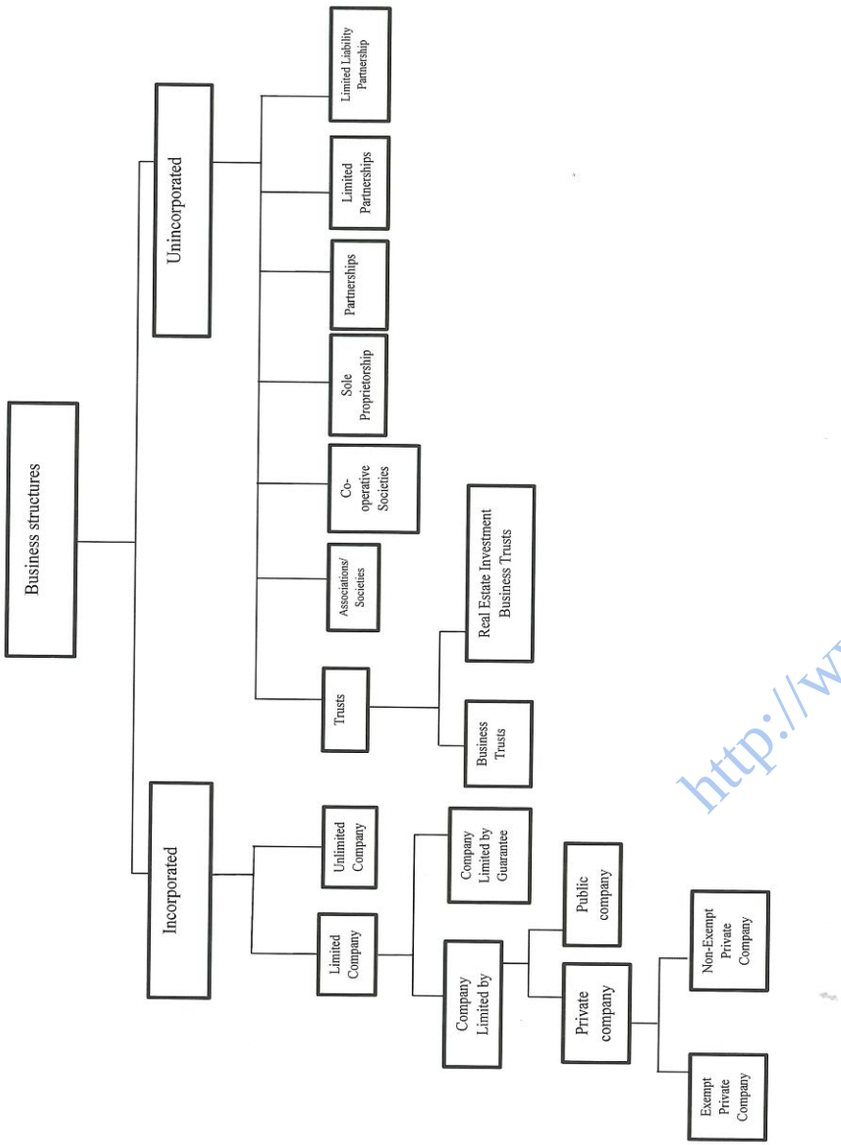
Figure 1.1 — Overview on different types of Singapore business structures



NATURE OF COMPANIES

Characteristics of a company ..... ¶1-300
Separate legal entity ..... ¶1-310
Ability to own property ..... ¶1-320
Liability of members for debts of a company ..... ¶1-330
Ability to sue and be sued ..... ¶1-340
Derivative action ..... ¶1-350

¶1-300 Characteristics of a company

On incorporation, the Companies Act confers on a company's powers to do certain acts. The capacity of a company to do these acts is the same as that of a natural person. This means that a company may do what a natural person does, such as hold property, enter into contracts, sue and be sued.

Section 19(5) of the Companies Act provides the effects of the incorporation of a company as follows:

- the company is a body corporate capable of exercising the functions of an incorporated company
- a company may sue and be sued in its own name
- it has perpetual succession
- it can own land in its own name; and
- members of the company enjoy limited liability.

¶1-310 Separate legal entity

A company is an artificially created person and the law treats it as being separate from its members and those who manage its operations. This is known as the doctrine of separate legal personality. The key characteristic of a company as a business form means that the company remains unchanged even if the identity of its stakeholders (eg directors, members) changes. A company can sue and be sued, and hold property in its own name. As a separate legal entity, it follows that a company can enter into legal relationships with its members and directors.

The landmark case that established a company is a legal entity separate from its participants is *Salomon v Salomon & Co Ltd*.[64]

The rule that a company is a separate legal entity from its controllers has been also upheld and applied by the Singapore courts. In *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association & Anor*,[65] the Singapore

64 [1897] AC 22.
65 [2000] 4 SLR 137.

Industrial Automation Association (the Association) was a society registered under the Societies Act. It set up a company, (SIAA Pte Ltd) with a paid up capital of S$2. The Association was the sole shareholder of SIAA Pte Ltd and managed the company. The office bearers were also the directors of the company and both organisations shared the same office address. The company entered into a contract with Miller Freeman Exhibitions Pte Ltd (Miller Freeman) and a dispute arose under the contract. Miller Freeman sued both the company and the Association. One of the issues arising from the case was whether the Association should be treated as one and the same with SIAA Pte Ltd. The Court of Appeal agreed with the trial judge's findings that the claim against the Association was misconceived because the contract in dispute was between Miller Freeman and SIAA Pte Ltd. The company was thus a separate entity from the Association.

¶1-320 Ability to own property

A company can own property in its own name. This means that even if one person owns all the shares in a company, the shareholder does not own the company's property nor does the shareholder have any equitable interest therein. This principle similarly applies to a company that is a wholly-owned subsidiary of another. Following from the doctrine of separate legal entity, the holding company does not own the property of its subsidiary.

¶1-330 Liability of members for debts of a company

Generally, a company's liabilities are its own. The members and company are separate legal entities such that the members of a company cannot be held liable for the debts of the company. This means debts or liabilities of the company will be paid by the company.

¶1-340 Ability to sue and be sued

A company may sue and be sued in its own name and the members may not maintain an action on the company's behalf. This is known as the "proper plaintiff rule" or the "rule in *Foss v Harbottle*".

In *Foss v Harbottle*,[66] 2 shareholders in the Victoria Park Company brought an action against the company's directors and some others for the misapplication and improper use of the company's property. The court held that the injury complained of was an injury to the company and the members could not maintain such a suit. It was for the company to bring the action.

Notwithstanding the proper plaintiff rule, there may be instances where a member is entitled to bring an action on behalf of the company. This is known as a derivative action. In such event, the member is not enforcing his/her personal rights as a member but rather, that of the company's.

66 (1843) 2 Hare 461.

¶1-350 Derivative action

At common law

A member may bring a derivative action in relation to a wrong done to the company where there is a fraud on the minority and the wrongdoer is in control of the company such that the latter is able to prevent any action to be brought against them. For example, majority shareholders may attempt to use their voting power in an illegitimate manner. A minority member may institute a derivative action against the wrongdoers if the claim is *bona fide* for the benefit of the company. The court has the discretion to disallow a member from bringing a derivative action if they have been guilty of delay in bringing the action.[67]

Statutory derivative action

Sections 216A and 216B of the Companies Act make provisions for a member to bring statutory derivative actions on behalf of a company in respect of any cause of action that the company has. Section 216A(2) of the Companies Act provides that a complainant may apply to the court for leave to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the action or arbitration on behalf of the company.

