Frustrating the No-Frustrating Rule – the Singapore Code on Takeovers and Mergers[1]

I. Introduction

1. An increasing number of iconic home-grown listed companies are acquired by foreign firms such as Raffles Hotel, Robinsons department store, Asia Pacific Breweries, and Fraser & Neave.[2] The trend has raised public concerns of whether the government, should do more to protect local brands in Singapore. This leads to the question of whether no-frustration rule should be abolished from the Singapore Code on Takeovers and Mergers to allow the target board to erect defensive measures to frustrate the bid. In particular, whether the Delaware position in the United States should be adopted instead. Delaware is chosen as a comparator for this paper as the majority of companies listed in NASDAQ and NYSE are incorporated in Delaware.

2. Part I of this paper will discuss the objective of having the no-frustration rule in Singapore to circumscribe defensive measures. While some academics view deal protection measures as a form of defensive measures, such discussion is outside the scope of this paper. Part II will explore the Delaware position in the United States ("***US***") and its features. Part III and IV will explore the pros and cons of adopting features of the Delaware position in Singapore, with references to the experience of other jurisdictions where appropriate. The paper concludes that the costs of adopting the Delaware position far outweigh the potential benefits for Singapore and advocates for a continuation of the current regulation.

II. Objective of the no-frustration rule in Singapore

3. No-frustration rule is enunciated in General Principle 7 and Rule 5 of the Singapore Code on Takeovers and Mergers ("***Code***"),[3] inspired by the United Kingdom ("***UK***").[4] The Securities Industry Council ("***SIC***") regulates compliance and imposes sanctions for

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[2] Yasmine Yahya, "Should S'pore firms do more to keep local brands?" *The Straits Times* (13 May 2014).
[3] The Singapore Code on Take-Overs and Mergers (25 March 2016) General Principle 7 and r 5.
[4] The City Code on Takeovers and Mergers (20 May 2006) General Principle 3 and r 21.

contraventions. The rule prohibits the target board from taking actions that frustrate an offer, unless with shareholders' approval. Such actions include:

a. issuance of shares to third parties;[5]

b. disposal of material amount of assets;[6]

c. issuance of subscription rights;[7] and

d. distribution of interim dividends.[8]

A. Controls the agency problem

4. The prohibition circumvents the principal-agent problem that plagues corporate law.[9] The separation of ownership and control leads to conflicts of interest between managers and shareholders.[10] The broad purpose of no-frustration rule is to prevent such conflicts in a bid context.[11]

5. The rule ensures that target shareholders are given sovereignty over their ownership. In friendly bid, studies have shown that CEOs are more likely to negotiate for a lower bid premium in return for an augmented golden parachute, consulting contracts, or special bonuses.[12] Under the "passivity thesis", [13] managers are often exposed to potential loss of office that motivates them to initiate defensive measures to protect their self-interests, even while shareholders are keen on making profits through such hostile takeovers. Accordingly, strong takeover defences may provide private benefits to managers at the cost of higher premium to shareholders[14] and become an instance of target mismanagement.[15]

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[5] *Supra* n 3, r 5(a).
[6] *Id*, r 5(d).
[7] *Id*, r 5(c).
[8] *Id*, r 5 Note 3.
[9] Matteo Gatti, "The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does it Make?" (2014) 20 Fordham J. Corp. & Fin. L. 73 at 170.
[10] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (MacMillan Co, 1933).
[11] Matteo Gatti, "The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does it Make?" (2014) 20 Fordham J. Corp. & Fin. L. 73 at 170.
[12] Jay Hartzell, Eli Ofek and David Yermack, "What's In It For Me, Personal Benefits Obtained by CEOs Whose Firms Are Acquired" (unpublished, 2000) at 20.
[13] Frank H. Easterbrook and Daniel R. Fishel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) at 102.
[14] Guhan Subramanian, "Bargaining in the Shadow of Takeover Defenses" (2003) 113 Yale Law Journal No.3 at 40.
[15] Frank H. Easterbrook and Daniel R. Fishel, "Auctions and Sunk Costs in Tender Offers" (1982) 35 Stanford Law Review at 10.

6. Arguably, issuing shares to the management may circumvent the agency problem.[16] Nonetheless, it is not a panacea. As seen in Enron and WorldCom scandal, stock-based salaries fuel managers' greed and incentivises unethical practices.[17] Therefore, the no-frustration rule provides a more viable solution to the agency problem.

