

The Derivative Action in Asia: A Complex Reality

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I. INTRODUCTION

The derivative action in Asia presents a tantalizing topic for comparative corporate law scholarship.¹ To start, the derivative action, which has its historic roots in the United States and United Kingdom, has become a ubiquitous feature in the corporate law regimes of Asia's leading economies.² Indeed, the derivative action has been implemented and more recently has captured the attention of corporate stakeholders, legislatures, courts, and scholars in Asia's three largest (i.e., China, Japan and India) and four "tiger" (i.e., Korea, Taiwan, Hong Kong and Singapore) economies.³ These seven jurisdictions account for approximately 80 percent of Asia's economic output,⁴ are home to its nine largest stock exchanges and are consistently recognized as the region's most important and/or dynamic economies.⁵ As such, an accurate understanding of the derivative action in these seven leading Asian economies provides an important window into how the historically Anglo-American derivative action functions within and impacts upon corporate governance in Asia.

The reality of the derivative action in Asia's leading economies can be summed up in one word: complex. This complex reality debunks the popular notion that shareholder litigation in Asia can be easily or meaningfully understood through the monolithic lens

1 This Article is based on the research done for the book: D.W. PUCHNIAK ET AL. (eds.), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) [hereinafter "PUCHNIAK 2012a"]. Specifically, it builds on the findings in Chapter 2 of the book (D.W. PUCHNIAK, *The Complexity of Derivative Actions in Asia: An Inconvenient Truth*, in: *ibid.*, 90-127 [hereinafter "PUCHNIAK 2012b"]) by extending its conclusions to the convergence debate and undertaking a more detailed analysis of the Asian non-litigious culture, the economically motivated and rational shareholder, and legal origins theories.

2 H. BAUM/D.W. PUCHNIAK, *The Derivative Action: An Economic, Historical and Practice Oriented Approach*, in: Puchniak et al., *supra* note 1.

3 *Ibid.* 1-2; PUCHNIAK 2012b, *supra* note 1, 100-124.

4 Y. GOTO, *Asian Economy at a Glance: Development and Challenges at the 15th International Conference "Future of Asia"* (May 21, 2009), http://e.nikkei.com/e/fr/forum/foa/pdf/Yasuhiro_Goto-e_presen.pdf.

For a list of the aggregate and individual GDPs of countries in Asia, which is based on data from the International Monetary Fund, See *List of Asian Countries by GDP*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Asian_countries_by_GDP.

5 After the United States, China and Japan are respectively the world's second and third largest economies and India and Korea are respectively the third and fourth largest economies in Asia (International Monetary Fund, *World Economic Outlook Database: Nominal GDP List of Countries – Data for the Year 2010*, <http://www.imf.org/external/index.htm>). In terms of economic dynamism, in 2010, Singapore (1), Hong Kong (2) and Taiwan (8) all ranked within the world's top ten most competitive economies and, along with Korea, are collectively known as the four "tiger economies" – a moniker gained as a result of decades of extraordinary economic growth which catapulted them from "developing" to "developed" world status. M. SCOTT, *Most Competitive Economies 2010*, Bloomberg Businessweek, http://images.businessweek.com/ss/10/05/0519_most_competitive_countries_2010/1.htm.

of Asia's ostensibly "non-litigious culture."⁶ To the contrary, an accurate understanding of the derivative action in Asia's leading economies turns the theory of Asia's non-litigious culture on its head.

6 The derivative action has increasingly piqued the interest of comparative corporate lawyers and scholars. However, the comparative literature has primarily focused on the United States, United Kingdom and, to a lesser extent, continental European jurisdictions. As a general rule, besides an occasional reference to China or Japan, Asian jurisdictions are not included in these comparative analyses. BAUM/PUCHNIAK, *supra* note 2, 2-3. In addition, when the comparative literature on derivative actions and shareholders' rights does mention a jurisdiction in Asia (normally, Japan and/or China) it tends to identify a cultural aversion to litigation as a possible reason for a dearth in derivative (or shareholder) litigation. For example, Reisberg's recent comprehensive comparative analysis of the derivative action mainly focuses on Western jurisdictions but briefly discusses Japan. In that discussion, Reisberg notes that "in Japan, there is a strong traditional cultural aversion to litigation as a means of settling disputes." A. REISBERG, *Derivative Actions and Corporate Governance* (Oxford University Press, 2007) 225. Reisberg goes on to speculate that the rise in derivative actions in Japan could be due, in part, to "the increasing exposure the Japanese have to Western influence and expressions of individualism and liberty." *Ibid.*

Similarly, a non-litigious Confucian culture is often considered as a possible reason for a dearth of derivative actions in China. See, e.g., M. SIEMS, *Private Enforcement of Directors' Duties: Derivative Actions as a Global Phenomenon*, in: University of East Anglia Law School, Working Paper No. 2012-MS-1 (2010) 10, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699353. However, although much of the recent comparative literature on derivative actions or shareholder litigation tends to consider "Asian" culture to be a possible deterrent to litigation the current trend is to suggest that Asian culture tends to play less of a role than economics and/or institutional factors in driving shareholder behavior. See, e.g., A. REISBERG, *Derivative Actions and Corporate Governance* (Oxford University Press, 2007) 225-226; X. LI, *A Comparative Study of Shareholders' Derivative Actions: England, the United States, Germany and China* (Kluwer Law International, 2007) 277-278; M. SIEMS, *Convergence in Shareholder Law* (Cambridge University Press, 2008) 258-263; M. WEST, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, in: *North-western University Law Review* 88 (1994) 1439; M. WEST, *Why Shareholders Sue: The Evidence From Japan*, in: *Journal of Legal Studies* 30 (2001) 351.

However, some comparative corporate law scholars still view culture, particularly "East Asian" culture, as a primary factor which either drives (in Western countries) or inhibits (in Asian countries) shareholder litigation. A. Licht et al., identify culture as the "mother of all path dependence" and suggest that strong shareholder protections in the US and the UK can be linked to their cultural features of "individualism" and "masculinity" whereas in East Asia a cultural emphasis on harmony helps explain why shareholders less often use positive law to enforce their rights. A. LICHT ET AL., *Culture, Law, and Corporate Governance*, in: *International Review of Law and Economics* 25 (2005) 229. Licht et al. reason that Confucian-inspired Asian societies "may have developed norms of social responsibility that do not rely on court litigation nor on other accountability mechanisms known in the West" – which explains why shareholder suits in such countries are "exceptional." *Ibid.* 252. For a concise explanation of why the common use of "Asian culture" as an explanation for a general dearth in litigation is clearly flawed, See G.F. BELL, *Harmonization of Contract Law in Asia – Harmonizing Regionally or Adopting Global Harmonizations – The Example of the CISG*, in: *Singapore Journal of Legal Studies* (2005) 362, 367.

Japan, which is often portrayed as the archetype of Asia's non-litigious culture, has become a world leader in derivative litigation and in doing so makes most Western countries (aside from the United States) appear squeamishly non-litigious.⁷ Korea, with an increase in economic incentives for derivative litigation and the emergence of a powerful shareholder activist group, has experienced a notable increase in derivative litigation without a noteworthy change in its traditional culture.⁸ China, in spite of not formally having a derivative action in its Company Law until 2006, has had a robust level of derivative litigation for over a decade.⁹ Yet, derivative litigation in *large public* Chinese companies is virtually nonexistent largely due to the political constraints placed on such actions.¹⁰ India, with almost 30 million cases pending before its courts, makes a mockery of the non-litigious Asian theory.¹¹ However, for a variety of complex reasons, derivative actions in India remain scarce.¹²

7 D.W. PUCHNIAK / M. NAKAHIGASHI, Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives as Rational Explanations for Shareholder Litigation, in: *Vanderbilt Journal of Transnational Law* 45 (2012) 1, 4-6, 25-26. [hereinafter PUCHNIAK / NAKAHIGASHI 2012a]. See also BAUM / PUCHNIAK, *supra* note 2, 1-2, 22-23.

8 In their recent book chapter on derivative actions in Korea, Rho and Kim undertake a detailed analysis of the forces that have driven derivative actions in Korea since the Korean Commercial Code was enacted in 1962. They discuss a myriad of possible factors that may have accounted for Korea's historical dearth of derivative litigation and the more recent increase in its volume of derivative actions. However, in the course of their detailed analysis, these two preeminent Korean corporate law scholars never posit traditional Korean (or Asian) culture as a factor which could account for either the historical dearth or more recent increase in derivative actions in Korea. H.J. RHO / K.S. KIM, *Invigorating Shareholder Derivative Actions in Korea*, in: Puchniak et al., *supra* note 1, 186-214.

9 D.C. CLARKE / N.C. HOWSON, *Pathway to Minority Shareholder Protection: Derivative Action in the People's Republic of China*, in: Puchniak et al., *supra* note 1, 243-244.

10 *Ibid.* 275-278. As Puchniak notes in his summary of Clarke and Howson's recent in-depth book chapter on the derivative action in China: "...the blurred line in China between political governance and corporate governance – especially in the case of large Chinese companies – suggests that the derivative action cannot be understood solely through a narrow economic cost-benefit analysis. As Howson and Clarke note, 'In China the actual implementation of a derivative lawsuit mechanism has implications going beyond mere corporate governance concerns'. They go on to describe a system in which many large corporate entities in China 'are dominated by insiders who have – or represent – significant political power that exceeds their formal economic or management power'. The derivative action, as a mechanism designed to allow minority shareholders to attack the misdeeds of such insiders, provides a powerful political tool for normally weak individual political actors to be heard. In addition, the government, which is controlled by the Communist Party, is the most important shareholder in the market. Thus, whether a derivative action is allowed to proceed and the ultimate impact it will have if it does are often far more issues of politics than economics. This is illustrated by Howson and Clarke's suggestion that, without an understanding of the politically sensitive nature of derivative actions involving widely held companies, it is difficult to explain their near-total absence – especially considering the robustness of derivative litigation in smaller quasi-partnership companies." PUCHNIAK 2012b, *supra* note 1, 112-113.

