

KOBRE & KIM

ENFORCING MINORITY SHAREHOLDER RIGHTS IN ASIA: A Comparative Guide to Derivative Actions

Minority shareholders have a number of effective options when a director (or other fiduciary) has engaged in conduct that has harmed a company. This may be surprising because the default position is that shareholders typically cannot sue directors in such circumstances for loss suffered by the company.

What can be done is often complicated by the multi-jurisdictional nature of many structures: a typical structure in Asia might for example involve a Cayman Islands company listed in Hong Kong, with BVI incorporated holding structures, and the company's operations and assets spread across several other jurisdictions.

In the table below, our Asia-based minority shareholder rights team examines derivative actions (where a shareholder brings the action in the name of the company) across five key jurisdictions. In a dispute involving multiple jurisdictions, it is often important to understand the differences so that an effective cross-border strategy can be devised.

		 UK	 HK	 BVI	 Cayman	 Singapore
Conditions for application	A member of a company or an associated company may bring or intervene in, and continue to advance, proceedings in respect of misconduct committed against the company .	✓ Section 263 of the Companies Act 2006 • Unregistered members to whom shares have been transferred (voluntarily or by operation of law) are also eligible to claim relief.	✓ Section 732(1) of the Companies Ordinance (Cap. 622) • Must be in the company's interest for a serious question to be tried	✓ Section 184C of the BVI Companies Act 2004 The Court must be satisfied that: • the company does not intend to bring/ continue proceedings • it would be in the interest of the company not to leave conduct of the action to the directors	✓ Remedy available under common law. May include claims against third parties who have contracted with the company where the third party is effectively an insider closely associated with the majority shareholder. The act complained of must meet one of the exceptions under <i>Foss v. Harbottle</i> (1843): • Ultra vires • Irregularity which should have been sanctioned by a special resolution/ majority of shareholders • Infringement of the applicant's rights • Fraud on the minority where the company is controlled by the wrongdoers	✗ Section 216A of the Companies Act allows for derivative claims, but not as a remedy for minority shareholder oppression . Applicant must prove to the court that: • It is probable that the directors would not bring or continue the action diligently; • The petitioning shareholder is acting in good faith to benefit the company • The derivative action is, on its face, in the practical and commercial interests of the company
	A member may intervene in, and continue to advance, proceedings on behalf of the company if the company fails to continue, discontinue or defend such proceedings due to the misconduct committed. • Historically brought against company directors for breach of fiduciary duties • Applicant's good faith, availability of alternative remedies, likelihood of success and the views of other members with no personal interest in the claim will be considered. • Risk of dismissal if the applicant is ruled to have wrongfully intervened.	✓ Sections 262 and 264 of the Companies Act 2006	✓ Section 732(3) of the Companies Ordinance (Cap. 622)			
Available relief	Interim order/ Directions pending the determination of proceedings	✓	✓	✓	✓	
	Order directing the company/ an officer of the company (not) to provide information that the Court thinks fit for the proceedings or application, or to (not) do any other act	✓	✓	✓	✓	
	Appointment of an independent person to investigate and report to the Court on the company's financial position, the facts that gave rise to the proceedings or the costs incurred by parties.	✓	✓	✓	✓	
	An order requiring the company to pay reasonable legal fees and disbursements incurred in litigation.	✓	✓	✓	✓ The Court may also order that payment be made to current/ former shareholders rather than to the company.	✓
	An order authorizing the applicant or some other authorized person to control the conduct of the lawsuit or arbitration on behalf of the company	✓	✓	✓		✓