Banking Amendment Bill 2016

The Monetary Authority of Singapore (the “MAS”) has been actively strengthening the consistently stringent capital and liquidity standards for banks in Singapore, especially in the light of the global financial crisis in 2008. It is constantly refining its supervisory and regulatory framework to enhance the stability of both the local and international banking system.

The latest introduction of the Banking (Amendment) Bill 2016 (the “Bill”) is part of MAS’ efforts to bolster prudential safeguards, strengthen corporate governance and reinforce risk management controls in the Singapore banking industry. This update highlights the key categories of amendments in the Bill.

1. Bolster prudential safeguards
The Bill introduces two main measures to bolster prudential safeguards.

Presently, a foreign bank is allowed to choose operating in Singapore either as a branch or a locally-incorporated subsidiary. The Bill however empowers
MAS to require a foreign bank branch to locally incorporate all or part of its banking business, where this is necessary or expedient in the interest of the public, the domestic financial system or the depositors. Local incorporation has been recognised as a useful prudential measure, since a locally incorporated bank will be subject to Singapore’s capital standards and corporate governance requirements, as opposed to a bank branch which will be subject to regulations imposed by its home supervisory authority on a group basis.

The Bill also empowers the MAS to impose prudential requirements that cap banks’ leverages, to ensure that banks maintain sufficient liquidity. This requirement has been introduced to reflect new international standards. Such measures allow better management of both risk-taking and innovation, and further the sustainable development of the financial services sector.

2. Strengthen corporate governance
The Bill further introduces a few measures to strengthen the corporate governance of banks.

The first measure empowers the MAS to remove key appointment holders of banks, including its chief executive officer and deputy chief executive officer, if they are not found to be fit and proper. Banks will have an obligation to immediately notify MAS of any material information which they may become aware of that will adversely affect the fitness or propriety of any such key appointment holders.

The second measure requires a bank to conduct all related party transactions on an arm’s length basis, and to obtain board approval before entering into any such transaction that may pose material risks to the bank. The Bill also empowers the MAS to prohibit, restrict or direct banks to terminate any related party transaction entered into by banks if any such transaction is deemed to be detrimental to the interests of depositors.

The third measure relates to the introduction of a safe harbour provision to protect banks’ external auditors from liability where they disclose, in good faith, information to the MAS as part of their reporting duties under the Banking Act (Cap. 19) of Singapore. Further, the MAS will be empowered to direct banks to remove their external auditors if they fail to carry out their statutory duties satisfactorily.

3. Reinforce risk management controls
The Bill also promises to reinforce risk management controls. It will formalise the MAS’ expectation for banks to set out risk management systems and controls that are commensurate to their business profiles and operations. The MAS may penalise banks that fail to do so.

Further, the Bill will introduce a requirement for banks to obtain the MAS’ approval to establish new places of business where certain non-banking activities are conducted. For example, before a bank commences money-changing and remittance businesses at new places, MAS will be able to require a bank to institute adequate safeguards against money laundering and terrorism financing. This empowers the MAS to exercise better oversight of banks’ activities.

4. Evaluation of the Banking (Amendment) Bill
While it is important to ensure the stability and safety of the Singapore banking industry, we must ensure that regulations must nonetheless be implemented in such a way as to minimise ambiguity and not create unnecessary red-tapes that will drive up compliance costs. Provisions that confer the MAS with additional powers over banks should not lengthen the turnaround time for decisions or limit business flexibility, which will eventually raise the cost of doing business. Such costs could end up being passed on to end-consumers of banking products, or adversely affect the financial job market.

We also observed that the Bill has attempted a balancing act between introducing more safeguards and ensuring that they remain relevant. For instance, the MAS has proposed the repeal of the provision that makes bank directors jointly and severally liable for any bank losses arising from credit facilities or exposures to the directors and their related parties. The MAS recognised that the provision, while enacted in light of the fiduciary duty bank directors owe to their banks, has deterred many candidates from taking up bank directorships. The MAS has also conducted an evaluation and concluded its ineffectiveness in providing oversight over bank’s related party transactions.

All in all, the introduction of the above prudential safeguards will enhance the ability of the MAS to protect banking customers as well as the stability of Singapore’s financial system, but in implementing these measures, Singapore must bear in mind to keep its banking sector relevant, competitive and attractive.

LOO CHOON CHIAW
Managing Partner, Loo & Partners LLP

CANDICE YONG
Legal Associate, Loo & Partners LLP
Proposed Alignment Of Listing Rules With Companies (Amendment) Act 2014

In October 2014, the Companies (Amendment) Act 2014 (the “Amendment Act”) was passed by Parliament to amend the Companies Act (Chapter 50) of Singapore (the “Companies Act”), following a series of comprehensive public consultations and a report published in June 2011 (the “Report”) from the Steering Committee for Review of the Companies Act (the “Steering Committee”). The Amendment Act came into full force and effect on 3 January 2016.

The Singapore Exchange (“SGX”) has proposed amendments to the SGX-ST Listing Rules (Mainboard) (“Mainboard Rules”) and the SGX-ST Listing Rules (Catalist) (“Catalist Rules” and together with the Mainboard Rules, the “Listing Rules”) to align the Listing Rules with the Companies Act, as amended by the Amendment Act.

The proposed amendments to the Listing Rules relate to three key areas: (i) directors, (ii) shareholders and (iii) shares.

1. Directors

Insurance Coverage and Indemnities for Directors

As detailed in the Report, the Steering Committee found that the leading jurisdictions allow companies to indemnify their directors against claims brought by third parties, subject to certain conditions.

The Amendment Act accordingly allows a company to indemnify its officers (including its directors) against third party liability, subject to certain liabilities which may not be indemnified, such as the payment of fines and penalties, and the defending of criminal and civil proceedings in which the officer is convicted or judgment is entered against him.

SGX has proposed to clarify the position under the Listing Rules that the provision of insurance coverage and indemnities by issuers for their directors do not constitute interested person transactions, where such insurance coverage or indemnity is specifically permitted under the Companies Act. This would apply to all issuers, whether incorporated in Singapore or outside Singapore, as long as the insurance coverage or indemnity is in a form allowed under the Companies Act, and in respect of foreign-incorporated companies, their respective company laws as well.

2. Shareholders

2.1 Shareholder Consent for Electronic Transmission of Notices and Documents

The Amendment Act allows a company to give notices and send documents to its shareholders by way of electronic transmission, if the company’s constitution provides for it and there is consent (which may be express, deemed or implied) in accordance with the constitution of the company. Such notices and documents may also be accessed by shareholders on a website if the company and the shareholders have agreed in writing to the notices and documents being access through such an avenue.

SGX has stated that they are supportive of the movement towards electronic transmission given the environmental benefits, cost savings for issuers and also faster dissemination of information to shareholders. In view of the advantages, SGX has proposed that issuers be allowed to electronically transmit certain types of notices and documents, if express consent or deemed consent of the shareholders is obtained and subject to certain safeguards.

