Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

In the Matter of

DONGGWANG CLARK CORPORATION

SEC Admin Case No. 10-13-168
(SEC-EPD Case No. 12-3010)
FOR: Revocation of Certificate of Incorporation

ENFORCEMENT & INVESTOR PROTECTION DEPARTMENT (formerly Enforcement and Prosecution Department),
Petitioner.
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DECISION

Before us is a Petition for Revocation of Certificate of Incorporation[1] ("Petition") dated 22 October 2013, filed by the then Enforcement and Prosecution Department, now the Enforcement and Investor Protection Department ("Petitioner"), on 25 October 2013 against Donggwang Clark Corporation ("Respondent Corporation"). Petitioner prays that the Certificate of Registration of Respondent Corporation be revoked based on Section 6, paragraph l: (1) fraud in procuring its certificate of registration and (2) serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the general public.[2]

ANTECEDENT FACTS AND PROCEEDINGS

As borne out by the evidence on record, the following are the antecedent facts and proceedings:

Respondent Corporation was originally registered with the Securities and Exchange Commission ("Commission") as DONG GWANG CLARK CORPORTION on 03 December 2008 with Company Registration No. CS200323149[3], which was later changed to DONGGWANG CLARK CORPORATION[4]. On 27 February 2012, Respondent

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[1] Petition for Revocation of Certificate of Incorporation dated 22 October 2013, Records, Volume I, pp. 385-404.
[2] Section 6(i), paragraphs (1) and (2), Presidential Decree 902-A, 11 March 1976.
[3] Petition, Annex "A" (Respondent Corporation's Certificate of Incorporation dated 03 December 2008), Records, Volume I, p. 384.
[4] *Ibid*, Annex "D" (Respondent Corporation's Certificate of Filing of Amended Articles of Incorporation dated 05 May 2009), Records, Volume I, pp. 346-348.

Corporation again amended its Articles of Incorporation ("AOI") to change its principal office.[5]

As provided for in its original and latest amended AOI, Respondent Corporation's primary purpose is:

> To engage into (sic) tourist-related industry, including real estate development and operation, gaming operation, and hotel construction and operation, to be situated within Clark Freeport zone or in any place allowed by law.[6]

Further, the same documents reflect the names of Respondent Corporation's incorporators with their respective nationalities and residences as follows:

NAME	NATIONALITY	RESIDENCE
1. LEE SHIN KUN	Korean	232-A Pinatubo St., Clark Freeport Zone, Pampanga
2. HWANG BYONG JONG	Korean	232-A Pinatubo St., Clark Freeport Zone, Pampanga
3. LEE SEONG HEON	Korean	109-1701 LG Hangang Apt., Ichon-Dong, Yongsan-ku, Seoul, Korea
4. LEE SEONG GI	Korean	232-A Pinatubo St., Clark Freeport Zone, Pampanga
5. LEE SUNGWON	Korean	109-7 Yeonhee-Dong, Seodaemun-ku, Seoul, Korea

On 23 August 2012, Petitioner received a letter[7] dated 22 August 2012 from Atty. Marian Jo S. Mercado, on behalf of First Worldwide Marketing Corporation ("FWMC"), requesting for the investigation of Respondent Corporation due to the following:

a. All of the stockholders and members of the Board of Directors of the corporation are citizens and residents of Korea;
b. The address of the corporation and three (3) of its incorporators is bogus and used only to make it appear that they are residents;
c. The presence of all the stockholders before the Notary Public of San Fernando, Pampanga on 27 November 2008 is being verified with the Bureau of Immigration;

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[5] *Ibid*, Annex "F" (Respondent Corporation's Certificate of Filing of Amended Articles of Incorporation dated 27 May 2012), Volume I, Records, pp. 331-335.
[6] *Ibid*, Annexes "B" and "G" (Respondent Corporation's original and latest amended Articles of Incorporation), Volume I, Records, pp. 359-382 & 326-331, respectively.
[7] *Ibid*, Annex "H" (Letter of Atty. Marian Jo S. Mercado addressed to the EPD dated 22 August 2012), Volume I, Records, pp. 323-325.

d. The company is performing activities outside of its purpose which includes the construction, development and sale of condotel inside the Clark Freeport Zone; and
e. Since the company is engaged in the sale of condotel units, its capitalization should have been $200,000.

