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A Relationship of Reciprocal Influence: Singapore Company Law and the Economy

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A Relationship of Reciprocal Influence: Singapore Company Law and the Economy

Abstract

A strong reciprocal relationship has existed between Singapore Company Law ("**SCL**") and the economy since Independence in 1965. Swift Parliamentary responses to economic events and successful implementation of Government policies has made it possible to clearly attribute cause and effect to statutory amendments and economic events in turn, proving the reciprocal relationship between the two. The first theme of this paper seeks to explain the fundamental characteristics of SCL that have resulted in such an unusually strong reciprocal relationship: the 1) Autochthonous nature of SCL; 2) Responsive nature of legislation; and 3) Government control at multiple levels of implementation. The second theme examines the interplay between 1) Domestic political and economic events; and 2) Foreign laws and economic events in influencing legislative responses over time and their impact on SCL. This will be done through an examination of four key areas of SCL over fifty years of Singapore economic history.

A. Introduction

This paper is organised around two main themes. The first theme seeks to explain the reasons behind the unusually strong reciprocal relationship between SCL (broadly defined including securities regulation) and the economy. Three fundamental characteristics of SCL have contributed to the smooth functioning of the reciprocal relationship. 1) The autochthonous nature of SCL: the law is free to develop according to the demands of commerce and increasingly without following uncritically the law in other jurisdictions. 2) The responsive nature of legislation: the Singapore legislative process is largely free from political deadlock and a strong parliamentary majority allows the Government to react to economic developments promptly. 3) Government control at multiple levels of implementation: the eventual implementation of a policy is aided by strong Government control at up to four levels of the implementation process (primary legislation, subsidiary legislation, Government agencies and possibly Government-linked Companies ("**GLCs**")).

The second theme examines the interplay between two key factors that have shaped legislative responses to economic events and their changing influence over time. While the first part of this paper establishes that SCL can readily respond to economic events and ensure the implementation of the desired governmental policy, it leaves open the question of what factors influence the decision of whether a legislative response is warranted and the kind of policy to be implemented. While there are potentially an infinite number of causal factors motivating legislative reform, we have limited our focus to 1) Domestic political and economic events; and 2) Foreign laws and economic events, the two key factors which have tremendous influence on SCL. The influence of the factors has varied over time and also varied depending on the area of SCL concerned. This paper tracks the development of four key areas of SCL to

explore the different extents of influence that the factors have had: 1) Regulation, 2) Insolvency, 3) Protecting Interested Parties, and 4) Directors' Duties.

B. Singapore's Legal and Economic History Post-Independence

The examination of the two themes requires an in-depth consideration of both the legal and economic history of Singapore from Independence in 1965 to the present day. Economists and historians apply a variety of frameworks to attempt to identify various phases of Singapore's economic development over time. When faced with this task, the lawyer naturally turns to Hansard to look for major statutory amendments as key milestones in legal history. Having identified these milestones, it is then necessary to look at the economic context in which these changes were made.

For the purposes of this paper, we have structured the phases of development of Singapore's legal history into four separate parts, tracking the implementation/enactment of milestone pieces of legislation that changed the landscape of SCL. Each of the key milestones took place following changes to the Singaporean economic background or as a result of the sudden occurrence of a major economic event. This section will introduce these milestone pieces of legislation, and will examine the events in Singapore economic history that provide the context in which these legal changes were made.

Pre- 1967: Independence as a Catalyst for Legal Change[1]

Before the 1960s, Singapore's economy was virtually dominated by entrepot trade, with only a small manufacturing sector.[2] During this period, some government initiatives were implemented to help Singapore expand beyond entrepot trade. In 1956, the Singapore Polytechnic was established to remedy traditionally inadequate industrial training facilities.[3] The Economic Development Board ("**EDB**") was formed in 1961 and tasked with attracting foreign investment.[4]

Before 1967, the Companies Ordinance 1940 was in force in Singapore, an Act based on the English Companies Act 1929. Following the merger of Singapore and Malaysia in 1963, Parliamentary draftsmen collaborated in the drafting of the Malaysian Companies Act (1965 Ed.). However, Singapore's sudden independence in 1965 derailed the Act's enactment,

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1 This paper focuses on Singapore legal and economic history post-Independence, where the reciprocal influence between SCL and the economy was clearly established. For a detailed analysis of pre-Independence Company Law in Singapore and Malaysia see Petra Mahy and Ian Ramsay, "Legal Transplants and Adaptation in a Colonial Setting: Company Law in British Malaya", [2014] S.J.L.S 123-150.

2 Peebles and Wilson, Economic Growth and Development in Singapore: Past and Future, (2002) (Edward Elgar), 26.

3 W. G. Huff, *The Economic Growth of Singapore: Trade and Development in the Twentieth Century*, (1994) (Cambridge University Press), 289.

4 https://www.edb.gov.sg/content/edb/en/about-edb/company-information/our-history.html (accessed on 12 January 2018).

leaving Singapore with a company law framework thirty odd years behind English Company Law.

1967-1985: Establishment of an SCL Framework

Singapore's independence from Malaysia caused a great sense of urgency in Parliament to implement an SCL framework,[5] and Parliament promptly held the first reading of the Companies Bill 1966 on 5 December 1966, a mere year after Independence. The first edition of the Singapore Companies Act (Cap. 50) was enacted in 1967 and came into force on 29 December 1967. The Act was largely similar to the Malaysian Companies Act (1965 Ed.). This was in part by design and in part due to the time constraints under which the Act had to be passed. Mr E. W. Barker expressly stated in the third reading of the Companies Bill that "Singapore's new law relating to companies should not be different from the legislation in force in Malaysia in order to facilitate trade and commercial intercourse with and within this region."[6] Indeed, the idea of SCL being similar to Company Law elsewhere has broadly endured till today with England, and to a lesser extent, Australia, being a particular reference point. Singapore's economic planners want SCL to resemble the law of a well-recognised jurisdiction so that foreign investors who establish companies in Singapore will be familiar and comfortable with the legal framework.

Independence also led to a shift in Singapore's economic planning. Following separation from Malaysia in 1965, there was no further prospect of a common market with Malaysia. Import substitution was rejected by the People's Action Party ("**PAP**") Government as impractical[7] given the small domestic market and dearth of natural resources.[8] Instead, the PAP focused on export-led industrialisation that would be primarily funded by foreign investments.[9] This strategy placed a heavy emphasis on attracting Multinational Corporations ("**MNCs**") to provide the necessary technology and capital[10] and the use of state-owned enterprises to develop key sectors of the economy such as defence, transport and telecommunications.[11]

Singapore's focus on export-led industrialisation coincided with a global shift towards a new international division of labour. MNCs were actively searching for locations to set up

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5 Singapore Parliamentary Debates, Official Report (21 December 1966) ("**Hansard 1966**") col 1073 (Mr E. W. Barker, Minister for Law and National Development).

6 Singapore Parliamentary Debates, Official Report (21 December 1967) col 1035 (Mr E. W. Barker, Minister for Law and National Development).

7 Gale Asia, *The Papers of Lee Kuan Yew: Speeches, Interviews and Dialogues*, (2011), "Growing Economic Links Between Singapore and Switzerland (1971)".

8 Peebles and Wilson (n 2), 186.

9 Jean E Abshire, *The History of Singapore*, (2011), 134.

10 Ravi Menon, "An Economic History of Singapore: 1965-2065", 5 August 2015, available at http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2015/An-Economic-History-of-Singapore.aspx (accessed on 12 January 2018).

11 Tan Cheng Han, Dan W Puchniak, and Umakanth Varottil, "State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform" (2015) 28 Columbia Journal of Asian Law 61.

assembly facilities for low value-added goods.[12] Singapore positioned itself as a low-risk investment environment and passed legislation to minimise labour unrest and provide tax incentives.[13] This strategy was highly successful and attracted a considerable transfer of capital investments and technical knowledge to Singapore. By 1972, Singapore's cumulative stock of foreign direct investment stood at US$547 million.[14] Further, beginning in 1965, the Singapore economy grew at 9 per cent annually.[15]

After the Companies Act (1967) was passed, developments in SCL were relatively quiet, with minor amendments made to the Act on five occasions.[16] For example, in 1970, an amendment was passed that required disclosure in the event of the acquisition or existence of substantial shareholding. In 1973, this was extended to require directors to disclose their beneficial ownership of securities in their companies. In 1974, this was further extended to require directors of listed companies to notify the Stock Exchange when acquiring or disposing of shares in their companies. By 1984, Parliament was ready to make further reforms to the Companies Act in order to keep pace with developments in the securities industry and capital markets.[17]

1985-2000: Corporate Regulation and Insolvency Reform Following Economic Crisis

Barely a year after the Companies Act (Cap. 50) (1984 Rev. Ed.) came into force, Parliament was forced to review the Act once again.[18] This period got off to a rough start with a recession in 1985; the only time that the domestic economy contracted in the face of a growing global economy.[19] To make matters worse, the collapse of Pan-Electric Industries forced the authorities to close the Stock Exchange of Singapore for the first and only time in its history and damaged Singapore's reputation as a financial centre.[20]

The crisis forced the authorities to temporarily close the Singapore stock exchange, and led to massive reforms in corporate regulation and insolvency. Parliament responded quickly by enacting the Companies (Amendment) Act 1987, which sought to remedy the weaknesses that had led to the crisis. A new framework was put in place to enhance the Government's ability to regulate the stock market and stricter regulatory standards were enforced.[21] Further

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12 Ooi Giok Ling, "Singapore's Changing International Orientations, 1960-1990", in *Singapore from Temasek to the 21st Century*, Karl Hack and Jean-Louis Margolin (eds.), (2010), 333.

13 Abshire (n 9), 135-136.

14 Lois Bastide, "Singapore in the New Economic Geography: From Geographic Location to the Relocation of Economic Dynamics", in *Gateways to Globalisation: Asia's International Trading and Finance Centres*, François Gipouloux (ed.), (2011), (Edward Elgar), 135.

15 Ooi (n 12).

16 The minor amendments were made in 1970, 1973, 1974, and twice in 1975.

17 Singapore Parliamentary Debates, Official Report (17 January 1984) ("**Hansard 1984**"), col 343 (Prof. S. Jayakumar, The Acting Minister for Labour).

18 See fn 94, *infra*.

19 Menon (n 10).

20 "Pan-Electric shock", The Economist (London, England), Saturday, December 7, 1985, 78.

21 Tan Chwee Huat, "Financial Institutions and Markets", in *Handbook of Singapore-Malaysian Corporate Finance*, Tan Chwee Huat and Kwan Kuen-Chor (eds.) (1988), 23.

amendments to tighten market regulation were subsequently made in 1989,[22] when there was more time for a comprehensive assessment of the regulatory regime.[23]

An Economic Committee was also established in the wake of the 1985 recession and recommended that Singapore should develop as a risk management centre, conducting money market and capital market activities.[24] This prompted the diversification of the Singapore economy, with reduced reliance on the traditionally dominant manufacturing industry. By 2000, the financial sector accounted for nearly 12 percent of Singapore's GDP,[25] making it one of the most important sectors in the economy.

2000 Onwards: Growing the Financial Services Industry

The spectre of Pan-El continued to haunt corporate regulation for years after the incident. It was not until the 2000s that Parliament was confident enough with the regulatory framework to start reversing the trend of prescriptive regulation that had started post-Pan El. In 2001, the regulatory philosophy of the stock market underwent a major paradigm shift from merit-based to disclosure-based regulation.[26]

As Singapore persisted in its attempts to build up its financial services industry, she became more outward-facing in seeking foreign listings. For example, the Singapore stock exchange has been aggressively seeking listings from overseas firms.[27] Chinese companies had in the past been the primary targets but other Southeast Asian countries have also been targeted.

Singapore has been attempting to boost her attractiveness as a listing venue by attempting to counter the perception that the Singapore stock markets are over-regulated.[28] It is unclear whether this strategy has paid off. One of the key issues that Singapore has also had to face in this area is her reputation as a financial centre. There has been some bad publicity arising from Singapore's previous experience with some black sheep Overseas-Listed Chinese Firms.[29] In 2004, the Singapore Stock Exchange was rocked by the China Aviation Oil scandal,

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22 Singapore Parliamentary Debates, Official Report (7 April 1989) ("**Hansard 1989**"), col 103ff (BG George Yong-Boon Yeo).

