Company Law in East Asia

Edited by Roman Tomasic

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List of Abbreviations

ASC	Australian Securities Commission
ASEAN	Association of South East Asian Nations
ASIC	Australian Securities and Investment Commission
BAPEPAM	The Capital Market Supervisory Agency (Indonesia)
BHP	Balai Harta Peninggalan (Indonesia)
BKPM	The Capital Investment Coordinating Board (Badan Koordinasi Penaman Modal) (Indonesia)
CA	Companies Act 1965 (Malaysia), Companies Act (Singapore) and the Companies Act 1956 (Brunei Darussalam)
CC	Commercial Code (Japan)
CCC	Civil and Commercial Code 1928 (Thailand)
COMECON	Council for Mutual Economic Assistance
CPV	Communist Party of Vietnam
CRA	Company Registration Authority (China)
CSRC	China Securities Regulatory Commission
CSTL	The Chattel Secured Transactions Law (Taiwan)
FIC	Foreign Investment Committee (Malaysia)
GDP	gross domestic product
GNP	gross national product
HKSAR	Hong Kong Special Administration Region
IOSCO	International Organization of Securities Commissions
KLSE	Kuala Lumpur Stock Exchange (Malaysia)
KMT	Kuomintang (Nationalist Party) (Taiwan)
LLCA	Limited Liability Act 1938 (Japan)
MIB	Melayu Islam Beraja (Malay Islamic Monarchy) (Brunei Darussalam)
MOEA	Ministry of Economic Affairs (Taiwan)
MOF	Ministry of Finance (Taiwan)
MOFTEC	Ministry of Foreign Trade and Economic Cooperation (China)
MPI	Ministry of Planning and Industry
NPC	National People's Congress (China)
NZSC	New Zealand Securities Commission
OECD	Organization for Economic Cooperation and Development

OTC	'over the counter'
PNG	Papua New Guinea
PLCA	Public Limited Companies Act 1992 (Thailand)
RGELS	Rules Governing Examination of the Listing of Securities (Taiwan)
ROC	Republic of China
SCRES	State Commission for Restructuring the Economic System (China)
SCSPC	State Council's Securities Policy Committee (China)
SEA	Securities and Exchange Act 1992 (Thailand)
SEHK	Stock Exchange of Hong Kong
SEC	Securities and Exchange Commission (Thailand) (Philippines)
SEL	Securities Exchange Law (Taiwan)
SET	Securities Exchange of Thailand
SFC	Securities and Futures Commission (Hong Kong) (Taiwan)
SIA	Securities Industry Act (Malaysia)
SMES	small and medium-sized enterprises
TNCs	transnational companies
TSE	Taiwan Stock Exchange

Contents

1 An Introduction

ROMAN TOMASIC*

Company law in many parts of Asia is currently undergoing considerable change. These changes have many causes. Some of these causes can be found in the need to reform outdated laws which are no longer considered to be appropriate to contemporary economic and political circumstances. Other explanations for the rush to reform the company laws in many Asian countries may be found in pressures coming from international sources, such as multinational corporations, international financial institutions and professional groups. To some degree, the pressure to achieve some kind of harmonization in international or crossborder corporate law practice in the region has also been a factor in stimulating reform efforts.[1] Yet another factor which has influenced company law reform in the region has been the pressure to lower business costs and to use more streamlined bodies of company law for this purpose.

In each country or legal system discussed in this book, the precise mix of factors which have influenced law reform has differed, but what is very clear is that company law has begun to be seen to play a much more important role in regard to matters such as corporate governance and corporate social control. The financial crisis which beset Asian economies in mid 1997 has also focused attention on other corporate law ideas, such as corporate insolvency, conflicts of interest on the part of corporate controllers and corporate borrowing and capital raising.

The chapters in this book seek to provide an in-depth overview of the background and the operation of company law ideas in a number of legal systems in Asia. The countries or legal systems covered here are primarily to be found in East and South East Asia, namely China, Japan, South Korea, Taiwan, Hong Kong, Vietnam, Thailand, Malaysia, Singapore, Indonesia, Brunei and the Philippines. The book also discusses the company laws of Australia, New

Zealand and Papua New Guinea. Due to a paucity of legal materials, it has not been possible to cover the company laws of Cambodia, Laos and Myanmar. We also have not sought to cover the company laws of the legal systems of South Asia. Perhaps the latter countries can be left to another volume although English language materials on these South Asian jurisdictions are relatively easily accessible.[2] The book also includes a chapter by Professor David Campbell on the meaning of the rule of law in the context of Asian company law reform.

