



# Bermuda Trusts

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## Preface

This publication has been prepared for the assistance of those who are considering the formation of trusts in Bermuda. It is not intended to be exhaustive nor a substitute for proper legal advice but provides a basic guide to the trust concept and an outline of trust law and trust administration in Bermuda for clients of Conyers Dill & Pearman.

Clients are advised that they should consider the implications in their home jurisdiction of establishing a Bermuda trust and should consult with their own legal, financial and other professional advisers as appropriate.

We also recommend that our clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

**Conyers Dill & Pearman**

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## STATUTORY REFERENCES

References to legislation are Bermuda Acts unless otherwise stated.

<b>Abbreviation</b>	<b>Name of Act</b>
<b>PTFA</b>	Pension Trust Funds Act 1966
<b>Trustee Act</b>	Trustee Act 1975 (as amended)
<b>1987 UK Act</b>	Recognition of Trusts Act 1987 (UK)
<b>1989 Act</b>	Trusts (Special Provisions) Act 1989 (as amended)
<b>Trustee Regulation Act</b>	Trusts (Regulation of Trust Business) Act 2001 (as amended)
<b>1998 SP Amending Act</b>	Trusts (Special Provisions) Amendment Act 1998
<b>1999 Amending Act</b>	Trustee Amendment Act 1999
<b>Hague Convention</b>	Hague Convention on the Recognition of Trusts
<b>NPS(OP)A 1998</b>	National Pension Scheme (Occupational Pensions) Act 1998
<b>2004 Amending Act</b>	Trustee Amendment Act 2004
<b>2004 SP Amending Act</b>	Trusts (Special Provisions) Amendment Act 2004
<b>Perpetuities Act</b>	Perpetuities and Accumulations Act 2009
<b>2014 Amending Act</b>	Trustee Amendment Act 2014
<b>2014 SP Amending Act</b>	Trusts (Special Provisions) Amendment Act 2014
<b>2015 PA Amending Act</b>	Perpetuities and Accumulations Amendment Act 2015
<b>2020 SP Amending Act</b>	Trusts (Special Provisions) Amendment Act 2020

### 1. INTRODUCTION – PLANNING USES FOR BERMUDA TRUSTS

Bermuda trusts are employed to achieve a variety of estate, personal, financial, tax or other business planning objectives. These objectives often include one or more of the following:

- provision for spouses and dependents;
- protection of assets from future personal liability;
- minimization of estate/inheritance tax, income tax and capital gains tax;
- preservation of family wealth and continuity of family businesses;
- efficient and timely distribution of assets upon death;
- protection against exchange controls;
- creating or making provision for charities;
- establishing pensions or employee stock option plans;

- ownership of particular assets or of investments generally;
- lender protection in corporate financing transactions.

## **2. THE TRUST CONCEPT**

The trust is a legal concept originally developed by English courts of equity although it is now governed, to a certain extent, by legislation. Bermuda trust law is based on English trust law but has been enhanced in certain areas by Bermuda legislation. English common law is of highly persuasive authority in Bermuda.

### **2.1. Description of Trust**

A trust is the legal relationship created whereby a person (the "settlor") gives property (the "trust fund") to a trustee or trustees to hold the legal title to the trust fund for the benefit of certain persons (the "beneficiaries") or for a specified purpose. Some trust arrangements also include a "protector".

The characteristics of a trust are described in section 2(2) of the 1989 Act as follows:

- (a) the trust assets constitute a fund separate from the trustee's own property;
- (b) legal title to the trust assets are held in the name of the trustee or in that of a nominee on behalf of the trustee;
- (c) the trustee has the power and also the duty to manage and dispose of the trust assets in accordance with the terms of the trust for the benefit of the beneficiaries in accordance with the fiduciary duties imposed upon him by law.

### **2.2. The Settlor**

The settlor may also be a beneficiary and, in certain circumstances, can act as a co-trustee. The settlor cannot be a sole trustee and a sole beneficiary of his trust. A company may act as settlor if it has the corporate capacity to make a gift of its assets or otherwise dispose of them for the purpose of establishing a trust.

### **2.3. The Trustee**

The trustee is the person, or persons, who hold(s) the legal title to the trust fund and who is obligated to administer the trust for the benefit of the beneficiaries. The trustee can be a company if it has the corporate capacity to act as a trustee.

The trustee stands in a fiduciary position *vis-a-vis* the beneficiaries and is required to honour certain stringent duties imposed by law (outlined in paragraph 4).

