

BOOK REVIEW

## A Case for a Shareholders' Fiduciary Duties in Common Law Asia

by Ernest Lim. Cambridge: Cambridge University Press, 2019. 656 pp.  
Hardcover: £123.00.

## The Cambridge Handbook of Shareholder Engagement and Voting

by Harpreet Kaur, Chao Xi, Christoph Van der Elst & Anne Lafarre (eds).  
Cambridge: Cambridge University Press, 2022. 600 pp. Hardback: £160.00.

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As scholars ponder why 'perfect' markets have led to such imperfect economies and societies, the focus has shifted from correcting the agency problems associated with corporate directors to encouraging shareholder stewardship with a focus on environmental, social, and governance (ESG) issues.<sup>1</sup> Two books by leading corporate law scholars offer divergent paths to enlighten the curious and concerned about shareholder behaviour: Ernest Lim's monograph *A Case for a Shareholders' Fiduciary Duties in Common Law Asia*,<sup>2</sup> and *The Cambridge Handbook of Shareholder Engagement and Voting*, authored by a team of scholars representing nineteen jurisdictions.<sup>3</sup> Each of these works provides perceptive examinations of the corporate shareholder, but they diverge in exactly the way we would expect a monograph to diverge from a handbook: the monograph aspires, the handbook evaluates. Read together, however, these books complement each other very well.

Lim argues for something of a 'silver bullet' to cure many of the collective action ills of corporate governance by recognising a fiduciary duty at the apex of corporate power. This reader finds no reason to doubt the efficacy of such a shareholder fiduciary duty on collective action, if properly enforced. Indeed, Berle and Means already lamented the loss of dutiful shareholding specifically,<sup>4</sup> and natural law scholar John Finnis recognised that ascribing a duty to each actor in a collective can form a 'pattern of life without which many of the benefits of community could not in fact be realized.'<sup>5</sup> Lim's approach neither harkens back to a golden age of responsibility nor evokes philosophy of law, but remains grounded in corporate reality. Lim demonstrates in great detail how the legal institution of corporate membership through shareholding begs the application of a fiduciary

<sup>1</sup>Lucian A Bebchuk, Kobi Kastiel & Roberto Tallarita, 'Does Enlightened Shareholder Value Add Value?' (2022) 77 *The Business Lawyer* 731, 732–733.

<sup>2</sup>Ernest Lim, *A Case for Shareholders' Fiduciary Duties in Common Law Asia* (Cambridge University Press 2019).

<sup>3</sup>Harpreet Kaur et al (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press 2022).

<sup>4</sup>Adolf A Berle & Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers 1991 [Harcourt, Brace & World, Inc 1932]) 64 ('[T]he position of ownership has changed from that of an active to that of a passive agent ... The owner is practically powerless through his own efforts to affect the underlying property').

<sup>5</sup>John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2003 [1980]) 307.

duty, beginning with the function of the general meeting as an agent of the company.<sup>6</sup> He then uses many comparative examples to explain how the existence of such a duty would provide a more effective check on power than the current inadequate measures.<sup>7</sup>

Lim's analysis is confined to Common Law Asia, ie, Hong Kong, Singapore, India, and Malaysia<sup>8</sup> – all jurisdictions where UK law was transplanted during colonisation. As Lim explains, unlike the US state law picture on which Berle and Means' idea of powerless shareholders was based, company law in Common Law Asia gives shareholders 'highly significant (albeit limited) powers.'<sup>9</sup> This is crucial to Lim's argument because, as he rightly notes, 'courts have justified their imposition of fiduciary duties' where 'one party (the fiduciary) exercises discretionary powers that impact upon the interests of the other (the beneficiary).'<sup>10</sup> Any argument for the existence of a fiduciary duty on the part of shareholders would then presuppose a careful analysis of the specific powers that exist under corporate law, and the interrelationships between them. This is the analysis that Lim undertakes for Hong Kong, Singapore, India, and Malaysia, using both original and existing research into the laws of these jurisdictions.

In their introduction to the *Handbook*, co-editors Chao Xi and Anne Lafarre point out that corporate shareholder power has increased in part due to the ballooning of assets-under-management,<sup>11</sup> and this is one ground for undertaking their encyclopaedic study of shareholder engagement.<sup>12</sup> 'The Handbook aims to contribute to current academic and policy debates by providing a broad, comparative, evidence-based understanding of current issues in major jurisdictions around the world.'<sup>13</sup> As the introduction makes clear, authors responsible for the nineteen jurisdictions under scrutiny were given a carefully devised schema and terms of reference to guide their detailed analyses. These terms of reference appear to have included an examination of each of the economic and legal components of shareholder engagement, as well as the complementary and dissonant interrelationships between them.

The *Handbook* makes several noteworthy contributions that extend beyond the existing body of scholarly work. One particularly significant effort lies in its endeavour to measure the nature of engagement and the impact generated by various categories of shareholders (including diverse types of entrepreneurs and funds).<sup>14</sup> Additionally, it aligns itself with the growing body of scholarship that recognises the informal pressure that shareholders can exert on management,<sup>15</sup> an analysis that has regrettably been absent from corporate law studies for decades.