23 See "Reform of Corporate Regulation" in Section D below.

24 Peebles and Wilson (n 2), 232.

25 *Ibid*, 113.

26 Jiang Yu Wang, "Making Singapore Company Law More Singaporean? –A Critical Examination of the Recent Revision of the Companies Act in the Light of Comparative Law", 14 Asian Bus. Law. 15 (2014), 15-36, 17. Merit-based regulation refers to a system where a regulator assesses securities being offered to the public. Disclosure-based regulation works by allowing market participants to make their own assessment of the securities being offered, based on information that firms are required to provide. See http://www.mas.gov.sg/annual_reports/annual20012002/developing-annual-c.html (accessed on 12 January 2018).

27 Sam Roseme, "Singapore's Economic Balancing Act: How a Company's Collapse Challenged the Country's New Corporate Governance Regime", (2007) 24 Pacific Basin Law Journal 249, 260.

28 *Ibid*.

29 See Peh Zu Hao, "Dealing with Perception: A Look at Overseas - Listed Chinese Firms in Singapore", Centre for Banking & Finance Law, Faculty of Law, National University of Singapore Working Paper CBFL- WP PZH01, (6 February 2014), available at

where a company had to file for creditor protection after suffering massive losses from speculation in derivatives.[30] As Singapore continues to focus on the financial services industry, new regulatory challenges such as whether to allow dual class shares constantly emerge.[31] The scene is an evolving one and a significant recent development was the establishment of Singapore Exchange Regulation Pte Ltd ("**RegCo**"). This new entity, established as a subsidiary of the Singapore Exchange (the current name of the Singapore Stock Exchange), came into operation on 15 September 2017. RegCo has taken over the regulatory functions of the Singapore Exchange leaving the latter to focus on its commercial role. Although RegCo is a subsidiary of the Singapore Exchange, it is intended to be independent of it. A majority of RegCo's board members including the Chairman must be independent of Singapore Exchange and RegCo's board is answerable to Singapore's de-facto central bank, the Monetary Authority of Singapore, which is the overall regulator of Singapore's capital markets.

THEME I: EXAMINING THE RECIPROCAL RELATIONSHIP

Law often influences economic (and more broadly, societal) events. Similarly, laws are constantly shaped by economic events as policy makers are forced to respond to them to maintain good governance. In practice, however, a badly drafted and implemented law will fail to effect the intention of Parliament and may lead to unforeseen repercussions. In the same way, a failure on the part of the Legislature to respond to economic events in a timely and apt manner limits the influence of economic events on shaping the law. Regulators may be left with a set of legal tools that are obsolete to the matter at hand. As demonstrated above, however, the Singapore Legislature has been extremely responsive to economic shocks. In this context, the success of legislative responses in Singapore to economic events is an indicator of the strong reciprocal relationship between SCL and the economy.

The reciprocal relationship is founded on three core characteristics of SCL. 1) The autochthonous nature of SCL; 2) the responsive nature of legislation; and 3) Government control at multiple levels of implementation. These characteristics have evolved over time and changed in nature. The path to autochthony took many years, with Singapore gradually becoming more confident of charting its own path in Company Law. On the other hand, the highly responsive nature of legislation has been a characteristic of SCL since Independence. While strong Government control has also been a constant feature of SCL, the increasing privatisation of GLCs has weakened Government control over the implementation of SCL over

https://law.nus.edu.sg/cbfl/pdfs/working_papers/Peh%20Zu%20Hao%20Working%20PaperV2.pdf (accessed on 12 January 2018).

30 Roseme (n 27), 250.

31 Michelle Dy, "The Future of a Dual-Class Shares Structure in Singapore: Roundtable Discussion Report", Centre for Banking & Finance Law, Faculty of Law, National University of Singapore, December 2016, report number CBFL-Rep-MD2, available at http://law.nus.edu.sg/cbfl/pdfs/reports/CBFL-Rep-MD2.pdf (accessed on 12 January 2018).

time,[32] raising questions as to the sustainability of the reciprocal relationship. At the present moment, however, the reciprocal relationship appears to be strong.

C. Features of Singapore Company Law

Autochthonous Nature

SCL is progressively autochthonous[33] even as the Government is desirous of the legal framework being familiar to overseas investors. It allows Singapore law to develop in a manner which the Legislature deems to be the most appropriate, without being held back by the developments in other countries. While developments in foreign laws may have some influence on SCL, these developments are carefully assessed for their suitability and, where necessary, adapted to suit the local context.[34] It is this element that allows for the reciprocal relationship between SCL and the economy. While law would certainly influence the economy in a non-autochthonous system, the influence of the economy on law would be more limited. An excessive reliance on foreign laws to direct the development of SCL in such a non-autochthonous system would impede the ability of the Legislature to respond to local triggers as they unfold.

This was not always the case in Singapore. The path to autochthony was a long one, with Singapore initially starting out by copying foreign legislation wholesale. Pre-Independence Company Law Legislation were often verbatim imports of the corresponding English statutes, with attempts to tailor the law to suit local conditions bearing very little fruit.[35] In fact, so extreme was the practice of following the English legislation, that in section 107 of the Companies Ordinance, the English numbering of sections was cross-referenced by mistake, instead of the Straits Settlements numbering.[36]

The Companies Act (1967 Ed.) substantially drew on the Malaysian Companies Act (1965 Ed.). However, Singapore had been involved in the drafting process, which broke the trend of blindly following English law by considering a wide range of precedents.[37] The next

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[32] It is unclear to what extent GLCs are subject to Government control. For more on this point, see fn 65, *infra*.

[33] "Autochthonous is simply the Greek equivalent of the Latin "indigenous". It means "of the land" and is something not imported; it means independent." See Goh Yihan and Paul Tan, "An Empirical Study on the Development of Singapore Law", (2011) 23 SAcLJ 176, 177.

[34] Ministry of Finance, Report of the Steering Committee for Review of the Companies Act ("**Steering Committee Report**") (MOF, 2011), (1-28).

[35] See Mahy and Ramsay (n 1), 138, citing "New Companies Bill is One of Longest Gazetted", The Straits Times (19 August 1939) 13.

[36] *Ibid*, citing H.G. Calvert, "Commercial Law" in George Williams Keeton and L.A. Sheridan, eds., *Malaya and Singapore, The Borneo Territories: The Development of Their Laws and Constitutions*, vol. 9 of *The British Commonwealth: The Development of Its Laws and Constitution* (London: Stevens & Sons Limited, 1961) 395 at 401.

[37] Mahy and Ramsay highlight that "[t]he drafting committee for the Malaysian legislation considered the English Companies Act 1948 (11, 12 Geo. VI, c. 38), the Australian Uniform Companies Acts 1961-1962, the U.K. Cohen and Jenkins Reports, and the draft code that had been prepared for Ghana (Malaysia, Parliamentary Debates, (9 August 1965)). The committee was assisted under the Australian Colombo plan, by

significant milestone occurred in 1974, when Singapore adopted several proposals from the 1962 U.K. Jenkins Committee Report, which Westminster had rejected.[38] In 1990, Singapore adopted the statutory derivative action ahead of Australia, Hong Kong and the UK.[39]

By 2007, Singapore Company Law had matured enough for the Steering Committee of the 2007 Review of the Companies Act (the "**Steering Committee**") to declare that foreign innovations should only be imported "if it would serve a useful purpose in our context".[40] The Steering Committee comprehensively reviewed the Companies Act in light of the legislation of other Common Law jurisdictions, submitting its report in April 2011.[41] Many of the proposed amendments were enacted in 2014, resulting in the largest overhaul of the Companies Act since independence[42] and signalling that an autochthonous Company Law had come of age.

Responsive Nature of Legislation

The speed at which the Singapore Legislature has been able to respond to trigger events is another defining characteristic of SCL. Developments in the economy are often time-sensitive and a lengthy feedback and legislative process would result in many proposed initiatives losing their effectiveness. The Singapore Legislature has constantly proceeded in a timely manner. A few examples illustrate this.

Enactment of the Companies Act

As noted above, when Singapore separated from Malaysia in August 1965, its Company Law statutory framework was more than thirty years out of date. While Parliament had to deal with the numerous pressing concerns arising from Singapore's sudden independence, the Companies (Amendment) Bill was ready for its first reading within a year after Independence and enacted the following year.[43]

Pan-El Crisis (Regulation)

During the Pan-El Crisis, the Government promptly responded by closing the Stock Exchange of Singapore for three days, arresting the free fall which had been precipitated by the collapse of Pan-Electric Industries.[44] Within months of the Crisis, Parliament had prepared a Companies

Mr. John Finemore, Victoria's Assistant State Parliamentary Draftsman", see Mahy and Ramsay (n 1), 140, citing Geoffrey Boland, "The Magna Carta of Malaysian Company Law" The Straits Times (20 June 1965) 6.

38 Wang (n 26), 28.

39 D. W. Puchniak, H Baum and M Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 337.

40 Steering Committee Report (n 34), (1-28).

41 Ministry of Finance, Consultation Paper on the Report of the Steering Committee for Review of the Companies Act, (June 2011), at 1.

42 *Ibid*.

43 Hansard 1966 (n 5).

44 Mimi Ho et. al., "Case Study on Pan-Electric Crisis", ("**MAS Paper**"), MAS Staff Paper No. 32, June 2004, 9.

(Amendment) Bill which sought to remedy the weaknesses that had led to the crisis, proceeding to enact the amendments the following year.[45] While further amendments had to be subsequently made in 1989,[46] Parliament chose to provide an immediate and adequate response to the Crisis, rather than to wait until a more comprehensive framework had been drafted.

Pan-El Crisis (Insolvency)

The Pan-El Crisis and the 1985 recession highlighted the inadequacies of the existing insolvency procedures. The insolvency regime at that point was "weighed in favour of creditors"[47] and wholly inappropriate in the background of a recession, where many companies suffered from temporary liquidity problems. When Parliament was addressing the issue of passing amendments to remedy the regulatory weaknesses exposed by the Pan-El Crisis and the recession, it also made changes to the insolvency regime.[48] A major change was the introduction of judicial management as an alternative to winding-up.

Government Control and Influence at Multiple Levels of Implementation

The eventual implementation of a policy is aided by strong Government control at up to four levels of the implementation process. Primary legislation, subsidiary legislation, Government agencies and sometimes GLCs. The benefits of this level of control were twofold. Firstly, the Government could carefully control the implementation process and ensure that legislation was implemented in a manner consistent with the intention of Parliament. Secondly, by being involved in the commercial world, the Government constantly had "its ear on the ground" and was able to swiftly craft an appropriate response when a trigger event occurred.

1st and 2nd Levels: Primary and Subsidiary Legislation

The People's Action Party's ("**PAP**") has enjoyed nearly complete control of Parliament since its decisive election victory in 1959. From 1968 to 1981, it was the sole party in Parliament.[49] This can be explained by the strong support of the PAP by the left-leaning masses of workers, allowing it to pursue policies which catered to the development of Singapore while side-lining the rich, who had their own partisan interests.[50] Since 1981, the PAP has never got less than 93 percent of all elected parliamentary seats at general elections.[51] This strong Parliamentary majority has allowed for the speedy passing of legislation without delays arising from deadlock or filibustering techniques in Parliament. Strong political support for the Legislature also

[45] Singapore Parliamentary Debates, Official Report (26 March 1967) ("**Hansard 1967**") col 1518 (Dr Hu Tsu Tau, The Minister for Finance).
[46] Hansard 1989 (n 22).
[47] Catherine Tan Swee Kian, "The Judicial Management Procedure in Singapore Company Law". J.B.L. 1988, Mar, 188-194, 188.
[48] Hansard 1967 (n 45).
[49] Eugene Tan, "Chapter 4: The Legislature", in Gary Chan & Jack Lee (eds), The Legal System of Singapore: Institutions, Principles and Practices, 125.
[50] Abshire (n 9), 134-135.
[51] Tan (n 49), 125.

allowed Parliament to freely enact policies which it deemed to best benefit Singapore, without being too concerned about the political impact.

