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**Directors' and Officers'
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Directors and Officers Liability in Singapore

1 Structure of Singapore corporate entities

There are four forms of business structures in Singapore. These are:

- sole proprietorship;
- partnership;
- company incorporated in Singapore; and
- branch of a foreign corporation.

(a) Sole Proprietorship

The term “sole proprietor” is used to describe a person who is engaged in business on his own without being associated with others. A sole proprietorship may engage in any type of business activity in Singapore save for those business activities which are required by statute to be conducted by a corporate entity, such as banking, finance and dealings in securities.

A sole proprietorship must be registered under the Business Registration Act (Cap 32).

(b) Partnership

A partnership consists of two or more persons carrying on business in common with a view to profit. The partners may either be natural persons or corporations. The maximum number of partners in a partnership is 20. Like a sole proprietorship, a partnership has no separate legal existence. It is not a legal person separate and distinct from the persons who are the partners. The partners are jointly liable to creditors directly for the debts and liabilities of the partnership without limitation.

A partnership must be registered under the Business Registration Act (Cap 32).

(c) Singapore incorporated company

The incorporation of a company in Singapore is governed by the Companies Act (Cap 50) (the “**Companies Act**” or “**Act**”). Unlike a sole proprietorship, a partnership or a branch of a foreign corporation, a company is a legal person separate and distinct from its members.

The liability of the members of a company to contribute to the assets of the company upon its liquidation may be limited or unlimited. This gives rise to the distinction between a limited company and an unlimited company.

A limited company may in turn be limited by shares or by guarantee. For a company limited by shares, the liability of the members is limited to the amount remaining unpaid on their shares. For a company limited by guarantee, the members are only obliged to contribute up to the amount which they have agreed to contribute.

For an unlimited company, the liability of the members is without limitation. An unlimited company may have a share capital. It is possible to convert a limited company into an unlimited one and an unlimited company into a limited one.

A company having a share capital, regardless of whether it is limited or unlimited, is a private company if it satisfies all of the following requirements:

- the right to transfer shares of the company is restricted;
- the number of shareholders must not exceed 50, excluding joint holders of shares and past and present employees of the company or a subsidiary thereof; and
- the raising of finance from the public by way of subscription for shares or debentures of the company or deposit of money with the company is prohibited.

Any company which is not a private company is a public company.

A private company may be converted into a public company. It is also possible to convert a public company into a private company.

Private companies may further be classified into exempt private companies and non-exempt private companies. An exempt private company is a private company in which no beneficial interest in the shares of the company is held by a corporation and which has no more than 20 shareholders. Therefore, a company with even one corporate shareholder cannot be an exempt private company. The Minister for Finance has the power to declare any private company that is wholly owned by the Government of Singapore to be an exempt private company. An exempt private company must prepare its balance sheet and profit and loss account annually but it need not submit these documents with its annual return.

The most common type of company in use in Singapore as a business vehicle is the company limited by shares.

(d) Branch of a foreign corporation

This form of business organisation is only available to foreign corporations. A foreign corporation, if it does not incorporate a company in Singapore, has to register a branch under the Companies Act if it wishes to carry on business in Singapore. A branch is not a separate legal entity in that its debts and liabilities are part and parcel of the debts and liabilities of the head office of the foreign corporation and its activities are limited to those stipulated in the constitution of the head office.

2 Who are directors and officers?

A “director” is not exhaustively defined in the Companies Act. The definition broadly provides that a 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, and an alternate or substitute director.

Similarly, the definition of an “officer” is also not exhaustive. The Act defines an officer to include:

- any director or secretary of the corporation or a person employed in an executive capacity by the corporation;
- a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and
- any liquidator of a company appointed in a voluntary winding up.

However, the following persons are specifically excluded from the definition of an “officer”:

- any receiver who is not also a manager;
- any receiver and manager appointed by the court;
- any liquidator appointed by the court or by the creditors; and
- a judicial manager appointed by the court.

Division 2 of Part V (Section 145 through to Section 174) of the Companies Act sets out detailed provisions dealing with directors and officers. These sections provide for *inter alia* the qualifications, disqualification, removal, age limit, duties and liabilities, powers, etc. of the directors and officers. In addition to these sections, a substantial number of provisions of the Act deal with the duties and obligations of directors and officers.

