

An Overview of Trusts, Trust Law & Trustee Services in the British Virgin Islands



O'NEAL WEBSTER (UK) LLP | Christopher McKenzie, Partner
+44 (0)749 891 5528 | cmckenzie@onealwebster.com

Onealwebster.com

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Background

In addition to being the world's leading international finance centre in which to set up companies, the British Virgin Islands ("BVI") is now regarded as one of the world's premier trust jurisdictions.

The general principles of the trust laws of the BVI are derived from those of English trust law. The principles of English common law and equity apply, as supplemented by BVI statute. The original Trustee Act was based on the English Trustee Act 1925 and Variation of Trusts Act 1958 but has now been updated by the Trustee (Amendment) Acts, 1993, 2003, 2013 and 2020. Other significant statutes relating to trusts and trustee services in the British Virgin Islands are the Virgin Islands Special Trusts Act, 2003 as amended in 2013 and 2020 ("VISTA"), the Banks and Trust Companies Act, 1990 and the Financial Services (Exemptions) Regulations, 2007 (as also amended in particular in 2013 and 2020).

In Part 1 below the basic features of BVI trusts are considered and in Part 2 below some of the particularly attractive provisions of BVI trust law, many of which are unique, are summarized.

Part 1: Basic features of BVI trusts

What is meant by a trust

Most of the provisions of the UK Recognition of Trusts Act 1987 have been extended to the BVI so that the majority of the provisions of the Hague Convention on the Law Applicable to Trusts and on Their Recognition (the "Hague Convention") apply to British Virgin Islands trusts.

The Trustee Act states, consistently with the Hague Convention, that the term "trust" refers to "the legal relationship created, either inter vivos or on death, by a settlor when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a special purpose".

The Act goes on to state, again consistently with the Convention, that a trust will have the following characteristics:

- (a) the assets constitute a separate fund and are not part of the trustee's own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and
- (c) the trustee has the power and the duty in respect of which it is accountable to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on it by law.

The Act further provides that the reservation or grant by the settlor of certain rights and powers, and the fact that the trustee may itself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

A BVI trust is not a separate legal entity.

Those not familiar with the concept of a trust may be concerned that the transfer of the ownership of their property to trustees may afford them with little protection. It is, however, a basic rule of trust law that the trustees of a trust must obey the provisions of the trust instrument in relation to both the entitlements of the beneficiaries and the trust's administration. The beneficiaries of a trust are also protected by a robust body of legal rules imposing very strict duties on the way in which trustees administer trusts. Indeed, if trustees do not observe those rules, a beneficiary may apply to the court for an order compelling them to do so.

Trust law also imposes "fiduciary duties" on trustees so that they may only benefit from the trust, and charge fees, to the extent that the trust instrument permits them to do so. Any other benefits received must be passed on to the beneficiaries. Trustees are not permitted to deal with trust assets for their own direct or indirect advantage and must not only exercise all the powers conferred upon them in the best interests of the beneficiaries, but must (subject to certain exceptions relating to VISTA trusts – see below) act prudently in the management of trust property.

If a settlor wishes to have the power to replace the trustees with other trustees this can be retained by him or conferred on a protector in whom various specified powers can be vested for the beneficiaries' protection. (For further information on protectors, see below.)

The use of trusts

By means of a trust, the legal title to assets passes to the trustees who will hold them on behalf of the beneficiaries until the assets are finally distributed to them. A trust can, and often does, last a number of generations and indeed the "perpetuity period" (see below) for BVI trusts can be and often is a fixed period of up to 360 years (for trusts created on or after 15 May 2013) and the rule against perpetuities does not apply to exclusively charitable or non-charitable purpose trusts (each of which are considered below) and so that these may last indefinitely.

Trusts can therefore be used, amongst other things, for the following purposes:

- as an instrument of estate planning i.e. as a probate avoidance vehicle since, if matters are properly structured, no grant of probate will be needed on the settlor's death;
- to avoid disruption on death;
- to run an individual's business or to own shares in a company;
- for the protection of the vulnerable and to preserve family wealth against dissipation;
- to protect assets (for example, from exchange control or other government interference);
- to circumvent forced heirship provisions and to protect assets from possible future matrimonial claims;
- as a confidential way of holding assets;
- to benefit charitable and non-charitable purposes;
- as a flexible way in which to hold assets; and
- to mitigate or avoid tax.

Trusts governed by BVI law

A BVI trust is a trust governed by BVI law. The Trustee Act provides that a trust instrument may expressly provide that the trust's governing law is that of the BVI. If there is no such statement in a trust instrument, its governing law will be that of the jurisdiction that may reasonably be inferred from the terms of the trust as being its governing law. If no such reasonable inference can be drawn from the trust instrument, the trust's governing law will be the law with which the trust is most closely connected, with reference, in particular, to a number of factors set out in both the Hague Convention and the Trustee Act.

The courts of the BVI will have jurisdiction in relation to a trust whose governing law is stated to be that of the BVI, even if it has no other real connection with the BVI (and regardless of where the trustees, settlor or beneficiaries are resident). The BVI courts will also have jurisdiction where:

- the trustee of the trust is resident in the BVI;
- any corporate trustee is incorporated or registered to do business in the BVI;
- any trust property is situated in the BVI (but only in respect of such BVI property);
- the administration of the trust is carried on in the BVI;
- the BVI court is otherwise the natural forum for the litigation;
- the parties submit to the jurisdiction of the court; or
- the trust instrument contains a provision referring disputes to the jurisdiction of the court.

Migration of trusts

The governing law of a trust may be changed from the law of a foreign jurisdiction to that of the BVI.

The governing law of a trust may similarly be changed from that of the BVI to that of another jurisdiction, but only where:

- there is express power enabling this to be done in the trust instrument; and

- the new jurisdiction recognises the validity of the trust and the respective interests of the beneficiaries.

A trust instrument may also allow for an automatic transfer and vesting of assets from one trustee to another trustee in a different jurisdiction upon the occurrence of certain permissible events (for example, the introduction of exchange controls, etc.).

Who may be a settlor?

Any individual who has legal capacity may be a settlor of a BVI trust. Depending on the powers conferred upon it by its constitution or by-laws, a company may also be a settlor. Furthermore, persons other than the original settlor may contribute property to the trust fund (unless they are precluded from doing so by the terms of the trust instrument), but additions should be properly documented.

A trust is generally established by way of a deed of settlement executed by both the settlor and the trustees (see “the trust instrument” below).

Who may be trustees?

Any individual, being an adult who has legal capacity may be a trustee. For a BVI company to be a corporate trustee, it must obtain a licence to carry on trust business under the BVI Banks and Trust Companies Act, 1990 unless it qualifies as a private trust company (see Part 2 below). A corporate trustee may act alone or jointly with an individual or individuals.

