British Virgin Islands private trust companies

Service area / Trusts and Private Wealth
Location / British Virgin Islands
Date / March 2017

Introduction

Private trust companies ("PTCs") are widely used in international structured finance transactions and are now increasingly used by high net worth private clients. In the latter context, certain families may prefer to establish their own PTC to act as the trustee of the trusts which they plan to create, rather than transferring assets to a corporate service provider's professional trustee company.

This briefing note considers key issues relating to the creation and use of British Virgin Islands ("BVI") PTCs in the context of private wealth management. BVI PTCs usually operate as trustees, although it is also possible for a BVI PTC to act as a protector or enforcer of a trust, or otherwise provide trust related services to a trust.

Regulation

The Banks and Trust Companies Act 1990 ("BTCA") is the principal piece of legislation relevant to the licensing and regulation of BVI trust companies. Among other things it states that a BVI company may not conduct 'trust business' – the business of acting as a professional trustee, protector or administrator of a trust or settlement or managing or administering a trust or settlement – unless it has a valid licence under the BTCA.

It has always been recognised that BVI companies which provide trust related services, but not as a business (for example those formed by a family for the purpose of acting as trustee of their private family trusts), are exempt from the BTCA's licensing requirement. However, since the Financial Services (Exemptions) Regulations, 2007 (the PTC Regs) came into force on 1 August 2007 it has been possible for a new type of BVI company, the BVI PTC, to conduct trust related services without being subject to the BTCA's licensing requirement or having to register with or be approved by any of the BVI's regulatory authorities.

The PTC Regs

The PTC Regs record the majority of the requirements for a BVI company to be incorporated as, or become, a BVI PTC and state the parameters within which BVI PTCs must operate. These requirements and parameters fall into three main categories: core requirements, conduct requirements and registered agent (RA) requirements.

Core requirements

Every BVI PTC must:

- be a BVI company limited by shares or guarantee which is not struck off or dissolved;
- contain an express statement in its memorandum of association that it is a BVI PTC;

- ensure that its name includes the designation '(PTC)' before its corporate suffix (eg Ltd); and
- except with the approval of the BVI Financial Services Commission (FSC), ensure that its name does not include any restricted words or phrases.

Conduct requirements

BVI PTCs must only conduct 'trust business' which for the purposes of the PTC Regs is acting as trustee, protector or administrator of a trust or settlement or managing or administering a trust or settlement. Unlike the BTCA's definition of trust business, there is no requirement for these activities to be undertaken as part of a business. Instead, a BVI PTC's trust business must be either 'unremunerated' or 'related' and these terms are explained below.

A BVI PTC may not simultaneously conduct unremunerated trust business and related trust business, although a BVI PTC conducting unremunerated trust business will not be penalised if part or all of that unremunerated trust business also happens to fall within the definition of related trust business and nor will a BVI PTC conducting related trust business be penalised if part or all of that related trust business also happens to fall within the definition of unremunerated trust business.

Additionally, BVI PTCs may not solicit trust business from members of the public.

Unremunerated trust business

If a BVI PTC is to conduct unremunerated trust business then no remuneration must be paid to or received by the PTC or any person associated with it in consideration for or with respect to the services which constitute the PTC's trust business. For these purposes:

- remuneration includes money or any other form of property and it is immaterial whether the remuneration is payable or received out of the assets (or underlying assets) of a trust in respect of which a BVI PTC is conducting trust business (a Relevant Trust), from the settlor or a beneficiary of a Relevant Trust, or from any other person pursuant to an arrangement with the settlor or a beneficiary of a Relevant Trust. Remuneration does not include payments made to a BVI PTC in respect of the costs and expenses it pays or incurs in conducting its trust business (eg its annual government fee, RA fees and fees for professional advice); and
- a person is associated with a BVI PTC if he has a legal or beneficial interest in the PTC, or is a director or employee or former director or employee of the PTC. This list is not exhaustive so, for example, it is likely that a family member of an individual who has a legal or beneficial interest in the PTC will be associated with the PTC for the purposes of the PTC Regs. However, remuneration paid to or received by a director of a BVI PTC in respect of 'professional director services' is permitted so long as the director is not otherwise associated with the PTC. The questions of what amounts to professional director services and whether a director is otherwise associated with a BVI PTC are determined on the facts of each case but the prudent approach for BVI PTCs conducting unremunerated trust business is to interpret 'professional director services' narrowly and 'associated' widely.