11 In their recent in-depth chapter on the derivative action in India, Khanna and Varottil describe the curious absence of derivative actions in an otherwise seemingly litigious environ-

The point is simple. There are a myriad of complex factors which result in varying levels of derivative litigation in Asia's leading economies.¹³ Ironically, the one factor that is conspicuously absent as a defining force of derivative litigation in *all* of Asia's leading economies is Asia's ostensibly non-litigious culture.¹⁴ This suggests that the cultural theory of Asian non-litigiousness provides scant explanatory or predictive value for either the evolution or function of the derivative action in Asia's leading economies.

In addition to lacking probative value, the overly simplistic and often tautological nature of the non-litigious Asian culture theory risks providing a seductively convenient, but wholly uninformative, rationale for explaining away behavior of Asian shareholders when it does not conform to "Western" norms.¹⁵ This risk is highlighted by the common trope of citing an Asian country's low level of shareholder litigation as evidence of its non-litigious Asian culture and then claiming that the same country's non-litigious Asian culture explains its low rate of shareholder litigation.¹⁶ As such, from the outset, this Article suggests that for the purpose of understanding the derivative action in Asia's leading economies, the non-litigious Asian culture theory should be relegated to the dustbin of academic history.

Without the black-box of Asian culture to erroneously explain away potential differences between "Asian" and "Western" derivative actions, the reality of the derivative action in Asia's leading economies becomes markedly more important. Indeed, if one

ment as follows: "[t]he paucity of derivative actions in India seems puzzling, because there are many thousands of Indian companies, and litigation in India is quite common, with nearly 30 million cases pending in the Indian courts. As we shall see, however, a combination of substantive legal and procedural impediments, alternative remedies and other factors makes the successful initiation of derivative actions both unattractive and very difficult." V. KHANNA / U. VAROTTIL, *The Rarity of Derivative Actions in India: Reasons and Consequences*, in: Puchniak et al., *supra* note 1, 381.

12 *Ibid.*

13 PUCHNIAK 2012b, *supra* note 1, at 100-127. See also D.W. PUCHNIAK / H. BAUM, *The Derivative Action in Asia: Some Concluding Observations*, in: Puchniak et al., *supra* note 1, 398-403.

14 BAUM / PUCHNIAK, *supra* note 2, 5-6; PUCHNIAK 2012b, *supra* note 1, 100-127; PUCHNIAK / BAUM, *supra* note 13, 399.

15 It should be noted that it is equally flawed to speak of "Western" norms of corporate law and governance as "Asian" ones. The flaw in attempting to distill a set of "Western" norms is also highlighted in the history and evolution of the derivative action which has been extremely divergent in major "Western" jurisdictions (*e.g.*, the United States, the United Kingdom, France and Germany). See generally BAUM / PUCHNIAK, *supra* note 2, 64-89 (however, because this Article focuses on Asia, this point is not explored in detail herein).

16 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, at 26. See generally M. RAMSEYER, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, in: *Yale Law Journal* 94 (1985) 604, 607. Ramseyer disagreed with the way in which the cultural theory was presented. However, he posited a new theory in his article based upon the interconnection between Japan's non-litigious ethos and its institutional barriers to litigation. *Ibid.*, 609-612.

views evidence from these seven leading Asian jurisdictions as evidence of how the derivative action functions in seven *leading global* economies (rather than seven *idiosyncratically Asian* ones) such evidence becomes a valuable litmus test for a number of comparative corporate law's most influential theories. As will be explained in detail below, such a litmus test is woefully lacking in the current literature.

The balance of this Article proceeds as follows. Section II identifies three prominent comparative corporate law theories (the "grand universal theories") and explains why evidence from the derivative action in Asia's leading economies provides a useful litmus test for the practical importance and academic value of these theories. Section III applies the evidence of the derivative action in Asia to each of the grand universal theories and demonstrates that none of them can adequately explain the evolution or function of the derivative action in Asia's leading economies. To the contrary, this section suggests that the grand universal theories are often more likely to mislead than to have any explanatory or predictive value. In light of these deficiencies, Section IV concludes by suggesting that academics should abandon their quest for grand universal theories and instead embrace the complex reality that is inherent in comparative corporate law.

II. DERIVATIVE ACTIONS IN ASIA: A LITMUS TEST FOR THE GRAND UNIVERSAL THEORIES

The discipline of comparative corporate law is dominated by grand theories which claim to be universally applicable.¹⁷ The theory that common law countries provide stronger shareholder protection than civil law countries (the "common law superiority theory") has monopolized the minds of comparative corporate law scholars for over a decade.¹⁸

17 In addition to the grand theories discussed below, it has been more generally recognized that a significant portion of the scholarship of comparative corporate law is based on universal claims. For example, in a recent article, Spamann explains how a substantial and important "body of comparative legal scholarship considers statements applicable to large, conceptually infinite numbers of countries." H. SPAMANN, *Large-Sample, Quantitative Research Designs for Comparative Law?*, in: *American Journal of Comparative Law* 57 (2009) 797, 797 [hereinafter SPAMANN 2009]. Spamann convincingly argues that even comparative research that considers two or three countries often implicitly or explicitly produces "theories [that] claim general applicability and are not limited to the countries that prompted the investigation." *Ibid.* 802.

18 R. LA PORTA ET AL., *Law and Finance*, in: *Journal of Political Economy* 106 (1998) 1113, 1151. A search on Google Scholar done on November 1, 2011 reveals that R. La Porta et al.'s *Law and Finance* article has been cited over 8,500 times since it was published. For a concise overview of literature that has been spawned by La Porta et al.'s watershed article, see A. PEKMEZOVIC, *Determinants of Corporate Ownership: The Question of Legal Origin (Part 1)*, in: *International Company and Commercial Law Review* 18 (2007) 97 and A. PEKMEZOVIC, *Determinants of Corporate Ownership: The Question of Legal Origin (Part 2)*, in: *International Company and Commercial Law Review* 18 (2007) 147. For a systematic cri-

The theory that corporate law regimes around the world are converging on a single efficient model of corporate law and governance (the “convergence theory”) has similarly produced a cottage industry of experts.¹⁹ The theory that shareholders will only sue when the financial benefit of suing exceeds the cost (the “economically motivated and rational shareholder theory”) has become the dominant approach for understanding shareholder litigation around the world.²⁰

The combined impact of these three grand universal theories has shaped a generation of comparative corporate law scholarship. However, in spite of their monumental impact and grand universal claims, these theories share three common features which raise

tique of the data used in La Porta et al.’s original research which fundamentally challenges their conclusions, See H. SPAMANN, The “Antidirector Rights Index” Revisited, in: *Review of Financial Studies* 23 (2010) 467 [hereinafter SPAMANN 2010].

- 19 D.W. PUCHNIAK, The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law, in: *Asian Pacific Law and Policy Journal* 9 (2007) 7, 8 [hereinafter PUCHNIAK 2007].
- 20 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 13-15. As Puchniak / Nakahigashi explain with respect to derivative actions, “[o]ver the past three decades, almost all of the definitive publications analyzing derivative actions have relied on the assumption that shareholders rationally decide whether to sue based solely on an ex ante analysis of the financial costs and benefits of pursuing a derivative action. In the 1980s, Fischel and Bradley, in their watershed article *The Role of Liability Rules and The Derivative Suit in Corporate Law*, assume that the ex ante evaluation of whether a derivative action is ‘a positive net value project’ axiomatically determines whether a derivative action will be pursued. In the 1990s, Romano, in her now iconic article *The Shareholder Suit: Litigation without Foundation?*, similarly assumes that shareholders rationally determine whether to bring derivative actions based on an ex ante evaluation of ‘the cost of bringing a lawsuit [versus] . . . the shareholder-plaintiff’s pro rata benefits.’ In the 2000s, Cheffins and Black’s award winning article, which analyzes how derivative actions in several jurisdictions impact the liability of outside directors, concludes that private shareholders normally only sue when it maximizes the shareholder’s ‘expected recovery, making due adjustments for time, risk, and expense.’ Most recently, Reisberg, in his leading text *Derivative Actions and Corporate Governance*, adeptly canvasses almost every conceivable issue with respect to derivative actions, but leaves the assumption that ‘a litigant will commence an action only when the expected value of the litigation is equal to or greater than zero’ largely untouched. In short, the assumption that economic motives and rational behavior are the sole determinants of whether shareholders will pursue derivative actions is the foundation upon which the leading scholarship on derivative actions is built.” *Ibid.* 14-15. As Puchniak and Nakahigashi also note, the notable exception from the above examples is Cheffins and Black’s article, *Outside Director Liability Across Countries*, *Texas Law Review* 84 (2006) 1385. *Ibid.* 14 n. 25. Although Cheffins and Black assume that private shareholders *normally* sue only when the direct financial benefit of litigation exceeds the cost, they do insightfully acknowledge that the only real litigation risk that outside directors face is in rare situations where idiosyncratic plaintiffs have the non-financial motive to “send a message” to directors. *Ibid.* In this respect, Cheffins and Black’s important “send a message” litigation finding supports this article’s general finding that non-monetary factors must be understood to accurately explain what drives derivative actions in Asia.

questions about their robustness. In addition, these same common features suggest that evidence from the derivative action in Asia's leading economies can provide a useful litmus test for examining the practical importance and academic value of these grand universal theories.

