The Law Society of Singapore
39 South Bridge Road S(058673)

t: +65 6538 2500 f: + 65 6533 5700
www.lawsociety.org.sg

Sender's Fax: 6533 5700
Sender's DID: 6530 0226
Sender's Email: alvin@lawsoc.org.sg

Our Ref: LS/10/COR2(PubCon)/11-11/AC.sam
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Your Ref:

16 September 2011

Corporate Regulation and Governance Unit
Economic Programmes Directorate
Ministry of Finance
100 High Street
#10-01, The Treasury
Singapore 179464

BY EMAIL & POST
Email:
mof_pccompaniesact@mof.gov.sg
No of pages : 26 (including this page)

Dear Sirs

PUBLIC CONSULTATION ON THE REVIEW OF THE COMPANIES ACT AND THE REGULATORY FRAMEWORK FOR FOREIGN ENTITIES

We refer to the e-mail dated 21 June 2011 from Ms Anitah Ghani of the Accounting and Corporate Regulatory Authority ("ACRA") inviting the Law Society to provide our feedback on the Steering Committee's Report on the review of the Companies Act and ACRA's Consultation Paper on the review of the regulatory framework for foreign entities.

This matter was released to our Corporate Practice Committee and Insolvency Practice Committee for comments.

The responses of the Corporate Practice Committee and Insolvency Practice Committee on the Steering Committee's Report are respectively enclosed in Annex A and Annex B. The Insolvency Practice Committee's responses pertain to only Recommendations 2.25 to 2.30. The Corporate Practice Committee's views on ACRA's Consultation Paper have been concurrently sent to ACRA separately.

Thank you for giving the Law Society the opportunity to consider the matter.

Yours faithfully

Alvin Chen
Chief Legal Officer
Director, Representation and Law Reform

Encl.

ANNEX A

RESPONSE BY THE LAW SOCIETY'S CORPORATE PRACTICE COMMITTEE

Response by the Corporate Practice Committee
c/o The Law Society of Singapore

Re: Report of the Steering Committee for Review of the Companies Act (MOF)

This response consolidates the various views and suggestions solicited through 2 roundtable sessions which the Corporate Practice Committee of the Law Society of Singapore facilitated in July and August 2011 and the views of the members of the Committee upon further discussion. It should be noted at the outset that the views on certain recommendations are not homogenous across all our member practitioners. Where relevant and appropriate, this response sets out the divergence of views for the Steering Committee's consideration.

The responses below address the following recommendations:
[Report of the Steering Committee for the Review of the Companies Act]

- Recommendation 1.5
- Recommendation 1.9
- Recommendation 1.17
- Recommendations 2.26 to 2.30
- Recommendation 3.34
- Recommendation 5.1
- Recommendation 5.11

Recommendation 1.5 Annex [1-5]

It would not be necessary to allow corporate directorships in Singapore.

Response to Recommendation 1.5:

The views which our member legal practitioners expressed on this recommendation are not unanimous. After much consideration, a majority of the Corporate Practice Committee members are of the view that corporate directorships should be allowed in Singapore if sufficient safeguards are put in place to ensure that such corporate directorships are provided by certain financial institutions licensed or regulated by the Monetary Authority of Singapore, a minority were not in favour of permitting corporate directorships in Singapore. The majority notes that such corporate directorships are in line with the developments in leading jurisdictions such as the United Kingdom and Hong Kong. The reasons in support are further set out below for the Steering Committee's consideration.

Comparing Singapore with Other Leading Jurisdictions:-

1. Corporate directorships are allowed, albeit in a restricted form, in several leading jurisdictions. In the United Kingdom, corporate directors are allowed save that the Companies Act 2006[1] states that a company must have at least one director who is a natural person.

2. In the Hong Kong Companies Ordinance[2], corporate directorship is currently allowed in private companies with shares not listed in a recognised stock market, by requiring every private company to have at least one director who is a natural person.

