

# Planning for succession to BVI companies

Many companies registered in the British Virgin Islands (**BVI**) have individual shareholders, and often, a single shareholder. Often the sole shareholder is also the sole director of the company. This briefing note summarises the methods and mechanisms which can be used in order to simplify the process on the death of a shareholder and director of a BVI company to ensure that ownership and control of the company can pass quickly and efficiently.

## Shareholders of BVI Companies

On the death of an individual shareholder, the shares need to be transferred to the intended recipient/s.

### *The process of transferring shares on the death of a shareholder*

Under the BVI Business Companies Act, shares in BVI companies are deemed to be situated in the BVI. Therefore, regardless of where the owner of a BVI company dies, his or her interest in a BVI company cannot be validly transmitted to his or her intended heirs until the appropriate grant (of probate, letters of administration or re-sealing) has been obtained from the BVI Court.

Prior to the required grant being obtained, the shares are effectively frozen, as they cannot be voted on, transferred or sold, nor can any dividends payable on those shares be distributed.

The BVI Court generally processes grant applications within 12-16 weeks of the submission of the application, but more complex cases will take longer.

There are several matters which will complicate applications and delay the issuing of the required grant, for example:

1. If the Will is not in English, a formal translation will be required and the translator will have to provide a sworn affidavit confirming that the translation is true and accurate;
2. If the Will is required to be submitted as part of the probate (or equivalent) proceedings in the home country of the deceased shareholder, then the commencement of the BVI proceedings may be delayed until probate (or

equivalent) has been obtained in the deceased's home country and the original or a court certified copy of the Will is available for submission to the BVI Court;

3. If the deceased shareholder died without leaving a Will, the person or persons entitled to apply for the grant in the BVI is dictated by the laws of the country in which the deceased died was habitually resident. This requires the BVI lawyer to liaise with a lawyer in the deceased's home country, which increases costs and causes delays.

### *Planning options*

The following steps can be considered to mitigate these issues:

#### *1. Joint Shareholders*

Shares can be held by more than one person as joint tenants with rights of survivorship. On death, the deceased's interest in the shares will pass automatically to the surviving joint shareholder without any requirement to obtain probate. Often, spouses will hold shares jointly so that probate is only required on the death of the survivor of them.

Joint shareholdings are less popular where the intended recipient of the shares is a child or children or other third party. Each joint owner has immediate and ongoing rights in the shares and giving up control and economic benefits during lifetime will not meet the objectives of a client who wishes to retain full control and economic benefits until death.

## 2. *BVI Will*

Putting a BVI Will in place will significantly simplify the process of obtaining probate in the BVI. It will also reduce the time required to obtain the grant as the BVI process can run concurrently with any application for probate (or equivalent) in the deceased's home country.

It should be noted however that whilst putting in place a BVI Will will simplify and speed up the process of obtaining probate to shares, the provisions of the BVI Will which provide for who is to inherit the shares may be overridden by any conflicting 'forced heirship' rules which apply under the laws of the deceased's home country.

Forced heirship laws apply in many countries, and vary from country to country. Where forced heirship rules apply, an individual is not free to dictate who inherits his or her assets on death, but rather the applicable law determines who the entitled heirs are. Insofar as shares in BVI companies are concerned, the applicable law is the law of the country in which the deceased was habitually resident, not the law of the BVI. Therefore, if the deceased shareholder is habitually resident in a country where forced heirship rules apply, those rules will override the terms of the BVI Will.

Even if the terms of a BVI Will providing for succession to the shares is overridden by the forced heirship rules applying in the deceased's home country, probate on that Will can still be obtained provided the appointment of the executor is valid. Therefore, from an administrative perspective, it is still preferable to have a BVI Will in place than for there to be no Will in place.

## 3. *BVI Trusts*

Trusts are established for many reasons, but primarily for asset protection and succession planning purposes. In this context, the primary benefits of holding shares in BVI companies in trust are:

- probate is not required in respect of shares settled in a BVI trust on the death of the settlor (ie the person who put the shares into the trust); and
- the BVI Trusts Act specifically states that assets held in a properly constituted BVI trust are not subject to any "right, claim or interest conferred by a foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights".

Shares held in a BVI trust are, therefore, protected from the forced heirship claims which would otherwise have arisen on the death of a shareholder if the shares had been personally owned by him.

4. Trusts are very flexible structures and can be in such terms as best meet the requirements of the settlor. Under BVI law, the settlor can be a beneficiary of the trust during his or her lifetime. BVI trust law also provides various mechanisms by which a settlor can

continue to exercise control over the shares put in trust during his or her lifetime, including the VISTA trust regime (see comments further below re ODRs and Harneys' note on VISTA Trusts).

## Directors of BVI Companies

### *The process of appointing a new director on the death of a sole director*

Following the death of a sole shareholder and director, it is not possible to appoint a new director as there will no one with power and authority to do so. Therefore, until probate has been granted and the shares previously held by the deceased have been transferred to the new shareholder/s, no director can be appointed to run the company. This leaves the company frozen for a potentially significant period of time.

### *Planning options*

The following steps can be considered to mitigate this issue:

#### 1. *Reserve Director*

Section 113(7) of the BVI Business Companies Act provides that where a company has only one individual member and that member is also the sole director of the company, the sole member can nominate a person as a reserve director to act in place of the sole director in the event of his or her death. Such nomination must be in writing and the appointed reserve director must sign a letter consenting to his or her appointment.

An appointment of a reserve director can be revoked or amended at any time prior to the death of the sole director.

Where a reserve director is appointed, the appointment of the reserve director as full director automatically and immediately takes effect the death of the sole director, allowing the reserve director to immediately take on the operation and management of the company.

#### 2. *Office of Director Rules (ODRs) under VISTA Trusts*

VISTA trusts are created under the Virgin Islands Special Trusts Act and are thus unique to the BVI.

Under a VISTA trust, the assets are held in a BVI company, rather than by the trustee directly and the director of the underlying BVI company has sole responsibility for and control over the investment and management of the company and its assets. The VISTA provisions allow ODRs to be included within the trust deed which direct who is to be appointed as director on the death of the original director.

The trustee is required to follow any such direction and, as shareholder of the BVI company, can immediately appoint the desired replacement on the director's death, minimising any disruption to the management of the company.

Harneys can assist with the preparation of BVI Wills, the establishment of BVI Trusts and the appointment of Reserve Directors (see Harneys' notes on Trusts and in particular, Share Trusts).



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