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**The Protection of Minority Shareholders
in Vietnam, Thailand and Malaysia**

By

Susanne Olberg



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A. Theoretical and Methodological Framework

I. Introduction

The protection of minority shareholders has become a favorite subject of scholarly debate. The main reason is economic in nature: in an environment of weak protection, minority shareholders will hesitate to contribute to the funding of corporations, resulting in increases in the average cost of capital for corporations. This in turn will lessen the competitiveness of these corporations in comparison to corporations in jurisdictions with higher protection of minority shareholders. Furthermore, capital will flow from jurisdictions with weak protection to jurisdictions with stronger protection of minority shareholders.

The debate on the protection of minority shareholders gained momentum after the Asian crisis in 1997 when international organizations like the World Bank called for better corporate governance in general and better protection of minority shareholders in particular.¹ Johnson et al. found evidence that, rather than macroeconomic factors, “corporate governance in general, and the de facto protection of minority shareholder rights in particular, matters a great deal for the extent of exchange rate depreciation and stock market decline in 1997–98”². The new awareness of the need for protection of minority shareholders was also reflected in a survey in December 1999 among portfolio investors in the major financial centers of Asia (excluding Japan), the U.S. and Europe, who ranked respect for minority shareholder rights as the second most important factor in assessing Southeast Asian equities.³ Asian countries responded to these increasing demands for better protection of minority shareholders by wide-ranging legal reforms that included the issuance of mandatory laws and regulations but also the drafting of voluntary codes of corporate governance.

¹ See for example *World Bank*, East Asia: Recovery and Beyond (2000) 107–111.

² *Johnson*, Simon et al., *Journal of Financial Economics* 58 (2000) 141 (143). This argument is not undisputed. For other explanations, see for example *Corsetti*, Giancarlo et al., *Japan and the World Economy* 11 (1999) 305; *Krugman*, Paul, *What happened to Asia?* (1998); *Radelet*, Steven et al., *Brookings Papers on Economic Activity* 1 (1998) 1.

³ *Freeman*, Nick J., *Foreign Portfolio Investors’ Approaches to Thailand’s Equity Market* (2000) 3, 24.

However, the question is whether and to what extent in practice these legal reforms result in enhanced minority shareholders' protection. The impact that 'law on the books' has in reality depends on a wide range of factors. Human behavior is not only shaped by formal rules, but also by informal rules. Furthermore, the extent to which formal and informal rules are implemented depends largely on their enforcement characteristics. These factors might be summed up by the term 'institutions'.⁴ In order to shed some light on the protection of minority shareholders in Vietnam, Thailand and Malaysia, the thesis will evaluate the formal and informal rules in regard to minority shareholders' protection and their enforcement characteristics in the three countries. To this end, the thesis will be divided into two parts. The first part will compare the law on the books, in other words, the formal rules that regulate the protection of minority shareholders, in the three jurisdictions. The second part will evaluate which informal rules and enforcement characteristics determine the protection of minority shareholders in each country and, finally, assess these factors and their impact.

This comparison is based on the reasons that follow. The thesis assumes that in line with a worldwide trend of convergence in corporate law along Anglo-American concepts of corporate law, there is also a convergence of the formal rules regarding the protection of minority shareholders in these three countries. Given such a convergence of legal concepts, informal rules and enforcement characteristics largely determine the differences between the jurisdictions. A comparison of the different countries therefore highlights which informal rules and enforcement characteristics cause similar formal rules to have different impacts. It thereby exposes the importance of informal rules and enforcement characteristics.

The choice of Vietnam, Thailand and Malaysia is based on two facts. First, the countries have started to rethink their formal rules roughly at the same point in time. Second, they have a totally different background *inter alia* in terms of different levels of economic development and completely different political systems. To start with, they have different political backgrounds ranging from a socialist to a democratic political system, and display different stages of capital market development and investors' bases. The comparison between the three countries is therefore especially qualified to highlight the importance of the local context of legal rules aiming to protect minority shareholders. The most interesting point, however, and the

⁴ *North*, Douglass C., *The American Economic Review* 84 (1994) 359 (360). See also *Kirchner*, Christian, *Comparative Law and Institutional Economics – Legal Transplants in Corporate Governance*, in: *Nobel, Peter/Gets, Marina (ed.)*, (2006) 201 (205) where institutions are defined as general rules together with the enforcement system.

main reason for the choice of these three jurisdictions is the fact that their jurisdictions have different legal origins: Malaysia belongs to the common law tradition, but also provides for sharia law. Thailand's legal system is based on civil law, but influenced by the common law system, while Vietnam's legal system is influenced by its socialist background and French civil law. A convergence along Anglo-American concepts of corporate law therefore highlights the difficulties in convergence and path dependencies. The objective of the thesis can therefore be summarized as illustrating the importance of context for the functioning of law, based on the example of a comparison of legal and factual protection of minority shareholders in Vietnam, Thailand and Malaysia.

II. Definition of Terms

The thesis focuses solely on companies limited by shares. Other forms of associations including limited partnerships by shares are not considered. Private companies (or 'privately held' or 'closed' or 'closely held' companies) are also excluded from analysis. To the extent possible, the thesis will point out differences between unlisted and listed joint stock companies. Shareholders are the members of the company holding "a participation interest in its capital (equity holder), composed of relatively small units called shares"⁵.

A starting point for the definition of minority shareholders is the differentiation from the majority shareholder. Perakis argues that "minority is a relational legal concept, whose definition needs the notion of majority"⁶. The definition of majority shareholder harbors its own problems. Majority is often defined by reference to the voting power or the capital prevalence. In regard to voting power at the shareholders' meeting, majority is usually defined as the power to enact a resolution. The threshold to pass a resolution, however, depends on the kind of resolution and jurisdictions may even provide different thresholds to pass an ordinary resolution. In most jurisdictions, resolutions regarding important decisions require two-thirds or three-fourths of votes whereas ordinary decisions require 50 percent of the votes although exceptions exist, such as the Vietnamese threshold of 65 percent to pass ordinary resolutions. However, the real percentage of voting power or capital prevalence that is necessary to pass a corporate resolution may differ significantly from the percentage stipulated in law. The Malaysian

⁵ *Perakis, Evangelos, Rights of Minority Shareholders General Report*, in: Perakis, Evangelos (ed.), (2004) 9 (16).

⁶ See the considerations in *Perakis, Evangelos, Rights of Minority Shareholders General Report*, in: Perakis, Evangelos (ed.), (2004) 9 (17).