SGX notes that there are potential concerns where consent of the shareholders is implied, as this would not allow shareholders the option of electing for physical copies of notices and documents, and has therefore consulted the public on whether such implied consent regime should apply to listed issuers.

2.2 Safeguards for Electronic Transmission of Documents

In relation to the above, SGX has also proposed that safeguards, which have been prescribed in subsidiary legislation pursuant to the recommendations of the Steering Committee, be adopted in connection with the electronic transmission of notices and documents. Such safeguards include the following:

(a) for the deemed consent regime, the company must have notified the shareholder directly in writing on at least one occasion:

(i) of his right of election whether to receive notices and documents by way of electronic communication or as a physical copy, and the consequence of the failure to elect;

(ii) the manner in which electronic communications will be used is specified in the company’s constitution;

(iii) that the election is a standing election, but

(iv) until the shareholder makes a fresh election, the election that is conveyed to the issuer last in
This update is intended for your general information only. It is not intended to be nor should be regarded as legal advice.

1.Announcements and Notices

(a) Where documents relate to actions that may have a significant dilutive effect on a shareholder's interest in the issuer or have a substantial impact on a shareholder's interest, and which contain important procedural instructions and forms or acceptance letters that shareholders may require to complete, documents which relate to routine matters of the issuer can be sent by electronic means to aid the issuer in reducing operational costs.

Matters which may have a significant dilutive effect on a shareholder's shareholding interest or have a substantial impact on a shareholder's interest include the issuance of shares, company warrants and convertible securities, adoption or amendment of the issuer's constitution, takeover circulars, interested persons transactions, major transactions, very substantial acquisitions or reverse takeovers, privatisation proposals, and merger, reorganisation or winding up proposals.

Matters which may require shareholders to complete documents in accordance with specified procedures include takeover offers, rights issues, election form(s) for scrip dividend schemes, preferential offerings and voluntary delistings.

Routine matters of the issuer include annual reports, share buyback mandates, general share issue mandate, share option or share scheme, and renewal of existing interested persons transaction mandate.

SGX has accordingly consulted the public on the categories of documents which should be transmitted by way of physical copies.

2.3 Restraint on Exercise of Voting Rights

Where a shareholder is required to abstain from voting pursuant to any court order, SGX has proposed that issuers be required to include an appropriate statement in shareholder circulars, and as part of the statement the issuer must also state that it will disregard any votes cast on a resolution by the person required to abstain from voting.

This follows the proposed amendment of the Securities and Futures Act (the "SFA") by the Monetary Authority of Singapore to allow the court to grant an order restraining the exercise of any voting or other rights attached to any specified capital market products in certain situations. In particular, it was proposed that a court may make an order restraining the exercise of any voting or other rights, if such shareholder has contravened, among others, the SFA or the Listing Rules. SGX does not propose to adopt these amendments unless the relevant amendments to the SFA are passed.

Currently, where a person is required to abstain from voting on a proposal at a general meeting pursuant to the Listing Rules, an issuer is required to include an appropriate statement in circulars sent to shareholders.

3. Shares

3.1 Treatment of Shares Held by a Subsidiary in its Holding Company

For a Singapore-incorporated company, while a subsidiary cannot be a shareholder of its holding company, a subsidiary can, subject to certain conditions, continue to be a shareholder of the holding company if it already holds shares in the holding company at the time it becomes a subsidiary.

The Amendment Act treats shares owned by a subsidiary in its holding company in a manner similar to the holding company's treasury shares. For instance, no rights may be exercised in relation to both types of shares, including the right to attend or vote at meetings. However, the shares owned by a subsidiary in its holding company may, in certain circumstances, still be eligible for receipt of dividends and other distribution of the holding company's assets.

SGX has proposed that such shares:

(a) be excluded from the calculation of issued share capital where it relates to voting rights (including in the calculation of the limits for share buy-back and share issue mandate, and in the definition of "controlling shareholder"); and

(b) not be excluded from the (i) calculation of issued share capital where it does not relate to voting rights and (ii) calculation of market capitalisation.

Foreign-incorporated companies subject to an equivalent regime should follow the treatment of such shares above, unless the applicable laws require otherwise.
Amendment Of The Singapore Code On Take-overs And Mergers

The Monetary Authority of Singapore, on the advice of the Securities Industry Council (the “Council”) and pursuant to Section 139(6) of the Securities and Futures Act (Cap 289 of Singapore), has amended the Singapore Code on Take-overs and Mergers (the “Code”). These amendments took effect earlier this year on 25 March 2016.

This legal update sets out the key changes to the Code, which are as follows:

1. Increasing certainty in situations of competing offers

Amendments to the Code have been made to provide greater certainty on the applicable procedures and timelines in cases of competing offers.

1.1 Offer timetables will now be aligned to that of the latest offer. Where the Council permits the extension of an offer on account of a competing offer having been announced, all existing offers will normally be bound by the timetable established by the despatch of the latest competing offer document.

1.2 If neither competing offeror has declared its final offer price in the later stages of the offer period, and the competing offerors and the offeree company cannot agree on an alternative procedure to resolve the competitive situation, an auction procedure will normally be prescribed by the Council to obtain a final offer price from each competing offeror.

The objective underlying the prescription of such an auction procedure is to achieve a finality of offers within a reasonable timeframe through an orderly resolution of the competitive situation. Rule 22.9 of the Code currently prescribes a 60 day timetable for the prosecution of a take-over offer. This means that an offer can remain open for acceptance up to the 60th day following the posting of the offer document. This Rule ensures that the offeree company is not under siege for an unduly long period of time, given that an offer creates uncertainty which may damage the offeree company’s business and prejudice the interests of its shareholders through a decrease of value of the offeree company.

Such uncertainty is greater for an offeree company faced with competing offers, given that the offeree company would have had the offer timetable reset by the emergence of the second offeror. Given that the offer must be kept open for acceptances for at least 14 days following any revision, the final day on which the offer can be revised is the 46th day following the posting of the offer document. Where the competing offers remain open and capable of revision leading up the 46th day following the posting of the offer document, there is uncertainty as to whether either or both offerors will make a final bid on the 46th day and when they will do so. This might lead to fluctuation of the share price of the offeree company in the period leading up to the 46th day. In addition, there may be a risk of the revised offer prices leaking when competing offerors rush to print their revised offer documents to meet the relevant deadline. The absence of an auction procedure thus may lead to a disorderly resolution of the competitive situation.

In light of the above considerations, the prescription of an auction procedure provides the shareholders of the offeree company with a period of certainty within which they can make their investment decisions on the competing offers. This requires that the competing offers are “final” and not capable of further revision. Such procedure will normally follow the default auction procedure set out in Appendix 4 to the Code.

The Council noted that the Code’s primary objective is to ensure the fair and equal treatment of shareholders. As such, the objective of obtaining “final” competing offers has to be distinguished from that of obtaining the best possible offer for the
shareholders. It was further noted that this primary objective similarly underlies the auction procedure provided for in the United Kingdom’s City Code of Takeovers and Mergers. The relevant intention is not to identify a winner, but to ensure that the shareholders can make their investment decisions with the benefit of finality.

