Comparative Takeover Regulation: The Background to Connecting Asia and the West

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A Introduction: Goals of the Book

The topic of mergers and acquisitions (M&A), particularly takeovers, continues to receive significant attention from both academic and practical perspectives. Apart from the usual contractual and deal-related issues arising from M&A, the growing incidence of takeovers (especially those of the cross-border variety) raises significant policy concerns. Regulators around the world are engaged in a constant review of the legal regime governing takeovers, and continue to introduce reforms as appropriate on a periodic basis.

While some common threads run among takeover regulations in various jurisdictions, they also demonstrate significant differences. Takeover regulations in individual jurisdictions are shaped by various factors including corporate history, corporate holding structures, concentration (or dispersion) of shareholding, the nature of the legal systems, characteristics of shareholders, evolution of regulatory regimes and the like. This has given rise to burgeoning, but influential, literature on comparative takeover regulation. The limitation of that literature, however, is that it is situated

1 Although M&A can take different forms, in this book we focus primarily on one form; namely, takeovers. A takeover or ‘control transaction’ has been defined as ‘one between a third party (the acquirer) and the company’s shareholders, whereby the third party aims to acquire the target company’s shares to the point where it can appoint its nominees to the board of that company’. Paul Davies and Klaus Hopt, ‘Control Transactions’ in Reinier Kraakman et al., The Anatomy of Corporate Law: A Comparative and Functional Approach, 2nd edn (Oxford: Oxford University Press, 2009), p. 225. See also, John C. Coates IV, ‘Mergers, Acquisitions, and Restructuring: Types, Regulation, and Patterns of Practice’ in Jeffrey Gordon and Wolf-Georg Ringe (eds), The Oxford Handbook of Corporate Law and Governance (Oxford: Oxford University Press, 2017 forthcoming); Wai Yee Wan and Umakanth Varottil, Mergers and Acquisitions in Singapore: Law and Practice (Singapore: LexisNexis, 2013).

in the Western hemisphere. It largely engages with the Anglo-American approaches to takeover regulation, with some of it focusing on the European Union (EU) more broadly and on countries such as Australia. At present, there is a lack of similar comparative academic studies in the Asian context. This is in spite of the fact that Asian economies have become significant players in the global M&A market, by regulating takeovers of companies within their jurisdictions (either by domestic or foreign acquirers), but also by enabling their own companies to seek out targets elsewhere (including in the developed markets).3

The phenomenon of takeovers (both domestic and cross-border) involving Asian companies has not been subjected to rigorous academic analysis. This, we believe, provides a useful setting or context for this book, which aims to fill a significant gap. In doing so, the book does not attempt to address Asian takeover regulation in isolation. It embarks upon a comparative analysis of eight Asian jurisdictions (China, Hong Kong, India, Japan, Korea, Malaysia, Singapore and Taiwan)4 in the context of the theoretical and empirical understanding of takeovers in general and also in other developed markets that are frontrunners in takeover regulation (such as the United States (US), the United Kingdom (UK), the EU more generally and Australia). A legal analysis of comparative takeover regulation must be informed by a strong framework constructed through the lens of economic and political considerations, which form an integral part of the book.

The principal analysis in this book relates to the role of takeover regulation in different economies. While the Western economies, whose takeover regulation has already been the subject matter of academic study generally, display dispersed shareholding in listed companies, the Asian economies commonly have concentrated shareholding, even in publicly listed companies.5 In the Asian context, the market for corporate

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3 See Section B.

4 The rationale for choice of these jurisdictions is discussed in Section C.

control may not widely exist so as to minimise the agency costs between managers and controlling shareholders, on the one hand, and minority shareholders, on the other. The nature of takeover regulation may necessitate a different approach, with greater emphasis on the mandatory bids and disclosure of substantial shareholding. The likelihood of hostile takeovers will be minimal. It is these differences among various jurisdictions that strike at the heart of this project.

Despite these fundamental differences in the takeover markets between the Western countries (with greater emphasis on the Anglo-American approach) and various Asian countries, it is indeed peculiar that nearly all the Asian jurisdictions studied in this book have adopted their takeover regimes from either the UK or the US, or both. Such reforms through the transplantation of takeover regulation from the West to Asia pays scant regard to the underlying differences mentioned above. Hence, as discussed in greater detail in this book, the Western takeover rules have been applied in rather odd ways in Asian jurisdictions, or have led to unintended consequences. While there are indications of a formal convergence of takeover regulation across jurisdictions that point towards the Anglo-American approach, the chapters on Asian jurisdictions show that there has been little movement towards functional convergence.

Section B of this chapter highlights the relevance of Asia to the global M&A markets and establishes the need for the present work. Section C sets out the structure of the book, which is divided into two parts; Part I examines takeover regulation from theoretical and empirical perspectives in the global context so as to set out the framework for the Asian discussion, and Part II contains a comparative cross-jurisdictional study of takeover regulation in eight Asian economies. Section D analyses the primary findings of the theoretical and empirical study of takeover regulation, primarily in Western countries. This effort is carried out using the reference point of minority shareholder protection in takeovers.

Economics 494 (for a more recent snapshot on the ownership concentration in selected East Asian listed issuers).

6 Note, however, that references to the Anglo-American approach must be considered in the light of significant differences in takeover regulation between the UK and the US. See, Armour and Skeel, ‘Who Writes the Rules for Hostile Takeovers, and Why?’

7 For a discussion on formal and functional convergence, see Ronald J. Gilson, ‘Globalizing Corporate Governance: Convergence of Form or Function’ in Jeffrey Gordon and Mark J. Roe (eds), Convergence and Persistence in Corporate Governance (Cambridge; New York: Cambridge University Press, 2004), p. 128.
Section E discusses the primary findings arising from the analysis of eight Asian jurisdictions. It focuses on specific aspects such as the mandatory bid rule (MBR), the market for hostile takeovers and the regulatory mechanisms governing takeovers in these Asian countries. Section F concludes with observations pertaining to the key lessons that can be learned from the aforesaid analyses in the context of whether there is likely to be convergence or divergence of takeover regulation. While we are less sanguine about the possibility of a functional convergence towards the Anglo-American approach, the reasons (including factors in political economy) that shaped takeover regulation in the Asian jurisdictions will form a critical part of the study and conclusion.

B The Relevance of Asia in the Global M&A Markets

As a region, Asia has risen in significance in the global M&A market. In recent years, several Asian countries have attracted buyers from Western markets through inbound M&A transactions. At the same time, large Asian countries have spearheaded the region’s foray into Western markets through outbound deals. For instance, Chinese companies have been engaged in large-scale acquisitions in several Western economies.

Recent data support the growth of Asia’s slice of the pie in the global M&A markets. According to Mergermarket, the total volume of global M&A in the first quarter of 2016 was US$597.4 billion. Of this, US$132.1 billion (22.1 per cent) came from Asia-Pacific (ex-Japan) and US$14.8 billion (2.5 per cent) from Japan. The total share of Asia-Pacific,
including Japan, aggregates to 24.6 per cent of the global M&A pie. The Mergermarket data is useful in that it provides comparisons with M&A activity in other regions of the world, as set out in Figure 1.1. Clearly, the Asia Pacific region represents the third largest in volumes and comes close to Europe. More importantly, the Asia Pacific region has witnessed an exponential growth in the incidence of M&A since the turn of the century. For example, data across time horizons indicate that M&A activity in the Asia-Pacific region, both in terms of number of deals and volumes, has grown faster than the worldwide rates such that the region’s share in the global M&A has increased significantly.\footnote{Institute for Mergers, Acquisitions & Alliances, M&A Statistics, https://imaa-institute.org/statistics-mergers-acquisitions/, last accessed 31 October 2016.} Based on information published by the Institute for Mergers, Acquisitions & Alliances,\footnote{Ibid.} Figures 1.2 and 1.3 set out data regarding the number and value of deals during five-year time periods since 2000.

