

# Teaching Foreign Law in the Philippines

Allan Verman Y. Ong\*

I. INTRODUCTION.....	481
II. RENDERING EFFECTIVE COUNSEL IN THE INTERNATIONAL LEGAL ORDER.....	485
III. UNDERSTANDING THE FOUNDATIONS OF PHILIPPINE LAW .....	501
IV. STUDYING FOREIGN LAW TO FACILITATE GLOBAL UNDERSTANDING .....	509
V. CONCLUSION.....	520

## I. INTRODUCTION

The idea of undertaking a systematic study of foreign law in law schools appears to be an eccentric, costly, and non-utilitarian proposal, particularly in the setting of the Philippine legal education. The Philippine bar examination is so difficult and has such a vast coverage that it is necessary to devote three academic years to introduce the subject matter to students for the first time and requires another year to review the matter for a second time. This leaves very little room for students to take up elective classes which would not cover another bar subject in detail,<sup>1</sup> or a specialized field which would be

---

\* '10 LL.M., Columbia University Law School; '09 LL.M., Chinese Law, Civil and Commercial Law, Peking University Law School; '04 J.D., *with honors*, Ateneo de Manila University School of Law. The Author is currently a Foreign Legal Advisor of Kelvin Chia Partnership in Singapore. He was a Member of the Board of Editors and was Lead Editor for the first issue of the 48th volume of the *Ateneo Law Journal*. His published works in the *Journal* include: *The Rise of the Prosecutorial Efforts in Foreign Corruption: Lessons Learned from Recent FCPA Cases*, 55 ATENEO L.J. 958 (2011); *The Google Books Search: The Changing Frontiers of Copyright Law*, 54 ATENEO L.J. 982 (2010); *Testing the Capacity of the Shareholders' Meeting to Protect Minority Shareholder Rights under the Chinese Company Law*, 53 ATENEO L.J. 628 (2008); *Regulatory Transition in Employee Stock Options as Exempt Transactions From the Securities Regulation Code*, 52 ATENEO L.J. 153 (2007); *Foreign Investment Law: Studying the Administrative Treatment of Legislative Restrictions*, 51 ATENEO L.J. 314 (2006); *Infusing Principles of Corporate Governance in Corporate Law: A Proposed Hierarchy of Director Accountabilities to Various Stockholders*, 50 ATENEO L.J. 479 (2005); *Upholding the Right to Freedom from Fear: An Examination of the Jurisprudential Response of Criminal Procedure and the Law on Public Offices to the Threat of Kidnapping for Ransom*, 48 ATENEO L.J. 1260 (2004); *The Commercial Ends that Motivate the Legal Profession: An Alternative Model to Understanding the Rules that Govern the Practice of Law*, 48 ATENEO L.J. 749 (2003); *The Implication of the Principles of Corporate Governance on the Doctrine of Piercing the Veil of Corporate Fiction: Rethinking MR*

ostensibly “useful” in law practice.<sup>2</sup> Further, for a school to be able to offer a class on foreign law would require the school to have in its faculty a scholar of such foreign law that is to be offered. Not many law schools will have the resources to hire a foreign scholar to teach a regular semester-length course. Lastly, lawyers educated in the Philippines will not be sought to advise on foreign law even if they have taken courses on such foreign law during law school, unless they are able to obtain qualification in another foreign jurisdiction.

Despite this, various schools the world over offer foreign law as part of its curricular offerings or even require the study of some foreign law as part of the regular law school curriculum. As early as in the first year of law school, students in Columbia Law School in the United States (U.S.) are required to take an elective class.<sup>3</sup> For the academic year of 2011–2012, a student may select, among others, courses on Japanese Law and Legal Institutions<sup>4</sup> and Lawyering Across Multiple Legal Orders.<sup>5</sup> As part of the upper year curriculum, students may take classes on African Law and Development, Chinese Legal Thought and Legal History, European Union Law and Institutions, Law and Legal Institutions in China, Cuban Law, Policy and Transition, the Geopolitics of Law and Conflict on the Korean Peninsula, Governance in the European Union, Indian Business Law, International Business and Investment Transactions with China, Islamic Law

---

*Holdings v. Bajan*, 48 ATENEO L.J. 209 (2003); and *Judicial Policy in the Law on Public Officers*, 47 ATENEO L.J. 71 (2002).

*Cite as* 56 ATENEO L.J. 481 (2011).

1. Several subjects which are part of the bar examination are not covered as part of the law school’s regular curriculum, and these include Intellectual Property Law, Law on Public Corporations, Agrarian Reform Law, Tariff and Customs Law, Securities Law, the various Banking Laws, Foreign Investments Law, and the various special penal laws.
2. These would include classes on admiralty law, international taxation, international business and commercial transactions, collective bargaining negotiation, business law practice, indigenous peoples’ law, children’s law, gender justice, poverty law, international commercial arbitration, environmental law, consumer protection law, trial technique, negotiation and other methods of alternative dispute resolution, mass torts, and project finance.
3. See Columbia Law School, The Foundation Curriculum (First Year Courses), available at [http://www.law.columbia.edu/lmgrad\\_studies/courses/The\\_Foundation\\_](http://www.law.columbia.edu/lmgrad_studies/courses/The_Foundation_) (last accessed Nov. 15, 2011).
4. See Columbia Law School, International, Foreign, and Comparative Law, available at [http://www.law.columbia.edu/courses/browse?global.c\\_id=3021](http://www.law.columbia.edu/courses/browse?global.c_id=3021) (last accessed Nov. 15, 2011).
5. *Id.*

and Middle Eastern Legal Institutions, and the Korean Legal System in the Global Economy.<sup>6</sup> But one need not look too far to find models for comparison. In Peking University in China, students are required to take one American law subject, taught entirely in English, by a visiting professor.<sup>7</sup> The National University of Singapore Law School includes as part of its course listing classes on Law and Development in China, Islamic Law, the Contemporary Indian Legal System, ASEAN Competition Law, European Union Law, ASEAN Environmental Law, and ASEAN Economic Community Law.<sup>8</sup>

The challenges present in offering foreign law courses in these schools are not the same as those of Philippine law schools. The bar examinations are structured differently in the U.S., China, and Singapore. In the U.S., the coverage for the bar examination in New York, for example, can be taken up over six weeks.<sup>9</sup> In China, one need not have taken a Bachelor of Laws to study for and take the *sifakaoshi* (the judicial exam, which is the equivalent of the bar examination in China).<sup>10</sup> The schools cited as examples enjoy government funding, have sizeable endowments, and enjoy generous alumni financial support, allowing them to offer attractive salaries such that lawyers will invest in their own academic training to develop the necessary expertise to teach foreign law. The countries where these schools are situated also have an educational system in place that supports its citizens who wish to obtain training in foreign law.<sup>11</sup> Still, the utility of offering foreign law courses is not apparent at first blush. One will not seek a graduate of

---

6. *Id.*

7. See Andy Guess, An American Law School in China, available at <http://www.insidehighered.com/news/2008/05/22/china> (last accessed Nov. 15, 2011). Apart from Peking University School of Transnational Law in Shenzhen, all law schools in China offer all of their courses in Chinese.

8. See National University of Singapore Faculty of Law, Course Listing, available at [http://law.nus.edu.sg/student\\_matters/course\\_listing/courses\\_disp.asp?MT=LL&Sem=ALL&MGC=2](http://law.nus.edu.sg/student_matters/course_listing/courses_disp.asp?MT=LL&Sem=ALL&MGC=2) (last accessed Nov. 15, 2011).

9. See New York State Board of Law Examiners, Content Outline for the New York State Bar Examination (New York Bar Exam Coverage), available at [http://www.nybarexam.org/Docs/CONTENT%20OUTLINE%20\(revised%20May%202010\).pdf](http://www.nybarexam.org/Docs/CONTENT%20OUTLINE%20(revised%20May%202010).pdf) (last accessed Nov. 15, 2011).

10. See The University of Melbourne, Admission to practise in China, available at <http://careers.law.unimelb.edu.au/index.cfm?objectid=BAD2CCFF-DBD7-F518-9E210EEFDF858A25> (last accessed Nov. 15, 2011).

11. For example, the Fulbright U.S. Student Program offers fellowships for U.S. graduating seniors, graduate students, young professionals, and artists to study abroad for one academic year. See Fulbright International Educational Exchange Program, Fulbright U.S. Student Program, available at <http://fulbright.state.gov/grants/student-program/u-s-citizen.html> (last accessed Nov. 15, 2011).

Columbia Law School to opine on a matter of Chinese law; neither will one consider the singular course taken by a graduate of Peking University Law School to opine on American law. Despite this, foreign law is part of the curriculum in these schools. This is not a recent phenomenon. As early as 1950, 26 law schools in the U.S. were offering courses on foreign and international law.<sup>12</sup>

A graduate of a Philippine law school will know some foreign law. After having taken Constitutional Law, one will know of the doctrine in the cases of *Madison v. Marbury*,<sup>13</sup> *Miranda v. Arizona*,<sup>14</sup> and *McCulloch v. Maryland*.<sup>15</sup> After taking a course on Corporate Law, one will know of a corporation's separate corporate personality,<sup>16</sup> the shareholders' right to bring a derivative suit,<sup>17</sup> and that a director can rely on the business judgment rule as a shield for most instances where liability may otherwise be imposed on such director.<sup>18</sup> Further, one will know that *hurto*<sup>19</sup> is a crime that is not accompanied with inflicting physical hurt, otherwise it will constitute the

---

12. John R. Stevenson, *Comparative and Foreign Law in American Law Schools*, 50 COLUM. L. REV 613, 613 (1950).

13. *Madison v. Marbury*, 5 U.S. (1 Cranch) 137 (1803).

14. *Miranda v. Arizona*, 384 U.S. 436 (1966).

15. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

16. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68, § 2 (1980).

17. *Id.* § 31.

18. *Philippine Stock Exchange, Inc. v. Court of Appeals*, 281 SCRA 232, 244 (1997).

19. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 308 (1932). This Article states that:

Theft is committed by any person who, with intent to gain but without violence against or intimidation of persons nor force upon things, shall take personal property of another without the latter's consent.

Theft is likewise committed by:

- (1) Any person who, having found lost property, shall fail to deliver the same to the local authorities or to its owner;
- (2) Any person who, after having maliciously damaged the property of another, shall remove or make use of the fruits or object of the damage caused by him; and
- (3) Any person who shall enter an inclosed estate or a field where trespass is forbidden or which belongs to another and without the consent of its owner, shall hunt or fish upon the same or shall gather cereals, or other forest or farm products.