3 Legal Basis of Directors, Officers and Managers' Liability in Singapore

(a) Statutory, civil or contractual legal framework

Directors of companies incorporated in Singapore are governed by the Companies Act. Directors are subject to various statutory and common law duties which overlap in some respects.

Company law in Singapore is generally based on principles established by the English common law, although Singapore's law differs significantly from its English counterpart in some respects. The provisions of the Singapore Companies Act also similar in many respects to the companies legislation in England as well as that in Australia. Accordingly, case law from England and Australia are of persuasive authority in Singapore and may be relied upon by Singapore courts in the absence of local case law.

(b) Duties and Requirements of Directors, Officers and Managers

At common law, the directors and officers are obliged to perform a number of duties. These duties may be broadly classified into two categories: the duties of good faith and that of care and skill. This mirrors the statutory duties as explained under (d) below.

(c) Is there an equivalent in Singapore to the US Business Judgment Rule?

The US business judgment rule creates a powerful presumption in favour of actions taken by directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be attributed to any rational business purpose: *In Re Encore Computer Corporation Shareholders Litigation Consolidated (2000)*.

There is no equivalent of the business judgment rule in Singapore. The director of a Singapore company must act in what he honestly considers to be in the interests of the company, and not in the interests of some other person or entity. However, his actions will not give rise to the presumption as stated in the business judgment rule.

(d) Duties of Directors, Officers and Managers towards the corporation: Statutory Duties

The statutory duties of a director are essentially contained in Section 157 of the Act, which provides that:

“As to the duty and liability of officers

157(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office

(2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company”.

There are two broad categories of directors’ duties under the Companies Act which basically mirror a director’s duties at common law. They are:

- the duty of good faith; and
- the duty of care and skill.

The duties of good faith are derived from the fiduciary relationship the director has with the company. As a general rule, a director’s fiduciary duties are regarded as falling into four categories, which overlap. They are:

- the duty to act *bona fide* in the interest of the company as a whole;
- the duty to exercise powers for the purposes for which they were conferred and not for any collateral or improper purposes;
- the duty not to fetter the future exercise of directors’ powers; and
- the duty to avoid being placed in a position of conflict of interest.

These duties mentioned in Section 157 of the Act are in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

While there is a duty to exercise care and skill, the director is, however, not required to exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

There is also a general duty imposed on a director to disclose to the shareholders in a general meeting, the nature of any interest which he has in a contract to which the company is *inter alia* a party to or in which the company has an interest. The duty is reflected to a certain extent in Section 156 of the Act which requires a director who is directly or indirectly interested in certain transactions with a company to declare the nature of the interest to the board of directors.

Civil liabilities may be imposed on a director who has breached his duties. Section 157(3) of the Companies Act specifically provides that a director is liable for any damage suffered by a company as a result of a breach of such duties. In addition, a breach of Section 157 also constitutes an offence punishable with a fine not exceeding S\$5,000 or to imprisonment for a term not exceeding one year.

Apart from the broad statement of a director's duty in Section 157, specific provisions of the Companies Act also imposes on directors the duty to ensure prompt holding of annual general meetings, filing of returns, preparation of audited accounts and directors' report, and other more specific matters.

(e) Duties of Directors, Officers and Managers towards majority and minority shareholders

As the duties of Directors are owed to the company and not to its shareholders, a minority shareholder who seeks redress against a defaulting director must commence action in the name of the company. This is called a "derivative action" and the right to bring such action is granted under Section 216A of the Companies Act. However, the right of redress under Section 216A is only available in respect of a company that is not listed on the Singapore Exchange. The provisions of Section 216A are discussed in more detail in the section dealing with shareholder actions.

(f) Duties of Directors, Officers and Managers in case of bankruptcy

Except with the leave of court or the permission of the Official Assignee, a person who is an undischarged bankrupt cannot be a director of a corporation or take part in the management of a corporation, whether directly or indirectly. This is provided for in Section 148(1) of the Companies Act. It is an offence for an undischarged bankrupt to act as a director or participate in the management of a corporation contrary to Section 148(1). The offence is punishable with a fine not exceeding S\$10,000, or imprisonment for a term not exceeding two years, or both. This disqualification is designed to protect the public as an undischarged

bankrupt is *prima facie* not a fit person to be entrusted with the management or direction of a company.

