Reporter
Issue 04 (2017)

Arbitration Review

Extending your reach to the "invisible parties" to the arbitration agreement

Introduction

Aggrieved claimants may sometimes seek to extend their claims not only to the company that agreed to arbitrate disputes – but also to that company's shareholders or ultimate controlling person(s). Such efforts are usually driven by commercial realities – while the company may be insolvent, or asset-light and liability-heavy, the shareholders or ultimate controlling person(s) may have substantial assets. Even if these parties have not signed the arbitration agreement in question, it may still be possible to join them by "piercing the corporate veil" of the signatory company.

Singapore courts have recognized a tribunal's authority to join shareholders to an arbitration by piercing the corporate veil. In fact, Singapore courts have already enforced awards against parties who did not expressly sign the arbitration agreement. However, these cases have only involved awards rendered by tribunals seated outside of Singapore. Nonetheless, the Singapore courts reasoned that so long as the supervisory court of the seat has not set aside the award, Singapore courts will be inclined to enforcing the award.

However, insofar as arbitrations seated in Singapore are concerned, there appears to be no reported decision where the Singapore courts considered the issue of whether to set aside an award in which the arbitral tribunal had exercised its power to pierce the corporate veil. Recently, the Delhi High Court in *Sudhir Gopi vs Indira Gandhi National Open University* O.M.P. (COMM) 22/2016, engaged in this analysis – ultimately deciding to set aside an arbitration award because the Delhi High Court found that the tribunal did not have sufficient grounds to pierce the corporate veil in order to join the shareholders in question.

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IN THIS ISSUE

Below, we discuss the factors a Singapore court may consider when deciding whether to set aside an award in which the arbitral tribunal had exercised its power to pierce the corporate veil. Notably, the Singapore court's considerations may differ in cases where the tribunal has joined shareholders (on the grounds of the "alter ego" doctrine) versus when it has joined a company (on the grounds that the company is part of a "group of companies").

Ultimately, while a Singapore court may uphold an award against a non-signatory shareholder, it may choose to set aside an award against a non-signatory company.

A. Joining non-signatory shareholders or individuals

Subject to the precise terms of the arbitration agreement, Singapore courts recognize that tribunals have jurisdiction to "pierce the corporate veil" and join parties who have not explicitly signed an arbitration agreement, on the basis of the *alter ego* doctrine.

1. Who can be considered an alter ego of the signatory?

"Piercing the corporate veil" refers to the situation where the company's separate legal personality can be disregarded, and the individual shareholders can be made personally liable for the acts of the company. When the company is used as an extension or *alter ego* of its controller to carry out his own business, the corporate veil can be pierced so as to impose liability on the controller under the contract and the arbitration agreement.

In Singapore, both courts and arbitral tribunals have the power to join companies or individuals who are not formally signatories to the arbitration agreement, if they are involved in some material way in the underlying transaction or project. In fact, non-signatories may be considered a party to the arbitration *via* piercing of the corporate veil on the basis of the *alter ego* doctrine.

In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 (Aloe Vera of America), the arbitration agreement was entered into between Aloe Vera of America Inc (AVA) and Asianic Food (S) Pte Ltd (Asianic). However, it was the shareholder of Asianic, Mr Chiew Chee Boon (Mr Chiew) who had signed the contract containing the arbitration agreement on behalf of the Asianic. A dispute arose between AVA and Asianic, and AVA commenced arbitration proceedings against both Asianic and Mr Chiew.

Here, the arbitral tribunal found that Mr Chiew was "*at all material times the president, a director and shareholder of Asianic and that Asianic was undercapitalised, failed to honour corporate formalities and was the alter ego of Mr Chiew",* and rendered a final award ordering both Asianic and Mr Chiew to pay AVA damages. When AVA sought to enforce the arbitration award in Singapore, Mr Chiew sought a declaration that he was not a party to the arbitration agreement.

The Singapore High Court found that whether a person is an *alter ego* of a company ***is an issue which can in an appropriate case be decided by arbitration***. In holding that Mr Chiew was a party to the arbitration agreement, the arbitrator was acting within his jurisdiction, as it was an accepted principle of arbitration law that an arbitral tribunal has jurisdiction to determine whether a particular person is party to an arbitration agreement. In this regard, if the tribunal had properly decided its jurisdiction under the law of Arizona, which was the governing law of the arbitration agreement, and the supervisory court in Arizona did not overrule the tribunal's finding, then the Singapore Court which is called to enforce the award is not entitled to look into the merits of the case. The Singapore High Court eventually upheld the assistant registrar's decision to grant AVA leave to enforce the arbitration award.

2. What laws apply to determine whether the non-signatory is an alter ego of the signatory?

Generally, the party seeking to join shareholders of a company who are non-signatories to the arbitration agreement has to demonstrate that piercing of the corporate veil will be appropriate under the laws of incorporation of the signatory company. However, the issue is that the definitions of *alter ego* vary materially across different jurisdictions, and are applied in various contexts. Thus, this raises an additional factor which parties should take into account before entering into arbitration agreements.

Some jurisdictions appear to be more open to piercing the corporate veil, while other jurisdictions appear to be less willing to do so. For instance, U.S. Courts appear to have been more prepared than courts in other jurisdictions to apply an *alter ego* analysis, so as to subject a non-signatory to an arbitration agreement to the arbitration proceedings.

In contrast, the English Courts appear to have been more hesitant to apply the *alter ego* doctrine in a similar context. This difference was recognised in the U.S. case of *FR 8 Singapore Pte Ltd v Albacore Maritime Inc and others 794 F. Supp. 2d 449* where the plaintiff, *FR 8 Singapore Pte Ltd* (FR 8), commenced an action against the defendant, *Albacore Maritime*, and three other non-

signatories to the arbitration agreement, to compel the non-signatories to arbitrate FR 8's claim in London as alter egos of Albacore Maritime.

In deciding whether to grant FR 8's motion, the District Court of New York noted that the U.S. federal common law of piercing the corporate veil is more favourable compared to English law. Nonetheless, the Court found that U.S. federal common law was not applicable as the contract between FR 8 and Albacore Maritime expressly provided for English law as the choice of law. Ultimately, the Court decided that based on English law, there were no grounds for the corporate veil to be pierced so as to compel the non-parties to arbitrate the FR 8's claim as alter egos of the Albacore Maritime. FR 8's motion was dismissed accordingly.

B. Joining a company under Group of Companies doctrine

Parties may also attempt to join an associated company that is a non-signatory to the arbitration agreement under the group of companies doctrine.

It is common for corporate organizations to structure their business by incorporating numerous subsidiary companies that share a common source of control. In such cases, it may be possible to argue that the companies function as a "group of companies" or a "single economic entity". While arbitral tribunals seem to have the power to pierce the corporate veil so as to join shareholders to the arbitration, such powers do not extend to situations involving a group of companies thought to be a single economic entity.

Unlike the situation of piercing the corporate veil, the Singapore Courts do not recognise that arbitral tribunals have the jurisdiction to join associated companies to the arbitration agreement. In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court found that the single economic entity concept has very little traction in the international arbitration community, especially outside jurisdictional issues (such as whether a company within the group is part of the group for the purposes of jurisdiction). Similarly, in the English case of *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm), the English Court rejected the "group of companies" doctrine, and found that the tribunal had no jurisdiction to award damages suffered by the group companies who were not parties to the arbitration agreement.