### **2.4. The Beneficiaries**

The beneficiaries can be individuals, companies and other legal entities. Trusts can also be established to further charitable or non-charitable purposes.

In order for a private trust to be valid, the identity of the beneficiaries must be capable of being established with sufficient certainty. Thus, in the case of a trust for groups or classes of persons, the trustee must be able to determine whether any given person is or is not a member of that group or class.

## **2.5. The Trust Fund**

The property constituting the trust fund can be any type of real or personal property (e.g. cash, securities, real estate, personal effects or other tangible or intangible property). The property must be capable of being ascertained in order to be subject to a trust.

## **2.6. The Protector**

The protector is often a person who is a friend or advisor of the settlor. The protector can also be a committee of individuals or a company. The inclusion of a protector is not necessary for the creation of a Bermuda trust, but a settlor may wish to include such a role. The extent of the protector's role and powers should be considered carefully and the trust deed drafted accordingly. The role of the protector is considered in more detail in paragraph 8 below.

# **3. TYPICAL FORMS OF TRUST**

## **3.1. Discretionary Trust**

The discretionary form of trust often provides the most flexible and efficient structure for the settlor and the beneficiaries.

After establishing the trust, the settlor will normally have divested himself of any ownership interest in the assets held in the trust (unless he retains certain powers).

Under the terms of a discretionary trust, the trustee is generally given wide discretionary powers over the trust fund and decides (according to the beneficiaries' best interests as a whole) when and to which beneficiary he should distribute capital and/or income of the trust, and in what proportions. For this reason, the beneficiaries are regarded as not having a specific interest in the trust but only a right to be considered when the trustee exercises his discretion.

## **3.2. Fixed Interest Trust**

Under a fixed interest trust, primary beneficiaries will normally be granted a right to receive the income and capital of the trust fund and the trustee will have little or any discretion over the nature and extent of distributions from the trust fund.

The fixed interest form of trust is used for estate planning purposes or to ensure that certain property passes on stipulated terms and at stipulated times for the benefit of relevant family members in an orderly manner. It is often specially drafted to suit the particular planning goals contemplated by the settlor (e.g. the settlor of a fixed interest trust can provide that the beneficiaries will not be able to sell off or otherwise dispose of their inheritance in a hasty manner). Many modern pension trusts take the form of fixed interest trusts where the trustee holds a fixed share for the member (beneficiary) of the pension scheme.

### 3.3. Charitable Trusts

A charitable trust may be established under Bermuda law to create a charitable fund or to make provision for existing charitable institutions or purposes.

A trust under Bermuda law, is charitable if its purposes fall exclusively within one or more of the following categories of charitable purposes specified by the Charities Act 2014, as amended:

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of arts, culture, heritage or science;
- the advancement of sport;
- the advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;
- the advancement of environmental protection or improvement;
- the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage;
- the advancement of animal welfare;
- the promotion of the efficiency of the armed forces of the Crown, police, fire and rescue or ambulance services;
- the provision of facilities for recreation or other leisure-time occupation if such facilities are in the interests of social welfare; or
- any other purpose that may reasonably be regarded as analogous to, or within the spirit of any of the above purposes.

Under the Charities Act 2014, the reference to public benefit is given the meaning used for the purposes of the law relating to charities in England and Wales. The common law of England and Wales and other commonwealth jurisdictions is used to determine issues relating to charities in Bermuda generally. If a trust is established for purposes which are not exclusively charitable, it may be treated as a private non charitable trust. Accordingly, such a trust will be held invalid unless the trust is for the benefit of certain persons and limited to a specified perpetuity period within the rule against perpetuities or unless it is properly constituted as a purpose trust in accordance with the 1989 Act (see following paragraph).

A charitable trust may continue indefinitely.

### **3.4. Purpose Trusts**

The concept of a non-charitable purpose trust was first introduced into Bermuda law under the 1989 Act. Bermuda was the first offshore jurisdiction to provide for these trusts by statute.

The 1989 Act permits the creation of a trust for the benefit of purposes (whether charitable or not) as opposed to specific persons. A purpose trust may continue indefinitely, however, the rule against the remoteness of vesting, as modified by the Perpetuities Act, will apply to a purpose trust.

The 1998 SP Amending Act introduced a number of refinements to non-charitable purpose trusts aimed at enhancing their reputation as effective offshore vehicles in a variety of applications, particularly commercial transactions. Essentially, the 1998 SP Amending Act provides that a trust may be established for non-charitable purposes provided that such purposes are sufficiently certain for the trust to be carried out, lawful, and not contrary to public policy. It is no longer required for a trustee to be a "designated person" (i.e. a local licensed trust company or other local professional not required) and the 1998 SP Amending Act now provides expressly who has standing before the courts.

