**A COMPARISON OF JAPAN AND VIETNAM LEGAL APPROACHES TO DERIVATIVE SUIT**

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**Abstract**: Derivative suits are claims brought by a shareholder or a group of shareholders on behalf of the company to redress for wrongs because those in the company’s control refuse to assert a claim usually because of a conflict of interest. In Vietnam, after careful consideration, the National Assembly passed the Enterprise Law in 2014 that provides a statutory scheme to deal with the issue of derivative suits. Under such a scheme shareholder or a group of shareholders may bring the lawsuit on behalf of the Joint Stock Company against the directors who breach their duty. Still, it is too early to evaluate the practicability and usability of the derivative suit mechanism, a plethora of defects and shortcomings in the statutory derivative suit along with the lack of interest in litigation on the part of shareholders cast doubt on the feasibility of the derivative suit in Vietnam. This article undertakes the analytical review of the substance of the statutory derivative suit in Vietnam and Japan. Then, some comments about the comparing result and some possible recommendations to make it more accessible and more effective will be withdrawal.

**Key words**: Derivative suits, shareholder, liability, fiduciary duty, cost.

**SO SÁNH PHÁP LUẬT NHẬT BẢN VÀ VIỆT NAM VỀ THỦ TỤC KHỞI KIỆN PHÁI SINH**

**Tóm tắt**: Kiện phái sinh được hiểu là các vụ kiện được thực hiện bởi một hoặc một nhóm cổ đông nhân danh công ty để yêu cầu bồi thường thiệt hại gây ra bởi những hành vi sai phạm của người quản lý. Tại Việt Nam, Luật Doanh nghiệp được Quốc hội thông qua năm 2014, trong đó có các quy định điều chỉnh những vấn đề liên quan đến thủ tục khởi kiện phái sinh. Theo đó, cổ đông hoặc một nhóm cổ đông nhân danh công ty cổ phần kiện những người quản lý để bồi thường thiệt hại cho những hành vi sai phạm gây ra trong quá trình điều hành công ty. Mặc dù vẫn còn khá sớm để đánh giá được tính khả thi và hiệu quả của thủ tục khởi kiện phái sinh tại Việt Nam, tuy nhiên những hạn chế trong quy định pháp luật cùng với sự thiếu quan tâm đến của cổ đông đã tạo ra sự hoài nghi về sự khả năng thực thi của thủ tục khởi kiện này. Trong bài viết này, tác giả sẽ phân tích những quy định của Việt Nam và Nhật Bản về thủ tục khởi kiện phái sinh. Từ kết quả so sánh, những bình luận cũng như những giải pháp được tác giả đề xuất nhằm nâng cao khả năng thực thi thủ tục khởi kiện phái sinh tại Việt Nam.

**Từ khóa**: Kiện phái sinh, cổ đông, trách nhiệm, nghĩa vụ ủy thác, chi phí.

**I. INTRODUCTION**

A direct suit is generally defined as an individual claim not brought on behalf of a company in nature,[[1]](#footnote-1) but the one brought by a shareholder in his own name to see a legal remedy for the harm that occurred directly to himself because of the violation of the directorial accountability by the company’s board of director.[[2]](#footnote-2) On the contrary, a derivative suit is a claim brought by a shareholder or a group of shareholders on behalf of the company to redress for wrongs because those in the company’s control refuse to assert a claim usually because of a conflict of interest.[[3]](#footnote-3) The shareholder initiating the lawsuit do so as a representative of the company to pursue civil liability from directors due to directors’ misconducting behaviours.[[4]](#footnote-4) Theoretically, the ground for a derivative suit is to redress harm to the company, not directly harmful to the individual shareholders.[[5]](#footnote-5) Thus, the right to sue in the derivative suit in nature belongs to the company rather than individual shareholders. However, as the company is unwilling to exercise their rights because of the conflict of interest, shareholders must derivatively assert this right on behalf of the company.

In addition to the function of loss recovery to the company, the derivative suit also serves as a threatening tool that can be possible deterrent to the neglect of duties by directors and other officers of the company[[6]](#footnote-6) because the directors and other officers of money, prestige or even their job can be deprived after the triumph of derivative suits brought by the shareholders.[[7]](#footnote-7)

In Vietnam, although there still cast doubt whether the nature of the action set forth in Decree 102/2010/ND-CP as a derivative suit,[[8]](#footnote-8) this was the first regulation which allowed shareholders to sue managers of company, who breached the fiduciary duties and harm the interest of company, to seek the legal remedy for the company’s benefit. In the subsequent years, there were no official derivative suits instituted by shareholders that are recorded. An important milestone for the development of the derivative suit in Vietnam was the effectiveness of the 2014 Enterprise Law that introduced the reform for the statutory derivative suit in the hope that the shareholder derivative suits will likely serve as an important tool for promoting the corporate governance in Vietnam. Subject to the 2014 Enterprise Law, a shareholder or group of shareholders owning at least one percent of the number of ordinary shares for six months to be entitled, on its own behalf or on behalf of the company, to initiate a legal action regarding civil liability against a member of the BOM or the director or general director who breach their duties. Despite so many efforts made, the use of the derivative suit by plaintiff shareholders both before and after its official recognition in Vietnam has not been notably changed. In fact there is still no robust increase in the derivative lawsuit, which can become an incentive for shareholders to commence a lawsuit on behalf of the company to pursue the directorial accountability.[[9]](#footnote-9)

