



Providing specialist trust and fund services

NOVEMBER 2011

British Virgin Islands – Private Trust Companies (PTC's)

Introduction and background

When most settlors establish a trust they use a professional trust company as the trustee. In this way they can ensure that their trustees are professionals with experience gained by being the trustee of many other trusts. However, whilst this is an ideal way to proceed for many settlors, some jurisdictions have made available the flexibility of using private trust companies ("PTCs")

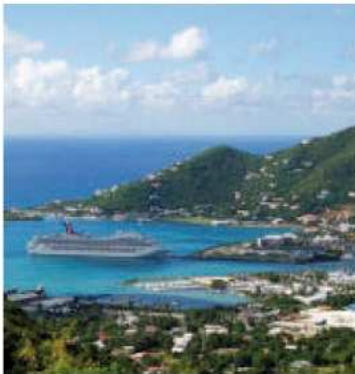
A PTC may be defined as a company which is incorporated with its main function being to act as the trustee of a specific trust or a number of related trusts. It should be contrasted with a professional corporate trustee, bank or financial institution which offers its services to the general public for a fee.

PTCs are useful in a number of situations, for example acting as trustees of private family trusts, as trustees of commercial trusts and to hold SPVs that are used in financial or other structures.

The most common use of a PTC is to act as trustee of a purpose trust or a discretionary trust which holds shares in a family company. Settlor's of such trusts often wish to keep control of the company themselves, and simply desire that the trustees retain such shares. A professional trustee will often be wary of doing so, however, as failure to diversify assets will almost always be a breach of its duty as a trustee as the trustee may be said not to be acting in the interests of the beneficiaries.

In the past this has been solved by placing express provisions in the trust deed which provides that the trustees shall hold the particular investment and removes all discretion on their part to deal with the investment. Such a provision will only be effective if absolutely unambiguous, and even then the trustees may be left with a residual discretion or the direction may be void for other reasons (e.g. public policy). The PTC may provide the solution to this dilemma.

In dealing with the creation of a PTC some International Financial Centres (IFC's) have either chosen to ignore licencing requirements or to issue some form of a restrictive licence. The high cost of obtaining a restrictive licence has been a deterrent to clients seeking the benefits of forming a PTC and certain other jurisdictions lack the proper regulation that modern compliance and transparency require.



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PTCs operate within the framework of general company law and trust law, but they will also generally be subject to at least some regulatory requirements.

PTCs enjoy the benefit of limited liability and perpetual existence which are usually the features of corporate vehicles and have the following further advantages:

1. The principal advantage of a PTC is that, like the BVI's VISTA legislation, the establishment of a PTC generally enables settlors or settlors' family members or their appointees to exercise a significant degree of control over trustees' decisions by being directors of PTCs; this enables them to respond quickly to issues which arise and to make decisions on the basis of their own personal knowledge and changing circumstances.
2. A PTC enables the trustee's charges to be kept in check.
3. The corporate structure will be readily understood by non-professionals, especially those from a non-trust jurisdiction and can be easily integrated into a family office or commercial structure.
4. Confidentiality can be preserved and this is an issue which is of increasing importance to those from jurisdictions where concerns over financial privacy are driven by issues of personal safety.
5. PTCs are often set up in circumstances in which the underlying assets of a trust are to comprise of speculative investments or investments which involve a degree of risk which might be regarded as unacceptable to a risk-averse professional trustee.

Through the enactment of the Financial Services (Exemption) Regulations, 2007 ('Exemption Regulations') the British Virgin Islands has successfully recognised the need for an acceptable and practicable level of control whilst still acknowledging the need to respond to market requirements for reduced costs in an environment where costs are becoming increasingly important. The resulting legislation appears to meet the demands of the industry and also clears up the past confusion for a BVI company to act as a private trust company and also enabling practitioners to structure PTC's with a sensible legal framework and without excessive cost.

