

KEY FACTS TRUSTS

THE TRUST IS A WELL-ESTABLISHED CONCEPT IN COMMON LAW ORIGINATING IN ENGLAND DURING THE MIDDLE-AGES. UNDERLYING THE TRUST IS THE CONCEPT OF “DUAL OWNERSHIP” – NAMELY, THAT THE LEGAL TITLE TO PROPERTY IS VESTED IN ONE PERSON (THE TRUSTEE) WITH BENEFICIAL OWNERSHIP OF THE SAME PROPERTY BEING VESTED IN ANOTHER.

In many cases, settling assets on a trust better serves a person’s purpose than placing them in a company.

When a person transfers assets to a company in return for shares, he retains an indirect proprietary interest in those assets through the shares in the company. When he transfers the same assets to a trustee, he can effectively divest himself of direct or indirect ownership of those assets yet retain control through the terms of the trust deed. Because of this basic difference in ownership, the trust is a useful financial and tax planning instrument.

BVI TRUSTS

As a common law jurisdiction, the British Virgin Islands is frequently selected as the proper law and administrative situs of trusts used for financial and estate planning purposes. Instruments of settlement and declarations of trust frequently specify that the trust shall be governed by BVI law.

The principal statute in the BVI governing the establishment and operation of trusts is the Trustee Ordinance, 1961. The ordinance has been subject to two substantive changes since its enactment, described below.

Trustee Ordinance Changes

In 1993 the Ordinance was amended to incorporate a number of important developments in international trust practice. The 1993 amendments include:

- > A 100-year perpetuity period may be stipulated in trust instruments.
- > “Wait and See” rules to avoid a trust being found to be in violation of the rule against perpetuities.
- > Rules relating to determining and changing the proper law of a trust.
- > A prohibition on the enforceability of civil law forced heirship rules to transfers to BVI trusts.
- > Rules governing the establishment of purpose trusts.
- > Statutory recognition of the office of protector.
- > Standard trustee powers which may be included by reference in a trust instrument.

In 2004 the Virgin Islands Special Trusts Act (VISTA), 2003 came into force. VISTA introduced the following innovative changes to the local trust law:

- > Trustees are permitted to hold shares in a company without fiduciary responsibility for the management or success of the company.
- > Third parties (e.g., lenders) dealing with trusts are able to enforce claims directly against the assets of a trust.
- > Existing protections for trusts against forced heirship claims are strengthened.
- > Settlers can prevent beneficiaries from unanimously agreeing to terminate a trust for a period of up to 20 years.
- > A settlor can confer on a trustee a duty to intervene to resolve specific problems (for example, a deadlocked board).
- > Trust instruments can lay down rules for the appointment and removal of directors (thereby reducing the trustee’s ability to intervene in management by appointing directors of their own choice).

- > Both beneficiaries and directors have the right to apply to court if trustees fail to comply with the requirements for non-intervention or the requirements for director appointments and removal.
- > The sale of shares can be made subject to directors' approval.
- > A trustee, except in certain specified circumstances, can be prevented from exercising its voting or other powers so as to interfere in the management or conduct of any business of the company.
- > The trustee can only dispose of the shares in a company with the consent of the directors of the company (or such other persons as are specified in the trust deed).

Additional changes made in 2004 to the BVI Trust Laws include:

- > A trustee of a trust which by its terms adopts the relevant provisions of the statute, will not be personally liable under any contract which the trustee has entered into with another if the trustee has disclosed (or the other party was aware) that it was contracting as trustee (unless the contract provides otherwise). A claim based on such a contract may be satisfied out of the trust fund.
- > If the trust deed does not elect to be governed by the relevant provisions of the statute (and if the trust instrument does not provide otherwise), where a trustee has entered into a contract having disclosed its fiduciary capacity, it will be liable under the contract to the third party only to the extent of the value of the trust fund when the payment falls due (including the amount of any distributions made after the contract was entered into).
- > A trustee will only be liable for a tort committed in the course of administering the trust if the trustee is personally at fault.
- > Where requested by a lender a trustee may restrict its future powers of investment and distribution (and the powers of appointment and removal of trustees) in order to protect the lender – the purpose of this provision is to address the legitimate concerns of those dealing with trustees who might be concerned that their rights will be diluted as a result of the manner in which the trust is administered after a liability has been incurred by the trustees.

Further enhancements to the Trustee Act and VISTA legislation in May 2013 included the following:

- > A 360-year perpetuity period may be stipulated in trust instruments.
- > Trust duty was increased to \$200.
- > The rules governing the relationship between trustees and creditors was expanded to cover types of assets, not just money.
- > A BVI private trust company can be the trustee of a VISTA trust.
- > Property can be appointed or settled onto a VISTA trust from an existing BVI trust.

Please see our separate factsheet for more details on these changes.

LOCAL REQUIREMENTS

BVI trusts are subject to a US\$200 trust duty payable on the execution of the trust deed. BVI trusts are exempt from all local registration requirements and all BVI taxes if the trust beneficiaries are not residents of the BVI.

Trident BVI does not provide legal or tax advice.

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