



THE YEAR IN REVIEW

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INTERNATIONAL LEGAL DEVELOPMENTS YEAR IN REVIEW: 2012

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This article reviews significant legal developments in nations comprising the Asia Pacific Region during 2012.¹

I. Australia

A. NEW REGULATION ON MARKET INTEGRITY

Australia is taking bold preventative strides to learn from the issues presented by the U.S. and European markets on the regulation of dark pools liquidity, automated algorithmic trading, and High Frequency Trading (HFT). In 2012, Australia took two steps to better understand and regulate dark liquidity and HFT. First, in July 2012, Australian Securities and Investments Commission (ASIC) announced the establishment of two new task forces to help ASIC understand the issues that arise with dark pools and HFT.² Second, on November 20, 2012, the ASIC announced new market integrity rules.³

* The 2012 Year in Review of the Asia Pacific Committee of the ABA Section of International Law was coordinated and edited by Justin G. Persaud, LL.M. candidate at Osgoode Hall Law School and an attorney practicing securities, ADR, litigation, commercial, and real estate law in the United States and Canada. The following authors submitted contributions: Justin G. Persaud (Australia); Steve Saunders, Lecturer in International Law, University of Toyama (Japan); Philippe Shin and Bynung-Tae Kim, Shin & Kim (Korea); Dr. Ngun Cung Lian, Senior Research Fellow, Myanmar Development Resources Institute, Eric C. Rose, Herzfeld & Rubin P.C., New York, New York, Matthew H. Baird, Environmental Counsel, Sydney, Australia, and Dominic J. Nardi, Jr., Ph.D. student, Department of Political Science, University of Michigan (Myanmar); Albert Vincent Y. Yu Chang, senior counsel, Warner Norcross & Judd LLP, Grand Rapids, Michigan (the Philippines); and Ricardo Silva, Partner, Miranda Alliance's Lisbon Headquarters, with the assistance of Sara Frazão (Timor-Leste).

1. For developments during 2011, see Justin G. Persaud & Steve Saunders, *Asia/Pacific*, 46 INT'L LAW. 483 (2012). For developments during 2010, see William A. Herbert et al., 45 INT'L LAW. 455 (2011).

2. Media Release, Australian Sec. & Invs. Comm'n [ASIC], 12-290MR ASIC Makes Announcements on Market Structure, Dark Liquidity and High Frequency Trading, ASIC (Nov. 21, 2012), <http://www.asic.gov.au/asic/asic.nsf/byHeadline/12-290MR%20ASIC%20makes%20key%20announcements%20on%20market%20structure%2C%20dark%20liquidity%20and%20high%20frequency%20trading?opendocument>.

3. *Key Announcements on Market Structure, Dark Liquidity and High Frequency Trading*, ASIC, <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Market-structure> (last updated Dec. 5, 2012).

right Law. The new penalty does not apply to any content that can be viewed for free online, but downloading such material could still be grounds for a civil action. Copying CDs for personal use is still legal. Copying DVDs is now illegal, but there is no penalty under the new law for this action.¹⁴ DVD-encoding technology generally prevents copying, although there are programs that can override the encoding and allow copying.

In addition to the JFBA, others have expressed concerns about how the law might be applied in relation to online games and written content.¹⁵ Some lawmakers also expressed concern that the law is too vague and does not help the public understand what is legal and what is not. The Recording Industry Association of Japan (RIAJ) has created a green logo, the “L Mark,” to indicate to consumers what websites contain material that can be legally downloaded, but neither the RIAJ nor Japan’s Cultural Affairs Agency (tasked with enforcing the Copyright Law) have done much to publicize the new “L Mark.”

The new law is part of a larger effort by the United States, European Union nations, and other countries to crack down on illegal downloading and copying (ripping) of CDs, DVDs, etc.

