

## The Bermuda Private Trust Company Guide

**Briefing Summary:** Private trust companies ('PTCs') may be described as companies established to act as trustees for one or more trusts that are related in some way e.g. made in connection with the same family group, philanthropic or charitable organisations, business or investment funds.

**Service Area:** Trusts and Private Wealth, Family Office, Wills and Inheritance, Private Trust Structures, Private Client, Family Law, Regulation of Trust Company Business, Estate Planning, Corporate Trust Structures

**Location:** Bermuda

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Bermuda has a stellar international reputation and is a popular jurisdiction in which to establish PTCs, trusts and underlying entities (including private funds and insurance vehicles) and family offices (or branches thereof). Part of Bermuda's international appeal includes:

- a high quality legal system, a common law system based upon, but independent from, that of England and Wales. Bermuda's final court of appeal is the Privy Council in London
- a pragmatic and respected regulatory environment
- direct flights to and from New York, London, Toronto, Miami and other major centres. When travelling to the United States, travellers clear U.S. customs and immigration in Bermuda
- the presence of international law firms in the jurisdiction and the ability of such firms to, where appropriate, employ talented lawyers from outside the jurisdiction and in appropriate cases, arrange for senior barristers (such as Queen's Counsel from the United Kingdom and other jurisdictions) to be granted rights of audience before the Bermuda courts
- the presence in the jurisdiction of the "big four" and other international accountancy firms as well as international trustee and corporate service providers
- political stability, safety and quality of schools, hotels, conference centres, restaurants and infrastructure.

### Licensed trustee vs PTC

In this guide, except where the context otherwise requires, a reference to a PTC shall be to a company acting as trustee in or from Bermuda which is exempt from Bermuda's trustee licensing requirements.

### Key Contacts



Keith Robinson  
PARTNER, BERMUDA  
+1 441 542 4502



Cheri Wainwright  
SENIOR ASSOCIATE,  
BERMUDA  
+1 441 542 4505

[EMAIL KEITH](#)

[EMAIL CHERI](#)

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY

CAPE TOWN HONG KONG SAR LONDON SINGAPORE

[careyolsen.com](#)

The selection of trustees is an important consideration, particularly for families considering establishing trusts outside the jurisdiction(s) with which they are most closely connected. Many licensed trustees and corporate service providers can offer the advantages of greater independence, a respected international reputation in financial services and the availability of directors and personnel well experienced in providing trust and corporate administration services under the laws and regulations of the jurisdictions in which they operate.

However, where circumstances permit, high net-worth families may wish to consider establishing a PTC to act as the trustee of trusts with the view of maintaining greater influence over the information and administration in respect of the trust structure. Use of a PTC does not of course preclude the engagement of licensed service providers to assist with certain aspects of administration of the PTC and the trust structure. Involvement of Bermuda licensed service providers may materially reduce the compliance obligations that would otherwise be directly imposed on the PTC. However, use of a PTC does provide to a family control over the extent that licensed service providers are involved in the administration of the trust structure.

## Advantages of the Bermuda PTC

The advantages of PTCs established under Bermuda law are numerous and include:

### **Control**

PTCs provide the settlor and/or the settlor's family the ability to retain greater control over the trustee decision making processes, including in respect of distributions, investment selection, management of underlying companies (whether operating or investment vehicles) and appointment of delegates (including licensed service providers).

### **Family involvement**

Family members and their trusted advisers may be appointed as directors of the PTC. This can facilitate family members working together in a structured environment and facilitate the development of younger family members' decision making capabilities and knowledge in respect of financial services, governance, investment and familial affairs.

### **Flexibility of investment selection**

Families may wish to have trust funds invested in alternative or high risk investments. A more risk averse licensed or individual trustee may be less inclined to make such investments, whereas PTCs are generally in a better position to do so, primarily because PTCs ordinarily do not have the same risk profile and regulatory and other pressures as licensed trustees. Individuals acting as trustees may become preoccupied with the risk of being sued personally should the investments diminish in value.

### **Minimising trustee and government fees**

PTCs provide families with the ability to minimise fees (including ad valorem fees based on the value of the trust fund) that may be charged by a licensed trustee. Bermuda PTCs do not incur government charges that are imposed upon Bermuda licensed trustees and only incur the relatively modest government fees (e.g. upon incorporation and annually) that are generally imposed on Bermuda companies.

### **No minimum capital and insurance requirements**

Bermuda PTCs are not subject to a minimum capital requirement and neither a PTC nor its directors are required to obtain insurance in connection with the performance of their functions. Of course, PTCs and their directors and officers are able to arrange insurance as they consider appropriate and, subject to the trust's terms, the premiums may be discharged from the applicable trust funds.

