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EQUITY AND PREFERENCE SHARES: A PROBLEM OF DEFINITION

This article examines the feasibility of a Singapore-incorporated company issuing participating preference shares and preference shares with full voting rights in the light of the existing definition of the term "preference share" in the Companies Act. It also examines what constitutes an "equity share", and the meaning of terms of similar import, in the context of company related legislation and The Singapore Code on Take-overs and Mergers. The legal and practical implications of such an inquiry are discussed and legal reform is suggested.

"What's in a name? That which we call a rose
By any other name would smell as sweet."

Shakespeare's Romeo and Juliet
Act 2, Scene 2, Line 43

I. INTRODUCTION

EVERY aspiring lawyer learns early in his law school days that words with seemingly common 'everyday' meanings may not take on such meanings where the law is concerned. One therefore quickly learns, sometimes through incidents which one would rather forget, that definition sections in statutes should never be ignored, even though they often make boring reading. Definition sections more often than not, assist in the interpretation of the statutes within which they reside. Once in a while, however, they pose more problems than they attempt to solve. Of such a case is the substance of this article.

Under the Companies Act (hereafter referred to as "the Act"),[1] the term "equity share" is defined to mean "any share which is not a preference share". The term "preference share" is in turn defined to mean a share, by whatever name called, which possesses the following two characteristics.[2] First, it must not entitle the holder of the share to the right to vote at a

1 Cap. 50, 1990 Rev. Ed., s. 4(1).
2 *Ibid.*

general meeting of the company.[3] Secondly, it must not entitle the holder of the share to any right to participate beyond a specified amount in any distribution whether by way of dividend or on redemption in a winding up of the company, or otherwise. For ease of reference, preference shares which fall within the definition of the term provided in section 4(1) of the Act will hereafter be referred to as "statutory preference shares".

The above definition of a "preference share" in section 4(1) of the Act is, however, expressly stated to be "in relation to sections 5, 64 and 180". The noticeable omission from this list is section 4 itself. This leads to the obvious question whether this definition of "preference share" applies to the definition of the term "equity share", both of which appear in section 4 of the Act. This seemingly trivial drafting point does, unfortunately, have significant legal and practical implications which is what this article attempts to highlight.

II. THE SIGNIFICANCE OF A PREFERENCE SHARE

At common law, a preference share is understood to mean any share which accords the holder thereof a right to preferential treatment vis-a-vis other classes of shareholders, usually in the form of a priority with respect to the receipt of dividends while the company is a going concern, or in the return of capital on a winding up of the company. The term "preference share" is not a term of art. The rights accorded to subscribers of an issue of preference shares may therefore vary substantially from those accorded to subscribers of another issue of preference shares. Ultimately, the rights of preference shareholders is a matter of contract between the issuing company and its preference shareholders. There is, however, no requirement at common law that preference shares be restricted in their ability to accord voting rights to those holding them.

The first question then is whether there is room under Singapore law for the existence of preference shares recognised at common law which fall outside the definition of the term in the Act. For instance, could there be preference shares with voting rights similar to or greater than those attached to common shares? Could there also be what are known commonly as participating preference shares? These are preference shares which entitle the holders thereof to participate in any ordinary dividends which may be

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[3] Preference shares issued after 15 August 1984 must, however, be entitled to at least one vote on a poll at any general meeting of the company in three specified situations, namely: (a) during such period as the preferential dividend or any part thereof remains in arrear and unpaid, such period starting from a date not more than 12 months, or such lesser period as the articles may provide, after the due date of the dividend; (b) upon any resolution which varies the rights attached to such shares; or (c) upon any resolution for the winding up of the company. (See ss. 4(1) and 180(2) of the Companies Act.)

paid out to ordinary shareholders in addition to and after they have been paid in full their preferential dividend. Participating preference shares could also confer on the holders thereof a right to participate in any distribution of surplus assets on a winding up of the company.

Secondly, if the answer to the first question is in the affirmative, can there be preference shares recognised at common law which are neither "equity shares" nor "preference shares" in the sense these terms assume in the Act? In other words, would non-statutory preference shares (that is, preference shares recognised as such at common law but which fall outside the definition of "preference share" in section 4(1) of the Act), be deemed "equity shares" under the Act?

The resolution of such inquiries is not merely of academic interest and this article will examine in turn its legal implications under the Companies Act, The Singapore Code on Take-overs and Mergers and the Listing Manual of the Stock Exchange of Singapore Limited.

A. *The Companies Act*

Sections 5, 64 and 180 of the Act will be dealt with first since the definition of "preference share" in section 4(1) of the Act is made expressly applicable to these sections.

