

INTERNATIONAL CORPORATE LAW
AND FINANCIAL MARKET REGULATION

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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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.

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INTERNATIONAL CORPORATE LAW AND FINANCIAL
MARKET REGULATION

Corporate law and financial market regulation matter. The global financial crisis has challenged many of the fundamental concepts underlying corporate law and financial regulation; but crisis and reform have long been features of these fields. A burgeoning and sophisticated scholarship now challenges and contextualizes the contested relationship between law, markets and companies, domestically and internationally. This series informs and leads the scholarly and policy debate by publishing cutting-edge, timely and critical examinations of the most pressing and important questions in the field.

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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

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)

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

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