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Pey Woan LEE

Singapore Management University, pwlee@smu.edu.sg

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Dual-Class Shares in Singapore – Where Ideology Meets Pragmatism

*Pey-Woan Lee**

Introduction

Dual class share (“DCS”) structures are a type of governance structure that deviates from the standard one share, one vote (“OSOV”) structure. They occur when a company issues two classes of shares with the same economic entitlements but different voting rights, thus creating a wedge between voting and cash flow rights. Because a DCS structure could vest control in the hands of a minority, it is often thought to be inherently unfair and objectionable. That notwithstanding, DCS structures have long been a familiar feature of American and European markets. In Asia, however, the idea is still relatively novel as concentrated shareholdings are more commonly achieved through pyramid structures and cross holdings.

In Singapore, the principle of proportionality—that voting power should correlate to economic interest—has for the most part of its young history been an entrenched feature of the nation’s regulatory framework. Companies with DCS structures are not therefore permitted to list on the Singapore Exchange. But that is set to change as the Singapore Exchange has recently confirmed its decision to introduce a new framework for DCS listings.¹ Unsurprisingly, this development has sparked controversy. Detractors have criticized it as a lamentable step that will trigger “a race to the bottom”.² Supporters, on the other hand, see it as a “progressive step forward to keep pace with global markets”,³ justified or even necessitated by the need to enhance Singapore’s attractiveness as a listing venue for promising start-ups.

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¹ Cai Haoxiang, *Singapore Introducing Dual Class Shares*, Straits Times, Jan. 20, 2018.

² David Smith, *Singapore Risks a Race to the Bottom with Dual Class Shares*, Financial Times, Mar. 16, 2017.

³ Lance Lim, *Dual Class Shares in Singapore*, Singapore Law Gazette, Apr. 2017, at 28.

This article seeks to understand the rationale for and potential implications of this development. It does so by first considering the theoretical as well as evidential arguments for and against the use of DCS, followed by a survey on the reception (or otherwise) of such structures in four common law jurisdictions with vibrant capital markets, *viz.*, Canada, the United States, United Kingdom and Hong Kong. It observes that the chief argument cited by business founders to justify the use of DCS structures is the desire to enhance a firm's long-term profitability by shielding the (talented) founder from short-term market pressures. Though the use of DCS structures remains controversial, the phenomenal success of technology unicorns such as Alphabet Inc. and Alibaba appears (for now) to have sealed the place of DCS in the American securities markets. This exerts considerable pressure on competing markets to follow suit. Singapore's response to this aggressive competition is pragmatic but measured. The indications so far are that the regulators would chart a middle path between the conflicting goals of incentivizing entrepreneurial fundraising and investor protection by permitting DCS structures in exceptional cases circumscribed by stringent safeguards. This, it is submitted, is an appropriate response given the theoretical and evidential underpinnings of DCS structures as well as economic and regulatory conditions peculiar to Singapore. Should it succeed, this development would serve as an interesting and notable example of a regulatory innovation that avoids the proverbial race to the bottom in the face of intense competition.

1. THE CONTROVERSY

A. *The Theoretical Debate*

In modern economies, the OSOV principle is widely regarded as the bedrock of sound corporate governance. Leading markets such as those of London⁴ and Hong Kong⁵ explicitly endorse the principle in their regulatory regime to underscore the importance of fair and equal treatment of shareholders. At the theoretical level, Easterbrook and Fischel present the classic justification of the principle,⁶ arguing that shareholders, as residual claimants, have the strongest incentives to maximize firm value. The OSOV rule is a logical consequence of

⁴ FCA Handbook, LR 7.2.1A, Principle 3.

⁵ Hong Kong Exchanges and Clearing Limited, Main Board Listing Rule 8.11. But this is also set to change, see discussion in text accompanying *infra*, notes 105 – 117.

⁶ Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & Econ. 395, 409 (1983).

that function because shareholders are most likely to make optimal decisions when their gains (or losses) are proportionate to their investments in the company. Disproportionate voting, on the other hand, leads to increased agency costs as it distorts the incentives for decision-making. A super-voting minority may take more risks than are optimal because it has (proportionately) less to lose if the risk materializes. For modern corporations typified by the separation of ownership and control, the OSOV principle is all the more imperative because it enhances voting as a monitoring mechanism.⁷ Where the managers underperform, shareholders may vote to remove them.⁸ By vesting the right to transfer control on majority equity owners, the OSOV rule ensures the decision is made by those most likely to act optimally. By contrast, dual class share structures may impede optimal transfers by allowing an insider-minority to entrench themselves, particularly by blocking value-enhancing takeover bids. On this view, the OSOV rule is crucial to good corporate governance as it facilitates optimal decisions and promotes managerial accountability. Deviations from the rule weaken the governance framework by heightening the risks of expropriation and entrenchment.

Although shareholder vote is an important means of containing agency costs, its effectiveness is limited by problems of collective action.⁹ This occurs when a corporation has diffused shareholding such that the holding of each shareholder is too small to justify the high cost of monitoring activities. The result is shareholder apathy and passivity, with decision-making left in the hands of either a small controlling minority or management. In their thesis, Easterbrook and Fischel recognize that problems of collective action undermine shareholder primacy, but they also observe that such problems may be overcome by the aggregation of shares, for those holding a sizeable block of shares (such as institutional investors) would, by reason of their economic exposure, have sufficient incentive to monitor management performance.¹⁰ To that end, proponents of OSOV argue that the principle remains significant as it optimizes shareholders' capacity to amass control. Unequal voting structures, on the other hand, are likely to exacerbate collective action problems since the more the votes vested

⁷ Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Stocks* 54 U. Chi. L. Rev. 119, 136 (1987).

⁸ The right to remove and elect board members is arguably the most fundamental of shareholder rights: see Julian Valesco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 416 – 417 (2006).

⁹ ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY*, 79, (rev. ed. 1967).

¹⁰ Easterbrook & Fischel, *supra* note 6, 402 and 406.

in (minority) insiders, the more the votes needed to defeat their proposals.¹¹ The increased costs of organizing and coordinating collective action of a large(r) group of dispersed shareholders also renders shareholder opposition more arduous, further deterring shareholder activism and aggravating apathy.¹² However, the cogency of these arguments is limited to the context of “horizontal conflicts”—typically cases of minority oppression where different groups of shareholders are battling each other.¹³ In the distinct context of takeover offers, where shareholders are required to collectively confront an outside party (the acquiror), a dual class structure may be optimal because it creates a controlling group that could overcome the problems of collective action to extract higher takeover premia from the acquiror.¹⁴ *Context* is therefore important when evaluating the merits of DCS structures.

Another limitation of Easterbrook and Fischel’s thesis concerns its assumption of shareholder homogeneity—that shareholders are best placed to maximize firm value because they are “a reasonably homogeneous group with respect to their desires for the firm” whose preferences can be aggregated to “form a consistent system of choices”.¹⁵ Grant Hayden and Matthew Bodie have persuasively demonstrated that this assumption is flawed.¹⁶ In their view,¹⁷

Shareholders are not the homogenous share-value maximizers that the “one share, one vote” theory envisions. Instead, shareholders are likely to have a variety of interests that can potentially compete with their interests as shareholders.

Thus, majority shareholders may differ from the minority in preferring decisions that advance their own interests at the expense of the minority; shareholders who have effectively hedged against downside risks may be indifferent to or even support a fall in stock price; employee-shareholders may be more concerned with protecting their employment than maximizing firm value; and institutional shareholders such as sovereign wealth and pension funds may invest

¹¹ Jeffrey Gordon, *Ties that Bind: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 C.L.R. 1, 45 – 46 (1998); Douglas C. Ashton, *Revisiting Dual-Class Stock*, St John’s L. Rev. 863, 907 – 909 (1984).

¹² Gordon, *supra* note 11, 46.

¹³ Indeed, it has been observed that the notion of shareholder primacy and the related notion of “one share, one vote” were generated primarily to resolve such horizontal conflicts: see Grant M. Hayden & Matthew T. Bodie, “One Share, One Vote and the False Promise of Shareholder Homogeneity” (2008) 30 Cardozo L. Rev. 445, 480.

¹⁴ Mike Burkart and Samuel Lee, *One Share – One Vote: The Theory*, 12 Rev. Fin. 1, 3 and 29 (2008).

¹⁵ Easterbrook & Fischel, *supra* note 6, 405.

¹⁶ Hayden & Bodie, *supra* note 13.

¹⁷ *Id.* 449.

with a view to advancing specific national or institutional agenda. Moreover, the term “wealth maximization” is inherently vague since shareholders with divergent time horizons are likely to conceive of firm value differently. While a short-term investor would vote to maximize short-term gains, the long-term investor may prefer to hold out for long-term appreciation. The narrow focus on maximizing *financial* wealth also fails to recognize that some shareholders may prize other values over financial gain. The rise in sustainable investment,¹⁸ for instance, suggests that a sizeable proportion of investors are committed to maximizing profits *within* the strictures of desired environmental, social, and governance goals. Therefore, far from being homogenous, shareholders are a heterogeneous group that seek to optimize a variety of interests beyond their residual interests in the firm.¹⁹ Consequently, shareholders do not invariably have the strongest incentive to maximize firm value and hence the case for maintaining the OSOV principle is correspondingly weakened.²⁰

The fact that the OSOV principle may not appear as sacrosanct as it is commonly assumed is not, of course, a sufficient reason for permitting disproportionate share structures. Supporters of DCS typically point, instead, to various *benefits* as justifications for such structures. First, it is said that unequal voting structures may be efficient if insiders value control more than outside shareholders.²¹ Allowing differentiated voting structures may therefore optimize social value as more votes may be granted to those who value them more. Second, consolidated voting control may increase a firm’s value by inducing its managers to invest in firm-specific human capital.²² This refers to skills and knowledge that are of value only for a particular firm, which managers would not be incentivized to acquire unless they are assured of continued employment by the company. Enabling insiders to hold superior-voting shares is one means of encouraging such firm-specific investment.²³ Third, DCS structures allow controlling shareholders and management to focus on the firm’s long-term profitability and

¹⁸ The Global Sustainable Investment Alliance reported in 2016 that US\$22.89 trillion assets were being managed under responsible investment strategies: see GLOBAL SUSTAINABLE INVESTMENT ALLIANCE, GLOBAL SUSTAINABLE INVESTMENT REVIEW 2016, http://www.gsi-alliance.org/wp-content/uploads/2017/03/GSIR_Review2016.F.pdf.

