

PART I

Theoretical and Empirical Understanding
of Takeover Regulation

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,¹ 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.² 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).

² John Armour and David A. Skeel Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 *Georgetown Law Journal* 1727; John Armour, Jack B. Jacobs and Curtis J. Milhaupt, 'The Evolution of

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

Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 *Harvard International Law Journal* 219; Guido Ferrarini and Geoffrey P. Miller, 'A Simple Theory of Takeover Regulation in the United States and Europe' (2009) 42 *Cornell International Law Journal* 301; Marco Ventoruzzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking UK Rules to Continental Europe' (2008) 11 *University of Pennsylvania Journal of Business Law* 135.

³ See Section B.

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

⁵ See Stijn Claessens, Simeon Djankov and Larry H.P. Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58 *Journal of Financial Economics* 81; Richard W. Carney and Travers Barclay Child, 'Changes to the Ownership and Control of East Asian Corporations between 1996 and 2008' (2013) 107 *Journal of Financial*

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)⁶ 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.⁷

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.⁸ In recent years, several Asian countries have attracted buyers from Western markets through inbound M&A transactions.⁹ At the same time, large Asian countries have spearheaded the region's foray into Western markets through outbound deals.¹⁰ For instance, Chinese companies have been engaged in large-scale acquisitions in several Western economies.¹¹

Recent data support the growth of Asia's slice of the pie in the global M&A markets. According to Mergermarket,¹² 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,

⁸ Vikram Chakravarty and Soon Ghee Chua, *Asian Mergers and Acquisitions: Riding the Wave* (Singapore: John Wiley & Sons, 2012).

⁹ Umakanth Varottil, 'The Impact of Globalization and Cross-Border Mergers & Acquisitions on the Legal Profession in India' in David B. Wilkins, Vikramaditya S. Khanna and David M. Trubek, *The Indian Legal Profession in the Age of Globalization* (Cambridge: Cambridge University Press, 2017), p. 170.

¹⁰ Ibid.

¹¹ 'Led by China, Asian outbound M&A hits record high of \$200 billion: Mergermarket', CNBC International, 1 September 2016, www.cnbc.com/2016/09/01/led-by-china-asian-outbound-ma-hits-record-high-of-200-billion-mergermarket.html, last accessed 31 October 2016; Jing Yang, 'Global mergers and acquisitions at tipping point, with Asian firms aggressive buyers, says JP Morgan', *South China Morning Post*, 19 November 2015, www.scmp.com/business/companies/article/1880574/global-mergers-and-acquisitions-tipping-point-asian-firms, last accessed 31 October 2016.

¹² Mergermarket, 'Global and Regional M&A: Q1 2016', www.mergermarket.com/pdf/MergermarketTrendreport.Q12016.FinancialAdvisorLeagueTables.pdf, last accessed 31 October 2016.

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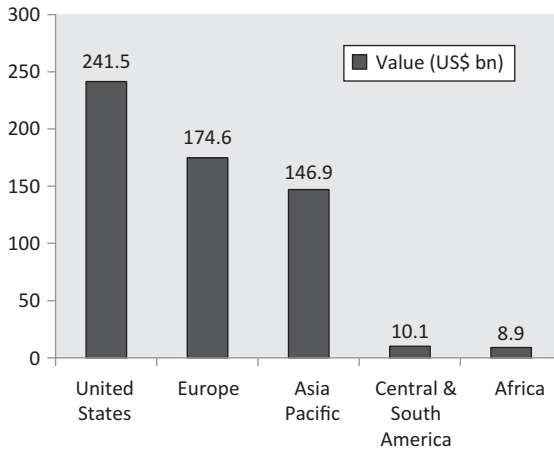


Figure 1.1 Regional comparisons of M&A activity in Q1 of 2016

Source: Mergermarket

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.¹³ Based on information published by the Institute for Mergers, Acquisitions & Alliances,¹⁴ 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.¹⁵ Table 1.1 compares the numbers and values of M&A deals in 2015 for each of the eight jurisdictions being studied.

¹³ Institute for Mergers, Acquisitions & Alliances, M&A Statistics, <https://imaa-institute.org/statistics-mergers-acquisitions/>, last accessed 31 October 2016.

¹⁴ Ibid. ¹⁵ Source: Thomson Reuters *Eikon* database, a subscription service.

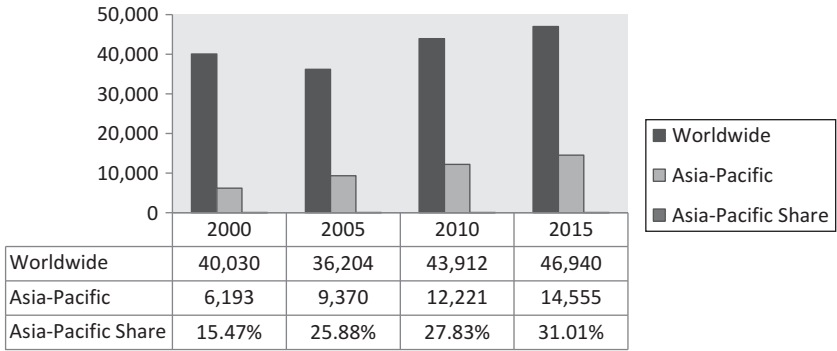


Figure 1.2 Total number of M&A deals
 Source: Institute for Mergers, Acquisitions & Alliances, M&A Statistics

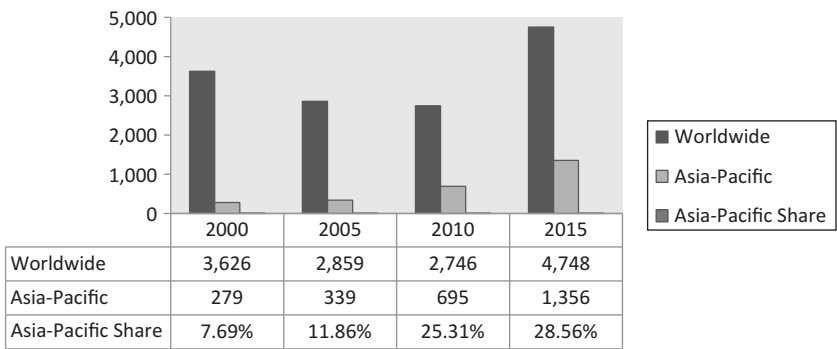


Figure 1.3 Total value of M&A deals (in US\$ billion)
 Source: Institute for Mergers, Acquisitions & Alliances, M&A Statistics

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.¹⁶ Comparatively, these eight Asian jurisdictions contribute 12,823 (28.1 per cent) deals

¹⁶ Ibid.

Table 1.1 *M&A in the eight Asian economies*

Country	Number	Value (US\$ mn)	Share of value
China	6,123	703,361.30	62.22%
Hong Kong	670	153,835.71	13.62%
Japan	2,345	99,919.22	8.84%
Korea	1,433	87,836.16	7.77%
Singapore	399	30,086.70	2.66%
India	1,110	29,499.58	2.61%
Taiwan	274	15,257.43	1.35%
Malaysia	469	10,560.84	0.93%
Total	12,823	1,130,356.94	100%

Source: Thomson Reuters

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-continentals 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