B. Guarantees an active market for corporate control

7. The no-frustration rule also ensures "the efficient working of the market for corporate control" and a constant supply of potential bidders.[18] When management underperforms, low share prices may attract hostile bidders who will replace the board upon obtaining control.[19] The threat of hostile bids has the disciplinary effect for ineffective managements. Hence, limiting the board's ability to defeat hostile bids prevents entrenchment of an inefficient management. [20] Such benefits are observed in Australia where there is a correlation between a change of management and increased post-bid performance.[21]

8. Admittedly, Singapore has a weak market for corporate control[22] because most companies are majority-controlled such that directors are largely nominees of majority shareholders.[23] However, the rule remains useful in "insecure blockholders control" situations,[24] a situation where there are more than one significant blockholders such that no one controlled the board. In such situation, the no-frustration rule limits the defensive measures that can be taken by nominees of these insecure blockholders.[25]

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[16] M.C. Jensen and W.H. Meckling, "Theory of the firm: Managerial behavior, agency cost, and ownership structure" (1976) Journal of Financial Economics 3 at 306; Y.T. Mak and Yuan Li, "Determinants of Corporate Ownership and Board Structure- evidence from Singapore" (2001) Journal of Corporate Finance 7 at 236.
[17] John Armour and David Skeel, "Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation" (2006) 95 Geo. L.J. 1727 at 1743.
[18] TI Ogowewo, "Rationalising General Principle 7 of the City Code"(1997) 1 Company Financial and Insolvency Law Review 74 at 80.
[19] V. Kennedy and R. Limmack, "Takeover activity, CEO turnover, and the market for corporate control" (1996) 23 Journal of Business Finance and Accounting 267 at 270.
[20] *Supra* n 9, at 136.
[21] Mark Humphrey-Jenner and Ronan Powell, "Firm Size, Takeover Probability, and the Effectiveness of the Market for Corporate Control: Does the Absence of Anti-Takeover Provisions Make a Difference?" (2011) 17(3) Journal of Corporate Finance 418 at 425.
[22] Y.T. Mak and Yuan Li, "Determinants of Corporate Ownership and Board Structure- evidence from Singapore" (2001) Journal of Corporate Finance 7 at 239.
[23] Wan Wai Yee, Legal Transplantation of UK-Style Takeover Regulation in Singapore" in Chapter in Comparative Takeover Regulation: Global and Asian Perspectives" (Cambridge University Press, forthcoming, 2017) at 21.
[24] Paul Davies, Edmund Philipp Schuster, Emilie Walle de Gheclcke, "The Takeover Directive as a Protectionist Tool" European Corporate Governance Institute Working Papers No. 141/2010.
[25] *Supra* n 23, at 6.

C. Ensures cost savings and efficiency

9. Absent strong defensive measures taken by the target board, takeover process can be completed quicker, cheaper, and with greater certainty.[26] There are also substantial cost savings because defence measures incur costs for the target company.[27]

D. Provides synergy

10. Without strong defensive measures that may defeat a takeover, the no-frustration rule also paves the way for mergers that create synergies between merged companies and increases social welfare.[28] Both the bidder and target will enjoy the various benefits of the takeovers.[29]

III. The Delaware position

11. The experience of companies under the Delaware law however, has shown that there are hidden costs from proceeding with hostile takeovers and positive functions of takeover defences.[30] This leads to Delaware judges,[31] the regulators of the board's response to bids, to confer the target board a broad authority to erect defensive measures when a bid is imminent without shareholders' approval including:
    a. issuing shares to third parties or issuing rights plan to current shareholders at a heavy discount;[32]
    b. distributing interim dividend[33] provided the company was not insolvent;[34] and

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[26] *Supra* n 3, r 22.
[27] Alexandros Seretakis, "Hostile Takeovers and Defensive Mechanisms in the United Kingdom and the United States: A Case Against the United States Regime" (2013) 8(2) The Ohio State Entrepreneurial Business Law Journal 245 at 256.
[28] High Level Group of Company Law Experts Report on Issues Relating to Takeover Bids (10 January 2002) at 21 (Chairman: Jaap Winter).
[29] Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at para 1.14.
[30] Klaus Gugler et all, "The Determinants of Merger Waves" (2006) Wissenschaftszentrum Working Paper No. SP II 2006-01.
[31] *Supra* n 17, at 1730.
[32] *Unitrin v American General Corp* (Del. 1995) 651 A.2d 1361 at 1379.
[33] Delaware General Corporation Law s 170(a).
[34] Delaware Fraudulent Conveyance Act, Delaware Code, Title 6, subtitle II, Chapter 13, s 1305.

