In focus

Comparing jurisdictions—answers to common problems

We are pleased to feature a new subject in our In Focus section. During 2010 we will be looking at key questions that busy practitioners face in daily practice. It is designed to help keep pace with rapid changes going on in the world of trusts. The question and answer format is designed to facilitate comparison across jurisdictions. The questions cover law and practice in relation to trusts and foundations and extend to related regulatory and company law issues. We are fortunate to start with answers from some of the leading firms in leading offshore jurisdictions, the British Virgin Islands, the Cayman Islands and Bermuda. Our aim is to include most other leading onshore and offshore jurisdictions in issues throughout the course of this year.

British Virgin Islands

Christopher McKenzie*, Walkers

Cayman Islands

Sara Collins and Bernadette Carey†, Conyers Dill Pearman

Bermuda

Edward Stone‡, Conyers Dill Pearman

*Christopher McKenzie, Walkers, 171 Main Street, PO Box 92, Road Town, Tortola, British Virgin Islands VG1110. Tel: +1 284 852 2216. Email: christopher.mckenzie@walkersglobal.com

†Sara Collins and Bernadette Carey, Conyers Dill & Pearman, Cricket Square, Hutchins Dr., P.O. Box 2681, Grand Cayman KY1-1111, Cayman Islands. Tel: +1 (345) 945-3901. Email: Sara.Collins@conyersdillandpearman.com or Bernadette.Carey@conyersdillandpearman.com

‡Edward Stone, Conyers Dill and Pearman, 10 Dominion Street, London, EC2M 2EE, England, UK. Tel: +44 (0)20 7562 0345. Email: Edward.stone@conyersdillandpearman.com

 doi:10.1093/tandt/ttp127

	British Virgin Islands	Cayman Islands	Bermuda
Trusts			
Has the Hague Trust Convention been ratified and implemented?	Yes. The convention was ratified by the UK on behalf of the BVI and was implemented by the Recognition of Trusts Act 1987 (Overseas Territories) Order 1989.	No.	By Order in Council, the UK Recognition of Trusts Act 1987 was made applicable to Bermuda as of 1 June 1989 and implemented by the Trusts (Special Provisions) Act 1989 ("TSPA 1989").
Are there statutory firewall provisions to protect trusts against claims based on forced heirship/matrimonial property regime?	Yes, in section 83A of the Trustee Act.	Yes. The relevant provisions are sections 90–93 of the Trusts Law (2009 Revision) ("the Trusts Law"). These sections provide that no trust governed by Cayman Islands law is void or can be set aside because the laws of any foreign jurisdiction prohibit the concept of a trust. In addition, foreign judgments based on such claims shall not be recognized or enforced by the Cayman Islands courts.	Yes. The relevant provisions are set out in section 11 of the TSPA 1989.
Are there statutory provisions for reserve power trusts?	Yes, in section 86 of the Trustee Act. VISTA trusts are also commonly set up as reserved power trusts (e.g. by reserving investment/administrative/management powers to a sole director).	Yes, section 14 of the Trusts Law provides for a wide range of powers to be reserved or granted by the settlor.	No but section 2(3) of the TSPA 1989 provides that: "the reservation by the settlor of certain rights and powers. . . [is] not necessarily inconsistent with the existence of a trust."
Is there a perpetuity period for private trusts? If yes, how long?	100 years for trusts for beneficiaries. No perpetuity period for charitable and non-charitable purpose trusts. The latter can now be established to benefit persons.	Yes, there is a single perpetuity period of 150 years plus a "wait and see rule" which provides that a disposition or power will only fail if it is to take effect outside of the perpetuity period. Cayman Islands STAR Trusts are not subject to perpetuity periods.	Not for trusts created after 1 August 2009.
Has the law has changed to permit perpetual trusts? If so, is the change retrospective?	Trusts for purposes may exist in perpetuity, but the change is not retrospective.	The Perpetuities Law (last revised in 1999) introduced the perpetuity period in 1995, and does not operate retrospectively.	Yes: the Perpetuities & Accumulations Act 2009. The change is not retrospective but section 4 of the act provides that it does not limit the power of the Bermuda court to extend the duration of a trust, the time within which an interest in property must vest, or the time within which certain powers are exercisable.
Are there provisions validating appointment of trust property from one trust to another, where first trust had a shorter perpetuity period than the second trust?	No. In such circumstances it would be normal first to reduce the trust period of the second trust or (subject to fraud on a power considerations) to appoint assets to a beneficiary who resettles the trust assets.	No.	No.
Is there an accumulations period? If so, how long?	No.	Income can be accumulated for the duration of the trust.	No.