1.3 The deadline for a potential competing offeror to announce a competing offer has also been extended. This provides the competing offeror with more time to consider and finalise the terms of an offer with knowledge of the first offeror’s revised offer. This in turn increases the prospects of a competing offer that is beneficial to the shareholders of the offeree company.

2. Encouraging pro-active offeree boards
Amendments to the Code have been made to encourage the boards of offeree companies to more actively safeguard shareholders’ interests.

2.1 The Council will not normally treat the solicitation of a competing offer or the running of a sale process as a frustration of the original offer. Such actions neither hinder the progress of the first offer nor deprive the shareholders of the opportunity to decide on the merits of the first offer. Rather, a better or alternative offer is generally in the interests of the shareholders of the offeree company.

The Council has clarified that the intention is not to impose an obligation on offeree boards to solicit competing offers or run sale processes. Offeree boards may consider the feasibility of soliciting competing offers or running sale processes when deciding what actions to take in the face of an offer.

In cases of doubt, the Council should be consulted.

2.2 The board of an offeree company may consider sharing available management projections and forecasts with the independent financial adviser for the purpose of securing advice on the offer.

The Council has clarified that the intention is not to impose an obligation on offeree boards to share management projections and forecasts with the independent financial adviser for the purpose of securing advice on the offer.

3. Ensuring timely disclosure of material information
Amendments to the Code have been made to require prompt disclosure of (i) any material change of information previously published in an offer; and (ii) any material new information which would have been required to have been disclosed during the offer period, had it been known at that time.

Where such disclosed information is material to the offeree company’s shareholders in determining whether to accept an offer, the Council expects the independent financial adviser and the offeree board to take into consideration such material information and, where appropriate, revise their recommendation and/or advice to the offeree company’s shareholders.

In cases of doubt, the Council should be consulted.

4. Codifying and streamlining existing practices
Amendments to the Code have been made to (i) clarify the standards that are required of the pre-conditions of a pre-conditional voluntary offer; (ii) allow the offeree company to post the offer document at an earlier date in a pre-conditional offer; and (iii) clarify how the offer value for a different class of shares should be calculated.

The amendments to the Code take into account market developments and evolving international practices in the field of mergers and acquisitions.

YAU KHAI LING
Partner, Loo & Partners LLP
Singapore Foreign Practitioner Certificate

LEE SHEN YANG
Legal Associate, Loo & Partners LLP

Crowdfunding

1. A fast growing industry, globally and in Asia
According to Massolution’s Crowdfunding Report 2015, the global crowdfunding industry has been expanding at significant growth rate and has raised a total capital of approximately US$34.4 billion in 2015, which was more than double compared to 2014. Asia is the key growing region in the crowdfunding industry, which puts Asia ahead of Europe as the second-largest region by crowdfunding volume. Whereas, North America took the lead position in the world in terms of crowdfunding volumes.
2. Crowdfunding plays a growing role in financing start-ups and small business in Singapore

Start-ups and small businesses contributed nearly to half of the GDP and employed about 70% of the workforce in Singapore. Currently, commercial lending represents the majority of small businesses lending. While Singapore has a good start-up ecosystem with wide network of venture capitals and business angels, and numerous financing incentives administered by the government, there is a funding gap in the financial system for start-ups and small businesses with no tangible assets and uncertain cash flows. SCF can help to bridge the funding gap that often imperils start-ups and small businesses.

Apart from start-ups and small businesses, crowdfunding will also be beneficial to established companies which may wish to explore a certain niche area of business, or to meet short-term financing needs, which may not receive support from existing shareholders. For instance, the Catalist-listed Epicentre Holdings through one of its subsidiary has raised S$1 million within period of time in a crowdfunding platform in March 2016. Having a listed company to raise capital in the crowdfunding platform is a validation that crowdfunding is a viable means of raising capital, even for an established company.

3. Definition and the Types of Crowdfunding

Crowdfunding generally refers to a capital-raising approach that seeks to raise capital from a large number of individuals. There is nothing particularly innovative about it. What makes the crowdfunding innovative is the advent of digital technology nowadays which allows the start-ups and small businesses to be able to reach out to large scale of people with internet connectivity to garner supports for their products or services.

Typically, capital are raised through an online platform using the following forms of crowdfunding:

(a) Donation-based crowdfunding: Where individuals pool their resources to support a charitable cause;
(b) Reward-based crowdfunding: Where individuals give money to a company in return for a “reward”, usually a product produced by the company;
(c) Lending-based crowdfunding: Where individuals lend money to a company and receive the company’s legally-binding commitment to repay the loan at predetermined time intervals and interest rate; and
(d) Equity-based crowdfunding: Where individuals invest in shares sold by a company and receive a share of the profits in the form of a dividend or distribution, subject to the company’s discretion.

Reward-based and donation-based crowdfunding are two prevalent forms of community crowdfunding which are not subject to securities regulation as they do not involve offers of securities or the prospect of financial returns.

On the other hand, the financial return model includes lending-based and equity-based crowdfunding. The financial model of crowdfunding that involves the offer of securities in the form of debentures or shares is also known as securities-based crowdfunding (“SCF”). SCF is subject to securities regulation in most jurisdictions. This article will focus particularly on SCF.

4. Benefits and risks

SCF presents numerous benefits which include lower cost of capital and high returns, portfolio diversification, cost efficiency and convenience of online platform.

Notwithstanding the potential benefits of SCF to the financing landscape for start-ups and small businesses, there are inherent risks such as loss of capital, lack of liquidity, fraud and platform closure or failure. SCF will attract mainly start-ups and small businesses which may not have an established track record. Hence, the failure rate for start-ups is high. This poses high risks of capital loss to investors, particularly for those who may not be familiar with early stage investing. In the absence of a secondary market for trading in the securities, investors face the risks of not being able to sell their securities or selling them at a significant discount. As fundraising is carried out through online platforms, investors may not have personal contact with persons making the offers of securities. There may also be limited information on the projects or business proposals being funded. As such, there is a risk that the projects or proposals may not be genuine and that the promised rewards or returns to investors will not materialise.

5. Singapore’s Key Regulatory Requirements

Generally speaking, there are two different broad approaches to regulate crowdfunding. Some jurisdictions apply their general securities framework, which often allows the use of certain build-in flexibilities. Other jurisdictions introduce ad-hoc regulatory regimes to regulate crowdfunding.

Singapore’s regulatory regime can be categorised under the first approach, where the capital raising through SCF is subject to the same regulatory regime of the Securities and Future Act (“SFA”) as capital raising by conventional means. Crowdfunding platforms that are deemed to be “dealing in securities” under the SFA must obtain Capital Markets Services (“CMS”) licence to operate.

