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Abstract
The accelerated growth in international trade and commerce brought by robust technology development commonly referred to as 'globalisation' has attracted the interest of governments and businesses and legal harmonisation. Harmonisation of law improves legal certainty and predictability. As most corporations in Asia are highly concentrated, it has been acknowledged that the protection of minority shareholders is considerably weak. It is believed that this perception of weakness is caused by a poor corporate disclosure regime, lack of independence in the executive boards, as well as lack of protection of the minority shareholders. One of the initiatives was to harmonise the laws via the ASEAN Disclosure Standards that allows cross-listing offering of financial products and services in ASEAN by removing regulatory barriers and ASEAN members' restrictive national measures and replacing them with common disclosure standards. This paper discusses the use of model laws as instruments of legal harmonisation by drawing comparisons to the European Union's Shareholder Rights Amending Directive 2017/828. This paper finds that the ASEAN Disclosure Standards does not incorporate the *ex-ante* approval process, absence of approval from an independent body such as independent directors and approval by the minority shareholders. This paper makes two recommendations to strengthen the regulatory framework in the ASEAN Disclosure Standards to protect the minority shareholders' interest in RPTs and ultimately to achieve better corporate governance in the region.
Keywords: ASEAN Disclosure Standards, European Union, Related Party Transaction, Harmonisation, Disclosure

Introduction

Active and robust development in technology has expedited the growth in international trade and commerce between countries, and improvements in technology and communication have reduced the costs of transporting goods and services. Globalisation refers primarily to the progressive elimination of barriers to trade and investment and unprecedented international mobility of capital (Zekos, 2003). It has led to the removal of restrictive legal regimes because it could hamper the efficiency of international trade. Therefore, harmonisation of legal framework seeks to create consistency in the law and to minimise

regulatory interventions for companies in the region, both internationally and nationally and represents a type of limited regulatory interference. It is acknowledged that related party transaction or RPT was one of the key concerns during the Asian financial crisis in 1997 due to the region's vast and unique concentrated ownership corporate structure (Claessens et al., 1999; Organisation for Economic Co-operation and Development, 2009). This was attributed to poor corporate disclosure regime, lack of independence in the executive boards and lack of protection to the minority shareholders. In concentrated companies, the key agency problem is tunnelling, where assets and profits are transferred out of firms for the benefit of their controlling shareholders.

The ASEAN Capital Market Forum (ACMF) was established in 2014 to develop a deep, liquid and integrated regional capital market to meet the objectives of the ASEAN Economic Community Blueprint 2015. Several initiatives were introduced, such as the Expedited Review Framework for Secondary Listing, the Framework for Cross-Border Offering at ASEAN CIS, and the ASEAN Disclosure Standards. There is extant literature that discusses the benefits of harmonising a legal framework, such as creating effective capital market integration (Rajagukguk, 2012), reduce administrative burden (Singh, 2009) and successfully unify many countries' regulatory framework via model law (Faria, 2002). One of the successful model laws is UNIDROIT Principles of International Commercial Contracts as a model for harmonising ASEAN contract law (Nghee, 1997) and UNCITRAL Model law trade law (Faria, 2002). However, there is a paucity of literature on the corporate law harmonisation at ASEAN. As such, this paper focuses on the ASEAN Disclosure Standards because it provides an insight into the attempt to harmonise corporate disclosure mechanism as the disclosure is one of the key aspects in corporate law.

Disclosure and information sharing represents a substantial portion of company law (Villiers, 2006). Disclosure serves as a notice to the other directors that there is a conflict of interest and the potential to influence the board's decision. According to Chen and Wai Yee, one way to control RPT is through disclosure, as propounded by the Organisation for Economic Co-operation and Development or OECD (Chen & Wan, 2018). Previous researches typically investigated the harmonisation of competition law (Nugraheni et al., 2016) (Silalahi, 2017a), intellectual property law (Siew-Kuan Ng, 2013) (Nurul, 2017) as well as contract law (Nghee, 1997) at ASEAN but very minimal in corporate law. Therefore, the objectives of this paper are as follows:

- To analyse the disclosure framework in the ASEAN Disclosure Standards to determine whether the harmonisation is sufficient to protect the minority shareholders in RPT;
- To discuss the model laws as instruments of disclosure framework harmonisation by drawing comparisons to the European Union's Shareholder Rights Amending Directive 2017/828 or known as SRD II; and
- To propose recommendations to the ASEAN Disclosure Standards.