Japan is probably regarded as a prominent example of transplanting the derivative suit under the pressure of the U.S. after World War II.[[10]](#footnote-10) As of the transplantation of the derivative mechanism into the Japanese corporate legal regime, this mechanism was moribund for more than forty years. In fact, the aggregate number of shareholders’ derivative suit between 1950 and 1993 was only thirty-three.[[11]](#footnote-11) There was a consensus of some scholars that the reason for Japanese shareholders had chosen not to use derivative suits not because of cultural mores, but mainly because of high filing fees.[[12]](#footnote-12) The scenario of the derivative suit in Japan had changed in the early 1990s. The financial crisis in the mid of 1980s had partially paved the way for the upsurge of derivative litigation in Japan.[[13]](#footnote-13) Most importantly, the reduction of the filing fee in the derivative suit explained much of the robust use of the derivative suit in 1993. Interestingly, in the wake of this legal reform, the number of derivative suits skyrocketed. More specifically, in Japan, while there had been only 84 suits pending in 1993, there were 286 by the end of 1999.[[14]](#footnote-14) Among other cases, Daiwa case was probably one of the highest amounts of damages acknowledge by the court before 2008 where the Osaka District Court, in a voluminous decision, ordered eleven current and former directors of Daiwa Bank to pay a total of 775 million US dollars’ worth of damages.[[15]](#footnote-15)

**II. THE COMPARISON STUDY OF STRUCTURE OF DERIVATIVE SUIT IN JAPAN AND VIETNAM**

**2.1. Quorum Requirement**

Japan is a notable exception case where shareholders can initiate the derivative suit without any requirements with regard to holding a minimum percentage of shares.[[16]](#footnote-16) Subject to the Company Act, the shareholder requirement to initiate a derivative suit is to hold the shares (more than one share) at least 6 consecutive months prior to making a demand to the company to initiate an action to pursue the liability of directors and other officers.[[17]](#footnote-17) If the company refuses to commence a lawsuit or it fails to file such lawsuit within sixty days from the day of the demand, the shareholder who has made such demand may file a lawsuit on behalf of the company.[[18]](#footnote-18) In addition, contemporaneous ownership[[19]](#footnote-19) is not a condition for derivative suits. In other words, it is not necessary for a shareholder to have its shares at the time of the alleged wrongful act of a director. However, if the shareholder ceases to be a shareholder during the derivative suit, the lawsuit will be dismissed unless the shareholder fulfils one of the exceptional conditions under which he or she has lost the status of shareholder such as in a merger.[[20]](#footnote-20)

In Japan, there are so many cases where the shareholders taking advantage of their shares to disrupt the company’s running for a variety of purposes (such as lowing the stock price or seeking a pay-out) by sôkai-ya[[21]](#footnote-21) in the manner of a settlement with the corporation or director sued in Japan.[[22]](#footnote-22) Perhaps for this reasoning, the right to demand the company to commence a lawsuit is not available to shareholders in case that the shareholders want the company to pursue is one that seeks unlawful gains for the shareholders or a third party or seeks to inflict damage on the company.[[23]](#footnote-23)

The prevailing statutory scheme in Vietnam also limits the commencement of the derivative suit to shareholders of the company. Comparatively, a prerequisite to a shareholder or a group of shareholders initiating a derivative suit against the member of the BOM or the director or general director is to own at least one percent (1%) of the number of ordinary shares in the JSC for six consecutive months.[[24]](#footnote-24) The prerequisite to the shareholder eligible for the derivative suit still keeps unchanged from Decree 102 to the 2014 Enterprise Law.[[25]](#footnote-25) Notably, it is not necessary for the shareholder to have its shares at the time of the alleged wrongful act of directors, provided that the shareholder has held such share for a period at least six consecutive months prior to the making of such demand upon the company. Therefore, to some extent, Vietnamese law imposes stricter requirements for shareholders to launch derivative lawsuits than in Japanese law.

**2.2. Who Can Be Sued?**

In Japan, as directors of a Stock Company owe a fiduciary duty to the company and shareholder,[[26]](#footnote-26) a director breaches his duty set forth by the law, they are liable vis-à-vis the company for damages and it is prerogative of the company to sue the director for resultant damages.[[27]](#footnote-27) The right to pursue the liability of directors of the company is also a ground for exercising a shareholder derivative suit. Regarding exemption of liability, if directors and the others can demonstrate that they did not fail to exercise their duty of care in the performance of their duties, they will not be held individually liable.

Although the Japanese law does provide the mechanism of the derivative suit to assist in supervising the responsibilities and duties of the corporation’s board and officers whether the classical or committee structured company,[[28]](#footnote-28) the derivative suit can be initiated by shareholders on behalf of the company against not only directors but also accounting adviser, corporate auditors, senior executive, accountants, founders, directors and corporate auditors in the established procedures and liquidators.[[29]](#footnote-29) Comparing with the ex-provisions, the derivative suit was available only against directors, but the 2005 Company Law expanded the scope of people whose liability can be pursued by a derivative suit. However, if the action is intended for the unjust benefit of the plaintiff shareholder, or a third party, or to cause damage to the company, this law does not apply.[[30]](#footnote-30)

From the Vietnamese perspective, comparing to the limited liability companies where the members of the company can sue not only president of the BOM, director, legal representative and other managers that commit violations against the manager’s duties provided by the law,[[31]](#footnote-31) the person who can be sued for civil liabilities in the JSC are only the members of the BOM, the director.[[32]](#footnote-32) This is a more limited approach than that found in Japan. As such, shareholders are not permitted to file a lawsuit against the other subject provided in Japanese law, such as accounting adviser, corporate auditors, senior executive, accountants, etc.

