IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 195 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA CVS (CAYMAN ISLANDS) HOLDING CORP.

IN CHAMBERS

Appearances:	Mr Tom Lowe QC of counsel and Mr Marc Kish and Ms Gemma Lardner of Ogier for Family Mart China Holding Co., Ltd ("the Petitioner")
	Mr Mac Imrie, Ms Natascha Steiner-Smith and Mr Ryan Hallett of Maples and Calder for Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan")
Before:	The Hon. Justice Kawaley
Heard:	24-25 January 2019
Draft Judgment: Circulated	19 February 2019
Judgment Delivered:	25 February 2019

HEADNOTE

Just and equitable winding-up petition - strike out application-whether petition disclosed reasonable cause of action - abuse of process - whether petition bound to fail - collateral purpose - relevance of availability of alternative remedies at interlocutory stage - whether subject - matter of petition arbitrable - whether mandatory arbitration stay should be granted - Companies Law sections 92(e), 95(1), (3) - Foreign Arbitral Awards Enforcement Law section 4

RULING ON STRIKE-OUT/STAY APPLICATION

Introduction and Summary

1. By a Petition dated October 12, 2018 the Petitioner, a Japanese company, seeks to wind-up China CVS (Cayman Islands) Holding Corp. (the "Company") on the just and equitable ground under section 92(e) of the Companies Law (2018 Revision). In the alternative, an order is sought requiring Ting Chuan to sell its shares in the Company to the Petitioner pursuant to section 95(3) of the Law. The Petitioner holds 40.35% and Ting Chuan holds 59.65% of the issued shares of the Company. The status of the Petitioner as a minority shareholder and Ting Chuan's status as a majority shareholder lies at the heart of the commercial dispute which underpins the present proceedings.

2. By a Summons dated November 23, 2018, Ting Chuan most significantly seeks the following orders:

> "*1. The winding up Petition dated 12 October 2018 (the 'Petition') be treated as an inter partes proceeding between the Petitioner and Ting Chuan.*
>
> *2. The Company be treated as the subject-matter of the Petition and shall be neutral giving such assistance as the Court shall direct.*
>
> *3. The Petition be struck-out on the grounds that the Petition is an abuse of the process of the Court.*
>
> *4. In the alternative, if the Petition is not struck out, that the Petition be dismissed or stayed pursuant to section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) and/or the inherent jurisdiction of the Court…*"

3. The present Judgment concerns the strike-out and/or stay application of Ting Chuan. For the reasons that are set out below, the strike-out application is refused but the mandatory stay application is granted.

4. The strike-out application was based on the following principal grounds:

   (a) the Petition failed to disclose a reasonable cause of action;

   (b) the Petition was an abuse because the Petitioner could adduce no evidence to support a finding that the key grounds for winding-up were made out (a justifiable loss of confidence in management);

   (c) the Petition was an abuse because it was a "rehash" of an earlier application for the appointment of inspectors;

(d) the Petition was an abuse because it was being prosecuted for a collateral purpose as illustrated, in particular, by its presentation before the Petitioner had even inspected certain 'Additional Materials' provided in the Inspectors Application (as defined below); and

(e) the Petition was an abuse because the Petitioner had failed to pursue alternative and more appropriate remedies, both under the SHA and by way of a derivative action.

5. The stay application was based on the arbitration clause in the May 11, 2011 Amended and Restated Shareholders Agreement ("SHA") and, primarily, on section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) ("FAAEL"). In the alternative reliance was placed on the Court's discretionary jurisdiction to grant a stay under section 95(1) of the Companies Law.

Findings: Does the Petition disclose a reasonable cause of action?

The Petition

6. It is uncontroversial that the Company was incorporated in the Cayman Islands in February 17, 2003 and that it engages in what is described as the "Convenience Store Business" in the People's Republic of China, excluding Hong Kong and Macau ("PRC"). It conducts its business (the "FM CVS Business") through nine "*Operating Subsidiaries*" under the "FamilyMart" brand. That brand has been used in Asia by one of the Petitioner's two main shareholders ("Japan FM") for over 40 years. (The Petitioner's shareholders are referred to collectively as the "FM Parties"). The Petitioner was incorporated in Japan on January 20, 2003. Ting Chuan was incorporated in the Cayman Islands on January 30, 2006.

7. The Company's initial shareholders were the Petitioner as minority shareholder and (until 2011) the parent company of Ting Chuan, Ting Hsin (Cayman Islands) Holding Corporation ("Ting Hsin"), as majority shareholder. The Company has seven directors; four "Majority Directors" and three "Minority Directors". The Petitioner believes that the Ting Hsin Group is owned and controlled by the Majority Directors.

8. Most of the Majority Directors (three out of four) have served since February 17, 2003, with only Mr Wei Junior being appointed subsequently (in 2014). The three long-serving Majority Directors are, using the abbreviations adopted in the Petition, Mr Wei and the 2nd and 3rd Brothers. The Minority Directors are the February 17, 2003 vintage Mr Pan, and the April 12, 2018 appointees Mr Kiriyama and Mr Kubo.

9. The parties' relationship is said, without controversy, to be governed by the following agreements:

(a) a 2011 Framework Agreement;

(b) the SHA (May 11, 2011); and

(c) a Chinese Franchise Sub-License Agreement (May 11, 2011) (the "SLA").

10. Controversially, the Petitioner avers that there was also a legally enforceable "Understanding" "*between the FM Parties and Ting Hsin*" that, in particular:

> "*(a) The Ting Hsin Group would use its resources in the PRC to procure from third parties or provide necessary infrastructure for the FM CVS Business including the contracting of food factories, logistics and the provision of an information processing system. Any such contracting of infrastructure services would be transparent and disclosed by Ting Hsin to the FM Parties and then only on the footing that the terms were fair and equitable*...." (paragraph 29) [emphasis added].

