



ANALYSIS

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1989, No. 23

An Act to amend the International Trusts Act 1984
(8 September 1989)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1 Short Title This Act may be cited as the International Trusts Amendment Act 1989 and shall be read together with and deemed part of the International Trusts Act 1984 (herein referred to as "the principal Act").

2 Application of this Act This Act shall apply to every international trust settled or established after the coming into force of this Act and every disposition of property to such trust made after the coming into force of this Act whether such property is situated in the Cook Islands or elsewhere unless, but without limiting the provisions of section 13G expressly provided in such trust disposition that the governing law shall be other than that of the Cook Islands.

3. Interpretation - (1) Section 2 of the principal Act is amended by omitting the term "Disposition" and its definition.

(2) Section 2 of the principal Act is further amended by inserting therein, in alphabetical order, the following terms and definitions -

"dispose and disposition" in relation to property includes -

- (a) every form of conveyance transfer assignment sale gift lease licence easement profit mortgage charge pledge encumbrance or other transaction absolute or limited by which any legal or equitable interest in property is created, transferred or extinguished;
- (b) the disposal of an interest in or right over property by the exercise of a power of appointment, power of maintenance, power of advancement or other authority; and also includes the conferring or variation or surrender of such powers or authority;
- (c) a contract to make any such disposition referred to in paragraph (a) or (b);

"formalities" in relation to a disposition of property means the documentary and other actions required generally by the laws of a relevant jurisdiction for all dispositions of like form concerning property of like nature, without regard to -

- (a) the fact that the particular disposition is made in trust;
- (b) the terms of the trust;
- (c) the circumstances of the parties to the disposition;
- (d) the rights interest or any claim in the property or against the person making the disposition held by a creditor; or
- (e) any other particular circumstances, but includes any special formalities required by reason that the party effecting the disposition is not of full age, is subject to a mental or bodily infirmity or is a corporation;

"governing law" has the same meaning as the expression "proper law";

"heirship right" means any right, claim or interest in, against or to property of a person arising or accruing in consequence of that person's death, other than any such right, claim or interest created by will or other voluntary disposition by such person or resulting from an express limitation in the disposition of the property of such person;

"Judgement" means a judgement or order given or made by a Court in any civil proceedings, or a judgement or order given or made by a Court in any criminal proceedings and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgement given by a Court in that place;

"personal relationship" includes every form of relationship by blood or marriage, including former marriage, and in particular a personal relationship between two persons exists if:-

- (a) one is the child of the other, natural or adopted (whether or not the adoption is recognised by law), legitimate or illegitimate; or
- (b) one is married to the other (whether or not the marriage is recognised by law); or
- (c) one cohabits with the other or so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife; or
- (d) personal relationships exist between each of them and a third person,

but no change in circumstances causes a personal relationship, once established, to terminate;

"protector" in relation to an international trust means a person who is the holder of a power which when invoked is capable of directing a trustee in matters relating to the trust and in respect of which matters the trustee has a discretion and includes a person who is the holder of a power of appointment or dismissal of trustees;

"settlor" in relation to an international trust means and includes an assignor of property to an international trust and each and every person who, directly or indirectly, on behalf of himself or on behalf of any other or others, as owner or as the holder of a power in that behalf, disposes of property to be held in such trust or declares or otherwise creates such trust."

(3) Section 2 of the principal Act is further amended by adding thereto the following subsection -

"(2) Every reference to an instrument trust or disposition shall, unless the context otherwise requires include every variation or amendment thereto."

4. Application of this Act - Section 5(1) of the principal Act is amended by adding the following paragraph -

"(c) any disposition to or by an international trust."

5. Presumption against avoidance of trusts - (1) Section 11 of the principal Act is repealed and the following section substituted:-

"11. Power of revocation - Unless an international trust contains an express power of revocation it shall be deemed to be irrevocable by the settlor and his legal personal representatives notwithstanding that it is voluntary.

(2) Notwithstanding the repeal of section 11 of the principal Act every matter, act or thing done pursuant to that section before the coming into force of this Act shall, if such matter, act or thing was validly done, remain so valid after the coming into force of this Act as if that section had not been repealed.

6. New sections inserted - The principal Act is amended by inserting after section 13 the following sections -

"13A. Bankruptcy - Notwithstanding any provision of the law of the settlor's domicile or place of ordinary residence or the settlor's current place of incorporation and notwithstanding further that an international trust is voluntary and without valuable consideration being given for the same, or is made on or for the benefit of the settlor spouse or children of the settlor or any of them, an international trust and a disposition to an international trust shall not be void or voidable in the event of the settlor's bankruptcy insolvency or liquidation (other than in the case of an international company registered pursuant to the International Companies Act 1981-82 that is in liquidation) or in any action or proceedings at the suit of creditors of the settlor but shall, remain valid and subsisting and take effect according to its tenor subject to the provisions of section 13B.

