

公报文章

Modernisation of the British Virgin Islands Trust legislation

英属维尔京群岛信托立法的现代化

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Legislative amendments to the British Virgin Islands (“BVI”) trust legislation took effect on 9 July 2021 under the Trustee (Amendment) Act, 2021. The reforms introduce welcome improvements to the BVI’s Trustee Act and ensure that the BVI remains a leading offshore jurisdiction for the establishment, administration, and maintenance of trusts.

The legislative amendments to the Trustee Act, 1961 (the “Trustee Act”), which is the main source of legislation concerning BVI trusts, are part of a process of fine-tuning the legislation by way of reforms brought under the Trustee (Amendment) Act, 2021 (the “Amendment Act”) which has introduced the following key changes:

1. **Power of the BVI Court to vary trusts:** making it easier for the BVI Court to approve a variation to a trust without the consent of adult beneficiaries and where such variation is “expedient”.
2. **Codifying the “Hastings-Bass” principle:** providing a clear statutory framework to apply for relief where the Trustee (or other power holder) or any other person beneficially interested in the trust, including the object to the power, has made a mistake in the exercise of their powers.
3. **Extending the “firewall” provisions:** extending the “firewall” or foreign element provisions which protect against a foreign law applying to a BVI trust so that all questions arising are to be determined exclusively by reference to BVI law and expanding the category of “personal relationships” forming the basis of claims against the BVI trust.
4. **Strengthening reserved powers provisions:** introducing a comprehensive set of powers reserved to settlors and “any other person or to

《2021年受托人（修订）法》对英属维尔京群岛（下称“BVI”）信托法律所作的修订于2021年7月9日生效。《BVI受托人法》因此得到进一步改善，受到了广泛欢迎并确保BVI仍是设立、管理和维护信托的领先离岸司法管辖区。

《1961年受托人法》（下称“《受托人法》”）是BVI信托的主要立法来源，而《2021年受托人（修订）法》（下称“《修订法》”）中所作的法律修订即是调整《受托人法》过程的一部分。《修订法》涵盖以下主要变更：

1. **BVI法院变更信托的权力：**使BVI法院更容易批准信托的变更，只要相关变更属适当，则无需取得成年受益人的同意。
2. **将“Hastings-Bass”原则编纂成法：**提供了明确的申请救济的法定框架，以便可以在受托人（或其他权力持有人）或在信托中享有实益权益的任何其他人士（包括权力的对象）在行使权力有误时，申请救济。
3. **扩展“防火墙”条文：**扩大了“防火墙”或涉外因素条文的范围，可防止对BVI信托适用外国法律，这样，所有出现的问题都将完全参照BVI法律来确定，并且扩大了构成对BVI信托申索基础的“个人关系”的类别。
4. **加强了保留权的规定：**推出了一套保留予委托人和“任何其他人士或任何任职人员或团体，包括（但不限于）保护人”的综合权力。
5. **维护和保存信托记录的职责：**对BVI信托受托人的记录保管义务进行了修订。

any office holder or body, including (but not limited to) a protector”.

5. **Duty to maintain and keep trust records:** amendment of the record keeping obligations imposed on trustees of BVI trusts.

Power of BVI Court to vary trust

The Amendment Act introduces a new section, 58B, which provides that an application may be made by the following parties: the trustee, any person authorised by the trust instrument to apply, or any beneficiary to vary the terms of a BVI trust established after 9 July 2021, or a foreign trust that has changed its governing law to BVI law after such date.

The BVI Court may grant an order varying the trust without the requirement to obtain the consent of the adult beneficiaries if it is “expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose”.¹

The BVI Court must have regard, in so far as in the Court’s considers them material and within the its knowledge, to factors such as:

- the wishes of the settlor.
- changes in any circumstances, such as family, fiscal, financial or commercial circumstances, since the trust’s establishment.
- the remoteness of the interest and the protective needs of the individual beneficiaries.

This new standard makes it easier to vary a BVI trust, while still offering the appropriate level of protection to those relevant persons and objects who have full capacity but do not wish to consent to the variation affecting their interest under the trust.

Codifying the Hastings-Bass Rule

Where a trustee or other fiduciary makes a mistake in the exercise of its powers, it stands to reason that innocent beneficiaries, for example, should have relief from the consequences of that mistake. Traditionally, common law courts had recognised wide powers in this regard, relying on the rule in *Re Hastings-Bass*² which concerns the ability or otherwise of a trustee’s exercise of their powers in reaching a fiduciary decision.

