CURRENT DEVELOPMENTS IN CORPORATE AND SECURITIES LAW IN SINGAPORE AND MALAYSIA

Amendments to the corporate and securities law of both countries seem inevitable under current conditions of cautious economic activity which was preceded by the stock market boom and bust of early 1973. Additionally takeover activity has caused legislative responses, in Malaysia to control and direct foreign takeovers, in Singapore to round off the status of the new Takeover Code. Since the amendments cover a wide and disparate field it is not intended here to consider the implications of all of them. Instead consideration will first be given to the securities amendments as they involve peripheral changes. Secondly the implications of takeover changes will be considered. The wide ranging changes on a variety of areas will conclude this paper.

I. *THE SECURITIES INDUSTRY (AMENDMENT) ACT 1974.*[1]

The problems in the Singapore securities industry which prompted the amendments relate primarily to the stockbroking members of the Stock Exchange. The major changes wrought by the amendment involve a movement away from the traditional multiplicity of business structures of the members towards a single corporate form. This is reflective of the trend towards modernisation and rationalisation of the securities industry since 1970. The underlying value is that the then existing partnership structure of most members was unprogressive and difficult to regulate. It is significant to recall the Ferris Report[2] in its diagnosis of the then prevailing conditions:

> "There is absolutely no way of knowing today the financial status of the various member firms. Since an audit is required only at the end of each fiscal year, a partnership can inject considerable capital at the end of each of its year and if desired, withdraw it the next day. The amount of bank overdrafts, which are sometimes without collateral and based on the reputation and degree of activity of the securities firm is not a sufficient credit check. Obviously, borrowed money is a very high percentage of most securities firms' working capital, leaving a very low margin for error. Some brokers can partially finance their operations through remisier's deposits and there have been a few instances of borrowing on stock brought in by customers for sale or deposit."[3]

* This paper was written for publication and to form the basis of a paper delivered to the Western Australia Law Society 1974 Convention in Singapore 1-4 July 1974.

1. Singapore Act No. 6 of 1974 amending the principal act No. 17 of 1973.
2. George M. Ferris Jr. 'A Study of the Securities Market in Singapore and Malaysia I.E.S.C. Project No. 2067 Singapore Government Printing Office.
3. *Ibid* , page 1-2.

The recommendation of the report was therefore that

> "...there is greater protection for the public through permanent capital, fuller disclosure asd easier regulation by the Exchange of unlimited liability corporations and thus such form of ownership is to be strongly encouraged."

As an adjunct towards greater assurance of adequate financial and safeguards changes were suggested requiring minimum capital maintenance, surprise financial audits,[4] examination of members records[5] and the expansion of the fidelity fund.[6] The model for such changes was inevitably but not necessarily wisely, the New York Stock Exchange. The various abuses of market processes were felt to be in part caused by the absence of regulation over the activities and organisation of the members of the Stock Exchange. The experience of the early 1973 boom and the following and now continuing depression on the market acted as a catalyst towards establishing the need for greater control of the industry. The Government's reluctance to regulate the market completely and its insistence on self regulation has yielded to some attempt to structure the market and to the creation of the Securities Industry Council. The latter whose primary function is to vet takeover activities has inevitably acquired additional influence and a watchdog function.

The requirement of corporate membership of the Stock Exchange is thus the climax of a series of developments in this direction. The phasing out of partnerships and sole traders in the stockbroking business thus takes the form of the new s. 14 of the Act, which mandates that a dealer's licence shall only be granted only to a corporation and the grant or renewal of the dealer's licence is conditional upon the character of its officers and its financial position as well as the public interest. Consequential amendments to the whole Act are thus also made. One may question the wisdom of these amendments for the underlying assumption appears to be that to prevent the absence of financial controls over the non-corporate members of the Exchange it is desirable to require all members to incorporate. It would have been much simpler to require specific accounting procedures and capital maintenance from existing members regardless of their corporate form. The need to incorporate brings with it the necessity of all directors being members of the Exchange and all shareholdings being approved by the Committee of the Exchange.[7] The effect of these rules is to preclude non-active members particularly those in originally family type partnerships from continuing to be directly involved in the structuring and control of any member firm. It ignores the position of the one man business firm in the transition of passing over control and management to another generation, a problem quite frequent in Singapore family businesses.

4. See now s. 43-52, Securities Industry Act 1973.
5. See now s. 89-82, *ibid.*
6. *Ibid.*, see infra at page 61 for discussion.
7. 18 Corporate members as at 31 December 1973. Rule 41 (d) Stock Exchange Rules.