[1] United Kingdom: Companies Act 2006, Section 155(1)

[2] Hong Kong: Companies Ordinance Section 154A

3. Corporate directorship is permitted in corporate friendly jurisdictions striving to encourage the growth of company incorporations in their respective states, such as Belize and Bahamas.

4. In view of the above developments in other jurisdictions, the following submissions in favour of allowing corporate directorships should be taken into consideration:-

5. The United Kingdom contemplated the abolishment of corporate directorships in the Company Law Reform White Paper[3] but conceded that an outright ban might harm those companies which make use of the current flexibilities for entirely legitimate reasons.

6. The position in Singapore ought to be aligned with the practice in the leading international financial centres of London and Hong Kong. Both London and Hong Kong permit corporate directorships as there are legitimate reasons for such corporate directorships save that each jurisdiction has a safeguard of requiring that at least one of the directors be a natural person. It is suggested that Singapore enact similar provisions to Section 155 of the United Kingdom Companies Act 2006 as the latter permits the use of corporate directorships for legitimate reasons without diminishing the accountability of directors.

7. However, there have been expressions of concern whether corporate directors would act responsibly, given that the experience with natural persons acting as directors already gives rise to some concern.

8. It is important to address these concerns by imposing some criteria to allow only regulated entities to act as corporate directors. As an additional safeguard, Singapore could enact a further condition that such corporation acting as a corporate director must

[3] United Kingdom: Company Law Reform White Paper 2005, Chapter 3.3

be an entity licensed by the Monetary Authority of Singapore under the Banking Act, the Finance Companies Act, a merchant bank that is approved as a financial institution under section 28 of the Monetary Authority of Singapore Act, the Insurance Act, the Trust Companies Act and the Securities and Futures Act.[4]

9. The Hong Kong Public Consultation Paper on the Companies Ordinance[5] raised concerns that the proposal to remove corporate directorships would have adverse implications for business, in particular, the ability to incorporate companies quickly and the flexibility provided by corporate directorship in the management of the companies set up purely for asset holding purposes. As the circumstances in Hong Kong are often similar to those in Singapore, the same reasons would apply in Singapore and provide justification for the introduction of corporate directorship with the appropriate safeguard of at least one natural person director. Singapore should not lose out to Hong Kong in providing practical benefits for foreign companies wishing to extend their operations to Singapore.

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[4] A useful list would be that similar to the definition of an institutional investor under the Securities and Futures Act *viz.*
(i) a bank that is licensed under the Banking Act (Cap. 19);
(ii) a merchant bank that is approved as a financial institution under section 28 of the Monetary Authority of Singapore Act (Cap. 186);
(iii) a finance company that is licensed under the Finance Companies Act (Cap. 108);
(iv) a company or society registered under the Insurance Act (Cap. 142) as an insurer;
(v) a company licensed under the Trust Companies Act 2005 (Act 11 of 2005);
(vi) the Government;
(vii) a statutory body established under any Act;
(viii) a pension fund or **collective investment scheme**;
(ix) the holder of a capital markets services licence for —
  (A) dealing in securities;
  (B) fund management;
  (C) providing custodial services for securities;
  (D) securities financing; or
  (E) trading in futures contracts;
(xi) the trustee of such trust as the Authority may prescribe, when acting in that capacity; or
(xii) such other person as the Authority may prescribe

[5] Hong Kong: Second Public Consultation Paper on Companies Ordinance Rewrite April 2008, Chapter 4.

10. Corporate directorship administers flexibility in the management of corporate service providers or financial institutions by extending nominee director services to handle business matters of overseas investors and clients (e.g. signing of documents) promptly in Singapore.

11. For corporate service providers in particular, corporate directorships have a number of advantages which are highlighted below:

    (i) Clients may find greater trust in a professional corporate service provider than an individual.

