
BVI SHARE TRUST WEALTH PLANNING GUIDE

- 1. Introduction**
- 2. BVI Share Trust - a comparative analysis**
- 3. Overall advantages**
- 4. Summary**
- 5. Further information**

1. Introduction

This Guide is intended to assist the professional wealth planner in assessing the advantages and uses of the BVI Share Trust (the “**Share Trust**”) as against use of more traditional planning methods and structures. There then follows a general explanation of the practical uses of the Share Trust. It is assumed that the reader has read our related guides: “BVI Share Trust – General Guide” and “BVI Share Trust – Detailed Guide” and has had an opportunity to consider the Share Trust documentation.

2. BVI Share Trust - a comparative analysis

This Guide is a comparison of the Share Trust with the more usual methods of holding shares in a BVI company, ranging with varying degrees of complexity, from an individual simply holding the shares personally to holding them under a professionally managed trust. The section ends with an explanation of the limitations of BVI law in the event of a shareholder’s incapacity; an area that is often not sufficiently considered during the planning process.

2.1 Share Trust compared with an individual holding shares personally until death

In the event of the death of a shareholder of a BVI company the deceased’s heirs or personal representatives will be required to make an application to the BVI Court to be recognised as the owner of the shares. If the deceased died with a valid will, the application will be for a Grant of Probate and if the deceased died without having made a valid will, the application will be for a Grant of Letters of Administration, in either event the grant will be a public document, which will contain or include details of the deceased’s BVI company shares.

Insofar as shares are concerned, BVI law looks to the law of the deceased’s home jurisdiction to govern devolution or succession to the shares; therefore if the deceased’s home jurisdiction has rules that predetermine entitlement to the deceased’s estate (“forced heirship” rules), then these same rules will be recognised and enforceable in the BVI – regardless of what is said in a foreign or BVI will.

An application to the BVI Court will be costly and is likely to involve delay – typically, two sets of lawyers will be involved: lawyers in the deceased’s home jurisdiction and lawyers in the BVI. Delays can be anywhere up to 3 months in the case of a simple estate, and may be longer in a complicated or contested estate.

By contrast, the Share Trust maintains confidentiality; trusts are not registerable documents in the BVI, succession to the shares occurs automatically on the death of the former shareholder, without the need to apply to a BVI Court – the trustee is already the legal owner of the shares and will simply transfer them to the named beneficiaries, the trust will then come to an end.

Foreign “forced heirship” rules are not recognised in the BVI where assets are held in a trust governed by BVI law, and therefore the Share Trust is able to provide for succession to shares that would not be possible if the deceased simply relied on a will or died without making a will.

One further scenario to note is the impact a shareholder death has on the business of the company where the shareholder was also the sole director of the company (a common situation). In such a case an application to the BVI Court will need to be separately made in order to appoint a successor director, prior and in addition to the above application to transfer the shares. The shareholder may have nominated a reserve director pursuant to section 113 (7) of the BVI Business Companies Act, to manage and run the business of the company, but such a reserve director cannot in any circumstances transfer shares to the deceased's heirs, that would constitute intermeddling in estate affairs and may have serious consequences to any reserve director that took it upon themselves to "administer" the deceased's estate.

The Share Trust utilises the provisions of the Virgin Islands Special Trusts Act ("VISTA"), under which the trustee can be directed to appoint a successor director in the event of death or incapacity. The Share Trust is able to achieve what a reserve director is not, that is simultaneous transfer of the shares to the beneficiaries and appointment of a successor director - a seamless transition of ownership and control of the company is thereby accomplished.

2.2 Share Trust compared with nominee ship

A nominee or bare trust arrangement does not validly provide for succession to shares in a BVI company in the event of the beneficial owner's death.

Alternatively, a nominee or bare trust agreement that provides for successive interests may be construed by a BVI Court as constituting a substantive trust, with disastrous consequences if a BVI company has been used to act as trustee. In such a case, a breach of the Banks and Trust Companies Act will have been committed if the "trust company" has not obtained a relevant trust licence or does not fall within any relevant exemptions, the penalties of which can be as high as a fine of \$50,000 and or a term of imprisonment for the directors of the company, not exceeding more than 2 years.

On the death of a beneficial owner, a bare trustee or nominee is in the same position as a reserve director, in that devolution and succession to the shares can only be authorised by a BVI Court appointed representative of the deceased's estate – a bare trustee or nominee would similarly intermeddle in estate affairs if they were to transfer the shares without such authority.

The Share Trust effectively confers the same level of control as that provided under a nominee arrangement, but with the added benefit of being able to transfer the shares to the deceased's named beneficiaries - without the need for application to the BVI Court and or the involvement of the deceased's Court appointed representative.

Nominee agreements that purport to transfer shares on the death of the beneficial owner are common and widely used. They are however an unqualified legal trap, and should be avoided at all costs.