The Companies Act stipulates that no action or arbitration may be brought and no intervention in an action or arbitration may be made unless the court is satisfied that the complainant has given 14 days' notice to the directors of the company of the complainant's intention to apply for leave, the complainant is acting in good faith; and it appears to be *prima facie* in the interests of the company that the action or arbitration be brought, prosecuted, defended or discontinued.[68]

The Companies Act further states that an application under s 216A shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the members of the company. However, evidence of approval by the members may be taken into account by the court in making an order under s 216A.[69]

A significant advantage of the statutory derivative action as compared to the common law derivative action is that in an application made or an action brought or intervened in under s 216A of the Companies Act, the court may order the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.[70]

67 *Nurcombe v Nurcombe* [1985] 1 WLR 370.
68 See s 216A(3) of the Companies Act.
69 See s 216B of the Companies Act.
70 See s 216B(3) of the Companies Act.

CLASSIFICATION OF COMPANIES

Limited and unlimited companies ..... ¶1-400
Company limited by shares ..... ¶1-410
Company limited by guarantee ..... ¶1-420
Company limited by both shares and guarantee ..... ¶1-430
Private companies ..... ¶1-440
Exempt private companies ..... ¶1-450
Limited liability companies ..... ¶1-460
Public companies ..... ¶1-470
Relationships between companies ..... ¶1-480

¶1-400 Limited and unlimited companies

The Companies Act currently distinguishes 3 types of companies, based on the nature of the liability imposed on the members.[71] These are:

(a) a company limited by shares

(b) a company limited by guarantee; and

(c) an unlimited company.

A company's notice of incorporation will indicate whether a company is an unlimited company, a company limited by shares or a company limited by guarantee.[72]

Unlimited company

An unlimited company is one formed on the principle that there is no limit placed on the liability of its members.[73] When the company is wound up, every member (whether past or present) is liable to contribute to the assets of the company and have no limit placed on their individual liability to contribute to the debts of the company.[74] Unlimited companies are usually incorporated in order to comply with legislation or the rules of some professional body.

For example, an unlimited company may be granted a license to provide architectural services whereas a limited company may be licensed only if its paid-up capital is not less than the amount prescribed by the Minister,[75] ie S$500,000.[76]

71 See s 17(2) of the Companies Act.
72 See s 19(4) of the Companies Act.
73 See s 4(1) of the Companies Act.
74 See s 250(1) of the Companies Act.
75 See s 20 of the Architects Act.
76 See s 2 of the Architects (Prescribed Amount of Paid-Up Capital) Notification 2005.

Limited companies

A limited company is distinguished from the other types of business structures by its name which contains the word "Limited" (abbreviated "Ltd") or "Berhad" (abbreviated "Bhd") as part of its name.[77] In a limited company, a member's liability to contribute towards the assets of the company on winding up is limited, the amount of which depends on whether the company is limited by shares or guarantee.[78]

¶1-410 Company limited by shares

A company limited by shares is the most commonly used company structure in Singapore. It is formed on the principle of having the liability of its members limited by the constitution to the amount, if any, unpaid on the shares respectively held by them.[79] Once the shares are fully paid, the shareholder is relieved of his/her liability to contribute and cannot then be asked to pay more than the amount (if any) unpaid on his/her shares in the event the company is wound up.[80] Creditors of a company limited by shares therefore have only a limited right to recover this unpaid amount from the shareholders in the event of the company going into winding up.

¶1-420 Company limited by guarantee

The term "company limited by guarantee" is defined as a company formed on the principle of having the liability of its members limited to the amount they agree to contribute in the event the company is wound up.[81] This amount is normally nominal and will be stipulated in the company's constitution. The members are thus not liable to put in money as long as the company remains a going concern.

The constitution of a company limited by guarantee must state that:[82]

- the liability of the members is limited and that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member and of the costs, charges and expenses of winding up and for adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding a specified amount; and

77 See s 27(7) and 27(9)(b) of the Companies Act.
78 See s 250(1)(d) and 250(1)(e) of the Companies Act.
79 See s 4(1) of the Companies Act.
80 See ss 22(3) and 250(1)(d) of the Companies Act.
81 See ss 4(1), 250(1)(e) and 250(4) read with s 22(3) of the Companies Act.
82 See s 22(1)(c) and 22(1)(e) of the Companies Act.

Register of directors' and chief executive officer's shareholdings

Under the Companies Act, a company must keep a register with respect to each director's or CEO's interests in the company. These include:[50]

- shares in the company
- (in the case of directors) debentures of or participatory interests made available by the company or a related corporation which are held by the director or in which he/she has an interest, and the nature and extent of the interest
- (in the case of CEOs) debentures of the company which are held by the CEO or in which he/she has an interest and the nature and extent of that interest
- rights or options in respect of the acquisition or disposal of shares in the company or (in the case of directors) a related corporation; and
- contracts of the company in which the director/CEO is a party or under which he/she is entitled to a benefit, being contracts under which a person has a right to call for or to make delivery of shares in the company.

Register of substantial shareholders (applicable for public company with share capital)

By virtue of s 88(1), a company shall keep a register in which it shall immediately enter —

(a) in alphabetical order the names of persons from whom it has received a notice under section 82; and

(b) against each name so entered, the information given in the notice and, where it receives a notice under section 83 or 84, the information given in that notice. [62/70; 49/73; 15/84]

Subsection (2) states the register shall be kept at the registered office of the company, or, if the company does not have a registered office, at the principal place of business of the company in Singapore and shall be open for inspection by a member of the company without charge and by any other person on payment for each inspection of a sum of $2 or such lesser sum as the company requires.

In connection with substantial shareholdings, s 79(1) states this section shall have effect for the purposes of this Div 4, but shall not prejudice the operation of any other provision of this Act.

50 See s 164 of the Companies Act.

Subsection (2) states a reference to a company is a reference —

(a) [Deleted by Act 2/2009 wef 19/11/2012]

(b) to a body corporate, being a body incorporated in Singapore, that is for the time being declared by the Minister, by notification in the *Gazette*, to be a company for the purposes of this Division; or

(c) to a body, not being a body corporate formed in Singapore, that is for the time being declared by the Minister, by notification in the *Gazette*, to be a company for the purposes of this Division.

A person has a substantial shareholding in a company if —

(a) he has an interest or interests in one or more voting shares in the company; and

(b) the total votes attached to that share, or those shares, is not less than 5% of the total votes attached to all the voting shares in the company.

A "voting shares" exclude treasury shares.

Register of charges

Under the Companies Act, every company must maintain a physical register of charges, which records all of the following charges:[51]

- charges to secure any issue of debenture
- charges on uncalled share capital of a company
- charges on shares of a subsidiary of a company which are owned by the company
- charges created or evidence by an instrument, which if executed by an individual, would require registration as a bill of sale
- charges on land wherever situate or any interest therein but not including any charge for any rent or other periodical sum issuing out of land
- charges on book debts of the company
- floating charges on the undertaking or property of a company
- charges on calls made but not paid
- charges on ships or aircraft or any shares in ships or aircraft; and
- charges on goodwill, on a patent or a licence under a patent, on a trade mark or a license to use a trademark, or on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design.

51 See s 131 of the Companies Act.

¶2-330 Company seal

Section 41A(1) states a company may have a common seal but need not have one.

Subsection (2) states ss 41B and 41C apply whether a company has a common seal or not.

Section 41B(1) states a company may execute a document described or expressed as a deed without affixing a common seal onto the document by signature —

(a) on behalf of the company by a director of the company and a secretary of the company;

(b) on behalf of the company by at least 2 directors of the company; or

(c) on behalf of the company by a director of the company in the presence of a witness who attests the signature.

Subsection (2) states a document mentioned in subs (1) that is signed on behalf of the company in accordance with that subsection has the same effect as if the document were executed under the common seal of the company.