    (ii) Corporate directorships are less expensive than individual directorships because the latter would require greater insurance coverage for staff so acting and such cost is likely to be passed on to the customers resulting in higher fees. Furthermore, as directors can be personally liable for certain actions of companies, a "natural person" may be reluctant to join the board without the appropriate insurance and/or indemnities being put in place.

    (iii) The high turnover of staff in corporate services industry would require frequent filing of updates of directors, which is both costly and time consuming.

12. In favour of an inclusion of corporate directorship in Singapore in a restricted form, a parent company may prefer to be a corporate director of its subsidiaries or associate companies as such an initiative facilitates closer group cohesion and more efficient management of resources.

13. Lastly, the introduction of corporate directorship in Singapore, in a restricted form, is unlikely to result in the proliferation of fraudulent commercial activities. This same reasoning was adopted in the Hong Kong Consultation Conclusion Paper[6], which

[6] Hong Kong: Consultation Paper: Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges, December 2008.

acknowledged that the United Kingdom approach (permitting corporate directorship so far as at least one director is a natural person) strikes an appropriate balance between enhancing corporate governance and the legitimate commercial need for flexibility. In addition, the Hong Kong Paper suggested that the United Kingdom approach is adequate to address the anti money laundering and terrorist financing concerns of the local Financial Action Task Force over the lack of transparency of legal persons and arrangements.

14. It is important for Singapore to provide a regulatory environment favourable to the financial services sector. The financial institutions in the United Kingdom and Hong Kong find it useful to clients to be able to provide corporate directorships. Singapore should be as competitive with the United Kingdom and Hong Kong and allow corporate directorships albeit with the additional safeguard that such corporate director must be a financial institution licensed by the MAS pursuant to the various regulations under the purview of the MAS.

Recommendation 1.9 Annex [1-8]-[1-11]

The automatic disqualification regime for directors convicted of offences involving fraud or dishonesty should be retained in the Companies Act, and directors so disqualified should be allowed to apply to the High Court for leave to act as a director or take part in the management of the company.

Response to Recommendation 1.9:

1. At the outset, the Corporate Practice Committee observes that the principles which likely underlie the 2 opposing views are as follows:

   (i) Views in support of reducing the scope of or removing the auto-disqualification regime are founded on the principle that directors should be disqualified only if they have the requisite *mens rea* of fraud and dishonesty.

   (ii) Views in favour of Recommendation 1.9 (to retain the auto-disqualification regime) are founded on the principle that Singapore should adopt a low-tolerance approach towards directors involved in fraudulent or dishonest behaviour.

2. Whilst the two views may *prima facie* appear to be polarised, the Committee is of the view that the above 2 principles can be reconciled. Before setting out the Committee's views and suggestions, we set out below a few observations from a minority of our member practitioners:

   (a) The auto-disqualification regime appears to be unnecessary for directors who commit an offence involving fraud or dishonesty in Singapore. As an offence committed in Singapore is subject to the jurisdiction of our local courts, the

courts are able to act as an objective safeguard against convicted persons continuing their work as directors in companies.

(b) There are offences which by definition may not be easily defined as involving elements of fraud or dishonesty. Section 154 does not contain the definition or test as to what constitutes such an offence. The closest definition in the Companies Act is section 207(9D), which states as follows:

> *"(9D) In subsection (9A), "a serious offence involving fraud or dishonesty" means –*
> *a. an offence that is punishable by imprisonment for a term that is not less than 2 years; and*
> *b. the value of the property obtained or likely to be obtained from the commission of such an offence is not less than $20,000."*

(c) Based on the above definition in section 207(9D), strict liability offences without the requisite *mens rea* of fraud or dishonesty, may possibly be caught under this definition. This goes against the principle that the auto-disqualification regime is aimed at weeding out directors who have been proven to be dishonest and fraudulent. The above definition also appears to be confined to the purposes of interpreting section 209(9A).

(d) Overseas offences in particular, require interpretation of foreign law as to what is defined as an offence involving fraud or dishonesty within that jurisdiction. In the interests of fairness and consistency, such an interpretation should not be undertaken by the director but by the Singapore Courts.

