ENFORCEMENT OF CORPORATE AND SECURITIES LAW

This book is the first of its kind in focusing on the enforcement of corporate and securities laws, both public and private. This relatively understudied issue is critically important for the development and health of global capital markets. In addition to a special focus on the young system coming into being in the People's Republic of China (PRC), this book also examines the enforcement of corporate and securities laws across the globe and across different legal and political systems from an in-depth comparative perspective. This single volume assembles a veritable 'dream team' of the very best scholars and legal specialists in the many national jurisdictions covered in the book. Hence, it is of significant value to corporate and securities regulators, judicial officials, prosecutors, litigation specialists, corporate counsel, legal and economic policy makers, scholars, think tanks, students and investors alike.

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ENFORCEMENT OF CORPORATE AND SECURITIES LAW

China and the World

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PREFACE

This volume collects the fruits of an unprecedented international academic conference, 'Public and Private Enforcement of Company Law and Securities Regulation – China and the World', which was held at the Chinese University of Hong Kong (CUHK) in December 2014 and convened by the Centre for Financial Regulation and Economic Development (CFRED) of the Faculty of Law of CUHK, the University of Michigan Law School and the Lieberthal Rogel Center for Chinese Studies at the University of Michigan.[1] The aim of the conference was to gather, in one place and at one time, some of the world's top academic specialists, legal practitioners and judicial personnel concerned with public and private enforcement of these two critical aspects of the legal system that govern the global economy and its capital markets, and to engage in an explicitly comparative discourse centred on a rapidly developing China, on one hand, and other developed and developing jurisdictions, on the other.

With ever-globalising capital markets, and particularly in the aftermath of the Global Financial Crisis of 2008, the enforcement of corporate law and securities regulation – both inside one country and across national borders – has garnered significant attention worldwide. While a great deal has been written about comparative corporate governance and the role of law – and specifically different legal and political systems – in the development of capital markets and overall economic development, the focus of that scholarship has been mainly on substantive law and institutional development, with much less attention paid to actual enforcement mechanisms and effects. This collection represents an effort to start filling this critical gap.

In our view, this book has at least four important features. First, and as noted above, it is devoted to relatively understudied but critically

[1] See conference website and list of participants and papers delivered at https://webapp1.law.cuhk.edu.hk/2014conference/1213/cfred/index.php.

important issues for corporate law and securities regulation. To be sure, the well-known 'law and finance' school of academic writing does take into consideration enforcement-related variables in explaining different levels of development amongst global financial markets. However, this particular approach to enforcement issues must be questioned because it focuses largely on formal, rather than applied, enforcement mechanisms. Accordingly, this book seeks to examine how these enforcement mechanisms are actually applied in practice across a wide number of legal and political systems that have firms which issue securities and capital markets, and what factors have determined the institutional environment for the making and application of these enforcement mechanisms.

Second, the book has a special focus on the case of the People's Republic of China (PRC). Compared with other jurisdictions, the PRC has received much less attention in both the analytical and empirical scholarship on comparative corporate and securities law, despite the fact that it is now the world's second largest economy and its issuer firms and increasingly institutional investors have a very significant role in the global capital markets. As an emerging as well as a transitional economy, China presents a particularly interesting case study, thanks to its distinctive political economy, its reconstructed and under-construction legal and regulatory system, and apparently its successful development model. In the PRC, the enforcement of corporate governance and capital markets norms impact directly on areas of critical import and some sensitivity, such as economic reform and the efficient allocation of capital; the development of Chinese capital markets under the much-discussed 'state capitalism' model; the power of China's strongest political economic actors and their impact on China's legal and regulatory system; and the form and function of China's law and legal institutions, from courts to the private bar. Hence, it is our hope that this book will be a first step in giving PRC corporate law and securities regulation enforcement the relatively detailed and comprehensive treatment it deserves in order to embrace a broader global comparative context.