	British Virgin Islands	Cayman Islands	Bermuda
Are non-charitable purpose trusts valid?	Yes, under section 84A of the Trustee Act provided certain requirements are satisfied.	Yes, provided that such trusts are created pursuant to the Special Trusts—Alternative Regime ("STAR") provisions set out at Part VIII of the Trusts Law.	Yes: under section 12A of the TSPA 1989.
• Do they have a perpetuity period? If so, how long?	No, although there is an option to specify a perpetuity period.	No.	No.
• Are they used?	Yes. They are commonly set up for off-balance sheet structures and other commercial purposes, for purposes which would not be regarded as charitable and to hold shares in PTCs.	Yes, they are used frequently, in particular where the settlor wishes to restrict the beneficiaries' enforcement rights or rights to information. They are also used in commercial transactions, for business related purposes.	Yes, they are used frequently in commercial transactions, for philanthropic trusts as well as for holding shares in a private trust company.
Are trustees required to make any filings?	No.	There are no public filing requirements for trusts and trust documentation is confidential. However, if the trustee is an exempted private trust company, some filings are required but such filings are not available for public inspection.	No.
Is preparation of trust accounts commonplace?	Yes, although most (but not all) BVI trusts tend to hold shares in BVI companies which hold the trusts' underlying assets.	Yes.	Yes.
Have the UK Trustee Act 1925 and/or Trustee Act 2000 been enacted into local law?	The BVI's Trustee Act contains many provisions which are substantially similar to those of the English Trustee Act 1925.	Yes, subject to modification by local statutes.	No; the Trustee Act 1975, as amended from time to time, contains provisions substantially similar to those of the English acts.
Do statutory powers entitle trustees to "make any kind of investment that he could make if he were absolutely entitled to the assets of the trust" or equivalent?	Yes, a general power of investment (which can be disapplied) is contained in section 3 of the Trustee Act. This would not enable trustees to sell or reinvest shares held on VISTA trusts.	Section 35 of the Trusts Law enables a trustee to invest in "any securities in which Trustees in England are for the time being authorized by the law of England to invest trust funds", so that the general statutory power of investment under the Trustee Act 2000 would be available to trustees.	Section 55A of the Trustee Act 1975 enables trustees to invest in "property of any kind, whether or not situated in Bermuda" and provides that in investing trust property "a trustee shall act as a prudent investor would."
Disclosure			
• Do statutory provision regulate disclosure to beneficiaries	No.	No. Case law confirms that the Court has a discretion to require trustees to disclose information to beneficiaries (see *Re Ojjeh's Trust* [1992–1993] CILR 348 and *Lemos v Coutts & Company (Cayman) Limited* [1992–1993] CILR 460).	No.
• Has *Schmidt v Rosewood* been applied?	Not in any reported decision, although it is clear that the decision would be applied by the BVI's courts.	Yes (see *Lemos v Coutts* [2004–2005] CILR 317).	Yes.

	British Virgin Islands	Cayman Islands	Bermuda
Are in *terrorem* clauses valid? Are they commonplace?	These are valid to the same extent as they are under English law; many trust deeds include such clauses but they could not be described as being commonplace.	*In terrorem* clauses are valid to prevent challenges to validity or 'unjustified' challenges to decisions and actions of the trustee (see *AN v Barclays Private Bank & Trust (Cayman) and others* [2007] WTLR 565)	*In terrorem* clauses are used but are not commonplace; they have not been tested in the Bermuda courts.
Can trustees seek blessing/directions from the local courts?	Yes. Under section 6 of the Trustees' Relief Act.	Yes. Section 48 of the Trusts law enables the Trustee to seek the advice or guidance of the Grand Court of the Cayman Islands. The court also has an inherent jurisdiction to supervise and, if necessary, intervene in the administration of a trust.	Yes.
Has *Public Trustee v Cooper* been applied?	Yes.	Yes (See *Re Q* [2001] CILR 481 and *Al-Ibraheem v Bank of Butterfield* [2000] CILR 507).	No.
Are such applications commonplace?	No.	Yes.	Yes.
• Has *Hastings Bass* been applied?	Not in any reported decision, although it is clear that the decision would be applied by the BVI's courts.	Yes. (See *A v Rothschild Trust Cayman Ltd* [2004–2005] CILR 485).	Not in any reported decision.
• Are applications to reverse mistakes commonplace?	These could not be described as commonplace although a number of successful applications for rectification have been heard by the BVI courts.	Applications for rectification are fairly common. There has been only one reported case applying the rule in Hastings Bass (see above)	Occasional only.
Can exoneration clauses exclude liability for anything except fraud? Are they commonplace?	Yes. Exoneration clauses are commonplace.	It is possible to exclude liability for everything save fraud or wilful default. Exoneration clauses in those terms are fairly commonplace.	Yes. Such exoneration clauses are fairly commonplace.
Are foundations more popular vehicles for new structures?	No, the BVI has no legislative provisions enabling foundations to be established.	No. There is no foundations law in the Cayman Islands.	Bermuda has no foundations law.
Foundations			
Is there a foundations law?	No.	No.	No.
Do foundations have a perpetuity period?	Not applicable.	Not applicable.	Not applicable.
Do private foundations have a guardian?	Not applicable.	Not applicable.	Not applicable.
What are the filing requirements?	Not applicable.	Not applicable.	Not applicable.
Are trusts more popular vehicles for new structures?	Yes.	Not applicable.	Not applicable.

