Shareholder Protection Law in Malaysia: Its Character, Evolution and Effectiveness

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Table of Contents

Abstract vi
Declaration viii
Publications during enrolment ix
Linguistic and citation notes to readers ix
Glossary x
Acknowledgements xi
CHAPTER 1 INTRODUCTION 1
PART 1 METHODOLOGICAL APPROACHES 9
CHAPTER 2 METHODOLOGICAL AND THEORETICAL PERSPECTIVES 10
2.1 RESEARCH METHODS 11
2.1.1 Qualitative Methods 11
2.1.2 The Leximetric Method 15
2.1.3 Descriptive Statistics 18
2.2 THEORETICAL PERSPECTIVES 20
2.2.1 Legal Origin Theories 20
a. Strong form legal origin hypothesis 21
b. Weak form legal origin hypothesis 25
2.2.2 Transnational Harmonisation 29
2.2.3 Legal Evolution 32
a. Early literature 34
b. Memetics 35
c. Autopoietic theory 36
d. Interaction of law and its context 37
2.2.4 Political Economy 40
2.3 CONCLUSION 46
PART 2 THE CHARACTER OF MALAYSIAN SHAREHOLDER PROTECTION LAW .. 51
CHAPTER 3 THE CONTENT OF MALAYSIAN SHAREHOLDER PROTECTION LAW 52
3.1 COLONIAL INFLUENCE 53
3.2 THE 1960S AND 1970S 55
3.2.1 Development of Malaysian law 55
3.2.2 The *Companies Act 1965* 57
3.2.3 Shareholder protection provisions of the *Companies Act 1965* 58
3.2.4 Common law and equitable principles 61
3.2.5 Regulation of listed companies 63

3.2.6 Enforcement 64
3.3 THE 1980S TO THE ASIAN FINANCIAL CRISIS 64
3.3.1 Amendments to the *Companies Act 1965* 68
3.3.2 *Malaysian Code on Takeovers and Mergers 1987* 70
3.3.3 *Listing rules* 70
3.3.4 Common law and equitable principles 71
3.4 THE POST-ASIAN FINANCIAL CRISIS REFORMS 72
3.4.1 Reform policy 74
3.4.2 The *Malaysian Code on Corporate Governance* and the *Listing Rules* 76
3.4.3 Review of the *Companies Act 1965* 78
3.4.4 Reforms from 2008 to 2016 83
3.4.5 The *Companies Act 2016* and increased powers of investigation 84
3.5 CONCLUSION 87
CHAPTER 4 THE STRENGTH OF MALAYSIAN SHAREHOLDER PROTECTION LAW 89
4.1THE LEXIMETRIC ANALYSIS OF MALAYSIAN SHAREHOLDER PROTECTIOn 90
4.1.1 Shareholder protection against the board of directors 91
4.1.2 Protection against other shareholders 95
4.1.3 Aggregate shareholder protection 98
4.1.4 Trends in legal change 99
4.2 INTERNATIONAL COMPARISON 100
4.3 AREAS OF CONVERGENCE OR DIVERGENCE WITH UK AND AUSTRALIAN LAW 105
4.3.1 Protection against the board of directors 106
4.3.2 Protection against other shareholders 109
4.4 CONCLUSION 111
CHAPTER 5 EFFECTIVENESS OF MALAYSIAN SHAREHOLDER PROTECTION LAW . 114
5.1 LITERATURE REVIEW: THE EFFECTIVENESS OF MALAYSIAN SHAREHOLDER PROTECTION LAW 115
5.1.1 Background 115
5.1.2 Shareholders' exercise of voting rights 118
5.1.3 Directors' duties, independent directors and board committees 120
5.1.4 Shareholder litigation 122
5.1.5 Public enforcement 124
5.2 ANALYSIS OF JUDICIAL DECISIONS ON BREACHES OF DIRECTORS' DUTIES 126
5.2.1 Derivative actions 130
5.2.2 Breaches of directors' duties 137
5.2.3 All cases involving alleged breaches of directors' duties, including derivative actions 142
5.3 DOCTRINAL ANALYSIS OF CASES ON DERIVATIVE ACTIONS 144
5.4 COMPARISON WITH AUSTRALIAN STATUTORY DERIVATIVE ACTIONS 151
5.4.1 Australian judicial decisions from 2008 to 2015 152

5.4.2 Legal principles applied by Australian courts 154
5.4.3 Comparison with Malaysian cases 157
5.5 PUBLIC ENFORCEMENT 165
5.5.1 Public enforcement of shareholder protection provisions in Malaysia 165
5.5.2 Public enforcement of shareholder protection in Australia 170
5.5.3 Conclusions on public enforcement in Malaysia 173
5.6 CONCLUSION 174
PART 3 CONTEXTUAL INFLUENCES AND THEORETICAL APPROACHES 179
CHAPTER 6 THE CHARACTER OF MALAYSIAN SHAREHOLDER PROTECTION LAW: CONTEXTUAL INFLUENCES AND THEORETICAL EXPLANATIONS 180
6.1 THE DEVELOPMENT OF FORMAL MALAYSIAN SHAREHOLDER PROTECTION LAW 180
6.1.1 Legal origin 180
a. Economic stimuli and the strength of the legal origin effect 181
b. Channels of influence 182
6.1.2 Transnational harmonisation 184
6.2 CO-EVOLUTION OF LAW AND ITS CONTEXT 185
6.2.1 Signalling compliance with international standards 186
6.2.2 Co-evolution of law and its context in the privatisation of listed companies 187
6.2.3 Memetics and autopoietic theory 189
6.3 POLITICAL ECONOMY AND THE SHAPE OF FORMAL LAW 189
6.3.1 Lethargic reform: directors' remuneration and disqualification 191
6.4 PROPOSED EXPLANATIONS FOR THE EFFECTIVENESS OF MALAYSIAN SHAREHOLDER PROTECTION 193
6.4.1 The ownership and control of Malaysian companies 193
a. Who owns Malaysia's largest companies? 194
b. Corporates structures which enhance control 195
c. Empirical analysis of ownership concentration and controlling shareholders 196
d. Comparison with the UK and Australia 197
6.4.2 The state-business nexus 199
a. State perspectives of minority rights and dissent 202
6.4.3 Cultural influences 204
6.4.4 Implications of contextual factors for the effectiveness of Malaysian shareholder protection law 205
a. Shareholders' voting rights 205
b. Independent directors 207
c. Shareholder litigation, public enforcement and the state-business nexus 208
6.5 THEORIES OF LEGAL EVOLUTION AND POLITICAL ECONOMY 209
6.6 CONCLUSION 212
CHAPTER 7 SUMMARY AND CONCLUSIONS 214
7.1 THE FIRST RESEARCH QUESTION 214

7.1.1 Summary of methods 214
7.1.2 Content of formal shareholder protection 214
7.1.3 Strength of formal Malaysian shareholder protection 215
7.1.4 Effectiveness of Malaysian shareholder protection in practice 215
7.2 THE SECOND RESEARCH QUESTION 216
7.2.1 Explanations for the shape of formal Malaysian shareholder protection law 217
7.2.2 The gap between formal law and its effectiveness in practice 217
7.2.3 Political economy 218
7.3 CONCLUSIONS 219
Bibliography 220
A Articles/Books/Reports 220
B Cases 237
C Legislation 243
D Other 245
Appendix 1: Leximetric Data 253
Appendix 2: Malaysian applications for leave to bring derivative actions: 2008 to 2015 302
Appendix 3: Malaysian applications for leave to bring derivative actions: 1999 to 2006 304
Appendix 4: Malaysian cases involving breaches of directors' duties: 2008 to 2015 305
Appendix 5: Australian applications for leave to bring derivative actions: 2008 to 2015 308

List of Figures

Figure 1: Shareholder protection against the board of directors (42 variables) in Malaysia from 1965 to 2010 92

Figure 2: Shareholder protection against other shareholders (18 variables) in Malaysia from 1965 to 2010 96

Figure 3: Aggregate shareholder protection (60 variables) in Malaysia from 1965 to 2010 98

Figure 4: Aggregate shareholder protection (60 variables) in seven countries from 1970 to 2005 101

Figure 5: Shareholder protection against other shareholders (18 variables) in seven countries 103

Figure 6: Shareholder protection against the board of directors (42 variables) in seven countries 105

List of Tables

Table 1: Research methods 48

Table 2: Theoretical approaches 49

Table 3: Derivative actions from 2008 to 2015 130

Table 4: Grounds for refusing leave in derivative actions from 2008 to 2015 131

Table 5: Defendants in derivative actions from 2008 to 2015 132

Table 6: Derivative actions from 1999 to 2006 135

Table 7: Basis of decisions 134

Table 8: Cases decided on the basis of the common law derivative action 136

Table 9: Cases decided on the basis of ss 181A and 181B of the *Companies Act 1965* 136

Table 10: Decisions on breaches of directors' duties 137

Table 11: Grounds cited for unsuccessful cases involving breaches of directors' duties 137

Table 12: Unsuccessful cases involving minority shareholder 138

Table 13: Plaintiffs in successful claims that directors' duties were breached 140

Table 14: Grounds for unsuccessful cases alleging breaches of directors' duties 142

Table 15: Australian applications for leave to bring shareholders' derivative actions 153

Table 16: Comparison between successful Australian and Malaysian derivative actions 154

Table 17: Statistics on controlling shareholders in Malaysia's largest companies 197

Table 18: Cross-country comparison of ownership concentration 199

ABSTRACT

This thesis describes and investigates the character and development of Malaysian shareholder protection regulation by analysing its content, protective strength and effectiveness. It describes and analyses the ways in which the regulation seeks to safeguard shareholders' interests from 1965 to 2016. The strength of Malaysian shareholder protection is measured through a quantitative measurement known as the 'leximetric' method, and compared with six other countries from 1970 to 2005. The analysis finds that Malaysian shareholder protection has been modelled substantially on UK and Australian regulations, providing a comprehensive framework for the protection of shareholders. The international comparison indicates that Malaysia had the weakest shareholder protection in 1970 among the seven countries. Nevertheless, it had the strongest growth over the 35 year period of the study. In 2005, aggregate shareholder protection in Malaysia was stronger than in the US but weaker than the other countries. Most of the countries in the comparison are advanced economies and the proximity in protective strength to the countries held out as models of international standards suggests the considerable potential strength of Malaysian shareholder protection regulation.

Although the analysis indicates the comprehensiveness and strength of formal Malaysian shareholder protection law, concerns have been raised over the regulations' apparent lack of effectiveness. The thesis investigates the manner in which shareholder protection mechanisms operate. It begins by analysing observers' reports on the functioning of various shareholder protection mechanisms. Many scholars highlight the limitations of Malaysian shareholder protection regulations in facilitating redress when allegations of expropriation arise. The study then turns to an in-depth analysis of judicial decisions on breaches of directors' duties over an eight-year period. The findings highlight the difficulties Malaysian minority shareholders face in obtaining redress for breaches of directors' duties. Comparison with the Australian statutory derivative action indicates that the equivalent Australian provisions were more effective in providing shareholders access to judicial redress.

Malaysian scholars commonly attribute the regulations' lack of effectiveness to specific features of the Malaysian context in which the regulations operate. In particular, corporate ownership structures are thought to allow controlling shareholders the capacity to dominate the board of directors, and at times the general meeting, which impedes effective functioning of shareholder protection mechanisms. The thesis further investigates the interaction of contextual influences and shareholder protection regulations.

In examining the character of shareholder protection, it has become evident that the issues of how and why it developed as it did are integral to understanding the character of shareholder protection. The content and strength of shareholder protection change in response to law reform. Shifting influences arguably have a degree of explanatory power for the character of shareholder protection at different times. The thesis examines the processes and interactions which have given Malaysian shareholder protection its particular character, analysing them by reference to theories of legal development. It finds that legal origin and transnational

harmonisation have considerable explanatory power for the shape of formal shareholder protection in Malaysia. Nonetheless, lethargy in the development of specific areas of shareholder protection may be attributed to political economy. The analysis concludes that the context in which shareholder protection operates and, in particular, corporate ownership structures, have significant implications for the effectiveness of Malaysian shareholder protection.

DECLARATION

This thesis contains no material that has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature: ……

Print Name: …….

Date: …….

PUBLICATIONS DURING ENROLMENT

Thesis-related publications	**Related thesis chapter**	**Comments**
Vivien Chen, 'The Statutory Derivative Action in Malaysia: Comparison with an Australian Judicial Approach' (2018) *Asian Journal of Comparative Law* (forthcoming)	Chapter 5: Effectiveness of Malaysian Shareholder Protection Law and part of Chapter 6	The article is based substantially on the empirical analysis of judicial decisions on derivative actions. Some reference is made to the legal evolution and political economy approaches in explaining the findings.
Vivien Chen, 'The Evolution of Malaysian Shareholder Protection: A Legal Origins Analysis' [2013] *Singapore Journal of Legal Studies* 100	Chapter 4: Strength of Malaysian Shareholder Protection Law and part of Chapter 6	The article is based on the leximetric analysis of shareholder protection discussed in Chapter 4. It includes a discussion of the influence of legal origin on the development of Malaysian shareholder protection.
Vivien Chen, 'Law and Society in the Evolution of Malaysia's Islamic Capital Market Regulation' (2017) 4 *Asian Journal of Law and Society* 133	Chapter 2: Theories of legal origin and legal evolution	The article considers the growth of Islamic law in the Malaysian legal system. It does not directly involve an analysis of Malaysian shareholder protection but examines the broader patterns of legal development. The article is referred to in Chapter 6.

Linguistic and citation notes to readers

All translation of material in the Malay language used in this thesis was undertaken by the author.

In Malaysia and Singapore, it is common for names to be in a different order to English names, particularly for persons of Chinese descent. Authors of secondary sources used in this thesis at times have their family name first, or if they have an English name, the family name may appear after an English name but before a Chinese name. However, some authors follow the Western style of stating their family name after their first names. Citation of sources in the footnotes state authors names as they appear in the publications.

GLOSSARY

ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
Celcom	*Celcom (Malaysia) Berhad v Mohd Shuaib Ishak*
CLJ	Current Law Journal
CLRC	Corporate Law Reform Committee
Companies Commission	Companies Commission of Malaysia
Daljit Singh	*Daljit Singh a/l Gurdev Singh v Forefront Online Sdn Bhd*
E&O	Eastern and Oriental Berhad
KLSE	Kuala Lumpur Stock Exchange
MCCG	Malaysian Code on Corporate Governance
MCCG 2012	Malaysian Code on Corporate Governance 2012
MLJ	Malayan Law Journal
OECD	Organisation for Economic Co-operation and Development
Renong	Renong Berhad
Swansson	*Swansson v RA Pratt Properties Pty Ltd*
UEM	United Engineers (Malaysia) Berhad

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CHAPTER 1

INTRODUCTION

In recent months, allegations of money laundering involving 1Malaysia Development Berhad (1MDB), a high profile company owned by the Malaysian state,[1] have triggered investigations in at least ten countries, including Australia,[2] situated across four continents.[3] Billions of dollars are claimed to have been misappropriated through questionable transactions, leaving the company struggling to pay its debts.[4] Evidence indicates that the impugned transactions were entered into without the authority of 1MDB's board of directors or shareholders.[5] This suggests that shareholder protection mechanisms were circumvented and failed to guard against the misappropriation of corporate property. Nevertheless, Malaysia's shareholder protection law[6] has been modelled largely on Anglo-Australian regulations, suggesting its apparent strength.[7] This raises questions as to how a Malaysian company was able to be used as a vehicle for fraud despite the existence of regulatory safeguards.

Allegations that shareholder protection mechanisms have failed to safeguard against the misappropriation of corporate property in Malaysia are, however, not limited to the 1MDB debacle. During the Asian financial crisis in 1997, the problem of self-dealing[8] by those in control of Malaysian companies was brought to light.[9] Although formal regulatory provisions ostensibly protected shareholders, in reality, the protections were shown to be largely ineffective and shareholders were left with little or no recourse.[10] The apparent vulnerability

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[1] 1MDB was established for the purpose of promoting the country's economic development.

[2] 'ANZ quizzed over AmBank link to Malaysia's 1MDB corruption scandal', *The Australian* (online), 4 April 2016 <http://www.theaustralian.com.au/business/financial-services/anz-quizzed-over-ambank-link-to-malaysias-1mdb-corruption-scandal/news-story/276a4d6e1f1b0961fde5bb2431197722>.

[3] Shamim Adam, '1MDB Hearing Spells More Trouble for Najib', *Bloomberg* (online), 12 April 2016 <https://www.bloomberg.com/news/articles/2016-04-11/bypassed-board-shows-malaysian-premier-s-knowledge-of-fund-deals>; '1MDB: The case that has riveted Malaysia' *BBC News* (online), 22 July 2016 <http://www.bbc.com/news/world-asia-33447456>.

[4] Mia Lamar, 'Malaysia's 1MDB Defaults on Series of Bonds', *Wall Street Journal* (New York), 26 April 2016.

[5] In July 2016, the US Department of Justice filed lawsuits to seize assets located in the US involved in money laundering of funds misappropriated from 1MDB; 'US Justice Department files lawsuits in connection with 1MDB probe', *Reuters* (online), 20 July 2016 <http://www.reuters.com/article/us-malaysia-scandal-lawsuit-idUSKCN1001FA>.

[6] In this thesis, the phrases 'law' and 'regulation' are used interchangeably. Both refer to the relevant legislation, case law, listing rules and voluntary codes which relate to the governance of companies and the rights of shareholders.

[7] Chapter 4 analyses the strength of Malaysian shareholder protection. The analysis finds that the strength of Malaysian shareholder protection approximates that of developed countries in the cross-country comparison, which includes UK and Australia, suggesting its strength internationally; Helen Anderson et al, 'The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison' (2012) 61 *International and Comparative Law Quarterly* 171.

[8] Self-dealing involves the misuse of corporate property, information or opportunity for personal gain.

[9] Philip Koh Tong Ngee, 'Reforms in the Light of Post-1998 Crisis' in Ho Khai Leong (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics, and Regulation* (ISEAS Publications, 2005), 102; Finance Committee, *Report on Corporate Governance* (February 1999); Pik Kun Liew, 'Corporate Governance Reforms in Malaysia: The Key Leading Players' Perspectives' (2007) 15 *Corporate Governance* 724.

[10] Finance Committee, above n 9, 42; Aiman Nariman Mohd Sulaiman, 'Responding to Concentrated Ownership – The Related-Party Transaction Provisions of Some Asian Countries' (2007) 3 *Corporate Governance Law Review* 70, 72.

of Malaysian shareholders attracted criticism from transnational financial organisations such as the World Bank and the Asian Development Bank.[11] As a consequence of the criticisms, the Malaysian government initiated a plethora of formal regulatory reforms following the Asian financial crisis, largely in accordance with foreign prescriptions.[12] Despite the reforms, anecdotal evidence suggests that the lack of substantive shareholder protection persists.[13] The reforms have been critiqued as 'form over substance'.[14] Deeply entrenched business practices continue,[15] while the ostensible strength of formal protections arguably forms a smokescreen against questionable practices.

Since the Asian financial crisis, public demand for more effective shareholder protection has remained strong.[16] Questions as to why the expropriation[17] of corporate assets, to the detriment of shareholders,[18] has persisted despite regulatory reforms continue to generate debate among scholars of Malaysian company law.[19] The quest for answers to the gap between formal law and its substantive effect inspires the central research questions of this thesis.

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[11] World Bank, *East Asia: The Road to Recovery* (1998) <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1998/11/17/000178830_98111703550666/Rendere/PDF/multi_page.pdf>; Juzhong Zhuang et al. (eds), *Corporate Governance and Finance in East Asia: A Study of Indonesia, Republic of Korea, Malaysia, Philippines, and Thailand* (Asian Development Bank, 2000) vol 1.

[12] Finance Committee, above n 9, 58; Pik Kun Liew, 'The (Perceived) Roles of Corporate Governance Reforms in Malaysia: The Views of Corporate Practitioners' in Mathew Tsamenyi and Shahzad Uddin (eds), *Corporate Governance in Less Developed and Emerging Economies (Research in Accounting in Emerging Economies, Volume 8)* (Emerald Group Publishing Limited, 2008) 455.

[13] Zarinah Anwar, 'Board of Directors: Performance Beyond Compliance', Conference on Corporate Governance – Adding Vision to Oversight, PWTC, Kuala Lumpur, 1 August 2003; Chan Wai Meng, 'Expropriation Through Related Party Transactions: The Position in Malaysia' (Paper presented at the International Applied Business Research & International College of Teaching & Learning Conferences, Orlando, Florida, USA, 4–6 January 2010).

[14] Janine Pascoe and Shanthy Rachagan, 'Key Developments in Corporate Law Reform in Malaysia' [2005] *Singapore Journal of Legal Studies* 93, 97; Amar Gill and Jamie Allen, 'Corporate Governance in Asia' (CG Watch, CLSA, 2007).

[15] Low Chee Keong, 'A Road Map for Corporate Governance in East Asia' (2004) 25 *Northwestern Journal of International Law & Business* 165, 193–4.

[16] Gurmeet Kaur and James S, 'Inside Looking Out' *Malaysian Business* (Kuala Lumpur), 16 April 2012; Rita Benoy Bushon, 'Minorities Are Often the Losers in the De-listing, Re-listing game' *The Star* (Selangor), 10 May 2012.

[17] Expropriation refers to the misappropriation of corporate property by those in control of companies, often for the benefit of one or more persons in control of the company, or entities related to such persons. This may also involve the misuse of corporate opportunity or information for unauthorised purposes. In Malaysia, minority shareholders whose shareholdings are relatively small are often thought to be the shareholders who suffer significant losses from such misappropriation. On the other hand, shareholders who own large controlling stakes in companies often wield considerable control over the management of companies. Such influence is thought to facilitate the misappropriation of corporate assets for personal profit. These issues will be examined in Chapter 6.

[18] In this thesis, the phrase 'expropriation of shareholders' refers to minority shareholders who suffer loss as a result of corporate property being misappropriated by those in control of companies. In Malaysia, minority shareholders are often thought to be in a disadvantaged position, as concentrated shareholding commonly allows controlling shareholders to dominate the control of companies. These shareholding structures and their implications for minority shareholders will be considered in Chapters 5 and 6.

[19] Aishah Bidin, 'Corporate Law Reform and Corporate Governance in Malaysia – Responses to Globalization' in P M Vasudev and Susan Watson (eds), *Corporate Governance After the Financial Crisis* (Edward Elgar, 2012) 229; Khoo Boo Yeang, *Review of Corporate Governance in Asia: Corporate Governance in Malaysia*

Against this background, the thesis aims to describe and investigate the character of Malaysian shareholder protection law and its operation. It seeks to understand the content, strength and effectiveness of relevant formal regulations. The thesis also seeks to identify the contextual factors and influences which have shaped the character of Malaysian shareholder protection.

An examination of formal law is integral to understanding the character of shareholder protection. Formal law constitutes the foundation for shareholder protection, providing it legitimacy and setting out the ways in which the law seeks to safeguard shareholders' interests. Two aspects of formal shareholder protection form the focus of this analysis, namely the *content* and *protective strength* of formal shareholder protection. An analysis of the content of shareholder protection facilitates an understanding of the ways in which regulations purport to safeguard shareholders' interests. The measurement of protective strength compares Malaysian shareholder protection with other countries held out by international financial organisations as models of international standards. As highlighted by observations of the gap between law in the books and law in practice,[20] there is equally a need to determine how those formal protections operate in reality. Hence, in addition to formal regulations, this thesis also examines the manner in which shareholder protection laws operate in practice in order to ascertain their *effectiveness* in safeguarding shareholders from expropriation of corporate assets by those in control of companies.

Existing studies provide snapshots of specific problems, often at set points in time.[21] While piecemeal efforts have been made to highlight deficiencies in the regulatory framework, there is a need for a thorough and comprehensive investigation. This thesis endeavours to investigate more comprehensively, *a range of ways* in which the regulations seek to protect shareholder interests. It incorporates a longitudinal study of Malaysian shareholder protection from the early days of Malaysia's nationhood to 31 December 2016.

Malaysia inherited its legal system from the British and much of its shareholder protection law has been modelled on regulations from other common law countries. Assumptions have been made in existing literature on the similarity of Malaysian shareholder protection with regulations from the UK or Australia. These have been premised on the transplantation of regulations from the UK or Australia. Nevertheless, there is limited verification of broader trends of similarity or the relative strength of shareholder protection. This study measures the strength of Malaysian shareholder protection and places it in an international context. An international comparison facilitates a better understanding of the strength of Malaysian shareholder protection relative to the UK and Australia. It also enables an analysis as to broader trends of similarity. In response to criticisms that Malaysian shareholder protection law lacks

(Asian Development Bank Institute, 2003) <http://www.adbi.org/conf-seminar-papers/2004/08/18/532.corporate.governance.malaysia/ >.

[20] Pascoe and Rachagan, above n 14, 97; Liew, 'Corporate Governance Reforms', above n 9.

[21] Ibid; Khoo, above n 19.

effectiveness in practice, this study examines the effectiveness of the regulations in providing shareholders redress when their rights are breached.[22]

This thesis is also a response to the need to understand the reasons for the gap between formal law and practice. Prior to the Asian financial crisis, scholarly writings on Malaysian shareholder protection primarily comprised doctrinal analyses of formal law. The widespread perception that regulatory safeguards had failed to curb corporate abuses during the Asian financial crisis precipitated a shift in scholarly thinking. Since then, scholars have contended that transplanted regulations are at times a poor fit with specific features of the Malaysian context.[23] The nexus between politics and business is thought to have a significant influence on regulatory enforcement.[24] In addition, cultural norms arguably impede the operation of shareholder protection.[25] Shareholding structures in Malaysia are thought to be substantially more concentrated than in the UK, giving rise to questions as to whether the regulations aimed at safeguarding shareholders from expropriation in the UK are suited to the Malaysian context.

The capacity for those in control of the company to engage in self-dealing is attributed to the separation between the ownership and control of companies.[26] In situations where shareholding is dispersed, shareholders are thought to be vulnerable to expropriation of corporate assets by directors.[27] Anglo-Australian regulations seek to protect shareholders from expropriation of corporate assets in several ways. These include giving them voting rights in relation to significant corporate decisions, and rights of recourse to the courts.[28] Nevertheless, shareholding structures in Malaysia arguably give rise to different issues.

Concentrated shareholding in Malaysian companies is thought to provide controlling shareholders[29] considerable influence over the board of directors.[30] Further, Malaysian shareholding structures allegedly allow controlling shareholders to dominate general meetings

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[22] As seen in the introduction to Chapter 5, effectiveness is measured by reference to the ability to obtain a remedy for breaches of shareholder rights. It also encompasses the ability to safeguard shareholders' interests in situations of potential or perceived expropriation.

[23] Shanthy Rachagan and Aiman Nariman Mohd Sulaiman, 'Controlling Shareholders: Issues and Challenges for Shareholders' Empowerment in Directors' Remuneration in Corporate Malaysia' [2014] *Asian Journal of Comparative Law* 267, 293.

[24] Edmund Terence Gomez and Kwame Sundaram Jomo, *Malaysia's Political Economy: Politics, Patronage and Profits* (Cambridge University Press, 1997).

[25] Elsa Satkunasingam and Bala Shanmugam, 'The Consequences of Culture on Shareholder Activism in Malaysia' (2006) 4 *Journal of Applied Management Accounting Research* 45.

[26] Eugene F Fama and Michael C Jensen, 'Separation of Ownership and Control' (1983) 26 *Journal of Law and Economics* 301; Lucian A Bebchuk and Assaf Hamdani, 'The Elusive Quest for Global Governance Standards' (2009) 157 *University of Pennsylvania Law Review* 1263, 1281.

[27] Dan W Puchniak, 'Multiple Faces of Shareholder Power in Asia: Complexity Revealed' in in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 511, 512.

[28] These regulations are detailed in Chapter 4 from p 104.

[29] The phrase 'controlling shareholder' refers to the shareholder who owns the largest block of shares in the company, which enables this shareholder to exercise stronger influence over significant decisions pertaining to the company. At times the controlling shareholder may comprise group of persons, such as members of a family, who act collectively in exercising control over the company. The controlling shareholder may also be an entity, such as the Ministry of Finance, or an institutional shareholder.

[30] Finance Committee, above n 9, 42.

and the board of directors, while minority shareholders[31] have limited influence despite the existence of formal voting rights.[32] However, there is a lack of empirical evidence to verify claims concerning the ineffectiveness of the regulations in protecting shareholders. This thesis seeks to address the gap in the literature through its empirical study of judicial decision on breaches of directors' duties, and to consider the veracity of explanations which have been suggested for the alleged ineffectiveness of shareholder protection law in practice.

Several other questions arise in examining the character of Malaysian shareholder protection. How and why did Malaysian shareholder protection obtain its character? A mere description of the character of shareholder protection would be superficial without a deeper understanding of the processes and interactions which have given Malaysian shareholder protection its particular character. As the examination of the character of shareholder protection has progressed, it has become evident that the issues of how and why it developed as it did are integral to understanding the character of shareholder protection. Preliminary investigations suggest that rather than being fixed or static, the character of shareholder protection reflects a degree of fluidity. The content and strength of shareholder protection change in response to law reform. Shifting contextual influences arguably affect the way in which shareholder protection operates.

Consequently, defining the character of shareholder protection requires the recognition of a continuum. A description of shareholder protection law at any one time is subject to the socio-political context or conditions prevailing at that time. Shifting influences arguably have a degree of explanatory power for the character of shareholder protection at various times.[33] For this reason, an explanation of the character of Malaysian shareholder protection requires an understanding of the influences on its evolution. An understanding of the forces which have shaped the particular character of shareholder protection also facilitates the identification of influences that underpin regulatory failure.

In summary then, the first aim of this thesis is to describe the character and evolution of Malaysian shareholder protection. The second aim is to examine the interaction of law and the influences which have shaped its character. These influences include political and economic influences as well as inherited legal tradition. This thesis analyses the process of legal evolution by reference to past and present events.[34] It does not purport to have any predictive

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[31] A minority shareholder is a shareholder who owns fewer shares in the company than the controlling shareholder and, consequently, does not have control over the company.

[32] World Bank, *Report on the Observance of Standards and Codes* (Corporate Governance Country Assessment – Malaysia, July 2012) <http://documents.worldbank.org/curated/en/216211468088741775/Malaysia-Report-on-the-Observance-of-Standards-and-Codes-ROSC-corporate-governance-country-assessment>; Pascoe and Rachagan, above n 14, 94.

[33] Evidence of this is reflected in the observations by scholars studying the leximetric time series data that the indicators were 'non-stationary'. They noted that they were 'liable to move persistently away from benchmark values in response to external shocks'; John Buchanan, Dominic Heesang Chai and Simon Deakin, 'Empirical Analysis of Legal Institutions and Institutional Change: Multiple-methods Approaches and their Application to Corporate Governance Research' (2014) 10 *Journal of Institutional Economics* 1, 12–13.

[34] This has been described as the 'hand of the past … exert[ing] a continuing influence upon the shape of the present'; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) 33.

value for future legal development. Likewise, it does not perceive the process of evolution as leading towards any predetermined or more advanced state.

** ** ** **

It follows, that the first central research questions is:

What is the character of Malaysian shareholder protection law?

In the thesis, the character of shareholder protection refers to its content, protective strength and effectiveness.

In order to answer the above question, the following sub-questions are considered:

(a) What are the content and protective strength of formal Malaysian shareholder protection law, and how have they evolved over time?

(b) How does the protective strength of Malaysian shareholder protection law compare internationally?

(c) How effective is Malaysian shareholder protection in practice?

The second central research question is:

What are the influences and contextual factors which have shaped the character of Malaysian shareholder protection law?

The sub-questions are:

(a) What are the influences which have contributed to the comprehensiveness and strength of formal Malaysian shareholder protection law?

(b) What are the possible explanations for the gap between formal Malaysian shareholder protection law and its effectiveness in practice?

(c) How do theoretical approaches contribute to the understanding of the manner in which the character of Malaysian shareholder protection has developed?

** ** ** **

This chapter, Chapter 1, introduces the research questions and explains the significance of this research. The chapter also provides an overview of the investigation which will be carried out. Following the introductory chapter, the thesis is divided into three parts.

Part 1 comprises Chapter 2 which details the research methods employed in analysing the first research question, and the theoretical approaches which inform the analysis of the second research question. It details the ways in which qualitative and quantitative methods facilitate insights into different facets of the character of Malaysian shareholder protection, collectively providing a fuller picture. Chapter 2 also explains how the strengths of the various methods compensate for the weaknesses of other methods employed in investigating the research questions. It is important to note that in view of particular circumstances in Malaysia, it was not possible to interview people involved in the development or implementation of Malaysian shareholder protection law.[35] Theoretical approaches which contribute to a more nuanced understanding of the development of law are subsequently examined in Chapter 2. These include theories of legal origin, legal evolution, political economy and transnational harmonisation.

Part 2 of the thesis comprises three chapters which present and examine the data that describes and explains the character of Malaysian shareholder protection. The character of shareholder protection in this thesis refers to the content, protective strength and effectiveness of shareholder protection. Each of these facets is considered in Chapters 3, 4 and 5 respectively.

Chapter 3 considers the content of Malaysian shareholder protection. Legislation, case law, listing rules and codes are sources of regulatory protection for shareholders. These regulations purport to protect shareholders from expropriation of corporate property by directors and other shareholders. This chapter describes the various ways in which the regulations provide formal protection to shareholders. It canvasses regulatory reforms from 1965, the year the first company legislation was enacted after independence, to 31 December 2016.

Chapter 4 examines the protective strength of shareholder protection through a leximetric analysis. It compares the strength of Malaysian shareholder protection from 1965 to 2010 with that of six other countries. The cross-country comparison facilitates an understanding of the strength of Malaysian shareholder protection relative to countries held out by international organisations as models of international standards. It also enables an analysis as to broader trends of similarity with shareholder protection in Australia and UK. Trends in legal change as indicated by the trajectory of Malaysian shareholder protection over the 45 year period form the basis for further analysis in Chapter 6. Chapter 6 considers the extent to which legal origin has influenced the development of Malaysian shareholder protection. It also seeks to identify the mechanisms by which legal origin has influenced the development of Malaysian law.

Chapter 5 considers the operation of Malaysian shareholder protection regulations. While Chapters 3 and 4 focus largely on formal regulations, Chapter 5 considers the effectiveness of

[35] The methods used to investigate the effectiveness of shareholder protection are described in Chapter 2 at pp 11–14 and 18–19.

the regulations in providing shareholders redress when shareholder rights are breached.[36] The chapter considers the ways in which various shareholder protection mechanisms operate. It examines the private and public enforcement of directors' duties. Judicial decisions involving breaches of directors' duties from 2008 to 2015 are analysed. The study reveals that minority shareholders continue to face considerable challenges in obtaining redress through the derivative action despite regulatory reforms. A comparison is made with Australian cases involving shareholders' derivative actions from 2008 to 2015 in order to ascertain whether similar issues are encountered in a comparable common law jurisdiction. The comparison with Australian cases provides insights into the effectiveness of the Malaysian statutory derivative action in facilitating shareholders' redress for breaches of directors' duties.

Scholarly critique examined in Chapter 5 suggests that concentrated shareholding structures impede the effectiveness of shareholder protection regulations in Malaysia. These and other contextual influences which have shaped the character of Malaysian shareholder protection will further be explored in Chapter 6.

Part 3 of this study comprises Chapter 6 which examines the second research question. Chapter 6 draws together the findings from Chapters 3 to 5 on the content, strength and effectiveness of shareholder protection, and analyses them by reference to theoretical approaches which facilitate a more nuanced understanding of legal development. The second research question which examines the contextual factors and influences which have shaped the character of Malaysian shareholder protection law is central to Chapter 6. This chapter considers the influence of legal tradition and transnational harmonisation in shaping the content and strength of formal Malaysian shareholder protection law. It examines the corporate ownership structures which developed as a result of Malaysia's political economy, and considers the implications of these ownership structures in perpetuating the gap between formal law and its effectiveness in practice. Chapter 7 concludes.

[36] The concept of effectiveness in this thesis extends to the ability to safeguard shareholders' interests in situations of potential or perceived expropriation.

PART 1

METHODOLOGICAL APPROACHES

CHAPTER 2

METHODOLOGICAL AND THEORETICAL PERSPECTIVES

This chapter explains the theoretical perspectives and research methods adopted in investigating the research questions outlined in Chapter 1. Part A examines the quantitative and qualitative methods used to explain the character of shareholder protection. Part B details the theoretical perspectives which may usefully be explored to identify possible explanations for the evolution of the character of Malaysian shareholder protection.

The first research objective, which is aimed at describing the character of Malaysian shareholder protection, is examined in Chapters 3 to 5. Chapters 3, 4 and 5 describe the content, strength and operation of Malaysian shareholder protection respectively. According to Buchanan, Chai and Deakin, a combination of qualitative and quantitative methods facilitate a more comprehensive understanding of the complexities inherent in the study of law and related institutions.[37] Qualitative and quantitative methods are used in this thesis to investigate different aspects of the character of shareholder protection, providing a more comprehensive and credible explanation of the character of Malaysian shareholder protection not adequately captured by individual methods. Multiple methods facilitate overarching perspectives while allowing the intricacies of specific situations and causal relationships to be appreciated.[38]

Part A begins by examining the qualitative methods used primarily in analysing the character of Malaysian shareholder protection. It considers the doctrinal analysis used in determining the content of shareholder protection in Chapter 3. It also canvasses socio-legal perspectives which inform the analysis of the operation of shareholder protection in Chapter 5 and contextual influences in Chapter 6. The discussion then turns to a description of the quantitative 'leximetric' method used to measure the strength of shareholder protection in Chapter 4. The strength of a quantitative methodology lies in its ability to provide an understanding of overarching trends. Nevertheless, the manner in which the leximetric method has been used in previous studies exhibits various limitations. Chief among these is the fact that existing studies using the leximetric method focus primarily on formal law and, accordingly, fail to capture the intricacies involved in the implementation of law such as difficulties in enforcement.[39] This thesis seeks to ameliorate this limitation through an examination of how shareholder protection law operates in practice in Chapter 5. Central to the analysis is an examination of judicial decisions on breaches of directors' duties from 2008 to 2015. The analysis draws on descriptive statistics to describe the extent to which shareholders have obtained redress for breaches of directors' duties through the courts as an indication of the regulations' effectiveness. The methods used to examine the content, strength and effectiveness of Malaysian shareholder protection law are summarised in *Table 1* at the end of this chapter.

[37] Buchanan, Chai and Deakin, above n 33, 14.
[38] Ibid.
[39] Anderson et al, 'Evolution', above n 7, 180.

Part B of the present chapter focuses on four theoretical perspectives which inform the analysis of the second research question. The question examines the contextual factors and influences which have shaped the character of shareholder protection law in Malaysia. Chapter 6 draws on the theoretical perspectives to illuminate how Malaysian shareholder protection has developed its particular character. As will be seen in Chapter 3, the habit of looking to other common law countries' regulations suggests the relevance of theories of legal origin, while initiatives towards aligning Malaysian law with international standards indicates the influence of transnational harmonisation. Scholars assert that interaction with specific features of the Malaysian context underpins the regulations' lack of effectiveness. Their assertions resonate with theories of legal evolution and a political economy approach. The theoretical perspectives which inform the analysis of the second research question are summarised in *Table 2* at the end of this chapter.

2.1 Research Methods

2.1.1 *Qualitative Methods*

Much of the data for this thesis is analysed through qualitative methods. These include the interpretation of legal sources through doctrinal analysis. The doctrinal method has been described as involving 'rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary material'.[40] Hutchinson characterises the doctrinal method as qualitative. He points to the selection and weighing of material, and the inductive or deductive reasoning employed, as characteristics of qualitative methods.[41] The perspective adopted is that of an insider to the legal system. The interpretation of authoritative texts is central, although Hutchinson suggests that some understanding of social context is also relevant to doctrinal analysis.[42]

As mentioned in Chapter 1, this study seeks to investigate and describe the character and evolution of Malaysian shareholder protection law. The character of shareholder protection encompasses aspects of the content, strength and effectiveness of the formal regulations. The doctrinal method is especially pertinent in determining the content and objectives of shareholder protection law. Chapter 3 identifies and systematically examines Malaysian shareholder protection law in order to define the nature and extent of protections afforded to shareholders. Malaysian shareholder protection law comprises legislation, case law, listing rules and codes. Hence, in addition to doctrinal analysis of decided cases, Chapter 3 explains the ways in which legislative provisions, listing rules and codes seek to protect shareholders from expropriation of corporate property by those who control companies.

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[40] Council of Australian Law Deans, *CALD Statement on the Nature of Research* (May and October 2005) 3 <http://cald.anu.edu.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>.
[41] Terry C M Hutchinson, *Researching and Writing in Law* (Lawbook Co, 3rd ed, 2010) 37.
[42] Ibid.

In addition to describing the content of Malaysian shareholder protection, Chapter 3 also explains changes in the content of shareholder protection over time. This entails an historical approach which extends beyond a strict doctrinal analysis. Secondary sources such as textbooks, journal articles, parliamentary debates and reports provide insights into the circumstances surrounding various reforms. These sources explain the motivation for the reforms and the sources of law from which the content of reforms were drawn. Scholarly writings facilitate the analysis of assumptions underpinning trends in Malaysian legal development. The approach adopted in analysing secondary sources shifts away from a pure doctrinal method towards a critical perspective premised on socio-legal studies. Nevertheless, the primary aim of Chapter 3 is to ascertain the ways in which the Malaysian regulations provide shareholders formal protection against the misuse of corporate powers by directors and controlling shareholders. Preliminary observations are made on several contextual influences on legal change. However, analysis of the interaction of law and its context is left largely to Chapter 6, which focuses on the influences which have shaped the character and evolution of Malaysian shareholder protection law.

The quest to explain the character of shareholder protection draws from both doctrinal and socio-legal approaches. Formal law and the way in which it operates are both integral aspects of the character of shareholder protection. While the doctrinal method examines formal law primarily from an internal perspective, the law and society approach emphasises the inextricable relation between law and its context. Each of these approaches provides an understanding of different and essential facets of the inquiry. Doctrinal analysis is asserted as being integral to legal research. Its primacy is seen in the pervasive use of doctrinal analysis as a platform for further theoretical or institutional legal research.[43] Until the Asian financial crisis, much of the analysis of Malaysian shareholder protection was doctrinal. Nevertheless, there are limitations to the doctrinal method and its inherent formalism. The gap between law in the books and law in practice, which has become apparent since the crisis, demonstrates the limitations of formalism.

This thesis draws on socio-legal perspectives to analyse the gap between law in the books and law in practice. This approach explains legal phenomena by reference to their context[44] and has commonly been used to examine the operation and impact of law. Likewise, studies have acknowledged that the form of regulations is at times influenced by its context through the processes which shape the law.[45] In contrast with formalism's perception of law as autonomous and, in many cases, monolithic, the socio-legal approach perceives law as 'fluid, pluralistic, contested and subject to often contradictory pressures and influences from both inside and outside its jurisdiction; that it reflects an always unstable diversity of traditions, interests, allegiances, and ultimately values and beliefs'.[46]

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[43] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 105.
[44] Lawrence M Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 763, 763.
[45] Ibid 772.
[46] Roger Cotterrell, 'Culture, Comparison, Community' (2006) 2 *International Journal of Law in Context* 1, 3.

The law and society perspective is pertinent to the analyses in Chapters 5 and 6. Chapter 5 examines the effectiveness of shareholder protection regulations by analysing the extent to which shareholders have been able to enforce their rights, or safeguard their interests, in situations of potential or perceived expropriation. In examining the effectiveness of Malaysian shareholder protection, Chapter 5 draws on several perspectives and methods to provide different snapshots of the situation. Collectively, the findings from various perspectives provide a richer and more complete understanding of the manner and extent to which shareholder protection is enforced. Chapter 5 begins with a broad overview of a range of shareholder protection mechanisms provided for by the regulations, as detailed in Chapter 3. These include shareholders' exercise of voting rights, checks and balances on internal management, enforcement through the court and oversight by regulators. One obvious method of ascertaining the effectiveness of the regulations would have been to carry out interviews among leading lawyers and other people involved in the implementation of Malaysian shareholder protection. However, it was not possible to arrange such interviews and, consequently, the more generalised approach outlined in the present section has been used as a substitute research method.[47]

The discussion canvasses secondary sources to ascertain how these mechanisms function and describes the extent to which shareholders have obtained redress for breaches of shareholder protection, or have otherwise been able to safeguard their interests. Scholarly critique in journal articles and book chapters provide insights into the issues which at times impede effective enforcement of shareholder protection regulations. In considering the manner and extent of enforcement, the literature invariably avers to the people involved in enforcement processes. The literature reflects the perspective underpinning the law and society approach, that law does not operate in a void but is inextricably linked with the context in which it operates, particularly in matters of enforcement.

The analysis of observers' reports on the functioning of a broad range of shareholder protection mechanisms provides a necessary bird's eye view of enforcement. However, there are limitations in relying primarily on anecdotal evidence. This raises the need for empirical evidence based on primary sources. In order to address this need, Chapter 5 conducts an in-depth analysis of judicial decisions on breaches of directors' duties. As we will see in Chapter 3, directors' duties are among the most significant of shareholder protections. The analysis seeks to ascertain the extent to which the company and its shareholders have been able to obtain a remedy for breaches of directors' duties through the courts, adopting a two-pronged approach which covers macro and micro perspectives.

The first part of the analysis draws on descriptive statistics to examine all available Malaysian judicial decisions from 2008 to 2015 involving breaches of directors' duties. In order to better understand the trends in enforcement revealed by the analysis based on descriptive statistics, the discussion draws on doctrinal analysis to examine significant judicial decisions involving applications to bring derivative actions. Doctrinal analysis facilitates an understanding of the

[47] See Chapter 1 p 7.

reasoning that underpins the judicial decisions. The analysis illuminates the manner in which the courts interpreted and applied statutory criteria for granting leave to bring derivative actions. This, in turn, provides insights into trends revealed by the descriptive statistics.

Chapter 5 also examines the public enforcement of directors' duties by the regulators. Sources examined include media reports, media releases and enforcement statistics issued by the regulators. Private and public enforcement in Australia are considered and compared with Malaysian enforcement. The cross-country comparison facilitates insights as to whether the level of enforcement and challenges observed in the Malaysian context are unique to Malaysia or are comparable to other common law countries.

The law and society approach is integral to Chapter 6, which focuses on contextual influences on the development of formal law and the operation of those laws. The literature examined in Chapter 5 refers to issues of political economy, corporate ownership structures and cultural values which affect the way in which shareholder protection regulations are enforced. These issues are explored in more detail in Chapter 6. Chapter 6 investigates the strong links between the state and corporate ownership, and considers the implications of these ownership structures on private and public enforcement of shareholder protection. Both Chapters 5 and 6 review literature obtained through library and internet research. The relevant literature includes journal articles written by scholars and reports of organisations, which include both state and non-state bodies.

Qualitative methods facilitate detailed descriptions which enable the intricacies and complexities of Malaysian shareholder protection to be appreciated. Nevertheless, these investigations are often confined to specific time frames and issues. Quantitative methods, on the other hand, facilitate broad overviews but fail to capture the finer details and subtle nuances. Scholars have advocated the use of multiple methods, emphasising that various methods are often complementary. The strengths of one method may compensate for the weaknesses of another.[48] Multiple sources of data and perspectives facilitate a richer description of complex realities.[49] The mixed method approach provides 'alternative perspectives that, when combined, go further towards an all-embracing vision of the subject than could be produced using a mono-method approach'.[50] Various methods emphasise different aspects of the issue, at times providing a degree of triangulation[51] and, hence, validation.[52] This thesis adopts both qualitative and quantitative methods, recognising that a multiple methods approach facilitates a more comprehensive and credible explanation of the character of shareholder protection.

[48] Martyn Denscombe, *The Good Research Guide* (Open University Press, 4th ed, 2010) 141.
[49] Ibid 62.
[50] Ibid 141.
[51] Triangulation involves the analysis of a research question from multiple perspectives, using various research methods, in order to establish the validity of findings.
[52] Hutchinson, above n 41, 128.

2.1.2 *The Leximetric Method*

Chapter 4 measures the protective strength of formal Malaysian shareholder protection through the quantitative measurement of law known as the 'leximetric' method. The leximetric method has been used to measure and compare the strength of various aspects of corporate law, as well as other legal fields, across countries.[53] The leximetric method is adopted in this thesis to examine overarching aspects of Malaysian shareholder protection which are not facilitated through qualitative analysis alone. Chapter 4 uses the leximetric method to measure the strength of Malaysian shareholder protection from 1965 to 2010. It seeks to place the strength of Malaysian shareholder protection internationally by comparing the Malaysian data with that of six other countries. The leximetric analysis also facilitates an investigation of several other trends which contribute to the analysis of the development of Malaysian shareholder protection law in Chapter 6.

The leximetric data facilitates an analysis as to how closely Malaysian law has followed that of the UK and Australia. Chapter 3 indicates that law reform initiatives have often sought to align Malaysian regulatory standards with those of developed common law countries. Frequent borrowing from other common law countries arguably gives rise to implicit assumptions of considerable similarity between Malaysian law and that of the UK and Australia. Nevertheless, the similarity of Malaysian shareholder protection to that of the UK and Australia has not been verified empirically. The few cross country studies which have included Malaysian shareholder protection are limited in breadth and time.[54] This thesis seeks to address the gap in the literature through a comparison of the strength of Malaysian shareholder protection with that of the UK and Australia. An analysis of the data also allows areas of convergence and divergence with Australian and UK shareholder protection to be ascertained. These trends assist in explaining the relative strength of Malaysian shareholder protection.

Another use of the leximetric method in the literature has been to analyse trends in legal change over time. Scholars have examined the contexts in which legal change occurred in order to ascertain the influences on legal change.[55] Trends in legal change as indicated by the leximetric analysis are further explored in Chapter 6 in order to better understand why Malaysian shareholder protection has developed as it has.

Several versions of the leximetric method have been used in existing studies. This thesis adopts the more comprehensive and robust version of the leximetric method developed and used in the time series studies.[56] The time series studies sought to address methodological concerns

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[53] Priya P Lele and Mathias M Siems, 'Shareholder Protection: A Leximetric Approach' (2007) 7 *The Journal of Corporate Law Studies* 17; Mathias M Siems, 'The Leximetric Research on Shareholder Protection' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 168.
[54] Some of La Porta and his colleagues' studies included Malaysia; Rafael La Porta et al, 'Agency Problems and Dividend Policies Around the World' (2000) 55 *The Journal of Finance* 1; Djankov et al, 'Courts' (2003) *The Quarterly Journal of Economics* 453; Siems' leximetric study of 10 variables over a period of 10 years also examined Malaysian shareholder protection; Mathias M Siems, 'Shareholder Protection Around the World (Leximetric II)' (2008) 33 *Delaware Journal of Corporate Law* 111.
[55] Anderson et al, 'Evolution', above n 7, 187–91.
[56] Lele and Siems, above n 53.

raised in relation to La Porta and his colleagues' (LLSV) earlier leximetric studies.[57] Criticism of LLSV's early methods included the limited number and selection of variables.[58] Limitations of data drawn from law in the books with minimal consideration of functional equivalents were also highlighted. In order to strengthen the robustness of the leximetric method, the Cambridge group[59] substantially increased the number of variables examined. They sought to select variables which were representative of a range of legal traditions and crucial concerns in developing countries.[60] Functional equivalents such as stock exchange rules, default rules, corporate governance and takeovers codes were taken into account. The values given for variables included intermediate values between 0 and 1 to allow varying degrees of shareholder protection to be considered. The data sets have been made publicly available by the authors to enable scrutiny of their studies.[61]

The leximetric method has also been described as numerical comparative law.[62] The strength of this method lies in its ability to facilitate the comparison of large amounts of information which would otherwise be overwhelming. According to Spamann, this method is particularly suited to testing theories which are thought to be applicable to a large number of countries.[63] Nevertheless, the leximetric approach is reductionist, giving rise to several limitations. First, the reduction of legal rights to a numerical value involves subjective judgement. Anderson et al suggest that the effect of this may be alleviated to an extent by subjecting the coding to the scrutiny of several people who are familiar with the law involved.[64] Secondly, the method as used in earlier studies fails to capture the wider context, including non-legal constraints and difficulties in enforcement.[65] Thirdly, the leximetric method assumes that each variable is of equal weight. It does not take into account the greater influence some laws may have in

[57] Early leximetric studies by La Porta and his colleagues examined six variables relating to shareholder protection against expropriation by directors. These protections were the right to vote by proxy, cumulative voting, pre-emptive rights and the deposit of shares prior to general meetings. The variables also involved remedies for oppressed minority shareholders and the percentage of share capital needed to call an extraordinary general meeting. Some studies included a variable for the one share-one vote principle. The empirical studies analysed the laws of 49 countries from English common law, French, German and Scandinavian civil law traditions; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113.

[58] LLSV's selection of the variables was criticised as ad hoc and reflected an Anglo bias; Mathias M Siems, 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al's Methodology' (2005) *International Company and Commercial Law Review* 300; Ralf Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, *Doing Business Reports* and the 'Silence of Traditional Comparative Law' (2009) 57 *American Journal of Comparative Law* 765; Lele and Siems, above n 53, 19-21.

[59] This refers to the Law, Finance and Development research project led by Simon Deakin, John Armour and Ajit Singh from the University of Cambridge and includes the leximetric analysis of shareholder protection by Lele and Siems referred to in n 53; University of Cambridge Judge Business School, *Law, Finance and Development* <https://www.cbr.cam.ac.uk/research/research-projects/completed-projects/law-finance-development/#item-1>.

[60] Lele and Siems, above n 53, 23-5.

[61] University of Cambridge Judge Business School, *Law, Finance and Development (output)* <https://www.cbr.cam.ac.uk/research/research-projects/completed-projects/law-finance-development/#item->.

[62] Michaels, above n 58.

[63] Holger Spamann, 'Large-Sample, Quantitative Research Designs for Comparative Law?' (2009) 57 *American Journal of Comparative Law* 797, 799.

[64] Helen Anderson et al, 'Shareholder and Creditor Protection in Australia: A Leximetric Analysis' (2012) 30 *Company and Securities Law Journal* 360.

[65] Anderson et al, 'Evolution', above n 7, 180.

protecting shareholders from expropriation of corporate property in practice. In recognising the limitations of this method, Spamann suggests that the research design for quantitative methods should be aimed at detecting interesting connections rather than descriptive accuracy.[66]

The Cambridge group's index adopted in this thesis examines 60 shareholder protection variables.[67] Forty-two variables relate to shareholder protection against expropriation by the board and 18 variables relate to protection against other shareholders. The variables examine a broad range of measures aimed at safeguarding shareholders' interests. The variables substantially canvass the ambit of shareholder protections which seek to deter opportunistic behaviour by directors. These variables are examined in more detail in Chapter 4. The leximetric analysis of Malaysian shareholder protection will be compared with the Cambridge group's leximetric analysis of shareholder protection in France, Germany, India, the UK and the US from 1970 to 2005.[68] Anderson et al's Australian data on shareholder and creditor protection from 1970 to 2010[69] will also form part of the international comparison.

The safeguards against expropriation of corporate assets by other shareholders canvassed by the variables are arguably less adequate to the particular needs of Malaysian shareholders. There are 18 variables on protection against other shareholders examined in the time series studies, significantly less than the 42 variables on protection against expropriation of corporate property by directors. Shareholding structures in Malaysia are commonly concentrated, and this gives rise to problems of expropriation by shareholders who control the board of directors. In such circumstances, there is arguably an equivalent or greater need for protection against expropriation by other shareholders. Nevertheless, the time series studies provide the most comprehensive template available to date. The time series studies also provide comparable data which facilitates an international comparison of the strength of Malaysian shareholder protection. Chapter 4 details how the variables are scored, particularly in relation to Malaysian shareholder protection. Some of the template's limitations in addressing the need for protection against other shareholders in the Malaysian context will be discussed in Chapter 4.

Despite measures taken by the Cambridge group to address the limitations of earlier leximetric studies, several shortcomings remain. As discussed, these include minimal consideration of the wider context and enforcement difficulties. Given the widespread criticisms of Malaysian shareholder protection as 'form over substance', these limitations are pertinent to the present study. In order to ameliorate the limitations of the leximetric analysis, Chapter 5 examines the effectiveness of Malaysian shareholder protection in its broader societal context.

Critics have pointed out that some phenomena cannot be discerned through quantitative analysis. Buchanan, Chai and Deakin posit that leximetric studies should be combined with qualitative methods such as descriptive statistics and documentary analysis. They reason that:

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[66] Spamann, 'Large-Sample', above n 63, 799.
[67] Lele and Siems, above n 53, 30.
[68] Ibid.
[69] Anderson et al, 'Shareholder and Creditor Protection in Australia', above n 64.

> It is not only the limitations of quantitative data on institutions that necessitate qualitative approaches, but also the nature of causal processes at work in institutional change. If institutional phenomena are seen as the outcome of evolutionary processes that are path-dependent and contingent on local factors, it becomes important to identify the role of specific features of social contexts on shaping outcomes.[70]

The complementarity between qualitative and quantitative methods is likewise observed by Milhaupt who argues that quantitative research is enriched when accompanied by thick descriptions which enable the findings to be contextualised.[71] Combining the leximetric method with a qualitative analysis, grounded in doctrinal analysis, descriptive statistics and analysis of secondary literature, of how shareholder protection law operates in the Malaysian context, mitigates the limitations of the quantitative leximetric analysis. The use of multiple methods facilitates a clearer understanding of complex interactions between transplanted law and contextual influences which have given Malaysian shareholder protection its particular character.

While some have queried the compatibility of quantitative and qualitative methods on grounds of their contrasting epistemological positions, others view the methods as autonomous and complementary.[72] Qualitative research has been used to 'provide the context for understanding broad-brush quantitative findings'.[73] Multiple methods have the additional benefit of allowing the assumptions underpinning quantitative methods to be tested.[74]

2.1.3 *Descriptive Statistics*

Chapter 1 highlighted the need for answers to the problem underpinning the common perception that Malaysian shareholder protection is 'form over substance'. Chapter 5 investigates the allegations that Malaysian shareholder protection lacks effectiveness in practice. It examines the evidence on how shareholder protection operates. An important characteristic of effective regulation relates to its enforcement. In the context of shareholder protection, the effectiveness of enforcement is measured by reference to the ability of shareholders to obtain redress when the regulations are breached.

The descriptive statistics method entails the collection and organisation of statistical data which may be relevant to provide perspectives on particular questions at hand. Chapter 5 draws on descriptive statistics to ascertain the effectiveness of formal shareholder protection through an analysis of judicial decisions on breaches of directors' duties. Descriptive statistics enable large amounts of data to be simplified and described in a way that is easily understood.[75] The

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[70] Buchanan, Chai and Deakin, above n 33, 14.
[71] Curtis J Milhaupt, 'Beyond Legal Origin: Rethinking Law's Relationship to the Economy - Implications for Policy' (2009) 57 *American Journal of Comparative Law* 831, 841.
[72] Alan Bryman, *Social Research Methods* (Oxford University Press, 3rd ed, 2008) 606.
[73] Ibid 620.
[74] Ibid.
[75] William M K Trochim, *Research Methods Knowledge Base* (Cornell University, 1999) 263.

method is used to capture and report phenomena which occur over a period of time. Descriptions are primarily quantitative but differ from the leximetric method in that the wider socio-economic and historical context of the phenomena form an essential part of the analysis. Winkler asserts that 'the original purposes for which business, economic and social statistics are produced, is to scan society and its changes, and to report its findings.' He further posits that the task of descriptive statistics is to 'scan such elusive, widely spread-out social and economic phenomena, and make them "visible."'[76]

Chapter 5 analyses reported and unreported judicial decisions between 2008 and 2015 involving breaches of directors' duties. Directors' duties are among the key regulatory provisions that protect shareholders from expropriation of corporate property.[77] The derivative action plays a significant role in allowing shareholders to enforce directors' duties particularly when the board of directors is controlled by the wrongdoers.[78] In such circumstances, the company is often unwilling to bring proceedings for breaches of duties. Shareholders may apply to institute a derivative action on behalf of the company with leave of the court.[79] Given the importance of the derivative action to minority shareholders, an essential part of the descriptive statistics analysis is to consider judicial decisions involving shareholders' derivative actions to enforce breaches of directors' duties.

The analysis of judicial decisions on breaches of directors' duties covers a period of eight years from 2008 to 2015. As the statutory derivative action was introduced in 2007, the year 2008 is thought to be an appropriate starting point for the study. The questions examined in relation to the judicial decisions are set out in Chapter 5. In summary, the study aims to determine the extent to which shareholders have been able to obtain a remedy where breaches of directors' duties are alleged. It determines the proportion of cases in which shareholders were successful and identifies common reasons why they were unsuccessful. The study seeks to identify features which may have contributed to better outcomes in litigation. It considers who the litigants were, and whether some types of litigants were more successful in obtaining redress for wrongs than others. In addition, the study canvasses whether the level of enforcement differs between private and public companies. Challenges faced by litigants in seeking to enforce shareholder rights are highlighted.

Chapter 3 notes that the statutory derivative action was introduced as a means of addressing the difficulties associated with bringing a common law derivative action. Chapter 5 considers the impact of the statutory derivative action by comparing the annual number of reported and unreported judicial decisions involving derivative actions from 2008 to 2015 with the number of decisions on derivative actions annually from 2000 to 2007. It considers whether the statutory derivative action has resulted in a higher rate of success for derivative actions. The analysis considers the grounds for the courts' decisions and determines whether the intended

[76] Othmar W Winkler, *Interpreting Economic and Social Data: A Foundation of Descriptive Statistics* (Springer, 2009) 63.
[77] See Chapter 3 p 60–61.
[78] Ian M Ramsay and Benjamin S Saunders, 'Litigation by Shareholders and Directors: An Empirical Study of the Australian Statutory Derivative Action' (2006) 6 *Journal of Corporate Law Studies* 397, 409.
[79] *Companies Act 1965* ss 181A–181B.

purpose of the statutory derivative action, which was to facilitate better shareholder access to the derivative action, has been realised. A comparison with an analysis of Australian judicial decisions provides further insights into the effectiveness of the Malaysian provisions.

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In summary, Section 2.1 of the chapter examines the methods adopted in describing and explaining the character of Malaysian shareholder protection. Three aspects of the character of shareholder protection are examined, namely the content, strength and effectiveness of Malaysian shareholder protection. The content of shareholder protection is described through a doctrinal analysis of primary legal sources in Chapter 3. The protective strength of Malaysian shareholder protection is measured through the leximetric method in Chapter 4. The strength of Malaysian shareholder protection is placed internationally through a comparison with leximetric data from six other countries. Trends in legal change over time as indicated by the leximetric analysis will further be examined in Chapter 6. These trends facilitate an understanding of the manner and extent to which legal origin has shaped the character of Malaysian shareholder protection.

The third aspect of the character of shareholder protection relates to the issue of effectiveness, which is considered in Chapter 5. The way in which shareholder protection operates in Malaysia is examined through descriptive statistics and doctrinal analysis of judicial decisions, as well as an analysis of scholarly literature and reports. Chapters 5 and 6 adopt the law and society approach, examining law's interaction with its context. Chapter 6 further investigates contextual factors and influences which have shaped the character of Malaysian shareholder protection. The chapter brings together the findings of earlier chapters and analyses them by reference to theoretical approaches examined below.

2.2 Theoretical Perspectives

This section examines the theoretical perspectives which inform the analysis of the contextual factors and influences which have shaped the character of Malaysian shareholder protection law. The discussion begins by examining the legal origin theories and transnational harmonisation. These approaches explain the shape of formal law. Put more candidly, they explain why law looks the way it does but give minimal consideration to issues of implementation. The discussion then turns to the theories of legal evolution and political economy which consider influences on the shape of formal law and its operation.

2.2.1 *Legal Origin Theories*

The analysis of the content of shareholder protection in Chapter 3 reveals a pattern of drawing from the regulations of other common law countries. Hence, legal tradition would appear to have some significance in explaining the evolution of Malaysian shareholder protection. This part canvasses the legal origin theories which emphasise the influence of legal tradition on legal

development. Two strains of this thesis are considered. These are the 'strong form' legal origin thesis and the 'weak form' legal origin thesis.

a. Strong form legal origin hypothesis

Proponents of the strong form of the legal origin theory maintain that legal origin exerts a persistent and powerful influence over the infrastructure of countries' legal systems. Fundamental differences in legal origin are thought to persist over centuries. This path dependence is attributed to the incorporation of distinctive institutions, beliefs and ideologies into the legal and political infrastructure.[80]

The legal origin hypothesis posits that the differences among legal families influence their regulatory styles. The regulatory styles associated with legal traditions are thought to have a strong influence on the quality of countries' laws.[81] Differences between common law and civil law traditions are the main focus of the legal origins theory, with civil law being further divided into French, German, Scandinavian and socialist origins. LLSV argue that the distinguishing characteristics of common law's regulatory style lie in its emphasis on private solutions and judicial independence. These characteristics are posited to facilitate the protection of private property from expropriation by the state. LLSV assert that there is a tendency in civil law systems towards extensive government ownership and regulation. In contrast with common law's focus on dispute resolution, civil law systems are centred on policy implementation.

The differences in regulatory style are posited to affect the quality of investor protection which in turn influences financial outcomes. LLSV's empirical studies indicate that English common law countries have stronger shareholder protection and better financial outcomes than French civil law countries.[82] LLSV assert that common law's success in facilitating financial outcomes lies in its emphasis on dispute resolution and private contracting. These, in turn, promote market-friendly outcomes and the development of markets.[83] In contrast, the tendency in civil law countries towards state-directed outcomes has been associated with an increased risk of corruption and an unofficial economy.[84] Common law's success in facilitating financial outcomes is also attributed to judicial flexibility in applying broad principles such as fiduciary duties.[85] Such broad standards are posited to be more effective than specific rules in deterring the misappropriation of corporate property.

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[80] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285.
[81] Ibid.
[82] Rafael La Porta et al, 'Legal Determinants of External Finance' (1997) 52 *The Journal of Finance* 1131. The range of financial outcomes examined included stock market capitalisation, dividend payments, corporate valuations and the dispersion of corporate ownership; Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 *The Journal of Finance* 471; La Porta et al, 'Agency Problems and Dividend Policies', above n 54.
[83] Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'What Works in Securities Laws?' (2006) 61 *The Journal of Finance* 1.
[84] Edward Glaeser and Andrei Shleifer, 'Legal Origins' (2002) 117 *The Quarterly Journal of Economics* 1193.
[85] La Porta et al, 'Economic Consequences', above n 80, 300.

Several channels through which legal origin exerts an influence on law and financial outcomes have been identified in the literature. Scholars assert that judicial decision-making on a case by case basis in common law systems facilitates adaptation to changing circumstances, terming it as the 'adaptability channel'.[86] Civil law, on the other hand, is alleged to be more rigid due to its reliance on codes which are less amenable to change. The 'judicial channel' posits that common law's value of judicial independence provides better security for private property rights from expropriation by the state.

The influence of the legal origin theory is reflected in the policies of influential international organisations.[87] The World Bank's Doing Business rankings and reforms advocated by the Asian Development Bank and the International Monetary Fund during the Asian financial crisis were premised on the claims of the legal origin thesis.[88] Since 1997, Malaysia has substantially reformed its shareholder protection regulations in conformity with these international standards.[89]

Nevertheless, a substantial body of literature disputes the claims of the law and finance literature on methodological and conceptual grounds. Criticisms of LLSV's leximetric analysis have been canvassed earlier in Part A. LLSV's description of the civil law regulatory style is thought to be over-stylised and inaccurate. Secondly, legal origin is posited to have a time-invariant effect despite its reliance on cross-sectional data. Third, scholars dispute the assumption that the correlation between legal families and shareholder protection equates with causation.

Scholars have pointed out that the description of legal families is over-stylised to the point of inaccuracy. They argue that the differences between common law and civil law are exaggerated,[90] and a few unrepresentative features of the French legal system are highlighted in the legal origin literature.[91] They dispute the assumption that civil law judges do not interpret law.[92] Conversely, shareholder protection in common law countries is frequently codified,

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[86] Thorsten Beck, Asli Demirguc-Kunt and Ross Levine, 'Law and Finance: Why Does Legal Origin Matter?' (2003) 31 *Journal of Comparative Economics* 653.

[87] Ruth V Aguilera and Cynthia A Williams, '"Law and Finance": Inaccurate, Incomplete and Important' (2009) *Brigham Young University Law Review* 1413; John Ohnesorge, 'Legal Origins and the Tasks of Corporate Law in Economic Development: A Preliminary Exploration' (2009) *Brigham Young University Law Review* 1619.

[88] The Doing Business ranking methodology has been informed by the literature espousing the strong form legal origin thesis; Doing Business, *Methodology* <http://www.doingbusiness.org/methodology>. Reforms advocated for countries affected by the Asian financial crisis reflected the influence of the legal origins thesis; World Bank, *The Road to Recovery*, above n 11, 63.

[89] For instance, country rankings by their 'ease of doing business' have influenced Malaysian economic policy; National Economic Advisory Council, *New Economic Model for Malaysia: Part 1 Strategic Policy Directions*, (2010). Likewise, corporate governance reforms after the Asian financial crisis were influenced by international standards; Finance Committee, above n 9, 59.

[90] Ulrike Malmendier, 'Law and Finance "at the Origin"' (2009) 47 *Journal of Economic Literature* 1076.

[91] Catherine Valcke, 'French Response to the World Bank's Doing Business Reports' (2010) 60 *University of Toronto Law Journal* 197.

[92] Benedicte Fauvarque-Cosson and Anne-Julie Kerhuel, 'Is Law an Economic Contest? French Reactions to the *Doing Business* World Bank Reports and Economic Analysis of the Law' (2009) 57 *American Journal of Comparative Law* 811.

although LLSV suggest that these are codifications of judicially developed principles.[93] French scholars posit that there is more judicial development of French law than the legal origin theory assumes.[94] Serpoul argues that the oppressed minorities mechanism developed on the basis of the 'majority abuse' theory is one of several examples of French judge made law.[95] He argues that the adaptability of French law is exemplified in such judicial decisions.

Associate Professor Puchniak's analysis of the derivative action in Asia's leading economies likewise refutes several claims of the strong form legal origin thesis. His study indicates that judicial decisions accounted for the development of the derivative action in civil law countries, while their common law counterparts relied on statute.[96] Contrary to LLSV's assertion that common law produces stronger shareholder protection, Puchniak's study demonstrates that the derivative action facilitated better protection for shareholders in civil law countries than common law jurisdictions.[97]

The classification of legal families adopted in the law and finance literature has been criticised as over-simplistic. Legal systems in many countries are influenced by more than one legal tradition.[98] Ramseyer cites examples of countries, such as Japan, which have borrowed from a number of legal systems across common and civil law traditions.[99] In observing the dearth of discussion on Southeast Asia in the law and finance literature, Harding remarks that legal families make little sense in this region, given their syncretic mix of customary law, Islamic law and European law.[100]

Scholars have queried the claim of path dependence persisting over centuries. Ramseyer suggests that path dependence is less fixed than the legal origins theory assumes, given the ability of countries to switch legal families.[101] Likewise, Whytock points out the contradiction in the use of the legal origin theory as a basis for policy advocating regulatory reform when the theory asserts strong time-invariant path dependence. He argues that if countries can change their rules to ameliorate the effects of legal origin, path dependence must be less fixed than posited.[102]

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[93] La Porta et al, 'Economic Consequences', above n 80, 310.
[94] Nuno Garoupa and Carlos Gomez Liguerre, 'The Syndrome of the Efficiency of the Common Law' (2011) 29 *Boston University International Law Journal* 287.
[95] Frederic Serpoul, *Shareholder Protection and Stock Market Development in France (1852-2007)* (2009) Social Science Research Network <http://ssrn.com/abstract=1529271>.
[96] Dan W Puchniak, 'The Derivative Action in Asia: A Complex Reality' (2012) 9 *Berkeley Business Law Journal* 1.
[97] Ibid 13–14.
[98] Fauvarque-Cosson and Kerhuel, above n 92; Kensie Kim, 'Mixed Systems in Legal Origins Analysis' (2010) 83 *Southern California Law Review* 693.
[99] J Mark Ramseyer, 'Mixing-and-Matching Across (Legal) Family Lines' (2009) *Brigham Young University Law Review* 1701.
[100] Andrew Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51(1) *The International and Comparative Law Quarterly* 35, 49.
[101] Ramseyer, above n 99.
[102] Christopher A Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2009) *Brigham Young University Law Review* 1879.

Critics of the law and finance literature have underscored the inadequacy of cross-sectional data as a basis for a theory that proposes a time-invariant legal origin effect.[103] Many of the empirical studies which underpin the early law and finance literature originated in the 1990s. Scholars examining financial development have found that the differences between legal traditions as posited by LLSV did not exist at the beginning of the 20th century. Rajan and Zingales found that French stock market capitalisation was close to double that of the US in 1913.[104] Likewise, the main continental European countries were more financially developed than the US then.[105] Musacchio asserts that in 1900 and 1913, shareholder protection across legal families converged.[106] Scholars also question the accuracy of LLSV's empirical findings. Spamann's replication of the antidirector rights index revealed substantial coding inconsistencies.[107] The results of Spamann's reconstructed index did not support the finding of better shareholder protection in common law countries.[108]

The question as to the cause of the differences among legal families has also been disputed. While LLSV attribute the differences to the effect of legal origins, other scholars have suggested that other influences may be responsible for these trends.[109] One of the main alternative theories argues that politics explains these differences. Rajan and Zingales attribute the 'great reversals' in financial development across legal origins in the early twentieth century to the influence of politics.[110] Roe posits that devastation through military occupation in core civil law countries in the twentieth century provides a more cogent explanation for their differences from common law countries.[111] His comparison of common law and civil law countries in the wealthy west indicated that common law countries did not experience the extent of devastation suffered by civil law countries. In basing his analysis on political economy, Roe argues that colonial legacy and political instability may have similar effects on

[103] John Armour et al, 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' (2009) 6 *Journal of Empirical Legal Studies* 343, 344.
[104] Raghuram G Rajan and Luigi Zingales, 'The Great Reversals: The Politics of Financial Development in the Twentieth Century' (2003) 69 *Journal of Financial Economics* 5.
[105] Frederic Serpoul, above n 95. However, Serpoul's study of stock market development in the late 19th and early 20th centuries suggest that French stock markets were never consistently as developed as that of the UK and US.
[106] Aldo Musacchio, 'Do Legal Origins Have Persistent Effects Over Time? A Look at Law and Finance Around the World c.1900' (Harvard Business School, December 2007).
[107] Holger Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23(2) *The Review of Financial Studies* 467.
[108] Holger Spamann, 'On the Insignificance and/or Endogeneity of La Porta et al's 'Anti-Director Rights Index' under Consistent Coding' (Discussion Paper No. 7, Harvard Law School, 2006) 1.
[109] For instance, Lipton disputes the law and finance thesis based on his study of the evolution of the joint stock company in England. He demonstrates that financial development came about as a result of commercial practice rather than legal rules; Phillip Lipton, *The Development of the Separate Legal Entity and Limited Liability Concepts in Company Law* (PhD Thesis, Monash University, 2011) 372–3.
[110] Rajan and Zingales, above n 104.
[111] Mark J Roe, 'Legal Origins, Politics and Modern Stock Markets' (2006) 120 *Harvard Law Review* 460.

institutions in developing countries. Colonial experience[112] and language[113] have been identified as other potential contributions to the differences between legal families.

The criticisms outlined above underscore the limitations of LLSV's claims in explaining legal development. The strong form thesis' focus on formal law, while neglecting to consider its implementation,[114] further limits the efficacy of the legal origin thesis in elucidating the evolution of Malaysian shareholder protection. The legal origins theory fails to consider the role of informal constraints such as cultural norms or reputation in regulating shareholder protection.[115] Milhaupt highlights the difference between formal law and the way in which it functions in its specific context.[116] Although a significant gap between law in the books and law in practice has been documented particularly in East Asia,[117] there is an absence of any discussion of this in the law and finance literature. Nevertheless, LLSV's leximetric studies and hypothesis on the influence of legal tradition have formed the basis for further studies which have led to the development of the weak form legal origin hypothesis. As will be seen in Chapter 6, the weak form thesis is significant in explaining the development of Malaysian shareholder protection law.

b. Weak form legal origin hypothesis

The weak form legal origin thesis emerged from the time series studies by the Cambridge group. The time series studies were aimed at addressing some of the criticisms levelled at the methods underpinning the strong form thesis. The methods adopted in the time series studies are outlined earlier in this chapter. The results of the Cambridge group's 35 year study of five countries refute LLSV's claim that legal origins determine the strength of a country's shareholder protection.[118] First, shareholder protection in common law countries was not stronger than civil law countries. Secondly, there were no distinct time-invariant differences between legal origins. All six countries had an overall increase in shareholder protection, with the US having the lowest shareholder protection at the end of the period. A second data set which covered the period 1995 to 2005 examined 10 variables on shareholder protection in 20 countries. Although shareholder protection was stronger in common law countries, it increased

[112] Daron Acemoglu, Simon Johnson and James A Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *The American Economic Review* 1369; Ronald J Daniels, Michael J Trebilcock and Lindsey D Carson, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (2011) 59 *American Journal of Comparative Law* 111; Daniel Klerman et al, 'Legal Origin or Colonial History' (2011) 3 *Journal of Legal Analysis* 379.
[113] Holger Spamann, 'Contemporary Legal Transplants - Legal Families and the Diffusion of (Corporate) Law' (2009) *Brigham Young University Law Review* 1813; Siems, 'Leximetric II', above n 54, 145.
[114] John W Cioffi, 'Legal Regimes and Political Particularism: An Assessment of the "Legal Families" Theory from the Perspectives of Comparative Law and Political Economy' (2009) *Brigham Young University Law Review* 1501.
[115] Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn Journal of International Law* 983.
[116] Milhaupt, above n 71, 844.
[117] Ohnesorge, 'Legal Origins and the Tasks of Corporate Law in Economic Development', above n 87, 1630; Zhuang et al, above n 11.
[118] Lele and Siems, above n 53, 44.

at a faster rate in civil law countries. The findings of the second data set reflect a trend towards convergence across legal traditions.[119]

Armour et al propose that the influence of legal origins on legal evolution is not as strong as LLSV posit. The infrastructure of legal systems is not as impervious to the influence of the economy as claimed. According to them, the 'legal infrastructure' comprises:

> The meta-level rules, norms and practices which determine, in a given national context, the mechanisms for law-making and dispute resolution, the competencies of legislatures and courts, and the conception of the role of government in the economy and society, among other things.[120]

This broad concept of legal infrastructure extends beyond formal legal institutions, and acknowledges the influence of societal perceptions, norms and practices on the legal system. Apart from legal origins, legal development may be affected by political, economic and social institutions as well as forces towards convergence. Armour et al argue against LLSV's claim that legal origins are exogenous, arguing that they are at least in part endogenous. They posit that the co-evolution of legal institutions with economic and political institutions is more plausible than the one-directional influence flowing from the legal system to the economy.[121]

Deakin et al posit that the differences between legal traditions may be explained by reference to historical influences.[122] More specifically, the differences were the result of complementarities between legal and economic institutions at the time of industrialisation.[123] Subsequent institutional lock in and diffusion of legal systems through colonisation resulted in the transplantation of these legal institutions across countries. The flow of ideas within legal families is facilitated primarily through 'affinities of legal thought and language'.[124] Path dependence is viewed as an 'efficient adaptation to the previously transplanted legal infrastructure'.[125]

Studies have indicated that pressures towards convergence with international standards, transnational harmonisation, economic, political and other endogenous factors may at times

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[119] Siems, 'Leximetric II', above n 54, 145.
[120] John Armour et al, 'Law and Financial Development: What We are Learning from Time-Series Evidence' (2009) *Brigham Young University Law Review* 1435, 1441.
[121] Ibid 1435.
[122] Simon Deakin, Priya Lele and Mathias Siems, 'The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes' (2007) 146 *International Labour Review* 133, 155.
[123] Beth Ahlering and Simon Deakin, 'Labor Regulation, Corporate Governance and Legal Origin: A Case of Institutional Complementarity?' (2007) 41 *Law & Society Review* 865, 903; Simon Deakin, 'Legal Origin, Juridical Form and Industrialization in Historical Perspective: The Case of the Employment Contract and the Joint-Stock Company' (2009) 7 *Socio-Economic Review* 35, 60.
[124] John Armour et al, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection' (2009) 57 *American Journal of Comparative Law* 579, 598.
[125] Juan C Botero et al, 'The Regulation of Labour' (2004) 119(4) *The Quarterly Journal of Economics* 1339, 1346.

have a stronger influence on legal development than legal origins.[126] Mitchell et al found that the evolution of Australian labour law was more consistent with the 'timing of stages of economic development, perhaps the type of labour market and industry structure' and political influences than legal origins.[127] Armour and Lele examined the effect of legal origins and political influences on the development of investor protection in India. They found that judicial decision-making and independence had a minimal influence on legal development. Political theories provided more plausible explanations for the development of Indian investor protection than legal origins.[128] Their findings also refute the adaptability and judicial channels posited by LLSV.

The 'weak form' legal origin effect is not anticipated to have any significant influence on economic outcomes, being one of several potential influences on legal development. This proposition is also consistent with the empirical finding that shareholder protection generally did not have any long-run influence on stock market development.[129] Instead, shareholder protection was negatively correlated with the number of listed companies,[130] suggesting that excessive shareholder protection may be counter-productive, increasing the cost of listing.[131]

LLSV's hypothesis that the common law regulatory style produces better financial outcomes has also been refuted in other studies. Ohnesorge underscores the economic success of Northeast Asian civil law countries despite their non-conformity with the legal origins theory.[132] In line with Milhaupt, he observes that while there was formal shareholder protection in these countries, the lack of enforcement resulted in poor minority shareholder protection.[133] LLSV's claim is premised on capital market development as a means of achieving economic progress. Dispersed share ownership and strong shareholder protection are regarded as hallmarks of progressive and successful economies. In contrast, corporate governance in Northeast Asia is characterised by informal networks, dominant controlling shareholders and reliance on bank finance rather than capital markets.