11. Mr Imrie submitted that there was no evidential support for the underlined averments in paragraph 29 (a) and that the averments were legally unsustainable in light of the "Entire Agreement" clause in the SHA. One limb of the Petition was a complaint that the Understanding had been breached.

12. The Petition alleged that the following duties were owed by the Majority Directors:

> "*33. ...the Majority Directors owed a duty not to cause the Company or the Operating Subsidiaries to enter into transactions with corporate entities, which were members of, affiliated with, or related to the Ting Hsin Group or with which the Majority Directors have close association ("**Related Parties**") without making full and frank disclosure to the Company and/or Petitioner ("**Related Party Transactions**").*"

13. The second limb of the Petition was a complaint grounded on a breach of these duties combined with an allegation that satisfactory disclosure was made up until 2012 of, *inter alia*, who the Related Parties were, but not thereafter. The averments culminate in the following crucial plea:

> "*55. Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the Majority Directors to act in breach of duty as aforesaid and/or allowed the Majority Directors and/or members of the Ting Hsin Group to profit from such breaches of duty and in doing so also acted in breach of the Understanding.*"

14. Mr Imrie submitted that this plea failed if the Understanding was not an enforceable one, a point which was reiterated in reference to the very similar pleas in paragraphs 80 and 82 of the Petition. The latter pleas were based on averments about the Petitioner's

growing concerns over the period 2013-2018, culminating in the filing of an application on May 15, 2018 in this Court under section 64 of the Companies Law (2018 Revision) (the "Inspectors Application"). In all three cases, the Understanding was relied upon as an alternative basis of liability to the claim of causing, permitting and procuring breaches of duty by the Majority Directors, however.

15. The Petition thirdly avers that there has been a justifiable loss of confidence in the management such that the relationship between the majority and minority shareholders has irretrievably broken down. Mr Imrie submitted that the high point of the Petitioner's case in this regard, non-disclosure apart, was the averment that as regards the "Undisclosed Related Party Transactions", "*the Petitioner suspects that their terms are not arms' length*" (Petition, paragraph 101). It was argued that the Petition failed to disclose a reasonable cause of action because it did not allege any actual diversion of profits. Paragraphs 109 and 110 of the Petition do support the alleged loss of trust and confidence solely by reference to a breach of the Understanding. However, the primary plea (Petition, paragraph 108) does not. The central assertion is that a high volume of Undisclosed Related Party Transactions have taken place involving breaches of duty by the Majority Directors. It was earlier averred, *inter alia*, that an Affirmation filed in the Inspectors Application admits that the terms on which Related Party Transactions are taking place have not been fully disclosed (Petition, paragraph 77).

Should the Petition be read narrowly or in its wider litigation strategy context?

16. The general question of how one should construe the Petition was understandably not directly addressed in argument. This was understandable because the sustainability of the pleading issue was addressed more fully in oral argument than in the Skeleton Arguments. It is well recognised that pleadings which can be cured by amendment should not ordinarily be struck-out without affording the pleader the opportunity to cure the deficiency, and that the Court has a generous ambit of discretion in this regard.

17. The most obvious reason for the somewhat obtuse way in which the Petition was crafted was the tactical goal of sidestepping the argument which Ting Chuan did in fact raise: the complaints properly arise in relation to the SHA, and are caught by its very broad arbitration clause. I bear this in mind when assessing the argument that no reasonable cause of action was disclosed on the face of the pleadings. In so doing, I consider that I am entitled to have regard to the possibility of remedial amendments which were not canvassed by the Petitioner's counsel but which fairly arise from the Petition as presently pleaded.

The Understanding

18. The Understanding is alleged to have been reached in 2003 between the parties who formed the Company. The relationship between the present disputants is clearly governed by the SHA, consummated in May 2011. Section 20.2 provides in salient part as follows:

> "*Without prejudice to any other provisions under this Agreement, this Agreement (including the documents, instruments, and all schedules and exhibits referred to herein), upon the Effective Date, constitute [sic] the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the Parties with respect to the subject matters hereof…*"

19. This was Mr Imrie's clearest "slam-dunk" point. Any contractual claim can only, it is plain and obvious, be brought based on the SHA. The purpose of the SHA was to govern the parties' relationship in the joint venture which was given legal life by the creation of the Company. Two further clauses were particularly relevant to both the present pleading point and the alternative arbitration stay argument.

20. Firstly, Article III of the SHA ("***BUSINESS SCOPE; PURPOSE OF COMPANY***"). This demonstrated that the SHA was very much concerned with the commercial activities to which the Understanding related. "Business" was defined in Section 1.1 as follows:

> "'***Business***' *means the engagement in and development of the convenience store business in the Territory, via company owned stores or franchise stores, using the 'FamilyMart' trademarks, service marks and other marks associated with the business and using know-how related to the management of convenience stores;…*"

21. Section 3.2 ("***Purpose and Operating Principle of the Company***") arguably contains a distillation of the core principles underpinning what is pleaded in more particularised form as the "Understanding". The governing objective is "generating maximum distributable profits", and the operational standards require business to be conducted "*in a manner consistent with the best interest of the Company*" and "*in accordance with sound and proper business and financial practices*". These operating principles arguably, by necessary implication, both:

    (a) prohibited the diversion of profits to parties related to the majority shareholder and management systems which deprive the minority

shareholder of the ability to verify that the principle of maximising profits for the Company is not being compromised; and

(b) required the majority shareholder to give disclosure of all significant dealings between the Company and Related Parties.

22. Section 9.1 ("**Compliance with this Agreement**") provides:

> "*Each Shareholder shall, and shall procure its Affiliates and directors nominated by it to, take all reasonable steps to ensure that the provisions of this Agreement are complied with and shall do all such other acts and things as may be necessary or required to implement the provisions of this Agreement or to consummate the transactions contemplated hereunder, including, without limitation, appearing at and exercising the votes it controls directly or indirectly at meetings of the Board of Directors, or the shareholders' meetings of the Company, whether acting as directors, shareholders or as proxies, to the extent that it has the right to cast the vote at its discretion.*"

23. Mr Imrie was keen to offer these provisions like a cup for his opponent to drink from, well knowing that from the Petitioner's standpoint it resembled a poisoned chalice.

