Vanderbilt Journal of Transnational Law

Volume 55
Issue 1 *January 2022*

Article 3

1-2022

The Divergent Designs of Mandatory Takeovers in Asia

Umakanth Varottil
National University of Singapore

Wai Y. Wan
City University of Hong Kong

The Divergent Designs of Mandatory Takeovers in Asia

Umakanth Varottil[*] *& Wai Yee Wan*[**]

ABSTRACT

Optimal takeover regulation aims to promote efficient changes of corporate control while curbing inefficient takeovers. Viewed from a comparative perspective, the Anglo-American prototypes of takeover regulation spearhead not only the discourse but also the dissemination of takeover regulation globally. At one end of the spectrum, the law in the United States follows the "market rule," whereby transfers of corporate control benefit from a regulatory free hand. At the other end of the spectrum lies the "mandatory bid rule" (MBR), epitomized by takeover regulation in the United Kingdom. Under the United Kingdom's version of the MBR, an acquirer who acquires de facto control over a target must make a general offer to the remaining shareholders to acquire all of their shares at the same price it paid to acquire the controlling block.

This Article aims to analyze how and why six significant Asian jurisdictions adopted the MBR and its variants. This is puzzling given that the jurisdictions display considerable divergence in terms of structural, legal, and institutional foundations, not only with their Anglo-American counterparts but also among themselves. This Article challenges the prevailing notion that the binary Anglo-American approach constitutes the framework for the dissemination of takeover regulation worldwide.

The Article claims that because of the political economy of takeover regulation in the Asian jurisdictions, the choice to adopt various intermediate positions is by design and not by accident. Considering that the market rule provides suboptimal protection to minority shareholders and the MBR curbs the market for corporate control, the intermediate positions aim to balance these somewhat conflicting objectives. This study contributes to the wider debate surrounding the appropriate takeover regulation

---

* Associate Professor, Faculty of Law, National University of Singapore.

** Professor, School of Law, City University of Hong Kong.

We are grateful to Robin Huang, Masafumi Nakahigashi, Dan Puchniak, Anand Jayachandran, Alan Koh, and Zhang Wei for comments on previous versions of this article. Errors or omissions are our own.

and, more specifically, the claims made by the proponents of the market rule on the one hand and the MBR on the other.

TABLE OF CONTENTS

I. INTRODUCTION

At the core of takeover law and regulation lie two, sometimes contradictory, objectives. On the one hand, takeover regulation is facilitative in nature, as it enables a market for corporate control.[1] At the same time, it also bears a commitment to protect the interests of the target's shareholders.[2] The goal of takeover regulation is to strike an appropriate balance between these two objectives.[3] Translated into efficiency terms, this suggests that optimal takeover regulation must

---

1. Paul Davies, *Control Shifts via Share Acquisition Contracts with Shareholders (Takeovers), in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 532, 568 (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., 2018).

2. Luca Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization without Foundation*, 1 EUR. CO. & FIN. L. REV. 440, 448 (2004).

3. Robin Hui Huang & Juan Chen, *Takeover Regulation in China: Striking a Balance Between Takeover Contestability and Shareholder Protection, in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 211, 218 (Umakanth Varottil & Wai Yee Wan, eds., 2017).

promote efficient changes of corporate control while curbing inefficient takeovers.[4]

Viewed from a comparative perspective, the Anglo-American prototypes of takeover regulation spearhead not only the discourse but also the dissemination of takeover regulation globally.[5] The law in the United States follows the "market rule," whereby transfers of corporate control benefit from a regulatory free hand.[6] Controlling shareholders are not required to share with minority shareholders certain benefits, such as control premiums they may obtain during control transfers.[7]

At the other end of the spectrum lies the "mandatory bid rule" (MBR), epitomized by takeover regulation in the United Kingdom.[8] Under the United Kingdom's version of the MBR, an acquirer who acquires *de facto* control (represented by 30 percent of voting rights) over a target must make a general offer to the remaining shareholders to acquire all of their shares at the same price it paid to acquire the controlling block.[9] The MBR deprives controlling shareholders of their exclusivity to the control premium, as they must share it with the minority shareholders.[10] It also enables the minority to exit the company in the event of a change in control of the target at a reasonable price.[11] Although the MBR has its benefits, it makes takeovers costly, thereby impinging upon the market for corporate control[12] and, in turn, arguably entrenching controlling shareholders and management of target companies.[13]

---

4. *See generally* Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957 (1994); Marcel Kahan, *Sales of Corporate Control*, 9 J.L. ECON. & ORG. 368 (1993).

5. *See infra* Part IIB.

6. Bebchuk, *supra* note 4, at 964; ALESSIO PACCES, RETHINKING CORPORATE GOVERNANCE: THE LAW AND ECONOMICS OF CONTROL POWERS 342, 371 (2012); Hubert de la Bruslerie, *Equal opportunity rule vs. market rule in transfer of control: How can private benefits help to provide an answer?*, 23 J. CORP. FIN. 88, 89–90 (2013).

7. However, the law in the U.S. restricts controlling shareholder action applying fiduciary duty principles. See text accompanying *infra* notes 34–35.

8. The Panel on Takeovers and Mergers, *The City Code on Takeovers and Mergers*, Rule 9 (hereinafter U.K. Code).

9. *See id.*; Paul Davies, Klaus Hopt, & Wolf-Georg Ringe, *Control Transactions, in* THE ANATOMY OF CORPORATE LAW 207, 227 (Reinier Kraakman, et. al, 3rd ed. 2017).

10. Davies, Hopt, & Ringe, *supra* note 9; Einer Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465, 1465 (1992); Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe: Enabling Companies to be Better Safe than Sorry*, 15 J. CORP. L. STUD. 55, 63 (2015); Nicholas Jennings, *Mandatory Bids Revisited*, 5 J. CORP. L. STUD. 37, 43–47 (2005).

11. Davies, Hopt, & Ringe, *supra* note 9, at 227-228; PACCES, *supra* note 6, at 388; Jennings, *supra* note 10, at 41–43.

12. *See* Johannes W. Fedderke & Marco Ventoruzzo, *The Biases of an 'Unbiased' Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge* in VAROTTIL & WAN, *supra* note 3, at 165; Deborah A. DeMott, *Current Issues in Tender Offer Regulation: Lessons from the British*, 58 N.Y.U. L. REV. 945, 945 (1983); Enriques, *supra* note 2, at 441–42.

13. *See, e.g.*, Fedderke & Ventoruzzo, *supra* note 12, at 169, 177.

Conventional wisdom indicates that the MBR and, to a very limited extent, the market rule, have formed the models for minority exit and protection worldwide.[14] For example, the UK takeover regulation has influenced the adoption of the MBR in continental Europe.[15] Outside Europe, the MBR has taken root globally, including in several jurisdictions in Asia. Significant Asian economies, including China, Japan, South Korea, India, Singapore, and Hong Kong have adopted varying versions of the MBR.[16]

This Article aims to analyze how and why these six Asian jurisdictions adopted the MBR and its variants. This is puzzling because the jurisdictions display considerable differences in terms of structural, legal, and institutional foundations, not only with their Anglo-American counterparts but also even among themselves. Several questions emerge. Does the rationale for adopting the MBR, which originated in the United Kingdom, where public companies display dispersed shareholding, apply equally in the Asian jurisdictions where concentrated shareholding is the dominant characteristic? If the MBR tends to stymie takeovers and entrench controllers, why do regulators in the Asian jurisdictions veer toward the MBR more than the market rule? Why do controlling shareholders, an influential group in the context of Asian corporate governance, still favor a version of the MBR if it means that they must pay a higher premium to consolidate their control and, when they sell, share their control premiums with minority shareholders?

This Article challenges the prevailing notion that the binary Anglo-American approach constitutes the framework for the dissemination of takeover regulation globally. Existing literature largely focuses on how jurisdictions have either adopted (with or without variation) the United Kingdom's stringent approach using the MBR for effecting transfers of control or, in some cases, the United States' light-touch approach of the market rule.[17] Some jurisdictions in Asia, such as Singapore and Hong Kong have faithfully transplanted the United Kingdom's version of the MBR in its essence and in practice.[18] Others, such as China, Japan, and India, have made appropriate modifications, including allowing partial offers in a wide

---

14. The popularity of the MBR outstrips that of the market rule. *See infra* Part IIB.

15. Jeremy Grant, Tom Kirchmaier, & Jodie A. Kirchner, *Financial Tunnelling and the Mandatory Bid Rule*, 10 EUR. BUS. ORG. L. REV 233, 236 (2009); Klaus J. Hopt, *European Takeover Reform of 2012/2013 – Time to re-Examine the Mandatory Bid*, 15 EUR. BUS. ORG. L. REV. 143, 153–54 (2014); Georgios Psaroudakis, *The Mandatory Bid and Company Law in Europe*, 7 EUR. CO. & FIN. L. REV. 550, 551 (2010); Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. L. 135, 135 (2008).

16. *See infra* Part III.A.

17. *See, e.g.*, Davies, Hopt, & Ringe, *supra* note 9; Davies, *supra* note 1, at 554–68.

18. *See infra* Part III.A.

range of circumstances, generous creeping acquisitions, and an array of exemptions from the MBR.[19] South Korea's version of the MBR is closer to the market rule than the UK MBR.[20]

The thesis of this Article is that the MBR and its variants are choices that each of the Asian jurisdictions makes as to where its regime lies along a spectrum between a strong MBR (closely resembling the UK version) and a diluted MBR (closely resembling the market rule). Contrary to Anglo-American discourse, which is dichotomous, this study demonstrates that the Asian analysis displays greater divergence.[21] Although it is enticing to treat this result as a failed transplant of the MBR, the position carries a lot more nuances that receive scant attention in the literature. Arising from Asia's divergent approaches, this Article challenges the notion that there can be one size that fits all models for the MBR, not only for all economies that adopt them but also for all companies within the same economy. This study also establishes the unintended consequences of the implementation of the MBR.

This Article claims that the political economy of takeover regulation in the Asian jurisdictions suggests that the choice to adopt various intermediate positions is by design and not by default. Given that the market rule provides suboptimal protection to minority shareholders and that the MBR curbs the market for corporate control, the intermediate positions seek to balance these somewhat conflicting objectives. Any form of the MBR operates as a signaling effect that takeover regulation in a jurisdiction comports with international practice,[22] but the deviations from the rule tend to be material enough to provide incumbents with the necessary protection against hostile takeovers while obtaining control premiums. [23] As controlling shareholders tend to bear significant influence in the process of carving out takeover regulation in the Asian jurisdictions, it is not surprising that they have advocated for a position that helps moderate the effect of control transfers in a manner that favors the incumbents.

This study contributes to the wider debate surrounding the appropriate takeover regulation and, more specifically, the claims made by the proponents of the market rule on the one hand and the MBR on the other.[24] Although the inclusion of the MBR in the EU

---

19. *See infra* Part III.A.

20. *See infra* Part III.A.

21. *See also* Yueh-Ping Yang & Pin-Hsien Lee, *Is Moderation the Highest Virtue: A Comparative Study of a Middle Way of Control Transaction Regimes*, 41 DEL. J. CORP. L. 393, 416 (2017).

22. See text accompanying *infra* notes 251–254.

23. *See infra* Part III.

24. *See, e.g.*, William D. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Bebchuk, *supra* note 4; de la Bruslerie, *supra* note 6; Erik Berglof, Mike Burkart, Tito Boeri, & Julian Franks, *European*

Takeover Directive spawned several studies of the MBR in the 2000s,[25] there is comparatively less traction for the analysis of the MBR in the Asian context. Some studies have focused on the incorporation of the MBR in individual Asian jurisdictions,[26] and others have focused on comparing specific aspects, such as partial offers, in a handful of Asian jurisdictions.[27] Through the broader study of six jurisdictions with varying legal traditions and economic landscapes, this Article seeks to more extensively tease out the distinctions in the design and implementation of the MBR in Asia.

The choice of China, Hong Kong, Japan, India, South Korea, and Singapore for this study merits explanation. They are six of the most significant economies in Asia, which also represent the largest takeover markets in the region.[28] This list of jurisdictions covers the hugely populated growth economies of China and India, the leading Asian financial centers of Singapore and Hong Kong, and the established economies of South Korea and Japan.[29] This combination also includes a balanced representation of both common law (India, Hong Kong, and Singapore) and civil law (China, Japan, and South

---

Takeover Regulation, 18 ECON. POL'Y 171 (2003); Clas Bergstrom, Peter Hogfeldt, & Johan Molin, *The Optimality of the Mandatory Bid Rule*, 13 J.L. ECON. ORG. 433 (1997); Mike Burkart & Fausto Panunzi, *Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE (Guido Ferrarini, et. al, eds., 2004); DeMott, *supra* note 12; Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Elhauge, *supra* note 10; Jesper Lau Hansen, *Mandatory Bid Rule - The Rise to Prominence of a Misconception*, 45 SCANDINAVIAN STUD. L. 173 (2003); Mark Humphery-Jenner, *The impact of the EU takeover directive on takeover performance and empire building*, 18 J. CORP. FIN. 254 (2012); Kahan, *supra* note 4; Ruth Lüttmann, *Changes of Corporate Control and Mandatory Bids*, 12 INT'L REV. L. ECON. 497 (1992); Joseph A. MacCahery & Erik P. Vermeulen, *Does the Takeover Bids Directive Need Revision?*, TILBURG L. SCH. RES. PAPER NO. 005/2010, available at https://ssrn.com/abstract=1547861 [https://perma.cc/HZ5B-P236] (archived October 26, 2021); Edmund Philipp Schuster, *The Mandatory Bid Rule: Efficient, After All?*, 76 MOD. L.R. 529 (2013); Simone M. Sepe, *Private Sale of Corporate Control: Why the European Mandatory Bid Rule is Inefficient*, ARIZONA LEGAL STUD. DISCUSSION PAPER NO. 10-29 (2010), https://ssrn.com/abstract=1086321 [https://perma.cc/Q5AV-U7KY] (archived Oct. 26, 2021); Ying Wang & Henry Lahr, *Takeover Law to Protect Shareholders: Increasing Efficiency or Merely Redistributing Gains?*, 43 J. CORP. FIN. 288 (2017).

25. *See, e.g.*, text accompanying *supra* note 15; *see also*, Berglof, Burkart, Boeri, & Franks, *supra* note 24; Humphery-Jenner, *supra* note 24; MacCahery & Vermeulen, *supra* note 24; Sepe, *supra* note 24.

26. Several of these studies are contained in VAROTTIL & WAN, *supra* note 3. We list other studies *infra* Part III.

27. Yang & Lee, *supra* note 21.

28. See, for example, S&P Global Market Intelligence, *Asia-Pacific Markets Monthly* (August 2020), demonstrating that for the periods Jan. 1, 2019 to July 31, 2019 and Jan. 1, 2020 to July 31, 2020, among the largest markets for M&A activity in Asia-Pacific (excluding Australia) by volume are China, Japan, South Korea, India, Singapore, and Hong Kong.

29. *See also* Umakanth Varottil & Wai Yee Wan, *Hostile Takeover Regimes in Asia: A Comparative Approach*, 15 BERKELEY BUS. L. J. 267, 269 (2019).

Korea) jurisdictions, although the influence of legal tradition[30] on takeover regulation in the context of the MBR and the market rule is tenuous.[31] A study of takeover regulation in these six jurisdictions provides a substantial and representative understanding of takeover regulation in Asia.

