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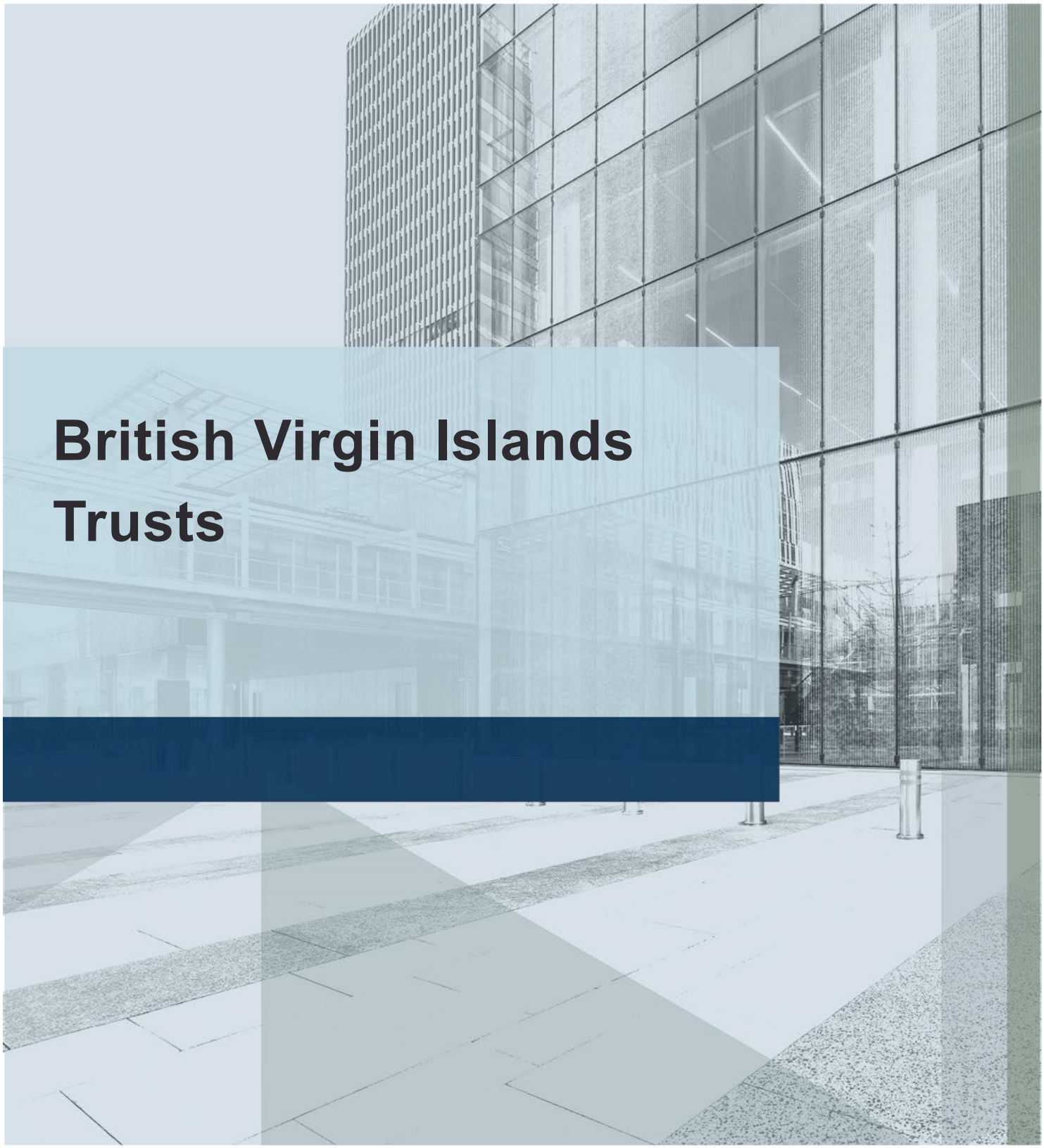

# British Virgin Islands Trusts

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# Preface

This Publication 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.

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

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## 1. INTRODUCTION – PLANNING USES FOR BVI TRUSTS

BVI trusts are established 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;
- avoiding forced heirship rules in civil law jurisdictions;
- preservation of family wealth and continuity of family businesses;
- efficient and timely distribution of assets upon death without the need to apply for probate;
- 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

### 2.1. BVI trust Law

The principal legislation governing BVI trusts is the Trustee Act 1961 (as amended), the Virgin Islands Special Trusts Act 2003 (as amended) ("**VISTA**"), the Banks and Trust Companies Act 1990 (as amended) ("**BTCA**") and the Financial Services (Exemptions) Regulations 2007 (as amended) (the "**Regulations**") which governed the establishment of private trust companies in the BVI.

### 2.2. Description of trust

A trust is the legal relationship created whereby a person (the "**settlor**") gives property (the "**trust fund**") to a trustee or trustees to hold the legal title to the trust fund for the benefit of certain persons (the "**beneficiaries**") or for a specified purpose.