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[126] Mathias Siems, 'Convergence in Corporate Governance: A Leximetric Approach' (2010) 35 *The Journal of Corporation Law* 729; Mathias Siems, 'The Web of Creditor and Shareholder Protection in 25 Countries: A Comparative Legal Network Analysis' (2010) 27 *Arizona Journal of International and Comparative Law* 747.
[127] Richard Mitchell et al, 'The Evolution of Labour Law in Australia: Measuring the Change' (2010) 23 *Australian Journal of Labour Law* 61, 87.
[128] John Armour and Priya Lele, 'Law, Finance, and Politics: The Case of India' (2009) 43 *Law & Society Review* 491, 520.
[129] Prabirjit Sarkar and Ajit Singh, 'Law, Finance and Development: Further Analyses of Longtitudinal Data' (2010) 34 *Cambridge Journal of Economics* 325, 337.
[130] Sonja Fagernas, Prabirjit Sarkar and Ajit Singh, 'Legal Origin, Shareholder Protection and the Stock Market: New Challenges from the Time Series Analysis' in K Gugler and B Yurtoglu (eds), *The Economics of Corporate Governance and Mergers* (Edward Elgar, 2008) 20.
[131] Simon Deakin, 'Corporate Governance, Finance and Growth: Unravelling the Relationship' (2010) *Acta Juridica* 191.
[132] John K M Ohnesorge, 'Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience' (2007) 28 *University of Pennsylvania Journal of International Economic Law* 219.
[133] Likewise, Pistor and Wellons' analysis of law and economic development in Asia found that formal law had minimal effect on corporate governance, particularly among state-owned enterprises; Katharina Pistor and Philip A Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995* (Oxford University Press, 1999) 134.

Northeast Asian countries also provide an interesting contrast to the hypothesis of the role of the state in economic development. The legal origins theory views the interventionist state as being negatively correlated with economic outcomes. Nevertheless, the governments of Northeast Asian countries were authoritarian, engaged in legal instrumentalism and restricted judicial independence.[134] The corporatist state which takes an active stance in economic development, both in terms of policy and the ownership and control of state-owned enterprise, is prevalent in various parts of Asia.[135] Nee and Opper note the prevalence in East Asia of family-owned corporations with close ties with the state.[136] Despite state involvement, corporations played a central role in facilitating economic growth in South Korea, Taiwan and Japan. The law and finance literature neglects to consider the role of the corporatist state in economic development.[137]

Scholars have suggested that the measures of economic success relied on in the law and finance literature reflect the leanings of Anglo-American free-market economies. Aguilera and Williams assert that financial outcomes such as capital market development are not universal measures of economic health.[138] Unemployment levels, the extent of informal economies, poverty rates and the equality of income distribution provide alternative measures of economic benefits. Sachs' survey indicated European civil law countries fared better on poverty and employment rates than free market common law countries such as Australia, Canada, New Zealand, the UK and the US.[139]

The experience of Northeast Asia indicates that economic development is also achievable in ways other than that envisaged by LLSV. Ohnesorge advocates a broader perspective of the means through which economic development may be facilitated, with a range of alternative options being presented to developing countries rather than reliance on a single method proposed by the legal origins theory.[140] His view resonates with Armour's suggestion that civil law institutions may indeed be suited to their economic institutions.[141] Hence, the path to economic development may vary in different contexts.

In summary, the weak form legal origin thesis asserts that legal origin is one of several potential influences on legal development. Accordingly, it is not anticipated to have any significant influence on financial outcomes. Armour et al posit that legal institutions co-evolve with other institutions in their context.[142] Mitchell et al and Anderson et al's studies of Australian legal development similarly find that that various contextual influences have stronger explanatory

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[134] Ohnesorge, 'Developing Development Theory', above n 132, 278.
[135] Pistor and Wellons, above n 133, 52, 114; Kanishka Jayasuriya, 'Corporatism and Judicial Independence within Statist Legal Institutions in East Asia' in Kanishka Jayasuriya (ed) *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (1999) 147.
[136] Victor Nee and Sonja Opper, 'Bureaucracy and Financial Markets' (2009) 62 *Kyklos* 293.
[137] Daniel D Sokol, 'Competition Policy and Comparative Corporate Governance of State-Owned Enterprises' (2009) *Brigham Young University Law Review* 1713.
[138] Aguilera and Williams, above n 87.
[139] Jeffrey D Sachs, *Common Wealth: Economics for a Crowded Planet* (The Penguin Press, 2008).
[140] Ohnesorge, 'Developing Development Theory', above n 132, 303.
[141] Armour et al, 'How Do Legal Rules Evolve?', above n 124, 597.
[142] Armour et al, 'Law and Financial Development', above n 120.

power for the shape of Australian law than legal origin.[143] Deakin et al argue that economic, political, social and transnational influences may at times be stronger determinants of legal change than legal origin. They posit that the strength of legal origin vis-à-vis other influences differs in accordance with the context in which legal evolution occurs. Hence, they assert that 'the strength of legal origins cannot be assumed *a priori*'.[144] Empirical analysis is required in order to ascertain the effect of legal origin in each situation. Armour et al and Deakin et al's perspectives that legal development is affected by contextual influences resonate with the broader theoretical discourse on legal evolution. These theories are discussed in greater detail later in the chapter.

Chapter 3 demonstrates that Malaysian shareholder protection law has been modelled substantially on the laws of other common law countries and, in particular, on Australian and UK law. This resonates with the claims of the legal origin theories that there is a degree of path dependence in accordance with inherited legal tradition in the development of a country's laws. Nevertheless, the strong and weak forms of the legal origin thesis differ as to the mechanisms by which legal origin influences legal development, and the strength of that influence. Chapter 6 analyses patterns in the growth of Malaysian shareholder protection, as revealed by the leximetric analysis in Chapter 4, and examines the context in which legal change has occurred. The analysis then considers the extent to which the strong and weak form legal origin hypotheses may explain the development of Malaysian shareholder protection law.

2.2.2 *Transnational Harmonisation*

In recent years, pressure towards transnational harmonisation of laws is thought to have had a significant impact on the shape of formal law across countries. Proponents of the weak form legal origin thesis concede that the legal origin effect is at times outweighed by forces towards transnational harmonisation.[145] In particular, the Cambridge group's second data set of 10 shareholder protection variables in 20 countries from 1995 to 2005 indicated that the differences between legal traditions decreased over time. They attribute the trend towards convergence largely to transnational harmonisation.[146] Likewise, Kraakman et al posit that globalisation and transnational harmonisation have influenced the shape of corporate law.[147] They assert that the rise in international institutional investors, particularly from the US, has facilitated an increase in convergence in corporate ownership structures and formal shareholder protection law internationally.[148]

The trend towards the international standardisation of shareholder protection is the result of the interplay of several factors. The Organisation for Economic Cooperation and Development (OECD)'s principles provide a readily available model which facilitates the process of

[143] Mitchell et al, above n 127, 87; Anderson et al, 'Evolution', above n 7, 188.
[144] Deakin, Lele and Siems, above n 122,133.
[145] Armour et al, 'How Do Legal Rules Evolve?', above n 124, 628.
[146] Mathias M Siems, *Convergence in Shareholder Law* (Cambridge University Press, 2008) 226–7.
[147] Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 3rd ed, 2017), 26.
[148] Ibid.

harmonisation. The model principles also set a standard by which the quality of shareholder protection across countries may be gauged. Pressure to conform to these 'international standards' has been brought about on several fronts.

Among the main reasons for adopting international standards is the competition for capital from foreign investors.[149] The increasing internationalisation of capital markets has intensified the competition for foreign capital. In the race for capital, controlling shareholders have been willing to accept investor-friendly reforms as a trade-off for the increased potential to raise capital.[150] Rating agencies commonly use the OECD's principles as a basis for ranking companies.[151] This contributes to the pressure to conform to these standards. In addition to the competition for foreign capital, international financial organisations have played a significant role in the shift towards transnational harmonisation.[152] Additional impetus towards transnational harmonisation has come from regional integration.[153]

As will be seen in Chapter 3, the Malaysian experience after the Asian financial crisis illustrates the link between regulatory reform and the perceived need for investor confidence. Malaysian shareholder protection was heavily criticised during the crisis. This was followed by the withdrawal of investments from the Malaysian market. As foreign investment has had an important role in the Malaysian economy,[154] efforts were made to reform regulations primarily to regain the confidence of foreign investors.[155] Reforms made in accordance with the standards advocated by international organisations such as the World Bank and the Asian Development Bank will be examined in Chapter 3.[156] Chapter 6 considers the influence of transnational harmonisation on the development of Malaysian shareholder protection law. As international organisations held out Anglo-American regulation as a model of international standards,[157] Malaysian reforms were largely consistent with UK law, and were also in tandem with inherited legal tradition.[158]

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[149] Siems, *Convergence in Shareholder Law*, above n 146, 270.
[150] Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 2nd ed, 2009), 305.
[151] Bebchuk and Hamdani, above n 26, 1274.
[152] OECD, *OECD Investment Policy Reviews: Indonesia 2010*, OECD (2010).
[153] Armour et al, 'How Do Legal Rules Evolve?', above n 124, 628; Siems, *Convergence in Shareholder Law*, above n 146, 373. Nevertheless, efforts to harmonise commercial law in Southeast Asia are limited to specific issues and do not include shareholder protection; ASEAN, *ASEAN Economic Blueprint* (November 2007).
[154] Tham Siew Yean, Liew Chei Siang and Marziah Mokhtar, 'Foreign Direct Investment and Spillovers in Malaysia' in Chalongphob Sussangkarn, Sung Jin Kang and Yung Chul Park (eds), *Foreign Direct Investments in Asia* (Taylor and Francis, 2011) 51–83; Kishor Sharma, James Nayagam and Hui Hon Chung, 'Determinants of Foreign Direct Investment in Malaysia: New Evidence from Cointegration and Error Correction Model' (2012) 46 *The Journal of Developing Areas* 71; Mohd Ridauddin Masud et al, 'Foreign Direct Investment in Malaysia - Findings of the Quarterly Survey of International Investment and Services' (2008) 1 *Statistics Malaysia* 1.
[155] A Shameen and S Oorjitham, 'I've Lost My Voice', *Asiaweek* (online), 27 March 1998 <http://www-cgi.cnn.com/ASIANOW/asiaweek/98/0327/cs4.html>; Finance Committee, above n 9, 3.
[156] See p 72.
[157] World Bank, *The Road to Recovery*, above n 11, 69.
[158] Please refer to p 88.

While there is consensus of a trend towards convergence in formal shareholder protection,[159] the same cannot be said of the implementation of these regulations. Pistor and Wellons emphasise the distinct differences between the evolution of formal law and its operation. Despite convergence in formal law brought about by transnational harmonisation of law and increasing internationalisation of trade, they observe persistent divergence in the operation of law.[160] This persistent divergence was evident not only between the Asian economies and those of the West but also among the six Asian economies studied. They explain that the processes of implementation and litigation are more susceptible to influence from contextual forces than formal law. The inertia observed in the implementation of law was attributed to political, cultural and historical factors.

Kraakman et al's cross-country study of corporate law highlights differences in enforcement levels despite similarities in formal law.[161] They also observe variations in the mechanisms employed to safeguard shareholders against expropriation through related party transactions, even among the developed common law countries in their study. While shareholder derivative actions were a significant means of enforcement of shareholder rights in the US, informal mechanisms such as pressure from institutional investors were more prevalent in the UK.[162]

Several comparative studies which have examined the function of corporate law across a range of Asian jurisdictions likewise reveal significant divergence in the practical implementation of formal regulations. In analysing the derivative action in Asia's leading economies, Associate Professor Puchniak asserts the superficiality of convergence in formal law, emphasising that 'unique regulatory, economic, institutional, and socio-political features in each of Asia's leading economies result in significant divergence as to how the derivative action in each jurisdiction actually functions in practice.'[163] Similarly, a study of the function of independent directors in Asia highlights distinct differences across countries, and greater disparities with the UK and US, although the formal regulations were based on Anglo-American models.[164]

Siems observes greater differences in the operation of law than in formal law. However, he argues that there is some evidence that these differences may be diminishing over time.[165] The growth in institutional shareholding by pension funds has given rise to a greater awareness of shareholder protection. Institutional shareholding is often associated with increased monitoring and activism on the part of shareholders.[166] He points to changes in Japan and China as indicative of a gradual trend towards convergence in legal culture. Increasing individualism is thought to be reflected in the rise of hostile takeovers and derivative actions

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[159] Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *The Georgetown Law Journal* 439; Wong Sau Ngan, 'Post-colonial Legal Developments' in K S Jomo and Wong Sau Ngan (eds), *Law, Institutions and Malaysian Economic Development* (NUS Press, 2008) 54.
[160] Pistor and Wellons, above n 133, 283.
[161] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 102, 164.
[162] Ibid, 167–8.
[163] Puchniak, 'Derivative Action', above n 96, 12.
[164] Dan W Puchniak and Kon Sik Kim, 'Varieties of Independent Directors in Asia: A Taxonomy' (NUS Centre for Law & Business Working Paper 17/01, March 2017) <http://law.nus.edu.sg/wps> 31.
[165] Siems, *Convergence in Shareholder Law*, above n 146, 250–3.
[166] Ibid.

in Japan. He argues that this is a shift from traditional practices based on cultural values of consensus and harmony. Likewise, he avers to the growth of private law in China as evidence of changing attitudes towards law and individual responsibility. He perceives the changing perceptions, and an increasingly internationalised legal profession, as signs that legal culture is slowly but surely converging.

Like Siems, Milhaupt and Pistor examine hostile takeovers in Japan. Milhaupt and Pistor focus particularly on the hostile takeover bid by Livedoor of Nippon Broadcasting System, Inc. This occurred against a backdrop in which hostile takeovers were rare and largely unsuccessful. In addition, they were frowned on as being contrary to cultural norms and business practices based on consensus. The CEO of Livedoor was also somewhat unorthodox, being a 'thirty-two year old college dropout in T-shirt and jeans'.[167] This case appears to have precipitated significant changes in the Japanese regulation of takeovers. After this high-profile takeover bid, non-binding guidelines for takeovers were issued. Milhaupt and Pistor observe that these guidelines reflected global standards and signified a departure from previous norms which had governed these situations. They acknowledge that the Livedoor case and the ensuing regulatory reform suggest changing perceptions of the role of law in Japan. Nevertheless, they do not share Siem's view that legal cultures are converging. Instead, they describe the 'process of market innovation and strategic legal response' as 'highly iterative'.[168] The proposition that law interacts with its context, and that this interaction is particularly relevant to implementation, is central to theories of legal evolution

2.2.3 *Legal Evolution*

The second research question of the thesis focuses on the contextual factors and influences which have shaped the character of Malaysian shareholder protection law. Theories of legal origin posit that inherited legal tradition significantly drives legal development. The legal origin studies focus almost exclusively on legal tradition. Minimal attention is given to other potential influences on legal evolution.[169] The weak form legal origin thesis briefly acknowledges that economic, political and other contextual influences may at times have a stronger effect on legal development than legal origin. Transnational harmonisation is also thought to affect the development of law, at times operating against the legal origin effect. However, there is little empirical and theoretical analysis of these other influences within the legal origin debates.

In contrast with the legal origin theories, legal evolution theory focuses on contextual influences on the development of law. Central to the legal evolution theory is the claim that

[167] Curtis J Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 88–91.
[168] Ibid 6.
[169] Coffee argues that the legal origins literature fails to recognise the extent to which formal law is affected by informal rules and the social norms which underpin them; John C Coffee, 'Do Norms Matter? A Cross-Country Evaluation' (2001) 149 *University of Pennsylvania Law Review* 2151.

law is inextricably related to its wider social, political and economic context.[170] Scholars argue that the allocation of rights intrinsic to law inherently incorporates a specific ideological position on social or economic matters.[171] They highlight the influence of politics on various aspects of legal development, ranging from the origin of differences between legal traditions,[172] to the development of property rights[173] and in the processes of legal change.[174] There are differences in emphasis, however, as to the specific influences which drive legal change. A range of influences which include cultural values, historical experience and political economy is thought to underpin the shape of law.[175]

A second persistent theme in the legal evolution literature draws a distinction between formal law and the operation of those laws.[176] The legal evolution literature focuses on the issues which impede the implementation of formal law. The operation of law is posited to be significantly affected by informal constraints which include commercial practices,[177] cultural values and social norms within a given context.[178]

Despite the common theme of legal development shared by both the theories of legal origin and legal evolution, the development of these theories has largely been mutually exclusive. There is little mention of inherited legal tradition in the legal evolution literature and vice versa. Preliminary investigations suggest that legal tradition has influenced Malaysia's borrowing of regulations from other common law countries. Scholarly critique also suggests that contextual influences shape the way in which shareholder protection law operates. Hence, both theories of legal origin and legal evolution are likely to be relevant in explaining the manner in which

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[170] Deakin and Wilkinson, above n 34, 28; Kevin E Davis, 'Legal Universalism: Persistent Objections' (2010) 60 *University of Toronto Law Journal* 537.

[171] Ugo Mattei and Alberto Monti, 'Comparative Law and Economics: Borrowing and Resistance' (2001) 1 *Global Jurist Frontiers* VII; Takao Tanase, 'Global Markets and the Evolution of Law in China and Japan' (2006) 27 *Michigan Journal of International Law* 873.

[172] Klerman attributes the differences between legal families to political choices in the seventeenth to nineteenth centuries; Daniel Klerman and Paul G Mahoney, 'Legal Origin?' (2007) 35 *Journal of Comparative Economics* 278.

[173] Douglass C North and Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 *The Journal of Economic History* 803.

[174] Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127.

[175] For example, Bruner posits that shareholder empowerment in the UK reflects the historical value of shareholder dominance. This perception of the role of shareholders is posited to lie 'at the very heart of the UK conception of the corporation'. In contrast, a higher value is placed on managerial autonomy in the US, flowing from historical and political processes; Christopher M Bruner, 'Corporate Governance Reform in a Time of Crisis' (2011) 36 *The Journal of Corporation Law* 309, 340; Christopher M Bruner, 'Power and Purpose in the "Anglo-American" Corporation' (2010) 50 *Virginia Journal of International Law* 579; Christopher M Bruner, *Corporate Governance in the Common-law World* (Cambridge University Press, 2013).

[176] Gani Aldashev, 'Legal institutions, political economy, and development' (2009) 25 *Oxford Review of Economic Policy* 257; Mattei and Monti, above n 171; Simon Deakin, 'Legal Evolution: Integrating Economic and Systemic Approaches' (Paper No. 41/2011, University of Cambridge, 2011); Randall Peerenboom, 'What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China' (2006) 27 *Michigan Journal of International Law* 825.

[177] Eisenberg traces the shift towards active enforcement of corporate governance by institutional shareholders to non-legal factors such as the increase in institutional shareholding and takeovers; Melvin A Eisenberg, 'Corporate Law and Social Norms' (1999) 99 *Columbia Law Review* 1253, 1286.

[178] Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *University of Pennsylvania Law Review* 1121, 1135; Coffee, 'Do Norms Matter?', above n 169, 2156.

Malaysian shareholder protection has developed. This thesis draws from perspectives provided by both theories. The influence of political economy and transnational harmonisation is also considered.

This part traces the influence theories of evolution have had on legal scholarship. The discussion begins by considering the early literature on legal development which reflects the influence of evolutionary theories. Subsequently, the discussion turns to memetics, which entails the evolution of ideas and borrows from theories of biological evolution, and the related concept of autopoiesis. Following this, the literature which demonstrates law's interaction with its context is examined. The analysis focuses on sociocultural influences which explain the gap between formal law and its implementation. Lastly, the influence of political economy is analysed.

a. Early literature

Ideas which had origins in biological theories of evolution have influenced legal thought since the nineteenth century.[179] Nevertheless, the early legal evolution literature provided at best rudimentary explanations of the mechanisms by which legal change occurred. Among the early references to evolution in legal scholarship is Savigny's assertion that legal systems progress through various stages of development. Likewise, Maine suggested that societies progress from the judgment of kings to customary law and ultimately towards codification.[180] Savigny's claims were based on concepts which pre-dated Darwin's theory.

Wigmore and Holmes' assertions were expressly based on Darwin's theory of evolution. Wigmore perceived legal evolution as a struggle between competing social forces.[181] He emphasised law's adaptation to its environment, disputing the concept of law's progressive evolution to a more advanced state.[182] Holmes asserted that legal doctrines evolve to adapt to 'the felt necessities of time'.[183] Holmes emphasised natural selection, describing legal development as 'a struggle for life among competing ideas'. This culminated in the 'survival of the strongest'.[184] Both Holmes and Corbin asserted that the community's social norms influenced the development of law.[185]

The 1970s saw a resurgence of evolutionary thought in legal scholarship, particularly in relation to the law and economics movement. Decisions of litigants were posited to have a significant influence on legal doctrine. Inefficient rules were argued as more likely to give rise

[179] Donald E Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 *Columbia Law Review* 38.
[180] Ibid 44.
[181] Ibid 48–9.
[182] Michael S Fried, 'The Evolution of Legal Concepts: The Memetic Perspective' (1999) 39 *Jurimetrics* 291, 304.
[183] Ibid; Elliott, above n 179, 51.
[184] Fried, above n 182, 304.
[185] Jan Vetter, 'The Evolution of Holmes, Holmes and Evolution' (1984) 72 *California Law Review* 343; Elliott, above n 179, 57.

to litigation and be challenged.[186] Several shortcomings of these claims have been identified. Among them are criticisms of the underlying assumptions of litigants' rational behaviour and wealth maximisation. The early legal evolution literature was also characterised by a lack of empirical and theoretical basis for the claims. More recently, scholars have developed an explanation of legal development by reference to memetics. These assertions detail the link between the mechanisms by which law evolves and theories of biological evolution.

b. Memetics

The memetic approach to the evolution of conceptual forms is informed by biological principles. Dawkins proposed that the term 'memes' should apply to ideas or concepts.[187] Memes are analogous to genes in the social sphere. In legal evolution, the memes or replicative units comprise legal concepts. Deakin posits that legal concepts embody 'in shorthand form information about the social world which is filtered through the processes of legal argument and exposition'.[188]

As legal concepts are replicated through communication, the people involved in legal processes, judges and lawmakers are key agents in the transmission of memes.[189] Legal concepts are subject to natural selection through legal processes. Decisions as to whether to litigate or settle and interest group lobbying are examples of pressures on the selection process. In the memetic approach to legal evolution, natural selection facilitates adaptation to the social environment.

Deakin posits that legal rules go through a process of abstraction during which they are translated or 'encoded' into legal concepts and doctrines. Conversely, the concepts are decoded when they are interpreted and applied to specific situations.[190] As concepts are applied in contexts which are subject to social and economic change, the content of concepts is altered over time. Deakin and Carvalho reason that the higher the level of abstraction in concepts, the less susceptible they are to environmental pressures. The pressure to adapt to the environment is greater where legal rules are closely tied to specific fact situations.[191]

The interaction of law and its environment is also evident in the selection process. Rules which are suited to the environment are arguably selected over rules which are less suitable. This allows social norms to be incorporated into the legal system at least to an extent. The legal system communicates information back to society in the form of legal norms. Hence, Deakin argues that there is a 'powerful feedback loop' between the legal system and its environment,

[186] Elliott, above n 179, 65–6; Fried, above n 182, 305.
[187] Fried, above n 182, 296.
[188] Simon Deakin, 'Evolution For Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1, 19.
[189] Ibid 32.
[190] Ibid 29.
[191] Simon Deakin and Fabio Carvalho, 'System and Evolution in Corporate Governance' in Peer Zumbansen and Gralf-Peter Calliess (eds), *Law, Economics and Evolutionary Theory* (Edward Elgar, 2011) 111, 122.

resulting in co-evolution.[192] Nevertheless, the processes of encoding information from the environment into concepts, subsequent transmission and replication result in some delay. Consequently, legal concepts often do not reflect contemporary social values. There is commonly a degree of misalignment between law and social norms.[193] The processes described above have been highlighted as bearing distinct similarities to the autopoietic perspective of legal evolution.

c. Autopoietic theory

Like memetics, the theory of autopoiesis has its origins in biology. The theory was subsequently extended to social systems.[194] Autopoietic social systems are self-referential and self-reproducing.[195] Communication is their primary mode of reproduction. The theory contemplates the existence of several social sub-systems including political, economic and legal sub-systems. Each of these is 'operationally closed'.[196] This means that their internal network is able to maintain the sub-system without reference to other social sub-systems. Although operationally closed, the sub-systems are 'cognitively open'.[197] 'Structural coupling' with the environment is thought to facilitate cognitive openness in the legal sub-system.[198] Hence, the legal sub-system is able to receive information from other sub-systems in the context in which it operates. However, information from its context needs to be coded into legal language before it can be received into the legal sub-system.[199]

Deakin suggests that internal consistency plays a pivotal role in the maintenance of self-referential and self-reproducing sub-systems. The legal sub-system maintains internal consistency by organising its information through inter-related rules and concepts.[200] The doctrine of precedent and legal reasoning facilitate internal consistency while allowing for variation to accommodate changing circumstances.

As with memetics, legal rules are posited to co-evolve with their environment. Likewise, autopoietic theory concedes a degree of asynchronism between the legal system and its environment.[201] Teubner posits that the operational closure of autopoietic sub-systems prevents them from responding directly to changes in the environment.[202] The processes of coding and decoding of information between sub-systems contributes to the misalignment between social and legal norms.

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[192] Deakin, 'Evolution For Our Time', above n 188, 32.
[193] Ibid 40.
[194] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419.
[195] Ana Lourenco, 'Autopoetic Social Systems Theory: The Co-evolution of Law and the Economy' (2010) 35 *Australian Journal of Legal Philosophy* 35, 36–7.
[196] Luhmann, above n 194, 1420.
[197] Ibid 1427.
[198] Ibid 1432.
[199] Lourenco, above n 195, 52.
[200] Deakin, 'Legal Evolution: Integrating Economic and Systemic Approaches', above n 176.
[201] Lourenco, above n 195, 54.
[202] Deakin, 'Evolution For Our Time', above n 188, 37.

Some resonance in the memetic and autopoietic approaches is also evident in their perceptions of the role of legal concepts. Legal concepts play a vital role in the transmission of information and processes of replication and variation in both approaches. The role of legal concepts as memes is similar to that of codes in autopoietic theory.[203]

Several limitations of autopoietic theory have been highlighted. The theory places a strong emphasis on communication but fails to consider the people involved in the communication. The wider institutional framework in which communication occurs is also absent from the discussion. Likewise, the proposition of coupling between sub-systems has been critiqued as overly simplistic.[204] The literature on memetics and autopoietic theory has focussed purely on theoretical aspects of the processes involved in the evolution of legal systems with little discussion of its application to real-life situations. In contrast, a substantial body of literature considers the interaction of law and its context from a more applied perspective. Nevertheless, it is only more recently that scholars have begun to integrate the findings of empirical studies on the interaction of law and its context with theoretical explanations of legal evolution.

d. Interaction of law and its context

A consistent theme throughout the legal evolution literature is that law co-evolves with the social, economic and political influences in its context. The claim of co-evolution is evident in both autopoietic theory and memetics. Both autopoiesis and memetics concede a degree of asynchronism between the legal system and its environment. Over time, hypotheses on the mechanisms by which law co-evolves with its contextual influences have been developed and refined. They vary in their emphases on the specific influences which appear to have a stronger effect on legal development. Some of the literature focusses on the role of social norms in legal evolution while other literature emphasises the role of economic and political influences in legal evolution.

Deakin argues that a 'powerful feedback loop' exists between the legal system and its environment.[205] Social norms are incorporated, at least to an extent, into the legal system. The legal system communicates information back to society in the form of legal norms, resulting in a mutual influence between law and its context. North's proposition of tension between formal and informal rules, which ultimately produces changes in both, resonates with the claim of co-evolution. Milhaupt suggests a 'rolling relationship' between law and the markets.[206] Belloc and Pagano posit that corporate governance co-evolves with politics.[207] Pistor and Wellons reason that a multi-directional influence among legal evolution, economic development and policy is more plausible than the unidirectional influence of law on financial development.

[203] Ibid; Deakin and Carvalho, above n 191, 120.
[204] Lourenco, above n 195, 41.
[205] Deakin, 'Evolution For Our Time', above n 188, 32.
[206] Milhaupt, above n 71, 836.
[207] Marianna Belloc and Ugo Pagano, 'Co-evolution of politics and corporate governance' (2009) 29 *International Review of Law and Economics* 106.

Deakin and Wilkinson view the relationship between legal evolution and social and economic change as complex, multi-linear and asynchronous.[208] They hypothesise that the process of legal evolution is unpredictable, with periods of stability being interspersed with periods of relative 'unrest'. While acknowledging the limitations of the predictive value of legal evolutionary theory, they nonetheless highlight the value of the historical analysis of institutional evolution in facilitating an understanding of legal evolution through patterns which emerge.[209]

One of the earlier scholars who consider the specific ways in which contextual influences affect legal development is Watson. Watson's argument emphasises the centrality of the people involved in legal processes in the interaction of the legal system and its context. He argues that the people involved in the legal system, such as judges and the legal elite, shape the law.[210] Their ideologies and familiarity with foreign systems influence the decisions and rules they make. Watson also posits that the ruling elite often have an interest in maintaining the status quo, particularly when it is favourable to their interests.

Tanase highlights the influence of cultural norms on the implementation of legal transplants. He argues that transplants function differently from their country of origin when the values embodied in those transplants conflict with the values of the country adopting them. Tanase posits that the value of harmonious relationships pervades the interpretation of laws in East Asia.[211] Where transplanted law reflects a different set of values, he asserts that they are likely to be interpreted and enforced in conformity with Asian norms. Nevertheless, even within a country, there are likely to be competing values.[212] Like Tanase, Kraakman et al posit that cultural norms perpetuate the gap between formal law and the implementation of shareholder protection in Japan. 'Friendly shareholdings' and inside directors protect corporate managers from challenge.[213] Hence, Kraakman et al observe that shareholder rights exists more in theory than in reality as they are rarely enforced.

Similarly, several Malaysian scholars assert that underlying cultural norms affect the way in which shareholder protection regulations are implemented. Malaysian society is strongly hierarchical, with a tendency towards deference to authority and avoidance of confrontation and criticism of those who are of higher social status.[214] Khoo suggests that social and cultural expectations significantly impede remuneration committees from assessing the performance of board members.[215] Chapter 6 details the cultural norms relevant to the manner in which

[208] Deakin and Wilkinson, above n 34, 30.
[209] Ibid, 33–5.
[210] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *Cambridge Law Journal* 313.
[211] Tanase, above n 171.
[212] Setsuo Miyazawa, 'How Does Culture Count in Legal Change?: A Review with a Proposal from a Social Movement Perspective' (2006) 27 *Michigan Journal of International Law* 917.
[213] Kraakman et al, *Anatomy of Corporate Law* (2nd edition), above n 150.
[214] Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organizations Across Nations* (Sage Publications, 2001).
[215] Khoo, above n 19.

directors interact with one another and with controlling shareholders. The analysis then considers the implications for the effectiveness of directors' duties in practice.

Cultural norms are referred to as informal rules in some of the legal evolution literature.[216] North considers that informal rules include 'routines, customs, traditions and conventions'.[217] Milhaupt and West assert that informal rules are often a more powerful constraint on behaviour than formal rules.[218] North attributes the persistence of informal rules to the deep-seated cultural values which underpin them. He argues that there is often tension between formal and informal rules due to their inherent inconsistency. This culminates in an adjustment in both formal and informal rules, which produces 'a new equilibrium'.[219]

The interaction of norms embodied in legal transplants and those of the local context is exemplified in Harding's analysis of transplanted law in Southeast Asia. Harding emphasises the pluralism inherent in the legal systems of Southeast Asia, asserting that they are a syncretic blend of European legal systems with indigenous customs and religious ideologies. He posits that legal transplants interact with existing laws and local socio-cultural, economic and political conditions, and are modified by them.[220] The importance of each country's unique context in determining the way in which law functions is also demonstrated in Puchniak and his colleagues' analysis of the derivative action across a range of Asian jurisdictions.[221]

Scholars argue that different perceptions of law and its role in society flow from the cultural and political environment. A different concept of 'the rule of law' is prevalent in Southeast Asia, attributed to the influence of economic and political governance as well as cultural values.[222] Premised on the value of collectivism, business and social interests are often given precedence over the rights of individuals.[223] In many East Asian countries, the role of law is also affected by the synthesis of political and corporate powers.[224] This gives rise to questions on the relevance of political economy in the evolution of corporate law.

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[216] Kahan considers the various definitions of 'norms' in the literature and concludes that, in essence, the term refers to informal rules; Marcel Kahan, 'The Limited Significance of Norms for Corporate Governance' (2001) 149 *University of Pennsylvania Law Review* 1869, 1875.
[217] Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 83.
[218] Curtis J Milhaupt and Mark D West, *Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules* (Oxford University Press, 2004) 4.
[219] North, above n 217, 91.
[220] Harding, 'Global Doctrine and Local Knowledge', above n 100, 51–3.
[221] Dan W Puchniak and Harald Baum, 'The Derivative Action in Asia: Some Concluding Observations' in Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 398, 398–9.
[222] Harding, 'Global Doctrine and Local Knowledge', above n 100, 51–3.
[223] Bahrin Kamarul and Roman Tomasic, 'The Rule of Law and Corporate Insolvency in Six Asian Legal Systems' in Kanishka Jayasuriya (ed) *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (1999) 128, 131.
[224] Jayasuriya, above n 135.

2.2.4 *Political Economy*

Theories of legal evolution seek to explain the gap between law in the books and law in practice, asserting that sociocultural norms and interest group politics shape the way in which transplanted laws are implemented. As law is regarded as being inextricably related to its context, theories of legal evolution also posit that formal law is influenced by contextual factors. Related to this is the idea that the development of shareholder protection law is influenced by political economy.

Political economy, or the power relations which affect economic outcomes, is pertinent to the way in which law operates as well as the law reform processes which determine the content of formal law. Political economy has been described as 'the social relations, particularly the power relations that mutually constitute the production, distribution and consumption of resources'.[225] Among its central themes is 'the effect of different political institutions on economic outcomes'.[226] Bebchuk and Roe emphasise the centrality of political economy in the development of corporate law.[227] They hypothesise that corporate ownership structures affect the distribution of resources and, hence, the political power of interest groups. Political power over legal processes, in turn, provides dominant interest groups the opportunity to reinforce their control over resources.

Similarly, Kraakman et al posit that political influence, particularly that flowing from corporate ownership structures, affects the shape of corporate law.[228] According to them, corporate law 'reflects the interests of influential constituencies' including 'controlling shareholders, corporate managers or organized workers'.[229] Law reforms following financial crises likewise reflect the influence of politics on corporate law, as lawmakers attempt to placate the electorate.[230] At the same time, Kraakman et al concede that interest group politics is one of several influences on the development of corporate law. Market forces at times dictate reforms aimed at addressing inefficiencies in legal institutions, and may have the effect of promoting social welfare.[231]

Kraakman et al draw a distinction between formal law and its effectiveness in practice, observing significant differences in levels of enforcement despite similarities in formal law across countries. They posit that there is a correlation between ownership structures and enforcement intensity, although other factors such as the dynamics of enforcement institutions are also relevant.[232] Kraakman et al suggest that that the bar, regulators and judges affect enforcement outcomes. Their assertion resonates with other scholars who emphasise the relevance of the human element in determining the effectiveness of enforcement.

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[225] Vincent Mosco, *The Political Economy of Communication* (Sage Publications, 1996) 25.
[226] Alberto F Alesina, 'Political Economy' [2007] 3 *NBER Reporter* 1, 4; Cioffi, above n 114, 1503.
[227] Bebchuk and Roe, above n 174.
[228] Kraakman, *Anatomy of Corporate Law* (3rd edition), above n 147, 25.
[229] Ibid.
[230] Ibid.
[231] Ibid 24.
[232] Ibid 169.

Milhaupt and Pistor's analysis likewise focuses on the influence of political economy on law in practice. Their historical institutional analyses of corporate governance failures cut across developed and developing countries from Asia and the West. Their study found that deep-seated conflicts over political power and the control of resources underpinned each of their case studies.[233] They identify the demand for legal governance, propelled by changes in the political elite, as the catalyst for legal change.[234]

While the legal origins theory emphasises the role of law in protecting property rights, Milhaupt and Pistor take a broader view of the function of law in supporting markets. They highlight the signalling function of law, asserting that law may signal compliance with internationally recognised standards, enhance credibility or coordinate market players.[235] An example of this is seen in the *Sarbanes-Oxley Act*, which was enacted following the Enron scandal. This arguably signalled the state's commitment to addressing financial crime and corporate governance problems. Milhaupt and Pistor argue that 'the signals sent by law may be more potent or novel than the legal provisions themselves'.[236] Developments in China's law, for example, had little protective value. However, they sent strong signals regarding the state's reform policies.[237]

In line with legal evolution scholarship, Milhaupt and Pistor distinguish between formal law and its implementation, positing that legal transplants necessarily go through a process of adaptation to the local legal system.[238] Like Watson who highlights the centrality of the people who interpret and enforce the law,[239] Milhaupt and Pistor assert that the processes of legal interpretation and enforcement depend largely on the 'proclivities of the people' involved.[240] They argue against the premise of formal law as a remedy for corporate failures, asserting that the corporate governance failures examined could not have been redressed merely through the adoption of formal law. One of the key claims of their thesis is that even among successful economies, law functions differently.

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[233] Milhaupt and Pistor, above n 167, 175.
[234] Ibid 179.
[235] The signalling function of law is also acknowledged in other legal evolution literature; Charles K Whitehead, 'What's Your Sign? - International Norms, Signals, and Compliance' (2006) 27 *Michigan Journal of International Law* 695. See also Dan W Puchniak and Luh Luh Lan, 'Independent Directors in Singapore: Puzzling Compliance Requiring Explanation' (NUS Centre for Law & Business Working Paper 15/03, February 2017) <http://law.nus.sg/wps>, 20.
[236] Milhaupt and Pistor, above n 167, 34.
[237] Ibid.
[238] Ibid 211–2.
[239] Watson,'Comparative Law and Legal Change', above n 210.
[240] Milhaupt and Pistor, above n 167, 201. This also resonates with Gillespie and Nicholson's emphasis on human agency in the interpretation of legal transfers. They define the term 'legal transfer' as referring to the 'globalisation of norms, standards, principles and rules that regulate (shape the behaviour) of the object of the transfer. It includes 'not only written laws and doctrines, but also spoken and sub-verbal communication'; John Gillespie and Pip Nicholson, 'Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development' in John Gillespie and Pip Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (Cambridge University Press, 2012) 1.

They assert that interest group politics strongly influences the role of law in economic governance. They identify political economy as the driving force behind the demand for law and its adaptation to the legal system.[241] Accordingly, complementarity between the political economy and the values embodied in the transplant is more likely to produce effective implementation.[242] Their view bears similarity to Harding's perspective that the success of transplants is facilitated by the needs of society being served.[243] Milhaupt and Pistor, however, place greater emphasis on the role of the political elite in determining the way in which legal transplants are implemented. This resonates with Coffee's argument that interest group politics may subsequently impede the implementation of such reforms.[244] Milhaupt and Pistor take the view that the legal community's familiarity with the transplant positively influences its performance. In this regard, legal families may play a significant role through shared conventions of legal thought and interpretation.

Several similarities emerge from the comparison of Milhaupt and Pistor's perspectives with that of Armour et al in relation to the weak form of legal origin. The first centres on the mutual influence among legal, political and economic institutions. Milhaupt and Pistor's hypothesis of a 'rolling relationship' between law and the markets[245] bears a strong similarity to Armour's and Deakin's[246] proposition of co-evolution of legal institutions with political and economic institutions. Secondly, together with Ohnesorge,[247] they hold a neutral view of the economic benefits of different legal systems, similar to that of varieties of capitalism. They also dispute the assumption of a 'one size fits all' remedy for all legal systems. Milhaupt and Pistor argue that solutions need to be tailored to agency problems encountered in individual situations.[248] Likewise, Armour et al suggest that the legal institutions of each system may be suited to their economic conditions.[249] They differ, however, on the issue of path dependence.[250] Armour et al posit that some degree of path dependence results from institutional complementarities.[251] Milhaupt and Pistor, on the other hand, argue that legal evolution is unpredictable.

While the legal origin theory focusses on formal law, perceiving it as a fixed endowment, Milhaupt and Pistor's analysis emphasises the dynamism of law in action as it interacts with its contextual influences.[252] Milhaupt and Pistor argue that legal analysis which focuses on the dynamics of change in legal systems provides a more representative perspective of legal governance than one which is restricted to the formal characteristics of legal systems. They

[241] Milhaupt and Pistor, above n 167, 193.
[242] Ibid 210.
[243] Harding, 'Global Doctrine and Local Knowledge', above n 100, 52.
[244] John C Coffee, 'The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated' (2012) 97 *Cornell Law Review* 1019.
[245] Milhaupt and Pistor, above n 167, 211.
[246] Deakin, 'Evolution For Our Time', above n 188.
[247] Ohnesorge, 'Legal Origins and the Tasks of Corporate Law in Economic Development', above n 87.
[248] Milhaupt and Pistor, above n 167, 203.
[249] Armour et al, 'Shareholder Protection and Stock Market Development', above n 103, 375.
[250] Ibid 202.
[251] Armour et al, 'How Do Legal Rules Evolve?', above n 124, 598.
[252] Milhaupt and Pistor, above n 167, 5.

cite examples in their case studies of legal transplants operating in different ways, influenced largely by political economy in their given contexts.

In short, the influence of political economy on legal development is evident not only in the processes of regulatory reform but also in the implementation of law. Cioffi underscores the significance of issues of corruption and the lack of enforcement in developing countries.[253] His perspective resonates with Harding who also highlights problems of abuse of power and crony capitalism. Harding asserts that the quantity of law in Southeast Asian countries does not equate with the level of their enforcement.[254] Similarly, Pascoe argues that the enforcement of Malaysian corporate law has been impeded by corruption and political involvement in the corporate sector.[255] Scholars have documented the selective enforcement of corporate law and favourable treatment of politically linked corporations in Malaysia.[256] In addition to political patronage, concentrated shareholding structures arguably contribute to a lack of effective implementation of shareholder protection law for minority shareholders.[257] These views provide support for the proposition that focusing on formal law while neglecting to consider its implementation runs the risk of painting a misleading picture of legal governance. In a similar vein, Harding avers to the limitations of the law and finance literature in its failure to adequately consider issues of enforcement.[258]

The analysis of political economy in legal development implicitly recognises the potential instrumental role of law. The role of law in the implementation of state policy has been observed in East Asian economies which are often characterised by the active involvement of the state in economic development and the corporate sector.[259] Pistor and Wellons's examination of legal development in six Asian economies noted that law was aligned with and facilitated the implementation of state policy.[260] They emphasise the centrality of economic policy as a catalyst of legal change.[261] This observation is supported by Wong who observes that the Malaysian legal framework was used to implement state policies.[262] She highlights changes made to legislation to facilitate privatisation policies aimed at the redistribution of resources.

Political economy also has implications for the relevance of corporate law. Pistor and Wellons observe that extensive state involvement in the corporate sector has reduced the relevance of corporate law in Malaysia. The state-business nexus is enhanced by state control of

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[253] Cioffi, above n 114.
[254] Harding, 'Global Doctrine and Local Knowledge', above n 100, 50.
[255] Janine Pascoe, 'Corporate Law Reform and Some 'Rule of Law' Issues in Malaysia ' (2008) 38 *Hong Kong Law Journal* 769, 783.
[256] William Case, 'Malaysia: New Reforms, Old Continuities, Tense Ambiguities' (2005) 41 *Journal of Developmental Studies* 284; Wong Sook Ching, K S Jomo and Chin Kok Fay, *Malaysian "Bail Outs"?: Capital Controls, Restructuring and Recovery* (NUS Press, 2005).
[257] Pascoe and Rachagan, above n 14, 94.
[258] Harding, 'Global Doctrine and Local Knowledge', above n 100, 49–50.
[259] Jayasuriya, above n 135.
[260] Pistor and Wellons, above n 133, 111.
[261] Ibid 105.
[262] Wong, 'Post-colonial Legal Developments', above 159.

institutional shareholders[263] and close relationships between the political and corporate elite.[264] Pistor and Wellons argue that this facilitates enforcement of property rights without recourse to corporate law. They likewise posit that state policy encouraged a greater emphasis on bureaucrats than on shareholders.[265]

Pistor and Wellons' findings challenge several claims associated with the strong form legal origins thesis. The first relates to the claim that strong shareholder protection leads to better financial outcomes. They find evidence of a reversed direction of causation in East Asian countries, asserting that economic development preceded legal change.[266] In contrast with LLSV, they posit that economic policy, rather than shareholder rights, determines economic development. Data from their regression analysis across economies indicated that economic policy was pivotal in the development of capital markets. Legal development, on the other hand, came after capital market development.[267] Nevertheless, they argue that the causal relationship is not unidirectional. On the contrary, they posit a multi-causal relationship involving economic policy, economic development and legal development.

A second observation relates to the shift away from common law institutions in Malaysia. Pistor and Wellons note that transplantation of the common law system in Malaysia was extensive and included the training of the legal elite in England. This would have facilitated a deep familiarity with the administration of the English judicial system. However, this did not prevent the shift away from market-based policies towards bureaucratic discretion. While the countries in the study moved towards market-allocative law in the 1980s, Malaysia remained the exception.[268] Instead, the Malaysian legal system moved further away from the English legal system through the curbing of judicial independence.[269] This demonstrates a shift in the operation of the Malaysian legal system away from its English common law origins. Two characteristics which are epitomised by the legal origin theory as being distinctly associated with the common law system are emphasised in this situation, namely judicial independence and the support of markets. Limited judicial independence in Malaysia persists to the present,[270] indicating that legal systems within a legal family do not necessarily operate in a similar way.

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In summary, Section 2.2 of this chapter outlines the various theoretical perspectives which might contribute to an explanation of the way in which Malaysian shareholder protection has

[263] Donald R Fraser, Hao Zhang and Chek Derashid, 'Capital Structure and Political Patronage: The Case of Malaysia' (2006) 30 *Journal of Banking and Finance* 1291.
[264] Gomez and Jomo, above n 24.
[265] Pistor and Wellons, above n 133, 114.
[266] Ibid 143.
[267] Ibid.
[268] Ibid 91.
[269] Ibid 106.
[270] Jayasuriya, above n 135.

developed. Transnational harmonisation and the theories of legal origin focus primarily on the shape of formal regulations. Legal evolution and political economy provide explanations as to the way in which law operates. Nevertheless, the legal evolution and political economy approaches also suggest that the shape of formal law may at times be affected by contextual influences. While each of the approaches emphasises different influences on legal development, there are shared themes across several approaches.

The first is the proposition that familiarity with particular legal systems or traditions affects legal evolution. The weak form thesis attributes the legal origin effect to the 'affinities of legal thought and language'. Likewise, Watson argues that the legal elite's ideologies and familiarity with foreign systems influence the decisions and rules they make. While the weak form legal origin thesis focuses primarily on the shape of formal law, Milhaupt and Pistor posit that shared conventions of legal thought and interpretation also affect the implementation of law. They assert that the legal community's familiarity with transplanted law positively influences its performance. Hence, the idea that legal families may play a significant role in shaping both formal law and its implementation is present across three out of the four theoretical approaches examined, namely the weak form legal origin thesis, legal evolution and Milhaupt and Pistor's approach.

Several approaches also intersect on the issue of transnational harmonisation. The effects of transnational harmonisation have been observed both in relation to legal origin and political economy. Proponents of the weak form legal origin thesis note a trend towards convergence in corporate law across legal traditions in recent years, attributing this to the influence of transnational harmonisation.[271] Likewise, Kraakman et al observe that the rise in international institutional investment has brought about greater convergence in corporate ownership patterns and a corresponding convergence in corporate law.[272]

Nevertheless, convergence as a result of transnational harmonisation is clearest in relation to formal law. Scholars concede that there is greater divergence in relation to the operation of legal transplants, although internationalisation and institutional shareholding have arguably increased shareholder activism in recent times.[273] Milhaupt and Pistor assert that the function of law is determined less by its form and more by the underlying purpose for its adoption. They assert that legal transplants undergo a process of adaptation to the local context. The effectiveness of legal transplants is influenced by the people who interpret and enforce the law, and complementarity between political economy and the values embodied in legal transplants.[274]

[271] Siems, *Convergence in Shareholder Law*, above n 146, 226–7.
[272] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 313.
[273] Ibid; Siems, *Convergence in Shareholder Law*, above n 146, 267–70.
[274] Milhaupt and Pistor, above n 167, 210.

2.3 CONCLUSION

This chapter has focused on the methods and theoretical approaches adopted in the analysis of the research questions. Section 2.1 examined the mixed methods approach, which will be used in describing and explaining the character of Malaysian shareholder protection. The doctrinal analysis of primary legal sources is adopted in Chapter 3 to examine the content of formal shareholder protection. The leximetric method measures the protective strength of formal Malaysian shareholder protection in Chapter 4. The strength of Malaysian shareholder protection is placed internationally through a comparison with six other countries.

The leximetric method and doctrinal analysis focus primarily on formal law with minimal consideration of its implementation. The common perception of Malaysian shareholder protection as 'form over substance' emphasises the need for an explanation to the anomaly. The operation of shareholder protection is not captured by the leximetric method nor doctrinal analysis. Chapter 5 describes the effectiveness of shareholder protection in its broader socio-economic context. This facilitates an understanding of causal relationships which underpin regulatory failure. There are parallels between the socio-legal approach and theories of legal evolution in their perspective of law as being inextricably related to its context. Chapter 5 examines the manner in which Malaysian shareholder protection operates, highlighting the areas in which the regulations lack effectiveness. Milhaupt and Pistor reason that failures and controversies warrant examination as they expose the weaknesses of systems which ordinarily lie 'beneath the radar'.[275] Chapter 5 begins to identify specific features of the context in which the regulations operate, which are thought to affect the implementation of law. These contextual influences are further investigated in Chapter 6.

The second research question of this thesis focuses on the contextual factors and influences which have shaped the character of Malaysian shareholder protection law. This forms the central question of Chapter 6. Chapter 6 brings together the discussion of contextual influences on the various aspects of Malaysian shareholder protection raised in earlier chapters. It further develops an understanding of the contextual factors and influences which have shaped formal Malaysian shareholder protection as well as its operation. The analysis in Chapter 6 is underpinned by the socio-legal perspective.

Chapter 6 examines the findings of earlier chapters on the character and development of Malaysian shareholder protection, and examines them by reference to the theoretical perspectives discussed in Section 2.2 of the present chapter. Theories of legal origin are relevant to the pattern of borrowing from the regulation of other common law countries which arises from the analysis in Chapter 3. Trends in legal change as indicated by the leximetric analysis in Chapter 4 provide insights into the role of legal tradition in the evolution of Malaysian shareholder protection.

[275] Ibid 10–11.

The analysis of the evolution of Malaysian shareholder protection draws from both legal origin and legal evolution approaches. Transnational harmonisation and political economy further illuminate the way in which Malaysian shareholder protection has evolved. These approaches are complementary, each addressing different facets of the evolution of Malaysian shareholder protection. Legal origin and transnational harmonisation potentially provide explanations for the shape of formal shareholder protection but do not provide an explanation for the Malaysian regulations' lack of substantive effect. The need to consider the manner in which law operates and the context in which it operates is met by incorporating perspectives from the legal evolution approach. Theories of legal evolution assert that political, economic and socio-cultural influences affect the way in which law operates, and together with political economy, offer relevant explanations for the gap between formal law and its implementation. A synthesis of methods and approaches provides a more complete perspective and explanation of the character of Malaysian shareholder protection and the manner in which it has developed. The synthesis enables the strengths of methods to compensate for the limitations of others, contributing to more robust findings.

Although the theories of legal origin and legal evolution are both concerned with the way in which law develops, the scholarship in these two discourses has largely been mutually exclusive. The weak form legal origin thesis briefly canvasses the relevance of contextual influences to the legal origin debate. Nevertheless, the discussions are in their early stages of development and are in need of further empirical testing. This thesis builds on preliminary observations in recent literature of the interaction among contextual influences, legal tradition and transnational harmonisation. It further synthesises perspectives provided by these approaches with insights drawn from political economy. Chapter 6 seeks to understand the way in which legal origin interacts with contextual influences, political economy and forces towards transnational harmonisation in shaping the character of Malaysian shareholder protection.

Table 1: Research methods

Aspect of the character of shareholder protection	**Formal law/ its operation**	**Research questions**	**Methods**
Content	Formal law	What is the content of shareholder protection? How has it changed over time?	Qualitative, doctrinal analysis of law
Strength	Formal law	What is the strength of shareholder protection? How has it changed over time? How does the strength of Malaysian shareholder protection compare internationally?	Quantitative, leximetric method, comparison with leximetric data from 6 other countries
Effectiveness	Operation in practice	How effective is Malaysian shareholder protection in practice?	Qualitative and quantitative Literature review of secondary sources Primary sources: judicial decisions on breaches of directors' duties from 2008 to 2015, focussing on derivative actions: Descriptive statistics Doctrinal analysis of judicial interpretation and application of statutory criteria Comparison with Australian decisions from 2008 to 2015 using both descriptive statistics and doctrinal analysis of judicial approaches

Table 2: Theoretical approaches

Theoretical approaches	**Focus**	**Explains**	**Why the approach may be relevant**
Legal origin	Inherited legal tradition	Formal law	Malaysian shareholder protection law largely comprises transplants from common law countries, UK and Australia.
Transnational harmonisation	Convergence with international standards	Formal law	Reforms after the Asian financial crisis were driven by the foreign investors' demands for international standards. As Anglo-American standards were held out as models of international standards, Malaysian reformers looked to UK and Australian regulations, and the reforms were also consistent with inherited legal tradition.
Legal evolution	Law co-evolves with its context	Formal law and operation	The regulations' lack of substantive effect is attributed to concentrated shareholding structures in Malaysia, and in particular to the dominance of controlling shareholders over corporate management. Concentrated shareholding structures have been precipitated by state policy, suggesting the relevance of political economy.
Political economy	Power relations which affect economic outcomes	Formal law and operation	Substantial direct and indirect state ownership and control of Malaysian companies, and political patronage of Malaysian companies, underpin the state-business nexus.

PART 2

THE CHARACTER OF MALAYSIAN

SHAREHOLDER PROTECTION LAW

CHAPTER 3

THE CONTENT OF MALAYSIAN SHAREHOLDER PROTECTION LAW

As established in Chapter 1, the aim of this thesis is to describe and explain the character and evolution of Malaysian shareholder protection law. The content of shareholder protection is one of the key aspects of shareholder protection which define its character. This chapter seeks to describe the content of Malaysian shareholder protection regulation. It details the specific ways in which the regulations seek to protect shareholders from expropriation by directors or controlling shareholders. In this thesis, references to the 'expropriation' of shareholders refer to the misappropriation of corporate property by those in control of companies which, in turn, causes losses to shareholders. In the Malaysian context, minority shareholders whose shareholdings are relatively small are often thought to suffer significant losses from such misappropriation. Shareholders who own large controlling stakes in companies often wield considerable control over the management of companies. Such influence is thought to facilitate the misappropriation of corporate assets for personal profit. Shareholding structures and their implications for the effectiveness of shareholder protection law in Malaysia will be examined further in Chapters 5 and 6.

The protections which the law provides for shareholders commonly take the form of rights of participation in key corporate decisions. At times, the protections provide shareholders rights of recourse to the courts such as when shareholders have been unfairly prejudiced.[276] Shareholder protection regulation also comes in the form of duties imposed on directors who manage the company. The regulations are designed to facilitate a degree of accountability to shareholders. Disclosure of information is particularly relevant where conflicts of interests between directors and shareholders arise. Such disclosure facilitates monitoring by shareholders and is thought to operate as a deterrent against corporate abuse.

This chapter draws on sources of shareholder protection which include formal law, codes and listing rules. For ease of reference, the phrase 'shareholder protection' is used in this thesis to refer to shareholder protection law or regulation. The phrases 'law' and 'regulation' are used interchangeably in this thesis to refer to the relevant legislation, case law, listing rules and voluntary codes which relate to the governance of companies and the rights of shareholders. As stated in Chapter 2, the description of the ways in which the regulations seek to protect shareholders from expropriation is informed by a doctrinal analysis of law. This chapter also seeks to ascertain how the content of shareholder protection has evolved over time. It canvasses developments in the content of Malaysian shareholder protection law, from the early years of Malaysia's nationhood to 31 December 2016. The analysis in this chapter forms a platform for the measurement of the strength of formal Malaysian shareholder protection in Chapter 4 while Chapter 5 examines the effectiveness of shareholder protection in practice.

Malaysia became an independent state in 1957. Since then, the regulation of shareholder protection has increased substantially. In examining shareholder protection reforms, several related questions arise. What stimulated the reforms and influenced legal change? What inspired the content of reforms? As the focus of this chapter is the content of shareholder

[276] *Companies Act 1965* s181; *Companies Act 2016* s346.

protection, these issues are secondary to the present discussion. Nevertheless, preliminary observations of these secondary issues will form the basis for further analysis in subsequent chapters. These observations are particularly relevant to Chapter 6 which examines the contextual influences on the development of shareholder protection law and its effectiveness. As a corollary, this chapter examines questions relating to regulatory enforcement. Who could enforce the various protections? Were there any regulators and, if so, who were they? These questions are further considered in Chapter 5 which focuses on the implementation of shareholder protection.

This chapter begins by examining the British colonial origin of Malaysian shareholder protection law. Prior to independence from the British, Malaya's legal institutions were modelled on the English common law legal system. In the first few decades after independence, the legal elite remained predominantly English trained. Many of the shareholder protection reforms reflected the influence of other common law countries. As developments in the content of Malaysian shareholder protection are traced over the course of this chapter, the continuing influence of regulation from other common law countries is evident. The implications of this trend are further explored in Chapter 6 which examines the influence of legal origin on the development of Malaysian shareholder protection.

The analysis in this chapter is set out chronologically. The discussion begins by considering Malaysia's colonial past which led to the reception of English shareholder protection in section 3.1. The early development of shareholder protection after independence is then examined. The analysis in section 3.2 focuses on the period spanning the 1960s and 1970s. Subsequently, the development of shareholder protection from the 1980s to the Asian financial crisis in 1997 will be canvassed in section 3.3. The discussion in section 3.4 then turns to the regulatory reform following the Asian financial crisis to December 2016. Each of these sections examines the content of the shareholder protection law, briefly canvassing the mechanisms for the enforcement of the provisions.

3.1 Colonial Influence

This section examines the early development of shareholder protection in Malaya prior to independence from the British. An examination of the origins of shareholder protection in Malaya provides insights into the role of inherited legal tradition in shaping the character and evolution of Malaysian shareholder protection. It is evident that the pattern of borrowing from English law began prior to independence. This chapter indicates that the tendency to emulate English law has continued. These trends suggest that inherited legal tradition has had a significant influence on the development of Malaysian shareholder protection. Chapters 4 and 6 further consider the role of legal origin in the development of Malaysian shareholder protection.

The earliest formal regulations governing shareholder protection in Malaya are attributed to British colonial influence. Prior to the formation of the Malayan Union, the various Malay states were British colonies and protectorates known as the Straits Settlements, the Federated Malay States and the Unfederated Malay States. The Straits Settlements comprised British

colonies established in Penang, Malacca and Singapore. English law was applicable in the Straits Settlements as early as 1878.[277] The *Companies Ordinance* (Straits Settlements) was enacted in 1889. Sulaiman described the legislation as 'very basic, adopting the reforms in company law that occurred in England in the early 1800s.'[278] Other sources of shareholder protection included English common law and equitable principles.

The Federated Malay States and the Unfederated Malay States often emulated company law in the Straits Settlements.[279] The Federated Malay States and Unfederated Malay States were British protectorates and did not formally receive English law until the early to mid-twentieth century.[280] Prior to English law being formally received in the British protectorates, English rules were informally adopted in the Federated Malay States based on the inherent jurisdiction of the court to do justice. Bartholomew posits that English law was perceived as the embodiment of progressive standards of justice.[281] The Bar and Bench in those states were English trained and applied English law in the courts. Likewise, although the Malay states were not formally required to adopt English legislation before the twentieth century, some of the Malay states nonetheless copied the English company legislation in force in the Straits Settlements.

The Federated Malay States, the Unfederated Malay States and two of the Straits Settlements, Penang and Malacca, were amalgamated in 1946. The federation was known as the Malayan Union. The *Companies Ordinance 1946* was the first uniform company legislation. It extended the application of the *Companies Ordinance 1940* (Straits Settlements) across the newly formed Malayan Union.[282] Subsequently, the Malayan Union was renamed the Federation of Malaya in 1948 and was granted independence in 1957.

In anticipation of Malaya attaining independence, the *Civil Law Act 1956* was enacted. The Act expressly provided that English common law and rules of equity as administered in England on 7 April 1956 should continue to apply in independent Malaya as long as they did not conflict with any written law.[283] The *Companies Ordinance 1946* continued to constitute the main legislative source of shareholder protection until the mid-1960s. Merging with Singapore and the states of Sabah and Sarawak, Malaya became known as Malaysia in 1963. Singapore subsequently separated from Malaysia in 1965.

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[277] *Civil Law Ordinance 1878* s 6.
[278] Aiman Nariman bt Mohd Sulaiman, 'Corporate Administrative Regulation: A Historical Study of the Role of the Registrar of Companies', (2000) 8 *International Islamic University* 21, 30.
[279] Petra Mahy and Ian Ramsay, 'Legal Transplants and Adaptation in a Colonial Setting: Company Law in British Malaya' [2014] *Singapore Journal of Legal Studies* 123.
[280] English law was formally received in Federated Malay States through the enactment of the *Civil Law Enactment 1937*. The Unfederated Malay States received English law formally through the *Civil Law (Extension Ordinance) 1951*. Bartholomew posits that formal statutory reception of English law resulted in little change to practices which were in place prior to formal reception; G W Bartholomew, *The Commercial Law of Malaysia: A Study in the Reception of English Law* (Malayan Law Journal Limited, 1965) 14–15.
[281] Ibid 13–15.
[282] Mahy and Ramsay, above n 279, 140.
[283] *Civil Law Act 1956* s 3.

3.2 THE 1960S AND 1970S

Among the most significant developments in shareholder protection which occurred in the early years after Malaysia's formation was the enactment of the *Companies Act 1965*. This was the first company legislation enacted by the newly independent state. The discussion canvasses the development of Malaysian shareholder protection before examining the content of statutory protections, common law and equitable principles. It also considers the regulation of listed companies. In addition, the analysis briefly outlines the mechanisms for enforcement of regulations.

3.2.1 *Development of Malaysian Law*

As mentioned above, English common law and equitable principles were expressly adopted in Malaysia by the *Civil Law Act 1956*. During the 1960s and 1970s, there were few locally reported cases relating to shareholder protection.[284] Although directors' fiduciary duties were an important source of shareholder protection, there was a lack of authoritative local decisions.[285] The few local decisions and scholarly commentary indicate that during the 1960s and 1970s Malaysian common law was a blend of laws drawn from several common law countries. The influence of English law was substantial, with Australian and Singaporean law having considerable influence.[286]

The common practice of referring to Singaporean cases was attributed to the lack of local cases and similarities in company legislation. Singh observed that the Malaysian and Singaporean *Companies Acts* were 'almost identical even to the numbering of the sections.'[287] Commentators at times referred to the shareholder protection law of Malaysia and Singapore interchangeably.[288] The shared colonial heritage and similarity in legal institutions arguably further contributed to the ease of borrowing from Singaporean law. As mentioned above, Singapore was part of the Straits Settlements, a British colony in Malaya. The tendency of the Malay states to emulate the English law in force in the Straits Settlements had been established by the early 20th century.

There are a number of reasons why English law continued to be influential. First, prior to 1985, appeals could be made to the Privy Council against Malaysian court decisions. Hence, the

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[284] Among the significant local decisions were cases on the oppression remedy such as *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 59, FC.

[285] One of these was *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259. This case involved s 131 of the *Companies Act 1965* which is a statutory restatement of the equitable no conflict rule.

[286] Examples of these include Pillai and Singh's works; Philip Pillai, 'Enforcement of Directors' Duties and Oppression: In 'Re Kong Thai Sawmill (Miri) Sdn Bhd' [1976] *Malayan Law Journal* lxxii, lxxiii; Awther Singh, *Company Law of Singapore and Malaysia* (Volumes 1 and 2) (Quins, 1976). Bartholomew's journal article on the reception of English commercial law in Malaysia refers particularly to English and Australian cases; G W Bartholomew, 'The Commercial Law of Malaysia' [1964] *Malayan Law Journal* xvii.

[287] Singh, above n 286, 3.

[288] Examples of such writings include P N Pillai, 'Oppression of Minority Shareholders: The Singapore and Malaysian Experience' (1979) 21 *Malaya Law Review* 241 and Koh Eng Tian, 'The Trustee-Director and His Remuneration' [1960] *Malayan Law Journal* xxxiii. Singh's textbook on the company law of Malaysia and Singapore stated that the discussion of the law was deemed to be applicable to both countries unless otherwise stated; Ibid.

prospect of appeal was likely to have been a significant reason why English decisions continued to have persuasive authority. Secondly, as mentioned above, there was a lack of local authority. English common law was the default position as a consequence of the *Civil Law Act 1956*. Although the cut-off date specified by the *Civil Law Act 1956* was 7 April 1956, English cases were subsequently still regarded as highly persuasive. This was so, particularly where there was a gap in Malaysian law. Wong's commentary suggested that UK cases were referred to in the absence of Malaysian case law on the point.[289] Pillai noted the 'tendency to use English texts and cases in construing similar local provisions.'[290] Singh mentions the 'overwhelming persuasiveness of decisions of the House of Lords' in relation to both Malaysian and Singaporean courts.[291] Nevertheless, English precedents were not always followed by Malaysian courts. In relation to the oppression remedy, for instance, local decisions demonstrated a greater willingness to find oppression than the Privy Council.[292]

Thirdly, scholarly critique reflected the implicit assumption that Malaysian law ought to keep up with developments in English law.[293] Scholars did not state the reason for this assumption. One possibility was that this was a continuation of the thinking established in colonial times that the colonies ought to emulate developments in the law of the metropolis.[294] Singh describes the strong influence of English law stemming from the English educated judiciary, legal profession and academics. He argues that this perpetuated the continuation of 'Englishness' of the local legal system after independence from the British.[295] Singh's assertions resonate with some arguments of the legal origin hypothesis and, in particular, with the proposition that 'affinities of legal thought and language' facilitate continued borrowing from countries of the same legal tradition. The implications of this for the evolution of Malaysian shareholder protection will further be considered in Chapter 6.

Over time, Australian law was also seen as embodying the regulatory standards of developed common law countries.[296] Together with English law, Australian law was at times regarded as a benchmark. In writing about company law reform across Commonwealth countries, Gower argued that company regulation in Afro-Asian countries should continue to be based on Western models. He premised this assertion on grounds that the joint stock company was essentially 'a product of Western industrial civilisation.'[297]

The *Companies Act 1965* strongly reflected the influence of other common law countries, particularly that of Australia and the UK. In drafting the *Companies Act 1965*, law reformers

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[289] Wong Weng Kwai, 'Minority Shareholders' Action: A Commentary on Federal Transport Service Ltd v Abdul Malik [1974] *Malayan Law Journal* xxxvi.
[290] Pillai, 'Oppression', above n 288, 248.
[291] Singh, above n 286, 21.
[292] Pillai, 'Oppression', above n 288, 257.
[293] For instance, Mooney highlights the benefits of drawing on English experience; Peter John Mooney, 'Section 181 of the *Companies Act, 1965*' [1977] 2 *Malayan Law Journal* xxii, xxiii; Wong critiques a Malaysian decision based on an analysis of English law; Wong, 'Minority Shareholders', above n 289.
[294] Rob McQueen, *A Social History of Company Law* (Ashgate, 2009), 275–7.
[295] Singh, above n 286, 19–20.
[296] Tan Pheng Theng, 'The Securities Industry Bills of Malaysia and Singapore' [1973] *Malayan Law Journal* xvi; Mooney, above n 293.
[297] L C B Gower, 'Company Law Reform' (1986) 4 *Malaya Law Review* 36, 37.

drew on company law reform initiatives from common law countries.[298] The Malaysian reforms were informed by the Cohen's Report (UK),[299] the Jenkin's Report (UK)[300] and the company legislation drafted for Ghana by Professor Gower.[301] The *Companies Act 1965* was premised on the Australian uniform company legislation. Overseas experience of regulatory enforcement also influenced the Malaysian reforms. The statutory oppression remedy, for instance, was drafted to avoid the problems encountered in other common law countries.[302]

3.2.2 *The Companies Act 1965*

In the early days of Malaysia's nationhood, the state sought to establish a regulatory framework which would facilitate the development of its economy. Corporations were perceived as being central to Malaysia's economic development. Malaysia's Federal Constitution's designated corporate regulation as a federal power. Efforts were made to develop the regulation of shareholder protection to foster a 'healthy climate for investment.'[303] Venturini describes the process as follows:

> In order to assist in the speedy preparation of a new Companies Act for Malaysia, the Government constituted on 30th October, 1963, a committee to advise in [sic] the forms and content of the new legislation. The Committee, which included representatives of the Bar Council, the Society of Accountants, and the Society of Chartered Secretaries, was chaired by Raja Mohar bin Raja Badiozaman, Secretary to the Ministry of Commerce and Industry.
>
> Working closely with the Attorney-General's Department the Committee has considered the current English and Australian legislation, the Cohen's Report[304] and the Jenkins' Report ,[305] as well as the Report and Draft Code prepared for Ghana[306] by Professor Gower and the many submissions for improving the law that have been sent to the Government by interested persons and bodies within Malaysia.[307]

The influence of other common law countries was evident in the drafting of the *Companies Bill*. The Mohar Committee also considered company legislation in force in other common law countries such as India and New Zealand.[308] Mr JC Finemore, the Draftsman of the

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[298] VG Venturini, *Company Law Reform in Malaysia* (University of Singapore Law Society, 1964) 12–13.
[299] The Cohen Committee was appointed to review the *Companies Act 1929* (UK). It was given the task of reviewing the 'requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest'. Its report was presented to the UK Parliament in June 1945; Cohen Committee, Parliament of UK, *Report of the Committee on Company Law Amendment* (1945).
[300] The Jenkins Committee was a Company Law Committee. Its terms of reference included reviewing the workings and provisions of the *Companies Act 1948* (UK) and making recommendations for reform of shareholder rights. Its report was presented to the UK Parliament in June 1962; Jenkins Committee, *Report of the Company Law Committee* (Parliament of UK, 1962).
[301] L C B Gower, *Final Report of the Commission of Inquiry into the Working and Administration of the present Company Law of Ghana* (1961). The draft code was the basis of the *Companies Act 1963* (Act 179) (Ghana).
[302] Mooney, above n 293, xxiii.
[303] Chong citing Raja Mohar's foreword to the *Companies Bill 1964*; Joseph KL Chong, *Chongs on Company Law of Malaysia* (Eastern Press, 1966) 4.
[304] Please refer to footnote 299 for more information on the Cohen Report.
[305] Please refer to footnote 300 for more information on the Jenkins Report.
[306] This draft legislation is further explained in footnote 301.
[307] Venturini, above n 298.
[308] Chong, above n 303, 4.

Australian uniform companies legislation, prepared the draft *Companies Bill 1964*. The Australian companies legislation was, in turn, influenced by the UK's company legislation.[309] In the foreword, Raja Mohar explained:

> The assistance derived from considering the laws and decisions of other countries of the Commonwealth is still considered greater rather than less because even the Australian laws have already adopted much of the latest thinking on company legislation from Canada, Ghana, the United Kingdom and India … The Australian influence is said to be more apparent than real.[310]

Raja Mohar detailed several principles considered by the Committee in preparing the Bill. He averred to the desirability of adhering to international standards. According to him, 'The Committee also bears in mind in the preparation of the draft the desire of the Government that Malaysia should adopt a company law that will be as good as, if not better than, any similar legislation in force in any other country.' At the same time, he emphasised the need for indigenisation. He describes the legislation as a 'Malaysian Act' which 'should be thought of as the basis upon which a law for truly Malaysian conditions will develop.'[311]

3.2.3 *Shareholder Protection Provisions of the Companies Act 1965*

The *Companies Act 1965* gave the general meeting power over a range of decisions. The approval of shareholders representing at least three quarters of voting rights was required for any amendment of the articles of association[312] or arrangements between the company and its creditors.[313] Decisions on capital measures including the reduction, increase, division or consolidation of share capital were also subject to the approval of three quarters of the voting rights.[314] Many of these regulations closely resembled those of the *Companies Act 1948* (UK) and the *Uniform Companies Act 1961* (Vic).[315]

The right to demand an extraordinary general meeting could be exercised by shareholders who held 10 per cent or more of the paid up capital.[316] Agenda setting power for general meetings was held by shareholders with five per cent or more of the company's voting rights or 100

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[309] H A J Ford, 'Recent Developments in Australian Companies Legislation' (1962) 4 *Malaya Law Review* 48, 49–50.
[310] Chong, above n 303, 4.
[311] Raja Mohar also acknowledged the inherent conflict in two other principles considered by the Committee in drafting the Bill. The first was that the investing public should be adequately protected. The second was that honest business enterprises should not be unnecessarily burdened. He emphasised the Committee's endeavours to maintain a fair balance between these principles; Ibid.
[312] *Companies Act 1965* s 31.
[313] *Companies Act 1965* ss 176, 273(1).
[314] Table A art 42 provides that the company may by special resolution reduce its share capital. Section 62 of the *Companies Act 1965* provides that share capital may be increased, consolidated or divided by the general meeting if authorised by the Articles. Article 40 of Table A states that this may be done with the approval of the general meeting.
[315] Sections 31, 62 and 176 of the *Companies Act 1965* are almost identical to ss 10, 61 and 206 of the *Companies Act 1948* (UK). Likewise, ss 31, 62 and 181 of the *Companies Act 1961* (Vic) correspond to these statutory provisions.
[316] *Companies Act 1965* s 144.

members.[317] Many of these protections were in force in the Straits Settlements and Malay states through colonial statutes enacted by the British in the early twentieth century.[318]

Table A of the *Companies Act 1965* provided shareholders with additional decision-making powers. These provisions were replaceable rules. Companies had the option of adopting Table A as default regulations. Article 70 specified that directors' remuneration should be determined by the company in general meeting. Article 66 of Table A accorded the general meeting of shareholders the power to elect or appoint directors. Article 98 of Table A allowed shareholders a limited right to participate in the declaration of dividends. This right was subject to the proviso that the dividend should not exceed the amount recommended by directors.

Shareholder participation was facilitated by regulations which allowed the exercise of voting rights through proxies. Nevertheless, persons who may have been appointed as proxies were restricted.[319] Shareholders were given the right to remove directors by ordinary resolution.[320] The duration of directors' appointments was restricted by Table A. Article 63 specified that a third of directors should retire every year.[321] Shareholders were entitled to inspect the company's register of members without any charge.[322] Where shareholder approval was sought for arrangements with creditors, the regulations provided that shareholders should be duly informed. In particular, the regulations required that shareholders should be given an explanation of the effect of the arrangement. They also specified that any material interest of directors should be disclosed.[323]

The *Companies Act 1965* introduced statutory directors' duties in Malaysia.[324] Section 132 of the *Companies Act 1965* imposed a duty of loyalty on directors. Prior to this, equitable fiduciary duties transplanted from England required directors to act bona fide in the interest of the company as a whole.[325] Directors were required to avoid conflicts of interests. The 'no profit rule' similarly prohibited directors from using their position to obtain a personal profit.[326] Section 132(2) resonated with the no profit rule while subsection (1) restated the directors' duty to act honestly and with reasonable diligence. Subsection (5) preserved the rules of equity

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[317] Section 151 of the *Companies Act 1965* provides that the proportion of members required to propose a resolution is five per cent or more voting rights or at least 100 members each holding RM500 (AUD166) or more paid shares.

[318] The *Companies Enactment 1917* (Federated Malay States) is an example of colonial legislation which contained many of the shareholder protections present in Malaysian law in 1965. These included alteration of the articles by special resolution, members' rights to inspect the register of members, increase or reduction of share capital, subdivision of shares by special resolution and the right to requisition an extraordinary general meeting. Three fourths of members could also enter into schemes of arrangement with creditors. Likewise, Table A contained the 'one share one vote' rule and provided that the remuneration of directors should be determined by the general meeting.

[319] Section 149(1)(b) of the *Companies Act 1965* specifies that a proxy must be a member or a solicitor, auditor or person appointed by the Registrar.

[320] *Companies Act 1965* s 128.

[321] The third of directors who have been longest in office should retire each year; *Companies Act 1965* Table A art 65.

[322] *Companies Act 1965* s 160(2).

[323] *Companies Act 1965* s 177. This section is almost identical to s 207 of the *Companies Act 1948* (UK).

[324] Earlier local company legislation such as the *Companies Ordinance 1940* did not contain any regulations on directors' duties.

[325] *Ngurli Ltd v McCann* (1953) 90 CLR 425; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656.

[326] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

and common law in relation to directors' duties. These statutory restatements of directors' duties were relatively brief compared with the more comprehensive fiduciary duties imposed by equitable principles.

The equitable no conflict rule had its statutory restatement in s 131 of the *Companies Act 1965*. As with s 132, the ambit of the statutory rule was more limited than the equitable principle. Section 131(1) required directors to disclose interests in contracts with the company. Section 131(5) mandated the disclosure of conflicts of interests arising out of directors holding any office or property. There were slight differences between the statutory rules and equitable principles. The statutory rule required disclosure to be made to directors of the company instead of shareholders. The statutory duty was in addition to the equitable principles.[327] Hence, the consent of shareholders to such conflicts of interests was still necessary in accordance with equitable fiduciary duties. Similarly, s 133 prohibited companies from giving loans to directors or providing security for such loans.[328] This prohibition extended to the directors of related companies.

One of the key differences between the statutory duty and equitable principles was in the penalties stipulated by legislation. Section 131 provided for criminal penalties for contravention of the section. The severity of criminal penalties potentially served as a greater deterrent against misconduct by directors than the civil remedies available for breaches of fiduciary duties.[329] The duty to avoid conflicts of interests was supported by the replaceable rules in Table A. Article 81 of Table A prohibited directors from voting on contracts they were interested in. In addition, Table A specified that if a director failed to declare the nature of his interest in a contract in which he was directly or indirectly interested, his office would become vacant.[330]

Directors are not allowed to take part in the management of companies without leave of the court if they are convicted of breaches of directors' duties under s 132, any offence in connection with the promotion, formation or management of companies, or any offence involving fraud or dishonesty punishable with imprisonment for three months or more.[331] The wording of s 130 of the *Companies Act 1965* indicates that only criminal convictions lead to disqualification. Hence, findings made against directors for breaches of duty in civil proceedings would not lead to disqualification. Undischarged bankrupts are also not permitted to take part in the management of companies without leave of the court.[332]

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[327] *Companies Act 1965* s 131(8); *Tan Kiong Hwa v Andrew S H Chang* [1974] 2 MLJ 188.

[328] Nevertheless, there were several concessions. Loans to employees which had been approved by the general meeting were exempted. Likewise, companies were permitted to give directors loans towards the purchase of a home, provided that the approval of the general meeting was obtained. Where loans were made to directors without the approval of the general meeting, the section provided that the directors who authorised the transaction were personally liable.

[329] Remedies for breaches of equitable fiduciary duties include damages and liability to account for profits; *Furs Ltd v Tomkies* (1936) 54 CLR 583; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; *Avel Consultants Sdn Bhd v Mohamed Zain Yusof* [1985] 2 MLJ 209.

[330] *Companies Act 1965* Table A art 72(h).

[331] *Companies Act 1965* s130. The prohibition is for a period of five years after conviction of offences.

[332] *Companies Act 1965* s 125.

The *Companies Act 1965* introduced an oppression remedy, which was at that time an innovation designed to address the shortcomings of the oppression remedies in UK and Australian statutes.[333] This contrasts with many of the provisions of the *Companies Act 1965* which closely followed UK and Australian company legislation. The limitations of the latter included their failure to include situations of unfair discrimination. In drafting the Malaysian oppression remedy, the recommendations of the Jenkins Committee (UK)[334] as well as the company legislation drafted by Professor Gower for Ghana[335] were considered.[336] Both of these had sought to address deficiencies in the remedies for oppressed minorities existing at that time.[337] As a consequence, s 181 was wider in ambit than the statutory provisions for oppressed minorities in both Australia and the UK.[338] Hence, Malaysian shareholders had the right to seek relief from oppressive conduct or disregard of their interests by controlling shareholders.[339] They could also seek relief from unfair discrimination.[340] As with the UK and Australia, shareholders could also apply to wind up the company on just and equitable grounds.[341]

3.2.4 *Common Law and Equitable Principles*

In addition to statutory protections, equitable fiduciary duties were important sources of formal shareholder protection. Common law principles also delineated rights and responsibilities among shareholders. This section analyses the post-colonial development of Malaysian common law and equitable principles. As noted above, the *Civil Law Act 1956* ensured that English common law and equitable principles applied in independent Malaya in so far as they did not conflict with any written law. Following independence from the British, the Malaysian judicial decisions continued to reflect the influence of English case law. Nevertheless, the influence of Australian and Singaporean law was also substantial.

The growing body of statutory protections in the *Companies Act 1965* did not displace the fundamental protections embodied by equitable principles. Sections 131 and 132 of the *Companies Act 1965* contained brief statutory statements of directors' duties, expressly preserving the operation of equitable fiduciary principles. Some of the most significant formal shareholder protections were contained in the equitable fiduciary duties. These fiduciary duties were applicable in Malaya from colonial times.

Equitable principles provided a broad and comprehensive framework which sought to protect shareholders from directors' self-interest. The equitable rules were buttressed by a wealth of

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[333] Pillai, 'Oppression', above n 288.
[334] Please refer to footnote 300 for further information on the Jenkins Committee.
[335] Section 181 of the *Companies Act 1965* is similar to s 218 of the *Companies Act 1963 (Act 179) (Ghana)*.
[336] Pillai, 'Enforcement of Directors' Duties', above n 286.
[337] Mooney, above n 293.
[338] *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 *Malayan Law Journal* 227, Privy Council per Lord Wilberforce; *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113, FC per Gopal Sri Ram JCA.
[339] *Companies Act 1965* s 181(1)(a).
[340] *Companies Act 1965* s 181(1)(b).
[341] *Companies Act 1965* s 218(1)(i); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; PC [1987] BCLC 472; [1987] 1 WLR 413; *Tien Ik Enterprises Sdn Bhd v Woodsville Sdn Bhd* [1995] 2 AMR 1033; [1995] 1 MLJ 769, SC.

case law capturing the directors' overriding obligation to act for the benefit of the company.[342] Directors were required to avoid conflicts of interests. They were not permitted to use their position for personal profit.[343] Equitable remedies allowed the company to recover the profits made by errant directors in breach of their fiduciary duties. However, the fiduciary duties were owed to the company rather than to individual shareholders and the rule in *Foss v Harbottle*[344] required that proceedings should be brought by the company. Hence, in order to enforce fiduciary duties, the majority of shareholders had to be willing to take action against the errant directors.[345] If the majority was unwilling to do so, minority shareholders faced considerable difficulties in enforcement. Common law allowed individual shareholders to bring a derivative action in limited circumstances.

