Hogan Lovells Lee&Lee

Changes to the Singapore Companies Act (Cap.50)

Contents

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Changes to the Singapore Companies Act (Chapter 50)

Introduction

The Singapore Companies Act (Chapter 50) (the "**CA**") is the primary legislation regulating corporate entities in Singapore. Ensuring the CA is kept up-to-date in order to efficiently reflect the realities of business in Singapore and maintain Singapore's strength as a global business hub, whilst at the same time providing appropriate safeguards for stakeholders, is a key concern of policy makers.

In 2013, the Ministry of Finance and the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") consulted extensively on draft amendments to the CA. On 8 October 2014, the amendments to the CA were passed in Parliament and the Companies (Amendment) Bill No.25 of 2014 (the "**Bill**") was enacted to implement the recommendations of the Steering Committee for the Review of the Companies Act.

ACRA has confirmed that the amendments will come into force in the second quarter of 2015; the effective date will be announced 2 months beforehand.

What is the aim of the amendments?

The Bill introduces wide-ranging amendments to the CA, seeking to:

- reduce the regulatory burden on companies, making it easier for them to do business in Singapore;
- promote greater business flexibility, accommodating different types of business and ways of raising capital; and
- improve the corporate governance landscape, ensuring greater accountability and transparency.

Various stakeholder groups such as public companies, private companies, small-and-medium enterprises ("**SMEs**") and retail investors will benefit from the changes set out in the Bill.

What are the key changes?

Abolition of financial assistance

Importantly, the prohibition on giving financial assistance will no longer apply to private companies, meaning a private company will be free to provide financial assistance for the purchase of shares in itself and in its private holding company. This reflects the changes made to the UK Companies Act in 2006, providing greater flexibility and simplifying many corporate transactions, including group re-organisations and leveraged buy-outs. The Bill will also render redundant the so-called "whitewash procedure", including auditors' responsibilities thereunder.

The main rationale for the restriction is to protect creditors and preserve the capital of a company. Whilst the restriction is not an everyday concern for companies, it often leads to convoluted deal structures in order to avoid financial assistance, or, if this proves impossible, the company carrying out the expensive "whitewash procedure". Even identifying whether a particular transaction involves financial assistance has been problematic in the past, with ambiguous case law and a wide variety of innocuous transactions possibly being prohibited (from the straightforward provision of a loan, to the payment of fees, to the granting of security over the company's assets or the giving of a guarantee). As such, the abolition will be welcomed by private companies in Singapore.

Public companies will benefit from being permitted to provide financial assistance for the acquisition of their own shares provided that doing so would not materially prejudice the interests of the company, its shareholders or the company's ability to pay its creditors. In doing so, the directors of the company must deem the terms of the assistance to be fair and reasonable.

However, the Bill does not mean that private companies can simply undertake transactions which previously would have been restricted without thought. There will still need to be legal and financial analysis relating to the effect of the transaction and directors will still need to consider whether a transaction would be most likely to promote the success of the company for the benefit of its members.

Rights of shares

Under the Bill, public companies will enjoy greater freedom to decide what rights attach to new shares, reflecting the existing regime for private companies whereby shares in private companies may be issued with different voting rights. Subject to certain safeguards, the restriction on public companies giving only one vote to each equity share will be lifted, allowing public companies to offer a broader range of voting rights to shareholders. In addition, both private and public companies may authorise in its constitution the conversion of one class of share into another class of share.

The intention is to engender greater trust in allowing public companies to manage their shareholders' voting rights as the company sees fit, providing flexibility in raising capital and capital management. Other jurisdictions such as the UK, US and Australia already have a similar regime in place.

Currently, the Monetary Authority of Singapore and the Singapore Stock Exchange ("**SGX**") are reviewing whether dual-class share structures should be permitted for listed companies.

Exemptions from audit

Currently, Singapore companies with an annual turnover of less than S$5 million who have less than 20 non-corporate shareholders (i.e. individuals) are exempt from statutory audit requirements (known as "Exempt Private Companies", or "**EPCs**"). Instead of filing audited annual accounts, EPCs simply submit a declaration of solvency signed by the directors and company secretary. If, for any reason, the EPC is unable to submit the declaration, it must submit its unaudited accounts to ACRA. There is no need for an EPC to appoint auditors.

Under the new regime, SMEs stand to benefit if they qualify under a new, broader criteria for exemption from statutory audit. To qualify as a "small" company, a company must fulfil at least two of the following three criteria:

- total revenue of not more than S$10 million;
- total assets of not more than S$10 million; and
- total number of employees of not more than 50.

Note that a company no longer needs to be "exempt" – this means that it may have corporate shareholders and/or more than 20 members (the former qualification under the existing regime usually being the bar to a company qualifying as an EPC). However, certain safeguards will remain, including allowing shareholders with at least 5% voting rights to require a company to prepare audited accounts.

The intention is to reduce the regulatory burden on small companies and move further towards a risk-based approach. In addition, the qualification criteria has been brought in line with that used for the Singapore Financial Reporting Standards for Small Entities.

It is expected that an additional 25,000 companies will benefit from this change.