Other disaggregated data available from Thomson Reuters enables us to analyse the contribution of the individual countries that are being examined in this book.\footnote{Source: Thomson Reuters \textit{Eikon} database, a subscription service.} Table 1.1 compares the numbers and values of M&A deals in 2015 for each of the eight jurisdictions being studied.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure1.1}
\caption{Regional comparisons of M&A activity in Q1 of 2016}
\textit{Source: Mergermarket}
\end{figure}
It is evident that China is an outlier, in that it contributes a very high proportion of the M&A volumes in these eight Asian countries. It is followed by Hong Kong, Japan and Korea, who each have a share of more than 5 per cent, with the other four countries commanding much smaller percentages.

For 2015, Thomson Reuters also reports a total of 45,630 M&A deals representing a total volume of US$4,409,872.5 million.\textsuperscript{16} Comparatively, these eight Asian jurisdictions contribute 12,823 (28.1 per cent) deals

\textsuperscript{16} Ibid.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
\hline
Worldwide & 40,030 & 36,204 & 43,912 & 46,940 \\
Asia-Pacific & 6,193 & 9,370 & 12,221 & 14,555 \\
Asia-Pacific Share & 15.47\% & 25.88\% & 27.83\% & 31.01\% \\
\hline
\end{tabular}
\caption{Total number of M&A deals}
\textit{Source: Institute for Mergers, Acquisitions & Alliances, M&A Statistics}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
\hline
Worldwide & 3,626 & 2,859 & 2,746 & 4,748 \\
Asia-Pacific & 279 & 339 & 695 & 1,356 \\
Asia-Pacific Share & 7.69\% & 11.86\% & 25.31\% & 28.56\% \\
\hline
\end{tabular}
\caption{Total value of M&A deals (in US$ billion)}
\textit{Source: Institute for Mergers, Acquisitions & Alliances, M&A Statistics}
\end{table}
representing a total volume of US$1,130,356.94 (25.63 per cent) to global M&A. As these data indicate, Asia does play an important role in the M&A market. This underscores the need for a deeper analysis of the regulation of M&A in general, and takeovers in particular. It is the rapid growth of the Asian M&A and the relevance of Asian companies in the global M&A market (both inbound and outbound) that has motivated the study undertaken in this book.

C Structure of the Book: Methodology

This book has two related parts. Part I of the book contains a theoretical and empirical understanding of takeover regulation that is primarily set in the Western context. This part considers the background to takeover regulation in general, the nature of takeover regulation and regulatory institutions, the allocation of power between the board of directors and shareholders (with varying discussions on regimes with dispersed shareholding and concentrated shareholding), and stakeholder considerations such as the protection of minority shareholders. We believe that such a discussion of the fundamental concepts and issues surrounding takeover regulation will set the framework within which Asian jurisdictions can be examined. Part II of the book contains a comparative cross-jurisdictional study of takeover regulation in eight Asian economies: China, Japan, Korea, Taiwan, India, Hong Kong, Singapore and Malaysia. As discussed
below, we believe a study of takeover regulation in these countries would provide a substantial representative understanding of takeover regulation in Asia more broadly. Such a two-part structure for understanding Asian takeover regulation in the global context merits explanation.

1 The West: Setting the Context

Part I of the book essentially examines takeover regulation and trends in the Western context and sets the framework for a discussion of takeover regulation in Asia. Given that the existing literature in takeover regulation is steeped in the Western context, a study of Asian jurisdictions would not be complete without referencing the existing literature. In fact, as the findings in this book demonstrate, takeover regulation in Asian jurisdictions display fundamental differences compared to the Western (particularly Anglo-American) jurisdictions. These differences cannot be appreciated in a vacuum, and Part I performs the role of providing the requisite frame of reference for comparison. While the use of the expression ‘Western jurisdictions’ could potentially give rise to some ambiguity, we intend for that to cover jurisdictions in the developed markets and primarily the US, UK, EU and Australia.

In particular, in Chapter 2 (‘Deal Structure and Minority Shareholders’), Afsharipour focuses on how deal structures affect the protection of minority shareholders. By exploring takeover regulation in both the US and the UK, this chapter sets out the various methods by which minority shareholders are conferred protection in those jurisdictions, thereby providing the context in which transaction structures and minority shareholder protection in Asia can be considered. In Chapter 3 (‘The Transactional Scope of Takeover Law in Comparative Perspective’), Davies sets out the theoretical framework for takeover regulation in contractual offers between the acquirer and the target shareholders and in non-contractual offers involving shifts of control through the exercise of statutory powers (such as the statutory merger or the scheme of arrangement). Using this theoretical framework, Davies explains the substantive takeover regulation that exists in the Western countries and selected Asian jurisdictions (particularly Singapore, Hong Kong and Korea), and how takeover regulation also exists to address the arbitrage opportunities provided by various deal structures on the takeover participants.

In Chapter 4 (‘A Comparative Analysis of the Regulation of Squeeze-Outs and Going Private Transactions’), Khanna focuses on one of the
most coercive and sensitive forms of takeover regulation, relating to the compulsory acquisition (or expropriation) of the shares held by minority shareholders, and will set the stage for a discussion of squeeze-outs in the Asian jurisdictions.

In Chapter 5 (‘Assessing the Performance of Takeover Panels: A Comparative Study’), Armson focuses on regulatory systems that use a Takeover Panel, or like body, to make decisions in matters relating to takeovers. It examines the aims and regulatory principles underpinning the regimes examined, which provide important lessons regarding the modes by which takeovers can be regulated. In Chapter 6 (‘The Biases of an “Unbiased” Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge’), Fedderke and Ventoruzzo discuss the MBR, which is an important cornerstone of takeover regulation that has been adopted in various forms in China, Japan, Taiwan, India, Hong Kong, Singapore, Malaysia and Korea (although in Korea it was subsequently repealed). The authors’ discussion of whether to regulate mandatory bids through either mandatory provisions or default measures would be of significance to Asian jurisdictions moving forward.

As this discussion indicates, apart from providing a framework for an analysis of the Asian jurisdictions, the chapters in Part I of the book themselves contain references to how various themes play out in the respective Asian jurisdictions. In other words, Part I is not intended to be a standalone discussion on aspects of takeover regulation in the Western context generally, but to provide a ‘lead-in’ to the discussion on Asia.

2 Asia: Moving to the Core

The choice of eight jurisdictions for the study of takeover regulation in Asia merits explanation. ‘Asia’ as a region is vast and diverse, and it is nobody’s case that what works for one Asian jurisdiction would work for another.\(^{17}\) That holds true in the area of takeover regulation as well.

\(^{17}\) Considerable difficulties arise in even attempting to define the concept of ‘Asia’. Geographically, it is a continent comprising 48 countries hosting a population of over 4 billion representing roughly 60 per cent of the world’s population. Dan W. Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge: Cambridge University Press, 2012), p. 98; Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia* (Cheltenham: Edward Elgar, 2014), p. 18. It also contains several regions or sub-continents such as East Asia, Southeast Asia, South Asia and the Middle East. It has been remarked: ‘Asia is more a geographic term than a homogeneous continent, and the use of the term to describe such a
However, it would be impractical (and perhaps impossible) to undertake an extensive task of examining takeover regulation in all Asian countries, or even a significant number of Asian countries. Hence, the study will necessarily be based on a sample analysis.