13B. Fraud - (1) Where it is proven beyond reasonable doubt by a creditor that an international trust settled or established or property disposed to an international trust -

- (a) was so settled established or disposed of by or on behalf of the settlor with principal intent to defraud that creditor of the settlor; and
- (b) did at the time such settlement establishment or disposition took place render the settlor, insolvent or without property by which that creditor's claim (if successful) could have been satisfied,

then such settlement establishment or disposition shall not be void or voidable and the international trust shall be liable to satisfy the creditor's claim out of the property which but for the settlement establishment or disposition would have been available to satisfy the creditor's claim and such liability shall only be to the extent of the interest that the settlor had in the property prior to settlement establishment or disposition and any accumulation to the property (if any) subsequent thereto.

(2) In determining whether an international trust, settled or established or a disposition, has rendered the settlor insolvent or without property by which a creditor's claim (if successful) may be satisfied, regard shall be had to the fair market value of the settlor's property, (not being property of or relating to the trust) at the time immediately after the settlement establishment or the disposition referred to in subsection (1)(b) and in the event that the fair market value of such property exceeded the value of the creditor's claim, at that time, after the settlement establishment or disposition, then the trust so settled or established or the disposition shall for the purposes of this Act be deemed not to have been so settled established or the property disposed of with intent to defraud the creditor.

(3) An international trust settled or established and a disposition to such trust shall not be fraudulent as against a creditor of a settlor if -

- (a) settled established or the disposition takes place after the expiration of 2 years from the date that creditor's cause of action accrued; and
- (b) the creditor fails to bring such action before the expiration of 1 year from the date such settlement establishment or disposition of property took place.

(4) An international trust settled or established and a disposition of property to such trust shall not be fraudulent as against a creditor of a settlor if the settlement establishment or disposition of property took place before that creditor's cause of action against the settlor accrued or had arisen.

(5) A settlor shall not have imputed to him an intent to defraud a creditor, solely by reason that the settlor -

- (a) Has settled or established an international trust or has disposed of property to such trust within two years from the date of that creditor's cause of action accruing;

- (b) Has retained, possesses or acquires any of the powers or benefits referred to in paragraphs (a) to (f) of section 13C.

- (c) Is a beneficiary.

(6) Where an international trust is liable to satisfy a creditor's claim in the manner provided for in subsection (1) but is unable to do so by reason of the fact that the property has been disposed of, other than to a bona fide purchaser for value, then any such disposition shall be void.

(7) For the purpose of this section the onus of proof of the settlor's intent to defraud the creditor lies on the creditor."

13C. Retention of control and benefits by settlor

- An international trust and a registered instrument shall not be declared invalid or a disposition declared void or be affected in any way by reason of the fact that the settlor, and if more than one, any of them, either -

- (a) Retains possesses or acquires a power to revoke the trust or instrument;
- (b) Retains possesses or acquires a power of disposition over property of the trust or the subject of the instrument;
- (c) Retains possesses or acquires a power to amend the trust or instrument;
- (d) Retains possesses or acquires any benefit interest or property from the trust or any disposition or pursuant to the instrument;
- (e) Retains possesses or acquires the power to remove or appoint a trustee or protector;
- (f) Retains possesses or acquires the power to direct a trustee or protector on any matter;
- (g) Is a beneficiary of the trust or instrument either solely or together with others."

13D. Foreign judgements not enforceable - Notwithstanding -

- (a) The provisions of any treaty;
- (b) The provisions of any statute;
- (c) Any rule of law, or equity,

to the contrary, no proceedings for or in relation to the enforcement or recognition of a judgement obtained in a jurisdiction other than the Cook Islands against either -

- (d) An international trust;
- (e) A settlor of an international trust;
- (f) A trustee of an international trust;
- (g) A protector of an international trust;

- (h) A beneficiary of an international trust;
 - (i) A person appointed or instructed in accordance with the express or implied provisions of an instrument or disposition to exercise a function or undertake any act matter or thing in connection with an international trust; or
 - (j) Property of either an international trust, or of a trustee or a beneficiary thereof;
- shall be entertained by any Court in the Cook Islands if -
- (k) that judgement is based upon the application of any law inconsistent with the provisions of this Act;
 - (l) that judgement relates to a matter or particular aspect that is governed by the law of the Cook Islands.

13F. Heirship rights - No international trust or any aspect of such trust governed by the laws of the Cook Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that such trust or disposition may avoid or defeat the right, claim or interest of a person held by reason of a personal relationship to the settlor or by way of heirship rights.

