

Nominee shareholder arrangements: Uses and Pitfalls for the beneficial owner

The following article was written by Bernard Tan. Bernard heads the firm's Corporate and Commercial Practice Group.

In this article, I wish to share some insights about what to look for when you ask someone to hold shares in a company for you. Such an arrangement is often called a nominee shareholder arrangement.

Reason for such arrangements

The person who is named as the owner is the nominee while the person who actually paid for the shares is the beneficiary. The beneficiary often feels that there is a need to be not named on the register of members as a shareholder and hence enters into such an arrangement.

Uses

The main use is that the actual beneficial owner of the shares will not be seen to be on the public records as a shareholder of the relevant company. This can give a measure of privacy and confidentiality. There are other methods such as setting up intermediary companies though these methods might cost more to implement than a nominee shareholder arrangement.

Pitfalls

Most of the pitfalls in such an arrangement arise from the fact that the nominee is put in a position of control of the rights that attach to the relevant shares; in addition, the company is not required by law to recognise any trustee or nominee shareholding arrangement.

Some of the common pitfalls that I have seen in my several years of practice are as follows:

- The legal owner or nominee refuses to return the shares to the beneficiary.
- The legal owner exercises the rights or enjoys the rights attached to the shares without the consent or knowledge of the beneficial owner. In particular, he uses the shares as security or sells them.
- The legal owner passes away or is deregistered and the beneficial owner is unable to get the shares transferred to himself.

Some Solutions

The solutions that I have recommended and implemented in the past aim at eliminating the possibility of the nominee exercising rights over the shares that he is not entitled to exercise and at the very least ensure that the arrangement is in written form and can be produced as evidence.

Firstly, it is essential that a nominee shareholder agreement with clear and adequate provisions for the beneficiary be prepared and stamped with the Inland Revenue Authority of Singapore or relevant tax office of the country where the shares are located. Stamping is essential in Singapore so that the nominee shareholder agreement can be produced in the Singapore courts as evidence.

However, based on experience and consideration of the risks concerned, a signed and stamped nominee shareholder agreement alone is not sufficient, even if it contains undertakings by the nominee to not exercise rights attached to the shares. As many unfortunate beneficiaries in such arrangements can attest, the nominee may choose to breach the agreement.

There are other documents and practical steps that can be prepared and taken and we have advised on and implemented such steps for beneficiaries before. Some of these involve amending the company's constitution and taking necessary actions with the share certificates.

Conclusion

Although the nominee shareholder arrangement is straightforward conceptually, it actually involves risks for the beneficiary which should be dealt with strongly failing which the beneficiary may find himself having to commence proceedings to assert his rights and ownership.

The arrangement can be likened to a situation where someone passes physical possession of a valuable to another person. The beneficial owner must ensure that the person who has possession does not seek to enjoy rights that he is not entitled to enjoy, and that he can get the property back easily when he wants to.

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