### **Continuity**

Licensed corporate trustees may experience a turnover in staff from time to time and may even undergo changes in ownership. This may result in a change in the nature and level of service and a loss of knowledge of the licensed trustee in respect of the family and the trust structure. These issues arise considerably less frequently with PTCs.

Additionally, PTCs provide families with the ability largely to (and often completely) avoid the disputes (and consequent inconvenience and costs) which can arise when replacing licensed corporate trustees or individual trustees and transferring trust property from outgoing trustees to incoming trustees. With a PTC, there is the ability simply to change directors of the PTC without the need to replace the trustee itself and thereby avoid the transfer of trust property to new or continuing trustees.

### **Preferable to individual trustees**

Aside from other issues outlined herein in respect of individual trustees, appointing individuals as trustees can also result in a number of other succession and administrative issues. For example, an individual trustee may die or lose mental capacity and this can result in delays and costs while arrangements are made to appoint a successor.

### **Minimise liability**

Directors, officers and members of a PTC benefit from the corporate veil. In the absence of dishonesty or personally assuming obligations to beneficiaries or third parties, it is ordinarily very difficult for a PTC's director, officer or member to be liable for a breach of trust or contract claim made in respect of a breach by the PTC as trustee. Concerns about possible personal liability on the part of directors of the PTC may be addressed through exoneration and indemnification provisions in the PTC's constitutional documents and in the applicable trust deed and/or by appropriate director and officer insurance.

### **Greater privacy**

Trustees often may receive, and be required to consider, personal and confidential information as part of their decision making processes. Use of a PTC can minimise the extent of personal information that families are required to share with third party service providers.

Separately, it should be noted that under Bermuda law trust documents, internal correspondence and records are not available for public inspection or generally to third parties. Only certain records of Bermuda companies (including PTCs) are available for public inspection. These are outlined later in this guide.

## Timely formation

Most Bermuda PTCs for international families ordinarily are incorporated within 5 to 10 business days of submission to the Bermuda Monetary Authority (BMA) of the application for approval, provided it is accompanied by all of the information the BMA requires.

## Form of PTC

PTCs are ordinarily established under Bermuda's Companies Act as companies limited by shares or, less frequently, companies limited by guarantee. A PTC may use the word 'trust' or 'trustee' in its name, notwithstanding that it is not a licensed trustee.

Companies limited by shares are required to have at least one member. Shares of no par value and bearer shares are not permitted. The liability of the member is limited to the paid up value of the shares.

Bermuda law distinguishes between 'local' companies, 'exempted' and 'overseas' companies. Most Bermuda PTCs established in respect of international families are incorporated as exempted companies i.e. companies that are exempted from the requirements of having local/Bermudian ownership and as such are typically incorporated by non-Bermudians (e.g. international businesses and families) and carry on business or activities outside of Bermuda.

Each Bermuda exempted company is required to have at least one director and a secretary. None of the company's directors or other officers are required to be resident in Bermuda. If none of the company's directors or officers are ordinarily resident in Bermuda, the company must appoint an individual or company who is ordinarily resident in Bermuda as its resident representative.

In respect of exempted companies, Bermuda law permits the appointment of:

- corporate directors and secretaries
- alternative directors to act in place of an absent director
- nominee members.

The following documents of Bermuda companies are available for public inspection:

- memorandum of association
- certificate of incorporation
- notice of the company's registered address
- register of directors and officers
- register of members
- register of charges.

Notably, a company's bye-laws are not available for public inspection and, provided they do not carry on activity that is regulated in Bermuda, exempted companies are not required to file accounts with Bermuda's regulators. Furthermore, with certain exceptions, companies are now required to maintain a register of beneficial owners and file beneficial ownership information with the BMA which is not available for public inspection.

Bermuda companies are required to keep basic corporate accounts at their Bermuda registered offices. These accounts are not required to be filed with Bermuda's regulators, but they are required to be available to all of the company's directors. PTCs generally have few assets and a PTC's accounts may consequently be in a very simple format.

## PTC exemption from trustee license requirement

Any person who provides the services as trustee as a business, trade, profession or vocation in or from Bermuda is required to be licensed under The Trusts (Regulation of Trust Business) Act 2001 unless exempted from the requirement.

The Trusts (Regulation of Trust Business) Exemption Order 2002 provides that a trust company is exempted from the trustee license requirement if it is authorised to provide the services of trustee to the trusts specified:

- in its memorandum of association
- in the case of an overseas company, its permit; and
- to such other trusts as the Minister of Finance may approve from time to time.

