *Supra*, footnote 55.
69. See s. 8 of the British Columbia *Conflict of Laws Rules for Trusts Act*, and s. 9 of the New Brunswick *Conflict of Laws Rules for Trusts Act*.

legislation, it may be reasonable to conclude that in those jurisdictions where no trusts conflicts legislation exists (for example, Ontario and Nova Scotia), these Wills Act provisions might supply the rules for determining the law governing essential validity for testamentary trusts if one assumes that the essential validity or intrinsic validity of a will includes the essential or intrinsic validity of any trusts described in the will. However, such an assumption is not free from doubt.

In the face of the imperative language of the Wills Act provisions, can a testator expressly designate any jurisdiction's laws to govern matters of essential validity for trusts described in his or her will? The answer is not certain. On the negative side, it might be argued that although *Jewish National Fund* was not about an express indication of a testator's intention, the testator arguably had an implied intention to have the testamentary trust governed by the laws of a jurisdiction other than his domicile at death. If so, the court did not give effect to this implied intention. Moreover, the Wills Act provisions, where they exist, tend to be cast in "mandatory" language without regard to a contrary intention in the will respecting essential validity, suggesting that if these provisions extend to trusts described in wills, intention will not be relevant. It might, therefore, be argued that intention is generally irrelevant in relation to essential validity of testamentary trusts, except in situations where: (i) an international element is involved and the court deciding the matter is in a jurisdiction that has adopted legislation to implement the rules contained in the Trusts Convention; or (ii) the conflicts problem involves solely inter-provincial elements and British Columbia or New Brunswick is the law of the forum. In these situations, it is arguable that the trust conflicts legislation trumps the potentially restrictive rules of the Wills Act provisions, at least insofar as movables are concerned. The trust conflicts legislation expressly permits the designation of a governing law that includes matters of essential validity and makes no distinction between testamentary and *inter vivos* trusts in this regard. In such cases, it may be argued that a testator's intention around the applicable law should govern, except where the choice may violate strong public policy or mandatory rules.[70]

70. See, for example, *Barna Estate (Re)* (1990), 40 E.T.R. 89 (B.C.S.C.), where it was held that the will in question was to be interpreted according to the laws of British Columbia because that was the law intended by the testator. Although this was a decision on the law governing interpretation of a will, could a similar result apply where the testator designates a law to govern essential valdity, at least with respect to any testamentary trust of movables created by the will? See *Granot v. Hersen Estate*, *supra*, footnote 66, which might suggest that a testator cannot override the statutory conflict rules despite an intention to do so.

Whether a testator in all cases can thus simply choose by express designation any jurisdiction's laws to govern the essential validity of a testamentary trust described in his or her will is therefore not free from doubt in relation to these Wills Act provisions. Arguably, these Wills Act provisions, combined with the decision in *Jewish National Fund* and other jurisprudence,[71] though not involving express choice of law clauses, suggest that a testator may, if at all, in general only designate *initially* the law of his or her domicile at death to govern the essential validity of a testamentary trust of movables and only the law of the situs of property to govern the essential validity of any testamentary trust of immovables. This presupposes that the law that is identified as applying under the rules itself precludes a testator from expressly designating any other law as the governing law for essential validity of a trust in the will.

On the other hand, the common law in all common law provinces takes it as axiomatic that the testator's intention generally governs and will be given effect, subject only to certain strong public policy or mandatory rules. Even the Wills Act provisions generally permit reference to the law of the place where the testator was domiciled when the will was made, in aid of its construction. Also, and perhaps of significant importance, *Jewish National Fund* was not a case about an express choice of law clause. The Wills Act provisions merely supply the law that governs, not the result. In addition, it is arguable that the Wills Act provisions relate to the will itself, not to the trusts created by it. Extending this argument further, a will's intrinsic or essential validity should not be considered to include issues such as whether the terms of a testamentary trust described in the will infringe any rules

71. See, for example, *Granot v. Hersen Estate*, *supra*, and *Hammill Estate v. McDonell* (1994), 3 E.T.R. (2d) 300 (Ont. Ct. (Gen. Div.)), although these cases were not about determining the validity of express "choice of law" clauses for testamentary trusts. In *Hammill*, Cosgrove J. referred to Lord Denning's decision in *Philipson-Stow v. Inland Revenue Commissioners*, [1960] 3 All E.R. 814 (H.L.), at p. 831, where Lord Denning stated:

> The so-called exceptions to which I have referred — about the *construction* of a will — are not really exceptions at all; for, in construing a will, so as to see what a testator meant, every civilised country looks to see what he intended — and for this purpose you may legitimately look at the law he had in mind — but this is only done as a guide to find his meaning. It is not done so as to find out the law which regulates his dispositions. He has no choice about that. Apart from this one question of construction, the succession to movables is regulated by the lex situs.

See also *Re Woods, Re Brown*, [1947] 4 D.L.R. 386, [1947] O.R. 753 (H.C.J.), regarding the validity of testamentary powers of appointment and the precedence of the law of the situs where immovables are concerned.

against perpetuities or accumulations or are otherwise invalid. Rather, the intrinsic or essential validity of a will would be interpreted to refer only to matters that strictly relate to succession or estate administration, such as whether a gift to a witness is valid or whether gifts that ignore certain family members, such as spouse and children, are valid. In *Re Lord Cable*,[72] Slade J. stated:

> There is no reason why the will of a testator domiciled in England should not, by appropriate language, set up a trust to be governed by some foreign law or conversely why the will of a testator domiciled in a foreign country should not set up an English trust.

Moreover, if the Wills Act provisions actually prevent a testator from choosing a law to govern a trust's essential validity, it would create an anomalous result. Specifically, it would mean that where the jurisdiction involved had adopted the Trusts Convention and the conflict involved an international element, the testator might generally be free to select a governing law for essential validity, but would be restricted if the conflict involved solely interprovincial elements (except if the court deciding the matter was in British Columbia or New Brunswick, due to their *Conflict of Laws Rules for Trusts Act*). Also, whereas a testator might be restricted in a choice of law, a settlor of an *inter vivos* trust would generally not be so restricted. For all of these reasons, it is submitted that the better view is that the Wills Act provisions should not apply to determine the law governing the essential validity of testamentary trusts and that jurisdictions in Canada would not, as a general principle, preclude a testator selecting a law to govern the essential validity of testamentary trusts, at least insofar as movables are concerned.

However, even if no legislative constraints exist, it may not be possible for a testator to choose a law to govern the essential validity of a trust of immovables other than the law of the jurisdiction where the immovable is located. This is due to the common law's predilection towards the precedence of the law of the situs in matters of immovable interests. Likewise for a trust of movables, if there is no connection with the selected law, a court may also decide that an unrelated choice of law should be disregarded. Indeed, art. 5 of the Trusts Convention provides that the Trusts Convention will not apply to the extent that the governing law determined under its provisions does not provide for trusts or the category of trusts involved. This might be interpreted to allow a court to deny recognition of a choice of law

72. [1977] 1 W.L.R. 7 (Ch. D.), at p. 20.

relating to a trust of real property interests if the law selected is of a jurisdiction that has no perpetuity rules, but the law of the situs has rules against perpetuities. Moreover, as will be discussed further, art. 13 of the Trusts Convention could result in a court refusing to recognize a trust if the significant elements of the trust — other than the choice of applicable law, the place of administration and the habitual residence of the trustee — are more closely connected to a jurisdiction which does not have the institution of the trust or the category of the trust involved.

Until a court in Canada definitively decides the matter, the postulation that a testator may have restrictions on his or her ability to freely select a choice of law governing the essential validity of a testamentary trust would appear open for debate. Moreover, even if this restriction exists, it would apply to a matter that pre-dates, if you will, the creation of the trust itself, especially if one considers essential validity here to include matters such as perpetuity rules. Consequently, it is submitted that the phrase "effect of a will" as used in the Wills Act provisions does not include matters of administration of such a trust because administration is not an "effect" of the will, but rather an effect of the law governing the trustees. The effect of the will may be to create or not create the trust, but administration is a result of factors external to the will and that operate on the trustees, such as the provisions contained in the various Trustee Act of provinces. Consequently, there should be no issue around the freedom of selecting a law to govern the administration of a trust.

4. Governing Law of Administration — Intention is Paramount (the "Subjective" Choice)

Assuming that the law governing essential validity dictates that a trust of movables has been validly constituted, the issue of the applicable law governing administration will arise. It appears to be generally accepted that the governing law of administration of a trust of movables is the law that the testator (or settlor in the case of an *inter vivos* trust) intended.[73] As noted earlier, for testamentary trusts, this

73. Castel and Walker, *op. cit.*, footnote 4, at p. 28.4, citing at fn. 14 the decision in *United Services Funds v. Richardson Green Shields of Canada* (1987), 40 D.L.R. (4th) 94, 16 B.C.L.R. (2d) 187 (S.C.). However, the settlor's or testator's freedom of choice may be subject to considerations of public policy within the jursidiction where the trust is considered to have been created. In other words, if the rule against perpetuities is determined to be a matter falling under the rubric of administration and considered by the court as a matter of public policy, a court in the jurisdiction where the trust is considered to have been created may not allow a

assumes that the Wills Act provisions of certain provinces will not be construed so as to encompass matters of the trust's administration.

In some cases, the instrument creating the trust of movables will specifically state that the law of administration is to be governed by a particular jurisdiction. This subjective express "choice" of law can resolve numerous issues involving the determination of the applicable law. Where there is no express choice of law clause, however, the intention may be ascertained from a review of the form of, and language used in, the trust instrument.[74] This might be referred to as the "implied" subjective choice of the settlor.[75] For example, the settlor may refer to a particular province's Trustee Act as applying to matters relating to trustee investments. Trustee investments being an aspect of administration, this particular reference might be used by a court to determine that the settlor intended that particular province's law to govern matters of trust administration in general.[76] Although relating to

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settlor or testator to evade the rule by simply choosing a jurisdiction whose internal laws are to govern and where the rule is not in effect. See Matthews, *op. cit.*, footnote 18, at p. 56.

74. Hayton, *op. cit.*, footnote 2, at p. 145. See also *Marlborough (Duke) v. Attorney-General (No. 1), supra*, footnote 41, at pp. 88-9.

75. Unless otherwise indicated by the context, "settlor" throughout also means "testator". In *Branco v. Veira, supra*, footnote 14, at p. 55, Carnwath J. discusses "implied intention" in the context of the validity of a trust. It is submitted that similar principles apply when considering implied intention to supply the law governing the administration of a trust:

> Insofar as the validity of a trust is concerned, one must first ascertain if the settlor has expressly named the jurisdiction by whose laws the trust is to be governed. Failing such express intention (as is the case before me), consideration turns to the existence of factors permitting a court to determine the implied intention of the settlor. As has been pointed out by Lester G. Hoar in *Some Aspects of Trusts in the Conflicts of Laws*, [1948] 26 Can. Bar Rev. 1421, implied intent appears to have at least three meanings, namely [at p. 1426]:
>
> > "(1) intent, as it comes into play in the interpretation of a document; (2) intent arising through a presumption that the creator of a trust intended that the trust should be governed by the law of the state that would uphold the trust provisions; and (3) intent arising by implication from the fact of a preponderance of operative factors within a particular jurisdiction, and through a deduction that the grouping of these factors was a conscious effort on the part of the creator."

76. However, in *Perpetual Executors and Trustees Association of Australia Ltd. v. Roberts*, [1970] V.R. 732, at p. 740, McInerney J. cited *Lindsay v. Miller (No. 1)*, [1949] V.L.R. 13, [1949] A.L.R. 200, noting in that case that Lowe J. "attached very little significance to the use of terms of Scots law, taking that to be 'a very natural consequence of the deed being drawn by Scottish lawyers'." McInerney J. also stated that Lowe J. did not consider the fact that there was a reference in one clause in the deed to English law as being sufficient to show that the transaction

a marriage contract[77] and immovable property, similar considerations applied in the case of *Re Fitzgerald, Surman v. Fitzgerald*.[78] In this English Court of Appeal decision involving a marriage contract that established a trust, Williams L.J. stated:

> It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of the marriage, was a domiciled Scotswoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the *prima facie* presumption that the law of the matrimonial domicil is to govern the contract.[79]

To take another example, suppose the settlor describes the trustee as being resident in, or in the case of a corporate trustee, as having an office in, a particular province. Absent any other indication of intention in the trust instrument, the settlor may in this case be said to have intended the trustee's place of residence as supplying the governing law of administration, and impliedly chosen that law by reference to that place of residence. This factor could also be said to relate back to the reference of "the place of administration designated by the settlor" that has been referred to as a likely factor at common law.[80] In a will situation, the testator may also include an express declaration as to his or her domicile which, in the absence of anything else in the will

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had its most real and substantial connection with England. Nevertheless, McInerney J. does indicate that Lowe J. was of the view that the tests to determine the proper law of a contract could be similarly used to determine the proper law of a trust deed. McInerney J. observed, at pp. 739-40, that Lowe J. adopted the rule in *Merwin Pastoral Co., Pty Ltd. v. Moolpa Pastoral Co., Pty Ltd.* (1933), 48 C.L.R. 565, [1933] A.L.R. 401, that it is the intention of the parties that primarily determines the proper law, but where no actual intention is evident, a "presumed or constructive intention" is determined "in the nature and subject-matter of the contract, its incidents, the situation of the parties, such other matters as must have been within their contemplation and the circumstances of the transaction". It was also indicated in the *Merwin* case that the intention of the parties was to be judged on "substantial considerations", which were said to include the place with which the transaction had the most real and substantial connection.

77. A number of the cases cited in this article refer to decisions involving trusts established under marriage settlements. Whether the results of such decisions can be transferred to trusts in general is not certain. However, as stated by Croucher, *op. cit*., footnote 45, at p. 111: "It is at least arguable that marriage settlement cases are sui generis".
78. *Supra*, footnote 43.
79. *Supra*, at p. 594.
80. *Chelleram (No. 2), supra*, footnote 22, at p. 49, *per* Collins J.

suggesting any other law is to govern administration, might be considered as indicating an intention that the testamentary trusts are to be governed as to administration of movables by the law of that declared domicile.[81]

Where there is ambiguity, evidence of surrounding circumstances might be referred to in order to resolve the ambiguity in favour of a specific governing law. This would require a review of the "connecting factors" to determine whether it can be said that the testator or settlor "intended" a particular jurisdiction to apply for the purpose of trust administration. In *Chelleram (No. 1)*,[82] Scott J. approved the reasoning of the Transvaal court in *In re Pollak's Estate*,[83] wherein the court concluded that the testator, in establishing a settlement to be adminstered in England, must have intended English law to govern its administration.[84]

Suppose the trust instrument describes the trustee as being resident in a particular jurisdiction, but goes on to provide that investments or the process of trustee resignation are to be governed by a particular jurisdiction's Trustee Act. It is arguable that a reference to a particular jurisdiction's laws relating to an "aspect" of trust administration (for example, investments or trustee resignation procedures) may carry greater weight in determining the overall governing law of the trust's administration than does a reference to the trustee's residence in a particular jurisdiction. An indication in the trust instrument that the

81. See, for example, *Re Lord Cable*, *supra*, footnote 72, at p. 20, where Slade J. stated that there was nothing sufficient to displace the presumption that the testator intended Indian law to be the governing law of the will for all purposes in relation to the testator's movable property. The headnote to the case indicates that this presumption arose from the testator's Indian domicile, coupled with the express declaration as to domicile contained in the will. This presumed intention governed despite the wills being essentially in English form and despite the fact that the majority of the original trustees were resident in England. The decision in this regard related to the proper or governing law. However, assuming that this law includes matters of adminstration, it is offered here as an example of how the governing law of administration might be identified by implied intention. Unless it could be argued that the Wills Act provisions of certain provinces restrict the ability of a testator to select the law governing a testamentary trust's essential validity, such an implied designation could also cover the law governing essential validity for a testamentary trust of movables.
82. *Supra*, footnote 17, at p. 431.
83. [1937] T.P.D. 91.
84. The facts were that the testator was domiciled in the Transvaal and left a will appointing as his executor and trustee an English bank that had no branch in South Africa. The testator left his residuary estate upon trust for beneficiaries, most of whom where domiciled in England. The testator's movables were located in England, South Africa and other countries.

performance of the trustee's duties are to take place in a particular jurisdiction likewise imply an intention that the laws of that jurisdiction are to govern matters of administration.

