
OLD WINES IN NEW BOTTLES? PRIVATE SECURITIES LITIGATION IN CHINA'S NEW SECURITIES LAW

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Abstract

Private securities litigation has been very weak since the establishment of China's stock market some 30 years ago. A new law on securities took effect in March 2020 and introduces some reformist changes to this area. This article will examine the likely effect of the new Securities Law on this form of litigation. In particular, it will examine China's most celebrated 'quasi-class action' system, i.e. Special Representative Litigation. This procedure is borrowed from Taiwan's non-profit organization model. The essay argues that, since the new Securities Law has made only limited efforts in addressing the primary reason for the weak private securities litigation, namely, lack of judicial independence, it is unlikely to make any significant changes to private securities litigation in China.

Keywords: private securities litigation; securities law; class action; cost of litigation; judicial independence.

[A] INTRODUCTION

The People's Republic of China (China or the PRC) established its two stock exchanges, the Shanghai Stock Exchange and Shenzhen Stock Exchange, in 1990 and 1991 respectively. China's securities market has grown exponentially over the past three decades. As of December 2019, there were over 3700 firms listed in the two exchanges and their combined market capitalization amounted to over \$8 trillion, trailing only the US equity markets. However, China's stock market has been a side experiment as a capital allocation channel. It has often been called a casino, with share prices bearing little connection to underlying economic conditions (*The Economist* 2015). During the period of 1992-2018, China's gross domestic product grew by a factor of eight in real terms, much

faster than other large economies. By contrast, among large developed and emerging markets, the Shanghai Composite Index has been one of the worst performing indexes, its performance being somewhat similar to the Nikkei in Japan (Allen & Ors 2020). Moreover, during the period 2000-2018, Chinese investors in the domestic stock market earned negative return in real terms, and the cumulative return of the market was lower than that of five-year bank deposits or three- and five-year government bonds in China during this period (Allen & Ors 2020).

There are various reasons for the poor performance of the Chinese stock market, among which the negligible role of private securities litigation (PSL) is undoubtedly one of the most important (Li 2004; Chen 2012; Huang 2013; Sheng 2015). In accordance with the current literature, PSL is central to financial development and, in the absence of an effective PSL system, one country is unlikely to develop a healthy stock market (La Porta & Ors 2006; Bruno & Claessens 2008; Hartmann & Ors 2007; Djankov & Ors 2008). The lately amended Chinese Securities Law¹ (2020 Securities Law) may bring new hope for improvements to the PSL system. In particular, Article 95 of the law introduces a ‘quasi-class action litigation with Chinese characteristics’ which is celebrated by many commentators as a significant step in improving PSL in China.

This article considers the question: what is the likely effect of the 2020 Securities Law on PSL in China? It contains four sections and is organized as follows: section [B] briefly reviews the evolution of PSL in China; section [C] discusses changes brought by 2020 Securities Law in relation to PSL; section [D] examines the likely effect of the 2020 Securities Law on PSL; the final section [E] then concludes the article.

[B] THE EVOLUTION OF PSL IN CHINA (1998-2019)

Although China’s stock market was established as early as 1990, there was almost no PSL in China until 2002. Prior to 2002, even if aggrieved investors wanted to sue for damages, they found little support in either the 1993 Company Law or the 1998 Securities Law. Despite this lack of legislative support, since 1998, Chinese investors have continuously made attempts to seek civil compensation. On 4 December 1998, the first civil suit was filed in Shanghai, where a shareholder brought a suit against Hong Guang Industrial for financial losses arising from the defendant’s accounting fraud, following a fine and administrative sanction imposed

¹ The Securities Law was revised on 28 December 2019, effective from 1 March 2020.

on the company by the Chinese Securities Regulatory Commission.² The Shanghai court dismissed the case mainly on the ground that there was in its view no causation between the investor's losses and Hong Guang's false statements (Sohu Caijing 2002).