	British Virgin Islands	Cayman Islands	Bermuda
Companies			
Audit and filing requirements—it is necessary to file accounts/details of shareholders/names of directors?	No.	It is necessary only to file the names of the directors with the Registrar of Companies.	The approval of the Bermuda Monetary Authority (the "BMA") must be obtained in connection with the issue or transfer of shares of all exempted companies. Signed personal declarations from each of the proposed ultimate beneficial owners of the company who will own, directly or indirectly, 5% or more will be required for submission to the BMA. An exempted company is not generally required to file accounts.
If so, is this information open to public inspection?	No.	No.	The register of shareholders is available for inspection.
Is company registry accessible online?	Yes, to BVI service providers through the registry's electronic filing system (VIRRGIN).	No.	No.
Are directors of insolvent corporate trustees personally liable for corporate trustees' obligations?	Whilst there is no decided case on this issue, this is thought to be a possibility in certain circumstances.	No.	No.
Are there residency requirements for directors/secretary/registered agent/office?	Not for directors and secretaries but BVI companies must have registered agents and registered offices in the BVI.	The only residency requirement is in respect of the registered agent and office, both of which must be located in the Cayman Islands.	The minimum number of directors of a Bermuda company is two. Every exempted company is required to have: (i) at least one director who is ordinarily resident in Bermuda, (ii) a secretary that is (a) an individual who is ordinarily resident in Bermuda or (b) a company which is ordinarily resident in Bermuda, or (iii) a resident representative that is (a) an individual who is ordinarily resident in Bermuda, or (b) a company which is ordinarily resident in Bermuda.
Regulation			
Are trust and company service providers regulated? Is the registry available online (provide the link)	Yes, by the Financial Services Commission. (www.bvifsc.vg)	Trust and company services providers must register with the Cayman Islands Monetary Authority ("CIMA"). The Register is not available online.	Yes: by the Bermuda Monetary Authority. (www.bma.bm)
Is there a regulatory requirement on trustees to carry insurance?	This is not a requirement, but the Financial Services Commission is empowered to require licensed trustees to obtain such cover.	No.	Licensed trustees are required to take out insurance.

	British Virgin Islands	Cayman Islands	Bermuda
Do PTCs need to be authorized?	No, provided the requirements which are contained in the Financial Services (Exemptions) Regulations, 2007 are met, authorization is automatic.	Under the Private Trust Companies Regulations 2008, a Cayman Islands Private Trust Company which only conducts "connected trust business" must be registered with the Cayman Islands Monetary Authority but will not require a trust licence and will not be subject to the regulatory requirements of the Banks and Trust Companies Law (2007 Revision).	Under the Trusts (Regulation of Trust Business) Exemption Order 2002, PTCs are exempted from the trustee licensing requirement.
Litigation			
Trust litigation—is litigation against trustees on the increase?	Yes.	There has not been any significant increase in litigation against trustees.	Yes.
Claims relating to investment losses—are you aware of claims arising from credit crunch?	Yes.	Yes.	Yes.
What is the ultimate court of appeal?	The Privy Council	Privy Council.	Privy Council.
Confidentiality/secrecy laws			
Are there confidentiality or secrecy laws?	No.	Yes. The Confidential Relationships Preservation Law (CRPL) (as revised).	There is an equitable doctrine which prevents the disclosure of confidential information, but no statutory confidentiality or secrecy laws.
Do such laws regulate provision of trust or company information to outsiders?	Not applicable.	Yes.	Not applicable.
Could breach result in criminal liability or professional censure?	Not applicable.	Yes, the CRPL contains provisions for criminal penalties.	Not applicable.
OECD/money laundering			
Black/grey/white list?	White list	White List.	White list
Are there TIEAs with 12 countries prescribed by OECD?	Yes.	Yes.	Yes.
Has information been sought under TIEA? Has it been provided?	Yes. Yes.	Yes.	Yes. Yes.
Predicate offence for anti money laundering purpose—does it extend to "all crimes" (including foreign tax evasion)	Foreign tax offences will frequently (but not always) be covered by the BVI's AML legislation.	No. If the predicate offence occurred in a foreign jurisdiction, the offence must be one that would similarly be an offence if it had occurred in the Cayman Islands (ruling out foreign tax evasion).	Tax crime is a predicate offence if it falls within the definition of "criminal tax evasion" in section 37 of the Taxes Management Act 1976.
Are there gateways to pass on intelligence derived from SARs to foreign revenue authorities?	No, the gateways only allow this to be passed to "foreign regulatory authorities".	Pursuant to the Proceeds of Crime Law 2008, the Cayman Islands Financial Reporting Unit has a policy of international cooperation and passes on intelligence derived from SARs in this manner.	Yes.