For reasons highlighted below, a study of takeover regulation in the eight jurisdictions chosen would provide a substantial representative understanding of takeover regulation in Asia more broadly. They cover the leading emerging economies of China and India, the leading Asian financial centres of Singapore and Hong Kong, the miracle economies of Korea and Taiwan, as well as the significant economy of Japan. Malaysia commands attention, as it, too, is a significant economy in the Southeast Asian region. This combination includes a balanced representation of both common law and civil law countries that enables us to examine the influence of legal tradition on takeover regulation. Within this broad paradigm, we narrowed our focus to the eight Asian countries for several reasons more pertinent to the nature of our project.

First, given that this book pertains to M&A and, more specifically, takeover regulation, which deals with public listed companies, the subject countries would have to be determined based on how deep their securities markets are. While several economies in Asia are large and are developing at a fast pace, they may not necessarily be prominent from the purview of takeover regulation as their securities markets may still be in an evolutionary process. Hence, while indicia such as population and gross domestic product (GDP) per person are useful generally to rank economies, we do not believe those are entirely conducive to determining the leading economies from an M&A perspective. Rather, it would be pertinent to examine data relating to stock markets, such as the number of listed companies and market capitalisation. Going by these criteria, the eight economies chosen for this book are home to the ten largest stock exchanges by market capitalisation, and to the eleven stock exchanges which have the largest number of listed companies in Asia, both as at vast area always carries the potential of obscuring the enormous diversity among the regions it encompasses.’ ‘Asia’, *Encyclopedia Britannica*, https://global.britannica.com/place/Asia.

Despite such diversity, the legal discourse often tends to incorporate concepts such as ‘Asian thought’, ‘Asian values’ and ‘Asian culture’ that contrast with Western thought, values and culture. Richard Nisbett, *The Geography of Thought: How Asians and Westerners Think Different – and Why* (London: Nicholas Brealey, 2003); Ting Sing Ning (alias Malcolm Ding) v. Ting Chek Swee (alias Ting Chik Sui) and Others [2008] 1 SLR 197; [2007] SGCA 49 (Court of Appeal, Singapore).
December 2015. The data provided by the World Federation of Exchanges are set out in Tables 1.2 and 1.3.19

In comparison, stock exchanges from other countries in the Asia-Pacific region have fewer companies listed on them than these eight countries; for example, the Stock Exchange of Thailand (639), Indonesia Stock Exchange (521), Ho Chi Minh Stock Exchange (307), Colombo Stock Exchange (294) and Philippine Stock Exchange (265).20

A similar result emanates from an analysis of the market capitalisation (as of December 2015) on the stock exchanges in these countries. Here again, it is evident that other countries in the Asian region lack the stock market depth of these eight, for example, the Stock Exchange of Thailand (US$348,798.0 million), Indonesia Stock Exchange (US$353,271.0 million) and the Philippine Stock Exchange (US$238,819.9 million).21

Given the significance of the eight selected economies to the stock markets where public M&A in the form of takeovers of listed companies

<table>
<thead>
<tr>
<th>Country</th>
<th>Stock exchange</th>
<th>Number of companies listed</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>BSE India Limited</td>
<td>5,836</td>
</tr>
<tr>
<td>Japan</td>
<td>Japan Exchange Group</td>
<td>3,513</td>
</tr>
<tr>
<td>Korea</td>
<td>Korea Exchange</td>
<td>1,961</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Hong Kong Exchanges and Clearing</td>
<td>1,866</td>
</tr>
<tr>
<td>India</td>
<td>National Stock Exchange of India</td>
<td>1,794</td>
</tr>
<tr>
<td>China</td>
<td>Shenzhen Stock Exchange</td>
<td>1,746</td>
</tr>
<tr>
<td>China</td>
<td>Shanghai Stock Exchange</td>
<td>1,081</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Bursa Malaysia</td>
<td>902</td>
</tr>
<tr>
<td>Taiwan</td>
<td>Taiwan Stock Exchange Corp.</td>
<td>896</td>
</tr>
<tr>
<td>Singapore</td>
<td>Singapore Exchange</td>
<td>769</td>
</tr>
<tr>
<td>Taiwan</td>
<td>Taipei Exchange</td>
<td>712</td>
</tr>
</tbody>
</table>


19 The data provided by the World Federation of Exchanges relates to the Asia-Pacific Region. However, we have excluded Australia for the purposes of these tables.
21 Ibid.
would be relevant, we believe a study of those would be substantially representative of the types of issues faced in takeover regulation in Asia.

Second, our economies contain a suitable mix of common law and civil law jurisdictions, which enable us to explore the impact of legal systems not only in the development of the capital markets in general, but also on takeover regulation. While the legal systems of China, Japan, Korea and Taiwan are steeped in the civil law tradition, those of India, Singapore, Hong Kong and Malaysia follow the common law tradition. Interestingly, this dichotomy breaks down in its application to takeover regulation, as the transplant of rules from Western to Asian jurisdictions does not necessarily follow a pattern. For instance, the MBR that originated from the UK has found its way not only to the Asian common law jurisdictions examined, but also to civil law jurisdictions such as China, Japan and Taiwan. Similarly, fiduciary duties of directors in a takeover situation, as developed by Delaware courts, have been the touchstone against which takeover defences have been tested in countries such as

Table 1.3 Asian stock exchanges by market capitalisation

<table>
<thead>
<tr>
<th>Country</th>
<th>Stock exchange</th>
<th>Domestic market capitalisation (USD millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td>Japan Exchange Group</td>
<td>4,894,919.1</td>
</tr>
<tr>
<td>China</td>
<td>Shanghai Stock Exchange</td>
<td>4,549,288.0</td>
</tr>
<tr>
<td>China</td>
<td>Shenzhen Stock Exchange</td>
<td>3,638,731.3</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>Hong Kong Exchanges and Clearing</td>
<td>3,184,874.2</td>
</tr>
<tr>
<td>India</td>
<td>BSE India Limited</td>
<td>1,516,216.7</td>
</tr>
<tr>
<td>India</td>
<td>National Stock Exchange of India</td>
<td>1,485,088.6</td>
</tr>
<tr>
<td>Korea</td>
<td>Korea Exchange</td>
<td>1,231,199.8</td>
</tr>
<tr>
<td>Taiwan</td>
<td>Taiwan Stock Exchange Corp.</td>
<td>744,999.7</td>
</tr>
<tr>
<td>Singapore</td>
<td>Singapore Exchange</td>
<td>639,955.9</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Bursa Malaysia</td>
<td>382,976.7</td>
</tr>
</tbody>
</table>


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Japan, Korea and Taiwan. Hence, while the common law-civil law dichotomy is a useful plank to place our analysis upon, lessons from the transplants examined in this book suggest that the diffusion of rules relating to takeovers is more complex and counterintuitive.

Third, our sample of Asian countries is representative in other ways as well. For example, it includes a mix of developing (e.g., China, India) and developed (e.g., Japan, Singapore, Korea) countries. While concentrated shareholding is the norm in most of the countries in the Asian sample, Japan represents an exception in that the shareholding in Japanese companies is said to be less concentrated and is often stated to be the jurisdiction with the most dispersed shareholding in the world after the US and the UK, thereby potentially raising the spectre of hostile takeovers for target companies listed there.23 Even where concentration is the norm, the nature of the controlling shareholders may vary significantly, thereby creating material differences in the manner of takeover regulation. For example, while China is epitomised by state-owned enterprises where the government is a controlling shareholder (as is Singapore), India and Korea display the prominence of family-owned businesses.24 Moreover, crossholdings of shares are prominent in countries like Japan and Korea.25 All of these jurisdictional idiosyncrasies provide fertile ground for research into the evolution and application of takeover regulation, and hence enhance the relevance of this work to the broader Asian context.

