

Guide to VISTA Trusts

The Virgin Islands Special Trusts Act (**VISTA**) came into force on 1 March 2004. Trusts established under the Act, known as ‘VISTA trusts’ are unique to the British Virgin Islands. The VISTA regime was introduced as a solution to what is commonly referred to as ‘the prudent investor problem’.

The ‘prudent investor problem’

Trustees are required to act in the best interest of the beneficiaries of the trust. In doing so, a trustee is required to act prudently, and to invest the trust assets with the diligence and prudence that a reasonable person would be expected to exercise in making an investment of his own money.

BVI trusts are routinely used to assets for a number of reasons, but primarily succession planning and asset protection. Where the company held by the trust is a trading company or family business (or the holding company of a trading company or family business) the trustee is under a duty and responsibility to actively review, manage and administer its interest in the company.

Potential conflicts can arise where the business of the company involves participation in activities which would be considered risky by an average prudent investor. In such circumstances, a trustee may find himself under a legal duty to intervene in the management decisions of the directors of the company. Such intervention is unlikely to be welcomed by the directors. The duty of prudence imposed on trustees will often be irreconcilable with the views of settlor who believes that risk taking is an integral part of business practice.

A trustee is required to actively manage the trust assets and to take steps which will maximise those value and return, but there may also be wider considerations which the settlor considers important. For example, when a trust holds a family business, issues such as family tradition and ethical and environmental considerations may also be relevant factors.

Further, in managing the trust assets, trustees are under a duty to ensure that trust assets are appropriately diversified. A trustee may well find himself required to diversify out of the family business.

For all of the above reasons, trust practitioners have long sought, with varying degrees of success, to draft trust instruments so as to reserve the powers of investment to persons other than the trustee.

The VISTA legislation neatly and effectively solves the ‘prudent investor problem’.

The legislation introduced a new trust regime under which trusts can be created where the trustees is not required, nor indeed permitted, to actively manage and invest the trust assets. The trustee will retain a statutory right to information about the company’s affairs, but otherwise, the management of the company will be the responsibility of its directors.

Mandatory requirements

The key conditions of a VISTA trust are:

- The trust can only directly hold shares in a BVI company (or companies). There are, however, no restrictions on the assets which can be owned by the underlying BVI company.
- At least one of the trustees must be a BVI licensed trust corporation or a BVI Private Trust Company (**PTC**) (for further information on PTCs, please see Harneys briefing guide).
- The trustee cannot be a director of the underlying BVI company.

Key features

If the VISTA criteria are satisfied, then not only does the trustee not have a duty to monitor or interfere with the management of the company, but the trustee is in fact prohibited from doing so, except in extreme circumstances

known as 'intervention calls'. An intervention call may be made by any 'interested person', including a beneficiary, if the circumstances defined as 'permitted grounds for complaint' in the trust instrument arise.

The default position under the VISTA regime is that the trustee has no fiduciary responsibility in respect of the BVI company (unless acting on an intervention call) at all, but it is possible to impose specific duties on the trustee. For example, the trustee might be given power to intervene to resolve particular issues, for example, a deadlocked board. This allows for the creation of bespoke trust vehicles to address any type of structuring situation.

Further, there is a restriction on the trustee's ability to sell the BVI company shares, which must be retained indefinitely.

Types of VISTA Trust

The VISTA provisions apply only to the administration of the Trust Fund, and not to the trustees' dispositive powers. The trustees therefore retain all the usual fiduciary powers regarding the appointment of the income and capital of the Trust Fund. A VISTA trust can, for example, be discretionary or fixed interest, charitable or non-charitable.

A VISTA trust is, therefore, the ideal structure where a settlor wishes to settle shares in a BVI company on trust for succession planning or other reasons, but wishes to retain control over the management of the company and its assets during his lifetime.

Harneys Share Trusts are an example of a simplified form of VISTA trust, designed as a single generation succession planning vehicle. (For further information regarding Trusts generally and Share Trusts specifically, please see Harneys' specific briefing guides).

Office of Director Rules (ODRs)

Generally, the shareholder of a company has power to appoint and remove directors. A settlor may be understandably nervous about entrusting this power to a third party corporate trustee.

The VISTA legislation allows detailed rules governing the appointment, removal and remuneration of the directors of the BVI company held in the VISTA trust to be incorporated into the trust instrument. 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. The settlor can also provide for who is to hold these powers following his death or incapacity.

Conversion to VISTA

The VISTA regime can be applied and dis-applied to trust, providing significant flexibility. Trusts which are not VISTA trusts can be converted into VISTA trusts, assuming that they satisfy the relevant conditions (eg the governing law of the trust is or can be changed to BVI law and the trust holds BVI company shares etc).



For more information and key contacts please visit harneys.com

© Harneys, May 2018 - 12946642

Harneys is a leading international offshore law firm. From more than 12 offices around the globe, Harneys advises the world's top law firms, financial institutions and corporations on the laws of Bermuda, British Virgin Islands, Cayman Islands, Cyprus and Anguilla. For more information about Harneys please visit www.harneys.com or contact us at marketing@harneys.com.

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation. Bermuda legal services are provided through an exclusive association with Zuill & Co which is an independently owned and controlled Bermudian law firm.