To pursue a derivative lawsuit against the directors and members of the BOM, the infringement of their duty is prerequisite. The law provides specific circumstances in which the derivative suit can be triggered by shareholders against the directors and members of the BOM for civil liabilities, such as failing to perform given rights and obligations honestly and prudently to the best of his ability and in the best interests of the company and shareholders, uses information, secrets, business opportunities of the company for self-seeking purposes or serving the interest of other entities.[[33]](#footnote-33) In addition, the legal grounds for pursuing a derivative suit have not yet mentioned the damage resulted in the wrongful act of a director or member of the BOM. In other words, provided that any violation of a director and a member of the BOM happens, the shareholder is entitled to sue, on behalf of the company regardless of whether actual damage arising from the infringing actions. However, in practice, even if the law is not required the damage as an element in derivative suits, the shareholders must prove the wrongful acts of the directors or member of the BOM, which cause damage in the trial.[[34]](#footnote-34)

**2.3. The Demand Requirement**

A theoretical perspective explains that since derivative suits are naturally derived from the rights belonging to the company, as an entity directly harmful from the misconducting behaviour of directors, it is often permitted to commence a derivative action by the shareholder if the company decides, as its creation, not to start a legal action upon its assessment of the case’s merits or any other reasons.[[35]](#footnote-35)

In Japan, prior to bringing a derivative suit, the shareholder must make a demand, in writing or any other method set for by the law, for the company to file the action for alleged breach or damage.[[36]](#footnote-36) In the case where the company refuses to commence the derivative suit within sixty days of the demand, the shareholder who made the demand is entitled to initiate an action on behalf of the company. As such, even in the case that the company refuses the demand to prevent a strike suit, the shareholder may still bring a derivative suit after the rejection of the company. Given that, the company cannot stop a derivative suit from being bought by the plaintiff shareholder even though it is a lawsuit without merits. Consequently, there may be the case where the company’s reputation is hurt even though the unmeritorious case can be rejected after the court’s investigation. Probably for this reasoning, scholars believe that, in the case of Japan, the demand requirement seems merely procedural.[[37]](#footnote-37) In the case of an emergency where there is a likelihood of irrecoverable loss caused to the company, the eligible shareholder may initiate the derivative suit without any request.

In Vietnam, there is no requirement to file a demand to the company to initiate a lawsuit before the shareholder commences a legal action on behalf of the company. Comparing to the other countries, such as Japan and Korean,[[38]](#footnote-38) under Vietnamese law, provided that should there happen any breaches of director’s duty, the eligible shareholder may file civil lawsuits on behalf of the company regardless of the board’s approval.

**2.4. Litigation Cost**

Since the derivative suit asserts a right on behalf of the company rather than the individual shareholders, any awards or settlements recovered typically goes to the company, instead of by an individual shareholder. However, the shareholders will also get a pro rata benefit indirectly through the increase of the book value of their stock. Meanwhile, the direct suit’s award recovered damages will belong to the individual shareholder, who has legitimate interests to be infringed upon. From such difference, the payment of litigation cost from the derivative suit and the direct suit is also totally different. That is, in the case that a derivative suit which is brought by shareholders prevails, the litigation cost shall be borne by the company rather than individual shareholder as in the direct suit. Perhaps for this reason, the reimbursement of litigation costs, including filing fees and lawyer fees by the company is statutorily stipulated in the Japanese corporate law.[[39]](#footnote-39) Previously, the filing fee for the derivative lawsuit was determined by the amount in dispute and therefore by the amount of damage sought by the plaintiff. Consequently, the filing fee presented a major deterrent from filing a derivative suit as it was substantial if the damages sought were high.[[40]](#footnote-40) In 1993, the major change regarding the calculation of the court fee to the derivative lawsuit led to a significant reduction of the filing fee.[[41]](#footnote-41) That is, the Commercial Code was amended to provide in Article 267 para. 4 that the derivative suit was to be deemed an action relating to a claim which is not a claim based on a property right in calculating the value of the subject-matter of the suit.[[42]](#footnote-42) As a result, the value of the subject-matter of the dispute was to be determined as a non-property claim in accordance with Article 4 para. 2 of the Law on the Fee of Civil Lawsuits.

With reference to the litigation costs in the derivative action, the law provides that if a shareholder who has filed a lawsuit pursuing the director’s liability prevails with the derivative suit, the shareholder may demand the company to pay an reasonable amount including the necessary costs (excluding court costs paid by shareholder)[[43]](#footnote-43) or fee to an attorney or a legal profession corporation with respect to the derivative lawsuit, on the condition that the amount is not exceeding the amount such cost or the amount of such fee.[[44]](#footnote-44) As such, the necessary costs or the lawyer’s fee of the derivative suit shall be borne by the company if the case is successful and these fees, in general, shall be accepted if reasonable, not exceeding the amount of such cost or the amount of such fee. Despite that, it is quite difficult to determine precisely what constitutes a “reasonable amount” in practice due to the lack of cases litigated to final judgment even after the 1993 Commercial Code revisions.[[45]](#footnote-45)

Comparatively, in Vietnam, litigation expenses in connection with the derivative lawsuit are mainly composed of the court’s fee (including the paying advance court fee[[46]](#footnote-46) and the fees incurred during and after hearing of the case e.g. fee for issuance of copies of court judgments and ruling) and the lawyer’s fee.

