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CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

Corporate governance and directors' duties in Singapore: overview

Stephanie Keen, Adrian Chan and Matthew Bousfield
Hogan Lovells Lee & Lee

global.practicallaw.com/9-502-3233

CORPORATE GOVERNANCE TRENDS

1. What are the main recent corporate governance trends and reform proposals in your jurisdiction?

Substantial amendments to the Companies Act

On 8 October 2014, Singapore's Parliament passed over 200 amendments to the Companies Act (Cap.50) (Companies Act). The changes aim to:

- Reduce the regulatory burden on companies.
- Promote greater flexibility in accommodating different business structures and means of raising capital.
- Ensure greater accountability and transparency.

The key changes are:

- Public companies will enjoy greater freedom to decide the rights that attach to new shares, and the restriction providing that each equity share must have one vote will be lifted, subject to certain safeguarding provisions.
- The prohibition on the giving of financial assistance will no longer apply to private companies. Public companies will be permitted to provide financial assistance, provided that doing so would not materially prejudice the interests of the company and its shareholders and the company's ability to pay its debts, and provided the directors deem the terms of the assistance fair and reasonable.
- Small to medium enterprises (SMEs) stand to benefit from new, broader criteria for exemption from statutory audit.
- Indirect investors (such as those with shareholdings through a nominee company, custodial bank or the Central Provident Fund agent bank) can participate more fully at general meetings, by way of the appointment of multiple proxies by the direct shareholder. Companies will not be allowed to opt out of this provision.
- Companies can use electronic communication to send notices and documents to members (provided this is allowed in their constitutional documents) and private and unlisted public companies will be allowed to pass written resolutions by e-mail.

Corporate governance landscape

The effect of the changes to the Companies Act will have a marked impact on the corporate governance landscape:

- Chief executive Officers (CEOs) will be required to comply with certain disclosure requirements already applicable to directors. These include disclosing interests in securities of the company and conflicts of interest in proposed transactions.
- Company auditors of public interest companies will no longer be able to resign prematurely at will, but must instead seek approval from the Accounting and Corporate Regulatory Authority (ACRA).
- The Company Registrar's powers to punish individual officers of non-compliant companies will be enhanced, including granting the Registrar the power to debar an officer for failure to lodge a document within three months of a Companies Act deadline.
- Private companies will no longer be obliged to keep a register of members; ACRA's electronic register will be authoritative.

Personal Data Protection Act 2012 (PDPA)

The PDPA established a new data protection law that applies across all industries and sectors. It is broadly drafted to apply to all organisations and natural persons that collect, use or disclose personal data from individuals in Singapore. The PDPA has extra-territorial effect and came fully into force on 2 July 2014.

CORPORATE ENTITIES

2. What are the main forms of corporate entity used in your jurisdiction?

The following forms of corporate entity can be established in Singapore:

- Public company limited by shares.
- Private company limited by shares or by guarantee.
- Sole proprietorship.
- General partnership.
- Limited partnership (LP) and limited liability partnership (LLP).
- Branch office or representative office.
- Business trust.

The most commonly established corporate entity is a company limited by shares (either public or private).

This chapter deals only with the regime applicable to private companies and public companies listed on the Singapore Exchange (SGX) (listed companies).

LEGAL FRAMEWORK

3. Outline the main corporate governance legislation and authorities that enforce it. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? List any such groups with significant influence in this area.

Corporate governance and directors' duties are mainly regulated by:

- Legislation, including:
  - the Companies Act, which is mandatory for all companies and is the key legislation governing corporate entities;
  - the Securities and Futures Act (Chapter 289) (SFA), which is mandatory for listed and other companies that offer securities to the public;
  - the Limited Liability Partnership Act (Chapter 163A) and Limited Partnership Act (Chapter 163B). These were introduced in 2005 and 2009 to govern LLPs and LPs, respectively.
- Common law.
- Policies, rules, codes and guidebooks issued by Singapore's regulatory bodies, including:
  - the Singapore Code on Takeovers and Mergers, which contains non-statutory rules for takeovers and mergers, issued by the Monetary Authority of Singapore (MAS) and administered by the Singapore Securities Industry Council (SIC);
  - the SGX Listing Manuals, which are non-statutory SGX rulebooks governing SGX Mainboard and Catalist companies, setting out criteria for listing and ongoing obligations;
  - the Code of Corporate Governance, which contains non-statutory principles for listed companies to follow on a "comply or explain" basis;
  - the Guidebook for Audit Committees in Singapore (ACGC Guidebook);
  - SGX press releases and guidance; and
  - SIC guidelines, practice notes and circulars.
- The company's constitution and terms of reference, including:
  - memorandum and articles of association; and
  - terms of reference of the audit committee, the nominating committee and the remuneration committee.

