

www.onealwebster.com



We know our Territory

**New British Virgin Islands Trust and Estate
Legislation: Part 2:**

NEW BRITISH VIRGIN ISLANDS TRUST AND ESTATE LEGISLATION: PART 2

1. Introduction

1.1 On 15 May 2013 the following British Virgin Islands (BVI) statutes and statutory instruments came into force:

- The Virgin Islands Special Trusts (Amendment) Act, 2013;
- The Trustee (Amendment) Act, 2013;
- The Banks and Trust Companies (Amendment) Act, 2013;
- The Trust Corporation (Probate and Administration) (Amendment) Act, 2013;
- The Financial Services (Exemptions) (Amendment) Regulations, 2013; and
- The BVI Business Companies (Amendment of Schedule 1) Order, 2013.

1.2 Each of these statutes was based on recommendations to the BVI Government by the Trust and Succession Law Review Committee of the BVI branch of the Society of Trust and Estate Practitioners (STEP) which was then chaired by O'Neal Webster partner Christopher McKenzie and which is now chaired by O'Neal Webster partner Vanessa King.

1.3 The provisions of the Virgin Islands Special Trusts (Amendment) Act, 2003 which made some significant amendments to the BVI's VISTA trust legislation are considered in the paper entitled 'A new and improved VISTA: May 2013 Amendments to the Virgin Islands Special Trusts Act'. The purpose of this paper is to consider the provisions of the other five statutes and statutory instruments.

2. Amendments to the Trustee Act

The Trustee (Amendment) Act, 2013 has made a number of amendments to the Trustee Act (which was previously amended by the Trustee (Amendment) Acts, 1993 and 2003). The relevant amendments to this statute (which applies both to non-VISTA trusts and, where relevant, VISTA trusts) are as follows:

2.1 The new perpetuity period

2.1.1 The rule against perpetuities, in so far as it applies to trusts, is a rule invalidating interests which vest at too remote a time in the future and indeed the rule is often referred to as the rule against the remoteness of vesting. The rule requires any future interest in property to vest 'in interest' (as opposed to 'in possession') within the perpetuity period.

- 2.1.2 At common law the perpetuity period consists of any lives in being plus an additional period of 21 years.¹ The lives in being must be human lives and must be mentioned expressly in the disposition or be identifiable by implication. As a consequence the practice of using 'royal lives clauses' was commonly adopted: trust instruments would specify perpetuity periods which terminated 21 years after the death of the last survivor of a specified English sovereign alive when the trust was established.
- 2.1.3 In 1964 English law was reformed by the Perpetuities and Accumulations Act 1964. This statute (*inter alia*) permitted a statutory period of up to 80 years to be specified as an alternative to the common law period of lives in being plus 21 years.
- 2.1.4 Subject to one important exception most of the provisions of the English Perpetuities and Accumulations Act 1964 were adopted by the BVI's Trustee (Amendment) Act, 1993 which introduced a new Part VII to the Trustee Act. The main exception to this was that a statutory perpetuity period of up to 100 years (rather than 80 years) was permitted as an alternative to the common law period of lives in being plus 21 years.
- 2.1.5 English law was recently reformed again by the Perpetuities and Accumulations Act 2009 (which came into effect on 6 April 2010): this extended the statutory perpetuity period to a fixed period of 125 years and most of the jurisdictions with which the BVI competes for the provision of financial services have also either extended or indeed abolished their perpetuity periods. Thus in the Cayman Islands the maximum perpetuity period is 150 years and there is no maximum period for STAR trusts;² nor is there any longer a maximum period for Bermuda, Jersey and Guernsey trusts created after recent statutory provisions came into effect in those jurisdictions. Nor is it understood that there is any maximum period for trusts governed by the laws of a number of states in the United States of America.
- 2.1.6 The view was taken that there were sound reasons of policy for providing for a maximum perpetuity period (i.e. since the purpose of the rule was effectively to prevent property from being tied up indefinitely). Accordingly the BVI has deliberately refrained from abolishing its maximum statutory perpetuity period. However, particularly since the perpetuity period provided for by BVI law is not only shorter than that provided for by the laws of its major competitors but also shorter than that provided for by English law, the period has been extended fairly substantially so that there should no longer be any disincentive for settlors who wish to set up 'dynastic' trusts which last quite a number of generations to use BVI law as the proper law of trusts. The period of 360 years has accordingly replaced the period of 100 years which is specified in section 68 (1) of the Trustee Act.

2.2 Trusteeship of purpose trusts

- 2.2.1 Historically, with limited exceptions, trusts for purposes rather than beneficiaries were refused recognition by the courts. The principal obstacle to recognition was the trustees'

¹ Plus any gestation period.

