

# **Minority Shareholders' Right to Derivative Action under the Public Company Act 1992**

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## **ABSTRACT**

This article aims to analyze the current status of statutory derivative action under The Public Limited Company Act B.E. 2535 (hereinafter “the Thai PCA”). It investigates derivative action under the Thai PCA does not provide minority shareholders in public company sufficient protections. It can only be brought by the aggregate minority shareholders against a conflict of interest transaction where the director received undue benefits personally, but they are unable to commence the derivative litigation against the third party. In addition, the minority shareholders can only claim for actual compensation, but not for losses.

From my study, it becomes evident that the statutory derivative action needs to be reformed, in that the legal framework and also some judicial discretions should be more extensive and effective in practical enforcement. The law should enable the minority shareholder to obtain legal redness more conveniently and cost-efficiently to enhance them the right and protection against exploitation and breach of duties by directors.

## **Introduction**

The high proportion of family-owned business in the market is the nature of Thailand's business specified problems, such as CP Corporation, Central group, Thai

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Beverage, and etc. They are usually controlled by a limited number of majority shareholders or close relationship members which can easily nominate board of directors and dominate the shareholder meetings. Because the democracy governing the company is based on the number of shared voting as the majority rule principle. Thus, Public Limited Company Act B.E. 2535 (hereinafter the Thai PCA) section 85 permits a shareholder to commence derivative action litigation provided that harm is done to the company as a result of a breach of directors' duties and the board of directors refusing to take action against themselves.

Although section 85 of the Thai PCA empowers the minority shareholders to initiate derivative action against directors for compensation on behalf of the company when the company fails to do so. It must be noted that, the provision under the Thai PCA does not impose what the damages cover for. However, the supreme court's discretion provides the judicial precedent in this situation that such claim is only asking for claiming compensation and from directors who breach of directors' duties. In addition, compensation awarded by the court is limited to actual damages not extent to unfair prejudice or monetary damages. The plaintiff is not entitled to the class of action on the third party under Thai law.

In detail, the Thai PCA point out the criterion of this provision that it's created for minority shareholders to initiate derivative action against directors on behalf of the company only, not the third parties. Consequently, the minority shareholders loss of incentive to claim derivative liability. Because of suing for cooperate behalf not only receive fewer reparations but also, even though the company wins the case, waiting for the declaration of dividend whether does not guarantee that minority shareholders will gain theirs profit back. And if yes, minority shareholders receive the dividends, after calculating profits compare with the number of shareholdings, they are still not worthwhile.

Bringing the claim against a third party. The Thai PCA does not empower to the shareholder where the director acted in cahoots with a third party and/or conspiracy for fraudulence, and the third party received the transfer of company's asset or which had been transferred in bad faith. Thai courts have no power to order the third party to hand back the assets to the company or reimburse the damages. In this sense, the statutory derivative action becomes an indirect protection protect the

third-party conspirator who causes a depletion of corporate assets more than the plaintiff shareholder or the company itself.

Even though Thai corporate law provides minority shareholders the right to sue on behalf of the company, it is obvious that there are insufficient measures for them to protect their interest from unfair treatment caused by majority shareholders. The law also fails to give minority shareholders sufficient reimbursement. There make the minority shareholders loss of incentive to take action in the derivative action, which is emphasizing the weaknesses of the Thai Company law. Thus, from the above causes, this article focuses on an analysis of legal frameworks based on derivative action and how to fine-tune against the Thai PCA involved by the relevant laws.

## **Research results**

### **1. Derivative Action and Its Development**

Derivative action is associating with directors' duties, it is designed to control the fairness and the integrity of directors when they make decisions or take action on behalf of the company, whether in board meetings or in meetings of delegated committees, that affect the company and its shareholders. The genesis of Derivative Claim was the ability of a shareholder to bring a claim in the name of, and for the benefit of, his own company.

In the past, derivative theory is initiated because in the common law system in the UK, a shareholder did not have the right to bring an action for any wrongdoings against a company or the right to make a complaint of irregularities in its internal affairs.

In *Foss V. Habottle*, the court held that a shareholder cannot bring an action on behalf of a company based on the principle of corporate personality and if the wrong is done to the company, it can be ratified by majority shareholders known as the majority rule.

