

BARBADOS

Editorial Board

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NEW DEVELOPMENTS

- Barbados is introducing an amendment to its legislation to provide for reserved powers to settlors.
- New legislation is currently being drafted to provide for the establishment of private trust companies, which are essentially IBCs approved to serve as trustee for a specific family.
- New legislation is also being drafted to provide for *Foundations* can best be described as a fund which has been endowed by its founder (known as the settlor in the Trust scenario) to be utilized for persons or purposes, as detailed in its statutes.

1. INTRODUCTION

A. History and background

Barbados is known for its political and economic environment, telecommunications systems, confidentiality laws, regulatory controls, supervision and other attributes. In addition, Barbados has numerous double taxation treaties with other countries.

The currency is the Barbados dollar (BBD).

B. Legal system

The law of Barbados has its foundation in English legislation, common law and rules of equity.

2. SOURCES OF LAW

A. Trust creation and administration

The law of trusts in Barbados has its foundation in the English *Trustee Act 1925 (TA)*, in common law, and in rules of equity. The general principles relating to trusts are supplemented by the Barbados *Trustee Act* and *International Trusts Act (ITA)*. The *International Financial Services Act 2002-5 (IFSA)* also regulates licensees acting as trustees of 'offshore trusts' in Barbados, and regulates the powers and duties of the licensee as trustee. Barbados has developed a legal infrastructure with accounting expertise to strengthen the proper establishment and administration of trusts.

B. Property, estate and probate

A Barbados trust provides for distributions at any time during the lifetime and upon the death of the settlor. It can provide most of the benefits of a will without requirements of probate and court approval for distribution of assets to beneficiaries. Law dictates that unquestioned legal title vests in the beneficiaries to the property of the trust.

A trust that takes effect only upon the death of the settlor must be declared as prescribed by the *Succession Act 1981*, since it is essentially a will and is therefore subject to probate. Further, the *Property Act 1979* requires that for dispositions of real property, the instrument must be in writing.

C. Taxation

The governing tax regime will depend on the type of trust and the tax planning it strives to achieve. Barbados has no capital gains tax or estate duty. Any distribution of capital gain to a trust beneficiary will not be subject to tax in Barbados.

3. TRUSTS

A. Introduction

Any resident or non-resident may settle assets in a Barbados trust. The trustees hold the assets as legal owner, subject to the trust instrument and laws of Barbados. The trust instrument may specify the trustee's duties and discretion. It also controls the distribution of the trust fund, which can take place before or after the settlor's death. The trust instrument may provide for the appointment of a protector to oversee the responsibilities of the trustee and may confer other powers on the protector.

A trust is arguably the most secure of all vehicles available to investors to protect their assets. There is a high duty of care imposed by law on a trustee and a degree of flexibility inherent in the establishment of a trust and its administration. Trusts can also provide a certain amount of mobility, enabling settlors and beneficiaries to avoid threats of a military or political nature. Settlor and beneficiaries can obtain additional protection against asset seizures and freezes, restrictive exchange control and tax regulations, and general risks of publicity associated with substantial wealth.

For almost 20 years in Barbados, tax advisors and other professionals have used trusts in effective tax planning and wealth management for high-net-worth persons and in facilitating commercial transactions.

B. Most frequently used trusts

Various laws governing trusts facilitate creative tax planning for international tax planners: the TA, the ITA, and the IFSA.

i. Domestic Barbados trust

Where the trustee is a Barbados resident individual or company, and where the trust deed does not specify that it is an international trust, it will be considered a domestic trust. Domestic trusts are generally entitled to treaty benefits. This substantially reduces or even eliminates tax in the other treaty jurisdiction. Domestic trusts have the following features:

- the majority of trustees must be Barbados residents
- the trustee can be an individual or a trust company licensed under the *Financial Institutions Act 1996-1 (FIA)*
- worldwide income is taxable
- expenses are subject to value added tax (VAT) in Barbados
- exemption from exchange controls may be received if the trust has foreign assets, non-resident beneficiaries, and deals primarily in foreign currency
- perpetuity period of 80 years, and
- no registration or filing requirements.

ii. International trust

One of the principal benefits of the international trust is its asset protection provisions. To qualify as an international trust:

- at least one trustee must be resident in Barbados
- the settlor must be resident outside Barbados
- the beneficiary must not be a resident of Barbados (with certain exceptions)
- the trust instrument must specify that the ITA applies
- no immovable property is owned in Barbados
- income derived within, or remitted to, Barbados is taxed in Barbados
- VAT is zero-rated, exempt from exchange controls, and Barbados withholding tax
- perpetuity period is up to 100 years, and
- registration is required but does not become publicly available.

