

VISTA Trusts

What is a VISTA trust?

The VISTA trust is a form of purpose trust made possible by the Virgin Islands Special Trusts Act 2003 and applicable only to the BVI. It is intended as an entity to own BVI companies and to eliminate the conflict between decisions of the trustees and the needs of operating a business.



VISTA trusts offer flexibility as the provisions of the trust instrument may be tailored to the particular transaction and the benefits of a VISTA trust without the problem of the trustee controlling the underlying company.

Why VISTAs?

Under existing trust legislation prudence is required of trustees (the 'prudent man of business' rule) and this may often conflict with the decision making process required of the directors to run a successful business. What the trustees consider as in the best interest of the company may not be what the settlor had in mind when he established the trust. Trustees are likely to be cautious and protect themselves against future claims in a litigious society. Monitoring the activities of directors is a trustee's obligation where they hold shares in a company and this could inhibit the company from entering into any risky or speculative ventures. With family businesses often involving a higher degree of risk there is a greater opportunity for conflict.

Key features

- The Act only applies to trusts specifically established under the VISTA Act
- The rule against perpetuities does not relate to VISTA trusts and so they may exist indefinitely
- The trustee's duty, to retain the shares as part of the trust fund, has precedence over any duty to preserve or enhance their value. The trustee is not liable for a decrease in the value of the shares or even the liquidation of the underlying company
- Subject to certain provisions in the trust instrument, the trustee may not exercise its voting or other powers so as to interfere in the management or conduct of any business of the company. The management or conduct of the company's business is left to its directors, whose fiduciary duties to the company remain intact
- The trust instrument may include 'office of director' rules specifying how the trustee must exercise its voting powers in relation to appointment, removal and remuneration of directors, and the trustee is generally required to follow these rules
- Unless the trust instrument provides otherwise the trustee is permitted to dispose of designated shares in the management or administration of the trust fund, but can only do so with the consent of the directors of the company (or such persons specified in the trust instrument)
- The rule in *Saunders v Vautier* does not apply (for a maximum of 20 years) to VISTA trusts where it has been expressly excluded by the trust instrument
- The Act is confined to shares in BVI International Business Companies and Companies Act companies
- The trustee of a VISTA trust must be a company which holds a licence to

undertake trust business under the Banks and Trust Companies Act 1990. Our sister company ILS Fiduciary (BVI) Limited is licensed to act as a trustee

- The company law duties of directors remain unchanged and the Act does not in any way alter the restraints placed on directors and others by criminal law

Who can benefit?

The VISTA is ideal for people with family owned businesses who want the benefits of estate planning conferred by a trust but who want to make their own decisions.

It only works for BVI BCs and local companies.

Its primary benefit is for trading companies, but it can provide an additional layer of confidentiality for any BVI company structure.



Uses

In a commercial transaction, a VISTA trust can be used to establish bankruptcy remoteness or to effect 'off balance sheet' transactions. The limitation of the powers of intervention of the trustee is important to investors and financial institutions as there is less likelihood of action being taken by the trustee that could be contrary to the business arrangement of which the trust is a part.

In terms of estate planning it could be appropriately used for the continuation of family businesses. The settlor can prescribe in

the trust instrument who will be the directors of the company on his death, whilst at the same time ensuring that the effective management of the company will not vest with the trustees but with his hand-picked successor (s). It is clear therefore that a VISTA trust can benefit the settlor in corporate succession planning.

The trust is often used for succession. In the VISTA case the trustees are disengaged from management responsibility and the business can be retained as long as the directors think fit.

Other considerations

- The trustee cannot use its voting powers to interfere with the management of the underlying company, unless expressly provided for in the trust instrument. This includes the removal or appointment of directors
- The statute does not permit the supervision of the management of the underlying company. A VISTA trust may have an enforcer, a protector and an appointed enquirer who may all be deemed to be 'interested persons'. The trust instrument may set out the grounds or circumstances under which an interested person may request an intervention by the trustees.
- The trustee may 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 his role of non-intervention.

The trust deed

The VISTA Act gives considerable flexibility and allows the trust to be drafted to suit the exact needs of the client and the following considerations may be made:

- The trustee's obligation to oversee the underlying company and to intervene in its running can be completely removed or just partially limited
- The trustee's duty in relation to the voting of shares and appointment and removal of a director can be clearly defined in the 'Office of Director Rules' and the trustee must act in accordance with the rules
- The trustee may retain the designated shares indefinitely or dispose of them with the consent of the directors of the company or other persons named in the trust deed
- Both the beneficiaries of the trust and the directors of the underlying company have the power to apply to the court if the trustees breach their obligation of non-intervention. Additionally, they and other specific persons may apply to the court to have the terms of VISTA enforced or for permission for the designated shares to be sold if retaining them is no longer in accordance with the wishes of the settlor.

What can ILS provide?

We have a full trust licence in the BVI and as such are well placed to establish and maintain trusts, and to act as trustees. Trustees of VISTA trusts may only be BVI licensed trust companies like ILS.

Please note that ILS Fiduciaries (IOM) Limited does not offer tax advice. If you are not professionally qualified to give tax advice, we will be happy to make an appropriate introduction.