c. selling material assets provided they do not amount to "substantially all of the company's assets".[35]

12. The most powerful defence is the issuance of shareholders rights plan, or poison pills.[36] There are two common types of poison pills, "flip-in" and "flip-over" pills.[37] The former allows target shareholders to purchase shares in the target while the latter allows target shareholders to purchase shares in the prospective bidder.[38] For both types, the poison pills are triggered when a hostile bidder acquires 15% or more of the target's shares,[39] making available an option to purchase shares at a discount, pushing the target's shares upwards, diluting the bidder's potential shareholdings, and rendering the deal unattractive to the bidder.[40]

13. The company, led by shareholders, may sue the directors in a derivative action for improperly erected defensive measures amounting to breach of their fiduciary duties. To determine the validity of the defensive measures,[41] the board must show that:
    a. the board had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed"; [42] and
    b. the "defensive response was reasonable in relation to the threat posed".[43]

14. If the two requirements are not met, the directors are found to be in breach of their fiduciary duties, and the defences may be removed.[44] The requirements balance the interest of shareholders and the discretion conferred to the board. In practice however, the court confers

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[35] *Supra* n 33, s 271(a).
[36] *Moran v Household International Inc* (Del. 1985) 500 A.2d 1346 at 1347; *Selectiva Inc. v Versata Enterprises Inc.* (Del. 2010) C.A. No. 4241.
[37] *Moran v Household International Inc* (Del. 1985) 500 A.2d 1346 at 1347; *Selectiva Inc. v Versata Enterprises Inc.* (Del. 2010) C.A. No. 4241.
[38] *Supra* n 27; Matteo Gatti, "The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does It Make?" (2014) Fordham Journal of Corporate Law 73 at 83–84; Habil András Kesckés and Vendel Halász, "Escaping From the Bear's Hug: Defensive Measures Against Hostile Bids" (2015) Annals of the Timisoara West University Law Series 5 at 15.
[39] *Supra* n 33, s 203.
[40] Alexandros Seretakis, "Hostile Takeovers and Defensive Mechanisms in the United Kingdom and the United States: A Case Against the United States Regime" (2013) 8(2) The Ohio State Entrepreneurial Business Law Journal 245 at 256.
[41] *Unocal Corporation v Mesa Petroleum* (Del. 1985) 493 A.2d 946 at 947.
[42] *Moran v Household International Inc* (Del. 1985) 500 A.2d 1346 at 1347; *Air Products and Chemicals Inc v Airgas Inc* (Del. 2011) 16 A.3d 48 at 107.
[43] *Ibid.*
[44] *Supra* n 41.

broad discretion to the board to determine how to pursue shareholders' interest.[45] Under the first requirement, threats such as potential injury to the corporation or its assets, diminution of a long-term corporate strategy,[46] loss of opportunity to propose a better alternative,[47] and the risk of shareholders coercion[48] justify implementation of defensive measures. While good faith is necessary, it is not alone sufficient.[49] Under the second requirement, the defensive measures should not be coercive, intrusive, or preclusive.[50]

15. The analysis above shows several features of the Delaware law in relation to defensive measures namely:

    a. the absence of no-frustration rule and availability of defensive measures such as poison pills, distribution of interim dividend, and sales of companies' assets;

    b. an assessment of the effect of the threat of hostile bid to the target company's policy and effectiveness; and

    c. a proportionality analysis of the defence measure against the threat of hostile bid.

16. In the US, shareholders may remove the measures by removing the directors with cause,[51] for instance in a proxy contest, where bidder attempts to control the company by electing the directors with the shareholders support.[52] This applies unless the companies adopt a staggered board,[53] such that triggering the poison pills is tantamount to board veto. However, this is inapplicable in Singapore, as directors may be removed with or without cause as long as ordinary resolution is passed.[54]

IV. Potential benefits to Singapore in adopting Delaware's approach

17. There are various potential benefits of the aforementioned features of Delaware approach. First, the target has stronger bargaining power. Second, the features increase shareholders'

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[45] *Paramount Communications Inc. v Time* (Del. 1990) 571 A.2d 1140 at 1153.
[46] *Id*, at 1154.
[47] *Air Products and Chemicals Inc v Airgas Inc* (Del. 2011) 16 A.3d 48 at 107.
[48] *Supra* n 41.
[49] *Omnicare Inc. v NCS healthcare Inc* (Del. 2003) 818 A.2d 914 at 934.
[50] *Supra* n 32, at 1387.
[51] Jennifer Hill, "Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance" [2010] European Corporate Governance Institute (ECGI) Law Working Paper No 168/2010 at 4.
[52] Sang Yop Kang, "Transplanting a Poison Pill to Controlling Shareholder Regimes – Why it is So Difficult" (2013) 33 Northwestern Journal of International Law & Business 619 at 627.
[53] *Supra* n 40.
[54] Companies Act (Cap 50, 2006 Rev Ed) s 152.

and society's welfare. Third, the target may better protect non-investor stakeholders. Fourth, it removes the pressure on the board to only consider short-term projects.

