

International Multiple Derivative Actions

King Fung Tsang*

ABSTRACT

This Article explores two choice of law issues in international multiple derivative actions: (1) the choice of substantive law that should govern multiple derivative actions and (2) the characterization of different aspects of the multiple derivative actions between substantive and procedural laws. After a comparison of choice of law approaches among various common law jurisdictions, the author advocates that the first choice of law issue—the substantive law to be applied to the action—should be governed by the law with the closest connections to the multiple derivative actions. This is the only practical choice given the complex nature of international multiple derivative actions. Regarding the second choice of law issue, the same concern on practicality also demands that the leave requirement, if present, should be characterized as procedural. This will minimize the occasions to have more than one law governing the same multiple derivative action. The application of both of these proposals would make multiple derivative actions more accessible to deserving minority shareholders by promoting flexibility regarding the governing law.

TABLE OF CONTENTS

I.	INTRODUCTION	76
II.	MULTIPLE DERIVATIVE ACTIONS	79
	A. <i>Foss v. Harbottle</i>	79
	B. <i>Holmes v. Camp</i>	81
	C. <i>Waddington Ltd. v. Chan Chun Hoo Thomas</i>	83
	D. <i>Universal Project Management Services Ltd. v. Fort Gilkicker Ltd. and Others</i>	83
III.	CHOICE OF LAW IN MULTIPLE DERIVATIVE ACTIONS	85
	A. <i>Which Country's Law?</i>	86
	1. The Law of the Place of Incorporation of the Subsidiary	90
	2. The Law of the Place of Incorporation of the Parent Company	93
	3. Both Laws of the Places of Incorporation ...	97
	4. The Law with the Closest Connections	98
	B. <i>Substantive or Procedural?</i>	103
	1. All Procedural	104
	2. Some Substantive, Some Procedural	106
	3. All Substantive	111

	a. United States.....	112
	b. British Virgin Islands	114
	c. Hong Kong	118
IV.	CONCLUSION	119

I. INTRODUCTION

Do multiple derivative actions help minority shareholders in common law jurisdictions? The answer appears to be in the affirmative, particularly after the English Court of Appeal’s decision in *Universal Project Management Services Ltd. v. Fort Gilkicker Ltd.*¹ In that case, for the first time in England, the court stated clearly that multiple derivative actions were allowed under English law.² Shareholders of holding companies can thus bring derivative actions on behalf of subsidiaries despite not owning shares directly at the subsidiary level.³

England is certainly not the first jurisdiction to recognize multiple derivative actions. In fact, multiple derivative actions have been recognized in the United States for more than a century, since *Holmes v. Camp* was decided in 1917.⁴ Canada, Australia, New Zealand, Singapore, and Hong Kong had also recognized multiple derivative actions prior to *Fort Gilkicker*.⁵ Still, *Fort Gilkicker* is expected to further promote multiple derivative actions in other common law jurisdictions, such as the British Virgin Islands (BVI), that have yet to explicitly recognize the device.⁶

* Associate Professor, Faculty of Law, The Chinese University of Hong Kong, LL.M., J.D. (Columbia), S.J.D. (Georgetown). The author would like to thank Professor Guangjian Tu and Dr. Rita Cheung for their invaluable insights on the subject and their suggestions on the early ideas of this Article. The author would also like to thank Professor Hisashi Harata, Alan Koh and Samantha Tang for their helpful comments on the topic.

1. *Universal Project Mgmt. Servs. Ltd. v. Fort Gilkicker Ltd.* [2013] EWHC (Ch) 348, [2013] Ch 551 (Eng.) [hereinafter *Fort Gilkicker*].

2. *Id.* ¶ 44.

3. Multiple derivative actions may be defined in the words of Judge Briggs “[C]ases in which the court recognized the conferral of locus standi to pursue the company’s cause of action not upon one of its members, but upon one or more members of its holding company, where the holding company was itself subject to the same wrongdoer control as the company.” *Id.* ¶ 21.

4. *Holmes v. Camp*, 180 A.D. 409 (N.Y. App. Div. 1917); see also *U.S. Lines, Inc. v. U.S. Lines Co.*, 96 F.2d 148 (2d Cir. 1938).

5. See *Fort Gilkicker* [2013] EWHC (Ch) 348 [49], [2013] Ch 551, 564 (Eng.) (the recognition of multiple derivative action “ensures that English company law runs in this respect in harmony with the laws of Hong Kong, Singapore, Canada, Australia and New Zealand, all of which have, albeit by different methods, ensured that injustice of the type described by Lord Millett can properly be addressed.”).

6. See [2017] HKEC 1164, para. 11 (it is expected that *Fort Gilkicker* will influence the BVI’s court’s decision in recognizing multiple derivative actions); see also *TIPP Investments PCC v. Chagala Group Ltd.*, (2016) Claim No. BIVHC (COM) 2016/102, ¶¶ 63, 66 (E. Caribbean Sup. Ct., H.C.) (Virgin Is.) (declining to grant summary judgment where defendants argued that no double derivative claim could exist, and reasoning that “in the light of [*Fort Gilkicker*] and the decision of the UK Supreme

The decision in *Fort Gilkicker* was no doubt driven by the potential injustice that might arise if multiple derivative actions were not allowed. Commenting on the lack of multiple derivative actions prior to *Fort Gilkicker*, Lord Millett said that had multiple derivative actions

come before an English court, the case must have been dismissed in limine, and for the first time for more than 150 years an alleged injustice would be without redress. The moral for would-be fraudsters is simple; choose an English company and be careful to defraud its subsidiary and not the company itself.⁷

Having recognized multiple derivative actions, this loophole was closed by the court in *Fort Gilkicker*, which believed that English law must be more flexible to address the injustice.⁸ This flexible approach is at the core of multiple derivative actions among common law jurisdictions. For example, the Supreme Court of Illinois explained that the multiple derivative action was essential because “a single derivative action on behalf of the subsidiary may only be maintained by a shareholder of record of the subsidiary . . . [and a] shareholder of record in the holding company would, therefore . . . be without remedy, even where . . . the holding company is the wrongdoer.”⁹

Thus, England is developing its multiple derivative action regime along the lines of other Anglo-American jurisdictions by taking a more pragmatic approach to deal with the ever more complicated structure of corporate groups. This development is significant, especially taking into account the increasing use of special purpose vehicles set up in offshore tax havens.¹⁰

However, this pragmatic approach may meet problems in the international context when the multiple derivative action involves a foreign company and thus the inevitable issue of choice of law arises. For example, in a multiple derivative action where the parent company is incorporated in England but its subsidiary is incorporated in the British Virgin Islands, which country’s law shall be the governing law? Should the English court apply the law of the place of incorporation of the parent (English law) or that of the subsidiary (BVI law)? Or should the court apply a third country’s law? If the governing law bars or substantially limits multiple derivative actions, then the shareholder will not be able to make use of the device as in the purely domestic case. Apart from the question of the choice of law approach on the substantive law of a multiple derivative action, the court will also need to decide the characterization of different aspects of the multiple

Court in *Roberts (FC) v. Gill & Co.* I do not see that there is any inherent objection in principle to a double derivative trust claim”).

7. *Fort Gilkicker* [2013] EWHC (Ch) 348 [40], [2013] Ch 551, 556 (Eng.).

8. *Id.* ¶ 49; see also *Wallersteiner v. Moir* (No. 2) [1975] QB 373 (Lord Denning MR) (Eng.) (“In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.”).

9. *Brown v. Tenney*, 125 Ill. 2d 348, 356 (Ill. 1988).

10. See generally William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081 (2018).

derivative action. Which aspects of the multiple derivative action should be characterized as substantive, and therefore be governed by the governing law? Which aspects of the multiple derivative action should be characterized as procedural, and therefore governed by the *lex fori*? These latter questions fall into the classic issue of characterization between substantive and procedural matters.¹¹

These choice of law questions exist in a single derivative action but will be exacerbated in international multiple derivative actions. Common law jurisdictions have been inconsistent on these important questions. There are multiple conflicting approaches being applied by the US courts.¹² Other jurisdictions, like England, have yet to consider these questions in the context of multiple derivative actions. Nor have they attracted the attention of commentators.¹³

Recent English cases, particularly *Novatrust Ltd. v. Kea Investments Ltd.*, suggest, however, that the English court will take a formalistic approach on these questions, which would be bad news for prospective minority shareholders.¹⁴ In *Novatrust*, the English court held that the plaintiff shareholder of a BVI company must seek leave from the BVI court before initiating a derivative action in England, as required by BVI law, which was the law of the place of incorporation.¹⁵ Since the plaintiff shareholder did not apply for such leave beforehand, its action was denied.¹⁶ Although *Novatrust* was not a multiple derivative action, the rulings—namely (1) the mechanical application of the law of the place of incorporation to the derivative action and (2) treating the leave requirement as substantive rather than procedural—have set difficult roadblocks to multiple derivative actions in the future.¹⁷ Considering that England is the latest common law jurisdiction to recognize multiple derivative actions and has yet to make a definite decision on the relevant choice of law approaches, it provides the best testing ground for the different choice of law approaches among common law jurisdictions.

This Article discusses how the formalistic choice of law rules will adversely impact the effectiveness of international multiple derivative actions by reviewing recent precedents from common law jurisdictions, most notably England, the United States, and Hong Kong. Comparison of the choice of law approaches among common law jurisdictions is particularly relevant as derivative actions and multiple derivative

11. DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS para. 2-016 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (AM. LAW INST. 1971).

12. *See* sources cited *infra* note 82 and Appendix I, Table 2.

13. *Cf.* Yaad Rotem, *The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation—Corporate Law in Conflict*, 46 CORNELL INT'L L.J. 321 (2013) (discussing choice of law issues on derivative action generally but not multiple derivative action).

14. *Novatrust Ltd. v. Kea Investments Ltd.* [2014] EWHC (Ch) 4061 (Eng.).

15. *Id.*

16. *Id.*

17. *See infra* Part III.B.

actions are both uniquely designed as shareholder protection devices in common law jurisdictions.¹⁸ These jurisdictions have long been influencing one another in their developments in both derivative actions and conflict of laws.

As will be elaborated below, it is suggested that international multiple derivative actions call for a more pragmatic and flexible approach in regard to choice of law, just like the approach applied in *Fort Gilkicker* when the court recognized multiple derivative actions in a purely domestic case. More specifically, common law jurisdictions should make an exception to the application of the law of the place of incorporation and consider applying the law with the closest connections to an international multiple derivative action. They should also characterize the application for leave of a foreign court as a foreign procedural matter. In order to investigate the choice of law issues and proposals, Part II first tracks the development of multiple derivative actions in common law jurisdictions. Part III then examines the two choice of law issues and the potential approaches, respectively. Part IV concludes the Article.

II. MULTIPLE DERIVATIVE ACTIONS

The development of multiple derivative actions in common law jurisdictions can be traced to four landmark cases from England, the United States, and Hong Kong.

A. *Foss v. Harbottle*

Derivative actions first took root in common law as an exception to *Foss v. Harbottle*, an English case decided in 1843.¹⁹ The general rule of *Foss v. Harbottle* is that the company, not the shareholders, is the proper plaintiff in claims for wrongs done to it.²⁰ This is sometimes referred to as the “proper plaintiff rule.”²¹ However, the court did recognize that there might be a need for an exception in appropriate cases for the interest of justice since “the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.”²² The English court subsequently developed a number of exceptions, with the

18. See P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 DUKE L.J. 1, 71 (1985) (“As in many civil law countries, an action on behalf of the corporation can be brought only if a majority of the shareholders so decide.”).

19. *Foss v. Harbottle* (1843) 67 Eng. Rep. 189.

20. See *Edwards v. Halliwell*, [1950] 2 All E.R. 1064, 1066–67 (Eng.) (“[T]he proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself.”).

21. See, e.g., *Oates v Consol. Capital Serv. Party Ltd.* (2009) 257 ALR 558, ¶ 124 (Austl.).

22. *Foss* (1843) 67 Eng. Rep. 189, 203.

most notable one being the “fraud on the minority” exception.²³ Under this exception, a shareholder must satisfy two litigation conditions, namely (1) that a fraud, which is a wrong done to the company not the shareholder, has been perpetrated, and (2) that the company is controlled by the wrongdoers.²⁴ Then, “the rule is relaxed in favor of the aggrieved minority who are allowed to bring what is known as a minority shareholders’ action on behalf of themselves and all others.”²⁵ This exception is essential for the shareholders since otherwise “the wrongdoers themselves, being in control, would not allow the company to sue.”²⁶

Clearly, this is a pragmatic compromise to the formalistic concern of the separate legal personality of a corporation.²⁷ The court’s willingness to inject flexibility is even more impressive given that *Foss v. Harbottle* was decided in 1843, more than fifty years before the landmark case of *Salomon v. Salomon*²⁸ and one year before the Joint Stock Companies Act, the first modern companies act in England.²⁹ At that time, despite still being years before *Salomon*, the concept of separate legal personality was already well established.³⁰ Therefore, unsurprisingly, the court decided the general rule that the company is the proper plaintiff. While the fraud on the minority exception has been much criticized for being overly burdensome for minority shareholders, one cannot deny the exception was indeed a flexible innovation at the time of *Foss v. Harbottle*.³¹

After *Foss v. Harbottle*, one of the difficulties was the level of proof required for a plaintiff to prove the aforementioned litigation

23. See *Edwards v. Haliwell* [1950] 2 All E.R. 1064, 1067 (Eng.) (recognizing four exceptions, namely (1) *ultra vires* and illegality, (2) special majority, (3) personal rights, and (4) fraud on the minority; the fraud on the minority exception has always been said to be the only true exception).

24. It is not the purpose of this article to discuss the substantive law on the fraud on the minority exception. For a classic discussion on the exception, see generally K.W. Wedderburn, *Shareholders’ Rights and the Rule in Foss v. Harbottle (continued)*, 16 CAMBRIDGE L.J. 93 (1958).

25. See *Edwards* [1950] 2 All ER at 1067.

26. *Id.*

27. See PAUL L. DAVIES, *GOWER’S PRINCIPLES OF MODERN COMPANY LAW* 660 (6th ed. 1997) (“[T]he law must balance the need to take decisions on corporate matters collectively and the equally important desideratum of not permitting errant directors to stifle suits arising out of their own wrongdoing.”).

28. *Salomon v. Salomon* [1897] AC 22 (HL) (firmly establishing the concept of separate legal personality and remains arguably the most important case in the company law of commonwealth jurisdictions).

29. See K.W. Wedderburn, *Shareholders’ Rights and the Rule in Foss v. Harbottle*, 15 CAMBRIDGE L.J. 194, 195 (1958).

30. *Id.* at 196.