Related trust business

Whereas a BVI PTC conducting unremunerated trust business may provide trust business in relation to any type if trust, related trust business is more restrictive and may only be conducted in relation to a 'qualifying trust' or a 'group of related qualifying trusts'. For these purposes:

- a qualifying trust is one in which every beneficiary is a charity, the settlor, or a 'connected person' in relation to the settlor (a connected person is someone who falls within the class of family relationships listed in PTC Regs); and
- one trust is related to another where the same settlor created both trusts or the settlors of the trusts are connected persons, and for a group of related trusts to exist each trust within the group must be related to all the others.

A BVI PTC conducting related trust business may receive remuneration for its services (and may therefore make a profit) and persons associated with the PTC, including lay directors, may be paid. However, the range of trusts in respect of which a BVI PTC can conduct related trust business is of course more limited, the intention being for related trust business to be primarily conducted in relation to groups of family trusts.

Registered agent requirements

A BVI PTC must ensure that at all times its RA holds a Class I trust licence under the BTCA. The RA is responsible for monitoring the PTC's compliance with the PTC Regs and this is achieved by imposing two main duties on the RA:

- it must refuse to accept its appointment as RA unless it has taken all reasonable steps to satisfy itself that the PTC is only carrying on trust business which is unremunerated trust business or related trust business and that the PTC is not soliciting trust business from members of the public (if the PTC has not commenced its trust business then the RA must be satisfied that when it does it will operate within these parameters); and
- it must notify the FSC in writing if, at any time, it forms the opinion that the PTC is in breach of these requirements.

The RA's duty to monitor the PTC is on-going and consequently it must conduct periodic reviews to ensure that the PTC remains compliant with the PTC Regs – the frequency of such reviews is dictated by the RA's assessment of the risk that the PTC will fail to comply. The PTC Regs do not provide any detail

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regarding the form of the reviews, however most RAs find it sufficient to request statutory declarations of compliance from the PTC's directors at least annually. In addition to undertaking the reviews, the RA must take all reasonable steps to ensure it holds (at its office in the BVI) up-to-date copies of the document(s) recording the creation and any variation of all Relevant Trusts and the documents it has relied upon to satisfy itself that the PTC is complying with the PTC Regs.

During any period in which the core requirements or the conduct requirements are not satisfied the BTCA's licensing requirement immediately re-applies, the PTC must remove the statement in its memorandum of association that it is a BVI PTC (it thus ceases to be a BVI PTC), and if it continues to conduct any trust business then it may face enforcement action from the FSC. These consequences will also flow if the PTC's RA ceases to hold a Class I trust licence under the BTCA although in these circumstances a four week grace period is given so that the affairs of the PTC and/or its RA can be regularised.

Benefits

The main benefits of using a BVI PTC are:

