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## **ADVANCED TRUST INSTRUMENT WEALTH PLANNING GUIDE**

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## 1. Introduction

This Guide is primarily intended for professional wealth planners considering the use of BVI trusts, and in particular BVI trusts which take advantage of the provisions of the Virgin Islands Special Trusts Act (“**VISTA**”). This Guide assumes a working knowledge of VISTA. However, if you require more information please see our “Guide to VISTA Trusts” and “Summary of New Trust Legislation In The BVI”.

The Guide contains a comparative analysis of the advantages and benefits of Harneys’ Advanced Trust Instrument (“**ATI**”) with a focus on the unique ability of users of the ATI to invoke VISTA during the trust period.

Under the ATI a settlor is given power, at the settlor’s absolute discretion, to invoke VISTA at any time during the trust period, and whether in respect of all or only some of the shares of BVI companies which are then comprised in the trust fund. The ATI is therefore a form of “**Convertible VISTA**” trust, distinguishable from a trust that applies VISTA from the start, a so called “**Fixed VISTA**” trust.

Fixed VISTA trusts come in two forms: ones that apply VISTA to a single identified BVI company and its shares, (a “**Specific Direction**”) and ones that apply VISTA generally, that is to say to any BVI company or companies the shares of which become comprised in the trust fund (at any time during the trust period) (a “**General Direction**”).

The Fixed VISTA trust (whether subject to a Specific Direction or General Direction) is the most commonly used VISTA trust in the BVI.

This Guide discusses the limitations and inadequacies of a Fixed VISTA when compared to the advantages and flexibility of the ATI.

The Guide also includes analysis of other planning and administrative improvements in the ATI.

## 2. VISTA restrictions - a general overview

As a preliminary to what follows in section 3 below, it is important to understand the limits of the relationship established between a trustee and a company, the shares of which are subject to VISTA (“**VISTA Company**”).

VISTA contains a number of statutory restrictions on the ability of the trustee to interact with a VISTA Company, for instance section 6 of VISTA restricts the ability of the trustee to interfere in the management and control of a VISTA Company, while section 13 of VISTA prohibits the trustee from being appointed a director of a VISTA company. In addition, under section 10 of VISTA, a Beneficiary can apply to Court to restrain a trustee from interfering in the affairs of a VISTA Company or otherwise breaching the other VISTA restrictions.

VISTA also contains extensive provisions that effectively exonerate the trustee from any liability where the shares subject to VISTA lose value; the trustee simply does not have the usual duty to preserve and enhance the value of the shares.

A trustee is therefore not able to control a VISTA Company, and is not liable if the shares of the VISTA Company lose value. The effect of this is that a trustee would, in all but the most exceptional circumstances, breach its duties and obligations to the Beneficiaries of the trust were it to exercise its powers to invest in a VISTA Company.

To illustrate the above point further, if a trustee were to subscribe cash for shares in a VISTA Company would this be an appropriate use of trust money? The trustee would in the ordinary course be under a duty to preserve and enhance the value of the trust fund, for the benefit of the Beneficiaries. However, by investing in a VISTA Company, the trustee will have no control over the investment and no liability if there is a loss - the trustee would be attempting to convert an asset in respect of which it owed duties and obligations (cash) into an asset (shares in a VISTA Company) in respect of which it owed no such duties or obligations. This cannot be a valid exercise of trustee investment powers, and would likely result in a breach of trust.

In summary, a trustee is in effect quarantined from interaction with a VISTA Company, to the extent that it should not exercise its powers to obtain the benefit of the VISTA protections – a trustee may not invoke VISTA.

Applying the above to the position of a trustee under an ATI or Fixed VISTA trust respectively, it will be seen that in both cases the position is the same: the trustee is prohibited from investing in the relevant VISTA Company. However, and this is the crucial distinction, a trustee of an ATI can validly invest in a company or companies the shares of which are then *later* made subject to VISTA - this is not possible with a Fixed VISTA trust, with serious consequences explained in greater detail below.

### **3. Trustee reinvestment powers – ATI and Fixed VISTA Trust compared**

The ATI and Fixed VISTA trust can be compared in two situations that serve to illustrate the reinvestment limitations of a Fixed VISTA.

The first involves dividend income and the other sale proceeds from disposal of shares in a VISTA Company.

