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Conyers Dill & Pearman

## British Virgin Islands Trusts

## **Foreword**

This memorandum has been prepared for the assistance of those who are considering the formation of trusts in the British Virgin Islands (“BVI”). It is not intended to be exhaustive nor a substitute for proper legal advice but provides a basic guide to the trust concept and an outline of trust law and trust administration in the BVI for clients of Conyers Dill & Pearman.

Clients are advised that they should consider the implications in their home jurisdiction of establishing a BVI trust and should consult with their own legal, financial and other professional advisers as appropriate.

We also recommend that our clients seek legal advice in the BVI on their specific proposals before taking steps to implement them.

This memorandum has been prepared on the basis of the law and practice as at the date set out below.

**Conyers Dill & Pearman**

1 October 2010

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## STATUTORY REFERENCES

<b>References to legislation are to BVI Acts unless otherwise stated.</b>	
<b>BTCA 1990</b>	Banks and Trusts Companies Act 1990
<b>Company Management Act</b>	Company Management Act 1990
<b>Regulations</b>	Financial Services (Exemptions) Regulations 2007
<b>Hague Convention</b>	The Convention on the Law Applicable to Trusts and on their Recognition signed at the Hague on 1 July 1985
<b>Proceeds of Criminal Conduct Act</b>	Proceeds of Criminal Conduct Act 1997
<b>1987 UK Act</b>	Recognition of Trusts Act 1987 (UK)
<b>Stamp Duty Law</b>	Stamp Duty Law (1995 Revision)
<b>Trustee Ordinance</b>	Trustee Ordinance, Cap 303 (as amended in 1993 and 2003)
<b>Trustee Act</b>	Trustee Ordinance, Cap 303
<b>2003 Amendment</b>	Trustee (Amendment) Act 2003
<b>VISTA</b>	Virgin Islands Special Trusts Act 2003

## 1. INTRODUCTION – PLANNING USES FOR BVI TRUSTS

BVI trusts are employed to achieve a variety of estate, personal, financial, tax or other business planning objectives. These objectives often include one or more of the following:

- provision for spouses and dependants
- protection of assets from future personal liability
- minimization of estate/inheritance tax, income tax and capital gains tax
- preservation of family wealth and continuity of family businesses
- efficient and timely distribution of assets upon death
- protection against exchange controls
- creating or making provision for charities
- establishing pensions or employee stock option plans
- ownership of particular assets or of investments generally
- lender protection in corporate financing transactions

## 2. THE TRUST CONCEPT

The trust is a legal concept originally developed by English courts of equity although it is now governed, in important respects, by legislation. BVI trust law is based on English trust law but has been enhanced in certain areas by BVI legislation.

Unlike many offshore jurisdictions where English common law is of merely persuasive authority, the rules and principles of English common law and equity apply directly in the BVI by reason of, respectively, the 1705 Common Law (Declaration of Application) Act and sections 14 and 15 of the West Indies Associated States Supreme Court (Virgin Islands) *Act* save to the extent that they have been abrogated or modified by applicable UK or local statutory provision. This has the happy consequence of making the non-statutory rules which govern BVI trusts highly accessible and predictable since the most developed body of rules governing the trust concept, as it has been received in Commonwealth jurisdictions, are those of English law.

## 2.1 Definition of a BVI Trust

A trust for the purposes of the Trustee Act refers to the legal relationship created either during life or on death by a person (the "settlor") who places assets (the "trust fund") under the control of a trustee or trustees to hold the trust fund for the benefit of certain persons (the "beneficiaries") or for the achievement of a specified purpose.

This definition does not exclude the establishment of a trust by a settlor declaring himself to be a trustee of his own property for specified persons or purposes as under English law, transfer of assets to another is not required.

The Trustee Act also provides that a trust has the following important characteristics in BVI law:

- the trust fund constitutes a separate fund and is not part of the trustee's own estate;
- title to the assets comprised in the trust fund stands in the name of the trustee or in the name of another person (a custodian or nominee) on behalf of the trustee; and
- the trustee has the power and duty in respect of which he is accountable to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.

Some trusts also include a "protector" who may be given powers (and in some circumstances may also have duties) in relation to the administration of the trust. BVI law gives statutory recognition to the office of protector, distinguishing it in principle from the roles given to the settlor and the trustee. More on the role of the protector can be found in 2.6 and 7 below.

