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SHAREHOLDERS' PETITIONS IN SINGAPORE TO WIND UP A FOREIGN COMPANY ON THE JUST AND EQUITABLE GROUND: LESSONS FROM HONG KONG

Under s 246(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), shareholders may petition in Singapore to wind up a foreign company on the ground that it is just and equitable to do so. Against the backdrop of a dearth of Singapore and English case authorities, this article considers the Hong Kong cases in this area and the principles that may be derived therefrom should a similar petition be brought before the Singapore courts.

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I. Introduction

1 Under s 246(1)(*d*) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA"), a foreign company that has "substantial connection" with Singapore may be wound up in Singapore. This jurisdiction of the Singapore courts is typically invoked by creditors during insolvency (*ie*, when "the company is unable to pay its debts"[2]), but insolvency is not the only ground under which a foreign company may be wound up in Singapore. Section 246(1)(*c*)(iii) of the IRDA also provides that a foreign company may be wound up "if the Court is of opinion that it is just and equitable that the company should be wound up", and s 124(1)(*d*) of the IRDA provides that a contributory (*ie*, a shareholder) has *locus standi* to bring such an application.

2 In practice, shareholders may petition to wind up a company on the just and equitable ground even if said company is entirely solvent. This generally occurs when shareholders desire to exit from their

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2 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 246(1)(*c*)(ii).

investment amidst shareholders' disputes, and is often accompanied by allegations that the company's affairs have been conducted in an unfairly oppressive or prejudicial manner. In the context of Singapore-incorporated companies, there is a wealth of jurisprudence on minority oppression actions under s 216 of the Companies Act 1967[3] ("Companies Act") and shareholders' just and equitable winding up petitions under s 125(1)(*i*) of the IRDA.[4] However, at the time of writing, there are no written judgments in Singapore involving shareholders' petitions to wind up a *foreign* company on the just and equitable ground.[5] There is also a dearth of English authorities.[6]

3 In contrast, there is a line of Hong Kong cases. The leading case is *Kam Leung Sui Kwan v Kam Kwan Lai*[7] ("*Yung Kee (HKCFA)*"), which was a unanimous decision of a five-judge Hong Kong Court of Final Appeal ("HKCFA"), with the judgment jointly delivered by Geoffrey Ma CJ and Lord Millet NPJ. *Yung Kee (HKCFA)* has since been applied by Hong Kong lower courts.

4 As it is not difficult to imagine Singapore owners of small, family or quasi-partnership businesses choosing the vehicle of a foreign holding company to conduct their Singapore-based businesses or to hold shares in Singapore companies, it will not be surprising if the Singapore courts encounter shareholders' petitions to wind up foreign companies in Singapore on the just and equitable ground. After all, the individuals involved in the dispute may all be based in Singapore and may prefer not to be put to the expense of litigating in the faraway jurisdiction of incorporation.

5 This article thus considers said line of Hong Kong cases, with a particular focus on whether the principles elucidated therein may be applied in Singapore. Some reference is made to related fields, for example, minority oppression actions with a foreign element and creditors' petitions to wind up a foreign company, but this article does not deal with cross-border insolvency.

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3 2020 Rev Ed.

4 Formerly s 254(1)(*i*) of the Companies Act (Cap 50, 2006 Rev Ed) (repealed by the enactment of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) with effect from 30 July 2020).

5 Although there are Singapore cases where *creditors* have petitioned to wind up a foreign company on the ground that it is just and equitable to do so, these concern insolvency and the courts did not analyse the just and equitable ground: *Re Griffin Securities Corp* [1999] 1 SLR(R) 219 at [21]–[22] and *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [12].

6 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [28].

7 [2015] HKCFA 79.

6 This article proceeds in the following manner. Part II[8] summarises the statutory provisions in Singapore and Hong Kong, before presenting *Yung Kee (HKCFA)*. Part III[9] considers whether the principles in *Yung Kee (HKCFA)* may be applied in Singapore. Part IV[10] considers the developments since *Yung Kee (HKCFA)* and their application in Singapore. Part V[11] briefly considers the just and equitable ground itself. Part VI[12] concludes.

II. Statutory provisions and *Kam Leung Sui Kwan v Kam Kwan Lai*

A. Statutory provisions in Singapore and Hong Kong

7 In Singapore, s 246(1) read with s 245(1) of the IRDA permits a foreign company that has "substantial connection" with Singapore to be wound up in Singapore on the ground that it is just and equitable to do so. To this end, s 246(3) of the IRDA provides a list of factors that the court may rely on to support a determination that a foreign company has "substantial connection" with Singapore.

8 The *locus standi* of shareholders to make an application is supplied by the phrase "any unregistered company may be wound up under Parts 8 and 9, which apply to an unregistered company" in s 246(1) of the IRDA. Parts 8 and 9 of the IRDA contain the statutory provisions for winding up Singapore-incorporated companies, and s 124(1)(*d*) of the IRDA, which falls within Part 8 of the IRDA, stipulates that a contributory (*ie*, a shareholder) may make an application to wind up the company.

9 In Hong Kong, ss 327(1) and 327(3) read with s 326 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance[13] ("CWUMPO") permit a foreign company to be wound up in Hong Kong on the ground that it is just and equitable to do so. The *locus standi* of shareholders to make an application is supplied by the phrase "and all the provisions of this Ordinance with respect to winding up shall apply to an unregistered company" in s 327(1) of the CWUMPO. In this regard, s 179(1) of the CWUMPO provides that contributories (*ie*, shareholders) may petition to wind up the company.

8 See paras 7–19 below.
9 See paras 20–86 below.
10 See paras 87–111 below.
11 See paras 112–117 below.
12 See paras 118–121 below.
13 Cap 32.

10 Unlike in Singapore, there is no specific statutory provision in Hong Kong requiring the foreign company to have "substantial connection" with Hong Kong in order to be wound up. As a corollary, there is also no specific statutory provision that lists factors going to "substantial connection". Instead, Hong Kong courts apply common law requirements, of which one is that the foreign company must have "sufficient connection" with Hong Kong. The common law requirements were elucidated in *Yung Kee (HKCFA)*, which this article now turns to.

B. Kam Leung Sui Kwan v Kam Kwan Lai

11 *Yung Kee (HKCFA)* was concerned with a company that was incorporated in the British Virgin Islands ("BVI") ("the Company"). The Company conducted no business or investment; its sole function was to hold shares in its wholly-owned subsidiary (another BVI company). The wholly-owned subsidiary in turn also had no business or investment; its sole function was to hold shares in Hong Kong companies that conducted a restaurant business exclusively in Hong Kong.[14] All the shareholders of the Company were family members and resident in Hong Kong.[15] All the directors of the Company and its subsidiaries were resident in Hong Kong.[16]

12 Before the Hong Kong courts, a shareholder of the Company commenced an unfair prejudice action seeking a buyout order. In the alternative and relying on substantially the same matters, said shareholder also petitioned to wind up the Company on the just and equitable ground.[17]

14 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [5]–[10] and [32].
15 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [1] and [8]. Although some shares in the Company were held indirectly by the family members, nothing turns on this.
16 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [32].
17 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [1].

13 In relation to the winding up petition, the HKCFA first explained the position on the winding up of foreign companies (generally)[18] under English and Hong Kong common law, which the HKCFA considered to be identical.[19] Under common law, it is recognised that although statute has conferred on the court the jurisdiction to wind up foreign companies:[20]

> … the most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated, and the jurisdiction to wind up a foreign company has often been described as 'exorbitant' or as 'usurping' the functions of the courts of the country of incorporation.

Accordingly, there must be some connection between the foreign company and the jurisdiction in which winding up is sought before a winding up order may be granted:[21]

> In these circumstances, the courts have adopted some necessary self-imposed constraints on the making of a winding up order against a foreign company … [in the form of] … three so-called core requirements which must be satisfied before the courts will exercise its statutory jurisdiction to wind up a foreign company …:
>
> > (1) there had to be a sufficient connection with Hong Kong, but this did not necessarily have to consist in the presence of assets within the jurisdiction;
> >
> > (2) there must be a reasonable possibility that the winding-up order would benefit those applying for it; and
> >
> > (3) the court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

14 The HKCFA then considered the "sufficient connection" requirement in the specific context of *shareholders*' petitions. Four notable principles of law may be distilled.

15 First, the HKCFA held that there was no reason why a foreign company should be required to have a "more stringent" connection with Hong Kong for shareholders' petitions, as compared to creditors' petitions.[22]

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18 *Ie*, without distinction between creditors' petitions in insolvency and shareholders' petitions.

19 See *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [19]–[21], where the court did not draw any distinction between the Hong Kong position and the English position when it traced the origin of the Hong Kong position.

20 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [19].

21 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [20].

22 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].

16 Second, the HKCFA held that for shareholders' petitions, the presence of shareholders within the jurisdiction where winding up is sought is "highly relevant", "an extremely weighty factor" and "will usually be the most important single factor" in establishing the sufficiency of the connection between the company and the jurisdiction where winding up is sought.[23]

17 Third, in determining whether there was "sufficient connection" with Hong Kong on the facts, it has been suggested that the HKCFA's analysis appeared to shade into a natural forum/*forum non conveniens* analysis.[24]

18 Fourth, in finding that the Company had "sufficient connection" with Hong Kong, the HKCFA included in its consideration the connections that the Company had, *through its wholly-owned subsidiary*, with Hong Kong.[25]

19 Finally, turning to the substantive just and equitable ground, the HKCFA cited the usual common law cases often referred to in domestic petitions.[26] Thereafter, the HKCFA held, on the facts before it, that a common understanding that the restaurant business would be jointly managed was breached.[27] The HKCFA therefore granted a winding up order in respect of the Company, although it temporarily stayed the order to allow parties to agree on a buyout.[28]

III. The applicability of *Kam Leung Sui Kwan v Kam Kwan Lai* in Singapore

20 The pertinent question that arises from *Yung Kee (HKCFA)* is whether the principles therein may be applied in Singapore. This Part first considers the differences in the statutory frameworks of Singapore

23 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27] and [30].
24 Clemence Yeung, "Winding up Foreign Companies on the Just and Equitable Ground" (2016) 132 LQR 562 at 565.
25 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [33]–[40].
26 *Eg*, *O'Neill v Phillips* [1999] 1 WLR 1092 and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. See *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [43]–[46].
27 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [54]–[58].
28 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [64]. Singapore courts have, in the context of locally-incorporated companies, also granted such stays: *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [46]–[48]. See also Alan K Koh, Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2020) 21 SAL Ann Rev 224 at paras 9.81–9.82.

and Hong Kong before dealing with each of the four legal principles mentioned above separately.