24. Mr Lowe QC had no credible answer to the submission that the "Understanding" averments, especially to the extent that they were relied upon as freestanding legal complaints, were unsustainable in light of the SHA. On proper analysis, all averments relating to the Understanding, albeit that they might potentially support substantially similar and legally viable SHA-based averments (which could be advanced through an amendment) are unsustainable as presently pleaded. They are liable to be struck-out.

Breach of fiduciary duty

25. In oral argument Mr Imrie submitted that no valid claim for breach of fiduciary duty was disclosed on the face of the Petition. This elaborated the narrower argument set out in Ting Chuan's Skeleton that an alternative remedy of suing the directors derivatively was available. In my judgment, it is impossible to fairly read the Petition as advancing a breach of fiduciary duty claim against non-party directors. Rather, as already noted above (paragraph 13), the case against Ting Chuan was that it caused or procured the Majority Directors to breach their fiduciary duties.

26. Ting Chuan's counsel did not appear to me to go so far as to submit that such a claim was legally unsustainable as against Ting Chuan. His submissions on alternative remedies helped to demonstrate that the pleading at worst lacked particularity. Was the claim advanced an equitable or tortious one? Had the Petitioner not been so keen to sidestep the arbitration stay implications of the SHA, a breach of contract claim would have been quite straightforward. More elaborate would be a tortious claim for procuring

a breach of the same contract. In my judgment, this claim does disclose a reasonable cause of action but is defective for want of particularity.

Summary: Does the Petition fail to disclose a reasonable cause of action?

27. Those portions of the Petition which assert a breach of the Understanding are unsustainable because the SHA expressly superseded any previous understandings between the parties. Paragraphs 29-31 of the Petition plead the Understanding as existing alongside or in addition to the written agreements and paragraphs 80, 82, 109 and 110 plead a breach of the Understanding. They are liable to be struck-out and in the exercise of my discretion I Order that they should be struck-out. If the Petition otherwise proceeds, I would nevertheless grant the Petitioner leave to apply to amend, if so advised, to rely on similar averments by way of a contractual claim.

28. The breach of fiduciary plea does disclose a reasonable cause of action. To the extent that it lacks particularity, and in my judgment it is unclear precisely what the legal basis of the claim is, I would grant leave to cure this defect by way of an application for leave to amend.

Findings: Is the Petition an abuse because the Plaintiff has not and cannot adduce evidence capable of supporting a finding that a justifiable loss of confidence has occurred?

29. Ting Chuan's submission that the Petitioner had adduced no evidence capable of supporting the pivotal loss of confidence plea was combined in oral argument with the following complementary submission. The matters pleaded in support of the conclusory loss of confidence plea were on the face of the Petition unsustainable, because it was not enough to prove a mere suspicion that profits were being diverted to Related Parties, it was contended.

30. In Ting Chuan's Skeleton Argument, it was firstly submitted that the suspicion averments were inadequately particularised:

> "*55.4 Finally, if the Petitioner's review of information during the Inspectors Application had sufficiently confirmed its 'suspicions', then one would expect to have seen that information used as the basis of properly particularised allegations showing a justification for winding up the Company. However, the Petitioner has failed to do so. The Petitioner may believe that it has sufficiently confirmed its own suspicions to itself (although TC doubts this), but it has failed to show to the Court a sufficient basis to justify the winding up of the Company*".

31. The following submissions are thereafter made:

> *"56. Considering that the Petitioner has now had two bites of the cherry (having filed the Inspectors Application and then the Petition, with ample opportunity to serve evidence satisfying the necessary evidential threshold), there is no indication that the Petitioner's evidence will improve between now and any hearing of the Petition.*
>
> *57. In accordance with its overriding objective to deal with matters justly, the House of Lords' guidance in Three Rivers District Council makes clear that 'it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial.' The Petitioner has not met the necessary standard of proof to show a loss of trust and confidence which justifies winding up the Company. At most, the Petitioner's complaints are based on its disagreement with the legitimate good faith decisions of the Majority Directors, and the Petitioner inflating this disagreement to further its abusive and collateral purpose for presenting the Petition, that is to terminate its joint venture with TC and TH so that Itochu can be free to pursue a PRC convenience store joint venture with other, larger third parties.*
>
> *58. There is no evidence to justify the Petitioner's claim of a loss of trust and confidence in the Company's management. Because the Petition has no real prospect of succeeding at trial, it is abusive and should therefore be struck out."*

32. In oral argument is was submitted that a plea based on mere suspicions was legally unsustainable and that evidentially it was clear the Petitioner could not prove any allegations capable of supporting a finding that the threshold for granting a winding-up order had been met.

33. The important question is not whether Mr Imrie was right to submit that the Petitioner was unable to allege and prove more than suspicions of profit diversions to Related Parties; in my judgment he plainly was. The important question is whether those suspicions reflect the high point of the Petitioner's case, it being relatively clear that proof of mere suspicions of misconduct, even if well-founded, are likely to be *prima facie* insufficient to support a just and equitable winding-up. I have already found above that the breach of fiduciary duty averments in the Petition, which centre on complaints of non-disclosure rather than any more substantive misconduct, are legally sustainable when generously read. It appears that the Inspectors Application was intended, at least in part, to obtain evidence for the Petitioner's secret profit suspicions. It was then abandoned when sufficient material was obtained to launch the Petition based on somewhat more modest and easy to prove non-disclosure and suspicion allegations.

