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Shareholders' Rights & Shareholder Activism 2025

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Trends and Developments

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WMH Law Corporation is a boutique law firm based in Singapore specialising in high-stakes dispute resolution. The firm specialises in complex litigation and arbitration with a strong reputation in cross-border boardroom, shareholder and joint venture disputes.

The firm's boardroom, shareholder and joint venture practice is spearheaded by its "boardroom^{WMH+}" practice group which services both a local and international clientele consisting of public listed entities and foreign conglomerates.

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Introduction

With the growing sophistication of investors and the deepening complexity of a fragmented corporate world, shareholders are no longer content with mere passive participation in the corporations they invest in. Shareholders are now increasingly seeking to “arm” themselves and reserve (or carve out) roles within a company that used to be traditionally reserved for directors. Shareholders now also seek to influence positive agendas within the company to dictate policy, corporate governance and operational decisions. This short article summarises some of the pertinent rights, sources of such rights and tools/remedies available to shareholders in Singapore.

Locus Standi – Beneficial Shareholders Beware

At the outset, a threshold question sometimes overlooked is – whom should or can be recognised as shareholders and be conferred corresponding rights and standing as a shareholder and/or under the Companies Act (Cap. 50) (“the Act”). For instance, increasingly, issues with equitable or beneficial interests in shares have generated much difficulty.

In *Tanoto Sau Ian v USP Group Ltd* [2023] SGHC 106, the Singapore High Court found that beneficial shareholders could not requisition an extraordinary general meeting under Section 176 (1) of the Act as they are “... not ‘members’ for the purposes of s 176 (1).” Persons who agree to be members have to have their names entered into the company’s register of members “in order to qualify as members”.

Amongst other observations, the High Court in *Tanoto Sau Ian v USP Group Ltd* [2023] SGHC 106 noted that in Singapore, an “intentional step [was] taken not to enfranchise indirect investors in the way done in the UK Companies Act 2006” and that Singapore adopts “a multiple proxies regime”. That said, it appeared that the High Court deemed the applicant in that case to have the locus standi to bring a derivative action under Section 216A of the Act.

In a separate instance, in *Marten, Joseph Matthew and another v AIQ Pte Ltd (in liquidation) and others* [2023] SGHC 361, the Singapore High Court took the view that a beneficial owner of shares (not being a registered member of the company and unless the

exception in Section 216 (7) of the Act applies) would not have the locus standi to bring a claim in oppression because “... trusts (whether express, implied or constructive) are not recognised under the Companies Act by virtue of s 195 (4).” Beneficial shareholders ought to also note that a company is not bound to recognise a trust and must be mindful that model/template company constitutions in Singapore may include a non-recognition clause on such terms or similar terms – ie, “[The company] shall not be bound by or recognise any... interest in the nature of a trust... in any share... except an absolute right thereto in the person for the time being registered as the owners thereof...”.

Such clauses do not per se prohibit a trust or make it invalid but merely state that the company shall not be bound to recognise a trust (*Forest Fibers Inc v K K Asia Environmental Pte Ltd and another and another suit* [2018] SGHC 195).

Company’s Constitution and Shareholders’ Agreement

A company’s constitution and the shareholders agreement (if any) between parties are typically the first ports of call when deciphering the rights and standing of a shareholder.

In Singapore, to incorporate a company, parties must, at its very inception, prepare and file that company’s constitution (formerly known as the memorandum and articles of association) – ie, a document that sets out the basic structure by which a company is organised. Notwithstanding a company’s constitution being a major source of a shareholder’s rights, it is often neglected by parties who adopt a template constitution for the sake of expediency and/or neglect to even consider the need for a shareholders’ agreement.

A shareholders’ agreement and a company’s constitution are enforced independently of each other and comprise distinct legal relationships (see *Corporate Law*, Second Edition, SAL Academy Publishing 2024).

The Singapore High Court in *BTY v BUA and other matters* [2018] SGHC 213 makes clear the foundational differences between a shareholders’ agreement and a company’s constitution. A shareholders’ agree-

ment is a private contract and therefore bears the following traits:

- “It derives its contractual force purely from the private law of obligations.”
- For any obligation to be binding, there must first be a “coincidence of offer, acceptance and consideration”.
- “At common law, nobody who is not a party to the contract can be bound by its provisions or can claim any rights under its provisions.” On the other hand, a company’s constitution “derives its contractual force from company law, not private law. Section 39 (1) of the Companies Act provides that the constitution of a company binds the company and its members as if the constitution had been signed and sealed by each member and contained covenants on the part of each member to observe its provisions. The constitution is therefore a deemed contract which binds immediately by force of statute upon and by virtue of registration. As such, it binds without any need for offer, acceptance or consideration.” As a result of the fundamentally different legal character of a shareholders agreement and constitution, poorly conceptualised contracts starved of intellectual capital can result in deep complications. This is particularly since the Singapore High Court made clear that “the private law plane is subordinate to company law” and “company law allows a shareholders’ agreement to supplement company law but never to supplant it”.

