

BVI Trusts: VISTA Trusts

INTRODUCTION

The Virgin Islands Special Trusts Act (“**VISTA**”) came into force on 1 March 2004 and was introduced in order to allow a shareholder to establish a BVI trust over a BVI company which disengages the trustee from administrative and managerial responsibility in relation to that BVI company.

The principal effect of VISTA is to remove the duty of trustees to monitor and intervene in the conduct of the directors and in the running of the BVI company held in trust. Owing to the large number of companies incorporated in the BVI, VISTA was introduced, on the one hand, to offer a vehicle which would remove the need to obtain a grant of probate in the BVI (which would otherwise be a requirement on the death of the owner of BVI company shares) by implementing a trust structure, while on the other hand, allowing the owner to retain effective management and control of the company after having divested himself of its ownership.

The VISTA regime can apply to discretionary trusts, fixed interest trusts, charitable trusts or purpose trusts as long as certain conditions are satisfied (see further below).

The VISTA legislation was amended in May 2013 to fine-tune certain elements of the regime and introduce greater flexibility and as a result is likely to remain the most popular form of trust vehicle in the BVI.

THE PRUDENT INVESTOR PROBLEM

An irreducible core of trust law is the trustee’s duties to act in the best interests of the beneficiaries of the trust and to safeguard the value of the trust assets. Consequently, the trustee is required to act prudently in relation to the trust assets and this creates a potential clash of investment approach between that of a conservative corporate trustee and that of a risk-taking settlor who may have built up his wealth over time through entrepreneurial flair.

This “Prudent Investor Problem” was keenly felt in the BVI because BVI trusts are commonly used to hold shares in a BVI company, which itself is a holding vehicle for a family business. A BVI trust may typically be used in such a scenario for succession planning reasons and thus it may be of great discomfort to the settlor of a trust that the trustee may have a duty to alter the make-up of the trust assets (i.e. by seeking to reinvest away from the family business) if the trust was specifically established as a succession vehicle for that family business.

The Virgin Islands Special Trusts Act 2003 (“**VISTA**”) was specifically enacted to solve the Prudent Investor Problem in relation to BVI companies held in trust.

ADVANTAGES OF VISTA TRUSTS

VISTA seeks to solve the following concerns which commonly apply to trusts when used as asset holding structures:

- (i) The duty of prudence imposed on trustees may be incompatible with a settlor who believes that risk taking is an integral part of business practice;
- (ii) There may be wider considerations than pure investment return. For example, when a trust holds a family business, issues such as family tradition and ethical and environment considerations may be relevant factors;
- (iii) The skill set of the trustee may not be relevant to the range of business activities carried out by the company held in trust and the directors are better placed to take the lead in that regard; and
- (iv) The costs involved with a trustee ensuring that it is properly discharging its administrative and monitoring obligations may be prohibitively expensive;

MANDATORY REQUIREMENTS AND RESTRICTIONS ON TRUSTEES' ACTIVITY

The key conditions of a VISTA trust are that:

- (i) the trust must **only** hold shares in a BVI company (or companies);
- (ii) at least one of the **trustees** must be a BVI licenced trust corporation or a BVI Private Trust Company ("**PTC**") (see our separate note on PTCs); and
- (iii) the trustee cannot be a director of the underlying BVI company.

If these conditions are satisfied and it is expressly provided in the trust instrument that VISTA will apply to the trust, the result is that the trustee is prohibited from interfering in the management of the BVI company (except in extreme circumstances known as intervention calls).

The May 2013 legislative amendments (as to which see further below) have provided increased flexibility as to when the VISTA regime is to apply to a BVI trust by allowing for the VISTA regime to be applied or disapplied on the occurrence of a particular event or by conferring power on an individual or committee (but not the trustee) to declare that a BVI trust will become or cease to be a VISTA trust.

There is a restriction on the trustee's ability to sell the BVI company shares, which must be retained indefinitely, thereby solving the Prudent Investor Problem. Except when acting or being required to act on an intervention call (following a beneficiary acting upon a "permitted ground for complaint"), a trustee of a VISTA trust "shall have no fiduciary responsibility or duty of care" in respect of the BVI company shares or "the conduct of the affairs of" the BVI company. However, the May 2013, changes have also created more flexibility in this regard.

OFFICE OF DIRECTOR RULES (“ODRS”)

VISTA also contains detailed rules by which the appointment, removal and remuneration of the directors of a BVI company held in a VISTA trust can be controlled by the settlor or another. Through the use of suitably drafted ODRs, a settlor can retain the ability to appoint and remove directors of the BVI company, free from interference from the trustee.

MAY 2013 AMENDMENTS

The key amendments, some of which are mentioned elsewhere in this note, are:

- (i) PTCs can now be trustees of VISTA trusts (in addition to trust licence holders) and there is no longer a requirement that VISTA trusts must only have one trustee; the requirement is now that at least one of the trustees must be a PTC or trust licence holder, which means that individuals or non-BVI companies can now be co-trustees of VISTA trusts
- (ii) Converting Non-VISTA Trusts - BVI trusts which are not VISTA trusts can now be converted into VISTA trusts (assuming that they satisfy the other conditions, e.g. holding BVI company shares) as long as one of the trustees of the trust is a PTC or a trust licence holder.
- (iii) The required declaration in a trust deed for a VISTA trust that the VISTA regime will apply to it can contain provisions for the declaration to be revoked, suspended or triggered by specific events or by a direction being given to the trustee by an individual or committee. This allows for greater flexibility and the establishment of trusts specifically tailored to meet the needs of each client.
- (iv) Whilst the default position for VISTA trusts is that the trustee has no direct fiduciary responsibility over the BVI company shares held in trust (unless acting on an intervention call), it is now possible to introduce specific fiduciary duties on the trustee in respect of the shares. This amendment again allows for the creation of bespoke trust vehicles to address any type of structuring situation.

PRACTICAL USES OF VISTA TRUSTS

- (i) VISTA trusts allow individuals to take advantage of the classic benefits of a trust vehicle, such as effective succession planning and holding assets in a confidential manner, without having to give up effective control of the assets held in the BVI company.
- (ii) Vista Trusts are especially useful where the underlying assets to be held by the BVI company in the trust are of specific strategic importance to the

family. This may apply to family heirlooms or shares in long established family companies.

- (iii) Where the assets or asset classes held by the BVI company in trust are viewed as risky or unconventional, VISTA can provide comfort to trustees by altering their fiduciary responsibility and duty of care in relation to the BVI company shares.
- (iv) A BVI trust which combines a purpose trust (i.e. a trust for non-charitable purposes) and a VISTA trust is considered the ideal holding vehicle for certain strategic assets, such as shares in a PTC.

FURTHER INFORMATION

For more information on BVI trusts please contact:

BVI & Cayman Islands

Henry Mander
Counsel
Tel: +1 345 815 2927
henry.mander@harneys.com

Hong Kong

Tim Bridges
Partner
Tel: +852 3195 7235
tim.bridges@harneys.com

Cyprus

Emily Yiolitis
Partner
Tel: +357 2582 0020
Emily.yiolitis@harneys.com

Latin America

Horacio Woycik
Consultant
Tel: +598 2518 2238
horacio.woycik@harneys.com

Hong Kong

Lisa Pearce
Partner
Tel: +852 3195 7244
lisa.pearce@harneys.com

Cyprus

Margarita Hadjitofi
Associate
Tel: +357 2582 0020
margarita.hadjitofi@harneys.com

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May 2013

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