² I.e. those to which Part VIII of the Trusts Law (2009 Revision) applies.

duty to account and the fact that this requires beneficiaries to enforce the duty. Charitable trusts were treated as an exception because they could be enforced on behalf of the general public by the Attorney General. There were one or two other limited exceptions (e.g. trusts for the maintenance of tombs) but these were generally regarded as anomalous.

- 2.2.2 Most leading international financial centres have introduced legislation enabling the creation of non-charitable purpose trusts ('purpose trusts') and a great deal of use is made of this legislation, particularly in the commercial context (in order to take advantage of one of the features of such a trust which is that there is no beneficial owner of the trust's assets). Examples of the commercial use of purpose trusts include isolating assets in financial deals and separating voting from economic control. They are also used a great deal for providing ownership structures for private trust companies.
- 2.2.3 The BVI's purpose trusts legislation (in so far as it relates to purpose trusts set up on or after 1 March 2004) is now to be found in section 84A of the Trustee Act. Section 84A permits purpose trusts to be created if the following conditions are satisfied:
- (i) the trust's purposes must be specific, reasonable and possible;
 - (ii) the purposes must not be immoral, contrary to public policy or unlawful;
 - (ii) at least one trustee of the trust must fall within the statutory definition of a 'designated person';
 - (iii) the trust instrument must appoint a person as enforcer of the trust and must provide for the appointment of another enforcer on any occasion on which there is no enforcer (or no enforcer able and willing to act); and
 - (iv) the enforcer appointed by the trust instrument must either be a party to the trust instrument or give his or her consent in writing (addressed to the trustee who is a designated person) to act as enforcer of the trust.
- 2.2.4 Prior to 15 May 2013 a 'designated person' was defined by subsection (1) to mean:
- (i) a barrister or solicitor practising in the Territory;
 - (ii) an accountant practising in the Territory who qualifies as an 'auditor' for the purposes of the Banks and Trust Companies Act, 1990 ('BTCA');
 - (iii) a licensee under the BTCA; or
 - (iv) such other person as the Minister of Finance may, by Order, designate.
- 2.2.5 In practice, before the May 2013 reforms took effect, the designated person would invariably be a licensee under the BTCA.

- 2.2.6 The definition of a 'designated person' in section 84A³ has now been extended to include BVI private trust companies (i.e. companies which are exempt from the licensing requirements of the BTCA as a result of the Financial Services (Exemptions) Regulations, 2007).⁴ This adds considerable flexibility, by e.g. allowing family controlled purpose trusts to be established, and will thereby make BVI purpose trusts more popular.
- 2.2.7 The amendment referred to in paragraph 2.2.6 above only applies to trusts created on or after 1 March 2004.⁵

2.3 Increase in trust duty

- 2.3.1 Prior to 15 May 2013, section 92 of the Trustee Act provided that, in the case of trust instruments falling within the definition of a 'chargeable instrument' executed on or after 1 March 2004, BVI trust duty of US\$100 was payable, within three months' of the execution of the document, in accordance with the provisions of that section. This duty was (and still is) payable by affixing a revenue stamp (or revenue stamps) for this sum to the original document which must be cancelled by an 'authorised person'. The statutory provision provides that the stamp or stamps will only be regarded as being validly cancelled when the authorised person signs and dates the stamps(s). An authorised person is defined to include the settlor, the trustee, any person who has executed the document on behalf of a corporate trustee, any person who is duly authorised to execute documents on behalf of a corporate trustee, any beneficiary or person capable of benefiting from the trust, anyone authorised or appointed by any of the foregoing persons to cancel the relevant stamp(s), a foreign lawyer acting for any of the foregoing persons and any BVI lawyer. Confidentiality is maintained since the statute specifies that the chargeable instrument cannot be submitted to the authorities for the purposes of enabling the duty to be paid.
- 2.3.2 The sanction for the non-payment of the duty within the three month time limit was (and still is) that the chargeable instrument was (and is) inadmissible in BVI civil proceedings unless both (a) the late duty of \$100 and penalty (amounting to \$200 for any year, or part of a year, which has elapsed since the trust instrument was executed) are paid *and* (b) the judge exercised his or her discretion to admit it in evidence.
- 2.3.3 The level of the trust duty has seldom (if ever) been a disincentive for settlors in choosing whether or not to set up BVI trusts, rather than foreign trusts. Accordingly trust duty has been increased modestly from \$100 to \$200 and that the penalty has similarly been increased from \$200 to \$400 but the increase only applies to 'chargeable instruments' executed on or after 15 May 2013.