In relation to trusts created after 1 November 1993, a decision of the majority of the trustees will be binding, subject to any contrary provision in the trust instrument. Trust instruments may also provide for the exercise of any of the trustees’ powers to be reserved by a managing trustee. The effect of this is that none of the other trustees will be liable for a default by the managing trustee in relation to the exercise of such powers.

Section 92A of the Trustee Act imposes record-keeping requirements on trustees which are BVI companies or who are persons resident in the BVI (or who administer trusts from within the BVI). These requirements oblige them to maintain these records for at least five years and there are criminal sanctions for non-compliance.

What property may be subject to a BVI trust?

Property of any description, wherever located, may be subject to a trust (unless the property is “inalienable” or land situated outside the BVI and the trust’s terms are inconsistent with the laws of the country or state in which the land is located. BVI land and mortgages may only be held in trust if the provisions of the Non-Belongers Land Holding Regulation Act are satisfied). The following, in particular, can normally be made subject to a trust:

- shares;
- other investments including debentures;
- cash;
- land and buildings (subject to the above caveats);
- debts and other liabilities;
- copyright and other intellectual property;
- interests in trusts and other equitable interests; and
- chattels such as motor cars, ships, airplanes, jewellery, furniture and other valuables.

Trusts are often established with only a nominal contribution to the trust fund (for instance, a cash sum of US\$100), with more substantial property being added subsequently by a deed of addition.

Who may be beneficiaries?

The following may be beneficiaries of a BVI trust:

- all individuals (including unborn persons, minors and persons who lack capacity);
- a corporate body capable of holding property;
- a settlor;
- a trustee;
- charitable organisations and purposes; and
- (since 1 November 1993) non-charitable purposes (for further information on non-charitable purpose trusts, see below).

Types of trusts

- Discretionary trusts

Most British Virgin Islands trusts, including most VISTA trusts (see Part 2 below), tend to be discretionary trusts. These are trusts in which the distribution of capital and income between beneficiaries is at the discretion of the trustees, with the result that no beneficiary is entitled to call on the trustees to distribute capital and income. If the terms of the trust allow it, the trustees may not be obliged to pay out capital or income to any of the beneficiaries for the entire perpetuity period of the trust (for further information on perpetuity periods, see below).

A trust's income may be accumulated for the whole of the period of the trust's duration unless the trust instrument specifies that there is to be a shorter accumulation period.

The class of beneficiaries is generally defined with reference to a wide class of persons born within the perpetuity period, although it may include corporations, charitable organisations and/or purposes. Power is generally conferred on the trustees to add further beneficiaries at a later date and to remove beneficiaries from the class of current beneficiaries.

In view of the extent of the discretion conferred upon the trustees, a settlor will generally provide the trustees with a non-binding letter setting out his or her wishes on matters such as distributions and the investment of the trust fund. The trustees are obliged to consider such wishes and will generally act in accordance with them if they are reasonable and practicable in the prevailing circumstances.

- **Fixed trusts**

These are trusts under which a beneficiary is entitled to the income from the whole or a fixed share of the trust fund regardless of whether he or she will also become entitled to a fixed share of the capital of the trust fund (for example, on attaining a specified age or on the happening of a particular event).

Settlements may change from one category to another during their existence and it is possible for settlements to be both fixed and discretionary.

- **Charitable trusts**

Fixed or discretionary trusts may be set up to benefit charitable purposes or organisations. Such trusts are not subject to the rule against perpetuities (see below) and may last indefinitely. Charitable purposes are trusts established for:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- any other purpose benefiting the public (as recognized by case law).

The purposes of such trusts must be **exclusively** charitable as determined by a vast body of English and Commonwealth case law over the last 400 years and must be regarded as being for the benefit to the public (again as determined by case law).

- **Non-charitable purpose trusts**

See Part 2 below.

- **Bare trusts (or nominee trusts)**

These are simple trusts whereby the trustee holds the trust property for the benefit of a single absolutely entitled beneficiary. The trustee's only duty is to hold the trust property and transfer it to the beneficiary or anyone nominated by him or her when directed to do so by him or her. Such trusts are unlikely to protect assets from creditors' claims and will not be

effective in terms of probate avoidance since the trust property will form part of the beneficiary's estate on death.

- **VISTA trusts**

Trusts of each of the categories described above may be set up as VISTA trusts so that the provisions of the Virgin Islands Special Trusts Act, 2003 (see Part 2 below) will apply to them.

- **Resulting and constructive trusts**

Trusts known as "resulting trusts" will arise by operation of law when a person to whom assets have been transferred is required by the principles of equity to hold such assets on trust for the transferor (or for the person who provided the funds for the transfer) or their estate.

A "constructive trust" is one which similarly arises by operation of law and not as a result of the intention of the parties. Such a trust arises when a person holding property does so in circumstances in which, in equity and good conscience, the property should be held or enjoyed by another. As a result, the courts will compel them to hold that property on trust for that other person.

Resulting and constructive trusts are outside the scope of this Overview and you should contact your O'Neal Webster adviser should you need any further information about them.

The perpetuity period

This is the period which determines the maximum duration of the trust. By law, all trust assets must "vest in interest" by the end of the perpetuity period. This means that before the perpetuity period expires all the persons who will share in the trust fund and the fractions that they will take must be fixed and determined, so that no element of contingency or uncertainty remains.

Since 15 May 2013 it has been possible for the perpetuity period of a BVI trust to be a fixed term not exceeding 360 years. It is also still possible to define the perpetuity period as one commencing on the date of the trust's creation and ending 21 years after the death of the last survivor of a class of persons alive at that date. The class named as "lives in being" need have no connection with the trust. Trust instruments sometimes often define the perpetuity period with reference to the descendants of King George VI of England alive at the date of the trust instrument, but in most cases the 360-year fixed period is selected.

The trust instrument

The trust instrument sets out the terms of the trust and the trustees' powers. Although the Trustee Act contains general provisions relating to trustees' powers and duties, these are rather narrow. A trust instrument will usually, therefore, expressly provide trustees with wide powers of administration

and investment, as well as detailing the procedures relating to the retirement of trustees and appointment of new trustees.

The Trustee Act does however also include provisions enabling standard trustee powers to be incorporated by way of reference to a schedule to the Act, thereby enabling the length of trust deeds to be reduced.

Trustees are now specifically permitted by statute to invest any portion of the trust funds in any kind of investment, wherever the investment is situated, and to make changes to investments. Trustees are (except to the extent that the Virgin Islands Special Trusts Act, 2003 modifies these requirements in the case of VISTA trusts – see Part 2 below) required to exercise these powers using the diligence and prudence of a reasonable man. These statutory powers are subject to any contrary provisions contained in the trust instrument.

The trust instrument should specify if the trust is to be irrevocable. If not, it should contain provisions setting out the manner in which its terms can be revoked or amended.

