ANDERSON MŌRI & TOMOTSUNE

SINGAPORE LAW NEWSLETTER

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May's issue begins with a broad overview of the proposed changes to Singapore's Companies Act. Thereafter, it examines in greater detail some of the clarifications to the law pertaining to the service of court documents in light of COVID-19 measures, the effect of boilerplate 'no-oral modification' clauses and the matter of corporate entities representing themselves, brought about by significant decisions of the Singapore courts.

I. Proposed Amendments to the Companies Act

Akshay Kothari, Attorney-at-law

1. Introduction

The Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") has proposed certain amendments to the Companies Act of Singapore (the "**Proposed Amendments**"). These have not yet been enacted as law, but they indicate how the Companies Act might be amended in the near future. The Proposed Amendments are intended to make it easier to do business in Singapore, while continuing to uphold market confidence and safeguarding public interest. This article summarises a few of the more pertinent Proposed Amendments.

2. Digitalisation

(1) 'Digital' meetings

A 'digital' meeting is one that is held using audio-visual communication equipment, i.e. a meeting held over videocall or over the phone.

(i) Board meetings

Currently, the Companies Act does not regulate how meetings of the board of directors are conducted. Of course, companies are free to make rules about board meetings in their constitution, but for many companies, this is not done because they tend to use a 'template' constitution. In our experience, for private companies, board meetings are therefore often held informally, especially for smaller companies and startups. For listed companies, the relevant SGX Rules regulate board meetings to some extent.

The Proposed Amendments include the addition of a provision that clarifies that nothing in the Companies Act prevents a board meeting being held digitally. Although this is already possible under the Companies Act and is inclined to be gaining prevalence in the age of travel restrictions brought about by the Covid-19 pandemic, adding such a provision would avoid doubts about whether a digitally-held meeting would be valid.

(ii) General meetings a.k.a shareholders' meetings

While the Companies Act provides for general meetings, it currently does not directly address the manner in which general meetings are to be held. However, there are several provisions that are premised on physical meetings being held. To clarify that meetings of the shareholders may be held digitally as well, one of the Proposed Amendments is to add a provision that clarifies that unless the company's constitution provides otherwise, a company may hold digital general meetings.

Holding digital general meetings might give rise to some concerns on the part of shareholders. For instance, a shareholder might feel himself/herself prejudiced if the internet connection to the digital meeting is poor, resulting in that shareholder not being able to hear a part of the meeting. To address this concern, the Proposed Amendments include amendments to section 392(3) of the Companies Act to ensure that the existing right a shareholder has to apply to the court to declare proceedings at a general meeting void should likewise apply to digital general meetings.

(2) Dematerialisation of physical share certificates

Currently, the Companies Act requires companies to issue physical share certificates to their shareholders. In past reviews of the Companies Act, it had been suggested that physical certificates should no longer be mandatory and companies be allowed to dematerialise their shares. However, at that time, it was decided to retain the requirement for physical certificates because they served as evidence of ownership, an important issue for non-listed companies. For listed companies, many of the drawbacks of physical certificates had been remedied by the Central Depository of the SGX, which kept physical certificates and allowed for dealings in these

shares to be by way of book-entry.

The Proposed Amendments, however, recognise the benefits of dematerialising shares, even for non-listed companies. Therefore, they recommend a provision that would provide all companies (listed or non-listed) the option to do away with physical share certificates. However, a company would still be allowed to issue physical certificates. This approach would give companies the flexibility to decide whether they wanted to dematerialise their shares or not. It was also recognised that certain non-listed companies would not have the operational infrastructure to administer and record share transactions for dematerialised shares. Therefore, to assist non-listed companies in this regard, the Proposed Amendments suggested that ACRA should consider keeping registers of members for all non-listed companies that wish to dematerialise their shares. It was recommended that a dematerialised version of the share certificate or an entry in the register of members should suffice to show evidence of ownership.

3. Lighter Financial Reporting Obligations for 'Micro' Companies

Currently, all companies, except dormant companies, must prepare full sets of financial statements. However, this can be a burden for smaller companies. Therefore, the Proposed Amendments recommend that "micro" companies that are non-publicly accountable be allowed to prepare and lodge simplified financial statements that consist of only the statement of comprehensive income and the statement of financial position, as well as specific key disclosures. A "micro" company is one that has a total annual revenue and total assets each being not more than $500,000 for the previous two consecutive financial years. The rationale for relaxing the financial reporting requirements is that the two statements mentioned above are the key components of the financial statements, and will provide the members with enough information on the company's financial state.