On 01 October 2012, the Complaint-Affidavit[8] of Mr. Anthony Roberto Arevalo, President of FWMC, which prayed for the cancellation of Respondent Corporation's Certificate of Registration, was received by the EIPD. In fine, the said Complaint-Affidavit provides the following allegations:

a. On 26 July 2011, FWMC and Respondent Corporation entered into a Contract for Construction Services[9] for the construction of a golf course project in the leased property. However, Respondent Corporation unilaterally terminated the said contract, thus, a Petition for Interim Reliefs was filed before the Regional Trial Court of Angeles City and Pampanga and it was for this reason why FWMC researched and secured copies of the certificate of registration of Respondent Corporation.

b. Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi, three (3) of the incorporators of Respondent Corporation, are not residents of the Philippines. Only Lee Shin Kun would visit the Philippines on rare occasions to check the progress of the ongoing projects of Respondent Corporation. Thus, the statement that Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi are residents of the Philippines is a gross misrepresentation that should result in the cancellation of Respondent Corporation's [certificate of registration].

c. The presence of Respondent Corporation's incorporators before Atty. Querolico Daag on 27 November 2008, the date of the execution of Respondent Corporation's AOI, is also doubtful, thus, a request before the Bureau of Immigration was made to verify such fact.

d. Respondent Corporation is engaged in the sale and lease of condominium units which was reported in its 2011 financial statement. However, Respondent Corporation's AOI does not include as part of its purpose its authority to sell condominium units.

Accordingly, on 22 November 2012, Summons [10] was served to Respondent Corporation requiring it to file its Counter-Affidavit to the Complaint-Affidavit of FWMC. Respondent Corporation was likewise informed of the findings based on the Certifications

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[8] *Ibid*, Annex "L" (Complaint-Affidavit of FWMC dated 24 September 2012), Records, Volume I, pp. 311-315.
[9] Contract for Construction Services between Respondent Corporation and FWMC dated 14 July 2011, Volume I, Records, pp. 256-265.
[10] Petition, Annex "T" (Summons address to Respondent Corporation dated 22 November 2012) Volume I, Records, pp. 200-201.

issued by the Bureau of Immigration that none of its incorporators were in the Philippines on 27 November 2008 contrary to the statement in its AOI.[11]

On 18 January 2013, instead of a Counter-Affidavit, Respondent Corporation filed an Answer[12] alleging the following:

(a) Respondent Corporation's incorporators executed its proposed AOI and By-Law in Seoul, Republic of Korea and they acknowledged the same before Notary Public Kyu-Dai Kwon on 24 October 2008, likewise in Seoul.

(b) After the documents were notarized, the same together with the notarial certification, were brought to the Philippine Embassy in Seoul for authentication on 29 October 2008. Thereafter, the documents were submitted to Respondent Corporation's Philippine lawyers for filing with the Commission.

(c) Respondent Corporation's incorporators have no knowledge that the documents were again notarized on 27 November 2008 in San Fernando, Pampanga. It was only when various complaints with different government agencies were filed by FWMC against Respondent Corporation that the latter and its incorporators were informed of the second notarization of the documents in the Philippines. Hence, there is no merit that Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi committed misrepresentation and perjury.

(d) Even assuming that there was a defect in the incorporation of Respondent Corporation, it should be considered a de facto corporation and as such, it may legally do and perform every act and thing within its powers.

(e) Respondent Corporation's primary purpose of "to engage into tourism-related industry, including real estate development and operation" necessarily includes the sale of beneficial rights and subleasing of the leased premises.

On 24 January 2013, FWMC submitted its Reply[13] and argued that Respondent Corporation failed to point out the Philippine lawyers who were assisting them in the preparation of their AOI. FWMC further argued that Respondent Corporation cannot invoke that it is a de facto corporation and can only do so after its AOI has already been revoked and only against those with whom it has business dealings. Accordingly, on 05 February 2013, Respondent Corporation submitted its Rejoinder[14] and alleged that after its incorporation, all

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[11] *Ibid.*
[12] Petition, Annex "Y " (Respondent Corporation's Answer to the Complaint-Affidavit dated 18 January 2013), Volume I, Records, pp. 186-192.
[13] Petition, Annex "Z " (FWMC's Reply dated), Volume I, Records, pp. 176-179.
[14] Petition, Annex "AA" (Respondent Corporation's Rejoinder dated 18 January 2013), Volume I, Records, pp. 167-168.

pertinent papers relating to its registration were given to its corporate secretary for custody and safekeeping.