One of the possible explanations why the courts hesitate to join associated companies under the doctrine of group of companies may be because the doctrine requires the arbitral tribunal to discern the *subjective* intentions of the parties, and enquire as to whether parties intended for the scope of the arbitration agreement to extend to the associated company. This seems to be stretching the notion that an arbitral tribunal has the power to decide its own jurisdiction a step too far.

C. Will Singapore courts ultimately set aside awards against a non-signatory party?

Singapore is seen as a pro-arbitration jurisdiction. As such, party autonomy plays a central role in any tribunal or court's consideration. The starting point of all arbitrations is an agreement to arbitrate, and a party cannot be forced to arbitrate against its will or without its consent. In fact, this was recently affirmed by the Singapore Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, where the Court held that an arbitral tribunal's jurisdiction is based on the consent of the parties, as manifested in the arbitration agreement.

While it has been well-established that Singapore courts are deferential to the courts of the place of the seat of arbitration when enforcing an award, it remains to be seen whether Singapore courts will take a different approach when deciding on whether the arbitral tribunal should pierce the corporate veil so as to join a non-signatory party to the arbitration, when Singapore is the seat of the arbitration.

D. Implications for Businesses

If you are being joined as a party to the arbitration agreement, please seek legal advice. This is to ascertain your rights and position and address the issue of whether the arbitral tribunal indeed has jurisdiction to allow such joinder, despite the lack of your express consent. As explained above, whether the arbitrator has jurisdiction to pierce the corporate veil will depend on the laws of incorporation of the signatory company. This may in turn raise complex choice of law issues. If an award has already been rendered against you even though you are a non-signatory to the arbitration agreement, it may be possible to set aside the award or challenge the enforcement of the arbitration award.

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If you intend to join a party to an arbitration that has not explicitly signed the arbitration agreement, it is prudent to consider whether (a) the laws of incorporation of the company being joined would support such a position and (b) whether the laws of the seat of arbitration support the position that arbitral tribunals have the jurisdiction to pierce the corporate veil.

Dentons Rodyk has a host of experts in arbitration and associated litigation – including enforcement of awards and setting aside proceedings, and we are available to answer any questions you might have regarding this and other issues.

Dentons Rodyk acknowledges and thanks associate Tan Ting Wei for her contribution to the article.

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Business Bulletin

From off-shore to on-shore: Moving foreign entities to Singapore under the inward re-domiciliation regime

Benefits, requirements, and tax considerations when transferring a foreign entity to Singapore

Increasingly, companies and individuals are reconsidering their use of "offshore" corporate entities, in light of a growing international push for transparency and exchange of information amongst jurisdictions for tax purposes. Additionally, public scandals, such as Panama Papers leak, have brought added scrutiny to the motives and reputations of companies using offshore entities.

As of 11 October 2017, Singapore has adopted a regime which allows for a greater flexibility to re-organise corporate groups for regulatory, strategic or organisational purposes. In essence, it allows foreign corporate entities to transfer their company's registration to Singapore and become a Singapore company limited by shares – under the "*Inward Redomiciliation Regime*" *(the Regime)*, under Part XA of the Companies Act of Singapore (sections 355 to 364A).

Re-domiciled entities may enjoy certain benefits, including more favourable tax treatment and access to Singapore's developed business environment. However, this Regime may not extend to, or benefit, all applicants.

Below, we explain (A) some of the benefits and implications of inward re-domiciliation; (B) requirements to transfer registration; and (C) the tax framework and considerations under the Regime.

A. Potential Benefits and Implications of the Inward Re-domiciliation Regime

This Regime stands as an alternative to setting up a business presence in Singapore through registering a branch or subsidiary, allowing a re-domiciled foreign corporate entity to retain its employees, corporate history, and branding. Additionally, as a Singapore company, the re-domiciled entity would need to comply with local legislation, including the Companies Act of Singapore.

Companies and individuals considering re-domiciling foreign corporate entities (*FCEs*) to Singapore, may enjoy several benefits under the Regime and Singapore's laws and business environment.

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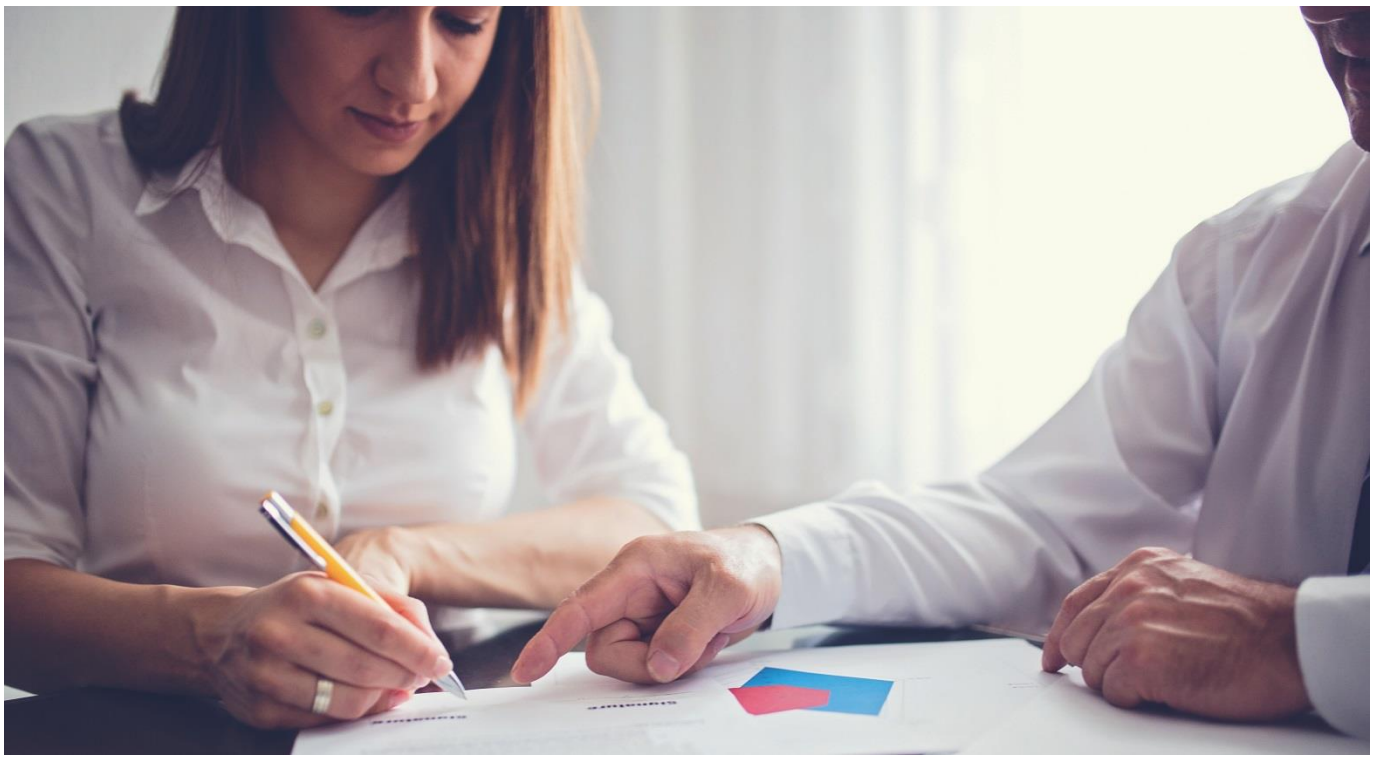

1. **FCE's Public Image:** the FCE's public image may be significantly enhanced by choosing to operate in Singapore, a reputable jurisdiction with a large network of double tax treaties, rather than an offshore entity. Traditionally considered "tax havens," offshore jurisdictions are losing their lustre due to damaging scandals, such as the Panama Papers leak, and increased international scrutiny, leading to robust information-exchange regimes targeting tax evasion.

