

THE DERIVATIVE ACTION IN ASIA

This in-depth comparative examination of the derivative action in Asia provides a framework for analysing its function, history and practical application and examines in detail how derivative actions law works in practice in seven important Asian jurisdictions (China, Hong Kong, India, Japan, Singapore, South Korea and Taiwan). These case studies allow an evaluation of a number of the leading Western comparative corporate law and governance theories that have come to define the field over the last decade. By debunking some of these critically important theories, this book lays the foundation for an accurate understanding of the derivative action in Asia and a re-examination of the regulation of the derivative action around the world.

DAN W. PUCHNIAK is an Assistant Professor in the Faculty of Law at the National University of Singapore (NUS), where he specializes in company law with an emphasis on comparative corporate law in east Asia.

HARALD BAUM is a Senior Research Fellow and Head of the Japanese Law Department at the Max Planck Institute for Comparative and International Private Law in Hamburg. He also serves as Professor of Law at the Faculty of Law of Hamburg University and as Research Associate at the European Corporate Governance Institute in Brussels.

MICHAEL EWING-CHOW is an Associate Professor at the Faculty of Law, NUS, where he teaches world trade law and corporate law.

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THE DERIVATIVE ACTION IN ASIA

A Comparative and Functional Approach

Edited by
DAN W. PUCHNIAK,
HARALD BAUM
and
MICHAEL EWING-CHOW



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CONTENTS

List of tables *page* xiv
List of contributors xv
Foreword xvii
Preface xix
List of abbreviations xxi

1 The derivative action: an economic, historical and practice-oriented approach 1
HARALD BAUM AND DAN W. PUCHNIAK

 I Introduction 1

 II The derivative action from an economic and functional perspective 7

 1 Definition, characteristics and delimitation 7

 a Definition 7

 b Characteristics 8

 c Delimitation 10

 2 Economic efficiencies and inefficiencies 12

 a Function 12

 b Empirical studies on the derivative action’s compensatory value 15

 c The comparative value of the empirical research 19

 d The ambiguous empirical picture is compounded by the deterrence effect 23

 e Illuminating the potential negative effects of derivative actions 26

 3 Key elements of regulatory design 31

 a The need for economic incentives and disincentives 31

 b Designing appropriate economic incentives 35

 c Sufficient access to corporate information 43

	d Making the company the first option	46
	e Filtering out unmeritorious actions	47
	f Settlement and abandonment	58
	4 The derivative action in context: functional alternatives	60
III	The derivative action from a historical perspective	64
	1 Historical development in the United States	64
	2 Historical development in the United Kingdom	66
	3 Germany’s historical rejection of the derivative action	72
IV	The derivative action from a practical perspective	74
	1 Procedure and practice in the United States	74
	2 Procedure and practice in the United Kingdom	77
	3 Procedure and practice in France	82
	4 Procedure and practice in Germany	84
2	The complexity of derivative actions in Asia: an inconvenient truth	90
DAN W. PUCHNIAK		
	I Introduction	90
	II The seven leading Asian jurisdictions	98
III	An overview of the derivative action in Asia	100
	1 Japanese derivative actions: the rise of non-economic litigiousness	100
	2 South Korean derivative actions: moderately litigious and intriguingly unpredictable	104
	3 Taiwanese derivative actions: the chill of financial disincentives and domestic cultural norms	108
	4 Chinese derivative actions: a complex pathway to minority shareholder protection	111
	5 Hong Kong derivative actions: a late and partial break with common law tradition lays a path for reform	114
	6 Singapore’s derivative actions: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth	117
	7 Derivative actions in India: explaining the rarity of derivative actions in a sea of litigation	120
IV	The complexity of derivative actions in Asia: a less convenient, but more realistic, truth	124

3 Land of the rising derivative action: revisiting irrationality to understand Japan’s unreluctant shareholder litigant 128

MASAFUMI NAKAHIGASHI AND DAN W. PUCHNIAK

I Introduction 128

II Applying the assumption of the economically motivated and rational shareholder litigant to Japan 132

1 The economically motivated and rational explanation for the absence of shareholder litigation in postwar Japan 132

2 Japan’s explosion of derivative actions (mis)understood through the lens of the economically motivated and rational shareholder litigant and its testable hypotheses 139

