

Overview of BVI Trusts

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This memorandum has been prepared for the assistance of clients considering creating a trust in the British Virgin Islands. It is intended to provide a summary of the main legal requirements and general principles applicable to the establishment and administration of trusts. It is not intended to be comprehensive in its scope and it is recommended that a client seek legal advice on any proposed transaction prior to taking steps to implement it.

A number of briefings on other aspects of British Virgin Island law have been prepared by Ogier and are available on request.

Introduction to the BVI

The British Virgin Islands are located 60 miles from Puerto Rico in the North Eastern Caribbean. They consist of around 50 islands of various sizes (15 of which are inhabited), the main island being Tortola where the capital, Road Town is found. As it is a British Overseas Territory, the United Kingdom is responsible for its foreign affairs and defence but has no control over internal affairs. The Queen is its head of state and is represented by an appointed governor. Following the adoption of a new constitution in 2007, the island government is organised around the House of Representatives (formally the Legislative Council) from which the Executive Council (cabinet) is formed, headed by the Premier (formerly Chief Minister). The official language is English.

Law in the British Virgin Islands has been heavily influenced by English common law and has been further developed by local legislation and judicial decisions. The British Virgin Islands has modern laws and regulations dealing with the needs of its finance industry but at the same time little change has occurred in certain of areas of law (e.g. family law) that still draw from older English laws. Areas of law which are not directly applicable to the BVI (such as international laws and obligations) are regulated externally through the Foreign and Commonwealth Office in London and applied where it is deemed necessary. The law relating to trusts and equity is derived directly from English law but has been modified by legislation to reflect its position as an offshore financial

centre.

The economy of the British Virgin Islands is one of the most prosperous in the Caribbean. The economy of the territory is based upon the twin pillars of tourism and financial services the latter of which generates more than half the total income of the territory. The official currency is the US Dollar due to close relations with the neighbouring US Virgin Islands and the United States.

Introduction to the trust concept

A trust is a legally binding arrangement whereby a person (known as a settlor) transfers assets to another person (known as a trustee) who is entrusted with legal title to the trust assets, not for his own benefit, but for the benefit of other persons (known as beneficiaries, who may include the settlor) or for a specified purpose.

The instructions from the settlor to the trustee as to the disposition of trust assets will normally be contained in a document called the trust instrument. This is for the benefit of all parties as it will ensure that the settlor, the trustee and the beneficiaries know precisely what their respective rights and duties are. The trust instrument will often provide that the trustee has the power to manage the trust assets in accordance with the terms of the trust instrument and the strict duties imposed on the trustee under statute, although in the British Virgin Islands powers can be reserved or granted to other persons, such as the settlor or protector (see further below).

In addition to the trust instrument it is also common for a settlor to indicate to the trustee his wishes as to the management and disposition of the trust fund in the future in a less formal manner. His expression is often contained in a letter of wishes which, although not legally binding, will generally be considered by the trustee to be of persuasive effect when performing his duties and, for example, determining to make a distribution out of the trust fund.

The trust system in the British Virgin Islands

British Virgin Islands trust law is based predominantly on English trust law, but has developed beyond English law to permit purpose trusts, extend the perpetuity period to 100 years and most notably to create the unique VISTA trust. The governing law is the Trustee Ordinance Act 1961 ("the Act") (most recently updated by the Trustee (Amendment) Acts of 2013 and 2015), and is supplemented by the Virgin Islands Special Trusts Act 2003 (the "VISTA legislation") (most recently updated by the Virgin Islands Special Trusts (Amendment) Act 2013).

Since the introduction of the VISTA legislation, it has been said by leading practitioners that the British Virgin Islands has the most modern and coherent trust legislation globally. Policies and legislation have been developed in close partnership with the private sector, and as a result respond well to the needs of business and demonstrate a sophisticated and cutting edge approach.

Trusts in the British Virgin Islands are exempt from registration under the Registration and Records Act and trustees are exempt from any reporting and filing requirements, ensuring a high degree of confidentiality. Protection for trusts is ensured by the requirement that companies carrying on trust company business must obtain a licence and conform to various requirements under the Banks and Trust Companies Act 1990.