A. The different statutory frameworks of Singapore and Hong Kong

21 As explained above,[29] the key difference in the statutory frameworks of Singapore and Hong Kong is that in Hong Kong, unlike in Singapore, there is no specific statutory provision requiring the foreign company to have "substantial connection" with Hong Kong and providing a list of factors going to "substantial connection". Instead, Hong Kong relies on the common law's three requirements, of which one is that the foreign company has "sufficient connection" with Hong Kong.

22 In this author's view, this difference should not preclude a Singapore court from adopting the common law principles in *Yung Kee (HKCFA)* to determine whether a foreign company has "substantial connection" with Singapore within the meaning of s 246(1)(*d*) of the IRDA.[30] The leading Singapore treatise on minority shareholders' rights[31] shares a similar view, and this view is worth developing further.

23 Firstly, based on legislative history, the common law principles in *Yung Kee (HKCFA)* should be equally applicable in Singapore.

24 In this regard, before 2017, the Singapore statutory framework was almost identical[32] to the Hong Kong statutory framework. There were no express statutory provisions requiring the foreign company to have "substantial connection" with Singapore and providing a list of factors going to "substantial connection". Instead, Singapore relied on common

29 See para 10 above.

30 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 ("*Yung Kee (HKCFA)*") at [36] considered itself to be pronouncing on the common law position against the backdrop of the Hong Kong statutory provisions. If the Singapore statutory framework is markedly different from that of Hong Kong, then the application of *Yung Kee (HKCFA)* in Singapore is a non-starter.

31 Margaret Chew, *Minority Shareholders' Rights and Remedies* (Lexis Nexis, 3rd Ed, 2017) at paras 5.106–5.107.

32 There are subtle differences in the precise wording, but nothing turns on them. It has been judicially acknowledged that the Singapore and English statutory provisions are "broadly similar": *Re Griffin Securities Corp* [1999] 1 SLR(R) 219 at [17]. The English statutory provisions are *in pari materia* with the Hong Kong provisions.

law requirements, derived from English common law and similar to the Hong Kong position,[33] to supplement the statutory wording.[34]

25 In 2017, when the Singapore statutory framework was amended to its present form ("the 2017 Amendment"), the intent behind the insertion of the express statutory provisions on "substantial connection" was not to do away with or vary the common law principles but, rather, to provide greater clarity. As explained by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring ("the Committee") in its report dated 20 April 2016 ("the Report"):[35]

> … Singapore case-law requires a foreign debtor to show that it has a clear connection or nexus to Singapore before the courts would be willing to take jurisdiction for purposes of a restructuring. [reference omitted]
>
> In order to introduce greater clarity for foreign corporate debtors that want to restructure in Singapore, further guidance should be provided on the factors which the courts will take into account to determine if they have jurisdiction over foreign corporate debtors. This could be accomplished by promulgating rules which clearly set out a list of factors which may be taken into account. …

26 Therefore, as the Singapore and Hong Kong statutory frameworks have a comparable starting point, and the intent behind the 2017 Amendment was simply to provide greater clarity, it would be coherent with the legislative history for the common law principles in *Yung Kee (HKCFA)* to apply in Singapore.

27 In this regard, it is worth noting that there were also suggestions in Hong Kong for the presence of assets or the carrying on of business, as examples of "sufficient connection", to be expressly incorporated into the CWUMPO as specific tests for when a foreign company may be wound up in Hong Kong.[36] However, The Law Reform Commission of Hong Kong preferred to leave out express jurisdictional requirements in the CWUMPO to preserve the courts' discretion.[37]

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33 See para 13 above.

34 *Re Griffin Securities Corp* [1999] 1 SLR(R) 219 at [17]; *Re Projector SA* [2009] 2 SLR(R) 151 at [26]. These were creditor petitions under the former s 351 of the Companies Act (Cap 50, 2006 Rev Ed). See also para 37 below.

35 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at paras 3.4–3.5.

36 The Law Reform Commission of Hong Kong, *Report on the Winding-up Provisions of the Companies Ordinance* (1999) at para 26.21.

37 The Law Reform Commission of Hong Kong, *Report on the Winding-up Provisions of the Companies Ordinance* (1999) at para 26.22.

28 Although the Singapore legislature differed from Hong Kong in its approach to incorporating specific requirements in statute, it is clear that both legislatures had a similar understanding of what the legal landscape ought to be. In Singapore, similar to Hong Kong, it was recognised that the flexibility and discretion of the courts ought to be maintained. The Committee expressly noted that "[t]o preserve flexibility, the list should not be exhaustive. The Singapore court may still determine that its jurisdiction has been invoked even if a foreign corporate debtor does not satisfy any of the factors on the list".[38] On the other hand, in Hong Kong, similar to Singapore, there was also recognition that certainty and clarity would be desirable. The Law Reform Commission of Hong Kong noted that there was "certainly merit" in the suggestion to set out specific tests for jurisdictional requirements on the basis that a list would provide certainty.[39]

29 Secondly, the fact that the Singapore statutory framework uses the term "substantial" when referring to the requisite connection, as opposed to the term "sufficient" used in common law, should be immaterial.

30 In the Explanatory Statement to the Companies (Amendment) Bill[40] ("the Explanatory Statement"), it was expressly stated that the list of factors in then-s 351(1)(2A) of the Companies Act (*ie*, s 246(3) of the IRDA) going to "substantial connection" was "drawn from case law from Singapore and other common law jurisdictions dealing with the determination of whether a foreign company is liable to be wound up under this Act or the corresponding legislation of those other common law jurisdictions". As the case law was decided on the basis of the common law requirement of "sufficient connection", and the Explanatory Statement expressly acknowledges the link between the express statutory factors and the previous case law, the phrase "substantial connection" in statute should be construed in a similar manner to "sufficient connection" in common law.

31 Moreover, in the Report, the Committee itself used the phrases "sufficiently connected" and "clear connection" interchangeably when

38 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.5.

39 The Law Reform Commission of Hong Kong, *Report on the Winding-up Provisions of the Companies Ordinance* (1999) at para 26.23.

40 Bill 13 of 2017. This was the bill in respect of the Companies (Amendment) Act 2017 (Act 15 of 2017).

describing the existing common law position.[41] As there was no indication that the Committee intended to provide a more stringent requirement for foreign companies to be wound up (or restructured) in Singapore, the language of "substantial" used in the statutory provision ought not to be construed as imposing a more onerous standard than the common law "sufficient". Rather, the use of "substantial" instead of "sufficient" was likely akin to the Committee's interchangeable substitution of the term "sufficient" with "clear" in its Report.

32 Indeed, Margaret Chew opines that the terms "sufficient" and "substantial" may be "readily substituted" with each other, as:[42]

> … [a]fter all, the technique of establishing sufficient (or for that matter, substantive) connection is but one of several 'necessary self-imposed constraints on the making of a winding up order against a foreign company' that have been adopted by the courts. The point is, a pragmatic yet cautious reading of the powers of the court to wind up a foreign company remains the key.

In the learned author's view, the Singapore statutory framework is a codification of the common law principles.

33 That being said, it is worth noting *Re PT MNC Investama TBK*[43] ("*PT Investama*"). There, in determining "substantial connection", the High Court was presented with submissions that, *inter alia*, relied on *Re Pacific Andes Resources Development Ltd*[44] ("*Pacific Andes*"), which was a case decided on the basis of the previous common law requirement of "sufficient nexus".[45] Although the High Court in *PT Investama* held that there was "substantial connection" on the facts before it, it left open the question of whether the reasoning in *Pacific Andes* in respect of the "sufficient nexus" requirement was applicable to the "substantial connection" requirement.[46] For the reasons above, this author's view is that this question should be answered in the affirmative.

34 Finally, the fact that the common law principles in *Yung Kee (HKCFA)* are framed as three cumulative requirements, as opposed to

41 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.4 and fn 19.

42 Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) at paras 5.106–5.107.

43 [2020] SGHC 149.

44 [2018] 5 SLR 125.

45 *Re PT MNC Investama TBK* [2020] SGHC 149 at [15]–[16], which treated "sufficient nexus" synonymously with "sufficient connection".

46 *Re PT MNC Investama TBK* [2020] SGHC 149 at [17]; *Re Zipmex Co Ltd* [2022] SGHC 196 at [23].

the singular requirement of "substantial connection" in the Singapore statutory framework, should not be a distinguishing factor. This is because the three cumulative requirements have regularly been reduced to a singular requirement.

