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Can New Zealand trusts be subject to foreign laws?

WILLS & TRUSTS

OPINION



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Anthony Grant

New Zealand lawyers who have practised in tax havens take it for granted that settlors can stipulate for trusts they create to be subject to the laws of different countries.

I was asked recently if this was permissible for New Zealand settlors if a settlor considered the laws of another jurisdiction would better achieve the settlor's objectives.

The classic illustration is where the laws are more favourable to debtors than creditors. So, a settlor wishing to avoid creditors will settle assets on a trust that contains a variety of devices that are likely to deter creditors from accessing the settlor's or a beneficiary's moneys.

I have not had personal experience with what I will call a New Zealand trust that has stipulated for an overseas country's laws.

I have, however, acted in some cases involving trusts that were the subject of the Cook Islands international trusts regime which can be hugely favourable for debtors.

In those cases, the trusts had been established by settlors in the USA.

The US courts ignored the stipulation that Cook Islands law would prevail and threatened the US debtors, who were beneficiaries of the trusts, with imprisonment if they didn't comply with the demands of the US courts.

In short, the stipulation for foreign law was completely ignored.

And that, I think, is likely to reflect the approach that New Zealand's courts would adopt if trusts settled by New Zealand settlors, involving New Zealand-based assets and New Zealand trustees, were to stipulate for foreign laws that were perceived to be unfair when contrasted with comparable New Zealand laws.

The Hague Convention on the law applicable to trusts and on their recognition contemplates that trusts which stipulate for foreign laws considered to be inherently unreasonable will not be upheld.

It provides in Article 18, that "the provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy".

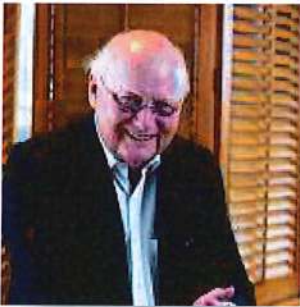
Henry Brandts–Giesen and Samira Boock of Dentons' Auckland office have said in a recent article in *Trusts & Trustees* that "it has become common and accepted practice in Australia for trusts to be set up under the laws of South Australia by residents in one of the other states for the sole reason that the rule against perpetuities has been abolished in South Australia".

This choice of law is presumably accepted by the courts in other Australian states.

It is understandable that the courts in, say, Victoria will uphold a stipulation for the laws of South Australia when both states are part of the same country, are subject to the same federal law and are subject to the supervising jurisdiction of the High Court of Australia.

The extent to which New Zealand courts will uphold a stipulation for a foreign law in trusts that would typically be the subject of New Zealand law (ie, they are settled by a New Zealand resident settlor, have New Zealand-resident trustees, hold New Zealand assets etc) does not appear to have been tested.

But I think it likely that our courts would be reluctant to uphold a foreign law which was perceived to be fundamentally unfair by New Zealand standards.



Anthony Grant is an Auckland barrister and trustee specialising in trusts and estates. He is a member of The Law Association's Trust Law committee