In *Harris Investments Ltd. v. Smith*,[85] a case involving a trust relating in part to an immovable, the terms of the trust deed provided that a new trustee was to be appointed under the *Trustee Act* of British Columbia in default of an appointment pursuant to certain provisions of the deed. It was also noted, in the judgment of Macdonald C.J., that British Columbia was the place where most of the trust provisions were to be performed. Macdonald C.J. indicated that the trust deed and obligations arising from it were to be considered "having reference to all the circumstances of the case".[86] Although the trustees resided in Oregon, Macdonald C.J. stated: "I agree with the learned trial Judge that the case is governed by the law of British Columbia and that there is no warrant for saying that the parties intended otherwise".[87] While it may be argued that the reference to "all of the circumstances" suggests a "proper law" type result based on a "closest and most real connection test", the decision of Macdonald C.J. is arguably based on teasing out the implied intent of the parties from the terms of the trust instrument.

Generally, it should be possible to identify the correct law governing administration using this "subjective" approach to find intention (*i.e.*, by some reference in the writing constituting the trust). However, what happens when that intention cannot be ascertained, either by express or implied factors?

5. Law of the Place of Administration — Where the Trustees Reside and Carry Out the Administration (the "Objective" Choice) for Trust of Movables

(1) Rule of the "Law of the Place of Administration"

In Canada, where there is no subjective choice of law evident, is there an objective choice of law rule for determining the relevant law governing administration of a trust of movables? While not free from doubt, there is support in some Canadian jurisprudence and noted authorities suggesting that absent any evidence of intention as to the applicable law, at common law,[88] the relevant law governing questions

85. [1934] 1 D.L.R. 748, 28 B.C.R. 274 (C.A).
86. *Supra*, at p. 749.
87. *Supra*, at p. 750.
88. The rule for determining the applicable law is different if legislation governs the matter. See, for example, the British Columbia *Conflict of Laws Rules for Trusts Act*.

of administration of a trust of movables may be the "law of the place of administration". This "objective" choice might arguably be considered by the courts to be based on what the settlor or testator intended be the applicable law, even though the will or trust instrument is otherwise silent.[89]

(2) Canadian Jurisprudence Supporting the Rule of the "Law of the Place of Administration"

There is a noticeable scarcity of Canadian jurisprudence relating to conflict of laws and trusts in general. As to the applicable law governing the administration of a trust of movables, two notable decisions do lend themselves in support of the proposition that the conflict rule is the law of the place of administration. The first of these is *Re Nanton Estate*,[90] a decision by Williams C.J. of the Manitoba Court of King's Bench. In that case, the testator, Mr. Nanton, died resident and domiciled in Ontario. His will, made in Manitoba, together with a codicil made in Ontario, was probated in Manitoba and resealed in Ontario. It appointed a trust company as executor and trustee which, according to the decision, was located in Manitoba. Among other things, the will established a trust fund that provided a life interest of the income to his daughter, a gift-over to the daughter's children on attaining majority, and a power of appointment exercisable by the daughter in her will, should none of the children reach the age of majority. Upon the death of the daughter, the income and capital could be used in the trustees' discretion for the maintenance, education and advancement of the daughter's infant children. The daughter and her twin sons were domiciled in England, where the daughter died after exercising the power of appointment in favour of her husband. During her lifetime, the daughter had used part of the income to pay for her sons' education. The husband, finding that since her death he had to pay for the boys'

89. See, for example, Castel and Walker, *op. cit.*, footnote 4, at p. 28.4, where it is stated: "some Canadian decisions favour the application to questions of administration of the domestic law of the place of administration, which is generally the place where the trustees or a majority of them reside or carry on the business of the administration". The decision in *Chelleram (No. 1), supra*, footnote 17, suggests that in order for the law of the place of administration of a trust to govern, there must be some evidence of the testator's intention to have that law apply. At p. 431, Scott J. stated:

> But it does not follow from *In re Pollak's Estate* [1937] T.P.D. 91 that the law of the place of administration of a trust would govern the rights and duties of the trustee in a case *where the circumstances did not enable the inference to be drawn that such was the testator's or settlor's intention.* [Emphasis added.]

90. *Supra*, footnote 49.

education out of his own capital requested that the trustees pay the whole or part of the annual net income of the fund to him, to be used for the sons' maintenance and education. The trust company brought an application to determine if they could do so.

Williams C.J. indicated that if the trust were considered to be an English trust, certain rules would apply by virtue of English legislation related to the ability of a guardian of minors to demand and obtain income from a trustee for the benefit of an infant. At issue was whether the law permitted trust income to be paid for the maintenance of an infant who had a father. Prior to legislative changes, courts of equity followed a general principle that no allowance for maintenance out of an infant's estate would be permitted where the father was able to provide support, notwithstanding that a will directed payment of such an allowance. Although legislation in England and in effect in Manitoba relaxed the rule to some extent, Williams C.J. was of the view that for the legislation in effect in Manitoba, it was still necessary for a court to conduct an inquiry into the ability of the father to maintain the infant himself.

Williams C.J. held that the law of Manitoba applied and ultimately determined that the trustees could pay the father the income of the trust. The judge stated:

> But although all the beneficiaries of the trust were, or are, domiciled in England, and the testator died domiciled in Ontario, I am of opinion that the questions I have to decide must be determined according to the law of Manitoba; the trustees are here, and the estate and trusts are being administered here.[91]

The judge adopted the following passage from Falconbridge's *Conflict of Laws* as the correct statement of the law:

> "The valid creation of a testamentary trust being assumed, including the vesting of the title to or the control of the assets in the trustee, a different question is what law governs the administration of the trust. It would seem that whatever be the nature of the trust *res* and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the *lex rei sitae*, including whatever effect that law gives to the expressed or implied intention of the testator. The law would also be the *lex fori* as regards the control which a court of the situs may exercise over the administration."[92]

91. *Supra*, at p. 117.
92. *Supra*, at pp. 117-18, quoting from J.D. Falconbridge, *Conflict of Laws* (Toronto: Canada Law Book, 1947).

The *lex rei sitae* is defined in Black's Law Dictionary (rev. 4th ed.) to mean "the law of the place of situation of the thing". Williams C.J.'s opinion that Manitoba law governed questions respecting the administration of the trust at issue was based on the fact that the trustees were located in Manitoba and the estate and trusts were being administered there. The judge appeared to equate the *lex rei sitae* with the law of the situs or seat of the trust — in effect the "law of the place of administration", determined by the residence of the trustee and the place where administration occurred.[93] While the phrase "*lex rei sitae*" could be considered to refer to the assets of the trust, the assets in question being of a movable type, would have had no "locality" as such. Movable property in relation to succession is considered subject to that law which governs its owner.[94] Consequently, as trustees are the legal owners of the trust property, one can see how, in a trust of movables, the *lex rei sitae* can be equated to the residence of the trustees. As is noted below, Manitoba has since enacted legislation that adopts the general rule of "one governing" law in the absence of evidence to the contrary (which at the very least would apply to trust conflict of laws matters where an international element is involved). Although the result might be the same, a Manitoba court would, on similar facts, today be required to consider the legislation, rather than rely simply on this apparent common law conflict of laws rule that suggests that the law governing the administration of a trust is the law of the place of administration, determined by the residence of the trustee and the place where they administer the trust.

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93. But *cf*. Croucher, *op. cit*., footnote 45, referring to the American authority, Beale, who defines "the seat of the trust" in the case of testatmentary trusts, as generally the domicile of the testator (with possible exception in cases of foreign corporate trustees), and in the case of *inter vivos* trusts, as depending on the intention of the settlor — such that if trustees outside of the settlor's jurisdiction are appointed, the settlor may have intended the law of the trustees' domicile to govern the administration of the trust. Trusts consisting primarily of immovable property would appear to have their "seat" where the land is situated.

94. In argument raised by the parties interested under the trust for accumulation in *Freke v. Lord Carbery*, *supra*, footnote 50, the following is cited:

> . . . the following passage in the judgment delivered by Lord Loughborough in Sill v. Worswick, cited with approbation in *Story's Conflict of Laws*: "It is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner".

Cf., *Bernstein v. British Columbia* (2004), 5 E.T.R. (3d) 1, 27 B.C.L.R. (4th) 176 *sub nom. Bloom Estate (Re)* (S.C.), a decision of the British Columbia Supreme Court for the test to be applied in determing the location or situs of shares, bonds and debentures for the purpose of assessing probate fees under British Columbia's *Probate Fee Act.*

Given Williams C.J.'s adoption of Falconbridge's statement, he appears to have considered powers of maintenance to be an issue of trust administration, rather than an aspect of the essential validity of the trust, since the valid creation of the testatmentary trust was to be assumed.

The second notable case is *Branco v. Veira*,[95] a decision by Carnwath J. of the Ontario Court (General Division). This case involved a motion for an order staying an application for a declaration of a trust, collapsing the trust and removing the trustees. The facts involved Sir Phillip Veira ("Sir Phillip") who was a director of Veira Investments Ltd. ("Veira Investments"), a company that maintained an account at Royal Bank Investment Management Inc. ("RBIM"). While in Canada, Sir Phillip dictated wishes to an officer of RBIM as to how the assets of Veira Investments were to be dealt with on his death. At the time, Sir Phillip also signed a resolution appointing as directors his spouse, Lady Clara Veira, and his daughter, Pamela Hazel Veira. Upon returning to St. Vincent, Sir Phillip signed another resolution (the "second resolution") that was inconsistent with his earlier instructions to the RBIM officer. The second resolution provided that all of the money in Canada in the name of Veira Investments was to be distributed in a specified manner, both as to amounts and conditions, among family members following his death. His daughter, Cheryl Branco, was one of those family members. One of the conditions required that any amount for a family member could not be accessed until the expiration of a certain number of years. After his death, Lady Clara and Pamela instructed the financial institution, Midland (then holding a portion of the funds) to transfer the amount identified in the second resolution for Cheryl to a separate account. Other accounts for the other specified members in the second resolution were also created at Midland and RBIM, the other custodian of the alleged trust funds.

Two years later, Cheryl applied for a declaration that a trust was created in her favour, an order collapsing the trust, and an order removing her mother and sister as trustees. In response, Veira Investments held a shareholders' meeting, passing a resolution that all moneys appropriated pursuant to the second resolution be withheld and retained by the company as its property, and that a declaration in the courts of St. Vincent be sought to determine the effect of the second resolution. The High Court of Justice of the Eastern Caribbean Supreme Court issued an *ex parte* order that the second resolution was not a trust instrument and did not create a trust in favour of any of the persons named; it was not a gift of money or personalty and was not

95. *Supra*, footnote 14.

binding on Veira Investments or on Lady Clara and Pamela, and was of no legal effect. Cheryl subsequently obtained an injunction, preventing the financial institutions in Canada and Lady Clara and Pamela from removing the "Branco trust property from Ontario". This injunction was later dissolved on the strength of an undertaking by Lady Clara and Pamela not to cause Viera Investments to remove or transfer funds from Cheryl's account. Lady Clara and Pamela then brought the motion to stay before Carnwath J.

Carnwath J. determined that Veira Investments, Lady Clara and Pamela were all resident in St. Vincent. Without deciding on the existence of the alleged trust, the decision also indicated that there was agreement that the settlor of the alleged trust would be Veira Investments. There was some dispute as to the identity of the trustees of the alleged trust — as between Viera Investments, on the one hand, and Lady Clara and Pamela, on the other. However, since it was determined that all three were residents of St. Vincent, the issue did not require resolution.

The judge then considered which jurisdiction's law, Ontario or St. Vincent, governed: (i) whether the alleged trust existed; and (ii) if it existed, the administration of the trust. With respect to validity, Carnwath J. held that it was the law of St. Vincent, basing his finding, in part, on the premise that it might be necessary to determine if Veira Investments had the corporate capacity to settle a trust (which could only be determined by the laws of St. Vincent). Also, citing *Re Nanton Estate* and *Jewish National Fund*, Carnwath J. stated that "where the validity of a trust has been called into question and where the settlor and the trustees are resident in the same jurisdiction, proper law has been found to be that of that jurisdiction".[96] This is interesting since in neither *Re Nanton Estate* nor *Jewish National Fund* did the testator die domiciled in the jurisdiction where the trustees were resident.

Carnwath J. stated that "one must examine the distinction between matters relating to the validity of a trust and matters relating to the administration of a trust in deciding the proper law to be applied".[97] This suggests that different aspects of a trust might be governed by different "proper" laws. However, a review of the decision indicates that what Carnwath J. meant by "validity" may have been limited to preliminary matters involving the capacity to create the trust, rather than essential validity or the validity of substantive provisions of the trust. It is not too difficult to see that an issue "external" to the trust, such as whether a settlor had capacity to create a trust and transfer property to

96. *Supra*, at p. 55.
97. *Supra*, at p. 54.

it, might be governed by a law different from the law that could be said to govern the trust, once established or its various aspects.[98] In fact, even the Trusts Convention, with its emphasis on one proper law, does not apply to such preliminary issues of validity as "capacity". The inference is that while matters of essential validity, construction and administration should, generally speaking, all be governed by one proper law, issues of capacity and formal validity may be governed by laws other than the trust's proper law. Consequently, it may be argued that Carnwath J.'s decision does not suggest the possibility of different laws applying to aspects of a trust once the preliminary issues of formal validity and capacity have been satisfied.

However, Carnwath J. did not expressly distinguish between formal validity and essential validity, and indicated that insofar as validity of a trust is concerned, one first must determine whether the settlor expressly designated the jurisdiction by whose laws the trust is to be governed. He subsequently addressed the issue of what is referred to in the decision as the "proper law" that "governs the administration", and then set out what appears to be a specific conflict rule to determine the law governing administration, thereby suggesting that other law(s) may govern other aspects of the trust. With respect to the issue of the governing law for the adminstration of the alleged trust, Carnwath J. quoted from Dr. Waters' seminal trust law text as follows:

> "Administration is a term which both embraces all those issues that are exclusively concerned with the management or administration of trust affairs, and also acts as a connecting factor. It connects those issues through the conflict rule with the law of the place of administration. This is a relatively recent conflict rule, however, and it is still a matter of some discussion as to where that place should most appropriately be located. There is, however, fairly general agreement that it is situated where the trustees reside and are administering the trust."[99]

Carnwath J. then referred again to the decision in *Re Nanton Estate*, indicating that, in that decision, "the residence of the trustees was found to be the most important factor in determining the choice of law for the administration of the trust".[100] He also cited *Thibodeau v. Canada*,[101] pointing out the court's conclusion that the trust was

98. See Matthews, *op. cit.*, footnote 18, at p. 56, para. 14.5, for support of the proposition that the law governing the capacity of a settlor to create a trust may be different from the law governing other aspects of the trust.
99. *Branco v. Veira*, *supra*, footnote 14, at p. 55, quoting Waters, *op. cit.*, footnote 3, at p. 1124.
100. *Supra*, at p. 56.
101. (1978), 3 E.T.R. 168, [1978] C.T.C. 539, 78 D.T.C. 6376 (F.C.T.D.).

resident in Bermuda because a majority of the trustees were there, even though some of the investments and assets were located in Canada. Turning to the circumstances of the alleged trust before him, Carnwath J. noted that the custodians of the alleged trust assets, and the assets themselves, were located in Ontario. He further indicated that, while the custodians may have implemented certain directions or instructions given to them, it was from Lady Clara and Pamela that the custodians took their directions and reported. As such, Carnwath J. expressly noted the importance of being clear on the meaning of the "administration of a trust" when considering the proper law to be applied by stating:

> It might be thought that since the assets were located in Ontario and since Midland and RBIM were custodians of those assets and carrying out the mechanics of any instructions given, therefore the alleged trust assets were being "administered" in Ontario. Such is not the case. The citation from Waters, above, makes it clear that the residence of the trustees, though perhaps not determinative, is of special significance.[102]

Carnwath J. then referred back to Dr. Waters' text for the scope of "administration", where it is suggested that the term covers such issues as "who may appoint and be appointed as a new trustee, the powers and duties of trustees, trustees' investments, the distinction between income and capital, the liability of trustees for breach of trust and their rights of indemnity and contribution".[103] The judge noted that the only persons who could be said to be responsible for these matters were either Veira Investments or Lady Clara and Pamela, and all were resident and domiciled in St. Vincent. Consequently, he held that the proper law relating to administration of the alleged trust was that of St. Vincent.