Also significant in this respect is that the term 'member corporation' is used rather than the more obvious term 'member company'. Barring careless drafting and an American penchant for the word 'corporation' some significance is indicated. As both terms are, by s.2 of the Securities Industry Act, assigned the same meaning ascribed them under the Companies Act,[8] it is necessary to consider the implications thereunder. By s.4 of the Companies Act the term 'company' means a company incorporated under the Companies Act or previous legislation. The term "corporation' includes *inter alia*, foreign incorporated companies. The upshot of the amendment would be that it is now available to foreign incorporated member firm's of international stock Exchange. This appears consistent with the objectives ultimately internationalising the Singapore securities market as part of the strategy of providing financial services to the whole of Southeast Asia.

The Stock Exchange Rules[9] still however adheres to the term 'member company' meaning one incorporated under the Companies Act. However if foreign entrants to membership is forthcoming with the active encouragement of the Monetary Authority of Singapore it is envisaged that amendments to the rules will be made.

The second significant change is also related to the foregoing discussion. One measure adopted to discourage abuses in share dealings was to require the maintenance of a register of securities by dealers, their representatives, investment advisers and their representatives and financial journalists, in which their interests in securities was to be listed. 'Interest' is assigned the same meaning ascribed to it by s.6A of the Companies Act[10] to include trusts and in any case where the dealer as corporate shareholder has control over another company which holds the securities in question. However the securities in respect of which disclosure was required involved only securities of a Singapore public incorporated company listed on the Stock Exchange.[11] Now by virtue of the amendment[12] disclosure is required of all listed securities regardless of their place of incorporation. This again envisages that foreign securities which are concurrently listed on more than one international stock exchange, are also to be the subject matter of such disclosure.

The final significant change relates to the quantum of the Fidelity Fund. The principal Act created a fidelity fund made up of levies from member companies to be used towards compensating anyone incurring any loss as a result of the defalcations of any member company.[13] The sum is now increased by the new s.67 and s.68 to two million dollars together with an annual addition of ten per cent of the net income of the Stock Exchange.

8. Cap. 185.

9. The Stock Exchange of Singapore Ltd. Rules, Bye-Laws & Requirements, article 1.

10. By s. 26 (6) and (7) Securities Industry Act.

11. S. 25(3) Securities Industry Act 1973 unamended.

12. S. 8 of the Securities Industry (Amendment) Act 1974.

13. S. 60-81 Securities Industry Act 1973.

In concluding this part it is to be noted that the Registrar of Companies now empowered by s.95(2) to compound offences on payment of the prescribed fine or a reduced sum.

II. *TAKEOVERS IN SINGAPORE AND MALAYSIA*.[14]

(a) *Singapore*

In Singapore recent changes[15] take the form of peripheral provisions to round off the elaborate scheme created via the Securities Industry Council and the Code on Takeovers and Mergers. (hereinafter called the Singapore Code). The Code which is an almost exact replica of the London City Code on Takeovers and Mergers is administered by the Council.

Firstly to ensure observance and to protect directors who observe the Singapore Code S.132B. lists out additional matters which they are entitled to consider in the exercise of their powers. The directors are entitled to consider the interests of employees in addition to members' interests. This is linked with s.19A which gives the company statutory powers to make provisions for employees in connection with the cessation of its business or any part of its business. This provides a statutory reversal of *Parke* v. *Daily News Ltd.*[16] where employees interests was held to be an unavailable consideration in the exercise of director's powers. S.132B's second limb permits the directors to have regard to the rulings of the Securities Industry Council as the interpretation of the principles rules and practice under the Singapore Code. This provision reinforces the non-statutory nature of the Singapore Code.

The avenues open to directors to thwart a takeover bid at their own initiative is further restricted by the new s.132C and s.132D. Noting that the Singapore Code is explicitly non-statutory in nature and effect certain rules have been elevated with the force of statutory rules with ensuing consequences. It gives statutory force to Rule 38 of the Singapore Code which seeks to prevent the directors from issuing new shares to thwart a takeover bid without the assent of the shareholders and the Council. S.132C[17] disallows the directors to proceed to dispose of the whole or substantially all the companies assets or property unless specifically approved by the shareholders in general meeting. If such action is anticipated s.132C(2) permits any member of the company to apply to court for an injunction restraining such action. If such transaction has been executed it is treated as valid only in relation to a third party who has provided valuable consideration therefor and was without actual notice (contra constructive notice) of the contraventions. This cuts into the effectiveness of the restriction and is somewhat out of step with the harsh consequences elsewhere imposed under analogous

14. This Part serves additionally to update the writer's paper on 'Corporate Takeovers in Singapore (1973) 15 Mal. L.R. 170.

15. Companies (Amendment) Act No. 10 of 1974.

16. (1962) Ch. 297.