Part II of this Article sets out the broad features of the MBR and examines the dissemination of the rule worldwide, particularly in Asia. Part III analyzes specific features of the MBR in the six Asian jurisdictions and demonstrates how it is different from the Anglo-American approach. It also identifies the divergence among these six jurisdictions. Part IV rationalizes the divergent designs of the MBR in Asia using several well-established comparative law tools, including legal transplantation and the political economy of regulation. It also seeks to provide some normative observations regarding the MBR as well as takeover regulation more generally. Part V concludes.

II. A FRAMEWORK FOR THE MBR

Before embarking on an analysis of takeover regulation in the Asian jurisdictions, it is necessary to consider the evolution of the MBR as well as its objectives. This better enables an examination of the comparison between the MBR and the market rule across theoretical and efficiency considerations. Finally, the dissemination of the MBR into other jurisdictions, including through the EU Takeover Directive and further into various Asian jurisdictions, merits scrutiny.

A. *Objectives and Utility of the MBR*

1. Reasonable Exit Right for Minority Shareholders

In some jurisdictions, such as the United States, only minimal restraints accompany a sale of control transaction.[32] Controlling shareholders do not bear an unqualified obligation to share with other target shareholders the control premium they may obtain from the acquirer.[33] However, sales of control cannot be carried out in an unrestrained manner, as controlling shareholders are subject to

30. The "law matters" thesis suggests that the legal framework governing financial markets and corporate governance had an important role to play in creating the conditions for economic growth in low and middle-income countries. Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

31. Varottil & Wan, *supra* note 29, at 304–05.

32. Davies, Hopt, & Ringe, *supra* note 9, at 232; Yang & Lee, *supra* note 21.

33. Davies, Hopt, & Ringe, *supra* note 9, at 232.

certain fiduciary duties when they decide to sell their shares.[34] These duties apply specifically to the controlling shareholders who are selling their shares, rather than to the acquirer. Moreover, a fiduciary duties-based regime places the onus for determining the scope of the duties as well as their breaches on courts, which they would exercise on an *ex post* basis on the facts and circumstances of each case.[35]

The market rule historically monopolized takeover regimes, and it was not until 1972 that the MBR found firm ground through its introduction into the UK City Code on Takeovers and Mergers (hereinafter the UK Takeover Code).[36] The theoretical basis for the MBR lies in the equality of treatment to shareholders in a control shift resulting from the acquisition of shares.[37] When an acquirer acquires adequate shares[38] to obtain "control"[39] over the target, the MBR requires the acquirer to offer to buy out the remaining noncontrolling shareholders for cash at no less than the price at which it acquired control.[40] The controlling shareholders have no possibility whatsoever of obtaining any control premium or disguised payments that offer them exclusive benefits that they can avoid sharing with the minority shareholders.[41] That apart, the MBR operates as an exit right for minority shareholders to liquidate their holdings upon a change in control so that they are not locked in, in case the new controller runs the company in a manner opposed to the minority's expectations.[42] The exit right also reduces the pressure on the remaining shareholders to tender.[43] In that sense, the MBR has twin elements: "sharing" and "exit."[44]

---

34. Such fiduciary duties tend to attach to controllers during a sale when either (i) the acquirer is prone to looting, (ii) there is a sale of office by the controller, or (iii) there is a diversion of corporate opportunity. Elhauge, *supra* note 10, at 1503–23; Sepe, *supra* note 24, at 17–18.

35. Elhauge, *supra* note 10, at 1501.

36. *See* U.K. Code, Rule 9; *see also* Ventoruzzo, *supra* note 15, at 145.

37. PACCES, *supra* note 6, at 342; Lüttmann, *supra* note 24, at 498–99; Thomas Papadopoulos, *The Mandatory Provisions of the EU Takeover Bid Directive and Their Deficiencies*, 1 LAW & FIN. MKT. REV. 525, 528 (2007).

38. Our references in this article to "shares" generally relate to shares with voting rights. It is the acquisition of a sufficient proportion voting rights that confers "control" on the acquirer.

39. For a discussion of "control" in the context of the MBR, see, Umakanth Varottil, *Comparative Takeover Regulation and the Concept of 'Control'*, SING. J.L. STUD., 208 (2015).

40. Davies, *supra* note 1, at 543.

41. Andrews, *supra* note 24, at 513–15.

42. Davies, *supra* note 1, at 543; Schuster, *supra* note 24, at 533; Jennings, *supra* note 10, at 42–43.

43. Davies, Hopt, & Ringe, *supra* note 9, at 227–28; Enriques, *supra* note 2, at 453.

44. See text accompanying *supra* notes 10–11.

Unlike the market rule, which focuses on the selling controller, the MBR imposes obligations on the acquirer.[45] Moreover, it is not the actual harm caused by the change of control to the minority shareholders of the target that matters but the very act of control shift. Such an *ex ante* determination that all control transactions might likely impinge upon the interests of the minority shareholders provides them with the exit option together with a share in the control premium.[46] The MBR achieves through *ex ante* overarching regulation what the US market rule does through *ex post* fact-based determination.[47]

The United Kingdom's approach toward the MBR is arguably stringent as it represents a combination of several features. *First*, an acquirer triggers the MBR when it acquires de facto control over the target, irrespective of whether its plans for the target are beneficial or destructive to the company's other shareholders. [48] *Second*, once triggered, the acquirer must make an offer to *all* the remaining shareholders of the target to acquire their shares (i.e., a full offer).[49] Concomitantly, the UK approach disavows a partial offer in the discharge of the MBR obligation, only allowing partial offers in voluntary situations and with several restrictions. [50] *Third*, the acquirer must make the offer at a minimum price, which is at least the price at which it acquired control.[51] *Fourth*, once the acquirer has de facto control over the target but not legal control,[52] it cannot acquire further shares and consolidate its holdings, unless it makes a mandatory offer to all the remaining shareholders to acquire their shares.[53] *Fifth*, only limited exceptions accompany the MBR.[54] Such a

---

45. In the U.K., the MBR is enforceable through a court of law. *See* Anna L. Christie & J.S. Liptrap, *Goldilocks (Control) and the Three Bears: Panel on Takeovers and Mergers v. King*, EUR. BUS. ORG. L. REV. 591, 591 (2020), available at https://link.springer.com/article/10.1007/s40804-019-00173-9 [https://perma.cc/6DZ6-CWBD] (archived October 26, 2021).

46. Elhauge, *supra* note 10, at 1501.

47. *See* Elhauge, *supra* note 10, at 1501.

48. U.K. Code, Rule 9.

49. U.K. Code, Rule 9.

50. U.K. Code, Rule 36; *see also* DAVID KERSHAW, PRINCIPLES OF TAKEOVER REGULATION 186–87 (2016).

51. U.K. Code, Rule 9.5. The minimum price must be "not less than the highest price paid by the [acquirer] or any person acting in concert with it for any interest in shares of that class during the 12 months prior to the announcement of that offer." *Id.*

52. For a more detailed discussion of this provision, *see infra* Part IIIF.

53. U.K. Code, Rule 9.1(b).

54. There are two significant exceptions. One applies when the target issues new shares to the acquirer in exchange for cash or assets, and the independent shareholders of the target approve such issuance through a process known as the "whitewash waiver". U.K. Code, *Notes on Dispensation from Rule 9 & Appendix 1*. The second exception applies when the financial situation of the target is so dire that it requires an immediate injection of capital. *See* U.K. Code, Rule 9, note 3.

tightly circumscribed MBR emanating from and prevalent in the United Kingdom is referred to as the "strong form of the MBR."[55]

2. Efficiency-Based Analysis

Aside from a theoretical prism, scholars have examined the impact of the MBR based on efficiency considerations. Professor Paul Davies observed that "the goal of takeover regulation should be to maximize the number of efficient shifts of control and to minimize the number of inefficient shifts." [56] An ideally designed MBR will appropriately balance these two considerations [57] and "can be considered efficient only if the aggregate value of the inefficient transactions that it deters is higher than the aggregate value of the efficient sales of control that would occur in its absence."[58] However, there is no consensus as to an optimal design of the MBR that meets efficiency considerations. Professors Marcel Kahan [59] and Lucian Bebchuk[60] argued that, in comparison with the market rule, the MBR not only generally eliminates inefficient transfers of corporate control but also discourages value-enhancing takeover transactions. Both acknowledged that it is not possible to tell whether one is more preferable to the other, as it would depend on several variables.[61] Professor Edmund Schuster, conversely, challenged the conventional law and economics argument that the MBR is inefficient and instead focused on the relative efficiency of the MBR in comparison with the outcomes presented by the market rule.[62]

In the same vein, the critics of the MBR in Europe have argued that in jurisdictions with concentrated shareholdings and high private benefits of control, the controlling shareholder will not sell unless the acquirer is willing and able to compensate for the value of shareholding that considers these private benefits of control.[63] However, at the same time, the MBR compels the acquirer to offer the same premium to all remaining shareholders even where it has no desire to do so, thereby increasing the costs of the takeover. [64] Hence, by protecting the

55. Despite its severity, commentators have advocated for the MBR as a significant tool towards minority protection in the context of takeovers. *See* generally, Andrews, *supra* note 24; Lüttmann, *supra* note 24; Schuster, *supra* note 24.

56. Davies, *supra* note 1, at 540.

57. Davies, *supra* note 1, at 540.

58. Sepe, *supra* note 24, at 28.

59. Kahan, *supra* note 4, at 377.

60. Bebchuk, *supra* note 4, at 960.

61. Bebchuk, *supra* note 4, at 978; Kahan, *supra* note 4, at 377.

62. Schuster, *supra* note 24, at 529.

63. *See generally* Luca Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 767 (Guido Ferrarini, et. al, eds., 2004); *see also* Humphery-Jenner, *supra* note 24. *But see* Wang & Lahr, *supra* note 24.

64. *See* Ventoruzzo, *supra* note 15, at 155–57.

minority shareholders from being trapped in the target, the MBR also has the effect of benefiting the ineffective incumbent management, thus preventing value-enhancing transactions.[65] The market for corporate control thereby becomes inefficient.[66] By contrast, in the United Kingdom, where the MBR originated, there are very few companies with controlling shareholders, and private benefits of control are tightly regulated through the existing regulatory regime; hence, the costs of the MBR will be minimal.[67]

There are several limitations to the universal applicability of the economic models that have been developed thus far.[68] First, they have only been tested by way of empirical studies in jurisdictions in continental Europe that have adopted the MBR.[69] Second, the economic models consider the MBR and the market rule in a binary fashion without considering possible hybrids of the two. For instance, partial offers have been allowed to discharge the obligations of making a mandatory offer in Asia (such as India) and are allowed more liberally in China and Japan. As outlined below, Asian jurisdictions have softened the MBR through pricing considerations and generosity in granting exemptions.

There is yet no comprehensive study of the MBR across Asian jurisdictions that encompasses the efficiency perspective. An exception is that of scholars Yueh-Ping Yang and Pin-Hsien Lee, who have extended the efficiency analysis to partial offers in the context of East Asia.[70] Unlike in a strong form of the MBR, a partial offer allows an acquirer who would like to acquire de facto control of the target to make an offer for *all* or *part* of the remaining shares of the target.[71] Nevertheless, their analysis deals with partial offers as alternatives to the market rule and the MBR, without differentiating between whether the partial offer may be made on an *ex ante* (usually voluntary) basis or an *ex post* (usually mandatory) basis. This Article argues that the distinction is necessary because, in comparison with an *ex post* mandatory offer, there are fewer objections to a partial offer when it is an *ex ante* voluntary offer, as compared to an *ex post*

---

65. *See id.* at 157, 168.

66. *See, e.g.*, Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2; Joseph A. McCahery & Luc Renneboog, *The Economics of the Proposed European Takeover Directive*, CTR. FOR EUR. POL'Y STUD. (2003); Burkart & Panunzi, *supra* note 24.

67. *See* Paul Davies, *The Transactional Scope of Takeover Law*, *in* UMAKANTH (Varottil & Wai Yee Wan eds.), COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 82–83 (2017).

68. Bebchuk, *supra* note 4; Schuster, *supra* note 24.

69. *See, e.g.*, Humphery-Jenner, *supra* note 24; Wang & Lahr, *supra* note 24.

70. *See* Yang & Lee, *supra* note 21 (wherein the authors analyze takeover regulation in China, Japan, Korea and Taiwan).

71. *Id.* at 397.

mandatory offer.[72] Furthermore, this Article goes beyond partial offers and investigates the efficiency considerations of the MBR using other parameters, such as trigger thresholds, pricing considerations, creeping acquisitions and waivers, and exemptions from the MBR.[73]

B. *Dissemination of the MBR Worldwide*

Despite the inconclusiveness of the debate surrounding the desirability and efficiency of either the market rule or the MBR, it is somewhat puzzling that the MBR has gained popularity worldwide.[74] This subpart seeks to explore the dissemination of the MBR more generally before discussing the impact of its reception on the Asian jurisdictions.

The transition of the MBR from the United Kingdom into the EU Takeover Directive provides one model, which has already been subject to a great deal of analysis.[75] More universally, it is clear that the MBR, which originated in the United Kingdom with dispersed shareholding as the norm, elicits unanticipated results when replicated in other jurisdictions, such as in continental Europe where companies with concentrated shareholding dot the corporate landscape.[76] The original intention of the MBR in the context of the United Kingdom's dispersedly held companies was that the minority shareholders must obtain the benefit of exit and sharing when an acquisition of a sufficient number of shares creates de facto control.[77] However, in the context of concentrated shareholding, the MBR tends to prevent value-enhancing takeovers and hence operates as an incumbent-friendly mechanism.[78] Since any acquirer crossing the MBR threshold would be required to make an offer to all shareholders that is costly, controllers who already hold shares in excess of that threshold enjoy protection from unwanted suitors for the company.[79] This weakens the market for corporate control as a corporate governance mechanism meant to

---

72. For example, even the U.K. displays a more liberal dispensation towards partials offers when they are voluntary. *See supra* note 50 and accompanying text.

73. *See infra* Part III.

74. *See, e.g.*, Ventoruzzo, *supra* note 15 (for Europe); VAROTTIL & WAN, *supra* note 3 (for Asia); Carlos Berdejo, *Oligarchs, Foreign Powers, and the Oppressed Minority: Regulating Corporate Control in Latin America*, 30 DUKE J. COMP. & INT'L L. 1 (2019) (for Latin America).

75. See text accompanying *supra* notes 15 and 25.

76. *See generally*, Davies, *supra* note 1.

77. Fedderke & Ventoruzzo, *supra* note 12, at 166.

78. *See* Ventoruzzo, *supra* note 15, at 140 (reasoning that when an acquirer seeks to buy a large percentage of shares, the fact that the acquirer must also be prepared to purchase shares from all other shareholders makes the acquisition expensive, thereby disincentivizing the acquirer from proceeding with the acquisition and enabling the controlling shareholders to keep a hostile acquirer at bay).

