

Chapter 1

Introduction

When growing on the south side of Huai River, Ju is Ju; when growing on the north side of Huai River, it becomes Zhi. Although the leaves of the two fruits do look similar, the tastes are quite different. Why has the fruit become different? The environment is different.

Yan Zi (?–500BC)¹

1.1 Subject of the Book

The Chinese mergers and acquisitions (M&A) market has been expanding at unprecedented rates in recent years (see Fig. 1.1). The year 2010 alone has witnessed 1,743 inbound M&A transactions, with an aggregate value of more than US\$52 billion.

The growth of the Chinese M&A market has been accompanied by the development of regulatory rules. In the area of corporate law and securities law, a most important legislation is *the Measures for the Administration of the Takeover of Listed Companies 2006* (Takeover Regulation 2006), which has been gradually developed since the promulgation of *Provisional Regulations for the Administration of Stock Issuance and Transaction* (Provisional Regulation for Stock Issuance and Transactions) in 1993.²

¹ Ju is a citrus fruit that usually has a sweet taste. Zhi is shaped like a small orange but is not edible due to its bitter taste.

The quote was made by diplomat Yan Zi when he went to Chu as an ambassador of his own country Qi. The king of Chu wanted to insult Yan Zi and his country. The king interrogated a thief who came from Qi and was caught stealing in Chu. The king asked Yanzi, quite provocatively, whether people from Qi were all thieves. As seen in the quote, Yan Zi's comment indicated that the environment of Chu made people from Qi thieves.

See 晏婴 [Ying Yan], '内篇杂下 [Part One Miscellaneous]' in 晏子春秋 [Yan Zi Chunqiu] (李万寿 [Wanshou Li] Interpreter, 台湾古籍出版社 1996).

² 股票发行与交易管理暂行条例 [Provisional Regulations for the Administration of Stock Issuance and Transactions] (People's Republic of China) State Council, Apr 22, 1993.

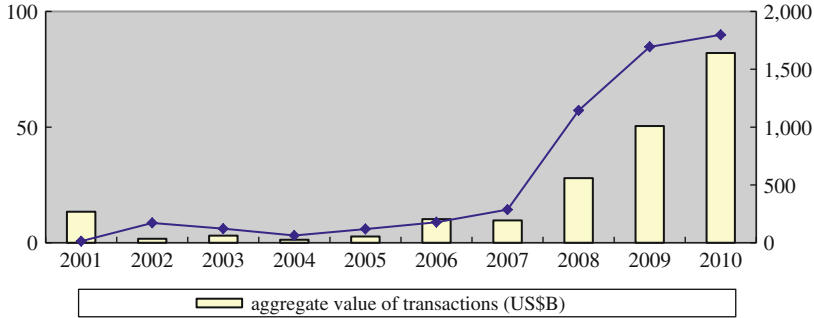


Fig. 1.1 M&A Transactions in China 2001–2010 [万格 [Ge Wan], ‘2010年中国并购市场统计分析报告’ (Jul 20, 2011) <http://report.chinaventure.com.cn/r/f/309.aspx>]. Source: www.chinaventure.com.cn, CVSource database

Takeover Regulation 2006 is currently under consideration for revision. The work embraces recent amendments and latest proposed revisions, such as the current and proposed amendment of the mandatory bid rule discussed in Chap. 5.

Takeover Regulation 2006 addresses a particular type of M&A transactions—takeovers. Takeovers are transactions whereby a person obtains control of a listed company through directly or indirectly acquiring voting shares of the target company.³ Takeover transactions, as defined above, have three features. First, the transaction targets at companies listed on the two Chinese stock exchanges, Shanghai Stock Exchange and Shenzhen Stock Exchange. Second, takeover transactions must involve the acquisition of shares, either through direct ownership or through indirect control of voting rights.⁴ Third, takeovers involve the change of corporate

A major difference between Takeover Regulation 2006 and previous regulatory rules such as Provisional Regulation for Stock Issuance and Transactions is that the former is a specific takeover law while the latter is a comprehensive securities law containing some takeover regulatory rules.