#### *Dividend Distributions*

Bearing in mind the restrictions mentioned and explained in section 2 above, a trustee of a Fixed VISTA trust that receives dividend income has limited reinvestment choices. If the trust is subject to a Specific Direction, then the trustee is free to invest through a further BVI company, however the shares of this new BVI company cannot ever be subject to VISTA, and therefore the trustee will be obliged to actively manage and control the business or investments of the BVI company.

The position is a little worse in the case of a Fixed VISTA subject to a General Direction. Here the trustee is effectively prohibited from using a BVI incorporated company as a means to reinvest the dividend as any such BVI company would automatically be subject to VISTA, and as explained above at section 2, the trustee will encounter serious fiduciary problems in investing in such a company. The trustee is therefore put in the bizarre position of only being able to use

non-BVI incorporated companies as a means to reinvest the dividend, with all of the added costs that may entail.

By comparison, a trustee of an ATI will not encounter any of these difficulties, and can effectively reinvest dividend income through a BVI incorporated company (there will be no question of having to use a non-BVI company), the shares of which may later be made subject to VISTA.

### Share Sale Proceeds

The trustee of a Fixed VISTA trust will similarly encounter reinvestment difficulties where shares in the VISTA Company are sold.

As above, a trustee of a Fixed VISTA trust, subject to a Specific Direction, will be able to reinvest sale proceeds but VISTA will no longer apply to the trust. It is absolutely crucial that prospective settlors appreciate this last point: a sale of the shares will fundamentally alter the relationship between the settlor and trustee. For example, were the trustee to reinvest sale proceeds into a newly incorporated BVI Company, the settlor would have no right to direct the trustee to nominate or remove a particular director or directors, the trustee would not be prohibited from appointing itself director, and would in the event probably wish to do so in order to better monitor and control the business and investments of the company. Contrast this situation with the freedom a settlor would have enjoyed while using the VISTA Company.

The position of a trustee of a Fixed VISTA trust, subject to a General Direction, is much worse in that (for the reasons mentioned in section 2 above) the trustee will be effectively prohibited from reinvesting the sale proceeds through a BVI incorporated company - if the trustee were to incorporate a BVI company, that company would automatically be subject to VISTA, a trustee would be attempting to invoke VISTA by use of its powers of investment, and as mentioned above, this would give rise to serious fiduciary issues.

In summary, VISTA can never apply to reinvestment of dividend or share sale proceeds under a Fixed VISTA trust, indeed VISTA ceases to apply at all where all the shares of a Fixed VISTA trust, subject to a Specific Direction, are sold. At that point in time a non-VISTA trust would result, with disastrous consequences if this was not appreciated by the settlor when creating the trust.

It is therefore crucial to appreciate the inbuilt limitations of a Fixed VISTA, particularly if there is any intention or expectation on the part of the settlor that the trustee will reinvest dividend and or share sale proceeds, as opposed to simply distributing all to the Beneficiaries of the trust.

The ATI is not affected by the above difficulties. Dividend and share sale proceeds can be reinvested through a separate BVI company which can later be converted to VISTA. This is a significant benefit and radically different from the constraints of a Fixed VISTA.

#### 4. Further comparisons between the ATI and a Fixed VISTA Trust

##### Restrictions on identity of Trustee

Under a Fixed VISTA there can only ever be a single corporate trustee and the trustee must be licensed under the Bank and Trust Companies Act of the BVI to conduct trust business. Such an entity is referred to in the legislation as a “**Designated Trustee**”.

It is not possible for a Fixed VISTA to commence with individual trustees and then later re-configure to satisfy VISTA. In contrast, a trust under the ATI can be constituted with an individual trustee or co-trustees, and these can then retire to be replaced by a Designated Trustee to satisfy VISTA.

The settlor may initially wish to appoint individual trustees, or non-Designated Trustees, for other purposes, including their expertise and or for tax planning reasons, but still require the option to change to a BVI resident Designated Trustees; a Fixed VISTA is unable to accommodate this form of planning.

##### Prohibitions on Directorship

A Designated Trustee is prohibited from being a director of a VISTA Company. Therefore a Fixed VISTA could not be used where a settlor wished temporarily to involve the trustee in the management of the company prior to conversion to a VISTA, e.g. to take advantage of relevant trustee expertise or to allow the trustee to assist in a corporate restructuring.