For illustration, the Act makes clear that where certain prohibitions/requirements apply under the Act, these cannot be contracted away by parties, including but limited to:

- Section 75: “Rights of holders of preference shares to be set out in constitution; 75.—(1) No company may allot any preference shares or convert any issued shares into preference shares unless there are set out in its constitution the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative or non cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares. (2) If default is made in complying

with this section the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$2,000.” Section 160: “Approval of company required for disposal by directors of company’s undertaking or property; 160.—(1) Despite anything in a company’s constitution, the directors must not carry into effect any proposals for disposing of the whole or substantially the whole of the company’s undertaking or property unless those proposals have been approved by the company in general meeting.” Section 163: Subject to certain exceptions and conditions being satisfied (including obtaining prior approval of shareholders at a general meeting), a company (other than an exempt private company) cannot make a loan to a director which would be regarded as a “restricted transaction”.

On that same note, the blind adoption of template company constitutions also often land parties in unintended predicaments. For instance, where a director is removed by shareholders through an ordinary resolution.

Such an article (eg, “The company may by ordinary resolution remove any director before the expiration of this period of office and may by an ordinary resolution appoint another person in his stead ...”) would be standard and can be found in template constitutions and typically go unnoticed until a dispute arises between opposing camps, a director is actually strategically removed by a rival majority and that director attempts to challenge his/her removal from the board.

In such instances, an aggrieved director (often also a shareholder) may likely only be able to restrain the shareholders’ exercise of their voting power by bringing his/her claim “within the statutory exceptions to majority rule established by s 216 or s 216A [of the Act]”. If no such allegations can be established, the shareholders will be deemed as merely (and lawfully) exercising their majority will at a general meeting (see *Debotosh Lodh v Boustead Services Pte Ltd and another* [2019] SGHC 52).

Shareholders’ Rights

Further to such rights conferred upon a shareholder by the company’s constitution or expressly agreed to

in a shareholders' agreement, a shareholder is entitled to the following:

- Every shareholder has a statutory right to have the company's constitution observed by every other shareholder and to restrain ultra vires and illegal acts.
- Rights to Requisition, Attend Meetings and Vote: Shareholders are entitled to attend an annual general meeting (AGM) which must be held by the company after the end of each financial year (see section 175 of the Act). Shareholders holding not less than 10% of the total number of paid-up shares of the company are also entitled to requisition for an extraordinary general meeting to be convened (see Section 176 (1) of the Act).
- Rights to Information:
 - (a) Along with a shareholder's right to attend an AGM, they are entitled to access the company's financial statements for the particular financial year in which the AGM is held. Such financial statements "must comply with the requirements of the Accounting Standards and give a true and fair view of the financial position and performance of the company" (see Section 201 of the Act).
 - (b) A shareholder is also entitled to inspect and have copies of the company's minute books which will include "minutes of all proceedings of general meetings and of meetings of its directors ..." (see Section 189 of the Act).
 - (c) Unlike a director, shareholders do not have an "unqualified right to [the company's] financial information" (*Ezion Holdings v Teras Cargo Transport Pte Ltd* [2016] SGHC 175)
- Reserve Management Powers: In exceptional circumstances, reserve powers may be implied (as a matter of necessity) in favour of the shareholders in general meeting subject to the following principles (*Chan Siew Lee v TYC Investment Pte Ltd and Ors* [2015] SGCA 40 cited in
- *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] SGCA 44):
 - (a) Management powers are reserved to the shareholders in a general meeting only where the board of directors is deadlocked or is unable or unwilling to act.
 - (b) Such reserve management powers' scope is limited to what is necessary to resolve the deadlock.
 - (c) Reserve powers may not be exercised to contravene an express term in a company's articles.
 - (d) Reserve power must be limited in that: (i) the dispute must relate to the performance of a bona fide obligation owed by the company to a third party; and (ii) there is no material suggesting that it will not be in the company's best interest to honour these obligations.
 - (e) Reserve powers are not meant to allow shareholders to "step into the shoes of the board". Rather, "it is limited to the minimum necessary to keep the company going by enabling it to meet its bona fide obligations as long as it is not shown that the company would be better off not meeting them."
- Shareholder Actions (focusing on Section 216 and Section 216A of the Act).

Minority Oppression – Section 216 of the Act

Section 216 of the Act provides an avenue for a minority shareholder who has been "suffering" at the hands of the controlling majority to seek redress. Such specific remedies available to a "suffering" minority shareholder are listed at Section 216 (2) of the Act, including to compel a share buy-out, provide that the company be wound up, etc.

A shareholder with less than 50% shareholding in the company is naturally understood to be a "minority" shareholder entitled to file a minority oppression lawsuit. That said, the express language of Section 216 does not preclude a majority shareholder from bringing an oppression claim. Quite to the contrary, Section 216 stipulates that "any member... of a company" may bring an action for relief under that provision with no further qualification that the same is only reserved for minority shareholders.