The main regulatory bodies are:

- **MAS.** The MAS (*www.mas.gov.sg*) is the central bank of Singapore and manages the exchange rate, foreign reserves and liquidity in the banking sector. The MAS also supervises financial services and grants operational licences to banks, insurance companies and other financial institutions.
- **SGX.** The SGX (*wwww.sgx.com*) is Singapore's stock exchange, the fourth largest in the world (after New York, London and Tokyo).
- **Accounting and Corporate Regulatory Authority (ACRA).** ACRA (*www.acra.gov.sg*) is the national regulator of business entities and public accountants, which monitors corporate compliance.
- **SIC.** The SIC (*www.mas.gov.sg/sic*) administers and enforces the Singapore Code on Takeovers and Mergers.
- **Economic Development Board (EDB).** The EDB (*www.edb.gov.sg*) is the lead government agency responsible for planning and executing strategies to enhance Singapore's position as a global business centre.
- **Ministry of Manpower (MOM).** The MOM (*www.mom.gov.sg*) administers employee matters in Singapore and grants work-pass applications.

Institutional investors can influence good corporate governance by voting, abstaining or, on rare occasions, voting against a particular issue (particularly director remuneration packages). However, contentious issues are often discussed with institutional investors before any resolution, and many prefer to reach agreement with the company "behind-the-scenes" before the matter is put to the vote. Although it is often impracticable for an institutional investor with a large shareholding to simply sell its shares if it wishes to force a corporate governance issue, the threat of doing so may be effective.

The Securities Investors Association (Singapore) is a non-profit organisation for retail investors, which acts as a watchdog for investor rights and monitors corporate governance practices in Singapore.

4. Has your jurisdiction adopted a corporate governance code?

The Code of Corporate Governance is a set of non-statutory "best practice" principles for listed companies.

Although only applicable to listed public companies, as a matter of good practice unlisted public companies and private companies are encouraged to follow the Code as far as possible.

The Code is not mandatory but instead adopts a "comply or explain" approach. Although there are no direct consequences of a failure to comply with the Code (such as the imposition of fines or reprimands), under the SGX Listing Rules, listed companies must disclose their corporate governance practices and give explanations for deviations from the Code in their annual reports.

The Code covers:

- Board matters (for example, board composition, the role of the chairman and chief executive officer (CEO), board performance and access to information).
- Remuneration (for example, procedures for developing remuneration policies, the level and mix of remuneration and disclosure of remuneration).
- Accountability and audit (for example, internal controls and the role of the audit committee).
- Shareholders' rights and responsibilities (for example, communication with shareholders and conduct of shareholder meetings).

The Code was first issued in 2001. A number of subsequent revisions have been made. The latest version of the Code was issued by the MAS on 2 May 2012, taking effect in respect of annual reports relating to financial years commencing on or after 1 November 2012.

The 2012 Code makes several key revisions to the 2005 Code, including in relation to:

- Director independence.
- Board composition.
- Multiple directorships.
- Remuneration practices and disclosures.
- Risk management.
- Shareholder rights.

The general response to the 2012 Code has been positive, although many feel that the rules have become more demanding.

CORPORATE SOCIAL RESPONSIBILITY AND REPORTING

5. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

It is becoming increasingly common in Singapore for companies to report on their corporate social responsibility (CSR) programmes, environmental awareness initiatives and commitment to ethical issues.

The Singapore government has adopted a tripartite approach, involving the government, the private sector and the labour movement in developing CSR. In May 2004, the National Tripartite Committee on CSR was established to study the issues holistically and address any gaps at the national level. In January 2005, the Singapore Compact for Corporate Social Responsibility was set up. This is a national society committed to bringing the CSR movement forward by developing co-ordinated and effective strategies to promote CSR in Singapore.

Other prominent stakeholders include:

- National Trades Union Congress (NTUC), which advocates CSR from a workers' perspective.
- Consumers Association of Singapore (CASE), which promotes CSR from a consumer protection perspective.
- Singapore National Employers and Business federations (SNEF and SBF), which promote various CSR-related programmes.
- Ministry of Finance (MOF) and MAS, which advocate CSR from a corporate governance perspective.

In June 2011, the SGX also released sustainability reporting guidelines, leading many major listed companies to include a CSR component in their annual reports.

So far Singapore has refrained from adopting a legislative framework on CSR, instead focusing on persuasion to emphasise ethical leadership and the promotion of social responsibility.

BOARD COMPOSITION AND RESTRICTIONS

6. What is the management/board structure of a company?

Structure

Companies have a single board structure, which is answerable to the shareholders of the company.

Management

Typically, all powers of management are vested in the company directors, except for those that are reserved for the shareholders under the company memorandum and articles of association, or under Singapore law.

Board members

The directors of a company are generally appointed by the shareholders (*see Question 10*). Singapore companies can appoint executive and non-executive directors, with the executive directors managing the day-to-day operations of the company. Executive directors generally work on a full-time basis under a service contract with the company. Non-executive directors are not employees but offer more general guidance and exercise oversight.

A company can also appoint independent directors. At least one-third of the board should be independent, increasing to half of the board in certain circumstances (*Code of Corporate Governance*) (*see Question 8*).

Employees' representation

Employees do not have a right to board representation.

Number of directors or members

The minimum and maximum number of directors is generally prescribed by the company memorandum and articles of association. Statute does not prescribe a certain number of directors and the Code of Corporate Governance simply states that the board should not be so large as to be unwieldy.

7. Are there any general restrictions or requirements on the identity of directors?

Age

Directors must be at least 18 years old.

A person aged 70 years old or over appointed as a director is subject to re-election at every annual general meeting (AGM). However, there is a proposal to remove this requirement under suggested amendments to the Companies Act that are expected to be implemented in 2014 (*see Question 1*).