Chapters 1–7 deal with company laws in Japan, Korea, the Peoples' Republic of China, Hong Kong and Taiwan. Chapters 8–17 contain discussions of company laws in Vietnam, Thailand, Malaysia, Singapore, Indonesia, the Philippines, Brunei, Papua New Guinea, New Zealand and Australia.

The discussion of each body of company law in the chapters which follow Chapter 2 adopts a largely standard format so as to ensure some degree of comparability between jurisdictions and to ensure that broadly similar questions are addressed by each author. Each chapter has been prepared by a company law authority who has sought to bring together the principal sources of company law in each jurisdiction. Wherever possible, each chapter also draws upon local legal expertise, either in the form of a local co-author (where the author is not based in that jurisdiction) or through resort to informal advice from local experts in the company law of the particular jurisdiction.

The authors of each country or legal system chapter were asked to discuss a set number of topics or issues which became the section or sub-section headings of each chapter. Sometimes a number of these topics are more conveniently discussed together, such as where there is limited legal material on a particular topic or where it is considered more appropriate in a particular context to discuss a topic in a different order. In some jurisdictions some areas of company law, such as takeovers and securities laws, are relatively underdeveloped or even non-existent and so less attention is devoted to these areas.

Each chapter begins with an introduction to the legal system of each jurisdiction and is followed by an overview of the relevant corporate law statute in that jurisdiction. This is followed by a discussion of the nature and powers of corporate regulatory bodies in the jurisdiction; a discussion of the types of companies which may be formed in that jurisdiction and the powers and capacities of these companies. Each chapter then goes on to discuss the company formation process, and the internal and external administration of companies. Finally, each chapter also discusses takeover and securities laws in each jurisdiction as well as such other areas as may be appropriate.

Generally, therefore, each author discusses his or her jurisdiction's body of company law by reference to the following issues or headings:[3]

1 An introduction to the nature of the legal system in each country, its history and judicial and regulatory structure
2 A description of the corporation law statute (and case-law) in the jurisdiction

- The constitutional basis of the company law
- How the company law came into being
- Who is responsible for changing the law?
- The principles, if any, underlying the company law
- How the legislation is interpreted (rules of interpretation)

3 The nature and powers of corporate regulatory bodies in the jurisdiction

- A description of the powers of company regulatory bodies
- The role of regulatory bodies in policy formation, practice and so on
- The mechanisms for the review of regulatory action

4 A description of the types of companies, their powers and so on

- A description of the types of local companies
- The recognition of foreign companies in the jurisdiction
- The legal capacities and powers of companies

5 Company formation

- The registration of companies, promoters and so on
- The corporate constitution (for example memorandum and articles)
- The restrictions on the use of certain names
- Membership and share capital requirements
- The amendment of corporate constitution
- Company registers

6 The internal administration of companies

- The registered office and name
- The duties, powers and responsibilities of officers
- Meeting procedures
- The audit and accounting rules

- The annual return and other registers
- Shareholder protection rules (for example minorities)
- The relationship between management and shareholders
- Corporate financial transactions (for example, charges, share buy backs and receivers)

7 The external administration of companies

- The rules regarding arrangements and reconstructions
- Voluntary administration and corporate rescue provisions
- Company winding up rules, tests for insolvency, grounds for winding up and mechanisms for initiating insolvency proceedings
- The protection of creditors and the ranking of claims
- Control of insolvency practitioners

8 Takeover rules

- An introduction to company takeover rules (statutory or voluntary)
- Takeover thresholds
- Disclosure requirements and shareholder protection
- The role of lawyers, experts and the regulator in takeovers
- Mechanisms for the review of takeover activity

9 An introduction to securities regulation in the country/jurisdiction

- The relationship between stock exchange(s) and corporate regulation
- The types of securities regulated
- The legal effect of listing rules and business rules of the stock exchange(s)
- Market conduct rules and sanctions for securities misconduct

10 Miscellaneous

- The powers of the courts
- Civil remedies
- Offences
- Who may initiate proceedings?
- The registration and control of persons under the legislation (for example auditors, liquidators and experts)

It should be noted that the majority of Asian legal systems are based on civil law ideas drawn from countries such as Germany, the Netherlands and France, although these ideas have often been affected by common law systems (principally, by ideas from the US and UK common law systems).[4] These civil law systems operate around broad codes which seek to set out the principles applying to a particular area and, generally, are not modified or developed through the courts by resort to the doctrine of precedent. Judges in the civil law tradition have less authority than common law judges, with civil law judges usually being career administrative officials whereas common law judges would usually come directly from a career at the private Bar.[5]

This is to be contrasted with common law systems which rely heavily upon both case-law developed by the courts and statutory enactments.[6] Only Hong Kong, Malaysia and Singapore have common law systems of the kind that are also found in Australia, New Zealand and Papua New Guinea. Common law systems, therefore, depend upon the existence of a body of case-law which forms the precedents which company lawyers in that jurisdiction would use when a matter is interpreted or litigated. However, as there has been relatively little company law litigation in East Asia, legal precedents from other jurisdictions have often been drawn upon in resolving disputes. Such precedents have been drawn from countries such as Britain, Australia and the United States.

