THE UNIVERSITY OF NAGOYA

GRADUATE SCHOOL OF LAW

Doctoral Dissertation

Directors' Duties and Shareholders' Remedies in Myanmar: A Comparative Approach to Reform

Dissertation presented as full fulfillment of the requirements for the Degree of Doctor of Laws

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Name of Course: LL.D (Comparative Law) Program in Law and Political Science for International Students (2009-2012)

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Date of Submission: 22 December 2011

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ACKNOWLEDGEMENTS

First and foremost, I would like to thank my gratitude to my main academic supervisor Professor Masafumi Nakahigashi and sub-academic supervisors, Professor Ryo Kobayashi and Professor Katsunori Imai for their kindness, patience, meticulous suggestion and guidance.

I am deeply thanks to Dr. Dan William Puchniak (Assistant Professor, Faculty of Law, National University of Singapore) for making comments and suggestions regarding to the legal arguments on the dissertation.

I wish to express my thanks to the Japanese Government (Monbukagakusho: MEXT) for the scholarship. Special thanks to all faculty members and staffs of the Graduate School of Law, Nagoya University, Japan, for their hospitality and kind support.

I am heartily thanking to my parents (especially to my mom who passed away on 8 June 2011, during the hardest time to accomplish the dissertation), my husband Naw San and my daughter Lily Mone, who gave the moral supports and continuous encouragement throughout my Ph.D. research.

Lastly, I offer my regards and blessings to all of those who supported me in any respect throughout my studies in Nagoya University, Japan.

ABSTRACT

This thesis focuses on directors' duties and shareholders' remedies under the Myanmar Companies Act 1914. It evaluates the effectiveness of these two increasingly important areas of Myanmar's company law by undertaking a comparative analysis of them with the equivalent areas of company law in the UK (i.e., the UK Companies Act 2006) and Singapore (i.e., the Singapore Companies Act, Cap 50, 2006 revised edition). Historically, in the UK and Singapore, the law relating to directors' duties has largely been based on common law and equitable principles that were developed by judges through case law. However, in the most recent version of the UK Companies Act 2006, the UK decided to codify its common law principles concerning directors' duties by inserting a statement of directors' duties into its Act. In addition, although (unlike the UK) Singapore has not inserted a detailed statement of directors' duties into its Companies Act, Singapore's courts have rendered numerous decisions which have made the scope and details of directors' duties in Singapore clear. After reviewing the relevant statutory provisions and reported cases in the UK and Singapore, it is clear that the statutory provisions related to directors' duties in the Myanmar Companies Act should be amended.

As detailed directors' duties are not specifically codified in Myanmar this means that case law is the primary source of law governing directors' duties. An analysis of Myanmar's reported cases reveals a tremendous gap in its company law. Unlike in Singapore where the lack of a detailed statutory section on directors' duties has been supplemented by a rich jurisprudence on directors' duties, in Myanmar there are only three reported cases related to directors' duties. In all three cases, the court had no choice but to decide them entirely based on its inherent jurisdiction because of the massive lacuna in Myanmar's company law jurisprudence. In addition, the three cases were decided on relatively narrow points of company law which significantly limits their precedential value.

Although the Myanmar Companies Act does contain some specific provisions regulating particular behaviors that fall within the general ambit of fiduciary duties (e.g., the regulation of loans to directors and the disclosure of conflicts of interest), the lack of broader and more detailed provisions related to directors' duties, both in Myanmar's Companies Act and case law, makes it exceptionally difficult to apply the law in practice. A comparison of directors' duties in Myanmar, the UK and Singapore, reveals that the Myanmar Companies Act lacks the necessary precision and clarity to effectively regulate the duties of directors. As such, to ensure that directors properly manage the

affairs of companies in Myanmar, the implementation of some more accurate and detailed provisions related to directors' duties is essential.

Specifically, the Myanmar Companies Act should be amended to provide precise provisions which make it clear that directors are bound by a fiduciary and negligence duties regime which is similar to the UK. To achieve this, Myanmar's Companies Act will at least have to be amended to include at least two new provisions: (1) requiring directors to act within the scope of their powers (i.e., the proper purpose duty); and (2) requiring each director to exercise a level of care, skill and diligence, as might reasonably be expected of a person with the director's knowledge and experience (i.e., the negligence duty). In fact, ideally Myanmar may be well served by implementing all seven of the duties articulated in the new UK Companies Act 2006. In addition, similar to in the UK, Myanmar's existing conflict of interest duty must be made more robust by making the scope of disclosure wider and the method of disclosure clearer. Alternatively, the Myanmar courts must render more broad based decisions on directors' duties in order to clarify its directors' duties law—which may not be as advantageous as the UK approach of a detailed statutory statement of directors' duties but which has succeeded in the context of Singapore.

In comparison to the UK and Singapore, the provisions relating to shareholders' remedies in Myanmar are scarce. In the UK and Singapore, the extremely powerful and flexible unfair prejudice/oppression remedy, combined with the more recent statutory derivative action, makes it unnecessary to resort to the blunt and often harsh just and equitable winding up remedy—except when a company is on the brink of insolvency. However, Myanmar does not have an unfair prejudice/oppression remedy or derivative action (i.e., it has no "alternative remedies") and therefore the *only* option for minority shareholders is the remedy of just and equitable winding up—which is extremely unsatisfactory for protecting minority shareholder interests in companies which want to remain going concerns. The lack of "alternative remedies" in Myanmar results from a failure to amend the Companies Act for almost a century and the Courts proclivity to cling to outdated English precedents (e.g., strictly enforcing the rule in *Foss v Harbottle* without any exceptions). The dearth of local case law has resulted in the law being essentially "frozen" in a time when minority protection was not the norm and procedural exceptions to the general rule in *Foss v Harbottle* were rare (if non-existent) and ill-defined.

In the UK and Singapore, the introduction of a statutory procedure to govern the conduct of derivative actions was considered necessary to counter the restrictive

nature of the rule in *Foss* and to achieve the proper balance between minority protection and majority rule. The need for a derivative action arises out of a conundrum that is inherent in the corporate form: directors become the target of a company's lawsuit when they breach their duties but it is often the same directors who can decide whether the company will sue (which, for obvious reasons, virtually never happens). The derivative action attempts to solve this company law conundrum by allowing an individual shareholder to bring an action for and on behalf of the company against the directors when the directors wrongfully decide that the company should not sue. The derivative action is thus a special procedural remedy because it allows minority shareholders to enforce *the company's* legal rights—which runs counter to the general rule in *Foss*. Without a derivative action, directors' duties are often meaningless as such duties can be breached with impunity when the wrongdoing directors have effective control over whether the company will sue.

As such, it would be of limited effect to reform Myanmar's directors' duties without providing a derivative action to ensure that those reformed duties can be effectively enforced. Therefore, a statutory derivative action should be inserted into Myanmar's Companies Act. This would allow minority shareholders in Myanmar to effectively ensure the enforcement of directors' duties—particularly in companies with

controlling shareholder directors which are the norm in Myanmar. It would also make this aspect of Myanmar's Companies Act similar to the UK, Singapore and other leading common law countries around the world.

However, at this stage of its development, it is suggested that Myanmar may not want to implement the oppression remedy. Although the oppression remedy is very powerful, it is also extremely vague. For the oppression remedy to be properly applied requires a significant amount of jurisprudence and nuisance judgments—which Myanmar currently lacks. Therefore, the oppression remedy seems like something that would be well suited for Myanmar after its company law jurisprudence has further time to develop.

In sum, as Myanmar stands on the precipice of opening its markets to the world, it is critically important that it creates conditions which foster investor trust. One of the key components for creating investor trust is to have a company law which ensures that directors act in the interest of their companies and that when they fail to do so minority shareholders have an effective remedy. This thesis identifies key areas of Myanmar's Company Law that must be updated in order to achieve such an investor trust facilitating legal regime which ultimately will help put Myanmar on the path to greater economic success and social development.

Chapter I

Introduction

An area of comparative corporate law and governance that has become increasingly important is the relationship between corporate law and economic development. Over the past two decades, perhaps the most cited comparative corporate law research has been the ground breaking study on how the protection of minority shareholders' rights impacts on a country's economic development.[1] Although there has been considerable debate on the specific claims made by this research, there is little doubt that having a company law which properly defines directors' duties and effectively protects minority shareholders is important for a country's economic success and development.

In light of this research, this thesis examines the Myanmar company law—particularly the law relating to directors' duties and minority shareholders' remedies—with the specific objective of finding ways to improve it and in turn, advance Myanmar's level of economic development. In order to achieve this goal, this thesis will undertake a comparative analysis of some of the world's leading common law jurisdictions. This will be done to first identify possible deficiencies in Myanmar's directors' duties and shareholders' remedies law and then to draw upon these comparative examples to suggest "a path for reform".

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[1] Rafael La Porta et al., "Law and Finance (1998)", '*106 Journal of Political Economy*', *University of Chicago Press, vol. 106(6)*.

Myanmar is a British common law country which became independent in 1948.[2] Its core piece of company law legislation is the Myanmar Companies Act 1914 (hereinafter the "Myanmar Companies Act") which was modeled on the 1908 UK Companies Act. Although there have been four separate attempts at reforming the Myanmar Companies Act, the major provisions relating to directors' duties and minority shareholders' remedies have essentially remained "frozen in time". As such, today the statutory law relating to directors' duties and shareholders' remedies in Myanmar are similar to what existed in most common law countries over a century ago. Specifically, as the common law world has increasingly moved towards detailed provisions concerning directors' duties and minority shareholders' remedies a lacuna has been exposed in Myanmar's company law. Without clear directors' duties or shareholders' remedies in the Myanmar Companies Act, Myanmar courts must look to local case law for guidance.

Unfortunately, guidance from Myanmar case law is almost completely nonexistent. Over the last half-century, there has been almost no local company law jurisprudence produced by Myanmar courts. For example, there are only three reported decisions by the Myanmar courts on directors' duties. There are no cases dealing with the critically important rule in *Foss v Harbottle*[3] (hereinafter the rule in *Foss*) and its exceptions. The non-interference rule applied in *Burland v Earle*[4] is still applicable in Myanmar courts and thus, there is effectively no meaningful way for minority shareholders to protect themselves from majority abuse. The scope of this dearth in the case law, which exists in almost all of the most critical areas of Myanmar company law, is difficult to comprehend.

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[2] British colonized Myanmar in 1866. Until World War II, Myanmar was ruled as a part of British India Empire. Thus, the laws enacted before independence through India. Hence, Myanmar received British common law in second-hand.

[3] (1834)2 Hare 461.

[4] [1902] AC 83 (PC).

The combination of statutory provisions that are over a century out of date and case law which has moved at a snail's pace has produced confusion and ambiguity for how shareholders, directors and the courts are to conduct themselves and resolve corporate disputes when they arise. As Myanmar continues to open up to the outside world, this lacuna in the company law will become a substantial hurdle in its economic development.

The principle goal of this thesis is to suggest, based on a comparative legal analysis, how the lacuna in Myanmar's company law (specifically, its directors' duties and shareholders' remedies) can be closed. Ultimately, the hope is that by doing so the company law in Myanmar will reach a satisfactory level of legal development and in turn improve its level of economic development.

The balance of this thesis will proceed as follows. Chapter II will provide an overview of Myanmar's Company Law by examining its history, important amendments and current problematic issues—particularly related to directors' duties and shareholders' remedies. A primary goal of this Part will be to clarify the scope of directors' duties in Myanmar and to suggest how they can be effectively enforced through minority shareholder litigation. In addition, based on a comparative analysis of the Companies Acts in the UK and Singapore, this Part will suggest several significant provisions which could be inserted into Myanmar's Companies Act to address its current shortcomings. Chapter III will examine the history and development of the UK Companies Act and analyze the emergence of directors' duties and shareholders' remedies under the relevant sections of the current UK Companies Act 2006. Chapter IV will focus on the Singapore Companies Act, which has a similar legal pedigree as the Myanmar Companies Act, and highlight how the Singapore legislature has updated its directors' duties and shareholders'

remedies law in order to bolster its economic success. Chapter V will draw on the earlier discussion and undertake a comparative analysis of directors' duties and shareholders' remedies in Myanmar, the UK and Singapore and suggest specific provisions that should be added to the Myanmar Companies Act to improve Myanmar's company law. Chapter VI will conclude by suggesting what the future may hold for directors' duties and shareholders' remedies in Myanmar.

Chapter II

Overview of the Myanmar Companies Act

Myanmar (which is also known as "Burma" or "the Union of Burma") was a British colonial country. The British annexed Myanmar in three stages: 1824, 1852 and 1885.[5] After the final annexation, the British consolidated their control and abolished the monarchy system of Myanmar.[6] From that point until 1937, Myanmar was ruled as a part of the British India Empire.[7] On 4 January 1948, Myanmar achieved independence from the United Kingdom.

The laws enacted before independence, which were received from India, consisted of both codes and case law. Thus, Myanmar inherited a British common law system. The laws enacted after independence up to 1954 were classified according to their subject matter in the Myanmar Code Volume I to XIII in the Laws Revision Committee. The Myanmar Code, which consists of 13 volumes, remains in force and is applied today.[8]

The Myanmar Companies Act is contained in Volume IX of the Myanmar Code.[9] As one would expected based on its British colonial heritage, the company law provisions contained in Volume IX of the Myanmar Code generally reflect the common law principles of company law which were in existence when the provisions contained in the Myanmar Code were drafted. After

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[5] Maung Maung, *Law and Custom in Burma and the Burmese Family*, (The Hague: M. Nijhoff, 1963), p.20. See Narayanan Ganesan, Kyaw Yin Hlaing, *Myanmar: State, Society and Ethnicity*, (Singapore: Institute of South East Asia Studies, 2007), pp.70-71. and Joseph Dautremer, *Burma under British Rule*, (London: T. Fisher Unwin, 1913), pp. 61-71.

[6] Maung, *Law and Custom in Burma*, p.20.

[7] The separation of Myanmar from India was written into the Government of India Act of 1935 and took effect on 1st April 1937. Myanmar Government came directly under British parliament.

[8] After publishing of Myanmar Code in 13 volumes, from 1955 up to now, Acts and Laws enacted were published yearly.

[9] The Myanmar Code (Volume IX), (Rangoon: Published under the Authority of the Union of Myanmar, 1957), p.210-406.

Myanmar's independence, due to the controlled nature of Myanmar's economy, the company law lay virtually moribund.

However, in 1988, the government initiated a series of reforms (including decentralizing government control, encouraging private sector development, abolishing price controls, reducing subsidies and allowing foreign direct investment) which were aimed at developing Myanmar's market economy.[10] These reforms, combined with more recent initiatives to integrate Myanmar into the global economy, have resulted in Myanmar's once moribund company law increasingly being heavily relied upon by Myanmar and foreign investors. The increasing reliance on Myanmar's company law has illuminated its antiquated nature and suggests that these old provisions are no longer appropriate for the new emerging market oriented system. This there is even more apparent when Myanmar's company law is contrasted with many of its regional neighbors, particularly Singapore, which has continuously updated their laws to reflect ongoing changes in business practice.

Since Myanmar's independence, the legislature has made only minor changes to the company law. These minor changes have failed to fill important gaps in the company law that have increasingly been exposed with the development of a market economy. For example, the company law lacks any detailed provisions, either in the statute or case law, concerning directors' duties and does not contain an efficient mechanism for minority shareholders to protect their rights.

In addition to merely filling obvious gaps in the company law, Myanmar also needs to update it's the Myanmar Companies Act, which is based on early 20th century UK Company Law, to boost become competitive in the global economy. In order to have a competitive financial

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[10] Minoru Kiryu (Ed), *Industrial Development and reforms in Myanmar: ASEAN and Japanese Perspectives*, (Bangkok: White Lotus Press, 1999), p.100.

system, Myanmar must upgrade the present Myanmar Companies Act to be in line with international standards. As will be explained in detail later, in order to achieve this the Myanmar Companies Act should be amended to provide precise provisions which make it clear that directors are bound by a fiduciary and negligence duties regime which is similar to the UK and Singapore. In addition, to ensure the effective enforcement of directors' duties—particularly in companies with controlling shareholder directors which are the norm in Myanmar—a statutory derivative action should be inserted into Myanmar's Companies Act.

For several decades, the developed and developing world has been intensely engaged in a debate about how to improve corporate governance. This debate has intensified with the rise of the current global financial crisis. Indeed, how to properly craft and enforce directors' duties has been an important part of this debate. However, in Myanmar the general debate on how to improve corporate governance has largely been silent.

The academic discussion is limited to descriptive commentaries on the implementation of the original Companies Act (in the Myanmar language) and a few other discussions focusing on corporate accounting. Indeed, to my knowledge, there is no current literature on how to properly craft and enforce directors' duties in order to bring Myanmar's company law into compliance with international standards and/or to improve its economic development. Perhaps, such a discussion will begin in earnest once serious proposals to amend Myanmar Companies Act are made and/or more case law is produced by the courts.

2.1 Myanmar's legal history and the Myanmar Companies Act

As mentioned earlier, as a result of Myanmar being annexed by Britain in 1886, throughout its modern history, Myanmar has had a British common law legal system. Myanmar became a province of British India during the colonial period. The codes of law, which were imported wholesale into Myanmar from India, first as unofficial guides and later by formal extension, embodied in large measure the principles of the British common law.[11]

The Indian statutes which were imported into Myanmar were based on English Common Law principles and were drafted by jurists like Lord Macaulay.[12] These statutes were enacted in the form of Legal Codes (e.g., the Penal Code, Civil Procedure Code and Criminal Procedure Code) and Acts (e.g., the Contract Act, Negotiable Instruments Act, Trust Act, Transfer of property Act, Registration Act, Sale of Goods Act, Companies Act, and Arbitration Act).[13] The legislation governing Myanmar was drafted in India for several decades and by the time legislative powers passed to the council in Myanmar the import of the codes and judicial principles from India was completed. Those codes and judicial principles were left to Myanmar's courts to harmonize as best as they could with the indigenous laws and customs.[14]

After the separation of Myanmar from India, the jurisdiction and powers of the Yangon High Court were defined by the Government of Myanmar Act, 1935. The jurisdiction and powers of the Yangon High Court were practically the same as those of the Indian High Courts under the Government of India Act 1935 which made the Indian Federal Courts the interpreters and

[11] Maung, *Law and Custom in Burma*, p.31.
[12] Aung Than Tun, *Myanmar Law Digest*, (Yangon: Innwa Publishing House, 2001), p.23.
[13] Than Tun, *Myanmar Law Digest*, p.23.
[14] Maung, *Law and Custom in Burma*, p.31.

guardians of the Constitution and the tribunal for the determination of disputes between the constituent units of the Federation of India. In India and Myanmar, however, the Indo-British legal system, which at its core is based on the British conception of equity, justice and good conscience, has been continued. This system is the result of centuries of legal evolution and experience which was meant to suit ever changing social norms and the varying complexities of local needs. The Indo-British legal system was firmly entrenched in Myanmar at the time of its independence and it appears destined to remain part of Myanmar's national heritage for the foreseeable future.[15]

Prior to Myanmar's independence in 1949, the Myanmar courts were bound by decisions from the Myanmar, Indian and UK law reports (e.g., Selected Judgments of Lower Myanmar (1872-1892), Printed Judgments of Lower Myanmar (1893-1900), Lower Myanmar Rulings, Upper Myanmar Rulings, Government Circulars (Two Volumes), the Indian Law Reports of Allahabad, Bombay, Calcutta, Madras and Yangon, Financial Commissioner's List of Circulars, Miscellaneous Circulars, Collections and Yearly Files as well as All England Reports and Privy Council Rulings). After Myanmar gained independence,[16] all the existing aforesaid legal reports were still applicable and the current Myanmar Law Reports (selected judicial precedents/ decisions) were applicable.[17] Thus, the legal system of the Myanmar is a unique combination of pre-independence English and Indian law combined with local Myanmar jurisprudence and legislation.[18]

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[15] Maung Ba Han, *A Legal History of India and Burma*, (Rangoon: The K.M.A.K Press, 1952), p.107.
[16] Myanmar becomes independent from British rule on 4th January1948.
[17] Than Tun, *Myanmar Law Digest,* p.99.
[18] Alec Christie, "Myanmar's Legal System and Contract Law", *Mondaq.com*, Available at: *http://www.mondaq.com/article.asp?articleid=42668* >, (Assessed on 16 October, 2011).

2.2 Enactment of the Myanmar Companies Act

In Myanmar, matters concerning companies (and corporations) are regulated by the Myanmar Companies Act and the common law. The Myanmar Companies Act is composed of 287 sections and three schedules. Historically, starting on 1 April 1914, the Indian Companies Act 1913[19] governed companies in Myanmar.

The Indian Companies Act of 1913 was modeled on the English Companies Act of 1908.[20] Accordingly, as and when the English law underwent modifications, the Indian counterpart followed suit. In English law, the legislative measures relating to companies were fused together in the English Companies Consolidation Act of 1908. The Indian Companies Act 1913 was further modified in 1936 in the light of the UK Companies Consolidation Act of 1929.[21] Myanmar amended its Companies Act according to the modifications made to the Indian Companies Act until its independence in 1949. As such, it can be said that the basic structure and fundamental principles of Myanmar Companies Act are very similar with the UK Companies Act and the Indian Companies Act.

2.3 Post-Independence amendments to the Myanmar Companies Act

Although in 1949 Myanmar broke away from the British Empire and became a sovereign and independent state, the Indo-British Legal System continued as the basis for Myanmar's legal

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[19] India Act VII 1913.
[20] Society of Comparative Legislation, *Journal of the Society of Comparative Legislation, Volume 17*, (London: Rivingtons, 1917), p. 108.
[21] A.K.Sur, *A Dictionary of Company Law,* (Calcutta: Institute of Company Affairs, 1968), p.49.

system. In most countries, major political, administrative and/or economic changes often produce significant legislative amendments and/or legal changes. However, in Myanmar, at least in the context of its company law, this did not occur. Although, the Myanmar Companies Act has been was amended four times (i.e., in 1955, 1959, 1989 and 1991)[22] since independence, all of the amendments have taken the form of minor changes rather than comprehensive reform.

In 1955, a few minor sections in the Act were changed. Specifically, under the amendment of 1955, the meaning of Myanmar Company and foreign company were precisely defined in the Act and minor changes were made to the format of the memorandum and articles.[23]In the 1959 amendment, the Myanmar Companies Act was amended to define the requirement and role of a "special auditor" in companies in which the government holds shares.[24] Another minor amendment was made to the Myanmar Companies Act by the State Owned Economic Enterprises Law in 1989 which increased and implemented various fines and charges for certain offences.[25] Finally, in 1991, the Act was amended in order to define the authority of the

[22] The 1955 amendment was obvious one for foreign companies but all amendments were not related to the role of directors and their duties.