First, although all of the grand universal theories claim to be universally applicable they have been primarily derived from and/or evaluated based on the American corporate law and governance experience.²¹ More recently, the universal applicability of these "American centric" grand universal theories has been meaningfully evaluated based on the corporate law and governance experiences in the United Kingdom and a handful of other leading Western countries. In stark contrast, limited efforts have been made to examine whether these ostensibly universal theories have any explanatory or predictive value in the context of Asia. In light of the substantial shift in economic power towards Asia, this gap in the literature is glaring.²² Evaluating the grand universal theories in the context of the derivative action in Asia's leading economies will help reduce this glare.

Second, to the limited extent that research on the three grand universal theories has included evidence from Asia, the evidence included has either been based primarily on the inclusion of a token Asian jurisdiction (normally Japan or China) or a cursory overview of the "law on the books" in several Asian jurisdictions as part of a wider multi-jurisdictional econometric study.²³ These two approaches present serious methodological problems for properly evaluating the robustness of the grand universal theories in the context of Asia. Clearly, using Japan or China as a proxy for Asia patently ignores the

21 The central question in the convergence debate has become whether the world will (or will not) converge on the "American" dispersed shareholding and shareholder primacy model. See PUCHNIAK 2007, *supra* note 19, 9; see also R.J. GILSON, Controlling Shareholders and Corporate Governance, in: Harvard Law Review 119 (2006) 1641, 1647; S.M. BAINBRIDGE, Director v. Shareholder Primacy in the Convergence Debate, in: Transnational Lawyer 16 (2002) 45. A primary focus of the common law superiority theory has been explaining America's unique status as a country with dispersed shareholding. See PUCHNIAK 2007, *supra* note 19, 23; see, e.g., LA PORTA ET AL., *supra* note 18, 1145-1151; J.C. COFFEE, Jr., The Rise of Dispersed Ownership, in: Yale Law Journal 111 (2001) 1, 9-11; M.J. ROE, Political Preconditions to Separating Ownership from Control, in: Stanford Law Review 53 (2000) 539, 593. The economically motivated and rational shareholder/attorney theory has been used to explain why the number of derivative actions in the United States has been dramatically higher than in other parts of the world. See PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 16-17, 30-36.

22 According to The Economist, if GDP is measured at purchasing-power parity ("PPP"), "Asia's share of the world economy has risen more steadily, from 18% in 1980 to 27% in 1995 and 34% in 2009. By this gauge, Asia's economy will probably exceed the combined sum of America's and Europe's GDP within four years. In PPP terms, three of the world's four biggest economies (China, Japan and India) are already in Asia, and Asia has accounted for half of the world's GDP growth over the past decade." "The Balance of Economic Power: East or Famine", Economist, 25 February, 2010, <http://www.economist.com/node/15579727>.

23 BAUM / PUCHNIAK, *supra* note 2, 2-3.

reality of Asia's enormous diversity, and is thus likely to mislead.²⁴ Similarly, limiting the analysis of Asia to an examination of corporate law "on the books" fails to address whether the grand universal theories have any relevance in actual practice.²⁵ Evidence derived from the regulation and implementation of the derivative action in Asia's leading economies overcomes both of these methodological problems. It draws on evidence from seven distinct jurisdictions in Asia that represent the vast majority of Asia's economy and provides a window into both corporate law "on the books" and "in practice."²⁶

24 With approximately 45 countries, 4 billion people and 2000 languages, it is difficult to overstate the diversity of Asia. S.R. ANDERSON, *How Many Languages Are There in the World?*, in: Linguistic Society of America Brochure Series, <http://www.lsadc.org/info/ling-faqs-howmany.cfm>.

25 La Porta et al.'s *Law and Finance* article, which includes some Asian countries in its analysis, is arguably the most influential article in comparative corporate law over the last decade. The article is based on the leximetrics method of coding specific provisions in the company laws of a large sample of countries with either a 0 or 1 to indicate whether or not they exist. LA PORTA ET AL., *supra* note 18. The 0s and 1s are then tabulated and regression analysis is used to see if there is a correlation between the existence of certain legal rules and other variables such as a country's legal origin or level of economic development. *Ibid.* Obviously, coding specific legal provisions with 0s or 1s based on their mere existence tells nothing about how (or whether) the law is actually applied in practice and pays scant attention to the specific wording of such provisions. See *Ibid.* This type of research has become extremely popular in the area of comparative corporate law, See, e.g., SPAMANN 2010, *supra* note 18, 801-803, and has even found its way into the much narrower comparative literature on derivative actions, See SIEMS, *supra* note 6. Kraakman et al.'s book, "The Anatomy of Corporate Law: A Comparative and Functional Approach", is perhaps the most influential comparative corporate law book in the last decade. See L. ENRIQUES, *The Comparative Anatomy of Corporate Law*, in: *American Journal of Comparative Law* 52 (2004) 1011 (reviewing R.H. Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach* 1st Edition (Oxford University Press, 2004)). At the beginning of the book, the authors develop a general taxonomy of legal strategies and then apply that taxonomy at a high level of abstraction to illustrate how these specific legal strategies tend to solve common problems inherent in the corporate form in several leading jurisdictions (with Japan being the only Asian jurisdiction substantially included in the analysis). *Ibid.* Although this approach is superior to the "leximetrics approach" in terms of allowing for more analysis of some of the finer details of each jurisdiction's corporate law and how it is applied in practice, such an approach still takes an extremely high level (abstract) view of the corporate law (i.e., there is little chance to delve into the minutiae of the law or how it applies in practice which we find is so important in this Article). It is worth noting that the authors of "The Anatomy of Corporate Law" appear to have tried to address this problem in the second edition of the book, which does deal somewhat more with the law in practice than the first edition. R.H. KRAAKMAN ET AL., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed. (Oxford University Press, 2009). However, the second edition still uses the general taxonomy of strategies and common legal problems which have made the book so deservedly popular – but necessarily keeps it at a high level of abstraction with the primary focus on broad corporate law rules/strategies and not the details of practice. *Ibid.*

26 See GOTO, *supra* note 4.

Third, evidence from the derivative action in Asia's leading economies provides information that directly relates to specific claims made by each of the individual grand universal theories. Serendipitously, Asia's seven leading economies are comprised of three common law (i.e., India, Hong Kong, and Singapore) and four civil law (i.e., China, Japan, Korea, and Taiwan) jurisdictions. This mix of civil law and common law jurisdictions is roughly representative of the wider mix of legal origins throughout Asia. How the derivative action functions within Asia's leading civil law and common law jurisdictions provides a novel window into whether the corporate law functions differently in systems with different legal origins. It also provides a chance to examine, in the context of the derivative action, whether the common law provides better protection for shareholders than the civil law. With respect to the convergence theory, the historical evolution and function of the derivative action in Asia's leading economies provides a unique perspective on whether convergence in a specific area of the corporate law is occurring and, if so, how and why it occurs. Finally, by examining the forces that drive shareholders to pursue derivative litigation in Asia's leading economies, a fresh perspective can be gained on the theory that shareholders will only decide to pursue a derivative action when the financial benefit of doing so exceeds the cost (i.e., the economically motivated and rational shareholder theory).

Based on the aforementioned reasons, it is clear that evidence from the derivative action in Asia's leading economies provides a useful litmus test for examining the practical importance and academic value of comparative corporate law's grand universal theories.²⁷ It is now time to put the grand universal theories to the test.

27 This being said, the fact that this Article is based solely on evidence from derivative actions in Asia's leading economies places two potential limitations on the broader conclusions that it can draw. First, the derivative action is a single corporate law mechanism within an entire system of corporate law and governance. As such, based solely on evidence from the derivative action in Asia it is impossible to *definitively* prove (or disprove) whether convergence among *entire* systems of corporate law and governance is occurring or whether the *entire* common law system better protects shareholders than the *entire* civil law system. However, even in light of this methodological caution, it must be remembered that the grand theories claim to be universally applicable. In other words, they posit that all jurisdictions will conform to their theoretical claims regardless of any idiosyncratic features that may exist in a particular jurisdiction or subset of jurisdictions. The claim of universality also does not suggest that one aspect of the corporate law will function differently from another. As such, although examining a single corporate law mechanism cannot definitively disprove (or prove) the common law superiority or convergence theories, it can raise important questions about their robustness and the universality of their claims. Also, it should be noted that the grand universal economically motivated and rational shareholder theory is a claim about the way specific shareholders, as opposed to the entire system of corporate law, behave. As such, evidence from the derivative action in Asia has the potential to *definitively* disprove the economically rational shareholder theory. Clearly, if there is convincing evidence that shareholders in Asia's leading economies (or even one of Asia's leading economies) often decide to pursue derivative actions when the economic cost of doing so exceeds the economic benefit, this would debunk the universality of the theory.

III. PUTTING THE GRAND UNIVERSAL THEORIES TO THE TEST

At risk of ruining the suspense, the derivative action in Asia's leading economies does not conform to any of the grand universal theories. To the contrary, in many instances, the derivative action appears to function in precisely the opposite manner to what the grand universal theories would predict. This calls into question both the practical importance and academic value of the three grand universal theories.

To start, whether one of Asia's leading economies has a civil law or common law legal origin appears to matter little in terms of how the derivative action actually functions. In fact, attempting to rely on a jurisdiction's legal origin to predict how the derivative action will function is likely to mislead. For example, over the past two decades statutory (codified) law has played a substantially more important role than case law in Asia's leading common law jurisdictions, while the reverse is arguably true in Asia's leading civil law jurisdictions.²⁸ This is precisely the opposite of what one would predict based on the jurisdictions' legal origins. Perhaps even more surprisingly, most evidence indicates that Asia's leading common law jurisdictions generally provide *weaker* shareholder protection through their derivative actions than their civil law counterparts.²⁹ This turns the common law superiority theory on its head.