³ But not that in section 84 which applies to purpose trusts established prior to 1 March 2004 when the Trustee (Amendment) Act, 2003 came into force.

⁴ As amended by the Financial Services (Exemptions) (Amendment) Regulations, 2013 which are considered below.

⁵ It will not however have had the effect of retroactively authorising the appointment, prior to 15 May 2013, of a private trust company as the trustee which qualifies as the designated person.

2.4 Amendments to section 101 (3) (optional power to vary trusts for protection of creditors)

- 2.4.1 Prior to 15 May 2013 section 101 of the Trustee Act (which only applies to a trust if the terms of the trust expressly so provide) enabled a trustee, for the protection of a third party who has loaned money to it, to restrict (a) powers of investment and other management powers, (b) the rights of beneficiaries to receive trust property, and (c) powers of appointment, retirement and removal of trustees. The restriction applied only where there was money outstanding. The trustee must have been satisfied that the restriction was compatible with its duties in relation to the beneficiaries (or, in the case of a purpose trust, in relation to the purposes of the trust).
- 2.4.2 With the objective of adding flexibility and thereby increasing the attractiveness of the statutory provision, two minor amendments have been made to section 101. First, consistently with section 102 and in order to reflect the sophisticated nature of the modern world of commerce, its provisions have been extended to trust assets other than money. Secondly, since the relevant loan documentation will usually be entered into contemporaneously with the exercise by the trustee of the power pursuant to the section, the section has been further amended by a provision which makes it clear that the loan may be entered into prior to, contemporaneously or after the exercise of the power.

3. Amendments to the Financial Services (Exemptions) Regulations, 2007

- 3.1 The Financial Services (Exemptions) Regulations, 2007 (the 'Regulations') came into effect in August 2007. They enable unlicensed private trust companies ('PTCs') to be established in the BVI if specified conditions are satisfied. These conditions are summarised in paragraph 3.5 below.
- 3.2 a company which is incorporated with its main function being to act as the trustee of a specific trust or a number of related trusts. It should be contrasted with a professional corporate trustee, bank or financial institution which offers its services to the general public for a fee.
- 3.3 PTCs operate within the framework of general company law and trust law, but they will also generally be subject to at least some regulatory requirements.
- 3.4 PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:
- (a) The principal advantage of a PTC is that, like the BVI's VISTA legislation, the establishment of a PTC generally enables settlors or settlors' family members or their appointees to exercise a significant degree of control over trustees' decisions by being directors of PTCs; this enables them to respond quickly to issues which arise and to make decisions on the basis of their own personal knowledge and changing circumstances.

- (b) The corporate structure will be readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure.
- (c) Confidentiality can be preserved - and this is an issue which is of increasing importance to those from jurisdictions where concerns over financial privacy are driven by issues of personal safety.
- (d) A PTC enables the trustee's charges to be kept in check.
- (e) PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee.

3.5 In order to qualify as an exempt PTC under the Regulations the following conditions must be satisfied:

- (a) Before 15 May 2013 it was a requirement that the company must have been BVI company which was first incorporated under the BVI Business Companies Act ('BCA'), although companies which were originally incorporated under the (earlier) International Business Companies Act ('IBC Act') and which have re-registered under the BCA would also have been eligible if certain elections had been made. This requirement has now been modified: see below.
- (b) The company's memorandum must state that it is a private trust company.
- (c) The company must be a limited company (whether limited by shares or by guarantee) and its name must include the designation '(PTC)'.
- (d) The company's registered agent must hold a class 1 trust licence under the BTCA.
- (e) The company must not solicit trust business from members of the public.
- (f) The company must carry on no business other than that of being the trustee, protector or administrator of trusts (or managing or administering trusts).
- (g) All the company's trust business must be 'unremunerated trust business' or 'related trust business' (see below).

3.6 Although the term is defined widely to prevent potential abuse, in most cases a company will be carrying on 'unremunerated trust business' where no remuneration is paid to the company or anyone associated with it in respect of the provision by the company of its trustee services. However it is permissible for professional directors who are not otherwise associated with the company to be remunerated and payments to the company to cover its legitimate expenses (such as the Government's incorporation and renewal fees, the fees of otherwise unconnected professional advisors, and the fees of the registered agent) will not in general be regarded as remuneration for these purposes.