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from Monetary Authority of Singapore ("MAS"). Presently, two SCF platforms have obtained the CMS licence, namely Capbridge and FundedHere. Another SCF platform, Crowdo recently has been reported to receive a provisional CMS licence from MAS.

On 16 February 2015, MAS issued a consultation paper proposing measures to facilitate the SCF from accredited and institutional investors by relaxing certain financial requirements for capital markets intermediaries that deal in securities, and clarifying the application of certain exemptions from prospectus requirements. On 8 June 2016, MAS provided its response to feedback received, and issued new guidelines to facilitate SCF following the close of the consultation paper. MAS will also modify proposed rules on SCF to better accommodate retail investors' participation, in a shift from earlier proposals that mostly focused on accredited and institutional investors. The key proposed changes and new guidelines are further explained below.

5.1 SCF from Accredited and Institutional Investors
Under the current MAS regulatory framework, an offeror can rely on the prospectus exemptions under the SFA to make offers of securities to Accredited Investors or Institutional Investors through SCF platform without a prospectus. Accredited Investors can be individuals with at least S$2 million in net personal assets, excluding their primary residence or S$300,000 in annual income; or corporation with net assets of at least S$10 million.

5.2 Easing the financial requirements
MAS will lower the minimum base capital requirement from S$250,000 to S$50,000 for crowdfunding intermediaries that require a CMS licence, taking into account the lower risk posed by the crowdfunding intermediaries which do not handle, hold or accept customer monies, assets, or positions, and do not act as principal in transactions with investors. For the same rationale, the requirement to maintain a security deposit requirement of S$100,000 with MAS will also be removed. This will allow more qualifying SCF operators to operate in the restricted space.

5.3 Advertising restriction
MAS has published new guidelines on SCF related advertising. The new guidelines clarify and guide the SCF platforms on the parameters within which they can publicise their platforms and services. In particular, the guidelines will clarify that the advertising restrictions under the SFA do not prohibit SCF operators from publicising their services provided no information on specific issuers are disclosed.

5.4 SCF from any investor (including retail investors)
The offeror may crowdfunding securities to investors (including retail investors), by registering and providing a prospectus for their offers or by complying with conditions that apply to the existing prospectus exemptions, such as the Small Offers or Private Placement exemptions. Under section 272A of the SFA, offerors may make personal offers of securities, up to $5 million within any 12-month period, without a prospectus (the small offers exemption), subject to conditions. In the current guidelines, the SCF operators are expected to assess both the knowledge and experience of potential investors, as well as the suitability of SCF investments for the investors by considering their investment objectives, risk tolerance and financial means. The MAS will simplify the pre-qualification checks for investors so that the process can be completed more easily. The SCF operators need only determine that investors have either the financial competencies or are suitable to invest in SCF given their investment objectives and risk tolerance. As demonstration of financial competence, SCF operators only need to ensure that investors have either the knowledge or experience to invest in SCF.

To ensure investors are fully aware of the risks and deterred from investing if they are unable to accept the potential losses, MAS will strengthen the existing risk disclosures to require any licensed SCF platform operator appointed by an offeror to intermediate the offeror’s Small Offers online and such an offeror to provide, at the minimum, a prescribed risk disclosure statement to each potential investor and obtain the investor’s acknowledgement that he is fully aware of and accepts the risks.

5.5 Promissory notes
MAS has moved to close a loophole that allowed some crowdfunding platforms to use an exemption for promissory notes in order to reach retail investors without the platform being licensed or the issuer having to publish a prospectus. Promissory note exclusions for SCF will be removed after considering that it has characteristics akin to that of any other debentures. Therefore, promissory note should be subject to securities regulation so investors can enjoy the corollary investor protections.

6. Conclusion – Striking the Right Balance
Traditional capital raising platform, namely the venture capital fund or early-stage investors still remain relevant in providing capital to the start-ups and small businesses. SCF, as an alternative form of capital raising, should be further facilitated in Singapore, to supplement and complement the
government initiatives to finance the development of the start-ups and small business. Many jurisdictions, including Singapore, attempted to strike a balance between investor protection and allowing start-ups or small businesses to use SCF as an effective capital raising tool. In the present context, without international consensus on the best regulatory model, it appears that MAS would refine its regulatory policy of the SCF on a prudent manner.

LOO CHOON CHIAW
Managing Partner, Loo & Partners LLP

GERALD CHEONG
Director, Corporate Department

NICHOLAS CHANG
Manager, Corporate Department

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**No Statutory Derivative Action For Members of Companies in Liquidation**

In Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others and another matter [2016] SGCA 17 ("Petroships Investment"), the Singapore Court of Appeal ("SGCA") held that a statutory derivative action pursuant to s 216A of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act") is not available when a company is in liquidation. As such, members of a company in liquidation will have to resort to other remedies provided by the liquidation regime in Singapore.

1. Facts

The appellant, Petroships Investments Pte Ltd ("Petroships"), is a minority shareholder of the first respondent, Wealthplus Pte Ltd ("Wealthplus"). The other shareholders of Wealthplus are Megacity Investment Pte Ltd ("Megacity") and Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("KBBCE"). Megacity and KBBCE have the same ultimate parent company, the Koh Brothers Group Limited ("Koh Bros Group").

On 19 June 2012, Petroships served notice on Wealthplus’ directors as required under s 216A(3) of the Act. The notice informed the directors of Petroships’ intention to, amongst other things, apply for leave to bring a statutory derivative action in Wealthplus’ name against its directors if they failed to provide a full explanation of four transactions that were allegedly not in Wealthplus’ interests (the "Four Transactions") within 14 days.

Wealthplus’ directors failed to act on Petroships’ notice. On 14 August 2012, Petroships filed an originating summons to seek the court’s leave to commence a derivative action ("OS 766"). The subject matter of the proposed derivative action included the Four Transactions.

A week after OS 766 was filed, Wealthplus was placed in members’ voluntary liquidation through a special resolution passed by the requisite majority of its shareholders. Liquidators were appointed (the "liquidators"). The liquidators subsequently stated that they intended to take steps to investigate Petroships’ allegations provided, amongst other things, that the shareholders consented. However, the shareholders could not arrive at any consensus and the liquidators applied to the High Court for directions. However, Megacity and KBBCE requisitioned an extraordinary general meeting to consider a resolution to remove the liquidators from office before the application could be heard. The liquidators tendered their resignations and Wealthplus appointed new liquidators (the "new liquidators"). The new liquidators did not intend to take over the previous liquidators’ application, which was accordingly withdrawn.

2. Decision of the court below

In OS 766, the learned High Court judge (the "Judge") did not grant Petroships leave to commence a statutory derivative action. It was held that while Petroships had complied with the notice pre-requisite, the pre-requisites in ss 216A(3)(b) and s 216A(3)(c) of the Act were not met.

As regards the pre-requisites in s 216A(3)(b) of the Act, the learned Judge was not satisfied that Petroships was acting in good faith within the meaning of the statutory provision. While this was sufficient to refuse leave for a statutory derivative action, the learned Judge went on to find that Petroships’ proposed action was not prima facie in Wealthplus’ interests within the meaning of s 216A(3)(c) of the Act.

