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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. It is not intended to be exhaustive but provides a basic guide to the trust concept and an outline of trust law and trust administration in the British Virgin Islands for clients of Conyers Dill & Pearman.

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

This memorandum has been prepared on the basis of the law and practice as at July 1999.

Table of Contents

1 Introduction

- 1.1 The British Virgin Islands
- 1.2 Planning Uses for British Virgin Island Trusts

2 The Trust Concept

- 2.1 Description of Trust
- 2.2 The Settlor
- 2.3 The Trustee
- 2.4 The Beneficiaries
- 2.5 The Trust Fund
- 2.6 Protectors

3 Typical Forms of Trusts

- 3.1 Discretionary Trust
- 3.2 Fixed Interest Trust
- 3.3 Charitable Trusts
- 3.4 Purpose Trusts

4 Trustees' Duties and Trust Administration

- 4.1 Trustees' Duties
- 4.2 Administration of the Trust

5 Jurisdiction of the British Virgin Islands Courts

6 General Legal Considerations

- 6.1 British Virgin Islands Legislation

- **6.2 The Hague Convention**
- **6.3 The Rule Against Perpetuities**
- **6.4 Foreign Laws and British Virgin Islands Trusts**

7 Protectors

8 Purpose Trusts

9 Trust Companies and Restricted Trust Companies

10 Confidentiality

11 Taxation and Stamp Duty

1. INTRODUCTION

1.1 The British Virgin Islands

The British Virgin Islands ("BVI") are a British Overseas Territory, and are located in the Caribbean, at the northernmost end of the Lesser Antilles (or Leeward Islands) chain, some 180 miles northwest of Antigua and 90 miles east of Puerto Rico. The population of the BVI is approximately 18,000 with 80% of the population living on the main island of Tortola, where the capital is located and where most government and business offices are based.

The main island of Tortola contains the capital, Road Town, which is the Government and business centre. Prior to 1988, tourism was the mainstay of the economy with Virgin Gorda boasting a number of attractive hotels. In 1984, the BVI encouraged the development of international business by the adoption of the International Business Companies Act, turning the BVI into the dynamic offshore financial centre it is today. The legal system is based upon English common law. Worldwide communications are excellent and a wide range of services are provided by lawyers, accountants, trust companies and four international banks. The time zone is that of the Eastern United States, the currency is the United States Dollar and regular air transportation is via Puerto Rico, St. Thomas or Antigua.

The BVI jurisdiction is part of the Eastern Caribbean States court system. The local courts comprise a Magistrates Court with limited jurisdiction in criminal and civil matters presided over by a resident judge appointed by the Government; and a High Court presided over by a resident judge approved by the Chief Justice of Eastern Caribbean States Supreme Court. Appeals from the BVI High Court are heard by the Circuit Court of Appeal, which sit in the BVI two or three times a year: a final appeal is available to the Privy Council in London.

1.2 Planning Uses for BVI Trusts

BVI trusts may be 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
- minimisation of estate/inheritance tax, income tax and capital gains tax

- preservation of family wealth and continuity of family business
- 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

[Return to table of contents](#)

2. THE TRUST CONCEPT

The trust, as a legal concept, developed under English common law although it is now governed, to a certain extent, by legislation. BVI trust law is based on English trust law and equity but has been enhanced in certain areas by BVI legislation. English common law is of persuasive authority in BVI.

2.1 Description of Trust

A trust is the legal relationship created (normally by a written instrument - the "trust deed") whereby a person (the "settlor") gives property (the "trust fund") to the trustee or trustees to hold the legal title to the trust fund for the benefit of certain persons (the "beneficiaries"). Some trust arrangements also include a "protector" (described below).

2.2 The Settlor

The settlor may also be a beneficiary and, in certain circumstances, can act as a co-trustee. The settlor cannot be a sole trustee and a sole beneficiary of his trust.