Subsection (3) states where a document is to be signed by a person on behalf of more than one company, the document is not considered to be signed by that person for the purposes of subs (1) or (2) unless the person signs the document separately in each capacity.

Subsection (4) states this section applies in the case of a document mentioned in subs (1) that is executed by the company in the name or on behalf of another person, whether or not that person is also a company.

Section 41C states where any written law or rule of law requires any document to be under or executed under the common seal of a company, or provides for certain consequences if it is not, a document satisfies that written law or rule of law if the document is signed in the manner set out in section 41B(1)(a), (b) or (c) and (3).

The Act requires that the company's name shall appear in legible romanised characters on the common seal, and the company will be guilty of an offence if this requirement is not followed.[52]

52 See s 144(1)(a) of the Companies Act.

¶2-340 Documents requiring sealing

The types of contracts which require sealing are generally contracts which, if made by private persons, would be required to be in writing under seal.[53] Under Singapore law, these would include the following:

- contracts without consideration, that is, deeds of gifts
- leases where the term exceeds 7 years at a rack rent[54]
- agency contracts where the agents have authority to bind the principals by deed (such as power of attorneys)[55]
- transfer of a ship or the shares in a ship;[56] and
- contracts involving the transfer of real property.[57]

It is also common for banking documentation to require the affixation of the company's common seal.

Contracts which can be made in writing or orally need not be made under seal. The person making the contract on behalf of the company must act under the express or implied authority of the company.

All share certificates issued by the company must be under the company's common seal. The company may have a share seal to authenticate its shares if the constitution allows. A share seal is a facsimile of the common seal with the words "Share Seal".[58]

The company may also have an official seal for use abroad if the constitution allows, which is a facsimile of the common seal but with the name and place where it is to be used added on its face. The person affixing the seal will have to sign and certify on the instrument to which the seal is affixed, the date on which and the place at which it is affixed.[59]

53 See s 41(3)(a) of the Companies Act.

54 See s 53(1) of the Conveyancing and Law of Property Act.

55 See s 41(5) of the First Schedule of the Bills of Sale Act.

56 See s 18(1) of the Merchant Shipping Act and the First Schedule of the Bills of Sale Act.

57 See ss 20(6) and 58(1) of the Land Titles Act.

58 See s 124 of the Companies Act.

59 See s 41(7) of the Companies Act.

CONVERSION OF STATUS

Conversion of status ..... ¶2-400
Conversion from private to public ..... ¶2-410
Certificate of incorporation on conversion to a public company ..... ¶2-420
Conversion from public to private ..... ¶2-430
No change in legal identity ..... ¶2-440
Conversion of unlimited company to limited company and vice versa ..... ¶2-450

¶2-400 Conversion of status

Private companies may convert their status to public companies and vice versa. Likewise, limited liability companies may convert from their limited liability status to remove the limits on their liability and vice versa.

¶2-410 Conversion from private to public

Under the Companies Act, a public company is defined as "*a company other than a private company*".[60] It is possible for a private company to convert into a public company, under the procedure set out in the Act.

A private company may convert to a public company if its constitution does not prohibit it, and by lodging with ACRA the following documents:[61]

- a copy of a special resolution determining to convert to a public company and specifying an appropriate alteration to its name. The special resolution complying with this requirement might be:

> . . . that the company be converted to a public company and that the name of the company be changed from ABC Pte Ltd to ABC Limited

- a statement in lieu of prospectus; and
- a declaration, to be made online, verifying that the directors have properly paid for their shares, if applicable. This declaration requires the secretary or a director to declare that:
  - "Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash"; or

60 See s 4(1) of the Companies Act.

61 See s 31(2) of the Companies Act.

  - "No director of the company has taken or contracted to take any share or shares in the company for which he is liable to pay in cash".

A fee of S$40 must accompany the application for conversion.[62]

¶2-420 Certificate of incorporation on conversion to a public company

Once ACRA is satisfied with the application for conversion from a private to public company, a notice of incorporation will be issued, which will confirm that the company is a public company. Upon application by the company and the payment of a fee, the company may also obtain a certificate confirming the incorporation of the company with the new status, although this is not mandatory, as the notice is sufficient. The limitations, restrictions and prohibitions imposed by the Companies Act as embodied in the constitution of the private company cease to form part of the constitution. The Companies Act requires that the constitution of a private company must:[63]

- restricts the right to transfer its shares; and
- limits the number of its members to not more than 50 (counting joint-holders of shares as one person and not counting any person in the employment of the company or its subsidiary or any person who while previously in the employment of the company or of its subsidiary was and thereafter has continued to be a member of the company).

Thus, when a conversion of a private company to a public company takes place, both restrictions required by s 18 of the Companies Act should be deleted from the constitution. Subsequent to the conversion, the new public company must then lodge with ACRA a list of persons holding shares in the company.[64]

¶2-430 Conversion from public to private

The conversion of a public company to a private company is also provided for under the Companies Act. A public company converts to a private company by lodging with ACRA a copy of a special resolution, which must satisfy the following:[65]

- It must determine to convert the company to a private company and specify an appropriate alteration to the name; and

62 See para 4 of the First Schedule of the Companies (Fees and Late Lodgment Penalties) Regulations 2015.

63 See s 18(1) of the Companies Act.

64 See s 31(3A) of the Companies Act.

65 See s 31(1) of the Companies Act.

are quoted or to be quoted (except when required by law). Where a listed company intends to deviate from Appendix 2.2 of the *Listing Manual*, an exemption must be sought from the SGX.

Companies limited by shares including preference shares

Section 75(1) states no company shall allot any preference shares or convert any issued shares into preference shares unless there are set out in its constitution the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non-cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares.

Subsection (2) states if default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000.

As a matter of practice, for a company with preference shareholders, the constitution of a company limited by shares must include:

- the rights of the holders of preference shareholders with regard to the repayment of capital
- participation in surplus assets and profits, cumulative or non-cumulative dividends, voting; and
- prioritising of payment of capital and dividends in relation to other shares or other classes of preference shares.[4]

¶3-030 Restrictions under the Companies Act for companies limited by guarantee

Section 38(1) states in the case of a company limited by guarantee, every provision in the constitution or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company, otherwise than as a member, shall be void.

Subsection (2) states for the purposes of the provisions of this Act relating to the constitution of a company limited by guarantee and of this section, every provision in the constitution or in any resolution of a company limited by guarantee purporting to divide the undertaking of the company into shares or interests shall be treated as a provision for a share capital notwithstanding that the number of the shares or interests is not specified thereby.

Thus, in practice it is important to note that neither the constitution of a company limited by guarantee nor its resolutions may purport to give any person a right to participate in the divisible profits of the company other than a member. Further, all provisions in the constitution or in any resolution of a company limited by guarantee purporting to divide the undertaking of the

4 See s 75 of the Companies Act.

company into shares or interests shall be treated as a provision for a share capital notwithstanding that the number of the shares or interests is not specified thereby. Thus, a company limited by guarantee cannot have shares or share capital.[5]

¶3-040 Adoption of the model constitution

Section 36(1) states the Minister may prescribe model constitutions for —

(a) private companies; and

(b) companies limited by guarantee, (referred to in this section and s 37 as specified companies).

Subsection (2) states different model constitutions may be prescribed for different descriptions of specified companies.

Private companies and companies limited by guarantee may adopt the model constitution found in the Companies (Model Constitutions) Regulations 2015 either wholly or in part. Such companies can also elect to adopt the model constitution as in force at the time of adoption or as may be in force from time to time. The difference between adopting the model constitution as in force at the time of adoption or as may be in force from time to time is that in the latter situation, the company will not need to alter its constitution specifically to track any amendments to the model constitution in the Regulations. This reduces the administrative hassle for a company as it will not be subject to the procedures relating to alteration of the constitution as discussed later in the chapter. On the other hand, adopting the model constitution as may be in force from time to time may result in a company having regulations that does not reflect how the members intend to run the company.

