

BVI Trusts: Private Trust Companies

INTRODUCTION

Since 2007, it has been possible in BVI to establish a Private Trust Company (“PTC”) 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.

In May 2013, the BVI trust legislation was amended to allow PTCs to be trustees of VISTA trusts (see separate guide on VISTA trusts) and Purpose Trusts (see separate guide on BVI Trusts – An Overview). It is anticipated that this additional flexibility in the use of PTCs will further enhance their effectiveness as sophisticated vehicles, which can be used in both private wealth planning and commercial structures.

GENERAL REQUIREMENTS & RESTRICTIONS

A PTC must:

- (i) be a BVI company limited by shares or guarantee;
- (ii) contain an express statement in its memorandum of association that it is a PTC; and
- (iii) must end with the designation “(PTC)” placed before the corporate suffix (i.e. Ltd, Corp, Inc etc). Additionally the name cannot include “trust”, “trustee”, “trust company” or “fiduciary”.

PTCs cannot conduct any business which is not “trust business” (as to which see below) or solicit trust business from members of the public.

TRUST BUSINESS REQUIREMENTS

The PTC must only conduct “trust business”. This is “the business of acting as a professional trustee, protector or administrator of a trust or settlement or managing or administering any trust or settlement”.

Additionally the trust business must either be “Unremunerated Trust Business” or “Related Trust Business”.

Unremunerated Trust Business requires that:

- (i) payments made to the PTC are only in respect of costs and expenses incurred in acting as trustee (or protector) of a trust – the PTC is not permitted to make a profit; and
- (ii) only “professional directors” are remunerated for providing director services (and such directors may not own shares in the PTC); and
- (iii) no person “associated” with the PTC is remunerated in consideration of services provided by the PTC which constitute “related trust business”. In this context “associated” means that the person has a legal or beneficial interest in the PTC, is a director or former director of the PTC (excluding professional directors) or is an employee or former employee of the PTC.

Related Trust Business requires that:

- (i) the relevant trust is exclusively charitable; or
- (ii) all the beneficiaries of the trust include the settlor and/or are “connected” to the settlor, which means that each beneficiary and the settlor fall within a class of family relationship defined in the BVI legislation.

If the Related Trust Business requirements are satisfied, a PTC may receive remuneration or make a profit and lay directors and associated persons may be paid.

On balance, unless there is a specific reason for the PTC to be remunerated, it is generally simpler for it to carry on Unremunerated Trust Business and thereby escape the constraints of the Related Trust Business limb of the exemption

REGISTERED AGENT REQUIREMENTS

The Registered Agent of a PTC must itself hold a class 1 trust licence in BVI and is responsible for policing that the PTC remains compliant within the BVI legislation. As a result, the Registered Agent will conduct periodic reviews to satisfy itself that the PTC is only carrying on Unremunerated Trust Business or Related Trust Business.

The Registered Agent must have copies of the trust deed and any documents which vary the terms of the trust and is required to notify the BVI Financial Services Commission if it forms the opinion that a PTC is carrying on trust business which is not Unremunerated Trust Business or Related Trust Business.

OWNERSHIP OF PTCs

Although the shares in a PTC will not themselves be of great financial value, they will be of extreme strategic importance to a family because the PTC will be the legal owner of all the assets held in trust. As a result, the ownership of the PTC shares themselves is an issue of crucial importance for a family considering establishing a trust structure with a PTC as trustee.

If the PTC shares are owned by individual outright, it will be necessary to obtain a BVI Grant of Probate on the death of each shareholder and this can cause delay and administrative burden at what may be a very important period for the PTC (especially if the deceased did not have a BVI Will). Accordingly a common structuring mechanism is for the PTC shares themselves to be held in a VISTA Trust. Where a PTC is held in a VISTA Trust, the interaction of the Office of Director Rules (within the VISTA regime) and the PTC structure can be very advantageous to clients.

TRUSTEE STANDARD OF CARE

PTCs can be a very effective element of a BVI trust structure for a number of reasons. Firstly, because the board of the PTC can be made up of family members, trusted family advisors or those familiar with the industry of a family business if that is the underlying trust asset. Additionally, PTCs are likely to be more familiar with the dynamics of the family and their investment culture and more reactive than a third party corporate trustee. The PTC's attitude to risk, for example in terms of investment decisions, may well be less conservative than a corporate trustee for various reasons.

However, it is important that a PTC is not simply viewed as a "family friendly" trustee. The position of trustee is a fiduciary office and the trustee is required to discharge its duties to the requisite standard of care irrespective of whether it is a PTC or a corporate trustee. It is therefore crucial that PTCs conduct their business in a suitable fashion and administer the trust to the standard of care required of them (although the position will be different where the PTC is trustee of a VISTA Trust). Failure to do so may open the door to breach of trust claims by beneficiaries of the trust in the future.

Harneys is able to offer assistance and guidance to PTCs in relation to all aspects of the administration of BVI trusts. Such assistance may include accounting services, the preparation of meeting minutes and related documents and general advice to PTCs in relation to all issues they will encounter concerning the administration of a trust.

FURTHER INFORMATION

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