Nationality

There are no nationality requirements for directors. However, companies incorporated in Singapore must have at least one director who is ordinarily resident in Singapore. This can be a Singapore national, a permanent resident or an expatriate residing in Singapore pursuant to an employment pass.

Foreign companies seeking a listing on the SGX must have at least two directors resident in Singapore.

Gender

There are no gender restrictions. However, for the first time, the 2012 Code of Corporate Governance makes specific reference to gender when discussing the need for the board to be appropriately diverse.

8. Are non-executive, supervisory or independent directors recognised or required?

Recognition

Non-executive, executive and independent directors are recognised under the Companies Act and the Code of Corporate Governance.

Board composition

The Code of Corporate Governance states that at least one-third of the board of listed companies should be independent. Half of the board should be independent in certain circumstances (*see below, Independence*). In addition, the chairman and the CEO should be different people and the board should consist of directors who as a group provide an appropriate balance and diversity of skills, experience, gender and knowledge.

Independence

An "independent" director must be someone who has no relationship with the company, its related corporations, its 10% or more shareholders or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment with a view to the best interests of the company. The board should identify in the company's annual report each director it considers to be independent and should state its reasons if it determines that a director is independent despite the existence of circumstances suggesting otherwise. The Code of Corporate Governance sets out a non-exhaustive list of such circumstances.

The independence of any director who has served on the board for more than nine years should be subject to particularly rigorous scrutiny (*Code of Corporate Governance*).

Ordinarily, one-third of the board should be independent. However, the independent directors should make up at least half of the board where any of the following apply:

- The chairman and the CEO (or equivalent) is the same person.
- The chairman and the CEO are immediate family members.
- The chairman is part of the management team.
- The chairman is not an independent director.

The requirement to increase the percentage of independent directors to half the board under certain circumstances is the only part of the Code of Corporate Governance that takes effect at a later date (that is, for financial years commencing 1 May 2016 onwards). This is to give listed companies more time to plan for any necessary restructuring of their boards.

Duties and liabilities

Non-executive and independent directors are subject to the same duties and liabilities as executive directors.

However, there is a distinction between executive and non-executive directors in terms of the level of skill to be expected. Where an executive director has specific management responsibilities and a contract of employment with the company, that director would contractually be required to act with reasonable skill, care and diligence and the level of such skill, care and diligence is assessed objectively against what can reasonably be expected of other individuals appointed to similar roles.

There is no objective standard of skill expected of non-executive directors, except that the director in question is expected to make reasonable efforts to become familiar with the affairs of the company and understand what is required of them under the company memorandum and articles of association, and Singapore law in general.

9. Are the roles of individual board members restricted?

For non-listed companies, there is no restriction on the roles of individual board members. For listed entities, there should be a clear division of responsibility between the leadership of the board and the executives responsible for managing the company's business (*Code of Corporate Governance*). No one individual should represent a considerable concentration of power. For example, the chairman and the CEO should in principle be separate persons and the division of responsibilities between the two should be clearly defined.

If the chairman and the CEO are the same, related or members of the same executive management team, companies can appoint an independent director to be a lead independent director. The lead independent director should be available to deal with shareholders' concerns where contact through the normal channels of the chairman, CEO or chief financial officer has failed to resolve a matter or is inappropriate.

10. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

Directors are typically appointed by the shareholders in a general meeting. The specific manner of appointment is set out in the company memorandum and articles of association. The board usually has the power to fill casual vacancies and appoint additional, or alternate, directors, in which case they hold office until the next general meeting and are subject to re-election by ordinary resolution of the shareholders.

Removal of directors

Removal of a director is generally by ordinary resolution of the shareholders; the procedure for this is set out in the company memorandum and articles of association. However, a public company can remove a director by ordinary resolution on special notice of at least 28 days, regardless of anything to the contrary in the company memorandum and articles of association or pursuant to any agreement with the director (*Companies Act*).

11. Are there any restrictions on a director's term of appointment?

Some company memoranda and articles of association stipulate that one-third of the directors must retire by rotation at each AGM, to then be re-elected by the shareholders. This is also recommended for listed companies (*Code of Corporate Governance*). However, this is not a legal requirement.

12. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Directors do not need to be employees of the company. However, it is usual for executive directors to be employees in the sense that they have a service contract with the company. A non-executive director will not be an employee of the company.

Shareholders' inspection

Unless otherwise stated in the company memorandum and articles of association, directors' service contracts are private documents and are not open for inspection by shareholders.

13. Are directors allowed or required to own shares in the company?

There is no requirement for directors to own shares in the company. However, there is no restriction on directors owning shares, provided that the ownership of any shares has been disclosed.

14. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

Directors' remuneration is determined by the board. For listed companies, there should be a formal and transparent procedure for developing policy on executive remuneration, with a remuneration committee (RC) being established (*Code of Corporate Governance*). The RC should consist of at least three directors, the majority of whom (including the chairman) should be independent, and all should be non-executive directors. No director should be involved in deciding his own remuneration. The RC's recommendations should be submitted to the entire board for approval.