The components of a trust

The Settlor

Once a trust is created the settlor will have divested himself of legal ownership of the trust assets. The settlor may be a beneficiary and, in certain circumstances, he may also act as a co-trustee. The settlor may, also, retain a degree of control over the trust, such as the power to approve distributions, the power to appoint and remove trustees and the power to revoke the trust. However, it is essential to the validity of a trust that the settlor actually disposes himself of the trust assets and he may not, for example, simultaneously be a sole trustee and a sole beneficiary.

The Trustee

Legal title to the trust assets is vested in the trustee under the obligations imposed by the trust and he is responsible for the administration of the trust.

A trustee must exercise his powers solely for the benefit of the beneficiaries. The trust assets, however, constitute a separate fund and do not form any part of the trustee's own estate.

The BVI regime offers considerable flexibility regarding trusteeship arrangements. There is no requirement for a BVI resident trustee and, subject to the terms of the trust, there is no minimum number of trustees required. The maximum number of trustees permitted is four.

The Beneficiaries

The beneficiaries are the persons entitled to benefit from the assets held on trust. As stated above, the settlor may himself be one of the beneficiaries. In order for a trust to be valid there must generally be sufficient certainty as to the identity of the beneficiaries. An express power for the addition of further persons to the class of beneficiaries may, however, be included in the trust instrument. The beneficiaries may enjoy equal or unequal benefits, as the trust instrument prescribes or, in the case of a discretionary trust, as the trustee may determine.

It is also possible to include in the trust instrument a power to exclude beneficiaries from future benefit.

The Trust Fund

At any time after settlement on trust of the initial assets further assets may be added. Indeed, a common arrangement is to establish a trust with a nominal initial amount and subsequently to add more substantial assets.

The assets constituting the trust fund may be of any type of real and/or personal property (with the exception of VISTA trusts where the assets can only comprise shares in certain BVI companies).

The Protector

Statute expressly acknowledges that a trust instrument may provide for the appointment of a protector, without whose consent the trustees may not exercise their powers and discretions. The trustees will not be liable for any loss caused by their actions if the protector gives consent.

A protector may also be appointed who has power to do any one or more of the following:

- determine the law of which jurisdiction shall be the proper law of the trust
- change the forum of administration of the trust
- remove the trustees
- appoint new or additional trustees
- exclude any beneficiary and
- withhold consent from specified actions of trustees either conditionally or unconditionally

A protector will not be liable to beneficiaries for the bona fide exercise of his power unless the trust instrument provides otherwise, nor will be deemed to be a trustee by virtue of the powers reserved to him.

Forms of trusts

Various types of trust have been developed over time and the most appropriate structure for the settlement will depend on the settlor's particular circumstances and objectives. Some of the more common types of trust are described below.

Fixed Interest in Possession Trust

Under the fixed interest trust the principal beneficiary will normally be granted a vested interest in the income of the trust fund throughout his lifetime and the discretion of the trustee regarding the disposition of the trust fund will be limited. For example, the trust instrument may specify that the trustee is required to distribute all of the income of the trust fund to a particular individual during that person's lifetime and subsequently to distribute the capital of the trust fund in fixed proportions to named beneficiaries (such as the settlor's children).

Accumulation and Maintenance Trust

An accumulation and maintenance trust is one where no beneficiary has a fixed entitlement to the benefits accruing to the trust for a certain period, during which time income is accumulated and becomes an accretion to capital. The persons who are ultimately entitled to the trust capital may thus benefit from the accumulation of capital. The trust instrument may give the trustee a discretionary power to make distributions amongst the beneficiaries up to a specific age for their education, maintenance and benefit and to provide thereafter for a designated share of the trust fund to be distributed to each child on attaining a specified age. An accumulation and maintenance trust may be particularly appropriate where the settlor wishes to benefit a group of children, for example, his grandchildren.

Discretionary Trust

The discretionary trust provides maximum flexibility and is often the most efficient structure for both settlor and beneficiaries. Under the terms of a discretionary trust the trustee is given wide discretionary powers as to when, how much and to which beneficiaries he should distribute the income and capital of the trust. Such a form of trust is useful where at the time of creation of the trust the future needs of beneficiaries cannot be accurately determined. The beneficiaries are not regarded as having any direct legal rights over any particular portion of the trust fund but only a right to be considered to benefit when the trustee exercises his discretion.

