04 SECURITIES CLASS ACTION RISK IN SOUTH EAST ASIA

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Since the start of the COVID-19 crisis, financial lines insurance practitioners in Asia have wondered whether, and to what extent, the crisis would lead to a wave of new claims. In Singapore, sheltering during the Government's lockdown, we have read with interest the descriptions of the securities class actions in the US linked to the current crisis.

We have felt fortified that Asia remains a benign claims environment and Asian directors and officers remain, in comparison, relatively insulated from securities class actions. We have also reflected on the resilience of the Asian economy through other crises in the past, including the 1997-98 Asian Financial Crisis, SARS and the 2008-09 Global Financial Crisis. Whilst those crises certainly drove claims activity, when compared to the rest of the world, the spike in claims was limited and short lived. It is unlikely that the current turmoil will upset that status quo.

Part of the reason for optimism is the rarity of collective action by shareholders in Asia. Many countries in Asia have collective action regimes, yet securities claims against directors are rare. The reasons why securities class actions are unusual in Asia are complicated and involve a myriad of legal (both procedural and substantive), economic and cultural issues. In this article, we examine these reasons and look to the future of collective action risk in Asia, in particular, given the increasingly global outlook of the American plaintiff bar.

For this article, we will focus on countries in South East Asia that make up the ASEAN group (i.e. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Timor-Leste, Thailand, and Vietnam). This part of Asia is very diverse – from language and customary practices, legal frameworks and regulatory oversight. The intention of this article is not to provide a detailed description of the intricacies of securities or class action law, but rather a high-level review of some of the common issues affecting securities collective actions across the region.

Except for Thailand, none of the countries of South-East Asia has US-style class action regimes. The Thai class action regime is a recent creation, and since 2018 only one class action has been certified: an environmental torts action against a waste recycling operator.

Most other South-East Asian countries do allow for collective legal action; usually through representative actions, that require all plaintiffs to "opt-in" to the proceeding. For example,

- in Singapore, dissatisfied members of country clubs brought two separate actions seeking compensation against the clubs' owners;
- in Malaysia, indigenous groups commenced representative actions seeking land rights;
- in Indonesia, communities affected by forest fires have filed representative actions against the government.

Representative actions remain rare and are not used by shareholders as a means of collective action. The opt-in nature of such collective action makes it more difficult to get started and build consensus amongst group members, particularly around the issue of who amongst the class would be willing to contribute to the costs of the proceeding. In the Singapore matter of *Tan Chin Seng & Others v Raffles Town Club Pte Ltd*, significant efforts were undertaken by a number of the dissatisfied club members to build a website and work to engage the 4,885 members.[1] Such a "book building" exercise would be challenging for minority shareholders to undertake.

Even if shareholders were able to organise, they would have to agree on how to fund the proceedings. A key difficulty is that contingency or conditional fees are either prohibited (e.g. Singapore or Malaysia), require leave of the Court (e.g. the Philippines) or the law is silent (e.g. Indonesia).

Further, third party funding is in its infancy in the region. Due to issues of champerty and maintenance, funding is generally prohibited. In Singapore, third party funding is permitted in International Arbitration and has been allowed with leave of the High Court in insolvency proceedings. The Singapore Court has indicated in *Re Vanguard Energy Pty Ltd*[2] that the categories of claims for which litigation funding is permitted is not fixed and that so long as the administration of justice and the interest of vulnerable litigants are protected, the categories may be expanded on a case-by-case basis.

However, any claim for assistance by minority shareholders would be considered a test case and would face significant hurdles. Few law firms in Asia would have the combination of technical skill, expertise and risk appetite to be able to successfully mount large scale securities litigation without being funded on a traditional time cost basis. This is in contrast with the US, the UK and Australia where active Plaintiff bars have long established the necessary entrepreneurial spirit and technical ability to drive the development of securities class actions.

It is not just the procedural law issues that impact the difficulty of securities class actions in Asia; substantive legal issues also compound the difficulty faced by minority shareholders, even in countries that require continuous disclosure obligations. For example, in Singapore, section 234 and 236 of the Securities and Future's Act provides for statutory compensation for shareholders who suffer loses as a result of false and misleading statements to the Securities Market. Since 2013, no shareholders have used this as a mechanism to seek compensation.

