MODERNISATION AND REFORM OF CORPORATE LAW AMIDST THE INFLUENCE OF GLOBALISATION AND DEVELOPMENT IN INFORMATION TECHNOLOGY

Introduction*

Regulatory measures aimed at reforming corporate law is a daunting and difficult task in view of the dynamic and ever-changing corporate environment. Nevertheless, the process of globalisation and developments in information technology has acted as a catalyst for corporate law reform in a number of jurisdictions. Amidst a meticulous, detailed and comprehensive re-examination of the current law, corporate regulators often face the dilemma of finding an appropriate niche that balances the conflicting needs of economic enterprise and shareholders' interest. At the initial stage of corporate law development, countries tend to adopt and apply the established model of another jurisdiction. This was evident in countries such as Australia, New Zealand and Malaysia where the English Companies Act had a dominant influence in the respective jurisdiction's corporate regulations. The "one size fits all" principle seems to play an effective role in the corporate regulatory framework during the embryonic stage of growth in the history of corporations. An illustration is that of the case in Malaysia.

In Malaysia, corporations are governed subject to the provisions encapsulated in the Companies Act of 1965.[1] The other relevant legislation comprised the Securities Commission Act of 1993,[2] the

* I wish to thank Professor Dr. John Farrar, Professor of Law, School of Law, Bond University for his support, encouragement, and insightful comments on an earlier draft of the article.

[1] The Companies Act 1965 (Act 125).

[2] Securities Commission Act (Act 498).

Security Industry Act of 1983, and the Listing Requirements of the Kuala Lumpur Stock Exchange.[3] Nevertheless, the core Malaysian corporate law is encapsulated in the Companies Act of 1965.[4] Generally, in the past, the Malaysian company law model appears to follow and has adopted the provisions established in the United Kingdom's company law model.

The Traditional United Kingdom-Based Public Company Model

Traditionally, Malaysia, Australia and New Zealand adopted the United Kingdom's model on company law. In 1981, Australia decided to pursue its own model of corporate governance that was based on the complex Companies Code.[5] Similarly, New Zealand regulators have also shifted their focus when they decided to adopt the Canadian Business Corporations Act and Ontario Business Corporations Act as their own model of company law. The Canadian company law model has been succinctly described by Farrar as a sort of a "half-way house between the UK and US models."[6] The model was effective in its role as a facilitator for the development of business in Canada.

The United Kingdom's company law model was established in the mid-nineteenth century and was essentially based on the Victorian public company model.[7] In view of the impact of globalisation and developments in information technology, the provisions of the model

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[3]The revamped Listing Requirements of the Kuala Lumpur Stock Exchange took effect from 1 June 2001 with the exceptions of the provisions in Table 1 that took effect on 15 February 2001.

[4]Bidin A, 'The Position of Share Buybacks in Malaysia and Recent Amendments to the Malaysian Companies Act' (1999) 20 *The Company Lawyer* 10, 33.

[5]Farrar JH, 'A Brief Thematic History of Corporate Governance' (1999) 11 *Bond LR* 259.

[6]Farrar JH, 'Closer Economic Relations and Harmonisation of Law Between Australia and New Zealand' in Joseph PA, (ed) *Essays on the Constitution*, Brookers, Wellington (1995) 158 cited in Farrar JH, 'A Brief Thematic History of Corporate Governance' (1999) 11 *Bond LR* 259.

[7] Pettet B, 'Towards a Competitive Company Law' (1998) 19 *The Company Lawyer* 5, 134.

has been subjected to a number of criticisms. Amongst other comments, the model has been described as "seriously out of date"[8], "signally ill-equipped"[9], "complex, obscure, and elephantine"[10], and a "patchwork of largely facilitative core and prescriptive additions" [11]. Given the slow pace at which company reforms have been carried out in the United Kingdom in recent years, it is inevitable that its corporations would be inadequately equipped to deal with the reconfiguration of a globalised economy.

