Regulatory Design and Hierarchy of Laws: Singapore

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26 May 2022

Brief History

- Companies Act 1967 based on UK Companies Act 1948 and Australian Companies Act 1961
- Securities and Futures Act 2001/2 based on NSW Securities Industry Code 1980 and Futures Trading Code 1986
- Latter Act came about after first major review of Singapore's corporate, accounting and financial laws after the 1998 Asian Financial Crisis

Philosophy

- CLRFC 2001 had certain principles which still carried over into later reviews in 2011 and the present one even if implementation has been difficult
  - Companies legislation to focus on small companies
  - Simplification and modernization and building on UK heritage rather than moving towards US laws due to capital needs
  - Listed companies to come under Securities and Futures Act where possible eg prospectus requirements
  - Separate omnibus insolvency and bankruptcy legislation
  - Greater use of civil penalties even if not civil liability enforceable by private actors

Delegated legislation

- Delegated or subsidiary legislation to cover technical, procedural and operational details
- Also for administrative sanctions as the position then in 2000 was still that most primary legislation was backed by criminal sanctions
- Former still true except in some areas in Securities and Futures Act eg conduct of business rules for licensed persons having to give priority to a customer's order as well as trading as principal
- Market changes rapidly here

Civil penalties

- Latter concerning the divide between criminal and civil sanctions that we have seen the largest changes with even the Securities and Futures Act itself allowing greater use of civil penalties
- Studies show more use of this than in Australia and HK for eg insider trading
- Many of these are settled directly out of court with the Monetary Authority of Singapore
- In contrast, company legislation does not provide the corporate regulator, the Accounting and Corporate Regulatory Authority, the power to obtain civil penalties, even in court
- Less successful enforcement as ACRA can only bring criminal actions and usually for small fines

More delegation a good thing?

- Need for more civil penalties eg for directors duties in the Companies Act
- Companies Act should be seen as more facilitative than mandatory in nature
- One view that we should in fact delegate more to administrative agencies as specialist knowledge resides there
- For example, with respect to one area which the Australian Treasury is looking at, the insolvency and restructuring of business trusts, the Securities Industry Council housed in the MAS, which is the equivalent of the UK Takeover Panel, in fact looked at the issue some 10 years before the first court judgment on the matter in 2017. The High Court relied on an SIC Practice Statement issued in 2008 in deciding that it was possible for a scheme of arrangement to be used for trust restructuring as an entity

Corporate versus securities legislation

- More regulatory deference to MAS than ACRA and perhaps more with financial regulation than corporate legislation
- But divide between the two not always clear
- For example, there was much debate after the 2011 major corporate law reform exercise in Singapore as to how to move provisions in the Companies Act relating to listed companies to the Securities and Futures Act
- Eventually only few were moved as the Government realised that provisions related to listed company matters like corporate governance eg the audit committee, or capital maintenance eg on-market buybacks for listed companies, had to remain in the Companies Act

Corporations Act

- Australia's problem may be from the other side of the spectrum
- Is there too much that is consolidated in the Corporations Act overseen by the ASIC?
- Carve out securities and derivatives legislation, as in Singapore and HK?
- Or slightly more broadly financial regulation as in NZ and perhaps even more as in the UK?
- Insolvency and restructuring has also become standalone legislation in many countries due to complexity and links with personal bankruptcy
- Driven by pragmatism rather than ideology

Smaller versus larger jurisdictions?

- Can technology allow legislation to remain consolidated?
- Technology has its limits
- But on cost-benefit analysis, given the expertise built up in ASIC, it may not be clear whether you should break up the Corporations Act
- In Singapore, companies legislation comes under ACRA in the Ministry of Finance, securities and derivatives under the MAS, and insolvency restructuring under the Ministry of Law
- Greater coordination problems and more path dependence in larger countries

Conclusion

- Yet there may be greater deference to regulators in countries like Australia, US and Canada compared to UK, Singapore and HK
- So we may be seeing the problem from a different perspective altogether as we are not looking so much at safeguards but more efficiency
- Different questions asked by the ease of searching for the law, ie coherence and navigability, for which too much delegation may create problems, and dealing with complexity efficiently, which more delegation will help
- The ideal might be more clearly defined and delineated legislation that is administered by a single agency