

Jersey private trust companies

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Private trust companies (“PTCs”) have been widely used in international structured finance transactions for many years and they are now increasingly being used by high net-worth private clients, who prefer to establish their own PTC to act as the trustee of their family trusts, 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 Jersey PTC in the context of private wealth management. References to “PTCs” are to companies which operate as corporate trustees, although it is also possible for a foundation to act as a private trust foundation (a “PTF”).

Regulation

The Financial Services (Jersey) Law 1998, as amended, (the “Financial Services Law”) is the principal legislation which regulates Jersey’s trust company industry. In broad terms it requires any person who carries out trust company business as a business in the Island to be duly registered by the Jersey Financial Services Commission (the “Commission”) under the Financial Services Law. Subject to some exceptions, acting as or fulfilling or arranging for another person to act as or fulfil the functions of a trustee of an express trust is a regulated activity under the Financial Services Law.

Since 2000 however, Jersey PTCs have been exempt from the requirement to register under the Financial Services Law and have been subject to a lighter touch in terms of their regulation by the Commission. Under the Financial Services (Trust Company Business (Exemptions) (Jersey) Order 2000), a Jersey PTC is exempt from the requirement to register as a trust company business provided:

- it is a company (defined under the Financial Services Law as a body corporate incorporated with or without limited liability in any part of the world);
- it provides trust company business services only in respect of a specific trust or trusts;
- it does not solicit from or provide trust company services to the public;
- it is administered by a ‘registered person’ who is registered to carry out trust company business under the Financial Services Law; and
- it notifies its name to the Commission.

The key points to note are:

- unlike many other jurisdictions, there is no requirement in Jersey to seek express exemption from regulation, to pay any PTC fees or to capitalise the PTC in a particular way. The Commission does however need to be notified and this is usually done by way of a simple letter;
- there is no requirement to submit to the Commission copies of documents in relation to the trust or trusts in respect of which the PTC is to act as trustee; and
- there is also no specific requirement for a regulated trust company to manage the PTC. The requirement is only that the “administration” of the PTC is carried out by a regulated entity in Jersey. Regarding what constitutes “administration” for the purposes of the exemption:
 - there is no definition or published guidance from the Commission. Our view is that “administration” constitutes more than company secretarial services but does not necessarily require the regulated entity to have a representative on the board of directors of the PTC;

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– however, the regulatory climate in Jersey means that most regulated trust companies in Jersey would look to place at least one of its professional directors on the board of a PTC. Amongst other things, this is to ensure that there is a sufficient flow of information about the management and governance of the PTC so that the regulated trust company is able to comply with its own regulatory obligations.

On 30 January 2023 new legislation was brought into force which made Jersey PTCs subject to the full scope of Jersey's anti-money laundering (AML) regulations to the extent that they are carrying on any AML regulated activities or operations "as a business", subject to some transitional arrangements which expired on 1 July 2023.

Jersey's AML obligations include, but are not limited to,; (i) performing Customer Due Diligence; (ii) appointing key persons (money laundering compliance office and money laundering reporting office); (iii) conducting business risk assessments/customer risk assessments; (iv) instituting appropriate and consistent policies and procedures to prevent and detect money laundering; and (v) AML record keeping.

Where a PTC is solely carrying out the activity of acting as a trustee of an express trust "otherwise than by way of business", it will now be subject to an AML "lite" regime established under the Proceeds of Crime (Duties of Non-Professional Trustees) (Jersey) Order 2016 by which some of the general Jersey AML obligations are disapplied. Whether the "full" or the "lite" AML regimes apply to the activities of a particular PTC will now depend on its individual circumstances. The activity of each PTC should be analysed so as to ascertain whether any application to the Commission for registration as an AML regulated business is required.

The ownership structure of a PTC

The shares in a PTC 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

Whilst it is possible for an individual, such as the settlor or a member of the settlor's family (or his/her nominee), to be the shareholder of a PTC, such an arrangement can give rise to concerns upon the individual's death.

One concern is practical and relates to probate requirements in respect of the individual ownership of the PTC's shares. The second concern relates to succession and the suitability of those person(s) to whom the PTC shares devolve 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. The shares of a PTC are therefore often held under the terms of a charitable or non-charitable purpose trust (a "Trust"). Where there is doubt about whether a charitable purpose trust will be

used for genuine charitable purposes, a non-charitable purpose trust is used to avoid allegations that the charitable trust is a sham.

