

3-2018

Public and private enforcement of corporate and securities laws: An empirical comparison of Hong Kong and Singapore

Wai Yee WAN

Singapore Management University, wywan@smu.edu.sg

Christopher C. H. CHEN

Singapore Management University, chchen@smu.edu.sg

Say Hak GOO

University of Hong Kong

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

 Part of the [Asian Studies Commons](#), [Public Law and Legal Theory Commons](#), and the [Securities Law Commons](#)

Citation

WAN, Wai Yee; CHEN, Christopher C. H.; and GOO, Say Hak. Public and private enforcement of corporate and securities laws: An empirical comparison of Hong Kong and Singapore. (2018). *New Voices in Commercial Law (SMU and Centre for Commercial Law Studies of Queen Mary Law School, London, (March 2018), Australia Corporate Law Teachers Association Conference 2018, La Trobe University, (February 2018), Business Law Centre of Renmin University, Beijing, China, (March 2018), Hong Kong University (March 2018), Centre for Financial and Economic Development, Chinese University of Hong Kong, (March 2018), City University of Hong Kong, (March 2018), ASLI Conference, Seoul National University (May 2018)*. 1-22. Research Collection School Of Law.

Available at: https://ink.library.smu.edu.sg/sol_research/2770



Public and Private Enforcement of Corporate and Securities Laws: an Empirical Comparison of Hong Kong and Singapore

公司与证券法之公部门与私人执行：香港与 新加坡执法案例之实证研究

Associate Professor Wai Yee Wan (SMU) 温慧仪

Associate Professor Christopher Chen (SMU) 陈肇鸿

Professor Say H. Goo (HKU) 吴世学

This research was supported by the Singapore Ministry of Education (MOE)
Academic Research Fund Tier 2 grant with the MOE's official grant number MOE2015-
T2-1-142.

March 2018

Background: Why is enforcement important?

背景：执法之重要性

- Enforcement vital to strong securities markets (La Porta, 2006)
- 有效执法及追诉对健全之证券市场具有相当的重要性
- Both Hong Kong and Singapore have significantly strengthened private enforcement framework since Asian financial crisis:
- 香港及新加坡自亚洲金融危机之后，具体强化对证券法之私人执行的机制，例如：
 - HK: statutory derivative action (2004)
 - 香港于2004年强化公司法下之衍生诉讼机制
 - Singapore: statutory compensation scheme for violation of corporate disclosure (2002, and significantly expanded in 2012)
 - 新加坡于2002年开始（并于2012年扩大其适用范围），对公开披露规定之违反，提供之法定补偿机制供投资人主张损害赔偿

Research questions 研究问题

- How robust is private and public enforcement of corporate and securities laws in Hong Kong and Singapore
- 于香港及新加坡，就公司及证券法令，利用私人执行或公部门执行之有效性
- Are there functional substitutes to enforcement
- 除法令执行与追诉之外，是否有其他有效的替代方案

Our focus 焦点领域

- Breaches of directors' duties
- 违反董事责任与忠实义务
- Corporate disclosure
- 公司披露规定的违反

Public and private enforcement: nomenclature and hybrids (定义及形态)

- Public enforcement (公部门执行)
 - Government actors eg securities regulators, public prosecutors and private organisation with quasi-public functions eg stock exchanges
 - 由政府部分执法，例如证券主管机关、检察官或其他准官方机关（例如证券交易所）
- Private enforcement (私人执行)
 - Shareholder actions, derivative actions
 - 例如股东提起之诉讼、代表（或派生）诉讼
- Hybrids (公私混合)
 - e.g. government actors obtain compensation for shareholders/company through actions or fair fund
 - 例如政府代股东或公司向加害人起要求偿或透过补偿基金补偿被害人

The choice of jurisdictions 市场选择

- We choose Hong Kong and Singapore to compare for the following reasons:
 - Both are Asian financial centres
 - Similar adoption of Anglo-American model of corporate governance
 - Both have concentrated shareholdings among their publicly listed companies
 - Wave of corporate governance fraud post-financial crisis
- 本研究选择香港及新加坡作为研究目标
 - 二地同为亚洲之国际金融中心
 - 二地同样实行英美之公司治理原则
 - 二地之上市公司皆有高度股权集中之倾向
 - 于国际金融危机之后，二地同样出现一波公司治理有关之丑闻

