



ANALYSIS

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1995-96, No. 25

An Act to amend the International Trusts Act 1984 and to modify the law relating to international trusts

(21 November 1996)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1. Short Title - This Act may be cited as the International Trusts Amendment Act 1995-96 and shall be read together with and deemed part of the International Trusts Act 1984 (hereinafter referred to as "the principal Act").

2. Interpretation - Section 2 of the principal Act is amended by -
- (a) deleting the definition of "instrument";
 - (b) inserting after the definition of "heirship right", the following definition -
"interested party" means in relation to any trust, any settlor, donor, trustee, protector, beneficiary, and any person claiming through any one of such persons";
 - (c) amending the definition of "International Trust" by -
 - (i) omitting the words "or disposition", and
 - (ii) adding the words "including a custodian trustee, or in the case of a disposition granting powers of appointment, maintenance or advancement, at least one of the" after the words "one of the trustees", and
 - (iii) adding at the end of the definition the words "and shall include, where the context so permits, a trust which is established or settled under the laws of another jurisdiction, but which, subject to paragraphs (a) and (b) of this definition, is subsequently registered as an International Trust under this Act;
 - (d) deleting the definition of "protector" and substituting the following -
"protector" in relation to an international trust means a person who, by whatever name or title -
 - (a) has the power to appoint or remove a trustee, or
 - (b) directly or indirectly controls, whether by power of veto or otherwise, the trustees exercise of one or more of their powers, functions or discretions under the trust, or
 - (c) holds the office of protector in accordance with subsection 20(1);
 - (e) amending the definition of "Trust" by adding after the words "dispositions of or in relation to property", the words "dispositions granting powers of appointment, maintenance or advancement,";
 - (f) inserting after the definition of "trust", the following new definition -
"trust instrument", "instrument" or "registered instrument" means the deed, trust agreement, will, codicil, settlement or instrument establishing or creating a trust and includes any variation or amendment to such deed, trust agreement, will, codicil, settlement or instrument;
 - (g) adding at the end of the definition of "trustee company", the words -
"and except in relation to section 15, includes a wholly owned subsidiary of a trustee company nominated pursuant to section 4A of the Trustee Companies Act 1981-82".
3. Saving of existing laws - Section 3 of the principal Act is amended by omitting the words "immediately prior to the commencement of this Act shall continue in force and":
4. Application of this Act - Subsection (1) of section 5 of the principal Act is amended by -
- (a) adding after the words "unless the context otherwise requires", the words "and subject to section 15,";
 - (b) adding after the words "international trusts", the words "registered pursuant to section 15";
 - (c) adding after paragraph (c), the following new paragraph -
"(d) all questions and matters relating to or concerning an international trust."

5. Power to specify perpetuity period - Section 6 of the principal Act is repealed and the following section substituted -

"6. Perpetuity period - (1) Notwithstanding any rule of law or equity to the contrary, the rule of law known as the rule against perpetuities or remoteness of vesting, and the rule of law known as the rule against perpetual trusts or against inalienability, shall each have no application to an international trust.

(2) Notwithstanding subsection (1), a trust instrument may make provision for vesting of all or any part of the property of the trust upon such terms as are prescribed by the trust instrument including, but not limited to, provision for -

- (a) a period within which the property of a trust shall vest in any beneficiary of the trust; or
- (b) the happening of an event upon which the property of the trust shall vest in any beneficiary of the trust; or
- (c) the property of the trust not to vest in any beneficiary of the trust or the trust not to terminate.

(3) Where a trust would, except for this subsection, be held by the Court to be void for uncertainty because of its terms relating to termination of the trust or vesting of the property of the trust, and such uncertainty would be removed by imposing a date for termination of that trust, then the trust shall terminate on the date 100 years from the date of creation of the trust, and the property of the trust shall vest in the beneficiaries on that date, unless termination or vesting occurs earlier in accordance with the trust instrument.

(4) Where a period or an event is specified within, or at the end of, or upon which the property of a trust shall vest in a beneficiary or where subsection (3) applies, the property of the trust then remaining shall vest in the beneficiary in accordance with the provision which specifies that period or event or in accordance with subsection (3), (as the case may be), and such vesting shall apply in relation to all property then remaining of that trust and every general or special power of appointment under that trust shall be exercised in a manner consistent therewith.

(5) Without limiting any other rights conferred on trustees to vary a trust instrument, the trustees of an international trust may with the prior consent of the interested parties, or if permitted by the trust instrument, vary the terms of the trust instrument to make provision -

- (a) for a period being not less than the existing period provided for in the trust instrument within which the property of the trust shall vest in any beneficiary of the trust; or
- (b) for the happening of an event being an event that will occur beyond the period within which the property of the trust would otherwise vest in the beneficiaries and upon the happening of which the property of the trust shall vest in any beneficiary of the trust; or

- (c) to remove the period within which the property of the trust shall vest in any beneficiary.

(6) Except where there is express provision to the contrary contained in the trust instrument, where the proper law of an international trust is to be changed from that of the Cook Islands to that of another jurisdiction, the trustees may with the consent of the interested parties, or if permitted by the trust instrument, vary the terms of the trust instrument to provide for a lesser period in which the then remaining property of the trust shall vest in any beneficiary so as not to infringe the law of that other jurisdiction."

6. Execution of a trust instrument - Section 7 of the principal Act is repealed and substituted by the following -

"7. Execution of a trust instrument - Notwithstanding any rule of law or equity to the contrary and except where there is express provision to the contrary contained in the trust instrument, a trust instrument and any counterpart thereof (whether an original or copy including a facsimile copy) may be executed by the settlor, trustee and any other parties thereto at different times and in different places whether within or outside the Cook Islands and a trust instrument so executed and a trust thereby created established or settled whether registered before or after the coming into force of this Act shall be deemed as valid as if the trust instrument were executed by the settlor and those parties simultaneously at the time the trust instrument was executed by the settlor, and at a place within the Cook Islands."