4. Altering Share Capital Without Issuing New Shares, Cancelling Existing Shares or a Shareholders' Resolution

Currently, the relevant provisions of the Companies Act pertaining to a company altering its share capital do not address whether a company may receive further funds to increase its share capital, or capitalise its profits, without issuing new shares. This may impede certain fundraising transactions. For instance, some institutional investors may want to invest in a company with a contractual arrangement that, if the company meets certain financial targets, the investor shall contribute additional paid-in capital. However, having to issuing additional shares in return for this additional contribution might upset the shareholding ratio that the parties intend.

Also, the current law is that an ordinary resolution of the shareholders (more than 50% of the voting rights exercised in favour of the resolution) is needed to authorise any alteration of share capital. However, if share capital is to be altered without issuing new shares, then the shareholders will not be prejudiced if additional capital is invested in the company, since there is no dilution to their shareholding. In light of this, the Proposed Amendments include a proposal to amend the relevant sections of the

Companies Act to allow the directors of a company, if so authorised by its constitution, to increase share capital or capitalise profits without issuing new shares and without requiring an ordinary resolution of the shareholders.

On a related point, currently, the Companies Act does not expressly clarify whether a company can reduce its share capital without cancelling issued shares. The benefits of being able to do this are that it would be a simple and efficient way to reduce share capital, because there would not be a need to cancel existing share certificates and reissue new ones. Problems of fractions of shares would not arise. Furthermore, it would leave the shareholding proportion of each shareholder unaltered. However, in the case of reducing share capital, the Proposed Amendments did not recommend amending the relevant provisions, because the existing provisions can be interpreted to allow capital reduction without share cancellation. Therefore, the Proposed Amendments recommended that it be left open to ACRA's consideration as to whether it will issue guidance to clarify this interpretation.

II. Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai [2021] SGHC 104

Hannah Tay, Attorney-at-law

In the recent decision of *Genuine Pte Ltd v HSBC Bank Middle East Ltd, Dubai* [2021] SGHC 104 ("***Genuine***"), the High Court in Singapore dealt with the difficulties of the service of a writ of summons in times of COVID-19.

In *Genuine*, the plaintiff had commenced an action against the defendant and served a copy of the writ of summons on the defendant's registered address on 4 August 2020. Under the Rules of Court, a writ of summons (which is the document that starts a lawsuit) can be validly served on a company by leaving it at the registered address of that company. Thereafter, the defendant must enter an appearance (i.e. file a document with the court that indicates that the defendant intends to defend the lawsuit) within eight days after the service of the writ of summons.

At the time the writ of summons was served, Singapore was in Phase 2 of the re-opening of its economy, during which most businesses were allowed to re-open. The defendant was one of the businesses that was permitted to operate from its office premises at the time the writ of summons was served. However, the defendant chose to continue with fully remote work arrangements until September 2020 on the basis that it was acting in accordance with the Ministry of Manpower's circular for remote work arrangements to remain the default arrangement.

As a result, there was no one physically present at the defendant's registered office around the period the writ of summons was served and the defendant did not discover that the writ of summons had been served until 12 September 2020. The defendant failed to enter an appearance within the stipulated period, and the plaintiff entered judgment in default of appearance against the defendant (a judgement in default of appearance means that the plaintiff wins 'automatically' because the defendant did not

indicate that it intended to defend the lawsuit.).

In attempting to set aside the judgment, the defendant argued that although the plaintiff had technically adhered to the proper procedures in serving the writ of summons, the judgment was nevertheless irregular.

The High Court, however, held that the service of the writ of summons had been valid, because it had been served 1½ months after Phase 2 had started. While work from home arrangements were the default arrangement at the time the writ of summons was served, it was still possible for the defendant's personnel or directors to return to the office premises. The defendant therefore ought to have made arrangements to return to the office in Phase 2 to check if there were any matters that required attention, especially since the defendant was aware that the plaintiff had threatened to commence action prior to the service of the writ of summons.

In the light of the additional measures being imposed to curb the spread of COVID-19 and the possibility of a second circuit breaker in Singapore, the decision is a timely reminder for companies implementing remote work arrangements to exercise oversight over the service of documents at its office premises, particularly if it is aware of threatened legal proceedings against it. The implementation of remote work arrangements, even if in accordance with the Ministry of Manpower's advisories, would not in itself be valid reason to absolve a litigant from the stipulated court procedures and timelines.