*Id.*

crime of *robo*.<sup>20</sup> Because Philippine legal tradition is influenced by both the Spanish and American legal systems, the study of Philippine law will require comparison with these foreign legal traditions.

However, the study of foreign law that this Article advocates is not the occasional comparison between Philippine law and foreign law in various courses throughout law school. It is the systematic study of a field of foreign law in a single course that teaches nothing but that particular piece of law, whether it is American Corporate Law, Spanish Contract Law, or Chinese Foreign Investments Law. This Article makes out a case for the study of foreign law as part of the initial legal training of a law student, as part of a student's Bachelor of Laws or *Juris Doctor* Degree, and not in the graduate level, in a Master of Laws program.

The rest of this Article argues that the study of foreign law is not simply a matter of academic curiosity, although this may very well be a reason in itself. Not everything that one learns in a formal academic setting should be intended to further oneself professionally, even in a professional school such as the law school, as the practice of law is not undertaken in a vacuum but in a larger national, social, cultural, and economic setting. Even a law school that designs its curriculum to prepare a law student for strictly utilitarian ends is in any event preparing a student for a legal career that will span 30 to 40 years, and the entire legal landscape of the Philippines may change in that period. There are reasons, including utilitarian and professionally related reasons, why Filipino students should take up foreign law at the first instance in their primary legal education.

## II. RENDERING EFFECTIVE COUNSEL IN THE INTERNATIONAL LEGAL ORDER

As early as 1950, Rene David wrote:

It is becoming more and more usual for private persons to be subject to the law of foreign countries or for judges to be called upon to apply foreign law. The reasons for this are numerous and easily understandable. As a result of the expansion of international trade, the larger proportion of transferable securities in private fortunes, and the increasing flow of immigration and emigration, private individuals, even without leaving their national territory, are often affected by the provisions of a foreign law with regard to family relations or estate, and the judges in one country are thus called upon to apply the law of other countries. ... The future of private international law, indeed, depends on that. No system enabling points of difference between laws to be satisfactorily reconciled can come into

---

20. *Id.* art. 293. This Article states that “[a]ny person who, with intent to gain, shall take any personal property belonging to another, by means of violence or intimidation of any person, or using force upon anything shall be guilty of robbery.” *Id.*

general use as long as the difficulties that now everywhere beset the determination of foreign law continue to exist, and particularly, as long as judges who have to give a decision on such points of difference have not received a training that would enable them to understand whatever foreign law is applicable, by virtue of the principles of private international law, to the case under consideration. It is often useful for private persons, if they are to be aware of their rights and manage their affairs, to have a knowledge of foreign law. It is also often necessary for the judge, in settling disputes, to know — or at least be able to understand — the law of a foreign country.<sup>21</sup>

Never has this been truer than today. As of this writing, the World Trade Organization (WTO) has 153 member states,<sup>22</sup> each country seeking to increase trade with other countries. This is particularly true with Asia. In terms of world merchandise exports of \$15.7 trillion, the WTO reports that Asia's share in 2008 was 27.7%.<sup>23</sup> In total world merchandise imports of \$16.1 trillion, Asia's share was 26.4%.<sup>24</sup> As to trade in commercial services, Japan, China, Hong Kong, Singapore, India, and Australia are net exporters of commercial services, providing 7.2% of global exports in trade in commercial services or \$1.58 trillion, and in turn taking up 5.4% of global imports in trade in commercial services or \$1.37 trillion.<sup>25</sup> Business will therefore involve cross-border elements and Philippine lawyers will be called upon to advise in the cross-border investment and trade deals. A Philippine company may wish to establish a factory in Vietnam and sell some of its products in Vietnam, and export the rest to China, Malaysia, Indonesia, and the Philippines. A Philippine law firm will not have the resources to advise on the laws of all these different jurisdictions and will likely work with foreign collaborating counsels, but Asian laws across the region vary so widely that what is very liberally regulated in one jurisdiction can be subject to the most restrictive of regulations in another. Below are some examples of areas of laws in various Asian jurisdictions that differ greatly with the Philippine legal system.

- (a) The two-tiered corporate governance system in Chinese corporate law.

---

21. Rene David, *The Study of Foreign Law as a Contribution Towards International Understanding*, UNESCO INT'L SOC. SCI. BULL., Spring 1950, at 3.

22. World Trade Organization, Members and Observers, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last accessed Nov. 15, 2011).

23. World Trade Organization, International Trade Statistics 2009 (WTO Report on World Trade) 9, available at [http://www.wto.org/english/res\\_e/statis\\_e/its2009\\_e/its2009\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2009_e/its2009_e.pdf) (last accessed Nov. 15, 2011).

24. *Id.*

25. *Id.*

When the Chinese Company Law<sup>26</sup> was first enacted in 1993 by the National People's Congress of China, it was intended to provide a legal framework for companies to set up business in China,<sup>27</sup> but it was primarily intended to facilitate the corporatization of state-owned enterprises (SOEs).<sup>28</sup> After several years of experimentation with a state-planned economy, it appeared that the most efficient means to achieve economic prosperity was to introduce elements of a market economy into China. The newly enacted Chinese Company Law sought to change SOEs into institutions that would no longer have as its primary motive the objectives laid down by the state, and would no longer be managed by a state-appointed government officer. At the same time, it allowed for the creation of privately held companies where all the parties are private persons. Thus, the Chinese Company Law provided for the creation of two kinds of companies — limited liability companies (LLC), which are corporations formed by less than 50 shareholders<sup>29</sup> and with lower capitalization requirements,<sup>30</sup> and joint stock limited companies (JSLC), which are corporations formed by promotion or stock flotation<sup>31</sup> and with higher capitalization requirements.<sup>32</sup>

The Chinese Company Law that emerged has characteristics that are unique to China.<sup>33</sup> As if mirroring the constitutional mandate that China is under the people's democratic dictatorship led by the working class,<sup>34</sup> the drafters chose to vest full control over the corporation on its most basic constituencies: the shareholders. Thus, the shareholders' meeting of a LLC

---

26. The Company Law of the People's Republic of China, as Amended [Chinese Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, revised Oct. 27, 2005, effective Jan. 1, 2006).

27. The discussions on Chinese Company Law in this Article are limited to the Company Law in effect in mainland China and does not include the laws of the Hong Kong Special Administrative Region, Macao Special Administrative Region, and Taiwan, Republic of China, each of which are governed by different bodies of law.

28. Chenxia Shi, *Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement*, 24 ARIZ. J. INT'L & COMP. L. 451, 471 (2007).

29. Chinese Company Law, art. 24.

30. *Id.* art. 26. Article 26 of the Chinese Company Law provides that the minimum amount of registered capital of an LLC is 30,000.00 Chinese Renminbi (RMB). *Id.*

31. *Id.* art. 78.

32. *Id.* art. 81. Article 81 of the Chinese Company Law provides that the minimum amount of registered capital of an LLC is RMB 5,000,000.00. *Id.*

33. The Chinese are fond of referring to this phenomenon as *youzhongguotese* or "with Chinese characteristics."

34. CHINA CONST. art. 1.

and the shareholders' assembly in a JSLC, are the "authority of the company" and exercises the company's powers.<sup>35</sup>

The most profound difference between Chinese companies and Philippine companies is the corporate governance mechanism. The Chinese Company Law adopts the two-tiered system of internal corporate governance, loosely based on the German system.<sup>36</sup> The system requires the setting up of a board of directors and a board of supervisors.

The board of directors of Chinese companies serve largely administrative and managerial. Article 47 of the Chinese Company Law states:

The board of directors shall be responsible for the shareholders' meeting and exercise the following authorities:

- (1) convening shareholders' meetings and reporting the status on work thereto;
- (2) carrying out the resolutions made at the shareholders' meetings;
- (3) determining the operation plans and investment plans;
- (4) working out the company's annual financial budget plans and final account plans;
- (5) working out the company's profit distribution plans and loss recovery plans;
- (6) working out the company's plans on the increase or decrease of registered capital, as well as on the issuance of corporate bonds;
- (7) working out the company's plans on merger, split-up, change of the company form, dissolution, and etc.;
- (8) making decisions on the establishment of the company's internal management departments;
- (9) making decisions on hiring or dismissing the company's manager and his remuneration, and, according to the nomination of the manager, deciding on the hiring or dismissing of vice manager(s) and the person in charge of finance as well as their remuneration;
- (10) working out the company's basic management system; and
- (11) other functions as prescribed in the articles of association.<sup>37</sup>

---

35. Chinese Company Law, arts. 37 & 100.

36. See generally Dr. Carsten Jungmann, *The Dualism of One-Tier and Two-Tier Board Systems in Europe (A Handout on Corporate Governance in One-Tier and Two-Tier Board Systems)*, available at [http://www.duslaw.eu/files/The%20Dualism%20of%20One-Tier%20and%20TwoTier%20Boards%20in%20Europe%20\(Jungmann\).pdf](http://www.duslaw.eu/files/The%20Dualism%20of%20One-Tier%20and%20TwoTier%20Boards%20in%20Europe%20(Jungmann).pdf) (last accessed Nov. 15, 2011).

37. Chinese Company Law, art. 47.



On the other hand, the board of supervisors is responsible for the following:

- (1) To check the financial affairs of the company;<sup>38</sup>
- (2) To supervise the duty-related acts of the directors and senior managers, to put forward proposals on the removal of any director or senior manager who violates any law, administrative regulation, the articles of association or any resolution of the shareholders' meeting;<sup>39</sup>
- (3) To demand any director or senior manager to make corrections if his act has injured the interests of the company;<sup>40</sup>
- (4) To propose to call interim shareholders' meetings, to call and preside over shareholders' meetings when the board of directors does not exercise the function of calling and presiding over shareholders' meetings;<sup>41</sup>
- (5) To put forward proposals at shareholders' meetings;<sup>42</sup>
- (6) To initiate actions against directors or senior managers when such director or senior manager has committed violations of laws, administrative regulations or the company's articles of association in the course of the performance of his duties, and such violation causes the company to incur a loss;<sup>43</sup> and
- (7) Other duties as provided may be provided for under the company's articles of association.<sup>44</sup>

To exercise these powers, the supervisors may attend the meetings of the board of directors as non-voting attendees, and may raise questions or suggestions about the matters to be decided by the board of directors.<sup>45</sup> If the supervisors find that the company is running abnormally, they may make investigations, and where necessary, hire an accounting firm to conduct an audit, with the expenses borne by the company.<sup>46</sup>

---

38. *Id.* art. 54 (1).