7. Application of the rule in Saunders v Vautier - Section 10 is amended by -

- (a) omitting from subsection (1) the words "for a period, being a period not in excess of the maximum perpetuity period permitted by this Act";
- (b) omitting from subsection (1) the words, "but subject to the express terms of the instrument", and substituting the words "subject to any other express terms of the instrument".

8. Charitable and Purpose Trusts - Section 12 of the principal Act is amended by -

- (a) omitting from subsection (1) the words "perpetuity period applying or expressed to apply to", and substituting the words "term of";
- (b) omitting from subsection (2) the words, "provided that the trust must vest in natural persons within the perpetuity period applying or expressed to apply to the trust".
- (c) omitting from subsection (2) the words "by the settlor or his personal representatives or" and substituting the words "on the terms set out in the trust instrument";

- (d) adding after subsection (2), the following new subsections -
- "(3) A person appointed to enforce the trust may resign or be removed or replaced in accordance with the trust instrument.

(4) If the person appointed to enforce the trust resigns, or is removed, or is unwilling, refusing, unfit or unable to act, and if no successor can be appointed in accordance with the trust instrument, the trustees shall forthwith apply to the Court for directions or for another person or persons to be appointed by the Court to enforce the trust, and the Court shall be empowered to make an order appointing a person or persons to enforce the trust on such terms as it sees fit, and pending appointment by the Court the Attorney-General shall be entitled, on such terms as he may require, to enforce the trust with the same rights and powers as the person appointed under the trust instrument to enforce the trust."

9. Investments - Section 13 of the principal Act is repealed and the following section substituted -

"13. Recording of title (1) For the purposes of identification and ease of administration, the trustees of an international trust may adopt a name for that trust.

(2) A trust instrument may authorise the trustees to cause the ownership or title of property of the trust to be recorded or registered in the name of that international trust rather than in the name of the trustees.

(3) Where the trustees of a trust cause the ownership or title of property of that trust to be recorded or registered in the name of that trust, the trustees shall where permitted by the jurisdiction of the relevant registry lodge with the relevant registry or recording authority an affidavit, which affidavit shall contain the following particulars namely, -

- (a) the name of the international trust;
- (b) the names and addresses of all the trustees;
- (c) whether fewer than all the trustees are authorised to act on behalf of and in the name of the trust in any acquisition, conveyance, encumbrance, lease or other dealing with the property and if so -
 - (i) designate the trustees or the manner in which the trustees shall be designated;
 - (ii) specify the limitations (if any) upon the authority of such trustees;
 - (iii) be executed by all the trustees named pursuant to paragraph (b).

- (d) where the affidavit does not provide for the matters contained in paragraph (c) then it shall be executed by at least one trustee named therein.

(4) Upon lodging an affidavit with the relevant registry or recording authority the affidavit shall constitute prima facie evidence of the facts recited therein, the authority of the deponent to execute and lodge the affidavit, and the authority of the trustees who are thereby empowered to convey or otherwise act on behalf of the trust insofar as the same affects title to any interest in the property.

(5) Subject to subsection (3), where an interest in property is recorded or registered in the name of an international trust, such interest shall only be conveyed, encumbered, leased or otherwise dealt with in the name of the trust by an instrument executed by all the trustees named in the affidavit.

(6) Where an interest in property is recorded or registered in the name of an international trust pursuant to the trust instrument, the legal title to that property shall be deemed to be held by the trustees.

(7) In the event of a change in any of the particulars contained in an affidavit under subsection (3) the trustees for the time being shall provide a further affidavit in accordance with that subsection."

10. Bankruptcy - Section 13A of the principal Act is amended by omitting the words "settlor spouse" and substituting the words "settlor, settlor's spouse".

11. Fraud - (1) Section 13B of the principal Act is amended by -
- (a) omitting from subsection (2) the words "shall for the purposes of this Act" and substituting the words "shall for all purposes";
 - (b) omitting from subsections (3) and (4) the words "shall not be fraudulent as against a creditor of a settlor" and substituting the words "shall for all purposes be deemed not to have been so settled or established, or the property disposed of with intent to defraud a creditor";
 - (c) omitting from paragraph (b) of subsection (3), the words "such action" and substituting the words "in a court of competent jurisdiction proceedings in respect of that creditor's cause of action";
 - (d) adding at the end of subsection (3), the words -
"provided that this subsection shall not have effect if, and subject to subsection (5), at the time of settlement, establishment, or disposition, as the case may be, proceedings asserting that creditor's cause of action against that settlor have already been commenced in a court of competent jurisdiction.";
 - (e) omitting from subsection (4) the words "against the settlor accrued or had arisen" and substituting the word "accrued";

- (f) omitting from paragraph (a) of subsection (5) the words "an international trust" and substituting the words "a trust";
- (g) adding at the end of paragraph (c) of subsection (5), the words "trustee, or protector.";
- (h) adding the following new paragraph to subsection (5) -
 - "(d) has settled or established a trust, or has disposed of property to such trust, at a time when proceedings asserting that creditor's cause of action against that settlor have already been commenced in a court of competent jurisdiction.";
- (i) deleting subsection (6) and substituting the following subsection - "(6) Where an international trust is liable to satisfy a creditor's claim in the manner provided for in subsection (1) -
 - (a) the creditor's rights to recovery shall be limited to that property referred to in subsection (1), or to the proceeds of that property, to the exclusion of any rights against the trustees of the international trust or any of them, against any other property of the international trust, or against any other of the property or assets of the trustees of the international trust, or any of them;
 - (b) where the international trust is unable to satisfy the creditor's claim by reason of the fact that the property referred to in subsection (1) has been disposed of, other than to a bona fide purchaser for value, then any such disposition shall be void.";
- (j) inserting in subsection (8) after the words "For the purposes of this section", the words "and section 13K";
- (k) deleting paragraph (b) of subsection (8) and substituting the following paragraphs -
 - "(b) the term "cause of action" means the earliest cause of action capable of assertion by a creditor against the settlor of an international trust or, as the case may be, against the settlor of property upon an international trust, by which that creditor has established (or may establish) an enforceable claim against that settlor;