1. *Section 5*

Under section 5(1)(a)(iii), a company is deemed a subsidiary of another corporation if the latter holds more than half of the issued share capital of the former, not taking into account any part thereof which consists of preference shares. If it is possible to have non-voting, participating preference shares, then whether a company (Company *A)* with an issued share capital divided into 40 per cent statutory preference shares, 35 per cent non-voting participating preference shares and 25 per cent common shares, would be deemed a subsidiary (under section 5(1)(a)(iii) of the Act) of another company (Company *B)* which holds all the non-voting participating preference shares but none of the common shares would depend on how we interpret the definition of "preference share" in the Act. If a strict application of the definition of "preference share" in section 4(1) is made to section 5(1)(a)(iii), that is taking the reference to preference shares in section 5(1)(a)(iii) to exclude only preference shares as defined in section 4(1), then Company *A* would be a subsidiary of Company *B* since more than half of its remaining issued capital would be held by Company *B.* However, if "preference share" takes on its wider common law meaning so that all forms of preference shares are excluded from the computation under section 5(l)(a)(iii), then

Company *A* would not be a subsidiary of Company *B* since none of its remaining issued share capital would be held by Company *B*.

Based on a matter of strict statutory interpretation, the former of the two interpretations of section 5(l)(a)(iii) ought to be favoured. After all, the definition of "preference share" in section 4(1) expressly states that it is meant to apply to section 5. However, such a strict interpretation is not without its problems. First, section 5(1) would appear to be laying down three tests of "control". In the example given above, Company *B* may hold more than 50 per cent of the issued share capital of Company *A* after excluding the statutory preference shares from the computation. However, all it holds are non-voting participating preference shares. Being non-voting shares, Company B, therefore, has very little control over Company A. It is, therefore, very difficult to justify an exclusion of statutory preference shares from the computation under section 5(l)(a)(iii) without also excluding other forms of non-voting preference shares. Secondly, it is not entirely clear if the two conditions listed in the definition of "preference share" in section 4(1) are to be read conjunctively or disjunctively, although on first reading, this writer was of the impression that they ought to be read conjunctively. Needless to say, if the conditions are read disjunctively, the non-voting participating preference shares in the above example would be treated as preference shares for the purposes of section 5(l)(a)(iii) and Company *A* would not be a subsidiary of Company *B*.

Similar problems of interpretation arise with respect to any allegation of a holding company-subsidiary relationship under section 5(l)(b) of the Companies Act. Whether a company is a subsidiary of another would also determine if they are "related corporations" as the term is defined under section 6 of the Act.

Needless to say, the practical ramifications of a company being deemed a subsidiary of another (known as a "holding company" under the Act) are manifold under the Companies Act.[4]

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[4] See the following sections of the Companies Act: 6; 7(4)(c); 7(5)(a); 10(l)(b); 10(l)(c); 10(3); I l(l)(b); 1 l(l)(c); 11(3); 18(l)(b); 21(1); 21(4); 24(1); 64; 69B; 69C; 69D; 76(l)(a); 76(1)(b)(ii); 76(1)(c); 76(12)(e); 97(3); 103(2)(d); 103(2)(e); 103(2)(f); 106B(1)(f); 131(1); 131(3)(c); 153; 160A; 162; 163; 164; 165(l)(a); 165(l)(b); 165(l)(d); 168; 173(1); 173(2); 199(2A); 200(1); 200(2); 201(3A); 201(4); 201(6A); 201B(2)(a); 201B(2)(b); 201B(3); 201B(10); 207(6); 207(9A); 213(2); 213(3); 213(10A); 215(1); 215(3); 235; 236; 402; 45(1)(d) and Fifth Schedule, Part II para. 20(3), 22, 23; 60(1) and Sixth Schedule Part II para. 2; 45(1)(d) and Fifth Schedule, Part I para. 5, 10 and 17; 106F and Fifth Schedule Part VI para. 11; 227G(4) and Eleventh Schedule para. (p); 201(14) and (18), 373(5) and Ninth Schedule para. 2, 4(2), 4(3), 4(4) and 8; 213 and Tenth Schedule Part A para. 2; 213 and Tenth Schedule Part B, para. l(d) and 4(a); 213 and Tenth Schedule Part C para. 2(d). Note also section 207(5) which uses the term "related company". The Companies Act does not provide a definition for such a term. It was probably intended to mean "related corporation" which is defined in section 6 of the Act.