In spite of the failure of the *Hong Guang* suit, the large number of frauds perpetrated by listed companies had caused investors to bring civil actions against a number of companies around the country. Important defendant companies included Yin Guangxia, ST Houwang and Zheng Baiwen. On 20 September 2001, PSL actions against Yian Technology were filed simultaneously at the Intermediate People's Courts of Beijing, Guangzhou and Shanghai. A wave of lawsuits seemed to be breaking, and this apparently panicked the Supreme People's Court. The next day, the Supreme People's Court issued the 'Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities for the Time Being' (known as Circular No 406), instructing courts nationwide temporarily not to accept PSL suits on the ground that the legislative and judicial conditions were not yet ripe.³

Circular No 406 provoked intensive criticism from investors, legal scholars, practitioners and the Chinese Securities Regulatory Commission. Thus, on 15 January 2002, the Supreme People's Court issued the 'Notice Regarding Civil Lawsuits against Companies on the Grounds of False Statements' (known as the 1.15 Notice).⁴ The Notice stipulated that lower courts may accept PSL suits based on false statements, subject to a condition that an administrative penalty has been imposed on the alleged fraud. Although the 1.15 Notice opened the door for PSL, it also had some obvious shortcomings. First, it explicitly excluded PSL based on other types of market misconduct, such as insider trading and market manipulation. Second, it created an additional obstacle for launching PSL outside Article 108 of the Civil Procedure Law 1991 by requiring an administrative sanction as a prerequisite.⁵ Third and probably the

² The Chinese Securities Regulatory Commission is a ministerial-level public institution operating directly under the State Council. In formal terms, it performs a unified regulatory function, in accordance with the relevant laws and regulations, and with the authority by the State Council, over the securities and futures market of China; and it maintains an orderly securities and futures market and ensures the legal operation of the capital market. See Chinese Securities Regulatory Commission [website](#).

³ Circular No 46 apparently contradicted Article 163 of the 1998 Securities Law which granted investors a right to civil compensation.

⁴ It contained only six articles in total.

⁵ By doing so, it substantially compromised shareholders' rights and was inconsistent with the principle of judicial independence.

most important, it rejected class action (*jituan susong*)⁶ and only allowed individual litigation (*dandu susong*) or joint litigation (*gongtong susong*) in PSL.

The 1991 Civil Procedure Law provided two types of joint action: those actions in which the number of parties is fixed at the time of filing under Article 54, and those actions in which the number of parties is not known at the time the case is filed under Article 55.⁷ Article 14 of the 1.15 Notice further required that the number of plaintiffs in a joint action should be finalized before the hearing, which essentially limited the form of joint action to the first category (Huang 2013: 340). Where multiple plaintiffs sue the same defendants for the same misrepresentation in standalone individual and joint actions, the court may ask the plaintiffs in individual actions to join the joint action (Civil Procedure Law 1991: Article 13, para 1). The Chinese joint action with a fixed number of plaintiffs is similar to the United States (US)-style class action (Federal Rules of Civil Procedure: rule 23)⁸ in that there are numerous plaintiffs involved and the judgment of the action applies to members of the plaintiff class who have not participated in the lawsuit.

Nevertheless, there are important distinctions between the two forms of action. In particular, the US-style class actions operate on an ‘opt-out’ regime, whereby an action is pursued on behalf of a defined class of unnamed claimants who are deemed to be included in the action and are bound by the outcome unless they ‘opt out’. By contrast, a joint action with a fixed number of plaintiffs follows an ‘opt-in’ approach, under which only the plaintiffs who have registered with the court at the time the case is filed can be bound by the judgment. As a result, the same suit may be repetitively filed and trialled in different jurisdictions, causing a waste of judicial resources and an increase in litigation costs.

Despite the limitations, the 1.15 Notice was welcomed by investors and lawyers. Immediately after the promulgation of the 1.15 Notice, three

⁶ Article 4 states that ‘it is not appropriate to use the form of class action’. However, since the procedure of class action has never been legally defined in Chinese law, there has been confusion as to what it is that the term refers. Most commentators agree that it seems to refer to joint action in which the number of parties is not known at the time the case is filed, as stipulated by Article 55, 1991 Civil Procedure Law.

⁷ These provisions were carried over to the 2007 Civil Procedure Law and continued into the 2013 Civil Procedure Law.

