Quick summary: British Virgin Islands

• Tiny group of islands in the Caribbean
• Population only approx 25,000
• Independent, but British Dependent Territory
• Offshore finance is the major industry
• Approx 900,000 offshore vehicles formed
• Estimated to be 41% of the world’s total
British Virgin Islands (cont)

- English speaking country
- US dollar is national currency (no exchange controls)
- English “common law” country
- Independent judiciary appointed by regional bodies (final appeal to Privy Council in London)
Quick summary: Harneys

• Harneys is the largest and oldest law firm in the BVI
• Larger that the next two largest firms combined
• Almost every major law relating to trusts was drafted with consultation with Harneys lawyers
• Also practice Cyprus, Cayman, Anguilla law
Uses of offshore trusts

• Broadly fall into three main categories:
  – Private wealth
  – Charitable and non-charitable purposes
  – Off balance sheet corporate finance

• The last is probably the largest category

• Today going to focus on the first
BVI Trusts overview

• Very large topic - lot of detail
• Try to focus today on the VISTA trust
  – Most popular BVI trust product
• Depending on timing, may look at some other issues:
  – PTC trusts
  – Share trusts
  – Purpose trusts
VISTA Trust

• Virgin Islands Special Trusts Act, 2003
VISTA Trusts were created to address two particular problems:

**First: the “prudent man of business rule”**
- English case of *Bartlett v Barclays Bank*

**Second: the probate rule**
- Applies to trusts generally, but had become particularly relevant in BVI structures
Many, many offshore structures involve the principal holding shares in his own name.

When the principal dies, this requires a grant of probate.

Potentially time consuming, expensive.

Can result in litigation.

Can create of a period of lack of control.
The trust solution

• In most offshore jurisdictions, the “probate problem” is addressed with a trust solution
• Generally effective
• But can run into the second problem: the prudent man of business rule
Prudent man of business rule

• Broadly, this provides that a trustee holding a significant interest in a company must monitor and intervene
• Operates well for strategic investments
• Does not operate well for private family companies / personal assets
• Trustees can find themselves obligated to intervene, or even sell trust assets
Issues relating to the rule

- **Common causes of conflict:**
  - Settlor’s entrepreneurial flair (risk taking) conflicts with trustee’s duty of prudence
  - Trustee’s duty to diversify investments
  - Family businesses may have wider concerns than simply producing financial returns
  - Trustee may not have right skill set
  - Costs of trustee monitoring and seeking advice
  - Potential loss of control by the settlor
Section 3 of VISTA states it purpose is:

“to enable a trust of company shares to be established under which ... the shares may be retained indefinitely and the management of the company carried out without any power of intervention being exercised by the trustee.”
<table>
<thead>
<tr>
<th>Personal ownership</th>
<th>Trust ownership</th>
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<tbody>
<tr>
<td>• Control</td>
<td>• Privacy</td>
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<tr>
<td>• <em>Freedom from interference</em></td>
<td>• Succession planning</td>
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<td>• <em>Security of assets</em></td>
<td>• <em>Tax mitigation</em></td>
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<td></td>
<td>• <em>Asset protection</em></td>
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</tbody>
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Comparing other jurisdictions

• These problems are not unique to BVI offshore structures (except perhaps in volume)

• Different countries have tried different approaches (eg. STAR trust in Cayman)

• Few accurate statistics, but probably fair to say that BVI VISTA trust is the market leader
Requirements

• First step is usually to form BVI company
  – Usually a generic BVI offshore company

• Second step is to transfer relevant assets into the BVI company
  – Shares must be on the only “trust property”

• Thirdly the shares are transferred to the trustee in respect of which a VISTA “direction” is made
Requirements

- Trustee must be a BVI licensed professional trustee
- Must be a sole trustee
- Trust must not have been created by a trustee of another trust ("trust switching")
- The underlying BVI company must not be conducting regulated financial business
Why a BVI company?