A. Strengthen target board's bargaining power and role

18. The first feature of Delaware approach appears to allow the target board to act collectively to increase its bargaining power with the potential hostile bidders. [55] Such bargaining power is crucial where the target shareholders are dispersed and are unable to bargain collectively.[56] From the bidder's perspective, proceeding to a hostile bid is less appealing compared to offering a higher premium,[57] given various additional costs such as out-of-pocket and reputational costs.[58] Acting on behalf of shareholders, the board may turn the potential hostile bid into a negotiated bid, and extract more in a negotiated bid compared to a target with weak defence measures. However, as later examined, whether the board in Singapore may enjoy such flexibility from simply removing the no-frustration rule is questionable.[59]

B. Increase shareholders' and society's welfare

19. Strong defensive measures also removes herding effect on shareholders to sell. In partial offer situation, where there is no guarantee that the takeover will take place, [60] uninformed shareholders may be pressured to sell their shares. [61] Additionally, where founder shareholders face an "insecure blockholders control" situation and fear that bidders are unappreciative of the company's long-term value, defensive measures allow founder shareholders to ward-off such bidders.[62]

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[55] *Moran v Household International* (Del. 1985) 490 A.2d 1059 at 1074.
[56] Lucian A. Bebchuk, "The Case Against Board Veto in Corporate Takeovers" (2002) The University of Chicago Law Review 973 at 1007.
[57] *Supra* n 14, at 2.
[58] *Id*, at 30.
[59] Below, Part IV A.
[60] *Unocal Corporation v Mesa Petroleum* (Del. 1985) 493 A.2d 946 at 947.
[61] *Supra* n 56, at 982.
[62] David Kershaw, "The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition" (2007) Int'l & Comp. L.Q. 267 at 299.

20. The third feature of balancing the defence measure's appropriateness against the threat of hostile bid also recognises the inefficiency of capital markets.[63] Managers and controlling shareholders who possess private information are arguably at a better position to assess the fundamental value of the company and decide whether shareholders will profit more by remaining independent or selling the company to the potential hostile bidder.[64]

C. Management may protect stakeholders adversely affected by the bid

21. The second feature under Delaware law of assessing the effect of a hostile takeover to the target provides protection for employees, customers, and creditors from asset-raiding bidders.[65] The Code in contrast, is "not concerned with the … disadvantages of a take-over or merger", but only with ensuring compliance of the Code.[66]

22. Absence of such an assessment may cause detriment to the company stakeholders as seen in the takeover of British icon Cadbury by American company Kraft Foods in the UK, that results in closure of numerous factories and job losses for Cadbury employees.[67] The situation arose after Kraft shifted the manufacturing activities of Cadbury to Poland despite its promise before the acquisition to keep the factories in the UK, angering labor unions, and provoking a sense of economic nationalism.[68]

23. Detriment to customers' expectation is also observed in Singapore, following takeovers by foreign bidders. Upon Heineken's acquisition of Asia Pacific Breweries, producer of Tiger Beer, a newspaper noted "Tiger time will not be Singapore time anymore".[69] The company's image, campaigns, and marketing are no longer associated with Singapore.[70] Detriment to customers, employees, and other non-investing stakeholders could have been avoided if the target board is conferred the powers to erect stronger defensive measures. Even if the threat

