LEGISLATION COMMENTS

OUT OF THE DEPTHS: THE COMPANIES (AMENDMENT) ACT, 1987

THE Companies Act[1], possessor of the dubious epithet of the "longest and most complicated statute in the statute books"[2] recently received yet another hefty boost to its already corpulent dimensions in the shape of the Companies Act 1987 ("the Amendment Act")[3]. In the greater part of its provisions, the Amendment Act continues in the tradition of its predecessors, effecting what amounts to fine-tuning of an increasingly mature piece of legislation. In its other provisions, the Amendment Act effectively tempers some of the more zealous reforms introduced by its immediate predecessor (the Companies (Amendment) Act 1984)[4], but some problems remain unaddressed. The most striking of the new provisions introduced by the Act, however, are those which reflect its conception in the depths of the first real economic recession in Singapore for two decades.[5] In the result, after much public debate and discussion (including that before a Parliamentary Select Committee[6]) a wholly new part introducing the concept of judicial management was introduced, a sort of temporary shelter of

1 Chapter 50, Revised Edition 1988, hereinafter called "the Act". Mercifully, the sections have not been renumbered, as in some previous editions! All references to sections hereinafter are references to sections in the Act, unless otherwise stated.

2 Walter Woon, *Company Law* (1988), preface, describing the Act, which in its latest reincarnation, the Revised Edition of 1988, is 567 pages long.

3 Act No. 13 of 1987 (122 pages). It was passed by Parliament on 26 March 1987 and was assented to by the President on 1 April 1987. It came into operation on 15 May 1987 pursuant to the Companies (Amendment) Act (Commencement) Notification 1987 (No. S 137 of 1987).

4 Hereinafter called the 1984 Act. For a survey of the principal changes introduced by the 1984 Act, see Walter Woon, "The Registrar's Shopping List - Some Problems Introduced by the Companies (Amendment) Act 1984", (1984) 26 Mal. L.R. 309.

5 See "The Singapore Economy: New Directions": The Report of the Economic Committee, Ministry of Trade & Industry, Singapore, 1986 (hereinafter referred to as "the EC Report" and "the Economic Committee" respectively), at page 38: "For the first time in two decades, our economy shrank in 1985. Real GDP declined by 1.7%, and is projected to show no growth in 1986." For commentaries on the recession, see Cheah Hock Beng, "The Downturn in the Singapore Economy: Problems, Prospects and Possibilities for Recovery", Southeast Asian Affairs 1986, Institute of Southeast Asian Studies, Singapore, 1986; and Tan, H.H. Augustine, "Singapore's Economy: Growth and Structural Change", Southeast Asian Affairs 1986, Institute of Southeast Asian Studies, Singapore.

6 See the Report of the Select Committee on the Companies (Amendment) Bill [Bill No. 9/86] (hereinafter referred to as "the SC Report"). The Bill was commited to the Select Committee ("the Committee") by resolution of Parliament on 5 May 1986, and was chaired by the then Speaker of Parliament Dr Yeoh Ghim Seng. Members of the Committee included Dr Richard Hu Tsu Tau (then the Minister for Finance and the Minister for Health) and Dr Lee Boon Yang (then the Minister of State, Ministry of Trade and Industry and Ministry of Home Affairs). The SC Report was presented to Parliament on 12 March, 1987.

last resort from creditors for indigent companies. In the following legislation comment,[7] a selection of some of the more interesting or important amendments introduced by the Amendment Act will be examined.[8]

Two clear but opposing trends are evident in the new provisions introduced by the Amendment Act. On the one hand, there is a general tendency towards the relaxation of rules formerly strictly applied, and the mitigation of some of their harsher consequences. This is exemplified in the modification of the rule against financial assistance, the abandonment of the concept of automatic disqualification of directors of failed companies, and the introduction of the concept of judicial management.[9] On the other hand, the Government has moved to tighten enforcement of the Act, and it is with this aspect that this comment will begin.

Enforcement: More Teeth For The Law

"Affairs of a Corporation" and New Investigative Powers. In the latter category of amendments must be included the amendments by which the global definition *"affairs of a corporation"* is introduced, and by which the law enforcement agencies are vested with new investigative powers.[11]

From the obscurity of a local definition contained in the part of the Act dealing with investigations,[12] the term *"affairs of a corporation"* has been refashioned into a broad global definition affecting the interpretation of several key provisions of the Act. The elements of the old definition have been retained, but to it has been added many others which wholly alters its general character. It now applies not only to Part IX, but significantly also to the new provisions relating to the powers of investigation and discovery,[13] to oppression,[14] to winding up by the Court on the ground that the directors have acted in their own interests,[15] to the power of the Court to order public examination of promoters and directors and to arrest absconding directors[16] and to the liability of officers for false reports.[17] The effect of this extension of the definition may be to expand considerably the ambit of section 216 (and probably section 254(1)(f) also) to a degree as yet unascertainable, and possibly unintended as well: the rather narrow construction of

7 The writer is grateful to Mr Soh Kee Bun of the Faculty of Law for his valuable comments and suggestions on the first draft of this legislative comment: any errors are, of course, the writer's.
8 Necessarily selectively, given the size of the Amendment Act.
9 See comments *infra* on the new s.76 and S.76A (financial assistance), s.149 (disqualification of directors of failed companies) and the new Part VIIIA (provisions for judicial management) introduced by the Amendment Act.
10 The new s.4(8) inserted by s.2(j) of the Amendment Act.
11 The new s.8A to s.8H.
12 S.229, Part IX of the Act. The old s.229 was repealed by the Amendment Act, and a new section substituted, the practical effect of which is the deletion of the definition of "affairs" in the old section.
13 S.8A to s.8H, see comments *infra.*
14 S.216.
15 S.254(l)(f).
16 S.286 and s.287.
17 S.402.

section 216 by the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd*[18] may now no longer be correct. In the light of the new definition, an order for winding up under section 254(1)(f) may now be had on the basis of instances of past abuses by the directors, such as that the directors acted in their own interests in the promotion or formation of the company, even if the company is at the time of the application being managed impeccably.

The re-definition of the term *"affairs of a corporation"* neatly dovetails with the new additions to section 8,[19] by which more teeth are conferred upon the machinery of law enforcement in the form of extensive new powers of investigation. These powers[20] come on top of the already considerable powers relating to investigations, discovery and inspection provided for in Part IX of the Act,[21] the production and inspection of books under the Act[22] and the Evidence Act.[23] Briefly, the new investigative provisions provide that the authorities may, if "satisfied that there is good reason for so doing", direct a corporation to produce such books "relating to the affairs of a corporation" as may be specified.[24] This power may also be invoked against any person who "appears" to the authorities to be in possession of such books.[25] Upon production, the person producing them may be compelled "to provide an explanation" of any of the books,[26] upon pain of a penalty of up to $2,000/- or six month's imprisonment, or both.[27] If an order for production is not complied with, the authorities are empowered to apply to court for warrants of search and seizure.[28]

Destruction, mutilation and falsification of documents "affecting or relating to the property or affairs of the company" is now an offence:[29] the offence is presumed upon the establishment of the facts, and the burden of proof is on the officer charged with the offence to prove his innocent intention in destroying or mutilating the documents in question. Banks and other institutions subject to the control by the Monetary Authority of Singapore are generally exempted from the effect of the new provisions in the new investigative provisions:[30] indeed, this seems to be the only area in which the provisions of section 394[31] are not completely overtaken and rendered superfluous by the far more extensive range and greater strength of powers conferred upon the authorities by the new investigative provisions. There is even a provision which empowers the Minister, if he has "rea-