## 2.2 The Settlor

The settlor may be a beneficiary under a trust established by him and can act as its trustee unless it is a non-charitable purpose trust (in which case he must have a “designated person” as a co-trustee – see 8 below) or a VISTA trust (the trusteeship of which must be sole and may be undertaken only by the holder of a trust licence under the BTCA 1990 – see 9 below). The settlor cannot, however, be both the sole trustee and the sole beneficiary of his trust.

By statute, important powers in relation to the administration of the trust may be reserved to a settlor without his being considered a trustee of it by reason only of their exercise.

A company may act as settlor if it has the corporate capacity to make a gift of its assets or otherwise to dispose of them for the purpose of establishing a trust.

## 2.3 The Trustee

The trustee is the person who holds the legal title to the trust fund (although he may place it in the name of a custodian or nominee, to be held to his order, if so authorised) and who has an enforceable obligation to administer the trust for the benefit of the beneficiaries or in furtherance of the trust purposes. In a charitable purpose trust, that obligation is enforceable by the Attorney-General. In a non-charitable purpose trust (see 3.4 and 8 below) it is enforceable only by the enforcer. In trusts with beneficiaries, the trust obligation is enforceable by, depending on the case, all or some of them.

The trustee can be a company if it has the corporate capacity to act as a trustee.

The trustee stands in a fiduciary position vis-à-vis the beneficiaries or trust purposes and is required to discharge certain duties, including ones of strict liability, imposed by law (outlined in 4 below) save to the extent that they can be and are excluded in the trust instrument.

## **2.4 The Beneficiaries**

The beneficiaries can be individuals, companies and other legal entities. Trusts can also be established to further charitable or non-charitable purposes. Charitable trusts are sometimes called public trusts.

In order for a private (i.e. non-charitable) trust for persons to be valid, the identity of the beneficiaries must be capable of being established with sufficient certainty. Thus, in the case of a trust for groups or classes of persons, the trustee must be able to determine whether any given person is or is not a member of that group or class. In the case of (non-charitable) purpose trusts, the certainty of objects requirement is that they be specific (rather than general). Charitable purposes can be very general and even vague so long as they count as charitable in law since the court can direct a scheme under which a general charitable purpose may be made more specific.

## **2.5 The Trust Fund**

The property constituting the trust fund can be any type of real or personal property (e.g. cash, securities, real estate, personal effects or other tangible or intangible property). The property must be identified or capable of being ascertained in order to be subject to a trust. Where a trust is established by transfer of property to the trustee, this is achieved by the transfer itself. Where, however, a trustee declares himself trustee of property, the property must be identifiable from the terms of the declaration.

A trust of future property does not, save where established for valuable consideration, create any obligation in relation to that property (and even then does so only when received by the trustee) but a present right to receive property in future (e.g. a royalty) is not future property in this sense.

## **2.6 The Protector**

The protector is usually a friend or advisor of the settlor. The inclusion of a protector is not necessary for the creation of a BVI trust but can balance the wide discretionary

and fiduciary powers often given to the trustee under the trust. Typically, the protector (which may be an individual or committee of individuals or a company) is appointed to ensure the wishes of the settlor are carried out by the trustees. The role of the protector is considered in more detail in 7 below.

### **3. TYPICAL FORMS OF TRUST**

#### **3.1 Discretionary Trust**

The discretionary form of trust often provides the most flexible and efficient structure for the settlor and the beneficiaries.

After establishing the trust, the settlor will normally have divested himself of any ownership interest in the assets held in the trust. He may, however, retain certain powers to deal with the trust property without thereby becoming either a trustee of it (see 2.2 above) or a beneficiary: importantly, the English rule that a power of revocation does not “undo” the trust until it is exercised also applies in the BVI although it is a separate and jurisdiction-specific question what effect a power of revocation may have for tax purposes.

Under the terms of a discretionary trust, the trustee is generally given wide discretionary powers over the trust fund and decides (according to the beneficiaries' best interests as a whole) whether, when and to which beneficiary he should distribute capital or income of the trust (as may be), and in what proportions. For this reason, the beneficiaries under a discretionary trust are regarded as not having a specific interest in the trust property but only a right to be considered when the trustee exercises his discretions.

