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GUIDE

BVI: VISTA Trusts

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What are VISTA trusts?

VISTA trusts are a type of British Virgin Islands (**BVI**) trust which were introduced into BVI law by statute[1] in 2004. They address the problems that can arise from a rule of English trust law (the 'prudent person of business rule') when businesses and other assets which represent a higher investment risk are held in trust.

Separate regime

The VISTA Trust regime only applies if the trust instrument contains a direction that it applies. It only affects the trustee's administrative duties; VISTA can therefore be combined with any form of beneficial provisions, including discretionary trusts, life interest trusts, or purpose trusts,[2] as well as reserved powers trusts (where the settlor reserves powers under the trust, such as a power to direct the trustee to make distributions of trust income to beneficiaries).

The prudent person of business rule

The duty of trustees is to take such care as ordinary prudent persons would take if they were minded to make an investment for the benefit of other people for whom they felt morally bound to provide.

There are a number of consequences of the rule. In particular, trustees must:

- avoid speculative or hazardous investments; and
- consider the need to diversify the investments to reduce investment risk.

In addition, where a trustee has a controlling interest in a company, it has a duty to monitor and, if appropriate, intervene in the business of that company if the directors of the company are not complying with the trustee's investment duties. This often creates difficulties in practice, as trustees are not generally ideally suited to involvement in trading companies and typically the settlor does not want them to be involved (or to pay them for their added responsibility and time) and will almost certainly not want the trustee to sell all or part of the business to diversify investment risk.

The primary purpose of VISTA is to avoid these problems by enabling a trust of company shares to be established under which:

- the shares may be retained indefinitely; and
- the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

It achieves this by incorporating a number of features, which are summarised below.

[1] VISTA stands for Virgin Islands Special Trusts Act.

[2] For more information about these types of trusts, see the separate Mourant guide to British Virgin Islands Trusts.

Principal features of VISTA Trusts

Limiting Trustee's duties

The starting point is that a trustee of a VISTA trust has no fiduciary responsibility or duty of care in respect of the assets of, or the conduct of the affairs of, the relevant company, except when acting, or required to act, on an 'intervention call' (see below).

Trust to retain shares

The trustee has a duty to retain the shares which takes precedence over any duty to preserve or enhance the value of the trust fund.

Intervention calls and permitted grounds for complaint

The only circumstances in which a trustee can intervene in the business of the company is where an 'interested person' calls upon the trustee to intervene, and then only if the grounds for the complaint are specified as permitted grounds in the trust instrument (the 'permitted grounds for complaint'). For these purposes, an 'interested person' includes a beneficiary, the attorney general (in relation to a charitable trust), an enforcer (of a non-charitable purpose trust) and a protector (i.e. anyone else with powers under the trust). It is also possible to appoint any other person (an 'appointed enquirer') for the specific purpose of making intervention calls.

The permitted grounds for complaint are typically a breach of duty by a director of the company, but other grounds can be specified.

In circumstances where an interested person calls upon the trustee to intervene and the grounds for that intervention are permitted by the trust, the trustee has a duty to investigate the complaint and can take action if satisfied that it is substantiated. That action might include taking appropriate advice on the manner of addressing the complaint, changing the directors of the company or procuring action by the company to recover any losses.

Office of director rules

The trust instrument may (and typically does) contain rules (the 'office of director rules') for determining the manner in which voting and other powers attributable to the shares in the company must be exercised by the trustee in relation to the appointment, removal and remuneration of directors of the company. For example, the office of director rules can provide that the trustee must act on those matters in accordance with directions from the settlor or a protector.

Protectors

A VISTA trust can have a protector (or anyone else with powers under the trust).

Duration

The rules on duration are the same as apply to non-VISTA trusts. Purpose trusts (both charitable and non-charitable) may exist indefinitely. Any other trusts may exist for 360 years (and potentially longer in certain circumstances, depending on the precise terms of the trust).

Formalities

A VISTA trust can only be created by written instrument, and can be created by will.

Trustees

The trustee of a VISTA trust must be or include the holder of a BVI trust licence or a company registered as a private trust company[3] in the BVI.

[3] See the separate Mourant guide to BVI Private Trust Companies.

Uses of VISTA trusts

There are a number of potential uses for VISTA trusts, both for private wealth structuring and in the commercial arena. We outline some of the principal uses of VISTA trusts below.

Family Businesses and other high risk assets

One of the most common uses for VISTA trusts (and the use for which the VISTA trust legislation was specifically designed) is for holding family businesses and other assets with a higher investment risk.

Pre-IPO trusts

For business continuity reasons, it is common for shares to be settled on trust as part of an entrepreneur's pre-IPO planning. It helps to ensure that the IPO can proceed, even where there are disruptive events that might otherwise derail the process, such as the departure of key shareholders, legal disputes or even divorce, incapacity or death. VISTA trusts are one of the most popular structures used for this type of planning.

Private trust companies

VISTA trusts (typically in the form of a non-charitable purpose trusts[4]) are frequently formed to incorporate and hold shares in a private trust company to act as trustee of one particular trust or a group of trusts, often for a specific family.

Special purpose vehicles (SPVs)

In securitisation and finance transactions, a VISTA purpose trust can be used instead of a charitable trust to hold the shares in an SPV in an 'orphan' or off balance sheet structure.

Management shares

Another use of VISTA purpose trusts in a commercial context is to hold the management shares in a mutual fund so that management control of the fund rests with the trustee in the BVI and not with the investors.

We can advise on the suitability of a new or existing VISTA trust, its drafting and on structuring issues relating to the use of VISTA trusts.

Contacts

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found here.

[4] See the separate Mourant guide to BVI Non-Charitable Purpose Trusts.