- Avoids a number of difficult conflict of laws issues
- Ensures one jurisdiction for all core issues in the event of a dispute
- Builds on an existing popular offshore product
- Inherent flexibility of BVI company law works well with VISTA structure
Mechanics

• Principal trust documents are:
  – Trust instrument
    • Office of director rules
  – Fee arrangement with trustee
  – (Sometimes) separate deed of settlement

• Everything else is “delegated downward” into the normal corporate control structure

• Settlor will frequently be sole director of BVI company
Timing

- Theoretically, can be set up very quickly
- Companies be incorporated in one day
- Trust deeds can be executed in very short order
- Time consuming parts tend to be:
  - Conducting client due diligence
  - Preparing a trust deed according to settlor’s requirements
How much does it cost?

• BVI company, typically: US$1,600
• Lawyer’s fee preparing trust instrument, typically: US$3,500 - 5,000
• Professional trustee fee: US$3,000

Set-up cost, total: US$8,000 - 10,000

• Annual fees, normally around US$3,500 to maintain company and trustee
• “Trust to retain”
• Presumption that the trustee is under a duty to retain the shares in the BVI company
• Takes precedence over any common law duty to sell or maximise value
• Contrast with the typical common law “trust for sale”
• Restrictions on voting shares to liquidate the company
Rule in *Saunders v Vautier*

- Under normal English trust law, beneficiaries can collectively decide to terminate the trust.
- That option can be excluded for up to 20 years under a VISTA trust.
- Prevents heirs and subsequent beneficiaries “breaking” the trust fund.
Office of director rules

- Trust instrument can set out rules for trustee voting on appointment of directors
- Can require settlor/protector to always be a director
- Can require a certain person to be appointed upon a future event happening
- Usually written directly into the trust instrument
Office of director rules

- Rules can also impose rules/restrictions on director remuneration
- Settlor can confer the power to vote the shares in relation to appointing/removing directors to an "appointor"
- Settlor can make himself the appointor
Intervention calls

- Trust deed may also make provision for “intervention calls”
- These permit the beneficiaries to require the trustee to intervene in specified “permitted grounds for complaint”
- Entirely optional
- Usually restrictions that settlor wishes to impose upon himself
When things go wrong

• Provision exists to apply to court for relief if trustee breaches its duties
• Applications are very rare
• VISTA trusts are constructed to minimise trustee involvement
• Also therefore minimises possibility of trustee breach
• VISTA trusts are popular with clients and professional trustees
  – Clients like the ability to retain control whilst obtaining benefits of a trust structure
  – Trustees like that they are freed from difficult commercial judgment calls
  – The legislation requires all parties to address core issues before trust comes into effect
• **VISTA trust is a tool**
  
  – Like any tool, it is only useful if you use it for the correct purpose

• **Works well for:**
  
  – Family companies
  
  – Holding wealth which has non-financial value
  
  – Settlors who are uncomfortable fully divesting control to a professional trustee
Practical application

- VISTA does **not** work so well for:
  - Joint venture investments calling for shareholder participation
  - Other joint ownership / minority interest investments
  - Managing wide portfolios of liquid securities
  - Where settlor may become incapable of managing their own affairs
Other tools in the box

- VISTA is the flagship trust product in BVI
- A number of other trust products exist
  - PTC Trusts
  - Share trusts
  - Non-charitable purposes trusts
- Always use the right tool
- Most common alternative to the VISTA trust is the PTC Trust
Quick summary of PTC trusts

• PTC trust is a regular trust with a special trustee
• PTC stands for “private trust company”
• The essential feature is that the settlor remains in control of the trust company
• Because the PTC operates under certain limits, it is exempt from trust licence requirements
Restrictions of PTC trusts

- PTC must be a BVI company
- It must be restricted in its constitution to “unremunerated trust business” or “related trust business”
- PTC cannot charge trustee fees, only expenses
- Directors generally cannot be paid
- BVI registered agent must hold a Class I trust licence
Limits of PTC trusts

• Registered agent is under various regulatory duties to make inquiries to ensure no paid trust business is conducted

• PTC is prohibited from:
  – soliciting business from public, or
  – doing anything other than private trust business
PTC trusts

- Other than the trustee, PTC trusts are just regular trusts

- Good news
  - Not restricted to BVI law to govern the trust
  - Can hold wider class of assets

- Bad news
  - No special protections on trustee’s duties
  - No exemption from *Saunders v Vautier*
  - No office of director rules
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