Disclosure

Where a director is paid a service fee for attending board meetings or carrying out his duties as a director, such fees need to be approved by the shareholders in a general meeting and disclosed in the company's accounts. However, if the director receives remuneration as an employee of the company (that is, his salary is

set out in his service contact, rather than being received as a fee "in respect of his office"), that remuneration need not be approved by the shareholders or disclosed in the company's accounts and is treated as a board matter.

However, the company should report to the shareholders each year on the remuneration of directors, the CEO and at least the top five key management personnel of the company as part of the company's annual report (*Code of Corporate Governance*).

Shareholder approval

For all companies, payment of director's fees must be approved by an ordinary resolution of the shareholders' at its AGM (*see above*). However, payment of a director's salary for services rendered need only be approved by the board.

MANAGEMENT RULES AND AUTHORITY

15. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

The internal management of a company is regulated by the Companies Act and the company memorandum and articles of association.

The quorum for both board and shareholder meetings is set out in the company memorandum and articles of association. Typically, the quorum for board meetings and shareholder meetings is two directors and two members, respectively.

There is no prescribed notice period, but adequate notice of board meetings should be given to allow full attendance by the directors, subject to the provisions of the company memorandum and articles of association. The relevant papers should be circulated together with the notice.

Board resolutions can be proposed on reasonable notice and passed by a simple majority of those present. The chairman can be given a casting vote under the company memorandum and articles of association.

Provided they are permitted under the company memorandum and articles of association, written resolutions can also be passed (although these often require unanimity between all directors) and meetings can be by video or teleconference.

16. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

The directors of a company can exercise all powers of the company, except for those that have been expressly reserved for the shareholders under the company memorandum and articles of association, or under Singapore law. Matters typically requiring shareholder approval include the issuing of shares and disposing of substantially the whole of the company's undertaking or property.

Restrictions

The company memorandum and articles of association can restrict the powers of the directors in any way the shareholders see fit. However, a third party is entitled to assume that the directors are validly exercising their powers unless the third party knew, or ought to have known, that the directors were acting beyond their authority. As such, a transaction with a third party is, on the face of it, valid, even where the directors did not have authority to execute the transaction.

It is also possible for certain matters to be reserved for the unanimous decision of the directors (rather than a simple majority vote) or reserved for the shareholders. Such provisions are commonly included in a shareholders' agreement or in the company memorandum and articles of association

17. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

A company's memorandum and articles of association typically give the directors authority to establish committees of directors, and for those committees to decide on certain matters. The directors can also delegate to individual directors, although in both cases each director's statutory duties and liabilities remain, meaning the director's liability cannot be delegated.

For listed companies, a company should delegate certain powers to the audit, nominating and remuneration committees (*Code of Corporate Governance*). However, this is not a legal requirement.

DIRECTORS' DUTIES AND LIABILITIES

18. What is the scope of a director's general duties and liability to the company, shareholders and third parties?

Directors have the following general duties:

- To act honestly and in good faith in the best interests of the company.
- To exercise powers for a proper purpose.
- Not to make improper use of information.
- To avoid conflicts of interest.
- Of care, skill and diligence.

Directors owe their duties to the company. As such, it is the company, through its board of directors (or, ultimately, the shareholders) that decides whether or not to take action against a particular director. If a director breaches his duties, the company can do any of the following:

- Sue for damages.
- Demand the return of a secret profit or specific property.
- Declare the act invalid.

A director may be guilty of a criminal offence if he has:

- Failed to act honestly and use reasonable diligence at all times in the discharge of the duties of his office.
- Made improper use of any information acquired by virtue of his position to gain, directly or indirectly, an advantage for himself or any other person or cause detriment to the company.
- Not sufficiently disclosed his interests.

The director is liable on conviction to a fine of up to SG$5,000 or to imprisonment for up to one year.

19. Briefly outline the regulatory framework for theft, fraud, and bribery that can apply to directors.

A director can be criminally liable under the general laws and statutes dealing with theft and fraud. Theft and fraud are also breaches of a director's general duties.

20. Briefly outline the potential liability for directors under securities laws.

A director can be liable for various offences under securities laws, including omissions and misleading or deceptive statements in disclosure documents (for example, a prospectus or takeover document). Insider trading while in the possession of price-sensitive information is also a securities offence (*see Question 30*). Such offences can attract both civil and criminal liabilities.

21. What is the scope of a director's duties and liability under insolvency laws?

The duties of directors shift during or pending an insolvency situation, as directors have a duty to take the interests of the company's creditors into account when making decisions on behalf of the company.

In particular, a director can be personally liable if the company incurs a debt while insolvent or if it becomes insolvent by incurring the debt if there was no reasonable expectation of the company being able to repay that debt. This can attract both civil and criminal liabilities.

In an insolvency situation, directors are advised to obtain personal legal advice at an early stage to avoid taking any actions that would expose them to personal liability to creditors.

22. Briefly outline the potential liability for directors under environment and health and safety laws.

It is possible for directors to be found personally liable for a company's breach of environmental laws. Penalties for violations can be severe and do not necessarily bear any relationship to the environmental harm that may have resulted. Environmental breaches involving the sea have generally attracted the largest penalties, with environmental breaches involving land attracting lesser penalties.

For example, general penalties under the Environmental Protection and Management Act (*Chapter 94A*) include a fine of up to SG$20,000 for a first offence, and up to SG$50,000 for a second offence. Continuing offences are subject to a maximum fine of SG$2,000 for each day for which the offence continues. If the offence involves a hazardous substance, a director can be liable to a fine up to SG$50,000 or imprisonment for up to two years.