79. *See id.*

protect outside shareholders from the actions of both the managers as well as the controlling shareholders.[80]

Hence, one consequence of the MBR in jurisdictions with controlling shareholders is that it results in a greater concentration of shareholding. [81] As Professor Simone Sepe argued, concentrated ownership coupled with a high level of extraction of private benefits of control provides a recipe for hostile takeovers carried out at a lower cost. [82] To fend themselves against such a possibility, controlling shareholders may likely solidify their position in the company further, leading to an increase in shareholding concentration levels.[83] Hence, Bebchuk found that the MBR "may lead to an increase in the incidence of controlling shareholder structures."[84]

In all, this Part finds that the MBR has become the mainstay in several jurisdictions worldwide, despite the criticism that it not only prevents inefficient transfers of controls but also curbs efficient ones. Although the MBR originated in the dispersed shareholding context, it is largely subject to implementation in the concentrated shareholding setting, which is more common globally (except in the Anglo-American setting). Such a worldwide evolution of the MBR phenomenon provides a useful setting for a detailed examination of the MBR regime in the selected Asian jurisdictions.

III. MBR IN ASIA: STRUCTURE AND OPERATION

The dissemination of the MBR into the Asian context offers fertile ground to analyze the implications of the rule from a comparative perspective. The MBR forms the cornerstone of takeover regulation in the six Asian jurisdictions. [85] In their rulemaking process, all jurisdictions cross-refer in varying degrees to the Anglo-American approaches to takeover regulation, particularly to the UK Takeover Code. However, as this Article demonstrates, the Asian jurisdictions have developed their own versions of the MBR that, in most cases, are significantly at variance with the UK-style strong form of the MBR and, in some cases, even fall closer to the market rule. This Part explores the evolution of the MBR in the six Asian jurisdictions. Thereafter, it discusses unique features of the MBR in each jurisdiction, followed by how the rule operates in practice therein.

---

80. *Id.* at 168; *see also* John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why?–The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1737 (2007).

81. Hansen, *supra* note 24, at 180.

82. Sepe, *supra* note 24, at 44.

83. *See id.*

84. Bebchuk, *supra* note 4, at 987.

85. Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia and the West*, *in* VAROTTIL & WAN, *supra* note 3, at 25.

A. *Evolution of the MBR in Asia*

Each of the six Asian jurisdictions studied in this Article has experienced a rather different trajectory in the adoption and alteration of the MBR. This is despite the close attention that their regulators paid to the UK Takeover Code while drawing up their MBRs. In some cases, any similarity with the United Kingdom has eroded over time, as the design of the MBR has undergone alteration to suit the specific needs of the recipient Asian jurisdiction.[86] In other cases, the evolution over time has brought either some degree of convergence between different Asian jurisdictions or even considerable divergence.[87] The evolutionary story is not only complex, but it also evidences subtle but essential variations in the MBR as it applies in the different Asian jurisdictions.

1. China

Chinese takeover regulation began with a wholesale transplant of the UK version of the MBR via Hong Kong in the form of the 1993 Interim Provisions on the Management of the Issuing and Trading of Stocks. [88] Interestingly, Chinese companies, predominantly state-owned enterprises (SOEs), were keen to raise funds in the Hong Kong stock market.[89] Hong Kong by then already followed the UK-style MBR. Moreover, as a former colony, its laws had a strong resemblance to English law. [90] Experts in Hong Kong also advised Chinese legislators, leading to the influence of Hong Kong law (and indirectly the UK-style MBR) in China.[91] Under such MBR, the trigger threshold was set at 30 percent, which is identical to the UK Takeover Code, and

---

86. This is evident from the examples of China (*see infra* Part IIIA.1) and India (*see infra* Part IIIA.4).

87. For example, one study shows that over time the Chinese MBR has diverged from its U.K. origin, and has taken on similarity with Japanese MBR. Robin Hui Huang & Charles Chao Wang, *The Mandatory Bid Rule Under China's Takeover Law: A Comparative and Empirical Perspective*, 53 INT'L LAW. 195, 211–13 (2020).

88. *Id.* at 201; *see also* Hui Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, 42 INT'L LAW. 153, 160 (2008); Hui Huang, *China's Takeover Law: A Comparative Analysis and Proposals for Reform*, 30 DEL. J. CORP. L. 145, 171 (2005).

89. Huang & Wang, *supra* note 87, at 201–02; *see also* Wei Cai, *The Mandatory Bid Rule in China*, 12 EUR. BUS. ORG. L. REV. 653, 654–55 (2011); Chao Xi, *The Political Economy of Takeover Regulation: What Does the Mandatory Bid Rule in China Tell Us?*, J.B.L. 142, 145 (2015).

90. Wei, *supra* note 89, at 654.

91. *Id.* at 654–55; Xi, *supra* note 89, at 145; Huang & Wang, *supra* note 87, at 201–02.

acquirers were required to make a full offer to the remaining shareholders, thereby shunning any form of partial offers.[92]

Although the design of the Chinese MBR was identical in its key characteristics to that of the UK-style MBR, there were hardly any mandatory offers in more than a decade since its inception, although several changes of control transactions did trigger the rule. The reason is that the securities regulator, the China Securities Regulatory Commission (CSRC), possessed "virtually unfettered discretion"[93] to grant exemptions and waivers from the application of the MBR. Hence, changes of control occurred without providing either an exit or sharing option to minority shareholders.

The year 2006 represents a turning point for Chinese takeover regulation, as the design of the MBR experienced alteration.[94] The regulators wholeheartedly accepted partial offers, thereby eliminating the erstwhile taboo against it.[95] Since 2006, partial offers have gained acceptance alongside full offers under the MBR. With these reforms, the current takeover regime in China broadly allows for three types of takeovers.[96] *First*, an acquirer who holds less than 30 percent of the shares in the target and wishes to enhance its shareholding beyond that limit may make a full or partial offer to acquire shares from the remaining shareholders,[97] so long as the partial offer is for no less than 5 percent of the shares.[98] In case of excess tendering, the acquirer must accept shares on a *pro rata* basis.[99] This enables an acquirer to cross the 30 percent threshold using a partial offer. A controlling shareholder who wishes to transfer control that enables the acquirer to cross the threshold must participate in the offer and cannot transfer such control privately.[100]

Second, if a shareholder holds 30 percent or more of the shares but less than 50 percent (thereby exercising de facto control), it can acquire further shares toward consolidation by making a partial offer, again

---

92. The MBR was incorporated into the Securities Law of the P.R.C. (promulgated by the Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999). In 2002, the Chinese Securities Regulatory Commission issued the Measures for Regulating Takeovers of Listed Companies (Takeover Measures). The latest edition was issued on March 20, 2020. *See also* Huang & Wang, *supra* note 87, at 202–03; Huang & Chen, *supra* note 3, at 212.

93. Xi, *supra* note 89, at 147.

94. The revised MBR found its place in the 2006 Securities Law and CSRC's 2006 Takeover Measures (which replaced the earlier 2002 Takeover Measures). Huang & Wang, *supra* note 87, at 204–08.

95. Xi, *supra* note 89, at 147.

96. *See generally* Wei Zhang, Weiran Lin, Ben Zeng, & Wenxiu Zhang, *Mandatory Bids in China: You Can Lead a Horse to Water, But You Can't Make Him Drink*, EUR. BUS. ORG. L. REV. 351 (2021).

97. 2006 Securities Law as amended in 2019, §65.

98. Takeover Measures (2020 revision), art. 25.

99. 2006 Securities Law as amended in 2019, §65.

100. Huang & Wang, *supra* note 87, at 227.

for a minimum of 5 percent of the shares on *pro rata* terms.[101] The shareholder can also make a full offer for all of the shares, but this is unlikely in practice, unless the shareholder wishes to delist the company.

Third, if an acquirer who holds less than 30 percent of the shares wishes to acquire shares by private arrangement that would breach the threshold, then the acquirer can do so only by making a full (and not partial) offer to all the shareholders of the company.[102] To that extent, Chinese takeover law recognizes both partial offers as well as full offers but in different circumstances.[103] The first two methods allowing partial offers are *ex ante* voluntary offers but differ from the United Kingdom's version in that Chinese takeover law lacks the restrictions before partial offers can be made. For instance, in the United Kingdom, a partial offer that results in the acquirer holding more than 50 percent of the shares requires the separate approval of independent shareholders.[104] Only the last method in China resembles the UK strong form of the MBR in requiring a full offer.

In China, creeping acquisitions are allowed for an acquirer who holds 30 percent or more of the shares so long as they do not exceed 2 percent over a twelve-month period.[105]

When it comes to exemptions, although the 2006 reforms to Chinese takeover regulation seek to streamline the regime and limit the discretion conferred upon the CSRC to grant waivers, [106] the scope of exemptions is considerably wider in comparison with the strong form of the MBR found and practiced in the United Kingdom.[107] In all, although China began with the UK form of the MBR, it has deviated substantially.

2. Japan

The cross-referencing of Japanese takeover regulation to the UK Takeover Code is not only far more tenuous, but the Japanese regime also deviated from the UK-style MBR from its very inception. The concept of the MBR found its way into the Japanese takeover regime

---

101. Zhang, Lin, Zeng, & Zhang, *supra* note 96, at 5.

102. 2006 Securities Law as amended in 2019, §73; Takeover Measures (2020 revision), arts. 47-48; *see also* Huang & Wang, *supra* note 87, at 204–08 (discussing the conflict between the 2006 Securities Law and Takeover Measures first introduced in 2006).

103. Huang & Wang, *supra* note 87, at 205; Zhang, Lin, Zeng, & Zhang, *supra* note 96, at 5.

104. U.K. Code, Rule 36.5.

105. Takeover Measures (2020 revision), art 63.

106. *See* Huang & Chen, *supra* note 3, at 222; Xi, *supra* note 89, at 147–48.

107. *See infra* Part IIIG.

in 1990.[108] Although some scholars have mentioned that the UK Takeover Code inspired the Japanese MBR,[109] others argued that the Japanese takeover regulation charted its own path.[110] Such a contentious outlook arose because the Japanese MBR provides that when an acquirer seeks to purchase more than one-third of the shares in a listed target through an off-market purchase, it shall make an offer to the other shareholders.[111] However, fully recognizing partial offers, the regime allows the acquirer to determine how many shares it wishes to purchase in the offer, so long as it caps such an offer at two-thirds of the target's shares.[112] In case shareholders tender shares in excess of the offer size, the acquirer may accept them on a *pro rata* basis.[113] Furthermore, the Japanese MBR triggers only when the acquirer crosses the threshold by way of private acquisition, and it does not apply to purchases of shares on the stock market.[114]

Such a regime is far from the strong form of the MBR practiced in the United Kingdom. At the outset, the Japanese MBR is anathema to the UK-style regulation, as it does not provide either exit or sharing of takeover premium to *all* the remaining shareholders of the target. Hence, it fails the tests regarding both the "exit rule" and the "sharing rule." This is a clear indication that the objectives of the Japanese MBR are dissimilar to that of the strong form of the MBR. Even when tested against the United Kingdom's version of the permitted *ex ante* partial offer resulting in change of control, the safeguard of shareholder approval is missing. Professor Tomotaka Fujita argued that the goal of the Japanese MBR is to ensure transparency, rather than exit or sharing to minority shareholders, which are the hallmarks of the UK

---

108. This occurred through an amendment to the Securities Exchange Act, which introduced Article 27-2(1). *See* Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule*, 3 U. TOKYO SOFT L. REV. 24, 25 (2011). Since 2006, the Securities Exchange Act has been referred to as the Financial Instruments and Exchange Act (hereinafter FIEA). *Id.* at 26–27.

109. John Armour, Jack B. Jacobs, & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 221, 249 (2011); Curtis J. Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 306 (Curtis J. Milhaupt ed.) (2003).

110. Fujita, *supra* note 108, at 24, 30; Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, *in* VAROTTIL & WAN, *supra* note 3, at 258.

111. *See* FIEA, §27-2; Fujita, *supra* note 108, at 25; Puchniak & Nakahigashi, *supra* note 110, at 260.

112. Puchniak & Nakahigashi, *supra* note 110, at 260. For examples of partial offers in Japan, see Alan K. Koh, Masafumi Nakahigashi, & Dan W. Puchniak, *Land of the Falling "Poison Pill": Understanding Defensive Measures in Japan on Their Own Terms*, 41 UNIV. PA. J. INT'L L. 687, 720 n.129 (2020). If the acquirer acquires more than two-thirds of the shares, the acquirer would have to make a mandatory bid for all of the remaining shares, *see infra* note 116 (and accompanying text).

113. *Id.* FIEA, §27-13.

114. Fujita, *supra* note 108, at 29.

takeover regulation.[115] That explains why the Japanese MBR is triggered only by acquisitions through private arrangements and not for market acquisitions.

In 2006, the Japanese Securities and Exchange Act was amended to introduce another rule.[116] By this, an acquirer who wishes to acquire more than two-thirds of the shares of a listed target must make a mandatory offer to acquire *all* its remaining shares.[117] At the level of this trigger, partial offers are out of favor, as this offer requirement is akin to the strong form of the MBR. Nonetheless, this rule too is far from being consistent with the UK takeover regulation, primarily because of the high trigger threshold. The objective of the UK MBR is to provide the benefits of exit and sharing to the minority shareholders when an acquirer crosses the threshold of de facto control (set in the United Kingdom at 30 percent of voting rights).[118] However, that objective is altogether inconsistent with the Japanese rule, which applies when the acquirer already has not only de facto control but also majority control over the target. The utility of such an MBR to protect minority shareholders against the actions of an acquirer that is already in majority control is perplexing. Professors Dan Puchniak and Masafumi Nakahigashi rationalize the rule on the basis that the "two-thirds trigger is rooted in a law-based approach: under Japanese company law a two-thirds shareholder vote is required to make fundamental corporate decisions."[119] In that sense, such a Japanese MBR is unique not only among the Asian jurisdictions but also more generally. Furthermore, after the close of the offer, the acquirer who has made the tender offer for all of the remaining shares is not under any obligation to acquire the shares of the shareholders who have not accepted the tender offer. By contrast, under UK corporate law, after the offer closes, if the acquirer has acquired 90 percent or more of the voting rights in the target, the minority shareholders can compel the acquirer to purchase their shares and are protected from being locked in with the acquirer.[120]

Compared with China, the Japanese MBR (at both thresholds discussed above) does not clearly comport with the objectives, structure, and practice of the strong form of the MBR that evolved in the United Kingdom. Some commentators argue fittingly that reference to the Japanese MBR in terms of UK takeover regulation is

---

115. *Id.* at 30–32.

116. The Law Amending a Part of Securities Exchange Act (Law No. 65, 2006); Fujita, *supra* note 108, at 26–27.

117. FIEA, §27-2(5) read with §8(5)(iii) of the Order for Enforcement of the Financial Instruments and Exchange Act. *See* Puchniak & Nakahigashi, *supra* note 110, at 261.

118. See text accompanying *supra* notes 9–11.

119. Puchniak & Nakahigashi, *supra* note 110, at 262.

120. Companies Act 2006, c. 46 (UK), § 983.

misplaced, and one must understand the Japanese takeover regime on its own idiosyncratic terms.[121]

3. South Korea

The MBR has experienced a rather unusual path in South Korea. Since the mid-1970s, South Korean law has required that any acquirer who wishes to acquire more than 5 percent of the shares in a company outside the securities market from ten or more shareholders during a six-month window may do so only through a tender offer.[122] This rule is more akin to the tender offer mechanism found in the United States and is a far cry from the strong form of the MBR for many reasons. *First*, the trigger for the tender offer requirement has no connection with the acquisition of de facto control, which forms the essence of a full-blown MBR. *Second*, the rule applies to off-market transactions and does not come in the way of acquisitions made in the securities market. Hence, similar to the Japanese rule,[123] the aim is not to ensure exit or sharing for minority shareholders[124] but to ensure transparency of the acquisition. *Third*, the tender offer rule focuses on partial offers implemented through *pro rata* acceptances.[125] In fact, commentators have observed that the regulatory framework for South Korean tender offers shares similarities with the US Williams Act.[126]

South Korean takeover regulation witnessed a curious turn of events in the 1990s. South Korea introduced an MBR on January 13, 1997.[127] Under this rule, any acquirer who acquires 25 percent of the shares in a target must make a tender offer at the same price such that it acquires 50 percent or more of the shares.[128] Such a rule transitioned South Korean takeover regulation further along the spectrum toward the UK-style MBR.