2. *Section 64*

Section 64(3) provides that any alteration of the rights of issued preference shares so that they become equity shares are deemed to be an issue of equity shares thereby attracting all the implications of the section in respect of equity shares. (These implications will be dealt with subsequently in this article.) The question posed earlier thereby rears its ugly head again albeit in a variant form, that is, whether the alteration of rights of preference shares so that they fall outside the definition of the term in section 4(1) of the Act would automatically convert them into equity shares or could they become preference shares of a kind falling outside both the definition of "preference share" and the definition of "equity share" in the Act.

3. *Section 180*

The definition of "preference share" in section 4(1) of the Companies Act also makes it expressly applicable to section 180 of the Act. The application of the definition to this section however does not raise any problems of interpretation.

4. *Other provisions of the Companies Act*

The term "preference share" is also used elsewhere in the Companies Act although the statutory definition of the term in section 4(1) of the Act would appear to have no application to these sections. For instance, there must be shown as separate entries in the accounts or consolidated accounts of a company:

(1) the rate of dividend on each class of preference shares;

(2) the amount of arrears of dividend on each class of preference shares;

(3) whether the preference shares are cumulative, non-cumulative, participating or non-participating; and

(4) whether the preference shares are to be redeemed or are liable to be redeemed at the option of the company and if so, the date on or before which they are to be or are liable to be redeemed, the earliest date on which they may be redeemed by the company and the premium (if any) payable upon redemption.[5]

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5 Companies Act, ss. 201(14), 201(18), 373(5), and Ninth Schedule, para. 4(l)(b).

A company with a share capital (with exception made for some public companies) is required to submit an annual return containing the particulars referred to in Part I of the Eighth Schedule to the Act and in the form provided in Part II of the same Schedule.[6] The form of return set out in Part II of the Eighth Schedule requires that preference shareholders be identified as such. Since the definition of "preference share" in section 4(1) of the Act does not apply to this provision, presumably, any shareholder who holds any preferential rights over ordinary shareholders would have to be listed as a preferential shareholder in the form.

The term "preference share" is again used in sections 70 and 75 of the Companies Act. The definition of "preference share" in section 4(1) of the Act, again does not refer to these sections and would therefore appear not to apply to them. The term "preference share" is also used in section 74(6) of the Act, which is again not subject to the definition of "preference share" in section 4(1). The ambiguity caused by this definition and that of the term "equity share," however, has no impact on this provision. The implications of the use of the term "preference share" in sections 70 and 75 will however be dealt with subsequently.

B. *The Singapore Code on Take-overs and Mergers*

The term "subsidiary" is used in The Singapore Code of Take-overs and Mergers on several occasions.[7] The Code often uses the term "parent" in place of the term "holding company". There is no definition in the Code forthe terms "subsidiary" and "parent". It is therefore natural to seek guidance from the Companies Act. However, in view of the attendant ambiguities of these terms even in the context of the Companies Act (as highlighted above), anyone seeking such guidance would be sorely disappointed.

C. *Listing Manual of the Stock Exchange of Singapore Limited*

Terms such as "subsidiary", "holding company" and the concept of related corporations are also used widely in the Listing Manual of the Stock Exchange of Singapore Limited.[8]

In addition, the articles of association of a public listed company would, in the ordinary case, be required to contain a provision that the total nominal

6 Companies Act, ss. 197(1), 197(2), 198(1), and 198(2).

7 See, for instance, the following in The Singapore Code of Take-overs and Mergers: The definitions of "acting in concert" and "associate"; Rule 14(3)(d); Rule 18(1) and Practice Notes 10(1) and 10(3). The reader should also note s. 4(4)(a) of the Securities Industry Act (Cap. 289, 1985 Rev. Ed.) which deems related corporations "associates" for the purposes of determining if a person has an interest in a security.

8 See, for example, the following provisions of the Listing Manual of the Stock Exchange of Singapore Limited: Art. 102(3); Art. 212 Items 5, 6, 8, 10, 12, 13, 14(0, 14(g) and 15;

value of issued preference shares may not, at any point in time, exceed the total nominal value of the issued ordinary shares.[9] The articles of association of a public listed company must, in the ordinary case, also provide that any repayment of preference capital (except redeemable preference shares) may only be made pursuant to a special resolution of the preference shareholders concerned (or where such resolution is not obtained at a meeting of these preference shareholders, with the written consent of three-quarters of the preference shareholders obtained within two months of such meeting).[10]

