# SOME OBSERVATIONS ON THE NEW MODEL CONSTITUTION FOR A PRIVATE COMPANY LIMITED BY SHARES

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This note comments on the model constitution for a private limited company recently enacted. While companies may use the model constitution, which is a very useful guide to drafting a constitution, we suggest that there are reasons to modify it and companies may prefer an alternative solution in the form of a customised constitution that is more adapted to current usage.

Following the Companies Act ("Act") amendments, effective on 3 January 2016, the regulations governing a Singapore company limited by shares are contained in a single document called the constitution, which replaces the memorandum and articles of association ("M&A"). A company's existing M&A will be deemed to be its constitution and a company may continue to make amendments to its pre-existing memorandum and articles in accordance with section 26 of the Act. The reason is that section 4(13)(a) of the Act states:"With effect from the date of commencement of section 3 of the Companies (Amendment) Act 2014:

1. the memorandum of association and the articles of association of a company that are in force for the company immediately before that date:

- shall collectively be deemed to as, that company's constitution; and
- may be amended by the company from time to time in the same manner as the constitution of a company;"

Note section 26(2) of the Act requires lodging a copy of the "constitution as adopted or altered" with the resolution for the amendment (unless the Registrar dispenses with that requirement). This seems to suggest the entire memorandum and articles, as amended, should be lodged as the constitution in the event of an amendment to the memorandum or articles of association under section 26.

Some regulations in the M&A of companies incorporated before 3 January 2016 will now be outdated because they do not reflect other recent amendments to the Act. For example, the amendments to the Act introduced the electronic register of members, which is kept by the Registrar for private companies (i.e. ACRA) under section 196A of the Act and replaces a private company's own register of members as the record of legal owners of the company's shares going forward. The Act (in particular the 12th Schedule) now regulates the requirements in relation to the company's financial statements somewhat differently than previously, so the provisions regarding these in existing M&A are probably outdated. The statutory provisions in relation to taking a vote on a poll have changed in some respects. The Act now requires disclosures of interests by chief executive officers (even if not a director) and keeping a register of directors' and chief executive officers' shareholdings and debenture holdings at ACRA. These are just some of the legislative changes that a company would want to reflect in its new constitution.

All of this means that sooner rather than later a company will want to replace the regulations in its M&A

with those of a modern constitution. Under s 19(1) of the Act, companies incorporated on or after 3 January 2016 should adopt a constitution at the point of registration. Thereafter, the constitution can be adopted by special resolution pursuant to section 26 of the Act. In accordance with s 36(1)(a) of the Act and the Companies (Model Constitutions) Regulations 2015, the model constitution for private companies limited by shares is contained in the First Schedule of the Act ("model constitution"). We comment below on some provisions in the model constitution we think it is worth highlighting when one considers the issues involved in adopting a new constitution.

## Constitutional requirement of a private company

S 18 of the Act states that a company having a share capital may be incorporated as a private company if its constitution: (a) restricts the right to transfer its shares; and (b) limits to not more than 50 the number of its members (counting joint holders of shares as one person and not counting any person in the employment of the company or of its subsidiary or any person who while previously in the employment of the company or of its subsidiary was and thereafter has continued to be a member of the company).

Notably the model constitution does not contain a regulation complying with this requirement in the Act. This begs the question as to what the implication of the omission of this language in the constitution is. Section 32(2)(c) of the Act states that where the constitution of a private company has been so altered that it no longer includes restrictions or limitations of the kinds specified in s 18(1), ACRA may by notice served on the company determine that, on such date as is specified in the notice, the company ceased to be a private company i.e., the company would be deemed to be a public company and the company must, within a period of 14 days after the date of the order or the notice, lodge with ACRA a statement in lieu of prospectus. Further, if ACRA deems that there has been a default in relation to a private company in complying with any restriction or limitation of a kind specified in s 18(1) that is included, or deemed to be included, in the constitution of the company, 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 $5,000 or to imprisonment for a term not exceeding 12 months. It should be noted these provisions in the Act seem to contemplate a private limited company cannot be incorporated without the constitution containing these restrictions but in fact many will have been so incorporated using the model constitution. The Act is not clear as to what the consequence is of a private limited company being incorporated without the constitution containing the above restrictions but we would suggest the company should be governed as though the provisions were included in the constitution and it should be amended to include them, in order to avoid any continuing ambiguity as to the status of the company as a private company (unless the company goes through the procedure to convert into a public company).

## Transfers of shares

Regulation 25 of the model constitution provides for lodging of a notice of transfer of shares with the Registrar (required to update the electronic register of members referred to earlier) under section

128(1)(a) of the Act on delivery to the company 'by the transferor' of the transfer documents mentioned. However, section 128(1)(a) does not require delivery 'by the transferor' but instead only that the transfer documents be delivered with a request for registration in writing by the transferor. In practice, the transferee will usually deliver transfer documents to the company, after it takes delivery of them at completion of the transfer, and not the transferor.
(It is interesting that regulation 25 of the model makes no mention of the request in writing by the transferor required under section 128(1)(a), which perhaps suggests the instrument of transfer is seen as amounting to this request?)

We would instead suggest the constitution is drafted so as be agnostic as to who delivers the transfer documents to the company and so as to envisage the company lodges the notice of transfer of shares with the Registrar under section 126(2) of the Act, which does not include any separate requirement of a request in writing by the transferor.

## Voting of directors with a conflict of interest

Regulation 85 of the model constitution precludes a director from voting in respect of any transaction or proposed transaction with the company in which the director is interested, i.e. where he has a conflict of interest. In practice, this can create problems, for example, in cases where none of the directors can vote on a matter because they all have an interest which creates a conflict. It may be more practical to start from a position that directors can vote on matters in which they have an interest, provided they have disclosed the interest in accordance with section 156 of the Companies Act. Of course, one may provide for a more nuanced approach and require some approval like board (or, where all the board is conflicted, shareholders') approval before a director can vote where they have a conflict, but to simply rule it out altogether as in the model may create a problem in practice.

## Retirement of directors by rotation

Regulation 67(2) of the model provides for retirement of one third of the directors by rotation at each annual general meeting subsequent to the first. These days it is not typical for private companies to follow this practice and many will want to depart from the model here.

## Electronic meetings

The model constitution does not provide for electronic meetings (for example over the telephone) although telephone meetings are very common these days, in particular of directors of a private company, so the company will want to add provision for these if using the model.

## Model Constitution does not provide maximum indemnities for directors

Regulation 119 of the model constitution indemnifies directors against liability in connection with any negligence, default, breach of duty or breach of trust (other than any liability referred to in section 172B(1)(a) or (b) of the Act). There seems no reason to limit the indemnity to liability involving fault, which seems to ignore the possibility of a director incurring no-fault liability, e.g. strict liability, for example under some anti-corruption laws. Therefore, we would suggest a slightly different approach to drafting the directors' indemnity to give them the widest indemnity permissible by law, with perhaps a power for the board of directors to make exclusions from the indemnity on a case-by-case basis.

## Data protection

Data protection provisions can be added to the model, to incorporate consents from the shareholders and directors regarding use of their personal data, as required by the Personal Data Protection Act 2012.