However, such a South Korean MBR was short-lived. Soon after the rule came to life, the Asian financial crisis engulfed the South

---

121. Fujita, *supra* note 108, at 24, 28; Puchniak & Nakahigashi, *supra* note 110, at 260.

122. Korean Securities and Futures Exchange Act, §21; *see* Young-Cheol K. Jeong, *Hostile Takeovers in Korea: Turning Point or Sticking Point in Policy Direction?*, 18 ASIA PAC. L. REV. 113, 120–21 (2010); Kwang-Rok Kim, *The Tender Offer in Korea: An Analytic Comparison Between Korea and the United States*, PAC. RIM L. & POL'Y J. 498, 504 (2001). The current version of the rule appears in the Financial Investment Services and Capital Markets Act, §133(3) read with the Enforcement Decree of the Financial Investment Services and Capital Markets Act, §140.

123. *See supra* Part IIIA.2.

124. In fact, the Korean judiciary expressly recognizes, and market practice widely acknowledges, the concept of control premium. Hyeok-Joon Rho, *M&A in Korea: Continuing Concern for Minority Shareholders*, *in* VAROTTIL & WAN, *supra* note 3, at 292.

125. Yang & Lee, *supra* note 21, at 405.

126. *See* Jeong, *supra* note 122, at 120; Kim, *supra* note 122, at 540.

127. Jeong, *supra* note 122, at 120.

128. *Id.*; Rho, *supra* note 124, at 293.

Korean economy.[129] As a condition for providing financial relief to South Korea, the International Monetary Fund and the World Bank imposed requirements that South Korea open up its economy to foreign investment.[130] More specifically, the newly minted MBR was found to act as an impediment against foreign acquirers taking control of financially distressed South Korean companies.[131] Professor Hyeok-Joon Rho argued that there was a concerted move to restore the similarity of South Korean takeover regulation to the US position, as the officials within the multilateral institutions spearheading the reform package were more familiar with the US system rather than the UK takeover regulation.[132] Interestingly, the South Korean entrepreneurs who advocated for the MBR in the first place found that the rule was a double-edged sword: it not only prevented hostile takeovers but friendly ones too.[133] For these reasons, the South Korean legislature repealed the MBR on February 24, 1998,[134] merely a year after it took root in South Korea.

Despite the specific and rather grave circumstances that led to its repeal, the South Korean takeover regulation has not witnessed any momentum seeking the resurgence of the MBR.[135] In these circumstances, only the longstanding 5 percent tender offer continues to hold sway, thereby making South Korea an outlier among the six selected Asian jurisdictions.

4. India

The evolution of the Indian MBR suggests that although it aims to draw inspiration from the UK-style MBR, it displays significant differences both in design and in implementation. Takeover regulation in India has witnessed a checkered history.[136] The Securities and Exchange Board of India (SEBI) was established in 1992 as a stock market regulator and issued the first set of takeover regulations in 1994.[137] Since then, based on the recommendations of various committees that SEBI appointed to reform takeover law in India,[138]

---

129. *See* Joongi Kim, *The Next Stage of Reforms, Korean Corporate Governance in the Post-Asian Financial Crisis Era*, 1 ASIAN J. COMP. L. 1, 3 (2006).

130. Rho, *supra* note 124, at 293; Kim, *supra* note 122, at 501.

131. Rho, *supra* note 124, at 293.

132. *Id.*

133. *Id.*

134. *Id.*; Jeong, *supra* note 122, at 120; Kim, *supra* note 122, at 503.

135. Rho, *supra* note 124, at 293.

136. Varottil, *The Nature of the Market for Corporate Control in India*, *in* Varottil & Wan, *supra* note 3, at 347.

137. *See generally* The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (hereinafter 1994 Regulations).

138. Securities and Exchange Board of India, *Justice P.N. Bhagwati Committee Report on Takeovers* (1997), www.sebi.gov.in/commreport/bagawati-report.html

SEBI issued a new set of takeover regulations in 1997,[139] introduced several rounds of amendments to them periodically (and most significantly in 2002),[140] and finally replaced them with the 2011 version of the regulations, which forms the present landscape of takeover regulation in India.[141]

These developments indicate the frenetic rulemaking activity by SEBI that has produced a constantly changing regulatory regime. Although the committees that made recommendations to SEBI for reforms considered the takeover regimes of fourteen different countries,[142] some of the key recommendations derived from takeover regulation in the United Kingdom and in countries that have adopted similar regulation.[143]

Under SEBI's current takeover regulations, the initial threshold for triggering the MBR is set at 25 percent of the target's shares with voting rights.[144] Any acquirer seeking to exceed this limit will have to make a mandatory offer to the remaining shareholders. Unlike the United Kingdom's strong form of the MBR, the acquirer can make a partial offer for a minimum of another 26 percent of the shares.[145] In case of excess interest on the part of the shareholders to tender in the offer, the acquirer must accept the offers on a *pro rata* basis.[146] The unique element of India's MBR is that an acquirer can trigger it even when the acquirer does not cross the 25 percent threshold.[147]

[https://perma.cc/N2GB-9JTG] (archived Nov. 1, 2021) [hereinafter Bhagwati Report 1997]; *see generally* Securities and Exchange Board of India, *Report of the Reconvened Committee on Substantial Acquisition of Shares and Takeovers Under the Chairmanship of Justice P.N. Bhagwati*, www.sebi.gov.in/takeover/takeoverreport.pdf [https://perma.cc/2VHP-27C5] (archived Oct. 13, 2021) [hereinafter Bhagwati Report 2002]; Securities and Exchange Board of India, *Report of the Takeover Regulations Advisory Committee Under the Chairmanship of Mr. C. Achuthan* (2010) [hereinafter TRAC Report].

139. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 [hereinafter 1997 Regulations].

140. Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 347–48.

141. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [hereinafter 2011 Regulations].

142. Bhagwati Report 1997, *supra* note 138, ¶xiii; TRAC Report, *supra* note 138, at 10.

143. Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 348.

144. 2011 Regulations § 3(1).

145. 2011 Regulations § 7(1).

146. Securities and Exchange Board of India, *Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011*, ¶50.

147. An additional qualitative trigger provides that even though an acquirer holds less than 25 percent voting shares, it will be subject to the MBR if it has the right to appoint a majority of the target's directors or to control the management and policy decisions of the target. 2011 Regulations § 4. For the purpose of the MBR, the regulation recognizes control whether it is exercised "directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". 2011 Regulations § 2(e).

Finally, the Indian MBR provides for a creeping acquisition mechanism. Any person holding between 25 and 75 percent of the shares in the company is entitled to acquire up to 5 percent voting rights during each financial year without triggering the MBR.[148] If such an acquirer breaches this annual limit, it will have to make an offer to the other shareholders to acquire at least another 26 percent of the shares on a *pro rata* basis. This suggests that any incumbent already holding de facto control over the company may entrench itself further through gradual bite-sized acquisitions, a facility unavailable to outside acquirers.

In all, although the Indian policymakers drew heavily on the UK model of the MBR, both acquirers as well as controllers enjoy several safety valves, including the partial offer and the creeping acquisition. Although the Indian regime appears, at least superficially, to be strict (including with the lower 25 percent threshold), certain key structural adjustments realign the Indian MBR further away from the strong-form version.

5. Hong Kong and Singapore[149]

Among the six selected Asian jurisdictions, only Hong Kong and Singapore steadfastly follow the design of the strong form of the MBR that emanated in the United Kingdom.[150] This is not surprising considering that the legal systems of both the former British colonies have drawn inspiration from the origin country.[151] Both the Code on Takeovers and Mergers and Share Buy-backs in Hong Kong (hereinafter the Hong Kong Takeover Code) instituted in 1992 and the Singapore Code on Takeovers and Mergers (hereinafter the Singapore Takeover Code) in 1974 represent a wholesale adoption of the UK Takeover Code.[152] Since then, both jurisdictions have kept pace with developments in the United Kingdom and frequently updated their takeover codes in ways that continue to maintain similarities between

---

148. 2011 Regulations § 3(2).

149. The takeover regulations in Hong Kong and Singapore are examined together since they bear similarities in structure and design, although there could be some differences in the operation. *See e.g.*, Christopher Chen, Wei Zhang, & Wai Yee Wan, *Regulating Squeeze-Out Techniques by Controlling Shareholders: The Divergence between Hong Kong and Singapore*, 18 J. CORP. L. STUD. 185 (2018).

150. The only difference relates to creeping acquisitions. See text accompanying *infra* notes 159–161.

151. Kwai Hang Ng & Brynna Jacobson, *How Global Is the Common Law? A Comparative Study of Asian Common Law Systems–Hong Kong, Malaysia, and Singapore*, 12 ASIAN J. COMP. L. 209 (2017); Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1 (2020).

152. David C. Donald, *Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules*, *in* Varottil & Wan, *supra* note 3, at 384; Wan, *Legal Transplantation of UK-Style Takeover Regulation in Singapore*, *in* Varottil & Wan, *supra* note 3, at 406.

Hong Kong and Singapore takeover regulation on the one hand and that of the United Kingdom on the other. Although the Singapore Takeover Code experienced a significant round of consultation,[153] where there was a proposal to transition away from the UK model of takeover regulation toward that in the United States, such a move came under considerable resistance from market participants and the status quo therefore remained.[154] It is hard to doubt the stickiness of the Hong Kong and Singapore takeover regulations to that in the United Kingdom, and this holds even for the MBR.

In both jurisdictions, an acquirer triggers the MBR when it acquires 30 percent or more of shares with voting rights in the target.[155] In such a case, the acquirer must make an offer for *all* the remaining shares.[156] This represents the essence of both the sharing and exit rules. Unlike all the other jurisdictions examined thus far, the regulations in Hong Kong and Singapore do not permit partial offers when an acquirer triggers the MBR.[157] Moreover, the regulators view partial offers with a great deal of skepticism and permit them only in limited situations in voluntary takeovers, as is the case in the United Kingdom.[158]

There is only one significant difference. Hong Kong and Singapore takeover regulations allow incumbents the facility of creeping acquisitions. If an acquirer already holds more than 30 percent voting rights in a company, it is entitled to acquire, in the case of Hong Kong, no more than 2 percent of the shares with voting rights over a twelve-month period[159] and, in the case of Singapore, no more than 1 percent over a six-month period,[160] without triggering the MBR. If the acquirer breaches this limit, the obligation to make a mandatory offer would activate. Although the UK takeover regulation initially devised the creeping acquisition rule, it has since moved away from it,[161] thereby requiring all incumbents to make a mandatory offer if they acquire any shares at all.

Structurally, barring the creeping acquisition rule, takeover regulation in Hong Kong and Singapore bears a close resemblance to the UK version. Moreover, both jurisdictions follow the UK approach to regulating takeovers as well through a takeover panel-type

---

153. *See generally* Securities Industry Council, *Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers* (Nov. 1, 1999).

154. *Id.* at 7–8; *see also* Wan, *supra* note 152, at 407.

155. Hong Kong Takeover Code, Rule 26; Singapore Takeover Code, Rule 14.

156. Hong Kong Takeover Code, Rule 26; Singapore Takeover Code, Rule 14.

157. Hong Kong Takeover Code, Rule 28; Singapore Takeover Code, Rule 16.

158. Hong Kong Takeover Code, Rule 28; Singapore Takeover Code, Rule 16.

159. Hong Kong Takeover Code, Rule26, Note 11.

160. Singapore Takeover Code, Rule14.1(b).

161. Wan, *supra* note 152, at 409; *see also* Raymond da Silva Rosa, Michael Kingsbury, & David Yermack, *Evaluating Creeping Acquisitions*, 37 SYDNEY L. REV. 37, 42 (2015).

specialist body to administer and enforce takeover regulation.[162] However, there are some material dissimilarities in the impact of the MBR in Hong Kong and Singapore on the one hand and the United Kingdom on the other. For example, in the United Kingdom, block holding in excess of 30 percent is uncommon, perhaps due to the existence of the MBR.[163] However, the MBR in Hong Kong and Singapore has not produced a similar result, as it operates differently in jurisdictions with concentrated shareholding. As one of the authors has argued, in a concentrated shareholding setting, the MBR may have the effect of enhancing concentration even further, as evidenced in Singapore.[164] With an MBR that is similar to Singapore, Hong Kong, too, has witnessed a further concentration of shareholding in recent years.[165] Hence, the adoption of the UK model of MBR in jurisdictions with concentrated shareholding will not necessarily promote a diffusion of shareholding but may result in further concentration.[166]

B. *Weak-Form MBR in Asia?*

This Article's study of the history and evolution of the MBR in Asia suggests that the rule in that region is not only different from its UK origins, but that there is also considerable divergence among the various Asian jurisdictions themselves. Although Hong Kong and Singapore remain closely aligned with the UK version of the rule, China, Japan, South Korea, and India have rules substantially diluted from the strong form of the MBR, primarily due to their willingness to allow partial offers in a wider range of circumstances. Among these, South Korea is further afield from the strong form of the MBR and closer to the US market rule, as its so-called MBR is more akin to the tender offer procedure mechanism under the US Williams Act.

Some commentators argue that the existence of either partial offers, creeping acquisition mechanisms, lax offer pricing norms and generous exemptions, or a combination thereof, make the MBR in the six selected Asian jurisdictions a weak form of the rule.[167] This Article, however, advances this analysis to demonstrate that some aspects of the design of the MBR in the Asian jurisdictions, as well as how regulators and courts implement it, make the MBR altogether unrecognizable from its customary UK-oriented conception. To that extent, they fall closer to the market rule along the spectrum than to the strong form of the MBR. To bolster the analysis, this Article now

---

162. *See* Emma Armson, *Assessing the Performance of Takeover Panels: A Comparative Study*, in VAROTTIL & WAN, *supra* note 3, at 105.

163. Wan, *supra* note 152, at 432.

164. *Id.*

165. Donald, *supra* note 152, at 392; Wan, *supra* note 152, at 432.

166. Consistent with earlier literature, we do not claim that abolishing the MBR will necessarily result in diffusion of shareholding. *See also* Wan, *supra* note 152, at 432.

167. Davies, *supra* note 9, at 234.

examines five key features of the MBR across the six selected Asian jurisdictions, namely: (i) trigger thresholds, (ii) partial offer structures, (iii) pricing considerations, (iv) creeping acquisitions, and (v) exemption mechanisms. Table 1 sets out a summary of the operation of the key features of the MBR across the six selected Asian jurisdictions.

C. *The Trigger Thresholds*

In five of the six jurisdictions, excluding South Korea, the MBR threshold is between one-quarter and one-third of the shares of the target.[168] This is entirely consistent with the United Kingdom's well-established trigger at 30 percent. Despite the apparent similarities, any uniformity between the Asian jurisdictions and the United Kingdom, and among the various Asian jurisdictions themselves, is likely to lead to incongruous results.

