

# CONYERS

## Cayman Islands Trusts

## Preface

This publication has been prepared for the assistance of those who are considering the formation of trusts in the Cayman Islands (“**Cayman**”). It is not intended to be exhaustive nor a substitute for proper legal advice but provides a basic guide to the trust concept and an outline of trust law and trust administration in Cayman.

Clients are advised that they should consider the implications in their home jurisdiction of establishing a Cayman trust and should consult with their own legal, financial and other professional advisers as appropriate.

We also recommend that our clients seek legal advice in Cayman on their specific proposals before taking steps to implement them.

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## 1. INTRODUCTION - PLANNING USES FOR CAYMAN TRUSTS

Cayman trusts are established to achieve a variety of estate, personal, financial, tax or other business planning objectives. These objectives often include one or more of the following:

- (a) provision for spouses and dependents;
- (b) protection of assets from future personal liability;
- (c) minimization of estate/inheritance tax, income tax, and capital gains tax;
- (d) avoiding forced heirship rules in civil law jurisdictions;
- (e) preservation of family wealth and continuity of family businesses;
- (f) efficient and timely distribution of assets upon death without the need to apply for probate;
- (g) protection against exchange controls;
- (h) creating or making provision for charities;
- (i) establishing pensions or employee stock option plans;
- (j) ownership of particular assets or of investments generally;
- (k) lender protection in corporate financing transactions.

## 2. THE TRUST CONCEPT

### 2.1. Cayman trust law

The principal legislation governing Cayman trusts is the Trusts Act (2021 Revision) (the “**Trusts Act**”), the Fraudulent Dispositions Act (1996 Revision) and the Perpetuities Act (1999 Revision).

The Trusts Act grants the Cayman Court jurisdiction to vary a trust in certain circumstances and the Cayman Court has a “supervisory” jurisdiction to deal with trust matters concerning Cayman law governed trusts. English case law is considered of highly persuasive authority in Cayman.

### 2.2. Description of Trust

A trust is the legal relationship created whereby a person (the “**settlor**”) gives property (the “**trust fund**”) to a trustee or trustees to hold the legal title to the trust fund for the benefit of certain persons (the “**beneficiaries**”) or for a specified purpose.

## 3. TYPICAL FORMS OF TRUST

### 3.1. Discretionary Trust

The discretionary form of trust often provides the most flexible and efficient structure for the settlor and the beneficiaries.

After establishing the trust, the settlor will have divested himself of any ownership interest in the assets held in the trust (unless he reserves certain powers).

Under the terms of a discretionary trust, the trustee is generally given wide discretionary powers over the trust fund and decides (according to the beneficiaries' best interests as a whole) whether, when and to which beneficiary he should distribute capital and/or income of the trust, and in what proportions. For this reason, the beneficiaries are regarded as not having a specific interest in the trust but only a right to be considered when the trustee exercises his discretions.

### **3.2. Fixed Interest Trust**

Under a fixed interest trust, primary beneficiaries will normally be granted a right to receive the income and capital of the trust fund and the trustees will have little, if any, discretion over the nature and extent of distributions from the trust fund.

The fixed interest form of trust is used for estate planning purposes or to ensure that certain property passes on stipulated terms and at stipulated times for the benefit of relevant family members in an orderly manner. It is often specially drafted to suit the particular planning goals contemplated by the settlor (e.g. the settlor of a fixed interest trust can provide that the beneficiaries will not be able to sell off or otherwise dispose of their inheritance in a hasty manner). Many modern pension trusts take the form of fixed interest trusts where the trustee holds a fixed share for the member (beneficiary) of the pension scheme.

### **3.3. Charitable Trusts**

A charitable trust may be established under Cayman law to create a charitable fund or to make provision for existing charitable institutions or purposes. A trust under Cayman law is charitable if:

- (a) all its purposes fall exclusively within one or more of the categories of charitable purposes recognized by law listed below:
  - (i) the relief of poverty;
  - (ii) the advancement of education;
  - (iii) the advancement of religion; or
  - (iv) other purposes beneficial to the community at large; and
- (b) there is an element of public benefit.

A charitable trust may continue indefinitely.

### **3.4. Trusts with Protectors**

A protector may be appointed to a trust in order to limit the powers of the trustees by requiring the trustees to obtain the consent of and/or act at the direction of, or in consultation with, the protector. The inclusion of a protector is not necessary for the creation of a Cayman trust but can balance the wide discretionary and fiduciary powers often given to the trustee under the trust. Typically, the protector

(which may be an individual or committee of individuals or a company) is appointed to ensure the wishes of the settlor are carried out by the trustees.