3rd Level: Government Agencies – The Role of EDB and Other Statutory Boards

Statutory boards are separate corporate legal entities which are established by Acts of Parliament.[52] While controlled by the Government, in that they are regulated by and accountable to ministries, statutory boards are given considerable autonomy since they are not Government departments. A considerable number of such boards were set up by the government largely to aid economic and social development.[53] Statutory boards were (and are) used to coordinate and otherwise support the Government's initiatives.

For instance, in 1961, the Economic Development Board ("**EDB**") was set up to attract new businesses to Singapore and help the country attain her goals of creating a strong manufacturing sector.[54] It helped foreign investors navigate the red tape and logistical issues in setting up businesses in Singapore and was in charge of administering several tax incentive schemes. In this sense, the EDB helped to ensure that the Government's policies were implemented as they were intended even at the ground level, where businesses were concerned.

4th Level: Government Influence on Companies

When Singapore first began its route to industrialisation, the Government struggled with a lack of human capital. Local businesses had little experience in the manufacturing sector and the capital markets were far too underdeveloped to provide funding for them.[55] To solve this problem, the Government was heavily involved in setting up new businesses and industries. It did this by aggressively courting MNCs, by strong state involvement in some economic sectors,[56] and by working closely with large businesses in Singapore. As will be shown below, however, Government control has gradually weakened over the years as the Singaporean economy matures in favour of deregulation and privatisation.

i. MNCs

The importance of MNCs to Singapore's industrialisation drive cannot be overstated. As a small country with no sizeable domestic market,[57] Singapore adopted an export-orientated approach right from the beginning. Rather than establishing homegrown local industries, Singapore sought instead to court MNCs to set up operations in Singapore. This eliminated the need to establish a market, since the MNCs had well-established market networks abroad.[58] The use of MNCs in the development strategy had other advantages as well. MNCs would

[52] Ow Chin Hock, "Development Strategies, Economic Performance, and Relations with the United States: Singapore's Experience" (1990) 1(1) Journal of Asian Economics 61-85, 70.
[53] *Ibid.*
[54] Tan et. al. (n 11).
[55] *Ibid*.
[56] *Ibid*.
[57] Ow (n 52), 68.
[58] *Ibid.*

often bear the start-up risk of the new facility, bring in new technology and train the local workforce in the use of such technology.[59]

In order to attract MNCs to establish their Asia-Pacific HQs in Singapore, the Government granted tax incentives and removed bureaucratic red tape. However, the Government also used these policies as a means of consolidating its control over the MNCs, making clear to the MNCs that the provision of these benefits were contingent on the beneficiary following Government policy. For example, the Government made it absolutely clear that MNCs had to have an export-oriented market.[60] Further "soft-control" was exercised by the close contact which MNCs had with EDB officers, who were tasked to aggressively court MNCs and respond to their needs.

The success of this strategy led to the Singapore economy becoming heavily reliant on MNCs. GDP contribution from foreign firms and residents increased from 15.7% in 1966-1973 to 28.1% in 1979-1984.[61] This was particularly pronounced in the manufacturing sector, where foreign investments made up 76.7% of all investments in manufacturing from 1972-1986.[62]

Concerns About Local Businesses

However, the focus on MNCs has diminished over the years, especially in light of widespread complaints around 1985 about the "crowding out" of local entrepreneurs.[63] In response, the EDB then increased its support for local enterprises, with a plan intended for Singapore to "grow its own MNCs".[64]

ii. GLCs[65]

As noted above, in the early stages of Singapore's industrialisation, the dearth of human and financial capital encouraged the Government to directly intervene in the economy and set up businesses in areas such as finance, transport, logistics and defence. Numerous GLCs were established in sectors which the Government felt were underdeveloped,[66] particularly between 1968-1972.[67] Some estimated 505 GLCs (in 1986) have largely been held under three

[59] Diane K. Mauzy and R. S. Milne, *Singapore Politics Under the People's Action Party*, (2002), 68.
[60] Gale Asia (n 7).
[61] Ow (n 52), 68.
[62] *Ibid.*
[63] Huff (n 3), 332.
[64] Peebles and Wilson (n 2), 188.
[65] The exact extent of control which the Government has over GLCs has not been empirically studied and is unclear. GLCs may disagree that they are subject to Government control, asserting that they are profit and efficiency-oriented. Many are also public listed companies who must act in the interests of shareholders. Further, the recent spate of corruption cases involving GLCs also gives one pause. Nevertheless, there is a *prima facie* case for arguing that that GLCs are subject to some form of Government influence, if not control. Many GLCs count Government-controlled holding companies as their majority shareholders and owe their existence to some form of Government initiative.
[66] Roseme (n 27), 257.
[67] Ow (n 52), 71.

Government-controlled holding companies: Temasek Holdings, MDN Holdings, and Sheng-Li Holding Company.[68] These GLCs have had various extents of public ownership over time.[69]

Privatisation

Over time, concerns emerged about the dominance of various GLCs and their impact on Singapore capital markets. The Singapore stock market had for some time been limited by the fact that the majority of the GLCs owned by the Government were not listed on the stock exchange. As an extreme example, in 1993, the bulk of daily trading was largely confined to eight stocks, given the limited nature of the market.[70] This state of affairs was significantly contributed to by the delisting of the stocks of Malaysian companies from the Singapore Stock Exchange in 1989, since Malaysian companies accounted for 182 of the 329 stocks listed on the Stock Exchange of Singapore and thirty-seven percent of its market capitalization.[71]

This scenario has been remedied partially by Government's privatisation of a number of GLCs, to add depth to Singapore's equity markets. By issuing shares to a large number of people, the Government has ensured a widespread distribution of capital.[72] For instance, Singapore Telecommunications was privatised in 1993, and the Government sold a part of its equity in the company.[73] However, privatisation has been somewhat hampered by the Government's concern that there are not enough local businessmen with enough capital to take over and run these companies.[74] The Government has announced that its eventual goal is a more market-controlled economy with GLCs and statutory boards playing a smaller role.[75]

iii. Large Local Companies

Companies in certain sectors have been protected by the Government, allowing them to perform exceptionally well with a state-mandated oligopoly. Such protection had the effect of rendering these companies amenable to the control of the Government. The prime examples of these are the financial and banking sectors.[76] The banking sector in Singapore has traditionally been dominated by four main banking groups: the privately-owned Oversea-Chinese Banking Corporation, United Overseas Bank and Overseas Union Bank groups, and the Government-owned Development Bank of Singapore.[77] These local banking groups have been protected by the Government in the sense that foreign competition in the banking sector was limited through

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68 Roseme (n 27), 257.
69 Ow (n 52), 71.
70 Michael S. Bennett, "Securities Regulation in Singapore: The City-State as an International Financial Center" (1993-1994) 12 UCLA Pac. Basin L.J 1-33, 18.
71 *Ibid.*
72 Mauzy and Milne (n 59), 72.
73 Peebles and Wilson (n 2), 258.
74 *Ibid*.
75 *Ibid.*
76 *Ibid*, 46.
77 Huff (n 3), 343.

policies restricting the number of foreign banks and what they could do (e.g. the opening of branches and automatic teller machines).[78]

However, in the interests of developing Singapore into a global financial hub, the Government has since decided to open up the financial industry to more foreign banks. The protection offered by the Government has gradually been eroded, with the number of foreign banks rising sharply from 1981 to 1990 (from 86 to 128).[79]

Conclusion on the Control Model

The Government mechanisms explained above have allowed for the reciprocal relationship between SCL and the economy to flourish. The Government has clearly established control over the four levels of implementation, allowing them to pass legislation and then ensure that it is implemented in practice in the manner originally intended. It also allows for a strong feedback loop where policymakers are also kept aware of the changing conditions on the ground and are able to shape their policies accordingly. This is illustrated by the frequent reliance on senior executives from GLCs on review committees established by the government in SCL matters.[80] Such involvement and feedback from executives of GLCs facilitates acceptance of changes to SCL.

While it is not uncommon for governments to play an entrepreneurial role, Singapore is one of the few countries where the role has been played successfully.[81] Unlike in systems which practice nationalisation, Singapore successfully established enterprises that created new wealth and jobs.[82]

Moving forward, it is clear that the level of governmental control has been changing over time. The PAP government went from occupying every seat in Parliament to the lowest level of 93%.[83] By the standards of most developed democracies, this is still exceptionally high. There has been a drive to reduce the role of the statutory boards and GLCs in favour of market self-regulation. MNCs are also diminishing in importance in the Singaporean economy as the Government's focus shifts to Small and Medium Enterprises ("**SMEs**") in Singapore.

Despite these changing trends, the Government continues to maintain a very high level of control over the implementation of its regulations and in in its engagement with local businesses. There is no reason to doubt that the reciprocal relationship will continue, with the

78 Peebles and Wilson (n 2), 116.
79 Huff (n 3), 344.
80 For example, Sum Soon Lim (Temasek), Tan Keng Boon (DBS) and Boon Swan Foo (ST Engineering) were on the Corporate Finance Committee (1998) (see http://www.mas.gov.sg/~/media/resource/publications/consult_papers/1998/21%20October%201998%20The%20Securities%20Market%20Final%20Recommendations.pdf (accessed on 12 January 2018)). Also, Hong Tuck Kun (DBS) and Jeffery Chua (Temasek) were on the Steering Committee for Review of the Companies Act (2011) (see the Steering Committee Report (n 34)).
81 Ow (n 52), 70.
82 Tan et. al. (n 11).
83 Tan (n 49), 125.

Legislature responding to trigger changes in the Singapore economy with policies that can be effectively implemented at every level.

THEME II: FACTORS INFLUENCING LEGISLATIVE RESPONSES

When the Government has decided to respond to a trigger economic event, the reciprocal relationship helps to ensure that its response will be implemented as intended. However, before this happens, a variety of factors will first influence the decision on whether to respond and if so, how to respond. While there are potentially an infinite number of causal factors motivating legislative reform, we have limited our focus to 1) Domestic political and economic events; and 2) Foreign laws and economic events, the two key factors which have had tremendous influence on SCL. The influence of these factors has changed over time and is very dependent on the particular area of SCL concerned. Four areas of SCL have been selected for review for the purposes of this study: 1) Regulation, 2) Insolvency, 3) Protecting Interested Parties, and 4) Directors' Duties.

D. Riding the Regulation Roller-Coaster: Changes in Singapore's Regulatory Regime[84]

The appearance of the first locally-formed joint stock companies in Singapore coincided with the period of rapid development of Singapore following its establishment as a trading post by Sir Stamford Raffles in 1819.[85] Before 1930, share trading was usually done informally by stockbrokers in a little room in the Arcade at Raffles Place.[86] Eventually, the Singapore Stockbrokers Association was formed in June 1930 to regulate the interest of the investing public and the conduct of its own members.[87] This was the precursor to the modern Singapore Exchange. On 23 May 1973, the Securities Industry Act 1973 was enacted alongside several other amendments to the Companies Act, forming the first modern regulatory framework for securities regulation in Singapore.[88]

The lack of a comprehensive regulatory framework for what appears to be an unusually long time can be explained by the nature of the domestic capital market in Singapore, which has traditionally had small capitalisation.[89] This is due both to the limited pool of investors in Singapore (and the absence of a hinterland) and the requirement of compulsory savings under the Central Provident Fund ("**CPF**") scheme, which locked up a sizeable portion of available capital.[90] In terms of equity capital markets, the MNCs and GLCs which dominated the

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84 For a more in-depth coverage of the history of the securities markets in Singapore, see Hans Tjio, *Principles and Practice of Securities Regulation in Singapore* (2nd Ed) (2011) (Lexis Nexis), 32-79.

85 Wong Kie Ann, "Role of Singapore and Malaysian Stock Exchanges", in *Handbook of Singapore-Malaysian Corporate Finance*, Tan Chwee Huat and Kwan Kuen-Chor (eds.) (1988), 74.

86 *Ibid*.