35 In *China Medical Technologies, Inc v Samson Tsang Tak Yung*,[47] the Hong Kong Court of Appeal ("HKCA") clarified that the *Yung Kee (HKCFA)* approach was really a "single overarching question" of whether there was sufficient connection between the company and the jurisdiction in which winding up was sought. The other two requirements[48] may be understood as aspects of this singular inquiry.[49]

36 In *In re Rodenstock GmbH*,[50] the English High Court explained that it is really only the first requirement of "sufficient connection" that is properly concerned with restraining the potential exorbitance in jurisdiction that may occasion if a court grants a winding up order in respect of a foreign company. The latter two requirements[51] are simply to "serve the practical purpose of ensuring that the court will only make orders where some useful purpose will be served".[52]

37 In Singapore, cases that pre-date the 2017 Amendment also refer to various alternative and cumulative common law requirements besides there being sufficient connection with Singapore, for example, presence of assets in Singapore and reasonable possibility that benefit would accrue to the petitioners.[53] However, in the Report, the Committee cited one of these cases and simply stated a singular requirement of "clear connection" or being "sufficiently connected".[54] As the Committee was not intending to vary the common law position,[55] it is reasonable to suppose that the "substantial connection" requirement in the 2017 Amendment, although

47 [2018] HKEC 392; [2018] HKCA 11.
48 See para 13 above.
49 *China Medical Technologies, Inc v Samson Tsang Tak Yung* [2018] HKCA 11 at [20].
50 [2011] EWHC 1104 (Ch). The English High Court in *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) at [20]–[21] traced the origin of the three cumulative requirements to the case of *In re Real Estate Development Co* [1991] BCLC 210. In *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [21], the Hong Kong Court of Final Appeal similarly traced the origin of the three cumulative requirements in Hong Kong to *In re Real Estate Development Co* [1991] BCLC 210.
51 See para 13 above.
52 *In re Rodenstock GmbH* [2011] EWHC 1104 (Ch) at [20]–[21].
53 *Re Griffin Securities Corp* [1999] 1 SLR(R) 219 at [17]; *Re Projector SA* [2009] 2 SLR(R) 151 at [26]; *Re TPC Korea Co Ltd* [2010] 2 SLR 617 at [12].
54 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.4 and fn 19.
55 See para 25 above.

framed as a singular requirement, also has inbuilt considerations of the other common law requirements.

B. No need for a "more stringent" connection for shareholders' petitions

38 Moving on to the first of the four principles in *Yung Kee (HKCFA)*, the HKCFA held that there was no reason why a foreign company should be required to have a "more stringent" connection with Hong Kong in the case of shareholders' petitions as compared to creditors' petitions.[56]

39 In this author's view, the HKCFA's reasoning does not give sufficient weight to choice of law issues. The three points in the HKCFA's reasoning will be examined, albeit in a different sequence to aid in the flow of analysis.

40 Firstly, the HKCFA rejected the argument that shareholders, by choosing to incorporate a company in the foreign jurisdiction, ought to be confined to winding up said company in the foreign jurisdiction of incorporation.[57] The HKCFA took the view that this argument:[58]

> … merely begs the question since it assumes that the shareholders who caused the company to be incorporated knowingly chose not only to confer jurisdiction on the courts of the country of incorporation but also to abstain from invoking the concurrent jurisdiction which statute has conferred on the courts of [the country where winding up is sought].

41 In this author's view, the HKCFA's reasoning misses the point, which should be on the issue of governing law (*ie*, choice of law) rather than jurisdiction.

42 It is well established that the proper law for determining questions of a company's legal personality, status and continued existence is the law of the company's state of incorporation (*ie*, law of incorporation).[59] Similarly, the proper law for determining "matters of substantive company

56 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
57 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25]. This argument was framed as "[the shareholders] made their bed; now they must lie on it" and was accepted by the Hong Kong Court of Appeal and Hong Kong Court of First Instance.
58 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
59 Ian F Fletcher QC, *The Law of Insolvency* (Sweet & Maxwell, 5th Ed, 2017) at paras 30-007 and 30-009; *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [41].

law"[60] or questions of a company's internal management[61] is the law of incorporation. It has also been said that "[t]he law governing the affairs of and the obligations owed by the company … and the general obligations of the majority to the minority would be the [law of incorporation]".[62]

43 It is therefore clear that the grounds on which a company may be wound up by shareholders (such as the just and equitable ground) is a matter that should ordinarily be dictated by the law of incorporation.[63] Winding up concerns the continued existence of the company. The grounds on which a company may be wound up by shareholders is a matter of substantive company law. The just and equitable ground for winding up a company also concerns internal management: it sets the standard of conduct of the affairs of the company and obligations between members, the breach of which attracts civil sanctions as between members of the company.[64]

44 As acknowledged by the HKCFA, it is understood that "shareholders of a foreign company or their predecessors *will usually have voluntarily adopted and approved the law of the state of incorporation* as the law governing the company's legal status"[65] [emphasis added]. However, when a foreign company falls within s 246 of the IRDA, it is not merely that Singapore courts have jurisdiction to wind up the foreign company. Rather, it is also further dictated that Singapore law (rather than the law of incorporation) will be the governing law applied to substantively determine whether the foreign company should be wound up, which is contrary to parties' voluntary adoption or approval of the law of incorporation to govern the same.

45 This may be gleaned from the fact that s 246(1)(*c*) of the IRDA does not in any way indicate that the just and equitable ground is determined under foreign law (such as the law of incorporation), and so Singapore law must presumably apply. Indeed, it would make no sense

60 *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 at [67]. *Eg*, directors' duties, the ability of a company to make distribution to its members and the circumstances under which derivative actions can be brought.

61 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [88].

62 *Fan Heli v Zhang Shujing* [2016] 1 SLR 1457 at [25].

63 It has been said, on a general level, that "the law of incorporation governs the dissolution of the corporation": *JX Holdings Inc v Singapore Airlines Ltd* [2016] 5 SLR 988 at [21].

64 This is, of course, on the assumption that the just and equitable ground for foreign companies is the same as that for domestic companies. See paras 112–117 below.

65 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25], *cf* the view that the state of incorporation is merely a letterbox jurisdiction, and that it is therefore in Singapore's interests to instead emphasise practical realities.

for s 246(1)(*c*) to be construed as requiring a determination, under the foreign law of incorporation, if it would be just and equitable that the company should be wound up, as there could be foreign law that does not even have such ground for winding up. In *Yung Kee (HKCFA)*, the HKCFA did not indicate that it was applying BVI law (the law of incorporation), and subsequent Hong Kong cases have cited the exposition in *Yung Kee (HKCFA)* on the just and equitable ground as authority for the domestic Hong Kong legal position.[66]

46 Thus, as recognised by the HKCA in *Re Yung Kee Holdings Ltd*[67] ("*Yung Kee (HKCA)*"), winding up a foreign company effectively "circumvent[s] the law of the state of incorporation"[68] as a different governing law (from what parties had voluntarily adopted) is applied to determine whether the company should be wound up. The point is starker if the law of incorporation does not even permit winding up on the just and equitable ground. By availing himself of s 246 of the IRDA, a petitioning shareholder effectively imposes on a respondent shareholder, in respect of the affairs of the company, a standard of conduct that is entirely different from that in the system of law which properly governs issues of "substantive company law" and "internal management" of the company, and claims that this standard has been breached to give rise to civil remedies.

47 Therefore, contrary to the HKCFA's explanation, the argument that shareholders ought to be confined to winding up in the foreign jurisdiction of incorporation is *not* premised on an assumption that shareholders who caused the company to be incorporated overseas intended to "abstain from invoking the concurrent jurisdiction which statute has conferred on the courts of [the country where winding up is sought]".[69] Rather, it is premised on parties' intention for the law of incorporation to govern whether the company should be wound up. Shareholders should ordinarily be confined to winding up in the foreign jurisdiction of incorporation because it is there that the appropriate governing law will be applied.

48 In this regard, Alexander Loke[70] suggests that it is inappropriate to construe parties' choice of jurisdiction of incorporation as indicating parties' *exclusive* choice of law that governs whether the company should be wound up, as "it is hard to imagine that the parties had intended

66 *Eg*, *China Habit Ltd v Health Links Development Ltd* [2018] HKCFI 1703 at [78].
67 [2014] 2 HKLRD 313.
68 *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [41] and [45].
69 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
70 Alexander Loke, "Winding-up of a Foreign Company on the Just and Equitable Ground: *Re Yung Kee Holdings Ltd*" [2016] 2 Sing JLS 336.

to exclude the legal and statutory rights conferred by the law of their domicile".[71]

49 With respect, it is unclear why this is so. As mentioned above, the grounds on which a company may be wound up (such as the just and equitable ground) sets the standard of conduct of the affairs of the company. For example, under Singapore law, it is insufficient for shareholders to simply abide by the company's constitution or shareholders' agreement because a breach of legitimate expectations arising outside of these documents may justify a winding up. In contrast, other systems of law may be less willing to consider such non-contractual expectations, and so shareholders can simply abide by these documents. It is surely reasonable to suppose that parties' expectations would be that only one standard applies, from which parties may take reference in conducting themselves. This should be the standard under the law of incorporation. It is instead hard to imagine that parties would have expected that two different standards may be suspended over the company, and for the one to eventually apply to be dependent on the petitioning shareholders' choice of forum.

50 Secondly, the HKCFA in *Yung Kee (HKCFA)* acknowledged the key distinguishing factor between shareholders' petitions and creditors' petitions, *viz*, that "creditors are not personally attached to the state of incorporation whereas the shareholders of a foreign company or their predecessors will usually have voluntarily adopted and approved the law of the state of incorporation as the law governing the company's legal status".[72] However, the HKCFA took the view that this factor "merely supports the starting point that the country of incorporation normally provides the most appropriate jurisdiction in which to seek a winding up order",[73] and was already accounted for by the "sufficient connection" requirement.[74]

51 In this author's view, the HKCFA's explanation is not entirely satisfactory. At the outset, it is not clear how the appropriateness of winding up in the country of incorporation and the "sufficient connection" requirement adequately addresses the *additional* concern in shareholders' petitions that was highlighted, given that these aspects are also present in creditors' petitions. Moreover, it is not merely that "creditors are not personally attached to the state of incorporation".[75] Rather, there is also

71 Alexander Loke, "Winding-up of a Foreign Company on the Just and Equitable Ground: *Re Yung Kee Holdings Ltd*" [2016] 2 Sing JLS 336 at 342.
72 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
73 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
74 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].
75 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [25].

the point that in the context of insolvency, which creditors' petitions are typically concerned with, party autonomy is subjugated to broader policy considerations.[76] For example, it has been strongly argued that in insolvency a party should *not* be entitled to demand that its choice of governing law be upheld so that a contractual debt owed to him can only be discharged under the law of the contract from which the debt arises.[77] By analogy, it is therefore understandable that choice of governing law (*ie*, the voluntary adoption or approval by shareholders of the law of incorporation as the law governing the company's legal status) may similarly be overridden in the case of creditors' petitions. There is, however, no similar explanation for shareholders' petitions.

