

KEY POINTS

What is the issue?

The ability to enforce onshore judgments against offshore trusts faces significant hurdles.

What does it mean for me?

Judgments from onshore jurisdictions cannot necessarily be enforced against offshore trusts, as a consequence of firewall legislation.

What can I take away?

The result of such provisions is that offshore jurisdictions continue to be an attractive proposition for settlors wishing to establish trusts.

Where there's smoke there's a fire(wall)

ANDREW PEEDOM, DAVID HARBY, DAVID O'HANLON AND SIMON HURRY DISCUSS THE DIFFICULTIES OF ENFORCING ONSHORE JUDGMENTS IN OFFSHORE JURISDICTIONS



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Trust practitioners will be all too familiar with the fact that, in recent years, there has been a significant increase in judgments issued from onshore jurisdictions that creditors seek to enforce against the assets of trusts established in offshore jurisdictions. In some instances, such proceedings also challenge the validity of an offshore trust (validity proceedings). Fundamental to these proceedings is an allegation that the sole purpose of establishing the trust was to put assets beyond the reach of another party (usually a divorcing spouse, a creditor or insolvency practitioner). Forced-heirship laws also continue to feature in these types of claims.

This article focuses on the offshore jurisdictions of the British Virgin Islands (BVI), the Cayman Islands, Guernsey and Jersey (the Jurisdictions), which have statutory provisions designed to protect trust assets from being susceptible to such attacks. Colloquially, those provisions are known as 'firewall legislation'. Although this legislation does not prevent the enforcement of an onshore judgment against, for example, UK-*situs* assets of such trusts, it acts as both a shield and a sword against any attempt to enforce an onshore judgment against an offshore trust.

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is construed insofar as it concerns validity proceedings. This article offers a comparative analysis of these issues and how they impact the Jurisdictions.

THE FIREWALL LEGISLATION

The key statutory provisions in force in each of the Jurisdictions are designed to ensure that all questions regarding a trust will be determined according to the laws governing the trust (usually specified in the trust instrument); and foreign law does not apply to such trusts. The second limb extends to heirship rights and foreign judgments not being recognised in relation to a trust. The purpose of such provisions is to ensure that the trusts are adequately protected against foreign claims.

By way of example, the *Cayman Islands' Trusts Act (2021 Revision)* specifically addresses those matters as follows:

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- '[a] term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances';¹
- '[N]o trust governed by the laws of the Islands and no disposition of property to be held upon trusts thereof is void, voidable, liable to be set aside or defective in any fashion...by reason that...the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person';² and
- 'A foreign judgment shall not be recognised, enforced or give rise to any estoppel insofar as it is inconsistent with [other provisions of the Act].'³

On any literal reading of those provisions, their meaning is clear. Nevertheless, the courts have taken differing approaches, for instance, on the effect of a submission of a trustee to foreign proceedings.

Previously, the Grand Court of the Cayman Islands (the Cayman Islands Court) held that they should be construed such that no order of a foreign court would be enforceable 'whether or not the trustee submitted to the jurisdiction'.⁴ Whereas the Royal Court of Jersey (the Jersey Court) seems to consider a trustee that has voluntarily submitted to the foreign court 'would be in some difficulty in arguing subsequently before [the Jersey] Court against the proposition that any order of the [foreign court] relating to the trust should be enforced without reconsideration of the merits of such order.'⁵ The Jersey Court has gone on to issue a clear warning to trustees who are considering submitting to the jurisdiction of an overseas court and held that it is more likely to be in the interests of a Jersey trust and its beneficiaries not to do so.⁶

The Royal Court of Guernsey (the Guernsey Court) has taken a slightly different approach, suggesting that where a trustee was voluntarily submitting to English and Welsh proceedings to which it had been joined, the 'impact of section 14(4) of the 2007 Law will have to be considered in the event that enforcement of any order made is sought, but I did not regard it as amounting to a bar to [the trustee] participating in the proceedings to which it has been joined'.

The Cayman Islands Court has described that legislation as 'a manifestation of a legislative intention of ensuring that the validity of trusts governed by Cayman Islands law will be determined in accordance with Cayman Islands law, being a system of law which has explicitly been designed to encourage foreign settlors to establish trusts here'.⁷ This purpose is evident from the manner in which the firewall provisions evolve to meet further needs.