17. S. 132C is a reintroduction of the old S. 35(3), (3A) and (3B) which were repealled in 1973.

situations.[18] In this instance where the sale of a company's undertaking is involved it would be reasonable to expect a purchaser to seek to be informed as to the existence of shareholder approval. Secondly the need for actual notice rather than constructive notice lends itself to abuse for it discourages any real attempt to ascertain the existence of such approval. Expressly exempted from such approval are disposals of the company's undertaking made by a receiver and manager or a liquidator under a voluntary winding up.[19]

Again the basic attitude inherent in the Singapore Code that any action taken to thwart a takeover bid should be approved by shareholders and not be unilaterally initiated and carried out by the directors [20] is statutorily reinforced by s.132D. The directors are denied the power unilaterally to issue shares but must seek the approval of the shareholders in general meeting. While s. 132D (2) provides for *carte blanche* approvals rather than specific approvals, s. 132D(3) restricts the operative period for such approvals until the next annual general meeting. If an offer, grant or option was granted during the continuance of such approval the issue of shares pursuant to such offer, grant or option after the cessation of the approval is nevertheless valid.[21] The approval is to be printed and lodged with the Registrar of Companies within one month of its passing.[22] Violation of this provision results in the issue being void and any consideration paid recoverable. Again this sanction seems excessively harsh. In the case of s.132C violation the transaction is presumed valid if the third party paid valuable consideration and was without actual notice of the breach. Here no such safeguards are provided. As in the case of the new s. 67(3) this sanction has far reaching consequences. While the object is clear i.e. to discourage violations and to deny the perpetrators the fruits of their attempted violation, the sanction goes beyond this. It is forseeable that third party purchasers may buy the shares on the stock market oblivious of the violation and will be met with a void issue of shares with the little comfort that they may recover any consideration paid. The nett result of this provision is to put prospective buyers on caution that if they purchase shares while a takeover bid is under way, they run the risk of having bought void shares. It would appear to have been preferable to have protected innocent third parties who have paid valuable consideration without notice to be entitled to have their shares. The alternative of expecting purchasers to seek to be informed of any potential takeover bid is too onerous.

It is to be noted with some interest that Gower in his Final Report on a Draft Company Law Bill for Ghana[22a] in article 56 on financial assistance expressly provides that the transaction (contra transfer) is

18. See infra at page 73 for discussion of the new S. 67(3).

19. S. 132C(4).

20. Rules 38 Singapore Code, *op. cit.*

21. S. 132D(4).

22. S. 132D(5) which involves s. 154 of the Act.

22a. Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana, (1961) Government Printer, Accra, Ghana.

voidable at the option of the company and the interests of a *bona fide* purchaser or seller of shares without knowledge of the breach is protected. Further any payment by the company is to include a 5% interest rate or any higher rate imposed by the Court.

Since the Singapore Code "has not and does not seek to have the force of law"[23] the sanctions imposed by s.132C and s.132D are therefore interesting. No criminal sanction is imposed specifically though any violation of the Act is an offence under the general section 369, but the deterrent by declaring the prohibited transaction as void is used. Further s. 132D(7) a director who permits or authorises a breach of the section is made liable to compensate the company or any person to whom the shares were issued for any loss, damages or costs incurred provided proceedings are brought within two years of the issue.

The existing scheme of prohibiting loans by a company to its directors in s.133 is easily circumvented by loans made by another company in which the directors have a share interest. The underlying value in creating this prohibition is stated briefly by the Cohen Committee thus:

> "We consider it undesirable that directors should borrow from their companies. If the director can offer good security, it is no hardship to him to borrow from other sources. If he cannot offer good security, it is undesirable that he should obtain from the company credit which he would not be able to obtain elsewhere."[24]

In recognition of the possible evasion of s.133, the new s.133A has now been enacted. S.133 of the principal Act disallows the company (except an exempt private company) from making loans to directors unless *inter alia* it has been approved by the shareholders in conjunction with a scheme for making loans to all employees. Noting that s.67 prohibits the company from providing financial assistance towards the acquisition of its shares, s.133A seeks to tighten this scheme by extending the regulation to include prohibition of loans to persons connected with the lending company. Thus a company is prohibited from making a loan or securing a loan to another company if the directors of one company individually or collectively own more than one-fifth of the nominal value of the equity shares of the other company. A director's interest for this purpose includes the interests of his family.[25] S.133A(2) prohibits loans or security made to a member of the family of a director or a director of its holding company.

Expressly exempted from s.133A(l) are such loans made in the context of a holding and subsidiary relationship or where both companies are subsidiaries of a holding company. Exemption from s.133A (1) and (2) is provided where the ordinary business of a company includes the lending of money or giving security in connection with loans made by other persons.