Nevertheless, initiatives have been undertaken to reform the United Kingdom's company law. The reforms are driven by reasons such as : - the need to improve the country's international competitiveness [12]; a growing tendency towards shareholder-orientation; attempts to remove obscure and complex provisions within the Companies Act 1985; and the urgent task of ensuring that there is in the United Kingdom a "modern law for the modern world." [13] Overall, the primary reason for reform was aimed at promoting business competitiveness in the gobal economy. Another reason was to clarify the law, thus enabling it to be more accessible and "less linguistically opaque". [14] This reason was also similar to that of the Corporations Law Simplification Programme in Australia where the regulators sought to re-write the Corporations Law in simple English Language and removed some of the archaic business regulations. Unfortunately, the programme resulted in an overly complex piece of legislation where "the legislation stands as an obese monument to complexity and confused thinking."[15]

[8] Ireland P, 'Back to the Future?: Adolf Berle, the Law Commission and Directors' Duties' (1999) 20 *The Company Lawyer* 6, 203.

[9] Bingham K, 'The Professional Board' (2000) 3 *Corporate Governance International* 4, 39 at 42.

[10] Sugarman D, 'Is Company Law Founded on Contract or Public Regulation? (1999) 20 *The Company Lawyer* 6, 162.

[11] Boyle T, 'Law Reform: The Use of Comparative Law in the Strategic Framework' (2000) 21 *The Company Lawyer* 10, 308.

[12] United Kingdom, Department of Trade and Industry, Consultation Paper: Modern Company Law for a Competitive Economy, (1999) London. Available at http://www.dti.gov.uk/cld/reviews/condocs.htm. [May 12 2001].

[13] *Supra* 9 at 308.

[14] *Supra* 8 at 203.

[15] *Supra* 5 at 269.

Examples of the United Kingdom's reform includes the introduction of the Law Commission Consultation Paper on Shareholder Remedies [16]; the Law Commission and Scottish Law Consultation Paper on Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties [17]; and the Department of Trade and Industry's Consultation Paper entitled "Modern Company Law for a Competitive Economy".[18] In the latter, proposals were made to improve the governance of companies. The main areas of reform covers directors' duties; reporting requirements for public and very large private companies; proposals for private companies; and an accounting regime for small companies. It also addressed the problems in Part X of the United Kingdom's Companies Act of 1985. In reality, the arcane provisions in Part X have been severely criticised as being "prolix, fragmented, inconsistent, lacking in overall coherence and obscure."[19]

The Canadian Private Company Model

Prior to the 1960s, legislative inactivity pertaining to Canadian corporations law was attributed to the effect of the economic depression, federal inactivity as a result of the decentralisation process, and emphasis on securities market.[20] Following a number of corporate failure, reform aimed at company law reform was accorded greater

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[16] United Kingdom, Law Commission, Shareholder Remedies: A Consultation Paper, (1995) *Consultation Paper No. 142, HMSO*, London.

[17] United Kingdom, Law Commission, *Company Directors; Regulating Conflicts of Interest and Formulating a Statement of Duties: A Consultation Paper*, (1998) *Consultation Paper No. 153, HMSO*, London. It seeks to address deficiencies in Part X of the Companies Act 1985 and the possibility of reducing directors' duties into a written statement.

[18] United Kingdom, Modern Company Law for a Competitive Economy: Developing the Framework (2000) A Consultation Document from the *Company Law Review Steering Group*. Available at http:// www.dti.gov.uk/cld/reviews/condocs.htm. [May 15th 2001]

[19] *Supra* 10 at 166.

[20] Ziegel JS (ed), Studies in *Canadian Company Law* Volume 2: Corporation and Securities Law in the Seventies (1973) Butterworths, Toronto.

attention particularly, in respect of investors' protection and directors' accountability. It was vital to ensure that the law does not become irrelevant and inappropriate.

In 1967, the Canadian government set up a task force to study and report on business corporations law. Proposals for a new business corporation law were discussed, proposed and introduced in Parliament. On 15 December 1975, the Canada Business Corporations Act of 1975 was enacted.[21] The purpose of corporations law as outlined in the Canada Business Corporations Act of 1975 was, amongst others:- to facilitate the efficient management of businesses; establish a legal framework that enables managers and investors to work together; prevent abuse of powers; and protect minority shareholders and creditors. The new legislation attempted to eliminate obsolete provisions, allow greater access to information for investors, increased opportunities for shareholders' participation, and enforcement of rights.

