A review of the proposed amendments to be made to s 216A of the Companies Act

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I declare that this research paper contains 2999 words (excluding footnotes and tables containing proposed redrafted provisions)
I. Introduction

The Steering Committee having reviewed the Companies Act made several recommendations. This memorandum will examine recommendations 2.28-2.30 which touch on s 216A and will provide a commentary on the proposed reforms.

II. Recommendation 2.28

The committee here had suggested the adoption of arbitration proceedings as an “action” under s 216A. The writer is of the opinion that there are three possible views to this proposal:

A. There is no need to redraft the provision as *Kiyue Co Ltd v Aquagen International Pte Ltd* (“Kiyue”) was wrongly decided.

B. Even if *Kiyue* was rightly decided, there may be good reasons to include arbitrations.

C. Apart from legislative reforms, there is also a possibility of employing the common law and no reforms are required.

A. *Kiyue was wrongly decided*

The arguments in *Kiyue* revolved around the word “action” and whether it could encompass arbitration.\(^2\) One possible view is that *Kiyue* was wrongly decided as arbitrations could fall within the narrow construction of the word “action”; such a perspective would not lead to the broad acceptance of arbitration under s 216A and instead arbitrations here would arise as a secondary effect in specific factual matrixes such as that seen in *Kiyue*.

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1. [2003] 3 SLR 130.
2. The counsel for the defendants had based their arguments on *Re Provinces & Central Properties Ltd and City of Halifax* (“Re Provinces”) (1969) 5 DLR (3d) 28 where the court held that “the word ‘action’ was expressed to mean ‘a civil proceeding commenced by writ, or such other manner as is prescribed by Rules of Court’ and that “these authorities support the conclusion that the arbitrator was not a Court and that proceedings before him did not constitute an action”. The counsel for the claimants in turn argued that *Re Provinces* should be viewed narrowly and an ordinary meaning be given to the word “action”. Choo J in his judgement took the view of the defendants especially since it was noted that if Parliament had subjectively intended to allow for arbitrations, it would have stated it as seen in section 366(2)(a).
The exact purpose of s 216A(2) was noted by Low. In his written representations to the original Select Committee, commented that the provision could have been more explicit in stating that the action is “to enforce any right, duty or obligation owed to the company…” and that the phrase was left out to prevent convoluted drafting.\(^3\) This view was not questioned by the committee and we can presume that the committee had implicitly endorsed it.\(^4\)

It is suggested that the problem in *Kiyue* originated from this drafting choice. The petitioner, Kiyue, could have applied to enforce the *right to set-aside* the directors’ decision to not dispute the claim. This is a right owed to the company because of the breach of directors’ duties.\(^5\) The court there was overly focused on the word “action” instead of enforcement by shareholders of rights owed to the company. This created the wrong belief that arbitration proceedings are precluded by the Act.

That said, there is still another hurdle because of how *Kiyue* was reasoned. Choo J had argued that taking s 216A as a whole, the word “court” suggested that the provision was drafted to deal only with court actions and arbitrations were implicitly excluded by context.\(^6\)

It is suggested that such a conclusion actually confuses the way the section operate. S 216A is actually a two stage procedure:

i) The claimant would first have to *apply to the court for leave* to bring an action.\(^7\)

ii) If the court so chooses to grant that leave, the court would then *make such orders as it thinks fit in the interests of justice*.\(^8\)

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\(^3\) Report of the select committee on the Companies (Amendment) Bill [Bill No. 33/92] at 57.

\(^4\) Id at B1-B9.

\(^5\) On the facts, it was found at [10] that “it may still have a cause of action against the directors concerned for breach of fiduciary duty.” Arguably, the company would be entitled to set-aside the decision not to arbitrate as it appears that the decision was made under undue influence with the knowledge of PGSI: See [11] of *Kiyue* read with Walter Woon on Company Law, Revised Third Edition (Sweet & Maxwell, Singapore) at 8.87-8.88.

\(^6\) *Kiyue* at [10] citing both Parliamentary comments made by Dr Richard Hu and s 216A(6).

\(^7\) Section 216A(2).

\(^8\) Section 216A(5).
Given the wide wording of s 216A(5), it is possible that the court may grant leave to allow the enforcement of the right to set-aside and give the necessary orders to effectuate that right which may necessitate arbitration; the “court” requirement merely deals with the first stage when leave is applied.