Although a high percentage threshold for triggering the MBR would fail to provide the full benefit of the equal treatment rule to the minority shareholders, as it would let several control changes fall under the radar, a low percentage would have the converse effect of unduly triggering the MBR and thereby impeding control changes.[169] Rather than viewing the threshold in absolute terms, it would be necessary to examine it contextually—considering the shareholding pattern of the relevant jurisdiction. In pegging the quantitative MBR threshold, the natural proposition would be that where shareholding is dispersed, the threshold must be lower, and where shareholding is concentrated, it must be higher.[170]

Critics have argued that the threshold has not been set appropriately in the United Kingdom as, "in a dispersed context, a holding of less than 30 percent may well be enough to give the holder *de facto* control of the company."[171] The converse scenario emerges in the Asian jurisdictions. Because of the concentration of shareholdings, the existing thresholds may prematurely attract the MBR, thereby preventing efficient transfers of control from occurring. This logic is evident in policymaking when Singapore raised the threshold from its original 20 percent to 25 percent in 1985 and then to the present 30

---

168. The limits are 25 percent (India), 30 percent (China, Singapore, and Hong Kong) and one-third (Japan). The other exceptional situations include 5 percent (Korea, following the U.S.-style tender offer rule), two-thirds (Japan, for post-legal control acquisitions), and the qualitative control trigger (India). *See supra* Part IIIA.

169. Varottil, *Comparative Takeover Regulation and the Concept of "Control"*, *supra* note 39, at 214.

170. *Id.*; Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 TEX. INT'L L.J. 171, 197 (2006).

171. Davies, *supra* note 1, at 555.

percent in 2001,[172] and when India raised it from 15 to 25 percent in 2011.[173] However, this is arguably insufficient, as the average concentration of shareholdings in the six jurisdictions (barring Japan)[174] exceeds the prescribed MBR thresholds.[175] The situation in India is somewhat compounded as an acquirer holding less than the threshold could potentially trigger the MBR because of the qualitative factors.[176]

As demonstrated in this discussion, pegging the MBR thresholds in the Asian jurisdictions at or about the limit set in the United Kingdom is counterintuitive, as it is bound to generate abnormal results. Because of the concentration of shareholding in Asia, such a situation hinders control shifts without attracting the costly MBR and hence may diminish the market for corporate control. Arguably, the focus on minority shareholder protection obscures the need for beneficial takeovers. At the same time, Asian jurisdictions display a more nuanced position due to the presence of other safety valve mechanisms that release the pressure from an inflexible MBR, and this Article now turns to discuss the nuances they present.

D. *The Attractiveness of Partial Offers*

Partial offers are the norm in four of the six selected Asian jurisdictions: China, Japan, South Korea, and India.[177] Hitherto, the academic analysis did not find significant differences in the consequences of the design of the partial offer and the full offer,[178] except for Yang and Lee, who extolled the virtues of the partial offer as an intermediate mechanism to achieve efficiency.[179] However, their model does not consider the difference between *ex ante* and *ex post* partial offers. As is evident, partial offers vary widely in Asia.

---

172. Securities Industry Council, *supra* note 153, at 12–13; Wan, *supra* note 152, at 419; Lan Luh Luh, Ho Yew Kee, & Ng See Leng, *Mandatory Bid Rule: Impact of Control Threshold on Take-over Premiums*, SING J.L. STUD. 433, 434 (2001).

173. TRAC Report, *supra* note 138, ¶ 2.8; Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 356.

174. *See* KRAAKMAN, ET. AL., *supra* note 9, at 75; Clifford G Holderness, *The Myth of a Diffused Ownership in the United States*, 22 REV. FIN. STUD. 1377 (2009) (Figure 2 showing that the average percentage is less than 20 percent for Japanese companies based on a sample of 50 companies); *see also* Richard W. Carney & Travers Barclay Child, *Changes to the Ownership and Control of East Asian Corporations Between 1996 and 2008: The Primacy of Politics*, 107 J. FIN. ECON. 494, 500–01 (2013).

175. Adriana De La Cruz, A. Medina, & Y. Tang, *Owners of the World's Listed Companies*, OECD CAPITAL MARKET SERIES, PARIS 18 (2019).

176. *See supra* note 147 and accompanying text.

177. *See supra* Part IIIA.

178. For example, in his seminal study, Bebchuk notes: "But even though the proration version of the rule seems less demanding at first glance, ... its consequences are largely the same as those of the complete acquisition version." Bebchuk, *supra* note 4, at 968.

179. Yang & Lee, *supra* note 21, at 398.

China, Japan, and South Korea allow *ex ante* partial offers in more liberal circumstances. In an *ex ante* offer in these jurisdictions, once the acquirer has the intention of increasing its stake that would breach the MBR threshold, it must make such acquisition by way of an offer made to all shareholders, albeit a partial one with prorated acceptances.[180] At that stage, the rule prohibits the acquirer from undertaking any private acquisitions, including from controlling shareholders, which would breach the MBR thresholds.[181] Existing controllers are, therefore, only able to sell their shares by participating in that offer. They can sell their shares proportionately along with the other shareholders who tender their shares. The controllers cannot ensure the sale of all their shares: the greater the participation in the offer by the other shareholders, the lesser the ability of the controllers to sell their shares.[182] In the *ex ante* offer, the offer is how the acquirer crosses the MBR threshold, and the result is that the offer places de facto control in the hands of the acquirer.

Hong Kong and Singapore, which closely track the UK Takeover Code, allow *ex ante* partial offers, but they are associated with voluntary offers rather than mandatory ones.[183] The takeover codes in these jurisdictions are very restrictive on how partial offers can be used to consolidate control. *First*, no partial offers can be made without the prior approval of the takeover panel.[184] *Second*, partial offers that result in a change of control of the target require independent shareholder approval.[185] *Third*, there are restrictions in the acquirer acquiring shares in the target during and surrounding the period of the offer.[186] Hence, even while permissible in the form of a voluntary offer, Hong Kong and Singapore generally look down upon such offers, as they militate against the principle of equality of treatment. However, once the MBR is triggered, a *full* offer is a *sine qua non* in Hong Kong and Singapore.

---

180. Yang & Lee, *supra* note 21, at 402; Fujita, *supra* note 108, at 28.

181. Yang & Lee, *supra* note 21, at 397, 401.

182. *Id.* at 437.

183. Hong Kong Takeover Code, Rule 28; Singapore Takeover Code, Rule 16; U.K. Code, Rule 36.

184. Hong Kong Takeover Code, Rule 28.1; Singapore Takeover Code, Rule 16.1; U.K. Code, Rule 36.1.

185. Hong Kong Takeover Code, Rule 28.5; Singapore Takeover Code, Rule 16.4(c); U.K. Code, Rule 36.5. In addition, in Singapore, the takeover regulator has made it clear that the partial offer can only be used to acquire a percentage of shares set out in the outset (and not as a range of shareholdings), to ensure that controlling shareholders do not use the partial offer as a means to fully exit from the target: Securities Industry Council, *Take-overs Bulletin*, Issue No. 4 (Jan. 2018), https://www.mas.gov.sg/-/media/MAS/resource/sic/Takeovers-Bulletin/Takeover-Bulletin-Issue-No-4-Jan-2018.pdf?la=en&hash=0FF9830927A342A9636A63F4CED0DC01FF975009 [https://perma.cc/ZNJ7-4EB9] (archived Oct. 13, 2021).

186. Hong Kong Takeover Code, Rules 28.2, 28.3; Singapore Takeover Code, Rule 16.4(b); U.K. Code, Rules 36.2, 36.3.

India is unique in that it not only recognizes *ex ante* voluntary offers[187] but also allows *ex post* partial offers when the MBR is triggered. *Ex post* offers arise when an acquirer either acquires or agrees to acquire de facto control over the target, which then obligates it to make an offer to the remaining shareholders to acquire their shares.[188] In this case, the acquisition of de facto control, for instance, through a private arrangement, is a *fait accompli*, and the mandatory offer is only a natural consequence that follows.[189] Conventional models tag *ex post* offers to full offers. For example, *ex post* offers pose no risk to minority shareholders in jurisdictions such as China,[190] Hong Kong, and Singapore, as well as in the United Kingdom, as the MBR guarantees the benefits of exit and sharing to *all* the remaining shareholders.[191]

SEBI's takeover regulation in India offers acquirers the unique combination of an *ex post* partial offer. This not only erodes the beneficial effects of the partial offer contained in the *ex ante* scenario but also does not provide the exit and sharing opportunities to the other shareholders that emanate from a full offer. Such a design unduly favors the acquirer and the controller, as they can affect a control shift at the cost of the remaining shareholders. A private transfer of control from the existing controller to the acquirer is only conditional upon the acquirer making the offer as a follow-on step.[192] Nothing prevents the private transfer from occurring outside of the offer.[193] In that sense, the controller in a private arrangement obtains a full exit and can even command a control premium, but the remaining shareholders can only participate *pro rata* in a partial offer. In case of excess tendering in the offer; the remaining shareholders get

187. The conditions for making a voluntary offer in India are less stringent compared to those in Hong Kong and Singapore. Neither the prior clearance from the regulator nor the approval of the independent shareholders are necessary to effect a voluntary offer. See, 2011 Regulations, §6; Securities and Exchange Board of India, *Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* 5–7 (Oct. 12, 2020), https://www.sebi.gov.in/sebi_data/faqfiles/oct-2020/1602498070087.pdf [https://perma.cc/78TT-LYZ7] (archived Oct. 13, 2021).

188. Fujita, *supra* note 108, at 28–29.

189. It is a different matter that the acquirer's failure to complete the mandatory takeover will invite regulatory consequences. *See* Christie, *supra* note 45.

190. China offers a textbook example of this model. It allows for partial *ex ante* offers and full *ex post* offers, thereby drawing the benefits of both types. See *supra* notes 96–103 and accompanying text.

191. It, however, does make the acquisition expensive for the acquirer.

192. 2011 Regulations, §13(1).

193. It is just that the completion of the private arrangement for transfer of control between the controller and the acquirer is subject to the completion of the mandatory offer formalities. *Id.* at §§22(3), 26(10).

neither a complete exit nor a full share of the premium offered to the controller.[194] This dilutes the equality of opportunity rule.

As seen, even within partial offers, there is no uniformity among the Asian jurisdictions. Existing literature adopts a monolithic approach to partial offers, but this Article takes the position that seemingly minor variations in the design can have widely different impacts on the balance between the facilitation of a market for corporate control and minority shareholder protection.

E. *Pricing Considerations*

Under the strong form of the MBR practiced in the United Kingdom, the acquirer must make the offer to the remaining shareholders at a minimum price that is determined by the highest price the acquirer paid for shares during the twelve-month period before the offer.[195] This is a manifestation of the sharing rule, upon which the MBR rests. Any derogation from the minimum pricing norms will undermine the robustness of the MBR.

In the Asian context, the minimum pricing norms are either flexible or non-existent in certain jurisdictions. In others, they are subject to manipulation and abuse. Artificially lower offer prices will lead to the lack of a strong response from the shareholders in the takeover offer, thereby facilitating the control shift on terms beneficial to the acquirer (lower cost of acquisition) and adverse to the interest of the minority (lack of sharing). These phenomena are worth examining using the examples of Japan and China.

Japanese takeover regulation provides a free hand to the acquirer to determine the price of a mandatory offer.[196] There are no minimum pricing norms aimed at minority shareholder protection.[197] Similarly, in South Korea, the acquirer may stipulate the terms and conditions of an offer, including price.[198] This enables the acquirer to fix an unattractive offer price that is lower than the prevailing market price.[199] Such an approach relies on a market price discovery

194. In case of excess tendering, only those shareholders are entitled to a share in the premium and exit only in respect of the shares that are accepted, and not for the remaining shares that they are unable to divest in the offer.

195. U.K Code, Rule 9.5. In Hong Kong and Singapore, the lookback period is reduced to six months. *See* The Codes on Takeovers and Mergers and Share Buy-backs, § 26.3 (1992); The Singapore Code on Take-Overs and Mergers, § 14.3 (2019).

196. *See* Katsumasa Suzuki, *Future Prospects of Takeovers in Japan Analyzed from the View of Share-Ownership Structures and Laws in Comparison with the United States and the European Union*, 42 COLUM. J. TRANSNAT'L L. 777, 791 (2004); Fujita, *supra* note 108, at 29.

197. *See* Joseph Lee, *The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?* 18 EUR. BUS. ORG. L. REV. 761, 761 (2017).

198. Financial Investment Services and Capital Markets Act, art. 134 para. 1.

199. *See* Suzuki, *supra* note 196; Fujita, *supra* note 108, at 29.

mechanism by which the shareholders will likely refuse to tender in an offer with a depressed price. However, without a price floor prescribed by regulation, it also runs the risk that shareholders may tender in a low-priced offer due to information asymmetry and collective action problems.[200] Conferring excessive freedom in the hands of the acquirer to fix the offer price could shift the balance of power in favor of the acquirer in the interest of the minority shareholders.

In China, however, the CSRC prescribes a minimum price for the offer, which is the highest price at which the acquirer has acquired the same class of shares in the target during the six-month period before the announcement of the offer.[201] A related benchmark suggests that if the offered price is lower than the daily average price during the thirty trading-day period before the announcement of the offer, then the acquirer's financial advisor must issue an opinion supporting the fairness of the offer price.[202] Although this pricing mechanism appears robust, recent empirical evidence suggests widespread circumvention of the rule.

Scholars Robin Hui Huang and Charles Chao Wang found that the pricing rule is defective as it "leads to rent seeking."[203] Acquirers make offers at prices far below the prevailing market price by relying upon the opinion of financial intermediaries.[204] Huang and Wang also found that acquirers ignore even the negotiated pre-offer prices as benchmarks, for which they are yet to receive a sanction, or even criticism, from the CSRC, all of which suggests laxity in enforcement.[205] Professor Zhang Wei and his co-authors found that, apart from depressing the offer price as mentioned above, acquirers are likely to manipulate the stock price of the target (upward).[206] This creates a chasm between a low offer price and a much higher prevailing market price, by which the takeover offer is doomed to fail.[207] The loopholes in the minimum pricing norms, thus, enable the acquirer to modulate both the offer price as well as the market price of the target's shares to produce the outcome most beneficial to it, but this operates to the detriment of the target's minority shareholders.

---

200. *See* Kenju Watanabe, *Control Transaction Governance: Collective Action and Asymmetric Information Problems and Ex Post Policing*, 36 NW. J. INT'L L. & BUS. 45, 49 (2016).

201. Regulation on the Administration Measures on Takeover of Listed Companies (promulgated by the China Secs. Regul. Comm., effective Apr. 29, 2008), c. 3, art. 35.

202. *Id.*

203. Huang & Wang, *supra* note 87, at 31.

204. *Id.*

205. *Id.*

206. Zhang, et. al., *supra* note 96, at 388.

207. *Id.*

Given the more robust pricing norms in Hong Kong, Singapore, and India,[208] there is no evidence yet of a common practice where acquirers utilize price as a means to sway the outcome of the offer. In that sense, acquirers may gain greater maneuverability on the pricing front in Japan, South Korea, and China. However, the tide turns when it comes to creeping acquisitions, as explored below.