Changes to proxy voting

Indirect investors, such as those with shareholdings through nominee companies, custodial banks or the Central Provident Fund agent bank, may participate more fully at general meetings by virtue of the appointment by shareholders of multiple proxies. At present, the CA only allows for the appointment of a maximum of two proxies unless a greater number is stipulated in the company's articles of association. Once the changes come into force, companies will not be permitted to opt out of this multiple proxy regime and indirect investors will be given the same rights as direct investors to vote at shareholders' meetings.

As this will engage a greater number of shareholders, the cut-off time for submission of proxy forms will be extended from 48 hours to 72 hours and a six month transitional period will be allowed to give companies more time to prepare for meetings and implement the changes.

Wider acceptance of electronic communication

Under the Bill, companies will be given greater freedom to use electronic communication as a formal means of communicating with shareholders, provided this mode of communication is stated in the company's constitutional documents. Both private and unlisted public companies may pass written resolutions by email, as well as send documents and notices to shareholders electronically.

This reform reflects the changing reality of business, with most companies conducting their businesses almost solely through electronic means. The wider adoption of electronic communication provides flexibility to companies, particularly in allowing resolutions to be passed by email, saving time and process costs.

Disclosure regime for CEOs

Chief Executive Officers ("**CEOs**") will be required to comply with certain disclosure requirements which are already applicable to directors. For example, CEOs will be compelled to disclose their and their family members' interests in securities and any conflict of interest which may arise in proposed transactions arising from their offices held or property possessed by them. This reflects the widely held belief in the public mind that CEOs are held to the same, if not higher, standards of scrutiny than directors given their key role in company decision-making. This change is also consistent with the approach already adopted for listed companies under the Securities and Futures Act, under which similar disclosures by both directors and CEOs are required.

Greater powers for ACRA

Company auditors of public interest companies (i.e. companies listed on the SGX, financial institutions and large charities) will no longer be able to resign prematurely at will, but will instead have to seek approval from ACRA. ACRA will use this power to both facilitate an auditor's resignation where the company is being obstructive by refusing to hold a general meeting to appoint a replacement, as well as stay the resignation until the end of the term where the premature resignation is not in the public interest.

In an effort to promote greater compliance by companies with their filing requirements, the Registrar's powers to punish individual officers of non-compliant companies will be enhanced, including granting the Registrar the power to debar any director or company secretary who has failed to lodge any documents within three months of the deadline prescribed by the CA. Once debarred, an officer will be prohibited from accepting any new appointment, although may continue with existing appointments. If the defaults are rectified, the debarment will be lifted.

Constitutional documents

Private companies will no longer be obliged to keep a register of members. Instead, ACRA's electronic register will be authoritative as the register. A transfer of shares in a private company will therefore not take effect until ACRA's register is updated, the date of filing to be taken as the effective date of entry or removal of a shareholder. This is in marked contrast to the current position by which ACRA's register is only as accurate as the information provided by company secretaries or officers to ACRA, and as such, it is the company's register of members that reflects legal title to the shares. This should ease the administrative burden on private companies and create a reliable one-stop-shop of online company registers.

Additionally, the Memorandum and Articles of Association will be merged and renamed the "Constitution". Private companies and companies limited by guarantee can choose to adopt the whole or part of several model constitutions prescribed for different types of businesses, available on the ACRA website. If a company adopts the model constitution in its entirety, there is no need to file the model constitution with ACRA. However, existing companies will not be required to incur additional costs by being required to merge the documents and can instead choose to switch over to the new form of constitution or simply to continue with their current M&A.

Changes to foreign companies

Foreign companies in Singapore must currently appoint a minimum of two authorised representatives (or agents). Subject to certain safeguards, the Bill will reduce this requirement to one, minimizing the regulatory burden and bringing Singapore in line with the requirements of the UK, Hong Kong, Australia and New Zealand.

Additionally, the Registrar will be given new powers to strike a foreign company off the register on three new grounds, in addition to one already existing ground. Under the Bill, a foreign company may now be struck off if:

- the Registrar has reasonable cause to believe that it has ceased to carry on business in Singapore or is being used for an unlawful purpose;
- the sole authorised representative has given notice of his resignation to the company and lodged a notice with the Registrar, but the foreign company has failed to respond or appoint another authorised representative within the period of 12 months;
- an authorised representative of a foreign company has received no instructions from the company within 12 months of a request made by the authorised representative as to whether the foreign company intends to continue its registration in Singapore; or
- the foreign company does not appoint a replacement authorised representative within 6 months after the death of the sole authorised representative.

What other legislation will be affected by these changes?

A simultaneous and complementary bill, the Statutes (Miscellaneous Amendment) (No.2) Bill, will be passed to align the provisions of the following Acts with the changes made to the CA:

- the Accountants Act
- the Limited Liability Partnerships (LLP) Act
- the Limited Partnership (LP) Act

Conclusion

The changes set out in the Bill will largely be welcomed by Singapore companies and directors, on the whole providing greater flexibility and aligning Singapore with other sophisticated jurisdictions.

The abolition of the financial assistance prohibition will be a particular relief to many.

However, the Bill also introduces safeguards to ensure that these changes are not to the detriment of stakeholders. Instead, the Bill will allow for a more efficient but regulated business environment, further confirming Singapore's commitment to improving its business and regulatory landscape.

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