3. Having considered the observations of the minority of our member practitioners above, the Committee notes that the problem lies in the narrow test circumscribed by section 154(1). This is where the 2 apparently polarised principles may be reconciled. The Committee's further views and suggestions are set out below in paragraphs 4 to 6.

4. If the Steering Committee decides to retain the auto-disqualification regime for overseas offences by directors, the following submissions in favour of re-drafting section 154(1) to replace the reference to "offences involving fraud or dishonesty" with a wider and more flexible definition should be considered:

   (a) In the interests of international comity, the reference to the committing of overseas offences involving fraud or dishonesty should be replaced with a definition or test that allows flexibility of application across various jurisdictions.

   - If the present test in section 154(1) is retained and Recommendation 1.9 is implemented, the Singapore Courts and the Singapore solicitors handling the application for leave would have to engage in an exercise of interpreting the laws of the overseas jurisdiction in which the offence was committed, to ascertain whether such an offence involved fraud or dishonesty in that particular jurisdiction.

   (b) Useful guidance may be taken from the provisions in Australia's Corporations Act 2001 ("Australia's Corporations Act") as to the test for when automatic disqualification should apply to a director's conduct, as set out below:

> [Australia's Corporations Act
> Part 2D.6 – Disqualification from managing corporations]
>
> 206B Automatic disqualifications
>
> *Convictions*
>
> (1) A person becomes disqualified from managing corporations if the person:
>
> (a) is convicted on indictment of an offence that:
> (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or

(ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; **or**

(b) is convicted of an offence that:
(i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; **or**
(ii) involves dishonesty and is punishable by imprisonment for at least 3 months; **or**

(c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The offences covered by paragraph (a) and subparagraph (b)(ii) include offences against the law of a foreign country.

(2) The period of disqualification under subsection (1) starts on the day the person is convicted and lasts for:
(a) if the person does not serve a term of imprisonment—5 years after the day on which they are convicted; or
(b) if the person serves a term of imprisonment—5 years after the day on which they are released from prison.

Bankruptcy or personal insolvency agreement

(3) A person is disqualified from managing corporations if the person is an undischarged bankrupt under the law of Australia, its external territories or another country.

(4) A person is disqualified from managing corporations if:
(a) the person has executed a personal insolvency agreement under:
(i) Part X of the *Bankruptcy Act 1966*; or
(ii) a similar law of an external Territory or a foreign country; and
(b) the terms of the agreement have not been fully complied with.

(5) A person is disqualified from managing corporations at a particular time if the person is, at that time, disqualified from managing Aboriginal and Torres Strait Islander corporations under Part 6-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006.*

Foreign court orders

(6) A person is disqualified from managing corporations if the person is disqualified, under an order made by a court of a foreign jurisdiction that is in force, from:
(a) being a director of a foreign company; or
(b) being concerned in the management of a foreign company.

(emphasis ours)

(c) Singapore may wish to adapt the above provisions set out at 206B(1)(a) to (c) of Australia's Corporations Act. The said provisions provide more flexibility as they allow more criterion to be applied for purposes of determining when auto-disqualification should apply to an offence.

5. Further, at the international level, it may be useful for Singapore to consider entering agreements with foreign jurisdictions for mutual recognition of director disqualifications. Australia has taken a step towards this by introduction of a mechanism for the mutual recognition of director disqualifications in section 206B of its Corporations Act. If Singapore also adopts such a mechanism, there are two clear benefits:

   (i) the administration of the auto-disqualification regime with respect to overseas offences will be improved; and
   (ii) our Singapore Courts will not inadvertently disregard international comity in the process of considering applications by directors seeking the leave of court to continue managing of companies which have committed offences overseas (if Recommendation 1.9 is implemented).

6. Save for the above observations and suggestions which the Committee strongly urges the Steering Committee to take into consideration, the majority of the Committee is in favour of Recommendation 1.9.