The uses of purpose trusts are summarized at paragraph 9 below.

## **4. TRUSTEES DUTIES AND TRUST ADMINISTRATION**

### **4.1. Trustees' Duties**

Trustees are required by law to fulfil certain fiduciary duties. The most important duties include the following:

- (a) to act honestly and in good faith for the best interests of the beneficiaries in accordance with the terms of the trust;
- (b) to bring and keep under their control trust property which must be kept separate from their private property and from any other property of which they are trustees;
- (c) to obey the terms of the trust deed unless all the beneficiaries are adult and consent to trustee actions contrary to the terms of the trust or the court sanctions a variation of the trust's terms;
- (d) to act impartially between the beneficiaries. This duty amounts to a fair balancing of the interests of beneficiaries, particularly where certain beneficiaries are entitled to current income and others to future interests in capital;
- (e) when considering investment of the trust fund, to act as a prudent investor would and exercise reasonable care, skill and caution when investing or applying trust property. Pursuant to the 1999 Amending Act, trustees of Bermuda trusts have the power, subject to a contrary intention expressed in the terms of the trust, to invest and apply trust property in the purchase or acquisition of property of any kind, whether or not income producing.

- This abolished the previous duty of trustees to preserve the trust property and sell any wasting assets;
- (f) to exercise reasonable care, skill and caution when choosing a delegate or supervising a delegate. The basic rule under English common law was that a trustee could not delegate the exercise of his duties. The 1999 Amending Act significantly widened trustees' delegation powers, allowing them to delegate all functions of an administrative or managerial nature to an agent. Trustees must exercise reasonable care, skill and caution when selecting an agent. Subject to wider authority in the trust deed, there is a list of trustee functions which are not delegable, such as formulating an investment policy for the trust, or exercising discretion to make distributions of income or capital for the benefit of a beneficiary;
  - (g) to exercise reasonable care, skill and caution in the administration of the trust and the investment of the trust assets. Unpaid trustees are bound only to use such due diligence and care in the management of the trust as a man of ordinary prudence, diligence and vigilance would use in the management of his own affairs. A higher standard of diligence and knowledge is expected from professional trustees who receive remuneration for their services (unless the trust deed provides otherwise);
  - (h) to act unanimously unless otherwise expressly authorized under the trust deed. Accordingly, investments and all trust property should be in the joint names or held to the order of all trustees;
  - (i) to act gratuitously, unless remuneration is authorized by the trust deed. The 1999 Amending Act introduced an exception to this rule so that now licensed trust companies are entitled to "reasonable remuneration" for their services as trustee;
  - (j) not to profit from the trust's property nor to purchase trust property for personal enjoyment. A trustee must account to the beneficiaries for any profit or other benefit received by virtue of his position as trustee. The purchase by a trustee of trust property is voidable by a beneficiary, unless authorized by the trust deed, irrespective of the fairness of the price paid; and
  - (k) to keep accounts and, at all reasonable times and on request, to furnish any beneficiary with accounts. Pursuant to the Trusts (Regulation of Trust Business) Exemption Order 2002, as amended, an exempted company must retain information on trusts for which it acts as trustee and trust records of account must be kept for a period of five years from the date on which such records were prepared;
  - (l) to segregate client funds from the trustees own funds or funds that it holds in respect of other business, and to maintain books of accounts and records in such form that such clients funds can be readily identified at any time. This requirement is pursuant to the recent amendments made in 2019 to the Trustee Regulation Act.

## 4.2. Administration of the Trust

Trustees are required, as a matter of law, to keep proper records and accounts of all trust assets and trust business. As a matter of proper administrative practice, all substantive trustee decisions or business decisions taken at the trustee level should be approved and recorded in trustee minutes.

The trustees should hold at least one or two formal trustee meetings each year in order to review and consider the accounts, trust business and financial position of the trust as a whole.

Trustees are required by law to ensure that they are properly informed as to the value of the trust assets and the nature of the business activities of any corporate entities held by them. Successor trustees are also impressed with a duty to review the history of the trust's business and examine the accounts and other trust records in order to satisfy themselves that no prior breach of trust has occurred.

