

## Share Trusts – flexibility, succession and privacy

### INTRODUCTION

As investors continue to seek innovative ways of investing, managing and safeguarding their resources, an increasing number are considering the specially crafted Harneys' Share Trust, which is regarded as a useful tool for succession planning. Designed by Harneys and used by many of our clients to provide a simple and flexible solution to succession planning for owners of shares in BVI companies, the Share Trust structure gives owners unprecedented freedom to manage succession to those shares with minimal interference to the business of the BVI company or enjoyment of the company's profits.

The creation of a Share Trust requires the owner of shares in a BVI company, referred to hereafter as the settlor to transfer his or her shares into trust, allowing legal ownership of the shares thereafter to be held by a trustee. This article examines the advantages of establishing a Share Trust, explains how it is established and compares it to other trust options.

### ADVANTAGES OF SHARE TRUSTS

The Share Trust provides a number of benefits to settlors and their families or other named beneficiaries. The costs associated with a Share Trust and the set-up time are regarded as basic advantages. The cost of establishing and maintaining a Share Trust is estimated to be 7 times cheaper than the nearest comparable BVI trust structure. Additionally, there is a standardised approach to setting up a Share Trust, facilitating its establishment in as little time as it takes to transfer the shares to the trustee. Other advantages are as follows:

- The Share Trust establishes automatic succession to ownership of the shares by beneficiaries named by the settlor, in the event of his/her death or incapacity. Therefore, while the settlor transfers legal ownership to the trustee, he/she continues to enjoy the practical benefits of owning the shares.
- The fact that beneficiaries are pre-determined means that a Share Trust can help to completely avoid a public application for probate in the BVI Courts upon the death of the settlor. This helps to maintain confidentiality, save costs and avoid the inevitable delays that an application for probate would entail.

- There is also automatic succession to the office of director in the event of the death or earlier incapacity of the settlor. Prior to his death or incapacity, the settlor can direct the trustee to appoint or remove a director but the trustee's power to do so is dependent on him/her having sufficient voting control of the company at the time of the settlor's death or incapacity.
- The settlor can retain control of the operation of the company during his/her lifetime or while he/she is not incapacitated. This is done by the settlor retaining the office of director as well as maintaining shareholder voting and income rights during his/her lifetime.
- The settlor can reclaim legal ownership of the shares from the trustee. The Share Trust can be fully reversed at any time prior to the death or incapacity of the settlor by use of the "call option" which is embedded in the Rights Deed, one of the instruments used in establishing the Share Trust. The trustee is contractually obliged to re-transfer the shares once the settlor has exercised his right to call for the shares, which he/she can do at any time and for whatever reason.

## THE SHARE TRUST COMPARED

- One of the primary concerns of someone establishing an ordinary trust is that it does not utilise the provisions of VISTA, which essentially enables one to retain control of the shares and the underlying company. While this is usually addressed by incorporating a private trust company, there is the risk of the trust being found to be a sham due to the settlor retaining extensive power in the trust instrument, rendering it nothing more than a nominee. The Share Trust on the other hand utilises VISTA provisions, conferring wide powers on the settlor.
- When compared to an individual holding shares personally until death the Share Trust is proven to be more cost effective and maintains confidentiality. In the event of the death of a shareholder of a BVI company, the heirs of the deceased are required to make an application to the BVI Court to be recognised as the owner of the shares. Such application will be costly and likely to involve delay. Additionally, BVI law looks to the law of the home jurisdiction of the deceased to govern the devolution of shares which means that if there are rules that predetermine entitlement to the estate of the deceased, these rules will be recognised and enforceable in the BVI. The Share Trust on the other hand maintains confidentiality and is not a registerable document in the BVI. Succession of the shares occurs automatically on the death of the former shareholder.
- A nominee or bare trust arrangement does not provide for succession to shares in the BVI company in the event of the beneficial owner's death. The consequences could also be disastrous if a BVI company has been used to act as a trustee under a nominee or bare trust arrangement that provides for successive interests which may be construed by a BVI Court as constituting a substantive trust. Conversely, while the Share Trust confers the same level of control as that provided under a nominee arrangement it has the added

benefit of being able to transfer the shares to the named beneficiaries of the deceased without having to apply to the BVI Court.

- Under BVI law, there is no provision akin to that of Enduring Power of Attorney, making it impossible for a shareholder to simply appoint someone to administer their shares in the event of their incapacity. A foreign receiver will therefore need to apply to the BVI Court for recognition and entitlement to administer the affairs of the shareholder who has been rendered incapable. This is likely to occur in open court, be time consuming and incur substantial costs. Comparatively, the Share Trust specifically addresses the shareholder's incapacity, providing for the automatic succession to the shares and nomination of a replacement director.

## ESTABLISHING A SHARE TRUST

There are two primary documents which constitute the establishment of a Share Trust; a Trust Deed which confers a life interest in the share on the settlor, and a Rights Deed which governs the circumstances in which shares can be re-transferred to the settlor prior to his death or incapacity. The Rights Deed also sets out the basis on which the settlor is willing to transfer shares to the trustee and the basis on which the trustee is willing to accept the shares as an addition to the trust.

It is extremely important to properly constitute the trust since it involves the transfer of legal ownership in the shares from the settlor to the trustee. The settlor effectively constitutes the trust by transfer of a nominal cash amount to the trustee.

Execution of the rights deed and transfer of the shares to the trustee complete the Share Trust structure.

A Share Trust can be set up in one week for a fee of US\$1,700. The annual maintenance fee is \$1,000.

## SUMMARY

The Share Trust structure provides a simple mechanism for the succession to BVI company shares in the event of a shareholder's death or incapacity. It allows owners of shares in BVI companies to have unprecedented freedom in managing the succession of those shares with minimal interference to the business of the company or enjoyment of the company's profits. It is able to achieve this without the need to amend company constitutional documents, with minimal disruption to practical managements and control of the company, while at the same time providing a fully reversible option.

## FURTHER INFORMATION

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