However, the rule in *Foss V. Habottle* has an exception. It is established in the case of *Edwards V. Halliwell*, which it provides that:

- a. The alleged wrong or breach of duty was done by a director and was incapable of being ratified by a simple majority of the members; and

b. The alleged wrongdoers are in control of the company, so that the company, which is the “*proper claimant*”, cannot make a claim by itself.

In these circumstances, a minority shareholder could seek to bring a derivative action on behalf of the company. It also permits a minority shareholder to commence litigation against a director who caused harm to the company as a result of breach of director’s duties, provided that the board of directors refused to take the action against that alleged director.<sup>1</sup>

Although derivative action is accepted as an equitable remedy and give opportunity to minority shareholders to bring action against those causing harm the company, the court, in exercising its discretion, could consider the conduct of the minority shareholders to see whether their motives in seeking to sue are for the sole benefit of the company and whether the availability of other remedies exist.

With the above pattern of common law, it became almost impossible for a minority shareholder to institute derivative action as the procedure was difficult, and the exceptions to the rule were uncertain. Thus, it could strongly be argued that these difficulties were part of the reasons why directors were not cautious in performing their duties. However, after this legal theory had faced with the criticisms for decades, the English Law Commission had conducted an extensive inquiry into shareholder remedies and concluded that repealing the Rule of Foss and its exceptions is crucial and desirable<sup>2</sup>. The Commission further suggested that the Rule of Foss should be replaced with a new form of derivative procedure as in section 260-264 in Chapter 1 of Part 11 of the Companies Act of 2006 or CA 2006, with wider provisions and some modifications on the common law derivative action.

Definition of Derivative Claims provided in section 260 of CA 2006 can be separated into 3 elements as follows:

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<sup>1</sup> John Lowry and Arad Reisberg, Pettet’s Company Law: Company Law and Corporate Finance 4<sup>th</sup> ed. (England: Pearson education, 2012), p. 237.

<sup>2</sup> In general, 5 exceptions of derivative action at common law were recognized: the illegal or ultra vires act exception, the special majority exception, the personal rights exception, the fraud on the minority exception, and the interests of justice exception. Len Sealy and Sarah Worthington, Cases and Materials in Company Law, 10<sup>th</sup> ed. (England: Oxford University Press, 2013), p. 640–642.

- a. It is brought by a member of a company;
- b. It is in respect of a cause of action vested in the company; and
- c. It is seeking relief on behalf of the company.

This means that the person who brings the claim must be a member of the company at the time he brings it and he does not need to have been a member at the time the cause of action arose. However, this is in line with the current position at common law and makes sense from the point of view of the cause of action being vested in the company rather than in the shareholder bringing the claim.

A derivative claim may be brought for a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company (including former directors and shadow directors). This will cover an alleged breach of any of the general duties of directors. The claim may be brought against a third party and/or against the relevant director himself.

Moreover, the regulatory design of a derivative claim includes sufficient economic incentives to ensure that the shareholders pursue derivative actions that are economically efficient for the company. The regulatory measures used to provide economic incentives for shareholders can be divided into two relatively distinct categories as follows:

- 1) enriching monetary incentives, which allow minority shareholders to benefit economically from pursuing efficient derivative actions; and
- 2) indemnifying monetary incentives, which indemnify minority shareholders against economic losses that they may suffer as a result of pursuing efficient derivative action.

This indemnity is provided to ensure that minority shareholders are not economic punished for pursuing efficient derivative actions. These indemnifying monetary incentives generally require the company, after certain criteria have been satisfied and at various states in the litigation, to indemnify the minority shareholder for the costs incurred in pursuing an efficient derivative action.<sup>3</sup>

Other indemnities of shareholders to require reimburse from the court after derivative action can be found in Section 994 of CA 2006. It stipulates that members

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<sup>3</sup> Dan W. Puchniak, Harald Baum, Michael Ewing-Chow, *op.cit.*, p. 36.

may make a petition to the court on grounds that the affairs of the company has been conducted in a manner unfairly prejudicial to the interest of members generally or of some part of its members (including at least himself) or any actual or proposed act or omission of the company (including an act or omission on his behalf) is or would be prejudicial. The provision includes present, past, and future. In “Lloyds V Caseythe, the court allowed the petitioner to include acts that occurred before he became a member of the company”<sup>4</sup>. Unfair prejudice is given a broad interpretation to include relief for corporate wrong. In “Clark V Cutland, it was held that relief in relation to corporate wrong can be obtained”<sup>5</sup>.