Prior to 1 November 1993, trust deeds and subsidiary trust documents had to be registered and filed in accordance with the requirements of the BVI Registration and Records Act, but the Trustee (Amendment) Acts, 1993 and 2020 exempted the following from registration and filing:

- all deeds creating trusts;
- all deeds of appointment made pursuant to the terms of a trust; and
- all other deeds executed by trustees, settlors and beneficiaries pursuant to the powers and discretions specified in the instrument creating a trust (including deeds and documents executed before 1 November 1993).

Protectors

A trust instrument may contain provisions relating to the appointment of a protector of the trust (or a similar person referred to by some other name) and the appointment of a successor protector. The instrument may specify that certain powers conferred upon the trustees (such as powers to replace the trustees or powers to advance capital and income to beneficiaries) may only be exercised with the protector's (or settlor's) consent and may confer upon the protector or settlor the power to remove trustees and replace them. They may also be specifically empowered to exclude any beneficiary as a beneficiary of the trust and to include any person as a beneficiary of the trust in substitution for or in addition to any existing beneficiary.

The Trustee Act gives statutory recognition to the office of protector and also makes it clear what powers can be conferred on that person (or indeed reserved by the settlor). See Part 2 below.

On setting up a trust, it is advisable for the settlor to prepare a memorandum specifying whether the powers which have been conferred on the protector have been conferred upon him or her in a

fiduciary or personal capacity, the reason for his or her appointment, and how the settlor would expect them to exercise their powers.

Asset protection

As a matter of BVI law, any transfer of assets (other than a transfer for value to a bona fide purchaser without notice), made with intent to defraud creditors is voidable at the instance of any persons thereby prejudiced.

Applications to the court for guidance

Any trustee is able to apply to the BVI court for its opinion, advice or directions on any question relating to the management or administration of a trust.

Why set up a trust in the British Virgin Islands rather than elsewhere?

- Political and economic stability

The BVI is a British Overseas Territory with a long history of political stability. The Government consists of a British appointed Governor, who is the representative of Her Majesty the Queen, and 13 constitutionally elected members of a Legislative Assembly. Elections are held at least once every 4 years. The legal tender of the BVI is the US dollar. There are no exchange controls in the BVI.

- Taxation

Provided that a trust does not own land or carry on a business or trade in the BVI:

- the income of the trust in the hands of a trustee will be exempt from income tax (which is in any event zero-rated in the BVI);
- any beneficiaries not resident in the BVI will be exempt from BVI income tax on payments received by them from the trustees of BVI trusts;
- no estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge is payable by beneficiaries who are not resident in the BVI in respect of any distribution to them by the trustee of any trust (and in any event the BVI does not currently have taxes of that nature); and
- any trust that does not have beneficiaries resident in the BVI will be exempt from stamp duty in respect of the trust instrument and all other deeds and instruments will be exempt from stamp duty.

All BVI trust instruments are liable to a trust duty of US\$200 which is paid by affixing a BVI postage stamp or stamps to the original trust instrument and cancelling them as prescribed by BVI statute within 3 calendar months from its execution. Confidentiality is preserved on

the basis that the Trustee Act provides that the trust instrument cannot be submitted to the BVI authorities in order to enable the duty to be paid.

- **Confidentiality**

There are no longer any filing or registration requirements for trust instruments, ancillary trust documents, trust returns or accounts in the British Virgin Islands; nor does a trust's name have to be approved.

- **Court system**

The BVI is part of the Eastern Caribbean Court system which was established over 50 years ago and the court's highly respected Commercial Court is headquartered in the BVI. The BVI has a vibrant Bar Association and numerous very reputable law firms have been established in the jurisdiction, many of them, e.g. O'Neal Webster, with offices in London, New York and elsewhere. In addition to excellent local QCs and junior counsel, English QCs frequently appear before the court in complex contentious cases. The final right of appeal is to the English Privy Council.

- **A pre-eminent international financial centre**

The popularity and success of its BVI Business Companies Act, as complemented by its innovative and client-friendly trust legislation which is summarized in Part 2 below, has placed the BVI in the forefront of locations for offshore company incorporation as trust formation. The jurisdiction has a reputation for integrity, flexibility and responsiveness to the interests of the financial services industry. The independent Financial Services Commission regulates BVI trust and corporate services providers, ensuring that the appropriate high standards are maintained and that the jurisdiction is fully competent with international regulatory requirements.

- **Client friendly and sophisticated trust laws**

The BVI has probably the most up-to-date and sophisticated trust laws in the world and its international clientele find these highly attractive. Some of the attractive features of BVI trust law are considered in greater detail in Part 2 below.

A branch of the Society of Trust and Estate Practitioners (STEP) was formed in the BVI in 1997. Its founding chair was O'Neal Webster partner Chris McKenzie and it is now chaired by O'Neal Webster managing partner Vanessa King (who is also chair of STEP's Caribbean and Latin America Region). The Branch, which is very active, provides a forum for professionals to discuss trust law and assists in maintaining practitioners' standards by way of education and training. Most of the BVI's cutting-edge trust legislation, including all the innovations referred to in Part 2 below, were drawn up following detailed recommendations from the Trust & Succession Law Review Committee of the Branch of STEP (which is currently chaired by O'Neal Webster partner Chris McKenzie).

Part: 2 Special features of the BVI trust law

Virgin Islands Special Trusts Act, 2003

The Virgin Islands Special Trusts Act, which is unique to the BVI, enables trusts (of all types) to be established as “VISTA trusts” so that special rules apply to such trusts. The VISTA trust regime is effectively a bespoke trust regime for shares in companies which eliminates those potentially serious technical difficulties which surrounds holding shares in trust arising from English law.

- **Background difficulties which arise from English trust law where trust assets comprise shares**

The trust had always been regarded as one of the best “succession vehicles”, but its use to cater for the succession of shares in companies had historically been impeded by a rule of English trust law (the “prudent man of business rule”) which was designed to help preserve the value of trust investments. This rule traditionally made the trust an unattractive vehicle to hold assets which settlors intend trustees to retain. Another aspect of the rule effectively required trustees to monitor and intervene in the affairs of underlying companies (as the English decisions *Re Lucking’s Will* and *Bartlett v Barclays Bank Trust Co Ltd* made clear); this also created difficulties both from the settlor’s standpoint and from that of the trustee.

The Virgin Islands Special Trusts Act enables special BVI trusts, which are known as VISTA trusts, to be created which circumvent these difficulties.

