GETTING THE DEAL DONE: WHAT TO DO WHEN YOUR REGISTERED AGENT GOES ROGUE


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What is a registered agent and why do they matter?

The registered agent, colloquially known as the RA, fulfils a key role for BVI companies, including the thousands currently doing business across Asia. Somewhere between a mailman, company secretary and compliance gatekeeper, the RA is the only entity able to make most filings with the BVI's registrar of corporate affairs (the **Registrar**), the usual keeper of the company's statutory registers and, from a regulatory standpoint, a key player in the BVI's anti-money laundering and compliance regime (as the principal person charged with collecting client due diligence information on BVI companies).

The RA system usually works extremely well and the BVI offers numerous highly professional outfits offering these services to a high standard. Occasionally, however, to the chagrin of the dealmaker, an RA may (however inadvertently) hold up a transaction by refusing to take a step which is within their power and vital to getting a deal completed. Based on practical examples from deals on which we have worked recently, this article considers the rights of directors and members and the options available to dealmakers in this situation.

Following a recent case where the BVI courts compelled an RA to provide client due diligence information by a *Norwich Pharmacal* order, we also examine the ways in which third parties may force RAs to provide documentation or assistance and the obligations RAs have to third parties generally.

The "client of record"

Historically, when agreeing to act as RA, the RA contracted with the relevant company and one or more named individuals or entities as its "client of record", from whom it was required to take instructions – often exclusively. This had no statutory basis but has arisen in practice to ensure RAs have clear instruction and reporting lines. Many BVI companies were formed with the involvement of an intermediary, such as a company formation agent, service provider or a professional advisor, and this was often the client of record.

Perhaps inevitably, problems arose. The client of record was not necessarily a director or shareholder and could be an individual over whom the directors have limited control or influence – for example, an intermediary or a past or present employee or agent of the company. Moreover, if the client of record was an individual, they could get sick, die, or go on holiday. This could leave shareholders (the owners of the company) and directors (in whom management and control is vested by statute) in limbo, without the ability to compel the RA to act.

Occasionally, the client of record may have some interest in delaying the relevant action – for example, where they are affiliated with a party opposed to the transaction. On a recent deal, for example, the client of record was a service provider appointed by investors with an interest in delaying the transaction. That provider no longer wished to act for the company in any capacity and initially refused to take any further action (including to give timely instructions to the RA). The company was in financial distress and the RA needed to make a filing in order for the parties to close the deal and stave-off looming insolvency, so another solution had to be found – and quickly.

Options for directors and shareholders

In part to address such situations, and seemingly with the intent of consigning the client of record concept to the history books, in 2015 the BVI introduced Section 91B into the 2004 Act. It provides that, subject to a company's memorandum and articles (**MAA**), an RA shall:

- act on the instructions of the company's directors if those instructions are set out in a resolution of directors and a copy made available to the RA; and
- recognise and accept the appointment or removal of a director or directors by members of the company.

Unfortunately, the client of record concept has not gone quietly. Some RAs maintain the supremacy of their client of record and may refuse to comply promptly with a Section 91B direction – particularly where the RA remains contractually obligated to take instructions exclusively from its nominated client or in contentious circumstances where the proper identity of the directors and/or members of a company is questionable (for example, where there is a dispute between members). There is no statutory penalty for non-compliance and the effects of non-compliance have yet to be tested in the BVI courts.

If the RA is holding up a transaction, or fails to comply promptly with a section 91B direction, the company may have contractual recourse against the RA. However, most RAs' standard terms include broad limitation of liability and indemnity protections for the RA so such recourse may be limited.

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We often see two scenarios play out where an RA remains recalcitrant or is unresponsive – either:

- the RA maintains the company's original registers and needs to update them (for example, to reflect changes to the members and/or directors) but does not need to make any filings with the Registrar to close the deal; or
- closing the deal is dependent on the RA making a filing with the Registrar.

In the first situation, if the only change is to the directors, there may be no critical issue - a change of directors need not be registered to be effective (although it does trigger filing obligations which may require the position with the RA to be resolved post-closing). Conversely, legal title to shares in a BVI company is generally evidenced by entry of the shareholder's name in the original share register (and a transfer of shares is effective on registration). However, BVI law does not require the original register be maintained by the RA and the directors generally have the power to resolve to maintain the original registers themselves (and then update them). The company is obligated to send copies of the updated registers and a notification of how they are being held to the RA.

Where the RA must make a filing, the best solution may be simply to change RA – such a change may be approved by a resolution of members or, if authorised by the MAA, the directors. It is generally preferable for the existing RA to file to change the RA. However, a BVI legal practitioner can force a change of RA provided certain conditions are met (which largely relate to ensuring adequate compliance information is collected). A forced RA change is typically the quickest method where the existing RA is completely unresponsive; however, time will need to be allowed to complete the compliance process and this can sometimes prove challenging where the company's registers and records have been maintained by an intermediary or the existing RA.

