

Nothing lasts forever... or does it?

New perpetuities legislation introduced in the Cayman Islands

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After a lengthy period of drafting, review, and industry consultation, the Perpetuities (Amendment) Act, 2024 (the “Act”) came into force on 22 August 2024. The introduction of the Act is welcome news for trust practitioners, trustees, and private clients who have previously encountered a number of practical drawbacks as a result of the 150 year perpetuity period presently applicable to most trusts in the Cayman Islands.

The “old” rule

The rule against perpetuities currently applicable in the Cayman Islands is derived from English law and is aimed at preventing individuals from ‘tying up’ their assets in trust indefinitely. Broadly speaking, the rule prescribes a set period – the perpetuity period – within which time the interest of each beneficiary must vest (i.e. each beneficiary must become absolutely entitled to the relevant property within a specified period). Where the rule is not adhered to, the trust will be void.

The general position is that trusts governed by Cayman Islands law which were settled on or after 1 August 1995 (when the Perpetuities Act 1995 (the “Perpetuities Act”) first came into force) are subject to a 150 year perpetuity period. This means that before the Act came into force a Cayman Islands law governed trust could only be established for a maximum of 150 years, subject to certain exceptions. There is also a saving provision in the Perpetuities Act, known as the ‘wait and see’ rule, which means that a Cayman Islands trust will not be declared invalid from the outset for failing to specify an

appropriate perpetuity period; instead it will become invalid at the time it becomes clear that the interest will not vest in its entirety by the end of the 150 year period.

There is an exception to this general rule for charitable trusts, pension trusts and for trusts established under the Special Trusts Alternative Regime (Part VIII of the Trusts Act (2021 Revision)): there is no need to specify a maximum duration in relation to such trusts.

The position is more complicated in relation to older trusts (excluding charitable trusts) established before the Perpetuities Act came into force. For these trusts, the perpetuity period could only be defined by reference to the lifetimes of persons in being at the time the trust was settled. Typically, a Royal Lives clause was used to define the perpetuity period in such cases.

Perpetuity problems

The rule against perpetuities creates a number of practical drawbacks from the perspective of settlors, trustees and beneficiaries, which are inconsistent with the ‘trust-friendly’ legislative approach generally in force in the Cayman Islands. The issues include the following:

- Many modern-day settlors do not wish to be constrained to a 150 year maximum period and prefer to establish ‘dynastic’ trusts for multiple generations of their family. This is permissible in many of the other international financial centres.

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- The perpetuity rule can create difficulties when changing the governing law of trusts from and to Cayman Islands law – any mismatch in the perpetuity period must be resolved, and this causes issues if it is not properly addressed.
- Where the drafting of a trust deed is defective, such that the rule is infringed, the trust may be rendered void (either from the outset or at a later point in time depending on whether the ‘wait and see’ rule applies). This can have severe implications for the settlor and intended beneficiaries who may face significant tax liabilities and it could also result in liabilities for the intended trustees, particularly if they have been administering the trust for some time on the basis that it is valid.
- Although the ‘wait and see rule’ provides some protection against these risks the operation of the rule is not entirely clear and relying on this provision is less than ideal.
- For trusts drafted with a defective perpetuity period, although relief may possibly be obtained through an application to the Court this is likely to result in significant additional costs.

The new Act

The Act introduces the following changes:

New trusts

The general rule is that trusts established following commencement of the Act can be established with an unlimited perpetuity period, provided that the rule against perpetuities is expressly disapplied in the trust deed and any other instrument transferring an interest or a right over property to the trustees (each, a “**disposition**”). There is a minor exception for direct or indirect dispositions of Cayman Islands land (or interests therein). In the case of such dispositions the existing maximum perpetuities period (i.e. up to 150 years) cannot be disapplied. However, this limited exception does not apply to dispositions of a company (or other entity) which in turn holds Cayman Islands land for the purposes of its business. In such a case the perpetuities period can be disapplied.

Existing trusts

For existing trusts to which a disposition may be made whether the disposition is dated prior to, on or after the date of the new legislation coming into force, an application can be made to the Grand Court to disapply the rule against perpetuities in relation to the disposition and the property which is subject to the disposition. The persons with the right to bring such an application to court are:

- a trustee, settlor or enforcer;
- a person who has trust powers conferred on them by an instrument; or
- a person with a beneficial interest in the trust.

The exception discussed above in relation to Cayman Islands land and the carve out to the exception also apply in the case of such applications.

Migration of non-Cayman Islands trusts

Where an existing foreign trust is amended to change the governing law to the Cayman Islands pursuant to section 89 of the Trusts Act (2021 Revision) and that trust is of unlimited duration and the rule against perpetuities does not apply to it under the foreign governing law, dispositions made in respect of the trust shall not be subject to the rule against perpetuities under Cayman Islands law. Again, the exception and the carve out apply.

Looking to the future

The Act introduces some positive new developments for the trusts industry in the Cayman Islands:

- Trusts from other jurisdictions without the same rules on perpetuities will be more easily transferable into the jurisdiction. This will likely provide a boost to the Cayman Islands trusts sector, as the industry in the jurisdiction is already highly regarded internationally with numerous quality, regulated trustees and a robust legal framework in place.
- Historical complexities created by the rule can be avoided for new trusts. There is also an option for a wide class of individuals to apply to the Grand Court to disapply the rule against perpetuities in relation to dispositions to existing trusts; this provides a greater degree of optionality with regard to wealth structuring in the jurisdiction.
- It is anticipated that, notwithstanding the new legislation, STAR trusts (introduced under the Special Trusts (Alternative Regime)) will remain a popular choice because of the other unique features of such trusts (i.e. the option to restrict rights to information and to establish trusts for non-charitable purposes).

In practice, trustees and their advisors will need to take care to ensure that any and all dispositions to trusts (whether made pursuant to the original trust deed or by way of supplemental deed) are appropriately drafted to implement the provisions uniformly and to avoid any inconsistencies or issues arising in the future.

Ultimately, the reforms will bring the Cayman Islands broadly in line with other jurisdictions which have introduced the option to settle perpetual trusts. The changes will create more options for settlors in the way that they structure their wealth, and give them more control over it as well, without the worry that future generations of their family will not be looked after.



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