
BVI SHARE TRUST DETAILED GUIDE

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1. Introduction

The BVI Share Trust (“**Share Trust**”) is a dedicated structure for the holding of and succession to the shares of a BVI company (the “**Shares**”) owned by an individual (the “**Settlor**”).

The Share Trust is constituted by two separate legal documents: a Trust Deed and a Rights Deed. The interaction between the Trust Deed and Rights Deed changes on the Settlor’s death or earlier incapacity, and therefore the summary of advantages and benefits below is split between those enjoyed prior to the Settlor’s death or incapacity and those that apply after such an event.

One point to note throughout is that the Share Trust is drafted so that it can be used for minority holdings. However, a number of the features of the Share Trust (such as those which relate to control of the company and the ability to control the identity of directors) are identified below and discussed on the basis that the shareholding which forms the subject of the trust is sufficiently large as a matter of general BVI corporate law and the constitution of the company to give a shareholder such control. This does not detract from the attractions of the Share Trust in respect of a minority holding but it is important to re-enforce the hopefully obvious point that the Share Trust cannot create for a Settlor greater control over the company than he or she would have had as an ordinary shareholder.

Advantages and benefits enjoyed prior to the Settlor’s death or earlier incapacity:

1. The ability for the Settlor to retain effective control of the BVI company¹;
2. Settlor is entitled (as of right) to any dividends or other income distribution accruing to the Shares;
3. The ability for the Settlor to vote the Shares;
4. The ability for the Settlor to recall Shares from the Share Trust at any time and for whatever reason;
5. The Trustee is able to re-transfer the Shares to the Settlor where certain conditions are satisfied, usually involving a reputation risk to the Trustee; and
6. Automatic re-vesting of the Shares or property representing the Shares to the Settlor, on the occurrence of certain specified events, the most important of which is the loss of protections under the Virgin Islands Special Trusts Act (“**VISTA**”).

Advantages and benefits enjoyed after the Settlor’s death or earlier incapacity:

1. Automatic succession to ownership of the Shares by beneficiaries named and determined by the Settlor;
2. Near automatic appointment of successor director(s)²;

¹ See minority shareholding point above.

² See minority shareholding point above.

Note that the provisions of the Rights Deed cease to have effect on the Settlor's death or incapacity.

2. Procedure for creating a Share Trust

As the Share Trust requires the creation of a trust (and ultimately the transfer of legal ownership in the Shares from the Settlor to the Trustee), it is necessary to properly constitute the Trust. The Settlor effectively constitutes the Trust by transfer of a nominal cash amount to the Trustee. The default cash figure for the Share Trust (under the Harneys documentation) is USD\$100.00.

Once the Trust is effectively constituted, the parties are then able to enter into the Rights Deed. The Rights Deed sets out the basis on which the Settlor is willing to transfer the Shares to the Trustee and the basis on which the Trustee is willing to accept the Shares as an addition to the trust.

The Share Trust structure is completed once the Rights Deed has been executed and the Shares have been transferred to the Trustee.

3. Key Provisions

This section highlights the key provisions of each of the Trust Deed and Rights Deed, with specific reference to the main attributes of each document.

3.1 Deed

The Trust Deed confers a life interest in the Shares on the Settlor, with the Settlor's named beneficiaries absolutely entitled in remainder. The Trust Deed is irrevocable, does not contain any overriding powers (e.g. trustee discretions), and is made subject to VISTA.

The proper law of the Trust is that of the laws of the British Virgin Islands and this cannot be changed (**Clause 11**).

There is a wide power for the Trustee to vary and or amend the terms of the Trust, whether dispositive or administrative (**Clause 12**).

“Settlor is able to retain effective control of the company”

The VISTA “Office of Director Rules” enable the Settlor to direct the Trustee to remove or appoint directors of the company during the Settlor's lifetime (assuming the Settlor is not then incapable)³ (**Clause 2.4** and **Schedule**).

By use of this power and the power to exercise the voting rights attaching to the Shares, (provided for in the Rights Deed), the Settlor is able, during his lifetime, to exercise effective control over the management and affairs of the company.

³ See minority shareholding point above.

“Settlor is able to enjoy dividends”

The Settlor is entitled to receive trust income, including any dividend or other income received in respect of the Shares or otherwise. The Trustee does not have any discretion in this regard (**Clause 4**).