#### **3.2 Fixed Interest Trust**

Under a fixed interest trust, primary beneficiaries will normally be granted a right to receive the income or capital of the trust fund (as may be) and the trustees will have little or any discretion over the nature and extent of distributions from the trust fund.

The fixed interest form of trust is used for estate planning purposes or to ensure that certain property passes on stipulated terms and at stipulated times for the benefit of relevant family members in an orderly manner. It is often specially drafted to suit the particular planning goals contemplated by the settlor (e.g. the settlor of a fixed interest trust can provide that the beneficiaries will not be able to sell off or otherwise dispose of their inheritance in a hasty manner). Many modern pension trusts take the form of fixed interest trusts where the trustee holds a fixed share for the member (beneficiary) of the pension scheme.

### **3.3 Charitable Trusts**

A charitable trust may be established under BVI law to create a charitable fund or to make provision for existing charitable institutions or purposes.

A trust under BVI law, which follows English law prior to the Charities Act 2006 in this respect, is charitable if:

- (a) all its purposes fall exclusively within one or more of the categories of charitable purposes recognized by law listed below:
  - the relief of poverty;
  - the advancement of education;
  - the advancement of religion;
  - other purposes beneficial to the community at large; and
- (b) there is an element of public benefit.

A charitable trust may continue indefinitely.

### **3.4 Purpose Trusts**

A 1993 amendment to the Trustee Act provided for the creation of non-charitable purpose trusts under BVI law and this jurisdiction was clarified and expanded by the 2003 Amendment. Broadly speaking a valid purpose trust may be created if, among

other things, its purposes are specific, reasonable and possible and are not immoral, contrary to public policy or unlawful. In respect of statutory purpose trusts established before 1 March 2004, there was a requirement that the trust be not for the benefit of particular persons (whether or not immediately ascertainable) or persons ascertained by reference to some personal relationship. In respect of trusts established on or after 1 March 2004, however, this restriction no longer applies. It is now possible, therefore, to establish trusts the principal purpose of which is to benefit particular persons (or classes of persons having a personal nexus) but the right to enforce which is given to an “enforcer” rather than the persons intended to be benefited. In this respect, the 2003 Amendment allows settlors to achieve under BVI law what might be achieved under part VIII of the Cayman Trusts Law (“STAR” trusts): it permits trusts under which entitlement to benefit and the right of enforcing the trust may be given to different persons.

Further information about purpose trusts can be found at 8 below.

#### **4. TRUSTEES’ DUTIES AND TRUST ADMINISTRATION**

##### **4.1 Trustees’ Duties**

Trustees are required to discharge certain statutory or equitable (including fiduciary) duties except to the extent that they can be and are excluded in the trust instrument. The following are the most important duties:

- (a) to act honestly and in good faith in the best interests of the beneficiaries or trust purposes in accordance with the terms of the trust and the general law - this duty may not be excluded;
- (b) to keep accounts and at all reasonable times and on request to furnish any beneficiary or the enforcer with accounts – this duty may not be excluded since it is an aspect of the necessary accountability of trustees for their stewardship of trust property without which there can be no trust obligation;
- (c) to bring and keep under their control trust property which must be kept separate from their private property and from any other property of which

they are trustees – this duty may not be excluded as regards co-mingling with trustee property since an unrestricted right of co-mingling would exclude any sort of trust obligation at all;