A derivative action could only be brought by individual shareholders if they could satisfy the court that they came within one of the exceptions to the rule in *Foss v Harbottle*. An example was where there was fraud on the minority and the wrongdoers were in control of the company.[346] In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd*,[347] Gopal Sri Ram JCA observed that the fraud on the minority exception related to situations in which those in control of the company abused their powers for collateral purposes, such as where directors expropriated the company's property for their personal benefit.[348] However, derivative actions were known to be notoriously difficult for minority shareholders.[349]

Common law required directors to exercise a degree of care and skill.[350] However, directors were not required to have any qualifications and the duty was subjective. Shareholders were not entitled to expect much skill from a director who had limited knowledge and experience. The limitations of common law in protecting minority shareholders were among the reasons for statutory intervention. Pillai acknowledged that the rule in *Foss v Harbottle* imposed unsatisfactory limitations on shareholder rights.[351] The statutory oppression remedy arose out of the perceived need to provide minority shareholders better rights of recourse. Although common law principles provided shareholders some protections, these were often limited.[352]

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[342] *Aberdeen Railway Co v Blaikie Brothers* (1854) 2 Eq Rep 1281.
[343] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Cook v Deeks* [1916] 1 AC 554.
[344] [1843] 2 Hare 461. The rule in *Foss v Harbottle* was accepted by the Malaysian courts in *Paidah Genganaidu v Lower Perak Syndicate Sdn Bhd* [1974] 1 MLJ 220 and *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1976] 1 MLJ 59.
[345] Equitable principles allowed the general meeting to ratify breaches of directors' duties. Ratification of the breach by the majority of shareholders could absolve directors from liability; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134. There were limitations to the capacity of shareholders to ratify such breaches. For instance, shareholders could not ratify breaches which amounted to a fraud on the minority; *Cook v Deeks* [1916] 1 AC 554.
[346] *Edwards v Halliwell* [1950] 2 All ER 1064; *Tan Guan Eng v Ng Kweng Hee* [1991] 3 CLJ 1881; [1992] 1 MLJ 487; *Ting Chong Maa @ Tun Mun Seng v Chor Sek Choon* [1989] 1 MLJ 477.
[347] [1995] 3 MLJ 417.
[348] Ben Chan Chong Choon, Philip Koh Tong Ngee and Peter S W Ling, *Chan & Koh on Malaysian Company Law* (Sweet & Maxwell Asia, 2nd ed, 2006) 483. For example, in *Cook v Deeks* [1916] AC 554, the diversion of corporate opportunity by several directors for their own benefit amounted to fraud on the minority.
[349] Jenkins Committee, above n 300, [206].
[350] The case of *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 held at 428–9 that a director need not exhibit greater skill than may reasonably be expected from a person of his knowledge and experience.
[351] Pillai, 'Oppression', above n 288, 246.
[352] Shareholder rights at common law included the right to file a claim against a void or voidable resolution of the general meeting; *Edwards v Halliwell* [1950] 2 All ER 1064.

The common law principles adopted during the colonial period tended towards a more *laissez-faire* approach. Judicial policy was one of non-interference in the internal management of companies.[353] Over time, lead common law countries introduced measures which increased directors' accountability and shareholder rights. Many of these were in the form of statutes and codes. Malaysia's emulation of some of the statutory protections was reflected in the *Companies Act 1965*. The trend of borrowing from developments in the codified protections of other common law countries continued in the 1980s and beyond.

3.2.5 *Regulation of Listed Companies*

The *Companies Act 1965*, common law and equitable principles applied to both private and public companies. Public companies whose shares were listed on the stock exchange were subject to additional regulations of the stock exchange. Shareholder protection in relation to listed companies was further strengthened when the Kuala Lumpur Stock Exchange's (KLSE) *Listing Rules* were introduced in 1973. Prior to this, the stock exchanges of Singapore and Malaysia were a single entity which functioned in dual locations after Singapore's separation from Malaysia.[354] The separation of the stock exchange into separate entities in 1973 led to the formation of the KLSE. This was accompanied by the introduction of *Listing Rules*.

The new *Listing Rules* introduced pre-emptive rights which protected minority shareholders from the dilution of their interests in the company without their consent.[355] The new rules also imposed the requirement of shareholder approval for an increase in directors' fees.[356] However, the replaceable rules in Table A of the *Companies Act* had since 1965 specified that directors' remuneration should be subject to the approval of the general meeting. Hence, the increase in shareholder protection as a result of the requirement of shareholder approval for an increase in directors' fees was marginal.

The *Listing Rules* required directors who had an interest in related party transactions and held shares in the company to abstain from voting at the general meeting. The restriction against directors voting at the general meeting is ambiguous as such meetings usually involve voting by shareholders rather than directors. A plausible interpretation was that the provision restricted voting by shareholders who were also directors and had an interest in the related party transaction. In 1988, the rule was replaced with a statement that the stock exchange had the right to require directors or substantial shareholders to abstain from voting. Subsequent to the introduction of the *Listing Rules* in 1973, there was little change in shareholder protection until the mid-1980s.

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[353] The courts were reluctant to intervene in matters which could be ratified by the general meeting; H A J Ford and R P Austin, *Principles of Company Law* (Butterworths, 5th ed, 1990) 564.
[354] Tan Pheng Theng, *Securities Regulation in Singapore and Malaysia* (Stock Exchange of Singapore, 1978).
[355] KLSE, *Listing Rules* art 8.
[356] KLSE, *Listing Rules* art 27.

3.2.6 *Enforcement*

The regulator responsible for the public enforcement of the *Companies Act 1965* was the Registrar of Companies.[357] Enforcement activity by the Registrar of Companies was confined to administrative matters.[358] Many of the protections given to shareholders by the *Companies Act 1965* were in the form of voting rights. The enforcement of these rights would have depended on shareholders exercising their voting rights. While literature from this period makes little mention of shareholders' exercise of voting rights, in later years, scholars assert that the exercise of voting rights by minority shareholders was poor.[359]

Duties imposed on directors by equitable principles and the *Companies Act 1965* were owed to the company and not individual shareholders. Civil proceedings for breaches of directors' duties had to be brought by the company. In situations where the majority of shareholders ratified a breach of directors' duties or chose not to bring proceedings against the errant directors, minority shareholders were left with little recourse. Individual shareholders did not have the capacity to enforce breaches of directors' duties except with leave of the court to bring a derivative action.[360] There were few reported cases involving breaches of directors' duties during this period.

In summary, the 1960s and 1970s saw the enactment of the *Companies Act 1965* based on Australian uniform company legislation. The post-colonial development of shareholder protection also reflected a shift away from exclusive borrowing from English law. Although English case law was still highly persuasive, the influence of the broader common law world was discernible. Hence, Malaysian shareholder protection at this stage strongly reflected the influence of its common law heritage

3.3 THE 1980S TO THE ASIAN FINANCIAL CRISIS

The 1980s were a time of significant growth in corporate activity as well as the regulation of shareholder protection. Economic policy favoured the privatisation of state enterprise and stimulated the use of the corporate form as an engine of economic growth.[361] The increase in corporate activity arguably contributed to the uncovering of inadequacies in existing regulations. The economic recession in 1985[362] also appears to have been a factor in the events which ensued.

In the early to mid-1980s, several significant corporate scandals occurred. Among these was the Bank Bumiputra scandal, described then by the New York Times as 'the biggest financial

[357] *Companies Act 1965* s 7.
[358] Sulaiman, 'Corporate Administrative Regulation', above n 278, 34.
[359] Philip Koh Tong Ngee, 'Principles, Practice and Prospects of Corporate Governance: The Malaysian Legal Framework' [1994] *Malayan Law Journal* ix.
[360] *Foss v Harbottle* [1843] 2 Hare 461.
[361] Jomo KS (ed), *Privatizing Malaysia: Rents, Rhetoric, Realities* (Westview Press, 1995).
[362] Ming-Yu Cheng, 'Economic Fluctuations and Growth: An Empirical Study of the Malaysian Economy' (2003) 7 *Journal of Business in Developing Nations* 51.

scandal in Malaysia's history.'[363] In addition, the collapse of Multi-Purpose Holdings in 1985 resulted in trading on the stock exchange being suspended and adversely affected a large number of investors. The collapse involved the largest losses ever recorded by a Malaysian company at that time, amounting to RM191.9 million (AUD64 million). A prominent political leader, Tan Koon Swan, had been at the helm of Multi-Purpose Holdings and expropriated the company's property to fund fraudulent transactions through a Singaporean company, Pan Electric. Pan Electric's collapse resulted in the closure of both the stock exchanges of Singapore and Malaysia from 2 to 4 December 1985.[364] Tan was subsequently imprisoned in both Malaysia and Singapore for fraud. In 1986, Tan's political party, the Malaysian Chinese Association, was involved in another scandal in which more than half a million investors in deposit taking co-operatives were defrauded.

The Parliamentary debates on the amendments to the *Companies Act 1965* reflected an awareness of the vulnerability of minority shareholders to fraudulent dealings by directors.[365] In the second and third readings of the *Companies (Amendment) Bill 1986*, anecdotal evidence of expropriation of corporate property to the detriment of minority shareholders was cited. Several highly publicised corporate scandals were referred to. Various members of the Senate expressed dissatisfaction with the prevalence of corporate misconduct. They emphasised the need for improved protection, particularly for minority shareholders, and for harsher penalties aimed at deterring directors from misusing their powers.

The period between 1986 and 1988 saw significant increases in shareholder protection. Changes were made in order to strengthen protection for shareholders against expropriation through related party transactions. These were brought about through amendments to the *Companies Act 1965* and the *Listing Rules*. In 1987, the *Malaysian Code on Takeovers and Mergers* was introduced. Reforms continued to draw substantially from UK and Australian law.

Judicial decisions and scholarly writings from the 1980s and 1990s indicated that Malaysian common law and equitable principles largely comprised rules drawn from other common law countries.[366] Malaysian common law drew from English law as part of the broader body of common law. Malaysian courts and scholars also referred to judicial decisions from Australia, Canada, New Zealand, India, Hong Kong and Singapore.[367] More frequent reference was made to Australian and English judicial decisions than those of other countries.[368] Although appeals to the Privy Council were abolished at the end of 1984, reference continued to be made to

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[363] 'Malaysia Discloses Details of Bank Scandal', *New York Times* (New York), 8 January 1985 <http://www.nytimes.com/1985/01/08/business/malaysia-discloses-details-of-bank-scandal.html>.
[364] Mimi Ho et al, *Case Study on Pan Electric Crisis* (June 2004) Monetary Authority of Singapore <http://www.mas.gov.sg/about-mas/monographs-and-information-papers/staff-papers/2004/mas-staff-paper-no32-jul-2004.aspx>.
[365] Malaysia, *Parliamentary Debates*, Senate, 16–17 December 1986.
[366] Loh Siew Cheang, *Corporate Powers: Controls, Remedies and Decision-making* (Malayan Law Journal, 1996).
[367] Ibid; Koh, 'Principles, Practice and Prospects', above n 359.
[368] The frequent reference to Australian cases has been attributed to the modelling of the *Companies Act 1965* on the Australian uniform company legislation; Shanthy Rachagan, 'Controlling Shareholders and Corporate Governance in Malaysia: Would the Self-Enforcing Model Protect Minority Shareholders?' (2007) 3 *Corporate Governance Law Review* 1, 37.

English cases in the absence of local decisions.[369] While English decisions were not binding on the Malaysian courts, they continued to have considerable persuasive authority. The significant influence of English law on the Malaysian courts was reflected in Woon's observation that English cases were indicative of the way in which local courts were likely to decide cases.[370]

The affinity with Singaporean law was still discernible in the 1980s.[371] Nonetheless, there was a gradual recognition of an increasing divergence between Malaysian and Singaporean law. This is seen in the noticeable shift away from the assumption of similarity towards highlighting the differences between Singaporean and Malaysian law in scholarly writings.[372] In later scholarly writings, articles increasingly focus solely on either Singaporean or Malaysian law.[373]

Reference was made to the laws of other common law countries for several reasons. These were a continuation of trends observed during the 1960s and 1970s. Where there was a gap in Malaysian law, judges, lawyers and scholars looked to other common law countries. Scholars also referred to the laws of other common law countries as a benchmark. The quality of Malaysian law was assessed against that of common law countries which were perceived as progressive. These were usually the countries which were more developed than Malaysia. Hirsch appeared to assess the Malaysian judicial approach in the decision of *Yap Sing Hock v Public Prosecutor* against the standard of UK case law.[374] He argued that the rigidity demonstrated by the Malaysian court had 'no parallel or precedent in the common law world' and was a 'dramatic and wholly impractical departure from the standard normally applied to the interpretation of particulars.'[375] Similarly, Wishart critiqued a Malaysian decision largely by reference to a Victorian Supreme Court decision.[376] He noted the similarity in the facts of the cases, the virtually identical Acts but contradictory decisions. While acknowledging that

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[369] Walter Woon Cheong Ming, 'The Recovery of Losses Occasions by Corporate Crime – Suits Against Officers who Involve their Company in a Crime' (1983) 25 *Malaya Law Review* 271.
[370] Ibid 272.
[371] The close association between Malaysian and Singaporean law is seen in Hicks' article. He considered recent case law development in Singapore, Malaysia and the UK. His analysis drew from UK experience to inform potential developments in Singapore and Malaysia. Andrew Hicks, 'Liability of Holding Companies for the Debts of Their Subsidiaries - Recent Developments' [1987] *Malayan Law Journal* clxxvi.
[372] Ter Kah Leng and Catherine Swee Kian Tay, 'A Comparative Study of the Regulation of Insider Trading in Singapore, Malaysia, Australia, England and the United States' [1987] *Malayan Law Journal* ciii. Ter and Tay compared black letter law on insider trading, noting the similarities and differences among the laws of Singapore, Malaysia, Australia and the UK. They observed that Malaysian and Singaporean law was derived from Australian provisions. Ter and Tay asserted that Malaysian regulation was largely similar to Singaporean law, albeit with a few differences. They highlighted several differences in formal regulation between both countries, without evaluating the implications of these differences.
[373] See Philip Pillai, 'The Pernas/Haw Par Saga: Legal Issues and Documentation' (1975) 17 *Malaya Law Review* 280; David A Wishart, 'The Underlying Concern of Section 181 of the *Companies Act, 1965*' [1988] *Journal of Malaysian and Comparative Law* 1; Berna Collier, 'The Application of the Rule in *Salomon v Salomon* in Malaysian Company Law' [1998] 2 *Malayan Law Journal* lxv.
[374] Steven A Hirsch, 'Pseudo-rules for Pseudo-directors: The Problem of Rules and Standards in *Yap Sing Hock v Public Prosecutor*' [1992] *Journal of Malaysian and Comparative Law* 161.
[375] Ibid 170–1, 191. Hirsch also highlighted errors in the court's reasoning. He observed that the court favoured form over substance with the result of rewarding non-compliance with the *Companies Act*. He critiqued the decision which purportedly allowed the defendant to benefit from his wrong, arguing that this outcome was contrary to justice.
[376] David A Wishart, 'Malaysian Code on Take-overs and Mergers' in *Company & Securities Regulations in Malaysia – Current Developments* (International Law Book Services, 1989) 39.

the Malaysian Supreme Court's decision would be more authoritative in Malaysia, Wishart emphasised that the judgement of the Australian court was well-researched and persuasive. He also argued that the decision of the Australian court was more compatible with developments in Malaysian law.[377]

In a similar vein, there appeared to be a discernible assumption among some commentators that Malaysian law ought to conform to that of the lead common law countries. Wishart examined the Malaysian statutory oppression remedy. He referred to equivalent law in other common law countries, focusing particularly on Australia, New Zealand and the UK. Wishart identified lessons which Malaysian law could draw from other common law countries. He suggested that:

> [T]he approach to such sections taken world-wide should be taken in Malaysia … There seems to be no peculiarity of this country which would necessitate a different approach. Indeed, the form of capitalism adopted in Malaysia is the same as that in other common law countries.[378]

Much of the scholarly writings of the 1980s through to the Asian financial crisis reflected a continuation of the trend in doctrinal analysis seen in the literature from the 1960s and 1970s.[379] In the later part of the 1980s, there was a shift in thinking towards a more critical analysis of the practical workings of Malaysian shareholder protection. Salim and Koh critiqued the presumption of formal law's adequacy as a safeguard against the expropriation of corporate property. They highlighted efforts to circumvent the rules, underscoring the failure of regulations to curb errant behaviour.[380] They also emphasised the lack of regulatory enforcement and difficulties in implementation. Salim and Koh's critiques were a precursor to the wealth of critical analyses which emerged after the Asian financial crisis. Chapter 5 examines these criticisms in further detail.

The discussion below examines revisions to the *Companies Act 1965*. The introduction of the *Malaysian Code on Takeovers and Mergers 1987* is canvassed in section 3.3.2. The discussion then turns to the amendments to the *Listing Rules* in section 3.3.3. As in the 1960s and 1970s, equitable principles continued to be a significant source of formal shareholder protection. These equitable duties are examined in section 3.3.4.

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[377] Ibid 54.

[378] Wishart, 'The Underlying Concern', above n 373, 40.

[379] Some of the early doctrinal analyses include Chong, above n 303; Thomas R P Dawson, *Aids to the Study of Company Law in Malaysia* (Prudent Enterprise, 1973); Cheong Yuen Hee, 'Exercise of Directors' Powers' [1970] *Malayan Law Journal* xxvii; Philip N Pillai, 'Commercial Morality of Company Directors: A Comment on *Raja Nong Chik v Public Prosecutor*' [1971] 1 *Malayan Law Journal* 190 and Pillai, 'Oppression', above n 288.

[380] Rafiah Salim, 'Liability of Company Officials in Insider Trading' in *Company & Securities Regulations in Malaysia – Current Developments* (International Law Book Services, 1989) 1, 10; Koh, 'Principles, Practice and Prospects', above n 359.

3.3.1 *Amendments to the Companies Act 1965*

The *Companies (Amendment) Act 1985*, which came into effect on 1 February 1986, increased disclosure requirements in relation to directors' shareholdings.[381] In addition, the amendments mandated the disclosure of substantial shareholders' interests.[382] Koh observed that the amendments closely followed Australian company legislation. According to Koh '[i]ts more distant antecedents are found in the *Companies Act 1967* (UK) and the Jenkins Committee[383] Report of 1962.'[384] The rationale for the disclosure was described by the Eggleston Committee[385] as follows:

> Shareholders are entitled to know whether there are in existence substantial holdings of shares which might enable a single individual or corporation, or a small group, to control the destinies of the company, and if such a situation does exist, to know who are the persons on whose exercise of voting power the future of the company may depend.[386]

Section 69D required persons holding interests in the company amounting to five per cent or more to notify the company.[387] The amendments provided the courts the power to intervene in situations where substantial shareholders failed to comply with disclosure requirements. The courts were entitled to restrain such shareholders from disposing of interests in shares or exercising voting rights. The court could also order the sale of the shares in which the defaulting substantial shareholder had an interest.[388] Koh described the power of the court to intervene as a 'radical intrusion into the management of companies.'[389]

Companies were required to maintain a register of substantial shareholders[390] and a register of directors' interests.[391] These included directors' shareholdings, participatory interests, options and contracts. Directors were obliged to give notice in writing to the company of the particulars of such interests.[392] The provisions were, again, based on Australian company legislation. Koh cited the Eggleston Committee's reasoning:

> The object of these provisions is to impose a restraint upon insider trading by directors by subjecting their dealings in securities of the company to public scrutiny … the best safeguard against improper transaction is to ensure that disclosure is made of all transactions.[393]

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[381] *Companies Act 1965* ss 134–5.
[382] According to s 69D of the *Companies Act 1965*, ownership of five per cent or more of the voting rights in the company amounted to a substantial shareholding.
[383] For a description of the Jenkins Committee, please refer to footnote 300.
[384] Philip Koh Tong Ngee, 'Company Ownership Disclosure and Liabilities in Malaysia' [1992] 2 *Malayan Law Journal* li, li.
[385] The Eggleston Committee was established in 1967 to review company law in Australia, issuing seven interim reports to the Parliament of Australia.
[386] Company Law Advisory Committee to the Standing Committee of the Attorneys General, Parliament of the Commonwealth of Australia, *Second Interim Report* (February 1969) 1.
[387] An interest in shares was defined to include the entitlement to exercise control of rights attached to shares, even if the person was not the registered holder. It also included the right to acquire shares; *Companies Act 1965* s 6A.
[388] *Companies Act 1965* s 69N.
[389] Koh, 'Company Ownership Disclosure', above n 384, lxi.
[390] *Companies Act 1965* s 69L. Any member would be entitled to inspect this register without charge.
[391] *Companies Act 1965* s 134.
[392] *Companies Act 1965* s 135.
[393] Koh, 'Company Ownership Disclosure', above n 384, lxiii.

The amendments to the *Companies Act 1965* in 1986 and 1987 contributed significantly to the formal protection of shareholders from expropriation of corporate property through related party transactions. Section 132E introduced the requirement of prior shareholder approval for transactions with a director of the company or a person related to a director.[394] The threshold value of acquisitions or disposals of assets which triggered the requirements was set at RM250 000 or 10 per cent of the company's assets. The section imposed criminal penalties for contravention of the provisions. In addition, it required persons who benefitted from the transaction to account for profits. Directors who authorised the transaction were liable to indemnify the company for any loss resulting from the transaction. Section 132E bore a close resemblance to s 320 of the *Companies Act 1985* (UK).

The *Companies Act 1965* prohibited companies from giving loans to directors.[395] Section 133A extended this prohibition to persons connected with directors. Hence, the provision strengthened shareholder protection against expropriation through related party transactions. In addition, companies were prohibited from giving security for loans to persons connected with directors. Shareholder protection was also strengthened through the insertion of ss 132C and 132D into the *Companies Act 1965*.[396] Section 132C required shareholder approval for the disposal of a substantial portion of the company's assets or an acquisition of property of substantial value. Directors were required by s 132D to obtain shareholder approval prior to issuing shares.

In 1992, another restriction against related party transactions was added to the *Companies Act 1965*. Section 132G(1) stated that:

> [A] company shall not enter into any arrangement or transaction to acquire the shares or assets of another company in which a shareholder or director of the acquiring company, or a person connected to such shareholder or director has a substantial shareholding … unless the arrangement or transaction was entered into three years after such shareholder, director or connected person as the case may be, first held the shares in that other company or after the assets were first acquired by the said company …

Directors faced potential criminal liability for breach of the section. Any transaction entered into in breach of s 132G was void.[397] A number of situations were exempted from the ambit of s 132G.[398] The provision was criticised for its lack of clarity and inflexibility.[399] It was also said to prohibit genuine transactions which did not involve expropriation. Section 132G was repealed in 2007.[400]

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[394] Section 132E was introduced by the *Companies (Amendment) Act 1986* which came into force on 1 February 1987.
[395] *Companies Act 1965* s 133.
[396] Sections 132C and 132D were introduced by the *Companies (Amendment) Act 1985* which came into force on 1 February 1986.
[397] *Companies Act 1965* s 132G(2).
[398] *Companies Act 1965* s 132G(6). This subsection was inserted by the *Companies (Amendment) Act 1993*.
[399] Corporate Law Reform Committee, *Responses and Comments Received on Consultative Document 'Creating a Conducive Legal and Regulatory Framework for Businesses'* <http://www.ssm.com.my/files/clrc/consultation_documents/cd7r.pdf>.
[400] *Companies (Amendment) Act 2007.*

3.3.2 *Malaysian Code on Takeovers and Mergers 1987*

The introduction of the *Malaysian Code on Takeovers and Mergers 1987* was preceded by the growth of large corporate conglomerates stimulated by the privatisation of state-owned enterprise.[401] The expansion of corporate conglomerates was also achieved through mergers and acquisitions which were at times aggressive and hostile.[402] The *Malaysian Code on Takeovers and Mergers 1987* was based on the *City Code on Takeovers and Mergers* (UK).[403] Takeovers are arguably relevant to shareholder protection as the market for corporate control is thought to constitute a means of disciplining managerial inefficiency.[404] Regulations relating to takeovers also commonly seek to protect shareholders' interests, in the event of a takeover, in several ways.

The *Malaysian Code on Takeovers and Mergers 1987* required an acquirer of more than 33 per cent of the voting rights in a company to make a mandatory bid for the entirety of the shares.[405] Offer documents were to be sent to each member holding the class of shares subject to the takeover,[406] and were required to specify details which enabled shareholders to make an informed judgment as to the merits of the offer. The Code applied the principle of strict neutrality, prohibiting the board from any action which may have led to the frustration of a takeover offer.[407] It also prohibited the issue of shares, entry into contracts of sale and the disposal or acquisition of assets of material amounts which were aimed at frustrating takeover bids.[408]

3.3.3 *Listing Rules*

Revisions to the *Listing Rules* in 1988 further strengthened shareholder protection through additional requirements of disclosure and shareholder approval. Significant transactions involving directors or substantial shareholders, or parties related to them, required circulars to be given to shareholders, informing them of details of the transaction, and seeking their approval at a general meeting.[409] Changes were also made to the regulation of transactions involving substantial amounts. These included an announcement to the exchange where the transaction involved five per cent or more of the percentage ratios.[410] Transactions involving

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[401] Jomo, above n 361.
[402] Kok Swee Kheng, 'Malaysia to 2003: From Redistribution to Growth' (EIU Special Report M216, Economist Intelligence Unit, 1994) 17; Rajeswary Ampalavanar Brown, *The Rise of the Corporate Economy in Southeast Asia* (London: Routledge, 2006) 165; Edmund Terence Gomez, *Chinese Business in Malaysia: Accumulation, Accommodation and Ascendance* (Richmond: Curzon, 1999).
[403] K Arjunan and C K Low, *Lipton and Herzberg's Understanding Company Law in Malaysia* (LBC Sydney, 1995).
[404] Rachagan and Sulaiman, above n 23, 6.
[405] *Malaysian Code on Takeovers and Mergers 1987* r 34.1.
[406] *Malaysian Code on Takeovers and Mergers 1987* pt III.
[407] *Malaysian Code on Takeovers and Mergers 1987* r 4.
[408] *Malaysian Code on Takeovers and Mergers 1987* r 37.
[409] KLSE, *Listing Rules* ss 115–116.
[410] KLSE, *Listing Rules* s 114.

15 per cent required a circular to shareholders, while the disposal of 25 per cent of the company's assets required shareholder approval.[411]

Shareholder approval was also introduced for directors' participation in employee share schemes.[412] All directors were also required to retire from office at least once in three years.[413] The *Listing Rules* stated that there should be independent directors on the board but did not specify the proportion of independent directors. Nevertheless, in practice, the presence of independent directors was not a common occurrence till 2000, when the *Malaysian Code on Corporate Governanc*e was introduced.

Similar to the pre-emption rights introduced by the *Listing Rules* in 1973, the 1988 revisions required all new shares or convertible securities to be offered to existing shareholders in proportion to their holdings unless otherwise directed by the general meeting.[414] Notices of meetings called to consider special business were also required to be accompanied by a statement regarding the effect of any proposed resolution.[415] In 1993, an amendment to the *Listing Rules* required listed companies to have audit committees with an independent majority.[416]

3.3.4 *Common Law and Equitable Principles*

During the 1980s and 1990s, equitable principles continued to be a significant source of formal shareholder protection. Among the developments during this period was the emergence of a local body of authoritative decisions on directors' fiduciary duties. Although there were not many reported cases relating to directors' duties during the 1980s and 1990s,[417] these cases were significant as the emergence of local decisions affirming equitable fiduciary duties reduced the need to rely on English case law. Malaysian authorities largely reiterated the equitable fiduciary duties applicable in common law countries, often citing UK or Australian cases.

For instance, the directors' fiduciary duty to avoid conflicts of interests was affirmed in *Avel Consultants Sdn Bhd v Mohamed Zain Yusof*.[418] The Federal Court decision of *PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd*[419] adopted the rule that a director should not make a personal profit from his position. The decision referred to the English case of *Regal (Hastings) Ltd v*

[411] KLSE, *Listing Rules* s 116.
[412] KLSE, *Listing Rules* s 281.
[413] KLSE, *Listing Rules* s 309.
[414] KLSE, *Listing Rules* s 287.
[415] KLSE, *Listing Rules* s 299.
[416] KLSE, *Listing Rules* s 15A.
[417] In several local decisions, directors were found to have breached their fiduciary duties by misappropriating corporate assets for their own benefit; *Ngan Tuck Seng v Ngan Yin Hoi* [1999] 5 MLJ 509; *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64.
[418] [1985] 2 MLJ 209. This principle was also applied in *Yukilon Manufacturing Sdn Bhd v Wong Gek Meng* (No. 4) [1998] 7 MLJ 551. Several cases discussed the no conflict rule in conjunction with its statutory restatement in Section 131 of the *Companies Act 1965*; *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd* [1999] 7 CLJ 1; *Tneu Beh v Tanjong Kelapa Sawit Sdn Bhd* [1995] 1 CLJ 741.
[419] [1980] 2 MLJ 136. The Federal Court is the highest appellate court in the Malaysian legal system.

Gulliver.[420] Similarly, several Malaysian decisions emphasised the relevance of equitable fiduciary duties which precluded directors from using corporate opportunity, information or property for their own personal gain.[421] Developments in Canada[422] which emphasised the need for flexibility in the application of the no profit rule were adopted by the Malaysian courts in the case of *The Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed*.[423]

The reforms which brought about more comprehensive shareholder protection during the 1980s and early 1990s were largely the result of statutes and codes, while case law often affirmed existing shareholder protections. Despite the increase in formal regulations, anecdotal evidence of widespread breaches of directors' fiduciary duties emerged following the Asian financial crisis.[424] There were few reported judicial decisions involving directors' fiduciary duties during the 1980s and 1990s, consistent with the suggestion that private enforcement was poor, if the number of reported cases was indicative of the level of private enforcement of fiduciary duties. Chapter 5 further considers the issue of the regulations' effectiveness in safeguarding shareholders from expropriation of corporate property.

In summary, growth in shareholder protection during the 1980s and 1990s was characterised by a continuation of previous trends of substantial borrowing from other common law countries. Much of the growth was concentrated over a short period spanning the mid to late 1980s. Circumstances preceding the reforms suggested that reforms were precipitated by economic events, including the economic recession of 1985 and the growth of corporate conglomerates following the state's privatisation policies. Following the reforms of the mid to late 1980s, there was little change in shareholder protection regulations until the Asian financial crisis.

3.4 The Post-Asian Financial Crisis Reforms

During the Asian financial crisis in 1997, Malaysian corporate governance practices were severely criticised.[425] Highly publicised incidents involving the expropriation of corporate property to the detriment of minority shareholders were the subject of much criticism. This led to a substantial loss of investor confidence and significant outflows of capital.[426] The Asian financial crisis represented a watershed in several respects. First, the crisis precipitated extensive reforms in the regulation of shareholder protection. These reforms were significantly more far-reaching than the reforms of the mid-1980s. Fundamental changes were made to the composition of boards. The reforms sought to increase safeguards against the expropriation of

[420] [1967] 2 AC 134.
[421] *Yukilon Manufacturing Sdn Bhd v Dato' Wong Gek Meng (No. 4)* [1998] 7 MLJ 551; *The Board of Trustees of the Sabah Foundation v Datuk Syed Kechik bin Syed Mohamed* [1999] 1 LNS 36.
[422] *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371.
[423] [1999] 1 LNS 36.
[424] Finance Committee, above n 9, 42.
[425] See for example Jonathan Moore, 'A Bailout in Malaysia: The Deal Smelled Rotten and It Was' *Bloomberg* (online), 8 June 1998 <https://www.bloomberg.com/news/articles/1998-06-07/a-bailout-in-malaysia-the-deal-smelled-rotten-and-it-was-intl-edition>.
[426] Andrew Sheng, *From Asian to Global Financial Crisis: An Asian Regulator's View of Unfettered Finance in the 1990s and 2000s* (Cambridge University Press, 2009) 192.

corporate property to the detriment of minority shareholders through related party transactions.[427]

Secondly, prior to the crisis, the impetus for shareholder protection regulatory reform had come from domestic sources. The regulatory reforms after the crisis had a distinctly foreign influence. The crisis attracted criticisms of Malaysian corporate governance from both international and local sources. Transnational financial organisations, such as the World Bank, held out the Anglo-American regulatory framework as the model to which East Asian countries should aspire. They attributed the prevalence of cronyism and corruption to the lack of regulatory safeguards.[428] There was an implicit assumption in their argument that regulatory reform would improve the governance of companies, ultimately strengthening the economy's resilience. Transnational financial organisations did not appear to have given much consideration to the suitability of the Anglo-American regulatory framework to the specific features of the Malaysian context.

Despite reservations by the state, sweeping regulatory reforms were made in response to international pressure. The reforms were perceived by the state as necessary in order to regain investor confidence, particularly that of foreign investors.[429] Foreign investors had been a significant source of capital to the Malaysian economy since independence.[430] Prime Minister Dr Mahathir remarked 'we try to follow [the IMF programmes] not because we think the IMF is right, but because if we don't then there will be a loss of confidence … So we try to show that we are with the IMF.'[431] The lack of internal demand for the reforms arguably engendered a situation in which the reforms were later described as 'form over substance'.[432] This is examined in Chapters 5 and 6.

Thirdly, the reforms were followed by a growing realisation of the limitations of transplanted Western regulatory frameworks. Scholarly critique following the reforms underscored the mismatch between transplanted regulations and business practices or cultural norms common to the Malaysian context.[433] Ironically, transnational financial organisations identified cronyism and corruption as problems particularly common to East Asia. Yet Western regulatory models were prescribed as the remedy for problems endemic to East Asia.[434] The reforms gave little consideration to the suitability of Western regulatory frameworks to local conditions. As Malaysian scholars highlighted the inadequacies of Western regulatory frameworks in addressing the specific problems arising in the Malaysian context,[435] there was a gradual shift away from the perception of formal law as a panacea for corporate governance problems. Despite scholarly critique, reforms in recent years indicate that the trend towards

[427] See p 74.
[428] Zhuang et al, above n 11.
[429] Liew, 'Perceived Roles ', above n 12, 455.
[430] Tham, Liew and Mokhtar, above n 154 .
[431] Shameen and Oorjitham, above n 155.
[432] Pascoe and Rachagan, above n 14, 97.
[433] Rachagan and Sulaiman, above n 23, 27.
[434] World Bank, *The Road to Recovery*, above n 11, 69.
[435] See for example Khoo, above n 19.

increasing formal regulation has continued, while enforcement mechanisms remain relatively weak.[436]

The analysis below examines the report of the Finance Committee on Corporate Governance. Reforms to the *Listing Rules* and the introduction of the *Malaysian Code on Corporate Governance* are then considered. Following this, the review of the *Companies Act 1965* is outlined.

3.4.1 *Reform Policy*

The Finance Committee was established in March 1998 in response to the need to address inadequacies in the regulatory framework highlighted during the Asian financial crisis.[437] Membership of the Committee comprised representatives of the state and industry. The Finance Committee's recommendations were instrumental in propelling regulatory reforms following the Asian financial crisis. In its influential report, the Finance Committee cited anecdotal evidence of corporate abuse which they attributed, at least in part, to ineffective governance structures.[438] According to them:

> Under difficult economic circumstances, corners were 'cut' and rules were 'bent'. Instances of abuse that have been extensively reported in the media include the following:
> • Related party transactions and incidences of capricious decision making by corporate leaders;
> • Asset shifting, as well as blatant and abusive conflict of interest transactions without proper disclosure by directors; and
> • Poor financial management by directors.
>
> These problems have been exacerbated in part by ineffectual enforcement, and in part by the presence of significant shareholders, i.e. shareholders whose holdings are such that they can exercise or influence the control of the company ... In companies with significant shareholder presence, there is immense scepticism within the shareholding community about the ability of boards to represent the interests of all shareholders, especially in the context of related party transactions, as a result of abuses witnessed in recent times. This has resulted in a massive loss of confidence by investors in the Malaysian capital markets. The questions often asked have been – "Where were the directors?", "Where were the regulators?"[439]

In short, the Finance Committee highlighted the lack of protection for minority shareholders. Expropriation through related party transactions by controlling shareholders, who frequently exercised substantial influence over the board of directors, was particularly problematic. The committee also underscored the perception that the regulators had failed to adequately enforce the available protections. They remarked that '[t]here is overwhelming public opinion that

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[436] See Chapter 5.
[437] Securities Commission Malaysia, *Finance Committee Report on Corporate Governance* <http://www.sc.com.my/finance-committee-report-on-corporate-governance/>.
[438] Finance Committee, above n 9, 42.
[439] Ibid.

regulators are not effectively discharging their duties in enforcing the law. There have been questions as to the will and ability of regulators to ensure transparency and protect investors …'[440]

In addition, there were allegations of favourable treatment of corporate magnates who had close links with influential politicians. The alleged bailout of troubled Renong by related company United Engineers (Malaysia) Berhad at the expense of its minority shareholders was particularly controversial. The transaction was said to have triggered a mandatory general offer under the *Malaysian Code on Takeovers and Mergers 1987*. However, an exemption was granted by the Foreign Investment Committee which forms a part of the Prime Minister's Department,[441] while the regulator charged with the administration of the Code was the Securities Commission.

The Finance Committee's report was instrumental in the ensuing changes to shareholder protection regulation. Their report highlighted the need to align Malaysian corporate governance with international standards.[442] As transnational financial organisations put forward Anglo-American regulation as the model for East Asian countries,[443] international standards were consistent with previous trends of borrowing from the regulations of developed common law countries. Malaysian law reformers once again looked to the UK, drawing substantially from the UK's Hampel and Cadbury reports[444] as well as its corporate governance code.

The Finance Committee expressed a preference for self-regulation and flexible standards modelled along the lines of the Hampel report. The flexible standards introduced were an innovation in Malaysian regulation as, prior to this, shareholder protection had been based primarily on mandatory rules. The Finance Committee underscored the role of the private sector in leading the reforms. They took the view that 'in some aspects, self-regulation is preferable and the standards developed by those involved may be more acceptable and thus more enduring.'[445] Shortly after their report, the *Malaysian Code on Corporate Governance* was introduced. The Finance Committee's proposals for statutory reform formed the basis of the subsequent review of the *Companies Act 1965*.

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[440] Ibid, 224.
[441] Koh, 'Reforms in the Light of Post-1998 Crisis', above n 9, 136.
[442] Finance Committee, above n 9, 59.
[443] World Bank, *The Road to Recovery*, above n 11, 69.
[444] The Cadbury Committee was set up in May 1991 to review aspects of corporate governance relating to financial reporting and accountability in the UK. The final report published in December 1992 recommended reforms to raise standards of corporate governance; Committee on the Financial Aspects of Corporate Governance, *The Financial Aspects of Corporate Governance* (December 1992). The Hampel Committee was established in November 1995 to review the Cadbury's Committee's recommendations on corporate governance in the UK. The Hampel Committee's final report was released in January 1998; Committee on Corporate Governance, *Final Report* (January 1998).
[445] Finance Committee, above n 9, 58.

3.4.2 *The Malaysian Code on Corporate Governance and the Listing Rules*

The Asian financial crisis was followed by a period of significant regulatory reform. Prior to the crisis, there were minimal changes in shareholder protection after the major reforms of the mid to late 1980s. Amendments to the *Listing Rules* in 1998 brought about significant changes to the regulation of related party transactions. Expropriation of corporate property through related party transactions was an issue which had attracted considerable criticism during the Asian financial crisis. The high incidence of these transactions was attributed to the dominance of controlling shareholders.[446] These transactions were particularly detrimental to minority shareholders. The revised *Listing Rules* attempted to address the imbalance of power flowing from concentrated shareholding structures.

The new regulations introduced additional safeguards for minority shareholders. Among the most significant reforms is the requirement that interested major shareholders should abstain from voting on shareholders' resolutions to approve related party transactions. The *Listing Rules* define a 'major shareholder' as a person who holds 10 per cent or more of the voting shares.[447] Persons connected with major shareholders are also prohibited from voting on such resolutions. Where any of the percentage ratios[448] of a related party transaction amounts to five per cent or more, r 10.08(2) imposes requirements of disclosure, shareholder approval and the appointment of an independent adviser. Announcements are to be made to the KLSE, disclosing the particulars of related party transactions.[449] Specific information relating to the transaction must be disclosed in a circular to shareholders.[450] Interested directors are required to abstain from board deliberations and voting. Interested directors and persons connected with them are also prohibited from voting on the shareholders' resolution in respect of the transaction.[451] The independent adviser's role is to comment on whether the transaction is fair and reasonable to shareholders.[452] The rules also require independent advisers to comment on whether the transaction is to the detriment of minority shareholders. Reasons for their views, key assumptions made and factors taken into account must be set out by independent advisers.

A number of transactions are exempted from the ambit of these rules. The most significant of these are recurrent related party transactions. A company may obtain a mandate from shareholders for recurrent related party transactions which satisfy a number of criteria. These include the requirement that the transaction should be in the ordinary course of business and

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[446] Ibid 42.
[447] The definition also states that 'major shareholder' includes the holder of five per cent or more of the voting shares in the company where such person is the largest shareholder; KLSE, *Listing Rules* r 1.01.
[448] Examples of percentage ratios include the value of the assets which are the subject of the transaction compared with the net assets of the listed issuer, and net profits attributable to the assets compared to the net profits of the listed issuer; KLSE, *Listing Rules* r 10.02(g).
[449] Rule 10.08(1) of the *Listing Rules* requires announcement to the KLSE and disclosure of specific information where any of the percentage ratios is 0.25 per cent or more.
[450] Shareholder approval is required where the any of the percentage ratios is equal to or exceeds five per cent. Percentage ratios are calculated on the basis of the value of the assets compared with the net tangible assets of the listed issuer. Alternative measures are based on net profits, value of the consideration or equity share capital; KLSE, *Listing Rules* r 10.02.
[451] KLSE, *Listing Rules* r 10.08(7).
[452] KLSE, *Listing Rules* r 10.08(3).

on terms not more favourable to the related party than those generally available to the public.[453] Where listed companies obtain a mandate from shareholders for recurrent related party transactions, r 10.08 does not apply.

In 2000, the *Malaysian Code on Corporate Governance* ('MCCG') was introduced, followed by a major review of the *Listing Rules* in 2001. While compliance with the *Listing Rules* is mandatory for listed companies, observance of the MCCG's principles is voluntary. The *Listing Rules* require listed companies to disclose the extent of their compliance with the recommendations of the MCCG in their annual reports.[454] Listed companies which choose not to comply with the recommendations of the MCCG are required to explain the circumstances justifying their departure from the recommended practices. In summary, the new regulations strengthened shareholder protection through the presence of independent directors and audit, remuneration and nomination committees. Mechanisms were created to safeguard minority shareholders' interests in related party transactions. The regulations also sought to enhance the disclosure of directors' remuneration.

The MCCG initiated significant structural changes to the board of directors, recommending that a third of boards should consist of independent directors.[455] Concentrated shareholding is common in Malaysia and appointments to the board are usually made by controlling shareholders.[456] Prior to the MCCG, the regulations made no provision for minority shareholders to be represented on the board. The MCCG contributed to minority shareholder protection by recommending that where there is a controlling shareholder, the board should have fair representation of the investment of other shareholders.[457] This constituted a radical departure from the status quo. However, compliance with this recommendation is optional. Difficulties in implementation are compounded by the absence of mechanisms aimed at facilitating minority shareholder involvement in board appointments. The *Listing Rules* subsequently mandated the one-third independence requirement for boards of listed companies,[458] but failed to provide any backing for the MCCG's recommendation that minority shareholders should adequately be represented on boards. Neither the MCCG nor the *Listing Rules* specified any procedures for minority shareholders to elect representatives.

The MCCG also proposed several committees aimed at improving the internal management of companies and enhancing accountability. It recommended that there should be a nomination committee responsible for proposing new nominations to the board and for assessing the effectiveness of the board and the contribution of each director.[459] The nomination committee was to comprise non-executive directors, the majority of whom should be independent. The MCCG also proposed the appointment of a remuneration committee responsible for making

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[453] KLSE, *Listing Rules* r 10.09(2).
[454] KLSE, *Listing Rules* r 15.26.
[455] *Malaysian Code on Corporate Governance 2000* pt 2 AA III.
[456] Philip N Pillai, *Sourcebook of Singapore and Malaysian Company Law* (Singapore Butterworths, 2nd ed, 1986) 264.
[457] *Malaysian Code on Corporate Governance 2000* pt 2 AA IV. The MCCG also sought to facilitate an avenue by which shareholders may raise concerns with the board. The MCCG recommended that a senior independent non-executive director should be named in annual reports for this purpose; *Malaysian Code on Corporate Governance 2000* pt 2 AA VII.
[458] KLSE, *Listing Rules* r 15.02.
[459] *Malaysian Code on Corporate Governance 2000* pt 2 AA VIII.

recommendations to the board on the remuneration of executive directors. The MCCG did not specify that the remuneration committee should have any independent directors but suggested instead that all members should be non-executive directors.[460] A third committee proposed by the MCCG was the audit committee which was responsible for internal audit, liaison with external auditors and reviewing related party transactions. According to the MCCG, all the members of the audit committee should be non-executive directors and the majority should be independent.[461]

The *Listing Rules* reinforced the recommendations of the MCCG by mandating the appointment of an audit committee with an independent majority.[462] The *Listing Rules* also facilitated independent review by the audit committee. Listed companies were required to provide the audit committee with access to information and professional advice.[463] There was no mention of the remuneration and nomination committees in the *Listing Rules*. However, annual reports were required to disclose the aggregate directors' remuneration and the number of directors whose remuneration fell within successive bands of RM50 000 (AUD17 000).[464] Likewise, the *Listing Rules* did not support the recommendations of the MCCG that each director's remuneration should be disclosed.[465] The MCCG's suggestion that directors' remuneration should be based on performance[466] was similarly not reflected in the *Listing Rules*.

Responsibility for enforcing compliance with the *Listing Rules* lies primarily with KLSE, or Bursa Malaysia as it was subsequently known. Sanctions for breaches of the *Listing Rules* include public reprimands, the imposition of fines on companies and their directors, and suspension or delisting for more serious breaches.[467] Legislative reforms following the Asian financial crisis provided the Securities Commission powers to impose sanctions for breaches of the *Listing Rules*,[468] including applying to the court to disqualify directors who breach the *Listing Rules*.[469]

3.4.3 *Review of the Companies Act 1965*

The Corporate Law Reform Committee ('CLRC') was formed in 2003 for the purpose of reviewing the *Companies Act 1965*. The CLRC noted that previous amendments to the

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[460] *Malaysian Code on Corporate Governance 2000* pt 2 AA XXIV.
[461] *Malaysian Code on Corporate Governance 2000* pt 2 BB I.
[462] The rules also require that the audit committee be chaired by an independent director and one of its members should be an accountant; KLSE, *Listing Rules* r 15.11. An amendment in 2008 streamlined the *Listing Rules* with the *Malaysian Code of Corporate Governance*. All audit committee members were required to be non-executive directors. An independent majority was maintained.
[463] KLSE, *Listing Rules* r 15.18.
[464] KLSE, *Listing Rules* app 9C.
[465] *Malaysian Code on Corporate Governance 2000* pt 1 B III.
[466] *Malaysian Code on Corporate Governance 2000* pt 1 B I.
[467] Bursa Malaysia, *Enforcement Approach* <http://www.bursamalaysia.com/market/regulation/enforcement/enforcement-approach/>.
[468] *Securities Industry Act 1983* s 11.
[469] *Securities Industry Act 1983* s 99C(3). This provision was inserted through the *Securities Industry (Amendment) Act 1998* s 37.

Companies Act 1965 had been 'made on a piece-meal basis'.[470] Hence, they observed a need for a 'systematic and coherent review of current law and practices' which 'allows modernisation and rationalisation of company law principles and practices.'[471] The CLRC's approach was consistent with previous law reform efforts in that the Malaysian reforms were modelled on developments in company legislation in other Commonwealth countries. According to the Chairman of the committee:

> In conducting its review, the CLRC undertook various cross jurisdictional benchmarking studies of jurisdictions that have a similar corporate framework as Malaysia such as Australia, New Zealand, the UK, Hong Kong and Singapore. These jurisdictions possess similar legal frameworks as Malaysia and had undertaken their own respective review exercise of their corporate laws. The CLRC has studied their reviews thoroughly and has endeavoured to cull [sic] the best principles to suit the local corporate environment whilst always ensuring that they are up-to-date, competitive and designed to allow the local corporation to be 'global' in nature.[472]

The amendments to the *Companies Act 1965* in 2007 reflect some of the CLRC's and the Finance Committee's proposals. One of these is the codification of directors' fiduciary duties. The Finance Committee observed that:

> This is an area of considerable abuse in the Malaysian corporate landscape. While there is some attempt to curb abuses in e.g. sections 132 C, 132E, 132 G, 133 [of the *Companies Act 1965*], there is no clear statement in the law that the director shall not put himself in conflict with the company. Case law is voluminous but there is difficulty in deriving clear principles because the rules operate in relation to the particular facts of cases. A bigger problem is enforcement ... Codification adds to clarity and aids enforcement. The statutory fiduciary duty should embrace conflicts of interests arising from misuse of corporate information, property or position, the taking of corporate opportunities and engaging in business in competition with the company. Additionally in the spirit of clarifying the duties and obligations of directors, section 132(1) CA should be amended to state explicitly the duty of directors to act for a proper purpose.[473]

In considering the Finance Committee's proposals, the CLRC noted that 'there is an educational role to be played by legislation' and that 'there are views that corporate governance failures are partly attributable to the lack of knowledge of what is to be expected of directors.'[474] Parliamentary debates on the *Companies (Amendment) Bill 2007* emphasised the economic dimensions of the revised directors' duties. The perceived benefits of enhanced shareholder protection included facilitating a competitive edge internationally and encouraging foreign direct investment.[475] The amendments were thought to align Malaysian laws with those

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[470] Corporate Law Reform Committee, *Review of the Companies Act 1965 - Final Report* (Companies Commission Malaysia, 2007) 10.
[471] Ibid.
[472] Ibid 5.
[473] Finance Committee, above n 9, 15.
[474] Corporate Law Reform Committee, *A Consultative Document on Clarifying and Reformulating the Directors' Role and Duties* (August 2006) 41.
[475] Malaysia, *Parliamentary Debates*, Senate, 23 May 2007, 113, 117–18.

of developed countries such as Australia, the UK and Hong Kong. The key reforms to the *Companies Act 1965* in 2007 include the revision of statutory directors' duties. The revised s 132 requires directors to act for a proper purpose and in good faith. Directors are prohibited from using the company's property, or any information or opportunity acquired by reason of their position in the company, for their own benefit.[476] The amendment also codifies the fiduciary duty which prohibits directors from competing with the company.

Most of the regulatory reform since the Asian financial crisis has been in the form of legislation, codes and listing rules. While this is consistent with trends in company law reform in other common law countries, the lack of judicial development of shareholder protection is arguably more evident in Malaysia. One of the few instances of judicial development of shareholder protection in the UK and Australia is the objectivised directors' duty of care. Prior to the early 1990s, directors were held to a subjective duty of care under common law. A director was not required to exhibit greater skill than may reasonably have been expected from a person of his knowledge and experience.[477] Judicial decisions in the UK and Australia in the early 1990s strengthened shareholder rights by imposing a higher, objectivised duty of care on directors.[478] The Malaysian courts, however, continued to apply the subjective duty of care.[479] The amendments to the *Companies Act 1965* in 2007 aligned the Malaysian position with that of the UK.

Section 132(1A) sets out the directors' duty of care, skill and diligence. The CLRC recommended that the UK's statutory statement of directors' duty of care should be followed. They preferred the UK approach, which incorporates subjective and objective elements, to the objective test used in Australia and New Zealand. They reasoned that:

> [I]n the event that the director has any additional knowledge, skill and experience, the director will be assessed against a reasonable person who has that additional knowledge, skill and experience. This approach proposes that the actual knowledge and experience of a director be taken into consideration as an addition to the minimum standard. This approach will not enable directors, who lack the necessary skill and experience, to use this as a defence.[480]

The statutory directors' duty of care is qualified. Directors may be absolved from liability on several grounds. These include reasonable reliance on information provided by others.[481] Section 132(1F) allows directors to delegate their responsibilities in good faith and on reasonable grounds. The amendments also incorporate the business judgment rule in s

[476] *Companies Act 1965* s 132(2).
[477] *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.
[478] *Norman v Theodore Goddard* [1991] BCLC 1027, *Re D'Jan of London* [1994] 1 BCLC 561; *AWA Ltd v Daniels* (1992) 10 ACLC 933.
[479] *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2000] 7 CLJ 550; affirmed in *Abdul Mohd Khalid Hj Ali v Dato Hj Mustapha Kamal* [2003] 5 CLJ 85 and *Perwira Affin Bank v Jasatera* [2010] 1 LNS 660.
[480] Corporate Law Reform Committee, 'Directors' Role and Duties', above n 474, 47–8.
[481] *Companies Act 1965* s 132(1C).

132(1B). These statutory exemptions correspond with the provisions of Australian and New Zealand company legislation.[482]

Expropriation through related party transactions was one of the key concerns during the Asian financial crisis. The Finance Committee underscored the centrality of substantial shareholders and their influence over the board of directors in these transactions. Section 132E is among the significant statutory provisions governing related party transactions. The section was amended to include arrangements or transactions with substantial shareholders and persons connected with them. Consequently, shareholder approval is required for transactions between the company and a substantial shareholder,[483] or a person related to a substantial shareholder. This requirement is in addition to the existing requirement of shareholder approval for transactions with *directors* or persons related to them. The revisions streamlined the statutory regulation of related party transactions with the corresponding provisions of the *Listing Rules*.

The amendment seeks to safeguard shareholders from expropriation of corporate property through related party transactions by requiring substantial shareholders and directors to abstain from voting on resolutions to approve transactions in which they have an interest. This prohibition extends to transactions involving persons related to them. Criminal sanctions are maintained in the revised provisions. Substantial shareholders and related persons who benefit from such transactions are subject to criminal liability.[484] Section 132E(4) requires beneficiaries to account for profits or indemnify the company for loss. Directors who knowingly authorise the impugned transaction are also subject to criminal liability and, likewise, may be required to indemnify the company.

The review of the *Companies Act 1965* in 2007 introduced a statutory derivative action.[485] Prior to this, common law allowed shareholders to bring a derivative action. Nevertheless, there were considerable difficulties relating to such proceedings. The limitations of the common law derivative action were acknowledged by the Finance Committee:

> The power to sue in the company's name rests with the board. Where the board is controlled by the defaulting director, it is practically very difficult for the board to commence action. A minority shareholder can commence action in the company's name BUT (emphasis in original) there are insurmountable procedural and substantive difficulties in instituting an action under exceptions to the rule in *Foss v Harbottle*.[486]

The Finance Committee suggested that a statutory derivative action could potentially alleviate the challenges associated with the common law derivative action. In its *Consultative Document on Members Rights and Remedies*, the CLRC acknowledged the inherent ambiguities and restrictiveness of the 'fraud on the minority' exception.[487] The CLRC considered reforms in

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[482] The reforms followed the business judgment rule in s 180(2) of the *Corporations Act 2001* (Cth). The delegation provisions were modelled on ss 190 and 198D of the *Corporations Act 2001* (Cth). The directors' right to rely on information provided by others was premised on s 138 of the *Companies Act 1993* (NZ).
[483] Section 69D of the *Companies Act 1965* defines 'substantial shareholder' as the holder of five per cent or more of the company's voting rights.
[484] *Companies Act 1965* s 132E(6).
[485] *Companies Act 1965* s 181A.
[486] Finance Committee, above n 9, 15.
[487] Corporate Law Reform Committee, *A Consultative Document: Members' Rights and Remedies (January 2007)*, 31.

other common law countries, including Australia. In place of the onerous common law locus standi requirements, the CLRC took the view that leave to bring derivative actions on behalf of companies ought to be granted if the applicants are acting in good faith and the derivative action is in the best interest of the companies.[488] As recommended, s 181A allows the courts to grant shareholders leave to bring derivative actions on satisfaction of the criteria suggested by the CLRC.[489]

The amendments also address several practical difficulties associated with derivative actions. The CLRC observed that challenges are posed by shareholders' lack of access to information on the internal management of companies, observing that, 'shareholders (who are not part of management) are likely to find that they are effectively prevented from taking action because they are unable to have access to information.'[490] The reforms provide the courts power to allow complainants to inspect the company's records.[491] The CLRC observed that the cost of litigation is a disincentive, as the shareholders who are bringing the proceedings bear the costs, while any damages awarded accrue to the company.[492] As recommended, the courts have been given powers to order the company to pay complainants' costs.[493] Nevertheless, the exercise of these powers by the court is discretionary, and complainants run the risk of incurring substantial costs which may not be recoverable.

The CLRC recommended that the common law derivative action should be abolished.[494] This suggestion was not implemented and, as a consequence, from 2007 to early 2017, the statutory derivative action co-existed with the common law derivative action in the Malaysian legal framework. The preservation of the common law derivative action was criticised as potentially giving rise to uncertainty and confusion.[495] Choong and Balan anticipated that these potential problems would be mitigated by a decline in reliance on the common law derivative action. They argued that the common law derivative action would 'be disused and eventually become redundant', reasoning that shareholders would rely on the statutory derivative action which proffers better access to redress.[496] Nevertheless, the analysis of judicial decisions in Chapter 5 indicates that a significant proportion of applications for leave to bring derivative actions have been determined on the basis of common law despite the availability of the statutory derivative action. Notably, the *Companies Act 2016* which came into effect on 31 January 2017 abolishes the common law derivative action.[497]

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[488] Ibid.
[489] *Companies Act 1965* ss 181A–181B. In deciding whether to grant leave to bring derivative actions, the courts must consider whether the complainant is acting in good faith and it appears prima facie to be in the best interest of the company that the application for leave be granted. Thirty days' notice in writing to the directors of the intention to bring a derivative action is also required.
[490] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 32.
[491] *Companies Act 1965* s 181E(1)(c).
[492] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 30–1.
[493] Ibid 12; *Companies Act 1965* s 181E(1)(d)–(e).
[494] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 35.
[495] Choong Yeow Choy and Sujata Balan, 'Charting the Course for Shareholders' Recourse: Observations on the Malaysian Response' (2011) 6 *National Taiwan University Law Review* 1, 11; Mohammad Rizal Salim and Deborah Gurdial Kaur, 'The Statutory Derivative Action in Malaysia' (2012) 24 *Bond Law Review* 125.
[496] Choong and Balan, above n 495, 12.
[497] Section 347(3) of the *Companies Act 2016*. Sections 347 to 350 of the *Companies Act 2016* provide for a statutory derivative action on similar grounds as set out in ss 181A–181E of the *Companies Act 1965*.

The reforms in 2007 also facilitate the reporting of corporate wrongdoing by providing protection to whistle blowers.[498] Auditors are required to report fraud and face criminal sanctions for failure to do so.[499] These regulations complement the provisions of the *Capital Markets and Services Act 2007* which impose a duty on auditors to disclose breaches of securities law, and reinforce the protection afforded to whistle blowers.[500]

3.4.4 *Reforms from 2008 to 2016*

Since 2007, there have been continued reforms by way of revisions to codes, *Listing Rules* and legislation. The trend towards proliferation of formal regulatory reforms has remained, and many of these changes have built on existing regulations.[501] Various reforms sought to improve the quality of disclosure;[502] to enhance disclosure in related party transactions;[503] and increase transparency in relation to poll voting[504] and in relation to takeovers.[505] The reforms to the regulation of takeovers, mergers and compulsory acquisitions in 2010 and 2016 provide for a higher degree of disclosure, and extend the role of independent advisers, in order to strengthen safeguards for minority shareholders' interests.[506] The *Listing Rules* have been revised in response to changing needs, such as the increase in the privatisation of listed companies through the sale of assets. In 2011, Bursa Malaysia introduced specific rules providing for independent advice, enhanced disclosure and the approval of 75 per cent of shareholders for such transactions.[507]

The *Corporate Governance Blueprint*, issued by the Securities Commission in 2011, sought to further strengthen corporate governance regulation as a means of promoting investor confidence and furthering the development of the economy.[508] Recommended reforms in the *Blueprint* were implemented through revisions to the *Malaysian Code on Corporate*

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[498] *Companies Act 1965* s 368B. Officers of the company who report corporate wrongs cannot be dismissed, demoted or discriminated against.
[499] *Companies Act 1965* ss 174(8)–(8A).
[500] Revisions to the *Companies Act 1965* buttress other regulations which require directors to have systems of internal control in place. Directors of public companies and their subsidiaries are subject to criminal liability for failure to ensure that adequate systems of internal control are operating; *Companies Act 1965* s 167A.
[501] For example, in 2008, the *Listing Rules* were amended to require the establishment of an internal audit function. This would conceivably support the audit committee's role; Bursa Malaysia, *Listing Rules* r 15.28. While the rules previously required listed companies to inform the Exchange of an external auditor's removal, the revised rules extended this to situations where external auditors resign. The revisions also required that a copy of written explanations for resignation be given to the Exchange; Bursa Malaysia, *Listing Rules* r 15.23.
[502] Bursa Malaysia, *Corporate Disclosure Guide* (2011).
[503] Bursa Malaysia, *Listing Rules* Chapter 10; Practice Note 12, Annexure PN12-A, para 16A–16B.
[504] Bursa Malaysia, *Listing Rules* r 9.19(7). The number of votes cast for and against resolutions must be disclosed.
[505] *Malaysian Code on Take-overs and Mergers 2010* rr 14–15. The reforms increase disclosure particularly by the board of the offeree and the independent adviser. The revised Code brings schemes of arrangement, amalgamation and selective capital reductions under the ambit of the Code. These are now subject to the higher standards imposed by the Code than were previously imposed by the *Companies Act 1965*. In 2016, the Code was replaced by the *Malaysian Code on Take-overs and Mergers 2016* and the *Rules on Take-overs, Mergers and Compulsory Acquisition 2016*.
[506] Wong and Partners, 'Transforming the Malaysian Code on Take-Overs and Mergers – Key Changes Under the Rules on Take-overs, Mergers and Compulsory Acquisitions' *Client Alert* (August 2016).
[507] Bursa Malaysia, *Listing Rules* r 10.11A. This rule became effective on 28 January 2011.
[508] Securities Commission Malaysia, *Corporate Governance Blueprint 2011* (July 2011).

Governance, the *Listing Rules* and legislation. The *Malaysian Code on Corporate Governance* ('MCCG 2012') was revised in 2012. The revised MCCG 2012 seeks to strengthen the independence of the board. It recommends that the board should have an independent majority where the chairman of the board is not independent.[509] The MCCG 2012 also recommends that the nominating committee should be chaired by a senior independent director but remains silent as to the independence of the remuneration committee.

The absence of increased transparency on directors' remuneration is in stark contrast to developments in UK and Australian regulations which have required substantially more extensive disclosure of directors' remuneration and have introduced shareholder voting in relation to directors' remuneration.[510] Malaysian regulation of directors' remuneration has remained conspicuously static and undeveloped by comparison. Directors' remuneration is a means by which insiders are able to extract private benefits.[511] The lack of regulatory reform in relation to directors' remuneration is significant in the light of reports of expropriation by Malaysian controlling shareholders.[512]

In response to the *Corporate Governance Blueprint*, the *Listing Rules* were revised in 2012. The revisions streamline the *Listing Rules* with the MCCG 2012.[513] Poll voting for related party transactions is now mandatory.[514] Amendments to the *Listing Rules* in 2012 require more detailed explanations on compliance with the MCCG 2012.[515] Recent changes to the *Capital Markets and Services Act 2007* allow the Securities Commission to impose harsher criminal penalties against directors who cause wrongful loss.[516]

3.4.5 *The Companies Act 2016 and Increased Powers of Investigation*

Following the CLRC's review of company legislation, the Companies Commission of Malaysia[517] sought to replace the *Companies Act 1965* with a newer statute. Comprehensive reforms were arguably needed to provide a modern regulatory framework consistent with international developments. The Companies Commission translated 183 of the CLRC's 188 recommendations into 18 policy statements which were submitted to Cabinet and approved in

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[509] *Malaysian Code on Corporate Governance 2012* recommendation 3.5.

[510] Rachagan and Sulaiman highlight the lack of independence requirements in relation to Malaysian remuneration committees. They suggest that there should be an independent majority and propose the introduction of non-binding votes in relation to executive remuneration; Rachagan and Sulaiman, above n 23, 28.

[511] Lucian Bebchuk and Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004) 5.

[512] Finance Committee, above n 9, 42.

[513] The establishment of the nominating committee is mandated by the revised rules; Bursa Malaysia, *Listing Rules* r 15.08A.

[514] Bursa Malaysia, *Listing Rules* r 10.08(7A).

[515] Listed companies are required to state in annual reports how they have applied each principle of the MCCG. Reasons must be given for departure from recommended practices and alternative strategies adopted by listed companies must be disclosed; Bursa Malaysia, *Listing Rules* r 15.25, Practice Note 9.

[516] Section 317A(1) of the *Capital Markets and Services Act 2007* states that a director shall not 'do or cause anyone to do anything with the intention of causing wrongful loss to the listed corporation'. Penalties include imprisonment of two to ten years and fines of up to RM10 million (AUD3.3 million); *Capital Markets and Services Act 2007* s 317A(3).

[517] The Companies Commission of Malaysia was previously known as the Registrar of Companies.

2010.[518] The policy objectives include 'facilitating and modernising entrance into the corporate sector', strengthening corporate governance particularly in relation to directors, enhancing shareholder rights and the introduction of 'alternative corporate rescue mechanisms' for insolvent businesses.[519] In drafting the new company legislation, the Companies Commission took into account recommendations from various sources. These include regulators, professional bodies, the World Bank and the OECD's reports on Malaysia and the World Bank's Ease of Doing Business criteria.[520] The *Companies Bill 2015* was passed by Parliament and received royal assent on 31 August 2016,[521] and came into effect on 31 January 2017.

The changes to corporate regulation under the *Companies Act 2016* are more significant in areas such as the incorporation and administration of private companies and the restructuring of insolvency law for financially distressed companies. In the area of shareholder protection, reforms are modest. Some of the more significant changes to shareholder protection relate to directors' remuneration and the abolition of the common law derivative action.

The reforms provide for greater transparency on director's remuneration. However, the reforms fall short of the more extensive disclosure requirements in the UK and Australia.[522] The *Companies Act 2016* requires directors' remuneration and other benefits to be disclosed in the directors' report[523] which is sent to every member together with the financial statement each year.[524] Directors are also required to disclose whether they have received any benefits from contracts with the company or a related company. Previously, only listed companies were required to disclose the aggregate directors' remuneration and the number of directors whose remuneration fell within successive bands of RM50 000 (AUD17 000) in annual reports.[525] The reforms require disclosure of directors' remuneration and other benefits across all companies, including private companies and companies which are not listed.

The *Companies Act 2016* requires shareholder approval for directors' remuneration and other benefits in relation to public companies, and listed companies and their subsidiaries.[526] Nevertheless, prior to this, replaceable rules provided that directors' remuneration should be approved by ordinary resolution of the general meeting. The *Companies Act 2016* removes the need for private companies to hold annual general meetings and facilitates corporate decision-making through written resolutions.[527] Section 230(4) allows shareholders of private companies who hold at least 10 per cent of the voting rights to object to remuneration if they perceive it to be unfair. Such shareholders may require that the remuneration be subject to

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[518] Companies Commission of Malaysia, *Public Consultation on the New Companies Bill* (July 2013) 4.
[519] Ibid 7–13.
[520] Ibid 6.
[521] 'Dewan Rakyat Passes Companies Bill 2015 with Amendment', *New Straits Times* (Kuala Lumpur), 5 April 2016.
[522] *Directors Remuneration Report Regulations 2002* (UK); *Corporations Act 2001* (Cth) s 300.
[523] *Companies Act 2016* s 253, Fifth Sch.
[524] *Companies Act 2016* s 248. Failure to comply with the requirements concerning financial statements is an offence. On conviction, directors are subject to a maximum fine of RM500 000 (AUD133 000) or one year's imprisonment.
[525] KLSE, *Listing Rules* app 9C.
[526] *Companies Act 2016* s 230(1).
[527] *Companies Act 2016* div 5 sub-div 2.

shareholder approval at a general meeting, if the company's constitution allows the board to approve directors' remuneration.[528]

Another significant reform relates to the derivative action. The right to bring a derivative action under common law has been abolished by s 347(3) of the *Companies Act 2016*. This amendment is likely to bring about greater clarity and better outcomes for shareholders seeking to bring derivative actions. As we will see in Chapter 5, preservation of the common law derivative action under s 181A of the *Companies Act 1965* resulted in a significant proportion of derivative actions being brought under the more restrictive common law provisions.

The conditions for the grant of leave under s 348 of the *Companies Act 2016* remain the same as those specified by s181B of the *Companies Act 1965*. In deciding whether to grant leave, the court considers whether the complainant is acting in good faith and whether it appears prima facie to be in the best interest of the company that the application for leave be granted.[529] As with the previous legislation, 30 days' notice in writing to the directors of the intention to bring a derivative action is required.[530] Section 347 of the *Companies Act 2016* omits the definition of 'complainant', which was previously in s 181A of the *Companies Act 1965*, arguably allowing for more flexibility as to who may bring proceedings under s 346.

Directors' duties as set out in the previous company legislation have been preserved in the *Companies Act 2016*.[531] Maximum penalties on conviction have been increased to RM3 million (AUD1 million).[532] Nevertheless, there are still no civil penalties for breaches of directors' duties. The right of minority shareholder to seek relief from oppression, disregard of their interests by controlling shareholders or unfair discrimination has been maintained.[533] An amendment which strengthens the position of shareholders is the provision of anticipatory remedies in the form of injunctions. An injunction may be granted to prevent persons from engaging in conduct which would contravene the *Companies Act 2016*.[534]

There are minor changes relating to the maintenance of share capital. As with previous company legislation, special resolutions are required for the reduction of share capital.[535] Under the new regulations, the reduction of share capital must either be confirmed by an order of the court[536] or supported by a solvency statement made by all the company's directors.[537] The new regulations also relax the rules on voting by proxy through the removal of restrictions as to who can be appointed as a proxy.[538] Consequently, shareholders are allowed greater freedom in the appointment of proxies to vote on their behalf.

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[528] *Companies Act 2016* s 230(4). Companies are also no longer required to have a constitution; *Companies Act 2016* s 31.
[529] *Companies Act 2016* s 348(4).
[530] *Companies Act 2016* s 348(2).
[531] *Companies Act 2016* ss 213–18.
[532] *Companies Act 2016* s 213(3).
[533] *Companies Act 2016* s 346.
[534] *Companies Act 2016* s 351.
[535] *Companies Act 2016* s 115.
[536] *Companies Act 2016* s 116.
[537] *Companies Act 2016* s 117.
[538] *Companies Act 2016* s 334.

The reforms arguably dilute shareholders' rights to requisition a general meeting. The minimum proportion of voting rights required to requisition a general meeting has been increased from five to 10 per cent for public companies.[539] Shareholders of private companies holding five per cent or more of the voting rights may requisition a general meeting if the company has not held a general meeting for more than 12 months.[540] Section 311(4) also provides that the proposed resolution must not be defamatory, frivolous or vexatious. If the directors fail to hold a general meeting which has been properly requisitioned under s 311, the shareholders may call a general meeting at the company's expense.[541]

Reforms have also strengthened the regulators' powers of investigation through the *Companies Commission of Malaysia (Amendment) Act 2015.* The Commission may exercise all the powers of a police officer, of whatever rank, as provided for under the *Criminal Procedure Code* in relation to enforcement, inspection and investigation.[542] The Commission may require persons to produce documents and to appear at a private hearing to give oral or written evidence.[543] Failure to comply with the Commission's orders is an offence punishable by a fine of up to RM500 000 (AUD 170 000) or imprisonment of up to three years.[544] In addition, persons who are the subject of investigation of an offence under company legislation may be required to surrender travel documents.[545]

3.5 Conclusion

As mentioned in Chapter 1, the central research question of this thesis focuses on describing and explaining the character and evolution of Malaysian shareholder protection law. The content of shareholder protection is a key aspect of the character of shareholder protection. The aims of this chapter have been to describe the content of Malaysian shareholder protection, and to ascertain how the content of shareholder protection has evolved over time.

The analysis in this chapter finds that Malaysian shareholder protection law is comprehensive. The regulations seek to facilitate shareholder protection through voting rights on specific important corporate decisions; internal management safeguards in the form of directors' duties of loyalty and the presence of independent directors; disclosure requirements; and rights of recourse to the courts such as the derivative action. There has been a proliferation of regulations over time and increasingly comprehensive formal safeguards have been established, following high profile corporate abuses. Reforms have also provided the regulators with enhanced powers of investigation, while criminal penalties have become more

[539] *Companies Act 2016* s 311(3)(a).
[540] *Companies Act 2016* s 311(4). Private companies are no longer required to hold annual general meetings.
[541] *Companies Act 2016* s 313.
[542] *Companies Commission of Malaysia Act 2001* s 27A. The power to arrest without warrant is expressly excluded by s 27A. The Registrar also has the power to access any place, and inspect or make copies of documents and books for the purpose of ascertaining compliance with company legislation; *Companies Commission of Malaysia Act 2001* s 27C.
[543] *Companies Commission of Malaysia Act 2001* s 27B(2).
[544] *Companies Commission of Malaysia Act 2001* s 27B(4).
[545] *Companies Commission of Malaysia Act 2001* s 27J.

severe. Nevertheless, specific areas of regulation have remained relatively undeveloped, such as the rules relating to directors' remuneration.

Much of the content of Malaysian shareholder protection comprises transplants from other common law countries. UK and Australian regulation have had a particularly strong influence on the content of Malaysian shareholder protection. Common law countries are perceived as comparable jurisdictions with similarities in corporate law and legal institutions. The continued influence of English law is also attributed to the legal elite, many of whom received an English legal education.[546] The influence of the wider common law world on reforms is also evident. These observations are relevant to the second research question which will be discussed in Chapter 6.

The Malaysian reforms were often underpinned by policy objectives reflecting the perceived need for conformity with international standards. In examining the reforms there appear to be implicit assumptions that legal borrowing from developed common law countries facilitates adherence to international standards. The modelling of regulations on those of the UK and Australia arguably endows Malaysian shareholder protection with the appearance of similar strength to that of the countries emulated. However, there is limited empirical evidence on the relative strength of Malaysian shareholder protection internationally.[547] The question as to how closely formal Malaysian shareholder protection has followed the regulations of these countries is not adequately answered by the existing snapshots. A global perspective spanning time and involving a wider range of protections would provide a clearer understanding as to the strength of Malaysian shareholder protection relative to the UK and Australia. Chapter 4 seeks to investigate this issue by comparing Malaysian shareholder protection with that of other countries over a substantial period of time. It uses the leximetric method discussed in Chapter 2 to measure the strength of Malaysian shareholder protection relative to the UK, Australia and other countries.

The analysis in this chapter suggests that most of the reforms were borrowed wholesale from the UK or Australia. Chapter 1 noted criticisms of Malaysian shareholder protection as 'form over substance', implying that the regulations are not achieving their desired effect.[548] Scholarly critique following the Asian financial crisis has sought to understand this phenomenon. There has been a corresponding shift in scholarly perspectives away from formalism, towards the conceptualisation of law as being inextricably related to the context in which it operates. Questions have also been raised as to the effective implementation of formal regulations. Several questions arise at this juncture. How do the regulations operate and how effective are they in safeguarding shareholders' interests or providing them redress when their rights are breached? Why do the regulations operate in those ways, and is their implementation affected by contextual factors? These questions will be investigated in Chapters 5 and 6.

[546] Singh, above n 286, 19–20.
[547] Some of La Porta and his colleagues' studies included Malaysia; La Porta et al, 'Agency Problems and Dividend Policies Around the World', above n 54; Djankov et al, 'Courts', above n 54; Siems' leximetric study of 10 variables over a period of 10 years also examined Malaysian shareholder protection; Siems, 'Leximetric II', above n 54, 127.
[548] Pascoe and Rachagan, above n 14, 97; Gill and Allen, above n 14.

CHAPTER 4

THE STRENGTH OF MALAYSIAN SHAREHOLDER PROTECTION LAW

The first research objective of the thesis is to describe and explain the character of Malaysian shareholder protection law, focusing on its content, strength and effectiveness. While Chapter 3 examined the content of shareholder protection, this chapter analyses the strength of formal Malaysian shareholder protection law, measuring it through the leximetric method and placing it internationally through a comparison with data from the UK, Australia and four other countries from 1970 to 2005.[549] An international comparison enhances the analysis of the strength of Malaysian shareholder protection by facilitating an understanding of the extent to which Malaysian shareholder protection approximates benchmarks of protective strength internationally. Several questions form the basis of inquiry in this chapter. What is the strength of Malaysian shareholder protection and how does it compare internationally? How has the strength of Malaysian shareholder protection evolved over time?

The leximetric analysis builds on several findings in Chapter 3. The leximetric measurement reveals how the strength of Malaysian shareholder protection has changed over time in response to the various law reform initiatives discussed in Chapter 3. This provides an indication of the impact of increased regulation on the strength of formal shareholder protection. As observed in Chapter 3, Malaysian shareholder protection has been modelled on the laws of other common law countries, particularly the UK and Australia, suggesting that the strength of Malaysian shareholder protection should approximate that of lead common law countries. Nevertheless, the few studies which have examined the strength of Malaysian shareholder protection internationally are limited.[550]

This chapter seeks to address the gap in the literature. The study aims to facilitate a better understanding of the strength of Malaysian shareholder protection by first examining the strength of Malaysian shareholder protection through a leximetric analysis over a period of 45 years. Secondly, the measurement of Malaysian shareholder protection is compared internationally in order to facilitate a better understanding of the relative strength of Malaysian shareholder protection. The international comparison also enables an analysis of the proximity in strength to the level of shareholder protection in developed common law countries which were held out by international financial organisations as models of international standards.[551] The longitudinal data further enables patterns in the growth of Malaysian shareholder protection, relative to the other countries, to be ascertained.

The leximetric analysis provides two complementary means of determining how closely Malaysian shareholder protection has followed that of the UK and Australia. First, the quantitative measurement indicates the strength of Malaysian shareholder protection relative to the UK and Australia. Secondly, an analysis of the variables provides insights into the areas

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[549] Parts of this chapter are based on a publication by the author: Vivien Chen, 'The Evolution of Malaysian Shareholder Protection: A Legal Origins Analysis' [2013] *Singapore Journal of Legal Studies* 100.
[550] This is discussed in Chapter 2 at p 15.
[551] World Bank, *The Road to Recovery*, above n 11, 69; Zhuang et al, above n 11; Mauro F Guillen and Laurence Capron, 'State Capacity, Minority Shareholder Protections, and Stock Market Development' (2016) 61 *Administrative Science Quarterly* 125, 132.

of Malaysian shareholder protection which converge or diverge with the UK, the primary source of legal transplants. The latter relates primarily to the second research question which is central to Chapter 6. The leximetric measurement provides valuable insights into the way in which Malaysian shareholder protection has evolved. Preliminary observations made in this chapter on this issue will be examined in Chapter 6.

This chapter is structured as follows. The discussion in section 4.1 begins by detailing the leximetric analysis of Malaysian shareholder protection law. Subsequently, the strength of Malaysian shareholder protection law is compared with that of Australia, France, Germany, India, the UK and the US in section 4.2. The discussion in section 4.3 then turns to an analysis of what the leximetric data reveals about similarities of Malaysian shareholder protection with UK and Australian law.

4.1 The Leximetric Analysis of Malaysian Shareholder Protection

The analysis in this chapter draws on the leximetric method, described in Chapter 2, to measure the strength of Malaysian shareholder protection from 1965 to 2010. Chapter 2 discusses developments in the leximetric method in response to criticisms of La Porta's early studies.[552] The time series studies, in particular, sought to address limitations in the leximetric method in several ways. In the time series studies, Lele and Siems examined 60 variables over a period of 35 years.[553] They sought to select variables which were representative of a range of legal traditions and included crucial concerns in developing countries. These developments in the leximetric method facilitate more robust measurements of protective strength. Nevertheless, the method has its limitations primarily in relation to specific features of the Malaysian context.

Chapter 1 noted criticisms of the Malaysian regulations as 'form over substance'. The leximetric method places strong emphasis on formal regulation while minimal consideration is given to issues of enforcement. In situations where there are considerable difficulties in enforcement, there is a risk that the leximetric analysis may engender a perception of protective strength which is illusory. In addition, dominant controlling shareholders have been highlighted as a recurrent problem in Malaysia.[554] This gives rise to the potential for problems between controlling and non-controlling shareholders. The template developed by Lele and Siems, however, is weighted towards protection against expropriation by directors. Forty-two variables examine shareholder protection against expropriation by the board, while 18 variables relate to protection against expropriation by other shareholders. In the Malaysian context, there is arguably a significant need for protection against other shareholders and, in particular, controlling shareholders.

The distinction between protection against directors and protection against other shareholders is significant as each of these categories of protections addresses a different agency problem.[555] Where shareholding is dispersed, directors are thought to have a greater capacity to expropriate

[552] Please refer to p 15 of Chapter 2 for more details relating to the leximetric method.
[553] Lele and Siems, above n 53, 30.
[554] Finance Committee, above n 9, 42. This was discussed in Chapter 3 at p 73.
[555] Bebchuk and Hamdani, above n 26, 1281.

corporate property to the detriment of shareholders. Hence, the need for protection against the board arises. In situations of concentrated shareholding, the presence of a controlling shareholder is thought to deter directors' breaches of duty. However, other shareholders are more likely to need protection from expropriation of corporate assets by controlling shareholders.[556] Chapter 6 further examines the implications of Malaysia's concentrated shareholding patterns for the character and development of Malaysian shareholder protection law.

This study adopts the leximetric method developed in the time series studies. Despite its limitations, the leximetric method used in the time series studies provides the most robust measurement of the strength of shareholder protection available to date. The 60 variables examine a substantial range of considerations relevant to the question of whether shareholders' interests are adequately protected.