⁸ Under rule 23(a), one or more members of a class may sue or be sued as representative parties on behalf of all members if the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defences of the representative parties are typical of the claims or defences of the class; and the representative parties will fairly and adequately protect the interests of the class.

investors went ahead to file individual suits in Harbin's Intermediate People's Court, suing Daqing Lianyi and its management for false disclosure and accounting fraud. Soon afterwards, 767 other investors sued the same defendants for the same cause of action. By the end of 2002, nearly 900 PSL suits against 10 companies had been filed, some of which were accepted by the courts (Chen 2003). However, due to the lack of detailed procedural rules governing such a situation, these cases became stalled.

On 9 January 2003, the Supreme People's Court issued 'Several Rules on Adjudicating Civil Lawsuits against Listed Companies on the Ground of False Statements' (known as the 1.9. Guiding or Regulations of 9 January). The Regulations of 9 January contained 37 Articles and set up a relatively complete legal framework for PSL arising from false statements. For instance, it stipulated the different types of misrepresentation (Regulations of 9 January: Article 17), the scope of eligible plaintiffs (Regulations of 9 January: Articles 2, 3), potential defendants (Regulations of 9 January: Article 7) and so forth. It extended the procedural prerequisite to include criminal penalties and administrative penalties made by administrative organs other than the Chinese Securities Regulatory Commission (such as the Ministry of Finance). However, it made no changes to the three key issues in the 1.15 Notice, namely, limiting civil litigation to suits brought on the grounds of false statements, rejecting class action and insisting on the procedural prerequisite. Rather, it added some new restrictions. Among other things, Article 9 provided that all PSL lawsuits must be filed with the Intermediate Court with jurisdiction over the area in which the listed firm is headquartered.⁹ Moreover, despite the useful guidelines, the courts remained uncertain about how to apply the rules. As a result, by the end of 2003, except for a handful of settlements, not a single case had been resolved through adjudication by the courts (Sheng 2015).

The possibility of PSL was formally incorporated into statutory law in 2005. Article 152 of the 2005 revised Company Law allows shareholders directly to file a lawsuit in their own names on the condition that they separately or in the aggregate hold 1 per cent or more of the total shares of the company for more than 180 days and must make a demand on the company first. The 2005 Securities Law also extended civil liability to insider trading and market manipulation (2005 Securities Law: Articles 76, 77). But the statutes were largely silent on implementation and the detailed rules were still to be found in the Regulations of 9 January. The latter were designed to deal with cases based on false statements, and so

⁹ This provision is inconsistent with the 1991 Civil Procedure Law which allows the plaintiff to choose jurisdiction between the plaintiff's local court and that of the defendant party (Article 29).

difficulties arise in applying the Regulations to cases of insider dealing or market manipulation. For instance, many insider-dealing suits were rejected on a basis of failing to establish causation between investors' financial losses and the impugned insider trading. As a result, from 2005 until the time of writing, there has been only one successful case of insider dealing (*Guang Da Securities*) (*Beijing Youth Newspaper* 2015) and one successful case of market manipulation (*Heng Kang Medical*) (Sina Finance 2020). The number of PSL suits in relation to false statements is also small. There were a total of 65 securities civil litigations launched during the period of 2002 to 2012 which represented only about 25.7 per cent of all the applicable criminal/administrative sanctions which could have led to securities civil suits (Huang 2013). The litigating rate is even lower when examined on the basis of 2000 to 2006 data (Liebman and Milhaupt 2008: 943).

[C] CHANGES UNDER THE 2020 SECURITIES LAW

The 2020 Securities Law dedicates Chapter 6 to investor protection. In relation to PSL, Article 85 shifts the burden of proof regarding misrepresentation to corporate controllers and *de facto* controllers;¹⁰ Article 94 significantly lowers the threshold for bringing derivate action by removing the Company Law's requirements of shareholding and holding period (2005 Company Law: Article 152). But the most important change lies in Article 95 which provides that PSL can take the form of 'ordinary representative litigation' (*putong daibiaoren susong*) (2020 Securities Law: Article 95, paras 1, 2) or 'special representative litigation' (*tebie daibiaoren susong*)' (2020 Securities Law: Article 95, para 3). On 31 July 2020, the Supreme People's Court released the 'Provisions on Issues of Representative Securities Litigation' (the Provisions) which set out detailed rules for implementing Article 95. On the same day, the Chinese Securities Regulatory Commission also issued a 'Notice on Investor Protection Institutions Participating in Special Representative Securities Litigation' (hereafter the Notice).