- **Disengaging trustee from management responsibility**

The Act enables a shareholder to establish a trust of his company that disengages the trustee from management responsibility and permits the company and its business to be retained as long as the directors think fit. This is achieved in general terms by:

- (a) authorising the entire removal of the trustee’s monitoring and intervention obligations (except to the extent that the settlor otherwise requires);
- (b) permitting the settlor to confer on the trustee a role more suited to a trustee’s abilities, namely a duty to intervene to resolve specific problems;
- (c) allowing trust instruments to lay down rules for the appointment and removal of directors (so reducing the trustee’s ability to intervene in management by appointing directors of its own choice);
- (d) giving both beneficiaries and directors the right to apply to the court if trustees fail to comply with the requirements for director appointment and removal; and

- (e) prohibiting the sale of shares without directors' approval.

- Features of VISTA

Some features of VISTA are as follows:

- (a) VISTA does not apply to BVI trusts *generally*: it only applies where there is a provision in the trust instrument directing the Act to apply. The trust instrument may however specify a future date on or event on the occurrence of which the Act will apply (or cease to apply), i.e., since for instance some settlors like VISTA only to apply until (or else to cease to apply to the trust following) their deaths. The events on which VISTA starts (or ceases) to apply to a trust may include the service on the trustee of a "trigger direction", which is made by a person or committee; the trigger direction may be given in a fiduciary or non-fiduciary capacity.
- (b) Where VISTA applies, designated shares will be held on "trust to retain" and the trustee's duty to retain the shares as part of the trust fund will have precedence over any duty to preserve or enhance their value. The trustee is not therefore liable for the consequences of holding (rather than disposing of) the shares. There will however be nothing to prevent trustees from transferring shares to beneficiaries in the exercise of any relevant dispositive powers under the trust.
- (c) The Act specifies that, subject to any contrary provisions in the trust instrument and subject to the comments set out in paragraph (d) immediately below, unless the trustee is acting on an "intervention call" (as defined in the Act), the trustee may not exercise its voting or other powers so as to interfere in the management or conduct of any business of the company; the management or conduct of the company's business will be left to those appropriate to deal with it, namely its directors, whose fiduciary duties to the company will remain intact, except to the extent that the trustee/shareholder will be refrained *qua trustee* from exercising some of the powers of a shareholder.
- (d) The 2013 amendments to the statute provide that the trustee-shareholder is not prevented by the terms of VISTA from exercising (i) its statutory rights to inspect, make copies of or take extracts from specified documents (such as registers of directors) and (ii) its entitlements to inspect, make copies, or take extracts from accounts and records of companies and underlying companies pursuant to provisions in the company's articles of association; this amendment ensures the trustee can appropriately protect itself against unforeseeable reputational risks.
- (e) The statute also provides that the trust instrument may include "office of director rules" specifying how the trustee must exercise its voting powers in relation to appointment, removal and remuneration of directors, and the trustee will generally be required to follow these rules. Except in compliance with these rules, the trustee must generally take no steps to procure the appointment or removal of the company's directors. This ingredient of the legislation provides an effective succession mechanism to

directorships in controlled companies (which is especially popular in the context of VISTA purpose trusts which are set up to hold shares in private trust companies).

- (f) The Act further provides that the trust instrument may specify that the trustee may intervene in the affairs of the company in specified circumstances, i.e. when required to do so by an “intervention call” by a beneficiary, an object of a discretionary power of appointment, a parent or guardian of either of them, a protector (unless the trust instrument provides otherwise), the Attorney General (in relation to charitable trusts), the enforcer (in relation to purpose trusts) or other specified persons such as anyone appointed by the terms of the trust to fill this role.
- (g) The Act specifies that (unless the trust instrument provides otherwise) the trustee is permitted to dispose of designated shares in the management or administration of the trust fund, but can only do so with the consent of the directors of the company (and/or that of such persons as are specified in the trust instrument).
- (h) VISTA contains provisions enabling beneficiaries, directors and others to apply to the court for enforcement of the terms of the Act and, on the application of a specified person, the court is empowered to authorise the trustees to sell designated shares where retaining them is no longer compatible with the wishes of the settlor.
- (i) The Act is confined to shares in BVI companies, but shares in non-BVI companies (and other assets) will invariably be held by a BVI company to which VISTA applies and those assets will then (effectively) be held subject to a VISTA trust.
- (j) It was originally a requirement of the legislation that the sole trustee of a VISTA trust had to have a trust licence under the BVI’s Banks and Trust Companies Act, 1990 and co-trusteeship was not permitted. However, as a result of reforms which came into effect on 15 May 2013, it is merely a requirement of the legislation that one of the trustees (or the sole trustee) of a VISTA trust which is set up on or after that date must either have a trust licence under the 1990 Act or be a BVI private trust company which is exempt from the need to obtain a trust licence as a consequence of the Financial Services (Exemptions) Regulations, 2007 (as amended: see the summary of the BVI’s private trust company regulations below). Accordingly, co-trusteeship of new VISTA trusts is permitted and the 2013 amendments enable family-controlled VISTA trusts to be established. They also give foreign service providers which do not have licensed BVI trust companies an incentive to encourage the creation of further VISTA trusts, i.e. since they are no longer disqualified from being co-trustees and/or can set up exempt BVI private trust companies to be sole trustees or co-trustees of new VISTA trusts.
- (k) There were restrictions in the original VISTA trust legislation which prevented assets from being transferred or appointed out of other trusts to existing or new VISTA trusts in the exercise of powers of appointment and other powers. However, these restrictions were substantially diluted in May 2013 so that (depending on the terms of the relevant trusts) assets can now be transferred or appointed from other trusts (“transferor

trusts”) to new VISTA trusts provided two conditions are fulfilled. First the transferor trusts must be governed by BVI law and secondly at least one trustee of the transferor trust must have a BVI trust licence or be an exempt BVI private trust company. These May 2013 amendments provide significant opportunities for the assets of existing trusts to be “VISTAized” and for advantage thereby to be taken of the benefits of the VISTA legislation. Although the ambit of the relevant powers in an existing trust, and the manner of their exercise, (and where relevant the doctrine of fraud on a power) would need to be considered, it should in many cases be possible for the proper law of an existing trust to be changed to BVI law, for a designated trustee (a licensed BVI company or an exempt BVI private trust company) to be appointed as the trust’s sole trustee (or a co-trustee) and then, say, for a power of appointment (or power transferring the assets to a new VISTA trust) to be exercised. It is however essential that advice from a specialist BVI lawyer be obtained whenever consideration is given to VISTAizing trust assets.

- **Typical uses of VISTA trusts**

VISTA trusts are typically set up in the following circumstances:

- (a) When trustee involvement in an underlying company’s affairs is undesirable or inappropriate.
- (b) When the settlor intends the shares which he wishes to settle on trust and/or the underlying assets of the company to be retained.
- (c) When the settlor wishes to retain control, since matters will, when appropriate, generally be structured so that settlor-control is retained at the director (company) level.
- (d) Where charitable or non-charitable purpose trusts are needed for securitisations and off-balance sheet transactions or to hold shares in private trust companies.
- (e) Where the underlying assets of the trust are to comprise of speculative investments or investments which involve a degree of risk which would otherwise be regarded as inappropriate for the trustees of a non-VISTA trust.