III. THE SIGNIFICANCE OF AN EQUITY SHARE

A. *Companies Act*

It should be obvious by now that the conclusion one reaches as to whether there may or may not be preference shares which fall outside the definition of the term in section 4(1) of the Act will also affect one's perception of what an equity share is, since for the purposes of the Act, an equity share is defined to mean "any share which is not a preference share". The significance of a share being an "equity share" is that under section 64 of the Act, equity shares issued by public companies or subsidiaries of public companies after 29 December 1967 must confer the right on a poll at any general meeting of the company to one vote and one vote only per share. It should be noted that Article 908(4) of the Listing Manual of the Stock Exchange of Singapore Limited requires that where "the capital of a company consists of shares of different monetary denominations, voting rights shall be prescribed in such manner that a unit of capital in each class, when reduced to a common denominator, shall carry the same voting power when such right is exercisable." This would seem to contradict section 64(1) of the Act. It is submitted that Article 908(4) of the Listing Manual was based on the predecessor of the present section 64(1) of the Act," which then required one vote to be given for each dollar or part of a dollar paid up on an equity share and that when the present section 64(1) was enacted, a need for a corresponding amendment to Article 908(4) of the Listing Manual was overlooked.

Art. 213, Papers B and I; Art. 301; Art. 312; Art. 314; Art. 316; Art. 332(3); Art. 374; Art. 392; Art. 510; Art. 531; Art. 602(8)(b); Art. 701(4), (5)(g), (13)(b), (15), (18)(b), (d) and (e), (19), (20), (21), (23), (26), (27), (28), (31) and (32); Art. 801(15), (17) and (20); Art. 1001(2), (3) and (8); paras. 4c and 7, General Criteria for Admission of a Company to the Official List of the SES. The reader should also note section 4(4)(a) of the Securities Industry Act which deems related corporations "associates" for the purposes of determining if a person has an interest in a security.

9 Listing Manual of the Stock Exchange of Singapore Limited, Art. 901(3).

10 Listing Manual of the Stock Exchange of Singapore Limited, Art. 905.

11 Companies Act, Cap. 185, 1970 Rev. Ed., s. 55(1).

The restriction in section 64(1) of the Act on the voting rights of an equity share has practical implications on the legality and, hence, availability of some of the defensive tactics available to a company to reduce the possibility of any undesired takeover offer being made for the company's shares.[12] For instance, one way to deter any takeover offer from arising is to transfer voting control of a company over to its directors. This could be done in several ways by means of creative recapitalisation exercises. There are three common schemes which have been employed in other jurisdictions to achieve this objective.

Under the first scheme, the shareholders would be made to approve a new class of shares that would carry more votes per share than the existing common shares. The terms of the issue would, however, be such that once transferred, the shares would automatically lose all votes in excess of that accorded to the existing common shares. These shares would also carry a lower dividend rate than what the common shares have customarily received. All shareholders would be given the right to exchange any of their existing common shares for these new shares with enhanced voting rights. However, since the dividend rate of these new shares would be lower than those attached to the existing common shares, only the directors and those seeking to establish control over the company would exchange their common shares for the new shares. If the shareholding in the company is fairly dispersed, only the executive directors would be motivated to effect the exchange. Hence, these directors would end up with effective control over the company even though they may hold only a small percentage of its total issued share capital.

A variant of this scheme is where the directors of a company declare a special share dividend to all common shareholders including those who are directors of the company. These bonus shares would carry much higher voting rights than the existing common shares. However, they would be subject to a term that once they are transferred, they would lose the voting rights in excess of that attached to the existing common shares. In the course of normal dealings and transfers, the control of the dispersed shareholders in the company would be diluted with the passage of time, while the directors who would be motivated to hold on to the bonus shares for the longest duration would end up having effective control over the company.

The third scheme sometimes used in other jurisdictions is for a company to provide that shares issued to the shareholders would gradually have their

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12 It should be noted that while the implementation of defensive tactics by target companies against an unfavoured takeover offer is subject to many restrictions in Singapore (see in particular, s. 157(1) Companies Act, The Singapore Code on Take-overs and Mergers, General Principle 4, 6 and 11 and Rules 4(1), 28(2), 28(5) and 37), these restrictions do not preclude the use of defensive tactics altogether.

voting rights enhanced with time. However, such enhanced rights would be lost once the shares are transferred by the original allottee. Again, executive directors with shareholdings in the company would in the long run end up with effective control of the company since they would be motivated to hold on to their shares much longer than the average shareholder with only a small stake in the company.

It would be clear that all of the three foregoing schemes require the creation of a class of shares with more than one vote per share. In the light of section 64(1) and the definitions of "preference share" and "equity share" in section 4(1) of the Act, this would not be possible unless there are "preference shares" which fall outside the definition of the term in section 4(1) and which are yet at the same time, not "equity shares" within the meaning of the Act.