Conditions which an exempt PTC must satisfy

In order to qualify as an exempt PTC under the Regulations the following conditions must be satisfied:

1. The company must be a BVI company which was first incorporated under the BVI Business Companies Act ('BCA'), but companies which were originally incorporated under the International Business Companies Act and which have

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re-registered under the BCA will also be eligible if certain elections are or have been made.

2. The company's memorandum must state that it is a private trust company.
3. The company must be a limited company (whether limited by shares or by guarantee) and its name must include the designation '(PTC)'.
4. The company's registered agent must hold a class 1 trust licence under the BVI's Banks and Trust Companies Act, 1990 (as amended).
5. The company must not solicit trust business from members of the public.
6. The company must carry on no business other than that of being the trustee, protector or administrator of trust (or managing or administering trusts).
7. All of the company's trust business must be 'unremunerated trust business' or 'related trust business'. Although the term is defined widely to prevent potential abuse, in most cases a company will be carrying on 'unremunerated trust business' where no remuneration is paid to the company or anyone associated with it in respect of the provision by the company of its trustee services. However, it is permissible for professional directors who are not otherwise associated with the company to be remunerated and payments to the company to cover its legitimate expenses (such as the Government's incorporation and renewal fees, the fees of otherwise unconnected professional advisers, and the fees of the registered agent) will not in general be regarded as remuneration for these purposes.

The use of VISTA trusts in PTC structures

VISTA trusts have become a very attractive vehicle in the context of the new Regulations for PTCs. Although exempt PTCs cannot be the trustees of VISTA trusts, there are advantages in terms of setting up VISTA charitable or non-charitable purpose trusts to hold the shares in exempt PTCs. This is particularly the case since the 'office of director' rules in VISTA trust instruments provide a unique and effective succession mechanism for directorships in PTCs and, in the case of PTCs, the succession to directorships is often critical, since it will, in effect, be its director or directors who exercise the PTC's discretionary trustee powers.

The registered agent's obligations and confidentiality

The Regulations imposed on the registered agent of the exempt PTC are the obligation to satisfy itself that the conditions which the PTC needs to comply with in order to be eligible for the exemption are met and it is required to do this both at the outset and on a continuing basis thereafter. It is also obliged to take all reasonable steps to ensure that up to date copies of documents such as the trust deed and any document varying its terms (in relation to each PTC for which it acts as registered agent) are kept at its office

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in the BVI. These documents do not need to be filed with the Financial Services Commission or the BVI authorities and are not available for public inspection.

Why the BVI should be considered as a jurisdiction in which to set up a PTC?

Prospective settlors should ask questions similar to those posed below when considering which jurisdiction to use to set up a PTC:

1. Is a licence needed and how long does it take to set up the PTC?
In the BVI, provided the conditions which are referred to above are met, no licence is needed and a BVI company can now be incorporated very quickly.
2. Is it necessary to have a local director or authorised representative (or a director with relevant qualifications or experience)?
There is no such requirement for an exempt PTC.
3. Must the company establish a physical presence in the jurisdiction?
There is no such requirement in the BVI.
4. Are there any capitalisation requirements?
There are none in the BVI for exempt PTCs.
5. What information must be provided and to whom? Must it be provided to the regulator?
In the BVI it is only the company's registered agent which must be provided with copies of the trust deeds and other documents referred to above.
6. What documents of the private trust company is a matter of public record?
In the BVI only the PTC's memorandum and articles of association will be filed publicly.
7. What are the costs of setting up and running the company?
In most cases these fees should be extremely competitive.

The BVI's Regulations should answer all of the above questions to most would-be settlors. The exemptions create an unparalleled degree of certainty. This certainty is always something that potential settlors find more attractive. The BVI's Regulations do not include any artificial protectionist features such as a requirement to the effect that at least one director must be a resident of the BVI or that a BVI resident representative of the company must be appointed, nor do they include the need to list particular trusts in the company's memorandum. They are more tailored to the unique flexibility of the BVI Company and are serving to enhance the ever increasing demand and popularity of the BVI Company and trust.

The Financial Services (Exemptions) Regulations, 2007 (the 'Regulations') came into effect in August 2007.

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