¹⁹ Hayden & Bodie, *supra* note 13, 499 – 500.

²⁰ Indeed, Hayden and Bodie cite dual class shares as a *settled* instance of how the law has accommodated shareholders’ diverse interests: id. 481 – 482.

²¹ Fischel, *supra* note 7, 136 – 137; Ashton, *supra* note 11, 872 and 928.

²² Id. 137 – 138; Ashton, *supra* note 11, 929; Harry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights – A Study of Public Corporations with Dual Class Stock*, 14 J. F. Econ. 33, 35 (1985); Burkart & Lee, *supra* note 14, 27.

²³ Ashton, *supra* note 11, 925.

success by shielding them from short-term market pressures.²⁴ This, as we shall see below, is now the dominant justification for the adoption of dual class structures by technology companies.²⁵ Fourth, dual class voting promotes entrepreneurial activities as it lowers the cost of acquiring control and facilitates risk-diversification.²⁶ Entrepreneurs who wish to access the capital markets without relinquishing control (and who may not otherwise have the means to acquire a controlling equity stake) may achieve that by acquiring a minority stake with super-voting rights. At the same time, the lower cost of investment allows controllers to diversify their firm-specific investment by sharing some of the firm-specific risks with outside investors.²⁷ Such diversification is ultimately beneficial not only to the insiders but also to society as a whole because diversified controllers are likely to pursue riskier investments that will increase the production of goods and services. Finally, it is well established that dual class structures are an effective anti-takeover mechanism. We have seen that this is a drawback of dual class structures insofar as it enables insiders to shield themselves from the discipline of the market and retain control, but it can also benefit shareholders when it is used primarily to fend off detrimental hostile bids.²⁸

In recent years, the popularity of DCS structures among high-growth technology companies has been justified chiefly on the need to maintain the long-term vision and control of the founders. For these companies, such control is seen as necessary to protect innovation and risk-taking from short-term market forces and risk-averse shareholders. For example, in defending Google's²⁹ DCS structure, Larry Page and Sergey Brin observed that "outside pressures too often tempt companies to sacrifice long-term opportunities to meet quarterly market expectations".³⁰ Likewise, Joe Tsai of Alibaba wrote in a blog post that the

²⁴ Id. 929; Thomas J. Chemmanur & Yawen Jiao, *Dual Class IPOs: A Theoretical Analysis*, 36 J. Banking & Fin. 305 (2012).

²⁵ See text accompany *infra*, notes 29– 33.

²⁶ Fischel, *supra* note 7, 139.

²⁷ *Id.*; Ashton, *supra* note 11, 927 – 928. It has also been argued that restricting all firms to a OSOV structure may have "a distortionary effect on firms' financing and investment decisions, or induces firms to resort to other means of separating ownership and control": see Burkart & Lee, *supra* note 14, 30.

²⁸ Kishore EeChambadi, *The Dual Class Voting Structure, Associated Agency Issue, and a Path Forward*, 13 N.Y.U.J.L. & Bus. 503, 517 (2017); Burkart & Lee, *supra* note 14, 26. Fischel explains this benefit in another way, by understanding insider control as a "signalling device" to communicate private information (as regards the firm's value) to outsiders, thus decreasing the need for expending resources to convince potential bidders that the firm's current use of assets is optimal: see Fischel, *supra* note 7, 138.

²⁹ Since restructured as a company wholly-owned by Alphabet Inc.: see Alphabet Inc., Current Report (Form 8-K), (October 2, 2015),

<https://www.sec.gov/Archives/edgar/data/1652044/000119312515336577/d82837d8k12b.htm>.

³⁰ See Google Inc., Registration Statement (Form S-1) (April 29, 2004),

<https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm>.

company's disproportional voting structure³¹ was designed to ensure that management could “set the company's strategic course without being influenced by the fluctuating attitudes of the capital markets so as to protect the long-term interests of our customers, company and all shareholders.”³² Outside the context of technology companies, this “preservation of founder ethos and values” rationale has also been invoked to rationalize the use of DCS in media (to maintain editorial integrity), fashion (to build brand equity closely associated with a founder) as well as employee-owned companies (to build high employee morale and increase productivity).³³

For advocates of DCS structures, the unparalleled success of companies such as Google, Facebook, and Alibaba stands as irrefutable evidence that disproportional voting structures can and do—when coupled with visionary leadership—enhance rather than destroy share value. Critics, however, argue that the “visionary founder” justification is no more than “a quixotic notion fed to public investors that allows an escape from shareholder accountability.”³⁴ After all, examples of outstanding single-class stock companies abound—Microsoft, Amazon, Twitter and Netflix are some that come to mind—and these have not needed heightened founder control to prosper. Even if a founder were particularly talented and committed such that her entrenchment at the time of IPO seemed right, there is no guarantee that that will always be the case.³⁵ Her priorities may change, or she may depart or decease. If, as is often the case, her successor is less capable, a DCS structure will more likely be used as a shield against market discipline than to protect the company's long-term interests.³⁶ Viewed in that light, the DCS structure is, ironically, no less a form of short-

³¹ Alibaba did not adopt a typical dual class structure that comprises two or more classes of shares with different voting rights. Instead, it instituted a “partnership” comprising the company's leading executives to appoint a majority of the company's directors. In addition, the company also adopted a series of anti-takeover provisions in its Articles of Association that make it practically impossible for public shareholders to alter the nomination rights of the founders. Commentators have labelled this as a form of “extreme corporate governance” that creates an even larger discrepancy between cash-flow rights and control rights than the typical dual-class structure: see Yu-Hsin Lin and Thomas Mehaffy, *Open Sesame: The Myth of Alibaba's Extreme Corporate Governance and Control*, 10 *Brook. J. Corp. Fin. & Com. Law* 437, 456 (2016).

³² See blog post of Joe Tsai, *Alibaba Offers an Alternative View of Good Corporate Governance*, ALIZILA, (Sept. 26, 2013), <http://www.alizila.com/alibaba-offers-an-alternative-view-of-good-corporate-governance/>.

³³ Stephen I. Glover & Aarthi S. Thamodaran, *Debating the Pros and Cons of Dual Class Capital Structures*, 27 *Insights; The Corporate and Securities Law Advisor* 10 at 12 (2013).

³⁴ EeChambadi, *supra* note 28, 515, citing Andrew Sorkin, *Stock Split for Google That Cements Control at the Top*, N.Y. Times DEALBOOK (Apr. 16, 2012).

³⁵ As Sorkin (id.) wrote, “Just think about other once highflying technology companies that turned sour. Yahoo. Or Research in Motion. Its founders were once lionized as visionaries — until they weren't. The problem is that Google will succeed until it doesn't. And when it falters, it won't have the kick in the pants that the prospect of pressure from shareholders can provide.”

³⁶ Chemmanur & Jiao, *supra* note 24, 306 (postulating that “while talented managers may create considerable

termism.³⁷ At the very least, concerns over succession would suggest that even if DCS structures were to be permitted, the case for their perpetual continuation is tenuous.³⁸

More fundamentally, these objections are concerned with the risk of expropriation by the controlling minority to the detriment of other shareholders.³⁹ The argument, as explained,⁴⁰ is that DCS structures undermine the function of shareholders as a monitoring mechanism, leading to increased extraction of private benefits. To this, the standard rejoinder of DCS advocates is that the market (being efficient) would itself be able to regulate such risks as investors would be able to anticipate the extent of private benefit extraction and discount the stock price accordingly.⁴¹ There is, in other words, a “price at which prospective investors are willing to accept any negative firm characteristics, including agency costs, bad corporate governance and so forth”.⁴² That being the case, private ordering (which is the general preference of corporate law) should prevail so companies can be free to select the capital structure that best suits their needs, and investors can choose between shares with different control rights.⁴³ The problem with this reasoning, however, is that it assumes that investors are able to accurately price the inferior-voting shares at the time of purchase (usually upon IPO). In reality, investors’ judgment may be impeded by information asymmetry (both at the point of IPO and subsequently), and the assessment of underwriters may not be reliable as they are susceptible to being “captive” of issuers.⁴⁴ The risk of unfair expropriation by the controlling minority therefore remains.

shareholder value by focusing on value maximization, the average CEO may not be able to do so, but would instead use this insulation from the disciplining effect of the takeover market to slack off and enjoy the perquisites of control.”) Wen cites the example of Rupert and James Murdoch, who were able to retain their positions as heads of News Corp despite having been implicated in criminal investigations for phone hacking: see Tien Wen, *You Can’t Sell Your Firm and Own It Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchange*, 162 U. Pa. L. Rev. 1495, 1502 (2014). See also Lin & Mehaffy, *supra* note 31, 469 – 470.

³⁷ James Kristie, *Dual-Class Stock: Governance at the Edge*, Directors and Boards, Third Quarter 2012 at 38.

³⁸ See generally, Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Va. L. Rev. 585 (2017).

³⁹ Burkart & Lee, *supra* note 14, 34; Eechambadi, *supra* note 28, 516.

⁴⁰ See text accompanying *supra*, notes 6 – 7.

⁴¹ Fischel, *supra* note 7, 147; Burkart & Lee, *supra* note 14, 34 – 35; and EeChambadi, *supra* note 28, 517.

⁴² Anita Anand, *Offloading the Burden of Being Public: An Analysis of Multiple Voting Share Structures*, 10 Va. L. & Bus. Rev. 395, 401.

⁴³ Hayden & Bodie, *supra* note 13, 482.

⁴⁴ Wen, *supra* note 36, 1505. Wen cites as example Facebook’s botched IPO, where underwriters were informed just 11 days before the launch of the IPO that Facebook was slashing its revenue estimates. While the news reached the banks in time to allow them to either make a profit (by shorting the stock) or avoid substantial losses, many retail investors were left out in the cold when the stock price plummeted subsequent to the IPO. See also Khadeeja Safdar, *Facebook, One Year Later: What Really Happened in the Biggest IPO Flop Ever*, ATLANTIC (May 20, 2013), <https://www.theatlantic.com/business/archive/2013/05/facebook-one-year-later-what-really-happened-in-the-biggest-ipo-flop-ever/275987/>.