Theoretical framework of enforcement

理论架构

- Limitations of measuring “inputs” (budgets, resource allocations) due to availability of data
- 鉴于有限的信息，难以有效分析对法令执行的「输入」因素（例如政府预算、资源分配等等）
- Thus, we measure “outputs” in the form of kinds of enforcement actions
- 因此，本研究系分析各种不同的公部门或私人执行之案件（即执法之「输出」结果）

Theoretical framework of enforcement

理论架构

- Merits of enforcement by regulators
 - E.g. Australia (ASIC), UK (FCA), US (SEC)
 - Range of sanctions can be calibrated
 - Directorial disqualification possible
 - Wide ranging powers of investigation required in cross-border fraud
 - However, limitations: resources, public interest
- 公部门执行的优点
 - 例如，澳洲之ASIC、美国之SEC、英国的FCA
 - 裁罚手段之多样性
 - 亦可能强制使公司董事失格
 - 特别系在跨境诈欺的案件，可享有较大的调查权力
 - 然而，公部门执行亦受限于政府预算及公共利益的要求

Theoretical framework of enforcement

理论架构

- Merits of private enforcement
 - Compensation and Deterrence of wrongdoing
 - However, collective action problem and civil procedure rules disincentivise private enforcement actions
- 私人执行之优点
 - 可寻求损害赔偿并可吓阻未来的违法
 - 然而，团体行为与搭便车的问题，以及民事诉讼制度可能会降低私人执行的诱因
- Enforcing continuous disclosure and directorial duties
 - Differences in choices of beneficiaries of compensation
 - Possible defendants differ
- 针对持续信息披露以及董事责任之执行
 - 损害赔偿之不同受益人间可能存在有相当的差异
 - 被告的种类亦可能有相当的差异

Dataset 数据数据

- 2000-2015 public and private enforcement actions 于两地公部门私人执行之案系数

	Hong Kong 香港		Singapore 新加坡	
Type of proceedings 种类	Number of cases 案件总数	Percentage 百分比	Number of cases 案件总数	Percentage 百分比
Public enforcement only 单纯公部门执行	71	89.87%	30	83.33%
Private enforcement only 单纯私人执行	6	7.59%	4	11.11%
Both public and private enforcement 同时有公部门及私人执行	2	2.53%	2	5.56%
Total number of actions 总计	79	100%	36	100%

Dataset: Breaches of directors' duties (Hong Kong) 香港违反董事责任之案件

Listed companies 上市公司名称	SFO 违反证期条例 之条款	Year 年度	Compensation amounts or consent/ court orders 补偿之金额或法院命令	Currency 货币	Underlying causes of action 请求权基础
Styland Holdings	Section 214	2012	85,950,000	HKD 港币	Breach of directorial duties 违反董事责任
China ASEAN Resources	Section 214	2012	10,700,000	HKD 港币	Breach of directorial duties 违反董事责任
First China Financial Network Holdings	Section 214	2015	18,692,000	RMB 人民币	Breach of directorial duties 违反董事责任
First Natural Food Holdings	Section 214	2017	84,880,000	HKD 港币	Breach of director's duties 违反董事责任
GOME Electrical Appliance Holdings	Section 213	2014	420,608,765	HKD 港币	Breach of directorial duties 违反董事责任
Rontex International Holdings	Section 214	2010	Ordered company to bring civil proceedings 命令公司提起民事诉讼	NA	Breach of directorial duties 违反董事责任
Hanergy Thin Film Power Group	Section 214	2017	Execute deed of guarantee 提供保证	NA	Breach of directorial duties 违反董事责任