13F. Spendthrift beneficiary - (1) For the purposes of this Act, and notwithstanding any rule of law or equity to the contrary, it shall be lawful for an instrument or disposition to provide that any estate or interest in any property given or to be given to any beneficiary shall not during the life of that beneficiary or such lesser period as may be specified in the instrument or disposition be alienated or pass by bankruptcy, insolvency or liquidation or be liable to be seized, sold, attached, or taken in execution by process of law and where so provided such provision shall take effect accordingly.

(2) Where property is given subject to any of the restrictions contained in subsection (1), the right to derive income from such property by a beneficiary and any income derived therefrom shall not pass by bankruptcy, insolvency or liquidation or be liable to be seized attached or taken in execution by process of law.

(3) Where property is given subject to a restriction against alienation then this right to derive income from that property shall not be alienated.

(4) A restriction imposed by this section or by an instrument or disposition that property or the right to derive income from such property shall not be alienated or that such property or the right to derive income or the income from such property shall not pass by bankruptcy insolvency or liquidation or be liable to be seized sold or attached or taken in execution by process of law may at any time after such property has been given removed if provided for in the instrument or disposition and in the manner specified therein.

13G. Governing law (1) - In determining the governing law of an international trust regard shall first be had to the terms of that trust and to any evidence therein as to the intention of the parties; and the other circumstances of an international trust may be taken into account only if the terms of the trust fail to provide such evidence.

(2) A term of an international trust expressly selecting the laws of the Cook Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.

(3) A term of an international trust that the laws of the Cook Islands are to govern a particular aspect of the trust or that the Cook Islands or the courts of the Cook Islands are the forum for the administration of the trusts or any like provision is conclusive evidence, subject to any contrary term of the trust, that the parties intended the laws of the Cook Islands to be the governing law of the trust and is valid and effective accordingly.

(4) The governing law of an international trust may be changed to or from the laws of the Cook Islands provided that:

- (i) in the case of a change to the law of the Cook Islands, such change is recognised by the governing law of the trust previously in effect;
- (ii) in the case of a change from the law of the Cook Islands, the new governing law would recognise the validity of the trust and the respective interests of the beneficiaries.

(5) A change in governing law shall, not affect the legality or validity of, or render any person liable for, any thing done before the change.

13H. Matters determined by governing law - (1) All questions arising in regard to an international trust which is for the time being governed by the laws of the Cook Islands or in regard to any disposition of property upon the trusts thereof including, without prejudice to the generality of the foregoing, questions as to:-

- (a) subject to subsection 2(c), the capacity of any settlor;
- (b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;
- (c) the administration of the trusts, whether the administration be conducted in the Cook Islands or elsewhere, including questions as to powers, obligations, liabilities and rights of trustees and their appointment and removal; or
- (d) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined according to the laws of the Cook Islands, without reference to the laws of any other jurisdictions with which an international trust or disposition may be connected.

(2) Subject to the provisions of this Act subsection (1) shall -

- (a) not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does that subsection affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;
- (b) take effect subject to any express contrary term of the trust or disposition;
- (c) as regards the capacity of a corporation, not affect the recognition of the laws of its place of incorporation;
- (d) not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;
- (e) not validate any trust of real property or disposition of real property situate in a jurisdiction other than the Cook Islands which is void ab initio according to the laws of such jurisdiction;
- (f) not validate any testamentary trust or testamentary disposition which is invalid according to the laws of the testator's domicile.

13I. Exclusion of foreign law - Without limiting the generality of section 13H it is expressly declared that no international trust governed by the laws of the Cook Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that:-

- (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust either in part or in whole; or
- (b) the international trust or disposition avoids or defeats rights, claims or interests conferred by the law of a foreign jurisdiction upon any person or, contravenes any rules of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests; or,
- (c) the laws of the Cook Islands or the provisions of this Act or the principal Act are inconsistent with any foreign law.

7. Registration - (1) Section 15 of the principal Act is amended by inserting after subsection (3) the following subsection -

"(4) Every trust registered in accordance with subsection (2) within 30 days of the trust being settled or established shall be deemed to have been so registered at the time it was settled or established and the provisions of this Act shall apply to such trust from that time as if it were an international trust.

(2) A trust registered in accordance with section 15 of the principal Act before the coming into force of this Act shall, notwithstanding that it was so registered after it was settled or established, be deemed to have been registered from the time that it was settled or established.

8. Annual certificate of registration - (1) Section 16 of the principal Act is amended by deleting subsection (3) and substituting the following subsections -

"(3) Application for renewal of registration may be made within the period 90 days of the date of expiry of the last certificate of registration and subject to section 26, no application for renewal of registration pursuant to subsection (2) shall be granted where application is not made or the prescribed fee paid within such period.