   Global tax transparency has been especially buttressed by the OECD's Base Erosion and Profit Shifting (BEPS) project and exchange of information regime, along with the Common Reporting Standard (CRS) and the requirements for country-by-country reporting (i.e., CbCR) for transfer pricing purposes.

2. **Tax Benefits under the Regime:** the FCE may benefit from tax credits if its originating jurisdiction imposes an exit tax on its unrealised profits, and those profits are also taxed in Singapore. The applicability of these benefits is discussed further in **Section C**.

3. **As a Singapore company, the FCE:**

   a. Is not subject to capital gains tax payable in Singapore;

   b. Is not subject to restrictions on foreign ownership of business;

   c. May easily repatriate its dividends;

   d. May benefit from various government grants and initiatives; and

   e. May operate in an attractive business environment – including: access to an educated workforce, well-planned infrastructure, a robust financial and intellectual property ecosystem, thriving capital markets, and a stable socio-political environment.

While this is not an exhaustive list of potential benefits and implications of an FCE's re-domiciliation under the Regime, Dentons Rodyk is happy to help you understand further implications based on your circumstances.

B. Requirements to Transfer Registration of an FCE

Under the Regime, FCEs can apply to the Accounting and Corporate Regulatory Authority of Singapore (ACRA) for re-domiciliation. The Companies (Transfer of Registration) Regulations 2017 (Regulations) set out the minimum requirements to apply for transfer of registration.

Requirement	Description
Size Criteria	The foreign corporate entity (the FCE) must satisfy any 2 of the following: • Value of its total assets exceeds $10 million; • Annual revenue exceeds $10 million; • Has more than 50 employees. If the FCE is a parent, the size criteria will be assessed on a consolidated basis. Where the FCE is a subsidiary, the size criteria will apply on a single entity basis. The subsidiary will also meet the criteria where its parent (Singapore incorporated or registered in Singapore through a transfer of registration) meets the size criteria.
Solvency Criteria	As at the date of application for registration: • There is no ground on which the FCE could be found to be unable to pay its debts; and • The value of its assets is not less than the value of its liabilities (including contingent liabilities). During the period of 12 months: • After the date of application for registration, the FCE is able to pay its debts as they fall due; and • After the date of winding up (if the FCE intends to wind up within 12 months after applying for transfer of registration), it is able to pay its debts in full within this period.
Laws of the Place of Incorporation	The laws of the FCE's place of incorporation: • Must authorise the transfer; and • Must be complied with by the FCE in relation to the transfer of registration.
Policy Considerations	The application for transfer of registration must not be intended to defraud FCE's existing creditors and is to be made in good faith.
Other Requirements	There are other minimum requirements for example the FCE is not under judicial management, not in liquidation nor being wound up etc.

The FCE should consult counsel in its current jurisdiction if (a) there is any criteria to be met or if there would be any objections or issues if it were to transfer its incorporation to another jurisdiction; and (b) if it has met any such criteria or resolved any such issues.

When re-domiciling, there may also be tax and stamp duty implications for the FCE. The FCE should understand how the transfer will be treated for tax and stamp duty purposes in the home country and assess whether they are prepared for the consequences, in addition to the tax implications in Singapore, further discussed in **Section C**.

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C. Tax Framework and Considerations under the Regime

An important issue to consider when deciding whether to transfer the FCE's registration, is the tax treatment of the re-domiciled company. We highlight that the tax considerations arise not only in Singapore but also in the jurisdiction of the FCE's place of incorporation.

1. Tax Framework under the Regime

The tax treatment of the re-domiciled FCE is set out in the proposed new sections 34G and 34H of the Income Tax Act (Cap. 134, Rev. Ed. 2014). The provisions specify the tax treatment of certain items of expenditure incurred, or assets acquired by a FCE that has never carried on any trade or business in Singapore before the date of registration.

Furthermore, the new section 34H provides for a tax credit to be given to a re-domiciled company if its originating jurisdiction imposes an exit tax on its unrealised profits, and those profits are also taxed in Singapore. This is subject to the approval of the Minister and the conditions upon which the tax credit is to be allowed.

2. Tax Considerations under the Regime

The Regime may be most suitable for foreign corporations that already have a presence or operations in Singapore (for example a branch), or foreign group companies that want to move their holding entities to Singapore. However, the Regime may not be suitable for all FCEs with an existing active business outside of Singapore.

In addition, there are various tax considerations one should have regard to before deciding whether registration should be transferred. As mentioned above, there may be tax implications in the originating jurisdiction arising from the transfer. Aside from stamp duties, there may also be capital gains tax or exit taxes in the originating jurisdiction.

D. Conclusion

This Regime provides an added option for FCEs to shift base to, or set-up in, Singapore. A foreign corporate that has grown in revenue and size in its country of origin may wish to consider re-domiciling the parent entity, subsidiary or whole group to Singapore to enjoy several benefits of being a Singapore-domiciled company as set out above.

Dentons Rodyk is well positioned to advice any foreign entity considering a move to Singapore on the benefits, requirements and process if any assistance is required (including relevant filings with ACRA).

If you wish to speak to us on any of the above, or require our assistance on the same, please do not hesitate to contact the persons below.

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Venture Capital fund managers may begin operations in record time in Singapore

New MAS regulations reduce the qualifying criteria for venture capital fund managers

Although a venture capital fund may be prepared to invest in a new country, lengthy requirements to set up operations may risk the loss of valuable business opportunities. In Singapore, however, the criteria for operating a venture capital (VC) fund have been significantly simplified by the Monetary Authority of Singapore (the MAS), allowing VCs to set up more quickly.

The new regulatory regime, in place since 20 October 2017, is a response to the sustained surge in VC fundraising in Singapore, with venture-investments totalling US$725.3 million in the second quarter of 2017 alone. This not only reflects the increasing interest in the region's start-ups and incubators, but also the MAS's vision of ensuring that Singapore remains an attractive base for VC fund managers.

Below we describe (A) the key changes to the qualifying criteria for VC fund managers, (B) qualifying criteria for VC funds, (C) risks and benefits associated with the new regime and (D) the next steps.

A. Key changes to the qualifying criteria for VC fund managers

The new regulatory regime shortens the authorisation process for VC fund managers while maintaining certain baseline thresholds. We note that the regime for other categories of fund managers remains unaffected. The key changes are as follow:

	Criteria for fund managers in general	New qualifying criteria for VC fund managers
Experience	Directors and representatives must have at least 5 years of relevant experience in fund management.	No minimum experience required.
Capital Requirements	Ranging from S$250,000 to S$1,000,000.	No minimum capital requirements.
Business Conduct	Onerous requirements in relation to custody, valuation, reporting, mitigating conflicts of interest, disclosure, etc.	No business conduct requirements.

Although they have reduced the traditional qualifying criteria, the MAS is nevertheless maintaining oversight of:

1. The existing fit and proper criteria with which to assess the individual's experience and qualifications; and
2. The existing anti-money laundering safeguards

both requirements of which are described in greater detail under the Securities and Futures Act of Singapore.