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[63] Martin Lipton, "Takeover bids in the target boardroom" (1979) 35 *Business Lawyers* 101 at 108.
[64] *Supra* n 14, at 13.
[65] *Supra* n 63; David Kershaw, *Principles of Takeover Regulation* (Oxford University Press, 2016) at para 11.51.
[66] *Supra* n 3, Introduction at 1.
[67] Michael R. Patrone, "Sour Chocolate: The UK Takeover Panel's Improper Reaction to Kraft's Acquisition of Cadbury" (2011) 8 Intl L. & Mgmt. Rev. 63 at 69.
[68] Reuters, "Kraft Agrees to Cadbury Deal After 4-months Fight" (19 January 2010) < bth://xw)veurscou/arce/2010/0191Ladbua-kr tidLTSLDL6OE0xI2O
10011>
[69] "Time to Raise a Toast to Tiger", *Straits Times* (10 August 2012).
[70] *Ibid.*

of hostile takeover may improve the position of non-investing stakeholders, there is no guarantee of such positive outcome given the concentrated shareholding structure of companies in Singapore as later argued.[71]

D. Ensure considerations of long-term benefits

24. The second feature also removes the pressure on managers to focus on the short-term results following a bid. Often, hostile bids cause the target board to be discouraged from making decisions that only produces benefits in the long-term.[72] Instead, where the target board is permitted to justify erecting defences with potential threats to long-term corporate strategy,[73] the pressure to focus on short-term projects is removed.

V. Cons of adopting the Delaware position

25. On the flipside, there are strong reasons not to adopt the position in Singapore. First, abolishing no-frustration rule in Singapore does not necessarily lead to the benefits enjoyed in the US because of company law and Listing Manual restraints. Second, there may be detriment to shareholders, the group that should be protected by the Code. Third, shareholders should be given priority protection over non-investor stakeholders. Fourth, management decisions are not always affected by hostile bids. Lastly, there are various costs associated with adopting the approach and little practical benefits in return.

A. Abolishing the no-frustration rule does not increase the target's bargaining power

26. Even if Singapore abolished the no-frustration rule, it is submitted there is "minimal scope for director-deployed defences" because of the limitations placed by Singapore's company law.[74] This paper will consider a Singapore regime in the absence of the no-frustration rule.

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[71] Below, Part IV D.
[72] *Supra* n 63, at 109.
[73] *Paramount Communications Inc. v Time* (Del. 1990) 571 A.2d 1140 at 1154.
[74] David Kershaw, "The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition" (2007) 56 ICLQ 267 at 273.

27. First, shares and warrants issuance are "only available with pre or post-bid shareholder approval"[75] because while the Code allows directors to issue shares and warrants to existing shareholders, the Companies Act still require shareholders' approval.[76] The strategy of issuing shareholders' rights plan at a discount also remains unfeasible because it violates the sacrosanct equal treatment principle.[77] While one may argue that poison pills do not violate the equal treatment principle because "the warrant provides a contingent right applicable to all shareholders",[78] the argument is unlikely to be accepted by the SIC because effectively, the strategy still discriminates some shareholders.

28. Even if the SIC accepts that poison pills do not contravene the equality principle, the board's power to issue shares is limited by its fiduciary duties to act for a proper purpose.[79] Case law suggests that the power to issue shares should not be used for "the purposes of securing the directors' control of the company".[80] The feasibility of adopting Delaware's second feature of proportionality analysis in place of the duty against improper purpose in a bid context will be discussed below.

29. While the board may then distribute extraordinary dividends from its profits[81] to reduce the value of the company similar to Delaware,[82] this strategy is unfavored because it may affect the company's performance in the short-run given limited cash.

30. Clearly, simply abolishing no-frustration rule from the Code does not lead to strengthening of the target board's power. To achieve such degree of flexibility for the target, major changes need to be made across the statutes.

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[75] *Id*, at 274.
[76] Companies Act (Cap 50, 2006 Rev Ed) s 161.
[77] *Supra* n 3, General Principle 3.
[78] *Supra* n 74, at 274.
[79] Companies Act (Cap 50, 2006 Rev Ed) s 157.
[80] *Hogg v Cramphorn* [1967] Ch 254.
[81] Companies Act (Cap 50, 2006 Rev Ed) s 403.
[82] Delaware General Corporation Law s 154.

B. Social welfare is not necessarily increased

31. The value of reducing shareholders' herding effect is arguably less relevant in Singapore. The mandatory bid rule adequately ensures that *all* shareholders enjoy an equal increase in premium,[83] preventing the "occurrence of preferential share purchases and uneven pricing".[84] Additionally, as there are contrasting empirical studies about benefits of defensive measures,[85] it cannot be said with certainty that shareholders benefit from increased bid premium or a better deal.[86]