Representative litigation suits can be based on false statements, insider dealing, market manipulation and other market misconduct (Provisions: Article 1). The procedural prerequisites are abolished, but plaintiffs are still required to submit *prima facie* evidence in order to have standing

¹⁰ The revised 2005 Company Law, Article 216, provides *de facto* controllers, referring to those who are not shareholders but can exercise control over corporate conduct through investment, financial agreement or other arrangements, including both natural persons and legal persons.

for bringing representative litigation, including any administrative punishment decision, criminal judgment, admissions made by the defendant, or a disciplinary punishment decision imposed by a stock exchange or other national securities trading places which have been approved by the State Council (Provisions: Article 5 [3]).

Ordinary representative litigation applies where plaintiffs total more than 10 persons (Provisions: Article 5 [1]) and two to five representatives in line with Article 12 of the Provisions are elected and ascertained in the statement of claim (Provisions: Article 5 [2]). Ordinary representative litigation does not require the number of plaintiffs to be finalized before the hearing, if the number cannot be ascertained when legal action is started, the court is required to review the facts of the dispute in question and make an announcement calling for registration (Provisions: Articles 6, 7). The Intermediate Court of the place of domicile of the issuer or of the defendant has jurisdiction over ordinary representative litigation (Provisions: Article 2).

A special representative litigation suit can be launched where an investor protection institution¹¹ has been mandated by 50 or more qualified investors during the announced registration period, and the investor protection institution then participates in the litigation as a representative (Provisions: Article 32). A special representative litigation suit needs to be filed with the Intermediate Court or Special Court¹² of the place where the stock exchange or other national securities trading places approved by the State Council are located (Provisions: Article 2). The most distinctive feature of special representative litigation is that it adopts the 'opt-out' legal regime under which an investor protection institution can register the investors confirmed by the Chinese Securities Depository and Clearing with the court, unless any investor explicitly refuses to be registered (Provisions: Articles 34, 35). The adoption of an 'opt-out' regime brings special representative litigation much closer to the US-style class action and is therefore labelled as a 'quasi-class action with Chinese characteristics'.

Provisions also grant representative litigation a preferential treatment in costs of litigation, as follows:

¹¹ The Chinese Securities Regulatory Commission Notice Article 2 stipulates that investor protection institutions refer to the China Securities Small and Medium-sized Investor Service Centre Limited Liability Company or the Chinese Securities Investor Protection Fund Corporation Limited.

¹² Special courts comprise the [Military Courts](#), [Railway Transport Court of China](#), [Maritime Courts](#), [Internet Courts \(Hangzhou\)](#), [Intellectual Property Courts](#) and the [Financial Court \(Shanghai\)](#). Except for the Military Courts, these courts of special jurisdiction fall under the general jurisdiction of their respective high court.

- 1** refund of court fees—if a qualified investor who has filed a lawsuit before the registration announcement wishes to withdraw the case and join in the representative lawsuit, the court is required to refund the court fees already collected (Provisions: Article 10);
- 2** allocation of legal costs—the court shall support the representative’s request for reimbursement from the losing defendant for reasonable costs like announcement fee, notice fee, lawyer’s fee, etc. (Provisions: Article 25);
- 3** arrangements for court fees—subject to the court’s discretion, the court fees may not need to be paid in advance under special representative litigation and may be wholly or in part refunded even if the plaintiff loses the case (Provisions: Article 39);
- 4** no security for property preservation (conditional)—under special representative litigation, if the investor protection institution applies for property preservation, the court may decide not to require provision of security (Provisions: Article 40).