The theoretical arguments examined in this section suggest that the arguments for and against DCS structures are finely balanced. Among the reasons commonly cited to justify the structure, the most significant is that it promotes innovation and entrepreneurial risk-taking, which is beneficial to both shareholders and the economy as a whole. Conventional understanding of market behavior tells us, however, that DCS structures are likely to aggravate agency problems by concentrating control in owner-managers whilst further disenfranchising outside shareholders. Given these concerns, DCS structures are only justified if their positive effects are substantial and exceed the costs thereof. The discussion below will briefly consider whether and to what extent empirical evidence gathered from jurisdictions that permit DCS structures elucidate that analysis.

B. The Empirical Evidence

Many empirical studies have been undertaken to understand the rationale and effects of DCS structures, but the evidence that has emerged is often inconclusive. This is, in part, due to the partisan nature of the debate (lobbyists on each side commission and cite studies that vindicate their cause⁴⁵), and, in part, to the analytical difficulties in establishing the impact of DCS structures on firm value and profitability.

Because a company's performance and returns on equity are dynamic and contingent upon a wide range of factors, it is often difficult to identify the true drivers that account for differences in firm performance: either between different firms at the same time or at different times for the same firm.⁴⁶ One company may perform better than another because of its superior product, better leadership, or more efficient operational processes, and hence no two companies are so similar or alike as to be truly comparable. To some extent, this difficulty may be tempered by looking at large sample sizes but that is often not possible given that DCS structures remain a relatively rare phenomenon in most jurisdictions.

⁴⁵ EeChambadi, *supra* note 28, 526 – 527.

⁴⁶ A useful discussion of these difficulties is set out in the Hong Kong Stock Exchange's consultation paper on dual class shares: see HONG KONG EXCHANGES AND CLEARING LIMITED, CONCEPT PAPER: WEIGHTED VOTING RIGHTS, at Appendix IV, paras. 4 to 10 (Aug. 2014), <http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Consultation-paper/cp2014082.pdf>.

Further, some studies—particularly those involving recapitalization—are affected by the problem of endogeneity. For example, it is often unclear whether a firm’s (better or worse) performance was the reason for recapitalizing as DCS in the first place, or whether that performance is a consequence of the new capital structure. The discussion below should, therefore, be understood with these difficulties in mind.

For policy makers facing the decision of whether to permit or prohibit DCS structures for public companies, the key question is whether such structures destroy firm value. As mentioned above, value destruction may come about mainly via the extraction of private benefits by minority controllers.

In a thorough review of the relevant empirical research, Adams and Ferreira conclude that the empirical evidence strongly supports the hypothesis that controlling shareholders of DCS companies are able to extract sizeable private benefits at the expense of non-controlling shareholders.⁴⁷ The authors derive this conclusion principally from studies that measure the value of control to controlling shareholders. For this purpose, the primary hypothesis is that control has value because it allows those in control to extract private benefits from the firm.⁴⁸ One method of computing this value is to compare the market prices of different classes of shares. The premium at which superior-voting shares trade over inferior-voting shares is indicative of the value of control.

Adopting this approach, Nenova established that quite a few countries exhibited high block control value, ranging from 48% in South Korea to -2.28% in Hong Kong.⁴⁹ Importantly, her results also demonstrate that legal environments characterized by effective law enforcement, good investor protection, and pro-investor takeover rules have the effect of lowering the

⁴⁷ Renée Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 Rev. Fin. 51, 79 (2008).

⁴⁸ As Zingales explained, “If there were no private benefits, there would be no reasons to hold large blocks of share in any one company.”: Luigi Zingales, *The Value of the Voting Right: A Study of the Milan Stock Exchange Experience*, 7 Rev. Fin. Stud. 125, 126 (1994). But see Valentin Dimitrov & Prem C. Jain, *Recapitalization of One Class of Common Stocks into Dual-class: Growth and Long-run Returns*, 12 J. Corp. Fin. 243, 344 (2006), who argue that the presence of a voting premium does not always imply that the controllers are benefiting at the expense of the holders of inferior vote shares. This is because: “[the] shareholders of the inferior voting class would also benefit if the dual-class structure induces the controlling managers to take profitable projects that they would otherwise not take. The premium may simply be thought of as an optimal compensation mechanism to the controlling managers that is in the best interests of all shareholders.”

⁴⁹ Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. Fin. Econ. 325 (2003).

voting control premia. In addition, her analysis suggested that a legal environment characterized by strong corporate governance rules is effective in mitigating the risks of controller expropriation.

Dyck and Zingales arrived at similar conclusions using a different methodology—by drawing inferences from the acquisition prices of controlling blocks in publicly traded companies. Their results show that, on average, control value is worth about 14% of the equity value of the firm.⁵⁰ They also found that the control premium is higher in countries where the investor is less protected, demonstrating once again that the legal environment has direct impact on the extent to which controllers extract private benefits from DCS companies. Thus, these studies suggest that DCS structures impose costs on non-controlling shareholders, but such costs can be mitigated by appropriate legal rules and effective enforcement.

While the studies on control value provide an indirect means of estimating controllers' private benefits, another group of studies sought to adduce evidence of the direct impact of DCS ownership structures on firm performance. For example, Gompers, Ishii, and Metrick compared DCS companies with single class share companies and found that a higher proportion of insider-voting rights will likely lead to lower firm valuation.⁵¹ More specifically, Masulis, Wang, and Xie found that increased divergence between insider control and cash-flow rights would likely lead to lower shareholder value through greater misuse of corporate cash, excessive compensation, value-destroying acquisitions and poor capital expenditure.⁵²

In contrast to the above findings, other studies have found that DCS companies enhance shareholder value notwithstanding the risks of expropriation and entrenchment. In a study of dual-class IPOs, Böhmer, Sanger, and Vashney found that companies listed with DCS structures outperform their single class counterparts in terms of stock returns and operational performance, thus suggesting that the benefits of adopting DCS structures outweigh the costs for some firms.⁵³ In another study focused on recapitalizations of single class shares into

⁵⁰ Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. Fin. 537 (2004).

⁵¹ Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 Rev. Fin. Stud. 1051 (2010).

⁵² Ronald Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual Class Companies*, 64 J. Fin. 1697 (2009).

⁵³ Ekkehart Bohmer, Gary C. Sanger & Sanjay B. Varshney, "The Effect of Consolidated Control on Firm Performance: the Case of Dual-class IPOs" in *EMPIRICAL ISSUES IN RAISING EQUITY CAPITAL* (Mario Levis,

dual class shares, Dimitrov and Jain found that recapitalizations are not undertaken to entrench managers but to finance growth without losing control.⁵⁴ Consequently, they observed that such companies experienced higher growth rates in sales, assets, and operating income than their single class competitors, and also enjoy significant long-run abnormal returns.

Overall, the empirical evidence is inconclusive as the studies suggest that DCS structures could enhance shareholder value in one context but destroy it in another.⁵⁵ For policy makers, this ambiguity leaves room for development in either direction. What is ultimately required is a judgment call on the possible impact of greater flexibility in divergence between ownership and control. That judgment would relate not only to the effects of such structures on shareholders (and other stakeholders) of the firm, but (perhaps more pertinently) on the wider economy. In particular, given that robust investor protection is linked to strong financial markets (and ultimately, economic growth),⁵⁶ and that DCS structures may erode investor protection by generating private benefits, it would be relevant to ask if the introduction of such structures would eventually lead to higher costs of capital that would in turn hamper financial development.⁵⁷ On the other hand, the absolute prohibition of such structures may also have cost implications: entrepreneurs may refrain from seeking outside capital or choose other forms of control enhancing mechanisms. Balancing such costs is, once again, critical but it can only be broadly appraised until more definitive evidence is available.

In the absence of overwhelming evidence that DCS structures are always harmful, it may be contended that there is no *a priori* reason why an absolute prohibition of such structures should be maintained. Indeed, if the evidence suggests that DCS structures enhance firm value in some contexts, and that the costs of such structures can be mitigated by robust investor protection rules, it would be rational to attempt to circumscribe their availability in conditions that are likely to optimize share value. This, as we shall see, is largely the approach that is adopted in those markets that have accepted DCS structures as a permissible form of governance.

ed.), Elsevier, 1996.

⁵⁴ See *supra* note 48, 346 – 347.

⁵⁵ Adams & Ferreira, *supra* note 47, 84.

⁵⁶ Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. Fin. Econ. 3 (2000).

⁵⁷ Adams & Ferreira recognised this possibility but were of the view that the evidence as to effects of DCS structures on the financial markets and the wider economy are not as yet clear: see *supra* note 47, 81.

2. A COMPARATIVE SURVEY

This section surveys the different approaches that are currently adopted in Canada, the United States, United Kingdom, and Hong Kong. These jurisdictions provide a useful point of reference for Singapore as their stock exchanges are among the world's largest⁵⁸ and their legal systems are founded on the common law tradition.

A. Canada

Canada offers an interesting context for study and comparison as its approach to DCS structures is largely based on market discipline. Consequently, the regulatory regime is relatively liberal with generally no legal prohibitions against DCS structures. Under Canadian corporate law, the OSOV principle is the default principle⁵⁹ but companies are free to provide for multiple vote shares in their constitution.⁶⁰ The listing and public trading of multi-vote shares on Canadian stock exchanges is also a common phenomenon.⁶¹ The Toronto Stock Exchange (“TSX”), for instance, permits the listing of shares with multiple or restricted votes.⁶² Moreover, listed companies may reorganize or reclassify its share capital so as to convert common shares into multiple or restricted vote shares provided that such changes are approved by a majority of the minority shareholders.⁶³ The TSX does, however, impose certain minimal safeguards against risks of abuse and exploitation by the controlling minority. These include the requirement for “coat-tail” provisions for all newly listed dual class share issuers⁶⁴ and various disclosure requirements to “alert investors of the fact that there are differences in the voting

⁵⁸ As of April 2017, the NYSE has the largest market capitalization at US\$19.22 trillion, followed by NASDAQ at US\$6.83 trillion and the LSE Group at US\$6.19 trillion. The Hong Kong Exchanges rank 6th at US\$3.33 trillion while the TMX Group (Canada) ranks 9th at US\$1.94 trillion: see The Statistics Portal, <https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-market-capitalization-of-listed-companies/>.

