

Books

The Derivative Action in Asia: A Comparative and Functional Approach by Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds)
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A decade or so ago, in the aftermath of the Asian Financial Crisis (1997), international institutions like the World Bank saw corporate governance as deeply problematic in many parts of Asia — contributing to so-called ‘crony capitalism’ and economic instability. The proposed solution was often reform based on Anglo-American models, aimed at promoting more transparent securities markets by, for example, protecting minority shareholders. Some Asian jurisdictions made changes in that direction, at least according to the ‘law in books’, but they varied in scope and impact.¹ Within a decade, moreover, large-scale corporate collapses in the West — particularly in the United States — and the Global Financial Crisis (2008) had called into question some fundamental assumptions and prescriptions of the Anglo-American approach to corporate governance. Intellectually, therefore, it is timely to revisit the situation in Asia from a broader comparative and historical perspective. Analysis of corporate governance in Asia also has obvious and immediate practical merit, given the region’s strong economic growth relative to Europe and the US, and especially in light of burgeoning cross-border investment flows arguably needed to sustain ‘the next convergence’ of developing and developed economies.²

This book therefore represents an admirable and successful step towards a better understanding of what many commentators have proposed as an important potential contributor to minority shareholder protection and effective corporate governance: namely, the derivative suit brought by a shareholder on behalf of the

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¹ Khai Leong Ho (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (ISEAS Publications, 2005); Curtis Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (Chicago University Press, 2008).

² Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Farrar, Straus and Giroux, 2011). On trends in cross-border investment in Asia, as well as international treaty and domestic regulatory regimes, see Vivienne Bath and Luke Nottage (eds), *Investment Law and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

company. The volume does not attempt a comprehensive analysis of corporate governance across the Asian jurisdictions subject to analysis, as this has been attempted elsewhere and necessarily becomes rather brief or descriptive.³ Nor does it adopt the differing approach of some recent scholarship that has focused on case studies of diverse failures in corporate governance in various countries in order to construct a general theory about comparative 'law and capitalism'.⁴ Nevertheless, the comparison of shareholder derivative suits across Asia does effectively draw attention to some of the key features of these corporate governance regimes.

The editors were also selective in choosing which jurisdictions to cover, which is understandable given the diversity across Asia.⁵ Following an introductory chapter (by Baum and Puchniak) containing a useful outline of key developments in the US, UK, France and Germany, this book focuses on derivative actions in seven major economies in the following sequence: Japan (Nakahigashi and Puchniak: chapter 3), South Korea (Rho and Kim: chapter 4), Taiwan (Tseng and Wang: chapter 5), China (Clarke and Howson: chapter 6), Hong Kong (von Nessen, Goo and Low: chapter 7), Singapore (Wee and Puchniak: chapter 8) and India (Khanna and Varottil: chapter 9). Puchniak also provides (in chapter 2) a detailed comparative analysis of highlights and emerging themes from the seven jurisdiction-specific studies. In chapter 10, Baum and Puchniak briefly set out their concluding observations, which readers might well like to skim-read first. Chapter 10 is immediately followed by a helpful 'Legislative Appendix', containing key legislative and regulatory provisions from the seven jurisdictions.⁶

Having co-authors for the jurisdiction-specific chapters no doubt assisted in generating often detailed analysis (epitomised by the empirical study into derivative actions in Japan). Comparability across chapters was promoted by the editors through the provision of a template set of issues to the authors for consideration, in so far as these issues were applicable in their respective jurisdictions.⁷ That template, however, is not explicitly set out in the book.

Overall, therefore, this work provides a convincing response to those who favour comparative or Asian law studies based on more broad-brush

³ OECD, *Corporate Governance in Asia: A Comparative Perspective* (Organization for Economic Co-operation and Development, 2001); Chee Keong Low (ed), *Corporate Governance: An Asia-Pacific Critique* (Sweet & Maxwell, 2002). See also, eg, Ahmed Naciri (ed), *Corporate Governance Around the World* (Routledge, 2008) (including overviews of corporate governance generally in Japan, China and Hong Kong) and Christine Mallin, *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar, 2nd ed, 2011) (Japan, China and Malaysia; the first edition included Japan, China and India).