While the scheme of s.133A is readily apparent it is difficult to agree with the wide-scaled exemptions. The abuse to be prevented

23. Introduction, Singapore Code *op. cit.*

24. Para 94, Cohen Committee Report (1945) Cmnd. 6659 quoted with approval in the Jenkins Report (1962) Cmnd. 1749 Para. 58.

25. S. 133A(4).

when companies make loans to one another where the directors hold shares in both, is equally present in the case where the interlocking shareholdings are held by the companies and not the directors. If it is undesirable for a company to make loans to its directors, except in specified instances, it is equally undesirable where there is a holding — subsidiary relationship unless checks by way of shareholder approval are available. It is interesting to note that the Jenkins Committee[26] in making its recommendations did not make any reference to exemptions for holding — subsidiary situations.

By s.135 directors of a company are required to notify the company *inter alia* of all particulars of their shares, debentures, interests, rights, options and contracts in such company or related company; as well or any changes thereto. Now s.135A requires the notification of such interests to be made additionally to the Stock Exchange if the matter relates to listed securities and permits the Stock Exchange to publish such information. This facet of the regulation seeks to control insider abuses by disclosure of interests and by providing for the publication of such information.

S.137 of the principal Act seeks to regulate payments to directors for loss of office by requiring shareholder approval therefor.[27] S. 137A now seeks to regulate the related area of increased evoluments for directors. It requires simply that an alteration of articles to provide or increase director's emoluments[28] may only be made by a separate resolution of the company in general meeting. This seeks to prevent the passing of such resolutions that are camouflaged by being inserted in a whole range of other innocuous proposals.

Finally s.179 of the Principal Act has been amended to make specific reference to the Singapore Code and the Securities Industry Council pursuant to the power of the Minister under s.179(11). The Minister's power on the advice of the Council periodically to revise the code is provided for by s.179(12)(b). Further s.179(12)(c) envisages the Council's making rulings on the interpretation of the Code and the practices to be followed and legislates that such rulings or practice are to be final and not amenable to challenge in court.

S.179 (12) (d) is curious in that while it reaffirms the non-statutory nature of the Code, it proceeds to state that the failure to observe the code may be relied upon in civil or criminal proceedings "as tending to establish or to negative any liability which is in question in the proceedings." What precisely then is its effect? Does a breach of any provision of the code however inconsequential have the same effect? Or as the writer submits, do only certain significant breaches which themselves are relevant towards establishing or negativing a cause of action have such effect ? If it is the latter then what novel change has s.179(12) (d) wrought? It would appear that the effect of this

26. Para . 68 *op. cit.*

27. For some discussion of s. 137 see article by writer 'Corporate Takeovers in Singapore *op. cit.* p. 188.

28. As defined in s. 137A(2) to include "fees and percentages, expense allowances, pension scheme payments and non cash payments in respect of service."

section is very modest. It probably is to operate as a caution to the parties concerned thus: notwithstanding the non-statutory nature of the code breaches of the code may be used in criminal or civil proceedings as tending to establish or to negative a cause of action. This reading illustrates a subtle variation of the initial premises of self regulation. In introducing the Code and in refraining from creating a powerful securities commission the Government's policy was to encourage self regulation by the industry. The subtle clout of s.179(12)(d) in that breaches of the Code may be used in Court proceedings belies the reality of self regulation in Singapore as indeed does the whole Securities Industry legislation.

(b) *Malaysia*

The Malaysian scheme of regulation is a more modest one. Basically it contains provisions s.179, and 180 and the Tenth Schedule[29] which are essential identical to the Singapore Companies Act regulation.[30] Thus the basic philosophy is one of disclosure and the operation of s.179 brings into play all the disclosure requirements of the Tenth Schedule with a view to providing shareholders of the offeree corporation with sufficient data to enable them to consider the merits of the offer without any undue pressure and surprise. S.180 is the provision that permits the acquisition of the dissentient ten per cent shareholders who remain after the acquisition has succeeded.

The priorities in Malaysia have not been the same as in Singapore and perhaps *inter alia* the liberalisation of exchange control in Singapore and the active wooing of foreign enterprise has caused the different set of problems. Again the investment policies of both states differ somewhat with Singapore's projection towards a financial and economic centre for multinational corporations servicing the whole of Southeast Asia, while Malaysia's projection of foreign capital is seen merely as an adjunct to its domestic development plans.[31] Thus while there has been almost total silence in the Singapore regulatory system on foreign takeovers, the Malaysians have evolved their Guidelines for Regulating the Acquisition of Assets, Mergers and Takeovers.[23] This is quite remarkable for it was Singapore that bore the brunt of the foreign takeover activity in 1972 and 1973 primarily in the form of operations by the Slater Walker group. It is significant to note that Malaysia's control of foreign takeovers is possibly tempered by the fact that Singapore is one of the major investors in the Malaysian economy directly and through foreign companies based in Singapore but operating in Malaysia. It has been a cause for some displeasure that the steep prices for Malaysian commodities resulted in those earned funds being channelled and kept in London and Singapore rather than directed back to Malaysia for domestic investment.