Evidence from the derivative action in Asia's leading economies similarly confounds the grand universal theory of the economically motivated and rational shareholder. At first blush, the assumption that shareholders always behave like economically motivated and rational actors has intellectual appeal. Indeed, it seems like common sense that, whether in the East or West, shareholders will not rush to the courthouse when the financial cost of pursuing a derivative action is greater than the financial benefit – even if the shareholder has a legitimate claim. However, evidence from the derivative action in Asia's leading economies illustrates that one must be cautious about extending the general assumption that shareholders *normally* are driven by economic motives and behave like rational actors to the broader assumption that this is *always* the case – which is what the grand universal theory claims.³⁰

Indeed, evidence from the derivative action in Asia's leading economies clearly demonstrates that a substantial amount of shareholder litigation may occur even when the financial cost of pursuing a derivative action is greater than the financial benefit.³¹ This may occur when – as is the case in Japan and Korea – *non-economic* forces, such as politics, drive derivative litigation.³² In such a case, a derivative action in which the direct financial cost is greater than the direct financial benefit may be rationally pursued for political (non-monetary) gain. Conversely, the experience in China illustrates that

28 See *infra* Part III.1.; see also PUCHNIAK 2012b, *supra* note 1, 92-93.

29 *Ibid.*

30 See *supra* note 18; see also *infra* Part III.2; PUCHNIAK 2012b, *supra* note 1, 93-95.

31 See *infra* Part III.2; see also PUCHNIAK 2012b, *supra* note 1, 95.

32 *Ibid.*

the government's political anxiety about derivative actions in large public companies may have a chilling effect on derivative actions, which may ultimately stifle derivative actions in China even when *prima facie* their direct financial benefit may be greater than their direct financial cost (i.e., when they would otherwise be economically rational to pursue).³³ This illustrates how non-economic forces can result in the grand universal economically motivated and rational shareholder theory either underestimating or overestimating the amount of derivative litigation in Asia (and, in all likelihood, everywhere else).

Aside from non-economic forces, the fact that shareholders sometimes act in ways that are *irrational* (i.e., *against their own self-interest*) further confounds the economically motivated and rational shareholder theory. The Japanese experience suggests that a significant amount of derivative litigation may be brought by (purely) economically motivated shareholders who irrationally pursue derivative actions when it is against their economic self-interest to do so.³⁴ This may occur when a shareholder's "bounded rationality," "cognitive bias" or "herding behaviour" causes them to miscalculate their prospect for economic gain resulting in derivative actions being pursued when the financial cost is greater than the combined financial and non-financial benefits (i.e., the "total utility benefit"). Such irrational shareholder behaviour results in derivative actions being pursued when the economically motivated and rational shareholder theory would predict that they would be avoided.³⁵

Finally, at first blush, the convergence theory stands out as the only grand universal theory that appears to generally fit with the reality of the derivative action in Asia's leading economies. Indeed, over the last two decades, there appears to have been a general level of convergence throughout Asia's leading economies towards a more shareholder-friendly derivative actions regime.³⁶ However, upon closer examination, this general level of convergence is largely superficial, as unique regulatory, economic, institutional, and socio-political features in each of Asia's leading economies result in significant divergence as to how the derivative action in each jurisdiction actually functions in practice.³⁷ Perhaps more importantly, the decline in the prominence and shareholder-friendly nature of the derivative action in the United States suggests that the evolution of the derivative action does not occur in a unidirectional fashion towards a shareholder primacy model.³⁸ If this is the case, even the superficial level of convergence that has taken place in Asia may ultimately be transitory. In addition, America's movement away from a more shareholder-friendly derivative action model undercuts the fundamental

33 CLARKE / HOWSON, *supra* note 9, 275-278; PUCHNIAK 2012b, *supra* note 1, 112-113. See also *supra* note 10.

34 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 52-53, 58-64.

35 *Ibid.*

36 See *infra* Part III.3.

37 *Ibid.*

38 BAUM / PUCHNIAK, *supra* note 2, 18-19, 30-31, 64-66.

logic of the convergence debate as the United States, which is often assumed to be the point of convergence, has now diverged from its own assumed “American endpoint model.”³⁹

That none of the grand universal theories can make sense of the derivative action in Asia’s leading economies should not surprise. Indeed, it would be surprising if any one theory could explain the evolution and function of the derivative action in seven distinct and complex jurisdictions that are constantly evolving in unpredictable ways. This is especially true given the fact that the derivative action in Asia’s leading economies (and, in all likelihood, everywhere else) is influenced by a myriad of idiosyncratic local forces including each jurisdiction’s specific regulatory, jurisprudential, economic, corporate governance, and socio-political environment.⁴⁰ Such a milieu does not lend itself to the simplistic monolithic truisms offered by the grand universal theories.

This suggests that the academy’s lust for grand universal theories is misguided and that there is good reason to alter the current focus of the field of comparative corporate law. However, considering the strong trend of leading scholars towards the production of even more grand universal theories, this claim will not likely be greeted with open minds. As such, before suggesting a new path forward for comparative corporate law, it may be useful to examine the fundamental defects in the grand universal theories in more detail, as revealed by their poor fit to the derivative action in Asia.

1. Turning the legal origins theory on its head

In terms of understanding the derivative action in Asia’s leading economies, whether a jurisdiction has a common law or civil law legal origin appears to matter little and risks confusing a lot. The grand universal theory that the common law provides better protection for shareholders than the civil law (i.e., the common law superiority theory) is built on the more general assumption that there are predictable differences between how corporate law functions in common law and civil law jurisdictions. Evidence from the derivative action in Asia’s leading economies undermines the general assumption that there are predictable differences between how corporate law functions in common law and civil law jurisdictions and illustrates how the more specific claim of common law superiority terribly misleads.

One of the most basic theoretical divides between civil law and common law systems is the prominence of codified law in the former and case law in the latter. This clear theoretical divide does not exist in the derivative actions of Asia’s three leading common law (i.e., India, Hong Kong and Singapore) and four leading civil law (i.e., China,

39 For a detailed critique of the convergence debate and an in-depth analysis of how corporate governance in the United States has moved away from its own assumed shareholder primacy endpoint model, see PUCHNIAK 2007 *supra* note 19, 69-70.

40 BAUM / PUCHNIAK, *supra* note 2, 6; PUCHNIAK 2012b, *supra* note 1, 96; PUCHNIAK / BAUM, *supra* note 13, 398-399.

Japan, Korea and Taiwan) jurisdictions.⁴¹ To the contrary, in all of Asia's leading economies, except for India, the fundamental legal rules governing the derivative action are contained in statutory law – not case law.⁴² In this sense, one of the most basic points of demarcation between how the corporate law “predictably” differs in common law and civil law jurisdictions is blurred.

Even more surprisingly, it appears that many of the most important recent changes in the derivative actions regimes of Asia's leading common law and civil law jurisdictions have occurred as a result of statutory amendments in the former and judicial decisions in the latter. Without dispute, over the last two decades, the most important changes in the derivative actions regimes of Hong Kong and Singapore – two of Asia's leading common law jurisdictions – have been the implementation of the statutory derivative action through amendments to their respective Companies Acts.⁴³ In stark contrast, in China, Korea and, more recently, Japan – three of Asia's leading civil law jurisdictions – court decisions, which have often been made by activist judges, have been critically important in the evolution of their respective derivative actions regimes.⁴⁴ The critical importance of statutory amendments in Asia's leading common law jurisdictions and judicial decisions in their civil law counterparts further confounds the idea that there are predictable differences between how corporate law functions in common law and civil law jurisdictions. In fact, it arguably turns what one would predict on its head.

The more specific common law superiority theory is similarly confounded by the reality of the derivative action in Asia's leading economies. On balance, evidence from Asia's leading economies suggests that shareholders in civil law jurisdictions have been better protected by the derivative action than their common law counterparts.⁴⁵ Indeed, minority shareholders in Japan, a civil law jurisdiction, have utilized the derivative action far more than their counterparts in any of Asia's common law jurisdictions (or, for that matter, any jurisdiction in the world aside from the United States).⁴⁶ Similarly,

41 PUCHNIAK 2012b, *supra* note 1, 92-93.

42 KHANNA / VAROTTIL, *supra* note 11, 380; see generally PUCHNIAK 2012b, *supra* note 1, 92-93.

43 M.S. WEE / D.W. PUCHNIAK, Singapore Derivative Actions: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth, in: Puchniak et al., *supra* note 1, 336-348, 366; P. VON NESSEN ET AL., A Parallel Path to Shareholder Remedies: Hong Kong's Derivative Actions, in: Puchniak et al., *supra* note 1, 299-302, 321-22.

44 PUCHNIAK 2012b, *supra* note 1, 107-108, 112; CLARKE / HOWSON, *supra* note 9, 260-263, 286-827, 293-294; RHO / KIM, *supra* note 8, at 211-213; D.W. PUCHNIAK / M. NAKAHIGASHI, Case No. 21: Corporate Law – Business Judgment Rule – Derivative Action, in: M. Bälz et al. (eds.), *Business Law in Japan – Cases and Comments: Intellectual Property, Civil, Commercial and International Private Law* (Kluwer Law International, 2012) 220-26 [hereinafter PUCHNIAK / NAKAHIGASHI 2012b]; see also PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 49-50.

45 BAUM / PUCHNIAK, *supra* note 2 at 6; PUCHNIAK 2012b, *supra* note 1, at 92-93.

46 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 4-6, 25-26. See also BAUM / PUCHNIAK, *supra* note 2, 1-2, 22-23.

