DIRECT SUITS AND DERIVATIVE ACTIONS: RETHINKING SHAREHOLDER PROTECTION IN COMPARATIVE CORPORATE LAW

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ABSTRACT

Shareholder lawsuits comprise two categories: direct suits and derivative actions. While singling out derivative actions as the quintessential minority shareholder protection mechanism, comparative corporate law scholarship, "Law and Finance" literature, and the World Bank's influential *Doing Business* reports have all failed to appreciate fundamental legal and functional differences between derivative actions and direct suits, as well as the value of direct suits as shareholder protection mechanisms. Consequently, one of the world's most powerful and influential institutions perpetuates a misleading view of shareholder protection around the world and promotes reforms that fail to achieve the desired policy objectives.

This Article offers a functional, comparative framework of shareholder lawsuits, and a taxonomy of direct suits that classifies how different types provide legal redress against diverse harms to shareholder interests. Drawing on examples from leading civil and common law jurisdictions in the Asia-Pacific, Europe, and North America, this Article shows that direct suits protect shareholders by

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providing some tangible advantage or alleviation of some specific detriment to the shareholder-plaintiff, shareholders generally, or both, through a wide range of monetary and non-monetary outcomes. Through this comparative analysis of direct suits in diverse jurisdictions, this Article sheds new light on the utility of direct suits for protecting minority shareholders and underscores the perils that arise when persons unskilled in comparative law engage in applied comparative law.

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INTRODUCTION

The use of shareholder lawsuits as a means of minority shareholder protection has fascinated comparative corporate law scholars and legally untrained economists alike. Scholarly interest in the private enforcement of corporate law exploded with the rise of the "Law and Finance" movement—also known by the labels "law matters" and "legal origins thesis"[1]—beginning in the late 1990s. In a highly cited[2] series of quantitative empirical studies, a leading group of US-based Law and Finance economists (known collectively as "LLSV" or "DLLS"[3]) sought to link economic development with, amongst other things, legal rules relevant to minority shareholder protection,[4] such as shareholder lawsuits.[5] The impact of Law and Finance did not stop at academic citations, as the World Bank began the *Doing Business* series of annual reports ("DBR")[6] measuring and ranking most of the world's jurisdictions using the methodology from articles authored by LLSV or DLLS.[7] Since the landmark 2008 article by DLLS on "The Law and Economics of Self-Dealing" ("DLLS Article"),[8] shareholder lawsuit mechanisms have become an established component of the DBR's "Protecting Minority Investors" indicator, and a matter of real stakes for the world's jurisdictions seeking to do well in such rankings.

Reducing over 100 complex regimes of shareholder lawsuits around the world into simple—and mostly binary—data points fit for ranking and quantitative analysis in the DBR[9] would appear at first glance to be a triumph for economists in academia and the World Bank. While the initial LLSV articles and overall Law and Finance project were received with skepticism by some corporate law scholars,[10] neither the DLLS Article nor

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[1] *See, e.g.,* John Armour et al., *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMP. LEGAL STUD. 343, 345–48 (2009).

[2] This may be readily confirmed using Google Scholar.

[3] "LLSV" comprises Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert Vishny, whereas "DLLS" comprises Simeon Djankov, La Porta, López-de-Silanes, and Shleifer.

[4] Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) [hereinafter La Porta et al., *Legal Determinants*]; Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) [hereinafter La Porta et al., *Law and Finance*]; Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008) [hereinafter Djankov et al., *Self-Dealing*]; Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1 (2006).

[5] Particularly in Djankov et al., *Self-Dealing*, *supra* note 4. *See also infra* Part II.

[6] *See generally* WORLD BANK, DOING BUSINESS,https://www.doingbusiness.org/en/doingbusiness (last visited Mar. 14, 2021).

[7] *See generally* Gerard McCormack, *Why "Doing Business" with the World Bank May Be Bad for You*, 19 EUR. BUS. ORG. L. REV. 649, 651–55 (2018). On the link between Djankov et al., *Self-Dealing*, *supra* note 4 and *Doing Business*, see *infra* Part II.

[8] Djankov et al., *Self-Dealing*, *supra* note 4.

[9] On the methodology of the DBR and underlying studies, see *infra* Part II.

[10] *See, e.g.,* Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 468

the DBR's shareholder lawsuit components have received the same level of scrutiny.[11] Leading corporate law critiques of the DBR fall into two categories. The first focuses on errors or other issues with the coding of specific jurisdictions' regimes, such as Singapore,[12] Italy,[13] and the US.[14] The second challenges DBR's relevance on the ground that high rankings derived from its "law in books" methodology belie the anemic reality of "law in action," using the case of the DBR's Related Party Transaction Index ("RPTI") as applied to Asian Anglo-Commonwealth jurisdictions.[15] No corporate law scholar[16] has, however, set out to critically examine whether the DBR data collected on minority shareholder protection—regardless of whether it reflects reality—is even meaningful for multiple civil and common law jurisdictions.

This Article argues that—even accepting the DBR's data as accurate and the "law in books" approach as not unsound—there are fundamental errors in the DBR's understanding of, and their approach to, minority shareholder protection via the legal mechanism of shareholder lawsuits. A set of unarticulated but critical premises about shareholder lawsuits and minority shareholder protection has made its way into the DBR data collection process and manifested in how the relevant indices for "Protecting Minority Investors" have been defined and scored. These premises arose from the economists' failure to appreciate two sets of distinctions in shareholder lawsuits and how they interact. The consequences: the neglect of a critical category of shareholder lawsuits and the perpetuation of a misleading picture of "shareholder protection" by one of the world's most influential

(2010); Priya P. Lele & Mathias M. Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17, 18–21 (2007); *see also* David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 117–23 (2015) (summarizing critiques).

[11] Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1, 10 (2020) (citing Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 34 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018)).

[12] *See, e.g.*, Lin Lin & Michael Ewing-Chow, *The* Doing Business *Index on Minority Investor Protection: The Case of Singapore*, 2016 SING. J. LEGAL STUD. 46 (2016).

[13] *See, e.g.*, Luca Enriques & Matteo Gargantini, *Form and Function in Doing Business Rankings: Is Investor Protection in Italy Still So Bad?*, 1 U. BOLOGNA L. REV. 1 (2016).

[14] *See, e.g.*, Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Shareholder Protection Across Time*, 68 FLA. L. REV. 691 (2016).

[15] *See, e.g.*, Puchniak & Varottil, *supra* note 11.

[16] Critiques by comparative law scholars or from perspectives other than corporate law abound. *See, e.g.*, McCormack, *supra* note 7 (critiquing the DBR from a law and development perspective); Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis,* Doing Business *Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765 (2009) (discussing the implications of the DBR for comparative law methodology generally).

institutions. This has serious ramifications for jurisdictions around the world who may seek to improve their performance on the DBR through shareholder litigation reforms.

This Article makes three contributions to the comparative corporate law literature. The first is to provide a clear and concise analytical framework illuminating the two critical pairs of distinctions in the form and function of shareholder lawsuits. Shareholder lawsuits comprise two categories distinct as a matter of legal form: derivative actions and direct suits. The former is a comparatively uniform set of mechanisms predominantly centered on one objective: suing a director on behalf of the company for compensation.[17] By contrast, the latter, direct suits, are a diverse grouping that comprises mechanisms deployable in vastly different factual scenarios to achieve various legal outcomes.

Another relevant distinction concerns the two functions of shareholder lawsuits: Director Liability and Shareholder Protection. Explored in Part I.B, Director Liability refers to how directors may be held civilly liable for their actions through litigation; this is the primary function of derivative suits. By contrast, Shareholder Protection focuses on the interests of shareholders by providing some tangible advantage or alleviation of some specific detriment to the shareholder-plaintiff, shareholders generally, or both, through a wide range of monetary and non-monetary outcomes. Notwithstanding the longstanding emphasis of corporate law and governance scholarship on aspects of Director Liability, Director Liability does not necessarily achieve Shareholder Protection. This is because Director Liability fails to address or remedy the wide range of scenarios in which shareholder interests can be harmed, including the acts or conduct of other shareholders or of the company itself.[18]

The second contribution of this Article is to show how the World Bank (and Law and Finance) economists fell short in their purported goal of scoring and ranking jurisdictions on "Protection of Minority Investors" through shareholder lawsuits. When non-legal scholars treat corporate law rules and systems as just another type of "data" to be collected and crunched for easy consumption by a broader non-jurist market, it invites over-simplification and error. Only lawyers have specialized subject-matter expertise, the ability to make judgment calls, and a grasp of fundamental legal principles; this is no less true for the field of corporate law and governance.[19] By failing to appreciate the distinction between the Director

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[17] On the function of derivative actions, see *infra* Part I.A.2.

[18] On the range of harms shareholders may suffer, see *infra* Part I.B.2.

[19] *Cf.*, on legal errors in the renowned "G-Index," Jens Frankenreiter, et al., *Cleaning Corporate Governance*, 170 U. PA. L. REV. 1, 8, 62–63 (2021).

Liability and Shareholder Protection functions of shareholder lawsuits, the DBR methodology as constructed by *economists* prioritized the narrow function of Director Liability over the broader possibilities of Shareholder Protection. Further, the DBR fixated on the mechanism corresponding to Director Liability—derivative actions. This checkered vision has come at the expense of a larger subset of shareholder lawsuits—direct suits. The resulting picture of shareholder lawsuits as mechanisms of Shareholder Protection around the world is therefore not just incomplete, but also misleading.

The Article's third contribution is to illustrate the existing and potential applications of direct suits. It offers a basic taxonomy of direct suits that illuminates, on a "law in books"[20] basis, both the range of detriments that a shareholder may suffer from and the diversity of possible legal responses. Drawing on numerous examples of direct suits from leading common law *and* civil law jurisdictions from Asia-Pacific, Europe, and the US, this Article makes a preliminary case for how the diverse range of legal mechanisms comprising direct suits offer protection for shareholders in a wide range of scenarios. As compared to the DLLS Article, the more inclusive taxonomy and broader range of jurisdictional examples in this Article lay the juridical and conceptual foundations for more rigorous data collection on and scholarly analysis of direct suits. These, in turn, have applications such as the latest round of DBR reform[21] or the development of comparable but better corporate law indices. In addition, the taxonomy may also prove useful as a framework for a subsequent "law in action", in-depth empirical micro-comparison of a small number of jurisdictions.

This Article proceeds as follows: Part I lays out the legal and conceptual framework by explaining distinctions between direct suits and derivative actions as a matter of legal form and function. Part II explains the premises underlying leading corporate law and governance indices in the World Bank's DBR and what this reveals about the legal and conceptual flaws in the methodology, as well as their implications for direct suits. Part III presents a survey of direct suit mechanisms in major jurisdictions including Germany, Japan, Korea, the United States, and key Anglo-Commonwealth nations and territories (United Kingdom, Canada, Australia, Singapore, and Hong Kong) as a comparative taxonomy of direct suits. A conclusion follows.

[20] *Cf.* Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

[21] *See* Andrea Shalal, *World Bank Aims to Replace Canceled Doing Business' Report in Two Years*, REUTERS (Nov. 11, 2021), https://www.reuters.com/business/world-bank-aims-replace-canceled-doing-business-report-two-years-2021-11-10/.

I. FORM AND FUNCTION IN SHAREHOLDER LAWSUITS: AN ANALYTICAL FRAMEWORK OF DIRECT SUITS AND DERIVATIVE ACTIONS

Before exploring the unarticulated premises that led the "Law and Finance" literature—and subsequently, the World Bank's *Doing Business* reports—to fixate on derivative actions at the expense of direct suits, it is apposite to explain the distinction between the forms and functions of direct suits and derivative actions.

A. Form: Subject Matter, Parties, Outcomes, and Cost Allocation

In this Subpart, I identify, explain, and compare key legal aspects of direct suits and derivative actions: the subject matter of the suit; parties to the litigation; possible monetary and non-monetary outcomes; and allocation of litigation costs between the parties.

1. Direct suits

For this Article, a direct suit (or action) is defined as "a mechanism that a shareholder or equivalent may, by virtue of or in connection with [their] status as a shareholder, litigate to obtain a legal outcome."[22] Direct suit mechanisms are diverse; prominent examples applicable to listed companies[23] include rescission suits challenging corporate acts,[24] shareholder oppression (also known as the "unfair prejudice" remedy),[25] and appraisal regimes.[26]

The scope of a direct suit varies widely. In terms of subject matter, a direct suit may be available for a wrong committed by a defendant against either the shareholder personally or the company (a good example is challenges against shareholder resolutions).[27] Direct suits need not be limited to legal wrongs or otherwise legally recognized loss suffered by the

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[22] Alan K. Koh & Samantha S. Tang, *Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy*, *in* COMPARATIVE CORPORATE GOVERNANCE 431, 438 (Afra Afsharipour & Martin Gelter eds., 2021). For an alternative definition and list of examples, see AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 7.01(b), 7.01 cmt. c (1994).

[23] While a prominent feature of shareholder suits in the context of small, privately held companies (close corporations), dissolution/ winding up is excluded as they are of little practical relevance to listed, public companies.

[24] *Anfechtungsklage* (Germany), *ketsugi torikeshi no uttae* (Japan) etc. See *infra* Part III.D.

[25] Such suits perform a variety of functions. See *infra* Parts III.A–B, D–G below.

[26] *See infra* Part III.C.

[27] *See, e.g., infra* Part III.D.

shareholder-plaintiff personally. For example, a shareholder-plaintiff may exercise appraisal rights[28] in the event of a past or future fundamental change to the company provided conditions are met—it does not matter whether the fundamental change works to their personal detriment, perceived or real.

Potential parties to a direct suit are similarly wide-ranging. Depending on the precise legal regime, a direct suit may be brought against the company, directors, controlling shareholders, or any other shareholder. A company may also be made party to the direct suit as appropriate, and not necessarily as a defendant.

A successful direct suit may result in a wide range of legal consequences applicable to one or more of the parties. A helpful distinction may be drawn between outcomes that are monetary and non-monetary. Monetary outcomes in listed companies usually take the form of compensation (i.e., damages) ordered to be paid by the defendant party to the shareholder-plaintiff. This is the essence of direct monetary claims[29] and one variant of appraisal.[30] Non-monetary outcomes are more varied, ranging from judicial invalidation of past or pending corporate acts or proceedings,[31] orders to the company or other persons to undo or do something specific,[32] orders for the removal of existing directors,[33] and even complex orders regulating the company's future acts and conduct.[34] Combined non-monetary (relinquishment of shares) and monetary (receipt of money in return for relinquishment of shares) outcomes may flow from withdrawal (albeit only for close corporations rather than listed companies)[35] and the appraisal variant involving a sale of shares.[36]

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[28] *See generally infra* Part III.C below.

[29] *See infra* Part III.A. However, the recovery of reflective loss poses challenging issues. *See, e.g.*, Hans De Wulf, *Direct Shareholder Suits for Damages Based on Reflective Losses*, *in* I FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG AM 24. AUGUST 2010: UNTERNEHMEN, MARKT UND VERANTWORTUNG 1537 (Stephan Grundmann et al. eds., 2010); Joyce Lee Suet Lin, *Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle*, 66 CAMBRIDGE L.J. 537 (2007); Alan K. Koh, *Reconstructing the Reflective Loss Principle*, 16 J. CORP. L. STUD. 371 (2016) [hereinafter Koh, *Reflective Loss*]; IY Joseph Cho, *Directors' Third-Party Liability: The Peculiar Case of Korea*, 18 AUSTL. J. ASIAN L., 239 (2017). *See also infra* Part III.A.