29. Malaysian Companies Act No. 79 of 1965.

30. See the writer's 'Corporate Takeovers in Singapore' *op. cit.*, at page 175.

31. See "Mid-Term Review Second Malaysia Development Plan 1971-1975 (1973) Government Press.

32. Malaysian Ministry of Trade 1974 accompanying note *Siaran Akbar* PEN 2/74/110 (PM).

Another significant factor which contributes to the shape and form of the Guidelines is the objective of the Malaysian Second Development Plan 1971-1975 which seeks to redistribute the economic wealth towards the Malays (termed "bumiputras" to include the aborigines). Thus while in 1970, about 60% of the share capital of Malaysian Companies was owned by foreigners, the redistribution seeks to have by 1990 ownership of 40% by Malaysian Malays 30% by Malaysian non-Malays and 30% by foreign interests.[33]

The Guidelines take on a new legal form. It is not legislative or passed as a regulation under the Companies Act. Instead it is an executive decree without formal legal status but its effectiveness is beyond question in that the negotiation of the entry of foreign capital via exchange control and the ability to continue operations are sanctions which ensure its observance. This development towards administration by decree the constitutionality of which is doubtful and its effectiveness undoubted, finds similar expression in Singapore. It finds analogies in the Indonesian structure of government. The speed and discretion which it provides make it more convenient than to formal legislative rules.

It is now intended to consider the Guidelines under the following headings: (i) scope of application; (ii) criteria for approved acquisitions; (iii) procedures for obtaining approval and (iv) the Foreign Investment Committee.

(i) *Scope of application:*

By article 4(b) the types of acquisitions which would bring the Guidelines into operation are listed: "(i) any proposed acquisition by foreign interests of any substantial fixed assets in Malaysia,

(ii) any proposed acquisition of assets or any interests, mergers and and take-overs of companies and business in Malaysia by any means, which will result in ownership or control passing to foreign interests;

(iii) Any proposed acquisition of 15% or more of the voting power by any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and businesses;

(iv) Control of Malaysian companies and businesses through any form of joint-venture agreement, management agreement, and technical assistance agreement or other arrangements;

(v) Any merger and take-over of any company or business in Malaysia whether by Malaysian or foreign interests;

(vi) Any other proposed acquisition of assets or interests exceeding in value of $1 million whether by Malaysian or foreign interests."

33. *Siaran Akbar op. cit.* See also James Puthucherry 'Ownership and Control of the Malayan Economy, Eastern Universities Press Ltd., Singapore 1960, and see Sumitro Djojohadikusumo 'Trade and Aid in Southeast Asia' *Malaysia and Singapore* Vol. 1 (1969) Chap. 6.

A mere glance at the above rules indicates immediately the vagueness that abounds. What are 'substantial fixed interests'? How is 'ownership or control' to be gauged? Is the Companies Act criteria of s.5 in relation to holding and subsidiary companies relevant? What is a merger or take-over under the Guidelines? If a take-over is conducted by an individual or in a way which does not bring s.179 into play is that take-over still a take-over for the purposes of the Guidelines ?

It is submitted that the vagueness of the Guidelines is deliberate. What appears to be its object is that any proposed acquisition or transfer of control is to be vetted by the Foreign Investment Committee. The tendency would be to veer towards an all inclusive coverage, since the Guidelines do not seek to prohibit acquisitions but merely to direct them towards a redistribution of control and ownership. Thus if a foreign enterprise can show such intended developments such approval would be readily available. The safety valve is that if a project or acquisition is desirable *per se* then article 4(b)(7) exempts the specifically approved project from compliance with the Guidelines.

The desirability of article 4(b) (iv) on control of companies through joint venture agreements management agreements and technical assistance agreements is somewhat doubtful. The experience in Singapore[34] has shown at least insofar as productivity is concerned, that it is higher in completely foreign firms rather than in equal joint ventures. Secondly in foreign financed capital intensive industries it is inevitable that the Malaysian partners lacking the technological expensive will not have control of the foreign partners. Again 'control' in relation to such contracts encompasses an amorphous range. In a management services contract it is to be expected that control via management will be wielded at least in matters pertaining to management. Again it is submitted that this is deliberate policy making. Here it is a functional test that will be used which is not easily crystallised into precise legal phrases. It's prime object is to redesign the structure of ownership of corporate enterprise in Malaysia. The object of these rules seems therefore to bestow almost uncontrolled discretion on the Foreign Investment Committee.