The VISTA trust regime has been very popular and had gained a substantial amount of very positive international attention. Many thousands of VISTA trusts have been set up holding asset all over the world worth many billions of dollars.

The reservation of powers to settlors and the grant of powers to others such as protectors

- **Background – why reserved power legislation has been enacted**

For many settlors, particularly those from non-trust jurisdictions or from family backgrounds in which well-administered trusts do not feature (such as those from civil law jurisdictions and Muslim countries), the establishment of an inter vivos trust can involve an appreciable leap of faith, especially since, once the trust has been validly established, the settlor has no right to interfere in its administration except to the extent that the relevant rights are expressly reserved to him or her by the trust instrument. These concerns of settlors about relinquishing ownership and control will indeed be particularly prevalent in the case of a trust which is established as a discretionary trust and where especially wide powers have been conferred on their trustees.

The administrative powers of BVI trustees are usually similarly extensive: unless the trust is established as a VISTA trust they would in most cases have the power to sell the assets which the settlor has transferred to them on establishing the trust and to reinvest the proceeds in other assets of their selection.

To the extent that the relevant principles of English law apply to a trust, it is thought that a settlor may reserve substantial powers to him or herself, but some commentators have suggested that there is, and indeed there clearly must be a limit. There is however some uncertainty about where precisely the line should be drawn given that there is very little satisfactory case law directly on this point. In North America, however, the trust concept has developed rather differently and there it seems that the settlor can, during his or her lifetime, have more extensive dominion without creating only a bare trust which arises as a matter of English law when powers and rights of such substance have been reserved to the settlor that it cannot be said that he or she has parted with any beneficial interest in the relevant property.

In the light of the above, and since there was clearly both (a) a need to introduce a measure of certainty for settlors who intend to set up trusts in jurisdictions such as the BVI in which the relevant principles of English law would otherwise apply and (b) an increasing desire for reform which meets the legitimate needs of would-be settlors, a number of international finance centres, starting with the BVI in 1993, had introduced reserved powers trust legislation the objective of which was both to provide this certainty and to meet settlors' expectations and requirements.

The BVI's initial 1993 legislation relating to reserved powers and protectors was contained in the original version of section 86 of the BVI's Trustee Act (which was inserted into that Act by the Trustee (Amendment) Act, 1993). However, the provisions of section 86 of the Trustee Act were in some respects regarded as problematic and outdated especially given that some of the BVI's competitors had since enacted what is generally regarded as more comprehensive legislation in this area.

Whilst this is broader in scope and is not solely designed to address the issue of settlor control, the BVI's VISTA trust legislation (which is considered above) also provides a mechanism by which the settlor can, if he or she wishes to do so, reserve control over investment and other administrative matters at the director (company) level. VISTA trusts have indeed been described as "the mother of all reserved power trusts". The VISTA trust legislation is however inevitably a lot more sophisticated and not specifically directed, as such, to enabling reserved power trusts to be established, albeit that

it can effectively be used as a perfect way to confer administrative powers such as investment powers more or less exclusively on those concerned.

- **Comparative review undertaken**

Since section 86 of the Trustee Act came into force on 1 November 1993, all or virtually all the BVI's competitors, such as Jersey, Cayman, The Bahamas and Bermuda, had introduced bespoke reserved power trust legislation and a review of this legislation was undertaken for the purposes of formulating the provisions of the new section. Following this review, a much more up-to-date statutory provision, which has been modelled on the best features those jurisdictions' legislation but which omits their more controversial provisions, has been enacted in the place of the earlier version of section 86 of the Trustee Act. These new provisions are due to come into effect shortly.

- **New section 86 of the Trustee Act**

The new section 86 is worded as follows:

- “86(1) The reservation by the settlor to himself or herself or the grant to any other person or to any office holder or body, including (but without limitation) a protector or protective committee, in a trust instrument evidencing and recording a trust governed by the laws of the Virgin Islands of any limited beneficial interest in the trust property whether of income or capital, or any or all of the powers specified in subsection (2), or both such an interest and any or all of such powers, shall not —*
- (a) invalidate the trust; or*
 - (b) prevent the trust taking effect according to its terms; or*
 - (c) cause any of the trust property to be part of the estate of the settlor for the purposes of succession on death, whether testate or intestate.*
- (2) The powers referred to in subsection (1) are —*
- (a) in the case of a reservation to the settlor or other donor of trust property, power to revoke the trusts in whole or in part;*
 - (b) power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;*
 - (c) a general, intermediate or special power to advance, appoint, pay, apply, distribute or transfer trust property (whether income or capital or both) or to give directions for the making of any such advancement, appointment, payment, application, distribution or transfer;*

- (d) *power to act as, or give binding directions as to the appointment or removal of, a director or an officer of any company wholly or partly owned by the trust or to direct the trustee as to the manner of exercising voting rights attaching to any of the shares held in such company;*
 - (e) *power to give binding directions in connection with the purchase, retention, holding, sale of or other commercial or investment dealings with trust property or any investment or reinvestment thereof or the exercise of any powers or rights arising from such trust property;*
 - (f) *power to appoint, add, remove or replace any trustee, protector, enforcer or any other office holder or any advisor, including any investment advisor or any investment manager;*
 - (g) *power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;*
 - (h) *power to change the proper law of the trust;*
 - (i) *power to change those of the terms of the trust which specify which courts have exclusive or non-exclusive jurisdiction in any proceedings involving rights or obligations under the trust; and*
 - (j) *power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction of, any person specified in the trust instrument.*
- (3) *No person, other than a person in whom trust property or an interest in trust property is vested, shall be or become a trustee by reason only of the reservation or grant of any of the powers set out in subsection (2).*
- (4) *Subject to any contrary provision herein, this section applies to any trusts governed by the laws of the Virgin Islands, whether created before, on or after the date on which this section comes into force, and to acts and omissions occurring while the trust was governed by the laws of the Virgin Islands.*
- (5) *In this section, “settlor” includes —*
- (a) *a testator who grants powers under a testamentary trust by the terms of his or her last will and testament; and*
 - (b) *a person who by a declaration of trust declares that assets held by him or her beneficially shall be held by him or her on the terms of the trust so declared.”*
- **Intentional omission of references to “fiduciary” powers and of provisions exonerating trustees**

There is in the new section no equivalent to the provisions in some of the BVI's competitors' legislation which specify that a trustee which acts or refrains from acting pursuant to reserved powers will not commit a breach of trust. Such provisions in our competitors' legislation have been the subject of academic criticism on the basis that their purpose and effect is not at all clear. Nor, similarly, have provisions specifying the extent to which the trustee has fiduciary or other duties been included in it, i.e. because the term "fiduciary" is not clear cut and it was thought that uncertainty in this area would be particularly undesirable.