Recommendation 1.17 Annex [1-18]-[1-19]

The following two new exceptions to the prohibition in section 163 should be introduced:

(a) to allow for loans or security/guarantee to be given to the extent of the proportionate equity shareholding held in the borrower by the directors of the lender/security provider;

(b) where there is prior shareholders' approval (with the interested director abstaining from voting) for the loan, guarantee or security to be given.

Response to Recommendation 1.17:

1. The Committee is of the view that there is a typographical error in Recommendation 1.17(a). It appears that paragraph (a) in Recommendation would only make sense if the rubric "the directors of" is removed so that (a) would read as follows:-

   "**The following two new exceptions to the prohibition in section 163 should be introduced:**

   (a) to allow for loans or security/guarantee to be given to the extent of the proportionate equity shareholding held in the borrower by ~~the directors of~~ the lender/security provider; and

   (b) *where there is prior shareholders' approval (with the interested director abstaining from voting) for the loan, guarantee or security to be given."*

2. The Committee also believes that the proposed exception in paragraph (b) shall apply equally as an exception for a company to grant a loan to a director of the said company, or to provide a guarantee or security in connection with such a loan, which is the mischief prohibited in Section 162 of the Companies Act. Therefore, the Committee urges the

Steering Committee to consider creating a new exception for the acts prohibited under Section 162 of the Companies Act by creating the same exception in paragraph (b) for Section 162 of the Companies Act.

3. Finally, it is noted that the concept of an "exempt private company" would be abolished under the revamped Companies Act. Currently, aside from being exempted from audit and certain filing requirements, exempt private companies are also exempted from compliance with Sections 162 and 163 of the Companies Act. It is not clear whether companies that are presently exempt private companies would continue to be exempted with the abolition of the concept of an "exempt private company". It is believed that many family-owned exempt private companies today rely on the exemption from Sections 162 and 163 of the Companies Act in granting loans or providing security for loans to their directors. As such, the removal of this exemption may create hardship for such exempt private companies and the unravelling of such arrangements may not be easily achieved, for example, banks might have disbursed loans and require the companies to provide security on a continuing basis and the borrowers are unable to repay the disbursed loans instantly. Thus, it would be necessary to consider either a grandfathering regime for present exempt private companies when the revamped Companies Act takes effect, or to allow the affected companies to pass a shareholders' resolution to authorise the company to continue granting the loan or providing the security.

Recommendation 2.26 Annex [2-34]-[2-39]

Section 254(1)(i) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.27

Section 254(1)(f) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.28

The scope of the statutory derivative action in section 216A should be expanded to allow a complainant to apply to the court for leave to commence an arbitration in the name and on behalf of the company or intervene in an arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the company.

Recommendation 2.29

Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.30

Section 216A should be amended such that the statutory derivative action in section 216A is applicable to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Response to Recommendations 2.26 to 2.30:

(Note: The following response remains the views of the Corporate Practice Committee's alone. For the feedback by the Insolvency Practice Committee on these recommendations from an insolvency practice perspective, see Annex B.)

Having considered the bases as set out in the Report for proposing Recommendations 2.26 to 2.30, the Committee is generally in agreement for the following reasons:

1. Recommendations 2.26-2.27: The proposed addition of the buy-out remedy in the situation of a winding-up application provides more options to aggrieved parties who initiate such applications. Winding-up applications are sometimes brought with the view of strategically putting pressure on the company for purposes of aiming for a stronger settlement that favours the applicant. Taken to its extreme, a company may be unnecessarily wound-up under a Section 254 application, even if the real motive behind such an application was really to coerce a buy-out of the applicant's shares. Expressly inserting a right for the Court to order a buy-out as an alternative to a winding-up order, gives companies a legitimate second lifeline and the opportunity to restructure their businesses, especially when companies are faced with a pressing Section 254 application that was not filed with the genuine intention of winding up the company in question.