Under the Vietnamese litigation system, there are two kinds of claims[[47]](#footnote-47) including non-property and property. For non-property claims (e.g. claims for the return of properties under others’ management), the court fee, in this instance, is a fixed amount.[[48]](#footnote-48) For property claims (e.g. seeking the compensation for the director’s liabilities), the court fee is calculated premised on the amount claimed. Unlike Japan, Vietnamese laws deem the court fee in the derivative suit as a property claim, the plaintiff shareholder shall, therefore, pay a contingent incremental fee, as opposed to a fixed fee.[[49]](#footnote-49) For litigation costs, Article 161 of the 2014 Enterprise law provides that the litigation cost shall be borne by the company, except where petition initiating legal action by a member is rejected. In other words, in case of losing the lawsuit, the plaintiff shareholder shall bear the litigation cost regardless of the action was brought in good faith.[[50]](#footnote-50) Therefore, the plaintiff, in this instance, also takes the risks involved into consideration when deciding to file a lawsuit.

Moreover, because the prevailing law only provides that the litigation cost shall be borne by the company, but not clear what kinds of cost, especially legal fee, will be categorized as litigation cost, the Civil Procedure Code, therefore, shall be applied to determine the lawyer’s fee.[[51]](#footnote-51) As such, each party shall pay its own fees for requesting such lawyers, except otherwise agreed upon by the parties.[[52]](#footnote-52) In the derivative lawsuit context, as the shareholder commences an action against the director for the civil liabilities on behalf of the company, the lawyer’s fee can be assumed as the part of litigation cost which the company must pay in case that the plaintiff shareholder claim accepted by the court.

**2.5. Limitations to Prevent Abuse of the Derivative Suits by Shareholders**

The purposes of the plaintiff shareholder’s deposition are to secure the recovery of damages caused by the plaintiff shareholder who brought a suit in bad faith and broadly to deter abusive actions.[[53]](#footnote-53) In Japan, in the case where a plaintiff files an action for pursuing liability, the court may, in response to a petition by the defendant, order such shareholder to post reasonable security. Besides, when the defendant intends to file the petition in response, the defendant shall make a prima facie evidence showing that the action for pursuing liability has been filed in bad faith.[[54]](#footnote-54) As such, when a case reaches the courtroom, the initially crucial decision is the court’s judgment of whether to require a plaintiff to post a bond. Although the bad faith in the derivative suit is not clearly defined under the Commercial Code, the dominant opinion expressed by the Tokyo District Court is that “bad faith” includes cases in which the plaintiffs sued with little hope of success, or that would likely be dismissed by defendants.[[55]](#footnote-55)

From the Vietnamese perspective, the law does not require the plaintiff shareholder to post security for the derivative suit. As such, the plaintiff can initiate the lawsuit on behalf of the company without posting security.

**III. POSSIBLE SHORTCOMINGS AND RECOMMENDATION FOR IMPROVEMENT**

**3.1. The Minimum Shareholding Requirement as a Barrier to Derivative suit**

As indicated earlier, the Vietnamese approach to the derivative suit is not available for the minor shareholders who directly or indirectly own less than one percent of voting stocks of an issuing organization, except for the case where several shareholders get together to meet the requirement. Although the minimum shareholding requirements are generally justified as being means by which frivolous lawsuits may be prevented,[[56]](#footnote-56) in the context of Vietnam, it has been suggested that the requirement of owning one percent by group or individual is a possible barrier to bring a derivative suit.[[57]](#footnote-57) For instance, a minimum share requirement based on the percentage will make more difficult for shareholders of the large companies or the companies required the high statutory, that is, credit institutions, insurance companies or listed companies, to start a derivative suit than those in small companies.[[58]](#footnote-58) Thus, holding one percent of ordinary shares of these companies are deemed “far too difficult”. Theoretically, shareholders can aggregate their shares to meet 1% of the shareholding requirement; however, in reality, the cost of coordination the shareholders to take an action will be a big issue. As such, the lack of derivative suits in Vietnam may be first of all attributed to the 1% minimum shareholding requirement. Therefore, a reduction of the shareholding requirement in listed companies and some specific companies with the high statutory capital such as credit institutions and listed companies shall be first of all taken into consideration.[[59]](#footnote-59) Keeping in mind that when considering the adoption of a minimum requirement, it is appropriate to consider not only the need to sift out frivolous litigation but also to ensure that meritorious suits are not blocked.

**3.2. Pre-trial Procedure: Can the Company Commence a Lawsuit against the (General) Director or Member of the BOM?**

Previously, the law required the shareholder or a group of shareholders holding at least 1% of ordinary shares for six consecutive months to request the Board of Supervision (the “BOS”) to institute a lawsuit over the civil liability of a member of the BOM or the director.[[60]](#footnote-60) If the BOS fails to institute a suit, or the company has no BOS, the shareholder or group of shareholders may directly institute a lawsuit against a member of the BOM or a director.[[61]](#footnote-61) Since the effectiveness of Decree 102, the statutory scheme, where the BOS had the power to commence the lawsuit, is seen by many commentators as a complicated litigation procedure.[[62]](#footnote-62)

This scenario was changed in the 2014 Enterprise Law in the manner that does not require eligible shareholders to file a demand to the company to pursue action against managers prior to commencing a derivative suit on behalf of the company. Thus procedures to review the merits of the case filed by the plaintiff shareholder in a derivative suit seem absent.