[30] *I.e.*, those brought purely for the purpose of challenging the *quantum* received for expropriated shares. *See infra* Part III.C.

[31] *Infra* Part III.D.

[32] *Infra* Part III.E.

[33] *Infra* Part III.F.

[34] *Infra* Part III.G.

[35] *See infra* Part III.B below.

[36] Those brought for the court-ordered purchase of the shareholder-plaintiff's shares by the company at a fair price; *see infra* Part III.C.

Direct suits are usually subject to the cost allocation rules for civil litigation. For the Anglo-Commonwealth, the usual court order for civil cases is "costs follow the event:" the loser pays for the winner's legal expenses, in addition to the loser's own expenses.[37] However, courts always have the discretion to deviate from this, such as ordering the winner to bear the loser's costs in exceptional cases,[38] or to simply make no order as to costs with the effect that each party bears their own costs. Among civil law jurisdictions, Germany[39] and some other European jurisdictions adopt "loser pays" in principle.[40] Japan's system is a complex one in which parties are required to bear their own attorney's fees and expenses,[41] but distinguishes between "contentious" (such as ordinary civil suits and most corporate law-related suits) and "non-contentious" (which applies to appraisal) litigation with respect to court fees. In Japan, a loser usually bears the burden of court fees in a contentious proceeding, but not in a non-contentious one.[42]

2. Derivative actions

In contrast with the diversity of direct suits, the derivative action is narrower in scope, and may be defined as "a mechanism that a shareholder or equivalent may, by virtue of or in connection with status as shareholder, take[] the place of the company in litigating to obtain a legal outcome

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[37] *See, e.g.,* Civil Procedure Rules 1998, SI 1998/3132, r. 44.3(2) (Eng.); Rules of Court 2021, O. 21 rr. 1, 3 (superseding Rules of Court (R5, Cap. 322, rev. ed. 2014), O. 59 rr. 1, 3, from 1 April 2022) (Sing.); Tullio Planeta v. Maoro Andrea G [1994] SGCA 76, [1994] 2 SLR(R) 501 [24] (Sing.); AUSTL. L. REFORM COMM'N, COSTS SHIFTING – WHO PAYS FOR LITIGATION ¶ 4.2 (A.L.R.C. Rep. No. 75, Oct. 1995).

[38] Alltrans Express Ltd. v. CVA Holdings Ltd. [1984] 1 WLR 394, 401–403, [1984] 1 All ER 685 (Eng. CA) (technical winner awarded nominal damages ordered to pay costs to the loser); Mahtani v. Kiaw Aik Hang Land Pte Ltd. [1994] SGHC 182, [1994] 2 SLR(R) 996 [58] (Sing.) (awarding defendant half the costs of trial). *See also* Civil Procedure Rules 1998, SI 1998/3132, r. 44.14 (Eng.); Rules of Court 2021, O. 21 r. 4 (superseding Rules of Court (R5, Cap. 322, rev. ed. 2014), O. 59, rr. 6A, 7 from 1 April 2022) (Sing.); Tullio Planeta v. Maoro Andrea G [1994] 2 SLR(R) 501 [24] (Sing.).

[39] Zivilprozessordung [ZPO] [Code of Civil Procedure], Jan. 30, 1877, RGBl at 83, revised Dec. 5, 2005, BGBl I at 3202, last amended by Gesetz [G], Nov. 22, 2020, BGBl I at 2466, art. 1, § 91 Abs 1–2 (Ger.).

[40] *See generally* Martin Gelter, *Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?*, 37 BROOK. J. INT'L L. 843, 862–64 (2012) [hereinafter Gelter, *Shareholder Derivative Suits*]. Note, however, that even under a "loser pays" regime it is still likely that successful parties have to bear the cost burden to some extent. *Id.* at 863–64.

[41] YUKIKO HASEBE, MINJI-SOSHŌ-HŌ [CIVIL PROCEDURE LAW] 7 (3d ed. 2020). An exception lies where an attorney is appointed for the party by court order pursuant to statute or regulation. Minji soshō hiyō-tō ni kansuru hōritsu [Act on Costs of Civil Procedure], Law No. 40 of 1971, art. 2(x) (Japan).

[42] MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 61 (losing party bears *soshō-hiyō* "litigation costs"), arts. 62, 63 (setting out exceptions to the general "loser pays" principle); Hishō jiken tetsudukihō [Non-Contentious Case Procedures Act], Law No. 51 of 2011, art. 26(1) (Japan) (parties generally bear their own *tetsuduki-hiyō* "costs of proceedings"); *see also* Alan K. Koh, *Appraising Japan's Appraisal Remedy*, 62 AM. J. COMP. L. 417, 446 (2014) [hereinafter Koh, *Appraisal*].

against a director or equivalent that binds the company in circumstances where the company does not litigate directly."[43] It is a necessary condition of the derivative action that the company has a cause of action that it could have theoretically pursued by itself. With scattered exceptions, the advent of derivative actions in this recognizably modern form is a relatively recent phenomenon in most jurisdictions.[44]

Derivative actions are typically envisioned primarily as a mechanism by which directors may be held liable for breach of their duties to the company. Still, sometimes derivative actions may be used to enforce a cause of action, or defend against a lawsuit, between the company and a third party. Even then, the nexus of breach of director's duties, or duties comparable to those imposed on directors,[45] is usually present.[46] Ordinarily, the true defendant in a derivative action is a director or equivalent officer (but the company may be included as a nominal defendant where civil procedure rules so require).[47]

Derivative actions do not offer shareholder-plaintiffs monetary outcomes. By definition, the *derivative* action is a lawsuit brought *in place of* the company. The underlying cause of action (or claim) forming the basis of the derivative action is the company's, and not the shareholder-plaintiff's in their personal capacity.[48] Barring isolated exceptions (that are better characterized as direct suits),[49] the monetary outcome, if any, resulting from

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[43] *Cf.* Koh & Tang, *supra* note 22, at 448 (offering the same definition but without the words in italics) (citing Samantha S. Tang, *Corporate Avengers Need Not Be Angels: Rethinking Good Faith in the Derivative Action*, 16 J. CORP. L. STUD. 471, 471 (2016)); Harald Baum & Dan W. Puchniak, *The Derivative Action: An Economic, Historical and Practice Oriented Approach*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 7 (Dan W. Puchniak et al. eds., 2012). For another definition, see AMERICAN LAW INSTITUTE, *supra* note 22, § 7.01(a).

[44] For a partial list of key milestone years in the derivative action regimes of leading jurisdictions, see Baum & Puchniak, *supra* note 43, at 2.

[45] E.g., "fiduciary" duties imposed on controlling shareholders in the United States. This, however, is not a feature of Anglo-Commonwealth jurisdictions. *See* ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 3–5 (2019).

[46] *See* Samantha S. Tang, *The Anatomy of Singapore's Statutory Derivative Action: Why Do Shareholders Sue – Or Not?*, 20 J. CORP. L. STUD. 327, 344 (2020) [hereinafter Tang, *Anatomy*]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRIVATE ENFORCEMENT OF SHAREHOLDER RIGHTS: A COMPARISON OF SELECTED JURISDICTIONS AND POLICY ALTERNATIVES FOR BRAZIL 25–29 (2020); Baum & Puchniak, *supra* note 43, at 57.

[47] Baum & Puchniak, *supra* note 43, at 8.

[48] *Id.* at 8–9.

[49] Israel's regime grants the court discretion, where the derivative action results in the company's victory against the defendant, to order a personal payment to the shareholder litigant as a reward. § 201, Companies Law, 5759–1999, LSI 44 119 (1999 –2000) (Isr.); Arad Reisberg, *Access to Justice or Justice Not Accessed: Is There a Case for Public Funding of Derivative Claims?*, 37 BROOK. J. INT'L L. 1021, 1034–36 (2012) [hereinafter Reisberg, *Access to Justice*]. For Canada's regime, *see, e.g.,* Canada Business Corporations Act, R.S.C. 1985, c. C-44, § 240(c) (Can.). Canada's regime has been classified

a successful derivative claim thus accrues to the company, not the shareholder personally.

Shareholder-plaintiffs cannot directly obtain a monetary outcome via a derivative action, but it is possible that the value of the shareholder-plaintiff's shares may increase to reflect the (theoretically) increased value of the company. Even assuming that the shareholder-plaintiff's shares do increase in value in a way that "compensates" for their reflective loss,[50] the only ways the shareholder-plaintiff could realize the recovery (receive cash or cash-equivalent in their pocket) involve either the shareholder-plaintiff disposing of their shares via sale or the company declaring a special distribution. Neither is a legal outcome flowing directly from a successfully concluded derivative action.

Derivative actions ordinarily share the same starting point for cost allocation as direct suits. The Anglo-Commonwealth "loser pays" rule poses a substantial financial obstacle for shareholder-plaintiffs, especially since the shareholder only benefits very indirectly if at all from a successful derivative action. Where the derivative action fails, the shareholder-plaintiff is liable to be on the hook for their own legal expenses, as well as the defendants'.[51] In response, various mechanisms have been devised to shift the burden (and possibly benefits) of derivative litigation from the shareholder-plaintiff. For example, conditional fee arrangements in the UK allow the client to avoid paying lawyer's fees if the claim fails, but the

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as a direct suit. Koh & Tang, *supra* note 22, at 443.

[50] The quantum of reflective loss and the extent to which it can be compensated is difficult to ascertain. The market may assess the likelihood that the company will successfully recover its losses from the wrongdoer(s) and price in the information accordingly, which might reduce or eliminate the shareholders' reflective loss. Lee, *supra* note 29, at 551; Koh, *Reflective Loss*, *supra* note 29, at 379.

Further, the shareholders' aggregate loss might exceed the company's if "the market rationally discount[s] the aggregate value of the corporate's shares by more than [the quantum of the company's loss] in anticipation of future abuses." John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 304 (1981). *See also* Arad Reisberg, *Funding Derivative Actions: A Re-Examination of Costs and Fees as Incentives to Commence Litigation*, 4 J. CORP. L. STUD. 345, 347 (2004) [hereinafter Reisberg, *Funding*] (observing that a successful derivative action might result in bad publicity or loss in managerial confidence that could depress share prices).To complicate matters further, empirical studies on derivative actions in the US and Japan suggest that even a successful monetary outcome for the company might be relatively insignificant in a large public company, and the successful monetary outcome may have only a limited effect on the company's share prices. Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261, 277–83 (1986); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J. L. ECON. & ORG. 55, 67–68 (1991); Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 358–64 (2001); Dan W. Puchniak & Masafumi Nakahigashi, *Japan's Love for Derivative Actions: Irrational Behavior and Non-Economic Motives and Rational Explanations for Shareholder Litigation*, 45 VAND. J. TRANSNAT'L L. 1, 37–43 (2012).

[51] Tang, *Anatomy*, *supra* note 46, at 331 n.15, 348.

lawyer is entitled to charge a success fee for a successful claim.[52] Anglo-Commonwealth courts also have the discretion to make an indemnity order requiring the company to indemnify the shareholder-plaintiff in part or whole for legal expenses incurred on the company's behalf,[53] but such orders are rarely awarded in practice.[54]

Cost allocation in civil law jurisdictions vary. In Japan, derivative actions are "contentious" suits but with a nominal court fee of just JPY 13,000,[55] and which may, applying the general rules, be claimed by a successful shareholder-plaintiff from the losing defendant. A successful shareholder-plaintiff may further claim from the company expenses including reasonable attorney's fees.[56] A successful defendant may recover attorney's fees and other reasonable costs of their defense from the company,[57] meaning that the losing shareholder-plaintiff ordinarily need not bear the winner's expenses.[58] A losing shareholder-plaintiff is required to compensate the company's loss only if the shareholder-plaintiff acted in bad faith.[59]

In Germany, the court fee payable by the shareholder-plaintiff in a derivative action (admission procedure) is specifically capped at EUR 3,901.[60] A shareholder-plaintiff that does not successfully obtain the court's permission to proceed through the admission procedure must bear their own

[52] Courts and Legal Services Act 1990, c. 41, §§ 58, 58A, 58AA, 58B, 58C (UK); Reisberg, *Funding*, *supra* note 50, at 379.

[53] *See, e.g.,* Wallersteiner v. Moir (No. 2) [1975] 1 QB 373 (CA); Canada Business Corporations Act, R.S.C. 1985, c. C-44, § 240(d) (Can.); Companies Act 1967, § 216A(5)(c) (Sing.); Companies Act 1993, s 166 (N.Z.); *Corporations Act 2001* (Cth), s 242 (Austl.); Companies Ordinance, Cap. 622, § 738 (H.K.).

[54] Tang, *Anatomy*, *supra* note 46, at 348–49.

[55] Kaishahō [Companies Act], Law No. 86 of 2005, art. 847-4(1) (Japan); Minji soshō hiyō-tō ni kansuru hōritsu, art. 4(2), Beppyō [Annex] 1 Item (1) (Japan).

[56] Kaishahō [Companies Act], Law No. 86 of 2005, art. 852(1); KENJIRŌ EGASHIRA, KABUSHIKI KAISHA-HŌ [LAWS OF STOCK CORPORATIONS] 502 (7th ed. 2017). For a dated but orthodox account in English of the law and practice of derivative-suit costs and expenses, see Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1456–66 (1994) (discussing Japan's derivative action fee system, including the practice of attorneys charging an agreed/scale fee plus an additional fee payable only if the suit is successful).

[57] EGASHIRA, *supra* note 56, at 503.

[58] This is unless the shareholder-plaintiff is ordered to furnish security for the defendant's expenses, which may occur upon application by the defendant if the defendant establishes on a *prima facie* basis that the shareholder-plaintiff acted in bad faith in commencing the derivative action. Kaishahō [Companies Act], Law No. 86 of 2005, art. 847-4(2)–(3). *See* EGASHIRA, *supra* note 56, at 499 (reporting that a typical amount of security ordered per defendant ranges from JPY 3 to 10 million).

[59] Kaishahō, art. 852(2).

[60] Gerichtskostengesetz [GKG] [Court Fees Act], revised Jan. 27, 2014, BGBl I at 154, last amended by Gesetz [G], Nov. 26, 2020, BGBl I at 2568, art. 3, § 53 Abs 1 S 5, Anlage 2 (Ger.).

costs[61] unless the ground or grounds for the shareholder-plaintiff's failure concerns the company's interests and the company could have so notified the shareholder-plaintiff but did not in fact do so, in which case the company shall reimburse the shareholder-plaintiff.[62] Unless the shareholder-plaintiff obtained permission to proceed through the intentional or grossly negligent use of information in the admission procedure, they are entitled to be reimbursed their costs by the company even if the substantive action does not succeed.[63]

B. Function: Director Liability Versus Shareholder Protection

Shareholder suits play two distinct functions: holding directors liable ("Director Liability") and protecting shareholder interests ("Shareholder Protection"). This Subpart defines each and explains how direct and derivative suits perform—and fail to perform—each of these functions.

