



FIREWALL FESTIVAL

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After three years in which significant amendments to various regimes have been made, we take a look back at the basics of firewalls, the main trends that have emerged in practice, as well as the latest legislative developments. These have all had a measurable impact on both divorce and trust practitioners in the UK.

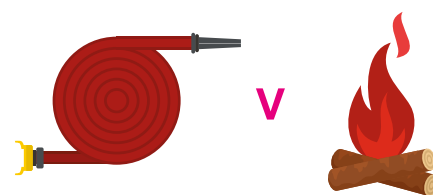
Firewalls: a brief recap

Firewall legislation stemmed from the wish of settlors to be able to choose the law governing their trusts. The Hague Convention provided a basic level of protection in this regard by granting settlors of express trusts the power to choose the law applicable to certain trust matters. However, the Convention provided that certain other issues, such as marital rights, should be dealt with under usual conflict of law rules, re-introducing foreign law into the equation. It was from these gaps that firewall regimes grew; augmenting the Convention by fortifying choice of law rules for settlors.

The Cayman Islands introduced the first firewall legislation in the Trusts (Foreign Elements) Law 1987 to defeat forced heirship claims. Other offshore jurisdictions soon followed suit, including Bermuda, the British Virgin Islands, Guernsey and Jersey.

Generally, the legislation confirms (i) the application of local law to certain trust-related issues (typically including the settlor's capacity and the trust's validity and administration) and (ii) the disregard of foreign law in relation to certain other issues, including rights conferred by reason of 'personal relationships'.

While the precise definition of 'personal relationship' is a living and evolving animal, broadly speaking, firewall regimes define 'personal relationship' as any relationship between a person and the settlor by blood or marriage. The effect of this is that property rights provided for under foreign law, such as pursuant to forced heirship rules or a foreign divorce order, may not be considered by a court in the firewall jurisdiction when determining challenges to, say, the settlement of a trust.



Notes on the implementation of the firewalls in divorce cases: watering down v or stoking the fire?

In practice, certain trends have emerged in the divorce context since the inception of firewall regimes.

Some courts have demonstrated a willingness to circumvent the firewall and allow the enforcement of English High Court divorce orders against local

trusts. In each of the cases of *Compass Trustees Ltd v McBarnett* [2002] and *In Re IMK Family Trust* [2008], the Jersey Royal Court granted an order to vary a Jersey trust pursuant to the terms of the English Matrimonial Causes Act 1973, in spite of the firewall, on grounds of comity (among others). These decisions caused some concern that the firewall was not operating as envisaged by the legislature, and demonstrated to divorcing couples that the door was open to pursue foreign assets held in trust notwithstanding the existence of firewalls. The two cases also provided a reminder that the strength of a firewall will in large part be determined by the approach of the judiciary.

However, since the IMK and Compass cases, Jersey amended its firewall regime in 2019 to prevent local courts from enforcing judgments of foreign courts against a local trust where that judgment is inconsistent with local law. Consequently, an application by a former spouse to enforce an order for financial maintenance by varying a local trust – which would likely be inconsistent with the rule against applying foreign law – would be prohibited under the terms of the firewall. This change brought Jersey in line with other jurisdictions, making it more difficult for parties divorcing in England to access offshore assets.

Guernsey has gone one step further and is therefore emerging as one of the more robust regimes, with provisions capable of withstanding pressure from foreign divorce orders.

Guernsey's legislation provides local courts with the power to refuse to recognise or enforce foreign judgments that do not protect beneficiaries' interests, even if the judgment is consistent with Guernsey's legislation. In contrast, as is the case in Jersey, most other firewall regimes prevent enforcement only where the foreign order is inconsistent with local law.



Blazing ahead with developments in the modern era

Since Jersey's 2019 update, three other firewall jurisdictions have passed statutory amendments. These all have a common theme of modernising the scope and meaning of 'personal relationships', with the intention of broadening the protection from rights arising from relationship breakdown.

1. In 2019, the Cayman Islands extended the scope of 'personal relationship' to include a relationship to any beneficiary, rather than just with the settlor. This amendment also introduced a prohibition on enforcement of foreign judgments (akin to the Jersey amendment of the same year).
2. In the following year, Bermuda passed an amendment to provide protection to settlors and beneficiaries from foreign-law rights arising from personal relationships, which is now defined to include domestic and analogous partnerships, as well as other familial relationships.
3. Similarly, in 2021 the BVI's Trustee Act 1961 was updated to extend the definition of personal relationships to capture "every form of relationship by blood, adoption, marriage or cohabitation, whether or not the relationship is recognised by the law", which relationship can also now be with a beneficiary. It is thought that this would also capture same-sex marriages, even though they do not enjoy general recognition under BVI law.

With beneficiaries given further protection, and with more modern forms of marriage and partnership included, these firewalls will assist in preventing the enforcement of foreign orders against local trusts.

Implications of the changes

The recent amendments to firewall legislation indicate a clear intention of firewall jurisdictions to reinforce the protections for trusts and to strengthen the primacy of local laws.

All offshore jurisdictions are demonstrating a willingness and ability to evolve and adapt their regimes in response to, or in anticipation of, legislative, political and societal change.

However, the developments, particularly with regard to the evolution of the definition of personal relationships, are interesting, as it is clear that jurisdictions are adapting at different rates and in different ways to incorporate modern personal relationships.

Given this, settlors and beneficiaries should be encouraged to engage with their trust practitioners in a thorough and regular analysis when determining which jurisdiction caters most comprehensively to their particular needs. It is also worth remembering that, regardless of how strong a firewall may be, it will have limited effect if there are no assets within its jurisdiction to protect. Location of assets (and their use and enjoyment) will therefore always be a central question in any structuring exercise.

