GUIDE

BVI succession planning and the use of private investment companies

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The British Virgin Islands (**BVI**) is one of the most popular offshore jurisdictions for personal investment companies (**PICs**), thanks to (among other things) its political stability, privacy, asset protection, flexible and well-developed common law legal system, ease of incorporation, lack of exchange controls and lack of corporate taxes.

BVI PICs are formed for a variety of purposes (including succession and estate planning, real estate holding vehicles, super yacht ownership, cash deposit accounts, art collections and securities portfolios) and often incorporated by high-net-worth individuals and family offices.

Mourant regularly advise individuals, owner/managers, families and family offices during the lifecycle of a BVI PIC on appropriate succession planning, to avoid common pitfalls. This guide explores some of the common undesired outcomes we come across in practice, along with the planning and solutions we recommend.

As a point to note, PICs should not be confused with investment funds or co-investment vehicles, and for more information on these types of structures, please refer to our guides on these vehicles: here.

Undesired outcomes

As with any BVI company, a BVI PIC needs to have at least one director and one shareholder. Quite often the director and shareholder will be the same individual. However, it should be noted that if this individual dies or becomes incapacitated, then, without appropriate planning, this can result in two significant issues for the company:

(a) without a director, there is nobody to run the business of the company, including to approve share transfers and make distributions; and

(b) without a shareholder, there is nobody to appoint a replacement director, leaving the company incapacitated.

Additionally, the shares of a deceased shareholder do not transmit automatically to the deceased shareholder's heirs. A grant of probate (for testate deaths under a valid will), a grant of letters of administration (for intestate deaths where there is no valid will) or re-seal a foreign grant of probate (in the case of a foreign law will) are required for the valid transmission of these shares. These processes take time, cost and energy to address (typically several months), during which time the company's activities and operations grind to a halt, often creating wider issues for family members and personal representatives.

Solutions

BVI law is extremely flexible, and we explore below some of the key solutions we regularly advise our clients on so as to avoid the issues outlined above:

Joint tenancy

A joint tenancy arises where shares in a BVI company are held jointly by two or more individuals. This means that *all* of the shares in the company are held by *both* holders and that, upon the passing of one of the joint holders, all of the shares automatically vest in the other joint holder.

This mechanic allows each surviving joint holder to skip the probate process, appoint a new director (if necessary), and greatly reduce the costs and time associated with this process.

Jointly held shares will require all joint holders to vote together, as if they were one, so a joint tenancy is typically most appropriate for married couples holding shares together, albeit there is no limit on the number of joint holders that can hold shares together.

Trusts (including the VISTA trust)

Another efficient option which bypasses the BVI probate process is for shares to be held on trust for the benefit of one or more beneficiaries, such that in the event of death of a beneficiary the beneficial (but not the legal) title changes. Trusts require the trustee (whether corporate or natural) holding the shares to administer the trust and any profits to be distributed under the terms of the trust.

This is a good solution where there are multiple members of a family nominated as beneficiaries and is particularly popular among jurisdictions which do not have the concept of trusts (such as some civil law jurisdictions). This option also provides added confidentiality, as the beneficiaries will not appear on the Register of Members.

The BVI offers a variety of trust products, including the VISTA Trust (being the Virgin Islands Special Trusts Act Trust), which allows the management of the company to remain the responsibility of its directors, with the trustee not being permitted to actively manage or invest trust assets. For more on this structure, please read our article on the topic BVI: VISTA Trusts.

Cascading shares

A BVI company can be authorised to issue different classes of shares under its memorandum and articles of association (the M&A) and each class can be assigned different class rights.

A mechanism can be incorporated into the M&A to provide that, following the death of the primary shareholder(s) (typically the parents) of a BVI PIC, their class of shares ceases to hold rights (i.e. voting and/or economic rights) and the class of shares held by the secondary shareholder(s) (typically the children) gain those rights, with the shares of the primary shareholder(s) being compulsorily redeemed for nominal consideration.

This approach, like a joint tenancy or trust, allows for control over the company to be retained upon the passing of a shareholder, at minimal cost and avoiding a potentially lengthy probate process.

Reserve directors

Finally, whilst the appointment of a reserve director does not necessarily ensure the easy transmission of shares, it does provide a contingency plan for the passing of a sole director who is also the sole shareholder.

Directors of a BVI company carry out the business and the management of that company, and if the company is left with no director, business continuity is jeopardised and could ultimately result in the company being struck off, with the assets automatically transferred to the Crown under the legal principle of *bona vacantia*. For more information see our guide on Strike off, dissolution and restoration under the BVI Business Companies Act.

A simple and effective way to avoid this is to appoint a reserve director empowered to act where the existing director (who must also be the sole shareholder) dies. Once the reserve director has been nominated, consented to act and been registered as a reserve director in the Register of Directors, their appointment is triggered on the death or permanent incapacitation of the sole director/sole shareholder, which ensures the Company is able to keep on operating.

On too many occasions we have been asked to help heirs of a deceased shareholder where significant assets were tied up in a BVI company for months (sometimes years) waiting for probate. All of which could

have been avoided if the deceased shareholder had simply appointed a reserve director. As such, we recommend that any company with a sole director who is also the sole shareholder appoints a reserve director for the reasons outlined above.

We also recommend that when setting up the PIC, only a small number of shares are issued, leaving a large number of authorised but unissued shares available to the director (or reserve director), which provides flexibility if the client wants to distribute assets before the grant of probate.

How Mourant can help

As a leading offshore law firm, Mourant regularly advise individuals, families and family offices throughout the lifecycle of a BVI PIC and have a core understanding of the issues faced and how best to mitigate or resolve them.

Contacts

A full list of contacts specialising in BVI law can be found here.