Branco v. Veira thus supports the argument that Canadian common law (or at least the common law as applied in Ontario) might recognize that different laws may govern different aspects of a trust. Carnwath J.'s reference to *Re Nanton Estate* and to Dr. Waters' text, combined with the result in *Branco v. Veira*, would suggest that the choice of law for administration is the law of the place of administration of the trust. The decision further suggests that, while not determinative, it is the trustees' residence and the place from which they are administering the trust that supplies the place of administration, and therefore the relevant law. It is possible that Carnwath J.'s statement that "the residence

102. *Branco*, *supra*, footnote 14, at p. 52.
103. *Supra*, at p. 56, quoting Waters, *op. cit*., footnote 3, at p. 1125.

of the trustees, though perhaps not determinative, is of special significance" leaves open the possibility, in certain circumstances, of some other rule than the place of administration as determined by the residence of the trustees determining the correct governing law for administration. What circumstances might there be?

In the first quotation from Dr. Waters cited by Carnwath J., Dr. Waters notes that there might be situations of multiple trustees residing in different jurisdictions, or a corporate trustee where aspects of the administration might be conducted or aided by several branches of the corporate trustee. In these cases, presumably, some other rule might be necessary to determine the appropriate law to govern the administration. Arguably, this could be how Carnwath J.'s statement about the rule not being determinative could be interpreted. In such cases, it is submitted that perhaps a form of the "closest and most real connection" test as it relates to the trust as a whole might be appropriate.

(3) How to Determine "Place of Administration"

If one accepts the view that issues involving the administration of a trust of movables are, absent legislation or evidence of intention, resolved by applying the law of the "place of administration" and that this law can differ from the "proper law" as determined by a "closest and most real connection test", how is the "place of administration" for a trust of movables determined? It seems the answer is to look to where the original trustees reside and carry on their business.[104] What does this mean?

As previously indicated, the law of the place of administration might best be described as the law of the place where the situs or seat of the trust is found; in other words, where the trust administration effectively occurs. The trustees' residence has been used as a factor to determine the "residence" of a trust (at least for tax purposes) and the trustees' residence was held to be a significant factor in determining the choice of law for the administration of a trust as seen in *Branco v. Veira* and *Re Nanton Estate*. It is submitted, however, that the proper test to determine the place of administration for a trust in order to determine its governing law of administration is to consider both the original residence of the trustees and the original place where the "power of administration" was exercised.[105] In most cases they should

104. Waters, *ibid.*, at p. 1129.

105. In *Burton v. Global Benefit Plan Consultants Inc.* (1999), 177 Nfld. & P.E.I.R. 60 (Nfld. S.C.), Dunn J., in concluding that Newfoundland was the proper forum for

be the same. In other words, the place of administration of a trust is where the original trustee who managed the trust or controlled the trust assets resided. It may be that in some cases (for example if the trust document requires trustee decisions to take place in a particular jurisdiction) the place of administration will be determined to be that jurisdiction rather than the residence of the trustees. In that case, it may also be said that the trust instrument itself evidences a subjective intention by the settlor to have that jurisdiction's laws govern the administration. The law of the place of administration then supplies the appropriate governing law for resolving trust administration issues. Where there are multiple trustees all having equal power, the place of administration should be the jurisdiction where the majority of the original trustees resided and carried on the administration of the trust.

Castel and Walker, authors of one of the leading texts on the issue of conflict of laws in Canada, suggest that while it is possible for a testator or settlor to designate the internal law of a place to govern the administration of a trust of movables, where no such designation is made, then for *inter vivos* trusts they suggest "the courts should apply the internal law of the place to which the administration of the trust is most significantly related or to which it is most closely connected".[106] For testamentary trusts, they suggest that the internal law of the testator's domicile at the time of his or her death should govern, unless the trust is to be administered elsewhere.[107] In other words, the law of the

hearing the matters raised, makes reference to, among other factors, the "power of administration" lying with the trustees who were resident in Newfoundland. *Branco v. Veira*, *supra*, footnote 14, is also cited as referring to the "powers" of administration. *Thibodeau v. Canada*, *supra*, footnote 101, and Interpretation Bulletin IT-447 together support the proposition that a trust is generally considered to reside (at least for Canadian tax purposes) where the trustee who manages the trust or controls the trust assets resides.

106. Castel and Walker, *op. cit.*, footnote 4, at p. 28.5.

107. *Ibid*., at p. 28.5. There is a distinction between the law governing the administration of a testamentary trust of movables and the law governing the administration of a deceased person's estate and the law governing succession thereto. It appears that where a grant of representation has been made (for example, letters probate or letters of administration), the administration of the deceased's assets by the executor/ administrator is governed by the law where the grant was issued, while succession rights are governed, in the case of intestacy, either by the domicile of the deceased at death (in the case of movables) or the *lex situs* of the property (in the case of immovables) and, in the case of testacy, will depend on the issue being addressed. So, for example, if the issue is the interpretation of the will, it will be the law intended by the testator or, absent such intention, it will be presumed to be the law of the testator's domicile at the time the will was made. This means that absent the testator's intention, either implied or express, the governing law of administration for a testamentary trust of movables may be a completely different legal system from that governing the preliminary estate administration if, following

place of administration is presumed to be the law of the testator's domicile when no designation has been made and the trust is going to be administered in that jurisdiction. If it is to be administered elsewhere, it is the law of that jurisdiction which should then govern the administration.

How does their view regarding *inter vivos* and testamentary trusts reconcile with the submission that, absent evidence of intention, the law governing the administration of a trust is the law of the place where the original trustees reside and carry on the trust administration? For *inter vivos* trusts of movables, it is submitted that the place to which the administration of the trust is most closely connected would be the place where the trustee who controls and manages the trust resides; that is to say, the place where the power of administration is exercised. Arguably, therefore, the rule that the choice of law governing trust administration matters is determined by the law of the place of administration appears to be supported by the Castel and Walker text.

For testamentary trusts of movables, where a will appoints trustees residing in the same jurisdiction as that of the testator's domicile at death, the choice of law derived from the Castel and Walker text would be the same as that derived from applying the rule of the law of the place of administration. If the trustees appointed were residing elsewhere than the place of domicile of the deceased at death, then on the basis of the applicable law being the law of the place of administration, the appropriate law would be that of the place of the original residence of the trustees and the place where they carried on the business of the trust. However, even Castel and Walker suggest that, if the trust is to be administered in some other legal unit, the local law of that legal unit should govern the administration. It seems, then, that where the trustees who assume the original trusteeship and receive the assets of the trust are located in a jurisdiction differing from that of the testator's domicile at death, Castel and Walker support the position that it is the law of the place where the original trustees reside and carry on the trust administration which governs the administration of a testamentary trust of movables.

However, what of the situation where each of the original trustees resides in a different jurisdiction and each of them has equal power in the administration of a trust of movables? In such a case, it would be

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estate administration, a testamentary trust is established by the executors delivering the trust property to the trustee residing in another legal jurisdiction. See also *Chelleram (No. 1), supra*, footnote 17, at p. 430, where reference is made to administrative powers conferred on personal representatives by English estate administration legislation and where Scott J. states: "These cases exemplify the well-settled proposition that the administration of a deceased's assets is governed by the law of the country from which the administrator derives his authority".

difficult to determine the governing law of administration based purely on residence or on the place where the power of administration was exercised. No particular trustee's jurisdiction of residence could be said to be dominant in terms of administration of the trust. However, assume that the trust instrument, while silent as to an express choice of law, requires that the trustees make all decisions involving the trust while physically present in a particular jurisdiction. In such a case, would it not be arguable that the law of the jurisdiction where the trustees are required to reside when they administer the trust is the intended law governing the trust's administration? Where no such provision exists, and where the court is satisfied that there is no evidence that points to a greater control in the hands of any particular trustee, then as noted in the discussion earlier relating to Carnwath J.'s decision in *Branco v. Veira*, it may be that a court will have to resort to a "closest and most real connection" test, based on the common law principles described earlier for determining the proper law of a trust. It seems reasonable to conclude that where these factors suggest the possibility of the law of several jurisdictions applying, a court will try to select a jurisdiction where the trust will be valid, as opposed to selecting one where it might not (for example, by violating a relevant perpetuities rule).[108] This suggests that, in cases of multiple trustees, an express choice of law clause should be utilized.

(4) Impetus to Find One "Proper Law"

Notwithstanding the conclusion that there may be different laws governing different aspects of a trust of movables, it is probably fair to say that, absent a contrary intention, a vast majority of such trusts will, as a result of factors present at their creation (*i.e.*, settlor, trustee and assets all located in same jurisdiction), be governed in all their aspects by one proper law. Even where there may be multi-jurisdictional aspects, many would agree that the difficulty in some cases of determining what is a matter of administration and what is a matter of validity should be avoided and, on the basis of the reasoning in *Chelleram (No. 1)*, lead to there being only one governing or proper law (again, absent intention to the contrary). This would avoid, for example, having a trustee of a testamentary trust of movables potentially being governed by the laws of jurisdiction A, as to accumulation rules, and as to matters of trustee investment, governed by the laws of jurisdiction B.

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108. Hayton, *op. cit.*, footnote 2, at pp. 145-6, where the maxim *ut res magis valeat quam pereat* or *semper in dubiis benigniora praeferenda sunt* is described.

In fact, the principle of one governing law derived from the legislation enacted by many of the Canadian provinces to implement the Trusts Convention may also be called upon by a court in those provinces to deal with interprovincial trust conflict issues, notwithstanding the argument that this legislation does not apply in those situations.[109] This may result in the law of the place of administration of the trust being selected, since where the trustees' residence is an element in determining the proper law under those statutes. However, despite this predilection towards finding one proper law, certain factors may contribute to a finding that more than one law applies to the trust. For example, if the trust holds both movable and immovable property, to the extent the property is held in different legal jurisdictions, the applicable law governing administration in relation to the different properties will be different.[110] Furthermore, the settlor or testator may expressly provide that different aspects of the trust are to be governed by the laws of different jurisdictions.[111] This could be the case either under Canadian common law or under provincial legislation addressing conflict rules for trusts.

6. Can the Law of Administration Change?

(1) Generally Law is Fixed

Can the law that governs the administration of a trust of movables, or other aspects of such a trust such as essential validity, change following its creation? As indicated below, the law may change in certain circumstances, such as where a power in the trust instrument to do so is exercised, but as indicated by Collins J. in *Chelleram (No. 2)*[112] in relation to the law governing the trust as a whole: "it is not changed merely by a change in circumstances such as a change in the

109. See in particular s. 1(2) of the Alberta *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, and s. 2 of the New Brunswick *International Trusts Act*, S.N.B. 1988, c. I-12.3, each of which provide that the statute does not apply to conflicts solely between the laws of the provinces and territories of Canada. See also the discussion later in this article under the heading, "Does the Trusts Convention Apply to Interprovincial Trust Conflict Issues?", on the applicability generally of the provincial implementing legislation to interprovincial trust conflicts issues.

110. See the discussion later in this article under the heading, "Trusts of Immovables (Real Property)", for details.

111. See the discussion later in this article under the heading, "Severable Aspects May be Governed by Different Laws (Trusts Convention and Common Law)".

112. *Supra*, footnote 22, at p. 46.

trusteeship (see *Duke of Marlborough's case*, [1945] 1 All E.R. 165 at pp. 169-70, [1945] Ch 78, at p. 85)". Under English law, a mere change in investments will not result in a change in the governing law of a trust.[113] Assuming the same principles apply in Canada, and assuming that at inception there may be differing laws governing matters such as administration and essential validity, then those laws should likewise not be subject to change merely as a result of a change in investments or a change in the residence of the trustees after the trust's creation. Dr. Waters has also indicated that, if there is no power in the trust instrument permitting a change in the place and law of administration of a trust, the law of the place of administration at the time the trust was established (for example, the death of the testator) will remain the law that governs administration for the lifetime of the trust. Even a subsequent transfer of the trust administration work from one jurisdiction to another will not change the applicable law.[114] Read literally, this might be interpreted to mean that, in order to change only the

113. Dicey and Morris, *op. cit*., footnote 30, at p. 1095, citing in support, at fn. 60, *Re Fitzgerald, supra*, footnote 43, at p. 588, and *Marlborough (Duke) v. Attorney General (No. 1), supra*, footnote 41, at p. 85.

114. Waters, *op. cit*., footnote 3, at pp. 1132-3. See also *In re Hewitt's Settlement; Hewitt v. Hewitt*, [1915] 1 Ch. 228. In *Hewitt*, Eve J. was of the view that the settlement (being a marriage contract) was in form and substance intended to be governed and construed by the law of Scotland (and so presumably the law of Scotland governed the administration of the trust created by the marriage contract). The judgment states that the original trustees were of Scottish domicil. Eve J. indicated that if the settlement was governed and construed by the law of Scotland, then even though the trust fund was wholly invested in English securities and the beneficiaries and persons subsequently claiming to be trustees resided in England, it still remained a Scottish settlement. It appears the basis for this was that the subsequent change in circumstances could not alter or affect the intention of the parties at the time the deed was originally executed (see pp. 223-34). *Quaere* whether a similar result would occur where the trust was created by an instrument other than a marriage contract. Presumably the answer would be "yes" if one assumes that the intention of the creator of the trust is always that the law governing administration (however determined) is not to change unless the trust creator provides an express power to do so. See also *Marlborough (Duke) v. Attorney-General (No. 1), supra*, footnote 41, at p. 85, and Dicey and Morris, *ibid*., at p. 1095, where the text states:

> The law applicable to the validity of the trust determines whether that law, or the law governing a severable aspect of the trust, may be replaced by another law. So far as English law is concerned, it is well settled that the governing law will not be regarded as changing merely because of a change in the place of investment of the trust property, or in the place of residence of the trustees, or in the domicile of the beneficiaries. The governing law may be changed by the exercise of a power reserved in the trust instrument, or by an agreement by the beneficiaries to change it and thus in effect make a new settlement; or by the court on an application under the *Variation of Trusts Act 1958*.

governing law of administration, the trust instrument must have terms permitting a change in both the place of administration and the law governing the administration. However, it is submitted that this may be too strict a result with reference to trusts of movables.[115]

In *Re Nanton Estate*, *supra*, footnote 49, the court observed that, while at the time of judgment, the trust was being adminstered in Manitoba by the corporate trustee, the trust company was entitled to do business in Ontario at the time the testator died (domiciled in Ontario). One wonders whether the corporate trustee had a branch in Ontario that performed trust administration at the time of the testator's death and, if so, whether the testator's will made reference to such a branch. (The will was made in Winnipeg with a codicil later made in Toronto, and the judgment indicates that probate was obtained in Manitoba, with a resealing in Ontario.) Administration might then be said to have been originally in Ontario, assuming that the Ontario branch initially administered the trust. If so, the law of the place of administration would originally have been Ontario (thus supplying the law governing the administration of the trust) and so could not subsequently have moved to Manitoba, even if the administration or the residence of the trust company carrying out the administration subsequently did. (The judgment indicates that, while the trust company was "entitled" to do business in Ontario from 1921 to 1940, it was no longer entitled to do so at the time of judgment. However, the judgment does not indicate whether the trust company actually established a branch in Ontario from which administration of trusts occurred.)