Where the trust assets are being re-invested on a regular basis, the trustees will often recommend that a professional investment advisor be employed to make recommendations to the trustees so that the trustees have professional advice upon which to base their investment decisions or to assist the management of the assets.

## 5. JURISDICTION OF THE BERMUDA COURTS

Section 9 of the 1989 Act (as amended by the 2020 SP Amending Act) sets out the jurisdiction of the Supreme Court of Bermuda (the "Supreme Court") in respect of Bermuda trusts and foreign trusts with a Bermuda connection. Under this section, the Supreme Court has jurisdiction to adjudicate claims concerning the validity, construction, effects or administration, including any of the matters set out in section 7(a) – (j) of the 1989 Act, such as appointment and removal of trustees, duties of trustees, variation and termination of a trust and distribution of trust assets.

Notably, the jurisdiction of the Supreme Court will be applicable as provided under this section notwithstanding that the person against whom the claim is made is not in Bermuda or (where applicable) that any wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

It is usually advisable to ensure that substantive contacts with Bermuda are established in order to create a clear jurisdictional nexus (i.e. the trust administration should take place in Bermuda or there should be at least one Bermuda resident trustee).

However, it should be noted that there is no requirement that the settlor be resident in, or have any physical connection with, Bermuda. Nor is it necessary, although it may often be advisable, to have the trust property situate in Bermuda.

## 6. GENERAL LEGAL CONSIDERATIONS

### 6.1. Bermuda Legislation

The principal legislation governing trusts in Bermuda is the Trustee Act, (as amended by the 1999 Amending Act, the 2004 Amending Act and the 2014 Amending Act), the 1989 Act (as amended by the 1998 SP Amending Act, the 2004 SP Amending Act, the 2014 SP Amending Act and the 2020 SP

Amending Act), the Perpetuities Act (as amended by the 2015 PA Amending Act), the Trustee Regulation Act, and the Conveyancing Amendment Act.

The Trustee Act, amongst other things, grants certain powers to trustees of Bermuda trusts, including the power to apply income for maintenance and education and to advance capital to a beneficiary who is entitled to a presumptive share. These powers will apply unless excluded or restricted or varied by express terms in the relevant trust deed. The Trustee Act also grants the court jurisdiction to vary a trust in certain circumstances.

The 1989 Act (as amended by the 1998 SP Amending Act) is comprised of three parts that deal with three quite separate matters:

- (a) The first part:
  - (i) clarifies that the governing law of a trust can be a matter of choice and can be changed to another law;
  - (ii) sets out the circumstances in which the Bermuda court has jurisdiction over trusts (see paragraph 5 above);
  - (iii) establishes favorable rules regarding the capacity of a settlor to create Bermuda trusts; and
  - (iv) protects Bermuda trusts from attack pursuant to foreign laws.
- (b) The second part contains the statutory basis for the establishment and operation of non-charitable purpose trusts (see paragraph 3.4 above).
- (c) The third part sets out a standard list of administrative provisions that can be incorporated by reference into trust documents and greatly shorten their length.

The Conveyancing Amendment Act introduced conservative provisions to avoid certain dispositions where the dominant intention is to put assets beyond the reach of creditors.

## 6.2. The Hague Convention

By Order in Council, the 1987 UK Act has been made applicable to Bermuda as of 1 June 1989.

The 1987 UK Act incorporates the major provisions of The Hague Convention into the law of the United Kingdom.

Essentially, the 1987 UK Act confirms and clarifies common law conflict of law principles applicable to trusts (e.g. as to jurisdiction and the applicable proper law of the trust) and provides a general descriptive definition of the characteristics of a trust (also confirming the common law position). The 1989 Act also adopts certain of these provisions of the Hague Convention verbatim.

The importance of the 1987 UK Act is the provision of a "codified" set of principles of trust law which can be referred to for the benefit of civil law or other foreign jurisdictions where the concept of a trust is not recognized.

At present, Italy, Australia, Canada, the Netherlands, Luxembourg and the U.K. have ratified the Hague Convention and China, Cyprus, Malta, Liechtenstein, France and the US have signed but not ratified.

### 6.3. The Rule Against Perpetuities

On 1 August 2009, the Perpetuities Act came into force, abolishing the rule against perpetuities (the “Rule”) for Bermuda law trusts in all cases except in respect of Bermuda real estate. Prior to the passing of the Perpetuities Act, Bermuda permitted a fixed trust period of up to a maximum of 100 years. The Perpetuities Act applies to trusts under a will executed on or after 1 August 2009 as well as *inter vivos* trusts settled on or after 1 August 2009. For instruments created on or after 1 August 2009, accumulations of income under a trust are no longer restricted to 100 years.