“Automatic succession to the Shares by named beneficiaries, in the event of the Settlor’s death or earlier incapacity”

The Settlor is able to name individually each beneficiary and to specify the exact portion of Shares of which that Beneficiary will take ownership of (**Clause 5.1**).

In the event that a Beneficiary dies prior to the Settlor’s death or incapacity then the Shares that that Beneficiary would have taken are reapportioned to the then remaining Beneficiaries (pro rata) (**Clause 5.2**).

The Settlor is able to nominate an alternate class of Beneficiaries to take the Shares in the event all of the preferred or first choice Beneficiaries predecease the Settlor’s death or earlier incapacity. In the unlikely event that all named Beneficiaries, whether first or second choice, predecease the Settlor, the Trust Deed then provides that the BVI Red Cross will take the Shares (**Clauses 5.3 and 6**) (note this provision can be changed to designate a charitable enterprise of the Settlor’s choosing).

“Automatic appointment of successor director(s), in the event of the Settlor’s death or earlier incapacity”

The Trust Deed is made subject to a general “VISTA Direction”, so that VISTA will apply to all BVI company shares later comprised in the Trust Fund (**Clause 2.1**).

The Settlor may direct the Trustee as to who should be appointed and or removed as directors of that company, on the Settlor’s death or incapacity, referred to as the VISTA “Office of Director Rules”⁴ (**Clause 2.4 and Schedule**).

3.2 Rights Deed

The principal purpose of the Rights Deed is to set out and govern the circumstances in which the Shares can be re-transferred to the Settlor prior to his death or earlier incapacity. There are three separate scenarios:

1. Where the Settlor wishes to recall the Shares;
2. Where the Trustee wishes to re-transfer the Shares; and
3. Where an event causes a compulsory re-transfer of the Shares by the Trustee.

The Rights Deed ceases to have effect on the death or incapacity of the Settlor – devolution and ultimate ownership of the Shares is then governed by the provisions of the Trust Deed.

“Settlor able to recall Shares at any time”

The Settlor is able, at any time and for whatever reason, to re-call some or all of the Shares, by issuing a written direction to the Trustee (**Clause 5**).

⁴ See minority shareholding point above.

“Settlor is able to retain voting rights to the shares”

The Settlor is granted a right to direct the Trustee as to the exercise of voting rights attaching to the Shares, which in practice is satisfied by the Trustee granting the Settlor a power of attorney over the voting rights. However, the Settlor does not have unlimited authority to vote on all matters (**Clause 4**).

“Trustee able to re-transfer Shares to the Settlor, in certain circumstances”

The Trustee is granted a power to re-transfer the Shares to the Settlor, and in doing so is expressly permitted to act in its own interest, and not in the interests of the Beneficiaries or the Settlor.

The Trustee would typically re-transfer the Shares where either the company or the Settlor has engaged in activities that pose a risk to the professional reputation of the Trustee. The Rights Deed contains a non-exhaustive illustrative list of circumstances in which the Trustee may (but need not) re-transfer the shares (**Clause 6**).

“Automatic re-vesting of Shares or property representing the Shares in the Settlor, on the occurrence of certain events”

Where VISTA ceases to apply to the Shares (for whatever reason), an automatic re-transfer from the Trustee to the Settlor occurs (**Clause 7**).

Other events that trigger an automatic re-transfer include where the company has been struck-off for more than 2 years, or where the Settlor has been declared bankrupt (**Clause 1.1.3.4** and **1.1.3.5**).

Where an automatic re-transfer occurs, the Shares or any property then representing the Shares is held by the Trustee on a bare trust in favour of the Settlor, pending final transfer and delivery (**Clause 7.1**).

4. Summary

The Share Trust affords BVI company shareholders unprecedented freedom and flexibility to determine succession to their Shares. It is able to achieve this without the need to amend company constitutional documents, with minimal disruption to practical management, control and enjoyment of profits of the business, and all contained in a confidential structure that is freely reversible.

5. Further Information

If you would like further information on the subject matter of this Guide, please contact Zac Lucas at zac.lucas@harneys.com or Sheila George at sheila.george@harneys.com or your usual contact at Harneys. Alternatively, you can visit our website at www.harneys.com.

This Guide is general in scope and is not intend to be comprehensive. It is not a substitute for legal advice.

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