115. To support the statement that the law of the place of administration, once fixed, governs for the lifetime of the trust, unless there is a power to change both the place of, and the law governing, administration Waters cites *Re Weston's Settlements*, [1969] 1 Ch. 223, [1968] 3 All E.R. 338 (C.A.), a case relating to a trust of movables. However, the case involved a two-step scheme that was intended to avoid English taxation. The first step required a judicial appointment under the *Trustees Act, 1925* of two Jersey-resident trustees, following which the original England-resident trustees would resign. The second step was for the court to grant a power to the new trustees under the *Variation of Trusts Act, 1958* that would permit them to revoke the trusts of the English settlement and to transfer the property to themselves as trustees of two new identical or nearly identical Jersey trusts that would be subject to Jersey law. It is not entirely clear from a reading of the case whether the mere change in the residence of the trustees was sufficient to avoid English taxation or whether the trust also had to abandon England as its governing law to give effect to this result. In any case, the second step involved the transfer of assets to new trusts, not just a change in the place of administration. While the court did not find favour with the overall scheme, it is submitted that this case does not necessarily stand for a clear proposition that the law governing the trust's administration cannot be changed unless the trust instrument permits a change in the place of, and law governing, administration. A power to change the law governing the administration of the trust should, in and of itself, be sufficient to permit such a change — so long as the trustees have exercised this power reasonably and in good faith and it was not against public policy to do so. It is reasonable to suggest that the trustees could meet that test only if they themselves moved to the jurisdiction whose laws they wished to have govern the trusts for the purpose of administration.

The original place of administration acts as the nexus or connecting factor supplying the appropriate conflict rule providing for the law of administration, in the absence of an express provision or other indication of intention. However, some trustees can and do move from one location to another from time to time. It seems unreasonable to ignore the fact that the place of administration may physically change from time to time, even absent express authority in the trust instrument to do so. The issue therefore should be whether trustees of a trust of movables can legally move the place of administration (*i.e.*, whether they can do so without committing a breach of trust). In certain circumstances, the answer should be "yes". In particular, this should be the case where the migration is a result of the exercise of the trustee's own discretion, exercised reasonably and in good faith. There appears to be authority to support this position, as indicated below. However, although the place of administration may move, the law governing administration should not thereby change. If the original place of administration identifies or supplies the relevant governing law of administration, the place of administration must be "de-linked" from the law of administration. In other words, once that law is set, it will not change unless there is a power in the trust instrument that permits it to change or a court orders that it change.

Presumably, this can be premised on the argument that the settlor views the "person" as the important consideration in the trusteeship appointment and not his or her place of residence (unless a contary intention is expressed). Also, absent intention to the contrary, the settlor would intend the law governing the administration of a trust of movables to remain fixed once determined and not to be subject to continual fluctuations. This allows the beneficiaries to have reasonable expectations regarding the trust administration. So long as the interests of the beneficiaries are not jeopardized, the settlor should not be seen as intending to prohibit the trustees from moving, requiring that they relinquish their trusteeship every time they move. In other words, any subsequent change in the residence of the trustees should not alter or affect the original law governing the adminstration of a trust of movables, where there is no intention expressed permitting such law to change. Whether a change in the trustee's location is permissible in the absence of an express power would therefore seem to depend on whether it was appropriate in the circumstances for the trustees to cause the place to change. That is, it would be no different from any other discretionary decision that trustees make in relation to the trust.

Thus, notwithstanding that the Trustee Acts of many Canadian provinces permit the appointment of a substitute trustee for a trustee

who remains out of the province for a period of more than 12 months,[116] it should be possible for trustees (even in the absence of an express power to do so) to move the place of administration of a trust of movables, since the "legal ownership" of the trust property belongs to them.[117] This might occur: (i) where a sole trustee migrates from one legal jurisdiction to another for personal reasons; or (ii) when a trustee resigns in favour of a foreign trustee, pursuant to a power in the trust instrument or by legislation. While a court might refuse to permit trustees to move the place of administration by way of a court order requesting the appointment of foreign trustees[118] (perhaps because this

116. See, for example, Ontario's *Trustee Act*, R.S.O. 1990, c. T.23, s. 3(1), and British Columbia's *Trustee Act*, R.S.B.C. 1996, c. 464, s. 27(1). Note, however, that this is a "power" to make the substitution, not a "requirement" that it be done. In most cases the legislation provides that it is either the person, if any, nominated in the trust instrument for the purpose of appointing new trustees who can exercise the discretion to remove an "absentee" trustee (*i.e.*, absent from the relevant jurisdiction), and failing such a nomination, the surviving or continuing trustee(s) or the personal representatives of the last surviving or continuing trustee. The beneficiaries of the trust are not empowered to make such substitutions, however, in the latter circumstances, Nova Scotia's *Trustee Act*, R.S.N.S. 1989, c. 479, s. 16(1), requires the beneficiaries' consent to the appointment of a substitutional trustee.

117. However, see Castel and Walker, *op. cit.*, footnote 4, at p. 28.4, where the text states: "Any change in the actual place of administration should be recognized only when the change is authorized by, and is further to, the trust instrument or an order of the court". If this is correct (and for the reasons given above it seems arguable that the physical place of administration, as opposed to the law of administration, could potentially change without express authority in the trust instrument to do so), a simple solution might be to include the following provisions in the trust instrument:

> A Trustee appointed hereunder may be resident or domiciled in any jurisdiction in the world. For greater certainty, but without limiting the generality of the foregoing, should it be necessary from time to time to appoint a substitute trustee pursuant to the terms of this Trust or the relevant governing legislation, the substitute trustee shall not be precluded from being appointed as a Trustee merely because the substitute trustee's residence or domicile is in a jurisdiction other than the jurisdiction of the appointing trustees, so long as in the exercise of an absolute discretion the appointing trustees consider it reasonable to appoint the foreign trustee. The Trustees may at any time, and from time to time, as they in their absolute discretion think fit move the situs of the Trust property, or any portion thereof, to any jurisdiction in the world, so long as the law of the transferee jurisdiction recognizes and gives effect to trusts.

118. See, for example, the decision of the Ontario Divisional Court in *Re Jones Trusts* (1910), 20 O.L.R. 457 (Div. Ct.), at p. 464, where the court stated:

> As pointed out in Lewin on Trusts, 11th ed., p. 823, the Court will not in general appoint persons trustees who are resident out of the jurisdiction: *In re Guilbert* (1852), 16 Jur. 852; *In re Custis's Trust* (1871), Ir. R. Eq. 429; but has done so in several cases where the special circumstances render that course advisable.

would remove the trustees from the court's immediate jurisdiction), there is jurisprudence suggesting that a trustee on his or her own may exercise a discretion that does not require court approval[119] to appoint a foreign trustee so as to replace a trustee who desires to retire provided that: (i) the trust funds are not put at risk; (ii) the beneficiaries still have recourse to the protection of a court; and (iii) the appointment was appropriate in the circumstances.[120] An example where it could make sense for a trustee to move might be a case in which a majority of the beneficiaries reside in the foreign jurisdiction.

Therefore, while the place of administration can move in certain circumstances, even if not expressly authorized in the trust instrument, it seems that the law of the administration of the trust cannot be changed unless there is a power in the instrument creating the trust allowing such a change to occur or, where permitted by law, all of the beneficiaries are *sui juris* and jointly act to change it — though the latter method will generally have the effect of creating a new trust.[121] It may also be possible in certain circumstances for a court to permit a

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The decision also describes other rules a court considers in determining whether to appoint a proposed person as a trustee. In addition to the general rule about not appointing a foreign trustee, these rules can be summarized as follows:

1. The court will not appoint a person as a trustee if the trust's creator, either expressly or by clear implication, indicated that the person should not be a trustee.
2. The court will generally not appoint a beneficiary or a relative of a beneficiary (because of the difficulty such a person may have in complying with the duty to act impartially).
3. The court will not appoint a person if his or her appointment as trustee will impede and delay the execution of the trust.

See also *Re Weston's Settlements, supra*, footnote 115. However, see *Re Windeatt's Will Trusts*, [1969] 2 All E.R. 324 (Ch. D.), where the court did permit a variation of trust having the effect of transferring the trust to a foreign jurisdiction, to be administered by foreign trustees, although what happened was a resettlement of trust property on a new trust created in the foreign jurisdiction.

119. For example, a power in the trust instrument to appoint substitute trustees.
120. Matthews, *op. cit.*, footnote 18, at pp. 24-5, where *Richard v. Mackay* (1997), 11 *Trust Law International* 22, and *Re Kay*, [1927] V.L.R. 66, are referred to.
121. Matthews, *ibid*., at p. 12, para. 3.5, states that "in *Duke of Marlborough v. A-G (No. 1)*, [1945] Ch. 78, 85, the Court of Appeal observed that, although the proper law of a settlement might be changed with the concurrence of the beneficiaries (meaning all the beneficiaries), this would have the effect of making a new settlement". It is submitted similar considerations should apply where the lone issue is the law governing administration, as opposed to the "proper law" in general. See the discussion under the heading, "Power in Trust Instrument to Change Applicable Law (Common Law Jurisdictions)". For additional arguments against the position that a new trust is created, see Matthews, *ibid*., at pp. 68-71.

variation of the trust so as to change the law governing its administration say, for example, where the beneficiaries and trustees have for some time been residing in the foreign jurisdiction to whose laws they wish the trust to be subject and none of them intends to return to the original jurisdiction.[122]

(2) Power in Trust Instrument to Change Applicable Law (Common Law Jurisdictions)

It is not clear at common law whether the proper law of a trust of movables can be changed by invoking a power to do so granted by the terms of the will or trust instrument.[123] However, support for the proposition is found in Collins J.'s judgment in *Chelleram (No. 2)*[124] where he alludes to the possibility of changing the governing law where the trust instrument provides a power to do so:

> Under English law the governing law may be changed with the concurrence of the beneficiaries (see *Duke of Marlborough v. A-G (No 1)* [1945] 1 All ER 165 at 169-70, [1945] Ch 78 at 85) and probably also by the exercise of a power reserved in the trust instrument (see *Dicey and Morris, The Conflict of Laws* (13th edn, 2000) p 1094 (para. 29-020); *Lewin on Trusts*, (17th ed, 2000) p 293 (para 11-42)).

He then discussed the execution of the choice of law by the trustees for the trusts in question, indicating such a selection is effective if made pursuant to a power to do so:

> But, in any event, in the second choice of law in 1985 the trustees chose Bermuda law and jurisdiction for the trusts, and therefore there is prima facie no basis for a contention that the trusts ought to be executed according to English law. The trustees had the power under cl 15(a) to select the applicable law, and that choice is prima facie effective as a combined result of the common law and arts 6(1) and 10 of the Hague Convention.
>
> There is no good arguable case for impugning the validity of the choice of applicable law. There is no reason to believe that there was any

122. See Dicey and Morris, *op. cit.*, footnote 30, at p. 1095, where reference is made to the English courts' having the ability to approve an arrangement under the English *Variation of Trusts Act 1958* that revokes an English settlement and substitute a foreign one in its place. *Quaere* whether a revocation is always necessary under the legislation before a court will vary a trust so as to permit it to be governed by a foreign law.

123. Matthews, *op. cit.*, footnote 18, at p. 3. See also Brownbill, *op. cit.*, footnote 17, at p. 170.

124. *Supra*, footnote 22, at p. 46.

> reason for the change other than to distance the trusts from United Kingdom tax law.[125]

Although the judge referred to the "governing law" (or the "proper law"), similar considerations should apply when referring to the law governing the administration of a trust of movables. This would seem logical if one assumes that under English law the matter of a trust's administration (or the law governing it) is simply one of the aspects of a trust that is governed by the "proper law" or "governing law" concept. Consequently, so the argument would run, what applies to the proper law in relation to all aspects that it covers should also apply to any single aspect (or law governing that aspect), if it should somehow become separated or severed from that proper law. By extension, where a jurisdiction recognizes different governing laws in relation to different aspects of a trust of movables (as is suggested here in relation to Canadian common law), it seems only logical that the concept of the general immutability of the original governing law of that aspect, subject to an express power to change it, should similarly apply.[126]

It appears that to change the law of administration where no such power exists would require terminating the trust of movables and resettling the assets on a new trust in the desired jurisdiction. However, in his text[127] Dr. Waters poses (but does not answer) the question of whether a provision in a trust instrument that permits a person to remove the trustees and replace them with foreign trustees could imply that the appointment of foreign trustees will change the law of administration to the law of the foreign trustees' domicile or residence. It is submitted, however, that an express provision to appoint foreign trustees (which as we have seen may be available to a resigning trustee,

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125. *Supra*, at p. 48.

126. A further or alternative argument to support the view that Canadian law should (absent a contrary intention) recognize the immutability of the original law identified as governing the administration of a trust of movables stems from the theory that legal rules exist to supply reasonable expectations by which society can structure its activities. Therefore, it would only be logical that the law governing administration (assuming it is different from the "proper" law governing other aspects of the trust) should not be subject to change at the mere whim of trustees who might periodically migrate to different jurisdictions. Instead, the concept of the immutability of the original "proper" (or relevant) law governing trust administration matters should act as the "compass" by which a trustee (whether original or succeeding) can readily find the trust's "home" jurisdiction for the purpose of identifying the relevant governing law, despite these migrations to other legal jurisdictions. This ensures that beneficiaries' reasonable expectations regarding the trust's administration will not be subject to potentially shifting legal results.

127. Waters, *op. cit.*, footnote 3, at p. 1133, fn. 56.

even without an express clause) should not be seen as also resulting in an automatic change in the law governing the administration of a trust of movables. A clear expression of such intention should be evidenced in the trust instrument.

Is there any limitation placed on trustees in exercising a power to change the governing law in general — or an aspect of it, such as the relevant governing law of administration? For example, is a trustee permitted to change the governing law (in the sense of the "proper law") to a jurisdiction that would result in the trust being unenforceable in that jurisdiction? The trustee's fundamental duties include preserving the trust property, acting in the best interest of the beneficiaries, and adhering to the terms of the trust. Changing the governing law so as to render the trust unenforceable, resulting in its effective "termination", would arguably be akin to a breach of the trustee's duty and therefore should not be permissible in any event. To prevent such an outcome any clause empowering a trustee to change the governing law should itself provide a restriction in this regard. In Quebec, there appears to be a limitation on a trustee's power to change the governing law as noted below.

(3) Power in Trust Instrument to Change Applicable Law (Quebec)

Nothing in the *Civil Code of Quebec* appears expressly to forbid a settlor from authorizing trustees to change the trust's governing law or the law governing an aspect of the trust. However, there appears to be some uncertainty as to whether such a provision in a will or trust instrument purporting to empower a trustee to change the proper law of a trust is effective.[128] This uncertainty stems from the language in art. 1294 of the new *Civil Code of Quebec* that seems to suggest only the court may amend the provisions of a trust where to do so would allow a more faithful compliance with the settlor's intention or assist in the fulfilment of the trust. According to one authority, a trustee having the power to modify the administrative regime of a trust would thereby have the power to interpret the wishes of the settlor and control the effectiveness of the mechanism to realize the trust's objectives, which functions are given exclusively to the court pursuant to art. 1294.[129]

Even so, some practitioners in Quebec are of the view that a specific provision, granting the trustee the unilateral power to modify the governing law of a trust, should be given the same legal effect as is a

128. J. Beaulne, *Droit des fiducies* (Montreal: Wilson & Lafleur Ltee, 1998), at pp. 258-9.
129. *Ibid*., at p. 259.

provision granting the trustee the power to appoint a replacement trustee of his or her choice.[130] The *Chambre des notaires du Québec* (the professional order for Quebec's notaries) provides a set of will precedents for its members which includes one providing that the law regulating the substance and administration of the trusts created by the will is the law that may be chosen by the trustees from time to time, and that such law may be different from that of the residence of the trustees.[131] Perhaps the viability of such a clause could be argued on the grounds that art. 1308 requires a trustee to "act within the powers conferred" on the trustee, thereby suggesting that so long as it is not contrary to law, a settlor can empower the trustee to change the governing law from time to time.