The ITA also provides for the establishment of non-charitable purpose trusts, which may have no named or ascertainable beneficiaries. One of the key attractions of the purpose trust is that it need not be set up for charitable purposes and may therefore be established for a group that does not otherwise meet the criteria of a charity. The purpose trust may be used in many diverse business transactions.

iii. Offshore trust

An offshore trust is created when the trustee is licensed under the IFSA. The settlor and beneficiaries must be resident outside Barbados and the trust assets must consist solely of foreign currency or securities. The offshore trust is exempted from all Barbados taxes, duties, and exchange control requirements.

The IFSA provides protection to beneficiaries by requiring the trustee to keep all assets held in trust separated from its other assets. Furthermore, a trustee may maintain one or more common trust funds and invest the assets held in those trust accounts in a common trust fund. The trust instrument and any co-trustee must give explicit permission for this investment.

There are no registration or filing requirements for an offshore trust, so confidentiality is easily maintained. The perpetuity period of the trust can be up to 80 years and income can be accumulated for the perpetuity period.

C. Proper law of a trust

The 'proper law' is the law of the jurisdiction stated in the trust instrument. If not expressly provided for, it is the jurisdiction with which the trust had its closest connection at the time of its creation (meaning place of administration, *situs* of assets, residence of trustee, and fulfilment of trust). The proper law is central to any trust since it applies to the administration of the trust, its construction and validity. The proper law may be changed provided the other jurisdiction recognises such a change.

Provided the trust is established pursuant to the terms of the ITA, any question of whether Barbados law governs the trust, or that fails to be decided in the disposition of trust property, will be determined solely under the laws of Barbados. The laws of another country may govern the trust so long as that is expressly provided in the trust instrument. The ITA stipulates that the Barbados courts may not set aside or vary an international trust pursuant to the laws of another jurisdiction in respect of marital, succession, or creditor rights.

Barbados is party to the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985, which seeks to establish common provisions on the law applicable to trusts.

D. Trust administration

i. Maintenance and advancement

It is preferable that the trust assets be managed in Barbados. If not, it is important to ensure that they are in a jurisdiction that recognises trusts and applies similar rules of private international law to Barbados. If the assets are held in a jurisdiction where trusts are not recognised, or where different international laws are applied, then a judgment creditor may succeed in enforcing judgment directly against the assets in that jurisdiction.

One of the primary duties of the trustees is to make trust assets productive by purchasing investments from which income and/or capital appreciation might be expected. The power to invest can be made explicit in the trust instrument or the trustee can rely on the provisions of the TA. The majority of trust companies in Barbados have specialised expertise in asset management and are able to fulfil their obligations with ease.

Where the power of maintenance and advancement is not specifically provided in the trust instrument, the trustee can turn to the TA for guidance.

ii. Variation of a trust

The TA provides for the variation of trusts in relation to trust management, administration and arising beneficial interest. The court has a restricted inherent jurisdiction to sanction departure from the terms of the trust instrument where an 'emergency' not provided for in the trust instrument arises in connection with the administration of the trust.

E. Confidentiality and disclosure

Stringent provisions have been included in the ITA to ensure that trustees maintain confidentiality of all international trust documents and any other person involved in the administration of the trust. It is an offence punishable by fine and/or imprisonment for a person or a body corporate (in the majority of cases, the trustee) to make or assist in making a report, return, notice or other document that contains an untrue statement of a material fact, or omits to state a material fact.

F. Rights of creditors

i. Transfers into trust

The ITA provides for the popular asset protection trust. Under the legislation, a disposition of property made with intention to defraud a creditor, or which is transferred for less than its value, may become ineffectual if an affected creditor pursues an action.

ii. Limitation period

The creditor has a legal requirement to prove their case. The case must be brought within three years of the property disposition.

G. Provision for private trust companies

i. Requirements

Private trust companies (PTCs) are not popular in Barbados, principally because Barbados possesses a body of corporate trustees with expertise in the administration and management of trusts. A PTC may be established under the FIA. Legislation are currently being drafted to specifically deal with the establishment of PTCs.

ii. Fees

The requirements under the FIA are stringent and the capital requirements are very high. Therefore, the trust assets would have to be substantial to justify the costs of forming and operating a PTC. It is expected that PTCs established under the new legislation will be more cost efficient and easier to set up.