The learned Judge further held that the remedy that Petroships sought was available through liquidators and that a derivative action had no relevance when a company was in liquidation. In light of the foregoing, the learned Judge refused to grant leave to Petroships to commence a statutory derivative action. Petroships appealed.

3. Decision of the SGCA

The SGCA disagreed with the learned Judge as regards his approach of determining whether the pre-requisites of s 216A of the Act have been fulfilled.
Instead, it held that the threshold issue was whether s 216A was even applicable to a company in liquidation. The SGCA opined that this is a question for which no answer was available in directly relevant case law. As such, the SGCA relied back on first principles to interpret s 216A of the Act by first interpreting the statutory text before exploring the legislative history and case law.

3.1 Interpretation of the statutory text
Based on the statutory text of s 216A of the Act, the SGCA held that the provision suggests that the application for leave to commence a derivative action is in the context of a company being a going concern.

In coming to this decision, the SGCA noted that s 216A(3)(a) of the Act stipulates that no action may be brought unless the court is satisfied that the complainant has given 14 days’ notice to the directors of the company of its intention to apply for leave to commence the action if the directors do not bring, diligently prosecute or defend or discontinue the action or arbitration.

Accordingly, the SGCA found it evident that the scenario envisaged in s 216A of the Act is one where the directors are capable of taking action to vindicate the company’s rights, i.e. the directors are in active management of the company. While it is normal for the board of directors to be vested with the power to manage the company when the company is a going concern, this is not the case in a company’s liquidation. Once a company enters liquidation, the board is effectively functus officio, and the liquidator is vested with the powers of management (and thus may commence corporate actions). Consequently, the directors have no power to react to any notice served pursuant to s 216A(3)(a) of the Act.

In addition, the SGCA found that s 216B of the Act further indicates that s 216A of the Act is meant to be applied to a company other than one under the control of a liquidator.

Accordingly, the SGCA found that the statutory text does not suggest that a derivative action pursuant to s 216A of the Act is available when the company is in liquidation.

3.2 Legislative history
The SGCA held that the legislative history of s 216A of the Act does not evince a contrary interpretation to their conclusion after analysing the text of the statutory provision.

Raison d’être for statutory derivative action
In coming to this decision, the SGCA noted that s 216A of the Act was based on legislation in Canada. The SGCA further noted that the relevant Canadian provision for statutory derivative action was based on the Interim Report of the Select Committee on Company Law in 1967 (the "Lawrence Report").

The Lawrence Report, amongst other things, recommended that the shareholder be required to demonstrate that it is prima facie in the interests of the company or its shareholders that the action be brought. The SGCA opined that this is an implied suggestion that the statutory derivative action was designed as a remedy for a minority shareholder in a going concern, as the interests of creditors would be the dominant consideration in a situation where an insolvent company is placed in a creditors’ voluntary liquidation.

In addition, the Lawrence Report concluded, amongst other things, that the statutory derivative action was the most effective remedy to enforce a standard of conduct and care to be imposed upon directors in the exercise of their duties and responsibilities.

S 216A of the Act was not intended to be available when a company has been placed in liquidation
The SGCA consequentially concluded that there is no indication that s 216A of the Act was intended to be available as a shareholder’s remedy in the context of a company that had been placed in liquidation.

3.3 Relevant case authorities
The SGCA acknowledged that there is no directly relevant case law on s 216A of the Act in this instance. However, the SGCA looked to other jurisdictions and found that there are authorities stating that leave to commence a statutory derivative action should not be granted when a company is in liquidation.

The SGCA noted that in the United Kingdom and New Zealand, the respective courts have mentioned that a statutory derivative action ought to not be granted when a company is in liquidation as, amongst other things, the company would be subject to appropriate insolvency procedures and that the shareholder should not seek to circumvent or undermine the insolvency regime by starting a derivative claim.

The SGCA further considered the Australian case of Chahwan v Euphoric Pty Ltd and another [2008] NSWCA 52, where it was held that statutory derivative action is not available to a company in liquidation. The SGCA found certain aspects of the Australian court’s reasoning relevant despite material differences in the wording of the Australian statutory derivative action provision. This is due to the rationale for the introduction of statutory derivative action being the same for both jurisdictions. In particular, the SGCA noted the Australian court’s reasoning that
statutory derivative actions were meant to apply only to companies which were going concerns in the absence of contrary indication, and that there were appropriate remedies available to a shareholder seeking recourse against a liquidator refusing to exercise his powers under the relevant Australian Act.

In light of the foregoing, the SGCA concluded that in so far as s 216A of the Act is concerned, the statutory provisions and the extrinsic materials have likewise suggested that s 216A of the Act is intended to apply to companies other than those in the control of a liquidator, and that the Act provides statutory remedies in the liquidation regime that negate the need for a shareholder to seek leave under s 216A of the Act as well. Accordingly, the SGCA subsequently concluded that a statutory derivative action under s 216A of the Act is not available to a company in liquidation.

3.4 Both common law and statutory derivative actions are not available to a company in liquidation

Last, the SGCA opined that the same principle should apply to both forms of derivative action. As such, a derivative action, whether under common law or pursuant to s 216A of the Act, should not be available to a company in liquidation.

4. Commentary

In light of the decision in Petroships Investments, members of a company in liquidation can no longer resort to statutory derivative action pursuant to s 216A of the Act. Furthermore, despite the SGCA’s view as regards the availability of common law derivative actions being obiter dicta, it is unlikely that an application for a common law derivative action will succeed when the company is in liquidation. Notwithstanding the above, members of a company in liquidation are not left without recourse. As was noted by the SGCA and the learned Judge, the liquidator is subject to the oversight of the court and there are remedies afforded by the liquidation regime under the Act. Members of a company placed in liquidation will now have to resort to these remedies instead.

CHIA FOON YEOW
Partner, Loo & Partners LLP

商务部发布《港澳服务提供者在内地投资备案管理
办法（试行）》

为推动内地与港澳基本实现服务贸易自由化，进一步提高内地与港澳的经贸交流与合作水平，2016年5月18日，商务部在其官方网站上公布了《港澳服务提供者在内地投资备案管理办法（试行）》（以下简称“《管理办法》”）。《管理办法》在内地全境将符合条件的港澳投资服务型企业设立及变更手续由过去的审批制改为备案制，大幅简化了审批程序。《管理办法》将于2016年6月1日起施行。《港澳服务提供者在广东省投资备案管理办法》同时废止。

