

## **A BIRDS EYE VIEW OF**

### **ST VINCENT AND THE GRENADINES INTERNATIONAL TRUST ACT 1996**

The International Trust Act 1996 (the "Act") specifically relates to Trusts that satisfy the definition of an International Trust. The conditions to be satisfied are as follows:

- (a) at the time of the creation or settlement of the Trust or any new disposition to the Trust neither the Settlor nor the beneficiary must be a Resident
- (b) the Trust must be evidenced by writing signed by the Settlor or his nominee and by a Registered Trustee;
- (c) at least one of the Trustees must be licensed under the Registered Agents and Trustees Licensing Act and;
- (d) the Trust property must not include any real property or an interest in any property situated in this State.

#### **THE MEANING OF A TRUST**

The Act further provides that a "trust" means "the legal relationship created under the principles of equity and common law when property has been placed under the control of a trustee for the benefit of one or more beneficiaries or for a charitable or other specific purpose." It also provides that a trust should have the following characteristics:

- (a) the property which is the subject matter of the Trust should be separate from and not form part of the Trustee's estate or taxable to the trustee;
- (b) title to the trust property is held in the trustee or in the name of another person who acts on behalf of the Trustee for the benefit of the Trust or beneficiaries;
- (c) the Trustee has the power and the duty in respect of which he is accountable to manage, employ or dispose of the assets in accordance with the terms of the trust instrument and the special duties imposed on him by law; and
- (d) the Trustee is a fiduciary, and thereby accountable for the management and administration of the property in the Trust.

On the basis of this it is clear that the Act **creates a split between the management of the property which it requires to be vested in the Trustees and the beneficial interest which is enjoyed by the beneficiaries.**

Such arrangement may on first appearance cause some concern to a prospective Settlor of an International Trust since he will be expected to transfer the legal title to his property to a person or persons that he may not know well enough to be entrusted with the management and administration of the Trust. Despite this the Act has afforded to the Settlor a significant,

amount of protection not only against potential breaches of trust by the Trustees, but also from prying eyes, fishing expeditions and orders or judgements originating from other jurisdictions.

### **Settlor's Protection**

The following represent some of the ways in which such protection can be obtained:

#### (i) Retention of Control

The Settlor may pursuant to the Act, either retain control over the management of the trust property by appointing a Protector (see page 6), issuing a letter of wishes or by reserving to himself certain rights and powers. In that regard the Settlor may retain to himself the power to revoke the Trust; amend the Trust; remove or appoint a Trustee, Protector or advisor; direct a Trustee or Protector on any matter and appoint the capital or income from the Trust to persons other than himself.

As a form of maintaining control of the Trust the Settlor may also retain or acquire any benefit, interest or property from the Trust or if he so desires exist as its sole beneficiary.

#### (ii) Exclusion of foreign Laws or judgements

The Trust, trust property or any person who is authorised to deal with the Trust or trust property will be protected from any proceedings relating to the enforcement or recognition of a judgement or order from a jurisdiction other than SVG where the laws of the foreign jurisdiction are inconsistent with or contrary to those of SVG.

#### (iii) Limitation on commencement of proceedings

Any action or proceeding against a Trustee for breach of trust or any such action or proceeding which challenges the creation of a trust or disposition to or by a trust is expected to be commenced in the court within two years of the date of creation of the Trust, the disposition of assets or breach of trust. Unless the person bringing the action can establish that he had an interest in the property before it was settled or before the disposition was made he will not be allowed to commence any action or proceeding.

If for example a creditor was able to establish an interest in the Trust or trust property at the time the Trust was created or the disposition was made, he will be required to commence that action within one year of the date the Trust was established or the disposition took place. Additionally, he will be required to prove beyond reasonable doubt in proceedings that are final and not subject to further appeal that the Trust was settled or the disposition was made with the intent to defraud him and that as a result of the settlement or disposition the Settlor was rendered insolvent.

#### (iv) Security for costs

In any event a creditor who seeks to bring an action or proceeding against a Trust or trust property will be required to deposit with the court prior to the commencement of the action or

proceeding at least US\$ 25,000 as security for legal costs which may become payable if he is unsuccessful. This will act as a deterrent to those wishing to embark on fishing expeditions.

#### (v) Heirship Rights

Unless the Trust instrument so provides, a Trust that is governed by the Act cannot be invalidated on the basis that it avoids or defeats the right, claim or interest of a person held by reason of a personal relationship to the Settlor or by way of heirship rights.

#### (vi) Fiduciary Duties

In addition to that provided for by the Act, common law and equity have over the years developed a considerable number of rules which impose very stringent duties on Trustees requiring them to discharge such duties with utmost honesty, diligence and reasonable despatch. For example a Trustee is expected to act honestly and to manage the affairs of the trust in the same way that a prudent man of business will manage his own affairs. In that regard he is under a duty not to make a profit from the Trust unless the terms of the Trust instrument clearly allow such a profit to be made.