However, regardless whether this is the case, it should be noted that these schemes, could still work in two limited situations. First, the scheme would be feasible in private companies which are not subsidiaries of public companies since the restriction over voting rights in section 64(1) applies only to public companies and subsidiaries of public companies. Secondly, section 64(1) and the definition of a "preference share" in section 4(1) of the Act are subject to section 180. Section 180(2)(a) of the Act requires that preference shares issued after 15 August 1984 be given the right to "at least one vote" on a poll if the preferential dividends attached to them are in arrears and remain unpaid for a specified period.[13] It would therefore appear from section 180(2) that it would be possible for the articles of a company to confer on its preference shares more than one vote per share in such situations. For instance, preference shares with preferential dividend arrears could carry more than one vote per share. It should be noted, however, that this would only be possible where the directors can honestly believe that keeping the preferential dividends in arrears would be in the interest of the company. In addition, the dominant purpose for the keeping of the preferential dividends in arrears must not be purely in order to accord voting rights to the preference shareholders. If not, the directors may be in breach of their duty to the company either on the ground that they have not acted in the best interest of the company (which would be a breach of their common law fiduciary duty and a breach of their statutory duty under section 157(1) of the Companies Act),[14] or on the ground that they have exercised a power vested in them for an improper

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[13] See also the Listing Manual of the Stock Exchange of Singapore Limited, Art. 901(6).

[14] *Re S.Q. Wong Holdings (Pte.) Ltd.* [1987] 2 M.L.J. 298; *Re W. & M. Roith Ltd.* [1967] 1 All E.R. 427; *Re Smith & Fawcett Ltd.* [1942] Ch. 304; *Charterbridge Corporation Ltd.* v. *Lloyd's Bank Ltd.* [1970] Ch. 62; *Marchesi* v. *Barnes & Keogh* [1970] V.R. 434; *Haw Par Brothers International Ltd.* v. *Jack Chiarapurk* [1991] 2 M.L.J. 428.

purpose (which would again be a breach of their common law fiduciary duty to the company).[15]

Following upon the foregoing, since section 70 of the Act relating to redeemable preference shares is not subject to the definition of "preference share" in section 4(1), one is left to wonder if it is possible, notwithstanding section 64, to have redeemable preference shares in public companies and subsidiaries of public companies with more than one vote per share. This would not be possible if such redeemable preference shares are automatically "equity shares" under the Act's definition of an "equity share".

A close relative to the term "equity share" is the term "equity share capital", which is also used several times in the Companies Act. The term is defined in section 69B(7) of the Act to mean a company's issued share capital excluding any part thereof which does not carry any right to participate beyond a specified amount in a distribution of either dividends or capital. "Equity shares" is defined in the same section to mean shares comprised in a company's "equity share capital". Taking these provisions together, it would mean that "equity share capital" would clearly exclude statutory preference shares and that participating preference shares and preference shares with full voting rights would be "equity shares". It should be noted, however, that this definition is only applicable to section 69B and is not of universal application. The term "equity share capital" is used again in section 160D(2) of the Act. This term is given the same meaning as in section 69B[16] but again solely for the purpose of interpreting the section (and, indirectly, section 160B(lA)(b) as well, in view of section 160D(1)). Section 163(l)(b), however, uses the term "equity share capital" without any definition of the term being provided. So one is left to wonder what is to be made of this term in the context of this section.

B. *The Singapore Code on Take-overs and Mergers*

The problem of definition continues into The Singapore Code on Take-overs and Mergers. Terms like "equity share capital" and "equity shares" are used quite often in the Code. An example of such an instance would be Rule 16(5) of the Code. Many other instances of such usage abound in the Code of which the following are further examples.

Under the Code, a holder of 10 per cent or more of the "equity share capital" of a company is to be deemed an "associate" of the company in any takeover offer in the which the company is either the offeror or the offeree. This includes any person who alone holds less than 10 per cent

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15 *Re S.Q. Wong Holdings (Pte.) Ltd.* [1987] 2 M.L.J. 298; *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254; *Howard Smith Ltd.* v. *Ampol Petroleum Ltd.* [1974] A.C. 8221; *Whitehouse* v. *Carlton Hotel Pty. Ltd.* (1987) 11 A.C.L.R. 715.