This study measures Malaysian shareholder protection through the leximetric method from 1965 to 2010. The measurement begins from 1965 which was the year in which the first Malaysian statute regulating shareholder protection was enacted after independence from the British.[557] Forty two variables relating to shareholder protection against the board are examined in the discussion below. Subsequently, the coding of the 18 variables on protection against other shareholders is examined. The strength of aggregate shareholder protection based on 60 variables is examined in the next section. The discussion then turns to observations on the trajectory of Malaysian shareholder protection which relate to the second research question.

4.1.1 *Shareholder Protection Against the Board of Directors*

In measuring the strength of shareholder protection against the board of directors, 42 variables are examined in the analysis. The variables include shareholders' rights of participation in significant corporate decisions. These variables cover the powers of the general meeting in relation to capital measures, mergers, amendments of the articles of association, the sale of substantial assets, the election of directors and dividend distribution. Issues of directors' acting in self-interest, directors' remuneration and duties, the composition of the board and the disqualification of directors are also considered. Shareholders' rights to information, proxy voting, the requisition of general meetings and agenda setting are examined in the variables. The variables take into account whether the law allows shareholders to propose resolutions, such as those appointing directors. Internal safeguards such as independent directors and directors' duties are examined. Other issues examined in the variables include pre-emptive rights and the enforcement of shareholder protection and corporate governance codes. The variables and the scores which have been given to each of them are set out in Appendix 1.

The template provides guidelines on how each of the variables is scored. The score of 1 should be given if the general meeting has powers in the specific situations and 0 should be given if the general meeting has no powers. Intermediate values may also be given. The Malaysian coding has leaned towards interpretations used in the UK coding for a number of reasons.

[556] Ibid.
[557] Page 56 of Chapter 3 discusses the *Companies Act 1965* in more detail.

Malaysian law has a closer connection with English law from the colonial period as well as through express adoption of the common law of England through the *Civil Law Act 1956*. There are more similarities between Malaysian and English law than with Australian law. As the emphasis in the literature relating to the leximetric method has been on the relative strength of shareholder protection across various countries, consistency in benchmarking the strength of Malaysian shareholder protection with one other country is more likely to produce data which would be useful for the purposes of a comparative study.

Figure 1 shows the growth in Malaysian shareholder protection against expropriation by directors from 1965 to 2010. The horizontal axis indicates the progression over time from 1965 to 2010, while the level of Malaysian shareholder protection against directors is indicated by reference to the vertical axis. As the growth in shareholder protection against expropriation by directors is measure by reference to 42 variables, the values in the vertical axis are considered against a possible maximum score of 42.

Figure 1: Shareholder protection against the board of directors (42 variables) in Malaysia from 1965 to 2010

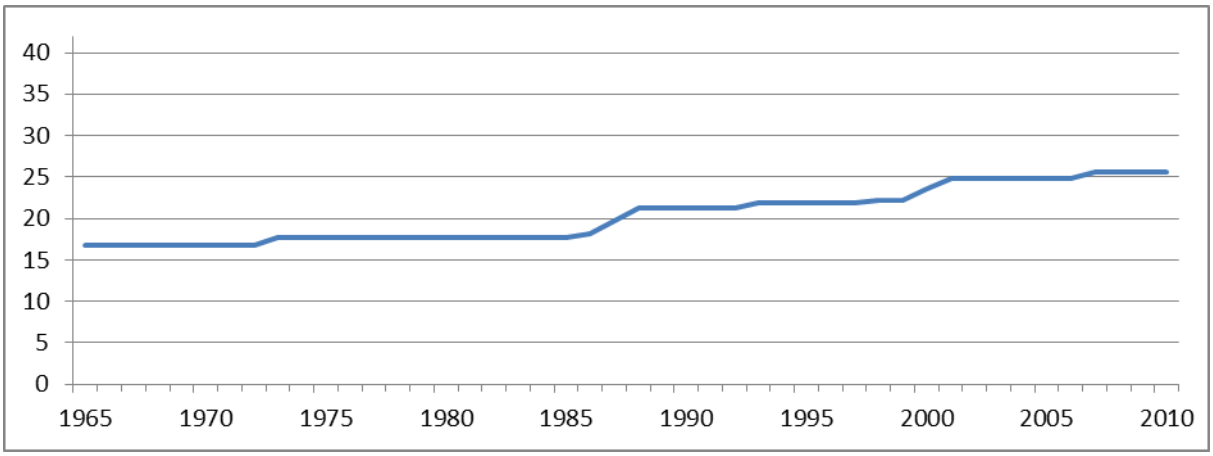

Figure 1 indicates that shareholder protection against the board was mostly stable over the first 20 years of the study. Most of the growth in shareholder protection occurred from 1985. Growth was concentrated over short periods of time which were interspersed with longer periods of relative stability. The two periods during which shareholder protection increased the most rapidly were from 1985 to 1988 and from 1997 to 2001. Both 1985 and 1997 were marked by financial crises. These were also periods during which there were significant corporate collapses and allegations of corporate impropriety.

Figure 1 shows that from 1965 to 1972, shareholder protection was stable and moderately low, at approximately 17 out of a possible maximum of 42. The score of approximately 17 was derived from provisions of the *Companies Act 1965* which gave the general meeting power over amendments to the articles of association and arrangements between the company and its creditors.[558] Shareholders also had the right to decide on capital measures including the

[558] These provisions of the *Companies Act 1965* are discussed in Chapter 3 at p 57.

reduction, increase, division or consolidation of share capital.[559] The right to demand an extraordinary general meeting could be exercised by shareholders who held 10 per cent or more of the paid up capital.[560] Agenda setting power for general meetings was held by shareholders with five per cent or more of the company's voting rights or 100 members.[561] Many of these protections were in force in the Straits Settlements and Malay states through colonial statutes enacted by the British in the early twentieth century.[562] Equitable principles transplanted from England prior to independence from the British continued to impose fiduciary duties on directors.[563] If enforced, these equitable fiduciary duties would provide significant regulatory protection for shareholders from self-interested behaviour by directors.

Some of the protections which were not available during this period include shareholders' rights to demand information and directors' disqualification for negligent conduct. There were also no specific rules governing related party transactions or the sale of substantial assets at this stage. There were no requirements of strict neutrality in takeover situations or substantive requirements limiting board remuneration.

There was a slight increase in shareholder protection in 1973 as a result of the introduction of the Kuala Lumpur Stock Exchange's ('KLSE') *Listing Rules*. The new *Listing Rules* introduced pre-emptive rights which protected minority shareholders from the dilution of their interests in the company without their consent.[564] The new rules also imposed the requirement of shareholder approval for an increase in directors' fees.[565] However, the replaceable rules in Table A of the *Companies Act 1965* had since 1965 specified that directors' remuneration should be subject to the approval of the general meeting. Hence, the increase in shareholder protection as a result of the requirement of shareholder approval for an increase in directors' fees was marginal. The new listing rules raised the level of shareholder protection to between 17 and 18 out of a possible maximum of 42.

Figure 1 indicates that from 1974 to 1985, the level of Malaysian shareholder protection remained stable. There was a sharp increase in shareholder protection from 1986 to 1988. During this period, the *Malaysian Code on Takeovers and Mergers 1987* was introduced and the *Listing Rules* were substantially revised. Amendments to the *Companies Act 1965* in 1986 and 1987 further strengthened shareholder protection.

The amendments to the *Companies Act 1965* during this period significantly strengthened formal protection from expropriation through related party transactions.[566] Nevertheless, the significance of the contribution made to shareholder protection by these provisions in comparison with other variables is not reflected in the index as equal weight is attributed to each variable in the template. Section 132E strengthened shareholder protection in an area of particular vulnerability. Expropriation through related party transactions has been a persistent

[559] *Companies Act 1965* s 62 and Table A art 42.
[560] *Companies Act 1965* s 144.
[561] *Companies Act 1965* s 151 is discussed in more detail in Chapter 3 at footnote 317.
[562] The *Companies Enactment 1917* of the Federated Malay States is an example of colonial legislation which contained many of the shareholder protections present in Malaysian law in 1965.
[563] These equitable principles are discussed in Chapter 3 from p 61.
[564] KLSE, *Listing Rules* art 8.
[565] KLSE, *Listing Rules* art 27.
[566] These statutory provisions are discussed in Chapter 3 from p 68.

problem in Malaysian corporate governance.[567] Section 132E introduced the requirement of prior shareholder approval for transactions with a director of the company or a person related to a director. The section imposed criminal penalties and required an account for profits. Likewise, ss 132C and 132D strengthened regulatory protections against asset shifting and the dilution of shareholding. Section 132C required shareholder approval for the disposal of a substantial portion of the company's assets or an acquisition of property of substantial value. Directors were required by s 132D to obtain shareholder approval prior to issuing shares.

When the *Malaysian Code on Takeovers and Mergers 1987* was introduced, it strengthened shareholder protection through the principle of strict neutrality in takeover situations, prohibiting the board from any action which may lead to the frustration of a takeover offer.[568] Revisions to the *Listing Rules* in 1988 further increased the level of shareholder protection through additional requirements of disclosure and shareholder approval. The stock exchange enhanced the regulation of related party transactions by requiring that circulars be given to shareholders and their approval be obtained for transactions involving directors or substantial shareholders.[569] The regulatory reforms from 1986 to 1988 strengthened Malaysian shareholder protection to a moderate level of approximately 21 out of a possible maximum of 42.

This level of shareholder protection was sustained until 1992, when s 132G was enacted, prohibiting asset shifting between related parties for specified periods.[570] In 1993, an amendment to the *Listing Rules* required listed companies to have audit committees with an independent majority.[571] In the same year, the Securities Commission was established. The commission was given the responsibility of regulating and enforcing compliance with securities law.[572] It was also given more extensive powers of investigation than previous regulatory enforcement bodies. The amendments increased level of shareholder protection to between 21 and 22 out of a possible maximum of 42. Shareholder protection remained stable from 1994 until the Asian financial crisis in 1997.

Another period of significant growth in shareholder protection following the Asian financial crisis is indicated from 1998 to 2001 in Figure 1. During the crisis, Malaysian corporate governance was subjected to heavy criticism by international financial organisations.[573] As discussed in Chapter 3, major reforms included the introduction of the *Malaysian Code on Corporate Governance 2000* and a review of the *Listing Rules*. The regulatory reforms which strengthened shareholder protection through the presence of independent directors and audit, remuneration and nomination committees are detailed in Chapter 3.[574] Mechanisms were created to safeguard minority shareholders' interests in related party transactions. The

[567] Chan, above n 13.
[568] *Malaysian Code on Takeovers and Mergers 1987* r 4.
[569] KLSE, *Listing Rules* ss 115–16. Section 281 of the listing rules mandated shareholder approval for directors' participation in employee share schemes. Notices of meetings called to consider special business are also required to be accompanied by a statement regarding the effect of any proposed resolution; KLSE, *Listing Rules* s 299.
[570] Section 132G is discussed in Chapter 3 at p 70.
[571] KLSE, *Listing Rules* s 15A.
[572] *Securities Commission Act 1993* s 15.
[573] Liew, 'Perceived Roles', above n 12, 455.
[574] Please refer to the discussion on the *Malaysian Code on Corporate Governance* from p 76.

regulations sought to enhance the disclosure of directors' remuneration. The *Securities Commission (Amendment) Act 1998* extended the Securities Commission's powers of investigation. It also introduced statutory provisions protecting whistle blowers. The level of shareholder protection was raised to between 24 and 25 out of a possible maximum of 42 as a result of the reforms.

As indicated in Figure 1, from 2002 to 2006 shareholder protection remained stable. In 2007, several regulatory reforms took place. However, despite the quantity of formal regulatory reforms, the substantive effect of the reforms on shareholder protection was marginal. Many of these regulations reiterated protections which were already in existence prior to 2007. Among the reforms which strengthened shareholder protection was the enactment of the *Capital Market and Services Act 2007*, which imposed a duty on auditors to disclose breaches of securities law. The Act also extended the protection afforded to whistle blowers. Following a major review of the *Companies Act 1965* by the Corporate Law Reform Committee, amendments to the *Companies Act 1965* in 2007 introduced a statutory derivative action[575] and an objective standard to the directors' duty of care.[576] Nevertheless, the effect on the level of shareholder protection was minimal as the duty of care was limited[577] and many of the amendments constituted codifications of existing equitable principles. The reforms raised the level of shareholder protection to a moderate level of between 25 and 26 out of a possible maximum of 42. Between 2007 and 2010, the level of shareholder protection remained stable. The period of the study ended with the level of shareholder protection against directors between 25 and 26 out of a possible maximum of 42.

4.1.2 *Protection Against Other Shareholders*

Figure 2 shows the growth in shareholder protection against other shareholders in Malaysia from 1965 to 2010. The horizontal axis indicates the progression over time from 1965 to 2010, while the level of shareholder protection against other shareholders is indicated by reference to the vertical axis. Eighteen variables are examined, and the level of shareholder protection against expropriation by other shareholders in the vertical axis is measured against a possible maximum score of 18. These variables cover issues relating to voting including supermajority requirements, quorums, the 'one share one vote' principle, cumulative and multiple voting rights. Shareholders' exit rights such as mandatory offers in relation to takeover bids and the compulsory acquisition of minority shareholding are considered. The disclosure of major share ownership and the rights of oppressed minorities are examined in addition to questions as to whether various aspects of shareholder protection are mandatory. Details of the scores given for each of the 18 variables are set out in Appendix 1.

[575] *Companies Act 1965* s 181A.
[576] *Companies Act 1965* s 132(1A).
[577] Directors are exempted from liability on grounds of reasonable reliance on information or a delegation of duties made in good faith; *Companies Act 1965* s 132.

Figure 2: Shareholder protection against other shareholders (18 variables) in Malaysia from 1965 to 2010

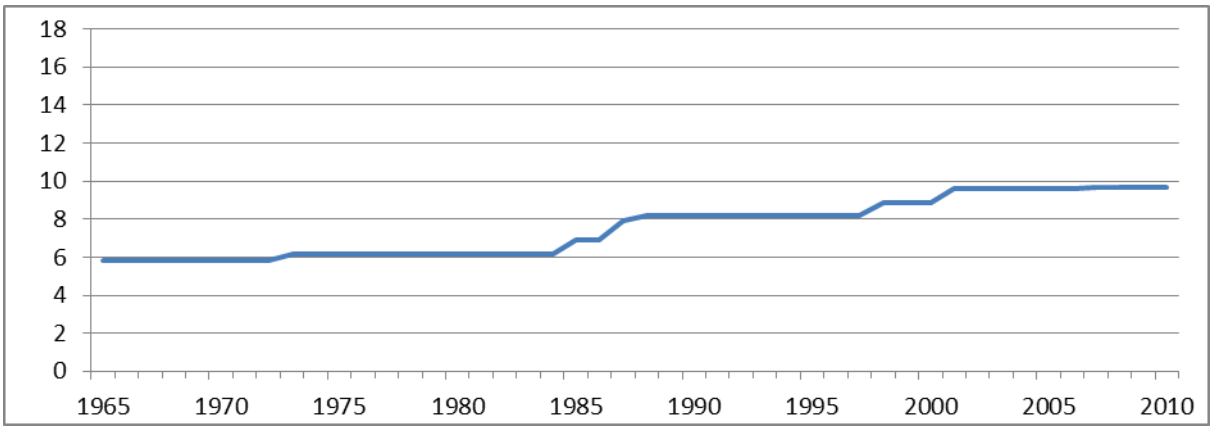

Figure 2 indicates that the level of protection against other shareholders in 1965 was less than 6 out of a possible maximum of 18. The formal regulations which contributed to the level of protection included the requirement that the approval of shareholders representing at least three quarters of voting rights should be obtained for any amendment of the articles of association[578] or schemes of arrangement with creditors.[579] English common law principles[580] which allowed shareholders to file a claim against a void or voidable resolution of the general meeting applied in Malaysia.[581] Shareholders had the right to seek relief from oppressive conduct or disregard of their interests by controlling shareholders through the statutory remedy for oppressed minorities[582] or winding up on just and equitable grounds.[583] The 'one share one vote' was applicable in Malaysia, and regulations did not permit directors' duties to be excluded by the Articles.

The considerably low level of protection against other shareholders may in part be attributed to the absence of various protections at that time. There were no prohibitions against multiple or capped voting rights. Likewise, Malaysian shareholders did not have the option of cumulative voting. There were also no prohibitions against voting by interested shareholders then. Mandatory bids in takeover situations, where a third of shares were acquired, were only introduced subsequently in 1987.

The level of shareholder protection remained stable from 1965 to 1972, increasing slightly in 1973 when the KLSE *Listing Rules* were established. The *Listing Rules* required directors who had an interest in related party transactions and held shares in the company to abstain from

[578] *Companies Act 1965* s 31.
[579] *Companies Act 1965* s 176.
[580] *Edwards v Halliwell* [1950] 2 All ER 1064.
[581] *Civil Law Act 1956* s 3.
[582] *Companies Act 1965* s 181.
[583] *Companies Act 1965* s 218(1)(i); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; PC [1987] BCLC 472; [1987] 1 WLR 413; *Tien Ik Enterprises Sdn Bhd v Woodsville Sdn Bhd* [1995] 2 AMR 1033; [1995] 1 MLJ 769, SC.

voting at the general meeting. The ambiguity surrounding the interpretation of this provision is discussed in Chapter 3.[584]

The first significant increase in shareholder protection is shown in Figure 2 from 1985 to 1988. As with protection against the board, the increase came about as a result of substantial regulatory revision during this period.[585] Among these were amendments to the *Companies Act 1965*, which mandated the disclosure of shareholding of five per cent of the company's voting rights.[586] The *Malaysian Code on Takeovers and Mergers 1987* provided for a mandatory bid for the entirety of the shares where there was an acquisition of 33 per cent or more of the voting rights.[587] The revision of the *Listing Rules* in 1988 required all directors to retire from office at least once in three years.[588] Following the regulatory reforms, the level of shareholder protection increased to a moderate level of approximately 8 out of a possible maximum of 18, remaining stable from 1989 to 1997.

The second period of significant growth in the strength of shareholder protection occurred following the Asian financial crisis in 1997. Amendments to the *Listing Rules* in 1998 brought about significant changes to the regulation of related party transactions, an issue which had attracted considerable criticism during the Asian financial crisis.[589] The revised *Listing Rules* attempted to address the imbalance of power resulting from the concentrated holdings of dominant shareholders through restrictions on voting by interested directors and controlling shareholders. Persons connected with them were also required to abstain from voting at the general meeting.[590] These voting restrictions were in addition to the disclosure requirements and independent advice previously mentioned in relation to shareholder protection against directors.

The increase in protection against other shareholders was also attributed to a new listing rule, which required a third of listed companies' boards to comprise independent directors.[591] The *Malaysian Code on Corporate Governance*, likewise, sought to contribute to minority shareholder protection by recommending that where the controlling shareholder held more than 50 per cent of the voting rights, the board should have fair representation of the investment of other shareholders. However, neither the *Malaysian Code on Corporate Governance* nor the *Listing Rules* specified any procedures for minority shareholders to elect representatives. The threshold for disclosure of substantial shareholding was amended from five per cent to two per cent of the company's voting shares in 1998.[592] Figure 2 reflects the increase in the level of shareholder protection to between 9 and 10 as a result of the reforms from 1998 to 2001.

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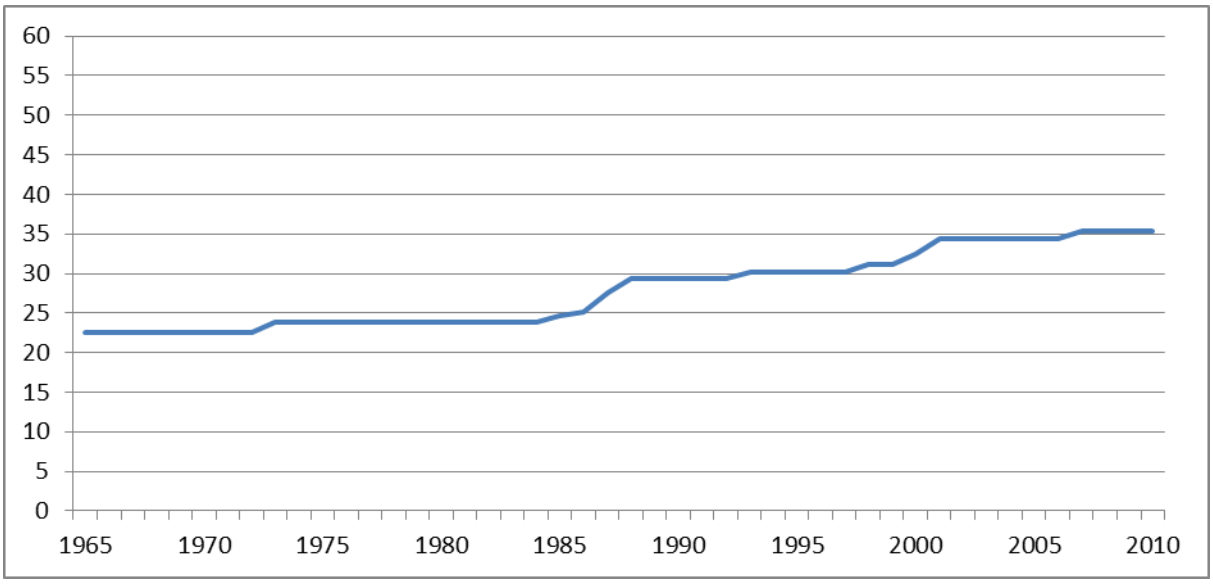
[584] Chapter 3 explains the ambiguity on p 63.
[585] These reforms are discussed in Chapter 3 from p 64.
[586] *Companies Act 1965* ss 69D and 69L.
[587] *Malaysian Code on Takeovers and Mergers 1987* s 9.
[588] KLSE, *Listing Rules* s 309.
[589] These reforms are discussed in Chapter 3 from p 73.
[590] KLSE, *Listing Rules* rr 10.08 and 10.09.
[591] KLSE, *Listing Rules* r 15.02.
[592] *Securities Industry (Reporting of Substantial Shareholding) Regulations 1998*; However, the change was short-lived and, in 2001, the threshold reverted to five per cent of the company's voting shares.

The review of the *Companies Act 1965* in 2007 introduced a statutory derivative action for oppressed minorities.[593] Although the statutory derivative action strengthened shareholder protection, the increase in the level of protection was marginal due to existing protection for oppressed minorities.[594] At the end of the period of the study, the level of shareholder protection remained below 10 out of a possible maximum of 18.

4.1.3 *Aggregate Shareholder Protection*

Figure 3 shows the aggregate shareholder protection consisting of both protections against the board and protections against other shareholders from 1965 to 2010. The aggregate shareholder protection measured against 60 variables reflects the trends in both Figures 1 and 2 of the highest growth in shareholder protection occurring from 1985 to 1988 and from 1998 to 2001. There is an overall increase and upward trend in the aggregate shareholder protection over the period 1965 to 2010. Figure 3 indicates that most of the growth in shareholder protection occurred from the mid-1980s. The level of shareholder protection increased by more than 11 points from 1985 to 2010 in contrast with the gain of slightly over 1 point from 1965 to 1984.

Figure 3: Aggregate shareholder protection (60 variables) in Malaysia from 1965 to 2010



[593] *Companies Act 1965* s 181A. The 2007 reforms to the *Companies Act 1965* are discussed in Chapter 3 from p 77.
[594] This is discussed in more detail in Chapter 3 at p 81.

4.1.4 *Trends in Legal Change*

The leximetric method has been used primarily for the purpose of comparing the strength of shareholder protection across countries. More recently, scholars have analysed changes in the strength of shareholder protection in individual countries to gain a better understanding of legal change. Periods of significant legal change were identified from the leximetric data. The contexts in which legal change occurred were examined to facilitate an understanding of the influences on legal evolution.[595] This section examines the trajectory of Malaysian shareholder protection from 1965 to 2010 and makes preliminary observations on what it reveals about the way in which Malaysian shareholder protection has evolved. These findings are further analysed in Chapter 6.

Figures 1 to 3 indicate that the growth in shareholder protection from 1965 to 2010 took place over several short periods of time. The short periods of rapid growth were interspersed with longer periods of relative stability. The two main periods of growth occurred from 1986 to 1988 and from 1998 to 2001. There were also minor increases in shareholder protection in 1973, from 1992 to 1993 and in 2007. Most of the growth in shareholder protection occurred after 1985 and was attributable to statutory reforms, codes and listing rules. The periods of growth in the strength of shareholder protection coincide with the periods of regulatory reform discussed in Chapter 3. This suggests that the increase in shareholder protection regulation, particularly in the few years following the mid-1980s and the Asian financial crisis, significantly strengthened Malaysian shareholder protection.

The two periods of strong growth in shareholder protection occurred immediately after economic crises. The economic crises were accompanied by corporate scandals and collapses. The substantial growth in shareholder protection from 1986 to 1988 occurred following the economic recession of 1985.[596] Chapter 3 considered the occurrence of several high-profile corporate scandals from the early to mid-1980s.[597] Trading on the stock exchange was suspended, adversely affecting a large number of investors.[598] The increase in shareholder protection during this period was arguably also precipitated by economic policy. Privatisation of state-owned enterprise had brought about the growth of corporate conglomerates.[599] The expansion of corporate conglomerates was achieved through mergers and acquisitions which at times were aggressive and hostile.[600] The introduction of the *Malaysian Code on Takeovers and Mergers 1987* followed this expansion of large corporate conglomerates.

The second period of substantial increase in shareholder protection occurred in the aftermath of the Asian financial crisis in 1997. Malaysian corporate governance was heavily criticised

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[595] Anderson et al, 'Evolution', above n 7, 187–91; Mitchel et al, above n 115.
[596] Cheng, above n 362. Economic growth in 1985 had contracted to minus one per cent in contrast with the average annual growth rate of seven per cent from 1980 to 1984; Prema-chandra Athukorala, 'The Malaysian Economy during Three Crises' in Hal Hill, Siew Yean Tham and Ragayah Haji Mat Zin (eds), *Malaysia's Development Challenges: Graduating from the middle* (Routledge, 2010) 83.
[597] See p 64 of Chapter 3.
[598] Ho et al, above n 364.
[599] Jomo, above n 361.
[600] Brown, above n 402; Gomez, *Chinese Business in Malaysia*, above n 402.

during the Asian financial crisis.[601] Significant reforms were brought about in response to the loss of investor confidence.

The strengthening of shareholder protection following economic events is relevant to the second research question which considers the influences that have shaped the character of Malaysian shareholder protection. The implications of these findings are further examined in Chapter 6. As the focus of this chapter is on the strength of shareholder protection, the following discussion considers how the strength of Malaysian shareholder protection compares internationally.

4.2 International Comparison

As mentioned in Chapter 2, the leximetric method has been used primarily for the purpose of comparing the strength of law across countries. The analysis in this section compares the trajectory of Malaysian shareholder protection with leximetric data from Australia, France, Germany, India, the UK and the US. The purpose of the international comparison in this study is to ascertain the strength of Malaysian shareholder protection internationally and, hence, to gain a better understanding of the character of Malaysian shareholder protection in a global context. The comparison draws from Anderson et al's[602] time series studies of Australian shareholder protection from 1970 to 2010 and the time series data from France, Germany, India, the UK and the US from 1970 to 2005.[603]

The discussion in Chapter 3 observed that major reforms following the Asian financial crisis were precipitated by international criticisms of Malaysian regulations. International financial organisations held out Anglo-American regulatory frameworks as models of international standards to be emulated by Malaysia and other countries affected by the crisis.[604] Their recommendations emphasised the need for stronger legal protection for minority shareholders and a reliance on market discipline along the lines of developed common law countries' regulations.[605] The international comparison of leximetric data in this section provides an empirical basis for determining the strength of Malaysian shareholder protection law relative to developed common law countries which were regarded as models of regulatory standards. The longitudinal study also facilitates an understanding of the growth of Malaysian shareholder protection relative to the six other countries from 1970 to 2005.

In summary, Malaysia had the highest overall growth in aggregate shareholder protection among the seven countries in the study from 1970 to 2005. Most of the growth occurred from the mid-1980s, raising the level of Malaysian shareholder protection to that of the US by the late 1980s. In 2005, shareholder protection in Malaysia was above that of the US but below the other countries. Figure 4 shows the aggregate strength of Malaysian shareholder protection relative to the other countries over the 35 year period.

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[601] Page 73 of Chapter 3 discusses this in further detail.
[602] Anderson et al, 'Evolution', above n 7.
[603] Lele and Siems, above n 53.
[604] World Bank, *The Road to Recovery*, above n 11, 69; Zhuang et al, above n 11.
[605] Ibid.

Figure 4: Aggregate shareholder protection (60 variables) in seven countries from 1970 to 2005

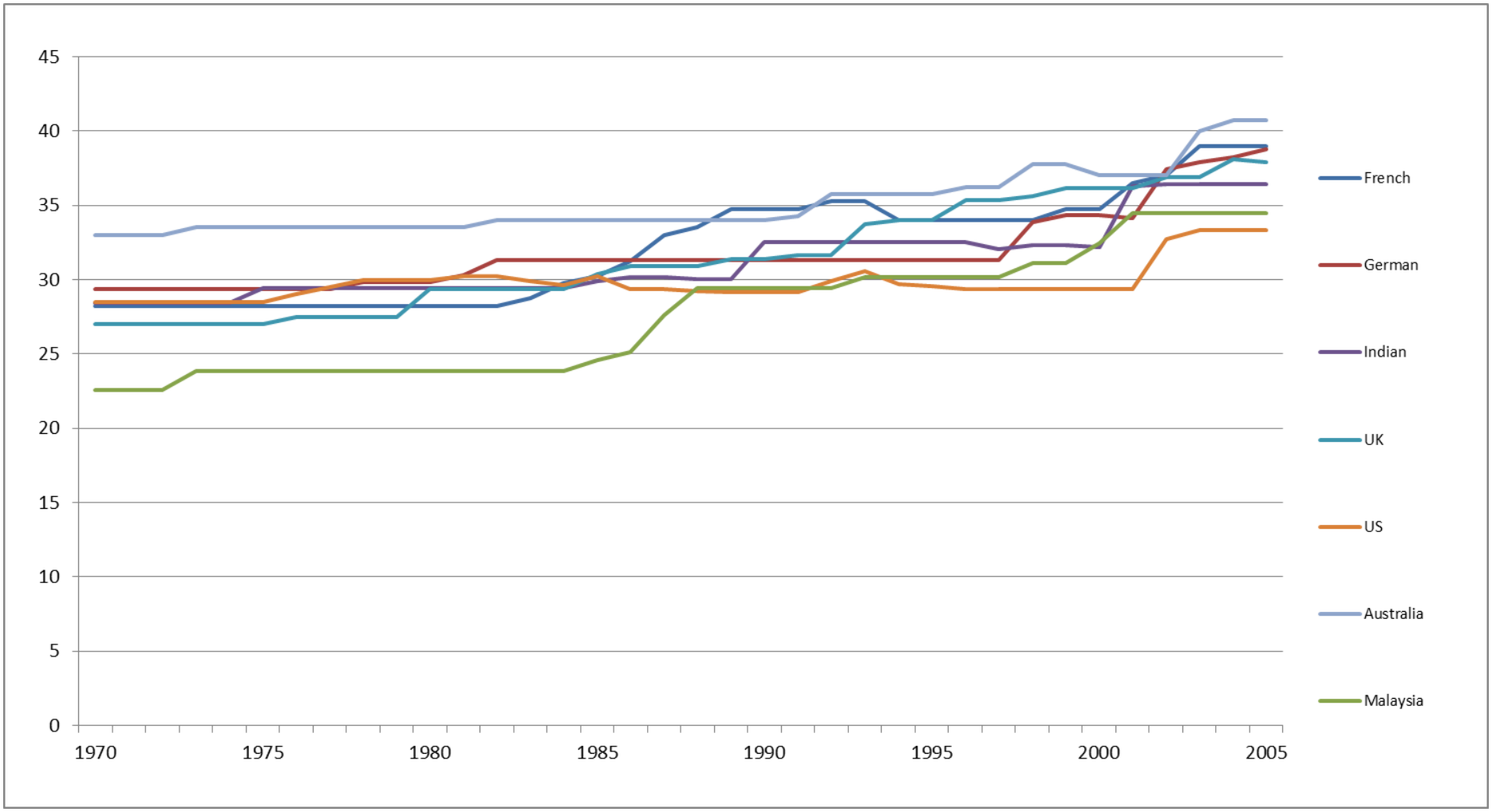

Figure 4 shows an upward trend in aggregate shareholder protection across all the countries in the study. At the start of the period, the level of aggregate shareholder protection in Malaysia was the lowest of all the countries. By the late 1980s, Malaysia's aggregate shareholder protection had reached the level of shareholder protection in the US. Between 1998 and 2001, Malaysian levels of protection momentarily reached that of India and Germany. However, after 2001, Malaysian shareholder protection stabilised while German shareholder protection continued to increase. Lele and Siems suggest that there was significant improvement in aggregate shareholder protection from 2000 to 2005 among the countries in their study. The data on aggregate shareholder protection in Australia likewise indicates similar growth in shareholder protection during this period. Shareholder protection in Malaysia follows a different trajectory during this period, with an increase in shareholder protection from the Asian financial crisis followed by a period of stability between 2001 and 2007.

The international comparison indicates that over the 35 year period, Malaysia had the highest growth in shareholder protection among the seven countries. At the end of the period in 2005, the level of aggregate shareholder protection in Malaysia was higher than that of the US but lower than in France, Germany, India, Australia and the UK. Nevertheless, there is not a lot of difference in the strength of shareholder protection among the countries examined. In addition, these differences appear to have narrowed over time. Figure 4 indicates that the gap between the strongest and weakest level of protection in 1970 had decreased by 2005.

Notably, the relative strength of Malaysian shareholder protection was not closer to the UK or Australia than other countries in the index despite Malaysian company regulation having been modelled after the UK's regulations and, to a lesser extent, Australian law. Conversely, while Australian shareholder protection was the highest among all the countries, Malaysian shareholder protection was at the bottom of the index, second only to the US.

Figure 5 compares the strength of protection against shareholders, based on 18 variables, in the seven countries. At the start of the period, Malaysia's level of protection against other shareholders was lower than all the other countries. Shareholder protection against expropriation by other shareholders maintained an upward trend throughout the period of the study. The upward trend was shared by Germany. The UK and Australia had a higher level of stability. India, France and the US experienced some fluctuation with India and France having an overall increase in protection against other shareholders by the end of the period. In contrast, the US ended the period with an overall decrease in protection against other shareholders. Malaysia had the highest rate of increase in protection against other shareholders over the 35 year period. At the end of the period, Malaysia's level of protection against other shareholders was above that of the US, UK and India but below France, Germany and Australia.

Figure 5: Shareholder protection against other shareholders (18 variables) in seven countries

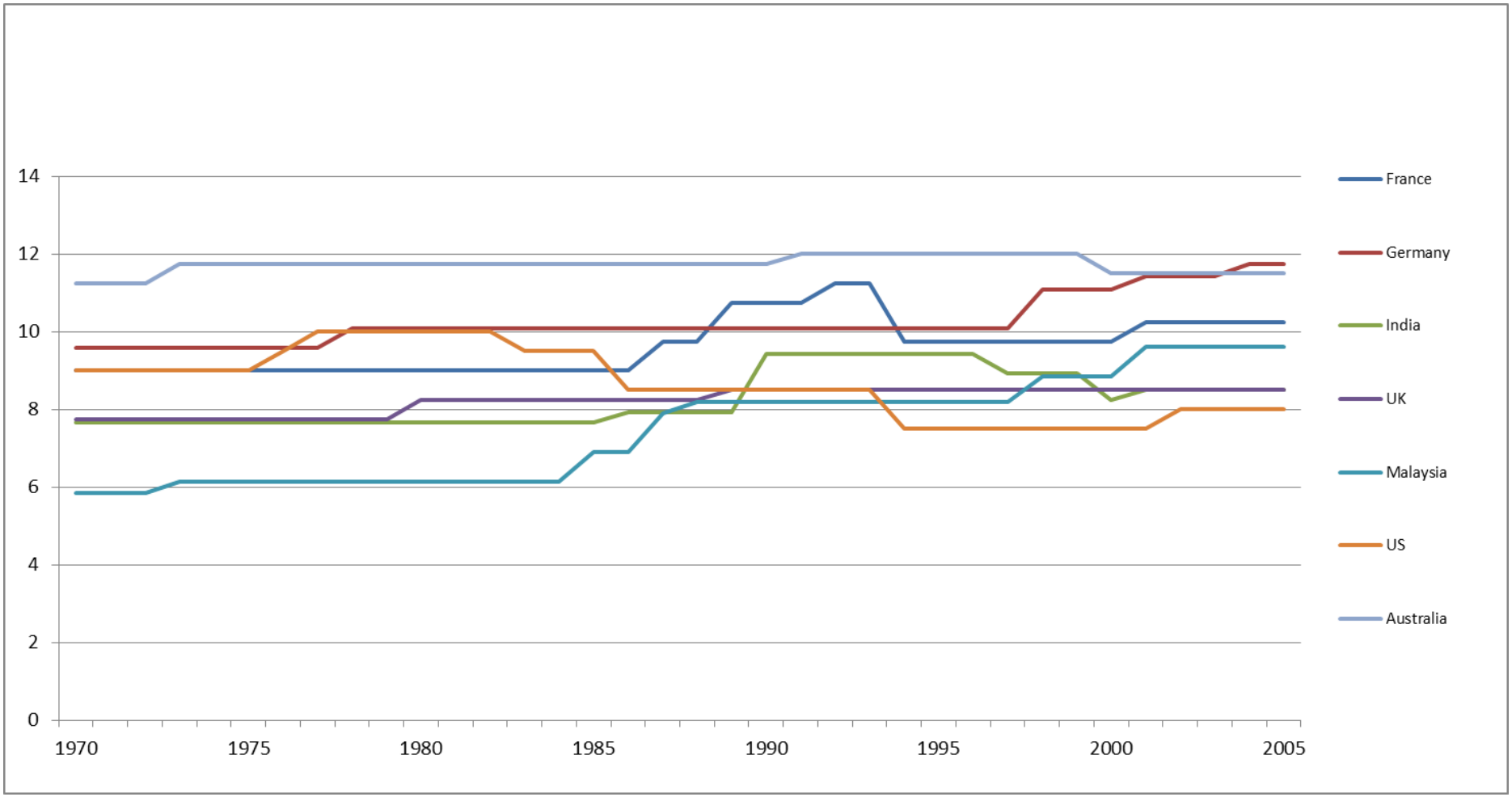

Figure 6: Shareholder protection against the board of directors (42 variables) in seven countries

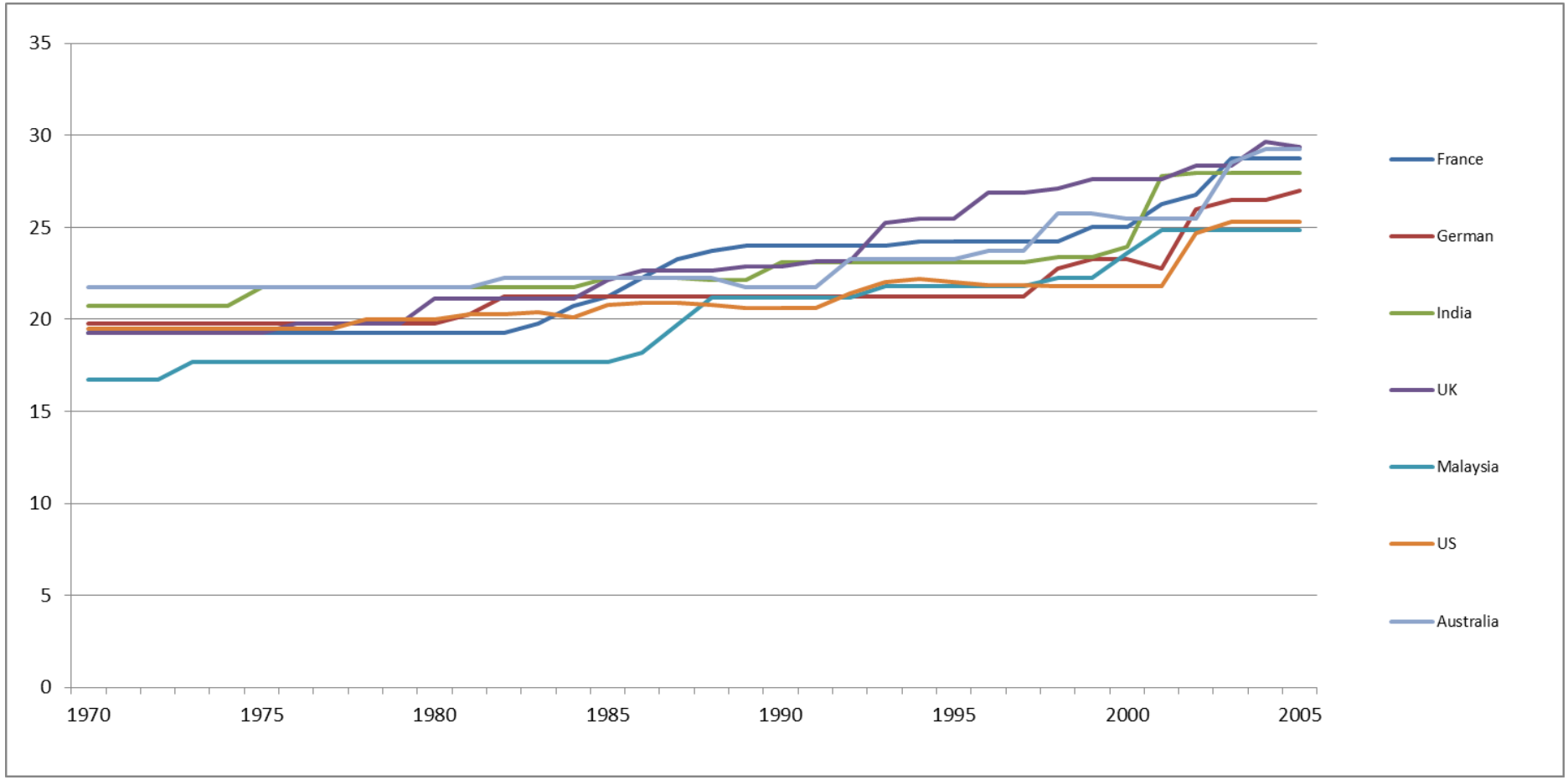

Figure 6 compares the strength of shareholder protection against the board of directors in the seven countries. As in Figures 4 and 5, Malaysia's level of shareholder protection was below that of the other countries at the start of the period. However, it reached the level of the US's protection against the board towards the end of the 1980s and in 1993 marginally exceeded Germany's level of protection. Figures 4 and 6 indicate that both Malaysia and India, the two Asian countries in the studies, experienced a sharp increase in aggregate shareholder protection and protection against the board from 1999 to 2001, although in India the growth occurred from 2000 to 2001.[606] Shareholder protection in both Malaysia and India remained stable after 2001, while there was growth in aggregate shareholder protection and protection against the board in the other countries. When the level of Malaysian shareholder protection moved into a period of stability after the post-Asian financial crisis reforms, it was overtaken by Germany and the US. At the end of the period, Malaysia's level of shareholder protection against the board remained below that of the other countries. There was an overall increase in protection against the board in all the countries.

Figures 5 and 6 indicate that the strength of Malaysian protections against expropriation by other shareholders relative to the other countries is significantly stronger than its protection against the board. As at 2005, Malaysian shareholder protection against other shareholders was higher than the US, UK and India and was just below that of France, Germany and Australia. As will be seen in Chapter 6, studies consistently indicate the presence of highly concentrated shareholding in Malaysia. This suggests a greater need for shareholder protection against expropriation by other shareholders. Figure 5 reflects the international strength of formal Malaysian shareholder protection in this area of need, relevant to the agency problem common to countries with concentrated shareholding patterns. This lends further support to the finding in this chapter that formal Malaysian shareholder protection is strong.

4.3 Areas of Convergence or Divergence with UK and Australian law

As seen in Chapter 3, a significant proportion of Malaysia's shareholder protection has been modelled on UK and Australian regulations. Nevertheless, the disparity between the strength of Malaysian shareholder protection and Australian shareholder protection is evident. Figure 4 indicates that Australia's aggregate protection was the highest of the seven countries. Malaysia's aggregate shareholder protection was among the lowest, marginally exceeding the US from the end of the 1980s to 2005. Malaysia was no closer to the UK than other countries despite the pattern of borrowing from UK regulation. Nevertheless, strong growth in Malaysian shareholder protection resulted in the gap between the strength of Malaysian shareholder protection relative to the UK and Australia narrowing over time.

A closer examination of the variables and leximetric coding provides insights into the reasons for the gap between UK and Malaysian law. As Malaysian shareholder protection has followed that of the UK more closely, the analysis focuses primarily on the gap with UK law. One of

[606] Nevertheless, reports indicate that India emerged relatively unscathed by the Asian financial crisis; Arunabha Ghosh, 'Pathways Through Financial Crisis: India' (2006) 12 *Global Governance* 413; 'IMF Lauds India for Avoiding the Asian Financial Crisis', *India Economic News*, May 1999, *Indian Embassy* <https://www.indianembassy.org/enews/econews(may99).pdf>.

the trends evident on closer examination of the coding is the lapse of time between the coming into force of protections in the UK and their adoption in Malaysia. For instance, various protections in relation to takeovers and mergers which were in force in the UK in 1965 were only adopted in Malaysia in 1987. The delay in Malaysia's adoption of regulations borrowed from the UK accounts for at least some of the difference in the protective strength of regulations in the two countries.

When the Malaysian coding of variables is compared with UK and Australian coding, the similarity of many of these provisions is evident. This is consistent with the finding in Chapter 3 of significant borrowing from Australian and UK regulation during periods of regulatory reform. For instance, many reforms in 1965, the mid-1980s and after the Asian financial crisis were based on UK and Australian company legislation. Likewise, Malaysian codes were modelled on UK takeovers and corporate governance codes.

The examination of the coding also reveals specific patterns of divergence from UK law. While there was a tendency for Malaysian law to converge with that of the UK in most areas of shareholder protection, persistent divergence was particularly evident in the regulation of directors' remuneration. Persistent divergence in this area also contributes to the difference in the protective strength of regulations in the UK and Malaysia. A closer analysis of specific variables provides more insights into the areas of convergence and divergence between shareholder protection in the UK and Malaysia.

4.3.1 *Protection Against the Board of Directors*

In 1970, many of the provisions of the *Companies Act 1965* examined in the coding bore a high degree of similarity to the *Companies Act 1948* (UK). The similarities are clearest in Variables 1 to 3 of the protections against the board and management. Variable 1 is divided into seven parts. Five out of the seven parts had virtually identical powers of the general meeting. These included powers to amend the articles of association, to approve of schemes of arrangement between the company and its creditors, and in relation to capital measures. Likewise, both the UK and Malaysia made provision for the powers of the general meeting to declare dividends in Table A, provided that the dividends did not exceed the amount recommended by the board of directors. In the UK and Malaysia, the power of the general meeting to elect the board of directors was contained in Table A and case law from the UK. Variables 2 and 3 which consist of three and two parts, respectively, were also very similar. Australian law on Variables 1 to 3 was also similar to the UK and Malaysia in 1970.

The coding for UK and Malaysia from Variables 6 to 8 produced identical scores from 1970 to 2005.[607] Variable 7 relates to individual information rights. The score of 1 is given if an individual shareholder or shareholders with five percent or less capital can demand information which will be answered at the general meeting. Both the UK and Malaysia scored 0 as neither

[607] A score of 0 is given for Variable 6 if shareholders are required to deposit their shares prior to the general meeting. If there is no such requirement a score of 1 is given. Malaysia, Australia and the UK scored 1 on this variable. As with the Malaysian position, nothing in Australian literature suggests that shareholders have to deposit their shares prior to the general meeting.

had any explicit right to ask or demand information. Hence, in both Variables 6 and 7, the UK and Malaysia's identical scores were the result of there being an absence of any express provision on the issues.

The key areas in which the divergence from UK provisions is clearest relate to directors' remuneration and directors' duties of care and skill. In four of the variables relating to directors' remuneration, developments in the UK were emulated but only to a limited extent. Variable 9(3) relates to the audit and remuneration committees having a majority of independent members. The *Combined Code on Corporate Governance 1998* (UK) recommended that all members of the remuneration committee should be independent. Although independence requirements were adopted in relation to the audit and nomination committees, Malaysian remuneration committees were not required to have any independent members. The remuneration committee's lack of independence and accountability has persisted despite subsequent regulatory reforms drawing from UK regulation in other areas.

Variable 10(1) relates to the power of the general meeting to approve directors' compensation schemes. Variable 10(2) concerns the disclosure of directors' remuneration. The Malaysian regulations on directors' remuneration remained unchanged from 1965 to 2010 apart from minor improvements to voluntary disclosure in 2000[608] and the introduction in 1988 of shareholder approval for directors' participation in employee share schemes.[609] Both the UK and Australian regulation increased the mandatory disclosure of directors' remuneration[610] and introduced advisory voting by the general meeting in relation to directors' remuneration from 2001 to 2002.[611] Likewise, with performance based remuneration in Variable 11, the regulations in UK and Australia were significantly more extensive than in Malaysia. The sole Malaysian recommendation was minimal, stating that, 'The component parts of remuneration should be structured so as to link rewards to corporate and individual performance, in the case of executive directors.'[612] No disclosure or any other form of accountability is recommended nor mandated in relation to performance based remuneration.

In contrast, from 1996 the *Combined Code on Corporate Governance* (UK) imposed a much higher level of accountability, requiring the disclosure of details on how performance evaluations of the board, its committees and individual directors had been conducted. Schedule A contained guidelines on the design of performance related remuneration. The *Directors Remuneration Report Regulations 2002* (UK) required disclosure of performance conditions for each director, why they were chosen, methods used in assessing whether they were met and

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[608] Part 1 B III of the *Malaysian Code on Corporate Governance 2000* recommends that details of each director's remuneration be disclosed in the annual report.
[609] KLSE, *Listing Rules* s 281.
[610] In the UK, the *Directors Remuneration Report Regulations 2002* (UK) require detailed disclosure of directors' remuneration. Section 300 of the *Corporations Act 2001* (Cth) requires detailed disclosure of remuneration in the annual directors' report. This includes policy, reasons for choosing performance conditions and methods used to assess whether the conditions are met. The board is also required to explain the relative proportions of remuneration which are performance based and those which are not. The value of options granted as remuneration should also be disclosed.
[611] *Corporations Act 2001* (Cth) ss 250R(2)–(3); Section 241A of the *Companies Act* (UK) was inserted by the *Directors' Remuneration Report Regulations 2002* (UK).
[612] *Malaysian Code on Corporate Governance 2000* pt 1 B 1; *Malaysian Code on Corporate Governance 2007* pt 1 B 1.

why those methods were chosen. Graphs showing the total shareholder return for the period, details of individual directors' remuneration including salary, fees, bonuses, expenses, non-cash benefits and share options were required to be shown in directors' remuneration reports. Details of long term incentive schemes, pensions and payments to third parties for the directors' services were also mandated. None of these reforms were followed in Malaysia despite the comprehensive review of companies regulation from 2003 to 2007.

The common law duty of care and skill as stated in *Re City Equitable Fire Insurance Co Ltd*[613] was adopted in Malaysia by virtue of the *Civil Law Act 1956*. This was a subjective duty which did not require a director to exhibit a greater degree of skill than may reasonably have been expected of a person of his knowledge and experience.[614] Further, directors were not required to have any qualifications, knowledge nor experience. The subjective duty was replaced by an objective standard in both the UK and Australia in 1991 and 1992 respectively.[615] Notably, these changes were brought about through judicial decisions in the UK and Australia. However, the Malaysian courts continued to apply the lower subjective duty of care and skill until statutory reforms in 2007 introduced the higher objective standard in Malaysia.[616]

It was only after the Corporate Law Reform Commission's comprehensive review of company regulations and the subsequent amendment of the *Companies Act 1965* in 2007 that an objective duty of care and skill was adopted.[617] Nevertheless, it was a qualified duty in which directors would be absolved from liability if they had relied on information provided by others or delegated their responsibilities in good faith and on reasonable grounds.[618] In this respect, the amendments appeared to be closer to Australian regulations.[619] The amendments also codified the business judgment rule,[620] which from the perspective of shareholders, is inimical to their interests as it limits the capacity to hold directors accountable for their decisions.

Under Malaysian regulations, directors are only disqualified in very limited circumstances such as undischarged bankruptcy[621] or conviction for fraud or offences relating to the management of a company.[622] As noted in Chapter 3, findings made against directors for breaches of duty in civil proceedings do not lead to disqualification. The wording of s 130 of the *Companies Act 1965* indicates that only criminal convictions lead to disqualification. Accordingly, negligence is not a ground for disqualification in Malaysia except in the rare case of a

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[613] [1925] Ch 407.
[614] Section 132(5) of the *Companies Act 1965* stated that the common law duty of care and skill was applicable in Malaysia.
[615] *Norman v Theodore Goddard* [1991] BCLC 1027, *Re D'Jan of London* [1994] 1 BCLC 561; Section 232(4) of the *Corporations Law*, *AWA Ltd v Daniels* (1992) 10 ACLC 933.
[616] Reported cases often cited s 132(5) of the *Companies Act 1965* as preserving the common law duty of care as stated in *Re City Equitable Fire Insurance*; *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2000] 7 CLJ 550; affirmed in *Abdul Mohd Khalid Hj Ali v Dato Hj Mustapha Kamal* [2003] 5 CLJ 85 and *Perwira Affin Bank v Jasatera* [2010] 1 LNS 660. Arguably, the wording of s 132(5) did not necessitate an interpretation of common law as frozen at the time of its enactment in 1965. An equally plausible interpretation would have been one which applied common law principles as they evolved.
[617] *Companies Act 1965* s 132(1A).
[618] *Companies Act 1965* ss 132(1C), (1F)–(1G).
[619] *Corporations Act 2001* (Cth) ss 189–190.
[620] *Companies Act 1965* s 132(1B).
[621] *Companies Act 1965* s 125.
[622] *Companies Act 1965* s 130.

conviction for criminal negligence. While regulations on the disqualification of directors in the UK have been substantially revised to strengthen the protection of shareholders against negligent directors, Malaysian regulations have seen only minor additions since 1965.[623] Compared with the UK and Australia, the situations in which a director may be disqualified are much more limited.

In summary, Malaysian shareholder protection converges substantially with the UK and, to an extent, Australian law. The substantial convergence with the Anglo-Australian regulations reflects the strength of Malaysian shareholder protection law. Nevertheless, there is divergence from the UK and Australia in areas of directors' remuneration and disqualification. This is primarily due to the stagnation in the development of Malaysian regulation in these areas, while the UK and Australia have introduced significant reforms.

The minimal Malaysian regulation in these areas has meant that there is a lack of accountability and safeguards against expropriation of corporate assets through excessive directors' remuneration. Notably, the emphasis in the *Combined Code on Corporate Governance* (UK) on the role of independent directors in safeguarding the interests of minority shareholders from expropriation was not adopted in the *Malaysian Code on Corporate Governance 2000*. Likewise, the UK's reforms towards greater independence of the board and its committees in the UK in 2003 were not followed when the Malaysian code was revised in 2007, although Malaysian board independence requirements were subsequently strengthened in 2012.

Apart from these specific areas of divergence, there is substantial convergence with UK and, to an extent, Australian law examined in the variables. This raises questions of why the regulation of directors' remuneration and disqualification differs from other areas of shareholder protection. The misappropriation of corporate property by those in control of companies, to the detriment of minority shareholders, has been identified as a persistent problem in the governance of Malaysian companies.[624] One of the common ways in which private benefits are extracted is through the remuneration of directors. The presence of dominant shareholders who hold board positions and control the board is often thought to increase the propensity for misappropriation of corporate property for personal gain.[625] The possibility that dominant controlling shareholders may have influenced the pattern of legal development will be explored Chapter 6.

4.3.2 *Protection Against Other Shareholders*

The similarity between UK law and Malaysian law is clearly seen in the identical scores throughout the period of the study in more than half of the 16 variables. These range from

[623] Section 130A which was enacted in 1992 allows the court to disqualify a director of a company which has gone into liquidation from taking part in the management of a company for a maximum of five years. An application under this section can only be made by the Registrar of Companies or Official Receiver. Bursa Malaysia's listing requirements provide that a director's office will become vacant in the case of a director being absent for more than half of the total board meetings in a financial year. Nevertheless, the rule does not disqualify the director from being involved in the management of any other company or of the company concerned at a future time.
[624] Finance Committee, above n 9, 42.
[625] Low, above n 15; Khoo, above n 19.

Variables 1 to 4, 6 to 7(1) and 10. Variable 2 concerns the requirement of a supermajority for amendments of the articles or mergers. Variable 3 relates to the one share one vote principle. Throughout the period, Malaysia and the UK scored 1 for both variables. Both these protections were also present in colonial Malayan legislation prior to independence.

More similarity is evident in the absence than in the presence of protections against other shareholders. The absence of protections against other shareholders as indicated by Variables 1, 3(2), 3(3), 4, 6 and 7(1) is consistent in both countries throughout the period. Australia shared in only half of these absences, scoring 0 for Variables 1, 4 and 7(1). The protections which all three countries did not have were a 50 per cent quorum for extraordinary shareholders' meetings, cumulative voting and appraisal rights. While the UK and Malaysia did not have express prohibitions of multiple voting rights, these were prohibited for Australian listed companies.

In relation to the capped voting rights referred to in Variable 3(3), the UK coding suggested that voting caps were generally admissible and a score of 0 was given. In Australia, however, a score of 1 was given on the basis that there was no suggestion capped voting rights were allowed. There is nothing in the Malaysian literature which suggests that capped voting rights are either allowed or prohibited.[626]

The third variable relates to the issue of whether a shareholder holding 90 per cent or more is able to 'squeeze out' the minority. The UK coding scored 0 throughout the period, citing s 209 of the *Companies Act 1948* for the initial period of the study. The Malaysian equivalent of this provision is s 180 of the *Companies Act 1965*. Both statutory provisions allow the holders of 90 per cent or more of the shares to compulsorily acquire the shares of dissenting shareholders in the context of a scheme of arrangement. The Australian coding for this variable cites a similar right of holders of 90 per cent or more of the share capital to compulsorily acquire the remaining shares. However, the limited situation of arrangements or reconstructions is emphasised in the Australian coding with the resultant score of 0.5 from 1970 to 1999. It would appear that all three countries had very similar regulations on this issue at least until 1999. Differences in coding scores appear to be the result of the interpretation of the variables rather than actual differences in the law.

Although Malaysian law initially scored below the UK in Variables 5, 7(2) and 8, subsequent developments resulted in Malaysian law converging with UK law. These developments were brought about by the adoption of the *Malaysian Code on Takeovers and Mergers 1987* and changes to the *Listing Rules* prohibiting voting by interested shareholders in related party transactions. The *Companies Act 1965* was also amended in 1985 to provide for disclosure of substantial shareholdings of five per cent or more. This was amended to two per cent in 1998 but subsequently reverted to five per cent again in 2001. Malaysia preceded Australia in adopting the requirement that shareholding of five per cent should be disclosed. Australia's

[626] As there is no express prohibition against capped voting rights in the Malaysian regulations, and the variable suggests that the score of 1 should be given if there is a prohibition but not otherwise, the score of 0 has been given for this variable. An alternative option would be to interpret the variable along the lines of what is suggested by the Australian coding in which case the score would be 1 on the basis that there is no suggestion that capped voting rights are allowed. Nevertheless, the former may arguably be more consistent with a purposive interpretation of the variable.

disclosure requirements were amended to five per cent in 1991. In 1989, the UK increased its disclosure requirements to three per cent of shareholding, a proportion which neither Australia nor Malaysia followed during the period of the study.

The influence of common law on Malaysian shareholder protection is reflected in Variable 9. Variable 9(2) relates to the right of a shareholder to file a claim against a resolution by the general meeting. In the UK, this right is based on common law.[627] English common law was expressly adopted in Malaysia through the *Civil Law Act 1956*. Hence, the same rights applied in Malaysia as they did in England as there were no subsequent Malaysian statutes or case law modifying the position.

Variable 9(1) which considered remedies for oppressed minorities provided an interesting contrast in that at the beginning of the period of the study Malaysia's shareholder protection was marginally stronger than that of the UK. One of the main statutory provisions was s 181 of the Malaysian *Companies Act 1965* which had its origins in the companies legislation drafted by Professor Gower for Ghana.[628] In drafting the statutory provision, Professor Gower had sought to address deficiencies in the common law remedies for oppressed minorities available at that time. As a consequence, s 181 was wider in ambit than the statutory provisions for oppressed minorities in both Australia and the UK.[629]

Variables 10(2) and 10(3) suggested atypical trends in that Malaysia's protections exceeded that of the UK's towards the latter part of the study. At the beginning of the period of the study both countries had similar levels of protection. These variables relate to mandatory rules on board composition and the duration of directors' appointments. This could suggest a greater willingness on the part of Malaysian regulators to impose mandatory requirements. Nevertheless, mandatory restrictions on the duration of directors' appointments are likely to be of limited benefit to minority shareholders who have little or no input into the appointment of board members. It is common practice for board appointments to be the exclusive purview of controlling shareholders.[630]

4.4 CONCLUSION

This chapter has sought to better understand the strength of Malaysian shareholder protection law. A number of specific questions were highlighted at the beginning of this chapter. What is the strength of Malaysian shareholder protection and how does it compare internationally? How has the strength of Malaysian shareholder protection changed over time?

The analysis in this chapter indicates that Malaysian shareholder protection law is comparatively strong, approximating the strength of shareholder protection in advanced common law economies held out by international financial organisations as models of

[627] See for example *Edwards v Halliwell* [1950] 2 All ER 1064.
[628] *Companies Act 1965* s 181 is discussed in Chapter 3 at p 61.
[629] *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 *Malayan Law Journal* 227, Privy Council per Lord Wilberforce; *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113, FC per Gopal Sri Ram JCA.
[630] Low, above n 15; Khoo, above n 19.

international standards.[631] While Malaysia had the weakest shareholder protection in 1970 among the seven countries, it had the strongest growth over the 35 year period of the comparative study. By the end of the period of the study in 2005, aggregate shareholder protection in Malaysia was stronger than in the US but weaker than the other countries. The comparative international strength of Malaysia's shareholder protection is reflected in the finding that its aggregate strength exceeded that of the US from the mid-1990s to 2005. The overall proximity of Malaysia's protective strength to that of advanced common law economies and models of international standards suggests the considerable strength of its shareholder protection.

In addition, Malaysia ranked at fourth place among the seven countries in 2005 for its protection against other shareholders. As a country with concentrated shareholding, Malaysia arguably has a greater need for strong shareholder protection from expropriation by other shareholders. Hence, the international strength of Malaysian protection against other shareholders further indicates the strength of its law in addressing the particular agency problem common to jurisdictions with concentrated shareholding.

There were noticeable differences in the strength of Malaysian shareholder protection relative to the UK and Australia despite the trend of following UK and Australian law.[632] Australian shareholder protection was at the top of the index while Malaysian shareholder protection was the second weakest of the seven countries at the end of the study. Malaysian shareholder protection was also weaker than the UK's in comparison with the other countries. There are several possible explanations for Malaysia's weaker protective strength. First, there was some delay between the enactment of regulations in UK and their adoption in Malaysia. Secondly, the stagnation of Malaysian regulation in relation to directors' remuneration and disqualification also contributed to Malaysia's weaker protective strength relative to UK and Australia. The leximetric analysis, however, does not provide an explanation as to why the regulation of specific areas has remained stagnant. This issue will be investigated in Chapter 6.

The measurement of shareholder protection also provides several insights into the manner in which Malaysian shareholder protection has changed over time. The trajectory of Malaysian shareholder protection reflects a pattern of punctuated equilibrium. Growth in the strength of shareholder protection occurred over several short periods of time interspersed between longer periods of relative stability. The strongest growth occurred during the mid to late 1980s and in the few years following the Asian financial crisis. When compared against the analysis in Chapter 3, it is evident that the periods of growth coincided broadly with the periods of significant regulatory reform, which in turn were preceded by economic crises and corporate failures. These trends, together with continued borrowing from other common law countries, are relevant to the analysis of the influences on the development of Malaysian shareholder protection in Chapter 6.

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[631] The International Monetary Fund classifies France, Germany, the UK and the US as major advanced economies, while Australia is regarded as an advanced economy; International Monetary Fund, *World Economic Outloook: Uneven Growth, Short- and Long-Term Factors* (April 2015) 150.

[632] The tendency to emulate UK and Australian regulation is discussed in the conclusion to Chapter 3 p 87.

The strength of the leximetric method lies in its ability to facilitate the comparison of large amounts of information.[633] Nevertheless, due to the manner in which the leximetric method has been used in international studies, limited consideration has been given to difficulties with implementation and contextual influences. Given the criticisms of Malaysian shareholder protection regulations on grounds of their purported lack of effectiveness, which in turn has been attributed to specific features of the Malaysian context such as concentrated shareholding, there is a need for further consideration of the way in which the regulations operate. This need is addressed through an analysis of the effectiveness of Malaysian shareholder protection law in Chapter 5, and of contextual influences in Chapter 6.

[633] Spamann, 'Large-Sample', above n 63, 799.

CHAPTER 5

EFFECTIVENESS OF MALAYSIAN SHAREHOLDER PROTECTION LAW

The analysis of the content of Malaysian shareholder protection in Chapter 3 finds that formal Malaysian law has comprehensive provisions for the protection of shareholders. Chapter 4 reveals that the protective strength of formal Malaysian shareholder protection law approximates that of developed countries held out by international financial organisations as models to be emulated by Malaysia. Nevertheless, concerns have been raised over the regulations' apparent lack of effectiveness in safeguarding shareholders' interests in practice. Following the Asian financial crisis, abusive related party transactions and conflicts of interest were widely reported in the media.[634] The Finance Committee attributed the regulations' lack of effectiveness in part to controlling shareholders whose influence over the board of directors contributed to boards failing to act for the benefit of companies and their shareholders as a whole.[635] The Finance Committee also noted the 'overwhelming public opinion that regulators are not effectively discharging their duties in enforcing the law'.[636] Despite extensive post-Asian financial crisis reforms, the perception that the regulations lack effectiveness has remained.[637]

This chapter examines the manner in which shareholder protection mechanisms operate in practice, and considers their effectiveness in safeguarding shareholders' interests. In this chapter, effectiveness is measured by reference to the ability to obtain a remedy for breaches of shareholder rights. It also encompasses the ability to safeguard shareholders' interests in situations of potential or perceived expropriation. The chapter begins by examining reports and scholarly literature on the effectiveness of mechanisms established for the protection of shareholders pursuant to regulations canvassed in Chapter 3. These include directors' duties, shareholders' voting rights, recourse to the courts and public enforcement. The analysis of secondary sources considers the manner in which the regulations operate in practice, and the extent to which they safeguard shareholders' interests. As a corollary, the analysis identifies challenges which shareholders face in enforcing their rights or obtaining redress when their rights are perceived to have been breached.

As an illustration of the manner in which shareholder protection regulations operate, and the extent to which they enable shareholders to obtain a remedy, the discussion turns to an analysis of judicial decisions on breaches of directors' duties over an eight-year period. The study underscores the substantial difficulties that minority shareholders face in obtaining redress for breaches of directors' duties despite the apparent strength of formal regulations. The analysis examines the judicial decisions by way of descriptive statistics, finding that the statutory

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[634] 'Wrongs and Renong', *The Economist* (London), 26 July 2001; Raphael Pura, 'Renong's Asset, Its History, Reveals It's Also a Liability', *The Wall Street Journal* (New York),19 January 1998; Kim Quek, 'Halim Saad, Anwar Ibrahim and the RM3.2b Question', *Malaysiakini* (online), 6 July 2004 <https://www.malaysiakini.com/letters/28222>.

[635] Finance Committee, above n 9, 42. The Finance Committee was established by the Malaysian government to address inadequacies in the regulatory framework highlighted by the crisis. The report of the Finance Committee is further discussed in Chapter 3 at p 74.

[636] Ibid 224.

[637] Liew, 'Perceived Roles', above n 12, 455.

derivative action,[638] which ostensibly strengthened minority shareholders' rights, has enabled very few minority shareholders to obtain a remedy. The regulations' limited effectiveness is further reflected in the doctrinal analysis of judicial decisions which reveals the courts' restrictive interpretation of the statutory derivative action.

Subsequently, the findings are compared with an analysis of the Australian statutory derivative action. The comparison facilitates insights as to whether the extent to which Malaysian shareholders were able to obtain redress, and whether the challenges encountered in seeking redress, are unique to the Malaysian context or shared with other common law countries. The discussion then turns to an examination of the public enforcement of shareholder protection provisions by the regulators. The final section of the chapter summarises the key findings on the effectiveness of Malaysian shareholder protection law.

5.1 Literature Review: The Effectiveness of Malaysian Shareholder Protection Law

Chapter 3 notes that the mechanisms established for the protection of shareholder interests take a number of forms. Shareholders have rights of participation in key corporate decisions, such as the appointment of directors. These ostensibly enable shareholders to safeguard their interests through the exercise of their voting rights at general meetings. Duties of loyalty are imposed on directors who manage the company. Reforms after the Asian financial crisis sought to strengthen checks and balances in internal management through independent directors and board committees. Rights of recourse to the courts when shareholder rights are breached further strengthen the position of shareholders vis-à-vis the directors and controlling shareholders who control the management of the company.

This chapter builds on the analysis in Chapter 3 by examining observations of the manner in which shareholder protection mechanisms operate. The discussion canvasses scholarly literature and observers' reports on the effectiveness of various shareholder protection mechanisms in safeguarding shareholders from expropriation of corporate assets. It begins by examining the broader historical context before turning to a discussion of specific shareholder protection mechanisms.

5.1.1 *Background*

Prior to the late 1980s, the literature on Malaysian shareholder protection was dominated by doctrinal analyses.[639] and, consequently, focussed on an understanding of formal law as reflected in statute and judicial decisions. Rafiah Salim and Philip Koh were among the earliest Malaysian company law scholars to challenge the formalist assumptions underpinning that

[638] Derivative actions are crucial in enabling minority shareholders to seek redress for breaches of directors' duties. The statutory derivative action is canvassed in Chapter 3 at p 81.
[639] The doctrinal method is described in Chapter 2 at p 11.

approach.[640] They emphasised the lack of regulatory enforcement and difficulties in implementation, underscoring the failure of regulations to curb errant behaviour. Salim and Koh challenged the presumption of formal law's adequacy as a safeguard against the expropriation of corporate property. Their analyses examined reasons for regulatory failure and efforts to circumvent the rules.

Salim's critique was among the earliest analyses of Malaysian law which focused primarily on regulatory enforcement.[641] Salim emphasised that despite anecdotal evidence which indicated that insider dealing was rife, there was a lack of prosecution of insider trading activities by company officials.[642] She noted that the Kuala Lumpur Stock Exchange had on several occasions required companies to explain rumours and unusual trends in share prices. Salim suggested that one of the reasons for the lack of regulatory enforcement could lie in the difficulty of proving insider trading. The criminal standard of proof contributed to the enforcement difficulties. In addition, attempts were often made to circumvent regulatory safeguards by effecting transactions through nominees and keeping shareholding levels below the threshold which triggered disclosure requirements. Salim expressed scepticism concerning the efficacy of formal rules in containing insider trading.[643]

Like Salim, Koh was among the earlier Malaysian writers to critique the emphasis on the instrumentality of law as a remedy for corporate governance problems. Koh underscored the limitations of Malaysian regulation in curbing expropriation of corporate assets to the detriment of minority shareholders. He argued that corporate governance reforms in the UK and Australia in the early 1990s were premised on the assumption that regulatory deficiencies underpinned the corporate collapses of the 1980s and, at the same time, expressed scepticism of the assumption that regulatory reforms were the appropriate remedy for corporate misconduct.

Koh's analysis focused on statutory reforms which introduced requirements of disclosure and shareholder approval to deter expropriation through related party transactions, and more specifically, asset shifting among related parties.[644] Koh highlighted ambiguities and uncertainties arising from the interpretation of these statutory provisions, arguing that there was little to demonstrate the effectiveness of these regulations in preventing expropriation. On the contrary, he suggested that schemes had been devised to circumvent the regulations. These included 'executing transactions through more layers of nominees'.[645] In addition to increased costs, Koh argued that over-regulation curbed entrepreneurial flair.[646] He attributed various

[640] Salim, 'Liability of Company Officials in Insider Trading', above n 380; Koh, 'Principles, Practice and Prospects', above n 359.
[641] Salim, 'Liability of Company Officials in Insider Trading', above n 380, 1.
[642] Ibid 10.
[643] Ibid 11.
[644] The relevant provisions were ss 132C, 132E and 132G of the *Companies Act 1965*. Koh, 'Principles, Practice and Prospects', above n 359.
[645] Ibid [7.5].
[646] Ibid.

corporate collapses in the course of history to 'the idea of easy money'[647] and argued that regulation was inadequate as a means of social control.

Koh emphasised that minority shareholder rights were often illusory, leaving exit as the only viable option in many cases. Shareholding was often concentrated in the hands of majority shareholders who controlled the board. Minority shareholders faced insurmountable obstacles in bringing legal proceedings. These included costs and the difficulty of satisfying procedural and substantive requirements. He referred to a description of general meetings as an 'elaborate exercise in popular illusion',[648] dominated by the management and skewered in their favour. While this description was made in relation to large American corporations, he argued that it aptly described Malaysian public companies. Minority shareholders were often poorly informed. Their concerns raised at the general meeting were politely but cursorily dismissed. There was little participation of minority shareholders in any decisions and critics were quickly silenced. Meetings usually ended with a 'Malaysian buffet tea and a gift of the company's products to the devoted shareholder who attended.'[649] Koh also asserted that the mechanisms surrounding proxy voting favoured the incumbent board.[650]

Chapter 3 cites the High Level Finance Committee's concerns over abusive related party transactions which came to light during the Asian financial crisis.[651] Such concerns were instrumental in precipitating regulatory reforms which were premised on international best practices. Nevertheless, following the reforms, scholars have continued to document anecdotal evidence of abusive related party transactions. Liew notes the 'continuing existence of many corporate abuses and exploitations (sic).'[652] Sulaiman finds anecdotal evidence of expropriation by controlling shareholders through corporate transactions which are not at arm's length.[653] Examples of such transactions include leases and transfers of assets below market value between the company and its controlling shareholder or parties related to the controlling shareholder. Sulaiman's observations resonate with Chan's case studies of related party transactions. Chan examines the issue of expropriation of corporate assets through related party transactions.[654] Her case studies centre on transactions with parties related to controlling shareholders. She argues that despite amendments to company legislation in 2007 which strengthened the regulation of related party transactions, minority shareholders have continued to suffer loss as a result of expropriation of corporate assets by those who control the company's management. Chan's three case studies find attempts to circumvent the safeguards embodied by the regulations. In one of the case studies, she argues that the audit committee, which was meant to monitor related party transactions, lacked independence. She raises questions as to whether the recurrent related party transactions estimated at RM300 million (AUD100 million)

[647] Ibid [4.0].
[648] Ibid [7.7].
[649] Ibid.
[650] Ibid [7.11].
[651] Page 74 of Chapter 3.
[652] Liew, 'Perceived Roles', above n 12, 467.
[653] Sulaiman,'Responding to Concentrated Ownership', above n 10.
[654] Chan, above n 13.

were indeed at arm's length. Chan's study queries the efficacy of the regulations and shareholder protection mechanisms in preventing expropriation.

Chapter 3 discusses the safeguards imposed by the regulations which seek to deter abusive related party transactions.[655] These include requiring interested major shareholders to abstain from voting, and the appointment of independent advisers to comment on whether the transaction is fair and reasonable to shareholders.[656] Nevertheless, the World Bank's 2012 *Report on the Observance of Standards and Codes* highlights impediments to the effective implementation of regulatory protections in Malaysia:

> Market participants have also raised questions about the independence of some third party assessments. Incomplete disclosure of beneficial ownership and control may allow interested parties to influence the approval. In addition, it is unclear if most [government linked companies 'GLCs'] are disclosing or effectively managing all transactions with other GLCs controlled by the same [government linked investment company].[657]

Many of the regulatory protections are premised on shareholders taking steps to realise their rights. Shareholders have voting rights on specific matters and may exercise their right to vote at general meetings. Aggrieved shareholders also have rights of recourse to the courts. Despite the existence of these formal shareholder rights, the World Bank report asserts that at times they remain inaccessible to minority shareholders. This is particularly evident in relation to shareholders' voting rights which are examined below.

5.1.2 *Shareholders' Exercise of Voting Rights*

Shareholders have the capacity to participate in corporate decisions through the right to vote on specific matters.[658] Nonetheless, studies indicate that the management of Malaysian listed companies often lies in the hands of controlling shareholders. While shareholders have rights to nominate directors and vote in relation to their appointment, Khoo's survey notes that in practice most directors are appointed by controlling shareholders. Sulaiman cites anecdotal evidence that the shareholder with the largest block of shares would usually be appointed as a director or appoint directors to the board.[659] Her observations are affirmed by the World Bank's 2012 *Report on the Observance of Standards and Codes*. The report highlights the difficulties minority shareholders face in nominating board members for election.[660] They then face the uphill task of getting their nominees elected to the board of directors. The report notes that 'minority shareholders have little influence on actual board selection, and whether or not the

[655] This is discussed in more detail in Chapter 3 from p 76.
[656] Bursa Malaysia, *Listing Rules* r 10.08.
[657] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 22.
[658] See for example Chapter 3 p 57.
[659] Sulaiman,'Responding to Concentrated Ownership', above n 10, 79.
[660] The reports notes that five per cent of the voting rights or at least 100 members, each holding RM500 (AUD166) or more paid shares, are required in order to propose a resolution; *Companies Act 1965*, s 151; World Bank, *Report on the Observance of Standards and Codes*, above n 30. Section 151 is discussed at footnote 317.

company decides to issue shares and to who[m].'[661] The report highlights the limited influence shareholders have on directors' remuneration acknowledging that:

> [S]hareholders, especially minority shareholders, have limited redress in the face of potential problems or abuse originating with the board or management. Shareholders with at least 10 percent of shares may call for a [general meeting]. Shareholders may not call for a special audit or investigation of the company, nor may they sell shares back to the company or controlling shareholders without a court order. As noted, their ability to influence the [general meeting] agenda, participate or effectively block capital increases, choose board members (if in the minority), or overturn board or CEO pay are all limited.[662]

Pascoe and Rachagan posit that in reality, there is often 'no opportunity for unconnected shareholders to exert any influence at all in public listed companies.'[663] Sulaiman argues that there are significant practical impediments to shareholders' exercise of voting rights at general meetings. She argues that existing mechanisms often 'tip the balance in favour of management'[664] which is usually controlled by controlling shareholders. Shareholders seeking to requisition for a general meeting or to solicit for proxies face the prospect of bearing their own costs. Management, on the other hand, have the benefit of controlling the agenda and using the company's funds to solicit proxies. In addition, the insignificant shareholdings of minority shareholders pose potential difficulties to the collective action necessary for challenging controlling shareholders and the management they control. She explains that it is often easier for minority shareholders to exit the company than to seek to enforce their shareholder rights.[665]

Similarly, Khoo asserts that general meetings are poorly attended by minority shareholders.[666] Like Koh, he observes that minority shareholders who attend meetings rarely question or challenge the management. He reasons that minority shareholders perceive their votes as too insignificant to influence resolutions. His views resonate with Sulaiman's observations that minority shareholders are often passive. Low likewise remarks that:

> Annual general meetings are usually uneventful, as most, if not all, resolutions are passed without many debates. Shareholders seldom pose difficult questions for directors to respond to despite the fact that the annual general meeting is usually the only forum in which they are heard. This may be attributed to the dominance of the controlling shareholder, leaving the minority shareholder to think that nothing can realistically be achieved without the endorsement of the former.[667]

These observations resonate with an Asian Development Bank survey which found that few Malaysian shareholders voted at general meetings and shareholders rarely rejected resolutions

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[661] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 3.
[662] Ibid 24.
[663] Pascoe and Rachagan, above n 14, 94.
[664] Aiman Nariman bt Mohd Sulaiman, 'Encouraging Shareholders' Participation in Company Decision-making: A Reflection on Existing Law and Reform Issues' [2003] 1 *Malayan Law Journal* cxlviii, clii.
[665] Ibid cxlix.
[666] Khoo, above n 19.
[667] Low, above n 15, 185.

proposed by the board.[668] The survey further noted the tendency for general meetings of corporations in the five East Asian countries[669] studied to be dominated by controlling shareholders. Hence, they conclude that the general meeting is an ineffective mechanism for holding corporate management accountable to shareholders.[670]

The literature examined above attributes the lack of minority shareholder participation in the general meeting to the high concentration of share ownership in Malaysia. Chapter 6 further investigates the concentration of voting rights held by controlling shareholders. The analysis considers the effect of pyramid shareholding structures,[671] cross holdings and controlling shareholders' involvement in management in enhancing control.[672]

5.1.3 *Directors' Duties, Independent Directors and Board Committees*

Following the Asian financial crisis, the Finance Committee highlighted the failure of boards of directors in effectively implementing directors' duties.[673] Significant reforms introduced independent directors and board committees aimed at strengthening the internal monitoring of corporate management. Despite these regulatory reforms, scholarly literature suggests that questionable practices and self-dealing have remained. Liew's study finds that while Malaysian regulations reflect international standards, implementation and enforcement are perceived as inadequate.[674] Liew interviewed 19 senior managers involved in the corporate governance of public listed companies. Interviewees cited widespread self-dealing by directors and controlling shareholders to the detriment of other shareholders.[675] Emphasis on compliance with the form of regulatory protections rather than their substance was thought to contribute to the lack of effective minority shareholder protection. Interviewees attributed the persistent expropriation to concentrated ownership structures and the dominance which controlling shareholders wield over corporate management.[676] One interviewee commented:

> The major shareholder always has the control at all levels and is the ultimate decision maker. At the end of the day, audit committee members will be threatened if they were not to follow his views. He will tell them that 'you take it or not, if not, I will give it to someone else' – the same applies to the external auditor.[677]

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[668] Zhuang et al, above n 11, 37.
[669] The study examined corporate governance in Indonesia, South Korea, Malaysia, the Philippines and Thailand.
[670] Zhuang, above n 11, 77.
[671] A pyramid shareholding structure refers to the situation where a shareholder owns a controlling stake in a holding company, which in turn holds a controlling stake in another company; Lucian Aye Bebchuk, Reiner Kraakman and George Triantis, 'Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights' in R Morck (ed), *Concentrated Corporate Ownership* (University of Chicago Press, 2000) 445.
[672] Chapter 6 p 193.
[673] These are discussed in Chapter 3 at p 74.
[674] Liew, 'Corporate Governance Reforms', above n 9, 724, 734.
[675] Ibid.
[676] Liew, 'Perceived Roles', above n 12.
[677] Ibid, 468.

