



**Zetland
Trust
Limited**

GUIDE TO TRUSTS

This guide has been prepared by the Zetland Fiduciary Group Limited and is intended for the information of clients or prospective clients. As such, it is designed to provide general information. The information set out is not, nor is it intended to be, exhaustive. While every effort has been made to ensure the accuracy and reliability of the information in this document, we cannot accept any responsibility for errors regarding any such information. Such information does not purport to be and is not legal, tax or other professional advice. Our aim has been to provide a broad overview. We will be pleased to offer more comprehensive and specific professional advice to individual clients depending on the situation.

Zetland Professional Trustees

Zetland is an independent trustee and holds Professional Trustee licenses in Hong Kong, Belize and New Zealand.

Although Zetland is not a large organisation it boasts well-qualified staff including lawyers and accountants and takes pride in giving excellent service to clients.

Zetland has the necessary expertise to administer highly complex vehicles whilst retaining:

- Neutrality
- Avoidance of any conflict of interest
- Flexibility: Zetland is able to tailor the trust in a unique way to suit the needs of the settlor and is not bound by a specific investment product.
- Privacy and discretion
- Diversification of assets

Background

A trust is a relationship whereby a legal person (the trustee) holds property donated by a settlor (grantor in USA) for the benefit of third parties (the beneficiaries). Trust relationships arise frequently in day to day affairs and are common in almost all cultures and countries. The law relating to trusts has its origins in medieval England and has evolved over a period of several centuries to become one of the most effective tax and estate planning techniques available. Today, most jurisdictions based on the English common law system, such as the USA or Hong Kong, have extensive law relating to trusts. Jurisdictions based on a civil code system, such as France or Switzerland, generally recognise the legal basis of trusts.

The essence of a trust is the transfer of legal ownership of property to a third party and the clear communication of instructions for the use of proceeds from and disposal of the property. If instructions are not strictly followed, the trust may be held to be a sham and thus invalid from inception. However, there is a great deal of flexibility in the way that trusts can be structured and there are numerous safeguards available to protect the interests of all parties.

There are three basic forms of trust:

Bare Trust: This is a simple form of trust usually involving a single item (eg ownership of shareholdings in corporate entities).

Will Trust: This form of trust is created upon death pursuant to the terms and conditions of the deceased's will. The executors of the estate are usually appointed trustee.

Inter Vivos Trust: This form of trust is created by a living person and may be either on a discretionary basis where there are wide powers available to the trustees to allocate

benefits and make investments - a Discretionary Trust or a Fixed Interest Trust - where entitlements of beneficiaries are defined in detail.

The three main parties involved in a trust are as follows:

Settlor: The person or company who transfers legal ownership of the property to the trustee and in so doing "settles the trust". In the USA, this person is often called the grantor or the trustor.

Trustee: The person (usually a trust company) charged with the primary responsibility of administering the trust.

Beneficiaries: The people or institutions who benefit from the property held on trust.

Additionally, many trusts have a Guardian and/or a Protector appointed to monitor the activities of the trustees and to ensure that the settlor's intentions are being followed. The protector usually has the power to change trustees.

The most important document in settling a trust is the Deed of Trust. This is the blueprint for the trust and must be carefully drafted. The language must be unambiguous since it will be referred to for many years. A Memorandum of Wishes is also often drafted by the settlor to indicate in a discretionary trust how the trustees should service the beneficiaries. Finally, there needs to be a transfer of legal ownership of the property to establish the trust. This should be fully documented to show that a change of ownership has in fact taken place.

All types of property may be held under trust including cash and bank balances, securities, personal and real property and shares in private companies. If personal property such as works of art, jewellery or furniture are being settled into a trust, it would be important to inventory and tag and identify these items. Ownership of the property rests with the trustees at all times, but use and day to day control may be delegated to others.

The trust itself has no legal identity (except in the USA). Rather it establishes a relationship between the trustee and the beneficiaries. The trustee has a strong fiduciary duty towards the beneficiaries.