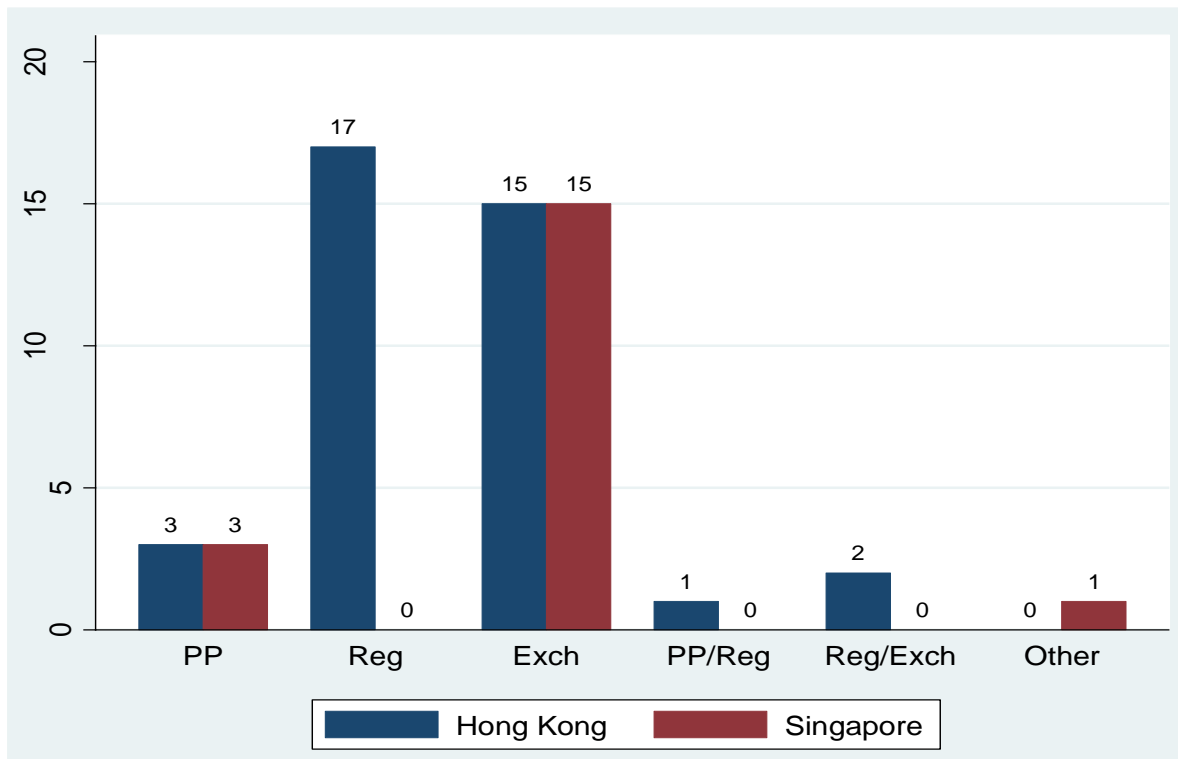
Dataset: Corporate disclosure

有关公司披露相关案件之案例

- HK: section 213 and/or 214 of the SFO
- 于香港，可能系违反证券暨期条例第213或214条
- Singapore: indirect compensation through the use of freezing orders but no action pursuant to statutory compensation scheme
- 于新加坡，透过法定之投资人补偿机制，投资人可间接透过法院之冻结命令，在未提起诉讼之情况下，即得补偿
- Freezing orders critical
 - China Sky (2013), China Aviation Oil (2005)
- 法院之冻结命令于实务上相当重要
 - 例如，China Sky (2013), China Aviation Oil (2005)