39. *Id.* art. 54 (2).

40. *Id.* art. 54 (3).

41. *Id.* art. 54 (4).

42. *Id.* art. 54 (5).

43. Chinese Company Law, arts. 54 (6) & 152.

44. *Id.* art. 54 (7).

45. *Id.* art. 55.

46. *Id.* art. 55.

What may cause additional confusion for Philippine lawyers dealing with Chinese companies is that when a company is a foreign invested enterprise, having been established either as a joint venture with a Chinese company or as a wholly foreign-owned enterprise, its corporate governance mechanisms are entirely different. Under the Law on Chinese-Foreign Joint Ventures in China,<sup>47</sup> the board of directors is empowered to discuss and decide all the major affairs of the joint venture.<sup>48</sup> For a wholly foreign-owned enterprise, its decision making process can be decided by the investors howsoever they wish, as the Chinese Law on Foreign Capital Enterprises<sup>49</sup> states, “Foreign enterprises may carry out their business management activities in accordance with the approved articles of association without any interference.”<sup>50</sup>

All these are essential knowledge for Philippine lawyers who assist clients in dealing with Chinese companies. What evidence is necessary to show that a company is duly authorized to enter into a transaction? Is it the board of directors, as is the case in Philippine companies, or is it another decision-making body in the company? Is a contract capable of being set aside by the board of supervisors? Are these rules the same when the company is a joint venture between a Chinese and a foreign company? A cautious Philippine lawyer will of course retain local Chinese counsel when advising a client on Chinese contracts. But to even know the right questions to ask, a Philippine lawyer will need basic knowledge on the Chinese corporate law and governance.

(b) Vietnamese foreign currency exchange restrictions

Article 29 of Vietnamese Decree No. 160 on Foreign Exchange Control dated 28 December 2006 (Vietnamese Decree on Foreign Exchange)<sup>51</sup> provides that within the territory of Vietnam, all transactions, payments, listings, and advertisements of residents and non-residents must not be effected in foreign exchange except for certain cases.<sup>52</sup> Thus, a Philippine company that establishes an enterprise in Vietnam will only be allowed to conduct its operations in Vietnamese Dong (VND), the local currency in

---

47. Law of the People’s Republic of China on Chinese-Foreign Joint Ventures, as Amended (promulgated by the Standing Comm. Nat’l People’s Cong., July 8, 1979, effective July 8, 1979).

48. *Id.* art. 6.

49. Law of the People’s Republic of China on Foreign Capital Enterprises, as Amended (promulgated by the Standing Comm. Nat’l People’s Cong, Apr. 12, 1986, effective Apr. 12, 1986).

50. *Id.* art. 11.

51. Decree Providing Regulations for Implementation of Ordinance on Foreign Exchange Control [Vietnamese Decree on Foreign Exchange], Decree No. 160, Dec. 28, 2006.

52. *Id.* art. 29.

Vietnam, and this may cause difficulties in remitting its profits out of Vietnam. There are certain exceptions provided under the Vietnamese Decree on Foreign Exchange and these are:

- (1) transactions with credit institutions and other institutions permitted to provide foreign exchange services;<sup>53</sup>
- (2) companies are permitted to transfer capital internally by a telegraphic transfer of foreign currency (as between a head office and its branch office or vice versa);<sup>54</sup>
- (3) residents are permitted to contribute capital in foreign currency in order to implement a foreign investment project in Vietnam;<sup>55</sup>
- (4) residents are permitted to receive payment by a telegraphic transfer of foreign currency pursuant to a contract entrusting import or export;<sup>56</sup>
- (5) resident domestic or foreign contractors are permitted to receive payment by a telegraphic transfer of foreign currency from investors or head contractors in order to make payment and disbursement transactions and to remit money overseas;<sup>57</sup>
- (6) resident insurance companies are permitted to receive a telegraphic transfer of foreign currency from insurance purchasers for all types of goods and services which must be reinsured offshore;<sup>58</sup>
- (7) resident duty free goods companies providing services in separated areas in international border gates or providing customs bond warehouse services are permitted to receive payment in foreign currency and Vietnamese dong for the supply of goods and services;<sup>59</sup>
- (8) resident customs and police offices of international bordergates and customs bond warehouses are permitted to receive foreign currency from non-residents for all types of

---

53. *Id.* art. 29 (1).

54. *Id.* art. 29 (2).

55. *Id.* art. 29 (3).

56. *Id.* art. 29 (4).

57. Vietnamese Decree on Foreign Exchange, art. 29 (5).

58. *Id.* art. 29 (6).

59. *Id.* art. 29 (7).

taxes and fees for entry/exit visas and fees for the provision of services;<sup>60</sup>

- (9) non-resident diplomatic offices and consulates are permitted to collect fees for entry/exit visas and other types of fees and charges in foreign currency;<sup>61</sup>
- (10) non-residents and resident foreigners are permitted to receive salary, bonuses, and allowances in foreign currency from residents and non-residents being organizations;<sup>62</sup> and
- (11) non-residents are permitted to make telegraphic transfers of foreign currency to other non-residents or in order to make payment to residents of money for the export of goods and services.<sup>63</sup>

It may be noted that the State Bank of Vietnam (SBV) has proposed a Draft Circular dated 17 May 2011 (SBV Draft Circular) to guide the implementation of Article 29 of the Vietnamese Decree on Foreign Exchange. The SBV Draft Circular provides an expanded list of transactions where foreign currency may be used, as an exception to the general rule.<sup>64</sup> However, the most important provision in the SBV Draft Circular is to prohibit contractual provisions that insulate the contracts from the devaluation of the VND.<sup>65</sup>

The SBV Draft Circular states that written agreements should not contain stipulations providing for the adjustment of prices according to fluctuations in the foreign currency exchange rate between VND and other foreign currencies.<sup>66</sup> The ordinary convention in international commercial contracts is for parties to provide for a contract price and to introduce a means of sharing the risk in the event of fluctuations in foreign currency exchange rates by providing for a minimum and maximum rate between which the currency can fluctuate without any impact on the price. The price is adjusted only if the variations of the exchange rate pass these limits. The Draft Circular would, however, restrict parties from agreeing to such provisions.

---

60. *Id.* art. 29 (8).

61. *Id.* art. 29 (9).

62. *Id.* art. 29 (10).

63. Vietnamese Decree on Foreign Exchange, art. 29 (11).

64. See Allens Arthur Robinson, Vietnam Legal Update (Updates on Vietnam Laws) 4-6, available at [http://www.vietnamlaws.com/vlu/may\\_2011.pdf](http://www.vietnamlaws.com/vlu/may_2011.pdf) (last accessed Nov. 15, 2011).

65. *Id.*

66. *Id.*

The SBV Draft Circular states that it is to take effect on 1 July 2011. As of this writing, there have been no developments as to whether the SBV Draft Circular has indeed taken effect. Should the SBV Draft Circular take effect, it will have implications in the sharing of risk among parties in international commercial contracts. Even while it has not taken effect however, it reflects the trend to increasingly restrict the use of foreign currency in Vietnam.

(c) Asian competition laws

Philippine competition law is at its infancy although what is present is in accordance with the competition law and policy of most jurisdictions. That is, whether there is an anticompetitive measure being adopted is determined in accordance with local factors. The Revised Penal Code of the Philippines states:

Art. 186. *Monopolies and combinations in restraint of trade.* — The penalty of *prision correccional* in its minimum period or a fine ranging from 200 to 6,000 pesos, or both, shall be imposed upon:

- (1) Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market;
- (2) Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market;
- (3) Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, or imported merchandise or object of commerce is used.

If the offense mentioned in this Article affects any food substance, motor fuel or lubricants, or other articles of prime necessity, the penalty shall be that of *prision mayor* in its maximum and medium periods it being sufficient for the imposition thereof that the initial steps have been taken toward carrying out the purposes of the combination.

Any property possessed under any contract or by any combination mentioned in the preceding paragraphs, and being the subject thereof, shall be forfeited to the Government of the Philippines.

Whenever any of the offenses described above is committed by a corporation or association, the president and each one of its agents or representatives in the Philippines in case of a foreign corporation or association, who shall have knowingly permitted or failed to prevent the commission of such offense, shall be held liable as principals thereof.<sup>67</sup>

Several jurisdictions have however adopted competition laws that will impact transactions that lie beyond their borders.

For instance, the Chinese Anti-Monopoly Law<sup>68</sup> is applicable to certain activities that it characterizes as “monopolistic conduct”<sup>69</sup> whether such activities are conducted within the territory of China or outside the territory of China, where the activity serves to eliminate or restrict competition on the domestic market of China.<sup>70</sup> The Chinese Anti-Monopoly Law requires the filing of a concentration declaration when two or more foreign companies enter into a merger, and the combination of the companies in the merger will cause the reaching of certain thresholds, which are:

- (1) (i) If all annual global sales amongst the parties are greater than 10 billion Renminbi (the official currency in China, or RMB), and
- (ii) at least two of the companies involved in the concentration have domestic sales of over 400 million RMB;<sup>71</sup> or
- (2) (i) If all parties have domestic sales in China of over 2 billion RMB, and

---

67. REVISED PENAL CODE, art. 186.

68. Anti-Monopoly Law of the People’s Republic of China [Chinese Anti-Monopoly Law] (promulgated by the Standing Comm. Nat’l People’s Congress, Apr. 30, 2007, effective Aug. 1, 2008). The law is similar to the US Antitrust Law or EC Anti-Competition laws, and seeks to advance “the public interest” through fair market competition and by, among other things, prohibiting horizontal agreements among competing undertakings. *Id.* art. 1. Because of the fairly recent implementation of the law, several questions about the interpretation of its broad language remain unanswered.

69. Chinese Anti-Monopoly Law, art. 3. Article 3 (3) of the Chinese Anti-Monopoly Law defines monopolistic conduct as “concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.” *Id.* art. 3 (3).

70. *Id.* art. 2.

71. The State Council Regulations on Notification Thresholds of Concentrations of Business Operators (promulgated by the St. Council, Aug. 1, 2008, effective Aug. 1, 2008), art. 3 (1).