52 Indeed, shareholders' disputes have often been likened to contractual disputes even though they are based on company law statutory provisions. For example, in *Re Yung Kee (HKCFA)*, the HKCFA noted that a shareholders' just and equitable winding up petition is "essentially concerned with a contractual dispute between shareholders".[78] Similarly, in the Singapore minority oppression case of *Lim Chee Twang v Chan Shuk Kuen Helina*[79] ("*Lim Chee Twang*"), the High Court justified its power to order a buyout in respect of foreign companies on the basis of the contract between the foreign companies' shareholders in the form of the companies' constitutions.[80] The reason for this association with contract is clear: shareholders' disputes are premised on shareholders' rights and/or relationships, and the source of these may typically be traced to a company's constitution or shareholders' agreement which may both be considered as contractual in nature.

53 In contract law, significant weight is given to party autonomy in determining the applicable governing law:[81] the proper law of a contract is determined by three sequential stages that prioritise parties' intentions over objective connecting factors.[82] The first stage is that if the parties have made an express choice of law, then that choice will be given effect to. Secondly, if there is no express choice, then the intention of parties as to the governing law as may be inferred (*ie*, implied choice of law) will be given effect to. Thirdly, it is only if there is no express or implied choice

76 Kannan Ramesh, "The *Gibbs* Principle: A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42 at para 24.
77 Kannan Ramesh, "The *Gibbs* Principle: A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42 at paras 21–24.
78 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27] and [31].
79 [2010] 2 SLR 209.
80 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [148]–[149]. See also paras 69–70 below.
81 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2020 Reissue) at para 75.343.
82 *Pacific Recreation Pte Ltd v S Y Technology* [2008] 2 SLR(R) 491.

that the contract is governed by the law with which the contract has its closest and most real connection.[83]

54 Given how shareholders' disputes have been likened to contractual disputes, it would be coherent for party autonomy to similarly be given priority in determining the applicable governing law for shareholders' disputes, even if the choice of law rules for contract may not, strictly speaking, apply.[84] For just and equitable winding up petitions, this means that shareholders' voluntary adoption or approval of the law of incorporation should be given greater precedence over objective factors that give rise to "sufficient" or "substantial" connection. This would be similar to how parties' express or implied choice takes precedence over objective factors establishing the "closest and most real connection" for contract.

55 Thirdly, the HKCFA in *Yung Kee (HKCFA)* rejected the view in the seventh edition of *Hollington on Shareholders' Rights*[85] that it would be a "very exceptional case" for the court to wind up a foreign company in a shareholders' petition.[86] Robin Hollington QC had suggested that one such "very exceptional case" would be where there existed a shareholders' agreement with a choice of law and jurisdiction clause in favour of the country where winding up is sought.[87] The HKCFA interpreted Hollington QC as suggesting that because the matter is "essentially concerned with a contractual dispute between shareholders whose contract is governed by [the law of the country where winding up is sought]",[88] it is therefore proper for the courts of the country where winding up is sought to exercise their jurisdiction to wind up the foreign company. The HKCFA opined that if that were the case, then "it is difficult to see why a dispute between shareholders based, not on contract but on equitable principles, should be different, at least where those principles are applicable in the place where the shareholders live".[89]

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83 The aim of the third stage is not to divine any "intent" of the parties but to consider which law has the most connection with the contract and the circumstances: *Pacific Recreation Pte Ltd v S Y Technology* [2008] 2 SLR(R) 491 at [47]–[49].

84 It is beyond the scope of this article to consider the theoretical underpinnings of party autonomy as a basis for choice of law. See Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

85 Robin Hollington QC, *Hollington on Shareholder Rights* (Sweet & Maxwell, 7th Ed, 2013) at para 12-05.

86 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [30].

87 In Singapore, this argument may have to overcome the principle that shareholders' agreements operate on the private law (and not company law) plane: *BTY v BUA* [2019] 3 SLR 786 at [85].

88 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [31].

89 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [31].

56 In this author's view, the HKCFA's explanation is, with respect, unconvincing. The HKCFA is correct that if the dispute is based on equitable principles in the law of the place where the shareholders live, it would be appropriate for the courts of the place where the shareholders live to exercise jurisdiction. However, this does not explain why in the first place the dispute should be decided on equitable principles in the law of the place where shareholders live, given that parties had voluntarily adopted or approved the law of incorporation as the governing law.

57 Finally, for completeness, the principle in *Yung Kee (HKCFA)* that there is no need for a "more stringent" connection for shareholders' petitions has endured a mixed reception. Whilst it finds support in Loke,[90] the latest edition of *Hollington on Shareholders' Rights* appears to disagree, suggesting that *Yung Kee (HKCFA)* may be explicable on the basis that "Hong Kong courts are generally more open [than English courts] to accepting jurisdiction over foreign companies … because under statute they can hear unfair prejudice petitions and derivative claims in respect of foreign companies".[91] This distinction should also apply in Singapore as the Singapore position is similar to the English position.[92]

C. Presence of shareholders in jurisdiction a weighty factor

58 Moving on to the second of the four principles in *Yung Kee (HKCFA)*, the HKCFA held that for shareholders' petitions, the presence of shareholders within the jurisdiction where winding up is sought is "highly relevant", "an extremely weighty factor" and "will usually be the most important single factor" in establishing the sufficiency of the connection between the company and the jurisdiction where winding up is sought.[93]

59 At the outset, it may be observed that the presence of shareholders within the jurisdiction is *not* found in s 246(3) of the IRDA, which expressly provides a list of factors going to "substantial connection". However, this does not mean that a Singapore court cannot rely on this

90 Alexander Loke, "Winding-up of a Foreign Company on the Just and Equitable Ground: *Re Yung Kee Holdings Ltd*" [2016] 2 Sing JLS 336 at 340–341.

91 Robin Hollington QC, *Hollington on Shareholder Rights* (Sweet & Maxwell, 9th Ed, 2020) at para 12-06, fn 12.

92 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [81]; *Ting Sing Ning (alias Malcolm Ding) v Ting Chek Swee (alias Ting Chik Sui)* [2008] 1 SLR(R) 197 at [33]; Robin Hollington QC, *Hollington on Shareholder Rights* (Sweet & Maxwell, 9th Ed, 2020) at paras 12-02 and 12-07; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 (Ch) at [67].

93 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27] and [30].

factor in determining "substantial connection", because the list in s 246(3) of the IRDA is not intended to be exhaustive.[94]

60 In this regard, *PT Investama* provides a starting point for the approach that a Singapore court may take in deciding whether to consider a factor that is not found in s 246(3) of the IRDA. There, the High Court distilled the common threads that run through the express factors in then-s 351(2A) of the Companies Act (*ie*, s 246(3) of the IRDA) and reasoned by analogy to hold that the listing of notes on the Singapore Stock Exchange, which was not an express factor, was a relevant factor that in and of itself sufficed to establish "substantial connection" with Singapore.[95]

61 Applying the approach in *PT Investama* may suggest that a Singapore court will be slow to consider the presence of shareholders in the jurisdiction as a relevant or weighty factor in establishing "substantial connection". This is because the presence of shareholders in Singapore, on its own, is fairly distinct from the common threads that run through the express factors in s 246(3) of the IRDA. It is also difficult to draw an analogy from any express factor in s 246(3).

62 In this author's view, whilst *PT Investama* provides a starting point, it does not lay down a rigid rule that a factor must cohere with the common threads that run through the express factors in s 246(3) of the IRDA, or be analogised from the express factors, in order to be relevant in establishing "substantial connection". Although it is eminently reasonable for the High Court to develop the law incrementally by reasoning from the express factors in s 246(3), it bears remembering that the drafters' intent was that Singapore courts should have flexibility.[96] In the spirit of flexibility, Singapore courts should be welcoming of the presence of shareholders in the jurisdiction as a relevant factor, despite it standing out from the other express factors in s 246(3).

63 Moreover, the absence in s 246(3) of the IRDA of factors similar to the presence of shareholders in the jurisdiction is readily explicable on the basis that the drafters simply did not contemplate shareholders' petitions when enacting ss 246(1)(*d*) and 246(3) of the IRDA. This may be

94 *Re PT MNC Investama TBK* [2020] SGHC 149 at [12]; Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at paras 3.5–3.6.

95 *Re PT MNC Investama TBK* [2020] SGHC 149 at [13]–[14].

96 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.5.

gathered from the fact that the Report was concerned with strengthening Singapore as an international centre for debt restructuring, which is clearly more relevant to creditors' petitions and is fairly removed from shareholders' disputes. The common law (at least in so far as it relates to shareholders' petitions) should therefore continue to be developed concurrently with statute.[97] Parliament ought not to be taken to have intended for this area of law to be governed exclusively by ss 246(1)(*d*) and 246(3) as there is nothing in the Report or the Explanatory Statement that suggests that ss 246(1)(*d*) and 246(3) were intended to circumscribe shareholders' petitions.