Third, the book tries to broaden its scope from a necessary concern with the PRC to the examination of the enforcement of corporate and securities laws across the globe from a comparative perspective. To this end, the book covers a total of 13 jurisdictions: the US, the UK, Australia, Canada, Germany, Italy, Japan, Korea, India, Brazil, Taiwan and Hong Kong, as well as the PRC. These jurisdictions were carefully selected to cover the various divides – such as the purported fundamental differences between the common law and civil law systems, 'the West'

and 'the rest', and 'developed' and 'developing' economies – that are traditionally drawn in the comparative law literature on these questions, notwithstanding the broadly accepted convergence driven by increasingly transnational capital markets. While it was, in concept, a daunting task to attempt to meaningfully discuss and compare so many jurisdictions, it was made a reality by a fourth and final feature of this book and its contributing authors: the assemblage of a veritable 'dream team' of conference participants and then contributors who are among the very best scholars and legal specialists in their respective jurisdictions.[2]

This book is divided into four parts. The first part, comprised of five chapters, lays the foundations of a theoretical framework and provides the context for the remaining three parts of the book. The second part consists of six chapters focusing on enforcement issues in the PRC. The third and fourth parts have six chapters each and are devoted to common law jurisdictions (the US, the UK, Australia, Canada, India and Hong Kong) and civil law jurisdictions (Germany, Italy, Japan, Korea, Brazil and Taiwan), respectively.

In the first chapter of Part I, we have included a *cri de coeur* by the Honourable Judge Jed S. Rakoff of the US District Court for the Southern District of New York, originally published in the 9 January 2014 issue of the *New York Review of Books*, which bemoans the lack of criminal enforcement after the Global Financial Crisis. Judge Rakoff is one of the most forceful and articulate judges ruling on the enforcement of corporate and securities law today. He is also a former US federal prosecutor with extensive experience in this area. We were honoured to have Judge Rakoff keynote our conference in Hong Kong, at which time he delivered an equally impassioned critique of the use (and abuse) of so-called 'deferred prosecutions', which was afterwards published as a review of Professor Brandon Garret's book *Too Big to Jail: How Prosecutors Compromise with Corporations* (Belknap Press/Harvard University Press, 2014) in the 9 February 2015 issue of the *New York Review of Books*.[3] In Chapter 2, Professor Mathias Reimann of the University of Michigan Law School provides a provocative and informative comparative view of private enforcement in the United States and Europe, adding what he understands to be the lessons for what are said to be 'civil law' Asian legal and economic systems. For Chapter 3, Professor

[2] For brief biographies of the contributors, see Notes on Contributors. For the names of the participants in the December 2014 conference, and their biographies, see https://webapp1.law.cuhk.edu.hk/2014conference/1213/cfred/speaker.php.

[3] Available at www.nybooks.com/articles/2015/02/19/justice-deferred-justice-denied/

Carsten Gerner-Beuerle of the London School of Economics and Political Science effects a unique historical consideration of the role of disclosure regulation and enforcement in the development of efficient capital markets in Germany and Britain of the late nineteenth and early twentieth centuries. Chapter 4 is a contribution by Professor Michael S. Barr, also of the University of Michigan Law School and a former Obama administration Assistant Secretary of the US Treasury for Financial Institutions (and key participant in the drafting of Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010), on the pervasive use of mandatory arbitration clauses in consumer and financial contracts, and their impact on enforcement questions. In Chapter 5, Professor Donald Clarke of George Washington University then interrogates the reality of a much-theorised 'bonding' effect for PRC issuers listing overseas and asks whether or not such apparent 'bonding' should conjure a price premium apparently attributable to better enforcement.

Part II of the volume turns specifically to the PRC. Chapter 6 presents a paper given at the December 2014 Hong Kong conference by Renmin University of China's Vice President Liming Wang on his ideas for amelioration of the regulatory and statutory system for private enforcement against false and misleading disclosure in the PRC securities markets. The chapter was translated and annotated by Professor Nicholas Calcina Howson of the University of Michigan Law School. Given before the collapse of the Shanghai and Shenzhen Exchanges in the summer of 2015 and again at the start of 2016, Vice President Wang's views on private enforcement in this area are nonetheless of critical importance given his stature in China as a technical legislative drafter and master of China's developing hybrid civil-common law legal system and the still-ongoing wholesale amendment of the PRC Securities Law 2006. Professor Xianchu Zhang of the University of Hong Kong similarly addresses the in-process amendment of China's Securities Law in Chapter 7, with a special emphasis on the proposed introduction of a class action mechanism – or something close to it – in the PRC. In Chapter 8, Professor Robin Hui Huang of the Chinese University of Hong Kong gives readers perhaps the most comprehensive survey in existence of the progress of private securities law enforcement in the PRC. Junhai Liu, Professor of Law at Renmin University of China, in Chapter 9, records his own broad-ranging views on desired amendment of the PRC Securities Law. Professor Liu's contribution is important, as he has taken an active and very public role inside the PRC in suggesting the way forward for China's securities regulation program, and he

