

Succession to BVI shares - the sun is shining

John F Kennedy was fond of saying that the "best time to mend a roof is when the sun is shining". This is good advice to follow in most parts of your life. Why put off until tomorrow things that you can do today. Just like trying to mend a roof in a torrential downpour, those involved in trying to settle an unplanned estate can be subjected to lengthy delay and additional cost that could have easily been avoided. While there are many options for estate planning and succession to BVI shares, the most straight forward option is to ensure that the BVI shares are covered by a well thought out will that effectively deals with the shares.

Background

The British Virgin Islands ("BVI") has a long history as a domicile for asset holding vehicles. The latest figures show that there are approximately 450,000 active BVI business companies and that number looks set to increase. With the first of these companies having been established over 30 years ago, the transmission of shares in a BVI company is becoming topical. Failure to consider the transmission of shares on death of a shareholder and to plan effectively will often result in additional delay and time in the process of transferring title on death. This article outlines the issues concerning transmission of shares in a BVI business company on death and how to deal with them.

The issue

As a matter of BVI law, shares in a BVI company are BVI "situs" assets or are deemed to be located in the BVI¹. The effect of this deeming language is that where a shareholder of a BVI company dies, his or her shares cannot effectively be transmitted to his or her heirs until a grant of probate (in the case of a

will - 'testate') or grant of letters of administration (in the case of no will - 'intestate') has been obtained from the BVI court² (a "Grant")³.

Technically there is no absolute rule at common law which dictates that a Grant must be taken out in the event of the death of any person. Indeed, the "effect" of probate is simply to prove the will of a deceased. Title to the shares does not flow from the Grant but from the will of a deceased. The strict legal position aside, as a practical matter the consensus view and consistent advice to directors of a BVI company and registered agents has been that a Grant in the BVI is required. Failure to obtain a Grant could render anyone dealing with the shares liable as an executor de son tort or for intermeddling. Where registered agents are often involved in updating the share registers and assisting with the transfer, they tend to be very reluctant to cooperate in the absence of a Grant, even if the directors agree to act without one.

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¹ BVI Business Companies Act s 245

² In limited cases a foreign grant of probate or letters of administration can be re-sealed by the BVI court.

³ Other considerations may arise in the case of shares held by a nominee where the legal title and the beneficial title is split.

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Clauses in the memorandum and articles

Certain constitutional documents can, on occasion, contain clauses that purport to enable the transmission of shares in a BVI company without a Grant. However, acting pursuant to a procedure set out in the Memorandum and Articles of Association may provide little protection against potential liability. These provisions often call for an indemnity, and as such, the only relief available to someone who incurs liability for acting without a Grant will be pursuant to the indemnity, which may or may not have value.

No will - intestate

Beneficial entitlement

As shares are movable property, on intestacy the laws of the domicile of the deceased will decide the question of beneficial entitlement, and a Grant will be needed in order to effect the formal transfer of the shares into the beneficiary's name. Domicile generally refers to the place which a person regards as his or her permanent home and with which he or she has the closest residential and social ties.

Who can obtain the Grant?

Where there is an application for letters of administration, the laws of the domicile of the deceased at the time of his or her death also determine who is entitled to make the application. These applications are very similar to an application for probate. An affidavit of foreign law from a law firm based in the domicile of the deceased is required to support these applications and sets out who is entitled to make the application for the letters of administration and who is entitled to the assets under the laws of the foreign country. We have considerable experience in drafting these affidavits and liaising with foreign counsel in relation to having them prepared and can advise on execution requirements.

Foreign wills

Certain foreign Grants of probate or letters of administration can be re-sealed by the BVI court⁴. Where re-sealing is not an option, an application for a fresh Grant will have to be made to the BVI Probate Registry. The BVI Probate Registry expects that a Grant should be obtained within three years from the date of death of the shareholder and if the application is made outside that period, an affidavit explaining the delay is needed to support the application. In the case of foreign

wills, while they can be probated in the BVI, delays can occur as the BVI process, usually, cannot be started until the will has been probated in the home jurisdiction. In the case of a foreign will an affidavit of foreign law is required as well.

BVI will

A BVI law governed will permits a testator to set out the intentions for his or her shares in a BVI company after death. It is important to note that the will must be effective under the law of the deceased's domicile at the time of death. In other words the will must be valid under that foreign law if it is to be valid under BVI law. Applications for a Grant for a BVI will, where the deceased died domiciled outside the BVI, must also be accompanied by an affidavit of foreign law confirming that the will is valid under the foreign law.

Applying for a Grant

In addition to the will, the following are required:

- an affidavit in standard form to support the application and undertaking to administer the estate;
- an affidavit as to execution of the will;
- certificate of death;
- affidavit that no other applications for probate exist;
- affidavit of foreign law;
- copies of advertising;
- declaration of value - please note no estate duty is payable;
- a draft order and Grant.

Certain other documents may be required depending on the nature of the application. Most commonly these are affidavit of delay in the case of a delay of more than 3 years between the time of death and the application. In the case of intestacy, it is often necessary to get those who are entitled to make an application for letters of administration to renounce their right.

From the time a completed application is filed with the BVI probate court registry it can take 3-6 months for the Grant to be issued although it may be longer where the estate is contested.

BVI taxes

There are no capital taxes, including inheritance tax, or stamp duty in the BVI.

Disclosure

A probate application is required to be advertised in a local BVI newspaper. The

⁴ Grants of probate issued by a court of the United Kingdom, a Commonwealth country or a dependant territory may be re-sealed in the BVI. Hong Kong Grants cannot be re-sealed.

Grant will, once issued, be a document of public record. Therefore, the ownership of the shares by the deceased and potentially the beneficiary will be available publicly.

What should I do?

The process of obtaining a Grant is not something to be feared. The process is straightforward and our experience with the BVI Probate Registry has been excellent. Certainly, there are planning options that are aimed at avoiding probate but many of these come with an annual cost that can often far exceed the cost associated with obtaining a Grant in the BVI. While one should consider all options, often the most effective solution is a straightforward BVI will or a comprehensive foreign law will. Why wait for tomorrow – the sun is shining today.

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