COLLAS CRILL

Successful succession: Personal investment holding companies in the BVI

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In addition to the many purposes for which a BVI Business Company limited by shares (**BVI Company**) is used, eg as a fund, co-investment vehicle, joint venture vehicle or listing vehicle, many BVI Companies are used as personal investment holding companies (**PIC**).

This guide provides an overview of the PIC, potential pitfalls in relation to succession planning and the various tools and structures that have evolved to help mitigate these.

Introduction

A PIC will routinely hold the assets of an underlying beneficial owner or even an underlying family (a family investment company or **FIC**). Such assets may include a residential property, a super yacht, a cash deposit account, an art collection or securities portfolio. The assets held by the PIC or FIC are determined by its directors and shareholders. Assets will routinely be held on a long-term basis with dividends being paid or capital returned to the shareholder(s) over time. The reasons for using PIC or FIC are varied but often include de-risking and privacy / confidentiality concerns especially for high-net-worth individuals or families in jurisdictions that are exposed to high levels of geopolitical risk and crimes against exposed wealth (for example, abduction of family members).

Like any BVI Company, a PIC or FIC is required to have at least one shareholder and one director at all times. Quite frequently in a PIC, the roles of shareholder and director are fulfilled by the same person (the patriarch or matriarch of the family). Should that person unexpectedly die or become incapacitated, the functional operation of the PIC grinds to a halt because, without a director, there is nobody able to attend to the business affairs of the PIC (such as payment of dividends or cash or assets transfers) and no shareholder able to appoint a replacement director. This business interruption can be particularly troublesome for a family that relies on the PIC to service their financial requirements.

Many of us choose not to focus on these grim consequences of death or incapacity, and continue our daily lives somewhat oblivious to them. As lawyers, it is our responsibility to ensure our clients are made aware of such eventualities and the various measures that can be easily adopted to mitigate them.

The inherent flexibility of a BVI Company together with some carefully thought out provisions in the constitutive documents (the Memorandum and Articles of Association or **MAA**) of the BVI Company can ensure the smooth transition of the BVI Company's management and control following the death of the primary shareholder.

Losing direction - the reserve director

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Any PIC (or any BVI Company for that matter) whose sole shareholder and sole director is one and the same person (the **Individual**) is encouraged to appoint a reserve director. The Individual may nominate a person to be their reserve director. The reserve director has no power or authority to act for and on behalf of the Company until the appointing director dies. This ensures that upon the death of the Individual the PIC is not left rudderless and the reserve director can continue to attend to the business affairs of the PIC and perform necessary functions such as approving and paying dividends or company expenses. The appointment of the reserve director does not affect the shareholding and the shares of the PIC will still need to transmit to the heirs of the Individual in accordance with BVI law.

A reserve director cannot be used to address the consequences of mental incapacity of the Individual. It therefore can be beneficial for the PIC to have two directors with one director potentially being a professional director. BVI law is modern and flexible and customised provisions can be drafted into the MAA to address instances where the Individual is mentally incapacitated and the consequences of such to their directorship. The sudden mental incapacity of the Individual can otherwise cause prolonged business interruption for the PIC.

Lost intention – the will

While there are a lot of things we have no control over during our lifetime, what happens to our assets upon our death is within our gift and we should make provision for this through the making of a will. A will is a legally executed, written instrument by which a person decides how and to whom their assets will be distributed upon their death.

If an individual dies without a valid will, the rules of intestacy will govern how their estate will be divided and distributed. Intestacy rules may conflict with the actual intentions of the deceased person but will nonetheless prevail over any such intentions where they are not contained within a valid will.

In many cases, shares in the BVI Company may be held by foreign-domiciled individuals for whom the BVI shares will form only part of their assets. Accordingly those individuals 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 (a **Foreign Law Will**). 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 under a Foreign Law Will to deal in the shares of a BVI company. 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 Law Will, particularly where that deceased individual was the sole director of the company and no reserve director was appointed.

The probate passage - transmission of shares

The shares of a deceased shareholder of a BVI Company do not automatically transmit (ie transfer) to the heirs of the deceased. There are certain rules and procedures that have to be followed and complied with in order for an heir to validly receive their shares. This process is known as the probate procedure. In the BVI the probate procedure is effected through the Registrar of the BVI Court (the **BVI Registrar**).