On 18 March 2013, Petitioner sent a letter-request to the Bureau of Immigration requesting for a certification as to the meaning of "EO408" as the immigration status of Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi, to which the said agency replied and explained that:

> "Executive Order No. 408 allows nationals from certain countries who are travelling to the Philippines for business or tourism purposes to enter the Philippines visa-free as temporary visitors for stay not exceeding twenty-one (21) days, provided they hold valid tickets for their return journey to port of origin or next port of destination and their passport are valid for a period of at least six (6) months."[15]

On 22 March 2013, Petitioner made a request from the Company Registration and Monitoring Department ("CRMD") to confirm whether or not the primary purpose of Respondent Corporation as stated in its AOI allows the said corporation to engage in the lease or sale of condominium units.[16] In reply, the CRMD explained that "Respondent Corporation may engage in all activities related to real estate development such as development and construction of condominium units but the business does not cover selling or leasing condominium units as selling and leasing are separate and distinct business activities"[17].

On 13 August 2013 and 30 August 2013, Petitioner conducted its Preliminary Conference. Consequently, on 25 October 2013 Petitioner filed the instant Petition against Respondent Corporation for the Revocation of the latter's Certificate of Registration.

In its Petition, Petitioner charges Respondent Corporation with: 1) fraud in procuring its Certificate of Registration because its AOI falsely stated that (a) majority of the incorporators namely Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi are residents of the Philippines and (b) all the incorporators acknowledged the same before the notary public in San Fernando, Pampanga on 27 November 2008; and 2) serious misrepresentation as to what the corporation can do or is doing to the great prejudice of or damage to the public for selling and leasing condominium units despite the fact that these acts are not covered by its primary purpose, which are both grounds for revocation of its Certificate of Incorporation.

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[15] Petition, Annex "FF" (Bureau of Immigration's Reply-Letter dated 03 June 2013), Volume I Records, p. 151.
[16] Petition, Annex "DD" (Petitioner's letter to CRMD dated), Volume I, Records, p. 162.
[17] Petition, Annex "EE" (Memorandum from the CRMD dated 03 June 2013), Volume I, Records, pp. 152-153.

On 09 January 2013, Respondent Corporation filed its Answer[18] to the Petition praying that the same be dismissed and alleged the following:

(a) The incorporators of Respondent Corporation have no knowledge that the articles of incorporation and the by-laws were again notarized in San Fernando, Pampanga. It was only when various complaints with different government agencies were filed against Respondent Corporation that the latter and its incorporators were informed of the second notarization of the said documents in the Philippines.

(b) Even assuming that there is a defect in the incorporation of Respondent Corporation, at most, it should merely be considered as a de facto corporation. Respondent Corporation was incorporated by its incorporators, who are foreigners and are clearly not familiar with Philippine laws, without knowing that the Corporation Code requires that majority of the incorporators should be residents of the Philippines. Nevertheless, Respondent has already cured the defect when majority of its incorporators obtained working visas and consequently, residency in the Philippines.

(c) Under Republic Act No. 9649, otherwise known as the Real Estate Service Act of the Philippines, the definition of a real estate developer refers to refers to any natural or juridical person engaged in the business of developing real estate development project for his/her or its own account and offering them for sale or lease. In the present case, Respondent Corporation is a real estate developer as stated in its primary purpose. Thus, contrary to Petitioner's argument, Respondent Corporation can clearly engage in the selling and leasing of condominium units as a real estate developer under the law.

On 20 January 2014, Petitioner filed its Reply[19] and raised the following arguments:

(a) The alleged Philippine lawyers to whom the AOI of Respondent Corporation were transmitted for filing with the Commission were never named nor presented to explain why another set of AOI stating that it was executed by the incorporators of Respondent Corporation in the Philippines was submitted to the SEC.

(b) Section 20 of the Corporation Code is not applicable to the present case. The instant case is not a private suit contemplated under Section 20 but a revocation proceeding before the Commission under Section (l) subparagraphs (1) and (2) of PD 902-A which is further supported by Section 5(m) of the Securities and Regulation Code.