- BVI PTCs are not required to obtain a licence or seek express exemption from regulation from the FSC or any other regulatory authority;
- subject to the usual limitations (ie as to undischarged bankrupts etc) anyone may be a director of a BVI PTC;
- BVI PTCs are not subject to any capitalisation requirements and may therefore be incorporated with minimal paid up share capital;
- BVI PTCs do not need to be managed or administered by a regulated trust company or other third party with relevant qualifications or experience and in our experience RAs do not normally seek to be represented on the boards of directors of the PTCs in respect of which they provide registered agent services;
- there is no requirement to disclose (i) the documents and information held by a BVI PTC's RA pursuant to the requirements in the PTC Regs, (ii) details of the PTC's directors and shareholders, or (iii) information about any Relevant Trusts (eg the names of the settlors or beneficiaries) to the Registrar of Companies, the FSC or any other regulatory authority in the BVI;
- BVI PTCs do not need to have a physical presence in the BVI (or anywhere else for that matter);
- the costs of incorporating and maintaining a BVI PTC – a relatively modest annual government fee and RA fees are payable – are very competitive. Using a PTC to provide trust related services also avoids incurring the fees of a third party corporate or individual trustee services provider;
- since May 2013 BVI PTCs have been able to act as the sole trustee, or one of the trustees, of (i) VISTA trusts[1] , and (ii) BVI non-charitable purpose trusts established on or after 1 March 2004 (see our separate briefing notes on these topics for further information);
- PTCs rarely have a public image to maintain and are therefore less sensitive about the reputation risk consequences of taking a given decision or action; and
- the corporate nature of PTCs means that (i) they are usually more familiar entities than trusts to settlors from non-trust jurisdictions, (ii) they are capable of lasting indefinitely, and (iii) they offer all the benefits of limited liability.

The ownership structure of a PTC

Where a BVI PTC is used thought must be given to the question of who should own its shares. This will be particularly important where the PTC acts as trustee because subject to the comments below in the 'Composition of the Board of Directors' section the PTC's shareholder will have power to appoint and remove the PTC's directors and thus effectively control the PTC's actions, including how it administers any Relevant Trusts and deals with the assets held by those trusts. The principal ownership alternatives are set out below.

Individual

The settlor or a member of his family could own the shares but tax or other factors often mean it is unattractive for those individuals to have an ownership interest in the PTC – in fact it is usually preferable for the PTC shares to have no beneficial owner so that the PTC's ownership is not attributable to any particular person. Another problem with ownership by an individual is that when the individual dies it will be necessary for his personal representatives to extract a grant of representation in the BVI before the shares can be transferred to the next owner.

This process can cause delay and administrative burden during what may be an important period for the PTC and the Relevant Trust(s). Equally, identifying the next owner may be problematic if the shareholder died intestate or failed to implement adequate succession planning steps in relation to the PTC shares and these issues can become more complex where the deceased was domiciled in a jurisdiction with forced heirship laws. Indeed, these factors can sometimes result in the PTC shares passing to an individual who the deceased would have deemed unsuitable to control the PTC.

1 "VISTA" is an acronym for the Virgin Islands Special Trusts Act, 2003 (as amended). Broadly speaking, VISTA is capable of applying to trusts governed by BVI law which hold shares in BVI companies. At least one of the trustees of a VISTA trust must hold a licence under the BTCA or be a BVI PTC and the trustee(s) may not also be director(s) of the company/companies held by the trust. Please see our separate briefing note on VISTA trusts for more information.

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Purpose Trust

Placing the shares in a BVI non-charitable purpose trust (a Purpose Trust) offers a solution to these problems. As a result of certain requirements in the Purpose Trust legislation, a BVI corporate trustee services provider which is licenced under the BTCA will almost always be the trustee of a Purpose Trust and will therefore hold legal title to the PTC shares, meaning the requirement to extract a grant of representation on the death of an individual shareholder will never arise.

Purpose Trusts may last indefinitely and they need not have beneficiaries. Instead, the trusts of a Purpose Trust holding PTC shares may simply require the trustee to retain the shares and maintain the PTC in good standing, meaning no person will have any beneficial interest in the shares.

A Purpose Trust established under the BVI's VISTA legislation will enjoy further advantages. Among other things VISTA removes the duty the trustee of the Purpose Trust would otherwise be under to monitor and intervene in the management of the PTC, meaning that other than in extreme circumstances all decisions regarding how the PTC operates will be taken by the PTC's directors, free from any interference from the trustee of the Purpose Trust. Additionally, unless the terms of the trust provide otherwise the trustee of a VISTA Purpose Trust holding PTC shares will be prevented from disposing of those shares without obtaining the agreement of the PTC's directors.