64 On this note, the distinction between creditors' petitions and shareholders' petitions was also relied on by the HKCFA in *Re Yung Kee (HKCFA)* to explain why the presence of shareholders in the jurisdiction is singled out in shareholders' petitions.[98]

65 According to the HKCFA, a creditors' winding up petition is "a dispute between the petitioner and the company",[99] commenced "in order to obtain payment in or towards satisfaction of debts", and so "the presence in [the jurisdiction] of significant assets which may be made available to the liquidator for distribution amongst the creditors will usually suffice".[100] In contrast, "the dispute [in shareholders' winding up petitions] is between the petitioner and other shareholders", and the winding up is sought "to realise the petitioner's investment in the company".[101] Thus, the presence of shareholders in the jurisdiction is "highly relevant", "an extremely weighty factor" and "will usually be the most important single factor".[102] In summary, "the factors which are relevant to establish the connection are different … [in the case of a shareholders' petition as compared to a creditors' petition] … because the nature of the dispute and the purpose for which the winding up order is sought are different".[103]

66 Raymond Siu[104] criticises the above-mentioned analogy from the presence of assets in creditors' petitions to the presence of shareholders in

97 See Goh Yihan, "Where Judicial and Legislative Powers Conflict: Dealing with Legislative Gaps (and Non-gaps) in Singapore" (2016) 28 SAcLJ 472 at paras 27, 51 and 73–74.
98 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27] and [30].
99 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27].
100 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [26].
101 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27].
102 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27] and [30].
103 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [26].
104 Raymond Siu *et al*, "*Re Yung Kee Holdings Ltd*" [2017] 28(7) ICCLR 265.

shareholders' petitions as being an "illogical conclusion".[105] With respect, whilst the HKCFA's reasoning is not particularly forceful, it goes too far to suggest that it is an "illogical conclusion". This is because the presence of shareholders in the jurisdiction does materially affect whether a shareholders' winding up petition may achieve its purpose, similar to how the presence of assets in the jurisdiction materially affects whether a creditors' winding up petition may achieve its purpose.

67 In the case of creditors' petitions, the assets present in the jurisdiction are what the creditor wishes to use to obtain payment in or towards satisfaction of debts, which is the purpose of the winding up petition. Thus, whether there are indeed assets present in the jurisdiction will materially affect whether the creditors' petition may achieve its purpose. For shareholders' petitions, the purpose of the winding up petition is "to realise the petitioner's investment in the company". The presence of shareholders in the jurisdiction materially affects whether this can be achieved, because the presence of shareholders affects whether any order of court "to realise the petitioner's investment in the company" has any teeth.[106]

68 For example, in *Yung Kee (HKCFA)*, there was concern that the shareholder may encounter difficulties in realising his investment notwithstanding that he was successful in his winding up petition, because an appointed liquidator may struggle to gain access to the underlying assets of the Company. The HKCFA considered that this was not an issue, because the other shareholders were resident in the jurisdiction, subject to the *in personam* jurisdiction of the court, and could therefore be compelled by injunction or otherwise to make the underlying assets of the Company available to the liquidator.[107]

69 A similar idea was also expounded in *Lim Chee Twang*. In that case, the plaintiff and the first defendant, who both resided in Singapore,[108] were involved together in an art business[109] carried out through five different companies – three incorporated in Singapore, one incorporated in the BVI, and one incorporated in Hong Kong.[110] The

105 Raymond Siu *et al*, "*Re Yung Kee Holdings Ltd*" [2017] 28(7) ICCLR 265 at 268.

106 Notably, the cases refer to "residence" rather than "presence". This distinction is likely immaterial, given that the shareholders in *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 were all resident in Hong Kong, and the Hong Kong Court of Final Appeal did not appear to be intending to refer to transient presence when using the word "presence".

107 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [39].

108 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [99].

109 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [6].

110 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [3].

plaintiff sought relief under s 216 of the Companies Act, claiming that he was the victim of oppression as a minority shareholder of the "group" of five companies.[111]

70 The High Court took the exceptional[112] step of ordering the first defendant to buy out the plaintiff's shares in the foreign companies (and not merely the local companies), notwithstanding that it did not have jurisdiction in a s 216 minority oppression action over foreign companies. In so ordering, the court emphasised that the plaintiff and first defendant were resident in Singapore and that the Singapore court had *in personam* jurisdiction over the plaintiff and first defendant. A court order could therefore operate as against the plaintiff and first defendant as shareholders of the foreign companies (rather than as against the foreign companies themselves), akin to an injunction against shareholders mandating compliance with the foreign company's constitution.[113] The effect of the buyout order was that the plaintiff was thereby able to realise his investment in the companies.

71 Notably, *Lim Chee Twang* is also useful for shedding light on a Singapore court's approach towards shareholders' disputes in respect of foreign companies. There, in deciding to order a buyout in respect of the foreign companies (and not just the local companies) on the basis of minority oppression, the court reasoned that:[114]

> … given the situation [the shareholders] are in, it cannot be the case that the Court only has power to solve half or part of the problem and leave the parties to take their dispute to the [foreign jurisdiction of incorporation] to re-litigate the same issues and resolve the rest of the same problem by expending so much more time, energy, aggravation and expense.

72 The High Court's motivations somewhat reflect one of the additional justifications raised in *Yung Kee (HKCFA)*, *viz*, that shareholders' petitions "may involve a lengthy and detailed examination of the management of the company's internal affairs which a petitioner is unlikely to be willing to undertake more than once".[115] If the purpose of a Singapore court adjudicating on a shareholders' dispute in respect of a foreign company is so that the shareholders need not (re-)litigate in a faraway land, it is logical that the presence of the shareholders in Singapore is a weighty factor in establishing sufficient/substantial connection. This

111 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [1]–[2].
112 The court in *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 emphasised the "special circumstances" of the case (at [149]) and noted that "it is not without some hesitation" that it held that it had the power to order the buyout (at [147]).
113 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [142]–[150].
114 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [144].
115 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [27].

is because it is when shareholders are present in Singapore that it makes practical sense for the dispute to be resolved once and for all in Singapore as the jurisdiction most accessible to the shareholders.

D. "Sufficient connection" inquiry shades into forum non conveniens

73 Moving on to the third of the four principles in *Yung Kee (HKCFA)*, it has been suggested that the HKCFA's analysis in determining whether there was "sufficient connection" on the facts shaded into a natural forum/*forum non conveniens* analysis.[116] Besides considering the connection of the *company*, the HKCFA considered the connection of the underlying *dispute*.[117] The HKCFA also noted that "[i]ndeed Hong Kong would be the natural jurisdiction in which Hong Kong residents should resolve a dispute over the future of their Hong Kong business".[118]

74 In this author's view, it is inappropriate to shift the inquiry to consider the connection between the *dispute* and the jurisdiction (as distinct from the connection between the *company* and the jurisdiction). It is also inappropriate for the inquiry to be characterised as a natural forum/*forum non conveniens* analysis.

75 Firstly, natural forum/*forum non conveniens* is an entirely separate inquiry from the question of sufficient/substantial connection.[119] As explained in *Dicey, Morris & Collins on the Conflict of Laws*, "[i]n cases in which a sufficient connection is shown to exist, the jurisdiction thus established is said to be subject to the [further] question of whether there is any other forum in which it would be more appropriate for the winding-up to take place".[120] Similarly, as noted in *Yung Kee (HKCA)*, the issue of *forum non conveniens* is considered "after the three core requirements being the basis for the exercise of jurisdiction have been established".[121]

76 As a matter of analytical clarity and precision, the inquiry of sufficient/substantial connection should therefore not be indiscriminately conflated with the question of natural forum/*forum non conveniens*. After all, it is theoretically possible for a foreign company to have sufficient/

116 Clemence Yeung, "Winding up Foreign Companies on the Just and Equitable Ground" (2016) 132 LQR 562 at 565.
117 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [32(8)].
118 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [33].
119 Acknowledged in Clemence Yeung, "Winding up Foreign Companies on the Just and Equitable Ground" (2016) 132 LQR 562 at 565.
120 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (Sweet & Maxwell, 15th Ed, 2017) at para 30-055.
121 *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [75].

substantial connection with Singapore, but for the petition to be stayed on the grounds of *forum non conveniens*. Notably, the Court of Appeal in the context of *forum non conveniens* has opined that "a company's place of incorporation [is], *prima facie*, the more appropriate forum in cases concerning its corporate governance or internal management, and that factor [is] to be given considerable weight in the analysis of the appropriate forum requirement".[122]

77 Secondly, it is also incorrect to suggest that the test of sufficient/substantial connection is "in substance"[123] one of natural forum/*forum non conveniens*. These two inquiries have different methodologies. The natural forum/*forum non conveniens* question demands a comparison between competing jurisdictions to identify the court that should adjudicate the dispute most suitably for the interests of all the parties and the ends of justice.[124] In contrast, the substantial or sufficient connection question should not involve any comparison between competing jurisdictions.[125] The court is not tasked with choosing between competing jurisdictions; it is tasked with a singular inquiry of ascertaining whether there is sufficient/substantial connection with Singapore to justify the Singapore court exercising an exorbitant jurisdiction and overriding parties' choice of law.

78 Thirdly, a shift in the inquiry to consider the connection between the *dispute* and the jurisdiction, akin to a natural forum analysis that focuses on the *dispute*, impermissibly deviates from the statutory language and is a slippery slope to considering far-flung connections.

79 In this regard, it bears emphasising that s 246(1)(*d*) of the IRDA (and the common law position)[126] refers to sufficient/substantial connection of the *company* with the jurisdiction. It does not refer to connection of the *dispute* with the jurisdiction.[127] Furthermore, if the inquiry is shifted to consider the latter, many other factors that are linked

122 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [82].

123 Clemence Yeung, "Winding up Foreign Companies on the Just and Equitable Ground" (2016) 132 LQR 562 at 565.

124 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [53].

125 In *Re PT MNC Investama TBK* [2020] SGHC 149 at [13], in the context of creditors' petitions, the court did not engage in any comparison with any other jurisdiction. In *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79, although the Hong Kong Court of Final Appeal stated that Hong Kong was the natural jurisdiction, it did not expressly engage in a comparison between Hong Kong and the British Virgin Islands.

126 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [21].