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(s) who holds the legal title to the trust fund and who is obligated to administer the trust for the benefit of the beneficiaries. The trustee can be a company if it has the corporate capacity to act as a trustee (see Trust Companies and Restricted Trust Companies at paragraph 9 below).

The trustee stands in a fiduciary position vis-a-vis the beneficiaries and is required to honour

certain stringent duties imposed by law (which are outlined in greater detail in paragraph 4 below).

2.4 The Beneficiaries

The beneficiaries can be individuals, companies and other legal entities. Trusts can also be established to further purposes, rather than for beneficiaries, which may be charitable or non-charitable.

In order for a private trust to be valid, the identity of the beneficiaries must be sufficiently certain. In the case of trusts 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.

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 capable of being ascertained in order to be subject to a trust.

2.6 Protectors

The protector is usually a person who is 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 paragraph 7 below.

[Return to table of contents](#)

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 (unless he retains certain powers).

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) when and to which beneficiary he should distribute capital and or income of the trust, and in what proportions. For this reason, the beneficiaries are regarded as not having a specific interest in the trust 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 (and possibly a portion of the capital) of the trust fund and the trustee's discretion over the trust fund will be limited. Secondary beneficiaries are also included who will have rights after the primary beneficiaries' rights have terminated.

The fixed interest form of trust is predominantly 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).

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, is charitable if:

- (a) all its purposes fall exclusively within one or more of the categories of charitable purposes recognised by law listed below:
 - (i) the relief of poverty;
 - (ii) the advancement of education;
 - (iii) the advancement of religion;
 - (iv) 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

BVI law has been developed to provide for non-charitable purpose trusts. 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 addition, a purpose trust cannot be a trust that is for the benefit of particular persons whether or not immediately ascertainable or ascertained by reference to some personal relationship.

[Return to table of contents](#)

4. TRUSTEES' DUTIES AND TRUST ADMINISTRATION

4.1 Trustees' Duties

Trustees are required by law to fulfill certain fiduciary duties. The most important duties include the following:-

- a. to act honestly and in good faith for the best interests of the beneficiaries in accordance with the terms of the trust;
- b. 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;
- c. to obey the terms of the trust deed unless all the beneficiaries are adult and consent to trustee actions contrary to the terms of the trust or if the court sanctions a variation of the trust's terms;
- d. to act impartially between the beneficiaries. This duty amounts to a fair balancing of the interests of beneficiaries, particularly where certain beneficiaries are entitled to current income and others to future interests in capital;
- e. to preserve the trust property and to sell wasting assets unless a contrary intention is expressed in the trust deed;
- f. to exercise reasonable care, skill and caution in the administration of the trust and the investment of the trust assets. Unpaid trustees are bound only to use such due diligence and care in the management of the trust as a man of ordinary prudence, diligence and vigilance would use in the management of his own affairs. A higher standard of diligence and knowledge is expected from professional trustees who receive remuneration for their services (unless the trust deed provides otherwise);
- g. not to delegate duties or powers either to a third party or to a co-trustee except when appropriately authorised by the trust deed;
- h. to act unanimously unless otherwise expressly authorised under the trust deed. Accordingly, investments and all trust property should be in the joint names or held to the order of all trustees;
- i. to act gratuitously, unless remuneration is authorised by the trust deed;
- j. not to profit from the trust's property nor to purchase trust property for personal enjoyment. A trustee must account to the beneficiaries for any profit or other benefit received by virtue of his position as trustee. The purchase by a trustee of trust property is voidable by a beneficiary, unless authorised by the trust deed, irrespective of the fairness of the price paid;
- k. to keep accounts and at all reasonable times and on request to furnish any beneficiary with accounts.

4.2 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.

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 subsidiaries. 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 invested on a regular basis, the trustees will often recommend that a professional investment adviser 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.

[Return to table of contents](#)

5. 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 further below). Section 82 of the Trustee Ordinance (as defined below) also 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.