Every Purpose Trust must have an enforcer who will be responsible for ensuring that the trustees carry out the purpose(s) of the trust, a function which is performed by the beneficiaries in the context of traditional non-purpose trusts. The trustee of a Purpose Trust may not simultaneously act as its enforcer but aside from this restriction the enforcer may be any natural or legal person anywhere in the world. Please see our separate briefing note on Purpose Trusts for more information.

Other options

Other ownership options for shares in a BVI PTC include:

- a BVI charitable purpose trust, which may be inappropriate because the settlor does not wish for the PTC shares to be used for genuine charitable purposes at any time during the trust's existence;
- a non-purpose BVI trust (such as a discretionary trust), which may be inappropriate because, among other things, the settlor does not wish for the PTC shares to be used to benefit a beneficiary or class of beneficiaries;
- a non-BVI law trust which, in addition to the above reasons, may not be as well suited to holding BVI assets (such as PTC shares) as a BVI trust and cannot qualify to benefit from the VISTA legislation; and
- a non-BVI law foundation – it is not possible to create a foundation under BVI law. Foundations can be established with the sole object of holding PTC shares. They are incorporated on the instruction of a founder but are not owned by the founder or anyone else so the issues associated with an individual owning an entity (outlined above) will not arise. Foundations can also act as a trustee or provide other trust related services instead of a PTC. The extent to which a foundation conducting those activities would be subject to the BTCA's licensing requirement is not clear.

Composition of the board of directors

Choosing who sits on a PTC's board of directors is a key issue. The initial directors will be selected by the person who incorporates the PTC, which is usually the settlor of the Relevant Trust(s). It is likely that the settlor will want to control the composition of the PTC's board of directors and/or be a member of the board so that he participates in the decisions made by the PTC in relation to the Relevant Trust(s) and the assets held subject to them.

The settlor's choice of directors is likely to be influenced by a range of factors including: (i) their knowledge and understanding of the assets held by the Relevant Trust(s); (ii) their expertise in managing those assets; (iii) their appreciation of the wishes and needs of the beneficiaries; (iv) their understanding of the settlor's wishes regarding the administration of the Relevant Trust(s) and the assets they hold; (v) tax considerations; and (vi) protection of privacy. Residence issues may also be relevant to the settlor's choice, especially if a proposed director resides in a jurisdiction where the tax rules adversely affect the deemed location of the PTC's management and control, or a director is subject to domestic legislation under which he can be forced to reveal information about the PTC, the Relevant Trust(s) or the assets held by the Relevant Trust(s).

Having taken account of the above considerations a settlor will frequently wish to appoint members of his family to the PTC's board of directors and in these circumstances potential conflicts of interest need to be managed. This can be addressed in the constitutional documents of the PTC, for example by regulating voting rights where personal conflicts of interest arise during the course of the PTC's business, or in the trust document via the mechanisms summarised immediately below.

If the shares of a BVI PTC are placed in a VISTA trust a feature of the VISTA legislation known as the 'office of director rules' permits the trust document to contain provisions which regulate how the trustee should exercise its voting powers as the PTC's shareholder in relation to the appointment, removal and remuneration of the PTC's directors. The office of director

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rules may be prescriptive as to the circumstances in which directors should be appointed and removed by the trustee. Alternatively, they may require the trustee to seek approval from the settlor or another person (eg the protector or enforcer of the trust) before effecting any changes to the composition of the board of directors, or provide that the trustee must follow the directions of the settlor or another person in relation to all such matters.

Similar provisions can be included in the terms of a non-VISTA trust which holds BVI PTC shares. However, unlike the office of director rules in a VISTA trust, such provisions will not be sanctioned by a specific statutory regime and may therefore give rise to concerns about whether diluting the trustee's powers and discretions as the PTC's shareholder undermines the validity of the trust.

Whatever structuring mechanisms are employed in relation to the appointment, removal and remuneration of directors and the other aspects of a BVI PTC's affairs (such as investment policy), a prevailing issue for advisers is to ensure that the settlor, the directors of the PTC, and any other relevant parties understand the scope of their respective powers and how the structure will operate in practice.