In reliance on this principle, common law courts had held that trustees’ exercise of their power was invalid not only where the power was exercised in bad faith or excessively, but also where the trustees, in exercising their powers, had taken into account irrelevant matters. The recent line of authority (originating from a UK

BVI 法院变更信托的权力

《修订法》新增了第 58B 条，规定申请可由以下当事方提出：受托人、信托文书授权可作出申请的任何人士或任何受益人，以变更 2021 年 7 月 9 日之后设立的 BVI 信托之条款，或在该日期之后将管辖法律变更为 BVI 法律的外国信托之条款。

BVI 法院可作出变更信托的命令，而无需征得成年受益人的同意，仅需“在当时的情况下属适当，而不论命令的条款是否可能对任何人士或任何目的产生不利影响”。¹

BVI 法院必须在其认为重要且知晓的范围内考虑以下因素：

- 委托人的意愿。
- 自信托成立以来，任何情况的变化，例如家庭、财政、金融或商业环境。
- 个人受益人利益的时间久远程度和保护需要。

新标准使变更 BVI 信托变得更加容易，同时仍为那些具有完全行为能力但因其信托权益将会受到影响而不愿同意变更的相关人士和对象提供适当程度的保护。

将“Hastings-Bass 规则”编纂成法

如果受托人或其他受信人在行使其权力时有误，无辜的受益人（以此为例）理所当然应就该错误行为导致的结果获得救助。传统上，依循 *Re Hastings-Bass*² 一案中的规则（该规则有关受托人行使其权力达成受信决定的能力或其他问题），普通法法院在此方面承认广泛的权力。

基于此原则，普通法法院认为，倘受托人恶意或过度行使权力，或在行使权力时考虑了不相关事项，则该权力的行使无效。最近的判例（源自英国最高法院的一项决定）³ 严格限制了法院纠正此类错误的权力。若 BVI 遵循英国的判例，则会要求申请人对违反受信职责的情况加以证明，这样法院才能

¹ Section 58B(4)

第 58B(4) 条

² [1975] Ch 25

Supreme Court decision)³ had severely restricted the court's ability to correct such mistakes. If the UK authority was followed in the BVI, it would require the applicant to prove a breach of fiduciary duty in order for the court to set aside a mistaken decision. This would have the potential to set an unreasonably high threshold and deny relief in circumstances where the trustee or other fiduciary had made their decision based on incorrect professional advice. As many exercises of dispositive powers by trustees in the BVI are based on professional advice, this would make it impossible for the BVI court to exercise its corrective jurisdiction.

Fortunately, the recent reforms to the Trustee Act inserts a new section, 59A, which provides a statutory framework for the setting aside of the exercise of fiduciary powers on the grounds of inadequate deliberation by trustees or any other power holder such as a delegate, or indeed a director of a BVI company, a beneficiary of a trust, the enforcer of a purpose trust, or the Attorney-General (where the trust is a charitable trust). Importantly, it is not necessary to prove that the person who exercise the power acted in breach of trust or duty rather, the focus (as in *Hastings-Bass*) is on:

- a) whether in exercising their powers, the power holder did not take into account one or more considerations of fact or law, or both, that were relevant to the exercise of the power, or took one or more such considerations that were irrelevant to exercise into account;
- b) but for that failure, the power holder would not have exercised the power, or would have exercised the power on a different occasion or in a different manner.

As a result of the recent amendments to the Trustee Act, the BVI Court is now empowered to set aside the exercise of a fiduciary's powers with the effect that it will be treated as having never occurred, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the Court may think fit. The BVI Court can also make such consequential orders as it considers necessary. However, protection is granted to ensure that any orders do not prejudice a bona fide purchaser for value of any trust property who did not have notice of the circumstances behind the exercise of such a power. As such, innocent third parties should not suffer as a result of any orders made under the new section 59A.

The amendments expressly provide that there is no limit or other affect on the law of mistake.

Extension of the “firewall” foreign element provisions

The BVI's firewall legislation in section 83A of the

³ *Pitt v Holt and Futter v Futter* (2011) EWCA Civ 197
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撤销错误的决定。这种情况下，倘受托人或其他受信人是基于错误的专业建议而作出决定，那么撤销错误决定的门槛就会变得极高且救济申请可能被拒绝。由于很多情况下受托人在 BVI 行使决定权都是基于专业意见，这将使 BVI 法院无法行使其纠正性的司法管辖权。

有利的是，近期经修订的《受托人法》增添了第 59A 条，就以受托人或任何其他权力持有人（例如代表人）、BVI 公司的实际董事、信托受益人、目的信托的执行人或检察总长（倘为慈善信托）考虑不周为由而撤销其权利行使的情况提供了法定框架。重要的是，无需证明行使权力的人违反了信托或职责，而是把重点（正如 *Hastings-Bass* 案所示）放在以下方面：

- a) 权力持有人在行使权力时，是否未考虑到与行使权力相关的一项或多项事实或法律因素，或两者皆未考虑，或者考虑了与行使权力无关的一项或多项此类因素；
- b) 若无该等失误，权力持有人就不会行使权力，或者会在不同的场合或以不同的方式行使权力。