4. PROPERTY, ESTATES AND PROBATE

A. Wills

A will is a legal instrument or document in which a person (the testator/testatrix), sets out how an estate is to be managed or distributed among persons or entities after his death.

Section 59 of the Succession Act Cap. 249 of the Laws of Barbados allows for a person to dispose of all property to which they are beneficially entitled at the time of their death and which on their death devolves on their personal representatives.

Anyone wishing to make a will must have attained the age of 18 years or have been married and be of sound mind. However, a minor, being a soldier in actual military service, or a mariner or seaman being at sea may dispose of his personal and real estate by will.

An inheritance or gift tax does not exist in Barbados law.

Section 61 (1) of the aforementioned Act states that no will shall be valid unless:

- it is in writing
- it is signed at the foot or end by the testator, or by some person in the testator's presence and by their direction;
- the signature is made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by their signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary.

B. Law of succession

In situations where the deceased died without leaving a will, the *Succession Act* makes provisions as to how the estate is to be distributed after payment of all expenses, debts and liabilities and any legal right properly thereout.

It should be noted that the Act sets out in chronological sequence the persons or class of persons who are to benefit from the estate first, followed by the other class of persons if the class has no such persons therein.

The first group to benefit would be the spouse and issue of the deceased. Section 49 (1) of the Act states that if an intestate dies leaving a spouse and no issue or next of kin, the spouse shall take the whole estate.

Section 49 (2) of the Act states that if an intestate dies leaving a spouse and no issue, but next of kin, the spouse shall take two-thirds of the estate and the remainder shall be distributed in equal shares among the next-of-kin.

Section 49 (3) states that if an intestate dies leaving:

- a spouse and one child, the spouse shall take two-thirds of the estate and the remainder shall go to the child;
- a spouse and children, the spouse shall take one-third of the estate and the remainder shall be distributed among the children in equal shares.

The deceased parents followed by the deceased's siblings and their children are second and third in line to benefit from the deceased's estate upon intestacy.

The fourth group to benefit from an intestacy is the next of kin. In default of any person taking the estate of an intestate, the residuary estate of the intestate shall vest in the crown.

C. Conflict of laws

A testamentary disposition shall be valid as regards form if its form complies with the internal law:

- of the place where the testator made it, or
- of a nationality possessed by the testator either at the time when they made the disposition or at the time of their death, or
- of a place in which the testator had their domicile either at the time when they made the disposition or at the time of his death, or
- of the place in which the testator had their habitual residence either at the time when they made the disposition or at the time of their death, or
- so far as immovables are concerned, of the place where they are situated.

Regardless of where the will was made, or of the location of the assets or of the nationality, domicile or residence of the testator, it is made in the form of an international will complying with the following provisions:

- it is in writing
- the testator has declared in the presence of two witnesses and of an authorised person that the document is their will and that they know the contents thereof
- the signature is made and acknowledged by the testator in the presence of each of two or more witnesses and of the authorised person present at the at the same time and each witness and the authorised person shall attest by their signature to the signature of the testator in the presence of the testator.
- it is signed at the foot or end thereof by the testator or by some person in their presence and by their direction, and
- in cases where the testator is unable to sign the will, they have indicated the reason for this to the authorised person and the authorised person has made a note thereof on the will.

There is no restriction on the transfer of property under a will to beneficiaries who reside outside the jurisdiction. The only requirement that needs to be fulfilled to ensure proper title passes to the foreign beneficiary, is that permission be obtained from the Exchange Control Department of the Central Bank of Barbados prior to recording the transfer document at the Land Registry, as the permission is attached to the transfer document.

5. OTHER FORMS/ENTITIES

Barbados provides various types of entity that are attractive both locally and internationally, since they provide financial incentives. These entities include domestic companies, international business companies, captive insurance companies, financial institutions, societies with restricted liability, mutual insurance companies, non-profit companies and ship registration. The *Companies Act* regulates the operations of these companies.