- (c) where a creditor has, or asserts, or could have asserted, multiple or successive causes of action against a settlor (whether by virtue of the nature of the relevant circumstances of the case, or by reason of having attained the status of a judgement creditor in respect of one or more of such causes of action, or by reason of asserting or being able to assert an allegedly fraudulent settlement of or disposition to an international trust, or otherwise) the entitlement of such a creditor to relief under this section shall be determined, and the periods referred to in this section shall be calculated with reference to one only of the creditor's causes of action, being that cause of action which accrued first in time in accordance with paragraph (b).
- (d) nothing in paragraphs (b) or (c) shall apply so as to affect the right or requirement of a creditor to commence separate proceedings under this section in relation to a cause of action which is separate from and independent of another cause of action where the Court is satisfied, having regard to paragraph (c), that both the circumstances out of which the cause of action arose and the subject matter of that cause of action are wholly unrelated to those of the other cause of action."
- (1) deleting subsections (9) and (10) and substituting the following subsections -
- "(9) The provisions of this section shall apply to all civil actions and proceedings brought in the Court in which fraud, deceit, unconscionable conduct or any other inequitable conduct however described or any species of unjust enrichment is alleged, against any person (whether a party to the proceedings or not) with regard to the settlement or establishment of an international trust or the disposition of property to such a trust, or receipt of property by or for such a trust (or subsequent disposition of property from such a trust with the intention of prejudicing creditors of the settlor of such property or such trust), and the remedy conferred by subsection (1) shall be the sole remedy available in such an action or proceedings, to the exclusion of any other relief or remedy against any party to the relevant action or proceeding.

(10) The provisions of this section shall operate to the exclusion of any other remedy, principle or rule of law, whether provided for by statute, or founded in equity or in common law including, for the avoidance of doubt, the imposition of a constructive trust upon any interested party or the recognition and enforcement of any constructive trust imposed or recognised by the laws of any other jurisdiction.

(11) Subject to section 16(6), the provisions of this section shall apply to every international trust, and to every trust which having been registered as an international trust, is no longer so registered, and in respect of all dispositions to such a trust.

(12) For the purposes of this section the term "creditor" means a creditor of the settlor and includes any person who alleges a cause of action against a settlor.

(13) A creditor seeking to enforce a claim under this section in reliance on a foreign judgement may not enforce such claim until such time as it can demonstrate to the reasonable satisfaction of the court that,

- (a) it has exhausted all remedies available to it against the settlor's remaining property, and
- (b) all rights of appeal against that foreign judgement have been exhausted."

12. Retention of control and benefits by settlor - Paragraph (g) of section 13C of the principal Act is amended by adding after the word "beneficiary", the words ", trustee or protector".

13. Foreign judgements not enforceable - Section 13D of the principal Act is repealed and the following section substituted -

"13D. Foreign judgements not enforceable - Notwithstanding the provisions of any treaty or statute, or any rule of law, or equity, to the contrary, no proceedings for or in relation to the enforcement or recognition of a judgement obtained in a jurisdiction other than the Cook Islands against any interested party shall be in any way entertained, recognised or enforced by any Court in the Cook Islands to the extent that the judgement -

- (a) is based upon the application of any law inconsistent with the provisions of this Act or of the Trustee Companies Act 1981-2; or
- (b) relates to a matter or particular aspect that is governed by the law of the Cook Islands."

14. Governing law - (1) Section 13G of the principal Act is amended by repealing subsections (3) and (4) and substituting the following subsections -

"(3) Where a trust instrument so provides, or where in accordance with the powers contained in a trust instrument, the law of the Cook Islands is chosen to govern a particular aspect of an international trust, and law other than that of the Cook Islands is chosen to govern other aspects of that trust, then the choice of Cook Islands law and the choice of that other law as to their respective aspects shall be valid effective and conclusive regardless of any other circumstances.

(4) Where a trust instrument contains a power to change the governing law of that trust, that law may be changed to or from the law of the Cook Islands in accordance with that power, and that change shall be valid, effective and conclusive according to the terms of such power."

(2) Section 13G of the principal Act is amended by adding after subsection (5), the following subsections -

"(6) A change in the governing law of a trust shall not of itself interrupt the continuity of the relationships whether in equity or law established by the trust and, without limitation, shall not constitute a resettlement of the trust.

(7) Subject to any other provision of this Act, the application of the governing law of a trust to that trust prior to a change in that governing law shall not be affected by that change.

(8) The disposition of any property to or from a trust in accordance with the governing law of that trust at the time of the disposition shall not be avoided or otherwise invalidated by a subsequent change from that governing law to some other law.

(9) Where the donee of a power to change or cause to change the governing law of a trust exercises that power in accordance with the terms of the power so conferred, then the exercise of that power by the donee shall be deemed to have been properly exercised.

(10) The location of the interested parties, selection or imposition of jurisdiction, place of administration, or the situation of the property of the trust shall not in any way affect the validity or effect of a choice of the governing law of a trust made in accordance with the trust instrument.

(11) Where the governing law of a trust is changed to or from the law of the Cook Islands, the trustees shall be empowered to make all such consequential alterations or additions to the trust instrument as the trustees shall consider necessary or desirable to ensure the provisions, rights, liabilities, powers and obligations of and under the trust instrument shall be as valid and effective under the new governing law as they were under the previous governing law.