一、背景

为逐步取消货物贸易的关税和非关税壁垒，逐步实现服务贸易自由化，促进贸易投资便利化，提高内地与香港、澳门之间的经贸合作水平。内地于2003年分别与香港特区政府及澳门特区政府签署了《内地与香港关于建立更紧密经贸关系的安排》及《内地与澳门关于建立更紧密经贸关系的安排》（以下统称“CEPA”）。之后的十年内，内地又分别与香港特区政府及澳门特区政府签署《CEPA》的十个补充协议。2015年11月，内地与香港、澳门进一步签署《〈内地与香港关于建立更紧密经贸关系的安排〉服务贸易协议》（下称“《内地与香港协议》”）、《〈内地与澳门关于建立更紧密经贸关系的安排〉服务贸易协议》（下称“《内地与澳门协议》”），归纳并覆盖《CEPA》及补充协议有关服务贸易开放的承诺，形成单独的服务贸易子协议。实际上在2014年，内地与香港、澳门在CEPA框架下签署了《关于内地在广东与香港基本实现服务贸易自由化的协议》、《关于内地在广东与澳门基本实现服务贸易自由化的协议》（合称“《广东协议》”），以广东省为试点在服务贸易领域对港澳服务提供者首次推行国民待遇加负面清单的方式，取得良好成效。此次，商务部配套两个服务贸易协议出台《试行办法》，简化港澳服务提供者在内地对港澳开放的服务贸易领域投资备案管理工作，将进一步改善在内地的营商环境，取得良好成效。
二、适用对象

《管理办法》适用的对象为符合《内地与香港协议》及《内地与澳门协议》规定的港澳服务提供者。港澳服务提供者包括自然人或法人，自然人是指中华人民共和国香港特别行政区永久性居民或中华人民共和国澳门特别行政区永久性居民；法人指根据香港特别行政区或澳门特别行政区适用法律适当组建或设立的任何法律实体，无论是否盈利为目的，无论属私有还是政府所有，包括任何公司、基金、合伙企业、合资企业、独资企业或协会（商会）。

作为法人的港澳服务提供商还需满足以下条件：
（一）根据香港或澳门适用法律注册或登记设立，并取得有效商业登记证或提供服务所需的牌照或许可；及
（二）在香港或澳门从事实质性商业经营，判断标准包括：（1）在香港或澳门从事提供服务的性质和范围应涵盖其拟在内地提供的服务的性质和范围；（2）已在香港或澳门注册或登记设立并从事实质性商业经营3年以上（提供建筑及相关工程服务、银行及其他金融服务（不包括保险和证券）、保险及相关服务、航空运输地面服务及第三方国际船舶代理服务的，根据情况需经营5年以上）；（3）在香港或澳门从事实质性商业经营期间依法缴纳利得税或所得补充税；（4）应在香港或澳门拥有或租用业务场所从事实质性商业经营，其业务场所应与其业务范围和规模相符合；及（5）香港或澳门雇用的员工中在香港或澳门居留不受限制的居民和获准在香港或澳门定居的人士应占其员工总数的50%以上。

三、适用范围

港澳服务提供者在内地仅投资《内地与香港协议》或《内地与澳门协议》对香港或澳门开放的服务贸易领域，其公司（以下简称“港澳投资企业”）设立及变更的合同、章程备案依照《管理办法》办理，但下列情形除外：
（一）《内地与香港协议》第四章第九条保留的涉及国民待遇与最惠待遇的限制性措施及电信、文化领域的公司，金融机构的设立及变更；
（二）《内地与澳门协议》第四章第九条保留的涉及国民待遇与最惠待遇的限制性措施及电信、文化领域的公司，金融机构的设立及变更；及
（三）公司以外其他形式的商业存在的设立及变更。

此外，《管理办法》规定，港澳服务提供者与非港澳服务提供者的其他境外投资者共同投资，或港澳服务提供者将其在港澳投资企业中的全部股权、合作权益转让给非港澳服务提供者的其他境外投资者，仍需按有关规定办理审批手续。

四、备案机构

与普通外商投资企业的设立、变更审批机关为该企业所在地商务主管部门不同，《管理办法》下的港澳投资企业设立及变更的合同、章程备案由各省、自治区、直辖市及计划单列市、新疆生产建设兵团、副省级城市商务主管部门（以下简称“备案机构”）负责。

五、备案情形及程序

港澳服务提供者或港澳投资企业可向商务部门（港澳台侨）外商投资备案信息（以下简称“备案系统”）在线办理备案。

对于在《管理办法》实施之后新设的港澳投资企业，在取得企业名称预核准通知书后，应由港澳投资企业的全体投资者指定的代表或共同委托的代理人通过备案系统在线填写和提交《港澳服务提供者投资企业设立备案申报表》（以下简称“《设立申报表》”）。

以备案方式设立的港澳投资企业出现港澳投资企业基本信息变更、投资者基本信息变更、股权或合作权益转让（包括股权质押）、合并、分立、终止、港澳投资企业财产权益对外抵押转让、企业或港澳投资服务提供者先行回收投资、合作企业委托经营管理及合同、章程其它主要内容修改等情形需要变更备案信息的，应由港澳投资企业指定的代表或共同委托的代理人通过备案系统在线填写和提交《港澳服务提供者投资企业变更事项备案申报表》（以下简称“《变更申报表》”）。

在《管理办法》实施之前设立的、属于《管理办法》规定的备案适用范围的港澳投资企业发生变更，应办理变更备案手续；已取得《港澳台侨投资企业批准证书》的还应缴销《港澳台侨投资企业批准证书》。

六、适用的其他规定

属于《管理办法》规定的备案适用范围的港澳投资企业仍然适用的其他规定包括：
（一）按所在地商务主管部门要求，在每年6月30日前登录备案系统，填写上一年度投资经营信息；
（二）投资事项涉及国家安全审查的，按相关规定办理；
（三）投资涉及经营者集中审查的，适用《反垄断法》及相关法律法规；
（四）并购内地企业、对上市公司投资、以其持有的内地企业股权出资的，应符合相关规定要求；及
（五）在自由贸易试验区投资的，适用自由贸易试验区关于外商投资企业设立、变更及合同章程备案管理的规定。
七、监督检查
《管理办法》规定，备案机构对港澳服务提供者及港澳投资企业遵守外商投资法律法规规定及备案事项承诺情况实施监督检查。备案机构可定期抽查、根据举报进行检查、根据有关部门或司法机关的建议和反映进行检查，以及依法定职权启动检查。

八、信息查询、共享及修正
港澳服务提供者或港澳投资企业在备案、登记及投资经营活动中所形成的信息，以及备案机构和其他主管部门在监督检查中掌握的反映其诚信状况的信息，将纳入商务部外商（港澳台）投资诚信档案系统，并以适当的方式予以公示。社会公众可以申请查询港澳服务提供者、港澳投资企业的诚信信息。
商务部与相关部门共享港澳服务提供者或港澳投资企业的诚信信息。
港澳服务提供者和港澳投资企业可以查询商务部外商（港澳台）投资诚信档案系统中的自身诚信信息；如认为有关信息记录不完整或者有错误的，可以提供相关证明材料并申请修正。

九、结论
《管理办法》施行后，港澳服务提供者或港澳投资企业可通过商务部外商投资备案信息系统在线办理备案，就设立事项在线填报和提交《设立备案申报表》，就变更事项在线填报和提交《变更备案申报表》，备案机构在3个工作日内完成备案。收到备案完成通知后，港澳服务提供者或港澳投资企业应依据《试行办法》的具体要求向备案机构领取《备案回执》，凭《备案回执》按内地有关规定办理相关手续。
特别值得注意的是，对于未按本办法规定进行备案、备案信息不实或对监督检查不予配合的，备案机构将把相关信息记入商务部外商（港澳台）投资诚信档案。

1. Background
The Contracts (Rights of Third Parties) Ordinance (Cap 623) (the “Ordinance”) came into force on 1 January 2016, evidencing a significant reformation to the Hong Kong law of contract.

