



Settlor "control" of trusts - what are the options?

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The trust structure - 1/2

- A trust exists where a person (known as a trustee) holds property for the benefit of any person (known as a beneficiary)
- Three principal parties
 - Settlor
 - » Original owner of the property
 - » Transfers the property to the trustee
 - Trustee
 - » Receives property from the settlor
 - » Holds the property on trust for the beneficiaries
 - Beneficiaries
 - » Right to benefit from the property in accordance with the terms of the trust
 - » Right to enforce the terms of the trust

The trust structure – 2/2

- Settlor must
 - have genuine intention to create a trust and to divest himself of the property
 - actually transfer the property to the trustee
- If not, trust is invalid

The uses of trusts

- Virtually unlimited uses
- Principal private client uses
 - Estate planning
 - Asset protection
 - Tax planning
 - Charitable giving
- Also many commercial uses
- All have two features in common
 - Settlor no longer owns or controls the assets
 - Separation of legal ownership and beneficial ownership

The attraction of settlor “control”

- For the settlor
 - Greater feeling of certainty that wishes regarding property will be honoured
 - Continued involvement
 - Facilitate transition
- For the trustee
 - Access to specialist knowledge, skill, experience, and expertise
 - Reduction of liability

The fundamental problem

- In order for a trust to be validly established and for it to achieve its purpose
 - Settlor must genuinely intend to create a trust and to divest himself of the property
 - Settlor must actually transfer property to the trustee
- But settlor (and trustee) would like some element of continued “control” (or involvement) of the settlor

Reserved powers trusts

- Available in a number of jurisdictions (Cayman, Guernsey, Jersey)
- Legislation codifies previous practice
- Settlor reserves to himself (or to a named third party) specific powers e.g.
 - Power to make investment decisions
 - Power to decide whether and when trust property is to be sold
 - Power to amend the terms of the trust
- Legislation states expressly that such reserved powers do not invalidate the trust
- Greatest Strength
 - Clarity and simplicity
- Possible problem
 - Is trustee under a duty to monitor and intervene in actions of the power holder?

BVI VISTA trusts – 1/2

- Virgin Islands Special Trusts Act 2003
- Must be
 - Governed by BVI law
 - A BVI licensed trustee
 - In writing
- Relates to trust of shares (known as designated shares) in a BVI company
- Fundamental feature – it separates
 - Ownership of designated shares (trustee)
 - Operation of the BVI company (director of the BVI company – usually the settlor)
- Trustee has duty to retain the designated shares
- Trustee has no fiduciary duty in relation to the designated shares

BVI VISTA trusts – 2/2

- Office of director rules
 - Optional
 - Rules in the trust deed regarding appointment, removal, remuneration, etc of directors of the BVI company
- Permitted grounds for complaint
 - Optional
 - Very specific and limited grounds in the trust deed upon which trustee can intervene in management of the BVI company e.g. fraud by director
- Greatest strength
 - Complements BVI company law
- Possible problem
 - Question as to whether it may be recognised by courts outside BVI

Cayman STAR trusts

- Special Trusts (Alternative Regime) Law 1997
- Fundamental feature – it separates
 - Benefit of trust property (beneficiaries)
 - Enforcement of the terms of the trust (enforcer)
- Enforcer
 - Only person with power to enforce terms of the trust
 - May be a beneficiary and/or the settlor
 - May be remunerated
 - Right to indemnity (same as trustee)
- Can be for attainment of a purpose e.g. to hold shares in a specific company
- Greatest Strength
 - Unique
- Possible problem
 - Question as to whether it may be recognised by courts outside Cayman

Conclusions

- Trust requires settlor ceasing to own property
- But settlor wants to retain “control” or involvement
- Number of possible solutions
 - Reserved powers trusts
 - BVI VISTA trusts
 - Cayman STAR trusts
- All have strengths
- Also other solutions (e.g. private trust companies)
- Best solution will depend upon client’s specific situation and their aims

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Thank you

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