

ARTICLE FOR STEP JOURNAL

VISTA trusts – some questions and answers

In March 2004 a new alternative trust regime came into force in the BVI which enables special new trusts, known as VISTA trusts, to be set up. VISTA permits shares in BVI companies (and the underlying assets of the companies) to be retained for so long as the directors think fit and disengages the trustee-shareholder from management responsibility. Christopher McKenzie (who chaired the STEP BVI technical committee the proposals of which led to the enactment of the new legislation) considers below some of the questions that people have been asking about VISTA. More detailed consideration to the new legislation is given in an article by Chris McKenzie and John Glasson in the TQR supplement accompanying this issue of the Journal ('the fuller article').

1. *How popular has VISTA been so far in terms of the numbers of trusts established?*

Although it only came into force just over a year ago, the VISTA legislation has already generated a great deal of positive international interest. There is a chapter on VISTA trusts in the new practitioner's book 'Law of Trusts' published by Oxford University Press and VISTA is to be taught on one of the LLM programmes at London University.

In the absence of registration requirements for trusts, it is not possible to give a precise figure for the present number of VISTA trusts, but my guess, based on personal experience and feedback from other lawyers, is that around 100 were created in the first year, and that the rate of creation is now increasing rapidly. Since I moved to Walkers last October, approximately half my work has been VISTA-related.

2. *For what applications have you seen VISTA trusts actually used so far?*

VISTA trusts have so far been set up in the situations below. In each case VISTA provides an ideal solution.

- When the settlor wishes to retain control - because where appropriate a VISTA trust can be structured so that the settlor has control at the director (company) level. (There is, on the other hand, no requirement that the settlor must be a director of the underlying company, so that if, say, for tax reasons, this is inappropriate, directors who are selected or approved by the settlor could instead be appointed.)
- When a trustee's involvement in an underlying company's affairs is undesirable or inappropriate.
- When the settlor intends the shares which he wishes to settle on trust and/or the underlying assets of the company to be retained.
- When the underlying assets of a trust involve a degree of risk which would be regarded as inappropriate for a trustee of a non-VISTA trust. On the other hand VISTA will also be appropriate when the settlor requires these underlying assets to be invested in compliance with the requirements of Sharia law.
- When charitable or non-charitable purpose trusts are needed for securitisations and off-balance sheet transactions.

These situations are considered in greater detail in the fuller article.

3. *Some advisers were hoping that VISTA would provide a convenient means of holding shares in private trust companies but it is understood that VISTA does not sit comfortably with the BVI requirements for the issue of a trust licence. Is that correct?*

The Act provides that only 'Virgin Islands shares' may be held on VISTA trusts and the definition of this term expressly excludes shares in companies which have trust licences under BVI regulatory legislation. It is however anticipated that this regulatory legislation will shortly be amended with a view to enabling applications for exemption from trust licensing to be made in circumstances in which an unremunerated private trust company is not offering its services to the general public. Once this amendment comes into effect, the BVI financial services industry expects that a great deal of use will be made of VISTA trusts as (charitable or non-charitable) purpose trusts to hold shares in private trust companies. As I have said, they are already been promoted and used for securitisations and off-balance sheet structures.

4. *It is a requirement of VISTA that only shares in BVI companies can be held by the trustee of a VISTA trust. Does this mean that the Act cannot apply to shares in non-BVI companies and other assets?*

No. In most cases the BVI company, the shares of which must be held directly by the VISTA trustee, will simply be a holding company and shares in non-BVI companies and/or other assets will be held by the BVI company or its subsidiaries. VISTA will then essentially prevent the trustee from being able to procure a disposal of underlying assets or from being able to engineer an intervention in the affairs of controlled subsidiaries.

5. *How certain are you that a VISTA trust would be recognised as a valid trust, were it to become the subject of litigation in the courts of a jurisdiction outside the BVI?*

Great pains were taken at the drafting stage to ensure that the legislation would be, and would be seen to be, sound in principle and consistent with the historical development of the trust. Accordingly I see no rational basis for a foreign court to refuse recognition. For those interested in the thought processes relating to VISTA legitimacy, see discussion in the fuller article.

It should also be kept in mind that the assets in a VISTA trust are shares in BVI companies, title to which is ultimately a matter for determination by the BVI courts.