1. Director Liability

Directors may be held civilly liable for their actions through shareholder lawsuits. The subject of the director's liability may be the company or the shareholders. Where the director is held liable to the company, it is invariably on the ground that the director has breached their duty or duties to the company. Relief to the company can be in monetary terms such as damages or compensation, in *specie* such as the return of misappropriated property, or in non-monetary terms such as an injunction regulating future conduct of the director or the rescission of a concluded transaction. In the case of monetary relief to the company, the shareholder's recovery is at best an indirect and unrealized one for reflective loss.[64]

Conversely, where the director is held liable to the shareholder personally, the basis of liability varies across jurisdictions, but may be grouped into two categories. First, the director breached a duty owed specifically to the shareholder. Second, liability is imposed on the director in connection with an underlying breach of duty owed to the company. Relief to the shareholder may include direct monetary compensation to the shareholder to the exclusion of any legal consequences for the company.

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[61] Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl I at 1089, last amended by Gesetz [G], Dec. 12, 2019, BGBl I at 2637, art. 1, § 148 Abs 6 S 1 (Ger.).

[62] AktG, § 148 Abs 6 S 2.

[63] AktG, § 148 Abs 6 S 5.

[64] *See supra* Part I.A.2.

In either group of scenarios, Director Liability's focus is on the defendant director. The shareholder-plaintiff's role is to facilitate negative legal consequences for the defendant director; whether the plaintiff gets anything personally out of it, financial or otherwise, is merely incidental. For completeness, Director Liability's function may extend beyond compensating a specific victim to encompass general deterrence of director misconduct.[65]

2. Shareholder Protection

Shareholder Protection focuses on the shareholder-plaintiff. Shareholder-plaintiffs may require protection not only from the acts of directors, but also from the shareholders as a whole acting as the company, the actions of other shareholders individually or as a group, or any combination of the above. Examples of relief include direct monetary compensation to the shareholder-plaintiff,[66] the rescission of transactions or other corporate acts detrimental to the shareholder-plaintiff's interests,[67] or facilitation of the shareholder-plaintiff's exit from the company by a court-ordered purchase of their shares at a fair price.[68]

Where the defendant who is imposed with the liability to pay money to or do something for the shareholder-plaintiff is a director, the Shareholder Protection and Director Liability functions overlap. Otherwise, the two functions are completely distinct. An example is when the defendant is not a director (or is in a position where their status as director is irrelevant to the basis of liability). Similarly, shareholder-plaintiffs may be protected from non-director controlling shareholder defendants by shareholder lawsuits that impose monetary liability or other outcomes on the latter; Director Liability lacks a similar effect.[69]

Shareholder Protection as used in the capitalized form in this Article must be distinguished from shareholder protection (in lowercase) in the broadest sense. For example, it is arguable that any lawsuit mechanism that deters director misconduct (which may be achieved by Director Liability)[70] benefits every shareholder, including those other than the shareholder-

[65] *See* ARAD REISBERG, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE 54–66 (2007).

[66] *Infra* Part III.A.

[67] *Infra* Part III.D.

[68] *Infra* Part III.B.

[69] Unless the controlling shareholder is simultaneously a director and there exists an independent basis for the defendant to be held liable *qua* director.

[70] *Supra* Part I.B.1.

plaintiff, in an abstract sense and accordingly performs a shareholder protection (lowercase) function, broadly construed.[71] However, how does deterrence benefit the shareholder-plaintiff *personally*? The benefit, if any, cannot be quantified in monetary terms or translated into a specific non-monetary outcome.[72] Shareholder Protection calls for some tangible advantage, or alleviation of some specific detriment, to the shareholder-plaintiff, shareholders generally, or both, through a monetary or non-monetary outcome achievable through a shareholder lawsuit.

3. Direct suits and derivative actions: distinct but overlapping functions

Based on this classification, direct suits and derivative actions perform largely distinct functions. Derivative actions, which are predominantly about the enforcement of corporate wrongs against directors, perform part of the Director Liability function.[73] Derivative actions do not, however, address liability of directors to shareholders personally, and shareholder-plaintiffs do not derive personal recovery from the director-defendants. Accordingly, derivative actions only perform the Shareholder Protection function at best only indirectly—and this is provided that the various legal and practical obstacles[74] do not make such suits a complete non-starter.

By contrast, direct suits are primarily about Shareholder Protection. As Part III below will demonstrate, direct suits brought by shareholder-plaintiffs enable them to obtain a wide range of outcomes, monetary and non-monetary, against defendants ranging from directors, controlling shareholders, to the company itself. Direct suits also perform the Director Liability function where the suit is targeted at director-defendants, subject to one limitation: direct suits do not in principle result in monetary compensation to the company. This should not be a surprise since the true plaintiff in a direct suit is not the company but rather a shareholder.

The fact that direct suits and derivative actions have distinct functions is not always recognized or emphasized in comparative corporate law literature. While scholars have largely accepted that derivative actions are an important aspect of "shareholder protection" (lower case) broadly construed[75] and comparative corporate law scholarship on derivative actions

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[71] *See, e.g.*, sources cited at *supra* note 4 and *infra* note 75.

[72] *Cf.* REISBERG, *supra* note 59, at 61 ("[T]he benefit of a derivative action may accrue less to the shareholders of the subject company and more to shareholders generally in the form of increased deterrence of managerial abuse").

[73] Lawsuits by companies directly against defendant directors are also examples of Director Liability but are beyond the scope of this Article.

[74] *Supra* Part I.A.2.

[75] *I.e.*, not necessarily within this Article's precise meaning of "Shareholder Protection" laid down

has flourished,[76] the same is not true for direct suits. As the taxonomy of direct suits offered in Part III below shows, direct suits—which can be sub-categorized into at least seven types with further inter-jurisdictional variation—are much more diverse in legal form than derivative actions.

Similarly, compared to the many combinations in which the Shareholder Protection function in its various facets is performed by different shareholder lawsuits against different parties, Director Liability is conceptually simpler and more uniform. The implications of Director Liability prevailing over Shareholder Protection in a leading corporate law and governance index is the subject of Part II.

II. SHAREHOLDER LAWSUITS IN THE *DOING BUSINESS* REPORTS: OR HOW THE WORLD BANK LEARNED TO STOP WORRYING AND FORGET DIRECT SUITS

Part I has established that in shareholder lawsuits there are two distinct categories in legal form (derivative actions and direct suits) and two distinct functions (Director Liability and Shareholder Protection). To what extent have these distinctions and categories been reflected in corporate law indices[77]—arguably the most prominent and practically significant

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in Part I.B.2. In addition to sources cited at *supra* note 4, *see, e.g.,* Tang, *Anatomy*, *supra* note 46, at 327–28, 329–30; OECD, *supra* note 46, at 25 (characterizing "derivative suits in the proper sense" as "the more important type of litigation"); COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH 377, 427 (Mathias Siems & David Cabrelli eds., 2d ed. 2018) (observing that "derivative actions are common to both common law, 'mixed' and civil law jurisdictions"); Armour, *supra* note 1, at 354; XIAONING LI, A COMPARATIVE STUDY OF SHAREHOLDERS' DERIVATIVE ACTIONS: ENGLAND, THE UNITED STATES, GERMANY AND CHINA 4-5 (2007); Puchniak & Nakahigashi, *supra* note 50, at 23; Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUS. L.J. 1, 15, 26 (2012) [hereinafter Puchniak, *Complex Reality*]; Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1760 (2004).

[76] In addition to sources cited at *supra* note 75, *see, e.g.,* Baum & Puchniak, *supra* note 43; Puchniak, *Complex Reality*, *supra* note 75.

[77] Leading indices of this type other than those used in the DBR and the DLLS Anti-Self-Dealing Index (ASDI) that supplied the intellectual basis of the DBR include LLSV's Anti-Director Rights Index (ADRI) (original and revised versions). *See* La Porta et al., *Legal Determinants*, *supra* note 4, at 1134; La Porta et al., *Law and Finance*, *supra* note 4, at 1123 (the publications establishing the original ADRI). Another leading index is the University of Cambridge Centre for Business Research's Shareholder Protection Index (SPI) (original, revised, and "extended" versions). *See* Djankov et al., *Self-Dealing*, *supra* note 4, at 455 tbl. 9 (defining the revised ADRI); Lele & Siems, *supra* note 10, at 45–49 (defining the original SPI); Mathias M. Siems, *Shareholder Protection around the World (Leximetric II)* 33 Del. J. Corp. L. 111, 116–19 (2008) (defining the revised SPI); CBR EXTENDED SHAREHOLDER PROTECTION INDEX (Mathias Siems ed., Centre for Business Research, University of Cambridge, 2d ed., 2016), https://www.repository.cam.ac.uk/bitstream/handle/1810/256566/cbr-spi-30-countries-codebook-and-methodology.pdf?sequence=9&isAllowed=y [https://perma.cc/CH3P-HEBK] [hereinafter CBR-ESPI]

application of the comparative law of shareholder lawsuits? To illustrate how the distinctions amongst direct suits and derivative actions, and between Director Liability and Shareholder Protection functions, have been underappreciated, and how direct suits have been neglected outright in the construction and coding of corporate law indices, this Article places the shareholder lawsuit-relevant components and indices in the World Bank's *Doing Business* reports (DBR) under the comparative law microscope.

Shareholder lawsuits form part of the DBR's overall assessment of legal regimes for minority shareholder protection, specifically under "Extent of Director Liability" (EDLI) (since DBR 2006[78]) and "Ease of Shareholder Suits" (ESSI) (since DBR 2015).[79] These two sub-indices together comprise two-thirds in weight of the "Conflict of Interest Regulation" index (also dubbed the "Related Party Transaction Index"[80]) (hereinafter "RPTI") that in turn makes up half the score[81] on which each economy will be ranked on "Protecting Minority Investors"[82] (prior to DBR 2015, "Protecting Investors"[83]). For ease of reference, by "PMI Indices" this Article means only the EDLI, ESSI, and RPTI.[84]

(being the codebook for the latest updated "Extended" SPI).

[78] *See* WORLD BANK GROUP, DOING BUSINESS IN 2006: CREATING JOBS 84–85 (Sept. 13, 2005), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB06-FullReport.pdf [https://perma.cc/QV46-BSBT] [hereinafter DBR 2006].

[79] The key ESSI component was introduced in DBR 2015. *See infra* Part II.B.3; *infra* notes 84, 125–126 and accompanying text.

[80] Puchniak & Varottil, *supra* note 11, at 4 n.5.

[81] Prior to DBR 2020 (*infra* note 96), a "Strength of minority investor protection index" was referred to in the data notes as "Protecting Minority Investors." *See, e.g.*, WORLD BANK, DOING BUSINESS 2019: TRAINING FOR REFORM 99 tbl. 8.10 (Oct. 31, 2018), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf [https://perma.cc/RK5B-HDD3].

For DBR 2020, the "Strength of minority investor protection index," albeit calculated on a different basis, still exists in the Data Notes. However, the Data Notes have been separated from the main DBR 2020 document but does not appear anywhere in the main DBR 2020. *Cf.* WORLD BANK GROUP, DATA NOTES 48 tbl. 10 (Jun. 12, 2019), https://openknowledge.worldbank.org/bitstream/handle/10986/32436/211440app.pdf [https://perma.cc/P7VN-LFK2] [hereinafter Data Notes 2020]. Due to the change in calculation and its lack of prominence in DBR 2020, this Article will not make further references to this "Strength of minority investor protection index."

[82] Data Notes 2020, *supra* note 81, at 48 tbl. 10.

[83] On the change in terminology and nomenclature, see WORLD BANK GROUP, DOING BUSINESS 2015: GOING BEYOND EFFICIENCY 31–32 (Oct. 29, 2014), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf [https://openknowledge.worldbank.org/bitstream/handle/10986/20483/DB15-Full-Report.pdf?sequence=1&isAllowed=y] [hereinafter DBR 2015].

[84] Note that the "Protecting Minority Investors" segment of the DBRs also measure other aspects of corporate law such as disclosure and approval requirements ("Extent of disclosure index") weighted at one-third of the RPTI. Data Notes 2020, *supra* note 81, at 48 tbl. 10. The RPTI is half the weight of the composite score for "Protecting Minority Investors." *Id.*; *see also id.* at 49–50. The "Extent of shareholder governance index" makes up the other half, which in turn comprises three sub-indices

The World Bank's treatment of direct and derivative suits in the PMI Indices deserves special attention for four reasons. First, the DBR—including the indicators on "protecting investors" or "protecting minority investors"[85]—has at some point or continuously since their inception, been unambiguously prescriptivist in its value judgments,[86] and professes nakedly reformist ambitions.[87] Second, the DBRs' existence has had a demonstrable impact on law reform efforts in a substantial number of jurisdictions ("economies" in World Bank and DBR parlance),[88] at least insofar as "law in books" is concerned.[89] Third, it purports to survey the

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purporting to measure shareholder rights on voting, pre-emption, and appointments ("Extent of shareholder rights index") (30%); an eclectic mix of rights, duties, and prohibitions relating to board composition, dividends, and the parent-subsidiary relationship ("Extent of ownership and control index") (35%); duties of companies to have financial statements externally audited and to disclose information on shareholders, directors, managers, and audit reports, as well as rules on general meetings and shareholder proposals ("Extent of corporate transparency index") (35%). *Id.*; *id* at 53–54. The three sub-indices under the "Extent of shareholder governance index" are also relatively late additions to the DBR. *See* DBR 2015, *supra* note 83, at 31–32. For completeness, the DBRs also mention a "Strength of minority investor protection index." *See supra* note 81.

Not only are the four sub-indices other than EDLI and ESSI an eclectic jumble of rights, duties, liabilities, and prohibitions that may or may not relate to *minority* shareholders specifically (as opposed to shareholders generally, or to non-shareholders such the directors, the board chair, CEO, or even the company), what they purport to measure are in any event legally distinct from legal rules and mechanisms of private enforcement of corporate law, *i.e.,* shareholder suits. Accordingly, they are of tangential—if any—relevance to "Protecting Minority Investors" via shareholder lawsuits, which is the subject of this Article.

[85] *See supra* note 83.

[86] *See, e.g.,* DBR 2006, *supra* note 78, at 39 ("Protecting investors against self-dealing—the use of corporate assets for personal gain—is necessary for equity markets to develop."); *id.* at 40 (dismissing the use of government inspectors as "a second-best choice when private action is unlikely to bring results."); *id.* at 40–42 (prescribing reforms); Mathias M. Siems, *The Methods of Comparative Corporate Law*, *in* ROUTLEDGE HANDBOOK OF CORPORATE LAW 11, 24 (Roman Tomasic ed., 2017) [hereinafter Siems, *Methods*] (summarizing critiques).

[87] A strong recent statement was in the 2018 iteration: *see* WORLD BANK GROUP, DOING BUSINESS 2018: REFORMING TO CREATE JOBS at iv (Oct. 31, 2017), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf [https://perma.cc/WH6R-83XY] ("The objectives of *Doing Business* are as clear as they are ambitious: to inform the design of reforms and motivate these reforms through country benchmarking."). It is interesting that the two more recent iterations of DBR no longer feature such language but continue to contain sections appraising the economies' reform efforts. *See also* Rush Doshi et al., *The Power of Ranking: The Ease of Doing Business Indicator and Global Regulatory Behavior*, *in* THE POWER OF GLOBAL PERFORMANCE INDICATORS 25 (Judith G. Kelley & Beth A. Simmons eds., 2020).

