

A Guide to BVI Trusts

This note provides a brief overview of British Virgin Islands (the “BVI”) trusts. In particular, it seeks to explain the main characteristics of the various types of BVI trusts and the key advantages of using them.

Overview:

The Trustee Ordinance Act 1961 (as amended) (the “Act”), the Virgin Islands Special Trusts Act 2003 (as amended) (the “VISTA Act”) and the Banks and Trust Companies Act 1990 (as amended) (“BTCA”) provide the legal framework for trusts in the BVI. The latter, together with the Financial Services (Exemptions) Regulations) 2007 (the “Regulations”), regulates the operation and licensing-requirements of private trust companies (“PTCs”).

The Act defines a trust as the legal relationship that is created when a person (a “Trustee”) receives assets from another person (the “Settlor”) to hold, not for the benefit of himself but for the benefit of another (a “Beneficiary”) or for a special purpose. A trust does not have a separate legal personality in the BVI. Where a trust is governed by BVI law, it is known as a ‘BVI Trust’.

Main Characteristics of a BVI Trust:

■ Settlement Deed, Trust Deed or Declaration of Trust

This is the document that sets out the powers and terms upon which the Trustee shall administer the trust, such as the power to make investments and/or pay monies to a Beneficiary. It is possible to reserve powers in favour of the Settlor and/or the Protector.

■ The Settlor

The Settlor creates a trust by transferring the legal title of the assets by way of gift or testamentary disposition to a Trustee, in order for a Trustee to hold it for the benefit of a Beneficiary. The property or assets of the trust are referred to as the “Trust Fund”.

The Settlor may be a Trustee and/or a Beneficiary of the trust but advice should be sought if this is to be the case.

■ The Beneficiaries

The Beneficiaries, be it individuals, corporate bodies or a class of persons, are required to be sufficiently identified or identifiable in order to be able to benefit from the trust. The settlement deed may empower the Trustee to add or remove Beneficiaries or to exclude them from future benefit. The settlement deed may also direct the Trustee to apply the Trust Fund to benefit the Beneficiaries equally or unequally, or according to the Trustee’s discretion.

■ The Trustee

Trustees are those persons who are appointed to hold and administer the trust property and assets for the benefit of the Beneficiaries or for a particular purpose. Trustees have certain statutory and fiduciary duties, unless such duties are legitimately excluded in the settlement deed.

The Trustees may be individuals, companies licenced as trust companies under the BTCA, or Private Trust Companies established under the Regulations. An individual Trustee does not have to be a BVI resident. Generally, the Trustee of a BVI Trust is a trust company based in the BVI.

Under BVI law no company may carry on the business of acting as Trustee without having a trust licence that has been issued by the BVI Financial Services Commission (“FSC”), except for Private Trust Companies.

■ Private Trust Companies

Generally, a PTC acts as Trustee of a single trust or a group of related trusts and does not charge fees. As an example, instead of using the services of a professional Trustee, the Settlor can establish a PTC in the BVI to act as Trustee of his family trusts. The Settlor or his trusted advisors can serve on the board of directors of the PTC, which allows them more flexibility, control and continuity in the administration of the trust's assets. PTC's can also be a more cost-effective solution in certain instances.

A PTC is exempt from the regulation and licensing requirements under the BTCA, subject to certain requirements, but it must have a Registered Agent in the BVI that holds a Class 1 trust licence issued under the BTCA. Hatstone Trust Company (BVI) Limited holds such a licence and so can act as Registered Agent to PTCs.

■ The Protector

The Protector is appointed under the settlement deed with certain powers in relation to the trust. Appointing a Protector usually occurs when the Settlor may be concerned that the Trustee will not provide enough consideration to his wishes or, for example, where he wishes for certain powers to be withheld from the Trustee and subject to the consent of an independent third party.

Powers that are generally vested in the Protector include: the power to appoint and remove Trustees, the power to add or remove Beneficiaries and the power to terminate the trust. Protectors are not mandatory.

Types of BVI Trusts:

The most common types of BVI Trusts are discretionary trusts, fixed interest trusts, VISTA trusts and non-charitable purpose trusts.

■ Discretionary Trust

The discretionary trust provides a flexible and efficient structure under which the Settlor transfers ownership of the assets to the Trustee, subject to any reserved powers or Protector provisions. The settlement deed generally gives the Trustees wide discretionary powers over the Trust Fund and their application for the benefit of the Beneficiaries. The Beneficiaries of a discretionary trust have no definite right to the assets of the Trust.