## Composition of the PTC board of directors

The choice of the board of directors of a PTC is a key issue. The settlor may wish to be involved in determining the composition of the board of directors and/or may wish to be a member of the board so that he or she participates actively in the decisions made by the PTC in relation to the underlying trusts and their assets.

The selection of directors will be based on knowledge and experience although it is also likely to be influenced by tax considerations and the protection of privacy.

## Inclusion of non-charitable purpose trust in a PTC structure

The shares in a PTC can be owned in a number of different ways depending on tax and other planning considerations relevant to the family's circumstances.

Whilst it is possible for an individual, such as the settlor or a member of the settlor's family (or his/her nominee), to be the member or shareholder of a PTC, such an arrangement can give rise to concerns upon the individual's death.

One concern is practical and relates to probate requirements in respect of the individual ownership of the PTC's shares. The second concern relates to succession and the suitability of those person(s) to whom the PTC shares devolve upon the individual's death.

In view of the problems associated with ownership by an individual, a PTC is usually an 'orphaned' structure so that its ownership is not attributable to any particular person.

## Regulatory obligations

PTCs have fewer regulatory obligations than licensed trustees. However, a PTC that does not:

- utilise the services of a Bermuda licensed corporate service provider; or
- have in its corporate structure, or engage the services of, a Bermuda licensed trustee

is required to register with the BMA under Bermuda's proceeds of crime legislation as a non-licensed 'AML/ATF regulated financial institution'.

Most Bermuda PTCs are owned by a licensed trustee in its capacity as trustee of a non-charitable purpose trust and consequently may not be required to be registered as AML/ATF regulated financial institutions. It would therefore not be subject to regulatory obligations that flow from that e.g. compliance manuals, appointment of a compliance officer and money laundering reporting officer etc.

The increase of international reporting and other obligations are resulting in more information being filed with regulatory authorities and in some instances shared with regulatory authorities of other designated jurisdictions e.g. in connection with international initiatives such as the Common Reporting Standard (CRS), Foreign Account Tax Compliance Act (FATCA), beneficial ownership registers and economic substance requirements. This phenomenon of increased transparency and reporting is not only occurring in Bermuda but in most jurisdictions. Notably, under Bermuda law the information reported is not available for public inspection.

## Settlor involvement

Settlor involvement can be achieved in several different ways and dependent upon tax and other planning considerations usually takes one or more of the following forms:

- as protector of and/or the person vested with reserved powers under the terms of underlying trusts of which the PTC is trustee;
- as a member of the board of directors of the PTC;
- as a member of an investment committee or council established to consult with the board of directors of the PTC regarding certain significant decisions affecting the underlying trusts, such as investment policy or the sale of family businesses; and/or
- as protector or enforcer of the trust which holds the shares in the PTC.

The settlor could also own the shares in the PTC but this may have undesirable consequences as outlined above.

## Taxation in Bermuda

Bermuda does not impose income or profit tax, withholding tax, capital gains tax, capital transfer tax or inheritance tax on Bermuda exempted companies or their members.

## Conclusion

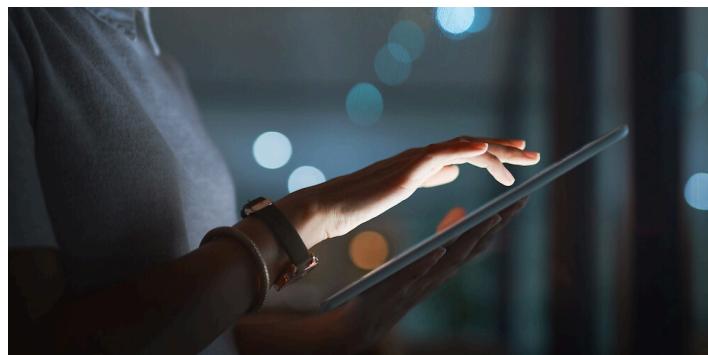
Bermuda is an excellent jurisdiction in which to establish a PTC, trust, family office and related entities.

PTCs provide a flexible way in which to arrange bespoke trustee services. PTCs offer a convenient platform from which family members can participate in a meaningful way in the management of underlying assets.

Particular care needs to be taken with regard to the initial structuring of the PTC. It is critical that the rights, powers and responsibilities vested in particular parties are fully understood (particularly by the settlor both during his or her lifetime and in the future) and Carey Olsen's experienced team of trust lawyers can guide the parties through this.

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