Marilyn Piccini Roy, in her article "Discretionary Trusts: Civil Law Perspectives",[132] suggests that the trustees can be empowered to change the governing law by an enabling clause in the instrument creating the trust. However, she indicates that there is a limit to the scope of a trustee's power in this regard. She writes:

> The power to change the governing law is constrained by an implied limitation: the governing law cannot be changed to a law that would render the trust unenforceable in the new jurisdiction. For example, the governing law of a Quebec trust should not be changed to that of a common law jurisdiction if, as a result, the trust would infringe the rule against perpetuities.[133]

(4) Does Exercising the Power to Change the Governing Law Create a New Trust?

Would the exercise of a power contained in the trust instrument to change the proper law of a trust of movables, or an aspect of it (such as the law governing its administration) if different from the proper law, result in the creation of a new trust? Although not specifically linking the change in proper law to the exercise of a power, Paul Matthews has indicated that, in relation to a change in the proper law, there is professional opinion to the effect that in English law a change

130. E-mail to author dated October 28, 2002, from A. Chaurette, Senior Counsel with Royal Bank of Canada.
131. E-mail to author dated November 24, 2003, from A. Chaurette, Senior Counsel with Royal Bank of Canada.
132. M. Piccini Roy, "Discretionary Trusts: Civil Law Perspectives" (2003), 51:4 Personal Tax Planning, Canadian Tax J. 1647.
133. *Ibid*., at p. 1682, where the author cites in support the decision of *Gillespie* (unreported, June 12, 2001, S.C. docket no. 500-05-064984-014).

in the proper law has the effect of creating a new trust, "though this view is not universally shared".[134]

However, the exercise of a power contained in the trust instrument itself to change the proper law, or a governing law in relation to an aspect of the trust, should not create a new trust. Such a power does not authorize the trustees to settle a new trust, it simply permits the trustees to change the law that governs aspects of the trust. While this might have the effect of changing the nature of the trust (whether substantively or administratively) as a result of the trust's provision being viewed under the lens of a different governing law, the trust itself remains. The change occurred as a result of the exercise of power given to the trustees by the settlor. In other words, the settlor contemplated both the existence of the power and its exercise, even if it might mean the administration of the trust could change depending on which laws were in effect. The settlor did not contemplate that a new trust would be created.

Though not directly on point, support for this position may be found from an income tax point of view in a Canada Customs and Revenue Agency ("CCRA") [now Canada Revenue Agency] Technical Interpretation. In Document No. 2001-0111303 (dated November 27, 2002), the CCRA indicated that the addition of a beneficiary to a discretionary trust as permitted by the terms of the trust would not result in a resettlement of the trust property. However, it would result in a partial disposition of the interest of each of the existing beneficiaries. Arguably, a trustee's power contained in the trust instrument to change the governing law and which, if acted upon, could cause a change in the beneficial entitlement of one or more beneficiaries, should not result in a resettlement of the trust property. Since the terms of the trust provide from inception for the change in the trust's governing law, the trustee's exercise of the power should not create a new trust.

It is submitted that the same principles and result should apply when referring only to a change in the law governing administration.

7. Trusts Convention and Canadian Legislation — Effect on Common Law Rules

(1) International Rules Regarding Determination of a Trust's "Proper Law"

A significant step towards the international recognition of trusts occurred with the adoption of the Trusts Convention developed by the

134. Matthews, *op. cit.*, footnote 18, at p. 68.

Hague Conference on Private International Law. The Trusts Convention specifies the law applicable to certain trusts and governs their recognition. It does not distinguish between trusts of movables and immovables. According to art. 8 of the Trusts Convention, the law determined by the relevant provisions of the Trusts Convention governs the "validity of the trust, its construction, its effects, and the administration of the trust". A "trust" is one that is created *inter vivos* or on death by a person referred to as the settlor. Article 3 indicates that, in order for the Trusts Convention to apply, the trust must be voluntary and in writing.[135] The Trusts Convention does not apply to trusts created by operation of law or by judicial decision (for example, constructive trusts), unless a Contracting State extends the Trusts Convention to apply to these types of trusts pursuant to art. 20.[136] Apparently, the Trusts Convention can apply to resulting trusts.[137]

Article 6 of the Trusts Convention provides that a trustee shall be governed by the law chosen by the settlor. The choice must be either express or implied in the terms of the instrument creating the trust or the writing evidencing the trust, interpreted, if necessary, in light of the circumstances of the case. In *Tod v. Barton*,[138] evidently the first case in England on the Trusts Convention and the English 1987 Act that adopted it, the will in question contained an express choice of law clause under which law the will was to take effect. It was determined that the express choice of law clause in the circumstances of that case could not be impugned. If the law so chosen does not provide for trusts, the law specified in art. 7 will apply. Article 7 provides that where no law has been chosen, "a trust shall be governed by the law with which it is most closely connected". To determine this, the following criteria are to be considered:

(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.

It seems that the various criteria are determined at the trust's inception,[139] with the result that the governing law would be fixed, unless

135. However, it appears that the trust can be established orally and then confirmed subsequently in writing: see the "Explanatory Report" by von Overbeck, *op. cit.*, footnote 2, at para. 52.
136. *Ibid*., at para. 49.
137. *Ibid*., at para. 51.
138. [2002] E.W.J. No. 1914 (Ch. D.), *per* Collins J.
139. Dicey and Morris, *op. cit.*, footnote 30, at p. 1091, where the authors state: "Although not expressly stated in the Hague Convention, it is clear from other

there is a power to change it. Article 9 provides that a severable aspect of the trust, particularly matters of administration, may be governed by a different law, and art. 10 states that 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. Whether art. 9 weakens the strength of what seems to be a "one law governs all" principle espoused by the Trusts Convention will be examined later in this article (under the heading, "Severable Aspects May be Governed by Different Laws (Trusts Convention and Common Law)") in relation to "dépeçage".

The Trusts Convention does not apply to preliminary issues relating to the validity of wills (for example, capacity and compliance with formalities)[140] or of other acts by virtue of which assets are transferred to the trustee (art. 4). Also the choice of law rules established by arts. 6 and 7 may be overruled in certain circumstances. For example, the first part of art. 15 states that the Trusts Convention "will not prevent the application of provisions of law designated by the rules of the forum, in so far as those provisions cannot be derogated from by voluntary act". The article then lists examples of such mandatory rules, including the protection of minors and incapable parties, personal and proprietary effects of marriage, and succession rights — particularly with respect to matters of "forced heirship". However, the article does indicate that if such rules prevent the recognition of a trust, a court must try to give effect to the trust by other means. In *Tod v. Barton*,[141] Collins J. commented on the purpose of art. 15 by stating:

> The purpose of Article 15 is to preserve the mandatory effect of the rules of the law designated by the conflict of laws rules for matters other than trusts. An example of such a rule is the rule that matters of succession to personal property are governed by the law of the testator's domicile at death. If he is domiciled in a country which gives indefeasible rights of succession to children, then the relevant rules of the country must be given effect notwithstanding the creation of a trust which purports to override those rights.

Article 16 of the Trusts Convention preserves the law of the forum, which must be applied even to international situations, regardless of rules of conflict of laws. Examples include laws intended to protect

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provisions of the Convention that these factors are to be considered as at the moment of creation of the trust".

140. Hayton, *op. cit.*, footnote 2, at p. 127.

141. *Supra*, footnote 138, at para. 42.

"certain vital economic interests".[142] Article 18 provides that the provisions of the Trusts Convention "may be disregarded when their application would be manifestly incompatible with public policy". It seems that the law of the place where litigation takes place (the *lex fori*) can interfere with the choice of law rules provided in arts. 6 and 7, to the point where one author stated: "All this provides fertile ground for disputes in future as to how far the law chosen under arts. 6 or 7 really is effective in governing the validity of the trust, its construction, its effect, and the administration of trusts".[143]

Notwithstanding the criticism that might be levelled against the Trusts Convention, it did accomplish the first step in achieving international harmonization of conflict rules for trusts. According to an article by the Deputy Secretary General Hague Conference on Private International Law, Adair Dyer, the Trusts Convention:

> . . . was first conceived as an instrument which would build a bridge between the common law and the civil law countries, providing uniform rules as to the law which applied to a trust and providing, for the civil law countries in particular, rules for recognition of this unknown form or property holding and for giving effect to the intent of the settlor of the trust, in so far as was possible given the conceptual and technical differences between the property systems of the different countries.[144]

(2) Scope of Trusts Convention

(a) In Canada

While the Trusts Convention is currently indicated as having nine signatories as of June 16, 2004,[145] it applies to only eight jurisdictions, including Canada, the United Kingdom and the Hong Kong Special Administrative Region.[146] In Canada, the Trusts Convention has been

142. "Explanatory Report" by von Overbeck, *op. cit*., footnote 2, at para. 149.
143. Matthews, *op. cit.*, footnote 18, at p. 58.
144. A. Dyer, "International Recognition of the Trust Concept" found at: http://www.trusts-and-trustees.com/library/trust_concept.htm (July 25, 2000).
145. According to the website of the Hague Conference on Private International Law found at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=59. This website provides a status report of when the Trusts Convention has come into force in a particular jurisdiction (and also which States have signed, ratified, or acceded to the Trusts Convention). As of June 16, 2004, the date of the last update, the website lists the following States as having signed: Australia, Canada, Cyprus, France, Italy, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland, and the United States of America.
146. *Ibid*. Australia, Canada, Italy, Luxembourg, Netherlands, and the United Kingdom of Great Britain and Northern Ireland are listed as having ratified the

adopted by implementing legislation in the following provinces: Alberta (with reservation under art. 16, para. 2), British Columbia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Manitoba and Saskatchewan.[147] Ontario, Nova Scotia, the Northwest Territories and Nunavut have not enacted implementing legislation. (The Trusts Convention will apply in the Yukon when Part 6 is added to its trustee legislation, as a result of the coming into force of the relevant portion of *An Act to Amend the Trustee Act*. Quebec has its own rules regarding conflicts of laws for trusts as described by arts. 3107 and 3108 of the *Civil Code of Quebec*. The Quebec rules contain some similarity to the rules contained in the Trusts Convention.[148] Elena Hoffstein indicated that the Wills and Trusts Section (since renamed the Trusts and Estates Section) of the Ontario Bar Association expressed a number of concerns about the Trusts Convention, including that there is:

Trusts Convention, whereas Malta has acceded to it. The website also indicates that the Trusts Convention has entered into force in these same States. China (People's Republic of) is indicated as having continued the Trusts Convention for the Hong Kong Special Administrative Region only so that it continues to apply there also.

147. See Alberta *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, Part I and Sch. 1; British Columbia *International Trusts Act*, R.S.B.C. 1996, c. 237; Manitoba *International Trusts Act*, C.C.S.M., c. T165; New Brunswick *International Trusts Act*, S.N.B. 1988, c. I-12.3; Newfoundland and Labrador *International Trusts Act*, R.S.N.L. 1990, c. I-17; Prince Edward Island *International Trusts Act*, R.S.P.E.I. 1988, c. I-7; Saskatchewan *Trusts Convention Implementation Act*, S.S. 1994, c. T-23.1. (*An Act to Amend the Trustee Act* will add Part 6 on proclamation to what will then be known as the *Yukon Trusts Act* and as a result of this the Trusts Convention will apply in the Yukon).

148. Article 3107 states:

> 3107. Where no law is expressly designated by, or may be inferred with certainty from, the terms of the act creating a trust, or where the law designated does not recognize the institution, the applicable law is that with which the trust is most closely connected.
>
> To determine the applicable law, account is taken in particular of the place of administration of the trust, the place where the trust property is situated, the residence or the establishment of the trustee, the objects of the trust and the places where they are to be fulfilled.
>
> Any severable aspect of a trust, particularly its administration, may be governed by a different law.

Article 3108 states:

> 3108. The law governing the trust determines whether the question to be resolved concerns the validity or the administration of the trust.
>
> It also determines whether that law or the law governing a severable aspect of the trust may be replaced by the law of another country and, if so, the conditions of replacement.

> . . . ambiguity as to the time at which factors for determining the applicable law are to be determined under the Convention rules, which leaves it open to a court to determine that as the circumstances of a trust change, so does the applicable law. The concern here is that this could result in uncertainty, confusion, arbitrariness and further prejudice.[149]

Each of the provinces that has adopted the Trusts Convention has, by its implementing legislation, extended the Trusts Convention to trusts declared by judicial decisions, including constructive trusts and resulting trusts. However, the implementing legislation does not require that recognition or effect be given to a trust declared by judicial decisions in another state or a severable aspect of such a trust, if the court in the relevant province is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect.[150] In Manitoba, Saskatchewan, New Brunswick and Alberta, the implementing legislation also provides that the Trusts Convention will not be construed so as to affect the application of the law with respect to anything done or omitted to be done under a trust before a specific date (*i.e.*, the "coming into force" date of the implementing legislation in that province).[151]

How, if at all, has the fact that many of the provinces have adopted the Trusts Convention affected the rule that, once a trust is established (subject to any terms of the trust), the law governing the administration of a trust of movables does not change? Does this still apply? Dr. Waters has expressed the view to this author that even in those provinces that have implemented the Trusts Convention, there will not be a change in the law of administration simply because the place of administration subsequently changes.

As further support for the general immutability of the proper law, even under the Trusts Convention (which, generally speaking by

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149. E. Hoffstein, "Multi-Jurisdictional and Separate Situs Wills", International Estate Planning Conference, The Canadian Institute (October 20 to 21, 1994), at pp. 26-7. Additional concerns with the Trusts Convention are expressed in this article.

150. A typical example is s. 3 of the implementing legislation of Prince Edward Island, the *International Trusts Act*, which provides:

> 3(1) The Convention is extended to trusts declared by judicial decisions including constructive trusts and resulting trusts.
>
> (2) Nothing in this Act is to be construed as requiring that recognition or effect be given to a trust declared by judicial decision in another state or a severable aspect of such a trust, if the Supreme Court of Prince Edward Island is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect.

151. See s. 3 of Manitoba's *International Trusts Act*, s. 4 of Saskatchewan's *Trusts Convention Implementation Act*, s. 1(5) of Alberta's *International Conventions Implementation Act*, and s. 5 of New Brunswick's *International Trusts Act*.

implication is, or includes, the law governing administration), *Dicey and Morris* states that "[a]lthough not expressly stated in the Hague Convention, it is clear from other provisions of the Convention that these factors are to be considered as at the moment of creation of the trust".[152] Of course, the terms of the trust could provide that the trustees or others can select a governing law from time to time, in which case the time for determining the applicable law could change.

(b) Does the Trusts Convention Apply to Interprovincial Trust Conflict Issues?

Under the Trusts Convention, absent evidence of intention, the law governing the administration of the trust will generally be the law of the jurisdiction with which the trust is most closely connected; that is, the "proper law". This may or may not be the law of the place of administration as determined by the trustees' residence or the place where they carry on their business. The Trusts Convention may therefore modify the common law rule in this regard. Furthermore, those provinces that have implemented the Trusts Convention by legislation can be said in certain circumstances to have adopted the position that, absent evidence of an intention to the contrary, a trust will generally be governed in all of its post-creation aspects by one governing (or proper) law. The provincial implementing legislation certainly applies in situations where there is an international element involved. However, will the Trusts Convention framework apply to purely interprovincial trust conflict issues?

