

Alert

Bermuda Amends Trust Law to Strengthen “Firewall” Provisions and Restores Settlers’ Freedom of Disposition with Regard to Illegitimate Children

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Bermuda has amended the **Trusts (Special Provisions) Act 1989** to modernise its ‘firewall’ provisions and to introduce flexibility and clarity with respect to excluding illegitimate children from benefiting from a trust.

Bermuda is a global leader in the international private client and trust sector and these amendments ensure that Bermuda trust structures remain competitive with those of other jurisdictions. The **Trusts (Special Provisions) Amendment Act 2020** and **Trusts (Special Provisions) Amendment No. 2 Act 2020** were both passed in Bermuda’s House of Assembly on 24 July, 2020.

Amendments to “firewall” provisions

Bermuda has had strong firewall provisions in place for many years now. Firewall provisions are an important feature of trust law as they protect the trust assets from attacks based on orders of a foreign court under foreign law; the amendments under the **Trusts (Special Provisions) Amendment Act 2020** are intended to:

- clarify the jurisdiction of the Supreme Court in respect of Bermuda trusts and foreign trusts with a connection to Bermuda
- enhance and modernize provisions of the **Trusts (Special Provisions) Act 1989** (the “Principal Act”) with regard to the application of foreign laws and foreign orders to Bermuda trusts
- make consequential amendments to the **Conveyancing Act 1983**.

The following amendments were made to the Principal Act:

1. New section 1A – to refine certain definitions, including the definition of the term ‘Bermuda trust’. This is of particular importance in relation to firewall provisions as it has been specifically tailored to allow for the possibility that Bermuda law may apply to a part of a trust only, in accordance with section 8 of the Principal Act. Other amended definitions were “foreign court” (to cover foreign arbitral tribunals or other bodies exercising judicial or quasi-judicial functions); “foreign order” (to include interim or final judgments, awards, orders or other decisions of a foreign court); and “settlor” (to include a testator of a will and the settlor or trustee of a declaration of trust).
2. Section 6(2) - to provide for the use of the term ‘Bermuda trust’ and to extend to the provision the inference that a trust may be governed by Bermuda law only in part.
3. Section 9 - to specify that the Supreme Court has the power to adjudicate claims concerning the validity, construction, effects or administration of the trust, including any of the matters set out in section 7(a) – (j) of the Principal Act, such as appointment and removal of trustees, duties of trustees, variation and termination of a trust and distribution of trust assets. The new section is considered an improvement on the provisions of competitor jurisdictions as it provides for the express jurisdiction of the Supreme Court, where the trust instrument provides for it.
4. Section 10 - to enhance the effectiveness of firewall protections. The revised approach is intended to provide 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. The new section 10(3) states that no foreign law shall apply to the determination of any question concerning the validity, construction, effects or administration of a Bermuda trust. This will include the matters set out in section 7 (a)-(j) of the Principal Act. The firewall protection afforded under the new section 10 will not apply to foreign land, or in cases where foreign law has been chosen to apply to any severable aspect of a Bermuda trust in accordance with section 8 of the Principal Act.

5. Section 11 - to supplement the protective measures under the new section 10 by preventing the enforcement or recognition of any order of a foreign court where such order is in conflict with the provisions of the new section 11.
6. Consequential Amendment to section 36G of the Conveyancing Act 1983 so as to allow for consistency with the updates to the firewall provisions in the Principal Act.

Amendments with respect to illegitimate children

In 2002 the Children Act 1998 was amended to abolish the distinction under Bermuda law between legitimate and illegitimate children. This change was driven by a desire to provide equal statutory protection to illegitimate children as existed for legitimate children in areas such as child abuse, care and supervision of children and the court's powers to order custody arrangements. A knock-on effect of this change was that it made it difficult, although not impossible, for a settlor to exclude illegitimate children/issue from benefiting from a Bermuda trust.

The Trusts (Special Provisions) Amendment No. 2 Act 2020 (the "No.2 Act") is intended to provide freedom of disposition to a settlor of a trust in circumstances where an express intention appears in the trust instrument with respect to beneficiaries who are children of the settlor contrary to the provisions of the Children Act 1998 and to make consequential amendments to the Children Act 1998.

Specifically, Clause 3 of the No.2 Act provides that Section 18A of the Children Act 1998 ("Section 18 A"), which is the section that provides for equal status of legitimate and illegitimate children, shall not apply to a trust instrument made under the Trusts (Special Provisions) Act 1989 in the case where the trust instrument expressly states a contrary intention to Section 18A. In other words, the amendments made by the No.2 Act allow for the terms of a trust to expressly exclude illegitimate children from benefiting from a trust. In the absence of an express exclusion of illegitimate children in a trust deed, Section 18A will continue to apply and the references to children in the trust will be deemed to include illegitimate children. This amendment will reintroduce flexibility and restore the freedom of disposition to the settlor of a Bermuda trust in line with other offshore trust jurisdictions.

Conclusion

These amendments add to the robustness of Bermuda's Trusts Law, by giving the parties clarity on their rights and standings, and will be of great support to the trustee in the decision-making process.

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