

Amendments to Cayman trusts law

Insights - 07/06/2019

A commencement date of 14 June 2019 has been set to bring into force the amendments to the Trust Law (2018 Revision) passed by the Cayman Legislative Assembly and gazetted on 15 May 2019. These amendments are welcomed by Cayman trust practitioners as they provide greater certainty and clarity, whilst also modernising fundamental aspects of the Law, and ultimately reaffirming the Cayman Islands' position as a market-leading jurisdiction for the establishment and administration of sophisticated trust arrangements.

The amendments are largely the fruits of a Cayman Islands Law Reform Commission industry consultation process, and were carefully crafted to ensure that the Law meets the evolving needs of the industry. We consider that the changes of particular importance are: (i) codification of the common law rules on trustee mistake; (ii) simplification of the Court's ability to vary a trust; (iii) inclusion of the Court's ability to approve compromises; (iv) modernisation of the firewall provisions; and (v) unification of the definition of 'trust corporation'.

Trustee mistake: Certainty as to the Court's power to retrospectively remedy the consequences resulting from the mistakes of trustees has been imported into the Law by virtue of the addition of section 64A. Previously, the Court's ability to intervene was in some doubt as a consequence of the English Supreme Court's ruling in *Futter v HMRC* [2013] UKSC 26 (more commonly known as *Pitt v Holt*). Effectively, this decision severely restricted the Court's discretion to intervene in circumstances where the trustee had acted in breach of its fiduciary duty when making the decision that resulted in the adverse consequences. The Cayman Court had previously indicated that it was unlikely to follow *Pitt v Holt* but the amended section 64A now puts it beyond doubt that, in the Cayman Islands, it is not necessary to establish a breach of a fiduciary duty before relief for mistakes may be granted.

Variation of trusts: The changes to the wording of section 72(1) of the Law confer on the Court a more flexible power to vary trusts. The changes replace the existing requirement that an arrangement must be shown to be for the "benefit" of minors and unborn beneficiaries with the less onerous requirement of establishing that the arrangement would "not be to the detriment of" such persons.

Approval of compromises: The addition of section 64B of the Law gives the Court the power to resolve trust disputes by approving compromises on behalf of beneficiaries. Following the approach taken in the amended section 72(1), the Court may approve a compromise where it is satisfied that such approval would be "not to the detriment" of the beneficiaries.

Modernisation of firewall protections: Commonly referred to as part of the firewall provisions, section 91 of the Law is designed to exclude certain adverse effects of foreign law on Cayman trusts. More specifically, this section originally prevented the enforcement of judgments arising from foreign legal claims arising from a "personal relationship" with the settlor of a trust (such as orders in foreign divorce proceedings or rights arising out of community property regimes). These benefits have now been extended also to block claims arising from "personal relationships" with beneficiaries.

Update of the definition of "trust corporation": Largely seen as an administrative change, the definitions of 'trust corporation' under the Law have been unified by updating the definition under section 2 of the Law to reflect the definition of the term imported to STAR trusts under the Trusts (Amendment) Law, 2016 and removing the separate definition of the term under section 105(2) of the Law to avoid redundancy. The apparent effect of this unified definition is to extend the definition of a trust corporation with regards to STAR trusts to all trusts largely to assist with discharging a retiring trustee.

Overall, these enhancements are a positive addition to the Law of the Cayman Islands. An increase in the flexibility of the Court's powers to vary trusts and correct mistakes is to be welcomed, further affirming the Cayman Islands' position as a leading trust jurisdiction. In addition, the modernisation of the firewall provisions is desirable and will likely reduce enforcement attempts (at least in the Cayman Islands) in connection with beneficiaries' interests in Cayman discretionary trusts.

If you require assistance with any non-contentious trust matter, please contact Anthony Partridge or Fraser Allister. For contentious trust matters, please contact Rachael Reynolds or Jennifer Fox.

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