

BVI TRUST & PRIVATE CLIENT SPECIAL REPORT

Mark Forté & Bernadette Carey – September 2009

The advantages of using BVI in these difficult times of global economic slowdown and market volatility

The largely unprecedented events in the global financial markets over the past twelve months have resulted in one of the most widely felt and multi-layered crises of our time. As part of the fall-out, the spotlight has inevitably been turned on offshore financial centres and many have been quick to label such jurisdictions as key contributors to the current economic difficulties faced by all. For the holders of the mass of private wealth that exists globally, the ability to legitimately preserve and protect personal assets in a convenient, private, and secure manner using these offshore financial centres may now seem to be under threat. With such jurisdictions placed under intense scrutiny in these difficult times, some have asked whether there remain any advantages to using offshore financial centres to achieve asset protection and succession planning goals.

Why BVI?

For its part, the British Virgin Islands (“BVI”) continues to be an extremely attractive and secure jurisdiction for private clients. As an internally self-governing British Territory, the BVI has an independent legal and judicial system which is secure and stable, and legislation which is both modern and facilitative of succession planning and asset protection. The jurisdiction offers a sophisticated and well-established infrastructure which has made it one of the largest and most successful offshore incorporate jurisdictions in the world. By way of example, and at last count, over 800,000 companies were registered in the BVI, which include holding companies established to acquire real estate, yachts, and other investment assets. Notably, the use of BVI companies as joint venture vehicles is also on the increase with dividends often paid up to BVI corporate shareholding structures, often themselves including trust structures.

Perhaps the most widely known benefit of doing business in the BVI, however, is that the jurisdiction enjoys a tax neutral regime. No taxes are payable on wealth inheritance, capital gains, or capital transfer, nor are there any estate or death duties. However, to combat any attempts to take an unlawful advantage of that regime, there is robust anti-money laundering legislation in place in the form of The Proceeds of Criminal Conduct Act 1997 (as amended). This legislation, along with the regulatory enforcement provided by the Financial Investigation Agency, has ensured that the BVI is a leader in international anti-money laundering measures, and reinforces the jurisdiction’s status as both legitimate and secure.

The BVI was also recently named on the “White List” of countries using internationally approved and recognised tax and transparency standards, created by the Organisation for Economic Cooperation and Development (“OECD”). The OECD’s seal of approval enforces the legitimacy of the BVI as an offshore centre and further enhances the attractiveness of the jurisdiction. Indeed, at the time of going to press the BVI has increased its tax recognition treaty obligations to beyond that “imposed” by the G20 group of countries. Despite its popularity, the BVI does not have the high profile, “red-flagged” reputation of other such international centres, making it an ideal offshore location for clients seeking confidentiality without compromising on integrity and security.

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Challenges

For many private clients affected by the current volatile economic environment, the events of the past year may have resulted in increased pressure on the client personally and on the particular asset protection structure used by the client. Statistical data available suggests that the BVI courts, which are well-equipped to deal expeditiously and cost-effectively with private client litigation, have already been called on to consider the expected mix of shareholder and trust disputes, tracing claims, and forum challenges which inevitably arise in a climate such as this. Indeed, it is worth noting the establishing of a new Commercial Court in the BVI with its own commercial judge, currently with a chancery silk from London with jurisdiction over disputes relating to trust law. With its own rules of procedure including revised rules on costs, this judicial support for the quick resolution of trust disputes will prove attractive to those all too familiar with lengthy trust disputes committed to the general High Court list.

However, even if private clients have been lucky enough to avoid becoming embroiled in litigation, other pressures remain. Two of the most common ways in which this pressure manifests itself for private clients is in the form of exposure to increased costs, in particular maintenance costs and administration fees, and frustration from an inability to restructure their affairs to their advantage due to the inflexibility of structures they have previously chosen to protect their assets. In the BVI, such difficulties are rare. In terms of costs, the incorporation of local companies and creation of trust and other such structures can be done in a speedy and cost-effective manner. Maintenance and administration fees in BVI are widely acknowledged as being at the lower end of the scale. Flexibility is also on offer, as the BVI legislation provides for the migration of structures in and out of the jurisdiction with relative ease and, as discussed further below, can provide clients with greater control over their assets.

Finally, and perhaps most importantly, expertise in the BVI private client market is well recognised. The BVI financial services sector is already well-established and trusted by a significant number of foreign investors, including large financial institutions, and the private sector in the BVI has expanded significantly to meet the growing demands of an increasingly diverse clientele. Many large and well-respected offshore law firms have opened offices in the BVI and recruited highly respected experts in the private client field, and there are now over 50 trustee service providers available to clients.

Trust structures

For private clients considering a move to the BVI, the jurisdiction offers a number of attractive asset protection structures. In particular, the BVI is renowned for the pioneering trusts and estate planning structures it offers to assist private clients in protecting their personal wealth while also providing them with greater flexibility and control – both sought-after factors in the current economic climate.

Private Trust Companies (“PTCs”) have become increasingly popular in offshore jurisdictions in recent times, and the BVI has been quick to enact special legislation to enable the creation of PTCs in the BVI. The BVI’s PTC legislation is modern and, most importantly, provides that there is no need to obtain a licence – which is required in other jurisdictions – to operate a PTC. A PTC has many advantages for private clients and their families in that it not only allows greater involvement in trust administration through board representation, but also provides for trusts to hold more non-traditional assets considered onerous by institutional trustees such as family trading companies, high risk portfolios, and unusual assets.

The Virgin Islands Special Trusts Act 2003 (“VISTA”) and the Trustee Act 2003 (“the Trustee Act”) are highly innovative statutes dealing with a number of important areas of trust law in the BVI. The VISTA Act created an alternative trust regime which enables special trusts, known as VISTA trusts, to be established. A VISTA trust is specifically designed to allow settlors to contribute shareholdings in companies, particularly family companies, and to specify the extent of the trustee’s duty to manage the shares. The settlor of the trust can specify when and why the trustee may become involved in the affairs of the company, and the trustee is more detached from actively managing the trust assets. The VISTA legislation has garnered

a huge amount of positive international interest, largely because of the flexibility of the regime, and a significant number of VISTA trusts have been set up. Both the VISTA Act and the Trustee Act were created with the assistance of the local branch of the Society of Trust and Estate Practitioners (“STEP”), demonstrating a close partnership between BVI Government and the private sector which is also of benefit for the jurisdiction’s international client base.

Conclusion

The BVI continues to demonstrate that it is a forward-thinking jurisdiction which is consistently adapting to the changing global environment and making a concerted effort to satisfy and go beyond international regulatory requirements. As a result of its innovative legislation and established infrastructure, it is going from strength to strength in its ability to attract foreign investors to the jurisdiction, and is likely to become a preferred jurisdiction for private clients seeking security, stability and flexibility in an otherwise shaky economic climate, and onwards to the future.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

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