It is now considered that, especially when considered in conjunction with its VISTA trust legislation, the BVI now has by far the most comprehensive, sophisticated and attractive reserved power trust legislation in the world.

Groundbreaking provisions relating to the variation of trusts

Many occasions may arise which the terms of a trust might need to be varied in order to reflect changed circumstances such as changes to the family's circumstances or changes to tax legislation.

Of course most BVI trusts are discretionary trusts which include either very wide overriding powers of appointment and/or powers of amendment which can effectively be exercised to vary trusts without beneficiaries' consent, but some BVI trusts, especially those with North American settlors, do not include such powers.

Prior to the reforms made by the Trustee (Amendment) Act, 2021, the Trustee Act included two provisions enabling the court to vary trusts: sections 58 and 59 of the Trustee Act. Under section 58, which was initially modelled on the English Variation of Trusts Act 1958, but reformed in 2004 to include a number of improvements, the court can approve arrangements on behalf of various categories of persons who are unable themselves to provide such approval, such as minors and unborn and unascertained persons. The arrangements which the court can approve include those which change the trust's dispositive provisions. It may only approve an arrangement if it is not detrimental to the interests of those on whose behalf it is approving it and it cannot provide approval on behalf of adult beneficiaries who themselves have capacity to approve such arrangements. Under section 59, on the other hand, the court has the power to authorise transactions by trustees which would otherwise be impermissible where this is expedient in the management or administration of the trust. The section 59 power does not however enable the court to alter the beneficial provisions of the trust, whereas the approval or consent of adult beneficiaries who have capacity is not required for an application under section 59 to succeed.

Prior to the 2021 reforms, there was therefore no provision in BVI legislation which allowed the interests of adult beneficiaries of full capacity to be changed by the court without their consent.

It was thought that this gap might usefully be filled in order to cater for situations in which adult beneficiaries of full capacity are unable to provide their consent, e.g. since providing it might adversely affect their tax situation, or in which beneficiaries with very remote interests block variations which are clearly beneficial to all those who are regarded as the trust's *principal* beneficiaries.

In determining how this gap should be filled, the provisions of Bermuda's equivalent to section 59 of the BVI's Trustee Act, (i.e. section 47 of its Trustee Act 1975) were considered. Bermuda's section 47 (the "Bermuda section") has, over the past few years, received a certain amount of international attention, because it is framed differently from the BVI's section 59 (which replicates the provisions of section 57 of the English Trustee Act 1925) in that it takes as its model section 64 of the English Settled Land Act 1925, i.e. in addition to taking it from section 57 of the English Act.

The current judicial interpretation on the Bermuda section, such as it is, was also considered for the purposes of formulating the new variation provision in the BVI's Trustee Act, but for various reasons the wording of the Bermuda section was not followed. The decision was instead taken to craft a new section which was specifically designed, amongst other things, to enable the beneficial provisions of relevant trusts to be varied, subject to including essential further safeguards (such as the requirement to "opt" in to the section) in the new statutory provision which is now to be found in section 58B of the Trustee Act

- **Wide ambit**

Where section 58B applies to a trust, the BVI court may change any of its terms, including its dispositive terms, but only if "the making of the order is determined by the Court to be expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose". The provisions of the section are therefore potentially very wide.

- **Critical safeguards**

Important safeguards are however included in the section to ensure that it is not abused. The relevant safeguards may be summarised as follows:

- The section is effectively an "opt in" section and will not apply to all BVI trusts. It only applies to BVI trusts created after the section came into force *if* there is an express provision in the trust instrument specifying that the section applies to the trust. It also applies to trusts which were previously governed by the laws of another jurisdiction and where there is an express provision to the effect that the section applies in the instrument effecting a change of the trust's governing law to BVI law (or else in another instrument executed contemporaneously) and the section itself permits such a provision to be included in such instruments.
- The section requires the court to have regard to various factors if they are material. These include the settlor's wishes or expectations, changes in circumstances and, if beneficiaries' interests are affected, the remoteness of those interests and the beneficiaries' needs.

- The court's powers under the section are subject to any exclusions or restrictions in the trust instrument which refer expressly or by implication to the new section.
- Orders may not be made which affect interests which have vested absolutely and indefeasibly in possession.

- **Who may apply to the court**

The new section enables applications to be made by trustees, beneficiaries and objects of discretionary trusts or powers. Any protectors, protective committees or other persons authorised to do so by the trust instrument may also make such an application.

- **Conclusion re variation**

In addition to adding useful flexibility to BVI trust law, this innovative new statutory provision in section 58B should be very attractive to those who are thinking of establishing trusts, or who have already established trusts in other jurisdictions, where disadvantageous tax consequences would or might follow from requiring certain beneficiaries to consent to variations as a result of changed circumstances (including tax changes); in the case of trusts already set up under non-BVI law it may be that it will sometimes be appropriate to change the trust's governing law to BVI law and then make a court application under section 58B. The new statutory provision may also be useful in circumstances in which beneficiaries with only very remote interests block variations.

Non-charitable purpose trusts

In common with other leading international financial centres the BVI has 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 taking transactions off balance sheet, isolating assets in financial deals, separating voting from economic control and (especially) providing ownership structures for private trust companies.

- **Conditions**

Section 84A of the Trustee Act permits purpose trusts to be created if the following conditions are satisfied:

- (a) the trust's purpose must be specific, reasonable and possible;
- (b) the purposes must not be immoral, contrary to public policy or unlawful;
- (c) at least one trustee of the trust must fall within the statutory definition of a "designated person" (and this would normally involve the appointment of a British Virgin Islands

licensed trust company or a BVI private trust company which is exempt from the need to obtain a trust licence as the sole trustee or one of the trustees of the trust);

- (d) 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
- (e) the enforcer appointed by the trust instrument must either be a party to the trust instrument or give his, her or its consent in writing (addressed to the trustee who is a designated person) to act as enforcer of the trust.

- **Purpose can be for the benefit of particular persons**

The requirement which appeared in the BVI's earlier purpose trust legislation to the effect that a purpose trust must not be for the benefit of "particular persons" or of "some aggregate of persons" was repealed in relation to trusts set up after February 2004, with the result that (as with Cayman Islands STAR trusts) the purpose of a trust which is set up under section 84A of the Trustee Act can be of benefit to one or more individuals or companies.

- **Perpetual purpose trusts permitted**

BVI purpose trusts are exempt from the rule against perpetual trusts, with the result that perpetual purpose trusts are capable of being set up. However, trust instruments have been given the *option* of specifying a terminating date or event, of providing for the disposition of trust assets on the trust's termination and of providing that (before the trust's termination as a purpose trust) the trustees will owe no duty to any persons entitled on such termination.