An important class of trust is the charitable trust where the beneficiaries are generally unrelated to the settlor and the reason for setting up the trust is altruistic in nature. In many countries charitable trusts are treated favourably for tax purposes and are therefore not often set up offshore.

An Offshore Trust may be defined simply as a trust established in a jurisdiction different from the domicile of the settlor. However, it is generally taken to be a trust established in one of the offshore trusts jurisdictions like Belize, BVI, Cayman Islands, Cook Islands, and Jersey to name a few. Offshore based trusts are proven vehicles for establishing the legitimate ownership of both offshore and onshore assets. They are particularly useful in regulating the succession to family wealth. In most developed countries the taxa-

tion of trusts has become extremely complex due to their ability to be used for favourable tax planning. In general and depending upon the domicile of the settlor and beneficiaries, offshore trusts enable income and gains to be accumulated with minimal local taxation.

Over the centuries, English trust law has evolved some basic rules regarding the conduct of trusts including:

- A discretionary trust must have a limited (though possibly very long) life.
- For a trust to be valid, the settlor must have intended to create a trust as opposed to some other arrangement such as bailment or nominee.
- With rare exceptions, non-charitable purpose trusts are not recognised.
- Trusts cannot be used to defraud creditors.

In recent years, many of the offshore jurisdictions have enacted legislation to ameliorate the first three of these provisions and to place time limits on a creditor's ability to prove fraud in transferring legal ownership of property to a trust.

Trustees are subject to strict legal constraints on the way they handle their responsibilities. They must show a duty of care, utmost good faith and exercise professional diligence in administering the trust for the benefit of the beneficiaries. They are also responsible for managing the investments and cash held by the trust and tend to be conservative in approach to ensure preservation of the capital base of the trust.

Trustees are generally free to engage other professionals such as investment managers to assist them. Trustees are also able to take their remuneration from the trust property held by them. In general, such remuneration is based on the value of assets held, subject to a minimum annual fee, and is often detailed in the trust deed.

The Benefits of Offshore Trusts

The use of an offshore trust can produce many substantial benefits. As always, proper professional advice needs to be taken in one's country of citizenship, residence and domicile before implementation. The major advantages of an offshore trust include:

Asset protection: An increasing purpose for using offshore trusts is to protect property from attachment by creditors. Certain professionals, such as medical practitioners, company directors, accountants and lawyers may be particularly vulnerable to unexpected and costly litigation.

The consequences of divorce in many countries may also be severe. Please refer to the Zetland Guide to Asset Protection for more details.

Intergenerational planning: The use of an offshore trust is an ideal tool for ensuring that property can be allocated in a manner that suits the settlor's wishes and avoids the consequences of forced heirship or inheritance laws.

Family succession planning: A trust provides great flexibility in providing for long term succession. For example, the education and maintenance of grand children or the exclusion of bankrupt or spendthrift relatives.

Privacy: A trust is a private agreement between the settlor and trustee. By establishing a trust in an offshore jurisdiction, privacy is greatly enhanced. Most offshore jurisdictions have strong privacy protection legislation and few of them have tax treaties permitting the exchange of information between governments.

Better environment: By moving offshore, one may take advantage of a less regulated environment with many opportunities. There may also be other international business benefits such as including the use of offshore companies owned by the trust.

Tax planning: An offshore trust may allow the reduction of liability to property, wealth or inheritance taxes in many countries and is a powerful tax planning tool for high net worth individuals. This largely depends on the nationalities of the settlor and/or beneficiaries.

Tax savings: An offshore trust set up in a tax haven or low tax jurisdiction will suffer no local taxes on income or capital gains, thus maximising the productivity of capital owned.

In general, the cost of setting up an offshore trust is not high although as mentioned above proper advice should be taken in the settlor's own domicile and this may incur initial expenses.

Offshore trusts are particularly useful as holding structures for the ownership of offshore companies, investment portfolios and offshore insurance policies. The use of an offshore trust should also be considered carefully before major lifestyle changes, for example, retirement or moving residence to a new country.