The answer may lie in an understanding of the scope and nature of the Trusts Convention (including the meaning of arts. 23 and 24) and the constitutional realities that exist in Canada.

Article 23 states:

> For the purpose of identifying the law applicable under the Convention, where a State comprises several territorial units each of which has its own rules of law in respect of trusts, any reference to the law of that State is to be construed as referring to the law in force in the territorial unit in question.

Article 24 of the Trusts Convention provides that:

> A State within which different territorial units have their own rules of law in respect of trusts is not bound to apply the Convention to conflicts solely between the laws of such units.

152. Dicey and Morris, *op. cit.*, footnote 30, at p. 1091.

Under Canadian law, it is the executive branch of government, exercising the prerogative powers of the Crown, that is enabled to negotiate and ratify international treaties or international conventions.[153] However, "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute".[154] Generally, implementation of an international convention so as to make it enforceable at law requires an act of Parliament.[155] It can therefore be said that while the authority of the executive branch is to determine how an international obligation is formed, it is the authority of the competent Parliament to determine how it is to be performed.[156] As a result of the federal nature of Canada and Canadian constitutional law, the jurisdiction to implement international treaties will depend on the nature of the matter being addressed.[157] Given the subject-matter addressed by the Trusts Convention then, in order for it to be binding in a Canadian province, that province's legislature must itself adopt the convention into its laws.[158] The purpose of the Hague Conference on Private International Law is to work for the unification of private international law.[159] It is therefore arguable that this mandate means that any conventions resulting from the Hague Conference, such as the Trusts Convention, merely address conflicts in an international setting. According to Adair Dyer, art. 24 "is intended to prevent the binding

153. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at p. 430.

154. *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 at para. 69, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173.

155. See, however, R. St. John MacDonald, Q.C., "International Treaty Law and the Domestic Law of Canada" (1975), 2 Dal. L.J. 307, at p. 313, where the author notes: "Although there have been few cases on the point in Canada, it is submitted that the English rule that the Crown can enforce a treaty without legislation so long as the actions required lie within its prerogative applies in Canada as well".

156. *Ibid*., at pp. 314-15.

157. Sullivan, *op. cit.*, footnote 153, at p. 430.

158. See para. 9 of the document,"Canada's place in the private international legal order", found at http://www.law.ualberta.ca/alri/ulc/priority/epil.htm where it states:

> One barrier to greater participation is that on many private law matters, provincial and territorial implementation is needed for constitutional reasons. Moreover few of the conventions attract a great deal of attention in themselves. The cumulative effect of adhering to them is usually much greater than the need to join any particular one. This is not to understate the competitive advantage of being part of modern international law, but this advantage may be hard to quantify when one is drawing up legislative agendas.

159. See para. 12 of the document, "History of the Conference", found at http://www.law.ualberta.ca/alri/ulc/about/ehistory.htm (July 1, 2003).

application of the Convention's rules as to trusts which only involve different states or provinces of a federation".[160]

The combined effect of arts. 23 and 24, the scope of the Trusts Convention and the constitutional realities of Canada appear to result in a situation where ratification by right of a particular province (which is followed by the adoption of the Trusts Convention by a sovereign act of that province through implementing legislation) means that the province must apply the Trusts Convention to trust conflict situations involving an international element. It also appears to mean that a province may apply the Trusts Convention as between itself and any other province or territory where no such international element is involved. However, does this mean that without an express provision in the provincial implementing legislation indicating interprovincial applicability, the courts of a province that has implemented the Trusts Convention are free to apply the Trusts Convention rules (rather than the common law rules) to purely interprovincial trust conflict of laws situations?

It has been suggested that the better answer is "no",[161] notwithstanding that Alberta and New Brunswick are the only two Canadian provinces whose implementing legislation contains a provision that expressly provides the implementing Act is not to apply to conflicts solely

160. Dyer, *op. cit*., footnote 144. The author notes, however, that in Australia, which is a federation and has ratified the Trusts Convention, both the Law Reform Commission and a leading expert on conflict of laws agreed that the law as between the States of the federation should be interpreted in conformity with the provisions of the Trusts Convention. This leads Dyer to state: "Thus the application of the Convention's principles is not necessarily limited to trust relationships actually covered by the treaty but may well be applied by analogy in situations not covered by the binding rules of the treaty".

161. According to a memorandum dated June 26, 2003, sent to the author by Dr. D.W.M. Waters (who was a Canadian delegate to the Hague Conference that resulted in the Trusts Convention):

> So the issue comes down to what is meant by the words, "is not bound to apply", in Article 24. Does it mean the courts of an adopting province that has no N.B./Alta. provision can apply the Convention rules to a purely within-Canada set of facts, if they choose to do so? Or does it mean in the Canadian federal context that an adopting province is free to provide that the Convention shall apply within Canada, and if it does not so provide the Convention has no within-Canada application?
>
> . . . I think the answer is No to the first of those possibilities, and Yes to the second. In my view the Hague Conference — an international body whose mandate is solely private international law concerns — was making absolutely sure it was saying nothing about rules that shall apply within a State. The only provision the Convention imports (Article 23) is that reference to the law of a State that has two or more trust laws shall be read as a reference to the "unit" that is in question. Articles 23 and 24 are "General Clauses", i.e., you find

between the laws of provinces and territories of Canada.[162] The provision in the implementing legislation of each of Alberta and New Brunswick is the same as that contained in the current model uniform statute (*International Trusts Act*) adopted by the Uniform Law Conference of Canada[163] ("ULCC") regarding potential provincial implementing legislation for the Trusts Convention. Did the ULCC consider that the Trusts Convention did not apply to solely interprovincial conflicts and simply wanted to make it clear by expressly so stating in its model legislation? Finally, the ULCC adopted a separate Conflict of Laws Rules for Trusts statute, although only British Columbia and New Brunswick have adopted it into their respective laws.[164] It is at least arguable to suggest that this legislation may have been intended, in part, to address the interprovincial conflicts situation, especially in light of the fact that the Trusts Convention was the outcome of a body concerned with developing uniform conflict of laws rules between countries, not between territorial units within a country.

Perhaps, therefore, the "proper law" concept under the rules of the Trusts Convention does not necessarily apply when determining con-

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them in every Hague convention. In otherwise saying nothing, save that "that matter is outside the Convention", the effect produced by the Convention within a State that has two or more trust law units (e.g., Canada, Spain) is that the State (which in Canada is the adopting unit), has expressly to make the Convention applicable for inter-unit purposes, if it is so to apply.

See also the article by Hayton, *op. cit.*, footnote 2, at p. 123, where Mr. Hayton writes: "Of course, the Hague Convention, being a private international law Convention, does not affect the domestic trust law of trust countries". Arguably, this might also include the domestic trust conflict of laws rules as between provinces and territories within Canada.

162. See s. 1(2) of Alberta's *International Conventions Implementation Act*, and s. 2 of New Brunswick's *International Trusts Act*.

163. The primary object of the Uniform Law Conference of Canada is "to promote uniformity of legislation throughout Canada or the provinces and territories on subjects on which uniformity may be found to be possible and advantageous" ("History of the Conference", *op. cit.*, footnote 159, at para. 7).

164. See British Columbia's *Conflict of Laws Rules for Trusts Act* and New Brunswick's *Conflict of Laws Rules for Trusts Act*. Note that both statutes contain a provision that states that the legislation is not to be construed as affecting the law to be applied in relation to anything done or omitted under a trust before a certain specified date. Each statute provides that it applies "if the law governing the trust as determined under this Act is that of a province or territory of Canada and if the International Trusts Act does not apply to the trust". Note that *An Act to Amend the Trustee Act* will add Part 5 on proclamation to what will then be known as the *Yukon Trusts Act* which will result in the Yukon trust legislation having similar provisions to the British Columbia and New Brunswick *Conflict of Laws Rules for Trusts Act.*

flict issues on an interprovincial basis in most of the provinces that have implemented the Trusts Convention by legislation.[165] The result could be that matters of a trust's administration might be governed by one law and matters relating to its validity, where the issue is between provinces, might be governed by another.

Notwithstanding this likely inapplicability to interprovincial conflicts, there would be merit for a court in a province that has adopted the Trusts Convention principle of the "proper law" to refer to that framework — and thereby apply similar rules — for purely interprovincial conflicts. By doing so, the court could achieve a measure of uniformity and integration in its conflict of laws rules.[166] Still, except for British Columbia and New Brunswick (and the Yukon, once the relevant section of *An Act to Amend the Trustee Act* comes into force), it is arguable that the common law continues to apply to determine trust conflict of laws issues that are purely interprovincial.

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165. For a possible alternative view, see Castel and Walker, *op. cit.*, footnote 4, at p. 28.1, where the authors state: "In the two provinces where the Convention does not apply to conflict of laws between the laws of the provinces and territories of Canada, either the common law rules prevail or special statutory rules are applicable". The footnote (fn. 3, at p. 28.2) for the reference to the two provinces refers to Alberta and New Brunswick, suggesting that it is only in these two provinces where the legislation implementing the Trusts Convention will not apply to conflicts solely between the provinces (whereas the legislation in the other implementing provinces would appear to suffice to address interprovincial trust conflict issues). *Quaere* whether the authors mean that the courts of those provinces (other than Alberta and New Brunswick) may apply the Trusts Convention rules or must apply them. One wonders whether this possible alternative view is a result of provisions in the implementing legislation of Alberta and New Brunswick that specifically declare the Act not to be applicable to conflicts solely between the laws of the provinces and territories of Canada (s. 1(2) of the Alberta legislation and s. 2 of the New Brunswick legislation). However, *quaere* whether this provision was even necessary. That is, does it merely reiterate or confirm what is already the case; namely, since the legislation implements an international convention, it applies only to situations where there is an international element involved, unless expressly made to apply to interprovincial conflicts? In other words, do the other provinces omit this provision from the implementing legislation because they did not consider it necessary, it being accepted that by the very nature and scope of the legislation (*i.e.*, implementing an international convention), it applies only where an international element exists? One possible argument as to why British Columbia and New Brunswick enacted separate legislation may be that since the Trusts Convention does not apply to oral trusts each of them wanted separate legislation to ensure that even oral trusts would be governed by similar rules.

166. See Castel and Walker, *ibid.*, at pp. 2.12-2.13, for a discussion on international and interprovincial conflict of laws rules.

8. Trust of Immovables (Real Property)

As indicated earlier in this article, the conflict rules for determining which laws govern essential validity in reference to a trust depend on whether it is a trust of immovables or a trust of movables. The same dichotomy exists with respect to the conflicts rules pertaining to matters of administration. If the trust property consists of interests in land, the applicable law for determining questions of administration is apparently also the law of the place of administration, but this place is considered to be the situs of the land.[167]

As also indicated earlier, there is a general rule that the law governing administration for a trust of movables will not change merely because of a change in the investments of the trust. Would this rule apply in the following scenario? A trust is originally settled with movable property such as cash and the law governing the trust's administration is jurisdiction A (where the trustees reside), and the trustees subsequently purchase an immovable in jurisdiction B. It may seem intuitively reasonable that the law governing administration would not change. Nonetheless, it would presumably depend on whether the laws of jurisdiction B, being the laws of the situs of the immovable acknowledge this rule, since the general conflict of laws rules tend to defer to the precedence of the situs in relation to immovables.

Where the terms of the trust contemplate that personal property forming the trust property is to be used to purchase real property in a specified jurisdiction expressly referred to in the trust, the law governing the administration of the trust may be that of the specified jurisdiction.[168] Is it possible that the law governing the trust in relation to future acquired immovables could be different from the law governing the trust's administration originally? There may be some support for this result in *Jewish National Fund*. In his reasons for judgment in that case, Cartwright J. declared that the place of administration of the trust

167. *Ibid*., at p. 28.7.

168. In *Fordyce v. Bridges*, *supra*, footnote 50, the testator left a will giving the residue of his personal estate to trustees to be converted into money for the purchase of estates in England and Scotland upon specified terms. The law of England would have resulted in the Scottish entail being void as a perpetuity. The Lord Chancellor stated at p. 514:

> The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. What the law of Scotland may be upon such a subject, the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire: the fund being to be administered in a foreign country is payable here though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country.

would be the country in which the lands were purchased and managed and that the residence of the trustees would be irrelevant.[169] In that case, the lands would have been purchased only after the trustees' receipt of the proceeds of the estate and could have been situated in different countries.

This suggests that the law governing the administration of a trust in relation to a given immovable is determined at the time of its purchase and would be the law of the situs. If this is correct, the result may differ from that generally arrived at under the Trusts Convention rules, where the factors to determine the governing law, absent a power to change the law, are considered at the time the trust is created, irrespective of the type of trust property involved. It also would be different from the common law rule applicable to a trust of movables where the law governing the trust is said to be fixed at inception, subject only to a power provided in the trust instrument to change it, a judicial intervention or the agreement of all of the beneficiaries (being legally capacitated). This would be unsatisfactory in that it would subject the rights of beneficiaries to potentially fluctuating rules around administration matters relating to the trust property. As noted under the heading "Severable Aspects May be Governed by Different Laws (Trusts Convention and Common Law)" which follows, the common law may not be amendable to more than one law governing a trust merely because the trust property is comprised of different types of assets.

As noted earlier, the law of British Columbia was considered to govern what appeared to be matters of trust administration (*i.e.*, the obligations of the trustees) in the case of *Harris Investments Ltd. v. Smith*,[170] arguably on the basis that the parties intended British Columbia law to apply, despite the fact that the trustees resided elsewhere. It is not clear, however, whether this case involved a trust of movables and immovables. There was property located in British Columbia that was the subject of a mortgage. The trustees were authorized to purchase certain bonds under the terms of the trust, but instead purchased certain securities for which no authority existed. One wonders what law or laws the court might have determined to be applicable if there had been no evidence of intention. The general rule is that an interest in a mortgage is an immovable.[171] If so, then absent evidence of intention, British Columbia law would presumably have been the appropriate law to apply in relation to the mortgage.

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169. *Jewish National Fund, Inc. v. Royal Trust Co.*, *supra*, footnote 55, at p. 791.
170. *Supra*, footnote 85.
171. See Castel and Walker, *op. cit.*, footnote 4, at p. 22.

This conflicts rule then raises the possibility that, where a trust consists of both movable and immovable property, dépeçage could arise. Dépeçage has been described as "the practice of subjecting certain elements of the trust to different laws".[172] For example, in the context of a single trust, the trustees may be operating under two or more sets of applicable laws governing the administration of the trust, based on the nature and location of each asset comprising the trust property. Arguably this could occur if, at the trust's creation, the trust property consisted of both types of property. However, if *Harris Investments Ltd.* did involve a trust of both immovables and movables, it would be noteworthy that Macdonald C.J. indicated there was no reason "why part of the terms of the contract should be carried out according to the laws of British Columbia and part according to those of the State of Oregon".[173] The judge noted that a different result might have applied if the deed contained a different provision. Evidence of intention that one law should govern administration may therefore preclude dépeçage in certain circumstances. Dépeçage in the context of the common law and the Trusts Convention will be discussed later in this article.

Notwithstanding the foregoing, it is uncertain whether a settlor can, in a trust instrument relating to a trust of immovables, absent legislation, provide for a choice of law for the trust's administration and a valid change of law clause, particularly where the selected choice of law is other than the one of the jurisdiction in which the immovable is located. It should be possible, at least to the extent that the law of the situs recognizes the validity of such a designation and of a power to change that law. However, where a jurisdiction in which an immovable is located considers that, as a matter of public policy, no foreign law is to govern any aspect of a right or interest in immovables located within its borders, such clauses would clearly be ineffective. In *Duke v. Andler*,[174] the Supreme Court of Canada confirmed the general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in that country. Presumably, this rule applies between provinces in Canada also.