16 Companies Act, s. 160D(6)(a).

of the equity share capital of the company but who holds his shares under an agreement (formal or informal) with others where the aggregate holdings of all parties to this agreement amount to 10 per cent or more.[17] The implication of being an associate of any party to a takeover or merger transaction (other than those involved in a partial offer) is that although such a person is still free to deal in the shares of the offeror or offeree company, he would be under a duty to make daily disclosures of the particulars of such dealings to the stock exchange, the Securities Industry Council and the press.[18] In addition, any such purchases or sales by such an associate for the account of investment clients must be reported to the stock exchange and the Securities Industry Council although they need not be disclosed to the press.[19]

In the context of a takeover offer (except a mandatory offer made under Rule 33 of the Code), if the offer is such that should it be accepted in full, the offeror would hold more than 50 per cent of the voting rights of the offeree company, it must be made a condition of the offer that the offer would not become or be declared to be unconditional unless the offeror has acquired or agreed to acquire shares carrying over 50 per cent of the voting rights attributable to the "equity share capital".[20] In addition, where the offer is for "equity share capital", in addition to fulfilling the foregoing condition, it may not be declared to be unconditional unless the offeror has acquired or agreed to acquire shares carrying 50 per cent of the voting rights of the offeree company and where the offeree has more than one class of "equity share capital", a comparable offer is made for each class after consultation with the Securities Industry Council.[21] Where the offer is for "non-voting equity share capital", it may not be made conditional upon any particular level of acceptances in respect of that class unless the offer for the voting share capital is also conditional on the success of the offer for the non-voting equity share capital.[22] Where a takeover offer is for less than 100 per cent of the "equity share capital" of a company not already owned by the offeror or any of its subsidiaries, the prior approval of the Securities Industry Council must be sought.[23]

The Code also provides that where a company owns or controls 20 per cent of the "equity share capital" of another company or of its related corporations, both companies are deemed "associated companies" under the Code and they and their directors would be presumed to be acting in concert

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17 The Singapore Code on Take-overs and Mergers, definition of "associate".
18 *Ibid.*, Rule 30(1). See also Practice Note 11.
19 *Ibid.*, Rule 30(2).
20 *Ibid.*, Rule 20(1).
21 *Ibid.*, Rule 20(2) and (3).
22 *Ibid.*, Rule 20(3).
23 *Ibid.*, Rule 26(1).

unless the contrary is proven.[24] (In this particular context, it may not be altogether illegitimate if some guidance in the interpretation of the term "equity share capital" is sought from the definition of the term "equity capital" in the Singapore Society of Accountant's Statement of Accounting Standards, since the term "associated company" is a recognised accounting concept. This definition will be dealt with in greater detail at the end of this article.)

Under the Code, a person is also deemed in the normal case, to be an "associate" under the Code where he holds 10 per cent of the "equity share capital" of the offeror or the offeree company and this includes any group of persons who acquire or hold such holdings pursuant to an agreement (formal or informal) and any person who acquires shares which takes him beyond the 10 per cent threshold.[25] In addition, and unless the contrary is proved, a financial advisor and his client are presumed to be "acting in concert", that is, cooperating to obtain or consolidate control of a company by the acquisition of shares in that company, where the financial advisor and any fund which he manages on a discretionary basis together hold 10 per cent or more of the "equity share capital" of the client.[26] Whether persons are deemed to be acting in concert with each other under the Code has immense practical significance in the course of a takeover transaction.[27]

Despite the wide usage of the term in the Code, the Code does not provide a definition for the term "equity share capital". Although the Code is issued pursuant to section 213(17) of the Act, there is nothing in the Act or the Code to suggest that the words used in the Code are to bear the same meaning as they do in the Act. Even if there was such a provision in the Act or the Code, it would not be of much assistance in the case of a term such as "equity share capital" since, as we have seen, there is no definition of the term of universal application in the Act. To the contrary, the Introduction to the Code expressly states that it was deliberately drafted in "non-technical language" and not as a form of "legislative expression".

The Code also refers to "non-equity capital".[28] This presumes that it is clear what "equity capital" means. Again there is no definition for either term in the Code.

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24 *Ibid.*, definition of "acting in concert" and "associate".

25 *Ibid.*, definition of "associate".

26 *Ibid.*, definition of "acting in concert".

27 Companies Act, s. 213(9)(c); The Singapore Code on Take-overs and Mergers, Rule 8; Rule 12(l)(a); Rule 16(l)(c) and (3); Rule 16(4); Rule 26(3); Rule 31(1); Rule 32; Rule 33(1), (3) and (7); Rule 34(1) and (2); Rule 35; General Principles 8, 9 and 13; Practice Note 11(2) and (3); Listing Manual of the Stock Exchange of Singapore Limited, Art. 602(4) and (6).

