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A PRECIS OF JERSEY TRUSTS LAW

WHAT IS A TRUST?

A trust is a legally binding arrangement by which a person (the settlor) transfers his/her assets to another person (trustee), who is given a legal title to hold those assets for the benefit of a third person (beneficiary) or a specified purpose.

Instructions are given to the trustee from the settlor in the form of a trust instrument, ensuring that each of the respective parties understands their rights and duties and usually giving the trustee power to manage the trust assets. To determine further actions, such as making a distribution out of the trust, instruction from the settlor may be given to the trustee in the form of a letter of wishes.

Jersey law recognises trusts as valid and enforceable.

WHAT IS THE LEGAL BASIS OF A TRUST IN JERSEY?

The Trusts (Jersey) Law 1984, as amended (the Trusts Law) provides the legal framework for trusts in Jersey, together with the vast wealth of Jersey case law and consideration of judgements made in England and Wales.

The Trusts Law defines explicitly a trust as existing where a person (a trustee) holds or has vested in the person property, not for the benefit of himself, but the benefit of beneficiaries. Under the Trusts Law, a trust does not have a legal personality. Where a trust is governed by Jersey law, it is known as a "Jersey trust" whereas a trust with a foreign proper law is known as a "foreign trust".

The Jersey court has jurisdiction over both types of trust; most foreign trust issues will be determined by the Jersey courts per the relevant foreign law.

Per the Trusts Law: -

1. the beneficiaries have proprietary rights in the trust property;
2. the trust property is treated as entirely separate from the trustee's personal assets;
3. any person having full capacity to dispose and hold property may be the trustee or the settlor;
4. the trustee has all the administrative powers of an absolute beneficial owner unless restricted by the terms of the trust; and
5. the trustee is in a fiduciary position and must exercise their powers in the beneficiaries' best interests.

WHAT ARE THE DOCUMENTS REQUIRED FOR THE ESTABLISHMENT OF A TRUST?

A trust can be established verbally. There are no particular formalities. However, in practice, a trust is typically founded with one key document. This is either a settlement where the settlor signs the document together with the trustee or a declaration where the trustee simply declares the trust. In each case, this document sets out the terms upon which the trustee shall administer the trust such as the trustee's powers (including powers to make investments and/or pay money to a beneficiary). It is possible to reserve powers favouring the settlor and/or a protector in this trust document.

WHO ARE THE LEADING PLAYERS IN A JERSEY TRUST?

- 1. The Settlor:** A settlor is a person who creates the trust by transferring his own assets to the trustees. The property or assets of the trust are often known as the "*trust fund*". The Trusts Law defines the settlor as a person who provides trust property or makes a testamentary disposition on trust or to a trust.
- 2. The Beneficiaries:** Beneficiaries are those persons who benefit from the trust. It is possible for persons not yet named as the trust beneficiaries to become so in the future. Power can be provided for this in the trust document. Beneficiaries may be individuals, corporate bodies or a class of persons. Subject to tax advice, the settlor may also be the beneficiary of the trust.
- 3. The Trustee:** A trustee is a person who holds and administers the trust property/assets. The trustee may be an individual or a company who must perform certain obligations set out in the Trusts Law and the trust document. Generally, the trustee of a Jersey trust is a professional trust company based in Jersey. The trustee, although the legal owner of the assets, must not administer the assets for his/its own benefit, but instead for the benefit of the beneficiaries. A trustee shall carry out and administer a trust per its terms, which involves preserving or enhancing the value of trust property as far as is reasonable. Trustees may only exercise their powers in the interests of the beneficiaries. Subject to its terms, a trust must have at least one trustee appointed to it. If there become fewer trustees than required by the terms of the trust, remaining trustees may only act to preserve the trust property. Additional or newly appointed trustees hold the same powers, discretions and duties as if they were initially appointed a trustee for the trust.
- 4. The Protector:** A protector is a person appointed under the trust document with certain powers concerning the trust such as a degree of control and supervision over the trustees. Selecting a protector usually occurs when the settlor may be concerned that the trustee will not provide enough consideration to his wishes or, for example, where he wishes for certain powers to be withheld for the trustee and subject to the consent of an independent third party. Powers, which are generally vested in the protector, include appointing and removing trustees, adding or removing beneficiaries, and terminating the trust.
- 5. The Enforcer:** The duty of an enforcer is to enforce a trust with non-charitable purposes.

WHAT ARE THE DIFFERENT TYPES OF TRUSTS?

In simple terms, there are two types of Jersey trusts; a discretionary trust and a life interest trust. With a life interest trust a beneficiary will have certain rights concerning capital and/or income of the trust. Under a discretionary trust, beneficiaries shall have no rights as to income and capital since the trustee may exercise its discretion to decide when and what extent beneficiaries shall benefit (subject to any powers reserved in favour of the settlor or protector). A discretionary trust is the most common trust in Jersey.

WHAT IS THE PROPER LAW?