⁴ Milhaupt and Pistor, above n 1. Selecting instead a diverse set of corporate governance topics across jurisdictions world-wide, including Japan, China and India; see also, Christine Mallin, *International Corporate Governance: A Case Study Approach* (Edward Elgar, 2nd ed, 2006).

⁵ Another largely compelling selective analysis of Asian legal systems, which can offer readers of this volume some useful broader context for the jurisdictions covered, is Ann Black and Gary Bell (eds), *Law and Legal Institutions of Asia* (Cambridge University Press, 2011) (reviewed by Butt and Nottage, *Lawasia Journal*, forthcoming 2012). However, the latter omits India (and South Asia generally).

⁶ Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds) *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 407–24.

⁷ Dan W Puchniak, 'The complexity of derivative actions in Asia: an inconvenient truth' in Puchniak, Baum and Ewing-Chow, above n 6, 90, 96.

categorisations and ‘grand theory’, often associated with comparisons across very many of jurisdictions (principally for the purpose of regression analysis). Specifically, Baum and Puchniak first reject a central claim of the ‘legal origins theory — that the common law is superior to the civil law for protecting minority shareholders’;⁸ if anything, ‘having a common law origin appears to be far more of a hindrance than a help’.⁹ Thus, for example, derivative suits remain relatively uncommon in India, yet have burgeoned over the last decade or so in Japan and Korea. Second, in light of such variance across jurisdictions, they find generalisations about ‘Asian non-litigiousness’ to be unpersuasive, and, more importantly, that ‘reluctant Asian litigant theory’ possesses ‘scant explanatory or predictive value, either for the evolution or for the function of derivative actions in Asia’.¹⁰

Yet, third and most ambitiously, Baum and Puchniak also have serious doubts about ‘economically rational shareholder theory’ in this Asian context: specifically, whether shareholders ‘normally pursue derivative actions only when the financial benefits of pursuing a derivative action are greater than the financial costs’.¹¹ The empirical analysis by Nakahigashi and Puchniak for Japan (as in the US) demonstrates that individual shareholders do not generally benefit indirectly from share price increases associated with derivative suits. Nor do lawyers seem to benefit financially (unlike in the the US, and contrary to a similar argument made earlier in the Japanese context by Mark West).¹² Instead, they (and Baum) are surprised by how much litigation is pursued for non-economic motives — by ‘shareholder ombudsman’ groups in Korea, for example, or through a quasi-governmental body in Taiwan. Or, indeed, pursued even irrationally — including perhaps under the influence of the ‘availability heuristic’ in Japan, which leads to actors overestimating the relevance of salient events such as early but atypical successful derivative actions.¹³

In short, Baum and Puchniak find that ‘whether in the East or the West, local context is critically important’, and this varies ‘in unpredictable ways, from jurisdiction to jurisdiction and within jurisdiction over time’, with the local context ‘defined by a myriad of unique features, including its law, economy, institutions and socio-political environment’.¹⁴ The one common theme, in Asia as elsewhere, seems to be:

the ubiquitous legislative hesitance to set up decisive incentive structures for plaintiff shareholders that would overcome the core problem of the derivative action: The minority plaintiff shareholder who invests his or her time and risks

⁸ Puchniak, Baum and Ewing-Chow, above n 6, 5.

⁹ Ibid 6. Cf, especially, Rafael La Porta et al, ‘Law and Finance’ (1998) 106 *Journal of Political Economy* 1113.

¹⁰ Puchniak, above n 7, 92.

¹¹ Puchniak, Baum and Ewing-Chow, above n 6, 6.

¹² Cf Mark D West, ‘Why Shareholders Sue: The Evidence from Japan’ (2001) 30 *Journal of Legal Studies* 351.

¹³ Masafumi Nakahigashi and Dan W Puchniak, ‘Land of the rising derivative action: revisiting irrationality to understand Japan’s unreluctant shareholder litigant’ in Puchniak, Baum and Ewing-Chow, above n 6, 128, 164.

