Handle with Care
Omonike Robinson-Pickering, March 2014

Over the past 20 years, the BVI business company has become an integral part of the wealthy individual’s portfolio. Many of these BVI business companies are held directly by individuals, who, as time marches on, will inevitably die. It is human nature to be reluctant to plan for one’s own death and it is not unusual for a BVI business company to have the same person be sole shareholder and sole director.

Pursuant to the BVI Business Companies Act 2004 (as amended) (the Act), a person who is the sole shareholder and sole director may nominate a reserve director to act in their place on death. This is helpful because, once a valid and unrevoked nomination of director exists on the death of the person who is both sole shareholder and sole director, the appointment of the reserve director is triggered, and this person, now being the new director, is able to recognise the title of a personal representative or transferee beneficiary to the shares.1

However, the nomination of a reserve director does not circumvent the requirements for dealing with shares in a BVI business company upon the death of an individual shareholder and it is therefore prudent to discuss the relevant procedure.

Obtaining a grant of representation

Shares in a BVI business company are BVI situs assets. This has been enshrined in s245 of the Act. As a consequence, the administrator of an estate that includes shares in a BVI business company can only deal with such shares by obtaining a grant of representation from the court in the BVI. The importance of this requirement has often been undermined by provisions in the articles of some BVI business companies that appear to suggest either that a grant of representation is not required to deal with their shares, or that a foreign grant of representation provides sufficient authority for a personal representative to deal with the shares. Both of these positions are inaccurate and any person who transfers shares in a BVI business company or is a recipient of shares in a BVI business company based solely on reliance on provisions in the company’s articles exposes themselves to the risk of liability as executor de son tort. Such intermeddlers become clothed with the burdens of an executor without being shrouded by the court. If such person is a director of a BVI business company, they may be held liable by disgruntled beneficiaries or creditors. If they are a transferee of shares, they are vulnerable to having their status as a shareholder challenged. Those who assist in transferring the shares (such as the registered agent of a BVI business company) also risk potential exposure.

Which type of grant?

The type of grant that should be applied for will be determined primarily by whether the deceased had a valid will. If so, it will be a grant of probate, or, if not, letters of administration. The validity of a will disposing of the shares in a BVI business company will be determined by the law of the place where the deceased was domiciled when they died, rather than under BVI law. Accurately identifying the domicile of a deceased person is vital not only in determining the validity of a will, but also in ascertaining which rules governing beneficial entitlement to the shares will apply, something that is particularly important where the shareholder dies intestate. An affidavit of foreign law must be submitted to the BVI court by a lawyer from the jurisdiction of the deceased’s domicile in order to deal with these matters.

Applying for a grant

Applying for a grant of representation is not usually difficult, but specialist legal advice is required to ensure the process runs smoothly, especially where the deceased was not domiciled in the BVI and private international law considerations therefore become relevant.

As a concluding point, it is often useful for international clients with connections to various jurisdictions to make a BVI-specific will in relation to their BVI situs property. Although not required, it makes the process of coordinating multiple applications for grants of probate in different jurisdictions more efficient, as applications can be made independently.

---

1 This article assumes that the shares in the BVI business company were not vested in a trust or held in a joint tenancy, and were held by a shareholder who was an individual

This article was published in the March 2014 issue of STEP Journal.