28 The Singapore Code on Take-overs and Mergers, definition of "offer".

C. *The Listing Manual of the Stock Exchange of Singapore Limited*

The Listing Manual of the Stock Exchange of Singapore Limited fares no better. It is stated as a Continuing Listing Requirement of the Exchange that except in the case of a rights issue, no director or any of his associates, may participate (directly or indirectly) in any issue of "equity securities" or "other securities convertible to equity" unless such director holds office in an executive capacity or unless the allotment to such director or associate has been approved by the shareholders at a general meeting with such director and associate abstaining from the voting.[29] A public listed company is also not allowed to issue any "equity securities" or "other securities with rights of conversion to equity" if the nominal value of those securities when aggregated with the nominal value of any other securities of the same class which it has issued during the previous 12 months, exceeds 10 per cent of the nominal value of that same class of security on issue at the commencement of the aforesaid 12-month period unless the securities were issued either with the precise terms and conditions of the issue having received the prior approval of the company in general meeting or on the exercise of options issued pro-rata to equity security holders or to ordinary shareholders.[30]

The Listing Manual also uses terms like "equity interest" and "equity capital". For instance, a company seeking listing on the main board of the Stock Exchange of Singapore Limited is required to provide to the Exchange a tabular list of all companies in which it has an "equity interest" of 10 per cent or more. The term "equity capital" is used in Article 510 of the Listing Manual.

There are, unfortunately, no definitions in the Listing Manual for the terms "equity security", "equity interest" or "equity capital". Although the definition section of the Listing Manual provides that in the application of the Manual, all words or expressions which are defined by the Companies Act are to have respectively the same meanings when used in the Manual, the fact remains that the Act provides no definition for the terms "equity security", "equity interest" or "equity capital" and the Act's definition of the term "equity share" is, as we have seen, not entirely free from doubt.

IV. THE STATUS Quo AND THE WAY AHEAD

What then is the true position in law as it stands at present? A survey of the Act and the history of the definition of "preference share" in the Act would suggest a limited answer to this problem. The definition of "preference share" in the Act was not always as it stands today. The restriction of its

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[29] Listing Manual of the Stock Exchange of Singapore Limited, Art. 369.
[30] *Ibid.*, Art. 361.

application to sections 5, 64 and 180 was only introduced by the Companies (Amendment) Act of 1987. It would appear from the comments of the then Minister of Finance of Singapore, Dr. Richard Hu in the Official Report of the Select Committee on the Bill that was the precursor to this Act,[31] that the rationale behind the amendment was to make it clear that it was possible to issue redeemable preference shares with full rights to voting and participation. It is beyond dispute that there were prior to the amendments of 1987, and there probably still are, redeemable preference shares issued by Singapore-incorporated companies which carry full voting rights and rights of participation. While the amendment was specifically targetted to remove any doubts that redeemable preference shares with voting and participation rights were allowed, the position should probably be the same for non-redeemable preference shares.

While the prevailing judicial consensus appears to be in favour of refraining from using reports of select committees of Parliament to interpret statutory provisions save to identify the mischief the provisions were intended to address,[32] the words of the Companies Act themselves would appear to be consistent with Dr. Hu's comments. For instance, section 75(1) of the Companies Act which is not subject to the statutory definition of "preference share" requires that certain rights of preference shares be expressly provided for in the company's memorandum or articles of association. Among the rights required to be so stated include the voting rights attached to the preference shares issued by the company and the rights of preference shareholders to participate in surplus assets and profits. If preference shares may only have the restricted voting rights under the Act and no rights whatsoever to participation beyond a specified amount in any distribution of dividends either upon redemption, winding up or otherwise, then this provision would be superfluous. Therefore to make sense of section 75(1), it must be read as an indication that preference shares with voting rights and rights of participation as to surplus assets and profits beyond those stipulated in the definition of "preference share" in section 4(1) were contemplated to be a legal possibility under the Act. The only other possible explanation for these requirements in section 75(1) is that they were purely intended to bring these restrictions imposed by the Act on preference shares to the attention of investors via the memorandum or articles of association of a company.

It is submitted that of these two interpretations, the former is the more plausible. This is reinforced by the fact that section 180(2) of the Act provides that the articles of a company "may" provide that holders of preference

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31 Companies (Amendment) Bill 1986, No. 9 of 1986.

32 *Black-Clawson International Ltd.* v. *Papeirwerke Waldhof-Aschaffenbu*A*G.* [1975] A.C. 591; *Davis* v. *Johnson* [1979] A.C. 264.

shares shall not have the right to vote at a general meeting of the company (save in certain exceptional cases). The mandatory "shall" was not used in the section. Since the statutory definition of "preference share" applies to section 180, the use of the word "may" in subsection (2) of the section would make no sense since all preference shares by the definition are not entitled to vote save in the limited situations set out in the section and 180 and these have to be stated in the memorandum or articles of association by virtue of section 75(1) of the Act. It would therefore be logical to conclude that the word "may" was used in section 180(2) simply because prior to the qualification of the statutory definition of "preference share" in 1987, it was possible to have preference shares with unrestricted voting rights. If so, then it should still be possible to issue such preference shares even after the 1987 amendments.

