

# British Virgin Islands: Trusts

Last reviewed: February 2025

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The British Virgin Islands (BVI) is a leading international finance centre with a well-established trusts industry. BVI trusts are governed by English legal principles, as supplemented by the Trustee Ordinance 1961 (the **Trustee Act**), an advanced and modern piece of legislation which offers both flexibility and a high degree of protection for the parties involved which means that it's a particularly advantageous jurisdiction in which to establish a trust.

## What are trusts used for?

Below are some examples of the purposes for which a BVI trust may be used:

- estate and succession planning
- philanthropy
- tax planning (for example protected or excluded property settlements for UK inheritance tax purposes and foreign grantor trusts for US tax purposes)
- asset protection
- privacy, and
- commercial uses, such as employee benefit trusts, pension funds and unit trusts.

## Key parties and documents

A trust involves the separation of the legal title, or ownership, of property from the right to benefit from that property. A trust is normally established by the transfer of legal title to property (known as the trust fund) by a person (known as the settlor) to another (known as the trustee) to be held for the benefit of one or more persons (known as beneficiaries) or for a particular purpose, which can be charitable or non-charitable.

There is flexibility as to how to create a trust because a trust may be created by oral declaration, by an instrument in writing (including a will or codicil) or by conduct. However, usually a trust is created using an instrument in writing, often in the form of a deed, which is known as the 'trust instrument' or 'trust deed'. Recording a trust in writing is generally advisable because it provides more clarity as to the terms of the trust.

There must be certainty as to the intention to create a trust, its property and its objects (i.e. its beneficiaries or purposes).

## Types of BVI trust

### Discretionary trusts

Perhaps the most commonly used type of trust, a discretionary trust gives the trustee the discretion as to how, when and how much of the trust fund should be applied for the benefit of the beneficiaries. The beneficiaries have no rights or entitlement as regards the distribution of the trust fund, having merely a hope that the trustee will exercise its discretion for their benefit. The settlor may give guidance, usually in

the form of a letter of wishes, as to how the settlor would like the trustee to exercise its discretion, but such guidance is not binding on the trustee.

### Life interest trusts

With a life interest trust, one or more specified persons (known as the life tenant(s)) have a right to receive the income from the trust fund or to use trust property during their lifetime. After the death of the life tenant, the trust will usually revert to being a discretionary trust for the benefit of other beneficiaries. This type of trust is commonly used where the settlor wishes to allow someone to remain in a property for their lifetime, but on the life tenant's death, they would like the property to pass to other beneficiaries (either outright or in trust).

### Purpose trusts

In the BVI, trusts can be established for both charitable and non-charitable purposes, or a combination of both. Purpose trusts do not have beneficiaries (although see below in relation to hybrid trusts) and instead have a purpose, in furtherance of which the assets are applied. Where the purpose trust is non-charitable, an enforcer must be appointed in relation to the non-charitable purposes. The enforcer has a fiduciary duty to enforce the purposes of the trust, thereby effectively holding the trustee to account. A charitable purpose trust does not require an enforcer as the BVI Attorney General can enforce the terms of the trust.

Whilst the potential uses of a charitable purpose trust are fairly self-explanatory, non-charitable purpose trusts have a number of potential uses both in a private and commercial context. Such uses include, amongst others:

- in securitisation and finance transactions, to hold the shares in an 'orphan' special purpose vehicle
- to hold shares in a private trust company, and
- philanthropy, where the purposes may not fit squarely within the traditional ambit of charity.

### Hybrid trusts

BVI law permits the establishment of hybrid trusts, which mix charitable and/or non-charitable purposes and/or trusts for beneficiaries. An enforcer must be appointed to enforce the trust in relation to any non-charitable purposes. The trustee will have a duty to administer the trust in the interests of the beneficiaries and in the furtherance of the purposes of the trust.

### Protective trusts

A protective trust is a particular form of trust whereby the interest of a beneficiary who is entitled to receive all or part of the income from a trust will automatically terminate if that beneficiary attempts to dispose of his rights under the trust or if they become bankrupt. Protective trusts are especially useful where a beneficiary is socially or financially vulnerable.

### VISTA Trusts

The Virgin Islands Special Trusts Act 2003 (**VISTA**) came into force on 1 March 2004 and was amended in 2013 and 2021.

The overall purpose of VISTA is to allow the establishment of a trust that can hold shares in a company, but which disengages the trustee from management responsibility in relation to the underlying assets (which a trustee would normally have). It permits the company and its business to continue for as long as the directors see fit.

VISTA trusts achieve this purpose by:

- authorising the entire removal of the trustee's monitoring and intervention obligations
- permitting the settlor to grant the trustee a role more suited to the trustee's abilities, namely a duty to intervene to resolve specific issues (for example, a deadlocked board)
- allowing trust instruments to lay down rules for the appointment and removal of directors (this reduces the trustee's ability to intervene in management by appointing directors of their own choosing)
- giving both beneficiaries and directors the right to apply to the court if trustees fail to comply with the requirements for non-intervention or the requirements for director appointment and removal, and
- prohibiting the sale of shares without directors' approval.