It is much better if the Vietnamese law grants companies a right to review any given cause of action that is available, and might decide to or not to pursue action against directors upon its consideration. The rational reason is that, the company, as the entity separated with the shareholders and harmful directly from the damages caused by breaching of the directorial accountability, is entitled to know the wrongdoers and might decide whether to commence a litigation for pursuing civil liabilities upon taking all relevant factors, such as the compensation value, litigation fee, reputation into account. It is reasonable for shareholders to initiate a lawsuit, on behalf of their company, after the company fails to bring a strike suit. Secondly, comparing to Japanese law, Vietnamese law does not require the plaintiff shareholder to notify the company about the lawsuit against a director or a member of BOM on behalf of the company. For this reasoning, it is very difficult for the company to know lawsuits of the shareholder against a director or a member of BOM. Thus, the company, itself, could not intervene or stop the lawsuit from being brought even though it is a case without merit. In addition, there are some cases a director or a member of BOM has breached their duty under the law, but the company and the alleged director or member of BOM have reached the agreement out of the court already by a compensation. Therefore, the company should have the right to receive the demand of the shareholder and initiate the case first, even if they fail to initiate the lawsuit.

**3.3. Litigation Cost: Lack of Incentive for Shareholders**

In Vietnam, the court fee in the derivative suit as a property claim calculated based on the percentage of the quantum of the claim, which is determined by the court. This approach seems to be unreasonable, according to some scholars, because it is accepted that the derivative suit does not bring the direct monetary benefit for the plaintiff shareholder themselves,[[63]](#footnote-63) and the recoveries accrue to the company as a whole with the plaintiff shareholder benefiting only small pro rata share of any award. Therefore, to provide some incentive for shareholders it is submitted that the law should regard the litigation cost that is the court fee, as a non-property claim, rather than a property claim. In addition, the litigation cost, if considering as a property claim, may be still regarded as the big hurdle for the shareholder to commence an action on behalf of the company for two main reasons. We can say, first, if it deems to be a property claim, the fee that the plaintiff ultimately ought to bear if he or she loses extremely high, as the quantum of the damage in the derivative suit tends to be large. However, if the derivative suit deems to be a non-property claim, then the fee will be set as a nominal flat rate. Moreover, subject to the Civil Procedure Code, those who initiate litigation must pay in advance a portion of court fee. Therefore, the shareholder plaintiff, who filed a lawsuit even on behalf of the company must pay the advance court. If the derivative suit is categorized as a non-property claim, the shareholder shall only pay the advance court fee equal to the court cost. In such a case, the court fee advance will likely be a very small amount (equal to the cost fee for the non-property claim). Therefore the hurdle in relation to cost fee borne by shareholders is also resolved.

**IV. CONCLUSION**

The derivative suit mechanism has recently developed as a powerful weapon in the shareholder’s arsenal to combat the director’s corporate misconducting in many Asian countries. Becoming a leader in the derivative suit of Japan is concrete evidence for the effect of this mechanism in even non-litigious countries. In some respects, Japan’s experience can shed light on suggestions for Vietnam to re-evaluate the prevailing legal framework since it has been reformed significantly in the 2014 Enterprise Law. That is, for one thing, it would be much better if the Vietnamese statutory scheme requires the shareholder to file a demand to the company to initiate the lawsuit prior to filing a lawsuit on behalf of the company. The quorum requirement for the shareholders to initiate the derivative suit is one percent of ordinary shares, except for shareholders in the listed company and some specific companies prescribed by law. On the other hand, the proposed regime of the filing fee in the derivative suit, which calculates the filing fee premised on a non-property claim, instead of a property claim will be an incentive for shareholders to bring an action, on behalf of the company, to pursue the liability of directors.

1. Wenjing Chen, A Comparative Study of Funding Shareholder Litigation, Springer Singapore (2017), pp. 16. [↑](#footnote-ref-1)
2. Brett Larson, Esq, A Cross Jurisdictional Analysis of Derivative Corporate Litigation, 1, National Litigation Consultant’s Review, (2014), pp. 2 (he indicates some examples, as courts determine, of direct claims include the deprivation of shareholders’ voting rights, denial of rights to inspect the corporation’s books and records, suits to compel the declaration of dividends, etc.). [↑](#footnote-ref-2)
3. From the theoretical perspective, the company is a separate entity distinct from its shareholders. A shareholder thus cannot sue for a wrongful act to the company made by its directors or other officers. Under such a case, the company as a party has a real interest in claims arising out of such wrongful acts. Nevertheless, as the company’s board of directors fails or refuses to initiate a lawsuit, the shareholder may maintain such actions in the name of the company if fulling a certain strict condition provided by law. See Stephen M. Bainbridge, Corporation Law and Economics, in University Textbook Series, Foundation Press, (2002), pp. 362. [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. Hiroshi Oda, Japanese Law, 17, 3rd ed., Oxford University Press (2009), pp. 253. [↑](#footnote-ref-6)
7. Song, Ok-Rial, Improving Corporate Governance Through Litigation: Derivative Suits and Class Actions in Korea, in Transforming corporate governance in East Asia Transforming Corporate Governance in East Asia (ed. by Hideki Kanda, Kon-Sik Kim and Curtis J. Milhaupt, London: Routledge, 2008, 91-115), pp. 91. [↑](#footnote-ref-7)
8. Quach believes that the derivative suit has been adopted to Vietnamese corporate law since Decree 102, although Decree 102 used the term “Shareholder’s right to sue members of Board of Management, Director (General Director)” instead of derivative suit. See Quach, Quynh Thuy, Transplantation of Derivative suits to Vietnam – Tip-Offs from Absence of Academic Debate, 7, Asian Journal of Comparative Law (2012).