The PA Amending Act 2015 created an express jurisdiction for trustees of pre-2009 trusts, and also trustees of trusts originally established in other jurisdictions, which had an applicable perpetuity period or similar limitation, but which are now governed by Bermuda law, to make a more simplified, cost effective application to the Bermuda courts to dis-apply or alter the relevant Rule or similar limitations on duration.

### 6.4. Effect of Foreign Laws on Bermuda Trusts

Section 10 of the 1989 Act (as amended by the 2020 SP Amending Act) specifies the circumstances under which any foreign law shall be excluded from application to a Bermuda trust. It provides that no foreign law which is excluded shall apply to the determination of any question concerning a Bermuda trust, including the capacity of a settlor to dispose trust property, any right or interest in or to property disposed upon the trust, the validity of a disposition of, or a declaration of trust in respect of property to be held upon trust, or any obligation or liability of a settlor, trustee or beneficiary.

Pursuant to section 10 of the 1989 Act (as amended by the 2020 SP Amending Act), foreign laws will be excluded in circumstances where it creates, recognises, or defeats or gives a foreign court power to create, recognise, or defeat, any right or interest in or to property, or any obligation or liability on any person by virtue or in consequence of, or in anticipation of:

- (a) The death of a person (other than as a result of a voluntary disposition, whether testamentary or otherwise, by the deceased);
- (b) The creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familiar relationship, whether by blood or adoption; or
- (c) Bankruptcy, liquidation or an analogous insolvency process, including a provisional process or a process for restructuring of debts.

It states that no foreign law shall apply to the determination of any question concerning the validity, construction, effects or administration of a Bermuda trust, including the matters set out in section 7(a) – (j) of the 1989 Act. This, however, will not apply where foreign land is concerned, or if foreign law has been chosen to apply to any severable aspect of a Bermuda trust in accordance with section 8 of the 1989 Act.

These protective measures are further supplemented by section 11 of the 1989 Act (as amended by the 2020 Amending Act), which prevents the enforcement or recognition of any order of a foreign court where such order is conflict with section 10 of the 1989 Act (as amended by the 2020 SP Amending Act).

The section is intended to clarify the position that Bermuda trusts will be held valid, if contested in a Bermuda court, when subject to a challenge based on foreign forced heirship laws, mandatory community property matrimonial laws and, in certain cases, when challenged under foreign bankruptcy laws. These rules, originally introduced in the 1989 Act, have been enhanced by the 2004 SP Amending Act and the 2020 SP Amending Act, which further strengthens the position of Bermuda trustees in resisting any such litigation.

## **6.5. Statutory Hastings-Bass**

The 2014 Amending Act inserted section 47A into the Trustee Act, giving the court statutory jurisdiction to remedy the negative effects or consequences of acts or omissions made by settlors, trustees or other fiduciaries, otherwise known as the ‘Rule in Hastings-Bass’. There are two parts to the exercise of the court’s jurisdiction:

- (a) first, the threshold test: two conditions must be met before the jurisdiction can be invoked (see below); and
- (b) second, if the jurisdiction is engaged, the court then has discretion to set aside the exercise of the fiduciary power in whole or in part, and either unconditionally or on such terms and subject to such conditions as it thinks fit.

The conditions that engage the court’s jurisdiction reflect the standard requirements of the traditional Hastings-Bass rule as follows:

- (a) the person exercising the fiduciary power must have either failed to take into account a relevant consideration, or has taken account an irrelevant consideration; and
- (b) the exercise of the power must be so flawed that but for that flaw, the power holder would not have exercised the power, would have exercised it but on a different occasion to that on which it was exercised or would have exercised the power, but in a different manner.

## **7. SETTLORS RESERVED POWERS**

The 2014 SP Amending Act added a new s.2A which provides statutory confirmation of the settlor’s right to reserve or grant those powers or interests specified without compromising the validity of the trust structure or causing the trust property to become part of the settlor’s estate. The 2014 SP Amending Act expressly states that any or all of the following powers can be reserved by the settlor or granted to any other person:

- (a) in the case of a reservation to the settlor or other donor of trust property, a power to revoke the trust in whole or in part;
- (b) a power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;

- (c) a power to decide on or give directions to advance, appoint, pay, apply, distribute or transfer the trust property;
- (d) a power to act as, or give directions as to the appointment or removal of, directors or officers of companies owned by the trust, or to direct the trustees how to exercise voting rights with respect to the shares of such companies;
- (e) a power to give directions in connection with investments or the exercise of any powers or rights arising from such trust property;
- (f) a power to appoint, add, remove or replace any trustee, protector, enforcer or other office holder or advisor;
- (g) a power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;
- (h) a power to change the governing law and the forum for administration of the trust; and
- (i) a power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of a person or the persons specified in the trust instrument.

