Introduction: Comparative Corporate Governance and Takeovers

TAKEOVERS ARTICLES BY PROFESSOR ROBERT B THOMPSON AND JUSTIN MANNOLINI

Comparative corporate governance has become a major field of study in the last decade. Within comparative corporate governance, the global corporate world is divided between legal systems with dispersed ownership structures, such as the United States, and those with concentrated ownership structures, such as those traditionally found in much of continental Europe.[1] Edward Rock describes the allure of comparativism as being that 'one can fruitfully transplant legal rules from one system to another ... The temptation is to try to get something for nothing, or at least at a discount'.[2]

The earliest phase of the comparative corporate governance debate was marked by US interest in improving its own financial performance, through the adoption of corporate governance mechanisms from other jurisdictions.[3] Nonetheless, the increasing dominance of the US economy from the mid-1990s significantly shifted the focus of debate in the comparative corporate governance arena.

A number of key themes and insights (which to a degree overlap) are evident in comparative corporate governance today. Recent scholarship has postulated that 'law matters' in the structure, development and performance of financial markets.[4] Specifically, this scholarship argues that there is a direct connection between ownership concentration in corporations and the level of legal protection accorded to minority shareholders by a legal system.

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1 See, for example, John Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications' (1999) 93 *Nw U LR* 641 at 707; Gustavo Visentini, 'Compatibility and Competition Between European and American Corporate Governance: Which Model of Capitalism?' (1998) 23 *Brooklyn J International L* 833.

2 Edward Rock, 'America's Shifting Fascination with Comparative Corporate Governance' (1996) 74 *Wash U LQ* 367.

3 Cf for example, Mark Roe, 'Some Differences in Corporate Structure in Germany, Japan and the United States' (1993) 102 *Yale LJ* 1927; Roberta Romano, 'A Cautionary Note on Drawing Lessons from Comparative Corporate Law' (1993) 102 *Yale LJ* 2021.

4 See, for example, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, 'Law and Finance' [1998] 106 *J Political Economy* 1113; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 *J Fin* 471; Brian Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 *J Legal Stud* 459.

Also embedded in recent comparative corporate governance is the so-called 'convergence-divergence debate'. This debate centres on the issue of whether corporate governance structures will ultimately converge into a system of global best practice, generally assumed to be based on the dominant US model of corporate governance.[5] This question may be more complex post-Enron and WorldCom. These events have led to considerable backlash, particularly in Europe, against the US model of corporate governance.[6]

Another strand of this debate is the issue of 'path dependence',[7] which traces differences in corporate governance structures throughout the world to the divergent historical and social underpinnings of jurisdictions.[8]

It is no accident that the rise of comparative corporate governance has coincided with the era of globalisation.[9] Globalisation, as it relates to takeovers, highlights the convergence issue in comparative corporate governance — namely, whether national takeover laws will ultimately converge towards a homogeneous international regulatory system. Major cross-border transactions, such as the DaimlerChrysler[10] and BHP/Billiton mergers, and the hostile takeover of Mannesmann AG by Vodafone[11] are recent examples of the impact, and in some cases problems, of globalisation in the area of mergers and acquisitions.

5 There is a voluminous, and growing, body of literature in the convergence-divergence debate. See, for example, John Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications' (1999) 93 *Nw U LR* 641 at 707; Douglas Branson, 'The Very Uncertain Prospect of 'Global' Convergence in Corporate Governance' (2001) 34 *Cornell International LJ* 321; William Bratton & Joseph McCahery, 'Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference' (1999) 38 *Columbia J Transnational L* 213.

6 See James Pressley, 'EU says "no" to US rules' *Australian Financial Review* (27 Jun 2002) 13. See also Margaret M Blair, 'Post-Enron Reflections on Comparative Corporate Governance' (August 2002) Social Science Research Network Electronic Library: <http://www.ssrn.com/> (visited 9 August 2002). Admittedly, however, corporate scandals, such as Enron and WorldCom, have also had a significant impact in tightening corporate governance rules in the United States. See, for example, the *Sarbanes-Oxley Act* of 2002.

