

Czech trust funds (sverensky fond) and their recognition in certain common law trust jurisdictions and practical aspects of transfer of governing law of trust

Mirek Gruna

Brno, Faculty of law, Masaryk University, 26.5. 2022

Common law concept of trust and its challenges for civil law countries

- ▶ The reception of trusts into civil law countries with legal tradition linked to law of England (Quebec, South Africa, Louisiana, Scotland)
- ▶ The first uses of trusts in those jurisdictions - property transmission within family (personal trusts or charitable trusts)
- ▶ Recognition by two means (either enacting **legislation** - Louisiana's law on charitable trusts; or the **courts** found trusts to be valid - South Africa - where trusts created by donation or will)
- ▶ Alienation to fiduciary (first developed in Germany - "*fiduziarische Treuhand*")
 - ▶ Concept of alienation to fiduciary (contract, creation of fiduciary obligation to administer/dispose of for the interests of the alienator or a third party)
- ▶ Concept of *fiducie*
 - ▶ Continental Europe - contractual nature with its limitation (vis a vis 3rd parties), no protection against breach of faith for the alienator or against insolvency of trustee (confined to business arrangements or regulated institutions - Germany, Switzerland, Luxembourg)
 - ▶ Quebec

Recognition of trusts in civil law jurisdictions where Hague Convention not applicable

- ▶ Problems in finding adequate characterization, in addition adaption or analogue of the trusts can be very difficult (especially with so many types of trusts that can be inter-vivos or testamentary e.g. discretionary, bare, fixed, charitable trust etc.)
- ▶ Increasingly the courts of civil law countries pay attention to the provisions of particular trust instrument and its consequences under the trust law to ascertain its true nature by reference to their own concepts
- ▶ Example - use of contract to interpret inter vivos trust - offers sensible solution giving effect to settlor's intentions if the trust is later challenged as invalid inter vivos family trust - Courtois v De Ganay (Paris Court of Appeal_10th January 1970)
- ▶ Applicable law where trust is characterized as contract
 - ▶ Law chosen by the settlor and accepted by the trustee in the same way as parties to a contract choose the applicable law

The Hague Convention on the Law Applicable to Trusts and on their recognition 1985

- key considerations

- ▶ Signatories and ratifiers, came into force on 1 January 1992
- ▶ Purpose - makes both trust and non-trust countries recognize trusts of property as a matter of private international law
- ▶ Scope - Art. 3 - applies only to trusts created voluntarily and evidenced in writing and applies to original as well as substitute trust assets
- ▶ Settlor's choice of governing law of trust (express or implied) - alternatively
- ▶ Art. 7 - objectively applicable law (is the law with which the trust is most closely connected)
- ▶ Art. 11 - a trust validly created in accordance with the applicable law shall be recognized as trust - what does it mean?
- ▶ Limitations of the applicability of the Convention - e.g. domestic mandatory rules (Art. 15, 16 and 18)

Recognition of “sverensky fond” under the Trusts (Jersey) Law 1984 (I/IV)

- ▶ Starting point: would *sverensky fond* constitute a trust for the purposes of Jersey law - Art. 2 of the Trusts (Jersey) Law 1984?

let's review the definition of a trust under Art. 2 :

- ▶ **Existence of a trust:**

A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right):

(a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;

(b) for any purpose which is not for the benefit only of the trustee; or

(c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b).

Recognition of “sverensky fond” under the Trusts (Jersey) Law 1984 (II/IV)

Therefore, for a valid trust to be established we need the existence of:

- ▶ The trustee who holds property (not for themselves) for the benefit of
- ▶ The beneficiary or a purpose
- ▶ The settlor who settles on the trustee
- ▶ the trust property for the trustee to manage and administer

Recognition of “sverensky fond” under the Trusts (Jersey) Law 1984 (III/IV)

- ▶ What is the definition of sverensky fond under part 4, sub-part 1 of the Czech Civil Code:
- ▶ **Separation of assets - para 1448 CCC**
 - ▶ sverensky fond exists where certain property is earmarked by the settlor to be in possession of the trustee and the trustee agrees (by virtue of a contract between the settlor and the trustee or by a will created by the settlor) to hold the legal title in such earmarked asset and to administer it
 - ▶ Once the asset is settled on the trustee - it is clear from the wording of para 1448 (2) and (3) that the assets do not form part of the trustee’s own patrimonium, is also no longer part of the settlors patrimonium but also does not belong beneficially to the beneficiaries
- ▶ **Existence of the trustee - para 1451 (1) CCC**
 - ▶ Sverensky fond comes into existence when the trustee accepts the trusteeship of it...
- ▶ **Existence of beneficiary or purpose - para 1449 (2) CCC**
 - ▶ Where sverensky fond is established for private purpose it can serve the benefit of certain person or in that person’s memory
- ▶ **Trustee’s duty to administer the trust assets - para 1453 CCC**
 - ▶ The trustee is responsible for the full administration of the trust assets; for the purposes of any entries into any public register the trustee will be entered as the legal owner of the trust asset accompanied by the following wording: “as trustee”
- ▶ Therefore there is a likely conclusion that a Czech “sverensky fond” would satisfy the definition of a trust under Art. 2 of the Trust (Jersey) Law 1984 - what does it mean?

