

A BILL

entitled

TRUSTS (SPECIAL PROVISIONS) AMENDMENT ACT 2020

TABLE OF CONTENTS

1	Citation
2	Inserts section 1A
3	Amends section 2A
4	Amends section 6(2)
5	Repeals and replaces section 9
6	Repeals and replaces section 10
7	Repeals and replaces section 11
8	Consequential amendment of section 36G of the Conveyancing Act 1983

WHEREAS it is expedient to amend the Trusts (Special Provisions) Act 1989 to clarify the jurisdiction of the Supreme Court in respect of Bermuda trusts and foreign trusts with a connection to Bermuda; to enhance and modernize provisions of the Act with regard to the application of foreign laws and foreign orders to Bermuda trusts; and to make consequential amendments to the Conveyancing Act 1983;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Trusts (Special Provisions) Act 1989 (the "principal Act"), may be cited as the Trusts (Special Provisions) Amendment Act 2020.

Inserts section 1A

2 The principal Act is amended by inserting after section 1 the following new section—

"Interpretation

1A In this Act, unless the context provides otherwise—

"Bermuda trust" means a trust governed in whole or in part by the law of Bermuda;

TRUSTS (SPECIAL PROVISIONS) AMENDMENT ACT 2020

“foreign court” means any court or tribunal (including an arbitral tribunal), or any other person or body exercising judicial or quasi-judicial functions, in a territory other than Bermuda;

“foreign law” means any law of a jurisdiction other than Bermuda;

“foreign order” means any interim or final judgment, award, order or other decision of a foreign court;

“foreign trust” means any trust other than a Bermuda trust;

“settlor” includes—

- (a) a testator who grants powers under a testamentary trust by the terms of his last will and testament; and
- (b) a person who by a declaration of trust declares that assets held by him beneficially shall be held by him on the terms of the trust so declared.”.

Amends section 2A

3 The principal Act is amended in section 2A by repealing subsection (9).

Amends section 6(2)

4 The principal Act is amended in section 6(2)—

- (a) by deleting the words “A trust that is governed by the law of Bermuda may provided” and substituting the words “A Bermuda trust may provide”;
- (b) by deleting the word “interest” and substituting the word “interests”.

Repeals and replaces section 9

5 The principal Act is amended by repealing section 9 and substituting the following—

“Jurisdiction of Supreme Court

9 (1) The Supreme Court has jurisdiction to hear and determine any claim concerning the validity, construction, effects or administration (including in respect of any of the matters referred to in section 7(a) – (j)) of—

- (a) a Bermuda trust; or
- (b) a foreign trust to which subsection (2) applies.

(2) A foreign trust referred to in subsection (1)(b), is a trust where—

- (a) the trust instrument contains a clause conferring jurisdiction on the courts of Bermuda;
- (b) all or part of the administration of the trust is carried on in Bermuda;

TRUSTS (SPECIAL PROVISIONS) AMENDMENT ACT 2020

- (c) a trustee is incorporated or resident in Bermuda; or
- (d) trust property is situated in Bermuda (but only in relation to a claim concerning that property).

(3) The jurisdiction of the Supreme Court is applicable as provided under this section notwithstanding that the person against whom the claim is made is not in Bermuda or (where applicable) that any wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.”.

Repeals and replaces section 10

6 The principal Act is amended by repealing section 10 and substituting the following—

“Exclusion of application of foreign law

10 (1) No foreign law that is excluded under subsection (2) shall apply to the determination of any question concerning a Bermuda trust, including any question concerning—

- (a) the capacity of a settlor to dispose of property upon the trusts of a Bermuda trust;
- (b) any right or interest in or to property disposed upon the trusts of a Bermuda trust;
- (c) the validity of a disposition of, or a declaration of trust in respect of, property upon the trusts of a Bermuda trust, including whether any such disposition should be declared void or invalid, rescinded, set aside, varied or amended; or
- (d) any obligation or liability of a settlor, trustee or beneficiary of a Bermuda trust.

(2) For the purposes of subsection (1), a foreign law is excluded if it creates, recognises, or defeats, or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any person, by virtue or in consequence of, or in anticipation of—

- (a) the death of a person (other than as a result of a voluntary disposition, whether testamentary or otherwise, by the deceased);
- (b) the creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familial relationship, whether by blood or adoption; or
- (c) bankruptcy, liquidation or an analogous insolvency process, including a provisional process or a process for the restructuring of debts.