(ii) at least two of the companies involved in the concentration have domestic sales of over 400 million RMB.<sup>72</sup>

The State Council, however, has the right to investigate concentration agreements that do not meet these criteria if they anticipate that the concentration will have a substantial impact on the Chinese economy.<sup>73</sup>

The Chinese Anti-Monopoly Law Enforcement Authority (AMLEA) will then conduct a preliminary review and notify the notifying companies of their determination within 30 days.<sup>74</sup> If AMLEA decides further review is necessary, such review will be completed no later than within 90 additional days.<sup>75</sup> No concentrating action can be taken during the waiting period.<sup>76</sup> If AMLEA fails to respond within that time period, the companies may continue with their planned activity.<sup>77</sup> However, AMLEA may request an extension of up to 60 additional days.<sup>78</sup> This means that if the merging companies are subjected to an additional review following the 30-day preliminary review, it could be as long as 180 days from the date of filing before a final decision is rendered.

When reviewing a Concentration Declaration, the Chinese Anti-Monopoly Commission will consider a number of factors, including market concentration, relative market share, price and supply considerations, economic development, and other factors affecting the national market.<sup>79</sup>

Note as well that the Chinese Anti-Monopoly Law prohibits certain transactions which it considers “monopoly agreements.” These are the following:

- (1) on fixing or changing commodity prices;<sup>80</sup>
- (2) on restricting the amount of commodities manufactured or marketed;<sup>81</sup>
- (3) on splitting the sales market or the purchasing market for raw and semi-finished materials;<sup>82</sup>

---

72. *Id.* art. 3 (2).

73. *Id.* art. 4.

74. Chinese Anti-Monopoly Law, art. 25.

75. *Id.* art. 26.

76. *Id.*

77. *Id.* art. 25 ¶ 2.

78. *Id.*

79. *See* Chinese Anti-Monopoly Law, art. 27.

80. Chinese Anti-Monopoly Law, art. 13 (1).

81. *Id.* art. 13 (2).

- (4) on restricting the purchase of new technologies or equipment, or the development of new technologies or products;<sup>83</sup>
- (5) joint boycotting of transactions;<sup>84</sup> and
- (6) other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.<sup>85</sup>

For the purposes of the Chinese Anti-Monopoly Law, monopoly agreements include agreements, decisions, and other concerted conducts designed to eliminate or restrict competition.<sup>86</sup> However, these may be allowed provided that the contemplated concentrating action can be proved to have been concluded for one of the following purposes:

- (1) improving technologies, or engaging in research and development of new products;<sup>87</sup>
- (2) improving product quality, reducing cost and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production;<sup>88</sup>
- (3) increasing the efficiency and competitiveness of small and medium-sized undertakings;<sup>89</sup>
- (4) serving public interests in energy conservation, environmental protection, and disaster relief;<sup>90</sup>
- (5) mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression;<sup>91</sup>
- (6) safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts;<sup>92</sup> or
- (7) other purposes as prescribed by law or the State Council.<sup>93</sup>

---

82. *Id.* art. 13 (3).

83. *Id.* art. 13 (4).

84. *Id.* art. 13 (5).

85. *Id.* art. 13 (6).

86. Chinese Anti-Monopoly Law, art. 13 (6).

87. *Id.* art. 15 (1).

88. *Id.* art. 15 (2).

89. *Id.* art. 15 (3).

90. *Id.* art. 15 (4).

91. *Id.* art. 15 (5).

92. Chinese Anti-Monopoly Law, art. 15 (6).



A declaration may be made to the AMLEA for the enforcement of the Chinese Anti-Monopoly Law under the State Council that the transaction should be exempted from the prohibition on monopoly agreement.<sup>94</sup> The AMLEA must, within 30 days from the date it receives the documents or materials submitted, make a preliminary review of the concentration declared by the businesses and make a decision whether to conduct a further review, and notify the undertakings of its decision in writing.<sup>95</sup> Before the AMLEA makes such decision, the concentration should not be implemented.<sup>96</sup>

Where a decision is made to conduct a further review, such review must be completed within 90 days from the date of decision, and a decision must be issued whether to prohibit the concentration, and a notification must be made in writing to the parties.<sup>97</sup>

If the concentration leads, or may lead, to elimination or restriction of competition, the AMLEA will issue a decision to prohibit their concentration.<sup>98</sup> However, if it can be proven that the advantages of such concentration to competition obviously outweigh the disadvantages, or that the concentration is in the public interest, the AMLEA may decide not to prohibit their concentration.<sup>99</sup>

---

93. *Id.* art. 15 (7).

94. *Id.* art. 23. Such declaration is required to have the following:

- (a) a declaration in writing;
- (b) an explanation of the impact to be exerted by the concentration on competition in a relevant market;
- (c) a copy of the concentration agreement;
- (d) the financial report of each of the undertakings in the previous fiscal year, which is audited by a certified public accountant firm; and
- (e) any other documents and materials as specified by the authority for enforcement of the Anti-monopoly Law under the State Council.

*Id.*

95. *Id.* art. 25.

96. *Id.*

97. Chinese Anti-Monopoly Law, art. 26.

98. *Id.* art. 28.

99. *Id.* Note that Article 27 of the Chinese Anti-Monopoly Law states that the following factors shall be taken into consideration in the review of concentration of undertakings:

The Chinese Anti-Monopoly Law was surprising when it was first enacted in that it was among the first pieces of legislation that actually restricted mergers, acquisitions, or other combinations that occurred outside of its jurisdiction. China may be unique of course, because it has such a huge market and companies whose annual sales into China reach the prescribed thresholds could be subjected to Chinese authority. However, other countries have also enacted anti-competition laws that have effects beyond the country's own borders.

Law No. 27/2004/QH11 on Competition dated 3 December 2004 (Vietnamese Competition Law)<sup>100</sup> and Decree 116/2005/ND-CP on Competition providing detailed regulations for implementation of a number of articles of the Law on Competition issued by the Government dated 15 September 2005 (Vietnamese Decree 116)<sup>101</sup> may impose certain requirements on mergers, acquisitions, and other corporate combinations that occur beyond Vietnam.

The provisions of the Vietnamese Competition Law are applicable to organizations and individuals conducting business in Vietnam, including enterprises engaged in production or supply of public utility products or services, enterprises conducting business in State monopoly industries and sectors, and overseas enterprises operating in Vietnam.<sup>102</sup>

The Vietnamese Competition Law is concerned with acts that constitute “economic concentrations” which are acts of the enterprises consisting of mergers, consolidations, acquisition of enterprise, joint ventures between

- 
- (a) the market shares of the undertakings involved in concentration in a relevant market and their power of control over the market;
  - (b) the degree of concentration in relevant market;
  - (c) the impact of their concentration on assess to the market and technological advance;
  - (d) the impact of their concentration on consumers and the other relevant undertakings concerned;
  - (e) the impact of their concentration on the development of the national economy; and
  - (f) other factors which the authority for enforcement of the Anti-monopoly Law under the State Council deems to need consideration in terms of its impact on market competition.

*Id.* art. 27.

100. The Competition Law [Vietnamese Competition Law], Law No. 23/2004/L-CTN (Dec. 3, 2004).

101. Detailed Provisions for Implementation of the Law on Competition [Vietnamese Decree 116], Decree No. 116/2005/ND-CP (Sep. 15, 2005).

102. Vietnamese Competition Law, art. 2.

enterprises, and other forms of economic concentration as stipulated by law.<sup>103</sup>

The transfer by one or more enterprises of all of its lawful assets, rights, obligations, and interests to another enterprise and at the same time the termination of the existence of the merging enterprise(s) will be considered as an act of economic concentration.<sup>104</sup> Notwithstanding the provision refers to the transfer of enterprise(s), under the laws of Vietnam, transfer of enterprise also includes the transfer of shares.<sup>105</sup>

An economic concentration wherein the enterprises participating in the economic concentration have a combined market share in the relevant market<sup>106</sup> of more than 50% are prohibited,<sup>107</sup> unless after the economic concentration, the company will still fall within the category of medium and small enterprises.<sup>108</sup> Thus, if two or more Philippine companies which have sales in Vietnam enter into a merger, it will be necessary to determine whether their combined sales will together have a combined market share of more than 50% of the relevant market share. In such a case, the merger or combination may be halted.

---

103. *Id.* art. 16.

104. *Id.* art. 17.

105. *Id.*

106. “Relevant Product Market” has been defined in Article 3(1) of the Vietnamese Competition Law as a market comprising goods or services which may be substituted for each other in terms of characteristics, use, purpose, and price. *Id.* art. 3 (1). Article 4 of Vietnamese Decree 116 further sets out the basis on which such characteristics may be determined and these include the physical, chemical, technical features, the side effects, the use, and the ability of the product to assimilate. Under the same provision, purpose is determined by the prime principal use purpose of such goods or services, and price shall be the price recorded in the retail sales invoice in accordance with law. Vietnamese Decree 116, art. 4.

107. Vietnamese Competition Law, art. 18. The exception to this is where after the economic concentration, the company will still fall within the category of medium and small sized enterprises as stipulated by Vietnamese Competition Law. *Id.* art. 19.

108. A medium and small sized enterprises are the enterprises in the fields of agriculture, forestry, aquaculture, manufacturing, and construction whose charter capital is equivalent to or less than 100 billion Vietnam Dong (VND) or where their total staff strength is equivalent to or less than 300 employees. An enterprise whose business activities are trading and service-based is considered a medium and small sized enterprise if its investment capital is less than VND 50 billion or a workforce of less than 100 employees. Prescribing the Policies and Management Support State Assistance for Development of Small and Medium Enterprises, Decree No. 56/2009/ND-CP, art. 3 (1) (June 30, 2009) (Viet.).

Based on the definition of “market share” in the Vietnamese Competition Law,<sup>109</sup> it is not clear whether the companies entering into a merger must actually have an enterprise in Vietnam in order for its sales (if any) to be included in the determination of the market share, or whether merely exporting goods into Vietnam without having established an enterprise in Vietnam will suffice. The authorities in Vietnam have considerable discretion in the interpretation of laws and they could interpret this provision broadly, as to include export sales into Vietnam (even if it has not established an enterprise in Vietnam) in determining the market share.