2. Doctrine of privity – Common law (non-statute) position prior to 1 January 2016
Prior to the enforcement of the Ordinance, the doctrine of privity in the common law of contract has established that a contract cannot confer rights or impose obligations arising under it on any person(s) or agent(s) except for the parties to the contract.

Traditional under the common law, a suffering party of a contract can only recover damages or be compensated for his own loss. The suffering party will not be able to be compensated for more than the amount he would have been obtained but for the incident (say, a breach of an express term of a contract causing loss). Consequential loss suffered by a third party (ie not a party of the contract) are not recoverable under the doctrine of privity, and were rarely addressed appropriately to its fullest extent.

The aforementioned has led to much confusion given modern commercial arrangements in addition to the burden imposed upon litigators and the court. Extra legal measures such as collateral contracts and trust arrangements would have to be taken or introduced in order to confer benefits and protect rights of multiple parties to a transaction. A common example for this would be an agency arrangement between an agent and a principal. The
agent would enter into agreements with another party on behalf of the undisclosed principal (for confidentiality or commercial reasons, typically for the benefit of the principal), while a separate agency agreement is entered between the agent itself and the principal to govern the agent’s obligations. However, assuming that such an agreement were absent and that the agent has failed to honor the contract between the agent and the third party, the principal’s interests would consequently be compromised. Similar difficulties are faced by contractors, sub-contractors, employees and suppliers in a business transaction who are not parties to the main contract.

3. Third Parties Rights – new contract law position imposed by statute after 1 January 2016
The enforcement of the Ordinance has vested parties that were not original parties of a contract the right to enforce a term of a contract (including a term that excludes or limits liability) provided that the following criteria were met:
(a) The contract was entered into on or after the commencement of the Ordinance, being 1 January 2016;
(b) Either the contract expressly provides that the third party may enforce his rights conferred by the contract, even if the third party has not given any consideration or was not in existence at the time of execution of the contract; or
(c) In the event that the aforementioned point (b) was not applicable, the term of the contract in question purports to confer a benefit on the third party; and
(d) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description. A third party may not be in existence at the time of the contract to benefit under the Ordinance.

4. Third Parties Remedial Rights and its restrictions
Provided that the above criteria is met conferring a third party certain rights under a contract, in an action for a breach, a third party who enforces a term of the contract would enjoy the remedy such as specific performances and damages that would have been available to the third party as if the third party had been a party to the contract. Save as to certain exceptions, the general rule of thumb is that the original parties of the contract may not rescind or alter the third party’s rights under the contract without the third party’s consent. The enforcement of the term by a third party shall, however, be subject to the application and the interpretation of the other term(s) of the contract relevant to the term in question. Say for instance, if the contract has specified that any contractual disputes shall be referred to and be dealt with in a particular way, for instance by way of arbitration, a third party’s remedy under that term will be subject to that particular arbitration clause.

5. Exceptions to the Ordinance – circumstances when third parties are unable to enforce its rights under the contract
The rights conferred upon to third parties by the Ordinance shall not apply if:
(a) The contract has expressly made clear that there is no intention to confer any benefit on third parties; or
(b) The agreement was either a:
(i) Bill of exchange; or
(ii) Deed of mutual covenant; or
(iii) Covenant relating to land; or
(iv) Contract of carriage within the meaning of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap.440) (save as to a liability exclusion or limitation clause of the contract); or
(v) Contract of carriage of goods governed by the Carriage by Air Ordinance (Cap.500); or
(vi) Letter of Credit; or
(vii) Company’s Articles which are treated by section 86 of the Companies Ordinance (Cap. 622) as having effect as a contract under seal; or
(viii) Contract of employment against an employee.

6. Conclusion
One must distinguish that the purpose of the enforcement of the Ordinance was to confer and protect third parties’ rights and interests arising under a contract. It is however not intended to impose obligatory duties against the third party. Any purported obligatory duties imposed upon a third party must first be agreed (in writing preferred) by the third party. Conclusively, the Ordinance calls for a high degree of transparency within the contents of the contract such as the identity of the third party be made clear in a clause and the intention to confer benefits on the third parties be expressed appropriately.
Key Changes Under
The Malaysian Companies Bill 2015

The Companies Bill 2015 (the "Bill") was tabled for its first reading in the Malaysian Parliament on 19 October 2015. The Bill was passed by the Dewan Rakyat (House of Representatives) on 4 April 2016, and by the Dewan Negara (House of Senate) on 29 April 2016. The Bill will proceed to obtain the Royal Assent from the Malaysian Ruler (the Yang Di-Pertuan Agong) before being gazetted into legislation. When it comes into effect, the Bill will replace the almost 50 year-old Companies Act 1965 (Act 125) (the "Act") and will bring major reforms to the Malaysian corporate landscape.

The key changes introduced by the Bill includes the following:

1. Incorporation by Single Member and Director
   Current requirement under the Act
   To incorporate a company under the Act, there has to be at least 2 members (section 14(1) of the Act) and at least 2 resident directors (section 122(1) of the Act).

   New requirement under the Bill
   Under the Bill, a company may be incorporated with only one member (individual or corporate member), and one resident director (who can also be the sole member of the company) (section 196(1)(a) of the Bill).

2. Single-document Constitution
   Current requirement under the Act
   Under the Act, all companies have a memorandum and articles of association ("M&AA"). Unless modified, the articles of association of a company may adopt all or any of the regulations contained in Table A, Fourth Schedule of the Act (section 30 of the Act).

   New requirement under the Bill
   The M&AA and Fourth Schedule of the Act is replaced by the ‘constitution’ of a company. It is not mandatory for a company to have a constitution (section 31(1) of the Bill). Unless expressly modified by the constitution (if any), all rights, powers, duties and obligations of a company are as set out in the Bill (section 31(3) of the Bill).

3. Age Limit for Directors
   Current requirement under the Act
   Under the Act, the age limit that a person can be a director of a company is 70 years old (section 129 of the Act).

   New requirement under the Bill
   There is no age limit for a director of a company. The Bill also introduces the minimum age requirement of a director, 18 years old (section 196(2) of the Bill).

4. Unlimited Capacity for Companies
   Current requirement under the Act
   Under the Act, the power and capacity of a company are restricted by its (i) objects clause in its memorandum and articles of association; and (ii) Third Schedule of the Act (section 19 of the Act).