127 *Cf* natural forum, which "is the forum with which the *action* has its most substantial connection, not the forum with which the *parties* have their most substantial

(cont'd on the next page)

to the dispute but not to the company, such as the location of witnesses, may potentially become relevant. It is difficult to see why such factors, which may be fairly remote and entirely fortuitous, should have any impact on weighty issues such as identifying the law that governs whether the company should be wound up. As explained above,[128] this has the effect of setting the standard of conduct of the affairs of the company. The inquiry should therefore remain focused on the connection of the *company* with the jurisdiction, to preclude connections of the *dispute* that are wholly extraneous and irrelevant to the company.

E. Connections through wholly-owned subsidiary are relevant

80 Moving on to the last of the four principles in *Yung Kee (HKCFA)*, the HKCFA in finding that the Company had "sufficient connection" with Hong Kong included in its consideration the connections that the Company had, *through its wholly-owned subsidiary*, with the jurisdiction.[129] It will be recalled[130] that the Company's sole asset was another BVI company, and it was this latter BVI company that held shares in Hong Kong companies running a restaurant business exclusively in Hong Kong.

81 The HKCFA opined that establishing sufficient connection of a company through its shareholders or subsidiaries did not entail disregarding the separate legal personalities of these entities,[131] and that there was no doctrinal reason to exclude a connection through a wholly-owned subsidiary.[132] The HKCFA then relied on the reasoning in *Waddington Ltd v Chan Chun Hoo*[133] ("*Waddington*"), where the HKCFA permitted a shareholder to commence a "multiple derivative action" under common law to recover money misappropriated, not from the company of which he was a member, but from the company's subsidiary. As explained by the HKCFA in *Yung Kee (HKCFA)*:[134]

> The Court [in *Waddington* permitted a multiple derivative action] because any depletion of a subsidiary's assets causes indirect but real loss to the parent company and its shareholders. The value of a company resides in the value of its assets, and the value of a parent company resides in the value of its subsidiaries' assets.

connections" [emphasis added]: *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 at [28].

128 See paras 46–49 above.

129 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [33]–[40].

130 See para 11 above.

131 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [34].

132 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [36].

133 (2008) 11 HKCFAR 370.

134 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [37]–[38].

> …
>
> [T]he answer [in the present case] is the same as in [*Waddington*] and for much the same reason. The shareholder who brings a petition to wind up a company does so in order to realise his investment, and if the company is a holding company then his purpose is to realise the value of its underlying assets, whether they belong to its direct or indirect subsidiaries.

82 In Singapore, *Pacific Andes* may arguably be read as rejecting such reasoning. There, a group of foreign companies applied for a moratorium under s 210(10) of the Companies Act to facilitate a restructuring under a scheme of arrangement, which was only available to companies liable to be wound up under the then-Companies Act or the IRDA. The High Court rejected the argument that the subsidiaries had "sufficient nexus" through their parent company because they were wholly owned by the parent company and were integral to the business that contributed significantly to the parent company's revenue. The High Court noted the subsidiaries were independent legal entities and had to themselves establish sufficient nexus to jurisdiction.[135]

83 In this author's view, *Pacific Andes* should be understood as being limited to creditors' petitions since *Pacific Andes* was concerned with a scheme of arrangement in respect of a group of companies in financial distress, which engages similar considerations to creditors' petitions. For creditors' petitions, the separate legal entity principle must be strictly upheld because the extent to which a creditor may recover its debts depends heavily on the proper identification of the entity that legally owns the asset or earns the revenue (rather than any economic realities); it is trite that the incorporation of separate legal entities serves to partition assets and thereby allocate risk as a creditor may not have recourse to assets owned by related companies. In contrast, there is no such concern for shareholders' petitions.

84 Indeed, as suggested by Loke, it is legitimate to "peep through" the corporate veil in establishing sufficient connection for shareholders' petitions. This is because the just and equitable ground itself contemplates considerations beyond the company in question, such as considerations of the wider business operated by the group of companies of which the company in question forms a part.[136]

85 In Singapore, a more robust approach to determining whether it is permissible to "peep through" the corporate veil may be found in *Ng Kek*

135 *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 at [39].

136 Alexander Loke, "Winding-up of a Foreign Company on the Just and Equitable Ground: *Re Yung Kee Holdings Ltd*" [2016] 2 Sing JLS 336 at 343.

Wee v Sim City Technology Ltd[137] ("*Ng Kek Wee*"), which was concerned with whether conduct in the affairs of a subsidiary may be taken into consideration for the purposes of a minority oppression action in respect of its parent company. The Court of Appeal held that the answer was to be found by striking a balance between avoiding technical or legalistic objections, the separate legal personality doctrine, and the wording and purpose of the statutory provision.[138]

86 The suggestion by Loke can fit within the approach set out in *Ng Kek Wee*. A balance should be struck between the express reference in s 246(1)(*d*) of the IRDA to the "substantial connection" of the *company*, the concerns about upholding the separate legal entity principle but not allowing a claim to be defeated by technical or legalistic objections, and the inherent nature of the just and equitable inquiry. In this author's view, this balance is struck by permitting connections through a related entity if the related entity plays a material role in the complaints raised in the just and equitable ground for winding up. This ensures that only connections that have some nexus to the substantive claim for relief are relied upon to establish jurisdiction, since the jurisdiction of the court is, after all, invoked for the purpose of adjudicating the substantive claim for relief. At the same time, the court will not be hamstrung by legal technicalities.

IV. Developments since *Kam Leung Sui Kwan v Kam Kwan Lai*

87 Following *Yung Kee (HKCFA)*, Hong Kong's lower courts have had the opportunity to revisit the principles in *Yung Kee (HKCFA)* and to expand on them. This part considers three such cases of note.

A. Re Great Choice Consultants Ltd

88 In *Re Great Choice Consultants Ltd*[139] ("*Great Choice*"), shareholders of a BVI holding company that held shares in Hong Kong companies petitioned in Hong Kong to, *inter alia*, wind up the BVI holding company on the just and equitable ground.[140] The petitioning shareholders further pleaded that some shares held by the BVI holding company (*ie*, shares in a Hong Kong company that carried out business in Hong Kong ("K&A"))[141] were held by said company on trust for its shareholders.

137 [2014] 4 SLR 723.
138 *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [42].
139 [2016] 3 HKLRD 854.
140 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [7].
141 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [4.2].

89 The HKCA applied *Yung Kee (HKCFA)* and considered whether the BVI holding company had sufficient connection with Hong Kong.[142] The HKCA noted that if it was indeed the case that the BVI holding company held the shares in K&A on trust for the BVI holding company's shareholders, then the BVI holding company would only be a trustee of the shares in K&A, and the shares in K&A could not be said to be the BVI holding company's assets.[143] As a corollary, the petitioner's arguments on "sufficient connection" of the BVI holding company that were based on K&A were negated.[144]

90 *Great Choice* provides at least two takeaways. Firstly, the fact that the BVI holding company was nonetheless the registered shareholder of the shares in K&A,[145] and therefore held the *legal* title in the shares in K&A,[146] did not appear to hold any sway with the HKCA. With respect, although bare legal title as such is a weak form of connection with the jurisdiction, it is still nonetheless *some* form of connection. In particular, being the registered shareholder of shares still comes with it attendant rights in respect of a company, which may be of relevance in the substantive just and equitable inquiry. Therefore, whilst mere legal title to shares in a company may carry little weight on its own, it should not be totally disregarded. It could, together with other factors, constitute sufficient/substantial connection.

91 Secondly, and more importantly, *Great Choice* provides a cautionary tale for the legal practitioner. In this regard, it is not uncommon to hear of arrangements under which a foreign holding company is used to hold shares in locally-incorporated companies carrying on business locally. At some point, a minority shareholder in the foreign holding company may be desirous of collapsing this holding structure, in the sense that he may wish to directly hold the shares in the locally-incorporated company so that they may be freely dealt with by him.

92 In these circumstances, framing the minority shareholder's claim becomes crucial. On one hand, depending on the facts, it may be argued that the foreign holding company was merely holding the shares of the locally-incorporated company on trust for the shareholders of the foreign holding company, similar to the pleading in *Great Choice*. On the other

142 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [14].
143 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [16.4].
144 Such as the British Virgin Islands holding company holding assets in Hong Kong (*ie*, the shares in K&A) and deriving income from business in Hong Kong (*ie*, the business of K&A). See *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [15.2] and [16.4].
145 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [4.2].
146 *Re Great Choice Consultants Ltd* [2016] 3 HKLRD 854 at [15.2].

hand, depending on the facts, the minority shareholder may petition to wind up the foreign holding company on the just and equitable ground to have the shares in the locally-incorporated company distributed. In light of *Great Choice*, legal practitioners should be wary that these two claims may not be entirely compatible as the former trust-based argument erodes the element of "substantial connection" that needs to be satisfied for the latter just and equitable winding up petition.

B. Champ Prestige International Ltd v China City Construction (International) Co Ltd

93 In *Champ Prestige International Ltd v China City Construction (International) Co Ltd*[147] ("*Champ Prestige*"), a BVI company whose sole business activity was the development of land in the US was subject to a shareholders' just and equitable winding up petition in Hong Kong. The BVI company was a joint venture vehicle between the petitioning shareholder (itself a company incorporated in the BVI and an indirect wholly-owned subsidiary of a company listed on the Hong Kong Stock Exchange) and a Hong Kong company (which was a wholly-owned subsidiary of a Mainland China-incorporated company).[148]

94 On the issue of sufficient connection, the Hong Kong Court of First Instance ("HKCFI") cited *Yung Kee (HKCFA)* but reframed the inquiry as "whether the management and ownership have sufficient connection with Hong Kong to justify the court exercising its jurisdiction".[149] On the facts, the HKCFI declined to strike out the petition as it considered that the petition was not bound to fail on the ground of lack of sufficient connection. The HKCFI highlighted that the project in the US was dormant, whereas a majority of the directors were resident in Hong Kong, the petitioning shareholder was owned by a Hong Kong-listed company, and the other shareholder was a Hong Kong company. Ownership and management of the BVI company was therefore "more closely connected with Hong Kong than they [were] with either the United States or the British Virgin Islands".[150]

95 Two points may be made. Firstly, the HKCFI's reframing of the sufficient/substantial connection inquiry arguably goes too far. As noted

147 [2020] HKCFI 335.