BVI conflict of laws provisions relating to trusts

Since trusts governed by the laws of the BVI usually have significant legal links with the laws of one or more other jurisdictions, it is essential for the BVI to have adequate rules of resolving "choice of law" questions relating to trusts. Although, as indicated in Part 1 above, the majority of the provisions of the English Recognition of Trusts Act 1987 (incorporating as it does most of the provisions of the Hague Convention) have been extended to the Territory, so ensuring a certain amount of certainty in relation to many of the relevant conflict of law rules relating to trusts, specified matters are expressly excluded from that Act, meaning that it is vital for these rules to be reinforced by additional statutory provisions.

Following the 2003 and 2021 amendments to the statute, the BVI's Trustee Act now contains detailed and well-thought conflict of laws rules relating to trusts which were drafted with the assistance of Professor Jonathan Harris of Birmingham University in the UK with the intention of setting up a regime which is likely to command a substantial degree of international recognition. These include comprehensive rules dealing with matters which are excluded from The Hague Convention which have therefore been drawn up with the objective of reflecting current common law trends. Whilst it cannot be guaranteed that these rules will necessarily correspond exactly with case law as it eventually

develops in other common law jurisdictions, they are rules which are likely to command a certain degree of academic support. For that reason, these rules should be seen by the courts of other jurisdictions as a legitimate and rational approach.

These conflict of laws rules apply to trusts generally, rather than merely to those which are governed by BVI law.

- **Forced heirship and matrimonial claims**

The Trustee Act also contains robust, comprehensive and carefully crafted provisions protecting BVI trusts (and dispositions to their trustee) against “forced heirship” claims. These provisions, which were updated and modernised in 2021, also prevent foreign judgments based on such “forced heirship” claims from being recognised or enforced in the Territory. In relation to trusts, it is now believed that the BVI not only has in force an anti-forced heirship regime which is as robust as that of any other offshore trust jurisdiction, but probably also has some of the most refined and comprehensive conflict of laws rules in the world. The relevant provisions are also increasingly considered by advisers in the context of trusts which are established with a potential objective being to safeguard trust assets in the context of a foreign divorce claim. The 2021 amendments are expected to come into effect shortly.

Trustees who deal with lenders and other third parties

- **Background: difficulties which arise under English law**

As a consequence of one of the basic features of English trust law (i.e. that a trust is not a separate legal entity), a trust cannot as such enter into liabilities, with the result that the primary remedy of anyone dealing with a trustee is against such trustee. This traditionally made the trust an unattractive vehicle for commercial transactions, which seriously inhibited legitimate commercial dealings by trustees.

Because the primary remedy of the party to whom a liability is owed is against the trustee personally, the courts have only allowed that party recourse to the trust fund by way of subrogation to the trustee’s right of reimbursement (so that the third party stands in the shoes of the trustee). However, such a right of subrogation may be of no value in a variety of possible circumstances. It will be of no value, for example, if the trust is declared invalid. Nor will it be of any value if the trustees do not have the power to incur such liability (or if they do have the power but have not complied with their fiduciary duties or the internal procedures laid down by the trust). Similarly, it may be of no value if the trustees have committed a previous breach of trust or if any of the trustees purporting to create the liability has not been validly appointed (or if the retirement of a previous trustee was ineffective). Additional difficulties of enforcement may arise if the trustee who incurred the liability has died, has retired or has moved.

Banks and other third parties who deal with trustees have often relied on legal opinions on the trust’s validity and the third parties’ ability to enforce their rights against the trust fund, but such

opinions have increasingly included so many assumptions that the comfort of banks and other third parties has been correspondingly diluted.

Moreover trustees, even if acting properly, have been at personal risk if the assets of the trust fund are insufficient to meet the liability. Whilst trustees have been able to limit their liability to the assets of the trust for the time being, they have only been able to do this if they have included an express provision in the contract to that effect: it has not been sufficient for them merely to state that they are acting “as trustees”.

It will be apparent from the above that the existing position under English law was most unsatisfactory. Not only did it place serious difficulties in the way of trustees, but it also, because of those difficulties, seriously inhibited legitimate commercial dealings by them.

- **Special provisions relating to trustees which deal with lenders and third parties**

With a view to making BVI trusts significantly more attractive in the commercial context, a number of provisions which facilitate dealings between trustees and third parties were included in the 2003 amendments to the Trustee Act. The provisions in question were based on proposals which were made by the English Trust Law Committee, but with a number of modifications, and make BVI trusts highly desirable in the commercial context.

- **Sections 95 and 96 – recourse permitted where reasonable enquiry made**

As a result of sections 95 and 96 of the Trustee Act, banks and other third parties dealing with trustees will be able to have recourse to the trust fund (and other protection) where, when entering into transactions, they have made reasonable enquiry that the trustee has the express power to enter into such transactions and has complied with any express requirements (such as requirements for consent) contained in the trust instrument. They will not however be able to have such recourse if they have acted dishonestly when entering into the transaction.

- **Section 97 – exoneration where disclosure of fiduciary capacity**

If (and only if) there is a provision in the trust instrument to the effect that section 97 of the Trustee Act applies, the trustee of a trust will not be personally liable under any contract which it enters into with another if it has disclosed (or the other party was aware) that it was contracting as trustee (unless the contract provides otherwise); furthermore a claim based (*inter alia*) on such a contract may be satisfied out of the trust fund.

- **Section 98 – limitation of liability**

On the other hand, if the trust has not opted into the provisions of section 97 of the Trustee Act (and if the trust instrument does not provide otherwise), the new section 98 of the Trustee Act specifies that where a trustee enters into a contract, having disclosed his fiduciary capacity, it will be personally 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).

- **Section 101 – restricting future exercise of powers of investment and distribution**

Section 101 of the Act (as amended in 2013), which only applies where the trust ‘opts in’ to this provision, specifies that, where a person who lends money (or other assets) to a trustee requests the trustee to do so, the trustee may restrict its future powers of investment and distribution (and the powers of appointment and removal of trustees) in order to protect that person. The purpose of this new provision is to address the legitimate concerns of those who make loans to trustees to the effect that their rights might be diluted as a result of the manner in which the trust is administered after the liability has been incurred.

- **Section 104 – trusts created prior to 1 March 2004**

Trustees of BVI trusts created before Part X of the Trustee Act (relating to trustees who deal with third parties) came into effect in March 2004 can now take advantage of Part X by executing a deed which provides that the Part X provisions will apply to the trusts in question.