III Putting the hypotheses of the economically motivated and rational Japanese derivative litigant to the test 144

1 Testing the economically motivated and rational shareholder hypothesis: do shareholders benefit financially from derivative actions in Japan? 144

2 Testing the economically motivated and rational attorney hypothesis: do economically motivated and rational attorneys drive derivative litigation in Japan? 150

3 Testing the financial tracking hypothesis: does the rate of derivative actions track changes in their financial costs/benefits? 155

IV Providing a rational explanation for ‘economically irrational’ derivative litigation in Japan 158

1 Demarcating the boundaries between rational and irrational behaviour 158

2 Quasi-rational (non-economically motivated) behaviour drives derivative litigation in Japan 160

3 Purely irrational behaviour as a potential driver of derivative litigation in Japan 163

V Conclusion 168

Appendices 170

4	Invigorating shareholder derivative actions in South Korea	186
	HYEOK-JOON RHO AND KON-SIK KIM	
I	Introduction	186
II	Basics of derivative actions: law and reality in South Korea	187
1	Background: the shareholding structure and the legal institutions for shareholder protection	187
a	The shareholding structure	187
b	Legal institutions for shareholder protection: shareholder direct suits and class actions	189
2	Overview of the structure of a derivative action	192
3	Some statistics and features	193
III	Standing for plaintiffs	196
1	General shareholding requirement under the KCC	196
2	Double derivative actions	198
a	Concept of a double derivative action and a recent Supreme Court case	198
b	Analysis: why are double derivative actions necessary in South Korea?	199
IV	Entrepreneurial lawyers: fees and incentives	200
1	Lack of shareholders' incentives and the role of entrepreneurial lawyers in derivative actions	200
2	Who will pay the plaintiff's lawyer?	201
3	How much will the plaintiff's lawyer be paid?	203
a	Limitation on contingency fees	203
b	Limitation of directors' liability	205
V	Regulation of frivolous actions	206
1	Demand requirement	206
a	Introduction	206
b	A corporation's decision not to sue	207
c	A derivative action filed without going through the demand process	207
d	Analysis	209
2	Limiting collusive settlements	210
VI	A new trend in case law: digression from the passive role model?	211
VII	Concluding remarks	213
	Appendix	214

5	Derivative actions in Taiwan: legal and cultural hurdles with a glimmer of hope for the future	215
	WANG RUU TSENG AND WALLACE WEN YEU WANG	
I	Introduction	215
II	The legal mechanism for conducting a derivative action: requirements for maintaining a derivative action	216
1	The shareholder rules	219
2	The 'continuing ownership' rule	220
3	The 'security for damages or costs' rule	220
III	The ambiguity of civil procedure in Taiwanese derivative actions	223
1	Notification of and intervening in a derivative action	224
2	Ambiguity in an involuntary decrease in a plaintiff's shareholdings	225
3	The binding effect of settlements in derivative actions	227
4	Court fees in derivative actions: a flat rate or a percentage?	227
IV	Derivative actions versus direct suits	228
V	The relationship between culture, institutional background and the derivative action	230
1	The controlling shareholder system	230
2	Weak company code	231
3	Emphasis on criminal/administrative sanctions	233
4	Taiwan's legal culture	233
5	Paternalism and mass dispute resolution: 'Asian values' after all?	234
VI	The impact of the derivative action on corporate governance	235
VII	The perception of the derivative action and professional services in the marketplace	237
VIII	Idiosyncrasies in derivative actions: the role of the government-sanctioned non-profit organization	240
IX	Concluding remarks	241