Korea, another civil law jurisdiction, is the only Asian leading economy, aside from Japan, to have a significant number of derivative actions involving large listed companies – making the derivative action in its Asian common law counterparts appear somewhat inept.⁴⁷

In light of the common law superiority theory it is ironic that the most likely culprit for the moribund nature of the derivative action in Asia's leading common law countries has, in fact, been their common law origin. The English common law Rule in *Foss*, which was directly transplanted into all of Asia's leading common law jurisdictions, is perhaps the most formidable restriction on derivative litigation in Asia's leading economies.⁴⁸ Indeed, both Singapore and, more recently, Hong Kong have implemented statutory derivative actions specifically aimed at providing minority shareholders with a way

47 PUCHNIAK 2012b, *supra* note 1, 104-108; PUCHNIAK / BAUM, *supra* note 13, 400-01, 403.

48 In the watershed English decision of *Foss v. Harbottle*, 67 Eng. Rep. 189, 2 Hare 461 (Ch. 1843) the court denied minority shareholders the right to bring an action on behalf of the company against its directors and promoters who had allegedly sold property to the company at an inflated value. The court held that the company (and not its individual shareholders) was prima facie the "proper plaintiff" and that if the alleged wrong might be made binding by a majority vote then the court should not interfere in the company's decision not to sue. In other words, the ratio in *Foss*, as more clearly articulated in decisions that followed it, was that prima facie a minority shareholder could not bring an action to recover corporate damages because the "proper plaintiff" in such an action is the company and to allow a minority shareholder to "force" the company to sue would circumvent the company's normal decision making process which is based on majority rule. The obvious problem created by the Rule in *Foss* is that, if applied strictly, it allows majority-shareholder-directors to essentially breach their duties with impunity because such majority directors control the regular corporate decision making process and will almost never use such control to cause the company to, in effect, sue themselves. See BAUM / PUCHNIAK, *supra* note 2 66-72; D.W. PUCHNIAK / T.C. HAN, Company Law, in: T.K. Sood (ed.) Annual Review of Singapore Cases 2011 (Academy Publishing, 2012) 156-157. From the time of the original decision in *Foss*, UK and other leading Commonwealth courts have recognized this problem and created exceptions to the Rule in *Foss*. As such, historically throughout the Commonwealth world minority shareholders could bring actions for and on behalf of the company (i.e., derivative actions) only if they could first prove in a preliminary leave application that they fit into one of the recognized exceptions to the Rule in *Foss*. This is an onerous requirement as it essentially forces minority shareholders to conduct a mini-trial in order to be granted permission to proceed to a trial for and on behalf of the company. Even more burdensome for minority shareholders is that the exact scope of the Rule in *Foss* and what amounts to an exception to the Rule has vexed lawyers, academics and Commonwealth courts for over 150 years. In addition, as a result of the loser pay costs rule and the lack of US-style contingency fees there is normally an enormous economic deterrent for shareholders in leading Commonwealth countries to engage in such a risky and costly corporate governance procedure. *Ibid.* This has resulted in the UK and several other leading Commonwealth countries inserting a right to bring a derivative action into their company law legislation (i.e., a "statutory derivative action") to essentially provide a way for minority shareholders to get around the ambiguous and potentially inequitable common law Rule in *Foss*. See *Ibid.*; WEE / PUCHNIAK, *supra* note 43, 330, 366.

around the Rule in *Foss*.⁴⁹ These statutory amendments have resulted in the derivative action being a considerably more powerful tool for minority shareholder protection.⁵⁰ In a similar vein, India, which is the only leading Asian jurisdiction without a codified derivative action, has almost no derivative litigation and the English Rule in *Foss* seems to be significantly to blame.⁵¹ In short, rather than providing better minority shareholder protection, which is what the common law superiority theory predicts, it appears that in terms of the derivative action the common law in Asia's leading economies has served to thwart minority shareholder protection.

As such, it is clear that the legal origins theory fails to make sense out of the derivative action in Asia's leading economies. Indeed, in many respects, evidence from the derivative action in Asia's leading economies turns the legal origins theory on its head. This demonstrates that the blunt civil/common law divide appears to be of little value in explaining or predicting how the derivative action functions in Asia. It also illustrates how the complexity of the derivative action in Asia's leading economies befuddles the academy's unyielding lust for grand universal theories.

2. *Failing to account for non-economically motivated and irrational derivative actions*

When will shareholders pursue a derivative action? A seemingly logical assumption is that shareholders will only pursue a derivative action when the financial benefit of doing so exceeds the cost. In other words, it seems logical to assume that shareholders are economically motivated and rational actors. This assumption forms the foundation of most of the leading literature on shareholder litigation⁵² and is the second grand universal theory that this Article explores in depth.

In most situations, the economically motivated and rational shareholder theory accurately predicts how the derivative action functions in Asia's leading economies – and, indeed, around the world. The principal prediction that flows from the economically motivated and rational shareholder theory is that, regardless of the jurisdiction, very few shareholders will pursue derivative actions. This prediction is based on two general rules that form the legal starting-point in every jurisdiction that provides shareholders with a derivative action: (1) the shareholder pursuing a derivative action is *prima facie* responsible for the financial cost of pursuing the action (the “Shareholder Risk Rule”); and (2) if the derivative action succeeds, any award flowing from the derivative action will normally be made to the company, and therefore a shareholder-plaintiff will only benefit from a successful derivative action to the extent that the award to the company causes an

49 WEE/PUCHNIAK, *supra* note 43, 336-348, 366; VON NESSEN ET AL., *supra* note 43, 299-302, 321-322.

50 WEE/PUCHNIAK, *supra* note 43, 336-48, 366; VON NESSEN ET AL., *supra* NOTE 43, 321-322.

51 KHANNA/VAROTTIL, *supra* note 11, 381-383, 396-397. See generally PUCHNIAK 2012b, *supra* note 1, 121-122.

52 See *supra* note 20 and accompanying text.

increase in the value of the shareholder-plaintiff's shares (the "Shareholder Benefit Rule").⁵³ The logical implication of these two universal rules is that economically motivated and rational shareholders will only pursue a derivative action if, based on an *ex ante* cost-benefit analysis, the financial cost of pursuing a derivative action is less than the expected increase in the value of the shareholder-plaintiff's shares should the action succeed.

Considering the high cost of derivative litigation and the small stake that most shareholders own in companies, such a financial cost-benefit analysis leads to the conclusion that it will normally be irrational for an economically motivated shareholder to pursue a derivative action – even when a successful result is guaranteed. This is particularly true in the case of shareholders of listed companies, as they normally own a minuscule percentage of the listed company's shares and the liquidity of listed shares often makes exit a cost-effective substitute for derivative litigation. Once you factor in the significant risk that the derivative action may fail in court, the obvious prediction is that in all jurisdictions derivative actions will be scarce – particularly for listed companies.⁵⁴

Historically, this prediction has generally proved to be correct. In spite of a worldwide proliferation of the derivative action and constant reforms to facilitate it, there has long been a global paucity of derivative litigation – particularly in listed companies.⁵⁵ In this respect, at least historically, Asia's leading economies are unexceptional.⁵⁶ The United States, on the other hand, is commonly cited as *the* exception to the worldwide paucity of derivative litigation as it *historically* has had far more derivative actions than any other country – particularly involving listed companies.⁵⁷

America's exceptionalism is generally attributed to unique economic incentives in its derivative actions regime which tip the financial cost-benefit analysis in favor of engaging in derivative litigation.⁵⁸ Most noteworthy is America's uniquely high-powered contingency fee system which essentially renders the Shareholder Risk and Shareholder Benefit Rules nugatory.⁵⁹ It achieves this by allowing derivative actions to proceed without financial risk to shareholder-plaintiffs and by providing risk bearing plaintiff-attorneys with a direct high-powered economic incentive if the derivative litigation "substantially benefits" the company (which is often found to be the case even when the company receives no monetary gain).⁶⁰ Thus, America's contingency fee system is "game-changing" in the sense that it transforms derivative litigation from an act which is normally economically irrational into one that is often economically rational.⁶¹

53 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 15.

54 *Ibid.*

55 *Ibid.* 15-16.

56 *Ibid.*

57 *Ibid.* 16.

58 *Ibid.* 17.

59 *Ibid.*

60 *Ibid.* 17-19.

61 *Ibid.* 17-21.

The high-powered economic incentive provided by contingency fees is buttressed by a number of other unique economic incentives that make derivative litigation more economically attractive in the United States than in most other jurisdictions.⁶² These unique incentives include high levels of Directors and Officers (D&O) liability insurance, a wide scope of pre-trial discovery, large damage awards, and a “parties pay their own costs” regime.⁶³ The combined impact of America’s contingency fee system and these other unique economic incentives is commonly cited as the reason for the relatively high rate of derivative litigation in the United States.⁶⁴ It also provides a strong narrative which supports the claim that the economically motivated and rational shareholder litigant theory is universally applicable.

In the specific context of Asia’s leading economies, the exceptional nature of the economic incentives that America’s derivative actions regime provides appears even more extreme. To start, similar to most other jurisdictions, none of Asia’s leading economies have anything similar to the American-style contingency fee system.⁶⁵ To the contrary, contingency fees are either explicitly prohibited, effectively restricted or have an ambiguous legal status in Asia’s leading economies.⁶⁶ In a similar vein, compared to the United States, Asia’s leading jurisdictions generally have lower levels of D&O liability insurance, a narrower scope for pre-trial discovery, lower damage awards, and some form of a “loser-pay” costs rule.⁶⁷ In addition, shareholders in Asia’s leading common law jurisdictions have historically had to confront the considerable expense and uncertainty of the English Rule in *Foss* when bringing a common law derivative action – which essentially requires a “trial before the trial” for a derivative action to proceed.⁶⁸ In a similar vein, in Asia’s leading civil law countries, with the notable exception of Japan, shareholders have the additional economic hurdle of having to hold a minimum percentage of shares before they have the right to pursue a derivative action.⁶⁹

62 *Ibid.* 21-22.

63 *Ibid.*

64 *Ibid.* 22.