(12) Where a trust instrument contains provision for the governing law of a trust to change upon a determination being made in accordance with the trust deed as to either -

- (a) the happening or non-happening of a specified event;
or
 - (b) a state of affairs coming into existence,
- and that determination as to the happening or non-happening of the event or the existence of the state of affairs is so made then that provision shall take effect accordingly.

(13) Nothing in this section shall affect the application of section 13K(5) to an international trust."

15. Matters determined by governing law - Paragraph (e) of subsection (2) of section 13H of the principal Act is amended by adding after the words "or disposition", the words "or transfer".

16. Exclusion of foreign law - Section 13I of the principal Act is amended by adding after the words "in any fashion", the words "nor may relief be had under section 13B".

17. Commencement of proceedings - (1) Subsection (1) of section 13K of the principal Act is amended by -

- (a) adding at the end of paragraph (b), the word; "or";
- (b) inserting after paragraph (b), the following -
"(bb) seek relief or remedy under section 13B;";
- (c) deleting from subparagraphs (i) and (ii) of paragraph (d), the words "that is sought to be set aside";

(2) Section 13K is further amended by deleting subsection (3) and substituting the following -

"(3) No action or proceeding (whether substantive or interlocutory in nature) to which either this section or section 13B applies shall be heard, and no order shall be made or granted by the Court in respect of or relating to such action or proceeding (including any injunction or order that shall have the effect of preventing the exercise of, or the granting or restoring of, any right, duty, obligation or power, or of preserving, granting custody of, or detaining or inspecting any property, including for the avoidance of doubt any Anton Pillar order or any Mareva injunction) unless the Court having regard to the affidavit filed pursuant to subsection (4) shall first be satisfied, beyond reasonable doubt that-

- (a) commencement of the action or proceedings is not precluded by the provisions of subsections (1) or (2);
and
- (b) the remedy or relief sought is not precluded by the provisions of subsection (6);
and in any action or proceedings to which section 13B applies that,
- (c) the remedy or relief sought is not precluded by the provisions of section 13B; and

- (d) the evidence as disclosed by the affidavit demonstrates the ability of the plaintiff to prove those matters necessary to establish a right to relief under section 13B(1)."

(3) Section 13K is further amended by deleting subsection (4) and substituting the following -

"(4) In every action or proceeding to which this section applies, or to which section 13B applies, the person or persons bringing the same (in this subsection referred to as "the plaintiff") shall, upon the commencement of such proceedings, file an affidavit which shall be made by the plaintiff or by any one of them (or in the case of a corporate plaintiff, by an officer thereof) who shall depose as to -

- (a) the facts and circumstances giving rise to the action or proceedings;
- (b) whether an action or proceedings have been commenced in any other jurisdiction between any of the parties to the action or proceedings or by any party against the settlor of any relevant trust or of property upon any relevant trust;
- (c) such of the circumstances of the plaintiff as are or may be relevant to determine the quantum of security to be paid by the plaintiff or if there is more than one plaintiff, any one or more of them, either as non-residents, or in connection with the making of any interim order; and
- (d) the date upon which the international trust or property, in respect of which the action or proceedings is brought, was settled or disposed of to the relevant international trust, as the case may be;

and in any case to which section 13B applies, the following further matters -

- (e) the facts and circumstances of the creditor's cause of action and if the creditor shall have multiple or successive causes of action the facts and circumstances of the creditor's cause of action which accrued first in time (as defined by and determined in accordance with section 13B);
- (f) the date upon which that creditor's cause of action accrued; and
- (g) whether an action or proceedings have been commenced in any jurisdiction in respect of that creditor's cause of action and if so, the date upon which that action or those proceedings were commenced."

- (4) Subsection (5) of section 13K is amended by -
- (a) deleting the words "shall apply to every international trust expressed to be governed by the law of the Cook Islands" and substituting the words "and section 13B shall apply to every international trust";
 - (b) adding after the words "shall change the law by which", the words "all or any aspects of";
 - (c) adding after the word "proceeding", the words "to which this Act applies, commenced";
 - (d) deleting the words "by a person claiming to be interested in, or prejudiced by, the settlement of property upon such trust, or any disposition of property to such trust before registration, shall be commenced subject to subsections (1) and (2) and every determination and order shall be made subject to subsection (3)" and substituting the words "concerning the settlement or establishment of such trust, or any disposition of property to such trust before or after registration, shall be subject to the provisions of this section and of section 13B, and shall be heard and determined".

(5) Section 13K is further amended by adding after subsection (5), the following subsection -

"(6) In any action or proceedings commenced, whether pursuant to this Act or at common law or in equity, wherein the usual or appropriate remedy (whether sought or not) would be either, -

- (a) the setting aside of the settlement of, or disposition to, an international trust; or
- (b) the award of a legal or equitable interest in property settled upon or disposed of to an international trust,

but the grant of such a remedy is or would be precluded either by subsections (1) or (2), or by section 13B, then neither damages nor any other relief or remedy which has the effect of providing relief or remedy alternative to or consequential upon that precluded by the said provisions, shall be awarded in such action or proceedings."

18. Application for registration - Section 14 of the principal Act is repealed and the following section substituted -

"14. Application for registration - (1) Application for registration of a trust as an international trust shall be made to the Registrar in the prescribed form, and accompanied by the prescribed fee, within 45 days of the date upon which a registered foreign company, international company or a trustee company, is appointed or declared a trustee of that trust.

(2) On application by a trustee of the trust, the Registrar may extend the period of 45 days referred to in subsection (1) subject to the Registrar being satisfied that the failure to register the trust as an international trust was as a consequence of inadvertence on the part of any interested party to the trust."