148 *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 335 at [1] and [5].

149 *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 335 at [7].

150 *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 335 at [9].

above,[151] s 246(1)(*d*) of the IRDA (and the common law position)[152] refers to sufficient/substantial connection of the *company* with the jurisdiction. The HKCFI's approach in *Champ Prestige* completely changes the entity whose connection forms the subject of the inquiry. In *Yung Kee (HKCFA)*, the HKCFA's point was that the *presence* of shareholders in the jurisdiction was the most important factor,[153] and that the *presence* of directors in the jurisdiction was also a relevant factor.[154] The *presence* of shareholders and directors is a connection of the *company* with the jurisdiction, and ought not to be conflated with the connections of the *shareholders and directors* themselves with the jurisdiction.

96 Secondly, it is notable that the HKCFI considered the connection that the BVI company had, through a company two layers above it in the shareholding structure, with the jurisdiction where winding up was sought. As mentioned above, the HKCFI referred to, *inter alia*, the fact that the BVI company was partially owned by the petitioning shareholder that was itself owned by a company listed on the Hong Kong Stock Exchange. This goes one step further than *Yung Kee (HKCFA)*, where the HKCFA accepted that sufficient/substantial connection may be established through a parent company.[155]

97 This aspect of *Champ Prestige* is explicable on the basis that the HKCFI considered that the substantial or sufficient connection inquiry ought to be "considered in general and common sense terms", in that it was "not necessary to undertake a careful forensic analysis of the various components of a company's operations and ownership if it is fairly clear that, wherever the company may have been incorporated in commercial terms, it is fairly viewed as a Hong Kong business entity".[156]

98 In this author's view, rather than simply conceding that the inquiry is "considered in general and common sense terms", it may be better to rely on a properly-defined rule to circumscribe the entities through which a connection of the company with the jurisdiction may be established.[157] In any event, going further up or down the shareholding structure leads to the inference that there is an element of artificiality and

151 See paras 78–79 above.
152 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [21].
153 See para 58 above.
154 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [32].
155 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [34], where the Hong Kong Court of Final Appeal uses the phrase "established through its *shareholders* or subsidiaries" [emphasis added].
156 *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 335 at [8].
157 See para 86 above.

cherry-picking. For example, the HKCFI in *Champ Prestige* pointed to the petitioning shareholder being owned by a Hong Kong-listed company, and the other shareholder being a Hong Kong company. However, at the same time, it could equally be said that the petitioning shareholder was a BVI-incorporated company and the other shareholder was owned by a Mainland China-listed company.

99 The upshot is that whilst going further up or down the shareholding structure increases the links/connections to the jurisdiction where winding up is sought, it also increases the connections that exist with other jurisdictions. Although there should not be a comparison between jurisdictions,[158] such a situation of selectively highlighting the connections nonetheless casts doubt on whether there is truly "substantial connection" with the jurisdiction. Ultimately, it should not be necessary to trawl through hierarchies of shareholding structures in search of connections. After all, what should matter is the quality of the connection, and not the quantity.[159]

C. Re ACE International (BVI) Ltd

100 In *Re ACE International (BVI) Ltd*[160] ("*ACE International*"), a shareholder petitioned in Hong Kong to wind up a BVI company on the just and equitable ground, but the petitioner did not (also) seek relief under a Hong Kong unfair prejudice action because the requirement therein that the BVI company must have a place of business in Hong Kong was not met.[161] The issue that arose was whether the petition ought to be struck out on the basis that it was unreasonable for the petitioner to proceed in Hong Kong to seek exclusively a winding up order when an unfair prejudice action was available in the BVI (and not Hong Kong) that could grant more moderate and appropriate relief (for example, a buyout).[162]

101 On the facts, the HKCFI declined to strike out the petition because the petitioners gave an undertaking that in the event the court declined to grant a winding up order, they would not commence proceedings in the BVI seeking relief for unfair prejudice.[163] However, the

158 See paras 73–79 above.

159 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [70], albeit in the context of the *Spiliada* test for *forum non conveniens*.

160 [2020] HKCFI 498.

161 *Re ACE International (BVI) Ltd* [2020] HKCFI 498 at [2] and [6].

162 This issue was raised in *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [61], but the Hong Kong Court of Final Appeal did not substantively consider it.

163 *Re ACE International (BVI) Ltd* [2020] HKCFI 498 at [3].

HKCFI nonetheless provided its opinion on what would have been the position had the undertaking not been given:[164]

> [U]nless it can be demonstrated that the respondent [shareholders] would be unlikely to be able to finance the purchase of the petitioner's shares or there is some other compelling reason not to require the petitioner to litigate his complaint in the place of incorporation, the petitioner should be required to do so …
>
> … [I]f a company is incorporated in a jurisdiction such as the BVI, which has a similar unfair prejudice regime to Hong Kong and the company does not have a place of business here [to be able to invoke the Hong Kong unfair prejudice remedy] generally the dispute between shareholders should be litigated in the place of incorporation, because the petitioner is behaving unreasonably in seeking exclusively a winding-up.

102 In Singapore, a minority oppression action under s 216 of the Companies Act is not available to foreign companies,[165] much like how the Hong Kong unfair prejudice action was not available to the company in *ACE International*. Therefore, the question is whether an argument based on *ACE International* may be made in Singapore, *viz*, that a just and equitable winding up petition in Singapore in respect of a foreign company should not be permitted because the petitioner is behaving unreasonably in petitioning in Singapore when the foreign jurisdiction of incorporation may grant more moderate and appropriate relief.

103 In this author's view, *ACE International* can be distinguished. First, under s 125(3) of the IRDA, a Singapore court has the power to grant buyout relief in a just and equitable winding up petition, unlike the position in Hong Kong where winding up is the only form of relief.[166] Thus, if a petitioner prays in a Singapore petition for a buyout in respect of the foreign company,[167] it may be difficult to say that the petitioner is forgoing "more moderate and appropriate relief" in the foreign

164 *Re ACE International (BVI) Ltd* [2020] HKCFI 498 at [9]–[10].

165 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [81].

166 Hong Kong Standing Committee on Company Law Reform, *The Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance* (February 2000) at paras 8.2–8.7.

167 A buyout is likely available, although it is not clear. It may be argued that a just and equitable winding up petition in respect of a foreign company is a petition grounded on s 246(1)(*c*)(iii) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) and not one grounded on s 125(1)(*i*) for the buyout relief under s 125(3) to be available. However, there is nothing in the *Report of the Steering Committee for Review of the Companies Act* (June 2011), where the buyout remedy was recommended, which suggests that foreign companies should be precluded from buyout relief.

jurisdiction of incorporation if a buyout is the very same relief provided in the foreign jurisdiction of incorporation.

104 Second, Singapore does not have an equivalent provision to that in Hong Kong that allows the court to refuse to grant a winding up order because of the petitioner's unreasonableness in omitting to pursue an alternative or lesser remedy.[168] In Singapore, the position is that:[169]

> … a shareholder has a right to have recourse to all statutorily available remedies; the pursuit of a winding-up remedy in circumstances where the test for the grant of such an order is met cannot be said to be an abuse of process [for the petition to be struck out] even if more moderate remedies were available under [s 216 of the Companies Act].

Applying this principle, the fact that more moderate remedies may be available in the foreign jurisdiction of incorporation will not warrant the striking out of the Singapore petition. This is because a petitioner in Singapore is entitled to seek as grave a remedy as it so desires if the facts justify such a remedy, regardless of the availability of lesser remedies.

105 Nevertheless, *ACE International* may still be relevant in Singapore in so far as it stands for a broader proposition that the court will be cognisant of the potential reliefs available in the foreign jurisdiction of incorporation. The question that then arises is how such cognisance may be factored into the issue of abuse of process in just and equitable winding up petitions where the *same* relief is available via other means. The Singapore approach was set out in *Ting Shwu Ping v Scanone Pte Ltd*[170] ("*Ting Shwu Ping*"), and three points raised therein are considered.

106 Firstly, the Court of Appeal highlighted the key concern surrounding just and equitable winding up petitions: the commencement of such petitions subjects the company to statutory disabilities that are likely to cause damage to the company.[171] In contrast, minority oppression actions under s 216 of the Companies Act do not have such effect even if the primary relief sought is winding up.[172] Notwithstanding that, the court took the view that there is no abuse of process if a petitioner seeks

168 Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (HK) s 180(1A). Although worded slightly differently from s 125(2) of the UK Insolvency Act 1986 (c 45), it encapsulates the same principle: *Re Wong To Yick Wood Lock Ointment Ltd* [2001] 2 HKC 618 at 623. In *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [52], the Court of Appeal acknowledged that Singapore does not have any equivalent to s 125(2) of the UK Insolvency Act 1986.

169 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [52]–[53] and [58].

170 [2017] 1 SLR 95.

171 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [54].

172 *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [10].

winding up relief through a just and equitable winding up petition, even though winding up relief is similarly available through a s 216 minority oppression action. This is because a winding up order is an order of last resort under a s 216 minority oppression action. Even if an applicant is able to prove facts justifying a winding up order in a just and equitable winding up petition, he may not necessarily be entitled to such an order on the same facts under a s 216 minority oppression action.[173] In other words, the petitioner cannot be faulted for trying to obtain its desired remedy by invoking the route that may be more favourable to it.