⁵⁹ s 24(3) of the Canadian Business Corporations Act (hereafter “CBCA”).

⁶⁰ s 24(4) CBCA.

⁶¹ The proportion of dual class firms listed on the Toronto Stock Exchange appears to have stabilised between 20% to 25%: see TARA GRY, DUAL-CLASS STRUCTURES AND BEST PRACTICES IN CORPORATE GOVERNANCE (18 Aug. 2005), <https://lop.parl.ca/content/lop/researchpublications/prb0526-e.htm#2end>. See also Burkart & Lee, *supra* note 14, 2.

⁶² Subject to such conditions as the Exchange may impose as to the total number of votes accorded to the class of shares generally or to specific decisions, such as those relating to election and remuneration of directors: see TSX VENTURE EXCHANGE, CORPORATE FINANCE MANUAL – POLICY 3.5 RESTRICTED SHARES (June 14, 2010), <https://www.tsx.com/resource/en/434>, at para. 3.5.

⁶³ *Id.* at para. 5.2.

⁶⁴ *Id.* at para. 6, the purpose of the coattail is to ensure holders of subordinated shares have an equal opportunity to participate in any “control premium” that may be offered in the event of a takeover.

powers attached to the different securities of an issuer”.⁶⁵

Notwithstanding a number of high profile scandals involving DCS firms,⁶⁶ the consensus in Canada appears to be that DCS structure should be permitted as it can be an optimal means of financing entrepreneurial activities. Disallowing this form of financing would cause entrepreneurs to “shun the stock market, curtail growth of their companies or find sub-optimal means of financing” with the result that “[all] would suffer: innovation, investors, economic growth and employment.”⁶⁷ Whilst the risks of exploitation and entrenchment subsist,⁶⁸ such risks appear to be reasonably well contained by adequate minority protection rules (the most significant of which is the mandatory coat-tail provision⁶⁹) fomented, in part, by activist institutional investors opposed to DCS structures.⁷⁰ Consequently, calls for reform in Canada appear largely focused on suggestions to improve the governance of DCS structures rather than their complete abolition.⁷¹ The measures advocated include (*inter alia*) further tightening of the coattail requirement, limiting the voting ratio of different classes of shares or of the total number of votes controlled by the insiders or founders, abolishing non-voting shares, and mandating sunset clauses.

⁶⁵ TSX COMPANY MANUAL, PART VI CHANGES IN CAPITAL STRUCTURE OF LISTED ISSUERS, §624(a), http://tmx.complinet.com/en/display/display_main.html?rbid=2072&element_id=299. These are aligned with the Ontario Securities Commission disclosure rules designed to avoid the use of confusing share terminology and on providing clear disclosure of the relative voting power of each class of shares: see SHAREHOLDER ASSOCIATION FOR RESEARCH AND EDUCATION, SECOND CLASS INVESTORS: THE USE AND ABUSE OF SUBORDINATED SHARES IN CANADA (April 2004), 9, http://www.share.ca/files/Second_Class_Investors.pdf.

⁶⁶ A particularly notorious incident involved the failed takeover bid for Canadian Tire Corp. Ltd. where the offerors (together with the minority controllers) had deliberately structured the offer to circumvent the coattail provision to deprive holders of common shares of the opportunity to exit at a premium. The bid ultimately failed when the Ontario Securities Commission stepped in and declared it to be contrary to public interests: see Stephanie Ben-Ishai & Poonam Puri, *Dual Class Shares in Canada: An Historical Analysis*, 29 Dalhousie L. J. 117, 151 – 153 (2006).

⁶⁷ YVAN ALLAIRE, THE INSTITUTE FOR GOVERNANCE OF PRIVATE AND PUBLIC ORGANIZATIONS, DUAL CLASS SHARE STRUCTURES IN CANADA: REVIEW AND RECOMMENDATIONS, 5 (2006).

⁶⁸ See *eg.* Masulis, Wang & Xie, *supra* note 52.

⁶⁹ According to Allaire, *supra* note 67, 21 “the coattail provision, along with the tighter governance rules implemented over the last ten years and the Canadian legal framework for protecting the rights of minority shareholders, have removed most, if not all, of the drivers of price premium and private benefits for Canadian dual-class-share structures.” This would, in Allaire’s view, explain why the control premium of Canadian dual class shares are among the lowest in the world: *id.* 11.

⁷⁰ Ben-Ishai & Puri, *supra* note 66, 154 – 156.

⁷¹ See *e.g.* Allaire, *supra* note 67; Daniel Cipollone, *Risky Business: A Review of Dual Class Share Structures in Canada and a Proposal for Reform*, 21 Dalhousie J. Leg. Stud. 62 (2012).

B. United States

Compared to Canada, the regulatory regime in the US is more restrictive. The major markets (*viz.*, NYSE⁷² and NASDAQ⁷³) permit the listing of DCS only by way of IPOs but not post-listing recapitalization. An issuer listed with a single class of shares is not thereby permitted to convert existing shares into multiple-vote shares or issue new classes of shares with different voting rights. That said, the US regime is also liberal in that it imposes few bespoke rules to safeguard minority interests in DCS companies. One exception is the specific prescription that non-voting shares must be accorded substantially similar rights (except for voting) to those of common shares.⁷⁴ Beyond that, minority shareholders of DCS companies can only look to standard safeguards such as prohibitions against conflicts of interests and misappropriation of corporate opportunities for protection against expropriation.⁷⁵ Curiously, NYSE listing rules also exempt “controlled companies” (companies with block-holders controlling 50% or more of voting rights) from the requirements of majority board independence.⁷⁶ This has, unsurprisingly, been accused of engendering “a rubberstamp board that is beholden to the chief executive”.⁷⁷

DCS structures have long been a divisive topic in the US. In particular, the use of such structures has been criticized by institutional investors and their representatives, who argue that such structures effectively create “the equivalent of a corporate safe room by making it nearly impossible for shareholders to replace directors, challenge management, or force change in control transactions.”⁷⁸ Thus, the Council of Institutional Investors has urged both the NYSE and NASDAQ to ban DCS structures, citing empirical studies that establish that dual class companies underperform those with single-class share structures, and have more weaknesses in internal controls and related party transactions.⁷⁹ Likewise, CalPERS, the

⁷² NEW YORK STOCK EXCHANGE, NYSE LISTED COMPANY MANUAL §313(A) (2013).

⁷³ NASDAQ, NASDAQ Stock Market Rule §5640 (2009).

⁷⁴ NYSE LISTED COMPANY MANUAL §313(B) (2013).

⁷⁵ *Id.* §303A.10 (2013). See also the discussion in Roger Barker & Iris H-Y Chiu, *Protecting Minority Shareholders in Block-controlled Companies: Evaluating the UK’s Enhanced Listing Regime in Comparison with Investor Protection Regimes in New York and Hong Kong*, 10 Cap. Mkt. L. J. 98, 120 (2015).

⁷⁶ NYSE LISTED COMPANY MANUAL §303A.00 (2013). See also NASDAQ Stock Market Rules §5615(c)(2) (2009).

⁷⁷ EeChambadi, *supra* note 28, 518.

⁷⁸ Glover & Thamodaran, *supra* note 33, 10.

⁷⁹ Council of Institutional Investors, *Letter to the New York Stock Exchange*, Oct. 2, 2012, http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_2_12_cii_letter_to_nyse_dual_class_stock.pdf; Council of Institutional Investors, *Letter to NASDAQ*, Oct. 2, 2012, http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_02_12_cii_letter_to_nasdaq_dual_class_stock.pdf.

largest public pension fund in the US, has indicated that it would boycott companies with DCS structures⁸⁰ and has instituted legal actions to stop companies from issuing more weighted vote shares to further entrench the controllers.⁸¹ Such persistent opposition of institutional investors has yielded palpable results. A striking example is the S&P 500's recent decision (following an uproar over Snap Inc.'s controversial issue of non-voting shares) to exclude companies with multiple voting share structures.⁸² MSCI, another major index provider, had temporarily blocked new companies with unequal voting structures from two of its indexes pending a consultation on the merits of a permanent exclusion.

Strong criticisms notwithstanding, DCS structures will likely continue to feature in US markets.⁸³ Its popularity amongst exceptionally successful technology companies, the perception that existing legal infrastructure adequately constrains abuses, faith in visionary founders, as well as intense regulatory competition both at home and abroad—all coalesce into the belief that such unique governance structures are not only defensible but necessary.

C. *United Kingdom*

Listing on the London Stock Exchange (“LSE”) is organized under the Premium/Standard listing regime. The main difference between the two categories is that Standard Listing only requires compliance with minimum governance standards stipulated by the European Union, whilst the Premium Listing requires compliance with enhanced listing requirements laid down by the Financial Conduct Authority (“FCA”).⁸⁴ DCS structures are permitted under Standard but not Premium listing.⁸⁵ Hence, DCS structures are not absolutely prohibited in the UK. Nevertheless, the general observation is that it is rare for public companies to list with dual or multiple vote structures.⁸⁶ Commentators attribute this relative low occurrence to

⁸⁰ Shanny Basar, *Calpers Sets Sights on Dual-Class Stock Structures*, Wall St. J., Aug. 20, 2012, <https://www.wsj.com/articles/SB10000872396390443855804577601271252759472>.

⁸¹ CalPERS News, *CalPERS Sues to Stop IAC/InterActiveCorp from Diluting Shareowners' Voting Power*, Dec. 12, 2016, <https://www.calpers.ca.gov/page/newsroom/calpers-news/2016/interactivecorp-diluting-shareowners-voting-power>.

⁸² Trevor Hunnicutt, *S&P 500 to Exclude Snap after Voting Rights Debate*, Reuters, Aug. 1, 2017, <https://www.reuters.com/article/us-snap-s-p/sp-500-to-exclude-snap-after-voting-rights-debate-idUSKBN1AH2RV>. Existing components of the S&P index with dual or multiple vote share classes (e.g. Alphabet Inc. and Berkshire Hathaway Inc.) will be “grandfathered”.