(g) Status of the enforcement of Directors, Officers and Managers' liability with respect to tax, labour and environmental regulations

In addition, the directors and officers may also be accountable under other statutes. For example, Section 55 of the Income Tax Act (Cap 134) provides that the manager or principal officer in Singapore of every company or body of persons is answerable for doing of all acts, matters and things as are required to be done under the Income Tax Act for the assessment of the company and payment of tax.

Section 113A of the Employment Act (Cap 91) provides that where an offence under the Employment Act{PRIVATE "TYPE=PICT;ALT=next"} is committed by a body corporate, and it is proved to have been committed with the consent {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} connivance of, {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} to be attributable to any act {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} default on the part of, any director, manager, secretary {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} other similar officer of the body corporate, he, as well as the body corporate, will be guilty of that offence and is liable to be proceeded against and punished accordingly.

A similar provision is found in Section 71 of the Environmental Pollution Control Act (Cap 94A).

(h) Directors, Officers and Managers' criminal liability

There are many provisions in the Companies Act which impose criminal liability on officers (the definition of which includes a director) who act in contravention of the said provisions. Examples include:

- where a director knowingly contravenes or permits or authorizes contravention of the prohibition against the exercise of any power of the company to issue shares without the approval of the company in general meeting, he will be liable to compensate the company and any person to whom the shares were issued for any loss, damages and costs which the company or person may have sustained or incurred thereby (Section 161 of the Act);
- where a company (other than an exempt private company) contravenes the prohibition against the making of a loan to a director or the entering into any guarantee or the provision of any security in connection with a loan made to such director by any other person, any

director who has authorised such contravention will be guilty of an offence and will be liable upon conviction to a fine of up to S\$20,000 or to imprisonment for up to 2 years (Section 163 of the Act);

- where a company is served by the requisite number of members or shareholders to disclose the emoluments and other benefits received by the directors and the notice is not complied with, the company and every director will be guilty of an offence and will be liable upon conviction to a fine of up to S\$10,000 (Section 164A of the Act);
- where a director fails to disclose information which he is required to give in order that the company may satisfy the requirements under, *inter alia*, Section 164 of the Act that a register with specified particulars be kept, he will be guilty of an offence and liable upon conviction to a fine not exceeding S\$15,000 or imprisonment for up to 3 years (Section 165 of the Act);
- where a company having a share capital fails to make the requisite annual return in the prescribed form and manner, the company and every officer of the company who is in default will be guilty of an offence and liable on conviction to a fine up to S\$5,000 and also a default penalty (Section 197 of the Act);
- where the accounting records and systems of control are not kept in accordance with Section 199 of the Act, the company and every officer of the company who is in default will be guilty of an offence and will be liable on conviction to a fine of up to S\$2,000 or imprisonment for up to 3 months and also a default penalty (Section 199 of the Act).

4 Statute of limitations

The statute of limitations in Singapore is the Limitation Act (Cap 163).

Under Section 6 of the Limitation Act, the period of limitation for claims arising out of contract or tort is 6 years from date on which the cause of action accrues. After that period, such claims are statute barred.

However, in the case of actions to recover land, the period of limitation under Section 9(1) of the Limitation Act is 12 years from the date on which the right of action accrues.

For actions based on the fraud of the defendant, the limitation period will only begin to run from the time the plaintiff has discovered the fraud{PRIVATE "TYPE=PICT;ALT=next"} or could with reasonable diligence have discovered it

Accordingly, the applicable limitation periods for the following type of actions are:

- shareholder actions – 6 or 12 years depending on whether it is an action to recover land;
- discrimination actions – 6 years;
- sexual harassment actions – 6 years;
- actions for wrongful termination of employment – 6 years;
- actions involving fraud – 6 or 12 years (depending on whether it is an action to recover land) from the time the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

For actions to recover tax by the relevant tax authorities, specific reference must be made to the applicable legislation. For example, pursuant to Section 74 of the Income Tax Act (Cap 134), where it appears to the Comptroller of Income Tax that any person liable to tax has not been assessed or has been assessed at an amount less than that which ought to have been charged, he may within the year of assessment or within 6 years thereof assess the person at such amount or additional amount as according to his judgment ought have been charged. However, where any form of fraud or wilful default has been committed by any person in relation to income tax, the Comptroller may, for the purpose of making good any loss of tax attributable to fraud or wilful default, assess that person at any time.