[88] *See, e.g.,* Lin & Ewing-Chow, *supra* note 14, at 48–50; McCormack, *supra* note 7, at 655–56; Mathias M. Siems, *The End of Comparative Law*, 2 J. COMP. L. 133, 144 (2007). *See generally* Doshi et al., *supra* note 87.

[89] There is nothing in the DBR to suggest that it aims to measure the "law in action" insofar as shareholder protection is concerned. In fact, in the article establishing the scholarly foundation for the DBR methodology, the authors made it clear that they were not interested in the law in action. Djankov et al., *Self-Dealing*, *supra* note 4, at 440 (stating that, in the context of the UK, "[a]lthough plaintiffs are unlikely to prevail, we follow the letter of the law and code U.K. standing to sue as 1, since it is possible

largest number of jurisdictions.[90] Fourth, the DBR is of unparalleled longevity; until the unprecedented pause on publication of the DBR 2021[91] and subsequent cancellation of the DBR,[92] data has been dutifully gathered and published annually for fifteen years.[93]

This Part of the Article scrutinizes the DBR's overall and PMI Indices-specific methodology, the precise questions asked in its data collection instrument, and the scholarly article on which the enterprise is based. In so doing, it reveals that the DBR's terminology and labels neither truly measure both derivative actions and direct suits, nor both Director Liability and Shareholder Protection functions of shareholder lawsuits. Rather, the DBR, by eliding critical distinctions in the forms and functions of shareholder lawsuits, is inconsistent, confusing, and misleading—and presents a limited and distorted representation of shareholder lawsuits in corporate law.

A. The Doing Business *Reports' Methodology and the Case of "Mr. James"*

The DBR's overall and PMI Indices-specific methodology, as based on the 2020 edition, bears explanation. The World Bank claims that DBR data is "collected in a standardized way," with "the *Doing Business* team, together with expert advisers" designing questionnaires. In each questionnaire, "a simple business case" is used "to ensure comparability across economies and over time."[94] The questionnaires are administered to "local experts" who "have several rounds of interaction with the *Doing Business* team, involving conference calls, written correspondence, and

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to sue").

[90] *Compare* DBR 2006, *supra* note 78, at 101-03 (providing "Protecting Investors" data for 145 out of 155 "economies"), *and* World Bank, *Ease of Doing Business Rankings*, WORLD BANK GRP. (2020), https://www.doingbusiness.org/en/rankings [https://perma.cc/78YH-5KM8] (providing data on and ranking 190 out of 191 "economies" on "Protecting Minority Investors" for DBR 2020), *with* La Porta et al., *Law and Finance*, *supra* note 4, at 1113 (providing data on 49 "countries"); Djankov et al., *Self-Dealing*, *supra* note 4, at 431 (providing data on 72 "countries"); *and* CBR-ESPI, *supra* note 77, at 2 (covering 30 "countries").

[91] *See Doing Business – Data Irregularities Statement*, WORLD BANK GRP. (Aug. 27, 2020), https://www.worldbank.org/en/news/statement/2020/08/27/doing-business---data-irregularities-statement [https://perma.cc/D5D4-BYUB].

[92] *See World Bank Group to Discontinue Doing Business Report*, WORLD BANK GRP. (Sep. 16, 2021), https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report [https://perma.cc/FN35-D2NP].

[93] Past data from DBR 2006 to DBR 2019 are available via World Bank, *Historical Data Sets and Trends Data*, WORLD BANK GRP. (2021), https://www.doingbusiness.org/en/custom-query (last visited Mar. 14, 2021). The SPI contains more years' worth of data but has not been updated with data from years after 2013.

[94] Data Notes 2020, *supra* note 81, at 1.

visits by the team." The questionnaire data is further "subjected to numerous rounds of verification, leading to revisions or expansions of the information collected."[95]

The World Bank relies on the responses of "contributors" from the surveyed economies.[96] These are "corporate and securities lawyers" for the "protecting minority investors" indicators.[97] For the EDLI and ESSI (which in turn comprise two-thirds of the RPTI),[98] contributors respond to a uniform "Conflict of Interest case study"[99] (a hypothetical scenario) in a standard questionnaire ("PMI Questionnaire").

The hypothetical is as follows. "Buyer" is a listed, non-state-owned company that is 60% owned by a single individual ("Mr. James"). Mr. James is also one of five directors of Buyer—albeit not the highest executive or board chair—and is accordingly Buyer's controlling shareholder-director. Mr. James also owns 90% of another company ("Seller"). Mr. James proposes a transaction by which Buyer would purchase certain assets from Seller. It is assumed that all mandatory disclosures are made, and all necessary approvals are obtained in respect of the transaction. Buyer agrees and pays for the assets in cash amounting to 10% of Buyer's total assets. Buyer's shareholders discover after the transaction that the assets were purchased at above their market value and seek to commence legal proceedings against Mr. James and the other four directors of Buyer.

Contributors' responses to the sixteen questions for the hypothetical in the DBR 2020 PMI Questionnaire form the basis for the three sub-indices that in turn make up the RPTI. Specifically, questions 6 to 10 in the questionnaire correspond to the EDLI's seven components, and questions 11 to 16 to the ESSI's six.[100]

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[95] *Id*. at 2.

[96] A list of contributors electing to be acknowledged is available at WORLD BANK GROUP, DOING BUSINESS 2020: COMPARING BUSINESS REGULATION IN 190 ECONOMIES 137-235 (Oct. 24, 2019), https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020---with-contributors.pdf [https://perma.cc/B33D-KH5P].

[97] World Bank, *Protecting Minority Investors methodology*, WORLD BANK GRP. (2020), https://www.doingbusiness.org/en/methodology/protecting-minority-investors [https://perma.cc/CB38-BC28] [hereinafter PMI Methodology]; Data Notes 2020, *supra* note 81, at 47.

[98] For completeness, the "Extent of disclosure index" comprising the RPTI's last third is also based on the same hypothetical but will not be discussed for reasons elaborated upon at *supra* note 84.

[99] *See* World Bank Group, *Doing Business 2020: Protecting Minority Investors in <<Survey_Economy>>* 3-4, https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/DB20-Protecting-Minority-Investors-Questionnaire.pdf [https://perma.cc/LDM6-XBXK] [hereinafter PMI Questionnaire]; PMI Methodology, *supra* note 97; Data Notes 2020, *supra* note 81, at 48-52.

[100] PMI Questionnaire, *supra* note 99, at 4-6; Data Notes 2020, *supra* note 81, at 50-52.

Because issues of directors' liability for fraud, misstatement, or non-disclosure do not arise,[101] the EDLI measures only the liability of Mr. James and Buyer's other directors for their role in the hypothetical transaction. An economy scores higher if: (1) shareholders have a theoretical basis to sue Mr. James whether directly or derivatively;[102] (2) the range of directors that may be found liable is wider (just Mr. James versus both Mr. James and other directors);[103] (3) the legal standard is lower for imposing civil liability on the director (fraud/bad faith/gross negligence of the director versus mere director negligence versus mere unfairness/prejudice to shareholders)[104] or for voiding/rescission of the transaction (fraud/bad faith/gross negligence versus oppressive/unfairly prejudicial to shareholders versus unfair/conflict of interest);[105] or (4) if the range of legal outcomes is broader (damages,

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101 Data Notes 2020, *supra* note 81, at 50, 101 n.4 (mentioning fraud expressly). Logically, where disclosures were accurately made and approvals properly obtained, there can be no liability for misstatements or non-disclosure.

102 Question 6 asks, "Can shareholders representing 10% of Buyer's share capital sue Mr. James for the losses that the transaction caused to Buyer?" PMI Questionnaire, *supra* note 99, at 4.

103 Question 7 asks, "Is evidence of unfairness, a conflict of interest or damages sufficient to hold Mr. James liable for the damage that the transaction causes to the company?", and question 8 asks, "Is evidence of unfairness, a conflict of interest or damages sufficient to hold the other board members for the damage that the transaction causes to the company?" PMI Questionnaire, *supra* note 99, at 5.

104 Question 7 asks, "Is evidence of unfairness, a conflict of interest or damages sufficient to hold Mr. James liable for the damage that the transaction causes to the company?", and question 8 swaps out "Mr. James" for "the other board members." PMI Questionnaire, *supra* note 99, at 5. The drop-down menu options are not disclosed in the questionnaire, but the Data Notes provide hints. *See* Data Notes 2020, *supra* note 81, at 50-51 ("A score of 0 is assigned if Mr. James cannot be held liable or can be held liable only for fraud, bad faith, or gross negligence; 1 if Mr. James can be held liable only if he influenced the approval of the transaction or was negligent; or 2 if Mr. James can be held liable when the transaction is unfair or prejudicial to shareholders."); *id*. at 51 (replacing references to "Mr. James" with "other executives and directors (the CEO, members of the board of directors, or members of the supervisory board)").

105 Data Notes 2020, *supra* note 81, at 51 ("Whether a court can void the transaction upon a successful claim by a shareholder plaintiff. A score of 0 is assigned if rescission is unavailable or is available only in case of fraud, bad faith, or gross negligence; 1 if rescission is available when the transaction is oppressive or prejudicial to the other shareholders; or 2 if rescission is available when the transaction is unfair or entails a conflict of interest.").

Note that neither the 2020 PMI Questionnaire nor Data Notes make clear *whose* fraud/bad faith/negligence or conflict of interest although presumably from context it means the directors. It is also unclear to *whom* the transaction must be "unfair" for a jurisdiction to score 2 out of 2, and how this "unfair" option is separate and distinct from "oppressive or prejudicial to other shareholders."

repayment of profits, disqualification from service as management,[106] voiding/rescission of the transaction[107]).

B. Exposing the Basic Premises Underlying the DBR's Protecting Minority Investor (PMI) Indices

Having laid out the DBR's methodology, the next step would be to establish which category of shareholder lawsuits and functions, or which combination of the above, is really being measured. This calls for delving deeper into the DBR, especially the PMI Questionnaire. On their face, however, they do not assist. The first question relevant to the PMI Indices, Question 6, seems agnostic as to whether the shareholder suit against Mr. James is direct or derivative.[108] As to which function, the DBR labels—the "Protecting Minority Investors" indicator but the "Extent of director liability index"—point in both directions and are hence inconclusive.

This Subpart takes a deep dive to expose the premises on which the DBR has operated, into not just the DBR materials but also the article "The Law and Economics of Self-Dealing" ("DLLS Article") by the famed Law and Finance scholars Simeon Djankov and others ("DLLS").[109] The *Doing Business* website expressly credits this article as the source of the methodology and provides a weblink to the published article as archived on the website.[110] As the foundation on which the legitimacy of the DBR's PMI Indices rest, it is only fitting that the DLLS Article should be put under the strictest scrutiny. The three premises so identified will illuminate what exactly the DBR has been measuring.

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[106] Question 9— "If shareholders are successful in their action against Mr. James, what remedies are available?"—offers the contributor three answer options, namely "He pays damages," "He repays personal profits made from the transaction," and "He is disqualified from serving in the management of any company for 1 year or more." PMI Questionnaire, *supra* note 99, at 5. Note that the third answer option, *i.e.*, disqualification from serving as company management, is neither a remedy for the company nor the (minority) shareholders; it is more accurately characterized as a legal "outcome" rather than "remedy." Interestingly, there is no corresponding question in the questionnaire on the legal outcomes available when the shareholder-plaintiff succeeds against a director *other than Mr. James*.

[107] Question 10: "Is evidence of unfairness, a conflict of interest or damages sufficient to void/rescind the transaction?" PMI Questionnaire, *supra* note 99, at 5.

[108] *See supra* note 102 and accompanying text.

[109] Djankov et al., *Self-Dealing*, *supra* note 4, at 435 (defining the Anti-Self-Dealing Index and its components).

[110] *Methodology for* Doing Business, THE WORLD BANK – DOING BUSINESS, https://www.doingbusiness.org/en/methodology (last visited Jan. 24, 2022) [https://perma.cc/KLY6-KDER] (linking to Djankov et al., *Self-Dealing*, *supra* note 4). On DBR's history and the connection between key persons at the World Bank and the "Law and Finance" movement, see Simeon Djankov, *The Doing Business Project: How it Started*, 30 J. ECON. PERSPECTIVES 247 (2016).

1. Mr. James is liable first (if not only) to the company

To whom is Mr. James liable in the event of a successful shareholder lawsuit? The two possibilities are the company (Buyer) and the shareholder-plaintiff.[111] On its face, the PMI Questionnaire is unclear as to which possibility it is contemplating and asking about. Question 6 asks only whether shareholders can sue Mr. James but without specifying to whom Mr. James will be liable.[112] Similarly, question 9 specifies two possible remedies—damages and payment of profits—but without specifying to *whom* the money must be paid.[113]

Contextual evidence points to the former possibility, i.e., liability to the company. Questions 6 and 7 contain respectively the qualifying clauses "for the losses that the transaction caused to Buyer" and "for the damage that the transaction causes to the company." A further clue is in the DLLS Article on which the PMI Indices is based. A key passage in the DLLS Article reads:

> [I]n most jurisdictions, *any damage that the transaction causes is assigned to Buyer rather than to individual shareholders*. Since Buyer is unlikely to pursue legal action that would harm its controlling shareholder, we measure the obstacles (e.g., high ownership requirements) faced by minority shareholders to gain standing to sue on behalf of Buyer. The cost of private enforcement increases with the obstacles faced by minority shareholders to sue derivatively."[114]

This reveals that the DLLS Article—and by extension the DBR—assumes (at least for most, if unspecified, jurisdictions) that in the hypothetical only the company suffers actionable harm. If only the company suffers actionable harm, barring exceptional circumstances, orthodox corporate law doctrine generally holds that the wrongdoer (Mr. James) is liable only to the victim of the harm, i.e., the company.[115] Accordingly,

[111] It is also possible that Mr. James could be liable to all other shareholders including but not limited to the shareholder-plaintiff, but that is a subset of liability to the shareholder-plaintiff. It is not likely that Mr. James would be liable to other shareholders *excluding* the shareholder-plaintiff.

[112] PMI Questionnaire, *supra* note 99, at 4 ("Can shareholders representing 10% of Buyer's share capital sue Mr. James for the losses that the transaction caused to Buyer?").

[113] PMI Questionnaire, *supra* note 99, at 5.

[114] Djankov et al., *Self-Dealing*, *supra* note 4, at 437 (emphasis added).

[115] Whether this makes economic, rather than legal-doctrinal sense is a separate discussion. *See*

reading the DLLS Article and PMI Questionnaire questions 6, 7, and 9 together, the natural inference is that the question 9—and therefore the PMI Indices—contemplate that Mr. James is liable for the monetary relief that is be made to the company, the harmed party, but not the shareholder-plaintiff, who is ostensibly unharmed.

For completeness, the PMI Questionnaire's phrasing also raises the possibility that Mr. James may be liable for monetary compensation or to restore his profits to the shareholder-plaintiff personally and directly (i.e., without paying the company). This possibility makes logical, economic sense because, for reasons explained above, even if Mr. James were to pay the company it does not result in any money going to the shareholder-plaintiff directly.[116] However, the Questionnaire is completely silent on whether the shareholder-plaintiff is considered to have, as a consequence of the transaction, suffered actionable harm in their own personal capacity as shareholder, as opposed to merely in an economic sense as a consequence of diminishment in the value of Buyer's assets and therefore its shares.[117] Because the hypothetical contemplates a listed company, unless the shareholder-plaintiff(s) own(s) a substantial percentage of Buyer's total issued shares, their economic or legal "loss" is insubstantial. Hence, the reasonable contributor is more likely to interpret the Questionnaire as referring to Mr. James's liability to the company, instead of the shareholder-plaintiff.