■ Fixed Interest Trust

A fixed interest trust specifies the rights of Beneficiaries in relation to the capital and/or income of the Trust Fund. For example, the settlement deed may specify that a Beneficiary is entitled to the income (and not the capital) of the Trust Fund during his lifetime.

A trust can also be structured as a combination of a discretionary and a fixed interest trust.

■ VISTA Trust

The VISTA trust is unique to the BVI and was created by the VISTA Act, as amended. The key features of a VISTA trust are: (a) it may only hold shares of an underlying BVI company, although the company is not restricted in what it may invest in; (b) the Trustee is not under a duty to diversify or monitor the Trust Fund and investments, which is a basic principle of the more standard trusts; (c) at least one of the Trustees must be a 'designated Trustee' as defined in the VISTA Act (for example a BVI PTC or a FSC licensed trust company); and (d) the Trustee cannot act as a director of the underlying company.

■ Non-Charitable Purpose Trust

A BVI Trust can be established partly or wholly for non-charitable purposes. The purpose must be specific, reasonable and possible, and may not be immoral, contrary to public policy or unlawful. An enforcer must be appointed who shall have the duty to ensure the Trustee fulfils the non-charitable purposes of the trust. At least one Trustee must be a "designated person" (for example a BVI PTC or a FSC licensed trust company). A purpose trust may exist in perpetuity or be terminated at a specified date.

The BVI purpose trust can be used for a variety of objectives, including family, philanthropic and commercial purposes.

Uses and Advantages of a BVI Trust:

A BVI Trust has a variety of uses, including asset protection, estate and succession planning, confidentiality,

minimising taxation as well as using the trust as part of a larger corporate transaction.

The advantages of establishing a trust in the BVI include the following:

- The BVI is self-governed and politically stable;
- Well-developed modern trust legislation based on English trust law;
- Sophisticated and professional trust sector;
- Effective judicial system with a specialist Commercial Court to handle trust matters;
- Comprehensive infrastructure for legal, accounting and banking services;
- No requirement for public registration of trusts;
- No income, capital gain or gift tax in BVI; and
- BVI Trusts are exempt from tax in the BVI; provided that no Beneficiaries are resident in the BVI and that the trust does not trade or conduct business or own land in the BVI.

Avoidance of Inheritance Restrictions:

Forced heirship restricts how a person may deal with his estate in the event of his death. Such rules are common in most civil law jurisdictions.

Article 83 of the Act precludes the application of forced heirship laws. Accordingly, persons domiciled outside of the BVI can place assets into a BVI trust during their lifetime without the restriction of the forced heirship laws applying.

Summary:

The modernised trust industry in the BVI caters both to those who wish to retain and protect their assets for future generations, as well as those who are venturing into start-ups and corporate transactions. The PTC is an alternative to the traditional Trustee, and offers a flexible structure for ultra high net worth individuals greater influence and involvement with the administration of over assets held in trust. If you are interested in PTCs then please refer to Hatstone's briefing note on PTCs.

About Hatstone:

Hatstone is a leading boutique multi-jurisdictional group providing legal, investment fund administration and corporate services with offices in BVI, Jersey, London, Panama and South Africa. Hatstone is happy to assist with the establishment of the trust (whether discretionary, fixed interest, VISTA or purpose trust), the incorporation of the PTC and the administration of the trust, (as required).

Our philosophy revolves around a Director/Partner-led client service.

We believe that the right people will attract the best work and we have put in place a first class team to assist you. The team has been carefully chosen to ensure that there is experience and strength-in-depth.

- **Director/Partner-led:** Our Directors/Partners each have a wealth of experience in banking and finance, the establishment and maintenance of investment funds, corporate and commercial, acquisitions and mergers, private equity and venture capital, structured finance, financial services and regulatory law, trusts and foundations. We believe that our clients benefit from having their affairs overseen by senior staff with the necessary experience.
- **Client Focus:** We are dedicated to providing a client focused services. Knowing our clients and understanding what drives their businesses is fundamental to us. We enjoy a very strong rapport with our clients whom have access to our lawyers 24/7 through the latest technology. Our principal aim is to help clients achieve their objectives by offering them pragmatic advice and solutions.
- **Transparency:** We are happy to work on a fixed fee basis (in most circumstances) and are transparent about our fees.

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NOTE ON THIS RELEASE

The information contained in this client information release is intended as a general guide only. The contents are not intended as a substitute for formal legal advice and should be interpreted accordingly. Formal legal advice in all relevant areas should be sought before relying on any of the information contained in this release