#### (vii) Bankruptcy

The Act provides that irrespective of the law of the Settlor's domicile or place of ordinary residence or the Settlor's current place of incorporation an International Trust shall not be void, or voidable in the event of the Settlor's bankruptcy, insolvency or liquidation or in any action or proceeding at the suit of creditors of the Settlor, but shall remain valid and subsisting and take effect according to its tenor subject to the provisions of the Act. An SVG International Trust by virtue of the protection it affords to the Settlor and beneficiary will provide the comfort and confidence that are required by the prospective Settlor who is in search of a vehicle and a country through which he can channel his wealth and be assured of absolute confidentiality.

### **Why use a Trust?**

Why would a prospective Settlor use the vehicle of a SVG International Trust as a way of managing his wealth? There are several reasons for doing this. Quite often the Settlor may wish to; (a) reduce his tax liability;(b) restructure the distribution of his assets on his death so as to get around forced heirship rights and to protect the family wealth from being squandered by a spendthrift; (c) extend his assets beyond the reach of prospective or even actual creditors and; (d) avoid foreign exchange regulations.

### **Creation of a Trust**

An International Trust may only be created by an instrument in writing which satisfies the formal requirements of a deed as prescribed by the laws of the jurisdiction ( see subheading applicable law of trust) that govern the Trust. The Trust is then created at the time that the trust property is vested in the Trustee pursuant to the terms of the Trust instrument but shall

be rendered invalid or unenforceable if it purports to do anything that is contrary to the laws of SVG.

#### (i) Power of Revocation

In establishing a Trust it is however important to note that the trust instrument should contain a power of revocation. Failure to so provide will raise the presumption that the Trust is irrevocable by the Settlor or his legal representative.

#### (ii) Duration of Trust

The Act provides that a Trust may subsist for a period not exceeding one hundred and twenty one years (120) after the date of its creation or sooner if so prescribed by the Trust instrument. The maximum duration period does not however apply to purpose trusts since such trusts continue in force indefinitely.

The rules against perpetuities do not however apply to trusts that are governed by the Act. Therefore, the Settlor is at liberty to provide in the terms of the Trust instrument for accumulation of income and capital for a maximum period of one hundred and twenty years (120) from the date of the creation of the Trust.

### **Capacity of Settlor**

The capacity of the Settlor to create a trust is dependent on three issues which are as follows; (i) whether or not the property that will constitute the Trust is movable or immovable (ii) whether or not the trust is an inter vivos trust, a testamentary trust or a trust of immovable property and (iii) whether the Settlor has the legal capacity to create a Trust. Where the trust is an inter vivos trust and the trust property is movable the Settlor will be required to have the legal capacity to create a Trust of movable property under the laws of SVG.

On the other hand if the Trust is a testamentary trust the Settlor is expected to have the legal capacity to create a Trust of movable property under the laws of his domicile. With regard to the trust of immovable property, the Settlor will also be required to have the capacity to create a Trust of immovable property under the law of the jurisdiction in which the immovable property is located.

An individual who not being insolvent, attained the age of majority (e.g. 18 years) and is considered to be of sound mind may be a Settlor.

### **Applicable Law of the Trust**

The applicable law of the Trust is that expressed or at least can be demonstrated with reasonable certainty by the terms of the Trust instrument or that intended by the Settlor to be the applicable law. Where no such intention can be ascertained, the jurisdiction with which the trust had the closest connection at the time that it was created will be chosen as the applicable law of the trust. The Act however also provides that if it is not clear as to which jurisdiction the trust had its closest connection then the laws of SVG shall apply.

In determining the law with which the trust had its closest connection consideration will be given to the following:

- (i) the place of residence or business of the Trustee(s);
- (ii) the place of administration of the Trust designated by the Settlor;
- (iii) the location of the assets of the Trust;
- (iv) the objects and purposes of the Trust and the places where they are to be fulfilled or met; and
- (iv) whether the Trust has been registered under the Act.

### **Changing Applicable Law of Trust**

Under the Act, the law that governs the Trust can be changed to or from that of another jurisdiction provided that the terms of the trust instrument expressly provide for such a change and the new applicable law recognises the validity of the trust and the respective rights of the beneficiaries.

Notwithstanding the foregoing, the court of SVG has jurisdiction in respect of any matters concerning a trust where:

- (i) the applicable law of the Trust is the law of SVG;
- (ii) a trustee of a Trust is a Resident;
- (iii) any part of the administration of the Trust is carried on in SVG, or
- (iv) the Trust is registered under the Act.