[Return to table of contents](#)

6. GENERAL LEGAL CONSIDERATIONS

6.1 BVI Legislation

The principal trusts legislation in the BVI since 1961 has been the Trustee Ordinance (the "Trustee Ordinance") which followed the English Trustee Act 1925 with a few exceptions, including, until 1993, the modern rule against perpetuities. In 1993 the Trustee Ordinance was amended by the Trustee (Amendment) Act (No.7 of 1993) which came into force on 1 November 1993.

The amended Trustee Ordinance, 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 trust.

6.2 The Hague Convention

The provisions of the English Recognition of Trusts Act 1987 have, with modifications, been extended to the BVI so that most of the provisions of the Hague Convention on the Law Applicable to Trusts and on their Recognition now form part of BVI law.

6.3 The Rule Against Perpetuities

The English Perpetuities and Accumulations Act 1964 applies in the BVI, except it is now possible to specify a fixed perpetuity period not exceeding 100 years (section 68 of the Trustee Ordinance).

6.4 Foreign Laws and BVI Trusts

As noted at paragraph 5 above, all questions concerning a trust subject to BVI laws (including the settlor's capacity to settle property (section 83 (1)(a) Trustee Ordinance) 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 Ordinance provisions of 1993. Thus, a spouse of a settlor may be able to claim a proprietary interest in the settled property under the laws of another jurisdiction.

Secondly, a corporate settlor's capacity to settle property will be governed by the law of its incorporation.

Thirdly, the rules do not validate a trust of foreign real property which is invalid under the laws of the situs of the property.

Fourthly, 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.

[Return to table of contents](#)

7. PROTECTORS

The BVI is one of the few jurisdictions that has 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 critically 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 Ordinance 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 in exercising the powers to change the proper law, remove trustees, or withhold consent to any proposed action by the trustees.

[Return to table of contents](#)

8. PURPOSE TRUSTS

As mentioned above, the Trustee Act of 1993 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 and reasonable and at least one trustee is a designated person. The rule against perpetuities and remoteness of vesting does not apply to purpose trusts. 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.

As with Bermuda purpose trusts, BVI purpose trusts can be applied for a number of private and commercial planning opportunities.

[Return to table of contents](#)

9. TRUST COMPANIES AND RESTRICTED TRUST COMPANIES

A company incorporated in the BVI or elsewhere may be trustee of a BVI trust. However banks and trust companies are regulated under the provisions of the Banks and Trust Companies Act (1990) ("BTCA"). Among other things, the BTCA 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 trustee, protector or administrator, managing or administering any settlement or company management as defined in the Company Management Act 1990.

If a trust company is to offer only trustee services to the public it will require a Trust Licence. A licensed Trust company must have a fully paid up share capital of not less than US\$250,000.00.

A "trust company formed on behalf of and owned by one or more trusts of which one or more members of the family are the principal beneficiaries and for which no remuneration is received by the trust company ..." shall not be regarded as carrying on trust business.

For the reasons outlined at paragraph 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) Limited which may be used for this purpose.

[Return to table of contents](#)

10. CONFIDENTIALITY

Under common law in the BVI, trustees have a duty of confidentiality as regards information pertaining to the trust, its existence, terms and parties.

Further, the Proceeds of Criminal Conduct Act 1997 contain special rules relating to the disclosure of evidence in criminal proceedings connected with indictable offences including suspected drug trafficking and money laundering.

[Return to table of contents](#)

11. TAXATION AND STAMP DUTY

Under the Stamp Duty Law (1995 Revision) stamp duty of US\$50 is payable on every trust instrument which is in writing. Ad valorem rates apply to conveyances or transfers of immovable property situate in the BVI.

There are no income, capital gains, wealth, withholding, gift or inheritance taxes in the BVI on non-residents. Generally, a BVI trust or company will not be liable to tax in the BVI except for stamp duty as noted above, annual application and licence fees for a company engaged in trustee or banking activities, or if a company is to engage in local trade or business.

[Return to table of contents](#)

This memorandum has been prepared on the basis of the law and practice as at July 1999.