Methods

This paper employed a qualitative and doctrinal study to discuss the European Union's experience harmonising the regulatory framework for RPTs by referring to the Shareholder Rights Amending Directive 2017/828 or SRD II and determining whether the existing ASEAN is Disclosure Standards are sufficient to protect minority shareholders in ASEAN. The objective of comparative research may either be to present information existing in two or more different factual contexts or to examine merits and demerits in a comparative perspective or to compare and contrast views, ideas, values, concepts, rules, principles, theories or any other

condition that has some bearing on law and its institutions (Yaqin, 2007). This paper was conducted primarily through library-based doctrinal analysis research. It includes identification, in-depth analysis, and comparative study of relevant primary resources from the European Union (EU) and ASEAN. The existing provisions on RPTs in the ASEAN Disclosure Standards is evaluated to identify loopholes and deficiencies in the legal framework to determine if it is sufficient to protect the minority shareholders from expropriation by the controlling shareholders. It is acknowledged that EU, in its unmodified form, is not necessarily a template for ASEAN; the SRD II builds on the experience of harmonisation of securities standards over a decade and takes place in the context of achieving a genuine single market and economic union, and the political will for such union is not present in ASEAN. Nevertheless, both models provide useful case studies on the key institutions, regulatory coordination and policies that account for the success of the directive.

Literature Review

Harmonisation is defined as achieving practise compatibility by reducing differences to achieve a level of similarity between systems while also accepting that some differences may remain (Paisey & Paisey, 2004). Harmonisation of regulatory frameworks among countries is not uncommon, as evidenced by the success of international harmonisation between Australia and New Zealand in commercial areas such as Intellectual Property Law, Consumer Protection, and Restrictive Trade Practices Law, which is based on the two countries' historical common roots and similar business laws. Company laws are converging, and the regulation of securities markets is relatively standardised in all developed countries (Maume, 2016). Under Article 50(2)(g) of the Treaty on the Functioning of the European Union, which provides the legal basis for many of the company law harmonisation measures that have been enacted thus far, the European Union has been at the forefront of law harmonisation. EU attempted to impose a single set of EU rules on RPT by introducing the SRD II for listed companies' RPT can be approved on the condition that the director or the shareholder on the other side of the transaction will have to be excluded from voting. Transactions with related parties may cause prejudice to companies and their shareholders, according to the preamble to SRD II, because they provide the related party with the opportunity to appropriate value belonging to the company. As a result, adequate safeguards for the protection of companies and shareholders' interests are critical. However, the harmonisation of corporate law in the EU was assessed as having no meaningful progress because of resistance by national interest groups such as dominant shareholders and differences in national 'meta-rules (Enriques, 2017). Also, the proposed RPT rules were very much watered down due to the pressure of interest groups representing the business community and their controllers, and with the help of some like-minded Member States (Gözlügöl, 2020). This is because there are no 'one-size-fits-all' rules that could be applied across the board. Meanwhile, ASEAN and its attempts at harmonisation are not new. The ASEAN Economic Community Blueprint 2015[1] initiated the harmonisation in capital market standards while offering greater flexibility in language and governing law requirements for securities (Zahid & Ali, 2011). Legal harmonisation, rather than judicialisation, has been used to align disparate national laws with ASEAN Charter commitments and other agreements (Deinla, 2017).

[1] This is later revamped into the Asean Economic Community Blueprint 2025 which re-emphasised the objectives and aims of AEC Blueprint 2015.

RPT can be both harmful and beneficial to corporations. Controlling shareholders in companies with concentrated control rights have an incentive to transfer public company resources through RPT to their own pockets. Such a transfer, also known as 'tunnelling', can take many forms, including financial assistance, asset purchase or sale, and transfer pricing (Johnson et al., 2000). RPT is an effective and, in some jurisdictions, common tool for those in control, i.e., controlling shareholders to divert value from a corporation (Enriques & Troeger, 2019). They are vested with colossal power to manage the company, which potentially allows the directors to choose their own interests over the interest of the company. However, RPT can be deemed as a tool to achieve optimal output by promoting contract efficiency facilitated by the related parties' familiarity with each other (Ryngaert & Thomas, 2012). It plays a significant role in a market economy, contributing to meeting the firms' basic needs, reducing transaction costs and facilitating the fulfilment of property rights and essential contracts for the firm.