[23] The Myanmar Companies Act 1914, s. 9 provided that how to print the memorandum, how to divide the body content and how to confirm the memorandum. Section 19 provided that how to print the articles of association, how to divide the body content and how to confirm the articles of association.

[24] The auditor of a company have a right of access at all times to the books and accounts and vouchers of the company and entitle to require form the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of auditors. According to section 145A, the President of the Union must appoint or re-appoint the auditor of the company on the advice of the Auditor-General. The Auditor-General has power to direct to audit the company's account by the auditor appointed and to give instructions in regard to any matter relating to the performance of the auditor. The auditor may conduct a supplementary or test audit of the company's accounts. The Auditor-General may request to furnish information or additional information by general or special order to audit the company's account. The Auditor-General may also request to produce before him the company's records or documents in its position or under its control for the purposes of audit or supplementary or test audit of the company's account. The auditor has to submit a copy of an audit report to the Auditor-General who has the right to comment upon or supplement the audit report. Anything under section 145A may be done by any person authorized by Auditor General either generally or specially.

[25] See. The Myanmar Companies Act 1914, ss. 25,36,82,83,87,112,124,125,135,136 and 248.

Chairman of "The State Law and Order Restoration Council" in those cases of varying and issuing a license for a non-profit association.

2.4 Current status of companies under the Myanmar Companies Act

Under the Myanmar Companies Act, a company may be established in the form of either a "public company"[26] or "private company"[27] in three ways: (1) a company limited by shares; (2) a company limited by guarantee; or (3) an unlimited company. Similar to in other common law jurisdictions, among these three types of companies, the company limited by shares is the most common form.

All types of companies are required to register under the Myanmar Companies Act at the Office of Registrar of Companies Registration. Every foreign company or company carrying on international trade has to apply and obtain a permit from the President of Myanmar before it registers with the Ministry of National Planning and Economic Development according to section 27A of the Myanmar Companies Act 1914. If one share is owned by a foreign partner, the company shall come under the definition of a foreign company.[28] Section 27A was inserted in the

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[26] Where the company to be formed any seven or more persons associated for any lawful purpose is a public company (s.5). A "public company" means a company incorporated under the Myanmar Companies Act, which is not a private company s. 2 (13A).

[27] Where the company to be formed any two or more persons associated for any lawful purpose is a private company (s.5). A "private company" which by its articles of association limits the membership to fifty, restricts the right to transfer the shares and prohibits any invitation to the public to subscribe for the shares of the company s.2 (13).

[28] Myanmar Business and Economy, "To Do Business In Myanmar", *myanmars.net homepage*, available online at: http://www.myanmars.net/myanmar-business/main.htm#Companies_Limited_by_Shares, (Accessed on 19 December, 2011).

1955 amendment.[29] The necessary documents have to be submitted when applying for the registration of a foreign company or branch office of a foreign company after permission is granted by the President.[30]

The law governing limited companies is the Myanmar Companies Act. A company in which the state holds shares must be registered under the Special Company Act 1950 and the Myanmar Companies Act. In addition to the Myanmar Companies Act, there are two substantial pieces of subsidiary legislation, namely, the Companies Regulations 1957 and the Companies (Winding-up) Rules 1940.[31]

After the market oriented economic system was implemented in 1988, each year has seen an increase in the number of registered companies and business organizations. According to the data of the Directorate of Investment and Company Administration (DICA) 2010, there are 21650 Myanmar Companies; 1279 Foreign Companies/Branches; 1072 Partnership; 71 Joint Venture Companies and 42 Associations.[32] The consistent increase in the number of companies and other business organizations illustrates the evolution of Myanmar's economy. It also demonstrates that there is a concurrent need for the company law to evolve.

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[29] The 1955 Amendment (Act XXIII, 1955).

[30] The necessary documents are- (1) Two sets of memorandum of association and articles of association duly stamped and printed both in Myanmar and English, (2) Translation certificate by a competent translator, (3) List of directors and managers for a company incorporated in Myanmar, (4) List of person (s) authorized to accept services of process and notice in Myanmar on behalf of the company (for a branch office of a foreign company), (5) Declaration of registration, (6) Declaration of legal and official version of the documents, and (7) Declaration of the situation of registered office.

[31] The Companies Regulations 1957 prescribed forms to be used. The Companies Winding-up Rules 1940 set out the procedure for the liquidation of company.

[32] DICA, "Data on Foreign Investment, Local Investment and Company Registration", *dica.gov.mmhomepage*, Available online at: *http://www.dica.gov.mm/dicagraph2.htm,* (Assessed on 2 Nov. 2011).

2.5 Current problematic issues in Myanmar Companies

One of the foundational problems with the current Myanmar Companies Act is that it is out of date. As described above, the Act has been updated several times since it was first enacted in 1914. However, the core provisions related to directors' duties and minority shareholders' remedies have remained "frozen in time". This is a serious problem because the original Myanmar Companies Act was modeled on the UK Companies Act 1908 which had no provision specifically articulating directors' duties or providing for minority shareholders' remedies.[33] In short, this has left an enormous gap in the Myanmar Companies Act which is readily apparent when compared to companies' acts around the common law world—which have increasingly included detailed provisions regulating directors' duties and minority shareholders' remedies.[34]

There is a need for substantial revision to the Act in accordance with a framework more directly suited to the economic and legal environment of Myanmar. At a general level, there should be detailed provisions specifically regulating directors' duties and clearly defining shareholders' remedies which can support an effective system of corporate governance.

In a company, shareholders and directors are normally the main actors in internal corporate governance. When forming a company, directors accept an important role and are considered fiduciaries in the law because of the extensive power they have over the assets of others. As such, they should be made clearly aware of their rights and responsibilities under the law. Indeed, this is the rationale that has caused some common law countries to specifically articulate

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[33] The UK Companies Act 1908.

[34] For example: the UK Companies Act 2006 (ss.171-177) director duties, the Singapore Companies Act (Cap 50 of the 2006 revised edition) (s.216A) derivative action.

the duties of directors in their primary company law legislation.[35] Even the UK, which historically has been comfortable relying on case law for the regulation of directors' duties—which may make sense because of its highly developed jurisprudence—has recently included detailed provisions concerning directors' duties in its latest version of the UK Companies Act 2006.[36]

Obviously, especially in large companies with many shareholders, it is administratively impossible for shareholders to be involved in the day-to-day management of the company. As such, almost universally company law allocates the day-to-day management of the company to the board of directors.[37] This fact buttresses the rationale for having clearly defined duties which both restrain the directors from acting in their own self-interest and mandate them to diligently perform their duties in the best interest of the shareholders. In short, as illustrated through the development of codified directors' duties and minority remedies law around the world, Myanmar would benefit from including detailed provisions relating to directors' duties and minority remedies in its Companies Act.

As detailed directors' duties are not specifically codified in Myanmar this means that case law is the sole source of law governing directors' duties. An analysis of Myanmar's reported cases reveals a tremendous gap in the company law. Under almost all circumstances, the case law is insufficiently developed to provide sufficient certainty for how directors' duties will (or should) be applied when dealing with a specific issue in practice. For example, in the critically important area of fiduciary duties, on several occasions the court has been left to decide a particular case based

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35 The Singapore Companies Act (Cap 50 of the 2006 revised edition), s. 156 & 157.
36 The UK Companies Act 2006, ss. 171-177.
37 Renier Karrakman, (2nd Ed), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, (Oxford: Oxford University Press, 2004), pp.12-14.

almost entirely on its discretionary or inherent power because of a lack of sufficient case law and absolutely no statutory guidance.

There are only three reported cases related to fiduciary duties which involve issues concerning: (1) whether the directors, liquidators and officers are liable for breaching their fiduciary duties;[38] (2) whether the heirs of an officer (which by definition may include a director) can also be liable for a breach of a directors' fiduciary duties;[39] and (3) whether a managing director breached his fiduciary duty and should thus be held personally liable for using the company for his own personal gain.[40] In all three cases, the court had to decide the case based on its inherent discretion because of the lack of available case law and absence of sufficient statutory provisions related to fiduciary duties.

Although, the Myanmar Companies Act does contain some specific provisions regulating particular behaviors that fall within the general ambit of fiduciary duties (e.g., the regulation of loans to directors and the disclosure of conflicts of interest) the lack of broader provisions related to fiduciary duties, both in the Myanmar Companies Act and case law makes it difficult, in litany of situations, to apply the law in practice. As such, specific provisions related to directors' duties should be inserted for the sake of shareholders, directors and the court so that all of these corporate governance actors remain cognizant of the rights and obligations that directors have when managing a company.

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[38] *Zakarikhan (Deceased) by his L/ R Mr. Mohamed Khan and two others (Appellant) v. The Official Liquidator, Chief Court Building, Rangoon (Responde*nt) 1966 B.L.R (Chief Court), 304.

[39] *U Zon and six others v. Daw Yay and three others* 1967 B.L.R (Chief Court) 279.

[40] *The Union of Myanmar Inland Transportation Group (Plaintiff) v. People Service Co. Ltd. (Respondent)* (1967) B.L.R (C.C) 484.

If the Myanmar Companies Act imposes particular duties on directors the Court may tackle cases in an effective way when directors' are accused of having been engaged in wrongdoing. Furthermore, the directors themselves can be protected from abusive claims if they are aware of their specific duties. Finally, an awareness of their specific duties will allow directors to more effectively fulfill their legal role as the day-to-day managers of the company.[41]

As for shareholders, they *prima facie* have no right to sue in the name of the company or on behalf of minority shareholders in the case of mismanagement of the company. In cases when a wrong has been committed by a majority shareholder who injures the minority, a minority shareholder was often unable to obtain any redress from the courts to stop the majority shareholders from acting in an oppressive manner. It is an elementary principle of the law relating to Joint Stock Companies that the court will not interfere with the internal management of the companies acting within their powers, and has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover money or damage alleged to be done to the company the action should *prima facie* be brought by the company itself.[42]

In limited circumstances, the remedy of applying to the court for winding-up the company on just and equitable grounds is available under section 162 (6) of the Myanmar Companies Act.[43] However, the courts are reluctant to interfere with the internal management of the company acting within its powers. In addition, the court has no right or duty of interference even in the case of

[41] Latin for "as it seems at first sight."

[42] These fundamental principles are laid down in *Foss v. Harbottle* (1843) 2 Hare 461 and *Burland v Earle* 1902 A.C 83 cases. Myanmar reported case *B. Cowasji and others v. Nath Singh Oil Co., Ltd.* 13 B.L.T 51 ;*Chan Tha Zay Co. v. U Ohn Maung and one* 1963 B.L R (C.C) 499 cases followed the decision of the *Burland v.Earle* case.

[43] Clause 6 of section 162 of the Myanmar Companies Act 1914 is not to be construed as being *ejusdem generis* with clauses one to five, but gives the court power to order the winding up of the company if it is of opinion that such order would be just and equitable.

conduct amounting to fraud or oppression.[44] Again, the shareholders normally have no right to interfere in the decisions of the board. If the directors breach their duties shareholder's also have no right to sue them as the directors' duties are owed to the company and not the shareholders. Thus, to justify court or shareholder intervention there must be strong grounds. It is only when the grounds are strong and sufficient that the Court should intervene and take a hand in the management of the affairs of the company or take the drastic step of ordering a winding up.[45]

The winding up of a company is an extraordinary remedy that should only be used as a last resort because it risks producing enormous "negative externalities".[46] As the Myanmar Companies Act only provides the minority shareholder remedy of winding up this puts the court in an extremely difficult situation and leaves a large lacuna in the law. It is often inappropriate to wind-up a company because even if the directors have harmed the company the drastic measure of putting an end to the company cannot be justified. In the case of a healthy and viable company it is often akin to "killing a mosquito with a sludge hammer". In this sense, the court will often fail to take any action when a remedy is justified to avoid the risk of producing significant negative externalities. This is inequitable as all shareholders should have the opportunity to obtain redress for violation of their rights. Thus, in order to create an equitable and efficient system of internal corporate management accurate duties of directors and efficient shareholders' remedies should be inserted into the Myanmar Companies Act.

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[44] *B.Coswaji and others v. Nath Sing Oil Co.Ltd* [13 BLT.51].

[45] *Chan Tha Zay Co. v. U Ohn Maung and one* (1963) B.L.R (C.C) 499.

[46] Negative externality means the negative effects or consequences that the act beyond the particular situation.

2.6 Statutory provisions concerning the directors and their duties

The Myanmar Companies Act defines "director" as "any person occupying the position of a director by whatever name called."[47] It appears that this definition includes "*de facto*" directors but it is unclear whether "shadow" directors are caught by this definition. The Act also makes it clear that a director is an officer of the company.[48] The director's function is to take part in decision making by attending meetings of the board of directors. Anyone who is called a director is vested with the authority to manage the day-to-day affairs of the company. The 'promoters'[49] of the company are usually accepted as directors by an ordinary resolution at the first general meeting of the company.

The director's role in the company is to manage it and as such directors are given extensive powers by the company under the memorandum, articles, and any resolutions by the members and by statute. The directors are given the authority to carry out their tasks of "exercising all the powers of the company" but these powers are limited.[50]

2.6.1 Article of associations defines duties of directors

Directors have the power to take business decision on behalf of a company through a majority vote. In addition, the directors through a majority vote have the power to bind a company to a third party in contract. As such, the directors are in a position where they have a considerable

[47] The Myanmar Companies Act 1914, s. 2 (5).
[48] The Myanmar Companies Act 1914, s.2 (11).
[49] The promoter is a person who is responsible for incorporation of a company.
[50] The Myanmar Companies Act 1914, Schedule I, Table A, art. 71.

amount of discretion and authority. Therefore, the company law places various duties on them to ensure that they properly exercise their powers for the benefit of the shareholders and are restrained from using their powers to act in their own self-interest.

The general law governing directors' duties in Myanmar is mainly found in a very small body of case law. Also, more specific provisions which may restrain a director from acting in their own self-interest in certain situations or which obligate directors to act in the interests of shareholders can be found in the company's memorandum and articles of association and the Myanmar Companies Act.

The articles of association have to be printed in Myanmar and English and to be divided into paragraphs numbered consecutively. Moreover, the articles of association, need to be signed by each subscriber of the memorandum of association (who shall add his address, nationality and description) in the presence of at least one witness who attests to the signature.[51] In the case of a company limited by shares, if the articles of association are not registered then the articles contained in Table A of the first schedule apply. In addition, if articles are registered the articles contained in Table A still apply but only in so far as the articles of association do not exclude or modify the regulations in Table A.[52]

The articles of association[53] are applied to all companies public and private under the Myanmar Companies Act. A company may use a set of rules contained in the Table A as its articles of association or replace or modify some or all of those rules with provisions to suit the particular circumstances of the company. The important items covered by the articles of

[51] The Myanmar Companies Act 1914, s.19, form and signature of articles is substituted by 1955 amendment Act.
[52] The Myanmar Companies Act 1914, s.18.
[53] Articles of association are also known as Table A.

association include: the issue and transfer of shares; alteration of capital structure; powers, duties, liabilities of directors; powers, duties, rights and liability of members, calling meetings and how they are to be conducted, dividends, accounts, rules for winding up, and voting powers of members. Thus, the main sources of directors' duties are company articles of association and Table A that significantly affects the duties of directors. Almost all companies limited by shares usually adopt Table A in the same way in the Act.

2.6.2 Specific duties of directors under the Act

The provisions that relate to the duty of directors under the Myanmar Companies Act are the duty to hold a specific amount of shares to qualify as a director, company loans to directors, the disclosure of interests by directors and duty to keep proper books of account. However, it must be stressed that these very specific provisions are not tantamount to more general directors' duties as they are specifically tailored to particular types of behaviors or situations.

2.6.2.1 Duty to hold a specific amount of shares to qualify as a director

Each director is required by the law to provide the company with details of their shareholding in the company. The director has to meet the specified shareholding requirement to serve as a director.[54] For a company's articles of association to comply with the Act they must

[54] The Myanmar Companies Act 1914, s.85.

provide that each director must hold at least one share in the company.[55] The shareholding requirement must be met within two months after the director is appointed or such shorter time as may be fixed by the articles of association. If an unqualified person acts as a director of the company, she is liable to a fine not exceeding fifty kyats for every day that she does not meet the requirement.

To summarize, the Act requires each director to hold a specified amount of shares in the company to qualify as a director. Failure to do so will result in a fine under the Act. As such, this can be seen as one of the obligations or duties that one must meet to be a director under the Myanmar Companies Act. The requirement to hold shares in the company may encourage directors to effectively perform their role as a director as it should, at least in theory, help to align a director's self-interest with the interests of the company. However, as has been seen with stock options in other countries, merely vesting directors with shares does not solve all directorial malfeasance. In fact, it may promote malfeasance as directors look for creative ways to raise the short term price of their stock so that they can profit at the long term expense of the company.

2.6.2.2 Loans to directors

The company cannot make any loan (or guarantee) to a director of the company or to a firm of which such director is a partner or to a private company of which such a director is a director.[56] Any director of a company who contravenes this provision may be subject to a fine not

[55] The Myanmar Companies Act 1914, Schedule I, Table A, art. 70.
[56] The Myanmar Companies Act 1914, s.86D.

exceeding five hundred kyats and will be disqualified as a director.[57] This restriction on company lending does not apply to a private companies (except a private company which is subsidiary of a public company) or to a company involved in the business of banking.

It is submitted that this restriction makes sense. There is a direct conflict of interest when a company makes a loan to one of its directors. Although such a loan may be necessary in the case of private companies, it is rarely required for doing business in the case of public companies—which is why the law provides an exception for private, but not public, companies.

2.6.2.3 Disclosure of interest by director

Every director, who has an express or implied interest in any transaction entered into by or on behalf of the company, has to disclose the nature of their interest at the meeting of the directors. Such disclosure must occur at the meeting when the transaction arises or at the first meeting of the directors after the director's conflict of interest arises. A director may make a general disclosure of their interests which will be valid for subsequent transactions. Specifically, after general notice is given it is not necessary to give any subsequent special notice relating to the same conflict of interest in future transactions.[58]

Every director who contravenes this provision is liable to a fine not exceeding one thousand kyats.[59] The company must keep a register in which the particulars of all conflicting

[57] To compare with the offence and the fine rate, it is a small amount. Myanmar needs to amend the existing fine rates (e.g., currency calculation was not up to date with present inflation).

[58] The Myanmar Companies Act 1914, s.91A (1).

[59] The Myanmar Companies Act 1914, s.91A (2).

transactions are entered and the register must be open for inspection by any member of the company at the registered office of the company during business hours.[60] Every officer of a company who knowingly and willfully acts in contravention of this provision is liable to a fine not exceeding five hundred kyats.[61]

This provision is important as it requires directors to disclose their conflict of interest which is a basic general requirement in most common law countries. It is aimed at preventing directors of a company (or a company controlled by a director) from entering into any contract for the sale, purchase, or supply of goods and materials with the company except with the consent of the other directors.[62] In addition, the Myanmar Companies Act attempts to prevent conflicts of interest by prohibiting directors of a company from profiting from their position as a director (except by receiving payments as a managing director, manager, a legal/technical advisor or a banker).[63] These two provisions are aimed at preventing directors from taking advantage of their directorial position in order to satisfy their own self-interest.

Although this general duty to disclose and prohibition on profiting from a directors' position are helpful, without more detailed statutory provisions or extensive case law they are extremely difficult to enforce. As will be explained later, this is why it is suggested that Myanmar should bolster its statutory restrictions on conflicts of interest and the courts should become more active in supplying judicial precedents to define the detailed scope of these general prohibitions.

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[60] The Myanmar Companies Act 1914, s.91A (3).
[61] The Myanmar Companies Act 1914, s.91A (4).
[62] The Myanmar Companies Act 1914, s.86F.
[63] The Myanmar Companies Act 1914, s.86E.

2.6.2.4 Duty to keep proper books of account

Every company has to maintain proper books of account in Myanmar or English[64] with respect to all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place and includes all sales and purchases of goods by the company; and the assets and liabilities of the company.[65] The books of account may be kept at the registered office of the company or at such other place as the directors think fit. It needs to be open for inspection by the directors during business hours. Any director or directors of a company, who have knowingly by their act or omission contravened this provision, may be liable to a fine not exceeding one-thousand kyats. Regarding the inspection of the accounts and books of the company, members not being a director do not have any right to inspect any account or book or document of the company expect as conferred by law or authorized by the directors or by the company in general meeting.[66]

This provision is important as it places a duty on directors to ensure that the activities of the company are transparent. Making the expenditures of the company transparent may prevent not only the improper use of company assets but also prevent officers from escaping liability when they have harmed the company.

[64] The proper books of account to be maintained in "Myanmar or English" were substituted by 1955 amendment Act.
[65] The Myanmar Companies Act 1914, s.130.
[66] The Myanmar Companies Act 1914, Schedule I, Table A, art. 105.

2.7 Three reported cases related to fiduciary duties of directors in Myanmar

An analysis of the extremely limited number of reported cases in Myanmar related to directors' duties highlights one of the most significant weaknesses of Myanmar's company law. The combination of a dearth in reported cases and the limited statutory provisions related to directors' duties makes it difficult for directors' duties to be enforced. Often when the courts are confronted with cases involving alleged breaches of directors' duties they must rely on their discretionary power or inherent jurisdiction as there are limited judicial precedents.

The most likely reason for the severe dearth in company law case in Myanmar is because of the historical small scope of the market for private businesses. In addition, due to the relatively closed nature of the business community most of the company law cases have historically been settled out of court. As such, since the time of Myanmar's independence there has only been three cases related to fiduciary duties.

2.7.1 Acts of director done by honestly and reasonably

In the case of *Zakarikhan (Deceased) by his L / R Mr. Mohamed Khan and two others (Appellant) v. The Official Liquidator, Chief Court Building, Rangoon (Respondent)*,[67] a private

[67] 1966 B.L.R (Chief Court) 304. U Thein Han, *Myanmar Law Digest of Cases (Civil & Criminal) 1956-1976*, (2nd Ed), (The Labour Press, 1983), pp.267-268. The original version of the case is in English language. Burma Law Report (BLR) is a government publication, published annually by the state-controlled Law Report Publishing Board. The report is based on judgments passed in significant cases by the Supreme Court. Most of the cases are published in Myanmar language but some cases are reported in English language. This case is reported in English language.

limited company, incorporated under the Myanmar Companies Act, was wound up by the High Court. Upon the winding, the Official Liquidator sued a director named Zakarikhan and two other unnamed directors ("the three directors") under section 235 of the Myanmar Companies Act. The evidence showed that the three directors allowed another director to take 20 shares when the articles required him to take 30 shares. Therefore, the court held that the three directors liable allowing a shareholder to be relieved of his obligation to purchase the required amount of shares from the company. Accordingly, the three directors were ordered to pay kyats 18,500 as compensation to the company. The three directors appealed the case to the Chief Court.