Finally, we are not alone in our approach in considering the jurisdictions we have selected to undertake a comparative study of law in Asia. Legal academics in the areas of corporate law, corporate governance and contract law have followed a similar approach of selecting seven to nine jurisdictions (all of which are covered in our study) in order to

25 See Dan W. Puchniak and Masafumi Nakahigashi, Chapter 8, Section C; Rho, Chapter 9, Section B(1).
understand specific legal issues in Asia, such as shareholder derivative actions, independent directors and remedies for breach of contract.

Like in any work of this nature, our sample may be critiqued using the absence of other countries in Southeast Asia (Indonesia, Thailand, Philippines and Vietnam), South Asia (Bangladesh and Sri Lanka) and the Middle East (United Arab Emirates, Saudi Arabia, Bahrain and Qatar), but evidently we had to make some difficult, but rational, choices.

3 The Methodology

The ability to undertake and conclude a detailed comparative study of the present kind requires contributions from experts in the field of comparative takeover regulation. We were extremely fortunate in being able to locate and secure the participation of leading scholars, not only on a global basis, but also those who specialised in the individual Asian jurisdictions. At the outset, we provided detailed terms of reference to the contributors that enabled them to draft their chapters. For Part I of the book, we provided indicative topics to the contributors who then moulded them appropriately. Given that Part I dealt with theoretical and empirical issues, the contributors had considerable flexibility to structure their chapters and their arguments. We followed a somewhat different approach for Part II of the book. Given that this required a comparative effort not only between Asia and the rest of the world, but also among various Asian jurisdictions, we had to balance the need of uniformity, on the one hand, with the need to accommodate local issues and perspectives in each jurisdiction, on the other. Keeping this in mind, we provided a questionnaire to the contributors to the chapters in Part II. While they were not required to answer every question, it was our hope that, if as many questions and issues were addressed, it would make the book coherent and complete. As a consequence, the chapters in Part II capture a number of common themes across various Asian countries, but also highlight several peculiarities of each country.

The draft chapters authored by the contributors were discussed at a conference held in Singapore in July 2015. Each of the authors also

26 Puchniak, Baum and Ewing-Chow (eds), The Derivative Action in Asia.
benefited from a critical reading of the chapter by a designated commentator, as well as responses from participants. Substantial emphasis was placed on drawing out the similarities and differences between various jurisdictions on key themes and issues, and the lessons that each jurisdiction can learn from the others. The conference was then followed by a series of exchanges between the editors and authors to ensure that all the individual chapters were closely knit and interconnected so as to enable a comparative analysis based on the specific and clear parameters.

We conclude the methodological discussion with a word on the order of chapters. Part I of the book begins with Chapter 2 (Afsharipour) and Chapter 3 (Davies), which deal with the structuring of various transactions and how they affect shareholders, particularly minority shareholders. These chapters essentially focus on the laws in the US and the UK, although they provide a frame of reference for a discussion of the Asian issues. Following this, Chapter 4 (Khanna) looks at a specific transaction structure (namely, squeeze-outs) that triggers sensitivities for minority shareholders. Moving to regulatory mechanisms to oversee takeover activity, Chapter 5 (Armson) examines the benefits and costs of the UK method of regulation through a Takeover Panel and compares it with the Australian example, and also correlates the experiences in these countries to those of the Asian countries of Singapore and Hong Kong, which continue steadfastly to adhere to the UK regulatory model. Finally, Chapter 6 (Fedderke and Ventoruzzo) continues with the regulatory theme and delves into a comparison of the mandatory and default regimes for takeover regulation using the example of the MBR and the Italian experience. Apart from setting out the theoretical framework, Part I of the book also engages in the debates that form the hallmark of the scholarship in comparative takeover regulation in the rest of the world, which we believe operates as an appropriate lead-in to the Asian discussion.

Part II of the book has been categorised along the common law–civil law divide. Within each category, we have ordered the countries according to a combination of country size and market capitalisation, which we have taken to be an important factor in determining the relevance of takeover regulation to each jurisdiction, with one exception to accommodate jurisdictional similarities. Hence, in the case of civil law jurisdictions, the chapters are presented in the following order: China (Huang and

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29 See Section C(2).
30 While, according to market capitalisation, Hong Kong is ahead of India, we have reordered the placement of the two countries in this book to place Hong Kong and
Chen), Japan (Puchniak and Nakahigashi), Korea (Rho) and Taiwan (Chu). For common law countries, they are: India (Varottil), Hong Kong (Donald), Singapore (Wan) and Malaysia (Khan). The final chapter sets out our conclusions on the results of our study, and argues that the rich diversity in takeover regulation in these jurisdictions has implications for the debates in comparative corporate governance on convergence and legal transplants.

D A Framework for Takeover Regulation: The Western Context

We begin with an Anglo-American perspective to takeover regulation. A number of reasons guide our approach. First, the UK and the US have been at the forefront of M&A activity. Second, the two jurisdictions have been the subject matter of considerable academic analysis that already equips our understanding of the regulation of takeovers. Third, and most importantly, the US and the UK have been exporters of takeover regulation to the rest of the world, including to Asia. If we are to meaningfully analyse takeover regulation in Asia, it must necessarily be placed in the context of the evolution of takeover regulation in the countries of origin (i.e., the UK and the US).

Companies in the UK and the US generally display dispersed share ownership, with no controlling shareholders. The types of issues that arise in takeovers would generally be specific to such ownership pattern. For instance, in dispersed ownership structures, the common agency problem is between the managers and the shareholders. In such a scenario, an acquirer is potentially able to obtain control of a target by making an offer to all the shareholders to acquire their shares. If the target’s managers possess de facto control prior to the offer, a successful offer would hand over such control to the acquirer. In dispersed

32 See note 2.
34 Kraakman et al., The Anatomy of Corporate Law, p. 227. 35 Ibid. 36 Ibid., p. 228.
ownership structures, this operates to create a market for corporate control, which is an effective corporate governance mechanism that keeps the target’s managers under check.37

In these circumstances, the question often arises whether the interests of the minority shareholders of the target are truly protected in a takeover. As Afsharipour notes,38 this generally depends upon the transaction structure utilised to effect a takeover. The structures could take many forms, such as takeover offers,39 schemes of arrangement, statutory mergers (including triangular mergers) and squeeze-outs. Davies argues that, while takeover regimes are engaged in the core activity of regulating voluntary offers by acquirers, they also have the effect of extending their scope to other forms of transactions, such as a consolidating offer (where a controller makes an offer to enhance its control in the target), a mandatory offer, statutory mergers, schemes of arrangement and share buyback.40 Both Afsharipour and Davies underscore the importance of transaction structure in the mode of legal regulation, and the ability of acquirers to engage effectively in regulatory arbitrage by adopting a route that is most suitable to them. Such a freedom conferred upon the acquirer might impinge on the protection available to minority shareholders. For both Afsharipour and Davies, minority shareholder protection operates as the touchstone against which transaction structures for acquisition or consolidation of control must be judged.

Viewed in this light, it would not be appropriate to treat the UK and the US in the same manner. Even though dispersed shareholding and a fairly robust market for corporate control characterise both, each of these jurisdictions has adopted rather divergent approaches towards takeover regulation. The manner of protection of the target’s shareholders varies considerably as well. In analysing the differences between the UK and the US, here, we limit ourselves to two aspects of takeover regulation, which are considered as cornerstones: first, the need for mandatory offers, and, second, the ability of the target’s board to interfere in a takeover offer. An analysis of these issues in the context of the UK and US is essential as the Asian jurisdictions studied in this book have

38 Afra Afsharipour, Chapter 2, Section A.
39 They are referred to in the US literature as ‘tender offers’.
40 Paul Davies, Chapter 3, Section A.
adopted their takeover regulations in respect of these fundamental issues from one of these two jurisdictions.