[D] THE LIKELY EFFECT OF THE 2020 SECURITIES LAW ON PSL

The 2020 Securities Law and Supreme People’s Court Provisions have a clear effect of lowering threshold and cost-effectiveness in PSL suits. Nevertheless, will these changes necessarily lead to an increasing use of PSL? The answer is probably not. Legal obstacles and litigation costs are only partial reasons for the weakness of PSL in China, and they are by no means the primary difficulties.

Legal Obstacles and Costs of Litigation

The prerequisite requirement prior to 2020 is often blamed as the reason for the small number of PSL cases in China. It is undeniably the case that the procedural prerequisite limited the scope of PSL to some degree, but it also offered a benefit of piggy-back. The civil court can avoid the difficult task of fact-finding in PSL by simply referring to the prior administrative or criminal decision. Huang Hui found the general view of lawyers is that the procedural prerequisite facilitates, rather than impedes, the pursuing of PSL in China (Huang 2013: 764). Even within the boundaries set by the procedural prerequisite, the litigation rate is stunningly low (Liebman and Milhaupt 2008; Huang 2013). This suggests that abolishing the procedural prerequisite can only have a marginal effect on promoting PSL.

Litigation costs can be a hurdle for bringing PSL suits as well. In China, the litigation costs are comprised mainly of court fees and attorney fees. The attorney fee is generally not an issue for the plaintiffs due to the availability of the contingency fee or risk agency fee system (*fengxian daili shoufei*).¹³ Court fees can be problematic as a plaintiff needs to pay a filing fee (Measures of Charging Litigation Fees: Article 13)¹⁴ when filing a case with the court. But, in practice, the filing fee is generally regarded as reasonable and does not appear to represent a serious burden for most investors. For instance, in a study of 1747 court decisions on PSL suits based on misrepresentation from November 2013 to 30 September 2016, it was found that 51.55 per cent of plaintiffs paid a filing fee of less than 500 yuan (around £55); 12.28 per cent of plaintiffs paid a filing fee between 500-1000 yuan (around £55-£111); 23.89 per cent of plaintiffs paid a filing fee between 1000-10,000 yuan (£111-£1111); and only 2.01 per cent of plaintiffs paid a filing fee above 10,000 yuan (£1111) (Xu 2017). In addition, the filing fee can be borne by ‘entrepreneurial lawyers’ in exchange for charging a higher risk agency fee (Huang 2018). Since litigation costs did not constitute a major obstacle for bringing a PSL suit prior to 2020, it is not clear to what extent PSL can be fostered by the measures that are designed to reduce litigation costs under the new law.

A Quasi-class Action with Chinese Characteristics

China’s stock market is known to be dominated by retail investors. By the end of July 2020, the total number of Chinese investors amounted to 17 million, among which 16.9 million are retail investors (*sanhu*).¹⁵ Thus, in China, market abuse often involves substantial numbers of individual investors with each suffering from a small amount of losses. Most investors have little incentive to participate in PSL as the cost of lawsuits often

¹³ In China, the contingency fee or risk agency fee system (*fengxian daili shoufei*) has long been used in practice. Under the 1997 ‘*Lüshi Fuwu Shoufei Guanli Zanxing Banfa*’ (Provisional Measures for the Administration of Lawyers’ Service Charges) Article 7, lawyers were able to charge fees based on a percentage of the value of the case in monetary disputes. The successor to the above regulation, the 2006 ‘*Lüshi Fuwu Shoufei Guanli Banfa*’ (Measures for the Administration of Lawyers’ Service Charges) has provided more detail on the application of the contingency fee system. A lawyer must first inform the client of the government-guided legal fee standard and then allow the client to choose whether to opt for the risk agency fee. To charge fees on the basis of risk agency, a law firm must enter into a fee-charging agreement with the client. This agreement should stipulate such matters as the division of risks and liabilities between the two parties, the methods of payment and the flat or proportional amount to be charged. The maximum amount charged on the basis of risk agency may not be higher than 30% of the value of the recovery as that value is stipulated in the fee-charging agreement (Articles 11, 13).

¹⁴ The filing fee is charged as a percentage of the claim’s value.