However, in that same case it was observed that English courts will enforce rights affecting real property in foreign countries if those rights are based on trust law and the defendant resides in England. It seems that a judgment in such a case would operate not against the lands

172. "Explanatory Report" by von Overbeck, *op. cit.*, footnote 2, at para. 91.

173. *Supra*, footnote 85, at p. 750.

174. [1932] 4 D.L.R. 529, [1932] S.C.R. 734, *per* Smith J. See also *Re Howard*, [1924] 1 D.L.R. 1062, 54 O.L.R. 109 (S.C.), for a discussion of conflict rules relating to testamentary dispostions of real property and personal property.

directly but upon the person.[175] Therefore, it is submitted that where the laws of the situs recognize the validity and effect of a choice of law clause governing the administration of a trust in relation to real property interests held in trust, such a clause could be considered effective at least insofar as the designated law could bind or affect the trustee (as opposed to the land) in relation to the trust administration issues. Recall that the Trusts Convention makes no distinction between trusts of immovables and trusts of movables and permits a settler to provide an express choice of law to govern the trust generally. Having similar legislative rules apply to all trust situations in all jurisdictions would avoid uncertainty.

Of course, it may be possible to get around some potential conflict of laws issues where an immovable is involved by transferring the immovable interest to a corporation so that the trust itself acquires only the shares of the corporation. In that way, the general common law rules should apply, so that an express choice of governing law for administration matters and a power to change that law would be valid and effective, at least where not otherwise prohibited.

9. Severable Aspects May be Governed by Different Laws (Trusts Convention and Common Law)

(1) Dépeçage and Common Law

As indicated above, it seems possible for dépeçage to arise in certain trust situations, particularly where the trust consists of movable and immovable property. According to one commentator, dépeçage would appear to occur simply as a result of the application of the common law conflict rules.[176] As indicated previously in this article, provincial legislation relating to the validity and effect of wills can also result in differing systems of law applying to the issue of succession, where an estate consists of both movables and immovables.

In *Parkhurst v. Roy*,[177] a testator domiciled in Ontario made a testamentary gift of the residue of his estate to the government and legislature of the State of Vermont. The State of Vermont was to appoint trustees to administer what appears to have been a charitable purpose

175. *Duke v. Andler*, s*upra*, at p. 739.

176. According to Matthews, *op. cit.*, footnote 18, at p. 65: "it is difficult to see how a settlor or testator can select a law to govern administration which is different from the law to govern validity and effect — though plainly it is possible for the imperative rules of the situs of the property concerned to provide for different treatment".

177. (1882), 7 O.A.R. 614.

trust. While there were estate assets of a movable nature in the United States, there may also have been real property in Ontario, though this is not expressly stated. The court confirmed that a bequest to the government and legislature of the State of Vermont was sufficient to entitle the State to take the bequest and that the bequest could not be rejected on the grounds that it benefited a foreign country and would be carried into execution there. The gift directed accumulations that would have made the trusts void according to the laws of Ontario. The Ontario court concluded that insofar as the devise affected real property in Ontario, it was void, but that it was for the courts of Vermont to determine if the direction to accumulate could be carried out, should the issue be raised. It appears that the Ontario court was indicating that Vermont law would govern the issue of accumulations as to the movables presumably because the trustee was there and the trust would be administered there, but as to the real property in Ontario, Ontario law would govern.

If this interpretation (while admittedly not certain) is correct, then where there are both movables and immovables compromising the property of the trust at its inception, two different laws may govern. This seems to be the result under the Wills Act provisions for matters of essential validity of a will. However, it would mean that trustees of trusts consisting of multiple immovables spread over several jurisdictions may, absent a valid choice of law rule, each be governed by a different set of laws. This has led to some judicial criticism.

In the English Court of Appeal decision in *Re Fitzgerald, Surman v. Fitzgerald*,[178] the property of the trust consisted primarily of Scottish heritable bonds (determined to be immovables, and so governed by the law of Scotland) and some cash that had been paid over to the trustees (mostly resident in England) for investment. Regarding the case, Cozens-Hardy L.J. said, "this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property".[179] The case suggests that where a determination is required as to the governing law of administration of a trust comprising both movables and immovables, dépeçage will be frowned upon by the courts with the result that only one law will apply to govern administration, in the absence of evidence of a contrary intention by the settlor.

As previously suggested, courts in Canada may still find that the trust as a whole is governed by different laws with respect to such matters as essential validity and administration. However, the foregoing

178. *Supra*, footnote 43.
179. *Supra*, at p. 588.

principles suggest that, in respect of a given matter, such as administration, multiple laws may not be held to apply merely because of the composition of the trust property. Clear judicial guidance or uniform legislation addressing this issue in all Canadian provinces at least insofar as interprovincial trust conflicts are concerned would be a welcome development.

(2) Severable Aspects and Essential Validity of Testamentary Trusts

As previously noted, the conflict of laws provisions in the wills legislation of certain provinces and territories may result in a determination that different laws govern the essential validity of a testamentary trust. Essential validity may include matters intrinsic to the trust itself, such as whether its terms offend any perpetuities rules. However, these provisions may not apply in certain circumstances, especially if the province has already addressed conflicts rules for such trusts in other legislation.

(3) Severable Aspects Under the Trusts Convention

The possibility of dépeçage is addressed in the Trusts Convention in arts. 9 and 10. Article 9 states: "In applying this Chapter a severable aspect of the trust, particularly matters of administration, may be governed by a different law". Article 10 provides: "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."

How is the phrase "may be governed by a different law" to be interpreted? Does this mean only if the settlor expressly indicates that different laws are to govern different aspects? Does it apply when both immovables and movables comprise the trust property?

The chapter referred to in art. 9 encompasses arts. 6 and 7. Since those articles relate to identifying the governing law, from both the subjective "selected" connection and the objective "determined" connection, the law specified under either art. 6 or art. 7 may not always be a single law.[180] Article 9 applies to situations where a settlor has expressly or impliedly selected a law and to situations where he or she has not done so. One may therefore argue that, under the Trusts Convention, the determination of whether different systems of laws apply to severable aspects of the trust requires the same analysis as is

180. This is confirmed by von Overbeck, *op. cit.*, footnote 2, at para. 81.

used in determining the governing law if only one law applied.[181] This may in some cases result in a determination that a trustee is governed in relation to matters of administration by two or more laws, in addition to any laws that govern other aspects of the trust.

Whether the fact that different assets subject to the same trust can be considered a severable aspect is not expressly indicated in the Trusts Convention, though it certainly seems reasonable to conclude that it might be.[182] In the British Columbia and New Brunswick legislation dealing with interprovincial trust conflicts, the matter is expressly addressed.[183] This would seem to allow the settlor or testator to expressly provide in the instrument creating the trust that different aspects of the trust will be governed by different laws. However, this may also mean that where no selection of a governing law is evident, a court applying the objective choice rule under art. 7 might conclude that certain aspects of the trust are governed by different laws, notwithstanding the Trusts Convention's apparent general objective of expounding a single system of law to govern all aspects of a trust, as indicated by art. 8.[184]

Certainly, it seems reasonable to conclude that it would not be open to a court to apply different laws to issues relating to different aspects of a trust where the settlor has chosen a law to govern the trust as a whole and no issues of public policy arise.[185] The inviolability of an express designation of choice of law is confirmed by the decision in *Tod v. Barton*.[186] However, what if no intention is evident? Assuming

181. *Ibid*., at paras. 91-6.

182. Certainly von Overbeck, *ibid*., at para. 91, suggests this might be the case when he states: "it is possible to envision as severable aspects of a trust issues concerning property which is situated in different countries or beneficiaries domiciled in different countries".

183. See s. 4(1) of British Columbia's *Conflict of Laws Rules for Trusts Act* and s. 5(1) of New Brunswick's *Conflict of Laws Rules for Trusts Act*.

184. Article 8 of the Trusts Convention states in part that 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".

185. See von Overbeck, *op. cit.*, footnote 2, at para. 91.

186. *Supra*, footnote 138, at para. 35, *per* Collins J., where he states:

> Article 9 does provide that a severable aspect of the trust, particularly matters of administration, may be governed by a different law. Here Sir Derek expressed the wish that his Will should take effect in accordance with English law. There is no process of interpretation by which that expression could be interpreted to exclude the trust provisions, still less any particular aspect of the trust relations. There is no conflict between the choice of law and the other terms of the Will. It is not possible to take into account extrinsic evidence to suggest that the choice of law does not mean what it says.

that the Trusts Convention was an attempt at uniformity and simplicity in the international context with a "one law governs all" general principle, it is reasonable to hope that, in applying the rules of the Trusts Convention where there is no evidence of intention to apply multiple laws, courts will endeavour to avoid such a result.[187]

However, as a matter of court procedure, a different result might apply if certain factors exist. Where (i) the foreign law is not proved in court, (ii) there is no connection to that foreign jurisdiction, other than the express reference to that jurisdiction's law in the trust instrument, (iii) the issue requiring resolution can be determined based on universal rules of application, and (iv) the trust has sufficient connection to the jurisdiction of the court hearing the matter to warrant making that court the appropriate forum, the court hearing the matter may apply the *lex fori* rather than the law expressly chosen by the settlor or testator. Such a result occurred in *Royal Trust Corp. of Canada v. S. (A.S.(W.))* (2004), 7 E.T.R. (3d) 213 (Alta. Q.B.), though the issue in that case involved a matter of construction. Where matters of trust administration are involved, a court hearing the matter might decide that local legislative rules that might otherwise resolve the issue (*e.g.*, as found in the domestic *Trustee Act* of the jurisdiction) are not "universal" in nature and so cannot be held to govern the matter, in the absence of proof of the foreign law.

187. In *Tod v. Barton*, *supra*, the primary issue involved whether English law or Texas law applied to the validity and effect of a deed of variation made by two residual beneficiaries that purported to prematurely terminate trusts establised by the testator (Sir Derek) in his will. While such an early termination is permitted under the circumstances of the case pursuant to English law under the rule in *Saunders v. Vautier* (1841), 4 Beav. 115, affd Cr. & Ph. 240, 41 E.R. 482, [1835-1842] All E.R. Rep. 58, there was evidence that it was not permitted under Texas law. Although the will in question contained an express clause designating that the will was to take effect according to the law of England, two arguments were raised by one of the co-trustees to suggest that, in the circumstances, the clause should not apply to the determination of the validity of the deed of variation, and that Texas law governed (under which the deed of variation would be ineffective). The first argument was that the testator could not have intended the express clause to apply to the trusts, as it would have frustrated his intentions with respect to them and so art. 6 of the Trusts Convention should permit an examination of the circumstances to imply a choice of Texan law. The second argument was that since the choice of law was in specific contravention of Texas law, being the law of the testator's domicile, the choice of law rules of the Trusts Convention would therefore have to defer to Texan law under art. 15. Collins J. rejected both arguments, stating with respect to the latter at para. 42:

> But in this case there is an insuperable hurdle to the application of Article 15. The only possibly relevant reference to Texas law which is required by the English rules of the conflict of laws is to Texas law as the domicile of Sir Derek to determine the essential validity of the Will. By that law the Will is valid. All of the provisions of the Will have been carried in effect, and in the circumstances of this case no rule of the English conflict of laws refers the validity of the Deed of Variation to Texas law, or permits or requires the application of the rule which rejects Saunders v. Vautier in the present context.

The foregoing suggests that while in certain circumstances a Canadian court might find that different provincial or territorial legal systems could govern different aspects of a trust, dépeçage should not be held to occur where a settlor has designated that a particular province's laws should apply to the trust (so long as that designation is otherwise valid). As seen in *Re Fitzgerald, Surman v. Fitzgerald*, and possibly *Harris Investments Ltd. v. Smith*, even in cases where a trust has movable and immovable property, giving rise to the potential of having two separate determinations as to the governing law of administration, a court in Canada may determine that only one of those laws governs administration. If the rules of the Trusts Convention can be interpreted so that an express designation of law would govern a trust comprising movable and immovable property, it certainly makes a case for all provinces to consider adopting legislation that applies the rules to interprovincial trust conflicts.

10. Enforcement of the Rights of Beneficiaries

The enforcement of the rights of beneficiaries as against the trustee appears to be a procedural matter governed by the law of the court which has assumed jurisdiction to administer the trust in question. If the beneficiaries are seeking to enforce their rights and, in doing so, request an order removing the trustees and replacing them with new ones, it appears that irrespective of the governing law of administration, a court may assume jurisdiction if a trustee is subject to the personal jurisdiction of the court.[188]

11. Implications for Trust Companies Accepting Trusteeship Appointments

What does all this mean for a trust company appointed as a trustee? Suppose a will client executes a will for movables that simply appoints the trust company by name as the sole trustee for continuing trusts, and there is no mention of the trustee's address, nor reference to any provincial legislation governing matters such as trust investment? For example, assume a client domiciled in British Columbia makes such a will and then dies in British Columbia. Assume also that the will creates an ongoing trust for movables. Finally, assume the trust company has an office in Vancouver (but only for the purposes of client relationships), and a head office in Toronto from which trustee

188. Dicey and Morris, *op. cit.*, footnote 30, at p. 1097.

investments and administration will occur. What law of administration would the will client have intended for the continuing testamentary trusts? Since the client's contact for the purpose of hiring the trust company as trustee was presumably the office located in British Columbia, and since the client was domiciled there at death, the client arguably intended British Columbia law to apply. However, since the will was silent regarding the client's intention, and since the trust company's head office is in Toronto and that is where the real administration will occur, the seat of the trust is in fact in Ontario. Is there not a stronger argument that Ontario law should govern? This result would seem even more likely if evidence were available and admissible showing that the testator's solicitor discussed the fact that the trust administration would take place in Ontario and not in British Columbia. Does the Trusts Convention affect the decision — or, more properly, does the British Columbia *Conflict of Laws Rules for Trusts Act* apply, and if so, what is its effect?

Castel and Walker make the following statement in relation to corporate trustees:

> Where there is a corporate trustee, and the settlor or testator carried out the arrangements for the setting up of the corporate trusteeship at a branch office, there should be a presumption that he or she intended the law of the place where the branch office is located to be the law of the administration.[189]

Such a presumption is certainly appealing. However, does it make sense if in fact the power of administration at inception of the trust will be carried on by a branch of the trust company located in another province? Does it make any difference if the branch office at the time of the making of the will no longer exists or no longer performs those functions at the time of the testator's death? Such questions, coupled with the uncertainty as to the law considered to govern any particular aspect of the trust, makes for a strong case that the settlor or testator should include a choice of law clause in the instrument creating the trust.

12. Public Policy and Mandatory Rules

Can there be circumstances in which a court might ignore an express choice of law clause? Where the application of a choice of law clause may give rise to a result that offends the public policy of the

189. Castel and Walker, *op. cit.*, footnote 4, at p. 28.5.

relevant jurisdiction, a court having to decide the matter might, in relation to the particular issue, ignore the choice of law clause. As previously indicated, the Trusts Convention contemplates such a public policy result. However, there appears to be no case law in which a court has declared a choice of law clause in a trust to be ineffective on public policy grounds. In *Re Fitzgerald, Surman v. Fitzgerald* a provision in the contract creating the trust provided that all payments to the beneficiary were to be strictly alimentary and not assignable or liable to creditor claims. Had English law governed the contract, the provision would have been ineffective. It was nevertheless considered effective because the provision was valid under the law governing the contract. Arguments that the English court should not enforce the provision on public policy grounds failed. As Williams L.J. stated, although the law would appear to be that private contracts cannot derogate from laws which interest public or good morals, the question in each case is:

> . . . whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognised and insisted upon by all civilised nations.[190]

Although the decision related to a marriage settlement that created a trust, it is submitted that similar considerations should apply to a choice of law clause in any instrument that creates a trust, whether *inter vivos* or testamentary, and whether for movables or immovables. It is further submitted that if that jurisdiction's law generally recognizes the use and validity of a choice of law clause, a court should invoke the public policy argument to invalidate or void such a clause only in rare circumstances and then only insofar as it affects the particular public interest at issue. Such a circumstance should occur only where there is a flagrant and egregious violation of public policy "which in principle is recognised and insisted upon by all civilised nations".