The 2014 SP Amending Act makes it clear that trustees will not be in breach of their fiduciary or equitable duties for complying with the valid exercise of the powers specified in the 2014 SP Amending Act. It also confirms that no person (unless formally appointed as trustee) will be deemed to be a trustee by reason only of the reservation or grant of any of the specified powers.

## 8. PROTECTORS

There is no statutory definition of a "protector" in England or Bermuda. However, the practice of designating certain persons to be protectors in offshore trust deeds is quite common, especially where the settlor is from a country which does not recognise the concept of a trust.

The protector is usually a person who is a close friend or other confidant of the settlor. A protector may be one individual, a committee of individuals or a company.

As well as an express power to receive certain information about the trust, a protector often holds powers such as:

- (a) power to remove and appoint trustees;
- (b) power to agree trustee fees;
- (c) power to vote or consent to the addition or removal of beneficiaries; and
- (d) power to consent to the exercise of certain (dispositive) trustee powers.

Whether the protector is deemed as having fiduciary obligations depends upon the type of powers that he or she holds under the trust. Dicta in the Bermuda case *Von Knieriem v Bermuda Trust Co. Ltd.* indicated that the power to remove and appoint trustees is a fiduciary one so that the exercise of the

power can potentially be reviewed by a court of law. In the Bermuda case of *A and 6 others v C and 13 others* the protector had a fiduciary role and the case confirmed that, in considering whether to consent to a decision by a trustee to exercise certain powers, the protector has an independent discretion to determine the merits of that decision (not a duty to merely check the legality of the trustee's decision), unless the trust deed expressly limits the extent of the protector's powers.

A protector is not a trustee and where protector powers are conferred it is important for the trust deed to be clear on how those should be exercised to avoid any doubt about the extent of the protector's role and discretion. This can also include a provision expressly setting out if the Protector has fiduciary obligations or not. Accordingly, careful drafting of the trust deed to deal with these matters is crucial.

## 9. PURPOSE TRUSTS

The 1989 Act provides a statutory basis from which to create trusts for non-charitable purposes in Bermuda. This is something that English law, with some anomalous exceptions, has generally declined to give legal effect.

The 1989 Act was amended by the 1998 SP Amending Act to provide increased flexibility in the structuring of purpose trusts as well as clarifying the definition of purpose trusts in Bermuda, with the aim being to provide a more streamlined approach to the administration of purpose trusts.

A purpose trust will be valid provided that its purposes are:

- (a) sufficiently certain to allow the trust to be carried out;
- (b) lawful; and
- (c) not contrary to public policy.

Essentially a purpose trust has no specified beneficiaries who would have an enforceable claim or interest in the trust fund. It should be noted that while the rule against perpetuities (otherwise known as the rule against excessive duration) does not apply to purpose trusts created under the legislation, the rule against remoteness of vesting still applies to purpose trusts created under the legislation.

However, the statutory definition of a Bermuda purpose trust allows for a person or company to receive indirect or intangible benefits without disqualifying the trust from the definition of a purpose trust.

Aside from no beneficiaries, the other elements of the trust relationship are present. A trustee receives property from some person (or may declare a trust) and holds and distributes that property in accordance with fiduciary obligations. Those obligations are not to act in the best interests of beneficiaries, but to administer the trust property in fulfilment of the stated purposes. The stated purposes may be such that they are carried out through the trustee expending that property until it is exhausted or the trust terminates, or they may be carried out by the trustee holding onto specific property and using it or controlling it in a certain way. An example of the first of these might be spending money to promote a particular political cause or quasi-philanthropic cause. An example of the second might be to hold shares in a company that are to be voted so as to perpetuate a particular type of business or to ensure that the company carries out a particular activity.

Before the 1998 SP Amending Act, a purpose trust had to have an "enforcer". The "enforcer" could obtain a petition from the court forcing the trustees to fulfil their obligations. It became clear that, in practice, any enforcement really came from the courts and that the role of the enforcer was less significant than originally thought. The 1989 Act therefore, was amended, allowing any of the following people the right to petition the court:

- a person appointed under the trust for this purpose;
- the settlor, (unless express provision to the contrary);
- a trustee of the trust; and
- any person the court feels has sufficient interest in the enforcement of the trust.