32. Even if potent defensive measures may lead to subsequent bidders offering higher price, there are unintended consequences of discouraging first bidders. The premium increase is a result of the bidder free riding on information generated from the first bidder.[87] Consequently, free riding discourages companies from being the first bidder given the uncertainty of success, harms target shareholders, and creates a less active market for corporate control.[88] This position is extremely undesirable in Singapore that already has a lackluster takeover landscape.[89] Hence, there is no increase in social welfare from permitting potent defensive measures, especially as takeovers inherently increase social welfare.[90]

33. The fact that the board may possess private information reflecting the shares' hidden value is not conclusive to decide the board as better positioned to assess the company's valuation, considering their self-serving interests.[91] The board may communicate such private information in their recommendation to the shareholders, the main tool to convince shareholders to reject the bid.[92] The high concentration of institutional, nominee, and state

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[83] *Supra* n 3, r 14.
[84] David Donald, "Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules" CHKU Research Paper No. 2015-09 at 8.
[85] John C. Coates, M&A Break Fees: US Litigation vs. UK Litigation" (29 December 2009) < http://ssrn.com/abstract=1475354>.
[86] Steven M. Bainbridge, "Director Primary in Corporate Takeovers" (2002) 55 Stan. L. Rev. 791 at 807.
[87] Frank H. Easterbrook and Daniel R. Fischel, "The Proper Role of a Target's Management in Responding to a Tender Offer" (1981) 94 Harvard Law Review 1161 at 1189.
[88] *Id*, at 1178.
[89] Angela Teng, "Singapore IPO Market languishes as Hong Kong surges" *Channel News Asia* (29 December 2015) < http://www.channelnewsasia.com/news/business/singapore/singapore-ipo-market/2383378.html>
[90] Lucian Bebchuk, "The Case for Facilitating Tender Offers" (1982) Harvard Law Review at 1046.
[91] Above, part I.
[92] *Supra* n 29, para 8.78.

shareholders in Singapore[93] also makes it likely that the blockholders have access to such information. Accordingly, shareholders are equally positioned to assess the value of the company.[94]

C. Management's primary duty to shareholders

34. Although engaging in a proportionality analysis tends to protect non-investor groups such as customers, employees, and creditors, the management does not owe a fiduciary duty to these groups but to the company, and is primarily required to consider the interest of shareholders alone.[95] As the fundamental tenet of the Code is "fair and equal treatment of all shareholders",[96] interests of non-investor stakeholders should be given effect only as far as they are aligned with the aggregate shareholders interest. In situations where the bidder is offering an attractive premium, it is in the shareholders interest to accept the offer.[97]

35. A successful takeover is not always detrimental to non-investing stakeholders. In fact, stakeholders of the target companies may perform better following the acquisition given the ability to expand.[98] For instance, Asia Pacific Breweries increased its performance and benefited stakeholders following Heineken's takeover because of its expansion to Vietnam markets.[99]

36. Even if public sentiment is evoked following acquisitions of Singapore's iconic brands, national interest is not at stake because the aforementioned companies are engaged in unregulated industries.[100] Furthermore, public sentiment is likely to be transient in nature.[101]

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[93] Tan Lay Hong, "Exploring the Question of the Separation of Ownership From Control: An Empirical Study of the Structure of Corporate Ownership in Singapore's Top Listed Companies", (The University of Auckland Business School, forthcoming, 2010) at 17, 20, 25 <http://docs.business.auckland.ac.nz/Doc/exploring-the-question-of-ownership-fromcontrol.pdf>.

[94] Y.T. Mak and Yuan Li, "Determinants of Corporate Ownership and Board structure: evidence from Singapore" (2001) 7 Journal of Corporate Finance 235 at 238.

[95] *Supra* n 3, General Principle 13.

[96] *Supra* n 29, para 3.4; The Singapore Code on Take-Overs and Mergers (25 March 2016) General Principle 13.

[97] Joyce Koh, "Chareon's Fraser & Neave Takeover Was years in the Making" *Bloomberg* (22 February 2013) <https://www.bloomberg.com/news/articles/2013-02-22/charoen-s-fraser-neave-takeover-was-years-in-the-making>.

[98] *Supra* n 29, at para 1.80.

[99] "Heineken banking on Tiger beer sales in Asia to spur 2017 earnings growth" *The Business Times* (16 February 2017) < http://www.businesstimes.com.sg/companies-markets/heineken-banking-on-tiger-beer-sales-in-asia-to-spur-2017-earnings-growth>.

[100] Wan Wai Yee & Umakanth Varottil, *Mergers and Acquisitions in Singapore: Law and Practice* (LexisNexis, 2013) at para 1.70.