Intensity of public enforcement 公部门执行的强度

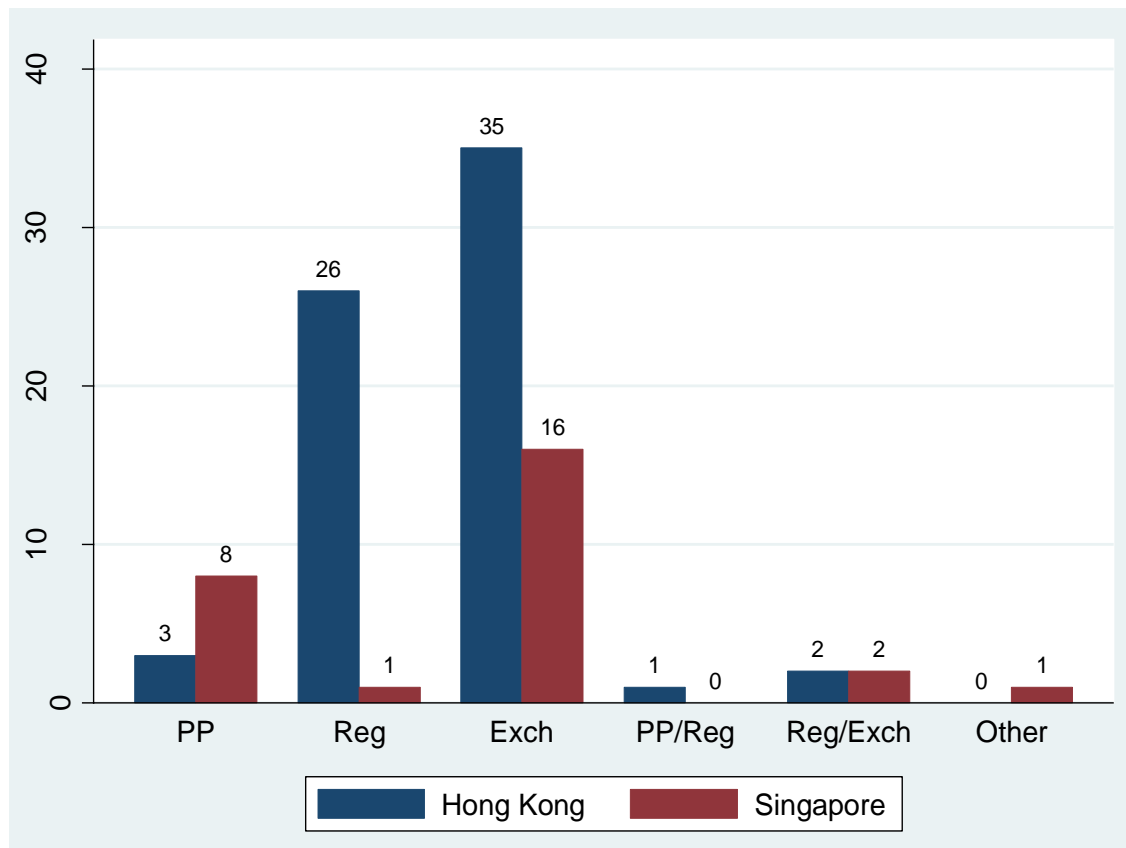
- Figure 1 – Enforcement Agency for Breach of Directorial duties in Hong Kong and Singapore 表一：于香港及新加坡，违反董事责任案例之执行机构



PP	检察官
Reg	证券主管机关（香港之SFC及新加坡之MAS）
Exch	证券交易所（香港之SEHK或新加坡之SGX）
PP/Reg	同时包括检察官及证券主管机关
Reg/Exch	同时包括证券主管机关及证券交易所

Intensity of public enforcement 公部门执行的强度

- Figure 2 – Enforcement Agency by Breach of Disclosure Obligations in Hong Kong and Singapore 表二：于香港及新加坡，违反披露规定之执行机关



PP	检察官
Reg	证券主管机关 (香港之SFC及新加坡之MAS)
Exch	证券交易所 (香港之SEHK或新加坡之SGX)
PP/Reg	同时包括检察官及证券主管机关
Reg/Exch	同时包括证券主管机关及证券交易所

Individual and corporate liability

个人或公司之法律责任

Hong Kong 香港	Companies only 仅公司负有责任	Companies individuals 公司及个人皆有责任	and	Individuals only 仅个人负有责任
Prosecution only 仅有检察官	0	0		0
SFC only 仅有证券主管机关	1	9		3
SEHK only 仅有证券交易所	3	18		0
Prosecution and SFC 检察官及主管机关	0	0		0
SFC and SEHK 主管机关及证交所	0	0		0
Total 总计	4	27		3

Singapore 新加坡	Companies only 仅公司负有责任	Companies individuals 公司及个人皆有责任	and	Individuals only 仅个人负有责任
Prosecution only 仅有检察官	0	0		5
MAS only 仅有证券主管机关	1	0		0
SGX only 仅有证券交易所	3	1		0
SGX and MAS 证券主管机关及交易所	1	0		1
Other 其他	0	0		1
Total 总计	5	1		7

Sanctions imposed 裁罚之种类

Table 4: Number and Type of Sanctions Imposed for All Cases

表四：所有案例之裁罚手段之数量

Type of sanctions 种类	Hong Kong 香港	Singapore 新加坡
Reprimand and/or governance changes 命 令公司管理及治理变动	35	19
Custodial sentence 有期徒刑	4	3
Criminal fine 刑事罚金	5	5
Custodial and criminal fine 徒刑加罚金	0	1
Disqualification+ 董事失格	14	2
Winding up of company 公司解散	1	0
Civil penalty and disgorgement 行政罚及获 利归入公司	1	1
Others 其他	4	0
Pending 未决案件	6	0
Civil penalty/disgorgement plus disqualification 民事罚金或归入权，以及董 事失格	2	0
Cases where the action was unsuccessful or where convictions were imposed but quashed subsequently 最终执行失败之案件	1	1
Total 总计	73	32

