

A guide to Cayman Islands STAR Trusts

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Introduction

The Cayman Islands provides for a unique form of statutory trust known as a "STAR Trust". "STAR" is an acronym for the Special Trusts Alternative Regime, now contained in Part VIII of the Trusts Act (as revised) (the "STAR Regime").

Trusts are used as a structuring mechanism in a range of legal contexts including wealth and succession planning, pensions, philanthropy, investment funds and various other commercial settings.

However, the traditional law of trusts limits in significant respects the extent to which trusts can be used to perform certain functions and allocates rights to information and enforcement in ways that are not always suited to the commercial and other objectives of the person(s) establishing the trust. The STAR Regime removes many of these limitations, thereby providing greater flexibility to tailor Cayman Islands trusts to meet specific objectives.

Particular features of STAR Trusts

A STAR trust ("STAR Trust") will usually be used where a trust with one or more of the following features is needed:

- a trust established for the furtherance of a non-charitable purpose (these can range from purposes that involve little or no public benefit, such as the holding/preservation of a specific family heirloom or antique, to purposes that are broadly philanthropic but may not qualify as purely

'charitable' under the traditional heads of charity, for example, because they involve an element of funding for a particular political purpose);

- a 'mixed' trust established both for the furtherance of noncharitable purposes and to benefit particular persons;
- non-charitable trusts, whether for persons or purposes or both, which are of unlimited duration (STAR Trusts are not subject to the perpetuity restrictions applicable to ordinary trusts);
- trusts established for charitable purposes where the settlor wishes to enhance the prospects of efficient and timely enforcement by conferring information rights and legal standing to enforce on persons other than the Attorney General of the Cayman Islands;
- trusts which remove or restrict the rights of beneficiaries to enforce the trust or obtain information about the trust fund and its administration from the trustee and instead vest such rights in an independent enforcer with standing to bring the trustees to account on behalf of the beneficiaries; or
- trusts which cannot subsequently be varied, whether by unanimous agreement of the beneficiaries or under the statutory jurisdiction in the Trusts Act (as revised).

These are all results difficult or impossible to achieve under the traditional law of trusts and serve to underscore the versatility of the STAR Trust regime.

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Technical requirements

Express provision

A STAR Trust must be created by an instrument in writing and must contain an express declaration that the STAR Regime applies to it. A settlor must clearly intend to opt-in to the STAR Regime. It should be emphasised, however, that the law relating to STAR Trusts is, subject to the specific variations introduced in the STAR Regime, the same in other respects as the traditional law of trusts.

Role and rights of the enforcer

Unlike ordinary trusts, a STAR Trust is required to have one or more enforcers who are the only persons who have standing to enforce a STAR Trust. Enforcers are appointed by the settlor when the trust is established or pursuant to the terms of the trust instrument or an order of the court. Enforcers can be corporate entities or individuals. One or more of the beneficiaries and/or the settlor and/or any protector of the trust may hold the office of enforcer.

The standing of an enforcer to enforce a STAR Trust may be reserved as a right or a duty. However, unless there is at least one beneficiary of full capacity who is an enforcer with the right (as opposed to the duty) to enforce the trust, then there must be at least one other enforcer who has a duty to enforce the trust and is fit and willing to do so. The court has jurisdiction to appoint an enforcer on the application of the trustee where there is no enforcer (or no enforcer that meets the necessary requirements as to capacity, willingness to enforce, etc.) and none has been appointed pursuant to the terms of the trust for a period of 30 days.

The STAR Regime expressly stipulates that an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust, but this is subject to evidence of a contrary intention in the trust instrument.

Subject to the terms on which they are appointed, enforcers enjoy the same rights and remedies as beneficiaries under ordinary trusts. They have standing to seek the direction of the Cayman court concerning the administration of the STAR Trust in appropriate cases, and rights to obtain information concerning the STAR Trust and its administration from the trustee and to take copies of trust documents. In addition, in the event of a breach of trust an enforcer has the same personal and proprietary remedies against the trustee and third parties as a beneficiary of an ordinary trust would have. Enforcers enjoy rights of indemnity out of the trust fund in the same way as trustees of an ordinary trust in discharging the performance of their duties.