(ii) *Criteria for approval:—*

These criteria must be viewed in the context of the underlying premises mentioned in the general policy guidelines.[35] They seek to encourage foreign investment via acquisitions if it promotes balanced ownership and control in addition to developing natural resources and providing expertise and employment. Purely economic acquisitions by foreign companies with the accompanying visible benefits are therefore to be discouraged. Thus the guidelines while applying to both domestic and foreign companies will be administered differentially in relation to each. Foreign companies may be involved in such acquisition if they warrant good corporate citizenship as demonstrated by the new policies.

34. "Analysis of Productivity Performance of Firms in Jurong", Singapore National Productivity Board (1974).

35. Article 3(3); (4) and (5). Guidelines *op. cit.*

To obtain approval article 4(5) lists a series of desirable objectives which must be demonstrated by the acquiring company being achievable. These involve: (1) a more balanced Malaysian participation in ownership and control;[36]

(2) the creation or expansion of net economic benefits in Malaysian and particularly Malay participation, ownership and Management as well as other purely economic factors like income distribution, growth, employment, exports, quality, range of products and services, economic diversification, processing and upgrading of local raw materials, training, efficiency and research and development;[37]

(3) The absence of adverse effects on national policy related to defence, environmental protection or regional development.[38]

The thrust of the criteria appears thus to taper in with the objectives of the Malaysian Second Development Plan. To some extent they are not new. As it was avowed Government policy to promote greater Malay participation in the economic sector, most industries have attempted, purely as an additional operating cost factor, to increase Malay participation even to the extent of a definite percentage of Malay workers. Thus the new criteria will involve companies in accelerating their programmes in such direction in an effort to demonstrate their achievement of such objects. To what extent this will exacerbate the already felt demand for silent Malay partners is problematic. The current trend of siting foreign labour intensive industry in the predominantly non-Malay states of Penang, Malacca and Selangor, will possibly be met with tendency to relocate new industries in the other states in the interest of regional development.

(iii) *Procedures for obtaining approval:*

Proposals for approval are to be submitted to the Foreign Investment Committee. The data required are related to the determination of the existence of the objectives of the Guidelines. The wealth of information and documents to accompany such application is reveall ed in article 5(9): and includes (i) the proposed scheme and the distribution of securities by citizenship; (ii) financial statements for the preceding three years; (iii) financial projections for the following three years; (iv) a list of substantial shareholders and their nominees, with details and the proportion of foreign interests (including options) all to illustrate the structure of ownership prior to the acquisition as well as the structure after such acquisition; (v) the proposed means of acquisition; and the nature of the association between the bidding company and the target company; (vi) the present and projected structure of employment in the company; (vii) all management, service and technical assistance and joint venture agreements; (viii) valuation reports of the target company's assets; (ix) terms of the acquisition and financial position of the target company; (x) the economic performance record of the target company

36. Article 4(5) (i) Guidelines *op. cit.*

37. Article 4(5)(ii) Guidelines *op. cit.*

38. Article 4(5) (iii) Guidelines *op. cit.*

and the effects of the acquisition; (xi) the skills and experience of the bidding company in the target companies areas of management, productio nand marketing; (xii) information on the degree of competition or complementarity between both companies in production or marketing; (xiii) details of special licenses, concessions, leaseholds and special Government permits enjoyed by the company as well as patents, manufacturing rights and export franchises; (xiv) details of economic costs and benefits of the acquisition; (xv) changes to be expected as a result of the acquisition in relation to employment, investment, exports, imports, processing and upgrading local materials, research and development industrial relations and environmental effects; (xvi) the proposed extent of Malaysian participation in ownership and management and the attitude of the target company's board to the offer; and (xvii) any evidence to establish that the acquisition is not against the national interest."

It is conceivable that a whole new set of documents will be drawn up to provide the required information without divulging vital management information.

(4) *The Foreign Investment Committee:*

The composition of this Committee is significant in the total absence of private sector interests therein. This is an indication at least that private sector interests are not viewed as useful or reliable in the deliberations of the committee. The key weakness of this absence is that business imperatives will not get as sympathetic a hearing as it otherwise would.

The tasks of the Committee includes the formulation of policy guidelines on foreign investment towards achieving the objectives of the New Economic Policy. It is empowered to regulate foreign investment problems and to advise Ministeries and Government agencies thereon. Further the conduct of foreign investment in Malaysia is to be subject to its constant surveillance.

III. *OTHER DEVELOPMENTS IN THE SINGAPORE COMPANIES (AMENDMENT) ACT 1974*

Apart from takeover related subjects, four areas are significantly affected by the new amendments in Singapore and will thus be discussed here briefly.