Most offshore jurisdictions allow for redomiciliation of existing trusts. This can be useful to take advantage of the tight asset protection legislation in certain offshore jurisdictions.

Control & Protection Issues

The essence of a trust lies in the transfer of legal ownership of property from a settlor to the trustees. How can the settlor ensure that the property will be properly safeguarded and that his wishes will be observed? There are several considerations, including the following:

Settlor: This is the person who creates the trust by transferring or settling his or her assets into a trust. They may or may not be named in the trust, as may be desired.

The actual settlor need not be the person who instigates the trust. For example, a corporation may be formed specifically for the purpose of transferring legal ownership of the property to the trust. This aids confidentiality and asset protection.

Trustee: It is advisable to appoint an experienced and professional trust company as trustee. Trustees have a fiduciary duty to act in accordance with the trust deed and for the benefit of the beneficiaries. The trust may continue for many years and there needs to be confidence that the trustee will continue to provide good service.

Although numerous large international banks have trust company subsidiaries, many settlors prefer to deal with the smaller specialised trust companies. The appointment of a trustee is often revocable and an unsatisfactory trustee can be replaced.

Initial Documentation: The trust deed needs to be carefully drafted in accordance with current best practice. This document specifies the details of how the trustees are to administer and manage the trust assets and how they are to distribute and dispose of trust assets during the lifetime of the trust. Typically, the assets of a trust will comprise cash, real estate and shares in companies, but could be extended to include ownership of any movable or immovable assets and ownership of intellectual property. Most trust companies will have a standard trust deed which they will amend to suit the requirements of clients.

Since it is likely that an offshore trust will be in a jurisdiction unfamiliar to a client's professional advisers, it is often desirable to get a legal opinion on the validity of the trust from a local lawyer as a safeguard. In a Discretionary Trust, the provisions of the Letter of Wishes must be clear.

Appointment of Protector: The protector is often an individual who is a friend or confidant of the settlor. The protector has watchdog role acting as a link between the trustee, settlor and beneficiaries. The protector can usually veto actions by the trustee and generally has an unfettered power to remove or appoint a trustee. It is important to delineate the powers of the protector carefully to avoid any attack on the trust as being a sham. The protector may usually nominate a successor in the event of death or incapacity or if he is unable or unwilling to continue with the role.

Choice of Domicile: While most offshore jurisdictions will function well from a tax planning point of view, some are distinctly superior in their asset protection features. The choice of domicile and governing law for an offshore trust is usually not final with most trust deeds incorporating so called "flee clauses" allowing for redomiciliation in the event that certain events such as civil disorder occur in the initial domicile. Redomiciliation may also take place to benefit from a better legal environment.

Use of Offshore Companies: It is common for offshore trusts to own companies in the same or other offshore jurisdictions. From the settlor's point of view, this may be a method to maintain influence or control over a business or to draw income from the company.

Most trust deeds will absolve the trustee from responsibility for the operation of companies owned by the trust. However a recent English legal decision implies that trustees do

have a duty to enquire into and intervene in the operation of underlying companies. The BVI has enacted specific trust legislation (VISTA Trusts) to disengage and place solely in the hands of the directors the operations of a BVI company owned by a VISTA Trust. It may be expected that other jurisdictions will follow suit.

Zetland establishes companies in most offshore jurisdictions and administers them from Hong Kong. Please refer to Zetland's Guide to Effective Offshore Operations for further details.

Captive Trust Company: In some situations, it may be desirable for a trust company to be set up and controlled by the settlor. Obviously, such an arrangement will involve extra costs and care needs to be given to the shareholding arrangements for the captive trustee. There is an increasing trend for formal supervision of trust companies by governments (and often minimum capital requirements) and this option is now available only in a limited number of jurisdictions.

Liechtenstein Foundation: Although not a trust, a Liechtenstein Foundation has a combination of trust like features together with those of a corporation. Liechtenstein is also reckoned to be one of the best jurisdictions in the world in terms of confidentiality and safety of the legal environment. Liechtenstein is an independent principality situated between Austria and Switzerland and is regarded as politically and economically stable.

