When common met civil

A cross-border analysis of the main issues relating to estate planning for Russian residents with British Virgin Islands companies

KEY POINTS

WHAT IS THE ISSUE?
When a testator resides in a civil-law jurisdiction, but has assets registered in a common-law one, the jurisdictions' legal systems may be in conflict, e.g. regarding local rules for forced heirs and matrimonial shares.

WHAT DOES IT MEAN FOR ME?
Advisors to any individuals holding assets outside their country of permanent residence should be aware of the issues outlined in this article.

WHAT CAN I TAKE AWAY?
Examples of useful estate planning instruments to help mitigate risk where Russian citizens or residents hold shares in British Virgin Islands companies.

Holding assets outside one's country of permanent residence can complicate the generational transfer of wealth, and particular attention is required when the head of the family resides in a civil-law jurisdiction but has holding vehicles incorporated in a common-law one. Different legal systems have their own rules for determining applicable law and competent bodies, along with differing approaches to succession and procedural requirements. In this article, we examine these issues with reference to Russia and the British Virgin Islands (BVI), which follow civil law and common law respectively.

INHERITING HOLDINGS IN BVI COMPANIES

RUSSIAN PERSPECTIVE

Russian conflict-of-laws rules provide that Russian succession law applies in two scenarios:

- over movable property if the deceased resided in Russia; and
- over real estate situated in Russia.

The deceased's nationality, citizenship and domicile are irrelevant. The testator is not permitted to choose the applicable succession law in their will or testament agreement. However, despite these quite simple rules, there may still be a risk of dispute as to which law applies. This is often the case when the deceased in reality resided in a foreign country but retained their registration at a place of residence in Russia.

Russian law provides that the estate comprises the property directly owned by the deceased. As such, if the deceased resided in Russia and the property ownership is structured though a BVI special-purpose vehicle, it is the shares of the BVI company that comprise the movable property to be regulated by Russian succession law. The heirs have six months to accept the estate, and only after that period will the notary issue an inheritance certificate.

In practice, this means that there are no shareholders or persons entitled to communicate with the administrators/directors of the foreign structures whose authorities are confirmed by legal documents.

BVI PERSPECTIVE

When a Russian (or other non-BVI) resident dies holding shares in a BVI company, either absolutely or as an ultimate beneficial owner (UBO) of a nomineeship, BVI conflict-of-laws rules will apply different jurisdictional laws to different questions:

- **The law governing title to assets:** this considers whether a Grant of Probate (or letters of administration) is needed and from where, and which documents are used to transfer assets. The relevant law is the law of the jurisdiction where the assets are situated: BVI law holds that shares in BVI companies are situated in the BVI.
- **The law governing the formal validity of wills:** this considers how a will is executed, and the relevant law is the law of the jurisdiction where the deceased died domiciled.
- **The law governing succession of assets:** this considers who is entitled to the deceased's assets and in what proportions. For movable assets such as shares, the relevant jurisdictional law is the law of the jurisdiction where the deceased was domiciled at death.

The biggest practical impact of these comes from the BVI's law governing title to assets. This requires that the only acceptable proof of an executor's (or administrator's) entitlement to transfer the deceased's assets is a Grant of Probate obtained from the BVI court. The vast majority of BVI-registered agents will require the executor's Grant of Probate before agreeing to register their requested transfer of shares to beneficiaries. A Grant of Probate obtained from most other jurisdictions (including Russia) is insufficient.

Likewise, most BVI nominees will require a Grant of Probate to hold the shares for a new UBO. If they do not request the proof they are entitled to, they would be liable if the requested transfer later turned out to be incorrect and the 'true' beneficiary suffered loss.

Further, until a Grant of Probate is obtained, the executor cannot exercise voting rights, potentially causing quorum and majority issues.