6 Pathway to minority shareholder protection: derivative actions in the People's Republic of China 243

DONALD C. CLARKE AND NICHOLAS C. HOWSON

- I Introduction 243
- II Economic and legal reform in the PRC and the derivative action 244
 - 1 Introduction: the derivative lawsuit and corporate governance in the Chinese context 244
 - 2 Corporatization and its effects 245
 - 3 The LLC form and other non-Company-Law forms 249
 - 4 The legal representative 253
 - 5 The Chinese judiciary: local protectionism, Party control and the avoidance of 'mass' litigant cases 254
 - 6 Derivative versus representative 257
 - 7 Costs, cost allocation and cost-benefit analysis for shareholder plaintiffs 258
- III Derivative actions before 2006 260
 - 1 Non-statutory rule making: CSRC principles, SPC utterances, local 'opinions', and the (draft) 'Omnibus' regulation on the 1994 Company Law 260
 - 2 Pre-2006 cases 263
 - a Genesis of the 1994 SPC Approving Response and other LLC cases 263
 - b Widely held companies 267
- IV The 2006 Company Law and statutory authorization for derivative actions 269
 - 1 Standing 270
 - 2 Demand 272
 - 3 Defendants and associated causes of action 273
- V The reality of derivative actions in the PRC from 1 January 2006 to date 275
 - 1 Absence of CLS or publicly listed CLS-related cases 275
 - 2 'Straddling' actions: 2006 Company Law application to pre-2006 transactions 278
 - 3 Avoidance of derivative pleadings 279
 - 4 Autonomy and acceptance 280
 - 5 Technical competence 282
 - 6 Difficulties regarding underlying substantive claims 284

CONTENTS

xi

7	Confusion between derivative and representative lawsuits	286
8	Judge-made direct litigation right for supervisors	286
9	Allocation of court fees and 'loser pays all'	287
VI	Critique of article 152 and reform suggestions	288
VII	Conclusion	293
7	A parallel path to shareholder remedies: Hong Kong's derivative actions	296
	PAUL VON NESSEN, S. H. GOO AND CHEE KEONG LOW	
I	Introduction	296
II	The common law derivative action: <i>Foss v. Harbottle</i> and its exceptions	297
III	The reform process in Hong Kong	304
1	The consultancy report	304
2	The report of the Standing Committee on Company Law Reform	305
3	The SCCLR corporate governance consultation paper (July 2001)	307
4	Companies (Amendments) Bill 2003	308
IV	How successful is Hong Kong's statutory derivative action?	310
1	The judicial pronouncements	311
2	Coexistence with the common law	315
3	Should Hong Kong adopt the British reforms?	319
4	Conclusions and observations on future success	321
8	Derivative actions in Singapore: mundanely non-Asian, intriguingly non-American and at the forefront of the Commonwealth	323
	MENG SENG WEE AND DAN W. PUCHNIAK	
I	Introduction	323
II	Law of minority protection	326
1	History and development	326
a	English tradition and seeds of change	326
b	Development of company law	328
c	Evolution of minority protection law	330

2	Common law derivative action	331
a	Introduction	331
b	Critique	332
c	Conclusion	336
3	Statutory derivative action	336
a	Impetus for reform	336
b	Scope	338
c	The law	341
4	Personal right, corporate right and section 216	348
a	Introduction	348
b	Giving corporate relief under section 216	349
5	Conclusion	351
III	Debunking Western stereotypes	351
1	Western stereotypes of Singapore	351
2	Realities	354
a	The evolution of Singapore society and the concurrent rise in shareholder litigation	354
b	Singapore's shareholder litigation defies the 'nanny state' and 'Asian values' stereotypes	359
IV	Intriguingly non-American in its success	365
9	The rarity of derivative actions in India: reasons and consequences	369
	VIKRAMADITYA KHANNA AND UMAKANTH VAROTTIL	
I	Introduction	369
II	Why have derivative actions?	371
1	The desirability of derivative suits to enforce corporate laws	371
2	Application to the Indian context	378
III	The derivative action in India	380
1	<i>Foss v. Harbottle</i> and its exceptions	381
a	Ultra vires transactions or illegality	382
b	Matters requiring special resolution	382
c	Fraud on the minority	382
2	Procedural constraints	383
a	The 'clean hands' doctrine	384
b	Order I, rule 8, Civil Procedure Code 1908	384

CONTENTS xiii

3	Availability of other remedies	386
a	Oppression and mismanagement	386
b	Securities laws and SEBI	388
4	Other constraints	390
a	Directors' duties	390
b	Controlling shareholders' duties	391
c	Cultural concerns	392
d	Costs	393
IV	Recent developments and reform efforts	394
V	Conclusions and recommendations for the future	396
10	The derivative action in Asia: some concluding observations	398
DAN W. PUCHNIAK AND HARALD BAUM		
	<i>Legislative appendix</i>	404
	<i>Bibliography</i>	422
	<i>Index</i>	443