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B. Qualifying criteria for funds

To qualify under this new regime, the VC fund manager must manage funds that meet the following characteristics:

1. Invest in business ventures that are not listed on a securities exchange;
2. Invest at least 80% of committed capital in securities which are directly issued by start-ups which are no more than 10 years old;
3. Interests in these funds are not available for new subscriptions after the close of fund-raising, and can only be redeemed at the end of the fund life (i.e. close-ended funds); and
4. Are offered only to accredited and/or institutional investors.

C. Benefits & risks

Some benefits of the new regime include:

1. **Cost-efficient incorporation process**: A VC fund manager who wishes to start a VC fund will no longer need to satisfy the experience, capital and business conduct requirements (as stated above). This will result in a more cost-efficient and streamlined process from the incorporation of the fund manager, the fund company and all the way to the actual deployment of funds into the start-up.
2. **Broader accessibility**: The Regime may also encourage more entrepreneurs and would-be fund managers to start VC funds since they will not be daunted by the need to appoint several service providers (i.e. custodians, valuation agents, etc.) prior to launching their fund.

The lower risks posed by VC fund managers, given their business model and sophisticated investors base, justifies reducing their regulatory obligations. To safeguard the standards of integrity in the industry, however, the MAS will still retain regulatory powers to oversee VC fund managers.

D. Next steps

VC fund managers will need to apply to the MAS to hold a capital markets services licence as a VC fund manager in order to qualify or transit to the simplified regime.

Our Investment Funds team is recognized for helping our clients set up VC funds quickly and efficiently in Singapore. If you have any questions about these new requirements and how they may apply to you, please call or e-mail us.

Dentons Rodyk acknowledges and thanks senior associate Vyasa Arunachalam for his contribution to the article.

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Litigation Brief

When is it illegal to hold private and public property interests in Singapore?

Avoiding legal issues around concurrent ownership of private property and HDB flats

Family or friends jointly investing in real property often begin with the best intentions. However, without clear agreements, these deals may end up in lengthy (and costly) disputes. Further complications may occur especially if one of the parties owns an HDB flat.

Dentons Rodyk has twice successfully represented a property owner against his younger brother's attempt to divest him of his legitimate property interests. Most recently, *in Cheong Kok Leong v Cheong Woon Weng* [2017] SGCA 47, the younger brother filed an appeal meant to unravel an agreement he had reached with the elder brother.

The elder brother had agreed to invest SG$200,000 towards the purchase of a private residential property, and for the property to be registered under his younger brother's name. In an earlier case, the High Court had already recognized the elder brother's beneficial interest in the private property, even though he was not the registered owner.

In the appeal, however, the younger brother claimed that it was entirely illegal for the elder brother, as the owner of an HDB flat at the time, to have invested in the private residential property. On this basis, the younger brother sought to have the agreement with the elder brother set aside. Regardless, the Court of Appeal ruled conclusively in favour of the elder brother – not only could he enforce his beneficial interest, but it was also not illegal for him to invest in a private property while owning an HDB flat.

Below, we illustrate how your property interests may be affected as a result of owning a private residence and an HDB flat in Singapore.

A. Present scenario of "illegal" concurrent property ownership

In the present case, the brothers invested in a condominium unit as agreed co-owners and equal partakers in any sale proceeds. But at the time, the elder brother owned an HDB flat – not knowing fully his legal position, he opted to be a beneficial instead of registered co-owner of the condominium unit, which was ultimately registered in the younger brother's sole name. The Court **enforced** the elder brother's beneficial interest in the private property.

Attack on elder brother's interest	The Court's ruling
• The elder brother was accused of illegally circumventing a law which grants HDB the power to compulsorily acquire the HDB flat of an owner who acquires an interest in a private property.	The Court found difficulty in seeing how it was illegal to merely complicate the efforts of HDB to re-acquire an HDB flat of an owner subsequently acquiring an interest in a private property.
• Allegedly, the elder brother deliberately excluded his name from the title to the private property to avoid being subject to HDB's power to acquire his HDB flat.	Nevertheless, any alleged illegality would have been "attached" to the HDB flat. His interest in the private property remained "untainted" by the illegality, if any.

As an HDB owner co-investing in private property or *vice versa*, consider if any illegality might potentially bar you from enforcing a sale, a right to rental proceeds, evicting a non-owner or retaining ownership of the HDB flat, amongst other interests you may hold in the HDB flat.

B. Other potential scenarios of concurrent property ownership

In another potential scenario, a Friend and his Buddy may seek to co-invest in a condominium unit which they intend to rent out under the home rental service "Airbnb" and to split the proceeds equally.

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However, Buddy, a newly-wed, is unsure if his interest in the condominium unit will affect his eligibility to apply for an HDB flat. They register the condominium unit in Friend's sole name. If a dispute arises, Buddy **may consider enforcing** his interest in the condominium unit, but **may be concerned** if any interest acquired by Buddy in an HDB flat is enforceable.

Potential disputes	Buddy's possible options
Buddy and Friend disagree over ongoing renovations in the condominium unit and Friend wishes to sell the unit.	Buddy may consider enforcing his interest in the unit to resist the sale.
Buddy's HDB flat application is denied as a private property owner may not buy a new HDB flat unless the private property is sold at least six months prior.	Buddy may consider selling his interest in the condominium unit and in order to apply for an HDB flat six months later.
Buddy's application to co-own an HDB flat with Wife is approved. They eventually divorce each other and Wife claims sole entitlement to the HDB flat sale proceeds.	Buddy may face potential difficulties in relying on his interest in the HDB flat to assert his entitlement to the HDB flat sale proceeds, given that he also holds beneficial interests in a condominium.

Conclusion

The potential ripple effects of concurrent property ownership may jeopardise your right to your HDB flat or to material sums of money relating to properties you own. In the present case, Dentons Rodyk, acting on behalf of the elder brother, successfully deflected the younger brother's "illegality" attack. However, steps should always be taken pre-emptively to ensure your home and personal finances do not hang precariously in the balance.

Dentons Rodyk acknowledges and thanks Audrey Thng for her contribution to the article.

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Property Notes

Establishing a chain of title: Leveraging blockchain for the real estate industry

Establishing a good title and guaranteeing speedy acquisition of real estate is of paramount importance to investors, funds, and real estate developers. For example, if salient information on prior encumbrances, easements and restrictive covenants is not easily obtainable, land ownership disputes may increase transaction risks significantly.

Uncertainty in property ownership globally may also be responsible for the loss of up to US$9.3 trillion in value. This uncertainty further hampers a party's ability to lend or borrow against the property. Most of this "dead capital", a term coined by Peruvian economist Hernando de Soto Polar, is primarily located in emerging economies. Land registries powered by blockchain technology may possibly bring this lost value into the mainstream economy, provided the information that is fed into the system is first verified and free from disputes.

Furthermore, in economies with reliable land registries, such as Singapore, the application of "smart contract" technology on a blockchain platform to automatically transfer land ownership upon certain conditions being met, could also substantially enhance its real estate sector. Transactions could be carried out much more quickly with fewer intermediaries, and potentially result in more secure ownership records.

While some cities are moving quickly to adopt blockchain technology, such as Dubai (UAE) and Andhra Pradesh (India), others have adopted a wait-and-see approach. In Singapore, the financial services sector has been quick to begin testing the applications of blockchain technology – and the real estate sector may not be far behind.