'Often firewall provisions protect trusts from challenges by those who bring a claim on the basis of their personal relationship to the settlor'

For instance, often firewall provisions protect trusts from challenges by those who bring a claim on the basis of their personal relationship to the settlor. The BVI has developed this to include, more recently, the beneficiaries of the trust. Importantly, the *BVI Trustee (Amendment) Act, 2021* extended and modernised the definition of 'personal relationships' to account for different family structures and types of relationships. The revised definition of 'every form of relationship by blood, adoption, marriage or cohabitation, whether or not the relationship is recognised by law...' now includes, for example, stepchildren and children born by surrogacy.⁸

VALIDITY PROCEEDINGS

Faced with the realisation that firewall legislation potentially inhibits one's ability to enforce an onshore judgment against an offshore trust, those asserting that foreign laws should apply to trust assets (or more simply that the establishment of a trust is a crude attempt to put assets beyond the reach of spouses or creditors) has resulted in trustees being faced with validity proceedings with increasing frequency.

Although the firewall legislation leaves little room for ambiguity, the position in relation to validity proceedings is more nuanced. Historically, declarations by the courts of offshore jurisdictions that a trust established in the said jurisdiction could only be varied in accordance with the law of (and by the court in) that jurisdiction were commonplace.⁹

More recent jurisprudence represents a departure from such a strict interpretation of firewall legislation, such that the courts of foreign jurisdictions are now, in certain circumstances, permitted to hear and determine validity proceedings. Crucially, there is the ongoing requirement that this can only occur if a foreign jurisdiction applies the law governing the trust.

This departure was most starkly illustrated in a relatively recent judgment from the Cayman Islands, where the Cayman Islands Court held that '[n]one of these [firewall] provisions ... expressly

deal with this Court's jurisdiction at all, let alone confer express statutory jurisdiction over all trusts governed by Cayman Islands law.'¹⁰ The Cayman Islands Court concluded that there was an absence of statutory provisions conferring exclusive jurisdiction on that court in relation to such trusts.

In Jersey, like elsewhere, what confers 'exclusive jurisdiction' in a trust deed is a question of fact and construction. This was highlighted in the UK Privy Council's decision that the forum for a trust's administration was not automatically the jurisdiction for resolving a dispute and that, although 'strong reason' would be required to continue proceedings in breach of an exclusive jurisdiction clause, such a clause attracts less weight than an equivalent clause in a contract.¹¹

One of the key factors for consideration by the courts is whether foreign proceedings attacking a trust are already underway. Other factors include the forum for administration of the trust (if it differs from that of its governing law), whether there is an exclusive jurisdiction clause (as above) and whether the trust instrument contains reserved powers.¹² If a trustee is desirous of having validity proceedings determined by the forum governing the trust, timing is also key. A trustee seeking the urgent determination of such proceedings might have difficulty obtaining the requisite relief from the courts if it has not acted diligently in seeking to have that issue resolved.

The firewall legislation nevertheless continues to be an important and attractive consideration for settlors wishing to establish trusts in the Jurisdictions. It is unclear whether there will continue to be an increase in attacks against offshore trusts (regardless of whether they were established for valid purposes), but these types of statutory protections will at least continue to assist trustees in resisting such hostile claims.

#CONTENTIOUS TRUSTS AND ESTATES #TRUSTS

¹ s.89(2), *Trusts Act (2021 Revision)* ² s.91, *Trusts Act (2021 Revision)* ³ s.93, *Trusts Act (2021 Revision)*. Similarly, see s.83A, *BVI Trustee Act, 1961 (as amended)*; art.14, *Trusts (Guernsey) Law 2007*; and art.9, *Trusts (Jersey) Law, 1984*. ⁴ *In the matter of the A Trust* [2016 (2) CILR 416] ⁵ *In the matter of the H Trust* [2006] JRC 057 ⁶ *In the matter of the Arpetaz Settlement* [2020] (2) JLR 119 ⁷ *In the Matter of a Settlement made by Deed dated 27 December 2017*, Grand Court of the Cayman Islands. Unreported judgment dated 27 July 2021, per Justice Kawaley (at [23]) ⁸ s.8(a)(ii), *BVI Trustee (Amendment) Act, 2021*, which amends s.83A, *BVI Trustees Act, 1961* ⁹ By way of example, see *In the matter of the B Trust*, *RBS Coutts (Cayman) Limited v W & Ors* [2010 (2) CILR 349]. ¹⁰ *Re The Stingray Trust*, Grand Court, Unreported judgment dated 21 December 2020, per Kawaley J (at [32]). ¹¹ *Crociani v Crociani* [2014] UKPC 40 ¹² By way of example, see *In the Matter of a Settlement made by Deed dated 27 December 2017*, above note at [26].