



Safe Harbour

Protecting and preserving wealth using Cayman Islands' trusts and foundation companies

The economic, political and social upheaval which has visited so many countries in recent months has forced many wealthy families to focus on their longer term financial plans. The desire to protect and preserve family wealth and business assets, and to rationalise and centralise its management and administration in a well-run, well-regulated and safe jurisdiction, has led to a marked increase in business for the finance sector in the Cayman Islands with a renewed movement of wealth into Cayman structures and, in certain cases, the relocation of the family itself to the Islands.

Traditionally, asset protection meant one thing – strategies designed to permit an individual or business to limit creditors' access to property in accordance with applicable debtor/creditor laws. Over the past two decades, the protection afforded by offshore trusts and foundations has become more sophisticated and, while mitigating litigation and bankruptcy risks continue to be valid concerns for many clients, a much broader range of defence mechanisms is available.

This article looks specifically at Cayman Islands trusts and foundation companies ("FCs") and the different types of protection they may offer.

Divesting ownership and reserving control

Establishing a trust involves a party (known as a "settlor") placing assets under the control of a trustee to hold for the benefit of certain persons (known as "beneficiaries") or to carry out specific purposes. Forming an FC involves a party (known as a "founder") incorporating the FC and then transferring property to the FC to be managed and applied for its objects by the board of directors.

Much of the protection gained from a trust or an FC stems from the simple fact that the settlor or founder is no longer the legal owner of the property in the structure: legal title to the property is transferred from the settlor to a trustee or from the founder to the FC, such that the property no longer forms part of their personal estate. From that point, subject to the principles discussed below, the assets are ring-fenced against the personal creditors of the settlor or founder, not subject to mandatory inheritance rules which may apply to their estate, and outside the probate regimes of any jurisdiction.

Giving up legal ownership does not, however, equate to surrendering all control over the property in the trust or FC or the ability to benefit from or enjoy it. Cayman law contains broad provision for "reserved powers" which allow settlors, or third parties appointed



by them, to retain a considerable amount of control over the management, investment and distribution of the trust property. In the case of an FC, the founder may sit on the board of the company or be appointed as a supervisor of the company and, in that capacity, continue to make or influence decisions about how the property of the FC is managed and applied. In either case, the settlor or founder may be a beneficiary.

Protection against future creditors

An individual with no existing claims against them, and no reasonably foreseeable claims in the pipeline, may transfer assets to a Cayman trustee or FC safe in the knowledge that, if the worst happens, those assets will be ring-fenced against the claims of future creditors.

Cayman's primary creditor protection legislation, the Fraudulent Dispositions Law (as amended), was enacted over thirty years ago. It sets out a two-pronged test which a creditor must satisfy in order to defeat a transfer of property to a trust or FC on the grounds that they have been defrauded by it. The creditor must show that (i) the transfer was made at an undervalue (that is, it was a gift or made at a significant discount); and (ii) the transferor acted with an intent to defraud (that is, it was in the mind of the transferor that they were putting, or trying to put, assets beyond the reach of a known creditor, or someone they ought to have known to be a creditor). A six year limitation period applies to any claim.

Protection against foreign inheritance and other laws

A trust or FC can help to preserve family wealth and business assets for future generations and avoid fragmentation caused by mandatory inheritance regimes under foreign legal systems.

Forced heirship, in different forms, applies in many civil law and Sharia countries: rules vary but, typically, an individual's ability to dispose of property freely on death will be restricted to a proportion of their estate only, with the remainder being divided up between prescribed heirs. Clawback may apply to reclaim gifts made by an individual during their lifetime.

Cayman law, on the other hand, places very little restriction on an individual's freedom to dispose of their property as they think fit, both during their lifetime and upon death. This extends to transferring property to a trust or FC. Further, Cayman law will actively protect that transfer by means of statutory rules known as the "firewall". The firewall excludes the application of all foreign law when determining matters such as the validity of a trust, the validity of a transfer of assets into a trust, the capacity

of the transferor, and the administration of the trust by the trustee – all such questions fall to be determined exclusively under Cayman law. Similarly, no trust, and no transfer of property to a trust, will be set aside because the law of another country does not recognise the concept of trusts or because the arrangement contravenes that country's inheritance laws. The same applies to a transfer of property to a FC (and companies generally). Any judgment of a foreign court which is inconsistent with these principles will not be recognised or enforced by the Cayman Islands courts.

The practical effect of the firewall is that anyone seeking to have a transfer of assets into a Cayman trust or FC declared void because it offends or denies their rights under the inheritance laws of another jurisdiction will have to argue the case before the Cayman court which will apply the firewall principles.

A note of caution. Physical location of the assets is a key consideration for any asset protection structure: as far as possible, assets should be kept outside any jurisdiction where there is a significant risk of attack. Technically, Cayman's firewall applies wherever the trust or FC property is situated. Nevertheless, if that property is located outside the Cayman Islands, and a successful claim is brought against the trust or FC in the courts of that jurisdiction, there may be little the trustee, the directors of the FC or the Cayman court can do to protect it.





Managing family disputes

The settlor of a trust established under Cayman's STAR law may restrict or remove the rights of enforcement and rights to information of any beneficiary of the trust, thus avoiding unwanted expense, disruption and publicity caused by frivolous law suits brought by fractious beneficiaries or warring family members.

Generally speaking, any beneficiary of a trust (which is not a STAR trust) will have a qualified right to receive information about the trust and the legal standing to apply to the court to have the terms of the trust enforced. These rights are the means by which the beneficiary's interest in the trust are protected and the trustee held to account.

Cayman's STAR law, enacted in 1997, introduced a variation to this general principle. STAR permits the settlor of a trust to vest all rights of enforcement and rights to information (which would otherwise belong to the beneficiaries) in one or more "enforcers" of the trust. The enforcers, who may or may not be beneficiaries, are the only persons who have these rights and, consequently, it becomes possible for the settlor to withhold enforcement and information rights from any beneficiary whom he thinks may abuse them. The trustee is still fully accountable for its actions, but to the enforcer, not to the beneficiaries.

The situation is similar, if not even more robust, in relation to an FC: unless the constitution provides otherwise, a beneficiary will have no powers or rights relating to the FC, its management or its assets, and no rights to receive reports, accounts or any other information about the FC's business and affairs.

Avoiding unwanted publicity

Automatic exchange of information is now a fact of life. Nevertheless, Cayman trusts and FCs still afford a high degree of privacy to clients who are concerned as to the implications for them and their families were the extent of their personal wealth to become publically known.

The trust deed of a Cayman trust is a private document. Trust documents and the information they contain do not appear on any register in the Cayman Islands. The trustees of the trust are bound to keep the affairs of the trust and all personal

information relating to the beneficiaries confidential. Under the STAR law (as seen above) it is also possible to restrict a beneficiary's access to trust documents and information.

The only publicly available information in relation to an FC is its date of incorporation, the company number, whether it is active or dissolved, the address of its registered office and the name of the current directors. The constitutional documents are not available to the general public.

Bespoke protection

Every settlor's or founder's circumstances are different. This article outlines the statutory protection under Cayman law but more tailored arrangements may be put in place to address specific situations. Walkers' Private Capital & Trusts team specialises in bespoke offshore structures which are designed to meet the practical needs of families and businesses and help them preserve, apply and grow their wealth across generations. We shall be happy to discuss the possibilities with you.

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