In both the UK and the US, takeovers are generally carried out through voluntary offers made by acquirers to the target’s shareholders. This is understandable, given this would be the most efficient way for an acquirer to obtain control over a target company with dispersed shareholding. However, when it comes to mandatory offers, there is a dichotomy between the UK and the US takeover regimes. The UK specifies the MBR, by which any shareholder who acquires (either by itself, or with persons acting in concert) shares representing 30 per cent of the voting rights in a company would be required to make an offer to the remaining shareholders of the company to acquire their shares. Although the MBR was not present in the original version of the City Code on Takeovers and Mergers in the UK (UK Code), it was introduced in 1972.41 While not devoid of controversy, the MBR stands on a strong theoretical and economic footing,42 in that it enables all shareholders of a target to share in the private benefits of control that some shareholders may obtain in handing over control to an acquirer. It is also consistent with the broader principle of equality of opportunity, which underpins takeover regulation, as it provides an exit option to minority shareholders when there is a change in control of a company. The rule compels an acquirer to distribute any premium equally among all shareholders.

On the other hand, the US does not subscribe to the MBR, except for its prevalence in a few states.43 As Davies observes, no constraints are imposed on the acquirer in terms of selectively paying a premium to shareholders from whom it acquires control, which it does not have to share with the other shareholders.44 However, in certain circumstances, such as where the acquirer might likely ‘loot’ the target, the seller may owe duties towards the other shareholders.45 In such case, the law looks towards constraining the selling shareholders, unlike the MBR, which is focused on the acquirer. Given the limited scope of this rule, it arguably confers less protection to minority shareholders than the MBR.

44 Davies, Chapter 3, Section C.
45 Ibid.
Conversely, one may argue that the robust protection available to minority shareholders under corporate law minimises the need for a strong measure such as the MBR which, while protecting the target’s minority shareholders from control changes, may also have a chilling effect on the market for takeovers by impeding even value-enhancing transactions.

From the purview of global regulatory practice, it is clear that most jurisdictions, including all our Asian jurisdictions (except for Korea) have adopted the MBR. In the design of the MBR, several countries have adopted the UK model as the starting point, and have made adaptations as necessary, a matter that is considered in detail in the chapters in Part II of this book.

Moving to the role of the target’s board in a takeover, in their seminal study, Armour and Skeel identify the fundamental differences between the UK and the US in regulating hostile takeovers, and discuss the underlying reasons for the divergence in regulation. In the UK, the ‘no frustrating action’ or the ‘board neutrality’ principle ensures that the board cannot set up takeover defences that prevent a takeover offer from proceeding. This is on the basis that the target’s shareholders are ultimately the sole determinants of the success (or failure) of an offer, and the board is incapacitated from interfering in the offer. Conversely, in the US, boards of targets enjoy considerable leeway in establishing takeover defences such as poison pills that could keep acquirers at bay. At the same time, target boards do not have unfettered discretion in erecting takeover defences. Their actions in the establishment and continued use of takeover defences are subject to the discharge of the fiduciary duties of directors under state corporate law, with the most prominent jurisdiction being Delaware. Several states have also enacted specific anti-takeover statutes that aid target boards in resisting hostile offers.

This dichotomy in the regulation of hostile takeovers in the UK and the US has also travelled across to Asia, in that, while all of the common law jurisdictions have adopted the board neutrality rule largely based on the UK approach, the civil law jurisdictions have looked to the US to regulate hostile takeovers by focusing on the actions of the target’s board. In that sense, the Asian jurisdictions have, in all, assimilated a mix of the UK and the US approaches.

Turning to the modes of regulation, as Afsharipour notes, the UK regulates takeovers (and places emphasis on minority shareholder

46 Armour and Skeel, ‘Who Writes the Rules for Hostile Takeovers, and Why?’
protection) through *ex ante* rules, while the US focuses on litigation as a means of resolving takeover disputes in an *ex post* fashion. The evolution and operation of the Takeover Panel in the UK is evidence of the jurisdiction’s intention to limit the use of courts in resolving takeover disputes. On the other hand, the US (in particular, Delaware) has relied strongly on courts in applying fiduciary duty standards on a case-by-case basis to determine the outcome of takeovers. Both approaches have been disseminated in various forms to other jurisdictions. Armson examines how the UK Takeover Panel has been used as the framework for regulation in other countries in the Commonwealth, such as Australia, Hong Kong and Singapore. She finds that although the Australian Takeovers Panel derived its initial support from the UK Takeover Panel’s structure, over a period of time significant differences have crept in between the two. At the same time, Hong Kong and Singapore have remained steadfast in their adherence to the regulatory model followed in the UK.

More recently, the regulatory discourse in takeovers has shifted to a discussion of whether a default regime would be more desirable, at least in certain respects, as compared to the mandatory regime that largely pervades takeover regulation. These developments extend beyond the Anglo-American jurisdictions. For example, in case of the MBR, Fedderke and Ventoruzzo discuss the example of Italy where small and medium-sized listed corporations have the ability to opt-out of a 30 per cent default regime for the MBR and to set a threshold anywhere between 25 per cent and 40 per cent of the shares voting on director elections. Neighbouring Switzerland permits a modification of the MBR whereby shareholders are permitted to increase the trigger threshold from one-third to 49 per cent or, in certain circumstances, disapply the MBR altogether.

47 Afsharipour, Chapter 2, Section A.
49 Ibid., 242.
50 Emma Armson, Chapter 5.
51 Ibid.
52 Ibid.
53 Johannes W. Fedderke and Marco Ventoruzzo, Chapter 6, Section B(2).
conferred upon minority shareholders. Fedderke and Ventoruzzo, however, contend that such a default regime may be biased in favour of either the incumbents or minorities, depending upon the design of the rule, and that it may not be eminently sensible to jettison the mandatory rule. They, however, recognise the rigidities of the MBR in its current form, and therefore call for a more liberal regime.

These regulatory discussions, especially the idea of default regimes, would be useful to initiate in the Asian context as well, where they have received scant attention. While we share Fedderke’s and Ventoruzzo’s scepticism regarding the default regime, especially in the context of Asian countries where mandatory rules have generally prevailed, the idea is worth considering. Among Asian jurisdictions, Hong Kong and Singapore might seem most amenable to default regimes, if at all.

In the light of the developments in takeover regulation in Western regimes, we now examine how several rules, particularly from the UK and the US, have been transplanted to various Asian jurisdictions, and analyse the effectiveness of the diffusion of such rules.

**E The Application of Takeover Regulation in Asian Jurisdictions**

Although Asian countries have extensively imported their takeover regulation from Anglo-American jurisdictions, there are significant differences in the ownership structures, legal systems, regulatory approaches and even corporate culture between the two sets of jurisdictions that raise serious questions about the efficacy of such legal transplants.

At the outset, concentrated shareholding epitomises our Asian jurisdictions. Publicly listed companies tend to be held substantially by controlling shareholders, who might be a business family or the state. In countries like India and Taiwan, control is enhanced through the use of methods such as crossholdings and pyramid structures. At one level, the dichotomy between dispersed and concentrated shareholdings may tell us only part of the story. It might be necessary to delve deeper to explore the identity of the controlling shareholders. Here, while countries

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56 Fedderke and Ventoruzzo, Chapter 6, Section B(3).