- (d) to obey the terms of the trust deed unless all the beneficiaries are of full capacity and consent to trustee actions contrary to the terms of the trust or if the court either sanctions a variation of the trust's terms or confers on the trustees a power in relation to the proposed action;
- (e) to act impartially between the beneficiaries except to the extent modified by the trust instrument. This duty amounts to a fair balancing of the interests of beneficiaries, particularly where certain beneficiaries are entitled to current income and others to capital at a future time;
- (f) to preserve the trust property and to sell wasting assets unless a contrary intention is expressed in the trust deed;
- (g) not to delegate duties or powers either to a third party or to a co-trustee except when authorised by statute or the trust deed;
- (h) to act prudently in the administration of the trust and, as regards the statutory power of investment of the trust assets in particular, to exercise the diligence and prudence that a reasonable person would be expected to exercise in making an investment as if it were his own money. This is arguably a lower standard than that set by the English equitable rule which referred to making investments for those for whom the trustee felt morally bound to provide. It is not clear whether this statutory provision ousts the English rule that a higher standard of diligence and knowledge is expected from professional trustees who receive remuneration for their services (unless the trust deed provides otherwise);
- (i) subject to other provision in the deed, to act unanimously, except where there are more than two trustees in which case action may be by majority decision (statutory provision makes this rule, which is in effect the rule for charitable trusts, the rule for private trusts). It remains a counsel of prudence, however, that all trust property should be in the joint names or held to the order of all trustees;
- (j) to act gratuitously, unless remuneration is authorized by the trust deed or the court;

- (k) not to cause loss to the trust by placing oneself in a position where one's duty as trustee may sensibly conflict with one's personal interest or duty to another and, save where the trust instrument or all the beneficiaries (who must be of full capacity and between them entitled to the trust property) say otherwise, to account for any profit made thereby; and
- (l) not to purchase trust property unless authorised to do so by the trust instrument or the court since the purchase by a trustee of trust property, unless so authorized, is voidable by a beneficiary irrespective of the fairness of the price paid.

### **Administration of the trust**

Trustees are required, as a matter of law, to keep proper records and accounts of all trust assets and trust business. As a matter of proper administrative practice, all substantive trustee decisions or business decisions taken at the trustee level should be approved and recorded in trustee minutes.

The trustees should hold at least one or two formal trustee meetings each year in order to review and consider the accounts, trust business and financial position of the trust as a whole.

Except to the extent that this duty is modified in relation to VISTA trusts (see 9 below) trustees are required by law to ensure that they are properly informed as to the value of the trust assets and the nature of the business activities of any corporate entities held by them. Money laundering concerns make it unwise for a trustee to accept trusteeship of a VISTA trust under which all rights to obtain information in relation to these matters have been excluded. Successor trustees are also impressed with a duty to review the history of the trust's business and examine the accounts and other trust records in order to satisfy themselves that no prior breach of trust has occurred.

Where the trust assets are being re-invested on a regular basis, the trustees will often recommend that a professional investment advisor be employed to make

recommendations to the trustees so that the trustees have professional advice upon which to base their investment decisions or to assist the management of the assets.

### **Dealings with Third Parties**

The 2003 Amendment introduced reforms based on those proposed in 1999 by the English Trust Law Committee (but as yet unenacted in England) which make it easier for third parties to deal safely and conveniently with trusts and which refine the doctrine of personal liability of the trustee so as the better to accord with modern commercial expectations. The new rules apply to trusts created on or after 1 March 2004.

### **Transactions deemed to be properly entered into with trustees**

Of particular importance for commercial transactions involving, for example, the charging of trust assets to lenders as security for moneys lent to or for the benefit of beneficiaries, a transaction will be deemed to be properly entered into by a trustee if it appears to the third party after reasonable enquiry that the trustee has the power, conferred by the terms of the trust or by law, to enter into a transaction of the kind in question and that any requirements for the exercise of that power (such as consent) have been complied with. It is specifically provided that the third party is not required to enquire as to whether the exercise of the power in entering into the transaction would be a breach of duty by the trustee (other than the duty to comply with any requirements for its exercise).

This provides useful clarity about the operation of what is, in effect, the *bona fide* purchaser rule in relation to transactions with trustees in commercial contexts. It also extends it in that the statutory rule applies even where the property held by the trustee is merely equitable property (e.g. an equitable interest in shares). Apart from this provision, priorities in such case would be determined not by the *bona fide* purchaser doctrine (which only applies where the third party is acquiring legal rights) but the equitable rule of priorities namely, that the first in time prevails unless priority is lost by conduct or expressly or impliedly postponed. The statutory provision

brings all transactions in relation to trust property, of whatever kind, under the one, clarified rule.

