

# Embracing change

Carlos de Serpa Pimentel and Orchid Morrison on new private trust company regulations in the Cayman Islands



A private trust company (PTC) is a limited liability company whose purpose is to provide trustee services to one or more family trusts or to a group of otherwise related trusts. The day-to-day activity of a PTC is carried out like that of an ordinary company, with decisions taken by its directors at board meetings. A PTC provides a useful alternative vehicle for a settlor who wishes their family members and/or advisors and themselves to take an active role in the decision-making process of the trustee and in the administration of one or more family trusts. The board of directors of the PTC may therefore include family members, close family friends, the settlor and/or a committee of advisors. Over time, younger family members may be appointed to the board of the PTC, thereby allowing future generations to play an active role in the administration and management of the family's wealth. A PTC is often used to administer a family's global assets and is increasingly considered to be a useful tool for tax and estate planning purposes.

In these economically challenging times, wealthy individuals may be more reluctant to relinquish control over their assets to corporate trustees who sometimes have little or no knowledge of the family's wealth, how to operate family businesses or truly understand the specific family dynamics. Equally, some corporate trustees can be reluctant to take on fiduciary responsibility for non-liquid assets such as yachts, aircraft

and art collections. These and other non-liquid family assets can be settled into one or more trusts of which a PTC acts as trustee alongside other trusts holding investments. As trustee, the PTC has a fiduciary duty to act in the best interests of the beneficiaries of the trust or trusts of which it is trustee. The directors must not act in breach of their fiduciary obligations. For this reason, at least one of the directors should have relevant trust experience or expertise which contributes to the good governance of the trusts administered by the PTC.

The shares of a PTC may be held by one or more individuals or in a trust. It is not unusual for a purpose trust, such as a Cayman Islands STAR Trust, to be used to hold the shares of the PTC. The purpose trust is formed for the express purpose of holding the PTC's shares and to facilitate the ongoing management and administration of the PTC. In this way, the shares of a PTC may be protected from exposure to potential creditors and the original subscribers need not be the shareholders and owners of the PTC, thereby avoiding potential adverse tax, disclosure and estate-planning consequences.

## New Cayman PTC legislation

The Cayman Islands have recently followed other trust jurisdictions such as Bermuda, the BVI and Jersey by enacting new *Private Trust Companies Regulations, 2008* (the Regulations) on 15 September 2008, with the aim of introducing a more lightly regulated regime for PTCs. Essentially, the Regulations provide that PTCs established under the Regulations are not required to obtain from the Cayman Islands Monetary Authority (the Authority) a restricted trust licence to carry on connected trust business (RTL) under the *Banks and Trust Companies Law (2007 Revision)*.

## The new regime

Under the new regime, a PTC is defined as a company incorporated in the Cayman Islands that will only conduct 'connected trust business': which means trust business where the contributors to the funds of the trusts are all 'connected persons'. A list of connected persons in relation to an individual is set out in the Schedule to the Regulations and includes, amongst others, spouses, the descendants of the individual, parents, grandparents, siblings, step-siblings, parents-in-law and step-parents-in-law. Under the Regulations, a PTC can only carry on business with such connected persons and not third parties or the general public. Interestingly, it appears that the definition of connected persons excludes half-blooded siblings who should perhaps be considered to be closer relatives than step-siblings. Arguably, this is an oversight by the draftsman, however the apparent omission should be kept in mind until clarification is forthcoming from the Authority. Further, it is a requirement that the contributors to the trust or trusts themselves must be connected persons.

The PTC must be incorporated in the Cayman Islands and must maintain its registered office at the office of a company that holds a trust licence under the *Banks and Trust Companies Law* i.e. a licensed Cayman Islands trust company. Copies of the trust deeds of each trust which the PTC administers must be kept at the registered office. Requirements of registration include the provision of: 1) annual declarations; 2) the names of the directors of the PTC and the name of the holder of the licensee that is providing the registered office of the PTC; and 3) a declaration that the company is registered and that the PTC is in compliance with the requirements of the Regulations. The annual declarations must set out the name of the

PTC, which must include the words 'Private Trust Company' or the letters 'PTC'.

An initial registration fee in the amount of KYD3,500 (approximately USD4,268) is payable on incorporation of the PTC, followed by an annual registration fee of KYD3,000 (approximately USD3,658) payable to the Authority, which is substantially less than the fee for an RTL, discussed below.

### The existing regime

It is important to note that the existing PTC regime under the *Banks and Trust Companies Law* still exists as an alternative for those clients who wish to establish a PTC with the benefit of a restricted licence.

Under the existing regime, fees payable on the grant of the RTL are currently in the amount of KYD7,000 (approximately USD8,536) and the sum of KYD6,000 (approximately USD7,317) is payable annually thereafter. Accounts are required to be audited annually and the company is also required to have a minimum fully paid-up capital of KYD20,000 (approximately USD24,390). Directors are to provide a number of supporting documents, including police clearance certificates and details of the names, addresses and nationalities of shareholders with at least a ten per cent stake in the company are to be reported to the Authority. At least one of the two or more directors is obliged to have professional knowledge and experience in the trust business. In the past, these and other stringent requirements meant that the process of obtaining an RTL could take between six and eight weeks.

The new regime has removed many of these restrictions and resulted in what is intended to be a 'lighter-touch' regulatory environment for PTCs in the Cayman Islands. It is anticipated that a PTC under the new

regime will be capable of being established within a much shorter period and, as noted above, at less cost.

### Alternative financial instruments

In addition, the Cayman Islands have gone a step further, at the same time also enacting the *Alternative Financial Instrument Regulations* on 15 September 2008, which it is anticipated will enable Islamic financial instruments such as *sukuk* structures to be used more easily in Cayman structures, as companies using such alternative financial instruments will no longer require a trust licence to act as trustee in their own debt issues.



Under Quranic principles, interest earned on money is forbidden, but certain types of finance are acceptable. The principle behind the *sukuk* is that the holder has an ownership interest in the debt, asset, project, business

or investment and is therefore entitled to the return created by such debt, asset, project, business or investment. The classic *sukuk* structure involves the acquisition of property by a special purpose company (the share of the special purpose vehicle may also be held on trust for the benefit of a charity, for example) established in a tax neutral jurisdiction, such as the Cayman Islands. The company funds itself by the issue of a *sukuk* declaring a trust in favour of the *sukuk* holder under which the Company will hold the assets on trust for the benefit of the *sukuk* holder. The holder of the *sukuk* receives a return based on the income generated by the asset (usually in the form of rent spread over the rental period). It is envisaged that the deregulation of PTCs will enhance the ability to use PTCs as the special purpose trust company in the *sukuk* transaction.

### Conclusion

It is anticipated that the introduction of the new PTC regime and the Alternative Financial Instrument Regulations will substantially increase the level of incorporation of Cayman PTCs and facilitate the use of Islamic financial instruments by Cayman Islands companies. The Authority and the Cayman trust industry as a whole are poised to facilitate the anticipated growth in such structures. That said, in relation to PTCs, the Authority has opted to maintain both regimes; the existing regime whereby clients are required to obtain an RTL and the new route where a licence is not required. The passage of time will reveal whether or not it was prudent to maintain the existing regime. In the words of Disraeli: 'In a progressive country change is constant, change is inevitable.' In relation to PTCs and alternative financial instruments, the Cayman Islands certainly appear to be embracing change. ■