TABLES

3A.1	Number of cases of shareholders' derivative actions in Japan	<i>page</i> 170
3B.1	Results of derivative actions filed	171
3B.2	Average per share recovery in judgment for plaintiff (listed companies only)	174
3B.3	Average per share recovery in settled cases (listed companies only)	175
3B.4	Event study on stock price reaction to derivative actions filed	176
3B.5	Event study on stock price reaction to derivative actions settled	176
3B.6	Average amount of damages claimed (1993–2009)	177
3B.7	Average amount of settlement, KO versus non-KO	178
3B.8	Statistics in actions in which the court orders the plaintiff to post a bond	180
3B.9	Average length of a derivative action	184
3C.1	Suggested attorneys' fees pursuant to the post-1994 Fee Rules	185
4A.1	Derivative actions in South Korea (1 January 1997–30 May 2010)	214
9.1	Comparison of key features of direct and derivative suits	373

CONTRIBUTORS

HARALD BAUM Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg; Professor of Law, Faculty of Law, University of Hamburg.

BRIAN R. CHEFFINS Professor of Law, Faculty of Law, University of Cambridge.

DONALD C. CLARKE Professor of Law, George Washington University Law School, Washington, DC.

MICHAEL EWING-CHOW Associate Professor of Law, Faculty of Law, National University of Singapore.

S. H. GOO Professor of Law, Faculty of Law, University of Hong Kong.

NICHOLAS C. HOWSON Professor of Law, University of Michigan Law School, Ann Arbor.

VIKRAMADITYA KHANNA Professor of Law, University of Michigan Law School.

KON-SIK KIM Professor of Law, School of Law, Seoul National University.

CHEE KEONG LOW Associate Professor of Corporate Law, CUHK Business School, Chinese University of Hong Kong.

MASAFUMI NAKAHIGASHI Professor of Law, School of Law, Nagoya University.

PAUL VON NESSEN Professor of Law, Department of Business Law and Taxation, Monash University, Melbourne.

DAN W. PUCHNIAK Assistant Professor of Law, Faculty of Law, National University of Singapore.

HYEOK-JOON RHO Associate Professor of Law, School of Law, Seoul National University.

WANG RUU TSENG Professor of Law, College of Law, National Taiwan University.

UMAKANTH VAROTTIL Assistant Professor of Law, Faculty of Law, National University of Singapore.

WALLACE WEN YEU WANG Professor of Law, College of Law, National Taiwan University.

MENG SENG WEE Assistant Professor of Law, Faculty of Law, National University of Singapore.

FOREWORD

Brian R. Cheffins

For those interested in analysing corporate law and corporate governance from a comparative perspective, these are intriguing times. Cross-border portfolio investment has grown dramatically in recent decades, meaning that investors have pragmatic reasons to familiarize themselves with laws and governance arrangements on a multi-jurisdictional basis. Moreover, a burgeoning ‘law and finance’ literature implies that corporate and securities law need to supply ample investor protection for capital markets to flourish, underpinned by empirical analysis using numerical coding to quantify the quality of law in countries around the world.

The Derivative Action in Asia, edited by Dan W. Puchniak, Harald Baum and Michael Ewing-Chow, is a lively, timely and informative addition to the comparative corporate law literature. As Puchniak and Baum point out in the opening chapter of the volume, the derivative action could be ‘a potentially powerful elixir for corporate governance ills’. Correspondingly, the derivative action has captured the attention of various comparative corporate law scholars. As Puchniak and Baum point out, however, analysis of the law in the United States and key European jurisdictions, such as the United Kingdom and Germany, dominates the relevant literature. *The Derivative Action in Asia* reorients matters in an Asian direction, as it provides detailed, chapter-length studies of derivative litigation from seven major Asian jurisdictions.

Bringing an Asian dimension to the table could not be timelier. As is well known, China and India have recently joined Japan and South Korea as major global economic players. Asia has simultaneously become a hive of corporate activity. In 2010 nearly two-thirds of all initial public offerings (IPOs), measured in terms of value, were carried out on stock exchanges in the Asia-Pacific region, up from one-fifth in 2000. There is also a strong cross-border dimension involved. In 2010 IPOs by Chinese companies accounted for nearly one-quarter of all IPO activity in the United States.