Revocable Trusts

Although for tax and other reasons it is generally desirable for a trust to be constituted as an irrevocable settlement, in certain circumstances the settlor may require the additional comfort of knowing that he has retained the power to revoke the trust and enforce the return of the trust fund. Careful consideration requires to be given to the possible consequences of a revocable trust because under the jurisdiction of the settlor's domicile, residence or nationality, revocation may negate some of the expected benefits of creating the trust.

Charitable and Non-charitable Purpose Trusts

Generally, in order for a trust to be valid there must be identifiable beneficiaries. In brief, the onerous duties imposed upon trustees are owed to the beneficiaries and without ascertainable beneficiaries who may enforce these duties against the trustees a trust will not be upheld. A long held exception to this general rule has permitted trusts to be established in favour of charitable purposes, such trusts being enforced by the Attorney General.

The BVI now also permits 'purpose trusts', that is, trusts for non-charitable purposes. Such trusts must appoint a person with a duty to enforce the trust, known as an enforcer. At least one of the trustees must be a designated person (as defined in the Act as a barrister or solicitor practising in the territory, an accountant practising in the territory who qualifies as an "auditor" under the

Banks and Trust Companies Act 1990, a licensee under the Banks and Trust Companies Act 1990, a private trust company or such other person as the Minister of Finance may by order designate). A purpose trust may be perpetual.

VISTA Trust

The Virgin Islands Special Trusts Act 2003 created a special trust (known as a "VISTA trust") in the British Virgin Islands which exists as an alternative to a non-charitable purpose trust. A VISTA trust is used purely for the holding of shares in a British Virgin Islands International Business Company, and enables a trustee holding such shares to distance himself entirely from the management of the company in which the shares are held. Where the trust deed contains a provision enabling the application of VISTA, the trustee will hold the shares 'on trust to retain', and this duty will take precedence over any duty to preserve or enhance the value of the shares. The responsibility for managing the company lies with the directors and the directors only. Such legislation circumvents the ongoing problem in other jurisdictions with regard to trustees' liability in relation to such high-risk assets as private family company shares. At least one of the trustees must be a designated trustee (as defined in the VISTA legislation as a licensee under the Banks and Trust Companies Act 1990 or a private trust company).

Practical applications of British Virgin Islands trusts

In essence a trust is a legal device, first developed under English law, under which legal ownership of assets is vested in a trustee whilst the enjoyment of the trust fund is preserved for the benefit of the beneficiaries on terms determined by the settlor.

The range of uses to which a trust may be employed is still being developed but flexibility and confidentiality are the principal advantages which a trust has over other legal forms designed to hold, preserve and transmit wealth. The trust concept has proved to be enormously adaptable and is widely used in financial planning.

Some typical applications are the following:

Preservation of Wealth

Trusts may be used to preserve the continuity of ownership of particular assets, such as a business, within a family. By vesting legal ownership of the assets in the trustee, the relevant individuals may be able to continue to benefit from the assets, whilst avoiding fragmentation of ownership amongst a large number of second and third generation beneficiaries. The use of a trust avoids, on the death of a beneficiary, the risk of a share of assets becoming owned outside the family, and thus enables settled assets to be preserved intact for the benefit of future generations.

Forced Heirship

Where a settlor disposes of assets during his lifetime by settling them on trust, the trust assets will not form any part of the settlor's estate upon his death. This may enable a settlor to avoid forced heirship rules which may be mandatory under the laws of his domicile, residence or nationality and which would otherwise dictate the persons to whom and proportions in which a settlor's estate will devolve.

Article 83 of the Act expressly provides that no rule relating to inheritance or succession of the law of the settlor's domicile shall affect any transfer or disposition of personal property to a trustee or otherwise affect the validity of the trust.

Succession Planning

The effect of a trust is to divest the settlor of ownership of the settled assets. Accordingly, upon the death of a settlor there will be no need to obtain a grant of probate or similar formalities in order to deal with the trust fund. A trust, therefore, provides an efficient vehicle for the transfer of beneficial ownership interests on the death of a settlor.

