

A Practical Guide to BVI VISTA Trusts

Trusts established under the British Virgin Islands' special trust regime are referred to as "VISTA Trusts". VISTA Trusts are a form of trust unique to the BVI with special features that make them particularly attractive to those who may be reluctant to relinquish complete control of a business or company to a trustee. VISTA Trusts are similar to traditional trusts in many ways, and the body of trust law and jurisprudence which applies to ordinary trusts is also be applicable VISTA Trusts except to the extent it is modified by statute in relation to the unique features of VISTA Trusts.

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What is a VISTA Trust?

VISTA Trusts are an innovative form of trust specifically designed to hold shares in a BVI incorporated company. The key feature of a VISTA Trust is to restrict the trustee's duty to monitor and intervene in the conduct of the directors and management of the trust's underlying BVI company. This means that the trustee of a VISTA Trust may be disengaged from management responsibility in relation to such company's affairs notwithstanding that it may have a controlling interest in the company. It therefore allows the underlying company and its business to be retained and run as its directors see fit, a feature which is attractive to settlors who are reluctant to relinquish management control of a company (and the assets of such company) to a trustee.

The major difference between VISTA Trusts and traditional trusts is in relation to the concept of the "*prudent man of business rule*". For ordinary trusts, this rule provides that a trustee has the duty to take due care and act prudently when making decisions concerning the investments comprised in a trust fund, including regular monitoring of their performance. Trustees are therefore typically under a duty to monitor the activities of a trust's underlying company and act in the best interests of the beneficiaries to safeguard the value of the trust assets. This can create a conflict between the trustee, who on the one hand may wish to take a conservative investment approach and prevent the company entering into risky or speculative corporate deals, and the settlor or directors on the other who may wish to take entrepreneurial risks in order to maximise profit for the company. Although bespoke drafting techniques may be used in traditional trusts in an effort to manage this conflict, VISTA Trusts introduce a more effective statutory framework to resolve such difficulties.

Who is the trustee?

All trusts are required to have one or more trustees who own legal title to the assets of the trust in accordance with its terms. Typically the trustee of a BVI trust is either a professional licensed trust company or a private trust company (PTC). The choice of whether to appoint a professional trust company or establish a PTC may depend on a wide variety of factors, however a PTC will be particularly attractive where it is desirable for the settlor or members of the settlor's family and/or their trusted advisors to serve on the board of directors and control the PTC. For a VISTA Trust, it is a requirement that at least one of the trustees is either a BVI licensed trust company or a BVI PTC.

Office of Director Rules

The trustee's duty in relation to the voting of shares and appointment and removal of directors can be clearly defined in the "Office of Director Rules" and the trustee must act in accordance with those rules. This allows for specific and bespoke rules as to how and by whom directors should be selected, and the right to select directors may be vested in an "Appointor" (such as the protector or some other party) who will directly instruct the trustee with regard to the appointment and removal of directors.

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What kind of distributions can VISTA Trusts make?

VISTA Trusts can be established on a fixed or discretionary basis and there is wide scope to tailor the distribution provisions of such trust to the settlor's wishes. For a discretionary trust, the trustee will have discretion as to the distribution of income and capital, whereas the terms of a fixed trust will require specific distributions to named beneficiaries (either of income, capital or both). There is wide scope to draft distribution provisions to the circumstances.

What tax reporting obligations are applicable?

There are no income, corporate or capital gains taxes in the BVI, however the BVI is party to certain tax information sharing arrangements. As such, there may be reporting obligations which require requesting information from different persons related to the trust, such as the settlor and beneficiaries. BVI companies also have a requirement to file annual financial returns (which do not need to be audited) within nine months of the company's financial year-end.

Is it common to have a protector? If yes, what are their major functions and duties?

It is common for most trusts, including VISTA Trusts, to have a protector or equivalent. The powers which may be vested in protectors vary and range from the appointment and removal of trustees, veto rights in respect of distributions, and the addition and removal of beneficiaries to variation of the terms of the trust.

Protectors fundamentally derive their powers from the terms of the trust instrument. As to the extent of the protector's duties, the question will often turn on the drafting of the deed and whether the powers to be exercised are expressed as being personal powers or fiduciary powers. Generally, if the powers are personal, the protector is entitled to exercise the power selfishly and in his own interests. If the powers are fiduciary powers, they carry with them an obligation to act in good faith in the interests of the beneficiaries as a whole and a duty to consider, from time to time, whether or not to exercise the power. A well-drafted trust deed should make clear whether certain powers are personal or fiduciary in nature as well as provide certainty as to the scope of the protector's powers such that there is certainty when, for example, a protector may refuse to consent to proposed actions of the trustee.

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Other key features

Feature 1

The trustee's obligation to oversee the underlying company and to intervene in its running can be completely removed or just partially limited. Whilst the default position for VISTA Trusts is that the trustee has no direct fiduciary responsibility over the BVI company shares held in trust, it is possible to introduce specific fiduciary duties on the trustee in respect of the designated shares. This allows a trustee's duties to be tailored to specific circumstances.

Feature 2

The trustee will often still have a supervisory role to play as the trust deed may specify certain circumstances in which a beneficiary or other named people may require the trustee to intervene in the management of the company under an "Intervention Call". This fail-safe mechanism gives the settlor comfort that the trustee can intervene in certain circumstances, but once the specific situation to which the Intervention Call related is over, the trustee must return to its role of non-intervention.

Feature 3

The rule in *Saunders v Vautier*, which may lead to the beneficiaries of a trust being able to wind it up, can be specifically dis-applied for up to 20 years.

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Why Conyers?

With 40 years in Asia, the Hong Kong office of Conyers continues to lead the way in providing offshore legal advice to many of Asia's largest and most innovative corporate and private clients. Conyers' private client practice consistently maintains top-tier rankings and has a long-standing history of advising some of the world's wealthiest individuals and groups, including in various high-profile and contentious matters.

Through our affiliated Conyers Client Services, an international network of licensed trust and corporate services providers, we provide a broad scope of trustee, fiduciary and related administration services meaning we are able to deliver a comprehensive and complete service to clients seeking to establish a VISTA Trust and related corporate structures.

Private Clients and Trust Team



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