

Bermuda simplifies and enhances “firewall legislation”

Service area / [Trusts and Private Wealth](#)

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The Bermuda legislature has recently passed the Trusts (Special Provisions) Amendment Act 2020 (**Amendment Act**) which amends Bermuda’s “firewall” legislation contained in the Trusts (Special Provisions) Act 1989. This law reform follows an initiative of the Bermuda Trust Law Reform Committee with the benefit of advice from David Brownbill QC and Andrew Holden (each of XXIV Old Buildings, Lincoln’s Inn, London). This reform will help ensure that settlors and families have greater certainty that their objectives will be met and trust assets protected. The Amendment Act became operative on 5 August 2020.

The purpose of Bermuda’s firewall legislation is to:

1. provide a system for the application of Bermuda trust law to certain key questions relating to the validity of transfers into and the operation of trusts in the jurisdiction (by modifying general choice of law rules to ensure that foreign law is not applied to questions affecting Bermuda trusts); and
2. prevent recognition and/or enforcement of foreign orders adverse to Bermuda trusts.

Choice of law rules determine whether a question is determined under one jurisdiction’s laws as opposed to laws of other jurisdictions. The inherent complexity of choice of law rules and the manner in which many jurisdictions have chosen to structure their firewall legislation has contributed to uncertainty in those jurisdictions when interpreting and applying their firewall legislation.

Simplification

The simplification of Bermuda’s firewall legislation has been achieved in the Amendment Act by providing for an exclusion of foreign law where appropriate as opposed to providing for a blanket application of Bermuda law subject to exceptions. This is accomplished by specifying the circumstances under which any foreign law shall be excluded from application to a Bermuda trust, reinforcing and extending specific exclusions of the application of foreign laws that conflict with Bermuda’s public policy.

Accordingly, the Amendment Act excludes the application of foreign law that creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any persons, by virtue or in consequence of, or in anticipation of:

- the death of a person other than as a result of a voluntary disposition, whether testamentary or otherwise, by the deceased, - including foreign laws that (i) prevent the recognition of the valid creation of a trust because of the application of mandatory succession rules (e.g. forced heirship) that provide, contrary to principles of testamentary freedom espoused in most common law jurisdictions, that a settlor is not capable of disposing of property otherwise than in fixed proportions; and (ii) would otherwise prevent the recognition of the valid creation of a trust because of personal rights in or claims to property as a result of the settlor’s death (e.g. a claim under the UK Inheritance (Provision for Family and Dependents) Act 1975);

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- the creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familial relationship, whether by blood or adoption – including “community of property” or other foreign law regimes that confer rights on spouses, children or persons in analogous relationships in respect of property settled on trust (e.g. orders by a UK or other foreign court purporting to vary a Bermuda trust or grants rights in respect of property of a Bermuda trust) or deem matrimonial property to be jointly owned (thereby preventing the disposition of such property otherwise than with the spouse’s consent); or
- bankruptcy, liquidation or an analogous insolvency process, including a provisional process for the restructuring of debts.

The exclusion of foreign law in respect of the above matters extends to questions in respect of creation of Bermuda trusts (colloquially referred to as “launching the rocket”) such as:

- the capacity of a settlor to dispose of property upon the trusts of a Bermuda trust;
- any rights or interest in or to property disposed upon the trusts of a Bermuda trust;
- the validity of a disposition upon the trusts in respect of, property of a Bermuda trust, including whether any such disposition should be declared void or invalid, rescinded, set aside, varied or amended; or
- any obligation or liability of a settlor, trustee or beneficiary of a Bermuda trust.

The firewall protection offered in respect of the creation of Bermuda trusts does not extend to foreign land or in cases where foreign law has been chosen to apply to a severable aspect of a Bermuda trust that is governed by foreign law.

The Amendment Act contains a wide provision which requires that once the trust has been created (i.e. once the “rocket” has been “launched”) Bermuda law (including the choice of law rules as modified by its firewall legislation) shall apply exclusively at the exclusion of foreign law to questions concerning the validity, construction, effects and administration of the Bermuda trust. Consequently, the firewall protection applies to any questions concerning the appointment of trustees, rights and duties of trustees, powers of delegation, investment and accumulation of income, duration of the trust, relationship between trustees and beneficiaries and any liability, variation or termination of the trust and distribution of trust assets.

Enhancement

The Amendment Act also implements the following further enhancements to Bermuda’s firewall legislation:

- the protection afforded by Bermuda’s firewall legislation has been extended to require Bermuda courts to not only refuse to recognise or give effect to orders of foreign courts that are inconsistent with a proper application Bermuda’s firewall legislation, but also foreign arbitral or other tribunal orders, judgments, awards that are inconsistent with Bermuda law (including its choice of law rules as modified by its firewall legislation);
- Bermuda’s firewall legislation applies to “Bermuda trusts” which is now defined to include trusts that are in part governed by Bermuda law as well as trusts that are wholly governed by Bermuda law;
- clarification that Bermuda courts i.e. all courts of Bermuda (including appellate courts) have jurisdiction in respect of Bermuda trusts;
- clarification that Bermuda courts also have jurisdiction when expressly stipulated by the trust instrument;
- clarification that a “settlor” includes the testator of a testamentary trusts and the settlor/trustee of a declaration of trust; and
- clarification that claims in respect of property of Bermuda trusts that would be defeated by Bermuda’s firewall legislation cannot be successfully brought under the regime contained within Bermuda’s Conveyancing Act 1983 which enables “eligible creditors” to set aside “fraudulent transfers”.

Final words

The jurisdiction in which trustees and trust assets are situated are among the factors that need to be considered in order to maximise the protection that firewall legislation provides to trust assets against the impact of foreign laws and foreign orders.

The Amendment Act assists Bermuda to continue to be an attractive jurisdiction: to select as the governing law of all or part of a trust’s provisions and within which to administer trusts and custody trust assets.

Continued



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