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LEGAL PROVISIONS APPLICABLE TO WILLS IN THE BRITISH VIRGIN ISLANDS

INTRODUCTION

Several problems can arise when a person dies, and his/her estate includes assets in jurisdictions other than his/her place of residence.

Among others, these problems include:
(a) delays in the transmission of said assets to the heirs;
(b) additional costs (for example, when the Courts and/or the lawyers of the country of residence of the deceased charge fees in relation to the whole estate irrespectively of whether there are assets within the estate abroad); and/or
(c) conflicts between laws that are often contradictory to each other.

It is not uncommon for those foreign assets to include shares of companies incorporated in the British Virgin Islands ("BVI") and this is precisely what this legal guide is about.

APPLICABLE LAW

The main law applicable to this matter is the so-called "BVI Wills Act" dated January 1873, which contains most of the provisions that regulate wills in the BVI.

However, other laws, including the following, are also applicable to specific situations:

> BVI Intestates Estates Act (regarding some aspects of judicial proceedings)
> BVI Business Companies Act (regarding corporate issues)
> BVI Mental Health Act (in relation to the requirements and procedures to be followed in the case of a testator not being of sound mind)

FACTUAL ASSUMPTIONS

When a person decides to plan his/her succession, the easiest option would be to consider the execution of a will to dispose of all his/her assets. This is due to the fact that wills are inexpensive and allow the owner of the **assets to** maintain control over them. However, what a wil does not offer is asset protection or a greater degree of privacy.

The problem, as we stated before, arises when the testator owns assets in more than one jurisdiction.

There are basically two possibilities:
> to execute a will in each jurisdiction where assets are owned (obviously, we will discuss here the specific case of the BVI); or
> to execute the will in accordance with the laws of the place of his/her domicile and make it valid in all jurisdictions where assets are located.

In both cases there are certain requirements to comply with.

EXECUTION OF A BVI WILL

If a person decides to execute a BVI will, he/she needs to take into account that said document will be subjected to the laws of that jurisdiction. This means that the decision must be made taking into account whether these laws are convenient in terms of the testator's wishes.

A

REQUIREMENTS TO EXECUTE A VALID WILL IN THE BVI:

According to the BVI Wills Act, a will in the BVI:

> must be done in writing;
> must be signed at the end of the document by the testator, or by another person, in the presence and under the guidance of the testator;
> must be signed in the presence of at least 2 (two) witnesses;
> the witnesses must attest and sign the will in the presence of the testator; and
> the testator must be at least 18 years of age at the time of the execution.

Once the will has been executed, we recommend that (although this is not a legal requirement) for a copy of it to be certified and apostilled.

B

CONTENT OF THE WILL:

In the BVI, there are no limitations regarding the content of a will. There is, in other words, an absolute freedom in regard to testamentary dispositions. Being this so, if a will has been executed in a valid manner, it cannot be contested in court.

This is, precisely, one of the advantages of using the jurisdiction.

That said, it is important to clearly identify the assets referred to by the will, the heirs and the executor or administrator.

EXECUTION OF A NON-BVI WILL

The second option we mentioned is to execute a will in accordance with the laws of the country of residence of the testator and, after he/she dies, to take steps towards recognizing it abroad, that is, in the BVI.

If this option is chosen, the first issue to be considered is which is the applicable law. To this end, the rules and regulations in force relating to Private International Law must be analysed.

There are two possible situations: there may be, or not, a Treaty regulating this issue between the BVI and the country of residence of the testator.

If there is a Treaty, its provisions will have to be obeyed.

If there is not a Treaty, and since the provisions in the "Convention on Conflicts of Laws Relating to the Form of Testamentary Dispositions" of 1961 are not applicable in the BVI, in order to make sure a foreign will is valid in the BVI, the provisions in the Private International Law of the BVI will have to be taken into account.

In this regard, the applicable principles are as follows:

> in the case of shares of BVI companies (which, obviously, qualify as movable assets), the formal validity of the will, as well as the capacity to execute a will and other aspects will respond to the laws of the country of residence of the testator (which could imply, for example, less flexibility for the testator); and

> only in the case of real estate situated in the BVI shall the laws of BVI be applied.

This second option is far more complex than the former, among other things, because the BVI Court demands that documents be translated into English and apostilled and often (due to misunderstandings related to language, formalities and/or culture) these proceedings take long and cause additional expenses (two of the undesirable effects that testators seek to avoid when they make a will).

Finally, if the owner of the assets wishes to protect his/her estate or to achieve fiscal optimization or privacy, a will is, in all likelihood, not the best solution. In this case, it is convenient to consider other options, such as trusts, foundations, companies with different types of shares, investment funds, etc.

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