18 [1976] 1 M.L.J. 59; [1978] 2 M.L.J. 227 P.C. See also Philip Pillai, "Oppression of Minority Shareholders: The Singapore and Malaysian Experience" (1979) 21 Mal. L.R. 241.
19 The new s.8A to s.8H (hereinafter referred to as "the new investigative provisions").
20 For a summary of the new provisions, see pages 121 and 122 of the Explanatory Statement to Bill No. 9/86.
21 Investigations conducted by investigators appointed by the Minister.
22 S.394 of the Act.
23 In relation to bankers' books, Part V of the Evidence Act.
24 S.8A(1).
25 S.8A(2).
26 S.8A(3)(b).
27 S.8(A)(6).
28 S.8B.
29 Bys.8D.
30 S.8G.
31 Marginal notes: "Production and inspection of books where offence suspected. U.K. s. 441. Aust. s. 368."

son to suspect that a person has committed an offence under [the Companies] Act" to "make such investigation as he thinks expedient for the due administration" of the Act."[32]

Although there is again obviously some degree of overlap between the new investigative provisions[33] and at least some parts of Part IX of the Act, there is an evident intention that the separate identities of the two groups of provisions be preserved. The new investigative provisions are directed at investigations of criminal offences (including offences under the Act) with a view to effecting prosecution of the guilty parties, whereas Part IX appears to be directed at investigations required in the public interest, or in the interests of shareholders or creditors of the company, without necessarily having prosecution as an object.[34]

Unlike investigations under Part IX,[35] investigations carried out under the new investigative provisions do not have the effect of suspending the affected company's capacity to enter into contracts. Thus investigations under the new investigate provisions may, if necessary, be carried out discreetly,[36] without disrupting or compromising the business of the company, or damaging its credit. This may be particularly useful where the offence under the Act in question has been committed by one or two individual officers of the company for their own individual gain, with the management as a whole not being a party to any wrongdoing. In such cases, the company itself would be as much a victim of the crime as its shareholders, and to have to resort to the disruptive machinery of investigations under Part IX of the Act would be inappropriate. In the case of a public company, public confidence in the company is preserved.

The true ambit and extent of the new investigative provisions are not immediately evident until they are read together with the newly-enlarged definition of "affairs of a corporation",[37] to which definition the new investigative provisions make extensive reference. The new provisions are obviously aimed at giving the law enforcement agencies speedier and more flexible options in tackling sophisticated white collar crimes, an area which has worried the Government sufficiently in recent years to move it to set up a specialist investigative and

32 S.8F.
33 Particularly s.8F.
34 Ground (b) to s.230 (at least) would appear to have been overtaken by the much wider s. 8F.
35 S.240.
36 There is even a provision in s.8H providing for the security of information acquired pursuant to the exercise of powers conferred by s.8A and s.8B, although such information, document or statement made by a person under compulsion of law pursuant to s. 8A(3) may be admitted in criminal proceedings (see s.8A(4), s.8C and S8H(a)-(d)).
37 *Supra,* text at footnote 10.

enforcement agency: the Commercial Affairs Department (CAD) of the Ministry of Finance.[38]

Dealings with the Shares of the Company: Reliefs in Relation to Share Premium Accounts, Mergers and Reconstructions. Relaxation of the Rule Against Financial Assistance

Share Premium Accounts, Mergers & Reconstructions

Yet another area of relaxation is to be found in the rules relating to the establishment and application of share premium accounts: six new sections in section 69A to section 69F ("the new section 69s")[39] now provide for certain reliefs from the strict application of the old rules relating to the establishment and application of share premium accounts.[40] In cases of merger where a company acquires a 90% (or more) equity holding in another company in consideration for the issue of shares in the acquiring company, the acquiring company is no longer required to create a share premium account equal in amount to the excess of the value of the shares of the company acquired over the nominal value of the shares of the acquiring company issued in exchange.[41] A slightly more involved scheme for relief from the provisions of section 69 is given to subsidiary companies involved in group reconstructions.[42] The stated purpose[43] of the new section 69s is to overcome the effect of the 1980 decision in *Shearer (Inspector of Taxes)* v. *Bercain Ltd*,[44] which had upset the then prevailing assumptions[45] as to the non-applicability of 69 in certain circumstances, such as the cases of merger now excluded.

Financial Assistance

The old section 76[46] which prohibited companies from giving financial assistance in the purchase of its own shares has been entirely repealed: in its place are two new sections, section 76 and section 76A.

38 Dr Richard Hu Tsu Tau made the following points when the Committee was receiving oral evidence from the representatives of the Law Society of Singapore:
"I think I should point out that the purpose of new sections 8A to 8H are as follows: firstly, to provide a speedy and flexible alternative to the expensive and time-consuming business of appointing an inspector under Part IX of the Act; to provide what is in fact a pre-investigative provision; and that a number of safeguards have been written into the provisions. I think it is safe to say that the Minister in exercising his powers will always act reasonably. If he does not, there is always the possibility of a judicial review. Although the Minister may exercise his powers principally where fraud, dishonesty or mismanagement of companies is suspected, it is not considered that the legislation should restrict his powers under the new section as you suggest. Circumstances may exist where the investigative authorities must move quickly". (See pages B 73 and 74 of the SC Report).

39 These appear to be modelled after s. 131 and s. 132 of the U.K. Companies Act, 1985.

40 S. 69.

41 S. 69B(1) and (2): it would otherwise have to do so under s. 69.

42 S.69C. For a fuller discussion, see Walter Woon, *ibid,* at pages 290–293, and Philip N. Pillai, "Company Law and Securities Regulation in Singapore", 1987, at page 114.

43 See Explanatory Statement to Bill No. 9/86. at page 123.

44 [1980] 3 All E.R. 295.

45 Robert Pennington, *Company Law,* 5th Edition, at page 182 and 183.

46 S.67 of the 1970 Edition of the Act.

The scheme of the new provisions are as follows: the general prohibition against financial assistance is set out in section 76. Unlike the old section 76 however, it does not stop there: it goes on to define exceptions to the rule. The general prohibition against financial assistance is also now more clearly defined, and more elaborate than that contained in the old section 76.[47] The consequences and penalties for breach are spelt out in section 76A. The new provisions amount to a considerable relaxation[48] of the former near-total prohibition against financial assistance: it is recognised that some forms of financial assistance need not necessarily be prejudicial to the interests of the shareholders of the company or its creditors.

As noted in the Explanatory Statement to the Bill for the Amendment Act,[49] recognition is now taken of the fact that interests in shares may be acquired in ways other than simple purchase: the "... wider expression 'acquisition'[50] is used rather than 'purchase'." The new provisions remove financial assistance[51] from the realm of strict liability offences[52]: contravention no longer results in an offence by the company, but by the officers of the company.[53] Civil liability for persons convicted of an offence under the new provisions has been introduced: in addition to the criminal penalty, the Court may order compensation to be paid to the company or any person who may have suffered loss or damage as a result.[54]

It is in the exceptions[55] which the Amendment Act introduces to the general rule against financial assistance that the central purpose of the amendment emerges. A recurring theme is the exemption of acts entered into "in good faith and in the ordinary course of commercial dealing".[56] A company is now at liberty to offer financial assistance to any person if the company in general meeting by special resolution

47 In part, this is to facilitate the distinction between void and voidable breaches of s.76. See discussion, *supra.*

48 Though it has not gone as far in that direction as the U.K. Companies Act 1985 (c.6) -sees. 151 to 158 of that Act.

49 At page 123.

50 Presumably, for example, where the shares are acquired for a monetary consideration, such as where the shares are exchanged for other shares or assets, or where the shares are indirectly acquired as a result of the takeover or the acquisition otherwise of the assets of a company.