Similarly, under the Environmental Protection Control Act (*Chapter 94A*), discharging toxic substances is punishable by a fine of up to SG$50,000 or imprisonment for up to 12 months.

Under the Planning Act (*Chapter 232*), carrying out works in a conservation area is punishable by a fine of up to SG$200,000.

Civil remedies are also available for breaches. For instance, it is open to the authorities, having effected a clean-up operation, to recover the cost of doing so from the director responsible for the breach.

Directors are subject to high standards in the preservation of their employees' health and safety. In particular, if a company is found to have breached its health and safety duties to its employees, its directors can be liable to a fine and imprisonment. For example, under the Workplace Safety and Health Act (*Chapter 354A*), a director (as a first-time offender) can face a maximum fine of up to SG$200,000 or imprisonment of up to two years.

23. Briefly outline the potential liability for directors under anti-trust laws.

Directors can be found personally liable for not ensuring that the company complies with anti-trust laws. Penalties for offences under the Competition Act (*Chapter 50B*) include a fine of up to SG$10,000 or imprisonment for up to 12 months.

24. Briefly outline any other liability that directors can incur under other specific laws.

Directors can be found personally liable for not ensuring that the company complies with cyber-crime laws. For example, under the Computer Misuse and Cybersecurity Act (*Chapter 50A*), a director who knowingly causes unauthorised access to computer material can be liable to a fine of up to SG$5,000 or imprisonment for up to two years. This increases to SG$10,000 or imprisonment for up to three years on a second offence, and to SG$50,000 and up to seven years if the offence causes damage.

Similarly, a director who causes unauthorised modification to computer material, obstruction of the use of a computer, or disclosure of an access code can be fined up to SG$10,000 or be subject to three years' imprisonment (increasing to SG$50,000 and up to seven years if the offence causes damage). For any offence involving a protected computer as defined under the Act, a director can be liable for a fine of up to SG$100,000 or imprisonment for up to 20 years.

25. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

It is not possible to restrict or limit a director's liability. Any provision in the company memorandum and articles of association or elsewhere that attempts to exempt a director from, or indemnify him against, any liability that would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust is void. This is subject to limited exceptions, mainly in defending any proceedings in which judgment is given in the director's favour or in which he is acquitted.

However, a company can maintain insurance for an officer against such liability (*see Question 26*). In addition, the members acting together can generally release a director from his fiduciary duties and excuse him from liability for any breaches.

The court has the power to relieve directors from the consequences of their negligence, default, breach of duty or breach of trust if (*Companies Act*):

- The director shows that he acted honestly and reasonably.
- It is fair to excuse him having regard to all the circumstances of the case.

26. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

It is common for a company to take out "directors and officers" insurance for personal liability on the director's behalf, meaning any financial penalty imposed for any negligence, default, breach of duty or breach of trust is covered. Such insurance generally covers:

- Damages awarded by the court.

- Any settlement with the claimant.
- Legal costs and expenses.

However, the insurance generally does not cover fraudulent, criminal or dishonest acts, or wilful breach of duty. Either the director himself or the company can pay the insurance premium.

27. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

The definition of "director" includes "any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act" (*section 4, Companies Act*). As such, de facto (or shadow) directors are equally liable under Singapore law, even if they have not been formally appointed.

To become a shadow director, a person must exercise a real influence over the company's affairs and direct the acts of the directors, such that the majority of the board act on those instructions, as a matter of practice, over a period of time.

TRANSACTIONS WITH DIRECTORS AND CONFLICTS

28. Are there general rules relating to conflicts of interest between a director and the company?

A director has a common law fiduciary duty to the company and must not place himself in a position in which there is a conflict between his duties to the company and his personal interests or his interests to others.

The following are particular instances of conflicts of interest.

Transactions with the company

A director cannot enter into a contract with the company without giving full disclosure of his interest. A failure to provide full disclosure and obtain the approval of shareholders, or perhaps of non-interested directors, renders the director accountable to the company for any profit made. In addition, the company may treat the contract as void.

Secret profits

If an opportunity to make a profit or obtain a benefit comes to a director by virtue of his position, that profit or benefit must be fully disclosed to the board. In the absence of the board's approval, the director is accountable to the company for that profit or benefit. The duty to account may arise even though the company does not want to, or is not able to, enter the transaction itself.

Misuse of corporate property, opportunity and information

A director who misapplies the property of, or misuses opportunities available to, the company for his own benefit is liable to compensate the company for losses arising from his breach of duty, and may be guilty of criminal breach of trust.

In addition, improper use of information acquired by virtue of his position to gain advantage or cause detriment to the company is an offence punishable by a fine or imprisonment.

Competition with the company

A director who engages in any business competing with the company runs the risk of breaching his duties. To avoid any such breach, a director who wishes to engage in any competing business should seek the company's approval and fully disclose his interest in the business and any potential conflicts that may arise.

