*Independent Directors in Asia: A Historical, Contextual and Comparative Approach* BY DAN W **PUCHNIAK**, HARALD **BAUM** AND LUKE **NOTTAGE**, eds [Cambridge and New York: Cambridge University Press, 2017. xv + 619 pp. Hardcover: US$155.00]

The concept of "legal transplants" and the role it played in the development of law gave rise to much, and at times polarised, debate amongst comparative lawyers. Nevertheless, there is no denying that such borrowing of legal rules does contribute to legal reform—the question is the extent of the transplant and the form it takes. In the area of corporate law alone, there is much evidence of such "transplantation" resulting

in significant commonality in the governance of companies across jurisdictions. Indeed, comparative studies in corporate law are often informed by the underlying uniformity of the corporate form, and the laws that govern it. As Armour *et al* observed in their essay "What is Corporate Law?" in *The Anatomy of Corporate Law: A Comparative and Functional Approach* 3d ed (New York: Oxford University Press, 2017) 1 at p 1, "[b]usiness corporations have a fundamentally similar set of legal characteristics—and face a fundamentally similar set of legal problems—in all jurisdictions". Legal transplants run the gamut from the adoption of entire Acts to the borrowing of particular concepts. The independent director is an instance of the latter form of transplant. This particular concept has been so widely adopted that the presence of independent directors is *de rigueur* on corporate boards from Europe to Asia. Nevertheless, legal transplants may not always operate as expected in the country of reception. A number of jurisdiction-specific factors, including social, political and cultural, may influence the "success" of the transplant. Kahn-Freund astutely observed that the "problem of transplantation" (Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 Mod L Rev 1 at p 5) lay with "the inappropriateness of assuming that a legal norm or structure which had been seen to work well in one jurisdiction could be successfully introduced into another" (see Mark Freedland, "Otto Kahn-Freund (1900-1979)" in Jack Beatson & Reinhard Zimmermann, eds, *Jurists Uprooted: German Speaking Émigré Lawyers in Twentieth-Century Britain* (New York: Oxford University Press, 2004) 299 at p 311, cited in John W Cairns, "Watson, Walton, and the History of Legal Transplants" (2013) 41 Ga J Intl & Comp L 637 at p 687). Local context matters. This is the broad point so eloquently made in this book, which is edited by scholars whose own research backgrounds equip them with the insight to undertake a project of this nature. Asia is diversity itself. A project that attempts to look at a seemingly common concept in corporate governance, the independent director, must necessarily be prepared to embrace the inconvenience of difference and hence the challenge of weaving a coherent whole. The editors have managed this admirably by adopting a thoughtful structure.

The book is organised into three parts. The first part serves to prepare the reader for her journey through Asia in Part II by providing three foundational chapters. Chapter 1 provides the historical backdrop to the Anglo-American concept of the independent director by examining its origins and then tracing its spread across Europe. The independent director has been an important figure on the corporate governance scene in the United States ("US") for many years before it "went global" (see Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation" (2017) 65 Am J Comp L 265 at p 274), first to the United Kingdom ("UK") and then on to other jurisdictions the world over. In Asia, too, the independent director was embraced wholeheartedly as a means of strengthening the board of directors for effective corporate governance. But Chapter 2 takes a hard look at the central concept of independence, and exposes its shortcomings. It makes the important point that "independence needs to be designed in accordance with the corporate environment and the specific purpose it is designed for in a given jurisdiction" (at p 83). In this connection, Ringe proposes that the concept of independence may be improved by paradoxically combining it with an