19. Registration - Section 15 of the principal Act is amended by repealing subsection (4) and substituting the following subsections -

"(4) Where upon settlement of a trust the trust instrument provides for the law of the Cook Islands to be the governing law of all or any aspects of that trust then that law and the provisions of this Act shall apply to those aspects of that trust governed by Cook Islands law from the date of establishment creation or settlement of that trust if the trust is at any time thereafter, subject to section 14(1), registered as an international trust.

(5) Where a trust is established created or settled under a law other than that of the Cook Islands, but Cook Islands law is subsequently chosen to be, or becomes, the governing law of all or any aspects of that trust, then Cook Islands law and the provisions of this Act shall apply to those aspects of that trust governed by Cook Islands law from the date that trust became wholly or partly governed by Cook Islands law if the trust is at any time thereafter, subject to section 14(1), registered as an international trust.

(6) Nothing in this section shall affect the application of section 13K(5) to an international trust."

20. Annual Certificate of Registration - Section 16 is repealed and substituted by the following -

"16. Certificate of Registration - (1) A certificate of registration issued pursuant to section 15(2) shall be valid and effective for the period specified in that certificate, and registration of the international trust the subject of that certificate shall be valid and effective until that international trust is deregistered pursuant to subsection(6)."

(2) Application for renewal of registration may be made upon -

- (a) filing with the Registrar an application for renewal of registration in the prescribed form; and
- (b) payment of the prescribed fee.

(3) Application for renewal of registration may be made within the period of 90 days of the date of expiry of the last certificate of registration and, subject to section 26, no application for renewal of registration pursuant to subsection (2) shall be granted where application is not made or the prescribed fee paid within that period.

(4) Every renewal of registration granted shall take effect from the date of expiry of the last certificate of registration.

(5) Every renewal of registration shall be for a period not exceeding five years as may be specified in the renewed certificate of registration."

(6) The Registrar may, on giving 7 days notice to the trustees at the registered office of the trust, deregister an international trust if -

- (a) a completed application for the renewal of its registration is not filed within the period specified in subsection (3), or
- (b) if he reasonably believes that trust no longer qualifies as an international trust in terms of the definition of "international trust" in section 2,

and on and from the date of de-registration the provisions of this Act shall cease to apply to that trust or, in respect of sections 13A and 13B, to any dispositions made to that trust prior to the date of deregistration, and if that trust is governed by the laws of the Cook Islands and, but for the provisions of this Act, would be held void by reason of breach of the rule against perpetuities or remoteness of vesting or the rule against perpetual trusts or against inalienability, such trust shall, unless otherwise provided in the trust instrument, be deemed varied immediately prior to de-registration such that the maximum duration of the trust shall be the period which ends on that day which is the 21st anniversary of the death or winding up of the settlor.

(7) A trust shall not be re-registered under this Act if it has been de-registered pursuant to this section.

(8) Except for the provisions of subsection (6), nothing in this section shall affect the application of section 13K(5) to an international trust."

21. Registered office - Section 18 of the principal Act is amended by repealing subsection (3), and substituting the following -

"(3) Every trustee company shall keep and maintain at its principal place of business in the Cook Islands a register of the name of every international trust of which it is a trustee, which register shall be made available at all reasonable times for inspection by the Registrar."

22. New Part IIIA - Trustees - The principal Act is hereby further amended by inserting after Part III, the following new Part -

"PART IIIA
TRUSTEES

19A. Trustees duties to beneficiaries - (1) Subject to subsections (2) and (3), a trustee in the performance of that trustee's duties to beneficiaries and in the exercise of any power, function or discretion shall exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others.

(2) Subject to subsection (3), where a trustee's profession employment or business is or includes acting as a trustee on behalf of others, the trustee, in exercising any power, function or discretion shall exercise the care, diligence and skill that a prudent person engaged in that profession, employment or business would exercise in managing the affairs of others.

(3) All duties and obligations of a trustee shall apply to that trustee only to the extent that a contrary intention is not expressed in the trust instrument and shall have effect subject to the terms of the trust instrument.

19B. Delegation - (1) Where a trust instrument authorises a trustee to delegate any or all of that trustee's powers, duties, functions or discretions then that trustee may delegate any or all of such powers, duties, functions and discretions provided that a trustee may not delegate, other than to a co-trustee, any powers, duties, functions or discretions involving the distribution or non-distribution of property of the trust to a beneficiary including, without limitation, distributions by way of payment, use, advancement, transfer or assignment.

(2) Except where the terms of a trust specifically provide to the contrary, a trustee may -

- (a) delegate management of property of the trust (including the selection of investments) and employ professional or skilled persons as investment managers;
- (b) employ professional or skilled persons to act in relation to any of the affairs of the trust or to hold any or all of the property of the trust.

(3) A trustee, who in good faith makes or continues such delegation or appointment, shall not be liable for any loss to the trust arising from or as a consequence of a delegation or appointment under subsections (1) or (2).

(4) A trustee may authorise a person referred to in subsection (2) to retain any commission or other payment usually payable in relation to any transaction.

(5) Where a trustee enters into an agreement for the employment of an investment manager under paragraph (a) of subsection (2), the trustee may agree on the same terms as are customarily found in an agreement between an investment manager and beneficial (as opposed to fiduciary) owner of property, including terms excluding or limiting the liability of the investment manager for negligent performance of duties, and, unless the trust instrument otherwise provides, the trustee shall not be liable for breach of trust by virtue of agreeing to such terms.

19C. Investments - (1) A trustee may invest any trust funds in any manner of investment or in any kind of property authorised for the investment of trust funds by and under the trust instrument or otherwise permitted by law.

(2) Where a trust instrument authorises expressly, or by necessary implication, the investment of the property of the trust in any investments authorised by the law of the Cook Islands for the investment of trust funds, the instrument shall be deemed to authorise investment in such investments as may be expressed to be trustee investments by regulations made under this Act.