- 3.7 Before the May 2013 amendments came into force, a company will have been regarded as carrying on 'related trust business' where all the beneficiaries of the trust (or trusts) of which it is trustee were related (in the manner specified in paragraph 3 of the Regulations) to the settlor (and, in the case of multiple trusts ('related trusts'), the settlors were related to each other); however the trust's beneficiaries may also have included charities. Before those amendments came into effect most PTCs will not have been carrying on 'related trust business' for instance because they will not have been regarded as doing so if the settlor was one of the beneficiaries of the trust or trusts of which it was trustee. In this connection it is of course very common indeed for settlors of *inter vivos* BVI trusts to be beneficiaries.
- 3.8 The Regulations have now been amended by the Financial Services (Exemptions) (Amendment) Regulations, 2013 ('the Amendment Regulations') so that (a) settlors can be beneficiaries of trusts without jeopardising the eligibility for the 'related trust business' head of the exemption and (b) trusts established by the same settlor (and not simply by settlors who are related to each other) qualify as 'related trusts'.
- 3.9 The amendments referred to in paragraph 3.8 above will inevitably result in increased use of the Regulations since they now, *inter alia*, permit exempt PTCs to be established in circumstances in which the 'unremunerated trust business' head of the exemption does not apply, where the settlor is a beneficiary of the trust and where all its other beneficiaries have the relationships to the settlor which are referred to in paragraph 3 of the Regulations or are charities.
- 3.10 The Amendment Regulations have further modified the 2007 Regulations so that the requirement to the effect that only BVI companies which were first incorporated under the BCA (or under the IBC Act if the relevant elections have been made) has been removed and so other BVI companies (such as those which were originally non-BVI companies which were 'continued' in the BVI and those first incorporated under the IBC Act in respect of which the relevant elections have not been made) will now be eligible to qualify provided the other conditions listed in paragraph 3.5 above are met.
- 3.11 The Government fees of \$750 and \$1,500 which were payable⁶ for exempt PTCs have now been increased⁷ respectively to \$1,250 and \$2,500. The level of these fees is seldom a disincentive for clients in selecting the BVI as a jurisdiction in which to incorporate a PTC (especially when this is contrasted with the higher fees of other jurisdictions) and this modest increase in the fees is unlikely to be a deterrent to clients.

4. Amendments to the Trust Corporation (Probate and Administration) Act

- 4.1 The Trust Corporation (Probate and Administration) Act (the 'TCPAA') was drawn up in 1947 and therefore predates the BTCA which introduced the modern licensing regime for professional trustees by many years.

⁶ As a result of paragraph 2 (b) and (c) of the BVI Business Companies (Amendment of Schedules) Order, 2007 made under the BCA.

⁷ By the BVI Business Companies (Amendment of Schedule 1) Order, 2013

- 4.2 The decision of Benjamin, J. in *In the Estate of Sylvia Chao Doone (deceased)*⁸ makes it clear that *probate* cannot be granted to a corporate executor appointed by a will unless it falls within the definition of a 'trust corporation' which is in section 2 of the TCPAA.⁹
- 4.3 Very few companies which have trust licences under the BTCA will have satisfied the capitalisation requirements which the definition of a 'trust corporation' in the TCPAA imposed on them before the Trust Corporation (Probate and Administration) (Amendment) Act, 2013 (the 'TCPA Amendment Act') came into force on 15 May 2013.
- 4.4 The TCPAA has now been amended by the TCPA Amendment Act to enable companies which hold Class I trust licences under the BTCA to fall within the definition of a 'trust corporation' within the meaning ascribed to that term in the amended TCPAA provided they fulfil the other conditions set out in the TCPAA (as amended).
- 4.5 Another requirement which most companies which provide executorship services will need to satisfy in order to qualify as a 'trust corporation' under the TCPAA is that it must have a place of business in the BVI. This term has now been defined by the TCPA Amendment Act¹⁰ so that it refers to 'premises occupied within the BVI from which it carries out its main activities'. Thus the earlier uncertainty as to what was meant by a place of business has been removed.
- 4.6 The amendments to the TCPAA to allow all companies which hold Class 1 trust licences to qualify as trust corporations removes unnecessary impediments on the ability of properly regulated companies from applying for grants of probate in circumstances in which testators have selected such companies to be their executors. It ensures that the wishes of testators are not defeated, at the same time bringing the provision of executorship services within the framework of the modern fiduciary licensing regime of the BTCA.¹¹ It also opens up new lines of revenue for BVI service providers and should have the (beneficial) indirect effect of encouraging further shareholders of BVI companies to prepare wills (which is always considered advisable when these are not held in effective succession trusts).¹²

Christopher McKenzie
Partner - Trusts & Estates/Private Client
O'NEAL WEBSTER
31, Southampton Row

⁸ 2 ITELR Jan/Feb 2000 425.

⁹ If the company does not qualify, letters of administration with the will annexed may nevertheless be granted to its nominee.