The protector often holds certain powers, such as: (i) power to remove and appoint trustees; (ii) power to agree trustee fees; and (iii) power to vote or consent to the addition or removal of beneficiaries.

### **3.5. Settlors' Reserved Powers**

An alternative to the appointment of a protector is to reserve certain powers to the settlor of the trust. The powers permitted to be reserved include the following:

- (a) any power to revoke, vary or amend the trust instrument or any trusts or powers arising thereunder in whole or in part;
- (b) a general or special power to appoint either income or capital of the trust property;
- (c) any limited beneficial interest in the trust property;
- (d) a power to act as a director or officer of any company wholly or partly owned by the trust;
- (e) a power to give binding directions to the trustee in connection with the purchase, holding or sale of trust property;
- (f) a power to appoint, add or remove any trustee, protector or beneficiary;
- (g) a power to change the governing law and forum for the administration of the trust; and
- (h) a power to restrict the exercise of any powers or discretions of the trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the trust instrument.

The structuring of reserved powers trusts must ensure that an agency relationship is not created, rather than a trust. Also, adverse tax consequences may arise for the settlor and the trust subject to the settlor's tax jurisdiction.

### **3.6. STAR Trusts**

The Special Trusts Alternative Regime came into effect in 1997 and provides for a different form of trust commonly referred to as a "STAR trust".

The objects of a STAR trust may be persons or purposes or both. The persons may be of any number, and the purposes may be of any kind, be it charitable or non-charitable, provided that they are lawful and not contrary to public policy. STAR trusts may be unlimited in duration, so there is no risk of a resulting trust in favour of the settlor at the end of the permitted trust period.

The only persons with standing to enforce a STAR trust are those persons who are appointed "enforcers" under the trust deed or by order of the court, as opposed to, for example, ascertainable beneficiaries under a standard discretionary trust. Enforcers are deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust, subject to evidence of contrary intention.

Trustees of a STAR trust are required to be (or include) a trust corporation (or its controlled subsidiary) licensed in Cayman or registered as a Cayman private trust company.

STAR trusts are commonly used for commercial purposes and in securitization transactions. For more information on STAR trusts, please refer to Conyers' publication "Cayman Islands STAR Trusts".

### **3.7. Exempted Trusts**

Exempted trusts must be registered in Cayman with the Registrar of Trusts and are entitled to a tax exemption undertaking. The undertaking guarantees that no law which may be enacted in Cayman imposing any estate duty or inheritance tax will apply to any property comprised in or any income arising under an exempted trust for a period not exceeding 50 years from the date of creating the exempted trust. The beneficiaries of an exempted trust cannot include any person resident or domiciled in Cayman, other than a charitable object.

Unit trusts are typically registered as exempted trusts. For more information on Unit trusts, please refer to Conyers' publication "Cayman Islands Unit Trusts".

## **4. TRUSTEES' DUTIES AND TRUST ADMINISTRATION**

### **4.1. Who May Act As Trustee?**

Individuals, as well as companies licensed as trust companies under the Banks and Trust Companies Act ("BTCA"), or established as private trust companies, may act as trustees of a Cayman trust.

### **4.2. Trustees' Duties**

Trustees are required by law to fulfil certain fiduciary duties for the beneficiaries of the trust. Save to the extent to which these duties may be modified by the Trusts Act as it applies to certain types of trusts (such as STAR trusts) the most important duties include the following:

- (a) to act honestly and in good faith for the best interests of the beneficiaries or trust purposes in accordance with the terms of the trust;
- (b) to keep under their control and manage trust property;
- (c) to obey the terms of the trust deed unless all the beneficiaries are of full capacity and consent to trustee actions contrary to the terms of the trust or if the court sanctions a variation of the trusts' terms;
- (d) to exercise reasonable care, skill and caution in the administration of the trust and the investment of the trust assets. The Trusts Act contains a list of authorised investments which are usually extended under the trust deed;
- (e) not to delegate duties or powers either to a third party or to a co-trustee except when authorised by the trust deed;
- (f) to act unanimously unless otherwise expressly authorised under the trust deed;

- (g) to disclose any conflict in relation to the trust and not to profit from the trust property; and
- (h) to keep current copies of any deed or other documents containing or varying the terms of the trust;
- (i) to keep accurate and adequate records and accounts, in particular an accurate record of the identity and particulars of:
  - (i) a settlor;
  - (ii) a contributor to the trust;
  - (iii) a specifically named beneficiary;
  - (iv) an identifiable class of beneficiary;
  - (v) a protector;
  - (vi) an enforcer of the trust;
  - (vii) a service provider to the trust including any investment adviser, manager, accountant or tax adviser; and
  - (viii) the person exercising ultimate control of the trust;
- (j) Records of information must be maintained in an easily accessible and legible form, in the English language and updated in a timely manner. Records must also be made available to a competent authority within forty-eight hours of a written request and retained for at least five years after the trustee ceases to be a trustee of the trust.