On 29 January 2014, Respondent Corporation filed its Rejoinder[20] and argued that Petitioner cannot impute fraud unto Respondent Corporation considering that good faith and

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[18] Respondent Corporation's Answer dated 08 January 2014, Volume I, Records, pp. 422-428.
[19] Petitioner's Reply dated 17 January 2014, Volume I, Records, pp. 429-436.
[20] Respondent Corporation's Rejoinder dated 29 January 2014, Volume I, Records, pp. 437-440.

lack of knowledge and familiarity of Philippine laws negate any presence of bad faith, deceit or fraud in the procurement of its certificate of registration. Respondent Corporation further reiterated that it is only the Office of the Solicitor General who could inquire into its incorporation through a *quo warranto* proceedings and not herein Petitioner before the Commission.

On 29 September 2014, Respondent Corporation filed its Manifestation[21] reiterating its allegations stated in its Answer and Rejoinder.

ISSUES:

(a) Whether or not there was fraud in the procurement of the Certificate of Incorporation of Respondent Corporation warranting the revocation of the same; and

(b) Whether or not there was serious misrepresentation as to what the Respondent Corporation can do or is doing to the great prejudice of or damage to the public for selling and leasing condominium units despite the fact that the primary purpose of the Respondent Corporation is only "to engage into tourist-related industry, including real estate development and operation, gaming operation, and hotel construction and operation", warranting the revocation of its Certificate of Incorporation.

RULING:

The Certificate of Incorporation of the Respondent Corporation should be revoked.

Section 10[22] of the Corporation Code expressly mandates that any number of natural persons not less than five (5) but not more than fifteen (15), all of legal age and a majority of whom are residents of the Philippines, may form a private corporation for any lawful purpose or purposes.

In the instant case, the incorporators of the Respondent Corporation admitted that they were not residents of the Philippines at the time the AOI was executed and filed before the Commission. They, however, dismiss the finding of fraud and, in defense, claim good faith and lack of knowledge and familiarity of Philippine laws, and claim that they have no knowledge that the AOI and the by-laws were again notarized in San Fernando, Pampanga.

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[21] Respondent Corporation's Manifestation dated 29 September 2014, Volume II, Records, pp. 756-765.

[22] **Sec. 10.** ***Number and qualifications of incorporators.*** - Any number of natural persons not less than five (5) but not more than fifteen (15), all of legal age and a majority of whom are residents of the Philippines, may form a private corporation for any lawful purpose or purposes. Each of the incorporators of s stock corporation must own or be a subscriber to at least one (1) share of the capital stock of the corporation.

Fraud may be actual or constructive. There is actual fraud when there is deception and intentional practice to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.[23] On the other hand, there is constructive fraud when, irrespective of the guilt of the fraud feasor, the law declares the act fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.[24] Thus, constructive fraud may result from reckless and heedless representations although they are not made with deliberate intent to deceive.[25]

For purposes of Section 6 of P.D. 902-A, fraud as one of the grounds for the revocation of a certificate of registration refers to fraud attendant in the registration and must be contained or connected with the documents or papers presented to the Commission for purposes of registration.[26] Admittedly, it includes not only actual fraud but also, by reason of public policy, includes constructive fraud. The clear objective of the provision is to ensure that every corporation established under the Corporation Code via the approval of the State through the Commission is truthful in each and every declaration and disclosure that it makes, and thus, protecting the public from the creation of fictitious, bogus or sham corporations. This is also considering the fact that in the application for the issuance of certificate of registration, the Commission has to rely on what is stated in the AOI and documents being submitted by the applicant-corporation, under the assumption that the entries and assertions made therein are truthful and correct. Thus, any material statement made by an incorporator in the AOI that turns out to be a falsehood as determined by the Commission is thereby considered fraudulent regardless of the incorporators' intent or knowledge of such falsehood.[27] It must also be emphasized that the AOI is the contract between the Respondent Corporation and the State, solemnly made under oath that the entries made therein are true and correct, and that any fraud committed in the procurement of its registration, makes the corporation a nullity.[28]

In the present case, there is substantial evidence to show that majority of the incorporators of Respondent Corporation were not residents of the Philippines, contrary to that stated in its AOI submitted to the Commission. First, the Certification issued by the Bureau of Immigration explaining that the status of Lee Shin Kun, Hwang Byong Jong and Lee Seong Gi as "EO408" means they are only temporary visitors for stay in the Philippines not exceeding (21) days.[29] Second, the AOI executed and notarized in Seoul, Korea, which as repeatedly alleged by Respondent Corporation is the one which the incorporators intend to file with the Commission, reflects that the residences of Lee Shin Kun, Hwang Byong Jong