In addition, in Quang’s book, he also says that the derivative suit was appeared in the Vietnamese company law since 2005, see Truong Nhat Quang, Principles of Law on Enterprises, (Enterprise Law), Dan Tri publisher (2016), pp. 282. [↑](#footnote-ref-8)
9. Effective from July 2015, one of the rare cases in respect to managers’ duty of care in the JSC recently is probably a derivative suit of shareholders of Sai Gon Tourist Joint Stock Company (“STT”) against the general director for breach of due care in the process of company operation. See “Tòa tuyên Tổng giám đốc STT phải bồi thường 1,5 tỷ đồng cho Công ty”, in Stock News, [Sept 16, 2016], <http://tinnhanhchungkhoan.vn/doanh-nghiep/toa-tuyen-tong-giam-doc-stt-phai-boi-thuong-15-ty-dong-cho-cong-ty-164112.html>. [↑](#footnote-ref-9)
10. Mathias Siems, Convergence in Shareholder Law, 522 Cambridge University Press (2008), 522, at 317. [↑](#footnote-ref-10)
11. H. Oda, pp. 254. [↑](#footnote-ref-11)
12. In the research of West, he argued that, prior to the revision of the derivative suit in 1993, the reason why the Japanese shareholders had chosen not to sue not because of cultural mores, but because of high filing fees, high attorneys’ fees, corporate governance constraints, and comparatively low incentives for Japanese attorneys. See West, “The Pricing of Shareholder Derivative suits in Japan and the United States”, 88 NW. U. L. REV. 1436, (1994). [↑](#footnote-ref-12)
13. During the economic bubble, the equity finance which diluted the share of existing shareholders was used by companies. Since the bubble burst, many companies were thus left with massive debts. Shareholders, therefore, had good reason to pursue the directorial accountability. See H. Oda, pp. 254.

West, in his research, also believed that the burst of the “bubble economic” in in the early 1990s may also account for some of the increase of derivative suits. Specifically, he argued that lower the cost of suing make it easier to pursue the derivative suit of shareholders. The post-Bubble decline in the Japanese economy may also influence some cases, as plaintiffs may find it easier to prove damages against flailing firms. See West, Mark D, Why shareholders Sue: Evidence from Japan, 30 J. LEGAL STUD. 351 (2001), pp. 353. [↑](#footnote-ref-13)
14. West, (2001) pp. 352. [↑](#footnote-ref-14)
15. In 2008, there were three cases where the defendants were ordered to pay a substantial amount of damages. In the case involving Duskin, which runs a doughnut chain, selling food with unlawful additives was at issue. Two directors who – even after they became aware of the existence of unlawful additives – continued to sell the products were ordered to pay 10.6 billion yen. The other case is Yakurt, in this case, a director in charge of finance made an investment decision in derivatives without the knowledge of the board and caused loss. He was ordered to pay 6.7 billion yen. Finally, in the Janome Sewing Machines case, five directors were ordered to pay 58.3 billion yen for paying an extortionist and assuming debts for him. H. Oda, pp. 255-256. [↑](#footnote-ref-15)
16. Puchniak, DaW. (2012), pp. 38. [↑](#footnote-ref-16)
17. Article 847 para. 1 of the 2005 Company Act. [↑](#footnote-ref-17)
18. Article 847 para. 3 of the 2005 Company Act. [↑](#footnote-ref-18)
19. In most jurisdiction in U.S, the contemporaneous ownership requirement in a derivative require that a plaintiff must have been a shareholder at the time of the misconducts infringing the company’s interest occur and must remain a shareholder pending the outcome of the litigation. See Seth Aronson, Sharon L. Tomkins, Ted Hassi & Tristan Sorah-Reyes, Shareholder Derivative suits: From Cradle to Grave, 1620 P.L.I./CORP 259, 263 (2007). [↑](#footnote-ref-19)
20. Article 851 of the 2005 Company Act. [↑](#footnote-ref-20)
21. According to West, a sokaiya is usually a nominal shareholder who either attempts to extort money from a company’s managers by threatening to disrupt its annual shareholders’ meeting with embarrassing or hostile questions or who works for a company’s management to suppress dissent at the meeting. See West (2001), pp. 374. In addition, according to Puchniak, the Sokaiya often has the close relationship with yakuza (Japanese mafia). In the history of derivative suits, the Sokaiya have commenced a tremendous number of derivative suits in Japan. See PUCHNIAK / NAKAHIGASHI 2012a, pp. 7-8. [↑](#footnote-ref-21)
22. Arno L. Eisen, Limitations on Derivative suits in Germany and Japan to Prevent Abuse, Nr. / No. 34 (2012), at. 200. [↑](#footnote-ref-22)
23. Article 847 para.1 of the 2005 Company Act. [↑](#footnote-ref-23)
24. Some believe that the possibility of abusive derivative suits for the other purposes (e.g. achieving the pay-out from a settlement with the company or impairing the company’s reputation) can be further reduced because in those cases all shareholders who get together would have to have the same abusive intent. See Eisen, pp. 200. [↑](#footnote-ref-24)
25. Article 25 of Decree 102. [↑](#footnote-ref-25)
26. Bruce E. Aronson, Learning from Comparative Law in Teaching U.S. Corporate Law: Director’s Liability in Japan and the U.S., 22 PENN ST. INT’L L. REV. 213 (2003). [↑](#footnote-ref-26)
27. According to Article 423 of the 2005 Company Act, if a director, accounting advisor, company auditor, executive officer or accounting auditor (hereinafter in this Section referred to as “Officers, Etc.”) neglects his/her duties, he shall be liable to such Stock Company for damages arising as a result thereof. Moreover, the liability of directors also mentions in other provision of the 2005 Company Act, for example, offering illegal profits regarding the exercise of the shareholder’s right is set forth in Article 120 of the 2005 Company Act or illegal distributions of surplus dividends or repurchase of shares that exceed the distributable amount under the 2005 Companies Act at the time of that distribution or repurchase of shares set forth in Article 212 of the 2005 Company Act. [↑](#footnote-ref-27)
28. Carl F. Goodman, the Rules of Law in Japan, Kluwer Law International, (2008), 391, pp. 279. [↑](#footnote-ref-28)
29. Article 847 of the 2005 Company Law. [↑](#footnote-ref-29)
30. H. Oda, pp. 253. [↑](#footnote-ref-30)
31. Article 72 of the 2014 Enterprise Law. [↑](#footnote-ref-31)
32. Article 161 of the 2014 Enterprise Law. [↑](#footnote-ref-32)
33. In Vietnam, as opposed to defining the duty of care, the law provides that the members of the BOM and the director have the responsibilities to exercise his powers and duties honestly and prudently to the best of his ability and in the best interests of the company and shareholders (Article 160 of the 2014 Enterprise Law). It should be noted that “prudently” in this case equates to the care and diligence. This is the most sophisticated wording set down for the JSC in connection with the care and diligence. See Jeremy Seymour Pearce, Directors’ Powers and Duties in Vietnam, Doctor’s thesis, the Faculty of Law at Bond University (2009), at 161.