Where the trust assets are being re-invested on a regular basis, the trustees will often recommend that a professional investment advisor be employed to make recommendations to the trustees so that the trustees have professional advice upon which to base their investment decisions or to assist the management of the assets.

Where a trustee forms a business relationship or enters into a one-off transaction with a person conducting relevant financial business as defined in section 2(1) of the Proceeds of Crime Act (2020 Revision), the trustee is required to either before or at the time the relationship is formed/transaction is entered into inform the person that the trustee is acting in the capacity as trustee of a trust.

A trustee's failure to act *bona fide* or to act properly can expose the trustee to a breach of trust claim brought by the beneficiaries. These claims can be made if the beneficiaries feel that any act or omission by the trustee has wrongly prejudiced their interests. A trustee against whom such a claim is successfully made will be liable to the beneficiary to account for any loss occasioned by the breach of trust.

#### **4.3. Setting Aside Mistaken Decisions**

The Trusts Act provides for the Grand Court to set aside mistaken decisions by trustees and other fiduciaries where:

- (a) the decision maker took into account irrelevant matters or failed to take into account relevant matters; and
- (b) but for that failure, the power would not have been exercised or would have been exercised in a different way or on a different occasion.

It is not necessary to show that the person who exercised the power (or their adviser) acted in breach of trust or duty. The Grand Court may set aside mistaken decisions with the relevant exercise of power treated as never having occurred. Protection is granted to innocent third parties who should not suffer as a result of such orders.

## **5. GENERAL LEGAL CONSIDERATIONS**

### **5.1. Effect of Foreign Laws**

Subject to any express term to the contrary in the trust deed, all questions arising in regard to a trust which is governed by the laws of Cayman are to be determined according to the laws of Cayman, without reference to the laws of any other jurisdiction(s) with which the trust or disposition may be connected. This includes all questions as to:

- (a) the capacity of any settlor;
- (b) any aspect of the validity of the trust or disposition or its interpretation or effect;
- (c) the administration of the trust (including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal); and
- (d) the existence and extent of powers of variation or revocation of the trust and powers of appointment.

No trust governed by the laws of Cayman and no disposition of property to be held upon the trusts thereof is void or can be set aside because:

- (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or
- (b) the trust or disposition avoids or defeats forced heirship rights conferred by foreign law.

### **5.2. Rule against Perpetuities**

With the exception of STAR and charitable trusts, which are unlimited in duration, all other types of Cayman trusts created after 1 August 1995 are subject to the Perpetuities Act which provides that a fixed period not to exceed 150 years may be chosen as the duration of a trust. The law also introduces the “wait and see” principle, so that a gift in trust will not fail for remoteness of vesting until it is established that the gift will not vest within the perpetuity period.

## 6. LICENSING REQUIREMENTS OF CAYMAN TRUSTEES

A trust company carrying on business from Cayman must be licensed pursuant to the BTCA. Licencees are required to satisfy certain prescribed net worth requirements and to be owned and managed by fit and proper persons. Unrestricted, restricted and nominee licences are available.

Through the licensing application process, Cayman seeks to protect its status as a reputable financial centre. Applications for licences must be made to the Cayman Islands Monetary Authority ("CIMA") in the prescribed form.

## 7. PRIVATE TRUST COMPANIES

A private trust company is a limited company whose sole purpose is to act as a trustee for a specific trust or a related group of trusts.

The regulation of private trust companies in Cayman is governed by BTCA and the Private Trust Companies Regulations ("PTCR"). The general rule under the BTCA is that no company may carry on the business of acting as trustee from within Cayman without possessing a trust licence issued by CIMA. Under the PTCR, a private trust company may obtain an exemption from this licensing requirement provided it meets certain specified criteria.

For more information, please refer to Conyers' publication "Private Trust Companies in the Cayman Islands".

## 8. CONFIDENTIALITY

There are no public registration requirements or other disclosure requirements concerning the establishment of trusts in Cayman except in the case of exempted trusts (see section 3.7 above). Certain rules relating to the disclosure of evidence and information are found under various treaties and anti-money laundering legislation.

## 9. TAXATION AND STAMP DUTY

Nominal stamp duty is payable on every settlement and deed in writing under the Stamp Duty Act. *Ad valorem* rates apply to conveyances or transfers of immovable property situated in Cayman.

There is no income, capital gains, wealth, withholding, gift or inheritance tax in Cayman.

Application and annual licensing fees are also payable by a company engaged in trustee or banking services, or if a company is engaged in local trade or business.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*