III. Boilerplates & Oral Modification of Contracts: The Court of Appeal's decision in *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] SGCA 43

Akshay Kothari, Attorney-at-law
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1. Introduction

A boilerplate, in the early 19th century, referred to a plate of steel that was used in the construction of steam boilers. These plates were standardised and identical. Fast-forward to the mid-1950s, when the legal profession started adopting the term "boilerplate" to refer to standardised contractual clauses pertaining to common issues in legal contracts, to be used by businesses or negotiating parties for efficient drafting and to avoid unintentional omissions or mistakes.

Today, boilerplate clauses have become a staple in a variety of legal documents. However, the Court of Appeal in Singapore was recently confronted with a situation which stressed the importance of paying attention to the contents of a boilerplate clause in the decision of *Charles Lim Teng Siang and another v Hong Choon Hau and another* [2021] SGCA 43 ("***Charles Lim***"). This case illustrates the dangers of inserting boilerplate clauses without paying attention to their wording.

A no-oral modification clause ("**NOM Clause**") is a common boilerplate in most commercial contracts. As its name indicates, it states that the contract cannot be modified unless such modification is done in writing by the parties. However, in practice, contracting parties often vary or modify the contents of contracts in an informal manner (e.g. by a discussion or over a telephone conversation) to react to the fast-changing commercial needs. The decision in *Charles Lim* clarifies how a NOM Clause will interact with such oral modification.

2. Brief Facts

The appellants in the matter entered into a sale and purchase agreement ("**SPA**") to sell shares to the respondents. However, this transaction was never completed, and consequently, the appellants brought a claim for damages against the respondents.

The respondents argued that the SPA had been orally rescinded by mutual agreement over a telephone call between the first appellant and first respondent. However, the appellants denied this and instead argued that a boilerplate NOM Clause in the SPA that prohibited "*variation, supplement* [sic]*, deletion or replacement*" of the SPA unless made in writing and signed by or on behalf of both parties invalidated any purported oral rescission.

The boilerplate NOM Clause stated:

> "***Variation of Terms***
> *No* ***variation, supplement, deletion or replacement*** *of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party."*
> (Emphasis added)

3. The Court of Appeal's Decision

The Court of Appeal decided that the NOM Clause did not apply to rescission, because rescission was not one of the four forms of modifications to the contract that was stipulated in the NOM Clause. The Court of Appeal went on to state that if the parties had wanted the NOM Clause to apply to prohibit oral rescission (rather than just variation, supplementation, deletion or replacement), it could have been expressly provided for in the clause. The Court of Appeal endorsed the position in the US Uniform Commercial Code that rescission was distinct from modification.

However, the Court of Appeal clarified that a NOM Clause, which prohibits oral modification, would not necessarily prevent the parties from making oral modifications at all times after the contract is entered into. It remained open to the parties to modify the terms of a contract (including the NOM Clause itself) by mutual agreement. A NOM Clause merely raises a rebuttable presumption that the only valid modifications are those in writing. The parties can potentially orally modify a contract, despite the

presence of a NOM Clause, if they can prove that at the time that they made the oral variation, that they would necessarily have agreed to depart from the NOM Clause had they addressed their minds to that question, regardless of whether they had actually considered the question or not. In so deciding, it took into account commercial realities, in which parties would seek to vary the terms of a commercial contract to account for changing commercial concerns without necessarily having thought about the NOM Clause. The Court of Appeal held that more cogent evidence of such intention would need to be adduced to rebut the presumption that there is no oral variation, which is raised by the NOM Clause.

4. Takeaways

(1) Parties should pay attention to the content of standard boilerplate clauses in general and especially so when dealing with NOM Clauses. If they want the NOM Clause to apply to rescission, they should make an express provision for the same in the NOM Clause.

(2) Parties should also be aware of the effect of NOM Clauses, particularly in that if there is a NOM Clause in a contract, they can deviate from it by mutual oral agreement. However, if challenged in court, there will be a need to provide compelling evidence by the party relying on such oral variation that they would have agreed to make such oral variation and to override the NOM Clause. In practice, however, the Court of Appeal noted that in acting in a manner that relies on such oral variation, such conduct of the parties would also give rise to an estoppel to any subsequent challenge to the validity of the oral variation.