29. Are there restrictions on particular transactions between a company and its directors?

There are no restrictions on directors transacting with the company, provided the director fully discloses his interest and the board approves the transaction. Failure to do so is an offence punishable by a fine and/or imprisonment. The following must be disclosed (*Companies Act*):

- The nature of the director's interest (whether direct or indirect, including a member of the director's family's interest) in any contract or proposed contract with the company.
- The nature, character and extent of any conflict that may arise by virtue of a director holding any office or owning any property.

A company must not make a loan to a director or a related company, or enter into any guarantee or provide security in connection with a loan made to a director of the company by other parties. This is subject to certain exceptions.

30. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Generally, there are no restrictions on the purchase or sale of a company's shares and other securities by a director. However, all directors must disclose their interest in any shares or debentures of a company he is a director of or a related company and the company must keep a register of directors' shareholdings at the registered office of the company (*Companies Act*). The register is open to inspection by the public. Changes in a director's interests must be notified within two business days.

The SGX Listing Manuals:

- Set out guidelines for dealing in securities, requiring listed companies to immediately announce the details of any notifications received from any director.
- Require disclosure of trading by directors in a company's securities during specified trading periods, such as for one month before the announcement of the company's full year financial statements.

The trading of securities by directors while in possession of price-sensitive information that is not generally available to the public is also an offence. Given their position, directors must be mindful of the laws regarding insider dealing and other securities laws.

DISCLOSURE OF INFORMATION

31. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

A director cannot enter into a transaction with the company without disclosing the fact that he is a party to the transaction and any profits that he will or is likely to obtain from the transaction.

The disclosure of certain conflicts of interest is also mandatory, and shareholders have access to certain records and registers of the company (*Companies Act*). Public and regulatory bodies also have wide powers to access information about a company and may require directors to disclose certain further information.

Listed companies also have periodic and continuous disclosure obligations, particularly under the SGX Listing Manuals. For example, listed companies must promptly disclose:

- All information that is necessary to avoid the establishment of a false market or is likely to materially affect the price of securities.
- Details of any interested person transactions equal to or more than 3% of the issuer's latest net tangible assets (and obtain shareholder approval if the interested person transaction value is equal to or more than 5%).
- Financial statements for each of its first three quarters and for the full financial year within 45 days of the end of the quarter and 60 days of the end of the full financial year respectively (if subject to quarterly reporting).
- An annual report within four months after the end of the financial year.

SHAREHOLDER RIGHTS

Company meetings

32. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

An AGM must be held once in every calendar year, within four months (if listed) and within six months (if unlisted) of the company's financial year end and no more than 15 months after the holding of the last preceding AGM.

However, for unlisted companies, an AGM can be dispensed with if all the shareholders agree that the holding of an AGM is not required (in which case, resolutions may be passed by written means).

The following matters are typically dealt with at an AGM:

- Laying the company's accounts before the shareholders.
- Retirement and election of directors and appointment of auditors.
- General approval for the issue of shares.
- Declaration of dividends.

33. What are the notice, quorum and voting requirements for holding meetings and passing resolutions?

Unless all shareholders agree to receive shorter notice (*Companies Act*):

- Ordinary resolutions must be passed on at least 14 clear days' notice.
- Special resolutions must be passed on at least 21 clear days' notice.

The quorum for both board and shareholder meetings is set out in the company memorandum and articles of association. Typically, the quorum for board meetings and shareholder meetings is two directors and two members, respectively.

Shareholder resolutions can be passed on a show of hands, unless a poll is legitimately demanded. The chairman can be given a casting vote under the company memorandum and articles of association. In listed companies, all resolutions at general meetings held from 1 August 2015 must be passed by poll (*SGX Listing Manuals*).

34. Are specific voting majorities required by statute for certain corporate actions?

Most corporate actions require an ordinary resolution, that is, a resolution that has been passed by a simple majority of over 50% of the votes cast by members entitled to vote, either in person or by proxy.

However, for certain corporate actions, a special resolution is required (*Companies Act*). This is a resolution that has been passed by no less than 75% of the votes cast by members entitled to vote, either in person or by proxy. Examples of special resolutions under the Companies Act include:

- Amendment of the articles of association.
- Changing the company name.
- Reduction of share capital.
- Voluntary winding up.
- Changing from a private company to a public company.
- Removal of a liquidator.

35. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Two or more shareholders holding no less than 10% of the issued shares of the company, or in the case of a company without a share capital, no less than 5% of the members, can call for an extraordinary general meeting.

Alternatively, shareholders holding no less than 10% of the company's paid-up share capital carrying voting rights can send a requisition to the directors to convene an extraordinary general meeting as soon as practicable, and in any event within two months. If the directors do not convene the meeting within 21 days of receiving the requisition, the requisitioning members can convene the meeting themselves within three months from the date that the requisition is deposited.

Minority shareholder action

36. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

A minority shareholder is entitled to be treated fairly and equitably. An aggrieved shareholder can seek redress from the High Court of Singapore if:

- The affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the shareholders (including himself), or in disregard of his or their interests as shareholders.
- Some act of the company has been done or is threatened, or some resolution has been passed or is proposed, which unfairly discriminates against or is otherwise prejudicial to one or more of the shareholders (including himself).

The court has the discretion to order a wide range of remedies, including ordering a "buy-out" of the aggrieved minority shareholder's stake or the winding-up of the company.