An interesting point is whether such an analysis is affected by the decision in *Electro Magnetic*. In that case, the court held that “proceedings” connoted a legal process and a right of set-off was an extra-legal step that falls outside the scope of “proceedings”. Assuming “action” also connotes a legal process, are we now precluded from allowing such a right to set-aside (arguably an extra-legal step)? It is submitted that s 216A is distinguishable as s 216A was meant to allow shareholders to enforce these rights in view of the company’s unwillingness to do so.

It is therefore arguable that *Kiyue* could have been decided as such and no reforms are required.11

**B. Other reasons to extend coverage**

It is submitted that while arbitrations may be “forced” into s 216A as seen above, the law as regards the ability to bring an arbitration action *per se* would still be uncertain.12 It is therefore proposed that “action” ought to be expanded to include arbitrations as this would be clearer as compared to the rights-based approach discussed earlier.

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10 Ibid at 741.
11 In doing so, the extent of s 216A may not be as wide as that seen under Part II.B. If such an option be chosen, Parliament would have to intervene by making clarifications as to the extent of the provision and perhaps highlight the purpose, as noted by Dr Low, that the action is to “enforce any right, duty or obligation owed to the company”.
12 Note however that it is possible to try an alternative argument that such a right, arising out of contractual agreement, can be considered as an obligation owed to the company. This would then necessitate the same analysis based on Low’s submissions.
Before going further, what is the statutory purpose of s 216A? In *Kiyue*, this purpose proved to be elusive as the court did not know the extent Parliament had intended to curb the proper plaintiff rule.\(^{13}\) While it was identified as giving shareholders “more effective remedies”,\(^{14}\) one must not forget that it is also a corporate governance tool.\(^{15}\) If we accept the latter view, s 216A being a corporate governance tool would necessarily go beyond the ability to commence court proceedings and could possibly cover arbitrations.\(^{16}\)

By choosing to restrict the section to just court proceedings, the High Court effectively crippled the spirit behind section 216A. In cases where the companies choose to draft in arbitration clauses and then, without good reason, fail to defend these actions, not only are these shareholders denied a remedy around the proper plaintiff rule, the corporate governance aspect is also denied. Conceptually, there appears to be little or no difference between a court proceeding and that of an arbitration to actually justify such an exclusion. Given the state’s encouragement of arbitration as an alternative dispute resolution, *Kiyue*’s narrow interpretation may possibly result in some uncertainty as to the effectiveness and extent of arbitration clauses.\(^{17}\)

Moreover, Choo J could have unknowingly assigned these shareholders to a legal black hole where their position is covered neither by the section nor under the exceptions to the proper plaintiff rule (which arguably also deal with the right to bring legal action rather than arbitration).\(^{18}\) While an alternative claim for breach of fiduciary duties may lessen the effects

\(^{13}\) *Foss v Harbottle* (1843) 2 Hare 461 (“Foss”). This problematic state of the law was noted at [10] in *Kiyue* where the court was hesitant to totally loosen the reins of the proper plaintiff rule.

\(^{14}\) *Kiyue* at [8] citing Dr Richard Hu’s speech.


\(^{16}\) In fact, if one were to adopt a very generous interpretation, any action that is related to corporate governance would in fact fall under s 216A. However the effects of this interpretation are beyond the scope of this memorandum and it is assumed here that we adopt a middle ground perspective that includes arbitration.

\(^{17}\) See *Kiyue* at [10] and [140]-[142] of the Steering Committee Report.

\(^{18}\) This view is fortified by judgment in *Kiyue*. As mentioned above, the court at [10] faced a dilemma as to the extent Parliament had intended to curb the proper plaintiff rule. This dilemma arguably arose because the common law rule is itself not extensive enough to cover arbitrations. If it were, Choo J would not have faced
of this black hole, it is questionable as to whether the availability of damages is always satisfactory.

With that said, there are implications behind the wholesale adoption of arbitration as there may be underlying conflicts between derivative actions and arbitrations. The writer is of the view that while arbitration can be adopted under s 216A, not all derivative actions are suited for arbitration and such possible conflicts must be taken into consideration when reformulating s 216A.

In view of the above arguments, Parliament should take this opportunity to clarify the extent of s 216A and what types of arbitrations are allowed.

**C. No reforms are required**

A possibility, though a remote one, is for our judges to reason by analogy and to make available, under the common law, the current exceptions to arbitration cases. This solution is not perfect and if applied to Kiyue’s case, the claimant may have difficulty in showing that there had been a fraud since the company could have affirmed the decision to not contest in the arbitration. It is also questionable under the common law as to whether a party can intervene in existing proceedings. The applicant by going under the common law forgoes much difficulty since he could have brushed off the issue by saying that Parliament by enacting the section intended to reflect the common law’s breadth and it would have included arbitrations.