In “Atlasview Ltd v Brightview Ltd, the court accepted that a breach of duty would be the classic example of conduct which is unfairly prejudicial to the interests of members “generally”, so to deny the application of CA 2006 Section 994 in such a case would be to deprive the section of much of its value”<sup>6</sup>. Thus, in circumstances where a wrong is done to the company, and corporate relief is sought by the petitioner, the court can award corporate relief directly under the unfair prejudice action.<sup>7</sup>

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<sup>4</sup> All Answers Ltd, “The Statutory Derivative Action and the Unfair Prejudice Remedy,” The Law Essay Professional, at <https://www.lawteacher.net/free-law-essays/company-law/the-statutory-derivative-action-and-the-unfair-prejudice-remedy-company-law-essay.php?vref=1>, (last visited 23 April 2018).

<sup>5</sup> All Answers Ltd, “The Statutory Derivative Action and the Unfair Prejudice Remedy,” The Law Essay Professional, at <https://www.lawteacher.net/free-law-essays/company-law/the-statutory-derivative-action-and-the-unfair-prejudice-remedy-company-law-essay.php?vref=1>, (last visited 23 April 2018).

<sup>6</sup> All Answers Ltd. The Statutory Derivative Action and the Unfair Prejudice Remedy. The Law Essay Professional. At <https://www.lawteacher.net/free-law-essays/company-law/the-statutory-derivative-action-and-the-unfair-prejudice-remedy-company-law-essay.php?vref=1>. (last visited 11 March 2018)

<sup>7</sup> All Answers Ltd. The Statutory Derivative Action and the Unfair Prejudice Remedy. The Law Essay Professional. At <https://www.lawteacher.net/free-law-essays/company-law/the-statutory-derivative-action-and-the-unfair-prejudice-remedy-company-law-essay.php?vref=1>. (last visited 11 March 2018)

From the above information, it can be seen that CA 2006 has provided more breadth for modern, flexible and accessible for determining whether a shareholder can pursue the action.<sup>8</sup> It allows minority shareholders to file a lawsuit in the position of company's representative, opens wider of fiduciary duties and duties of care by including actual monetary and physical losses which minority shareholders can request for monetary compensation. Moreover, the revising of law also governs damages resulting from a third party where the third party knowingly received a company's money or property from a director acting in breach of his fiduciary duties.

## **2. Derivative Action in England, United State and Germany**

Taking action against an outsider is acceptable in English Law, provided that the third parties are relevant to the asset of the company and have received any transfer of shares in bad faith. The courts are also authorized to order the third party to hand back the assets to the company or reimburse the damages.

Moreover, the Act has obviously provided opportunities for minority shareholder to report unfair treatment caused by alleged directors. The law also trends to give minority shareholders sufficient reimbursement considering the fact that not only the actual damages occurred, but also some foreseeable damages that cannot be calculated at the current time, or into exact indemnity cost, such as stock prices; opportunities cost; economic loss; and litigation cost.

The compensation awarded by a court once used to be returned to the company's equity. However, from now on, the derivative claim has made a significant change, in that indemnity may be return to minority shareholders by unfair prejudice. This encourages the minority shareholders to take action in the derivative claims and enhance good corporate governance in order to protect minority shareholders' right. Most importantly, the law has imposed an interesting provision by not indicating minimum proportion of shareholding, and the initiate duration of shareholding is extended to those resulted by the operation of law.

In MBCA and Federal Rule of civil procedures, the responsible men are included involved persons who harm the company. Claiming compensations from any

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<sup>8</sup> Her Majesty's Stationery Office, "Shareholder Remedies: A Consultation Paper" Stationery Office Books (1996).

actions can be obtained too, as such shareholders can claim actual compensation against director; and also injunction relief, which is considered as an equitable remedy to redress members of the company – to reassure that they receive adequate relief and compensation for all litigation fees.

