



## Shares in BVI Business Companies: Avoiding a Succession Problem

### The succession problem

A very great deal of global wealth, but particularly wealth in the Asian and MENA regions, is held through British Virgin Islands ("BVI") business companies. Where, however, the shares in a BVI business company are registered in the name of an individual rather than a corporate entity, a question will arise concerning succession to the shares on the death of the individual. The aims of succession planning are both to provide a reliable answer to that question and to reduce substantially the delay and cost involved in ensuring that effect is given to the individual's wishes, so far as they may be lawfully achieved, concerning succession. Failure to put appropriate succession planning in place may, correspondingly, result in unanticipated or undesired outcomes and will inevitably involve both delay and increased cost in dealing with the shares after death. This, in turn, may have significant and adverse consequences for the commercial life of the company which may, effectively, be put on hold. The adverse consequences will be exacerbated if the shareholder in question is also the company's sole director and no reserve director has been nominated – a situation that occurs with surprising frequency – since in such circumstances the assistance of the BVI court will be required to break the management impasse.

## 英領ヴァージン諸島会社の株式： 相続問題の回避

### 相続問題

世界各地に所在する非常に膨大な資産、とりわけアジア及び中東・北アフリカ地域の資産が、英領ヴァージン諸島商事会社(BVI Business Company、「BVI 会社」)を通して保有されています。しかし、法人ではなく個人で登録された BVI 会社の株式の場合、当該個人の死による株式の相続問題が生じます。かかる問題を回避し、被相続人の相続に関する遺志を適法な限り保証するための時間や費用を大きく削減するためには、相続計画を整えることが重要です。適切な相続計画の不備は、予想外や期待外れの結果を招聘し、被相続人の死後の株式の取扱いの遅延や費用の増加が避けられなくなる可能性があります。これは、翻って、会社に重大な悪影響を及ぼし、企業活動の停止が余儀なくされるかもしれません。当該株主が会社の唯一の取締役で予備取締役が指名されていない場合、事態は更に悪化します(かかる状況は予想以上に頻繁に発生します)。かかる場合、経営の膠着状態を打破するため、BVI 裁判所の関与が必要となるからです。

It is therefore very important that careful thought is given to succession planning in relation to BVI shares where they are or will be registered in the name of an individual. Succession planning may take the form of a BVI will dealing exclusively with their devolution or a BVI trust.

### **BVI Wills – a solution for some cases**

A BVI will may be the simplest and most appropriate form of succession planning where, at least, the individual is not subject to “forced heirship” rules. Indeed it may also be the most appropriate vehicle for individuals who are subject to such rules but where there is no desire to make provision inconsistent with them.

In either case, a BVI will is ordinarily advisable because a foreign representative of the deceased’s worldwide estate (or a person beneficially entitled to it under foreign law) will have no title under BVI law to deal with BVI situated assets. Shares in a BVI business company are, for this purpose, treated as BVI situated under BVI law. Accordingly, even a validly appointed foreign representative of a deceased person’s estate will have to make application to the BVI court for a grant of representation before there may be any lawful dealing with the shares. It is, however, significantly less costly and speedier for the executor of a BVI will which deals with devolution of the shares to obtain probate of that will and begin administration of the estate in accordance with applicable law.

### **BVI Trusts – a solution in other cases**

Where, however, the owner of BVI shares is subject to forced heirship rules (for example, in accordance with shariah law) and wishes to make provision for the shares’ devolution which differs from that of the jurisdiction of domicile at death, a BVI will is likely to be an inappropriate succession planning tool. This is because, in respect of shares in a BVI business company

したがって、BVI 株式を個人名で登録する場合、その相続計画を熟考することが非常に重要です。相続計画には専ら、権利の相続に関する BVI 遺言状又は BVI 信託が使われます。

### **BVI 遺言状：特定の状況におけるソリューション**

BVI 遺言状は、被相続人に「強制相続人」ルールが適用されない場合、最もシンプル且つ適切な相続計画です。また、当該ルールが適用されても、被相続人がこれに反する意思がない場合も、最も適切な手段ともいえるかもしれません。

いずれの場合も、世界各地に所在する被相続人の資産の外国代理人(または外国法上の当該資産の実質的保有者)は、BVI 法上、BVI 所在の資産を取り扱う権利がないため、BVI 遺言状が通常は望ましいでしょう。BVI 会社の株式は、BVI 法上、相続に関しては、BVI 所在の資産とみなされます。すなわち、正当に任命された被相続人の財産の外国人代理人であっても、BVI 裁判所に代理の許可を申請しなければ、BVI 株式の適法な取引を行うことができません。一方、株式の相続を取り扱う BVI 遺言執行者は、著しく低コスト且つ短期間に、遺言の検認を受け、適用法に従い財産の管理を開始することができます。

### **BVI 信託：その他の状況におけるソリューション**

一方、BVI 株式を保有する被相続人に強制相続人ルールが適用され(例えば、シャリア法の適用)且つ死亡時の居住管轄とは異なる株式の相続を希望する場合、BVI 遺言状は、相続計画の手段としては不適切となる可能性が高くなります。すなわち、BVI 法上、BVI 会社の株式(相続に関しては、不動産ではなく動産に分類される)を含む動産の相続には、死亡時の居住管轄の法律が適用され、BVI 遺言状の

(which are classified as movable rather than immovable property for succession purposes), BVI law treats the law of the jurisdiction of domicile at death as the law governing succession to movable property. If the provisions of a BVI will contravene applicable law, they will not have effect.