(a) *Disclosure of a director's interest in a contract with the Company*

S.131 requires a director who has a material interest in a contract with the company to disclose his interest on pain of the voidability of such contract[39] his vacation from office[40] and a criminal sanction.[41] It has always been somewhat difficult to determine the nature of the interest that merits disclosure. This has led to the argument by analogy, that if by s.134 as relates to a register of director's shareholdings, the interest of members of his family have also to be registered, such

39. *Hely-Hutchinson* v. *Brayhead* [1967] 2 All E.R. 14, affirmed [1967] 3 All E.R. 98 (C.A.).

40. Article 72 (h) Table A, Companies Act, *op. cit.*

41. S.131(9).

interest is material under s.131. The matter has now been put to rest by the new s.131 (7A) that the interests of his family constitute the director's interest for disclosure under s.131. What is unsatisfactory is that while s.134 (15) and (16) define family specifically to include wife or husband, infant son or daughter (both including step or adopted children, s.131 (7A) does not. The analogy, it is submitted is equally applicable.

(b) *Refusal to Register a Transfer S.105(1 A)*

By s.105 if a company refuses to register a transfer, it has within one month of the date of lodgement for registration to so inform both the transferor and transferee. This provision is applicable to both public and private companies. The practice of the board of directors to refuse to register a transfer particularly where disputes exist in private companies has been the subject of some litigation in both Malaysia and Singapore.[42] The new amendment is a radical variation of the principle particularly in private companies that the board's discretion to register is tempered only by the need for it to be bona fide in the interests of the company.[43] By s.105(1A) the company if it is given the power discretion by its articles may only refuse to register a transfer or transmission if within one month after the application it serves on the applicant a notice in writing stating the facts which justify the refusal to exercise the discretion. Thus no new discretion to refuse registration is accorded if some already exists in the articles. The effect of s.105 (1A) is merely to temper such discretion if it already exists by requiring the company to state the facts justifying refusal to register. This provides the applicant with some assurance as to his success or failure were he to bring an action in court to rectify the register under s.162.

This is in fact a statutory disapproval of the practice of Board's using their discretions for extraneous reasons. To this extent then the decision of *Lim Ow Goik* v. *Sungei Merah Bus Co.* Ltd.[44] where the Malaysian Court held that the directors were not obliged to state their reasons for the refusal to register no longer avails in Singapore but the result of that case where the directors in fact gave reasons which constituted an improper exercise of their powers and was therefore impugned by the Court is still pertinent. The unfettered discretion held to exist by *Kesar Singh* v. *Sepang Omnibus Co. Ltd.*[45] is thus also tempered by s.105 (1A).

(c) *Register of Substantial shareholdings.*

By the amendments of 1970[46] the register of substantial shareholdings was created with the consequent requirement of disclosure by

42. See *Lim Ow Goik & Anor.* v. *Sungei Merah Bus Co. Ltd.* [1969] 2 M.L.J. 101. *In re Len Chee Omnibus Co. Ltd., Chin Sow Lan* v. *Lee Chee Omnibus Co. Ltd. & Ors.* [1969] 2 M.L.J. 202 and *Kesar Singh* v. *Sepang Omnibus Co. Ltd.* (1964) 30 M.L.J. 122.

43. *Smith* v. *Fawcett* [1942] 1 All E.R. 542.

44. *Op. cit.*

45. *Op. cit.*

46. Companies (Amendment) Act No. 62 of 1970.

such shareholders. A substantial shareholder was defined as a 10% holding of the voting shares of a company.[47] The new amendments of 1974 have cut this down to 5%. S.69C(4) is a transitional provision to facilitate registration of shareholders of between 5% -10% who have hitherto not been required to register their interest.

In the case of a company listed on the Stock Exchange the new s.69N empowers to company to trace and record the true owners of shares through requiring information from any member as to the real nature of his holding. Thus s.69N(l) empowers such company to require a member to inform it whether he holds any voting shares in the company as beneficial owner or trustee. If he holds as trustee he may be required to indicate the beneficiaries by name and particulars and the nature of their interests. Once the company has invoked s.69N(l) it may follow through on its pursuit of the true owners by requiring any other person (other than the initial member) who has an interest to disclose the same information *ad infinitum.* By s.69N(3) the company is empowered to request and be supplied with information as to the existence of any agreement or arrangement amongst shareholders by which any other person is entitled to control the exercise of those rights; as well as details as to the identity of the parties. This is an attempt to determine the real controllers of any shares. The information obtained by virtue of s.69N is to be inscribed on the register of substantial shareholdings created by s.69J which is a register available for inspection to members and any person on payment of a fee. Thus the secrecy of any shareholder's voting agreements is no longer available.