Notable points there include: i) the need of a valid arbitration clause whether be it in the articles (when dealing with intra-company disputes) or in contracts (inter-company disputes); ii) the company needs to be a party before arbitrations can be brought in its name; and iii) the qua member principle and the inapplicability of arbitrations when dealing with disputes between shareholders and directors. Arguably these are preliminary issues that ought to be considered prior to the application under s 216A itself. However, there ought to be some legislation present to prevent frivolous applications as well as to ensure that the applications are themselves consistent with the notion behind arbitrations.

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20 See Part II.B where it was argued that the common law exceptions, as seen in the case law, to the proper plaintiff rule currently also deal with the right to bring legal proceedings and not arbitrations.

21 See Walter Woon on Company Law, Revised Third Edition (Sweet & Maxwell, Singapore) at 9.70
the statutory advantage as regards the above two difficulties. Given such imperfections, it is suggested that this option be a remedy of last resort.

**D. Other Jurisdictions**

It appears that this issue is inherent in other jurisdictions as all are based on a common Canadian source (Canada Business Corporations Act (“CBCA”))\(^\text{22}\). Some insights can be drawn from examining their provisions.

Referring to the Canadian sections, they appear similar. However, unlike the Canadians, we do not have our equivalent of s 238 which defines “action” as “an action under this Act”. It is disputable that Parliament by choosing not to include this definition, had intended that “action” here is to extend beyond the scope of the Act and may include actions arising outside the act.\(^\text{23}\) If such an issue were to arise in Canada, it is arguable that arbitration can still be pigeon-holed into the Act via their s 241.\(^\text{24}\)

For New Zealand, their position there may be totally different as the word “proceedings” was used instead.\(^\text{25}\) The word “proceedings” may actually be broader in scope as was seen in *Electro Magnetic* where it was found to include both court and arbitration actions.\(^\text{26}\) Such a conclusion is fortified by the drafting choice observed in Hong Kong. While Hong Kong also employs the word “proceedings”, what differentiates it is the use of the phrase “intervene in

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\(^{23}\) *Supra*, Part II.A where the common law director duties were employed in substantiating an action.

\(^{24}\) S 241 of the CBCA is the equivalent of our s 216. As regards the Canadian position, it is perhaps possible to make a claim under s 241(2) for oppression and an order for arbitration under s 241(3). It would then fall within an action arising from the Act.

The same could be said for our s 216 in the event we also intended to copy the definition of “action” as seen in s 238 of the CBCA. An alternative argument involves the same points made in Part II.A but in the statutory context of s 157. S 157(4) allows the importation of common law duties and its remedies since that section is “in addition to and not in derogation of any other [rule of law] relating to the duty or liability of [directors] of a company”. This would allow to run essentially the same arguments but as a statutory action.

\(^{25}\) Companies Act 1993, s 165(1).

\(^{26}\) *Supra*, n9.
any proceedings *before* the court”. This seems to indicate that in Hong Kong, at least, their legislature had limited the scope to just court proceedings without which arbitrations could have been allowed.

From the above examples and in light of arguments raised in Part II.B, it is suggested that reformed s 216A be as such:

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**Derivative or representative actions**

S 216A. – (1) In this section

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“proceedings” include both court and arbitration proceedings.

(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring proceedings in the name and on behalf of the company or intervene in proceedings to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(3) No proceedings may be brought and no intervention in proceedings may be made under subsection (2) unless the Court is satisfied that –

…

(d) in the event of arbitrations, the nature of the proceedings do not conflict with the subject matter claimed thereunder.

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### III. Recommendations 2.29 and 2.30

Under these recommendations the committee had suggested we standardise the applicability of the SDA for Singapore-incorporated companies that are listed both locally and overseas.

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27 Companies Ordinance, s 168BC(1)(b) and s 168BA where “proceedings” was defined as “any proceedings…within the jurisdiction of the court”.

28 Changes made to the original act would be underlined.
The writer would in this memorandum substantiate why such a reform is desirable. The memorandum will cover:

A. i) The reason behind and ii) the (negative) effects of the different standards;
B. Whether the reasons given were still applicable; and
C. A comparative study examining unique points considered in New Zealand and in Hong Kong. 29

A (i). The reason

As noted by the Committee, the argument then was based on the possibility of frivolous applications made so as to harass these listed companies and the possible manipulation of share prices. 30 Influenced by this possibility and the view that public listed companies are already monitored by various regulatory authorities and disgruntled shareholders of such companies can always choose to sell their shares, 31 the committee found that there was no need for s 216A to cover locally listed companies. The opposite approach was taken for companies listed overseas as it was felt that due to their small numbers, the risk of increased litigation would be minimal and the applicability of s 216A was therefore not restricted.