(4) Every renewal of registration granted shall take effect from the date of expiry of the last certificate of registration."

(2) Every renewal of registration granted before the coming into force of this Act shall notwithstanding that such renewal may have been granted after the expiry of the last certificate of registration be deemed to have been granted upon the expiry of that certificate of registration.

9. Interpretation - (1) Section 20 of the principal Act is repealed.

(2) Notwithstanding the repeal of section 20 of the principal Act every matter act or thing done pursuant to that section before the coming into force of this Act shall if such matter act or thing was validly done remain so valid after the coming into force of this Act as if that section had not been repealed.

10. Application of other Acts to international trusts - (1) Section 21 of the principal Act is repealed and the following section substituted -

"21. Application of other enactments - (1) Subject to section 3 no enactment other than this Act the principal Act and the enactments set out in the Schedule to this Act shall -

(a) impose -

- (i) any liability, duty, responsibility, obligation or restriction; or
- (ii) any fee, impost, tax, levy, dues, duty, or excise;
- (iii) any fine or penalty

on an international trust; or

(b) require -

- (i) the deposit of any moneys in any public account;
- (ii) the filing of any accounts, returns, reports or records; or
- (iii) the licensing or registration of any document act matter or thing pertaining to an international trust,

by an international trust.

(2) Notwithstanding subsection (1), an international trust shall not be required to register as a foreign enterprise pursuant to the provisions of the Development Investment Act 1977 and shall not be subject to that Act by reason only that it -

- (a) carries on business with another international trust;
- (b) carries on business with an international company registered under the provisions of the International Companies Act 1981-82;
- (c) carries on business with a foreign company registered under the provisions of the International Companies Act 1981-82;
- (d) carries on business with an international partnership registered under the International Partnership Act 1984;
- (e) obtains legal advice or legal representation;

- (f) obtains accounting advice or has its accounts prepared or audited;
 - (g) operates a bank account for the purpose of either depositing, receiving or transmitting money due or owing by such trust or undertakes a transaction with a bank for purposes principally associated with the objects of the trust;
 - (h) utilises the services of a trustee company or any subsidiary of such company.
 - (i) undertakes any act matter or thing as may be prescribed by regulation."
- (2) The Queen's Representative may by Order in Executive Council amend the Schedule to this Act by omitting therefrom or adding thereto any enactment (including any regulation) and may in like manner determine whether an enactment or regulation shall be omitted or added either in whole or in part.
- (3) Notwithstanding the repeal of section 21 of the principal Act, every matter, act or thing done pursuant to that section before the coming into force of this Act shall, if such matter, act or thing was validly done remain so valid after the coming into force of this Act as if that section had not been repealed.

11. Resident beneficiary - Section 22 of the principal Act is amended by -

- (a) inserting after the heading "Resident beneficiary" the word "(1)"; and
- (b) adding the following subsection -
"(2) For the purposes of this section an international company, a foreign company, an international partnership, and an international trust shall be deemed not to be resident in the Cook Islands."

12. Guarantee by Crown - The principal Act is amended by inserting after section 27 the following section -

- "27A. Guarantee by Crown - The Crown guarantees to all international trusts that there shall be no compulsory acquisition or expropriation of the property of such trusts, or their investors, situated in the Cook Islands except -
- (a) in accordance with the due process of law;
 - (b) for a public purpose defined by law; and
 - (c) in payment of compensation as defined by law."

13. Regulations - Section 29 of the principal Act is amended by omitting the words "including the prescribing of penalties for breaches of such regulations" and substituting the following words -

- "and may in particular make regulations prescribing -
- (a) the duties and liabilities of trustees;
 - (b) the powers of trustees;
 - (c) the protection of trustees against liability;

- (d) the investment of trust funds;
- (e) the manner in which an instrument or deed of trust may be executed;
- (f) the appointment and discharge of trustees;
- (g) the powers of the Court in respect of an application by a trustee for directions;
- (h) the rules of procedure in respect of judicial proceedings;
- (i) the distribution of trust property.
- (j) the manner in which a trustee shall deal with property that is subject to any encumbrance or restriction whether such encumbrance or restriction is imposed or authorised by this Act or any other Act and the rights interests duties and liabilities of persons subsequent to such dealing.
- (k) the matter by which property (whether of a particular class or otherwise) together with any accumulation thereto or any property in substitution therefore shall be identified as being subject to the provisions of section 13F.
- (l) penalties for breach of such regulations.

S C H E D U L E

International Companies Act 1981-82
International Partnership Act 1984
Off-Shore Banking Act 1981
Off-Shore Insurance Act 1981-82
Trustee Companies Act 1981-82
Monetary Board Act 1981
Development Investment Act 1977.

This Act is administered by the Cook Islands Monetary Board.