34. There is some evidential support for the pleas (Petition, paragraphs 65-66) about how the relationship finally broke down. The Petitioner's Skeleton Argument summarised the Petitioner's case in this regard as follows:

"31 A meeting between the shareholder representatives eventually took place on 24 January 2017 between JFM's President, Mr. Sawada, and Mr. Wei (the "24 January Meeting") at which Mr. Wei proposed a "divorce" between the Petitioner and made it clear that the TH Group no longer wanted the Petitioner's involvement in the Company's business. Mr Wei essentially acknowledged that there had been a loss of trust and confidence.

32 Mr Wei denies in Wei 2 that this is an accurate description of the 24 January Meeting and now suggests in his evidence that his wish is for the Petitioner and Ting Chuan to continue to work together for the Company's benefit.

33 However, following the 24 January 2017 Meeting, without giving any, or any proper, explanation to the Company, the Majority Directors:

(a) suspended payment of royalty fees and delayed paying the royalty fees due under the SLA (see paragraphs 47 to 48 of Ogawa 1);

(b) failed to provide the Petitioner with monthly reports required to be provided under the SLA;

(c) expelled the remaining two JFM employees who had been seconded to the Company; and

(d) demanded that the Petitioner either agree to terminate the relationship between the parties or, inter alia, reduce the 1% running royalty rate under the SLA to 0.3% and reduce its shareholding from 40.35% to 19%.

34 In addition to the misconduct set out below, this amounts to a breach of the fundamental understanding between the parties giving rise to the Petitioner's loss of trust and confidence in the Company (see Ebrahimi v Westbourne Galleries [1973] AC 360 and CVC v DeMarco [2002] CILR 77)."

35. The evidential support for these allegations is principally found in the First Affirmation of Shuji Ogawa sworn in support of the Inspectors Application. Some of the evidence may border on the melodramatic, but the core assertions are not really disputed altogether. The inferences to be drawn from the primary facts are in controversy and those relied upon by the Petitioner cannot at this stage be characterised as inherently improbable. The additional misconduct complained of relates to the Undisclosed Related Party Transactions which it is contended the Majority Directors breached their fiduciary duty in not disclosing. Four potentially significant allegations in the Petition are the following:

(a) from 2013 onwards, accounting procedural changes resulted in the identity of Related Parties not being included in audited accounts (Petition, paragraph 53);

(b) at a March 21, 2018 Board meeting, a request was made for the audited financial statements of the main Related Parties which was denied by the Chairman (Petition, paragraph 71);

(c) on May 15, 2018, the Petitioner filed the Inspectors Application in this Court (Petition, paragraph 72); and

(d) at a June 12, 2018 Board meeting, the Majority Directors supplied a Related Parties Schedule which revealed for the first time five Related Parties with which the Company was dealing (Petition, paragraph 75).

36. These specific allegations are supported by evidence and are not altogether disputed. The accounting change is, as I understand it, not disputed; however, it is explained by reference to a seemingly straightforward change of accounting basis justification. The Second Affirmation of Mr Wei disputes the secrecy complaints made by the Petitioner, but counters them in large point by reference to information disclosed under legal compulsion (paragraphs 15.3, 15.4, 15.5 and 15.6). Mr Lowe QC described the assertion that adequate disclosure had been made through audited financial reports as "flimsy to the power of 10". Other complaints about the way in which Minority Directors were treated during the period 2012-2017 are admittedly extremely weak, mainly because the Petitioner only presently relies upon witnesses only able to give direct testimony of the post-March 2018 period.

37. In my judgment it is not possible to fairly conclude at this stage that the facts which the Petitioner appears to be capable of at least potentially proving do not even potentially support a finding that there was a justifiable loss of confidence in management on the Petitioner's part. This is, of course, perhaps not the typical case where it is obvious that if the relevant facts are proved that the Petitioner will prevail. Because the very existence of the duty of disclosure upon which significant reliance is placed is subject to argument on legal grounds. Nevertheless, Ting Chuan's submission (Skeleton, paragraph 57) that the "*Petitioner has not met the necessary standard of proof to show a loss of trust and confidence which justifies winding up the Company*" is clearly beside the point at the strike-out stage. Paragraph 63 of the Petitioner's Skeleton set out the applicable legal test to strike-out applications based on the 'bound to fail ground':

> "*It is trite law that an application to strike out will fail unless it is plain and obvious that the petition will not succeed. If the court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour of the petition, then it must let the petition go trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established*

by evidence which is not disputed, lead the court of the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing and thereby to protract the uncertainty that hangs over the company." (Ralph Gibson LJ in *Re a Company No 003096 of 1987* [1988] 4 BCC 80 at page 81)

38. I accordingly find that this strike-out ground has not been made out. I am unable to find that the presentation and/or further prosecution of the Petition constitutes or would constitute an abuse of process because it is plainly bound to fail.

Findings: Is the Petition an abuse of process because it seeks to re-litigate matters raised in the Inspectors Application?

39. Ting Chuan submitted:

"*21. In the Inspectors Application, FMCH essentially had four complaints:*

21.1. That the Company had a high level of related party transactions, and that it suspected that the Majority Directors may be diverting profits from the Company by entering such transactions;

21.2. That the Company had been mismanaged;

21.3. That there were discrepancies in the Company's audited financial statements; and

21.4. That the FMCH-Appointed Directors had been excluded from the Company's management."

40. Ting Chuan's Skeleton then describes the filing of evidence in response to the application, preparing the "PwC AUP Report" in August 2018, making various documents available for inspection and finally (after the Inspectors Application proceeding had been consensually terminated), collating the "Additional Materials" requested by the Petitioner. As to the agreed termination of the proceedings, Ting Chuan submitted:

"*27. This agreement to discontinue the Inspectors Application, essentially an agreement to settle FMCH's claim, was memorialised in the Consent Order discontinuing the Inspectors Application filed by Ogier on 25 September 2018, only one week prior to the scheduled hearing of the Inspectors Application which had been fixed for 2 and 3 October 2018.*"

