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The trusted solution in wealth structuring

Succession Planning using BVI trusts

Why use a trust for BVI company shares?

The BVI as an offshore jurisdiction is known primarily for its simple and effective, yet proportionately regulated, provision of BVI companies for use on the international stage. However, the BVI can also provide a variety of modern and efficient trust solutions that offer clients assistance with succession planning, tax planning, confidentiality, control and centralisation of assets in addition to other typical advantages of trusts.

The importance of trusts in the BVI becomes evident when you consider what must be done to transfer shares in a BVI company when a shareholder dies. If an individual is a shareholder of a BVI company, either in their own name or through a nominee arrangement, a grant of probate (or letters of administration if no will exists) will be required in the BVI to validly and legally transfer the shares after their death. Obtaining the grant of probate can take up to six months and is a public document that leads to the loss of confidentiality for the shareholder. The shares will then be passed in accordance with the laws of the domicile of the shareholder, which may differ from what the shareholder really wished to happen.

Where the BVI company is either a family run business, or owns shares in a family run business, it is important to think about its future. If, on the death of an individual beneficial owner, the shares are divided between the children and the surviving spouse, this can often lead to disagreement and dispute over the running of the business. Worse still, during the lifetime of an individual shareholder such as the family patriarch, loss of ownership of some of voting capital can occur in the event of a divorce. Family owned businesses typically struggle to survive past two generations. By having the shares owned by a trust, the control and ownership can be centralised and continuous, and the board of directors can run the company without fear of shareholder disagreement and interference. It should however be said that dependent on the terms of the owning trust, varying degrees of involvement of the trustees may be required.

In the world of international business, many clients will have companies and operations in numerous jurisdictions. From a corporate governance, succession and control perspective they often like to have the ownership centralised in one location and sometimes with one firm. It is not unusual that a BVI company is used as a holding company for the other business interests, and holding the shares of that BVI company in a BVI trust is an efficient and popular solution to achieve the required goals due to the trust legislation on offer in the BVI and its cost effectiveness.

In addition to the succession advantages that holding shares in trusts there are the benefits that trusts provide that include:

- asset protection
- structured inheritance by children of shares and overall wealth
- protection of pre-marital assets from divorce
- confidentiality

The BVI has developed as a trust jurisdiction and has number of different solutions to assist clients with the above concerns.

The Virgin Islands Special Trusts Act 2003 (“VISTA”)

Under VISTA a client can transfer their shares in a BVI company into a trust of which they are the settlor. Subject to tax advice, the settlor can continue to be a director of the BVI company and as the shares in the BVI company will be owned by the trustee, they will not be subject to the requirement for probate upon the settlor’s death. One of the trustees of a VISTA trust must be either a licensed trustee in the BVI or a BVI private trust company.

VISTA prohibits the trustee from intervening in the management of the BVI company, except in certain pre-determined circumstances, meaning the directors’ management of the company assets is not fettered by a trustee’s often conflicting objectives. If the company declares a dividend it will be paid to the trust and then be distributed to beneficiaries in accordance with the terms of the trust deed, guided by a letter of wishes from the settlor.

Another key advantage of VISTA is the office of director rules (“ODRs”). The ODRs enable the settlor to determine who the directors of the underlying company are for the duration of the trust (BVI trusts can last for up to 360 years). This gives the settlor certainty as to who will ultimately manage the BVI company when he is no longer able to be involved, and this is of particular importance in ensuring the long term future of any family business. The ODRs allow the settlor to create procedures for the appointment, removal and remuneration of directors of the BVI company even after their death.

Only shares in a BVI company may be held at trustee level with a VISTA trust. However, any assets located in any jurisdiction can be owned by the holding BVI company, allowing for the centralisation of international assets.

VISTA trusts are an excellent solution for clients holding “high risk” assets that trustees of a standard trust may seek to avoid due to management and control duties, such as controlling shareholdings in private companies and speculative investments.

The private trust company (“PTC”)

For a number of reasons, some clients may not be comfortable gifting their assets to an institutional trustee, despite the safeguards afforded by VISTA and the regulations set by the BVI Financial Services Commission. These reasons can include confidentiality, trust, or the need of specialist commercial knowledge not possessed by an institutional trustee. Those clients may, as an alternative, consider setting up a PTC to act as the trustee of a BVI trust. By having family members as directors of the PTC, they can retain control of the assets whilst separating the legal ownership. A PTC does not require a BVI based director, but suitable advice should be obtained with regard to the constitution of the board.

The board of the PTC, and thus the directors, make the decisions as the trustee of the trust, and as such it is fundamental that the correct people are appointed. The directors are often a mix of family members plus an institutional director, so that the family members can provide the expertise with regard to the business decisions and the institutional director can provide the administrative expertise. Good corporate governance relies on a balance of strengths and skills of directors, and this model continues to reap benefits in this regard.

The PTC would be a BVI company, and as such its shares would be subject to probate in the BVI. The beneficial owner of the shares should therefore consider settling the shares into a trust (these shares will not have any financial value, as the assets will be held in the trust of which they are trustee). A very attractive option is to settle the shares upon a BVI VISTA trust, allowing the beneficial owner to determine the members of the board of the PTC both during and after his life-time. This structure ensures that the assets held in trust, of which the PTC is trustee, will continue to be controlled by the directors of the PTC (who have been determined by the beneficial owner), but the shares in the PTC will remain in trust beyond the life of the settlor.

The Life Trust

If clients do not want a substantive trust, and purely wish to avoid probate and forced heirship they should consider using the Life Trust. The Life Trust is effectively a single generational VISTA trust where the settlor is entitled to the income of the trust during their lifetime. The assets of the Life Trust will be the shares in the BVI company, and the income is therefore dividends received from that company. On the settlor’s death the shares pass automatically to the named beneficiaries. This is a revocable trust so the settlor can have the shares transferred back to him at any point he wishes, and the remainder beneficiaries can be changed at any point whilst the settlor has capacity.

This is a low cost and inflexible solution that is typically used when there are no concerns with assets passing to the next generation on death, because either they are of sufficient financial maturity or the value of the assets does not warrant a substantial trust.

The discretionary trust

If the client does not want to use VISTA legislation or a PTC they are able to establish a standard BVI trust with discretionary dispositive powers. As the trustee is not afforded the protection of VISTA, its responsibilities are far greater and therefore the costs also increase.

This kind of trust is most suitable where the settlor wants a professional trustee to continue to hold and manage the assets on behalf of future generations, and only provide the beneficiaries with such financial benefit as the settlor originally intended. Such trusts are the most flexible, and likewise the most complex, but can provide distinct advantages for both tax and succession planning, especially where the beneficiaries are minor, spendthrift or have special needs

This guide is meant as a short introduction to the various types of trusts and associated structures available in the BVI, and some of the advantages of each of them. Whilst Nerine has detailed fact sheets on the different types of trusts, it is only when we understand the needs and requirements of our clients that we can recommend a particular solution. If you would like further information please do not hesitate to contact your usual contact at Nerine.