The Chief Court held that the three directors' act of failing to enforce payment for unpaid shares resulted in a permanent reduction of the capital of the company, which could only be done with the sanction of Court under section 56 of the Myanmar Companies Act. As this was not done, the act of the three directors was clearly unlawful and invalid. However, the judge went on to consider whether the three directors should have excused under section 281 of the Myanmar Companies Act.

In order to grant relief such relief under section 281 the court must be satisfied that three factors have been established: (1) that the director acted honestly; (2) that the director acted reasonably; and (3) that in light of all the circumstances of the case the director "ought fairly" to be relieved of liability. The burden of proof lies with the defendant-director to prove on a balance of probabilities that they acted reasonably and that they ought fairly to be relieved of liability. The court generally assumes that the directors acted honestly unless the contrary is proved by the company or the aggrieved shareholder.

The appellants in the instant case in accepting the surrender and ordering forfeiture of certain shares might have acted with the "honest intention" of relieving their friends of liabilities which they could not pay. However, the Court found that the three directors' act was against the interests of the company and other share-holders and thus could not be said to be "reasonable" so as to entitle the benefits of section 281. The court clarified that before section 281 can be invoked, it must be shown that the directors have acted reasonably as well as honestly. As such, the three directors' appeal was dismissed.

In the context of the present case, the court clarified that if the appellants could have proven that they acted reasonable and honestly, they might have been relieved from liability. The consideration of the court to relieve a director from his fiduciary duty is based on "whether the acts of such person are done by honestly and reasonably or not." The consideration depends upon the particular circumstances of the case and the judge's discretionary power.

The duty to act honestly includes the fiduciary principle that directors must exercise their powers and duties in good faith in the best interests of the company. In addition, the fiduciary nature of a director's duty requires them to use the powers they have been given for "a proper purpose". Moreover, a director needs to act in accordance with the company's constitution and to exercise the powers which are conferred to them. However, all of these concepts remain extremely vague under Myanmar's law as the courts have not developed these aspects of the fiduciary duty of directors. In addition, Myanmar's Companies Act does not elaborate on these principles. As such, in the absence of such case law, the Myanmar Companies Act should provide more detailed law concerning directors' fiduciary duties.

2.7.2 The court's power to assess damages against heirs of a delinquent officer

The case of *U Zon and six others v. Daw Yay and three others*[68] involved a case against the heirs of the companies' liquidators upon winding up of the company. Upon the company being wound up, U Ba and U Ba Twin were appointed as liquidators. After U Ba and U Ba Twin died an application under section 235 of the Myanmar Companies Act was filed for the misappropriation against their heirs (Daw Yay, Daw Khin Soe, Daw Han Tint and Daw Sein Nyunt). After hearing the argument of the shareholder-plaintiff's lawyer, Justice U Thet Pe decided that the heirs of the deceased liquidators could not be made responsible for their actions. As such, the application under section 235 of the Myanmar Companies act was dismissed.

In this case the court clarified that under section 235, in the course of winding up a company, the court may make hold any director, manager, liquidator or officer of the company liable when it appears that they have misapplied, retained or been guilty of any misfeasance or breach of trust with respect to any money or property of the company. Moreover, the court made clear that this section is applicable notwithstanding that the offence is one for which the offender may also be held criminally responsible.

In this case, under section 235, it was made clear that the duties of liquidator and director are the same and that after a director's death their heirs cannot be held liable. However, the Supreme Court also held that its decision did not mean that the company has no remedy as they may take other civil actions against the directors heirs—but these actions would not fall under

[68] 1967 B.L.R (Chief Court) 279. Thein Han, *Myanmar Law Digest,* p.268-269. The original version of this case is in Myanmar language and translated by myself into English language. Any errors and omissions are my own.

section 235 of the Act. As such, the precedential value of this case is limited to the narrow point that relatives of directors cannot be held liable under the Act for a deceased directors' malfeasance.

2.7.3 Misfeasance of managing directors and liability of company

The word "misfeasance" means a lawful act performed in a wrongful manner. For example, an act committed by an officer of a company in the nature of breach of trust or breach of duty, particularly relating to the company's assets. In the case of *the Union of Myanmar Inland Transportation Group (Plaintiff) v. People Service Co. Ltd.* (Respondent) (1967),[69] a managing director appeared to be acting as an agent of the company and as such a third party assumed that his actions were acts of the company (not of himself personally).

Before the Supreme Court, the plaintiff, Union of Myanmar Inland Transportation Group, brought an action against the defendant, People Service Co. Ltd, for the failure to pay for goods delivered on credit. The plaintiff sold engines, bicycles and parts of machines to the defendant on credit for 1,10400 kyats and 38 pyas respectively. After delivery, the defendant refused to repay the money because it claimed that "the company" did not agree to purchase any goods from the plaintiff. Specifically, the defendant company claimed that the goods were purchased in a personal capacity by the defendant company's managing director.

This case is important because the court made it clear that a company is an artificial legal entity, created and recognized by law. As such, the subscribers must appoint the board of directors

[69] (1967) B.L.R (C.C) 484. Thein Han, *Myanmar Law Digest,*p.259-260. The original version of this case is in Myanmar language and translated by myself into English language. Any errors and omissions are my own.

in order to carry out the business of company. As the directors cannot be expected to deal with day-to-day matters of the company, a managing director is appointed to carry out business on behalf of the company. Therefore, the court rejected the defendant's argument that the managing director was not an agent who could bind the company. To the contrary, the court held that third parties dealing with the managing director can assume that they are dealing with the company. If the defendant company alleges that the managing director is not an agent of the company, the burden of proof lies on the defendant company to prove such statement. In this case, the court held that the defendant company could not prove that the act of the managing director was not related to company's business and thus that it did not bind the company. As result, the court found that defendant company purchased the goods from the plaintiff company and was therefore liable.

In this case, according to the testimony of the managing director, it was clear that the managing director committed misfeasance towards the company. However, the respondent company had to pay for the cost of goods purchased. The Myanmar Companies Act does not contain any provision relating to managing directors but the articles of association of companies give normal power to the board to appoint from amongst themselves one or more "managing director."[70]

In some small companies the managing directors is given extensive power over the management of the company.[71] The managing director took advantage the absence of statutory provision and escaped from his liability. The managing director breached the fiduciary duty he owed to the company by acting beyond the scope of his powers. Every director must exercise the

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[70] Myanmar Companies Act 1914, Schedule I, Table A, art 72.
[71] Victor Yoe…[et al], *Commercial Application of Company Law in Singapore*, (3rd Ed), (Singapore: CCH Asia Pte Ltd., 2008), p178-179.

powers conferred to him or her within the limits of those powers (i.e., for a proper purpose). The provision relating to directors to act within the power should be provided for in the act so that such directors will be constrained from taking advantage of their powers. Perhaps, if the Myanmar Companies Act had contained such a provision this act may not have occurred or it may have been easier for the company to have received compensation from the director (although it should be noted that in this case the company would have likely had a claim in agency law against the director for breach of an agent's warranty of authority).

From the three above-mentioned cases the conclusion that can be gleaned is that, similar to other common law countries, Myanmar's company law general treats directors as fiduciaries. This means that directors are required to act bona fide in the interests of the company, not place themselves in a position of conflict and must not exercise their powers for any collateral purpose. In addition, a director must exercise reasonable care and such skill as might reasonably be expected of a person of his knowledge and experience. A failure to act as a fiduciary can result in the director being liable to the company for their breach. The Act, in section 91A, also provides for criminal sanctions if the directors fail to comply with the requirement to declare their conflicts of interest.

Although these general principles can possibly be gleaned from the three decisions above and Myanmar's common law heritage, it is obvious that the necessary details of what exactly is required of a director as fiduciary under Myanmar's company law are exceptionally hazy. All of the three cases describe above were decided on narrow points of law and therefore have extremely limited precedential value. In turn, the case law does little to define the precise scope of directors' duties in Myanmar or the necessary details for how the general common law principles concerning

directors' duties should be applied in the context of Myanmar. This lies in stark contrast to almost all other common law jurisdictions where significant and detailed jurisprudence exits in the area of directors' duties. As explained above, this dearth in the case law is compounded by the paucity of provisions related to directors' duties in the Act.

2.8 Shareholders' remedies in the Myanmar Companies Act

There is a clear conundrum in the corporate form which company law must address. Directors owe their duties to the company and the company must sue to enforce the duties directors owe to it. However, a company has no physical existence—it is a legal fiction. The question thus becomes: who decides when "the company" will sue on the duties that directors owe to it.

This question may be answered by examining the division of corporate powers in a company's articles of association. If the articles specify that a person or body may commence litigation for the company then that person or body has the authority to cause the company to sue. However, commonly nothing is specifically stated in the articles regarding the right to sue. As such, normally the board of directors has the right to cause the company to sue as this power falls under the board's general ambit of *de facto* authority to "manage" the company.

Providing the board with the authority to sue is normally efficient as the board normally has the most information about the company to properly determine whether the company should pursue a lawsuit. In addition, the directors are bound by their duty to act in the company's best interest. However, providing the board with the power to determine when the company should sue

is ineffective when the target of the company's potential lawsuit is the directors themselves. In such a case, for obvious reasons, the directors will normally not exercise their power to cause the company to pursue a lawsuit—even when it would be in the best interest of the company to do so.

The common law has generally dealt with this problem by providing minority shareholders with the right to sue (either directly or on behalf of the company) in circumstances when directors will likely not pursue lawsuits which are otherwise in the best interest of the company and/or the shareholders as a whole. However, due to the dangers of granting such extraordinary powers to minority shareholders, the circumstances under which the common law traditionally has granted minority shareholders such remedies have been limited. In general, most common law countries allow minorities such protection in three circumstances: (1) when they can prove that bringing a derivative action would be in the best interests of the company; (2) when they can prove that they have been oppressed or suffered unfair prejudice; and/or (3) when they can prove that it would be just and equitable for the court to windup the company. Myanmar's company law is extraordinary in that it only provides for one of these three general minority protections—a just and equitable winding up—which is the least powerful and most difficult of the three minority remedies to pursue.

2.8.1 Just and equitable winding up

Section 162 of the Myanmar Companies Act, provides the grounds under which the court can order the winding up of a company.[72] Under Clause 6 of section 162, the court can order a

[72] Winding up is divided into (1) by the court; or (2) voluntary; or (3) subject to the provision of the court of the company.

company to be wound up if "the court is of an opinion that it is just and equitable that the company should be wound up." This provides a minority shareholder with the opportunity to argue before the court that a company should be wound up when it has been managed in a manner that offends the principles of equity and justice.

In *B. Cowasji and others v. Nath Singh Oil Co.Ltd*,[73] Rutledge.J observed that the winding up of the company was an extra-ordinary remedy to be restored only in extreme cases. Internal fraud or improper conduct of the directors in managing the affairs of the company was not a ground for a winding up order at the instance of a minority of the shareholders. In the judgment of the *U Ohn Maung and one v. Chan Thar Zay Co., Ltd and two other*[74] case U Maung Maung, J followed the decision in *B. Cowasji and others v. Nath Singh Oil Co., Ltd* case.[75] This position could be seen in the matter of *Chan Thar Zay Co. v U Ohn Maung and one*[76] case. The petitioner had applied to the Court for winding up of the respondent company of which they were "members"[77] on the grounds of misconduct and mismanagement under sections 162 and 166 of the Myanmar Companies Act. At the hearing the main charges were mismanagement of the Board of Directors, past and present, inefficiency, waste of company resources and the gloomy prospects of the company to make profits in the future.

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[73] 13 B.L.T. 51. Dunkley…[et al], *A Digest of Burma Rulings (1872-1922),* (Rangoon: Superintendent, Government Printing and Stationary, 1928), 318.

[74] 1964 B.L.R (C.C), 258. The company should be wound up if the company unable to pay its debt under s.162 (vi) of the Myanmar Companies Act but it does not amount to be unable to pay debt for the reason of taking loan from others.

[75] 13 B.L.T 51. In this case the Judge cited the early 19th Century English case *Burland v. Earle* [1902], AC 83(PC).

[76] 1963 B.L.R (C.C) 499.

[77] The term "member" as known to the law and the term "shareholders" as used in business has same meaning. In English Company law "member" is a synonym for "shareholder".

The Judge clearly pointed out that "a company is like a family of people who have pooled their resources to work together and share the profit, sticking together in good times and in bad. When problem arise about the management of their affairs the natural and reasonable thing for the members of the family to do is to get together and discuss the problems and arrive at their solutions in the domestic forum of the company first. It is only when the company was incapable of making a decision and the grounds are strong and sufficient that the court might consider intervening in the management of the affairs of the company or drastic step of winding it up. Here the petitioners have disdained to voice of their feelings or seek their remedies at the domestic forum and rushed to the court instead." It was held by the judge that a sufficient case had not been made out to render it just and equitable for the court to order a winding up of the company. In the result, the appeal failed and was dismissed.

From the two cases above, the question that arises is: when will the court order a just and equitable winding up in Myanmar? It appears from the case law that the most likely case is when there has been an irretrievable breakdown between "quasi-partners" to the extent that it is virtually impossible to carry out the company's business. In *Re Yenidje Tabacco Co. Ltd.*[78] the company had two shareholders with an equal number of shares who were each directors. They could not agree on how the company should be managed. There was no provision for breaking the deadlock and a petition to wind the company up on the just and equitable ground was granted.

It is clear that to date, in circumstances where there has been a complete irretrievable breakdown then Myanmar Court may be willing to apply the doctrine of just and equitable winding up. This is useful in cases where the company has become unmanageable or is virtually

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[78] [1916] 2 Ch.426 (CA).

insolvent. However, it is of little help when the majority directors are managing the company and using their power to both generate profits and tunnel some of those profits to themselves. In such a case, the negative externalities of winding up a company will be far too great for the court to award such a remedy. In addition, no irretrievable breakdown" in management will be present. Thus, in most common law countries minority shareholders have additional remedies such the oppression/ unfair prejudice remedy or a derivative action. However, these remedies are absent in Myanmar's company law—which presents minority shareholders in Myanmar with a serious problem.

2.8.2 Available mechanisms to control the management

With a lack of other available minority protections under the Myanmar Companies Act, minority shareholders in Myanmar must try to look elsewhere for protection. Besides the Myanmar Companies Act, the Penal Code provides for the punishment of an officer for the forgery and/or criminal breach of trust. As well as, the Civil Procedure Code provides for suits of a civil nature. For example, any person who commits a criminal breach of trust can be charged under section 406 of the Penal Code.[79] Section 9 of the Civil Procedure Code gives the Civil Court the general jurisdiction to try all suits of a "civil nature".[80]

[79] Whoever commits criminal breach of trust can be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
[80] Suits for damages for a tort or for breach of contract, or for a specific relief like declaration or injunction, specific performance or even a right of worship or burial are suits of a civil nature.

2.8.3 The criminal charge under the Penal Code

In addition, an officer can be charged with a criminal offence under section 406 of Penal Code. Section 405 reads:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates converts to his own use of that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust."[81]

As directors or any officer are also trustees of a company's shareholders, whenever misconduct is done by them, such delinquent directors or officers may be held liable under section 405 of the Penal Code.

2.9 Lack of other remedies compare to the UK and Singapore

The just and equitable winding up remedy is only one remedy available under the old English law. Both the Myanmar and Singapore Companies Acts are based on the UK Companies Act—which contains the original just and equitable remedy.[82] However, the UK has gradually extended its shareholder remedies after realizing the inequities minority shareholders faced under

[81] Penal Code, s.405.
[82] The UK Companies (Consolidation) Act 1929, s. 168(6), now under the Insolvency Act 1986, s.122(l) (g); The Myanmar Companies Act 1914, s.162(6) and the Singapore Companies Act, s. 254(l) (i).

the rule in *Foss*. The other remedies available in the UK will be explained detail in Chapter 3. Also, as explained in Chapter 3, based on a similar rationale as the UK, Singapore has also extended the scope of its shareholders' remedies under the influence of the UK and Canada.

2.9.1 The non- interference rule and just and equitable winding up remedy still applies in Myanmar Companies

Traditionally, under the common law, it has been extremely difficult for minority shareholders to pursue an action against directors who mismanage a company. The classic common law case which makes this point is the UK decision in *Burland v Earle*[83] where Lord Davy stated that *"it is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of the companies acting within their power, and in fact have no jurisdiction to do so. Again, it is clear law that in order to redress wrong done to the company, the action should prima facie be brought by the company itself."*

The principle of non-interference in corporate management protected the directors from liability form mere negligence. This non–interference rule has been eroded in the modern company law by creating and extending the exceptions to the rule in *Foss* which traditional barred shareholders from suing on behalf of the company. The original exceptions to the rule in *Foss* were analyzed in *Burland v Earle*[84] and have recognized other types of complaints where actions appear to be permissible.

[83] [1902] AC 83 (PC).
[84] [1902] AC 83 (PC).

2.9.2 The English case law that provides a foundation for understanding the policy behind the shareholders' remedies

When discussing shareholder litigation it is necessary to distinguish whether the wrongs alleged to be done by the directors are wrong done to the company or wrongs done to the shareholders.[85] The shareholders have only limited power to sue when the wrong is alleged to be done to the company. This is because of the rule in *Foss* that restricts on shareholder litigation.

In the case of *Foss v Harbottle*[86], *"two shareholders alleged that directors in the company had sold land to the company at exorbitant prices and had caused the company to make improper mortgages in relation to the property. The shareholders, who did not hold a majority of the shares, sued the directors for the supposed wrongs done to the company. The court held that the shareholders did not have standing to pursue the action and the proper party to bring such action was the company."*

It is a well-know principle, enunciated in the *Foss v Harbottle* that the proper plaintiff principle and the majority rule principle restricts the minority from bringing an action for wrongs alleged to have been done to the company. The proper plaintiff principle is that in respect of a wrong allegedly done to a company it is *prima facie* the company that is the "proper plaintiff". Since the company is the proper plaintiff in any action for a wrong that it suffers, it is for the company to decide on the course of action that it wishes to take in respect of the wrong.

The legal principle that forms the foundation of the "proper plaintiff" principle is that a company is a separate legal entity. As a company is an entity separate and apart from its members,

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[85] Petri Manthysaari, *Comparative Corporate Governance: Shareholders as a Rule Maker,* (Berlin: Springer, 2005), p.166.

[86] (1834) 2 Hare 461.

a member may not sue to enforce a company's rights. According to the legal principle exemplified in *Salmon v Salmon & Co., Ltd.,*[87] a company is a legal person separate and distinct from its members. The rights belong to the company and are a company's rights—not its members. Where the company has suffered a legal wrong, it is the company who is a separate legal entity from its incorporators and who has the legal right to decide whether or not to take any legal action in respect of the wrong that it has suffered. Thus, the proper plaintiff is the party who has suffered the wrong which is the company.

Therefore, the "proper plaintiff" in an action for a wrong alleged to have been done to the company (e.g., when directors have breached their duties against the company) is the company itself. The practical effect of the "proper plaintiff" principle is that it restricts minority shareholders from bringing an action with respect to wrongs done to the company because the majority shareholders have the *de facto*[88] power to decide when the company will pursue an action.

The majority rule principle is that where the alleged wrong is a transaction which might be made binding on the company by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter. The majority rule principle also restricts the ability of minority shareholders to commence litigation and places the power to do so in the hands of the majority. Thus, the general underlying value of corporate control is that of majority rule. The company decisions are taken by the members in meeting together and deciding by the majority vote. In this situation the minority shareholder have no chance to commence a company action as they holds the minority vote.

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[87] [1897] AC 22 (HL).
[88] Latin for "in reality or fact".

2.9.3 The development of shareholders' remedies in the UK

Accordingly the principles adopted in *Foss* restrict the ability of minority shareholders to commence litigation and place the power to do so in the hands of the majority. The English courts have overcome the difficulties of the rule in *Foss* by developing exceptions to the rule. There are a number of exceptions to the rule in *Foss* under which a shareholder can bring an action if the company will not do so. *Burland v Earle*[89] analysed the rule in *Foss* and held that the exceptions in *Foss* rule are (1) personal acts; (2) *ultra vires*; (3) acts requiring a special majority vote; and (4) fraud on the minority.[90]

In the UK, there are four main shareholders' remedies: (1) the 'unfair prejudice' remedy in which a member seeks redress for action by the company which injures his interest as a member; (2) the derivative action, in which a member seeks to enforce a claim belonging to his company; (3) just and equitable winding up; and (4) an action to enforce the company's constitution.[91]

2.9.4 The development of shareholders' remedies in Singapore

As a result of its English common law heritage, Singapore adopted the rule in *Foss*. The rule in Foss establishes that the company is the proper plaintiff when harm is done to the company. There are four exceptions to the rule in *Foss* in Singapore: (1) personal claim; (2) transactions

[89] (1902) A.C.83 (PC).
[90] S.C Sen, *Company Actions in the Modern Set-up*, (Calcutta: Eastern Law House Private Limited, 1969), p.27.
[91] The Department of Trade and Industry, the Law Commission of its Report on shareholder remedies, Consultation Paper No.142.

requiring a special majority, (3) *ultra vires*[92] or illegal transactions; and (4) cases of fraud on minority. A plaintiff has *locus standi*[93] to bring an action if the action that she seeks to bring falls within one of the exceptions to the rule in *Foss*.[94]

The Singapore legislature has attempted to solve the trouble of applying the rule in *Foss* by implementing a statutory derivative action—which is in line with developments in the UK and Canada. As such, there are four mechanisms for minority shareholder protection in Singapore: (1) just and equitable winding up;[95] (2) oppression remedy;[96] (3) common law derivative action; and (4) statutory derivative action.[97] Just and equitable winding up, oppression actions and statutory derivate actions are statutory exceptions to the rule in *Foss*.[98]

2.10 Summary

Myanmar is a British colonial country and was part of the British India Empire until 1937. Thus, Myanmar inherited the British Common law system. The codes of the British Common law system were imported into Myanmar from India and enforced in Myanmar. For this reason, the India Companies 1913 was transplanted into Myanmar as the Myanmar Companies Act 1914. India adopted the English Companies Act 1908 and an amending Act. The Indian Companies Act 1913 was further modified in 1936 in the light of the UK Companies Consolidation Act of 1929.