The Attorney-General may also make an application to the court where there are no other persons who are willing and able to make an application to the court.

Previously, only those on the list of "designated" persons could be appointed trustee. Under the 1998 SP Amending Act any person, wherever resident, may be appointed trustee, thus reflecting general trust law and allowing greater flexibility.

Purpose trusts continue to be a popular option for the promotion of Bermuda companies to participate in transactions (such as asset financing where an "orphan company" is desirable), or to perform specific activities (such as owning a private trust company which acts as the trustees of a particular trust or group of trusts).

## **10. LICENCING REQUIREMENTS OF BERMUDA TRUSTEES**

The Trustee Regulation Act, which came into effect on 25 January 2002, provides that any person who carries on "trust business" in or from Bermuda must be licensed unless he is covered by one of the exemptions under the Trusts (Regulation of Business) Exemption Order 2002, as amended.

"Trust business" is defined as "the provision of the services of a trustee as a business, trade, profession or vocation".

There are two types of licence available: unlimited and limited licences. Only trust companies are permitted to hold unlimited licences whereas individuals or partnerships are restricted to limited licences only. A limited licence trustee may hold trust assets in an amount not exceeding an authorised amount, currently set at \$30 million. The underlying policy objective is that all trust business of significant size and complexity should be conducted inside a trust company.

A limited licence trustee may hold trust assets in an amount exceeding the authorised amount provided an unlimited licenced trustee is appointed to manage and administer the excess amount.

An individual trustee is exempted from the licencing requirements where the trustee is:

- (a) a co-trustee of a trust and at least one of the other co trustees is an unlimited licenced trustee;

- (b) a member of recognised professional body in Bermuda;
- (c) a professional person and appoints a specified licenced trust company to maintain the trust records; and
- (d) a trustee of certain pension funds.

Trustees who are seeking to be exempted from licensing pursuant to the Trustee Regulation Act are required to apply for an exemption.

A private trust company is exempted from the licensing requirements although it is required to state the nature and scope of the business, being that business which is set out in the Memorandum of Association, in the written notice confirming that the company qualifies for exemption, and thereafter, on or before 31 March in every year that it continues to qualify by completing and submitting the BMA the prescribed form of declaration.

Trust licensees are regulated by the BMA. They are required to provide the BMA with such information as may be reasonably required for insuring it is complying with the provisions of the Trustee Regulation Act, to maintain trust records and separate accounts and abide by the Code of Conduct.

## **11. PRIVATE TRUST COMPANIES**

A private trust company may be incorporated in Bermuda with the limited object of acting as trustee for a restricted class or group of trusts, and is advantageous for a number of reasons.

The cost of incorporating and operating a private trust company may be lower than the fees of a professional trust corporation. Use of such a company ensures greater flexibility and confidentiality and allows the settlor and his family or friends, if he so wishes, to play an active role by serving on the board of directors or by owning the shares of the Company. The shares of the company may be held in a purpose trust, charitable trust or other private trust.

The private trust company also has a role to play in reducing the potential liability of professional trustees. Due to the increasing risk of being sued both by beneficiaries and third parties, professional trustees are increasingly reluctant to take ownership of assets or participate in ventures where substantial risks may be present, such as owning commercial real estate in high tax jurisdictions, venture capital investments or companies which own ships or aircraft. The professional trustee's preference is normally for a diversified portfolio of low risk investment. In such circumstances, the incorporation of a private trust company may be advisable. The professional trustee is then able to provide management and administration services to the trust company rather than acting as trustee.

## **12. PENSION TRUSTS AND EMPLOYEE PROVIDENT FUNDS**

Employee benefit plans and/or international pension plans are often set up in Bermuda by subsidiaries of multi-national corporations.

Usually such plans are established to benefit employees who are nationals of different countries or who happen to travel from country to country for employment periods of several years in each country. The common advantages to utilizing such plans are:

- (a) less regulation of such plans in Bermuda (whereas there may be complicated regulations in the home country of the multi-national);
- (b) one international plan can be used to cover an employee who travels from country to country instead of moving him from separate plans applicable to each country;
- (c) the lower cost of administration of the foreign plan; and
- (d) complete freedom as to the type of investment and the type of design of the benefits which may be instituted under a Bermuda plan.