III. Korea

Under the Korean Commercial Code in effect prior to April 15, 2012 (the Old KCC), cash-out mergers were controversial because the Old KCC did not specifically address the issue. But the amended Korean Commercial Code (the Amended KCC), which has been in effect since April 15, 2012, now explicitly permits a cash-out merger when the surviving company pays cash (instead of shares, as would be the case in a regular merger) in consideration for the shares of the company to be dissolved in the merger.¹⁶

Due to a lack of clarity in the Old KCC, many legal scholars had interpreted its provisions to mean that shares in the surviving company should be provided as merger consideration and that cash consideration should be allowed only for certain limited purposes, including adjustment of merger ratio and clearance of fractional shares.¹⁷ The Amended KCC, however, allows cash-out mergers and also allows “other properties” to be used as merger consideration.¹⁸ As there is no explicit statutory restriction, “other properties” may include many different types of consideration. Accordingly, under the Amended KCC, merger consideration may be paid solely in cash or in combination with any other properties, such as bonds issued by the surviving company or any third party companies, or shares of the surviving company’s parent company. Still, the value for each needs to be fairly estimated, and equal treatment of shareholders in the dissolving company should be observed in providing such shareholders with cash or other properties as merger consideration. For example, if some shareholders of the dissolving company are cashed-out, while

14. Kazuaki Nagata, *Copyright Law with Teeth Leaves Download Masses Puzzled*, JAPAN TIMES (July 11, 2012), <http://www.japantimes.co.jp/text/nn20120711f1.html>.

15. Tomoko Otake, *Music Industry Wins a Battle as Antidownloading Bill Gets Some Teeth*, JAPAN TIMES (June 21, 2012), <http://www.japantimes.co.jp/text/fm20120621a3.html>.

16. See, e.g., Nathan McMurray, *The Game Has Changed. Revised Korean Commercial Code Set to Take Effect*, KOR. L. TODAY (Mar. 21, 2012), <http://www.korealawtoday.com/2012/03/21/the-game-has-changed-revised-korean-commercial-code-set-to-take-effect/>.

17. *Id.*

18. Sangbeob [Commercial Act]; Act. No. 10,600, May 23, 2011, art. 523 (S. Kor.).

others are provided with shares in the surviving company as merger consideration and remain as shareholders, the merger could potentially be invalidated on the ground that it violates the principle of equal treatment of shareholders.

The Amended KCC repealed Article 470 of the Old KCC, which limited the total principal amount of bonds issuable by a Korean corporation. As a result, we can expect to see an increase in the number of cash-out mergers in which consideration is paid in bonds.

In addition, the Amended KCC now permits triangular mergers that provide the dissolving company's shareholders with shares issued by the surviving company's parent company as consideration.¹⁹ Even if only a forward triangular merger is allowed and a reverse triangular merger is still not permissible under the Amended KCC, this reform will likely boost efficiency in corporate restructuring and promote strategic affiliations between companies. In a forward triangular merger, the target company (dissolving company) merges with and into the subsidiary (surviving company) of a parent company, which is often established for the sole purpose of the merger. From the viewpoint of a parent company, the main advantages of a triangular merger are (i) to avoid the automatic assumption of liability resulting from its merger with the target company, which would be desirable especially when the target company is a high-risk enterprise, and also (ii) to avoid allowing the parent company's shareholders to exercise their appraisal rights.

It should be noted that, under the Amended KCC, cash-out mergers may not be used in any consolidation (i.e., the combination of two or more companies into a newly established company). Also, the Amended KCC prohibits the use of cash-out mergers in some other types of corporate restructuring prescribed by the KCC, such as a merger of a spin-off company into another company (referred to as *hup-soo-boon-hal-hap-byung* in Korean).²⁰

Meanwhile, cash-out mergers could help reduce management costs by enabling majority shareholders to squeeze out minority shareholders. Cash-out mergers could also be utilized as an alternative tool for publically traded companies to be taken private. With regard to the former, the majority shareholder of a listed company can easily squeeze out minority shareholders by taking the following sequence of actions: (i) establish an unlisted, wholly-owned subsidiary; (ii) merge the listed company into the newly established company; and (iii) pay the minority shareholders' merger consideration in cash. From the perspective of a majority shareholder, cash-out mergers can be more advantageous for squeeze-outs than the "compulsory acquisition right," which was newly introduced along with cash-out mergers under the Amended KCC.²¹ By exercising the "compulsory acquisition right," a controlling shareholder holding 95 percent or more shares in a Korean company could require minority shareholders to sell their shares to the controlling shareholder at a fair price, similar to the minority shareholders' right to exercise their appraisal right. As a counterpart to a controlling shareholder's compulsory acquisition right, minority shareholders are provided with sellout rights.²² By exercising such rights, minority shareholders may demand purchase of their shares by being "cashed out" when there is a controlling shareholder holding more than 95 percent of the shares in a company.