	British Virgin Islands	Cayman Islands	Bermuda
Donor insolvency			
What is the definition of creditor for the purpose of the Fraudulent Conveyances Act? Is it confined to creditors in existence at time of disposition, or does it extend to future creditors?	The BVI has deliberately refrained from enacting legislation which is designed to defeat creditors' claims and so future creditors may be able to set aside transfers which are made with the intent to defraud them.	The Fraudulent Dispositions Law (as revised) defines "creditor" simply as "a person to whom an obligation is owed". However, in order to attract the application of the Law, the "obligation" must exist on or prior to the date of the disposition.	Under section 36A of the Conveyancing Act 1983: "eligible creditor" means a person to whom—(i) on, or within two years after, the material date the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied; (ii) on the material date the transferor owed a contingent liability and since that date the contingency giving rise to the obligation has occurred and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied; or (iii) on the date of the action or proceeding to set aside the relevant disposition, the transferor owes an obligation in consequence of a claim, made by that person against the transferor, arising from a cause of action which accrued prior to, or within two years after, the material date.
Are transfers to third parties valid provided the third party acted in good faith or only if the third party also provided consideration?	Transfers to third parties will be incapable of being set aside on insolvency notwithstanding the absence of consideration but only if certain conditions are also satisfied.	In order to be valid, the transfer must have been made without any intent to defraud creditors, and the third party must have provided valuable consideration such that the transfer was not made at an undervalue.	Transfers are voidable if made with the requisite intention and at an undervalue.
Family relations			
Does definition of children include illegitimates?	The BVI has no statutory provisions extending the definition of children to those born out of wedlock, although it is arguable whether (inter alia) the anti-discrimination provisions in the Virgin Islands Constitution Order 2007 have this effect.	Pursuant to the Status of Children Law 2003, there is now a presumption that illegitimates are included in the definition of "children".	Yes.
Are same sex partnerships recognized and valid?	No.	No. The Marriage Law 2007 introduces an express definition that marriage is between a man and a woman only.	No.
Matrimonial			
Joint or separation of property?	Spouses can hold property jointly or separately. There is no community of property regime in the BVI.	Cayman Islands law does not categorize matrimonial property as either joint or separate at the time of marriage, with such categorization only considered on divorce by agreement or following assessment by the Court with reference to the circumstances of the case.	Property can be held jointly or separately.

	British Virgin Islands	Cayman Islands	Bermuda
If joint, does this give rise to proprietary interests in matrimonial property?	Yes, assuming that the beneficial interest is held jointly.	Not applicable.	Not applicable.
Are prenuptial agreements valid and effective?	These are not binding on the BVI's courts, but, as in England, the court may have regard to them when making decisions relating to the disposition of property on divorce.	Prenuptial agreements are not binding on the court, but it is likely that the position will be the same as in England, so that they may be taken into account as evidence of the parties' intentions in any court proceedings.	Prenuptial agreements are not automatically binding but are generally admitted subject to the overriding discretion of the Bermuda courts.
Death			
What is the connecting factor—domicile/nationality or other? What do these mean?	Domicile. The concept of domicile is very similar, but not identical, to that under English law.	Domicile. There is no statutory definition of "domicile".	Domicile governs the choice of law for succession to movables. Under section 2 of the Administration of Estates Act 1975, to establish that the court has jurisdiction to grant probate or administration in Bermuda, the deceased person at the time of his death must be ordinarily resident in Bermuda or have some property in Bermuda.
Is there freedom of testamentary disposition (coupled with power to make financial provision for dependents) or forced heirship rights?	Freedom of testamentary disposition, although as a result of the application of the doctrine of scission, the ability to dispose of moveable property will be determined by the law of the testator's domicile at death.	There is freedom of testamentary disposition and power to make financial provision for dependents. There are no forced heirship rights.	Freedom of testamentary disposition. Section 13 of the Succession Act 1974 provides for financial provision to be applied for by certain "dependants". When a deceased person dies domiciled in Bermuda and is survived by any of the following persons: (i) the husband or wife of the deceased (ii) a former spouse who has not remarried (iii) a child of the deceased (iv) a grandchild of the deceased who was immediately before the death of the deceased was being maintained either wholly or partly by the deceased that person may apply to the Court for an order under section 14 on the ground that the disposition of the deceased's estate (either by will or the law relating to intestacy) is not such as to make reasonable financial provision of the applicant.
Unity or Scission—are there different law governing succession to moveable and immoveable property?	Scission. Different laws govern the succession to moveable and immoveable property.	Succession to immoveable property in the Cayman Islands is governed by *lex situs* (the place where the property is located). Succession to moveable property is governed by the law of the place of last domicile of the deceased.	The principal of Scission of Succession applies in Bermuda.

British Virgin Islands

The general principles of the trust laws of the British Virgin Islands (the "BVI") are derived from those of English trust law. The principles of English common law and equity apply, as supplemented by BVI statute. The original Trustee Act was based on the English Trustee Act 1925 and Variation of Trusts Act 1958 but has now been updated by the Trustee (Amendment) Acts, 1993 and 2003. Other significant statutes relating to trusts and trustee services in the British Virgin Islands are the Virgin Islands Special Trusts Act, 2003 ("**VISTA**"), the Banks and Trust Companies Act, 1990 and the Financial Services (Exemptions) Regulations, 2007.

Trusts in the BVI may be established by persons in any part of the world with property or investments in any part of the world. Trusts may be discretionary or fixed interest in nature or indeed any other type of trust recognized under English common law.

VISTA trusts

The use of the trust to hold shares in companies has historically been impeded by a rule of English trust law which was designed to help preserve the value of trust investments. This rule traditionally made the trust an unattractive vehicle to hold assets which settlors intend trustees to retain. Another aspect of the rule effectively required trustees to monitor and intervene in the affairs of underlying companies (as the English decisions *Re: Lucking's Will Trusts* and *Bartlett v Barclays Bank Trust Co Ltd* made clear); this also created difficulties both from the settlor's standpoint and from that of the trustee.