Where the enterprises participating in an economic concentration have a combined market share in the relevant market consisting from 30% to 50%, the enterprises must notify the administrative body for competition prior to carrying out the economic concentration.<sup>110</sup> In such case, the merger that is contemplated may only be carried out after the receipt of a written notification from the Vietnamese Competition Administration Department (VCAD) that the intended transaction is not within the category prohibited by the Competition Law.<sup>111</sup> The exception to the aforesaid is if after the economic concentration, the new enterprise would still fall within the category of a medium and small sized enterprise.<sup>112</sup>

The Vietnamese Competition Law provides that the VCAD must, within a period of 45 days from the date of receipt of the complete file for the notification of an economic concentration, provide a written reply to the parties to the economic concentration.<sup>113</sup> In complex cases, the VCAD may, at its own discretion, extend the time for issuing its written reply provided that it may only effect this time extension on two occasions and each extension may not exceed 30 days.<sup>114</sup>

---

109. Vietnamese Competition Law, art. 3 (5). This Article defines “Market share” as:

the percentage of turnover from sales of such enterprise over the total turnover of all enterprises conducting business in such type of goods or services in the relevant market or the percentage of turnover of inward purchases of such enterprise over the total turnover of inward purchases of all enterprises conducting business in such type of goods or services in the relevant market for a month, quarter or year.

*Id.*

110. *Id.* art. 20.

111. *Id.* art. 24.

112. *Id.* art. 10 (1) (e).

113. *Id.* art. 23 (1).

114. Vietnamese Competition Law, art. 23 (2).

A final example is the Indonesian Government Regulation No. 57/2010<sup>115</sup> dated 20 July 2010 concerning Mergers or Consolidations of Business Entities and Company's Shares Acquisitions That Cause Monopolistic and Unfair Business Competition Practices which states that notification is mandatory for a merger or consolidation of business entities or an acquisition of Indonesian companies, Indonesian Downstream Entities, including foreign-invested companies (or PMA Companies), that cause:

- (1) the value of the company's assets to exceed 2.5 trillion Indonesian Rupiah (IDR); and/or<sup>116</sup>
- (2) the sales value to exceed IDR 5 trillion.<sup>117</sup>

The notification is required to be submitted to the Indonesian Business Competition Supervisory Commission not later than 30 days from the effective date of the pertinent merger, consolidation, or acquisition.<sup>118</sup> An administrative sanction in the form of a fine of IDR one billion for each day of delay (up to a maximum penalty of IDR 25 billion) may be imposed for the failure to submit such notification.<sup>119</sup>

These examples show that transacting in the international legal order may trigger the application of a certain country's laws. Without any knowledge at all of the laws of other jurisdictions, a Philippine lawyer will have blind spots in advising clients. It is no longer enough to simply master Philippine law in order to render sufficient advice and in order to be a good practitioner.

### III. UNDERSTANDING THE FOUNDATIONS OF PHILIPPINE LAW

Scholars and practitioners in the Philippines are not shy about borrowing from foreign sources to draw persuasive strength in support of an argument or to strike a comparison with Philippine law. But practitioners and scholars who study the basics of a foreign law can make sharper comparisons and more persuasive cases that draw from foreign law.

---

115. Concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares That Could Result in Monopolistic Practices and/or Unfair Business Competition, Government Regulation of the Republic of Indonesia No. 57 Year 2010 (July 20, 2010).

116. *Id.* art. 5 (2) ¶ a.

117. *Id.* art. 5 (2) ¶ b. For the banking industry, the threshold is that it should be in excess of 20 trillion Indonesian Rupiah (IDR). *Id.* art. 5 (2) ¶ c.

118. *Id.* art. 5 (1).

119. *Id.* art. 6.

Several examples on this point can be made. In *Harden v. Benguet Consolidated Mining Co.*,<sup>120</sup> the Supreme Court observed:

Under the guidance of this and certain other provisions thus enacted by Congress, the Philippine Commission entered upon the enactment of a general law authorizing the creation of corporations in the Philippine Islands. This rather elaborate piece of legislation is embodied in what is called our Corporation Law (Act No. 1459 of the Philippine Commission). The evident purpose of the [C]ommission was to introduce the American corporation into the Philippine Islands as the standard commercial entity and to hasten the day when the *sociedad anonima* of the Spanish law would be obsolete. That statute is a sort of codification of American corporate law.<sup>121</sup>

Readers of *Harden* would therefore be of the otherwise justifiable belief that there is a piece of legislation that governs all of American corporations, as the Supreme Court has called the Corporation Law<sup>122</sup> the “codification of American corporate law.”<sup>123</sup> But this belies the fact that there is no single piece of legislation that governs the incorporation, organization, and incidents of all the corporations in the U.S. This is because corporate law in the U.S. is a “creature” of state law.<sup>124</sup> Promoters of corporations can choose the law under which they will organize the corporation, but most promoters choose<sup>125</sup> Delaware as the state of incorporation,<sup>126</sup> to fall under the

---

120. *Harden v. Benguet Consolidated Mining Co.*, 58 Phil. 141 (1933).

121. *Id.* at 145-46.

122. An Act Providing for the Formation and Organization of Corporations, Defining Their Powers, Fixing the Duties of Directors and Other Officers Thereof, Declaring the Rights and Liabilities of Shareholders and Members, Prescribing the Conditions Under Which Such Corporations May Transact Business, And Repealing Certain Articles of the Code of Commerce and All Laws or Parts of Laws in Conflict or Inconsistent with this Act [The Corporation Law], Act. No. 1459 (1906).

123. *Harden*, 58 Phil. at 146.

124. John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications* (Working Paper No. 144 of the Columbia Law School Working Paper Series), available at <http://papers.ssrn.com/sol3/Delivery.cfm/991020101.pdf?abstractid=142833&mirid=1> (last accessed Nov. 15, 2011). John C. Coffee Jr. observes that the trend is for variations in state corporate laws to persist, but this will be overshadowed by the relative uniformity in the federal law applicable to securities market. He gives this example: “Thus, while the law of Delaware may differ from that of California, these differences have been effectively marginalized by the degree to which the federal securities laws force disclosure of fiduciary misconduct and provide special remedies by which to reduce agency costs.” *Id.* at 24.

125. It has been noted that a central feature of the corporate environment in the United States is the existence of corporations among states in the field of corporate law. Because promoters are free to choose their state of incorporation

Delaware General Corporation Law.<sup>127</sup> This means that decisions of the courts of Delaware interpreting Delaware General Corporation Law are of the most persuasive effect, first, because the most number of corporations are incorporated under Delaware law, and second, because states seeking to make their corporate laws more attractive to promoters will seek to emulate the Delaware General Corporation Law.

On the other hand, if on this basis, a lawyer comes to think that Delaware law is best and supremely persuasive, then this would be erroneous. For example, is it correct to say that *Smith v. Van Gorkom*<sup>128</sup> is case law because it was decided by the Delaware Supreme Court — therefore it must be good case law, having been decided by a court of the influential state of Delaware? She would however not be citing good law.

*Van Gorkom* was about the sale of a company, Trans Union. Trans Union was a publicly-traded company, the principal earnings of which were generated by its railcar leasing business.<sup>129</sup> The company had a cash flow of hundreds of millions of dollars annually but it had difficulty generating sufficient taxable income to offset increasingly large investment tax credits.<sup>130</sup> To solve this problem, the company's senior management presented Jerome Van Gorkom, Trans Union's CEO and Chairman, with a solution including the sale of Trans Union to a company with a large amount of taxable income.<sup>131</sup> A price for the sale of the company was suggested, but:

[t]hey did not 'come up' with a price for the Company. They merely 'ran the numbers' at \$50 a share and at \$60 a share with the 'rough form' of their cash figures at the time. Their 'figures indicated that \$50 would be

---

and voluntarily choose the law under which they will subject itself to. Oren Bar-Gill et al., *The Market for Corporate Law* (Discussion Paper No. 377 07/2002, Revised 11/2005, as revised for publication in 162 J. INSTITUTIONAL & THEORETICAL ECON. 134 (2006)), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID275452\\_code542089.pdf?abstractid=275452&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID275452_code542089.pdf?abstractid=275452&mirid=1) (last accessed Nov. 15, 2011).

126. Among publicly traded non-financial firms, Delaware is the domicile of 58% of the publicly traded companies, 59% of the Fortune 500 companies, and 67% of the companies that went public during 1996-2000. *Id.* at 1 (citing Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383 (2003)).

127. DEL. CODE ANN. tit. 8, ch. 1 [General Corporation Law of the State of Delaware] (1953) (U.S.).

128. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (U.S.).

129. *Id.* at 864.

130. *Id.*

131. *Id.* at 864-65.

very easy to do but \$60 would be very difficult to do under those figures.’<sup>132</sup>

At this meeting, Van Gorkom stated that he would be willing to take \$55 per share for his own 75,000 shares.<sup>133</sup> He decided to meet with Jay A. Pritzker. Van Gorkom assembled a proposed per share price for sale of the company and a financing structure by which to accomplish the sale. Van Gorkom did so without consulting either his Board or any members of Senior Management except one the company’s controllers.<sup>134</sup> Eventually, Pritzker advised Van Gorkom that he was interested in the \$55 cash-out merger proposal and requested for more information on the company. After this, Pritzker insisted that the Trans Union Board act on his merger proposal “within the next three days, stating to Van Gorkom: ‘We have to have a decision by no later than Sunday [evening, September 21] before the opening of the English stock exchange on Monday morning.’”<sup>135</sup>

In the directors’ meeting called to discuss the transaction:

Van Gorkom began the Special Meeting of the Board with a twenty-minute oral presentation. Copies of the proposed Merger Agreement were delivered too late for study before or during the meeting. He reviewed the Company’s ITC and depreciation problems and the efforts theretofore made to solve them. He discussed his initial meeting with Pritzker and his motivation in arranging that meeting. Van Gorkom did not disclose to the Board, however, the methodology by which he alone had arrived at the \$55 figure, or the fact that he first proposed the \$55 price in his negotiations with Pritzker.<sup>136</sup>

The Board meeting of September 20 lasted about two hours.<sup>137</sup> Based solely upon Van Gorkom’s oral presentation, Chelberg’s supporting representations, Romans’ oral statement, Brennan’s legal advice, and their knowledge of the market history of the Company’s stock, the directors approved the proposed Merger Agreement.<sup>138</sup> The Merger Agreement was executed by Van Gorkom during the evening of September 20 at a formal social event that he hosted for the opening of the Chicago Lyric Opera.<sup>139</sup>

---

132. *Id.* at 865.

133. *Id.*

134. *Van Gorkom*, 488 A.2d at 866.

135. *Id.* at 867.

136. *Id.* at 868.

137. *Id.* at 869.

138. *Id.*

139. *Id.*



Neither he nor any other director read the agreement prior to its signing and delivery to Pritzker.<sup>140</sup>

The shareholders of Trans Union filed a class action suit seeking the rescission of the transaction on the ground that the consideration was inadequate.