### **Protection of persons dealing with trustees**

If, according to these provisions or otherwise, a transaction is properly entered into, then unless the terms of the transaction provide otherwise, property acquired by the third party by virtue of the transaction shall be taken free and discharged from the trust and the third party shall not be concerned to see that property acquired by the trustee from the third party by virtue of the transaction is properly applied. This means, in particular, that lenders can be absolutely sure, so long as they have made reasonable enquiry such as taking legal advice from BVI Counsel that the trustee has the relevant power and that specified requirements for its exercise have been met, that their interest in the trust property charged will prevail over any interest of the beneficiaries in the property. The provision expressly preserves any liability of the trustee to the beneficiaries if he has acted improperly and can be seen therefore simply to affect priorities.

### **Optional provision concerning liability of trustees**

Further, a settlor may stipulate that section 97 of the Trustee Act applies to his trust. If he does so, his trustee shall have no personal liability on any contract properly entered into in a disclosed or known fiduciary capacity. However, a claim based on any contract entered into by the trustee, any obligation arising from ownership or control of trust property, or tort committed in the administration of the trust may be asserted by a third party in a judicial proceeding against the trustee in his fiduciary capacity (and whether or not the trustee is liable in a personal capacity) so that the third party shall be entitled to satisfaction out of the trust fund directly rather than by way of subrogation to any right of indemnity of the trustee. This provision both protects the trustee and the third party by making the latter's rights against the trust fund non-dependent on personal liability of the trustee.

Subject to the terms of the trust and without prejudice to the position under a trust to which section 97 has been applied, section 100 of the Trustee Act preserves and extends the right of indemnity of a trustee against the trust fund, property distributed from the trust fund (other than by way of disposal for value in good faith in the management or administration of the trust) and its traceable product in respect of liabilities incurred or contracts properly entered into and makes it available by way of subrogation to the third party in whose favour the liability arises.

### **Limitation of trustee's personal contractual liability**

Where section 97 has not been applied, section 98 of the Trustee Act shall apply, unless the settlor stipulates otherwise, in order to govern the extent of a trustee's personal liability in contract. (If the settlor disapplies section 98, then the rules pertaining prior to the 2003 Amendment shall apply to govern the extent of a trustee's personal liability on a contract i.e. the English equitable rules.)

Where section 98 applies and where a trustee properly enters into a contract in a disclosed or known fiduciary capacity, the trustee is liable for any sum payable under the contract only to the extent of the value of the trust fund when payment falls due which shall, however, be computed as still including any property distributed (other than by way of disposal in good faith for valuable consideration) since the contract was entered into.

### **Protection from tortious liability**

Section 99 of the Trustee Act provides that a trustee shall be personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property (e.g. as landlord and expressly including any liability for breach of environmental laws) only if the trustee is personally at fault. This provision is not subject to contrary expression of intent and abolishes the doctrine of vicarious liability of trustees in the circumstances specified.

### **Optional power to vary trust for protection of creditors**



Where money has been lent to a trustee, section 101 of the Trustee Act gives the trustee power, at the lender's request and for his protection by written declaration, to restrict as the trustee sees fit (and considers to be compatible with his equitable duties to the beneficiaries) or to impose conditions on the exercise of any administrative powers, including those of investment and relating to the appointment, retirement or removal of trustees, or any rights of beneficiaries or objects of powers to actual receipt of trust property to which they may have become entitled. This allows a trustee during the term of a loan, to vary the terms of a trust for the comfort of lenders and, in particular, to retain assets in their current form, prevent changes of trusteeship and postpone distributions to fully entitled beneficiaries or objects until, for example, a loan has been repaid or the lender consents to such change in the status quo.

## **5. JURISDICTION OF THE BVI COURTS**

Section 82 of the Trustee Act states that the BVI courts have jurisdiction when:

- (a) the law of a trust or of a particular aspect of a trust is BVI law;
- (b) the trustee is a resident of the BVI;
- (c) in the case of a corporate trustee, it is incorporated or registered in the BVI;
- (d) any trust property is situated in the BVI, but only in respect of that property;
- (e) the administration of the trust is carried on in the BVI;
- (f) the BVI courts are otherwise the natural forum for the litigation;
- (g) the parties submit to the jurisdiction of the BVI courts; or
- (h) the trust instrument contains a provision referring to the jurisdiction of the BVI courts.