### **12.1. Structure**

The usual structure involves the creation of a pension trust by the company whereby the initial assets (constituted by contributions from the company and/or the employees) are transferred to a trustee who holds them subject to the trust deed and the rules of the pension plan. One of the advantages of having pension assets held in trust is to ensure that they are legally segregated from the assets of the company and therefore unavailable to creditors of the company.

The rules are drafted to suit the requirements of each company and will define the benefits to which participating employees will be entitled. The terms of the trust and the rules will usually provide for the creation of a committee which oversees the administration of the employee benefit plan and which will often be granted the powers to make determinations on difficult questions (e.g. questions of early retirement and questions of the level of disability of an employee). The committee may also be given the power to amend the rules of the plan.

The trust deed is usually drafted in such a way so that the situs of the trust and its administration may be moved to another jurisdiction if it ever became desirable to do so.

### **12.2. Legislation**

Until 1998, the principal legislation applicable to pension trusts was the PTFA. The PTFA was important in that it required all local pension trusts to be registered under the PTFA (with the Department of the Registrar General), and also introduced voluntary registration for international pension trusts which provided, among other things, exemption from stamp duty. Depending upon the relevant jurisdiction, in some cases registration in Bermuda could lend enhanced credibility to the pension in the parent's home jurisdiction.

Since 1 January 2000, the primary source of legislation governing local pensions is the NPS(OP)A 1998 and regulations made under that act. All employers in Bermuda with employees who are Bermudian or spouses of Bermudians must establish and register an occupational pension plan, which in turn may be in the form of a pension trust. This includes international businesses in Bermuda who have Bermudian employees.

### 12.3. Registration under the PTFA

This was repealed as regards to employers obliged to register pension plans under the NPS(OP)A 1998. However, registration under the PTFA is unaffected for those plans registered under that act and continuing to have entirely non-Bermudian, or spouses of Bermudian, members.

### 12.4. Rule Against Perpetuities

Under the PTFA, the rule against perpetuities does not apply to a pension trust registered under that act. Section 7 of the NPS(OP)A 1998 also provides the rule against perpetuities and accumulations does not apply to pension trusts registered under that act.

### 12.5. Stamp Duty

There is no *ad valorem* or other stamp duty on pension trust deeds in respect of non-Bermuda property. Additionally, if a local pension trust is registered under the NPS(OP)A 1998, no stamp duty is payable on Bermuda assets settled or contributed into trust.

## 13. CONFIDENTIALITY

There are no public registration requirements or other disclosure requirements concerning the establishment of trusts in Bermuda. Trust records kept by a trustee should not be disclosed unless required by law. All information passing from a settlor to the trustee is treated as absolutely private and confidential by the trustee.

## 14. TAXATION AND STAMP DUTY

At the date of this publication, Bermuda corporate income tax (CIT) applies only to certain Bermuda constituent entities that are members of Multinational Enterprise Groups with consolidated financial statements showing annual revenue of at least 750 million Euros for at least two of the last four fiscal years. For all Bermuda companies which are out of scope of CIT, there is no Bermuda income or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by such Bermuda company or its shareholders, other than shareholders ordinarily resident in Bermuda. However, certain minor stamp duties may apply to various documents.

### 14.1. Private and Purpose Trusts

There is no stamp duty payable in Bermuda on the initial trust deed or on the conveyance or transfer of non-Bermuda property into the trust. Non-Bermuda property basically refers to all assets except Bermuda currency denominated assets and Bermuda land. The shares of a Bermuda incorporated exempted company are considered to be non-Bermuda property, and are excluded from stamp duty.

### 14.2. Charitable Trusts

A charitable trust of non-Bermuda property is not subject to stamp duty. A charitable trust of Bermuda property will be exempt from stamp duty if:

- (a) it constitutes a charity which is registered under the Charities Act 1978 of Bermuda; or

- (b) the trust's purposes are in favour of a body of persons or institutions whose purposes, in the opinion of the Minister of Finance, are charitable.

Exemption (a) principally applies to charities operating locally in Bermuda. Exemption (b) is generally only applied where the trust has a connection with and affords a benefit to Bermuda.

Other transactions involving a Bermuda trust may be subject to nominal amounts of stamp duty. However, stamp duty is generally only payable in Bermuda if the relevant documents are executed in Bermuda or, if executed elsewhere, are brought into Bermuda.

## **15. FURTHER INFORMATION**

More detailed information on any of the topics contained in this publication is readily available. Clients should contact any member of our Trust and Private Client Department.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

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