87 *Ibid*, 75.

88 *Ibid*, 81.

89 Huff (n 3), 344.

90 Peebles and Wilson (n 2), 94.

Singapore economic scene (as noted above) often bypassed the domestic capital market in favour of foreign capital markets (for MNCs) and government funding (for GLCs). For debt capital markets, most MNCs preferred to rely on foreign funding such as loans and trade credits with their parent companies.[91] GLCs have generally been profitable and have not required much debt financing.[92] In addition, GLCs were not created through share issues and were largely held by one or more of the large government holding companies.[93]

In 1984, Parliament made some changes to the regulatory regime, including amendments to broaden the scope of insider trading provisions and strengthen the regulation of take-overs.[94] However, barely a year after the Companies Act (Cap. 50) (1984 Rev. Ed.) came into force, Parliament was forced to review the Act once again due to the Pan-El Crisis.

The Pan-Electric Crisis ("Pan-El")[95]

Pan-El was a marine salvage and construction company that got into financial trouble when it was unable to meet its debt obligations. Further investigations revealed that the company had entered into some S$280m of forward contacts in its shares that it could not honour.[96] The financial collapse of Pan-El affected several stockbroking firms who were overtrading and over-extending loans.[97] The worry was that this would set off a chain reaction that would result in stockbrokers, banks and minority shareholders losing practically all their investments.[98]

Framework for Analysing the post-Pan-El Reforms

In the wake of the Pan-El Crisis, Parliament reacted by enacting the Companies (Amendment) Act 1987 and the Securities Industry Act 1986,[99] which sought to remedy the weaknesses that had led to the crisis.[100] Corporate regulation mechanisms can be divided along at least two lines. Firstly, there can be merit-based regulation - where a regulator assesses securities being offered to the public; and disclosure-based regulation - where market participants are allowed to make their own assessment of the securities being offered, based on information that firms

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91 *Ibid*, 209.
92 *Ibid*, 115.
93 *Ibid*.
94 Hansard 1984 (n 17), col 345-346.
95 See Tjio (n 84), 40-47.
96 "Singapore after its Pan-Electric shock", The Economist (London, England), Saturday, May 31, 1986, 92.
97 Tan (n 21), 23.
98 The Economist (n 96), 92.
99 The latter Act was repealed in 2001 and replaced with the Securities and Futures Act (Cap. 289) ("**SFA**") which is currently in force.
100 Parliament expressly referenced the Pan-El Crisis in the Parliamentary debates over the Companies (Amendment) Bill 1987 and the Securities Industry Bill 1986. See Singapore Parliamentary Debates, Official Report (5 May 1986) col 51 (Mr J. B. Jeyaretnam, Member of Parliament for Anson) and Singapore Parliamentary Debates, Official Report (31 March 1986) col 1442 (Dr. Hu Hsu Tau, The Minister for Finance).

are required to provide.[101] Common law countries tend to rely more on market regulation than civil law countries, with the courts playing a more prominent role as well.[102] Secondly, the disclosure of corporate information can be regulated by automatic disclosure - where firms are required to release certain kinds of information without the express demand of regulators; and reactionary disclosure - where parties are given legal powers to request specific information from firms.

Reform of Corporate Regulation

The Companies (Amendment) Act 1987 and Securities Industry Act 1986 provided the government with a framework to ensure that the Singapore stock exchange properly regulates the market.[103] The two main areas of reform in corporate regulation were disclosure and audit requirements. For broking houses, minimum financial requirements were set through capital adequacy requirements[104] and limits were placed on requirements for maintenance of reserve funds for firms.[105]

Disclosure Requirements

A new rule empowered 10 per cent of the members of a company or the holders of 5 per cent of the issued share capital to require the disclosure of the directors' emoluments and benefits in an audited statement.[106] Regulators were given the power to require local and foreign companies to produce company records, with mutilation or destruction of the documents being made an offence.[107] In cases of commercial fraud, inspectors could order directors to produce their personal bank statements.[108] The new regulatory regime was a far cry from the limited powers of inspection provided for in the Companies Act (1967 Ed.), which a specially commissioned committee of the London Metropolitan Police found to be inadequate.[109]

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[101] http://www.mas.gov.sg/annual_reports/annual20012002/developing-annual-c.html (accessed on 12 January 2018).

[102] Helen Anderson et. al, "The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison", I.C.L.Q. 2012, 61(1), 171-207, 174.

[103] Wong (n 85), 82.

[104] Ibid.

[105] *Ibid.* These provisions were introduced in the Securities Industry Act 1986 and the Securities Industry Regulations 1986. Both the Act and the Regulations were repealed in 2001 and replaced with the Securities and Futures Act (Cap. 289) ("**SFA**") which is currently in force. The SFA currently imposes various requirements on the conduct of brokers. (See ss. 2(1), 84, 85, 87, 90, 91, 93 - 97, 99, 100, 102, 104, 118, 120, 123, 128, 337, 339(3) and 341). Further details are laid out in the Securities and Futures (Licensing and Conduct of Business) Regulations (Rg. 10) (2004 Rev. Ed.). In addition, brokers are supervised by the MAS, which has additional regulatory powers.

[106] Andrew Hicks, "Company Law Reform in Singapore", Comp. Law. (1987), 8(4), 188-190, 188.

[107] *Ibid.*

[108] *Ibid.*

[109] Walter Woon (Ed), *Woon's Corporations Law* (Lexis Nexis 2016), 35. Also see Singapore Parliamentary Debates, Official Report (5 May 1986) ("**Hansard 1986**"), cols 38-39 (Dr Hu Tsu Tau, Minister for Finance), arguing for the need for new powers to effectively combat commercial fraud.

Audit Requirements

The form and content of accounts were standardised, reducing the possibility of information being cherry-picked to present a misleading picture.[110] Directors were required to take reasonable steps to ensure that the accounts were audited at least 14 days before the Annual General Meeting ("**AGM**") and if the accounts were submitted on time, auditors would be guilty of an offence if the audit was not completed before the AGM.[111]

As Parliament had more time to reflect on the Pan-El Crisis, further amendments to the corporate regulatory regime were made by a further statutory amendment in 1989.[112] Public companies were required to establish a system of internal accounting controls and audit committees were mandated for listed companies.[113] In addition, auditors were given the responsibility of reporting corporate fraud, with the enactment of a new rule requiring them to report actual or potential offences involving fraud or dishonesty.[114]

Analysing the post-Pan-El Reforms

The amendments made in the wake of the Pan-El Crisis may be analysed in light of the framework discussed above. The pre-1985 corporate regulatory regime was deficient in both merit-based and disclosure-based regulatory mechanisms. In terms of the framework of assessment, Singapore had a largely merit-based system at the time. However, regulation by the regulators may not have been particularly effective with the tools then available.

The regulators had no real powers[115] and minority shareholders had little legal recourse other than a largely inapplicable oppression remedy[116] and a common law n derivative action that was notoriously difficult to bring.[117] Both automatic disclosure and reactionary disclosure were weak, with no mandated standards for presenting accounts and inadequate powers given

[110] Hicks (n 106), 188.
[111] *Ibid.*
[112] Hansard 1989 (n 22).
[113] *Ibid*, cols 106-107.
[114] *Ibid.*
[115] MAS Paper (n 44), i.
[116] It was necessary for a member to show that they had suffered unfair prejudice to successfully plead oppression. This might not always be easy to prove when company directors engaged in risky practices that had not yet caused any loss. The courts in Singapore are reluctant to second guess board decisions, see Chia Yaru, "The Business of Judging Directors' Business Judgments in Singapore Courts", (2016) 28 SAcLJ 428, 470-471. In addition, the remedy, which has its basis in equity, is difficult to invoke in the context of publicly listed companies, see Tan Cheng-Han and Wee Meng-Seng, "Equity, Shareholders and Company Law" in *Equity, Trusts and Commerce*, Paul S Davies and James Penner (eds.) (2017), 12-17. Conceptually, the shareholder oppression action is arguably provided to protect the interests of the members of a company while the derivative action enables a member to bring an action on behalf of a company. Courts have been concerned about drawing a clear boundary between the two actions. See Paul Davies and Sarah Worthington, *Gower & Davies: Principles of Modern Company Law* (10th Ed.) (2016) (Sweet & Maxwell), 674-678, citing *Charnley Davies Ltd (No.2), Re* [1990] B.C.L.C. 760.
[117] See Singapore Parliamentary Debates, Official Report (14 September 1992) ("**Hansard 1992**"), col 231 (Dr Richard Hu Tsu Tau, Minister for Finance).

to the regulators to demand information.[118] With an information deficit, both regulators and shareholders not only lacked the ability to do anything about questionable practices, but were often completely ignorant of such practices in the first place. Even while external regulation was weak, self-regulation was completely non-existent. It is thus unsurprising that the corporate regulatory regime was completely unable to detect the fraud and questionable practices that had such an impact on the securities market.

The post-Pan-El reforms sought to improve disclosure and investor protection,[119] enhancing both automatic and reactionary disclosure of information by increasing audit and disclosure standards. The merit-based regulatory regime was improved, with regulators being given more powers to ensure compliance and auditors being tasked with highlighting fraudulent and dishonest practices. In the wake of the crisis, Parliament chose to err on the side of caution, enhancing the regulatory regime to the extent that there were concerns that Singapore would be at a disadvantage when compared to other financial centres like Hong Kong or Tokyo.[120]

Concerns of Over-Regulation

Although no new crises erupted in the years after the Pan-El Crisis, changes to the competitive landscape in Southeast Asia led to increasing worries about the possibility of over-regulation in Singapore. By 1993, Singapore's regulatory regime was considered to be significantly more restrictive than that of any other Asian securities market.[121] There were concerns that the Singapore financial authorities placed too much emphasis on stability and too little on growth.[122] In light of the growth of aspiring financial centres in the region like Australia, Indonesia, Malaysia, Thailand and Taiwan,[123] Singapore faced the difficulty of having to balance prudent regulatory standards with international competition for capital. This was particularly difficult given that Singapore had the disadvantage of having a significantly smaller domestic market than those of its competitors.

Changing the Regulatory Regime

Singapore moved from a merit-based regime for public companies to a disclosure-based one in 1997.[124] She was heavily criticised for this at the time and even more so when the China

[118] See Woon (n 109) and Hansard 1986 (n 109).
[119] Hicks (n 106), 189.
[120] "Crime and punishment", The Economist (London, England), Saturday, November 22, 1986, 20.
[121] Bennett (n 70), 15.
[122] *Ibid.*
[123] *Ibid*, 9.
[124] Tjio (n 84), 56.

Aviation Oil scandal broke out later.[125] Under the merit-based regime, the regulator would decide which products would be allowed on the market.[126] The switch to a disclosure-based regime allowed companies more freedom in this respect. The regulator's focus would be on full and frank disclosure, with the onus on the investor to make informed decisions.[127]

The decision on whether to move from a merit-based to a disclosure-based regulatory regime required Parliament to carefully balance the interests of ownership and management of companies.[128] The move eliminated the need for companies to receive approval from a regulatory agency prior to proceeding with a transaction,[129] easing the regulatory burden on management. On the other hand, it required shareholders to more actively monitor the management of companies if they wished to safeguard their investments. Without a regulator to determine which transactions should be approved, shareholders would have to rely on the public disclosures filed by management to determine whether to intervene or to vote with their feet and sell their shares.

The difficulty is that the disclosure-based model requires shareholders to be more vigilant in the oversight of the companies which they own. Some companies have a mindset of minimum disclosure, preferring not to give shareholders more information than what is expressly required under the regulatory regime. This has caused some problems since shareholders still tend not to ask for more information.[130] Shareholder monitoring is weak where minority shareholders are dispersed and ultimately, the equity market in Singapore is dominated by the government, families and wealthy individuals.[131] In the absence of activist institutional investors, these are not good conditions for encouraging shareholder monitoring.