¹⁴ Dan W Puchniak and Harald Baum, ‘The derivative action in Asia: some concluding observations’ in Puchniak, Baum and Ewing-Chow, above n 6, 401.

his or her money does not participate directly in the positive outcome of a successful action, as all compensatory payments by the defendants flow directly to the company.¹⁵

Legislative reforms have dealt mainly with negative incentives (neutralising or reducing the risks of costs being incurred by the plaintiff shareholders), but without providing positive incentives. Moreover, and rather curiously, many jurisdictions have embarked on comprehensive reform programs, yet have merely ended up introducing measures to discourage ‘unmeritorious’ derivative actions. For example, Hong Kong abandoned a proposal to eliminate a requirement for leave (a trial before the main trial), while the Singaporean legislature decided at the last minute to limit a new statutory derivative action to unlisted local corporations.¹⁶ Political circumstances also seem to play a major role in explaining developments in China, especially the virtual absence of derivative suits among widely-held companies. Both political and economic factors also typically influence the existence and impact of alternative mechanisms for securing minority shareholder rights and benefits, such as enforcement by public authorities, securities-fraud class actions and takeovers. This makes it impossible, according to Baum and Puchniak, to generate a consensus as to whether the economic benefits of derivative actions outweigh their costs.¹⁷

The Derivative Action in Asia: A Comparative and Functional Approach therefore provides a refreshing break from comparative corporate governance ‘grand theories’, let alone broad-brush prescriptions from international bodies promoting derivative actions as a remedy for corporate governance ills. This is consistent with other Asian country-specific analyses of corporate governance that have also tended to emphasise complexity: things ‘changing gradually and in ambiguous directions’.¹⁸

Nonetheless, one is left wondering whether the analysis of patterns in derivative action law and practice across the Asian jurisdictions surveyed in the present volume could have benefited from insights provided by different theories and studies. In particular, it would be valuable to know whether there is a tradition across these jurisdictions — as in Australia¹⁹ — of institutional shareholders or significant ‘blockholders’ in listed companies being linked to delays in the implementation of extensive statutory reforms relating to derivative actions or other protections for minority shareholders. In other words, is there a phenomenon of blockholder apathy in these Asian jurisdictions that, as a matter of practice, negates the hard-fought legislative gains outlined in this book? To test this hypothesis, however, would have required further background information on the ‘corporate governance basics’ in each Asian jurisdiction. As noted above, the

¹⁵ Ibid 404.

¹⁶ Ibid 405.

¹⁷ Ibid 405–6.

¹⁸ Souichirou Kozuka, ‘Conclusions: Japan’s Largest Companies, Then and Now’ in Luke Nottage, Leon Wolff and Kent Anderson (eds), *Corporate Governance in the 21st Century: Japan’s Gradual Transformation* (Edward Elgar, 2008) 228, 245. Puchniak also contributed to that edited volume.

¹⁹ Luke Nottage, ‘Corporate Governance and M&A in Australia: An Overview for Assessing Japan and the “Americanisation” Thesis’ (2008) 08/28 Sydney Law School Research Paper <<http://ssrn.com/abstract=1105639>>.

editors quite understandably avoided such a descriptive account; interested readers can look elsewhere for such background.²⁰

In sum, to echo the words of Brian Cheffins who contributed the foreword, this volume is a 'lively, timely and informative addition to the comparative corporate law literature'.²¹ It makes accessible in English, in a readily comparable format, detailed studies by leading scholars covering important Asian jurisdictions. It is highly recommended for academic researchers and teachers, policy-makers and practitioners alike. For instance, chapter 1 (mainly detailing economic and historical rationales for derivative actions) would be particularly useful for a comparative corporate governance course, especially at the postgraduate law level; chapter 2 (reviewing highlights from the seven main jurisdictions compared) is similarly useful for a course like *Law and Investment in Asia*. The book provides valuable information and insights not just concerning derivative actions per se, but also corporate governance patterns and theoretical debates, the investment environment and capitalism generally in Asia.

²⁰ See, eg, Peter Alexis Gourevitch and James Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press, 2005) (setting shareholder dispersion patterns in even broader context, but not limited to Asian jurisdictions).

²¹ Puchniak, Baum and Ewing-Chow, above n 6, xvii.