Sustainability and Corporate Mechanisms in Asia BY ERNEST **LIM** [Cambridge University Press, 2020. xix + 409 pp. Hardcover: £95.00]

"Sustainability" is very much on the world's agenda today. At the recently-held 26th United Nations Climate Change Conference of the Parties, Sir David Attenborough warned that the stability of the Earth's climate, which had for millennia enabled human civilisation to flourish, is being seriously threatened by human activity in

recent times. It is more urgent than ever that humanity must, in Sir Attenborough's words, "rewrite our story to turn this tragedy into a triumph". The notion of "sustainability", however, is not strictly confined to climate or environmental issues. Embedded in most definitions of sustainability are concerns for social equity and economic development. And in this latter regard, the world has had to grapple with the COVID-19 Pandemic, which has profoundly impacted human life on earth over the last two years. As the United Nations ("UN") noted, "[the Pandemic] is much more than a health crisis. It is a human, economic and social crisis. The coronavirus disease … is attacking societies at their core" (UN Sustainable Development Group, *Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19*).

The disruptions caused by the Pandemic have certainly tried and tested the human spirit but have also very sharply highlighted the divide between those who have and those who have not. Against this backdrop, Professor Ernest Lim's book is both timely and topical as attention is increasingly focused on the part that corporations should and must play in our changing world. As Lim notes, there are commanding commercial reasons for corporations to embrace sustainability in crafting their business strategies not least because of evolving consumer perspectives. Lim's book however focuses on the legal mechanisms available to encourage and compel the adoption of sustainability as a value that defines corporate practice. Over eight chapters, Lim examines six legal mechanisms he identifies as relevant to encouraging the pursuit of sustainability—sustainability reporting, gender diversity on boards, constituency directors, stewardship codes, directors' duties and corporate and internal stakeholder liability—in the four common law jurisdictions in Asia, namely, Hong Kong, India, Malaysia and Singapore. Lim scrutinizes these legal mechanisms to assess if they contribute, or can pragmatically contribute, to the advancement of the sustainability agenda.

In the opening chapter, Lim explains that his selection of the four Asian jurisdictions is underpinned by a number of factors that bind them, including their common legal heritage, institutional similarities as well as the pace and extent of their legal developments in sustainability. Importantly, Lim notes the comparable levels of state involvement in corporate governance and the prevalence of controlled enterprises in each of these jurisdictions. This last factor provides the anchor for Lim's nuanced analysis, especially of those legal mechanisms which are imported or "transplanted" from the West. Indeed, much of the similarities in the operative legal framework in each of the four countries may be traced to such transplanted legal rules and practices. However, it is the jurisdiction-specific socio-political and economic context that must inform any meaningful analysis of these rules and practices. Any coincidence in the regulatory regimes for governance of companies across the jurisdictions may, in the final analysis, be purely superficial as the local socio-political environment disarm and dislocate the purpose and intent behind the rules as envisioned in their original contexts. Lim makes this point cogently particularly in connection with the imported regimes that govern sustainability reporting obligations imposed on listed companies in Hong Kong and Singapore (Chapter 2) and stewardship responsibilities (Chapter 5).

In Chapter 2, Lim questions the suitability of transplanting the "comply or explain" mechanism tailored for a dispersed ownership jurisdiction like the United

Kingdom ("UK") into Hong Kong and Singapore, where the corporate ownership landscape is markedly different. In an illuminating discussion, Lim points out that the "comply or explain" mechanism is crafted on certain fundamental assumptions which are unlikely to hold true in either Hong Kong or Singapore given not only the concentrated nature of corporate ownership in these countries, but also the government's involvement and influence as regulator and shareholder. In Chapter 5, Lim expresses the same skepticism in connection with efficacy of the stewardship codes adopted in Hong Kong, Malaysia and Singapore, asserting that "the UK Stewardship Code was essentially transplanted … with little consideration given to how the code should be modified in light of the different ownership structures in these Asian jurisdictions". Indeed, the *UK Stewardship Code* [*UK Code*], as originally envisioned, was targeted essentially at institutional investors who own a majority of the shares of listed entities in the UK. The appropriateness of the *UK Code* in the starkly different investing landscape present in the Asia jurisdictions under consideration is justifiably questioned as any realistic prospect of minority institutional investors engaging meaningfully with the controllers is slight at best. There is thus reason to doubt the effectiveness of such codes beyond merely as a device to signal the importance of corporate governance in the adoptive jurisdictions. A recent work by Puchniak and Tang (Dan W Puchniak & Samantha Tang, "Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret" (2020) Vand J Transnatl L 989) provides support for this somewhat cynical view, arguing that Singapore's adoption of the *UK Code* was a deliberate and studied manoeuvre designed not to rock the boat but to maintain Singapore's continued corporate governance success. Be that as it may, the *UK Code* has been recently revised and in Singapore, proposals are afoot to revise the *Singapore Code* avowedly to "advance stewardship practices in Singapore and provide investors with guidance to demonstrate their stewardship outcomes" (see https://www.stewardshipasia.com.sg/enable/investors). It may be then that, at least where Singapore is concerned, some of Lim's concerns will be addressed.

