

## TRUSTS (AMENDMENT NO. 7) (JERSEY) LAW 20[•]

### What's Not Included

by David Dorgan

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This briefing will focus on those areas consulted upon and considered for Amendment No. 7 to the Trusts (Jersey) Law 1984 (as amended) (**Trusts Law**), but which either will not be progressed at this time; will be subject to further consultation or will be enacted pursuant to other legislation.

#### **REQUIREMENT FOR A BENEFICIARY AT ALL TIMES – ARTICLE 2**

Despite Article 2 of the Trusts Law stipulating that a trustee holds property for the benefit of any person “whether or not yet ascertained or in existence”, several decisions of the Royal Court have been unhelpful in this area and so consideration was given to clarifying the issue. One option considered was the adoption of a regime akin to that of the STAR trust in the Cayman Islands (where, most pertinently for these purposes, an enforcer is appointed pursuant to the trust deed or by court order rather than a beneficiary having the right to enforce the trust). The Government will consider the responses further with the Working Group before confirming its proposals.

#### **ARBITRATION**

Consideration was given as to the possibility of including an arbitration clause in a trust instrument which binds beneficiaries. This was ultimately not supported on the basis that respondents were unaware of a demand for arbitration and a key reason for choosing a Jersey trust is its respected judiciary in matters of trust law together with an extensive body of trust cases which would likely reduce if arbitration were to become prevalent. Also, there already exists the option to agree to arbitration or mediation should parties wish to do so. Therefore, Government is of the view that the introduction of provisions making an arbitration clause binding on a beneficiary is not necessary at this time.

### **TRUSTEES SELF-CONTRACTING – ARTICLE 31**

Article 31(3) was introduced by Amendment No. 5 to permit a trustee to contract with itself as trustee of another trust. Consideration was given to removing any ambiguity over the retrospective nature of Article 31 and to expressly permit a trustee to contract with itself in different capacities (i.e. as an individual/company and as a trustee). Consultation revealed there is no clear evidence that this is something that is causing widespread difficulty and therefore an amendment is not merited at this time.

### **CONFIRMATION OF APPOINTMENT OF A CORPORATE TRUSTEE POST-MERGER**

The consultation paper noted that the Trusts Law is silent upon whether, following a merger of two corporate trustees, the surviving trustee entity continues to be validly appointed as trustee of the trusts of the non-surviving trustee entity without further action. Whilst responses did not highlight an amendment as a necessity, the Government is minded to make a clarification amendment within the Companies (Jersey) Law 1991 rather than the Trusts Law.

### **LÉGITIME (FORCED HEIRSHIP RIGHTS)**

If resident in Jersey, a person has unrestricted freedom as to whom they leave their realty, but their personal effects are subject to légitime or forced heirship rights. This includes Jersey trusts established by a Jersey resident settlor. There were detailed responses to this consultation question with the common view to abolish légitime.

However, it was considered inappropriate to abolish légitime without there being protective legislation to protect those inappropriately left without adequate provision following the death of a testator. Therefore, the Government intends to consult specifically on légitime in order to provide an opportunity for the whole community of Jersey to comment on its retention or abolition.

### **RESTRICTION ON HOLDING JERSEY IMMOVEABLE PROPERTY BY TRUSTEES**

Article 11(2)(a)(iii) of the Trusts Law restricts trustees directly holding Jersey immovable property. Some respondents were strongly in favour of removing this restriction, particularly given the ability to circumvent the provision by interposing a company owned by the trustee. The Government will further consider the removal of this restriction, ideally as part of a comprehensive review of Jersey property law rather than in isolation of the Trusts Law.

### **INTRODUCTION OF A SPECIFIC 'NON-CHARITABLE PURPOSE TRUSTS REGIME' (AKIN TO STAR OR VISTA)**

One of the industry associations was keen to see this pursued but equally warned that it must not undermine the strength of the existing trust concept and, if adopted, should be enacted as a separate chapter in the Trusts Law or as a separate law altogether. The Government intends to further explore this option during 2017 through further consultation.

### **INTRODUCTION OF AN EXPRESS POWER TO RATIFY CONDUCT OF AN IMPROPERLY APPOINTED TRUSTEE**

In such circumstances, the basis for the court's jurisdiction to ratify the circumstances is not certain and so a general legislative treatment might be desirable. At this time, the Government will not take further steps, but will review recent case law and associated issues with the Trusts Working Group with a view to further consideration if considered necessary.

## **RECONSIDERATION OF THE LANGUAGE OF ARTICLE 9 (“FIREWALL” LEGISLATION)**

Firewall legislation requires certain questions (e.g. validity or interpretation) relating to a Jersey trust to be determined by Jersey law and not by foreign law or rules. In light of critiques published in peer journals, the consultation paper asked if amendments should be made to Article 9. All respondents who commented on this agreed that there should be no further change to this Article at this point in time.

## **INSOLVENCY AND TRUSTS**

Following the case of *re Z Trusts* [2015], and in particular the question of priority of creditor claims by former trustees, the consultation asked if a formal statutory regime applicable to trusts should be introduced. Currently, priority of claims will be determined by the courts. The majority of respondents did not support statutory intervention preferring the courts to determine the best approach in an individual case.

The Government takes the view that it is not appropriate at this time to pursue a change in the context of the Trusts Law alone and so intends to establish a Working Group to consist of the Viscount, representatives from Community and Constitutional Affairs, and other interested parties, to consider this further.

## **COMMENT**

As can be seen, a number of issues will continue to be consulted upon but not necessarily within the confines of the Trusts Law. As always, Jersey continues to consider changes to its laws to provide clarity or improve its position in the market place.

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