31. See, e.g., J.H. Farrar, *Ownership and Control of Listed Public Companies: Revising or Rejecting the Concept of Control*, in *COMPANY LAW IN CHANGE* 39, 54 (B.G. Pettet ed., 1987) (pointing out that the difficulties in bringing a derivative action for fraud on the minority will “still prevent it from being an effective way of monitoring management in a public listed company”); L.S. Sealy, *Problems of Standing, Pleading and Proof in Corporate Litigation*, in *COMPANY LAW IN CHANGE*, *supra* at 1–2.

conditions for a derivative action.³² In *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.*, the Court of Appeal found a halfway-house solution and added a new procedural step; the plaintiff must prove a *prima facie* case that he has satisfied the litigation conditions to continue the derivative action if it is challenged by the defendant.³³ Effectively, this created a leave requirement for a derivative action under the common law. In fact, this led subsequently to the introduction of Order 15, Rule 12A to the Rules of the Supreme Court, under which the plaintiff must apply to the court for leave to continue the action if the defendant has given notice of an intention to defend.³⁴

B. *Holmes v. Camp*

The flexible approach to address injustice imposed upon minority shareholders of *Foss v. Harbottle* was emphasized by the Appellate Division of the New York Supreme Court's decision in *Holmes v. Camp*.³⁵ Citing from *Foss v. Harbottle*, the court held that the multiple derivative action "is an invention of equity, and stockholders are allowed to resort to it, notwithstanding a lack of direct interest in the relief sought."³⁶ This is the first clear statement of the recognition of the multiple derivative action in the United States, and probably for the rest of the world.³⁷

Holmes led to the subsequent recognition of multiple derivative actions in other US states. To date, multiple derivative actions are generally recognized in the United States with plenty of precedents.³⁸

32. See *Prudential Assurance Co. Ltd. v. Newman Indus. Ltd.* [1982] Ch 204 at 219 (Eng.) ("If, upon such an application, the plaintiff can require the court to assume as a fact every allegation in the statement of claim, as in a true demurrer, the plaintiff will frequently be able to outmanoeuvre the primary purpose of the rule in *Foss v. Harbottle* by alleging fraud and 'control' by the fraudster. If on the other hand the plaintiff has to prove fraud and 'control' before he can establish his title to prosecute his action, then the action may need to be fought to a conclusion before the court can decide whether or not the plaintiff should be permitted to prosecute it. In the latter case the purpose of the rule in *Foss v. Harbottle* disappears.")

33. *Id.* at 221–22 ("In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*.").

34. Rules of Supreme Court (Amendment) 1994 ¶ 4, <http://www.legislation.gov.uk/ukSI/1994/1975/made> [<https://perma.cc/9C8Q-MR7W>] (archived Nov. 30, 2018) (since replaced with the Civil Procedure Rules).

35. *Holmes v. Camp*, 180 A.D. 409, 412 (N.Y. App. Div. 1917).

36. *Id.* at 412 (citing *Foss v. Harbottle* (1843) 67 Eng. Rep. 189, 203).

37. *Id.* at 411 ("This question is one of first impression in this state, and so far as we are able to learn has never been judicially discussed elsewhere.").

38. See *infra* Appendix I, Table 1, summarizing fifty precedents identified by the author through searches in Westlaw using search phrases "multiple derivative action" and "double derivative action." These cases include *Lambrecht v. O'Neal*, 504 Fed.Appx.23 (2d Cir. 2012); *Fagin v. Gilmartin*, 432 F.3d 276 (3d Cir. 2005); *Eckelkamp v. Beste*, 515 F.3d 863 (8th Cir. 2002); *Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998); *Goldstein v. Groesbeck*, 142 F.2d 422 (2d Cir. 1944); *United States Lines, Inc. v.*

Internationally, *Holmes* has also been influential. The Hong Kong Court of Final Appeal, the highest court in Hong Kong, recognized multiple derivative actions in *Waddington Ltd. v. Chan Chun Hoo Thomas*,³⁹ where Lord Millett cited *Holmes*: “The free use of holding companies which has grown up in recent years would prevent the righting of many wrongs if an action like the present might not be maintained by a stockholder of a holding company.”⁴⁰ The Hong Kong court had no hesitation in following *Holmes*, saying that “[i]f this was true of New York in 1917 it is certainly no less true of Hong Kong in 2008.”⁴¹

United States Lines Co., 96 F.2d 148 (2d Cir. 1938); Blasband v. Rales, 971 F.2d 1034 (3d Cir. 1992); Fishman v. Philadelphia Fin. Life Assurance Co., 2016 WL 2347921 (S.D.N.Y. 2016); Refco Grp. Ltd., LLC v. Gantor Fitzgerald, L.P., 2014 WL 2610608 (S.D.N.Y. 2014); In re Capital One Derivative S'holder Litig., 979 F.Supp.2d 682 (E.D. Va. 2013); Yale M. Fishman 1998 Ins. Tr. v. Gen. Am. Life Ins. Co., 2013 WL 842642 (S.D.N.Y. 2013); In re Harbinger Capital Partners Funds Inv'r Litig., 2013 WL 5441754 (S.D.N.Y. 2013); In re Merrill Lynch & Co., Inc., Securities, Derivative and ERISA Litigation, 773 F. Supp. 2d 330 (S.D.N.Y. 2011); In re Bear Sterns Cos., Inc. Sec., Derivative, and ERISA Litig., 763 F. Supp. 2d 423 (S.D.N.Y. 2011); Reiniche v. Martin, 2010 WL 4386700 (N.D. Ill. 2010); In re Countrywide Fin. Corp. Derivative Litig., 581 F. Supp. 2d 650 (D. Del. 2008); Mohnot v. Bhansali, 2002 WL 603049 (E.D. La. 2002); Silver v. Allard, 16 F. Supp. 2d 966 (N.D. Ill. 1998); Olesh v. Dreyfus Corp., 1995 WL 500491 (E.D.N.Y. 1995); Heine on behalf of Comput. Assocs. Intern., Inc. v. Soros, 1994 WL 613304 (S.D.N.Y. 1994); West v. West, 825 F. Supp. 1033 (N.D. Ga. 1992); Untermeyer v. Valhi, Inc., 665 F. Supp. 297 (S.D.N.Y. 1987); Fischer v. CF & I Steel Corp., 599 F. Supp. 340 (S.D.N.Y. 1984); Kennedy v. Nicastro, 517 F. Supp. 1157 (N.D. Ill. 1981); Gadd v. Pearson, 351 F. Supp. 895 (M.D. Fla. 1972); Issner v. Aldrich, 254 F. Supp. 696 (D. Del. 1966); Matthies v. Seymour Mfg. Co., 23 F.R.D. 64 (D. Conn. 1958); Saltzman v. Birrell, 78 F. Supp. 778 (S.D.N.Y. 1948); Hirshhorn v. Mine Safety Appliances Co., 54 F. Supp. 588 (W.D. Pa. 1944); Wachsmann v. Tobacco Products Corp. of N.J., 42 F. Supp. 174 (D.N.J. 1941); Mueller v. Macban, 62 Cal.App.3d 258 (Cal. Ct. App. 1976); Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A. 34 A.3d 1074 (Del. 2011); Lambrecht v. O'Neal, 3 A.3d 277 (Del. 2010); Sternberg v. O'Neil, 550 A.2d 1105 (Del. 1988); Hamilton Partners, L.P. v. Englard, 11 A.3d 1180 (Del. Ch. 2010); Kostolany v. Davis, 1995 WL 662683 (Del. Ch. 1995); Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982); Leibert v. Grinnell Corp., 194 A.2d 846 (Del. Ch. 1963); Flocco v. State Farm Mut. Auto. Ins. Co., 752 A.2d 147 (D.C. 2000); Brown v. Tenney, 125 Ill.2d 348 (Ill. 1988); Tomran, Inc. v. Passano, 862 A.2d 453 (Md. Ct. Spec. App. 2004); Prof'l. Mgmt. Assoc., Inc. v. Coss, 598 N.W.2d 406 (Minn. Ct. App. 1999); Pessin v. Chris-Craft Industries, Inc, 181 A.D.2d 66 (N.Y. App. Div. 1992); Silver v. Chase Manhattan Bank, 355 N.Y.S.2d 387 (N.Y. App. Div. 1974); Kaufman v. Wolfson, 1 A.D.2d 555 (N.Y. App. Div. 1956); Holmes v. Camp, 180 A.D. 409, 412 (N.Y. App. Div. 1917); Lait v. Leon, 37 Misc.2d 800 (N.Y. Sup. Ct. 1962); Rhode Island Hops. Tr. Co. v. Claude Neon, Inc., 109 N.Y.S.2d 834 (N.Y. Sup. Ct. 1951); Sneed v. Webre, 465 S.W.3d 169 (Tex. 2015); Neff v. Brady, 527 S.W.3d 511 (Tex. App. 2017); Haberman v. Washington Pub. Power Supply Sys., 109 Wash.2d 107 (Wash. 1987).

39. *Waddington Ltd. v. Chan Chun Hoo Thomas et al.* [2008] H.K.C.F.A.R. 1498 (C.F.A.).

40. *Holmes*, 180 A.D. at 412.

41. *Id.*

C. Waddington Ltd. v. Chan Chun Hoo Thomas

In *Waddington*, a shareholder of a Bermudan company sought to bring a derivative action on behalf of a BVI subsidiary and a BVI subsidiary.⁴² The defendant argued, *inter alia*, that a multiple derivative action should not be allowed since a company is a separate legal person, and the directors owed no fiduciary duties to the shareholders of its parent company.⁴³ This is a formalistic argument.⁴⁴ Lord Millett rejected this approach in favor of a pragmatic approach.⁴⁵ To him, what mattered was “whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it.”⁴⁶ Since any depletion of a subsidiary’s assets invariably causes indirect loss to the shareholders of the parent company, the answer was plainly “yes.”⁴⁷ He also explained that the recognition of multiple derivative actions did not require piercing the corporate veil.⁴⁸ Thus, there was a clear indication of Lord Millett’s strong belief in flexibility.

D. Universal Project Management Services Ltd. v. Fort Gilkicker Ltd. and Others

The English Parliament reformed the common law rule in the Companies Act 2006 (the 2006 Act).⁴⁹ Under this new section, minority shareholders no longer need to prove fraud and control. Instead, whether leave to continue the derivative action will be granted is subject to court discretion according to criteria set out in subsections 261–263 of the 2006 Act.⁵⁰

However, new problems soon found their way to the court in the form of multiple derivative actions. In *Fort Gilkicker*, the claimant was a member of a limited liability partnership (LLP) who sought to bring a derivative action on behalf of a wholly owned subsidiary of the LLP.⁵¹ Interpreting the 2006 Act, the court came to the conclusion that “the statutory language does not include a shareholder in a parent company

42. *Waddington* [2008] H.K.C.F.A.R. 1498 [¶¶ 35–44].

43. *Id.* ¶ 69.

44. Such a formalistic approach can be traced back to the landmark case, *Salomon v. Salomon* [1897] AC 22 (HL).

45. *Waddington* [2008] H.K.C.F.A.R. 1498 [¶ 74].

46. *Id.*

47. *Id.*

48. *Id.* ¶ 65 (“In some [US] cases the subsidiary has been treated as a mere instrument, agent or alter ego of the parent company; in others the corporate structure has been described as a fiction or “specious and illusory device” allowing the court to pierce the corporate veil. In the absence of special circumstances it is not permissible to adopt such an approach in Hong Kong.”).

49. Companies Act, (2006), §§ 260–69 (Eng.).

50. *Id.* §§ 263(3)–(4).

51. *Universal Project Mgmt. Servs. Ltd. v. Fort Gilkicker Ltd.* [2013] EWHC (Ch) 348, Ch 551 (Eng.).

who is not a shareholder in the company the rights of which are being asserted,” with its clear wording limiting statutory derivative actions to direct shareholders only, and thus not to multiple derivative actions.⁵² Instead, the court held that (1) multiple derivative actions were allowed under common law, and (2) the common law rules survived the enactment of the 2006 Act.⁵³

For the first holding, the court followed Lord Millett’s judgment in *Waddington*. Citing *Waddington* extensively through the judgment, it is clear that the court’s recognition of multiple derivative actions under common law was influenced by Lord’s Millett’s emphasis on flexibility:

In my judgment the common law procedural device called the derivative action was, at least until 2006, clearly sufficiently flexible to accommodate as the legal champion or representative of a company in wrongdoer control a would-be claimant who was either (and usually) a member of that company or (exceptionally) a member of its parent company where that parent company was in the same wrongdoer control. I would not describe that flexibility in terms of separate forms of derivative action, whether headed “ordinary,” “multiple” or “double.” Rather it was a single piece of procedural ingenuity designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in *Foss v. Harbottle*.⁵⁴

The second holding that the common law rules survived the 2006 Act was more controversial. As highlighted by the court in *Fort Gilkicker*, academics were split on whether the common law derivative action was preserved by the 2006 Act.⁵⁵ In the end, the court was apparently motivated to close the gap in the law, affording no remedy to shareholders in holding companies of the corporate groups, and decided that the common law rule survived the 2006 Act.⁵⁶ In particular, the court emphasized the need to address the injustice that would result from nonrecognition of multiple derivative actions.⁵⁷ In the words of Justice Briggs:

I reach this conclusion with some relief. Not only does it address the manifest scope for real injustice which the abolition of any derivative action by members of a holding company would have entailed, and as graphically described by Lord Millett in his article, but it ensures that English company law runs in this respect in harmony with the laws of Hong Kong, Singapore, Canada, Australia and New Zealand, all of which have, albeit by different methods, ensured that injustice of the type described by Lord Millett can properly be addressed.⁵⁸

52. *Id.* at 554.

53. *Id.* at 548.

54. *Id.* at 552–53.

55. *See id.* at 556 (“Academic commentary on the effect of the 2006 Act upon multiple derivative actions has been evenly divided.”).

56. *Id.* at 548.

57. *Id.* at 557.

58. *Id.*

Similarly, *Fort Gilkicker* also displayed the flexible approach by extending multiple derivative actions to an LLP.⁵⁹

Overall, *Fort Gilkicker* is at the forefront of the developments of the derivative regime in England, not only because it recognized multiple derivative actions but also because of the court's willingness to apply a flexible approach so as to do justice to minority shareholders whose interests may be jeopardized by the management's control.⁶⁰ The court thus valued flexibility over strict adherence to formalism. In the ever more complex world of corporations, this flexibility is essential for the ongoing relevance of corporate law to modern corporations. In this sense, *Fort Gilkicker* simply followed the underlying mandate of pragmatism that has existed from *Foss v. Harbottle*, *Holmes*, and *Waddington*.

III. CHOICE OF LAW IN MULTIPLE DERIVATIVE ACTIONS

After *Fort Gilkicker*, the English court has continued to recognize multiple derivative actions and the flexibility enshrined therein in such cases as *Novatrust*,⁶¹ *Bhullar v. Bhullar*,⁶² and *Abouraya v. Sigmund*.⁶³ *Abouraya* has particular relevance to the choice of law issue. In that case, a shareholder of a Hong Kong company sought to initiate a multiple derivative action against the director of an English subsidiary.⁶⁴ There was potentially a choice of governing law between Hong Kong law and English law.⁶⁵ However, despite the court's recognition that multiple derivative actions were viable in cases involving foreign holding companies, the choice of law aspect was not raised.⁶⁶ The court simply treated the case as a domestic one and

59. *Id.*

60. See Tan Cheng-Han, *Multiple Derivative Actions*, 129 L.Q.R. 337, 338–39 (2013) (“[T]he conclusion [in *Fort Gilkicker*] . . . has the merit of ensuring that an undesirable lacuna does not subsist in cases where a suitable minority shareholder of the wronged company is non-existent. This can arise not only in cases such as [*Fort Gilkicker*] where the subsidiary is wholly owned by its parent company and therefore there is only one shareholder, but also where the board and all the shareholders in a company together with those in control of a corporate shareholder of such company (which may or may not be the majority shareholder of the company) have perpetrated a wrong against the company and therefore have no desire for the company to protect its interests.”).

