

Changes to BVI Trust Legislation – Fine-tuning the Law to Promote Flexibility

The British Virgin Islands is a well respected and sophisticated jurisdiction for the establishment of trusts. The general principles of BVI trust law are derived from those of English law and they have been supplemented by statute to offer a variety of flexible and user-friendly trust structuring options.

New legislation has been enacted in May 2013 to further refine the trust legislation, especially the use of Private Trust Companies ("PTCs") and VISTA trusts, which will help to ensure that BVI remains at the cutting edge of international trust planning and a jurisdiction of choice for high net worth families from around the globe.

THE TRUSTEE ACT

(a) Trust Periods - The maximum perpetuity period has been increased from 100 years to 360 years, which applies to new trusts established after 15 May 2013.

(b) Purpose Trusts – BVI has sophisticated legislation for the creation of non-charitable purpose trusts, under which trustees can hold property on trust to carry out further purposes which cannot be classed as charitable. The requirement concerning the trustees of purpose trusts has been changed. There remains a requirement that at least one trustee must be a "Designated Person", which has until now meant a lawyer or auditor in BVI or a BVI trust licence holder, but this definition has been extended to include PTCs.

(c) Trust Duty - The trust duty fee has increased from \$100 to \$200 and the late fee (which is payable for each year which has elapsed since the creation of a trust until trust duty is finally paid) will increase from \$200 to \$400.

Trust duty is payable on all documents which create inter vivos trusts, other than bare trusts and charitable trusts.

(d) Third Party Lending - Previously a third party lending money to a trustee could request, where there is an express provision in a trust deed that section 101 of the Trustee Act applies, that the trustee restrict its powers of investment, distribution and to appoint and remove trustees, for the protection of the lender. This section was enacted to address concerns of lenders that their rights might be diluted as a result of the manner in which a trust is administered after a liability has been incurred and it has now been expanded to cover scenarios where any assets, not just money, have been lent by third parties to trustees and so will help to offer further security for lenders.

VISTA

The Virgin Island Special Trusts Act (“VISTA”) came into force on 1 March 2004 as a trust regime for BVI companies held in trust and VISTA trusts have become increasingly popular since that time. The principal effect of VISTA is to remove the duty of trustees to monitor and intervene in the conduct of the directors and in the running of the BVI company held in trust. VISTA trusts offer all the classic advantages of a trust, such as succession planning, but at the same time allow individuals to retain effective control of the BVI company which has been transferred into trust.

Please see our separate note on VISTA trusts for further information.

The VISTA legislation has principally been amended as follows:

(a) VISTA Declaration – Every VISTA trust must contain a declaration that the VISTA regime is to apply it. However, it is now clear that the required declaration in a trust deed that the VISTA regime will apply need not always been in force (i.e. that the VISTA regime can be applied and disappplied to a trust during the life of a trust)

It is confirmed that:

(i) the VISTA declaration can specify an event on which the VISTA regime will apply/cease to apply; and

(ii) the power to make that declaration that VISTA will apply/cease to apply can be vested in an individual or a committee but not in any of the trustees.

This was always taken to be the case but it is now expressly clear in the legislation.

(b) Converting Non-VISTA Trusts - BVI trusts which are not VISTA trusts can now be converted into VISTA trusts (assuming that they satisfy the other conditions, e.g. holding BVI company shares) as long as one of the trustees of the trust is a PTC or a trust licence holder.

(c) Trustees - PTCs can now be trustees of VISTA trusts (in addition to trust licence holders). Additionally, there is no longer a requirement that VISTA trusts must only have one trustee; the requirement is now that at least one of the trustees must be a PTC or trust licence holder, which means that individuals or non-BVI companies can now be co-trustees of VISTA trusts.

(d) BVI Company Shares - The rules as to which BVI companies cannot be held in a VISTA trusts have been updated to reflect current legislation - effectively any BVI company that is licenced cannot be held in a VISTA trust.

(e) Appointed Inquirer - In relation to permitted grounds for complaint, it is provided that the appointed inquirer, if one is appointed, can be paid from the trust assets and is to be given information about the trust.

(f) Corporate Settlers - It is made clear that corporate settlors can establish VISTA trusts.

PTCs

Since 2007, it has been possible in BVI to establish PTCs, which may act as trustee of trusts without the need to obtain a BVI trust licence as long as certain conditions are satisfied.

BVI PTCs have become very popular, especially among high net worth families and clients from civil law jurisdictions who do not necessarily welcome the prospect of transferring their wealth to an independent third party trustee when establishing a trust.

Please see our separate note on PTCs for further information.

In addition to the changes which now allow PTCs to be trustees of VISTA trusts and purpose trusts, a further change in the legislation now means that for the "related trust business" condition, under which a PTC can act as a trustee without a trust licence, the class of beneficiaries for a trust to fit within this condition can now include the settlor. This is a welcome amendment, which means that PTCs will no longer have to carry on only "unremunerated trust business" if the settlor is in the class of beneficiaries and such PTCs can carry on "related trust business" instead.

CONCLUSION

These are all very positive changes in terms of the suite of BVI trust vehicles available to international clients. The use of PTCs in purpose trusts and VISTA trusts will allow those types of trusts to be used in a wider variety of circumstances and make PTCs more attractive. Extending the maximum trust period to 360 years is also a welcome move for long term planning by promoting wider flexibility.

Some of the changes simply clarify the ways in which BVI trusts can be used, especially VISTA trusts, but these are very welcome clarifications which will make them even more user-friendly.

May 2013

FURTHER INFORMATION

Please contact any of the following Harneys lawyers if you require additional information on the changes to BVI trusts.

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