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BVI companies: A flexible vehicle for succession planning

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The issue of succession may not be a primary consideration when incorporating a company in the BVI or indeed in any jurisdiction. However it is worthwhile, particularly in situations where companies are controlled by one individual at shareholder and/or board level that this matter be given careful whether at incorporation or by subsequent review and amendment of the company's memorandum and articles of association ("**M&A**"). The inherent flexibility of BVI business companies as corporate vehicles together with some carefully thought out provisions in the company's M&A can ensure the smooth transition of the company's management and control following the death of the primary shareholder.

Sole Shareholder/Director with Foreign Will

In many cases, shares in BVI companies are held by foreign domiciled individuals for whom the BVI shares will form only part of their assets and accordingly they will most likely have had a will prepared in a foreign jurisdiction which has named a foreign domiciled individual to act as the executor of their estate. It is important to remember that BVI shares will, as a matter of law, be deemed to be located in the BVI and BVI law does not recognise the rights of a foreign appointed executor to deal in the shares of a BVI company (or indeed any BVI situated assets). Therefore a problem can arise where the majority of the shares in a BVI company are held by a foreign domiciled deceased individual with a foreign will, particularly where that deceased individual was the sole director of the company and no reserve director has been appointed under the Business Companies Act 20014 (the "**BVI Act**").

As the BVI court will not recognise the ability of the foreign executor to deal in the company's property and/or pass same on to the heir of the deceased until a BVI grant of probate has been obtained a lacuna arises in the control and management of the company. The extraction of a grant of probate in resect of a foreign will can be a lengthy process typically involving a substantial degree of correspondence between the lawyers for the deceased in their jurisdiction of residence and local BVI lawyers and may often require translations of key documents to be provided together with accompanying affidavits and an affidavit of foreign law. This can be a long process and can cause serious difficulties for the company and the beneficiaries of the deceased shareholder as technically the shares cannot be voted during this period and, where the deceased was the sole director, board level decisions cannot be made. This can therefore create an undesirable situation where dealing in the company's assets is effectively frozen pending the outcome of the probate process.

The Probate Procedure in the BVI

Typically for a BVI will, the estate's legal representatives will need to submit the application for the grant of probate and accompanying affidavit. The accompanying affidavit will need to exhibit copies of the death certificate and the will. The original will also needs to be submitted and marked in accordance with Probate Form P10 together with an affidavit of attesting witness, a declaration of oath as to value, and an affidavit of search. Two newspaper notices advertising the application for probate will also need to be published. The probate application process can generally take up to 2 months from submission of this documentation.

However where a foreign will has been made the process will invariably take longer due to the additional documentation which will need to be assembled and reviewed. A lawyer for the deceased's estate in the country of domicile will typically need to swear an affidavit of foreign law which outlines the background as to how and why the purported beneficiaries are entitled to take under the foreign law will. Where the deceased's domicile is non English speaking, translations of the will and any codicils, together with the death certificate and the foreign grant of probate (if applicable) will need to be obtained. Where the translator is not an official sworn translator bearing the seal of the court or a national translation institution, the translation will need to be accompanied by an affidavit which attests to the relevant qualifications of the translator. As such, it is vital to engage with experienced local counsel in the first instance in order to navigate the most expeditious way through the probate application process.

Other traditional succession planning tools which may be considered include the use of trusts or VISTA trusts or indeed making a BVI will to cover BVI situate property. However an alternative method of seeking to ensure that the above lacuna is avoided on the death of the primary shareholder is to plan for succession through the M&A of the BVI company itself. BVI companies are extremely flexible and provide a number of distinct advantages as corporate vehicles. Before examining the means of planning for succession through the company's M&A it is worth reviewing some of the inherent advantages and characteristics of BVI companies.

BVI Companies – Flexible and Modern

By far the most common form of BVI company is the company limited by shares and this is the form of entity which we will focus on for the purposes of this article.

Limited Liability: As with other common law jurisdictions the shareholder of a company limited by shares enjoys limited liability up to the amount not paid up on their shares, any liabilities expressly provided for in the M&A and a liability to repay any distributions made in contravention of the solvency requirements under section 58 of the BVI Act.

No Requirement for Subscriber shares or initial Directors on Incorporation: BVI companies are not required to be incorporated with subscriber shares nor is there a requirement to appoint directors on incorporation and this allows shelf companies to be quickly set up while decisions are made regarding shareholding and board composition.

Unlimited Objects: A limited company’s constitutional documentation are its M&A. The memorandum historically provides for the relationship of the company with the outside world whereas the articles provide for the internal management rules of the company. However, as per section 28(1) of the BVI Act the company can, carry out unlimited objects.