IV. Corporate Self-Representation for Foreign-Incorporated Entities before the SICC

Akshay Kothari, Attorney-at-law

1. Introduction

In litigation, sometimes natural persons may represent themselves in court as a plaintiff or defendant, instead of hiring a lawyer to represent them. However, are companies involved in litigation allowed to similarly represent themselves (via one of their personnel)? This issue recently came before Singapore's highest court.

In the recent case of *Offshoreworks Global (L) Ltd v POSH Semco Pte Ltd* [2021] 1 SLR 27 ("***Offshoreworks***"), the Singapore Court of Appeal ("**SGCA**") affirmed that entities incorporated outside Singapore were prohibited from self-representation in proceedings before the Singapore International Commercial Court ("**SICC**"), including all appeals from the SICC (collectively referred to as "**SICC Matters**").

2. Background of the Case

Offshoreworks concerned appeal proceedings brought by Offshoreworks Global (L) Ltd, a company incorporated in Malaysia, regarding an SICC decision. During the hearings before the SGCA, the appellant's sole shareholder and executive director appeared on behalf of the appellant in his own capacity, without a lawyer. An issue hence arose as to whether a corporate entity – particularly a foreign-incorporated entity as in the case at hand – must be represented by a lawyer in proceedings before the Singapore courts, or whether it could self-represent.

3. General Prohibition Against Corporate Self-representation

The SGCA affirmed the general prohibition under Singapore's Rules of Court that a corporate entity, whether Singapore-incorporated or otherwise, cannot (1) commence or carry on any action in court, or (2) enter an appearance in or defend such action as a defendant, unless it is represented by a lawyer for proceedings in court (the reference to "lawyer" in this sentence includes registered foreign lawyers). It also noted that "court" was defined in the Rules of Court as the Singapore High Court or District Court, and as the SICC was a division of the Singapore High Court, the prohibition also applied for SICC matters.

In the case of *Bulk Trading SA v Pevensey Pte Ltd and another* [2015] 1 SLR 538, the Singapore High Court had previously considered the various reasons for this general prohibition. However, the High Court opined that these reasons were not particularly compelling, and in any case, could very well apply with equal force to self-representation by natural persons.

4. Exception to the prohibition against self-representation

The Rules of Court allow for an exception to the prohibition against corporate self-representation - a company may apply to the court for permission to have its officer act on its behalf in court proceedings, and the court may grant such permission where it has deemed that there is no undue prejudice in allowing the company to self-represent.

However, the relevant rules define a "company" eligible for this exception as a company incorporated under Singapore's Companies Act. The practical effect of this definition of "company" is that only Singapore-incorporated companies, and not foreign corporate entities that are not incorporated under the Singapore Companies Act, can apply for such permission. While the SGCA in *Offshoreworks* explored various possible interpretations of the relevant rules to allow for self-representation of a foreign-incorporated entity, it concluded that the only viable interpretation was that (1) the general prohibition against corporate self-representation apply to all SICC matters, and (2) foreign-incorporated entities appearing in such SICC matters could not benefit from the exception (i.e. getting permission from the court to self-represent).

5. Call for the rule to be amended

The SGCA in *Offshoreworks* criticised the present legal rules under which a court is barred from an opportunity to consider whether a foreign-incorporated entity should be allowed to self-represent. It opined that these rules appeared to run contrary to the very purpose of establishing the SICC – which is to "grow the legal services sector and to expand the scope for the internationalisation and export of Singapore law". It expressed regret at the "somewhat less than satisfactory result" of this case, given that many SICC matters usually involve at least one foreign-incorporated entity.

Despite these concerns, the SGCA stopped short of effectively rewriting the statutory rules for the purposes of fairness and justice. Instead, it encouraged Parliament to effect the appropriate legislative amendments to allow foreign-incorporated entities to seek the court's permission to self-represent in SICC matters.

6. Concluding Remarks

The case at hand dealt only with the issue of corporate self-representation for foreign-incorporated entities in SICC matters. Nonetheless, in light of the SGCA's affirmation of the interpretation of "company" in the relevant rules, this restriction likely applies beyond just SICC matters to all proceedings before the High Court and State Courts.

For the time being, it appears that only Singapore-incorporated companies may seek the court's permission to self-represent. It remains to be seen if legislative amendments will be made to solve this gap in the current legal regime governing corporate self-representation before the Singapore courts.

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