A (ii). The effects

The purpose behind s 216A as noted earlier is not only to provide more remedies but also to function as a corporate governance tool. By excluding this remedy from locally listed companies, the effect is to deny an effective means of addressing a wrong done to the company. If we recognise that the common law derivative action (“CDA”) is itself very

29 In Hong Kong, their administration made available the statutory derivative action to Hong Kong incorporated companies and non-Hong Kong companies. For companies incorporated outside Hong Kong, the law of that country governs the right of a shareholder to bring a common law derivative action. While not directly relevant as regards listing, it is a good analogy as it is also a situation giving rise to the coexistence of both the common law derivative action and the statutory derivative action.
30 Steering Committee Report at [143].
31 Steering Committee Report at [147].
difficult to succeed and hence the need for the SDA, the exclusion would mean granting the wrongdoers in such companies a perceived sense of immunity. \(^{32}\) Instead of protecting shareholders, the exclusion here entrenches the wrongdoers in an already superior position. Such an effect turns the whole notion behind the SDA up on its head especially since the need to protect shareholders is enhanced when dealing with such listed firms where corporate wrongs may actually be substantially greater. The seriousness of this was noted in Lee’s article where Singapore-listed entities fared worst in the area of shareholder rights. \(^{33}\)

Granted, the shareholders in these listed firms may sell away their shares and hence protect themselves. It is suggested that this does not address the purpose behind s 216A which is targeted at good corporate governance. It is questionable as to what the link is between selling one’s shares and that of corporate accountability. Moreover, as noted by Koh, “the stock market is not necessarily a satisfactory method of escape as the shareholder may have to settle for a lower share price. To close the public shareholder to the availability of a [SDA] is to deny him his options.” \(^{34}\) It is important to note that often, shareholders in such companies own shares in large quantities and to sell them in a short time may lead to a drastic drop in share prices. It would create a dilemma for shareholders as they are now placed on a cliff set in between the great blue sea and a pack of corporate wolves; either they take the plunge and hence suffer immense financial losses or they take their chances with the wolves. Such a dilemma could have been avoided if s 216A had been available.

\textbf{C. Whether the reasons are the applicable today}


\(^{33}\) Jamie Lee, “Where firms are found wanting in corporate governance issues: Listed companies score lowest when it comes to the rights of shareholders”, Business Times 15 March 2012.

\(^{34}\) Pearlie MC Koh, “For better or for worse – The statutory derivative action in Singapore”, (1995) SAcLJ 74 at 85.
The arguments for change were exhaustively discussed by Koh and to avoid rehashing her points, the memorandum will briefly summarise her views and then proceed to discuss, in Part D., other considerations that ought to be deliberated.

Koh in her articles listed several reasons why we ought to extend the application of s 216A.

Firstly, she argued that given the way local listed companies are held, the risk of frivolous litigation is actually negligible as compared to the benefits obtained from allowing SDAs. These firms are held mainly by a few main shareholders and would share a common interest to not disrupt the company’s operation by endless suits. The risk of frivolous claims made by the minority shareholders can be restricted by safeguards built into the action.

Secondly, in light of the shift to a stock market exchange that is based on the principle of caveat emptor it is now appropriate for us to adopt the SDA. While previously protected by compulsory corporate governance rules, listed firms today operate on a non-compulsory best practices guide. By removing away such in-built protections, the SDA would help fill in the gaps left behind by such a change. If the maxim is truly “let the buyer beware”, surely it would make sense for the section to now apply to these excluded firms so as to afford to buyers a greater level of protection.

Thirdly, the reason to not extend the remedy to local listed firms is itself not perfect. She argues that the ability of the authorities to keep the management in check is limited by budgetary and political considerations. While these checks may help curb corporate wrongs,

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36 Arguably, s 216A(3) provides a sufficient barrier when viewed with the need to apply to court for leave to bring the action. The problem envisaged by the original committee would likely be seen in jurisdictions like the United States where the process is not as well defined or regulated. However in those states, the process is also modelled based on a highly restrictive set of procedures which include the Model Business Corporation Act where similar hurdles are prescribed.
such checks are limited in terms of their effectiveness and will not block off all wrongs.\textsuperscript{38} The availability of the SDA would complement existing measures to afford better protection.

In light of the arguments raised above as well as the negative effects discussed earlier, there appears to be little basis in maintaining this separation and it is suggested that the SDA be extended as proposed under recommendation 2.30.