7 See, for example, Mark Roe, 'Path Dependence, Political Options, and Governance Systems' in Hopt & Wymeersch, *Comparative Corporate Governance:Essays and Materials*' (1999); Helmut Kohl, 'Path Dependence and German Corporate Law: Some Skeptical Remarks from the Sidelines' (Third Frankfurt-Columbia Symposium on Comparative Law) (1999) 5 *Columbia J European L* 189.

8 See, for example, Karl Moore & David Lewis, 'Foundations of Corporate Empire: Is History Repeating Itself?' (2000), stating that '[t]he lesson of history ... is that while markets have always been there, they have always operated in the context of geography, religion, language, folkways, families, armies, and governments, never in a vacuum' (at 291).

9 See generally, John Farrar, 'Globalisation, the New Financial Architecture and Effective Corporate Governance' in John Farrar, *Corporate Governance in Australia and New Zealand* (2001) Ch 34 at 429.

10 See Dennis Logue & James Seward, 'Anatomy of a Governance Transformation: The Case of Daimler-Benz' (1999) 62 *Law and Contemporary Problems* 87.

11 See Martin Hopner & Gregory Jackson, 'An Emerging Market for Corporate Control? The Mannesmann Takeover and German Corporate Governance' (September 2001) Social Science Research Network Electronic Library: <http://www.ssrn.com/> (visited 9 August 2002).

Regulatory developments in Europe are also interesting on this issue. For example, efforts by the European Union to ensure harmonisation and a level playing field in takeover law via the 13th directive on takeovers have proven politically controversial and, as yet, unattainable.[12]

While the market for corporate control is a critical aspect of corporate governance, analysis of different takeover regimes is relatively undeveloped in comparative corporate governance literature and studies, where there has been much greater focus on the board of directors.[13]

In February 2002, the University of Sydney Law School held a Takeovers Forum, to explore US and Australian takeover law from the perspective of comparative corporate governance. In Australia, the introduction under the *Corporate Law Economic Reform Program Act* 1999 of an enhanced role for the Takeovers Panel, and the Panel's subsequent activist approach to rule-making in the takeover context, raise interesting issues about the future impact of international takeover principles on the development of Australian law.

The articles in this issue of the *Sydney Law Review* by Professor Robert B Thompson, New York Alumni Chancellor's Chair, Vanderbilt University Law School, and member of Sydney Law School's Visiting International Faculty in Corporate, Securities and Finance Law Program, and by Justin Mannolini, Partner, of Freehills, were originally presented as conference papers at this Takeovers Forum.

Professor Thompson focuses on the relationship between target shareholders and managers. He explores developments in US takeover law since the revised standard of judicial review of defensive tactics to hostile takeovers in the *Unocal* decision.[14] He finds that the promise of enhanced judicial scrutiny of directors' defensive tactics under the *Unocal* decision has not been achieved under Delaware law, and that there is still considerable judicial deference to board decisions. By way of contrast, Professor Thompson notes that developments in Australia and the UK have curtailed the autonomy of the target board in the context of a hostile bid and accorded greater powers to the shareholders. He suggests that the developing models in Australia and the UK may provide better regulatory solutions to common problems.

Justin Mannolini's article explores developments in the realm of Australian takeover law, against the backdrop of the convergence/divergence and path dependence debates. Highlighting the historical and policy foundations of

12 See, for example, John Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and State in the Separation of Ownership and Control' (2001) 111 *Yale LJ* 1 at 21; 'So near, yet so far: Efforts to ease cross-border takeovers and mergers in the European Union have fallen at the last hurdle' *The Economist* (4 Jun 2001).

13 See, for example, Egon Zehnder International, *Board of Directors Global Study* (2000); *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States*, Final Report, January 2002.

14 *Unocal Corp v Mesa Petroleum Corp*, 493 A 2d 946 (Del. 1985)

Australian takeover law, he examines the extent to which the 'flavour' of Australian law, with its focus on shareholder protection under the Eggleston Principles, can withstand the inevitable conflict with principles of market efficiency in the globalised takeover world. Finally, he assesses the way in which this conflict may shape the future direction of takeover law and practice in Australia's takeover laws.

By focusing on the role, and regulatory mechanisms, of takeover law in the US and Australian contexts, these articles provide a valuable contribution to comparative corporate governance literature.

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