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[92] Latin for "beyond the power".
[93] Latin for "standing".
[94] Dan William Puchniak, '*Unpublished Lecture paper on the Protection of Minority Shareholders in Singapore*', (Graduate School of Law, Nagoya University, Japan, October 2010).
[95] The Singapore Companies Act, s.254.
[96] The Singapore Companies Act, s.216.
[97] The Singapore Companies Act, s.216A.
[98] Margaret Chew, *Minority Shareholders Rights and Remedies*, (2nd Ed), (Singapore: Lexis Nexis 2007).p.30.

The Myanmar Companies Act was amended in accordance with the modification of Indian Companies Act until it gained its independence in 1949.

After Myanmar broke away from the British Empire, the Myanmar Companies Act was amended four times in 1955, 1959, 1989 and 1991. Although these changes were made they were generally minor in nature. These changes certainly have not kept up with the significant changes in Myanmar's political, administrative and economic systems.

In Myanmar a company either private or public company may be established in three ways: (1) A company limited by shares, (2) a company limited by guarantee, and (3) an unlimited company. Among these three types of companies, the company limited by share is the most common form.

The present Myanmar Companies Act, which was promulgated over ninety years ago, has become outdated and requires reconsideration. An analysis of Myanmar's reported cases reveals a tremendous gap in the core provisions related to directors' duties and shareholders' remedies when compared to the companies' acts of the UK and Singapore. The chapters which follow will examine the UK and Singapore Company Laws in more detail to highlight the gaps in Myanmar's company law and then propose solutions to fill these gaps.

Chapter III

Overview of the UK Companies Act 2006

The UK was one of the first nations to establish rules governing the operation of companies.[99] Over several centuries joint-stock companies were formed in England for trading and other purposes (e.g., the famous East India Company was formed in the sixteenth century).[100] The first legislation for incorporation of companies was the Joint Stock Companies Act 1844.[101] The principle of limited liability, which was introduced in 1855 and was then combined with the registration system in the Joint Stock Companies Act 1856.[102] With regard to legislation, a general pattern began in 1862 of reforming legislation followed by a consolidating Act.

The first Companies Act was promulgated in 1862.[103] All of the Acts collectively known as "The Companies Act, 1862 to 1908" were consolidated by the Companies (Consolidation) Act 1908. According to the Cohen Report, the Companies Act 1907[104] became operative in July 1908. The process continued at regular intervals (1908 and 1929) until the Companies Act of 1948.[105] The courts were faced with the task of grappling with a number of new principles to accommodate the ever changing statutory structure. In many areas, the new principles could be created by

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[99] Government of the UK, "The Explanatory Notes on the Companies Act 2006", *legislation.gov.uk Homepage*, available online at: http://www.opsi.gov.uk, [Accessed on 3.10.2011].

[100] Boyle & Sykes, *Gore-Brown on Companies*, (London: Jordan & Sons limited, 1972), p.3.

[101] Stephen Mayson…[et al], *Company Law,* (London Blackstone, 2001), p.16.

[102] MC Oliver and EA Marshall, *Company Law,* (London: Pitman Publication, 1991), pp. 2-4.

[103] John Birds…[et al], *Boyle & Birds' Company Law*, (6th Ed), (London: Jordan Publishing, 2007), p.6.

[104] 7 Edw.7, C.50, ss.19, 21.

[105] Boyle & Sykes, *Gore-Brown on Companies,* p.3.

drawing upon existing bodies of partnership, trust and agency law to meet the needs of the old incorporated joint-stock companies.[106]

The Companies Act of 1948 subdivided private companies into exempt and non-exempt private companies and laid down an elaborate definition for exempt private companies which alone continued to enjoy the two most important advantages accorded to private companies, namely, freedom from the obligation to file accounts and permission to make loans to the directors.[107]

The Companies Act of 1967 abolished the status of exempt private companies. All companies, however small, were bound to file accounts with their annual return and no company could make a loan to a director but the distinction between public and private companies remained.[108]

On 1 January 1973, the UK joined the European Economic Community (EEC), now the European Union (EU) and then the UK became subject to the provisions of the Treaty of Rome, which dealt with the harmonization and unification of company laws.[109] On its entry to the European Community, the UK became obliged to give legislative form to European Community[110] (EC) Company Law Directives.[111]

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[106] Birds, *Boyle & Birds' Company Law*, p.6.

[107] L.C.B Gower…[et al], *Gower's Principles of Modern Company Law,* (4th Ed), (London: Steven &Sons, 1979), p.13.

[108] Gower, *Gower's Principles of Modern Company Law,* p.14.

[109] John H. Farrar, *Farrar's Company Law,* (4th Ed), (London: Butterworths, 1998), p.22.

[110] In the 1950s, six European countries decided to pool their economic resources and set up a system of joint decision-making on economic issues. To do so, they formed three organizations: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom), the European Economic Community (EEC).These three communities – collectively known as the 'European Communities' – formed the basis of what is today the European Union. The EEC soon became by far the most important of the three and was eventually renamed simply 'the European Community' (EC). With the Lisbon treaty in 2009 the

The Companies Act of 1980 promoted the interest of employees in order to adapt the company law to the requirements of the "age of social responsibility" and also to provide new classifications for companies which was necessary to give effect to the Second Council Directive of the EEC on the harmonization of company law.[112] Furthermore, the 1980 Act implemented the Second EC Company Law Directive and adopted a more satisfactory approach for defining a public company as a company limited by shares.[113]

The fiduciary position of directors, which has affected the position of directors and defines the relationship between directors and companies, is one of utmost good faith. The Companies Bills of 1973 and 1978 spelt out the fiduciary duty in express terms but the Companies Act of 1980 did not contain a detailed provision describing the fiduciary duty of directors.[114] The UK courts have developed the concept of the fiduciary duty of directors in numerous cases[115] and have stated repeatedly that a director must not use the property of the company or the special knowledge acquired whilst holding office as a director for his own benefit. If a director misuses either property of the company or special knowledge, he has to account to the company. The 1980 Companies Act deals extensively with transactions likely to give rise to a conflict between the

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word 'community' disappeared and became fully replaced by 'European Union'. There are however still many texts where the word 'community' is used and means more or less the same as 'EU'.

[111] Peter Loose… [et al], *The Company Director Powers and Duties,* (7th Ed), (London: Jordans Publishing Limited, 1993), p.1.

[112] Clive M. Schmitthoff, *Commercial Law in Changing Economic Climate,* (2nd Ed), (London: Sweet & Maxwell, 1981), p.36-38.

[113] Paul L.Davies, *Gower's Principles of Modern Company Law,* (6th Ed), (London: Sweet & Maxwell, 1997), p.12.

[114] Schmitthoff, *Commercial Law in Changing Economic,* p.41.

[115] *Regal (Hastings) v. Gulliver* [1942] 1 All E.R.378 / *Phipps v. Boardman* [1967] 2 A.C.46 / *Industrial Development Consultants Ltd. v. Cooley* [1972] 1 W.L.R. 443.

company's interest and the personal interest of the director and for the first time imposes financial limits on specified dealings between them.[116]

The legislation in the Companies Acts 1948-1981 was consolidated into the Companies Act 1985. At this time, the Insolvency Act 1985 was also created. This process required the amendment of substantial parts of the Companies Act 1985 with respect to the winding up of insolvent companies.[117]

The Companies Act of 1989 implemented the Eighth European EC Company Law Directive on the qualification and training of auditors. The stated purposes of the Act were to "secure that only persons who are properly supervised and appropriately qualified are appointed as company auditors, and that audits by persons so appointed are carried out properly and with integrity and with a proper degree of independence." To qualify for appointment as a company auditor, a person, either an individual or a firm must be a member of a recognized supervisory body; and eligible for appointment under the rules of that body. [118]

The legislature has enacted and reformed the Companies Act over the years. Thus, the legislation in the Companies Acts of past 1929, 1948, and 1985 were consolidated into the UK Companies Act 2006 by re-writing, updating and modernizing company law. Hence, the Companies Act of 2006 is the existing company law legislation governing the UK and it introduced a new statutory codification of directors' duties and statutory derivative action.

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[116] The UK Companies Act 1980, Part IV, ss.47-67.
[117] Birds … [et al], *Boyle & Birds' Company Law*, (6th Ed), (London: Jordan Publishing, 2007), p.9, 10.
[118] Birds, *Boyle & Birds' Company Law,* p.538.

3.1 The development of UK Companies Act

Approximately every decade, a committee in London was appointed to reexamine the company law and a major piece of company law legislation was passed in England. Minor amendments were passed more frequently. At present, British company law has diverged from its common law roots under the growing influence of the EU.

The UK has historically led the way in the development of company law in the common law world, not only with statutory rules but also by adopting a successful non-statutory voluntary corporate governance code. The UK reforms to corporate governance regulation have focused on consistently developing codes of best practice. The Cadbury Committee, the Greenbury Committee and the Hample Committee have been undertaken to review and reform corporate governance practice.[119]

The Companies Act 2006 effectively replaced existing company law legislation by re-writing, updating and modernizing UK company law. The changes focused on in this thesis include the new statutory codification of directors' duties and the introduction of the statutory derivative action. The statutory statement of directors' duties codified the general duties embodied in common law rules and equitable principles. However, existing case law remains relevant when interpreting the new statutory duties. The aim of the statutory statement of directors' duties was to amplify the general duty of directors to operate their companies for the benefit of their shareholders collectively.[120]

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[119] Fiona Macmillan (Ed), *International Corporate Law 1*, (Oxford; Portland Or.: Hart Publication, 2000), p.174.

[120] Eilís Ferran, "Company Law Reform in the UK", '*Singapore Journal of International & Comparative Law*

Extensive inquiries into shareholder remedies were conducted by the UK Law Commission in 1995 and 1997.[121] This resulted in the recommendation for a new statutory derivative action. The Company Law Review Steering Group has endorsed the recommendations of the Law Commission for a new statutory derivative action—which now exists in the current UK Companies Act 2006.

3.2 Current status of the UK Companies Act 2006

Under the UK Companies Act 2006 there are seven types of companies: (1) limited companies; (2) unlimited companies; (3) private companies; (4) public companies; (5) companies limited by guarantee; (6) companies having share capital; and (7) community interest companies.[122] In the UK, most companies are companies having share capital.[123] In terms of directors' duties and shareholders' remedies, there are two key changes under the UK Companies Act 2006 Act: (1) a comprehensive statutory statement of directors' duties replacing the common law duties; and (2) a statutory derivative action.[124]

In addition to the UK Companies Act, companies are regulated by other statutes, common laws rules, European Law and certain other special rules. Other statutes that regulate companies in the UK also include the Insolvency Act 1986 and the Financial Services and Market Act 2000.

Singapore Journal of International & Comparative Law', (2001), pp 516- 568.

[121] Shareholder Remedies Law '*Com Con Paper No 142 (1995)*'; 'Shareholder Remedies Law Com Report No 246 (1997)'.

[122] The UK Companies Act 2006, ss.3-6.

[123] Mantysaari, *Comparative Corporate Governance*, p.81.

[124] Alan Steinfeld… [et al], *Blackstone Guide to the Companies Act 2006*, (Oxford: Oxford University Press, 2007), p.7.

There are also special rules that govern listed companies under the listing rules of the London Stock Exchange.

3.3 Directors and their duties within UK Companies Act 2006

3.3.1 Directors

According to the UK Companies Acts 2006 the expression "directors" includes "any person occupying the position of director, by whatever the name called."[125] This definition has been interpreted in the case law to include executive directors, non-executive directors and *de facto* directors. A *de facto* director is a person who has not properly been appointed even though she assumes that status and functions as a company director. Another type of director is a "shadow director" which is defined in the Act as "a person in accordance with those direction or instructions the directors of the company are accustomed to act".[126] All private UK companies must have at least one director and all public companies must have at least two directors.[127] In addition, all companies must have at least one director who is natural person.[128]

[125] The UK Companies Act 2006, s.250.
[126] The UK Companies Act 2006, s.251.
[127] The UK Companies Act 2006, s.154.
[128] The UK Companies Act 2006, s.155 (1).

3.3.2 The duties of director

Directors are responsible for the management of the company. As such, a director stands in a position of trust and many of their duties arise because directors are seen to act as a "fiduciary"[129] for the shareholders of companies. The English Court has explained the term fiduciary in *Bristol and West Building Society v Mothew*[130] as follows*:*

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence…A fiduciary must act in good faith; he must not make profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or benefit of third person without the informed consent of his principal."

Historically, the general duties of directors have been based on common law rules and equitable principles that are owed by a director to the company—but not to shareholders, employees, creditors or other members who have some other interest in the company's affairs. This general principle was enunciated in the *Percival v Wright*:[131] "that directors owe their fiduciary duties to the company only." However, it should be noted that directors may owe duties to individual shareholders in special circumstances as articulated by the UK court in the leading case of *Peskin v Anderson*.[132]

[129]A fiduciary is someone who exercises powers or holds money or assets on behalf of others.
[130] [1998] 1 Ch 1.
[131] [1902]2 Ch 421.
[132] [2001] 1 BCLC 372.

Fiduciary duties and the duty of care and skill were developed by judges over the years on a case by case basis. In fixing the minimum duties of directors, Romer J stated in the leading decision of *City Equitable Fire Insurance Company Ltd.*[133] that:

"In discharging those duties, a director (a) must act honestly, and (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf. But, (c) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment,(d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings and at meetings of any committee to which he is appointed, and though not bound to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the article of association, may properly be left to some other official, he is, in the absence of grounds for suspicion justified in trusting that official to perform such duties honestly."

Based on this definitive statement of directors' duties, the duties of directors in the light of modern developments may be summarized as a director having to act honestly, exercise her duties with care, skill and diligence in carrying out the company's business, and must perform her duties under the articles.

The provisions in the UK Companies Acts 2006 relating to the duties of directors have arguably made directors' duties in the UK wider in scope and more detailed than under the former Companies Acts. This is because there was previously no provision specifically articulating the

[133] (1925) Ch 407.

duties of directors under the UK Companies Acts. Under the UK Companies Act 2006, the legal requirements for directors generally apply equally to private and public companies. Chapter 2 of Part 10 of the UK Companies Act 2006 sets out to codify the general duties of directors for the first time according to the recommendations of the Law Commissions.

There are seven express directors' duties in the UK Companies Act 2006 which were implemented in two stages. In the first stage, on 1 October 2007, the directors' duties to act within their powers, to promote the success of the company, to exercise independent judgment and to exercise skill, care and diligence came into force. In the second stage, on 1 October 2008, the duties to avoid conflicts of interest, not to accept benefits from third parties, and to declare interests in proposed transactions or arrangements came into force. The seven general duties will be briefly explained below.

3.3.2.1 Duty to act within powers

A director of a company must act in accordance with the company's constitution,[134] and only act within the powers which are conferred on them.[135] This section sets out the principle of law that a director should exercise his powers in accordance with the terms on which they were granted and director must exercise their powers for a "proper purpose".[136] This section codified the directors' duty to comply with the company's constitution, which includes not only the articles of association but also certain resolutions taken by members of the company.

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[134] The UK Companies Act 2006, ss.17 and 257.
[135] The UK Companies Act 2006, s.171.
[136] The UK Companies Act 2006, s.171(b).

The restriction on the exercise of powers only for the purposes for which they are conferred is a codification of the principle articulated in *Howard Smith Ltd v Ampol Petroleum Ltd*[137]. The power that conferred to the directors must have been exercised for its proper purpose. The use of directorial power for an improper purpose is void as decided in *Hogg v Cramphorn Ltd*:[138] *"the director of the defendant company acting in good faith had issued 5,707 shares with special voting rights to the trustees of a scheme set up for the benefit of the company's employees in an attempt to forestall a take over bid by one Baxter. This was held to be improper use of the directors' power to issue shares but to be capable of ratification by the shareholders in general meeting."*[139]

This duty was recognized in early years of modern company law and is reflected in a number of nineteenth- century decisions usually involving the purported exercise by directors' power which were *ultra vires* the company or that were contrary to the provisions in the articles.[140] More recently, the proper purpose duty has been applied in cases where directors attempt to issue shares in order to prevent a hostile takeover.

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[137] [1974] AC 821. In this case, the company's directors allotted sufficient additional shares to a minority shareholder to constitute it a majority shareholder, thereby promoting success of its takeover bid, which the directors recommended. The court set aside the allotment, notwithstanding the fact that the directors had been acting bona fide in what they considered to be the best interest of the company. See also in Victor Joffee… [et al], *Minority Shareholders Law, Practice, and Procedure*, (3rd Ed), (Oxford: Oxford University Press, 2008), p.366.

[138] [1967] Ch 254, Chancery Division.

[139] Len Sealy and Sarah Worthington, *Cases and Material in Company Law*, (Oxford: Oxford University Press Inc., 2008), p.286.

[140] Paul L. Davies, *Gower and Davies' Principles of Modern Company Law,* (8th Ed), (London: Sweet & Maxwell Ltd, 2008), p. 498.

3.3.2.2 Duty to promote the success of the company

Directors are required to act in good faith and to act in a way which promotes the success of the company for the benefit of its members as a whole.[141] In doing so, a director needs to have regard to the likely consequences of any decision in the long term, the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others. A director also needs to consider the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly as between members of the company. In certain circumstances, the duty to promote the success of the company requires the directors to consider or act in the interests of the company's creditors.

Directors must act *bona fide* meaning that they must act in the way that they believe is for the benefit of the company's members as a whole. This duty is similar to the duty to act bona fide in the interest of the company illustrated in *Re Smith v Fawcett Ltd.*:[142] "*Director must exercise their discretion bona fide in what they consider not what a court may consider is in the interests of the company and not for any collateral purpose*."

3.3.2.3 Duty to exercise independence judgment

A director of a company must exercise independent judgment. This duty is not infringed by an act in accordance with an agreement duly entered into by the company that restricts the

[141] The UK Companies Act 2006, s.172.
[142] [1942] Ch 304.

future exercise of discretion by its directors, or in a way authorized by the company's constitution.[143] This section was intended to codify the common law principle whereby directors were required to exercise their powers independently, without subordinating their powers to the will of third parties.

This duty seeks to regulate two behaviors of directors: (1) the delegation of powers; and (2) the fettering of discretion. The common law did not allow directors to unreasonably delegate all of their power or fetter all of their discretion. However, the common law did allow for reasonable delegation by directors which was required for the company to carry out its business.[144]

3.3.2.4 Duty to exercise reasonable care, skill, and diligence

According to the Law Commission report, "Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties", the duty to exercise reasonable care, skill, and diligence includes a number of features:

(1) A director of a company must exercise independent judgment.

(2) This duty is not infringed by a director acting:

(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its director, or

(b) in a way authorized by the company's constitution.

143 The UK Companies Act 2006, s.173.
144 Joffe… [*et al*], *Minority Shareholders,* p.371.

Under this section, every director is bound to exercise objectively reasonable care, skill, and diligence by virtue of his position as employee.[145] An act of a director is negligent when it is not in accordance with the standard of skill and care expected of them. As defined by the case law, the duties to which the directors must abide by are the duty of loyalty and duty of care and skill. The definition of what is intended by duty of loyalty is taken from Green MR in *Re Smith and Fawcett Ltd*[146] who said that directors of a company must act *"in bona fide in what they consider and not what the court may consider to be in the interests of the company and not for a collateral purpose."*

Directors are expected to act with reasonable care, skill and diligence. The standard of care to which they are bound has somewhat evolved from that of the honest layperson to that of the reasonable businessperson. As stated in *Re City Equitable Fire Assurance Co.*:[147] "*a director must pay diligent attention to the business affairs of the company in which he holds office and errors of judgment will not necessarily constitute a breach of duty*." Traditionally, the courts did not require directors to exhibit a greater degree of skill than may reasonably be expected from a person with their knowledge and experience.

3.3.2.5 Duty to avoid conflicts of interest

The duty to avoid a conflict of interest further supplements a director's general fiduciary duty. The director must avoid any situation that may put their personal interests into conflict with

[145] Birds… [et al], *Boyle & Birds' Company,* p.622.
[146] (1924) Ch 304.
[147] (1925) Ch 407.

the company's interests.[148] Interests in transactions or arrangements with the company must be declared in the proposed transactions[149]or in the case of existing transactions.[150]

This duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorized by the directors. The directors may give authorization under two circumstances. Firstly, directors may give authorization where the company is a private company and nothing in the company's constitution invalidates such authorization and secondly, directors may also give authorization where the company is public company and its constitution includes provisions enabling the directors to authorize the matter.

The authorization is effective only if the requirement for a quorum at the directors' meeting is met (excluding any interested directors) and the matter must be agreed to without the votes of interested directors being counted.

3.3.2.6 Duty not to accept benefits from third parties

This duty codifies the law prohibiting exploitation of the position of director for personal benefit.[151] A director of a company must not accept a benefit from a third party, a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate, conferred by reason of being a director, or doing (or not doing) anything as director. The benefits, however, received by a director from a person by whom his

[148] The UK Companies Act 2006, s.175.
[149] The UK Companies Act 2006, s.177.
[150] The UK Companies Act 2006, s.182.
[151] The UK Companies Act 2006, s.176.

services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party. This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

This duty also prohibits the acceptance of benefits (including bribes). At common law, it is enough that there has been the payment of money or the conferment of another benefit upon an agent whom the payer knows is acting as an agent for a principal in circumstances where the payment has not been disclosed to the principal. There is no need to show that the payer of the bribe acted with a corrupt motive.[152] The acceptance of a benefit giving rise to an actual or potential conflict of interest falls not only within the duty to avoid conflicts of interest[153] but also within this duty.

3.3.2.7 Duty to declare interest in a proposed transaction or arrangement

If a director has any interest directly or indirectly in a proposed transaction or arrangement with the company, she must declare the nature and extent of that interest at a meeting of the directors, or by notice in writing or by general notice to the other directors.[154] A further declaration must be made, if a declaration of interest becomes inaccurate or incomplete at the meeting or in general notice. The declaration must be made before the company enters into the transaction or arrangement. The declaration need not be made in the case of an interest of which

[152] Davies, *Gower and Davies' Principles of Modern Company Law,* p.575.
[153] The UK Companies Act 2006, s.175.
[154] The UK Companies Act 2006, s.177.

the director is not aware or where the director is not aware of the transaction or arrangement in question.

A director need not declare an interest if it cannot reasonably be regarded as likely to give rise to a conflict of interest. A director need not make disclosure if the situation in which she is involved cannot reasonably be regarded as likely to give rise to a conflict of interest. There is no duty to disclose a conflict of interest if the other directors are already aware or ought reasonably to be aware of the nature of the interest enjoyed by the director. If the interest concerns the potential conflicts of interest with respect to a service contract that is considered by a meeting of the directors or by a committee of the directors appointed for the purpose under the company's constitution.