2. Mr. James is liable qua director

The hypothetical's Mr. James wears two separate and distinct hats: he is simultaneously a director and the controlling shareholder of Buyer. It is therefore possible to interpret Mr. James's actions in the transaction to be in his capacity as director, as controlling shareholder, or both.

The PMI Questionnaire itself does not take an unequivocal position, as none of the questions relevant to Mr. James's liability—questions 6, 7, and 9—refer to Mr. James specifically as director or controlling shareholder. However, three clues point to Mr. James's liability *qua* director as the better interpretation. First is the existence of question 8, which is identical in phrasing as question 7 except that it refers to "other board members" (i.e., directors other than Mr. James) rather than Mr. James. Given the similarity

supra Part I.A.2 and *infra* text accompanying note 116.

[116] *See supra* Part I.A.2.

[117] On the assumption in the original DLLS Article as opposed to the PMI Questionnaire itself, see *supra* note 114 and accompanying text.

between the two questions, it would be reasonable to infer that Mr. James's liability is also *qua* director in question 7. Further support lies in the fact that Mr. James's status as a 60% or controlling shareholder is never mentioned in any of the relevant PMI Questionnaire questions (6 to 16). Finally, there is language in the DBR Data Notes reflecting the World Bank's characterization of the EDLI as primarily, if not exclusively, an assessment of liability as director, including but not limited to the EDLI's very nomenclature ("Extent of director liability index") if it is to be taken at face value.[118]

3. The shareholder suit used against Mr. James is a derivative action

On the face of it, the PMI Questionnaire does not clearly contemplate that the shareholder suit to be employed against Mr. James is to be exclusively a direct suit or derivative action, nor does it distinguish between the two. Question 6 simply asks whether "shareholders representing 10% of Buyer's share capital" can "sue Mr. James."[119] In fact, none of the questions corresponding to the EDLI (6 to 10) demonstrate any awareness of direct and derivative suits being distinct possibilities. The DBR Data Notes' use of "directly or derivatively,"[120] and the DLLS Article's use of the phrase "the availability of direct and derivative suits" at one location[121] seemingly reinforces the DBR's agnosticism as to derivative actions or direct suits.

A more careful examination reveals otherwise. First, in the critical table presenting all the variables investigated, the DLLS Article's description of the variable "Standing to Sue" reads: "Equals 1 if a 10% shareholder can sue *derivatively* either Mr. James or the approving bodies or both for damages that the firm suffered as a result of the transaction, and zero otherwise."[122] A direct contradiction thus arises within the DLLS Article: is it measuring *both* derivative actions *and* direct suits (at page 433), or

[118] Data Notes 2020, *supra* note 81, at 48 ("shareholders' ability to sue and hold directors liable for corporate self-dealing (extent of director liability index)"), 48 fig. 11 ("Extent of director liability" and "Ability to sue directors for damages"), 51 ("The [EDLI] ranges from 0 to 10, with higher values indicating greater liability of directors.").

[119] PMI Questionnaire, *supra* note 99, at 4.

[120] Data Notes 2020, *supra* note 81, at 50 ("Whether shareholders can sue directly or derivatively for the damage the transaction causes to the company. A score of 0 is assigned if suits are unavailable or are available only for shareholders holding more than 10% of the company's share capital; a score of 1 is assigned if direct or derivative suits are available for shareholders holding 10% or less of share capital.").

[121] Djankov et al., *Self-Dealing*, *supra* note 4, at 433.

[122] Djankov et al., *Self-Dealing*, *supra* note 4, at 434 tbl. 1 (emphasis added). To avoid all doubt, this is from the version of the article archived at the DBR website at https://perma.cc/7THC-UFNL. If this were in error, the onus would be on the World Bank *Doing Business* team to rectify this with a corrigendum.

derivative actions only (in Table 1 at page 434)? Giving economists generally and DLLS specifically the benefit of the doubt on whether they took their variables and data seriously,[123] the table defining the variables should be given greater weight than a stray line in the main text of the article. Any lingering doubts should be dispelled by a third section of text in the DLLS Article:

> … in most jurisdictions, any damage that the transaction causes is assigned to Buyer rather than to individual shareholders. Since Buyer is unlikely to pursue legal action that would harm its controlling shareholder, *we measure the obstacles* (e.g., high ownership requirements) *faced by minority shareholders to gain standing to sue on behalf of Buyer*. The cost of private enforcement increases with the obstacles faced by minority shareholders to sue *derivatively*.[124]

This is the smoking gun: the only reasonable inference to be drawn from this passage is that DLLS—and by extension, the World Bank—had in mind only derivative actions.

A further major piece of evidence supporting the derivative action interpretation of the EDLI lies in the ESSI. The ESSI claims to measure "ease of shareholder suits" generally, but one component (first added in the 2015 DBR[125]) stands out: "Whether shareholder-plaintiffs can recover their legal expenses from the company."[126] Nothing in the DBR Data Notes indicates whether the World Bank means the company as a *defendant*, a co-plaintiff, non-party, or in some other capacity.[127] However, there is nothing unusual in loser pays jurisdictions about the company paying the

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[123] Having said that, the many contradictions, conflicts, or inconsistencies between the Data Notes, PMI Questionnaire, and the DLLS Article do give rise to at least a reasonable suspicion that not all the actors involved were always necessarily clear, consistent, or conscientious about what they were doing.

[124] Djankov et al., *Self-Dealing*, *supra* note 4, at 437 (emphasis added).

[125] Lin & Ewing-Chow, *supra* note 14, at 53–54.

[126] Data Notes 2020, *supra* note 81, at 52. *See also id*. ("A score of 0 is assigned if no, 1 if plaintiffs can recover their legal expenses from the company upon a successful outcome of their legal action, or 2 if plaintiffs can recover their legal expenses from the company regardless of the outcome of their legal action.").

[127] *Cf*. PMI Questionnaire, *supra* note 99, at 6 ("Must the company or defendant reimburse legal expenses incurred by shareholders in their action against company directors? (e.g., court fees, attorney fees and related expenses)"). The PMI Questionnaire phrasing is vaguer and may possibly accommodate an interpretation whereby the defendant—not being the company—reimbursing the shareholder-plaintiff's expenses could be consistent with a direct suit, but the DBR Data Notes is unequivocal in referring only to *the company*.

shareholder-plaintiff's legal expenses if the company is the losing defendant. The only conceivable circumstance in which the company would pay the shareholder-plaintiff's legal expenses in any capacity other than defendant would be in a derivative action.[128] Accordingly, this ESSI variable—and the ESSI overall—is further support for the derivative action interpretation.

C. What the DBR Is Really About: Director Liability, Not Shareholder Protection; Derivative Actions, Not Direct Suits

The previous Subpart has established that careful analysis of the vague and inconsistent terminology used in the PMI Questionnaire, DBR Data Notes, and the DLLS Article reveals the true premises upon which the *Doing Business* team has constructed the PMI Indices and collected and coded data for it: Mr. James is liable to the company in his capacity as director and is sued using a derivative action. The conclusions are clear. The only function of shareholder lawsuits the DBR meaningfully measures is Director Liability, not Shareholder Protection. The only type of shareholder lawsuits it is concerned with are derivative actions, not direct suits.

For completeness, consider how a competent corporate law jurist without sight of the PMI Questionnaire questions, the DBR Data Notes, or the DLLS Article, and therefore unencumbered by the premises as exposed above, might have approached the hypothetical. Such a jurist would be aware of the many legal possibilities open to Buyer's shareholders in response to Mr. James's actions.[129]

Consider the four pairs of possibilities. Derivative actions and direct suits comprise the two mechanisms (i.e., shareholder suits) by which Buyer's shareholders may sue Mr. James. There are two possible persons to whom Mr. James may be held liable: the company (Buyer) (not Shareholder Protection), and the shareholder-plaintiff (Shareholder Protection).[130] As Mr. James is simultaneously a director and controlling shareholder of Buyer, there are two distinct conceptual bases for Mr. James's liability: as director (corresponding to the Director Liability function), and as controlling shareholder (not Director Liability). It is also possible that the shareholder-plaintiff may have recourse via a lawsuit, but one in which a

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[128] As discussed above at Part 1.A.2, some jurisdictions have rules that allow (usually successful) shareholder-plaintiffs to recover part or whole of their legal expenses from the company.

[129] It cannot be ruled out that the World Bank contributors gave nuanced, contextualized answers in their responses at some point in the DBR's history; however, the 2020 edition contains no evidence to suggest that these other possibilities have resulted in changes to the DBR's methodology.

[130] *See supra* note 111 and accompanying text.

successful outcome does not cause Mr. James to be personally liable to either the company or the shareholder-plaintiff (not Director Liability). Excluding the impossible combinations,[131] the seven legally possible combinations are presented in Table 1.

Table 1: Possible Lawsuit Combinations			
No.	Shareholder Suit Type	Mr. James is liable to the …	Mr. James is liable in his capacity as …
1	**Derivative**	**Company**	**Director**
2	Derivative	Company	Controlling shareholder
3	Direct	Company	Director
4	Direct	Company	Controlling shareholder
5	Direct	Shareholder	Director
6	Direct	Shareholder	Controlling shareholder
7	Direct	Not liable	Not applicable

The DBR reflects just one of the possible options: Combination 1, the derivative action *par excellence*. None of the other six possible combinations are captured by the DBR, and all except one of these neglected combinations are direct suits. The DBR's narrow focus on Director Liability and derivative actions to the exclusion of alternatives is brought only into starker relief.

In light of the above, two observations are evident. First, the "Protecting Minority Investors" nomenclature, which creates the impression that the DBR is concerned with the Shareholder Protection function of shareholder litigation mechanisms as opposed to Director Liability, is misleading and

[131] Given that derivative actions are defined at Part I.A.2 above as "a mechanism that a shareholder or equivalent may, by virtue of or in connection with their status as shareholder, take the place of the company in litigating to obtain a legal outcome *against a director or equivalent* that binds the company in circumstances where the company does not litigate directly," it is impossible for a derivative action to be used to hold the defendant, whether as director or controlling shareholder, liable to the shareholder *personally*.

That said, there are derivative action mechanisms that make it possible for the defendant to be held personally liable to pay the shareholder-plaintiff; an example would be the Canada Business Corporations Act, R.S.C. 1985, c C-44, § 240(c) (Can.) (permitting the court to order payment to "security holders," which includes shareholders). *See also* Reisberg, *Access to Justice*, *supra* note 49, at 1034–36 (on the Israeli derivative action). However, if and when a derivative action does result in personal relief to the shareholder-plaintiff, it should be characterized also as a direct suit in terms of *function*.

inappropriate. Regardless of why this misrepresentation arose,[132] DLLS and the DBR officials have erred gravely. Second, the World Bank focused only on the laws on derivative suits in the EDLI and ESSI, while disregarding direct suits. In so doing, the World Bank has failed to represent the richness and variety of direct suits in the surveyed economies.

The next Part of this Article shows how direct suits in selected leading jurisdictions perform, at least at the level of "law in books," the function of Shareholder Protection in various ways—and in some cases, Director Liability as well.

III. TOWARDS A COMPARATIVE TAXONOMY OF DIRECT SUITS

Part II has shown how the Shareholder Protection function of shareholder lawsuits and the existence of direct suits have been given short shrift in the world's most consequential document that purports to code and rank almost every economy on the planet based on how much they "protect[] minority investors."[133] This oversight is to some extent also reflected in the comparative corporate law literature, and thus permeates the conversation from all sides. In contrast with derivative actions, comparative legal scholarship on direct suits was and still is far less organized and developed. While rectification of this deficit is beyond the scope of this Article, this Part takes a substantive first step towards that ultimate objective by illustrating, with examples, the diversity and potential utility of direct suits as modalities of not only Director Liability, but also Shareholder Protection. In so doing, this Article lays the foundation for integrating direct suits into future iterations of corporate law and governance indices.[134]

To do so, I offer a relatively jurisdiction-neutral taxonomy of direct suits[135] based on the following components: (1) subject matter; (2) basis, nature (monetary vs non-monetary), and subject (who does the outcome legally bind) of legal outcomes; and (3) function (Director Liability or Shareholder Protection). The taxonomy is fleshed out with examples of direct suits from leading corporate law jurisdictions with relatively established corporate law regimes and shareholder suit mechanisms—

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[132] One possible explanation is that the DBR's "protecting minority investors" indicators are based on their creators' unarticulated assumption that Shareholder Protection is either synonymous with or inexorably flows from Director Liability. Another is that the DBR's creators were never cognizant of this functional distinction.

[133] *Cf.* the use of "Protecting Minority Investors" (or until 2014, "Protecting Investors") as the name of a DBR indicator, *see supra* note 83 above and accompanying text.

[134] This may be considered the first step towards a formal codebook of direct suits.

[135] This taxonomy draws on – but develops and expands on – the version in Koh & Tang, *supra* note 22, at 438–48.

primarily the Anglo-Commonwealth (the United Kingdom, Canada, Australia, New Zealand, Singapore, and Hong Kong), Germany, and Japan, but also including Korea and Delaware—although this taxonomy makes no claim of comprehensiveness or exhaustiveness. In contrast with the *DBR*, which addressed only a single hypothetical of a self-dealing transaction, this Part is not so strictly confined. Direct suits that are directed against the company as the defendant, as well as direct suits the result of which binds and benefits the company in a non-monetary sense, are also considered.

For the avoidance of doubt and for considerations of length, this Part discusses only direct suits founded in corporate law, but not in securities or insolvency law. While the focus will be on direct suits available for shareholders of listed companies, direct suits available only for unlisted or close corporations will also be mentioned.

A. Direct Monetary Claims

A "direct monetary claim" is defined as a direct suit resulting in monetary recovery to the shareholder personally. [136] Such suits are Shareholder Protection *par excellence*; Director Liability is a concurrent outcome if and only if the defendant made liable to pay is a director. For the avoidance of doubt, a direct suit may possibly result in monetary recovery to the company, but as this does not translate to protection for the shareholder-plaintiff personally, such direct suits will not be discussed further below.[137]

In Anglo-Commonwealth jurisdictions, direct monetary claims appear to be available through oppression or unfair prejudice statutory remedies either expressly[138] or implicitly,[139] albeit with exceptions and qualifications. Hong Kong's Companies Ordinance excludes direct monetary claims for

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[136] *Cf*. definition of "direct suit" *supra* note 22 and accompanying text; *see also* Koh & Tang, *supra* note 22, at 442. In the listed company context, this category includes both corporate law claims (e.g., for breach of fiduciary duties owed personally to the shareholders), as well as claims more closely related to securities law (fraudulent or negligent misstatements, insider trading, etc.). It is also possible for concurrent claims to arise from common facts under both corporate and securities law.

[137] An example is the right of a minority shareholder of an *Aktiengesellschaft* company that is a subsidiary in a *de facto* corporate group (*faktischer Konzern*) to sue the controlling shareholder, where the controlling shareholder—without compensating the company—causes detriment to the company by causing the company to enter into a transaction or to do or refrain from doing any act, for compensation to be paid to the company. AktG, § 317 Abs 1 S 1, § 309 Abs 4 S 1–2.