41. This submission on its face lacked conviction. Firstly, the application can hardly be viewed as asserting a "claim". Sections 64-65 of the Companies Law (2018 Revision) provides:

> *"64. APPOINTMENT OF INSPECTORS TO REPORT ON AFFAIRS OF COMPANIES*
>
> *The Court may appoint one or more than one competent inspectors to examine into the affairs of any company and to report thereon in such manner as the Court may direct-*
>
> *(a) in case of a banking company having a capital divided into shares, upon the application of members holding not less than one-third of the shares of the company for the time being issued;*
>
> *(b) in the case of any other company having a capital divided into shares, upon application of members holding not less than one-fifth of the shares of the company for the time being issued; and*
>
> *(c) in the case of a company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the total number of persons for the time being entered on the register of the company as members.*
>
> *65. POWERS OF INSPECTORS*
>
> *It shall be the duty of all officers and agents of the company to produce for examination by an inspector all books and documents in their custody or power; any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly; and any officer or agent who refuses or neglects to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, shall incur a penalty not exceeding forty dollars in respect of each such offence."*

42. These statutory provisions support investigative rather than adversarial proceedings and can legitimately be used as a platform for winding-up proceedings where an inspector's report suggests such proceedings are warranted. In the instant case the Company voluntarily produced information before any appointment was actually made.

43. Secondly, the Consent Order can hardly be construed as settling claims which could not have been asserted in those proceedings against Ting Chuan which, after all, was not even a party to them. The September 26, 2018 Consent Order merely granted leave to discontinue the proceedings brought by the Petitioner against the Company and dealt with the production and inspection of what were in these proceedings described as the

"Additional Documents". The critical paragraph in the Consent Order provided as follows:

> "*1. The Applicant has leave to discontinue the proceedings and the proceedings are hereby discontinued.*"

44. Nonetheless Ting Chuan submitted:

> "*69. Applying Dyson LJ's test in Ako v Rothschild, in all the circumstances, it was reasonable for the Company to believe that, upon signing the Consent Order that the Petitioner had elected not to further pursue its claims alleging that the Majority Directors had conducted the Company's affairs with a lack of probity (especially with respect to allegedly undisclosed related party transactions), and for each of the reasons listed above at paragraph 68, it would be an abuse of process for these claims to be re-aired through the hearing of the Petition.*"

45. The *dicta* of Dyson LJ in *Rothschild Asset Management Limited-v-Ako* [2002] ICR 899 (at paragraph 41) were simply these:

> "*there is no inflexible rule to the effect that a withdrawal or judgment by consent invariably gives rise to a cause of action or issue estoppel. If it is clear that the party withdrawing is not intending to abandon the claim or issue that is being withdrawn, then he or she will not be barred from raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur.*"

46. How such principles apply is always a fact-sensitive question. In *Ako*, an Industrial Tribunal at the request of the applicant dismissed an unfair dismissal complaint. Shortly thereafter, the applicant filed a fresh complaint against Rothschild and another new second respondent based on the same facts. Rothschild raised *res judicata* and the applicant contended she had not intended to debar herself from pursuing the second claim. The pivotal legal principle which actually resolved the appeal against Rothschild in that case was the following principle which undermines Ting Chuan's argument in the present case. Dyson LJ held:

> "*30. In my judgment, the reasoning in Barber and Lennon does not require that cause of action estoppel, as applied in the ordinary courts, should apply to Employment Tribunal cases where it is clear, on an examination of the surrounding circumstances, that the withdrawal of the application is in substance a discontinuance of the proceedings. Discontinuance does not release*

or discharge the cause of action. It preserves the right to establish an untried claim on the merits in other proceedings. If, as I have explained, this is so in ordinary courts, it does not make any sense that the position should be more strict in its application in the less formal setting of the Employment Tribunals." [Emphasis added]

47. In the present case the Inspectors Application was discontinued. Ting Chuan could point to nothing in the circumstances surrounding the consummation of the Consent Order which plausibly signified (or even suggested) that the Petitioner was undertaking not to pursue the same allegations against the Company, far less against Ting Chuan, in other proceedings.

48. I find that there is no basis for finding that the discontinuance of the Inspectors Application against the Company estopped the Petitioner from pursuing the present Petition against Ting Chuan.

Findings: Is the Petition an abuse because it is being prosecuted for a collateral purpose?

49. This strike-out ground had more superficial appeal to it but, on careful scrutiny, it is also largely based on the following premises which I reject:

(a) the present proceedings are a corollary to the Inspectors Application; and

(b) that the only sustainable complaint a minority shareholder can assert in support of a just and equitable winding-up application is that the majority shareholders are actually diverting profits to third parties.

50. In Ting Chuan's Skeleton the following central arguments was advanced:

"*59. The Petitioner failed to take any concrete steps to exercise its right to inspect the Additional Materials before presenting the Petition, such as enquiring with TC regarding a draft NDA for the Petitioner's consideration or convenient dates on which a representative of the Petitioner could undertake the inspection. It was only after this failure was highlighted by Maples and Calder in correspondence (on 25 October 2018), that on 30 October 2018, Ogier nominated Ms Meng to inspect the Additional Materials pursuant to the Consent Order....*

62. Simply put, the Petitioner's failure to inspect the Additional Materials before presenting the Petition is telling and speaks to the mala fides of the Petition. For this further reason, the Petition is abusive and should be struck out..."

51. However, another collateral purpose relied upon was not subject to these objections. Ting Chuan submitted:

> "*39.4. The Petition has been presented by the Petitioner to engineer a basis to terminate its relationship with TC, thus furthering the Petitioner's collateral purpose of pursuing a tie-up with third parties*".