⁸³ EeChambadi, *supra* note 28, 529.

⁸⁴ See London Stock Exchange, Listing Regime < <http://www.londonstockexchange.com/companies-and-advisors/main-market/companies/primary-and-secondary-listing/listing-categories.htm>>.

⁸⁵ See *supra*, note 4.

⁸⁶ In a study conducted by Shearman and Sterling LLP in 2007, it was found that only 5% of the UK companies analyzed had multiple voting structures: see SHEARMAN & STERLING LLP, PROPORTIONALITY BETWEEN

the strong presence of activist institutional shareholders in the UK.⁸⁷ Institutional investors who believe DCS structures to be harmful by reason of their disenfranchising effects on outside shareholders routinely opposed such structures.⁸⁸ Over time, this sustained opposition has influenced policy makers such that the UK government is said to have “systematically discouraged” the IPO of new companies with DCS structures.⁸⁹ Indeed, the FCA’s steadfast adherence to the default OSOV rule is evidenced by both its rejection of Manchester United’s bid to list on the LSE with a DCS structure⁹⁰ and its very public support of Hong Kong’s refusal to accede to Alibaba’s proposed dual class listing.⁹¹

A further development that may be seen as signalling the FCA’s resolve to strengthen minority shareholder rights—and thereby distance itself from unequal voting structures—is the introduction of an enhanced listing regime for block-controlled premium-listed companies.⁹² The enhancements seek, firstly, to limit the influence of the controlling shareholder by requiring it to enter into a mandatory agreement undertaking to transact with the company at arm’s length and not to take any action to impede or circumvent proper compliance with the listing rules;⁹³ and secondly, to give more control to minority shareholders by subjecting the election of independent directors⁹⁴ and delisting of the

OWNERSHIP AND CONTROL IN EU LISTED COMPANIES: COMPARATIVE LEGAL STUDY (2007) at 12.

http://www.ecgi.org/osov/documents/study_report_en.pdf. In total, 40 UK listed companies were analyzed in this study, comprising a mix of top 20 market-capital companies and small and recently listed companies.

⁸⁷ See Amy Chen, *Spending Less Time with the Family: Are Dual-Class Shares A Necessary Evil?*, 7 Queen Mary L. J. 72, 87 (2016); Wolf-Georg Ringe, *Deviations from Ownership-Control Proportionality – Economic Protectionism Revisited* in COMPANY LAW AND ECONOMIC PROTECTION, 228 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010).

⁸⁸ Flora Huang, *Dual Class Shares around the Top Global Financial Centres*, J. Bus. L. 137, 145 – 146 (2017). Huang further argued that a further reason for DCS’s lack of popularity is the break through rule that is present in the Article 11 of the UK Takeover Bids Directive. Essentially, this rule allows a shareholder who owns 75% of total equity to break through the company’s voting structure and exercise control according to the one share one-vote principle. Further, the investor will have complete control of the firm and can appoint/remove board members. Thus, should an outside investor succeed in acquiring 75% of the ordinary shares, it will essentially be able to break the control of the founders despite them holding shares with more voting rights.

⁸⁹ Chen, *supra* note 87, 88.

⁹⁰ Id. 87.

⁹¹ Commenting on the Hong Kong regulator’s decision, Martin Wheatley (then chief executive of the FCA) said that “no matter how difficult it would be to lose a very high-profile company to list, it is important to keep the principle to protect shareholders’ interests”: see Enoch Yiu, *British Regulator Backs Hong Kong Stance on Alibaba IPO*, South China Morning Post, Mar. 20, 2014, <http://www.scmp.com/business/money/markets-investing/article/1452681/british-regulator-backs-hong-kong-stance-alibaba>.

⁹² FINANCIAL CONDUCT AUTHORITY, RESPONSE TO CP13/15—ENHANCING THE EFFECTIVENESS OF THE LISTING REGIME (May. 2014), <https://www.fca.org.uk/publications/policy-statements/ps14-8-response-cp13-15-%E2%80%9393-enhancing-effectiveness-listing-regime>. The new rules took effect from May 16, 2014. For a thorough critique of this reform, see Barker & Chiu, *supra* note 75.

⁹³ FCA Handbook, L.R. 6.5.4 and L.R. 9.2.2AD.

⁹⁴ Id. LR 9.2.2E and L.R. 9.2.2F.

company to independent shareholder approval.⁹⁵ Underpinned, as it were, by the “fundamental concept” that shareholders are entitled to participate directly in the governance of the companies they own,⁹⁶ these changes suggest that the UK regulators are likely to continue to view with disfavor disproportional voting structures that effectively disenfranchise minority shareholders. That said, one cannot completely rule out the possibility that the UK regulators may review and soften their stance on this issue as competitive pressures mount against the backdrop of Brexit and growing acceptance of DCS structures elsewhere (such as Hong Kong and Singapore).⁹⁷

D. Hong Kong

Hong Kong does not currently countenance the public listing of companies with DCS structures,⁹⁸ but this state of affairs will soon be consigned to history as the Hong Kong Exchange (“HKEx”) has—in a move to defend Hong Kong’s pre-eminence as the leading global IPO destination—announced its decision to push ahead with DCS listings. This outcome was not, of course, achieved without a protracted and stormy campaign sparked by the painful loss of Alibaba’s potential listing on the Stock Exchange of Hong Kong (“SEHK”) in 2014. The heated debate that ensued prompted the HKEx (parent company of SEHK) to embark on an extensive review of DCS structures and sought market feedback through the issue of a Concept Paper.⁹⁹ But while there was sufficient support to proceed to a second stage of consultation,¹⁰⁰ this first attempt at reform came to an abrupt halt when the Securities and Futures Commission (“SFC”) publicly rejected the HKEX’s proposals.¹⁰¹ At

⁹⁵ Id. LR 5.2.5(2).

⁹⁶ FINANCIAL CONDUCT AUTHORITY, FEEDBACK ON CP12/25—ENHANCING THE EFFECTIVENESS OF THE LISTING REGIME (Nov. 2013) at para. 1.2, <https://www.fca.org.uk/publication/consultation/cp13-15.pdf>.

⁹⁷ Indeed, the FCA noted the value of DCS structures as a means of providing growth capital to early-stage science and technology companies in a recent review: see FINANCIAL CONDUCT AUTHORITY, DISCUSSION PAPER: REVIEW OF THE EFFECTIVENESS OF PRIMARY MARKETS: THE UK PRIMARY MARKETS LANDSCAPE (Feb. 2017), <https://www.fca.org.uk/publication/discussion/dp17-02.pdf>

⁹⁸ See HKEx Main Board Listing Rule 8.11; Growth Enterprise Market Listing Rule 11.25. Although the HKEx is empowered “in exceptional circumstances” to approve listings of DCS companies on a case-by-case basis, no DCS company has to date been admitted by the HKEx under this exception: HKEx Concept Paper, *supra* note 46.

⁹⁹ HKEx Concept Paper, *supra* note 46.

¹⁰⁰ HKEX, CONSULTATION CONCLUSIONS TO CONCEPT PAPER ON WEIGHTED VOTING RIGHTS (2015), <http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Conclusions/cp2014082cc.pdf>.

¹⁰¹ SECURITIES AND FUTURES COMMISSION, SFC STATEMENT ON THE SEHK’S DRAFT PROPOSAL ON WEIGHTED VOTING RIGHTS (25 June 2015), <http://edistributionweb.sfc.hk/t/ViewEmail/j/C5CD004D12EE9F25/F672ACDCDBF32846942A2DF08F503B7C>. This dramatic turn of events spawned, in a short time, a proliferation of academic commentary. On the one hand, there are those who argue that some relaxation of the current strict policy is defensible since it is beneficial to have greater flexibility in ownership structures and that the drawbacks of such structures can (mostly) be managed by prescribing appropriate legal rules: see *eg*,

that time, the SFC was concerned, *inter alia*, that the eligibility criteria identified by the proposals were inherently uncertain, and that the suggested safeguards would not be sufficient to protect minority shareholders against the risk of abuse by controlling shareholders.

For a while, the SFC's objections forged an uneasy truce. However, the pressure for Hong Kong to keep pace with the more liberal regimes of other leading financial markets mounted as Chinese information technology firms increasingly prefer to list in the US with weighted-voting structures.¹⁰² In the face of such aggressive and relentless competition, the Hong Kong regulators had to respond with concrete measures to protect the market. In June 2017, the HKEx issued another Concept Paper to seek public feedback on a proposed third board to facilitate fund-raising by mega-technology firms with DCS structures and smaller start-ups.¹⁰³ However, this proposal was soon aborted.¹⁰⁴ In place of a third board, the HKEx concluded that the better way forward was to amend the listing rules to accommodate the listing of "New Economy" companies with weighted voting rights ("WVR") structures as well as pre-revenue Biotech companies.¹⁰⁵ By this time, the SFC was supportive of the move. This volte-face is no doubt a pragmatic concession in view of the competitive landscape.¹⁰⁶

Junzheng Shen, *The Anatomy of Dual Class Shares: A Comparative Perspective*, 46 H.K.L.J. 477 (2016). Opponents, on the other hand, have argued that Hong Kong's market structure, which is dominated by concentrated ownership, has (rightly) caused regulators to favor the extant approach that emphasizes *ex ante* prevention of abuses over *ex post* enforcement: Raymond Chan & John Ho, *Should Listed Companies be Allowed to Adopt Dual-Class Share Structure in Hong Kong?* 43 Common L. World Rev. 155, 175 (2014). Yet another view is that the unique social and political context of Hong Kong renders perceptions of fairness and equity particularly critical in its formulation of economic policies, and it is in maintaining a high quality legal infrastructure (more so than the acceptance of DCS structures) that would help Hong Kong to preserve its competitive edge in attracting foreign as well as Chinese listing applications: see Shen and Young, *Dual Share Plan in Context: Making Sense of Hong Kong's Decision Not to Embrace Alibaba's Listing*, 26 Int'l Co. Com. L. Rev. 4 (2015).