51 As defined in s. 76(1)(a).

52 See s.76(4), which requires that the company be "aware that the financial assistance would financially assist... ".

53 See s.76(5) - (7). The reference in s.76(4) to the company having to be "aware that the financial assistance would financially assist" seems rather at odds with s.76(5): if the law makes a distinction in this case between the liability of the company and the liability of its officers, the reference should instead be to the awareness of the officers of the company. See *Tesco Supermarkets Ltd.* v *Nattrass* [1972] A.C. 153.

54 S.76(6). There is no limit on the amount ordered by the court to be paid as compensation. In the context of commercial crimes, this may serve as a more effective deterrent than ordinary fines. See also s.76A(4).

55 S.76(8) to (15).

56 See for example, grounds(a).(b).(c).(g).(i).(j)to s.76(8).

agrees to the financial assistance being given, provided that certain procedures are complied with.[57]

The new provisions also introduce a distinction between acts in contravention of section 76 which are absolutely void,[58] and those which are merely voidable at the option of the affected company.[59] The Court is given broad powers to give relief "as it thinks just and equitable" upon the application of any person (including the company) who "has suffered, or *is likely to suffer*[60] loss or damage" as a result of a transaction in breach of section 76, or as a result of a "related contract". Such relief may take the form of an order for the return or refund of monies or property, an order for damages (again, theoretically without limit) and an order for an indemnity to be given.[61]

The categories of persons against whom an order may be made are very wide: they include "any person who aided, abetted, counselled or procured, or was, by act or omission, in any way, directly or indirectly, knowingly concerned in or party to the contravention". For those who become ensnared in the tangle of sections 76 and 76A there is extended the saving consolation of section 76A(12), which provides that relief under section 391 may be granted[62] by the Court.

Automatic Disqualification of Directors: A Strategic Retreat

The amendment introduced in 1984[63] providing for automatic disqualification of directors of insolvent companies in certain

57 These procedures are set out in s.69(10) to (14). They are obviously modelled on the procedures for the reduction of capital. The objection to permitting companies complete liberty in giving financial assistance is of course that it would amount to an unauthorised reduction of capital-see *Trevor v Whitworth* (1880) 17Ch.D. 76. As stated in the Explanatory Statement to Bill No. 9/86 (at page 123), the "main objective of the new section, as of the section it replaces, is to ensure that the capital of a company is preserved intact and not eroded by deliberate acts done otherwise than in the ordinary operations of the company undertaken in the pursuit of the objects for which it was established." The procedures are so involved that it is likely that few companies will be tempted to include financial assistance as a routine tool of their financial arrangements.

58 S.76A(1). Generally, contracts by which a company acquires or purports to acquire . its own shares, or that of its holding company, or by which it lends money on security of its own shares or that of its holding company.

59 S.76A(2).

60 S.76A(4). Emphasis mine.

61 S.76A(5).

62 In view of the emphasis placed on the *mens rea* element of the offence in s.76, it is unlikely that the circumstances will be many in which relief under s391 will obtain, particularly in the light of the recent decision by Chan Sek Keong, J.C., in *Swee Leong Cheng* v *Project Aqua Culture & Trading Co. Pte. Ltd.* (judgment delivered 27 May 1988, in Originating Petition No. 71 of 1986). The Court questioned whether s.391 "was ever intended to apply to criminal offences": it observed that the "use of the expression "claim" in section 391 (2) would suggest that relief is granted only for civil breaches of duty or default", but left the question open, as the court was not addressed by Counsel on this point. See also *Customs and Excise Commissioners* v. *Hedon Alpha Ltd.* [1980] Q.B. 815.

63 To the then s.125A (now s.149).

circumstances[64] attracted much criticism during its short lifetime.[65] It might have stood a better chance of survival, had not the timing of the introduction of the 1984 amendment been so particularly inopportune — it came at the beginning of a recession in the economy, during which period there was a dramatic rise in the number of companies wound up.[66]

The Amendment Act repeals the 1984 section 149, and substitutes for it a new provision. The essential difference is that the automatic disqualification concept has been abandoned in favour of one which requires that an application be made to Court by the Minister or Official Receiver for a disqualification order:[67][68] notice of such an application is to be given to the targeted director. This provision for notice, together with the requirement that disqualification is to be by an order of Court, effectively removes one of the objections raised to the 1984 amendment formulation, which was that a director in certain circumstances might be automatically disqualified without his being aware of it.[69]

Of the two trigger events set out in the 1984 provision,[70] the first has been retained in a modified form.[71] An application to Court may

64 For a full discussion of the automatic disqualification scheme introduced by the 1984 Amendment Act to s. 149, see Walter Woon, "Disqualification for Unfitness — Section 149 of the Companies Act" (1985) 27 Mal. L.R. 149.

65 See, for example, the representation of the Singapore Society of Accountants to the SC Committee: the Society felt that the 1984 s. 149 should not have been amended, but repealed altogether (page A-73 to A-75, SC Report). Emphasis was placed on the argument that s. 149 was unnecessarily penalising the innocent and deterring much-needed enterpreneurship and calculated risk taking.

66 See statistics on p. 363.

67 See the SC Report, pages D18-20. The nature of the balancing act involved in the formulation of s. 149 is well brought out in the statement of Dr Richard Hu Tsu Tau in Appendix V of the Report:

> "[The 1987 s.149] substantially recasts the existing section 149 and abandons the concept of automatic disqualification of a person who is or has been a director of two companies that have gone into insolvent liquidation.... My general comment on the new clause is that while, on the one hand, it takes into account many of the criticisms that have been leveled at the repealed section 149 [the 1984 s. 149, which had not then actually yet been repealed?], on the other hand, the policy underlying the repealed section is retained and the particular mischief that section sought to remedy is preserved i.e. the ease with which under the law before that section was enacted with which a person trading through the medium of one or more companies with limited liability can allow such a company to become insolvent, form a new company and then carry on trading as before leaving behind a trail of unpaid creditors. It is in essence a measure to protect the public against unscrupulous and irresponsible directors of companies who take advantage of the privilege of being able to carry on business with limited liability to cause substanctial loss to creditors of the company, particularly unsecured creditors.... The new clause by its terms is much less harsh in many respects than the repealed section and deals with this social and economic problem in a fairer and more enlightened manner.... I should emphasise that I am conscious in introducing this new clause that there is a need to encourage, and not deter, legitimate enterprises but at the same time the Government recognises the need to ensure that Singapore should be seem to be a clean and fair place to do business and to ensure that the privilege of limited liability is not abused to the detriment of the public."

68 S.22 of the Amendment Act.

69 For example, if the second company referred to in the 1984 s.149(l)(b) went into liquidation without his knowledge because he had long ceased to be a director of the company.