The Virgin Islands Special Trusts Act enables special BVI trusts, which are known as VISTA trusts, to be created which circumvent these difficulties, thereby creating significant new business opportunities for risk-averse trustees.

VISTA enables a trust to be set up where the trustee is disengaged from management responsibility and permits the company and its business to be retained as long as the directors think fit. Essentially this is achieved by:

- authorizing the entire removal of the trustee's monitoring and intervention obligations (except to the extent that the trust deed expressly requires);
- permitting the trustee to be given a role more suited to its abilities, namely a duty to intervene to resolve specific problems;
- enabling trust deeds to lay down rules for the appointment and removal of directors (so reducing the trustee's ability to intervene in management by appointing directors of its own choice); and
- prohibiting the sale of shares without the consent of the directors (and/or others nominated in the trust deed for this purpose).

VISTA trusts are typically set up in the following circumstances:

i. when the settlor wishes to retain control, since matters will, when appropriate, generally be structured so that settlor–control is retained at the director (company) level.
ii. when the settlor intends the shares which s/he wishes to settle on trust and/or the underlying assets of the company to be retained.
iii. when trustee involvement in an underlying company's affairs is undesirable or inappropriate.
iv. where charitable or non-charitable purpose trusts are needed for securitisations and off-balance sheet transactions or to hold shares in private trust companies.
v. where the underlying assets of the trust are to comprise of speculative investments or investments which involve a degree of risk which would otherwise be regarded as inappropriate for the trustees of a non-VISTA trust.

Non-charitable purpose trusts

In common with the other leading offshore jurisdictions, the BVI has legislation enabling the creation of non-charitable purpose trusts ('purpose trusts') and a great deal of use is made of this legislation, particularly in the commercial context (in order to take advantage of one of the features of such a trust which is that there is no beneficial owner of the trust's assets). Examples of the commercial use of purpose trusts include taking transactions off balance sheet, isolating assets in financial deals, separating voting from economic control and providing ownership structures for private trust companies.

The BVI's Trustee Act permits purpose trusts to be created if the following conditions are satisfied:

i. the trust's purposes must be specific, reasonable and possible;
ii. the purposes must not be immoral, contrary to public policy or unlawful;
iii. at least one trustee of the trust must fall within the statutory definition of a 'designated person' (and this would normally involve the appointment of a licensed British Virgin Islands trust company as the sole trustee or one of the trustees of the trust);
iv. the trust instrument must appoint a person as enforcer of the trust and must provide for the appointment of another enforcer on any occasion on which there is no enforcer (or no enforcer able and willing to act); and
v. the enforcer appointed by the trust instrument must either be a party to the trust instrument or give his or her consent in writing (addressed to the trustee who is a designated person) to act as enforcer of the trust.

The requirement which appeared in the BVI's earlier purpose trust legislation to the effect that a purpose trust must not be for the benefit of 'particular persons' or of 'some aggregate of persons' was repealed in relation to trusts set up after February 2004, with the result that (as with Cayman Islands STAR trusts) the purpose of a new trust which is set up under the Trustee Act can be to benefit to one or more individuals or companies.

BVI purpose trusts are exempt from the rule against perpetual trusts, with the result that a perpetual purpose trusts are capable of being set up. However, trust instruments have been given the *option* of specifying a terminating date or event, of providing for the disposition of trust assets on the trust's termination and of providing that (before the trust's termination as a purpose trust) the trustees will owe no duty to any persons entitled on such termination.

BVI conflict of laws provisions relating to trusts

Since trusts governed by the laws of the BVI usually have significant legal links with the laws of one or more other jurisdictions, it is essential for the BVI to have adequate rules for resolving 'choice of law' questions relating to trusts. Although the majority of the provisions of the English Recognition of Trusts Act 1987 (incorporating as it does most of the provisions of the Hague Trusts Convention) have been extended to the Territory, so ensuring a certain amount of certainty in relation to many of the relevant conflict of law rules relating to trusts, specified matters are expressly excluded from that Act, meaning that it is vital for these rules to be reinforced by additional statutory provisions.

The BVI's Trustee Act now contains detailed and well-thought conflict of laws rules relating to trusts which were drafted with the assistance of Professor Jonathan Harris of Birmingham University in the UK, one of the editors of the leading English text on conflict of laws, Dicey, Morris & Collins, with the intention of setting up a regime which is likely to command a substantial degree of international recognition. These include comprehensive rules dealing with matters which are excluded from The Hague Trusts Convention which have therefore been drawn up with the objective of reflecting current common law trends. Whilst it cannot be guaranteed that these rules will necessarily correspond exactly with case law as it eventually develops in other common law jurisdictions, they are rules which are likely to command a certain degree of academic support. For that reason, these rules should be seen by the courts of other jurisdictions as a legitimate and rational approach.

These conflict of laws rules apply to trusts generally, rather than merely to those which are governed by BVI law.