¹⁰² As of 13 June 2017, "33 out of 116 (28%) Mainland companies with primary listings in the US have [weighted voting rights] structures 25, their combined market capitalisation of US\$561 billion represents 84% of the market value of all US-listed Mainland companies. Their market capitalisation is equivalent to 15% of the entire market capitalisation of the Hong Kong market": see HONG KONG EXCHANGES AND CLEARING LIMITED, CONCEPT PAPER: NEW BOARD at para. 40 (June 2017), <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/Concept-Paper-on-New-Board/cp2017061.pdf>.

¹⁰³ Id. See also Enoch Yiu, *Hong Kong Moves Closer to Dual-share Listings as SFC Backs Consultation on Third Board*, South China Morning Post (Apr. 28, 2017).

¹⁰⁴ Laura He & Enoch Yiu, *Hong Kong Stock Exchange Backs Down on Demand for Third Board to Let Start-ups Raise Funds*, South China Morning Post (Oct. 23, 2017).

¹⁰⁵ HONG KONG EXCHANGES AND CLEARING LIMITED, CONSULTATION CONCLUSIONS: NEW BOARD CONCEPT PAPER at para 31 (Dec. 2017), [http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/June-2017-Concept-Paper-on-New-Board/Conclusions-\(December-2017\)/cp2017061cc.pdf](http://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/June-2017-Concept-Paper-on-New-Board/Conclusions-(December-2017)/cp2017061cc.pdf) (hereafter "Consultation Conclusions").

¹⁰⁶ Enoch Yiu, *Securities Commission Backs Introduction of Dual Class Shares on Hong Kong Stock Exchange*, South China Morning Post (Dec. 20, 2017).

As it stands, the WVR framework outlined by the HKEx is tightly circumscribed (at least initially) to admit only companies with demonstrated potential for extraordinarily high growth. Hence, a WVR structure would ordinarily only qualify for listing if it were an “innovative company”¹⁰⁷ with a track record of and potential for high business growth;¹⁰⁸ has received meaningful funding from sophisticated investors¹⁰⁹ and an expected market capitalization of at least HK\$10 billion and total revenue of at least HK\$1 billion in the last financial year.¹¹⁰ In addition, WVR holders must be persons who have materially contributed to the company’s growth and who are or will be directors of the company with executive functions post-IPO.¹¹¹ To attenuate the heightened risks posed by WVR structures, the HKEx also included in its proposal a slew of investor-protection measures, of which the more salient ones are:

- (a) The use of WVR structures will be restricted to new listing applicants and the proportion of WVR may not be increased post-IPO except in very limited circumstances.¹¹²
- (b) Only directors of the company are eligible to hold shares with WVR. The WVR will lapse upon the director’s death, cessation as director, or transfer to a non-director. Such directors will also be required to meet minimum equity threshold at the time of IPO.¹¹³
- (c) Voting differential between the superior and ordinary shares are capped at the ratio of 10:1. Other than voting rights, the rights attached to both classes of shares must be equal in all aspects. Selected key decisions such as material changes to constitutional documents, variation of class rights, appointment and removal of independent directors and winding up of the company will be voted on an OSOV basis.¹¹⁴

¹⁰⁷ These are technology and other innovative companies whose assets comprise largely intellectual property and other intangible assets: see Consultation Conclusions, *supra* note 105, at paras. 249 and 259(a).

¹⁰⁸ Id. at para. 259(b).

¹⁰⁹ Id. at para. 259(e).

¹¹⁰ The revenue requirement is dispensed with if the WVR structure has an expected market capitalization of at least HK\$40 billion: id. at para. 262.

¹¹¹ Id. at paras. 259(c) and (d).

¹¹² Id. at para. 264.

¹¹³ Id. at *supra* n 105, para 265. Other than the cessation of the WVR in these circumstances, the HKEx did not think it necessary to impose time-defined sunset clauses. In its view, such a requirement would “likely make Hong Kong very uncompetitive versus overseas markets where no requirement for a sunset clause exists (particularly the US)”: see id. at para. 270.

¹¹⁴ Id. at para. 266.

- (d) Companies listed with WVR structures will be required to constitute a corporate governance committee comprised of independent non-executive directors to ensure compliance with governance rules.¹¹⁵
- (e) Companies with WVR structures must further enshrine the prescribed safeguards in their constitutions so as to afford shareholders private redress in the event of breach.¹¹⁶

The intention of this proposed framework is unambiguous: it is to single out the “truly big boys” that have the (actual and potential) scale of success that justifies limited incursion in investor protection. The proposal is also innovative and coherent as it seeks to adhere closely to the visionary-founder rationale by restricting WVR to founder-directors (and by this means ensure that the controlling minority is constrained by the fiduciary obligations that they owe as directors to the company). Further, the exceptionally broad range of suggested safeguards evidence an earnest attempt at seeking optimal ways to preserve investor rights. In practice, however, their efficacy may still be limited by an enforcement regime that is characterised by relatively restrictive access to minority actions and general shareholder inertia (due, perhaps, to the absence of a litigious culture fuelled by contingency fee-based class actions), with the result that the extraction of private benefits by controlling shareholders will continue to be difficult to detect and remedy.¹¹⁷ This, as we shall see, is also a regulatory constraint that Singapore has to contend with.

3. EVOLUTION OF DCS IN SINGAPORE

Historically, the principle of OSOV was firmly entrenched in Singapore. Section 64 of the Companies Act¹¹⁸ (hereinafter referred to as “the Act” or “CA”) made clear that a public company and its subsidiaries (other than a newspaper company¹¹⁹) may only issue equity shares that confer upon its holder one vote per share.¹²⁰ In 2003, this rule was relaxed to

¹¹⁵ Id. at para. 268.

¹¹⁶ Id. at para. 269.

¹¹⁷ See Chan & Ho, *supra* note 101, 175 – 179.

¹¹⁸ Cap. 50, 2006 Rev. Ed., §64(1) read with §64(5).

¹¹⁹ Newspaper companies are expressly permitted to issue management shares that carry more votes than ordinary shares. For example, Singapore Press Holdings Limited has both ordinary and management shares which carry respective 1 and 200 votes per share: see SINGAPORE PRESS HOLDINGS ANNUAL REPORT 2017 at 127, <http://sph.listedcompany.com/misc/annualreport/2017/SPH%20AR2017.pdf>.

¹²⁰ Although this did not prohibit public companies from issuing preference shares with different voting rights (see CA § 75). Preference shares are a separate class of shares with distinct economic risks and benefits from

allow private companies that are subsidiaries of public companies to issue shares with multiple, limited, or no voting rights.¹²¹ This was thought to be desirable as it would afford such companies greater flexibility in structuring joint ventures and strategic alliances.¹²² However, the same extension was deemed inappropriate for public companies. Allowing a public company to issue shares with multiple or no voting rights would result in the concentration of control in the hands of a few without commensurate economic investments. Such an outcome would run counter to the fundamental precept of shareholder democracy, the cornerstone of good governance.¹²³

By 2011, however, regulatory attitude had shifted owing to concerns that insistence on the one share per vote principle might render Singapore uncompetitive as a destination for IPOs. The trigger for this turnaround is often traced to Manchester United's aborted plans to list on the Singapore Exchange ("SGX") on account of the latter's ban of dual class share structures.¹²⁴ In a report issued by the Steering Committee for the Review of the Companies Act, the committee recommended abolishing the one-share-one-vote structure to allow public companies greater flexibility in capital management.¹²⁵ Acting on this recommendation, the Singapore Parliament amended §64 of the Act in 2014 to clarify that the one-share-one-vote principle is only a *default* rule which may be displaced by contrary provisions in the company's constitution.¹²⁶ Following this amendment, public companies became free to adopt dual class share structures.

those of ordinary shares. In contrast, dual class shares typically comprise classes of shares with similar economic benefits and risks but different voting rights.

¹²¹ Companies (Amendment) Act 2003 § 5. The amendment came into effect on 15 May 2003.

¹²² REPORT OF THE COMPANY LEGISLATION AND REGULATORY FRAMEWORK COMMITTEE, at para. 3.6.4, 2002 (hereinafter referred to as the "CLRFC Report").

¹²³ CLRFC Report, at paras. 3.6.2 – 3.6.3.

¹²⁴ See *Singapore to Allow Dual-class Shares to Attract Listings*, Reuters (Oct. 3, 2012); and Lance Lim, *Recent Amendments to the Companies Act: Rethinking Dual-class Shares in Singapore – Caveat Emptor?*, Sing. Law. Gaz., 30 (Jan. 2015).

¹²⁵ MINISTRY OF FINANCE, REPORT OF THE STEERING COMMITTEE FOR REVIEW OF COMPANIES ACT, at 3-14 (June 2011).

¹²⁶ See Companies (Amendment) Act 2014 §33, which took effect on Jan. 3, 2016.

Under the amended rules, the issue of shares with no or different voting rights is subject to the following safeguards:

(1) A public company may only issue different classes of shares if (a) its constitution provides for the issue of different classes of shares, (b) the rights attached to each class of shares are set out therein, and (c) the issue is approved by special resolution: see CA §64A(1) & (3); and

(2) The holder of a *non-voting share* will still have one vote in a general meeting to vote on any resolution that seeks to wind up the company voluntarily or vary the rights attached to that share: see CA §64(4).

Although the change in general corporate law did not apply to listed companies,¹²⁷ it was widely seen to herald a similar development in securities regulation. In early 2017, the Listings Advisory Committee (“LAC”), a committee comprising independent and experienced market professionals set up to advise the SGX on listing policies, endorsed the listing of DCS structures in the belief that it could help “Singapore’s capital market ... become more attractive for businesses run by entrepreneurs to list, thereby providing investors access to a wider range of companies and sectors.”¹²⁸ However, LAC’s support was predicated upon the institution of various safeguards against risks to investors.

Since then, the SGX has publicly consulted¹²⁹ on the LAC’s recommendations and confirmed its decision to allow dual class share structures.¹³⁰ More recently, it has issued a further consultation paper¹³¹ (“SGX Consultation Paper II”) to solicit public feedback on a proposed listing framework for DCS structures. This proposal restricts DCS to new listings¹³² and to occasions where an issuer demonstrates it is “suitable” for adopting such a structure.¹³³ The factors relevant for determining an issuer’s suitability for listing with a DCS structure include the company’s business model, its operating track record, the role and contribution of the holders of multiple-vote shares, and participation by sophisticated investors.¹³⁴

Similar to the framework proposed for Hong Kong, the SGX proposal comprises substantial safeguards against the risks of entrenchment and expropriation. These measures include:

¹²⁷ SINGAPORE EXCHANGE, THE CAPITAL STRUCTURE OF LISTED COMPANIES IN SINGAPORE (Sep. 20, 2011).