Moreover, the law has mentioned nothing about minimum shareholding requirements. This, therefore, enhances the minority shareholders to commence the derivative litigation without tight restriction. The initiate duration of shareholding is extended to those resulted by the operation of law in the United States.

Different from the English law, Germany protects the minority shareholder by granting pre-state permission after the shareholder files a written demand to the board of directors, then he must wait at least for 90 days, and he can bring the claim to the court to initiated litigation procedure.

AktG protects the shareholders from all kinds of loss, such as litigation fee and any damages that occurred from any person who has gained advantages from any harmful act – a person exercising his influence over the company or acting in the detriment of the company. The law has supported derivative procedures by imposing that after the shareholders file a written demand to board of directors, they have to wait at least for two months, and then they can bring the claim to the court to initiate further litigation procedure. Therefore, minority shareholders have the lawful rights to commence the derivative suit to protect their own benefits and for the sake of the company.

### **3. Derivative Action under Public Limited Company Act B.E. 2535**

The Thai PCA was first promulgated in 1992, aiming to develop business and financial market in Thailand. After Asian financial crisis in 1997, the Thai PCA were amended to promote good corporate governance, transparency and accountability for the market. The laws were then amended periodically to address the rapid economic growth and to promote good corporate governance in the Thai corporate environment. Nevertheless, in some respects, the provision adopted the same concept as the Thai Civil and Commercial Code. Particularly, the provision still does not allow any shareholder to bring the claim against a third party. In addition, the requirement to firstly ask the company before bringing the action and the availability of remedy being the “compensation”.



Section 85 of the Thai PCA specifically imposes the duty on the directors in a public company to “comply with all laws, the objects and the articles of association of the company, and the resolutions of the meeting of shareholders in good faith and with care to preserve the interests of the company.”

It further sets out a procedural requirement for bringing a statutory derivative action in the second paragraph of the provision. If a director fails to comply with his duties, section 85 (1) states that “if such act or omission causes damage to the company, the company may claim compensation from such director. In the case where the company fails to make such claim, any one or more shareholders holding shares amounting to not less than five percent of the total number of shares sold of the company may issue a written notice directing the company to make such a claim. If the company fails to take action as directed by the said shareholders, such shareholders may bring a suit to the court to claim compensation on behalf of the company”

The director’s duties imposed under section 85 seemly provides clearer and more defined director’s duties, which help identifying the right of shareholders to bring the litigation against alleged directors. They must run the business not only by complying with all laws – under the objects and the articles of association of the company – and the resolutions of the meeting of shareholders, but also focusing on intention of the matter of law that the directors must run the business in good faith and with care in order to preserve the interests of the company.

The derivative legal problems are clarified and discussed in following passages and on the next content. Such as the provision does not allow any shareholders to bring claims against third parties. Moreover, the Supreme Court’s judgement imposed that the shareholders cannot request any indemnities for themselves. They can initiate derivative action only for the company benefits as such. The shareholders do not have any incentive to start the derivative litigation procedure because they cannot request other kinds of remedies; namely, injunction relief, unfair prejudice, reflective loss or any litigation loss. Even though the company wins the case, the process for declaration of dividend does not guarantee that minority shareholders gain theirs profit back. Even if the minority shareholders receive the dividends, after calculating and comparing the profits with the number of shareholdings, they are still not worthwhile. In addition, the requirement to ask the

company first before bringing the action and the availability of remedy concerning the “actual compensation from the direct consequence” are included in the provision.

The section which seems to deteriorate and affect the derivative action framework is section 95 of the Thai PCA. It provides strict legal matter about general meeting's after approval. The directors are no longer relevant. This also involves the supremacy shareholder rule or section 107 of the Thai PCA, which illustrates the power of majority shareholder's right. As such, the compose of section 95 and 107 of Thai PCA leads to a consequence that, even though the directors run the business by breach of fiduciary duties and the majority shareholders give them consent with those acts, the directors should not be responsible to the wrongdoing and related damages. In other word, section 95 and 107 seem to be overqualified since they can prevent the initiation of litigation procedure at the beginning of minority shareholder's right.