70 In s.149(l)(a) and (b).

71 In the 1987 s.l49(2)(b)(i).

be made on the strength of a single insolvency, and an order is to be made[72] if the Court is satisfied that the conduct of the director "either alone or taken together with his conduct as a director of any other company or companies makes him unfit to be a director of or in any way, whether directly or indirectly be concerned in, or take part in, the management of the company".[73] Under the new scheme, the "other company or companies" need not be insolvent companies.

One unsatisfactory aspect of the new section 149 is that the clean-slate rule[74] no longer applies: an application may be made by the Minister or the Official Receiver at any time after the insolvency of a director's company, no matter how long ago that insolvency occurred. Theoretically, therefore, an application to Court under the 1984 section 149 could be made 20 years from now on the basis of an insolvency today, and the application would have to be granted if the second limb (relating to the conduct of the director) was also satisfied.[75] In considering whether the second limb has been satisfied, the Court is to take into account various considerations such as whether the director concerned has been in breach of his common law duties or statutory duties as a director, the extent of the director's responsibility for the insolvency of the company, and "... whether the causes of the company becoming insolvent are attributable to its carrying on business in a particular industry where the risk of insolvency is generally recognised to be higher."[76]

The last is a welcome recognition of the fact that the degree of risks differ in different businesses, and that the failure of a company may not be a reflection of bad management or turpitude on the part of its management but simply be due the degree of risk inherent in the company's chosen field. Instead, the Government now recognises that risk-taking is something to be encouraged in the interests of the

72 The words used in s. 149(2) are "The Court *shall* make a disqualification order if..." [*emphasis mine*].

73 S.149(2)(b)(ii).

74 See Walter Woon, "Disqualification For Unfitness: Section 149 of the Companies Act", 27 Mal. L.R. 149, at page 150.

75 There is an issue of whether s. 149 may be read so as to allow the Court to take into account insolvencies which occurred before the coming into force of the Amendment Act: see Article 11(1) of the Constitution of the Republic of Singapore, 1985 Ed. ("11.-(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed." By s. 149(10), no liquidation before 15 August 1984 is to be taken into account for the purposes of s. 149. This is no consolation to those directors caught by the provisions of the 1984 s. 149: the 1987 s. 149 does not affect any disqualification under the 1984 s. 149, and directors so disqualified will have to sit out the five years prescribed by the 1984 s. 149. Additionally, these persons face the further prospect (at least in theory) of an application being made to Court under the 1987 s. 149 on the basis of the same insolvencies by which they were disqualified under the 1984 s.149, as it may be argued that the 1984 and the 1987 provisions raises distinctly different grounds or bases of disqualification (see Article 11(2) of the Constitution of the Republic of Singapore (1985 Ed.) which deals with the rule against double jeopardy).

76 S.149(6). Query whether the Court may only have regard of the considerations set out in s. 149(6): would it be free to formulate or take into account other considerations as in the pre-Amendment Act case of *Quek Leng Chye v Attorney-General* [1985] 2 M.L.J. 270. There does not, however, seem to be any basic inconsistency between the approach taken in that case by the Privy Council and that prescribed by s. 149(6).

development of the economy.[77] Also new in section 149[78] is the concept of the "shadow director": essentially, a person who is all but in name a director. Persons who are not themselves directors, but who have *de facto* control and direction of a company are equally open to disqualification under the new section 149.

It is interesting to note that the principle of automatic disqualification abandoned in the new section 149 is retained in section 155, which the Amendment Act leaves untouched except for a minor clarification to section 155(3): this is despite the uncertainty surrounding the true construction of some of its provisions.[79] Many of the arguments for the abolition of automatic disqualification in relation to section 149 may be applied to section 155.[80]

Company Administration: Of Unqualified Secretaries, Registration of Charges and The Companies Regulations 1987

Secretaries

Company secretaries are now required to meet certain qualifications[81]: essentially, they must have at least 3 years (out of the 5 years preceding their appointment) experience as a company secretary, or be a lawyer, an accountant, or a member of the Singapore Association of

77 See the EC Report, where the following statements are made (in Chapter 13, entitled "Entrepreneurship"):

> "For the future, we need an environment where more Singaporeans can channel their entrepreneurial spirit to exploiting the opportunities of a modern economy. This requires moving out of traditional businesses, into new and unfamiliar areas. We have not yet produced sufficient entrepreneurs in new areas of business, who ceaselessly innovate, experiment, fail, pick themselves up, and start again. Only when we have such entrepreneurs, with the technical know-how to seize opportunities, and the courage and confidence to take risks, can Singapore become a throbbing and vibrant international business centre.
> Reasons for Lack of Entrepreneurship in Singapore);]
> ... our society has a low tolerance for failure. If we are to encourage greater entrepreneurship and risk-taking, we should adopt the attitude that failures are not so much disgraces as lessons. Enterpreneurs who fail in one venture should write off their set-backs to experience, pick themselves up, and move into new ventures. This is the nature of entrepreneurship.
> Measures to Promote Entrepreneurship[:]
> ... The right balance should be struck in the formulation of laws and regulations to allow private enterprise to flourish. While laws and regulations are necessary to protect the general public, we should take care that laws to prevent transgressions by a small minority do not immobilize the enterprise of the innocent majority. The "double liquidation" restriction in [the 1984] Section 149 of the Companies Act is a case in point; the provision automatically debarring a person who has been involved in two insolvent companies from holding directorships should be revised."

The Economic Committee was chaired by Brigadier-General (Res.) Lee Hsien Loong, and its members comprised prominent leaders of the public and private sectors.

78 S.149(8).

79 See Andrew Hicks, "Disqualification of Directors For Persistent Default in Filing Documents", 27 Mal. L.R. 329.

80 See Andrew Hicks, *ibid,* at pages 349 to 353. In this connection, the proposal by Hicks for some form of notice to be given to the offending director, at least, seems worthy of serious consideration by the authorities, in view of the uncertainties in the construction of the section.

81 S.171(1A).

the Institute of Chartered Secretaries and Administrators, "or a member of such other professional association as may be prescribed." Aspiring secretaries not qualifying for any of the above titles should be prepared to prove that they were already holding the office of secretary in the company in question on the coming into operation of the Amendment Act, or that they are "person, who, by virtue of such academic of professional qualifications as may be prescribed, is capable of discharging those functions."

The amendment was envisaged as "a step in the direction of upgrading the whole profession and the standard of reporting". One criticism made of the new section 171 (A) was that it might have the effect of unnecessarily increasing administrative costs for exempt private companies, particularly small, family-run concerns[82]. This argument was not accepted by the majority of the Committee, apparently on the basis that exempt private companies were the category of companies which would most benefit from "a certain standard of professionalism", and that there should be one single standard of management applicable to all companies.[83]

As noted by the Committee,[84] the new provision leaves unaffected the majority of existing companies, as the new provisions allow 'unqualified' secretaries to continue in their appointment even after the coming into operation of the Amendment Act. Companies incorporated after the coming into force of the Amendment Act, however, will be affected, as they will have to appoint a 'qualified' secretary from the start. On balance, the new provisions appear to have fairly taken into account the interests of existing 'unqualified' secretaries,[85] while moving to upgrade the standards of the administration of companies in Singapore. The professional bodies, no doubt, are delighted.

