

• UPDATE: TRUSTS (AMENDMENT NO. 5) (JERSEY) LAW 201-

The Trusts (Amendment No. 5) (Jersey) Law 201- (the "Amendment") was adopted by the States of Jersey on 3 November 2011 and is presenting awaiting its sanction by H.M. Privy Council before being brought into force, which is likely to be in the first half of 2012.

The Amendment clarifies certain matters in the Trusts (Jersey) Law 1984 (the "Law") which previously were the subject of some debate. In particular the Amendment will make the following amendments:

1. FOREIGN COURT INTERFERENCE

The Amendment will amend Article 9 of the Law in several ways:

- 1.1 The Royal Court judgment of *Mubarak v Mubarak* [2008] confirmed that a judgment of an overseas court purporting to alter or vary a Jersey trust cannot be enforced by the Royal Court. However, questions as to the meaning of the Law were raised and therefore the Amendment will introduce new sub-articles 9(1)(f) and 9(1)(g) which will confirm the position; in particular that the purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a Jersey trust or ruling on the nature and extent of any beneficial rights or interests in trust property are determined in accordance with Jersey law and not by foreign law.
- 1.2 Article 9(2)(b) shall be amended to delete the reference to "the settlor" and Article 9(6) is amended to insert a replacement definition of "personal relationship" to widen its meaning so as to prevent personal relationships with beneficiaries being used as grounds to look through a Jersey trust by a foreign court under foreign law.

1.3 A new Article 9(2A) will be introduced to clarify the conflict of laws provisions. In particular, it will make it clear that the protection of Article 9 cannot:

- (i) validate a transfer of property which was neither owned by the settlor nor the subject of a power of disposition vested in the settlor;
- (ii) affect the recognition of the law of any other jurisdiction in determining the questions at (i) above;
- (iii) displace express provisions to the contrary in the terms of the trust;
- (iv) in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;
- (v) affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;
- (vi) validate any trust or disposition of immoveable property situated in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction;
- (vii) validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

1.4 Article 9(4) is improved so that no judgement of a foreign court or tribunal (whether in arbitration or otherwise) shall be enforceable or given effect.

2. SETTLOR RESERVED POWERS

Article 9A(e) of the Law will be replaced with an improved sub-article so that the settlor can appoint or remove any trustee, enforcer or beneficiary and *any other person holding a power, discretion or right in connection with the trust or in relation to the trust property*. Previously the sub-article also made express reference to the appointment or removal of a protector which is now absent, but the new language would include a protector in any event.

3. DEFINITION OF PURPOSE

By the Trusts (Amendment No. 3) (Jersey) Law 1996, Jersey introduced the concept of a non-charitable purpose trust, but it was unclear whether the single purpose of owning assets (e.g. holding shares in a private trust company) was sufficient to properly constitute a purpose and, therefore, often purposes were drafted wider than wanted by the settlor. The Amendment will introduce a new definition of "purpose" to clarify that Jersey law allows the ownership of assets to constitute a sufficient purpose, for example the holding of securities only.

4. REMUNERATION AND EXPENSES OF TRUSTEES

Presently, the Law provides that unless a trustee is authorised by the terms of the trust, the beneficiaries or the Royal Court, it shall not be entitled to remuneration for its services. The Amendment will alter this situation and introduce a new sub-article 26(1A) of the Law so that where the trust instrument is silent on the matter, a professional trustee is entitled to reasonable remuneration. In the future this will reduce costs as there will now be no need for the trustees to apply to the Court to amend

the trust instrument depleting the value of the assets of the trust. However, it should be noted that this will only be applicable to services after the Amendment comes into force.

5. TRUSTEES ACTING IN RESPECT OF MORE THAN ONE TRUST

The Amendment will introduce a new sub-article (3) clarifying that trustees have the ability to enter into a contract with themselves in the capacity of trustees of separate trusts, subject to their duty to account to the beneficiaries, and resign in appropriate circumstances where there is a conflict of interest.

6. POSITION OF OUTGOING TRUSTEE

The Law currently provides that a person, on ceasing to be a trustee, may require to be provided with reasonable security against liability before surrendering trust property. It was anticipated that the Amendment may introduce a trustees' non-possessory lien over trust property, but this is not the case.

However, the Amendment will introduce a provision strengthening the position of trustees by giving them a right to enforce a term of a contract extending or renewing such security even through they are not party to the contract (i.e. a principle similar to the English common law concept of vicarious immunity put onto a statutory footing by the Contracts (Rights of Third Parties) Act 1999). Therefore despite the privity of contract rule, a former trustee may benefit from an indemnity provided to them notwithstanding they are not a party to the contract.

7. LIMITATION OF ACTIONS OR PRESCRIPTION

A number of changes will be made to Article 57 regarding limitation of actions or prescription, in particular:

- 7.1** clarifying the 3 year limitation period of trust claims against a trustee by a beneficiary or an enforcer or former trustee;
- 7.2** introducing a 21 year long-stop to allow trustees to draw a line under past events; and
- 7.3** clarifying that if a breach occurs when the beneficiary is a minor, an interdict or under a legal disability, the period will not run until he or she reaches full age or ceases to be an interdict or under a legal disability or sooner dies.

In summary, the changes in Amendment No. 5 only go to strengthen and improve Jersey's Trusts law. The changes provide certainty in areas which were previously questioned and introduce practical solutions (for example in respect of trustee remuneration) for the benefit of the trust industry as a whole.

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