Where a company chooses to adopt the whole model constitution for the type of company to which it belongs, it may do so by making reference to the title of the model constitution during incorporation. However, a copy of the constitution of a specified company must be submitted to ACRA where the company:

- adopts only part of the model constitution
- includes provisions additional to those in the model constitution; or
- includes object clauses as part of its constitution.

Companies choosing to adopt the model constitution will reduce the set-up costs for companies as the preparation of a bespoke constitution will require some professional advice to ensure that the constitution remains consistent. However, the needs of each company and the understanding between the company founder(s) and its shareholders may be different. In such a situation, the adoption of a set of regulations that depart from the model constitution,

5 See s 38 of the Companies Act.

¶3-120 Contract among members inter se

Section 39(1) states subject to this Act, the constitution of a company shall when registered bind the company and the members thereof to the same extent as if it respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the constitution.

Subsection (2) states all money payable by any member to the company under the constitution shall be a debt due from him to the company.

It should be noted that the constitution is also a contract between a member and other members of the company (*Wood v Odessa Waterworks Co* (1889) 42 Ch D 636). All existing members are bound to this contract. In other words, new members to the company are treated as having agreed to be bound by the contract whereas past members will cease to be bound by it once they are no longer members of the company.[9]

¶3-130 Enforcing members' rights

A member has a right to have the provisions of the constitution observed. They can enforce this right by asking the court for an injunction, either mandatory or prohibitive. The action can be brought against the other members directly. For example, where a company's constitution provides that a member who wishes to transfer shares has to inform the directors who were bound to take the shares equally between them at a fair value, the member can commence an action against the directors to compel them to purchase their shares in accordance with the constitution without the company being a party to the action (*Rayfield v Hands* [1960] Ch 1).

Whether or not a provision of the constitution is fair, it is irrelevant when deciding its enforceability. Rather, the member's rights and liabilities are "purely a matter of contractual obligation and the [member] must be held to the obligations he had undertaken" (*Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140).

As to effect of alterations on members who do not consent, section 39 (3) states notwithstanding anything in the constitution of a company, no member of the company, unless either before or after the alteration is made agrees in writing to be bound thereby, shall be bound by an alteration made in the constitution after the date on which they became a member so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made or in any way increases their liability as at that date to contribute to the share capital of or otherwise to pay money to the company.

9 See s 39(1) of the Companies Act.

To avoid members not knowing the constitution and their obligations, copies of constitution are stipulated in s 40 in the following manner:-

Subsection (1) states a company shall, on being so required by any member, send to him a copy of the constitution, if any, subject to payment of $5 or such lesser sum as is fixed by the directors. [Act 36 of 2014 wef 03/01/2016]

Subsection (2) states where an alteration is made in the constitution of a company, a copy of the constitution shall not be issued by the company after the date of alteration unless —

(a) the copy is in accordance with the alteration; or

(b) a printed copy of the order or resolution making the alteration is annexed to the copy of the constitution and the particular clauses affected are indicated in ink.

¶3-140 Effect on third party

Since the constitution is a contract among members of the company, a non-member is not privy to the contract and thus cannot enforce any rights purportedly conferred on them by the constitution. A chief executive officer, officer, director, employee or such other associate of the company is also considered a third party.

However, parties may incorporate specific provisions of the constitution into any contract that they may have with the company whether by express reference or by implication. For example, where the contract states that "X shall be a director of the Company and shall hold office in accordance with the constitution", the constitution is expressly incorporated into the contract.

The common situations for an implied contract are in relation to directors and auditors as the constitution of companies provide, among other things, for the appointment and duties of directors and auditors. Where a company does not want particular provisions of the constitution to govern the relationship between the company and the third party, the company should expressly state its intention in the contract to avoid any possible dispute.

¶3-150 Effect of amendment of constitution on existing relationships

Section 26(1) states unless otherwise provided in this Act, the constitution of a company may be altered or added to by special resolution.

Subsection (1AA) states any alteration or addition made to the constitution under subs (1) shall, subject to this Act, be deemed to form part of the original constitution on and from the date of the special resolution or such later date as is specified in the resolution.

OBJECTS AND POWERS

Objects clauses in the constitution ..... ¶3-200
Objects clauses in practice ..... ¶3-210

¶3-200 Objects clauses in the constitution

"Power" is a legal ability to do something. "Object" is the purpose for which a company exists. Normally, however, the term "objects" encompasses both "powers" and "objects".

Historically, the constitution contained an objects clause of the company and a list of the powers which could be exercised by the company in achieving those objects. Thus, the legal capacity of the company to carry on any activity was derived from its objects and powers contained in the company's constitution.

The capacity and powers of the company is stipulated in s 23 in the following manner:-

> Subsection (1) states subject to the provisions of this Act and any other written law and its constitution, a company has —
>
> (a) full capacity to carry on or undertake any business or activity, do any act or enter into any transaction; and
>
> (b) for the purposes of para (a), full rights, powers and privileges.
>
> Subsection (1A) states a company may have the objects of the company included in its constitution.
>
> Subsection (1B) states the constitution of a company may contain a provision restricting its capacity, rights, powers or privileges.

In a summary, it can be said that there is no longer a requirement for a company to state its objects in its constitution although a company may choose to do so. Instead, the Companies Act provides that subject to the provisions of the Companies Act and any other written law and the company's constitution, a company has full capacity to carry on or undertake any business or activity, do any act or enter into any transaction and (for the purposes of carrying out such business or activity) full rights, powers and privileges. Therefore, while drafters of constitutions at times recite all a company may do, this is no longer necessary nor common in Singapore.[11]

¶3-210 Objects clauses in practice

Some companies may choose to include objects clauses in the constitution. In such cases, the main objects of a company will be provided in the first few

11 See s 23 of the Companies Act.

regulations with general objects filling out the remainder of the objects clause. It was common previously to include a general purpose objects clause allowing the company to engage in any business that the members or the directors think desirable. The inclusion of an objects clause is particularly useful where a company is used in a joint venture or as a special purpose vehicle (SPV). In such instances, the investors may wish to ensure that the company does not (without amending its objects clause) carry out activities other than those for which it was originally set up. Where a SPV is concerned, it is created to carry out some specific purpose, or circumscribed transaction, or a series of such transactions. Therefore, it is particularly important that the objects clause for a SPV limits its activities. A sample objects clause where the SPV is created for the set up of a securitisation transaction is as follows:

> "The Company will undertake securitisation and ancillary activities to support the purchase from [name of the originator] of receivables generated on an ongoing basis and for such purpose, shall have full capacity, rights, powers and privileges to carry on or undertake any business or activity, do any act or enter into any transaction in connection with, in relation to or resulting from the foregoing.
>
> Except as stated above, the Company shall not engage in any other business or activities whatsoever."

Companies limited by guarantees are used mainly for setting up non-profit organisations. The constitution of such a company limited by guarantee must state the purpose of the institution and such purposes must be exclusively charitable. Any power to carry out activities as a means to further the charity's main objects (for example, to raise funds, conduct seminars and events) should be provided under an incidental clause.[12]

Section 23(2) stipulates certain restriction as to power of certain companies to hold lands in the following manner:

> A company (limited by guarantee) formed for the purpose of providing recreation or amusement or promoting commerce, industry, art, science, religion or any other like object not involving the acquisition of gain by the company or by its individual members shall not acquire any land without the approval of the Minister but the Minister may empower any such company to hold lands in such quantity and subject to such conditions as he thinks fit.

Upon the application of a company and payment of the prescribed fee, the Registrar shall issue to the company a certificate confirming the decision under subs (2).