19. *Id.* art. 523-2.

20. *Id.*

21. *Id.* art. 360-24.

22. *Id.* art. 360-25.

Although minority shareholders can protect their interests by exercising their appraisal right in a cash-out merger, they might not be fully protected if they object to the merger because they would be deprived of the opportunity to share the future profits of the surviving company following the merger. In this regard, commentators have argued that if the sole purpose of a cash-out merger is to exclude minority shareholders of the dissolving company, the merger should be voided because it unfairly damages the interest of minority shareholders.²³ It remains to be seen how courts will decide this issue in the future.

IV. The Republic of the Union of Myanmar

In 2010, the Republic of the Union of Myanmar (also known as Burma) began a process of legal reform designed to bring it in line with its Association of Southeast Asian Nations (ASEAN) neighbors and the international community. Some of the more notable developments in 2012 have been the enactment of the following laws.

A. THE FARMLAND LAW AND THE VACANT, FALLOW, AND VIRGIN LANDS MANAGEMENT LAW

Approved by the *Pyidaungsu Hluttaw* (the Union Assembly) on March 30, 2012, both the Farmland Law²⁴ and the Vacant, Fallow, and Virgin Lands Management Law²⁵ were criticized for causing thousands of farmers to lose control of their land and thus become government tenants.²⁶ The displacement of farmers in Myanmar has recently been exacerbated by land grabs and land concession awards to well-connected individuals and corporations.²⁷

23. For an example of a U.S. court applying this argument to analyze a cash-out merger to exclude a minority shareholder from a lucrative transaction, see *In re Sunbelt Beverage Corp. S'holder Litig.*, No. 16089-CC, 2010 WL 26539 (Del. Ch. Jan. 5, 2010) (voiding cash-out merger and awarding damages to the minority shareholder of 2.5 times the value payable in the merger). See also *Delaware Court Criticizes Board's "Strong-Armed" Tactics in Staging Freeze-Out Merger*, MILBANK, TWEED, HADLEY & MCCLOY LLP (March 10, 2010), <http://www.milbank.com/images/content/7/1/715/031010-In-re-Sunbelt-Beverage-Corp.pdf>.

24. The Farm Land Law, No. 62/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), available at http://www.burmalibrary.org/KN/30.3.12_Farmland_law-red.pdf. For an unofficial translation of the implementing rules, see *Farm Land Law*, ONLINE BURMA/MYAN. LIBR., http://www.burmalibrary.org/docs14/Uncorrected_Translation_of_Bylaws%20for_Farmland_Law.pdf (last visited Feb. 9, 2013).

25. The Vacant, Fallow, and Virgins Lands Management Law, No. 10/2012, Pyidaungsu Hluttaw Law, 2012 (Myan.), available at http://www.burmalibrary.org/docs13/Farmland_Act-2012-03-30.pdf. For an unofficial translation of the law, see http://www.burmalibrary.org/docs13/VFVLM_Law-en.pdf. For an unofficial translation of the implementing rules, see http://www.burmalibrary.org/docs14/Unofficial_translation_of_by-laws_for_Vacant_Land_Law.pdf.

26. Sandar Lwin, *Farmland Laws Should Be Amended: Committee*, MYAN. TIMES (June 25-July 1, 2012), <http://www.mmmtimes.com/2012/news/632/news63201.html>.

27. DISPLACEMENT SOLUTIONS, MYANMAR AT THE HLP CROSSROADS: PROPOSALS FOR BUILDING AN IMPROVED HOUSING, LAND AND PROPERTY RIGHTS FRAMEWORK THAT PROTECTS THE PEOPLE AND SUPPORTS SUSTAINABLE ECONOMIC DEVELOPMENT (2012), available at <http://displacementsolutions.org/files/documents/MyanmarReport.pdf>.