



# Legal Briefings

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## Understanding Reserved Power Trusts in the British Virgin Islands

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The British Virgin Islands (“BVI”) has long been a favoured jurisdiction for establishing trusts, particularly due to its flexible legal framework and favourable tax regime. Among various trust structures, Reserved Power Trusts (“RPTs”) have gained prominence as high net worth individuals and others seek to retain a level of control over the administration of assets they have placed into trusts. This article delves into what Reserved Power Trusts are, how they function in the BVI, and their advantages and certain issues to consider.

### What is a Reserved Power Trust?

A Reserved Power Trust is a type of trust wherein the settlor retains certain powers (e.g. the power to: (a) determine the law of which jurisdiction shall be the proper law of the trust; (b) change the forum of administration of the trust; (c) remove trustees; (d) appoint new or additional trustees; (e) exclude any beneficiary as a beneficiary of the trust; (f) include any person as a beneficiary of the trust in substitution for or in addition to any existing beneficiary of the trust) that are typically relinquished in traditional trust arrangements. This flexibility allows the settlor to maintain a degree of control over the trust assets and their distribution.

### Legal Framework in the BVI

The BVI’s Trustee Act of 1961 (the “Act”) provides the legal framework for trusts in the jurisdiction. It establishes the framework for creating and managing trusts, including the roles of settlors, trustees, and beneficiaries. The Act has been amended over time, with significant updates introduced by the Trustee (Amendment) Act of 2021, which enhanced the legislation regarding the variation of BVI trusts and other aspects of trust management. The Act sets the framework for the creation of various trust types, including Reserved Power Trusts. Amendments to the Act, particularly with the introduction of the BVI Business Companies Act, have further enhanced the attractiveness of the trust regime.

### Key Features of Reserved Power Trusts

1. **Control Retention:** The settlor can retain powers such as appointing or removing trustees, amending the trust deed, or even revoking the trust altogether. This control contrasts with irrevocable trusts, where the settlor has no such powers post-establishment.
2. **Flexible Asset Management:** Settlor can influence investment decisions, adjust the management of assets, or change the beneficiaries under specific circumstances.
3. **Protection from Creditors:** Assets placed in a Reserved Power Trust may enjoy protection from the settlor’s creditors, providing an additional layer of security for beneficiaries.

4. **Tax Benefits:** The BVI has no capital gains tax, inheritance tax, or estate tax, making it a tax-efficient jurisdiction for holding trusts.

### Advantages of Reserved Power Trusts

1. **Tailored Control:** Settlers can create a trust structure that aligns closely with their unique financial objectives and family dynamics.
2. **Beneficiary Assurance:** While maintaining control, settlers can ensure that beneficiaries are provided for, which can help in long-term wealth preservation.
3. **Estate Planning Flexibility:** RPTs allow for adjustable arrangements in the face of changing family circumstances, like divorce or the birth of children.
4. **Confidentiality:** The BVI trust structure offers a high level of confidentiality, as trust details do not need to be publicly disclosed.

### Considerations and Challenges

While RPTs present numerous benefits, they also come with certain considerations, including the following.

- i. **Regulatory and Compliance Requirements:** The settlor should always have specialist BVI advice on dealing with BVI compliance and regulatory matters with respect to the trust once established. The settlor should also have tax advice in respect of the potential tax impact which may be triggered by the transfer of assets into the trust.
- ii. **Impact on Administration of the Trust:** As the Settlor has reserved powers in the trust to, among other things, veto distributions, this can mean that it is possible for the settlor to be pressured to have direct impact on the trust administration itself. If, for example, the trustees of the Reserved Power Trust suspect that the settlor may have capacity issues such that he/she cannot exercise his/her powers, the trustees may have fundamental doubt about how the settlement should be administered.
- iii. **How much power should the settlor retain?:** Section 86 of the Act as amended by the Trustee (Amendment) Act of 2021 makes it clear that (i) the reservation of any or all of the powers specified in section 86 (2) of the Act shall not (a) invalidate the trust; (b) prevent the trust taking effect according to its terms; or (c) cause any of the trust property to be part of the estate of the settlor for the purposes of succession on death, whether testate or intestate. This is important because there has been a debate about how much power should a settlor reserve. For example, if a settlor reserves too many powers, is there a risk that the trust will fail (or, at least, be more open to challenge) because the trust may not have the “irreducible core of trustee obligations”<sup>1</sup> that are required in order for the trust to be valid. It is advisable that the settlor only reserve those powers stated in the Act (as amended) that he/she needs in order to feel comfortable with the level of control he/she retains over the trust. This will minimize the risk of arguments about legal validity of the trust – especially in jurisdictions where RPTs are not recognized and the validity of a trust with extensive reserved powers may more likely be challenged.

### Conclusion

BVI Reserved Power Trusts offer an attractive solution for settlers seeking to achieve a balance between tax efficient asset protection and retaining a level of control. Consulting with specialist legal and financial

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<sup>1</sup> The Irreducible Cores of Trustee Obligations by Adam S. Hofri-Winogradow Peter A. Allard School of Law, the University of British Columbia - 139 *Law Quarterly Review* 311-336, 2023

professionals can help ensure these trusts are established and managed effectively, maximizing their benefits while minimizing risks.

### Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to the matters discussed in this Briefing, please contact us. We would be delighted to assist.

E: [gary.smith@loebsmith.com](mailto:gary.smith@loebsmith.com)  
E: [robert.farrell@loebsmith.com](mailto:robert.farrell@loebsmith.com)  
E: [elizabeth.kenny@loebsmith.com](mailto:elizabeth.kenny@loebsmith.com)  
E: [kate.sun@loebsmith.com](mailto:kate.sun@loebsmith.com)  
E: [vanisha.harjani@loebsmith.com](mailto:vanisha.harjani@loebsmith.com)  
E: [faye.huang@loebsmith.com](mailto:faye.huang@loebsmith.com)  
E: [vivian.huang@loebsmith.com](mailto:vivian.huang@loebsmith.com)  
E: [yun.sheng@loebsmith.com](mailto:yun.sheng@loebsmith.com)



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