On appeal, the Supreme Court of Delaware ruled that the Board of Directors did not reach an informed business judgment on 20 September 1980 in voting to “sell” the Company for \$55 per share pursuant to the Pritzker cash-out merger proposal.<sup>141</sup> The Court found that the Trans Union Board based its decision to approve the cash-out merger primarily on Van Gorkom’s representations. None of the directors, other than Van Gorkom and one other director, had any prior knowledge that the purpose of the meeting was to propose a cash-out merger of Trans Union.<sup>142</sup> Only three members of the Senior Management were present, and two of them had only learned of the proposed sale an hour earlier.<sup>143</sup> The company’s general counsels attended the meeting, but were equally uninformed as to the purpose of the meeting and the documents to be acted upon.<sup>144</sup> Without any documents before them concerning the proposed transaction, the members of the Board were required to rely entirely upon Van Gorkom’s 20-minute oral presentation of the proposal. No written summary of the terms of the merger was presented; the directors were given no documentation to support the adequacy of \$55 price per share for sale of the Company; and the Board had before it nothing more than Van Gorkom’s statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the Board had ever seen.<sup>145</sup>

The Court held that a substantial premium may provide one reason to recommend a merger, but in the absence of other sound valuation information, the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price.<sup>146</sup>

Without knowing the consequences brought about by this decision however, a law student may think that this decision of the Delaware Supreme Court is good law. *Van Gorkom* was however met with criticism from directors, the academe, and the legal profession. As the finding of the

---

140. *Van Gorkom*, 488 A.2d at 869.

141. *Id.* at 874.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Van Gorkom*, 488 A.2d at 875.

Delaware Supreme Court was anchored on a finding of gross negligence, such “gross negligence” is hard to find when:

the economic rationale for the merger was obvious: Trans Union possessed valuable tax credits that it could not use but that could be sold to the bidder through a merger. The board acted quickly, not because it failed to understand the gravity of its decision, but because the bidder had insisted that it respond to the proposal within three days. The board had been warned by counsel that failure to approve the merger might result in personal liability. The purchase price of \$55 a share, representing a fifty percent premium over market, hardly seemed inadequate, particularly since the firm’s shares were publicly traded, and had never traded at a price higher than \$39[.50]. After the board originally approved the merger, it met again to reconsider the matter. Shareholders overwhelmingly approved the merger.<sup>147</sup>

Wary of a possible flight of corporations using Delaware as their state of incorporation, the Delaware legislature subsequently amended the Delaware General Corporation Law to eliminate or limit directors’ liability for breach of the fiduciary duty of due care.<sup>148</sup>

---

147. Jonathan R. Macey and Geoffrey P. Miller, *Trans Union Reconsidered* (Yale Law School Legal Scholarship Repository Faculty Scholarship Series) 129-30, available at [http://digitalcommons.law.yale.edu/fss\\_papers/1743](http://digitalcommons.law.yale.edu/fss_papers/1743) (last accessed, Nov. 15, 2011).

148. General Corporation Law of the State of Delaware, § 102.

Contents of certificate of incorporation.

...

In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

...

A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director’s duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141 (a) of this title,

Students of Philippine Corporate Law who have been introduced to the ideas that are the foundations of Philippine Corporate Law, when exposed to an in-depth study of American Corporate Law, will recognize many familiar concepts. But what is striking in American Corporate Law is the competition that has arisen among states to attempt to make their corporate laws more attractive to shareholders, directors, and managers to attract incorporations in their states. Thus, as the example of the Delaware General Corporation Law and *Van Gorkom* and its results shows, American corporate laws are mostly minimum rules and are highly subject to “customization” by their shareholders and directors, and ultimately, even by the legislators themselves, whether to attract incorporations in their state, or to improve the rights of shareholders. It is therefore necessary to realize this, and that American Corporate Law may be moving away rapidly from Philippine Corporate Law.

Another body of American law on which Philippine law has been modeled from is constitutional law, in particular the bill of rights. Article III of the Philippine Constitution closely tracks the language of the Bill of Rights of the U.S. Constitution, which are the first 10 amendments. A reading, however, of the Bill of Rights of the U.S. Constitution will show that it was fashioned under very different circumstances from the Philippine Constitution. The Preamble of the U.S. Constitution clearly provides the historical milieu of the U.S. Constitution — different, almost disparate, states, who chose to form a Union; a new country:

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>149</sup>

This Union that arose was an entirely new body with awesome powers. The first ten amendments to the U.S. Constitution therefore sought to guard against the possible abuse of the Union. Akhil R. Amar observes:

[T]he Bill of Rights was centrally concerned with controlling the ‘agency costs’ created by the specialization of labor inherent in a representative government. In such a government, the people (the ‘principals’) delegate power to run day-to-day affairs to a small set of specialized government officials (the ‘agents’) who might try to rule in their own self-interest, contrary to the interests and expressed wishes of the people. To minimize such self-dealing (‘agency costs’) the Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that

---

exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

*Id.*

149. U.S. CONST. pmb1.

ordinary citizens would participate in the federal administration of justice through various jury provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.<sup>150</sup>

Take, for instance, therefore, the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>151</sup>

It was Congress therefore that was prohibited from establishing religion, prohibiting free exercise, or abridging the freedom of speech, of the press, or to assemble. Congress was restrained, but not state legislatures, as state legislatures were viewed as representative of popular will.<sup>152</sup> This was the case as well for the rest of the Bill of Rights:

Amendment 2 — A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 4 — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

---

150. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xiii (1998).

151. U.S. CONST. amend. I.

152. AMAR, *supra* note 150, at 21-22.

Amendment 7 — In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8 — Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 9 — The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10 — The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>153</sup>

It was not until the enactment of the incorporation clause under the Fourteenth Amendment, nearly a quarter of a century after the enactment of the Bill of Rights,<sup>154</sup> when these restrictions were extended against the states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>155</sup>

The Bill of Rights in the Philippine Constitution, on the other hand, has always been set in place against all of the government. Thus, even if the language of the Philippine Bill of Rights tracks those of the U.S. Bill of Rights, there is a very different historical significance and legal effect of the Bill of Rights of each jurisdiction.

#### IV. STUDYING FOREIGN LAW TO FACILITATE GLOBAL UNDERSTANDING

Philippine law is relatively well-developed compared to other legal regimes, and a casual perusal of the laws of other countries may mystify or even shock a person who has only ever known Philippine law. A good example is Chinese Constitutional and Administrative Law.

The Chinese Constitution on its face reveals the awesome power exercised by the Chinese Communist Party (CCP) over the running of the Chinese Government. The people's democratic dictatorship is "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory[,] and the important thought of 'Three Represents.'"<sup>156</sup> This means that the Chinese Constitution, its laws, and its government, are subordinated to the leadership

---

153. U.S. CONST. amends. II, IV & X.

154. The Bill of Rights, comprising the first ten amendments, was ratified on Dec. 15, 1791. The Fourteenth Amendment was ratified on July 9, 1868.

155. U.S. CONST. amend. XIV.

156. CHINA CONST. pmb., as Amended.

of the CCP. Even though the Chinese Constitution now recognizes promulgated laws enacted by the legislative organs as the vehicle for defining and implementing policy rather than CCP policy directives, the implementation of legislation still depends on CCP policies.<sup>157</sup> Stanley B. Lubman observes that while China's leadership has emphasized the importance of the role of law, at the same time they also insist on maintaining the dominant role of the CCP in Chinese society.<sup>158</sup>

If Chinese administrative law is tested against the principles that have been posited as the indicators of the presence of a rule of law in a legal system,<sup>159</sup> the following would result:

(1) There are no meaningful restraints on rule-making power

The Chinese State Council's power to adopt administrative measures is limited in that the administrative measures should be in accordance with the Chinese Constitution and with the law.<sup>160</sup> However, many provisions of Chinese law are too vague, and it is very hard, if not impossible, to tell whether implementing rules are pursuant to laws in practice.<sup>161</sup> It is further noted that delegation is usually too broad, and sometimes without imposing any limits.<sup>162</sup>

The Chinese Law on Legislation<sup>163</sup> itself provides that the Chinese National People's Congress (NPC) and the Standing Committee of the NPC (SCNPC) are entitled, when no law has been enacted on certain important matters, to authorize the State Council to formulate administrative regulations on those matters.<sup>164</sup> These rules have been characterized as

---

157. Stanley B. Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 384 (2000).

158. *Id.*

159. Randall Peerenboom, Varieties of Rule of law: An Introduction and Provisional Conclusion (Asian Discourses of Rule of Law, University of California School of Law Research Paper Series), available at <http://ssrn.com/bstract=445821> (last accessed Nov. 15, 2011). "Rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite." *Id.* at 2.

160. CHINA CONST. art. 89 (1).

161. Xixin Wang, Rule of Rules: An Inquiry into Administrative Rules in China's Rule of Law Context (Mansfield Dialogues in Asia) 77, available at [http://www.mansfielddn.org/backup/programs/program\\_pdfs/06wang.pdf](http://www.mansfielddn.org/backup/programs/program_pdfs/06wang.pdf) (last accessed Nov. 15, 2011) [hereinafter Wang Inquiry into Rules].

162. *Id.*

163. Legislation Law of the People's Republic of China [Chinese Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000).

164. *Id.* art. 9.

“experimental rules” and have been described as anathema to the constitutional demand that agency rules must not conflict with the laws and regulations, for there would be no workable criteria to check such rules.<sup>165</sup> The experimental laws are not the exception. As noted above, statutory delegations themselves are broad and impose virtually no limits and thus, “as a practical matter, agenc[ies] can make rules with no effective limits imposed by the Constitution, the [L]egislature[,] or the People’s Court.”<sup>166</sup>

- (2) There is little clarity in the rules for determining which entities make laws

The Chinese Constitution provides that the NPC and the SCNPC are in charge of drafting of laws.<sup>167</sup> Other institutions are, however, able to issue documents which have legislative effect. The State Council has the power to issue administrative regulations which have the force and effect of law.<sup>168</sup> There are also various institutions that have the power to issue interpretations of law, which also have the force of law. The SCNPC has the power to interpret laws of the land.<sup>169</sup> The Supreme People’s Court<sup>170</sup> and the Supreme People’s Procuratorate<sup>171</sup> also have the power to issue interpretations of law, and in fact the largest quantity of interpretative materials falls under this category.<sup>172</sup>

- (3) The system for publicity and accessibility of laws is not well developed

Under the Chinese Law on Legislation, after a law or administrative regulation is signed for promulgation, it shall be published in the bulletin of the SCNPC in case of laws and of the State Council in case of administrative

---

165. Wang Inquiry into Rules, *supra* note 161, at 76.

166. *Id.* at 77.

