

---

# COMPARATIVE ANALYSIS OF SELECTED ASIAN JURISDICTIONS

ERNEST LIM AND LUH LUH LAN

NATIONAL UNIVERSITY OF SINGAPORE

Working draft. Please do not circulate without first obtaining permission of the authors

---

# DERIVATIVE ACTIONS IN SINGAPORE, HONG KONG, TAIWAN AND CHINA

Why derivative actions?

Distinction between wrongs done to the (a) company and (b) shareholders

Why these four jurisdictions?

---

---

# ANALYTICAL FRAMEWORK

Screening rules:  
How to prevent  
vexatious and  
frivolous lawsuits?

Standing rules: Who  
can bring the action  
and how easily?

Cost rules: Who is  
responsible for  
bearing the cost of  
litigation and who  
gets the damages?

---

---

# SINGAPORE AND HONG KONG

Common law jurisdictions (rules are based on or influenced by English law)

Distinction between common law derivative action (CLDA) and statutory derivative action (SDA)

---

---

# CLDA

- CLDA: uncertainties/problems:
    - (1) fraud on the minority: narrow view (dishonesty) or broad view (wrongdoing)
    - (2) wrongdoer in control: narrow view (>50% shareholding) or broad view (influence)
    - (3) require defendant to have gained a benefit
    - (4) claimant cannot succeed if general meeting has ratified the director's wrongdoing
-

---

# SDA

- No need to prove fraud on the minority and wrongdoer in control ; ratification does not bar complainant from bringing action=> improve standing rules
- In HK: only members can bring the action => does not facilitate standing rules
- In SG: members, the minister and any person authorized by the court can bring the action =>partially improves standing rules

[But in Taiwan and China: non-members can bring the action: => improve standing rules]

- HK and SG: Courts can order the company to pay reasonable legal fees, disbursements and costs to the complainant => improve cost rules (but damages awarded by court will go to the company so does not incentivize members to bring action; also, no class action)
  - BUT in HK and SG: courts must first grant permission to the complainant to bring the action:
    - HK: is there a serious question to be tried?
    - SG: whether the complainant is acting in good faith?
    - HK and SG: whether it appears prima facie in the company's interests
- => Does not necessarily improve screening rules
-

---

# TAIWAN & CHINA

- Similar but different – different legal origins
    - Taiwan – SDA transplanted from Japanese Commercial Code with US law influence
    - China – SDA started in 2006 (last amendment in 2018, applies to both LLC and CLS) – very much followed the UK company law but wider in terms of defendants as it covers directors, supervisors and third parties who have caused damage to the company
  - Standing rule: largely similar now:
    - Shareholding requirements (1% - Taiwan used to require 3%) and holding period (180 days(C), 6 months (T) – Taiwan used to require 1 year). Demand must be made to the supervisory board and if do not hear within 30 days (China- or, if the supervisory board refuses to sue; or if there is an emergency e.g. defendant dissipating the assets), shareholder can bring action: in name of company by furnishing security deposit (T) or sue in his/her name (China).
    - Non-shareholder can bring action – will elaborate later
-

---

# TAIWAN & CHINA

- Cost rule:
    - Taiwan – Requires security deposit; winnings go to company and cost of litigation is not reimbursed by company as of right – still need to satisfy “beneficial to the company” requirement;
    - China – No explicit security deposit requirement; winnings go to company and cost of litigation reasonably incurred to be reimbursed by company – but unclear what is “reasonably incurred”.
  - Screening rule:
    - No explicit guidelines on screening guidelines – appears that if shareholder satisfies standing rule, no court permission is required and the shareholder can bring the action in the name of the company (T) or in his/her name (C). Purely procedural requirements.
-



---

# TAIWAN & CHINA

- Derivative actions by non shareholder

	Taiwan	China
Who?	Securities and Futures Investors Protection Center (SFIPC) (证券投资人及期货交易人保护中心)	China Securities Investor Services Center (ISC) (中证中小投资者服务中心)
Nature	Not-for-profit organisation established under an Act of Parliament- funded by the Taiwan stock exchange etc. and private financial institutions	Not-for-profit financial institution under the direct administration of the China Securities Regulatory Commission (CSRC): totally funded by the govt.
When created	2003	2014
Scope	Mediation; managing protection fund that offers compensation to investors who suffer losses because of insolvency of brokers or securities firms; and bring action against company	Investor education; <u>holding of securities to exercise shareholders' legitimate rights</u> ; mediation; <u>investigating and monitoring investors' needs and speaking to the government and regulatory authorities on behalf of investors</u> ; and bringing action against company

	Taiwan	China
Types of Litigation	Class action if authorized by 20 or more shareholder	Securities representative actions (特别代表人诉讼) against listed companies under the Securities Act (证券法) – if mandated by 50 or more shareholders – 1 litigation as of 2021
	Bring action as a shareholder – must purchase shares and satisfy the general requirements in a derivative action	Derivative and direct action as shareholder (股东诉讼) – enforcement of shareholders either in direct or derivative actions – as of 2021, 1 case and it won – it was for invalidating a corporate action/resolution passed by the board – NB. It owns shares in more than 3000 listed companies
	SFIPC’s own standing “Derivative action” under Article 10-1 of SIFTA: 1) for listed co; 2) if after demand supervisory board fails to act; 3) no need security deposit; 3) more securities law violation rather than breach of director’s duties	Support litigation (支持诉讼) – ISC will pick the cases and send in its litigation team to support shareholders in their claims – as of 2021 June, it has supported 44 cases, seeking compensation of 122million RMB on behalf of 692 shareholders – eventually it managed to seek compensation for 483 shareholders and awarded damage of 54.54m RMB, settled for 209 people and claimed 5.53m RMB in settlement for them)
	Ancillary civil action together with a criminal action	

---

# TAIWAN & CHINA

- **Some observations**

- Taiwan – In a 2014 study, it was found that 42.75% of the cases were brought by SFIPC as ancillary civil actions under criminal proceedings –Taiwan’s criminal procedural law allows a victim to open a criminal case without going through a public prosecutor. However, overall the success rate for SFIPC is low – failure rate of 62%.
  - China – ISC is more active in AGM participation to exercise the rights of questioning, inspecting, voting, litigating and making suggestions – they have done so 1,876 times as of 2017 – its quasi-regulator/govt nature makes its very effective. In terms of litigation, ISC’s role appears to be most successful in supporting shareholders’ litigation by either funding the litigation or sending its legal team to assist shareholders.
-

---

Thank You

Q&A

---