12 See s 23 of the Companies Act; Charities (Registration of Charities) Regulations.

ALTERATION OF CONSTITUTION

Alteration of constitution ..... ¶3-300
Restrictions on alteration of constitution ..... ¶3-310
Requirements as to alteration of constitution ..... ¶3-320
Requirements as to change of objects ..... ¶3-330
Alteration of constitution affecting the Company ..... ¶3-340
Alteration of share capital ..... ¶3-350
Reduction of share capital ..... ¶3-360
Remedies under the Companies Act ..... ¶3-370
Orders of the court ..... ¶3-380
Role of case law ..... ¶3-390

¶3-300 Alteration of constitution

The Companies Act imposes specific procedures and meeting requirements to alter a constitution. It also provides protective provisions and restraints for particular types of companies. This is because the changes to the constitution may have significant impact on the member of the company.

However, a member of a company is not bound by an alteration of the constitution made after he/she became a member (unless he/she agrees in writing to be bound) where the alteration:

- requires such member to take or subscribe for more shares than the number held by him/her at the date of alteration; or
- increases his/her liability to contribute to the company's share capital or otherwise to pay money to the company.[13]

Any other alteration will be binding on the members of the constitution. If the constitution is altered by special resolution and not all members agree to the members' resolution, a dissenting member may subsequently claim that there is minority oppression under s 216 of the Companies Act, the elements of which will be discussed in the next chapter.

¶3-310 Restrictions on alteration of constitution

The Companies Act provides that the constitution may be altered or added to by special resolution. A special resolution is a resolution that is passed by at least three-fourths of the votes cast at a general meeting and where the stipulated notice period has been given.[14]

13 See s 39(3) of the Companies Act.

14 See s 184(1) of the Companies Act.

Section 184(1) states a resolution shall be a special resolution when it has been passed by a majority of not less than three-fourths of such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy present at a general meeting of which —

(a) in the case of a private company, not less than 14 days' written notice; or

(b) in the case of a public company, not less than 21 days' written notice,

specifying the intention to propose the resolution as a special resolution has been duly given.

Summary for practice

While the alteration of an objects clause requires a special resolution, the Companies Act provides for additional requirements which are discussed at ¶3-330.

However, there are 2 exceptions. All members must agree to:

(a) the alteration of a provision contained in the constitution of a company immediately before 1 April 2004 and which could not be altered under the provisions of the Companies Act in force immediately before that date; and

(b) the insertion, alteration or removal of an entrenching provision.

In relation to limb (a), prior to 1 April 2004 (which is when the *Companies (Amendment) Act 2004* came into effect), the memorandum of a company could only be altered to the extent and in the manner provided by the Companies Act. The permitted alterations in the Companies Act then included:

- changing the company's name
- conversion from a public company to a private company or vice versa
- alteration of the objects clauses
- conversion from an unlimited company to a limited company and vice-versa
- alteration of share capital; and
- reduction of share capital.

All other provisions in the memorandum could not be altered. However, the Companies Act at present permits these provisions that previously could not be altered to be altered where all members agree to such alteration.

In relation to limb (b), an entrenching provision is a provision of the constitution of a company to the effect that other specified provisions of the constitution:

- may not be altered in the manner provided by the Companies Act
- may not be so altered except:

- by a resolution passed by a specified majority greater than 75% (the minimum majority required by the Companies Act for a special resolution); or
- where other specified conditions are met.

The Companies Act expressly permits an entrenching provision to be provided in the constitution of a company. Therefore, if members want to remove or alter an entrenched provision, the conditions set out in the entrenching provision must be complied with.[15]

For example, if it is agreed that Z, a minority shareholder, is to be appointed as the managing director of the company and that Z shall hold the office for life unless Z tenders resignation, becomes of unsound mind or a resolution to remove Z is supported by at least 90% of the votes cast at a general meeting, a provision appointing Z as the managing director on those terms can be included in the constitution, together with another regulation providing that the former provision can only be altered by a majority of at least 95% of the votes cast on the resolution. The latter regulation will be an entrenching provision, and the former provision is the entrenched provision. In this case, the requisite majority of at least 90% will have to be obtained if the members want to remove Z as managing director subsequently. The shareholders cannot circumvent this by passing a special resolution:

(a) to delete the entrenching provision as an entrenching provision may only be altered or removed where all members agree; or

(b) to remove or alter the entrenched provision.

It also should be noted that where the capital of a company is divided into different classes of shares and there is a provision in the constitution authorising the alteration of class rights only with the consent of some specified proportion of the holders of shares of that class, an alteration of the constitution to affect class rights may be restrained under s 74 of the Companies Act. Under that section, the holders of not less than 5% of the total number of issued shares of that class can apply to court to have such an alteration cancelled. The application must be made within one month of the consent to the alteration unless the court otherwise allows.

¶3-320 Requirements as to alteration of constitution

Apart from the restrictions mentioned in ¶3-310, a company may freely alter the provisions of its constitution by way of a special resolution. Such alterations are "deemed to form part of the original constitution on and from the date of the special resolution or such later date as is specified in the resolution".[16]

15 See ss 26, 26A and 33 of the Companies Act.

The constitution is the only effective way to restrict a company's ability to alter its constitution. A company cannot restrict itself of the right to amend its articles by entering a contract not to alter its constitution (*Punt v Symons & Co Ltd* [1903] 2 Ch 506). Thus, the power of alteration conferred under the Companies Act is always available to a company save for the circumstances mentioned in ¶3-310.

Generally, members are permitted to vote on a resolution, including one that proposes to alter the constitution of the company, at their own discretion. This is because members, unlike directors, do not owe fiduciary duties to other stakeholders of the company and are generally accepted to not have to be concerned about conflict of interest and duty and may vote to advance their own interests (*Peck Constance Emily v Calvary Charismatic Centre Ltd* [1991] 2 MLJ 455).

¶3-330 Requirements as to change of objects

Where a company includes object clauses in its constitution, a company may alter its objects in compliance with the Companies Act. An objects clause of a company may be altered by special resolution in the manner provided under s 33 of the Companies Act. It requires the company to give the following persons 21 days' prior written notice in writing and by electronic communication of the intention to propose such special resolution to alter the objects of the company:

- all members
- all trustees for debenture holders; and
- if there are no trustees for any class of debenture holders, to all debenture holders of that class whose names are, at the time of the posting of the notice, known to the company.

The Companies Act provides for a 21-day period after the special resolution is passed within which the certain persons may object to the alteration.

Where there is no objection to the alteration of objects, the form "Notice of Resolution" containing the special resolution should be filed with ACRA within 14 days after the expiration of the 21 days of passing the resolution.

However, if an application has been made to the court in accordance with s 33(5) of the Companies Act, the form should not be lodged before the application has been determined by the court. The form should be lodged with ACRA together with an office copy of the order of the court within 14 days after the application has been determined by the court. This is regardless of whether the court confirms the alteration or otherwise.

16 See s 26 of the Companies Act.

unless, before —

(i) the incorporation of the company; or

(ii) the filing of any return in the prescribed form containing the particulars required to be specified in the register of directors, chief executive officers and secretaries,

as the case may be, the person has complied with the conditions set out in subs (1A).

