Cayman Islands private trust companies

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Introduction

Private trust companies ("PTCs") are increasingly being used by high net-worth private clients as part of their wealth structuring. Many individuals and families prefer to establish their own PTC to act as the trustee of the trusts which they plan to create, rather than transferring assets to an offshore service provider's professional trustee company.

This briefing note considers key issues relating to the establishment and use of a registered Cayman Islands PTC in the context of private wealth management.

Regulation

The Banks and Trust Companies Act (as revised) (the "BTC Act") is the principal legislation regulating Cayman's trust company industry. Amongst other things, it requires any company which carries out "trust business" in or from within the Cayman Islands to be licensed by the Cayman Islands Monetary Authority ("CIMA"). Under the BTC Act: acting as a trustee of an express trust on a professional basis is a regulated activity, as is acting as an executor or administrator.

Since 2008, however, in a move towards 'lighter touch' regulation, Cayman PTCs which fulfil certain requirements have been exempt from the licensing requirement under the BTC Act[1]. Such PTCs need only to register with CIMA having demonstrated that they fulfil the requirements for an unlicensed PTC.

Under the Private Trust Companies Regulations (as revised) (the "PTC Regs"), a Cayman PTC is exempt from the licensing requirement provided it:

- is a company incorporated in Cayman under the Companies Act (as revised)[2];
- conducts only trust business that is "connected trust business" as defined in the PTC Regs (see further below);
- maintains its registered office with a service provider that holds a full trust licence issued by CIMA under the BTC Law;
- includes in its registered company name the words "Private Trust Company" or the letters "PTC"; and
- does not solicit from or receive contributions in respect of trusts of which it is trustee from either the public or persons that are not, in relation to each other, "connected persons" as defined in the PTC Regs.

The registered PTC can conduct only "connected trust business", and for these purposes the relevant consideration is whether the settlors/contributors of the property subject to the

1 *Before the PTC Regs were issued it was necessary to obtain either a restricted or full trust licence from CIMA for the PTC. Restricted trust licences can still be obtained for PTCs where the advantages of having an entity fully regulated by CIMA act as trustee outweigh the burdens of obtaining and maintaining the licence.*
2 *It can be incorporated as either an ordinary company or an exempted company, and the latter form of company is usually used. Advantages of using an exempted company for the PTC include: the availability of tax exemption certificates from the Cayman government guaranteeing that the company will not be taxed for 20 years following its incorporation even if, which at present appears very unlikely, direct taxes on companies are introduced; and the words 'Limited' or 'Ltd' need not appear in the company name.*

trusts of which the PTC is the trustee are all "connected persons" as defined in the PTC Regs. The concept of "connected persons" covers both individuals, companies and includes various family relationships and relationships between companies in a group and with their shareholders. As a rule of thumb, PTCs established to act as trustee of one or more trusts for a particular family will have no difficulty satisfying the connected trust business requirement. Unlicensed PTCs must keep at their registered office in Cayman in relation to the trusts of which they are trustee available for inspection by CIMA: up to date copies of the documents recording the terms of the trusts; the details of the trustees, contributors and beneficiaries receiving distributions from the trust; details of the settlor and any protector and / or enforcer; any instruments varying the terms of the trusts; and the financial and transactional records of the PTC and its connected trust business.

The key points to note include:

- in registering with CIMA and annually thereafter the PTC is required to file details of its name, the names and addresses of its directors and shareholders and the name of its registered office service provider which holds the full trust licence. It must also provide CIMA with confirmation that it is a private trust company eligible to be registered as an unlicensed PTC and is in compliance with the requirements in the PTC Regs. CIMA is entitled to review all documents and records of the PTC at its registered office;
- there is no requirement in Cayman that the PTC be capitalised in any way or maintain a minimum net worth, no requirement for local directors or officers for the PTC (or any vetting or approval requirement, although it is necessary for at least one director to be an individual) and no need to file audited accounts with CIMA. Copies of documents in relation to the trust or trusts in respect of which the PTC is to act as trustee do not have to be filed with CIMA (these must be kept at the registered office available for CIMA's inspection);
- there is also no specific requirement for a regulated trust company to manage or administer the PTC, although it is fairly common in practice that such companies will provide administration and secretarial services and also one or more professional directors to sit on the board of the PTC;
- while Cayman's anti-money laundering legislation applies to PTCs, the due diligence burden rests on the registered office service provider which holds the full trust licence. There is no general requirement for a registered PTC itself to have a dedicated money-laundering reporting or compliance officer; and
- a registered PTC can also act as the sole trustee of a 'STAR' Trust.

Registration fees

The combined government incorporation and miscellaneous disbursements (filing fees, stamp duty, etc) payable to the Registrar of companies are approximately US$900 for an exempted company.[3] The registered office service provider will also charge fees which will differ depending on the provider, and such fees will usually be higher than their usual fees for providing a registered office service because of the additional burden and responsibility imposed by the PTC Regs for registered PTCs. If the service provider is also providing the trustee service for orphaning the PTC (see below) there will be an additional fee for this. The CIMA application fee for registration of the PTC will be CI$3,500 (approximately US$4,200).