Similarly, pursuant to Section 45(1) of the Goods and Services Tax Act (Cap 117A), the Comptroller of Goods and Services Tax may impose an assessment of tax on a taxpayer up to 7 years after the end of a prescribed accounting period. However, there is no limitation to the period within which the Comptroller may impose an assessment if the taxpayer has committed any form of fraud or wilful default.

5 Action against directors: who may sue?

(a) Corporation: (derivative action under s216A)

The general rule, as established by the English cases of *Foss v Harbottle* (1843) and *Percival v Wright* (1902), is that a director's duties are owed to the company and not its shareholders (the company and its members not

being the same in law). The basis for the rule is that directors are “not in a fiduciary relationship with the individual shareholders”.

Accordingly, there is a statutory provision (by way of Section 216A of the Act) which allows a complainant to apply to court for leave to bring derivative or representative actions 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.

Singapore law now looks as much to Australia as to England for inspiration, and in Australia, there are some cases which have decided that in some circumstances, there may be a fiduciary relationship between the directors and shareholders such that the directors may owe duties to the shareholders too.

The net effect of the relevant cases from Australia is that there may well be a fiduciary relationship between the director and the shareholder which gives rise to duties owed directly to the individual shareholder rather than to the company at large and the factors that point towards such a relationship are:

- shareholders' dependence upon directors for information and advice;
- the existence of a relationship of confidence between shareholders and directors;
- the significance of some particular transaction for the parties and the extent of a positive action taken by, or on behalf of, the directors to promote the transaction; and
- the structure of the shareholdings in the company.

However, there has not as yet been an opportunity for the courts in Singapore to express their view about these cases and to decide whether a similar stance will be adopted here.

(b) Shareholders (direct actions and class actions)

In Singapore, the company may sue its directors for breach of duties owed by the directors to the company. As noted earlier, in Australia, there is case law to the effect that directors may owe fiduciary duties to shareholders as well, and as such, the shareholders may bring an action against the directors for breach of those duties. It remains to be seen whether the Singapore courts will adopt the Australian position.

In any event, under Section 216 of the Act, any member or holder of a debenture of a company may apply to the court for an order on the ground:

- that 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 members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
- that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

Under Section 216A of the Companies Act, a complainant may apply to the court for leave to bring derivative or representative actions 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.

In addition, Section 409A of the Act enables any person whose interest has been, is or would be affected by the conduct of a person who has engaged, is engaged or is proposing to be engaged in any conduct that constituted, constitutes or would constitute a contravention of the Act may apply to the court for an injunction to restrain that person from engaging in that conduct or even to require that person to do any act or thing.

At common law, the rule in *Foss v Harbottle* that only the company may enforce its rights against the director for breach of his duties owed to the company still prevails.

There are, however, two recognised exceptions to the rule:

- where the acts complained of are *ultra vires* the objects of the company; and
- where there is a fraud on the minority and the wrongdoers are in control of the company.

The “*ultra vires* acts” exception allows any member to commence an action to restrain the *ultra vires* transaction and even to recover the company’s property which has been transferred to a third party under the agreement. In Singapore, this exception has little significance because Section 25(1) of the Act preserves the validity of a transaction vis-à-vis a third party even though the transaction is *ultra vires* and as mentioned

above, Section 409A gives a personal right to any member to restrain the *ultra vires* acts.

The most significant protection that is afforded to a minority shareholder is the common law principle that forbids majority shareholders from acting in "fraud on the minority". The "fraud on the minority" exception is a procedural device to allow the minority member to obtain justice but it is not a right given to him to bring a derivative action. "Fraud" here is not limited to common law fraud but extends to fraud in an equitable sense such as where there has been an abuse of power.