Registration of Charges

The procedure for the registration of charges under section 131 has been amended - creditors or companies are now no longer required to lodge the original instrument of charge and a copy of it together with a verifying affidavit. All that is now required is for the original instrument (or a copy of it) to be produced for inspection by the Registar, and for a statement of the prescribed particulars to be lodged.[86] In effect, this means that no copy of the instrument of charge will be retained by the Registry: parties wishing to ascertain the exact terms of a charge will either have to rely solely on the statement of prescribed particulars filed by or on the behalf of the chargor company, or request inspection or copies of the instrument of charge from the chargor company pursuant to section 138.

82 In 1987, exempt private companies formed about 70% of the total number of companies registered at the Singapore Registry of Companies: SC Report, at page D 31.
83 See the SC Report, at pages D-28 to D-32, in particular the proposal of Mr Tang See Chim at D-29 for the inclusion of the qualifying phrase "other than an exempt private company" to the word "company"; Mr Bernard Chen's and Dr Lee Boon Yang's reply at D-30; and the observation of Mr A.E.Daniel at D-31 in relation to the "strange things going on in this secretarial area".
84 At page D 29 of the SC Report.
85 Who, in any event, would be entitled (by virtue of s. 171 (1A)(a)) to offer themselves as secretaries to any company upon acquiring three years experience with any company.
86 See s.131(1) and (1A).

The amendments have apparently been introduced to facilitate a greater degree of computerisation of the operation of the Registry of Companies through their Electronic Filing Service,[87] but it is not immediately apparent how the new procedure would speed up the filing of charges, as the instrument of charge (or a copy of it) would still have to be produced for inspection by the Registrar.[88] In its representations to the Committee, the Law Society of Singapore expressed the fear that the new procedure would negate an important function of the registration system in that "immediate and accurate" searches could no longer be made at the Registry for details of charges. It also thought that there was "the further danger that instruments kept by the company may be lost or their terms subsequently falsified, without the assurance to the business community that a reliable centrally deposited record of such instrument is maintained."[89] In answer, Dr Richard Hu Hsu Tau pointed out that the "UK has operated a system for the last 30 years (I am told) without any problems, a system in which the charge is not centrally located..." at a central registry. Given the current practice of solicitors acting for creditors to record on the statement of prescribed particulars all such terms of the charges as they may wish to give notice to third parties (in particular, 'negative pledge clauses', or clauses prohibiting any subsequent charge without the prior consent of the prior chargee), the new system may seem adequate. The English authorities available on this point, however, are not comforting.[90]

New Regulations — the Companies Regulations 1987

With the coming into force of the Amendment Act, the old Companies Regulations 1984 have been revoked, and its place assumed by the new Companies Regulations 1987.[91] Both the Amendment Act and the Regulations were gazetted[92] to have come into operation on the same day, but there is perhaps a possible argument as to whether in fact this has been properly affected in the case of the Regulations.

The Regulations are expressed to have been made in "exercise of the powers conferred by section 411 of the Companies Act". This reference to section 411 can only refer to section 411 as amended by the Amendment Act, as a substantial part of the Regulations sets out rules of procedure in relation to judicial management. As it stood before the Amendment Act, section 411 did not contain any

87 See *s.* 12A, which provides for the electronic filing of documents required under the Act.

88 Unless a copy transmitted by tele-facsimile would be accepted. See also Regulation 6(3)-(7) of the Companies Regulations 1987. No separate form for electronic lodgement is prescribed by the First Schedule to the Regulations for the Statement of Particulars in repect of Charge and the Affidavit Verifying Execution of Charge to be lodged pursuant to s. 131. Also, given the wording of s. 131 (1A), would the 30-day rule in s. 131 (1) apply to the production of the instrument of charge as required in s. 131 (1 A)?

89 SC Report, at page A-44.

90 See *Wilson* v *Kelland* [1910] 2 Ch 306, and *Siebe Gorman & Co. Ltd. v. Barclays Bank Limited* [1979] 2 Lloyd's Rep. 142.

91 The Companies Regulations 1987 (Subsidiary Legislation Supplement No. S 138 of 1987) (hereinafter called "the Regulations".)

92 Subsidiary Legislation Supplement No. S 137 and S 138 of 1987.

provisions empowering the Minister to make rules in relation to judicial management - such a power was added by the Amendment Act. The Regulations were published in the Government Gazette Subsidiary Legislation Supplement dated Monday, May 11, 1988 *i.e.* a date before the coming into operation of the Amendment Act. In other words, the Regulations were made on or before May 11, 1988 (this is supported by the wording of the recital), and the power conferred by section 411 *as amended by section 67 of the Amendment Act* was exercised on or before the same date. On a strict construction of the words of the recital, therefore, it may be argued that at least Part V of the Regulations are void, because the Minister made the Regulations in exercise of a power that did not then exist. That Regulation 1 of the Regulations provides for the coming into operation of the Regulations on the same day as the Amendment Act would not, upon such a strict construction, affect the logic of the argument, or remedy the defect.[93]

In the main, the changes to the Regulations are in the prescribed forms, which have been revised to permit electronic filing. A substantial new section is to be found in the new Part V to the Regulations, which sets out the procedure to be followed in relation to judicial management.

Before going on to the subject of judical management, it remains to note in passing a few other amendments introduced by the Amendment Act. Section 160 has been beefed-up with section 160A to section 160D, which lay further restrictions on transactions between the company and its directors. At the moment, the new provisions seem mainly notable for the rather baffling definition in section 160A of a non-cash asset, which appears to be an error introduced in the process of the drafting of the amendment.

Of especial interest to company auditors, financial controllers and advisers will be the amendments to section 201 (to which a number of new sub-sections have been added), sections 202-204, and the new section 201 A. These deal with accounting and reporting procedures: the amendments in general reflect the current trend towards a more informative approach in the presentation of company accounts and directors' reports. In the case of related companies, consolidated accounts presenting a more complete picture of the group's finances as

[93] This looks like a plum for the administrative law enthusiast: if the argument is correct, the Regulations are *ultra vires.* It is an established principle of English administrative law that judicial review of delegated legislation (in the context of Singapore, subsidiary legislation) may be had if an authority acts in excess of the powers granted to it by Parliament: this is the "illegality" ground in the case of *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] 1 A.C. .374 (House of Lords), in which Lord Roskill held that judicial review would avail "where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess." The principles of judicial review in this case seems to have been accepted by the Singapore High Court in the case of *Kevin Desmond De Souza and Others* v. *The Minister of Home Affairs and Others* [1988] 2 M.L.J. 493 (See also H.W.R. Wade, *Administrative Law,* 5th Edition, at pages 747 to 749). The question is whether they may be saved by any other principle of law, for example, that of the principle of benevolent construction in relation to executive legislation. One such instance of the application of this principle may perhaps be found in the case of *Public Prosecutor* v. *M.M. Pillay*[1971] 1 M.L.J. 228 (see K.L. Koh's note on this case in [1977] 2 M.L.J. 1). The facts, however, are very different, and it is submitted that it does not offer any useful precedent in the present case.

a whole are now required.[94] The old Ninth Schedule has been repealed in entirety, and replaced by a new one.