Recognition of “sverensky fond” under the Trusts (Jersey) Law 1984 (IV/IV)

- ▶ Art. 49 of the Trusts (Jersey) Law 1984 - Enforceability of a foreign trust:
 - ▶ a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with, its proper law.
- ▶ This in practice mean that (subject to public policy considerations) Jersey law would recognise a Czech sverensky fond as a valid foreign trust
- ▶ Therefore, a Czech sverensky fond can be administered by a Jersey trustee whilst it is still governed by Czech law and its terms can be enforced in Jersey if brought before the Jersey Court, but the Jersey Court would look to Czech law to interpret the terms of the sverensky fond

But what if the definition and functions of Czech sverensky fond are too incompatible with the definition under Art. 2 of the Trust (Jersey) Law 1984?

- ▶ What are our options:
- ▶ Does Czech law allow sverensky fond to have a foreign trustee?
- ▶ Para 1453 (1) - the trustee can be any individual person who is *sui iuris* (legal person can be a trustee only in instances allowed by the relevant law)
- ▶ In Jersey, a professional trustee is usually a corporation only (that requires a specific licence from the Jersey Financial Services Commission to carry out trustee services) however a person can also be a trustee (subject receiving similar licence from the regulator)
- ▶ How strong is the position of trustee if all the trust assets are situated in the Czech Republic?
- ▶ Jersey trustee of a Czech sverensky fond would unlikely succeed brining a claim in front of Jersey Courts to enforce its terms
- ▶ Czech courts would be the forum for any disputes around enforceability of the terms of the sverensky fond
- ▶ So what about changing the governing law of Czech sverensky fond to the laws of Jersey?

Change of „proper law“ of sverensky fond to the laws of Jersey? (I/II.)

- ▶ If we concluded that a particular Czech sverensky fond becomes an enforceable foreign trust in Jersey - can we change its governing law to the law of Jersey?
- ▶ Czech Civil Code does not regulate the change of the governing law of sverensky fond - do we apply to maxim of “what is not prohibited is allowed”?
- ▶ We need to make a reference to the statute governing the sverensky fond - do the terms of the statute allow for the governing law to be changed?
- ▶ If the answer is yes - what steps we need to take to effect that change of the governing law into the laws of the Island of Jersey?
- ▶ Is it necessary for the trustee or the settlor to apply to the Czech Court under Para 1469 (2) to amend its statute if the statute is silent on the change of the governing law?
- ▶ Does the change of governing law imply that the Czech sverensky fond will no longer be considered as such under the Czech Civil Code and hence it will need to be removed from the semi-public registry?

Change of proper law of “sverensky fond” to the laws of Jersey (II/II)

- ▶ If we answered all the Czech law related questions positively and indeed the governing law of the Czech sverensky fond has been changed to the laws of the Island of Jersey - what are our options?
- ▶ Making the trust statute more understandable to the Jersey trustee - how?
- ▶ Amend the terms of the statute to make the trust more aligned with the relevant Jersey laws so that the Jersey trustee/legal advisors/Court are more familiar with its terms
- ▶ If we do all of that and there is Czech-situs assets and Czech beneficiary files a claim against the Jersey trustee with Czech Courts - likely scenario
- ▶ Highly likely that in respect of the Czech-situs assets the Czech Courts may disregard the now-Jersey-law-governed trust
- ▶ Practical recommendation - where possible also change the situs of the assets (by for example inter-posing a holding vehicle based in another country - common law or at least a signatory to the Hague Convention)

Conclusion

- ▶ This "unchartered territory" of change of governing law has not yet been tested by Czech courts
- ▶ Important to plan in advance with the settlor when the statute of sverensky fond is being created
- ▶ Carefully consider the implications of having corporate rather than individual trustee if change of trustee is needed
- ▶ Carefully consider the "mobility" of the trust assets
- ▶ Carefully consider the tax position for the settlor and the beneficiaries upon the change of governing law of sverensky fond (crystalising any capital appreciation of the trust asset or deemed distribution?)
- ▶ Higher standard of care as Jersey trustees are regulated
- ▶ Very similar (identical) conclusion if we look at Guernsey or the Cayman Islands (another story 😊)