A minority shareholder can also bring a derivative claim under the Companies Act for breach of duty of the company's directors (even if the director has not benefited personally from the breach) if a

shareholder believes the action being taken is in breach of the directors' duty to the company.

Additionally, if a minority shareholder feels that a wrong has been done to the company and this has not been redressed, he can apply to the High Court of Singapore for leave to bring an action in the name and on behalf of the company, or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company. There is no minimum level of shareholding required.

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

37. Are there any formal requirements or guidelines relating to the internal control of business risks?

Guidelines on the internal control of business risks are included in:

- The Code of Corporate Governance.
- The ACGC Guidebook.
- The audit committee's terms of reference.
- Policy guidelines from various regulatory bodies, such as the MAS.

If the audit committee of a company becomes aware of any suspected fraud, irregularity or suspected infringement of any Singapore law, regulation or rule, which has or is likely to have a material impact on the company's operating results or financial position, the audit committee must disclose this to the external auditor and, at the appropriate time, report the matter to the board (*Companies Act* and *SGX Listing Manuals*). The board is primarily responsible for ensuring internal controls are put in place to manage business risks.

38. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

The company must maintain proper accounting and other records to explain sufficiently the transactions and financial position of the company (*Companies Act*). The company must prepare true and fair profit and loss accounts and balance sheets. The directors must take reasonable care to ensure the accounts are properly prepared or audited to achieve this standard.

Breach of this obligation may mean the director is liable to fines and imprisonment, as well as breaching his fiduciary duty to the company. However, it is a defence for a director to show that any omission was unintentional and immaterial.

39. Do a company's accounts have to be audited?

The directors must appoint an auditor to audit the accounts, unless the company has been dormant for that financial year or is an exempt private company (that is, a company with fewer than 20 shareholders, all of whom are natural persons and an annual revenue of less than SG$5 million).

However, when the amendments to the Companies Act come into force, the concept of an exempt private company will be replaced with the concept of a small company. A small company will be a private company that meets two of the following three criteria:

- Total revenue not exceeding SG$10 million.
- Total assets not exceeding SG$10 million.
- The number of employees not exceeding 50.

To qualify as a small company in any financial year, a company must satisfy the foregoing criteria for the previous two financial years. For a company which is part of a group to be exempt, it must individually qualify as a small company and the group must meet two of the three criteria on a consolidated basis.

40. How are the company's auditors appointed? Is there a limit on the length of their appointment?

A company's auditor must be appointed by the shareholders in an AGM. The auditor holds office until the conclusion of the company's next AGM, when their appointment is renewed or terminated.

Removal of an auditor before his term expires must be approved by a resolution at a general meeting and special notice must be given. Additionally, when the amendments to the Companies Act come into force, auditors of public interest companies (including SGX-listed companies, financial institutions and charities) and their subsidiaries must obtain ACRA's consent to resign before the end of their term.

The individual audit partner must be rotated out after being in charge of more than five consecutive full-year audits (*SGX Listing Manuals*). There is no requirement to rotate the appointment of the audit firms (except for banks and other financial institutions).

41. Are there restrictions on who can be the company's auditors?

There are certain prohibitions from being appointed as an auditor, including if the person (*Companies Act*):

- Is not a public accountant.
- Owes more than SG$2,500 to the company.
- Is an officer of the company, or a partner, employer or employee of an officer of the company.

An auditor must be independent of the company and should be free from any business or other relationships with the company that would materially interfere with his ability to act with integrity and objectivity. The audit committee of a company should carefully consider the actual and perceived independence of the external auditors each year (*Code of Corporate Governance*).

The Code of Professional Conduct and Ethics for Public Accountants and Accounting Entities under the fourth schedule of the Accountants (Public Accountants) Rules (Chapter 2) sets out further criteria for auditor independence.

42. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

Generally, there are no statutory restrictions for non-audit work undertaken by an auditor. However (*Code of Corporate Governance*):

- The company should disclose in the annual report the aggregate amount of fees paid to the external auditors for that financial year, including a breakdown of the fees paid in total for audit and non-audit services, respectively.
- Where the external auditors also supply a substantial volume of non-audit services to the company, the audit committee should keep the nature and extent of such services under review, seeking to maintain objectivity.

Examples of services that should not be performed by auditors include services that would result in the auditors (*ACGC Guidebook*):

- Functioning in the role of management.
- Auditing their own work.
- Serving in advocacy roles for the company.

43. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

An auditor is generally liable to the company under a contract of engagement. However, an auditor may also be liable for negligence in tort if a person to whom he owed a duty of care has suffered loss as a result of the auditor's negligence. An auditor usually owes a duty of care to his own client, and is likely to owe a duty of care to third parties where:

- It is reasonably foreseeable that the statements will be relied on by the third party.
- There is a "relevant degree of proximity" between the parties.
- It is just and reasonable to impose a duty of care on the auditor to the third party.

An auditor's liability cannot generally be limited or excluded, although certain precautions can be taken by the auditor, such as marking any report "confidential" and for the client's own use. A court can also relieve an auditor either wholly or partly from liability if he has acted honestly and reasonably and that, having regard to all the circumstances of the case (including those connected with his appointment), he ought fairly to be excused.