For example, the common law jurisdictions in Hong Kong, Singapore and Malaysia would frequently draw upon authorities and statements of legal principle from the United Kingdom and from Australia. In the more recent reforms of the company laws of jurisdictions influenced by civil law, such as Indonesia, the Philippines, Vietnam and China, US ideas have been drawn upon to some degree, although none of these jurisdictions has slavishly merely adopted foreign bodies of company law; however, this may have been done in earlier times.[7] US company law ideas have also been influential in Indonesian, New Zealand and Hong Kong reform efforts.

US influences have also been apparent in Japan, Korea and Taiwan through the impact of US postgraduate legal education upon legal practitioners working in the corporate law field. However, even this important influence has not meant that local factors have not had an impact on the form and content of company law ideas adopted in each jurisdiction. This is especially so in jurisdictions based on civil law ideas which have been affected by socialist ideas, such as China and Vietnam, where the categorization of the system becomes considerably more complex. Earlier German legal ideas have had an influence on Japan, Taiwan, Korea and China, whereas earlier Dutch legal ideas have had an influence in Indonesia. What is apparent,

however, is that a hybridization of legal systems is emerging in some legal systems and that company law is increasingly being influenced by common law ideas where it operates within what is still basically a civil law system. The addition of local cultural variables adds yet another layer to the complexity of company law and practice in Asia.

Each chapter, therefore, looks closely at the history and constitutional structure of each legal system and the legal mechanisms or procedures which are in place to mobilize their respective bodies of company law. However, local cultural, historical and political factors will continue to play an important role in affecting the mobilization of corporate law in Asian legal systems.

Although it is not the aim of this introduction to summarize each of the chapters in this book, a number of inter-related themes emerge from these chapters. Some of these issues are discussed by Professor Campbell in Chapter 2.

Various other themes would be familiar to company lawyers and some of these may be mentioned here briefly. First, there is a tension in company law between the extent to which such laws are primarily facilitative or coercive and whether these laws are optional or mandatory in character. There has long been an argument in company law debates regarding the primary function of company law. Thus, it has been asked whether company law should aim to ensure compliance with strictures regarding business conduct or, alternatively, merely lay down the broad parameters or boundaries for acceptable business conduct and be primarily concerned with facilitating business activity.

As authors on company law such as Stone[8] in the United States and Tomasic and Bottomley[9] in Australia, have shown, there are major limits to corporate law as a regulatory or coercive device. The limits of corporate law are attributed in part to the importance of cultural factors in the structure of corporate action. Thus, far more important than corporate law are the cultural variables which are at work within the corporation. To be effective, corporate sanctions need to be linked to the sub-cultural and organizational dimensions of the corporation.[10] The use of serious corporate sanctions against corporate misconduct or the misconduct of corporate officers has been notoriously difficult and costly, so that criminal sanctions have been less effective in changing conduct by and within the corporation than well-targeted civil remedies and internal corporate compliance programmes.[11]

Company law has increasingly been seen as a set of rules which it is more efficient for a business to adopt rather than to have to negotiate these rules anew in the marketplace each time that it wishes to undertake commercial transactions. Law and economics scholars have supported this line of thinking about company law, tending also to

see the corporation itself (or more correctly the firm) as a nexus of contracts.[12] Corporation law has increasingly come to be seen as a set of mandatory and optional rules which are provided to facilitate business activity. These kinds of debates are beginning to be echoed in different parts of Asia, such as in the work of the recent company law inquiry in Hong Kong and in the company law reform efforts in New Zealand. The debates in the latter jurisdiction have also had an effect on company law reform elsewhere in the region, such as in Vietnam and in Papua New Guinea.