Below, we (A) briefly explain what makes blockchain technology particularly useful for land registries, (B) discuss some ways in which this technology is being implemented in various jurisdictions, and (C) explain expected benefits and challenges when implementing this technology.

A. What is blockchain and how is it relevant to land registries?

A blockchain is a ledger (i.e., record book) in which a string of transactions are recorded in "blocks" and "hashes". Any changes to property ownership in the land registry would be recorded in a "block" which contains a public timestamp. It would be impossible to modify an existing entry without modifying every subsequent entry that was made in that ledger, due to the connecting "hashes".

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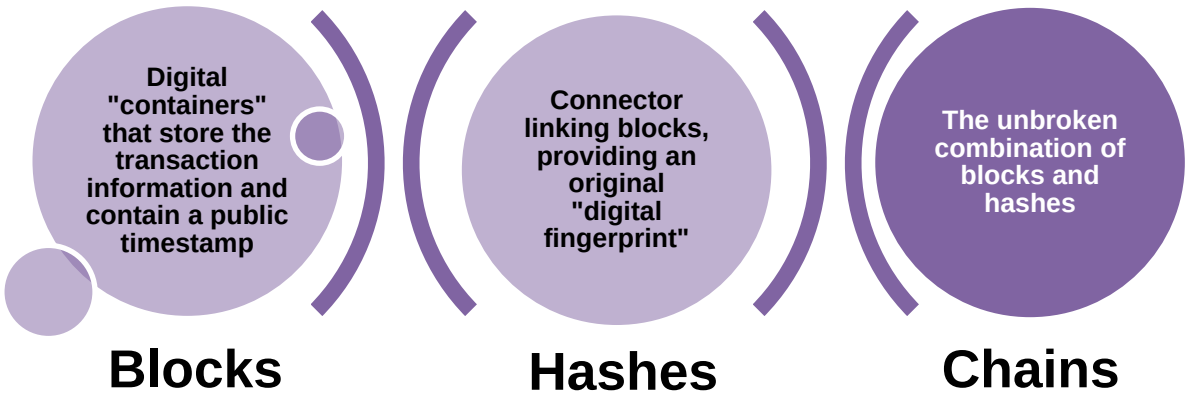

This would ensure an increased security of title, which would be highly valuable, especially in developing jurisdictions. This in turn will make property investment in such jurisdictions even more attractive to investors.

The following features of blockchain technology are especially helpful in preventing fraud in a land registry:

1. **Sequential:** To perform a fraudulent transaction, all the subsequent blocks in the chain must be re-written, not just the block denoting the target transaction. Any attempted modification would be easy to detect.

2. **Unalterable:** The information stored in each block exists in a permanent and unalterable state. A block cannot be added to a chain of blocks without validation through complex algorithms and peer-to-peer consensus.

3. **Decentralized:** The blockchain exists as a distributed ledger that constitutes a publicly-accessible database where all users possess an identical copy. In theory, no one single or central database exists. Consequently, a single user (i.e. the database controller) is prevented from fraudulently and unilaterally manipulating the data.

Furthermore, when combined with "smart contract" technologies, blockchain-based land registries may significantly reduce the cost and time required to buy and sell real estate. "Smart contracts" are essentially electronic contacts embedded in the blockchain that would cause certain actions to automatically occur (e.g. the release of funds) when certain obligations in a contract are met. The use of smart contracts in real estate is a significant topic that merits discussion in a separate article.

B. How are various jurisdictions using blockchain for their land registries?

1. India

In October 2017, the government of Andhra Pradesh in India teamed up with a Swedish start-up, ChromaWay, to create a land registry based on a blockchain system for its new city of Amaravati. This platform will incorporate blockchain technology with next-generation database infrastructure, while allowing users to search through property records using a conventional search engine.

2. Dubai

In October 2017, Dubai announced that it would migrate its entire land registry on a blockchain system which would record all real estate transactions as well as lease registrations.

An additional feature of Dubai's blockchain system is that it also aims to connect these transactions and lease registrations with the Dubai Electricity and Water Authority and the telecommunications system and various property related bills. For instance, this system will maintain a tenant database which contains information such as Emirates Identity Cards and residency visas. This system would allow tenants to make payments electronically without having to write cheques.

3. Georgia

In January 2017, Georgia announced that it would be migrating its land registry onto a blockchain system. The land registry interface would remain the same as most of the changes are intended to be made on the back end; the key difference being an increased confidence in Georgia's land registry.

4. Sweden

Since June 2016, the Lantmäteriet (Sweden's land registry authority) has been experimenting ways to record property transactions on a blockchain, with the intention of saving Swedish taxpayers over €100 million a year by eliminating paperwork, minimising fraud, and accelerating transactions.

C. What are some challenges to implementing blockchain?

Developing countries with high growth potential would especially benefit from widespread use of blockchain technology in their land registries. However, governments face some common hurdles in attempting to implement these technologies.

1. Digitisation and accuracy

Before blockchain technology can be applied to land registries, land titles must first exist on digital platforms and not in manual records. For some jurisdictions, the process of digitisation may take time.

Further, in certain complex cases, historical records for a certain property may date back over many years (e.g. historical easements which could be recorded under the deeds system), and it may take a long time before such information is digitised.

Separately, given that blockchain technology merely ensures authenticity, not accuracy, bona fide errors while digitising the records (e.g., human error) may still occur even though the title itself is genuine.

2. Property ownership disputes

Ownership of titles registered onto the system must first be verified and free from disputes. This is something which may not be immediately feasible in developing jurisdictions where the courts may have backlogs in resolving ownership disputes.

3. Awareness and regulation

Given the pace of technological development, the difficulty may not be implementation but, rather, awareness. Legislators will have to consider how to ensure the accuracy of a database hosted on multiple servers, as well as how to regulate individuals charged with managing the database. In order for such change to gain support, the community will also have to be educated.

Conclusion

Notwithstanding the challenges facing its implementation, blockchain has immense potential to make property investment in both developed and developing jurisdictions even more attractive.

Will Singapore soon leverage blockchain technology to transform its land registry?

The Singapore Land Authority's (SLA) Torrens system, which guarantees an indefeasible title for properties which are included in the register, is known worldwide to be extremely reliable and accessible.

Given the SLA's constant pursuit of advancement, it is not inconceivable that Singapore may harness blockchain technology for its land registry in the near future, to even further enhance what is already a very reliable system. If so, coupled with the potential of smart contracts hosted on a blockchain system, the Singapore real estate sector may well look forward to yet another revolution.

Dentons Rodyk acknowledges and thanks David Lui for his contribution to the article.

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Regional Report

Practical tips for maintaining a list of “registrable controllers” in Singapore: What Japanese companies should know

Executive Summary

Japanese companies, branches, and subsidiaries incorporated or registered in Singapore may face novel challenges when complying with the new requirement to maintain a register of “registrable controllers”. Certain companies are exempted from this new requirement. (Refer to Fourteenth and Fifteenth Schedule of the Companies Act (Chapter 50) of Singapore)

While the register will not be publicly disclosed, it must be kept at either the company’s registered office in Singapore, or the registered filing agent’s registered office, and disclosed to the relevant authorities upon request. The grounds justifying disclosure are set out in the law and may involve investigations related to money laundering and terrorism funding. Non-compliance attracts a fine of up to S$5,000.