由于近期对《受托人法》的修订，BVI 法院现在有权撤销受信权的行使，其效果是权力的行使将全部或部分视为从未发生，不论是无条件地或是按照法院认为合适的条款和条件。BVI 法院亦可做出其认为必要的相应命令。但是，法院也会提供保护，以确保任何命令均不会损害未留意到权力行使背后情况的任何信托财产价值的善意购买者。因此，无辜的第三方不会因根据新订的第 59A 条作出的任何命令而受到损害。

修订的内容明确规定，对法律错误没有限制或其他影响。

对“防火墙”涉外因素规定的扩展

最初起草 BVI《受托人法》第 83A 条的防火墙法律是为了保

Trustee Act was originally drafted to protect trusts which are governed by the BVI law which are being attacked because a foreign law concerns a party with an interest in the trust assets by virtue of their personal relationship with the settlor (for example, persons claiming as a result of forced heirship).

Questions have therefore arisen as to the application of the firewall provisions and the protection afforded to settlor's descendants once the settlor was no longer living. In order to avoid any technical difficulties in this regard, section 83A of the Trustee Act has been amended by extending the reference to a "personal relationship to the settlor" to include a personal relationship to any beneficiary and personal relationships including stepchildren, or children born by means of artificial fertilisation or surrogacy.

Also, the revised section 83A extends the "firewall" or foreign element provisions which protect against a foreign law applying to a BVI trust so that all questions arising are to be determined exclusively by reference to BVI law.

Reserved powers provisions

A revised section 86 has been introduced which expands the existing provisions on the ability of reserved powers trust. The amendment expressly provides that the reservation or grant of any or all of a comprehensive set of powers reserved to settlors and "any other person or to any office holder or body, including (but not limited to) a protector" shall not invalidate the trust, or prevent the trust taking effect according to its terms, or cause any of the trust property to be part of the settlors estate on death.

Trustee's duty to maintain and keep trusts records

A new duty is imposed on "Relevant Trustees" (defined as any BVI incorporated company and any foreign company registered under the BVI's Business Companies Act, any individual resident in the BVI and any other person who is trustee of a trust administered in whole or in part from the BVI). The duty applies to an "Applicable Trust" (defined as a trust governed by the law of any jurisdiction but excluding implied, constructive or bare trusts or the duties incidental to the office of a personal representative of a deceased estate). The amendment provides that the trustee's duty is to maintain and retain books and records for at least five years whether in or outside the BVI "in such form as is appropriate to the Trust and the trust property".

Conclusion

The recent reforms are a positive step towards the modernisation of the trust legislation in the BVI. This will ensure that the BVI remains an attractive and leading jurisdiction for wealth structuring and management well

护受 BVI 法律管辖的信托，这些信托受到外国法律的冲击是因为，外国法律涉及的一方因与委托人有个个人关系而在信托资产中享有权益（例如，因强制继承而提出申索的人士）。

这样就出现了在委托人过世后如何适用防火墙条款以及如何为委托人的后裔提供保护的问题。为了避免这方面的任何专门性的难题，《受托人法》第 83A 条经修订，将“与委托人的个人关系”这一提述扩展至包括与任何受益人的个人关系，以及包括继子女或通过人工受精或代孕方式出生的子女在内的个人关系。

此外，经修订的第 83A 条扩大了“防火墙”或涉外因素条款的范围，可防止对 BVI 信托适用外国法律，这样，所有出现的问题都将完全参照 BVI 法律来决定。

保留权规定

经修订的第 86 条扩大了关于信托保留权能力的现行规定。修订部分明确规定，将委托人和“任何其他人士或任何任职人员或团体（包括但不限于保护人）”所保留的任何或全部综合权力保留或授出均不会使信托无效，或阻止信托根据其条款生效，或导致任何信托财产在委托人去世时成为其遗产的一部分。

受托人维护和保存信托记录的职责

“相关受托人”须承担新的职责（相关受托人是指任何在 BVI 注册成立的公司和任何根据《BVI 商业公司法》注册的外国公司、任何居住在 BVI 的个人以及担任全部或部分于 BVI 进行行政管理的信托之受托人的任何其他人士）。该职责适用于“适用信托”（指受任何司法管辖区法律管辖的信托，但不包括默示信托、推定信托或消极信托，或死者之遗产代理人的职务所附带的职责）。此项修订规定，受托人的职责是“以适合信托和信托财产的形式”在 BVI 境内或境外维护和保留账簿和记录至少五年。

结论

近期的改革标志着 BVI 信托立法向现代化迈出了积极的一步。这将确保 BVI 在未来仍是财富构建和管理方面具有吸引力和领先的司法管辖区。

into the future.

For further information, please contact your usual Conyers contact or the contact listed below.

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