The effect of moving from a merit-based to a disclosure-based regulatory regime was to shift more power to majority shareholders. Whether this was an unintended consequence is unknown, but the side-effect of replacing regulatory supervision with market-supervision meant that shareholders with more voting rights would have more power to make decisions that would have been previously determined by the regulators. In light of the fact that the equity market in Singapore is dominated by the government, families and wealthy individuals, there are concerns of a lack of safeguards for the rights of minority owners. This issue will be discussed subsequently in Section F of this paper.

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[125] Roseme (n 27), 261.
[126] Tjio (n 84), 56.
[127] *Ibid.*
[128] The Corporate Finance Committee appointed to consider reforms to the regulatory regime supported the move, recommending in its report that: "[a] predominantly disclosure based philosophy of regulation should be adopted as it best fosters a market driven environment that promotes innovation, entrepreneurship, efficiency and business flexibility while protecting the integrity of the securities market." See, Corporate Finance Committee, "The Securities Market Final Recommendations", 21 October 1998, 5.
[129] Roseme (n 27), 261.
[130] *Ibid.*
[131] *Ibid.*

The CAO Crisis

In November 2004, China Aviation Oil ("**CAO**") filed for protection from its creditors after suffering losses from speculative derivatives trading totalling US$550 million.[132] Despite legal requirements of continuous disclosure, the losses were not disclosed to the Singapore Exchange or captured in the company's financial statements.[133] The CEO of CAO, Chen Jiulin was found guilty to consenting to the non-disclosure and making of misleading statements and was jailed and fined.[134]

A few months after the CAO Crisis, the Singapore Stock Exchange announced that it would enhance its standards of governance and listings as part of "an annual review".[135] The focus of the new amendments was stated to be in enhancing corporate governance and extending the role of intermediaries.[136] The CAO Crisis also appears to have triggered a change in the disclosure attitude of the MAS. Whilst they tended to emphasise the confidentiality of its dealings with financial institutions in the past, the MAS has provided increased information in the form of staff and information papers, and substantiated grounds for enforcement actions against financial institutions since the CAO Crisis.[137]

The trend towards deregulation may simply have been temporarily derailed. The Chairman of the Singapore Stock Exchange stated in the company's annual report that the CAO Crisis did not necessarily suggest that the regulatory regime was defective.[138] As such, it is questionable whether the CAO Crisis has resulted in any long-term significant changes to the regulatory regime.

Factors Affecting Legislative Responses

Foreign Laws and Economic Events

The Singapore regulatory regime has been influenced by a wide variety of various factors. In terms of foreign laws and economic events, Singapore's move from a merit-based to a disclosure-based regulatory regime may have been influenced by increasing competition from other developing financial centres in Southeast Asia.[139] Her drive to present herself as not "overly-regulated" was also a direct result of the desire to attract Chinese companies to list in Singapore.[140]

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[132] *Ibid*, 250.
[133] Tjio (n 84), 63.
[134] Ibid, 64, citing *Public Prosecutor v Chen Jiulin* DAC 23249/2005.
[135] Roseme (n 27), 267.
[136] *Ibid*, 267-268.
[137] Yvonne C L Lee, "The Corporate Rule of Law: Governing Singapore's Securities Regulators", The Corporate Governance Law Review (2007) Vol 3. No.2, 225- 254, 243.
[138] Roseme (n 27), 262.
[139] Bennett (n 70), 9.
[140] Roseme (n 27), 260.

The CAO crisis illustrates the difficulties that Singapore faces in becoming a strong financial centre. While Singapore's key selling point has been its strong regulatory regime, which inspires confidence in investors,[141] it must balance this against the demands of companies who may potentially want to list in Singapore. Standards of corporate governance in China are very different from Singapore and Chinese companies are often secretive and unwilling to adhere to the transparency standards of Western countries.[142] Moving forward, it appears that Singapore will continue to adjust her regulatory regime depending on foreign laws and economic events, especially since the focus has shifted from China to Southeast Asia in terms of courting companies to list in Singapore.

Domestic Political and Economic Events

As for domestic political and economic events, the immediate responses to the Pan-El and CAO Crises demonstrate the paramount influence which domestic developments have on SCL. In contrast to foreign laws and economic events, which were responded to over time, the legislative responses to domestic events were generally swift and bold, no doubt reflecting the immediacy of the impact domestic events can have on the local economy and the need to manage any potential political fallout from disgruntled investors.

E. Rising from the Ashes: Insolvency Policy as a Tool for Growth

The Companies Act (1967 Ed.) has provided for an insolvency regime since its earliest incarnation. The Companies (Winding-Up) Rules 1969 have been in existence for nearly as long. However, there were no major developments to the insolvency regime until 1984 and the Pan-El Crisis in 1985, which coincided with a recession. The reform of the insolvency regime was perhaps not seen as much of a priority due to the focus of the Government at the time. From 1967 to 1984, Singapore focused on attracting foreign investments and courting MNCs to set up operations in the country. The Government also set up numerous GLCs.

A study conducted around 1978 revealed that not a single MNC's business had failed in Singapore.[143] It revealed that wholly-owned foreign enterprises from the US, Europe and Japan had a failure rate of only 6%.[144] One can thus see why insolvency reform was not a priority at this point. The most important companies to Singapore's economy at the time had a very low risk of insolvency, reducing the importance of a well-developed regime to deal with such situations. As for GLCs, they were largely managed by the Government and strong insolvency legislation was not required to deal with the case if they went insolvent.

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[141] *Ibid*, 250.
[142] *Ibid.*
[143] Gale Asia, *The Papers of Lee Kuan Yew: Speeches, Interviews and Dialogues*, (2011), "Extrapolating from the Singapore Experience (1978)".
[144] *Ibid.*

The pre-Pan-El insolvency regime has been described as "weighed in favour of creditors".[145] Companies with temporary liquidity problems were subject to the mercy of its creditors and sometimes forcibly wound up.[146] 1985 marked the beginning of a shift towards a more debtor-friendly system. The recession also highlighted the changes in the economic climate. With the rising cost of labour acting as a disincentive to foreign firms, Singapore could no longer predominantly rely on foreign investment to create jobs. The Government adapted its economic strategy to focus, *inter alia*, on the promotion of innovation, enterprise and entrepreneurship.[147] The 1985 amendments to the insolvency regime were in-line with these objectives as they were intended to encourage entrepreneurship and healthy risk-taking, leading to a climate more conducive to corporate rescue.[148]

Framework for Understanding Insolvency Policy

Insolvency policy focuses on balancing the various conflicts of interest at play when a company is teetering on the brink of collapse. The company management is likely to be slow to recognise an inevitable end[149] and in fact have an incentive to attempt to trade its way out of the crisis regardless of the odds. They lose nothing if the company eventually becomes insolvent, but stand to gain if they successfully keep it alive. This incentivises the company management to take more risks than would otherwise have been prudent.[150] On the other hand, creditors have an incentive to force payment as quickly as possible, attempting to secure an advantage over other creditors.[151] Creditors may not be willing to bear the risks of rehabilitating a company if they can secure (even at a fraction) payments by forcing a liquidation. The result of these conflicts of interest is the need for a neutral system to manage affairs and maximise aggregate welfare.

The Repeal of Automatic Disqualification of Directors

Another aspect of insolvency policy is the extent to which directors and other senior management are held to account for a failed business enterprise. In 1984, a particularly controversial amendment was passed with the intention of preventing abuse of the corporate form.[152] In one of the rare occasions documented in Hansard, several Members of Parliament

[145] Tan (n 47), 188.
[146] *Ibid.*
[147] *Ibid.*
[148] Debby Lim, "Banking and Insolvency", 30.1.1, available at http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-30 (accessed on 12 January 2018).
[149] Andrew Hicks, "Reforming Insolvency Law- Company Rescues", (1986) 7 Sing L. Rev., 128, 129.
[150] This effect has been extensively documented in English academic literature. See Keay, "Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-protection of Creditors" (2003) 66 MLR 665; and Keay, "Directors' Duties and Creditors' Interests" (2014) 130 LQR 443.
[151] *Ibid.*
[152] Singapore Parliamentary Debates, Official Report (29 June 1984), col 1511 (Prof. S. Jayakumar, The Minister for Labour and Second Minister for Law and Home Affairs).

vehemently objected to this amendment,[153] which provided for the automatic disqualification of directors from other directorships if they were on the boards of two insolvent companies which had gone into liquidation within five years of one another.[154] The provision was arguably intended to pre-empt and prevent the practice of establishing phoenix companies. When a company goes insolvent, its former directors may simply set up another company with a similar name to benefit from the goodwill of the previous firm, whilst avoiding its liabilities.[155] While the amendment may have had the effect of weeding out unfit directors, it also had the potential to disqualify directors who were merely unlucky enough to join the boards of two failing companies. Leave of court could be obtained to certify one as fit to be a director again, but the unfortunate director was left to bear the consequences of the disqualification applying in the interim.[156] The grave impact of the automatic disqualification provision was felt within a year. The timing of the amendment could not have been worse, for the 1985 Pan-El Crisis and the recession hit with full force shortly after it was passed, rendering numerous companies insolvent and affecting a considerable number of directors.

Throughout the entire saga, Parliament seems to have completely missed the point of disqualifying directors in the first place. A disqualification regime should be designed to protect shareholders from directors who are unfit to manage. An automatic disqualification provision is both under and over-inclusive as it fails to consider the significant element of chance. It will leave out directors with appalling management skills whose companies somehow managed to survive, while catching potentially brilliant directors who just happened to be on the boards of several companies in a severe recession. The key factor of the soundness of the management decisions is weakly assessed through the proxy of whether the company is liquidated, while the irrelevant considerations of chance and the number of companies heavily influences the disqualification.

Automatic disqualification was not only conceptually unsound but completely at odds with the strategy of promoting local entrepreneurship. By 1987, Parliament acknowledged that a court order should be required for disqualification and repealed automatic disqualification.[157] Currently, the position stands that directors are disqualified only where a court order to that effect has been made or they have been convicted of certain criminal offences.[158] This is a more refined approach to protecting shareholders and safeguarding against the abuse of corporate form.

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[153] Andrew Hicks and Walter Woon, The Companies Act of Singapore: An Annotation (Butterworths 1989), 296.
[154] Walter Woon, Company Law (2nd edn, Pearson 1997), 155. Also see Hansard 1984 (n 17), col 347.
[155] David Milman, "The "Phoenix Syndrome"", 2001 Insolvency Lawyer 119, 119.
[156] Woon (n 154), 155. Also see Walter Woon, Disqualification for Unfitness: Section 149 of the Companies Act (1985) 27 Mal LR 149; Walter Woon, "The Registrar's Shopping Lost – Some Problems Introduced by the Companies (Amendment) Act 1984" (1984) Mal LR 309, 326; Tan Boon Teik, "Duties of Directors under the Companies (Amendment) Act 1984" (1985) 11 Sec Ind Rev No 1 p1; and Walter Woon, "For Better or for Worse – Directors' Duties and Liabilities in Singapore" [1985] 2 MLJ xvi, xxvii-xxxiii.
[157] Hicks and Woon (n 153), 296.
[158] See, *inter alia*, ss 149, 149A, 148(1), 154(1), 154(2), 155 and 155A of the Companies Act (2006 Rev. Ed.).