If a Jersey non-charitable purpose trust is used, an enforcer must be appointed to enforce the stated purpose of such trust. The enforcer must be a separate entity from the trustee but does not need to be licensed by the Commission. For example, a client's professional adviser could act as the enforcer. The trustee of the Trust (the "Trustee") can be a different legal entity, possibly located in a different jurisdiction, to the administrator of the PTC which (to gain exemption under the Financial Services Law) must be based in Jersey. The division of roles in this way can assist with separating out the respective rights and responsibilities within the structure.

Foundation

A foundation can be established with the sole object of holding the shares in a PTC.

A foundation is incorporated on the instruction of a founder, but is not owned by the founder, nor by anyone else. Therefore, ownership issues will not arise in that context.

Alternatively, a foundation could itself be used to act as the trustee in the place of the PTC. The private trust company business exemption from registration under the Financial Services Law is equally available to Jersey private trust foundations (PTFs).

Incorporating a PTC

A PTC can be incorporated with or without limited liability in any part of the world and is usually incorporated using standard private company memorandum and articles of association (or the equivalent).

Composition of the board of directors

The choice of the board of directors of a PTC is a key issue. 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 assets.

Control of the board of directors can be structured through the constitutional documentation of the PTC and/or through the terms of the Trust. It may be that the Trustee is required under the terms of the Trust to seek the approval of the settlor or a nominated other, such as the enforcer (in the case of a noncharitable purpose 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 structuring and 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), 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, or

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indeed other family members, once the structure is in operation.

The selection of directors will 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 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, its underlying trusts and assets.

Where family members participate as directors, conflicts of interest need to be managed and this can be addressed in the constitutional documentation of the PTC, for example by regulating voting rights where personal conflicts of interest arise during the course of the PTC's business.

Directors' liability

One reason for the increased use of PTCs in Jersey results directly from the abolition of the statutory guarantee which was historically imposed upon trust company directors under the Trusts (Jersey) Law 1984, as amended. As a result of the abolition, the risk of personal liability under Jersey law has been reduced significantly and therefore lay directors such as family members are more willing to act as directors.

Some judicial discussion has taken place about the liability of a director of a trust company and whether "dog-leg" claims are sustainable under Jersey law. "Dog-leg" claims are based on the notion that the duties owed by a director to a company may, in certain circumstances, be regarded in law as an 'asset' of the trust of which the company is trustee. Whilst such claims have not been ruled out as impossible, they are certainly very difficult claims to construct and pursue.

Insofar as there are concerns about possible personal liability on the part of directors of the PTC, this can be addressed through the provision of indemnities and/or appropriate director and officer insurance.

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 may have undesirable consequences.

Operation and funding of a PTC

The regulated trust business which provides administrative services to the PTC will need a sufficient and prompt flow of information to be satisfied about the nature and conduct of the PTC's business. The mechanism by which information is relayed is generally a practical matter and varies between service providers.

Where a professional director from a regulated trust company business is appointed to the board of the PTC he or she 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 there is a desire in due course to switch the administration of the PTC to a different service provider (or indeed to a different jurisdiction) this can, subject to the terms of the documentation in place, be easily achieved by terminating the administration agreement and putting a new one in place with the new service provider.

Changing the Trustee should also be straightforward given the limited assets (namely, the share capital of the PTC) held by the Trustee.

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.

Family awareness

Family awareness of the PTC and the manner in which the trust structure as a whole is intended to operate is also a key issue for settlors. One way of communicating the settlor's wishes is to agree a family charter which provides a formal statement of the role, investment principles and philanthropic intentions of the PTC structure established.

A charter can encourage a uniform approach to the family's affairs from beneficiaries and other participants, such as external directors of the PTC, thereby reducing the scope for dispute amongst family members at a future date.

Conclusion

Jersey's legal and regulatory framework, together with the resident administration expertise, makes the Island an excellent choice for establishing a PTC.

PTCs provide a flexible, timeless and relatively portable way in which to arrange bespoke trustee services. PTCs offer a convenient platform from which family members can participate in a meaningful way in the management of underlying assets.

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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 team of trust lawyers can guide the parties through this.



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