A foundation is a good holding structure for high net worth individuals who may continue to exercise complete control over the property and also make a determination as to the passing of control upon death or disability. Foundations are more expensive to establish and administer compared with most offshore trusts. A Panamanian Foundation is a lower cost alternative and details can be provided by Zetland on request.

No asset owning structure offers complete protection against a determined and well-funded legal action. In particular, a trust may be attacked on the grounds that it is a sham i.e. that the settlor effectively retains full control of assets and the trustees are compliant with his wishes. However this can be quite difficult to prove and a properly and clearly constituted trust that is well run should be safe from this avenue of attack.

Although a trust may be held to valid nevertheless it and the assets it controls may be subject to action. Increasingly the family courts of a number of jurisdictions have the power to vary trust deeds in the case of divorce or inheritance disputes. (Of course the courts in the jurisdiction of the domicile of the trust must also recognise the judgment of the court and this is not assured.)

Equally the assets owned by a trust may be determined to be a "resource" and may be allocated to one of the parties in a dispute by the courts. If the asset is, for example, a property situated in the same place as the court giving an unfavourable judgement it will inevitably be lost. A leading English case *Charman v Charman* (a divorce action in 2007) saw

37% of the assets of a Jersey trust valued at £120 million being awarded to the wife

The choice of an offshore jurisdiction is also important. Although most offshore jurisdictions may seem fairly similar, there are important legal differences between them. For example, a few jurisdictions require registration of trusts usually in a confidential register maintained by the government.

Investment Issues

The discretionary investment of trust assets is probably the single greatest area of difficulty for trustees. As noted, trustees have a duty to preserve trust assets for the beneficiaries and will therefore tend to favour conservative investments with appropriate returns. It is common practice to engage third party banks or investment managers to look after substantial trust portfolios but it is always desirable to have an agreed investment strategy and for this to be monitored closely and on a timely basis by trustees. Issues include:

- Appropriate investment benchmarks to use
- Actual adherence to a laid-down strategy by investment managers
- Comparative performance compared with alternative strategies
- Liquidity and safety of investments
- Costs of investment management and dealing

Professional Advisers

The advice of an experienced professional in the country of residence/citizenship of the settlor should always be sought before settling a trust. The professional adviser should carefully consider, as a minimum, the following questions and discuss the effects with the client:

Why is the trust being established? Will it fully meet the objectives and expectations of the client? Does the client fully understand all the implications?

How is the trust to be settled?

Who are to be the beneficiaries? Should they be informed?

How and when are the beneficiaries to benefit?

What effects will the settlement of property have on the client's financial position? If property is still to be controlled or enjoyed by the settlor, what mechanisms and safeguards need to be employed?

Is a protector to be appointed? If so who should this person be? Does he or she understand the responsibilities? Will he or she agree to be appointed?

What items should appear in the Memorandum of Wishes?

What are the domestic tax implications of setting up the trust?

In which jurisdiction should the trust be set up? Should there be one or more alternative jurisdictions? Should an opinion be obtained from legal counsel in the jurisdiction on the validity of the trust?

Who is to act as a trustee? What is their background and standing?

What are the initial and annual costs of administering the trust? If the trust is being used for asset protection purposes, does the settlement of property into the trust raise any questions as to legality?

It is worth spending time and money at the outset in getting sound local advice. Zetland has contacts with knowledgeable professional intermediaries in many countries around the world and will be happy to make introductions in case existing professional advisers are not sufficiently familiar with offshore trusts. Zetland is equally happy to work with a client's own advisers. Potential settlors should be aware that many offshore trust schemes are being marketed currently (particularly in USA) often with exaggerated claims made regarding their efficacy.

Zetland works closely with professional intermediaries such as lawyers and accountants around the world and is always pleased to form new relationships and to provide references, if requested.

Zetland's Approach to Trust Administration

Zetland's approach to trust administration may be summed up in just two words; devotion and objectivity.