¹⁰ Which has made a number of other significant amendments to the TCPA Act which are not covered by this paper.

¹¹ The banks and Trust Companies (Amendment) Act, 2013, has amended the BTCA to make it clear that the definition of 'trust business' includes acting as executor or administrator

¹² A bare trust or nomineehip will not normally be effective in terms of disposing the beneficial interest in the shares on the death of the beneficial owner.

London WC1B 5HJ
Tel: +44 (0)203 078 7295 (office)
+44 (0)203 078 7297 (direct)
+44 (0)783 702 5118 (cell)
Fax: +44 (0)203 008 6015
E-mail: cmckenzie@onealwebster.com
Website: www.onealwebster.com

Firm Overview:

O'Neal Webster is a leading offshore law firm located in the British Virgin Islands. Our firm provides legal advice and solutions of the highest quality to a broad client base including leading financial institutions, law firms, trust companies, investment houses, corporations and high net worth individuals. O'Neal Webster is a member firm of Lex Mundi, the world's largest association of independent law firms. O'Neal Webster is also a member of World Services Group, a global membership association whose members are among the top providers of professional business services. Our firm's affiliated financial services company, Coverdale Trust Services Limited provides a full complement of corporate and fiduciary services including company, trust and fund formation, and related services.

Main Areas of Practice:

Banking & Finance:

The Banking and Finance Team has extensive experience in advising financial institutions and borrowers on international and local banking transactions. The team is on the legal panel of many international banks as the BVI law firm of choice to advise on various types of transactions including property acquisition financing, asset and project financing, debt financing and general banking transactions involving BVI entities.

Corporate & Commercial:

Our firm's Corporate and Commercial Team has a wide breadth of expertise and experience in international and local corporate and commercial transactions. It advises on stock exchange listings, private equity transactions, joint ventures, redomiciliations, corporate arrangements, mergers and acquisitions, partnerships, corporate restructuring and related aspects of corporate and commercial law. The team is regularly instructed by leading financial institutions, law firms, trust companies, investment houses and corporations on high value commercial transactions and have a reputation for providing quality advice and solutions to clients.

Investment Funds:

The BVI funds legislation provides a flexible, user-friendly and recognised framework for the establishment of collective investment vehicles. The Funds Team offers efficient, practical and cost effective advice to those wishing to establish or maintain funds in the BVI. It is able to offer advice on fund formation, offering documentation, service providers and agreements with investment managers, administrators and custodians. Our firm receives instructions from a wide range of international clients and can assist with identification of counsel and service providers throughout the world where necessary through our international network. The goal is to provide the highest level of service to clients whether they are incorporating a private fund or arranging for the listing of a fund on a stock exchange.

Litigation:

The Litigation Department has earned a reputation for excellence in complex business disputes including insolvency and restructuring, asset tracing and general commercial litigation. Both international and local clients look to O'Neal Webster for practical and cost effective solutions. The attorneys combine creative, innovative legal strategies with the dedication of advocates experienced before all levels of the local and regional courts. The team of experienced trial attorneys collaborate with clients and their advisers to keep them involved in every stage of the process. The Litigation Team is committed to providing results and clients can be assured that their matters will be dealt with promptly and with professionalism.

Trusts & Estates:

The Trusts Team provides practical commercial advice on all aspects of BVI trusts law. Whether clients are seeking to take advantage of cutting edge legislation by utilising a VISTA trust or simply wish to adopt a more standard structure, the team can help. It advises trustees (individuals and corporations) and beneficiaries alike on many issues such as wealth protection, probate planning, trust creation, administration and termination.

Real Estate:

Real estate in the BVI is scarce and tightly regulated. Licences are required for foreign ownership of real estate, and the regulatory framework involved is complex. Our firm's experience in commercial, hotel, and residential real estate in the BVI is virtually unmatched. O'Neal Webster has represented major hoteliers and other tourism related developments in the BVI. Our firm works with clients through all phases of development including title verification, planning and design approval, corporate structuring and financing. It has gained particular expertise in tourism projects from concept phase through construction and sales.

Shipping:

The BVI's reputation as a premier sailing destination has also made it an attractive choice for the registration of vessels. The BVI has a category 1 ship registry status and can register mega yachts up to 3,000 gross tons and general cargo vessels of unlimited tonnage. However, there is no VAT or any other levy imposed with respect to registration in the BVI, except for the basic registration fee. Our firm offers the full range of services required to secure the registration of vessels in the BVI and advises on all matters relating to the acquisition, financing, operation and transfer of vessels in the territory.



www.onealwebster.com