65 BAUM / PUCHNIAK, *supra* note 2, 39-41, 89; PUCHNIAK 2012b, *supra* note 1, 102, 107, 122; PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 28-29, 36-40, 44-45; RHO / KIM, *supra* note 8, 203-05, 211-13; W.R. TSENG / W.Y. WANG, Derivative Actions in Taiwan: Legal and Cultural Hurdles with a Glimmer of Hope for the Future, in: Puchniak et al., *supra* note 1, 239; CLARKE / HOWSON, *supra* note 9, 259-260; KHANNA / VAROTTIL, *supra* note 11, 375-380; PUCHNIAK / BAUM, *supra* note 13, 401.

66 *Ibid.*

67 BAUM / PUCHNIAK, *supra* note 2, 34, 40-42, 59; PUCHNIAK 2012b, *supra* note 1, 102, 107, 109, 122; PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 21-22; TSENG / WANG, *supra* note 65, 233; CLARKE / HOWSON, *supra* note 9, 258-259, 287-288, KHANNA / VAROTTIL, *supra* note 11, 375, 393.

68 PUCHNIAK 2012b, *supra* note 1, 114-15, 118-19, 121-22.

69 RHO / KIM, *supra* note 8, 196-97; TSENG / WANG, *supra* note 65, 219, 221, 225-26, 237-239; CLARKE / HOWSON, *supra* note 9, at 272, 289-290. See generally BAUM / PUCHNIAK, *supra* note 2, at 54-55.

In sum, based on the economically motivated and rational shareholder theory, the derivative action in Asia's leading economies *should* be moribund. However, in reality, it is not. To the contrary, Japan now challenges the United States as the jurisdiction in the world with the highest rate of derivative litigation involving listed companies.⁷⁰ Korea has recently had a spike in derivative litigation which has included actions involving many of the nation's most powerful companies.⁷¹ India and Taiwan may be on the precipice of a sharp increase in derivative litigation.⁷² These facts demonstrate that there is a gross disparity between the current reality of the derivative action in Asia's leading economies and what the economically motivated and rational shareholder theory predicts.

The reason for this disparity is that derivative actions are not always driven by economic forces or rational behavior. Indeed, as noted above, there is strong evidence that politics (not economics) is the most important factor influencing derivative litigation in Japan, Korea and China. In Japan and Korea, the dramatic increase in derivative litigation involving listed companies, which occurred over the last two decades, has been significantly driven by non-profit shareholder and social activist organizations.⁷³ For such organizations, the calculus of whether to pursue a derivative action is much more political than economic.⁷⁴ As such, even when the financial cost of pursuing a derivative action is greater than the financial benefit, the financial loss may be worth bearing in exchange for achieving a political goal.

Originally, the phenomenon of derivative litigation being driven by non-profit organizations appeared to be confined to Japan and Korea. However, there is recent evidence that similar organizations are developing in Taiwan and India.⁷⁵ This suggests that in the future an even greater portion of derivative litigation in Asia's leading economies will be driven by non-economic motives – further confounding the predictive and explanatory value of the economically motivated and rational shareholder theory.

The effect of non-economic forces on derivative litigation has also found its way into China, but with the opposite result. In China's case, instead of non-economic forces driving otherwise economically irrational derivative actions, it appears that non-economic forces are preventing otherwise economically rational derivative actions from being pursued.⁷⁶ In the context of China, the derivative action provides an avenue for citizens

70 RHO / KIM, *supra* note 8, 196-197; PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 4-6, 25-26. See also BAUM / PUCHNIAK, *supra* note 2, 1-2, 22-23.

71 RHO / KIM, *supra* note 8, 187, 193-94, 213-214.

72 PUCHNIAK 2012b, *supra* note 1, 111, 124; TSENG / WANG, *supra* note 65, 240-242; KHANNA / VAROTTIL, *supra* note 11, 394-396.

73 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 7; RHO / KIM, *supra* note 8, 194-195, 201.

74 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 7, 54-56, 62; RHO / KIM, *supra* note 8, 201.

75 PUCHNIAK 2012b, *supra* note 1, 111, 124; TSENG / WANG, *supra* note 65, 240-242; KHANNA / VAROTTIL, *supra* note 11, 394-396.

76 See *supra* note 10.

outside of the political elite to have a powerful “public voice” by engaging in derivative litigation against the directors of large Chinese companies which are often directly or indirectly controlled by government officials.⁷⁷ It appears that the government has used its informal control over the judicial system to stifle derivative litigation against the directors of large Chinese companies in an effort to block off this avenue for “public voice.”⁷⁸ Such evidence of non-economic forces preventing derivative actions from proceeding when they are otherwise economically rational further confounds the economically motivated and rational shareholder theory.

Finally, in the case of Japan, there is compelling evidence that over the last two decades – in addition to the significant volume of non-economically motivated derivative actions being brought for political reasons (as explained above) – another significant portion of derivative litigation has been driven by *irrational* behavior.⁷⁹ Such irrational behavior exists when shareholder-plaintiffs who are driven *purely* by economic motives act against their own economic self-interest by deciding to pursue derivative actions which are objectively money losing ventures.⁸⁰ Why would purely economically motivated shareholder-plaintiffs pursue derivative actions that are objectively against their own economic self-interest?

Simply stated, shareholders are human beings (or, in the case of corporate shareholders, controlled by human beings) and, as decision theory and cognitive psychology have convincingly shown, human beings often act irrationally (i.e., against their own self-interests).⁸¹ Drawing on these fields of research, Puchniak and Nakahigashi have recently undertaken a detailed case study and empirical analysis of Japanese derivative actions which concludes that a significant portion of the high rate of derivative litigation in Japan can be traced back to irrational shareholder-plaintiff behavior (i.e., shareholders pursuing derivative actions against their own economic self-interests due to the influence of “inaccurate mental heuristics,” “an overconfidence bias,” and/or “herding behavior”).⁸² Specifically, Puchniak and Nakahigashi explain how in the late 1980s and early 1990s there were a number of salient events in Japan that made the derivative action the focus of a significant amount of media attention.⁸³ Moreover, throughout the 1990s, the large number of derivative actions brought by non-profit organizations increased the media hype surrounding the derivative action and created the (false) impression that derivative actions were an effective means for shareholders to obtain economic redress.⁸⁴

77 PUCHNIAK 2012b, *supra* note 1, 112-113. See also CLARKE / HOWSON, *supra* note 9, 244-245.

78 PUCHNIAK 2012b, *supra* note 1, 112-113. See also CLARKE / HOWSON, *supra* note 9, 244-245, 277-278.

79 PUCHNIAK/NAKAHIGASHI 2012a, *supra* note 7, 58-64.

80 *Ibid.* 52-53.

81 *Ibid.* 12-14, 52-53.

82 *Ibid.* 58-64.

83 *Ibid.* 59-62.

84 *Ibid.* 62-63.

Contrary to this impression, however, Puchniak and Nakahigashi's in-depth empirical and econometric analysis shows that the media hype and shareholder belief that the Japanese derivative action is an effective means for shareholders to obtain economic redress is completely unfounded.⁸⁵ To the contrary, the empirical evidence demonstrates that normally neither shareholders nor attorneys financially benefit from derivative litigation in Japan.⁸⁶ In other words, for purely economically motivated shareholder-plaintiffs, it is normally irrational to pursue derivative actions in Japan.⁸⁷ Unfortunately, Puchniak and Nakahigashi's empirical findings seem to have arrived too late for a large number of Japanese shareholder-plaintiffs who, over the past two decades, appear to have pursued derivative actions under the false impression that such actions presented an effective means for economic redress.⁸⁸ In other words, a large number of economically motivated shareholder-plaintiffs appear to have irrationally pursued derivative actions in Japan based on an inaccurate understanding of their chances of success and prospects for economic gain.⁸⁹

Shareholder-plaintiffs in Japan who have pursued derivative actions based on an inaccurate understanding of their chances of success and prospects for economic gain are no different from the gambler who erroneously decides to bet his life savings at the roulette table on "black" because the ball has landed on "red" on the ten previous spins – both actions are irrational behavior. The only difference is that the irrational behavior in the case of Japanese derivative actions takes place at the courthouse instead of the casino. Such shareholders may be purely motivated by economic self-interest and yet they are acting against their own self-interest by pursuing actions where objectively the financial cost is greater than the benefit. The fact that such irrational behavior drives a substantial portion of Japanese derivative litigation is yet another reason why the simplistic maxim put forward by the economically motivated and rational shareholder theory – that shareholders will only pursue derivative actions when the financial benefit is greater than the financial cost – terribly misleads.

3. *Some general evidence of convergence but without much meaning*

The debate over corporate governance convergence has been heated for years and has produced a cottage industry of experts.⁹⁰ A primary focus of the debate has been on whether corporate law around the world is converging on the American shareholder primacy model.⁹¹ "American evolutionists" strenuously argue that economic efficiency and

85 *Ibid.* 7, 62-64.

86 *Ibid.* 7.

87 *Ibid.* 7, 57-64.

88 *Ibid.* 58-64.