107 In the context of foreign companies, the corollary is that if the standard for obtaining winding up relief under the foreign jurisdiction of incorporation's minority oppression/unfair prejudice action is equivalent to or lower than the standard for obtaining winding up relief under Singapore's just and equitable winding up petition, then there may be some basis for saying that there is abuse of process in commencing the just and equitable winding up petition in Singapore. This is because, unlike the case where the comparison is with the Singapore s 216 minority oppression action, the petitioner cannot argue that it is preferring a just and equitable winding up petition in Singapore because it provides an easier route to obtaining its desired relief. On the other hand, if the foreign jurisdiction of incorporation's minority oppression/unfair prejudice action subjects the company to (foreign) statutory disabilities when winding up relief is sought, then there is an additional argument for there being *no* abuse of process in bringing a just and equitable winding up petition in Singapore. This is because regardless of whether the action is brought in Singapore or in the foreign jurisdiction of incorporation, the company will be subject to some form of statutory disability.

108 Secondly, the Court of Appeal took the view that a petitioner who primarily seeks a buyout order in a just and equitable winding up petition, even though a buyout order is similarly available through a s 216 minority oppression action, may provide the court with a basis for inferring that the just and equitable winding up petition was preferred because the petitioner wished to harass/vex/pressure the company with the consequences that attend the presentation of a winding up application.[174] This is because the standard for obtaining a buyout order under both provisions is similar,[175] and so *prima facie* there is no other reason for preferring the just and equitable winding up petition. However, the court

173 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [58] and [60]; *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [38].

174 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [59].

175 Given that a buyout is not a remedy of last resort under a s 216 minority oppression action and the degree of unfairness required to invoke the just and equitable jurisdiction should be as onerous as that required to invoke the minority oppression

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nonetheless cautioned that abuse of process should not be automatically inferred as the inquiry is a fact-specific one.[176]

109 In the context of foreign companies, courts should be slower to infer that the petitioner intended to harass/vex/pressure the company and thereby find an abuse of process. This is because, unlike the domestic scenario where the choice is just between two domestic statutory provisions, there are various other factors that could influence a decision as to which of two forums to pursue legal action. These include, *inter alia*, broader litigation strategy, differences in legal procedure and location of assets. As long as the "substantial connection" requirement is satisfied, these considerations should be accepted as being legitimate. Indeed, if the only reason for preferring a just and equitable winding up petition in Singapore is costs or convenience, that too should be entirely legitimate because that is purportedly one of the reasons why just and equitable winding up petitions in respect of foreign companies is permitted.[177] That said, shareholders could well be motivated by increased publicity of the action in Singapore where the shareholders reside, especially when the offshore jurisdiction of incorporation is more discreet. This could conceivably constitute a form of harassment, vexation or pressure that may warrant a finding of abuse of process.

110 Finally, the Court of Appeal also caveated that the above points only applied when both a s 216 minority oppression action and a just and equitable winding up petition were available to the petitioner. If the facts do not justify the former but could be sufficient for the latter, the shareholder cannot be faulted for invoking the latter.[178]

111 In the domestic context, Lee has suggested that it is hard to think of circumstances (other than fault-neutral deadlocks) that would only satisfy a just and equitable winding up petition but not a s 216 minority oppression action.[179] In the context of foreign companies, it is likely that this caveat by the Court of Appeal will play a greater role. Given that the comparison is between two different systems of law, there will likely be greater differences between the causes of action and therefore more factual scenarios that may fall within the ambit of one but not the other. Notably, the fact that a petitioner prefers Singapore because the facts do not grant him relief under the foreign jurisdiction of incorporation should

action. See *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [37] and *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [59].

176 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [59].

177 See para 72 above.

178 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [61].

179 Lee Pey Woan, "The Minority Shareholder's Statutory Exits" [2007] Sing JLS 184 at 195.

not *per se* constitute an abuse of process. This is because the petitioner is indeed seeking a remedy that is available under the law (in Singapore) and not using the process of the Singapore court for a collateral object.[180]

V. Just and equitable ground – Identical for foreign and local companies?

112 Hitherto, this article has proceeded on the basis that once the sufficient/substantial connection test is satisfied, the substantive just and equitable ground for winding up is identical for both locally-incorporated companies and foreign companies.[181] In other words, s 246(1)(*c*) of the IRDA is no different from s 125(1)(*i*) of the IRDA, and both refer to the approach contained in the line of cases that originates from the House of Lords' decision in *Ebrahimi v Westbourne Galleries Ltd*[182] ("*Ebrahimi*"). The grounds for winding up include, *inter alia*, loss of substratum, deadlock in management, breakdown of trust and confidence between shareholders, loss of confidence in directors on account of lack of probity in the conduct or management of the company's affairs, shareholders' exclusion from management, and the company's business being carried on in a fraudulent manner.[183]

113 In *Yung Kee (HKCFA)*, the HKCFA did not expressly consider this issue; it simply proceeded to state the law in the line of cases originating from *Ebrahimi* after finding that there was sufficient connection.[184] Subsequent Hong Kong cases concerning purely domestic companies have gone on to apply *Yung Kee (HKCFA)*'s exposition of the law on the substantive just and equitable ground.[185] Commentators take the view that the substantive just and equitable ground is essentially the same regardless of whether the company in question is locally incorporated or foreign.[186]

114 In this author's view, while the substantive just and equitable ground for winding up foreign companies is *generally* the same as that for locally-incorporated companies (*ie*, they both refer to the line of cases originating from *Ebrahimi* and the grounds developed therefrom), there

180 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95 at [53].
181 See para 43 and n 64 above.
182 [1973] AC 360.
183 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] SGHC 137 at [58].
184 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [43]–[46].
185 *China Habit Ltd v Health Links Development Ltd* [2018] HKCFI 1703 at [78].
186 Raymond Siu *et al*, "*Re Yung Kee Holdings Ltd*" [2017] 28(7) ICCLR 265 at 268; Ian F Fletcher QC, *The Law on Insolvency* (Sweet & Maxwell, 5th Ed, 2017) at para 30-026.

may be slight differences in its *application*. This is somewhat hinted at in *Yung Kee (HKCFA)*, where the HKCFA noted that "[i]n the case of a shareholder's petition on the just and equitable ground, the question is whether, having regard to all the circumstances, *including the fact that the company is incorporated in another jurisdiction*, it is just and equitable that the company should be wound up in Hong Kong"[187] [emphasis added].

115 As discussed above,[188] one significant concern with winding up a foreign company on the just and equitable ground is that it effectively "circumvent[s] the law of the state of incorporation",[189] as a different governing law (from what parties had voluntarily adopted and approved) is applied to determine whether said company should be wound up. It is submitted that this concern can be reflected in the substantive just and equitable ground itself, even if these concerns do not justify a requirement for a more stringent connection with the jurisdiction where winding up is sought (*per Yung Kee (HKCFA)*).[190] Thus, in determining whether to grant relief, the court may have regard for whether the law of incorporation has a similar just and equitable ground for winding up, and whether there are any differences in application. By doing so, the court can at least ameliorate the above-mentioned concerns.

116 For example, under Singapore law, legitimate expectations based on "informal" and "implied" understandings may be given effect to notwithstanding the absence of a quasi-partnership.[191] In contrast, even if foreign jurisdictions have a just and equitable ground for winding up, they may require a quasi-partnership before such legitimate expectations may be given effect to. A shareholder petitioning in Singapore on the basis of "informal" and "implied" understandings outside of a quasi-partnership situation is arguably trying to impose on a respondent shareholder a standard of conduct that is different from what parties had envisaged (*ie*, the standard under the law of incorporation, which parties had voluntarily adopted). A question may therefore arise as to whether the requisite "unfairness"[192] to justify the grant of relief is truly met, especially if the respondent shareholder may have been entirely compliant with the standard under the law of incorporation the whole time.

117 Indeed, Singapore cases have demonstrated cognisance of whether the law of incorporation provides similar grounds before

187 *Kam Leung Sui Kwan v Kam Kwan Lai* [2015] HKCFA 79 at [30].
188 See paras 42–47 above.
189 *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313 at [45] and [41].
190 See paras 38–57 above.
191 Alan K Koh, Dan W Puchniak & Tan Cheng Han SC, "Company Law" (2019) 20 SAL Ann Rev 198 at paras 9.61–9.63.
192 *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827 at [31].

granting relief in Singapore. In *Lim Chee Twang*,[193] the High Court in granting a buyout order in respect of foreign companies on the basis of minority oppression was careful to note that both BVI law and Hong Kong law, which were the respective laws of the states of incorporation of the companies, also had equivalent minority oppression provisions that catered for a buyout.[194]

VI. Conclusion

118 In summary, *Yung Kee (HKCFA)* and the subsequent Hong Kong decisions provide useful guidance for the Singapore position, notwithstanding the slight differences in the statutory frameworks of Singapore and Hong Kong. However, several aspects are noteworthy.

119 As regards *Yung Kee (HKCFA)*, it is arguable that the HKCFA did not give sufficient weight to choice of law considerations. It is inappropriate to characterise the "sufficient connection" inquiry as a natural forum/*forum non conveniens* analysis. Connections through related entities should only be permitted if the related entity plays a material role in the complaints raised in the just and equitable ground for winding up.

120 As regards the subsequent Hong Kong decisions, *Great Choice* raises the issue of the connection of bare legal interests and provides a cautionary tale in framing a minority shareholder's claim. *Champ Prestige* is arguably an example of a court going too far in accepting tenuous connections with the jurisdiction where winding up is sought. *ACE International* provides insights into how abuse of process in just and equitable winding up petitions, as set out in *Ting Shwu Ping*, may be assessed when a foreign company is involved.

121 Finally, as regards the substantive just and equitable ground, its application may be slightly different when a foreign company is involved as the court may have regard for the law of incorporation in assessing whether the requisite "unfairness" is met.

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193 The facts of which have been set out at para 69 above.
194 *Lim Chee Twang v Chan Shuk Kuen Helina* [2010] 2 SLR 209 at [148].