### **PROTECTOR**

The terms of the Trust instrument may make provision for a Protector. If such a provision is made and the terms of the Trust do not otherwise provide, the protector shall be given the following powers:

- (i) the power to appoint and remove a Trustee;
- (ii) the power to change the applicable law of the Trust;
- (iii) the right to receive notice in advance of specified actions of the Trustee;
- (iv) the right to receive information relating to or forming part of the accounts of the Trust; and
- (v) such further powers as are conferred on the Protector by the terms of the Trust or by the Act

Although the Act provides that a Protector may also be a Trustee, the Protector will not be so regarded in the exercise of his office, unless and until he has been appointed to the office of Trustee. Notwithstanding the foregoing and unless the terms of the trust instrument otherwise provide, a Protector owes a fiduciary duty to the beneficiaries of the trust or to the purpose for which the Trust has been established and may be held liable for any breach of that fiduciary duty.

The terms of the Trust instrument may provide for the appointment of more than one Protector. Where such a provision is made, any function conferred on the protectors will be exercised after they have consulted each other and a majority of the protectors arrived at an agreement to that effect.

### **WHO MAY BE TRUSTEES?**

Anyone who is an adult and of sound mind is eligible to be a trustee. A company which was incorporated under the local Companies Act may also be a trustee of a Trust provided that it possesses a valid and subsisting licence to conduct its operations as a Registered Trustee pursuant to the Registered Agent and Trustee Licensing Act 1996.

The Act also provides that a person who derives a profit from a breach of trust shall be deemed to be a trustee of the profit or property unless he derives or obtains it in good faith and without actual, constructive or implied notice of the breach of trust. If the profit was not obtained in good faith the person profiting from the breach will only be made a trustee to the extent that he holds the profit on constructive trust (see page 9) and until such time as he repays the said profit to the person properly entitled to it. He will not however be subject to the body of common law and equitable rules which expound the managerial and administrative duties of a trustee.

### **WHAT PROPERTY MAY BE SUBJECT TO AN INTERNATIONAL TRUST?**

Property of any description may be the subject of an SVG International Trust regardless of where it is situated, including any share or interest therein, except that such property does not include any real property situate in SVG or an interest in property so situate.

### **WHO MAY BE BENEFICIARIES?**

The Act defines a beneficiary as a person entitled to benefit under a Trust, or in whose favour a power to distribute trust property may be exercised, and includes a body corporate. Thus, anyone can be a beneficiary of a Trust governed by the Act. This will include a minor, person of unsound mind, Settlor, Trustee and Protector. A Settlor may also be a beneficiary and, as mentioned above, a trustee may be one of the beneficiaries.

The class of beneficiaries may also include charitable organisations and for purposes which are both charitable and non-charitable.

### **CLASSIFICATION OF TRUSTS**

There are several types of Trusts. However the Act expressly refers to four types namely;

- Spendthrift Trust (or Protective Trust)
- Charitable Trust
- Non-Charitable Purpose Trust
- Constructive Trust.

#### (i) Spendthrift Trust

This is a Trust that makes provision to terminate, alienate, suspend or mitigate the interest of a beneficiary or restrict any dealing in that interest on the happening of a specific event. Such an event may include the insolvency of the beneficiary or the exposure of his property to sequestration or seizure for the benefit of his creditors.

If the specific event occurs, the Trustee pursuant to the Act may in his absolute discretion distribute the income to the beneficiary, or any spouse or child of the beneficiary or if there is no such spouse or child to the beneficiary or those persons who will be entitled to the estate of the beneficiary if he had died intestate and domiciled in SVG.

A Settlor may use a Spendthrift Trust if he wishes to protect the trust property against an improvident beneficiary and the claims of his creditors.

#### (ii) Charitable trusts

Trusts created for charitable purposes are required to benefit the community or a substantial section of the community. Those purposes will be regarded as being charitable if they relieve poverty, advance education and religion, protect the environment and advance or protect human rights and fundamental freedoms. A purpose may be regarded as being charitable whether it is carried out in SVG or elsewhere and whether it is beneficial to a community in the state or elsewhere.

Where there is a failure of the Trust because the purpose ceased to be charitable or cannot be fulfilled or the purpose which can be fulfilled provides a use for only part of the trust property or has been adequately provided for by other means, the court upon application by the Trustee may declare that the trust property should be held for such other charitable purpose that it considers to be consistent with the original intention of the Settlor.