Part of the reason for this is that the cause of action requires the shareholder to prove reliance. In comparison, the US "fraud on the market" or Australian "market-based" causation theories are used to establish indirect causation and presume that market prices reflect all available information and does not require the shareholders to prove reliance on the specific statement independently.

Outside of the legal obstacles, there are also economic and cultural reasons as to why securities actions against directors remain rare for South-East Asian directors. Concentrated shareholdings can be common for public listed companies. For example, in Singapore, approximately 66% of listed Singapore companies have beneficial owners holding between 30% and 87%.[3] Shareholders with concentrated holdings may have less incentive to hold a company liable for disclosure violations. In addition to concentrated shareholdings, there is less participation in the local securities markets from activist institutional investors such as large pension funds, that in the US and Australia regularly take a position as a lead representative plaintiff.

The culture of Asian societies is also a contributing factor in the absence of collective actions. A common observation in the insurance market is that Asian society is not litigious. It is difficult to assess the validity of such claims due to the lack of available data. Anecdotally, South East Asian society does place significant emphasis on making decisions in a way that builds consensus and avoids overt conflict and causing embarrassment.

Attitudes towards corporate governance also focus on consensus. David Gerald, the President and CEO of the Securities Investor Association Singapore (SIAS), stated that he is not in favour of lawsuits becoming the preferred course of action for aggrieved minority shareholders. The SIAS preferred approach to handling securities disputes is to build consensus between investors, the company's management and the market regulators to work out an acceptable solution in the interest of all parties.[4]

It seems therefore that there continues to be strong head winds preventing any material growth in securities collective actions against Asian companies (and their directors) in Asia. Currently, there is no jurisdiction in ASEAN with the combination of favourable class action procedures and securities law, aggressive entrepreneurial lawyers and activist investors to bring about that change.

In contrast of course, the USA does satisfy these criteria, and it presents a growing extra-territorial risk to Asian companies through American Depository Receipt (ADR) litigation. An ADR is a negotiable certificate issued by a US depository bank and represents a specific number of shares in a company listed on a foreign stock exchange. ADRs are traded on US Stock Exchanges or are available on the over-the-counter market.

ADRs are an easy way for US investors to buy foreign shares. There are two basic types of ADRs:

1. Sponsored ADRs which are issued on behalf of an international company; and
2. Unsponsored ADRs which are issued without the consent of the foreign company.

The recent ruling in the *Toshiba* litigation has confirmed that even unsponsored ADRs, issued without the consent of the foreign company, can still be subject to a US securities suit.

US plaintiff firms continue to target international companies through their ADRs. In the past two years, the number of securities actions against non-US issuers has more than doubled the historical average. Companies in Asia have been targeted and include Olympus, Nissan and Toshiba. In 2020, ADR claims have been commenced in the USA or investigations announced against several Australian companies, including Westpac, Boral and Treasury Wines. Two recent ADR claims are linked to the COVID -19 crisis:

1. iAnthus Capital Holdings, a Canadian holding company with interests in different cannabis cultivators, processors and dispensaries. Its shares are listed on the Canadian Stock Exchange and are traded in over-the-counter American Depositary Receipts in the US.
2. Phoenix Tree Holdings, a Cayman Island holding company that leases and manages apartments in 13 Chinese cities, including Wuhan. Its shares are traded in the USA through American Depository Shares on the NYSE.

No ADR litigation has targeted a company listed on a South-East Asian stock exchange, but it would be short-sighted to ignore this risk. A significant number of leading South-East Asian companies carry such exposure; 40 companies in Indonesia, 6 in Malaysia, 40 in the Philippines, 49 in Singapore and 84 in Thailand have sponsored and unsponsored ADRs traded on US exchanges and over the counter.

South-East Asia remains a low-risk region for securities class actions for the reasons outlined. However, directors and their insurers should not be complacent and ignore the risk of exposure to US class actions.

End Notes

1. Jeffery Pinsler, Group Litigation in Singapore The annals of American Academy of Political and Social Science Mar 2009 Vol 622, The Globalization of Class Actions, p 298

2. [2015] SGHC 156

3. Wai Yee Wan, Christopher Chen and Say H Goo, Public and Private Enforcement of Corporate and Securities Laws: An Empirical Comparison of Hong Kong and Singapore

4. Michelle Quah, Are class actions good for investors and Singapore markets? 21 April 2016, www. asiaone.com/are-class-actions-good-for-investors-and-singapore-Markets

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