Judicial Management: New Alternative For Indigent Companies

By section 45 of the Amendment Act, the boldest innovation[95] in many years in the history of the Companies Act was introduced by the new Part VIIIA. The need for such a provision had been evident for a long time: in their 1986 Report, the Economic Committee had expressed the view that with "... greater entrepreneurial activities, and a business environment that is becoming increasingly complex, it is inevitable that some companies will encounter difficulties and be threatened with failure. Singapore should introduce legislation to enable companies in temporary financial difficulties to re-organise and restructure their operations. Companies that are essentially viable should not be forced by creditors to liquidate before they can re-organise their affairs."[96]

This was perhaps a rather belated recognition of an old problem in the framework of the then existing law: as long ago as 1977 in the United Kingdom, the Cork Committee had been appointed to consider and make recommendations as to *(inter alia)* "less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances."[97] As the law stood before the Amendment Act, companies which ran into temporary financial difficulties faced the prospect of being wound up upon the petition of a jumpy creditor unless it could persuade its creditors to abide by a voluntary moratorium[98] to enter into an arrangement. The test of insolvency applied by the common law did not help: if the company was unable to pay its debts as they fell due, the court had no discretion to refuse a winding-up order.[99]

In the wake of the recession in 1985 and 1986, the need for an alternative became even more urgent, as may be illustrated by the

94 See s.201(3A)-(3C).

95 In the context of the Singapore Companies Act only!

96 EC Report, at page 130.

97 The Review Committee on Insolvency Law and Practice ("the Cork Committee"), chaired by Sir Kenneth Cork, was appointed on 27 January 1977. It delivered its Final Report (Cmnd. 8558 ("The Cork Report")) in June, 1982.

98 A device notoriously prone to sudden collapse or sabotage by the smaller creditors, who can demand that they be paid off on the threat of their filing a petition for the winding up of the company against the wishes of the majority creditors: see B-127 and B-129 of the SC Report.

99 See *Re Sunshine Security Pte. Ltd.* [1978] 1 M.L.J. 57 (Court of Appeal, Singapore), and *Wei Giap Construction Co, (Pte) Ltd* v. *Intraco* [1979] 2 M.L.J. 4, in which D'Cotta, J. quoted with approval the statement of Lord Cranworth in *Bowes* v. *Hope Life Insurance & Guarantee Co.* (1865) 11 M.L.C. 388. This would not apply if the company was able to raise a cross-claim of substance or a serious *bona fide* dispute regarding the indebtedness imputed against it: *Malayan Plant (Pte.) Ltd. Moscow Narodny Bank Ltd.* [1980] 2 M.L.J. 53 (an appeal to the Privy Council from Singapore).

startling increase in the number of companies compulsorily wound up by the Court in Singapore between 1983 to 1986:

Year	No. of Companies Compulsorily Wound Up by Court
1983	212
1984	238
1985	393
1986	485
1987	452
1988(1st half)	186

In the course of their inquiry, the Cork Committee noted that one effective device already existed by private arrangement between some companies and their creditors: the institution of the private receiver and manager appointed pursuant to a debenture.[2] Accordingly, the Cork Committee recommended that "... in all cases, and whether or not there is a floating charge in existence, provision should be made to enable a person (whom we shall call an Administrator) to be appointed whenever the circumstances justify such a course, with all the powers normally conferred upon a receiver and manager appointed under a floating charge, including power to carry on the business of the company and to borrow for that purpose."[3] These recommendations were carried into effect in the U.K. Insolvency Act 1985 (c.65), and subsequently also in the U.K. Insolvency Act 1986 (c.45).[4] In a

1 Source: The Official Assignee & Public Trustee, Singapore, pers. comm. 9 September 1988. The writer would like to record his thanks to the Official Assignee and Public Trustee for his assistance.

2 The Cork Committee's description of the problem is most illuminative:

> "There is... one aspect of the floating charge which we believe to have been of outstanding benefit to the general public and to society as a whole; we refer to the power to appoint a receiver and manager of the whole property and undertaking of a company. ... Such receivers and managers are normally given extensive powers to manage and carry on the business of the company. In some cases, they have been able to restore an ailing enterprise to profitability, and return it to its former owners. In others, they have been able to dispose of the whole or part of the business as a going concern. In either case, the preservation of the profitable parts of the enterprise has been of advantage to *the employees,* the commercial community, and the general public.
>
> "None of these steps is possible in the absence of a floating charge. Where there is no such charge, the choice lies between an informal moratorium or a formal scheme of arrangement under the Act of 1948 [see Part VII of the Singapore Companies Act]. Neither is wholly satisfactory. The latter is expensive and time consuming; the former is informal, is not binding on those creditors who do not assent, and can lead to problems in practice. Where neither course is practical, the directors of a company which is or appears to be insolvent have no option but to crease trading. We are satisfied that in a significant number of cases, companies have been forced into liquidation, and potentially viable businesses capable of being rescued have been closed down, for want of a floating charge under which a receiver and manager could have been appointed."

3 The Cork Report, para 497.

4 For a history of the development of Insolvency Act 1985, see Ian Fletcher, "Insolvency Act 1985", London, 1986 (Sweet & Maxwell), pages 65–8 to 65–11.

modified form, the same recommendations form the basis of Part VIIIA[5] introduced by the Amendment Act.[6]

Under the new provisions, a company or any of its creditors may now apply to Court for an order of judicial management if the company or the creditor considers that the company is or will be unable to pay its debts[7] *and that* (a) there is a "reasonable probability" of rehabilitation, or (b) there is a reasonable probability of the preservation of the business in whole or in part, or (c) the interests of the creditors would be better served by judicial management than winding up.[8] On the analogy of a debenture, the precondition as to the insolvency or impending solvency of the company may be regarded as the sole event of default precipitating crystallization and the right to appoint a receiver and manager, but with the added requirement that one of the conditions in section 227A(b) be further satisfied. Upon a petition for judicial management, the Court may then make an order if it is satisfied that certain conditions exist, which conditions are essentially the same as the grounds (discussed above) on which a petition for judicial management may be presented, but with the addition that the Court may make a judicial management order with a view to facilitating a compromise or arrangement pursuant to section 210 between the company and its creditors.[9]

In making the order for the appointment of a judicial manager, the Court may take as its object the preservation of "the whole or part of its [the company's] undertaking as a going concern": presumably, a petitioner may succeed even where it is proposed that only a small part of the undertaking of a company be hived off and saved. This makes

5 Hereinafter referred to as "the new provisions".

6 Despite much initial public discussion about importing a scheme of company reorganisation modelled on Chapter 11 of the United States' Bankruptcy Code (see page 130 of the EC Report), Part VIIIA as established by the Amendment Act is modelled principally on the U.K. Insolvency Acts of 1985 and 1986. There are, however, some significant differences, particularly in the opening sections. On the provenance of Part VIIIA, Dr Richard Hu Tsu Tau commented as follows: "We have essentially tried to follow very much the UK provisions with some local variations. It follows the UK Insolvency Law much closer than, say, Chapter 11 of the United States" [B-129 of the SC Report].

7 By s.227B(12), the definition in s.254(2) of "inability to pay debts" apply to the new provisions: therefore, the same test of insolvency used in winding up proceedings applies. Presumably, proof of the precondition of insolvency in S.227A could be readily satisfied by sending the statutory letter of demand pursuant to s.254(2)(a) - practitioners should therefore consider amending their standard statutory letter of demand in appropriate cases to include a warning to the effect that a judicial management order may be petitioned for, in addition to the usual warning in relation to winding up proceedings. It should be noted that although the definition of insolvency under the new provisions is the same as that applied in winding up, it is *not* a precondition under the new provisions that the company be *already* insolvent: unlike in a petition for winding up on the grounds of the company's insolvency (s.254(l)(e)), a petition for judicial management may be presented if the company or creditor" ... considers that the company ... *will be* unable to pay its debts ...".