A. Domestic Barbados companies

The following is a synopsis of domestic Barbados companies:

- incorporated within 24 hours by filing articles of incorporation at the Registry of Corporate Affairs
- a minimum of one director who need not be a resident of Barbados
- shareholders may or may not be residents of Barbados; a foreign shareholder must apply to the Exchange Control authorities to hold shares in a Barbados domestic company
- no minimum shareholding requirements
- annual audit required if assets and/or gross revenue exceed USD500,000
- taxed at the rate of 37.5 per cent per annum on profits, and
- must file annual returns.

B. International business company (IBC)

An IBC can be incorporated within 24 hours by filing articles of incorporation at the Registry of Corporate Affairs. Upon incorporation, the IBC applies to the Ministry of Economic Development for a licence to conduct business. The following is a synopsis of IBCs:

- must have at least one director, who need not be resident of Barbados
- shares may be issued to residents of Barbados or foreign entities
- no minimum capital requirement
- shares can be issued in various classes and are not issued at par value
- taxed at rates ranging from a low of 0.25 per cent to a maximum of 2.5 per cent on profit
- restricted from carrying on business with residents of Barbados
- exempt from exchange control requirements, withholding taxes on payment of dividends, interest, royalties, management fees, and other fees to non-residents
- annual licence fee of USD425
- annual audit required if assets and/or gross revenue exceed USD1,000,000
- most supplies are zero-rated for the purposes of VAT, and
- must file annual tax returns.

C. Society with restricted liability (SRL)

An SRL (International SRL and Regular SRL) is an entity designed to take advantage of benefits that can be gained in the US through the use of hybrid entities, characterised in the local jurisdiction as corporations but treated as partnerships for US tax purposes. The SRL is governed by the *Society with Restricted Liability Act 1995-7*, as amended (SRL Act). An SRL can be engaged in any legal business activity.

The following is a synopsis of SRLs:

- must have at least one manager who need not be resident in Barbados
- must have at least one member
- no minimum capital requirement
- can be organised as an international society or a regular domestic society
- International SRL restricted from carrying on business with residents of Barbados
- International SRLs are similar to IBCs and taxed at rates ranging from 0.25 per cent to a maximum of 2.5 per cent on profits

- International SRLs exempt from exchange controls and withholding taxes on distributions to non-residents
- annual audit required if assets and/or gross revenue exceed USD1,000,000
- International SRL must pay annual licence fee of USD425, and
- must file annual tax returns.

D. Exempt insurance company (EIC)

The following is a synopsis of EICs:

- must be incorporated and licensed under the Exempt Insurance Act in Barbados with a minimum capital of USD125,000
- must have at least two directors who need not be residents of Barbados
- taxed at the rate of 0 per cent with an annual licence fee of USD2,500
- exempt from exchange controls and withholding tax being levied on remittances to non-residents, and
- must meet reasonable solvency tests.

E. Qualifying insurance company (QIC)

A company licensed under the *Barbados Insurance Act* may apply for a certificate of qualification where at least 90 per cent of its premiums and risks originate outside the Caribbean Community (CARICOM). The following is a synopsis of QICs:

- can benefit from a low effective rate of tax of 1.75 per cent after deduction of a foreign currency earnings tax credit (applicable to general insurance business)
- tax rate for life insurance business can be lowered to 0.35 per cent of gross investment income
- reasonable solvency requirements
- exempt from exchange controls and withholding taxes, and
- may be owned by residents of Barbados, who can insure a certain amount of local risk.

F. Financial institutions

The IFSA permits banking in foreign currencies (receiving deposits, sale of securities, making loans, advances, and investments). There are capital and reserve requirements, which must be audited annually. The following is a synopsis of the laws governing banking in foreign currencies.

- licensees are under the supervision and regulation of the Central Bank of Barbados
- initial application fee and annual licence fee of USD25,000
- exempt from withholding tax on payment of dividends, interest to non-residents and exchange controls
- thorough investigations of the shareholders, directors and officers of a company are carried out before a licence is granted, and
- IFSA provides total and complete exemption in respect of trust activities carried on by a licensee.

G. Redomiciliation of companies

The *Companies Act* provides for a Barbados company to be continued in another jurisdiction with shareholder approval so long as it satisfies the Registrar of Corporate Affairs that its proposed

continuance will not detrimentally affect shareholders or creditors. It is necessary for the other jurisdiction to provide complementary legislation, which recognises the assumption by the continued entity of all rights, obligations, and liabilities of the continued company.