The Derivative Action in Asia's virtues extend well beyond its topical nature. Each of the country-specific chapters is thoroughly researched and provides crucial institutional background in addition to providing an instructive overview of the essential legal details. Puchniak and Baum place the country-specific studies in context, using Chapters 1, 2 and 10 to provide a detailed analysis of derivative litigation from a functional, institutional and theoretical perspective (Chapter 2 was authored solely by Puchniak). Correspondingly, *The Derivative Action in Asia* constitutes an invaluable resource not only for those wanting to learn about minority shareholder rights in key jurisdictions in Asia but also generally for students of comparative corporate law.

As Jack Coffee, a law professor at Columbia Law School, observes in a 2010 working paper, theorists can be divided into 'lumpers', who seek broad, gestalt-like patterns and emphasize similarities rather than differences, and 'splitters', who focus on differences and emphasize institutional detail.¹ Puchniak and Baum, in their overview chapters, mark themselves out clearly as 'splitters', arguing that the country-specific studies in *The Derivative Action in Asia* call into question three 'grand theories' that might be expected to account for the structure and operation of the derivative action. Specifically, they maintain that the chapters in the book show that derivative litigation cannot be explained by reference to a supposed Asian cultural aversion to litigation, they cast doubt upon the law and finance claim that minority shareholders are protected differently – and better – in common law jurisdictions, and they demonstrate that derivative litigation patterns cannot be accounted for purely by reference to economic rationality.

Ultimately, it falls to readers to judge whether *The Derivative Action in Asia* demonstrates, as Puchniak and Baum maintain, that a myriad of factors within a particular country, such as the specific regulatory framework, case law, corporate governance institutions and socio-political environment, do a better job of explaining derivative litigation than 'grand theories'. Regardless of what readers conclude on this particular point, they will find that this book provides them with numerous fascinating insights concerning derivative litigation, Asian corporate law and Asian corporate governance.

¹ J. C. Coffee, 'Dispersed ownership: the theories, the evidence, and the enduring tension between "lumpers" and "splitters"' (2010), Columbia Law School Center for Law and Economic Studies Working Paper no. 363: 6.

PREFACE

It always feels nice to be proved right. Often, however, greater understanding comes from being proved wrong. Indeed, in this book project, most of the understanding we have gained – which we hope to pass on to our readers – has come from being proved wrong.

When we started this project, in late 2009, the idea was to discover common features in derivative actions across Asia. We solicited top experts with the hope of enticing them to come together in Singapore to provide the fuel for our discovery – the ‘common features’ in derivative actions across Asia. We are extremely thankful that our co-authors ‘took the bait’ and joined us in our quest to discover a grand theory to explain how the derivative action in Asia functions.

We failed, however. Our failure certainly was not the fault of our co-authors, as they masterfully analysed the derivative action in their respective jurisdictions. It was not the fault of the Faculty of Law of the National University of Singapore, the Asian Law Institute or the Centre for Commercial Law Studies, all of which generously sponsored and supported this project by providing funding to bring our experts together. It was definitely not the fault of the fine administrators at NUS (particularly Elizabeth Chua) or the student research assistants (particularly Lance Lim, Seah Hui Wen and Timothy Woon), who all did an exceptional job facilitating our research. The editors cannot even blame their wives, Norah and Karen, as they provided much more care and support than the editors could ever have hoped for or deserved. Perhaps the failure was not the fault of the editors either.

Rather, the blame lies squarely with the fascinating, but intensely complex, reality of the derivative action in Asia. As this book explains, this reality does not lend itself to the production of grand theories or universal themes. To the contrary, in the course of illuminating the complexity of the derivative action in this book, we challenge several of the grand theories that have defined comparative corporate law over the last two decades. In addition, by doing so, this book illuminates the

critical importance of each jurisdiction's domestic context (which includes its unique laws, institutions, economic incentives and socio-political environment) for reaching an accurate understanding of how the derivative action in Asia functions.

In this sense, our 'failure' may perhaps be our success. We feel that it is time for the field of comparative corporate law to leave aside grand theories and move towards focusing on the reality of the complex details of how corporate law actually works in practice across multiple jurisdictions. Our book aims to make a start in this direction.