Likewise, the ability of independent directors to function as an effective check and balance on the board has been questioned. While the post-Asian financial crisis reforms emphasise the role of independent non-executive directors in monitoring management, there is little evidence which suggests that this has been effective. Deputy Chief Executive of the Securities Commission, Zarinah Anwar observed:

> Unfortunately, the appointment of independent directors remains one of form over substance. The persistent cases of minority shareholder exploitation demonstrate the failure of independent directors in giving effect to the role and responsibility intended to be discharged by them, either by condoning the wrong of the executive directors or being unaware of such wrong in the first place.[678]

Similarly, the World Bank's 2012 *Report on the Observance of Standards and Codes* notes:

> Some market participants also question the effective independence of many long-tenured board members and some [government linked companies'] directors. In practice, the controlling shareholder still has great influence [on] board selection. The controlling shareholder may also pick the CEO, which is not an explicit board power, and in turn some board members may see the interest of the company and the controlling shareholder as being largely the same thing.[679]

Khoo's survey similarly indicates that independent directors 'rarely or if not never (sic) add, alter or disapproved board meeting agendas'.[680] Although independent directors had access to managers who were not board members, they rarely had discussions with them. More significantly, Khoo underscores the difficulty remuneration committees face in assessing the performance of directors and determining their remuneration:

> [T]his is easier said than done … This does not take into account the social and cultural sensitivities in this region. Particularly in Malaysia where there are many instances where the controlling shareholders are also the directors, the tasks of assessing performance can be very delicate and sensitive in the absence of an agreed and formalized mechanism or evaluation instrument and set criteria. The Malaysian mindset where bosses do the evaluation and not being evaluated (sic) is the norm and where 360 degrees performance evaluation is not widely practiced, it is an uphill task for the remuneration committee to play its role meaningfully. From the survey, all respondents indicated that there is a formal mechanism to evaluate the performance of directors but they are ineffective.[681]

Liew argues that boards focus on compliance with the form rather than the substance of the law. Her interviewees observed efforts to circumvent regulations. She concludes that the reforms are perceived as 'largely ineffectual and have led to little real practical change in behaviour.'[682]

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[678] Anwar, above n 13.
[679] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 3.
[680] Khoo, above n 19, 20.
[681] Ibid 22.
[682] Liew, 'Perceived Roles', above n 12, 471.

5.1.4 *Shareholder Litigation*

Chapter 3 noted that the directors' fiduciary duties to act in the interest of the company as a whole are central to protecting shareholders from expropriation of corporate property. Where the board has approved transactions which benefit the controlling shareholder to the detriment of the company and its shareholders as a whole, the directors are liable for breaches of fiduciary duties. Nevertheless, the right to bring legal proceedings against errant directors is accorded to the companies, and where the board is controlled by the wrongdoer, there are significant obstacles to the enforcement of such breaches of directors' duties. Chapter 3 noted that minority shareholders have limited rights to pursue legal proceedings against errant directors through derivative actions. Section 181 of the *Companies Act 1965* further provides minority shareholders rights to seek relief from oppression.

There are considerable difficulties faced by minority shareholders in bringing derivative actions.[683] Obstacles include the high cost of litigation borne by minority shareholders. Further, any damages awarded accrue to the company rather than the shareholders instituting legal proceedings.[684] Hence, there is a lack of incentives for minority shareholders to seek redress for breaches of directors' duties through derivative actions. Derivative actions can only be brought with leave of the court, and shareholders face additional challenges of satisfying the court that they should be granted leave to bring a derivative action. The need to prove fraud on the minority and wrongdoer control under common law is thought to be fairly onerous.

The Corporate Law Reform Committee highlighted further obstacles shareholders encounter in obtaining the necessary information for derivative actions.[685] The Committee observed that:

> Access to information is very limited for shareholders who are not part of management and therefore it is difficult to commence proper action. Shareholders (who are not part of management) are likely to find that they are effectively prevented from taking action because they are unable to have access to information.[686]

The OECD's *White Paper on Corporate Governance in Asia* observes that 'the prevalence of informal agreements and relationships that leave no paper trail for investigators or litigants to follow' exacerbates difficulties of enforcement in Asia.[687]

These challenges collectively contribute to the view that the common law derivative action is an ineffective means of protecting shareholder interests.[688] Nevertheless, the statutory derivative action introduced in 2007 appears to facilitate better access to derivative actions by replacing the onerous common law locus standi requirements with more flexible criteria.[689] Provision is made for the courts to order 'any person to provide assistance and information to

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[683] Choong and Balan, above n 495.
[684] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 31.
[685] Ibid 32.
[686] Ibid.
[687] OECD, *White Paper on Corporate Governance in Asia* (OECD Publishing, 2003) 18.
[688] Choong and Balan, above n 495, 8.
[689] Section 181A is discussed in more detail in Chapter 3 at p 81.

the complainant'.[690] The courts may also order that shareholders be reimbursed for legal costs.[691] The World Bank's report notes that since the amendments 'shareholders have filed a few derivative suits against directors, though none have yet led to award of damages to a company.'[692] They observe that 'in practice, the great majority of cases under the [*Companies Act 1965*] involve disputes between major shareholders, and that the courts have been 'skeptical towards the claims of smaller shareholders and their grounds to bring complaints against the company, directors, or major shareholders.'[693]

There are currently no existing studies which consider the extent to which shareholders have been able to obtain redress for breaches of directors' duties, or other shareholder protection regulations, through the statutory derivative action in Malaysia. Consequently, in order to address the gap in the literature, judicial decisions involving shareholders' derivative actions are examined.[694] The analysis considers whether the statutory derivative action has provided shareholders with a more effective means of enforcing breaches of directors' duties than the common law derivative action.[695]

Shareholders who are oppressed or whose rights are disregarded also have rights of recourse under s 181 of the *Companies Act 1965*.[696] Scholarly opinion on the effectiveness of the minority shareholder oppression provision is mixed. Choong and Balan assert that s 181 has been an effective means of safeguarding shareholder interests:

> A large volume of case law involving applications under section 181 demonstrates that this section is a well-accepted recourse for Malaysian shareholders for the enforcement of their rights. It has been seen that the requirements of the section are drafted in liberal terms and a wide range of remedies may be dispensed by the court to bring an end to the matters complained of.[697]

In contrast, Rachagan and Satkunasingam argue that the rate of litigation in situations of minority shareholder oppression is low.[698] They attribute minority shareholder passivity to cultural factors such as 'power distance'[699] and collectivism. They emphasise the prevalence of companies dominated by family groups, asserting that shareholders would find it particularly challenging to institute legal proceedings against family members perceived as being of higher social status. In order to gain a better understanding of the extent to which shareholders have been able to obtain redress for breaches of directors' duties, all available Malaysian judicial

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[690] *Companies Act 1965* s 181E(1)(c).
[691] *Companies Act 1965* s 181E(1)(d).
[692] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 18.
[693] Ibid.
[694] Chapter 2 discusses the descriptive statistics and doctrinal methods used to analyse the judicial decisions. See pp 11 and 18.
[695] See p 125.
[696] Section 181 of the *Companies Act 1965* allows minority shareholders to seek relief from oppressive conduct, disregard of their interests or unfair discrimination by controlling shareholders.
[697] Choong and Balan, above n 495, 17.
[698] Shanthy Rachagan and Elsa Satkunasingam, 'Improving Corporate Governance of SMEs in Emerging Economies: A Malaysian Experience' (2009) 22 *Journal of Enterprise Information Management* 468.
[699] Power distance is defined as 'interpersonal power of influence between two people as perceived by the less powerful'; Ibid 476.

decisions involving proceedings for breaches of directors' duties from 2008 to 2015 are examined below. The judicial decisions analysed include shareholders' derivative actions against directors for breaches of duty.

In summary, the discussion above indicates that shareholders face considerable difficulty in enforcing their rights. Their votes are thought to be fairly insignificant at general meetings due to the concentration of share ownership which often allows controlling shareholders to dominate the general meeting. Likewise, recourse to the courts is impeded by the cost of litigation and difficulties in accessing the necessary information to prove their case. In the circumstances, public enforcement of shareholder protection by the regulators is critical in safeguarding against expropriation of corporate assets to the detriment of minority shareholders.

5.1.5 *Public Enforcement*

Several regulators are responsible for the public enforcement of shareholder protection regulations in Malaysia. The Companies Commission of Malaysia is the regulator responsible for the public enforcement of the *Companies Act 1965* and has authority to investigate breaches of provisions which are aimed at protecting shareholders from expropriation of corporate assets.[700] The Commission has powers of inspection, investigation and examination[701] that facilitate the enforcement of shareholder protection regulations. Hassan observes that enforcement action by the Companies Commission[702] has centred largely on undischarged bankrupts acting as directors, false or misleading statements made to the Commission and procedural matters such as the failure to table accounts at the annual general meeting.[703] There is little evidence of prosecution for breaches of key provisions aimed at protecting minority shareholders from expropriation such as directors' duties or s 132E of the *Companies Act 1965*.[704]

Bursa Malaysia is the regulator responsible for enforcement of the *Listing Rules*. Sulaiman notes that the Securities Commission has considerable powers of investigation and may potentially use the information obtained to assist shareholders in proceedings against the errant directors.[705] However, there is no evidence that suggests these powers have been used to assist shareholder litigation. Few studies have examined public enforcement by the Malaysian regulators despite the greater emphasis on enforcement since the Asian financial crisis. This chapter seeks to address this gap in the literature by examining statistics released by the

[700] Chan, Koh and Ling, above n 348, 24.
[701] Sections 7B–7D of the *Companies Act 1965*.
[702] The Registrar of Companies was merged with the Registrar of Businesses to form the Companies Commission of Malaysia in 2002.
[703] Mohd-Haswadi Hassan et al, 'The Enforcement Role of the Companies' Commission of Malaysia' (2010) 9 *International Business & Economics Research Journal* 135, 141.
[704] Ibid, 143.
[705] Aiman Nariman bte Mohd Sulaiman, 'Civil Proceedings in Companies and Securities Regulation: Access to Information for Private Enforcement and Shareholder's Consent' [1999] 4 *Malayan Law Journal* xlvi.

regulators on the enforcement of shareholder protection law. The extent of public enforcement will be discussed later in the chapter.[706]

The regulators have at times been criticised for failure to act despite apparent breaches of provisions which protect shareholders.[707] During the Asian financial crisis, there were allegations of favourable treatment of corporate magnates who had close links with influential politicians. The alleged bailout of troubled Renong by related company UEM at the expense of its minority shareholders was particularly controversial.[708] Since then, the perception that the regulators lack independence has persisted.[709] In a similar vein, the World Bank noted that the Securities Commission is not fully independent from the state. Questions have been raised about its impartiality, particularly when prominent persons are involved.[710] In considering enforcement by regulators and the courts in Asia, the OECD observed 'extensive anecdotal evidence provided by Roundtable participants of inaction or bias connected with capacity constraints, political influence and corruption.'[711]

Pascoe argues that the lack of effective shareholder protection is symptomatic of broader systemic problems in Malaysian public governance and the rule of law.[712] She cites the lack of judicial independence as an example of political interference in law enforcement processes. Pascoe observes 'concerns about possible interference in prosecutorial discretion in cases of corporate transgressions involving high profile figures with government connections.'[713] Close links between the state and the corporate sector are also thought to underpin the lack of public enforcement in relation to well-connected corporations.[714] The nexus between the state and business will be analysed in Chapter 6.

In summary, the literature indicates that the shareholder protection mechanisms in Malaysia have not been particularly effective in practice. Further, the regulators have had a limited role in enforcing key provisions aimed at safeguarding shareholders from expropriation of corporate property. Nonetheless, the secondary sources examined above rely primarily on anecdotal evidence. Hence, there is need for a stronger empirical basis to determine the effectiveness of the regulations. A more in-depth analysis of the manner in which specific shareholder protection mechanisms operate would also facilitate insights into the reasons for the

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[706] See p 164.
[707] Finance Committee, above n 9, 42.
[708] The transaction was said to have triggered a mandatory general offer under the *Malaysian Code on Takeovers and Mergers 1987*. However, an exemption was granted by the Foreign Investment Committee, which forms part of the Prime Minister's Department, although the Securities Commission was the regulator charged with the administration of the code. The waiver was widely perceived to have been unfair and reflected a bias towards politically linked individuals; Koh, 'Reforms in the Light of Post-1998 Crisis', above n 9, 136.
[709] Philip Koh Tong Ngee, 'Corporate Governance Regulation in Malaysia: Regulatory Reform and its Outcomes' in Eduardo T Gonzalez (ed), *Best Practices in Asian Corporate Governance* (Asian Productivity Organization, 2007) 92, 102; Mohammad Rizal Salim, 'Legal Transplantation and Local Knowledge' (2006) 20 *Australian Journal of Corporate Law* 55, 63.
[710] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 15–16.
[711] OECD, *White Paper on Corporate Governance*, above n 687, 29.
[712] Pascoe, above n 255, 787–8.
[713] Ibid 790.
[714] Megat Najmuddin Khas, Low Chee Keong and Kala Anandarajah, 'Corporate Governance in Malaysia' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (Sweet & Maxwell Asia, 2002).

regulations' lack of effectiveness. The discussion now turns to an analysis of primary sources in the form of judicial decisions in order to address these issues.

5.2 Analysis of Judicial Decisions on Breaches of Directors' Duties

This section analyses judicial decisions over an eight-year period in order to ascertain the effectiveness of specific shareholder protection laws in enabling shareholders to obtain redress where allegations of expropriation arise. Shareholders' rights of recourse to the courts are an example of fundamental mechanisms established for the protection of shareholders. The analysis focusses on judicial decisions relating to directors' duties, which is among the most significant shareholder protection provisions. It seeks to ascertain the extent to which shareholders were able to obtain redress for perceived breaches of directors' duties.

Judicial decisions of Malaysian courts from 2008 to 2015 are analysed by reference to the descriptive statistics method described in Chapter 2.[715] The doctrinal analysis of judicial decisions on the statutory derivative action below further explains the trends in litigation outcomes revealed by the descriptive statistics. In summary, the empirical analysis of Malaysian judicial decisions finds that minority shareholders were only able to obtain redress for breaches of directors' duties in very limited situations. The empirical findings further strengthen the claims that Malaysian shareholder protection law lacks effectiveness in practice. The analysis identifies factors that contribute to the lack of effectiveness, and further illuminates the reasons for the phenomenon.

This study analyses all available reported and unreported Malaysian judicial decisions from 2008 to 2015 involving alleged breaches of directors' duties. As the Finance Committee highlighted the complicity between controlling shareholders and the board of directors in the expropriation of corporate property, it is anticipated that shareholders would at times have to bring derivative proceedings in order to obtain redress for breaches of directors' duties. Minority shareholders also have rights to seek relief from oppression. It is also anticipated that there may be some overlap between minority shareholder oppression and breaches of directors' duties to act in the interest of the company.

In order to ensure that a comprehensive search for judicial decisions involving allegations of impropriety by directors was conducted, searches were made on the Lexis and CLJ Law databases for Malaysian cases using the search terms 'directors duties' and 'derivative'. The two major Malaysian law reports are the Malayan Law Journal ('MLJ') and Current Law Journal ('CLJ'). MLJ cases are available on the Lexis database and CLJ reports are available online through the CLJ Law electronic database. Both databases contain reported judgments as well as some unreported decisions. The searches identified 103 relevant reported and unreported judicial decisions from 2008 to 2015 involving breaches of directors' duties or applications for leave to bring derivative actions for breaches of directors' duties. Cases which

[715] The descriptive statistics method is discussed in Chapter 2 at p 19. The year 2008 is thought to be an appropriate starting point for the study as the statutory derivative action was introduced in 2007.

indirectly involved directors' duties or derivative actions but focussed primarily on other matters were excluded.

Several limitations of this study warrant consideration. The data on reported and unreported cases is confined to cases in which legal proceedings were brought, and which have been documented either in the law reports or as unreported decisions. As discussed above, scholars have observed that there are significant disincentives to shareholder litigation. These include costs and difficulty in accessing information on corporate dealings, particularly for shareholders who are not involved in the company's management. This study does not capture breaches of shareholder protection regulations which shareholders did not attempt to enforce through the courts or which were not documented as reported or unreported decisions. Scholars assert that it is often easier for shareholders to exit the company than to seek to challenge breaches of shareholder rights.[716] Hence, the analysis of reported and unreported decisions arguably captures only a proportion of the breaches of shareholder protection regulations which have occurred.

Despite limitations in the available data, by examining judicial decisions over a period of eight years, this study endeavours to describe how breaches of directors' duties are being enforced through the courts and to assess the effectiveness of the regulatory framework in facilitating shareholders' redress for breaches of directors' duties. It considers the level of success in litigation as an indicator of the extent to which shareholders were able to obtain redress for alleged breaches of shareholder rights. Nevertheless, it should be clarified at this point that the study does not assume that all the cases should have been successful. Successful litigation turns on a number of factors including the individual facts of the case and the manner in which legal principles are interpreted and applied. Due to the large number of cases in this study, it is not possible to discuss the facts of each of the cases in detail. At the same time, in recognition of the need for a better understanding of the circumstances in which the litigation occurred, this study considers specific features of the cases as outlined below. In addition, the study analyses the manner in which the relevant legal principles were interpreted and applied in the cases.

This study examines the circumstances surrounding private enforcement and seeks to identify features which may have contributed to better outcomes in litigation. More specifically, the study considers who the litigants were, whether plaintiffs were minority shareholders, controlling shareholders or involved in the company's management. It seeks to ascertain whether some types of litigants were more successful in obtaining redress for wrongs than others. A further issue is to determine whether the extent to which redress was obtained for breaches of directors' duties differed between private and public companies. In addition to considering the rate of success, the study analyses the grounds for the outcomes. The study identifies challenges faced by litigants in seeking redress for breaches of directors' duties. An analysis of the reasons for failure facilitates understanding of the challenges faced by shareholders in obtaining redress.

[716] Sulaiman, 'Encouraging Shareholders' Participation', above n 664, cxlix; Koh, 'Principles, Practice and Prospects', above n 359, [7.7].

Chapter 3 observes that the statutory derivative action was introduced in 2007 to address some of the limitations of the common law derivative action.[717] This study further seeks to determine whether the statutory derivative action has facilitated better shareholder access to the courts when alleged breaches of directors' duties occur. In determining whether the statutory derivative action has facilitated better shareholder access to the courts, this study considers the manner and extent to which the more liberal criteria introduced by the statutory derivative action have been applied by the courts in considering whether to grant leave to bring derivative actions.[718] Grounds for refusal of leave in unsuccessful cases are analysed in order to ascertain whether barriers to the granting of leave have been reduced following the introduction of the statutory derivative action, as law reformers intended. In addition, the courts have been given powers to order that shareholders' costs of litigation should be borne by the company. The courts have also been granted powers to order that shareholders should be given access to information, including inspection of the company's books. The questions as to whether the statutory derivative action has facilitated better access to the courts also considers the extent to which the courts have exercised these powers to assist shareholders with the cost of litigation or access to information.

The analysis of judicial decisions considers the statutory derivative action's impact on the number and the success of derivative actions instituted. In order to facilitate the comparison between the common law derivative action and the statutory derivative action, reported and unreported judicial decisions involving shareholder derivative actions from 1999 to 2006 are also examined. The number of proceedings and the rate of success in obtaining leave to bring derivative actions before and after 2007 are compared.[719]

The cases are analysed quantitatively and qualitatively by reference to the following research questions:

1. How many cases were there in each year from 2008 and 2015 which involved

a) breaches of directors' duties?

b) derivative actions?

2. How many cases were successful?

3. How many cases were proceedings against directors of public companies? How does this compare with the number of proceedings against directors of private companies? Are there

[717] The reforms are discussed in Chapter 3 at p 81.

[718] The difficulties shareholders face in seeking redress through derivative actions are discussed at p 122. These include the onerous criteria that need to be satisfied under common law in order for leave to be granted, the cost of litigation and the lack of access to information on the company's internal management. As discussed in Chapter 3, law reformers intended to reduce these barriers by introducing the statutory derivative action. Specific measures aimed at making the statutory derivative action a more feasible method of private enforcement include liberalising the criteria for the granting of leave.

[719] Cases decided in 2007 are excluded for the reason that the statutory derivative action came into effect on 31 July 2007. Accordingly, it is not clear whether cases decided in 2007 would have been decided under the old or new provisions.

differences in the extent to which redress was obtained against directors of public companies and directors of private companies?

4. What were the most commonly cited grounds for failure of the plaintiffs' applications? How many cases cited these grounds?

5. Who were the plaintiffs in successful cases? Were they involved in the management of the company?

6. How many cases involved companies in liquidation or administration? How did this affect the proceedings?

7. How many judicial decisions involved applications for leave[720] to bring derivative actions for breaches of directors' duties from 1999 to 2006?

8. How does this compare with the number of judicial decisions involving applications for leave to bring derivative actions after 2007?

9. How does the rate of success in obtaining leave to bring derivative proceedings after 2007 compare with the corresponding rate of success in obtaining leave before 2007?

10. How effective has the statutory derivative action been in facilitating shareholders obtaining redress for breaches of directors' duties? Effectiveness is measured by the level of success in obtaining leave on the basis of criteria less onerous than the requirements of common law. In gauging effectiveness, the courts' exercise of powers in reducing barriers to shareholder litigation such as granting shareholders' access to information, or reimbursement of costs, is also considered. More specifically:

a) Has the change in criteria for granting leave resulted in shareholders obtaining leave to bring derivative actions:

i) more frequently?

ii) without the need to prove fraud on the minority or wrongdoer control, hence, more easily?

b) Have the courts' powers to provide shareholders access to information and order payment of costs facilitated shareholders' recourse to the courts through the derivative action?

The discussion begins with the analysis of judicial decisions on derivative actions. The discussion then turns to cases on breaches of directors' duties. Subsequently, all cases involving allegations of breaches of directors' duties are examined.

[720] In this study, applications for leave include applications in which plaintiffs sought the courts' determination that they had the requisite locus standi to bring derivative actions under common law.

5.2.1 *Derivative Actions*

The aim of this analysis is to gauge the effectiveness of the statutory derivative action in providing shareholders better recourse to the courts and, ultimately, better enforcement of shareholder rights. As noted above, shareholders face several challenges in seeking redress for breaches of directors' duties through the derivative action. These include the necessity of obtaining leave of the court, the cost of litigation and the lack of available evidence. The study analyses the extent to which shareholders have been able to obtain leave to bring derivative actions for breaches of directors' duties. The analysis quantifies the number of derivative actions instituted and the rate of success. The study also identifies challenges encountered by shareholders in obtaining leave to bring derivative actions, examining substantive issues such as the grounds on which the courts refused to grant leave to litigants.

Table 3: Derivative actions from 2008 to 2015

Year	Total cases	Successful/ leave granted	Unsuccessful cases	Final outcome unknown
2015	6	1	5	0
2014	3	0	3	0
2013	4	1	2	1
2012	6	1	4	1
2011	5	1	3	1
2010	4	0	4	0
2009	4	1	3	0
2008	0	0	0	0
Total	32	5 (16%)	24 (75%)	3 (9%)

Table 3 shows that there were 32 decisions involving shareholders' derivative actions from 2008 to 2015.[721] Leave to bring derivative actions was granted in five cases (16 per cent). Twenty four of the 32 cases (75 per cent) were unsuccessful. Further analysis of the 24 unsuccessful cases indicates that leave to bring a derivative action was refused in 18 of the 24 unsuccessful cases, while 6 cases were struck out in early stages of the application for leave. The judgments suggest that the applications for leave had not been fully considered at the time the cases were struck out.

In order to gain a better understanding of the reasons behind the low success rate in applications for leave to bring derivative actions, the reasons for judgment were examined to ascertain why the applications were unsuccessful. The analysis includes reasons for the striking out of applications for leave. Many cases cited several reasons for the refusal of leave. As it was not clear from the reasons for judgment as to the weight placed on various issues in coming to the conclusion that leave should not be granted, this analysis does not seek to rank the reasons in terms of importance. Greater emphasis is placed on recurrent mention of specific issues of

[721] These cases are set out in Appendix 2.

concern rather than how determinative they may have been in the courts' decisions. Table 4 below indicates the grounds commonly cited for refusal of leave in the cases examined.

Table 4: Grounds for refusing leave in derivative actions from 2008 to 2015

Grounds for refusing leave	Number of cases
No wrongdoer control	6
Procedural defects	6
No standing	6
No reasonable cause of action	5
Lack of good faith	1
No fraud on the minority	1
No jurisdiction	1

The three most common grounds cited for refusing leave were the absence of wrongdoer control,[722] lack of locus standi[723] and procedural defects.[724] Each of these grounds was cited in six cases. The absence of wrongdoer control was cited in four cases in which the courts found that the plaintiff had no locus standi.[725] The absence of a reasonable cause of action or reasonable prospects of success was cited in at least four cases in which leave to bring a derivative action was refused, while another case in which the claim was not supported by the evidence was struck out.[726] Other reasons for refusal of leave include a lack of good faith[727] and the absence of fraud on the minority.[728] One case was dismissed on grounds that the court did not have jurisdiction over foreign companies.[729]

This study also seeks to ascertain the extent to which private enforcement through derivative actions occurs in relation to private companies vis-à-vis public companies. Table 5 shows the

[722] The absence of wrongdoer control was cited in *Ho Hup Construction Company Bhd v Bukit Jalil Development Sdn Bhd* [2012] 1 CLJ 649; *Shamsul bin Saad v Tengku Dato Ibrahim Petra* [2010] 4 MLJ 37; *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2014] 1 LNS 1770; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780; *AIC Dotcom Sdn Bhd v MTex Corporation Sdn Bhd* [2009] 1 LNS 118; *Pioneer Haven Sdn Bhd v Ho Hup Construction Company Bhd* [2012] 2 CLJ 169.
[723] *Ho Hup Construction Company Bhd v Bukit Jalil Development Sdn Bhd* [2012] 1 CLJ 649; *Krishnasamy G B Vatchelu v Eng Ah Phoo @ Ng Ah Phoo* [2013] 1 LNS 1160; *Shamsul bin Saad v Tengku Dato Ibrahim Petra* [2010] 4 MLJ 37; *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2014] 1 LNS 1770; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780; *See Hua Realty Bhd v KTS News Sdn Bhd* [2012] 1 LNS 1119.
[724] Procedural defects were highlighted in *Koh Jui Hiong v Ki Tak Sang* [2014] 2 CLJ 401; *Li Chin Thee v Francis Chin* [2014] 1 LNS 1330*; Lim Peak Suan Sdn Bhd v Sungei Bongkoh Estate Sdn Bhd* [2009] 2 CLJ 719; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313; *Krishnasamy G B Vatchelu v Eng Ah Phoo @ Ng Ah Phoo* [2013] 1 LNS 1160; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780.
[725] *Ho Hup Construction Company Bhd v Bukit Jalil Development Sdn Bhd* [2012] 1 CLJ 649; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780; *Shamsul bin Saad v Tengku Dato Ibrahim Petra* [2010] 4 MLJ 37; *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2014] 1 LNS 1770.
[726] *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313; *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808; *Lee Suan Ngee v On Network Sdn Bhd* [2013] 1 LNS 506; *Lim Peak Suan Sdn Bhd v Sungei Bongkoh Estate Sdn Bhd* [2009] 2 CLJ 719; *Wong See Ming v Wong Tuck Wai* [2011] 1 LNS 659.
[727] *Celcom (M) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808; *Dato' Daljit Singh a/l Gurdev Singh v Forefront Online Sdn Bhd* [2010] 1 LNS 1631.
[728] *Ramakrishnan Rajeswari v Syarikat VK Kalyana Sundram Sdn Bhd* [2015] 1 LNS 168.
[729] *Lim Cheong Chuan v Chan Kok Heng* [2009] 1 LNS 1240.

number of cases in which the defendants were directors of private companies, and the number of cases in which proceedings were brought against directors of public companies.

Table 5: Defendants in derivative actions from 2008 to 2015

Defendants	Directors of private companies	Directors of public listed companies
Number of cases	23 (72%)	9 (28%)

As seen in Table 5, 72 per cent of the cases were brought against directors of private companies. Nine of the 32 derivative actions (28 per cent) were against directors of public companies. Of the nine actions against public companies, six were brought by minority shareholders against directors of public listed companies. A further two derivative actions were brought by individual shareholders against directors of public companies, although the size of their shareholding was not stated. One derivative action was brought by an institutional shareholder against a public company.[730] The institutional shareholder successfully obtained leave to proceed with the derivative action. Other shareholders had an almost equal rate of success in obtaining leave, with three unsuccessful and four successful cases.

Most of the derivative actions against directors of private companies were instituted by individual shareholders who held non-controlling stakes. The courts refused to grant leave to bring derivative actions in all the cases in which the plaintiffs held controlling stakes. The absence of wrongdoer control was held to disqualify litigants from bringing derivative actions. In a few cases, the plaintiffs were public listed companies suing directors of joint venture companies.

The finding that 28 per cent of applications for leave were brought in relation to public companies is consistent with previous research which indicates that derivative actions are used primarily by shareholders of private companies.[731] When compared with Ramsay and Saunders' findings that 13 per cent of Australian derivative actions were brought against directors of public companies, the proportion of Malaysian cases against directors of public companies appears to be relatively high. In addition, it is usually easier for shareholders to exit public companies than to seek to challenge breaches of directors' duties.[732]

In many cases, costs were awarded to the successful party. Hence, in line with the high proportion of unsuccessful derivative actions, costs orders were made against the plaintiff in more than half the cases. There were no orders as to costs, or costs were left to subsequent proceedings, in a few cases. In 18 of the 32 derivative actions (56 per cent), plaintiffs were required to pay the defendants' costs as well. Plaintiffs were awarded costs in only three cases. The costs would arguably have been prohibitive for individuals who were the litigants in most cases. Costs are regarded as a significant disincentive to shareholders' enforcement of their rights through litigation, and s 181E(1)(e) provides the courts powers to order shareholders'

[730] *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd* [2013] 8 CLJ 38.
[731] Ramsay and Saunders, above n 78, 420.
[732] Sulaiman, 'Encouraging Shareholders' Participation', above n 664, cxlix; Koh, 'Principles, Practice and Prospects', above n 359, [7.7].

costs to be paid by the defendant. There was no indication in the decisions that this power was used. However, the CLRC anticipated that this power should be used in cases where the applicants were successful.[733] As costs are usually awarded to the successful party in any event, the statutory power to award costs is arguably of little effect.

The amendments to the *Companies Act 1965* in 2007 further gave the courts the power to make orders to facilitate shareholders' access to corporate information.[734] This provision was intended to assist shareholders who are not involved in management to overcome barriers to accessing the necessary information.[735] There was no indication in any of the 32 decisions involving derivative actions that the power had been used to facilitate shareholders obtaining information. On the contrary, in five cases leave was refused or the case was struck out on grounds that there was insufficient evidence or there was no reasonable cause of action. These could potentially have been situations in which the courts could have used the power to facilitate the applicants' access to information. However, there was no discussion in any of these judgments on the possible use of this power.

The discussion now turns to the question of whether the rate of success in obtaining leave to bring derivative action has increased since s181A was introduced in 2007. Table 6 shows the number of derivative actions from 1999 to 2006.[736] There were six reported and unreported cases involving derivative actions during this period, which is an average of 0.75 cases each year.

Table 6: Derivative actions from 1999 to 2006

Year	Number of cases	Successful cases
2006	0	0
2005	0	0
2004	1	1
2003	3	1
2002	0	0
2001	1	0
2000	0	0
1999	1	1
Total	6	3 (50%)

When compared with the number of derivative actions from 2008 to 2015 shown in Table 3, it is clear that since the introduction of the statutory derivative action in 2007, the number of reported and unreported derivative actions has increased substantially. There is an average of four derivative actions yearly for the period 2008 to 2015. Despite the increase in the average annual number of derivative actions, the rate of success in obtaining leave has declined. While

[733] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 31–2.
[734] *Companies Act 1965* s 181E(1).
[735] Ibid.
[736] These cases are set out in Appendix 3.

leave was obtained in an average of 50 per cent of the derivative actions from 1999 to 2006,[737] the average for 2008 to 2015 is 16 per cent.

One of the findings which warrants further investigation is the repeated citation of the absence of wrongdoer control as a ground for refusal of leave to bring derivative actions as reflected in Table 4. Section 181B(4) of the *Companies Act 1965* makes no mention of any need to prove wrongdoer control. The criteria for leave under s 181B(4) are good faith and that the proceedings appear to be *prima facie* in the best interest of the company. Hence, the recurrent refusal of leave on grounds that wrongdoer control was not proved is incongruous with the statutory derivative action. Wrongdoer control is an essential element of the 'fraud on the minority' exception of the rule in *Foss v Harbottle*. The recurrent refusal of leave on the ground that wrongdoer control was not proven is reminiscent of the common law derivative action.

Closer scrutiny of the cases indicates that many of the cases were decided by reference to common law principles. Table 7 below shows the number of cases which were decided on the basis of common law principles and the cases which were decided by reference to ss 181A and 181B of the *Companies Act 1965*.

Table 7: Basis of decisions

Year	**Total**	**Common law derivative action**	**Statutory derivative action**	**Not stated**
2015	6	3	3	0
2014	3	1	2	0
2013	4	1	3	0
2012	6	4	0	2
2011	5	1	2	2
2010	4	2	2	0
2009	4	4	0	0
2008	0	0	0	0
Total	32	16 (50%)	12 (38%)	4 (13%)[738]

Table 7 shows that the matters were decided solely by reference to common law principles in 16 or 50 per cent of the 32 cases. In these cases, there was no discussion of the statutory derivative action. In three cases, this may be explained by the proceedings having commenced prior to the introduction of the statutory derivative action.[739] However, even in cases as recent as 2015, decisions on the granting of leave have in some cases been based solely on common

[737] There were three unsuccessful cases from 1999 to 2006. These failed on grounds that there was no wrongdoer control and, accordingly, the plaintiffs' claims did not fall within the exceptions to the rule in *Foss v Harbottle*. Among the three successful cases, two were found prima facie to have shown fraud on the minority. The third successful case involved a company in liquidation.

[738] Percentages have been rounded up to the closest whole number. Without rounding, the total proportion of cases decided on the basis of the statutory derivative action is 37.5 per cent, and the total proportion of cases which did not state the basis of the decision is 12.5 per cent.

[739] *Kuan Pek Seng v Chin Foh Berhad* [2009] 1 LNS 1427; *Lee Kin Tong @ Lee King Hoon v Hoklian Holdings Berhad* [2012] 1 LNS 804; *AIC Dotcom Sdn Bhd v MTex Corporation Sdn Bhd* [2009] 1 LNS 118.

law.[740] The judgments for the 16 cases in which the decisions were based solely on common law did not contain any discussion of the statutory derivative action, and it is not known whether ss 181A and 181B of the *Companies Act 1965* were raised during the proceedings. The judgments also do not clearly state whether the applicants had sought leave to bring derivative actions under statute or common law.

Section 181A of the *Companies Act 1965* expressly preserves the operation of the common law derivative action.[741] Accordingly, litigants had the option of relying on the common law derivative action from 2008 to 2015. However, given the less onerous criteria under the statutory derivative action, the logical choice for shareholders seeking to bring derivative actions would have been to rely on ss 181A and 181B of the *Companies Act 1965*. As applicants would have benefitted from the application of the less onerous criteria under the statutory derivative action, the applicants' lawyers should arguably have attempted to have the matter decided by reference to statute. However, as the judgments are silent on this issue, it is not possible to determine why the applications for leave were decided solely on the basis of common law principles, and the statutory derivative action was not mentioned in the judgments for these cases.

In addition, the facts of these cases indicated that they did not fall outside the ambit of the statutory derivative action. Cases from the UK and Australia indicate that at times litigants rely on the common law derivative action where the statutory derivative action is not available to them, such as where the company is a foreign company.[742] However, this was not the case with the 16 Malaysian cases which were decided solely by reference to common law principles. On the contrary, the facts of the cases indicated that the statutory derivative action should have been available to the applicants.

Table 7 indicates that 12 (38 per cent) of the cases were decided on the basis of ss 181A and 181B of the *Companies Act 1965*. When the cases decided by reference to the statutory derivative action were examined, it was apparent that these cases had a higher rate of success than cases decided under common law principles. The last column of Table 7 shows the number of judgments which were very brief and did not set out the basis of the decisions. Four (13 per cent) of the cases from 2008 to 2015 fell within this category and, accordingly, it is not clear whether these decisions were made based on common law principles or ss 181A and 181B of the *Companies Act 1965*.

Table 8 shows the outcomes of the cases decided by reference to the common law derivative action and Table 9 sets out the outcomes of cases brought under the statutory derivative action.

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[740] *See Teow Guan v Yeoh Jin Hoe* [2015] 8 CLJ 531; *Kingdom Seekers Ventures Sdn Bhd v Chong Ket Pen* [2015] 1 LNS 546.

[741] The CLRC was of the view that the statutory derivative action should replace the common law derivative action as the former was aimed at alleviating the challenges posed by the common law derivative action; Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 35. However, the 2007 amendments to the *Companies Act 1965* did not abolish the common law derivative action as proposed by the CLRC.

[742] *Oates v Consolidated Capital Services Ltd* [2009] NSWSC 183.

Table 8: Cases decided by reference to the common law derivative action

Year	Total	Leave granted	Leave not granted	Not decided
2015	3	0	3	0
2014	1	0	1	0
2013	1	0	1	0
2012	4	1	3	0
2011	1	0	0	1
2010	2	0	2	0
2009	4	1	3	0
2008	0	0	0	0
Total	16	2 (13%)	13 (81%)	1 (6%)

Table 9: Cases decided on the basis of ss 181A and 181B of the *Companies Act 1965*

Year	Total	Leave granted	Leave not granted	Not decided
2015	3	1	2	0
2014	2	0	2	0
2013	3	1	1	1
2012	0	0	0	0
2011	2	1	1	0
2010	2	0	2	0
2009	0	0	0	0
2008	0	0	0	0
Total	12	3 (25%)	8 (67%)	1 (8%)

Table 9 above shows that leave was granted in 25 per cent of the applications decided by reference to the statutory derivative action. Cases decided by reference to common law principles were less successful in obtaining leave, with leave granted in only 13 per cent of the cases as shown in Table 8. Eighty one per cent of cases decided under common law were unsuccessful. The proportion of cases in which leave was refused is lower in cases brought under ss 181A and 181B of the *Companies Act 1965*, with 67 per cent of applications failing. A comparison of Table 8 and Table 9 clearly indicates that cases decided by reference to the statutory derivative action had better outcomes than the cases determined under common law. Nevertheless, the results show that even under statute, shareholders seeking leave to bring derivative actions for breaches of directors' duties were successful in only 25 per cent of cases.

In summary, the analysis of derivative actions reveals that the statutory derivative action has to an extent facilitated better access to redress for aggrieved shareholders. This is reflected in the higher rate of success in obtaining leave to bring derivative proceedings compared with cases decided by reference to common law principles. At the same time, the courts' powers to order costs and access to information have been poorly utilised, limiting the effectiveness of the provisions in reducing barriers to shareholder litigation. Further, the doctrinal analysis of cases discussed later in the chapter reveals that the manner in which the courts have interpreted and applied the criteria for granting leave has constrained the effectiveness of the statutory

derivative action in facilitating access to redress. Nevertheless, for cases in which leave was granted to bring derivative proceedings, the next stage involves the determination as to whether directors have breached their duties. Accordingly, the discussion now turns to an analysis of cases involving claims that directors' duties were breached.

5.2.2 *Breaches of Directors' Duties*

There were 70 judicial decisions involving the private enforcement of breaches of directors' duties from 2008 to 2015.[743] Table 10 shows the number of decisions for each year, indicating the number of successful and unsuccessful cases.[744]

Table 10: Decisions on breaches of directors' duties

Year	Total number of cases	Successful cases	Unsuccessful cases	Final outcome Unknown
2015	14	6	7	1
2014	4	1	2	1
2013	8	2	6	0
2012	14	5	8	1
2011	5	2	2	1
2010	9	3	5	1
2009	7	2	5	0
2008	9	3	6	0
Total	70	24 (34%)	41 (59%)	5 (7%)

Table 10 indicates that 41 cases (59 per cent) were unsuccessful. Twenty four cases (34 per cent) were successful. The decisions were examined in order to ascertain reasons for failure of the 41 unsuccessful cases. As with derivative actions, in some cases more than one of these grounds was mentioned. Table 11 below sets out the most commonly cited reasons for the cases' failure.

Table 11: Grounds cited for unsuccessful cases involving breaches of directors' duties

Grounds for failure	**Number of cases**
Claims not proved	20
Failure of oppression claim	10
No locus standi	5

The most common ground cited was that the claims were not proved. In 20 of the 41 unsuccessful cases, the plaintiffs' claims failed on grounds that the claims were not proved. The second most common ground cited was failed minority shareholder oppression claims. Ten unsuccessful cases were failed oppression claims. There were 12 cases involving petitions for relief from minority shareholder oppression in addition to allegations that directors' duties

[743] These cases are set out in Appendix 4.
[744] The cases were considered as successful in this study if there was any finding that directors' duties had been breached.

were breached. Out of the 12 cases, 10 were unsuccessful. Only one oppression case was successful while another case involved interim proceedings and the final outcome is unknown. As cases involving allegations the directors' duties were breached and petitions for relief from minority shareholder oppression fared particularly badly, the reasons for failure of these cases warrant further consideration.[745] These reasons are set out in Table 12 below.

Table 12: Unsuccessful cases involving minority shareholder oppression and breaches of directors' duties

Grounds for failure	**Number of cases**
Claims not proved	4
Liquidation	2
Petitioners breached director's duties	2
Public company	1
No locus standi	1

Table 12 indicates the grounds on which the oppression cases were unsuccessful. In four cases, the allegations of oppression were not proved. Two oppression claims were disallowed as the company was wound up or under liquidation.[746] In two cases, the petitioners themselves were found to have breached directors' duties and their claims for relief from oppression were disallowed.[747] One case involved allegations against a public company and the court held that oppression is rare in public companies.[748] In another case, the petitioner was found to have no locus standi as he was not affected personally by the breach of directors' duties and should have brought derivative proceedings.[749]

The low success rate seen in relation to oppression petitions may also be attributed to an extent to the courts' reluctance to interfere in management decisions. For instance, in *Soh Choo v Unico-Desa Plantations Bhd*,[750] the judge cited the Court of Appeal in *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd*: [751]

> The court, under the pretext of minority protection under s181, should be slow from interfering or enquiring into the desirability or wisdom of the acts of those who control or manage the company's affairs. It cannot be the function of the court to take management

[745] The analysis relating to petitions for relief from minority shareholder oppression is limited to situations in which oppression claims were made in conjunction with allegations that directors' duties were breached.
[746] *S&S Power Finvest Ltd v S&S Power Corporation Sdn Bhd* [2009] MLJU 0079; *Lee Ah Lin v Lee Choon Ket* [2012] 2 CLJ 458.
[747] *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd* [2010] 5 MLJ 342; *Leslie Mohd Omar v Rozina Omar* [2012] 1 LNS 869.
[748] *Soh Choo v Unico-Desa Plantations Bhd* [2011] 1 LNS 1101. In this case, Mary Lim J held the requirements of s 181 of the *Companies Act 1965*, the provision which allows minority shareholders relief from oppression, were 'not satisfied on the facts and on the law'; [2011] 1 LNS 1101, [70]. In coming to this conclusion, Lim J considered the facts of the case and a previous Court of Appeal decision which held that petitions under s 181 are rarely allowed in public listed companies. This is further discussed at footnote 768 below in relation to public companies.
[749] *Choo Jan Hong v Selera Citarasa Sdn Bhd* [2010] 1 LNS 1927.
[750] [2011] 1 LNS 1101.
[751] [2010] 5 MLJ 342.

> decisions and to substitute its opinions for those of the directors and the majority of the members.[752]

Judicial reluctance to interfere in internal management is also seen in cases involving allegations that directors' duties were breached. For instance, in *Cepatwawasan Group Bhd v Tengku Kamal,*[753] the court was reluctant to scrutinise directors' expenses, asserting that these were matters for the company's internal management. The decision emphasised that it was not the judiciary's role to determine the reasonableness of expenses or whether they were within the ordinary course of business.

Table 11 indicates that the third most commonly cited ground for failure of cases involving breaches of directors' duties was the plaintiff's lack of locus standi to bring proceedings. This occurred in five cases. In several of these cases, the plaintiff was a shareholder and the court held that the directors did not owe any duty to the plaintiff but to the company. As such, the company was the proper plaintiff. In another case, the plaintiff lacked locus standi as he was not a registered shareholder at the time of the transaction.

Table 11 indicates that the majority of unsuccessful cases involving alleged breaches of directors' duties failed on grounds that the claims were not proved. There are several possible reasons why claims are not proven. One possibility is that the allegations are unfounded. Alternatively, failure on this ground may reflect the difficulty of proving breaches of fiduciary duties. This is consistent with the views of the CLRC that shareholders who are not involved in the company's management often have very limited access to information.[754] The Committee asserted that the inability to obtain evidence hampers shareholders' enforcement of their rights through litigation. Likewise, the OECD's report suggests that the lack of a paper trail poses challenges to proof.[755]

At the same time, the analysis of successful cases indicates the strength of evidence in support of findings that directors' duties were breached.[756] The reasons for the decisions included descriptions such as 'overwhelming' or 'incontrovertible' evidence pointing to the defendants' breach of duties.[757] Likewise, adverse findings in relation to the defendants' demeanour such as evasiveness or inconsistent testimony were common.[758] For instance, in *CTI Leather Sdn Bhd v Hoe Joo Leong,*[759] Pathmanathan J found 'glaring inconsistency' in the first defendant's

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[752] Ibid 355.
[753] [2008] 2 CLJ 620.
[754] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 32.
[755] OECD, *White Paper on Corporate Governance*, above n 687.
[756] For example, comments on the clarity and strength of the evidence against defendants are found in the judgments of *Chan Fong Cheng v Aunfu Fibre Board (M) Sdn Bhd* [2013] 1 LNS 1147, *Perbadanan Kemajuan Pertanian Selangor v Megafores Nursery Sdn Bhd* [2010] MLJU 1572 and *Dato' Gan Ah Tee (as liquidator of Par-Advance Sdn Bhd (in liq))v Kuan Leo Choon* [2012] 10 MLJ 706; *Sundai (M) Sdn Bhd v Masato Saito* [2013] 9 MLJ 729.
[757] *Soon Seng Palm Oil Mill (Gemas) Sdn Bhd v Jang Kim Luang* [2011] 9 MLJ 496; *Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd* [2012] MLJU 605.
[758] *Zung Zang Wood Products Sdn Bhd v Kwan Chee Hang Sdn Bhd* [2012] 1 LNS 250; *Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd* [2010] 9 MLJ 385; *Dato' Raja Azwane bin Raja Ariff v Dato Man bin Mat* [2011] 9 MLJ 467.
[759] [2012] 10 CLJ 287.

evidence,[760] while his testimony in court was 'completely at odds with his witness statement'.[761] Her Honour also found the third defendant to be 'astoundingly glib and flippant in his evidence, brushing off clear conflicts of interest … as the way in which 'Chinamen' do their business.'[762] Judges also observed the lack of evidential support for the defendants' claims.[763] Some judgments contained positive observations of the plaintiffs' evidence including consistency or truthful demeanour.[764]

The analysis also indicates that in many of the successful cases, the plaintiffs were involved in the company's management. In 20 cases in which directors were found to have breached their duties, the plaintiffs were the company or persons involved in the management of the company concerned. Table 13 sets out the plaintiffs in these cases.

Table 13: Plaintiffs in successful claims that directors' duties were breached

	Total	Company	Directors or former directors	Liquidators	Statutory body
Number of cases	20	9	6	3	2

The plaintiffs were the corporation which had been wronged in nine successful cases. In six of the successful cases, the plaintiffs were directors or former directors of the company concerned. The plaintiffs were liquidators in three cases and statutory bodies in two successful cases. As the plaintiffs in all these cases were involved in the management of the companies concerned, this would arguably have facilitated their access to information and evidence in support of their claims against the defendant directors.

The success rate was much higher in suits against directors of private companies than public companies. In all except one of the successful cases, the defendants were directors of private companies. The majority of successful suits involved closely held companies, including family companies, quasi partnerships and in one case a joint venture company. Common claims included attempts to dilute shareholding, wrongful removal of directors and competition with the company.

The only successful suit against directors of a public company was brought by the company against former directors.[765] Notably, unsuccessful claims against directors of public companies

[760] Ibid 302.
[761] Ibid 304.
[762] Ibid 306.
[763] *Citec International Sdn Bhd v Yeam Sai Meng* [2008] 8 MLJ 640*; Soon Seng Palm Oil Mill (Gemas) Sdn Bhd v Jang Kim Luang* [2011] 9 MLJ 496; *Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd* [2012] MLJU 605; *Peymaneh Nazemi v Sayed Mohammad Mahdi Mousavian* [2013] 7 MLJ 342.
[764] *Zung Zang Wood Products Sdn Bhd v Kwan Chee Hang Sdn Bhd* [2012] 1 LNS 250; *Cheah Ngun Ying v Low Cheong & Sons Sdn Bhd* [2010] 9 MLJ 385.
[765] *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra Tengku Indra Petra* [2014] 1 LNS 236. In this case, the plaintiff company was successful only on one count of negligence and other claims for breaches of fiduciary duties were unsuccessful.

include two suits brought by minority shareholders[766] and one of them involved an oppression claim. In *Soh Choo v Unico-Desa Plantations Bhd*,[767] it was noted that 'petitions of oppression under section 181 by minority shareholders are rarely allowed in cases of public-listed company (sic) since aggrieved shareholders are said to be able to simply take out their "stake and go elsewhere."'[768]

Liquidation appeared to affect litigation for breached of directors' duties in several ways. Claims for breaches of directors' duties instituted by liquidators had a high rate of success. There were three claims for breaches of directors' duties brought by liquidators and all three were successful.[769] One possible explanation for the success of liquidators' claims is that liquidation would have brought wrongdoer control to an end. Liquidators would have access to the company's records which arguably facilitate proof of the claims. In contrast, liquidation affected petitions for minority shareholder oppression negatively. The courts disallowed oppression claims in relation to companies which were wound up or under liquidation.[770]

There were fewer cases against directors of public companies compared with private companies. There was only one successful claim for breach of duties against directors of public companies and the plaintiff was the company.[771] Similarly, there was only one petition against minority shareholder oppression relating to a public company. The claim was unsuccessful, the court commenting that oppression is rare in public companies.[772] These findings suggest that minority shareholders of public companies face greater challenges in obtaining recourse through the courts than their counterparts in private companies. The findings are consistent with commentators' observations that it is easier for minority shareholders of public companies to exit the company than to enforce their rights.[773]

The analysis of successful cases suggests that involvement in the management of companies was positively associated with successful claims for breaches of directors' duties. Public companies have a larger proportion of shareholders who are not involved in the company's management. The lower success rate in claims against directors of public companies may possibly be attributed, to an extent, to the greater separation between ownership and control in public companies.

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[766] *Soh Choo v Unico-Desa Plantations Bhd* [2011] 1 LNS 1101; *BSNC Corporation Bhd v Ganesh Kumar Bangah* [2010] 7 MLJ 85.
[767] [2011] 1 LNS 1101.
[768] Ibid [71]. The court cited the Court of Appeal's decision in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd* [1996] 1 MLJ 661 as authority for this proposition.
[769] *Dato' Gan Ah Tee v Kuan Leo Choon* [2012] 10 MLJ 706; *CTI Leather Sdn Bhd v Hoe Joo Leong* [2012] 10 CLJ 287; *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong* [2009] 1 MLJ 723.
[770] Ibid.
[771] Please refer to n 765 above.
[772] *Soh Choo v Unico-Desa Plantations Bhd* [2011] 1 LNS 1101.
[773] Sulaiman, 'Encouraging Shareholders' Participation', above n 664, cxlix; Koh, 'Principles, Practice and Prospects', above n 359, [7.7].

5.2.3 *All Cases Involving Alleged Breaches of Directors' Duties, Including Derivative Actions*

As mentioned above, the aim of the analysis of judicial decisions is to ascertain the effectiveness of Malaysian shareholder protection law in providing shareholders redress for alleged breaches of directors' duties. An essential part of the analysis is to identify the challenges encountered in seeking redress from the reasons for decisions in unsuccessful cases. The study examines a total of 102 cases involving breaches of directors' duties from 2008 to 2015. Thirty two of the 102 cases were derivative actions. The most common grounds cited for failure to obtain redress are examined in Table 14.

Table 14: Grounds for unsuccessful cases alleging breaches of directors' duties

Grounds	**Number of cases**
Derivative action which failed in initial stages	24
Failure to prove the case	21
No locus standi (not derivative action)	4
Struck out	3

Twenty four of the unsuccessful cases were derivative actions which failed in the initial stages, with leave being refused or the case being struck out on grounds that there was no reasonable cause of action.[774] Twenty one of the remaining unsuccessful proceedings for breaches of directors' duties failed due to the plaintiffs' inability to prove their cases. The plaintiffs were found to have no locus standi to bring proceedings in four cases.

It is evident from the data that there is a high incidence of cases which were unable to proceed due to the failure of derivative actions in the initial stages. The derivative action is important to minority shareholders, as it potentially allows them to seek redress against directors when those in control of the company are unwilling to institute proceedings. The substantial proportion of failed attempts to bring derivative actions indicates that minority shareholders face significant challenges in obtaining redress for perceived breaches of directors' duties. Only one of the 24 successful claims for breaches of directors' duties was brought by way of a derivative action.[775] As noted above, 12 cases involving allegations that directors' duties were breached also involved petitions for relief from minority shareholder oppression. Ten of these were unsuccessful. The low success rate in claims for relief from oppression likewise suggests that minority shareholders have often not been able to obtain redress for perceived breaches of shareholder rights through the courts. The high cost of litigation and the added disincentive of having to pay the defendants' costs in failed claims present further challenges to minority shareholders' private enforcement of their rights.

Table 14 indicates that the second most common ground for unsuccessful cases was the failure to prove the claims that directors' duties were breached. While satisfying the burden of proof

[774] *Rules of the High Court*, O 18 r 19(1).
[775] *Wong Mee Ling v Chong Piang Fong* [2010] 1 LNS 1321.

is a challenge common to many litigation cases, several trends in the cases suggest the importance of access to information in facilitating proof that directors' duties were breached, where such proof exists. First, plaintiffs who were involved in the management of the companies concerned had a significantly higher rate of success.[776] In most of the successful claims for breaches of directors' duties, the plaintiffs were the company, other directors, liquidators or others involved in the companies' management. Secondly, the reasons for decisions in successful cases often emphasised the strength of the evidence in support of the plaintiffs' claims. Plaintiffs involved in the company's management would arguably have better access to information and records relating to internal management and the impugned transactions, which in turn provide support for their claims against directors.

At the same time, shareholders' derivative actions had little success in obtaining redress for breaches of directors' duties. There was only one claim for breach of directors' duties brought by way of a derivative action which succeeded, enabling the shareholder to obtain redress for the breach. This was the case of *Wong Mee Ling v Chong Piang Fong*[777] in which the plaintiff was a shareholder and former director of the company. The facts suggest that it was a small family business and, as such, the plaintiff would have been involved in the management of the company. The judgment also indicated that there was clear documentary evidence which supported the plaintiff's claim that the defendant director had misappropriated funds.

Shareholders who do not own controlling stakes have a greater need for the statutory derivative action. There is also less likelihood of involvement in management decisions and access to internal management records. Public companies, in particular, have a larger proportion of shareholders who are not involved in the company's management. Minority shareholders of public companies arguably face greater challenges in accessing information due to their lack of involvement in management and, as such, lack the ability to substantiate their claims with the necessary evidence.

Law reformers envisaged that the court's power to order access to information should assist minority shareholders who would otherwise be unable to access information relating to their claims. These powers have not been used to alleviate the challenges faced by shareholders in bringing derivative actions for breaches of directors' duties. The power to order access to information has, however, been used in one derivative action which did not involve allegations that directors' duties were breached. In *Ng Hoy Keong v Chua Choon Yang*, the plaintiff applied for leave under the statutory derivative action to defend proceedings which were brought against the company.[778] The court ordered that the plaintiff should be provided assistance and information including access to all books and records of the company. Greater willingness to use this power to assist minority shareholders' derivative actions would potentially contribute to better outcomes in seeking redress against directors.

The analysis of judicial decisions indicates that minority shareholders continue to encounter significant challenges in obtaining redress for breaches of directors' duties, despite the

[776] This issue is discussed in relation to Figure 11.
[777] [2010] 1 LNS 1321.
[778] [2011] 4 CLJ 545.

introduction of the statutory derivative action.[779] This raises questions as to the effectiveness of the statutory derivative action in reducing constraints to shareholder litigation posed by common law. Consequently, there is a need to gain a better understanding of the way in which the statutory derivative action has been interpreted and applied by the courts. The discussion below further examines the judicial decisions involving derivative actions through a doctrinal analysis.

5.3 Doctrinal Analysis of Cases on Derivative Actions

As stated earlier, the aim of this chapter is to determine the effectiveness of formal Malaysian shareholder protection. Effectiveness measured by the extent to which shareholders have been able to enforce their rights or obtain redress when allegations of expropriation arise. The literature examined in section 5.1 reveals the limitations in the effectiveness of Malaysian shareholder protection in providing minority shareholders redress. The analysis of judicial decisions in section 5.2 further confirms that minority shareholders face substantial difficulties in obtaining redress for breaches of directors' duties through the courts. The analysis of judicial decisions by way of descriptive statistics sheds light on some of the reasons why minority shareholders had minimal success in obtaining redress for breaches of directors' duties. Nonetheless, there is a need for a more nuanced understanding of the reasons for the phenomenon.

In order to better understand the trends revealed in section 5.2, this section examines significant judicial decisions on the derivative action by way of doctrinal analysis.[780] As discussed earlier, the way in which the courts interpret and apply the relevant law is one of the significant factors on which the success of cases turns. In examining the reasoning that underpins the judicial decisions, the analysis in this section provides further insights into the operation of the derivative action in Malaysia. This, in turn, facilitates a more in-depth understanding of the effectiveness of the statutory derivative action in providing shareholders redress. Subsequently, the insights gained through the analysis of Malaysian judicial decisions on derivative actions will be compared with a similar analysis of derivative actions in Australia. The doctrinal analysis of Malaysian cases begins by examining the principles espoused by the courts in interpreting the statutory derivative action. The discussion then turns to an analysis of the manner in which the principles were applied in the cases.

The leading case on the statutory derivative action in Malaysia is the Court of Appeal decision in *Celcom (Malaysia) Berhad v Mohd Shuaib Ishak*.[781] The case has been influential for its judicial interpretation of the criteria for the granting of leave under s 181B of the *Companies Act 1965*. To recap, s 181B stated that in deciding whether to grant leave, the court should consider whether the complainant was acting in good faith and whether it appeared prima facie

[779] See text relating to n 485.
[780] Chapter 2 explains doctrinal analysis at p 12.
[781] [2010] 7 CLJ 808.

to be in the best interest of the company that the application for leave be granted.[782] Thirty days' notice in writing to the directors of the intention to bring a derivative action was also required.[783]

In *Celcom*, the Court of Appeal remarked that 'leave to bring a derivative action must not be given lightly', citing the Australian case of *Swansson v RA Pratt Properties Pty Ltd* ('*Swansson*').[784] Abdull Hamid Embong JCA stated:

> The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s 181A of the [*Companies Act 1965*] are met. A low threshold of merely determining if there existed a prima facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 181A of the [*Companies Act 1965*].[785]

The plaintiff in *Celcom* was a former shareholder who alleged that the directors of Celcom (Malaysia) Berhad had caused the company to breach an agreement which resulted in a mandatory general offer being made at a lower share price. As a consequence, the plaintiff's shares were compulsorily acquired at RM2.75 (AUD0.09) per share. The plaintiff asserted that the acquisition would have taken place at RM7.00 (AUD2.30) per share if the directors had not caused the company to breach the agreement. The court of first instance granted the shareholder leave to bring a derivative action. On appeal, the trial judge's grant of leave was overturned. The Court of Appeal held that the trial judge had too readily granted leave, asserting that s 181A of the *Companies Act 1965* should be applied restrictively. In reaching the decision, the Court of Appeal took into account the fact that a committee of independent directors had reached the decision in question, on the basis of legal advice. The Court of Appeal was reluctant to interfere with the commercial decisions of disinterested directors.

The Court of Appeal considered the criterion of 'good faith' specified in s 181B of the *Companies Act 1965*. Citing *Swansson*, the court observed that this involved considering whether 'the applicant honestly believes that a good cause of action exists and has reasonable prospects of success.'[786] Further, the application should not have been brought for a collateral purpose. The court also considered the criterion in s 181B(4) as to whether it 'appeared prima facie to be in the best interest of the company that the application for leave be granted', noting that *Swansson* had raised the issue of reasonable prospects of success.

On the facts, the Court of Appeal held that the applicant lacked good faith. The court reasoned that the applicant was merely advancing his personal interest, as he had brought a personal action against the defendant in relation to the same subject matter. This conclusion appeared to have been influenced in part by the applicant having ceased to be a member six years prior to the proceedings. The proceedings were also found to be counterproductive to the company's

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[782] During the period of the study from 2008 to 2015, ss 181A and 181B of the *Companies Act 1965* set out the conditions for the grant of leave to bring a derivative action. These conditions are replicated in s 348 of the *Companies Act 2016*.
[783] *Companies Act 1965* s 181B; *Companies Act 2016* s 348(2).
[784] [2002] NSWSC 583.
[785] [2010] 7 CLJ 808, [8].
[786] Ibid [16].

interest. Success of the application would have entailed the unwinding of the entire mandatory general offer which would have been detrimental to the company's market reputation and would have caused substantial hardship to shareholders. There was 'no reasonable commercial sense' to the proposed derivative action.[787]

The Court of Appeal's decision in *Celcom* has often been cited for its exposition of the principles to be applied in interpreting ss 181A and 181B.[788] In *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd,*[789] the court referred to the Court of Appeal decision in *Celcom* and applied the test of good faith espoused in that case. Hashim J found that the plaintiff, an institutional shareholder, had established through affidavit evidence that it was acting in good faith. There was no evidence of collateral purposes. Her Honour referred to the criterion that the granting of leave should appear prima facie to be in the best interest of the company. Noting that the plaintiff's affidavits showed that the complaints were 'not without basis or substance', leave was granted to the institutional shareholder to bring a derivative action.[790]

Nevertheless, in many of the cases, the judgments emphasised the need for a restrictive application of the statutory derivative action espoused by the Court of Appeal in *Celcom*.[791] This appears to have engendered some caution in the granting of leave to bring statutory derivative actions. The cases indicate that the courts often referred to several other criteria in addition to the conditions expressly set out in ss 181A and 181B in deciding whether to grant leave. At times, these were considered as part of s 181B(4)(b) – whether it was prima facie in the best interest of the company that leave be granted. For instance, the courts examined whether there were reasonable prospects of success[792] or considered the strength of evidence adduced in support of the claim.[793] Applicants were also required to have exhausted all internal management avenues, demonstrating to the courts' satisfaction that the company would not bring proceedings against the directors for the wrongs alleged.[794] This condition appears to have a less obvious connection with the criteria set out in ss 181A and 181B of the *Companies Act 1965*.

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[787] Ibid [29].

[788] *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd* [2015] 10 CLJ 599; *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd* [2013] 8 CLJ 38; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313.

[789] [2013] 8 CLJ 38.

[790] Leave to bring a derivative action was also granted under s 181A of the *Companies Act 1965* in *S Vigneswaran M Sanasee v Maju Institute of Educational Development (MIED) (No 2)* [2011] 2 CLJ 678, although this was a case which relied on the lower court judgment in *Celcom*, which was subsequently overturned by the Court of Appeal. In this case, the applicant sought leave to bring a derivative action against directors for breaches of their statutory duties and fiduciary duties. In granting leave, Mah Weng Kwai JC noted that the applicant was acting in good faith and the proceedings were in the interest of the company. The company had been established as the educational arm of the Malaysian Indian Congress, a political party, and the applicant alleged that serious breaches of fiduciary duties had occurred. The judicial commissioner cited the principle from the lower court judgment in *Mohd Shuaib Ishak v Celcom (Malaysia) Berhad* [2008] 5 MLJ 857 that 'there was a reasonable basis for the complaint and the proposed action was legitimate and arguable, in that it has some semblance of merit'.

[791] *Celcom*'s restrictive approach was cited and applied in *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313 and *Lim Aik Chin v Hong Leong Bank Bhd* [2015] 8 CLJ 755.

[792] *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313.

[793] *Lee Suan Ngee v On Network Sdn Bhd* [2013] 1 LNS 506.

[794] *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2014] 1 LNS 1770; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313, [68].

The cases indicate that Malaysian courts have drawn on common law principles in interpreting the statutory derivative action. Consequently, some of the restrictions of the common law derivative action have encroached on the statutory derivative action, limiting the latter's effectiveness in facilitating shareholders' access to judicial redress. An example of this is seen in the refusal of leave in *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd.*[795] Leave was refused on the ground that the applicants were not a genuinely aggrieved minority, despite the absence of any express requirement in ss 181A and 181B to that effect. When imposing these conditions, the courts referred to the purpose of the common law derivative action, emphasising its role in allowing minority shareholders to bring proceedings where wrongdoers are in control of the board.[796] Accordingly, the judges reasoned that the implied purpose of the statutory derivative action was likewise to allow an aggrieved minority to seek redress. The effect of this judicial approach was to limit the statutory derivative action to 'genuinely aggrieved minorities',[797] although ss 181A and 181B did not contain such restrictions. This resonates with a purposive approach rather than a more literal approach based on the ordinary meaning of the words.[798] Nonetheless, the CLRC indicated that the statutory derivative action was intended to alleviate the limitations of the common law derivative action,[799] raising questions as to whether the extent to which judges have imported restrictions from common law is consistent with the underlying aims of the reforms. The influence of common law principles on the interpretation of the statutory derivative action is reflected in the emphasis on the need to prove wrongdoer control which prevents the company from pursuing legal action,[800] and citation of Malaysian authority on the common law derivative action.[801] Similarly, in *Dato' Daljit Singh a/l Gurdev Singh v Forefront Online Sdn Bhd* ('*Daljit Singh*'), the judge referred to common law principles in *Foss v Harbottle* in interpreting the statutory derivative action.[802] In contrast with the Malaysian courts, the analysis of Australian decisions in Part 4 below indicates that the Australian courts did not import such restrictions from common law.

In addition, the cases indicate that the Malaysian courts often took a strict approach towards compliance with formal requirements, with the result that in a significant number of cases, leave was refused on grounds of technicalities. For instance, in *Krishnasamy G B Vatchelu v Eng Ah Phoo @ Ng Ah Phoo*,[803] the proceedings were dismissed on the basis that the plaintiff did not formally state that he was suing in a representative capacity, despite the pleadings

[795] [2014] 1 LNS 1770. The Court of Appeal affirmed the lower court decision to refuse leave. More details on the decision to refuse leave are set out in the judgment of the High Court in [2013] 1 LNS 203.
[796] *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2013] 1 LNS 203; affirmed in [2014] 1 LNS 1770; *Dato' Daljit Singh a/l Gurdev Singh v Forefront Online Sdn Bhd* [2010] 1 LNS 1631.
[797] Nawawi JC stated: [S]ince the purpose of s. 181A is to protect the interest of the minority shareholders who have no control over the company's decision making organs, I am of the considered opinion that the threshold issue here is to ascertain whether the Plaintiffs are **'genuinely aggrieved minority'** (emphasis by the judge); and that unless they are the 'genuinely aggrieved minority' they have no right to the relief afforded by s 181A; [2013] 1 LNS 203, [38].
[798] Further details on the principles of statutory interpretation in Malaysia are available in Sharifah Suhana Ahmad, *Malaysian Legal System* (Malayan Law Journal, 2nd ed, 2007) and the *Interpretation Acts 1948 and 1967*.
[799] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 35.
[800] [2013] 1 LNS 203, [37].
[801] *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 4 CLJ 551.
[802] [2010] 1 LNS 1631, [17].
[803] [2013] 1 LNS 1160.

having clearly indicated the plaintiff's intention to bring a derivative action. Nevertheless, some Malaysian courts have adopted a more liberal approach, and in *Adenan bin Ismail v Naluri Corporation Bhd*, the court regarded a similar situation as a procedural defect which could be rectified.[804] The cases also reflect a strict judicial approach to notice requirements.[805] As will be seen below, the Australian courts tend toward an emphasis on the substance of the requirements, leading to leave being more readily granted. The remainder of this section describes the manner in which the courts have applied the legal principles considered to be relevant to the decision whether to grant leave to bring derivative actions under ss 181A and 181B of the *Companies Act 1965*.

As stated above, the Court of Appeal decision in *Celcom (Malaysia) Berhad v Mohd Shuaib Ishak*[806] has been influential on Malaysian decisions involving the statutory derivative action. One of the cases in which the restrictive approach espoused in *Celcom* was cited is *Abdul Rahim Suleiman v Faridah Md Lazim*.[807] The judgment in this case cited a number of quotes from *Celcom* such as 'there needs to be a strict interpretation of s181A', 's181A [of the *Companies Act 1965*] should thus be restrictively applied', 'we agree that the court should thus not interfere and substitute its own judgment in what we hold to be was a proper and prudent business and commercial decision of the directors', 'leave should not be too easily allowed in an application of this nature' and 'leave is a filtering process which in this instance, the court should have used with vigilance.'[808]

The court refused leave on grounds that the derivative action had no reasonable prospect of success, and it was not prima facie in the best interest of the company that leave should be granted. In addition, the court highlighted a number of technicalities which led to the finding that the notice requirements of s 181A were not met. The case arguably demonstrates a strict application of the notice requirements. The court appeared to impose additional technical requirements, more than a literal interpretation of s 181A necessitates. The court found that the applicant failed to give the directors adequate notice on several grounds. First, the judge stated that the complainant should have given notice of his or her intention to make an application under s 181A to *all the individual directors of the company* in question. Notice to the board of directors was held to be inadequate, despite the fact that s 181B(2) of the *Companies Act 1965* merely requires notice to be given to the *directors* of the company. Secondly, the applicant had sent several letters informing the defendants of the matters complained of and the intention to seek leave to bring derivative proceedings. However, these were considered to be inadequate for the purposes of s 181B(2). The judge noted that one of the letters was marked 'without prejudice' and as such did not meet the notice requirements, as it was not intended to be admissible in evidence. Wong JC asserted that notice requirements were important to ensure that the company's internal processes were duly exhausted before

[804] [2010] 1 LNS 486. Nevertheless, leave was not granted on grounds of *res judicata*.
[805] *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313; *Lim Aik Chin v Hong Leong Bank Bhd* [2015] 8 CLJ 755.
[806] [2010] 7 CLJ 808.
[807] [2015] 1 LNS 313. The judge argued that s 181B(4)(b) of the *Companies Act 1965* imposes a higher threshold than Canadian and Singaporean statutory derivative actions which use the phrase 'in the interest' of the company as opposed to the Malaysian wording 'in the best interest' of the company; Ibid [80].
[808] Ibid 51–2.

derivative proceedings are brought.[809] A comparison with Australian cases below demonstrates that Australian courts have taken a different and more pragmatic approach to notice requirements.

Celcom's restrictive approach has been cited in a number of other cases. In the case of *Daljit Singh*, the judge referred to the decision in *Celcom*, noting that the Court of Appeal had 'placed a stringent test' in line with common law principles outlined in *Foss v Harbottle*.[810] The court refused leave on the ground that the applicant lacked good faith. The facts of the case indicated that there had been ongoing disputes between the parties for some years. Consequently, the court held that the applicant lacked good faith, finding that the application for leave to bring derivative proceedings was a 'collateral step to advance the dispute among the respective parties'.[811] Likewise, in *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd*, the Court of Appeal refused to grant leave under s 181B of the *Companies Act 1965*.[812] Leave was refused on grounds that the applicants were not an aggrieved minority, as they controlled the board. In addition, they were found to lack good faith. Significantly, ss 181A and 181B do not impose any requirement that applicants should be an aggrieved minority in order for leave to be granted.

Similarly, in *Lim Aik Chin v Hong Leong Bank Bhd*,[813] Lim JC observed the need to construe ss 181A and 181B of the *Companies Act 1965* strictly, citing the Court of Appeal's ruling in *Celcom* that 'leave to bring a derivative action must not be given lightly' and that s 181A should be 'restrictively applied'.[814] Consequently, the application for the grant of leave retrospectively[815] was refused. The requirement of 30 days' notice was also strictly interpreted, and the plaintiff's failure to comply with this criterion was held to preclude the court's grant of leave.[816]

As noted above, the courts' power to order access to the company's books was not exercised in any of the cases involving derivative proceedings for breaches of directors' duties. These powers were intended by law reformers to level the playing field for minority shareholders by facilitating access to evidence in support of their claims, where such proof exists.[817] The analysis of Malaysian cases indicates that the lack of supporting evidence was critical to the courts' decisions to refuse leave in some cases. For example, in *Lee Suan Ngee v On Network Sdn Bhd*,[818] leave to bring a statutory derivative action was refused as the plaintiffs, who were minority shareholders, could not establish that they had an arguable case with reasonable

[809] Ibid [68].
[810] [2010] 1 LNS 1631.
[811] Ibid [18].
[812] [2014] LNS 1770.
[813] [2015] 8 CLJ 755.
[814] Ibid [26].
[815] In this case, leave had been obtained to bring derivative proceedings against some of the defendants. Another defendant was subsequently joined, however, the plaintiff omitted to seek leave to bring derivative proceedings at the time of the joinder. In these proceedings, the plaintiff sought to rectify the omission by seeking that leave be granted, retrospectively, for the derivative proceedings against this defendant.
[816] [2015] 8 CLJ 755, [33-5].
[817] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 32.
[818] [2013] 1 LNS 506.

prospects of success. The court noted the plaintiffs had locus standi but the application for leave was dismissed with costs, as it was deemed not to be in the best interest of the company due to the lack of evidence. It is possible that orders facilitating access to corporate records may have mitigated these deficiencies, although such orders were not discussed in the judgments.

The recent case of *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd* reflects a more liberal approach.[819] In granting leave to bring a statutory derivative action, Ghazali JC held that it is not necessary for applicants to be minority shareholders in order to bring statutory derivative actions. The defendant director in this case colluded with a third party. The shareholder was granted leave to bring proceedings against the third party in addition to proceedings against the director. It remains to be seen whether judicial interpretations reflecting more liberal perspectives will withstand the scrutiny of the higher courts given the Court of Appeal's conservative approach in *Celcom* and *Suhaimi Ibrahim*.

As noted above, close to half the applications to bring derivative actions were decided based on common law principles, citing Malaysian cases[820] which in turn followed UK case law.[821] Many of these cases relied on the fraud on the minority exception to the rule in *Foss v Harbottle*. The most commonly cited ground for refusal of leave was the lack of wrongdoer control.[822] The discussion above noted that derivative actions were also dismissed for failure to comply with procedural requirements[823] and the lack of evidence.[824]

While the more onerous common law criteria may have contributed to the difficulty in obtaining leave to bring derivative actions, examination of the cases decided by reference to common law principles indicates that some of them would probably have been unsuccessful even if the statutory derivative action had been relied on. For instance, in *Dato See Teow Guan v Yeoh Jin Hoe*, the application for leave was dismissed as the wrong complained of was done to him in a personal capacity and could not be the subject of a derivative action.[825] Likewise, in *Ramakrishnan Rajeswari v Syarikat VK Kalyanasundram Sdn Bhd*,[826] the lack of evidence to support the claims is likely to have led to leave being refused under the statutory derivative action on grounds that there were no reasonable prospects of success.

The case of *Kingdom Seekers Ventures Sdn Bhd v Dato Sri Chong Ket Pen*[827] appears to be rather anomalous. While the judgment makes no mention of ss 181A or 181B of the *Companies*

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[819] [2015] 10 CLJ 599.
[820] *Abdul Rahim Bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417; *Tan Guan Eng v Ng Kweng Hee* [1992] 1 MLJ 487.
[821] *Foss v Harbottle* [1843] 67 ER 189; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.
[822] *Shamsul bin Saad v Tengku Dato' Ibrahim Petra* [2010] 4 MLJ 37; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780; *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd* [2012] MLJU 167; *Kingdom Seekers Ventures Sdn Bhd v Dato' Sri Chong Ket Pen* [2015] 1 LNS 546; *Ramakrishnan Rajeswari v Syarikat VK Kalyanasundram Sdn Bhd* [2015] 1 LNS 168.
[823] *Krishnasamy G B Vatchelu v Eng Ah Phoo @ Ng Ah Phoo* [2013] 1 LNS 1160.
[824] *Ramakrishnan Rajeswari v Syarikat VK Kalyanasundram Sdn Bhd* [2015] 1 LNS 168.
[825] [2015] 8 CLJ 531.
[826] [2015] 1 LNS 168.
[827] [2015] 1 LNS 546.

Act 1965, in deciding the application for leave, the court considered the applicant's good faith as well as the issue of wrongdoer control. Malaysian common law cases do not usually consider the issue of good faith. As such, the court appears to have amalgamated some criteria from statute and common law, ultimately holding that leave should be refused due to the lack of wrongdoer control and good faith.

In summary, the analysis above demonstrates that the statutory derivative action has had a limited effect in facilitating shareholder access to redress. Leave to bring derivative actions has been granted in 25 per cent of cases by reference to the criteria specified in s 181B of the *Companies Act 1965*,[828] which are less onerous than the requirements of the common law derivative action. Shareholders obtained leave to bring derivative actions in only 13 per cent of cases under common law.[829] Overall, leave was granted in only 16 per cent of applications to bring derivative actions from 2008 to 2015.[830] Despite the increase in the number of applications for leave to bring derivative actions since 2008, the rate of successful applications has decreased. The low success rate in obtaining leave to bring derivative actions may be attributed, at least in part, to a restrictive judicial approach to the granting of leave under the statutory derivative action and continued reliance on common law principles. The following section of this chapter examines the way in which the statutory derivative action has been applied in Australia. The analysis facilitates a better understanding of the comparative effectiveness of the Malaysian statutory derivative action.

5.4 Comparison with Australian Statutory Derivative Actions

This section considers Australian judicial decisions involving shareholders' applications for leave to bring statutory derivative actions for breaches of directors' duties from 2008 to 2015. The comparison with Australian cases facilitates an analysis of whether the Malaysian experience of the statutory derivative action outlined in the previous section is unique to Malaysia or more commonly shared with other common law countries. More specifically, the manner in which the Malaysian statutory derivative action has been interpreted and applied, and the extent to which shareholders have been able to obtain leave, will be compared with the Australian equivalents.

The discussion begins by setting out the legal principles on which the courts in Australia grant leave to bring derivative actions. The criteria for the granting of leave are set out in ss 236 and 237 of the *Corporations Act 2001* (Cth). The study analyses Australian judicial decisions on derivative actions over a period of eight years from 2008 to 2015, focussing on the rate of success. Judicial interpretation and application of the statutory criteria are examined. Subsequently, the differences in judicial approaches to the granting of leave in Malaysia and Australia are highlighted.

[828] This is set out in Table 9 above.
[829] Please refer to Table 8 above.
[830] Further details are set out in Table 3 above.

In Australia, shareholders may bring derivative actions on behalf of the company under s 236 of the *Corporations Act 2001* (Cth), provided that leave of the Court is obtained pursuant to s 237. In contrast with the Malaysian position, the common law derivative action has been abolished in Australia.[831] Section 237(2) sets out the criteria for granting of leave, stating that the Court must grant the application for leave to bring a derivative action if it is satisfied that:

(a) It is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings – there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

Although the Australian statute sets out more criteria for the granting of leave, the Malaysian courts have in practice relied on similar criteria in considering whether to grant leave to bring derivative actions under the Malaysian statutory equivalent. The Malaysian courts have often referred to the Australian case of *Swansson*[832] in deciding whether to grant leave. The similarities and differences between Malaysian and Australian approaches will be explored later in the chapter.

5.4.1 *Australian Judicial Decisions from 2008 to 2015*

This section examines data from Australia which is comparable with the Malaysian judicial decisions from 2008 to 2015 analysed above. The study seeks to analyse Australian decisions through the descriptive statistics and doctrinal methods.[833] The aim of this section is to ascertain whether Australian applications for leave to bring derivative actions had a similar success rate to Malaysian applications for leave. Australia is considered to be a comparable jurisdiction for several reasons. Chapter 3 observed that Malaysian law reformers have drawn from Australian shareholder protection law in drafting statutory reforms, while the courts and scholars have referred to Australian cases in interpreting and applying Malaysian shareholder protection. In addition, the Malaysian Court of Appeal's influential decision in *Celcom* based

[831] *Corporations Act 2001* (Cth) s 236(3).
[832] (2002) 42 ACSR 313. This case was cited in *Re Dynamic Industries Pty Ltd* [2014] VSC 101.
[833] Chapter 2 pp 11 and 18.

its restrictive interpretation of the statutory derivative action on the Australian case of *Swansson*.[834]

The analysis above considered the extent to which Malaysian shareholders were able to obtain leave to bring derivative actions for breaches of directors' duties – the grant of leave to bring derivative proceedings being the initial hurdle for shareholders to overcome in order to obtain redress where the company is unwilling to bring proceedings. In order to facilitate the cross-country comparison, a search was conducted for all available Australian judicial decisions involving applications for leave to bring derivative actions against directors for breaches of their duties from 2008 to 2015. The search term 'derivative' was used to identify relevant cases on the LexisNexis Australia database. From the search, 45 relevant cases involving applications for leave to bring derivative actions under ss 236 and 237 of the *Corporations Act 2001* (Cth) were identified.[835] As with Malaysian derivative actions, the analysis examines the rate of success in obtaining leave to bring derivative actions as set out in Table 15 below.