F. *Creeping Acquisitions*

Hong Kong, Singapore, India, and China all carry the creeper rule by which incumbents who hold de facto control over the target may consolidate their control without triggering the MBR.[209] Interestingly, although the four jurisdictions appear to have incorporated the creeper rule from the United Kingdom, the UK takeover regulation has done away with the creeper rule altogether. Under earlier versions of the UK Takeover Code, any person holding between 30 percent and 50 percent of the shares in the target could acquire up to another 1 percent of the shares during a twelve-month period without an obligation to make an offer to the other shareholders.[210] However, lessons from the operation of the rule revealed that it resulted in adverse consequences to the target and its shareholders, as it made it easier for controllers to extract private benefits of control and stood in the way of value-enhancing offers by outside acquirers.[211] Consequently, the creeper rule was removed from the UK Takeover Code in 1998.[212] Despite this, Hong Kong, Singapore, India, and China have persevered with this rule and, in India's case, with immense generosity to incumbents.[213] In India, there is also sufficient evidence to indicate the extensive use of the creeping acquisition mechanism by controlling shareholders, including staving off potential hostile takeovers.[214]

---

208. *See* The Codes on Takeovers and Mergers and Share Buy-backs, Rule 26.3 (1992); Singapore Takeover Code Rule 14.3; 2011 Regulations, §8(2). All three jurisdictions peg the minimum offer price to the highest price at which the acquirer acquired shares during the period of six months prior to the commencement of the offer. In India's case, there are other conditions such as the average market price of the target's shares during the 12 months preceding the announcement of the offer. *See also infra* Table 1.

209. *See supra* Part III.A.

210. Wan, *supra* note 152, at 409.

211. Nemika Jha, *Political Economy of Takeover Regulation in India: How Good is India's Mandatory Bid Rule?*, SJD THESIS AT FORDHAM UNIVERSITY SCHOOL OF LAW 117 (2019) (copy on file with the authors); *see also*, Enriques & Gatti, *supra* note 10, at 61–67.

212. *See* da Silva Rosa, Kingsbury, & Yermack *supra* note 161.

213. The headroom for creeping acquisitions up to 5 percent per year in India outweighs much smaller limits in Hong Kong (2 percent in a twelve-month period) and Singapore (1 percent in a six-month period). *See supra* Part III.A.

214. Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, COLUM. BUS. L. REV. 800, 807–09 (2007).

The generous creeping acquisition limits and their extensive use create a significant distortion in the market for corporate control in Hong Kong, Singapore, India, and China. Incumbents can shore up their holdings without triggering the MBR, thereby depriving the public shareholders of the exit and sharing principles that form the stated philosophy of takeover regulation. At the same time, the creeping acquisition mechanism unduly favors the incumbents against outside acquirers, including hostile acquirers. Although incumbents possess headroom for acquisitions without triggering costly obligations under the MBR, outside acquirers enjoy no such ability. That outside acquirers will trigger the MBR when they cross the initial threshold, coupled with the reality that incumbents may use the creeping acquisition rule to put up a defense by building up their stake without being subjected to the costly MBR, would deter outsiders from challenging the control enjoyed by the incumbents. This severely hampers the market for corporate control.

G. *Waivers and Exemptions from the MBR*

Because a rigid MBR will thwart efficient changes of control, most jurisdictions incorporate a system of waivers and exemptions in their takeover regulation. This seeks to maintain a balance between facilitating efficient transactions and preventing inefficient ones. For example, in some cases, substantial shareholding may change hands without actually altering control over the target. In other cases, there may be further reasons for granting exemptions from the MBR: when the company issues new shares in exchange for capital investment,[215] when a takeover resuscitates a financially distressed company,[216] or where family controllers engage in succession planning.[217] Although the rationale for such waivers and exemptions is understandable, there is a wide spectrum of when these waivers are granted.

The UK Takeover Code specifies the situations where acquisitions within the same concert party group do not necessarily trigger the MBR.[218] Singapore and Hong Kong have largely followed the UK Takeover Code; transfers within the same concert party group can take place without attracting the MBR so long as there is no change in the

---

215. *See* U.K Code, *Notes on Dispensation from Rule 9,* Appendix 1.

216. *See id.* at § 9, Appendix 1.

217 Jha, *supra* note 211, at 185.

218. U.K Code, Rule 9.1, n.4. A 'concert party group' refers to persons who are "acting in concert" within the meaning ascribed to the term in the UK Takeover Code, Definitions: "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company." The UK Takeover Code also lists out categories of persons who would be presumed to be acting in concert, unless the contrary is established.

overall control maintained by the concert party group.[219] Particularly, the Securities and Futures Commission of Hong Kong has emphasized the narrowness of the exception, both by way of a practice note[220] as well as a recent decision of *Re Magang (Group) Holding Limited.*[221] In that recent decision, the Hong Kong Takeover Panel clarified that not all levels of companies that the Government of the People's Republic of China controls through the State-owned Assets Supervision and Administration Commission should be regarded as acting in concert, as reference must be made to the specifics of each case.[222]

However, outside of Singapore and Hong Kong, some of the Asian jurisdictions display an unduly wide scope on exemptions, which undermines the objectives of the MBR by providing benefits to incumbent controllers at the cost of the minority shareholders. This subpart illustratively examines some of the key exemptions in the Asian jurisdictions and the trends emanating from their utilization in practice.[223]

Exemptions from the MBR have historically formed a prominent part of Chinese takeover regulation.[224] Under the 2002 version of its takeover regime, the CSRC had considerable discretion in granting waivers from the MBR.[225] Between 2003 and 2007, the CSRC issued 178 waiver decisions, all of them favorably.[226] It did not reject any waiver application.[227] The waiver route turned out as a prominent mitigating factor against the severity of the MBR under the 2002 regime, especially since partial offers were impermissible.[228] Upon the introduction of the partial offer regime in 2006, it would have been

---

219. The Singapore Code on Take-Overs and Mergers, § 14.1, n.5 (2019); The Codes on Takeovers and Mergers and Share Buy-backs, § 26.1, n.6 (1992).

220. Securities and Futures Commission, *Practice Note 21 - Acquisitions of voting rights by members of concert group*, § 6 (Mar. 2016).

221. Takeovers and Mergers Panel, Ruling on whether the mandatory general offer obligation that would result from the proposed transfer of an interest in Magang (Group) Holding Company Limited, the controlling shareholder of Maanshan Iron & Steel Company Limited, should be waived, and, if not, the applicable offer price per H share for the purposes of the offer (July 22, 2019).

222. It should also be pointed out that there were other applications involving transfers within family block-holders where the Takeovers Executive has not granted the waiver. *See, e.g.*, Takeovers and Mergers Panel, *Ruling on whether a general offer obligation will result from the proposed transfer of the controlling shareholding interest in The Cross-Harbour (Holdings) Limited (Stock Code 32) by Y.T. Realty Group Limited (Stock Code 75) to Mr. Cheung Chung Kiu and, if so, whether it should be waived* (Dec. 21, 2015).

223. A comprehensive discussion of waiver and exemption regimes in MBR is beyond the scope of this article.

224. *See* Cai, *supra* note 89, at 665–66.

225. *See* Huang & Wang, *supra* note 87, at 7–8.

226. *See* Xi, *supra* note 89, at 149.

227. However, Xi rationalizes this position by stating that there was an informal screening practice whereby parties would check with CSRC beforehand and weed out "unwarranted waiver applications." *See id.*

228. Huang & Chen, *supra* note 3, at 221–22.

natural to anticipate a diminished role for waivers and exemptions.[229] However, although the 2006 regime streamlined the exemption mechanism, the trend involving the use of exemptions continued, with acquirers both relying on automatic exemptions made available in specific circumstances and by approaching the CSRC in others. The CSRC continued its practice of liberally granting exemptions from the MBR.[230] In particular, the exemptions included transfers where there was no actual change in control of the listed company, which is considerably broader than the UK Takeover Code where exemptions are limited to acquisitions within the same concert party group, taking into account the balance of interests. Further, exemptions are available where independent shareholders waive the mandatory bid in the case of issuing new shares to an acquirer. There is also a catchall provision catering to "any other circumstance recognized by the CSRC for adapting to developmental changes of the securities market or to the requirements for protecting the lawful rights and interests of the investors."[231] Restructurings of SOEs also have specific exemptions.[232]

Recent empirical studies also reveal an excessively high approval rate for exemptions from the CSRC. One study indicates that between 2004 and 2010, of the 733 transactions triggering the MBR, the CSRC granted exemptions in 706 (96.32 percent) and required the acquirers to make the offer only in 27 (3.68 percent).[233] Another study of transactions between 2004 and 2012 also indicates an approval rate of over 96 percent by the CSRC for exemptions.[234] Such extreme statistics suggest that the MBR is largely in the books, and actual offers to noncontrolling shareholders are in fact the exception.

In India, too, SEBI's takeover regulations exempt several transactions from the MBR. SEBI has narrowed and streamlined the exemptions over time. Some are automatic approvals that acquirers may avail themselves of after making certain disclosures, whereas in other cases, the acquirer or the target may approach SEBI for a specific exemption. Despite streamlining, how acquirers have utilized the exemptions suggests that they have defied the purpose of takeover regulation in structuring a market for corporate control.[235]

An empirical study one of the authors conducted indicates that acquirers in India have been successful in extensively relying upon

---

229. *See* Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, *supra* note 88, at 168.

230. *See* Huang & Wang, *supra* note 87, at 19.

231. Cai, *supra* note 89, at 659 (citing Regulations on Takeovers of Companies Listed in China, art. 62 (2006)).

232. *See id.*

233. Huang & Wang, *supra* note 87, at 19.

234. *See* Zhang, *supra* note 96, at 360 (citing Tang Xin & Hideki Kanda, *The Legal Rules of Public Tender Offers: From China to Japan*, 2 TSINGHUA L. REV. 28–48 (2019)).

235. *See* Jairus Banaji, *Thwarting the market for corporate control: takeover regulation in India* 5 (2005), http://eprints.soas.ac.uk/10920/1/QEH_banaji.pdf [https://perma.cc/L6KP-LRE6] (archived October 26, 2021).

exemptions,[236] and in avoiding the MBR. Between 1997 and 2011, of the 4,404 transactions that triggered the MBR, the acquirers in 3,271 (74 percent) transactions took advantage of the exemption route and only 1,133 (26 percent) made takeover offers.[237] Even in terms of transaction values, exemptions constituted 57 percent, whereas offers constituted only 43 percent.[238] Although there seems to be some balance between offers and exemptions in the amounts, there is considerable disparity in the numbers of transactions.

The widespread availability and use of sizable exemptions indicate that several control transactions occur without the accompanying mandatory offer. More importantly, whereas incumbents are entitled to rearrange their shareholdings and garner their positions to defend themselves, outside acquirers cannot avail themselves of similar exemptions and would have to acquire control through the costly mandatory offer process. Here again, it is evident that the exemption mechanism is intended to benefit the incumbents against possible outside acquirers. Although the data suggest that the use of the exemption mechanism in India is not as stark as in China, it is material enough to thwart the market for corporate control and favor the incumbents, such as family and government controllers, to consolidate their holdings without providing the exit or sharing option to the noncontrolling shareholders.

In both Japan and South Korea, the MBR omits the acquisition of shares on the stock markets from its scope. Commentators rationalize this exemption on the ground that the MBR in these jurisdictions aims to introduce transparency in control transfers rather than to ensure exit or sharing for the noncontrolling shareholders.[239] Moreover, since a stock market purchase is an anonymized transaction, an acquirer cannot transact with a specific controller to acquire shares.[240] Also, acquisitions on the market mean that the acquirer would have to pay market prices.[241] Hence, noncontrolling shareholders have an opportunity similar to the controller to sell their shares on the stock market and to partake in any premium. Despite such a gallant regulatory intention, acquirers may circumvent the stock market acquisition to acquire shares from the controller without providing either exit or sharing to the remaining shareholders. For example, the acquirer and the controlling shareholder could execute a matched trade on the stock exchange that would excuse the acquirer from the MBR,

---

236. The exemptions are categorized under the Securities and Exchange Board of India Regulations, 2011, §10.

237. Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 368.

238. *Id.*

239. *See* Fujita, *supra* note 108, at 31–33; Yang & Lee, *supra* note 21, at 453–54.

240. *See* Yang & Lee, *supra* note 21, at 453.

241. Tang & Kanda, *supra* note 234.

although the acquisition may exceed the threshold.[242] This is, however, subject to securities regulation and the stock exchange rules of the relevant jurisdiction.

Overall, the Asian jurisdictions display an excessive reliance on exemption and waivers by which an acquirer ends up avoiding its obligation to make an offer to the remaining shareholders. The available trends indicate that exceptions have in fact turned out to be the norm in certain Asian jurisdictions, thereby diluting the effect of the MBR and moving it further away from the strong-form version practiced in the United Kingdom.

In conclusion, this Part finds that although the existing discourse surrounding the comparative analysis of the MBR attributes its origin to the UK-style strong form of the MBR, the design of the rule in the six Asian jurisdictions varies considerably from its purported source. That apart, there is considerable divergence even among the Asian jurisdictions, indicating that the idiosyncrasies in each of those jurisdictions play an essential part in the design, evolution, and implementation of the rule. Viewing them through a common lens is to misapprehend the problem.

IV. RATIONALIZING THE DIVERGENCE OF THE MBR IN ASIA

The divergent approaches to the MBR in Asia implore some key questions. Why did the six Asian jurisdictions design and implement their MBR in very specific ways? What are the factors that influenced the approach of the legislature and regulators? Does the political economy of the MBR in the Asian jurisdictions reveal the role of interest groups? Given the existing scenario with the MBR, one wonders whether noncontrolling shareholders gain adequate protection against inefficient control transfers or whether it is possible to extend alternative tools in company law to serve the purpose. A diluted version of the MBR coupled with an ineffective system of minority protection generally under company law leaves noncontrolling shareholders exposed to agency problems surrounding controlling shareholders, particularly in controlled companies that populate the Asian landscape. At the same time, a strong form of the MBR can deter value-enhancing acquisitions. On the basis of such analysis, this Article engages in a normative endeavor to expound some of the lessons that the review of the MBR in Asia offers to the study of the rule more generally.

242. *See* Yang & Lee, *supra* note 21, at 454.

A. *MBR and the Theories of Legal Transplant*

Given that the origin of the MBR is attributable to the UK Takeover Code and that of the market rule to the US securities laws, a discussion surrounding the theories of legal transplant is inevitable. Not only are the two systems the origins of the respective rules, but they are also responsible for the dissemination of the rules or their variants to countries around the world, including those in Asia.

The legal transplant theory developed by Alan Watson (at least in his earlier, extreme version) asserts that the transplantation of legal rules from one jurisdiction to another is "socially easy."[243] According to Watson, the law can be divorced from social, economic, and political contexts.[244] His theory has been subject to a great deal of criticism on the ground that it fails to consider the role of culture in either the donor country or the recipient country.[245] Particularly, Pierre Legrand asserted that legal transplants cannot occur because once a host country receives a rule or system of law, one cannot compare it with its original formulation, and the local context and culture instead shape its continued form.[246] Law is but a "mirror" of the society.[247]

The legal systems of the six selected Asian jurisdictions do not clearly follow either of the two extreme theories of Watson or Legrand. The transplants of MBR (without rejection or significant modification) in Hong Kong and Singapore contradict the mirror theory; so does the adoption and continuation of the US-style takeover regulation in South Korea. Conversely, the South Korean example also offers a rejection of Watson's theory when the short-lived UK-style MBR it adopted suffered a rejection within one year of its introduction. More importantly, China, Japan, and India tread a middle path of having adopted the UK MBR with significant variations to suit their

---

243. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (2d ed. 1993). The strong and weak versions of Watson's theories were discussed in William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995). For a retrospective assessment, see John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637 (2013).