¹⁵ Data source Chinese Securities Depository and Clearing monthly report, available at [Chinese Securities Depository and Clearing website](#).

exceeds its benefit. A US-style class action can be particularly useful in this context. Instead of each shareholder pursuing an individual action, the US-style class action allows the entire shareholder class to pursue a single unified action against a defendant by relying on the efforts of the plaintiffs' representatives and attorneys. The class as a whole then internalizes both the cost and benefits of pursuing the action (Choi 2004). Prior to 2020, the procedure of class action was rejected in China, and its absence is often blamed for the weakness of PSL (Ren 2008; Ni 2019).

Under the new law, a quasi-class action, namely, a special representative litigation suit is made available to Chinese investors. By adopting the 'opt-out' regime, special representative litigation can offer investors a more cost-effective mechanism in pursuing PSL. Nevertheless, does special representative litigation mark a new era of PSL, as many commentators have been expecting? There are at least two reasons not to be too optimistic. Firstly, although class action was not permitted in previous law, 'entrepreneurial' lawyers have long been active in driving PSL in the PRC (Huang 2013: 767-778). These enterprising lawyers are called securities rights lawyers (*zhengquan weiquan lüshi*) in China. Like their US counterparts, they keep a close eye on the stock market, in particular the publication of the Chinese Securities Regulatory Commission's administrative penalty sanctions, to seek out opportunities to file PSLs. They will try to reach potential investor-plaintiffs once such opportunities arise. Under the risk agency fee system, the lawyers normally bear the costs of litigation and, if successful in their suit, will withhold a percentage of the amount recovered as the lawyer's fee (Measures for the Administration of Lawyers' Service Charges: Articles 11, 13). It looks as if the collective action problem in bringing PSL has been effectively mitigated by these lawyers, and it remains to be seen how much of a difference the special representative litigation regime can make in this regard.

Secondly, there is a doubt about the role of the investor protection institution in promoting PSL suits. As discussed earlier, the current rules limit special representative litigation representatives to two investor protection institutions—the Investor Service Centre and the Securities Investor Protection Fund. The Securities Investor Protection Fund was established on 30 August 2005 and is a wholly state-owned corporation funded by the State Council.¹⁶ The Investor Service Centre is a limited liability company that was set up in December 2014. It has five shareholders, namely, the Chinese Securities Depository and Clearing, the Shanghai Stock Exchange, the Shenzhen Stock Exchange, the China

¹⁶ See Securities Investor Protection Fund website.

Financial Futures Exchange and the Shanghai Futures Exchange. Both the Securities Investor Protection Fund and Investor Service Centre are registered as public interest organizations,¹⁷ operating under the direct administration of the Chinese Securities Regulatory Commission.¹⁸ Empowering a government-sanctioned public interest institution to lead securities class action is a model that originated from Taiwan (Milhaupt 2004; Lin 2007).¹⁹ In Taiwan, it is the Securities and Futures Investors Protection Centre²⁰ that plays the role of lead plaintiff in representative litigation. The Taiwan model has been praised for its advantage over the US-style class action in addressing the agency costs in the lawyer–client relationship (Fulop 2007).

However, an investor protection institution may not be properly incentivized in pursuing PSL actions for the following reasons.

- 1** An investor protection institution and its staff have little economic incentive in pursuing PSL suits. For instance, the Investor Service Centre holds only 100 shares in every company that is listed on the two stock exchanges,²¹ and its staff are paid at a fixed salary, so neither the Centre nor its staff will be financially rewarded from any increase of PSL suit numbers or successful outcomes. Hence, we should not expect an investor protection institution to pursue a more aggressive approach in promoting PSLs, in contrast to the ‘entrepreneurial’ lawyers.
- 2** The investor protection institution has been granted a *de facto* monopoly status of lead plaintiff in special representative litigation. Lack of competition often leads to inefficiency which, in turn, can undermine its capacity in enforcement of securities law. The Chinese Securities Regulatory Commission Notice did not mention

¹⁷ For details, visit [Investor Service Centre website](#).

¹⁸ This is clearly stated in their websites.

¹⁹ In accordance with the Securities Investors and Futures Traders Protection Act of Taiwan (which came into effect on 12 January 2003). In Taiwan, the institution is based on a government-sanctioned non-profit organization model.