A second key theme in company law debates has been that of corporate governance. Increasingly, we are seeing international corporate governance debates being extended into the Asian and the Pacific region. This has seen the emergence of debates regarding the roles of boards of directors, independent and executive directors, the company chairman, supervisory boards, audit committees and stakeholder groups, such as large shareholders, pension funds and employees.[13] The dominance of so many Asian companies by strong family groups[14] or by the state has tended to limit the impact of this debate, although it is likely that this will change following the financial crisis which has beset most Asian economies since mid 1997. However, the state still continues to play an important role in many Asian economies, having the effect of severely limiting the free play of market forces. This has led to what might be described as the rule by law rather than the rule of law in some Asian countries.[15] This issue is taken up further by Professor Campbell in Chapter 2. Heavy state ownership of companies in many Asian countries has also served to limit the extent to which corporate law principles have been able to be applied freely in these countries. However, the Asian economic crisis of late 1997 and 1998 may begin to loosen the reliance which has been placed upon state control of markets and economic activity in these jurisdictions.

A third key concern is the manner in which company law serves as a means of dealing with corporate debt problems, such as the problem of insolvent trading by companies. One of the traditional areas of concern in company law has been with the winding up of companies, corporate restructuring and the appointment of receivers over corporate assets. This concern has become increasingly significant, of course, since the currency collapses of 1997 and is likely to lead to a new interest in corporate insolvency laws. However, insolvency laws will always have to operate in a cultural context, especially in Asia.[16] At the same time, Asian insolvency laws are slowly being amended to introduce more effective means of rescuing companies which are in financial difficulties. Illustrations of this kind of reform effort are to be found in Hong Kong, Singapore and now China, with its heavily indebted state-owned enterprises.

A final general issue which might be considered here is that of capital raising by Asian companies. The emergence of stock exchanges in many Asian countries has seen increasing trading in the securities of Asian-based companies. This has meant that corporate regulatory bodies and stock exchanges have had to take an increasing interest in the application of company laws. In some Asian jurisdictions, such as Singapore and Hong Kong, companies and securities laws work reasonably effectively.[17] Singapore's handling of the collapse of Barings is testimony to the high standards of security regulation in that jurisdiction.[18] However, this is not the case in some very well-developed Asian legal systems, such as Japan and Korea, if the number of recent securities market abuses and irregularities is a guide.

Other countries in the region, such as China[19] and Vietnam, are still developing their securities market rules and institutions, so that it will be some time yet before they match the kinds of securities market practices found, for example, in the United States. However, as not all corporate capital raising takes place on stock exchanges, company law rules will continue to be important in this area.

Company law in an advanced economy is unlikely to be static, so that, as practitioners are well aware, any understanding of this area will need to accommodate this process of change and include an understanding of regulatory practice, court cases and law reform and business debates. Given the pivotal role of company law in providing a mechanism for the containment of risk and for the raising of capital, it is inevitable that corporate law and practice in each jurisdiction will tell us a lot about the organization of economic activity in these places. However, we are still only beginning to fully understand the nature of corporate law in Asian countries and hopefully this book will serve both to bridge the gap and to facilitate further inquiries and research in this area.

Notes

* University of Canberra.

1 See generally, Taylor, V. (1995), 'Harmonising Competition Law within APEC: US-Japan Disputes on Vertical Restraints', *Australian Journal of Corporate Law*, **5**, 379.

2 See for example, Wickremasinghe, K. (1992), *Wickremasinghe's Company Law of Sri Lanka (Revised 2nd edition)*, Colombo: Kimarli Wickremasinghe; Fernando, H.M. (1995) *Sri Lanka – Its Company Law Stock Exchange Company Commercial Practice*, Colombo: H.M. Fernando.

3 Sometimes use of these headings has been departed from where the author has considered it appropriate depending on the local circumstances.

4 See for example, Smith, M. (1997), 'Private Law and Public Control of Commercial Activity in Japan – the Role of the Codes', in J. Gillespie (ed.), *Commercial Legal Development in Vietnam: Vietnamese and Foreign Commentaries*, Singapore:

Butterworths Asia, 261–276. See also, Ruru, B. (1995), 'Development of Equity and Bond Markets: History and Regulatory Framework Indonesia', *Australian Journal of Corporate Law*, **5**, 326.

5 See generally, Weeramantry, C.G., (1982), *An Invitation to the Law*, Sydney: Butterworths, 50–52; and Von Mehren, A.T. (1963), *Law in Japan: The Legal Order in a Changing Society*, Cambridge: Harvard University Press.

6 Llewellyn, K.N. (1960), *The Common Law Tradition: Deciding Appeals*, Boston: Little, Brown and Company; Stone, J. (1985), *Precedent and Law: Dynamics of Common Law Growth*, Sydney: Butterworths; Holmes, O.W. (1963), *The Common Law*, Boston: Little, Brown and Co; Twining, W. (ed.) (1986), *Legal Theory and Common Law*, Oxford: Basil Blackwell.