8 S.227A.

9 S.227B(1). The additional ground is in s.227B(1)(b)(ii). It would be expected that the grounds on which a petition may be presented would be identical to that on which the Court might grant an order in terms on the petition, but the wording of the grounds in S.227A and S.227B (even apart from s.227B(l)(b)(ii) are not identical. This could (in theory, at least, although it is difficult to think of any such situation) may conceivably give rise to situations where a creditor would by S.227A be entitled to petition for winding up, but in which the Court would have no power to grant the relief prayed for.

especial sense in this age of multi-tiered corporate structures, the individual units of which may be engaged in very different businesses with differing degrees of risks, profitability and long-term viability.

The presentation of a petition for judicial management operates as an immediate moratorium on any moves to wind up, take legal proceedings or levy execution or distress against the company;[10] secured creditors are likewise prohibited from enforcing "any charge on or security over the company's possession under any hire-purchase agreement, chattels leasing agreement or retention of title agreement ... "[11] At first glance, this automatic moratorium might seem open to abuse by less than scrupulous directors, who when faced with mounting pressure from creditors, could put in a petition for judicial management in order to buy time for the directors to bleed the company of its remaining assets. On the other hand, the protection of the scheme in Part VIIIA would be rendered illusory if creditors were not restrained from rushing in to realise or enforce their security over the company's property.

The Cork Committee recognised this dilemma, and suggested that the Court be given power to "not only award costs against an unsuccessful applicant, but to make such orders as it thinks just with a view to redressing any injustice which may have resulted."[12] This recommendation has been given effect in section 277B(9); in addition, there is further protection for creditors against unscrupulous directors of debtor companies in 277B(10), which empowers the Court to appoint an interim judicial manager who "may exercise such functions, powers and duties as the Court may specify in the order." Presumably this power to appoint an interim judicial manager would be exercised on considerations similar to that taken into account in an application for a provisional liquidator.[13] There may however be a weakness in the scheme of the moratorium in section 227C(a) in that while it prohibits the passing of a resolution for or the making of an order for the winding up of the company once a petition for the appointment of a judicial manager has been presented, the *presentation* of a petition for winding up does not appear to be prohibited, with the practical result that the company's operations would be paralysed notwithstanding the moratorium because its bank accounts would effectively be frozen, and the suppliers and lenders of the company rendered reluctant to extend the credit necessary for the continued operation of the company's business.[14]

[10] S.227C. The Court is empowered to grant a creditor leave to proceed in certain cases, but no resolution or order for the winding up of the company shall be allowed in any event.

[11] The last is presumably aimed at any creditor claiming a proprietary remedy, such as under a *Romalpa* clause (see *Aluminium Industrie Vaassen* v. *Romalpa Aluminium, Ltd.* [1976] 1 W.L.R. 676).

[12] Cork Committee Report, at paragraph 509. See also D-42 of the SC Report.

[13] Sec SC Report, at D-42. Dr Richard Hu: "Circumstances may arise where it is essential that the court, should in the interim period after presentation of a petition and making its decision as to whether a judicial management order should be made, have the power to appoint an interim judicial manager, for example, to preserve the assets of the debtor company and prevent them from being dissipated."

[14] The combined effect of s.255(2), s.259, and s.269 and s.329(l)-(3).

One exception to the moratorium granted to the company upon presentation of the petition for judicial management is the provision[15] that any floating charge created before the coming into force of Part VIIIA is to be deemed to contain a power to appoint a receiver and manager. Prudent solicitors would therefore do well to revise their standard form debentures to include as an event of crystallisation the presentation of a petition for judicial management! Upon the presentation of the petition, notice is to be given to such chargees, and the chargees can then either proceed to appoint a receiver and manager, or place on record their objections to the petition. In either event, upon hearing the petition, "the Court *may* dismiss the petition" or make "any other order that it thinks fit".[16] The tenure of any receiver and manager so appointed, however, is likely to be short-lived, as they will have to vacate office upon the appointment of a judicial manager by the Court.[17]

Upon the appointment of the judicial manager, a moratorium similar to that imposed upon the presentation of the petition takes effect.[18] The scope of the powers of the judicial manager reflect the origins of the concept of the Administrator in England: his powers are basically that given to private receivers and managers under a well-drafted debenture.[19] Although the board of directors of the company is not ousted, their powers and duties are generally assumed by the judicial manager, who is to assume control of the company's property.[20] The judicial manager is also constituted the statutory agent of the company,[21] but with the rather pointed corollary that he is to be "personally liable on any contract... entered into or adopted by him in the carrying out of his function."[22]

Although he is entitled to be indemnified against such liability (and also for disbursements and remuneration) "out of the property of the company ... in priority to all other debts" except property subject to a valid security,[23] and to disclaim any personal liability in respect of any contract which he may adopt,[24] such liability imposed upon the judicial manager may well have the practical effect of discouraging

15 S.227B(4)-(5).

16 S.227B(6). See SC Report at paragraph 564: "We do not think it is necessary to spell out that reasons should be given to the court to justify opposition, although no doubt the court would need to be satisfied that grounds do exist".

17 S.227D(1). In this connection, it is interesting to note that in the examination of the representatives of The Singapore Merchant Bankers' Association by the SC Committee, an representative of the Association observed that "financing in industry and trade in Singapore is very much what we call 'asset based', in other words, a lot of lending is contingent upon security being granted, unlike in the States where banks are used to lending on a cash flow" (at paragraph 550 of the SC Report). If the implication of this statement is that the majority of debtor companies would have granted security over their assets by way of mortgage or charge, it would appear that the need for interim judicial managers may not be as great as it might appear, as chargees could always intervene to protect the assets of the distressed company in the period between the presentation of and the grant of an order in terms on a petition for judicial management.

18 S.227D, except in relation to such acts or proceedings as the Court may allow, or to which the judicial manager may consent.

19 S.227G, and the Eleventh Schedule.

20 S.227G(1)-(3).

21 S.227I(l)(a).

22 S.227I(1).

23 S.227I(2).

24 S.227I(2).

persons who may otherwise be willing and able to be appointed as judicial manager. In the case of privately-appointed receivers and managers, they would normally have (and indeed, insist upon) an indemnity from the appointing party, for if the company which they were appointed to receive and manage turned out to be worthless, they would be left out on a limb, not only in respect of their liability for contracts, but also for remuneration and disbursements.[25]

The dilemma, of course, is between the interests of the creditors and third parties who may deal with the judical manager on the one hand, and on the other, the need to permit the judicial manager some room to manoeuvre, to take risks if necessary to effect a successful rehabilitation of the company.[26] On the basis that the rehabilitation of a company would require bold action which must entail some degree of risk-taking on the part of the judicial manager, it seems inappropriate, in view of the object of the scheme of the amendment, to so impose a personal liability which might have the effect of restricting the options of the judicial manager. Given that the judicial manager is appointed by and is subject to the control of the Court, and to the close scrutiny of and to some extent the control of the creditors,[27] the imposition of personal liability seems unnecessary, and unduly restrictive and onerous. It surely is anomalous that a judicial manager be subject to a liability greater than that of directors of the distressed company: should not a judicial manager be protected so long as he has acted *bona fide* in the interests of the company? In this, the origins of the concept of the judicial manager appears to have asserted itself: the comparison appears to have been made, not as between a judicial manager and the directors of the company, but as between a judicial manager and a receiver and manager privately appointed pursuant to the terms of a debenture. In the result, a provision allowing the judicial manager to take indemnities from third parties (presumably the petitioning creditor, in the usual case) was inserted[28] after the Committee had

[25] In their representation to the SC Committee, the Singapore Society of Accountants recommended that greater protection should be extended to the judicial manager "... in the event that there are insufficient assets available. We recommend that this section should include provisions to the effect that" "remuneration and expenses of a judicial manager that remain unpaid due to insufficiency of a company's assets, shall be paid by the petitioner subject to the Court approval". Where the petitioner is the company itself, the directors should be responsible for such payment."