52. Mr Imrie in oral argument went some way towards persuading me that this might well be a motive for the present Petition: the desire to enter into a fresh joint venture even if there were no or no serious complaints of misconduct against the Company's management. But I was unable to find at this stage that this was the only motive. The Petitioner again identified the correct legal approach in its Skeleton:

> "*72. Further, this is bound to be a fact sensitive issue which is impossible to decide without cross-examination. In order to be satisfied that a Petition should be struck out on the basis that the Petitioner was motivated by a collateral purpose, the Court must determine summarily:*
>
> *(a) what is the Petitioner's purpose(s) in presenting the Petition; and*
>
> *(b) that none of the Petitioner's purposes identified were legitimate.*
>
> *73 The Petitioner hoped, by virtue of presenting the Petition, to achieve the following objectives:*
>
> *(a) An end to its relationship with the Company and the Majority Directors;*
>
> *(b) If appropriate, an orderly court-supervised investigation into the affairs of the Company and in particular, the related party transactions;*
>
> *(c) An end to the mismanagement and breaches of duty carried out by the Majority Directors; and*
>
> *(d) An order compelling Ting Chuan to sell its shares in the Company to the Petitioner on transparent and commercial terms and at a value to be determined objectively and independently under the supervision of the Court.*
>
> *74 It is submitted that each of these purposes is a legitimate purpose for the presentation of a winding up petition (particularly in the Cayman Islands where there is no freestanding unfair prejudice remedy).*"

53. The purported minority shareholder's complaints advanced herein were on their face the sort of complaints one would expect a minority shareholder to make. I decline to accept Mr Imrie's submission that the present case is similar to my decision in *Ctrip Investment Holding Ltd-v-eHi Car Services Limited* [2018] 1 CILR 641 where I struck-out the petition in part because I summarily found that it was presented for a collateral purpose[1]. The central holding made on the collateral purpose issue in that case (where I implicitly found that there were no other legitimate or potentially legitimate motives for presenting the petition at all) was as follows:

> "*45...In addition the main purpose of the Petition is quite obviously to advance the rival bid supported by the Petitioner, not to advance the class interests of the shareholders the Petitioner is supposed to be representing.*"

54. In the present case there is no inherent inconsistency between the complaints set out in the Petition and the Petitioner's status as a shareholder of the Company. It is not "*quite obviously*" the case that the main purpose of the Petition is to advance interests collateral to the pleaded complaints. Nor is it clear that the main purpose of the proceedings is to obtain discovery to substantiate the Petitioner's suspicions; this complaint also tacitly presupposes that the Petition can only succeed if actual diversion of profits is proven.

55. I find that there is no basis for striking-out the Petition on collateral purpose grounds.

Findings: Should the Petition be struck-out or stayed because the Petitioner has failed to pursue more appropriate alternative remedies?

56. Ting Chuan submitted that the Petition was an abuse of process and liable to be struck-out because it was unreasonable for the Petitioner not to have pursued two alternative remedies first, namely:

(a) the dispute resolution mechanisms under the SHA (amicable settlement and/or arbitration); and

(b) a derivative action against the Majority Directors.

57. Mr Lowe QC submitted that the appropriateness of (discretionary) alternative remedies could not be determined at the interlocutory stage, save in very clear cases. It was argued in the Petitioner's Skeleton:

[1] The main focus of the *Ctrip* decision was the unsustainability of the Petition.

> *"64. Even in the case of the most common alternative remedy in the Cayman Islands (i.e. a fair offer by the Company to buy out the petitioner), the answer to both questions is inherently fact sensitive. Accordingly, it cannot be determined summarily that a Petition should fail on this ground save in very clear cases. As the CICA explained in Asia Pacific v Arc Capital [2015] (1) CILR 299, it is not always obvious that a shareholder is acting unreasonably even in refusing a buy-out offer. Even though this is a standard form of alternative remedy, it is dangerous to determine the issues summarily. The CICA expressly warned of the "potential danger of pre-judging the outcome of the trial".*

58. Mr Imrie demonstrated that it is arguable that the parties have agreed a contractual exit mechanism and that this should be resorted to rather than the Court's statutory buy-out jurisdiction. His opponent countered that it is not possible to contract out of the Court's statutory remedial jurisdiction. I consider it to be far from clear at this stage that, viewing the dispute resolution provisions in the SHA as optional rather than mandatory, that that procedure is more appropriate than the present Petition. Even if the arbitration clause attracts a mandatory stay, it is not obvious that the Petitioner would not, after having established its contractual claims in an arbitration proceeding, be entitled to invoke the statutory jurisdiction of the Court for further and other relief. The 'clean hands' arguments based in part on various alleged breaches of the SHA are even more unsuitable for summary determination at this stage, speaking as they do to the question as to whether relief to which the Petitioner would otherwise be entitled should be refused on discretionary grounds.

59. The alternative of a derivative claim against the Majority Directors would perhaps have been a stronger argument if the Petitioner was seeking relief against the Majority Directors as parties to the present action. As I have found above, it is possible (because of the SHA) for the Petitioner to complain that Ting Chuan procured breaches of duty by the Majority Directors, a plea that has not been made explicit (it seems to me) because it would serve to highlight the centrality of the SHA to the dispute which underpins the Petition.

60. Accordingly, I decline to strike-out the Petition on the grounds that the Petitioner has unreasonably failed to pursue alternative remedies.

Findings: Is Ting Chuan entitled to a mandatory arbitration stay under the FAAEL?

61. It was clear beyond sensible argument that the allegations raised in the Petition related to the subject-matter of the SHA, which had a broadly drafted mandatory arbitration clause. If Mr Imrie's strike-out out points were like rugby running backs, unable to pierce his opponent's defences, the alternative stay application was like a winger finally able to grasp the ball with an almost unimpeded path to the try line.

62. As noted above, the SHA governed the joint venture between the parties. Clause 20.3 (b) provides in salient part that:

> "*any and all disputes in connection with or arising out of this Agreement* [shall be] *submitted for arbitration in accordance with and finally settled under the Rules of Arbitration of the* [ICC] *in effect at the time...*"

63. Ting Chuan on November 29, 2018 referred various disputes to arbitration in reliance upon that clause. The alleged breaches of contract which overlap most obviously with the claims asserted in the Petition (and to which Mr Imrie referred) are the following:

- Requesting information to which the Petitioner was not entitled;
- Unjustifiably making the Inspectors Application; and
- Filing the Petition rather than deploying the dispute resolution mechanisms under the SHA.