44. What is the role of the company secretary (or equivalent) in corporate governance?

A company secretary's duties are generally those assigned to him by the company's memorandum and articles of association and include ensuring compliance with certain corporate regulatory matters, including:

- Maintaining the company registers.
- Filing documents and forms with ACRA.
- Organising meetings.
- Attending and recording minutes of meetings.

The secretary must:

- Be a natural person.
- Possess the requisite knowledge and experience.
- Be resident in Singapore.

Where a director is the sole director of the company, he cannot also act as the secretary of the company.

ONLINE RESOURCES

Attorney-General's Chambers: Singapore Statutes Online

W http://statutes.agc.gov.sg/aol/home.w3p

Description. Official website for all statutes, case law and rules in Singapore, maintained by the Government of Singapore and the Attorney-General's department. English language and updated on a regular basis.

SGX Rulebooks

W http://rulebook.sgx.com

Description. Official website for all rulebooks and guidance notes issued by the SGX. English language and updated on a regular basis.

Code of Corporate Governance

W www.mas.gov.sg

Description. Official MAS website linking to the latest Code of Corporate Governance, maintained by the MAS. English language and updated on a regularly basis.

Guidebook for Audit Committees in Singapore

W www.acra.gov.sg

Description. Official ACRA website linking to the latest Guidebook for Audit Committees in Singapore, maintained by ACRA. English language and updated on a regular basis.

Securities Industries Council

W www.mas.gov.sg/sic

Description. Official MAS website regarding the SIC, including all press releases and guidance notes. English language and updated on a regular basis.

Practical Law **Contributor profiles**

Stephanie Keen

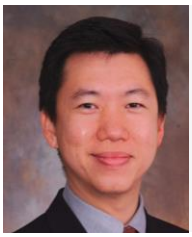
Hogan Lovells Lee & Lee
T +65 6302 2553
F +65 6538 7077
E stephanie.keen@hoganlovells.com
W www.hoganlovells.com

Qualified. England and Wales (1998); Singapore (2012)

Areas of practice. Corporate and commercial; mergers and acquisitions; private equity and buy-outs; equity capital markets; employment law.

Recent transactions

- Navis Capital Partners, a leading Asian private equity firm, on its acquisition of MFS Technology (S) Pte Limited and certain specific assets from MFS Technology Limited, a Singapore manufacturing company listed on the Singapore Stock Exchange.
- Hawksford Holdings Limited, a UK independent wealth structuring company, on its acquisition of Janus Corporate Solutions Pte Ltd, a leading corporate services firm in Singapore.
- Navis Capital Partners on the sale of Mentor Media Limited, a Singapore-headquartered global supply chain services company with operations in eight countries, to Elanders AB, an international graphic company listed on the NASDAQ OMX in Sweden.
- Debt/equity swap of First Engineering Limited, the Singapore precision engineering business, and its subsequent sale to Anchorage Capital Partners.
- Acquisition of ESPN's 50% equity interest in ESPN STAR Sports, giving News Corporation full ownership.
- Goldman Sachs, Lehman Brothers (in administration) and Unitas Capital on the auction sale of the Metalform Group to MMI Holdings, a KKR owned entity.



Adrian Chan

Hogan Lovells Lee & Lee
T +65 65574 814
F +65 62250 438
E Adrianchan@leenlee.com.sg
W www.leenlee.com.sg

Qualified. Singapore (1990)

Areas of practice. Corporate and commercial; mergers and acquisitions; capital markets; corporate finance; securities law; stock exchange practice; employment law.

Recent transactions

- Reverse takeovers of the following listed companies on the Singapore Stock Exchange: Albedo Limited; Europtronic Group Ltd; Hisaka Holdings Ltd; Pteris Global Limited; Sky One Holdings Limited.
- Takeover offers and privatisation exercise including Cerebos Pacific Ltd; Allgreen Properties Limited; Viz Branz Limited; Berger International Limited.
- Acquisition of US$81.3 million in economic rights to a major development project in Yangon, Myanmar by Yoma Strategic Holdings Ltd.

Matthew Bousfield

Hogan Lovells Lee & Lee
T +65 6302 2565
F +65 6538 7077
E matthew.bousfield@hoganlovells.com
W www.hoganlovells.com

Qualified. England and Wales (2010)

Areas of practice. Corporate and commercial; mergers and acquisitions; private equity; equity capital markets; employment law.

Recent transactions

- Navis Capital Partners, a leading Asian private equity firm, on its acquisition of MFS Technology (S) Pte Limited and certain specific assets from MFS Technology Limited, a Singapore manufacturing company listed on the Singapore Stock Exchange.
- Hawksford Holdings Limited, a UK independent wealth structuring company, on its acquisition of Janus Corporate Solutions Pte Ltd, a leading corporate services firm in Singapore.
- Navis Capital Partners, a leading Asian private equity firm, on the sale of Mentor Media Limited, a Singapore-headquartered global supply chain services company with operations in eight countries, to Elanders AB, an international graphic company listed on the NASDAQ OMX in Sweden.
- GE Healthcare on its US$1.065 billion acquisition of three healthcare business lines from Thermo Fisher Scientific Inc.
- Redomiciliation of a US public listed company listed on AIM in the UK to Singapore and re-admission to AIM.
- Laboratory Corporation of America on its acquisition of Clearstone Central Laboratories (Singapore) Pte Ltd and on general corporate and commercial matters.