Table 15: Australian applications for leave to bring shareholders' derivative actions

Year	Total	Successful	Unsuccessful
2015	6	4	2
2014	8	3	5
2013	7	5	2
2012	2	2	0
2011	7	3	4
2010	4	3	1
2009	5	3	2
2008	6	3	3
Total	45	26 (58%)	19 (42%)

Table 15 indicates that in 58 per cent of the cases, shareholders were granted leave to bring derivative actions under ss 236 and 237 of the *Corporations Act 2001* (Cth). Forty two per cent of the applications for leave were unsuccessful. The rate of success in obtaining leave in the Australian cases was substantially higher than in Malaysian cases. Table 16 below compares the rate of successful Australian statutory derivative actions with the success of Malaysian derivative actions.

[834] (2002) 42 ACSR 313. This case was cited in *Re Dynamic Industries Pty Ltd* [2014] VSC 101.
[835] These cases are set out in Appendix 5.

Table 16: Comparison between successful Australian and Malaysian derivative actions

	Malaysian derivative actions			Australian statutory derivative actions
	Statutory	Common law	All	
Number of cases from 2008 to 2015	12	16	32[836]	45
Successful cases	3 (25%)	2 (13%)	5 (16%)	26 (58%)

As noted in Table 3, only 16 per cent of Malaysian applications for leave to bring shareholders' derivative actions for breaches of directors' duties were successful from 2008 to 2015. Although the Malaysian cases decided under the statutory derivative action had a higher success rate than cases decided under common law, this was less than half the rate of success for Australian statutory derivative actions. Twenty-five per cent of Malaysian applications for leave under the statutory derivative action were successful, substantially less than the 58 per cent of successful Australian applications for leave to bring statutory derivative actions. Nonetheless, in interpreting the relative rates of success, there is a need to consider a number of factors. These are discussed at the end of section 5.4.3.

In order to better understand the reasons for the difference in success rates, the Australian judicial decisions are examined by way of doctrinal analysis. The discussion below considers the legal principles relied on by the courts in deciding the applications for leave. The analysis considers the manner in which the criteria set out in s 237(2) of the *Corporations Act 2001* (Cth) have been interpreted and applied. Subsequently, the analysis highlights differences in approaches taken by Australian and Malaysian courts on several issues. These differences indicate a greater willingness on the part of Australian courts to grant leave to bring shareholders' derivative actions.

5.4.2 *Legal Principles Applied by Australian Courts*

In deciding whether to grant leave to bring derivative actions under s 237(2) of the *Corporations Act 2001* (Cth), the courts commonly considered five matters which must be satisfied. The first criterion to be established by the applicant is the probability that the company itself will not bring proceedings. The cases reflect a pragmatic approach by the courts, who have been willing to find that this criterion was satisfied where the directors of the company had been informed of the applicant's complaints and had not taken any steps against the directors for breaches of their duties. Where board decisions depended on directors who were alleged to have breached their duties, judges reasoned that directors were unlikely to authorise the company to bring proceedings against themselves.[837]

[836] This total includes four cases in which there were insufficient details to determine whether the question of leave was decided on the basis of common law or statute.
[837] For example, in *Re Gandangara Services Ltd* [2014] NSWSC 546 it was found to be probable that the company would not bring proceedings as there were no directors who would authorise the proceedings.

An example of this is seen in *Re Akierman Holdings Pty Ltd.*[838] The applicant in this case had informed the company of her intention to seek leave to bring a derivative action for breach of directors' duties and outlined her complaints. The company did not commence proceedings over a considerable period. The court found that the sole director, who denied the allegations, had no reason to cause the company to commence proceedings for breach of directors' duties. Accordingly, the court was satisfied that it was probable that the company would not bring proceedings. Likewise, where the directors were likely to be deadlocked as to whether proceedings should be brought, the courts have found that it was probable the company would not bring proceedings.[839] In contrast, the court was not satisfied that the company would not bring proceedings in *Cody v Live Board Holdings*.[840] Due to a recent judgment, the applicant was in a position to gain control of the board and bring misfeasance proceedings against former directors. Leave to bring a derivative action was refused as a consequence.

The second criterion considered by the Australian courts for the granting of leave to bring derivative actions relates to whether the applicant is acting in good faith. In determining whether the requirement of good faith is satisfied, case law suggests that two inter-related factors are examined. The first relates to whether the applicant honestly believes that 'a good cause of action exists and has a reasonable prospect of success.'[841] The second factor is whether the applicants are acting for a collateral purpose.[842] The authorities clearly state that the courts should readily draw an inference of good faith where the applicant has a substantial economic interest in the company and would indirectly benefit from any recovery by the company as a result of the proceedings.[843]

The requirement of good faith is relatively easy to satisfy where the applicant holds more than a token shareholding and the derivative action seeks recovery of property which would increase the value of the applicant's shares.[844] Where the applicant has clearly devoted significant efforts in applying for leave to bring a derivative action, this has been found to support the court's finding of good faith.[845] In *Re Dynamic Industries Pty Ltd*, it was found that the applicant's efforts and expense incurred in obtaining access to the books of the company, and undertaking to indemnify the company in respect of the costs of proceedings, supported the finding that the proceedings were brought in good faith.[846]

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[838] [2015] NSWSC 1395.
[839] *Suh v Cho* [2013] VSC 491; *Australian Mortgage & Finance Company Pty Ltd as trustee of the Melnikoff Family Trust v Rome Euro Windows Pty Ltd as trustee of Rome Euro Windows Unit Trust* [2014] NSWSC 996.
[840] [2014] NSWSC 820.
[841] *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313, [36]; *South Johnstone Mill Ltd v Dennis* (2007) 163 FCR 343, [64].
[842] Ibid.
[843] *Re Imperium Projects Pty Ltd* [2015] NSWSC 16, [11].
[844] *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313, [38].
[845] *Re Akierman Holdings Pty Ltd* [2015] NSWSC 1395. In contrast, a history of the applicants' allegations of dishonesty against the defendant, many of which were without substance, led to the court questioning whether the applicants lacked good faith in *Jensen v RQYS Marina Ltd* [2014] QSC 243. Nevertheless, the judge noted that a finding that the applicants were not acting in good faith was serious and as the application was dismissed on other grounds, it was unnecessary to conclude whether the requirement of good faith was met; *Jensen v RQYS Marina Ltd* [2014] QSC 243, [140].
[846] *Re Dynamic Industries Pty Ltd* [2014] VSC 101, [95].

The third matter for the granting of leave is whether it is in the best interest of the company that leave be granted. Case law indicates that there is a high threshold to be met in regard to this matter.[847] Factors considered by the courts in relation to this point include the prospects of success, likely costs, likely recovery if the action succeeds and likely consequences if the action is unsuccessful.[848] The courts also consider whether the company would be prejudiced by being exposed to the cost and expense of litigation and risks of an adverse cost order.

The grant of leave is often conditional on the applicant indemnifying the company for costs.[849] This is seen as an important means of alleviating risks which might otherwise flow to the company from the proceedings. For example, in *Suh v Cho*, leave was granted on condition that the applicant was responsible for costs ordered against the company.[850] The applicant further undertook not to seek any contribution or indemnity from the company in respect of the costs of the proceedings. Derham AsJ considered that the claims resulted from the dispute between the applicant and defendant. Accordingly, it was appropriate that the risk of failure should be borne by those advancing the claims.[851] Conversely, the lack of an adequate indemnity to safeguard the company against exposure to the costs of proceedings reduces the likelihood of leave being granted.[852] In *Cooper v Myrtace Consulting Pty Ltd*, the applicant did not have the financial capacity to provide an adequate indemnity.[853] The court took this into account in refusing leave on grounds that it was not satisfied that the proceedings were in the best interest of the company.

Prospects of success are also relevant to the question of whether the proceedings are in the company's best interest.[854] In *Re Fishinthenet Investments Pty Ltd and Coastal Waters Seafood Pty Ltd*,[855] the prospect of significant recovery was so slight that the proceedings were held not to be in the company's interest. Although one of the proposed claims was potentially in the company's interests and seriously arguable, the court observed that an indemnity for costs was essential as the cost of the proceedings could well exceed the amount potentially recovered. Due to the lack of evidence in support of the applicant's capacity to provide an adequate indemnity, leave to bring a derivative action was refused.

Fourthly, the courts assess whether there is a serious question to be tried. The test applied is similar to the test used in relation to interlocutory injunctions.[856] This involves ascertaining whether the applicant has established a prima facie case. More specifically, there should be

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[847] *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313; *Re Dynamic Industries Pty Ltd* [2014] VSC 101, [96].
[848] *Re Gladstone Pacific Nickel Ltd* [2011] NSWSC 1235; *Huang v Wang* [2015] NSWSC 510.
[849] *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480, [29].
[850] [2013] VSC 491, [5].
[851] Ibid [55].
[852] *Jensen v RQYS Marina Ltd* [2014] QSC 243; *Re Sundara Pty Ltd* [2015] NSWSC 1694.
[853] [2014] FCA 480.
[854] In *Australian Mortgage & Finance Company Pty Ltd as trustee of the Melnikoff Family Trust v Rome Euro Windows Pty Ltd as trustee of Rome Euro Windows Unit Trust* [2014] NSWSC 99, the proceedings were likely to be struck out, the applicant having failed to plead material facts. Consequently, the court refused leave as it was not satisfied that the proceedings would be in the best interest of the company; [2014] NSWSC 99, 6.
[855] [2014] NSWSC 260.
[856] *South Johnstone Mill Ltd v Dennis* (2007) 163 FCR 343, [78].

sufficient likelihood of success at the trial.[857] In this regard, there is some overlap with the prospects of success considered in relation to the question of whether the proceedings are in the best interest of the company. In addition, there is a need to consider whether the inconvenience or injury that the applicant would suffer, as a result of leave being refused, would outweigh the injury which the defendant would suffer if leave was granted.[858]

Fifthly, the courts consider whether adequate notice has been given to the company of the intention to apply for leave and of the reasons for the application. A default notice period of at least 14 days is specified in s 237(2)(e)(i), although the legislation allows for some flexibility in this matter. The courts are permitted to grant leave in appropriate cases despite 14 days' notice not having been given. The cases reflect a pragmatic approach by the courts on the issue of notice.

Shareholders who apply for leave to bring derivative actions may also seek orders to allow them to inspect the books of the company. The courts may grant orders authorising shareholders to inspect the company's books if satisfied that the applicants are acting in good faith and the inspections are conducted for purposes connected with the application for leave.[859]

5.4.3 *Comparison with Malaysian Cases*

As mentioned at the start of this chapter, one of the aims of this chapter is to compare the manner in which Malaysian courts have applied the statutory derivative action with the Australian equivalent. The comparison is anticipated to provide insights as to whether the approach of Malaysian courts in granting leave to bring derivative actions is similar to other common law countries. This, in turn, contributes to a better understanding of the comparative effectiveness of Malaysian shareholder protection in providing shareholders redress for breaches of their rights.

In summary, Malaysian cases often reflect a narrow and strict application of the statutory derivative action, citing *Celcom* as authority for the restrictive interpretation. In contrast, the examination of Australian cases reveals a more liberal and pragmatic approach, which translates to a higher incidence of leave to bring derivative actions being granted than is seen in Malaysian cases.

At first glance, when the criteria for the granting of leave in the Malaysian and Australian statutes are compared, the Australian requirements are clearly more extensive than their Malaysian counterparts. However, examination of judicial approaches reveals that, in practice, the Malaysian courts have imported several additional criteria. As a result, when considering whether to grant leave to bring derivative actions under ss 181A and 181B of the *Companies Act 1965*, the Malaysian courts consider similar criteria to the express requirements of ss 236

[857] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [65]; *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480, [35].
[858] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.
[859] *Corporations Act 2001* (Cth) s 247A.

and 237 of the *Corporations Act 2001* (Cth). Both Malaysian and Australian statutes require the courts to be satisfied that the applicants are acting in good faith and that the grant of leave would be in the best interest of the company. Likewise, adequate notice should have been given to the company of the applicants' intentions to apply for leave and of the reasons for the application. In Malaysia, 30 days' notice is required, while the Australian default notice period is 14 days.[860]

The Australian statute specifies two additional criteria. The first concerns the probability that the company itself will not bring proceedings, while the second requires that there should be a serious question to be tried. Although these are not expressly set out in the Malaysian statute, the courts have imposed similar requirements on applicants, reasoning that it would not be in the interest of the company to grant leave if these criteria are not satisfied. For instance, in *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd*,[861] leave was refused as the court was not satisfied that the company would not bring proceedings.

As for the criterion that there is a serious question to be tried, the Australian courts have examined whether the applicant has established a prima facie case, and whether there is sufficient likelihood of success at the trial.[862] These considerations have been taken into account by Malaysian courts in assessing the best interest of the company. In *Abdul Rahim Suleiman v Faridah Md Lazim,*[863] leave was refused as the derivative action was deemed to have no reasonable prospect of success. Consequently, the court held that it was not prima facie in the best interest of the company that leave should be granted. Likewise, in the case of *Lee Suan Ngee v On Network Sdn Bhd*,[864] leave to bring a derivative action was deemed not to be in the best interest of the company due to the lack of evidence.

Having established that the Malaysian and Australian courts have applied similar criteria in considering whether to grant leave to bring derivative actions, the discussion now turns to the application of these principles to the facts of cases. The analysis indicates that there are significant differences in judicial approaches between the two jurisdictions. In summary, the Australian courts have adopted a pragmatic approach and demonstrated a greater propensity towards positive findings that specific criteria have been met. In particular, the Australian courts have applied a lower threshold for the criterion of good faith. The Australian courts have also readily drawn inferences from surrounding circumstances that the requisite criteria of good faith, and the probability that the company itself would not bring proceedings, have been met.[865] The Malaysian courts, on the other hand, have often emphasised the need for a restrictive interpretation of the statutory derivative action. The stricter approach to the requirements for the granting of leave is seen in the reiteration of the principle that 'leave

[860] *Corporations Act 2001* (Cth) s 237(2)(e)(i).
[861] [2014] 1 LNS 1770.
[862] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [65]; *Cooper v Myrtace Consulting Pty Ltd* [2014] FCA 480, [35].
[863] [2015] 1 LNS 313.
[864] [2013] 1 LNS 506.
[865] *Re Dynamic Industries Pty Ltd* [2014] VSC 101; *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313.

should not be given lightly'.[866] While Malaysian courts have adhered strictly to formal notice and procedural requirements, this trend is not seen in Australian cases. The contrasting position of Australian and Malaysian courts is also apparent in applications for retrospective leave[867] to bring derivative actions. A final observation concerns the courts' power to grant applicants access to the company's books. While orders for access to the company' records have been made in a number of Australian cases, Malaysian cases demonstrate limited use of these powers. These findings are examined in below.

One of the significant differences in the approaches of the Malaysian and Australian courts centres on the divergent ways in which both courts have interpreted and applied the case of *Swansson.*[868] This case is regarded as authoritative in both jurisdictions, setting out the principles to be applied in granting leave under the statutory derivative action. In Malaysia, this case has been cited as the basis for the proposition that leave to bring derivative actions should not be granted lightly. As noted above, this may be attributed to the influential Malaysian Court of Appeal decision in *Celcom (Malaysia) Berhad v Mohd Shuaib Ishak* ('*Celcom*')[869] which is frequently referred to by Malaysian courts.[870]

Notably, the decision in *Swansson* did not impose a single standard across all the criteria specified by statute for the granting of leave. Instead, *Swansson* and other Australian cases have maintained a clear distinction between the lower threshold applicable to the criterion of good faith, and the higher threshold required of the criteria that the grant of leave should be in the interest of the company and whether there is a serious question to be tried.[871] Accordingly, Australian cases have consistently asserted that requirement of good faith is relatively easy to satisfy.[872] In contrast, Malaysian cases have cited *Swansson* as authority for an overarching restrictive approach, without differentiating the lower threshold for the criterion of good faith.[873] The emphasis in *Swansson* on the relative ease with which applicants may satisfy the requirement of good faith is absent from the Malaysian cases.

As noted above, Australian cases reflect a more liberal judicial approach towards findings of good faith, consistently affirming that the requirement of good faith is satisfied where the applicant holds more than a token shareholding and the derivative action seeks recovery of property which would increase the value of the applicant's shares.[874] Inferences of good faith

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[866] *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313; *Lim Aik Chin v Hong Leong Bank Bhd* [2015] 8 CLJ 755.
[867] Where parties have commenced proceedings but have omitted to apply for leave to bring derivative proceedings, leave may be applied for retrospectively to rectify the omission.
[868] (2002) 42 ACSR 313.
[869] [2010] 7 CLJ 808.
[870] *Lim Aik Chin v Hong Leong Bank Bhd* [2015] 8 CLJ 755; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313; *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd* [2015] 10 CLJ 599; *Lembaga Tabung Angkatan Tentera v Prime Utilities Bhd* [2013] 8 CLJ 38.
[871] *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313; *Re Imperium Projects Pty Ltd* [2015] NSWSC 16; *Re Dynamic Industries Pty Ltd* [2014] VSC 101.
[872] Ibid.
[873] *Celcom (Malaysia) Berhad v Mohd Shuaib Ishak* [2010] 7 CLJ 808; *Abdul Rahim Suleiman v Faridah Md Lazim* [2015] 1 LNS 313.
[874] *Re Imperium Projects Pty Ltd* [2015] NSWSC 16, [11]; *Swansson v R A Pratt Properties Pty Ltd* (2002) 42 ACSR 313; *Re Dynamic Industries Pty Ltd* [2014] VSC 101.

have also been made where applicants have devoted significant efforts in applying for leave.[875] The Malaysian cases often provided few details on the courts' reasoning and the facts on which the courts' based their decisions as to whether the applicants were acting in good faith. While limitations in the available information do not permit a comparison, more generally, of the basis on which Malaysian and Australian courts determined whether the applicants were acting in good faith, the differences in approaches between Australian and Malaysian courts is evident in situations where there was a history of animosity between the parties.

In the Malaysian case of *Daljit Singh*,[876] the court held that the applicant lacked good faith, noting that there had been ongoing disputes between the parties for some years. Abu Backer JC reasoned that the application for leave was a 'collateral step' in the dispute between the parties.[877] His Honour noted that the applicant had delayed in seeking leave to bring derivative proceedings and was reluctant to hear the application in the absence of the defendant who had not entered an appearance. In finding that the applicant lacked good faith, the judge emphasised the parties' acrimonious relationship. However, His Honour did not elaborate why the application for leave was deemed to be a collateral step in the dispute between the parties. The applicant was a shareholder and director of the defendant company and was seeking to bring a derivative action to recover monies owed to the defendant company. As a shareholder and director, he would have stood to benefit from the proceedings indirectly had they been successful. As noted above, the Australian authorities state that the Australian courts should readily draw an inference of good faith where the applicant holds more than a token shareholding and the derivative action seeks recovery of property which would increase the value of the applicant's shares. If the Australian approach had been applied in *Daljit Singh*, it is likely that the courts would have drawn an inference of good faith. In addition, the facts of the case indicated that the board of directors was deadlocked and paralysed, which led to the company not bringing proceedings for the recovery of monies owed.

A similar situation arose in the Australian case of *Ragless v IPA Holdings Pty Ltd (in liq)*[878] where the court found that the plaintiff, who was seeking leave to bring a derivative action with the intention of breaking the deadlock between the parties, was acting in good faith. If successful, the proceedings would have added value to the plaintiff's shares. The court also considered that the plaintiff honestly believed he had a good cause of action and reasonable prospects of success. These matters were not mentioned in the judgment handed down in *Daljit Singh*.[879]

The Australian cases indicate that the Australian courts are more willing to find that the requirement of good faith is satisfied in situations where relationships among shareholders are acrimonious. Australian case law has found that the 'existence of personal animosity towards

[875] *Borczyk v Van Rooy* [2014] VSC 101.
[876] [2010] 1 LNS 1631.
[877] Ibid [18].
[878] [2008] SASC 90. This case was not included in the 45 Australian cases discussed in relation to Table 15 as a breach of directors' duties was not alleged.
[879] Malaysian courts have adopted the principle in *Swansson* that in assessing good faith, the courts should consider whether the applicants honestly believed they had a good cause of action and reasonable prospects of success; *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808, [8].

other shareholders, or between the shareholders in dispute, does not necessarily involve a lack of good faith.'[880] While the parties in the Australian case of *Suh v Cho* had ongoing disputes for several years, the court found the requisite good faith on grounds that 'Mr Suh has a real interest in the company recovering moneys from Mr Cho' and 'Mr Suh would suffer a real and substantive injury if a derivative action were not permitted and the … injury is connected with the status of Mr Suh as a shareholder and director of the company.'[881]

Another essential criterion for the granting of leave under the Australian statutory derivative action is the probability that the company itself will not bring proceedings. In several Malaysian cases, the courts refused leave on grounds that the applicants had not shown wrongdoer control which prevented the company itself from bringing proceedings, hence imposing an equivalent consideration on Malaysian applicants.[882] The Australian cases reflect a greater willingness to find that the criterion has been satisfied. In several cases, the Australian courts drew inferences from the facts that the company would not bring proceedings.[883] These included situations where the director complained of was supported by the majority shareholder;[884] where the company was denying that it was in the best interest of the company that leave be granted;[885] or where the directors of the company were informed of the applicant's complaints and a substantial period had elapsed without proceedings being brought by the company against the directors for breaches of their duties.[886] Likewise, where the directors were likely to be deadlocked as to whether proceedings should be brought, the courts found that it was probable the company would not bring proceedings.[887]

In contrast, despite the deadlock in the company's decision-making structures in *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd*, the Malaysian Court of Appeal refused leave on grounds that the internal processes of the company had not been exhausted. The court stated that they preferred to have a clear resolution of the company on the matter.[888] The facts indicated that at various times the parties had sought without success to obtain a resolution of the board of directors on the issue of the proceedings for which leave to bring a derivative action was sought. Efforts had also been made to obtain a resolution of shareholders at an extraordinary general meeting without success. Despite the evidence of the deadlock in the company's decision-making structures, the Court of Appeal was insistent on formal procedures being met, regardless of whether this was achievable in the circumstances.

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[880] *Suh v Cho* [2013] VSC 491, [35] citing *Pottie v Dunkley* [2011] NSWSC 166, [58].
[881] [2013] VSC 491, [42-3].
[882] *Ho Hup Construction Company Bhd v Bukit Jalil Development Sdn Bhd* [2012] 1 CLJ 649; *Leow Yin Choon v Tang Fook Siong* [2012] 1 LNS 780; *Shamsul bin Saad v Tengku Dato Ibrahim Petra* [2010] 4 MLJ 37; *Suhaimi Ibrahim v Hi-Summit Construction Sdn Bhd* [2014] 1 LNS 1770.
[883] *Re Gandangara Services Ltd* [2014] NSWSC 546.
[884] *Re Dynamic Industries Pty Ltd* [2014] VSC 101.
[885] *McLaughlin v Dungowan Manly Pty Ltd* [2010] NSWSC 187.
[886] *Re Wan Ze Property Development (Aust) Pty Ltd* [2012] NSWSC 722, [12].
[887] Ibid; *Suh v Cho* [2013] VSC 491; *Australian Mortgage & Finance Company Pty Ltd as trustee of the Melnikoff Family Trust v Rome Euro Windows Pty Ltd as trustee of Rome Euro Windows Unit Trust* [2014] NSWSC 996.
[888] [2014] 1 LNS 1770.

The pragmatic and more liberal approach of the Australian courts is also seen in relation to notice requirements. This may be attributed to the Australian statutory provision which allows the court discretion to waive the requirement of 14 days' notice.[889] The Australian decision of *Suh v Cho*[890] demonstrates that the courts are prepared to consider that notice requirements have been satisfied when the underlying objectives are fulfilled. In *Suh v Cho*, the parties had been in proceedings for three years and, as such, 14 days' notice was found to be unnecessary. Similarly, in *Re Gandangara Services Ltd*, leave was granted due to the urgency of the circumstances despite notice requirements not being satisfied.[891]

Malaysian courts, on the other hand, have demonstrated inflexibility toward the fulfilment of formal notice requirements. The decision in *Abdul Rahim Suleiman v Faridah Md Lazim* indicates that the court imposed stricter conditions than the requirements expressly set out in the statute.[892] The statutory requirement stated that notice should be given to the *directors*. The court rejected the notice given to directors as inadequate, insisting that notice should have been given to *each of the directors individually*. As observed above, there was no express requirement that the directors should be notified individually. Notice requirements were also strictly interpreted in *Lim Aik Chin v Hong Leong Bank Bhd*.[893]

The Malaysian cases also reflect a stringent approach to formal procedural requirements which is not seen in Australian cases. In *Koh Jui Hiong v Ki Tak Sang*,[894] the company was not joined as a nominal respondent. Consequently, the award of damages was set aside due to the procedural defects in the derivative proceedings.[895] Likewise, reliance on the restrictive approach in *Celcom* has arguably led to divergent positions on whether leave to bring derivative actions may be granted retrospectively. Leave has been granted retrospectively in several Australian cases.[896] In contrast, Malaysian courts have refused to grant leave retrospectively,

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[889] *Corporations Act 2001* (Cth) s 237(2)(e)(ii).
[890] *Suh v Cho* [2013] VSC 491.
[891] *Re Gandangara Services Ltd* [2014] NSWSC 546, [29].
[892] [2015] 1 LNS 313. The judge argued that s 181B(4)(b) of the *Companies Act 1965* imposes a higher threshold than Canadian and Singaporean statutory derivative actions, which use the phrase 'in the interest' of the company as opposed to the Malaysian wording 'in the best interest' of the company; [2015] 1 LNS 313 [80].
[893] [2015] 8 CLJ 755.
[894] [2014] 2 CLJ 401.
[895] This case was brought under s 181A of the *Companies Act 1965*. However, the emphasis on technicalities is also seen in several cases in which the decisions whether to grant leave to bring derivative actions were made under common law. For example, in *Krishnasamy G B Vatchelu v Eng Ah Phoo @ Ng Ah Phoo* [2013] 1 LNS 1160, the application was dismissed on the ground that the plaintiff had brought the proceedings in his own name without indicating that he was bringing the action in a representative capacity. It was clear from the pleadings that the proceedings were intended to be a derivative action for the benefit of the company. However, this was held to be insufficient to cure the defect in the procedural requirements. Likewise, in *Lim Peak Suan Sdn Bhd v Sungei Bongkah Estate Sdn Bhd* [2009] 2 CLJ 719, failure to show in the title that the action was brought in a representative capacity contributed to the decision not to grant leave. Nevertheless, in this case, there was also a lack of evidence and arguably no cause of action. These were likely to have been more determinative of the outcome than the procedural requirements.
[896] *Australian Mortgage & Finance Company Pty Ltd as trustee of the Melnikoff Family Trust v Rome Euro Windows Pty Ltd as trustee of Rome Euro Windows Unit Trust* [2014] NSWSC 996; *Power v Ekstein* [2010] NSWSC 137; *Suh v Cho* [2013] VSC 491.

reasoning on the basis of *Celcom* that ss 181A and 181B of the *Companies Act 1965* should be construed strictly.[897]

The discussion above indicates that across a number of criteria relevant to the granting of leave, the Australian courts adopted a broader approach than the Malaysian courts. The Australian courts demonstrated greater willingness to find that the requirements for leave were fulfilled. This arguably provides some explanation for the higher rate of success in Australian applicants obtaining leave to bring derivative actions, as indicated by the success of 58 per cent of Australian statutory derivative actions in Table 15 compared with the success of 25 per cent of Malaysian statutory derivative actions in Table 9 above.

One further factor that is likely to have contributed to a higher incidence of leave being granted in Australia was the more extensive use of the courts' power to order access to the company's books. As earlier noted, s 181E(1)(c) of the *Companies Act 1965* and s 247A of the *Corporations Act 2001* (Cth) provide the courts the power to order that applicants should be granted access to the company's books.[898] The underlying objective of this power is to assist shareholders who would otherwise be unable to access information on the company's internal management in support of their claims.[899] The applicant's ability to show that there is sufficient likelihood of success at the trial is an essential condition to the granting of leave, and the threshold for this criterion is fairly high. Consequently, access to the company's records has a significant bearing on the applicants' capacity to obtain evidence, which in turn affects their ability to satisfy essential criteria for obtaining leave.

There were no Malaysian cases involving allegations that directors' duties were breached in which orders for access to the company's books were granted, or even discussed. However, orders to allow inspection of the company's books were granted in one case involving an application for leave to bring proceedings on behalf of the company against a third party.[900] In contrast with the minimal use of this power in Malaysia, Australian cases reflect a more extensive use of the courts' power to order access to the company's books. Orders for inspection of the company's books were granted under s 247A of the *Corporations Act 2001* (Cth) in *Re Style Ltd; Merim Pty Ltd v Style Ltd*.[901] The applicant sought the orders to facilitate investigation as to whether the directors and officers of the company had exercised their powers reasonably, in good faith and for proper purposes. Similarly in *Hanks v Admiralty Resources NL*, the applicant sought orders of inspection to facilitate determination of whether to apply for leave to commence a derivative action against the directors of the company.[902] Orders for inspection of the company's books were also granted in *Smartec Capital Pty Ltd v Centro*

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[897] *Lim Aik Chin v Hong Leong Bank Bhd* [2015] 8 CLJ 755, [26].

[898] Section 247A of the *Corporations Act 2001* (Cth) provides that the courts may only make the orders if satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. Section 181E(1)(c) of the *Companies Act 1965* does not specify any particular criteria for the granting of orders of inspection, stating broadly that 'the Court may make such orders as it thinks appropriate'.

[899] The purposes of the reforms are discussed in more detail in Chapter 3 at p 81.

[900] *Ng Hoy Keong v Chua Choon Yang* [2011] 4 CLJ 545.

[901] [2009] FCA 314.

[902] [2011] FCA 891. The court authorised the applicant to inspect the company's books subject to the condition that the applicant should not disclose information obtained to anyone except legal advisers or others as necessary to decide whether to apply for leave to bring a derivative action.

Properties Ltd[903] and *London City Equities Ltd v Penrice Soda Holdings Ltd.*[904] Orders for inspection of the company's assets, equipment, documents and financial records were allowed in *Suh v Cho,* a case in which leave was granted to bring derivative proceedings.[905]

In short, the Malaysian courts' narrow interpretation of the statutory derivative action, and the lack of use of the courts' powers to order costs and access to information, arguably contributed to the low rate of success in applicants obtaining leave to bring derivative actions. Another possible factor which may have affected the levels of success in obtaining leave is the degree of risk lawyers and litigants were prepared to take in instituting proceedings. Where lawyers were more cautious or selective in instituting proceedings, allowing cases to proceed to litigation only when there were considerably good prospects of success, this is likely to have engendered higher rates of success.

Several other factors may have impeded the effectiveness of the Malaysian statutory derivative action in facilitating shareholders' access to redress. In particular, the co-existence of the common law action in Malaysia appears to have resulted in less reliance on the statutory derivative action. The study indicates that many applications were decided on the basis of the common law derivative action despite the availability of the statutory derivative action. While analysis of the judicial decisions does not reveal the reasons for this phenomenon, Associate Professor Salim suggests that the failure to abolish the common law derivative action may have led to a degree of confusion regarding the benefits of the statutory derivative action. In examining one of the cases decided under common law, Salim posits that the plaintiffs may have opted to bring a common law derivative action instead of a statutory derivative action on the misconception that the former did not require leave of the court.[906] Nevertheless, locus standi must be determined as a preliminary hurdle under common law. Consequently, Salim argues that in the interest of clarity, the common law derivative action should be abolished. Following the introduction of the *Companies Act 2016* which came into effect on 31 January 2017, common law derivative actions will no longer be permitted in Malaysia.

More broadly, a number of practical considerations also constrain the effectiveness of the statutory derivative action as a means of improving shareholders' access to redress. These include the cost of litigation and lack of incentives, in that the benefits of a successful action accrue to the company rather than the applicant.[907] Consequently, it is often easier for minority shareholders to sell their shares in the company than to engage in litigation to enforce their rights.[908] In such situations, investigations and proceedings instituted by the regulators potentially bridges the gap in enforcement initiatives.

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[903] [2011] NSWSC 495.
[904] [2011] FCA 674.
[905] [2013] VSC 491. Nevertheless, the orders for inspection were granted under s 55 of the *Civil Procedure Act 2010* (Vic) rather than the *Corporations Act 2001* (Cth).
[906] Mohammad Rizal Salim, 'Whither the Common Law Derivative Action: A Malaysian Case Study' (2016) 27 *International Company and Commercial Law Review* 14.
[907] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 31.
[908] Sulaiman, 'Encouraging Shareholders' Participation', above n 664.

5.5 PUBLIC ENFORCEMENT

The survey of reports and scholarly literature earlier in the chapter indicates that both private and public enforcement of Malaysian shareholder protection are not very effective. Further examination of the private enforcement of directors' duties, through an analysis of judicial decisions, highlights the challenges and limitations of private enforcement particularly for minority shareholders. In view of the limitations of private enforcement of shareholder protection, public enforcement of the regulations is crucial.

The regulators responsible for the public enforcement of shareholder protection regulations are less constrained by some of the challenges faced by private litigants. Regulators often have powers of investigation which give them access to companies' internal management records, while the cost of enforcement action is borne by the public purse. The regulators are well-positioned to attempt to strengthen compliance with shareholder protection regulations through public enforcement.[909] Enforcement action taken by the regulators against directors for misconduct is posited to have a deterrent effect which, in turn, strengthens the effective implementation of regulations aimed at safeguarding shareholders' interests.

Section 5.5.1 examines the public enforcement of shareholder protection provisions by Malaysian regulators. Public enforcement by Australian regulators is then described in section 5.5.2 and compared with the Malaysian position in section 5.5.3.

5.5.1 *Public Enforcement of Shareholder Protection Provisions in Malaysia*

The main regulator responsible for the public enforcement of shareholder protection regulations in Malaysia is the Companies Commission of Malaysia ('Companies Commission'). The Companies Commission's responsibilities include enforcement of the *Companies Act 1965*[910] which is the source of many of the shareholder protection regulations. This section details the enforcement action taken by the Companies Commission in relation to breaches of shareholder protection regulations. The analysis examines the Commission's recent annual reports and media reports. In addition, this section canvasses enforcement action taken by Bursa Malaysia in relation to breaches of the *Listing Rules*, which are the source of some shareholder protection regulations for listed companies, and briefly examines the role of the Securities Commission in public enforcement. In summary, the analysis finds that the Malaysian regulators have had an active role in enforcing procedural safeguards in the form of disclosure requirements, such as the lodgement of annual returns and financial statements. However, enforcement of substantive shareholder protection regulations, such as directors' duties, is limited.

As the primary regulator responsible for the public enforcement of shareholder protection regulations, the Companies Commission's mandate includes ensuring that 'all corporate and business activities are conducted in accordance with established norms of good corporate

[909] See text to n 542 to 545.
[910] *Companies Commission of Malaysia Act 2001* s 17. The Companies Commission's responsibilities extend to the public enforcement of the *Companies Act 2016*.

governance.'[911] It monitors compliance with the provisions of the *Companies Act 1965* through the physical inspections of companies' records and examination of the Companies Commission's database records. The Companies Commission enforces breaches of company legislation through administrative action such as issuing compound notices and imposing fines. It also institutes criminal proceedings against companies and directors, at times through the public prosecutor. No civil penalties are available for breaches of directors' duties under Malaysian company legislation. Hence, the Companies Commission is limited to the more onerous standard of criminal proceedings in order to enforce breaches of directors' duties.

Examination of the enforcement statistics released by the Commission indicate that enforcement of procedural safeguards such as lodging annual returns, holding annual general meetings or tabling accounts is robust. Nevertheless, the Companies Commission's enforcement of directors' duties and other substantive provisions that are aimed at protecting shareholders from expropriation of corporate property appears to be limited.[912] Statistics indicate that few legal proceedings have been instituted and fewer criminal convictions have been obtained for breaches of directors' duties.

In 2015, the Companies Commission registered 10 473 cases in the courts for breaches of company law, most of which were in relation to procedural safeguards such as the lodgement of annual returns.[913] The *Annual Report* mentioned only one prosecution involving a breach of directors' duties. In this case, the director was convicted for improper use of his position.[914] The Commission conducted investigations into 10 instances of alleged breaches of directors' duties[915] but they do not appear to have been followed by enforcement proceedings, apart from the one prosecution mentioned above. There are currently no statistics available in relation to enforcement proceedings by the Companies Commission in 2016. However, media reports released by the Commission indicate that proceedings were instituted against the directors of two companies for breaches of duties during the year.[916]

Interestingly, there has not been any investigation by the Companies Commission into the affairs of the embattled 1MDB despite international inquiries into its money laundering activities which have resulted in criminal sanctions in Singapore.[917] Criminal activity of this

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[911] Ibid.
[912] See text to n 915 and n 921.
[913] Companies Commission of Malaysia, *Annual Report 2015* (2015), 242.
[914] The director was sentenced to 17 years' imprisonment; Ibid.
[915] These involved alleged breaches of s 132 of the *Companies Act 1965*. Eight investigations were conducted in relation to the failure to disclose conflicts of interests under s 131 of the *Companies Act 1965*. However, the *Annual Report* did not state whether these were the same cases as the alleged breaches of s 132; Ibid 240.
[916] Suruhanjaya Syarikat Malaysia, 'Dua Bekas Pengarah Syarikat Protasco Bhd Dituduh Gagal Mendedahkan Kepentingan Dalam Perjanjian Beli Saham Berjumlah USD22 Juta dengan Syarikat Asing' (Press release, 11 July 2016) <https://www.ssm.com.my/en/press-release/dua-bekas-pengarah-syarikat-protasco-bhd-dituduh-gagal-mendedahkan-kepentingan-dalam>; Suruhanjaya Syarikat Malaysia, 'Pengarah Syarikat Didakwa Gagal Mendapatkan Kebenaran Mesyuarat Agung Tahunan Syarikat untuk Menggunakan Kedudukan Sebagai Pengarah bagi Memindahkam Wang kepada Perniagaan Sendiri' (Press release, 24 November 2016) <https://www.ssm.com.my/en/press-release/pengarah-syarikat-didakwa-gagal-mendapatkan-kebenaran-mesyuarat-agung-tahunan-syarikat>.
[917] Grace Leong, 'Ex-BSI Banker Yvonne Seah Gets Jail Term, Fine in Singapore's 1MDB Probe' The *Straits Times* (Singapore), 16 December 2016.

nature would arguably entail breaches by directors of their duties to act in the interest of the company. Despite widespread public and international concern over the governance of the high-profile Malaysian company, Malaysian regulators have been conspicuously silent in relation to the 1MDB debacle. Statistics and media releases suggest that the Companies Commission has been less active in enforcing shareholder protection provisions over the past 2 years compared with previous years.[918]

For instance in 2014, the Commission instituted a significantly higher number of court proceedings in relation to non-compliance with company law, with a total of 30 621 cases filed in the courts.[919] Most of these were procedural matters involving failures to lodge annual return, hold annual general meetings or to table accounts at the annual general meeting. Other breaches of company legislation enforced included false statements made in documents lodged with the Commission.[920] Enforcement proceedings in relation to breaches of directors' duties comprised slightly over 2 per cent of the court proceedings instituted by the Companies Commission in 2014.[921]

Statistics released by the Companies Commission indicate that in 2014, it received 84 complaints relating to inappropriate conduct by directors.[922] It also received 129 complaints relating to managerial misconduct involving 'monetary or material claims, internal affairs and procedures of meetings'.[923] The Companies Commission conducted investigations into 37 alleged breaches of fiduciary duties and 10 allegations of failure to disclose conflicts of interest.[924] Enforcement proceedings were instituted by the Companies Commission in relation to seven instances of breaches of directors' duties in 2014.

Press releases by the Companies Commission in 2014 described three criminal cases for breaches of s 132 of the *Companies Act 1965*.[925] The offences included obtaining a personal gain from the sale of corporate assets without consent of the general meeting[926] and engaging in competition with the company.[927] In addition, two directors appealed their convictions for

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[918] In its *Annual Report 2015*, the Companies Commission noted that it had instituted 66 percent fewer enforcement proceedings in 2015 compared with 2014; Companies Commission of Malaysia, *Annual Report 2015*, above n 913, 242.
[919] Companies Commission of Malaysia, *Annual Report 2014* (2014), 218.
[920] These include false information regarding the appointment of directors or in relation to the transfer of shares; Ibid 217.
[921] Ibid 218.
[922] Ibid 205.
[923] Ibid.
[924] Ibid 214.
[925] Companies Commission of Malaysia, 'Four Senior Management of Sime Darby Engineering Charged for Failing to Exercise Their Fiduciary Duties' (Press release,17 April 2014) <https://www.ssm.com.my/en/press-release/four-ex-senior-management-sime-darby-engineering-charged-failing-exercise-their>.
[926] Companies Commission of Malaysia, 'Director of Adegan Satria Sdn Bhd Charged for Breach of Fiduciary Duties Under the *Companies Act 1965*' (Press release, 28 May 2014) <https://www.ssm.com.my/en/press-release/director-adegan-satria-sdn-bhd-charged-breach-fiduciary-duties-under-companies-act>.
[927] Companies Commission of Malaysia, 'Suruhanjaya Syarikat Malaysia (SSM) Charges Director of Sin Lee Marketing Sdn Bhd under the *Companies Act 1965*' (Press release, 24 January 2014) <https://www.ssm.com.my/en/press-release/suruhanjaya-syarikat-malaysia-ssm-charges-director-sin-lee-marketing-sdn-bhd-under>.

breaches of fiduciary duties and failure to disclose their interests in a contract.[928] In its *Annual Report*, the Companies Commission noted that it obtained a total of six convictions in 2014 for breaches of directors' duties.[929] Media reports indicated that all the enforcement proceedings involved private companies, although one of the companies was a subsidiary of a prominent public listed company.[930]

The Companies Commission's tendency to institute enforcement proceedings in relation to procedural safeguards such as the failure to lodge annual returns is consistent with trends seen in earlier years.[931] Likewise, media reports in 2013 indicated that the proceedings brought against directors for breaches of duties involved private companies.[932] The directors were convicted in three of the cases, with sanctions imposed in the form of fines or imprisonment.[933]

The Companies Commission also enforces provisions of the *Companies Act 1965* through administrative action. Nevertheless, there is no indication that any administrative action was taken in relation to directors' duties. Administrative sanctions have been imposed primarily in relation to obligations to lodge annual returns, financial statements and for failure to hold annual general meetings.[934] As observed in Chapter 3, directors who are bankrupt or have

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[928] On appeal their convictions were upheld but their sentences were revised to higher fines but without imprisonment; Companies Commission of Malaysia, 'The Court of Appeal Dismissed Directors' Appeal Against Conviction for Committing Offences under the *Companies Act 1965*' (Press release, 21 July 2014) <https://www.ssm.com.my/en/press-release/court-appeal-dismissed-directors%E2%80%99-appeal-against-conviction-committing-offences-under>. The sentences imposed on appeal were fines of RM30 000 (AUD10 000) for contravention of s 132(1) of the *Companies Act 1965*, and fines of RM150 000 (AUD50 000) each for contravention of s 131(1) of the *Companies Act 1965*.

[929] Companies Commission of Malaysia, *Annual Report 2014*, above n 919, 215.

[930] See n 925 to 928.

[931] Companies Commission of Malaysia, *Annual Report 2013* (2013), 213; Hassan et al, above n 703.

[932] Companies Commission of Malaysia, 'SSM Obtains Conviction Against Two Company Directors under *Companies Act 1965* for Unauthorised Use of Company's Property' (Press release, 26 September 2013) <http://www.ssm.com.my/en/press-release/ssm-obtains-conviction-against-two-company-directors-under-companies-act-1965>; Companies Commission of Malaysia, 'Director of Ascendex Sdn Bhd Charged for Breach of Fiduciary Duties under the *Companies Act 1965*' (Press release, 4 September 2013) <http://www.ssm.com.my/en/press-release/director-ascendex-sdn-bhd-charged-breach-fiduciary-duties-under-companies-act-1965>; Companies Commission of Malaysia, 'Two Directors Charged for Breach of Fiduciary Duties under the *Companies Act 1965*' (Press release, 28 August 2013) <http://www.ssm.com.my/en/press-release/two-directors-charged-breach-fiduciary-duties-under-companies-act-1965>; 'Two Directors of Cosmic Electrical Engineering Sdn Bhd Charged under the *Companies Act 1965* for Withdrawing Company's Funds Without Approval' (Press release, 26 June 2013) <http://www.ssm.com.my/en/press-release/two-directors-cosmic-electrical-engineering-sdn-bhd-charged-under-companies-act-1965>; Companies Commission of Malaysia, 'A Former Engineering Company Director Charged by SSM for Contravention under the *Companies Act 1965*' (Press release, 29 April 2013) <http://www.ssm.com.my/en/press-release/former-engineering-company-director-charged-ssm-contravention-under-companies-act-1965>; Companies Commission of Malaysia, 'Company Director Jailed and Fined for Unauthorised Allotment of Shares in a Landmark Decision' (Press release, 19 December 2013) <http://www.ssm.com.my/en/press-release/company-director-jailed-and-fined-unauhtorised-allotment-shares-landmark-decision>; Companies Commission of Malaysia, 'A Company Director Convicted for Committing Offences under Section 132(1) and 133A(1)(a) *Companies Act 1965'* (Press release, 13 June 2013) <http://www.ssm.com.my/en/press-release/company-director-convicted-committing-offences-under-section-1321-and-133a1a-companies>.

[933] Criminal proceedings for breaches of directors' duties were reported in *Public Prosecutor v Teh Weng Kuang* [2013] MLJU 1500. However, the judge found that the prosecution failed to establish its case and the charges were dismissed.

[934] In 2014, the Commission issued 116 098 compound notices and 56 628 inquiries to companies which failed to lodge annual returns and financial statements in accordance with s 165(4) of the *Companies Act 1965*; Companies Commission of Malaysia, 'Annual Report 2014', above n 919, 208.

criminal convictions are disqualified from managing companies.[935] In 2014, the Commission issued compliance notices to 135 bankrupt directors and companies related to them, and compliance notices to 27 convicted directors and related companies.[936]

Responsibility for enforcement of the *Listing Rules* falls on Bursa Malaysia. As seen in Chapter 3, the *Listing Rules* contain some significant protections for shareholders of listed companies.[937] Among the most pertinent are the rules on related party transactions.[938] Like the Companies Commission, Bursa Malaysia's enforcement action has focussed primarily on disclosure requirements. A survey of Bursa Malaysia media releases indicates that there were 12 instances of enforcement action against companies for breaches of *Listing Rules* in 2015. Most of the enforcement was in relation to breaches of disclosure requirements, such as inaccuracies or lack of timely disclosure. Sanctions were imposed in the form of public reprimands and in some instances fines were imposed on the directors. There was one instance in which a breach of rules on related party transactions resulted in a public reprimand and the directors were fined.[939] Inadequate internal audit functions attracted a reprimand in one instance and fines were imposed on directors. Similar patterns in enforcement proceedings are seen in media releases in 2014 and 2016.[940] Enforcement centred largely on breaches of continuous disclosure requirements and financial reporting. In 2016, directors of a company were reprimanded and fined for failure to make immediate announcement and to seek shareholder approval in relation to a recurrent related party transaction.[941]

The Securities Commission is responsible primarily for securities regulation, although its mandate under the *Securities Commission Malaysia Act 1993* includes the regulation of listed companies' corporate governance.[942] In addition, the Securities Commission has the power to take enforcement action in relation to breaches of the *Listing Rules*.[943] The Securities Commission's responsibilities extend to the regulation of takeovers and mergers, and its functions include maintaining 'the confidence of investors in the capital market by ensuring adequate protection for such investors'.[944] Its powers extend to insider trading, which may at times overlap with directors' duties. Nevertheless, in practice, the Securities Commission's enforcement action has usually focussed on securities regulation offences such as market

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[935] As discussed in Chapter 3 at p 61, directors are disqualified on grounds of bankruptcy or conviction of criminal offences; *Companies Act 1965* ss 125, 130.
[936] Companies Commission of Malaysia, 'Annual Report 2014', above n 919, 209.
[937] This is discussed in Chapter 3 at pp 71, 76.
[938] The regulations on related party transactions were strengthened following the Asian financial crisis. More details are set out in Chapter 3 from p 76.
[939] Bursa Malaysia, *Enforcement of Listing Requirements* <http://www.bursamalaysia.com/market/regulation/enforcement/enforcement-news/listing-requirements-enforcement-news>.
[940] Almost all of the 17 public reprimands issued in 2014 were in relation to late, inaccurate or misleading disclosures or reports. One reprimand related to the failure to establish adequate internal audit functions; Ibid. Media releases for 2016 are found at Bursa Malaysia, *Media Releases: Public Enforcement on Directors or Individuals – 2016* <http://www.bursamalaysia.com/corporate/media-centre/media-releases#/?year=2016&subject=5&page=1>.
[941] 'Bursa Malaysia Securities Publicly Reprimands Golden Plus Holdings Berhad and Fines 10 Directors' (Media release, 14 April 2016) <http://www.bursamalaysia.com/corporate/media-centre/media-releases/4109>.
[942] *Securities Commission Malaysia Act 1993* s 15(1)(q).
[943] *Capital Markets and Services Act 2007* s 26(6).
[944] *Securities Commission Malaysia Act 1993* s 15(1)(g).

manipulation, insider trading, false or misleading disclosure and unlicensed trading.[945] The only recorded instance in which the Securities Commission took action for breaches of directors' duties was in 2009, when proceedings were brought against a director who misused company funds for his own benefit.[946] Apart from this, enforcement of shareholder protection law has been left primarily to the Companies Commission while responsibility for compliance with the *Listing Rules* lies with Bursa Malaysia.

5.5.2 *Public Enforcement of Shareholder Protection in Australia*

The regulator responsible for the public enforcement of shareholder protection in Australia is the Australian Securities and Investments Committee ('ASIC').[947] Like the Companies Commission of Malaysia, ASIC issues compliance notices and warning letters to companies for non-compliance with regulations such as obligations to lodge financial reports.[948] The Australia Securities Exchange ('ASX') monitors and enforces compliance with the ASX's *Listing Rules*. The ASX can require listed companies to take corrective action and has the power to suspend trading in the securities of companies which refuse to comply with the *Listing Rules*.[949] The ASX is obliged to refer significant breaches of the *Corporations Act 2001* (Cth) to ASIC.[950]

The analysis of ASIC's enforcement action indicates that it has had a substantially more active role in enforcing the regulations on directors' duties than the Malaysian regulators. ASIC has a wider range of enforcement options than is currently available to Malaysian regulators. In addition to criminal proceedings, ASIC enforces breaches of directors' duties through civil penalty proceedings.[951] ASIC's enforcement initiatives extend beyond court-based enforcement proceedings, and include enforceable undertakings[952] and disqualification of

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[945] Securities Commission Malaysia, *Enforcement – Actions* <http://www.sc.com.my/enforcement/actions/>; Securities Commission Malaysia, *The Reporter*, January to August 2015, 18-30. Information on enforcement released by the Securities Commission focuses on specific cases rather than statistics of overall enforcement trends.

[946] The director was ordered to pay RM2.49 million (AUD0.8 million) in restitution to the company; Securities Commission Malaysia, *Corporate Governance Blueprint 2011*, above n 508, 66.

[947] The Commonwealth Director of Public Prosecutions also brings criminal proceedings for breaches of directors' duties.

[948] Australian Securities and Investments Commission, *Corporate Compliance* <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/corporate-compliance/>.

[949] Australian Securities Exchange, *Monitoring and Enforcing Compliance with ASX's Listing Rules* <http://www.asx.com.au/documents/regulation/listing-rules-enforcement.pdf>.

[950] Australian Securities Exchange, *ASX Referrals to ASIC* <http://www.asx.com.au/regulation/compliance/asx-referrals-asic.htm>.

[951] *Corporations Act 2001* (Cth) ss 1317E, 1317G.

[952] Enforceable undertakings are provided to ASIC to carry out specific actions or to refrain from doing particular activities or to pay monies. The undertakings are given as an alternative to ASIC bringing court proceedings or administrative action, and are enforceable in court; Australian Securities and Investments Commission, *Enforceable Undertakings – Markets Disciplinary Panel* <http://asic.gov.au/regulatory-resources/markets/markets-disciplinary-panel/enforceable-undertakings-markets-disciplinary-panel/>. Directors' undertakings not to take part in the management of corporations for a number of years following ASIC's investigations, which revealed breaches of directors' duties are detailed in Carol Taing, 'A Report on Enforceable Undertakings Accepted by ASIC from 1998 to 2008' (Research Report, Centre for Corporations Law and Securities Regulation, Melbourne Law School, 2008) 36. A recent analysis observes that directors' undertakings not to take part in management are often accompanied by a ban from providing financial services;

directors under s 206F of the *Corporations Act 2001* (Cth). Where a company has been wound up and the liquidator lodges a report that directors may have breached duties to the company, ASIC may disqualify the director from managing corporations.[953] From 1 July 2008 to 30 June 2014, ASIC disqualified 394 directors.[954] As seen above, the Companies Commission of Malaysia enforces directors' duties through criminal proceedings, and is substantially more limited in the type of enforcement proceedings it may institute due to the lack of legislative authority to seek civil penalties.

Earlier in the chapter, criticisms levelled against Malaysian regulators for the lack of public enforcement in high profile cases were highlighted. The analysis of enforcement by the Companies Commission Malaysia indicates that most of the proceedings were brought against directors of private companies which were relatively obscure.[955] In contrast, proceedings relating to high profile scandals and corporate collapses feature prominently in Australian public enforcement.[956]

Australian scholars have highlighted the difficulties in procuring criminal convictions for breaches of directors' duties and other corporate offences. Proving breaches beyond reasonable doubt is challenging where the requisite evidence is often under the directors' control.[957] Civil penalties were introduced to the Australian regulatory framework in response to the difficulties of prosecuting criminal provisions. Civil penalties were thought to be easier to obtain, given the lower standard of proof on the balance of probabilities, compared with the criminal standard of proof which requires elements of the offence to be proved beyond reasonable doubt.[958] Nonetheless, the perceived advantage of civil rules of evidence and procedure is thought to have been weakened by the imposition of many procedural requirements by the courts.[959]

While a comparison of the number of criminal proceedings brought by Malaysian and Australian regulators in recent years may not, in itself, reveal substantial divergence in the level of enforcement proceedings, the differences are more apparent when civil penalty proceedings

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Helen Bird et al, 'An Empirical Analysis of the Use of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015' (Working Paper No 106/2016, Centre for International Finance and Regulation, Melbourne Law School, 2016) 2.

[953] *Corporations Act 2001* (Cth) s 206F.

[954] Helen Anderson, Ian Ramsay and Michelle Welsh, *Criminal, Civil and Administrative Penalties for White Collar Crime*, Submission to the Senate Economic References Committee: Penalties for White Collar Crime (24 March 2016) 8.

[955] This is discussed at p 166.

[956] These include *ASIC v Rich* (2004) 220 CLR 129; *ASIC v Vizard* (2005) 145 FCR 57; *ASIC v Adler* [2002] NSWSC 171. Comino observes that proceedings were instituted against directors in a range of high profile cases including the James Hardie asbestos scandal and AWB; Vicky Comino, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233.

[957] Michelle Welsh, 'The Regulatory Dilemma: The Choice between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Securities Law Journal* 370, 371; Roman Tomasic, 'Corporate Crime' in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, 1994) 263.

[958] Welsh, 'The Regulatory Dilemma', above n 957, 373.

[959] Ibid, 380; Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Securities Law Journal* 249. In addition, Comino observes that the courts have tended to treat 'civil penalties as quasi-criminal offences by affording defendants heightened procedural protections'; Vicky Comino, 'Australia's "Company Law Watchdog": The Australian Securities and Investments Commission and the Civil Penalties Regime' (2014) *Journal of Business Law* 228.

and ASIC's disqualification of directors under s 206F of the *Corporations Act 2001* (Cth) are considered. ASIC's report of enforcement outcomes notes that as at 1 January 2016, there were 13 criminal actions and 25 civil actions against directors before the courts involving corporate governance misconduct.[960] From January to June 2015, four directors were banned from managing companies on grounds that included breaches of directors' duties.[961] In criminal proceedings brought by the Commonwealth Director of Public Prosecutions, a director pleaded guilty to dishonestly using his position to misappropriate funds and was sentenced to imprisonment.[962]

The Australian regulators' relatively active enforcement of directors' duties, in comparison with Malaysian regulators, as observed in recent times, is consistent with trends observed in earlier studies. A study of public enforcement of directors' duties in Australia from 2005 to 2014 identified 99 judicial decisions resulting from proceedings brought by ASIC or the Commonwealth Director of Public Prosecutions.[963] Twenty seven of the cases were civil court decisions, while 72 were criminal proceedings.[964] The analysis observed that disqualification from management was the predominant sanction for breaches of directors' duties.[965] Professor Welsh's study of ASIC's enforcement action indicates that 78 criminal prosecutions and civil penalty proceedings alleging breaches of statutory directors' duties were issued from 2001 to 2006.[966] In an earlier study of civil penalty proceedings for breaches of directors' duties from 1993 to 2003, Welsh finds that ASIC was highly successful, obtaining declarations of contravention and civil penalty orders in 29 of 33 finalised cases.[967]

Varzaly's analysis of 145 Australian judicial decisions from 2001 to 2013 involving private or public enforcement of breaches of directors' duties emphasised the significance of public enforcement in Australian public listed companies.[968] Seventy four per cent of the cases involving public companies were brought by way of public enforcement.[969] The prevalence of public enforcement proceedings against directors of public companies was attributed to ASIC's

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[960] Australian Securities and Investments Commission, 'ASIC Enforcement Outcomes: July to December 2015' (Report 476, March 2016) 12.

[961] Australian Securities and Investments Commission, 'ASIC Enforcement Outcomes: January to June 2015' (Report 444, August 2015); 'ASIC Bans Former Managing Director of Provident Capital Ltd' (ASIC Media Release 15-033MR, 20 February 2015); 'ASIC Bans Former Directors from Managing Companies' (ASIC Media Release 15-006MR, 21 January 2015); 'ASIC Disqualifies Former Directors of Reed Constructions Australia Pty Ltd' (ASIC Media Release 15-099MR, 5 May 2015).

[962] 'Company Director Pleads Guilty' (ASIC Media Release 15-107MR, 7 May 2015).

[963] Jasper Hedges et al, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40 Melbourne University Law Review 905.

[964] The study indicates that criminal enforcement is significantly more prevalent than civil enforcement for breaches of directors' duties; Ibid 937.

[965] Ibid 955–6. Directors are automatically disqualified from managing companies for five years as a result of criminal convictions for breaches of directors' duties; *Corporations Act 2001* (Cth) s 206B.

[966] Welsh, 'The Regulatory Dilemma', above n 957, 384.

[967] Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42 *Federal Law Review* 217, 234.

[968] Jenifer Varzaly, 'The Enforcement of Directors' Duties in Australia: An Empirical Analysis' (2015) 16 *European Business Organization Law Review* 281.

[969] In contrast, private enforcement was substantially more prevalent in private companies. Out of the 145 cases, 126 involved private companies. In 107 of the cases involving private companies, proceedings were brought by way of private enforcement; Ibid 306.

policy of targeting high-profile cases, while the challenge of collective shareholder action in public companies arguably deters private enforcement.

5.5.3 *Conclusions on Public Enforcement in Malaysia*

In contrast with ASIC's enforcement initiatives in high-profile cases, the Malaysian Companies Commission has focussed largely on relatively obscure private companies. As noted above, the Companies Commission has taken limited enforcement action in relation to directors' duties and other substantive shareholder protection law.[970] Most of the proceedings instituted in relation to directors' duties are relatively recent and involve private companies. Despite the public outcry surrounding various high-profile listed companies alleged to have engaged in controversial transactions which were detrimental to minority shareholders, reports suggest that the Companies Commission did not investigate nor bring enforcement proceedings in relation to these companies or their directors. On the contrary, at times the regulators have granted waivers from compliance with regulations aimed at safeguarding minority shareholders' interests.

For instance, the acquisition by public listed company United Engineers (Malaysia) Berhad ('UEM') of 32.6 per cent of the shares of Renong Berhad ('Renong'), during the Asian financial crisis should have triggered a mandatory general offer under the *Malaysian Code on Takeovers and Mergers 1987*. Nonetheless, the regulators waived the requirement of a mandatory general offer which is aimed at safeguarding the interests of shareholders in the event of a takeover.[971] The acquisition was perceived as a bailout of UEM's ailing parent company, Renong, and detrimental to the minority shareholders of UEM. Notably, Renong and its major shareholder were widely known to be well-connected to influential politicians.[972] The unusual manner in which the mandatory general offer was waived by authorities linked to the Prime Minister's Department caused members of the public to perceive that the regulators were subject to the overriding control of the government.[973]

Similarly, allegations of the regulators' apparent lack of independence arose in relation to the Securities Commission's waiver of a mandatory general offer for Sime Darby Berhad's acquisition of a 30 per cent stake in Eastern & Oriental Berhad ('E&O'). Among the parties who stood to benefit from the transaction was the Chairman of E&O who was also the husband of the Chairman of the Securities Commission at that time.[974] The favourable treatment towards parties related to the regulator's Chairman elicited criticism of the regulator's apparent lack of impartiality. Minority shareholders protested against the waiver and one shareholder instituted court proceedings challenging the regulator's decision.[975] Questions as to whether

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[970] See p 166.
[971] 'UEM's Waiver From Making General Offer Reinstated', *Utusan* (Kuala Lumpur), 11 January 1998.
[972] Pura, above n 634.
[973] 'UEM's Waiver', above n 971.
[974] Rachagan and Sulaiman, above n 23, 26.
[975] However, the courts struck out the application, awarding costs to the Securities Commission; Presenna Nambiar, 'Judicial Review Against SC's 2011 Decision Denied', *The Sun Daily* (Selangor), 21 November 2013; 'E&O Minority Shareholder Challenges Securities Commission, *The Star* (Selangor), 23 December 2011.

the transactions were at arm's length were reinforced by the unusually high purchase price paid which was 60 per cent more than the market price.[976] This precipitated claims of possible collusion among the major shareholders involved in the transactions to the detriment of minority shareholders.

While the circumstances in each of the listed companies mentioned above present issues of propriety which raise the likelihood of directors' duties having been breached, the Companies Commission and other regulators did not investigate the potential breaches of shareholder protection law. The conspicuous inaction of Malaysian regulators in relation to troubled 1MDB despite extensive investigations and the imposition of criminal sanctions in other countries[977] epitomises the lack of regulatory enforcement in Malaysia, particularly where well-connected persons are involved. Likewise, the Companies Commission's silence is evident in relation to Malaysian Airlines Berhad which has been embroiled in contentions of mismanagement for several decades, leading to claims of the company's insolvency.[978]

5.6 Conclusion

As stated in Chapter 1, the first research question of the thesis aims to describe and explain the character of Malaysian shareholder protection law. Three aspects of the character of shareholder protection are examined, namely the content, strength and effectiveness of the regulations. While Chapters 3 and 4 demonstrate that formal Malaysian shareholder protection is both comprehensive and strong, the analysis in this chapter points to a lack of effectiveness in the implementation of shareholder protection law.

This chapter examines the effectiveness of Malaysian shareholder protection regulations from several perspectives in order to ensure a thorough investigation. First, secondary sources which analyse a range of mechanisms aimed at safeguarding shareholders' interests are examined. A consistent theme that emerges from the literature is the influence controlling shareholders commonly have over the management. In contrast, minority shareholders often face significant challenges in enforcing their shareholder rights. While formal law provides shareholders voting rights in relation to specific important decisions such as the appointment of directors, in practice, observers' reports indicate that these processes are heavily influenced by the controlling shareholder. Minority shareholders have been observed to adopt a passive stance towards voting at general meetings. Collective action among minority shareholders is often required in order to meet the requisite thresholds to propose resolutions or influence decisions. The challenges of obtaining such collective action, coupled with the costs and effort it involves, are thought to contribute to minority shareholder passivity.

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[976] Ibid.

[977] 'Second Singapore Banker Jailed in Malaysian 1MDB Scandal', *New Straits Times* (Kuala Lumpur), 16 December 2016.

[978] Ram Anand, 'The 21 Years of Mismanagement that Brought MAS to its Knees', *The Edge Malaysia* (Selangor), 27 May 2015; 'Malaysia Airlines "Technically Bankrupt": CEO', *The Sydney Morning Herald* (Sydney), 1 June 2015.

In recognition of the influence of controlling shareholders over the board, independent directors were introduced by the post-Asian financial crisis reforms. Independent directors are thought to function as a safeguard against self-dealing by directors. Nevertheless, studies and reports indicate that the presence of independent directors on the board is largely 'form over substance'.[979] The Deputy Chief Executive of the Securities Commission remarked that independent directors often do not exercise independent judgment.[980] Instead, they condone or are unaware of misconduct by the board of directors. This is again attributed to the dominance of controlling shareholders over the board of directors, which extends to independent directors and board committees.

Formal law provides minority shareholders rights of recourse to the courts in situations where they are oppressed or their rights are disregarded.[981] The derivative action likewise allows shareholders to bring proceedings against directors for misconduct with leave of the court.[982] Commentators observe that the cost of litigation, difficulties of obtaining evidence, and the fact that the benefit of derivative actions accrues to the company, are disincentives to private enforcement by shareholders.[983] However, the observations in secondary sources of the manner and extent to which Malaysian shareholder protection have been effective are based largely on anecdotal evidence. Consequently, there is a need for a stronger empirical basis on which the effectiveness of Malaysian shareholder protection may be assessed.

Secondly, the need for empirical evidence is addressed, and the discussion turns to judicial decisions on the private enforcement of directors' duties. In summary, the analysis indicates that the minority shareholders had minimal success in obtaining redress for breaches of directors' duties through the derivative action. This is consistent with scholars' assertions that minority shareholders face significant challenges in enforcing breaches of directors' duties and other shareholder protection regulations. The study of judicial decisions reveals that leave to bring derivative actions was obtained in only 25 per cent of Malaysian cases decided under the statutory derivative action and in 13 per cent of cases decided under common law.[984] Likewise, the analysis of cases on breaches of directors' duties indicates that all of the successful cases were brought by plaintiffs who were involved in the management of the companies concerned. Again, minority shareholders fared poorly, with only one successful case brought by way of a derivative action.[985] In this case, the plaintiff was also a former director of the company who was involved in the company's management.

Thirdly, comparison with Australian judicial decisions from 2008 to 2015 indicates that leave to bring statutory derivative actions was granted in a substantially higher proportion of Australian cases than in Malaysian cases. Fifty eight per cent of Australian applications for leave to bring derivative actions were successful in comparison with 25 per cent of Malaysian

[979] Anwar, above n 13.
[980] Ibid.
[981] *Companies Act 1965* s181.
[982] *Companies Act 1965* s181A
[983] Corporate Law Reform Committee, 'Members' Rights and Remedies', above n 487, 30–1.
[984] See Tables 8 and 9.
[985] *Wong Mee Ling v Chong Piang Fong* [2010] 1 LNS 1321.

applications for leave decided on the basis of the statutory derivative action.[986] The analysis of the reasons for the decisions reflects a more liberal and pragmatic approach on the part of the Australian courts, while the Malaysian courts took a restrictive approach to the granting of leave to bring derivative actions. In addition, Australian cases demonstrate more extensive use of the power to grant orders to allow inspection of the company's books, hence, facilitating shareholders' access to evidence in support of their claims.

As observed in the introduction to this chapter, one of the measures of the regulations' effectiveness is the extent to which shareholders were able to obtain a remedy for breaches of their rights. The findings of this chapter suggest that the Malaysian statutory derivative action has not been very effective in facilitating redress for breaches of directors' duties. Further, the comparison with Australian cases demonstrates that litigants have had better outcomes under equivalent Australian regulations. While the express conditions for the granting of leave specified by the Malaysian statute are fewer than the Australian statutory derivative action, in effect, implementation of the Malaysian statutory derivative action has been more restrictive, resulting in leave being granted in a lower proportion of Malaysian cases. This suggests that the extent to which shareholders were able to obtain leave was determined by the implementation of the statutory derivative action rather than the form of the regulations. This is also consistent with the observations of commentators that Malaysian shareholder protection regulations are not lacking in their formal content – rather the lack of effectiveness centres on the issue of implementation.

Fourthly, public enforcement has the potential to foster compliance with shareholder protection regulations and strengthen the effective implementation of regulations aimed at safeguarding shareholders' interests. The analysis finds that Malaysian regulators have taken limited enforcement action for breaches of regulations which provide substantive protection to shareholders, directors' duties being a key provision.[987] In contrast, the Australian regulator, ASIC, has had a more active role in the public enforcement of directors' duties. ASIC's enforcement initiatives are seen in its disqualification of directors for breaches of duties and civil penalty proceedings against high profile directors.

The primary and secondary sources examined in this chapter consistently indicate that the Malaysian regulations lack effectiveness, particularly in relation to minority shareholders who are not involved in the management of the company. Comparison with the Australian position suggests that, at least in relation to the statutory derivative action, equivalent regulations in Australia have been more effective in providing shareholders with access to redress against errant directors. Likewise, the analysis of public enforcement suggests that the regulators have not had a significant role in enforcing regulations which provide substantive protection to shareholders in Malaysia. In short, the findings of this chapter collectively lend credence to the assertion that there is gap between law in the books and law in practice in Malaysian shareholder protection.

[986] See Tables 9 and 15.
[987] See p 165.

The strength and comprehensiveness of formal Malaysian shareholder protection demonstrated in Chapters 3 and 4, together with the lack of effectiveness shown in this chapter, raise further questions leading to the second research question of this thesis. What are the contextual factors and influences which have shaped the character of Malaysian shareholder protection law? What has contributed to the increasing strength and comprehensiveness of formal Malaysian shareholder protection over time? What accounts for the gap between law in the books and law in practice? These issues are considered in Chapter 6. The secondary sources examined in this chapter averred to the dominance of controlling shareholders as one of the key reasons for the regulations' lack of substantive effect. Although the right to vote at general meetings is an important means by which shareholders may seek to safeguard their interests, the lack of available data does not permit an analysis of the exercise of voting rights. Nonetheless, Chapter 6 seeks to alleviate this gap by further investigating the claims that concentrated share ownership may provide some explanation for the difficulties minority shareholders face in seeking to safeguard their interests. These claims resonate with the theories of legal evolution, which posit that the way in which law operates is inextricably related to its context.

PART 3

CONTEXTUAL INFLUENCES AND THEORETICAL APPROACHES

CHAPTER 6

THE CHARACTER OF MALAYSIAN SHAREHOLDER PROTECTION LAW: CONTEXTUAL INFLUENCES AND THEORETICAL APPROACHES

The first research objective of the thesis focuses on describing the character of Malaysian shareholder protection law. The analysis in Chapters 3 to 5 suggests that the character of Malaysian shareholder protection is comprehensive and comparatively strong, but lacking effectiveness in practice. This chapter considers the second research question of the thesis, which is to investigate the influences and contextual factors which have shaped the character of Malaysian shareholder protection law. The second research objective also focuses on possible explanations for the lack of effectiveness of Malaysian shareholder protection law in practice. The analysis in this chapter draws on the theoretical perspectives outlined in Chapter 2 which illuminate the development of law, and facilitate a more nuanced understanding of the manner in which Malaysian shareholder protection law operates.

The overarching aim of the chapter is to consider how the theoretical perspectives potentially explain the development of Malaysian shareholder protection law – its comprehensiveness, strength and effectiveness. Several sub-questions form the basis of inquiry. What are the influences which have contributed to the comprehensiveness and strength of formal Malaysian shareholder protection law? What are the possible explanations for the gap between formal shareholder protection law and its lack of effectiveness in practice? How do theoretical perspectives shed light on the manner in which the character of Malaysian shareholder protection has developed?

The discussion begins by considering the development of formal Malaysian shareholder protection law. The analysis considers the influences and theoretical perspectives which may have explanatory power for the comprehensiveness and strength of formal Malaysian shareholder protection law. The discussion then turns to the effectiveness of Malaysian shareholder protection in practice. The analysis identifies features of the Malaysian context which may account for the regulations' lack of effectiveness. It details the interaction of the mechanisms established under the regulations for the protection of shareholders and these contextual factors. The analysis then draws on theoretical perspectives to illuminate the gap between formal law and its effectiveness in practice.

6.1 THE DEVELOPMENT OF FORMAL MALAYSIAN SHAREHOLDER PROTECTION LAW

6.1.1 *Legal Origin*[988]

As observed in Chapter 2, theories of legal origin posit that the development of formal law is influenced by inherited legal tradition. While the legal origin theories focus on formal law, minimal attention is given to the effectiveness of the law in practice. Accordingly, theories of legal origin are useful in elucidating the evolution of formal Malaysian shareholder protection

[988] Chapter 2 p 22.

law, its content and strength. However, the legal origin approach does not explain the regulations' lack of effectiveness in practice.

The development of Malaysian shareholder protection law, as seen in Chapter 3, reveals a pattern of consistent borrowing from the laws of other common law countries and, in particular, from the UK and Australia. Much of the content of Malaysian shareholder protection comprises transplants from other common law countries.[989] This is consistent with assertions of the legal origin theories that inherited legal tradition has a significant influence on legal development.[990]

Chapter 2 canvassed two variants of the legal origin thesis, namely the strong form and weak form theories. The strong form legal origin theory posits that a country's legal development is path dependent in accordance with legal tradition.[991] Such path dependence is thought to persist over long periods of time and is attributed to deeply embedded institutions, beliefs and ideologies in the legal and political infrastructure.[992] Proponents of the weak form thesis posit that the tendency to borrow from the regulations of other countries which share the same legal tradition is underpinned by institutional complementarities.[993] However, forces such as the economy or transnational harmonisation may at times have a stronger influence on legal development than inherited legal tradition.

Several observations indicate that the weak form legal origin thesis has stronger explanatory power for the development of Malaysian shareholder protection than the strong form thesis. Consistency with the weak form thesis is seen in the relevance of economic influences in advancing reforms and the perpetuation of the legal origin effect through institutional complementarities.

a. Economic stimuli and the strength of the legal origin effect

The leximetric analysis in Chapter 4 indicates that growth in Malaysian shareholder protection occurred primarily over two periods, following the economic recession in 1985 and the Asian financial crisis.[994] Strong growth in shareholder protection immediately after economic shocks suggests that economic factors have played a role in precipitating legal development in Malaysia. Several significant corporate scandals occurred in the mid-1980s which resulted in trading on the stock exchange being suspended.[995] Parliamentary debates reflected an awareness of the vulnerability of minority shareholders to fraudulent dealings by directors.[996] The relevance of economic influences is also seen in relation to the introduction of the *Malaysian Code on Takeovers and Mergers* in 1987. This was preceded by the substantial

[989] Chapter 3 p 87.
[990] See Chapter 2 p 21.
[991] La Porta et al, 'Economic Consequences', above n 80, 308.
[992] Ibid.
[993] Armour et al, 'How do Legal Rules Evolve?', above n 124, 598–9.
[994] Chapter 4 p 113.
[995] Ho et al, above n 364.
[996] Malaysia, *Parliamentary Debates*, Senate, 16 December 1986.

growth of large corporate conglomerates following the privatisation of state-owned enterprises.[997]

The importance of economic factors in the development of Malaysian shareholder protection is at odds with the strong form legal origin thesis which asserts that endogenous factors, such as economic influences, have minimal impact vis-à-vis the powerful and persistent effect of legal origin on legal development.[998] In contrast, proponents of the weak form legal origin thesis posit that legal systems are to some degree endogenous to their economic contexts. Consequently, the weak form thesis concedes that legal change may at times be influenced by economic factors.[999] The incidence of rapid growth in shareholder protection following significant economic events is consistent with the weak form legal origin hypothesis.

b. Channels of influence

Analysis of the mechanisms by which legal origin has influenced the evolution of Malaysian shareholder protection also indicates that the weak form legal origin thesis offers a more credible explanation for the legal origin effect. Proponents of the strong form thesis argue that path dependence in accordance with legal origin persists over centuries, attributing this to the incorporation of distinctive institutions, beliefs and ideologies into the legal and political infrastructure.[1000] These claims are difficult to sustain in Malaysia's changing socio-political milieu in which Islamic law has gained momentum over the years.[1001] Shariah has a distinctly different regulatory style from common law. Fundamental differences include shariah's theocratic jurisprudence and reliance on the Quran and interpretation of texts by Islamic scholars.[1002] In contrast with the common law system, legislation and precedents are not often relied on by the shariah courts. Although shareholder protection law has not been affected by the increasing Islamisation of law, the shift towards shariah in the broader Malaysian legal system suggests that common law institutions, beliefs and ideologies are not as deeply ingrained as the strong form thesis posits.[1003]

Proponents of the strong form thesis posit that there are several key institutions which are characteristic of common law systems. The first is an independent judiciary, while the second is the incremental adaptation of law to changing market conditions through judicial decisions.[1004] Neither of these institutions has had a significant influence on the development of Malaysian shareholder protection. Notably, judicial independence has been curbed since the Lord President was removed from office in 1988.[1005] Chapter 3 indicates that judicial

[997] Jomo, above n 361.
[998] La Porta et al, 'Economic Consequences', above n 80, 298.
[999] Armour et al, 'How do Legal Rules Evolve?', above n 124, 596.
[1000] La Porta et al, 'Economic Consequences', above n 80, 308.
[1001] Andrew Harding, 'The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia' (2002) 6 *Singapore Journal of International and Comparative Law* 154.
[1002] Timothy Lindsey and Kerstin Steiner, *Islam, Law and the State in Southeast Asia* (I B Tauris, 2012) vol 3.
[1003] Vivien Chen, 'Law and Society in the Evolution of Malaysia's Islamic Capital Market Regulation' (2017) 4 *Asian Journal of Law and Society* 133.
[1004] The strong form legal origin thesis is examined in Chapter 2 from p 22.
[1005] Andrew J Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International and Comparative Law Quarterly* 57.

decisions had a negligible role in the growth of shareholder protection. On the contrary, the growth in Malaysian shareholder protection is attributable to legislative reforms, codes and *Listing Rules*. The director's duty of care and skill was among the only areas in which legal change was propelled by judicial decisions in the UK and Australia between 1992 and 1994.[1006] These significant judicial decisions were not followed by the Malaysian courts, and legislative reform was required in 2007 to facilitate legal change.[1007] Further, the trajectory of growth in Malaysian shareholder protection reveals that most of the growth in Malaysian shareholder protection occurred rapidly over several short periods interspersed between longer periods of relative stability.[1008] This pattern of punctuated equilibrium is at odds with the proposition that law adapts incrementally to changing economic circumstances by way of judicial decisions.

On the other hand, the weak form thesis offers a plausible explanation for the consistent borrowing from other common law countries. The weak form legal origins hypothesis argues that the flow of ideas within legal families is facilitated primarily through 'affinities of legal thought and language'.[1009] Path dependence is viewed as an 'efficient adaptation to the previously transplanted legal infrastructure'.[1010] Several factors indicate consistency with the proposition that institutional complementarities underpin the pattern of persistent drawing from the regulation of common law countries. Malaysia's inheritance of its legal system from the British and similarities in corporate law with other common law countries contribute to the perception that UK and Australian law are suitable models.[1011] The continued influence of common law is also attributed to the legal elite, many of whom received their legal education in the UK and other common law countries.[1012] Liew's survey found that the key players involved in the regulatory reforms following the Asian financial crisis were more inclined to adopt UK regulations on grounds of their familiarity.[1013] The borrowing from other common law countries is also facilitated by common use of the English language in the Malaysian legal system.

In summary, the analysis finds that the pattern of borrowing from the UK, Australia and other common law countries seen in Chapter 3 resonates with the weak form legal origin thesis. Transnational harmonisation, political economy and socio-cultural norms have also seemingly influenced the development of Malaysian shareholder protection law and its effectiveness in practice. These observations are consistent with the weak form thesis which perceives legal origin as one of several potential influences on legal development.

[1006] *Re D'Jan of London* [1994] 1 BCLC 561 (Ch.); *AWA Ltd v Daniels* (1992) 10 ACLC 933 (Comm D).
[1007] Chapter 3 discusses the legislative reforms in 2007 from p 78.
[1008] Chapter 4 p 113.
[1009] Armour et al, 'How do Legal Rules Evolve?', above n 124, 598.
[1010] Botero et al, above n 113.
[1011] Chapter 3 p 87. While shariah has become increasingly important in the Malaysian legal system, law reforms have continued to model Malaysian law on the shareholder protection law of other common law countries as these laws reflect values consistent with shariah principles. This is further explained in Chen, 'Law and Society' above n 1003.
[1012] Singh, above n 286, 19–20.
[1013] Liew, 'Corporate Governance Reforms', above n 9, 724.

6.1.2 *Transnational Harmonisation*[1014]

Initiatives towards transnational harmonisation have focussed on formal law, with minimal consideration of its effectiveness in practice. Consequently, transnational harmonisation is relevant to explaining the development of formal Malaysian shareholder protection, and its content and strength. As with theories of legal origin, transnational harmonisation does not illuminate the reasons for the law's lack of effectiveness.

Following criticisms of Malaysian shareholder protection law during the Asian financial crisis, sweeping reforms were made in line with international standards in order to regain the confidence of foreign investors.[1015] Malaysia's endeavours in adhering to international standards are part of a broader global shift towards transnational harmonisation of laws.[1016] The competition for foreign capital and the common use of the OECD's principles by rating agencies as a basis for ranking companies are thought to encourage transnational harmonisation.[1017] Scholars observe that pressure towards transnational harmonisation has resulted in a trend toward increasing convergence in formal shareholder protection law internationally.[1018] As transnational financial organisations put forward Anglo-American regulation as the model of international standards for East Asian countries,[1019] Malaysian law reformers looked once again to the regulations of developed common law countries.