61. *Novatrust Ltd. v. Kea Investments Ltd.* [2014] EWHC (Ch) 4061 (Eng.).

62. *Bhullar v. Bhullar* [2015] EWHC (Ch) 1943 (Eng.).

63. *Abouraya v. Sigmund* [2014] EWHC (Ch) 277 (Eng.).

64. *Id.* ¶¶ 1–6.

65. *Id.* If the court applies the law of the place of incorporation of the parent company, Hong Kong law will be the governing law. However, if the court applies the law of the place of incorporation of the subsidiary, English law will be the governing law. *Id.*

66. *Id.* ¶ 13 (“In so far as a double derivative claim involves a member bringing a claim on behalf of a holding company, of which he is a member, as well as the subsidiary, it follows that the court has jurisdiction to entertain the claim notwithstanding that the holding company is a foreign company.”).

applied English law.⁶⁷ *Abouraya* does show that choice of law issues could easily arise in multiple derivative actions. In fact, these choice of law issues have been common in other jurisdictions. For example, in the United States, thirty-eight of the fifty multiple derivative actions surveyed involved choice of law issues (see Appendix I, Table 1).⁶⁸ The choice of law questions must therefore be addressed.

In multiple derivative actions, there are two particular issues relating to choice of law that deserve further discussion: (1) which country's law should apply to the right of the plaintiff in multiple derivative actions, and (2) which aspects of multiple derivative actions will be regarded as relating to the "right" and therefore be covered by the applicable law chosen in (1)?

Both of these issues can potentially raise additional hurdles to the plaintiff's right to make use of multiple derivative actions that involve foreign companies. Using the facts of *Abouraya* as an example, if only English law, but not Hong Kong law, allows multiple derivative actions, the choice of law issue will be outcome determinative.⁶⁹ On the other hand, even if Hong Kong law is to apply, the court could still apply English law, the *lex fori*, to the multiple derivative action if it characterizes the matter as procedural.

A. Which Country's Law?

Although there is no precedent dealing with choice of law in multiple derivative actions, English cases on choice of law in a single derivative action do lay down the framework for multiple derivative actions.

The starting point under English law is *Konamaneni v. Rolls Royce Industrial Power (India) Ltd.*⁷⁰ In this single derivative action, shareholders of an Indian company tried to bring a derivative action on behalf of the company against the defendants, who allegedly paid bribes to the managing director of the company in order to secure a power plant construction contract in India.⁷¹ The court was asked to

67. See *id.* ¶¶ 14–15. The court did not conduct any choice of law analysis throughout the case. It did, however, discuss the related jurisdictional perspective of the case. *Id.*

68. See *infra* Appendix I, Table 1.

69. This is for illustrative purpose only. As shown by *Waddington*, Hong Kong law of course recognizes multiple derivative action. In fact, after *Waddington*, the Companies Ordinance (Cap 622) has since been amended to accommodate multiple derivative action under the statutory regime. See Companies Ordinance, (2014) Cap. 622, 14–22, §§ 731–738 (H.K.). The Hong Kong statutory regime is similar to its English counterpart under Part 11 of the Companies Act 2006 which may in fact be more favorable to the minority shareholders since they will not be required to prove fraud and control. See *generally* *Waddington Ltd. v. Chan Chun Hoo Thomas et. al.* [2008] H.K.C.F.A.R. 1498 (C.F.A.).

70. *Konamaneni v. Rolls Royce Indus. Power (India) Ltd.* [2001] EWHC (Ch) 470, [2002] 1 WLR 1269 (Eng. & Wales).

71. *Id.* at 1272.

decide whether English law or Indian law was to be applied to the right to bring the derivative action.⁷²

The clear answer by Justice Collins, as he then was, was Indian law, the law of the place of incorporation.⁷³ He reached this conclusion by drawing upon the experiences of the US courts,⁷⁴ which were based on the “internal affairs” doctrine.⁷⁵ Under the doctrine, matters peculiar to the company and its insiders, such as shareholders and directors, are generally regarded as internal affairs to be governed by the law of the place of incorporation.⁷⁶ In particular, Justice Collins cited with approval *Batchelder v. Kawamoto*, a case decided by the United States Court of Appeals for the Ninth Circuit.⁷⁷

Quoting from *Batchelder*, Justice Collins stated that “[the] beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organised under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of incorporation.”⁷⁸ In other words, the law of the place of incorporation has the advantage of consistency, which in turn promotes certainty.⁷⁹ There is generally little doubt as to the country in which a company is incorporated.⁸⁰ This is to be contrasted against other choice of law rules, such as the law of the jurisdiction where the company’s “real seat” is located, which is the rule generally utilized by

72. *Id.* at 1282.

73. *Id.* at 1284.

74. *See id.* at 1283 (“The approach in these [US] cases is that the right of the shareholder to bring the derivative action is governed by the law of the state of incorporation, but that the wrongdoers may be sued in a state which has personal jurisdiction over them, but subject to the American principles of forum non conveniens. In the international context it has been held also that the right to bring a derivative action depends on the law of the place of incorporation.”).

75. The term “internal affairs” encompasses “those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.” *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081 (Del. 2011).

76. *See* Willis L. M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124 (1958) (“[M]atters peculiar to corporations are concerned primarily with the ‘internal affairs’ of the corporation or, stated in other words, with the relationships *inter sese* of the corporation, its directors, officers, and stockholders.”).

77. *Konamaneni*, [2001] EWHC (Ch) 470 [¶ 49] (citing *Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998)).

78. *Id.*

79. *See* Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV. L. REV. 1480, 1486–87 (2002) [hereinafter Harvard Note].

80. *See* Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”*, 57 CAMBRIDGE L.J. 165, 168–69 (1998) (“One of the major advantages of the place of incorporation theory in practice is its certainty. It is a relatively simple matter to discover where a corporation has been incorporated . . .”).

countries in Continental Europe.⁸¹ Apart from certainty, other justifications commonly argued for the internal affairs doctrine among US commentators include the incorporating state's interest and the implied consent by the shareholders.⁸² First, it has been argued that since it is the state of incorporation that created the company, that state will have a greater interest in having its law apply to the internal affairs of the company.⁸³ However, analysis on state interests has long been limited to the United States and has not been influential in English courts.⁸⁴ The implied-consent justification is more relevant. Since parties to these internal affairs all voluntarily join the company, it is fair to presume that they have all implicitly agreed to submit themselves to the law of the place of incorporation of the company.⁸⁵ With both the plaintiff shareholders and defendant directors being the corporate insiders, derivative action falls squarely into the domain of the internal affairs rule under the implied-consent justification.⁸⁶ This rationale can find support in the facts of *Konamaneni*. Most of the plaintiff shareholders and the director accused of taking bribes from the defendants were Indian.⁸⁷ The company was incorporated in India, and the disputed transaction was a power plant project in India.⁸⁸ In regard to the justifications of certainty and implied consent by the corporate insiders, *Konamaneni* can therefore be seen as no more than the application of this general choice of law rule to a derivative action.⁸⁹ Not surprisingly, *Konamaneni* has been approved and incorporated in *Dicey, Morris & Collins: The Conflict of Laws*,⁹⁰ the bible of English private international law edited by Lord Collins, and has been followed by subsequent cases in England, including *Base Metal Trading Ltd. v. Shamurin*,⁹¹ *Novatrust*,⁹² and most recently *Popely v. Popely*.⁹³

The only other candidate considered by Justice Collins was the law of the underlying claim, which in this case would likely be the

81. See Christian Kersting, *Corporate Choice of Law—A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 2 (2002).

82. See Harvard Note, *supra* note 79, at 1483 (terming the implied-consent justification “contractual justification” there). For other justifications, especially in relation to the application to pseudo-foreign corporations, see Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137, 138–43 (1955).

83. See Harvard Note, *supra* note 79, at 1483.

84. P.M. NORTH & J.J. FAWCETT, *CHESHIRE, NORTH & FAWCETT, PRIVATE INTERNATIONAL LAW* 35 (12th ed. 1992).

85. See Harvard Note, *supra* note 79, at 1483.

86. See Reese & Kaufman, *supra* note 76, at 1125 n.29 (regarding derivative action as matters peculiar to corporations).

87. Two of the claimant shareholders were residents in India. More importantly, the shareholder who funded the litigation, was a non-resident Indian. See *Konamaneni v. Rolls Royce Indus. Power (India) Ltd* [2001] EWHC (Ch) 470 [¶ 1], [¶¶ 8-10] (Eng.).

88. *Id.* ¶ 1.

89. See *id.* ¶ 45.

90. See DICEY, MORRIS & COLLINS, *supra* note 11, at ¶ 30-028.

91. *Base Metal Trading Ltd. v. Shamurin* [2004] EWHC (Civ) 1316 (Eng.).

92. *Novatrust Ltd. v. Kea Inv. Ltd.* [2014] EWHC (Ch) 4061 (Eng.).

93. *Popely v. Popely* [2018] EWHC (Ch) 276 (Eng.).

governing law of the contract.⁹⁴ However, he rejected that approach without specifying why.⁹⁵ In addition, he did not consider applying the law with the most significant connections to the derivative action.⁹⁶ It should also be highlighted that the principles stated by Justice Collins are *obiter* since he saw no material difference between English law and Indian law in the case.⁹⁷

The law of the place of incorporation cannot, however, be applied seamlessly as the choice of law rule in multiple derivative actions when the parent and the subsidiary are incorporated in two different jurisdictions. *Batchelder v. Kawamoto*, the case approved by Justice Collins in *Konamaneni*, was just such a case where the parent company was incorporated in Japan while the subsidiary was incorporated in California.⁹⁸ A decision had to be made between Japanese law and California law. Multiple derivative actions therefore call for a new choice of law approach.

There are at least four potential choice of law approaches to the governing law issue:⁹⁹ (1) the law of the place of incorporation of the subsidiary; (2) the law of the place of incorporation of the parent company; (3) the laws of the place of incorporation of both the parent and subsidiary; and (4) the law with the closest connections to the multiple derivative action.

The first two approaches are the main ideological camps in common law jurisdictions, based on actual precedents from those jurisdictions. Hong Kong courts appear to have adopted the law of the place of incorporation of the subsidiary as their choice of law approach.¹⁰⁰ On the other hand, although the US precedents are not

94. Justice Collins did not discuss what that law was in the judgment. However, since the case involved a contract allegedly procured by fraud, it is assumed that he was referring to the governing law of the contract in question.

95. *Konamaneni v. Rolls Royce Indus. Power (India) Ltd* [2001] EWHC (Ch) 470 [¶ 45] (Eng. & Wales) (“There is little to be said for another possible candidate, the law of the underlying claim which it is sought to bring on behalf of the company.”).

96. The application of the law with the closest connections will make no difference to the case of *Konamaneni* as all relevant parties and transactions clearly had their closest connections with India, which was also the state of incorporation. *Id.*

97. *Id.* ¶ 50.

98. *Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998).

99. There are of course other potential approaches. For example, corporate matters are governed by the law of the jurisdiction where the real seat is located in a number of EU member states. See Kersting, *supra* note 81, at 2. This is not considered herein since most European states, like a lot of civil law countries, do not recognize derivative action. See Kozyris, *supra* note 18, at 71. Other American approaches include by agreement between the litigants at trial, the law of the underlying claim, and law of the place of incorporation (without deciding which corporation’s law to apply). See *infra* Appendix I, Table 2. This Part only focuses on the most relevant ones found in common law jurisdictions.

100. See *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2016] H.K.E.C. 1127 (C.A.); *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2013] H.K.E.C. 2013 (C.F.I.); *East Asia Satellite Television (Holdings) Ltd. v. New Cotai LLC*, [2011] 3 H.K.L.R.D. 734 (C.A.); *Ming Lai Siu Fun v. Tsang Hung Kong*, [2010] H.K.E.C. 1452 (C.A.).

perfectly consistent on this issue,¹⁰¹ a substantial number of multiple derivative actions, particularly those decided by Delaware and New York, have opted for the parent's law of incorporation (see Appendix I, Table 2).¹⁰²

The third approach is simply a combination of the first two. While there is no clear precedent that applies this approach, it can be considered a theoretical possibility to contrast the first two approaches. Finally, notwithstanding the limited amount of precedents that have been identified in the case of multiple derivative actions, it is submitted that the law of the state with the closest connection to the action is recommended here for multiple derivative actions in the future.

1. The Law of the Place of Incorporation of the Subsidiary

Hong Kong courts appear to have chosen the law of the place of incorporation of the subsidiary on the applicable law issue in multiple derivative actions. In the *Waddington* litigation, the shareholder of a Bermudan parent sought to sue the directors of two BVI-incorporated subsidiaries (one of them was a direct subsidiary and the other was a sub-subsidiary of the Bermudan parent).¹⁰³ After the Court of Final Appeal recognized multiple derivative actions under Hong Kong law, the case went to trial, where the defendant argued that multiple derivative actions were not allowed under BVI law.¹⁰⁴ Although this argument was rejected on the basis of issue estoppel since the defendant had not raised the argument previously, both the Court of First Instance and the Court of Appeal appeared to have implicitly treated BVI law (the law of the place of incorporation of the subsidiaries) as the governing law, instead of Bermudan law (the law of the place of incorporation of the parent in which the plaintiff shareholder owned shares).¹⁰⁵ Without going through a detailed choice of law analysis, both courts simply discussed in *obiter* the multiple derivative action issue under BVI law.¹⁰⁶

The implicit choice of law of the place of incorporation of the subsidiary was also shown in another Hong Kong case, *East Asia*

101. See *infra* Appendix I, Table 2. Of the 26 cases that have applied a choice of law analysis, nine have not applied a choice of law approach.

102. Kozyris, *supra* note 18, at 21–22.

103. *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] H.K.C.F.A.R 1498, ¶¶ 35–44 (C.F.A.).

104. *Waddington*, [2013] H.K.E.C. 2013.

105. *Id.* ¶¶ 84–86, 96–124. This was approved by the Hong Kong Court of Appeal subsequently. See *Waddington*, [2016] H.K.E.C. 1127, ¶¶ 102–36.

106. The most that has been said by the Court of Appeal was that “[i]t has been established as a matter of case law that whether a derivative action is available is a question of substantive law governed by the law of the place of incorporation.” The court did not specifically identify BVI law as the law of the place of incorporation. See *Waddington* [2016] H.K.E.C. 1127, ¶ 102.

Satellite Television (Holdings) Ltd. v. New Cotai LLC.¹⁰⁷ Again, without going through a choice of law analysis, the Hong Kong Court of Appeal applied Macanese law to the derivative action brought on behalf of the Macanese subsidiary, instead of BVI law, under which its immediate parent company and ultimate parent company were incorporated.¹⁰⁸

The clearest statement in Hong Kong on the reasoning of applying the law of the subsidiary's place of incorporation can be found in *Ming Lai Siu Fun v. Tsang Hung Kong*.¹⁰⁹ In that case, the plaintiff, a shareholder in the Hong Kong-incorporated parent company, tried to bring a derivative action on behalf of the People's Republic of China (PRC)-incorporated subsidiary.¹¹⁰ The defendant sought to strike out the case on the basis that PRC law did not recognize multiple derivative actions.¹¹¹ While the Court of Appeal affirmed the first instance judgment that the choice of law issue should not be decided in a summary manner,¹¹² Justice Yuen was clearly in favor of the law of the place of the subsidiary. In her opinion,

[t]he question whether an action on behalf of [the subsidiary] can be brought only by its shareholder [the parent], or also by a shareholder (the Plaintiff) of [the parent], although expressed as a question whether the Plaintiff has *locus standi*, ultimately depends on the substantive rights of the shareholders of [the subsidiary], which is governed by the law of its place of incorporation.¹¹³

Accordingly, the case should be dismissed since PRC law (the law of the place of incorporation of the subsidiary) did not permit multiple derivative actions. Thus, Justice Yuan's rationale in applying the subsidiary's law of incorporation as the governing law is based on the shareholders' right to file a derivative action at the subsidiary level.¹¹⁴ Having said that, her view shall be regarded as *obiter* since it was not shared by Justice Le Pichon.¹¹⁵ It therefore does not represent the stance of the Hong Kong Court of Appeal either.