## 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 have divested himself of any ownership interest in the assets held in the trust (unless he reserves 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) whether, 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 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 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 is charitable if:

(a) all its purposes fall exclusively within one or more of the categories of charitable purposes recognized by law listed below;

  (i) the relief of poverty;

  (ii) the advancement of education;

  (iii) the advancement of religion; and

  (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. Trusts with Protectors

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

A protector may be appointed to a trust in order to limit the powers of the trustees by requiring the trustees to obtain the consent of, act at the direction of or in consultation with the protector. The inclusion of a protector is not strictly necessary for the creation of a BVI trust but can 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 are carried out by the trustees.

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.

### 3.5. Purpose Trusts

A valid BVI 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.

It is possible 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.

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;

(c) a licensee under the BTCA; or

(d) such other person as the Minister of Finance may by order designate.

BVI purpose trusts may be established for a very wide range of family, philanthropic and commercial purposes.

### 3.6. VISTA TRUSTS

On 1st March 2004, VISTA came into force enabling a settlor to create a trust holding shares in a BVI incorporated company under which the trustee may be disengaged, notwithstanding that his 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.

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 the trust.

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).

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.

For more specific information on VISTA trusts, please refer to Conyers Dill & Pearman's Publication "British Virgin Islands VISTA Trusts".

## 4. TRUSTEES' DUTIES AND TRUST ADMINISTRATION

### 4.1. Who May Act As Trustee?

Individuals, as well as companies licensed as trust companies under the BTCA, or established as private trust companies under the Regulations, may act as trustees of a BVI trust.

### 4.2. 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;

(b) to keep under their control and manage trust property;

(c) 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 sanctions a variation of the trust's terms;

(d) 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;

(e) 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;

(f) 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);

(g) to disclose any conflict in relation to the trust and not to profit from the trust property nor to purchase trust property for personal enjoyment; and

(h) to keep accurate records and accounts.

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.

### 4.3. Duty to maintain records and underlying documentation

Every relevant trustee is required to maintain records and underlying documentation of the trust whether within or outside the BVI and retain those records and underlying documentation for a period of at least 5 years from the date on which they first came into possession or under the control of the trustee or they were prepared by the trustee. A relevant trustee is a company incorporated in the BVI, a foreign company registered under Part XI of the Business Companies Act, 2004, an individual resident in the BVI or any other person who is a trustee of a trust administered (in whole or in part) in or from within the BVI.

### 4.4. Trustee to collect, keep and maintain beneficial ownership information

A relevant trustee of an applicable trust shall collect, keep and maintain adequate, accurate and up to date information on the beneficial owners of the applicable trust. The trustee shall take reasonable steps to verify the beneficial owner information, including the identity of the beneficial owner, to ensure that it is adequate, accurate and up to date. The trustee shall also, within 30 days of becoming aware of any changes in the beneficial owner or information in relation to a beneficial owner or its interest in the trust, update the information. The trustee shall also maintain the information for at least 5 years from the date of the trust's termination. A relevant trustee of an applicable trust is required to cooperate with (i) a competent authority in the lawful discharge of its functions under an enactment or pursuant to an agreement or a treaty or other similar arrangement to provide mutual legal or regulatory assistance and (ii) a law enforcement agency in the lawful performance of its investigative functions or in relation to the lawful exercise of its investigative powers.

## 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 6.1 below).

The Trustee Act 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.

The Trustee Act grants the BVI court jurisdiction to vary a trust in certain circumstances and the BVI Court has a "supervisory" jurisdiction to deal with trust matters concerning BVI law governed trusts. English case law is considered of highly persuasive authority in the BVI.

## 6. GENERAL LEGAL CONSIDERATIONS

### 6.1. 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.

### 6.2. The Rule Against Perpetuities

With the exception of charitable trusts and statutory purpose trusts which are unlimited in duration, all other types of BVI trusts are subject to a maximum perpetuity period of 360 years, plus a "wait and see" rule whereby a disposition or power will fail only if it actually takes effect outside of the perpetuity period.

### 6.3. Effect of Foreign Laws on BVI Trusts

Subject to any express term to the contrary in the trust deed, 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.

- 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.
- a corporate settlor's capacity to settle property will be governed by the law of its place of incorporation.
- 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.
- 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.
- The Trustee Act contains robust and comprehensive provisions protecting most BVI trusts (and their dispositions to trustees) from forced heirship claims. These also prevent foreign judgments based on such claims from being recognised or enforced in the BVI.

## 7. 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. 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 a professional trustee, protector or administrator, or managing or administering any settlement or company management as defined in the Company Management Act.

## 8. 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 Regulations exempt a PTC from regulation and licensing under the BTCA provided that it carries on either unremunerated trust business or related trust business and no other business. For more information, please refer to Conyers Dill & Pearman's Publication "British Virgin Islands Private Trust Companies".

## 9. CONFIDENTIALITY

There are no public registration requirements or other disclosure requirements concerning the establishment of trusts in the BVI. Trust records kept by a trustee should not be disclosed unless required by law. Certain rules relating to the disclosure of evidence and information are found under various treaties and anti-money laundering legislation.

## 10. TAXATION AND TRUST DUTY

There are no estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge levied in the BVI 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.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

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