H. Registration of external company

A company incorporated under the laws of another country may register in Barbados as an external company where it proposes to carry out an undertaking in Barbados.

6. TAXATION

A. Taxation of trusts

In order for a trust to be considered a tax resident of Barbados, the trustees must be resident in Barbados and the administration and management of the trust should be in Barbados. A domestic trust is taxed at the same rate as are individuals. The trustee is liable for payment of that tax, assessed on worldwide income of the trust. In determining taxable income, allowance is made for expenses incurred as well as any amounts payable to beneficiaries. Distributions made to non-resident beneficiaries will only be taxable on income derived from Barbados.

An international trust is deemed to be non-domiciled in Barbados for taxation purposes, and is subject to tax only on its Barbados source income and overseas income remitted to Barbados. In particular: income and gains are exempt from tax in Barbados; amounts allocated to non-resident beneficiaries out of income are not subject to tax in Barbados; and the trust is exempt from indirect tax or other imposts on transactions undertaken pursuant to its activities.

In the case of trusts regulated pursuant to the IFSA, no tax is payable either by the trust or beneficiaries.

B. Treaties

Barbados has income tax treaties with Austria, Botswana, Canada, CARICOM countries, the People's Republic of China, Cuba, Finland, Iceland, Luxembourg, Malta, Mauritius, Mexico, Norway, the Netherlands, Panama, Spain, Sweden, Switzerland, Republic of Seychelles, the United Kingdom, the US, Venezuela, . Reduced withholding taxes on dividends and interest are features of these treaties, resulting in the establishment of investment management companies and trusts in Barbados.

The government of Barbados continues to pursue its commitment to promote and develop the international business sector in Barbados. In this regard, the government is actively seeking to negotiate additional beneficial tax treaties, bi-lateral investment treaties and tax information exchange agreements with countries that it views as potential trading partners, such as, Brazil, Republic of Ghana, Portugal, Czech Republic, Italy, Vietnam, Belgium, Bahrain, Denmark, Greenland, Faroe Island, Germany, France.

7. OTHER RELEVANT MATTERS

Anti-money laundering rules

The Barbados regulatory anti-money laundering controls are found in the new *Money Laundering and Financing of Terrorism (Prevention and Control) Act, 2011-23 (MLFTA)*. Guidelines are being developed by each regulatory body (such as the Central Bank, Financial Services Commission, Bar Association)

The first important change to the MLFTA is a significant expansion of the numbers and types of entities and professionals covered. In the past, anti-money laundering risks and regulations were primarily geared towards traditional financial services entities, such as banks and insurance.

The new legislation now expands beyond financial institutions, to include non financial business entities, as well as professionals involved in a wide range of financial transactions. This includes real estate agents involved in the purchase and sale of properties, dealers in precious metals or stones, independent attorneys or accountants engaged in certain types of transactions, corporate or trust service providers and even international business corporations.

Another change is the removal of the BDS\$10,000 reporting threshold replaced by conducting a risk based assessment. Rather than using a tick list of reporting BDS\$10,000 whether the customer was high risk or low risk, there is now a requirement to profile the entity as well as the customers using risk filters to determine where the vulnerabilities lie.

The third and most significant change is the introduction of administrative fines and sanctions for non compliance. For those firms who do not establish AML policies & procedures, appoint a Money Laundering Reporting Officer, train their directors and employees and other components of an Anti Money Laundering Programme with integrity, the penalties can be severe. The penalties are progressive starting out with a warning, followed by a \$5,000 fine and then \$500 per for the next 30 days until compliant after which the regulator may revoke the business license (this is controversial for the attorneys).

The MLFTA confers responsibility for the supervision of financial institutions to the Financial Task Force.

Barbados has fulfilled the requirements of the *1988 UN Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances* ('1988 Vienna Convention') by the enactment of the *Drug Abuse (Prevention and Control) Act 1990*, the *Proceeds of Crime Act 1990*, and the *Mutual Assistance in Criminal Matters Act 1992*.

8 RESOURCES

A. Publications

G Kodilinye and TA Carmichael, *Commonwealth Caribbean Trusts Laws*, 2nd ed (London: Cavendish, 2002)

B. Websites

Barbados International Business Association: www.biba.bb

Corporate Affairs and Intellectual Property Office: www.caipo.gov.bb

InvestBarbados: www.investbarbados.org

Ministry of Industry and International Business: www.barbadosbusiness.gov.bb