The Introduction of Judicial Management

The birth of judicial management in Singapore is directly attributable to the Pan-El Crisis.[159] The prolonged state of limbo that Pan-El was in before its eventual liquidation highlighted the inadequacies of the existing insolvency procedures, prompting the Government to introduce a new mechanism.[160] The intention was to preserve viable businesses and protect them from creditors until they could be restored to profitability.[161] To achieve this goal, the law provided for the appointment of an independent qualified judicial manager to run the business in the best interests of the company and its creditors,[162] relieving the directors of their control[163] and shielding the company from the conflicts of interest that might otherwise sink it. It has been said that the Pan El crisis and the 1985 recession contributed to a commercial environment more conducive to entrepreneurship and healthy risk-taking.[164]

While the intentions of introducing the judicial management regime in Singapore may have been good, its effectiveness has been somewhat questionable. In 2013, the Report of the Insolvency Law Review Committee ("**ILRC**") noted that there are few reported success cases where judicial management has been applied and that the majority of applications for judicial management filed in the courts have not been granted.[165] However, the ILRC acknowledged that judicial management still has a role to play in Singapore's insolvency regime, particularly in cases where there is a need to realise or maximise the value of corporate assets that would be extinguished or devalued in the event of liquidation.[166] Thus, they proposed retaining it, but with certain reforms to address its deficiencies.[167]

An International Insolvency Hub

In the wake of the 2008 global financial crisis and growing demand for restructuring work in the Asia Pacific region,[168] the Government spotted an opportunity for Singapore to position itself as a leading insolvency and debt restructuring centre.[169] Two committees comprised of insolvency experts were commissioned to help achieve this[170] and their recommendations included several changes such as the adoption of the UNCITRAL Model Law on Cross-Border Insolvency and the reform of the current judicial management regime.[171] The recommendations

[159] Woon (n 109), 971.
[160] Hicks (n 106), 188.
[161] *Ibid*, Choong Thung Cheong, "Judicial Management in Corporate Insolvency", (1988) 30 Mal. L. R., 259, 261.
[162] Hicks (n 106), 194.
[163] Tan (n 47), 190.
[164] Lim (n 146).
[165] Success rates hovering between 26% and 28% from 1996 to 2010. See Report of the Insolvency Law Review Committee (2013) ("**ILRC Report**") around 82-89.
[166] *Ibid.*
[167] *Ibid.*
[168] Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, 20 April 2016 ("**Insolvency Committee Report**"), 1.5.
[169] *Ibid*, 2.1-2.3.
[170] *Ibid*, 1.4, ILRC Report (n 165).
[171] Insolvency Committee Report (n 168), 1.5, ILRC Report (n 165), 129.

are expected to be reviewed by Parliament and enacted progressively within a few years.[172] The establishment of Singapore as an international centre for insolvency and debt restructuring is intended to enable insolvency to be an engine for economic growth in Singapore in a very different way and will mark the next stage of the development of insolvency law in Singapore.

However, there have been concerns about the way that SCL has been reformed and the potential effectiveness of the new insolvency regime. As part of the reform, Singapore adopted significant parts of the United States Chapter 11 framework.[173] However, given the complexities of Chapter 11 and the need to add parts of the Chapter 11 framework to the established Singapore insolvency regime, it is uncertain whether Singapore will succeed with the new regime.[174] Further, there are questions of whether the Chapter 11 framework is even appropriate for Singapore in the first place.[175] It may be that the policy makers are aware of this but are adopting the time tested practice of adapting a familiar international framework in SCL to engender confidence in an area that Singapore intends to grow. It highlights the limits of autochthony faced by a small country that is dependent on commerce for her lifeblood. Care must be taken to ensure that foreign legal imports are compatible with the domestic system while retaining the essence of what is being adopted.

F. International and Regional Influence and Reputation: Protecting Interested Parties

Arguably, the control of a company rests in the hands of the majority shareholders, either directly through exercise of their voting rights at a company general meeting, or more importantly, indirectly through their ability to appoint and remove directors. However, majority shareholders are not the only group who may have an interest in a company. Creditors and minority shareholders are, *inter alia*,[176] other interested parties who will be significantly affected by the decisions of the majority shareholders with respect to the company. Thus, Company Law provides for several safeguards to ensure that these interested parties are protected from the untrammelled control of the majority shareholders over the company. These safeguards include capital maintenance regulations which address the tension between creditors and shareholders with respect to the allocation of a company's capital.[177] Without sufficient capital maintenance regulations, shareholders (who are generally in a position of control) can make distributions to themselves, reducing the pool of capital in the company that

[172] Insolvency Committee Report (n 168), 1.5.
[173] Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?", 29-30, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922956 (accessed on 12 January 2018).
[174] *Ibid*, 30.
[175] *Ibid*, 29-30.
[176] Success rates hovering between 26% and 28% from 1996 to 2010. See IRLC Report (n 165), around 82-89.
[177] Jennifer Payne, "Legal Capital in the United Kingdom after the Companies Act 2006", in Armour & Payne (eds), *Rationality in Company Law* (Hart Publishing, 2009), 124.

is potentially available to creditors.[178] This section studies the evolution of such safeguards over Singapore's economic history.

The main developments in these safeguards occurred relatively later than those for regulation and insolvency. Singapore was an established financial centre by the 1970s but increased competition from other regional financial centres significantly intensified in the late 1990s and early 2000s.[179] It was during this period that Singapore began to significantly relax its capital maintenance regime. At the same time, with a less prescriptive regulatory regime following the adoption of a more disclosure based system, Singapore started to place more emphasis on protecting minority shareholders.

The Statutory Derivative Action

The first milestone of safeguards reform occurred in 1993, with the enactment of a statutory derivative action. While the common law derivative action did exist in Singapore at the time, the considerable difficulties posed by the rule in *Foss v Harbottle* applied to Singapore common law as well[180] and Parliament recognised this.[181] Initially, the statutory derivative action was limited to unlisted companies on the basis that listed companies were already subject to extensive central regulation and disgruntled shareholders could readily sell their holdings on the open market.[182] Parliament was concerned that extending the statutory derivative action to listed companies would encourage minority shareholders to make frivolous applications and open the floodgates of litigation.[183] The statutory derivative action was only extended to listed companies in 2014, on the advice of the Steering Committee[184] that frivolous applications would likely be minimal due to the prospect of having to pay the legal costs of the application.[185]

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[178] *Ibid*, 125.

[179] Menon (n 10).

[180] The difficulties in actually bringing a common law derivative action have been discussed extensively and eventually led other common law jurisdictions like Australia, Hong Kong and the UK to enact their own statutory derivative actions. See Roger Smith, "Minority Shareholders and Corporate Irregularities" (1978) 41 MLR 147; Wedderburn, "Shareholders' Rights and the Rule in *Foss v Harbottle*" [1957] CLJ 194 and [1958] CLJ 93; Sullivan, "Restating the Scope of the Derivative Action" [1985] CLJ 236; and, for an illustration of the practical impact of enacting a statutory derivative action, Keay & Loughrey, "Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006" (2008) 124 LQR 469.

[181] Hansard 1992 (n 117).

[182] Singapore Parliamentary Debates, Official Report (28 May 1993) ("**Hansard 1993**"), col 293 (Dr Richard Hu Tsu Tau, Minister for Finance).

[183] M. Chew, Minority Shareholders' Rights and Remedies, 2nd edn (LexisNexis: Singapore, 2007) 295, 296. Also see Walter Woon, "Reforming Company Law in Singapore", (2011) 23 SAcLJ 795, [43], citing Hansard 1993 (n 182), col 293.

[184] Woon (n 183), [43], citing Steering Committee Report (n 34), Recommendations 2.29 and 2.30.

[185] *Ibid.* One of the authors, who has been involved in a number of exercises relating to SCL reform, can attest to a concern in Singapore that an overly litigious culture, especially that found in the United States, does not evolve because of the fear that this will hamper business enterprise. Such fear is overblown as Singapore does not have class action suits and unlike the United States, the general principle is that the losing party bears the legal costs of the other party.

The Introduction of Share Buy-Backs

The next milestone occurred in 1998, when Parliament introduced an amendment allowing companies to buy-back their own shares using distributable profits without the need for court approval.[186] This was one of the effects of Singapore moving from a merit-based to a disclosure-based regulatory regime in 1997. Parliament noted that share buy-backs provided certain advantages over capital reduction procedures in terms of flexibility and efficiency,[187] advantages which led several of Singapore's larger corporations to consider and push for the approval of such schemes.[188] The key driving force for the amendment was the increased competition from other financial centres, as Parliament noted that Singapore was behind the United States, the United Kingdom, Hong Kong, Australia and New Zealand in that it lacked some form of share buy-back procedure.[189]

The scope of the share buy-back provisions were extended in 2000 to include preference shares[190] and again in 2005, when companies were allowed to buy-back shares using profits or paid-up capital, instead of only distributable profits.[191] As permitting share buy-backs potentially increased the risk of disadvantaging creditors, Parliament introduced a solvency test, which made directors' personally liable if they approved share buy-backs knowing that it would result in the insolvency of the company.[192]

The 2005 Major Reforms

Safeguards underwent a massive paradigm shift in 2005, with numerous amendments being made to modernise the regime and abolish what were perceived to be outmoded relics of the past. The concepts of par value and authorised capital were removed from the legislation on the grounds that they were highly inaccurate proxies for value and served no useful purpose.[193] An alternative capital reduction regime was also instituted, allowing companies to reduce their share capital without the need for Court approval.[194] Instead, a special shareholders' resolution

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[186] Singapore Parliamentary Debates, Official Report (12 October 1998) ("**Hansard 1998**") col 1078 (Dr Richard Hu Tsu Tau, The Minister for Finance); also see Victor C. S. Yeo, "Singapore: A Cautious Approach to Share Buy-Backs", Comp. Law. 1999, 20(9), 308-310, 308.

[187] Hansard 1998 (n 186), col 1078.

[188] Yeo (n 186), 109, citing Straits Times, August 10, 1998, p. 37.

[189] Hansard 1998 (n 186), col 1078.

[190] Singapore Parliamentary Debates, Official Report (13 November 2000), cols 1027- 1028 (Mr Lim Hng Kiang, The Second Minister for Finance).

[191] Singapore Parliamentary Debates, Official Report (16 May 2005) ("**Hansard 2005**") col 702 (Mr Raymond Lim Siang Keat, The Second Minister for Finance).

[192] Hansard 1998 (n 186), col 1078.

[193] Hansard 2005 (n 191), col 699. See Maisie Ooi, Lucien Wong and Margaret Chew, "The Companies (Amendment) Act 2005: Impact on Capital Raising and Capital Maintenance" in *Developments in Singapore Law Between 2001 and 2005*, ed Teo Keang Sood (SAL, 2006).

[194] Hansard 2005 (n 191), cols 700- 701.

would suffice, provided that it was supported by a solvency statement from the company's directors.[195]

Financial assistance restrictions were also liberalised, with companies allowed to provide such assistance, provided that it did not exceed 10% of the paid-up capital and reserves of the company, or there was unanimous shareholder approval.[196] Once again, Parliament attempted to protect shareholders through a disclosure-based mechanism, where directors were required to make a solvency statement that would result in criminal penalties if made without reasonable grounds.[197] In 2014, financial assistance was eventually made even easier by the introduction of a new "material prejudice" exception that provided that financial assistance by a public company or a subsidiary of one was not prohibited so long as, *inter alia*, it did not materially prejudice the interests of the company, its shareholders and the claims of its creditors and the terms of assistance were fair and reasonable to the company.[198] The financial assistance prohibition for private companies was completely abolished.

Greater reliance was placed on disclosure-based mechanisms, with the Companies (Amendment) Act 2014 introducing a new procedure for financial assistance in s 76(9AB). To safeguard shareholders, s 76 of the Companies Act (2006 Rev. Ed.) provides that a company may not provide financial assistance in connection with the acquisition of its own shares.[199] Before 2014, there were limited exceptions to the s 76 rule, involving the making of a solvency statement by directors and a whitewash procedure of shareholders passing a special resolution.[200] The new s76(9AB) procedure simplifies matters considerably by allowing financial assistance in cases where the directors pass a resolution that the company should give the assistance, provided that the terms of the assistance are fair and reasonable to the company and the interests of the company, shareholders and creditors are not materially prejudiced.[201]

2014: Taking Flexibility to the Next Level

By 2014, Singapore was starting to feel significant pressure to introduce more flexibility into its capital markets regulation. Leading bourses like the New York Stock Exchange and The London Stock Exchange had allowed dual-class share ("**DCS**") structures for listed companies for years, making them an attractive listing location for tech companies in particular, which

[195] *Ibid*, col 701.
[196] *Ibid*, cols 700- 701.
[197] Woon (n 109), 351.
[198] s 76(9AB) Companies Act (2006 Rev. Ed.), introduced by the Companies (Amendment) Act 2014; Annabelle Yip, "Financial Assistance in Singapore", (2016) 2 JIBFL 103B, 104C.
[199] Yip (n 198), 103B. Also see Eilis Ferran, "Financial Assistance: Changing Policy Perceptions but Static Law" [2004] CLJ 225, 240.
[200] *Ibid.*
[201] *Ibid.*

have tended to prefer such structures.[202] In contrast, the Hong Kong Stock Exchange had lost the listing of Alibaba to the New York Stock Exchange due to its unwillingness to remove or allow the circumvention of its ban on DCS.[203] The loss of one of the largest ever initial public offerings on the basis of this single point weighed heavily on the minds of Parliament, which was already under pressure on this issue due to reports that Manchester United had supposedly given up attempts to list in Singapore due to the prohibition on DCS.[204] Parliament eventually amended the law to allow for DCS for public companies in addition to private ones.[205] The issue thus shifted to the Singapore Exchange to determine whether to allow DCS structures to list on the Exchange.