Subsection (1A) states the conditions to be complied with by a person referred to in subs (1) are the following:

(a) the person has, by himself or through a registered qualified individual authorised by him, filed with the Registrar —

(i) a declaration that he has consented to act as a director

(ii) a statement in the prescribed form that he is not disqualified from acting as a director under this Act; and

(iii) a statement in the prescribed form that he is not debarred under s 155B from acting as director of the company; and

(b) he has, by himself or through a registered qualified individual authorised by him —

(i) filed with the Registrar a declaration that he has agreed to take a number of shares of the company that is not less than his qualification, if any

(ii) filed with the Registrar an undertaking that he will take from the company and pay for his qualification shares, if any

(iii) filed with the Registrar a declaration that a specified number of shares, not less than his qualification, if any, has been registered in his name; or

(iv) in the case of a company formed or intended to be formed by way of reconstruction of another corporation or group of corporations or to acquire the shares in another corporation or group of corporations, filed with the Registrar a declaration that —

(A) he was a shareholder in that other corporation or in one or more of the corporations of that group; and

(B) as a shareholder he will be entitled to receive and have registered in his name a number of shares not less than his qualification, by virtue of the terms of an agreement relating to the reconstruction.

Subsection (2) states where a person has undertaken to the Registrar under subs (1A)(b)(ii) to take and pay for his qualification shares, he shall, as regards those shares, be in the same position as if he had signed the constitution for that number of shares.

Subsection (3) states subss (1) and (2) (other than the provisions relating to the signing of a consent to act as director) shall not apply to —

(a) a company not having a share capital

(b) a private company; or

(c) a prospectus or a statement in lieu of prospectus issued or lodged with the Registrar by or on behalf of a company or to a constitution adopted by a company after the expiration of one year from the date on which the company was entitled to commence business.

Subsection (4) states if default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 and also to a default penalty.

Subsection (5) states the restrictions in this section on a director or proposed director of a company incorporated under this Act in relation to a prospectus shall apply in the same manner and extent to a director or proposed director of a foreign company as if the references in subss (1) and (4) to a company included references to a foreign company.

¶5-220 Appointment of company secretary

Constitutions typically vest the power to appoint a secretary and to determine the secretary's terms of office in the Board. In appointing the secretary, the Board's legal obligation is stated in s 171 of the Companies Act which specifies that it must take all reasonable steps to ensure that the secretary is a person who appears to have the requisite knowledge and experience to discharge the functions of a secretary of the company. In practice, Boards usually appoint company secretaries who hold requisite professional and/or academic qualifications (like those listed below for public companies).

The secretary or secretaries shall be appointed by the directors and at least one of those secretaries shall be present at the registered office of the company by himself or his agent or clerk on the days and at the hours during which the registered office is to be accessible to the public.

However, a secretary, his agent or clerk of a private company need not be physically present at the registered office during the times specified in that subsection if a secretary, his agent or clerk of the private company is readily contactable by a person at the registered office by telephone or other means of instantaneous communication during those times.

Anything required or authorised to be done by or in relation to the secretary may, if the office is vacant or for any other reason the secretary is not capable of acting, be done by or in relation to any assistant or deputy secretary or, if there is no assistant or deputy secretary capable of acting, by or in relation to any officer of the company authorised generally or specially in that behalf by the directors. The office of secretary must not be left vacant for more than 6 months at any one time.[16]

¶5-222 Qualification of Company Secretary

Regulation 89 of the Companies Regulations 1990 stipulates the requirement for company secretary stating that for the purposes of s 171(1AA)(b) of the Act, the requirements relating to experience, professional and academic requirements and membership of professional associations that a secretary of a public company must satisfy are any of the following:

(a) the person has, for at least 3 years in the period of 5 years immediately preceding his appointment as secretary, held the office of secretary of any company

(b) the person is a qualified person under the *Legal Profession Act (Cap 161)*

(c) the person is a public accountant

(d) the person is a member of the Institute of Singapore Chartered Accountants

(e) the person is a member of the Chartered Secretaries Institute of Singapore

(f) the person is a member of the Association of International Accountants (Singapore Branch)

(g) the person is a member of the Institute of Company Accountants, Singapore.

¶5-230 Requirements for company secretary of a public company

For public companies, directors have to take the additional step of ensuring that the company secretary satisfies such requirements relating to experience, professional and academic requirements and membership of professional associations as may be prescribed in the Company Regulations. These requirements are as follows:[17]

- the person has for at least 3 years in the period of 5 years immediately preceding his/her appointment as secretary, held the office of secretary of any company

16 See s 171(4) of the Companies Act.

17 See s 171 of the Companies Act; reg 89 of the Companies Regulations.

- the person is a qualified person under the *Legal Profession Act* (Cap 161) of Singapore
- the person is a public accountant
- the person is a member of the Institute of Singapore Chartered Accountants
- the person is a member of the Singapore Association of the Institute of Chartered Secretaries and Administrators
- the person is a member of the Association of International Accountants (Singapore Branch); or
- the person is a member of the Institute of Company Accountants, Singapore.

REMUNERATION

Directors
Remuneration of directors ..... ¶5-300
Regulation of director's remuneration ..... ¶5-310
Professional fees and salaries ..... ¶5-320
Recovery of overpayment during liquidation ..... ¶5-330
Company secretary
Remuneration of company secretary ..... ¶5-340

¶5-300 Remuneration of directors

The remuneration of a director can be divided into 2 types:

(a) moneys paid to a director as a non-executive director ie having no contract of services rendered to the company (usually referred to as director's fees); and

(b) moneys paid to a director who is an employee director with a service contract, approved by the board of directors.

A distinction must be made between the aforesaid as only the former type of payment is made to a director in respect of his/her office and is regulated in the manner as discussed in ¶5-310. The latter is usually dealt with by parties' private dealings and based on employment contract(s).

¶5-310 Regulation of directors' remuneration

Given that the Board is itself mainly responsible for the nomination and appointment of directors, there is a need to ensure that directors do not abuse this power by providing themselves with unwarranted remuneration and other benefits in their contracts of appointment. Accordingly, the Companies Act provides that companies that wish to provide or improve emoluments for their directors must do so through a resolution that is not related to other matters. Here, the term "emoluments" include fees and percentages, expense allowances, any contribution paid in respect of a director under any pension scheme and any benefits received by them otherwise than in cash.[18]

The Companies Act only regulates emoluments given to directors in respect of their services as directors and not as executives. There is no equivalent provision that requires a resolution to be passed for executive salaries paid to executive directors. Executive remuneration is an issue that falls within the general powers of management that vest in the Board.

In addition, members are permitted under the Companies Act to require the disclosure of directors' emoluments. Section 164A of the Companies Act

18 See s 169 of the Companies Act.

provides that 10% (or more) of the members of the company (excluding the company if the company itself is a member), or a member or members holding 5% or more of the total number of issued shares of the company (excluding treasury shares) may, through the giving of a notice, require the company to disclose emoluments given to the directors. Upon receipt of such notice, the company must prepare an audited statement showing the total amount of emoluments and other benefits paid to or received by each of the directors of the company and each director of the company's subsidiaries. The information must include any amount paid by way of salary, for the financial year immediately preceding the service of notice. The audited statement must then be sent to all persons entitled to receive notice of meetings and be laid before the next general meeting of the company. Failure to respond to a proper notice would render the company and all directors of the company liable for an offence.

SGX-listed Companies

For companies listed on the SGX, the Code provides that the Board shall establish a Remuneration Committee (RC). The RC must be composed of at least 3 directors, consisting entirely of non-executive directors and the majority of whom should be independent, including the chairman of RC. The duties of the RC include:

- recommending to the Board:
  - a general framework of remuneration for the Board and key management personnel
  - the specific remuneration packages for each director and key management personnel; and
- reviewing the eligibility of directors for benefits under long-term incentive schemes.

Following from Principle 9 of the Code, every company should provide clear disclosure in the company's annual report of its remuneration policies, level and mix of remuneration, and the procedure for setting remuneration. In particular, Guideline 9.1 of the Code states that a company should disclose the link between remuneration and performance of executive directors and key management personnel. In addition, the remuneration of each individual director and the CEO must be disclosed on a named basis, rounding off the disclosed remuneration to the nearest thousand dollars. The Code also provides that a company should name and disclose the remuneration of at least the top 5 key management personnel (who are not directors or the CEO) in bands of S$250,000.