There is further support in the Act that the definitions of "preference share" and "equity share" in the Companies Act were not meant to preclude the issue of participating preference shares. In particular and as noted earlier, the Act requires the accounts or consolidated accounts of a company to state, among other things, whether its preference shares (if any) are participating or non-participating.[33] This implicitly acknowledges the feasibility of an issue of preference shares with participation rights by a Singapore-incorporated company. In addition, section 75(1) refers to the rights of preference shareholders in the participation of surplus assets and profits and their rights to voting, thereby indirectly recognising that preference shares may be accorded such rights. This could only be referring to preference shares falling outside the definition of "preference shares" in section 4(1) of the Act. It should be further noted that Dr. Richard Hu's comments in the Official Report of the Select Committee on the Companies (Amendment) Bill 1986, indicated that the omission of sections 70 and 75 of the Companies Act from the present definition of "preference share" in the Act was a deliberate act of drafting and that the aim of the amendment to the definition was to "remove any doubts that Singapore law is any different from the law prevailing in the United Kingdom and Australia with regard to the issue of redeemable preference shares carrying full voting or participating rights."

Notwithstanding the foregoing clues as to Parliament's intention, the issues raised thus far are by no means completely free from doubt since the foregoing provisions highlighted still do not solve the puzzle as to whether it was intended by Parliament that all preference shares that fall outside the definition of the term "preference share" in the Act should automatically be treated as "equity shares" for the purposes of the Act. It is possible to argue that it was not intended to be so in view of the use of the term "preference share" in sections 70, 74(6) and 75(1) of the Act. Since these

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33 Companies Act, ss. 201(14), (18), and s. 373(5), Ninth Schedule, para. 4(l)(b).

sections are not subject to the definition of "preference share" in section 4(1), the use of this term in these sections must be a reference to other forms of preference shares which are nonetheless not equity shares. If not, the term "equity share" would have been used instead. Even with respect to sections 5, 64 and 180 of the Companies Act to which the definition of "preference share" in section 4(1) of the Act does apply, the fact that participating preference shares would not be a "preference share" for the purposes of these sections does not by necessity mean that they are therefore equity shares in the context of these sections. It is not unknown in the realm of legal drafting, for words of a usually wide import to be limited in scope for the purpose of a particular section in a statute without affecting their ordinary meaning for the purposes of the other statutory provisions. The foregoing arguments are unfortunately not irresistably compelling and are far from conclusive.

In addition, whatever meaning we may eventually attach to the term "equity share", we would still be left wondering as to what the term "equity share capital" means in the context of section 163(l)(b) of the Companies Act. Similarly, what should we make of the terms "equity share capital", "equity share" and "non-equity capital" in The Singapore Code on Take-overs and Mergers? We would also be left without guidance as to what the terms "equity securities", "other securities convertible to equity", "equity interest" and "equity capital" were intended to embrace in the context in which they appear in the Listing Manual of the Stock Exchange of Singapore Limited.

Seeing, however, the practical significance of the terms highlighted in this article, one cannot help but suspect that some administrative conventions must have evolved in the implementation of these statutory and regulatory provisions. While these conventions may work for practical purposes it is unsettling to know that they may be called in question at any time in view of the lack of a firm statutory basis for them. It is submitted that the existing statutory ambiguity in terms so fundamental to the law relating to companies should be put to rest by an appropriate amendment to the Companies Act.

In this respect, the Singapore Society of Accountant's Statement of Accounting Standard No. 3 defines "equity capital" to mean the issued share capital of a company which is neither limited nor preferred in its participation in distributions of the profits of a company or in the ultimate distribution of its assets. It is proposed that the definition of "equity share" in the Companies Act be amended to a form similar to this. Such an amendment would make it clear that a share which does not fall within the definition of "preference share" in section 4(1) need not necessarily be an equity share. The proposed definition would exclude all forms of preference shares (statutory and common law) from the definition of "equity shares" and put to rest any legal doubt over the possibility of Singapore-incorporated companies

having participating preference shares and preference shares with full voting rights. These companies would then be able to fine-tune their capital structure, without fear of being challenged, to suit their capital requirements through the issue of preference shares with such rights as they may freely decide.

V. CONCLUSION

As the reader would realise by now, the foregoing discussion is not a mere indulgence in legal hair-splitting as there are very real and practical legal implications involved in what would admittedly, at first sight, appear to be an exercise in semantics. Therefore in answer to Juliet's question as to what is in a name, the reply must be an emphatic, "plenty!", if the subject of inquiry is an equity share or a preference share.

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