The New Zealand Company Law Model

Until the late 1970s, the New Zealand Companies Act of 1955 adopted the provisions of the United Kingdom Companies Act of 1948. However, following the United Kingdom's membership into the European Union, the model seems no longer to be an appropriate model. Subsequent substantial amendments to the New Zealand Companies Act of 1955 meant that it began to diverge from the United Kingdom model. After the 1970s, New Zealand opted for the Canadian models of the Canada Business Corporations Act and Ontario Business Corporations Act of 1993.[22] It is noted that harmonisation with the Australian Corporations Law was not pursued. The reasons are:- the model did not address reforms related to the abolition of par value and nominal capital; the duty of directors was not delineated and identified appropriately; and, uncertainty and ambiguity were prevalent as corporations law in Australia was consolidated.

Before the Canadian Models were adopted, the New Zealand Law Commission had released the Report on Company Law Reform and Restatement in 1989. It set out the proposals for reform, policies to

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[21] *Ibid.*

[22] *Supra* 5.

be pursued, and the need for reform.[23] The important reforms that were proposed by the New Zealand Commission were: - (i) the introduction a new Companies Act to replace the 1955 Act; (ii) abolition of par value and nominal capital; (iii) allowing share buy backs; (iv) statutory distribution of power within the company; (v) a standard company constitution; (vi) statutory re-statement of directors' duties and powers; (v) shareholders' protection in certain circumstances; (vi) simplified liquidation rules; (vii) liquidators and receivers must be independent and experienced; (viii) receiverships provisions to be restated in the Property Law Act 1952; (ix) the law related to company charges to be incorporated into Personal Property Securities Act.[24]

The Report was prepared based on the following policies, that is:

> "a good system of company law should provide a simple and cheap method of incorporation and company organisation which is flexible enough to meet the needs of diverse organisations; clearly identify the duties and powers within the corporate structure in an Act designed for use by directors and shareholders and not just lawyers and accountants; provide for better accessibility to company law by setting up the Act as the statement of first recourse in identifying rights and duties within the company; ensure that regulation to prevent abuse is appropriate and is commensurate with the aims of company law and securities law."[25]

The major themes and issues that were faced by the Law Commission consist of: - the need to provide a more accessible, usable, simple and intelligible law; the need to ensure that legislation remains relevant and applicable; ensuring that the provisions are appropriate from the practical aspect; and the overlapping between the Companies Act 1955 and the Securities Act 1978.

Overall, the New Zealand Model seems to succeed in providing businesses with a clear and better perception of the regulatory framework. Its objectives appears to have been fulfilled if the preamble to

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[23] New Zealand, Law Commission Report No. 9: Company Law Reform and Restatement (1989) Wellington.

[24] *Ibid.*

[25] *Ibid* 4.

the New Zealand Companies Act of 1993 which states the purpose of legislation is to reform the law, is examined. It main purpose was:[26]-

(i) To reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks; and
(ii) To provide basic and adaptable requirements for the incorporation, organisation, and operation of companies; and
(iii) To define the relationships between companies and their directors, shareholders, and creditors; and
(iv) To encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power; and
(v) To provide straightforward and fair procedures for realising and distributing the assets of insolvent companies.

Generally, the New Zealand company regulators appears to pursue a different approach. Its company law model has shifted from the Australian corporations model to that of the Canadian model.

The Modernisation of Corporate Law in Australia

In the past, corporation law in Australia has been described as unduly prescriptive, complicated, and difficult to comply with.[27] Australian legislators had previously adopted the Uniform Companies legislation which was based primarily on the Victorian Companies Act of 1958. This was almost a replica of the United Kingdom's Companies Act of 1948 model. Later amendments in the United Kingdom has also prompted similar amendments in Australia. However, certain provisions have been added to remedy some inadequacies in the law and

[26] *Supra* 5 at 269.