#### (iii) Non-Charitable Purpose Trusts

A Non-Charitable Purpose Trust may be created for a purpose which is not charitable provided that the purpose is specific, reasonable, capable of fulfilment and not immoral, unlawful or contrary to the public policy of SVG. The terms of the Trust must provide for the appointment of a Protector and his successor and must also specify the event which will terminate the Trust, and how the surplus assets should be disposed of upon its termination. Where although the terms of the Trust make provision for a Protector no one is holding such an office, the International Financial Services Authority on the advice of the its Inspector will appoint a person to be Protector of the Trust.

The Act also extends the doctrine of Cy-pres to trusts created for non-charitable purposes. Thus, if a non-charitable trust is ineffective or fails subsequently the trust property may not result to the Settlor- instead it can be applied for another purpose that is non-charitable and which is proximate to the original Trust.

(iv) Discretionary Trusts

These are trusts where discretion is given to trustees to select amongst a class of beneficiaries. They may also be used to exercise control over the young and improvident beneficiaries of the trusts. With a discretionary trust the beneficiaries do not have any right to any part of the trust fund. The Trustees pursuant to the terms of the Trust have a discretionary power to distribute the capital and income of the Trust to the beneficiaries as they the Trustees see fit. Thus the trustees may not be required to distribute the income or the capital for the entire perpetuity period. Except insofar as a distribution has been actually paid to the beneficiary, there is no interest in the trust property which can be identified as being owned by the beneficiary and on which his creditors can claim.

(v) Fixed Trusts

These are Trusts which specify in the trust instruments the interest to which each beneficiary is entitled.

(vi) Constructive Trusts

A Constructive Trust is one which is imposed by equity when a person holds property which by the demands of justice and good conscience should be held or enjoyed by another. In such circumstances the court may declare that the property should be held on trust for the other person without regard to the presumed intention of the parties.

**Other Benefits**

(a) Taxation

Provided that the Trust:

(i) does not own any interest in real property situate in SVG and all income (other than interest from regular bank accounts or portfolio investments of securities held by the trust in SVG) is either accrued or derived from outside of SVG;

(ii) is not established by or on behalf of, nor for the benefit , of residents and the terms of the trust so provide,

Then all income, asset, profit or gain realised or received by the trust or any beneficiary of the trust shall be exempt from income, estate, inheritance, succession, gift, excise or capital appreciation tax, rate, duty, levy or other charge.



Any transfer of funds or other assets by a trust registered under the Act to an International Business Company (IBC) registered under the IBC Act 1996 shall be exempt from any tax, duty or other impost.

### **SVG's prominence as an International Financial Services Centre**

In addition to the International Trusts Act 1996, The St. Vincent and the Grenadines International Financial Services Authority offers to clients a Menu of Acts from which they are free to make informed choices that will suit their respective needs. The Registered Agent and Trustee Licensing Act 1996 provides the framework for licensing and regulating offshore representation for those persons discharging the functions of company registered agents or managers or as trustees of trusts registered in SVG. The International Financial Services Authority Act 1996 which established the St Vincent and the Grenadines International Financial Services Authority (formerly the Offshore Finance Authority) stipulates the said Authority's duties and responsibilities.

The International Business Companies Act 1996 provides for the incorporation, regulation and operation of IBCs and related matters. The International Banks Act 1996 provides for the licensing and regulation of offshore banking business and related matters and The Merchant Shipping Act 1982 deals with Merchant Shipping and matters incidental thereto.

Except for the Merchant Shipping Act 1982, the SVG International Financial Services Authority is responsible for permitting the conduct of international financial services operations, pursuant to the other acts aforementioned. The prospective applicants need only submit applications to one Authority thus making the process simpler and a lot more efficient.

The Menu of Acts was developed after very serious consideration has been given to the effectiveness of the international financial services legislation in the well established jurisdictions throughout the world. The decisions of courts in other jurisdictions in dealing with issues relating to Trusts and other international financial services vehicles have also been taken into account in putting together this masterpiece of very modern menu of legislation. It was only after such diligent deliberations that the tried and tested legislation in other jurisdictions were adapted and modified primarily to suit the needs of clients. In developing these measures the needs of the client have been, as it always will be, of paramount importance.

SVG boasts a large pool of professionals and a stable political and economic environment where friendly people exist in peace and harmony. The crime rate is relatively low and due to the efforts of a very efficient police department the conviction rate is extremely high. The physical infrastructure is of a very good standard. Thus, its excellent telecommunications facilities and availability of office space at very competitive prices make it the natural place to conduct offshore financial services operations and to do business with.

### **Distinct attributes of SVG Trust law**

These include:

- Confidentiality;
- Anti-forced heirship rules;
- A maximum perpetuity period of 120 years;
- An option to accumulate income for the entire Trust period subject to a maximum period of 120 years;
- Exclusion and unenforceability of foreign judgements;
- The recognition of purpose trusts;
- The statutory recognition of a Protector **and**;
- The statutory recognition of trust advisors