Legal fees for advising on the establishment of the structure and preparing the documentation would be additional.

The ownership structure of a PTC

PTCs can be owned in a number of different ways depending on tax considerations and the client's circumstances. The principal alternatives are set out below.

Individual

PTCs are generally companies limited either by shares or by guarantee, and it is not uncommon for an individual, such as the settlor or a member of the settlor's family (or his/her nominee), to be the shareholder/member of a PTC limited by shares or guarantee.

Such an arrangement can, however, give rise to concerns upon the individual's death. One concern is practical and relates to probate requirements in respect of the individual's ownership of the PTC's shares or his entitlement to membership of the PTC. This can raise acute difficulties where there is an urgent need to exercise voting rights following the death of the individual shareholder/member, as this must often await a grant of representation from the Cayman court. The second concern relates to succession and the suitability of those person(s) to whom the PTC shares or membership devolves upon the individual's death.

Purpose trust

In view of the problems associated with ownership by an individual, a PTC is usually an 'orphaned' structure so that its ownership is not attributable to any particular person.

Where the PTC is a company limited by shares these are often held under the terms of a charitable or non-charitable purpose trust, the latter usually a STAR Trust.

If a Cayman STAR Trust is used, an enforcer must be appointed to enforce the stated purpose of such trust. The enforcer must

3 *With an authorised share capital of up to US$50,000, which is reasonably standard.*

be a separate person from the trustee but does not need to be licensed by CIMA. For example, a client's professional adviser could act as the enforcer.

Composition of the board of directors

The choice of the board of directors of a PTC is a key issue. It is mandatory for at least one director to be an individual, but other than this stipulation the composition of the board can be comprised according to the settlor's wishes. The settlor may wish to control the composition of the board of directors and/or may wish to be a member of the board so that he or she participates actively in the decisions made by the PTC in relation to the underlying trusts and their businesses.

Control of the board of directors can be structured through the constitutional documentation of the PTC and/or through the terms of the purpose trust used to orphan it (the "Trust"). It may be that the trustee of the Trust (the "Trustee") is required under its terms to seek the approval of the settlor or another third party, such as the enforcer (in the case of a STAR Trust) or a protector, in relation to the appointment or removal of directors of the PTC. Alternatively, the Trustee could be required to follow the directions of the settlor or the enforcer in relation to the composition of the PTC's board of directors.

Whatever mechanisms are used in relation to the appointment or removal of directors (and indeed other aspects of the management of the affairs of the PTC, such as investment policy), a prevailing issue for advisers to the settlor and the trustees is for the settlor to understand how the balance of power will work in practice so that there are no surprises for the settlor and other family members once the structure is in operation.

The selection of directors will generally be based on knowledge and experience although it is also likely to be influenced by tax considerations and the protection of privacy. Concern can arise if one or more of the directors of the PTC is resident in an unfavourable tax jurisdiction and this adversely affects the location of the PTC's management and control. Issues can also arise if a director is subject to domestic legislation which can be used to obtain detailed information about the PTC, or its underlying trusts and assets.

Settlor involvement

Settlor involvement can be achieved in several different ways and, dependent upon tax advice, that involvement usually takes one or more of the following forms:

- as protector of and/or the person vested with reserved powers under the terms of underlying trusts of which the PTC is trustee;
- as a member of the board of directors of the PTC;
- as a member of an investment committee or council established to consult with the board of directors of the PTC regarding certain significant decisions affecting the underlying trusts, such as investment policy or the sale of family businesses; and/or
- as protector or enforcer of the Trust which holds the share capital of the PTC.

The settlor could also own the shares in the PTC but this can lead to complications where the settlor loses capacity or dies.

Operation and funding of a PTC

The board of directors of the PTC, particularly where one or more independent professional directors are appointed, will wish to ensure that the PTC is acting in a manner which accords with the terms of the underlying trusts of which it is trustee, that professional advice is sought where appropriate and that proper records are kept of the decisions taken by the PTC.

If the PTC is an orphaned structure, thought must be given to the way in which the PTC will be funded. It is often preferable, where possible, for a structure to be self-sufficient financially (so it can be kept in good standing). To achieve this, the PTC needs to be sufficiently capitalised or be able to discharge its running costs from the underlying trust(s) by, for example, invoicing for trustee services.

Conclusion

Cayman's legal and regulatory framework makes it an excellent choice for establishing a PTC.

PTCs provide a flexible vehicle through which bespoke trustee services can be arranged, and offer a convenient platform from which family members can participate in a meaningful way in the administration of family trusts and the management of any underlying businesses held on the terms of such trusts.

Particular care needs to be taken with regard to the initial structuring of the PTC. It is critical that the rights, powers and responsibilities vested in particular parties are fully understood (particularly by the settlor both during his or her lifetime and in the future) and Carey Olsen's experienced lawyers can guide the parties through this.

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