[27] Pascoe J, 'The Australian Federal Government Adopts the 1997 Wallis Report' (1999) 20 *The Company Lawyer* 1, 29.

also to reduce future corporate failures. Between 1961 to 1962, a number of States and Territories in Australia had passed a uniform Companies Act. Although this was a significant legislative milestone in Australian company law, nevertheless the uniform legislation was deemed to be "technically disappointing" based on the argument that it lacked a comprehensive and substantial reform.[28]

Since the 1980s, the corporation's regulatory framework has been subjected to regular reviews and reforms. There has been a shift towards a uniform Australian legislation and "gradual attainment of uniform administration under a national regime."[29] In 1989, the Corporations Act of 1989 was enacted to become a unilateral Commonwealth legislation governing companies and securities.

In the 1990s, further reforms and changes were again made to corporation law. These includes:[30] - (i) the Corporations Legislation Amendment Act of 1991 (Cth) which effect changes to insider trading; (ii) the Corporate Law Reform Act of 1992 (Cth) which brought changes to the provisions related to benefits accorded to directors of public companies and related parties; introduction of voluntary administration; limitations on insolvent trading; voidable transactions in windings up; (iii) the Corporate Law Reform Act of 1994 (Cth) pertaining to indemnification of directors and also enhanced disclosure; (iv) the First Corporate Law Simplification Act of 1995 (Cth) governing simplified drafting; share buy-backs; proprietary companies; simplified company registers; (v) the Company Law Review Act of 1998 (Cth) that seeks to further simplify drafting; memorandum and articles replaced; prohibits registration of companies limited by shares ad guarantee; abolition of par value shares; (vi) the Financial Sector Reform (Amendments and Transitional Provisions) Act of 1998 whereby the Australian Securities Commission became the Australian Securities

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[28] Sawer G, 'Federal-State Co-operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4 *MULR* 238 at 240 cited in Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (9th edn, 1999) Butterworths, Sydney at para. 2.180.

[29] Ford HAJ, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (10th edn, 2001) Butterworths, Sydney.

[30] *Ibid* para. 2.291.

and Investments Commission with additional regulatory powers over insurance and financial offerings to the public.

A subsequent revamp was made under the Corporate Law Economic Reform Programme (CLERP) to improve the governance of directors' duties. The regulatory changes were made based on the following principles: - [31]

(i) the law should facilitate, and not impede, business;
(ii) respect the principle of sanctity of contract;
(iii) balance regulation against director's freedom to make business decisions;
(iv) meet business needs and be built on a proper understanding of how business works;
(iv) be adequately flexible for directors, when permitted by law, to consider other constituency interests;
(vii) ample but efficient disclosure;
(viii) courts should not substitute their judgement for that of the directors made in good faith;
(ix) a different set of rules to be applied to different types of companies;
(x) flexible sanctions for breach of directors' duty;
(xi) shareholders and directors must have separate but interdependent roles.

One component of the CLERP, the Company Law Review Act of 1998, came into effect on 1 July 1998. It was acknowledged to be the most significant reform to company law since the introduction of the Corporations Law in 1991 as fundamental changes were introduced with respect to the provisions related to the formation of companies, meetings, share capital, financial assistance, and financial reports. [32]

Similar amendments were made in governing the formation of companies namely: - simplification of the formalities required to set up

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[31] *Ibid* 17.

[32] Mitchell V, 'Company Law Reviews in Australia and the United Kingdom' (1999) 20 *The Company Lawyer* 4, at 101.

and manage a company [33]; establishment of a one member company[34]; abolition of the memorandum of association; and re-naming of the articles of association to that of a "constitution".

The changes to company meetings involve the following aspects: - modification of the rules on the holding of meetings; use of electronic technology to hold meetings[35]; provision of notices of meetings [36]; notice of meetings of listed company [37]; and a reasonable opportunity for members to ask questions or comment on the company's management.

On the other hand, the new provisions related to share capital have led to: - abolition of the concept of par value[38]; removal of the need for approval from the court for capital reduction, subject to some restrictions[39]; and changes in shares buy-back regulations.[40] The provisions governing financial assistance by a company for acquiring

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[33] Section 117(1) of the Corporations Law now requires a single application to be lodged with ASIC.

[34] Section 114 of the Corporations Law states that a company needs to have at least 1 member.