²⁰ The Securities and Futures Investors Protection Centre was established in 2003. Donors to the fund include the Taiwan Stock Exchange, Taiwan Futures Exchange, GreTai Securities Market, Taiwan Securities Central Depository, the Taiwanese Securities Association, Securities Investment Trust and Consulting Association of ROC, Taipei Futures Association, Fuhwa Securities, Global Securities Finance, Fubon Securities and Entie Securities. At the same time, Article 18 of the Securities Investors and Futures Traders Protection Act requires securities firms, futures firms, Taiwan Stock Exchange, Taiwan Futures Exchange and GreTai Securities Market to contribute each month to the fund. The Securities and Futures Investors Protection Centre is controlled (directly and indirectly) by the securities regulator and the Financial Supervisory Commission respectively.

²¹ See [Investor Service Centre website](#).

how to divide the work between the Investor Service Centre and the Securities Investor Protection Fund, but it clearly has no intention of making them compete.

- 3** Last, but most importantly, the investor protection institution lacks independence and is susceptible to political influence. Both the Securities Investor Protection Fund and the Investor Service Centre are administrated by the Chinese Securities Regulatory Commission, that is to say the Chinese Securities Regulatory Commission has ultimate control over their decisions in relation to special representative litigation suits. China's stock market is dominated by state-owned enterprises (Tam 2002; Liu & Sun 2003; Jiang & Kim 2020),²² and many such enterprises are politically powerful, in particular those controlled by the central government, such as Petro China and China Mobile. It is hard to believe that the Chinese Securities Regulatory Commission will approve a special representative litigation suit that challenges a powerful state-owned enterprise or its senior managers.²³ It is equally unthinkable that the Chinese Securities Regulatory Commission would approve a special representative litigation suit that may lead to a substantial loss for a state-owned enterprise, or to popular protests (*qunti shijian*, literally 'mass action'). Its sanction records show that the Chinese Securities Regulatory Commission has never dared to take on these powerful actors itself, even in the most liberal times. In the current conservative political atmosphere, the leaders of the Chinese Securities Regulatory Commission will find themselves facing serious political or legal consequences, or both, if special representative litigation is not well controlled.

The experience of Taiwan also sheds light on what we can expect from special representative litigation in mainland China. By November 2015, for the 78 ongoing cases pertaining to securities law, 48 civil suits were filed as supplementary suits to the criminal case after indictment, and 28 civil suits were filed parallel to the criminal case but only initiated after indictment. That is, an overwhelming number of cases were filed following criminal indictment. Only one civil suit was filed before criminal indictment, and the remaining one case is absent a criminal indictment

²² At the end of 2000, 90% of listed companies were originally state-owned enterprises. A 2003 study showed that approximately 84% of listed companies were viewed solely from the standpoint of equity ownership and not taking consideration of informal mechanisms of influence, directly and indirectly under state control. In the past decade, there are more private companies listed in the Chinese stock market and, as a result, state-owned enterprises currently account for one-third of firm numbers but two-thirds of market capitalization.

²³ They might enjoy a ministerial or vice ministerial rank that is above the chairman of the Chinese Securities Regulatory Commission.

(Shao 2013: 81-84; Wang Wenyue 2017: 461). If the role of the Securities Futures and Investor Protection Centre in enforcing securities actions is indeed somewhat limited in Taiwan (Shao 2013; Wang Wenyue 2017),²⁴ then that of its mainland counterparts—the Investor Service Centre and the Securities Investor Protection Fund—can only be weaker.