Applicants obtain a Grant of Probate by application to the BVI probate registry (the Registry). Application documents depend on the exact circumstances, but generally include:

- an affidavit by the executor confirming the value of the BVI assets – this can be a rough value because no inheritance tax is payable in the BVI; or
- an affidavit by a lawyer in the deceased's country of domicile explaining why the executor is entitled under that jurisdictional law to administer the assets.

Applicants will also submit an original or authenticated will (if applicable), death certificate and other documents. They must place adverts in a BVI newspaper and make necessary searches at the Registry. BVI probate practice is largely unwritten and subject to frequent change, even after the recent new rule set given in the *Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017*,[1] so it is important to obtain advice from an experienced BVI-based firm that knows the current requirements.

The Registry will typically take three to four months to consider the application and make a Grant of Probate. The length of time will depend on the application's complexity, whether a BVI will is available and whether the firm has provided everything currently required. Once a Grant of Probate is made, the executor instructs the registered agent to transfer the shares to the beneficiaries.

As such, BVI law follows the provisions of Russian succession law if it applies. However, Russian and BVI conflict-of-laws rules use different definitions for determining applicable law, so the risks of conflicts cannot be totally avoided if, for example, an individual with BVI shares has Russian domicile under BVI law but resides in a

third country. Because of this necessity to obtain a BVI Grant of Probate, in addition to Russian documents confirming the heirs' rights, strict estate planning should be employed to reduce the period when the shares remain without proper management.

WILLS AND OTHER ESTATE PLANNING INSTRUMENTS

RUSSIA

Under the general rule of Russian law, an individual is entitled to transfer their estate to any person; the only requirement is to issue a will certified by a notary. However, if the individual has minor or disabled children, an incapacitated spouse or parents, or disabled dependents, such persons, termed 'forced heirs', will inherit regardless of the will's provisions. The spouse also has a matrimonial share in the estate if the assets are held within a community property regime.

Accordingly, in reality a testator's freedom of testation can be quite limited, and when the estate includes shares in a BVI company, one of the main issues is how the Russian notary shall calculate the forced heirs' shares and matrimonial shares. Not all notaries in Russia have the skills to consider foreign assets for these purposes, or to investigate such assets if the heirs do not know which were owned by the testator or cannot confirm title.

The only thing such notaries usually do is issue a 'general' inheritance certificate for foreign property, listing only the heirs and their entitlements without stating the exact assets (such as company names, descriptions of shares, place of incorporation). This brings risk that the property due to the forced heirs will not be calculated properly, and that the foreign assets will become ownerless if the heirs do not have enough information about them.

Meanwhile, Russian inheritance legislation has significantly developed in recent years. From 1 June 2019, spouses will be able to execute a joint testament in respect of their property and thus confirm the matrimonial shares of the estate. Further, the testator will be able to conclude inheritance agreements with any potential heirs and agree with them in advance which items are to be inherited, as well as the rights and obligations of the parties.

BVI

In the BVI, clients choose different instruments depending on whether their priority is to avoid BVI probate on death or have full control over their assets during life.

If the client wishes to maintain their absolute ownership or nomineeship, simple BVI wills are a quick and inexpensive way of speeding up the probate process. Although a Grant of Probate can be obtained with or without a Russian will, the Registry is more comfortable with BVI wills, as the documents are more straightforward and no translation is needed.

A BVI will must abide by the succession law of the client's domicile, including any forced-heirship laws like the ones outlined above.[2]

CONCLUSION

When a testator resides in one jurisdiction with their assets located in another, the succession rules and opportunities of both jurisdictions should be reviewed in order to implement the testator's wishes in the easiest way, and to protect the rights of weaker parties such as forced heirs. During estate planning, it is necessary to consider whether a general will from the testator's residence or domicile jurisdiction is enough, or whether a separate BVI will is required. The answer will require a holistic analysis of the client's particular situation and wishes.

1 bit.ly/2UNRQM6 **2** We also recommend executing the will in accordance with the formal validity laws of the client's domicile, although this is a debated question.




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