Generally, BVI law will apply if the choice of BVI law is expressed or implied in the trust instrument. If the choice of law cannot be established expressly or impliedly construed from the trust instrument, then the applicable law will be that with which the trust is most closely connected, under Article 7 of the Hague Convention (see 6.2 below). Section 82 provides that the BVI courts will have jurisdiction in relation to a

trust which has no real connection with the territory other than its express governing law, notwithstanding that its settlor, trustees and beneficiaries are resident elsewhere.

## **6. GENERAL LEGAL CONSIDERATIONS**

### **6.1 BVI Legislation**

The principal trusts legislation in the BVI is what is sometimes referred to as the Trustee Ordinance. It came into effect in 1961. Since the coming into force of the Interpretation Act 1986, it is now styled and referred to as “the Trustee Act”. It remains permissible, however, to continue to cite it (and all statutes passed before the Interpretation Act) as an Ordinance or by reference to a chapter number which, in the case of the Trustee Act, is Cap 303. One may therefore see the statute referred to as: the Trustee Ordinance, Cap 303 or the Trustee Act. It was significantly amended by the Trustee (Amendment) Act 1993, which came into force on 1 November 1993.

The Trustee (Amendment) Act 1993, among other things, introduced the modern rule against perpetuities and accumulations, extended trustees' powers to invest, clarified a number of issues arising under private international law, introduced a number of anti-forced heirship rules, specific protector provisions and rules for the establishment of non-charitable purpose trusts.

The 2003 Amendment is the most recent amendment to the Trustee Act and came into effect on the same day as VISTA, namely 1 March 2004 (see 9 below).

### **6.2 The Hague Convention**

Most of the provisions of the 1987 UK Act have been extended to the BVI so that most of the provisions of the Hague Convention now form part of BVI law. This is supplemented by a comprehensive set of conflicts rules which deal with the validity of trusts and forced heirship claims.

### **6.3 The Rule Against Perpetuities**

The rule against remoteness of vesting applies to all BVI trusts except statutory purpose trusts created prior to 1 March 2004 and to the extent that a gift over from one charity to another is, as in England, exempt from the rule. The maximum specifiable perpetuity period in the BVI is 100 years.

The rule against inalienability or perpetual duration does not apply to charitable trusts or statutory purpose trusts whenever created.

### **6.4 Effect of Foreign Laws on BVI Trusts**

As noted at 5 above, all questions concerning a trust subject to BVI laws (including the settlor's capacity to settle property and questions of the trust's administration) will be decided in accordance with BVI law without reference to the laws of any other jurisdiction. This rule, however, is subject to a number of important exceptions.

- First, foreign laws may be applicable to determine the settlor's ownership of the property settled under settlements created before the Trustee Act provisions came into effect. Thus, a spouse of a settlor may be able to claim a proprietary interest in the settled property under the laws of another jurisdiction.
- Second, a corporate settlor's capacity to settle property will be governed by the law of its place of incorporation.
- Third, the rules do not validate a trust of foreign real property which is invalid under the laws of the jurisdiction where the property is situated.
- Fourth, the capacity of a testator to create a BVI testamentary trust will be governed by the law of the testator's domicile at the time of death.

## 7. PROTECTORS

The BVI is one of the few jurisdictions that have given statutory recognition to the office of protector.

The protector is usually a person who is a close friend or other confidant of the settlor. The provision of a protector is not strictly necessary for the creation of a BVI trust but is often employed to balance the wide discretionary and fiduciary powers given to the trustees under the trust. Typically, the protector (which may be one individual, a committee of individuals or a company) is appointed to ensure that the wishes of the settlor of the trust are carried out by the trustees in the proper fashion.

The protector will normally be entitled to receive financial information and be able to review the investment management of the trust. Also, he will be able to advise the trustees on what financial needs the beneficiaries may have. The protector often holds certain powers, such as: (i) power to remove and appoint trustees; (ii) power to agree trustee fees and (iii) power to vote or consent to the addition or removal of beneficiaries.

Section 86 of the Trustee Act provides that a trust instrument may contain provisions where the exercise of any powers or discretions of the trustees are subject to the prior consent of the settlor, a protector, nominator or committee. These include power to change the proper law of the trust and forum of administration, removing trustees and appointing and excluding beneficiaries.