Settlor involvement

Involving the settlor in the administration of a structure which includes a BVI PTC can be achieved in several ways. Dependent on tax and other advice, such involvement usually takes one or more of the following forms:

- the settlor may be the protector of and/or the person vested with reserved powers under the terms of the Relevant Trust(s);
- he may be a member of the PTC's board of directors;
- he may have power to control the appointment, removal and remuneration of the PTC's directors, whether pursuant to the VISTA office of director rules or otherwise;
- he may be a member of an investment committee/council established to consult with the PTC's board of directors regarding certain significant decisions affecting the Relevant Trust(s), such as investment policy or the sale of assets; and/or
- he may be the protector or enforcer of a trust which holds the PTC's shares and have certain powers in that capacity.

The settlor could also own the PTC shares but, for the reasons explained above, this may have undesirable consequences.

Operation and funding of a PTC

A BVI PTC's RA will require a certain amount of information in order to discharge its responsibilities under the PTC Regs (detailed above) and this information must be provided promptly.

Information will also need to be shared with the PTC's directors in order for them to discharge their duties. Any professional directors will be particularly concerned about ensuring that the PTC is acting in accordance with the terms of the Relevant Trust(s), that professional advice is sought where appropriate and that proper records are kept.

If the PTC is held by a Purpose Trust or other 'orphaned' structure, thought must be given to how the PTC will meet its maintenance costs, so it can be kept in good standing, and any other costs it incurs (eg the cost of taking professional advice). The person who creates the PTC will usually assume responsibility for meeting these costs on behalf of the PTC, but if there is a preference for the PTC to be self-sufficient then it will need to hold enough cash for it to discharge its liabilities or be able to meet those liabilities from the liquid assets in the Relevant Trust(s).

Family awareness

The extent to which the beneficiaries of a trust structure (commonly the settlor's family) are aware of the manner in which the structure will operate, including the role of any PTCs, is a key issue for settlors.

Often individual trusts are supported by a letter of wishes in which the settlor records how he would like the assets held by the trust to be invested and ultimately used to benefit his chosen beneficiaries. In the context of more complex structures a family charter or other family 'constitutional' document can provide guidance to a PTC (or other trustee) as to the overarching strategic and other long-term aims which motivated the settlor to create the structure. A family charter can also be used to formally state the role of any PTCs and other power holders under the structure.

Letters of wishes and family charters are a useful means of sharing information with beneficiaries and other participants with a view to encouraging a uniform approach to the administration of a trust structure, thereby reducing the potential for dispute.

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Conclusion

BVI PTCs provide a flexible and cost-effective way of arranging bespoke trust related services. They also offer a convenient platform from which the settlor, his family and any others he selects can participate in a meaningful way in the management of a trust structure. For these reasons BVI PTCs have proved very popular with settlors who do not wish to transfer their assets to an independent third party trustee who may be located in a far flung jurisdiction.

Particular care needs to be taken when determining the scope of a BVI PTC's powers – it is critical that all relevant parties understand the extent of the PTC's rights and responsibilities in relation to the Relevant Trust(s) and are aware of their respective roles in managing and operating the PTC. The relevant parties must also appreciate that where the PTC is a trustee of a Relevant Trust it will be a fiduciary and must therefore act in the best interests of the Relevant Trust's beneficiaries at all times, unless this standard of care is validly diluted by the terms of the Relevant Trust or a specific statutory regime, such as VISTA (the PTC is also likely to be a fiduciary if it acts as a protector or enforcer of a Relevant Trust so the same considerations will apply in these circumstances). Carey Olsen's experienced team of trust lawyers can guide the parties through these issues.

The BVI has undoubtedly become a jurisdiction of choice in which to establish a PTC. The nature of the regime implemented by the PTC Regs means that BVI PTCs can offer flexible solutions in a variety of situations, particularly when they form part of structures which also take advantage of the BVI's VISTA and Purpose Trust legislation.

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