3.4 Shareholders' remedies in the UK Companies

The protection of shareholders in the UK has developed due to the Europeanization of company law in the United Kingdom,[155] the improvement of shareholder protection by the UK Companies Act 1985,[156] and the corporate governance codes of the 1990s.[157] Currently, minority shareholders have four main remedies in England namely: the derivative action, the unfair

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[155] In particular the Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards that, for the protection of the interests of members and others are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty. Second Council Directive 77/91/EEC, 1977 O.J. (L 026).

[156] In particular, the rules on unfair prejudice (ss 459-461 of the Companies Act 1985; now ss 994-996 of the Companies Act 2006).

[157] Lele & Siems, "Shareholder Protection: Leximetric Approach", '*(2007) 7 Journal of Corporate Law Studies 17-50*', 'Centre for Business Research, University of Cambridge' pdf, Available at: *http://ssrn.com/abstract=897479*, [Assessed on 3 Nov. 2011].

prejudice remedy, just and equitable winding up and the shareholder's personal right to enforce articles of association.[158]

At common law, it was a fundamental principle that a shareholder could not bring an action on behalf of the company under the rule in *Foss*. In order to redress the wrong the claim had to be brought by the company itself. As the majority is entitled to ratify an act and controls the voting in the board and general meeting, it is nearly impossible, without special minority shareholder protections, for a minority shareholder to make a claim against a controlling wrongdoer. In this situation the minority has very limited remedies since the courts are reluctant to interfere on their behalf. Nevertheless, the judiciary has made some attempts to solve this injustice that may flow from a strict application the rule in *Foss*.[159]

In order to bring an action under the common law a shareholder would have to demonstrate that the action fell one of the exceptions to the rule in *Foss*. There is an exception to rule in *Foss* where the decision of the majority is said to amount to "a fraud on the minority". When the fraud on minority exception can be established the minority may be able to sue for and on behalf of the company. The fraud on minority exception is a procedural device created by court to allow the complaining shareholders to bring an action for and on behalf of the company in their own names.

On the recommendation of the Law Commission, the Steering group has put forward a proposal to replace the exception of rule in *Foss* with a statutory provision, which would set out

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[158] Xiaoning Li, *A Comparative Study of Shareholders' Derivative Actions,* (Deventer: Kluwer, 2007), P.84.
[159] Andrew Hicks & S.H.Goo, *Cases and Material on Company Law*, (6th Ed), (Oxford: Oxford University Press, 2008), p.429.

the circumstances in which a derivative action would be permissible.[160] Thus, the 2006 reform has introduced the possibility of derivative claim without a minority shareholder having to establish "fraud on the minority" or fit into one of the other exceptions to the rule in *Foss*.[161]

According to the Dr. Reisberg, *"The starting point for considering the new statutory derivative actions is through the interaction with the new sections on directors' duties. Section 170 (scope and nature of general duties) provides that directors general duties are owed to the company rather than to individual members. It follows that only the company can enforce them and do not formulate a substantive rule to replace the Foss rule, but rather a new procedure for bringing such an action which set down criteria for court digested from the Foss jurisprudence."* The 'derivative claim' under the Companies Act 2006 applies to both private and public companies in the same way.[162]

3.4.1 Just and equitable winding up

The just and equitable winding up shareholder remedy was promulgated formerly under section 168(6) of the Companies Act 1929 and is now under section 122(l) (g) of the Insolvency Act 1986. Prior to the enactment of oppression remedy, minority shareholders were forced to use the winding up petition of the company as they had few other options. This created a considerable problem in obtaining an appropriate remedy for minority shareholders. Historically, the English

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160 Mark Stamp, *Private Company Law*, (3rd Ed), (London: Cavendish Publishing Limited, 2001), p.124.

161 Mathias M.Siems, *Convergence in Shareholder Law*, (New York: Cambridge University Press, 2008), p. 213.

162 Arad Reisberg, *Derivative Actions and Corporate Governance*: *Theory and Operation* (Oxford: Oxford University Press, 2007), p.8.

common law has offered certain avenues of redress for minority shareholders in some recognized situations. However, many scholars have viewed these limited situations as deficient. This deficiency was fixed in part by a statutory remedy borrowed from partnership law, namely that of winding up on just and equitable grounds.[163] Winding up the company is a "sledge-hammer" remedy as it puts an end to the company.

A company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. Under the just and equitable winding up remedy, the courts are prepared to exercise their discretion in favor of granting a winding up order in three main situations:[164] (1) serious fraud, misconduct or oppression; (2) an irretrievable breakdown in management; and/or (3) a loss of substratum. In *Loch v. John Blackwood Ltd* [165] *"a Privy Council decision on appeal from the Court of Appeal of the West Indies (Barbados), where directors had failed to supply corporate information to shareholders and to hold company meetings and in general ran the company as if it was their own property, a winding-up order was granted."*

It is just and equitable to wind up the company in which there is an irretrievable breakdown in the relationship between quasi-partners. In *Re Yenidje Tobacco Co. Ltd.*[166] *"the company had two shareholders with an equal number of shares who were each directors. They could not agree on how the company should be managed. There was no provision for breaking the deadlock and a petition to wind the company up on the just and equitable ground was granted."*

A loss of substratum occurs when it has become impossible to achieve the objects for which the company was formed. This is one of the grounds upon which the court may grant a just

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[163] Elizabeth J. Boros, *Minority Shareholders' Remedies*, (Oxford: Clarendon Press, 1995), p.113.
[164] Boros, *Minority Shareholders' Remedies*, p.113.
[165] [1924] AC783 (PC)).
[166] [1916] 2 Ch.426 (CA).

and equitable winding up. As noted in *Re Suburban Hotel Co*,[167] *"the significance of this ground has been reduced by the practice of drafting objects clauses extremely widely."*

The scope of operation of the winding up remedy has diminished in recent times. However, it continues to play a role where the company is insolvent or has ceased trading, in some cases of irretrievable deadlock and where the petitioner's conduct means that prejudicial conduct on the part of the respondent cannot be regarded as unfair.[168] The main statutory provisions on winding up are now consolidated in the Insolvency Act 1986 which is supported by the detailed provisions in the Insolvency Rules made by the Insolvency Rules Committee.[169]

3.4.2 The unfair prejudice remedy

Prior to the enactment of the oppression remedy, minority shareholders were often force to use the petition for winding up of the company.[170] The winding-up remedy is a drastic remedy in that its consequence is the termination of the existence of the company. The drastic nature of the just and equitable remedy prompted the English legislature to develop the oppression remedy. According to the recommendations of Cohen Committee,[171] the oppression remedy was passed in an attempt to provide a remedy for minority shareholders against oppressive conduct by the majority.

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[167] (1867) 2 Ch App.737.
[168] Boros, *Minority Shareholders' Remedies*, p.167.
[169] Francis Rose, *Company Law*, (7th Ed), (London: Sweet & Maxwell, 2009), p.87.
[170] The Companies Act 1929, s. 168(6).
[171] *The Cohen Committee Report 1945 (Report of the Committee on Company Law Amendment)* (Cmnd 6659), para 60.

In short, the oppression remedy was enacted as an alternative to a just and equitable winding-up petition.[172] The meaning of 'oppression' has been defined as 'burdensome, harsh and wrongful' by Viscount Simonds J in *Scottish Co-operative Wholesale Society Ltd. V Meyer*.[173] The original oppression remedy provided relief for members only where the company's affairs were being conducted in an oppressive manner (which was interpreted as a very difficult standard for minority shareholders to satisfy) and was only of limited use for minority shareholders. Soon after it was enacted, the oppression action was replaced by the unfair prejudice action.

The unfair prejudice remedy was introduced as a statutory remedy under section 459 of the UK Companies Act 1985 and is most commonly used in private companies. Section 459 allowed a member of a company to bring a claim on the ground of unfair prejudice and thus was a replacement of the oppression remedy. The goal of the replacement was to make it easier for the court to exercise its broad remedial powers to protect minority shareholders. The oppression test was substituted with the test of "unfair prejudice".

The old section 459 of the UK Companies Act 1985 was transplanted into section 994 of the UK Companies Act 2006. Shareholders who prefer to obtain a remedy for themselves can sue wrongdoing directors under section 994 of the UK Companies Act as modern remedy for individual shareholders (the minority).[174]

In order to establish unfair prejudice,[175] the plaintiff-shareholder is required to show that they suffered by unfair prejudice. Unfairness in this context might consist of a breach of the

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[172] The UK Companies Act 1948, s.210.
[173] [1959] AC 324.
[174] *The report of Jenkins Committee (Report of the Company Law Committee*, Cmnd 1749, 1962) at paras 200 to 206.
[175] The UK Companies Act 2006, s.994.

corporate constitution or of using the rules in a manner which in equity would have been regarded as contrary to good faith.[176]

Section 994 of the UK Companies Act 2006 only states the general words "unfair prejudice"—but provides no further definition of what amounts to "unfair prejudice". As such, the case law is critical for determining the exact type of behavior that amounts to unfair prejudice.[177] According to the leading case of *O'Neill v. Phillips*[178] the broad concept of unfairness in section 994 of the UK Companies Act 2006 does not permit an individual judge to order whatever she thought to be fit and fair in each case.[179] The court stressed that there must be a meeting of the minds between the parties which rises to the level of a "legitimate expectation". Only after, such a legitimate expectation has been breach will the court view an act as amounting to unfair prejudice. To be clear, merely because a minority shareholder views the acts of the majority as unfair does not make it unfair. Unfairness, only arises when a shared legitimate expectation of the parties has been broken. This provides a logical rationale for applying the broad concept of unfair prejudice and does not leave it open for a judge to merely make an award if she feels some vague unfairness has been suffered.

Any member or shareholder of a company may apply to the court to protect themselves against unfair prejudice under section 994 of UK Companies Act 2006. One of the grounds to apply under this section is that the company's affairs have been conducted in a manner of unfair prejudice to the interests of members generally or some part of its members.[180] Another ground is

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[176] *O'Neill v. Phillips* [1992] 2 BCLC 1.
[177] Joffe… [et al], *Minority Shareholders Law,* para. 5.58-5.69.
[178] [1992] 2 BCLC 1.
[179] Joffe… [et al], *Minority Shareholders Law,* para 5.65.
[180] The UK Companies Act, 2006, s. 994(1) (a).

that an actual or proposed act or omission of the company is or would be prejudicial to members of the company.[181] Moreover, if the Secretary of State finds any of the above two grounds, they may apply to the court by petition for protection of members against unfair prejudice.[182] The UK Companies Act 2006 authorizes the Secretary of the State to take measures for protection of members against unfair prejudice under the supervision of the court.

However, as suggested above, the unfair prejudice remedy has been somewhat limited to cases of enforcement of quasi-contractual rights, statutory rights and/or breaches of the articles.[183]Ultimately, the unfair prejudice remedy may eliminate many difficulties caused by the rule *in Foss* and the effect of ratification.[184] However, the shareholder-plaintiffs are still required to show that they have suffered unfair prejudice which is often difficult considering that the *de facto* rule in company law is majority rule. In addition, it may be difficult for minority shareholders to establish unfair prejudice because there are no detailed provisions on what conduct amounts to "unfair prejudice" under the Act.

3.4.3 The statutory derivative action

The common law derivative action has its origin in the English case law of the nineteen century. It was established as an exception to the rule in *Foss* and which was composed of two general principles: (1) the "proper plaintiff principle"; and (2) the "majority rule principle". Both principles emphasize the *prima facie* right of majority shareholders in a company to decide how

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[181] The UK Companies Act 2006, s. 994(1) (b).
[182] The UK Companies Act 2006, s. 995(2).
[183] Boros, *Minority Shareholders' Remedies*, p. 221-225.
[184] Boros, *Minority Shareholders' Remedies*, p.219.

the company's affairs are to be conducted and restrict the ability of minority shareholders to commence litigation. Making the company the "proper plaintiff" vests the power to pursue claims for wrongs against the company in the hands of the majority. Prohibiting minority shareholders from bringing claims based on irregularities limits the power of minority shareholders in favour of the majority.

The proper plaintiff principle does not prevent a minority shareholder from pursuing a claim for an injury to themselves in their personal capacity. This exception to the rule in *Foss* is stated in the judgement of Jenkins LJ in *Edwards and another v Halliwel and others.*[185] The plaintiffs, as members of a trade union, sued the union and the members of its executive committee claiming a declaration that a decision to increase the union dues payable by members was invalid on the ground that the union's rules—requiring a two-thirds majority vote on a ballot of its members—had not been observed. The central issue was whether the plaintiff members' claim was based on a "wrong done to the union" (in which case the members would have no standing to sue) or a "wrong done to the members individually" (in which case the members would have standing to sue). The Court of Appeal upheld the declaration by the lower court affirming that the plaintiff members' action was based on a "wrong to the individual members" (not "a wrong to the union") and therefore the members were entitled to bring an action in their names.

However, *Edwards v Halliwell*[186] laid down the rule which opened a window for a derivative action: *"Where what is complained of amounts to fraud and those responsible for the fraud are in control of the company [a shareholder may bring a claim for and on behalf of the*

[185] [1950] 2 All ER.
[186] [1950] 2 All ER.

company][187]*"*. In short, a shareholder can bring a common law derivative action if they can establish that the majority's behavior amounts to "fraud on the minority". However, the UK Company Act 2006 provided for a "statutory derivative action"—which allowed a shareholder to bring an action for and on behalf of the company (i.e., a derivative action) if they met the statutory test (i.e., shareholders are no longer required to establish "fraud on the minority" to bring a derivative action in the UK as long as they met the test for a statutory derivative action set out in the Act).

In short, the provision of the statutory derivative action essentially abolishes the rules on common law derivative actions and made the rule in *Foss* and its exceptions largely moot.[188] In relation to claims against directors for breach of duty a shareholder may clearly bring a derivative claim in a statutory form, and then must apply to the court for permission to continue the claim under section 261 of the UK Companies Act 2006.[189]

In sum, normally when the majority shareholders control the company, the minority shareholders cannot protect their rights. This is the result of the general concept of majority rule in company law. Although, the general concept of majority rule normally makes sense it can result in serious abuse and unfairness. As such, historically the UK courts allowed for exceptions to the strict rule in *Foss* which created limited situations in which minorities could sue wrongdoing majority controllers.[190] Specifically, the UK courts allowed common law derivative actions to be

[187] Steinfeld… [et al], *Blackstone Guide,* p.104.
[188] David Kershaw, *Company Law in Context: Text and Material,* (Oxford: Oxford University Press, 2009), p. 456,551.
[189] Kershaw, *Company Law in Context,* p.554.
[190] *Wallersteiner v. Moir* (No.2) [1975] Q.B 373 and *Newman Industries Lt*d. [1980] 3 W.L.R. 543.

brought by a minority shareholder against alleged wrongdoers.[191] The decision in *Edwards v Halliwell*[192] supported this avenue for minority shareholders to protect their rights (and also allowed for some other limited protections). Thus, whether shareholders could seek redress under derivative claim depended on the principles adopted through legal decisions.

The statutory derivative action is a new procedure for minority shareholders to pursue derivative claims that essentially replaces the common derivative action.[193] By inserting a derivative action into its Companies Act, the UK has followed in the footsteps of many other common law jurisdictions, including Canada, New Zealand, Australia, Hong Kong and Singapore.[194] In other common law jurisdictions, the introduction of a statutory procedure to govern the conduct of derivative actions was considered necessary to counter the restrictive nature of the rule in *Foss* and to allow the derivative action to function as an effective tool of corporate governance. In Canada, the Dickerson Committee felt that the best means of enforcing the corporation law was to confer reasonable power on the allegedly aggrieved party to initiate legal action for and on behalf of the company to resolve the problem.[195]

A statutory derivative claim may be brought under the Chapter 1 Part 11 of the Companies Act 2006 or pursuant to an order of the court in proceedings brought for unfair prejudice under section 994. Under section 260(3), the action must arise from an actual or

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[191] Schmitthoff, *Commercial Law in Changing Economic,* p. 42.
[192] [1950] 2 All ER 1064.
[193] The UK Companies Act 2006, ss.260-264.
[194] Steinfeld… [et al], *Blackstone Guide,* p.103.
[195] Choo, Pearlie Koh Ming, "The Statutory Derivative Action in Singapore - A Critical Examination", [2001], '*BondLawRw 3; (2001) 13(1) Bond Law Review 64*, Australian Legal Information Institute, *AustlIIHomepage*, Available online at: *http://www.austlii.edu.au/au/journals/BondLRev/2001/3.html,* [Assessed on 30/10/2011].

proposed act or omission by a 'director'[196] involving negligence, default, breach of duty or breach of trust by the director of the company. The cause of action may be against the director or another person or both. It does not matter whether the cause of action arose before or after the person seeking to bring the derivative claim became a member (section 260(4)). In order to bring a derivative claim a member of a company must apply to court for permission (section 261).

Section 263 sets out the criteria that a member must meet for permission to pursue a derivative action. In order to consider whether to grant permission, the court is required to consider the conditions mentioned in section 263 (3). There are three conditions[197] which authorize the court to give permission.[198] There are also certain conditions which bar the court from giving permission.[199] Section 263 provides all of the factors that the court should consider when determining whether to let a derivative claim proceed. Thus, section 263 is the core statutory procedure for derivative action.[200]

3.5 Summary

The UK has a long history of regulating the corporate form. The modern era of corporate regulation began with the UK Companies Act 1844 that established the rules for operation of

[196] 'Director' include former director; a shadow director; and a member of a company include a person who is not a member but to whom shares in the company have been transferred by the operation of law. The UK Companies Act, s.260 (5).

[197] (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or (b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or (c) where the cause of action arises from an act or omission that has already occurred, that the act or omission (i) was authorised by the company before it occurred, or (ii) has been ratified by the company since it occurred..

[198] The UK Companies Act 2006, s.263 (3).

[199] The UK Companies Act 2006, s.263 (2).

[200] John Armour and Jennifer Payne, *Rationality in Company Law: Essays in Honour of DD Prentice,* (Oxford: Hart Publishing, 2009), p.25.

companies. The Joint Stock Companies Act 1856 created a wholly revised system which has been regularly amended and updated to the present day. The latest Act is the Companies Act 2006 which fully came into force on 1 October 2009.

The updated company law now includes a detailed statutory statement of the general duties of directors which codifies the common law rules and equitable principles from the past. The historically weak common law protections for minority shareholders have been modernized with the unfair prejudice remedy and statutory derivative action. However, even with the UK's modern updated Act, the historical UK case law is still relevant as it must be used to interpret how the current Act should be implemented.

Chapter IV

Overview of the Singapore Companies Act (Cap 50 of the 2006 revised edition)

Singapore is a former British colony and as a result follows the English common law tradition. Thus, Singapore's company law is composed of a mix of statutory law and case law. As a member of the Association of South East Asian Nations, Singapore shares the English common law tradition with Malaysia, Brunei Darussalam and Myanmar.[201]

The first company law legislation in Singapore was the Indian Companies Act 1866.[202] This Act applied in the Straits Settlement.[203] In 1867, the Straits Settlements were separated from India and the Indian Companies Act ceased to have effect in 1889. At this point, the Companies Ordinance was enacted for the first time in 1889. The Companies Ordinance was repealed and replaced in 1915, 1923 and 1940. The Companies Ordinance 1940 was replaced by the present Malaysian Companies Act 1965. The Companies Act of 1967 was the first Companies Act passed by Singapore's Parliament after its independence. It was almost identical to the Malaysian Companies Act of 1965, which was based on the UK Companies Act 1948 and Victoria's Companies Act 1961.[204]

In 1985, the sections in the Singapore Companies Act were renumbered and since then sections of the Singapore and Malaysian Companies Acts no longer correspond. However, the Singapore Companies Act retains sections that are similar to sections in the Malaysia Companies

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[201] Kevin YL Tan (Ed), *The Singapore Legal System*, (Singapore: Singapore University Press, 1999), p.1.
[202] Yeo, *Commercial Applications of Company,* p.22.
[203] Straits settlement comprised Penang, Singapore and Malacca.
[204] CH Tan (Ed), *Walterwoon on Company Law*, (3rd Rev. Ed), (Singapore: Sweet & Maxwell, Thomson Reuters, 2009), p.14, 15.

Act. Singapore Company law continues to absorb and modify the common law as well as best practice of procedure law form Canada, Australia and the UK Companies Acts.

The authorities in Singapore have taken pains to keep track of developments in other countries, and where appropriate, have adopted similar practices after making suitable modifications where necessary. As Singapore developed as an independent nation and established its place in an economically dynamic country, Singapore fashioned its legal system to reflect the local culture and its own values. In this way, it followed many other former British colonies whose systems had the same provenance and a similar pattern of development.[205]

It is anticipated that changes will ensue in the near future flowing from the studies and recommendations done and put forward by the various committees set up pursuant to recommendations made by the Corporate Finance Committee of the Financial Sector Review Group.

4.1 History of Singapore Companies Act

Singapore is a former British colony and has particularly strong links to the English common law system. Since the Malay states were administered for some time through India, rather than directly by the Colonial office, there are also some significant influences from the 19th century India codification process. In the twentieth century, Singapore has looked to Australia and Canada for legal models and in particular the company law developments in Singapore are

[205] Roman Tomasic (Ed), *Company Law in East Asia*, (Dartmouth: Ashgate, 1999), p.417.

modeled on recent Australian and Canadian innovations, rather than the English model.[206] Historically, Singaporean company law derived from Australian and, in turn, English law, but now is increasingly 'home grown' so as better to fit the political and social values of the region.[207]

4.2 Amendments to the Singapore Companies Act

The Singapore Companies Act governs businesses incorporated in Singapore and is known as the Companies Act (Cap 50 of the 2006 Revised Edition of the Singapore Statutes). This is a new Act that came into effect on January 30, 2006. In order to keep the contents of the Act relevant to the current situation regular amendments have been done to the Singapore Companies Act. Most recently, the Act underwent substantial amendments in 2001 and 2005.

4.3 Current status of Singapore Companies Act

The main sources of Singapore Company Law are the Companies Act,[208] Case law, the Securities and Futures Act[209] and other sources of law including the Companies Regulation, Singapore Stock Exchange Listing Manual, Code of Corporate Governance, Singapore Stock Exchange Best Practices Guide and Financial Reporting Standards.[210] Specific types of companies

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[206] University of California, *Doing Business in Asia*, *Volume 3*, (The Hague: Kluwer Law International, 2005), p.67, 941.
[207] Eilis Ferran, "Company Law Reform in the UK, Singapore Journal of International & Comparative Law" (2001)5 pp 516-568.
[208] Cap 50, 2006 revised edition.
[209] Cap 289, 1994 revised edition.
[210] Pamela Hanrahan, *Company Law in Singapore,* (9th Ed), (Singapore: CCH Asia Pte Limited, 2008), p. 5.

are regulated by other statutes such as the Insurance Act, Banking Act, Finance Companies Act and Trust Companies Act.[211] Although, there are a number of types of companies available in Singapore the most common type is the company limited by shares. The public and private company distinction is the same as English law.