7 See for example, Le Dang Doanh (1996), 'Economic Reform in Vietnam: Legal and Social Aspects and Impacts', *Australian Journal of Corporate Law*, **6**, 289.

8 Stone, C. (1975), *Where the Law Ends, The Social Control of Corporate Behavior*, New York: Harper & Row.

9 Tomasic, R. and Bottomley, S. (1993), *Directing the Top 500: Corporate Governance and Accountability in Australian Companies*, Sydney: Allen & Unwin.

10 See further, Jackall, R. (1988), *Moral Mazes: The World of Corporate Managers*, New York: Oxford University Press.

11 See further, Tomasic, R. and Bottomley, S., note 9, above; Tomasic, R. (1993), 'Corporations Law Enforcement Strategies in Australia: The Influence of Professional, Corporate and Bureaucratic Cultures', *Australian Journal of Corporate Law*, **3**, 192; and Fisse, B. and Braithwaite, J. (1993), *Corporations, Crime and Accountability*, Melbourne: Cambridge University Press.

12 See further, Easterbrook, F.H. and Fischel, D.R. (1991), *The Economic Structure of Corporate Law*, Cambridge: Harvard University Press; Romano, R. (ed.) (1993), *Foundations of Corporate Law*, New York: Oxford University Press; Tomasic, R. (1995), 'A note on law and economics thinking about corporate law', *Canberra Law Review*, **2**, 155.

13 See for example, Low Siew Cheang (1996), *Corporate Powers: Controls, Remedies and Decision-making*, Kuala Lumpur,: Malayan Law Journal Sdn Bhd.

14 See generally, Redding, N.S. (1990), *The Spirit of Chinese Capitalism*, New York: Walter de Gruyter. See also, Steward, S. and Donleavy, G. (eds) (1995), *Whose Business Values? Some Asian and Cross-Cultural Perspectives*, Hong Kong: Hong Kong University Press.

15 See generally, Tomasic, R. (1995), 'Company Law and the Limits of the Rule of Law in China', *Australian Journal of Corporate Law*, **4**, 470.

16 See further, Tomasic, R. and Little, P. (1997), *Insolvency Law and Practice in Asia*, Hong Kong: FT Law & Tax.

17 O'Hare, J. (1996), 'Regulation of the Securities Industry in Hong Kong: The Securities and Futures Commission', *Australian Journal of Corporate Law*, **6**, 178; Neoh, A. (1995), 'The Capital Markets of Hong Kong: Opportunities and Challenges of the Future', *Australian Journal of Corporate Law*, **5**, 334.

18 Lim, M. and Tan, N. (Inspectors) (1995), *Baring Futures (Singapore) Pte Ltd: The Report of the Inspectors appointed by the Minister for Finance*, Singapore: Ministry of Finance. Also see generally, Gapper, J. and Denton, N. (1996), *All that Glitters: The Fall of Barings*, London: Hamish Hamilton; Leeson, N. and Whitley, E. (1996), *Rogue Trader*, London: Little, Brown & Company (UK).

19 Gao, Xi-Qing (1996), 'Developments in Securities and Investment Law in China,' *Australian Journal of Corporate Law*, **6**, 228.

2 What is Meant by 'the Rule of Law' in Asian Company Law Reform?

DAVID CAMPBELL*

1 Introduction

The recent resumption by the People's Republic of China (PRC) of sovereignty over the former British territory of Hong Kong has posed perhaps the most acute example of the major problem facing business law throughout Asia. General commitment to capitalist economic development in Asia, from which arguably only North Korea now remains a clear dissentient, requires the development of the legal framework necessary for capitalist enterprise, particularly company law, in countries within which the development of such a law has either remained vestigial or indeed has been actively opposed.

It is manifest that such a development poses a quite enormous legislative problem, one that can be met only by commitment of concomitantly enormous resources to company law inception or reform. What is in one sense even worse is that it is now beginning to be recognized within company law – although it was through the more theoretical perspectives of comparative law[1] and the sociology of law[2] that the problem was perceived initially – that the reception of legislation cannot be governed by (although obviously it is influenced by) the quality of the drafting of the legislation. Any accurate estimate of the reception of a law must pay regard to what here will be called the institutions relating to (the relevant) law prevailing in the country in which the law is to be implemented. The existence of, as it were, the requisite *material* institutions – in essence the sufficient resources (including a competent and committed legal personnel) – to not merely promulgate but enforce the law is an obvious issue. As these resources, although apparently (potentially) sufficiently available in, say, Hong Kong or Singapore, are restricted in other countries