2.3 Share Trust compared with an ordinary trust

Of principal concern to a shareholder who establishes an ordinary trust, that is a trust that does not utilise the provisions of VISTA, is the ability to retain control of the shares and the underlying company. This concern is typically addressed by either incorporating a private trust company (“PTC”) to act as trustee of the trust; the shareholder is typically appointed director of the PTC, or the trust instrument is drafted in such a way that substantial powers of control are reserved to the Settlor.

The main problem encountered with the above scenario is the ever present risk of the trust being found to be a sham, and therefore of no effect. This would usually be a risk where the Settlor, out of an abundance of caution, insists on reserving extensive and wide ranging powers in the trust instrument, to such an extent that the trust amounts to little more than a form of “nomineeship”; with all of the limitations and adverse consequences described above. The same risk of sham would occur where the shareholder used a PTC, not as a trustee of the trust, but rather as a convenient way to extract benefits from the trust, without regard to the interests of the other beneficiaries – a sort of personal money box.

Under VISTA, a trustee is prohibited from interfering in the affairs of the BVI company, and it cannot be a director of the BVI company, the shares of which are comprised in the trust fund. VISTA establishes a statutory trust to retain and not dispose of the BVI shares. Under a VISTA trust the shareholder has rights to direct the trustee as to who should be appointed, and or removed as directors of the company. Together these restrictions and provisions enable a settlor to retain effective control of the company, during his or her lifetime, at the same time as enjoying the benefits of placing their shares in trust. In these circumstances, the need for a PTC or extensive reserved powers in the instrument is much diminished, and with it the risk that the structure would be found a sham, and therefore void.

As mentioned above, the Share Trust takes advantage of VISTA, in that it establishes a trust to retain the shares, and confers wide powers on the settlor to determine the directors of the company - this is supplemented by the Rights Deed, under which the settlor is able to vote the shares and receive enjoyment of the economic rights attaching to them along with the ability to recall the shares at will. The Share Trust makes redundant the need to reserve extensive powers in the trust instrument or to operate an expensive PTC solution.

2.4 Share Trust compared with receivership

The inability of an individual by reason of mental impairment to manage their own affairs because of old age, infirmity or otherwise, must also be specifically considered.

BVI law does not contain the equivalent of an English law Enduring Power of Attorney, and so a BVI company shareholder cannot simply appoint a person to administer their shares in the event of their incapacity. Instead a foreign receiver (a person appointed by a foreign Court to administer the patient’s estate) will need to apply to the BVI Court to be recognised as entitled to administer the patient’s estate – much the same way as with a personal representative on the shareholder’s death. Such an application may be in open Court, and would involve BVI legal

counsel, as well as lawyers from the patient's home jurisdiction, the procedure will invariably take time and may involve substantial costs and expenses.

The Share Trust specifically deals with the shareholder's incapacity by providing automatic succession to the shares and nomination of a replacement director in the event of the shareholder's incapacity without the need to apply to a BVI Court, or involve lawyers, whether foreign or in the BVI.

3. Overall advantages

In addition to the above, the Share Trust enjoys a number of general advantages, further described below:

- **Costs**

The costs of establishing and maintaining a Share Trust are estimated to be in the region of 700% cheaper than the nearest comparable BVI trust structure.

- **Time**

The Share Trust incorporates a standardised approach in its structure and documentation, and therefore can be created in as little time as it takes to transfer the shares to the Trustee.

- **Commercial terms**

The Rights Deed establishes the settlor's right to recall the shares at any point prior to death or incapacity, and is expressed in contractual terms that are readily understood by the business community, in contrast to the terms used in a typical trust deed, which may not be.

- **Certainty**

The Share Trust establishes a very simple and easily understood mechanism for the devolution of BVI company shares. No discretion is conferred upon the Trustee and therefore the settlor can be certain that the shares will pass to his named beneficiaries. This is a crucial attribute of the Share Trust when introduced to businessmen who may not have had any practical life experience in the use of trusts.

- **Memorandum and articles of association**

The Share Trust does not require changes to a company's memorandum and or articles of association in order for it to be used by a shareholder.

- **Minority shareholders**

A minority shareholder may use and utilise the Share Trust. Once shares are placed in a Share Trust a settlor may exercise the right to recall some but not all of the shares held in a share trust, for any purpose, including sale which may result in the trust holding a minority interest in the company.

- Trustee Reputation

The Trustee is able to re-transfer the shares to the shareholder, with or without cause in its own self interest. This enables the Trustee to control the level of reputation risk that it is willing to incur in accepting Share Trust business.

4. Summary

The Share Trust provides a simple and easily understood mechanism for the succession to BVI company shares in the event of death or incapacity. Shareholders are able to exploit the use of the trust no matter what their percentage of shareholding is in a BVI company, and without risk of interference to the practical running and operation of the company. Settlers using the structure have a legally enforceable contractual right to recall the shares at any time during their life. Together these attributes significantly enhance and ease the professional wealth planner's ability to meet and indeed exceed their client's expectations.

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.