Thus, there is a similarity in legal principles between the old common law derivative action and the current provision governing derivative action in public company. The statutory of derivative action, an ingenious accountability and minority shareholder protection mechanism is fractious and permissible under Thai law.

See that, the initiating the derivative action is obstructed by the company which is controlled by the wrongdoers and they have de jure or de facto control of each general meeting through their shares. The minority shareholder may not be able to bring a derivative action because of the result of double control and the supremacy of the shareholder's rules.

Although the provision of derivative action exists to see whether the adopted legal can effectively function, none of legal issues of the statutory of derivative action under the Thai PCA has been brought to a serious discussion resulting from the conditions of derivative action. Moreover, the option to obtain remedies for minority shareholders is either to remain silent, or only actual damages can claim for compensation. Moreover, the cost of litigation is high but there is not sufficient reimbursement resulting from the lacks of compensatory incentives to minority shareholders to advance the claim in court. Neither the opportunity cost nor economic loss, which may be higher than actual compensation that the court foresees, is seriously discussed. Likewise, the court's judgement keeps stipulating that a plaintiff shareholder is unable to claim damages from third party who receives benefit from alleged directors whether he is irrespective bona fide or not.

The conditions leading to initiate derivative action is deeply flawed; they provide continuous ownership requirement, but do not give any definitions of plaintiff shareholders, minimum shareholding requirement and the limitations which block the right of initiate derivative action. As the result, the law does not confer such rights to a shareholder under section 85.

The current status of derivative action under the Thai PCA might be the cause of the minority shareholder's disappearance from the public company. The fact that the more he invests in the company, the stronger incentive he has in pursuing the claim against the director who causes damage to the company<sup>9</sup>, creates no good reason for the shareholder to bring the derivative action, at least from the financial and economic perspectives. As a result, the dearth of derivative action in Thailand is apparent. Thai's corporate law is unable to protect minority shareholders which are one of the key factors in national economic growth.

**The Comparative study of Thai Derivative Action Statutory with that of England, of the United States and of Germany.**

Legal issues	Comparative of Legal status toward the Derivative Action			
	England	United States	Germany	Thailand
<b>A. Type of Claims</b>				
- Actual damage related to actual compensations	✓	✓	✓	✓
- Any type of damages that harm the company related to any kind of loss	✓	✓	✓	X
<b>B. Scope of Claim</b>				
- Director	✓	✓	✓	✓

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<sup>9</sup> Ibid., p. 44.

- Third parties or involved person who harm the company	✓	✓	✓	X
- Shareholder by the operation of Law	✓	✓	✓	X
- Claim for monetary loss	✓	✓	✓	✓
- Claim for non-monetary loss i.e. opportunity loss, cancelation of registration act	✓	✓	✓	X
- Claim for litigation loss	✓	✓	✓	X
<b>C. Conditions of Derivative action</b>				
- Universal Demand	✓	✓	✓	✓
- Member of the company at the time to bring the claim	✓	✓	X	✓
- Member of the company at the time of wrongdoing arising (contemporaneous ownership requirement)	X	✓	✓	✓
- Member of the company during litigation procedure	X	X	X	X
- Required minimum proportion of shareholding	X	X	✓	✓

## Conclusion

Concerning the elements of the Rule of Foss imprinted on the Thai PCA, Thai statutory derivative action and the interpretation of judicial enforcement seem ambiguous and have functionally failed to serve purpose of providing an adequate

remedy to the aggrieved minority shareholders. It is questionable whether the legal remedies granted in those cases would be worth the plaintiff shareholder's effort, as higher cost can be incurred and it is time-consuming. As a result, many plaintiff shareholders are frustrated and despaired.

This is because the current status of the Thai PCA seems to ignore this type of claims which limit from minority shareholder to file the claim against alleged directors. In my opinion, the Thai PCA should be amended by expanding the causes of action to cover more than the actual damage and encouraging the right of claim to include economic rights. Moreover, after adding more causes of claims, in order to protect minority shareholder from possible damages, imposing a suitable remedy is significant. Other than the actual compensation of direct action resulting from alleged directors, the court should invest a wider discretionary power in order to make the remedies fair and justified.