Considering the reliance on Hong Kong precedents in derivative actions by the English courts in recent cases, it is likely that the choice of law approach of the Hong Kong courts will influence the English courts when they face the issue. However, the limited discussion on the justifications is a cause for concern.

107. *East Asia Satellite Television (Holdings) Ltd. v. New Cotai LLC* [2011] 3 H.K.L.R.D. 734 (C.A.).

108. *Id.* at 753.

109. *Ming Lai Siu Fun v. Tsang Hung Kong* [2010] HKEC 1452 (C.A.).

110. *Id.* ¶ 6.

111. *Id.* ¶ 25.

112. *Id.* ¶¶ 11–14.

113. *Id.* ¶ 28.

114. *Id.*

115. Justice Le Pichon dismissed the appeal on the basis of the unsatisfactory expert evidence on PRC law and agreed with the trial judge that such novel matter of law would not be appropriate to be dealt with in a summary judgment. *See id.* ¶¶ 11–12.

Sternberg v. O'Neil, a case decided by the Delaware Supreme Court, offers more elaborated justifications for the adoption of the law of the place of incorporation of the subsidiary.¹¹⁶ In that case, the court had to decide whether it had jurisdiction over the parent company, incorporated in Ohio.¹¹⁷ One of the considerations in deciding jurisdiction over an out-of-state corporation was the governing law of the multiple derivative action. The court held that the multiple derivative action was governed by Delaware law, the law of incorporation of the subsidiary.¹¹⁸ Two main arguments were raised. First, the court placed an emphasis on the relationship between director's duties and the state of incorporation: "[T]he internal affairs doctrine mandates . . . the application of Delaware law to the internal operation of [the subsidiary]. It is a basic principle of Delaware corporation law that directors of Delaware corporations are subject to fiduciary duties."¹¹⁹

The second argument, a corollary of the first argument, was that Delaware had a "legitimate interest" as the state of incorporation of the subsidiary in the multiple derivative action since "Delaware has an interest in holding accountable those responsible for the operation of a Delaware corporation."¹²⁰ Otherwise, a Delaware corporation might become "a shield for unfair business dealing."¹²¹ Accordingly, "Delaware has a legitimate interest in providing a forum for hearing and applying Delaware law to a double derivative claim related to the internal operation of a wholly owned Delaware subsidiary."¹²²

The emphasis placed by the court in *Sternberg* on the relationship between director's duties and the state of incorporation is certainly significant. Most common law jurisdictions apply the law of incorporation for breach of fiduciary duties, which is the most common cause of action in derivative actions.¹²³ In England, this was the position taken by Lady Justice Arden in the Court of Appeal of England and Wales case *Base Metal Trading Ltd. v. Shamurin*: "In my judgment, the law of the place of incorporation applies to the duties inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss incurred, in some other jurisdiction."¹²⁴

It is therefore likely that in a multiple derivative action the law of the place of incorporation of the subsidiary will govern the underlying substantive action on breach of fiduciary duty by the directors of the

116. *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988).

117. *Id.* at 1108.

118. *Id.* at 1123.

119. *Id.* at 1123–24.

120. *Id.* at 1123.

121. *Id.* at 1124 (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 93 (1987)).

122. *Id.*

123. DICEY, MORRIS & COLLINS, *supra* note 11, ¶ 30-028.

124. *Base Metal Trading Ltd. v. Shamurin* [2004] EWCA (Civ) 1316 [¶¶ 67–77] (Eng. & Wales).

subsidiary. Thus, applying this law aligns the law governing the cause of action with the multiple derivative action, which is the enforcement mechanism for such cause of action.

In summary, whether it is the emphasis by Justice Yuen on the shareholders' right on behalf of the subsidiary in *Ming Lai*, or the emphasis of directors' duties at the subsidiary level in *Sternberg*, both of them highlight the role of the subsidiary in multiple derivative actions.

2. The Law of the Place of Incorporation of the Parent Company

The *Sternberg* ruling is not representative of the approach in Delaware nor US courts in general. Only two of the twenty-six conflict cases opted for applying the law of the place of incorporation of the subsidiary, while there were nine such cases applying the law of the place of incorporation of the parent (see Appendix I, Table 2).¹²⁵ Among the cases that adopted the latter approach, the most notable ones are *Kostolany v. Davis*,¹²⁶ *Batchelder v. Kawamoto*,¹²⁷ and *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*,¹²⁸ all of which involved parent companies incorporated in non-US jurisdictions.

Kostolany v. Davis was the first Delaware case that expressly applied the parent's law of incorporation to multiple derivative actions. In that case, plaintiff shareholder argued that the Delaware court should apply Delaware law, the law of incorporation of the subsidiary, instead of Dutch law, the law of incorporation of the parent.¹²⁹ This was rejected by the court as inconsistent with *McDermott, Inc. v. Lewis*, a precedent on voting rights.¹³⁰ In that case, the Delaware court applied Panamanian law (the law of the parent's state of incorporation), which permitted a subsidiary to vote on the stock of a parent even though that voting was prohibited under Delaware law (the law of the state of incorporation of the subsidiary).¹³¹ Thus, the court in *Kostolany* was of the opinion that the law of the place of incorporation of the parent should be applied by analogy in multiple derivative actions.¹³²

Precedents aside, the court clearly put its emphasis on derivative action being a right of the immediate shareholders of the company. Thus, despite Delaware having a strong interest in protecting the minority shareholders of Delaware corporations, this interest does not apply to a multiple derivative action since the "plaintiff is a stockholder

125. See *infra* Appendix I, Table 2.

126. *Kostolany v. Davis*, No. 13299, 1995 WL 662683 (Del. Ch. Nov. 7, 1995).

127. *Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998).

128. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074 (Del. 2011).

129. *Kostolany*, 1995 WL 662683, at *1.

130. *McDermott, Inc. v. Lewis*, 531 A.2d 206 (Del. 1987).

131. *Id.* at 214–17.

132. *Kostolany*, 1995 WL 662683, at *2–3.

of the Dutch parent, not of the Delaware subsidiaries.”¹³³ The court was therefore in favor of applying the parent’s law of incorporation. However, no reference was made to the different approach adopted in *Sternberg*.

Citing in approval both *McDermott* and *Kostolany*, *Batchelder v. Kawamoto* also applied the law of the place of incorporation of the parent.¹³⁴ *Batchelder* was a holder of American depository receipts of Honda Japan who sought to initiate a multiple derivative action against the defendant directors on behalf of Honda Japan’s American subsidiary, American Honda.¹³⁵ In a similar tone to the Delaware court in *Kostolany*, the Court of Appeals for the Ninth Circuit also found that “ordinary conflicts-of-law principles would direct us to apply Japanese law to *Batchelder*’s claim [because] *Batchelder* holds an interest in Honda Japan, not American Honda.”¹³⁶

The court addressed the different approach declared in *Sternberg*. Distinguishing *Sternberg* as a case on jurisdictional issues, the court held that the effect of *Sternberg* was overstated by the plaintiff.¹³⁷ Since *Konamaneni* adopted *Batchelder*’s choice of law rule on a single derivative action, it can be argued that English courts could also adopt *Batchelder*’s choice of law rule on multiple derivative actions.

Finally, *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.* is the case that best illustrates the tension between the two camps.¹³⁸ In that case, the issue was whether the governing law should be Spanish law (the law of the place of incorporation of the parent company (Uniland)), which required a shareholder’s resolution to file a derivative action by a minority shareholder, or Delaware law (the law of the place of incorporation of the third-tier subsidiary (UAC)), which did not have the same requirement.¹³⁹ The plaintiff (*Sagarra*) made similar arguments to those in *Sternberg*. First, it placed an emphasis on the role of the subsidiary’s place of incorporation in the right to bring multiple derivative actions:

Sagarra argues that a proper application of the internal affairs doctrine requires the application of Delaware’s derivative standing rules, because the right *Sagarra* seeks to enforce “is not a right created in any way by Spanish law.” Rather, that right “arose [under Delaware law] when Uniland SA incorporated a

133. *Id.* at *3.

134. *Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998).

135. *Id.* at 916–17 (“Harry C. *Batchelder, Jr.* alleges that at all times relevant to this case he owned 1,246 American Depository Receipts (‘ADRs’), each of which reflects ownership of ten shares of stock in Honda Japan.”).

136. *Id.* at 920.

137. *Id.* (“However, *Batchelder* overstates the effect of *Sternberg*. The issue before the *Sternberg* court was whether it had personal jurisdiction over an Ohio parent company in a double derivative suit against a Delaware subsidiary, ‘not choice of law.’”).

138. *Sagarra Inersiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074 (Del. 2011).

139. *Id.* at 1078.

subsidiary in Delaware. . . . [The] Delaware subsidiary's board [therefore] breached their [fiduciary] duties in effectuating that transaction."¹⁴⁰

The plaintiff also made similar arguments based on Delaware's superior interest in applying its law, though they were made in terms of "sound public policy" and "equitable" principles, to "ensure that breaches of duty by directors of a Delaware subsidiary cannot escape judicial review."¹⁴¹

The plaintiff's arguments were adamantly rejected by the Supreme Court of Delaware, which emphasized the right of the shareholders stemming from their ownership of the parent's shares instead:

Sagarra's standing to sue derivatively on behalf of UAC must necessarily derive from its ownership of shares of Uniland, because Uniland is the only corporation in which Sagarra owns shares. Without that ownership stake, Sagarra would have no basis to claim standing to sue on behalf of any entity within the Uniland corporate hierarchy.¹⁴²

While the preference of the court is clear, it is unclear why concern over shareholders' rights (an interest of the parent's place of incorporation) should always trump the duties owed to the subsidiary (an interest of the subsidiary's place of incorporation).

The Supreme Court of Delaware further strengthened its argument by highlighting the implied consent to the Delaware law by the shareholders:

When Sagarra took ownership of its Uniland shares, it did so with presumed knowledge that its ownership interest was subject to the legal rights conferred, and the restrictions imposed, by the Spanish legal regime. Whatever legal rights Sagarra initially contracted for to challenge a transaction whose terms were determined and structured at the Uniland level would necessarily be defined by Spanish law.¹⁴³

However, this probably carries the argument too far. A minority shareholder has very little power to control its fate, including whether a subsidiary is to be set up, as was the case in *Sagarra*.¹⁴⁴ The court's argument effectively gives a blank check to the controller of the company to do anything against the wishes of the minority shareholders in the name of their initial consent to become shareholders.

The argument advanced by the court may be more appealing *after* taking into account the domiciles of the minority shareholder-plaintiffs who, along with most parties concerned, were Spanish. Sagarra (the

140. *Id.*

141. *Id.*

142. *Id.* at 1080.

143. *Id.* at 1083.

144. The Delaware subsidiary was set up as a special purpose vehicle for an acquisition that the plaintiff shareholder failed to challenge. *See id.* at 1075–78.

plaintiff minority shareholder), Uniland (the parent company), CPV (the defendant majority shareholder), and the defendant corporate directors of Uniland were all incorporated in Spain.¹⁴⁵ The only Delaware-domiciled party was UAC (the nominal defendant), which was a special purpose vehicle incorporated specifically for the disputed transaction.¹⁴⁶ However, this is a conclusion that has taken into account additional factors and therefore cannot justify the universal application of the parent's law of incorporation in *every* case as pronounced by the Delaware court.

The second argument similar to *Sternberg*, that of state interest, was also rejected.¹⁴⁷ The court was of the opinion that the state interest had already been incorporated by the general rule that granted the Delaware courts jurisdiction to police the breach of fiduciary duties.¹⁴⁸ The court had no power to intervene unless standing was established.¹⁴⁹ In other words, public policy cannot trump the general rule, namely that the law of the place of incorporation of the parent governs the right to derivative action.¹⁵⁰ The court also acknowledged the ruling in *Sternberg* but probably misinterpreted it as supporting the application of the parent's law of incorporation.¹⁵¹

In summary, the two camps are stuck in a deadlock, with one emphasizing the shareholders' rights at the parent level and the other emphasizing shareholders' rights and directors' duties at the subsidiary level. There is no denying that both aspects are important, and both the states of incorporation of the parent and subsidiary have legitimate interests in having their laws applied to multiple derivative actions. Certainly, there is no difficulty regarding the law of incorporation to apply to single derivative actions when there is just one company, because it governs both aspects of shareholders' rights and directors' duties. It is when these two aspects are separated in

145. See *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas S.A.*, No. 6179-VCN, 2011 WL 3371493, at *1; Defendants' Opening Brief in Support of Their Motion to Dismiss or Stay, *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas S.A.*, 2011 WL 3371493 (No. 6179-VCN), 2011 WL 5600248 [hereinafter *Sagarra Brief*].

146. *Sagarra Brief*, *supra* note 145.

147. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1083 (Del. 2011).

148. *Id.*

149. *Id.*

150. *See id.*

151. In *Sagarra*, the court stated that *Sternberg* "acknowledg[ed] that because parent corporation 'is an Ohio corporation, Ohio law must be applied to one aspect of [the plaintiff's] . . . double derivative action.'" *See id.* at 1080–81. However, that quotation was the position of the defendant, not that of the court in *Sternberg*. In fact, the argument was rejected by the *Sternberg* court right away. *See Sternberg v. O'Neal*, 550 A.2d 1105, 1122–23 (Del. 1988) ("GenCorp's final argument is an attempt to meet that burden. GenCorp points out since it is an Ohio corporation, Ohio law must be applied to one aspect of Sternberg's double derivative action. Therefore, GenCorp argues that Delaware has a tenuous connection with this litigation and should not exercise jurisdiction in this case which may require it to apply Ohio law to a portion of Sternberg's claim. A similar argument has been considered and rejected by the United States Supreme Court for three reasons in *Keeton v. Hustler Magazine, Inc.*").

multiple derivative actions that the court must make a hard decision between the two.