[35] Section 249S of the Corporations Law allows a company to hold a meeting of its members at 2or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.

[36] Section 250A of the Corporations Law regulates the appointment of a proxy. On the other hand, section 250B stipulates the use of electronic means to receive proxy documents.

[37] Section 249HA of the Corporations Law expressed that at least 28 days notice must be given of a meeting of a company's members.

[38] Section 254C expressed that shares of a company have no par value.

[39] Section 256B(1) enables a company to reduce its share capital that is not otherwise authorised by law if the reduction (a) is fair and reasonable to the company's shareholders as a whole; and (b) does not materially prejudice the company's ability to pay its creditors; and (c) is approved by shareholders under section 256C. Additionally, section 256C(3) requires that a copy of the resolution to reduce capital must be lodged with the ASIC within 14 days after it is passed. The company must not make the reduction until 14 days after lodgment.

[40] Section 257B to section 257J of the Corporations Law.

shares in the company or a holding company have also been relaxed. However, the transaction is restricted to some conditions.[41]

The new provisions also require companies to keep financial records.[42] The annual financial reporting to members can either be in the form of full or concise report. [43]

Earlier on in March 1997, the Australian government announced that a fundamental review of the regulations governing business and investment activity would be conducted to ensure that it promotes economic efficiency. The reform programme known as the CLERP adopted an economic approach to corporate regulation. The CLERP initiative was driven by the forces of globalisation, market behaviour and the inability of the law to keep pace with change.[44] Economic reasons play a prominent role as a catalyst for reform. The CLERP advocated an economic approach to corporate regulation. It was based on the following goals: - principles of market freedom, investor protection, information transparency, cost effectiveness, regulatory

[41] Section 260A(1) of the Corporations Law allows a company to financially assist a person to acquire shares in the company or a holding company of the holding company only if: (a) giving the assistance does not materially prejudice; (i) the interests of the company or its shareholders; or (ii) the company's ability to pay its creditors; or (b) the assistance is approved by shareholders under section 260B (requires advance notice to ASIC); or (c) the assistance is exempted under section 260C. On the other hand, section 260C(4) mandates that financial assistance is exempted from section 260A if it is given under an employee share scheme that has been approved by:

(a) a resolution passed at a general meeting; and (b) if the company is a subsidiary of a listed domestic corporation – a resolution passed at a general meeting of the listed domestic corporation; and (c) if paragraph (b) does not apply but the company has a holding company that is a domestic corporation and that is not itself a subsidiary of a domestic corporation – a resolution passed at a general meeting of that holding company.

[42] Section 286 (1) of the Corporations Law expressed that a company must keep written financial records that: (a) correctly record and explain its transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited.

[43] Section 314 of the Corporations Law allows two alternatives that may be selected by companies.

[44] Black A, Bostock T, Golding G and Healey D, CLERP and the New Corporations Law (2nd edn, 2000) Butterworths, Sydney.

neutrality and flexibility, business ethics and compliance. [45] In 1997, the proposed reforms were outlined in a series of discussion papers namely: - Paper No. 1 Accounting Standards; Paper No. 2 Fundraising; Paper No. 3 Directors' Duties and Corporate Governance; Paper No. 4 Takeovers; Paper No. 5 Electronic Commerce; and Paper No. 6 Financial Markets and Investment Products. A total of sixty policy reforms were proposed and released on 17 March 1998. On 9 April 1998, the authorities released a comprehensive draft of legislative provisions with 386 pages of new legislation for comments. Following that, the Corporate Law Economic Reform Bill was introduced into Parliament and released on 2 July 1998. [46]

On 24 November 1999, the Corporate Law Economic Reform Program Act (the "CLERP Act") was enacted. The CLERP Act of 1999 brought significant changes to the Australian Corporations Law in five primary areas, that is: - corporate governance, accounting standards, fundraising, takeovers, and share capital. Substantial changes were effected in the area of corporate governance by the CLERP Act of 1999 are: - [47] (i) a new definition of the term "officer" that includes "shadow" officer and "executive" officer; (ii) the introduction of a statutory business judgement rule to protect directors whose decisions are made in good faith; (iii) a reformulation of the statutory duty of care of directors; (iv) directors and officers of the corporation are required to act in good faith in the best interests of the corporation and for a proper purpose instead of only the statutory duty of honesty; (v) new rules pertaining to dependence on information or advice provided by others, and responsibility for the actions of a delegate; (vi) protection for a director of a wholly owned subsidiary who acts in the best interests of the holding company; and (vii) introduction of a statutory derivative action.