By amending the provision, the law should add value to opportunities and economic indemnities, providing more methods to require the compensations. In England; for example, the law amended unfair prejudice, in the United States; equitable remedies or in Germany, the shareholder can request any kind of losses. Those countries have tried to enhance and empower the court to initiate discretion in order to "compensate such a shareholder for the actual expense being incurred that the court think fit" and "to order for the company to reimburse the litigation loss to the plaintiff shareholder.", if the action is brought by the shareholder in good faith.

In addition, the reimbursement of derivative action should not be concentrated only on the actual damages and the actual compensation. In model countries, stopping any act of alleged directors or any person who harms the company; or cancelling any registration of juristic act; or asking the wrongdoer to transfer asset back, the decisions must be consensual. However, the Thai PCA empowers the plaintiff shareholder to block only any action which harms the company before it has been done. In case a breach of fiduciary duties is already done, revoking asset transfer or cancelling registration of juristic act is impossible. As described above, the Thai PCA does not provide these kinds of reimbursement, thus making the Supreme Court's judgment a judicial error. It is always interpreted according to the previous judgement but does not consider facts or intent to cure the minority shareholder's loss. Thus, the court has to

be open-minded and dares to create a new criterion for the Supreme Court's judgement.

Moreover, the Thai PCA does not consider a person who is responsible for redressing derivative action regardless of a successful outcome in the case obtained by the plaintiff. Specifically, this study would like to recommend that the legal and regulatory framework should be updated to improve the definition of directors and other persons who harm the benefit of the company. This is because the liability under this section should not only be applied to the appointed director, whose duties in the company are similar to those of a shareholder. By virtue of this section, he can bring the claim against any "executive or the related person who obtained undue benefits" as mentioned in English, American and German laws; in order to enforce responsibilities from their action or omission. The Thai PCA must ensure that the director of the company who breached fiduciary duties and caused damage to the company cannot be released from liabilities simply by resolution of shareholders or the board of directors. Thus, derivative action under the Thai PCA should be amended, so that claims can be made against both directors and the third parties who have colluded to defraud the company and caused harms to shareholders' interest. As such, conditions and approaches observed from English, American and German laws should be studied in detail.

A person who can bring the derivative action is an individual shareholder or shareholders who hold a suitable aggregate of shares. In order to protect minority shareholders, the Thai PCA should be extensively interpreted in the same way people did in other countries. A person who receives shares by the operation of law deserves the rights to claim in the derivative action. This study would like to suggest that the legislators should amend the Thai PCA by following this example: P is bringing a derivative action to claim from A. company. P did not own share in A. company when the claim arose, but her uncle did. In the meantime, her uncle passed away and she inherited the share from him. Thus, she received the share by operation of law – from someone who owned the share when a claim arose. Now, she is a member of the company and receives the damage. She is an injured person who deserves to receive a chance to claim for any damages causing by the alleged directors.

Despite these criticisms, the minimum shareholding requirement remains firm and undiminished under the Thai PCA. In practice, however, it is highly unlikely for a minority shareholder to hold as many shares as that proportion since the 5 percent shareholding can cost around two thousand million baht. Instead of serving as a tool to prevent an abuse of derivative action, this legal requirement becomes another major obstacle to a minority shareholder preventing him from exercising an effective right of derivative action in a public company context. The requirement, therefore, should be abolished or alternatively reduce the ratio of the minimum share ownership to a reasonable percentage and provide an option, similar to German law, for prospective shareholders to use a proportional value of issued shares.

Another great obstruction against the derivative action is in section 95 of the Thai PCA. The absolute power of the company belongs to the majority shareholders, implying that “the authority can be exercised by a majority vote”. Based on this provision, it can be regarded as the exception of derivative action under the Thai PCA as it effectively bars the minority shareholder to proceed with the litigation against the will of the majority shareholders. In other words, an aggrieved shareholder may not commence proceedings where the action of a director has been authorized and ratified by the majority of the members in a duly convened general meeting. Thus, the content of this article seems to block minority shareholder to operate derivative action under section 85 at the very beginning.