If these two approaches are the only possible options, the law of the place of incorporation of the parent should be the better of the two. It may be argued that if the law of the place of incorporation of the subsidiary is to be applied, it is more prone to manipulation by the management. For example, directors of a company incorporated in Hong Kong can simply incorporate a new subsidiary in a country where derivative action is not permitted to block the shareholder's right to multiple derivative actions. This is exactly the loophole described by Lord Millett, albeit in the context of private international law.¹⁵² Here, the moral for would-be fraudsters is simple, too; choose an English company and be careful to defraud its *foreign* subsidiary and not the company itself.¹⁵³ Where the foreign law under which the subsidiary is established does not recognize multiple derivative actions, the minority shareholder will have no recourse against wrongs committed by the controller of the company. On the other hand, while it is technically possible to incorporate a new parent company, such as by a scheme of arrangement, it is more difficult, as shareholders will have some say on the approval of such a scheme.¹⁵⁴ Further, should the law of the subsidiary's incorporation be adopted, courts will have to juggle multiple governing laws if there are multiple subsidiaries incorporated in more than one jurisdiction.¹⁵⁵

3. Both Laws of the Places of Incorporation

The third approach that may address the interests of states of incorporation is for both laws to be applied. In other words, unless the laws of both places of incorporation allow a minority shareholder to bring multiple derivative actions, the suit will be denied. On paper, this approach ensures that the shareholder of the parent has a right to bring the action under the law of the place of incorporation of the parent, and also establishes that the directors are susceptible to the action under the law of the place of incorporation of the subsidiary. No precedent was found that adopts this approach explicitly. It may be argued that the High Court in Malaya of Malaysia adopted this approach implicitly by considering both laws of the places of

152. See *Universal Project Mgmt. Servs. Ltd. v. Fort Gilkicker Ltd.* [2013] EWHC (Ch) 348 [25], [2013] Ch 551 (Eng. & Wales).

153. See *id.* ¶ 40.

154. See Companies Act 2006, c. 46, § 899(1) (UK) (requiring an approval by three-quarters of the shares for a scheme to be binding on the shareholders in question).

155. See, e.g., *Refco Group Ltd., LLC v. Cantor Fitzgerald, L.P.*, No. 13 Civ. 1654, 2014 WL 2610608, at *8 (S.D.N.Y. 2014). Of the four funds involved in the case, two of them were established in Delaware, while the other two were established in England. The court applied Delaware law, the law of the place of the incorporation of the parent, and thus avoid the necessity to apply two different laws in the same multiple derivative action. *Id.*

incorporation to see whether the multiple derivative action could be brought.¹⁵⁶ This approach is similar to the double actionability rule under English law, which allows a foreign tort action to be brought if it is actionable under both English law, the *lex fori*, and the law of the place of the tort, thereby serving the interests of both jurisdictions.¹⁵⁷

However, much like double actionability, this approach is seriously flawed, as it makes it more difficult for the plaintiffs to receive remedy. To succeed in bringing the action, plaintiffs must satisfy both jurisdictions' requirements on derivative action. Failing either one will mean the end of the litigation. In truth, such a rule will only double the legal hurdles while frustrating the underlying interest of both jurisdictions, which is to protect minority shareholders. While the double actionability rule might not be as devastating a rule as commentators make it out to be,¹⁵⁸ it is difficult to see the benefits in adopting a similar approach in multiple derivative actions.

4. The Law with the Closest Connections

Thus far, the focus has been on approaches involving the law of the place of incorporation. This is a corollary of having the law of the place of incorporation governing single derivative actions. For example, in the survey of American precedents in Table 2 of Appendix I, the majority of precedents, eighteen of the twenty-six cases, that have conducted a choice of law analysis applied an approach that is based on the law of the place of incorporation. The English precedents on choice of law in single derivative actions also suggest that courts will apply the law of the place of incorporation to a derivative action mechanically. Since *Konamaneni*, no court has ever questioned the correctness of the rule.¹⁵⁹

However, should these be the only options? A mechanical application of the law of the place of incorporation may be justified in the case of a single derivative action based on certainty and implied consent, but in the case of a multiple derivative action resulting from a complicated corporate group structure, the inflexibility of such an approach is worth rethinking.

156. See *Sidhu v. Zavarco PLC* [2015] MLJU 638 [6] (Malay.). Similarly, in *Fagin v. Gilmartin*, the court applied the demand futility requirement under New Jersey and Delaware laws to the parent and subsidiary respectively. While the court did not elaborate this point, the application of both demand futility requirements means that the shareholder will not be able to bring the derivative action should he fail the demand futility requirement under either law. However, the case was far from clear, since the court claimed that it followed Delaware law, the law of the place of incorporation, which required the shareholder to satisfy both demand requirements in the first place. *Fagin v. Gilmartin*, 432 F.3d 276, 283 (3d Cir. 2005).

157. See *Chaplin v. Boys* [1971] A.C. 356 (H.L.) 356 (Eng.).

158. See King Fung Tsang, *Double Actionability: An Outdated Rule in Modern Times*, 86 UMKC L. REV. 73, 89 (2017).

159. See *Popely v. Popely*, [2018] EWHC (Ch) 276 [83] (Eng. & Wales); *Novatrust Ltd. v. Kea Inv. Ltd.*, [2014] EWHC (Ch) 4061 (Eng. & Wales); *Base Metal Trading Ltd. v. Shamurin*, [2004] EWCA (Civ) 1316 [68] (Eng. & Wales).

If the court must apply a choice of law rule based on one of the three aforementioned approaches, no matter which law of the place of incorporation is chosen, these mechanical approaches are bound to create injustice, either by allowing unjustified multiple derivative actions or barring justified ones. For example, even if the courts adopt the law of the place of incorporation of the parent, the better law of the three as argued above, a multiple derivative action will be barred as long as the parent's law of incorporation disallows a derivative action. This is so, notwithstanding that the subsidiary's law of incorporation may allow a derivative action and most of the corporate insiders happened to be domiciled in that same jurisdiction. This is the case of *Mohnot v. Bhansali*, where the United States District Court for the Eastern District of Louisiana denied the multiple derivative action after applying Illinois law, the law of the place of incorporation of the parent.¹⁶⁰ Meanwhile, India was the place of incorporation of the subsidiary, the place of residence of the defendant director, as well as the place that the investment project of the group was supposed to be implemented.¹⁶¹ However, the court applied Illinois law mechanically.¹⁶² Arguably, injustice will result if India law actually allowed multiple derivative actions.¹⁶³ On the other hand, applying the law of the place of incorporation of the subsidiary will create the same injustice in the facts of *Sagarra*.

If one can agree with the relevance of domicile, should the courts consider other relevant factors as well? Commentators have argued that courts should be more flexible in choosing the law applicable to director's duties in general:

Although [the law of the place of incorporation] will almost certainly have a well-founded interest in being applied to a claim that a company director has performed his duties carelessly, it should not be applied automatically (and without regard to connections with other legal systems) by reason only of the fact that the claim is characterized as being neither contractual nor tortious. There is no magic in a duty of care of an equitable character.¹⁶⁴

It is therefore suggested that a more flexible approach be adopted to the choice of law rule on director's duties by analogy to the flexible exception in tort cases.¹⁶⁵ This approach can definitely apply in the

160. *Mohnot v. Bhansali*, No. 99-2332, 2002 WL 603049, at *1 (E.D. La. Apr. 17, 2002).

161. *Id.*

162. *Id.* ("Inasmuch as Illinois allows 'double derivative' actions (i.e., suits by shareholders of a holding corporation (ICL) for harm to a subsidiary (ITIL)), the Court applied Illinois law to determine whether plaintiffs may bring suit for injury to ITIL.")

163. This was not decided in *Mohnot*. *See id.* at *1.

164. *See, e.g.*, Andrew Dickinson, *Applicable Law Arbitrage—An Opportunity Missed?*, 121 L.Q.R. 374, 377, 379 (2005).

165. *See id.* at 379–80 ("[I]t is submitted that a preferable solution would have been apply the common law choice of law rules for torts by analogy, while recognizing that the law of the place of incorporation had a powerful claim to apply under the flexible exception."). Under EU conflict of laws, in tort cases, the law of the place of damage

closely related doctrine of multiple derivative actions as it is the mechanism that provides teeth to the enforcement of the director's duties.¹⁶⁶

Another way to state the problem is this: if a single derivative action is an internal affair of the company, then a multiple derivative action is an internal affair of the *corporate group*. A good choice of law rule should be able to identify the law that is the appropriate one not only for a specific company within the group, be it the law of incorporation of the parent or a subsidiary, but also for the entire corporate group. An approach that can take into account the various aspects of the corporate group as a whole should be adopted instead.

It is submitted that for a multiple derivative action the court should apply the law with the closest connections to it, with the presumption that either the law of the place of incorporation of the parent or the subsidiary will be the governing law. If both companies are incorporated in the same place, then the law of the common incorporation will prevail.¹⁶⁷ When they are different, then the courts shall consider all relevant factors. The list of these factors, while not definitive, shall include the places of incorporation of both parent and subsidiary, the domiciles of the shareholders and directors, the law governing the underlying cause of action, and the principal places of business of the companies.¹⁶⁸ The courts should be able to identify certain common factors in the long run to guide this part of the analysis as they have done in contract and tort cases. Finally, although it should be rare, it is possible for the court to rebut the presumption that either law of incorporation is to be applied and apply a third country's law. This will probably only happen when none of the places of incorporation has any connections beyond the incorporations (i.e., pseudo-foreign corporations), and a third country shows much stronger connections.¹⁶⁹

governs the tort but can be trumped by the law of the common domicile or ultimately the law that is manifestly more clearly connected to the tort. *See* Commission Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 4(3), 2008 O.J. (L 199) 40 ("Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.").

166. *See* PAUL L. DAVIES & SARAH WORTHINGTON, *PRINCIPLES OF MODERN COMPANY LAW* 643 (9th ed. 2012).

167. *See, e.g.*, *Renova Res. Private Equity Ltd. v. Gilbertson*, [2009] CILR 268 at 289 (Cayman Is.) (both the parent and subsidiary were incorporated in Cayman Islands); *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 151 (D.C. 2000) (both the parent and subsidiary were incorporated in Illinois).

168. These factors essentially represent the most important elements in choice of law in the context of company. The places of incorporation of parent and subsidiary are no doubt significant given the three approaches discussed above. In addition, legitimate expectations of the relevant parties and state interests can also be derived from the latter three factors.

169. *See* Latty, *supra* note 82.

Although the law with the closest connections is constantly criticized for being too broad and unpredictable for a commercial transaction, these criticisms are certainly overstated in the context of multiple derivative actions upon closer examination. First, the design of a presumption will substantially reduce the uncertainty. It is expected that the law of the place of incorporation of either the parent or the subsidiary is likely to be the law with the closest connections in multiple derivative actions in most cases. Two of the most prominent connections in multiple derivative actions are the law governing the underlying cause of action, which is likely to be the law of the place of incorporation of the subsidiary, and the domiciles of the shareholders and the directors, which are more likely to be the country where the parent is incorporated. Second, various other areas of the law have choice of law rules similar to these, and they seem to operate efficiently. For example, under English conflict rules, the governing law of contract is governed first by the choice of law agreement or, in the absence of choice, the law with the closest connections.¹⁷⁰ The law of the place of incorporation will also continue to be the governing law in single derivative actions so the use of this new approach will be comparatively rare.

Further, the underlying justifications of applying the law of the place of incorporation (certainty and implied consent) for single derivative actions are not applicable in multiple derivative actions. When the courts face two different states of incorporation in a multiple derivative action, there is no certainty as to which state's law to apply. In addition, the idea that one law will always be able to govern all aspects of a corporate action is more of a fiction in multiple derivative actions. For example, if the law of the place of incorporation of the parent is to apply, the US courts will usually apply the law of the state of incorporation of the parent on the right to file a multiple derivative action and the law of the state of incorporation of the subsidiary on the substantive breach of fiduciary duties.¹⁷¹ Thus, at least two different laws are applied. This problem is even more prominent internationally.¹⁷² When not all countries adopt the law of the place of incorporation, there is bound to be forum shopping.

170. See Commission Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 4(1), 2008 O.J. (L 177) 6 ("To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected."); see also *McDermott, Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987) (regarding tort conflict rules).

171. See *Bybee Farms, LLC v. Snake River Sugar Co.*, 625 F. Supp. 2d 1073, 1078 (E.D. Wash. 2007) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 11, at § 302) (holding that breach of fiduciary duties, including those owed by the directors, is governed by the law of the state of incorporation).

172. US conflict rules apply generally to both domestic and international cases on corporate law matters. See *Kozyris*, *supra* note 18, at 86 ("In choosing the law applicable to internal corporate affairs the states have drawn no distinctions between sister-state and foreign country corporations.").

In connection with implied consent, there is no implied consent on either one of the laws of incorporation to apply since expectations of shareholders and directors may not align in a multiple derivative action. On the other hand, as discussed above on *Sagarra*, the application of Spanish law can be justified if one takes into account the Spanish domiciles of the parties.¹⁷³ The relevance of the domicile can actually be further enhanced by the implied-consent justification and the related concept of expectation.¹⁷⁴ To illustrate, the Spanish director serving on UAC (the nominal defendant) was appointed by the Spanish parent company.¹⁷⁵ If he were to be sued by a Spanish shareholder of the parent company, he would therefore both expect and impliedly consent to the application of Spanish law to the multiple derivative action.

Support for this new approach can also be found in US authorities. Deviation from the law of the place of incorporation is possible under the Restatement (Second) of Conflict of Laws when “some other state has a more significant relationship” to the parties and the transaction.¹⁷⁶ There are a number of US cases that have applied this principle.¹⁷⁷ On multiple derivative actions, the Appellate Division of the New York Supreme Court, in *Pessin v. Chris-Craft Industries, Inc.*, held that New York law should apply to the contemporaneous ownership requirement instead of Delaware law, the law of the place of incorporation.¹⁷⁸ According to the court, even though Delaware would normally have the greatest interest on internal affairs matters, New York had the greater interest in this case since New York Business Corporation Law had spoken specifically on the contemporaneous ownership requirement.¹⁷⁹ Admittedly, these cases are the exceptions rather than the norm, but having regard to the reasons discussed above, multiple derivative action is just such a circumstance that warrants the exception.

While this new approach is expected to help promote minority shareholders’ protection in appropriate cases, it is not to say the closest connections rule should be manipulated to always choose the law that provides for the most favorable rules on multiple derivative action for the shareholders. Derivative action is never just about blindly protecting minority shareholders. The courts are constantly seeking a balance between protecting minority shareholders and not

173. See *Sagarra Brief*, *supra* note 145, at 40.

174. See *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, No. 6179-VCN, 2011 WL 3371493, at *4 (Del. Ch. Aug. 5, 2011).

175. See *Sagarra Brief*, *supra* note 145, at 11 (stating that Jaime Úrculo Bareño was alleged to reside in Spain).

176. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 11, at § 309.

177. See *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317, 320 (5th Cir. 1959); *W. Air Lines, Inc. v. Sobieski*, 12 Cal. Rptr. 719, 723 (Cal. Ct. App. 1961).

178. *Pessin v. Chris-Craft Indus., Inc.*, 586 N.Y.S.2d 584, 586–87 (N.Y. App. Div. 1992).