This point is also of critical importance when viewed from the trustee’s perspective in that a Fixed VISTA does not afford a trustee an opportunity to assess the nature of the settlor’s business prior to accepting the trust. This may not prove much of a problem where the settlor has an established relationship with the trustee, but can present substantial risks (not least to the trustee’s professional reputation) where the settlor and his trading activities are otherwise unknown. The ATI enables the trustee to put the settlor through a sort of probationary period prior to VISTA conversion; the trustee can always retire if the risks are considered too high.

A trustee of a Fixed VISTA can only ever retire in favour of a Designated Trustee (i.e. a BVI licensed corporate trustee), which substantially narrows the field of potential successor trustees. This problem does not exist with the ATI, as the trustee is able to prevent VISTA conversion pending their retirement – the trustee then does not need to retire in favour of a Designated Trustee.

##### Statutory obligations to disclose

Where a Fixed VISTA contains “**Permitted Grounds for Intervention**”, and does not appoint an “**Appointed Enquirer**”, the trustee is required to provide a Beneficiary with a copy of the trust, details of the trustee, name and address of the company and its directors and the nature of its business. This may or may not prove a problem, but does mean that the trustee will be under a statutory obligation to disclose the existence and details of the trust; the ATI affords a greater level of confidentiality while unconverted, and generally would not include “Permitted Grounds for Intervention”.

### Advanced Planning - Foreign Trust VISTA Conversion

As explained in section 2 above, a trustee of a Fixed VISTA trust is prohibited from investing in a VISTA Company. One practical consequence of this is that were such a trustee to receive a distribution from a foreign law trust (say a Jersey trust), the trustee could not then use that distribution to make a further investment in a VISTA Company.

The ATI does not encounter this problem, as it is perfectly permissible for the trustee to invest the distribution by incorporating and investing into a BVI company, the shares of which can later be made subject to VISTA, and in this way the assets of the foreign trust would have effectively been converted to a VISTA trust.

This provides a practical method for foreign trusts to be effectively exported to the BVI to take advantage of the freedoms afforded by VISTA.

### General ATI VISTA Provisions

The ATI also contains new uses of VISTA Office of Director Rules. Specific rules are now provided to protect the reputation of the trustees in the Prohibited Activities clause. Broadly, what this provides is a list of activities that the trustee deems a risk to their reputation, with power for the trustee to replace all directors of the VISTA Company found to be engaged in such prohibited activities. This is a further provision that enhances the trustee's ability to control risk, in the take-up of new business.

The above is not an exhaustive analysis of the differences between an ATI and a Fixed VISTA, but highlights some of the more substantive points of difference.

## **5. General planning points**

The ATI contains a number of innovations unrelated to VISTA, two notable examples of which are the "Secured Communication" and "Automatic Protector Committee" provisions.

### Secured Communication

The secured communication provisions facilitate use of the latest means of communication in the administration of the trust. The trustee is able to prescribe methods of secured communication between, for example the trustee, beneficiaries and protectors, which could be by telephone or by secured website. It is intended that use of secured communications will provide a level of flexibility and ease of use that a modern client would expect and demand.

### Automatic Protector Committee Rules

The automatic protector committee provisions are included as part of the enabling nature of the trust - this essentially recognises that the trust must be able to accommodate changed circumstances and the ability to scale up and down in complexity of use. The default protector provisions allow the settlor to determine, during the trust period, the composition of the protector committee (a 'committee' is formed when more than 2 protectors are appointed), and thereafter

automatic rules apply to determine the manner in which its members vote and require appointment of a Nominated Member, to receive and communicate with the trustee.

## **6. Summary**

The ATI is the first substantive BVI VISTA trust and marks a departure from the previous custodian based approach (illustrated by the limitations of a Fixed VISTA). VISTA convertibility opens up a whole host of planning options and opportunities, some of which have been explored in this guide. Taken together with the secured communications, automatic protector committee and modernised administration and dispositive provisions the ATI establishes a truly self contained multi-generational planning and succession vehicle.

## **7. Further information**

**If you would like further information on the subject matter of this Guide, please contact Zac Lucas at [zac.lucas@harneys.com](mailto:zac.lucas@harneys.com) or Sheila George at [sheila.george@harneys.com](mailto:sheila.george@harneys.com) or your usual contact at Harneys. Alternatively, you can visit our website at [www.harneys.com](http://www.harneys.com).**

*This Guide is general in scope and is not intend to be comprehensive. It is not a substitute for legal advice.*

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