57 Ibid., Section D(1).

58 Umakanth Varottil, Chapter 11, Section E(2).

59 Claire Te-Fang Chu, Chapter 10, Section C.
like India, Hong Kong, Singapore, Korea and Taiwan witness the dominance of business families, the Chinese landscape is scattered with state-owned enterprises. From a takeover perspective, these distinctions may matter, in that there could be varying motivations of different types of incumbent shareholders to ensure the design of takeover regulation perpetuates their entrenchment in the companies. For instance, Varottil discusses the influence of domestic controlling shareholders in the design of Indian takeover regulation, while Wan points to the influence of business families in Singapore.

Among all our jurisdictions, Japan’s experience stands out and may throw further light on the relevance of shareholding structures in the design and implementation of takeover regulation. Existing literature sometimes treats Japanese companies as being similar to UK and US companies, in view of the fact that Japanese ownership is widely dispersed, as in the case of UK and US companies. Hence, academics have predicted that the Japanese takeover markets would develop on the same lines as the Western markets. However, as Puchniak and Nakahigashi ably demonstrate in their chapter, the reality is far from the prophecy. Drilling down to the identity of shareholders, they argue that this is due to the presence of ‘stable shareholders’ who, while considered to be dispersed in nature, are strongly incentivised to support incumbent management. To that extent, the presence of stable shareholders operates similarly to that of ownership concentration in other Asian jurisdictions so as to have a chilling effect on the market for corporate control. Hence, while Japan may, at a broad level, be considered to have the most diffused shareholdings among all our Asian jurisdictions, it does not automatically translate into the creation of a conducive environment for takeovers, particularly of the hostile variety.

Moreover, there is no clear sign that shareholdings in Asian jurisdictions are likely to move in the direction of dispersion in any significant way. To the contrary, countries such as Hong Kong, Singapore and India have witnessed greater concentration in recent years, which militate against the growth of a market for corporate control. In Japan,

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60 For a discussion of this issue using interest group theory, see Section F.
61 Varottil, Chapter 11, Section F.
62 Wai Yee Wan, Chapter 13, Sections C, D.
64 Puchniak and Nakahigashi, Chapter 8.
65 Ibid., Section C.
66 David C. Donald, Chapter 12, Section C(1).
67 Wan, Chapter 13, Section D(1).
68 Varottil, Chapter 11, Section E(2).
while there is no evidence of reduction in dispersion, the continuance of large stable shareholding in small and medium-sized listed enterprises that are normally vulnerable to takeovers, as well as the growth of foreign shareholders, will ensure the market’s resistance to takeovers. Hence, if a market for corporate control is scarce in Asian jurisdictions, there is little indication that such a market will be spurred in the future.

For these reasons, there is a fundamental difference in the manner in which takeovers are carried out between the Anglo-American jurisdictions and the Asian ones. As seen earlier,\textsuperscript{69} in Anglo-American jurisdictions with dispersed shareholdings, a takeover is seen as a method of shifting control from the target’s board to the acquirer. Such a market for corporate control will act as a governance-enhancing mechanism. However, in the Asian scenario, the role of takeover regulation is primarily to give effect to orchestrated shifts of control between a controlling shareholder (seller) and an acquirer. The key concern here is to ensure the protection of minority shareholders of the target. The takeover regime is not intended to provide an avenue for acquirers to approach the target’s shareholders to acquire control. Rather, the regime is focused upon the impact of private arrangements by which control is transferred from one shareholder to another. Such transfers by private arrangement are common in countries such as China\textsuperscript{70} and India,\textsuperscript{71} and even take the form of block deals in Korea.\textsuperscript{72} Even though there has been a diffusion of Anglo-American takeover regulation in Asian countries, the differences in shareholding structures means that such regulation operates in significantly different ways.

In considering the diffusion of takeover regulation from the US and the UK to several Asian jurisdictions, similar to our analysis in the previous part, we limit ourselves to two aspects of takeover regulation; namely, mandatory offers and powers of the target’s board to interfere in a takeover offer. Given that takeovers are essentially organised control shifts, Asian jurisdictions place considerable emphasis on the MBR as a cornerstone of takeover regulation. All our jurisdictions, with the exception of Korea, carry the MBR, whose origins can be attributed to the rule developed in the UK. But, they are vastly different in their operation in as much as they deviate from the very purpose for which they were instituted in the first place. While in the UK it is seen as a specific manifestation of the equal opportunity rule that provides exit to minority

\textsuperscript{69} See Section D. \textsuperscript{70} Robin Hui Huang and Juan Chen, Chapter 7, Section B(3)(b). \textsuperscript{71} Varotttil, Chapter 11, Section A. \textsuperscript{72} Rho, Chapter 9, Section C(3)(a).
shareholders, in many Asian jurisdictions it has effectively operated not only to impede a market for corporate control, but also to allow incumbents to take shelter under it to preserve their control.

In order to function effectively, the MBR must comply with its essential elements. These are that once an acquirer obtains effective (or de facto) control over a company, such an acquirer must make an offer to all the other shareholders to acquire their shares at the highest price at which the acquirer obtained effective control.73 Among the Asian jurisdictions surveyed in this book, only Hong Kong and Singapore remain fully loyal to all the facets of the MBR as outlined above. Nevertheless, the outcomes are vastly different. Wan argues that, in cases of dispersed shareholdings, the MBR tends to reinforce the separation of ownership and control.74 However, in the context of Singapore, she finds that, in a jurisdiction with concentrated shareholding, the MBR will not have the effect of bringing about dispersion of shareholding, but might result in the maintenance or even enhancement of concentration.75 Hence, a full-fledged MBR that was introduced in the UK, which displayed dispersed shareholding, may have a completely different effect if applied in toto in a jurisdiction with concentrated shareholding.

If differences are likely to operate in the MBR when it is applied wholesale, matters are likely to become more complex when it is applied with considerable variations. At one level, these variations may dilute the operation of the MBR and adversely affect minority interests; on the other hand, it can also be utilised by incumbents to entrench themselves further in companies they already own. Several chapters highlight these difficulties. First, the MBR can be diluted by not requiring an acquirer who triggers it to make an offer for the entire remaining shares of the company. Several of our Asian jurisdictions permit partial offers to be made to satisfy the MBR. These include China, Japan, Taiwan and India. For example, in Japan, where an acquirer crosses a threshold of one-third of a listed company’s shares, it has the ability to set a cap at below two-thirds of the target’s shares.76 In India, while the trigger for the MBR stands at 25 per cent of voting rights, an acquirer is required to make an offer for only an additional 26 per cent of shares of the target.77 Such partial offer requirements erode the protection available to minority shareholders.

73 Davies, Chapter 3, Section C. 74 Wan, Chapter 13, Section D(1). 75 Ibid. 76 Puchniak and Nakahigashi, Chapter 8, Section D(1). 77 Varotttil, Chapter 11, Section C(4).
shareholders in the event of organised changes of control that dot the Asian takeover landscape.

Second, some jurisdictions do not require a mandatory offer to be made at the 'highest price' at which de facto control was acquired.\textsuperscript{78} This effectively dilutes the equal opportunity rule, as the minority shareholders do not get to share the premium enjoyed by those shareholders who handed over de facto control to the acquirer.

Third, a generous creeping acquisition provision will enable incumbents to consolidate their control without making an offer. For example, in India an incumbent controller holding between 25 per cent and 75 per cent of shares is entitled to acquire additional 5 per cent of shares each year without making an offer.\textsuperscript{79} This deprives the minority shareholders of the equal treatment benefit in being able to obtain a share in the premium enjoyed by the shareholders who sell as part of the acquirer’s creeping acquisition efforts.