In practice, most companies have reported the brief terms of references of the RC and have generally shared information or disclosed remuneration frameworks pursuant to the Code's requirements. Some companies have

COMPANY'S OBLIGATIONS TO ITS AUDITORS

Rights of auditor to information ..... ¶10-900
General meetings attendance ..... ¶10-910
Fees ..... ¶10-920

¶10-900 Rights of auditor to information

Under the Companies Act, the auditor of a company has a right of access at all times to the accounting and other records, including registers of the company, and is entitled to require from any officer of the company and any auditor of a related company, such information and explanations as he/she desires for the purposes of an audit.[56] Where the company in question is a parent company, this access extends to any subsidiary company.

The Companies Act grants the auditor the free and unhindered right of access at all reasonable times to the accounting and other records (including registers) of the company. In addition, the auditor is entitled to require from any officer of the company and any auditor of the related company such information and explanations as he/she needs for the audit of the company's accounts.[57]

It is an offence for an officer of a company to refuse access or fail to provide access, without lawful excuse, to the auditor of his/her company or holding company in respect of accounts, records and other documents in his/her control. It is also an offence by a company officer to refuse or fail to give, without excuse, the information and explanations the auditor requires. In addition, anyone hindering, obstructing or delaying an auditor in the performance of his/her duties or exercise of his/her powers will also be committing an offence, and upon conviction liable to a fine of up to S$4,000.[58]

¶10-910 General meetings attendance

Section 207(8) of the Companies Act states that an auditor of a company or his agent authorised by him in writing for the purpose is entitled to attend any general meeting of the company and to receive all notices of, and other communications relating to, any general meeting which a member is entitled to receive, and to be heard at any general meeting which he attends on any part of the business of the meeting which concerns the auditor in his capacity as auditor.

56 See s 207(5) of the Companies Act.

57 See s 207(6) of the Companies Act.

58 See s 207(10) of the Companies Act.

¶10-920 Fees

The auditor of a company appointed at an AGM of the company will receive fees and expenses as fixed by the company in a general meeting. The auditor's fees may also be decided by the directors provided the directors are authorised to do so by the members at the last AGM.

If the auditor is appointed by the directors or by the Registrar of Companies, his/her fees will be fixed by the directors or Registrar respectively. If the directors or Registrar fail to fix the auditor's fees, the fees may be determined by the company in general meeting.[59]

Section 205(16) states that the fees and expenses of an auditor of a company —

(a) in the case of an auditor appointed by the company at a general meeting — shall be fixed by the company in general meeting or, if so authorised by the members at the last preceding AGM, by the directors; and

(b) in the case of an auditor appointed by the directors or by the Registrar under this section or under s 205AF — may be fixed by the directors or by the Registrar, as the case may be, and, if not so fixed, shall be fixed as provided in paragraph (a) as if the auditor had been appointed by the company.

Auditors' remuneration disclosure

Section 206 of the Companies Act provides for disclosure of auditors' remuneration in the following manner:-

Subsection (1) states if a company is served with a notice sent by or on behalf of —

(a) at least 5% of the total number of members of the company; or

(b) the holders in aggregate of not less than 5% of the total number of issued shares of the company (excluding treasury shares),

requiring particulars of all emoluments paid to or receivable by the auditor of the company or any person who is a partner or employer or employee of the auditor, by or from the company or any subsidiary corporation in respect of services other than auditing services rendered to the company, the company shall immediately —

(c) prepare or cause to be prepared a statement showing particulars of all emoluments paid to the auditor or other person and of the services in respect of which the payments have been made for the financial year immediately preceding the service of such notice;

59 See s 205(16) of the Companies Act.

(d) forward a copy of the statement to all persons entitled to receive notice of general meetings of the company; and (e) lay such statement before the company in general meeting.

Subsection (1A) states without prejudice to subs (1), a public company shall, under prescribed circumstances, undertake a review of the fees, expenses and emoluments of its auditor to determine whether the independence of the auditor has been compromised, and the outcome of the review shall be sent to all persons entitled to receive notice of general meetings of the company.

Subsection (2) states if default is made in complying with this section, the company and every director of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$5,000.

PROTECTION OF AUDITORS

Protection from defamation actions ..... ¶10-930
Indemnification of auditors ..... ¶10-935

¶10-930 Protection from defamation actions

Auditors enjoy a qualified privilege in order for them to report their findings freely and without fear of reprisals through the courts in defamation actions. The Companies Act specifically states that an auditor is not liable to any defamation action for any oral or written statement which he/she makes in the course of his/her duties as an auditor unless such a statement is made maliciously. As a natural extension of that rule, a publisher of documents prepared by an auditor in the course of his/her duties as required by the Companies Act, also enjoys a qualified privilege. The protection of auditors and publishers in this manner does not limit or affect any other right, privilege or immunity which the auditor or publisher may have as a defendant in an action for defamation.[60]

¶10-935 Indemnification of auditors

A company may not, by way of its constitution or contract, exempt its auditor from any liability which by law would otherwise attach to him/her or it in respect of any negligence, default, breach of duty or breach of trust of which he/she may be guilty in relation to the company.

The company can however indemnify its auditor against any liability incurred or that will be incurred by him/her or it:

- in defending any proceedings (whether civil or criminal) in which judgment is given in his/her or its favour or in which he/she or it is acquitted; or
- in connection with any application under s 76A(13) or 391 of the Companies Act (in relation to a company dealing in its own shares), or any other provision of this Companies Act, in which relief is granted to him/her or it by the court.[61]

60 See s 208 of the Companies Act.
61 See s 208A of the Companies Act.

In addition, if an auditor of a public company or a subsidiary corporation of a public company, in the course of the performance of his/her duties as an auditor, has reason to believe that a serious offence involving fraud or dishonesty is being or has been committed against the company by officers or employees of the company, he/she must immediately report the matter to the Minister or the MAS.[71] A serious offence involving fraud or dishonesty is one where the value of the property that has or is likely to be obtained from the offence is at least S$100,000 and the offence is punishable by imprisonment for no less than 2 years.[72]

The duty to report a serious offence involving fraud or dishonesty to the Minister is not considered to be a breach of duty by the auditor, and can be fulfilled by the reporting of the same crime under a different law.

¶10-960 Duty to trustees for debenture holders

Whenever the auditor of a borrowing company delivers to that company any financial statements or any report, certificate or other document which is required by the Companies Act or by the debentures or trust deed to give to the corporation, the auditor must within 7 days of doing so, send by post to every trustee for the holders of debentures of the borrowing corporation a copy thereof.

Similarly, when an auditor of a borrowing company discovers in the course of his/her duties any matter which in his/her opinion is relevant to the exercise and performance of the powers and duties imposed by the Companies Act or by any trust deed upon any trustee for the holders of debentures of the corporation, he/she shall within 7 days after so becoming aware of the matter, send by post a report in writing on such matter to the borrowing corporation and a copy thereof to the trustee.

An auditor who fails to comply with his/her duties to the trustees for debenture holders will be guilty of an offence and upon conviction liable to a fine of up to S$1,000, and also a default penalty.[73]

¶10-965 Auditor's liability to third parties

The Singapore Court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[74] clarified that there should only be one test for the imposition of a duty of care and skill by professionals to third parties, notwithstanding the damages being claimed. Such test comprised:

71 See s 207(9A) of the Companies Act.

72 See s 207(9B), (9C) and (9D) of the Companies Act.

73 See s 209 of the Companies Act.

74 (2007) 4 SLR 100; SGCA 37.