The requirements to be considered a “registrable controller” are somewhat vague and, consequently, compliance with the requirement could be onerous for companies. Companies should keep the following guidelines in mind:

- Registrable controllers include not only substantial shareholders, but also persons who are directly or indirectly exercising significant influence or control over a company.
- A representative director of a Japanese company who has individual and independent decision-making and executive power under the Companies Act of Japan may be considered a registrable controller of a Singapore wholly-owned subsidiary – in particular if he has the power to significantly influence, directly or indirectly manage, and/or control the Singapore subsidiary.
- A retired founder of a family-owned holding company in Japan may also qualify as a registrable controller even if he is not a director, is acting as a non-executive director, is a minority shareholder, or does not even hold any shares. The relevant question is whether the individual retains significant influence over the decision-making of the company, branch or subsidiary registered in Singapore.

The company must identify individuals who are reasonably believed to be registrable controllers, notify these parties of their status, and obtain their confirmation that they are indeed registrable controllers. The company must then record the particulars of these registrable controllers – including their full name, residential address, nationality, date of birth, and the date when they became a registrable controller. The person receiving said notice has 30 days to respond to the request and must also identify any other registrable controller besides himself/herself.

A new Singaporean company, subsidiary or branch must keep a register of its registrable controllers within 30 days from its incorporation or registration. Existing companies had 60 days after 31 March 2017 to establish the register. Not only must new registrable controllers be added to the register, but it is also necessary to record the date on which a registrable controller ceased his or her control.

Accordingly, the register of registrable controllers must be updated regularly during the post-incorporation period. For example, a newly-established Japanese company will often name a temporary director in Singapore during the incorporation phase, until the employment pass (EP) for the resident director (e.g., a Japanese expatriate, relocating to Singapore) is approved. The resident director will be confirmed upon EP approval and the capital injection to the new Singapore company may also follow thereafter – leading to further changes to the board and shareholders, all of which must be reflected in the register.

Registrable controllers must notify the company of a change in particulars. If this notification does not take place, but the company has reasonable grounds to believe the change has occurred, it must notify (in the prescribed form) that registrable controller to confirm if the changes had indeed occurred. Once the changes are confirmed by the registrable controller in question, the company must update the register of registrable controllers within 2 business days. Given that the timeline is rather short, companies must be vigilant of updating the register promptly.

Challenges may arise when obtaining the particulars of a registrable controller in a timely manner. For example, registrable controllers residing in Japan may not be aware of the legal requirements in Singapore, and may hesitate to provide what they consider to be sensitive information. Additionally, they may not be conversant in English or may be difficult to contact directly. Other delays could arise when translating notification documents, supporting documents, and responses from Japanese into English (and vice-versa).

Japan-based staff should be prepared to liaise closely with Singapore-based managerial and administrative staff, the company secretarial agent in Singapore, and the registrable controllers in Japan. Furthermore, Singapore-based staff should understand these new requirements in depth, work to facilitate communication, and provide close guidance to registrable controllers to ensure the register is completed within the prescribed timeframe.

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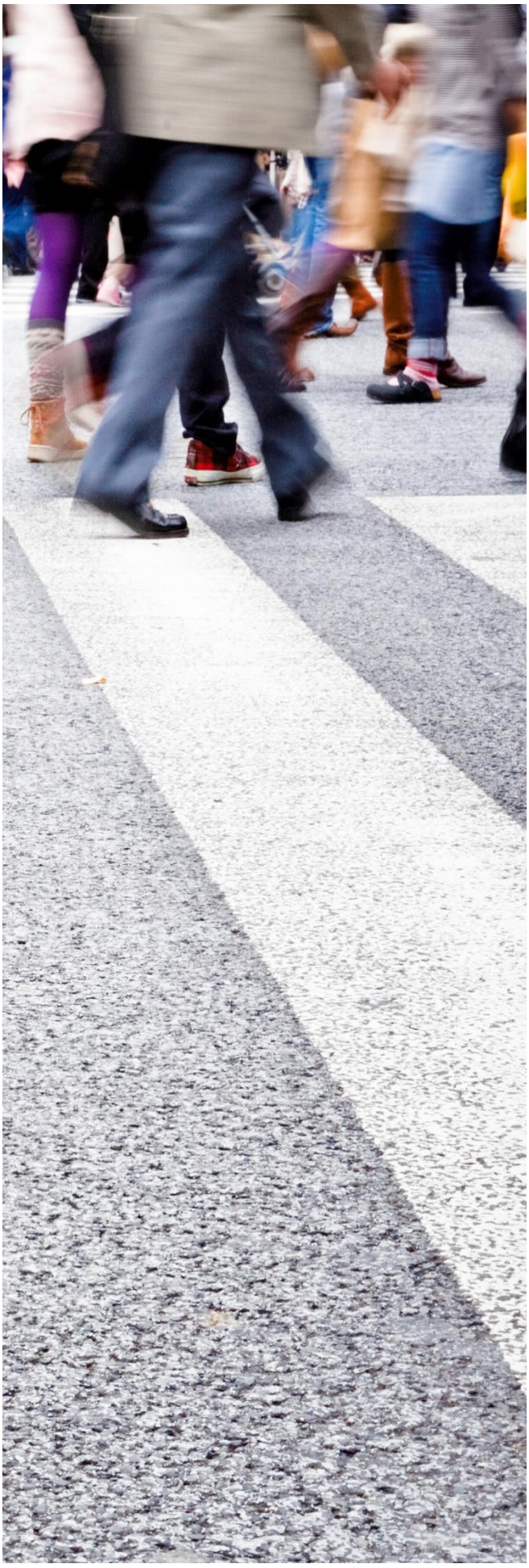


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日系企業が留意すべきシンガポール法上の「支配者」記録簿の作成と保存義務について

１．法改正による Controller（「支配者」）の記録簿の整備義務の導入

平成 29 年 3 月 31 日の法改正により設けられたシンガポール会社法 386 条 AG(2)(a)によって、シンガポールに登記された会社は、外国会社であっても、一定割合を超え当該会社の議決権保有割合を有する「株主」、または、その他の者であって当該会社の「支配者」と認められる者が存在する場合、合理的な調査を実施し、これらの者に関する法定の情報を取得し、変更の際には更新し、法定の書式を満たす「記録簿」として会社の登記住所地に整備しておくことが義務付けられました。なお、会社がかかる法令に違反した場合には、会社法に定める罰則（5,000 ドルを超えない範囲での罰金）の対象となる可能性があります。（但し、特定の条件を満たした上場会社等、記録簿の整備義務が免除される場合はあります）。なお、記録簿は、公開されるものではなく、マネーロンダリング等の所定の理由に基づき当局から法律上開示を求められた場合のみ開示されることになります。

２．「支配者」とは

法令上調査すべき「支配者」とは、対象会社について直接間接に株式を保有していなくとも、これに相当する「相当の受益権」を有するか、または、組織の意思決定に関して 25%以上の議決権を有すること等を通じて対象会社に対して「実質的な支配」を有する個人または法人を言います。具体的に「実質的な支配」を有する場合や「相当の受益権」を有する場合とは、以下の場合をいいます（会社法 386 条 AB）。

（「実質的な支配」について）

個人または法人が会社または外国会社に対して実質的な支配を有する場合とは、当該個人または法人が、以下のいずれかに該当する場合です。

(a) 直接または間接的に、当該会社または外国会社の取締役、または、取締役会において多数議決権を有する者、または、全ての若しくはほぼ全ての決議事項に関して、右の者と同等の権限を持つ者について、これを選任し、または、解任する権限を持つことができる場合、

