

THE TRUST THAT OWNS THE AMERICA'S CUP

by Vanessa Schrum

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With four weeks of exhilarating sailing behind us featuring collisions, a capsizing and even men over board, all eyes are on Bermuda as we near the conclusion of the 35th America's Cup.

As the oldest international sporting trophy in the world, it is timely to reflect on what the Cup, affectionately called the "Auld Mug", is and how it is governed.

The Cup, an ornate sterling silver bottomless ewer, was originally awarded on 22 August 1851 by the Royal Yacht Squadron for a race around the Isle of Wight in England. That race was won by the U.S. schooner "America" and the trophy was promptly renamed "America's Cup". On 8 July 1857 George L. Schuyler, as sole surviving owner of the Cup, donated it under a Deed of Gift to the New York Yacht Club to hold on trust 'upon the condition that it shall be preserved as a perpetual challenge Cup for friendly competition between foreign countries'.

The Deed of Gift is essentially a trust. The current version of the trust deed is the third revision of the original deed as amended in 1887.

The deed provides for successive trustees. It requires the current trustee or Cup holder to 'deliver the said Cup to the foreign yacht Club whose representative yacht shall have won' following a successful challenge. The new trustee must covenant to hold the Cup on the terms and conditions of the trust so that it is available for perpetual international competition. If the trustee is dissolved, the Cup is to be 'transferred to some Club of the same nationality, eligible to challenge under the deed of gift, in trust and subject to its provisions'.

The original deed provides that only a yacht Club 'having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both' shall be entitled to a challenging race. In addition, the match shall be sailed 'with a yacht or vessel propelled by sails only and constructed in the country to which the challenging Club belongs'. This has led to much debate and several interpretive decisions concerning the terms "arm of the sea", "constructed" (later being construed as "designed and built") and the requirement for a national crew.

The original terms also required competing vessels to 'proceed under sail on their own bottoms to the port where the contest is to take place'. This requirement was helpfully removed by amendment in 1956 permitting boats to be shipped to the venue without having to sail across the sea or contain living accommodations. In 1956 the minimum waterline length of a single mast vessel competing for the Cup was reduced from 65 feet (20m) to 44 feet (13m) to allow the smaller 12-metre class yachts to compete. In 1985 a Southern Hemisphere amendment was included so that the races must now be held between 2 May and 31 October if conducted in the Northern Hemisphere, and between 2 November and 30 April if conducted in the Southern Hemisphere.

As we reflect on the trust that holds the Auld Mug we should note that Bermuda is a first-class jurisdiction in which to establish and administer trusts, offering features that include:

- Charitable trusts are easily set up in Bermuda and can, if necessary, be registered. The modern Charities Act allows for sensible regulation of all registered charities and a broad definition of what is charitable. Bermuda was the first offshore jurisdiction to allow the creation of non-charitable purpose trusts to benefit wider philanthropic and commercial uses.
- Charitable trusts can last in perpetuity. Since 2009, other forms of trust can last indefinitely, provided they do not hold Bermuda real property. For Bermuda trusts established prior to 2009 and foreign trusts that move to Bermuda, it is possible to apply to court in a simple, cost-effective manner to extend the duration of the trust.
- Control – a settlor/grantor may reserve to himself or grant to others an extensive range of powers, while retaining the legal validity of the trust. This is attractive to international clients from jurisdictions unfamiliar with trusts and reluctant to relinquish full control over trust assets.
- Variations – the Section 47 Trustee Act 1975 provides the Bermuda court power to vary beneficial interests and administrative provisions of a trust where it is expedient and in the interests of the beneficiaries to do so, but without requiring the involvement of all beneficiaries. Bermuda is one of just three offshore jurisdictions with legislation allowing for "statutory Hastings Bass". This allows trustees, fiduciaries and others to apply to court to set aside a flawed exercise of a fiduciary power where it has resulted in adverse consequences, tax or otherwise, on the beneficiaries or the trust fund.

Finally, not unlike Oracle Team USA and Emirates Team New Zealand, Bermuda has a team of highly competent professionals having international designations who stand ready to help you determine the best strategies for the course that lies ahead.

This article has been written by:

Bermuda

Vanessa Schrum

Partner and Local Group Head

+1 441 505 3928

vlschrum@applebyglobal.com

Attorney Vanessa Schrum is a Partner and Local Group Head of the Private Client and Trusts Practice Group at Appleby, Official Law Firm of the 35th America's Cup.

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