To ensure reliability of the information given, s.69N(b) renders the failure to comply with the notice or compliance which makes any statement which is knowingly materially false or the reckless making of such statement a criminal offence. To prevent abuse however, no offence is committed if it is established that the company was already in possession thereof or that the requirement to give such information was frivolous or vexatious.[48]

The purpose of such disclosure of interests in the register is partially to discourage wider abuses by virtue of the fact that the insiders exact shareholdings and interests at varying points of time are available for public scrutiny. It is submitted that the reality of such disincentives is tenuous. It's effectiveness is ensured only if there is a coordinating body which vets and coordinates all the data that is collected variously by the Registrar of companies, the Stock Exchange, the Securities Industry Council and the various company reports and registers. It is inadequate that disclosure is made to various bodies, without the close surveillance by any one of them. The detection of securities frauds and insider abuses is made difficult without such vetting and has hitherto occurred only by coincidence or in relation to criminal breach of trust allegations.

47. S. 69(C) (1).

48. S.69N(7).

4. *Effect of Company Giving Financial Assistance in the Acquisition of its own shares.*

With other common law jurisdictions the prohibition of a company giving financial assistance in the acquisition of its shares is similarly regulated.[49] The exemption from illegality for providing financial assistance has now been extended to cover loan scheme for employees of a company as well as its subsidiary.

The scheme of s.67 is readily apparent: s.67(l) provides for an illegality. At common law this immediately renders any such contract void although there are exceptions where recovery is available.[50] The caselaw in England created some difference of opinion as to whether the transaction was void because of the underlying reality that so to do would jeopardise the company's assets. Both Singapore and Malaysia have additionally preempted the caselaw problems of the English courts of whether the transaction is void, initiated by *Victor Battery Co. Ltd.* v. *Curry's* Ltd.[51] and climaxing in its rejection by *Heald* v. *O'Connor.*[52]

A local case *The Batu Pahat Bank Ltd.* v. *Official Assignee*[53] decided by the Privy Council, considered the same point. With a similar provision involved the Privy Council decided that the illegality did not invalidate the security but merely prohibited the making of a loan on security under pain of incurring the specified penalties and liabilities. Thus s.67(4) was enacted to clarify the position somewhat that any security given by the company is recoverable notwithstanding the illegality. One obvious gap in this scheme is that of the status of any shares that have been issued or transferred in consequence of the assistance. S.67 (3) as now amended to provide that any transfer or allotment of shares in contravention of s.67(l) is void. Thus as in the case of s.132D(3)[54] third parties who purchase shares on the market which later appear to have been tainted by financial assistance are left with valueless shares. It is of course obvious that the transferee has an immediate cause of action against the transferor for breach of the implied term in a contract for the sale of shares that the share certificates delivered carry the rights and interest they purport to convey.[55] The implication of such provision is that any buyer undertakes such risks or has to perform the impossibly onerous duty of ascertaining the absence of such financial assistance.

This approach of the draftsman seems inadequate from all points of view. If it is intended to maintain the transaction as void then the

49. See s. 54 U.K. Companies Act 11 & 12 Geo. VI. 1948; s.67 Australia; Victoria Companies Act No. 6839 of 1961; S. 67 Malaysian Companies Act No. 79 of 1965.

50. See *Sarjan Singh* v. *Sardara Ali* (1960) A.C. 167 (Privy Council).

51. [1946] 1 All E.R. 519.

52. [1971] 1 W.L.R. 597.

53. (1933) M.L.J. 237 (Privy Council).

54. Discussed *supra* at p.

55. *Stray* v. *Russell* (1859) 1 E & E 888, affirmed (1860) 1 E & E 916.

safeguards suggested by the Jenkins Committee[56] is of some merit. In para. 178 it is suggested that the unlawfulness pervades unless the transaction has been approved by a special resolution of the company (with a right to the dissentient 10 per cent to seek redress from the courts); and a declaration of solvency of the company to be made by the directors.

This survey of current developments indicates the nature and scope of current problems in corporate and securities law in Singapore and Malaysia and the legislative responses while the stop gap measures are understandable it is unsatisfactory if the law reform in this area takes only this form for what appears then as is a constantly repeating response (in the form of legislation) to current corporate practices. The direction of such reform will always then be elusive. Credence to this criticism is given by the development that the Singapore Companies amendments may not be brought into force because of subsequently discovered defects. The tendency to draft such legislation without the benefit of comments of interest groups, in this case the securities market, the Registrar of Companies and the legal profession, has caused on many occasions unsatisfactory legislation.

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56. *Op. cit.,* para. 178.

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