

Shares in BVI Business Companies – Avoiding a Succession Problem

A great deal of global wealth, particularly wealth in the Asian and MENA regions, is held through British Virgin Islands (“BVI”) business companies. Where 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 the succession to the shares in the event of the death of the individual. The aims of succession planning are both to provide a reliable answer to this 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 plans in place may result in unanticipated or undesired outcomes which 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.

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 the BVI company shares, or the establishment of 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. It may also be the most appropriate vehicle for individuals who are subject to such rules but where there is no desire to make any provisions inconsistent with them.

In either case, a BVI Will may be 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 BVI company shares. It is, however, significantly less costly and quicker for the executor of a BVI Will which deals with the BVI company shares to obtain a grant of probate of that Will in the BVI.

It is extremely important to obtain BVI legal advice with regard to the drafting of a BVI Will. Matters can become complicated where the deceased person has executed several Wills, all governed by the laws of different jurisdictions. It is important to ensure that one Will does not inadvertently revoke another, or purport to deal with the same property as another Will but in a different manner.

Grant of Probate Procedure

In order to obtain a BVI grant of probate, a formal application is made to the BVI Court by the executors as appointed under the terms of the BVI Will. It usually takes the BVI Court six to eight weeks to process the application. However, from the date of the shareholder's death until the grant of probate has been issued by the BVI Court, the BVI shares are effectively paralysed as no one can vote, transfer or sell them, or give valid receipt for any dividends.

It is common for an individual to be sole shareholder and sole director of a BVI company. Upon such an individual's death, there will be no director authorised to update the shareholder register, or pass a shareholder resolution to appoint a new replacement director. However, it is possible to avoid this problem by nominating a reserve director whose appointment is effective upon the death of the sole director.

BVI Trusts – a solution in other cases

Where 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 his 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 (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 the law applicable to the testator's domicile at death, 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.

It is also possible for a settlor who transfers his BVI company shares into a BVI trust, to reserve certain powers relating to the administration of the trust, such as the power to amend or revoke the trust, the right to receive dividends and to direct the trustee to make certain investments of the company's property, i.e. the trust's assets.

A BVI trust has the advantage over a BVI Will in that the settlor may retain some control and benefit from the BVI shares during his lifetime. Furthermore, a BVI trust provides longer term estate planning as the BVI company shares may remain in trust long after the settlor's death. Also, should the settlor become incapacitated and unable to deal with his business and affairs, the terms of the trust instrument may deal with such an event. A BVI trust has the added advantage that any dealings with the BVI company shares will not be paralysed upon the settlor's death or incapacity, and there will be no issue of delay whilst an application for probate or other court procedures are pursued in respect of the settlor's death or ill health.

For more information in respect of BVI trusts, please see Conyers Dill & Pearman's Publication entitled "[British Virgin Islands Trusts](#)".

VISTA Trusts - retaining a degree of control

The *Virgin Islands Special Trusts Act, 2003 (as amended)* ("VISTA") provides for the creation of a type of BVI statutory trust known as the VISTA trust. VISTA is an innovative trust specifically designed to hold shares in a BVI incorporated company under which the trustee may be disengaged from management responsibility, notwithstanding that his trust shareholding gives him a controlling interest in the company, in relation to the company's affairs. It therefore allows the company and its business to be retained and run as its directors see fit.

The effect of VISTA is to remove the trustee's duty to monitor and intervene in the conduct of the directors and the management of the trust's underlying BVI company.

VISTA trusts may continue indefinitely and the regime can apply to discretionary trusts, fixed interest trusts, charitable or purpose trusts subject to satisfying the statutory criteria.

At least one of the trustees of a VISTA trust must be a BVI company licensed under the *BVI's Banks and Trust Companies Act*, or a BVI private trust company. Individuals or non-BVI companies may be co-trustees of VISTA trusts. The features of a VISTA trust which have been highlighted above are likely to give comfort to settlors who put their BVI company shares into trust that a significant amount of control over any disposition may still lawfully be retained by them under BVI law.

For more information in respect of VISTA trusts, please see Conyers Dill & Pearman's Publication entitled "[British Virgin Islands VISTA Trusts](#)".

Conclusion

In the vast majority of cases, one or other of the succession planning tools discussed above may 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 of the BVI company, 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.

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