89 *Ibid.*

90 PUCHNIAK 2007, *supra* note 19, 8.

91 *Ibid.* 9.

globalization will inevitably force countries around the world to adopt the American shareholder primacy model or perish.⁹² “Path dependent theorists” rebut this argument by claiming that each jurisdiction’s unique historical and institutional path will likely prevent convergence on the American shareholder primacy model from occurring.⁹³

In terms of the derivative action in Asia’s leading economies, it appears, at least at first blush, that the “American evolutionists” may be correct. Generally, over the past two decades, Asia’s leading economies have made significant efforts to strengthen their derivative actions and in doing so have arguably buttressed their shareholder primacy models. Singapore and Hong Kong have implemented statutory derivative actions to provide a way around the terribly restrictive English Rule in *Foss* and thereby provide minority shareholders with more power.⁹⁴ Japan and Korea have substantially lowered the economic hurdles in the way of minority shareholders pursuing derivative actions: the former significantly reduced its filing fee, and the latter substantially lowered its minimum shareholding requirement.⁹⁵ China recently codified its derivative action, providing shareholders with a formal legal right to pursue derivative litigation – previously, shareholders could only seek a derivative action in the shadows of the law.⁹⁶ The Taiwanese and Indian governments have recently set up organizations to facilitate the protection of minority shareholder rights which may, in the future, significantly strengthen derivative litigation in both jurisdictions.⁹⁷ These facts suggest, at least on a general level, that over the past two decades the derivative action in Asia’s leading economies has moved towards a more shareholder-friendly regime in line with the American shareholder primacy model.

It is questionable, however, whether this observation of general convergence, at such a high level of abstraction, has any real explanatory or predictive value, or is indeed even correct at all. Upon closer examination, this general level of convergence appears to be more superficial and incomplete than real. Indeed, it appears that unique regulatory, economic, institutional, and socio-political features in each of Asia’s leading economies result in significant divergence in how the derivative action in each jurisdiction actually functions in practice.⁹⁸ As noted above, Japan and Korea have powerful non-profit organizations that have significant and idiosyncratic effects on the type and frequency of derivative litigation in both countries.⁹⁹ The Chinese government has unique

92 *Ibid.* 16-20.

93 *Ibid.* 21-22.

94 WEE/PUCHNIAK, *supra* note 43, 365-367; VON NESSEN ET AL., *supra* note 43, 299-302, 321-322.

95 NAKAHIGASHI/PUCHNIAK 2012a, *supra* note 7, 29-30; RHO/KIM, *supra* note 8, 196.

96 CLARKE/HOWSON, *supra* note 9, 243-244.

97 PUCHNIAK 2012b, *supra* note 1, 111, 124; TSENG/WANG, *supra* note 65, 240-242; KHANNA/VAROTTIL, *supra* note 11, 394-396.

98 BAUM/PUCHNIAK, *supra* note 2, 6; PUCHNIAK 2012b, *supra* note 1, 96; PUCHNIAK/BAUM, *supra* note 13, 398-399.

99 PUCHNIAK/NAKAHIGASHI 2012a, *supra* note 7, 7; RHO/KIM, *supra* note 8, 194-95, 201.

political powers and concerns about derivative actions which have effectively prevented derivative litigation in large listed companies.¹⁰⁰ Taiwan has a uniquely aggressive culture of business journalism, which results in a few derivative actions having a large deterrent effect.¹⁰¹ Singapore's statutory derivative action only applies to companies that are not listed in Singapore, which creates a unique regulatory framework that facilitates derivative actions in non-listed companies and restricts them in publicly listed ones.¹⁰² The list of idiosyncrasies among Asia's leading economies could go on and on – but the point is simple. Some evidence of general high level convergence towards the American shareholder primacy model tells us little about the reality of the derivative action in practice in any of Asia's leading economies – and, in fact, the practice suggests meaningful divergences.

Additionally, it is easy to find evidence that suggests that at least some of Asia's leading economies have made reforms in the opposite direction – towards a less shareholder-friendly derivative actions regime. In Japan, following the rise in derivative actions in the early 1990s, there have been a number of judicial and statutory measures (*e.g.*, the courts more liberally ordering shareholder-plaintiffs to post security for costs, a statutory cap on directors' liability, and the judicial recognition of the business judgment rule) to control the amount of derivative litigation.¹⁰³ In Korea, the only other jurisdiction with a significant amount of derivative litigation involving listed companies, there is also evidence of legislative and judicial measures (*e.g.*, maintaining the minimum shareholding requirement in the recent amendment to the Korean Commercial Code) which suggests that the goal is not just to facilitate shareholder rights through derivative actions, but also to achieve the appropriate balance between shareholders' rights and directors' autonomy.¹⁰⁴ In China, although there was formal recognition of the derivative action through its insertion into the company law, as explained above, the government has effectively limited derivative litigation to small, unlisted companies.¹⁰⁵ These examples illustrate that Asia's leading economies are not converging on a single endpoint shareholder primacy model, but are rather trying to find the "appropriate" balance between shareholders' rights and directors' autonomy that will suit the various needs and interest groups within each individual jurisdiction. Of course, such needs and interests will vary over place and time, which may spur the readjustment of this balance from jurisdiction to jurisdiction and over time.

100 See *supra* note 10.

101 PUCHNIAK 2012b, *supra* note 1, 110-11; TSENG / WANG, *supra* note 65, 236.

102 PUCHNIAK 2012b, *supra* note 1, at 119.

103 PUCHNIAK / NAKAHIGASHI 2012b, *supra* note 44, 220-226; PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 49-51; B.E. ARONSON, Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case, in: Cornell International Law Journal 36 (2003) 11, 47-48.

104 RHO / KIM, *supra* note 8, 196, 206-214.

105 CLARKE / HOWSON, *supra* note 9, 275-276. See generally *supra* note 10.

Such an ebb and flow of the derivative action between shareholders' rights and directors' autonomy should not surprise. Indeed, in the United States, which is often the assumed "point of convergence," there has been a similar ebb and flow in derivative actions law which has made it more and less shareholder-friendly over time.¹⁰⁶ Indeed, the consensus view is that the derivative action in the United States is currently considerably less shareholder-friendly than it was several decades ago.¹⁰⁷ As such, in terms of the derivative action, America has ironically moved away from its own "American shareholder primacy model." This observation undercuts the utility of the entire convergence debate.

If there is no optimally efficient "endpoint model" of convergence, and if jurisdictions constantly adjust their balance between shareholders' rights and directors' autonomy, the fact that a number of jurisdictions have a similar balance today tells us little about why that similarity exists or what will happen in the future. In this sense, the grand universal convergence theory seems to be no more helpful than the other grand theories in making sense out of the derivative action in Asia's leading economies.

IV. THE COMPLEX REALITY OF DERIVATIVE ACTIONS IN ASIA: AN INCONVENIENT TRUTH

It is readily apparent that the theories of Asian cultural non-litigiousness, common law superiority, the economically motivated and rational shareholder, and corporate law convergence terribly miss the mark. However, this does not mean that culture, legal origins, economic rationality, and convergence are irrelevant. To the contrary, they are all important – but not uniformly, not exclusively, and not in an "Asian" sense.

To start, there is considerable evidence from Asia's leading economies that *domestic* culture and *local* business norms (as opposed to a monolithic and static "Asian culture") matter. For example, in the case of Taiwan, its local journalistic culture, which aggressively reports on cases against corporate directors, helps explain why Taiwan's limited number of derivative actions may still have an important impact on its corporate governance.¹⁰⁸ In India, a pragmatic business culture of not challenging directors with powerful bureaucratic connections helps shed light on its dearth of derivative actions in what is otherwise a sea of litigation.¹⁰⁹ In Hong Kong, the pragmatic economic culture of shareholders, combined with the high costs of litigation, helps explain why shareholders more often sell their shares than sue.¹¹⁰ However, as clear as it is that domestic culture

106 BAUM/PUCHNIAK, *supra* note 2, 18-19, 30, 64-66. See generally, PUCHNIAK 2007, *supra* note 19, 69-70.

107 BAUM/PUCHNIAK, *supra* note 2, 64-66.

108 PUCHNIAK 2012b, *supra* note 1, 110-11; TSENG/WANG, *supra* note 65, 236.

109 KHANNA/VAROTTIL, *supra* note 11, 392-393.

110 VON NESSEN ET AL., *supra* note 43, 321.

and local business norms matter, it is even more evident that this “cultural effect” varies from jurisdiction to jurisdiction – and also likely over time. This conclusion is diametrically opposed to the stereotypical view of the non-litigious Asian culture which is assumed to apply uniformly across the entire region and remain static over time.

Similarly, the legal origins of Asia’s leading economies may have some impact on their derivative actions but this also varies considerably from jurisdiction to jurisdiction and over time. The derivative action in all of Asia’s leading common law jurisdictions has undoubtedly been affected by the English common law Rule in *Foss*.¹¹¹ That being said, the impact of the Rule in *Foss* differs in each of Asia’s leading common law jurisdictions depending on whether, when, and in what form each jurisdiction decided to implement a statutory derivative action and how the courts have enforced the Rule in *Foss*.¹¹² The impact of Asia’s leading jurisdictions’ legal origins becomes even more variable when one considers that often a jurisdiction’s derivative action has a different “legal origin” from the legal origin of its general legal system. For example, Japan, Taiwan, and Korea’s derivative actions are rooted in US law but they are generally considered civil law countries.¹¹³ Even when one traces back and compares the derivative action in one of Asia’s leading jurisdictions to the derivative action in the jurisdiction which served as its model, this provides scant explanatory or predictive value – the divergent cases of Japan, Korea, and Taiwan make this abundantly clear.¹¹⁴ In sum, although in some cases a jurisdiction’s or a derivative action’s legal origin reveals some general common historical features, the actual impact of these historical features on the current practice of the derivative action varies from jurisdiction to jurisdiction and may change or fade over time.¹¹⁵

In a similar vein, economic motives and rational behavior matter to some extent in all of Asia’s leading jurisdictions but again their impact varies from jurisdiction to jurisdiction and over time. Indeed, the reduction in Korea’s minimum shareholding requirement and Japan’s filing fee appear to have had some impact on the increased rate of

111 WEE/PUCHNIAK, *supra* note 43, 365-367; VON NESSEN ET AL., *supra* note 43, 299-301, 321-322; KHANNA/VAROTTIL, *supra* note 11, 381-383, 396-397. See generally PUCHNIAK 2012b, *supra* note 1, 114-124.