[101] Wong Siew Ying, "Raffles Hotel ownership throughout the years" *Straits Times* (11 December 2015) < http://www.straitstimes.com/singapore/raffles-hotel-ownership-through-the-years>.

Where protected industries are concerned, other regulations such as industry specific statutes[102] and competition law[103] prevent foreign companies from taking over these companies.[104]

D. No guarantee of long-term benefits

37. Admittedly, studies have also suggest that the threat of hostile bids affect management decisions on beneficial long-term projects.[105] However, the Delaware and Singapore approach will produce different results *only* where shareholders would choose not to defer to the directors.[106] Therefore, implicit in the Delaware approach is the assumption that shareholders often make the wrong decision such as focusing solely on short-term benefits, which mandates for a broad discretion to be conferred to the board.[107] This is largely inapplicable in Singapore. The high concentration of state ownership in Singapore usually having long-term investment horizon and private information disprove hypothesis of directors being pressured to prioritise short-term investments.[108] While institutional shareholders are more likely to quickly cash out on their investment,[109] studies have shown the lack of short selling.[110] In view of Singapore's concentrated shareholding structure,[111] shifting powers from the shareholders to directors is unjustified and undesirable.

E. Practically difficult to implement

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[102] Broadcasting Act (Cap 28, 2012 Rev Ed) s44 restricting foreign equity ownership of companies broadcasting to the Singpaore domestic market to less than 49%.
[103] Competition Act (Cap 50B, 2006 Rev Ed) s 54; Telecom Competition Code (14 November 2016).
[104] *Supra* n 29, at para 1.73.
[105] Jeremy C. Stein, "Efficient Capital Market, Inefficient Firms: A Model of Myopic Corporate Behaviour" (1989) 104 Q J Econ 655 at 659; Lucian A. Bebchuk and Lars A. Stole "Do Short-Term Managerial Objectives Lead to Under- or Over-invetment in Long-Term Projects?" (1993) 48 J Fin 719 at 725.
[106] Martin Lipton, "Corporate Governance in the Age of Finance Corporatism" (1987) 136 U. Pa. L. Rev. 1 at 69.
[107] *Supra* n 56, at 1003.
[108] Christopher Chen, "Solving the Puzzle of Corporate Governance of State-Owned Enterprises: The Path of Temasek Model in Singapore and Lessons for China" (2016) 36 Northwestern Journal of International Law and Business 303 at 320; Isabel Sim, Steen Thomsen, and Gerard Yeong, "The State as Shareholder: The Case of Singapore" (June 2014) *Centre for Governance, Institutions & Organisations NUS Business School* at 8.
[109] Andrew C Spieler and Andrew S Murray, "Management Controlled Firms v Owner Controlled Firms: A Historical Perspective of Ownership Concentration in the US, East Asia and the EU" (2008) 7(1) The Journal of International Business and Law 49 at 62.
[110] Tan Lay Hong, "Exploring the Question of the Separation of Ownership
From Control: An Empirical Study of the Structure of Corporate Ownership in Singapore's Top Listed Companies", (The University of Auckland Business School, forthcoming, 2010) at 26 <http://docs.business.auckland.ac.nz/Doc/exploring-the-question-of-ownership-fromcontrol.pdf>.
[111] *Id*, at 30-49.

38. If Singapore decides to adopt features of the Delaware approach, there are various costs involved. These include complexity costs of maintaining a fusion regime with contrasting fundamental tenet, uncertainty costs, loss of shareholders' flexibility, costs of educating the legal profession, and possible public backlash from institutional shareholders and state investment bodies who dominate Singapore's corporate landscape.

39. More importantly, the Delaware approach relied on the court's active role. Inappropriate defence measure results in breach of fiduciary duties and personal liabilities of directors. In contrast, breach of the Code only leads to private reprimand, public censure, or temporary sanctions on the company of Code-related work because of the Code's non-statutory nature.[112] Fiduciary duties under the Companies Act only requires the directors to act in good faith and for a proper purpose,[113] which is not always sufficient to meet the second feature of Delaware approach.[114] Adopting the Delaware approach necessarily requires involvement of courts or the SIC to make a value judgment on the commercial advantage and disadvantage of the takeover for the target, "tying up court resources which could be more gainfully employed",[115] and running contrary to the spirit of the Code as simply a "standard of conduct" to ensure fairness to shareholders.[116]