- proximity of the damage; and
- policy considerations (such as the presence of a clearly defined contractual duty), taking into account the factual foreseeability of the damage.

¶10-980 Audit exemption in certain companies

Certain companies are exempted from obligation to appoint auditors as stipulated in s 205A of the Companies Act in the following manner:

Subsection (1) states notwithstanding s 205 on appointment and remuneration of auditors, a company which is exempt from audit requirements under s 205B or 205C, and its directors shall be exempt from s 205(1) or (2), as the case may be.

Subsection (2) states where a company ceases to be so exempt, the company shall appoint a person or persons to be auditor or auditors of the company at any time before the next AGM; and the auditors so appointed shall hold office until the conclusion of that meeting.

Subsection (3) states if default is made in complying with subs (2), the company and every director of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$5,000.

Dormant company exempt from audit requirements

Section 205B of the Companies Act stipulates in the following manner:

Subsection (1) states a company shall be exempt from audit requirements if —

(a) it has been dormant from the time of its formation; or

(b) it has been dormant since the end of the previous financial year.

Subsection (2) states a company is dormant during a period in which no accounting transaction occurs; and the company ceases to be dormant on the occurrence of such a transaction.

Subsection (3) states for the purpose of subs (2), there shall be disregarded transactions of a company arising from any of the following:

(a) the taking of shares in the company by a subscriber to the constitution in pursuance of an undertaking of his in the constitution;

(b) the appointment of a secretary of the company under s 171;

(c) the appointment of an auditor under s 205;

(d) the maintenance of a registered office under ss 142, 143 and 144;

(e) the keeping of registers and books under ss 88, 131, 173, 189 and 191;

(f) the payment of any fee or charge (including any fee, penalty or interest for late payment) payable under any written law;

(fa) the payment of any composition amount payable under s 409B or any other written law; [Act 36 of 2014 wef 03/01/2016]

(fb) the payment or receipt by the company of such nominal sum not exceeding such amount as may be prescribed;

(g) such other matter as may be prescribed.

Subsection (4) states where a company is, at the end of a financial year, exempt from audit requirements under subs (1) —

(a) the copies of the financial statements or consolidated financial statements and balance-sheet of the company to be sent under s 203 need not be audited;

(b) section 203 has effect with the omission of any reference to the auditor's report or a copy of the report;

(c) copies of an auditor's report need not be laid before the company in a general meeting; and

(d) the annual return of the company to be lodged with the Registrar shall be accompanied by a statement by the directors —

(i) that the company is a company referred to in subs (1)(a) or (b) as at the end of the financial year;

(ii) that no notice has been received under subs (6) in relation to that financial year; and

(iii) as to whether the accounting and other records required by this Act to be kept by the company have been kept in accordance with s 199.

Subsection (5) states where a company which is exempt from audit requirements under subs (1) ceases to be dormant, it shall thereupon cease to be so exempt; but it shall remain so exempt in relation to accounts for the financial year in which it was dormant throughout.

Subsection (6) states any member or members holding not less than 5% of the total number of issued shares of the company (excluding treasury shares) or any class of those shares (excluding treasury shares), or not less than 5% of the total number of members of the company (excluding the company itself if it is registered as a member) may, by notice in writing to the company during a financial year but not later than one

month before the end of that year, require the company to obtain an audit of its accounts for that year.

Subsection (7) states where a notice is given under subs (6), the company is not entitled to the exemption under subs (1) in respect of the financial year to which the notice relates.

Subsection (8) states in this section, "accounting transaction" means a transaction the accounting or other record of which is required to be kept under s 199(1).

Small company exempt from audit requirements

Section 205C of the Companies Act stipulates small companies are exempt from audit requirement in the following manner:

Subsection (1) states subject to subss (3), (4) and (6), a company that is a small company in respect of a financial year shall be exempt from audit requirements for that financial year.

Subsection (2) states s 205B(4), (6) and (7) shall apply, with the necessary modifications, to a small company so exempt.

Subsection (3) states subs (1) does not apply to a parent company unless the parent company —

(a) is a small company; and

(b) is part of a small group.

Subsection (4) states subs (1) does not apply to a subsidiary company unless the subsidiary company —

(a) is a small company; and

(b) is part of a small group.

Subsection (5) states in this section, "small company" and "small group" have the same meanings as in the Thirteenth Schedule.

Subsection (6) states this section shall not apply to a company with respect to its financial statements for a financial year commencing before the date of commencement of s 128 of the *Companies (Amendment) Act 2014* and such a company shall prepare its accounts or consolidated accounts and its directors shall lay them at its AGM in accordance with Pt VI in force immediately before the date of commencement of s 128 of the Companies (Amendment) Act.

Subsection (7) states without prejudice to the generality of s 197(2), a company referred to in subs (6) shall, when lodging a return with the Registrar under s 197, attach a copy of the accounts or consolidated accounts so prepared.

repay the underlying debt still remains, even if such debt would now rank only as an unsecured debt in the event of the liquidation of the borrower.

Registration also acts as constructive notice of the existence of the charge to all persons affected thereby.

¶11-220 Duty to register charges

The company is required under the Companies Act to register registrable charges against it. However, any interested party may do so as well and claim the registration fees incurred from the company instead. If the registration requirements are not complied with, the company and its defaulting officers will be guilty of an offence. Typically, lenders would procure as a term of the charge instrument that the borrower takes all necessary steps to preserve the validity of the charge created therein. This would ostensibly include registering the charge with ACRA within the 30 day period. Alternatively, lenders might themselves prepare and make the necessary filings rather than rely on the borrowing company to do so.

Section 132 of the Companies Act stipulates duty to register in the following manner:

> Subsection (1) states documents and particulars required to be lodged for registration in accordance with s 131 may be lodged for registration in the prescribed manner by the company concerned or by any person interested in the documents, but if default is made in complying with that section the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$1,000 and also to a default penalty.
>
> Subsection (2) states where registration is effected by some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by the person on the registration.

¶11-230 Registration procedure

As mentioned above, all registrable charges must be registered with ACRA within 30 days of their creation (ie the date the instrument creating the charge is executed). Also as mentioned above, there is no need to file the instrument or a copy of it.

Where a registrable instrument or document is made or executed outside Singapore, the time for registration of the document or instrument is extended by 7 days or by such further extensions as may be allowed by ACRA.[9]

9 See s 139 of the Companies Act.

The Court may extend the time limit for registration if it is satisfied that:

- it is not prejudicial against the borrower's creditors or shareholders
- the failure to register was accidental, inadvertent or due to some other sufficient cause; or
- it is just and equitable to grant relief.

Upon the application of the company and payment of the prescribed fee, the Registrar must issue to the company a certificate confirming the registration of the charge. The certificate is conclusive evidence that the requirements as to registration have been complied with.[10]

¶11-240 Company obliged to keep register

Section 138(1) of the Companies Act states that every company must keep at its registered office a register of charges containing details of all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company for as long as the charge to which the instrument relates remains in force, but in the case of a series of debentures the keeping of a copy of one debenture of the series is sufficient for the purposes of this subsection.

The register must contain the following details in relation to all charges:

- a short description of the property charged
- the amount of the charge
- the names of the persons entitled to the charge.

The register is open for inspection to any creditor or member of the company. Other persons may inspect the register on payment of a small fee. In addition, a company must keep at its registered office the instruments creating registrable charges or copies thereof for so long as such charges remain in existence or the underlying debt is unpaid, and for a period of 5 years thereafter.

These obligations apply to all companies within Singapore, including registered foreign companies.[11] A company or any of its officers who does not comply with these requirements commits an offence.

Further details on the register of charges can be found at ¶7-700.

10 See s 134(3) of the Companies Act.

11 See s 141 of the Companies Act.