112 Specifically, the Rule in *Foss* currently plays a substantial role in India because the legislature has not yet implemented a statutory derivative action. KHANNA/VAROTTIL, *supra* note 11, 380-81. The Rule in *Foss* currently plays a marginal role in Hong Kong as it is merely intended to fill any gaps that may have been overlooked in its relatively new statutory derivative action. VON NESSEN ET AL., *supra* note 43, 315. The Rule in *Foss* currently plays no role in private companies incorporated in Singapore but is determinative in listed and foreign incorporated companies as Singapore’s statutory derivative action only applies to companies which are incorporated in Singapore and not listed on a Singapore exchange. WEE/PUCHNIAK, *supra* note 43, 331, 338.

113 PUCHNIAK/NAKAHIGASHI 2012a, *supra* note 7, 23-24; RHO/KIM, *supra* note 8, 187; TSENG/WANG, *supra* note 65, 215-216.

114 PUCHNIAK 2012b, *supra* note 1, 100-111.

115 See *e.g.*, *supra* note 112.

derivative litigation in both countries.¹¹⁶ However, it is also abundantly clear that in both countries the change in the economic cost of bringing a derivative action only provides a part of the explanation for the rise in derivative litigation. In both cases, activist organizations, primarily driven by political (and not economic) motives, loom large.¹¹⁷ Similarly, in China, it appears that politics – not economics – provides the best explanation for the almost complete absence of derivative litigation in large listed companies.¹¹⁸ This being said, obviously, if the economic cost of a derivative action is so exorbitant that it is neither a cost effective way to make money or achieve a non-monetary objective, then derivative actions will likely be scarce. However, even if this is the case, as we have seen in Japan, shareholder-plaintiffs may still irrationally pursue derivative actions.¹¹⁹ Thus, from a general perspective, economic rationality does not differ much from culture and legal origins in the sense that it matters – but its precise effect varies from jurisdiction to jurisdiction and over time.

Finally, although the idea of convergence appears to be fundamentally flawed without an “endpoint model,” the realization that there is no endpoint model in itself may be a valuable insight.¹²⁰ This realization may alert reformers to the fact that the value of the derivative action is not in any one model. Rather, the utility of the derivative action is more likely found in its ability to help achieve the appropriate balance between shareholders’ rights and directors’ autonomy. How and whether the derivative action can meaningfully achieve such a balance will, of course, vary from jurisdiction to jurisdiction and over time.

In addition to culture, legal origins, economics, and convergence, each of Asia’s leading economies has a myriad of other factors, which, to varying extents, may drive derivative actions. The local political reality in a jurisdiction sometimes proves critical – which is most evident in China where the line between political governance and corporate governance is almost entirely blurred.¹²¹ Institutions matter in each jurisdiction as the courts play a critical role in both common and civil law jurisdictions in determining how the black letter derivative action laws are ultimately enforced. In addition, in several of Asia’s leading jurisdictions non-profit organizations and quasi-governmental bodies have, to varying extents, become important factors in derivative litigation. Moreover, the complex interplay between public regulatory institutions and private shareholders in the enforcement of directors’ duties has important and varied effects on derivative litigation that cannot be ignored. Last, but certainly not least, as corporate law scholars, we cannot forget the importance of minor variations in the technical requirements of the black letter law which governs derivative actions – which inevitably varies

116 RHO / KIM, *supra* note 8, 196-197; NAKAHIGASHI/PUCHNIAK 2012a, *supra* note 7, 29-30.

117 Rho / Kim, *supra* note 8, 194, 201; NAKAHIGASHI/PUCHNIAK 2012a, *supra* note 7, 37-38.

118 CLARKE/HOWSON, *supra* note 9, 277-278; PUCHNIAK 2012b, *supra* note 1, 112-13.

119 PUCHNIAK / NAKAHIGASHI 2012a, *supra* note 7, 58-64.

120 PUCHNIAK 2007, *supra* note 19, 69-70.

121 PUCHNIAK 2012b, *supra* note 1, 112-113.

from jurisdiction to jurisdiction and are critically important.¹²² Obviously, in contrast to some extremely prominent corporate law studies in the past, the mere fact that a country's law provides, or does not provide, a derivative action matters little, whereas the minutia of the derivative action legislation and the manner in which it is enforced matters a lot.¹²³

In sum, this Article illustrates that there are no grand theories that can accurately explain or predict how the derivative action functions in Asia. The assumption that the rate of derivative litigation will necessarily be modest merely because a jurisdiction has an "Asian culture" is absurd. The fact that a jurisdiction follows either the civil law or common law tradition does not necessarily allow us to predict whether judicial decisions or statutory provisions will be more influential, or whether the derivative action will provide strong protection for minority shareholders. The fact that the derivative action is economically inefficient – or even economically irrational – to pursue does not allow us to axiomatically conclude that it will be scarcely utilized. Moreover, the fact that Asia's leading jurisdictions seem to have adopted some general shareholder-friendly measures in their derivative actions regimes does not necessarily suggest convergence, as all of the jurisdictions remain functionally diverse, do not appear to evolve in a unidirectional fashion, and a static American endpoint model does not even appear to exist.

In this sense, the truth revealed in this Article is an "inconvenient one." The fact is that the forces that drive derivative actions in Asia's leading economies (and, most likely, everywhere else) are far too complex and varied to conform to any one grand universal theory. This means that to accurately understand how the derivative action functions in Asia's leading economies it is necessary to consider a myriad of local factors including the specific regulatory framework, case law, economic forces, corporate governance institutions, and sociopolitical environment that affect derivative actions in each individual jurisdiction.

Such an approach may seem like common sense – because it is. However, unfortunately, the field of comparative corporate law has increasingly moved away from such research towards using leximetrics in large multijurisdictional studies or broad taxonomies of abstract corporate law principles which are normally only based on a cursory analysis of how specific aspects of the corporate law function in practice.¹²⁴ Although, in some instances, such research may be valuable in uncovering larger trends, there is the real (if not insurmountable) risk that at such a high level of abstraction the critically important complexities of how particular aspects of the corporate law work in practice become almost entirely obscured. Perversely, viewing comparative corporate law at such a high level of abstraction is seductive as it allows for grand universal theories to emerge without interference from the "noise" of how the law actually works in practice.

122 See, e.g., *Legislative Appendix*, in: Puchniak et al., *supra* note 1, 404 *et seq.*

123 See *supra* note 25.

124 See *supra* note 25.

Hopefully this Article will help start a new trend in comparative corporate law to embrace, rather than avoid, the “noise” of corporate law in practice as such noise is, in fact, the complex reality of corporate law which makes comparing it so enjoyable.

ABSTRACT

This Article uses the derivative action in Asia as a lens for re-evaluating the foundational theories of Asian and comparative corporate law. It begins by demonstrating that the cultural theory of “Asian non-litigiousness” provides scant explanatory or predictive value for either the evolution or function of the derivative action in Asia’s leading economies. As such, this Article suggests that the theory of Asian non-litigiousness should be relegated to the dustbin of academic history. Without the black box of Asian culture to erroneously explain away potential differences between “Asian” and “Western” derivative actions, the reality of the derivative action in Asia’s leading economies becomes markedly more important. It allows evidence from the derivative action in Asia to be used as a valuable litmus test for three of comparative corporate law’s most important theories which all claim universal applicability (the three “grand universal theories”).

This Article demonstrates, using evidence from the derivative action in Asia, that the claim of universal applicability, which underpins the grand universal theories, is erroneous. Indeed, this Article turns the grand universal theories on their heads by demonstrating that they not only fail to explain the derivative action in Asia but also terribly mislead. As such, this Article concludes by suggesting that comparative corporate law should replace its lust for grand universal theories with a quest for understanding (rather than avoiding) the complex reality that is inherent in comparative corporate law.

ZUSAMMENFASSUNG

Der Beitrag nimmt die Praxis der Aktionärsklage in Asien zum Anlass, grundlegende Theorien zum Recht in Asien und zum vergleichenden Gesellschaftsrecht neu zu evaluieren. Er weist zunächst nach, dass die tradierte Ansicht von der "typisch asiatischen Streitvermeidung" wenig zur Erklärung beizutragen vermag, wie die Aktionärsklage sich in führenden asiatischen Wirtschaften entwickelt hat und welche funktionale Bedeutung ihr dort heute zukommt. Der Verfasser schlägt vor, sich von dieser überkommenen akademischen Sichtweise endgültig zu lösen. Wenn man darauf verzichte, unter der wenig zielführenden Berufung auf die "Kultur Asiens" die funktionalen Unterschiede zwischen „östlichen“ und „westlichen“ Aktionärsklagen wegzudiskutieren, bekomme die einschlägige Praxis in den führenden asiatischen Wirtschaftsnationen ein um so größeres Erklärungspotential. Die Erfahrungen, die man dort gemacht habe, eigneten sich als Prüfstein für drei wichtige Theorien des vergleichenden Gesellschaftsrechts, die alle internationale Gültigkeit für sich beanspruchen.

Am Beispiel der Aktionärsklage in Asien zeigt der Beitrag auf, dass dieser Gültigkeitsanspruch nicht fundiert ist. Er stellt besagte Theorien vielmehr auf den Kopf, indem er nachweist, dass sie nicht nur die Praxis in den asiatischen Staaten nicht zu erklären vermögen, sondern in die falsche Richtung weisen. Die im vergleichenden Gesellschaftsrecht verbreitete Neigung, vermeintlich international gültige Theorien zu entwickeln, sollte vielmehr durch eine sorgfältige Analyse der jeweiligen Praxis ersetzt werden, die sich der Komplexität dieser Rechtsmaterie stellt, anstatt sie wegzudiskutieren.

(Übers. durch d. Red.)