Devotion since we zealously view trust assets as if they were our own funds;

Objectivity since we always attempt to take decisions based on a detached analysis of the situation.

Zetland believes that the following are important aspects of trust administration which we endeavour to undertake in all cases:

Prior to set up of the trust it is important to conduct due diligence on the parties and assets which will form the settlement. For example in order to avoid exposure to money laundering legislation the source of funds should be determined. If pre existing companies form part of the settlement, accounts should be examined and in the case of real property an inspection may be desirable. If chattels are involved then they must be properly inventoried and labelled.

Operational matters such as the location and nature of bank accounts, the identities of investment advisers and fund managers and the objectives given to them shall be dis-

cussed and agreed with the settlor prior to establishment of the trust. Monitoring of all trust assets shall take place on a continuous and timely fashion.

Accounting for trust assets should be done on a regular basis with close attention being paid to investment performance. Basic accounting must be up to date, accurate and properly reviewed and supervised.

Decision taking should be based on a consensus of views with no one individual able to dominate matters. At Zetland we have an experienced staff including qualified lawyers and accountants and we always seek to discuss issues fully and if necessary obtain appropriate outside help or advice.

Adherence to the provisions of the trust deed is always paramount and other documents such as a settlor's Letter of Wishes are consulted. Key decisions taken in the administration of the trust are documented and filed.

Cost and Fees

Zetland charges trust fees on the following basis and does not generally charge fees as a percentage of assets under management or levy distribution fees.

Initial set up fee – this covers the costs of taking instructions and drafting the trust deed.

Annual fixed fee – covers the cost of holding the office of trustee.

Administration fee – covers the cost of trust administration, accounting and bookkeeping and is charged on a time spent plus direct costs basis.

Glossary of Trust Terminology

Asset Protection Trust : An offshore trust whose main object is the protection of a settlor's property from future attack by creditors.

Bare Trust: A simple form of trust.

Beneficiary: A person who will receive benefits from a trust.

Declaration of Trust : A simple form of Bare Trust usually relating to ownership of securities by a nominee.

Deed : A legal term for a document establishing a trust and setting out in detail how it will work.

Discretionary Trust : A situation where the trustees have discretion as to who will benefit and in what amounts and how the trust will be invested.

Domicile : The country where the trust is established.

Forced Heirship Laws : Laws which force division of an estate upon death to specified people, i.e. spouse, children.

Fraudulent Transfer : The transfer of assets in order to avoid their attachment by people who have legitimate claims over them.

Governing Law : The choice of law to govern the operations of a trust.

Grantor or Trustor : USA terminology for settlor.

Guardian : A person with similar duties to the protector.

Inter Vivos : Latin term—"between the living".

Jurisdiction : Country the laws of which will be governing a situation.

Memorandum of Wishes : A non-legally binding memorandum detailing the wishes and intentions of the settlor as to how a trust is to operate and who will benefit.

Nominee : A person who acts on behalf of another.

Protector : A person nominated to monitor trustees.

Redomiciliation : Movement from one domicile to another.

Settlor : A person who settles property into a trust, thus establishing it.

STAR Trust : A trust established under the Special Trusts (Alternative Regime) legislation of the Cayman Islands. This permits a purpose trust to be established where beneficiaries have no power of enforcement.

Trust : An obligation on a person to deal with property over which he has control for the benefit of beneficiaries.

Trustee : A person or company that owns the trust property and administers it according to the provisions of the trust deed.

Will Trust : A trust arising as a result of the provisions of a will.

VISTA Trust : A trust established under the Virgin Islands Special Trusts Act enabling a BVI company owned wholly by the trust to be solely the responsibility of its directors.

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Zetland Guides and Info Sheets (available from our website or on request)

Asset Protection; Belize Companies & Trusts; Doing Business in China; Foundations; Hong Kong Companies; Off-shore Operations; Seychelles; Mauritius; Singapore Business Structures; Singapore Residency; Trusts; Offshore RMB and info sheet on Hong Kong company ongoing obligations.