244. WATSON, *supra* note 243, at 108; *see also* David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 124 (2015).

245. LAWRENCE FRIEDMAN, LAW AND SOCIETY 76 (1977) (arguing that without an understanding of culture, legal systems and their institutions are merely "lifeless artifacts").

246. Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 117 (1997); *see also* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 14 (1998).

247. For a discussion on the "mirror" theory, see Ewald, *supra* note 243, at 492; Mindy Chen-Wishart, *Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?*, 62 INT'L COMP. L.Q. 1, 2–3 (2013).

individual circumstances.[248] These trends indicate, as Professor Mindy Chen-Wishart noted, that the question is not whether a legal transplant is possible or not,[249] but instead, what the shape of the legal transplant should be. The shape of a legal transplant "is contingent on a wide range of variables triggered by the particular transplant; the result can occupy any point along the spectrum from faithful replication to outright rejection."[250] This cannot be truer than in the dissemination of the MBR in Asia.

What explains this phenomenon? Why did the Asian jurisdictions cross-refer, either consciously or inadvertently, the takeover regulation in the Anglo-American setting? This Article argues that the Asian jurisdictions borrowed the ideas surrounding the MBR from the UK market, given its prominence as a strong minority protection tool, principally as a signaling mechanism to demonstrate to foreign investors that their domestic legal standards are in tune with global norms and expectations.[251] The signaling function plays an essential role, as investors, particularly from the Western economies, are generally concerned about the level of investor protection in markets in which they invest.[252] The minority shareholder protection and equal treatment themes surrounding the MBR add further significance. Target companies and their incumbents are also likely to apply pressure on their governments and regulators to introduce a conducive regime that will enable them to raise capital on attractive terms.[253] Such an effort motivated by the need to create a signaling effect leads to some level of convergence in the norms, at least at a superficial level.[254]

---

248. Watson's extreme version of the theory is too narrow in its failure to take into account the relevance of the particular legal economics into which an institution or legal rule is transplanted. His argument that the transplantation of law is "socially easy" is open to question, as can be seen from the examples relating to the modifications of the MBR.

249. Chen-Wishart, *supra* note 247, at 2.

250. *Id.* at 2.

251. *See* Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, *The Transplant Effect*, 51. AM. J. COMP. L. 163, 164 (2003); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 125 (2002). Spamann notes that "a country can develop a policy, totally autonomously, and yet utilize foreign statutory language for technical simplicity or as a decoy." Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, BYU L. REV. 1813, 1852 (2009).

252. *See* Pistor, *supra* note 251, at 125; *see also* Chen-Wishart, *supra* note 247, at 10.

253. *See* Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L COMP. L.Q. 405, 405 (1999). They could exert pressure using the threat of migrating elsewhere if the regime is not conducive to trade or capital flows. *See* Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339, 340 (2006).

254. *See* Pistor, *supra* note 251, at 97.

However, a more nuanced analysis of transplants is also needed.[255] The question regarding the precise manner in which a rule came into a jurisdiction is more vital than where or from which legal family the transplantation occurred. [256] For example, the MBR underwent minimal to substantial modifications from the strong form of the MBR, either at the time it took shape in the Asian jurisdictions or over time thereafter. Even when received as a wholesale transplant, experience reveals that the operation of the rule has been vastly different than in the country of origin. For example, acquirers circumvented the strong form of the MBR in force in China before 2006 through waivers that were routinely granted by the CSRC.[257] By liberally allowing partial offers, China, Japan, and India have avoided the full rigor of the MBR, thereby signifying a "cautious legal transplant."[258] In Hong Kong and Singapore, the results of a strong form of the MBR in terms of its unintended effects on shareholding patterns have been counterintuitive compared with that in the United Kingdom, although there is sufficient similarity between the various rules.[259]

This analysis of the diffusion of the MBR in Asia indicates that the impact of a rule received in a jurisdiction is driven predominantly by its ability to match with local conditions.[260] Even ostensibly subtle variations can make a major difference,[261] and one must specifically focus on the transformations that the imported law undergoes in its host jurisdiction and how its role differs therein.[262] Legislators and regulators adopt rules from foreign jurisdictions, but they either adopt them at the time of incorporation or modify them subsequently on the basis of their experience in implementing them.[263] Accordingly, as Gunther Teubner argued, the "result is not more uniform laws but more fragmented laws as a direct consequence of globalizing

255. *See* Chen-Wishart, *supra* note 247, at 2; Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEGAL STUD. 570, 590 (2011); David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 112 (2015).

256. *See* Berkowitz, Pistor, & Richard, *supra* note 251, at 167.

257. *See* text accompanying *supra* notes 224–228.

258. Davies, Hopt, & Ringe, *supra* note 9, at 235.

259. See text accompanying *supra* notes 164–166.

260. Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity*, 41 L. & SOC'Y REV. 865, 879, 903 (2007).

261. Dean, *supra* note 255, at 589.

262. Teubner, *supra* note 246, at 12.

263. Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp, & Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 797 (2002); *see also*, Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 380 (2013).

processes."[264] In such a paradigm, legal rules tend to be mixed in nature without exceptions—"only that the mixture is different" and that given "the levels of combinations . . . the extent of the mix varies."[265] Viewed through this lens, the issue relates much less to whether a legal transplant succeeds or fails but rather the extent to which the law has developed as an assortment of principles in each jurisdiction. The evolution and state of play of the MBR in the six selected Asian jurisdictions clearly reflect the fragmentation of approaches to the rule and the different combinations that arise in the varying characteristics among the rules, even raising the specter of whether a legal transplant is a "misleading metaphor"[266] in such contexts.

Finally, while considering a legal transplant, one must bear in mind the objectives of the rule in the jurisdiction of origin as well as in the host jurisdiction.[267] If the rule originated to serve a specific purpose but was transplanted into another jurisdiction that sought to achieve a different objective, the operation of a similar rule will be vastly different in each jurisdiction.[268] The analysis of the MBR in this Article emphasizes this point. For instance, the MBRs in South Korea and Japan (which bear the exception for purchases made on the stock exchange) focus on the goal of achieving transparency in the acquisition of control, unlike in jurisdictions such as the United Kingdom, Hong Kong, and Singapore, where the objective of their MBRs is to confer exit and sharing benefits to the noncontrolling shareholders.[269]

Related to this is the fact that attempts at legal transplantation, harmonization, and convergence may offer a smokescreen to legislators and regulators to adopt the MBR from other jurisdictions and redesign them (either marginally or significantly) to suit the purposes of specific interest groups. For example, Professor Marco Ventoruzzo lamented that in the efforts toward the harmonization of European takeover regulation, the "notions of good corporate governance can be manipulated to turn against their own purposes."[270] Similarly, although the origins of the MBR relate to minority shareholder protection, the incorporation of the rule in Asian jurisdictions may act against the interest of the very constituency it sought to benefit and

---

264. Teubner, *supra* note 246, at 13. He goes on to observe: "Against all expectations that globalization of the markets and computerization of the economy will lead to a convergence of economic regimes and to functional equivalence of legal norms in responding to their identical problems, the opposite has turned out to be the case." *Id* at 24.

265. Esin Orucu, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 221 (2002).

266. Teubner, *supra* note 246, at 11.

267. Ahmad A. Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 IND. INT'L & COMP. L. REV. 237–38 (2012).

268. *Id.*

269. See text accompanying *supra* notes 115, 123–124.

270. Ventoruzzo, *supra* note 15, at 138.

instead inure to the benefit of insiders, such as managers and controlling shareholders, especially in the case of companies with concentrated shareholdings.[271] It is to this phenomenon that this Article now turns.

B. *The Political Economy of the MBR in Asia*

The role of interest group politics in takeover regulation has attracted an established line of scholarship.[272] In their seminal work, Professors John Armour and David Skeel argued that it is beneficial to view takeover regulation from the lens of interest group politics, using the supply and demand side of takeover regulation.[273] Analyzing the contrasting approaches between the United Kingdom and the United States in their regulation of hostile takeovers, Armour and Skeel argued that the United Kingdom's self-regulatory regime and aggressive lobbying by strong institutional shareholders have resulted in a pro-shareholder regime. By contrast, the US courts serve as arbiters of takeover disputes—where the judgment of corporate boards and management obtain greater leeway in the determination of the interests of the company. The discussion on interest group politics theory is ensconced mainly in the debate surrounding hostile takeovers.[274] There is burgeoning literature regarding its applicability to analyze the dissemination of the MBR into other jurisdictions, particularly in Asia, and such literature covers individual analyses of countries such as China[275] and India.[276] This Article seeks to examine not only the relevance of the interest group theory more broadly to the dissemination of the MBR worldwide but also the theory's specific applicability to the Asian jurisdictions under consideration herein.

A key question arises: Whose interests would be relevant to the incorporation of the MBR into a jurisdiction? First, this subpart looks at the supply side of regulation; it examines the role of the state or the regulator. In emerging markets where the private benefits of control are high and minority shareholders are weak, Professor Mariana Pargendler argued that the MBR serves the important function to

---

271. Jha, *supra* note 211, at 12.

272. Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2, at 456–57; Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia and the West*, *in* VAROTTIL & WAN, *supra* note 3, at 33.

273. Armour & Skeel, *supra* note 80, at 1794; *see also*, Armour, Jacobs & Milhaupt, *supra* note 109.

274. In other work, we document the influence of controlling shareholders in the design of regulation of hostile takeovers in the six Asian jurisdictions that are the subject matter of study herein. Varottil & Wan, *Hostile Takeover Regimes in Asia*, *supra* note 29.

275. Xi, *supra* note 89.

276. Jha, *supra* note 211.

protect minority shareholders. [277] However, the adoption and subsequent modification of the MBR in Asian jurisdictions pose an interesting problem. Available evidence demonstrates that the legal transplantation of the Anglo-American models in emerging economies, without more, is insufficient to achieve strong financial markets in the absence of effective legal institutions.[278]

The evolution of the Chinese MBR provides interesting insights on the supply side of regulation. Under the 2002 takeover regime, the CSRC wielded significant power by granting "itself a central and pivotal role in the Chinese market for corporate control" by exercising its discretion to grant waivers from the MBR.[279] In his study, Professor Chao Xi found that SOEs "controlled by the top levels of the Chinese central and local governments" fared better under this regime than did other SOEs or private acquirers.[280] The preferential treatment that the Chinese securities regulator has provided to SOEs in case of control shifts has raised some level of controversy.[281] However, the supply side of regulation in China after 2006 is confounding, as the CSRC ceded its discretionary powers by limiting the exemption regime and allowing partial offers.[282] Chao Xi argued that such a modification to the MBR regime reflects the private interests of the Chinese securities regulator in driving state-led acquisitions and industrial development (as evidenced from the shift in approach in the transition from a planned economy).[283] Another objective is to reflect the state's interests in encouraging takeovers and yet at the same time signaling its commitment to protecting minority shareholders.[284]

Moving to the demand side, the institutional shareholders have played an essential role in shaping takeover regulation in the United Kingdom. [285] However, in jurisdictions with concentrated shareholding, controlling shareholders tend to influence the shape of the regulation as well as the manner of its implementation. [286] Considering the significant concentration of shareholding in the Asian

---

277. Mariana Pargendler, *Takeovers, Ownership Structures and Control Premiums: A Comparative Analysis* (2004), https://www.seer.ufrgs.br/ppgdir/article/download/49628/31028 [https://perma.cc/J3QM-4QK2] (archived Oct. 26, 2021).

278. Katharina Pistor, Martin Raiser, & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECON. TRANSITION 325 (2000).

279. Xi, *supra* note 89, at 143.

280. *Id.* at 151.

281. *Id.* at 160.

282. *Id.* at 148.

283. *Id.* at 143, 164.

284. *Id.* at 164; Huang & Chen, *supra* note 3, at 222–23; *see also* Cai, *supra* note 89, at 665–68 (2011).

285. Armour & Skeel, *supra* note 80, at 1767–76.

286. The European experience is instructive, where shareholdings are concentrated and the MBR is incorporated in the EU Takeover Directive. Reports indicate that market participants, particularly controlling shareholders, often circumvent the MBR. Grant, Kirchmaier, & Kirshner, *supra* note 15.

jurisdictions (barring Japan),[287] such a phenomenon is evident in this region as well. This is illustrated by examining the design of the MBR in India, where controlling shareholders, also known as promoters,[288] of Indian companies (where shareholding is generally concentrated) form the dominant interest group influencing takeover regulation.

Two specific features of the Indian MBR provide direct evidence of interest group influence from the promoters. The first relates to partial offers. Ordinarily, promoters must be suspicious of partial offers, as they enable an outsider acquirer to wrest control over the company without undertaking a full offer that is costly. Therefore, partial offers expose the incumbents to the market for corporate control in comparison with full offers. Why did the promoter faction not oppose the idea of partial offers? The answer lies in an idiosyncrasy of acquisition financing in India. Domestic acquirers in India face regulatory constraints in raising bank financing to affect takeovers.[289] However, foreign acquirers raising financing overseas are not subject to the same limitation. After a consultation process,[290] SEBI concluded that a full offer requirement would impose an undue burden on cash-strapped domestic acquirers and thereby expose Indian companies to takeovers by well-funded foreign acquirers. Evidently, the approach toward partial offers adopted by Indian takeover regulation has been to placate domestic business interests that were apparently feeling the threat of potential takeovers by foreign companies. The interests of domestic industry prevailed in the regulatory process.[291] In that sense, an extraneous matter, such as a quirk in the law relating to acquisition financing and the purported discrimination between domestic and foreign acquirers, motivated the introduction of the partial offer requirement in India. Although this issue came up during further reform efforts in the takeover arena, it has not gained enough momentum to attract change, and the scenario prevails even today.[292]

The second aspect of India's takeover design relates to creeping acquisitions, which, as discussed earlier,[293] are incumbent-friendly

---

287. *See supra* note 174 and accompanying text. However, the presence of stable shareholders in Japan makes it somewhat unique and different from jurisdictions that typically have dispersed shareholding. Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 17–22 (2018).

288. In Indian regulation and literature, controlling shareholders are generally referred to as "promoters". Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 346.

289. *Id.* at 363.

290. Bhagwati Committee Report, 1997, *supra* note 138, ¶6.12.

291. This position remained unchanged when the Takeover Regulations were reviewed subsequently. *See* Bhagwati Report 2002, *supra* note 138, ¶5.

292. The status quo is beneficial to controlling shareholders, as the *ex post* partial offer scenario in India enables them to exit the target in entirely while it only provides a partial exit to minority shareholders. *See supra* Part IIID.

293. *See supra* Part IIID.

measures. The transparency surrounding the demand for this regulation is evident when an earlier consultation process "appreciated the fact that in a competitive environment, it may become necessary for person(s) in control of the company to consolidate their holdings either *suo moto* or to build their defenses against takeover threats."[294] This is an explicit recognition of the influence of the Indian promoter groups in protecting themselves from the challenges arising from a vibrant market for corporate control.[295]

Such an apparently muddled design of the MBR did not emerge by accident but through extensive consultation processes wherein the influence of interest groups was evident.[296] The committees that recommended different versions of the takeover regulations not only had strong representation from the Indian industry but also comprised leading Indian corporate lawyers.[297] The Indian industry received a dominant voice in the shaping of takeover regulation. The interest group theory explains why takeover regulation in India (and in varying forms, other Asian jurisdictions) is often subject to capture by the incumbents.