The importance of international standards has been reflected in various Malaysian reform initiatives since the Asian financial crisis. The Finance Committee's report emphasised the need for Malaysia to align its shareholder protection with international standards.[1020] Following this, the CLRC was established for the purposes of reviewing Malaysian company law. The CLRC's objectives were to facilitate and develop 'a conducive and dynamic business and regulatory environment for the country which is in line with international standards'.[1021] Parliamentary debates on the *Companies (Amendment) Bill 2007* highlighted the benefits that shareholder protection standards comparable with developed countries such as Australia, the UK and Hong Kong would facilitate.[1022] These include strengthening Malaysia's competitiveness in the international markets and encouraging foreign investment. More

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[1014] Chapter 2 p 30.
[1015] Chapter 3 p 74.
[1016] Chapter 2 discusses the literature on transnational harmonisation from p 30. In the milieu of increasing Islamisation of the Malaysian legal system, harmonisation with international standards of shareholder protection is perceived as being consistent with shariah principles; Chen, 'Law and Society', above n 1003.
[1017] Siems, *Convergence in Shareholder Law*, above n 146, 270, 327; Armour et al, 'How do Legal Rules Evolve?', above n 124, 628. Although regional integration in Southeast Asia has seen efforts to harmonise specific aspects of commercial law, these initiatives do not extend to shareholder protection; Association of Southeast Asian Nations, *ASEAN Economic Blueprint* (November 2007); Association of Southeast Asian Nations, *ASEAN Economic Community Blueprint 2025* (2015). One possible reason may be that previous initiatives towards adopting international standards, such as the World Bank and the International Monetary Fund's prescriptions following the Asian financial crisis, may have facilitated a measure of harmonisation in shareholder protection law among the more financially developed ASEAN Member States, alleviating the need for specific ASEAN initiatives in this area.
[1018] Siems, *Convergence in Shareholder Law*, above n 146, 227.
[1019] World Bank, *The Road to Recovery*, above n 11, 69.
[1020] Finance Committee, above n 9, 59.
[1021] Companies Commission of Malaysia, *Public Consultation*, above n 518, 4.
[1022] Malaysia, *Parliamentary Debates*, Senate, 23 May 2007, 113, 117-8.

recently, the Companies Commission of Malaysia in its public consultation on the proposed *Companies Bill* observed that 'the new corporate legal framework for Malaysia will remain forward looking' and is consistent with international standards.[1023] Nevertheless, scholars argue that convergence in shareholder protection brought about by transnational harmonisation is limited to formal law, while persistent differences in implementation remain.[1024] The implementation of law is thought to be affected by contextual forces in individual countries.[1025]

In short, initiatives which have sought to align Malaysian law with international standards have been underpinned by the perceived need for Malaysia to remain competitive in the increasingly internationalised markets. The significance of economic factors in driving transnational harmonisation resonates with theories of legal evolution.

6.2 Co-evolution of Law and its Context[1026]

Theories of legal evolution specifically address the possibility that formal laws may at times fail to operate effectively. The manner in which laws are interpreted and applied by the people involved in legal processes, for instance, has potential implications for the effectiveness of law in practice. Contextual factors, including cultural values, political or economic influences, arguably affect the implementation of law and the extent to which their underlying objectives are fulfilled. Theories of legal evolution are useful in providing possible explanations for the lack of effectiveness of Malaysian shareholder protection law observed in Chapter 5.

At the same time, theories of legal evolution offer possible explanations for the shape of formal law, positing that economic, political and socio-cultural factors affect the evolution of formal law, and its content and strength. Accordingly, theories of legal evolution appear to be useful in explaining the influences which have contributed to the comprehensiveness and strength of formal Malaysian shareholder protection law, as well as illuminating the reasons for the law's lack of effectiveness.

As observed in Chapter 2, the legal evolution scholarship highlights the inextricable relation between law and its context. Deakin underscores the 'powerful feedback loop' between the legal system and its environment, while Milhaupt and Pistor similarly posit that there is a 'rolling relation' between law and the markets.[1027] The importance of the markets in precipitating legal change is evident not only in the reforms after the Asian financial crisis, but also in the strengthening of shareholder protection law in the two decades after the crisis.

Reports indicate that Malaysia failed to regain the level of foreign investment enjoyed prior to the 1997 Asian financial crisis despite regulatory reforms.[1028] Government policy documents in 2009 noted the steady decline in Malaysia's economic dominance in the region since the

[1023] Companies Commission of Malaysia, *Public Consultation*, above n 518, 6.
[1024] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 169.
[1025] Pistor and Wellons, above n 133, 283.
[1026] Chapter 2 p 33.
[1027] Milhaupt and Pistor, above n 167, 34; Deakin, 'Evolution for our time', above n 188, 32.
[1028] National Economic Advisory Council, above n 79, 44.

crisis, observing that growth in neighbouring economies further posed a challenge to Malaysia's global competitiveness.[1029] Lingering doubts over the effectiveness of Malaysian shareholder protection in practice continued to persist. For instance, in 2002, the largest public pension fund in the US announced its intention to withhold new investments in several emerging markets, including Malaysia, due to poor corporate governance practices.[1030] In 2011, the *Capital Market Masterplan 2*[1031] acknowledged:

> While there have been substantial reforms, it has been observed that many [public listed companies] tend to comply with the form rather than the substance of corporate governance codes. The recurrence of corporate scandals clearly indicates a gap in the active and independent monitoring of corporate conduct.[1032]

Policy documents indicate the tendency to respond to the decline in Malaysia's international competitiveness and concerns over the lack of effective shareholder protection by proposing further law reform.[1033] Many of the recommended reforms were aimed at improving Malaysia's rankings on global indices, such as the World Bank's Doing Business index, by aligning formal Malaysian regulations with international best practices.[1034] Notably, the Doing Business methodology is premised on studies led by proponents of the strong form legal origin thesis.[1035] Consequently, the reforms focussed primarily on formal regulation, consistent with the premises of the strong form thesis.

6.2.1 *Signalling Compliance with International Standards*

The reforms, which sought to enhance Malaysia's standing in global rankings, resonate with scholars' propositions that law performs a signalling function. In particular, law reforms may signal compliance with international standards or the state's commitment to addressing problems of ineffective shareholder protection.[1036] Such signals are often aimed at enhancing the credibility of a country's regulatory framework. The signalling function of the post-Asian financial crisis reforms is reflected in the remarks of the then Prime Minister Dr Mahathir, '[w]e try to follow [the IMF programmes] not because we think IMF is right, but because if we don't then there will be a loss of confidence … So we try to show that we are with the IMF.'[1037]

[1029] Ibid 48.
[1030] Liew, 'Perceived Roles', above n 12, 455.
[1031] The Capital Market Masterplan 2 was part of the Malaysian government's strategic plan to strengthen economic growth and the competitiveness of Malaysia's capital market. The Masterplan was formulated with the assistance of the Securities Commission Malaysia.
[1032] Securities Commission Malaysia, *Capital Market Masterplan 2* (2011), 79.
[1033] Ibid 90; National Economic Advisory Council, above n 79, 128.
[1034] The *Corporate Governance Blueprint 2011* was issued further to the *Capital Market Masterplan 2* and sought to implement international standards; Securities Commission Malaysia, *Corporate Governance Blueprint 2011*, above n 508. As seen in Chapter 3, reforms to the *Companies Act 1965* in 2007 likewise sought to facilitate investment by strengthening Malaysian shareholder protection standards in line with international standards.
[1035] Doing Business, *Methodology* <http://www.doingbusiness.org/methodology>. See n 88.
[1036] Milhaupt and Pistor, above n 167, 34.
[1037] Shameen and Oorjitham, above n 155.

In short, Dr Mahathir indicated that the reforms were aimed at demonstrating conformity with international recommendations in order to strengthen the confidence of foreign investors in the Malaysian market. Notably, the Malaysian government did not agree with international criticisms that substantive reforms were necessary but, nonetheless, conceded the reforms in order to placate foreign investors. This dichotomy has significant implications for the manner in which Malaysian shareholder protection has developed. In particular, the dichotomy is important in explaining the gap between formal law and its effectiveness in practice. This will be explored later in this chapter.[1038]

Milhaupt and Pistor posit that reforms which send strong signals aimed at increasing investor confidence may not necessarily increase the protective strength of regulations.[1039] This is reflected in specific Malaysian reforms to the *Companies Act 1965*. For instance, the statutory restatement of directors' duties was among the significant reforms in 2007.[1040] The restatement of directors' duties arguably signalled the government's commitment to improving board integrity.[1041] However, the reforms had minimal impact on the protective strength of the regulations as the statutory provisions merely reiterated protections which had existed by virtue of equitable fiduciary duties since colonial times.[1042]

While the influence of the markets in stimulating regulatory reform is evident in the analysis above, scholars posit that market-driven reforms are part of broader patterns of mutual influence between law and its environment. The co-evolution of law and its context is reflected in reports which indicate that Malaysian regulatory reforms have also had an influence on the markets and on the behaviour of controlling shareholders and minority shareholders. This is consistent with descriptions of a 'rolling relation' or a 'feedback loop' between law and the markets.[1043] Deakin and Wilkinson describe the interaction of legal development and social and economic change as complex and multi-linear.[1044] Further evidence of iterations between law and its context is seen in the demand for stronger minority shareholder protection stimulated by the impact of law on the markets, shareholders and the broader community. These interactions are illustrated in an analysis of the privatisation of Malaysian listed companies below.

6.2.2 *Co-evolution of Law and its Context in the Privatisation of Listed Companies*

From around 2007, media reports began to highlight the incidence of controlling shareholders purchasing all the shares of listed companies, delisting the companies and, as such, privatising

[1038] See text to n 1209.
[1039] Milhaupt and Pistor, above n 167.
[1040] The reforms are discussed in Chapter 3 at p 79.
[1041] The Corporate Law Reform Committee's report also indicated that the reforms had an educational role, as a statutory statement of directors' duties facilitated clarity, and was more easily understood than case law; Corporate Law Reform Committee, 'Directors' Role and Duties', above n 474.
[1042] See Chapter 3 p 52.
[1043] Milhaupt and Pistor, above n 167; Deakin, 'Evolution for our time', above n 188, 32.
[1044] Deakin and Wilkinson, above n 34, 30.

them.[1045] In many cases, the controlling shareholder purchased 90 per cent or more of the company's shares, and compulsorily acquired the remaining shares. The motivations for the rise in the privatisation of Malaysian listed companies included favourable pricing[1046] and the increased cost of compliance with regulations.[1047] Arguably, the increasing encroachment on controlling shareholders' dominance over the board of directors also contributed to the initiatives towards privatisation of listed companies.[1048] The rise in the privatisation of listed companies reflects the influence of regulatory reforms on the markets and controlling shareholders. Co-evolution of law and its context is also seen in the rise in minority shareholder activism in response to the privatisations and the increasing role of the media in facilitating greater awareness of minority shareholder rights in the broader community. Media reports highlighted perceptions that many of the privatisations were unfair to minority shareholders.[1049] Reports observed that minority shareholders were usually outvoted at general meetings, and their shares were compulsorily purchased at prices deemed as undervalued, based on substantially outdated valuations.[1050]

The Minority Shareholder Watchdog Group (MSWG) was established as part of the government's post-Asian financial crisis reforms.[1051] This was one of the few reforms which did not entail formal regulatory reform but centred on strengthening the implementation of shareholder protection law. Initiatives taken by the MSWG in lobbying for minority shareholders have been instrumental in facilitating the rise of minority shareholder activism.[1052] The increased awareness of minority shareholder rights following the initiatives is indicative of the influence of regulatory reforms on its context. Public criticisms reported in the media over the allegedly unfair acquisitions of minority shareholders' shares at undervalue precipitated reforms to the *Listing Rules* which further strengthened the protection of minority shareholders' interests.[1053] These interactions reflect the mutuality of the influence between

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[1045] Abdul Wahab Jaafar Sidek, 'Going Private: A Dilemma to Minority Shareholders', *The Star* (Selangor), 26 July 2008; 'Some Feel Ranhill's Offer Inadequate', *The Star* (Selangor), 17 June 2008.

[1046] Reports indicate that low trading prices of shares on the markets was a significant factor which motivated the privatisation of listed companies; A Kadir Jasin, 'Buybacks Threaten Bursa Malaysia' *Malaysian Business* (Kuala Lumpur), 16-28 February 2013, 8–9; Lau Chee Chin, *An Analysis of Why Public Listed Companies Go Private in Malaysia* (Masters Thesis, University of Malaya, 2009) 28.

[1047] Lau, above n 1046, 28; 'Removing the PLC Constraints', *The Edge Malaysia* (Selangor), 7 May 2007.

[1048] Ibid.

[1049] Doreen Leong, 'Minority Shareholders Beware' *Focus Malaysia* (Selangor), 27 April–3 May 2013; Gurmeet Kaur, 'Will Minority Shareholders Triumph in Seeking Higher Value', *The Star* (Selangor), 22 January 2014.

[1050] Chong Jin Hun, 'Disgruntled Shareholders Fail to Scuttle Glenealy Privatisation', *The Edge Malaysia* (Selangor), 14 September 2012; Thomas Huong, 'Nilai Resources Privatisation May Not Be Successful', *The Star* (Selangor), 7 August 2012.

[1051] The Minority Shareholders Watchdog Group is an organisation established for the purpose of advocating minority shareholders' interests. It was established with financial assistance from public institutional shareholders, and is currently funded by the Capital Market Development Fund and its own fund-raising initiatives; Minority Shareholder Watchdog Group, *Who We Are* <http://www.mswg.org.my/page.php?pid=36&>.

[1052] Rita Benoy Bushon, 'Shareholders Should Voice Dissent More Strongly', *The Star* (Selangor),, 20 September 2012; Daniel Khoo, 'MSWG Calls for a Closer Look at Some of the Latest Privatisation Deals', *The Star* (Selangor), 25 January 2014.

[1053] Securities Commission Malaysia and Bursa Malaysia, *Proposed Amendments to Bursa Malaysia Securities Berhad Listing Requirements on Privatisation of Listed Companies Via Disposal of Assets*, Joint Public Consultation Paper No. 3/2010 (19 March 2010).

regulatory reforms and their context, resonating with assertions of a rolling relation between law and the markets.[1054]

6.2.3 *Memetics and Autopoietic Theory*

While the analysis above examines broader patterns of co-evolution between law and its socio-economic context, scholars have also proposed theoretical explanations for the manner in which the legal system adopts influences from its context while remaining distinctly separate and independent.[1055] The memetic approach perceives legal concepts as memes which embody 'in shorthand form information about the social world which is filtered through the processes of legal argument and exposition'.[1056] These memes are transmitted through communication by the people involved in legal processes such as judges and law reformers. Scholars posit that concepts which are better suited to the environment are incorporated as legal rules, as a result of natural selection through legal processes.[1057] The norms are then communicated to society through legal rules, as part of a 'feedback loop' between law and society.[1058]

Evidence of such a feedback loop is perhaps seen in the reforms which strengthened protection for minority shareholders after the Asian financial crisis. The market-driven reforms embodied egalitarian values, emphasising the importance of minority shareholders' interests. These values were then communicated back to society, fostering the public demand for fairer treatment of minority interests, which in turn stimulated reforms to the *Listing Rules*. Processes of natural selection in this context are arguably reflected in the markets, from which the demand for better safeguards against expropriation of corporate property arose following corporate failure.

The analysis of judicial decisions in Chapter 5 reflects some of the patterns posited by proponents of memetics and autopoietic theory. Although case law may be regarded as part of formal regulation, the decisions on the statutory derivative action are relevant to the discussion of how regulations are interpreted. They provide an illustration of how judges facilitate the interaction of the legal system and political economy. These interactions will be described later in the chapter.[1059]

6.3 Political Economy and the Shape of Formal Law[1060]

In line with the legal evolution approach, scholars assert that the shape of formal law is influenced by political economy. Political economy refers to the power relations which affect economic outcomes.[1061] The political economy perspective is relevant to explaining the evolution of the content and strength of Malaysian shareholder protection law. It also

[1054] See Chapter 2 p 37.
[1055] See Chapter 2 p 35.
[1056] Deakin, 'Evolution for our time', above n 188, 19.
[1057] Ibid.
[1058] Ibid.
[1059] See pp 207–8.
[1060] Chapter 2 p 40.
[1061] See text to n 225.

potentially has some explanatory power for the gap between formal law and its effectiveness in practice.

Scholars assert that dominant corporate interests use their political influence over legal processes to consolidate their control over resources.[1062] In allocating themselves a larger portion of resources through corporate law, dominant corporate interests reinforce their political influence. In the context of Malaysia's concentrated shareholding structures, formal regulatory reforms which have strengthened minority shareholders' rights appear to be contrary to the interests of controlling shareholders. Nevertheless, scholars concede that at times, competition for capital in the increasingly globalised markets leads controlling shareholders to concede reforms which erode their dominance while promoting investment.[1063] The post-Asian financial crisis reforms which were aimed at promoting investment appear to resonate with such assertions.

Notably, the reforms were motivated by the need to placate foreign investors rather than the government's perceived need for substantive change.[1064] The substantial outflows of foreign capital after the Asian financial crisis were detrimental to the corporate and political elite who are closely related, as will be seen later in the chapter.[1065] The post-Asian financial crisis reforms signalled conformity with international standards and were aimed at restoring investor confidence.[1066] As suggested by Milhaupt and Pistor, the political elite's demand for legal governance at times acts as a catalyst for legal change.[1067]

While the political elite stood to benefit from the investor confidence engendered by the formal reforms, the erosion of controlling shareholders' dominance was inimical to their interests. Studies suggest that laws which erode the position of dominant corporate interests may subsequently be poorly implemented.[1068] Kraakman et al raise the possibility that to an extent, international best practices in blockholder jurisdictions may be 'ornamental', particularly as 'dominant shareholder coalitions retain the power to hire and fire the entire board, including its nominally independent directors.'[1069] Consequently, controlling shareholders are able to attract investment, by conforming to standards required by international institutional investors, while retaining power.

The finding in Chapter 5 that the Malaysian reforms have lacked effectiveness is consistent with the proposition that in blockholder jurisdictions, international best practices may be adopted in form while substantive implementation of its underlying values may nonetheless be

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[1062] Bebchuk and Roe, above n 174.
[1063] Kraakman et al, *Anatomy of Corporate Law* (2nd edition), above n 150, 32.
[1064] This is reflected in former Prime Minister Dr Mahathir's statement that the reforms were meant to show investors that Malaysian law was compliant with international recommendations, despite disagreeing with the premise that the Malaysian legal framework was inadequate; Shameen and Oorjitham, above n 155.
[1065] See p 197.
[1066] Chapter 3 p 73.
[1067] Milhaupt and Pistor, above n 167.
[1068] Coffee, 'Political Economy of Dodd-Frank', above n 244; Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 164-9.
[1069] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 25.

avoided.[1070] The political influence of controlling shareholders in shaping formal law is arguably also reflected in the stagnation of law in key areas of shareholder protection. This raises the possibility that the Malaysian reforms were selective, and that controlling shareholders were able to use their political influence to maintain their dominance in relation to critical matters.

6.3.1 *Lethargic Reform: Directors' Remuneration and Disqualification*

Chapters 3 and 4 observed that the regulation of directors' remuneration and directors' disqualification has remained largely unchanged for over 50 years from 1965 to 2015. Directors' remuneration is an important means by which corporate assets may be expropriated by those in control of companies. Both UK and Australian law have seen major reforms in the area of directors' remuneration which have increased transparency and enabled shareholders to have a stronger voice.[1071] Malaysian regulations have only in very recent times, through the *Companies Act 2016*, increased transparency and mandated shareholder approval for the remuneration of directors of public companies, listed companies and their subsidiaries.[1072]

In addition to the delay of 14 years since major UK reforms to directors' remuneration in 2002, the Malaysian reforms are more limited in comparison with the UK and Australia. First, fewer details relating to directors' remuneration and benefits are required to be disclosed.[1073] Secondly, the Malaysian reforms do not empower minority shareholders as is the case in Australia and the UK. In Australia, the board of directors may be required to stand for re-election if shareholders controlling 25 per cent or more of the voting rights object to the remuneration reports at two consecutive annual general meetings.[1074] In the UK, where a significant proportion of votes are cast against a resolution at a general meeting, the *Corporate Governance Code* states that companies should address reasons behind such objections.[1075]

Although the Malaysian reforms require shareholder approval of directors' remuneration in public companies, listed companies and their subsidiaries,[1076] the discussion later in this chapter reveals that controlling shareholders are often able to determine the outcome of resolutions at general meetings, either on their own or together with the holder of the second largest block of shares.[1077] As a consequence of highly concentrated shareholding, minority

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[1070] Puchniak, 'Multiple Faces', above n 27, 512; Guido Ferrarini and Marilena Filippelli, 'Independent Directors and Controlling Shareholders Around the World' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar, 2015) 269, 289.
[1071] *Directors Remuneration Report Regulations 2002* (UK); *Corporations Act 2001* (Cth) ss 250R(2)–(3), s 300.
[1072] *Companies Act 2016* s 230(4).
[1073] The new regulations require directors' remuneration and other benefits to be disclosed to shareholders; *Companies Act 2016* s 31. Australian regulations require more extensive disclosure including details of contracts to which directors are a party or under which they receive benefits; *Corporations Act 2001* (Cth) s 300(11).
[1074] *Corporations Act 2001* (Cth) ss 250U–250V. Shareholders' votes on directors' remuneration are non-binding but have significant clout due to the ability to require the board to stand for re-election.
[1075] Financial Reporting Council, *The UK Corporate Governance Code (September 2014)* [E.2.2].
[1076] *Companies Act 2016* s 230(1).
[1077] See p 194.

shareholders' votes tend to have minimal effect on resolutions at general meetings.[1078] In the circumstances, the need for minority shareholders to be given a voice on critical matters is arguably greater than in contexts where corporate ownership is more dispersed.

Directors' disqualification has been used to sanction breaches of directors' duties in the UK and Australia.[1079] In contrast, Malaysian regulators have not used disqualification as a sanction for directors' misconduct.[1080] As observed in Chapter 3, Malaysian law only allows directors to be disqualified in very limited situations. Despite extensive reforms in other areas of company regulation, the *Companies Act 2016* does not address the limitations to the existing provisions on the disqualification of directors. Instead, the new regulations largely maintain the position under the *Companies Act 1965*. Directors are only disqualified if they have criminal convictions or are or are subject to a court order disqualifying them from holding office as a director.[1081]

The significant potential for directors' remuneration to be used as a means of expropriation, and the wide use of directors' disqualification in the UK and Australia as a sanction for breaches of directors' duties,[1082] suggest the importance of reforms to these areas in strengthening shareholder protection. Minimal and lethargic reform in these areas of Malaysian shareholder protection has seemingly allowed controlling shareholders to preserve their dominance over critical matters of corporate regulation. The lack of reform in critical areas suggests the possibility that controlling shareholders have used their political influence to avoid reforms which would have substantially eroded their dominance. This resonates with the political economy perspective which asserts that dominant corporate interests use their political influence to shape corporate law so as to consolidate their control over resources.[1083] Hence, the analysis suggests that the influence of controlling shareholders over legal and political processes potentially affects the shape of formal shareholder protection law as well as the manner in which it is interpreted and applied in Malaysia.

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In summary, the analysis of the manner in which formal Malaysian shareholder protection has evolved indicates that several theoretical perspectives on legal development canvassed in Chapter 2 have some explanatory power for the shape of formal law. The tendency to emulate the regulations of other common law countries reflects a weak form legal origin effect. The trend towards international standards in recent years is consistent with initiatives towards transnational harmonisation. Reforms which strengthened Malaysian shareholder protection often followed economic events, suggesting the relevance of economic forces in precipitating legal change. Theories of legal evolution, which posit the co-evolution of law with economic, social and political influences in its context, also provide an explanation for the manner in

[1078] See Chapter 5 p 119.
[1079] Chapter 5 p 170; Richard Williams, 'Enlightened Shareholder Value in UK Company Law' (2012) 35 *UNSW Law Journal* 360.
[1080] Enforcement action by the Malaysian regulators is discussed in Chapter 5 at p 166.
[1081] *Companies Act 2016* ss 198–199.
[1082] Chapter 5 p 170.
[1083] Chapter 2 p 40.

which formal Malaysian shareholder protection has developed. Lethargic reform in the regulation of directors' remuneration and disqualification further suggests the influence of political economy on the shape of formal shareholder protection law. Political economy is also relevant to the effectiveness of shareholder protection law in practice. This is considered in the section below.

6.4 Proposed Explanations for the Effectiveness of Malaysian Shareholder Protection

The legal evolution scholarship posits that the interaction of law and its context has significant implications for the manner in which law operates. Milhaupt and Pistor assert that the 'proclivities of the people' are central to the interpretation and enforcement of legal transplants.[1084] The values and ideas of the people involved in the legal system, including judges and the legal elite, invariably shape the implementation of law.[1085] The literature examined in Chapter 5 attributes the regulations' lack of effectiveness to several contextual factors.

This section examines specific features of the Malaysian context. The analysis focuses on the people involved in the implementation of law, examining the human agency in the interaction of the mechanisms established under the regulations for the protection of shareholders and contextual influences. It uses the categorisation of shareholder protection mechanisms employed in Chapters 3 and 5, namely shareholders' voting rights, directors' duties, recourse to the courts and public enforcement.

The concentration of shareholding is analysed in section 6.4.1 in order to ascertain the degree of control over the general meeting commonly exercised by controlling shareholders relative to minority shareholders. The patterns of ownership concentration flow from the state's redistribution and privatisation policies. Hence, the nexus between the state and business and the various ways in which the state maintains significant involvement in the ownership and control of many Malaysian companies are subsequently described in section 6.4.2. The discussion then turns to cultural norms in section 6.4.3. Section 6.4.4 considers the implications of each of these contextual factors for the manner in which shareholder protection mechanisms operate in Malaysia.

6.4.1 *The Ownership and Control of Malaysian Companies*

Several studies have examined the ownership structures of Malaysia's largest companies in order to ascertain who the controlling shareholders were and the concentration of ownership in the companies.[1086] While there are differences in the methods used to measure ownership concentration, the studies consistently reflect findings of highly concentrated ownership. The

[1084] Milhaupt and Pistor, above n 167, 201.
[1085] Watson, 'Comparative Law and Legal Change', above n 209.
[1086] See eg. n 1088, 1092.

focus on ownership patterns among Malaysia's largest public listed companies is significant for the reason that large listed companies have more dispersed share ownership than non-listed or private companies.[1087] Consequently, trends in the ownership concentration of the largest companies are indicative of broader patterns of corporate ownership among Malaysian companies. The studies also indicate that families, individuals and the state dominate the ownership and control of Malaysian companies. The findings of these studies are discussed below.

a. Who owns Malaysia's largest companies?

Lim's analysis of the 100 largest Malaysian corporations from 1974 to 1976 was among the earliest analyses of corporate ownership structures.[1088] The study highlighted the concentration of share ownership, observing that 'a few hundred families own the majority of stocks in Malaysia.'[1089] While there were approximately 100 000 shareholders in total among the 62 largest listed companies, approximately 69 per cent of the shares were owned by 797 shareholders, comprising 0.8 per cent of shareholders.[1090] Analysis of these largest shareholdings held by the 797 shareholders and worth RM1.4 billion (AUD467 000) further reinforced findings of concentrated share ownership. Twenty nine per cent of the largest shareholdings were owned by the top 1 per cent of the 797 shareholders, while 97 per cent of the largest shareholdings were in the hands of the top 50 per cent of the 797 largest shareholders.[1091]

Lim's conclusions resonate with Sieh Lee's analysis of the 98 largest manufacturing companies in Malaysia in 1974 and 1975, which likewise reflected a high concentration of share ownership. Her study found that ownership of 61.8 per cent of the share capital was concentrated in the hands of the top 0.2 per cent of shareholders.[1092] Sieh Lee observed the 'phenomenal participation of the Malaysian government and its agencies' in the ownership of Malaysian manufacturing corporations.[1093]

Subsequently, the Asian Development Bank's survey in 1998 across a range of East Asian companies similarly found concentrated share ownership in Malaysia. According to the study, 'the largest shareholder owned 30.3 per cent, the top five shareholders owned 58.8 per cent and the top 20 owned 80 per cent of total outstanding shares of an average [Malaysian public listed company].'[1094] The study found similar ownership concentration among prominent large

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[1087] La Porta et al, 'Corporate Ownership Around the World', above n 72. In Malaysia, the *Listing Rules* require at least 25 per cent of a listed company's shares to be held by a minimum of 1 000 members of the public, each holding 100 or more shares; Bursa Malaysia, *Listing Rules* r 3.06. In contrast, private companies must not have more than 50 shareholders; *Companies Act 1965* s 15(1)(b).
[1088] Lim Mah Hui, *Ownership and Control of the One Hundred Largest Corporations in Malaysia* (Oxford University Press, 1981).
[1089] Ibid 30.
[1090] Ibid 114.
[1091] Ibid.
[1092] Sieh Lee Mei Ling, *Ownership and Control of Malaysian Manufacturing Corporations* (University of Malaya Cooperative Bookshop, 1982) 24.
[1093] Ibid 78
[1094] Zhuang et al, above n 11, 22.

corporate conglomerates since the early 1990s.[1095] The study identified nominee companies as the largest group of shareholders, holding 45.6 per cent of shares owned by the top five shareholders in non-financial public listed companies in Malaysia.[1096] A large proportion of shares held through nominee companies were found to be owned by families.[1097] The study also observed significant corporate ownership by the state which held 17.2 per cent of the shares owned by the top five shareholders.[1098]

The high concentration of ownership in Malaysian companies was reaffirmed by Benjamin et al in a more recent study. Their analysis examined the level of collective shareholding held by members of the same family in a sample of 160 of the largest companies listed on the Malaysian stock exchange, Bursa Malaysia, from 2005 to 2010. The results revealed that families held controlling stakes which exceeded 33 per cent of the company's share capital in approximately 44 per cent of the companies.[1099]

b. Corporate structures which enhance control

Studies have also highlighted the presence of corporate structures such as pyramids and cross-holdings which enhance shareholders' control over companies. Pyramid structures refer to arrangements in which a shareholder owns a controlling stake in a holding company, which in turn holds substantial stakes in other companies.[1100] Cross-holdings refer to the situation where two or more companies own shares in each other.[1101]

Lim's study in the 1970s observed that 'a complex and highly sophisticated system of interlocking stock ownership has developed which enables a few wealthy individuals or families to control an amount of capital many times more than what they actually own.'[1102] These include pyramid shareholding structures and common directorships. Lim observed that in addition to strengthening control, pyramiding further allows controlling shareholders to remain hidden from public view. His analysis found that directors commonly held several directorships in companies, fostering 'tightly integrated groups' which in turn reinforced the economic influence wielded by the owners of corporate groups.[1103]

Sieh Lee similarly highlighted the presence of extensive 'interlocking directorships', in which directors served on the boards of other companies, reflecting the extent of inter-company ties.[1104] Subsequently, Claessens, Djankov and Lang's study also found shareholding through

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[1095] Ibid.
[1096] Ibid 24.
[1097] Zhuang et al reason that shares were commonly held through nominees as a means of hiding the identities of the beneficial owners. This, in turn, was attributed to the state's redistribution policies; Ibid 25.
[1098] Ibid 24.
[1099] The study identified 70 out of the 160 companies with family holdings of more than 33 per cent; Samuel Jebaraj Benjamin et al, 'Family Ownership and Dividend Payout in Malaysia' (2016) 12 *International Journal of Managerial Finance* 314, 321.
[1100] Lim, above n 1088, 115; Bebchuk, Kraakman and Triantis, above n 671, 295, 298.
[1101] Bebchuk, Kraakman and Triantis, above n 671, 299.
[1102] Lim, above n 1088, 115.
[1103] Ibid.
[1104] The study found that more than half the directors held board positions in more than one company, and that on average, these directors held board positions in 5.3 companies; Sieh Lee, above n 1092, 249.

nominee accounts, pyramid structures and cross-holdings to be prevalent in Malaysia in the late 1990s.[1105] Like Lim, they posit that these structures have the effect of camouflaging ultimate ownership while allowing control to be enhanced.[1106] Control over corporate management is arguably reflected in the capacity to appoint key management positions such as the Chairman of the board or Chief Executive Officer. The World Bank's report demonstrates the influence of controlling shareholders over management in its finding that the Chief Executive Officer or board chairman was usually a nominee of the controlling shareholder.[1107]

In summary, the studies consistently indicate the high concentration of share ownership across several decades, with families, individuals and the state holding the largest blocks of shares.[1108] Corporate structures such as pyramids, cross-holdings and common directors further strengthen the control over companies by controlling shareholders. Nevertheless, apart from Benjamin et al's study[1109] which focusses on family ownership, there is an absence of more recent studies which investigate the concentration of share ownership and the identity of controlling shareholders in Malaysia. In particular, in view of observations of significant levels of state ownership in the 1970s and 1990s, questions remain as to the extent of state ownership in more recent times.

c. Empirical analysis of ownership concentration and controlling shareholders

In order to address the gap in the literature identified above, the remainder of this section examines patterns of corporate ownership among the largest companies listed on the Malaysian stock exchange, Bursa Malaysia. A list of the 30 largest public listed companies based on market capitalisation was obtained from the Kuala Lumpur Composite Index (KLCI 30) in July 2016. Subsequently, annual reports were sourced from the websites of these companies. Data on corporate ownership was available in relation to 25 of the KLCI 30 companies. The study examined the size of the largest shareholding and the identity of the entity controlling the largest block of shares in the 25 companies. In addition, a comparison was made with data relating to ownership concentration in the UK and Australia. Table 17 below sets out the analysis of controlling shareholders in the 25 companies.

[1105] Stijn Claessens, Simeon Djankov and Larry HP Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58 *Journal of Financial Economics* 81.
[1106] Their analysis indicated that family control increased from 57.5 per cent to 67.2 per cent when pyramid structures and cross-holdings were taken into account; Ibid 104.
[1107] This was based on an analysis of the ten largest companies by market capitalisation; World Bank, *Report on the Observance of Standards and Codes*, above n 30,10.
[1108] The political connections of many individuals and families who control large listed companies are considered later in the chapter.
[1109] Benjamin et al, above n 1099.

Table 17: Statistics on controlling shareholders in Malaysia's largest companies

Controlling shareholders	Number of companies	Controlling shareholder with 50%+	Controlling shareholder with 45-49%	Controlling shareholder with 40-44%	Controlling shareholder with <20%
State	13 (52%)	13	-	-	-
Individual/family	11 (44%)	4	5	1	1
Foreign company	1 (4%)	1	-	-	-

The analysis of 25 of the largest Malaysian companies indicates that controlling shareholders held more than 45 per cent of the voting rights in 96 per cent of the companies examined. Fifty two per cent of the companies were controlled by the state. All the companies controlled by the state had more than 50 per cent of the voting rights held either directly by the state or institutional investors controlled by the state, or multiple state-controlled entities. In 4 of 13 state-controlled companies, the state held more than 60 per cent of the voting rights directly. Individuals or families were controlling shareholders in 44 per cent of the companies analysed.[1110] In most of the companies controlled by families or individuals, the largest shareholder held more than 45 per cent of the voting rights.

The analysis further suggests that in most of the companies, the largest shareholder or the two largest shareholders were able to control more than 50 per cent of the votes. In many family companies, the second largest shareholder was a state-controlled entity such as the Employees Provident Fund, a state-controlled institutional investor.[1111] This means that in many of the largest listed companies, controlling shareholders on their own or together with the state-entity holding the second largest block of shares would be able to attain the 50 per cent threshold needed to pass ordinary resolutions at a general meeting. As noted in Chapter 3, many significant corporate decisions such as the appointment of directors and approval of their remuneration are determined by way of ordinary resolutions at the general meeting.[1112] In the circumstances, minority shareholders' votes would make little difference to ordinary resolutions. This is consistent with observations in the literature that minority shareholders' holdings are often too insignificant to influence resolutions at a general meeting.[1113]

d. Comparison with the UK and Australia

The relative dispersion of shareholding in the UK and Australia leaves considerably less control over the general meeting in the hands of controlling shareholders. Share ownership in the UK

[1110] The level of family ownership and control in this study is measured by reference to the collective shareholding held by members of the same family. Information on family relations was available from the annual reports of companies. The records indicate that collective family shareholdings were usually held by immediate family members such as spouses, children, siblings and their respective spouses. The significance of family ownership and control of Malaysian companies through collective shareholdings is also reflected in studies such as Benjamin et al, above n 1099.
[1111] Genting Berhad and Genting Malaysia are exceptions. The second largest shareholders in these companies are nominee companies and the identity of the shareholders is not disclosed.
[1112] *Companies Act 1965* Table A arts 60, 70; Bursa Malaysia, *Listing Rules* r10.09.
[1113] Chapter 5 p 119.

is dispersed,[1114] while Australia's patterns of share ownership have been described as occupying an intermediate position between countries of dispersed shareholding and concentrated shareholding structures.[1115] Differences in share ownership concentration, and the ensuing implications for the effectiveness of minority shareholders' voting rights, are clearer when statistics across the three countries are compared. However, the absence of studies which have compared ownership concentration across the three countries poses some challenges to an appropriate comparison.

La Porta and his colleagues' cross-country comparison, based on data from 1995 to 1997, indicated that 35 per cent of large Australian listed companies had a controlling shareholder holding 20 per cent or more of the company's voting rights.[1116] Share ownership in the UK was more dispersed than in Australia, with no large listed corporations having a controlling shareholder holding 20 per cent or more of voting rights. The data indicated that 45 per cent of Australian companies, compared with 10 per cent of UK companies, had controlling shareholders who controlled at least 10 per cent of voting rights.[1117]

Although data on corporate ownership in Malaysia is not directly comparable with statistics on the UK and Australia, several studies collectively indicate a higher level of ownership concentration in Malaysia in comparison with the UK and Australia. The high concentration of share ownership in Malaysia is also consistently reiterated across the studies examined above. The Asian Development Bank's survey in 1998 found that the largest shareholder of the average Malaysia public listed company owned 30.3 per cent of the company's shares.[1118] This suggests a significantly higher level of ownership concentration than La Porta et al's analysis of large listed companies in Australia and the UK. The findings of the Asian Development Bank survey are consistent with an analysis of recent data on the ownership of 25 of the largest Malaysian listed companies. The analysis indicates that 96 per cent of the companies had controlling shareholders with 20 per cent of voting rights or more, while 100 per cent of companies had controlling shareholders holding at least 10 per cent of the voting rights. The higher level of ownership concentration in Malaysia is reflected in Table 18.

[1114] Stilpon Nestor and John K Thompson, *Corporate Governance Patterns in OECD Economies: Is Convergence Underway?* (Organisation for Economic Co-operation and Development, 2006) 5.
[1115] Vivien Chen, Ian Ramsay and Michelle Welsh, 'Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure' (2016) 44 *Australian Business Law Review* 18, 21; Alan Dignam and Michael Galanis, 'Australia Inside-Out: The Corporate Governance System of the Australian Listed Market' (2004) 28 *Melbourne University Law Review* 1, 7.
[1116] La Porta et al, 'Corporate Ownership Around the World', above n 72, 492.
[1117] Ibid, 493.
[1118] Zhuang et al, above n 11.

Table 18: Cross-country comparison of ownership concentration

Country (year of study)	Controlling shareholders holding ≥10% of voting rights	Controlling shareholders holding ≥20% of voting rights
UK (1995–97)	10%	0
Australia (1995–97)	45%	35%
Malaysia (2016)	100%	96%
(1998)	Average controlling shareholder held 30.3%	

Chapter 2 canvassed the hypothesis that the implementation of legal transplants is affected by the context in which law operates.[1119] Although Malaysia has modelled much of its shareholder protection laws on the UK and Australia, the high concentration of shareholding as seen in the analysis above poses comparatively greater challenges to the effectiveness of minority shareholders' voting rights. The relative ease with which controlling shareholders in Malaysia may determine the outcome of resolutions put to the general meeting is evident, particularly as controlling shareholders control 45 per cent or more of the voting rights in 96 per cent of the largest listed companies. The implications of these findings will be considered later in this chapter, while the state's significant role in the ownership of Malaysian corporations is further examined below.

6.4.2 *The State-Business Nexus*

The state has maintained a significant role in the ownership and control of Malaysian companies. The Ministry of Finance Incorporated owns controlling stakes in a significant number of Malaysia's largest groups of companies through its investment arms such as Khazanah Nasional Berhad.[1120] The state holds special rights in some of these companies including veto powers in the decision-making processes of these corporations.[1121] In addition, the state has substantial influence over Malaysian companies through some of the country's largest institutional investors.[1122] Known as government-linked investment companies, these institutional investors are subject to state control in matters such as the appointment of directors and senior management who report directly to the state.[1123] The investment policies of these institutional investors are often thought to be aligned with state policy.[1124] The extent of state influence through institutional investors is reflected in Wahab, How and Verhoeven's analysis which found that five of the largest public institutional investors held close to 70 per cent of

[1119] Theories of legal evolution are examined in Chapter 2 at p 33.
[1120] Khazanah Nasional, *Corporate Profile* <http://www.khazanah.com.my/About-Khazanah/Corporate-Profile>.
[1121] Koh, 'Reforms in the Light of Post-1998 Crisis' above n 9.
[1122] Effiezal A Abdul Wahab, Janice C Y How and Peter Verhoeven, 'The Impact of the Malaysian Code on Corporate Governance: Compliance, Institutional Investors and Stock Performance' (2007) 3 *Journal of Contemporary Accounting and Economics* 106.
[1123] Khazanah Nasional, *Government-linked companies* <http://www.khazanah.com.my/FAQ>.
[1124] Wahab, How and Verhoeven, above n 1122, 110–11.

the institutional shareholdings in companies listed on Bursa Malaysia's Main Board in 2003.[1125]

A more nebulous form of links between the state and business enterprise is the political patronage of controlling shareholders by influential politicians.[1126] State policies on privatisation and redistribution of wealth among ethnic groups[1127] have fostered the emergence of well-connected controlling shareholders whose corporate fortunes have been linked with the success of their political patrons.[1128] Gomez and Jomo posit that controlling shareholders depend on political patrons for privileges for their companies such as contracts, monopolies, exclusive rights and licences, and reciprocate with support for their patrons.[1129] Their study documents multiple instances of such relations between influential politicians and controlling shareholders, suggesting that political patronage of Malaysian businesses is extensive, particularly among large listed companies.[1130] While there are few formal records of the nexus between political patrons and controlling shareholders, factions within the ruling political party have at times resulted in the public disclosure of these relations.[1131] Further, public scrutiny of controversial transactions has also at times led to exposure of the links between controlling shareholders and their political patrons.[1132]

Several high profile bailouts of politically connected companies by state controlled companies during the Asian financial crisis arguably reflect the inter-connection between the state and companies supported by political patrons. These include the bailout of Renong Berhad by related company United Engineers Malaysia Berhad (UEM) and the Employees Provident Fund (EPF), a state-linked institutional investor. The bailout raised public outcry as it was perceived to have benefitted the controlling shareholders of Renong Berhad at the expense of

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[1125] These were the Employees Provident Fund, Lembaga Tabung Haji (Pilgrim Fund), Lembaga Tabung Angkatan Tentera (Armed Forces Fund), Permodalan Nasional Berhad and National Social Security Organization of Malaysia; Ibid 110.

[1126] Peter Searle, *The Riddle of Malaysian Capitalism: Rent-Seekers or Real Capitalists?* (Allen and Unwin, 1999).

[1127] Brown, above n 402. Following independence from the British, political power was vested in the Malays while the Chinese dominated the economic sector. As a result of the racial riots of 1969, the state intervened to redress the economic imbalance through the New Economic Policy (NEP). One of the objectives of the NEP was to raise Malay corporate ownership from 2.4 per cent to 30 per cent; Heng Pek Koon and Sieh Lee Mei Ling, 'The Chinese Business Community in Peninsula Malaysia, 1957-1999' in Lee Kam-Hing and Tan Chee-Beng (eds), *The Chinese in Malaysia* (Oxford University Press, 2000).

[1128] For instance, businesses affiliated with deposed former Deputy Prime Minister Anwar Ibrahim which flourished during his heyday rapidly suffered losses of contracts and other business opportunities subsequent to Anwar's removal and arrest; Simon Johnson and Todd Mitton, Cronyism and Capital Controls: Evidence from Malaysia' (2003) 67 *Journal of Financial Economics* 351; 'The Politics of Business', *The Star* (Selangor), 6 December 2008. Similarly, Razaleigh's failed bid to oust Dr Mahathir from party leadership saw the decline of his allies' businesses. Nevertheless, the resilience of some capitalists who have been able to maintain their dominance despite political changes suggests that while ties with influential politicians are important, they are not the sole determinants of success.

[1129] Gomez and Jomo, above n 24; Claessens, Djankov and Lang, above n 1105.

[1130] Ibid.

[1131] Edmund Terence Gomez, *Politics in Business: UMNO's Corporate Investments* (Forum, 1990).

[1132] Gomez and Jomo, above n 24; Claessens, Djankov and Lang, above n 1105.

[1132] Among these are the state's purchase of a 29 per cent stake in Malaysia Airlines from shareholder Tajudin Ramli for approximately twice the market value; Johnson and Mitton, above n
1128, 376.

minority shareholders of UEM and EPF contributors.[1133] Public criticisms were also rife concerning the purchase of assets by state-owned company Petronas from the financially distressed shipping company controlled by the Prime Minister's son.[1134]

The links between politics and business are thought to be considerably more extensive and nebulous than the publicly-available information on share ownership indicates. Evidence has emerged of individuals having acted as a front or trustee for the dominant ruling political party, the United Malays National Organisation (UMNO), or the government. For instance, Tajudin, who was the controlling shareholder of Malaysia Airlines Berhad, alleged that he held the shares and carried on business as an agent or nominee of the Malaysian government.[1135] According to Tajudin, his purchase of shares in Malaysia Airlines Berhad which led him to become its controlling shareholder was 'disguised as an arm's length commercial deal' at the request of the government.[1136] Similarly, Halim Saad, the controlling shareholder of embattled Renong Berhad was alleged to have been a nominee of UMNO, and the Renong conglomerate was known to be the 'investment arm of UMNO',[1137] although none of this was reflected in official records held by the Companies Commission, the stock exchange or information released by the company such as annual reports.

The use of nominees as a camouflage for the assets and economic influence of the political elite is indicative of the lack of transparency surrounding the ownership and control of Malaysian companies. Evidence of these hidden relationships emerged primarily as a result of disputes between the nominees and the beneficiaries for whom they were acting.[1138] Prior to these disputes, information concerning the links between such nominees and their beneficiaries was largely based on hearsay. However, scholars who have examined the links between politics and business in Malaysia assert that they are far more pervasive than official records suggest. Gomez, for instance, details widespread political patronage involving many of Malaysia's largest and most successful corporate conglomerates.[1139] He argues that nominee companies are used extensively to 'shield the extent of corporate wealth of politicians and political parties'.[1140] Brown likewise describes multiple instances of mutually beneficial relations between political patrons and controlling shareholders of large corporate groups.[1141]

Despite the opacity surrounding the ownership and control of companies through informal nominees and the common absence of these structures from official records, aggrieved insiders such as Tajudin, the former controlling shareholder of Malaysia Airlines Berhad, describe the symbiotic relationship between the state and corporate magnates as a key feature of the state's privatisation initiatives.[1142] In his court documents, Tajudin revealed the prevalence of the

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[1133] Wong, Jomo and Chin, above n 256, 259–60.
[1134] Johnson and Mitton, above n 1128, 376.
[1135] 'Tajudin Alleges Secret Deal with Dr M and Daim', *The Sun Daily* (Selangor), 6 July 2006.
[1136] Ibid.
[1137] Pura, above n 634.
[1138] BK Sidhu, 'Halim Saad's Legal Move Challenged', *The Star* (Selangor), 24 October 2013.
[1139] Gomez, *Politics in Business*, above n 1131.
[1140] Ibid 174.
[1141] Brown, above n 402.
[1142] 'Tajudin Alleges Secret Deal with Dr M and Daim', above n 1135.

unofficial state-business nexus, asserting that many entrepreneurs were required to carry on business on behalf of the government as a 'matter of National Service or Duty'.[1143]

As seen above, the state's influence over the governance of Malaysian companies is facilitated through multiple channels. The first and most direct method of influence is through its ownership of controlling blocks of shares, the second is through state-linked institutional investors, while a third, and the least direct channel of influence, is fostered through relationships between controlling shareholders and political patrons. The benefits offered in the form of contracts and licences provide incentives for controlling shareholders to comply with state policy and the preferences of political patrons. In addition, evidence suggests that controlling shareholders of large corporate conglomerates at times carry on business as unofficial nominees of the political elite and are subject to their directives.[1144] The pervasiveness of the state-business nexus suggests the possibility that attitudes commonly adopted by the state towards minority interests and dissent would spill over into the corporate context dominated by political connections.

a. State perspectives of minority rights and dissent

Former Prime Minister Dr Mahathir argued that economic development and the rights of the majority should take precedence over the rights of minorities or individuals.[1145] Asserting the need for 'Asian values', Dr Mahathir rejected a universal interpretation of civil rights as a form of western hegemony. Laws such as the *Sedition Act 1948* have been used to silence political dissidents and civil rights activists advocating the rights of minority groups,[1146] citing justifications of political stability, economic development and the threat of extremism.[1147] In describing the state's involvement in business, Professor Harding observes several features common to Asian developmental states.[1148] These often include 'dominant party rule where

[1143] Ibid.
[1144] Ibid.
[1145] Carolina Lopez C, 'Globalisation, State and G/local Human Rights Actors: Contestations Between Institutions and Civil Society' in Edmund T Gomez (ed), *Politics in Malaysia: The Malay Dimension* (Routledge, 2007) 50.
[1146] These include indigenous people and migrant workers; Kirk Endicott, 'Indigenous Rights Issues in Malaysia' in Bartholomew Dean and Jerome M Levi (eds), *At the Risk of Being Heard: Identity, Indigenous Rights and Postcolonial States* (University of Michigan Press, 2003) 142; 'Harrison Ngau held at airport', 2 August 2010, Free Malaysia Today (online) <http://freemalaysiatoday.com/fmt-english/politics/sabah-and-sarawak/8683-harrison-ngau-held-at-airport>.
[1147] Amnesty International, 'Malaysia: End Unprecedented Crackdown on Hundreds of Critics' (Press release, 11 March 2016) <https://www.amnesty.org/en/press-releases/2016/03/malaysia-end-unprecedented-crackdown-on-hundreds-of-critics-through-sedition-act/>; Amnesty International, 'Malaysia: National Security Council Act Gives Authorities Unchecked and Abusive Powers' (Press release, 1 August 2016) <https://www.amnesty.org/en/latest/news/2016/08/malaysia-national-security-act-abusive-powers/>.
[1148] In developmental states, the government assumes an active role in facilitating economic development. Jayasuriya posits that relationship-based capitalism in which the state and business enterprise are inextricably linked in a symbiotic relationship is endemic to many parts of Southeast Asia; Jayasuriya, above n 135; Kamarul Bahrin and Roman Tomasic, 'The Rule of Law and Corporate Insolvency in Six Asian Legal Systems' in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (Routledge, 1999) 128; Gordon P Means, 'Soft Authoritarianism in Malaysia and Singapore' (1996) *7 Journal of Democracy* 103.

democratic principles may in practice be limited in scope and developmental policies predominate' and 'limits on judicial review and civil liberties'.[1149]

Similar perspectives of dissent and minority rights are reflected in judicial decisions.[1150] The removal of the Lord President from office in 1988 was a watershed which had the consequence of limiting judicial independence in Malaysia.[1151] Harding posits that the 'judiciary was tamed and trained to serve the needs of the developmental state, as if it were a department of the Federal Government answerable to the Prime Minister rather than the law.'[1152] Since then, judicial decisions suppressing dissent by civil rights activists and political opponents have reinforced the perception that the judiciary continues to lack independence from the executive.[1153] Although such perceptions are strongest in relation to cases involving political dissidents,[1154] the outcomes of some civil suits involving politically well-connected companies or businessmen have also fuelled the notion that minorities are likely to encounter considerable challenges in seeking redress against the political elite and their associates.

The *Bakun Dam* case illustrates the challenges minority groups face in seeking redress against well-connected companies. The case involved an application by indigenous people who sought to have their traditional native rights over the land upheld.[1155] The applicants opposed the construction of the hydroelectric dam on their purported native land by a company associated with high-ranking government officials. The application was dismissed by the appellate courts, with the result that the indigenous people were displaced from their traditional lands. Critics argue that the decision was contrary to principles of the *United National Declaration on the Rights of Indigenous People* and common law.[1156] At the same time, the decision ostensibly legitimised the government's plans to construct the Bakun Dam.

Critics assert that defamation suits have also been used as a means of silencing allegations of impropriety against prominent businessmen.[1157] The courts have awarded excessively high

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[1149] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012) 66.
[1150] Amnesty International UK, 'Malaysia: End Trial of Human Rights Activist Irene Fernandez' (Press release, 13 January 2003) <https://www.amnesty.org.uk/press-releases/malaysia-end-trial-human-rights-activist-irene-fernandez>.
[1151] Harding, 'The 1988 Constitutional Crisis in Malaysia', above n 1005; Khoo Boo Teik, 'Between Law and Politics: The Malaysian Judiciary Since Independence' in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (Routledge, 1999) 174.
[1152] Harding, 'The Constitution of Malaysia', above n 1149, 223.
[1153] 'Anwar Ibrahim: Malaysian Opposition Leader Loses Final Appeal to Sodomy Conviction, Sentenced to Five Years' Jail', *ABC News* (online), 10 February 2015 <http://www.abc.net.au/news/2015-02-10/malaysias-anwar-ibrahim-sentenced-to-five-years-jail-sodomy/6082574>; *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v YAB Dato' Dr Zamry Abd Kadir; Attorney-General of Malaysia (Intervener)* [2010] 2 CLJ 925; M Mageswari, 'Dr Zambry is valid Perak MB, Federal Court rules', *The Star* (Selangor), 9 February 2010.
[1154] International Commission of Jurists, 'Federal Court Judgment on Anwar Ibrahim's "Sodomy II" Appeal a Blow to Human Rights in Malaysia' (Press release, 10 February 2015) <http://www.icj.org/federal-court-judgment-on-anwar-ibrahims-sodomy-ii-appeal-a-blow-to-human-rights-in-malaysia/>.
[1155] *Ketua Pengarah Jabatan Alam Sekitar v Kajing Tubek & Ors* [1997] 3 MLJ 23.
[1156] Wendy Zeldin, 'Malaysia: Native Villagers Lose Land Rights Suit over Bakun Dam Construction', *Global Legal Monitor*, 12 September 2011 <http://www.loc.gov/law/foreign-news/article/malaysia-native-villagers-lose-land-rights-suit-over-bakun-dam-construction/>; Gurdial Singh Nijar, 'The Bakun Dam Case: A Critique' [1997] 3 *Malayan Law Journal* ccxxix.
[1157] International Bar Association, The ICJ Center for the Independence of Judges and Lawyers, The Commonwealth Lawyers' Association and the Union Internationale Des Avocats, *Justice in Jeopardy: Malaysia*

sums as damages, amounting to several hundred million ringgit, which arguably serve as a punitive measure and a deterrent to potential critics. Harding and Whiting observe:

> In a string of commercial and defamation cases throughout the 1990s, most famously the *Ayer Molek* litigation, a case 'which gives the impression to right-thinking people that litigants can choose the judge before whom they wish to appear'; the MBf Holdings litigation, and the many cases involving the business dealings and reputation of politically well-connected businessman Vincent Tan, it seemed that some judges were not deciding cases according to law, but in order to please powerful business interests.[1158]

The discussion now turns to the question of how these observations relate to the character of Malaysian shareholder protection. Previous chapters of the thesis indicate that formal Malaysian shareholder protection law is comprehensive and strong but lacks effectiveness in practice. The analysis of judicial decisions in Chapter 5 highlights the challenges that minority shareholders continue to face in obtaining leave to bring derivative actions. This is attributed substantially to the Malaysian courts' restrictive interpretation of the statutory derivative action. There is arguably some resonance between the restrictive judicial approach in giving effect to minority shareholders' rights and the treatment of minority interests and dissent in the broader socio-political milieu.

The discussion above detailed the pervasive links between the state and business in Malaysia. The state holds controlling blocks of shares in a substantial proportion of Malaysia's largest companies. State-linked institutional investors and informal relations with political patrons further strengthen the state-business nexus. Trends in judicial decision-making suggest that the courts would be cautious in giving effect to minority shareholders' rights to challenge those who control companies, particularly in the context of prevalent connections between controlling shareholders and the state. Similarities may be drawn with the derivative action in China, where the state likewise maintains significant ownership of listed corporations. Clark and Howson underscore the political sensitivity of allowing derivative suits against corporations controlled by the state.[1159] They reason that such circumstances are likely to engender judicial restraint in deciding these claims.

6.4.3 *Cultural Influences*

Malaysian society comprises several ethnic groups, the largest of which are the Malays, Chinese and Indians. The Malays are the dominant ethnic group, both in terms of population and political influence. The second largest ethnic group are the Chinese who have a significant

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(2000). Examples of cases include *MBf Capital Berhad v Tommy Thomas* [1999] 1 MLJ 139; *MBf Capital v Param Cumaraswamy* [1997] 3 MLJ 824.

[1158] Andrew Harding and Amanda Whiting, '"Custodian of Civil Liberties and Justice in Malaysia": The Malaysian Bar and the Moderate State' in Terence C Halliday, Lucien Karpik and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony* (Cambridge University Press, 2012) 247, 275.

[1159] Donald C Clark and Nicholas H Howson, 'Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China' in Dan W Puchniak, Harald Baum and Michael Ewing-Chow (eds), *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 243, 247.

presence in the economic sector. Although each ethnic group has its unique cultural and religious features, they share common values of collectivism and respect for authority.[1160]

In Malaysia's collectivist society, a high premium is placed on maintaining harmonious interpersonal relationships.[1161] A fundamental aspect of maintaining social harmony is the preservation of 'face'. According to Abdullah, 'face' saving involves 'maintaining a person's dignity by not embarrassing him'.[1162] Deference to superiors and elders is an integral part of 'face' saving and is evidenced by politeness and submissiveness while conflict and confrontation are avoided. Assertiveness and critical thinking which are valued in individualist cultures may be perceived as ill-mannered, particularly when directed at superiors in a collectivist culture. Likewise, challenging or commenting on a superior's views is seen as improper.[1163] The concept of 'face' is underpinned by a keen sense of each individual's place in the social hierarchy. Pye notes the instinctive ability to grasp the finest gradations of status.[1164] Hofstede's power distance index places Malaysia at the apex, indicating the social acceptance of a high level of inequality in distribution of power.[1165] Confucianism is similarly strongly hierarchical, requiring individuals to 'conform with the basic social order of his surrounding world'.[1166] The influence of cultural values on the manner in which directors' duties are performed are discussed below.

6.4.4 *Implications of Contextual Factors for the Effectiveness of Malaysian Shareholder Protection Law*

The literature examined in Chapter 5 reflects the proposition that Malaysian shareholder protection laws often do not operate effectively to safeguard minority shareholders from expropriation of corporate property.[1167] This section considers the manner and extent to which the contextual factors explain the regulations' lack of effectiveness. The analysis begins by considering the interaction of shareholders' voting rights and contextual influences. Subsequently, the discussion turns to the role of independent directors and board committees introduced by the post-Asian financial crisis reforms in order to strengthen checks and balances in internal management. Thirdly, the potential influence of the state-business nexus on the regulators responsible for public enforcement and judicial responses to the strengthening of minority shareholders' rights will be canvassed.

[1160] Raduan Che Rose et al, 'A Face Approach to Conflict Management – A Malaysian Perspective' (2007) 2 *Journal of Social Sciences* 121.
[1161] Ibid.
[1162] Asma Abdullah, *Going Glocal: Cultural Dimensions in Malaysian Management* (Malaysian Institute of Management, 1996).
[1163] Ibid.
[1164] Lucian W Pye, *Asian Power and Politics: The Cultural Dimensions of Authority* (Harvard University Press, 1985), 127.
[1165] Geert Hofstede and Gert Jan Hofstede, *Cultures and Organizations: Software of the Mind* (McGraw-Hill, 2nd ed, 2005).
[1166] Douglas M Branson, 'The Uncertain Prospect of Global Convergence in Corporate Governance' in Low Chee Keong (ed), *Corporate Governance: An Asia-Pacific Critique* (Sweet and Maxwell, 2002) 475.
[1167] Chapter 5 p 116.

a. Shareholders' voting rights

In Chapter 5, minority shareholders were observed to be passive towards voting at general meetings.[1168] This is attributed, at least in part, to the perception of minority shareholders' votes as insignificant, and that resolutions supported by controlling shareholders will be passed irrespective of how minority shareholders vote. These perceptions are supported by the empirical data on ownership concentration analysed above. In most of the 25 large listed companies examined, the largest shareholder on its own, or with the second largest shareholder, was able to exercise more than 50 per cent of the company's voting rights. As the majority of decisions at general meetings are made by way of ordinary resolutions, the two largest shareholders would often determine the outcome of resolutions put to the general meeting.

Minority shareholders' votes are of greater significance where special resolutions, requiring the approval of holders of 75 per cent of voting rights, are before the general meeting. Nevertheless, there are limited situations in which special resolutions are required.[1169] In recent years, there has been a surge in bids by controlling shareholders to privatise listed companies by purchasing all the share capital of individual companies and delisting them. Since 2010, the *Listing Rules* have required the approval of at least 75 per cent of the voting rights for such privatisation bids.[1170] As the privatisation of listed companies also entails the compulsory acquisition of shares and delisting, a high threshold of 90 per cent of the votes must be met, and there must not be objections to the delisting from holders of more than 10 per cent of the shares.[1171] In many privatisation exercises, minority shareholders' shares were purchased by the controlling shareholder at a price which they deemed too low, based on valuations which were outdated and disputed.[1172]

Media reports indicated that in many cases, minority shareholders were opposed to privatisation exercises.[1173] However, the diminutive holdings of minority shareholders impeded their capacity to influence resolutions put to the general meeting, even when acting collectively. Minority shareholders who were unsuccessful in preventing the approval of resolutions to privatise companies took their grievances public,[1174] often with the support of the Minority Shareholders' Watchdog Group. Media reports of one privatisation bid stated that minority shareholders walked out of the meeting in protest without voting, as they perceived that the company would be privatised against their wishes regardless of whether they voted.[1175]

[1168] Chapter 5 p 119.
[1169] Chapter 3 p 58. These include arrangements between the company and its creditors; reduction, increase, division or consolidation of share capital; variation of class rights and amendment of the articles of association. The *Companies Act 2016* abolishes the need for the articles of association.
[1170] Bursa Malaysia, *Listing Rules* r 16.06(1)(b)
[1171] Ibid; *Companies Act 1965* s 180.
[1172] Chan Su-Li, *Plugging the "Loophole",* Skrine <www.skrine.com/plugging-the-loophole>.
[1173] Bushon, 'Shareholders Should Voice Dissent More Strongly', above n 1052; Kaur, 'Will Minority Shareholders Triumph in Seeking Higher Value', above n 1049.
[1174] Sidek, above n 1045; 'Some Feel Ranhill's Offer Inadequate', above n 1045.
[1175] Chong Jin Hun, 'Minority Shareholders Storm Out of Glenealy EGM', *The Edge Malaysia* (Selangor), 13 September 2012.

On a few occasions, minority shareholders succeeded in influencing corporate decisions, denying shareholders the requisite threshold of 90 per cent[1176] or lobbying for higher offer prices. For instance, lobbying by a group of approximately 100 minority shareholders who collectively held a 2.6 per cent stake resulted in a marginally higher price offered to minority shareholders to the proposed privatisation of MBf.[1177] The group of minority shareholders was seen as pivotal as the controlling shareholder was unable to obtain the requisite threshold for compulsory acquisition without their votes.[1178] The reports suggest that minority shareholders acting collectively were often only able to mobilise a small percentage of the voting rights.[1179] Most company decisions requiring shareholder approval, however, are made by way of ordinary resolution requiring the support of 50 per cent of voting rights. Consequently, minority shareholders' votes are of little significance in most decisions at a general meeting unless supported by an institutional investor.[1180]

b. Independent directors

The post-Asian financial crisis reforms introduced independent directors and board committees ostensibly aimed at strengthening the internal monitoring of management decisions.[1181] Nevertheless, the observers' reports canvassed in Chapter 5 indicate that the board of directors, including independent directors, is usually appointed by controlling shareholders and often defers to them.[1182] Controlling shareholders commonly hold the position of Chairman or Chief Executive Officer, further reflecting their dominance over the board.[1183] The capacity of controlling shareholders to dominate board appointments stems primarily from the concentration of share ownership.[1184]

The challenges faced by Malaysian directors in monitoring conflicts of interest resonate with scholars' observations that independent directors commonly have a limited role in safeguarding the interests of minority shareholders in countries where shareholding is concentrated.[1185] Ferrarini and Filippelli observe that 'controlling shareholders perform many of the same functions that independent directors exercise in diffuse shareholder companies' and, consequently, the role of independent directors is limited to ratifying decisions which have

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[1176] 'Petronas Bid to take MISC private fails', *The Star* (Selangor), 20 April 2013. Resistance by minority shareholders of Hong Leong Capital Berhad likewise prevented the company from being privatised, with only 2.21 per cent of minority shareholders voting in favour of the offer; Kathy Fong, 'Quek Fails to Take Hong Leong Capital Private', *The Edge Malaysia* (Selangor), 26 February 2013.
[1177] 'Lourdenadin Persistent to Take MBf Private, Shareholders Won't Budge', *The Edge Malaysia* (Selangor), 3 April 2013.
[1178] 'Revised Takeover Offer For MBf Accepted', *Malaysian Reserve* (Kuala Lumpur), 16 April 2013.
[1179] Several media reports suggest that the minority shareholders acting collectively comprised less than four and a half per cent of the respective companies' voting rights; Wong Wei Shen, 'Privatisation of Glenealy Approved', *The Star* (Selangor), 13 September 2012; Perak Corp May Abort SCR', *The Star* (Selangor), 25 October 2014.
[1180] Kaur and James, above n 16.
[1181] Chapter 3 p 76.
[1182] See p 120.
[1183] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 10.
[1184] Finance Committee, above n 9, 42.
[1185] Puchniak, 'Multiple Faces', above n 27, 512; Ferrarini and Filippelli, above n 1070, 289; Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 2.

been predetermined.[1186] Countries are incentivised to adopt regulations requiring the presence of independent directors as consistency with international best practices is perceived as being conducive to investment. [1187] However, despite the widespread adoption of Anglo-American models of regulation, studies highlight distinct jurisdictional differences in the effectiveness of independent directors' monitoring of corporate misconduct.[1188]

In the Malaysian context, cultural values arguably intensify the challenges faced by directors in monitoring the propriety of internal management decisions. Malaysian cultural values of collectivism, consensus and deference to authority are at odds with the presupposition of an active monitoring role by independent directors. Directors who monitor conflicts of interest, or raise questions in relation to the propriety of transactions, would arguably be perceived as challenging the integrity of the individuals involved, causing a loss of face. The loss of face is magnified when such questions are raised in the presence of other members of the board. Hierarchical social structures further contribute to the challenges of effective monitoring, as controlling shareholders are often wealthy, closely associated with the political elite and hold honorific titles. Che Rose et al noted the tendency for subordinates in a Malaysian workplace to defer to their superiors unquestioningly.[1189] Their findings are consistent with Hofstede's view that subordinates are unlikely to contradict or criticise their superiors' judgment. Similarly, Khoo highlights the 'social and cultural sensitivities' encountered by the board and its committees in assessing directors' performance and recommending their remuneration, particularly as performance evaluation is usually the prerogative of superiors.[1190]

c. Shareholder litigation, public enforcement and the state-business nexus

As seen in Chapters 3 and 5, there are limited situations in which shareholders may have recourse to the courts for breaches of shareholder protection law. The Malaysian courts have interpreted the statutory derivative action restrictively and held that the oppression remedy is rarely allowed for minority shareholders of public listed companies.[1191] In a similar vein, the World Bank's report observes that the courts have been 'skeptical towards the claims of smaller shareholders and their grounds to bring complaints against the company, directors, or major shareholders'.[1192] Scholars observe that the judiciary has been subordinate to the executive and decisions are often in line with state policy.[1193] The restrictive interpretation of minority shareholders' rights of recourse to the courts is consistent with the preservation of the state's interests as a controlling shareholder, and the state's perspective of minority rights. This

[1186] Ferrarini and Filippelli further highlight the inadequacy of independence requirements which commonly do not consider social ties; Ferrarini and Filippelli, above n 1070, 272, 288. For instance, Puchniak and Kim observe that in Singapore, independent directors of companies controlled by families are often friends of the family; Puchniak and Kim, above n 164, 24.
[1187] Ibid 289; Puchniak, 'Multiple Faces', above n 27, 514.
[1188] Puchniak and Kon, above n 164; Ferrarini and Filippelli, above n 1070, 289.
[1189] Che Rose et al, above n 1160.
[1190] Khoo, above n 19, 22.
[1191] *Soh Choo v Unico-Desa Plantations Bhd* [2011] 1 LNS 1101.
[1192] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 18.
[1193] Harding, 'The Constitution of Malaysia', above n 1149, 223; Harding and Whiting, above n 1158, 275.

suggests the relevance of political economy in explaining the restrictive judicial approach to minority shareholders' rights to seek redress through the courts.

The state-business nexus is arguably relevant to the lack of public enforcement of key substantive shareholder protection provisions such as directors' duties. The analysis in Chapter 5 indicates that Malaysian regulators have not had an active role in enforcing directors' duties,[1194] despite the Finance Committee having highlighted concerns regarding 'the ability of boards to represent the interests of all shareholders' and abusive related party transactions.[1195] The regulators are thought to lack independence from the state.[1196] Hence, reticence in investigating and enforcing breaches of directors' duties may be attributed to the sensitivities of political involvement in the control of companies.

6.5 Theories of Legal Evolution and Political Economy

The analysis above demonstrates the interaction of law and its context that has led to the lack of effective implementation of Malaysian shareholder protection law. Concentrated share ownership, the state-business nexus and cultural values impede the effective substantive implementation of the regulations. In contrast with the weak effectiveness of shareholder protection law in practice, formal Malaysian shareholder protection is comprehensive and strong, having been modelled on UK and Australian law. This phenomenon, which scholars have described as 'form over substance'[1197] may be explained by reference to theories of legal evolution that emphasise law's inextricable relation to its context.[1198]

Scholars such as Milhaupt and Pistor assert that legal transplants go through a process of adaptation to the local context.[1199] Complementarity between the political economy and the values embodied in transplants is posited to engender more effective implementation of legal transplants.[1200] The relevance of political economy for the effectiveness of Malaysian shareholder protection is seen in the centrality of the state-business nexus, and highly concentrated shareholding flowing from the state's privatisation and redistribution policies.

The high concentration of shareholding in Malaysia is thought to be a primary contributing factor to the regulations' lack of effectiveness.[1201] This is consistent with scholars' observations that countries with concentrated corporate ownership often have less effective implementation of laws which protect minority shareholders, despite convergence in formal regulations across countries.[1202] Several reasons have been proposed for this phenomenon. One line of reasoning focuses on the agency problem. Regulations aimed at addressing agency

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[1194] Chapter 5 p 166.
[1195] Finance Committee, above n 9, 42.
[1196] World Bank, *Report on the Observance of Standards and Codes*, above n 30, 15–16.
[1197] Pascoe and Rachagan, above n 14, 97.
[1198] These theories are examined in Chapter 2 p 33.
[1199] Milhaupt and Pistor, above n 167, 211–2.
[1200] Ibid 210.
[1201] Finance Committee, above n 9, 42.
[1202] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 169; Puchniak, 'Multiple Faces', above n 27, 512; Ferrarini and Filippelli, above n 1070, 289.

problems in situations of dispersed shareholding may not effectively deal with pertinent issues that arise where concentrated shareholding is common.[1203] Another suggested argument is that shareholding structures are relevant to the political influence which controlling shareholders wield.[1204] This, in turn, may be exercised in favour of maintaining their dominant position. In addition to shareholding structures and political economy, other influences such as cultural norms are posited to affect the implementation of law.[1205]

The analysis in section 6.4.4 suggests that controlling shareholders' dominance over the general meeting and board appointments, including independent directors, coupled with sociocultural norms and a political culture averse to dissent,[1206] collectively add to the regulations' lack of effectiveness. The judiciary's and regulators' lack of independence,[1207] as well as their tendency to implement state policy and defend state interests, further impede the regulation's effectiveness in safeguarding the interests of minority shareholders. As a result of interaction with these specific features of the Malaysian context, many of the protections for minority shareholders have remained largely illusory.

Scholars assert that the underlying purpose for the adoption of reforms is a stronger determinant of its function than the form of the regulations.[1208] The post-Asian financial crisis reforms were driven primarily by the perceived need to placate foreign investors, while the government took the view that substantive reforms were unnecessary.[1209] The underlying purpose for the adoption of the post-Asian financial crisis reforms was to signal conformity with international standards with the aim of regaining foreign investment.[1210] Nonetheless, if implemented effectively, the reforms would have eroded the dominance of controlling shareholders. While controlling shareholders benefit from the investor confidence engendered by regulations conforming to international standards,[1211] controlling shareholders have a vested interest in maintaining their dominance over the governance of companies. In the Malaysian context, strong formal law with weak implementation favours the interests of controlling shareholders.

The analysis of Malaysian cases in Chapter 5 reflects a restrictive judicial approach to the statutory derivative action.[1212] This may arguably be explained by reference to theories of legal evolution. The legal evolution scholarship emphasises the centrality of the people involved in legal processes in determining the way in which law is interpreted and enforced.[1213] Against

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[1203] In situations of dispersed shareholding, self-dealing by managers is of greater concern, while conflicts between controlling shareholders and minority shareholders prevail where shareholding is concentrated; Puchniak and Kim, above n 164, 20; Bebchuk and Hamdani, above n 26, 1281.
[1204] Coffee, 'Political Economy of Dodd-Frank', above n 244; Claessens, Djankov and Lang, above n 1105, 109.
[1205] Kraakman et al, *Anatomy of Corporate Law* (3rd edition), above n 147, 24–5; Puchniak and Kim, above n 164, 21.
[1206] See p 202.
[1207] See text to n 1152.
[1208] Milhaupt and Pistor, above n 167.
[1209] Shameen and Oorjitham, above n 155.
[1210] Puchniak and Kim observe that reforms requiring independent directors are a fairly inexpensive means of signalling compliance with international best practices while allowing existing governance structures to remain largely in the hands of controlling shareholders; Puchniak and Kim, above n 164, 28.
[1211] Chapter 2 p 29.
[1212] Chapter 5 p 156.
[1213] Chapter 2 p 32.

the background of Malaysian legal history, in which judicial independence has been curbed for several decades,[1214] it is unsurprising that judicial decisions would be in line with state policy. A restrictive interpretation of legal rights which empower minority shareholders against controlling shareholders is consistent with preservation of the state's interests as a dominant player in the ownership and control of companies. Nevertheless, the analysis of cases in Chapter 5 reveals that the decisions were reached on the basis of legal reasoning rather than non-legal considerations such as political economy. Consistent with autopoietic theory and memetics, the influence of political economy was arguably embedded in legal concepts, and legitimised through legal reasoning.

The memetic approach highlights judges as key agents in the transmission of memes which are replicated through communication.[1215] The legal system receives information from the context in which it operates. Such information is then coded into legal language.[1216] Deakin posits that legal concepts embody 'in shorthand form information about the social world which is filtered through the processes of legal argument and exposition'.[1217] As with memetics, proponents of autopoietic theory assert the significance of legal concepts in transmitting information between law and society. Autopoietic social systems are perceived as self-referential and self-reproducing, meaning that they are able to maintain themselves without reference to other sub-systems.[1218] At the same time, cognitive openness enables the legal sub-system to receive information from other social sub-systems, subject to such information being coded into legal language.[1219] Legal concepts which incorporate contextual influences are perpetuated through the doctrine of precedent, while legal reasoning facilitates internal consistency within the legal system.[1220]

The body of case law espousing a restrictive interpretation of the statutory derivative action arguably reflects the processes suggested by memetics and autopoietic theory. Consistent with the political economy, the judiciary adopted a cautious approach to the strengthening of minority shareholders' rights. This approach appears to have been encoded into legal concepts and legitimised through legal reasoning. The judgments referred to the common law derivative action and Australian case law as grounds for a restrictive interpretation of the statutory derivative action. Although the Malaysian courts cited Australian case law as authority for a strict approach, the analysis in Chapter 5 reveals that the Malaysian courts imposed greater restrictions on access to the statutory derivative action, resulting in significantly fewer successful applications for leave as compared with Australian courts.[1221] Through the doctrine of precedent, the restrictive approach was perpetuated across multiple judicial decisions, facilitating consistency in case law. Ultimately, a body of authoritative cases emerged,

[1214] See text to n 1152.
[1215] Deakin, 'Evolution for our time', above n 188, 32; Memetics is discussed at p 36 of Chapter 2.
[1216] Deakin, 'Evolution for our time', above n 188, 29.
[1217] Ibid 19.
[1218] Lourenco, above n 195, 36-7.
[1219] Ibid 52.
[1220] Deakin, 'Evolution for our time', above n 188, 37.
[1221] Chapter 5 p 157.

reinforcing the restrictive interpretation of the statutory derivative action and limiting its effectiveness in providing minority shareholders redress from breaches of shareholder rights.

6.6 CONCLUSION

This chapter has examined the question of how the various theoretical perspectives may explain the development of Malaysian shareholder protection law – its comprehensiveness, strength and effectiveness. Each of the theoretical perspectives outlined in Chapter 2, with the exception of the strong form legal origin thesis, appears to have some explanatory power for the development of Malaysian shareholder protection law and its particular character.

The first section of the chapter focuses on formal Malaysian shareholder protection, identifying the forces and influences which have contributed to its increasing comprehensiveness and strength. The analysis in this chapter reveals multi-faceted interactions which have shaped the character of Malaysian shareholder protection law. Legal origin and, more recently, transnational harmonisation, have significantly influenced the content and strength of formal Malaysian shareholder protection. The influence of inherited legal tradition is reflected in the pattern of consistent borrowing from the laws of other common law countries. The habit of looking to the regulations of Australia, the UK and other common law countries is underpinned by institutional complementarities, as posited by the weak form legal origins thesis. The finding that transnational harmonisation and economic forces have also influenced the evolution of Malaysian shareholder protection is consistent with legal origin being one of several potential influences on the development of law. This further indicates that the weak form legal origin thesis has stronger explanatory power for the evolution of Malaysian shareholder protection than the strong form thesis.

An emphasis on international standards since the Asian financial crisis suggests that transnational harmonisation has had a role in shaping formal Malaysian shareholder protection over the past two decades. Law reformers often looked to developed common law countries as models of international standards, in line with Malaysia's common law legal origin. Reforms towards international standards were primarily market-driven, and were aimed at attracting investment and enhancing Malaysia's competitiveness internationally. This suggests the relevance of economic factors in driving law reform. The analysis reveals patterns of co-evolution between law and its context, demonstrating that regulatory reforms also influenced market and shareholder responses. Further evidence of iterations between law and its context is seen in the demand for further regulatory reform following lobbying by minority shareholders and criticisms in the broader community of the regulations' inadequacy in safeguarding minority shareholder interests.

Scholars argue that the shape of formal law is also affected by the political economy of a particular national system. In countries with concentrated shareholding, company law is posited to reinforce the dominance of controlling shareholders. Nevertheless, the strengthening of formal Malaysian shareholder protection law ostensibly weakens the dominance of controlling shareholders and the boards they control, contrary to the political economy

argument. However, the reforms are consistent with the proposition that controlling shareholders are at times willing to concede reforms that weaken their dominance in exchange for better prospects of raising capital. Stagnation of law in some critical areas of shareholder protection, nonetheless, suggests the influence of political economy in preserving controlling shareholders' dominance in these areas of regulation.

The discussion then turns to the regulations' lack of effectiveness in practice. The analysis suggests that, consistent with the claims of legal evolution, the interaction of law and its context accounts for the lack of effectiveness. Highly concentrated shareholding allows controlling shareholders to dominate the general meeting, rendering minority shareholders' votes inconsequential in many cases. The state maintains substantial ownership and control of many Malaysian companies. The nexus between the state and business underscores the relevance of political economy in explaining the effectiveness of shareholder protection. Cultural norms further intensify challenges to directors' monitoring of conflicts of interest, while the form of political governance in Malaysia arguably contributes to judicial conservatism in giving effect to minority shareholders' rights, and limited public enforcement of substantive shareholder protection law.

The post-Asian financial crisis reforms were driven primarily by the perceived need to placate foreign investors. Although the government did not think that substantive reforms were necessary, they conceded the reforms in order to strengthen Malaysia's competitiveness internationally. Controlling shareholders benefitted from the investment engendered by regulations which signalled conformity to international standards, but had vested interest in maintaining their dominance over the governance of companies. Consequently, the phenomenon in which formal shareholder protection law is strong but substantive implementation is weak favours the interests of controlling shareholders, their political patrons and, ultimately, the synthesis of political and corporate power in Malaysia.

CHAPTER 7

SUMMARY AND CONCLUSIONS

7.1 THE FIRST RESEARCH QUESTION

As noted in Chapter 1, the first research objective of the thesis is to describe and explain the character and evolution of Malaysian shareholder protection. Three facets of the character of shareholder protection are analysed, namely the *content*, *strength* and *effectiveness* of shareholder protection. Each of these is examined through the methods outlined in Chapter 2.

7.1.1 *Summary of Methods*

Chapter 3 describes the content of shareholder protection law through a doctrinal analysis of cases and explains the manner in which legislative provisions, listing rules and codes seek to protect shareholders from expropriation of corporate property. Chapter 4 measures the strength of Malaysian shareholder protection through a quantitative measurement known as the leximetric method. The effectiveness of Malaysian shareholder protection in practice is examined in Chapter 5 through several methods. The discussion canvasses secondary sources which consider how shareholder protection law operates in the Malaysia's socio-cultural, economic and political context. As an illustration of the manner in which shareholder protection regulations operate, Chapter 5 analyses judicial decisions on breaches of directors' duties over an eight-year period, drawing on descriptive statistics and the doctrinal analysis of cases.

In summary, the analysis of the character of Malaysian shareholder protection finds that formal Malaysian shareholder protection is comprehensive and strong. Nevertheless, despite the apparent strength of formal law, in practice, Malaysian shareholder protection lacks effectiveness.

7.1.2 *Content of Formal Shareholder Protection*

Chapter 3 describes the *content* of formal Malaysian shareholder protection, detailing the various ways in which the regulations purport to safeguard the interests of shareholders. These include shareholders' voting rights in relation to significant corporate decisions; directors' duties of loyalty and the presence of independent directors; shareholders' recourse to the courts; disclosure of corporate information; and public enforcement by the regulators. The chapter examines changes in the regulations from 1965 to 2016, and finds that the proliferation of formal regulatory reforms over time has led to Malaysian shareholder protection becoming increasingly comprehensive. The analysis observes that significant periods of regulatory reform were preceded by economic events, and reforms were modelled largely on UK and Australian law. Consequently, the content of Malaysian regulatory reforms bears strong similarities to Anglo-Australian shareholder protection. Notably, for many decades, Anglo-

Australian regulations were mostly adopted with little consideration of the implications that specific features of Malaysia's socio-economic context may have for the effectiveness of reforms. Law reformers have only in recent years begun to acknowledge the possible relevance of Malaysia's corporate ownership structures in formulating law reform proposals.[1222]

7.1.3 *Strength of Formal Malaysian Shareholder Protection*

In Chapter 4, the *strength* of formal Malaysian shareholder protection is measured through the leximetric method over a period of 45 years. The measurement of Malaysian shareholder protection is then compared with six other countries from 1970 to 2005. The analysis finds that Malaysian shareholder protection is strong, and its strength is comparable to that of advanced common law economies held out by international financial organisations as models of international standards.