element of *dependence* defined by reference to the purpose which the concept is intended to serve—adopting what Ringe refers to as a "functional notion" of director independence. Hence, if the purpose for the presence of the independent director is to protect minority shareholder interests, then the independent director should be made accountable to minority shareholders. This seems at first blush an immensely attractive proposal, but there may be practical difficulties. First, even within a single jurisdiction, companies are not necessarily homogeneous in their ownership patterns. And this is the case even in the US, where the widely-held, Berle and Means-type company (Adolf A Berle & Gardner C Means, *The Modern Corporation and Private Property* (1940) at p 47), characterised by a separation of shareholding and management control corporate ownership, is considered broadly representative of the majority of public corporations. Controlled corporations, whilst in the minority, nevertheless constitute a "sizeable minority" (see Lucian A Bebchuk & Assaf Hamdani, "Independent Directors and Controlling Shareholders" (2017) 165 U Pa L Rev 1271 at p 1279). The possibility that there are differences even *within* either class of corporations—widely-dispersed or controlled—cannot be excluded, as Puchniak and Lan demonstrate in their chapter on Singapore where they drew a distinction between family-controlled companies and Government-linked companies. In the US, at least, this lack of homogeneity has led Bebchuk and Hamdani to note the ineffectiveness of US-type independent directors in controlled companies to safeguard against "controller opportunism" (Bebchuk & Hamdani at p 1274). What this means is that the parameters of any "functional notion" of director independence may well be very difficult to define. Secondly, any concept of "dependence" in this context will have to cohere with the extant imposition of directors' duties. In Singapore, the law does not distinguish between the different types of directors. All directors are therefore subject to the duties imposed on them by the *Companies Act* (Cap 50, 2006 Rev Ed Sing) and by general law. Taiwan adopts a similar position as the Taiwanese Company Act applies the same duties to both inside and independent directors (at p 242). However, whilst the Singapore courts have tended to approach the no-conflict rules strictly, Taiwan's courts appear to take a more nuanced approach by taking into consideration a number of factors, including the position and knowledge of the independent director, to "reduce or exempt" the independent director from liability (at p 243). Again, this underscores the need to be sensitive to the situation that obtains in any particular jurisdiction, and any attempt to shift the object of a director's accountability will have to be carefully considered against that backdrop.

Chapter 3 concludes the introductory part by exposing the "myth of the monolithic 'Anglo-American' independent director", and demonstrates that, even as the phrase "independent director" is adopted universally, in reality, *none* of the Asian jurisdictions had adopted the American concept of the independent director. What is particularly interesting is the finding of a broad commonality *within* Asia—that the main function of the independent director is to monitor controlling shareholders. With this insight, it might well prove more edifying for Asian jurisdictions to study intra-Asia similarities and differences, to look East instead of West, when mining for lessons in law reform. Puchniak and Kim attempt to facilitate this by identifying six factors that influenced the development of the concept of the independent director in Asia, providing what the authors term as a "loose taxonomy" with which to compare

and contrast the concept of the independent director across Asia. These factors provide a useful framework with which to approach the jurisdiction-specific chapters in Part II of the book.

As the editors explain in the Introduction, they had chosen to concentrate on Asia's seven most important and dynamic economies—China, Hong Kong, India, Japan, Singapore, South Korea and Taiwan. Each chapter provides carefully researched coverage of the origins and development of the independent director within each specific jurisdiction, as well as useful surveys of relevant empirical research. Each chapter tells the jurisdiction's own unique experience of introducing and operationalising the concept of the independent director within that jurisdiction's peculiar context. It appears that the single most significant *common* denominator across these Asian jurisdictions is the corporate ownership structure: most companies across the swath of Asian jurisdictions have a concentrated shareholder structure. Although Puchniak and Kim would consider Japan a "notable exception" (at p 120), it is possible that Japan may still have more similarity with the rest of Asia in this aspect than with either the US or the UK. Goto, Matsunaka and Kozuka point out in their chapter that investors in Japanese listed companies may be categorised into "insider shareholders" and "outside shareholders", with the former historically controlling a majority of the shares. These insider shareholders tended to be supportive of the incumbent management, suggesting that, behaviourally, they might well approximate the controlling shareholders of other Asian jurisdictions. The authors also point out that whilst the percentage of shares held by insider shareholders fell to a minority by 2012 in large public corporations, this was not the case for small and medium-sized listed companies. For these latter type corporations, the balance of control remained vested in the insider shareholders. Nevertheless, what comes out most strongly throughout the book is the diversity that surrounds this single concept—from the identity of those who tend to be appointed independent directors to the purpose for which they serve.

These points are emphasised in the chapters that make up Part III of the book. Apart from the chapter on Australia, which provides a counterfoil to the East-facing perspective (although, paradoxically, Australia is geographically even farther east), the final two chapters attempt to tie the earlier chapters together. Chapter 12 utilises actual case studies from six of the jurisdictions considered to make the point that the *function* of the Asian independent director differs in unexpected but positive ways from the independent director originally conceptualised in the US/UK model. Chapter 13 places the discussions in the book within the broader comparative law context, and affirms that legal transplants are necessarily complex processes. Baum had ended Chapter 1 by asking "Should the West's Independent Director Migrate East?". The answer is provided by Kozuka and Nottage in the final chapter—yes, but in a re-contextualised manner.

All in all, this book has been a fascinating read, rich in detail and full of insight. The editors have succeeded in putting together a book that will undoubtedly be an important resource in the arsenal of all who are concerned with corporate governance generally.

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