167. CHINA CONST. arts. 62 (3) & 67 (2).

168. CHINA CONST. art. 89 (1).

169. CHINA CONST. art. 67 (4) ; Chinese Law on Legislation, art. 42.

170. The basis for this power is the 1981 Resolution of the Standing Committee of the NPC and the Organic Law of the Supreme People’s Court of 1979. Organic Law of the People’s Courts of the People’s Republic of China, as Amended (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1979, effective Jan. 1, 1980), art. 32 ; Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law [1981 Chinese Resolution] (promulgated by the Standing Comm. Nat’l People’s Cong., June 10, 1981, effective June 10, 1981).

171. 1981 Chinese Resolution, *supra* note 170.

172. ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 117 (3d ed. 2004).

regulations.<sup>173</sup> They shall also be published in newspapers distributed nationwide without delay.<sup>174</sup> The version published in the bulletin of the SCNPC or of the State Council, as the case may be, is considered the standard version of the law.<sup>175</sup> On the other hand, local regulations which are promulgated are published in the bulletins of the SCNPC at the same level and the newspapers distributed within their administrative areas without delay.<sup>176</sup>

It should be noted, however, that agencies have the power to make normative documents, within its jurisdiction.<sup>177</sup> These normative documents are made internally, are policy-oriented, and are rarely made public, but in practice, do become binding on the public, as agency rules. These normative documents are “secret rules” which the public must follow.<sup>178</sup> To this extent, not all laws or rules which bind the public are made public and accessible.

(4) The general applicability of laws is questionable

The general applicability of laws is mandated by the Chinese Constitution which provides that all state organs, the armed forces, all political parties and public organizations, and all enterprises and institutions must abide by the Constitution and the laws, and that all acts in violation of the Constitution or the law must be investigated.<sup>179</sup> It is questionable however, how the law applies to the CCP. As the law is considered a “mature form of party and state policy,”<sup>180</sup> it would appear that the CCP can very easily alter party policy and codify it in law.

(5) There are problems with the clarity, consistency, stability, and prospective application of laws

Scholars criticize provisions of law as too broad and imprecise, such that many varying interpretations are possible in practice<sup>181</sup> and too vague.<sup>182</sup> Legislation still tends to consist of principle-like pronouncements, broadly

173. Chinese Law on Legislation, art. 52.

174. *Id.*

175. *Id.* arts. 52 & 62.

176. *Id.* art. 70.

177. Organic Law of Local People’s Congresses and Local People’s Governments of the People’s Republic of China, as Amended (promulgated by the Standing Comm. Nat’l People’s Cong., July 4, 1979, effective Jan. 1, 1980).

178. Wang Inquiry into Rules, *supra* note 161, at 76.

179. CHINA CONST. art. 5.

180. CHEN, *supra* note 172, at 117.

181. *Id.* at 118.

182. Wang Inquiry into Rules, *supra* note 161, at 75.



worded discretions, undefined terms, omissions, and general catch-all clauses, and it appears that this ambiguity is intended, as China “has adopted a rationale that lends itself to the creation of laws that are inherently flexible so that they may be adjusted according to the vagaries of human behavior.”<sup>183</sup> As a result of the openness of Chinese law to interpretation, together with the recent legislative activity, Chinese law is in a state of flux, and cannot be considered stable. Lastly, although laws are of prospective application, interpretations of law which are issued by the SCNPC are considered to be effective as of the date when the law took effect.<sup>184</sup> Since these interpretations can enlarge or modify the law that it is purportedly interpreting and can take effect retroactively, it cannot be said that the principle of prospective application of laws applies.

- (6) There is need for further protection from administrative abuse

Actions arising from possible abuses by administrative agencies became possible under the Chinese Administrative Litigation Law.<sup>185</sup> Under this law, a citizen, a legal person, or other organizations have the right to bring a lawsuit before the people’s courts if a concrete administrative action by administrative organs or their personnel infringe their lawful rights and interests.<sup>186</sup> The people’s courts are called to exercise judicial power independently with respect to administrative cases, and the court shall not be subject to interference by any administrative organ, public organization, or individual.<sup>187</sup> Scholars have noted, however, that in practice, courts very rarely overrule the decision of an administrative body on the basis that the act was executed illegally for procedural reasons, perhaps out of fear of making the administrative body “lose face.”<sup>188</sup>

The move towards an administrative rule of law is likewise unmistakable. The passage of the Chinese Administrative Litigation Law is a landmark in the development of administrative law in China. A statistical analysis of cases brought before courts under the Chinese Administrative Litigation Law suggests that the law has gained a limited role in curbing and rectifying unjust treatment of citizens by government officials. It is also

---

183. Peter Howard Crane, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 374 (2002).

184. See, e.g., *Great Wall Company v. Ocean Plaza Company* (Beijing Interm. People’s Ct. June 28, 2004) (China).

185. Administrative Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990).

186. *Id.* art. 2.

187. *Id.* art. 3.

188. Crane, *supra* note 183, at 377.

interesting to note that there is a rising rate of settlements that provide effective judicial relief to the plaintiffs.<sup>189</sup> But the foundation of administrative law is a defined legislative system which places boundaries on the power of administrative agencies to enact laws and a meaningful implementation of laws that allow citizens to bring cases of administrative abuse to court. Judicial and procedural reforms need to be undertaken in order to make administrative laws, and the curbing of administrative abuse, more meaningful.<sup>190</sup>

A student who has learned of the Philippine Constitution may therefore judge the Chinese system and has nothing to learn from the Chinese Constitutional Law system. The system fails all the tests that have been posited as indicators of a rule of law, and the Philippine legal system would appear to meet the criteria cited above. A catalogue of how the Philippine legal system would comply with these tests is not necessary here. It is therefore easy to think — *we have a system under a rule of law; what can we learn from the Chinese legal system?*

The same student who takes up Philippine Corporate Law may have the same conclusions when she encounters the Chinese Company Law structure.

The decision-making body in a Chinese company is the shareholders meeting. This is different from the Philippine legal system where it is the board of directors which is the decision-making body.<sup>191</sup> What is curious with the Chinese system is the quorum and voting requirements.

The Chinese Company Law provides for two kinds of companies — limited liability companies (*youxianzeren gongsi* or LLC) which is a corporation formed by less than 50 shareholders<sup>192</sup> and with lower

---

189. Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, THE CHINA QUARTERLY, No. 152, Dec. 1997, at 843.

190. See Xixin Wang, *Administrative Procedure Reforms in China's Rule of Law Context*, 12 COLUM. J. ASIAN L. 251 (1999).

191. CORPORATION CODE, § 23. This Section provides:

Sec. 23. The board of directors or trustees. — Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified.

*Id.*

192. Chinese Company Law, art. 24.

capitalization requirements,<sup>193</sup> and joint stock limited company (*gufenyouxian gongsi* or JSLC) which is a corporation formed by promotion or stock flotation<sup>194</sup> and with higher capitalization requirements.<sup>195</sup> In the shareholders meeting in LLCs, voting rights are exercised based on the percentage of the capital contributions of the shareholders.<sup>196</sup> To approve the revision of the articles of association, the increase or decrease of registered capital, merger, split-up, dissolution, or change of company form, the approval should come from shareholders representing two-thirds (2/3) or more of the voting rights.<sup>197</sup> No other provision provides for the threshold of votes that is required to be obtained in order for any other type of resolution to pass.

For JSLCs, when any resolution is to be made by the shareholders meeting, it should be adopted by shareholders representing more than half of the voting rights of the shareholders present.<sup>198</sup> Similar to LLCs, a higher threshold is required in deciding to modify the articles of association, or to increase or reduce the registered capital, or a resolution about the merger, split-up, dissolution, or change of the company form. But the vote requirement is different — it is 2/3 or more of the voting rights of the shareholders in presence.<sup>199</sup>

A careful reading of the provisions reveals that there are some fundamental differences of the Chinese system with the Philippine system.

There is no requirement under the provisions of the Chinese Company Law for a quorum to be present during shareholders meetings.<sup>200</sup> For JSLCs, this is reflected in Article 104 of the Chinese Company Law which states, in part: “When any resolution is to be made by the shareholders’ assembly, it shall be adopted by shareholders representing more than half of the voting

---

193. *Id.* art. 26. Article 26 provides that the minimum amount of registered capital of an LLC is RMB 30,000.00. *Id.*

194. *Id.* art. 78.

195. *Id.* art. 81. Article 81 provides that the minimum amount of registered capital of an LLC is RMB 5,000,000.00. *Id.*

196. Chinese Company Law, art. 43.

197. *Id.* art. 44.

198. *Id.* art. 104.

199. *Id.*

200. “Quorum” refers to a rule requiring that a minimum number of members of a deliberative body should be present in order to conduct the business of that group. Ordinarily, this is a majority of the persons expected to be present. For example, under the Philippine Corporation Code, “a quorum shall consist of the stockholders representing a majority of the outstanding capital stock or a majority of the members in the case of non-stock corporations.” CORPORATION CODE, § 52 .

rights of the shareholders in presence.”<sup>201</sup> Since a resolution may be passed when it is adopted by the shareholders representing more than half of the voting rights present in the meeting (not the total voting rights), and since there is no minimum attendance requirement, then any resolution can theoretically be adopted by shareholders who represent less than majority of the total voting rights of the corporation.

This means that a JSLC may have widely dispersed shareholders and it may be difficult to gather all the shareholders to pass resolutions that might be urgently needed by the company. Further, since the Chinese Company Law requires that shareholders decide on more issues and are actually the governing body of the corporation, rather than the board of directors, if the vote of shareholders representing majority of the voting rights is required to be present in order to pass resolutions, then the operations of the company can be paralyzed by the refusal of shareholders to attend meetings.

Further, Article 104 of the Chinese Company Law provides that resolutions in a shareholders’ assembly concerning the amendment of the company’s articles of association, the increase or reduction of registered capital, the merger, division, dissolution, or restructuring of the company shall require at least 2/3 of the voting rights held by the shareholders in attendance for adoption.<sup>202</sup> Thus, if 2/3 of those holding voting rights present vote for the merger, then the company can be merged with another company based on the vote that could be representing a virtual minority of the voting rights in the corporation.