Accordingly, a more robust structure is needed and a BVI trust will, in many cases, meet that need since no transfer of property into a BVI trust may be set aside by the BVI court on the ground that the transfer defeats heirship rights - or rights conferred on a person by reason of a personal relationship, including marriage or former marriage - under foreign law. It may also be the case that a timely lifetime transfer into trust may have beneficial estate or inheritance tax consequences which are jurisdiction specific and on which separate onshore advice needs to be taken.

### VISTA Trusts - retaining a degree of control

For pure succession purposes, however, a transfer of BVI shares into trust would typically reserve a life interest to the settlor and make provision for the shares to be held in trust for those whom the settlor wanted to benefit upon death. The settlor's life interest would afford entitlement (subject to the annual costs of running the trust) to receipt of income from the shares for life and, if the provisions of the Virgin Island Special Trusts Act 2003 ("VISTA") are applied to the trust of the shares, would also allow the settlor to retain control of or influence in the management of the company either directly as lifetime board member or through control of the process of appointments to the board. Quite apart from leaving the settlor in control of running the company business, this would also allow retention of direct or indirect control over the declaration of dividends which, as income in the trustee's hands, would be distributable to the settlor alone. Additionally,

条項は、かかる適用法に違反する場合、無効となります。

したがって、BVI 信託が、より堅実な相続計画として、多くの場合、そのニーズを満たすものとなります。すなわち、BVI 裁判所は、BVI 信託への財産の移転を、外国法上の相続権（または現在もしくは過去の結婚を含む個人的関係に基づき付与された権利）に反することを理由に、取り消すことができません。また、信託への適時の生前譲渡は、特定の管轄において資産又は相続税上優遇される場合もあり、別途当該管轄における助言が必要となります。

### VISTA 信託： 支配権の保持

BVI 株式の信託への移転は通常、相続の目的上、信託の設定者の生涯権を留保し、設定者の死により、その望む者に対して信託株式が与えられます。信託設定者の生涯権は、株式からの利益（信託運営の年間費用を除く）の受領を生涯に亘り保証し、また、2003 年ヴァージン諸島特別信託法（Virgin Islands Special Trusts Act 2003、「VISTA」）の条項が株式信託に適用される場合、信託設定者は、生涯取締役として直接又は取締役の任命権を通じ、当該会社の経営を支配し又は影響を与えることができます。信託設定者の生涯権は、当該会社の経営の支配を信託設定者に留保する上、配当の決議に対する直接又は間接的な支配権を付与し、受託者が収益を保有しながら、配当は設定者のみに分配されます。さらに、VISTA の当該信託への適用により、信託設定者は、特定の同意がある場合を除き、信託株式の売却その他の処分を避けることができます。VISTA 信託の受託者は、BVI 信託ライセンスを保有し単独で行動する必要がありますが、ここで取り上げている信託の特徴は、その保有する株式を当該信託に譲渡する信託設定者に対し、BVI 法上信

applying VISTA to the trust allows the settlor to prevent a sale or other disposition of the shares save with specified consents. Although the trustee of a VISTA trust must be the holder of a BVI trust licence and act alone, the features of the trust which have been highlighted here are likely to give comfort to settlors who put their shareholding into trust that a significant amount of control over the disposition may still lawfully be retained by them under BVI law.

### One or the other

In the vast majority of cases, one or other of the succession planning tools discussed in this article will be appropriate where shares in a BVI business company are held by an individual. The sensible time to address such questions is at the point of incorporation but failure to address them during the lifetime of the shareholder may risk frustrating the very aims sought to be achieved by incorporating in the BVI to begin with.

託株式の処分権が留保されることにつき、コンフォートを与えるでしょう。

### いずれか一方

個人保有の BVI 会社の株式に関する殆どの場合、本稿で説明した相続計画のいずれか一方が適切となるでしょう。会社の設立時にかかる問題につき対処するのが最も賢明ですが、株主の生存中に適切な対応を怠ると、そもそも BVI 会社を設立した目的が果たせなくなるリスクが生じます。

*本記事は、法律的助言又は法律意見ではなく、一般的な情報の提供を目的としています。*

*This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.*

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