Moreover, like the duty of care, the duty of loyalty is also understood in the same manner. That is, the members of the BOM, the (general) director have the responsibilities to act in the best interest of the company and shareholders; do not use information, secrets, business opportunities of the company; do not misuse the position, power, or assets of the company for self-seeking purposes or serving the interest of other entities. Therefore, breaching the fiduciary duty is one of the conditions for the shareholders to initiate the derivative lawsuit under the Vietnamese corporate law. [↑](#footnote-ref-33)
34. Quang, Truong Nhat, pp. 288. [↑](#footnote-ref-34)
35. Article 847 para. 4 of the 2005 Company Act of Japan provides that the company shall, without delay, notify the person who made such a request of the reason for not filing an Action for Pursuing Liability, etc. in writing or by any other method prescribed by law it refuses to commence a derivative action for pursuing liability. However, this feature deems to be inaccuracy in the context of Vietnamese law. Accordingly, it allows shareholders to initiate a lawsuit on behalf of the company to pursue the civil liability of directors without the demand requirement to the company. [↑](#footnote-ref-35)
36. Article 847 of the 2005 Company Act. [↑](#footnote-ref-36)
37. In the research of Song, he also describes both Korean and Japanese law in terms of requiring the Board to pursue the derivative suit is just a procedural. The only way for the Korean company’s board to bar a derivative suit is to accept the demand and have the company itself file the suit. In those respects, a derivative suit is more easily brought in Korea (Japan as well) than in the U.S. (see Song, pp. 96).