4.4 The general framework of the directors and their duties

4.4.1 Directors

Directors as defined in the Companies Act as including "any directors occupying such position by whatever name they are called,"[212] and includes *de facto* or shadow director. The difference between *de facto* and shadow directors is explained by Millett J in *Re Hydrodam* (Corby) Ltd[213] as follows *"A de facto director is a person assumes to act as a director. He is held out as director by the company, and claims and purports to be a director."* A shadow director is a person in accordance with whose directions or instructions the directors are accustomed to act. This explanation is articulated in *Heap Huat Rubber Company Sdn Bhd v Kong Choot Siam*[214] and *Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tein See.*[215]

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[211] Tan, *Walterwoon on Company Law*, p.14.
[212] The Singapore Companies Act, s.4.
[213] [1994]2BCLC 180,182 (High Court of England).
[214] [2004] SGCA 12.
[215] [2002] 3 SLR 76; [2001] SGHC 381.

In practice, there are eight types of directors in Singapore Company law, namely: executive directors, non-executive directors, the chairperson of the board, the managing directors, nominee directors, alternate directors, *de facto* directors, and shadow directors.[216]

The common law has viewed directors as fiduciaries as they have a wide scope of power and stand in a position of trust and responsibility vis-à-vis the company. A person who is in a fiduciary relationship with another is bound to exercise any rights and powers conferred on her in good faith for the benefit of the other person. The first directors of the company are those named in the memorandum or articles.[217] Thereafter, the tenure of directors will be in accordance with the articles of association (clause 63-71 of Table A of the Fourth Schedule).

4.4.2 The duties of directors

Directors are regarded as fiduciaries under the common law and therefore owe fiduciary duties to their companies. There are two types of duties under the Act: (1) the general law (or "common law") duties; and (2) statutory duties. All directors have a common law duty to act *bona fide* in the interests of the company. The principle that a director has a duty to act in the best interest of the company is illustrated in *Swiss Buthery Pte Ltd v Huber Ernt*[218] where Woo Bih Li J held that the courts will not interfere with management decisions that are arrived at bona fide even

[216] Yeo, *Commercial Applications of Company Law,* p.171. Also see Hanrahan, *Company Law in Singapore,* p.85-87.
[217] The Singapore Companies Act, s.145 (3).
[218] [2010] 3 SLR 813.

if the decisions turned out to be a poor commercial decision (as long as the directors intended the decision to be in the company's best interests).[219]

The common law "negligence duty" owed by the directors (and senior executive officers who can be regards as fiduciaries) can be divided into three components: standard of care, degree of skill and level of diligence. The standard of care is determined by an "objective" test, whether the director has exhibited the same degree of care as a reasonable director found in her position. All directors must possess the skill necessary to have a basic understanding of the business of the company and its financial status. A director is required to use reasonable diligence in the discharge of her office.[220]

4.4.2.1 Duty to act honestly and with reasonable diligence

The Singapore Companies Act prescribes certain "statutory duties" which significantly overlap with those in the common law. One of the most important statutory duties under the Act is found in section 157 which requires directors to always act honestly and use reasonable diligence in the discharge of the duties of their office.[221] In addition, the Act restricts a director (officer or agent) of a company from making improper use of any information, directly or indirectly, acquired

[219] *Puchniak, Dan W and Tan, Cheng Han. Company Law [online]. Singapore Academy of Law Annual Review of Singapore Cases, Annual Review 2010, 2010: 196-212. Availability: <http://search.informit.com.au/documentSummary;dn=182822009409345;res=IELHSS> ISSN: 0219-6638. [cited 15 Nov, 11].*

[220] Dan William Puchniak, "Directors' Duties in Singapore, '*Unpublished Lecture Paper*', (Graduate School of Law, Nagoya University, 2009).

[221] The Singapore Companies Act, s.157(1).

by virtue of his position as a director (officer or agent) of the company to gain an advantage for himself or for any other person or to cause detriment to the company.[222]

A breach of the statutory duties found in section 157 results in both civil and criminal liability under of the Singapore Companies Act.[223] A director who breaches this section may be liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach.[224] In addition, section 157(4) provides that the section is in addition to and not in derogation of any other rule of law relating to the duty or liability of directors or officer of a company. This is important as the duties covered by section 157 overlap with the duties under the general law. However, this make it clear that section 157 does not affect any of the duties directors may have at common law—even if they overlap with the statutory duties. As a general rule, directors and other officers owe their duties to the company. The duties are not owed to the individual members, creditors or others. As such, *prima facie*, all breaches of duties are the company's to enforce.

Possible remedies for breach of a common law duty are an injunction, compensation or damages, account of profits, constructive trust and rescission of contracts. The remedies for a breach of duty under section 157 include a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year which is enforced by the Accounting and Corporate Regulatory Authority.[225] This is important to note as a director may face criminal penalties if they are found to breach their statutory duties but will not face criminal sanctions for merely breaching their common law duties.

[222] The Singapore Companies Act, s.157(2).
[223] The Singapore Companies Act, s. 157(3).
[224] The Singapore Companies Act, s 157(3) (a).
[225] The Singapore Companies Act, s. 157 (3) (b).

In general, Singaporean courts have used the case law concerning fiduciary and negligence duties as the foundation for interpreting section 157. Statutory duties are enforced by the Accounting and Corporate Regulatory Authority.[226] The statutory statement of the duties of directors was derived from similar provisions in the Australian Companies Act[227] and cannot be contracted out of by directors (i.e., they are mandatory).[228]

4.4.2.2 Disclosure of interests in transaction, property or office, etc.

Every director of a company who is interested in a transaction or proposed transaction with the company whether directly or indirectly must declare the nature of his interest at a meeting of the directors of the company as soon as practicable after the relevant facts have come to his knowledge.[229] The interests of directors may be regarded as not being "a material interest" where the interest of the director consists only being a member or creditor of a corporation.[230]A director of a company may not be deemed to be interested or to have been at any time interested in any transaction or proposed transaction by reason only: (a) in case where the transaction or proposed transaction relates to any loan to the company; or (b) in a case where the transaction or proposed transaction has been or will be made with or for the benefit of or on behalf of the corporation that he is a director of that corporation.[231] Failure to disclose to the board is an offence and liable on

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[226] Hanrahan, *Company Law in Singapore,* p.101.
[227] Australia Companies Act 1961, s 124.
[228] Fiana Jesover, *Enforcement of Corporate Governance in Asia*, (Paris: OECD, 2007), p.94.
[229] The Singapore Companies Act, s.156 (1).
[230] The Singapore Companies Act, s.156 (2).
[231] The Singapore Companies Act, s.156 (3).

conviction to a fine not exceeding $ 5,000 or to imprisonment for the term not exceeding 12 months.[232]

4.5 Shareholders' remedies in Singapore

There are broadly two kinds of shareholder remedies available in Singapore company law: (1) personal remedies; and (2) procedural remedies. Personal remedies are those remedies which shareholders can use to enforce their own personal rights. At common law, the most common personal remedies available to shareholders were the right they had to enforce the articles of incorporation or enforce their right to vote. Under the Companies Act, the two most powerful personal shareholder remedies are the oppression remedy and just and equitable winding up.

Procedural remedies are those remedies that allow the shareholders a procedural right of standing to force the company to sue on the company's rights (i.e., a derivative action). In Singapore, there are now two types of derivative actions: (1) a common law derivative action; and (2) a statutory derivative action.

The statutory derivative action in Singapore is modeled after the statutory derivative action in the Canadian Business Corporations Act[233] and is found in sections 216A and 216B of the Companies Act (Cap 50). Section 216A allows a complainant to apply to the court for leave to

[232] The Singapore Companies Act, s.156 (10).
[233] Canada Business Corporation Act 1985, ss.238-240.

bring an action in the name of and on behalf of the company, or to intervene in an action to which the company is a party.[234]

4.5.1 Just and equitable winding up

Section 254 deals generally with circumstances under which a company may be wound-up by the court. It is possible to meet the test for just and equitable winding-up when the company is unable to pay its debts, the members believe the company is no longer serving its purpose and/or there is a deadlock between majority shareholder directors. This allows individual shareholders to recover their investment when they are unjustly locked into a failed quasi-partnership. Typically, minority shareholders do not have the voting power to secure a special resolution to effect a regular corporate winding-up (which normally requires a special majority vote). However, minority shareholders can seek a winding-up on "just and equitable" grounds under section 254(1)(i) that provides individual shareholders with a remedy to apply to court for the company to be wound up when it is "just and equitable" to do so.

The "just and equitable grounds" test provides the court with extremely wide discretion but an extremely narrow remedy. Section 254(1)(i) is more appropriate in cases where an aggrieved minority is intent on winding up the company and the facts point to a fault neutral breakdown of a quasi-partnership. It provides a single remedy with dramatic consequences.

[234] Pearlie Koh Ming Choo, *The Statutory Derivative Action in Singapore: A Critical and Comparative Examination* - [2001] BondLRev 3; (2001) 13(1) Bond Law Review 64, p.9.

In *Sim Yong Kim v. Evenstar Investments Pte Ltd*[235] *"the company was a quasi-partnership in which two brothers held all of the shares. The plaintiff, who was a minority shareholder, entered into the company pursuant to his brother's promise that he would buyout the plaintiff's shares should the plaintiff exit the company. The Court of Appeal held that the terms of the promise were too vague to form a contract, but nevertheless amounted to a "legitimate expectation" which was breached when the majority shareholder brother refused to purchase the plaintiff's shares for a reasonable price. The Court ordered a just and equitable winding up under section 254(1) (i)."*

4.5.2 The oppression remedies

Claims for oppression are normally based on acts by corporate controllers that are unfair to minority shareholders. The most common remedies for a successful oppression action are the court ordering the majority to purchase the oppressed minority's shares or a winding-up. However, section 216 of the Singapore Companies Act provides the court with an extremely wide ambit of authority to remedy oppressive behavior as it allows they court to do "as it thinks fit" to put an end to the oppression.

The oppression remedy was introduced in response to the difficulties encountered by minority shareholders in corporate environment that is normally governed by the general principle of majority rule.[236] It also prevents majority shareholder directors from escaping liability. Hence,

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[235] [2006] SGCA 23.
[236] Attorney, "Shareholders' Remedies in Canada", *H.G Legal Directories.Org*, [September 12, 2007], Available online at: *http://www.hg.org/article.asp?id=4818,* [Accessed on 15 November 2011].

the wide scope of acts which may fall under the oppression remedy and its broad remedial power makes oppression one of the powerful weapons for minority shareholders.[237]

The oppression remedy under section 216 provides a remedy in circumstances where the affairs of the company or powers of directors are being exercised in a manner oppressive to one or more of the members including himself. An application to the court on those grounds can be brought by any member, debenture holder or the Minister where the company is under investigation pursuant to Part IX of the Singapore Companies Act.

On its face, section 216 appears create four separate heads of conduct that amount to oppressive conduct: "oppression', "disregards of interest", "unfair discrimination" and "prejudice". However, the case law is clear that these four tests can be generally seen as one singular test of "commercial unfairness". In short, for a minority shareholder to succeed in a claim for oppression under section 216 they must establish that the actions of the corporate controller has resulted in commercial unfairness to themselves.

The oppression remedy is primarily aimed at addressing personal wrongs. Therefore, in situations where there is purely a corporate wrong, which does not amount to oppression (e.g., in a breach of director's duty), a derivative action is normally the most appropriate way for a minority shareholder to seek redress. This is particularly the case where the shareholder wants to maintain their interest in the company.

[237] Oppressive remedy required oppressive conduct of the affairs of the company to be shown, and the courts defined oppression as 'burdensome, harsh and wrongful' in Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 (House of Lords) by Viscount Simonds J. The oppressive remedy is originated from the UK legislation based on the recommendation of the Cohen Committee to give a minority member an 'alternative remedy' to bringing a derivative action or petitioning to wind up the company on the just and equitable ground.

In *Over & Over Ltd v Bonvests*[238] *"the plaintiff and defendant were two family controlled companies that entered into a joint venture agreement to develop and manage a large hotel in Singapore. For the purpose of the joint venture, the plaintiff and defendant companies incorporated another company ("JV Company") in which they respectively owned 30% and 70% of the shares. The JV Company purchased land on Scotts Road and developed and managed a hotel on the land. The hotel was the sole business of the JV Company. Under section 216 of the Companies Act (Cap 50, 2006 Rev Ed), the plaintiff claimed that three actions taken by the defendant, during a six-year period after the hotel was built, amounted to oppression: (1) the transfer of JV Company shares by the defendant to its related company which allegedly breached the plaintiff's pre-emptive rights under an oral agreement it had with the defendant; (2) a rights issue in the JV Company orchestrated by the defendant to allegedly dilute the plaintiff's JV Company shares; and (3) several related party transactions which were allegedly undertaken by the defendant in an unfair manner and without proper disclosure. At trial, the Judge rejected all three claims holding that the plaintiff consented to the share transfer, the rights issue was properly undertaken in order to repay the JV Company's loan and the related party transactions were not unfair. Accordingly, his Honour rendered a decision dismissing the section 216 action for oppression which was appealed by the plaintiff. In a watershed judgment, the Court of Appeal allowed the appeal. It held that the appellant had suffered oppression under section 216 and ordered the respondent to purchase all of the appellant's JV Company shares at fair market value without a minority discount. In arriving at this decision, Judge of Appeal V K Rajah (delivering the judgment of the Court of Appeal) respectfully disagreed with each of the three main findings of the trial Judge.*

[238] [2010] 2 SLR 776.

The Court of Appeal held that the transfer of the JV Company shares in itself amounted to oppression. Justice Rajah reasoned that the share transfer 'manifestly and irretrievably altered' the informal nature of the JV Company by transforming it from a private to a semi-public company. This "profound" change caused a "loss of substratum" which, when considered together with the respondent's conduct in securing the transfer, was oppressive. Contrary to the trial Judge's finding, the Court of Appeal held that the appellant's consent to the share transfer did not prevent the transfer from being used as evidence in the appellant's oppression claim. Specifically, Justice Rajah suggested that the importance of the appellant's consent was substantially diminished by the fact that the respondent had made it known that the share transfer would ultimately be carried out with or without the appellant's consent.

The Court of Appeal further held, contrary to the trial Judge's decision, that the rights issue was also in itself sufficient to support the appellant's claim for oppression. Justice Rajah cited the "complete absence of any commercial justification" for the rights issue as evidence of its oppressive nature. In a similar vein, he described the rights issue as an "ill-conceived attempt to dilute the [appellant's] shareholding" in the JV Company. Ultimately, the Court of Appeal held that the rights issue prejudicially forced the appellant to incur the unnecessary expense of infusing extra capital into the JV Company for no valid commercial reason—which was oppressive. With respect to the respondent's related party transactions, the Court of Appeal agreed with the trial Judge's general finding that the transactions did not in themselves amount to oppression. In fact, Justice Rajah acknowledged that the respondent's related party transactions may have even benefited the JV Company and in turn indirectly benefited the appellant. However, he went on to find that the manner in which the related party transactions were conducted—which included

numerous breaches to the JV Company's articles—reinforced 'the perception that the [respondent] had been in the habit of riding roughshod over the [appellant's] interests'. As such, the Court of Appeal held that when viewed "holistically" the related party transactions served to reinforce its finding of oppression."

4.5.3 The common law derivative action

Common law derivative action is based on fraud on minority. There is no formal procedure in the rules of court or the Singapore Companies Act for pursing a common law derivative action. A common law derivative action allows an individual shareholder to bring an action for the benefit of the company based on the company's cause of action. They have been considered in a wide range of decisions in Singapore, Australia and the United Kingdom.[239]

A minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company. In *Daniels v. Daniels*[240] *the minority shareholders were allowed to maintain an action against the directors of the company where the directors had affected a sale of the company's land at undervalue. Allegations of "fraud" were not pleaded and Templeman J had to consider whether a derivative action could be allowed. He held that the minority shareholders could bring an action under the "fraud on the minority" exception where directors had acted negligently. It was significant that the sale at undervalue was made to one of*

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[239] Tomasic, *Company Law in East Asia*, p.450, 451.

[240] High Court, England, [1978] 2 All ER 89. The decision of the case followed in *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR 197 (Court of Appeal, Singapore).

the directors who had effected the sale, from which the wrongdoers could be said to have benefited."

A common law derivative action is brought in the complainant shareholders' name. It is also available for non-Singaporean or listed companies (which do not have access to the statutory derivative action under section 216A). In *Ting Sing Ning v. Ting Chek Swee*[241] *"the Singapore Court of Appeal decided that the case had to proceed under the common law derivative action rather than under section 216A because the company was incorporated in Hong Kong (not Singapore). Therefore, section 216A did not apply."*

4.5.4 The statutory derivative action

Protection of minority shareholders is also afforded by the Singapore Companies Act section 216A which has established a statutory derivative action.[242] The statutory derivative action was inspired by Canadian legislation and was implemented in Singapore to provide more clarity than the common law derivative action and to provide better protection for minority shareholders.[243] In Canada, the Dickerson Committee suggested that the statutory derivative action should be implemented as it felt that the best means of enforcing company law was to confer reasonable power on the allegedly aggrieved party to initiate legal action to resolve the problem.[244]

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[241] [2008] 1 SLR 197 (Court of Appeal, Singapore).

[242] Statutory derivative action introduced into the Singapore Companies Act in 1993.

[243] The Canada Business Corporation Act 1985, ss. 239,242.

[244] R. W. V. Dickerson, L. Getz and J.L. Howard, *Proposal for a New Business Corporations Law for Canada: Commentary and Draft Act*, vol. II (Ottawa: Information,1971), p.174.

In November 1993, Singapore enacted its statutory derivative action based on the Canadian model.[245] The statutory derivative action is only for non-listed Singaporean company incorporate in Singapore.[246] The main reasons given for restricting the statutory derivative action to non-listed companies was that in listed companies the stock exchange already monitors the companies and shareholders of listed companies may sell their shares easily which is an effective remedy.

Nevertheless, it should be noted that the exchange cannot compel a director to pay damages to the company and thus, any financial wrong done to a company may be difficult to remedy if the shares are devalued such that disgruntled shareholders cannot sell their shares except at a loss. It seems clearly that the main concern was the prevention of greenmail by shareholders or over litigation by shareholders-yet this has not come to pass in Canada and it is unlikely that Singapore would have seen more litigation.

According to the provisions under section 216A (3) there are three prerequisites for the derivative action:[247]

(1) 14 days notice to the directors that a section 216A application will be made if the directors do not act to remedy the situation;

(2) that the complainant is acting in good faith; and

(3) that it appears to be *prima facie* in the interest of the company that the action be brought, defended or discontinued.

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[245] Dan William Puchniak, "The protection of minority shareholders in Singapore", '*Unpublished Lecture Paper*', (Graduate School of Law, Nagoya University, October 2010).

[246] This limitation is does not exist in Canada even s. 216A is derived from the Canada Business Corporations Act 1985, ss 238-40.

[247] The Singapore Companies Act, s.216A (3).

The procedural requirement of the 14 days' notice may be waived by the court. However, if the requirement is not waived, the court requires that the notice contains enough detail to alter and inform the directors of the derivative action.[248] As such, the purpose of the notice requirement is to allow the directors the opportunity to decide whether to bring the action on behalf of the company. The requirement of good faith is probably a codification of the equitable requirement of "clean hands" under the common law derivative action. The final requirement, that it would be in the "interest of the company" to bring the action is the most important part of the test as it weeds out abusive actions and ensure that only commercially viable claims are pursued by the company.

In sum, the statutory derivative action empowers members to challenge company controllers who are not acting in the interest of the company by failing to pursue a valid corporate action (normally which is aimed at the directors themselves). It overcomes the procedural difficulties faced by company members as a result of the proper plaintiff rule and the ill-defined common law derivative action. The rule in *Foss* holds that the company is the appropriate body to litigate in instances of breaches of directors' duties owed to it. Under that rule the directors make the decision as to whether the company would undertake litigation. If the directors are potential defendants, it is extremely unlikely the company will launch an action—as doing so would require the directors to decide to launch an action against themselves. Section 216A tries to provide an efficient and equitable solution to this problem by allowing minority shareholders to effectively force the company to pursue an action when it is in the company's interests to do so.

[248] The Singapore Companies Act, s.216A (4).

4.6 Summary

The Singapore Companies Act is rooted in the Malaysia Companies Act 1965 that was modeled on the English Companies Act 1948 and the Australia Companies Act 1961. The provisions on directors' duties were approximately the same as the UK at that time and have been updated in line with the Australia and Canadian models. The Singapore legislature has been particularly active in adopting minority protection legislation inspired from different parts of the common law world—most notably the UK, Australia and Canada. The English, Canadian and Australian case law is also referred regularly by Singapore courts when they apply the Companies Act.

The statutory derivative action is viewed as a deterrent to potential corporate wrongdoing rather than as a mere remedy. Both the common law derivative action and statutory derivative actions do not result in a direct personal benefit to minority shareholders. All damages recovered as a result of a derivative action are paid to the company. This makes the derivative action a less attractive option for minority shareholders than the oppression remedy which provides flexible remedies that directly benefit minority shareholders (e.g., the purchase of an oppressed minority's shares or a division of assets on winding up). One salient feature of the statutory derivate action is that it is only applicable for unlisted Singaporean companies—which has kept the common law derivative action in Singapore alive.

The just and equitable winding up remedy is applicable in the case of quasi-partnerships and is normally only applied when a company is on the brink of insolvency. In cases involving a deadlock between equal shareholders—where it may be difficult to attribute oppressive or unfairly

discriminator conduct to either party—the courts have, nevertheless, been ready to grant winding-up orders pursuant to their “just and equitable” jurisdiction.

The next chapter will explore the comparison of the directors’ duties and shareholders’ remedies of in the UK, Singapore and Myanmar. The similarities and differences of each jurisdiction will be analysed and amendments to improve the future for Myanmar’s company law will be suggested.

Chapter V

Comparison of directors duties and shareholders' remedies in each Jurisdiction; and suggestions for future implementation of the Myanmar Companies Act

A review of the UK and Singapore reveals that they often use the same strategies to shape the internal management of their companies. Indeed, there is a significant overlap in the way that directors' duties and shareholders' remedies have been crafted and applied in the UK and Singapore. In turn, to a large extent, it can be said that the UK and Singapore have adopted similar patterns of corporate governance in terms of their directors' duties and shareholders' remedies.