(3) Where a trust instrument expresses trustees' powers of investment in general terms including powers to undertake any manner of investment in any kind of property, or including powers equivalent to those of a natural person then, notwithstanding any rule of law or equity to the contrary, the trustee shall have such power and be authorised to invest trust funds and property accordingly, and every such authorisation shall be given such fair large and liberal interpretation as to give full effect to its tenor and, except where the trust instrument so provides, any other provision in the trust instrument authorising any specific manner of investment or investment in any specific property shall not derogate from or limit the generality of this section.

(4) Nothing in this section shall preclude a trust instrument from expressly excluding any manner of investment in any kind of property.

19D. Trustee's majority decisions - (1) Where a trust instrument provides for majority decisions of trustees such provision shall be valid and effective on the terms set out therein.

(2) Subject to any provisions contained in a trust instrument, every -

- (a) decision made, resolution passed or power or discretion exercised by the trustees shall be valid if made passed or exercised by a majority of the trustees if there are more than 2 of them; and
- (b) thing done and every deed or other instrument executed by the majority of trustees shall be valid and effective as if done or executed by all the trustees.

19E. Trustees limitation of liability - Where any provision of a trust instrument limits the liability of a trustee or provides relief or indemnity for a trustee, such provision shall be valid and effective according to its terms, and every such provision shall be given a fair, large and liberal interpretation so as to give full effect to its tenor, notwithstanding any rule of law or equity to the contrary.

19F. Custodian trustees - (1) Subject to the provisions of this section and to the trust instrument any person or group of persons may be appointed as custodian trustee under this section to be custodian trustee of any international trust in the same manner as a trustee may be appointed.

(2) Notwithstanding any other provision of this Act, but subject to the provisions of the trust instrument, where a custodian trustee is appointed of any international trust -

- (a) all of the trust property shall be held by transferred to or vested in the custodian trustee as if the custodian trustee were sole trustee, and for that purpose vesting orders may, where necessary, be made by the Court on application by the custodian trustee or the managing trustee, but without prejudice to the managing trustee's control of that property;

- (b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the managing trustee as fully as effectually as if there were no custodian trustee;
- (c) the sole function of the custodian trustee shall be to get in and hold the trust property, and invest its funds, and dispose of the assets, as the managing trustee in writing directs, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustee may in writing direct;
- (d) for the purposes of paragraph (c) a direction given by the majority of the managing trustees where there are more than one, shall be deemed to be given by all the managing trustees;
- (e) the custodian trustee shall not be liable to any interested party or third party for acting on any direction of the managing trustee, but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions, but without being under any obligation to do so;
- (f) the custodian trustee shall not be liable to any interested party or third party for any act or default on the part of the managing trustee or any of the managing trustees;
- (g) all actions and proceedings touching or concerning the property of the trust shall be brought or defended in the name of the custodian trustee and the custodian trustee shall not be liable for the costs thereof apart from the property of the trust;
- (h) no person dealing with the custodian trustee shall be concerned to enquire as to the existence of any direction, concurrence or otherwise of the managing trustee, or be affected by notice of the fact that the managing trustee has not issued any direction or concurred;
- (i) the power of appointing a new trustee or trustees when exercisable by trustees, shall be exercisable by the managing trustee alone, but the custodian trustee shall have the same power as any other trustee of applying to the court for the appointment of a new trustee.

(3) Subject to the provisions of the trust instrument and subsection (8), on the application of the custodian trustee, or a managing trustee, and on satisfactory proof that it is in the best interests of the beneficiaries, or that on other grounds, having regard to the trust instrument, it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose, and may also make such vesting orders and give such directions as in the circumstances, seem to the Court to be necessary or expedient.

(4) Subject to the provisions of the trust instrument, in any case where remuneration or commission is payable to the trustee of any trust property, remuneration or commission may be paid to both the custodian trustee and the managing trustee, and subject as aforesaid the amount thereof shall be determined by the managing trustee if the managing trustee is entitled to fix its own remuneration.

(5) Subject to the provisions of the trust instrument, the provisions of this Act relating to the delegation of trustees' powers shall apply to a custodian trustee.

(6) For the purposes of this section a reference to a managing trustee shall be a reference to a trustee other than the custodian trustee.

(7) Notwithstanding subsection (3) -

- (a) a custodian or managing trustee may resign, be appointed, be removed or be replaced in the same manner as a trustee or as prescribed by the trust instrument.
- (b) a trustee who accepts appointment as both managing and custodian trustee shall for all purposes be treated as, and be, an ordinary trustee, in which case the respective rights and obligations imposed on custodian and managing trustees under this section or the trust instrument shall have no further application to that trustee, and that trustee shall not be entitled to rely on the limited liability of a custodian trustee, nor charge remuneration as both a managing trustee and a custodian trustee.

(8) Subject to the trust instrument, upon termination of the appointment of the custodian trustee and unless there is a simultaneous appointment of a new custodian trustee, the following provisions shall apply -

- (a) any restrictions upon the powers of the managing trustees by virtue of the appointment of the custodian trustee shall lapse, and the managing trustees shall thereafter be the only trustees; and
- (b) the title to the property of the trust shall vest in the trustees.

(9) The powers, duties, functions, discretions and office of the managing trustee, if vacant and not filled or replaced pursuant to subsections (2)(i) or (7)(a), may be assumed by or appointed to, a person or persons as prescribed in the trust instrument.

19G. Advisor to Trustees. - (1) Subject to the provisions of this section, a trust instrument may provide for any person or group of persons (in this section referred to as an "advisor") to be appointed as advisor under this section to advise the trustee of a trust in respect of all or some of the matters relating to the property of the trust.