179. *Id.* at 587.

overburdening the management of the company.¹⁸⁰ To illustrate, if both of the laws of incorporation are from jurisdictions which clearly do not allow multiple derivative actions, barring circumstances that indicate strong connections with England, the English court should not just find a way to apply English law so that multiple derivative actions can continue. In other words, the fact that a jurisdiction's law does not recognize multiple derivative actions is not by itself a justification not to apply such law.¹⁸¹ This is because in that case both the plaintiff and defendants will have legitimate expectations at the parent and subsidiary levels that no multiple derivative actions will be allowed. Bending the rule whenever possible will disrupt the consent to the ecosystem to which all corporate insiders have subscribed. In *Batchelder*, despite Japanese law denying the derivative action in question, the court correctly stated that “the fact that Japanese law may differ in this regard from California law does not necessarily signify that application of Japanese law would contravene California’s public policy.”¹⁸²

B. *Substantive or Procedural?*

Regardless of whichever law governs the right of the derivative action, one must also look at the second choice of law question: what does “right” cover in a multiple derivative action? In the United States, the courts usually refer to the issue as one of “standing,”¹⁸³ and so too do the Hong Kong courts.¹⁸⁴ No matter the terminologies, this is an important question because procedural issues not covered by the substantive “right” will be governed by the *lex fori*, the domestic rules of the court litigating the matter.¹⁸⁵

Once again, the starting point is the relevant rules on single derivative actions. Three interrelated common issues in relation to derivative actions will need to be characterized: (i) the availability of a derivative action; (ii) the litigation conditions that constitute standing;

180. See DAVIES & WORTHINGTON, *supra* note 166, at 643–47.

181. See, e.g., *Kostolany v. Davis*, No. 13299, 1995 WL 662683, at *1 (Del. Ch. Nov. 7, 1995) (rejecting the defendants’ argument that “the internal affairs doctrine calls for application of the law of the Netherlands, where [the parent company] is incorporated, and that there is no right to pursue a derivative action under Dutch law.”).

182. *Batchelder v. Kawamoto*, 147 F.3d 915, 919–20 (9th Cir. 1998).

183. See, e.g., *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1078 (Del. 2011).

184. See *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] 11 H.K.C.F.A.R. 370, ¶¶ 72–74 (C.F.A.) (noting that Hong Kong courts have used “right” and “standing” in this context interchangeably).

185. DICEY, MORRIS & COLLINS, *supra* note 11, ¶ 7R-001 (“All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (lex fori).”).

and (iii) the grant of leave, if any, by the court in the place of incorporation.¹⁸⁶

The availability of a derivative action refers to whether derivative action exists under the country's law. For example, in *Kostolany*, derivative action did not exist under Dutch law. In that case, the court's characterization of availability of derivative action as substantive meant that the minority shareholders were barred from initiating a derivative action on behalf of the company. On the other hand, the availability of a derivative action under a given law does not necessarily mean that a shareholder can successfully bring a derivative action. Most jurisdictions that allow derivative actions require the satisfaction of certain litigation conditions by the shareholders. In England, these litigation conditions mean proving fraud and control under the fraud on the minority exception to *Foss v. Harbottle*. Lastly, in a conflict case, the leave requirement refers to the foreign governing law requirement that plaintiff must obtain the foreign court's leave to commence or continue the derivative action. Leave is usually granted on the foreign court's discretion based on the relevant litigation conditions.

Three different approaches of characterization can be identified, which depend in turn on the characterization of the three components above: (1) all aspects of a derivative action are procedural, including the availability of a derivative action, litigation conditions, and any leave requirement; (2) all aspects of a derivative action are substantive, including the availability of a derivative action, litigation conditions, and any leave requirement; and (3) only some aspects of a derivative action (e.g., the availability of a derivative action and litigation conditions) are substantive, but the other aspects (e.g., the leave requirement) are procedural.

1. All Procedural

This appears to be the position taken in *Heyting v. Dupont*, the oldest English case on a single derivative action that involves foreign corporations.¹⁸⁷ In that case, a minority shareholder of a Jersey company brought a derivative action against the company's directors. Although the choice of law argument was not raised, Lord Justice Russell said:

186. There are certainly more issues in relation to derivative actions. See Kozyris, *supra* note 18, at 21–22 (“[T]he courts continue routinely to choose the law of incorporation—whenever state law is applicable—to resolve almost every major derivative suit issue, such as: the availability of the derivative action, whether the action is direct or derivative, standing to sue, proof of stock ownership, charging to the corporation the expenses of opposing the action,⁸⁶ pro-rata recovery directly to the shareholders, security for expenses and, last but not least, demand requirements on directors and shareholders.”). This Article focuses only on the three most common issues based on common law jurisdiction precedents.

187. *Heyting v. Dupont* [1964] 1 WLR 843 at 848 (Eng.).

I dare say that the rule in *Foss v. Harbottle* is a conception as unfamiliar in the Channel Islands as is the Clameur de Haro in the jurisdiction of England and Wales. But clearly this is a matter of procedure to be decided according to the law of the forum.¹⁸⁸

This approach by the English Court of Appeal is supported by A.J. Boyle, but neither the court nor Boyle came up with any real justifications for the approach.¹⁸⁹ If the availability and all relevant conditions to initiate a derivative action are considered procedural issues, it will mean that derivative action is essentially governed by the *lex fori*. This renders meaningless the whole discussion of governing law in Part II, above.

Heyting was followed in one Canadian case, *Everest Canadian Properties Ltd. v. CIBC World Markets Inc.*¹⁹⁰ The issue was whether a trust established under Maryland law would be subject to the rule under *Foss v. Harbottle*. Citing *Heyting* and Boyle, the British Columbia Court of Appeal held that “the better view would appear to accord with *Heyting v. DuPont* . . . Accordingly, the *lex fori* rather than the law of Maryland was properly applied to the question of whether [the plaintiff] had standing to make its claims.”¹⁹¹ However, this decision did not address any argument that favors characterizing the matter as substantive. It has also been criticized for citing other cases that were alleged to have characterized the rule as procedural even though they were not conflict cases.¹⁹²

In summary, it is hard to see any justification from the authorities for characterizing all aspects of derivative action as procedural. The best argument on treating all matters as procedural is probably to make the English derivative action (the exception under *Foss v. Harbottle*) available to all minority shareholders even if the law of the place of incorporation does not allow for derivative action. However, this again disrupts the balance of the ecosystem that the parties have originally subscribed to.¹⁹³ Such an approach will also encourage forum shopping that may not be in the interest of the companies and directors. Lord Justice Russell in *Heyting* offers nothing more than an *obiter*.¹⁹⁴ In addition, both *Heyting* and *Everest* are inconsistent with other precedents in England and Canada. In *Konamaneni*, Justice

188. *Id.*

189. See A. J. Boyle, *The Shareholder's Derivative Action in the English Conflict of Laws*, 11 EUR. BUS. L. REV. 130, 130 (2000).

190. *Everest Canadian Properties Ltd. v. CIBC World Markets, Inc.* (2008), 294 D.L.R. 4th 622, ¶ 12 (Can. B.C. C.A.).

191. *Id.* ¶¶ 13–14.

192. See RICHARD GARNETT, *SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW* 136 (James J. Fawcett ed., 2012).

193. See *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1083 (Del. 2011).

194. See *Novatrust Ltd. v. Kea Inv. Ltd.*, [2014] EWHC (Ch) 4061 [31] (Eng. & Wales).

Collins made it clear that the right to file a derivative action by a shareholder is substantive:

[B]ecause the basic rule is that the shareholders have no direct rights, as *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)* makes clear. Although for purely English domestic purposes, the exceptions to the rule have been regarded as a procedural device, I do not consider that in the international context their real nature is procedural. They confer a right on shareholders to protect the value of their shares by giving them a right to sue and recover on behalf of the company. It would be very odd if that right could be conferred on the shareholders of a company incorporated in a jurisdiction which had no such rule, and under which they had acquired their shares.¹⁹⁵

Similarly, in *Axis Management v. Alsager*, the Canadian Court of Queen's Bench for Saskatchewan held that the right to file a derivative action was governed by the law of the place of incorporation. Accordingly, the all-procedural approach should not be adopted.¹⁹⁶

On the other hand, Justice Collins did not make clear whether the litigation conditions under *Foss v. Harbottle* and/or any leave requirement were to be considered as part of the "right" or not. Thus, one must examine further whether the litigation conditions and any leave requirement are to be treated as substantive.

2. Some Substantive, Some Procedural

While the precedents are not consistent, the most representative characterization under this approach is to treat availability and litigation conditions as substantive and the leave requirement, if any, as procedural. In other words, this approach is to inject the same flexibility we have discussed regarding the choice of substantive law in Part III.A. to the characterization issue.

Considering that Justice Collins relied on US precedents in adopting the law of the place of incorporation as the choice of law approach, it is likely that Justice Collins would adopt the US approach on characterization.

Like the fraud on the minority exception in England, all states in the United States impose certain litigation conditions in order to bring a derivative action.¹⁹⁷ Generally, the plaintiff is required to prove that he was a shareholder at the time of the transaction complained of.¹⁹⁸ This is known as the contemporaneous ownership rule.¹⁹⁹ The plaintiff must also prove that he has either made a demand to the board of the

195. *Konamaneni v. Rolls Royce Indus. Power (India) Ltd.* [2001] EWHC (Ch) 470 [50] (Eng. & Wales).

196. *Axis Mgmt. v. Alsager*, 197 Sask. R. 234 (Can. Sask. Q.B.).

197. See 8 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 5972 (2018).

198. FED. R. CIV. P. 23.1(b)(1).

199. See FLETCHER, *supra* note 197, § 5981.

company to sue or that such a demand would be futile.²⁰⁰ In *Kamen v. Kemper Financial Services, Inc.*, the U.S. Supreme Court held that the demand requirement was substantive and therefore governed by the law of the place of incorporation.²⁰¹ Justice Marshall explained the rationale of this holding:

The purpose of the demand requirement is to afford the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. Ordinarily, it is only when demand is excused that the shareholder enjoys the right to initiate suit on behalf of his corporation in disregard of the directors' wishes. In our view, the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of "substance," not "procedure."²⁰²

Accordingly, a litigation condition that serves to limit the right of the minority shareholder to file a derivative action should be characterized as substantive. Under this approach, the litigation conditions specified under *Foss v. Harbottle* should also be substantive.

In contrast, in *Virgtel Ltd. v. Zabusky*, the Supreme Court of Queensland appeared to have treated the litigation conditions as procedural.²⁰³ In that case, the plaintiff filed a single derivative action on behalf of a Nigerian company.²⁰⁴ Pursuant to the Foreign Corporations (Application of Laws) Act 1989, the law of the place of incorporation (Nigerian law) governs any question relating to "the rights . . . of the members or officers of a foreign corporation."²⁰⁵ While the case focused on the leave requirement (to be discussed below), the court clearly thought that the substantive "right" to bring a derivative action only covered availability of the derivative action. However, the court regarded the litigation conditions and the leave requirement under Nigerian law as procedural: "although whether a shareholder has the right to launch a derivative action is to be determined here by Nigerian law . . . that does not extend to the manner of exercise, or the fulfilment of pre-requisites to the exercise, of that right."²⁰⁶ Meanwhile, *Konamaneni* was distinguished as *obiter*.²⁰⁷ Accordingly, the court went on to apply the litigation conditions under *Foss v. Harbottle* instead.²⁰⁸

It is submitted that *Virgtel* interpreted the substantive right under the governing law too narrowly. The shareholder's right to bring a derivative action is always a conditional right. While these conditions

200. FED. R. CIV. P. 23.1(b)(1).

201. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991).

202. *Id.* at 96–97.

203. *Virgtel Ltd. v. Zabusky*, [2006] 2 Qd R 81, ¶ 51 (Austl.).

204. *Id.* ¶ 12.

205. *Foreign Corporations (Application of Laws) Act 1989* (Cth) s 7(3) (Austl.).

206. *Zabusky*, [2006] 2 Qd R ¶ 46 (Austl.).

207. *See id.* ¶ 58.

208. *See id.* ¶¶ 84–95.

vary between different countries' laws, the essential delimiting function served by those conditions is part and parcel of the right itself. It is thus difficult to see how they can be seen as only relevant to "the manner of exercise" of the substantive right. Further, the case was criticized on the basis that most of the Australian cases relied on by the court in *Virgtel* were not conflict cases.²⁰⁹ In short, the preferred approach would be to treat litigation conditions as substantive.

The more controversial issue is the leave requirement. If litigation conditions are substantive, should the plaintiff be required not just to fulfill them, but to fulfill them to the satisfaction of the foreign court? This is the key area where the two approaches (*all substantive*; and *some substantive, some procedural*) diverge.

As mentioned at the outset, the court's permission to continue the derivative action has been long required in England since *Prudential*.²¹⁰ This has been incorporated into the Rules of the Supreme Court and subsequently Rule 19.9 of the Civil Procedure Rules.²¹¹ Thus, there has long been a leave requirement under English law. Such a requirement can also be found in Canada,²¹² Hong Kong,²¹³ Cayman Islands,²¹⁴ and the BVI.²¹⁵ The question is whether the leave requirement is part of the substantive law.

Although *Konamaneni* did not address the leave requirement explicitly, it would appear that there would be no need to apply for leave from the state of incorporation as Justice Collins indicated in the judgment. He was apparently aware of this issue as he referred to Master Moncaster's consideration on whether the derivative action required authorization from the Indian court in the judgment.²¹⁶ In the subsequent part of the judgment, however, Justice Collins never stated that the Indian court's leave was necessary even though, according to Indian company law at the time, a derivative action would indeed

209. See GARNETT, *supra* note 192, at 136.

210. See *Prudential Assurance Co. Ltd. v. Newman Indus. Ltd. (No. 2)* [1982] Ch 204 at 219 (Eng.).

211. There is effectively no difference between the permission under *Prudential* and the leave requirement under the CPR. See *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2016] H.K.L.R.D. para. 109 (C.F.I.) ("Though Hong Kong did not follow suit in having a similar provision as the English O15 r12A, the substantive requirement of showing a prima facie case before a plaintiff could have the locus standi to pursue a derivative action is the same.").

212. See Locals 302 & 612 of Int'l Union of Operating Eng'rs–Emp'rs Constr. Indus. Ret. Tr. v. Blanchard, No. 04 Civ. 5954, 2005 WL 2063852, at *3 (S.D.N.Y. Aug. 25, 2005).

213. Companies Ordinance, (2014) Cap. 622, 14–22, § 732(1) (H.K.).

214. See Cayman Is. Grand Court Rules, (1995) R. 12A, 1 (Rev. ed.) 49, 128; *Davis v. Scottish Re Grp. Ltd.*, 88 N.E.3d 892, 893 (N.Y. 2017).

215. See *Novatrust Ltd. v. Kea Inv. Ltd.*, [2014] EWHC (Ch) 4061 (Eng. & Wales).

216. *Konamaneni v. Rolls Royce Indus. Power (India) Ltd.* [2001] EWHC (Ch) 470 [45] (Eng. & Wales) ("[W]hen considering the without notice application, canvassed the possibility that the English court might not allow a derivative action unless and until it had been authorised by the foreign court.").

require leave from the Indian courts.²¹⁷ If leave from the Indian court was necessary, it would certainly be a factor to be considered for *forum non conveniens*, which was the key inquiry of the case.²¹⁸ This approach found support in *Base Metal Trading Ltd. v. Shamurin*.²¹⁹ Lady Justice Arden expressed that some aspects of derivative action should be regarded as procedural:

The question whether a shareholder has a right to bring a derivative action may have to be distinguished in future from the question whether the shareholder has satisfied any procedural rules from bringing a derivative claim, for example, by serving prior notice on the company. My provisional view is that these are matters of procedural law for the *lex fori* rather than the law of the place of incorporation.²²⁰

She repeated that opinion with more specificity in the Court of Appeal decision in *Harding v. Wealands*, saying in obiter that “there may be matters in respect of such [derivative] actions, for instance, compliance with CPR r 19.9 which are matters of procedure and are thus governed by English law.”²²¹ The reference to Civil Procedure Rule 19.9 is particularly relevant. At the time of the judgment, the then version of Rule 19.9(3) provided that “[a]fter the claim form has been issued the claimant must apply to the court for permission to continue the claim.”²²² This suggests that Lady Justice Arden also thought that the issue of leave should be characterized as a matter of procedure.