With the *Handbook* noting that 'the shareholder's right to request information beyond what is required in the mandatory disclosure regime has not so far been adequately studied',<sup>16</sup> it is certainly

<sup>6</sup>Lim (n 2) 25 et seq.

<sup>7</sup>ibid 205 et seq.

<sup>8</sup>ibid 3.

<sup>9</sup>ibid 11.

<sup>10</sup>ibid 39.

<sup>11</sup>As Leonard explains, 'Between 2007 and 2017, the Fed's balance sheet nearly quintupled, meaning it printed about five times as many dollars during that period as it printed in the first hundred years of its existence. All those dollars were forced into a zero-interest-rate world, where anybody was punished for saving money. It was impossible to trace the path of each QE [Quantitative Easing] dollar released in the flood of \$3.5 trillion ... This money flowed out into the system, and it pushed all the major financial institutions to search for yield. Many Wall Street traders ... developed a nickname for it: the "everything bubble.'" (Christopher Leonard, *The Lords of Easy Money: How the Federal Reserve Broke the American Economy* (Simon & Schuster 2022) 211–212). 'All told, QE programs started with QE2 in 2010 expanded the size of the Fed's balance sheet from \$2.3 trillion to \$8.2 trillion and rising in mid-2021.' (ibid 349).

<sup>12</sup>Chao Xi & Anne Lafarre, 'Shareholder Voting and Engagement: An Introduction', in Harpreet Kaur et al (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press 2022) 3.

<sup>13</sup>ibid 4.

<sup>14</sup>ibid 8.

<sup>15</sup>ibid 14.

<sup>16</sup>ibid.

unfortunate that its publication date preceded the appearance of a major study on shareholder information rights by one year.<sup>17</sup> Perhaps a future edition of the *Handbook* will take this new research into account. For the most part, the *Handbook* offers a comprehensive, encyclopaedic, and broadly comparative view of ‘how shareholders make use of their voting rights and other engagement instruments within their own jurisdictions’ legal, regulatory and broader institutional contexts.<sup>18</sup>

Lim’s *Case for Shareholders’ Fiduciary Duties* is an excellent companion to the *Handbook*: while the latter offers a global, expertly structured examination of ‘what is’, the former argues for ‘what could be’ – the introduction of a duty based on existing shareholder power in the company. Indeed, having digested Lim’s *Case*, a reader can read each of the *Handbook*’s jurisdictional studies against the background of what could change if shareholders were to have a fiduciary duty. That analysis goes beyond the scope of the *Handbook*. For example, in applying corporate law, courts in both Germany and Delaware ascribe fiduciary duties to shareholders who exercise power that affects the company as a whole and other shareholders, but the *Handbook*’s structure, carefully arranged along terms of reference to highlight shareholder engagement, means that neither its chapters on Germany<sup>19</sup> nor on the United States<sup>20</sup> refer to such duties. Incorporating Lim’s perspective presents an opportunity for a fresh assessment, offering a basis for comparison with the actual structure of fiduciary duties applicable to controlling shareholders under German and Delaware law. In turn, the *Handbook*’s analysis of ‘the laws and empirical realities’<sup>21</sup> of the nineteen jurisdictions surveyed can lay the groundwork for an analysis along the lines proposed by Lim: ‘examining not only why these duties should be imposed, but also, crucially, when the duties should be imposed, who should impose the duties, how the duties can be imposed as well as how the duties can be enforced.’<sup>22</sup>

Information on the global array of corporate law rules that affect shareholder engagement, and aspirations to bring shareholder power under the reasonable harness of a fiduciary duty, are useful complementary contributions to corporate law scholarship. As Xi notes in his conclusion to the *Handbook*, given the pervasive power of the modern corporation, ‘[t]he renewed ideological debates on the purpose of modern companies and, relatedly, on the (re)allocation of corporate power between shareholders and stakeholders, will have a fundamental impact on the way in which comparative [study of] voting and engagement are approached in the future.’<sup>23</sup>

<sup>17</sup>Randall S Thomas, Paolo Giudici & Umakanth Varottil (eds), *Research Handbook on Shareholder Inspection Rights: A Comparative Perspective* (Edward Elgar Publishing 2023).

<sup>18</sup>Chao Xi, ‘Shareholder Engagement and Voting: Where Does the Future Lie?’, in Harpreet Kaur et al (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press 2022) 537.

<sup>19</sup>Florian Möslein & Christopher Rennig, ‘Shareholder Engagement in Germany’, in Harpreet Kaur et al (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press 2022) 308.

<sup>20</sup>Vikramaditya S Khanna, ‘Shareholder Engagement in the United States’, in Harpreet Kaur et al (eds), *The Cambridge Handbook of Shareholder Engagement and Voting* (Cambridge University Press 2022) 239.

<sup>21</sup>Lim (n 2) 475.

<sup>22</sup>ibid 475.

<sup>23</sup>Xi (n 18) 545.