These principles have been entrenched in, and widened by Section 216 of the Companies Act. Under Section 216(1) and decided case law, a minority shareholder may apply to the court for relief in the following circumstances:

- the majority attempts to appropriate to themselves money, property or advantages belonging to the company;
- a majority member has benefited at the expense of the company;
- the majority attempts to prevent the company from bringing proceedings with regard to a cause of action that it possesses.
- the affairs of the company are being conducted in a manner oppressive to one or more of the members of the company;
- the powers of the directors are being exercised in a manner oppressive to one or more of the members of the company;
- the affairs of the company are being conducted in disregard of the interests of one or more of the members of the company;
- the powers of the directors are being exercised in disregard of the interests of one or more of the members of the company;
- some act of the company has been done or is threatened to be done which unfairly discriminates against one or more of the members of the company;
- some resolution of the members (or any class of them) has been passed or is proposed which unfairly discriminates against one or more of the members of the company;
- some act of the company has been done or is threatened which is otherwise prejudicial to one or more of the members of the company;

- some resolution of the members (or any class of them) has been passed or is proposed which is otherwise prejudicial to one or more of the members of the company.

If a minority shareholder succeeds in establishing a case under Section 216(1), the court has wide powers under Section 216(2) to render relief, or bring an end to, or remedy the matters complained by the member. In particular, the court may order the following:

- direct or prohibit any act or cancel or vary any transaction or resolution;
- regulate the conduct of the affairs of the company in future;
- authorise civil proceedings to be brought in the name of or on behalf of the company by such persons or persons and on such terms as the court may direct (i.e. a derivative action);
- provide for the purchase of the shares or debentures of the company by other members or holders of debentures or by the company itself;
- in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- provide that the company be wound up.

A member may also sue for a personal remedy if his personal rights are infringed. In this case, the directors and majority members cannot stop him. This situation would arise where a member complains of a tort committed against him by the company, or where the company is threatening to breach or actually breaches a contract with a member. To institute a personal action, the member must show that the injury complained of is an injury to the member personally, not the company.

(c) Creditors

Section 340 of the Companies Act allows creditors to bring an application to the court if in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.

In this case, the court may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs.

The above position has also been upheld by Australian and English case law. A director owes a duty to the company and the creditors of the company to ensure that the affairs of the company are properly managed and that the directors do not secure benefits for themselves to the prejudice of the creditors. If the directors act in a manner prejudicial to the creditors, the creditors may apply to court via Section 340 to hold the directors responsible. However, this does not mean that the creditors may sue the directors, as directors do not owe a duty in that sense to the creditors.

(d) Insolvency Administrators / Trustees in Bankruptcy

In Singapore, bankruptcy is governed by the Bankruptcy Act (Cap 20). Previously only the Official Assignee could administer the estates of bankrupts. However, since July 1995, it has been possible for the court, on the application of the petitioning creditor, to appoint a person other than the Official Assignee to be the trustee of the bankrupt's estate. This change is in line with the UK and Australian insolvency regimes which encourage the involvement of the private sector in the administration of insolvent estates. A trustee of a bankrupt's estate has all the functions, duties and powers of the Official Assignee in relation to the administration of a bankrupt's estate.

The Official Assignee or trustee in bankruptcy may commence, continue or defend any legal proceedings concerning the property of the bankrupt: Section 112(b) Bankruptcy Act. This is because the property comprised in the bankrupt's estate vests in the trustee; therefore he is the proper party to maintain or defend any proceedings concerning the bankrupt's property.

(e) Regulatory Authorities

When a director of a company acquires confidential information by virtue of his capacity as a director and he knows the information is likely to materially affect the price of the securities of the company or another company, he should not make use of the information and deal in those securities to gain an advantage for himself. Insider trading is prohibited in Singapore.

A director who has engaged in insider trading faces criminal and civil liabilities under the Securities Industry Act (Cap 289). The Monetary Authority of Singapore ("**MAS**") is empowered under Section 104A of the Securities Industry Act to bring an action in court against a director who has engaged in insider trading for an order for civil penalty. The MAS is authorised by law to regulate the banking, insurance, securities and futures industries.

A civil penalty imposed on a director under Section 104A of the Securities Industry Act will be payable to the MAS. If the director fails to pay the civil penalty imposed on him, the MAS may sue the director for the civil penalty as a judgment debt to the MAS.

