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Making a success of succession planning: Structuring the holding of assets using British Virgin Islands (BVI) companies

MARCH 2022

Many private investors use BVI companies to hold their assets. Complications can arise on death of the investor (D):

- where forced heirship laws apply and D loses control of where his or her BVI shares are entailed upon death due to conflicts of laws rules arising in D's domicile that may prevail over a BVI law will, notwithstanding situs issues; or
- where a grant of probate (for testate deaths) or grant of letters of administration (for intestate cases) from the BVI Registrar, or the resealing of a foreign grant of probate, is required to transfer the shares to D's beneficiaries. Probate matters can take months or even years to be settled and can be very costly, causing severe business interruption.

There are a range of structuring options available to BVI companies to ensure that businesses and assets can pass smoothly to D's chosen beneficiary.

Joint tenancy

BVI shares can be held jointly and joint tenants enjoy *rights of survivorship*, meaning that on the death of D, his/her jointly held BVI shares will automatically vest in the joint holder (**J**) without the need for a grant of probate (or letters of administration or a resealed grant). This avoids cost, delay and business interruption, but conversely it does mean that J enjoys the same rights of legal and beneficial ownership prior to D's death, including the right to vote the shares and to receive an equal share of the economic benefits of ownership: this may not be desirable. Note that a probate will be required on the death of J.

Trust structures

In some cases, it may be appropriate for D to transfer their shareholding to a trustee to be held on trust for various beneficiaries on the death of D (prior to which D would have a life interest). This approach avoids probate on succession, but does require D to relinquish legal ownership of the shares in his/her lifetime, and may have tax or accounting implications onshore. The BVI has a special product, the VISTA trust, which allows a settlor to retain control of the underling company. Trusts are more expensive to implement and run than other structuring solutions.

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Succession tools

Where a BVI company has a sole shareholder/director structure, challenges can arise on the death of D, effectively rendering the company inoperative due to lack of a board (and a lack of member to appoint one). Statute permits a reserve director to be automatically appointed to take the place of a deceased sole director and operate the company on his/her death. This allows D to exercise full control during his/her lifetime, but avoids the pitfalls of a rudderless company going through the probate procedure.

Cascading shares

An even more elegant solution to the cost and delay of probate applications is for D to issue his or her beneficiar(ies) cascading shares of a separate class that have rights that only become active on the death of D. Concurrently with D's death, D's original shares are automatically redeemed by the company. This results in the beneficiaries taking immediate full legal and beneficial ownership of the company without a probate process, and without D having to forgo ownership, control or economic rights during his/her lifetime. No trust structure is required and a regular BVI business company can be used with a bespoke memorandum and articles of association. Whilst the simplest structure could have just two share classes, it is possible to structure cascading shares in a way to convey different rights on different beneficiaries and of course, cascading shares can be perpetual, avoiding the postponed inconvenience of a probate process on the death of a surviving joint holder in the example above.

False friends

It should be noted that nominee agreements and arrangements involving D circulating signed but undated share transfers and board resolutions, do not work. Bearer shares are no longer legal in the BVI. Gifts of shares may be made, but the tax consequences can be disastrous if executed in an untimely way.

The local tax consequences of any proposed succession structure should always be considered prior to implementation.

Summary

Jointly held shares	Trust	Succession M&As	Cascading shares
D shares control with joint owner	Assets will be held legally by trustee subject to reserved powers	D holds shares in sole legal name	D holds legal ownership of sole "active" class of shares
D shares economic rights with joint owner	D is beneficiary during lifetime	D enjoys all economic rights	D enjoys all economic rights

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Jointly held shares	Trust	Succession M&As	Cascading shares
No probate required until beneficiary passes	No probate required	Probate required but board is not suspended	No probate required
Cheap and easy to implement	Requires a trust structure to be set up and maintained	No onerous structuring steps	Requires bespoke M&As

Read more about this topic here.

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