The Singapore Exchange was understandably uncertain as to this decision.[206] Singapore's previous experience with some black sheep Overseas-Listed Chinese Firms has not done its reputation any favours[207] and there are concerns that allowing dual class shares may not be in Singapore's interest as a financial centre.[208] On the other hand, some academics and practitioners have been more positive about dual class shares, with the general consensus being that it may be worth allowing them so long as proper safeguards and regulations are put in place to manage the risks.[209] The Singapore Exchange has launched a public consultation exercise on whether to allow companies with DCS structures to be listed on the Exchange.[210] The outcome of the consultation is still uncertain. The Singapore Exchange has also sought the advice of the SGX Listing Advisory Committee ("**LAC**") on this issue, which overwhelmingly voted in favour of permitting DCS structures to list on the Exchange.[211] However, the LAC advised that such structures should only be permitted if there is a compelling reason for it.[212] Thus, although there should be the flexibility to offer DCS listings when the right company

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[202] Singapore Parliamentary Debates, Official Report (8 October 2014) (Mr Ong Teng Koon).

[203] *Ibid.* Also see Pey Woan, Lee and Christopher C. H. Chen, "Modernising Company Law: The Singapore Experience", (2016) Company and Securities Law Journal 34, (2), 157-165, 162, citing R Chan and J Ho, "Should Listed Companies be Allowed to Adopt Dual-Class Share Structure in Hong Kong?" (2014) 43 CLWR 155.

[204] Lee and Chen (n 203), 162, citing Reuters, "Singapore to Allow Dual-class Shares to Attract Listings", Reuters, 3 October 2012; L Lim, "Recent Amendments to the Companies Act: Rethinking Dual-class Shares in Singapore – Caveat Emptor?" (2015) Sing Law Gaz 30.

[205] Wang (n 26), citing Ministry of Finance, Review of the Singapore Companies Act: Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act, (Oct. 3, 2012), available at http://app.mof.gov.sg/data/cmsresource/SC_RCA_Final/AnnexA_SC_RCA.pdf (visited Oct. 20, 2014), 43.

[206] See also the comments of the SGX Chairman at the SGX AGM on September 21, 2017, The Straits Times, September 22, 2017, available at http://www.straitstimes.com/business/sgx-says-still-evaluating-feedback-on-dual-class-shares (accessed on 12 January 2018).

[207] See Peh (n 29).

[208] Mak Yuen Teen has been a vocal opponent of dual class shares, writing extensively on this issue. See http://governanceforstakeholders.com/2016/08/26/mas-should-say-no-to-dual-class-shares/, http://governanceforstakeholders.com/2015/11/28/say-no-to-dual-class-shares/, http://governanceforstakeholders.com/2016/08/31/dual-class-shares-safeguards-or-minefields/, and http://governanceforstakeholders.com/2016/10/03/dual-class-shares-myopia-or-opportunism/ (accessed on 12 January 2018).

[209] Dy (n 31).

[210] See http://www.channelnewsasia.com/news/singapore/sgx-seeks-feedback-on-possible-introduction-of-dual-class-share/3524478.html (accessed on 12 January 2018).

[211] Singapore Exchange, Listings Advisory Committee: FY2016 Annual Report, 2.

[212] *Ibid*, 14.

comes along, companies with DCS structures are not intended to and are unlikely to become the norm in Singapore.

Factors Affecting Legislative Responses

Foreign Laws and Economic Events

Due to a small domestic capital market, Singapore's success as a financial centre was highly dependent on its ability to attract foreign firms and capital.[213] As such, the Government has always been cognisant of the need to evaluate Singapore's safeguards vis-à-vis the competition and ensure that it remains attractive to investors and potential listing companies. This involves a delicate balancing act. It is crucial to ensure that safeguards are not excessively strict as to drive away potential listing companies and simultaneously, offer sufficient protection to investors to avoid a reputation of being a weak regulator beholden to the interests of companies and majority shareholders. In practice, international pressures have resulted in a constant softening of what were once seen as necessary safeguards. This is in line with global trends as well, as competition for mobile capital intensifies.[214]

The strongest indication of the sheer influence which foreign laws and economic events have on safeguards in Singapore is probably Singapore's recent shift to permit DCS structures through an amendment to the Companies Act. Despite numerous concerns about the risk to Singapore's reputation, Singapore's Parliament has decided to remove the legal impediment.

Domestic Political and Economic Events

The influence of domestic political and economic events on safeguards in Singapore can be seen by the close relationship between the development of the Singapore domestic capital markets and capital maintenance regulations. Before the 1970s, limited domestic capital markets corresponded with few changes to the regulatory regime. Thereafter, with increased privatisation of GLCs and the permission to use CPF funds to invest in certain shares, domestic capital markets expanded, with a corresponding increase in the rate of developments of the regulatory regime.[215]

G. Toeing a Visible Line: Rethinking Directors' Duties

[213] Huff (n 3), 344.

[214] It is noted that New Zealand has abolished the capital maintenance doctrine altogether. Wee Meng Seng argues that Singapore should do the same. See Wee Meng Seng, "Reforming Capital Maintenance Law: The Companies (Amendment) Act 2005", (2007) 19 SAcLJ 295.

[215] Peebles and Wilson argue that the Government used the liberalisation of the use of the CPF "as an incentive for attracting foreign fund managers to Singapore", noting that at the end of 2000, CPF balances totalled S$90.298 billion. See Peebles and Wilson (n 2), 89.

Traditionally, the law on directors' duties in Singapore essentially followed the English position, which focused heavily on common law rather than statute. However, when the first edition of the Companies Act was enacted in 1967, it drew heavily on the 1965 Malaysian Companies Act, which itself followed the Australian model of directors' duties. Under the Australian model, common law and statute imposed concurrent and sometimes overlapping duties on directors.[216] Thus, while directors' duties under SCL had a statutory framework, it was also able to benefit from developments in English jurisprudence as the latter evolved. The main difference between the two sources of law was that the common law duties could be contracted out of under certain conditions whilst statutory duties were binding regardless of any agreements to the contrary.[217]

Codification

The U.K. eschewed the codification of common law directors' duties until 2006, when Westminster finally reversed this long-standing position, adopting amendments that had the effect of completely replacing any common law duties in this area with statutory duties. The common law was relegated to the role of clarifying the statutory duties and aiding in their interpretation.[218]

After nearly fifty years of gradual and minor changes to Singapore's directors' duties legislation, the two approaches of complete codification and the Australian model were subjected to detailed scrutiny when the Steering Committee evaluated whether to codify directors' duties in 2011.[219] The Steering Committee eventually recommended against codification on the grounds that "that such a move would inhibit judicial development in a particularly dynamic area of law."[220] The core structure of directors' duties legislation in Singapore remained unchanged for an extraordinary period of time, especially when assessed in light of the developments in regulation, insolvency and capital maintenance law within the same period. However, it is not difficult to see why Parliament was comfortable with the status quo.

In a sense, Singapore had the best of both worlds by adopting the Australian model. She was able to avail herself of the latest developments in the law on directors' duties, which, as the Steering Committee noted, tended to develop rather rapidly. On the other hand, having a coexisting statutory framework enabled Parliament to directly intervene to remedy weaknesses and gaps in the common law. The English common law could not be expected to take into account the local conditions in Singapore and the relatively low volume of litigation

[216] Rosemary Teele Langford, "General Law and Statutory Duties: "Unmixed Oil and Water" or "Integrated Parts of the Whole Law?", (2015) 131 Law Quarterly Review 635, 640.
[217] Tan Cheng Han, "Singapore Company Law", 8 January 2016, 16.3.3, available at http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-16 (accessed on 12 January 2018).
[218] Langford (n 216), 640.
[219] Lee and Chen (n 203), 163, citing Steering Committee Report (n 32), (1-26).
[220] *Ibid.*

in Singapore meant that uncertainty would persist until such issues specific to Singapore found their way into the local courts.

The price to pay for such flexibility was some uncertainty as to the exact scope of directors' duties and how the law would be applied. Without an exhaustive list of duties which directors could refer to, legal advice would have to be sought more often, creating transaction costs. However, it is not clear that the English model has fared any better since directors' duties were codified there in 2006. The inherent open texture of legal language[221] and the inability of Westminster to predict changing circumstances have meant that it is currently still impossible to form any sound legal position just by looking at the UK Companies Act 2006 alone.[222] The English statutory provisions must still be read in conjunction with the common law, raising questions on whether codification has actually made the law more accessible to the lay public. If not, the more flexible Australian model would probably still be a better choice.

As to whether there may come a point where directors' duties have crystallised such that codification may become a more attractive option, the U.K.'s experience with codification does not encourage other jurisdictions to follow its lead. The loss of flexibility in such a system seems poorly compensated by any corresponding gains in "legal certainty". There has been a call, however, for some statutory intervention to enact a formal business judgment rule, which would serve to clarify the law and help directors avoid breaching their duties.[223]

The s 407 General Penalty Provision

Walter Woon has singled out s 407 of the Companies Act (2006 Rev. Ed.) for criticism, noting that it is far too broad, given that it provides that the failure to comply with any provision of the Act is an offence.[224] The Steering Committee recommended that the general penalty provision in s 407 be repealed and that Parliament individually assess the appropriate penalty for each contravention of the Act.[225] Section 407 has its origins in the Australian Companies Act 1961, which was adopted in the Malaysian Companies Act of 1965. From there, it found its way into the first edition of Singapore's Companies Act in 1967.

Australia has amended the General Penalty Provision to reference a Schedule which provides for specific penalties for each of the offences in the Australian Corporations Act 2001.[226] In contrast, Malaysia has retained the General Penalty Provision in her latest amendment to her Companies Act in 2016 in s 588. The Steering Committee's proposal to

[221] For a discussion of the open texture of law, see Herbert L. A. Hart, '*The Concept of Law*', (2nd Ed) (OUP 1994), 128.

[222] Also note that s 178 of the UK Companies Act 2006 provides that the civil consequences of the breach of the codified directors' duties "are the same as would apply if the corresponding common law rule or equitable principle applied." Hence, the English common law still retains considerable importance.

[223] See Chia (n 116).

[224] Yap Chee Keong and Walter Woon, "Dealing with Directors Who Fail in Their Duties & Responsibilities", in Singapore Institute of Directors, *The Directors' Bulletin*, Kala Anandarajah (Ed.) Issue 5 (2011), 6-10, 7.

[225] Woon (n 183), [8].

