The trusted solution in wealth structuring

Indian domestic trusts

The Indian Trusts Act of 1882 is proof enough of the longstanding tradition of using trusts for succession and estate planning in India. Whilst the Indian domestic trust has perhaps been out of vogue in recent years, it is increasingly being seen as an important tool for modern-day Indian families, wherever they are based.

The trust concept - Indian style

Perhaps not surprisingly, the Indian domestic trust is a variation on the traditional Anglo-Saxon theme and whilst it undoubtedly has features that are particular to India, essentially Indian trust law recognises the core relationships that are generally found in trust law – property is held by a trustee to administer on behalf of beneficiaries with a range of powers and obligations governed by the trust deed and the law. The beneficiaries of the trust have a right to enforce the terms of the trust against the trustee – a right that they can litigate before the Indian courts if needs be.

Formalities

An Indian domestic trust ("IDT") can be settled by any person that has the capacity to contract in their own right, or on behalf of a minor with the consent of a competent court. There is no technical restriction on a non-Indian person settling an IDT, or from being a beneficiary of an IDT. The settlor can be a corporate entity, an association or a Hindu undivided family unit through its karta (manager).

In principle, there is also no restriction to a non-Indian person acting as trustee of an IDT, although trustees must be resident in India, and it is of course important that the trustee is fully conversant with the principles of Indian trust law etc.

In practice, we expect settlors of IDTs will be Indian residents or individuals in possession of a Person of Indian Origin card ("PIO"). Entitlement to PIO status is open to anyone who can demonstrate Indian descent, so children and grandchildren of an Indian citizen would be eligible, even if they hold, say, a UK passport and have never lived in India.

The trust may be private or public, but if it is to hold Indian real estate, a key use of the IDT, then it has to be registered with the relevant sub-registrar under the auspices of the Indian Registration Act 1908.

IDTs can hold immovable property (i.e. real estate) or moveable property (i.e. cash, shares, etc.) or any combination of the two. To settle real estate into an IDT, the settlor must execute a formal deed of settlement. This formality is not required for moveable property, but we would generally recommend a deed is entered into between the settlor and the trustee as this gives greater certainty in later years.

Under Indian law, only Indian residents, NRIs (i.e. Indian citizens resident outside of India) or PIO cardholders are entitled to acquire Indian real estate. This applies even if an IDT is used, so it will be necessary that the beneficiaries of the trust are individuals who would be able to acquire Indian real estate in their own right. Foreigners may be beneficiaries of a testamentary trust involving immoveable property. It will also be necessary for the trustee to be resident in India – whether that be an individual or an Indian registered company (such as Nerine Trustee Company Pvt Limited).

For some families, we recommend the use of a family-owned private trust company ("PTC"), as explained below. If a company (PTC or otherwise) is to act as the trustee, the directors also have to be Indian residents if it is intended that the trust will acquire Indian real estate. The trust can be established during the settlor's lifetime, or it can be established under the terms of his or her will. As discussed below, our view is that a trust established during the settlor's lifetime has distinct advantages.

Tax aspects of the IDT

On registration, there is an initial charge payable based on the initial funds settled. We would recommend that the initial settlement, which will be recorded in the trust deed, is set at £1,000. At present, subsequent additions of moveable property to the trust will not attract any additional duty.

Stamp duty will be payable if the settlor settles immovable property into the trust. The duty is calculated under the auspices of the Indian Stamp Act 1899 and will vary from state to state.

For income tax purposes, trust income will be attributed to the settlor if they are a beneficiary, or to the extent that their spouse or minor children can benefit.

Otherwise, income tax will be assessed on beneficiaries with a defined interest in the trust, or, for traditional discretionary trusts, on the trustees at the highest marginal rate.

India has a capital gains tax. For IDTs' trust gains are taxed on Trustees at the highest marginal rate, subject to normal relieving provisions.