Trustee requirements

A STAR Trust, like any other trust, must have one or more trustees. But it is a general legal requirement for a STAR Trust

that at least one trustee be a 'trust corporation' as the term is defined in the Cayman Trusts Act (as revised). The Cayman court has jurisdiction to authorise non-compliance with this requirement.

An individual or corporate trustee not qualifying as a 'trust corporation' can be a co-trustee of a STAR Trust, provided that there is at least one trustee who qualifies as a trust corporation.

Certainty and reform of purposes ('Cy-près')

The non-charitable purposes for which STAR Trusts are established must be consistent with public policy and not contrary to the law of the Cayman Islands but, subject to these parameters, a STAR Trust established for non-charitable purposes is not rendered void for uncertainty as to its object or mode of execution. The terms of the trust itself may confer on the trustee or any other person power to resolve such uncertainties, and failing that the Cayman court has jurisdiction to do so.

Where the execution of a STAR Trust in accordance with its terms becomes over time impossible, impractical, unlawful, contrary to public policy or otherwise obsolete the terms of the trust may empower the trustee to reform it and failing that the Cayman court has jurisdiction to reform the trust and its purposes on application by the trustee.

Land in the Cayman Islands

No land or interest in land sited in the Cayman Islands can be subject, directly or indirectly, to a STAR Trust. However, a STAR Trust is permitted to hold an interest in a company, partnership or other entity which holds land in the Cayman Islands, or an interest in such land for the purposes of its business.

Practical uses of STAR Trusts

The following are some examples of where STAR Trusts have proved particularly attractive to clients:

- where there is a need to 'orphan' or make 'ownerless' special purpose vehicles in a commercial context, for example, to hold assets off balance sheet or to create bankruptcy remote structures. There are advantages in being able to appoint private enforcers for such trusts as this reduces enforcement risks and helps to preserve the structure's privacy, as the traditional alternative is a charitable trust which depends on the Attorney General for its enforcement;
- for orphaning private trust companies which act as trustees of family trusts. Such arrangements can provide the family with a greater degree of oversight than would otherwise be the case if an unconnected trust company acted as trustee of the family trust;
- for holding operating companies on trust in such a way as

to limit trustee involvement in the business of the operating company, or for investing in family companies where economic performance is likely to be poor or uncertain;

- in establishing trusts which, by vesting enforcement and information rights in an independent and trusted enforcer, will prevent beneficiaries prone to disagreement from consuming the trust fund in speculative legal claims; and
- for social benefit projects (both public and private), to enable certain community facilities or areas to be maintained and for the preservation of monuments, (i.e. to provide financial support to an opera house or to fund particular political purposes).

Recognition outside of the Cayman Islands

Notwithstanding the concerns expressed when the STAR Regime was introduced in the Cayman Islands about whether STAR Trusts would be recognised as valid trusts in other jurisdictions, there does not seem to be any reported case successfully challenging the validity of, or refusing to recognise, a STAR Trust as a valid trust.

A STAR Trust would generally fall within the definition of a 'trust' in The Hague Convention (the "Convention") on the Law Applicable to Trusts. This is on the basis that Cayman law would govern the question of a STAR Trust's validity, being the law chosen by the settlor. It follows that in countries that have adopted the Convention, it can be expected that a STAR Trust would generally be recognised as a trust.

Conclusion

As a result of the flexibility of the STAR regime, particularly in relation to trusts established for non-charitable purposes in a broad range of different contexts and trusts where enforcement/information rights are conferred in non-traditional ways, it is anticipated that the role of STAR Trusts in offshore transactions and arrangements will continue for many years to come.



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