Length of time to resolve 案件终结之时间

Table 5: Length of time to resolution for concluded cases (public enforcement) – all cases

Panel A: Hong Kong

表五：香港 – 案件执行至结案之时间（所有公部门执行之案件）

Type of regulatory action 种类	Number of cases 案件数量				
	Time taken to resolution 2 years or less 至结案的时间于二年以内	Time taken to resolution 3 to 4 years 三年至四年间	Time taken to resolution 5 to 6 years 五年至六年间	Time taken to resolution more than 6 years + 超过六年	Total 总计
Prosecution only 仅有检察官	0	0	1	3	4
SFC only 仅有证券主管机关	13	5	4	2	24
SEHK only 仅有证券交易所	32	2	2	0	36
Prosecution and SFC 检察官及主管机关	1	0	0	0	1
SFC and SEHK 主管机关及证交所	0	0	1	1	2
Total 总计					67

Length of time to resolve 案件终结之时间

Panel B: Singapore 新加坡

Type of regulatory action 种类	Number of cases 案件数量				
	Time taken to resolution 2 years or less 至结案的时间于二年以内	Time taken to resolution 3 to 4 years 三年至四年间	Time taken to resolution 5 to 6 years 五年至六年间	Time taken to resolution more than 6 years 超过六年	Total 总计
Prosecution only 仅有检察官	5	2	1	0	8
MAS only 仅有证券主管机关	1	0	0	0	1
SGX only 仅有证券交易所	10	2	0	0	12
SGX and MAS 证交所及主管机关	2	0	0	0	2
Other 其他	0	0	0	1	1
Total 总计					24

Substitutes for private enforcement – shareholder resolutions 私人执行之替代方案：股东会决议

	Hong Kong 香港		Singapore 新加坡	
年度	Number of requisitions 股东会决议之提案数量	Of which, governance related 与公司治理有关之提案数量	Number of requisitions 股东会决议之提案数量	Of which, governance related 与公司治理有关之提案数量
2008	1	0	3	3
2009	0	0	6	1
2010	2	0	2	0
2011	2	1	4	2
2012	3	2	2	0
2013	4	2	3	1
2014	5	0	1	0
2015	16	4	4	2
总计	33	9	25	9

Lessons and Implications 规范反思

- Private enforcement is rare
- 于香港及新加坡，私人执行相当少见
- Directorial duties enforcement rare in Singapore, despite the substantive law for directors' duties
- 于新加坡，仅实体法上有强化董事责任的机制，实际上追诉执行董事责任的案件相当稀少

Lessons and implications 规范反思

- Individual and/or corporate liability (for corporate disclosure violation)
 - Should the proper beneficiaries of compensation be the company (as in China Sky) or the shareholders (as in the case of Greencool)
 - Should the proper defendant relating to the compensation be the company or the individual directors?
 - Should the same approach be taken in relation to criminal and civil penalty actions (do we target the company or the individual)?
- 有关公司信息披露规定之违反之个人或法人法律责任
 - 损害赔偿之请求权人究竟应系公司（例如于China Sky乙案）或股东（例如于Greencool乙案）？
 - 请求损害赔偿案件之被告究应系公司或系个别董事？
 - 刑事或民事诉讼是否应采取相当的手段（亦即，是否可视手段及目的针对公司或个人采取不同的执法手段）？

Conclusion 结语

- Gaps between law in books and law in action
 - Enforcement of directors' duties (in Singapore)
- 法令规定以及法律具体执行的成果间，有相当的落差
 - 例如新加坡有关董事忠实义务之执行
- Differences in which corporate disclosure is enforced privately (beneficiaries of compensation and defendants) and recommendations for reform
- 有关公司披露规定的违反，立法建议以及事实上违反公司披露规定系主要透过私人执行的方式（即向特定被告请求损害赔偿）来执法之间，存在有相当落差