(3) No foreign law shall apply to the determination of any question concerning the validity, construction, effects or administration of a Bermuda trust, including any of the matters referred to under section 7(a) – (j).

TRUSTS (SPECIAL PROVISIONS) AMENDMENT ACT 2020

(4) If and to the extent that this section excludes the application of foreign law, to that extent the court shall apply instead the law of Bermuda excluding rules of conflict of laws (save for those set out herein).

(5) This section shall not apply to the determination of any question to the extent that the question—

(a) concerns immovable property outside Bermuda; or

(b) relates to a severable aspect of a Bermuda trust governed by foreign law.”.

Repeals and replaces section 11

7 The principal Act is amended by repealing section 11 and substituting the following—

“Restriction on effect of foreign orders

11 (1) The court shall not give effect to any foreign order that is inconsistent with section 10.

(2) In this section, to give effect to a foreign order means to recognise, enforce, or otherwise give effect directly or indirectly to that foreign order, including by the conferral of any right, the imposition of any obligation or liability, or the raising of any estoppel.”.

Consequential amendment of section 36G of the Conveyancing Act 1983

8 The Conveyancing Act 1983 is amended by repealing section 36G and substituting the following—

“Relationship with Trusts (Special Provisions) Act 1989

36G Nothing in this Part shall be construed as permitting the court to give effect to any foreign order to which section 11 of the Trusts (Special Provisions) Act 1989 applies.”.

TRUSTS (SPECIAL PROVISIONS) AMENDMENT BILL 2020

EXPLANATORY MEMORANDUM

This Bill seeks to amend the Trusts (Special Provisions) Act 1989 (the “principal Act”) to clarify the jurisdiction of the Supreme Court in respect of Bermuda trusts and foreign trusts with a connection to Bermuda; to enhance and modernize provisions of the Act with regard to the application of foreign laws and foreign orders to Bermuda trusts;; and to make consequential amendments to the Conveyancing Act 1983.

Clause 1 provides a citation for the Bill.

Clause 2 amends the principal Act to insert section 1A to provide definitions for the Act. The definition of the term ‘Bermuda trust’ is of particular importance in relation to firewall provisions as it has been specifically tailored to allow for the possibility that Bermuda law may apply to a severable part of a trust only, in accordance with section 8 of the principal Act.

Clause 3 amends the principal Act by repealing section 2A(9), which defined “settlor” as the definition is now provided for under the new section 1A.

Clause 4 amends the principal Act in section 6(2) to provide for the use of the term ‘Bermuda trust’ and to extend to the provision the inference that a trust may be governed by Bermuda law only in part. The clause also makes a correction in section 6(2).

Clause 5 amends the principal Act by repealing and replacing section 9 in order to specify that the Supreme Court has the power to adjudicate claims concerning the validity, construction, effects or administration of the trust, including any of the matters set out in section 7(a) – (j) of the principal Act. The new section is intended to enhance the provisions of the current section and is also considered an improvement on the provisions of competitor jurisdictions as it provides for the express jurisdiction of the Supreme Court where the trust instrument provides for it.

Clause 6 amends the principal Act by repealing and replacing section 10 in order to enhance the effectiveness of firewall protections under that section. The current sections 10 and 11 of the principal Act embody firewall protections that have come to be considered as unclear and confusing. The revised approach as contained in the new section 10 is intended to provide for an exclusion of foreign law where appropriate as opposed to providing for a blanket application of Bermuda law, subject to exceptions. This is accomplished by specifying the circumstances under which any foreign law shall be excluded from application to a Bermuda trust. The firewall protection afforded under the new section 10 will not apply to foreign land or in cases where foreign law has been chosen to apply to any severable aspect of a Bermuda trust in accordance with section 8 of the principal Act.

Clause 7 amends the principal Act by repealing and replacing section 11 in order to supplement the protective measures under the new section 10 by preventing the enforcement or recognition of any order of a foreign court where such order is in conflict with the provisions of the new section 11.

TRUSTS (SPECIAL PROVISIONS) AMENDMENT BILL 2020

Clause 8 repeals and replaces section 36G of the Conveyancing Act 1983 so as to simplify the language of the current section 36G to allow for consistency with the updates to the firewall provisions in the principal Act.