Using Trusts Effectively in a Cross-Border Context: Case Study - The British Virgin Islands

In recent years, there has been a marked increase in specifically Chinese investment and personal wealth being structured through BVI corporate and trust structures, both indirectly through Hong Kong and Singapore and directly from financial centres in the People's Republic of China (the "PRC") itself.

In 2003, the BVI's trust legislation was substantially revised in a number of important respects, effective 1 March 2004. Key among these for present purposes was the enactment of the Virgin Islands Special Trusts Act 2003 ("VISTA") and a new section 83A of the Trustee Act which, amongst other things, clarified the BVI rules of private international law concerning transfers of foreign assets into BVI trusts.

VISTA was designed to allow for the establishment of a valid trust of the shares of a BVI business company in which (a) the trustee's duty of prudence in investment is excluded so as to allow for and, in an administrative sense, require retention of the shares for the duration of the trust (i.e. even during a period when a prudent trustee acting in the interests of the beneficiaries would sell the investment in order to make a profit or avoid a loss), (b) the trustee's power and duty of intervention in the management of the company could be modified or even excluded and (c) in which a settlor could specify in advance and for the duration of the trust how rights attaching to the shares, especially voting rights which control appointments to the board of the company, should be exercised ("Office of Director Rules").

VISTA has proven popular because of the very high degree of indirect control over assets which have been settled into trust that the legislation permits: the Office of Director Rules may be drafted so that the settlor's appointees are appointed to the

board and, of course, removed in accordance with his wishes thus leaving the settlor in de facto control of the asset settled into trust.

Since the subject-matter of a VISTA trust must be shares in a BVI business company, there is no difficulty from the point of view of private international law about their transfer into trust. To the extent that it is desired to put other assets into trust, these can continue to be held directly by e.g. a foreign operating subsidiary whose shares are acquired by the BVI business company in exchange for shares in the latter.

It may, however, be desired to place assets other than the shares of a BVI business company directly into an offshore trust. An ordinary trust may be established under BVI law for this purpose. How are such foreign assets to be transferred into it? The answer is comprehensively set out in section 83A of the Trustee Act which was drafted in consultation with a leading UK academic in the field of private international law.

Section 83A provides first, by subsection (8), that not merely the formal and essential validity of a disposition but also the general capacity of a transferor to make a disposition of intangible property shall be determined in accordance with the First Schedule and, if not provided for in the First Schedule, in accordance with the law under which the property came into existence; and, second, by subsection (9), that the capacity to subject property to a trust, as distinct from the capacity to dispose of that property, shall be determined in accordance with the law governing the essential validity of the trust. Where the trust in question is a BVI trust, this necessarily means that no question of the transferor's capacity in this second sense will arise as a matter of BVI law.

As regards general capacity, however, that is to be determined pursuant to subsection (8) along with questions of formal and essential validity under the rubric of the First Schedule, which provides a table consisting of two columns. The one on the left identifies seven different categories of intangible property and that on the right the law which shall determine "questions of essential and formal validity and capacity." Where listed assets are in question, the category that will be of primary relevance is the first namely that comprising "shares in a body corporate." The effect of the corresponding provision in the right hand column is that questions of essential and formal validity and capacity will be determined by the law of the state of incorporation. Where, therefore, the listed assets in question are those of PRC incorporated entities, the necessary formalities and proper mode of transfer of such assets to a trustee to be held on the terms of a BVI trust are, quite simply, those applying under PRC law, the transferor's general capacity to dispose of the property

being likewise determined but the particular capacity to settle property on trust being a matter of BVI law (and thus not an issue). Where, however, foreign securities are listed on a Chinese exchange, the applicable law to determine formal and essential validity and general capacity will therefore be the law of the place of incorporation of the foreign entity whose securities are listed (subject to the provision concerning change of place of incorporation) but the question of capacity to settle property on trust will remain a matter of BVI law exclusively and thus, from the BVI point of view, not an issue.

Raymond Davern
Head of Private Client, British Virgin Islands

1 (284) 852 1122
raymond.davern@conyersdill.com

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of Bermuda, British Virgin Islands, Cayman Islands, Cyprus and Mauritius. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters. Conyers' structure, culture and expertise enable responsive, timely and thorough service. Conyers provides clients with the highest quality legal advice from strategic global locations including offices in the world's leading financial centres in Europe, Asia, the Middle East and South America. Founded in 1928, Conyers comprises 550 staff including 150 lawyers. Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

For more information please contact:
Naomi Little
+1 (441) 298 7828
naomi.little@conyersdill.com
www.conyersdill.com