(2) Where an advisor is appointed to an international trust the property and management of the trust and the exercise of all powers and discretions exercisable by the trustee under the trust shall remain vested in the trustee as fully as effectually as if no advisor was appointed except that;

- (a) the trustee may consult the advisor, and the advisor may advise the trustee, on any matter relating to the property of the trust for which the advisor was appointed;
- (b) the advisor shall not be liable as or considered a trustee of the trust in acting as an advisor;
- (c) where any advice or direction is tendered or given by the advisor, or the majority of advisors if there are more than one, the trustee may follow the same and act accordingly, without being under any obligation to do so, and the trustee shall not be liable for anything done or omitted by them by reason of the trustee following that advice or direction;
- (d) subject to the trust instrument, in any case where remuneration or commission is payable to the trustee of a trust, remuneration or commission may be paid to the advisor, at such rate as determined by the trust instrument, or by the trustee in the absence of any specific direction in the trust instrument.

(3) No person dealing with the trustee shall be concerned to enquire as to the concurrence or otherwise of the advisor, or be affected by notice of the fact that the advisor may not have concurred.

19H. Holding of title to property - (1) Notwithstanding any rule of law or equity to the contrary a trust instrument may provide for the trustees of an international trust to delegate among themselves the function of holding title to trust property.

(2) Notwithstanding any rule of law or equity to the contrary a trust instrument may further provide that where property of an international trust is situated in a jurisdiction in which a trustee or trustees reside, any one or more of those trustees may hold title to that property in one or all of their names, and not in the name of all trustees of the international trust

(3) Where, whether before or after the coming into force of this Act, title to property is transferred to a trustee or trustees, other than to all of the trustees of an international trust, with the intention that it be held by that trustee or those trustees as trust property, then such transfer shall have the same effect as if the property had been transferred to all of the trustees to be held on the trusts set out in the trust instrument.

19I. Protection of trust property Without prejudice to any rights or remedies available to the creditors of a trustee qua trustee, that trustee's personal creditors shall have no right or claim against any property of any trust held by that trustee qua trustee.

19J. Protection of third parties - (1) Where any property of a trust is disposed of by a trustee, including by way of sale, mortgage, charge, lien, or lease, to a third party for value, the title of the third party to the property, and the enforceability of any contract related to that disposition -

- (a) shall not be impeachable except on the ground of actual fraud by or with the knowledge of that third party, and
- (b) shall not otherwise be affected on the ground that the transaction was unauthorised or not within the power of the trustee, or that the relevant power (if any) was otherwise improperly or irregularly exercised,

and that third party shall not be concerned to see to the application of the money or consideration paid by him, or be responsible for the misapplication thereof.

(2) Where any interested party has with the principal intent of defrauding a particular third party acted, or procured or permitted others to act, to dispose of or reduce the value of the property of the trust or the validity or enforceability of a trustee's indemnity, such action shall be voidable at the instance of the third party, provided that any disposition of property of the trust ~~may not be avoided where that property has been~~ disposed of to a bona fide recipient for value who at the time of the disposition did not have notice of the intention to defraud the third party.

(3) For the purposes of this section -

- (a) "third party" means a person other than a person in a capacity as -
 - (i) a settlor, trustee, protector or beneficiary of the trust; or
 - (ii) any creditor of, or other person claiming through, a settlor, protector or beneficiary of the trust.
- (b) the term "trustee's indemnity" shall mean that trustee's right of indemnity against the property of the relevant trust.

(4) Nothing in this section shall affect or limit the liability of a trustee to a beneficiary for a breach of trust."

23. New Part IV - Protector - The principal Act is amended by repealing Part IV and substituting the following -

"PART IV PROTECTOR

20. Protector of a Trust - (1) The terms of a trust instrument may provide for the office of protector of that trust.

(2) A protector shall have the following powers and functions -

- (a) unless the trust instrument shall otherwise provide, the power from time to time to remove any trustee and to appoint a new or additional trustee;

(b) such further powers, delegations or functions as are conferred on the protector by the trust instrument or by this Act, or as may be prescribed.

(3) A protector of a trust may also be a settlor, a trustee or a beneficiary of that trust.

(4) In the exercise of his office, the protector shall not be accountable or regarded as a trustee.

(5) Subject to the trust instrument, a protector of a trust shall not be held liable as a fiduciary in relation to any act or omission by the protector in performing his obligations under the trust instrument.

(6) Where there is more than one protector of a trust then, subject to the trust instrument, any power or function conferred on the protectors may be exercised if the majority of the protectors for the time being agree upon its exercise.

(7) A protector who dissents from a decision of the majority of protectors may require his dissent to be recorded in writing and filed at the registered office of the trust, and subject to the trust instrument, shall not be liable for the acts of the majority of protectors pursuant to such decision.

(8) While no protector is appointed to a trust, any statutory powers or functions conferred upon a protector under this Act shall be deemed to be conferred upon the Court until such time as a protector is appointed.

(9) Any powers or functions conferred by this Act on a protector, or on the Court pursuant to subsection (8), shall have effect subject to the terms of the trust instrument.

21. Consent of beneficiaries - (1) A trust instrument may provide for the protector or any other person or persons (in this section referred to as a "nominated person") to represent all or any beneficiaries who are minors, or beneficiaries yet to be ascertained, or beneficiaries not having legal capacity, or beneficiaries who, after the best reasonable endeavours of the trustees, are unable to be contacted (which beneficiaries are in this section referred to as a "represented beneficiary").

(2) A nominated person may, on behalf of a represented beneficiary, consent to or ratify any act or omission on the part of a trustee. Every consent or ratification provided shall be deemed to be the consent or ratification of the represented beneficiary and shall be construed by every Court as the consent or ratification of the represented beneficiary to that act or omission."

24. Secrecy - Section 23 of the principal Act is amended by -

- (a) omitting from subsection (1), the words "subsection (2)" and substituting the words "subsections (2) and (3)";
- (b) omitting from subsection (2), the words "without leave of the Court or the person presiding.", and substituting the words "except in accordance with subsection (3).".