¹²⁸ LISTINGS ADVISORY COMMITTEE: FY 2016 ANNUAL REPORT at 13.

¹²⁹ SGX CONSULTATION PAPER, POSSIBLE LISTING FRAMEWORK FOR DUAL CLASS SHARE STRUCTURES (Feb. 16, 2017), <http://www.sgx.com/wps/wcm/connect/71f41364-8584-4da0-b8a5-7891dd16e52e/DCS+Consultation+Paper+%28SGX+20170216%29%28Final%29.pdf?MOD=AJPERES> (hereafter referred to as “SGX Consultation Paper I”).

¹³⁰ Cai Hongxiang & Angela Tan, *SGX Introduces Dual-Class Shares and Unveils Debt Issue Plans*, Business Times, Jan. 20, 2018.

¹³¹ SGX CONSULTATION PAPER, PROPOSED LISTING FRAMEWORK FOR DUAL CLASS SHARE STRUCTURES (Mar. 28, 2018), <http://www.sgx.com/wps/wcm/connect/bc5e0f06-26d4-4564-9445-e14d79529846/Consultation+Paper+on+Proposed+Listing+Framework+for+Dual+Class+Share+Structures.pdf?MOD=AJPERES> (hereafter referred to as “SGX Consultation Paper II”).

¹³² Id. at Part II, para. 2.1. Existing companies with a OSOV structure would not be permitted to convert to a DCS structure post-listing.

¹³³ Id. at Part II, para. 2.2.

¹³⁴ Id. Such applications would also be referred to the LAC for review and advice, at least during the initial phase of the implementation of the new regime (see Id. at Part II, para. 2.3). Previously, the SGX had contemplated imposing two additional listing criteria: (1) a minimum market capitalization of S\$500 million and (2) sophisticated investors must have subscribed for at least 90% of the public float (see SGX Consultation Paper I, *supra* note 129, at Part II, paras 4.7 and 4.9) but this suggestion has been abandoned as it did not have the support of consultees.

imposing a maximum voting differential (between multiple and one-vote shares) of 10:1;¹³⁵ enhancing the rights of one-vote shareholders to convene general meetings;¹³⁶ prohibiting post-IPO issue of multiple-vote shares;¹³⁷ restricting the issue of multiple-vote shares to directors;¹³⁸ requiring the automatic conversion of multiple-vote shares to single-vote shares once the director disposes of his shares or when he ceases to hold executive office in the company;¹³⁹ requiring enhanced independent elements on board committees;¹⁴⁰ and mandating an enhanced voting process (which accords only one vote to each multiple-vote share) to certain reserved matters including changes to the issuer’s constitution, variation of share rights and the appointment and removal of independent directors.¹⁴¹

Singapore’s proposal to introduce DCS has stirred both excitement and controversy. Supporters see this potential development as “a progressive step forward to keep pace with global markets”¹⁴² and as a move that could help to establish Singapore as a “leading technology listing market” that attracts high profile IPOs.¹⁴³ Supporters also argue that if Singapore does not woo start-ups by accepting DCS, it may “be squeezing out huge chunks of growth”.¹⁴⁴ On the other hand, detractors, are pessimistic about the consequences of allowing DCS. Mak Yuen Teen, a vocal critic, castigates the introduction of DCS as a retrograde step—its effect is to “[export] the monitoring function to third parties[—]to the government, the courts, the regulators ... because dual class shares will severely inhibit the role of directors, shareholders and markets in corporate governance.”¹⁴⁵ Mak further points out that Singapore lacks the legal infrastructure needed to protect investors against the heightened risks of abuses inherent in unequal voting structures. In the US, where a disclosure-based caveat emptor approach predominates, shareholder rights are “backed by strong regulatory enforcement, a very developed commercial court system and the

¹³⁵ SGX Consultation Paper II, *supra* note 131, at Part III, para. 1.1.

¹³⁶ *Id.* at Part III, para. 2.1.

¹³⁷ *Id.* at Part III, para. 3.1, except in the event of rights issues.

¹³⁸ *Id.* at Part III, para. 4.1.

¹³⁹ *Id.* at Part III, para. 4.3, although shareholders may approve of any deviation from this requirement through an enhanced voting process.

¹⁴⁰ *Id.* at Part IV, para 1.1. This means that the majority of the Nominating Committee, Remuneration Committee and Audit Committee, including the Chairman, must be independent.

¹⁴¹ *Id.* at Part IV, para. 2.2.

¹⁴² Lim, *supra* note 3.

¹⁴³ Oliver Ward, *The SGX Grows Stronger from its Challenges and is on the Cusp of a Turnaround*, ASEAN TODAY, Sep. 29, 2017.

¹⁴⁴ MICHELLE DY, THE FUTURE OF A DUAL-CLASS SHARE STRUCTURE IN SINGAPORE: ROUNDTABLE DISCUSSION REPORT, Dec. 6, 2016, <https://law.nus.edu.sg/cbfl/pdfs/reports/CBFL-Rep-MD2.pdf>.

¹⁴⁵ Mak Yuen Teen, *Say No to Dual Class Shares*, Business Times, Nov. 27, 2015.

availability of contingency-fee class actions.”¹⁴⁶ In contrast, there is a general lack of shareholder activism in Singapore,¹⁴⁷ as investors rely primarily on public enforcement to guard against the excessive exploits of controllers.¹⁴⁸

4. CHARTING THE MIDDLE PATH

In deciding whether to lift the ban on DCS in Singapore, the SGX has had to squarely confront the conflict between its rational pursuit of profits as a for-profit demutualized exchange, and its regulatory function in ensuring high standards of investor protection. A vigorous investor protection regime is crucial for maintaining a strong and vibrant securities market,¹⁴⁹ but DCS structures threaten to undermine that by subverting outsider monitoring and augmenting the risks of private benefit extraction. At the same time, however, the uptrend in DCS listings among technology companies is a reality that cannot be ignored. Attracting high-growth companies to Singapore is important for optimizing SGX’s revenue and market capitalization, defending the country’s position as a leading financial market in the region, and generating “positive externalities”¹⁵⁰ of growth and employment in the wider economy.¹⁵¹ Seen in that light, the decision over DCS listings primarily requires a balancing of divergent *public* (*viz*, investor protection and wider economic) interests.

The safeguards outlined in the SGX Consultation Paper II suggest that Singapore, like Hong Kong, is charting a pragmatic yet cautious path forward. DCS structures will be permitted but only on an exceptional basis on proof of “suitability”. Investor protection will still be paramount, but such protection will reside in a series of safeguards rather than in rigid adherence to the OSOV principle. The result is a unique regime that has more safeguards, and is therefore stricter, than those found in other jurisdictions.¹⁵² As a matter of theory and evidence, this balance between minority protection and promoting entrepreneurial financing

¹⁴⁶ Mak Yuen Teen, *The Risks of Having Minority Controlling Shareholders in Firms*, Business Times, Dec. 28, 2017.

¹⁴⁷ Although there are signs that shareholder activism is increasing: see *infra* note 166168.

¹⁴⁸ See Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case in Singapore*, 583 – 585 in THE RESEARCH HANDBOOK OF SHAREHOLDER POWER (Randall Thomas & Jennifer Hill eds. 2015).

¹⁴⁹ Bernard Black, *The Core Institutions that Support Strong Securities Markets*, 55 Bus. Law. 1565 (2000).

¹⁵⁰ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT, vol. 92 (Oct. 8, 2014).

¹⁵¹ REPORT OF THE COMMITTEE ON THE FUTURE ECONOMY: PIONEERS FOR THE NEXT GENERATION, Recommendation SC3.9 (Feb. 7, 2017), <https://www.gov.sg/~media/cfe/downloads/cfe%20report.pdf?la=en>.

¹⁵² Dy, *supra* note 144, 7.

is defensible since there is some consensus that DCS issued with adequate investor protection enhances share value.¹⁵³

Although it is not possible at this early stage of its development, to comment on the efficacy of the proposed new regime,, several observations may nevertheless be made of its implications.

First, the developments in Singapore and Hong Kong are significant because they entail regulatory innovation. In both jurisdictions, an optimal compromise is thought to be found in combining weighted voting arrangements with stringent listing criteria and extensive safeguards. This combination deviates from the market-based approach in the US and Canada, where DCS structures are only lightly-regulated so that market discipline remains a significant restraint of abuse. This deviation reflects the appreciation that a light-touch approach works only in contexts where the corporate governance system is not founded on only formal rules but also “a wide array of complementary institutions, constraints, and practices that work together to create a whole that is greater than the sum of its parts.”¹⁵⁴ These would include factors such as diffused share ownership, an active market for control, an experienced and sophisticated judiciary that regularly articulates standards of best practices (e.g., Delaware’s Court of Chancery), and other “second-order” institutions (such as investment bankers, securities analysts, accounting firms, lawyers, rating agencies and the financial media) that help to monitor compliance with corporate governance rules.¹⁵⁵ In contrast, the market in Singapore is largely characterised by concentrated ownership held by the State:¹⁵⁶ the market for control is practically non-existent and shareholder activism as well as enforcement are relatively subdued. This divergence in the overall “institutional mix”¹⁵⁷ of different jurisdictions thus renders the wholesale importation of the US regime inappropriate. Instead, a modified scheme with extensive safeguards is necessary to make up for the lack of complementary institutions in Singapore.

¹⁵³ As discussed in *supra* Section 1.

¹⁵⁴ Troy Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing US Corporate Law Isn't the Answer*, 45 Wm. & Mary L. Rev. 1055, 1075 – 1076 (2004).

¹⁵⁵ *Id.* 1094 – 1095.

¹⁵⁶ Rafael LaPorta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. Fin. 471 (1999).

¹⁵⁷ Paredes, *supra* note 154, 1060.