Furthermore, a protector or similar person shall not be deemed to be a trustee by reason only of exercising the powers to change the proper law, remove trustees, or withhold consent to any proposed action by the trustees.

## 8. PURPOSE TRUSTS

As mentioned in 3.4 above, the Trustee Act has for some time provided for the creation of non-charitable purpose trusts under BVI law. Among other formal requirements, a purpose trust must have purposes which are valid, specific, reasonable and possible and not immoral, unlawful or contrary to public policy. At least one trustee must be a 'designated person', which means:

- (a) a barrister or solicitor practicing in the BVI;
- (b) an accountant practising in the BVI who qualifies as an 'auditor' under the BTCA 1990;
- (c) a licensee under the BTCA 1990; or
- (d) such other person as the Minister of Finance may by order designate.

The rules against remoteness of vesting and perpetual duration do not apply to purpose trusts created under section 84 but only the latter rule is disappplied in relation to trusts created under section 84A i.e. those established on or after 1 March 2004. A purpose trust must have an 'enforcer' and if that person dies or is unwilling or otherwise unable to act, the "designated person" who is a trustee is required to notify the Attorney General who, in turn, must apply to the Court within ninety days for the appointment of someone to enforce the trust.

The 2003 Amendment clarifies certain aspects of the BVI purpose trust regime (for example, that trusts for exclusively charitable purposes are outside it and that the enforcer has the exclusive power and duty of enforcing a purpose trust) but also expands it in deliberate ways (for example, and as has already been stated, by dropping the requirement that a purpose trust be not for the benefit of 'particular persons' or classes of persons connected by a personal nexus).

As a result of the 2003 Amendment, BVI purpose trusts may now be established for a very wide range of family, philanthropic and commercial purposes.

## 9. VISTA TRUSTS

On 1st March 2004, VISTA came into force enabling a settlor to create a trust of shares in a BVI incorporated company under which the trustee may be disengaged, notwithstanding that his trust shareholding gives him a controlling interest in the company, from management responsibility in relation the company's affairs. It therefore allows the company and its business to be retained and run as its directors see fit.

Although VISTA allows a settlor to modify or exclude the trustee's duty and power to monitor and intervene in relation to the management of the company, total exclusion is likely not to be attractive to a VISTA trustee since only BVI trust licensees are permitted to undertake VISTA trusteeships and it would not be possible for such trustee to comply with its regulatory obligations in a case where it had neither right nor duty to intervene in at least some respects. Accordingly, it is desirable and has become routine when establishing VISTA trusts to preserve the trustee's statutory right to information about the company's affairs and to specify well defined permitted grounds for complaint on the part of interested persons in relation to them. Appropriate use of the provisions of VISTA allows a settlor to achieve what cannot be achieved by mere exclusion of power and duty in a trust instrument (since no provision in a trust instrument can deprive a trustee of the power to exercise rights which it holds as a matter of company law) and, so far, legislative sanction for this outcome is available in no other jurisdiction.

In order for VISTA to apply, however, there must be a provision in the trust deed stating that VISTA will apply and the shares involved must be in a BVI business company.

One other advantage of VISTA is that it allows a settlor to specify in advance "office of director rules" whereby the trustee can be required to secure a specified composition of the board throughout the trust period.

## **10. LICENSING REQUIREMENTS OF BVI TRUSTEES**

A company incorporated in the BVI or elsewhere may be trustee of a BVI trust. However, banks and trust companies carrying on trust business in or from within the BVI are regulated under the provisions of the BTCA 1990. Among other things, the BTCA 1990 requires trust companies to obtain a licence and provide information in the application including details of its members, directors, ownership structure, reasons for wishing to obtain the licence sought and evidence of professional knowledge and experience in trust business. "Trust business" is defined as acting as a professional trustee, protector or administrator, or managing or administering any settlement or company management as defined in the Company Management Act.

For the reasons outlined at 5 above, we would recommend the use of a BVI incorporated company to act as either sole or co-trustee of a BVI trust. Conyers Dill & Pearman has an affiliated company, Codan Trustees (BVI) Ltd. which may be used for this purpose.

## **11. PRIVATE TRUST COMPANIES**

A private trust company ("PTC") may be incorporated in BVI and will have a limited business purpose to act as a trustee of a single trust or a limited class or group of related trusts.