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[23] *In the Matter of: Knight Capital Phils., Inc*, SEC Admin. Case. No. 07-10-121, August 23, 2012, citing *Lorenzo Berico, et al. v. Court of Appeals*, G.R. No. 96306, August 20, 1993.
[24] *Ibid.*
[25] *Ibid*, citing *In the Matter of Charyn Marketing Corporation*, SEC Case No. 03-05-49.
[26] *In the Matter of: Knight Capital Phils., Inc*, SEC Admin. Case. No. 07-10-121, August 23, 2012.
[27] *Ibid.*
[28] *Ibid.*
[29] *Supra* note 15.

and Lee Seong Gi are in Seoul, Korea.[30] Third, there is practically an admission that majority of the incorporators of Respondent Corporation are not residents of the Philippines.[31]

As mentioned above, Respondent Corporation did not deny nor refute, and hence, impliedly admitted, the allegation that it did not comply with the residency requirement under Section 10 of the Corporation Code. However, Respondent Corporation insists that the incorporators were not knowledgeable of Philippine laws and were not aware of the alterations made in the AOI they intended to file. To reiterate, Respondent Corporation claims that "the authenticated notarized AOI and the English version were transmitted to its Philippine lawyers and its incorporators were never informed that the same AOI and By-laws were never submitted for filing with the Commission, instead, an altered English version was the one filed"[32]. For being unrefuted, the misstatement on residency indicated in the AOI is a falsehood and therefore fraudulent as contemplated in Section 6 of P.D. 902-A and thus, warrants the immediate revocation of Respondent Corporation's certificate of registration.

Moreover, even if we are to recognize that the AOI executed and notarized in Seoul, Korea is the one that should have been filed with the Commission, as Respondent Corporation repeatedly asserts in all its pleadings, the same still lacks credence considering that the residence of the majority of Respondent Corporation's incorporators expressly indicated therein is Seoul, Korea which is still violative of the residency requirement stated in Section 10 of the Corporation Code.

With regard to Respondent Corporation's defense that it is a *de facto* corporation, we agree with the Petitioner that the instant case in not a private suit contemplated under Section 20[33] of the Corporation Code but a revocation proceeding before the Commission pursuant to its jurisdiction and power under Section 6(l) of PD 902-A, which is further bolstered by Section 5(m) of the Securities and Regulation Code. Further, it must be emphasized that "the *de facto* doctrine is meant to protect the enforceability of corporate dealings and contracts, to allow the public to take at reasonable face value the authority of the corporation to enter into valid and binding contacts, thereby providing a healthy system by which to encourage the public to deal with corporate entities; the de facto corporation doctrine is therefore meant to apply to the level of existence that pertains to the relationship of the corporation with the dealing public and is not meant to govern nor be applicable to other levels of existence"[34], thus, it should not be used as a defense in a revocation proceedings instituted by the Commission in the exercise of its jurisdiction and powers.

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[30] Petition, Annex "II" (Respondent Corporation's Compliance Re Exhibits Marked dated 23 August 2013), Volume I Records, pp. 116-123.
[31] Page 4, *Supra* note 18.
[32] Paragraphs 8 and 9, *Supra* note 21.
[33] *Sec. 20. De facto corporations.* - The due incorporation of any corporation claiming in good faith to be a corporation under this Code, and its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such corporation may be a party. Such inquiry may be made by the Solicitor General in a *quo warranto* proceeding.
[34] Rationale of De Facto Corporations, Villanueva, Philippine Corporate Law (2001) p.132.

As to the second issue, considering that fraud in the procurement of registration had already been more than satisfactorily established by the Petitioner to warrant the revocation of Respondent Corporation's Certificate of Incorporation, we find it no longer necessary to discuss the same.

WHEREFORE, premises considered, the instant petition is hereby **GRANTED**. The Certificate of Registration of DONGGWANG CLARK CORPORATION under SEC Company Registration No. CS200323149 is hereby **REVOKED** without prejudice of re-registration.

Let the Company Registration and Monitoring Department be furnished a copy of this Decision for appropriate action.

SO ORDERED.

Mandaluyong City, 31 October 2014.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner