

Upcoming amendments to BVI trust and estate laws

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BVI has recently introduced bills to amend the current Trustee Act (the **TA**), the current Virgin Islands Special Trusts Act (**VISTA**), the current Probates (Resealing) Act (the **Resealing Act**) and the current Administration of Small Estates Act. This article highlights the key changes and their implications.

| Trustee Act and VISTA

The bill essentially seeks to:

1. give general power to the BVI High Court (the **Court**) to vary BVI trusts which opt in to the regime
2. empower the Court to set aside the flawed exercise of fiduciary power
3. strengthen the firewall legislation
4. expand the list of possible reserved power
5. clarify the rules for retention of trust records

Variation of Trust

At present, pursuant to section 58 of the TA, the Court has power to approve variation of trusts on behalf of persons who are infant or under incapacity, contingent beneficiaries, unborn persons and beneficiaries under protective trusts. For trusts with adult beneficiaries with full capacity, their consent must be sought to vary the relevant trust. The new section 58B once passed will empower the Court to vary the trust without the consent of adult beneficiaries in circumstance where such variation is considered expedient by the Court, whether or not the order may adversely affect any person or purpose.

Upon application by the trustee, a beneficiary, a protector or any person authorised to apply by the trust instrument, the Court may order to vary, add to, revoke or replace all or any of the trusts; enlarge, restrict or remove all or any of the powers of the trustee; or vary, add to, remove, or replace any or all of the other provisions of the trusts.

In considering the circumstances, the Court would take into account the following factors:

1. the settlor's wishes
2. changes in circumstances after the creation of the trust
3. the remoteness of the interest and the protective needs of individual beneficiaries

It is important to note that this new variation power is not applicable to existing BVI trusts. It will apply only to: (1) trusts created on or after the new section 58B comes into force and the trust instrument expressly provides for its application; and (2) a foreign existing or new trust being migrated to BVI and the application of section 58B is explicitly provided in the relevant deed.

To benefit from the flexibility to vary a trust, a bespoke clause is required to be explicitly included in the trust deed to provide for the application of the new section 58B of the TA.

In addition, the Court's powers to vary is subject to any specific exclusion or restrictions imposed by the trust instrument, so the extent of the section 58B Court power can be tailored for the circumstances of each trust.

The new section 58B of the TA will not affect the application of section 12 of VISTA which concerns the modification of the Saunders v. Vautier rule. The amendment in VISTA is to ensure that during the period of exclusion of entitlement, neither section 58 nor the new section 58B would apply to vary the trust.

Setting aside Mistake

Right now, the Court's power to retrospectively remedy the consequences resulting from the mistakes of trustees has been governed by common law. The introduction of the new section 59A will provide a statutory basis and certainty to the scope of the such power.

Under the new section 59A, upon the application by the fiduciary power holder, trustee, a beneficiary or such other person approved by the Court, the Court may set aside the exercise of the **fiduciary power**, whether conferred or exercised before or after the new section 59A comes into force, and make such consequential orders. For these purposes, **fiduciary power** is widely defined as *any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power*. This would include a trustee, protector and other power holder whose power is a fiduciary nature under the trust instrument.

For the Court to consider exercising the power to set aside the mistake, the Court must be satisfied that the fiduciary power holder did not take into account one or more relevant considerations (whether of fact, law, or a combination of fact and law) or took into account any irrelevant considerations and but for such failure, the fiduciary power holder would not have exercised the power, or would have exercised the power, but on a different occasion or in a different manner. Once the exercise of such power is set aside, the exercise of such power shall be treated as never having occurred. Any allegation or proof of breach of trust or breach of duty may not be required.

Firewall Legislation

The current section 83A is commonly regarded as firewall provisions aimed at excluding certain adverse effects of foreign law on BVI trusts. It provides for certainty to matters to be decided by BVI law only and prevents the enforcement of judgments arising from foreign legal claims arising from a **personal relationship** with the settlor. These benefits will now be extended beyond the trustee - a new definition of **office-holder** is to be introduced - for the application of BVI law and to **persons internal to the trust relationship**, i.e. any *office-holder, settlor or beneficiary*, for protection under BVI law. The **personal relationship** definition will also be expanded to include notably stepchild and child born by means of artificial fertilisation or surrogacy.