F. Limited practical benefits

40. The various costs are unlikely to be balanced with sufficient benefits. There are hardly any hostile takeovers in Singapore and Asia. Hostile takeovers can "only take place in companies with dispersed stock ownership",[117] which is rare in Singapore landscape dominated with companies having concentrated stock ownership.[118] In Hong Kong for instance, which has a more active takeovers market compared to Singapore and similar corporate shareholding structure, an assessment of 60 reported takeovers show only three

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[112] *Supra* n 3, Introduction at 2.
[113] Companies Act (Cap 50, 2006 Rev Ed) s 157.
[114] *Omnicare Inc. v NCS healthcare Inc* (Del. 2003) 818 A.2d 914 at 934.
[115] *Supra* n 29, at para 3.22.
[116] *Supra* n 3, Introduction at 1.
[117] John Armour, Jack B. Jacobs, and Curtis J. Milhaupt, "The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework" (2011) 52 Harvard International Law Journal 219 at 221.
[118] Jennifer Hughes, "Why Asia lacks dramatic takeover battles" *Financial Times* (7 March 2017) < https://www.ft.com/content/0827aac0-0239-11e7-ace0-1ce02ef0def9>.

could be considered as a hostile takeover,[119] which later morphed to become negotiated bids. Thus, the unfavorable culture for hostile bids, complemented with stringent shareholders protection, provides little room for strong defensive measures.

G. Contrary to international trend

41. Takeover laws in common law countries globally are moving towards adopting no-frustration rule. In New Zealand, Rule 38 of the Takeover Code[120] and *Baigent v DMcL Wallace Ltd* established the no frustration rule to circumvent the agency problem.[121] In Canada, while its company law provides discretion to the board to consider non-investor stakeholders interest, the target board is similarly prohibited from taking frustrating actions without the shareholders' approval under its securities law.[122] The European Economic Community also recently inserted the no-frustration rule in its takeover directive in view of the high concentration of institutional shareholders.[123]

42. Even in the UK where the rule was criticized following the takeover of national-brand Cadbury by Kraft, the rule was not abolished.[124] Instead, the UK legislator implemented "put-up and shut-up" rule and prohibition of deal protection measures and inducement fees to strengthen the target board's position by methods other than defensive measures.[125] Therefore, a comparative analysis reflects that having the no-frustration rule remain the preferred position in Commonwealth countries for its various benefits.

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[119] David Donald, "Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules" CHKU Research Paper No. 2015-09 at 3; The Takeovers Executive of the Securities and Futures Commission sanctions and the executive directors of International Capital Network Holdings Limited (24 April 2003); The Takeovers Executive of the SFC Sanctions GP NanoTechnology Group Limited and its Directors for Breach of Takeovers Code (18 October 2004); Panel Decision in relation to a referral by the Executive to the Takeovers and Mergers Panel for a ruling in relation to statements made by a representative of the Offerors and Mergers (12 April 2012).
[120] The Takeover Act 1993 s 38.
[121] (1984) 2 NZCLC at para 96-011.
[122] Canadian Securities Administrators, "Takeover Bids – Defensive Tactics" Policy Statement No. 38 at para 5.
[123] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJEU L 142/12 (30 April 2004) Art 9 and 11.
[124] The Takeover Panel, "Review of Certain Aspects of the Regulation of Takeover Bids – Response Statement By the Code Committee of the Panel Following the Consultation on PCP2011/1" (21 July 2011) at 1.
[125] The Takeover Panel, "Review of Certain Aspects of the Regulation of Takeover Bid PCP2011/1" (21 May 2011) PCP 2011/1 at 37.

VI. Conclusion

43. In sum, while adopting the features of Delaware approach in Singapore may better protect stakeholders and founder shareholders facing "insecure blockholders control" situation, it does not bring significant practical benefits considering the extent of the agency problem and Singapore's concentrated state and institutional ownership.

44. Should Singapore choose to abolish no-frustration rule and engage in proportionality analysis, the amendment runs counter to the spirit of the Code as a standard of conduct to ensure fairness to *all* shareholders and falsely assumes that shareholders are insufficiently informed to form the best decision for the company.

45. Even when one view proportionality analysis as procedural inquiry aligned with the Code's spirit, there are various complexity costs in adopting Delaware given contrasting regulators of takeovers and assessment of directors' fiduciary duties. In return, there are little benefits to strengthen the target's position in light of various shareholders' protection in Singapore's Companies Act and Listing Manual.

46. Therefore, it is submitted that the no-frustration rule should be maintained in light of the various benefits including ensuring certainty, vibrancy of takeovers, accountability of directors, and protection of shareholders interest.