(b) 直接または間接的に、当該会社または外国会社の株主総会において議決すべき事項に関して 25%を超える議決権を有する者、または、当該会社又は当該外国会社において右の者と同等の権限を持つ場合、または、

(c) 当該会社または外国会社に対して、重大な影響、あるいは、実質的支配権を及ぼすことが出来る権利を有するか、または、現実に当該権利を行使している場合。

(「相当の受益権」について)

「個人または法人が、当該会社または外国会社に対して、相当の受益権を有する場合」とは、以下のいずれかの場合に該当する場合です。

(a) 当該個人または法人のいずれかが、当該会社又は外国会社の持分の 25%を超える持分を保有している場合、または、

(b) 以下の(i)(ii)　の両方を満たす場合。

(i) 当該個人または法人のいずれかが、当該会社又は外国会社において、1 株以上の議決権付株式を保有している場合であって、かつ

(ii) その 1 株式に付着する議決権の総数、あるいは、保有株式の総数に付着する議決権の総数が、当該会社または外国会社における議決権全体の 25%を超える場合。

（具体例）

Ａ社の株主の構成として、30％を個人であるＢ、40％を法人であるＣ社、15％を個人であるＤ、15％を法人であるＥ社が保有していた場合、Ｂ、Ｃ社については株式保有割合からして実質的支配者といえます。また、Ｃ社の株式を 100％Ｆが保有していれば、Ｆも実質的支配者といえます。さらにＤが株式割合に関わらず、株主総会において、事実上意のままに決議させ得る立場にいる場合にはＤも実質的支配者といえる場合があります。

次に、Ａ社の取締役がＢ，Ｄ，Ｘである場合、それぞれ単独では取締役会における多数決の議決権を持つわけではありませんので、原則として実質的支配者に該当しません。ただし、例外的に、規定等によって単独で議決できるような状況にあるのであれば、実質的支配者に該当することも考えられます。例えば、Ｄが少数株主であっても、株主であることからして、現実に取締役会を意のままに操ることが出来る等の特殊な権限を持っているのであれば、役職に関係なく実質的支配者となることも考

えられ、このような内部事情の有無を確認するのが通知の目的の一つともいえます。

また、シンガポール法上は代表取締役という制度は存在しないものの、A社が日本の会社でXが代表取締役であれば、日本法上は自己の名前で会社の法律行為が出来るという性質を考慮すれば、原則として実質的支配者と考えておくのがコンプライアンスの観点からは無難であると考えられます。

3．具体的な調査義務の履行について

(1) 法令上の調査義務の概要

会社法 386 条 AG(2)によれば、会社法上記録すべき支配者に該当する者、合理的に判断して記録すべき支配者と解釈される者、及び本人が記録すべき支配者に該当せずとも、他にそのような支配者がいることを知っていると合理的に判断される者や、知っている可能性があると判断される者の全員に対して、当該会社または外国会社は、法定の質問事項を記載した通知を送ることが義務付けられています。通知の方式は、具体的には以下の通りです。

1. 会社は、記録すべき支配者に該当する者、および支配者に該当する可能性のある者が誰かを合理的に判断し、それらの者に対して以下の質問を記載した通知を送らなければならない。

   (a) 記録すべき支配者に該当するか。

   (b) 通知の受領者が、合理的な根拠に基づき、他に記録すべき支配者に該当する者の情報を所持しているに違いないと考える者がいるか。またはそのような情報を所持している可能性がある者がいるか。該当する場合、そのような者に関する所定の情報。

   (c) 当該支配者に関する所定の事項(個人については、氏名、住所、国籍、身分証番号、生年月日、支配者となった日付等。法人については、商号、法人の種類、設立の準拠法、会社設立国及び登記管轄官庁名、登記住所地、登記番号、設立日、支配者となった日付等)。

2. 会社は、合理的な根拠に基づいて（その本人が支配者に該当しなくとも）記録すべき支配者に該当する者の情報を所持しているに違いないと判断する者や、そのような情報を所持している可能性があると考えうる者に対しても、以下の質問を記載した通知を送らなければならない。

   (a) 他に「記録すべき支配者」に該当する者を知っているか。該当する場合、その支配者を特定するための所定の事項。他に記録すべき支配者に関する情報を保有している可能性がある者を知っているか。該当する場合、そのような情報の保有者を特定するための情報。

   (b) 該当する場合、所定の事項（上記①(c)に相当）。

上記２．で記載した例において、仮に上記の事実関係が既に判明している場合には、初回の通知としては、A社の 25%以上の株主であるB，C社、C社を支配しているF、事実上の株主総会を支配できるD、（代表）取締役であるX，Y，Zは最低限として、もし会社が他にも支配者となる可能性がある者が存在すると考える場合、その者に対しても通知を送付します。その後、各人の回答を踏まえ、新たに支配者となり得る者が判明すれば、その者にも通知を送ってさらなる調査をし、確認された情報に基づいて記録簿を作成するという流れになります。

なお、通知の送付後、当該会社が全ての事項に対する回答を通知の名宛人から受領する義務があるかまでは明確に定められていませんが、通知を受けた者には回答義務が生じ、違反に対しては会社法上の罰則が定められています。

(2)手続きにかかる実務面での注意事項

改正法の施行前に設立された会社においては、施行日より 60 日以内、すなわち 2017 年 5 月 30 日までに記録簿の整備をする義務が定められています（施行後設立の場合は設立より 30 日以内）。したがって、既存の会社や外国会社（支店）においては本稿執筆の時点（2017 年 8 月）では既に対応済みでなければならないものです。改正法施行以降に設立される会社等における注意点としては、設立段階でのノミニー居住取締役がいる場合の対応、および設立直後の組織変更に伴う記録簿の更新、たとえば、エンプロイメント・パスの承認後に行われることが多い取締役の増員や入替え、発起株式の譲渡、増資に伴う新規の株主の参入等が挙げられます。設立の段階で、25%以上の保有割合を有する株主（法人の場合さらにその上位の支配者となるであろう者が判明していればその者も含む）及び設立時の各取締役に対する通知については、設立と併行して準備することはもとより、このような設立直後に行われることが多い変更事項にに伴う支配者記録簿の更新についても、法定の期日に間に合うように、予め準備を行っておくべきです。もちろん、いずれの会社においても、設立直後でなくても、任期満了に伴う取締役の辞任、新任等の様々な変更があり、それに対応しなければならない場面が想定されます。

具体的には、初回調査に基づいて記録された情報に変更が生じた場合は、記録簿に記載された支配者が、当該会社または外国会社に対して、変更から 30 日以内に届出る義務があると共に、会社も、当該変更が生じた事実またはその可能性を知りかつ支配者等からの変更届出を受けていない場合は、変更を知った日あるいは合理的に知りうるべき日から 30 日以内に、該当する支配者に対して通知し、変更の有無や変更内容等所定の事項について当該支配者に確認し、回答を受領した場合はその受領日から 2 日以内に登録簿を更新することが必要です。

