Privy Council clarifies BVI company shares are movable property

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If an individual has shares in a British Virgin Islands company but lives in another jurisdiction, what happens to their shares after they pass? Would the shares be considered movable or immovable property?

The Privy Council has confirmed BVI company shares are considered to be movable property. Lord Hodge's judgment in *Al Thani & Anor v Al Thani & Ors* [2024] UKPC 35 is a welcome clarification for offshore and onshore private wealth planners and individuals who hold BVI shares in their personal name.

The judgment clarifies that shares in a BVI company are movable property for the purposes of the law of succession and, consequently, their transfer on death should be determined by the law of the domicile of the deceased.

The Privy Council's role in *Al Thani v Al Thani*

In *Al Thani v Al Thani*, the deceased was domiciled in Qatar and had left a Qatari will. Included within their estate were shares in various BVI companies.

By the time the Privy Council decided the case, the Qatari courts had determined the will was valid as a matter of Qatari law. What the Privy Council was being asked to decide was whether shares in BVI companies are immovable property and therefore had to be dealt with on the death of their owner according to BVI law.

It was not disputed that the Qatari will failed to comply with section 7 of the Wills Act, 1872. This meant that if the shares were to be transferred on death according to BVI law, the will would have been ineffective and the distribution of the shares would have had to comport with BVI intestacy rules.

Movable vs immovable

English private international law (and consequently BVI private international law) treats shares as intangibles and classifies them as movable property. On death, immovable property is transferred according to the law of where it is situated and movable property is transferred according to the law of the domicile of the deceased.

Section 245 of the BVI Business Companies Act, 2004 provides: "For purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company [incorporated in the BVI] is in the Virgin Islands."

The appellants argued that the effect of this section was that BVI law governed not only the transfer of shares inter vivos (between living persons) but also the transfer on the death of their owner. So, by fixing the situs of BVI shares, section 245 deemed shares in BVI companies to be immovable with the result that the BVI court would be bound to apply domestic BVI law of succession (including the Wills Act, 1872), to determine the validity of any testamentary instrument which purported to transfer those shares.

The Board's decision to dismiss the appeal

The Board disagreed with the appellants. Lord Hodge analysed numerous authorities dealing with statutory interpretation. When interpreting any statute, it is the task of the court not simply to interpret the statute literally, but to have regard to its purpose. Looking at the words used in section 245, it was clear that it was directed at the court only and it was also confined to matters of title and jurisdiction. Antecedent provisions in the International Business Companies Act, 1984 (since repealed) used similar language.

What then was the legislature's intention when drafting section 245? Lord Hodge acknowledged that at common law, the situs of the shares of a company was not always the place of its incorporation and may be where the share register is kept or, if there is more than one register, the place where the register on which the shares would be dealt with in the ordinary course of affairs by the registered owner. In the context of BVI companies, whose shareholders are for the most part overseas, there were good reasons for the legislature to fix the situs of shares in BVI companies in the BVI. This provided greater certainty among investors and removed the need for the court to enquire where the principal register of members was located at the time of transfer.

The Board also considered whether the effect of section 245 (bearing in mind its purpose) was to deem BVI company shares to be immovable for the purposes of the law of succession. Lord Hodge determined that such an implication would be "a radical change to the rules of private international law [...]". The effect would be to require non-BVI resident shareholders to create separate wills, one of which would have to be BVI-compliant in order to dispose of BVI shares. It

was "inconceivable" that the legislature would have intended this outcome when it drafted a section with the purpose of providing more certainty. In the absence of clear words, the court cannot assume that the legislature intended to overturn a long-standing rule such as the rule that shares are movable property for the purposes of the law of succession. The appeal was dismissed.

The impact for BVI shareholders and private wealth practitioners

Until this judgment from the Privy Council, it had been common practice for personal representatives of deceased foreign BVI shareholders to apply for a separate grant of probate or grant of letters of administration in the BVI to deal with the transmission of BVI shares in the estate. The judgment in *Al Thani v Al Thani* highlights that separate succession planning in the BVI will not be necessary for foreign shareholders (unless they hold other property in the BVI).

Personal representatives of deceased persons from sixty-seven jurisdictions can apply to have their home grant of probate or grant of letters of administration resealed in the BVI. Resealing foreign grants gives them the same force and effect in the BVI as if they had been granted by a BVI court. The process for resealing is more streamlined than the process for obtaining a new grant, requiring fewer documents to be filed. Resealing a foreign grant will now be sufficient to deal with shares in BVI companies if the foreign law or foreign will governs the transmission of those shares.

Hong Kong is one of the sixty-seven jurisdictions whose grants can be resealed in the BVI according to the Probates (Resealing) Act, 2021.

Alternatively, and particularly in circumstances where the deceased is not domiciled in one of these sixty-seven jurisdictions meaning that resealing is not possible, one may prepare an additional BVI will to cover their BVI assets only. Clients based in the People's Republic of China or Brazil, for example, should consider this option. This will often expedite and simplify the administration of the BVI estate, as the executors of the BVI will can apply for probate in the BVI immediately following death. This avoids the need to wait for a grant of representation of a foreign will to be obtained in the jurisdiction where the deceased was domiciled. For further information, read our At a Glance Guide to BVI Wills for non-doms.

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If you have any questions surrounding the probate process in the BVI, contact any of our probate practitioners across our worldwide team.

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