Trusts were more common when India had inheritance tax/estate duty. Although there is no inheritance tax in India at the moment, the government is certainly talking about the possibility of reintroducing it. It is to be expected that trusts will offer an attractive tax planning opportunity if inheritance tax does return.

Benefits of establishing an IDT

When you come to us, you may have a number of concerns that will suggest that an IDT is the most appropriate vehicle for you. Whilst the reasons for using a trust are numerous, they may include one or more of the following:

- You want to ensure that the assets in the trust remain outside your estate
- You want to ring-fence your private family assets so they remain unaffected by personal guarantees, in the event of bankruptcy or marital divisions and the like
- You are planning around the possible introduction of inheritance tax
- You are concerned to ensure that there is an efficient transfer of assets on your death to the next generation
- You want to make sure that the family business carries on after you've gone, reducing as much as possible the problems associated with family disputes and dissipation of control by successive generations with diverse family members and competing priorities
- You want the option of using professional management whilst providing a store of wealth for your children, grandchildren and beyond
- You want a measure of control over the disposition of the wealth that you have accumulated
- You want to safeguard your legacy
- You are worried that political and/or economic events will affect the security of your wealth
- You have a legitimate desire to keep details of your wealth confidential
- You want to provide a fund for the furtherance of philanthropic/charitable purposes

There is a particularly strong argument for establishing a trust during your lifetime, rather than in your will. Obviously, whilst you are alive, this allows you to have an influence on trustee decisions – either through a letter of wishes, or through reserving some decisions to yourself during your lifetime or through your participation in a private trust company structure as explained below.

In addition, it is a simple fact that it is very common for large estates in India to be disputed after the testator's death. These challenges, which often involve suggestions that the testator lacked legal capacity or was under duress, cause untold damage to inter-family relations, and can take many years to resolve. It is much more difficult to challenge your ability to establish a trust during your lifetime than it is to challenge a will when you are no longer around. Given some of the high profile family disputes that are well known in India – such as the Reliance Group break up – this is a fundamental issue for you to consider when you are thinking about the benefits of establishing a trust.

The Private Trust Company

For some clients, there is a concern that giving assets to a trustee to hold as legal and beneficial owner involves a significant loss of control. This concern can be alleviated in a number of ways:

- By granting the settlor reserved powers in the trust deed (such as a power to revoke the trust or to control investment decisions)
- By the appointment of a protector to retain a right of veto over certain trustee decisions
- By providing the trustees with guidance on the management of the trust assets through a letter of wishes

For families wishing to have a greater sense of control over the trustee, we recommend the use of a PTC. For an IDT, this will necessarily involve the incorporation of an Indian private company, with specially drafted articles of association, and Indian resident directors. The family will own the PTC, and as such will retain the right to appoint and remove directors.

How Nerine can help

As a fiduciary specialist, working in a number of jurisdictions with a global client base, Nerine has the necessary experience to ensure that the trusts we establish and administer are fit for our clients' purposes, and the expertise to ensure that we are able to meet our responsibilities to the beneficiaries for whose benefit the trust was established.

Like many of our clients, Nerine is a privately owned and managed business. We are genuinely independent, which gives our clients tremendous peace of mind, knowing that we will work with them and in their interests in the management and investment of their wealth.

Our clients appreciate and value a relationship with us that is a strong and rewarding partnership. The trust ensures that wealth is safely passed down the generations, and we never lose sight of the needs and aspirations of the settlor whose legacy the trust was designed to preserve.

We have formulated and evolved trust structures that address specific concerns and effectively manage the limitations presented by Indian trust law. For example, by adding an independent third party as an additional beneficiary with a nominal interest, the risk of all family-member beneficiaries terminating the trust by unanimous decision is obviated.

Nerine Trustee Company Pvt Limited is able to assist clients in all aspects of the establishment, registration and administration of an IDT. For clients looking to establish a PTC, Nerine can assist in the formation of an Indian company to act as trustee and can provide Indian resident directors, either as sole directors or alongside family members.