Legal Guide

HARNEYS

Guide to VISTA Trusts

The Virgin Islands Special Trusts Act (***VISTA***) established trusts known as 'VISTA trusts', which 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 their own money.

BVI trusts are routinely used to hold assets for a number of reasons, but primarily for 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 actively to 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, trustees may find themselves 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 a settlor who believes that risk taking is an integral part of business practice.

Trustees are required to actively manage the trust assets and to take steps to maximise the assets' value and investment return, but there may be wider and competing considerations that are important to the settlor. 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 trust assets, trustees are under a duty to ensure that trust assets are appropriately diversified. Trustees may well find themselves required to diversify out of the family business.

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

The VISTA legislation neatly and effectively solves this '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 retains a statutory right to information about the company's affairs, but otherwise the management of the company is 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***).
- 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 also wishes to retain control over the management of the company and its assets during their lifetime.

Harneys Share Trusts are an example of a simplified form of VISTA trust, designed as a single generation succession planning vehicle.

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 specify who will hold these powers following the settlor's death or incapacity.

Conversion to VISTA

The VISTA regime can be applied and disapplied to a 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**

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