The Trustee Act also contains robust, comprehensive and carefully crafted provisions protecting BVI trusts (and dispositions to their trustees) against 'forced heirship' claims. These provisions, which have been modelled largely on the equivalent laws of the Cayman Islands (but subject to a number of refinements and modifications to reflect the Territory's other laws) also prevent foreign judgments based on such forced heirship claims from being recognized or enforced in the Territory.

In relation to trusts, it is now believed that the BVI not only has in force an anti-forced heirship regime which is as robust as that of any other offshore trust jurisdiction, but probably also has some of the most refined and comprehensive conflict of laws rules in the world.

PTCs and trustee and related services

According to statistics produced by the Financial Services Commission, there are presently over 200 trust companies in the BVI, nearly 100 of which currently hold unrestricted trust licences allowing them to provide complete trustee services from within the BVI. Trust companies operating from within the Islands must conform to strict government regulations and maintain a minimum required capital and are supervised by the Financial Services Commission in accordance with internationally accepted supervision standards. There are also a substantial number of other well-established and qualified service providers such as lawyers, accountants and investment advisors operating in the BVI which cater to the trust industry.

The Financial Services (Exemptions) Regulations, 2007 (the 'Regulations') enable unlicensed private trust companies ('PTCs') to be established in the BVI if the company is not remunerated for the provision of its trustee services, does not solicit business from members of the public and satisfies a number of other conditions which are not too onerous to comply with.

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

i. 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.
ii. The corporate structure is readily understood by non-professionals, especially those from non-trust jurisdictions and can be easily integrated into a family office or commercial structure.
iii. Confidentiality is 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.
iv. A PTC enables the trustee's charges to be kept in check.
v. 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 trustees.

The BVI is increasingly selected as one of the leading jurisdictions to use to incorporate PTCs for the following reasons:

i. Provided the company is not being remunerated for the provision of its trusteeship and the other conditions set out in the Regulations are met, no licence is needed and a BVI company can be incorporated very quickly, especially following the introduction by the BVI Companies Registry of its 'VIRRGIN' system which provides for the electronic filing of documents.

ii. It is not necessary to have a local director or authorized representative (or indeed a director with relevant qualifications or experience).
iii. There are no capitalization requirements for exempt PTCs.
iv. The company need not establish a physical presence in the BVI.
v. The costs of setting up and running the company are extremely competitive: the government's fee will generally only be an additional $400.00 on incorporation and annually thereafter.
vi. There is no need to list particular trusts in the company's memorandum.
vii. Only the PTC's memorandum and articles of association, which are likely in most cases to be fairly standard documents revealing little more than the name of the company, will be filed publicly and (except in cases of abuse) there is no need to supply the regulatory authorities with copies of the trust documentation or to disclose the identity of the settlor or beneficiaries of the trust; the company's registered agent must instead be provided with copies of the relevant documents.
viii. With over 800,000 companies on its register, the BVI is regarded as the world's leading financial centre for international business companies.

Conclusion

The BVI is renowned for its state of the art legislation relating to trusts and trustee services which has been developed in close partnership with the private sector to ensure that it keeps pace with the modern demands on trusts. It is perceived as innovative and flexible and continues to attract positive attention from the international financial community.

Cayman Islands

For many years, the Cayman Islands has been widely recognized as a leading jurisdiction for the establishment of private and commercial trusts. The industry has developed on a sound legislative framework and with the assistance of a knowledgeable and experienced judiciary.

Trusts Law

Trusts law in the Cayman Islands is derived from English statute and common law, which has been supplemented by local legislation. The principal statue is the Trusts Law (2009 Revision) ('the Trusts Law'), which is supplemented by the Fraudulent Dispositions Law (1996 Revision) and the Perpetuities Law (1999 Revision).

The Trusts Law, among other things, grants specific express powers to trustees of Cayman trusts. These powers include the power to apply income for maintenance and education of beneficiaries, and to make advances of capital to beneficiaries. Such powers apply unless excluded, restricted, or varied by the express terms of the relevant trust deed.

The most common forms of trusts created in the Cayman Islands are discretionary trusts, pursuant to which the settlor divests himself of any ownership of the assets settled on trust and the appointed trustee has wide discretionary powers over the trust fund. Fixed interest trusts are also common, pursuant to which the primary beneficiaries are granted a right to receive the income and capital of the trust fund and the trustees will have little, if any, discretion over the nature and extent of distributions from the trust fund.

The Cayman Islands has also enacted 'reserved powers' legislation, which was consolidated into the Trusts Law in 2001. Pursuant to this legislation, the settlor of a trust may, without invalidating the trust, reserve various specified powers including (among others) a power to revoke, vary or amend the trust, a power to give binding directions to the trustee, and a power to appoint, add or remove the trustee or beneficiaries.

More recently, the creation of special non-charitable purpose trusts pursuant to the Cayman Islands

'STAR' legislation, referred to in detail below, has become popular.

Jurisdiction of the Cayman courts

Pursuant to the Trusts Law, and subject to any express term to the contrary in the trust deed, all questions arising in regard to a trust which is governed by the laws of the Cayman Islands are to be determined according to the laws of the Cayman Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected. This includes all questions as to the capacity of the settlor, any aspect of the validity of the trust or its interpretation or effect, the administration of the trust and the existence and extent of powers of variation and revocation of the trust and powers of appointment. The Trusts Law also grants the Court jurisdiction to vary a trust in certain circumstances.