While the Court of Appeal decision in *Harding* was subsequently repealed by the House of Lords, Lady Justice Arden’s opinion on derivative action was untouched.²²³ On characterization generally, the House of Lords applied the traditional right/remedy approach. Rules that affect the rights of the parties are regarded as substantive, while those that affect the remedy of the parties are regarded as procedural.²²⁴ Although this approach is heavily criticized, being called “disappointingly regressive” by one commentator, it remains valid law

217. Leave requirement existed since *Prudential*, and Collins thought English law and Indian law were the same. *See id.* ¶ 50 (“In the present case, the important question of choice of law does not arise for decision, because there is no material difference between English law and Indian law. It is clear from the evidence, and the texts on Indian company law—see Ramaiya, *Guide to the Companies Act*—that the Indian courts follow English case law on the point and permit derivative actions based on the exceptions to the rule in *Foss v. Harbottle*.”).

218. *See id.* ¶ 55.

219. *Base Metal Trading Ltd. v. Shamurin* [2004] EWCA (Civ) 1316 [68] (Eng. & Wales).

220. *See id.* It is important to note that Lady Justice Arden’s opinion is only dicta.

221. *Harding v. Wealands*, [2004] EWCA (Civ) 1735 (Eng. & Wales) ¶ 62.

222. *See* The Civil Procedure (Amendment) Rules 2000, 2000, No. 221 (L.1) (U.K.).

223. *See* GRAEME JOHNSTON & PAUL HARRIS, *THE CONFLICT OF LAWS IN HONG KONG* 576 (3d ed. 2017).

224. *Harding v. Wealands*, [2006] UKHL 32, 2 A.C. 1 (appeal taken from Eng.) (“Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made”) (quoting *Don v. Lippmann* (1837) 5 Cl & Fin 1, HL (Sc.)).

in England.²²⁵ The facts of the *Harding* case, however, neither concern derivative action nor the foreign leave requirement, so it is not clear how the right/remedy test will be applied in such contexts. Some indications may be found in the United States as this test was applied recently by the New York Court of Appeals, the highest state court in New York, in *Davis v. Scottish Re Group Ltd.*²²⁶

In that case, the plaintiff sought to bring a multiple derivative action against the defendant directors, who served on the boards of the subsidiary, by derivative actions. Both the parent company and the subsidiary were incorporated in the Cayman Islands. The New York Court of Appeals characterized the leave requirement under Rule 12A of the Rules of the Grand Court of the Cayman Islands as procedural and held that no such leave was required.²²⁷ There were three reasons for holding so. The first was the court's interpretation that the Rule 12A was not literally applicable to a derivative action initiated outside of the Cayman Islands.²²⁸ More importantly, the second and third reasons challenged the practice of requiring the plaintiff to seek leave in overseas courts generally. The second reason pointed to the leave requirement being about a remedy rather than a right:

Rule 12A . . . allows any plaintiff the right to commence a derivative action, and sets forth a procedural mechanism for a threshold determination of merits and standing. Certainly, if a plaintiff does not seek leave to continue, the rule creates an impregnable barrier to continuing the derivative action, forestalling any remedy, just as a statute of limitations forecloses a plaintiff who sleeps on its rights from obtaining a remedy. However, Rule 12A itself neither creates a right, nor defeats it. Rather, it is the initial decision by the Grand Court judge, made after an evaluation of the plaintiff's complaint using the substantive law, along with the defendant's evidence, that may terminate the action.²²⁹

This is practically the same test as applied in *Harding* under English law.

Thirdly, the court took a pragmatic approach to characterization as it did for derivative action generally. It emphasized that the practical impacts in terms of costs and inconvenience on both the plaintiff and the courts, both the forum and the foreign court, are to be considered:

[G]eneral policy considerations ought to be weighed when determining whether a rule is substantive or procedural. Specifically, we consider whether our determination would impose a burden on the foreign court . . . and whether it would threaten to cause delay in the "conduct of judicial business and impair judicial efficiency." Here, these factors further weigh in favor of our conclusion that Rule 12A is procedural. Holding that Rule 12A is procedural does not impose

225. See GARNETT, *supra* note 192, at 33.

226. *Davis v. Scottish Re Grp. Ltd.*, 88 N.E.3d 892, 897–99 (N.Y. 2017).

227. *Id.* at 893–94.

228. *Id.* at 896 ("By its terms, [Rule 12A] does not specifically apply to actions involving *Cayman*-incorporated companies.").

229. *Id.* at 897–98.

a burden on our courts, or the courts of the Cayman Islands. However, were Rule 12A held to be substantive, it is unclear what procedural path a party seeking to bring a derivative action in New York on behalf of a Cayman company would follow to comply with Rule 12A. Must the party first proceed by writ in the Grand Court and then discontinue the Cayman action to return to, or commence its action here in New York? Would the ruling by the Grand Court that there was a sufficient showing of merit be binding on a New York court on a motion to dismiss or for summary judgment? Rule 12A provides no answers.²³⁰

The latter part of the quote above touched on the potential impacts of the characterization on jurisdiction of the court. While this part is not fully elaborated by the court, it is noted that jurisdictional rules are generally characterized in common law countries as substantive.²³¹ Thus, this further adds to the justification in characterizing the leave requirement as procedural.

Finally, in Hong Kong, Lord Millett made it clear in *Waddington* that the leave requirement was a matter of procedure: “If the question whether a derivative action is available is a question of substantive law . . . then it is governed by the law of the place of incorporation . . . The question whether the leave of the court is required is a procedural question governed by the *lex fori*.”²³² Thus, the highest courts in England, Hong Kong, and New York all seem to support the characterization of the leave requirement as procedural.

3. All Substantive

There are, however, certain precedents that characterized all derivative action issues as substantive, including the leave requirement. As will be seen below, this treatment will have negative impacts in multiple derivative actions and is thus not preferred.

Novatrust Ltd. v. Kea Investments Ltd. is a recent English case that has the most detailed discussions on the characterization of the leave requirement by the English courts, albeit in a case on a single derivative action.²³³ In that case, the English court characterized the leave requirement under BVI law as substantive.²³⁴ The plaintiff shareholder of a BVI company must therefore obtain leave from the BVI court for BVI pre-litigation procedures prior to the derivative action in England.²³⁵ The court relied on authorities from the United States, the BVI, and Hong Kong.

230. *Id.* at 898 (citing *Tanges v. Heidelberg N. Am., Inc.*, 710 N.E.2d 250, 251–53 (N.Y. 1999)).

231. See GARNETT, *supra* note 192, at 71 (“It is well established in all systems of private international law that the manner of effecting service of originating process on a defendant is governed by the law of the forum court.”).

232. *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] 11 H.K.C. 370 (C.F.A.).

233. See *Novatrust Ltd. v. Kea Inv. Ltd.*, [2014] EWHC (Ch) 4061 (Eng. & Wales).

234. *Id.*

235. *Id.*

a. United States

The English court approved the characterization test in *Vaughn v. LJ International Inc.*, a decision of the California Court of Appeal.²³⁶ Similar to *Novatrust*, *Vaughn* dealt with a single derivative action on behalf of a BVI company. The test stated by the court in *Vaughn* was:

Whether appellant's right to bring this action involves no more than compliance with procedural requirements extraneous to the substance of their claim, or whether it concerns the very nature and quality of their substantive rights, powers and privileges as stockholders . . . the issue is not just "who" may maintain an action or "how" it will be brought but "if" it will be brought.²³⁷

Citing this test, the *Novatrust* court held that the BVI leave requirement fell into the substantive category. However, this *Vaughn* test is not consistent with the right/remedy approach approved by the House of Lords in *Harding*. As discussed above, nor is this test universal, even in the United States—as *Davis v. Scottish Re Group Ltd.* has shown.²³⁸

Putting aside the precedents, the *Novatrust* ruling is problematic, both theoretically and practically. Theoretically, such an "outcome determinative" approach will essentially make most rules "substantive."²³⁹ Any procedural rule could have a significant impact in a given case that forces the plaintiff to give up the proceedings. In addition, even if such a test is to be adopted, it may not necessarily reach the same conclusion. The High Court of Australia developed in *John Pfeiffer Party Ltd. v. Rogerson* a similar "outcome determinative" approach under which "matters that affect the existence, extent or enforceability of the rights or duties of the parties" are characterized as substantive, while "rules which are directed to governing or regulating the mode or conduct of court proceedings" are characterized as procedural.²⁴⁰ Applying this test, the Supreme Court of Queensland concluded in *Virgtel* that the leave requirement under Nigerian law was procedural, as it only dealt with "the manner of commencement of this proceeding."²⁴¹

Further, the *Novatrust* court appears to have characterized the specific BVI rule that requires court leave instead of the general issue of the leave requirement in a derivative action.²⁴² It is submitted that

236. *Vaughn v. LJ Int'l, Inc.*, 94 Cal. Rptr. 3d 166, 172–73 (Cal. Ct. App. 2009).

237. *Id.* at 171.

238. *See Davis v. Scottish Re Grp. Ltd.*, 88 N.E.3d 892 (N.Y. 2017). The test stated in *Vaughn*, which was originally set out in *Hausman v. Buckley*, 299 F.2d 696 (2d Cir. 1962), was not mentioned or cited in *Davis*. Thus, the continued validity of this test in the state of New York is very much in doubt.

239. *See GARNETT*, *supra* note 192, at 21.

240. *John Pfeiffer Party Ltd. v. Rogerson*, (2000) 203 CLR 503 ¶ 99 (Austl.).

241. *Virgtel Ltd. v. Zabusky*, [2006] 2 Qd R 81 ¶¶ 44–46 (Austl.).

242. *See Novatrust Ltd. v. Kea Inv. Ltd.*, EWHC (Ch) 4061 [38] (Eng. & Wales) ("In my judgment the effect of s.184C(6) is that by BVI law a member of a company does

the courts should characterize the “issue” instead of the “rule.” This age-old problem is best illustrated by *Re Cohn*.²⁴³ In that case, the issue was whether the English or German law on survivorship applied to the estate of a mother who died at the same time as her daughter in an air raid during the Second World War.²⁴⁴ The court reviewed the rules of English and German laws and concluded that both were substantive.²⁴⁵ Accordingly, only German law applied.²⁴⁶ The methodology of characterizing the rules but not the issue was heavily criticized.²⁴⁷ By interpreting the rules, it is possible that the courts could have concluded that the English rule was procedural and German substantive, and therefore both were applicable. Conversely, it is also possible for both rules to be inapplicable (German law being procedural and English law being substantive).²⁴⁸ Because of these potential fallacies, it has been argued that the court should have characterized the “issue,” namely, the issue of survivorship in *Re Cohn*, instead of the respective “rules” of England and Germany.²⁴⁹

The fallacies in *Re Cohn* may be a potential problem, considering *Novatrust* adopted the same approach. The court examined the BVI rule and concluded that the plaintiff was required to obtain leave at a BVI court in order to initiate derivative action, even outside of the BVI.²⁵⁰ The court, however, did not examine how this BVI leave requirement interacted with the English litigation conditions and the leave requirement under *Foss v. Harbottle*.²⁵¹ Assuming that the claimant obtained court leave from the BVI court prior to initiating a derivative action in England, and if the English rules are also characterized as procedural, it will have the effect of requiring the claimant to apply for leave from both jurisdictions. This is an adverse result that is similar to applying both laws of incorporation to a

not have the right to bring proceedings in the name of or on behalf of a company unless that member has complied with the other provisions within s.184C and that is so whether the proceedings are to be brought in the courts of the BVI or elsewhere. Absent this provision I would have agreed that the requirement for leave from the BVI Court was procedural.”).

243. *Re Cohn* [1945] Ch. 5 (Eng.)

244. *Id.* at 5.

245. *Id.* at 6–8.

246. *Id.* at 8.

247. *See* DICEY, MORRIS & COLLINS, *supra* note 11, ¶ 2-021.

248. *Id.*

249. *See* *Macmillan Inc. v. Bishopsgate Inv. Trust PLC*, [1995] EWCA (Civ) 55 [41] (Staughton L.J.) (Eng. & Wales) (“I would regard it as plain that the rule of conflict of laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action which the plaintiff relies on.”); ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 110 (2014) (“It is usually understood that issues, rather than rules of law, are characterized.”); SYMEON SYMEONIDES, CHOICE OF LAW 64 (2016) (“Modern systems, such as the Restatement (Second) and recent conflicts codifications, employ rules or approaches that . . . are constructed around narrower categories or ‘issues.’”).

250. *See* *Novatrust Ltd. v. Kea Inv. Ltd.* [2014] EWHC (Ch) 4061 [38] (Eng. & Wales)

251. *Foss v. Harbottle* (1843) 67 Eng. Rep. 189.

multiple derivative action. While it is unlikely in practice for the court to interpret the English leave requirement as procedural, this methodology is problematic and sets a bad precedent for future cases.

b. British Virgin Islands

Aside from theoretical issues, the requirement of BVI leave imposes a heavy duty on the plaintiff in derivative cases in practice. This is particularly the case for multiple derivative actions and best illustrated by the litigation between Microsoft and Vadem which spans two BVI judgments and four US judgments.

The dispute was between the plaintiff, Microsoft, a Washington state incorporated company, and the defendants, who were directors in the BVI parent and the California subsidiary.²⁵² Microsoft was a shareholder of the BVI parent but owned no shares in the California subsidiary.²⁵³ The plaintiff sued the defendants in the Delaware Court of Chancery for, *inter alia*, breach of fiduciary duties of the defendants at both the BVI parent and the California subsidiary.²⁵⁴ The issue was whether the plaintiff needed to first obtain leave from the BVI court.²⁵⁵ Citing *Sagarra*, the court applied BVI law, the law of the state of incorporation of the parent, to determine standing in multiple derivative actions.²⁵⁶ Similar to *Novatrust*, the court looked at BVI law and found that it required the plaintiff to obtain leave from the BVI court in a derivative action against any BVI companies.²⁵⁷ Since the plaintiff did not obtain leave, the Delaware court dismissed the case against the plaintiff but gave the plaintiff the opportunity to seek leave in the BVI and refile afterwards, having regard for the novel nature of the issue.²⁵⁸ This judgment was subsequently confirmed by the Delaware Supreme Court.²⁵⁹

Microsoft's subsequent quest for BVI court leave did not go smoothly because of the lack of a relevant mechanism under BVI law for dealing with such an application. At first instance, the BVI court did grant leave for the derivative action against the BVI parent but expressly stated that the leave only applied to the cause of action attached to the BVI parent, not the California subsidiary.²⁶⁰ In fact,

252. Microsoft Corp. v. Vadem, Ltd., C.A. No. 6940-VCP, 2012 WL 1564155, at *2 (Del. Ch. Apr. 27, 2012).

253. *Id.* at *5–6.

254. *Id.* at *11.

255. *Id.* at *13–14.

256. *Id.* at *14–17.

257. *See id.* at *4 (“On its face, § 184C appears to require that any member of a BVI company must obtain leave before bringing a derivative suit on behalf of the company.”).

258. *Id.* at *20–21.