Over the years the concept of the duties of directors and shareholder remedies has changed. Professor Dodd has argued that modern directors are not limited to running the business enterprise to maximize profit alone and in fact the law has come to recognize them as administrators of a community system.[249] Indeed, the idea that companies are not merely economic wealth creation machines but important pieces of every country's social fabric has made corporate governance a concern for the wider public—not just lawyers and law professors. This has meant that there has been an increasing push in Singapore, the UK and many other developed (and increasingly developing) countries to fine tune and revise their corporate law.

Upon examining the UK and Singapore Companies Acts, it is clear that they have spent considerable time and effort to clarify and fine tune their directors' duties and shareholders' remedies through legislative amendments and court decisions. It is also clear that the same has no occurred in Myanmar. As we have seen, Myanmar's provision on directors' duties and

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[249] Bryan Horrigan, *Corporate Social Responsibility in the 21st century: debates, models and practices across government, law and business,* (Cheltenham, UK: Edward Elgar Publishing, 2010), p.89.

shareholders' remedies are outdated and much less clear than in Singapore and the UK. In fact, despite some significant differences Singapore and the UK appear to have a number of important similarities and be moving in a similar director—while Myanmar appears frozen in its colonial past.

More specifically, in both the UK and Singapore the derivative action plays as an indispensable role in the enforcement of directors' duties and gives a right to minority shareholders to ensure that directors are held liable when they breach their duties. This provides meaning to the fiduciary and negligence directors' duties in the UK and Singapore which are largely similar in their scope and content.

However, in contrast, Myanmar lacks a derivative action (in either common law or statute) which renders its directors' duties (which are also not well defined) essentially moot when majority shareholders control the board—which is most often the case in Myanmar. In addition, the UK and Singapore both have the oppression/unfair prejudice remedy which is another valuable weapon to protect minority shareholder rights. Indeed, over the last two decades, the oppression/unfair prejudice remedy has arguably become the most important protection for minority shareholders in Singapore and the UK. Again, in stark contrast, Myanmar has failed to insert an oppression/unfair prejudice remedy into its Act.

5.1 Comparative analysis of directors' duties in Myanmar, the UK and Singapore

It is clear that out of the three jurisdictions the UK has the clearest articulation of directors' duties in its Companies Act. Specifically, the UK Companies Act 2006 details seven

general duties of directors: to act within their powers; to promote the success of the company, to exercise independent judgment; to exercise reasonable care, skill and diligence; to avoid conflicts of interest; to not accept benefits from third parties; and to declare interests in proposed transactions or arrangements. The specific nature of the UK duties is the result of its efforts to incorporate its extensive case law into its most recent Companies Act.

Under the Singapore Companies Act, directors' duties are composed of the duty to act honestly and reasonably and to disclose conflicts of interest. Although, the articulation of directors' duties in the Singapore Companies Act is far less robust than under the current UK Companies Act 2006, the Singapore courts have rendered numerous detailed decisions to provide clarity to these broad provisions.

Unfortunately, in Myanmar, the legislature has not followed the path of the UK as it has not inserted a clear statement of directors' duties into the Myanmar Companies Act. In addition, the courts have not followed the Singapore path by rendering detailed decisions on directors' duties. In fact, the Myanmar courts have rendered only three decisions on directors' duties which due to their specific findings have limited precedential value. The net result is that the law of directors' duties in Myanmar is far less clear than in the UK or Singapore. This is the general conclusion. Now, a more detailed comparison will follow.

5.1.1 Comparison on loans of directors

In Myanmar, a loan to a director of a public company is not permissible (this provision does not apply to a private company except a private company which is the subsidiary of the

public company or to a banking company) and if a director makes a lone, he is punishable under the Act.[250] Therefore, a director cannot make a loan from a public company to themselves—which is a very specific duty or restriction imposed on directors of public companies in Myanmar.

In the UK, the UK Companies Act 1948,[251] restraints the making of loans to directors but the UK Companies Act 1985[252] extends the ability to make loans—especially in relation to public companies.[253] The Companies Act 2006 makes a significant alteration to ban on company loan to directors by allowing such loans to be made if they are approved by the shareholders in general meeting.[254] Thus, under the UK Companies Act 2006, the director may make loan if the transaction has been approved by a resolution of the members of the company.[255] Under section 197 of the UK Companies Act, a director may make loan if the transaction has been approved by a resolution of the members of the company. It is clear that loans to directors are permissible but need the member's approval for loans. Again, the term "quasi-loan" is also defined and explained in detail under section 199 as: a transaction under which one party ("the creditor") agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another ("the borrower") or agree to reimburse, or reimburses otherwise than in pursuance of an agreement, expenditure incurred by another party for another ("the borrower"). The quasi-loans to directors are also need to approval of the members.[256] Both a private company and public company can make loans to a director of a company or a director of its holding company but such an activity requires members' consent.

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[250] The Myanmar Companies Act 1914, s. 86D.
[251] The UK Companies Act 1948, s.190.
[252] The UK Companies Act 1985, ss. 330-344.
[253] Davies, *Gower's Principles of Company,* p.637.
[254] Kershaw, *Company Law in Context,* p.458.
[255] The UK Companies Act 2006, ss.197-214
[256] The UK Companies Act 2006, s.198.

The Singapore Companies Act also prohibits loans to directors but such a loan is permissible in limited situations. A company must not make a loan to a director of the company or to directors of related corporations[257] but this restriction does not apply if the amount of loan or the extant of the guarantee or security is disclosed to the members and prior approval of the company in the general meeting is obtained.[258]

In addition, under the Singapore Companies Act, it is permissible to provide a director engaged in the full-time employment of the company or of a related corporation with a loan for the purpose of purchasing or otherwise acquiring a home occupied or to be occupied by a director. If the company has a loan scheme for employees, loans may be made to directors who are full time employees of the company or its related corporations. The loan must be made in accordance with the scheme, which must have been approved in advance by the general meeting. A loan made in the ordinary course of business by bank, finance company or insurance company to a director is also permissible.

In short, in certain circumstances and when certain requirements have been met, loans to directors are permitted in the UK and Singapore. There is nothing to prevent a director of a company from borrowing from company with the prior approval given by shareholders in general meeting. This is one of the differences between Myanmar, the UK and Singapore Companies Acts. In Myanmar, when allowing the loans to directors of the public company under the certain circumstances, it is also necessary to provide and implement the associate sections (like UK Companies Act 2006, sections 197-214). It is also necessary to consider that whether the director can offer good security for a loan or not. Furthermore, making loan to the directors may diminish

[257] The Singapore Companies Act, s.162.
[258] The Singapore Companies Act, s.162 (2) (a).

the company capital. To determine where the directors can offer good security or not may cause difficulties in practice. On one hand, companies should not make loans to their directors because it may cause a conflict between the interests of directors and duties of directors to the company. On the other hand, the office of the director must be vacated if the director accepts loans from the company and also the disqualification of the director will occur in Myanmar.[259] Therefore, it is not preferable to make loan to directors in Myanmar. In this point, the thesis argues the Myanmar Companies Act should not emulate that of the United Kingdom and Singapore as there loan provisions open the window for potential abuse.

5.1.2 Comparison on disclosure of interests

In Myanmar, "every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company has to disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on. If the interest of the director then exists, that director needs to disclose the making of the contract or arrangement after the acquisition of the interest at the first meeting of the directors. After the general notice is given it is not necessary to give any special notice relating to any particular transaction with such company."[260]

In the UK, "if a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest at the meeting of the directors or by notice to the directors in accordance with notice in

[259] The Myanmar Companies Act 1914, Schedule I, Table A, art. 77(g).
[260] The Myanmar Companies Act 1914, s.91A (1).

writing or general notice to the other directors."[261] Any declaration must be made before the company enters into the transaction or arrangement. A further declaration must be made if a declaration of interest becomes inaccurate or incomplete. A declaration of an interest is not required in the case of an interest which the director is not aware of or where the director is not aware of the transaction or arrangement in question. In some situations, a director does not need to declare an interest: (1) if it cannot reasonably be regarded as likely to give rise to a conflict of interest; (2) if the other directors are already aware of the conflict; or (3) if the transaction concerns terms of his service contract that have been considered by a meeting of the directors, or by a committee of the directors appointed for the purpose under the company's constitution.

In Singapore, every director must disclose the nature of the directors' interest in a transaction or proposed transaction at the meeting of the directors of the company as soon as practicable after the relevant facts have come to his or her knowledge.[262] Besides the requiring disclosure of interest in transaction, directors who hold any office or possess any property where duties or interest might be created in conflict with their duties or interest as director have to declare the fact and the nature, character and extent of the conflict at the meeting of the directors of the company.[263] Every declaration has to be recorded in the minutes of the meeting at which it was made by the secretary of the company.[264] Any director who fails to disclose under section 156 is an offence and liable on conviction to a fine or imprisonment.

To summarize, the theme of provision of section 91A of the Myanmar Companies Act, section 177 of the UK Companies Act and section 156 of the Singapore Companies are basically

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[261] The UK Companies Act 2006, s.177 (1).
[262] The Singapore Companies Act, s.156 (1).
[263] The Singapore Companies Act, s.156 (5).
[264] The Singapore Companies Act, s. 156 (7).

the same but the method of disclosure is a little bit different from each other. Generally, the disclosure of interest in transactions is made at the meeting of directors. In Myanmar, such disclosure has to be made at the meeting of the directors at which the contract or arrangement is determined. In UK, such disclosure must be made before the company enters into the transaction or arrangement at meeting [265]or by notice.[266] In Singapore, directors have to declare the interest in transaction, as soon as possible after the relevant facts have come to his knowledge, at a meeting of the directors of the company.[267] A further declaration must be made if the declaration is inaccurate or incomplete.[268] In Myanmar, such kind of further declaration is not mentioned.

The UK Companies Act has gradually changed and the provisions relating to the disclosure of directors has become wider and more detail than under the former Companies Acts. In Myanmar, the way of disclosure in any contract or arrangement is not mentioned in detail. Therefore, the Myanmar Companies Act needs to define such kind of duty more precisely in its Act. The way of disclosure of interest by directors practicing in UK is more flexible and accessible than the rigidity in Myanmar. If Myanmar expands the definition of disclosure of interest by directors (e.g., to declare the nature and extent of the interest by notice to the directors in accordance in with notice in writing or general notice to other directors and allow to make further declaration if the declaration is inaccurate or incomplete), that expansion will be convenient to apply and will be more efficient and effective. The UK's manner of disclosure should be followed in Myanmar (not the Singapore method) as the Singapore is even less detailed than in Myanmar.

[265] The UK Companies Act 2006, s.177 (2) (a).
[266] The Singapore Companies Act, s. 177 (2) (b).
[267] The Singapore Companies Act, s.156 (1).
[268] The UK Companies Act 2006, s. 177 (4).

5.1.3 Comparison on other duties relating to directors

The obligation for directors to keep a proper book of accounts can be assumed as the administrative duty of directors in Myanmar Companies.[269] In the UK, a company has to keep accounting records.[270] Where the company has failed to keep adequate accounting records under the section 386 of the UK Companies Act 2006 it may give rise to criminal offence for every officer of a company who is in default.[271] The directors of a company have to deliver the accounts and reports to the registrar for each financial year.[272] The filing obligations are differs from types of companies.[273] The unlimited companies are exempt from filing obligations.[274]

In Singapore, a director or promoter who takes part in management of the company, in any way directly or indirectly, has to file a return, account or other document and deliver it to the Registrar.[275] Company books are included in any account or document and any other record of information.[276] Failing to keep proper accounts or engaging in wrongful trading may disqualified a person from managing companies.[277]The provision on keeping a book of accounts is similar but not identical to each other under the three Acts. It is not suggested to change the current provision in Myanmar.

Holding of share qualification to be a director is the duty of directors in Myanmar. According to the provision the director must hold at least one share in the company. In practice,

[269] The Myanmar Companies Act 1914, s.130.
[270] The UK Companies Act 2006, s.386.
[271] The UK Companies Act 2006, s.387.
[272] The UK Companies Act 2006. s.441.
[273] The UK Companies Act 2006, s. 444, s.446 and s.447.
[274] The UK Companies Act 2006, s.448.
[275] The Singapore Companies Act, s.155 (2).
[276] The Singapore Companies Act, s.4.
[277] The Singapore Companies Act, s.399.

every director must hold at least ten shares in the company. In the UK Company, the share qualification to be a director is not applicable.[278] Interestingly, in Japan, a director does not need to hold any shares to be a director. Article 331(2) reads: "A Stock Company may not provide in the articles of incorporation that directors shall be shareholders; provided, however, that this shall not apply to a Stock Company that is not a Public Company."[279] As Professor Egashira, "it would be the result to recognize that the ideal of public companies is to seek candidates of directors broadly."[280] Singapore also does not require directors to hold shares in the company to be a director. In Myanmar this duty should not be amended because holding shares in the company may encourage the director to perform their function well and to promote the success of the company. To confirm that idea, Nicholas Grier also mentioned that "qualification shares exist because it is thought that directors who have a personal stake in a company more likely to try hard for the overall good of the company."[281]

5.2 Comparative analysis of shareholders' remedies in Myanmar, the UK and Singapore

In Myanmar, the provision relating to shareholders' remedies are scarce under the Myanmar Companies Act. The winding up remedy is only available if it is just and equitable to do so. As just and equitable winding up is a harsh remedy, it does not lead to a desirable outcome for minority shareholder and the break-up value of the assets may be low.

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[278] It is the duty of every director who is by the company's articles required to hold a specified share qualification under s.291 of the UK Companies Act 1985.

[279] Japan Companies Act (Act No.86 of 2005).

[280] Kenjiro Egashira, *Laws of Stock Corporations (Kabushiki-kaisha ho)*, (3rd Ed), (Tokyo: Yuhikaku, 2006), p. 360.

[281] Nicholas Grier, *UK Company Law*, (Sussex, England: John Wiley & Sons Ltd, 1998), p.359.

In comparison to the UK and Singapore, in respect of shareholder remedies, there are other statutory remedies such as the oppression/unfair prejudice remedy and derivative action that can be brought in order to protect minority shareholder rights.

In the UK, the undesirable position of minority shareholders was observed by the Cohen Committee and it was recommended that a special remedy was needed where minorities suffer oppression.[282] Thus, the oppression remedy were implemented in the UK Companies Act 1948, section 210. The introduction of section 210 in England thereby made it possible for shareholders to institute a different type of action where the procedural bar of having suits instituted in the name of the company or to satisfy the court that the majority of the shareholders were preventing an action in the name of the company was removed. The substantive bar emanating from the doctrine of the rule of the majority on matters relating to the internal management of the companies was effectively removed and the jurisdictional bar to courts interfering in matters of internal management was effectively lifted.

The minority shareholders' remedies are provided as a mechanism for minority shareholder to protect and enforce their rights when they have reasonable grounds to believe that they have been violated by the directors or majority shareholders. Shareholders are the owners of the company. They ultimately control the company by virtue of their ability to remove and appoint directors and to change the articles. Their rights and obligations as shareholders will usually be set

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[282] Andrew Hicks & S.H.Goo, *Cases and Material on Company Law*, (6th Ed), (Oxford: Oxford University Press, 2008), p.445.

out in articles, backed up by the Company Act and the law developed by judges in decided cases.[283]

5.2.1 Comparison on just and equitable winding up remedy

The basic remedy for minority shareholder is just and equitable winding up. It is rooted in the UK jurisprudence,[284] which was transplanted into Singapore[285] and Myanmar.[286] In *Ebrahimi v Westbourne Galleries Ltd*[287] Lord Wilberforce gave content to the concept of "just and equitable" winding up in the former section 222(f) of the UK Companies Act 1948 as follows:

"The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way.

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[283] Martin Webster (Ed), *The director's Handbook: Your duties, responsibilities and liabilities*, (2nd Ed), (London: Kogen Page Limited, 2007), p.12.
[284] The UK provision setting out the 'just and equitable' ground for winding up is presently under the UK Insolvency Act 1986, s.122 (1) (g). It is previously the UK Companies Act 1948, s 222(f).
[285] The Singapore Companies Act, s.254 (1) (i).
[286] The Myanmar Companies Act 1914, s.162 (6).
[287] [1973] AC 360.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sums these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however

domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

This case makes it clear that it may be just and equitable to wind up a company even though the controllers have acted within their strict legal rights and when the complaint relates to behavior that is contrary to the settled and accepted course of conduct between the parties. Cases involving management deadlock or loss of mutual trust and confidence have been successfully invoked under the just and equitable winding up remedy. The just and equitable jurisdiction can be re-characterized as cases of unfairness, whether arising from broken promises or disregard for the interests of the minority shareholders. The most obvious example of just and equitable winding up would be the cases involving a deadlock between equal shareholders, in such cases the court have been ready to grant winding up orders pursuant to just and equitable jurisdiction.

Reviewing the just and equitable winding up remedy, it is a sledge-hammer device in that it puts an end to the company. As such, it is normally only appropriate or desirable in case where the company is on the brink of insolvency. Given this constraint, the operation of the winding up remedy should remain a statutory provision even in Myanmar—as it may be effective in cases involving near insolvent companies. Contrary to the Myanmar and Singapore, the statutory provision on winding up has been consolidated in the Insolvency Act 1986 in the UK. In Myanmar, the Yangon Insolvency Act[288] and the Myanmar Insolvency Act[289] apply solely to the insolvency of individuals, not of partnerships or corporate entities. As such, the UK approach would not fit with the existing statutory scheme in Myanmar and therefore should not be followed.

[288] The Yangon Insolvency Act 1909.
[289] The Myanmar Insolvency Act 1920.

5.2.2 Comparison on oppression remedy

Myanmar does not have an oppression remedy. In the absence of the oppression remedy, minority shareholders are often forced to use the just and equitable winding up remedy. This is precisely the reason that the Cohen Committee recommended that the UK adopt the oppression remedy—which it did. Under the UK legislative framework, section 210 of the UK Companies Act 1948 empowered the courts where oppressive conduct was shown to provide a flexible remedy to end the oppressive behavior (i.e., the courts were not limited to the harsh remedy of wining up).[290] The UK legislation that implemented the oppression remedy adopted a formula based solely on 'oppression' and only granted relief for oppressive conduct to the minority shareholders. Under section 210, conduct it was difficult for minority shareholders to satisfy the court that they had been "oppressed". As such, to expand the scope of the oppression remedy the UK legislature replaced it with the "unfairly prejudicial" remedy under section 495 of the UK Companies Act 1985 (now section 994 of the UK Companies Act 2006).

In Singapore, there is no separate provision for an "unfair prejudice remedy" but section 216 of the Singapore Companies Act has been interpreted to be analogous to the "unfair prejudice remedy—although the language of oppression is used in part of the section. This is because the Singapore Companies Act defined oppression more broadly by including the terms 'unfair discrimination' and 'prejudice' in the Act. The oppression remedy covered the four alternative criteria of grounds 'oppression,' 'disregard of interests,' 'unfair discrimination' and 'prejudice' under section 216 of the Singapore Companies. Thus, the Singapore legislation on oppression

[290] The Report of the Cohen Committee (Report of the Committee on Company Law Amendment, Cmnd 6659, 1945), para 60.

remedy that covers the four grounds stood apart from section 210 of the UK Companies Act 1948. Presently, the relevant provision with section 216 of the Singapore Companies Act is section 994 of the UK Companies Act 2006 that uses the language of 'unfair prejudice.' Both oppression and unfair prejudice remedy entitle shareholders to pursue a personal action and provide the court with an extremely wide ambit of authority to put an end to the oppressive behavior.

To evaluate the unfair prejudice remedy in the UK and oppression remedy in Singapore, the words slightly differ between the jurisdictions. In UK, the legislation provides a remedy against conduct which is unfairly prejudicial to the interests of its members generally or some part of its members. In Singapore, the remedy is available where the conduct is oppressive or disregard of interest or unfairly prejudice to or unfairly discriminate against a member or members. As both remedies are personal remedies, neither of them require shareholders to be given leave by in order to have standing to pursue the remedies. However, the oppression/unfair prejudice remedies are vaguely defined and do not apply to harm done directly to the company (as they are personal, not corporate, remedies). Therefore, these remedies cannot be used in all cases. The UK expanded the scope of unfair prejudice remedy and implemented the statutory derivative actions. The UK statutory derivative action is a new procedure for minority shareholders to pursue an action in respect of alleged breach of any of the general duties of directors. Singapore also allowed for expansion of the oppressive remedy to prevent corporate controllers from abusing their powers and implemented the common law derivative action and statutory derivative action.

5.2.3 Comparison on derivative action

Myanmar has neither a common law nor a statutory derivative action. A derivative action is an action brought by an individual shareholder on behalf of the company. The common law's approach to the derivative action is normally referred to as the rule in *Foss*. The common law derivative action is technically barred by the 'proper plaintiff' and 'majority principles' rule as interpreted by the English courts in *Foss*—unless the shareholder can prove "fraud on the minority" which provides an exception to the rule in *Foss*.

The rule in *Foss* has caused minority shareholders to face enormous difficulty even if they want to sue a wrongdoing director on behalf of the company. Thus, the rule and it exceptions were the subject of sustained criticism by academic commentators. Prior to the introduction of the statutory derivative action, the only way an applicant could bring a common law derivative action was under one of the exceptions to the rule in *Foss*.

The statutory derivative action has replaced the exceptions to the rule in *Foss*, so that the derivative action can now be commenced with leave of the court. In particular, the statutory derivative action was enacted to overcome the common law problems with respect to ratification, the prohibitive cost of litigation, and the restrictive standing requirements confronting shareholders. The UK jurisdiction abolished the common law derivative action expressly when they enacted the statutory derivative action.

Singapore applies both common law derivative action and statutory derivative action. Singapore's common law derivative action is a legacy from its colonial days. The rule in *Foss* and its exceptions have been accepted as good law in Singapore. Singapore implemented a statutory

derivative action because of the inadequate protection that the common derivative action provided for minority shareholder. Thus, since 1993, the fundamental legal rules governing the derivative action are contained in statutory law which was modeled on the statutory derivative action in Canada.

However, in Singapore common law derivative remains alive and thus the exception based on “fraud on minority” is still important. A member can bring the action on behalf of the company when the wrongdoers have control and benefited from the wrong. It is available for foreign incorporate companies and companies listed in Singapore—which do not have access to the statutory derivative action as a result of the language used in section 216A of the Singapore Companies Act. As such, the statutory derivative action in Singapore can only be utilized members of unlisted Singapore incorporate companies—which is different from the UK.

5.3 Suggestions for future reform on shareholders’ remedies in Myanmar based on the comparative analysis

As a result of comparative analysis mentioned above, Myanmar does not have effective shareholders’ remedies. The reason is that Myanmar still applies the outdated provisions and Myanmar Courts still cling onto outdated English precedents (e.g., the ‘rule in *Foss*’ at present tightly constrains the *locus standi*[291] of individual or minority shareholders to complain of breaches of duty by directors without any exceptions). Furthermore, dearth of local case law makes it extremely difficult to enforce directors’ duties and/or apply shareholder remedies in practice.