*Dan W. Puchniak
Harald Baum
Michael Ewing-Chow
Singapore/Hamburg, May 2011*

ABBREVIATIONS

A.C.	Law Reports Appeal Cases
ACSR	Australian Corporation and Securities Reports
AIR	All India Reporter
AktG	Aktiengesetz (German Stock Corporation Act)
ALI	American Law Institute
All ER	All England Law Reports
art.	Article
ASIC	Australian Securities and Investment Committee
B.C.C.	British Company Law Cases
BCLC	Butterworths Company Law Cases
CA 2006	Companies Act 2006 (UK)
CASAC	Companies and Securities Advisory Committee (Australia)
CEO	chief executive officer
Ch, Ch D	Law Reports, Chancery Division
CLB	Company Law Board
CLRFC	Company Legislation and Regulatory Framework Committee (Singapore)
CLS	company limited by shares
Cmnd	Command Paper
CMS	controlling minority shareholder
COR	contemporary ownership rule
CPR	Amended Civil Procedure Rules
CSRC	China Securities Regulatory Commission
Ct.	court
D&O	directors' and officers' (liability insurance)
DA	derivative action
DEC	Dutch Enterprise Chamber
Del.	Delaware
Dist. Ct.	district court
DLR	Dominion Law Reports
Doc.	document
ECGI	European Corporate Governance Institute
ER	England Reports
EWCA	England and Wales Court of Appeal
FIE	foreign-invested enterprise

xxii	LIST OF ABBREVIATIONS
FRCP	Federal Rules of Civil Procedure (United States)
FSC	Financial Supervisory Commission (Taiwan)
GVIO	gross value of industrial output (China)
Hare	Hare's Chancery Reports
HC, High Ct.	High Court
HKC	Hong Kong cases
HKCFAR	Hong Kong Court of Final Appeal Reports
HKLRD	Hong Kong Law Reports and Digest
IMF	International Monetary Fund
inc.	incorporated
J for D	judgment for defendant
J for P	judgment for plaintiff
JORF	Journal Officiel de la République Française (France, Official Gazette)
JV	joint venture
KCC	(South) Korean Commercial Code
KO	Kabunushi Onbuzuman (Japan)
Lah	Lahore Series (Indian Law Reports)
LLC	limited liability company
LR	Law Reports
MBCA	Model Business Corporation Act (United States)
NASDAQ	National Association of Securities Dealers Automated Quotations
NCLT	National Company Law Tribunal (India)
NGO	non-governmental organization
NPO	non-profit organization
NYSE	New York Stock Exchange
OECD	Organisation for Economic Co-operation and Development
OTC	over the counter
PACAP	Pacific-Basin Capital Markets
PC	Privy Council
plc	public limited company
PRC	People's Republic of China
PSLRA	Private Securities Litigation Reform Act (United States)
Q.B.	Queen's Bench / Law Reports, Queen's Bench cases
r., rr.	rule, rules
ROHGE	Entscheidungen des Reichsoberhandelsgerichts (Germany, decisions of former Supreme Court)
s., ss.	section, sections
SC	Session cases
SCAA	Securities Class Action Act (South Korea)
SCAP	Supreme Commander for the Allied Powers (Japan)
SCCL	Security Cares Consultancy Limited (Hong Kong)

LIST OF ABBREVIATIONS xxiii

SCCLR	Standing Committee on Company Law Reform (Hong Kong)
SEBI	Securities and Exchange Board of India
SEC	Securities and Exchange Commission (United States)
SER	Solidarity for Economic Reform (South Korea)
SFIPC	Securities and Futures Investors Protection Center (Taiwan)
SGCA	Singapore Court of Appeal (unreported judgments)
SGHC	Singapore High Court (unreported judgments)
SIAC	Singapore International Arbitration Centre
SLC	special litigation committee
SLR	Singapore Law Reports
SOE	state-owned enterprise
SPC	Supreme People’s Court (China)
UCLA	University of California, Los Angeles
UMAG	Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (Germany, Act regarding the Integrity of Companies and Modernization of Shareholder Rights to Bring Actions)
WLR	Weekly Law Reports