Lim makes the case for companies to pursue sustainability goals on the back of strategic and ethical grounds. This revives, in a very real and present context, that enduring debate over what a corporation's purpose should be and, against the backdrop of global events, in a very present and real context. The fundamental question that has divided commentators is whether the company ought to be seen as essentially a private organisation dictated solely, or at least principally, by shareholder interests, or as a responsible corporate citizen, with a purpose that embraces the interests of multiple "stakeholders" or constituencies including its employees, its creditors and the larger public and community. The COVID-19 Pandemic had precipitated a trend of companies looking beyond shareholder value. This may be said to be the latter view of corporate purpose being put in practice. The fact is that there has been, in recent times, increasing emphasis and support for a more expansive view of a company's purpose, a purpose that embraces environmental, social and communitarian themes. In an absorbing discussion in Chapter 6, Lim engages this issue in relation to the duty imposed on directors to act in good faith in the interests of the company. As Lim points out, notwithstanding broad commonality across the four jurisdictions in the imposition on board directors of a best interests duty, there are variations in how this duty is interpreted and implemented. India, for

example, stands out in its imposition of a statutory obligation predicated on a stakeholder view of corporate purpose. As Lim notes, there are inherent difficulties in the interpretation and enforcement of this duty that detracts from its realistic utility as a means of promoting sustainability. Lim, however, suggests that it may be a plausible solution for the statute to provide private and public enforcement mechanisms to protect the interests of stakeholders. Lim does not explain the form in which such mechanisms should take, and it remains the case that unless the boundaries of the duty are made clear, vesting rights of enforcement on various stakeholders may have the direct and undesirable consequence of fostering defensive management, with potentially wider and negative implications for innovation and entrepreneurship generally.

Lim's eventual proposal, however, is to eschew the stakeholder value vs shareholder primacy dichotomy. Instead, he holds up the Singapore and Malaysia model as representing a viable middle path. In these jurisdictions, the notion of "corporate interests" that define the directors' best interests duty is potentially wide enough to encompass interests beyond shareholder value. Lim asserts that Singapore law defines duties by reference to the separate and distinct interests of the *company* as a separate legal entity and in so doing, "implicitly rejects shareholder primacy theory". Two points may be proffered here. First, any consideration of directors' duties must be assessed against the overall regulatory regime provided by the governing legislation. The fact is that, under Singapore's *Companies Act* (Cap 50, 2020 Rev Ed) [*Companies Act*], the collective shareholder body occupies a central and preeminent position, vested with the power to dictate the contours of the governance framework. It is the exclusive domain of the shareholders, for instance, to decide what powers to vest in the board, and the power to ratify and forgive directorial breaches of duties is generally accepted to lie with the shareholders. Accordingly, it may be somewhat precipitous to deny the continued influence of shareholder primacy. Secondly, anchoring directors' duties to the separate interests of the company is not unknown to common law. In *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, the English court accepted that should there be a conflict between shareholder interests and the interests of the company, the latter prevail. Nevertheless, it is true that Singapore law is largely accommodative of the idea of a more inclusive "purposive-ness". Indeed, as Lim notes, Singapore's *Companies Act* enshrines this by making it explicit that directors can take account of employees' interests. It may also be worth noting that when a company is in financial difficulties, Singapore law requires directors to de-prioritise shareholder interests in favour of, specifically, creditors' interests. Although not as all-encompassing as true stakeholderism might demand, this legal obligation does underscore the need to look beyond shareholder value in times of crisis, and is therefore consistent overall with the idea of "purposiveness". Indeed, what is good business must depend on the times. An insistence on adhering to the narrower traditional conception of "purpose" might well mean a failure on the part of the board to adjust to the times, hence a possible breach of duty.

All in all, this book has been a compelling read. As Lim asserts, such extant literature as there is that analyses the extent and efficacy of corporate governance mechanisms in advancing sustainability as a way of corporate life has tended to focus on Western jurisdictions. This book contributes to a fuller global picture by looking East. The book's true contribution, however, is its context-driven and nuanced

analysis. It should prove to be an important resource for anyone concerned with sustainability-driven corporate governance.

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