The proper law (jurisdiction-specific law) of a trust is as is given in the terms of the trust as proper law, however, failing that proper law is expressed or implied, proper law will be taken to be that of the jurisdiction with which the trust has the closest connection (the place of administration by the settlor; the situs of assets; place of residence or business of the trustee; or object of the trust and place to be fulfilled).

Only trusts which use Jersey law as the proper law or hold property in Jersey may be administered in Jersey.

CAN ASSETS AND BENEFICIARIES BE ADDED TO A TRUST ONCE CREATED?

Yes.

Assets: The trust must have assets from the outset or an interest in asset. Once created, it is possible to add other assets. The most common arrangement is to add the majority assets once created.

Beneficiaries: A power may be vested in the trustees for the addition of future beneficiaries by way of class (such as children and issue) and individuals.

IF A PERSON SETTLES A TRUST, CAN THAT PERSON RETAIN POWER?

Subject to any legal and tax implications, a settlor may retain substantial powers over the trust, including power to revoke or vary the terms of the trust and give directions as to investments. A settlor may be a beneficiary.

HOW ARE TRUSTEES APPOINTED AND REMOVED?

Typically, the terms of the trust provide for the settlor or any other person (such as a protector) to have the power of appointment and removal of trustees?

What protection is available if there is political upheaval or a strategic emergency in the trustee's country of residence?

So-called "*flight clauses*" may be inserted into the document establishing the trust whereby the trustee is substituted with a foreign trustee in such an event.

The trust may also include the power to change the proper law of the trust to another jurisdiction. Vice versa, a change of proper law from a foreign law to Jersey law may be valid.

CAN A JERSEY TRUST BE INVALID?

A Jersey trust is deemed invalid if it: -

1. purports to do anything contrary to Jersey law;
2. confers any right or power, or imposes any obligation contrary to Jersey law;
3. purports to apply directly to immovable property situated in Jersey;
4. is created purpose for which there is no beneficiary or for a non-charitable purpose; or
5. if the court declares that the trust: -
 - a. was established under duress, fraud, mistake, undue influence or misrepresentation, or in breach of fiduciary duty;
 - b. the trust is immoral or contrary to public policy; or
 - c. the terms of the trust are so uncertain that its performance is rendered impossible (certainty of intention, subject matter and object).

Where a trust was created for more than one purpose and one or more purpose is deemed invalid, and that purpose cannot be separated from the other purpose(s), the whole trust will be rendered invalid.

WHO IS LIABLE FOR A BREACH OF TRUST?

The trustee will be liable for any breach of trust that they committed or concurred. This includes liability for a loss or depreciation of the value of trust property resulting from a breach of trust, and for any profit that the trust would have accrued had there been no breach of trust.

How is a trust terminated?

The beneficiaries of a trust may request that a trust be terminated. On the termination of a Jersey trust, the trust property shall be distributed by the trustee to the persons entitled to it per the terms of the trust.

Alternatively, the court may require a trust to be terminated, and in doing so, they may direct a trustee not to distribute trust property, or make any such order as it sees fit.

Settlement, declaration or instrument of trust

This is the document, which in this trust document.

WHAT ARE THE USES AND ADVANTAGES OF A JERSEY TRUST?

A Jersey trust has various uses, including asset protection, estate planning, confidentiality, part of a corporate transaction, and minimising taxation.

There are also numerous advantages of creating a Jersey trust, including but not limited to: -

1. trust instrument is not a public document;
2. Jersey is politically and economically stable;
3. well-developed legal system;
4. extensive range of case law;
5. professional trustees which are regulated by the Jersey Financial Services Commission;
6. potential to circumvent forced heirship laws;
7. Jersey is not required to adopt EU directives on taxation;
8. no capital gains tax, succession or inheritance taxes in Jersey;
9. no stamp duties or other fixed charges payable on the creation of a trust or during the administration of a Jersey trust; and
10. no income tax liability for Jersey trustees on income received by them from the trust where none of the beneficiaries is resident in Jersey.

What are the contrasts between Jersey and English trust law?

1. Jersey real estate (other than share transfer property) is excluded. Notwithstanding this, holding Jersey real estate through a holding company is permitted. However, this workaround is pointless regarding residential property as there are restrictions on residential property ownership in Jersey.
2. The rule against perpetuities does not apply in Jersey.
3. Trustee's liability to a third party for a Jersey trust only extends to the trust property provided that the third party was aware that the trustee was acting as trustee.
4. The Trusts Law has protective provisions when dealing with Jersey trusts against the consequences of foreign forced heirship rules.

DO JERSEY TRUSTS HAVE INTERNATIONAL RECOGNITION?

The Hague Convention on the law applicable to trusts and their recognition was extended to Jersey in 1992. The Convention lays down rules for determining the country's laws governing a particular trust. The Convention sets out the fundamental legal consequences of a trust which must be recognised once its proper law has been determined.

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