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[45] Baxt R, Fletcher K and Fridman S, Afterman & Baxt's Cases and Materials on Corporations and Associations (8th ed, 1999) Butterworths, Sydney, 173; cited in Farrar JH, 'A Brief Thematic History of Corporate Governance' (1999) 11 Bond LR 259.

[46] *Ibid.*

[47] Ford HAJ, Austin RP and Ramsay IM, An Introduction to the CLERP Act 1999: Australia's New Company Law (2001) Butterworths, Sydney.

These changes were justified based on the need to maintain investors' confidence while fostering a healthy business enterprise. They also strive to establish a climate of certainty in respect of directors' responsibility and liability. Directors are also encouraged to delegate their powers and obtain professional advice from others. The statutory derivative action addresses the burden of costly litigation faced by shareholders. Nevertheless, on 15 July 2001, the Corporations Law was replaced by the Corporations Act of 2001. The new provisions sought to enhance Australian corporate law to cope with the demand of globalisation and modernisation.

The Mandatory/Enabling Debate in the United States

In the United States, two diverse views prevails pertaining as to what constitutes the structure of corporate law. First, corporate law consists of mandatory rules whereby shareholders are expected to comply with the provisions in a rigid manner. [48] The mandatory core of corporate law protects shareholders from unconscionable risks. On the other hand, the second view is that corporate law possess another form of configuration. Essentially, it comprised of default rules which are waivable whereby parties are free to opt out of these "off-the-rack" rules"[49] subject to specific reasons. The latter "contractarian" view believed that corporate law is, in reality, an extension of the law of contract. It opined that mandatory legal rules are by nature, inappropriate, as it tends to be "anti-contractarian" in nature.[50]

One effect of the mandatory/enabling debate has been a shift in emphasis from law to economics.[51] Consequently, some of the problematic issues that have emerged from this paradigm shift are: - (i) an inclination to ignore "an important feature common to all forms of long-term relational contracts: namely, that courts have invariably played an active and indispensable role in monitoring and interpreting such

[48] Coffee JC, Jr, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 *Columbia Law Review* 1618.

[49] *Ibid* at 1619.

[50] *Ibid.*

[51] *Ibid.*

agreements"[52]; (ii) a greater need to examine and learn from the mandatory/enabling balance in the corporate law of other jurisdiction; (iii) the contribution of mandatory law towards the efficiency of the law; (iv) judicial activism and greater contractual freedom; and, (v) the shrinking of the supposedly mandatory core of corporate law.

Although there is some strength in both the mandatory/enabling arguments, Coffee posited that both have mis-stated the problem. In a detailed analysis of the debate, he made the following observation : -

> "contractual innovation can be reconciled with a stable mandatory core of corporate law if we recognize that what is most mandatory in corporate law is not the specific substantive content of any rule, but rather the institution of judicial oversight. Judicial activism is the necessary complement to contractual freedom".[53]

Overall, the courts in the United States seem to play an active role in reforming the corporate contract. According to Coffee, the three approaches adopted are: - the moral approach of traditional fiduciary law, the wealth maximising approach of hypothetical bargaining, and the information-revealing approach of coercive" default rules. [54] The first approach postulates that moral considerations necessitate judicial intervention. Trustee directors are required to subordinate their interest to beneficiary shareholders. The second approach argues that it is more efficient and economical to delegate " the task of drafting the appropriate contractual term on an ex post basis when and if the contingency arises" [55] to the court rather than to the parties concerned. Conversely, the third approach is based on the premise that "rigorous fiduciary duties make excellent default rules." [56].

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[52] *Ibid* 1619.

[53] *Ibid* at 1621.

[54] *Ibid* at 1623.

[55] *Ibid* at 1624.