The Chinese Judiciary

If the procedural prerequisite requirement, costs of litigation or the unavailability of class action could not account for the scarcity of PSL suits prior to 2020, then how to explain the low number of such cases? The answer lies with the judiciary. The Chinese court has been very passive in handling PSL and made every stage of the litigation process inhospitable to investors (Huang 2013; Sheng 2015). Even though the facts of suits had already been decided in the preceding administrative or criminal cases, the courts have constantly refused to accept cases or have delayed case filing (Liebman 2007; Huang 2013: 769-770). And even if a case is accepted, there will be endless hearings waiting ahead (Wang Liming 2017).²⁵ Even when a judgment or settlement is finally obtained (Wang 2006a),²⁶ it is often followed by a long period of waiting for its enforcement. The *Daqin Lianyi* case can serve as a reference to the sluggish litigation process: it took the plaintiffs two months to file their cases, two years to obtain a judgment and another two years to receive the actual compensation awarded to the plaintiffs (Wang 2006b). As discussed above, Chinese investors were very keen to seek civil remedies in the late 1990s and early 2000s, but their faith in PSL was gradually crushed by the reality of China's political-legal system.

The inhospitality of the courts in handling PSL can be attributed to various reasons, such as lack of expertise, resources shortage and so on. But the most fundamental reason is a lack of judicial independence. Lack of independence is almost a cliché in discussing the Chinese judiciary nowadays (Peerenboom 2002; Chow 2003; Clarke 2015), and that is particularly problematic in PSL. Under previous rules (Regulations of

²⁴ The Securities Futures and Investor Protection Centre preference over utilization of criminal findings may therefore be indicative of lack of intent for full enforcement or reflect insufficient staffing for its *de facto* status as the monopoly enforcer.

²⁵ For a detailed discussion of hearings, see Wang Liming (2017). Wang has explained that in reality, the practice of 'separate case establishments, collective hearings' is fairly common, whereby courts will wait through to the end of the two-year statute of limitations period before beginning any hearings on the case, with final conclusion of the case coming even later.

²⁶ Wang (2006a) reports that, until April 2006, among the 20 cases that were accepted by the courts, only two cases have resulted in court judgments ordering compensation to plaintiffs; another four cases have resulted in settlement.

January 9: Article 9), the Intermediate Court of the place of domicile of the defendant has jurisdiction over PSL. The defendant can be a listed company, or its senior managers, or both. A listed company is normally important to the local economy in terms of taxation and employment, especially in less-developed regions. Its senior managers are generally well connected with the local government. Local government has a vulnerability to local pressures and connections, intended to protect the defendant. At the same time, the Intermediate Court is heavily dependent on local government for financial support and other welfare benefits. These difficulties give rise to a so-called judiciary localism.

The Supreme People's Court Provisions have not done much to deal with the issue of judicial localism, except for special representative litigation. In accordance with Article 2, the Shenzhen Intermediate Court, the Beijing Intermediate Court and the Shanghai Financial Court are given jurisdiction over special representative litigation suits. In theory this could generate some positive results: most listed companies lose their local patron; the governments of Beijing, Shanghai and Shenzhen are not dependent on any particular company for economic support; and the above-mentioned courts have the best resources and staff in China. Nevertheless, this is based on the presumption that special representative litigation will be widely used. This presumption, as discussed earlier, is not without its doubts. In other forms of PSL, including ordinary representative litigation, judicial localism remains an issue and investors will continue to suffer. Moreover, in China's current political environment, judicial independence has increasingly become a topic tabooed for public debate, and it would be naïve to believe that the court will act in a more progressive fashion in handling PSL suits.

[E] CONCLUSION

PSL has been a very weak part of the Chinese legal system since the establishment of China's stock market. Many commentators have placed their hope in the new Securities Law for an improvement in the PSL situation. This article has examined the likely effect of the new Securities Law on PSL. It briefly reviewed the development of PSL in China and examined the recent changes brought by the new Securities Law. It argues that procedural prerequisite requirements, litigation costs and the absence of class action did not seriously impede investors from seeking civil remedies under the previous laws. The measures adopted in the new law that aim to address these issues will only have a modest effect as a result. The article has also offered a close examination of the most celebrated 'quasi-class action with Chinese characteristics'—special representative

litigation—a borrowing of the Taiwan non-profit organization model. This contribution has suggested that, since special representative litigation suffers from a similar incentive issue as its Taiwan counterpart and faces a more severe problem of political control, its role in promoting PSL might be fairly limited. The new Securities Law has made only limited efforts in addressing the primary reason for the weak PSL, namely a lack of judicial independence. As a consequence, it is unlikely to bring significant change to PSL in China.

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