Re-introduction of the “old rule in Hastings-Bass”

A new section, section 59A, was added to the Trustee Act in 2021 (which is due to come into effect shortly) to give the court jurisdiction to set aside the flawed exercise of a fiduciary power, thereby giving statutory effect to what is colloquially known as the “old rule in Hastings-Bass”. The new section 59A of the Trustee Act provides much needed certainty and should be of considerable potential use for trustees, beneficiaries and professional advisers who now have the comfort of knowing that if a power is exercised which turns out to have adverse consequences, then an application may be made to the court to set it aside. Such a remedy is generally considered preferable to beneficiaries having to rely upon claims for breach of trust or fiduciary duty against trustees or on claims of negligence against advisers: such claims can be time-consuming and expensive.

Trustee and related services

- **Licensed trustees**

According to statistics produced by the Financial Services Commission there are currently over 150 trust companies in the BVI, nearly 90 of which currently hold unrestricted trust licences allowing them to provide complete trustee services from within the BVI. Trust companies operating from within the BVI must conform to strict government regulations and maintain a minimum required capital and are supervised by the Financial Services Commission in accordance with internationally accepted supervision standards. Most BVI trust companies which have class 1 trust licences have also, since 15 May 2013, been able to act as executors of wills provided they have places of business (as defined by BVI statute) in the jurisdiction. There is also a substantial

number of other well established and qualified service providers such as lawyers, accountants and investment advisors operating in the BVI which cater to the trust industry: see Part 1 above.

- **Private trust companies**

The Financial Services (Exemptions) Regulations, 2007 (the “PTC Regulations”) enable unlicensed private trust companies (“PTCs”) to be established in the BVI if the company satisfies a number of conditions which are not, in our experience, too onerous to comply with.

PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:

- (i) 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.
- (ii) The corporate structure is readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure.
- (iii) Confidentiality is 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.
- (iv) A PTC enables the trustee’s charges to be kept in check.
- (v) PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise of speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee.

- **Conditions with which a BVI PTC must comply**

The conditions with which a BVI private trust company must comply are, essentially, as follows:

- (a) The company must be a BVI company (whether or not it was first incorporated in the BVI, so that companies which have been “continued” in the BVI now also qualify); this would naturally mean, amongst other things, that the general requirements of the corporate and regulatory laws of the BVI must be satisfied.
- (b) The company’s memorandum must state that it is a private trust company.

- (c) The company must be a limited company and its name must include the designation “(PTC)” before its permitted ending.
- (d) The company’s registered agent must hold a Class 1 trust licence under the BVI’s Banks and Trust Companies Act, 1990.
- (e) The company must not solicit trust business from members of the public.
- (f) All the company’s trust business must be “unremunerated trust business” and/or “related trust business”. These terms are explained immediately below.

Unremunerated trust business

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 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.

Related trust business

A company will, on the other hand, be regarded as carrying on “related trust business” where all the beneficiaries of the trust (or trusts) of which it is trustee are related (in the manner specified in paragraph 3 of the PTC Regulations) to its settlor (and in the case of multiple trusts, the trusts either have the same settlor or else the settlors of all trusts of which the company is trustee are related in the prescribed manner to each other); however, the trust’s beneficiaries may also include the settlor (or settlors) or the trust (or trusts) and/or charities.

- Why the BVI is increasingly selected as a jurisdiction to use to incorporate PTCs

The BVI is increasingly selected as one of the leading jurisdictions to use to incorporate PTCs for the following reasons:

- (i) Provided all the conditions specified in paragraphs (a) to (f) immediately above have been satisfied, no licence is needed and a BVI company can be incorporated very quickly.
- (ii) It is not necessary to have a local director or authorised representative (or indeed a director with relevant qualifications or experience).
- (iii) There are no capitalisation requirements for exempt PTCs.

- (iv) The company need not establish a physical presence in the BVI¹.
- (v) The costs of setting up and running the company are extremely competitive: The Government's fee will in most cases only be an additional US\$900 (i.e. a total of \$1,350 *including* the Government's incorporation/renewal fee) on incorporation and annually thereafter.
- (vi) There is no need to list particular trusts in the company's memorandum.
- (vii) Only the PTC's memorandum and articles of association, which are likely in most cases to be fairly standard documents revealing little more than the name of the company and the identity of its registered agent, will be filed publicly and (except in cases of abuse) there is no need to supply the regulatory authorities with copies of the trust documentation or to disclose the identity of the settlor or beneficiaries of the trust; the company's registered agent must instead be provided with copies of the relevant documents.
- (viii) With approximately 400,000 active companies on its register, the BVI is regarded as the world's leading international financial centre for international business companies.

- **Individuals and non-BVI companies as trustees**

Other than those of the requirements of VISTA and the BVI's purpose trust legislation which are summarised above which require at least one trustee of a VISTA or a BVI purpose trust to be a licensed trustee or a BVI PTC, there are no BVI restrictions on the ability of individuals (whether or not resident in the BVI) or non- BVI companies to act as trustees of BVI trusts. It is however essential that where individuals act as trustees of trusts of shares in BVI companies, there are at least two individuals in office at any one time i.e. so as to ensure that probate is not needed to transfer the shares into the name of any successor trustee appointed under the terms of the trust instrument following the death of a sole trustee.

Conclusion

The BVI is renowned for its state-of-the-art legislation relating to trusts and trustee services which has been developed in close partnership with the private sector to ensure that it keeps pace with the modern demands on trusts. It is perceived as innovative and flexible and continues to attract positive attention from the international financial community.

Note: When considering setting up a BVI trust, in addition to obtaining advice from a specialised BVI trust practitioner, a prospective settlor should always obtain legal and tax advice from advisors in

¹ Note however that the BVI's economic substance legislation should always be considered when establishing any BVI company.

his or her country of domicile, residence and nationality, as well as in the jurisdiction where the beneficiaries are resident and where assets which are proposed to be placed in trust are located.

The information contained in this memorandum is general in nature and does not constitute legal advice. Appropriate legal and other professional advice should be sought for any specific matter.



Christopher McKenzie, Partner
Trusts & Estates
2 John Street
London WC1N 2E
+44(0)783 702 5118
cmckenzie@onealwebster.com



Vanessa King, Managing Partner
Trusts, Banking & Finance, Corporate &
Commercial
Commerce House, 181 Main Street
Road Town, Tortola VG 1110
(284) 393 5800
vking@onealwebster.com



Nadine Whyte Laing, Partner
Commercial Litigation, Probate
Commerce House, 181 Main Street
Road Town, Tortola VG 1110
(284) 393-5800
nwhyte@onealwebster.com



Kerry Anderson, Partner
Investment Funds &
Regulatory, Corporate &
Commercial
575 Lexington Ave New York, NY
10022
(718) 307 9491
kanderson@onealwebster.com



Jenelle Archer, Partner
Property & Business, Trusts
& Estates
Commerce House 181 Main
Street
Road Town, Tortola VG 1110
(284) 393 5800
JArcher@onealwebster.com