64. Section 4 of the FAAEL provides as follows:

> "*4. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.*"

65. I accept Ting Chuan's following submissions:

> "*116. It is clear that the SHA governs the entire relationship between the joint venture partners, including without limitation the purpose of the Company, the composition of the Company's Board of Directors, the power and authority of the shareholders' meeting, operational matters of the Company, and matters requiring unanimous board resolution.*

117. Therefore, any dispute as to the conduct of the Company and its directors – including the entering into of related party transactions – may be considered to be a dispute 'in connection with or arising out of' the SHA."

66. I reject the Petitioner's submission that the subject-matter of the Petition is not arbitrable because only this Court can grant the relevant statutory relief. In my judgment there is a fundamental distinction between the question of whether the underlying disputes are arbitrable and the question of whether only the Court can grant the statutory relief of, *inter alia*, winding-up. Ting Chuan's counsel (at paragraph 131) advanced the following pivotal submission:

> "*…an arbitral tribunal can properly decide matters which might form the basis of a winding-up order, without the tribunal actually ordering a winding-up itself. Lord Patten's dicta in Fulham Football Club (1987) Ltd v Richards provides that an arbitration agreement would in fact operate:*
>
> > *'as an agreement not to present a winding up petition unless and until the underlying dispute has been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition [pursuant to the section of the UK Companies Act regarding just and equitable winding-up petitions]. In these circumstances the court could be invited to lift any stay imposed on proceedings [statutorily imposed pursuant to the UK Arbitration Act].'(emphasis added)*"

67. I accept the first limb of that submission based on the judgment of Patten LJ in an unfair prejudice context. In the present case, it is not necessary for me to decide whether the arbitration tribunal could or should decide the specific question of whether or not a winding-up order is justified on loss of confidence grounds. That question is closely connected to and almost indistinguishable from the Court's statutory jurisdiction to grant relief and it seems doubtful to me that an arbitrator would be competent to decide that issue. In my judgment, the Petitioner's substantive complaints can, subject to that one exception, all quite simply be formulated in contractual terms. I regard the "loss of confidence" pleas as conclusory in character, pleas which are only properly engaged if a foundational claim (e.g. procuring the Majority Directors to breach their obligations under the SHA) is first established. I see no significance in the fact (relied upon by Mr. Lowe QC) that neither the Company nor the Majority Directors are party to the SHA. The only genuine dispute is between the minority shareholder and the majority

shareholder whose relationship in relation to the Company is entirely governed by the SHA. In these circumstances it is quite straightforward to conclude that the arbitral tribunal can decide the relevant contractual disputes and that, if the Petitioner's complaints are vindicated, the Petitioner could (if appropriate):

(a) apply for leave to lift the stay of the present Petition and leave to make appropriate amendments to the Petition; and

(b) by way of enforcement of or reliance upon the award, seek appropriate statutory relief on the grounds that the tribunal's findings support the summary or conclusory finding that there has been a loss of confidence sufficient to justify a winding-up and/or alternative statutory relief. This is what routinely happens when a creditor's petition is stayed so that a disputed debt arising out of a contract containing an arbitration agreement can be determined by an arbitrator.

68. The purpose of the mandatory stay provisions of the FAAEL is to give effect to the strong legal policy that where parties to a contract have agreed to exclusively refer a suite of disputes to arbitration, they should be held to their contractual bargain. What additional relief may be necessary by way of enforcement of the resultant award before the courts is a separate matter, the full ramifications of which fall to be considered at the enforcement stage. The Petitioner's counsel was unable to identify any authority which clearly supported the proposition that the mere fact that a litigant was seeking ultimate relief which could only be granted by a court rendered the underlying dispute non-arbitrable.

69. *Cybernaut Growth Fund LP*, unreported, 23 July 2013, Jones J, was relied upon by Mr Lowe QC for the proposition that, as Jones J held, "*winding-up orders, supervision orders and orders for the appointment/ removal of liquidators as class remedies, which in turn leads me to the conclusion that such proceedings fall within the exclusive jurisdiction of the Cayman Court*". The petitioners were limited partners who presented a just and equitable winding-up petition against the limited partnership, which was opposed by the general partner. In that case Jones J found that in relation to a limited partnership agreement which had an arbitration clause not dissimilar to that in the SHA and also dealt with winding-up:

(a) the parties had not contracted out of the statutory winding-up jurisdiction; and

(b) the relevant dispute was not arbitrable.

70. Jones J opined as follows:

"*6. The GP and Oriental seek a stay of the winding up petition pursuant to s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision)...*

7. I think it is common ground that it is for this Court to determine whether there is any rule of public policy or statutory provision which renders the arbitration agreement, or some particular matter within its scope, null and void, inoperative or incapable of being performed (see Fulham Football Club (1987) Ltd v. Richards [2012] Ch. 333, per Patten LJ at paragraph 36). Counsel for the Petitioners challenges the strike-out and stay applications, inter alia, on the basis that the only relief sought in their petition is a winding-up order and the appointment of a qualified insolvency practitioner as liquidator. As a matter of principle, I think that this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding-up order (whether relating to a company or an exempted limited partnership) is an order in rem which is capable of affecting third parties. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. Secondly, any dispute about who should be appointed as liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business. The shareholders of a solvent company and the partners of a solvent exempted limited partnership are given a free hand to appoint whomsoever they please as voluntary liquidator. If a company or partnership is or may be insolvent, or the liquidation is brought under the supervision of the Court for whatever reason, a qualified insolvency practitioner must be appointed in place of the shareholders/partners' chosen liquidator. There is a public interest in ensuring that all businesses are properly liquidated in the interests of all their stakeholders. The appointment of a liquidator in these circumstances is therefore a public process which is not suitable for determination in private by an arbitral tribunal, even where all the shareholders/partners are themselves parties to an arbitration agreement in terms wide enough to encompass a dispute about the appointment or removal of a voluntary liquidator. I regard winding-up orders, supervision orders and orders for the appointment/removal of liquidators as class remedies, which in turn leads me to the conclusion that such proceedings fall within the exclusive jurisdiction of the Court.