上記のように、法令上、30 日内の通知、および、回答受領から 2 日以内という速やかな記録化が求められている以上、余裕を持って通知を送ることはもちろん、会社が通知を送る際には、通知義務の履行を証拠化するために、通知の受領書や配達証明書を保管するよう注意すべきです。このような業務は会社のマネージメントが、当該会社等のカンパニー・セクレタリー（秘書役、登記された必要的機関）と連携しながら行う必要のあるものです。最後に、特に調査の対象となる方が日本人・日本企業であれば、シンガポール法のコンプライアンス対応には不慣れである可能性が高いものと思われることからすると、早期に適切な回答を得るためには、会社の担当者も法令の内容を理解し、通知の名宛人に対して適切な説明を行うことが必要になると考えられます。

（日本語版執筆）中川真理子（パートナー弁護士・デントンズ・ロダイク法律事務所）柿平宏明（日本法弁護士・弁護士法人中央総合法律事務所より 2017 年 8 月まで出向）

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Accolades

Asialaw Profiles

Asialaw Profiles has named fourteen of Dentons Rodyk's practices in their 2017 edition. The following practices were Highly Recommended: Banking & Finance, Competition & Antitrust, Construction & Real Estate, Dispute Resolution & Litigation, Energy & Natural Resources (newly ranked), Intellectual Property, IT, Telco & Media, Project & Infrastructure, Restructuring & Insolvency and Shipping, Maritime & Aviation. Dentons Rodyk also had the following practices listed as Recommended: Corporate/M&A, Investment Funds, Labour & Employment (newly ranked) and Taxation (newly ranked).

Dentons Rodyk acting in Ascott's acquisition and development of serviced residence at Funan

Dentons Rodyk is acting for The Ascott Limited, CapitaLand's wholly owned serviced residence business unit, who is investing S$170.3 million in the service residence component of the Funan integrated development. This will be done through Ascott's 50:50% joint venture service residence global fund set up with Qatar Investment Authority (QIA) in 2015. Of the S$170.3 million, the fund is acquiring the serviced residence component from CapitaLand Mall Trust (CMT) for S$90.5 million, and developing the Singapore flagship of Ascott's millennial-focussed lyf brand on the site for an estimated S$80 million. The investment is made via the purchase of units in the special purpose trust which owns the service residence component in Funan. The acquisition is based on an agreed land value of S$90.5 million for Funan's service residence component, and other assets of about S$11.3 million. This includes capitalised development costs up to the completion date of the acquisition, which is expected to be in Q4 2017. The service residence to be named 'lyf Funan Singapore' will consist of a 9-storey co-living property spanning about 121,000 sq. ft. in gross floor area and will provide 279 units with flexibility to offer up to 412 rooms.

IFLR1000 2018

Dentons Rodyk has seen a marked improvement in our International Financial Law Review 1000 (IFLR1000) rankings this year, with 16 of our lawyers being endorsed for Financial & Corporate Law: Ajinderpal Singh, Doreen Sim, Eng Leng Ng, Evelyn Ang, Gerald Singham, Gilbert Leong, Ho Wah Lee, I-An Lim, Jacqueline Loke, Junming Tong, Kenneth Oh, Nicholas Chong, Nigel Chia, S. Sivanesan, Sunil Rai and Valerie Ong.

IP STARS Report 2017

Dentons Rodyk Intellectual Property Practice was ranked in the IP STARS Report 2017 for the following categories: Copyright, Patent contentious, Patent filing & prosecution, Trade mark contentious and Trade mark filing & prosecution.

About Dentons Rodyk

Situated at the southern most tip of Southeast Asia, Singapore is a massive regional hub for global commerce, finance, transportation and legal services. This important island city-state is a vital focal point for doing business throughout the Asia Pacific region.

As one of Singapore's oldest legal practices, trusted since 1861 by clients near and far, rely on our full service capabilities to help you achieve your business goals in Singapore and throughout Asia. Consistently ranked in leading publications, our legal teams regularly represent a diverse clientele in a broad spectrum of industries and businesses.

Our team of more than 200 lawyers can help you complete a deal, resolve a dispute or solve your business challenge. Key service areas include:

- Arbitration
- Banking and Finance
- Capital Markets
- Competition and Antitrust
- Corporate
- Intellectual Property and Technology
- Life Sciences
- Litigation and Dispute Resolution
- Mergers and Acquisitions
- Real Estate
- Restructuring, Insolvency and Bankruptcy
- Tax
- Trade, WTO and Customs
- Trusts, Estates and Wealth Preservation

Providing high quality legal and business counsel by connecting clients to top tier talent, our focus is on your business, your needs and your business goals, providing specific advice that gets a deal done or a dispute resolved anywhere you need us. Rely on our team in Singapore to help you wherever your business takes you.

About Dentons Rodyk Academy

Dentons Rodyk Academy is the professional development, corporate training and publishing arm of Dentons Rodyk & Davidson LLP. The Dentons Rodyk Reporter is published by the academy. For more information, please contact us at sg.academy@dentons.com.

About Dentons

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com

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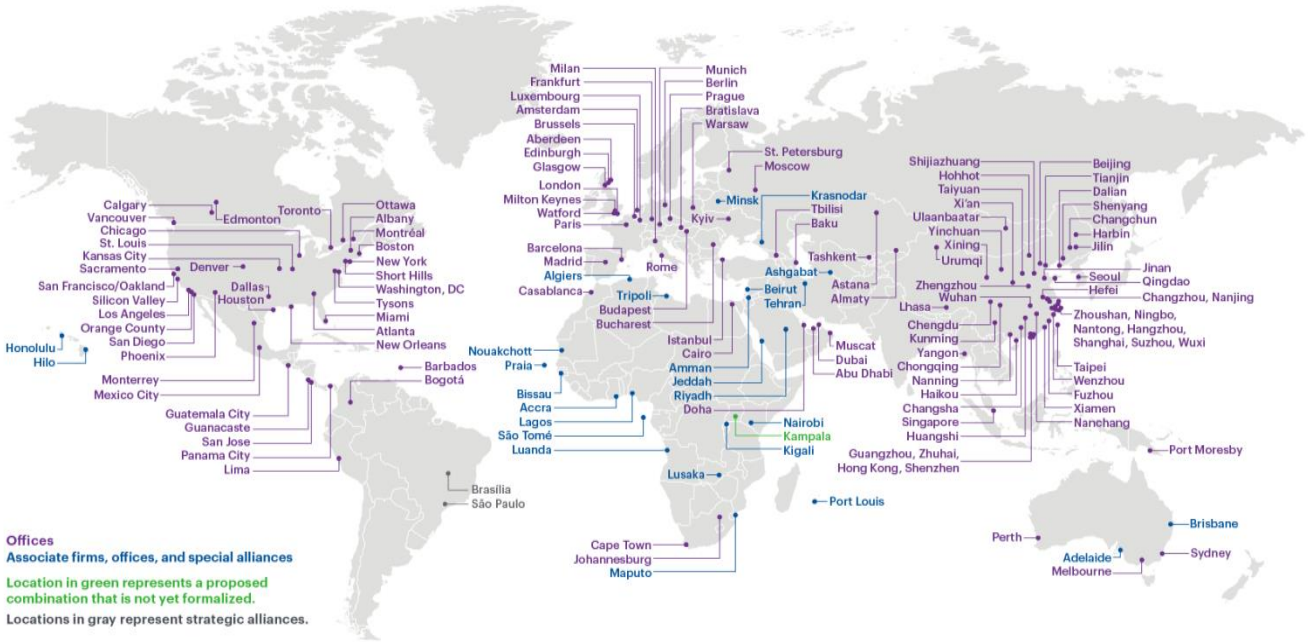

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