Although the level of aggregate shareholder protection in Malaysia was the lowest of all the countries in 1970, by the late 1980s, Malaysia's aggregate shareholder protection had reached the level of shareholder protection in the US. At the end of the period of comparison in 2005, the level of aggregate shareholder protection in Malaysia was higher than that of the US but lower than in France, Germany, India, Australia and the UK. Nevertheless, the differences in the strength of shareholder protection among the seven countries were minimal, and proximity to the level of protective strength of UK regulations and that of other advanced economies demonstrates the strength of Malaysian shareholder protection.

Malaysia had the strongest growth among all the countries in the study over the 35 year period. Growth in the strength of Malaysian shareholder protection occurred over several short periods of time interspersed between longer periods of relative stability, with the two strongest periods of growth following financial crises. Despite the tendency for Malaysian law to emulate developments in UK and Australian law, specific areas of Malaysian shareholder protection remained largely unchanged. In particular, the regulation of directors' remuneration and disqualification remained stagnant, while shareholder protection in these areas was strengthened considerably in the UK and Australia.

7.1.4 *Effectiveness of Malaysian Shareholder Protection in Practice*

Chapter 5 examines the *effectiveness* of Malaysian shareholder protection in practice. It measures effectiveness by reference to the ability to obtain a remedy for breaches of shareholder rights or the ability to safeguard shareholders' interests in situations of potential or perceived expropriation. The analysis examines reports on the decisions, and rights of recourse to the courts. The findings collectively indicate that Malaysian shareholder protection lacks effectiveness in practice. This is attributed primarily to the dominance of controlling shareholders, and the insignificance of minority shareholders' votes at general meetings. Cultural implementation of regulations aimed at safeguarding shareholders' interests including

[1222] Securities Commission Malaysia, *Corporate Governance Blueprint 2011*, above n 508, 32.

directors' duties, the right to vote on specific corporate factors are further thought to impede the effective exercise of directors' duties to the company.

As an illustration of the manner in which Malaysian shareholder protection law operates, and the extent to which they have been effective in safeguarding shareholders' interests, the discussion then turns to a closer examination of judicial decisions on breaches of directors' duties over a period of eight years. The analysis finds that Malaysian minority shareholders had minimal success in obtaining redress for breaches of directors' duties despite the strengthening of formal rights to institute proceedings through the shareholders' derivative action. Australian shareholders were able to obtain leave to bring statutory derivative actions in a substantially higher proportion of cases (58 per cent) than in Malaysia (25 per cent).

The low rate of success in Malaysian applications is attributed to the Malaysian courts' restrictive approach, and challenges faced by minority shareholders in obtaining the requisite proof. Further, the power to assist shareholders by granting them access to the company's records has rarely been used in Malaysia. The analysis of public enforcement reveals that the regulators have rarely taken enforcement action in relation to beaches of directors' duties. Consequently, evidence of both private and public enforcement indicates that Malaysian shareholder protection law has been relatively ineffective in safeguarding minority shareholders' interests.

Having established that formal Malaysian shareholder protection is comprehensive and strong but lacks effectiveness in practice, the question then arises as to why this might be so. This brings the discussion to the second research question of the thesis, which is the focus of Chapter 6.

7.2 The Second Research Question

The second research objective is to investigate the contextual factors and influences which have shaped the character of Malaysian shareholder protection law. The analysis draws on the theoretical approaches outlined in Chapter 2 which propose various explanations for the development of law.

The analysis finds a distinction between the theoretical approaches which contribute to a better understanding of the shape of formal Malaysian shareholder protection law, and theoretical approaches which illuminate the regulations' lack of effectiveness in practice. In summary, a weak legal origin effect and transnational harmonisation provide some explanation for the strength and comprehensiveness of formal Malaysian shareholder protection. Legal evolution theory, which emphasises the interaction of law and its context, and political economy, appear to have some explanatory power for the gap between formal law and its effectiveness in practice. Nonetheless, legal evolution and political economy also have some explanatory power for the shape of formal Malaysian shareholder protection law.

7.2.1 *Explanations for the Shape of Formal Malaysian Shareholder Protection Law*

Chapter 6 begins by examining the influences which have shaped the character of formal Malaysian shareholder protection law. The content and strength of formal Malaysian shareholder protection reflect the influence of legal origin and, more recently, transnational harmonisation. The influence of inherited legal tradition is clearly seen in the pattern of persistent borrowing from the laws of other common law countries, particularly the UK and Australia. The habit of looking to the regulations of Australia, the UK and other common law countries is underpinned by institutional complementarities, as posited by the weak form legal origins thesis.

Since the Asian financial crisis, law reformers have emphasised the need for international standards. This indicates the significance of transnational harmonisation in shaping formal Malaysian shareholder protection over the past two decades. Nevertheless, in line with Malaysia's common law legal origin, law reformers often looked to developed common law countries as models of international standards.

Major reforms that strengthened shareholder protection were precipitated by economic forces, such as economic crises and ensuing corporate failures. In particular, the competition for capital and the need to bolster investor confidence had a significant influence in driving legal change. The importance of economic influences suggests the relevance of theories of legal evolution which highlight the inextricable relation between law and its economic, social and political context.

Scholars posit that there is a mutual influence between law and the markets. The analysis reveals the mutual influence between law and its context in several ways such as shareholders' responses to market-driven reforms. For instance, the rising cost of compliance with regulations contributed to the surge in controlling shareholders' privatisation of listed companies. An increasing awareness of minority shareholders' rights facilitated by activism and media reports highlighting allegedly unfair outcomes of privatisations brought about further reforms to the *Listing Rules* which strengthened shareholder rights.

7.2.2 *The Gap between Formal Law and its Effectiveness in Practice*

The discussion in Chapter 6 then turns to the effectiveness of Malaysian shareholder protection in practice. The study seeks to understand the reasons for the phenomenon of strong and comprehensive formal law which is weak in effectiveness. Chapter 6 investigates specific features of the Malaysian context which are thought to underpin the ineffective implementation of shareholder protection law. Corporate ownership structures, the nexus between the state and corporations, and cultural values are examined. The study considers the implications of these contextual features for the manner in which shareholder protection mechanisms operate.

The findings indicate that highly concentrated share ownership often allows controlling shareholders to dominate voting at general meetings, while minority shareholders' voting rights are relatively insignificant. Consequently, the general meeting is often an ineffective means of

safeguarding minority shareholders' interests. Further, the state is the controlling shareholder in many of Malaysia's largest companies. The state-business nexus, coupled with the form of political governance in Malaysia, arguably contribute to judicial conservatism in giving effect to minority shareholders' rights, and limited public enforcement of substantive shareholder protection law. The effectiveness of independent directors as a safeguard against expropriation is impeded by cultural values which eschew dissent. Hierarchical social structures pose a further challenge to directors' monitoring of conflicts of interest.

The significance of contextual factors in elucidating the regulations' lack of effectiveness underscores the relevance of theories of legal evolution in explaining the character of Malaysian shareholder protection. Legal evolution theory emphasises the centrality of the people who interpret and apply the law in determining the manner in which law operates. In the Malaysian context, political economy has particular significance for the effectiveness of legal transplants. Highly concentrated shareholding structures stem from the state's redistribution policies, while the state maintains substantial involvement in the ownership and control of Malaysian companies.

7.2.3 *Political Economy*

The political economy approach posits that dominant corporate interests use their influence over political processes to shape corporate law, so as to consolidate their control over resources.[1223] Following the withdrawal of foreign investment during the Asian financial crisis, reforms which signalled conformity with international standards fostered investor confidence in Malaysian companies. The reforms engendered significant benefits for controlling shareholders in the form of capital. However, if effectively implemented, the reforms would have eroded the dominance of controlling shareholders.

Accordingly, it was in the interest of controlling shareholders and their political patrons to have strong and comprehensive formal shareholder protection which is ineffective in practice. This resonates with scholars' propositions that controlling shareholders may concede formal regulatory reforms which facilitate better prospects of raising capital, but subsequently resist the effective implementation of the reforms which erode their control.[1224] The influence of political economy is also seen, to an extent, in the shape of formal law. In particular, stagnation of growth in critical areas of shareholder protection, namely the regulation of directors' remuneration and disqualification, suggests the avoidance of reforms which would have substantially eroded controlling shareholders' autonomy.

The influence of political economy is also arguably reflected in the restrictive judicial interpretation of the statutory derivative action. The restrictive approach to minority shareholders' rights is consistent with the preservation of controlling shareholders' dominance. Against the history of judicial decisions favouring the political elite and their business interests,

[1223] Chapter 2 p 40.
[1224] Coffee, 'Political Economy of Dodd-Frank', above n 244.

and the lack of judicial independence, reticence in giving effect to minority shareholders' right to challenge controlling shareholders is unsurprising.

In line with autopoietic theory and memetics, the influence of political economy was arguably embedded in legal concepts, and legitimised through legal reasoning. The restrictive approach was perpetuated through the doctrine of precedent, resulting in a body of consistent, authoritative case law which limits the statutory derivative actions' effectiveness in providing minority shareholders redress from breaches of shareholder rights.

7.3 CONCLUSIONS

Several conclusions may be drawn from the findings. First, the strength of a country's formal shareholder protection law is not a reliable indicator of its effectiveness in practice. Shareholder protection mechanisms established pursuant to regulations may create an impression of strong shareholder protection. Nevertheless, in reality, such mechanisms may form a smokescreen for practices detrimental to the interest of shareholders.

Secondly, there is a need to consider the interaction of law and the specific features of the context in which law operates, such as the concentration of corporate ownership. For instance, the general meeting is more effective in safeguarding shareholder interests where shareholding is dispersed. However, in the Malaysian context, the general meeting is relatively ineffective, particularly for minority shareholders, as controlling shareholders are often able to determine the outcome of shareholders' resolutions.

The Malaysian experience indicates the need to consider the implications of political economy for shareholder protection. In contrast with the UK and Australia's liberal democracies, Malaysia's form of political governance and the state-business nexus have significant implications for the way in which shareholder protection operates.

The findings of the thesis demonstrate the limitations of transplanting shareholder protection law from the UK or Australia without further considering the implications of corporate ownership structures, political economy and cultural norms for the effectiveness of transplanted law in Malaysia. The disparity between law in the books and law in practice highlighted in the thesis has broader implications for the trend towards international convergence in shareholder protection law. While the literature indicates that initiatives towards convergence have centred primarily on formal law,[1225] the findings of the thesis demonstrate the superficiality of formal convergence. Further investigation of the interaction of law and the context in which it operates may reveal deeper differences in the effectiveness of reforms in practice.

[1225] Chapter 2 p 30.

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Appendix 1: Leximetric Coding of Malaysian Shareholder Protection

	Description	Score	Code and Explanation
I. Protection against board and management			
1. Powers of the general meeting	The following variables equal 0 if there is no power of the general meeting and 1 if there is a power of the general meeting. (1) Amendment of articles of association *UK – 1 throughout* *s10 of Companies Act 1948, etc* *Aus – 1 throughout*	1 1965-present	Section 31 Companies Act 1965. Power in general meeting to amend articles of association by special resolution. Wording of Section 31 is almost identical to Section 10 of the UK Companies Act 1948 and Section 9 of the UK 1985 Act.
	(2) Mergers and divisions *Note s411 CA (Aus) similar – co in the course of being wound up.* *UK - s 206, 209 CA1948; s425, 427 CA 1985* *1 throughout* *Aus – eg. s411 CA 2001 (also requires 75% of votes)* *1 throughout*	1 1965-present	Section 273(1) Companies Act 1965. Arrangement between company about to be wound up and its creditors – binding on company if sanctioned by special resolution. Section 176 – compromise or arrangement between a company and its creditors binding if approved by majority (representing ¾ value) of creditors or members. Section 176 is almost identical to s206 of UK CA1948 and Section 180 is similar to s209 UK CA 1948.
	(3) Capital measures *Note: UK coding has considered increase, consolidation, division, reduction of share capital; Aus*	0.5 1965-1985	Section 64 Companies Act 1965 – subject to confirmation of court and if authorised by articles, the company may by special resolution reduce its share capital. Table A, Article 42

	– reduction and share issues exceeding 15% of issued capital in 12 month period. *CA 1948, ss. 61(2), 66(1); now: CA 1985, 121, 135 for alteration and reduction of capital.* *Score 0.5 1970 to 1979* *CA 1980, s. 14; now: CA 1985 s. 80 for allotment of shares (background: art. 25 of the Capital Directive 77/91/EEC). – shareholder approval or authorization in articles needed before directors may allot shares* *Score 1 from 1980-2005.* *Australia:* *Shareholder approval required for reduction of share capital. Score of 1 given throughout. (Selective reduction requires special resolution). ASX listing rules also required shareholder approval of share issues exceeding 15% of the issued capital in a 12 month period – 1988-2009.*	1 1986- present	provides that the company may by special resolution reduce its share capital. Section 62 of the Companies Act 1965 – share capital may be increased, consolidated or divided by the general meeting if authorised by the Articles. Article 40 of Table A states that this may be done with the approval of the general meeting. BMLR 13.07 – subdivision of shares requires shareholders' approval. Section 62 is almost identical to s61 UK CA1948, and Section 64 is very similar to s66 UK CA1948 Section 132D – directors shall not exercise any power of the company to issue shares without the prior approval of shareholders. The approval shall continue in force until the next general meeting (or expiration of the period within which the next AGM is required to be held – once every calendar year). *Came into force 1 February 1986. See Companies (Amendment) Act 1985- Act A616; P.U. (B) 30/86.* Listing requirements – 6.10 – not to issue shares exceeding 10% of nominal value of issued and paid up capital unless prior approval of the precise terms and conditions of the issue is obtained from the shareholders in general meeting. (The circular to be sent to the securities holders of the listed issuer to obtain the approval of the securities holders in respect of a new issue of securities includes the information set out in Part A of Appendix 6C.)

			(Shares issued under ESOS must not exceed 15% of the issued and paid up capital.) *Note Aus shareholder approval for reduction of share capital but no court confirmation required.*
	(4) De facto changes: The decisive thresholds are the sale of substantial assets of the company (eg. if the sale of more than 50% requires the approval of the general meeting it equals 1; if more than 80% it equals 0.5; otherwise 0) *UK – general meeting is required to approve 25% or more of total assets – listing rules in force form 1985. Score 0 till 1984, score 1 from 1985-2005* *Aus – listing rules required shareholder approval throughout the period. Scored 1 throughout.*	0 1965-1985 1 1986-present	Bursa Malaysia Listing Requirements 10.06 – sale of 25% requires the approval of the general meeting. KLSELR s116 shareholder approval required for disposal of 25% of the company's assets. Section 132C of the Companies Act 1965 requires the approval of the general meeting for the sale of a substantial portion of the company's total assets. This was not defined when s132C was enacted by Companies (Amendment) Act 1985 which came into force 1/2/86. On a more practical note, Section 132E of the Companies Act 1965 would also have been relevant where the transaction involved a director or a party related to a director. Related party transactions are fairly common in Malaysia. Shareholder approval would have been required where the asset was worth 10% of the company's asset value. Section 132E came into force in 1986 as well. S132C was amended in 2007 by the Companies (Amendment) Act 2007 (Act A1299). It inserted subsection (1A) which states that for listed companies the terms 'substantial value' or 'substantial portion' should have the same meaning as that given by the listing rules. For unlisted companies, subsection (1B) states that the value or portion would be considered as substantial if it exceeds 25% of the assets of the company or issued capital of the company.

	(5) Dividend distributions: Equals 1 if the general meeting can effectively influence the amount of dividend (i.e., if it decides about the annual accounts and the annual dividend, and if the board has no significant possibility of 'manipulating' the accounts); equals 0.5 if there is some participation of the general meeting; equals 0 if it is only the board that decides about the dividend. *UK – Table A – general meeting adopts dividends, may not be higher than proposed by board.* *0.5 throughout.* *Aus – 1970-1988 shareholders in general meeting had power to declare dividend but within limits set by directors – Table A. Score 0.5 between 1970 – 1988* *1998-2009 – replaceable rule that directors have the power to determine that a dividend be paid and fix the amount – 0 from 1998-2009*	0.5 1965-present	Table A, Article 98 - the company in general meeting may declare dividends but no dividend shall exceed the amount recommended by directors. Persistent refusal to declare dividends together with the failure to maintain proper accounting records have been held to constitute oppressive conduct in several cases; *Eric Lau Man Hing v Eramara Jaya Sdn Bhd* [1998] 7 MLJ 528; *Chiew Sze Sun v Cast Iron Products Sdn Bhd* [1994] 1 CLJ 157. In *Re Gee Hoe Chan Trading Pte Ltd* (check Singapore?) [1991] 3 MLJ 137 dividends were minimal while directors were paid generous remuneration - oppressive?
	(6) General election of board of directors *UK – Table A – 1 throughout* *Aus – general meeting had power to elect the directors – 1 throughout*	1 1965-present	A company has inherent power to nominate and appoint directors unless restricted by the Memorandum or Articles – *Worcester Corsetry Ltd v Witting* [1936] Ch 640, 650 (Chan and Koh p535) Table A, Article 66 – the company may elect or appoint directors.

			Since 2000, Malaysian Code on Corporate Governance has recommended that where there is a significant shareholder, the board should also have fair representation of the investment of minority shareholders. Nevertheless, there is no procedure in place or right of minority shareholders to elect their representative.
	(7) Directors' self-dealing of substantial transactions *UK and Australian coding interpret this as related party transactions* *UK – s320 CA1985 is similar to s132E. The requisite value likewise is 50000 pounds (a bit more than RM250,000) or 10% of the company's assets. Shareholder approval required.* *UK 0.5 till 1979 (listing requirements made provision for approval of the general meeting on some related party transactions), 1 from 1980-2005* *Aus – 0 between 1970-1991, 1 from 1992-2009*	0 1965-1986 0.5 1987-1991 0.6 1992-1997 0.8 1998 - present	1973 KLSE Listing Manual stated that transactions involving directors or substantial shareholders required the prior approval of shareholders in general meeting. No percentage given. Section 132E of the Companies Act 1965 - related party transactions – refers to Bursa Malaysia Listing Requirements for listed companies – Listing requirement 10.08 specifies that related party transactions involving 5% or of the company's assets or share capital more needs the approval of shareholders in a general meeting. For non-listed entities Section 132E requires prior shareholder approval for transactions above RM250,000. Shareholder approval is also required when the transaction is below RM250,000 if it exceeds 10% of the company's assets. Section 132E was inserted by the Companies (Amendment) Act 1986 (Act A657) which came into effect on 1 February 1987. From 1988, the KLSELR stated that the Exchange would normally require a circular to shareholders and the prior approval of the general meeting. Again no percentage stated.

			In 1992, Section 132G was inserted into the Companies Act 1965, prohibiting asset shifting between related parties for a specified period. From 1998, the KLSE Main Board Listing requirements were revised to provide for increased disclosure and closer monitoring of related party transactions. The amendments included the introduction of independent advisers for transactions involving percentage ratios of 25% or more. KLSELR 10.08 (now BMLR 10.08) has required shareholder approval for related party transactions where the percentage ratio is 5% or more. Independent corporate financial advisers must be appointed and required to comment on whether the related party transaction is fair and reasonable and whether it is to the detriment of minority shareholders. However, a range of transactions are exempted from this requirement. BMLR 10.09 requires shareholder approval for recurrent transactions of a revenue nature 'in the ordinary course of business' and on terms 'not more favourable than those generally available to the public' but exempts these transactions from the requirement of independent corporate advice.
2. Agenda setting power4	(1) General topics: Equals 1 if shareholders who hold 1 % or less of the capital can put an item on the agenda; equals 0.5 if there is a hurdle of more than 1 % but less than 10 %; equals 0 otherwise. *UK – 0.5 throughout* *CA1948 & 1985 – 5% or not less than 100 shares on which an average of 100pounds has been paid up each.*	1 1965-present	Section 151 of the Companies Act 1965 – proportion of members required to propose a resolution is 5% or more voting rights or at least 100 members each holding RM500 or more paid shares. As with Australia, 100 members in a public listed company would normally constitute less than1% of the share capital.

	Aus – throughout 5% of votes or at least 100members could give notice of a resolution they proposed to move at the meeting. Listed companies – 100 members would usually constitute less than 1% *Score of 1 throughout*		
	(2) Election of directors: ditto *(Note Australian coding gave same answer as (1) above noting there was nothing to suggest that the notice of resolution did not include nominating directors.)* *UK – 1 throughout* *Table A 1948 Art 93 – makes reference to shareholder proposing director for election. No such equivalent in Malaysia's Table A* *Aus – 1 throughout – refers to the right to propose a resolution as in Variable 2(1) above, noting that there is nothing in the literature to suggest that the notice of resolution did not include nominating directors. Listing rules also make reference to members nominating directors.*	1 1965-present	Section 151 of Companies Act 1965 - as above. BMLR 7.30 member can give notice proposing election of a person as director within a specific time frame. The notice of candidature for election to the board of directors will be served on all registered holders of shares prior to the meeting at which election will take place. (Similar to UK's Table A Art 93.) KLSELR suggests by implication that members can propose the appointment of directors. Section 311 of the 1988 rules state that no person not being a retiring director shall be eligible for election unless a member proposes the director's appointment 11 days before the meeting.
	(3) Costs: Equals 1 if shareholders do not have to pay for their proposals; equals 0 otherwise. *UK – 0 throughout* *Shareholder has to bear the costs.* *Aus – 0 between 1970-30/6/1998*	0 1965-present	Section 151(1) – expense to be borne by requisitionists and they have to deposit a sum reasonably sufficient to meet the company's expenses – Section 151(4)(b).

	Expense borne by shareholder, needed to lodge sum. See Aus coding for more details. *1 from 1/7/1998-2009* *Shareholders did not have to pay or proposals provided the company received it in time for the scheduled meeting.*		
3. Extraordinary shareholder meeting5	(1) Right: Equals 1 if the minimum percentage of share capital to demand an extraordinary meeting is less than or equal to 5 %; equals 0.5 if it is more than 5 % but less or equal than 10 %; equals 0 otherwise. *UK – 0.5 throughout* *Aus – 0.5 between 1970 and 30.6.1982* *10% of share capital required* *1 from 1/7/1982 – 2009* *5% of vote or 100 members who are entitled to vote*	0.5 1965-present	Section 144 – members holding 10% or more of paid up capital with voting rights required to demand EGM. Secion 145 –also requires 10% or more of the issued share capital to call a meeting.
	(2) Enforcement: Equals 1 if shareholders can call the meeting themselves or have a right that the court will enforce it; equals 0 if the court has discretion. *UK – 1 throughout* *Aus – 1 throughout* *shareholders could call meeting themselves if directors didn't.*	1 1965-present	Section 144(3) – the requisitionists or any of them representing more than half the total voting rights of all of them can themselves convene a meeting.

4. Anticipation of shareholder decision	(1) Restrictions on proxy voting: Equals 0 if there are restrictions on who can be appointed or which rights the proxy has so that it is likely that proxy voting does usually not take place; equals 0.5 if there are some restrictions which reduce the relevance of proxy voting; equals 1 if there are no restrictions *UK – ¾ because proxies have no right to speak at the general meeting and can participate in deciding only in the case of a written vote. CA 1985 s372(1), (2)(c); Table A 1985 arts 46-52. S372 says that proxies have a right to attend and vote instead of the member. In the case of private companies proxies also have the same right as a member to speak at the meeting.* *Aus – 1 throughout* *Anyone could be appointed proxy. Proxy had same rights as the member except that in some circumstances the proxy was not entitled to vote on a show of hands.*	0.5 1965-present	Section 149(1)(b) – proxy must be a member or a solicitor, auditor or person appointed by the Registrar. In *Tan Guan Eng v BH Low Holdings Sdn Bhd* [1992] 1 MLJ 105, the restriction was upheld although the Articles (according to Table A) said the proxy may but need not be a member. *Section 149 also restricts voting by proxies – proxies are not entitled to vote except on a poll. Chan & Koh p660, the usual practice is to vote by a show of hands unless a poll is validly demanded. Refers to pre-1965 English case law. Table A, Article 51 states that at any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is demanded.* In public listed companies the listing rules throughout the period have allowed proxies to vote on a show of hands: s22 of the oldest listing manual; Art 22 of 1970s listing manual; s302 of the 1980s KLSELR; 7.20 of Bursa Malaysia Listing Requirements allows proxies to vote on a show of hands on any question at any general meeting. Unlike the UK provisions, the Malaysian provisions allow proxies to speak at the general meeting.
	(2) Anticipation facilitated: Equals 1 if postal voting or proxy solicitation with two-way voting proxy form has to be provided by the company; equals 0.5 if two-way proxy form has to be provided but not proxy solicitation; equals 0 otherwise.	0.25 1965-present	Section 149(2) – every notice calling a meeting must have a statement as to the right of members to appoint proxies but no requirement of proxy solicitations. Table A, Article 60 contains a two-way proxy form. No express requirement that proxy voting forms should be provided but BMLR 9.23A(e) mentions in the context of

	UK listing rules – two-way proxy forms required but not solicitations. 0.5 throughout. *Aus – 0.5 throughout* *Listing rules required proxy form allowing shareholder to vote for or against each resolution to be sent with the notice of meeting. No need to provide solicitation.*		CDROM Annual reports, the inclusion of hard copies of the notice of AGM and proxy form. In practice listed companies often include a proxy form either with the annual report or notice of annual general meeting.
	(3) Costs of proxy contest: Equals 1 if the costs of proxy solicitations are paid by the company or if proxies have the right to have their proposals included in the company's proxy form; equals 0 otherwise. *UK and Aus 0 throughout*	0 1965-present	Proxies do not have the right to have their proposals included in the company proxy form. There is no requirement that the company pay costs of proxy solicitations.
5. Information in the run- up of the general meeting	(1) Amendments of the articles of association: Equals 1 if the exact wording has to be sent in advance ('push-system'); equals 0.5 if the shareholders have to request it ('pull-system'); equals 0 otherwise. *UK – 0.75 throughout* *the words 'specifying the intention to propose a resolution' mean that the tenor or entire substance of the proposal must be given (Davies)* *Aus –* *1970-30.6.98 – notice of meeting required to state that a special resolution was proposed but details were not required. Scored 0 for this period.* *1.7.98 – 2009 – Notice of meeting had to include the wording of any proposed special resolution.* *Scored 1 for this period.*	0 1965 – 1987 0.5 1988-present	No requirement that the exact wording should be sent in advance. Table A, Article 45 states that the notice of meeting only needs to state the general nature of any special business to be transacted at the meeting. Chan & Koh p651. s299 of KLSELR and BMLR 7.17 – Notice of meeting called to considers special business should be accompanied by a statement regarding the effect of any proposed resolution on the special business.

	(2) Mergers: Equals 1 if a special report has to be sent in advance ('push-system'); equals 0.5 if the shareholders have to request it ('pullsystem'); equals 0 otherwise. *Both Australian and UK coding refer to legislation on schemes of arrangement which encompass not just mergers but include reconstructions and compromise with creditors.* *UK – 1 throughout* *Aus – 1 throughout* *Whenever merger effected by a scheme of arrangement a statement explaining the scheme was required to be sent to shareholders with the notice of meeting.*	1 1965-present	Section 177 of the Companies Act 1965 – every notice to shareholders summoning a meeting should include a statement explaining the effect of the arrangement. s177 is almost identical to UK s207 CA1948 BMLR 11.06 just says shareholders must be sent all documents required by law to be sent to the holders of shares subject to the takeover. Section 13 of the Malaysian Code on Takeovers and Mergers 1998 required the offer documents to be sent to shareholders. Part III of the Malaysian Code on Takeovers and Mergers 1987 also required the offer documents to be sent to each member holding the class of shares subject to the takeover. The offer documents had to specify details including all relevant facts to enable shareholders to make an informed judgment as to the merits of the offer. References: Arjunan and Low, Lipton and Herzberg's Understanding Company Law in Malaysia, page 378.
6. Shares not blocked before general meeting	Equals 0 if shareholders have to deposit their shares prior to the general meeting and if this has the consequence that shareholders are prevented from selling their shares for a number of days; equals 1 otherwise. *UK – 1 throughout – no details given* *Aus - 1 throughout – nothing in the literature to suggest that shareholders had to deposit shares.*	1 1965-present	There is nothing in the literature that suggests that shareholders are required to deposit their shares prior to the general meeting.

7. Individual information rights	(1) Right to demand information (1): equals 1 if an individual shareholder or shareholders with 5 % or less capital can demand information which will be answered at the general meeting; equals 0.5 if shareholders with 10% or less capital have this right; equals 0 otherwise. *UK – 0 throughout* *No explicit right to ask questions. Q&A sessions at general meetings are usual but explicit statutory provision for this was recently rejected because the course of the general meeting is to continue to be left up to 'best practice'.* *Aus – 0.5 throughout* *No explicit right to demand info.* *1.7.98 to 2009 s 250S CA2001 and CL1991 provided that the chair of the AGM must allow a reasonable opportunity for members as a whole at the meeting to ask questions of management. Prior to 1 Jul 98, it was usual practice for members to ask questions at the AGM. But both periods – no stat requirement that questions be answered.*	0 1965-present	There is nothing to indicate that shareholders have a right to demand information which will be answered at a general meeting, although shareholders attending general meetings may have the opportunity to raise questions during the meeting.
	(2) Right to demand information (2): equals 1 if an individual shareholder or shareholders with 5 % or less capital can demand information independent of the general meeting; equals 0.5 if shareholders with 10% or less capital have this right; equals 0 otherwise.	0 1965-present	There is nothing to suggest that shareholders have a right to demand information independent of the general meeting.

	UK – 0 throughout – no details given *Aus – 0 – shareholders no right to demand info outside the AGM. 1986-2009 – members could apply to the court for an order allowing them to inspect the books of account.*		
8. Communication with other shareholders	(1) Right to access the register of shareholders and (if necessary) beneficial owners: Equals 1 if the right of inspection can be used by a single shareholder; equals 0 if there is no such right. *UK – Score 0.5 throughout* *There is a note that 'due to widespread separation of registered ownership from economic ownership often useless.* *CA 1948 s113(1), CA 1985 s356* *Aus – 1 throughout* *Shareholders had right to inspect register of members.*	1 1965-present	Section 160(2) of the Companies Act states that the register of members can be inspected by any member without any charge.
	(2) Equals 1 if communication is not affected by proxy rules; equals 0 otherwise. *UK - 1 throughout – no details* *Aus – 1 throughout – nothing in the literature to suggest communication was affected by proxy rules.*	1 1965-present	There is nothing in the literature which suggests that communication may be affected by proxy rules.

9. Board composition	(1) Division between management and control: Equals 1 if there is a two-tier system or at least half of the board members are nonexecutive; equals 0.5 if at least 25% of the board members are non-executive; equals 0 otherwise. *UK* *1970-1992 – 0* *1993-98 – ¼* *Code of Best Practice – significant number of non-exec directors* *1999-2003 – ½* *Combined Code 1998 – 1/3 non-exec directors* *2004-2005 – 1* *Combined Code 2003 – ½ non-exec directors* *Aus* *1970-2002 – 0* *2003-2009 – 0.5* *ASX Corporate Governance principles (not mandatory – required to disclose extent to which principles followed) – recommendation that majority of the board should be independent*	0 1965-1999 0.25 2000 0.5 2001-present	MCCG recommends that a third of board members in listed companies should be independent non-executive directors. MCCG Pt2.AA.III.[1226] MCCG since 2000. Since 2001, Bursa Malaysia Listing Requirements 15.02 – mandatory requirement that listed companies should have at least 1/3 of board members independent
	(2) Independent board members:7 Equals 1 if at least half of the board members must be independent;	0 1965-	Bursa Malaysia Listing Requirements 15.02 – mandatory requirement that listed companies should have at least 1/3 of

[1226] Note:
Paragraph 15.26 of the *Listing Requirements of Bursa Malaysia* requires all listed companies to state in their annual reports:
• how they have applied the principles set out in Part 1;
• the extent to which they have complied with the best practices set out in Part 2;
• identify and give reasons for areas of non-compliance; and • where applicable, state the alternative practice(s) adopted

	equals 0.5 if at least 25 % of them must be independent or if the independence requirement is very low; equals 0 otherwise. *UK –* *1970-1999 – 0* *1993-2003 – ¼* *Code of best practice – majority of non-executive directors must be independent* *2004-2005 – 1* *Combined Code 2003 – at least half the board members must be independent* *Aus* *1970-2002 – 0* *2003-2009 – 0.5* *As in variable 9.1 above*	1999 0.25 2000 0.5 2001-present	board members independent. Malaysian Code on Corporate Governance Pt2.AA.III recommends that 1/3 of the board to be independent. However, compliance with the MCCG is voluntary. Since 1988 the KLSELR have stated that there should be independent directors on the board. However, they do not specify the proportion of independent directors. The presence of independent directors did not become a common practice nor gain significance till 2000.
	(3) Committees: Equals 1 if companies have to install an audit and a remuneration committee with a majority of independent members; intermediate scores are possible if the requirement is partial, (for instance requires setting up of one of the committees or the independent members of the committees constitute less than a majority); equals 0 if committees are not necessary or if they are not required to have independent members. *UK*	0 1965-1992 0.5 1993-1999	KLSE Listing Requirements amended in 1993 – require audit committee with independent majority from 1.8.93; Rule 15A. MCCG also recommends a majority of independent directors on audit committees (Pt2.BB.I). However, remuneration committees are only required to comprise wholly or mainly non-executive directors. Although there is no express requirement of independence on remuneration committees, it is likely that non-executive directors are assumed to be more independent than executive directors. (Pt2.AA.XXIV)

	1970-1992 – 0 *1993-1995 – ½* *Code of Best Practice 1992 – audit committee at least 3 non-executive directors* *1996-1998 – ¾* *Code of Best Practice 1995 – remuneration committee of exclusively non-exec directors* *1999-2005 – 1* *Combined Code 1998 – all members of remuneration committee independent, half members of audit committee independent* *Combined Code 2003 – all members of audit and remuneration committees independent* *Aus* *1970-2002 – 0* *2003-2009 – 0.5* *ASX corporate governance principles – recommend audit committee with independent majority and nomination committee with independent majority. ASX companies in top 300 must have majority of independent directors.*	0.6 2000-present	Compliance with MCCG is voluntary, listing rules require companies to comply or explain. From 2001, BMLR 3.15 – the audit committee must have majority of independent directors. BMLR 15.10(1)(c) – one member must be a member of the Malaysian Institute of Accountants. BMLR 15.11 – Chairman must be independent. BMLR 15.13 lists out the functions which the audit committee is required to discharge. These include reviewing the audit plan and system of internal controls with external auditors. The audit committee is also to review related party transactions. BMLR 15.16 specifies what the audit committee report should include. From 2008, BMLR require all audit committee members to be non-executive. The amendments expand the functions of the audit committee including reviewing the adequacy of the competency of the internal audit function. The timeframe for compliance was between 1 April 2008 and 31 January 2009.
10.No excessive remuneration for non-executive and executive directors	(1) General meeting power:8 Equals 1 if the general meeting has to approve all compensation schemes; equals 0.5 if this is limited (e.g. applies to stock option plans only, or if some directors are excluded); equals 0 otherwise. *UK – normal remuneration (no statutory provision) decided by general meeting resolution. A note has*	0.3 1965-1972 0.4 1973-1987	Table A Art 70 – Directors' remuneration to be determined by the company in general meeting. There is also a restriction on increase of directors' fees. This requires shareholders' approval; Art 27 KLSELR 1973, s307 KLSELR 1988; BMLR 7.26.

	been made that other forms of remuneration are more important. Approval by general meeting not necessary. For stock options, capital provisions apply (shareholder approval) and listing rules provide for shareholder approval of employee share schemes and long term incentive schemes in which directors participate. Score of 0.5 given till 2001. After insertion of advisory votes in 2002, score of 0.75 given. *Australia – 0.5 – only disclosure of remuneration, no requirement of approval except in relation to stock options. Listing rules required shareholder approval of stock options.*	0.5 1988-present	Shareholder approval is required if directors participate in employee share schemes – BMLR 7.04; s281 KLSELR 1988.
	(2) Annual disclosure: Equals 1 if there is full and specific disclosure about the individual remuneration of each director; equals 0.75 if there is information about the individual remuneration of some directors; equals 0.5 if there is disclosure about the top 2 directors (executives); equals 0.25 if there is only disclosure about the overall remuneration; equals 0 otherwise. *UK Companies Act 1989 Schedule 4 required disclosure of the aggregate amount of emoluments paid to directors. Also the bands eg. <5000, 5000-10000 etc. Aggregate pension, compensation for loss of office and payment to third parties or the director's services had to be disclosed.*	0.5 1965-1999 0.75	Companies Act 1965, Ninth Schedule – profit and loss accounts need to disclose remuneration paid to directors including the money value of benefits received by them otherwise than in cash. These accounts need to be audited and laid before the company at its AGM annually – s169. CCH Australia Ltd's *Duties and Responsibilities of Company Directors in Malaysia and Singapore*, 1974 at p802 states that the Schedule excluded professional fees paid to a director or the firm of which he is a member. Currently Schedule 9 requires that the amount paid to a director's firm should not be included in the total but should be shown separately. A comparison of s196 UK CA1948 and the Ninth Schedule shows the provisions to be quite similar. UK score of 0.5 followed

	Disclosure of overall remuneration (CA 1948, CA 1985 etc) *Disclosure of emoluments of chairman and highest paid director – as well as disclosure of other emoluments in bands.* *Score ½ till 2001* *Score 1between 2002-2005* *In 2002 the Directors Remuneration Report Regulations 2002 came into force requiring much more detailed disclosure.* *Australia:* *Section300A of the Corporations Act 2001 (Cth) (given score of 1) requires much more details than Mal. This includes explaining relative proportions of each director's salary related to performance and those which are not, a summary of performance conditions and methods used to assess whether they are satisfied.* *The AASB 1017 standards on the other hand, which were given a 0.25 score required disclosure of the aggregate income paid to all directors directly or indirectly, whether by the company or any related party. The bands ($10000) of the directors' salary also had to be disclosed. Given score of 0.25.* *From 2004 –CA2001 s300A(1B)(b) required to disclose details of remuneration paid to all directors. Details include summary of performance conditions,*	2000-present	From 2000 - Code of Corporate Governance Part 1.B.III recommends that details of **each** director's remuneration be disclosed in the annual report. Appendix 9C of the BMLR state that the annual report should state: (a) the aggregate remuneration of directors with categorisation into appropriate components (e.g. directors' fees, salaries, percentages, bonuses, commission, compensation for loss of office, benefits in kind based on an estimated money value) distinguishing between executive and non-executive directors; and (b) the number of directors whose remuneration falls in each successive band of RM50,000 distinguishing between executive and non-executive directors;

	methods used to assess whether satisfied, why those conditions were chosen. Explain relative proportions of elements related to ? (can't read my writing) for each person. *Score 1 from 2004-2009*		
	(3) Substantive requirements placing limit for remuneration in order to protect shareholders: Equals 1 if there is a direct regulation; equals 0 otherwise. *UK and Aus 0*	0 1965-present	There is nothing to indicate a limit on directors' remuneration in order to protect shareholders.
11. Performance based remuneration	Equals 1 if performance based remuneration of directors and managers is fostered (e.g. facilitation of stock options to reward performance); equals 0 otherwise. *UK – 0 till 1995* *1 from 1996 (Code of Best Practice 1995 s C6, now Combined Code 2003 sB.1.1)* *UK Combined Code B.1.1 states:* *"The performance-related elements of remuneration should form a significant proportion of the total remuneration package of executive directors and should be designed to align their interests with those of* *shareholders and to give these directors keen incentives to perform at the highest levels."* There is a much higher level of accountability required as to the performance of executive directors. A.6.1 states that the annual report should state how performance evaluations of the board, its committees	0 1965-1999 0.5 2000-present	MCCG 2000 Pt 1.B.1 and MCCG2007 Pt1.B.1 state: Levels of remuneration should be sufficient to attract and retain the directors needed to run the company successfully. The component parts of remuneration should be structured so as to link rewards to corporate and individual performance, in the case of executive directors. In the case of non-executive directors, the level of remuneration should reflect the experience and level of responsibilities undertaken by the particular non-executive concerned. The BMLR do not require disclosure as to how remuneration is linked to performance. *My notes:* *UK places greater emphasis on performance eg. "significant proportion of total remuneration". Both UK and Australia require accountability and detailed disclosure of remuneration as well as its link to performance.* *(Note both UK and Mal performance-related remuneration only for executive directors.)*

	and individual directors has been conducted. Schedule A contains guidelines on the design of performance related remuneration. The Directors Remuneration Report Regulations 2002 require disclosure of performance conditions for each director, why they were chosen, methods used in assessing whether they are met and why those methods were chosen. The report should have a graph showing the total shareholder return for the period. It should also disclose details of individual directors' remuneration including salary, fees, bonuses, expenses, non-cash benefits and share options. It must disclose details of long term incentive schemes, pensions and payments to third parties for the directors' services. *Aus – 0 – 1970-2002* *1 – 2003-2009* *ASX CG Principles (Mar 2003) Principle 9 recommends a defined link between remuneration and individual and corporate performance. Companies need to adopt remuneration policies that attract and maintain talented and motivated directors and employees so as to encourage enhanced performance.*		As Malaysia does not require disclosure and hence there is little accountability in relation to performance related remuneration, the score should be significantly less than the UK and Australia.
12. Duration of director's appointment	(1) Normal duration: Equals 1 if this is one year or less; 0 if this is five years or more; equals 0.5 if this is more than 1 but less than 5 years. *UK – 0.5* *Table A – not more than 3 years; also Combined Code 2003*	0.5 1965-present	BMLR 7.28(2) – All directors to retire from office at least once in three years. MCCG Pt1.A.V Table A Article 63 specifies that a third of directors should retire every year, and those longest in office should retire (Article 65).

	Aus – 0.5 – directors of listed companies required to retire every three years – listing rules and Table A		
	(2) Dismissal feasible: Equals 1 if there are no special requirements; equals 0 if an important or good reason is required; intermediate scores are possible if there are no special requirements but there may be financial burden for the company (e.g. in the form of compensation under a statute or contract or damages for breach of contract or salary under a fixed term contract). *UK – 1970-1979 – 0.5* *Dismissal without particular thresholds is possible (CA 1948, s. 184; CA 1985, s. 303). But there is often a financial burden on the firm where on appointment the member concluded a contract giving rise to a compensation claim upon dismissal. In particular, an agreement whereby the (ex-) director receives compensation is possible (CA 1948, s.184(6); CA 1985, s. 303(5)). Moreover, members of the board may often agree on a separate service contract (Table A1948, arts. 107, 108; Table A 1985, art. 84) with long notice periods, so that a compensation claim arises in the event of early dismissal.* *1980-1992 – 5/8*	0.5 1965-present	Section 128 – may remove director by ordinary resolution; *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd* [1996] 1 MLJ 661. If allowed by Articles, director may be dismissed by notice; *Tien Ik Sdn Bhd v Peter Kuok Khoon Hwong* [1992] 2 MLJ 689. Section 137 – compensation for loss of office must be approved by the general meeting. However, subsection (5) allows payment pursuant to s contract of service between the director and the company. Similar to Australia. The Corporate Law Reform Committee noted in their Consultative Document on Clarifying and Reformulating the Directors' Role and Duties, August 2006, that severance payments which are part of directors' contractual remuneration packages are not caught by s137. They also highlighted a practice in which s137 is circumvented by the use of subsidiary companies to make compensation payments or 'golden handshakes' to directors of holding companies. (page 39 of the CLRC report)

	CA 1980, s. 47; CA 1985, s. 319: a contract with a period of more than five years can only be concluded with the assent of the general meeting. *1993-1995 – ¾* *Code of Best Practice 1992, s. 3.1: a contract with a period of more than three years can only be concluded with the assent of the general meeting.* *1996-2005 – 7/8* *Code of Best Practice 1995, s. D2 and Combined Code 1998, s. B.1.6: notice or contract periods should be one year or less.* *Aus – 0.5 throughout* *Dirs of public companies could be removed by ordinary resolution. However the company may be liable for damages if there is a separate employment contract.*		
13. Directors duties10	(1) Directors' liability - duty of care: Equals 0 if there are narrow criteria which virtually exclude liability; equals 0.5 if there are some restrictions (e.g., business judgement rule; gross negligence); equals 1 if there are no or little restrictions (regarding business judgement and standard of care). *UK –* *1970-1990 – ¼*	0.25 1965-present	Case law has referred to *Re City Equitable Fire Insurance* as setting out the duty of care and skill for directors; *Double Acres Sdn Bhd v Tiarasetia Sdn Bhd* [2000] 7 CLJ 550; affirmed in *Abdul Mohd Khalid Hj Ali v Dato Hj Mustapha Kamal* [2003] 5 CLJ 85 and *Perwira Affin Bank v Jasatera* [2010] 1 LNS 660. *Re City* was referred to as early as 1963 in *Re Tan Lye Dec'd, Tan Lian Chye* [1963] 1 LNS 116 (although on a different point). In *Double Acres*, the case of *Straits & Island General Insurance Sdn Bhd v Lawrence Chung Hee Menn* [1991] 2 CLJ 1024 was also referred to. That case stated

	Duty of care based on common law (see, e.g., Davies, supra note 232, at 432 et seq.), Although there is no business judgement rule in the UK, many decisions indicated a similar subjectivisation of liability; see, e.g., Re City Equitable Fire Insurance Co. [1925] 1 Ch. 407 at 427; Re Smith & Fawcett Ltd [1942] Ch. 304 at 306; Howard Smith Ltd v. Ampol Petroleum Ltd [1974] A.C. 821 at 832. In general, it was said that there were only "light obligations of skill and diligence" (Davies, ibid.). *1991-1993 – ½* Since 1991 objectivisation and intensification of liability (see Davies, supra note 232, at 432-7; Len Sealy, Directors' Duties Revisited, (2001) 22 Company Lawyer 79, 82). The starting point was Norman v. Theodore Goddard [1991] B.C.L.C 1027 where Hoffmann J. draw on the wrongful trading provision of Insolvency Act 1986, s. 214. *1994-1997 – ¾* Re D'Jan of London [1994] 1 BCLC 561 (Hoffmann J. uses "objective test" of Insolvency Act 1986, s. 214(4)); Bishopsgate Investment Management Ltd. v. Maxwell (No. 2) [1994] 1 All ER 261 (Hoffmann J. states that Company Directors Disqualification Act 1986 has led to change in attitude to corporate governance). *1998-2004 – 1*		directors must exercise reasonable diligence (Byrne v Baker [1964] VR 443) but there was no necessity for the directors to exhibit any skill or be careful when carrying out his duties. Also referred to Section 132(5) of the Companies Act 1965 which is read as preserving the common law duty of care. In *Double Acres*, the common law duty of care in *Re City* was stated to be that a person need not display nor exhibit a greater degree of skill than may 'reasonably be expected of a person of his knowledge and experience. A director owes a duty of care not to cause loss to the company by an act of negligence.' It is not known whether s132(5) is read as freezing the common law as at 1965 or why later common law cases such as *Re D'Jan* are not considered. The business judgment rule was upheld in *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808. From 2007, the business judgement rule was also incorporated into Section 132 of the Companies Act 1965. In 2007, revisions to the Companies Act provided for an objectivized duty of care. However, directors may be absolved from liability on grounds of the business judgment rule or if they have relied on information or delegated their duties in good faith and on reasonable grounds.

	Re Barings plc (No.5) [1999] 1 BCLC 433, esp. at 486-489 (see also Re Barings plc (No. 5) [2000] 1 BCLC 523); Re Landhurst Leasing plc [1999] 1 BCLC 286: board members must not be passive; not enough to delegate or to rely on chairman. Although these were disqualification cases, they also have an indirect impact on duty of care (see Adrian Walters, Directors' Duties: The Impact of the Company Directors Disqualification Act 1986, (2000) 21 Company Lawyer 110). *2005 – ¾* Companies (Audit, Investigations & Community Enterprise) Act 2004 (Ch 27) (in force since 2005): boards can grant directors extended indemnity or pay their defence costs. Although this law does not change directors' duties, it is taken into account nevertheless because it reduces the deterrence function of these duties. *Aus –* *1970 – 1991 –0.5* *statutory duty of care did not contain standards of reasonableness and the common law subjectivization of liability applied – Re City Equitable Fire Insurance Co.* *1992-1999 – 1* *The duty of care contained a reasonable person test and no business judgment rule – s 232(4) CL1991 and AWA v Daniels (1992) 10 ACLC 933.*		

	2000-2009 – 0.75 *The duty of care in s180 was restricted by the business judgment rule (introduced March 200) s180(2) CA 2001, CL 1991. However, the business judgment rule has very high requirements and it has not been successfully used by company directors since it's introduction.*		
	(2) Directors' liability - duty of loyalty: Equals 1 if there is a duty not to put personal interests ahead of the company; equals 0 otherwise. *UK – 1* *Aus - 1*	1 1965-present	Section 132 and equitable fiduciary duties. In *Double Acres*, reference was made to a Singapore case, *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 which set out the test as 'whether an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the company.' The case also referred to *Lim Koei Ing v Pan Asia Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR 449 in which it was stated that a director must not put himself in a position where his duty and interest conflict; nor must he use the powers and assets entrusted to him for improper purposes. Table A, Article 81 – prohibits directors from voting on contracts they are interested in. Table A, Art 72(h) – if a directors fails to declare the nature of his interest in a contract which he is directly or indirectly interested in, his office shall become vacant. *Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 (PC)

			2007 Amendments merely codified existing equitable principles and, hence, there was no resulting increase in shareholder protection for this variable.
	(3) Private enforcement: Equals 0 if this is typically excluded (e.g., because of strict subsidiarity requirement, hurdle which is at least 10%; cost rules); equals 0.5 if there are some restrictions [e.g., certain percentage of share capital (unless the hurdle is at least 10 %); cost rules; demand requirement]; equals 1 otherwise. *UK –* *1970-1979 – 0* Foss v. Harbottle (1943) 2 Hare 461: it is in principle not possible for a shareholder to bring an action on behalf of the company (although there are some exceptions; see Boyle, Minority Shareholders' Remedies, 2002). *1980-1988 – ¼* According to CA 1980, s. 75 (now: CA 1985, ss. 459, 461) shareholders could, with court authorisation, sue on behalf of the company for compensation for damages. Yet, it could be said that this provision was only about discriminatory treatment so that an unfair conduct which affected all shareholders equally would not have been covered (Davies, supra note 232, at 513). *1989-2005 – ½*	0.2 1965-2006 0.5 2007-present	*Foss v Harbottle* applied by virtue of the Civil Law Act. *Owen Sim Liang Khui v Piasau Jay Sdn Bhd* [1996] 2 AMR 2477 cited *Prudential Assurance Co Lt v Newman Industries Ltd (No. 2)* [1982] Ch 204. 5th exception (i.e. justice of the case so requires) considered in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 AMR 3050. Gopal Sri Ram JCA considered both Australian and English cases and decided to follow *Biala v Malina* (declined to follow *Prudential).* Like Australia and the UK, winding up on just and equitable grounds was a possible remedy; s218(1)(e). Oppression: Section 181 was based on Section 210 of the UK Companies Act 1948 and similar to s186 of the UCA 1961, although in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 2 AMR 2477, Gopal Sri Ram JCA noted that s181 was initially wider than both Australian and UK provisions. However, there was a need to show 'oppression' or 'disregard of interests'. Costs are a deterrent; Securities Commission Malaysia, Corporate Governance Blueprint 2011, at page 65. The CG Blueprint also acknowledged that the statutory derivative action is seldom used and cites the high costs and the fact that the

	CA 1989, sch. 19 amended CA 1985, s. 459: now it is clarified that CA 1985, s. 459 is about both cases of unfair conduct (note 279 above); However, there are still limits (and therefore the coding ½): First, the courts can relieve officers (cf. CA 1985, s. 744) from their liability if the breach of duty can in the circumstances be excused (CA 1985, s. 727; formerly CA 1948, s. 448). Second, there is the problem of costs. According to the "English rule" the loser has to pay the winner's costs. Thus, what is problematic is the risk the shareholder runs on loss of the suit. In this case, alongside his own costs and the high court fees, he also has to bear the opponent's lawyers' fees. Although there have been some changes and thus the possibility of a claim for reimbursement against the company, this has been counterbalanced by the requirement of court's approval for derivate actions (see Davies, supra note 232, at 454-5 on Wallersteiner v. Moir (No. 2) [1975] 1 All E.R 849 and the new Civil Procedure Rules). *UK has had the shareholder remedy of winding up on just and equitable grounds since at least the Companies Act 1948, Section 222. BH McPherson in his article "Winding up on the "Just and Equitable" Ground (1964) 27 Modern Law Review 282 suggests that orders have been made where directors breached fiduciary duties. However, he also suggests that a representative action by minority shareholders may be a more appropriate remedy. Hence, courts may be*		remedy goes to the company rather than the party instituting proceedings as disincentives. From 2007, Section 181A allowed shareholders to bring an action on behalf of the company with the leave of the court. However, in *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* [2010] 7 CLJ 808, the High Court took the view s 181A should be applied restrictively. The applicant in that case was required to show a direct causal nexus between the complaint and how he ceased to be a member. He also had to satisfy the court that the application was brought in good faith. Although Section 181E gives the court power to order the company to pay the legal fees and disbursements incurred by the complainant, it is still discretionary and costs are likely to be a deterrent to aggrieved shareholders.

	reluctant to wind up a company when there are alternative remedies. *Section 210 allowed alternative remedies to winding up in the case of shareholder oppression.* *Query why English and Australian scores are different.* *The only significant difference I notice is the Prudential case* *Aus – 0.5 throughout* *Throughout the period shareholders had limited common law rights – Foss v Harbottle. Statutory derivative action introduced in 1999 but court approval required. Other statutory rights were available to shareholders throughout the period but they all contained some requirement that restricted shareholders' rights to private enforcement – oppression s232 CA2001, s246AA and 260 CL 1991 ... s 186 UCA, winding up applications s461(1)(e) CA2001, injunctions s1324 CA2001 and CL1991, s574 Code 1982.*		
14. Shareholder supremacy	(1) General principle: Equals 1 if the board always has to give priority to shareholders interests; equals 0 if the board have to give priority to the interests of other stakeholders; equals 0.5 in other cases. *UK – ½ throughout*	0.5 1965-present	Chan & Koh cites UK, Australian and New Zealand case law on this point. The only local case is *Lum Sow Kuen v Chuah Choong Heong* [1998] 4 AMR 3518.

	The principle that the board has to pursue the interests of the company as a whole is normally understood in such a way as to refer to the interests of the shareholders (see e.g. Ferran, supra note 242, at 125 et seq.; Davies, supra note 232, at 491-2); But it is sometimes taken that the interests of the company as a separate entity may outweigh shareholders' interests (see e.g., Farrar, Company Law, 1998, at 14). And the courts rarely practise strict shareholder supremacy, but are instead increasingly recognising entitlements of other interests (Cf. Grantham (1998) 57 C.L.J. 554 at 567, 569 et seq.).; generally, see also Armour et al., Shareholder Primacy and the Trajectory of UK Corporate Governance, (2003) 41 British Journal of Industrial Relations 531. *Aus – ½ throughout* *Directors required to act in the best interest of the company. Since 1976 this duty required directors to have regard to the interests of creditors when a company is approaching insolvency – Walker v Wimborne. Prior to 1976 the literature argues that directors seem to have been subject to a duty to act in the interests of creditors as the company approaches insolvency.*		
	(2) Takeover law: Equals 1 if there is the principle of strict neutrality in case of takeovers; equals 0.5 if the principle of neutrality is subject to exceptions; equals 0 otherwise.11	0 1965-1986	Rule 4 of the Malaysian Code on Takeovers and Mergers 1987 prohibited the board from any action which may have led to frustration of an offer. Rule 37 of the 1987 Code also prohibited the issue of shares, entry into contracts or sale,

	UK – 1 throughout *City Code, General Principle 7 and Rule 21; the board neutrality principle has been part of the Takeover Code since its inception in 1968 (see E Stamp & C Marley, Accounting Principles and the City Code: The Case for Reform, 1970, 21).* *Aus – 0.5 throughout* *Directors of target companies able to engage in some defensive strategies and tactics to frustrate hostile takeover bids. However, directors were limited by the requirement to comply with their duties esp the duty to act in the best interests of the company. Also restrictions in the listing rules – entity must not issue securities without the approval of holders of ordinary securities for 3 months after it's told in writing that a person is making or proposes to make a takeover for securities in it. Takeover Panel Guidance Note on Frustrating Action – also places some limits on directors' defensive actions.*	1 1987-present	disposal or acquisition of assets of material amounts which were aimed at frustrating takeover bids. The prohibitions against frustrating takeover bids have been repeated in the 1998 and 2010 Codes. For instance, the 1998 code contained restrictions against the board issuing shares or option or selling/acquiring assets of the offeree if the board had reason to believe a takeover offer may be imminent; Section 35 of the Malaysian Code on Takeovers and Mergers 1998. The Malaysian Code on Takeovers and Mergers 2010 specifies in Section 8(3) that the board should not take any action or make any decision without the approval of its shareholders at a general meeting which could result in any takeover offer being frustrated. Philip N Pillai, Sourcebook of Singapore and Malaysian Company Law (Second Supplement up to May 1979), 1979 at p107 – Malaysia did not have a Takeovers and Mergers Code as at 1979 (Singapore did). Reference: Arjunan and Low at 380 and 384.
15. Pre-emptive rights12	Equals 1 when the law grants shareholders the first opportunity to buy new issues of shares, and this right can be waived only by the general meeting;13 equals 0 otherwise. *UK – 1*	0 1965-1972 1 1973-Present	The Articles of Association could specify pre-emptive rights but Table A does not contain them. 1970s listing manual, Art 8 contained pre-emptive rights, s287 of 1980s KLSELR; BMLR 7.10 – all new shares or convertible securities to be offered to existing shareholders in proportion

	Pre-emptive rights according to listing rules; see Palmer's Company Law Vol. II, 22nd edn., 1976, p. 4012; Listing Rules 1984, Section 1, Chap. 2, para. 15; see also Section 5; Chap. 2, para. 38. *Aus - 0*		to their holdings, unless otherwise directed by the general meeting.
16. Director's disqualification	Equals 1 if negligent conduct can lead to disqualification; 0.5 if only in specific instances of negligence directors are disqualified (e.g., failure of financial reporting); equals 0 if negligent conduct itself is not necessary for disqualification. *UK –* *1970-1975 - 0* *Companies Act 1948, ss. 187, 188: cause for disqualification limited to personal bankruptcy and conviction for fraud (see generally Leigh, Disqualification Orders in Company and Insolvency Law, (1986) 7 Company Lawyer 179).* *1976-1985 – 0.5* *Companies Act 1976, s. 28; Insolvency Act 1976, s. 9: in addition to "personal bankruptcy and conviction for fraud" new grounds for disqualification of directors were introduced. Persons who were directors of companies with "persistent default in satisfying the reporting requirements of the Companies Acts, and ... proven cases of improper, reckless, or incompetent*	0 1965-present	Directors are only disqualified if they: - are undischarged bankrupts (s125) - have been convicted of fraud or offences relating to the management of a company (s130), or - have been directors of insolvent companies (s130A). BMLR 15.05 similar. Section 130A – not automatic disqualification. An application has to be made to the court to disqualify the director. Conditions are that the person was a director of a company which has gone into liquidation and was insolvent then, and the director's conduct makes him unfit to be concerned with the management of a company. Section 130 – a person convicted of any offence in connection with the promotion, formation or management of a corporation, or any offence involving fraud or dishonesty (punishable with imprisonment for 3 months or more) or any offence under s132, 132A or 303 cannot take part in the management of a corporation. s303 refers to liability for not keeping proper accounts of the company or insolvent trading.

	management", and "persons who had been directors of companies which successively became insolvent" were disqualified. *1986-2005 – 1* *Insolvency Act 1985, ss. 12-19 (into operation since 1986); now: Company Directors Disqualification Act 1986: enumerates different grounds for which directors may be disqualified which include the above as well as grounds like "if deemed unfit to be concerned in the management of a company".* *Aus -* *1 throughout* *Directors could be disqualified as a result of negligent conduct; s 180(1), s 206C CA 2001 … s122 UCA 1962 – disqualification of directors convicted of breaching duty of honesty and reasonable diligence; s124 UCA 1962.*		s132A (insider trading, improper use of confidential information - now repealed)
17. Corporate governance code	Equals 1 if companies have to disclose and explain whether they comply with a corporate governance code; equals 0.5 if this is only recommended; equals 0 otherwise. *UK –* *1970-1992 – 0* *1993- 2005 – 1*	0 1965-2000 1 2001-present	BMLR 15.26 Disclosure pursuant to the Code: A listed issuer must ensure that its board of directors makes the following statements in relation to its compliance with the Malaysian Code on Corporate Governance in its annual report:- (a) a narrative statement of how the listed issuer has applied the principles set out in Part 1 of the Malaysian Code on Corporate Governance to their particular circumstances; and

	Code of Best Practice 1992, s. 3.7 (compliance since 1993); Listing Rules, para. 12.43A(c)(vii); today Combined Code 2003, Preamble point 4, Schedule C; the compliance level of the combined code is high (see, Arcort et al., Corporate Governance in the UK: Is the Comply-or-Explain Approach Working?, Working Paper 2005). *Aus -* *1970-30/6/96 – 0* *1/7/96 – 2002 – 0.5* *Required to disclose main corporate governance practices. ASX LR 3c(3)(j), LR 4.10.3 but there was no Code or list of best practices to comply with.* *2003-2009 - 1* *Required to disclose extent to which they have complied with the corporate governance code and provide reasons for not doing so; ASX Principles, ASX LR 4.10.3*		(b) a statement on the extent of compliance with the Best Practices in Corporate Governance set out in Part 2 of the Malaysian Code on Corporate Governance which statement shall specifically identify and give reasons for any areas of non-compliance with Part 2 and the alternatives to the Best Practices adopted by the listed issuer, if any.
18. Public enforcement of company law	The following variables equal 0 if there is no power of public authority and 1 if public authority has power. (1) Authorisation for director's self dealing of substantial transactions. *UK –* *0 throughout* *No explanation* *Aus –*	0 1965-present	Public authorities do not have the power to approve directors' self-dealing of substantial transactions.

	0 throughout *Authorities could not authorize directors' self-dealing of substantial transaction. These types of transactions are subject to shareholder approval.*		
	(2) Authorisation for appointment of managers. *UK –* *0 throughout* *No explanation* *Aus –* *0 throughout* *Regulator no power to authorize the appointment of managers*	0 1965-present	Public authorities do not authorise the appointment of managers.
	(3) Power to intervene in cases of prejudice to public interest or interest of the company for instance due to "mismanagement of company" or in cases of oppression of shareholders. *UK –* *½ throughout* *CA 1948, ss. 165-175 (regarding appointment of outside inspectors); CA 1967, ss. 109-118): CA 1985, ss. 431-453 provides administrative remedies, which, e.g., may be used in cases of oppression of shareholders and mismanagement. However, only appointment of outside inspectors and investigation of companies documents is possible.* *Aus –* *1 throughout*	0.5 1965-1992 0.6 1993-1997 0.75 1998-2006	Chan and Koh page 24: Prior to 1 March 1993, the Registrar of Companies had enforcement and investigatory powers. Sections 7B-D gave the Registrar of Companies powers of inspection, investigation and examination. The enforcement and investigatory role was taken over by the Securities Commission in 1993 (although its powers of investigation are in respect of securities law and the Registrar of Companies has retained its powers under the Companies Act 1965). The Securities Commission Act 1993 gave the Securities Commission more extensive powers of investigation than the ROC. The Securities Commission (Amendment) Act 1998 extended the Securities Commission's powers of investigation and protection for whistleblowers.

	ASIC – between 1991-2009, ability to intervene by instituting criminal prosecutions, civil penalty applications (since 1993), s50 actions on behalf of the company, seeking injunctions and winding up orders Previously NCSC had powers of investigation and could apply for injunctions, instigate criminal proceedings and apply for other remedies where there was oppressive conduct. Prior to 1982 the Minister could appoint an inspector to investigate the affairs of the company. This could lead to commencement of proceedings or the winding up of the company ss169 – 180 UCA 1962.	1 2007-present	In 2007, the Capital Markets and Services Act 2007 imposed on auditors the duty to disclose breaches of securities laws – s320. It also extended the protection afforded to whistleblowers. In recent years the Securities Commission has instituted civil proceedings for market misconduct. The Corporate Governance Blueprint cites at page 66 an instance of the SC bringing proceedings against a director of a company who had misused company funds for his own benefit. The director was ordered to make restitution for his breach
II. Protection against other shareholders			
1. Quorum[1227]	Equals 1 if there is a 50 % quorum for the extraordinary shareholder meeting (when called for the first time); equals 0.5 if the quorum is 1/3; equals 1/4 if the quorum is 1/4. Equals 0 otherwise. *UK* *0 throughout* *CA 1948, s. 134(c); CA 1955, s. 370(4): just 2 shareholders have to be present.* *Aus –* *0 throughout*	0 1965-present	Section 147 – 2 members of the company shall be a quorum.

[1227] The purpose of requiring a substantial percentage of shareholders to constitute a valid quorum could be to prevent decisions of the general meeting which are not supported by a significant majority much like the supermajority requirements (see Lele & Siems, above n 53, Section D (1)(c)).

	1970-30/6/1998- quorum for members' meeting was 3, 1/7/1998 to 2009 quorum was 2.		
2. Supermajority requirements	Equals 1 if there are supermajority requirements (e.g., 2/3 or 3/4) for amendments of the articles of association, mergers, and voluntary liquidations ; equals 0 if they do not exist at all. *UK –* *1 throughout* *Amendment of articles: CA 1948, s. 141; CA 1985, s. 378(1) UK-CA; mergers: CA 1948, s. 206(2); CA 1985, s.425(2); liquidations: 1986 Insolvency Act 1985, s.84(1)(b),(c).* *Aus –* *1 throughout* *75% majority needed to alter the articles of association. Mergers effected under a scheme of arrangement require approval of 75% of the company's shareholders.*	1 1965-present	Section 31 Companies Act 1965 – special resolution needed to amend articles; schemes of arrangement - s176, approval of majority representing ¾ in value of members needed.

3. One share – one vote[1228]	(1) Default rule: Equals 1 if this principle exists as a default rule; equals 0 otherwise. *UK –* *1 throughout* *Cf. Davies, supra note 232, at 619.* *Aus* *1 throughout* *ASX listing rules – 1 vote per share*	1 1965-present	Although it is often assumed in the literature that the 1 share 1 vote principle applies in Malaysia, nothing specifically states that. Voting is usually on a show of hands at meetings and each person present is entitled to 1 vote on a show of hands. If a poll is required, then each member is entitled to 1 vote per share; Section 147 Companies Act 1965. BMLR 7.19A states that on a show of hands a holder of ordinary or preference shares who is present and entitled to vote shall be entitled to 1 vote. Golden shares held by the state in government-linked companies have veto rights. Pyramid structures and cross-shareholdings are common and allow some shareholders to exercise de facto control over companies in excess of what their shareholding would have allowed them under the one share one vote principle. References: Stijn Claessens, Simeon Djankov and Larry H.P. Lang, 'Who Controls East Asian Corporations?' World Bank Policy Research Working Paper 2054, November 30, 1999, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=597191 (accessed on 30 August 2011). Mike Bukart and Samuel Lee, 'The One Share – One Vote Debate: A Theoretical Perspective', Finance Working Paper No. 176/2007, May 2007, http://ssrn.com/abstract_id=987486 (accessed on 30 August 2011).

[1228] Preference shares without voting rights are not addressed because they are feasible in all countries

	(2) Prohibition of multiple voting rights (super voting rights): Equals 1 if there is a prohibition; equals 2/3 if only companies which already have multiple voting rights can keep them; equals 1/3 if state approval is necessary; equals 0 otherwise. *UK* *0 throughout* *Multiple voting rights are admissible Cf., e.g., Bushell v. Faith [1970] A.C. 1099; Davies, supra note 232, at. 620-1.* *Aus* *1 throughout* *Prohibition on super voting rights for listed companies.*	0 1965-present	There is no express prohibition of multiple voting rights. Again, the golden share held by the state in government-linked companies would entitle the state to exercise a veto vote equivalent to multiple voting rights.
	(3) Prohibition of capped voting rights (voting right ceilings): Equals 1 if there is a prohibition; equals 2/3 if only companies which already have voting caps can keep them; equals 1/3 if state approval is necessary; equals 0 otherwise. *UK* *0 throughout* *Voting caps are in general admissible. The Listing Rules only require disclosure (Listing Rules, para 6.B.5(a)). There still are some companies with voting caps in the UK (see Deminor, Application of the one share – one vote principle*	0 1965-present	Nothing to suggest capped voting rights are allowed or prohibited.

	in Europe, 2005, p. 17). *Aus* *1 throughout* *Nothing to suggest capped voting rights were allowed*		
4. Cumulative voting	Equals 1 if shareholders can cast all their votes for one candidate standing for election to the board of directors or if there exists a mechanism of proportional representation in the board by which minority interests may name a proportional number of directors to the board (default or mandatory law); equals 0 otherwise. *UK* *0 throughout* *Aus* *0 throughout* *No mechanism for proportional representation. Cumulative voting not permitted for listed companies*	0 1965- present	No cumulative voting in Malaysia.
5. Voting by interested shareholders prohibited	Equals 1 if a shareholder cannot vote if this vote favours him or her personally (i.e., only 'disinterested shareholders' can vote); equals 0 otherwise.	0 1965 – 1972	Shareholders are not subject to any restrictions in voting except in related party transactions involving their interests or the interests of someone related to them.; BMLR 10.08 and

	UK *½ throughout* *In general, voting is not subject to any formal restrictions (see Carruth v. Imperial Chemical Industries Ltd [1937] A.C. 707; Cheffins, supra note 263, at 238, However, independent shareholder approval is required for related parties transactions of substantial shareholders (i.e., shareholder with more than 10 % of the voting rights) (Listing Rules 1979, ch. 4.8; Listing Rules 1984, s. 6.1.4; Listing Rules 1993, para. 11.1(a),(b)(i), 11.4(d)).* *Aus* *0.5 throughout* *Shareholders generally entitled to vote in their own interests so long as not acting oppressively or unfairly. However, in some contexts shareholders were prohibited from voting on resolution in their own interests eg. under Chap 2E – not allowed to vote on resolution giving financial benefit to related party if shareholders is a related party.*	0.3 1973-1987 0.1 1988-1997 0.5 1998-present	10.09. From 2007, Section 132E likewise required interested parties to abstain from voting to approve the transaction. 1970s listing manual – interested directors to abstain from voting on related party transactions. 1980s KLSELR stated that the Exchange had the right to require that directors/substantial shareholders abstain from voting. However, there was no prohibition of voting by interested parties. KLSE Main Board Listing Requirements amended in 1998. BMLR 10.08(7) and 10.09(1)(d) – interested directors, majority shareholders and persons connected with them must not vote on resolution. The opacity regarding the actual or beneficial ownership of shares, which is often masked by layers of shareholding, cross-holdings and nominees, contributes to the difficulty of monitoring compliance with these provisions.
6. No squeeze out (freeze out)	Equals 0 if a shareholder holding 90 % or more can 'squeeze out' the minority; equals 1 otherwise. *UK* *0 throughout* *CA 1948, s. 209; CA 1985, ss. 429, 430 (90 %).*	0 1965-present	Section 180 Companies Act 1965 provides that if the holders of 90% or more of the shares have approved the scheme, the dissenting shareholders may be compulsorily acquired. Section 180 is very similar to Section 209 of the UK Companies Act 1948. Section 222 of the Capital Markets and Services Act 2007 has a similar provision.

	Aus *1970-1999 - 0.5* *Majority shareholders had a limited ability to squeeze out minority eg. shareholder who obtained 90% or more of share capital under an arrangement or reconstruction could compulsorily acquire the remaining shares.* *2000-2009 - 0* *Shareholder holding 90% or more could compulsorily acquire the remaining shares.*		
7. Right to exit	(1) Appraisal rights: Equals 1 if they exist for mergers, amendments of the articles and sales of major company assets; equals 0 if they do not exist at all. *UK* *0 throughout* *There are no appraisal rights in British law; CA 1985, s. 461(2)(d) is different because it is necessary that the majority did not act lawfully (see variable II 9 for these cases).* *Aus* *0 throughout* *No appraisal rights*	0 1965-present	No appraisal rights.

	(2) Mandatory bid: Equals 1 if there is a mandatory bid for the entirety of shares in case of purchase of 30% or 1/3 of the shares; equals 0 if there is no mandatory bid at all. *UK* *1 throughout* *City Code, rule 9.1.* *Aus –* *1 throughout* *1/7/88-2009 – shareholders could not acquire more than 20% without complying with takeover provisions – make public offer for remaining issued shares. 1972-30/7/1988 – 15%; 1970-71 - 1/3 shares.*	0 1965-1986 1 1987-present	The 1987 Takeovers and Mergers Code provided for a mandatory bid for the entirety of the shares in case of a acquisition of more than 33% of voting rights. This was continued in the 1998 Code. The 2010 Code provides for a mandatory offer on acquisition of a controlling stake. The Capital Market and Services Act 2007 defined 'control' as 30% of voting rights. This was amended to 'more than 33%' by the Capital Markets and Services (Amendment) Act 2010.
	(3) Mandatory public offer: Equals 1 if there is a mandatory public offer for purchase of 10% or less of the shares; equals 0.5 if the acquirer has to make a mandatory public offer for acquiring more than 10% but less than 30 % of the shares; equals 0 otherwise *UK* *0 throughout* *The Rules Governing Substantial Acquisition of Shares do not require buyers to make a tender offer* *Aus*	0 1965-present	A mandatory offer is only required where an acquirer who holds more than 33% but less than 50% acquires more than 2% of the voting rights of the company within a period of six months; Section 9 of the Takeovers and Mergers Code 2010.

	Interpreted as – if purchaser was to acquire the percentage of shares specified, the purchaser is required to make a public offer and cannot buy the shares privately *1970-1972 – 0* *1/3 shares* *1973-2009 – 0.5* *1972 to 30 Jun 1988 – 15% shares* *1/7/1988 – 2009 – could not acquire more than 20% without complying with takeover provisions*		
8. Disclosure of major share ownership	Equals 1 if shareholders who acquire at least 3 % of the company's capital have to disclose it; equals 0.75 if this concerns 5 % of the capital; equals 0.5 if this concerns 10 %; equals 0.25 if this concerns 25 %; equals 0 otherwise *UK* *1970-1988 - ¾* *CA 1967, s.33; CA 1976, s. 26(2); CA 1985, s. 199(2)(a) (usually 5 %).* *1989-2005 - 1* *CA 1985, s. 199(2)(a) was changed by Companies Act 1989 (usually 3 %; in some special cases 10 %).* *Aus –* *1970-1990 – 0.5* *Acquisition of at least 10% required to be disclosed*	0 1965-1984 0.75 1985-1997 1 1998-2000 0.75	BMLR 9.25, Appendix 9C require the names of substantial shareholders and percentage of holdings to be disclosed in the annual report. Substantial shareholding is defined in Section 69D as 5%. (s69D since 1985) Section 69L also requires the company to maintain a register of substantial shareholders. The Securities Industry (Reporting of Substantial Shareholding) Regulations 1998 which came into force on 1 May 1998 changed the threshold for disclosure to 2% of the voting shares. This was changed back to 5% again in 2001 by the Securities Industry (Reporting of Substantial Shareholding) (Amendment) Regulations 2001. Note: KLSELR s62(e) from 1980s requires disclosure of the 20 largest shareholders' names and the number of shares held. This period is covered by s69D. It's difficult to determine what this translates into in terms of percentage of share capital held and may vary from company to company.

	1991-2009 – 0.75 *acquisition of at least 5% required to be disclosed*	2001-present	
9. Oppressed minority	(1) Substantive law: Equals 0 if majority decisions of the general meeting have to be accepted by the outvoted minority; equals 1 if some kind of substantive control is possible (e.g., in cases of amendments to the articles of association, ratification of management misconduct, exclusion of the pre-emption right, related parties transactions, freeze outs); equals 0.5 if this control covers only flagrant abuses of majority power. *UK* *1970-1979 – ½* *A duty of loyalty by the majority is in principle not assumed, and also the statement that action should be "bona fide for the benefit of the company as a whole" is mostly not regarded as a significant limitation on majority power (cf. Cheffins, supra note 263, at 325-6; Modern Company Law: Final Report, 2001, paras. 7.52 et seq.). Yet, there is a general limit on "fraud on the minority", which may operate for example in the event of amendments to the articles of association or the ratification of management misconduct (Ebrahimi v. Westbourne Galleries Ltd [1972] 2 All E.R. 492 at 500; Davies, supra note 232, at 438 et seq., 673, 709 et seq., 716-7). Furthermore, according to CA 1948, s. 210 (now: Insolvency Act 1986, s. 122) an oppressed minority can apply for a "just and equitable" winding up order. Finally, a majority*	0.6 1965-2006 0.7 2007-present	s181 of the Companies Act has an oppression remedy but is limited to flagrant abuses of majority power. Winding up on just and equitable grounds is possible under Section 218(1)(e). Exceptions to the rule in *Foss v Harbottle* are limited and disincentives include high costs and damages going to the company rather than the shareholder. Since 2007, Section 181A permits actions to be brought on behalf of the company with the leave of the court. Courts have power to require the company to pay the costs of complainants.

	shareholder may in some cases be a shadow director (CA 1985, s. 741(2)), and thus, to some extent, be treated as if he or she were a director. *1980-2005 – 1* *CA 1980, s. 75; CA 1985, s. 459; Insolvency Act 1986, s. 122(1)(g): Rule against unfair impairment of shareholder interests. CA 1980, s. 75(3), CA 1985, s. 461(2)(d) provides that unfair prejudice may give rise to an obligation to purchase its own shares. Additionally, if a purchase offer has previously been made, it may be harder to show unfair prejudice (see Re a Company (No. 00709 of 1992) [1999] 1 W.L.R. 1092 at 1107 (O'Neill v. Phillips)).* *Aus (interpreted as whether shareholders can file a claim as opposed to the merits)* *1 throughout* *Majority's decision did not have to be approved by outvoted minority. Minority protected by oppression remedy*		
	(2) Shareholder action: Equals 1 if every shareholder can file a claim against a resolution by the general meeting because he or she regards it as void or voidable; equals 0.5 if there are hurdles such as a threshold of at least 10 % voting rights or cost rules; equals 0 if this kind of shareholder action does not exist	1 1965- present	The Civil Law Act adopted English common law in Malaysia as at 1956. Hence, *Edwards v Halliwell* applies in Malaysia.

	UK *1 throughout* *See, e.g., Edwards v. Halliwell [1950] 2 All E.R. 1064 at 1067.* *Aus* *1 throughout* *In limited circumstances shareholders could obtain a remedy if a resolution was invalid as a result of failure to comply with the constitution or articles, or because it was oppressive.*		
10. Shareholder protection is mandatory	(1) Exclusion of directors duty of care (see variable I 13.1) in articles: equals 0 if possible and equals 1 otherwise. *UK* *1 throughout* *Directors' liability cannot be excluded in the articles in advance; only indemnification may be possible (see note 276 above).* *Aus* *1 throughout* *Directors duty of care could not be excluded in Articles or constitution.*	1 1965-present	Directors' duty of care cannot be excluded in the articles.

	(2) Rules on duration of director's appointment (see variable I 12.1 and 2): equals 1 if mandatory and 0 otherwise. *UK* *½ throughout* *Limits to the appointment are only based on the Table A and corporate governance codes (see note 267 above). However, companies cannot deviate from the CA 1985, s. 303 on the dismissal of directors.* *Aus* *1 throughout* *Mandatory rules relating to length of appointment of directors.*	0.5 1965-1987 1 1988-present	Table A, Art 63, directors to retire once every three years. Table A is a replaceable rule. From 1988, s309 of KLSELR, BMLR 7.28(2) – All directors to retire from office at least once in three years. This is mandatory for listed companies. Query whether in Malaysia the restriction on the duration of directors' appointments has much value as a means of safeguarding shareholders' interests. The appointment of directors is largely the purview of substantial shareholders and the board. When directors retire from office, their reappointment or the appointment of directors replacing them still remains in the hands of controlling shareholders. See Pillai's observations in Protection against the Board: Variable 1(6).
	(3) Board composition (supervisory boards, non-executive directors) (see variable I 9.1 and 2): equals 1 if mandatory and 0 otherwise. *UK* *0 throughout* *Board composition is only based on the Combined Code and its predecessors (see notes 252-256 above), hence not mandatory.* *Aus*	0 1965-2000 1 2001-present	Bursa Malaysia Listing Requirements 15.02 – mandatory requirement that listed companies should have at least 1/3 of board members independent.

	0 throughout *Board composition based on ASX CG Principles and is not mandatory*		
	(4) Other topics: equals 1 if there is the general rule that company law is mandatory; equals 0 if company law is in general just a "model off the shelf"; equals 0.5 if there is no general rule. *UK* *1970-1971 – 0* *In general, English company law did not use to be mandatory, although since 1948 a general trend towards increasingly mandatory law can be noted (Cf. Davies in Baums & Wymeersch (eds.), Shareholder Voting Rights and Practices in Europe and the United States, 1999, 331 at 344).* *1972-2005 – ½* *The trend towards mandatory law has been enhanced by the accession to the EU and thus the influence of the EU company law directives. Relaxations are increasingly allowed for private companies (Companies Act 1989). The focus of this study is, however, on public companies.* *Aus* *0.75 throughout* *Much of company law was mandatory except for replaceable rules and Table A. Some appear to be*	0.75 1965-present	Companies Act, common law and equity are mandatory although Table A is not. BMLR are mandatory; MCCG is voluntary, although listed companies are required by BMLR to 'comply or explain'.

	mandatory but aren't, as they may be modified by agreement in the company's constitution.		

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APPENDIX 2

Malaysian applications for leave to bring derivative actions: 2008 to 2015

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APPENDIX 3

Malaysian applications for leave to bring derivative actions: 1999 to 2006

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APPENDIX 4

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Australian applications for leave to bring derivative actions: 2008 to 2015

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