- (c) adding after subsection (2), the following subsection -
 "(3) Every decision of the Court in respect of any proceedings concerning the application or interpretation of this Act shall be published or reported for the purposes of affording a record of those proceedings, provided that in every case -
- (a) the written decision of the Court shall be edited to such extent as shall be necessary to preserve secrecy in respect of the identity of the trust, of every interested party and of the subject matter of the proceedings, and
 - (b) no such report shall be reported or published unless or until a judge of the Court shall have ascertained the views of the parties to the proceedings as to the adequacy of any editing undertaken, and certified in writing to the Registrar of the Court that the decision as edited may be released for publication or reporting."

25. Application of other enactments - The principal Act is amended by adding after section 27A, a new section 27B as follows -

"27B. Application of other enactments - (1) Subject to section 3 no enactment other than this Act and the enactments set out in the Schedule to this Act shall -

- (a) impose -
 - (i) any liability, duty, responsibility, obligation or restriction; or
 - (ii) any fee, impost, tax, levy, due, duty, or excise; or
 - (iii) any fine or penalty, on an international trust; or
- (b) require -
 - (i) the deposit of any moneys in any public account; or
 - (ii) the filing of any accounts, returns, reports or records; or
 - (iii) the licensing or registration of any document act, matter or thing pertaining to an international trust,
 by an international trust.

(2) Notwithstanding subsection (1), an international trust shall not be required to register as a foreign enterprise pursuant to the provisions of the Development Investment Act 1977 and shall not be subject to that Act by reason only that it -

- (a) carries on business with another international trust;
- (b) carries on business with an international company registered under the provisions of the International Companies Act 1981-82;
- (c) carries on business with a foreign company registered under the provisions of the International Companies Act 1981-82;
- (d) carries on business with an international partnership registered under the International Partnership Act 1984;
- (e) obtains legal advice or legal representation;
- (f) obtains accounting advice or has its accounts prepared or audited;
- (g) operates a bank account for the purpose of either depositing, receiving or transmitting money due or owing by such trust or undertakes a transaction with a bank for purposes principally associated with the objects of the trust;
- (h) utilises the services of a trustee company or any subsidiary of such company;
- (i) undertakes any act matter or thing as may be prescribed by regulation.

(3) The Queen's Representative may by Order in Executive Council amend the Schedule to this Act by omitting therefrom or adding thereto any enactment (including any regulation) and may in like manner determine whether an enactment or regulation shall be omitted or added either in whole or in part."

26. Transitional - (1) Subject to the prior written consent of the interested parties being obtained, or if permitted by the trust instrument, a trustee of an international trust may within 2 years of the date of the coming into force of this Act or in the case of an international trust registered after the date of the coming into force of this Act within 2 years of the date of first registration and unless the trust instrument shall expressly exclude the application of this section or any other provision of this Act, vary the provisions of the trust instrument so as to facilitate the application of this Act to an international trust and include therein provisions consistent with the provisions of this Act and may make all such consequential alterations, amendments, or additions to the trust instrument as the trustees shall consider necessary or desirable to ensure the trust powers and provisions of the settlement shall be as valid and effective notwithstanding the variation and nothing in this subsection shall limit the liability of a trustee arising from the exercise of the power to vary a trust instrument.

(2) Every variation pursuant to subsection (1) shall take effect from the date of the variation.

(3) No variation made pursuant to this Act shall affect the liability of a trustee for any act or omission prior to the date of the variation taking effect.

27. Application - (1) Except where expressly provided to the contrary in this Act the provisions of this Act shall apply to every international trust, whether registered before or after the commencement of this Act, and to all matters relating to or concerning every such international trust, or the interested parties to every such international trust.

(2) The provisions of sections 10 to 17 (both inclusive) of this Act shall apply to every international trust settled or established on or after the 8th day of September 1989 and to every disposition of property to such trust made on or after that date, whether such property is situated in the Cook Islands or elsewhere, except that subsection 11(1)(d) of this Act shall not apply to any trust registered as an international trust on or before the coming into force of this Act.

(3) The provisions of the principal Act as amended by sections 2 to 9 (inclusive) and sections 18 to 24 (inclusive) of this Act shall be deemed to have come into force on the same date as the principal Act provided always that -

- (a) the provisions of this subsection shall not apply to or in respect of matter act omission or thing inconsistent with any of those provisions if validly done or omitted prior to the coming into force of this Act;
- (b) nothing in this subsection shall operate or be interpreted or construed to relieve any trustee from any liability arising prior to the passing of this Act or arising in respect of any matter act omission or thing occurring prior to the passing of this Act.

(4) The provisions of sections 49 and 50 of the Trustee Act 1956 shall have no further application to an international trust provided however that every matter, act, omission, or thing done or omitted, pursuant to those provisions before the coming into force of this Act shall remain as valid after the coming into force of this Act as prior to its coming into force.

(5) Nothing in this Act shall apply to or affect any proceedings commenced in the Court before the coming into force of this Act.

(6) Where a trust instrument contains provisions consistent with the provisions of the principal Act as amended by this Act then those provisions of the trust instrument shall be as valid and effective as if the provision of the principal Act (as amended) with which it is consistent was in force as at the date that the provision of the trust instrument was incorporated therein.

28. Savings - (1) Without limiting the provisions of the Acts Interpretation Act 1924 or any other provision of this Act, but subject to this Act, it is declared that no provision of this Act shall operate or be interpreted or construed to invalidate any matter, act, omission, or thing validly done or omitted, prior to the coming into force of this Act.

(2) Without limiting the generality of section 3 of the principal Act, as amended, it is declared that the provisions of the Trustee Act 1956 (NZ) shall continue to apply to international trusts and in the event of any conflict or inconsistency between those provisions and those of the principal Act (as amended) the latter shall prevail over the former.

This Act is administered by the Cook Islands Monetary Board.