If, as these illustrations reveal, the design of the MBR in the Asian jurisdictions is incumbent friendly, the MBR will play a more diluted role in protecting the interest of minority shareholders against actions of controlling shareholders and acquirers when there is a control shift. This leads to the question of whether there are alternative mechanisms in the Asian context that operate to rein in the actions of acquirers and controllers in case of control shifts, which are likely to augur to the benefit of minority shareholders.

C. *Functional Substitutes to the MBR*

Scholars have argued that stringent rules under company law that prevent controlling shareholders from self-dealing could operate as a functional substitute to the MBR.[298] Hence, there could be some level of functional convergence between the fiduciary duties of controlling shareholders (prevalent in the United States in the context of the market rule) and the MBR.[299] Extending this argument further, one may hypothesize that in the context of an inchoate MBR present in several Asian jurisdictions, the reliance upon controlling shareholder fiduciary duties could fill the gap in protecting minority

---

294. Bhagwati Committee Report, 1997, *supra* note 138, ¶6.2.

295. Banaji, *supra* note 235, at 4.

296. Jha, *supra* note 211, at 93.

297. *Id.* at 92–93; Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 379.

298. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 336 (2001); ALESSIO M. PACCES, RETHINKING CORPORATE GOVERNANCE: THE LAW AND ECONOMICS OF CONTROL POWERS 357 (2012).

299. Gilson, *supra* note 298, at 337.

shareholders during a control shift. However, the analysis in this Article reveals that such an approach is unconducive to the Asian context.

As far as the authors are aware, none of the six Asian jurisdictions imposes any form of fiduciary duty on controlling shareholders seeking to transfer control to an acquirer. For example, with the weakest form of the MBR among the six jurisdictions, it would be reasonable to expect South Korea to use alternative strategies to address minority shareholder protection in case of a takeover. However, controlling shareholders in South Korean companies are free to seek control premium from acquirers, which they need not share with the other shareholders.[300] The available duties of controlling shareholders and possible remedies for breach are not "perfect or fully efficient."[301] Duties under South Korean law still focus on directors: controlling shareholders are accountable only if they fall within the scope of shadow directors. [302] Statutory shareholder remedies, such as derivative actions, are restricted to breaches of directors' duties[303] and not to controlling shareholders' duties. These limitations have led to a call for more robust duties on controlling shareholders of South Korean companies in the context of takeovers.[304] A similar position ensues in common law Asia as well. The law does not impose US-style fiduciary duties on controlling shareholders, particularly in the context of the sale of control.[305]

It is therefore clear that the strategy of the Asian legislators and regulators is to rely largely upon the MBR rather than to address minority shareholder protection during control shifts by treating controlling shareholders as fiduciaries and to impose duties on them. Although scholars have argued for imposing fiduciary duties on controlling shareholders in the Asian context,[306] several limitations could accompany such a strategy. *First*, controlling shareholders' fiduciary duty involves a principle-based approach that adopts an *ex post* fact-based determination by the courts.[307] Unlike the MBR, which is a bright-line rule, the fiduciary duty standard requires judicial determination on a case-by-case basis.[308] *Second*, there could be issues surrounding the enforcement of controlling shareholders' fiduciary

300. Rho, *supra* note 124, at 292.

301. *Id.*

302. *See* Korea Commercial Act, art. 401-2.

303. *See* Korea Commercial Act, art. 402, 403.

304. Stephen J. Choi, *The Future Direction of Takeover Law in Korea*, 7 J. KOREAN L. 25, 36 (2007).

305. *See, e.g.*, Jha, *supra* note 211, at 212 (on India). More generally, see ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA (2019) (arguing for the importance of duties on controlling shareholders).

306. *See, e.g.*, Choi, *supra* note 304; LIM, *supra* note 305.

307. See text accompanying *supra* note 35.

308. Elhauge, *supra* note 10, at 1501.

standards.[309] A lot depends upon the legal and institutional machinery within each jurisdiction to determine whether shareholders can succeed in legal action against controlling shareholders for breaches of duty. The sophistication and speed of the judiciary, the manageability of costs, and the availability of appropriate incentives to shareholders and plaintiff law firms would determine the success (or failure) of the fiduciary duty approach.[310] Enforcement of the MBR, conversely, relies largely on the securities regulator or a specialist takeover panel.

In these circumstances, despite the divergent (and, in some cases, imperfect) designs of the MBR in the six Asian jurisdictions, it would be imprudent to discard or devalue the rule and rely on the fiduciary duties of controlling shareholders, which are inadequate in the Asian context. The continued importance of the MBR in Asia leads to some recommendations to redesign it in light of the vast divergence therein.

D. *Addressing the Objectives: A Normative Analysis of the MBR in Asia*

The experience from the six Asian jurisdictions clearly demonstrates considerable divergence in the objective, evolution, design, and implementation of the MBR. These jurisdictions populate several points along the spectrum between the strong form of the MBR and the market rule. This highlights the complexities surrounding the MBR in Asia. Considering the lessons emanating thus far, is it necessary to reconsider the utility of the MBR in Asia as meeting the twin objectives set out in Part II above of minority shareholder protection and ensuring efficiency-based control shifts? Should the Asian jurisdictions go to the extent of eliminating the MBR in favor of the market rule? If not, how must jurisdictions redesign the MBR to address the complexities arising from the deep divergence in the rule within Asia to meet the twin objectives of minority investor protection and ensuring a vibrant market for corporate control?

To begin with, this Article does not advocate abolishing the MBR, at least in the Asian context. There is consensus that the rule performs the role of minority protection in the form of exit and sharing, and the controversy surrounds only the nature and extent of its role in this regard. Moreover, the market rule prevails in jurisdictions such as the United States because a robust regime that imposes fiduciary duties on controlling shareholders in control shifts accompanies the rule. Until such a controlling shareholders' fiduciary regime, which is either nascent or non-existent in Asia in the context of control shifts, develops further, this Article adopts the position that the MBR must remain, at

309. *Id.*

310. For example, Indian courts suffer from backlog and delays. M.J. Antony, *Only Bad News*, THE BUS. STANDARD (Jan. 14, 2014); *see also* Jayanth Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57 (2010).

least as a default rule. The task then leads to an exploration of the possible modifications to the MBR's design in Asia.

As is clear thus far, "the tradeoff between eliminating inefficient transfer of control and forgoing efficient transfer of control will play out differently in different jurisdictions."[311] This is true not only among jurisdictions but also between various companies within the same jurisdiction. As one group of researchers found, "no single and comprehensive rule such as the MBR is the best choice for all corporations and all potential takeover situations."[312] It boils down not only to a jurisdiction-level analysis but also to a company-level analysis.

Notwithstanding the utility of the MBR, it is questionable whether it is always appropriate to have a one-size-fits-all rule for all companies within each jurisdiction. Some have argued that it is optimal to leave the decision of whether to have the MBR and its precise design to the shareholders of the company and in turn to the market.[313] Professor Luca Enriques and his co-authors argued that takeover regulation must maintain a neutral, "unbiased" approach that offers companies a menu of options to choose from.[314] This is because companies vary in their governance techniques on the basis of their shareholding pattern and other conditions affecting their governance.[315] Furthermore, the theory recognizes that such a mix of factors will change over time.[316] Thus, takeover regulation must provide for a default MBR, from which the shareholders may opt out.[317]

Although the default MBR theory is attractive, it has also received some criticism. Professors Johannes Fedderke and Marco Ventoruzzo argued that such a default MBR "is not always the most efficient and fair option."[318] The claim rests on at least two grounds. *First*, they argued that default rules work well only when parties possess "similar bargaining strength."[319] In an orchestrated control shift, the selling controller and the acquirer will likely have a superior bargaining position compared with the noncontrolling shareholders. *Second*, default rules need the support of efficient financial markets, which do

311. Zhang, *supra* note 96, at 24.

312. Bergstrom, Hogfeldt, & Molin, *supra* note 24, at 447.

313. Sepe, *supra* note 24, at 26.

314. *See generally* Luca Enriques, Ronald J. Gilson, & Alessio M. Pacces, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, 4 HARV. BUS. L. REV. 85 (2014).

315. *Id.* at 102.

316. *Id.* at 88.

317. Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, *supra* note 88, at 161; Charlie Xiao-chaun Weng, *Lifting the Veil of Words: An Analysis of the Efficacy of Chinese Takeover Laws and the Road to a "Harmonious Society"*, 25 COLUM. J. ASIAN L. 180, 216 (2012).

318. Fedderke & Ventoruzzo, *supra* note 12, at 176.

319. *Id.*

not suffer from information asymmetry between the various players.[320] In the MBR scenario, leaving the rule to market forces will enable the more informed constituencies to gain an upper hand.[321] Therefore, Fedderke and Ventoruzzo argued that such a default regime will always operate in the interests of the incumbents and that it "could easily morph into a *free rein* of the most powerful, informed, or organized constituencies."[322]

Although there is merit in the critique of the default rule, the idea is worth considering in a manner that mitigates its countervailing factors. This Article is sanguine about the default MBR, but it also suggests additional checks and balances in the implementation of the idea. To begin with, each jurisdiction may prescribe a default rule that defines the various elements, including the trigger threshold, whether the rule is for a full offer or a partial offer, minimum pricing requirements, creeping acquisition limits, and exemptions. These parameters must be clearly written, with there being no ability to exempt the MBR beyond what is stated therein. The default rule will apply to all listed companies at the time of its introduction and to all companies listed thereafter. The rule may be situated in the company's corporate constitution.

Nevertheless, it is open to the company to alter any of the elements of the MBR by way of the shareholder resolution. To mitigate the concern that such a rule will be incumbent friendly, this Article proposes a shareholder approval requirement that satisfies two conditions cumulatively. First, the modification of the MBR must command the approval of a majority of all shareholders of the company or such a higher threshold that may be required under the laws of individual jurisdictions. [323] The controlling shareholders will undoubtedly sway this decision. To ensure a balance against the dominance of the controlling shareholders, the proposed model recommends that the shareholder approval must, second, receive the support of a majority among all the noncontrolling shareholders.[324] This additional condition will ensure that the modification of the MBR is not only a matter left to the influence of the controlling shareholders but also has the support of the minority shareholders, thereby ensuring

320. *Id.* at 177.

321. *Id.*

322. *Id.* (emphasis in original).

323. For example, in several jurisdictions, a higher majority requirement applies for amendment to the constitution. *See* Companies Act, 2013, § 14(1) (in India); Companies Act (Rev. Ed. 2006), §26.

324. In some jurisdictions such as Hong Kong, Singapore, India and Malaysia, material related party transactions require the approval of shareholders through MoM voting. Puchniak & Varottil, *supra* note 151.

that deviations from the default rule can occur only when they benefit the larger shareholder body and not merely the incumbents.[325]

This indeed imposes rigorous conditions on deviating from the default rule, thereby diminishing the MBR's utility but appropriately softening its rigidity. By ensuring a transparent process that leaves decision-making in the hands of the shareholders, it overcomes the problems of the current system in which, as seen earlier, acquirers rely on large-scale exemptions and other means of circumventing the MBR. The imposition of a higher threshold for deviations from the default rule is an inevitable fallout of the need to protect the noncontrolling shareholders against unilateral actions of incumbents.

V. CONCLUSION

Achieving the twin goals of takeover regulation in promoting efficient changes of corporate control and curbing inefficient changes is a challenge for all takeover regulators. This Article conducts a study of the mandatory takeover regimes in six Asian jurisdictions in a comparative frame with the United States and the United Kingdom. It first compares the MBR in the United Kingdom and the market rule in the United States, and then analyzes the implications for either rule on the market for efficient corporate control and minority shareholder protection. It finds that the six Asian jurisdictions have not adopted either approach wholesale but instead have made modifications that lie along a spectrum between the strong MBR rule in the United Kingdom and a diluted MBR rule resembling the US approach. In fact, the modifications bear little similarity to the origins of either rule. Rather, in fashioning their takeover regulations, jurisdictions base their decisions on the political economy of each jurisdiction, including the need to signal to the investing community its commitment toward adopting international practice on takeover regulation, the varying shareholding patterns, and the capacity of the regulatory authorities. This Article demonstrates the continued influence of controlling shareholders—often business families and the state—in framing the ultimate rule that is to be adopted, which tends to benefit their own interests.

---

325. Such a dual-voting requirement is not unique. For example, in case of premium-listed companies in the U.K., independent directors must be elected by a majority of the shareholder body as a whole and also by the non-controlling shareholders as a separate class. *See* Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL & COMPARATIVE APPROACH 100 (Dan W. Puchniak, Harald Baum, & Luke Nottage eds., 2017).

Table 1: MBR (Intensity)

	Market rule							Strong form MBR
Jurisdiction	**U.S.**	**South Korea**	**Japan**	**China**	**India**	**Hong Kong**	**Singapore**	**U.K.**
Trigger threshold	None at the federal level	Acquirer purchasing more than 5% off the market from 10 or more shareholders must do so via a tender offer	(1) One-third (for off-market purchase) (2) Two-thirds of shares	30%	Either 25%, or where there is "control"	30%	30%	30%
Allowing partial offer	Yes, voluntary partial offer is allowed under the tender offer regulation, which requires the *pro rata* purchase of the shares tendered	Yes, allow *ex ante* partial offer	Yes, allow *ex ante* partial offer for (1) above. Partial offer not allowed if the bidder has acquired more than two-thirds of shares	Yes, allow *ex ante* partial offer	Yes, allow (i) *ex ante* partial offer that is voluntary; and (ii) *ex post* partial offer that is mandatory	Yes, allow *ex ante* partial offer, but only voluntarily	Yes, allow *ex ante* partial offer, but only voluntarily	Yes, allow *ex ante* partial offer, but only voluntarily
Price at which the offer must be made	The bidder pays the same price for shares acquired in the tender offer. However, the bidder can acquire shares from controlling shareholder outside tender offer and not share the control premium	No prescribed price for the offer	No prescribed price for the offer	The highest price at which the acquirer has acquired shares in the last 6 months. If offered price is lower than the daily average price during the 30-day period before the announcement of the offer, the acquirer's financial advisor must issue a fairness opinion	No less than the highest of (a) the highest price paid for acquisition that triggered the offer; (b) volume-weighted average price paid by the acquirer for shares in the last 12 months; (c) highest price paid for shares in the last six months; and (d) the volume-weighted average market price of the shares for 60 trading days before the offer	No less than the price paid for shares in the last 6 months or during the offer	No less than the price paid for shares in the last six months or during the offer	No less than the price paid for shares in the last 12 months or during the offer
Allowing creeping acquisitions without triggering MBR	n/a	n/a	n/a	Yes, 2% every 12 month period	Yes, if holding between 25 to 75% shares, the acquirer can acquire up to 5% each financial year	Yes, 2% every 12 month period	Yes, 1% every 6 month period	No
Waivers and exemptions	n/a	MBR not applicable to market acquisitions of shares	MBR not applicable to market acquisitions of shares	High number of waivers and exemptions granted pursuant to the takeover regulation and by CSRC	Relatively high number of waivers and exemptions granted pursuant to the SEBI takeover regulation and by SEBI	Few waivers and exemptions, all tightly prescribed; no discretion to have a blanket waiver/exemption	Few waivers and exemptions, all tightly prescribed; no discretion to have a blanket waiver/exemption	Few waivers and exemptions, all tightly prescribed; no discretion to have a blanket waiver/exemption