For LLCs the provisions of the Chinese Company Law are not very clear. On the one hand, Article 43 states: “The shareholders shall exercise their voting rights at the shareholders’ meetings on the basis of their respective percentage of the capital contributions unless it is otherwise prescribed by the articles of association.”<sup>203</sup> Article 44 on the other hand states: “A resolution made at a shareholders’ meeting on amending the articles of association, increasing or reducing the registered capital, merger, split-up, dissolution[,] or change of the company form shall be adopted by the shareholders representing 2/3 or more of the voting rights.”<sup>204</sup>

The statutes are unclear on how to gather enough votes for an ordinary resolution to pass. While it is clear that for special matters such as for mergers and split-ups, the vote of stockholders representing 2/3 of the voting stock is required, for ordinary matters, the Chinese Company Law provides a bare provision stating that “shareholders decide based on the basis of their capital

---

201. Chinese Company Law, art. 104.

202. *Id.*

203. *Id.* art. 43.

204. *Id.* art. 44.

contribution”<sup>205</sup> but without providing for a quorum requirement. This can be interpreted in two ways. First, since the Chinese Company Law provides that the vote of the shareholders representing majority of voting rights is needed, even if there is no minimum attendance requirement for an LLC shareholders meeting to be valid, a meeting attended by stockholders who do not represent a majority of the voting stock will not be able to decide on any matter, since voting rights are exercised based on the percentage of capital contribution. Under this school of thought, a majority vote of the shareholders, i.e. more than 50% of the voting stock, is necessary for all resolutions to pass, except for those matters requiring the vote of stockholders representing 2/3 of the voting stock.

A second possible interpretation is that since the Chinese Company Law sets no quorum requirement, then in the shareholders meeting, as long as the shareholders decide on the basis of their capital contribution, then the requirements of the Chinese Company Law are met. So in the example given, the meeting attended by the shareholders representing only 40% of the voting stock will still be able to decide on ordinary matters if a majority of those 40% will vote for the passage of a resolution.

This lack of definitive language in the Chinese Company Law leads to confusion in the LLC provisions on the decision-making process in shareholders meetings. If the rule were interpreted to mean that a majority of the voting rights is required to pass resolutions then the rule is logically and commercially sound. Shareholders may need to meet in order to discuss certain emergency matters that arise, *even if the shareholders representing the majority of the voting stock are not present*. This group that forms less than the majority will not be able to issue resolutions because the majority of the voting stock is not present. Since shareholders hold a stake on the corporation arising from the investment they have made, they deserve to be able to control corporate affairs. However, if the rule were interpreted to mean that the vote of shareholders who represent a majority of the subscribed capital could decide on ordinary matters, then the rule appears to be illogical. While such interpretation can serve to make the decision-making process in a company efficient, any efficiency that arises from such a system sacrifices true representation in the company’s affairs.

The LLC is a conglomeration of small group of persons who want to engage in the business only with each other. In fact, the Chinese Company Law provides for strict rules on the transferability of stock rights in LLCs.<sup>206</sup> The second interpretation of the decision-making process for LLCs will allow a self-serving majority to be able to easily exploit minority interests.

---

205. *Id.* art. 43.

206. *Id.* arts. 72 & 73.

Given that the Chinese Company Law is the basis for Chinese corporate governance, studies show that corporate governance in companies in China is poor.<sup>207</sup> Further, the rule of law is theorized as a necessary component in corporate governance systems, such as in the enforcement of the rights of minority shareholders. As the earlier evaluation of the rule of law in China appears to yield poor results, it should in theory be logical to assume that there would be no foreign investment in China, and that its stock market would be significantly less robust than other legal systems with strong protection for minority shareholders and a strong sense of the rule of law. It has been noted that common law legal systems outperform civil law legal systems in establishing an environment in which securities markets can prosper and grow. It has been further noted that those legal systems that provide significant protections for minority shareholders can develop active equity markets, and it is the U.S. and the United Kingdom (U.K.) which stand apart.<sup>208</sup> The lack of a rule of law in China, therefore, has a substantial impact on corporate governance in China and under the theory that the legal system in a jurisdiction would substantially affect the size of its securities market, then the Chinese securities market should theoretically be insignificant compared to that of the U.S. and the U.K.

But that is not the case, as the Shanghai Stock Exchange ranks sixth among stock exchanges in the world in terms of market value and share turnover.<sup>209</sup> The London Stock Exchange is ahead of Shanghai Stock Exchange at fifth, and the second largest stock exchange belongs to a civil law jurisdiction which is Japan.

STOCK EXCHANGE	MARKET VALUE	SHARE TURNOVER
New York Stock Exchange	\$9.57 trillion	\$7.99 trillion
Tokyo Stock Exchange	\$3.1 trillion	\$1.56 trillion
NASDAQ	\$2.77 trillion	\$12.26 trillion
Euronext	\$2.26 trillion	\$743 billion
London Stock Exchange	\$2.20 trillion	\$1.48 trillion
Shanghai Stock Exchange	\$2.07 trillion	\$1.69 trillion
Hong Kong Stock Exchange	\$1.77 trillion	\$519 billion
Toronto Stock Exchange	\$1.35 trillion	\$491 billion
Frankfurt Stock Exchange	\$1.13 trillion	\$1.10 trillion

207. See Centre for Financial Market Integrity, China Corporate Governance Survey (CFA Institute Survey on Corporate Governance), available at <http://www.iasplus.com/china/0704cfainstitutereport.pdf> (last accessed Nov. 15, 2011).

208. See Coffee, *supra* note 124, at 7-8.

209. World Federation of Exchanges, WFE Database, available at <http://www.world-exchanges.org/statistics> (last accessed Nov. 15, 2011). Data as of 2009.

Bombay Stock Exchange	\$1.03 trillion	\$84 billion
-----------------------	-----------------	--------------

China's legal system may surprise Philippine-educated lawyers, because their system is so different, but this does not mean that the Philippines does not have anything to learn. This is of course not to advocate the creation of an authoritarian regime in the Philippines. But in the creation of policies, and laws based on these policies, with a view to what the country will be 10 or 20 years from when the policies are first set in place, there may be something to learn from the Chinese system. Lawyers exposed and familiar with different legal systems would know well to avoid passing immediate judgment over a legal system which on its face appears less sophisticated than one's own. Instead, differences in legal systems should be studied and examined, and the lessons distilled.

The converse of this is that while the Philippines is a relatively sophisticated legal system, it does not rise to the intricacies of mature and developed legal systems such as the U.S. For instance, the first effort in the world to criminalize extraterritorial bribery was from Foreign Corrupt Practices Act of 1977 (FCPA) of the U.S. The enactment of the FCPA was a direct result of the Watergate Special Prosecutor's disclosure that major American corporations were engaged in the systematic bribery of foreign government officials.<sup>210</sup> As a result, it is the U.S. that has the greatest experience in implementing foreign anti-bribery laws and imposing criminal penalties for the bribery of foreign persons abroad.<sup>211</sup> Since 1998 however, beginning with the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions<sup>212</sup> by the Organization for Economic Cooperation and Development, various international bodies have enacted conventions that call on states to adopt national legislation to curb bribery of foreign officials.<sup>213</sup>

210. DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE I* (2d ed. 1999).

211. Nick Burkill, *Doing Business Abroad — International Legal Obligations and Penalties Relating to Corruption* (Dorsey & Whitney LLP Corporate Counsel Symposium Paper) 2, available at [http://www.dorsey.com/files/upload/MP\\_CCS09\\_corporate\\_fraud\\_business\\_abroad\\_burkill.pdf](http://www.dorsey.com/files/upload/MP_CCS09_corporate_fraud_business_abroad_burkill.pdf) (last accessed Nov. 15, 2011).

212. Organisation for Economic Co-operation and Development [OECD], *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, DAF/IME/BR(97) 20 (Dec. 17, 1997).

213. Some of these are the United Nations Convention against Corruption, the Inter-American Convention against Corruption, the Council of Europe Conventions, the South African Development Protocol against Corruption, the African Union Convention on Preventing and Combating Corruption, and the World Bank Anti-Corruption Strategies. The Business and Industry Advisory

The difficulty that U.S. companies operating abroad had was that they were hamstrung in competing against other foreign companies whose jurisdictions did not prohibit against foreign corruption. It has, however, been observed that U.S. companies are no longer prejudiced by having to play by more stringent rules than companies from other countries, because now, the major economies of the world have adopted rules that prohibit their nationals from bribing foreign officials.<sup>214</sup> This global effort to counter the corruption of foreign officials therefore serves to level the playing field globally. The other touted benefit of anti-foreign corruption laws is the possibility of obtaining increased business arising from the trust that other companies would place on companies belonging to jurisdictions with the same restrictions.

Foreign corrupt practices laws, however, require resources to comply with and to enforce. Will an analysis of the costs associated with compliance and enforcement of anti-foreign corruption laws yield a result that such laws are necessary to bring more business to Philippine companies? Seen from a larger perspective, is legal reform always a matter of seeing that something is regulated more efficiently abroad and then adopting such regulation wholesale?

Indeed, the study of a country's economy, history, philosophy, and sociology, which is necessary in order to fully comprehend its legal system, will enrich the global understanding among nations, but will also allow a country to understand its place in this community of nations.

## V. CONCLUSION

This Article takes the reader on a journey of a sample of issues that seeks to prove that legal practice, scholarship, education, and reform can no longer be insular in its scope. The systematic study and knowledge of foreign law, at the very beginning of a lawyer's formation, is necessary in order to introduce the breadth of what a career in law can and will involve. It is hoped that at the end of this Article, the study of foreign law will not be as eccentric a proposal, and that its utilitarian purposes will be more apparent, such that the necessary investments can be made by law schools to offer courses on foreign law to students. Actually putting these proposals into operation would of course involve tremendous work by law school administrators, but it is hoped that the reasons cited in the Article as to the benefits of studying foreign law makes out the case for the urgency of introducing the study of

---

Committee to the OECD, *Anti-Bribery Resource Guide*, available at [http://www.biac.org/pubs/anti-bribery\\_resource/section\\_1.htm#africa](http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#africa) (last accessed Nov. 15, 2011).

214. David W. Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 315 (2008).



foreign law in legal education in the Philippines. What is more, the knowledge of foreign law is not merely a tool with which a lawyer can serve one's client or one's cause. The in-depth knowledge of one's own legal system thrusts upon a lawyer a role as an agent of change and as a leader in society. The knowledge of foreign law can only enhance one's abilities as a leader and as a visionary, who is able to bring together what was previously thought to be different, disparate, and alien, as part of a greater community.