[226] Section 1311, Australian Corporations Act 2001, referencing Schedule 3 of the Act.

repeal s 407 was not adopted by Parliament in the Companies (Amendment) Act 2014. It is possible that Parliament considered the change to be of little practical significance, given that the section is almost never used to prosecute where there has been no resulting loss to the company or the general public.[227]

Imposing Criminal Liability on Directors

Singapore's directors' duties regime provides for criminal penalties in certain situations. In recent years, leading practitioners and academics have raised the issue of whether criminal penalties are warranted for the breach of these duties, some of which are merely regulatory offences.[228] One potential consideration might be whether the "legal compass" is in fact aligned with the moral compass; in other words, whether the law imposes criminal penalties on directors for acts which can reasonably be said to be morally wrong. Walter Woon has expressed this concern in the statement that "one does not go to jail for the sins of others", noting that as a general guide, criminal liability should only be imposed in cases of egregious failures to act or dishonesty.[229] The Steering Committee has echoed this sentiment in their Report published in 2011.[230]

Of the offences provided for in the Companies Act (2006 Rev. Ed.), criminal liability is easy to justify for some. Directors who fail to disclose personal conflicts or interests in transactions are liable to be fined and/or jailed.[231] They may also be subject to imprisonment if they deliberately sign off on the company's financial statements knowing that the statements are not a true and fair reflection of the company's financial state.[232] A more dubious case would be where a director fails to fine an annual return.[233]

The s 157 Duty of Due Diligence Provision

One area where SCL completely departs from English law in terms of both statute and the common law is the imposition of criminal liability on directors should they breach their duty of diligence. Under s 157 of the Singapore Companies Act (Cap. 50) (2006 Rev. Ed.), a director who fails to use reasonable diligence in the discharge of the duties of his office may not only be subject to civil penalties, but may also be liable to both a fine and imprisonment. Once again, s 157 of the Singapore Companies Act has its origins in the Australian Companies Act 1961, finding its way into SCL through the Malaysian Companies Act of 1965.

The Steering Committee's report notes that other jurisdictions such as New Zealand and the UK have already taken steps to decriminalise breaches of duties of diligence.[234]

[227] Woon (n 183), [8].
[228] Yap and Woon (n 224).
[229] *Ibid*, 7-8.
[230] Steering Committee Report (n 34), (1-28) – (1-29).
[231] Section 156(1) and (5) Companies Act (2006 Rev. Ed.).
[232] s 201 Companies Act (2006 Rev. Ed.).
[233] *Ibid.* Also see Yap and Woon (n 224), 6.
[234] Steering Committee Report (n 34), (1-28).

Significantly, even Australia, from which Singapore derived s 157 in the first place, has removed the prospect of criminal penalties from their corresponding section.[235] On the other hand, Malaysia has retained their corresponding provision of s 157 (under s 213 of the Malaysian Companies Act 2016) in their recent amendment to their Companies Act. Some industry players have suggested that the prospect of criminal liability may have an impact on the willingness of competent directors to serve on corporate boards.[236] However, the Steering Committee eventually recommended that criminal penalties under s 157 be preserved so as not to send the wrong signal and encourage misconduct.[237]

However, as Victor Yeo notes, in handing down its recommendation, the Steering Committee did not distinguish between the various duties covered by s 157.[238] The section has two subsections, the first of which requires a director to act honestly and use reasonable diligence in the discharge of the duties of this office, and the second of which requires a director not to make improper use of his position in the company or any information acquired through that position. It is submitted that for an offence to pose imprisonment as a potential penalty, some sort of moral culpability ought to be required as part of the *mens rea* of the offence. The serious consequences of imprisonment make it exceedingly harsh to expose directors to the risk of it for mere regulatory offences or negligence. In this aspect, the recommendation of the Steering Committee that criminal penalties under s 157 should be retained may be defensible, but only in cases where a director has acted dishonestly. The breach of a duty of diligence can be addressed through the use of civil remedies alone, which are better suited for ensuring that the company is adequately compensated.[239] This would also put Singapore's position on the issue in line with those of the Commonwealth jurisdictions highlighted above.

In any case, it is noted that shareholders cannot bring a criminal action against the directors themselves, even in the event of a clear breach of the duty of diligence. While shareholders may bring a civil action (either with the support of the board of directors or through the derivative action), only the Accounting and Corporate Regulatory Authority ("**ACRA**") may commence criminal proceedings against errant directors. In practice, such proceedings are only brought in serious cases where shareholders have suffered serious losses and the directors can be said to be morally culpable to some extent.

Factors Affecting Legislative Responses

Foreign Laws and Economic Events

It is interesting to note that directors' duties is the one area of SCL in this paper that has been affected by foreign laws and economic events to a very small extent. Since the Australian

[235] *Ibid.*
[236] Victor Yeo Chuan Seng, "Directors' Duty of Care and Liability for Lapses in Corporate Disclosure Obligations: Observations and Comments on Select Issues", (2016) 28 SAcLJ 598, 601.
[237] Steering Committee Report (n 34), (1-28).
[238] Yeo (n 236), 602.
[239] *Ibid*, 602.

model of directors' duties was adopted in 1967 (the first edition of the Singapore Companies Act), there have been very few changes to the regulatory regime, despite the fact of numerous changes overseas. For example, SCL in this area remained unchanged when the UK codified its directors' duties in 2006, and when other Commonwealth jurisdictions abolished general penalty provisions and criminal liability for breach of the duty of diligence.

One potential reason for the lack of foreign influence in this area is that unlike capital markets regulation or protection of interested parties, which require competitive frameworks to attract foreign investment, directors' duties really only potentially affect a very small number of foreign directors. Further, the practical impact of s 157 has been very limited due to the fact that it is not commonly used, and even when it is, imprisonment is rarely handed down as a sentence. Thus, imprisonment is more of a theoretical possibility than a real risk. In addition, the common law and equitable rules that underlie this area are highly developed and the statutory framework does not intend to derogate from such rules.

Domestic Political and Economic Events

It would appear that domestic political and economic factors have had a far stronger impact in this area of SCL. Longstanding local fears of sending the wrong signal and encouraging misconduct have discouraged Parliament from reforming some of the harsher points of the regulatory regime. There has also been considerable inertia in this area of SCL, in that there appears to be a reluctance to disrupt the status quo, especially since no major issue has yet arisen from any problems with the regulatory regime. The Steering Committee's recommendation that the s 407 general penalty provision be repealed has not been adopted, which is made all the more stark when we consider the number of their recommendations that have been adopted by Parliament in the other areas of SCL covered in this paper.

H. Power Shift Among Sources of Influence Over Time

As a small nation, Singapore is heavily reliant on trade and investment flows with foreign jurisdictions. The dominating influence of foreign laws and economic events arises out of the need to constantly keep Singapore as an attractive trading partner and investment destination. The greater the need to overcome Singapore's small size, the greater the pressure to submit to changes in foreign jurisdictions. Thus, due to Singapore's small domestic capital markets, regulations and safeguards protecting interested parties have had to be carefully calibrated. There is a natural tension between large controlling shareholders who can make the decision of whether to list in Singapore and the many other smaller investors who must decide whether Singapore has stringent enough measures to protect their investments. Similarly, the desire to attract businesses to Singapore necessitates frameworks that are familiar to the international business community which leads to a tension with autochthony.

Amidst a global trend of greater competition for mobile capital,[240] Singapore has been under heavy pressure to adjust to market demands. Key points include the shift from a merit-based to a disclosure-based regulatory system in 1997, and the move to allow DCS structures to list in Singapore in 2016, both changes which were most likely brought about as a response to changes in the regulatory regimes of foreign jurisdictions.

SCL has undergone several cycles where the influence of foreign jurisdictions has varied. From 1967- 1985, the heavy reliance on foreign investment meant that Singapore had to be particularly responsive to developments in foreign jurisdictions. However, this did not translate into changes in SCL because the vast majority of foreign companies were either subsidiaries of companies that were based overseas or preferred to seek debt financing from overseas markets.[241] Singapore's SCL framework was already comparable to that in the UK and to a lesser extent, Australia. There was little focus on regulations and safeguards for capital markets in Singapore. In a growing economy, insolvency was not seen as an area of concern.

The period following the Pan-El Crisis and the recession in 1985 marked a relative decline in the influence of foreign laws and economic events, and a rise in the influence of domestic political and economic events. In particular, the Pan-El Crisis meant that SCL had to address the deficiencies in its regulatory structure for capital markets. While SCL certainly looked to foreign jurisdictions for ideas on how to improve its regulatory framework, domestic events were the trigger for such studies. In terms of insolvency, the 1985 recession prompted an urgent re-examination of the creditor-friendly insolvency regime, which threatened to bankrupt numerous businesses which were still viable

As a result of the 1985 recession, Singapore looked to the financial sector as a potential means of growth. A large capital market had to be established and Parliament had to consider how to woo foreign investors to Singapore. However, by 1993, Singapore's regulatory regime was still considered to be significantly more restrictive than that of any other Asian securities market.[242] Increasing competition from neighbouring countries at the time forced Singapore to reform her regulatory regime yet again, marking a revival of foreign influences in SCL. This culminated in the significant shift from a merit-based to a disclosure-based regulatory system in 1997. The continuance of the dominance of foreign influence can be seen from the decision to allow DCS structures to list in Singapore in 2016. Moving forward, the desire of the Singapore Exchange to continue courting mainland Chinese and Southeast Asian companies to list in Singapore suggests that foreign laws and economic events will once again dominate in their influence of the future direction of SCL.

The other sector of potential growth Singapore is looking into is that of insolvency services and the development of Singapore into an insolvency hub. Given the need to offer an internationally-familiar insolvency framework, Singapore has adopted large portions of the

[240] Wee Meng Seng argues that Singapore should abolish the concept of capital maintenance regulations. See Wee (n 214).
[241] Peebles and Wilson (n 2), 209.
[242] Bennett (n 70), 15.

United States Chapter 11 provisions in its latest reforms to its insolvency regime. The fact that it has done so despite the recommendations of the ILRC[243] shows the extent which foreign influence has had on SCL.

The one area where foreign laws and economic events have had very little influence is that of directors' duties. Then again, very little has changed in this area over the years. There has been much discussion over potential reforms periodically, but the inertia in this area appears to be strong and the lack of any major issue arising from any potential deficiencies in the law here has meant that Parliament is reluctant to disrupt the *status quo*. That being said, the influence of domestic political and economic events can be seen in this area of SCL, since the refusal to amend the provisions on directors' duties can be said to stem by local fears that this might send the wrong signal and encourage misconduct.

On the whole, however, the clearest patterns in the development of SCL over time has been the periodic waxing and waning influences of foreign and domestic laws and events. At the present moment, the trend in the majority of areas of SCL very much appears to be the rising influence of foreign laws and economic events. In an increasingly competitive world, this is completely understandable given Singapore's small size. The need to constantly ensure that Singapore is an attractive trading partner and investment destination is likely to persist for the foreseeable future and future developments in SCL are likely to continue to be heavily influenced by the developments of overseas jurisdictions. While SCL remains autochthonous insofar as Parliament independently decides which foreign laws to adopt, global pressures mean that Parliament is considerably limited by foreign factors in shaping the overall framework of SCL.

I. Fifty Years Ahead: Singapore Company Law and the Economy

Predicting the future can be a particularly tricky task, but the Monetary Authority of Singapore ("**MAS**") seems to have a plan mapped out for Singapore. The Managing Director of the MAS, Ravi Menon predicts that from 2026 to 2040, Singapore's economy will predominantly be driven by the export of capital and people, with widespread use of technology and increased focus on the ideas economy.[244] SCL would have to adapt to the new economic climate by pre-empting these changes and creating the necessary legal frameworks well in advance of them. One question is whether the types of companies traditionally found in the Companies Act such as exempt private companies and companies limited by guarantee are sufficient to provide the flexibility that businesses today demand. This in turn is linked to the broader issue of how to make corporate legislation continue to be 'fit for purpose', including the optimal balance between regulation and its associated costs. The export of capital and people would also necessarily require strong corporate governance and capital markets practices in Singapore ensuring that the headquarters and/or hubs based in Singapore are stable, efficient and resistant

[243] Insolvency Committee Report (n 168), 1.5.
[244] Menon (n 10).

to fraud and dishonest practices. The use of software in regulation like automated auditing technology and spot-checking software could boost efficiency and pre-empt possible problems.

Insolvency could be one of the major areas for economic growth in Singapore, with a world-class insolvency hub based in Singapore, at the forefront of international insolvency practices. Regulation and the protection of interested parties would have to be flexible enough to attract investments to one of the world's leading bourses, located in Singapore, while a strong disclosure regime coupled with a well drafted statutory derivative action ready to protect minority shareholders. Directors' duties should continue to evolve with the times, with periodic updates and partial codifications of common law duties to enhance legal certainty. Directors' criminal liability should be well-structured to ensure a fair and proportionate penalty regime, which would assuage the fear of honest directors going to jail for minor regulatory offences, while acting as a suitable deterrent against fraudulent activities.