Two broad strategies have been adopted in dealing with RPT, namely, *ex-ante approval* and *ex-post liabilities* (Kamin & Rachlinski, 1995). The former is procedural, where it deals with disclosure and requires the company to obtain the necessary approval from the board. On the other hand, the *ex-post* principles-based approach involves litigation where the court will act against the predefined duties and liabilities. This paper focuses in the *ex-ante* strategy as the central theme of this paper.

Previous research has primarily focused on the harmonisation of laws in ASEAN from the perspectives of intellectual property law (Nurul, 2017), competition law (Silalahi, 2017b; Svetlicinii, 2017) and international trade (Davidson, 1994). There has been little effort to analyse the harmonisation of corporate law in the region, especially on the disclosure framework in RPT. Therefore, this is an opportunity for this paper to contribute to this under-researched area by examining the dynamics harmonisation of corporate law by focusing on the disclosure framework in RPT at ASEAN. As RPT is prevalent in concentrated companies in the region, studies in this area will contribute to the literature on the subject matter.

Harmonisation of Related Party Transaction Regulatory Framework at ASEAN: An Overview

An integrated capital market will result in more efficient capital allocation because savings can flow more efficiently and lower investment costs because barriers have been removed (Singh, 2009). At the 9th ASEAN Summit in 2003, the Association of South-East Asian Nations or ASEAN[2], launched the ASEAN Community, which comprises the ASEAN Economic Community (AEC), the ASEAN Security Community (ASC), and the ASEAN Socio-Cultural Community (ASCC). AEC aimed to deepen integration through the free movement of services, investment, capital, and skilled workers, in addition to the free movement of goods. It also addresses a wide range of issues, including standardisation, intellectual property rights, competition policies, infrastructure development, and closing the development gap. Capital market integration was viewed as critical for reducing vulnerabilities to external shocks and market volatility following financial crises, as well as providing issuers with "liquidity, scale, and capacity" to complete globally (Wan, 2017). The AEC's broad objectives range from market integration, infrastructure development, and intellectual property protection to close the development gap between member countries (Ishikawa, 2021). The ASEAN Capital

[2] ASEAN was founded in 1967 as a result of the Bangkok Declaration. Malaysia, Singapore, Thailand, Indonesia, Brunei Darussalam, the Philippines, Cambodia, Vietnam, Laos, and Myanmar are its members.

Markets Forum, or ACMF, was established in 2004 under the auspices of the AEC to make significant progress toward the creation of a regionally integrated market in which capital can move freely, issuers can raise capital anywhere, and investors can invest anywhere (ASEAN Capital Markets Forum, 2009). ACMF focuses its efforts on projects to harmonise standards in capital market regulation in ASEAN in the two areas of disclosure requirements for equity securities and the rules of distribution. For example, the Expedited Review Framework for Secondary Listings was signed in March 2012 between capital market regulators from Malaysia, Singapore and Thailand, which allows the time-to-market for corporations seeking a secondary listing in a participating ASEAN country has been significantly reduced from 112 days to 35 business days (ASEAN Capital Markets Forum, 2016). Secondly, the ASEAN Disclosure Standards or ADS 2013 was to facilitate multi-jurisdiction offerings of equity and plain debt securities to retail investors within ASEAN participating countries. It was benchmarked against the International Organization of Securities Commissions (IOSCO) International Equity Disclosure Standards 1998 and designed primarily to distribute simple debt or equity across ASEAN countries. This standard allows for a single and common prospectus to allow for multiple listings in various ASEAN jurisdictions.[3] An issuer wishing to make multi-jurisdictional offerings would only need to provide investors in each participating jurisdiction with a single set of disclosure documents that comply with the ADS 2013. Before listing on the stock exchange in other ASEAN countries, ADS 2013 only requires the issuer to provide information on RPT connected to the issuer for three years before issuing a prospectus. It also requires the issuer to disclose that proposed or completed RPTs have been conducted on an arm's length basis and explain the "procedure to be followed" to ensure that the transaction is conducted on an arm's length basis. This paper finds that this general requirement to explain "the procedure to be followed" is vague and insufficient as it does not elaborate on the procedures to ensure that the RPT is fairly approved by the independent directors or minority shareholders, which should have been included in the disclosure standards. It is important to note that the existing domestic rules prohibiting conflict transactions between interested parties are complex and can be avoided by using complex corporate structures such as interlocking shareholding or directories, or both (Abdul Rahman & Salim, 2010; Claessens et al., 1999). As a result, the RPT may be approved by questionable means because there is no clear regulatory framework of the approval process. The independent third party and minority shareholders in the transaction were not stated in ADS 2013. Therefore, this paper suggests that the lack of an expressed provision in ADS 2013 requiring shareholder and independent director approval may not be sufficient to protect minority shareholders from abusive RPTs.