The Singapore legislation in respect of the securities and futures industries has been reviewed recently and the Securities and Futures Act 2001 (Act 42 of 2001) was passed on 5 October 2001. Only certain parts of the Securities and Futures Act 2001 have come into force. When the whole of the Securities and Futures Act comes into force, the Securities Industry Act will be repealed. Section 104A of the Securities Industry Act will be migrated to Section 232 of the Securities and Futures Act 2001. Section 232 of the Securities and Futures Act 2001 is essentially similar to Section 104A of the Securities Industry Act.

(f) Employees

In the case of a company and its employees, the parties to a contract of employment would be the company and the individual employee concerned. The contract of employment would not be between the employee and a director of the company. As such, there is no privity of contract between a director of a company and the employees of the company. Therefore, any action brought by an employee for breach of the employment contract would be taken against the company and not the directors of the company.

However, for offence under the Employment Act{PRIVATE "TYPE=PICT;ALT=next"} (Cap 91), Section 113A of the Employment Act provides that where an offence under the Employment Act{PRIVATE "TYPE=PICT;ALT=next"} is committed by a body corporate, and it is proved to have been committed with the consent {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} connivance of, {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} to be attributable to any act {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} default on the part of, any director, manager, secretary {PRIVATE "TYPE=PICT;ALT=prev"}or{PRIVATE "TYPE=PICT;ALT=next"} other similar officer of the body corporate, he, as well as the body corporate, will be guilty of that offence and is liable to be proceeded against and punished accordingly. An example of an offence under the Employment Act is where an employer without reasonable excuse refuses to allow an employee whose contract of service has been determined to leave his service: Section 108.

Sexual Harassment

Singapore does not have a comprehensive legislation which deals specifically with sexual harassment. However, there are specific statutory provisions which provide protection against sexual harassment.

For example, Section 14 of the Employment Act (Cap 91) allows an employee who is dismissed without just cause or excuse by his/her employer to seek redress with the Minister for Manpower. A refusal to unwelcome sexual invitations by words or gestures by the employer will easily amount to a non-justifiable cause or excuse. The employee may make representations to the Minister for Manpower for reinstatement. A similar provision is found in Section 35 of the Industrial Relations Act (Cap 136).

The following provisions in the Penal Code (Cap 224) are relevant:

- Section 509 of the Penal Code makes it an offence to utter any word, make a sound or gesture with an intention to insult the modesty of a woman. Such an offence is punishable with imprisonment for a term of one year, or with fine or with both.
- Sections 354 and 354A of the Penal Code makes it an offence for a person to assault or use criminal force with the intention or knowledge that it would outrage the modesty of another person. The offence is punishable with imprisonment for a term not exceeding two years, or fine or caning, or any two of such punishments.

In addition to the protection provided by legislation, an action may also be brought at common law in appropriate cases. In a recent landmark case in 2002, the Singapore High Court ruled that an employee who engaged in persistent acts of harassment of his former employers could be stopped with an injunction from continuing with these acts. The recognition of the tort of harassment in Singapore means that a victim of harassment (including sexual harassment) has a civil remedy against the perpetrator, and an injunction may be issued to restrain the harassment.

6. Enforceability of Foreign Judgments on Singapore Directors, Officers and Managers under Singapore law

A foreign judgment obtained against a director in Singapore may be enforced against that director in the following ways:

- pursuant to the provisions of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (the “**RECJA**”);
- pursuant to the provisions of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265) (the “**REFJA**”); and

- enforcement at common law.

(a) Reciprocal Enforcement of Commonwealth Judgments Act

Under the RECJA, money judgments made by the superior courts of certain British Commonwealth countries may be registered with the Singapore High Court and enforced in Singapore.

An application to enforce a Commonwealth judgment should be brought within 12 months after the date of the judgment. The application for registration is made ex-parte and, in cases of urgency, it is possible to obtain a hearing date on the same day as the day when the application is made. The order registering the judgment will stipulate a period after notice of registration has been given in which any application to set aside the registration must be made. After the expiry of this period, the registered judgment may be enforced in the same manner as any other Singapore judgment.

However, not all judgments may be registered. The following circumstances restrict the registration of judgments:

- the original court acted without jurisdiction;
- the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court;
- the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or
- the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

(b) Reciprocal Enforcement of Foreign Judgments Act

Under the REFJA, a judgment creditor has six years from the date of the foreign judgment to apply to the Singapore High Court to have it registered. However, a foreign judgment will not be registered if at the date of the application it has been wholly satisfied or it could not be enforced by execution in the country of the original court.