\textbf{D. Other considerations}

While the recommendations made are sound, it is suggested that committee go beyond what was proposed and consider the following issues which would necessarily arise if the recommendations are adopted.

\textit{Statutory context of s 216 and s 216A}

A relevant issue would be the relationship between sections 216 & 216A as regards listed companies. This point was not considered in the report and perhaps a more detailed study is required. Koh in her article cited Shapira, who “observed that in contrast to the oppression remedy which seemed to be designed for the private company, the statutory derivative action should provide ‘the major legal control over shareholder’s litigation in the public company.’”\textsuperscript{39}

This issue was later examined by Watson.\textsuperscript{40} Her article focused on their s 174\textsuperscript{41} and whether listed companies are barred from the remedy provided therein. The main focal point was on \textit{Latimer Holdings Ltd v SEA Holdings NZ Ltd}\textsuperscript{42} where their Court of Appeal found that while s 174 would still apply to listed companies, “the considerations which will apply to them will

\textsuperscript{38} Pearlie MC Koh, “For better or for worse – The statutory derivative action in Singapore”, (1995) SAcLJ 74 at 85.
\textsuperscript{39} \textit{Id.}, at 84.
\textsuperscript{40} 11 NZBLQ 288.
\textsuperscript{41} This section is the equivalent of our s 216 and deals with the oppression remedy.
\textsuperscript{42} \textit{Latimer Holdings Ltd v SEA Holdings NZ Ltd} 15/9/04, CA214/03.
not necessarily be the same as obtain with respect to closely held companies”. As part of her analysis of that case, she reasoned that as claimants would have both the oppression remedy as well as the SDA, it would not be unreasonable to restrict the oppression remedy to certain classes and that in certain cases the SDA would be a more appropriate remedy.  

This above discussion would suggest that taking into account the entire statutory context, the SDA is perhaps more directed towards listed companies with the oppression remedy playing a lesser role. This raises an important question in our own statutory context as to how s 216A is to be applied and whether it modifies the availability of s 216. As part of recommendation 2.30, a related point that Parliament should also consider would be the actual relationship between s 216 and s 216A.

*The future of the CDA*

In light of the proposed extension of s 216A, a subsidiary question would arise: Should the CDA be abolished? Without any gap to fill, the CDA appears to have lost it purpose here locally.  

The question then is whether are there still good reasons to retain it.

A comparable jurisdiction would be that of Hong Kong where the CDA was retained for companies incorporated outside Hong Kong. While we do not share the same reason for allowing CDAs, the arguments there are still relevant.

The issue was considered in *Waddington Ltd v Chan* where Ribeiro PJ noted that the co-existence of both the CDA and SDA may lead to problems of abuse of process where shareholders try to invoke the derivative actions sequentially and thereby increase their

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43 11 NZBLQ 288.
44 Previously, one reason for the retention of the CDA was to deal with locally listed companies. This is because without SDA, such companies would require the CDA to address possible wrongs done to the company.
45 The SDA being applicable for Hong Kong incorporated companies and non-Hong Kong companies.
46 FACV No.15 of 2007.
He concluded his judgment by stating that the co-existence of the CDA with the SDA is “unusual” and “is a source of confusion and complication” such that it would be appropriate for the SDA to replace the CDA altogether.

Arguably in light of the expansion of s 216A, there appears to be little justification to retain the CDA and if we were to consider the above arguments made in Waddington, the case for abolishment would be even stronger. It is therefore suggested to the Committee that the future of the CDA in our jurisdiction ought to be given some thought as well when dealing with recommendations 2.29 and 2.30.

IV. General Conclusions

Having examined both sets of recommendations, it appears that the Steering Committee is in fact on the right track. However, these recommendations cannot be looked at narrowly and greater thought would have to be given to possible issues that might arise subsequently. The writer wishes to emphasize that more has to be done as regards the statutory context of s 216A and s 216 as well as the possible abolishment of the CDA which would bring Singapore in line with other jurisdictions such as Canada and the United Kingdom.

47 Ibid at [29]. The problem arguably is possibly even more severe here in Singapore as compared to Hong Kong. In Hong Kong, s 168BE restricts the ability to bring both actions at the same time. However the provision fails to handle cases where parties bring an action sequentially thereby bypassing the restriction. It is noted that under our s 216A, no such restrictions are present.

48 Id at [32]. See also Beck, “The Shareholders’ Derivative Action”, (1974) 52 Can Bar Rev 159 at 207 where Beck writes:

   It would only lead to confusion to allow both common law and statutory actions. A more orderly development of the law would result from one point of access to a derivative action and would allow for a body of experience and precedent to be built up to guide shareholders.