This paper also argue that the ADS 2013 suffers from a lack of enforcement will among the signatories. It neither has any provision for any non-compliance to the standards nor penalty provisions. This is believed due to the loosely used term "ASEAN Way" spirit that binds the relationship of all Member States in the region. The members of ASEAN have been reluctant to be too legalistic in their relations with each other, preferring to conduct relationships in the "ASEAN way" due to history and culture (Goldstein, 2004). There is no supra-national body that oversees the implementation of soft laws and therefore, they prefer to resolve any dispute and misunderstandings behind a closed door. Article 20 (4) of the ASEAN Charter addresses the issue of a serious breach of the Charter or non-compliance that stipulates any

[3] Malaysia, Singapore, and Thailand have all agreed to incorporate this standard into their respective listing regulations.

dispute among the Member States shall be referred to the ASEAN Summit for deliberation and decision. Unfortunately, the Charter does not mandate any power to ASEAN to require all Member States to comply with any treaties or legal documents issued by ASEAN. The lack of provision for effective compliance and accountability mechanisms may impede the effective implementation of regional agreements between the Member States (Ahmad, 2016).

Harmonisation of Related Party Transaction Regulatory Framework at European Union

European Union (EU) is a grouping of twenty-eight (28) European countries and has a population of approximately 490 million people and a land area of nearly 4.5 million square kilometres (International Finance Corporation, 2015). The main impetus for harmonisation of corporate law in the EU is Article 50(2)(g) of the Treaties of the Functioning European Union, which states:

> *"The European Parliament, the Council, and the Commission shall carry out the duties devolved upon them under the preceding provisions, in particular: by coordinating to the extent necessary the safeguards which, for the protection of the interests of members and others, are required by the Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making them available to the public."*

The harmonisation of the EU legal framework has three (3) goals: equality safeguards for all Member States and others, preventing regulatory arbitrage and finally, fostering economic integration (Gelter, 2017). Since 2000, the actions of the EU have, in general, focused on creating a system in which effective and accountable companies report to responsible shareholders (Dallas & Pitt-Watson, 2016). As a result, it has promoted shareholder rights and responsibilities among European corporations. The European Parliament and the European Council passed and adopted the Shareholder Rights Directive 2007/36 in 2007, intending to improve the corporate governance of EU companies trading on EU-regulated markets by allowing shareholders to exercise their voting rights and information rights across borders. However, this directive was fraught with shortcomings and several shortcomings related mainly to two problems: insufficient engagement of shareholders and lack of adequate transparency. According to the European Commission, the directive did not provide shareholders with enough information ahead of the planned RPTs, and those shareholders also lack adequate tools to oppose abusive transactions (European Commission, 2014). Therefore, the Shareholder Rights Amending Directive 2017/828 or SRD II was passed in 2017, which aims to address the lack of engagement between shareholders and the lack of protection for minority shareholders in various ways, including by improving the transparency of asset managers' engagement policies and their implementation. These initiatives provide minority shareholders with confidence in corporate governance and could be useful as a supply-side in stimulating measures to encourage investor interest in pan-European equity markets. Therefore, it could contribute to the much-needed European initiative to develop deep and liquid capital markets and corporate finance (Chiu, 2016).

Furthermore, the revised directive established a comprehensive *ex-ante* review regime for potentially conflicted transactions involving publicly traded companies, major shareholders, downstream entities, and managers. *Ex-ante* strategies seek to prevent or deter potential managerial unaccountability and opportunism by restraining controlling shareholders' ability

to exercise their multiple voting shares (Kraakman et al., 2006). Therefore, any proposed RPTs must be evaluated in advance by the board of directors, shareholders or the stock market. This is to ensure that the approval had undergone this mechanism to prevent any opportunistic behaviour by the controlling shareholders. Article 9c of SRD II states that any significant transactions with parties related to the company must be approved by the shareholders, management, or supervisory body. The company must disclose any material transactions when they entered into the contract and provide all information required to assess the transaction's accuracy. However, rather than prescribing the materiality threshold, SRD II leaves it to the Member States to define materiality through one or more qualitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company'. The directive further instructs them to consider the "influence that the information about the transaction may have on the economic decisions of shareholders" and "the risk that the transaction creates for the company and its shareholders" (Engert & Florstedt, 2019). The company must publicly announce (to the stock exchange) that RPTs are conducted in a "fair and reasonable" manner from the standpoint of the company and the shareholders who are not related parties, including minority shareholders. The announcement may be supplemented by an independent report assessing whether or not the transaction is fair and reasonable by any of the following parties, including from an independent third party, the company's administrative or supervisory body, or the audit committee or any committee comprised of the majority of independent directors. This is supported by evidence that the independent directors who can stand up to managers are better monitors (James et al., 2021). Independent directors have a fiduciary responsibility to ensure that management implements more accurate disclosure to reduce information asymmetry.