The amended section 83A will essentially provide greater certainty to the application of BVI laws relating to issues around the rights and duties of all the parties to the trust relationship, as opposed to only the trustee and settlor. As to foreign judgments, the amended section 83A will extend its application to the beneficiaries and specifically states that a foreign judgment varying a BVI trust without the consent of the adult beneficiaries shall be considered inconsistent.

Reserved powers

The current list of reserved powers provided in section 86 is rather limited. The validity of reserving any powers that is not on the list is uncertain.

The amended section 86 significantly expands the powers that may be reserved by the settlor (or granted to any other person) without invalidating the trust. The expanded list of reserved powers includes, without limitation, the power to revoke the trust; vary the terms of a trust instrument; appoint, pay, apply, distribute or transfer trust property; act as or give binding directions as to the appointment and removal of a director or an officer of any company owned by the trust; giving binding directions relating to the purchase, retention or sale of trust property.

For trust instruments of existing trusts having included a reservation of any power in the expanded list under the amended section 86, these will now be certain that such reservation will

not invalidate the trust.

Retention of Trust records

Section 2A of the current TA will be repealed and be replaced by the new section 92A. It clarifies that the retention period of at least 5 years starts from the date on which either the document first came into possession or under the control of the trustee or such documents were prepared by the trustee.

Section 92A also seeks to clarify that the trust document retention requirement is applicable to all BVI trusts other than implied, constructive or bare trusts or duties incidental to the office of a personal representatives in respect of a deceased's estate.

Resealing

Currently, the ability to reseal foreign grants of probate and letters of administration in BVI is very limited – at present it is available only in respect of those issued by courts of probate in Her Majesty's dominions, i.e. a British protectorate or protected state and any territory in respect of which a mandate or trusteeship is being exercised by Her Majesty's Government in the United Kingdom or the Government of any part of Her Majesty's dominions (section 2 of the Resealing Act). That means that grants of probate from almost all Asian countries can't be resealed.

The bill will repeal and replace the Resealing Act entirely. The new Act will provide for the resealing of foreign probates and letters of administration granted by a court of probate in a **recognised jurisdiction** in respect of the estate of deceased persons. The list of recognised jurisdictions will be significantly expanded to include all commonwealth jurisdictions and territories and some other jurisdictions which have probate concept similar to that of BVI. Importantly, among the recognised jurisdictions are Hong Kong, Singapore, Australia (all states and territories), Canada (except Quebec), Malaysia, New Zealand and the US (including D.C.). The list of recognised jurisdictions may be amended by adding to or deleting from such list.

There are three important points to note regarding the new resealing regime. First, it applies to foreign grants issued both before or after the Resealing Act comes into force. Second, only foreign grant issued by the court having jurisdiction at the place where the deceased died domiciled may be resealed in the BVI. For example, a Hong Kong grant issued for a deceased died domiciled in mainland China may not be resealed in the BVI. Third, the resealing application is also subject to the very limited stamp duty in respect of the BVI estate of the deceased.

The resealing procedure is provided in Rule 30 of the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017. The resealing application may be made by the personal representative of the deceased or his attorney. There is no requirement to make the application in person – it can be done remotely. The application is required to be

advertised in newspaper in BVI for at least 7 days before the resealing application. The applicant should file:

1. the prescribed form
2. the original or duplicate certified copy of the foreign grant
3. a copy of the advertisement
4. if the application is made more than three years after the death of the deceased, an affidavit explaining the delay
5. a declaration of the value of the BVI estate of the deceased in prescribed form
6. an official copy of the deceased's Will (if any); and
7. (for resealing probate) an affidavit setting out the place of execution of the Will (if any)

Small Estates

At present, only estates valued at not more than US\$240 may be regarded as small estates and thus dispense with the formal grant application to administer a deceased's estate.

The bill will substantially increase the qualifying estate value to US\$25,000 and at the same time will restrict its application to persons who die domiciled in the BVI.

In other words, irrespective of the value of the BVI estate of a deceased died domiciled outside BVI, either a resealing or full grant application is required to administer the deceased's estate. This will make the small estates regime irrelevant to everyone except those domiciled in the BVI and will effectively bring all those who die domiciled outside the BVI with BVI estates within the BVI probate or resealing regime.

Conclusion

The proposed amendments may appear to be small changes but have significant implications on persons with or managing BVI assets, notably, shares in a BVI company, and BVI trusts.

The proposed changes modernise the BVI trust and estate laws and once again show the readiness of BVI to adapt to the modern world, in particular by giving greater certainty in uncertain times.

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