Ease of Amendment of M&A: The directors of BVI companies are entitled, subject to certain exceptions, to amend the M&A where same is provided for within the M&A. Whereas in many other common law jurisdictions, even the most minor amendments are required to be approved by special resolutions of members, the above allows the directors the flexibility to make required operational changes at short notice.

Corporate Benefit: In other common law jurisdictions companies are generally prohibited in the first instance from entering into transactions which do not result in a clear corporate benefit (ie providing guarantees, interest free loans or subordinating debt). However section 28(1) of the BVI Act specifically removes this obligations by the providing that the powers of the company may be exercised “irrespective of corporate benefit”. This provides significant advantages in that certain transactions which are required within a group such as guarantees, interest free loans or debt subordination which may not have a clear corporate benefit attributable to the particular entity but will be of wider benefit of the group would be delayed or impeded due to the requirement to seek specific shareholder approval. This law in this area reflects the reality that many BVI companies form part of a wider group and allows for a BVI company to act in the best interest of a JV partner and/or a parent company.

Confidentiality: A BVI company must keep either the original or a copy of its register of members with its registered agent. However, while a BVI company may file its register of members with the BVI registrar of companies it is not required by law to do so. The register of shareholders is therefore not required to be disclosed publicly.

Distributions/Dividends: There is no requirement under BVI law that a company have distributable reserves prior to making a distribution. Instead the directors must be satisfied that the company would pass the "solvency test" and this must be specifically referred to in the directors' resolution approving the dividend. Section 56 of the BVI Act provides that a company satisfies the solvency test where (i) the value of its assets exceeds its liabilities and (ii) it is able to pay its debts as they fall due.

Tax: The vast majority of corporate transactions in the BVI are not taxable. BVI companies are not subject to any form of corporation/profit tax or capital gains tax nor are they required to register for, or charge VAT/sales tax. There is no stamp duty charged on the transfer of shares in a BVI company (provided it does not directly or indirectly hold BVI real property) nor is inheritance tax charged in the BVI on the passing of BVI situate assets.

Financial Assistance: Many jurisdictions prohibit a company from providing financial assistance in connection with the purchase of its own shares. The prohibition is usually overcome by some form of "whitewash" involving a members' resolution, a directors' declaration of solvency and filings with the local registrar of companies. Often the term "financial assistance" is incredibly broad and can cause unintended difficulties and delays in transactions as various matters are required to be whitewashed in order to err on the side of not offending the legislation. Section 28(2)(iv)(a) of the BVI Companies Act specifically provides that a BVI company may give financial assistance in connection with the purchase of its shares, again allowing for a far more streamlined transaction process.

Rights Attaching to Shares: BVI companies provides for a great degree of flexibility as to the rights which may attach to share classes. Along with the numerous other benefits which this confers, this allows shareholders to provide for sensible succession planning particularly where a company is controlled/managed by one individual.

Succession Planning through the M&A

One approach to ensure that ownership and control passes from the primary shareholder to their intended successor automatically and by contract is to effectively provide for this through the M&A. Simply put, this would entail the creation of two classes of share, one of which ceases to hold rights on the primary shareholder's death and the other of which attains right on the primary shareholder's death.

The company would, either on incorporation, or subsequently through amendment of its M&A, create two classes of share. One class of share ("**A Shares**") is held by the primary shareholder and a second class of share ("**B Shares**") is held by the person or persons whom the primary shareholder wishes to succeed them as majority shareholders upon their death. The A Shares would, depending on the level of control which the primary shareholder wishes to retain, hold all of the voting and economic rights. However this class of share would cease to hold any rights upon the death of the primary shareholder and the M&A would permit them to be be compulsorily redeemable at nominal value at the instance of the Company and without the consent of the holder.

Conversely the B Shares would attain all of the voting and economic rights upon the cessation of the rights attaching to the A Shares and/or the death of the primary shareholder. This method of succession planning would ensure that the intended beneficiaries would immediately and automatically control the shares in the company and would be entitled to appoint their own nominees to act as directors to manage and operate the company. The deceased’s shares, which would now effectively have no rights attaching, could be left in issue pending the grant of probate or could simply be redeemed and cancelled by the Company. This method of dealing with succession allows continuity in the company's affairs and provides a substantial measure of certainty to all stakeholders in the group and its business including creditors, customer and employees.

Caveat/Tax Advice

As above, the BVI does not apply inheritance tax or capital gains tax in respect of BVI located assets and accordingly the inheritance of shares is not a taxable event in the BVI. However it should be borne in mind that the above does not in any way purport to comment on the inheritance tax position in the beneficiaries’ jurisdiction of domicile or residence (or internationally), and specific tax advice should always be obtained in this regard. What it does allow for is immediate continuity and certainty in the control and management of the company which can only be for the benefit of the company, its subsidiaries, employees, creditors, suppliers and customers.

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