The EU's readiness to legislate a specific framework on RPT is commendable, especially in light of emerging concerns that many corporations did not engage effectively with their shareholders. Nevertheless, there are sceptics in SRD II because the flexibility provided to the Member States in determining the materiality threshold allows for steering or adjustment that would likely fail to detect cash-flow tunnelling and also the effectiveness of the enforcement (Enriques, 2015). Also, EU's Member States are allowed to depart from this directive provided that their respective domestic laws can protect the minority shareholders. It is absurd as the leeway defeats the reason why the directive was drafted in the first place. Having said this, the effort to harmonise the RPT regulation is laudable because it provides clear guidance for all Member States to legislate on the appropriate legislation in their respective jurisdictions.

Recommendations

Having analysed and compared the disclosure framework in ADS 2013 and SRD II, this paper proposes three recommendations to improve the ADS 2013. Firstly, this paper recommends incorporating the *ex-ante* strategy in the ADS 2013, such as an independent monitoring mechanism. It can be in the form of requiring the company to obtain approval from the independent directors during the process. RPT is one area that requires a higher level of monitoring by a non-interested independent body such as independent directors due to the high concentration of ownership in Asian corporations. Non-executive independent directors occupy an essential position within the corporate governance board structure: they monitor the management and executive. They can mitigate the agency problems that arise between controlling and minority shareholders by monitoring the private benefits of control enjoyed

by the controlling shareholders. This *ex-ante* strategy has already been implemented in Malaysia, Singapore and Thailand, where their stock exchanges regulators made it mandatory for the listed issuer to seek approval from an independent third party, including the audit committee, which comprises of majority of independent directors. This is similar to the same strategy employed by SRD II.

Secondly, on top of the approval by the independent directors, ADS 2013 should include a requirement for approval by disinterested minority shareholders. To assist them in making the decision, the independent report shall be made available to minority shareholders in order for them to determine whether the proposed RPT is "fair and reasonable". This is in line with the self-enforcing model that advocates a law that creates corporate decision-making processes that allow minority shareholders to protect themselves by their own voting decisions and by exercising transactional rights. In doing so, the disinterested minority shareholders must be disclosed with material information by the directors as to the nature and effect of the proposed RPTs. Such disclosure to members enables them to deliberate and approve or reject such a proposal. For the disclosure to be adequate, it must be made in full at the shareholders' meeting.

Last but not least, it is timely for ASEAN to have a a supra-national legal framework to promulgate and enforce the laws in the region. Despite the sceptics, EU has been proven as a success in integrating the different ideas and policies in the region and this paper is optimistic in doing that. One of the reasons to this success was attributed to the clear international judicial structure (Hopkins, 2015). ASEAN should shift from its ASEAN Way approach to a more rule-based regime and rule of law framework. As such, for a start, ASEAN policy makers should strengthen the ASEAN Charter by incorporating judicial structure in the region by considering the inter-state and inter-judicial co-operation in the region. For example, in 2004, the ASEAN Mutual Legal Assistance in Criminal Matters was signed and ratified by all ASEAN countries. It is hoped that similar mechanism can be applied in capital market area.

Conclusion

Given that emerging ASEAN country such as Malaysia, Thailand and Indonesia have high ownership concentrations, it is timely for ASEAN to consider working harder to harmonising their capital market laws and regulations. ASEAN should be bold in advocating for a more robust legal framework to promote capital integration and good corporate governance in the fast-moving globalisation race. Capital market integration will lead to an efficient allocation of capital for governments and regulators because savings can flow more efficiently and at a lower cost to investment and remove barriers. Regulation of cross-border trades and investment will be strengthened due to the sequenced liberalisation and integration process, and regulators will offer more excellent protection to investors. Through legal framework harmonisation and mutual recognition agreements, ASEAN markets will improve their regulatory and corporate governance standards to be at par with the international standards and adopting best practices. Given the rising prevalence of concentrated corporation at ASEAN, there is an essential need to conduct more research on this topic.

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