259. Microsoft Corp. v. Vadem, Ltd., 62 A.3d 1224 (Del. 2013).

260. Microsoft Corp. v. Vadem Ltd., (2012) BVI HC (COM) 2012/0048, ¶ 14 (Virgin Is.) (“I am therefore satisfied that Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else, causes of action vested in Vadem California.”).

the judge went on to hold that Microsoft could not bring a derivative action “here or anywhere else, on causes of action vested in Vadem California.”²⁶¹ On appeal, although the BVI Court of Appeal ruled that the first instance court’s remark on the California subsidiary was “unnecessary and unhelpful and may also have been incorrect,” it stopped short of granting leave for multiple derivative actions on those cause of actions attached to the California subsidiary.²⁶² Thus, no leave was granted to the multiple derivative action. In fact, the court did not think it could grant such leave:

[I]t is not open to BVI court to give leave to a member of a company to bring proceedings not just in the name of and on behalf of the company of which he is a member but so too in the name of and on behalf of a company of which the first company is a member.²⁶³

Instead, the court simply stated that it was an issue to be decided by the *lex fori*, which in this case was Delaware law.²⁶⁴ The BVI decisions were not surprising as the relevant BVI law, at least at the time of those decisions, was not clear as to whether multiple derivative actions were allowed.²⁶⁵

This *renvoi*-like bouncing sequence²⁶⁶ continued in Delaware when the plaintiff went to the Delaware courts for the third time.²⁶⁷ The Delaware court was faced with the fact that the BVI leave decision did not establish whether multiple derivative actions were allowed.²⁶⁸ Instead, it simply said: “BVI law does not preclude Microsoft from pursuing claims on behalf of Vadem California in this proceeding” and the alternative grounds were sufficient to deal with the issue.²⁶⁹ First, it said, without being specific, that most of the causes of action were attached to the BVI parent instead of the California subsidiary.²⁷⁰

261. *Id.*

262. Microsoft Corp. v. Vadem Ltd., (2013) BVICVP 2013/0007, ¶ 13 (E. Caribbean Sup. Ct., C.A.) (Virgin Is.).

263. *Id.*

264. *Id.* ¶ 14 (“Whether [BVI court’s leave to bring derivative action on behalf of Vadem BVI] will enable Microsoft (in the name of and on behalf of Vadem BVI) to bring proceedings vested in a wholly-owned subsidiary of Vadem BVI will be determined by the *lex fori*.”).

265. See Waddington Ltd. v. Chan Chun Hoo Thomas, [2016] H.K.E.C. 1127, ¶ 156 (C.A.)

266. *Renvoi* is not a recognized principle in the context of derivative action in the United States. See Kostolany v. Davis, No. 13299, 1995 WL 662683, at *9 (Del. Ch. Nov. 27, 1995) (“Plaintiff argues that a Dutch court would view plaintiff’s allegation as stating a tort claim and would apply the law of the place of the tort, France. However, under the internal affairs doctrine, this court does not look to Dutch choice-of-law rules but applies Dutch local law. Restatement (Second) of Conflict of Laws § 302 cmt. j (1971).”). Here, the term is only used for the purpose of analogy.

267. Microsoft Corp. v. Amphus, Inc., No. 8092-VCP, 2013 WL 5899003 at *12–14 (Del. Ch. 2013).

268. *Id.* at *18.

269. *Id.*

270. *Id.*

Second, even if the causes of action were attached to the California subsidiary, there was enough evidence to pierce the corporate veil between the BVI parent and the California subsidiary.²⁷¹ This second alternative ground in particular showed how desperate the Delaware court was to find a way out of the BVI leave debacle.

To start with, this is not a standard piercing-the-corporate-veil case where a creditor seeks to pierce the corporate veil of a company to reach a shareholder. Instead, it is what is sometimes referred to as “inside reverse piercing,” which means a “corporate insider . . . attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.”²⁷² This appears to be the case here since it was Microsoft, a shareholder, that sought to pierce the veil to reach the cause of actions belonging to the subsidiary. This type of piercing is not allowed in most states in the United States.²⁷³ While it is not the purpose here to discuss inside reverse piercing, there is at least one Delaware case refusing to recognize such piercing.²⁷⁴

Further, even assuming that inside reverse piercing is recognized in Delaware, under Delaware conflict rules, piercing the corporate veil is governed by the law of the place of incorporation as well.²⁷⁵ Thus, the court should have applied either BVI or California law, being the laws of incorporation of the parent²⁷⁶ and the subsidiary.²⁷⁷ However, the court simply applied Delaware law without conducting a choice of

271. *Id.* at *18–20.

272. See Greiling v. Zahoudanis, No. CV08-06467, 2009 WL 700049 at *6 (C.D. Cal. Mar. 13, 2009) (“The first and most traditional manner to pierce the corporate veil occurs when a ‘shareholder [is] held liable for the debts or conduct of the corporation.’ Second, ‘[s]ome courts recognize the corporate veil may be pierced in reverse so that a corporation may be held liable for the debts or conduct of a shareholder.’ Typically, reverse piercing involves a ‘corporate insider ... attempting to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.’ This is referred to as ‘[i]nside reverse piercing.’ The third ‘sometimes called ‘outside’ or ‘third party’ reverse piercing, occurs when a third party outsider seeks to reach corporate assets to satisfy claims against an individual shareholder.”).

273. See *id.* at *9 (holding that such reverse piercing was not recognized under the law of California); see also Kuryla v. Coady, No. 126009961, 2013 WL 1494223, at *13 (Conn. Super. Ct. Mar. 22, 2013) (“Analyzing arguments concerning insider reverse piercing, courts, both within Connecticut as well as in other jurisdictions, have refused to allow corporations to pierce their own veil.”).

274. See *MIG Invs. LLC v. Aetrex Worldwide, Inc.*, 852 F. Supp. 2d 493, 505 (D. Del. 2012) (rejecting reverse piercing to impute the jurisdictional contacts of the parent to the subsidiary).

275. See *In re Wash. Mut., Inc.*, No. 10–847, 2017 WL 2256965, at *5 (D. Del. May 23, 2013) (“Delaware choice-of-law rules required the court to apply Washington law to evaluate whether WMI can be held liable for WMB’s actions, as both WMI and WMB are Washington corporations.”).

276. See generally *Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc.*, No. 09–cv–1410, 2013 WL 1334271 (E.D.N.Y. Mar. 28, 2013) (applying the law of the place of incorporation of the parent company to reverse piercing).

277. *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit L.P.*, 491 B.R. 335, 346–47 (S.D.N.Y. 2013) (applying New York, Delaware and Nova Scotia laws respectively to four subsidiaries of The Goldman Sachs Group).

law analysis.²⁷⁸ Applying BVI law was also likely to fail as the BVI court had previously rejected such argument in the first instance.²⁷⁹

After the case went to trial, the court did not discuss any of the above issues in that fourth Delaware judgment and instead rejected the plaintiff's claim of lack of personal jurisdiction over the defendants.²⁸⁰ It remains unclear what the Delaware court will do if none of these alternative options are available. Should it simply rule that the leave requirement is satisfied since the multiple derivative action was not "precluded" by the BVI court? Alternatively, the court may reject the multiple derivative action for lack of express leave from the BVI court. However, there is no precedent or legal basis for either option.

The Microsoft episodes therefore highlight, in relation to multiple derivative actions, the lack of an existing mechanism in both the forum where derivative actions are conducted and the forum where leave is to be obtained. While the litigating court expects the leave-seeking court to decide on whether to give leave for multiple derivative actions, the leave-seeking court may not have the law or system in place to make a decision thereto. The BVI court may be certain that its law should apply to an overseas derivative action against a BVI company in a single derivative action, but not in the case of a multiple derivative action.

If the English court is to apply *Novatrust's* ruling to multiple derivative actions in the future, it will likely encounter the aforementioned issues in the Microsoft litigation. Comparatively, *Novatrust* was a much easier decision. Apart from being a single derivative action, the court did not allow the plaintiff to seek leave from a BVI court again and just rejected the plaintiff's case outright.²⁸¹ Thus, the court never had to consider the type of leave granted by the BVI court in *Microsoft Corp. v. Vadem, Ltd.* In addition, both *Microsoft* and *Novatrust* dealt with a BVI-incorporated company and therefore the BVI court. The costs and inconvenience to the plaintiff could substantially increase with the involvement of a less experienced court, such as the Nigerian court in *Virgtel*.²⁸² These practical concerns thus make the current approach of *Novatrust* problematic as a general approach, particularly in the context of multiple derivative actions.

278. *Microsoft Corp. v. Amphus, Inc.*, No. 8092-VCP, 2013 WL 5899003, at *19–20 (Del. Ch. Oct. 31, 2013).

279. *Microsoft Corp. v. Vadem Ltd.*, (2012) BVI HC (COM) 2012/0048, ¶ 13 (Virgin Is.).

280. *Microsoft Corp.*, 2013 WL 5899003, at *19–20.

281. See *Novatrust Ltd. v. Kea Inv. Ltd.* [2014] EWHC 4061 (Ch). The court never discussed the possibility of allowing the plaintiff to seek leave from the BVI court in the judgment. This is contrasted against the Delaware court's approach in *Microsoft Corp. v. Vadem, Ltd. Vadem*, 62 A.3d 1224 (Del. 2013).

282. See *Virgtel Ltd. v. Zabusky*, [2006] 2 Qd R 81 ¶ 2 (Austl.) (discussing the lengthy proceedings that were still happening in Nigerian courts alongside the current lawsuit in Australia).

c. Hong Kong

Novatrust cited another Hong Kong case, *Wong Ming Bun v. Wang Ming Fan*,²⁸³ as support for its decision to require leave from the BVI. It was indeed a similar case, as the Hong Kong Court of First Instance rejected the plaintiff's single derivative actions for failing to obtain leave from the BVI court.²⁸⁴ However, as discussed above, *Waddington* leaves little room to argue, as far as Hong Kong law is concerned, that the leave requirement is a procedural matter and thus is to be governed by the *lex fori*.²⁸⁵ Interestingly, although *Wong* also quoted Lord Millett in its judgment, it conveniently omitted the part on leave being governed by the *lex fori*.²⁸⁶ Nor did *Novatrust* discuss *Waddington* on the leave issue.²⁸⁷

In *Chen Lian Ting v. Zhang Qin*, a subsequent Hong Kong case on multiple derivative actions, the court touched on, though did not elaborate on, the discrepancy in the issue.²⁸⁸ In that case, the plaintiff shareholder sought to bring a multiple derivative action on behalf of the subsidiary against the defendant director.²⁸⁹ The defendant asked the court to strike out the action as the plaintiff did not have leave from the BVI court.²⁹⁰ The court recognized that the leave requirement was characterized as procedural in *Waddington* and substantive in *Wong* and *Novatrust*.²⁹¹ Implicitly siding with *Waddington*, the court dismissed the strike out application, holding that the defendant failed to show that "it is necessary as a matter of substantive law for the plaintiff to obtain the prior permission of the BVI High Court."²⁹² In light of Lord Millett's clear statement on the matter, this is clearly the right decision.

In summary, while *Novatrust* might not have reached an unreasonable conclusion based on the facts of that case (a single derivative action involving a company incorporated in a jurisdiction with a highly skilled and experienced bar and court system), the *Novatrust* court certainly did not take into account the broader impacts that the case would have on multiple derivative actions involving less common and sophisticated jurisdictions. This is not meant as any disrespect to the *Novatrust* court. At the time of that case, the last two Delaware cases had not been decided, so the court could not fully comprehend all the problems in the *Microsoft* litigation.

283. *Wong Ming Bun v. Wang Ming Fan*, [2014] 1 H.K.L.R.D. 1108 (C.F.I.).

284. *Id.* at 1120.

285. *See* *Heyting v. Dupont*, [1964] 1 WLR 843 (Eng.).

286. *Wong Ming Bun*, [2014] 1 H.K.L.R.D. at 1121.

287. *See generally* *Novatrust Ltd v. Kea Inv. Ltd.* [2014] EWHC 4061 (Ch) (Eng. & Wales); *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] 11 H.K.C. 370 (C.F.A.).

288. *See* *Chen Lian Ting v. Zhang Qin*, [2017] HCA 2273, ¶ 8 (C.F.I.).

289. *Id.* ¶¶ 5–6.

290. *Id.* ¶ 2.

291. *Id.* ¶¶ 8–9.

292. *Id.* ¶ 18.

IV. CONCLUSION

International multiple derivative actions call for more tailor-made choice of law rules given their complexity. For the first issue, over which law should govern, it is advisable at least to explore choice of law options beyond the law of the state of incorporation. A mechanical application of the law of the state of incorporation of either the parent or subsidiary is bound to be problematic so long as (1) the parent and subsidiary are incorporated in two different jurisdictions and (2) their laws on multiple derivative actions constitute a true conflict. This Article suggests that a new exception based on the law of the closest connections shall be applied to multiple derivative actions. As outlined above, this approach will provide the flexibility to resolve the deadlock between the two laws of the places of incorporation. The accompanying uncertainty could also be mitigated by creating a presumption in favor of one of the two laws of the places of incorporation being the governing law. When both the parent and subsidiary are incorporated in the same jurisdiction, it will point strongly to the law of that jurisdiction to apply. A balance can therefore be struck between the flexibility required for multiple derivative actions and the certainty required for corporate transactions. Through this choice of law approach, an applicable law that properly represents the internal affairs of the corporate *group* can be identified to govern the multiple derivative action.

On the second question, regarding substance and procedure, no matter which law of the place of incorporation is adopted, it is suggested that the court shall not treat all relevant aspects of multiple derivative actions as entirely substantive or procedural. The availability of multiple derivative action and litigation conditions shall be characterized as substantive, while the leave requirement shall be characterized as procedural. Particularly, by treating the leave requirement as a procedural issue, the possibility of having two different, potentially conflicting leave requirements to apply to the same multiple derivative action would thereby be avoided. In addition, it will definitely save the plaintiffs the trouble in terms of money and time of seeking leave from remote parts of the world and the courts from working out how the leave requirement works with the forum's jurisdiction.

These suggestions can be looked at as separate proposals, and adopting one does not exclude the other. However, it is clearly better to adopt both. The result of both proposals is that they make multiple derivative actions more accessible to deserving minority shareholders by identifying the most relevant governing law and removing the uncertainty under the current law.

Choice of law ultimately should serve the need of the underlying law. These suggestions are consistent and in fact further the goal of allowing multiple derivative actions in the first place. As stated by Justice Bokhary PJ and Justice Chan PJ, “[o]n the well established thinking as to why a single derivative action is maintainable, there is

no reason why a multiple derivative action is not.”²⁹³ By the same token, there is no reason why an otherwise valid international multiple derivative action should be blocked by the application of mechanical and unnecessarily cumbersome choice of law rules.

Appendix I

Table 1 – Summary of US Multiple Derivative Action (MDA) Cases

Total No. of MDA Cases	Conflict Cases among MDA Cases	Choice of Law Analysis Conducted in Conflict Cases
50	38	26

Table 2 – Summary of Choice of Law Approaches in Conflict Cases

State of Incorp. (parent)	9
State of Incorp. (subsidiary)	2
State of Incorp. (both)	1
State of Incorp. (did not decide)	6
Underlying Claim	3
Interest Analysis	1
By Agreement	3
Lex Fori	1
Total	26

293. *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] 11 H.K.C. 370 ¶ 2 (C.F.A.).