2. Recommendation 2.28: In view of the growing emphasis on developing Singapore as an international arbitration hub, it is timely that section 216A actions may now be commenced by arbitration. It also allows for confidentiality as to the contents of the wrong which was alleged to have been done to the company. The ability to keep arbitration proceedings confidential will be helpful in preventing exposure to unnecessary adverse publicity which may affect the company's share price if it is a public-listed company.

3. Recommendations 2.29 to 2.30:

(a) The recommendations are welcome. The Committee agrees with MAS at paragraph 147(b), page [2-38] of the Report, that it is more desirable to empower shareholders to take action through a 216A action than to rely solely on regulatory authorities to do so.

(b) The Committee also agrees that there is minimal risk that this proposed extension of the 216A action to listed companies would invite abuse, as there is the safeguard by way of the screening mechanism that the complainant has to seek leave of court before section 216A arbitration proceedings may be instituted.

(c) The Committee urges that the statutory/judicial criterion to be applied for approving such an application for leave of court be set stringently to weed out frivolous actions. The Law Society of Singapore would be grateful for the opportunity to provide feedback during the drafting process for such statutory criterion.

Recommendation 3.34 Annex [3-27]-[3-32]

The section 403 test for dividend distributions should be retained.

Response to Recommendation 3.34:

The test for defining "profits" in section 403 should be aligned with accounting standards as approved by the Accounting Standards Council.

Recommendation 5.1 Annex [5-1]-[5-3]

Section 190 (Register and index of members) should no longer apply to private companies as the registers maintained by ACRA in electronic form and accessible by the public can be used as the main and authoritative register of members for private companies in Singapore.

Response to Recommendation 5.1:

1. The Committee supports this Recommendation, but notes that there are many administrative issues that ACRA will have to address in the process of implementation:
   (a) The integrity of the ACRA online register needs to be protected to avoid leakage or misrepresentation of any information. In view of the potential huge losses in case of mistakes or fraud in the register of members, strict control must be placed on the persons who can be allowed to change or amend the register of members; and
   (b) ACRA should ensure historical records of share transfers in the companies are maintained online as well, so that information on both the present and historical ownership of the company can be accessed.

2. It is also suggested that the proposed ACRA online register import the same kind of safeguards which the Singapore Land Authority ("SLA") has put in place for its land title registration system, for example:
   (a) Updating or change of information in the SLA land title registration system is carried out by the employees of SLA; and
   (b) Furthermore, any updating must be upon submission of the prescribed forms by the claimants which must be certified by a practicing advocate and solicitor.

Recommendation 5.11 Annex [5-10]-[5-11]

(a) **A natural person who is presently legally required to report his residential address under the Companies Act (e.g. directors, secretaries, managers) may choose to report either his residential address or to report any other address where he can be located ("alternate address"). ACRA will distinguish and indicate whether the reported address appearing on the public records is the residential or an alternate address; and**

(b) **Directors who are currently required to disclose their residential address on the register of directors, managers, secretaries and auditors kept at the registered office will similarly be permitted to elect to disclose their alternate address where they can be located.**

Response to Recommendation 5.11:

1. Directors may abuse the alternate address and use it to avoid detection. There were concerns raised that allowing directors to post only their alternate address may hinder effective personal service of documents. This would be of particular concern for service of court documents. While substituted service is still available in any event, the costs involved in applying for substituted service may be avoided if the accurate address is reported by the director in the first place.

2. The concern that the director may abuse the alternate address was raised at the public seminar on 19 August 2011. We understand from the legal officer of ACRA that the proposed alternate address policy was merely to supplement the present existing residential address policy, not to replace it. It was further explained that the alternate address would be offered to directors as an alternative, not a mandatory change or removal of all residential addresses from the ACRA public records.