Fourth, the regulators in several of our Asian jurisdictions are generous in exempting acquirers from making mandatory offers. For instance, in the past, the China Securities Regulatory Commission (CSRC) had been routinely granting exemptions whenever an acquirer triggered the mandatory offer requirements.\textsuperscript{80} As Huang and Chen show, the CSRC has streamlined its exemption mechanisms, but several automatic exemptions from the MBR are still available.\textsuperscript{81} In India, too, exemptions have been used extensively to skirt the MBR, and thereby deprive minority shareholders of the exit opportunity. Moreover, as Varottil argues, these exemptions operate to the benefit of incumbents who may avail themselves of the opportunity to rearrange their shareholdings, while outside acquirers do not enjoy similar benefits, which therefore makes takeovers a costly affair.\textsuperscript{82}

As this discussion indicates, all our Asian jurisdictions that prescribe the MBR have looked to the UK for inspiration. However, except for Hong Kong and Singapore, these jurisdictions only adopted a diluted form of the MBR, which has limited utility in protecting minority shareholder interests and, instead, favours incumbents. Even Hong Kong

\textsuperscript{78} See, e.g., Chu, Chapter 10, Section D(1)(c) (in the case of Taiwan).
\textsuperscript{79} Varottil, Chapter 11, Section D(1).
\textsuperscript{81} Huang and Chen, Chapter 7, Section C(2)(c).
\textsuperscript{82} Varottil, Chapter 11, Section D(3).
and Singapore, which have stayed loyal to the UK-style MBR, have experienced varying results due to differences in their ownership structures as compared to the UK. These reveal a story of the inchoate transplant of the MBR, a matter we explore in detail in Chapter 15.

In concluding the discussion on the MBR, it is imperative to mention Korea. Rather than look to the UK, Rho notes that Korea did adopt the MBR for about one year, after which it was jettisoned.\(^{83}\) In that sense, the position in Korea is similar to that in the US, being our only Asian jurisdiction that does not have the MBR. Although the rationale for the lack of MBR in the US can be attributed to the presence of robust corporate law that protects minority shareholders in other ways (for instance, through fiduciary duty class actions), it is not entirely clear if that rationale would operate similarly for Korea.

Moving to the role of the target’s board in a takeover, we begin with what appears to be a stark conclusion emerging from all of our Asian jurisdictions: companies there have faced only a handful of hostile takeovers, of which even fewer have succeeded. At first blush, viewed from the Western perspective, it might appear that the boards of target companies in the Asian jurisdictions are conferred significant powers to erect takeover defences. However, that is far from the truth. Boards have limited powers to interfere in takeovers, but hostile takeovers have failed due to other circumstances prevalent in Asian countries. These include the existence of concentrated shareholding structures, restrictive foreign investment regimes (that impede cross-border takeovers),\(^{84}\) the lack of clarity regarding directors’ duties and even other factors such as a business culture that displays an aversion towards hostility in corporate transactions.

Beginning with our common law jurisdictions, they all follow the strict board neutrality rule adopted from the UK Code, and hence the target directors’ hands are tied once a takeover offer is in the vicinity. Moreover, the common law principle imposing fiduciary duties on the target’s directors would apply, such that they are not only to act in the interests of the company, but also to exercise their powers for proper purposes.\(^{85}\)

\(^{83}\) Rho, Chapter 9, Section C(3)(a).


Despite the powerlessness of the target’s board, hostile takeovers are far from the norm. The primary reason for this is the concentrated nature of shareholdings in these countries. Although there are a handful of companies with dispersed shareholdings, which could become targets for hostile takeovers, the other factors listed above could act as a dampener to hostile takeovers, particularly of the cross-border type.

Turning to our civil law jurisdictions, the role of a target’s board in a takeover is less clear. On the one hand, some countries like China have adopted a variant of the board neutrality rule prevalent in the UK although, as Huang and Chen note, the adoption is not straightforward and hence the rule operates differently. Moreover, Chinese law also regulates the target board’s conduct in a takeover through the application of fiduciary duties, although Huang and Chen lament the absence of any case law that expounds such duties. They note that, in practice, Chinese companies have set up various forms of takeover defences that prevent hostile takeovers.

Japan presents a fascinating story, as shareholding in its companies is the most dispersed of our Asian jurisdictions. Moreover, it has witnessed some high-profile hostile takeovers that have drawn the attention of courts and, consequently, that of commentators. Japan applies the ‘primary purpose’ rule as a judicial doctrine to determine the acceptability of a target board’s action in light of a hostile takeover. As Puchniak and Nakahigashi note, this duty is different from the duty of directors to exercise powers for proper purpose as applied in the UK as well as our Asian jurisdictions that follow common law. Japan stands out among other Asian jurisdictions in that parties in two hostile takeovers found themselves in the court. Despite the court rulings rendered in those cases, the authors observe that there is a continued lack of clarity regarding the ability of directors to defend against hostile takeovers, and that has contributed to a sparse market for such takeovers; hence they argue that any predictions that Japan might become the next Delaware ought to be put to rest.

Somewhat similar to Japan, Korea too has adopted a ‘proper business purpose’ test, which would determine the validity of an issue of shares by the target’s board in the wake of a hostile offer. As Rho points out, the Korean courts have interpreted this test quite strictly, thereby precluding

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86 Huang and Chen, Chapter 7, Section C(3)(a).  
87 Ibid.  
88 Ibid., Section C(3)(b).  
89 Puchniak and Nakahigashi, Chapter 8, Section D.  
90 Ibid., Section D(1).  
91 Ibid., Section D(2).  
92 Rho, Chapter 9, Section D(2)(a).
share issuances as a means by which Korean boards can stave off hostile acquirers.\textsuperscript{93} However, Rho finds that Korean companies have resorted to the sale of treasury shares to fend off takeovers, and that this has become a useful defensive mechanism.\textsuperscript{94} Given the lack of consistency in court rulings on whether a sale of treasury shares would be treated on par with an issue of new shares for the purpose of applying the ‘proper business test’, target managements are effectively taking advantage of the ambiguity in the legal regime.\textsuperscript{95}

Lastly, Taiwan, too, exhibits curiosity in the manner in which it has adopted rules governing takeovers and other forms of M&A transactions. For instance, while it has introduced the requirement of an independent committee to review the fairness and reasonableness of certain transactions (similar to the requirement in Delaware, especially for transactions with controlling shareholders), such an independent committee possesses limited powers of negotiation with the acquirers, and does not have the authority to approve (or disapprove) transactions.\textsuperscript{96} In other words, its role is purely advisory in nature.\textsuperscript{97} This diminishes the protection available to the target’s shareholders from actions of the target’s board or controllers in an M&A transaction even though they may be against minority interests.

The lack of a market for hostile takeovers in several Asian jurisdictions has also been attributed to non-legal factors. Huang and Chen note that the emphasis of Chinese culture on traits such as harmony and friendship run counter to the idea of hostile takeovers.\textsuperscript{98} The effect of culture is somewhat more pervasive in Japan, where ‘cultural distaste’ for a sale of the company would ensure that innate mechanisms such as boards dominated by lifetime employees who are supported by stable-shareholders would unite to defeat hostile takeovers.\textsuperscript{99} Although cultural factors are difficult to evaluate objectively, their impact cannot be ignored.

