MIND THE PITFALLS OF PTCs

The popular private trust company structure has its upsides, but watch out for the hidden complications, **Richard Grasby** warns

PRIVATE TRUST COMPANIES (PTCs) are a very useful option to consider when putting together wealth-planning structures. Indeed, they have been, and remain, particularly popular in Asia.

The advantages of a PTC are significant and can be very attractive. First, using a PTC can give increased control via the personal appointment of directors. Second, they benefit from increased confidentiality, and third, a PTC's board may have significant knowledge of the trust's beneficiaries and assets. Fourth, a PTC may have a greater than average appetite for risk. And finally, using a PTC can help you to sidestep any issues arising from a change of trustee.

Part of the appeal comes from the fact that many jurisdictions allow a PTC to be established with minimal licensing requirements or restrictions, and at a low cost, but this does bring with it some potential dangers. For example, where a trust is a new concept and engaging a trustee is also unfamiliar, many settlors ask if they can 'do it themselves'. In many cases, the literal answer is 'yes'. In practice, the question they should be asking is not 'can I set up a PTC?', but 'should I?'

FEE FOCUS

Many clients want a PTC not primarily for the advantages listed above, but as a way of saving time and cost. The mandatory costs in many jurisdictions are substantially lower than a third-party trustee fee (which typically involves both an establishment fee and an annual charge). Rather than a product, it is imperative that a PTC structure be treated as a project in itself – separate from and in addition to the underlying trusts. Certainly, for a family's first PTC structure, using a PTC should typically take longer, require more thought and cost significantly more than using a third-party trustee.

Those involved must consider a number of issues carefully. In today's increasingly regulated, transparent and litigious world, many of the advantages and objectives of the desired trust structure can be placed at risk by a poorly constructed and operated PTC. So what needs to be addressed? As a minimum, care and consideration need to be given to ownership, governance, any regulatory and reporting obligations, and the PTC's role as trustee of one or more trusts.

PTCs are, themselves, companies, and many are owned by a single shareholder (who is often also the sole director). Much has been written about the potential issues for a company arising from the death or incapacity of a sole shareholder or director, but there is a heightened risk where the company in question is a trustee. In such cases, there is an argument to be made that the trustee was no longer capable of acting.

DISCIPLINE STILL MATTERS

Even with a broad ownership or board, the usual rules of governance apply. Clients who do things themselves tend to be light on formality and details. Are meetings held? Where? Is there a quorum? Are conflicts dealt with? Are minutes taken? Are directors independent or acting in accordance with the instructions of others? Is the board aware of the disclosure, certification and filing requirements in the relevant jurisdictions in relation to matters such as the US *Foreign Account Tax Compliance Act* and the OECD Common Reporting Standard? What about any anti-money laundering requirements? Economic substance? Taxation? Are the family members resident in a country where trusts are recognised?

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Many clients are familiar with being a company director, but in the case of a PTC there will typically be few assets on the balance sheet. The PTC board needs to appreciate that the PTC is acting as trustee. Many clients are not familiar with trusts, let alone with acting as a trustee. Have the directors read the trust deed and the letter of wishes? Do they understand them? Do they know the scope of their powers? Are there mandatory trusts? Has the PTC considered the exercise of its powers from time to time, even if it decides not to exercise them? Are formalities complied with? For example, are distributions made correctly? Failure to appreciate this and to act properly opens up potential arguments for sham, illusory trusts and breach of trust.

So what should be done? Proper advice is essential, and for many clients, professional directors and trust administrators will be required. In other instances, appointing a third-party trustee will be more sensible, perhaps with other checks and balances in the structure.

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