The choice of law, even in relation to matters of essential validity, should not be ignored by a court for certain matters that might be argued by some as offending public policy — for example, avoiding rules against perpetuities[191] or accumulations in the settlor's jurisdiction

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190. *Re Fitzgerald, Surman v. Fitzgerald, supra*, footnote 43, at p. 597.

191. However, as has been indicated, under Quebec law trustees may not change the governing law in a manner that would render the trust unenforceable in the new jurisdiction.

where the trust is first established — at least insofar as trusts of movables are concerned.[192] Legitimately avoiding (as opposed to evading) taxes in a particular jurisdiction should also not be seen as being contrary to public policy.[193] Instead, avoiding such rules at the inception of the trust should be seen as a valid estate planning exercise that permits a settlor greater flexibility in arranging his or her affairs, since these types of rules affect interests only after they are given by the settlor or testator, rather than interests that exist regardless of the trust. Where a settlor wants to establish a trust whose terms would offend a rule against perpetuities in the settlor's jurisdiction, it should not offend any moral perception or public policy for that settlor to select the governing law of a jurisdiction whose laws do not have such a rule. Such a decision does not directly seek to disentitle anyone of an interest that he or she might otherwise already have under the laws of the settlor's jurisdiction which the community has deemed to be of an inviolable nature.

Of course, this argument is more difficult, if not impossible, to make when it comes to immovable interests. Arguably, the public policy of the situs of the immovable may be so strong in relation to immovable interests such as real property located within its borders that it would prevent a settlor or testator from avoiding perpetuity rules by a judicious choice of law rule. In relation to immovable interests, perpetuity rules might take on the character of "mandatory rules" that simply cannot be avoided by express intention, unless legislation to the contrary exists in that jurisdiction.

Similarly, it may not be possible for a settler or trustee, by choice of law clause, to derogate from certain "mandatory" rules that the community or jurisdiction has deemed to be necessary to protect

192. Of course, this assumes that, for testamentary trusts of movables, the Wills Act provisions discussed earlier and the result in *Jewish National Fund, supra*, footnote 55, do not automatically preclude a testator's freedom to choose a system of laws other than that of his or her domicile at death.

193. See for example, *Chelleram (No. 2), supra*, footnote 22, at p. 48, where Collins J. states:

> There is no good arguable case for impugning the validity of the choice of applicable law. There is no reason to believe that there was any reason for the change other than to distance the trusts from United Kingdom tax law. There is clear and contemporary evidence produced by the defendants that the change to a Bermuda-based trustee and the choice of Bermuda law and jurisdiction in 1985 was tax-driven, to avoid an argument that United Kingdom tax law might apply . . . I do not see how the claimants can possibly establish a good arguable case that the choice of Bermuda law is ineffective . . .

Note however that art. 19 of the Trusts Convention provides that nothing in the Convention "shall prejudice the powers of States in fiscal matters".

certain persons or the jurisdiction's interests. Examples of such mandatory rules may include forced heirship rights (generally found in civil law jurisdictions) and the rights of creditors, divorcing spouses or dependants.[194] If the previously mentioned Wills Act provisions respecting essential validity apply to testamentary trusts, they may also fall under this umbrella. In addition, it seems reasonable to suppose that a court might ignore a choice of law clause or even a power to change the governing law of a trust if giving effect to it would contravene or permit contravention of certain international agreements — for example, anti-money-laundering laws.[195] A court might invoke the public policy argument to render ineffective a choice of law clause or a power to change the governing law to the extent necessary to prevent avoidance of such mandatory rules.

It would be prudent in any event to ensure that there are at least some relevant connections to the selected jurisdiction. For example, for an *inter vivos* trust, the trustees might reside in the chosen jurisdiction, even if the settlor resides elsewhere and the trust document was signed elsewhere. Having the trust property and trustees located in the jurisdiction whose laws purport to govern the various aspects of the trust might also protect the trust property from exigibility to certain foreign claims.[196] Some or all of these conditions should aid in maintaining the integrity of the trust. It has been suggested that a chosen law may be disregarded where it has no significant connection with the trust and its application would violate the public policy rules of the forum.[197] Article 13 of the Trusts Convention allows a court to refuse to recognize a trust whose significant elements (except for the choice of applicable law, the place of administration and the habitual residence of the trustee) are most closely connected to a jurisdiction which does not have the institution of the trust or the category of the trust involved. Might art. 13 be stretched to include the situation where a jurisdiction recognizes trusts in general, but does not recognize a perpetual trust of real property?[198]

194. Hayton, *op. cit.*, footnote 2, at pp. 132 and 147.

195. What if a beneficiary insists that a trustee utilize a power to change the governing law so as to permit, for example, a distribution of trust property that is permitted under the laws of the desired jurisdiction but is prohibited by the laws of the jurisdiction that presently govern the trust? According to Hayton, *ibid.*, at p. 134, "a Court of Equity will . . . not require a person to do an act that is illegal where it is to be done".

196. *Ibid.*, at p. 132.

197. *Ibid.*, at p. 145.

198. See "Explanatory Report" by von Overbeck, *op. cit.*, footnote 2, at para. 124, where the author states that:

> It will also be noted that this provision allows a judge of a State which does not have trusts to refuse recognition to the trust because he thinks that the

As appears to be the case in Quebec, it would seem logical to suppose that where a clause to change the governing law is otherwise valid, a trustee cannot exercise the power once a valid trust has been created and an original valid governing law established, if to do so would render the trust unenforceable in the new jurisdiction. Arguably, the overriding duty of a trustee to preserve the trust property and adhere to the terms of the trust would preclude the trustee's acting in such a way as to make the trust either invalid or unenforceable.

Similarly, any power to change the governing law of the trust should indicate that it cannot be used so as to violate the perpetuities rules of the "original jurisdiction" to which an established trust is subject. In those jurisdictions where the common law rule against perpetuities exists, the fact that a change of law clause could result in the trust being subject to a legal regime with no rule against perpetuities might mean that the trust could never have been validly created in the original jurisdiction; the mere possibility that interests could vest outside the perpetuity period could result in the trust being invalid at inception. Alternatively, a court in the jurisdiction under which the trust would, but for the change of law clause, be valid might simply determine that the clause itself is invalid or of no force and effect. Being separate from the trust, the clause cannot void the trust at the outset for violating perpetuity rules in the original jurisdiction (assuming that jurisdiction has no legislation that otherwise tempers the usual common law rule against perpetuities).

13. Conclusions

Based upon the foregoing discussion, the following observations are offered here:

1. Conflict of laws in relation to trust issues is complex and unsettled.
2. English law leans toward the view that aspects of a trust, such as administration and validity, are governed by one "proper law", determined by a "connecting factors" test (*i.e.*, the jurisdiction with which the trust is most closely connected). This rule is expressed in the Trusts Convention.

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situation involved is internal to his State. In contrast this possibility does not exist for those States which have trusts, but those States do not seem to feel the need for it.

The author also notes that art. 13 does not indicate the time at which the conditions set out in the article need to be fulfilled, and notes at para. 126: "Reasoning from the purpose of this provision it seems morevoer that the time of recognition and not that of the creation of the trust ought to be determinative".

3. A number of Canadian provinces have enacted legislation to implement the Trusts Convention. However, the provincial statutes adopting the Trusts Convention do not appear to apply to strictly interprovincial trust conflicts. This appears to be the case for Alberta and New Brunswick and is arguably the case for the other implementing provinces. In order to engage the Trusts Convention implementing legislation, an international element must be present.
4. Only British Columbia and New Brunswick (and the Yukon, once the relevant section of *An Act to Amend the Trustee Act* comes into force) have specifically enacted legislation that applies to trust conflict issues arising between provinces. The legislation largely adopts the principles of the Trusts Convention.
5. Provincial legislation leans toward the rule that, unless otherwise expressly provided, one governing law or proper law applies to trust matters. This governing law will therefore also apply to trust administration issues. The legislation does, however, admit the possibility of severable aspects of a trust being governed by different laws. Therefore, there may be an argument that, in applying the legislation in a situation where no evidence of intention is present, a court may, in certain circumstances, determine that a severable aspect, such as administration, will be governed by a different law.
6. Common law experience suggests that the law governing a trust of movables or an aspect of such a trust, such as administration, will depend on the intention of the settlor/testator, whether that intention is express or implied.
7. The Canadian common law experience suggests that, absent evidence of intention, different aspects of a trust of movables — in particular administration and validity — may be governed by different laws.
8. As regards the choice of law governing issues respecting the administration of a trust, the Canadian common law suggests that absent evidence of intention the relevant law is found by determining the law of the place of administration of the trust. For trusts of movables, this is the place where the trustees exercising the power of administration reside.
9. In those provinces that have adopted the Trusts Convention through legislation that does not expressly apply to trust conflicts solely between the provinces, courts hearing interprovincial trust conflicts issues may be influenced by the principles promulgated by the legislation to find one proper or governing law, based on the "connecting factors" test.

10. Since Ontario, Nova Scotia, Nunavut and the Northwest Territories have no legislation that applies to either domestic or international trust conflicts, the common law rules will apply to both situations in determining the relevant law governing administration of the trust. This will also be the case for the Yukon until the coming into force of a relevant portion of *An Act to Amend the Trustee Act*.
11. Subject to public policy considerations, under both common law and relevant legislation where enacted, a settlor/testator would generally appear to be able to select the law that will govern the administration of a trust of movables. A settlor should, subject to these same considerations, also be able to designate the law governing the validity, effect and construction of an *inter vivos* trust of movables. However, there may be limitations to such freedom of choice where testamentary trusts of movables are involved, depending on the province and circumstances and whether the conflict of laws provisions within the province's Wills Act legislation are considered to apply.
12. Common law as developed overseas supports the proposition that a settlor/testator can provide the trustees with a power to change the law governing the administration of a trust of movables or the law governing such a trust in general, so long as the trust remains enforceable under the laws of the newly selected jurisdiction.

(1) Drafting Considerations

Given the complexity of conflicts of laws issues, it is suggested that all wills and all *inter vivos* trust instruments that create trusts of movables contain a choice of law clause that, at a minimum, declares the law that governs the administration of any trusts of movables and, better yet, provides a choice of law for all matters related to the trust, as contemplated by the Trusts Convention. This assumes that the wills legislation of those provinces that contain conflicts of laws provisions either do not address the essential validity of trusts or, if they do, they do not preclude a testator's ability to select a governing law, so long as matters of public policy and mandatory rules are not contravened. Otherwise, a testator would be restricted to selecting the laws of his or her domicile at death for testamentary trusts of movables and the laws of the situs for trusts of immovables.

For *inter vivos* trusts, the choice of law should probably have some relevant connection to the trust; for example, the trustee and trust property being located in the jurisdiction whose law is designated to apply.

As it is not certain whether a testator can select any law to govern matters of a testamentary trust's essential validity, perhaps a choice of law clause should be limited to the law of the testator's domicile at death, rather than identifying a specific law at the time of execution of the will. Where a testator is free to select any governing law, there should probably also be some relevant connection between the chosen law and the testamentary trust to be governed by that law.

Alternative or additional drafting considerations may include the following:

1. Provide a general choice of law clause to supply the law governing the validity, administration, construction and effect of a trust, but include a "severability" clause. For example, a "severability" clause could specifically state that each and every term and provision of the trust and the choice of law clause is severable from every other provision or part and that the terms of the choice of law clause and the terms of the trust are to be considered valid and enforceable and be given effect, to the extent permitted by law. It can further provide that if any part of the trust or the choice of law clause is invalid or unenforceable for any reason, it will not affect the validity or enforceability of any other provision or part of the trust or choice of law clause.
2. Insert a preamble to the choice of law clause along the lines of "to the extent permitted by any applicable law".
3. Provide that the choice of law is intended to apply only in matters of administration and construction (especially for will situations).
4. Restrict the choice of law clause to trusts of movable property (or include a separate choice of law clause for trusts of immovable property, so long as the selected law in the case of immovables is the law of the situs of the immovables).

It may also be beneficial for wills and trust instruments to contain an express power to change the choice of law. This may assist in the effective and efficient administration of trusts of movables, should the actual administration of the trust move from one jurisdiction to another to facilitate administration. Any such clauses designating a choice of law or empowering a change of law should expressly state that the reference to a jurisdiction's laws is deemed to exclude its conflict of laws rules. This should prevent the invocation of *renvoi*.

In relation to immovable interests, the validity and effect of a choice of law clause and a clause empowering a change in the law will presumably depend on how the jurisdiction of the situs views such a clause. Within common law jurisdictions in Canada, choice of law and

change of law clauses at common law relating to movable interests appear to be valid, at least insofar as they address matters of a trust's administration. In a province that has adopted the rules of the Trusts Convention, particularly where an international element is concerned, it is hoped that such clauses in relation to immovable interests in that jurisdiction would be accorded similar validity, especially regarding the aspect of a trust's administration (and to that extent any choice of law and change of law could be drafted so as to be limited to this aspect only). However, it is acknowledged that the public policy of the jurisdiction of the situs of immovable interests may not permit another jurisdiction's laws to govern any matters involving such immovable interests.

In order to change the place of administration or domicile of a trust of movables, as opposed to the governing law of the trust, the will or trust instrument may need to have a separate clause that empowers the trustee to do so. This may be especially relevant for corporate trustees with branch offices who may wish to move the place of administration from one trust office to another. There is no new trustee being appointed that might otherwise evidence a change in the trustee's location and, by extension, the place of administration.[199]

199. The following are possible precedents from Royal Trust Corporation of Canada's *Trust & Estate Planning Precedent Guide* (August 18, 2003), that might be included in the will or trust instrument to permit the trustees to change the place of administration (see also the precedent in footnote 117, *supra*):

Testatmentary trusts:

My Executor(s) and Trustee(s) may at any time or times and from time to time by Deed declare that the situs of administration of my Estate or of any trust or trusts created by my Will shall from and after the execution of such Deed be domiciled in a jurisdiction other than that which shall be the situs of administration of my Estate, or of any trust or trusts created by my Will, immediately prior to the execution of such Deed and such other jurisdiction shall thenceforth be the situs for the administration of my Estate or of any trust or trusts created by my Will as the case may be and my Executor(s) and Trustee(s), as the case may be, shall forthwith become vested with title to the assets of my Estate or of any trust or trusts created under my Will as the case may be at the address of the corporate Executor and Trustee in such other jurisdiction.

Inter vivos trusts:

The Trustee(s) or the Settlor during his lifetime may at any time or times and from time to time by Deed declare that the situs of administration of any trust or trusts created under the terms of this Settlement shall from and after the execution of such Deed be domiciled in a jurisdiction other than that which shall be the situs of administration of such trust or trusts immediately prior to the execution of such Deed, and such other jurisdiction shall thenceforth be the situs for the administration of the trust or trusts and my Trustee(s) shall forthwith become vested with title to the assets of such trust or trusts at the address of the corporate Trustee in such other jurisdiction.

Furthermore, such a clause should help to address any concerns over whether the trustees have the ability to move the place of administration to a foreign jurisdiction.

It is important that any clause purporting to select a governing law or change the proper law of the trust be drafted so as to ensure that there is no possibility that the trust itself might be considered invalid or unenforceable. In addition, consideration should be given to drafting language that would prevent inadvertent results with respect to the distribution of income resulting from differing accumulation rules that might exist in different jurisdictions. If there is a concern that the laws of certain foreign jurisdictions might affect the trust so as to create potential adverse results by, for example, including a person as a beneficiary who was not intended to be a beneficiary or by causing negative tax consequences, consideration should be given to limiting the scope of the power to change the governing law accordingly. Finally, it would also be prudent to provide a choice of forum clause that specifies which jurisdiction's courts are to have carriage of any proceedings involving any aspect of the trust.