This brings us to a discussion on the modes by which takeovers are regulated in these Asian jurisdictions. In our common law jurisdictions, two trends are evident. Hong Kong and Singapore closely follow the UK approach of regulating takeovers through a panel-like body.\textsuperscript{100} Such a body lays down \textit{ex ante} rules, and also plays a role in implementing those rules. The idea in these systems is to keep takeovers outside the purview of courts, to the extent possible. While the other two common law

\textsuperscript{93} Ibid. \hfill \textsuperscript{94} Ibid., Section D(2)(b). \hfill \textsuperscript{95} Ibid. \hfill \textsuperscript{96} Chu, Chapter 10, Section B(1).
\textsuperscript{97} Ibid. \hfill \textsuperscript{98} Huang and Chen, Chapter 7, Section C(3).
\textsuperscript{99} Puchniak and Nakahigashi, Chapter 8, Section E. \hfill \textsuperscript{100} Armson, Chapter 5, Section A.
jurisdictions (namely, India and Malaysia) have adopted substantive regulations that are UK-style, they have shied away from a panel-like approach towards implementation. Rather, it is the securities regulator (which is a statutory body) that performs the function of regulating takeovers in India and Malaysia (the Securities and Exchange Board of India and the Securities Commission, respectively).\textsuperscript{101} Even here, courts are generally kept out of the purview of takeover disputes.

Our Asian jurisdictions following civil law display less of a clear pattern, and the regulatory approach is somewhat ambiguous. They have borrowed takeover rules from both the UK and the US, although these rules apply very differently in the host jurisdictions. What is more interesting is the origin of the rules for these jurisdictions. One would imagine that, given their legal systems, they would look to other civil law jurisdictions to derive their regulatory set-up. Instead, they have looked to the common law jurisdictions to draw inspiration for their takeover regime. This can be attributed to several reasons, including that the UK and the US are the leading jurisdictions for takeover regulation and it makes eminent sense for countries to draw from their framework. Moreover, in certain countries, policy-makers, securities regulators and even leading academics have been trained in the Anglo-American jurisdictions; this leads them to gravitate towards those two countries as reference points while drawing up policy or enacting rules.\textsuperscript{102} China, Japan, Korea and Taiwan have all looked to the US for inspiration, in addition to the UK, while the common law jurisdictions have all largely confined their adoption to the UK takeover regulation.

Even more intriguing is the role of the courts in resolving takeover disputes. Our Asian common law jurisdictions have shunned any reliance upon the court system to determine the outcome of takeovers but, rather, have looked to voluntary informal takeover panel-type bodies, or to a statutory body such as the securities regulator. On the other hand, our civil law jurisdictions have relied much more on courts, especially in considering the role of the target’s board through the application of fiduciary duties of directors to takeover situations. While our common law jurisdictions in Asia have largely relied on \textit{ex ante} regulation, the civil law jurisdictions have relied on a combination of \textit{ex ante} regulation through legislation or rules and also \textit{ex post} determination of outcomes through resolution before the courts. The diminished role of courts in

\textsuperscript{101} Varottil, Chapter 11, Section C(3)(b); Mushera Ambaras Khan, Chapter 14, Section B.

\textsuperscript{102} See, e.g., Chu, Chapter 10, Section B(1) (in the case of Taiwan).
common law jurisdictions and the enhanced role in those that follow civil law appear somewhat counterintuitive, but the phenomenon has held sway in Asia.

F The Key Lessons

Asia’s rise in the global M&A space in the last two decades has been dramatic. Regulatory changes within several jurisdictions in Asia that deal with the effects of takeovers have been equally fast-paced. However, takeover regulation in Asia suffers from several inadequacies. At a regulatory level, Asian jurisdictions have largely adopted the rules and regulations governing takeovers from the Western (primarily Anglo-American) jurisdictions without fully having regard to the underlying differences between the countries of origin and the host countries. Moreover, even the takeover literature in the legal academy has been embedded in the Western discourse. The effort in this volume is to nudge readers to view takeovers in Asia through a different lens altogether. Even within our Asian jurisdictions, fundamental differences are evident in the approaches adopted to regulate takeovers.

At the outset, the very purpose of takeover regulation displays vast differences between Western and Asian jurisdictions. In Western jurisdictions, the focus is on voluntary offers as means to enable an acquirer to obtain control over a target. Conflicts arise because the board of the target may seek to frustrate an offer, and hence the regulatory approaches seek to achieve an appropriate balance using minority shareholder protection as the key touchstone. In Asia, however, no such market for corporate control exists at all, and the results of this volume do not inspire much confidence that it will develop in any meaningful way in the near future. This is due to the concentration of shareholding as well as other factors, such as culture. Broadening the discussion to the sphere of corporate governance, it would be imprudent for Asian jurisdictions to consider the market for corporate control as a governance-enhancing mechanism. Policy-makers and scholars may very well divert their attention to other mechanisms that are appropriate in the Asian context. The focus of takeover regulation in Asia is hence narrowed to facilitating organised changes of control between parties in a manner that does not undermine the interests of minority shareholders.

The design and implementation of takeover regulation in Asian jurisdictions reveal interesting phenomena. All of our jurisdictions have looked either to the UK or the US to source their regulation: in some
countries (e.g., Hong Kong and Singapore), they have largely been designed and implemented in the same manner as the country of origin (e.g., the UK). Nevertheless, the impact of the regulation is fundamentally different due to the nature of shareholders (i.e., dispersed versus concentrated). In other countries, the UK-type regulation has been adopted with modifications. As we have seen, the UK-style MBR has been modified in seemingly innocuous ways for adoption in countries such as China, Japan and India. Inherent in some of these dynamics are rent-seeking and the operation of the interest group theory, which several of the chapters in the volume highlight clearly. The interest group theory of takeover regulation posits that certain interest groups are likely to exercise their influence in the shaping of takeover regulation in each jurisdiction. For instance, in India, established domestic business groups (in India) and the state (in China) have helped steer the direction of takeover regulation, arguably in a manner that safeguards their own interests. In other cases, such as China and Japan, even culture has a bearing on the manner in which takeover regulation is designed and implemented.

Lastly, this volume also reveals some lessons relating to the operation of legal systems. The ‘legal origins’ strain of literature posits that, in common law countries, the judiciary plays an important role in defining and enforcing investor rights. Hence, minority investor protection is an important tool for the development of deep capital markets. On the other hand, civil law countries tend to rely heavily on governmental intervention in protecting minority shareholder interests. The legal origins analysis gives rise to curious outcomes in takeover regulation pertaining to our Asian jurisdictions. First, the originating countries for the diffusion of takeover regulation (i.e., the UK and the US) are both common law jurisdictions. However, their regulations have been

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103 See Section E above.
105 Ibid. Varottil, Chapter 11, Section F.
106 See, generally, Huang and Chen, Chapter 7. But, for a different perspective, see Xi, ‘The Political Economy of Takeover Regulation’.
107 Huang and Chen, Chapter 7, Section C(3); Puchniak and Nakahigashi, Chapter 8, Section E.
transplanted to Asian jurisdictions that follow common law as well as civil law. In other words, our Asian civil law jurisdictions have found it appropriate to look to the UK and the US (as leading takeover markets) rather than to other civil law jurisdictions. Second, and more intriguingly, the diffusion of legal norms has occurred in rather counterintuitive ways. All our common law jurisdictions have preferred not to use the court system to resolve takeover disputes. While the use of a takeover panel-like arrangement by Hong Kong and Singapore is understandable, given the preference displayed by the UK, the exclusion of courts from takeover regulation in India and Malaysia is less clear. Our Asian jurisdictions following civil law have, instead, embraced the use of *ex post* determination through courts as a means of regulating takeovers, especially through fiduciary duties of the target’s board. This phenomenon undermines the applicability of the ‘legal origins’ thesis, as it receives no support in takeover regulation.

In the end, the specific circumstances and factors present in each individual jurisdiction may explain the regulatory choice it makes as regards takeovers. The remaining chapters present several issues pertaining to takeover regulation, first from a theoretical and empirical perspective, and then in respect of each of the eight Asian jurisdictions.