One may, of course, doubt the efficacy of this proposal: to the extent that the safeguards prescribed by Singapore or Hong Kong are more restrictive than those found in other jurisdictions, why would issuers choose to list there?¹⁵⁸ There is force in such scepticism. To the extent that DCS structures are desired for their ability to enlarge and entrench board control, their appeal would likely diminish as the austerity of safeguards increases. That said, there is no reason to assume that issuers are always motivated by the desire to exploit.¹⁵⁹ A rational issuer generally seeks to list on an exchange with a strong investor protection regime in order to minimise its cost of capital. In the context of DCS listings, an issuer who is willing to subscribe to the additional prescribed safeguards would be perceived as authenticating its commitment to high standards of corporate governance. When that occurs, the safeguards would serve as a badge of quality rather than as a form of deterrence. It remains to be seen whether such an approach would succeed in identifying the true winners that preserve founder autonomy without eroding responsible governance. But to the extent that it is successful, this novel approach would serve as a striking example of how regulatory competition could excite a race to the top rather than the bottom.

A second observation concerns the regulatory philosophy underlying the proposed listing framework. Under the proposed regime, SGX is ultimately responsible for deciding whether a company is “suitable” for adopting DCS structures. To the extent that this involves an assessment of the *merits* of a listing application, it seems redolent of the outmoded merit-based approach¹⁶⁰ and hence a departure from the market-driven, disclosure-based approach that has shaped securities regulation in Singapore over the last two decades.¹⁶¹ Although such deviation may be seen as an isolated measure to mitigate the heightened risks of DCS structures, it is also illustrative of the adaptations that are necessary when applying the market-based model of corporate governance to less sophisticated and developed markets. In such markets, a measure of paternalism remains important to make up for inadequate market

¹⁵⁸ ACGA Submission on SGX Consultation: Possible Listing Framework for Dual-Class Share Structures, Apr. 11, 2017, https://www.acga-asia.org/upload/files/20170411_ACGA_Submission_SGX_DCS_Consultation_Final.pdf. See also Goh Eng Yeow, *Protecting Investors in Dual-class Listings*, Business Times, Dec. 5, 2016 (arguing that DCS should be disciplined by market forces as “the best safeguard is to have no safeguard.”)

¹⁵⁹ Fischel, *supra* note 7, 128 – 129.

¹⁶⁰ Where the regulator, rather than the market, judges the suitability of securities being offered to the public company.

¹⁶¹ A disclosure-based regime is a key tenet of financial regulation in Singapore: see MONETARY AUTHORITY OF SINGAPORE, OBJECTIVES AND PRINCIPLES OF FINANCIAL OVERSIGHT IN SINGAPORE, April 2004 (Sep. 2015) at para. 15.

mechanisms.¹⁶² However, the obvious drawback of a more regulated regime is the risk of moral hazard—investors may discount the risks of acquiring inferior-voting shares if they perceive SGX’s approval of a particular DCS listing as an assurance against the downside risks of their investment. The result is that, rather than sensitizing investors to the higher risks of DCS structures, the “suitability” criterion may have the opposite effect of inducing complacency. Given this concern, it may be that such a discretionary criterion is only appropriate at the germinal stage of the new framework and ought eventually be replaced by a more objective measure of eligibility.

Finally, there may be merits in the criticism that the proposed framework does not sufficiently address the risks of ineffective enforcement. In the first round of consultation, SGX acknowledged the importance of enforcement as a means of controlling managerial opportunism but took the view that the existing enforcement regime is sufficiently robust since both private and public enforcement options have increased in recent years.¹⁶³ It cites, as examples, the extension of statutory derivative actions to listed companies¹⁶⁴—and institutional investors can fund such actions—and the set-up of an independent Listings Disciplinary Committee.¹⁶⁵ However, while there are signs of increased activism,¹⁶⁶ institutional investors in Singapore have traditionally preferred to influence management decisions through media campaigns rather than seek recompense through enforcement of legal rights.¹⁶⁷ In the near to medium term, therefore, some measure of enforcement deficit is likely to persist.¹⁶⁸ So even if the holders of multiple-vote shares, being directors, are obliged to act in the company’s interests, the enforcement of such duty would still be weak given the

¹⁶² Hans Tjio, *Enforcing Corporate Disclosure*, Sing. J. Legal Stud. 332, 334 [2009].

¹⁶³ SGX CONSULTATION PAPER I, *supra* note 129 at Part III, para. 2.5.

¹⁶⁴ CA § 216A, as amended by Companies (Amendment) Act 2014, § 146.

¹⁶⁵ SGX Regulatory Announcement, *Gautam Banerjee to Chair SGX Listings Advisory Committee, Eric Ang to Chair Listings Disciplinary Committee, Francis Xavier, SC to Chair Listings Appeals Committee*, Sep. 15, 2015,

http://infopub.sgx.com/FileOpen/20150915_SGX_establishes_three_listings_committees.ashx?App=Announcement&FileID=369602.

¹⁶⁶ There is, for example, increased activist-investor interests in Singapore stocks: see Klaus Wille & Jonathan Burgos, *Activist Investors Take Aim at Singapore’s ‘Buy, Pray and Hope’ Model*, Bloomberg, Nov 4, 2016. A recent study also suggests that there is a clear trend of increase in shareholder-initiated general meetings: see MAK YUEN TEEN & CHEW YI HONG, THE SINGAPORE REPORT ON SHAREHOLDER ACTIVISM: THE DAWN OF SHAREHOLDER ACTIVISM at 24 (Mar. 2017), <http://governanceforstakeholders.com/wp-content/uploads/2013/07/Shareholder-Meetings-Volume-3-.pdf>.

¹⁶⁷ Lee Suet Fern & Elizabeth Kong Sau-Wai, *Singapore*, in FRANCIS J AQUILA, THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW (2nd ed, Sep. 2017), <https://thelawreviews.co.uk/edition/the-shareholder-rights-and-activism-review-edition-2/1147520/singapore>.

¹⁶⁸ In the context of disclosure obligations, such deficit is said to reflect the legislative emphasis on corporate governance over investor protection: see *Tjio*, *supra* note 162.

public shareholders' lack of financial and informational resources. To bridge that gap, further regulatory reform may be needed to equip shareholders of DCS companies with more means to call controller-insiders to account. Possible measures include further reducing the shareholding threshold for convening general meetings¹⁶⁹ and strengthening statutory remedies for shareholders who have incurred losses as a result of material non-disclosure by the company or trading misconduct by insiders.¹⁷⁰ A more radical step would be to vest in the Monetary Authority of Singapore, as a public enforcement agency with the power to pursue civil actions when this is in the interests of the public.¹⁷¹ This could serve as a deterrent as well as redress for small minority shareholders without the wherewithal to mount legal suits.

In all, the DCS listing regime proposed by SGX may be seen as a measured attempt at mediating the opposing demands of intense competition¹⁷² and legitimate governance concerns. In a sense, it is “inevitable”¹⁷³ that Singapore would have to open its doors to DCS structures to be competitive, but an accompanying suite of exacting criteria and safeguards is put in place to avoid racing to the bottom. Excessive prudence may blunt the effectiveness of the new device, but a calibrated approach that can be fine-tuned over time makes sense when one is sailing in a sea of uncertainty and volatility.

CONCLUSION

At a basic level, the debate on DCS structures may be pitched as a contest between the interests of investors and the profitability of demutualized stock exchanges. Historically, however, DCS structures have often been invoked to advance wider public or national

¹⁶⁹ CA § 176 currently provides that holders of at least 10% of a company's total voting rights may requisition for a general meeting to be held. In the SGX Consultation Paper II, SGX contemplates modifying this threshold such that the requisite 10% is determined on a one-share-one-vote basis: see *supra* note 131, at Part III, para. 2.1. But it is arguable this threshold could be further lowered to 5% given the increased risks of expropriation in DCS companies.

¹⁷⁰ HANS TJIO, WAI YEE WAN, HON YEE KWOK, *PRINCIPLES AND PRACTICE OF SECURITIES REGULATION IN SINGAPORE* 75 – 76 (3rd ed, 2017).

¹⁷¹ A similar suggestion (modelled after s 50 of the Australian Securities and Investments Commission Act 2001 (Cth)) had previously been made in the reform of Singapore's insider trading laws (see CORPORATE FINANCE COMMITTEE, *THE SECURITIES MARKET: FINAL RECOMMENDATIONS* 29, Oct. 21, 1998) but was not adopted by the Government.

¹⁷² Wei Han Wong, *More Singapore Companies Consider Moving to Hong Kong Bourse*, Straits Times, May 15, 2017; Melissa Tan, *Singapore Risks Fading into Investor Backwater as Market Cap Shrinks*, Business Times, Jan. 4, 2016.

¹⁷³ R Sivanithy, *Dual-class Shares: Issue Now is Striking the Balance*, Business Times, Feb. 17, 2017.

policies.¹⁷⁴ Thus, while the ideology of shareholder parity remains significant, it has not been and is not the sole determinant of regulatory policies. Rather, it is an important factor to be weighed against economic and social policies. In Singapore, the use of DCS structures has been advanced as one of multiple strategies for economic growth, and this serves as a heavy counterweight against shareholder governance concerns. Whether this strategy will turn out to be the winning bet remains to be seen, but, for now it would seem that the assumption of that risk is unavoidable.

Postscript:

Since the submission of this Article, the SGX has confirmed¹⁷⁵ the listing framework for DCS structures, the rules of which reflect the proposals set out in SGX Consultation Paper II.¹⁷⁶

¹⁷⁴ It has been observed, for example, that nationalist concerns of foreign ownership and domination of Canadian companies best explain the proliferation of DCS structures in Canada in the 1970s and their persistence to the present: see Ben-Ishai & Puri, *supra* note 66, 132 – 142. Ringe likewise argues that post-2008 financial crisis, the use of multi-vote structures was expected to rise in Europe as a form of economic protectionism against the infiltration of Sovereign Wealth Funds from the middle east and far east: see *supra* note 87.

¹⁷⁵ SGX News Release, SGX Launches Rules for Listing of Dual Class Shares Companies, Jun. 26, 2018, accessible at http://infopub.sgx.com/FileOpen/20180626_SGX_launches_rules_for_listing_of_DCS_companies.ashx?App=Announcement&FileID=511967.

¹⁷⁶ The rules of the new framework may be accessed at http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Mainboard_Rules_June_26_2018.pdf.