The Singapore High Court may refuse to enforce a foreign judgment in some situations, e.g. if the judgment was obtained by fraud or if the enforcement would be contrary to public policy in the country of the registering court.

Thus far, the only region to which the provisions of the REFJA have been made applicable is the Hong Kong Special Administrative Region of The People's Republic of China.

(c) Enforcement under common law

Foreign judgments that do not fall within the RECJA may be enforced under common law if the judgment is:

- for a definite sum of money;
- final and conclusive; and
- the foreign court has “jurisdiction” in the conflicts of law sense.

In general, the foreign court would have such “jurisdiction” if the judgment debtor:

- agreed to submit to the jurisdiction of the foreign court;
- was the plaintiff or counter-claimed in proceedings before the foreign court;
- voluntarily entered an appearance in the foreign proceedings; or
- was resident in the foreign country at the time the proceedings were instituted.

The Singapore High Court may, however, refuse to enforce a foreign judgment *inter alia* if there has been fraud or if the enforcement would be contrary to public policy.

The process of suing on the foreign judgment should ordinarily take about 12 to 18 months (excluding appeal). If the claim is a straightforward one and summary judgment can be obtained, the process should only take about

three months. A successful suit results in a Singapore judgment being obtained, and such judgment may then be enforced in the usual manner.

7. Liability of Directors, Officers and Managers for Punitive Damages under Singapore law

Punitive damages, or exemplary damages, are awarded when the defendant's conduct is sufficiently outrageous to merit punishment. Punitive damages are considered anomalous because it confuses the civil and criminal functions of the law, and the money obtained from the defendant goes to the plaintiff as a windfall rather than to the state. As a result, the Singapore courts have been very cautious in awarding punitive damages, and have only restricted it to certain categories of cases.

In England, cases of exemplary damages have been explained as cases of aggravated damages, i.e. cases of extra compensation to the plaintiff for injured feelings and dignity: *Rookes v Barnard* (1964). In England, exemplary damages are basically confined to the tort of trespass. Lord Devlin in *Rookes v Barnard* identified three categories of cases where awards of exemplary damages would be given:

- oppressive, arbitrary or unconstitutional conduct by government servants;
- conduct calculated to result in profit;
- express authorisation by statute.

Directors owe a fiduciary duty to the company to manage its affairs in good faith and diligence. Where the directors have misused their powers, the company may sue them for damages for breach of contract or of fiduciary duty. However, there are no reported cases in Singapore where punitive damages have been awarded for breaches of a director's duties. The closest category this could fall under is Lord Devlin's second category, which is directed against a defendant who "with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk".

8. Indemnification of Directors, Officers and Managers under Singapore law and D&O Insurance Policies

Pursuant to Section 172(1) of the Companies Act, any indemnification by a company of its directors' or officers' liability in relation to the company shall be void. However, what is not prohibited is a company indemnifying its directors and officers against liability to third parties.

9. Directors & Officers Insurance Policies

Notwithstanding the prohibition in Section 172(1) of the Companies Act against a company indemnifying its directors' or officers' against liability in relation to the company, it is expressly provided in Section 172(2) that a company can take out insurance to indemnify a director or officer ("**D&O insurance**") against a liability arising as a consequence of negligence, default, breach of duty, or breach of trust by the director or officer to the company. For such insurance policies, the company may pay 100% of the insurance premiums.

However, a company is prohibited from taking out the insurance where the liability arises out of conduct involving dishonesty or a wilful breach of duty.

Section 172 of the Companies Act does not restrict a company from taking out D&O insurance from an insurer carrying on insurance business in Singapore.

A company that pays premiums for D&O insurance may be able to claim a tax deduction under Section 14(1) of the Income Tax Act (Cap 134), which provides that "*there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income*". Similarly, where the director himself takes out such insurance, he will probably be entitled to claim a tax deduction in respect of the premiums paid against his director's fees under Section 14 of the Income Tax Act.

This article provides a brief overview of a director's and officer's liability under Singapore company law. It is not intended to be exhaustive and should not be acted upon without obtaining specific advice.