In addition, in the research of Gen Goto, he also assumes that derivative suits are easily initiated and hard to dismiss. Shareholders of Japanese corporations, therefore, are arguably in a stronger position than those in, for example, the United States. See Gen Goto, Legally “Strong” Shareholders of Japan, 3, MICH. J. PRIVATE EQUITY & VENTURE CAPITAL L. 125, pp. 127. [↑](#footnote-ref-37)
38. In Korea, the RMBCA and the ALI’s Principles of Corporate Governance provided, and a plaintiff shareholder should wait for 30 days. Only if the demand and waiting 30 days for board’s response might cause the company irreparable damage, shareholders can bring a suit without demand on board. [↑](#footnote-ref-38)
39. Article 852 para.1 of the 2005 Company Act (Japan). [↑](#footnote-ref-39)
40. Eisen, pp. 213. [↑](#footnote-ref-40)
41. West (2001), pp. 352 (He indicated that upon the legal reform in 1993, the number of derivative suits in Japan skyrocketed year by year. That is, by the end of 1993, 84 suits were pending in Japanese courts. By 1996, that number rose to 174, and by the end of 1999, there were 286 such suits, including 95 filed in 1999 alone. The robust use of the derivative suit upon the reform has resulted in a new corporate governance innovation in Japan). [↑](#footnote-ref-41)
42. Article 847 (6) of 2005 Company Act. [↑](#footnote-ref-42)
43. In the context of Japanese Civil Procedure, the defeated party bears the court costs (Article 61). Therefore, in such a case, the court costs will be exempted from the reimbursement of costs by the Company to the plaintiff shareholder if the case prevails. [↑](#footnote-ref-43)
44. Article 852 para. 1 of the 2005 Company Act. [↑](#footnote-ref-44)
45. West (2001), pp. 356. [↑](#footnote-ref-45)
46. Article 146.1 of the Civil Procedure Code provides that the plaintiffs, the defendants who have made counter-claims against the plaintiffs and the persons with related rights and interests who have made independent claims in civil lawsuits must advance first-instance Court fees; the persons who have made appeals must advance appellate Court fees, except for cases where they are exempted from, or do not have to pay Court fee advances. [↑](#footnote-ref-46)
47. Article 24 of the Resolution No. 326/2016/UBTVQH14 provides that court cost in the first instance trial divides into first-instance civil court costs involving and not involving monetary value. Accordingly, civil cases involving no monetary value means cases in which claims of involved parties are not sums of money or cannot be valued in specific sums of money. On contrary, civil cases involving a monetary value means cases in which claims of involved parties are sums of money or assets which can be valued in sums of money. [↑](#footnote-ref-47)
48. Article 27 of the Resolution No. 326/2016/UBTVQH14. [↑](#footnote-ref-48)
49. For this reason, in the research of Quach, she also indicated that subject to this calculation, the potential shareholder plaintiffs will probably hesitate to start a lawsuit mainly due to concerns over costs. See Quach (2012). [↑](#footnote-ref-49)
50. Article 161.2 of the 2014 Enterprise Law. [↑](#footnote-ref-50)
51. Article 161.2 of the 2014 Enterprise Law provides that procedures for proceedings are prescribed by corresponding regulations of law on civil proceedings. [↑](#footnote-ref-51)
52. Article 168.3 of the CCP. [↑](#footnote-ref-52)
53. Takahashi, Koji, Japan – Shareholder derivative suit: safeguards against abuse, 7, Amicus Curiae (1998), pp. 32. [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. West (2001), pp. 355. [↑](#footnote-ref-55)
56. Zhang, Zhong, The Shareholder Derivative suit and Good Corporate Governance in China: Why the Excitement is Actually for Nothing? 28-174, Pacific Basin Law Journal (2011), pp. 197.

In addition, the minimum shareholding requirement is widely recognized as locus standi rules for taking a derivative suit in civil law jurisdictions. For example, in Korean, the shareholding threshold for filing a derivative suit was 0.01% in case of listed companies and 1% in case of non-listed companies or holding 1% of the statutory capital or shares with a par value of EUR 100,000 in case of Germany. See Korean Securities and Exchange Act § 191-13(1), Korean Commercial Code § 403(1), Article 148 (1) of the German Stock Corporation Act. [↑](#footnote-ref-56)
57. Song, pp. 95. [↑](#footnote-ref-57)
58. The lawful capital requirement for the commercial bank is 3,000 billion Vietnam dong (see Decree No. 10/2011/ND-CP), the range from 300 – 1000 billion for the lawful capital to the insurance company depending on the types of the insurance business (See Decree No 73/2016/ND-CP), or 120 billion Vietnam dong for the company listed in Ho Chi Minh Stock Exchange (See Decree 58/2012/ND-CP). [↑](#footnote-ref-58)
59. However, the arising issue is that what extend the threshold should be reduced to enable minority shareholders to bring the lawsuit, while still preventing frivolous action? In fact, it is too difficult to set an appropriate threshold requirement because any fixed percentage of shareholding requirement seems arbitrary. In the case of China, Zhang believes that any figure is arbitrary, over-inclusive, and under-inclusive. In the case that lawsuits are brought for non-financial considerations, a minimum shareholding requirement is irrelevant. It is impossible to ascertain to what extent the Chinese shareholding requirement should be reduced; on the other hand, there is the legitimate concern that any reduced threshold figure may be too low. See Zhang (2011), pp. 197-198. [↑](#footnote-ref-59)
60. Article 25.1 of Decree 102. [↑](#footnote-ref-60)
61. Article 25.2 of Decree 102. [↑](#footnote-ref-61)
62. A commentator believes that granting the power to review and initiate the lawsuit to the BOS made it impossible in practice. Or Hieu, Phan, as the vice leader of the Drafting Committee for the 2014 Enterprise Law, also criticized that this mechanism makes the procedure for derivative suit more complicated in. See “Kiện lãnh đạo doanh nghiệp, cổ đông “bó tay”, in Stock News, [Jan 7, 2014], <http://tinnhanhchungkhoan.vn/phap-luat/kien-lanh-dao-doanh-nghiep-co-dong-bo-tay-84317.html>. Notably, Quach is probably one of the most outstanding commentators who supports this mechanism. From her argument, it could be convincing to assume that the mechanism for reviewing the case before the derivative suit is necessary. However, the role of BOS is still vague. That is, Decree 102 does not state any investigation procedures that the BOS needs to conduct upon receiving the shareholders’ request. Therefore, it is hard to assume that the BOS’s function has the function as the reviewing committee as U.S. law. If the BOS merely works as a disinterested organ to challenge the company’s managers on behalf of the company, the law still leaves two unresolved matters including what grounds can the BOS refuse the shareholders’ request to bring the case, and if we assume that the BOS refuses to bring the case because it does not serve the best interest of the company, does such a decision of the BOS carry any weight in determining while the shareholders may still bring the case after the BOS’ refusal to sue? See Quynh, Quach Thuy (2012). [↑](#footnote-ref-62)
63. Keay, AR (2016) Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006. Journal of Corporate Law Studies, 16 (1). pp. 8. [↑](#footnote-ref-63)