[26] See the written representation of the Singapore Merchant Bankers' Association to the SC Committee, at page A 120 of the SC Report. See also pages B 131 to B 133 of the SC Report.

[27] S.227R, by which creditors who feel that they are being unduly prejudiced by the actions of the judicial manager may apply to Court, which may then give such relief as it may think fit.

[28] S.227I(4).

heard representations on the issue,[29] but the personal liability provision was nonetheless retained.

An order ofjudicial management is valid in the first instance for a period of 180 days, with extensions being given at the discretion of the Court.[30] Within 60 days of his appointment however, the judicial manager is to come up with a statement of proposals for the consideration of the creditors.[31] A meeting of creditors is then to be convened to decide if they should approve of the proposals: if a majority "in number and value of creditors"[32] disagree, then the Court "may" make an order discharging the judicial manager. If the creditors approve the proposals, the judicial manager may then proceed to carry out the terms of the proposals.[33] If at any time during the term of his appointment the judicial manager feels that the purpose of his appointment has been achieved, or cannot be achieved, he is under a duty to apply for an order to discharge himself.[34]

The provision contained in section 227B, taken together with section 227H(2) and (3) (particularly the latter), is probably cause for relief among banks and financial institutions: its practical effect is that provided that floating charges are drafted to include as an event of crystallisation the presentment of a petition for judicial management, their inchoate security will be converted into a fixed and certain security upon the presentation of the petition, and will have to be treated as such by the judicial manager if one is appointed.

The question is whether banks and financial institutions (which are the creditors most likely to take a floating charge) should in a judicial management be placed in a position better than that of trade creditors who have supplied goods to the company, and then find themselves to be in position of unsecured creditors. If one takes the

29 See B 99 of the SC Report. Here is one instance, perhaps, where the concept of judicial management has been unduly restricted by its model - the comparison between the powers and liabilities of a judicial manager and that of a receiver and manager was clearly in the mind of the SC Committee. In moving the relevant amendment to the Bill, Dr Richard Hu observed that"... [T]his amendment seeks to ameliorate the personal liability of a judicial manager as regards contracts entered into by him even though subsection (1)(b) [of s.2271] does reflect the present state of the law with regard to personal liability of receiver and managers in this context. Since it is not easy to strike the right balance in this area as between safeguarding the interests of the judicial manager and those who enter into contracts with him, we believe that we have gone as far as we should go in protecting the position of the judicial manager" [at page D 39 of the SC Report]. The contrary argument would be that this is one comparison with private receivers and managers which would not be apt, for the circumstances and object of their appointment, and the control of the exercise of their duties, would be completely different.

30 S.227B(8).

31 S.227M.

32 Which is in practice not the one and the same thing: smaller creditors accounting for a small proportion of the total claim may far outnumber the bank creditors whose claim in monetary terms may dwarf that of other more numerous creditors. If taken literally, both a majority in number AND in value of the creditors (inelegant phrase!) would have to approve the proposal of the judicial manager, leaving the whole scheme open to the same evil that it was intended to alleviate: that tendency of the smaller creditors to "rock the boat" (see page B 129 of the SC Report) in a voluntary moratorium. But the use of the word "may" line 4 of s.227N(4) may perhaps give the Court some discretion in this regard.

33 S.227P.

34 S.227Q.

view that the banks and financial institutions have had the better opportunity (and certainly the better resources) than the trade creditors to investigate and assess beforehand the risks involved before lending to the company, it seems particularly inequitable to the trade creditors, who may have supplied goods, to be relegated to the back of the priority queue.[35] The obvious rejoinder to this would be that, if the institutional lenders were under any doubt that a floating charge would not be effective as against an order of judicial management, they would simply demand other (and less flexible) forms of security such as fixed charges, which would not be in the commercial interests of the borrowing companies. On the other hand, it might have the salutary effect of weaning institutional lenders from their preoccupation with lending against assets, which in the case of floating charges and 'letters of hypothecation', may well prove illusory in practice.

By section 227N, only the creditors of the company are entitled to vote on the statement of proposals: perhaps the class of persons entitled to have a say (but not necessarily to vote) should be enlarged. The insolvency of a company is not an event which affects only the creditors of the company: indeed, the primary motive force in the genesis of the provisions has been the larger public interest. Although the Court appears to have a discretion under section 227N to override any unreasonable objections from creditors in relation to the approval of the statement of proposals, this is by no means clear. A positive step in this direction has been the inclusion of the provisions in section 227S, which grants recognised trade unions *locus standi* to represent such of its members as are employees of the company in meetings of creditors convened to approve the statement of proposals under section 227M, as well as to deal with the judicial manager on their members' behalf.[35] Recognised trade unions are also entitled to apply to Court for relief if they feel that their members' rights are being unfairly prejudiced by the acts of the judicial manager, but the matters in respect of which they may complain are restricted to those set out in section 277S(2). It should also be noted that the rights of the employees in large part depend on whether or not there are any arrears on their wages: if there are not, they do not count as creditors, and their influence on the course of the judicial management is thereby considerably weakened.

Conclusion

The Amendment Act, although born of the recession, came into operation at a time when the perceived malady had already been identified, the remedy already applied with vigour and the economy well on its way to recovery. With recession in retreat, the issues of automatic disqualification of directors and the compulsory winding up of temporarily distressed but otherwise viable companies no longer

35 Who may on this argument be quite justified in threatening to "rock the boat" if their demands are not met by the major lenders.

36 S.227S(2). This section was inserted after the Singapore National Trade Unions Congress had in their representation to the SC Committee expressed their concern that the Bill (in the form that it was) did" ... not sufficiently safeguard the interest of workers who invest their careers in their companies and whose careers are their only valuable assets (see page A 55 of the SC Report, and generally also A53 to A 55, and B 67 to B 70)."

command the public attention or interest they did in 1986. With the exception of the new investigative powers, the Amendment Act taken as a whole would appear to represent a net gain for those who would argue for a relaxation of unnecessary rules in the lives of companies. The first tentative steps have been taken to fill an obvious (with the benefit of a little hindsight!) gap in the law relating to insolvency: to some, it may still appear to be a case of too little, too late. But ambitious experiments are apt to attract more discomfort than little steps: witness the brief and unhappy life of the automatic disqualification scheme for directors of bankrupt companies.[37] Only time will tell if more, or less, should have been done, and if so, what. Perhaps happily, it appears that critics and defenders of the faith alike are in for a long wait, given the present state of the economy.

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[37] S.149, born 15 August 1984, died unmourned 14 May 1987.

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