[56] *Ibid.*

The Company Law Model in Malaysia

In Malaysia, the Indian Companies Act of 1866 constitutes the first piece of legislation that was introduced.[57] It was then replaced by the Companies Ordinance of 1889 and later, by the Companies Ordinance of 1915. Subsequently, it was replaced by the Companies Ordinance of 1923, the Companies Ordinance of 1940, the Companies Ordinance of 1946, and the present Malaysian Companies Act of 1965.[58] Overall, Malaysian corporate law legislation appears to have shifted away from its traditional reliance on the provisions set out in the United Kingdom Companies Act of 1948.

The Companies Act of 1965 was based on the Companies Act 1961 of Victoria, Australia. At that time, it was acknowledged as the most up to date model. Nevertheless, recent changes made to the corporations law in Australia have not been incorporated completely into the Malaysian Companies Act of 1965 by the Malaysian legislators. Thus, it appears that Malaysia's company law has proceeded on a different "path" in contrast to the earlier harmonisation attempt with Australian corporations law.

Impetus to contemporary reform may be attributed to the financial contagion that afflicted the country in 1997. The authority's swift response to the financial markets crisis is indeed commendable. In order to remedy the contagion, a number of legislative measures that were implemented. These consists of: - (i) the February 1999 Report on Corporate Governance: (ii) creation of the Malaysian Code on Corporate Governance: (iii) amendments to some provisions in the Companies Act of 1965: (iv) amendments to provisions in the Securities Commission Act of 1993 and Security Industry Act of 1983; (v) implementation of a new Listing Requirements of the Kuala Lumpur Stock Exchange; (vi) formulation of the Capital Market Master Plan by the Securities Commission; and (vii) the Financial Sector Stability Master Plan by the Central Bank (Bank Negara Malaysia).

Generally, these regulatory reforms were aimed at: - enhancement of corporate governance and transparency; development of a resilient,

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[57] Walter Woon, *Company Law* (2nd edn, 1997) FT Law and Tax Asia Pacific, Singapore.

[58] *Ibid.*

competitive and dynamic financial market; and promotion of investors' confidence. It reflects the attitude adopted by the government towards ensuring that company law remains updated in line with the impact of globalisation and developments in information technology. The advent of the Internet has led to greater investor empowerment and market efficiency. Corporate disclosure practices on the Internet facilitate public access to prescribed corporate information. Corporate law reform and corporate governance in the Information Age necessitates a new approach.

The information technology revolution has also led to the evolution of a new financial architecture. Its impact on the international financial landscape will have significant repercussions on the Malaysian corporation. The advent of the virtual organisation and agile corporation with a highly integrated, fast, flexible and seamless electronic environment will also redefine the competitive dynamics of the modern corporation. In coping with the demands of the new international financial architecture, Malaysian companies' ability to enhance their information communication technology-based competitive edge will most likely to be determined by the regulatory environment. A resilient and enhanced corporate regulatory framework is important to face the global trend towards deregulation and liberalisation of the financial system with its consequent blurring of traditional demarcation lines separating the activities of corporations. The integrated financial markets have been driven by technological advances in communication, information processing and computing technology. Another challenge of globalisation is the management of international capital flows and the macroeconomic implications on the country. This necessitates appropriate standards of prudential supervision in the corporate environment such as the exploration of new modalities in corporate regulation.

A substantial part of corporate law reform in Malaysia have also relied on the experience of other jurisdictions, in particular, the United Kingdom and Australia. This is due to historical reasons as Malaysia has formerly adopted the common law approach in its overall regulatory framework. The recent extensive reforms to company law have adopted some of the recommendations and provisions forwarded in the CLERP, Cadbury Report and the United Kingdom Companies Act of 1985. An example is the amendment proposed to section 132(1) of the

Malaysian Companies Act of 1956 whereby directors are required to act in the best interest of the company. This reformulation was proposed in tandem with the CLERP proposal[59] and both the New Zealand and Canadian companies legislation.[60] Perhaps, certain elements of the principle "one size fits all" approach are relevant to some of the new provisions in both the Malaysian Companies Act of 1965 and the revamped Listing Requirements of the Kuala Lumpur Stock Exchange.