[138] Canada Business Corporations Act, R.S.C. 1985, c C-44, § 241(3)(j) (Can.) and C.I. Covington Fund Inc. v. White, 2000 CanLII 22676, 10 BLR (3d) 173 [46] (Can. Ont. Sup. Ct. J.); Companies Act 1993, §174(2)(b) (N.Z.); Companies Ordinance, Cap. 622, § 725(2)(b) (H.K.).

[139] Companies Act 2006, c.46, § 996(1) (UK); Companies Act 1967, § 216(2) (Sing.); *Corporations Act 2001* (Cth), § 233(1) (Austl.).

"reflective loss" by shareholders.[140] Singapore excludes reflective loss claims by doctrine.[141] The UK appears to allow direct monetary claims for private, unlisted companies, but not listed companies.[142] For Anglo-Commonwealth-listed companies, a shareholder's direct monetary claim came closest to succeeding in Canada,[143] and remains merely theoretical elsewhere.

Shareholders of German stock corporations (*Aktiengesellschaft*) may make direct monetary claims for loss other than reflective loss against another shareholder who influences the company, the managing board, or the supervisory board to act to the company's detriment.[144] Separately, where a shareholder suffers damage in connection with a shareholder resolution, the regime on challenges to shareholder resolutions provides that the company may be ordered to pay monetary compensation to shareholders in certain circumstances; this regime is discussed in greater detail later.[145] In the *de facto* corporate group (*faktischer Konzern*) context, a minority shareholder of an *Aktiengesellschaft* may also bring a direct monetary claim against a controlling shareholder. However, where reflective loss results from a controlling shareholder causing either (1) the company to enter into a transaction, or (2) the company to do or not to do something, that loss may not be recovered via direct suit.[146]

Japan's Companies Act provides that any person other than the company, including but not limited to shareholders, who is harmed by an intentional or grossly negligent breach of duty by a stock corporation's (*Kabushiki Kaisha*) directors and officers may bring a direct monetary claim

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[140] Companies Ordinance, Cap. 622, § 725(5) (H.K.) (expressly prohibiting in its oppression statute direct monetary claims by shareholders for reflective loss).

[141] Ng Kek Wee v. Sim City Technology Ltd. [2014] SGCA 47, [2014] 4 SLR 723 [60]–[65] (Sing.).

[142] *Cf.* Rembert v. Daniel [2018] EWHC 388 (Ch), [2018] 2 BCLC 156 [39], [41] (Eng.) (trial court ordered defendant to pay equitable compensation to the shareholder-plaintiff personally) with Re Astec (BSR) Plc [1998] 2 BCLC 556 (Ch) 588–89 (Eng.) (rejecting the possibility that "legitimate expectations" (which at the time provided the doctrinal basis for relief to be granted to minority shareholders under the unfair prejudice provision) may apply in listed companies). There is no plausible alternative, theoretical or practical, to the unfair prejudice remedy as a basis for direct monetary claims in listed companies.

[143] Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board (2006), 79 O.R. 3d 81, 263 D.L.R. 4th 450 [113]–[123] (Can. Ont. C.A.). On direct monetary claims in Canada see generally Stephanie Ben-Ishai & Poonam Puri, *The Canadian Oppression Remedy Judicially Considered: 1995-2001*, 30 QUEENS L.J. 79, 102, 107, 109, 113 (2005).

[144] Technically, any person, including but not limited to shareholders, is liable for any damage to the company and the shareholders. AktG, § 117 (Ger.). Shareholders' reflective loss is excluded. CHRISTINE WINDBICHLER, GESELLSCHAFTSRECHT [CORPORATE LAW] 404 (24th ed. 2017).

[145] Part III.D; *see infra* notes 202–203 and accompanying text.

[146] AktG, § 317.

against the wrongdoers.[147] There is an equivalent provision[148] that arguably allows shareholders (strictly speaking, "members" (*sha'in*))[149] of limited liability corporations (*Gōdō Kaisha*) to sue manager-shareholders.[150] The Korean Commercial Act also provides for a similar direct monetary claim.[151] Whether reflective loss may be recovered by shareholder-plaintiffs via direct monetary claims is debated in both jurisdictions.[152]

Much of the direct monetary claims in listed companies incorporated in the US state of Delaware take the form of direct suits for breach of fiduciary duties in the context of merger transactions,[153] usually brought as a class action and sometimes known—somewhat misleadingly—by the name "quasi-appraisal."[154]

B. Withdrawal

Withdrawal is defined as a direct suit resulting in exit of the shareholder from the company and the payment to the exiting shareholder of a monetary sum for the value of their shares.[155] It combines two elements: a direct monetary claim; and the shareholder's loss of status, rights, and duties as a

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[147] Kaishahō, art. 429(1). On article 429 generally, see Kazushi Yoshihara, *§ 429*, *in* KAISHA-HŌ KONMENTĀRU 9 – KIKAN (3) [COMMENTARY ON THE COMPANIES ACT VOLUME 9 – ORGANS (3)] 337 (Shinsaku Iwahara ed., 2014). On directors' and officers' liability for false statements or disclosures, see Kaishahō, art. 429(2).

[148] Kaishahō, art. 597.

[149] Yukimi Ozeki, *§ 597*, *in* KAISHA-HŌ KONMENTĀRU 14 – MOCHIBUN KAISHA (1) [COMMENTARY ON THE COMPANIES ACT VOLUME 14 – MEMBERSHIP COMPANIES (1)] 172, 173 (Hideki Kanda ed., 2014).

[150] *Gōdō Kaisha* do not have directors; they are managed by "executive members." Alan K. Koh, *Shareholder Protection in Close Corporations and the Curious Case of Japan: The Enigmatic Past and Present of Withdrawal in a Leading Economy*, 53 VAND. J. TRANSNAT'L L. 1207, 1237–38 (2020) [hereinafter Koh, *Withdrawal*].

[151] Sangbeob [Commercial Act], Act No. 17362 (2020), art. 401 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, http://elaw.klri.re.kr/eng_service/main.do (search required) (applying to *Jusik-Hoesa* stock corporations); *see generally* Cho, *supra* note 29. *See also* Sangbeob, art. 408-8(2) (applicable to *jibhaeng imweon* (sometimes translated "executive directors" but the concept is closer to "executive officer" / Japan's *shikkō-yaku*) in stock corporations that opt into them), art. 567 (applying article 401 *mutatis mutandis* to *Yuhan-Hoesa* (limited liability corporation roughly comparable to the German GmbH or the defunct Japanese *Yūgen Kaisha*)).

[152] For summaries of the debates, *see* Yoshihara, *supra* note 147, at 382–84 (Japan) and Cho, *supra* note 29, at 5–6, 10–13, 14–16 (Korea).

[153] Including the watershed case of Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[154] Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983). Quasi-appraisal is the label attached to the quantification of damages payable when a director "breaches [their] duty of disclosure in connection with a transaction that requires a stockholder vote." In re Orchard Enterprises, Inc., 88 A.3d 1, 42 (Del. Ch. 2014). Accordingly, this should not be confused with "appraisal" (discussed at Part III.C below) in the technical sense.

[155] *See* text accompanying *supra* note 35; *Cf*. Koh, *Withdrawal*, *supra* note 150, at 1217.

shareholder.[156] Provided the shareholder-plaintiff desires to cease involvement with the company and obtains a monetary outcome from the defendant[157] no worse than a voluntary sale of their shares to another party—insofar as such a sale is legally or practically feasible[158]— withdrawal is a form of Shareholder Protection *par excellence*.[159]

However, this primarily benefits shareholders of close corporations,[160] whereas withdrawal is rarely available in the listed company context. While there is no express exclusion by statute of listed or unlisted "public" companies from the scope of the oppression/unfair prejudice remedies, there is scant authority in the Anglo-Commonwealth to suggest that oppression/unfair prejudice may be invoked by a shareholder-plaintiff to seek withdrawal in such contexts.[161] Canada may be an exception.[162] There is also no recognized legal basis for withdrawal for public company forms in Japan (*Kabushiki Kaisha* (KK)), Germany (*Aktiengesellschaft*), or Korea (*Jusik-Hoesa*).[163]

C. Appraisal

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[156] *See id.* (defining "exit" as "any legal mechanism by which a shareholder terminates their status as shareholder and the legal rights and obligations between the shareholder and the corporation and between the exiting shareholder and the other shareholders").

[157] The defendant liable to pay the withdrawing shareholder-plaintiff varies by jurisdiction. *See* Alan K. Koh, Shareholder Protection in Close Corporations: Theory, Operation and Application of Shareholder Withdrawal ch. III.D (pp. 83–84) (Dr. jur. dissertation, Goethe University Frankfurt, 2019) (manuscript on file with author).

[158] Restrictions on share transfers and the absence of a liquid market for shares—which are particularly applicable to unlisted, closely-held companies ("close corporations")—may make a voluntary sale difficult or impossible.

[159] There is no body of examples in which a director is the defendant liable for the consequences of withdrawal. Accordingly, there is little to suggest that withdrawal performs the Director Liability Function in reality, although the theoretical possibility exists.

[160] Withdrawal is available for the close corporation forms of the UK, US, Germany, and Japan. Koh, *Withdrawal*, *supra* note 150, at 1217–19, 1242–51. For a comparative overview of withdrawal as applicable to close corporations, see Koh & Tang, *supra* note 22, at 438–41.

[161] *See, e.g.*, Re Astec (BSR) Plc [1998] 2 BCLC 556 (ChD) 570 (Eng.); *Latimer Holdings Ltd. v. SEA Holdings N.Z. Ltd.* [2005] 2 NZLR 328 (CA) [102]–[111].

[162] On oppression suits arising from takeover bids in listed companies, *see* Ben-Ishai & Puri, *supra* note 143, 92–97; MARKUS KOEHNEN, OPPRESSION AND RELATED REMEDIES 265–326 (2004). For completeness, the leading Canadian case of BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 S.C.R. 560 (Can.) does not concern shareholder-plaintiffs, and the prominent Canadian shareholder oppression case, Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board (2006) 79 O.R. (3d) 81; 263 D.L.R. 4th 450 (Can. Ont. C.A.) did not involve withdrawal, but rather a direct monetary claim, as the shareholder-plaintiffs had already lost their shares via compulsory acquisition.

[163] *See* Koh, *Withdrawal*, *supra* note 150, at 1223–27; CHRISTIAN HOFMANN, DER MINDERHEITSSCHUTZ IM GESELLSCHAFTSRECHT [MINORITY PROTECTION IN CORPORATE LAW] 486 (2011) (observing that there has been little literature on a withdrawal on good cause (*Austritt aus wichtigem Grund*) regime for AG shareholders, but arguing that there are no fundamental objections to recognition either).

An appraisal[164] action[165] can mean two separate sub-types of legal action that are not mutually exclusive; a single jurisdiction may have either or both. Appraisal rights offer shareholders either (a) the option of seeking a superior monetary outcome in terms of a more favorable valuation for their shares than doing nothing, or (b) the option in (a) above *plus* the option of exiting the company at a fair and independently assessed price instead of accepting the alternative outcome/*status quo*. The availability of appraisal rights is not conditioned on legally recognized harm to the shareholder-plaintiff; it suffices that the legal conditions for triggering appraisal are met. Depending on the precise legal mechanism and type of transaction involved, the defendant liable to pay the shareholder-plaintiff in an appraisal action may be the company,[166] another shareholder, or even a third party. Accordingly, appraisal variants are modalities of Shareholder Protection, but not Director Liability.

The first appraisal variant is a direct suit by which a shareholder may, "in connection with the prospect of involuntary loss of their shares and status as shareholder in exchange for compensation, … have the compensation quantum determined or reviewed by the court."[167] A self-dealing transaction such as the DBR hypothetical by itself does not give rise to appraisal. Rather, this type of appraisal action is typically available to minority shareholders dissenting against (or at least not voting in favor of) specific "squeeze-out" transactions such as cash mergers, compulsory acquisitions, or takeovers. As a shareholder would have no incentive to bring such a pure valuation-type appraisal action unless the goal is to receive greater compensation than they would otherwise have, this type of appraisal action resembles a direct monetary claim. Jurisdictions offering this type of appraisal action include Delaware,[168] Germany,[169] Japan,[170] and South Korea.[171]

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[164] Also known in Canada and some other jurisdictions as "dissenters' rights."

[165] *See generally* Martin Gelter, *Mapping Types of Shareholder Lawsuits Across Jurisdictions*, RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 459, 466–67 (Sean Griffith et al. eds., 2018) [hereinafter Gelter, *Shareholder Lawsuits*].

[166] Or, if the company is the disappearing entity in a merger or equivalent transaction, its legal successor.

[167] Koh & Tang, *supra* note 22, at 443.

[168] For mergers with cash or securities that are either of a closely held company or otherwise not traded as consideration. DEL. CODE ANN. tit. 8, § 262(b).

[169] AktG, § 327f (Ger.).

[170] Kaishahō, art. 179-8.

[171] Sangbeob [Commercial Act], Act No. 17362 (2020), art. 360-24(8).

The second type of appraisal is a direct suit whereby "a shareholder not consenting to specified fundamental changes to the company [may] compel the company to purchase their shares at a price to be determined or reviewed by the court."[172] Usually, appraisal actions of this type may be brought in the case of fundamental corporate changes such as mergers, consolidations, and constitutional amendments which do not involve the expropriation of the shareholder-plaintiff's shares. This type of appraisal overlaps with the first appraisal type because valuation by a court is involved, but the second type contains the additional element of shareholder choice: the shareholder may either accept the consequences of the fundamental change notwithstanding their non-consent, or elect to pursue an appraisal action that results in the shareholder's exit from the company. Anglo-Commonwealth jurisdictions offering this type of appraisal actions include the UK,[173] Canada,[174] and New Zealand.[175] Civil law jurisdictions with this type of appraisal include Germany,[176] Japan,[177] and South Korea.[178]

Finally, in parts of Europe, the Anglo-Commonwealth (e.g. Singapore), and in South Korea, a shareholder may use a direct suit to compel the purchase of their shares by a controlling shareholder with a very high percentage of shares (such as 90% or more); these are usually called "sell-out" rights.[179] Insofar as sell-out rights are not tied to a specific triggering event (expropriation or non-consent to a fundamental change), they are somewhat distinct from appraisal.

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[172] Koh & Tang, *supra* note 22, at 444; for another definition *see* Hideki Kanda & Saul Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. REV. 429, 429 (1985).

[173] Albeit with the valuation to be conducted via arbitration instead of judicial proceedings and availability limited to merger or demerger-type reorganizations. *See* Insolvency Act 1986, c. 45, §§ 110–111 (UK).

[174] Canada Business Corporations Act, R.S.C. 1985, c C-44, §§ 190, 206 (Can.).

[175] Companies Act 1993, §§ 110–115 (N.Z.).

[176] Spruchverfahrensgesetz [SpruchG] [Appraisal Proceedings Law], Jun. 12, 2003, BGBl I at 838, last amended by Gesetz [G], Jul. 23, 2013, BGBl I at 2586, art. 16, § 1 (Ger.); *see generally* Gelter, *Shareholder Lawsuits*, *supra* note 165, at 467.