This was confirmed by the Singapore Court of Appeal in *Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47. The Court of Appeal explained that "... the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive

acts.” More specifically, it was accepted that “the mischief which [Section 216] was intended to cure, viz. the abuse of power to the prejudice of shareholders who lack the power to stop that abuse.” What constitutes “oppressive”/“unfair” conduct? Section 216 provides a remedy for a wrong suffered in the shareholder’s personal capacity. The individual shareholder sues in his/her own right to protect his/her interests as a shareholder of the company. Of course, the conduct complained of must relate to the affairs of the company. Whilst the local courts used to rely on four different tests to establish “oppression” – ie, (i) oppression; (ii) disregard of interests; (iii) unfair discrimination; and (iv) prejudice, *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 has explained that “There is... little utility in reading the four limbs disjunctively and attempting to draw a distinction between each limb.” The litmus test of “commercial unfairness” involves a consideration of whether there has been a “visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect”.

Where the issue of such possible remedies available to an aggrieved shareholder is concerned, the Singapore Court of Appeal in *Liew Kit Fah and others v Koh Keng Chew and others* [2019] SGCA 78 made equally clear that:

“20 It is clear, therefore, that the court’s powers under s 216 (2) are only enlivened where the court is satisfied that minority oppression under s 216 (1) has been established. The correctness of this view is further buttressed by the fact that the court’s order under s 216 (2) is to be made ‘with a view to bringing to an end or remedying the matters complained of’. There is, however, no complaint to bring to an end or remedy if the court is not satisfied, in the first place, that a case of minority oppression under s 216 (1) has been established.” Consequently, therefore, whether there was a “continuing state of oppression” would be relevant in the courts determining the appropriate remedy/relief to grant in any given circumstances. As a result, it has been made clear that “notwithstanding s 216 (2) of the Act conferring [on] the Court an extensive discretion to ‘make such order as it thinks fit’, this discretion must necessarily be exercised judiciously:

... any order granted must be made with a view to bringing an end to or remedying the matters complained of... The purpose of s 216 is to relieve minority oppression, not to proscribe majority rule. It is for that reason that in most cases, the only practical mechanism to end minority oppression is a corporate divorce where one party buys the other out” (*Ong Heng Chuan v Ong Teck Chuan* [2021] SGCA 46).

Derivative Action – Section 216A of the Act

In a claim for minority oppression (under Section 216 of the Act), a shareholder is seeking to right a personal wrong that has been inflicted against him/her qua shareholder. In turn, in that scenario, such remedies sought are meant to address a personal wrong suffered by the shareholder.

In this instance, we touch on Section 216A of the Act, which provides shareholders the ability to (i) overcome an unwilling/uncooperative board of directors; (ii) step into the shoes of the company; and (iii) right a corporate wrong committed against the company (not a wrong suffered in the shareholder’s personal capacity).

A common scenario is where the shareholders feel that the company ought to take a certain errant director to task but the board (ie, a “rogue” board) refuses to do so. Significantly, the Court of Appeal also helpfully summarised the purpose of Section 216A:

“The derivative action... is one that avails a minority shareholder who is dissatisfied by the refusal of the board to act in the interests of the company. Its primary rationale is that it enables a party – who is aggrieved by the fact that those in control of the company are unwilling to act – to initiate the necessary legal action.” The need for Section 216A of the Act is premised on the principle that “in an action for a wrong alleged to have been done to a company (ie, a corporate wrong) the proper plaintiff is prima facie the company itself” – ie, the proper plaintiff rule (*Ng Kek Wee v Sim City Technology Ltd* [2014] SGCA 47).

Section 216A clearly sets forth certain “pre-requisites” that have to be satisfied before a statutory derivative action may be commenced (*Petroships Investment*

Pte Ltd v Wealthplus Pte Ltd [2016] SGCA 17) (“Petroships Investment”):

- A complainant must first apply to the Singapore High Court for leave/permission to bring a derivative action (Section 216A(2) of the Act).
- To do so, the complainant must have first given 14 days’ notice to the directors of the company of his/her intention to commence a derivative action. Simply, the directors of the company must first be given a chance to decide whether or not to vindicate the alleged corporate wrong (Section 216A(3)(a) of the Act).
- The Court must be satisfied that the complainant is “acting in good faith” (Section 216A(3)(b) of the Act). At the High Court level of Petroships Investment, the Hon. Judge accepted that a shareholder acted in good faith so long as its “dominant purpose” was to benefit the company.
- The Court must be satisfied that the complainant’s application is “prima facie in the interests of the company” (Section 216A(3)(c) of the Act). Again, at the High Court level of Petroships Investment, the Hon. Judge stated that the question of

whether a proposed derivative action was prima facie in the company’s interests involved not just an assessment of the legal merits of the action to determine if it was “legitimate and arguable” but also a holistic consideration of whether the action was in the “practical and commercial interests of the company”.

Whilst it is trite that it would be an abuse of process to allow an essentially corporate wrong to be pursued under Section 216, there can be cases where what appears to be a corporate wrong can plausibly also be a personal wrong – ie, overlapping wrongs. Notwithstanding, the Court of Appeal in *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] SGCA 46 emphasised that “it remains a prerequisite, even where ‘overlapping’ wrongs are concerned, that a distinct injury must be suffered by the shareholder. The injury to the minority shareholder thus cannot merely reflect the injury suffered by the company. It must further be shown that the distinct injury amounts to commercial unfairness against the plaintiff as a member of the company.”

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