Despite the fact that derivative action supports the enforcement of director’s responsibilities through shareholders litigation, in practice, it is difficult for company shareholders to bring a claim against the directors. This is because the shareholders are generally not in a position to access adequate information regarding corporate management and the directors can be released from their liabilities due to shareholder’s approval. In addition, the judicial enforcement can face an unexpected verdict, advanced payment and additional costs. Since the derivative action is claimed by shareholders on behalf of the company, the compensation goes to the company. The compensation, then, benefits the shareholders as a whole. It does not belong to any shareholder or group of shareholders who brings the lawsuit. Hence, there is no incentive for shareholders to initiate the case. As a result, litigation against directors who are in breach of their duties is rare, though there is derivative action recognized by the Thai PCA. Provisions on directors’ responsibilities, then, are not properly

interpreted and enforced. Thus, to support the minority shareholder's right and encourage good corporate governances in Thailand, the Thai PCA need a reformation by adding more provisions or amending some as mentioned above.

## **Recommendations**

1. The provision under Thai PCA does not impose what the damages cover, and the Supreme Court's discretion provides a judicial precedent that such a claim only request a compensation from the director who breaches their duties. In addition, the compensation awarded by court is limited to actual damages, not extended to unfair prejudice or monetary damages. Thus, the renewed version should incorporate the cause of action which covers all kinds of damage that harm the company and any kinds of loss. Moreover, the law should give the minority shareholders chances to be able to request compensation resulting from unfair prejudice. In order to protect them from damages, a significant suitable remedy which encourages the minority shareholders to make a claim in their own names should be imposed.

Moreover, the court should invest on a wider discretionary power in order to make remedies fair and just.

2. The provision and court's discretion should be revised by focusing on the responsible persons – the directors of the company including any person harming the company's benefits. From the court judgement, the plaintiff is not entitled to any cause of action on the third party under Thai law. Thai PCA points out the criterion of this provision that it is made for minority shareholders to initiate a derivative action against directors on the company's behalf, and that the third parties cooperate with alleged directors in bad faith.

3. The provision about the universal demand and reducing proportion of aggregate shareholding must be revised in order to make the derivative action more realistic and practical, thus, enhancing the role of the minority shareholders. Moreover, decreasing the amount of shareholding is significant to the initiation of the derivative action; reducing 5 percent of the capital seems like a more reasonable number. It may be implemented by German law, which imposes 1 percent of share, or at the suitable par value.



4. The court's discretion should be encouraged to consider litigation fees, lawyer fees, etc. This must be added in order to reimburse any damages which may occur during the litigation process and as a consequence the minority shareholder may face resulting from the company's benefit.

5. The provision, which suggests that a shareholder must be a member of the company at the time the wrongdoing arises (contemporaneous ownership requirement) until the time the claim is brought (continue ownership requirement), must be revised, because the consequences of both requirements compel the minority shareholder, which acts on behalf of company's benefit, must hold shares in a very long period of time in order to keep litigation right. He cannot sell shares or finds another exit. Thus, this can prohibit potential plaintiffs from filing lawsuits, or a derivative action is commenced by simply selling shares after the alleged wrong has occurred. Hence, the point where they need to become the members of the company at the time the derivative action is brought to the court is adequate, similar to the English law.

6. Section 95 of the Thai PCA must be revised because this section is like a huge stone which obstructs a derivative action process. This section stipulates the power of majority vote. In other words, an aggrieved minority shareholder may not commerce any derivative action when the action of a director has been authorized and ratified by a majority of the member in a duly convened general meeting. Thus, the implementation of section 1170 of the Thai CCC, which stipulates some exceptions for minority shareholder who does not agree with the resolution of shareholders' meeting to file the derivative action after the director has committed wrongdoing, looks like the most promising ways.

Thus, if the Thai PCA can be revised, renewed and revoked according to these recommendations, it will be more beneficial for the minority shareholders to receive true protections. Moreover, corporate law in Thailand will be developed and implemented in accordance with the model countries. Finally, it can also encourage Thailand's business and economic systems to run in attunement with the good corporate governance theories.