[291] Latin for “standing”.

According to Professor Petri Mantysaari, both the unfair prejudice remedy and derivative action are specialist remedies. The unfair prejudice remedy is more common than the derivative action but is most commonly used in private companies. The derivative action is of much less importance in practical terms than the unfair prejudice remedy. It is nevertheless regarded as an important mechanism for shareholders to control corporate wrongs.

There is some doubt about what kind of shareholders' remedies should be adopted in Myanmar. The unfair prejudice remedy in the UK is similar to oppression remedy applied in Singapore. Considering the oppression remedy Singapore, it provides members with a remedy for personal wrongs suffered in their personal capacity as members and thus it is an exception to the rule in *Foss*. In order to succeed the complaint the member must demonstrate that the conduct of the company offends the standards of commercial fairness and is deserving of intervention by the courts. The concept of commercial unfairness provides the court with extremely wide discretion for determining when to intervene in corporate affairs to disrupt majority rule. However, the court cannot decide what is fair and unfair on a case by case basis without a judicial rationale. Therefore, cases considering unfair prejudice in section 994 of the UK Companies Act provide useful guidance for interpreting the oppressive action in Singapore.

As already mentioned above, the Myanmar court has not accepted the exceptions to the rule in *Foss* and therefore does not have a common law derivative action. In addition, the Myanmar Companies Act has not implemented a statutory derivative action or an oppression/unfair prejudice remedy. If the oppression remedy was implemented in Myanmar it may be extremely difficult to apply because of the extreme lack of corporate law jurisprudence and

the difficulty of enforcing this nuanced remedy which provides the court with an extremely wide ambit of authority.

Thus, after analyzing all of the remedies in the UK and Singapore, the ‘derivative action’ appears best suited to improve Myanmar’s company law at this stage of its development. The starting point for considering the statutory derivative action is through the interaction with the new directors’ duties in the UK. A derivative claim is confined to the enforcement of directors’ duties which are specified in section 260 (3) as “only in respect of cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company.” In the UK, the statutory derivate action has effectively taken the place of the common law derivative action whereas Singapore still has maintained the common law derivative action. The common law derivative action is available in Singapore in two situations: (1) where the company is foreign company; or, (2) where it is listed on the Singapore Exchange. As maintaining both the common law and statutory derivative action may cause greater confusing in its application and does not provide substantial benefits, it is suggested that Myanmar should implement the statutory derivative action as implemented in the UK rather than Singapore. Indeed, there are current discussions in Singapore about expanding the scope of the statutory derivative action as to effectively eliminate the common law derivative action. Thus, the UK approach is becoming the norm.

5.4 Summary

When comparing directors' duties in the Myanmar, the UK and Singapore Acts, the fundamental principles of fiduciary duties are largely similar. The disclosure of interest is basically the same in three countries but the method of disclosure in Myanmar is little bit different for the UK and Singapore. It is suggested that Myanmar expand the method of disclosure of interest by directors (e.g., declare the nature and extent of the interest by notice to the directors in accordance in with notice in writing or general notice to other directors and allow to make further declaration if the declaration is inaccurate or incomplete) by essentially adopting the UK approach.

Regarding shareholders' remedies, unlike the UK and Singapore, Myanmar does not have an oppression/unfair prejudice remedy. It is not recommended to adopt the broadly worded oppression/unfair prejudice remedy in Myanmar as the lack of jurisprudent would make such a remedy extremely difficult to enforce.

After clarifying the duties of directors in Myanmar it is necessary to enforce those duties. The UK and Singapore both have adopted derivative actions for this purpose. In the UK and Singapore, the introduction of a statutory procedure to govern the conduct of derivative actions was considered necessary to counter the restrictive nature of the rule in *Foss* and to achieve the proper balance between minority protection and majority rule. The need for a derivative action arises out of a conundrum that is inherent in company law. The derivative action attempts to solve this company law conundrum by allowing an individual shareholder to bring an action for and on behalf of the company against the directors when they wrongfully decide that the company should

not sue. The derivative action is a special procedural remedy because it allows the shareholders to enforce the company's legal rights.

Chapter VI

Conclusion

This thesis focused on directors' duties and shareholders' remedies under the Myanmar Companies Act 1914. It evaluated the effectiveness of these two increasingly important areas of Myanmar's company law by undertaking a comparative analysis of them with the equivalent areas of company law in the UK (i.e., the UK Companies Act 2006) and Singapore (i.e., the Singapore Companies Act, Cap 50, 2006 revised edition). Historically, in the UK and Singapore, the law relating to directors' duties has largely been based on common law and equitable principles that were developed by judges through case law. However, in the most recent version of the UK Companies Act 2006, the UK decided to codify its common law principles concerning directors' duties by inserting a statement of directors' duties into its Act. In addition, although (unlike the UK) Singapore has not inserted a detailed statement of directors' duties into its Companies Act, Singapore's courts have rendered numerous decisions which have made the scope and details of directors' duties in Singapore clear. After reviewing the relevant statutory provisions and reported cases in the UK and Singapore, it is clear that the statutory provisions related to directors' duties in the Myanmar Companies Act should be amended.

As detailed directors' duties are not specifically codified in Myanmar this means that case law is the primary source of law governing directors' duties. An analysis of Myanmar's reported cases reveals a tremendous gap in its company law. Unlike in Singapore where the lack of a detailed statutory section on directors' duties has been supplemented by a rich jurisprudence on directors' duties, in Myanmar there are only three reported cases related to directors' duties. In all three cases, the court had no choice but to decide them entirely based on its inherent jurisdiction

because of the massive lacuna in Myanmar's company law jurisprudence. In addition, the three cases were decided on relatively narrow points of company law which significantly limits their precedential value.

Although the Myanmar Companies Act does contain some specific provisions regulating particular behaviors that fall within the general ambit of fiduciary duties (e.g., the regulation of loans to directors and the disclosure of conflicts of interest), the lack of broader and more detailed provisions related to directors' duties, both in Myanmar's Companies Act and case law, makes it exceptionally difficult to apply the law in practice. A comparison of directors' duties in Myanmar, the UK and Singapore, reveals that the Myanmar Companies Act lacks the necessary precision and clarity to effectively regulate the duties of directors. As such, to ensure that directors properly manage the affairs of companies in Myanmar, the implementation of some more accurate and detailed provisions related to directors' duties is essential.

Specifically, the Myanmar Companies Act should be amended to provide precise provisions which make it clear that directors are bound by a fiduciary and negligence duties regime which is similar to the UK. To achieve this, Myanmar's Companies Act will at least have to be amended to include at least two new provisions: (1) requiring directors to act within the scope of their powers (i.e., the proper purpose duty); and (2) requiring each director to exercise a level of care, skill and diligence, as might reasonably be expected of a person with the director's knowledge and experience (i.e., the negligence duty). In fact, ideally Myanmar may be well served by implementing all seven of the duties articulated in the new UK Companies Act 2006. In addition, similar to in the UK, Myanmar's existing conflict of interest duty must be made more robust by making the scope of disclosure wider and the method of disclosure clearer. Alternatively,

the Myanmar courts must render more broad based decisions on directors' duties in order to clarify its directors' duties law—which may not be as advantageous as the UK approach of a detailed statutory statement of directors' duties but which has succeeded in the context of Singapore.

In comparison to the UK and Singapore, the provisions relating to shareholders' remedies in Myanmar are scarce. In the UK and Singapore, the extremely powerful and flexible unfair prejudice/oppression remedy, combined with the more recent statutory derivative action, makes it unnecessary to resort to the blunt and often harsh just and equitable winding up remedy—except when a company is on the brink of insolvency. However, Myanmar does not have an unfair prejudice/oppression remedy or derivative action (i.e., it has no "alternative remedies") and therefore the *only* option for minority shareholders is the remedy of just and equitable winding up—which is extremely unsatisfactory for protecting minority shareholder interests in companies which want to remain going concerns. The lack of "alternative remedies" in Myanmar results from a failure to amend the Companies Act for almost a century and the Courts proclivity to cling to outdated English precedents (e.g., strictly enforcing the rule in *Foss* without any exceptions). The dearth of local case law has resulted in the law being essentially "frozen" in a time when minority protection was not the norm and procedural exceptions to the general rule in *Foss* were rare (if non-existent) and ill-defined.

In the UK and Singapore, the introduction of a statutory procedure to govern the conduct of derivative actions was considered necessary to counter the restrictive nature of the rule in *Foss* and to achieve the proper balance between minority protection and majority rule. The need for a derivative action arises out of a conundrum that is inherent in the corporate form: directors become the target of a company's lawsuit when they breach their duties but it is often the same directors

who can decide whether the company will sue (which, for obvious reasons, virtually never happens). The derivative action attempts to solve this company law conundrum by allowing an individual shareholder to bring an action for and on behalf of the company against the directors when the directors wrongfully decide that the company should not sue. The derivative action is thus a special procedural remedy because it allows minority shareholders to enforce *the company's* legal rights—which runs counter to the general rule in *Foss*. Without a derivative action, directors' duties are often meaningless as such duties can be breached with impunity when the wrongdoing directors have effective control over whether the company will sue.

As such, it would be of limited effect to reform Myanmar's directors' duties without providing a derivative action to ensure that those reformed duties can be effectively enforced. Therefore, a statutory derivative action should be inserted into Myanmar's Companies Act. This would allow minority shareholders in Myanmar to effectively ensure the enforcement of directors' duties—particularly in companies with controlling shareholder directors which are the norm in Myanmar. It would also make this aspect of Myanmar's Companies Act similar to the UK, Singapore and other leading common law countries around the world.

However, at this stage of its development, it is suggested that Myanmar may not want to implement the oppression remedy. Although the oppression remedy is very powerful, it is also extremely vague. For the oppression remedy to be properly applied requires a significant amount of jurisprudence and nuisance judgments—which Myanmar currently lacks. Therefore, the oppression remedy seems like something that would be well suited for Myanmar after its company law jurisprudence has further time to develop.

In sum, as Myanmar stands on the precipice of opening its markets to the world, it is critically important that it creates conditions which foster investor trust. One of the key components for creating investor trust is to have a company law which ensures that directors act in the interest of their companies and that when they fail to do so minority shareholders have an effective remedy. This thesis identifies key areas of Myanmar's Company Law that must be updated in order to achieve such an investor trust facilitating legal regime which ultimately will help put Myanmar on the path to greater economic success and social development.

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APPENDIX A

SAMPLE OF THE MEMORANDUM OF ASSOCIATION FOR PRIVATE COMPANY LIMITED BY SHARES [292]

THE MYANMAR COMPANIES ACT

PRIVATE COMPANY LIMITED BY SHARES

MEMORANDUM OF ASSOCIATION

OF

XXXXXX COMPANY LIMITED

****

I. The name of the Company is XXXXXX Company Limited.

II. The registered office of the Company will be situated in the Union of Myanmar.

III. The objects for which the Company is established are as on the next page.

IV. The liability of the members is limited.

[292] Sets of the memorandum and articles of association for private company limited by shares is mentioned the same as the original one but omitted the name and capital amount. All the private companies limited have applied as a common form.

V. The authorized capital of the Company is Ks.---------/- (Kyats------- only) divided into (---) shares of Ks.------/- (Kyats -----only) each, with power in General Meeting either to increase, reduce or alter such capital from time to time in accordance with the regulations of the Company and the legislative provisions for the time being in force in this behalf.

(1) To carry on trading business of importers, exporters, wholesaler and retailers of the following commodities and products permitted by the Government, solely on its own or in joint-venture, with any foreign or local partners.

(a) Agricultural and farm produces.

(b) Forest products and value-added wood-based products.

(c) Animal by- product and Animal feed.

(d) Marine Products.

(e) Fertilizer and insecticides.

(f) Chemicals and dyes.

(g) Factory utensils and raw material.

(h) Household goods.

(i) Personal goods.

(j)Construction material and paints.

(k) Electrical and electronic products.

(l)Vehicles, Machinery and spares.

(m) Foodstuff and general merchandise.

(n) Textile and garment.

(o) Foodstuff and general merchandise.

(p) Textile and garment.

(q) Paper, stationary and photographic stores.

(r) Office equipment and education supplies.

(2) To borrow money for the benefit of the Company's business from any person, firm, company, bank or financial organization in the manners that the company shall think fit.

PROVISO: - Provided that the Company shall not exercise any of the above objects whether in the Union of Myanmar elsewhere, save in so far as it may be entitled so as to do in accordance with the Laws, Orders and Notifications in force from time to time and then only subject to such permission and or approval as may be prescribed by the Laws, Orders and Notifications of the Union of Myanmar for time being in force.

We, the several persons, whose names, nationalities, addresses and descriptions are subscribed below, are desirous of being formed into a Company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Sr. No.	Name, Address and Occupation of Subscribers	Nationality & N.R.C No.	Number of shares taken	Signatures

Yangon. Date:

It is hereby certified that the persons mentioned above put their signatures in my presence.

Signature

(Accountant & Auditor)

APPENDIX B

SAMPLE OF THE ARTICLES OF ASSOCIATION FOR PRIVATE COMPANY LIMITED BY SHARES

THE MYANMAR COMPANIES ACT

PRIVATE COMPANY LIMITED BY SHARES

ARTICLES OF ASSOCIATION

OF

XXXXXX COMPANY LIMITED

****

1. The regulations contained in Table 'A' in the First Schedule to the Myanmar Companies Act shall apply to the Company save in so far as such regulations, which are in consistent with the following Articles. The compulsory regulations stipulate in section 17(2) of the Myanmar Companies Act shall always be deemed to apply the Company.

PRIVATE COMPANY

2. The Company is to be a Private Limited Company and accordingly following provisions shall have effect: -

(1) The number of members of the Company, exclusive of persons who are in the employment of the Company, shall be limited to fifty.

(2) Any invitation to the public to subscribe for any share or debenture or debenture stock of the Company is hereby prohibited.

CAPITAL AND SHARES

3. The authorized capital of the Company is Ks.-----/- (Kyats------- only) divided into (---) shares of Ks.----/- (Kyats ----- only) each, with power in General Meeting either to increase, reduce, or alter such capital from time to time in accordance with the regulations of the Company and the legislative provision for the time being in force in this behalf.

4. Subject to the provisions of the Myanmar Companies Act the shares shall be under the control of the Directors, who may allot or otherwise dispose of the same to such persons and on such terms and conditions as they may determine.

5. The certificate of title to share shall be issued under the Seal of the Company, and signed by the General Manager or some other persons nominated by the Board of Directors. If the share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, and on such terms, if any, as to evidence and indemnity as the Directors may think fit. The legal representative of a deceased member shall be recognized by the Directors.

6. The Directors may, from time to time make call upon the members in respect of any money unpaid on their shares, and each member shall be liable to pay the amount of every call so made upon him to the persons, and at the times and places appointed by the Directors. A call may be made payable by installments or may be revoked or postponed as the Directors may determine.

DIRECTORS

7. Unless otherwise determined by a General Meeting the number of Directors shall not be less than (-) and not more than (-).

The First Directors shall be: -

(1) --------------

(2) --------------

(3) --------------

(4) ---------------

(5) ---------------

8. The Directors may from time to time appoint one of their bodies to the office of the Managing Director for such terms and at such remuneration as they think fit and he shall have all the powers delegated to him by the Board of Directors from time to time.

9. The qualification of a Director shall be the holding of at least (--) shares in the Company in his or her own name and it shall be his duty to comply with the provision of Section 85 of the Myanmar Companies Act.

10. The Board of Directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares without assigning any reason.

PROCCEDINGS OF DIRECTORS

11. The Director may meet together for the dispatch of business, adjourn and otherwise regulate their meeting as they think fit and determine the quorum necessary for the transaction of business. Unless otherwise determined, two shall form a quorum. If any question arising at any meeting the Managing Director's decision shall be final. When any matter is put to vote and if there shall be an equality of votes, the Chairman shall have a second or casting vote.

12. Any Director may at any time summon a meeting of Directors.

13. A resolution in writing signed by all the Directors shall be as effective for all purposes as a resolution passed out at meeting of the Directors, duly called, held and constituted.

POWERS AND DUTIES OF DIRECTORS

14. Without any prejudice to the general power conferred by Regulation 71 of the Table "A" of the Myanmar Companies Act, it is hereby expressly declared that the Directors shall have the following powers, that is to say power: -

(1) To purchase or otherwise acquire for the Company any property, rights privileges which the Company is authorized to acquire at such price, and generally on such terms and conditions as they think fit; also to sell, lease, abandon or otherwise deal with any property, rights or privileges to which the Company may be entitled, on such terms and conditions as they may think fit.

(2) To raise, borrow or secure the payment of such sum or sums in such manner and upon such terms and conditions in all respects as they think fit and in particular by the issue of debentures or debenture stocks of the Company charged upon all or any part of the property of the Company (both present and future) including its uncalled capital for the time being.

(3) At their discretion, to pay for any rights acquired or services rendered to the Company, either wholly or partially in cash or in shares, bonds, debentures or other securities of the Company and any such shares may be issued either as fully paid up or with such amount credited as paid up thereon as may be agreed upon; and any such bonds, debentures or other securities may be either specifically charged upon all or any part of the property of the Company and its uncalled capital or not so charged.

(4) To secure the fulfillment of any contract or engagement entered into by the Company mortgage or charge upon all or any of the property of the Company and its uncalled capital for the time being or by granting calls on shares or in such manner as they may think fit.

(5) To appoint at their discretion, remove or suspend such Managers, Secretaries, Officers, Clerks, Agent and Servants for permanent, temporary or special services as they may from time to time think fit and to determine their duties and powers and fix their salaries or emoluments and to require security in such instances in such amount as they think fit and to depute any officers of the Company to do all or any of these things on their behalf.

(6) To appoint a Director as Managing Director, General Manager, Secretary or Departmental Manager in conjunction with his Directorship of the Company.

(7) To accept from any member on such terms and conditions as shall be agreed on the surrender of his shares or any part thereof.

(8) To appoint any person or persons to accept and hold in trust for the Company and property belonging to the Company or in which it is interested or for any other purposes and to execute and do all such deeds and things as may be requisite in relation to any such trust.

(9) To institute, conduct, defend or abandon any legal proceedings by or against the Company or its officers or otherwise concerning the affairs of the Company and also to compound and allow time for payment or satisfaction of any debts due to or of any claims and demands by or against the Company.

(10) To refer claims and demands by or against the Company to arbitration and to observe and perform the awards.

(11) To make and give receipts, releases and other discharges for money payable to the Company and for the claims and demands of the Company.

(12) To act on behalf of the Company in all matters relating to bankruptcy and insolvency.

(13) To determine who shall be entitled to sign bills of exchange, cheques, promissory notes, receipts, endorsements, releases, contracts and documents for or on behalf of the Company.

(14) To invest, place on deposit and otherwise deal with any of the money of the Company not immediately required for the purpose thereof, upon securities or without securities and in such manners as the Directors may think fit, and from time to time vary or realize such investments.

(15) To execute in the name and on behalf of the Company in favour of any Director or other person who may incur or be about to incur any personal liability for the benefit of the Company, such mortgages of the Company's property (present and future) as they think fit and any such mortgage may contain a power of sale and such other powers, covenants and provisions as shall be agree on.

(16) To give any officer or other person employed by the Company a commission on the profits of any particular business or transaction or a share in general profit of the Company and such commission or share profit shall be treated as part of the working expenses of the Company.

(17) From time to time, to make, vary and repeal by-laws, for the regulation of the business of the Company, the officers and servants or the members of the Company or any section thereof.

(18) To enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts, deeds and things in the name and on behalf of the Company as they may consider expedient for or in relation to any of the matter aforesaid or otherwise for the purposes of the Company.

(19) To borrow money for the benefit of the Company's business from any person, firm or company or bank or financial organization of local and abroad in the manner that the Directors shall think fit.

GENERAL MEETINGS

15. A general meeting shall be held within eighteen months from the date of its incorporation and thereafter at least once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be fixed by the Board of Directors. No business shall be transacted at any general meeting unless a quorum of members is presented at the time when the meeting proceeds to business, save as herein otherwise provided Members holding not less than 50 percent of the issued shares share capital (not less than two members) personally present, shall form a quorum for all purposes. And if and when in the case of there are only two number of members in the Company, those two members shall form a quorum.

DIVIDENDS

16. The Company in general meeting may declare a dividend to be paid to the members, but no dividend shall exceed the amount recommended by the Directors. No dividends shall be paid otherwise than out of the profits of the year or any other undistributed profits.

OFFICE STAFF

17. The Company shall maintain an office established and appoint a qualified person as General Manager and other qualified persons as office staffs. The remunerations and allowances such as salaries, traveling allowances and other expenditures incidental to the business shall be determined by the Board of Directors, and approved by the general meeting. The General Manager shall be responsible for the efficient operation of the office in every respect and shall be held accountable at all times to the Managing Director.

ACCOUNTS

18. The Director shall cause to keep proper books of account with respect to: -

    (1) all sums of money received and expended by the Company and the matters in respect of which the receipts and expenditures take place;

    (2) all sales and purchases of goods by the Company;

    (3) all assets and liabilities of the Company.

19. The books of account shall be kept at the registered office of the Company or at such other place as the Directors shall think fit and shall be opened to inspection by the Directors during office hours.

AUDIT

20. Auditors shall be appointed and their duties regulated in accordance with the provisions of the Myanmar Companies Act or any statutory modifications thereof for the time being in force.

NOTICE

21. A notice may be given by the Company to any member either personally or sending it by post in a prepaid letter addressed to his registered address.

THE SEAL

22. The Directors shall provide for the safe custody of the Seal, and the Seal shall never be used except by the authority of the Directors previously given, and in the presence of one Director at least, who shall sign every instrument to which the Seal is affixed.

INDEMNITY

23. Subject to the provisions of Section 86 (C) of the Myanmar Companies Act and the existing laws, every Director, Auditor, Secretary or other officers of the Company shall be entitled to be indemnified by the Company against all costs, charges, looses, expenses and liabilities incurred by him in the execution and discharge of the duties or in relation thereto.

WINDING-UP

24. Subject to the provisions contained in the Myanmar Companies Act and the statutory modification thereupon, the Company may be wound up voluntarily by the resolution of General Meeting.

****

We, the several persons, whose names, nationalities, addresses and descriptions are subscribed below, are desirous of being formed into a Company in pursuance of this Articles of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

Sr. No.	Name, Address and Occupation of Subscribers	Nationality & N.R.C No.	Number of shares taken	Signatures

Yangon. Date:

It is hereby certified that the persons mentioned above put their signatures in my presence.

Signature

(Accountant & Auditor)