In order for shares in a BVI Company to validly transmit to the heirs of the deceased shareholder, the BVI Registrar will need to:

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- issue a grant of probate (for testate deaths under a valid will); or
- issue a grant of letters of administration (for intestate deaths where there is no valid will); or
- reseal a foreign grant of probate (in the case of a Foreign Law Will).

As the BVI Registrar will not recognise the ability of the foreign executor to deal in the BVI Company's property and/or pass same on to the heirs of the deceased until the applicable grant has been obtained, a problem can arise in relation to the control and management of the company.

Typically where the shares of the BVI Company are the subject of a valid BVI law will, the estate's legal representatives will need to submit an application for the grant of probate and accompanying affidavit to the BVI Registrar. The accompanying affidavit will need to exhibit copies of the death certificate and the will. The original will must also be submitted together with additional affidavits and advertising requirements adhered to. The probate process can generally take up to two months from submission of the application.

Where a Foreign Law 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 or residence will typically need to swear an affidavit of foreign law which outlines the background as to how and why the heirs are entitled to receive under the Foreign Law Will. Where documents are not in English, official translations of the Foreign Law Will and any codicils will need to be obtained, together with the death certificate and the foreign grant of probate (if applicable),. It is therefore vital to engage with experienced foreign counsel in the first instance in order to navigate the most expeditious way through the probate application process and also to consider whether any forced heirship laws apply.

This probate passage can be a long and costly process and can cause serious difficulties for the BVI Company and the heirs as technically the shares cannot be voted during this period and, where the deceased was the sole director, board-level decisions cannot be made, causing severe business interruption. . Various succession tools and structures have evolved to avoid the risk of any such business interruption.

Bypassing probate - alternative succession tools

There are a range of structuring options available to a BVI Company to ensure there is no business interruption and to enable assets to pass smoothly to the heirs of a deceased shareholder.

Joint tenancy

Shares in a BVI Company may be held jointly with rights of survivorship, meaning that on the death of a joint shareholder, their jointly held shares will automatically vest in the other joint holder(s) without the need to navigate the probate passage. This avoids cost, delay and business interruption, but conversely it does mean that joint shareholders enjoy joint rights and obligations in relation to the jointly held shares, including the right to vote the shares and to receive an equal share of the economic benefits of ownership, which may not be desirable. Complications can also arise where there is a rift or breakdown in relations between the joint holders. Reducing joint ownership back to individual ownership invariably requires the

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cooperation of the joint holders. It should also be noted that the probate process will ultimately apply upon the death of the last joint holder.

Trust structures

A shareholder may transfer their shareholding to a trustee to be held on trust for various beneficiaries upon the death of the shareholder (prior to which the shareholder would have a life interest in the shares). This approach avoids probate on succession, but does require the shareholder to relinquish legal ownership of the shares in their lifetime, and may have foreign law tax or accounting implications. The BVI has developed a special product, the VISTA trust, which allows a settlor to retain control of the underling BVI Company. Trusts are more expensive to implement and run than other structuring solutions.

Succession planning through the MAA - cascading shares

Another approach to ensure that ownership and control passes from the primary shareholder to their intended successors automatically and by contract is to effectively provide for this through the MAA of the BVI company. Simply put, this would entail the creation of two (or more) separate classes of shares, one of which ceases to hold rights on the primary shareholder's death and the other(s) attaining rights on the primary shareholder's death.

The BVI Company would, either on incorporation or subsequently through amendment of its MAA, create the separate classes of shares and associated class rights. Restrictions and activation triggers.

This method of succession planning ensures that the intended beneficiaries will immediately and automatically control the shares in the BVI Company upon the death of the primary shareholder and would be entitled to appoint directors to manage and operate the BVI Company thereby avoiding any business interruption. The shares of the primary shareholder are surrendered upon their death (through bespoke contractual, subscription terms and conditions). This method of dealing with succession provides continuity in the company's affairs and a substantial measure of certainty to all stakeholders, both internal and external.

False friends, caveats and complete advice

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

The BVI does not apply inheritance tax or capital gains tax in respect of BVI located assets and accordingly the inheritance of shares in a BVI Company is not a taxable event in the BVI.

However, it is essential to consider all foreign law implications relative to the BVI Company and its shareholders and the legal and tax position of the intended inheritance, particularly the laws of the beneficiaries' jurisdiction of domicile or residence. Specific foreign law and tax advice should always be obtained in relation to any succession planning.

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If you would like further advice on this topic or specific advice on your own circumstances, please contact a member of our BVI legal team. Key contacts are listed on the right of the page.

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