

BLUE-SKY ESG THINKING



IN AN OFFSHORE CONTEXT

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The interest of some trust settlors and beneficiaries in environmental, social, and governance (ESG) investing is perhaps the hottest current topic in our industry conferences and periodicals. You will have doubtless read a substantial amount about the principle of ESG in trusts, and we, as offshore lawyers, are occasionally less involved in that initial client discussion which tends to be with their onshore advisors or trust company.

But on the implementation side, we sometimes see onshore lawyers

attempting to force offshore trusts into an inflexible onshore-style arrangement, even when there is no tax requirement. As such, we want to sketch some hopefully liberating concepts that dovetail with ESG investment (or other specialised investment approaches like cryptocurrency or art/wine investment). We shall focus on the British Virgin Islands (BVI) and Cayman Islands, which we think combine a flexible approach to this area while staying in the mainstream of English-style common law.

The problem we must overcome will be familiar, that of the trustee needing to be a 'prudent investor' who always acts in the best interests of their beneficiaries. Can a professional trustee or their investment advisor feel reassured that they have the freedom to make ESG-favouring investment choices when asked to do so by the family? Would the trustee be safe if hindsight proves such choices to have been less profitable? There are two main ways to deal with this concern: reserved powers or explicit trust purposes.



Allowing the family to make the decision

The reader will know that most offshore trust regimes allow the trustee's duties of investment and management to be partly or wholly delegated away to family members, who then have the freedom to develop ESG investments. There are different ways to achieve this. Powers can be reserved by the simple invocation of the BVI's Virgin Islands Special Trusts Act (VISTA) legislation which delegates the trustee's duties of investment and management (although note, not its powers over distributions which remain with the trustee) to the directors of an underlying BVI company which then holds the substantive assets underneath. Or powers can be reserved through numerous permutations of bespoke drafting: mechanisms such as investment committees (which, despite their name, are often made up of family members) or specified companies over which the trustee must accept investment directions.

It is possible to have such reserved powers (including VISTA) over only a portion of the trust fund, or 'sub fund,' for example, if only one beneficiary wants to experiment with ESG and its impact on returns – eg if a trust holds one BVI company (which holds the ESG assets) and one Delaware company (which holds everything else), VISTA will apply to only the BVI company. It is also possible to have trigger points that switch reserved powers/ESG off or on.

Whether and which reserved powers regimes are available in any given situation will largely depend on onshore factors. However, it is as well to remind those who act as trusted advisor to HNW clients that VISTA, a regime enshrined in statute, works extremely well for clients in a hugely wide range of countries around the globe. There is a reason why VISTA trusts are so popular, after all.



Making ESG a purpose of the trust

Instead of reserved powers, it is also possible to use a variation of purpose trust with the explicit aim of furthering ESG objectives. In all the variations we will discuss, 'purpose' can take a

commercial meaning (for example, the purpose of furthering the interests of X company) or a more philanthropic meaning (for example, furthering the interests of Y cause) and to combine those two meanings dovetails nicely with ESG investment (for example the purpose of furthering the interests of companies which pursue Z objectives).

A client could choose a "pure" purpose trust. Any returns from the investments could be reinvested or, for example, donated to philanthropic but not explicitly charitable aims. Its trust deed could have trigger mechanisms for when assets could be fed back into the wider family structure. We recently drafted, in conjunction with onshore lawyers, a trust deed for a substantial family philanthropic trust, which has purposes that strongly reflect the family's beliefs in responsible business.

Or, the client could choose a Cayman Special Trusts (Alternative Regime) (STAR) trust. This concept, currently unique to Cayman, allows a combination of beneficiaries and purposes in the same trust. This form of trust is the ultimate in flexibility because it is even possible to make one of the purposes, that of following the family's wishes over investments (thus bringing in a form of reserved powers mechanism). The STAR legislation also removes the beneficiaries' rights to enforce the trust or to information, passing those to the enforcer, which can be beneficial to families who are conscious of the future possibility of dispute over their chosen ESG approach.

Finally, it is possible to have an offshore charitable trust. These have increased in popularity over recent years, and we do see private families, particularly from regions such as Asia and Latin America, setting them up as part of their dynastic planning. A multi-branch family may set up a structure where a Private Trust Company (with all the branches represented on the board) is trustee of several family trusts and one charitable trust, for example.

The mention of Private Trust Companies reminds us that there are yet further ways for families to take a more active role in trust management. However, for those who wish for asset protection or other reasons to stay with a professional third-party trustee, it is possible to do good for people and the planet too.