The cost of incorporating and operating a private trust company may be lower than the fees of a professional trust corporation. Use of such a company ensures greater flexibility and confidentiality and allows the settlor and his family or friends, if he so wishes, to play an active role by serving on the board of directors or by owning the shares of the company. The shares of the company may be held in a purpose trust and it is not uncommon to see VISTA trusts of such shares so that advantage may be taken of the office of director rules (see 9 above).

The private trust company also has a role to play in reducing the potential liability of professional trustees. Due to the increasing risk of being sued both by beneficiaries and third parties, professional trustees are increasingly reluctant to take ownership of assets or participate in ventures where substantial risks may be present, such as

owning commercial real estate in high tax jurisdictions, venture capital investments or companies which own ships or aircraft. The professional trustee's preference is normally for a diversified portfolio of low risk investment. In such circumstances the incorporation of a private trust company may be advisable. The professional trustee is then able to provide management and administration services to the trust company rather than acting as trustee.

The Regulations exempt a PTC from regulation and licensing under the BTCA 1990 provided that it carries on either unremunerated trust business or related trust business and no other business.

'Unremunerated trust business' is carried on where no remuneration is payable or received by the PTC or any person associated with the PTC in consideration for providing trust services. The provision of professional director services does not breach this rule.

'Related trust business' means providing trust business to either a single qualifying trust or a group of related qualifying trusts. To be a qualifying trust, each beneficiary of the trust must either be connected to the settlor (as defined in the Regulations) or a charity. Related trusts are defined as trusts the settlors of which are connected to each other.

The name of a BVI PTC must end with the designation "PTC" placed immediately before the Limited or Ltd and the memorandum of association must state that it is a private trust company. The registered agent of a PTC must hold a Class I Trust Licence and must ensure that the PTC meets and continues to meet the requirements for exemption.

No governmental approval is required to set up a business company in the BVI. The incorporation process for a business company requires the filing of its Memorandum and Articles of Association with a certificate from its first registered agent and incorporation can usually be completed within 24 hours, subject to completion of KYC procedures.

## **12. CONFIDENTIALITY**

BVI trustees have a common law duty of confidentiality as regards information pertaining to the trust, its existence, terms and parties. Further, trust instruments are not required to be registered in BVI or even presented to any public authority for the purposes of stamping the trust instrument with the US\$100 trust duty (see 13 below) which may be done entirely in-house by professional advisers.

The primary anti-money laundering legislation in BVI is the Proceeds of Criminal Conduct Act, 1997 (the "PCCA"). Growing out of the "forty plus nine" recommendations formulated by the Financial Action Task Force, the PCCA sets out BVI's legal systems and mechanisms to counter the laundering of drug trafficking money and other criminal proceeds. For full particulars of the PCCA and related legislation, please see our publication entitled "Anti-Money Laundering Measures in the British Virgin Islands".

## **13. TAXATION AND TRUST DUTY**

BVI trusts without any BVI resident beneficiaries are generally not liable to tax in the BVI. The Trustee Act provides that:

The income of any trust in the hands of a trustee is exempt from income tax and the beneficiaries of any trust who are not resident in the BVI shall likewise be exempt from payment of income tax in respect of distributions received by them.

No estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge is payable by beneficiaries who are not resident in the BVI in respect of distributions received by them.

A trust which does not have any beneficiaries resident in the BVI and neither holds any land in the BVI nor carries on a business or trade in the BVI shall be exempt from stamp duty with respect to the trust documents.

Although trusts without BVI resident beneficiaries are exempt from stamp duty, any instrument declaring or evidencing a trust governed by BVI law and any instrument changing the proper law of a trust to BVI law is liable to trust duty at the rate of \$100.

#### **14. FURTHER INFORMATION**

More detailed information on any of these topics contained in this memorandum is readily available. Prospective clients should contact Raymond Davern who is head of our Private Client Department in the BVI.

*This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

### **About Conyers Dill & Pearman**

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

Conyers' sophisticated client base includes FTSE 100 and Fortune 500 companies. Working with leading local and international firms, Conyers advises on highly complex multi-jurisdictional projects.

Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

Founded in 1928, Conyers has 600 staff, including more than 150 lawyers.

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