8. Counsel for Oriental relies upon the dicta of Patten LJ in Fulham Football Club (1) in support of the proposition that I should stay the petition pending a resolution of the underlying allegations pleaded in support of the proposition that the Petitioners have justifiably lost confidence and trust in the GP. The Fulham Football Club case involved an 'unfair prejudice claim' under s.994 of the English Companies Act 2006. The judge granted a stay of the petition on the ground that members of companies and companies themselves could agree to refer to arbitration disputes which would otherwise support unfair prejudice petitions, provided that the award sought was not in a category which was limited by considerations of public policy. The Court of Appeal upheld this

decision. In the headnote to the case in the Law Reports ([2012] Ch. at 333), the court was recorded as having held that 'the question in each case was whether the dispute engaged third party rights or represented an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process...' The Court went on to find that an unfair prejudice petition under s.994 was not a claim for a class remedy. The stay was upheld because the petitioner was not seeking a winding-up order and a claim alleging unfair prejudice consisting of a breach of an agreement or some other unconscionable behaviour was capable of being decided by an arbitrator. This case is different. The only remedy sought by the Petitioners is a winding-up order and the appointment of qualified insolvency practitioners as official liquidators."

71. Mr Imrie rightly submitted that the present case could be distinguished factually from *Cybernaut* because no winding-up order was actually sought. The SHA has its own buy-out mechanism and the Petitioner seeks either a winding-up order or alternative relief which corresponds to a contractually available form of relief. In contrast, in Cybernaut, Jones J characterised the legal and factual matrix as follows:

> "*...The parties are all agreed that the partnership should be wound up. The real issue is whether it should be wound up by the GP or a qualified insolvency practitioner appointed by the court...*" (at paragraph 10).

72. There is also an important difference in legal context between the English Court of Appeal decision in *Fulham Football Club (1987) Ltd v. Richards* [2012] Ch. 333 (Patten LJ, Longmore LJ and Rix LJ concurring) and that faced by this Court in *Cybernaut*. In the former case the petition was an unfair prejudice petition and winding-up was not an available remedy. The latter case involved a just and equitable winding-up petition. Unfair prejudice petitions are designed to remedy prejudice suffered by individual shareholders while a just and equitable winding-up petition is a class remedy. It might appear to be a distinction of no relevance in the present case where the Petitioner is the sole minority shareholder, but it may well be relevant to the analysis of whether the availability of a class remedy can be determined by an arbitrator as a matter of principle. The authorities placed before me suggest such a question is not arbitrable. In this regard it is important to note that Patten LJ (albeit *obiter*) expressed the following views on the position in relation to a just and equitable petition:

> "*83....Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the ACD Tridon case, that the same probably goes for a similar dispute which is used to ground a petition under section 122(1)(g) to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of*

whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under section 9(4)..."

73. Jones J expressly acknowledged the soundness of Patten LJ's views and their potential relevance to cases with a legal and factual matrix such as exists in the present case. In *Cybernaut Growth Fund LP*, unreported, 23 July 2013, he opined as follows:

> "*11. It seems to me that the possible approach suggested by Patten LJ probably only has any practical application in two circumstances. If a winding-up petition includes a matter which constitutes a discrete inter partes claim falling within the scope of an arbitration agreement, then it could be hived off for decision by the arbitral tribunal. Alternatively, if the petition includes matters which could properly be tried as preliminary issues then I think that those issues could be determined by an arbitrator rather than the court. However, this is not such a case. The only relief sought by the petitioners is a winding-up order and the appointment of an independent liquidator.*"

74. In the present case, the Petition includes matters which, shorn of their thinly veiled drafting disguise, clearly constitute claims falling within the arbitration agreement. They can properly be "hived off" for determination by the arbitration tribunal, and the present proceedings can be stayed. Should the Petitioner succeed and need to seek relief which only this Court can grant, it can apply to lift the stay and rely upon the findings reflected in the award. In my judgment the *obiter dicta* of Patten LJ in the *Fulham Football Club* case and Jones J in *Cybernaut* are *ad idem* in supporting this resolution of the arbitration stay issue on the facts of the present case.

Findings: Is Ting Chuan entitled to a discretionary stay under section 95(1) of the Companies Law

75. The Court undoubtedly has the jurisdictional competence to grant a discretionary stay under section 95(1) of the Companies Law[2]. Based on the findings I have reached on

[2] Section 95 provides:

"*(1) Upon hearing the winding up petition, the Court may-*

the availability of the mandatory statutory stay under section 4 of FAAEL, I need not decide this issue. If I were required to decide the issue on the assumption that the mandatory stay does not apply, I would likely invite further submissions and the filing of further evidence on the status and likely progress of the arbitration proceeding commenced by Ting Chuan.

Summary

76. For the above reasons, in the exercise of my discretion I decline to strike-out the Petition, even though there are portions of it which are liable to be struck-out as presently pleaded and/or in any event (see paragraphs 27-28 above); . However, I grant Ting Chuan's alternative application for a stay under section 4 of the FAAEL, with liberty to apply should the Petitioner wish to further prosecute the Petition after the arbitrable disputes have been contractually adjudicated, or the Company and/or Ting Chuan wish to have the Petition dismissed altogether.

77. Unless either party applies by letter to the Court within 21 days to be heard as to costs, the costs of the present application shall be payable by the Petitioner to be taxed if not agreed on the standard basis.

HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit…"