3. It appears that the main concern is not with the filing of residential address information with ACRA but that members of the public have unrestricted address to such residential address information. The Corporate Practice Committee considers that there should be an option for those filing residential address information to choose to file it on a confidential basis subject to ACRA's discretion to release such residential address information on application by the member of the public for good reasons. Some guidance could be derived from the approach of the Singapore Courts in applications by members of the public to inspect court case files and affidavits filed with the Singapore court registries. The name and identity of such applicant should be recorded and the grounds for such inspection stated for consideration by the Assistant Registrar of the Singapore Courts. Valid grounds for inspection would include the intention to serve court proceedings on the director at his residential address.

ANNEX B

RESPONSE BY THE LAW SOCIETY'S INSOLVENCY PRACTICE COMMITTEE

Response by the Insolvency Practice Committee
c/o The Law Society of Singapore

Re: Recommendations 2.25 to 2.30 – Report of the Steering Committee for Review of the Companies Act (MOF)

This response addresses solely the views of the Insolvency Practice Committee of the Law Society of Singapore in response to Recommendations 2.25 to 2.30.

Recommendation 2.25 Annex [2-30]-[2-39]

The Companies Act should not be amended to introduce a minority buy-out right / appraisal right in Singapore where such rights would enable a dissenting minority shareholder who disagreed with certain fundamental changes to an enterprise or certain alterations to shareholders' rights, to require the company to buy him out at a fair value.

Recommendation 2.26

Section 254(1)(i) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.27

Section 254(1)(f) should be amended to allow a court hearing a winding-up application under that limb the option to order a buy-out where it is just and equitable to do so, instead of ordering that the company be wound up.

Recommendation 2.28

The scope of the statutory derivative action in section 216A should be expanded to allow a complainant to apply to the court for leave to commence an arbitration in the name and on behalf of the company or intervene in an arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the arbitration on behalf of the company.

Recommendation 2.29

Section 216A should be amended to achieve consistency in the availability of the statutory derivative action for Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Recommendation 2.30

Section 216A should be amended such that the statutory derivative action in section 216A is applicable to Singapore-incorporated companies that are listed for quotation or quoted on a securities market, whether in Singapore or overseas.

Response to Recommendations 2.25 to 2.30:

Having considered the bases as set out in the Report for proposing Recommendations 2.25 to 2.30, the Insolvency Practice Committee is generally in agreement with these Recommendations, with the following additional comments on the Recommendations as set out below.

Recommendation 2.26:

- The Committee notes that paragraph 131 of the Report states that the additional buy-out remedy would allow a court to order a buy-out instead of a winding up in cases where the company is still viable and it would be a more efficient solution for the majority to buy out the minority. The Committee is of the view that the viability of the company should not be made a condition to allowing a buy-out remedy but should be only one of the factors which the Court may consider in the exercise of its discretion. For example, what if the party who is acting badly is the party whom the viability of the company depends on? If viability is a condition, that party may avoid a buy-out by ensuring that the company is not viable. The Court should retain the ultimate discretion as to whether a buy-out remedy may be given, subject to the usual criterion to be met under the "just and

equitable" ground. If appropriate, the court may be required statutorily to give due consideration to viability, but viability per se should not be made a condition precedent.

Recommendation 2.27:

- The Committee agrees with the Recommendation because ordering a company to be wound up is a drastic measure. This Recommendation gives flexibility to the Court to order a buy-out on the "just and equitable" ground.

Recommendations 2.29 and 2.30:

- The Committee notes that Singapore-incorporated companies which are listed for quotation or quoted on a securities market in Singapore were historically excluded from the ambit of section 216A actions. The proposed change may be disruptive to the business of such companies especially if minority shareholders issue frivolous actions.
- Notwithstanding the above, the Committee is of the view that there is merit in Recommendations 2.29 and 2.30 because there is no compelling reason why there should be a distinction between shareholders of Singapore listed companies and those of other companies, and the court should be allowed to determine the merits of each application The class of shareholders in Singapore listed companies should have the same recourse as those in non Singapore listed companies.