The Cayman Islands does not recognize forced heirship claims and they cannot be enforced against assets held in a Cayman trust. Part VII of the Trusts Law provides that no trust governed by Cayman Islands law will be considered invalid or set aside because the laws of a foreign jurisdiction prohibit or do not recognize the concept of a trust.

Perpetuities

The English common law rules against the vesting of trust property in perpetuity and against the remoteness of vesting apply in the Cayman Islands to trusts created before 1 August 1995. For trusts created on or after that date, the common law rules on perpetuity have been abolished and replaced with the provisions of the Perpetuities Law, which provides that a fixed period not to exceed 150 years may be chosen as the duration of the trust. It further introduces a 'wait and see' principle, so that a trust will not fail for remoteness of vesting until it is established that the gift will not vest within the perpetuity period.

The rule against perpetuities does not apply to a trust or power created under the STAR provisions, referred to below.

Fraudulent dispositions

Cayman Islands trusts are also subject to the provisions of the Fraudulent Dispositions Law (1999 Revision), which provides that any disposition of property at an undervalue is voidable within six years by a creditor prejudiced by the disposition if the disposition was made with the intent to defraud creditors. The burden of proof to establish the fraudulent intention and that the disposition was made at an undervalue is on the creditor.

STAR trusts

One of the more unique aspects of the Cayman Islands Trusts Law is that it permits the creation of non-charitable purpose trusts, pursuant to the Special Trusts (Alternative Regime) ('STAR') Law 1997 which has since been incorporated as Part VII of the Trusts Law.

Contrary to the general rule that a trust will be void if its objects are uncertain, a STAR trust may be created for any objects, whether persons, purposes or both, provided they are lawful and not contrary to public policy. The only persons with standing to enforce a STAR trust are those persons who are appointed 'enforcers' under the trust deed or by the Court. Enforcers are deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust, subject to evidence of a contrary intention.

Trustees of a STAR trust are required to be (or to include) a trust corporation licensed in Cayman or registered as a private trust company.

Trust companies

A trust company carrying on business from Cayman must be licensed pursuant to the Banks and Trust Companies Law. Licensees are required to satisfy certain net worth requirements and they must be owned and managed by fit and proper persons. Licences are available in unrestricted, restricted and nominee classes. The licensing process involves a very rigorous examination procedure for new licensees and close supervision of the business of existing licences.

Private trust companies are an increasingly popular tool in the Cayman Islands, as the advantages of having a private trust company acting as trustee of a group of family trusts have become more recognized. Pursuant to the Private Trust Companies Regulations 2008, a Cayman Islands private trust company which only conducts 'connected trust business' and is registered with the Cayman Islands Monetary Authority ('CIMA') does not require a trust licence. Determining 'connected trust business' requires an assessment of the relationship between the contributors of the underlying trust assets: each contributor must be a connected person to any beneficiaries or other contributor for example, related by blood or marriage or members of the same group of companies. The Trusts Law has also recently been also amended to allow a registered Cayman Islands PTC to act as the sole trustee of a STAR Trust.

A registered Cayman Islands private trust company is not therefore currently subject to any minimum capitalization requirements, its directors and shareholders are not subject to CIMA vetting and approval, and it is not required to have audited annual accounts.

Confidential information

The Cayman Islands courts have considered the confidentiality of trust information on a number of occasions, with reference to the Confidential Relationships (Preservation) Law (2009 Revision) ('the CRPL'). The CRPL sets out the gateways for disclosure of confidential information held by Cayman Islands professionals (for example, to police officers investigating crimes, and in evidence in court proceedings pursuant to the direction of the Cayman Islands courts).

Case law in the Cayman Islands also acknowledges the accepted common law principle that the trustee owes fiduciary obligations not to divulge trust information except in accordance with the law which governs the trust. The courts have considered this duty in the context of requests for the release of information about the assets held on trust in response to subpoenas or to assist with inquiries by international regulators.

Cayman Islands courts will take the approach set out in the Privy Council in *Schmidt v Rosewood* [2003] UKPC 26 to the disclosure of information to beneficiaries. This will be dealt with by the court as an exercise of discretion under its inherent jurisdiction to supervise the administration of a trust.

Succession law

Succession law in the Cayman Islands is also largely based on English precedent. The Succession Law (2006 Revision) governs the administration and distribution of the estate of the deceased person in the Cayman Islands. It provides that no person may take possession of, administer, distribute or otherwise deal with any part of the estate unless a grant has been obtained from the Grand Court. This rule applies to all forms of property situated in the Cayman Islands at the time of death of the deceased.

The Succession Law applies regardless of whether the deceased was domiciled in or a national of the Cayman Islands or elsewhere.

OECD

The legitimacy of the Cayman Islands as an offshore financial centre has recently been confirmed by the elevation of the Cayman Islands to the 'White List' created by the Organisation for Economic Cooperation and Development ('OECD') for the purpose of identifying those jurisdictions who have substantially implemented the OECD's internationally agreed tax standards.