On the deal mentioned above, the RA was faced with the prospect of the company commencing urgent court proceedings for an order to amend the memorandum and articles (while an amendment is generally effective when registered by the Registrar, the court may order that the amendment should have effect from a date no earlier than the relevant resolutions) and potentially against the RA itself if it failed to comply with a Section 91B direction or to confirm that its compliance information on the company was up-to-date. Happily, the situation was ultimately resolved amicably with the RA and their client of record.

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Rights of third parties against RAs

If it can sometimes be difficult for directors of a BVI company to compel their RA to act, it is unsurprisingly almost impossible for a third party to do so. The RA generally has no duty of care, and no obligation to provide any information, to – for example – creditors of the company, shareholders in parent companies, beneficiaries of a deceased shareholder, estranged spouses of shareholders or journalists on a fishing expedition.

There are a few exceptions to this. First, the BVI is signed up to a number of international tax and information exchange agreements and the RA may be required to disclose information to the competent regulator where these apply. Second, in financing transactions involving security over shares in a BVI company, the RA will usually receive an irrevocable direction by the directors and/or client of record authorising and directing it to act on lender's instructions in an enforcement scenario.

Finally, in some circumstances, a BVI registered agent may be compelled by court order to provide information. A *Norwich Pharmacal* order (named after the English case which gave rise to these types of disclosure orders) may be sought against an RA where there is wrongdoing by a shareholder or person affiliated with a company and the RA is held to have – however innocently – facilitated that wrongdoing. This principal was established in the unreported case of *JSC BTA Bank*[1] and recently applied to force an *RA*[2] to provide compliance information regarding a shareholder in one BVI company to a person who was a joint shareholder with that person in another company, which was facing a striking-off.

Final thoughts

Some of the problems outlined above could have been avoided if the issues had been considered when the structure was first established. At the risk of stating the obvious, directors or shareholders of, or third parties dealing with, a BVI company should always take appropriate BVI legal advice. Where such issues do arise, however, there are tools available to get the deal done.

1 *JSC BTA Bank v Fidelity Corporate Services Limited and others.*
2 *Rui Manuel Cabecadas Coelho De Sousa v Harneys Corporate Services Limited.*

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ASIAN LEGAL BUSINESS

BVI

NEW LEGISLATION IN THE BRITISH VIRGIN ISLANDS (BVI) HAS COME INTO FOCUS IN 2018 DUE TO ITS REPUTATION AS THE MOST POPULAR TAX HAVEN. THE RECENT LEGAL DEVELOPMENT OF BVI IS ALSO GEARED TOWARDS REINFORCING THE JURISDICTION'S POSITION AS A PREMIER OFFSHORE FINANCIAL CENTRE.

New anti-money laundering law not welcomed in BVI

BVI, along with the Cayman Islands and Bermuda, will be forced to disclose the ownership of companies based there after the U.K. approved new measures to tackle money laundering, tax evasion and terrorist financing. Former U.K. Prime Minister David Cameron proposed the new measures in 2013 amidst an international wave of political uproar about tax avoidance by large firms and wealthy individuals.

The new measures, announced in May this year, forced the territories to make public the owners of all their registered companies by the end of 2020, which expectedly, triggered backlashes from BVI authorities on the accusations of violating their sovereignty.

BVI is also worried about how the new legislation will affect its position as a financial hub. In the same month the measures were announced, over 1,000 people on BVI marched in protest against the enforced changes in the current transparency legislation.

Currently, BVI has set up registers for the beneficial owners of companies but the relevant information is only disclosed upon request to British law enforcement agencies. The BVI government has not decided whether it would start a legal war with the U.K. According to BVI Finance, the jurisdiction now generates around £3 billion ($3.89 billion) annually in tax revenue for the U.K. and supports around 150,000 jobs.

Relaxed rules on segregated portfolio

Controversial enforcement of new legislations aside, the BVI Business Companies (Amendment) Act, 2018 came into effect on Oct. 1 and repealed the 2004 version. Historically, BVI restricted the use of segregated portfolio company (SPC) structures to regulated funds and insurance companies. Under the changes by the new act, the restrictions are relaxed and the types of BVI companies eligible to use SPC structures are expanded to include nearly all companies.

SPCs are now used in closed-end fund structures, which can assist in the ring-fencing of assets and liabilities. The act also includes a new obligation for SPCs to notify the Financial Services Commission to reinstate their previous terminated portfolios. Under the new act, segregated portfolios of the same SPC can also contract with each other.

Changes to limited partnership

The BVI Partnership Act 2017 was enacted in December last year, an update from the provisions of the 1996 Partnership Act. As the growth in investment fund activities drove up the appetite for limited partnership structures, the new act was adapted to meet market practices and norms.

Under the new act, people can choose to form a limited partnership with or without legal personality. What is unique to BVI law is the ability for residents to publicly file a charge against a limited partnership with legal personality and obtain priority over subsequent charges.

Another feature of the new act that is exclusive in BVI law is that limited partnerships are free to carry out key statutory reorganisation and reconstruction of structures, including to merge or consolidate limited partnerships.