[177] For *Kabushiki Kaisha* stock corporations but not *Gōdō Kaisha* close corporations. Kaishahō, arts. 116, 182-4, 469, 785, 797, 806; *see also* Koh, *Appraisal*, *supra* note 42.

[178] For *Jusik-Hoesa* stock corporations only. Sangbeob [Commercial Act], Act No. 17362 (2020), arts. 360-5 (share swaps), 374-2 (acquisitions and transfers of business), 522-3 (mergers).

[179] Christoph van der Elst & Lientje Van den Steen, *Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights*, 4 EUR. CO. & FIN L. REV. 391 (2009) (discussing European sell-out rights); Companies Act 1967, § 215(3) (Sing.); Sangbeob [Commercial Act], Act No. 17362 (2020), art. 360-25 (minority shareholder in a *Jusik-Hoesa* stock corporation with a 90% controlling shareholder may bring a direct suit against the controlling shareholder to force the latter to purchase the minority's shares at a court-determined price at any time).

D. Challenges Against Corporate Acts or Proceedings

Shareholders who are negatively affected by a corporate act or proceeding may use direct suits to challenge the act or proceeding's legal validity. Success usually results in a resolution or other corporate act being rescinded or declared void (collectively, "invalidated" for convenience[180]); a non-monetary outcome which generally binds the company and all its participants. Invalidation of an act or proceeding that would have had an adverse effect on the shareholder-plaintiff is a form of Shareholder Protection, but Director Liability does not arise.

In some Anglo-Commonwealth jurisdictions, a company's "proceedings"—a broad term that includes the process leading up to and the conduct of a shareholder meeting or the activities of the board of directors[181]—may generally be challenged by a shareholder on the grounds of "procedural irregularity." The ill-defined concept of procedural irregularity may include failure to give notice or improper notice of meetings, lack of quorum, or a shareholder's lack of reasonable opportunity to participate in a meeting.[182] Depending on jurisdiction, procedural irregularities may result in invalidation of the proceeding if the irregularity is other than accidental (UK),[183] or if the irregularity causes "substantial injustice" (Australia and Singapore).[184] In Australia and Singapore, a substantive (as opposed to procedural) irregularity may suffice for invalidation.[185] Hong Kong also recognizes challenges for irregularities.[186] Australia appears to be the only Anglo-Commonwealth jurisdiction with reported cases on challenges to listed companies' proceedings.[187]

Direct suits may also be brought against infringements of company constitution[188] provisions relevant to the personal rights of and capacity as

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[180] The distinction between rescission and declaration of invalidity is that an act or proceeding is valid until rescission is ordered, whereas a declaration of voidness or nullity only confirms that the void act or proceeding was of no legal effect at any time.

[181] *See, e.g.*, ROBERT P. AUSTIN & IAN M. RAMSAY, FORD, AUSTIN AND RAMSAY'S PRINCIPLES OF CORPORATIONS LAW [7.582.3] (17th ed. 2018).

[182] *See, e.g.*, AUSTIN & RAMSAY, *supra* note 181, at [7.581.3], [7.581.6], [7.581.9], [7.582.6], [7.582.9].

[183] Companies Act 2006, c. 46, § 313 (UK); Musselwhite v. Musselwhite & Son Ltd. [1962] Ch 964 (ChD) 978.

[184] *See, e.g.*, Corporations Act 2001 (Cth), § 1322(2) (Austl.); Companies Act 1967, § 392(2) (Sing.).

[185] Cordiant Communications (Aust) Pty Ltd v. The Communications Group Holdings Pty Ltd [2005] NSWSC 1005, 55 ACSR 185 [87], [97], [103]–[108]; Thio Keng Poon v. Thio Syn Pyn [2010] SGCA 16, [2010] 3 SLR 143 [65]–[73] (Sing.).

[186] Lam Hon Keung Keith v. Dalny Estates Ltd., [2018] 1 H.K.L.R.D. 409 [18]–[33] (C.A.).

[187] *See, e.g.*, Carpathian Resources Ltd v. Hendriks [2011] FCA 41, (2011) 81 ACSR 542.

[188] This includes companies' legislation provisions that are incorporated as part of the "statutory

a shareholder,[189] or of shareholder rights grounded in statute or case law.[190] Non-monetary outcomes—injunctive[191] or declaratory relief—are expected in such direct suits, while monetary outcomes are unusual.[192] Direct suits may also be available for specific scenarios such as amendment of the company constitution not in good faith and in the interests of the company,[193] expropriation of shares for an improper purpose or at an unfair price,[194] or acts or conduct oppressive/unfairly prejudicial to the shareholder-plaintiff.[195]

In Germany, shareholders of *Aktiengesellschaft* stock corporations and *GmbH* limited liability corporations may challenge shareholder resolutions using rescission suits[196] if the resolution's contents breach the law or the company constitution (*Satzung*),[197] or if the resolution was used by another shareholder to obtain special benefits to the company's or other shareholders' detriment.[198] As a rescission suit can be highly disruptive once commenced,[199] resolutions on capital increases, capital reductions, or

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contract." *See, e.g.,* AUSTIN & RAMSAY, *supra* note 181, at [6.030], [10.235].

189 Hickman v. Kent or Romney Marsh Sheep-Breeders' Association [1915] 1 Ch. 881 (ChD) 889–900.

190 For a list of such rights, *see* AUSTIN & RAMSAY, *supra* note 181, at [10.233].

191 *See, e.g.,* Pender v. Lushington (1877) 6 Ch. D 70 (Eng. Ch.) (shareholders succeeded in obtaining injunctive relief restraining the company from putting into effect shareholder resolutions that were improperly passed). Injunctions will be discussed again as a separate suit under Part III.E below.

192 AUSTIN & RAMSAY, *supra* note 181, at [10.235.3]. On enforcing the company constitution on its own terms versus using oppression or unfair prejudice remedies, *compare id.* at [10.235.18] (opining that the latter has advantages) *with* BRENDA HANNIGAN, COMPANY LAW [5-53] to [5-64] (6th ed. 2018) (describing problems with the former).

193 Allen v. Gold Reefs of West Africa Ltd. [1900] 1 Ch. 656 (CA) 671.

194 Gambotto v. WCP Ltd. [1995] HCA 12, (1995) 182 CLR 432 (Austl.).

195 Companies Act 1967, § 216(2)(a) (Sing.); Canada Business Corporations Act, R.S.C. 1985, c C-44, § 241(3)(h); Companies Act 1993, § 174(2)(h) (N.Z.).

196 AktG, § 243 et seq. (Ger.); Johannes Wertenbruch, *§ 47 Anhang Nichtigkeit und Anfechtung von Gesellschafterbeschlüssen* [*Appendix to Section 47 Nullity and Rescission of Members' Resolutions*], *in* II MÜNCHENER KOMMENTAR ZUM GESETZ BETREFFEND DIE GESELLSCHAFTEN MIT BESCHRÄNKTER HAFTUNG – GMBHG [MUNICH COMMENTARY ON THE LAW ON LIMITED LIABILITY CORPORATIONS] Rn. 120 (Holger Fleischer & Wulf Goette eds., 2d ed. 2016) (the Aktiengesetz rescission suit is applicable to GmbHs by analogical application). *See generally*, in English, Rainer Kulms, *Enforcement of Company and Securities Laws in Germany: An Exercise in Diversity*, *in* ENFORCEMENT OF CORPORATE AND SECURITIES LAW 371, 375–77, 378 (Robin Hui Huang & Nicholas Calcina Howson eds., 2017). Rescission suits are also a major feature in European jurisdictions. Gelter, *Shareholder Derivative Suits*, *supra* note 40, at 881–84; Andreas Cahn, *The Shareholders' Fiduciary Duty in German Company Law*, *in* SHAREHOLDERS' DUTIES 347, 357–58 (Hanne S. Birkmose ed., 2017); GREGOR BACHMANN ET AL., REGULATING THE CLOSED CORPORATION 28, 63–64 (2014).

197 AktG, § 243 Abs 1 (Ger.).

198 AktG, § 243 Abs 2 S 1 (Ger.). The resolution is not subject to challenge on this ground if it provides for compensation to the shareholders affected. AktG, § 243 Abs 2 S 2 (Ger.).

199 This is because the challenged resolution cannot be registered until the legal proceedings are concluded. Gelter, *Shareholder Derivative Suits*, *supra* note 40, at 885–86. A capital increase, capital reduction, or corporate group agreement does not take effect until the resolution is registered. AktG, §§ 211, 224, 238 S 1, 294 Abs 2 (Ger.).

corporate group agreements (*Unternehmensvertrag*) may be submitted by the company to a judicial "clearance procedure" (*Freigabeverfahren*).[200] If the court grants clearance, its decision is final, and the resolution will be valid and binding.[201] However, if the shareholder's challenge against the resolution is held to be legally founded, the company must compensate the shareholder-plaintiff for loss resulting from the resolution coming into effect.[202] The rescission suit and clearance procedure combination may create outcomes similar to direct monetary claims.[203] In addition, shareholders may apply to court for a declaration that a resolution is void *ab initio* on several grounds.[204]

Any shareholder resolution of a Japanese *Kabushiki Kaisha* is void if its substantive content is in breach of statute or regulation.[205] A resolution may also be rescinded for either (1) defects in the procedure by which the shareholder meeting (at which the resolution was purportedly passed) was called or the method by which the resolution is passed,[206] or (2) substantive defects of the resolution itself.[207] However, the court may decline to rescind a resolution with only minor defects in meeting procedure or if the method of passing the resolution had no effect on the resolution.[208] Shareholders of *Gōdō Kaisha* limited liability corporations lack access to a similar direct suit as corporate decisions are made not by resolution but by simple majority of the shareholder-managers as a default rule.[209] Shareholders of Korean

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[200] AktG, § 246a (Ger.). On the abuses of the rescission suit and the legislative response in enacting the clearance procedure, see Gelter, *Shareholder Lawsuits*, *supra* note 165, at 475–77.

[201] AktG, § 246a Abs 1 S 1, Abs 3 S 4–5 (Ger.).

[202] AktG, § 246a Abs 4 (Ger.).

[203] *See* Gelter, *Shareholder Lawsuits*, *supra* note 165, at 477. On direct monetary claims see Part III.A above.

[204] E.g., that the shareholder meeting was not called; the resolution was not recorded; the resolution is incompatible with the nature of a stock corporation or is in breach of rules primarily or exclusively for the protection of creditors or otherwise for the public interest; or the resolution is *contra bones mores*. *See* AktG, § 241 (Ger.).

[205] Kaishahō [Companies Act], Act No. 86 of 2005, art. 830; *see also* Hideyuki Matsui, *§ 830*, *in* KAISHA-HŌ KONMENTĀRU 19 – GAIKOKU KAISHA; ZASSOKU (1) [COMMENTARY ON THE COMPANIES ACT VOLUME 19 – FOREIGN COMPANIES; MISCELLANEOUS PROVISIONS (1)] 225 (Shinsaku Iwahara ed., 2021).

[206] Such as a breach of the law or the company constitution, or extreme unfairness. Kaishahō [Companies Act], Act No. 86 of 2005, art. 831(1)(i); *see also* Shinsaku Iwahara, *§ 831*, *in* KAISHA-HŌ KONMENTĀRU 19 – GAIKOKU KAISHA; ZASSOKU (1) [COMMENTARY ON THE COMPANIES ACT VOLUME 19 – FOREIGN COMPANIES; MISCELLANEOUS PROVISIONS (1)] 244 (Shinsaku Iwahara ed., 2021).

[207] Such as the content of the resolution being in breach of the company constitution, or if the resolution was extremely improper and was passed because of the exercise by a person with a "special interest" in the resolution of their voting rights. Kaishahō [Companies Act], Act No. 86 of 2005, art. 831(1)(ii)–(iii).

[208] Kaishahō [Companies Act], Act No. 86 of 2005, art. 831(2).

[209] Kaishahō [Companies Act], Act No. 86 of 2005, arts. 590(2), 591(1).

Jusik-Hoesa stock corporations[210] and *Yuhan-Hoesa* limited liability corporations[211] have access to similar direct suits as Japanese *Kabushiki Kaisha* shareholders. Other than shareholder resolutions, Japanese *Kabushiki Kaisha*[212] and Korean *Jusik Hoesa*[213] shareholders may also challenge specified corporate acts. Even without specific corporate law statutory provisions to the effect, defective resolutions of the board of directors may also be challenged in Japan[214] and Korea[215] according to the general principles of civil law.

Delaware's General Corporation Law permits a shareholder to apply to court for a determination of the validity of any corporate act or transaction.[216] In addition, shareholders may also apply for judicial determination of the validity of a shareholder resolution for a director's election or removal.[217]

E. Injunctions

Another type of direct suit results in court-ordered injunctions prohibiting ongoing or proposed future acts, or compelling specified acts by any relevant party, which include the company itself, directors, or other shareholders. As a form of non-monetary outcome, an injunction may protect shareholders if it undoes past harm, ceases ongoing harm, or prevents future harm. Injunctions often feature in two contexts: merger and acquisition (M&A)/corporate reorganization-type scenarios; and harmful or unlawful conduct by directors or the company.[218] Injunctions protect shareholders in both scenarios, but do not result in Director Liability *per se* even when issued against a director.[219]

The Japanese Companies Act creates a regime of M&A/corporate reorganization-related injunctions[220] by which a *Kabushiki Kaisha*

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[210] Sangbeob [Commercial Act], Act No. 17362 (2020), arts. 376–381.

[211] Sangbeob [Commercial Act], Act No. 17362 (2020), art. 578 (applying articles 376–381 *mutandis mutandis*).

[212] Kaishahō [Companies Act], Act No. 86 of 2005, arts. 828–829.

[213] Sangbeob [Commercial Act], Act No. 17362 (2020), arts. 236, 429, 529.

[214] WATARU TANAKA, KAISHA-HŌ [CORPORATE LAW] 237–39 (3d ed. 2021).

[215] KYUNG-HOON CHUN ET AL., CORPORATIONS AND PARTNERSHIPS IN SOUTH KOREA 54 (3d ed. 2019).

[216] DEL. CODE ANN. tit. 8, § 205(a)(4) (2015).

[217] DEL. CODE ANN. tit. 8, § 225 (2010).

[218] In addition, injunctions may be available as a procedural device part of pre-trial or other proceedings including derivative actions; such injunctions will not be discussed in this Article.

[219] Unless the director is imposed with monetary or other negative legal consequences for breaching an injunction.

[220] For a critical analysis of the Japanese regime, see generally Masanori Wakita, *Soshiki saihen no sashitome no uttae (1)* [*Injunction Against M&A (1)*], 137(2) Hōgaku Kyōkai Zasshi [Journal of the

shareholder may bring a direct suit against the company for an injunction restraining a corporate reorganization if there is a risk that shareholders of the company would suffer harm and if the reorganization is either in breach of the law or of the company constitution,[221] or if the transaction terms in a short-form reorganization are extremely improper.[222]

By contrast, Anglo-Commonwealth M&A transactions often involve court supervision and ex-ante approval via schemes or arrangements; injunctions are not a prominent feature. In Germany, a corporate reorganization resulting in serious infringement of shareholders' rights and interests without obtaining approval by shareholder resolution may be restrained by injunction.[223] Delaware M&A litigation used to feature shareholder suits seeking injunctive relief on grounds of breach of fiduciary duty of directors or controlling shareholders, but recent case law developments seem to have led to a decrease in such suits.[224]

In Anglo-Commonwealth jurisdictions, shareholders may apply to court for injunctions to restrain a director or the company from acts or conduct in contravention of company law or the company constitution.[225] Oppression/unfair prejudice statutory regimes enable shareholder-plaintiffs to seek injunctions against the company, other persons, or some combination thereof in response to oppressive/unfairly prejudicial conduct.[226] Directors' or executive officers' (*shikkōyaku*) ongoing or future

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Jurisprudence Association] 161 (2020).

