Following comprehensive consultation with private client industry professionals, new trust legislation was introduced in July 2014 to provide certainty to those settlors who wish to reserve powers over a trust or grant them to a third party. The new legislation confirms the retention or grant of extensive rights and powers, permissible under Bermuda law.

BERMUDA TRUSTS LEGISLATION UPDATE

The express powers that can be reserved or granted are as follows:

(a) in the case of a reservation to the settlor or other donor of trust property, a power to revoke the trust in whole or in part;
(b) a power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;
(c) a power to decide on or give directions to advance, appoint, pay, apply, distribute or transfer the trust property;
(d) a power to act as, or give directions as to the appointment or removal of directors or officers of companies owned by the trust, or to direct the trustees how to exercise voting rights with respect to the shares of such companies;
(e) a power to give directions in connection with investments or the exercise of any powers or rights arising from such trust property;
(f) a power to appoint, add, remove or replace any trustee, protector, enforcer or other office holder or advisor;
(g) a power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;
(h) a power to change the governing law and the forum for administration of the trust; and
(i) a power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of a person or the persons specified in the trust instrument.

THE TRUSTS (SPECIAL PROVISIONS) AMENDMENT ACT 2014

The Trusts (Special Provisions) Amendment Act 2014 (the “Amendment Act 2014”) amended the Trusts (Special Provisions) Act 1989, into which new reserved powers provisions were inserted. Most of these new provisions (with the exception of certain presumptions which apply only to trusts created after the Amendment Act 2014 came into force) apply to any trust governed by the laws of Bermuda, whether created before or after the commencement date of the Amendment Act 2014, and to acts and omissions occurring while the trust was governed by the laws of Bermuda.

Adopting a clear statutory framework for the reservation or grant of powers provides certainty to settlors and enhances Bermuda’s reputation as a high quality, sophisticated jurisdiction for international trust business.

THE EXPRESS RESERVED POWERS

The express powers that can be reserved or granted are as follows:
The Amendment Act 2014 absolves trustees from any fiduciary liability which may otherwise have arisen solely by virtue of their compliance with the exercise of the powers listed. It also absolves trustees from fiduciary liability where they fail to act in compliance with the exercise of one of the listed powers because this would be unlawful, or because they have insufficient rights or powers in relation to the trust property.

The Amendment Act 2014 clarifies that the grant or reservation of the powers listed does not render the power holder a trustee (unless he or she has been formally appointed as such).

It also provides that the terms of a trust deed governed by Bermuda law may expressly provide that the person who holds the powers listed shall not be subject to a fiduciary duty.

Furthermore, it states that where a person, who is not the sole trustee, has a general power of appointment, a power to revoke, or the present beneficial interest in all or part of the trust property, the trust instrument may provide that the trustee only owes duties to that person in relation to all or the relevant part of the trust property.

Finally, and uniquely, it creates presumptions on the fiduciary nature of the reserved powers. These presumptions apply to Bermuda trusts created after the Amendment Act 2014 came into force. They are subject to overriding contrary intention in the trust instrument. For such new trusts, it shall be presumed that if:

(a) the powers are granted to a beneficiary or reserved by a settlor, those powers will be personal and non-fiduciary (as long as the power-holder is not the sole trustee); and

(b) in any other case, those powers will be fiduciary.

These presumptions create certainty and a clear framework of liability, but with flexibility for the settlor to override them by express terms in the trust.

USEFUL LINKS

- To view the full Trusts (Special Provisions) Amendment Act 2014, please visit www.bermudalaws.bm and click on “Annual Laws”, “2014”, and then “Acts”.

- For more information on Bermuda Trusts, please visit www.bermudabda.com/publications and expand the “Trust & Private Client” tab.

ABOUT BERMUDA BUSINESS DEVELOPMENT AGENCY (BDA)

The BDA helps companies set up operations in Bermuda and provides access to information and resources to assist companies with their jurisdictional decision making. As a public-private partnership, the BDA can connect you with Bermuda industry professionals, key contacts in the Bermuda Government and regulatory officials at the Bermuda Monetary Authority.

To learn more about Bermuda as a world class financial centre or to connect with a BDA representative, please visit our website, www.bermudabda.com.

Maxwell Roberts Building  ■  6th Floor  ■  1 Church Street  ■  Hamilton HM 11  ■  Bermuda