

Corporatising the ownership of your assets

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In this article, we will explore why it may be better for an individual ('Owner') to 'corporatise' the ownership of their assets such as business interests, company shares and property investments ('Assets'), through a corporate entity ('HoldCo'), rather than hold these in his or her personal capacity. We will also discuss the advantages and disadvantages of each.

Advantages of personal ownership

The advantages of owning Assets in a personal capacity are:

1. *Efficiency*

The Owner can sign business documents related to their Assets, such as shareholder resolutions and powers of attorney, directly and relatively quickly; and

2. *Cost-effectiveness*

There are little to no extra costs, except where, for example, these documents are required to be executed in front of an authority such as a Notary Public, and a fee is required.

Disadvantages of personal ownership

The main risks of owning Assets in a personal capacity are those that relate to the Asset's business and ownership continuity. It is possible that situations might arise where substantial and consequential business decisions will be on hold while the rest of the market and competition is still active. These risks include, for example:

1. Inability to sign business documents due to illness

If an Owner becomes seriously ill, they may not have the physical and/or mental capacity to sign the business documents, or even to grant powers of attorney ('POAs');

2. Reduced ability to make major business decisions during probate (death of Owner)

If the Owner passes away, their holdings in the Assets would be frozen while the probate procedures (of the jurisdiction in which those Assets are held) take place. Major decisions or actions regarding the Assets would likely be put on hold. The quicker the relevant jurisdiction traces and confirms the identities of the deceased Owner's rightful heirs and beneficiaries, the shorter the probate period, and the quicker the ownership of the Assets will pass on to the new legal owners. The probate period differs from one jurisdiction to another, and it is generally administratively costly and time consuming. The new owners, assuming they want to maintain the Assets, can then make the required business decisions.

3. Cancellation of POAs (death of Owner)

If the Owner passes away, any POAs that they have granted will automatically be cancelled once the jurisdiction in which those POAs are issued receives formal notice of the death. This means that any authorised signatory will no longer be able to take any action(s) relating to the Assets which are the subject of that POA. This includes both general POAs relating to appearing in front of government authorities, as well as specific POAs relating to property, investments, legal proceedings, etc. If the grantor of the POA passes away, and the authorised signatory uses their powers before the relevant jurisdiction is aware of the grantor's passing, i.e. illegally, it is very likely these decisions will be challenged by other interested parties and that there will be criminal penalties against that authorised signatory. The exact penalties will differ from one jurisdiction to another.

4. Risks from illness or death of other individual co-Owners

The above risks are present if any of the Asset's Owner(s) holds their shares in a personal capacity. For example, Owner 1 is in peak health and fitness, it is possible that important business decisions be on hold should any of their partners (e.g. Owner 2) become seriously ill or pass away. In addition, any decisions relating to the deceased Owner 2's shares in the Assets will be put on hold, and any POAs Owner 2 granted will be cancelled. The more individual co-Owner(s) there are for an Asset, the higher the risk.

Advantages of ownership through a HoldCo

The main advantages to owning Assets via a legal entity such as a HoldCo relate to the continuity of the business and ownership of the Assets, It is less likely that major and consequential business decisions will be put on hold, and the HoldCo can adjust more quickly to the market and the competition. These advantages include for example:

1. *Ability to sign business documents regardless of Owner's illness ('Business Continuity')*

Even if an Owner becomes seriously ill, a HoldCo's board of directors ('Board') can still sign the business documents and take care of the day-to-day running of the HoldCo;

2. *Business Continuity and ownership continuity after Owner's death*

If the Owner passes away, their holdings in the HoldCo would be frozen while the probate procedures (of the jurisdiction in which HoldCo is based) take place. After the probate period, the Owner's rightful heirs and beneficiaries will hold shares in the HoldCo. Assuming that there are no citizenship (or other) restrictions on the indirect ownership of the Assets, HoldCo's ownership in the Assets is generally not affected;

3. *Business Continuity after Owner's death (POAs)*

The Board would typically be the authority delegating powers to an authorised signatory. Depending on the jurisdiction, it could do this by way of a POA or a Board resolution. Even if the Owner or any or all of the Board members pass away, the authorities to which they granted the POAs would be deemed to have been on behalf of the HoldCo and would still be valid;

4. *Business Continuity with partners*

The above advantages are present if all of the Assets' Owners hold their shares via a legal entity such as a HoldCo. If for example, Owner 1 and Owner 2 have their own respective HoldCos (e.g. HoldCo 1 and HoldCo 2) to own the Assets, then if Owner 2 becomes seriously ill or passes away, the ownership of the downstream Assets is generally not affected: there would still be Business Continuity and ownership continuity;

Disadvantages of ownership through a HoldCo

The disadvantages of owning Assets through a HoldCo are:

1. *Inefficiency*

If HoldCo has multiple directors, it can be more time-consuming to obtain the required signatures;

2. Expensive

There are costs, in terms of time and money, associated with establishing and maintaining a HoldCo. Points to consider are the HoldCo's compliance requirements with the relevant jurisdiction's regulations. While some requirements may be straightforward, others may require professional advice.

3. Business Continuity risks at HoldCo

Although owning Assets through a HoldCo can save the Owner from the Business Continuity and ownership risks at the Asset-ownership level (mentioned above), these risks may transfer upwards and apply at the HoldCo level. This means that it may be the HoldCo itself that will face the Business Continuity and ownership risks. This can apply, for example, if the Owner is the only HoldCo director, and they are unable to execute a HoldCo Board resolution, or if they are the only shareholder and unable to execute a HoldCo shareholder resolution. If the HoldCo has multiple Board members or shareholders, the Owner's incapacity may mean there is no quorum for the HoldCo to implement the required action(s).

5. Business Continuity risks from HoldCo partners

If Owner 1 and Owner 2 own shares in the same HoldCo, and Owner 2 becomes seriously ill or passes away, then the same risks would apply as if both Owners held the Assets directly. This would result in Owner 2 being unable to sign the HoldCo business documents due to illness. If Owner 2 passes away, then major decision making relating to HoldCo itself will likely be frozen pending a probate period regarding Owner 2's shares, and any relevant POAs Owner 2 granted in their personal capacity will be cancelled.

Factors to consider in choosing a jurisdiction for HoldCo

Choosing a jurisdiction in which to establish a HoldCo is a multi-faceted and important decision. Critical factors to consider include the Owner's comfort with:

1. the jurisdiction;
2. the legal system;
3. its reputation;
4. the type of entity one can establish there (e.g. special purpose vehicles, foundations, headquarters company, etc.);
5. the ability of entities from that jurisdiction to own the Assets;
6. whether any tax advantages exist;
7. the flexibility in amending HoldCo's Articles of Association;
8. the ease of altering the ownership structure;
9. the ability to make officer appointments; and
10. the ease of doing business in that jurisdiction.

Corporatising the ownership of your assets

While specific circumstances of each Owner may differ from one to another, it may be worth exploring whether it is viable and worthwhile for Owners to corporatise the ownership of their Assets, since one cannot mitigate against all risks. Not all Assets are equally valuable. Not all Owners have partners and there are no unlimited budgets. Corporatising the ownership of the substantial or 'high-priority' Assets can be a significant step towards maintaining Business and ownership continuity for Owners and their families.

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