Interests of beneficiaries under discretionary trusts do not constitute a separate asset but rather constitute a beneficial interest in the assets held by the trustees. A trust structure may therefore assist in the avoidance of stamp duty or inheritance taxes which would otherwise be payable on the death of a beneficiary (but this is a matter for the tax residency of the beneficiary and advice should always be sought).

In addition, a trust can be used to hold shares in a company owning immovable property situated outside the BVI rather than directly in the real property itself, with the effect of transforming characterisation of an interest from immovable to movable, which can present attractive opportunities for tax and financial planning. A trust may also be used to protect financially unsophisticated beneficiaries and to make financial provisions for the improvident.

Asset Protection

Historically trusts have been established for the principal purpose of protecting assets from risk. In a modern context, trusts may be employed to hold assets in a secure and stable political environment. Trusts play a major role in financial planning for individuals, families and companies. The use of a trust in conjunction with an underlying company can be used to convert an onshore asset into an offshore one and to interpose an additional layer of confidentiality in a chain of ownership. The use of the trust and company combination may also enable trust assets to be held in a jurisdiction which does not recognise the trust concept. Such an arrangement may be attractive to a lender for the purpose of obtaining security against assets. Trusts may also safeguard assets against strategic risks, such as confiscation or expropriation by the State in the country of the Settlor's domicile, residence or nationality. As a further protection, a modern trust instrument can provide for the proper law of settlement, or its administration, to be moved to another jurisdiction in the event of political or strategic emergency in the country of the trustee's

residence.

Commercial trusts

The variety of means to which a trust may be put in the commercial context has only been partly realised.

BVI trusts have been used for the following commercial purposes:

- as a unit trust for the collective investment of capital
- in off-balance sheet transactions, the share capital of an "orphan" special purpose vehicle will typically be held by a trustee under the terms of a charitable trust
- asset securitisation schemes have been structured to provide for mortgages and receivables to be held pursuant to the terms of a trust
- employee share option and executive incentive schemes (as well as regular pension schemes) will benefit from being established in a politically stable, fiscally neutral jurisdiction

Taxation

British Virgin Islands trusts will be exempt from all British Virgin Islands taxes provided that no beneficiaries are resident in the Islands and that the trust does not conduct any business or own any land in the jurisdiction.

Trust duty of US \$200 is payable on chargeable trust instruments.

Creation of a trust

Trusts created in writing may be either a Settlement of Trust signed by both the settlor and the trustee, or by a Declaration of Trust signed by the trustee alone. Following execution of the trust instrument a trust will come into existence upon settlement of the initial property, which may be supplemented later. Ogier is able to assist with preparation of all of the appropriate documentation.

Services offered by Ogier

In connection with the formation of trusts our Team is able to provide the following services:

- advise and liaison with professional advisers in other jurisdictions in order to recommend the most practical and efficient structure to achieve the settlor's objectives
- preparation of the trust instrument, letters of wishes and formation of underlying companies

to hold the trust assets

- preparation and review of documentation relating to commercial transactions underlying the trust
- assistance to the settlor in the choice of a trustee for a British Virgin Islands trust and the preparation and review of all documentation to provide for the proper administration and operation of the trust and underlying companies

Administration services

Ogier cannot provide trustee or trust administration services. However, we work closely with all of the trust corporations licenced in the British Virgin Islands and are very happy to recommend a service provider.

Should you wish to proceed with the establishment of a British Virgin Islands trust please contact any member of the Team listed at the back of this client briefing.

Reflects the relevant laws of the British Virgin Islands as at 1 October 2018.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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Meet the Author



Marcus Leese

Partner

Guernsey

Hong Kong

E: marcus.leese@ogier.com

T: [+44 1481 737152](tel:+441481737152)

Key Contacts



Anthony Partridge

Partner

Cayman Islands

E: anthony.partridge@ogier.com

T: [+1 345 815 1810](tel:+13458151810)



Jennifer Fox

Partner

Cayman Islands

E: jennifer.fox@ogier.com

T: [+1 345 815 1879](tel:+13458151879)



Gregory Haddow

Associate

Cayman Islands

British Virgin Islands

E: gregory.haddow@ogier.com

T: [+1 345 815 1824](tel:+13458151824)

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