6. *Despite the non-intervention rules, does the trustee not retain a residual duty to apply to the court for directions if it becomes aware of the directors taking actions that may seriously damage the financial performance of the company?*

No. A fundamental of the Act is that there should be no chink in the Chinese wall between directors and trustees *except* in specifically defined circumstances. This is evident not only from the clear drafting of the legislation itself - see, inter alia, section 15 (exclusion of fiduciary duties and duty of care) - but also from the basis on which the legislation was presented to the BVI legislature. The Chinese wall approach, it should be said, has an entirely benign purpose as explained in the fuller article.

7. *Why does the Act contain a requirement that a VISTA trust must have a sole trustee, licensed in the BVI? (By comparison, under the Cayman STAR provisions, the corresponding requirement is that the trustees must include a trustee licensed in the Cayman Islands.)*

Historically the vast majority (perhaps 99%) of ordinary BVI trusts have satisfied this requirement in any event: only very rarely will there be more than one trustee of a BVI trust - and that trustee will invariably be a BVI company.

Moreover the VISTA legislation is of course very new and it was thought that, at least initially, it should be confined in its operation to trusts over shares in BVI companies, the trustee of which is licensed by BVI regulatory legislation. This guarantees that only those who are familiar with the legislation, and who are subject to proper regulation and supervision, are able to administer VISTA trusts. It should also go a long way towards ensuring that, should any disputes arise, these will be handled by lawyers and determined by judges who have a similar familiarity.

(There is, by the way, no requirement that licensed BVI trustees should be BVI companies or administer trusts from (or have a physical presence in) the BVI.)

8. *Do the non-intervention requirements pose a due diligence risk for the trustee, in that it is prevented from obtaining the information that it would usually require regarding the business of the underlying company?*

VISTA (which is concerned with trustee responsibilities in relation to beneficiaries) is certainly not intended to cut across due diligence requirements under money laundering regulations etc. It goes without saying that all VISTA trusts should be structured to take into account current requirements of law in this area.

Although in strict law monitoring duties are not at present imposed in the BVI on shareholders acting *as such*, the precedents which are generally used by most of the BVI trust industry (and certainly those which I use) ensure that the trustee *will* be entitled to full information about underlying companies - and surely no trustee would want to be placed in a position in which it is precluded from obtaining this information.

Also important to note in this context are:

- (a) that the trustee of a VISTA trust will be a company holding a trust licence and this will require it, under the BVI's particularly robust and comprehensive anti-money laundering ('AML') regime, to make suitable due diligence enquiries when it accepts the trust, and
 - (b) that the VISTA structure does not relieve the underlying company or any subsidiary from compliance with all relevant AML provisions in the jurisdictions in which they operate - and the duties of directors of underlying companies are not in any way affected by VISTA.
9. *Can a VISTA trust be drafted in such a way that it will cease to be subject to VISTA at a specified time, e.g. on the death of the settlor?*

The Act itself allows for considerable flexibility in how its provisions will apply. In any event most VISTA trusts, like most offshore trusts, tend to be discretionary trusts. This means that quite a few alternatives will be available for removing the trust from the VISTA regime. These include making an absolute appointment (or distribution) of the trust's assets to beneficiaries, making an appointment on non-VISTA trusts, exercising a power to transfer the holding to another (non-VISTA) trust, and selling the shares (with the directors' consent).

10. *Does each VISTA trust need to be specifically drafted to suit the particular case, or is a standardised template emerging?*

As in the case of *any* trust, it is of paramount importance that the trust deed should be tailored to meet the settlor's requirements and circumstances. But, just as with non-VISTA trusts, a number of standard precedents have been prepared and are used by the BVI's trust industry. In addition to those which are invariably found in offshore trust deeds, there are quite a number of further provisions which should advisably be included in VISTA deeds. These include:

- (a) the provisions to which I have already referred which ensure that the trustee is entitled to information about underlying companies, and
- (b) carefully crafted office of director rules, and grounds for intervention to ensure, for example, that the trustee can intervene in a company's affairs in the event of fraud or wholly unanticipated events.

Proper structuring is everything – and that is where the members of the BVI branch of STEP can help!