VISTA does not apply to BVI trusts generally: the trust instrument must specify that it applies. At least one of the trustees must be a designated trustee (ie a trust company with a BVI trust licence or a BVI private trust company).

### Uses of VISTA trusts

Some common uses for VISTA trusts include:

- in family business scenarios, where a settlor wishes to plan for the succession of his or her business but does not want the trustees to have the usual fiduciary duties in relation to that business
- the acceptance of high-risk assets (such as real estate, speculative financial investments and chattels) due to the reduction of fiduciary risk for the trustees of VISTA trusts
- matrimonial settlements, where the family can still benefit from the dividends of the family business but the entrepreneurial spouse has autonomy in running the company (without fear of interference from the trustee or pressure being exerted on that trustee by the rest of the family)
- commercial arrangements, where the removal of investment duties means there is no inherent conflict between commercial negotiations and the duties of the trustee, and
- holding shares in private trust companies.

### Other considerations

#### Duration

Ordinary BVI trusts (including VISTA trusts) may exist for periods of up to 360 years (and potentially longer in certain circumstances, depending on the precise terms of the trust). This fixed period only applies if it is specified in the trust instrument.

Trusts established for charitable or non-charitable purposes may exist for an unlimited duration.

#### Reservation of powers

The settlors of BVI trusts have the freedom to reserve a number of powers to themselves or confer them on others, often referred to as protectors, without prejudicing the validity of the trust. Examples of powers that may be reserved by a settlor include:

- power to revoke the trusts in whole or in part;
- power to vary or amend;
- powers to direct payments of income or capital or both;
- power to direct the trustee to remove and appoint directors or officers of companies owned by the trust;
- power to direct investments;
- power to appoint and remove trustees and other office-holders;
- power to change the proper law and to specify which courts have jurisdiction over the trust; and
- power to require the exercise of trustee powers to be subject to the consent of any person.

The Trustee Act expressly provides that the reservation or grant of any or all of the specified powers will not invalidate the trust, will not prevent the trust taking effect in accordance with its terms nor will it cause any of the trust property to be part of the Settlor's estate on death for succession law purposes.

#### Asset protection and firewalls

The Trustee Act contains provisions (known as "firewall" provisions) that prevent a BVI trust from being rendered void by reason that it avoids or defeats a claim under foreign matrimonial, civil partnership or forced heirship laws. These firewall provisions also protect BVI trusts against attack by courts in foreign jurisdictions by ensuring that (subject to the terms of the trust) all questions arising in relation to a BVI trust or any disposition of property to or upon such a trust are to be determined in accordance with the law of the BVI, without reference to the law of any other jurisdiction, including, for example, questions as to:

- the capacity of the settlor
- the validity, interpretation or effect of the trust or disposition or any variation thereof

- the administration of the trust, including the functions, appointment and removal of trustees and enforcers, and
- the existence and extent of any functions in respect of the trust, including powers of variation, revocation and appointment, and the validity of the exercise of any such function.

A foreign judgment based on foreign heirship or matrimonial rights will not be recognised or enforced by the BVI courts.

It is however recommended that the trust assets are, so far as possible, located in the BVI, to guard against a foreign court order attaching directly against property situated in the foreign jurisdiction.

### Trustee's duties

A trustee must act prudently and in the interests of the beneficiaries and perform its duties honestly and in good faith.

### Rights of beneficiaries to information

Often, knowledge of entitlement under a trust can be detrimental to beneficiaries. For example, where a beneficiary is in education, knowledge of entitlement to wealth may not serve the best interests of that beneficiary, or in the case of a pension scheme, the entitlement of one member should not be information available to other members. A trustee should therefore consider carefully whether information can and should be disclosed to beneficiaries.

As a matter of BVI law, a trustee is not normally obliged to disclose the following:

- any document which reveals the trustee's deliberations as to how it should exercise its trustee functions
- the reasons for any decision made in the exercise of those functions
- any material upon which such a decision was or might have been based, and
- any letter of wishes.

In addition, a trustee normally has a duty to provide copies of the trust instrument and any supplemental trust documents as well as information as to the state and amount of the trust property (normally in the form of trust accounts) at the request of any beneficiary.

### Limitation periods

The usual limitation period for bringing actions for breach of trust is six years from the date on which the right of action accrued, provided the claim is not based on fraud or conversion to the trustee's own use, in which case, there is no limitation period.

If a right of action accrued on a date on which a beneficiary was under a disability (such as being subject to a mental incapacity or under the age of 18), the action may normally be brought at any time before the expiration of six years from the date on which that person ceased to be under a disability.

### Tax and legal advice

Tax and legal advice should be sought on a case by case basis, to ensure that the creation or administration of a new trust does not give rise to adverse tax or legal issues.

### Contacts

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found [here](#).