[221] Kaishahō [Companies Act], Act No. 86 of 2005, arts. 784-2(i), 796-2(i), 805-2, 816-5. However, a "breach of the law" does not include a director's (*torishimariyaku*) or executive officer's (*shikkōyaku*) breach of their duty of care or duty of loyalty. EGASHIRA, *supra* note 56, at 892.

[222] Kaishahō [Companies Act], Act No. 86 of 2005, arts. 784-2(ii), 796-2(ii).

[223] Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 25, 1982, 83 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 122 (Ger.) (*Holzmüller*) (a case of spinning off a substantial part but not all of the business of the company into a subsidiary); *see also* Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 26, 2004, 159 BGHZ 30 (Ger.) (*Gelatine*) (clarifying *Holzmüller*).

[224] *See e.g.*, Edward Micheletti, Jenness Parker & Bonnie David, *M&A Litigation Developments: Where Do We Go From Here?*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jul. 18, 2018), https://corpgov.law.harvard.edu/2018/07/18/ma-litigation-developments-where-do-we-go-from-here/; *see also* Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 195–97 (2019).

[225] Companies Act 2006, c. 46, § 40(4) (UK) (implicitly recognizing the right of shareholders to apply for injunctions restraining acts beyond directors' powers); Companies Act 1967, §§ 25(2)(a)–(b), 25(3) (applying to *ultra vires* transactions); 409A (Sing.) (applying to contraventions of Companies Act); Companies Act 1993, s 164 (N.Z.) (applying to both contraventions of the corporate constitution and the Companies Act); *Corporations Act 2001* (Cth), s 1324 (Austl.) (contraventions of the Corporations Act); Companies Ordinance, Cap. 622, §§ 728–730 (H.K.) (applying to breaches of the Companies Ordinance, fiduciary duties, and the corporate constitution).

[226] *See, e.g.*, Companies Act 2006, c. 46, § 996(2)(b) (UK) (company); Companies Act 1967, § 216(2)(a) (Sing.) (no limitation); *Corporations Act 2001* (Cth), s 233(1)(i)–(j) (Austl.) ('a person'); Companies Ordinance, Cap. 622, §§ 725(2)(a)(i), (iv)(D) (H.K.) (no limitation); Canada Business

acts likely to cause a Japanese *Kabushiki Kaisha* significant damage that are in breach of statute, regulation, or the company constitution, or otherwise beyond the company's objects (*mokuteki*) may be enjoined upon application by a shareholder.[227] In Korea, shareholders meeting minimum shareholding requirements may seek comparable injunctions against directors and executive officers (*jibhaeng imweon*) of *Jusik-Hoesa* stock corporations and against directors of *Yuhan-Hoesa* limited liability corporations.[228]

Injunctions against other forms of misconduct (e.g., by shareholders) may also be possible. In Germany, a shareholder may theoretically seek an injunction against an imminent breach of shareholder's duty of loyalty (*Treuepflicht*).[229]

F. Director Removal

Shareholders may exercise their right to apply to court to have a director or officer removed for legal grounds through direct suits. Insofar as removing a director prevents future harm to the shareholder-plaintiff's interests, director removal may serve as Shareholder Protection, while mere removal does not equate to Director Liability for past action. Note that judicial removal of directors is separate and distinct from the more common corporate law feature of director removal by majority or supermajority shareholder vote.

Although Anglo-Commonwealth companies legislation[230] mostly lack specific mechanisms enabling shareholder-plaintiffs to have directors judicially removed,[231] oppression/unfair prejudice regimes grant courts

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Corporations Act, R.S.C. 1985, c C-44, s. 241(3)(a), (h) (Can.) (no limitation and the company, respectively).

[227] Kaishahō [Companies Act], Act No. 86 of 2005, art. 360(1) (for directors), art. 360(3) (replacing the "significant damage" requirement with the higher "irreparable damage" for *Kabushiki Kaisha* with one (*kansa-tō i'inkai secchi kaisha*) or three directors' committees (*shimei i'inkai-tō secchi kaisha*) or with statutory auditors (*kansayaku secchi kaisha*)), art. 422(1) (for executive officers; irreparable damage requirement).

[228] Sangbeob [Commercial Act], Act No. 17362 (2020), art. 402 (1% shareholding requirement for injunctions against *Jusik-Hoesa* directors), art. 408-9 (applying article 402 *mutatis mutandis* to executive officers in *Jusik-Hoesa* with them), art. 542-6(5) (minimum shareholding requirement lowered to 0.05% or 0.025% for listed *Jusik-Hoesa* if held for more than six months), art. 564-2 (3% shareholding requirement for *Yuhan-Hoesa*).

[229] Cahn, *supra* note 196, at 356–57.

[230] Directors' disqualification or investigation procedures are not counted as direct suits as they typically involve regulatory authorities.

[231] An exception is Canada Business Corporations Act, R.S.C. 1985, c C-44, s. 241(3)(e) (Can.). Mechanisms permitting shareholders to request official inspections or investigations do not count as the result would turn, at least in part, on the regulator's decision.

considerable discretionary powers to remedy conflicts which should include the power to order removal of directors.[232]

By contrast, in Japan, *Kabushiki Kaisha* shareholders holding 3% of total voting rights or total issued shares may apply to court to have a director or officer removed for misconduct, illegal acts, or breaches of the corporate constitution in connection with the execution of their duties.[233] The shareholder only has the right to make the application if an unsuccessful attempt at having the director or officer removed at a shareholder meeting is first made.[234] It is possible for shareholders with no voting rights on director appointments and removals by resolution to make the application.[235] However, if the director is reappointed after the facts on which removal is sought have become known to the shareholders, the shareholder-plaintiff becomes disabled from bringing an action for judicial removal.[236] Korea has comparable provisions applicable to *Jusik-Hoesa*[237] and *Yuhan-Hoesa* directors.[238]

G. Regulation of the Company's Affairs

Direct suits may be used to regulate the company's affairs prospectively, presumably in a way that is advantageous to or otherwise protective of the shareholder-plaintiff. While conceptually overlapping with injunctions, for this Article's purposes, regulation of corporate affairs refers to changes binding on the company not reducible to a simple "do this" or "do not do that." Examples include amendments to the company constitution and changes to corporate records. Insofar as such changes alleviate past—or prevent future—detriment to the shareholder-plaintiff, they protect shareholder interests. Director Liability does not feature here.

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[232] *See, e.g.*, *Re:Spargos Mining NL* (1990) 3 ACSR 1, 50–51 (Austl.).

[233] Kaishahō [Companies Act], Act No. 86 of 2005, art. 854; *see also* Michiyo Hamada, *§ 854*, *in* KAISHA-HŌ KONMENTĀRU 19 – GAIKOKU KAISHA; ZASSOKU (1) [COMMENTARY ON THE COMPANIES ACT VOLUME 19 – FOREIGN COMPANIES; MISCELLANEOUS PROVISIONS (1)] 635 (Shinsaku Iwahara ed., 2021). The 3% requirement is a default that may be lowered by provision in the corporate constitution. *Id*. Both the company and the director/officer sought to be removed are defendants to the action. *See* Kaishahō [Companies Act], Act No. 86 of 2005, art. 855.

[234] Kaishahō [Companies Act], Act No. 86 of 2005, art. 854(1) (either a resolution for removal must have failed to pass, or otherwise could not take effect due to a veto by another class of shareholders).

[235] Kaishahō [Companies Act], Act No. 86 of 2005, art. 854(1)(ii).

[236] EGASHIRA, *supra* note 56, at 401 n.10.

[237] Sangbeob [Commercial Act], Act No. 17362 of 2020, art. 385(2).

[238] Sangbeob [Commercial Act], Act No. 17362 of 2020, art. 567 (applying article 385 *mutatis mutandis* to *Yuhan-Hoesa*).

Anglo-Commonwealth oppression/unfair prejudice regimes usually provide for a general power of the court to regulate the conduct of the company's affairs in the future.[239] Some regimes further specify that the court may amend (or restrain the amendment of) the company constitution, shareholder agreements, or some combination thereof.[240] In one Hong Kong unfair prejudice action, the constitution of a listed company suspended from trading was ordered to be amended so that the company could avoid delisting.[241] Another method by which Anglo-Commonwealth courts may regulate corporate affairs is "rectification," i.e., ordering records to be changed or corrected.[242] Courts have also demonstrated willingness to make complex regulatory arrangements for companies on an individual, customized basis.[243]

CONCLUSION: THE DIVERSITY OF SHAREHOLDER LAWSUITS AND THEIR IMPLICATIONS FOR COMPARATIVE CORPORATE LAW AND GOVERNANCE

Comparative corporate law is no longer, if it ever was, a mere scholarly curiosity. As applied comparative law,[244] it is also more than just a means by which a single jurisdiction consciously and autonomously reforms their corporate law. A "global governance" movement led by institutions including the World Bank promoting so-called "tools" of "good corporate governance" has resulted in the adoption of such tools by many jurisdictions.[245] As darlings of Law and Finance scholars and featured in the World Bank's DBR indicators on "Protecting Minority Investors," shareholder lawsuits are indisputably part of the good corporate governance toolbox; jurisdictions have something to gain economically or

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[239] *See, e.g.*, Companies Act 2006, c. 46, § 996(2)(a) (UK); Companies Act 1967, § 216(2)(b) (Sing.); *Corporations Act 2001* (Cth), s 233(1)(c) (Austl.); Companies Ordinance, Cap. 622, § 725(2)(iv)(A) (H.K.); Companies Act 1993, s 174(2)(c) (N.Z.).

[240] *See, e.g.*, Companies Act 2006, c. 46, § 996(2)(d) (UK); Companies Act 1967, § 216(4) (Sing.); *Corporations Act 2001* (Cth), s 233(1)(b), 233(3) (Austl.); Companies Act 1993, ss 174(2)(d), 176 (N.Z.); Canada Business Corporations Act, R.S.C. 1985, c C-44, s. 241(3)(c) (Can.).

[241] *See* Luck Continent Ltd. v. Cheng Chee Tock Theodore, [2013] 5 H.K.C. 442 (C.A.).

[242] *See, e.g.*, Companies Act 1967, § 392(4)(b) (Sing.); *Corporations Act 2001* (Cth), s 1322(4)(b) (Austl.); Companies Act 1993, s 174(2)(f) (N.Z.); Canada Business Corporations Act, R.S.C. 1985, c C-44, s. 241(3)(k) (Can.); Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (PC) (appeal taken from N.S.W.) (Austl.).

[243] Re Harmer Ltd. [1959] 1 W.L.R. 62 (CA); McGuinness v. Bremner PLC (1987), 1988 S.L.T. 891 (CSOH); Hawkes v. Cuddy (No. 2) [2007] EWHC 2999 (Ch), [2008] BCC 390, appeal dismissed [2009] EWCA Civ 291, [2010] BCC 597.

[244] See Siems, *Methods*, *supra* note 86, at 25–26 (discussing comparative corporate law as applied comparative law).

[245] Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829, 875 (2020); *see also* Gordon, *supra* note 11, at 44–49.

reputationally by introducing or reforming their shareholder lawsuit regimes to expand and strengthen their toolboxes.

The idea that derivative actions are an important aspect of Shareholder Protection broadly construed[246] has received widespread acceptance amongst scholars[247] and key global institutions such as the World Bank.[248] Coinciding with the period when Law and Finance scholars and the World Bank began picking up on the derivative action as a tool of good corporate governance, leading economies introduced or substantially reformed their statutory derivative action regimes,[249] and comparative corporate law scholarship on derivative actions boomed.[250]

Despite this, shareholder lawsuits are not truly understood by the global corporate governance community. Specifically, the utility, practical or potential, of direct suits for achieving Shareholder Protection outcomes have been virtually ignored by leading economists and the World Bank. Leaving non-lawyers in charge of the most critical parts of the process (index construction and data coding) creates real costs. The resulting quantitative product inevitably lacks the crucial inputs of specialized subject-matter knowledge, legal judgment, and understanding of fundamental legal concepts—all skills that only competent and experienced jurists can supply.[251]

As Part II has shown, key Law and Finance scholars in the DLLS Article and the World Bank across fifteen years' worth of DBRs[252] have acted on unarticulated premises based on their failure to understand key distinctions in legal form and function. Derivative actions enable shareholders to sue directors in place of the company for the purpose of holding directors liable; direct suits are much more varied as to who they can be used against and the legal outcomes that can be obtained.[253] Director Liability and Shareholder Protection are separate and distinct functions of shareholder lawsuits.[254] Derivative actions are—at their best—about Director Liability, but not Shareholder Protection. Some direct suits offer not only Director

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[246] I.e., not necessarily within this Article's precise meaning of "Shareholder Protection" laid down in Part I.B.2.

[247] See *supra* note 4 and note 75.

[248] *See infra* Part II.

[249] *See* Baum & Puchniak, *supra* note 43, at 2.

[250] *See supra* note 4 and note 75, *see also, e.g.*, THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan W. Puchniak et al. eds., 2012); Puchniak, *Complex Reality*, *supra* note 75.

[251] *Cf.* Frankenreiter et al., *supra* note 19, at 8, 62–63.

[252] *See supra* note 93.

[253] *See infra* Part I.A.

[254] *See infra* Part I.B.

Liability, but also Shareholder Protection in myriad overlapping ways.[255] At present, derivative actions are the only shareholder lawsuit type that count for DBR purposes; to score higher on indices purportedly about "Protecting Minority Investors" through shareholder litigation reform, economies need only introduce or reform derivative action regimes.[256] Direct suits, despite being a conceptually distinct,[257] larger, more diverse, and potentially useful set of shareholder lawsuits[258]—fall by the wayside.

This Article has shown that the universe of shareholder lawsuits comprises not only derivative actions, but also a rich variety of direct suits that protect shareholders in overlapping but different ways that are yet to be deeply explored in comparative corporate law and governance literature. For anyone serious about using corporate law to improve Shareholder Protection and corporate governance, fixating on derivative actions is myopic and counterproductive. Recent challenges[259] and the DBR's suspension and subsequent cancellation[260] aside, there is little sign that the global corporate governance movement's movers and shakers are ready to give up on their aspiration of promoting "tools" for Shareholder Protection and "good corporate governance." If so, it would be of profit to the World Bank's DBR team (were the DBR to be revived)—and other institutions or scholars with comparable ambitions—to open their minds to the possibilities in form and function offered by direct suits across the world. This Article has laid the foundations based on corporate law concepts and the "law in books;" the challenge of the future would be to bring the "law in action" of direct suits to life.

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[255] *See infra* Parts I.B.3, III.
[256] *See infra* Part II.A.
[257] *See infra* Part I.A.
[258] *See infra* Part III.
[259] Goto, *supra* note 245, at 876–78 (on the negative consequences of promoting a "toolbox").
[260] *See supra* text accompanying notes 91–92.