   New requirement under the Bill
   Under the Bill, a company has unlimited capacity to carry on or undertake business activities as a company is not required to specify its objects. However, where the constitution of a company specifies objects, the company can only undertake according to its objects (section 35 of the Bill).
5. No-Par Value Regime
*Current requirement under the Act*
Under the Act, all shares are issued with a par/nominal value.

*New requirement under the Bill*
There is no-par / nominal value for shares under the Bill. The concept of authorized share capital is abolished as well.

6. No-Annual General Meeting (“AGM”)
*Current requirement under the Act*
All companies (public and private) are required under the Act to hold an AGM once in every calendar year (section 143 of the Act).

*New requirement under the Bill*
The Bill abolishes the requirement for private companies to hold AGM. However, minority members holding at least 5% paid-up capital can request directors to hold physical meeting if more than 12 months has elapsed since the end of the last members’ meeting, and the resolution proposed is not defamatory, vexatious or frivolous (section 311(4) of the Bill).

The requirement to hold AGM remains mandatory for public companies (section 340 of the Bill).

7. Majority Approval for Written Members’ Resolutions
*Current requirement under the Act*
The Act requires the approval of all members to pass the written resolution, and once approved, it will be treated as duly passed at a general meeting (section 152A of the Act).

*New requirement under the Bill*
The Bill allows members of private companies to pass written resolution provided that requisite majority is met, i.e., more than 50% approval for ordinary resolutions and at least 75% for special resolutions (sections 291 and 292 of the Bill). Notwithstanding the above, a member of a private company holding at least 5% of the total voting rights of the company may require the company to circulate a resolution accompanied by a statement on the subject matter of the resolution prior to the passing of the written resolution (section 302 of the Bill).

Private companies are not permitted to pass a written resolution to remove a director or an auditor before the expiration of their term of office (section 297(2) of the Bill).

Public companies are required to pass a resolution at the meeting of the members (section 290(2) of the Bill), and no longer be allowed to pass written resolutions.

8. Distribution of Dividends
*Current requirement under the Act*
The Act required payment of dividends by a company to its members only out of its profits (section 365 of the Act).

*New requirement under the Bill*
A company may only make a distribution of dividends to its members out of profit of the company available if the company is solvent (section 132(1) of the Bill). A company is regarded as solvent is the company is able to pay its debt when it becomes due within 12 months immediately after the distribution is made (section 132(2) of the Bill). Under the Bill, a company is able to claw-back from a member any amount of distribution made improperly, unless the member has received the distribution in good faith and is not aware that the distribution is made without meeting the solvency test (section 133(1) of the Bill).

9. Alternative Procedure for Capital Reduction
*Current requirement under the Act*
Under the Act, a company wishing to undertake a capital reduction exercise requires the sanction of the court (section 64 of the Act).

*New requirement under the Bill*
Under the Bill, a company wishing to reduce its capital has to satisfy the solvency test; (a) cash-flow solvency (i.e., there are no grounds on which the company could be found to be unable to pay its debts); and (b) balance sheet solvency (i.e., the assets of the company are more than its liabilities), (section 112 of the Bill).

Directors of the company are required to declare that the company has satisfied the solvency test (in the form of a solvency statement) (section 113 of the Bill). The directors will be personally liable for the solvency statement made without reasonable grounds (section 114 of the Bill).
10. Liberalising the Financial Assistance Prohibitions

Current requirement under the Act
The Act contains rigid prohibitions against a company from giving financial assistance for the purchase of its own shares or its holding company save for limited exceptions (sections 67 of the Act).

New requirement under the Bill
The Bill liberalises existing prohibitions for financial assistance by a company.

A company may give financial assistance for (i) the purpose of acquisition of its shares or its holding company; or (ii) for the purpose of reducing or discharging liability incurred for such an acquisition, if (section 126(2) of the Bill) –
(a) the financial assistance is approved by at least 75% of the members of the company;
(b) the directors resolve that it is in the best interests of the company and the terms and conditions of the financial assistance are just and reasonable to the company;
(c) majority of the directors who voted in favour of the financial assistance makes a solvency statement (section 113(2)(b) of the Bill);
(d) the aggregate amount of the assistance and any other financial assistance previously given that has not been repaid does not exceed 10% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company;
(e) the company receives fair value in connection with the giving of assistance; and
(f) the assistance is given not more than 12 months after the solvency statement date.

11. New Corporate Rescue Mechanisms

Current requirement under the Act
Under the Act, insolvent companies has only few options available, i.e., receivership, winding-up or undertake a scheme of arrangement with its creditors.

New requirement under the Bill
The Bill introduces 2 alternative corporate rescue mechanisms to facilitate the rescue and rehabilitation of companies in financial difficulties but whose business are still viable to remain as going concern and to avoid winding-up (Division 8 of the Bill):

(a) Corporate Voluntary Arrangement (Subdivision 1, Division 8 of the Bill)
This voluntary arrangement allows the directors of a company to make a proposal to the company and its creditors regarding the company’s debts. It requires the involvement of a nominee who must be a qualified insolvency practitioner who will supervise and implement the proposed voluntary arrangement. The company may apply for a moratorium of between 28 and 60 days during which, inter alia, the company cannot be wound-up, no application for judicial management order can be made against the company, no security can be enforced, and no shares can be transferred. A simple majority by its members and 75% of the total value of the company’s creditors present and voting at the creditors’ meeting either in person or in proxy are required to approve the proposed voluntary arrangement. Once approved, the proposed voluntary arrangement will bind all creditors of the company, whether or not the creditors have voted in favour of the proposed voluntary arrangement.

(b) Judicial Management (Subdivision 2, Division 8 of the Bill)
Under the judicial management concept, the company or its creditors may apply to the Court to place the company under the hands of an independent and qualified judicial manager, if the company or its creditors considers that, inter alia, there is a reasonable probability of rehabilitating an insolvent company as a going concern rather than resorting to winding-up. Once a judicial management order is granted by the Court, a moratorium of 6 months takes effect during which the company cannot be wound-up, no security can be enforced and no other proceedings can be commenced against the company except with the leave of the Court. The Judicial Manager will prepare a workable restructuring proposal which must be approved by a majority of 75% in value of creditors present and voting at a creditor's meeting either in person or in proxy. Once approved by the creditors and
sanctioned by Court, the restructuring proposal will be implemented and bind all creditors of the company, whether or not the creditors have voted in favour of the restructuring proposal by the judicial manager.

12. Conclusion
The proposed new Bill lays down the legislative changes which are expected to reduce regulatory burden and compliance costs, provide greater flexibility for companies and enhance the obligations, responsibilities and protection of corporate participants in line with the international standards of good corporate governance.

YAU KHAI LING
Partner, Loo & Partners LLP
Singapore Foreign Practitioner Certificate

ONG LI LING
Senior Legal Associate, Loo & Partners LLP
Registered Foreign Counsel