Conclusion

The "modernisation" of company law has been characterised by numerous measures that have a common goal in "facilitating the imperatives of the new global economy".[61] As a sort of a hybrid that traverses public and private law, company law reforms can be a daunting task. The risk of excessive regulation looms and the consequences are worse as businesses fail to operate in optimal efficiency. Such lengthy and burdensome provisions have been manifested in the growth of the mandatory law and the diminution of the "enabling" characteristics of company law.

Some jurisdictions may resort to wholesale adoption of another's company law model to deal with the various complications. It is argued that the latter's model has been effective in facing numerous challenges. Thus, "the one size fits all" principle is justified. Nevertheless, this may be true at only one point in time. Given the rapid change effected by communication and information technology, the principle may be just another fallacy.

It is vital that the authorities and regulators adopt a systematic approach to reform of its corporate laws. A "principled" development of the law is preferable rather than wholesale adoption or even a form of piecemeal reform. The latter approach will not succeed in reducing the amount and complexity of existing legislation. Moreover the current trends of law reform that are centered on the principles of accountability, transparency, fairness and responsible corporate

[59] CLERP Proposals for Reform: Paper No. 3 Directors' Duties and Corporate Governance- Facilitating Innovation and Protecting Investors.

[60] Canadian Business Corporations Act 1975, paragraph 122(1)(a).

[61] *Supra* 10 at 162.

behaviour may change in the not too distant future. There appears to be a shift towards self-regulation. Perhaps, a more business-friendly approach with a laissez-faire spirit and a more internationally competitive company law will gradually evolve. In the future, greater emphasis may be given to societal values such as greater participation from the other societal groups besides shareholders. Perhaps, aspects such as democracy and citizenship may become more important in the future reform of company law.

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NOTIS KONSTRUKTIF & KAEDAH DALAM ROYAL BRITISH BANK V TURQUAND

Sistem pengumuman dan pendaftaran

Undang-Undang Syarikat moden dibina di atas beberapa batu asas. Salah satu daripada batu asas itu ialah prinsip pengumuman dan pendedahan maklumat mengenai sesebuah syarikat berdaftar. Akta Syarikat 1965 memerlukan setiap syarikat mendaftarkan dengan Pendaftar Syarikat beberapa jenis dokumen[1] yang akan mengandungi butiran tertentu mengenai syarikat. Selain itu, setiap syarikat dikehendaki menyimpan dan menyelenggarakan beberapa buku daftar[2] di pejabat berdaftarnya. Buku-buku berdaftar itu akan mengandungi maklumat tertentu berkenaan urusan-urusan, ahli-ahli dan pegawai-pegawai syarikat. Dokumen-dokumen dan buku-buku berdaftar tersebut adalah terbuka untuk pemeriksaan oleh ahli-ahli syarikat dan pihak luar yang berminat untuk mendapat maklumat umum atau maklumat tertentu mengenai sesebuah syarikat. Sistem pendaftaran dokumen-dokumen dan sistem penyimpanan buku-buku daftar adalah salah satu daripada beberapa cara untuk menentukan pengumuman dan pendedahan maklumat syarikat bagi menjamin wujudnya ketelusan dalam pentadbirannya. Tujuannya bukan sahaja untuk melindungi pihak luar (terutama bakal pelabur dan pemiutang syarikat) dengan memberi maklumat. Ia juga merupakan suatu langkah pencegahan terhadap frod dan tindakan-

[1] Sistem pendaftaran dokumen dengan Pendaftar Syarikat telah diwujudkan di England mulai tahun 1856 oleh Joint Stock Companies Act 1856. Contoh-contoh dokumen yang perlu didaftarkan dengan Pendaftar Syarikat di Malaysia oleh Akta Syarikat 1965 ialah memorandum persatuan (seksyen 16), artikel-artikel persatuan (seksyen 16) dan resolusi-resolusi khas (seksyen 152).

[2] Contoh-contoh buku daftar itu ialah buku daftar gadaian (seksyen 115), buku daftar pegangan sycr pengarah (seksyen 134) buku daftar pengarah, pengurus dan setiausaha (seksyen 141) dan buku daftar ahli (seksyen 158).