participates in an Asian Development Bank expert group (with Professor Howson), advising the PRC legislature on this amendment of the PRC Securities Law. In Chapter 10, the National University of Singapore's Jiangyu Wang records his revealing conception of how the PRC courts actually enforce orthodox fiduciary duties in connection with China's company law, asserting that PRC judges are using something like tort law doctrine (and defences) in applying this most critical aspect of corporate law. Finally, Dr Xiaochun Liu, President of the newly autonomous Shenzhen Court of International Arbitration writes authoritatively in Chapter 11 on the possible use of arbitration – and not judicial enforcement – in sorting financial disputes arising in China's recently augmented 'Free Trade Zones'.

Part III of this book turns to common law jurisdictions and begins with Chapter 12 by Duke University's James D. Cox and Vanderbilt University's Randall S. Thomas. These two most authoritative observers of the US system argue that, perhaps surprisingly, more efficient corporate governance and market mechanisms have increasingly been used to address management agency costs over a progressively weakened representative shareholder litigation mechanism. Chapter 13 is a previously published paper by conference participant John Armour of Oxford University, writing with Bernard S. Black of Northwestern University, Brian R. Cheffins of Cambridge University and Richard Nolan of University of York. The authors attempt an empirical comparison of the 'law in action' (specifically, private enforcement of corporate law via fiduciary claims) in the US and the UK in the mid-2000s. Professor Jeffrey G. MacIntosh of the University of Toronto follows in Chapter 14 with an inventive and wide-ranging consideration of securities law enforcement, public and private, and how it contradicts or supports basic notions of 'rule of law'. Chapter 15 has Michael Legg of Sydney's University of New South Wales discussing the class action in Australia as presently implemented, and Chapter 16 is University of Michigan Law School Professor Vikramaditya Khanna's consideration of the class action in a jurisdiction that is both common law and 'Asian' – India. Finally in the common law jurisdictions part of the book, Chapter 17 provides a writing by the University of Hong Kong's Alexa Lam, a former Deputy Chief Executive of the Hong Kong Securities and Futures Commission, with a high-level and broadly philosophical analysis of how the Hong Kong SAR's securities laws are enforced, invoking some fascinating examples taken from her time as a leader of the Hong Kong enforcement apparatus.

The final section of this book, Part IV, addresses the enforcement of corporate law and securities regulation in civil law jurisdictions, or jurisdictions that are understood to be closer to the civil law system than the traditional common law nations. In Chapter 18, Professor Rainer Kulms of the Max Planck Institute for Comparative and International Private Law provides an expert appraisal of the enforcement problem with respect to a whole range of corporate or legal person entities in the German context and in the civil and criminal spheres. Professor Guido Ferrarini of the University of Genoa and Professor Paolo Giudici of the Free University of Bozen-Bolzano turn to Italy – 'ten years after Parmalat' – in Chapter 19, bemoaning the continuing lack of effectiveness in the particular Italian circumstance. Chapter 20 has University of Tokyo Professor Gen Goto's presentation on the progress of private securities litigation against securities issuers in Japan. Chapter 21 offers the same consideration but with respect to South Korea by Hwa-Jin Kim, a professor at Seoul National University and William W. Cook Global Law Professor at University of Michigan Law School. In Chapter 22, National Taiwan University's Professor Wen-Yeu Wang studies, in a comparative manner, what he and others have called Taiwan's 'semi-public' enforcement model – the Investor Protection Center starting in 2003 (and successor to a similar body from 1998) – a mechanism which continues to attract significant attention in the PRC across the Taiwan Straits. The last chapter in this book, Chapter 23, sees Professors John Armour and Caroline Schmidt, both of Oxford University, describe the developing institutional basis for enforcement of corporate and securities law in Brazil, a jurisdiction which has, over the decade, attracted a great deal of study.

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