The Cayman Islands has a well-established framework in place for the exchange of tax information internationally. For its part, the Cayman Islands Government has entered into bilateral agreements, including TIEAs, with the governments of Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden, and unilaterally extended comprehensive tax information assistance to Germany, Austria, Belgium, Czech Republic, Luxembourg, Slovak Republic and Switzerland in relation to civil, administrative and criminal tax matters. It has also implemented automatic information-sharing with all EU states under the EU Savings Directive. In addition, the Cayman Islands Monetary Authority ('CIMA') has signed a total of fourteen formal Memoranda of Understanding ('MoUs') with other jurisdictions which outline the types of assistance that can be requested and given by CIMA and the Financial Services Association ('FSA'), including providing tax information and obtaining specified information and documents from other parties.

In 2005, the Cayman Islands introduced the Tax Information Authority Law ('the Law'), which is now the principal legislation enabling the provision of tax information by the Cayman Islands to other countries. The main purpose of the Law is stated as being to provide for assistance generally in criminal and non-criminal tax matters, particularly in relation to the obtaining of information, the execution of searches and seizures, and the interview and examination, by consent, of taxpayers of the requesting country who are located in the Cayman Islands. It is now widely accepted that the Cayman Islands operates a legitimate and transparent tax information sharing regime.

Bermuda

Legislation

The principal legislation governing trusts in Bermuda is the Trustee Act 1975 (as amended) (the 'Trustee Act'), the Conveyancing Act 1983 (as amended), the Trust (Special Provisions) Act 1989 (as amended) (the 'TSPA 1989'), the Perpetuities and Accumulation Act 1989, the Trusts (Regulation of Trust Business) Act 2001 (as amended) and the Perpetuities and Accumulation Act 2009.

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 TSPA 1989 is comprised of three parts that deal with three quite separate matters:

i. The first part (a) clarifies that the governing law of a trust can be a matter of choice and can be changed to another law, (b) sets out the circumstances in which the Bermuda court has jurisdiction over trusts, (c) establishes favourable rules regarding the capacity of a settler to create Bermuda trusts and (d) protects Bermuda trusts from attack pursuant to foreign laws.
ii. The second part contains the statutory basis for the establishment and operation of non-charitable purpose trusts (see below).
iii. 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 Act 1983 (as amended) introduced conservative provisions to avoid certain dispositions where the dominant intention is to put assets beyond the reach of creditors.

Trusts may be discretionary or have fixed interests, for charitable or non-charitable purposes.

Perpetuities

The rule against perpetuities and accumulations has been abolished in Bermuda for trusts created on or after 1 August 2009. For further details on the impact of this, please see Trust & Trustees, Vol. 15, No. 9, November 2009.

Jurisdiction of the Bermuda courts

Under Section 9 of the TSPA 1989, the jurisdiction of the Supreme Court of Bermuda in respect of matters concerning a Bermuda trust is established in any of the following circumstances:

i. where a trustee is resident in Bermuda;
ii. where any trust property is situated in Bermuda but only in respect of such property;
iii. where the administration of any trust is carried on in Bermuda; or
iv. where the Court thinks it is appropriate.

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, 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 situated in Bermuda.

Effect of foreign laws on Bermuda Trusts

Section 11 of the TSPA 1989 provides that a trust which is validly created under the laws of Bermuda shall not be varied or set aside by a Bermuda court and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside for any reason, nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any rights, by reason that

i. the law of any another jurisdiction prohibits or does not recognize the concept of a trust;
ii. the trust or disposition avoids or defeats rights, claims or interests conferred by the law of another jurisdiction upon any person by reason of a personal relationship to the settlor or to any beneficiary or by way of heirship rights, or contravenes the law of another jurisdiction or any foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to any such rights, claims or interests; or
iii. the trust or disposition avoids or defeats rights, claims or interests conferred by the law of another jurisdiction upon any person in respect of the protection of creditors in matters of insolvency.

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.

Purpose Trusts

The TSPA 1989 provides a statutory basis from which to create trusts for non-charitable purposes in Bermuda. In 1998, the TSPA 1989 was amended 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:

- sufficiently certain to allow the trust to be carried out,
- lawful, and
- not contrary to public policy.

The rule against perpetuities does not apply to purpose trusts and the trust deed may impose on the trustees a duty or power to accumulate income for any duration (including an unlimited duration).

Essentially a purpose trust has no specified beneficiaries who would have an enforceable claim or interest in the trust fund. 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 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 TSPA 1989 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 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 trustee company which acts as the trustees of a particular trust or group of trusts).

Private trust companies

A private trust company ('PTC') 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. A Bermuda PTC is exempt from the licensing requirements under the Trusts (Regulation of Trusts Business) Act 2001 so long as it only offers trustee services to those trusts specified in its memorandum of association. The exemption is provided for under section 3 of the Trusts (Regulation of Trust Business) Exemption Order 2002.

Use of a PTC 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 PTC may be held in a purpose trust, charitable trust or other private trust.

The PTC 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 PTC may be advisable. The professional trustee is then able to provide management and administration services to the trust company rather than acting as trustee.