³ M. A. Weinberg et al., *Weinberg and Blank on Takeovers and Mergers* (Sweet and Maxwell, 4th ed, 1979), 3. ‘Indirect acquisition of shares’ refers to circumstances under which a person controls voting rights of shares without becoming the registered owner of those shares. Such indirect acquisition of control is discussed in more details in Chap. 6.

⁴ In Chinese practice, acquisitions of shares are often conducted along with acquisitions of assets and other transactions/arrangements in an M&A transaction. This is different from countries such as the UK, in which takeovers as a form of M&A transaction are regulated separately from another form of M&A transaction called scheme of arrangement. The implication of this local Chinese feature provides one justification for Chinese takeover law not adhering to the principle of ‘equal treatment of shareholders’ adopted in the UK takeover law. More details will be discussed in Chap. 4.

According to recent news report, the CSRC is considering changing the current unseparated regulatory mechanism, namely regulating takeover bids separately from other M&A transactions. Report Team for National People’s Congress, ‘中国证监会副主席庄心一表示并购重组分道制审核或于2013年启动[Vice President of CSRC said Separate Review of Takeovers and Restructuring may Experiment in 2013]’, *China Securities Journal* (Beijing), Mar 4, 2013.

control to the acquirer after their completion. The features of takeover transactions, such as targeting at listed companies, acquiring publicly traded shares, and resulting in a change of corporate control, pose challenging tasks for inexperienced Chinese securities regulators.

1.2 The Particular Perspective: Divergence

There have been many insightful discussions on Chinese takeover regulation.⁵ Nonetheless, this work offers a fresh perspective to discuss Chinese takeover law, that is, to discuss the divergence between the transplanted Chinese takeover law and the law of its origin.

The Chinese takeover law is developed through legal transplantation, namely borrowing legal rules from other jurisdictions. Chinese lawmakers mainly transplant rules from the UK, Hong Kong, and the US, which are referred to as the ‘origins’ of Chinese takeover law in this work. In addition to the above three countries, the work also discusses the Australian takeover law. The Australian takeover law originated from the UK City Code, which is the primary law of origin for the Chinese takeover law.

However, legal transplantation often generates divergence, and the divergence can be justifiable when fitting into the regulatory environment of the recipient country. The work discusses the divergence in Chinese takeover law, as well as how to evaluate the divergence and how to improve the Chinese takeover law.

1.3 Practical and Theoretical Contributions of the Work

The work makes both practical and theoretical contributions to existing literature on the transplantation of takeover law into China. From a practical perspective, the Chinese M&A market has been booming at an unprecedented rate in recent years. Not only domestic investors but also foreign funds and multinational companies do actively participate in the market. For both market participants and researchers, it is crucially important to understand the emerging and transitional feature of the Chinese economy and its M&A market and the impacts of such feature on the

⁵ An incomplete list of the existing studies include Guanghai Yu, ‘Takeovers in China: the Case against Uniformity in Corporate Governance’ (2005) 34(2) *Common Law World Review*; Hui Huang, ‘China’s Takeover Law: A Comparative Analysis and Proposals for Reform’ (2005) 30 *Delaware Journal of Corporate Law* 145; Wei Cai, ‘The Mandatory Bid Rule in China’ (2011) 12 *European Business Organization Law Review*.

relevant laws. The book provides a comprehensive and in-depth review of the Chinese takeover law, with emphasis on the differences between the Chinese takeover law and takeover rules in the UK, the US, and Hong Kong. Moreover, the work discusses important theories, including equality among shareholder, efficiency, and board neutrality. Understanding these theories will help readers understand the generally complex and very detailed takeover rules.

The work makes theoretical contributions by reaching several general conclusions on legal transplantation.⁶ To start with, the work discusses socioeconomic factors that are important in legal transplantation, such as institutional capacity or the demands of authorities. Moreover, the work discusses how to evaluate a specific legal transplantation through resorting to the general principle of fitting into local context and the specific principles of a particular law. Furthermore, the work discusses the phenomenon of selective transplantation, the careful selection of foreign rules from more than one jurisdiction. These theoretical observations provide useful ways to ‘engineer’ legal transplantation practices in order to meet designated goals, which can be useful for legal transplantation in other Chinese legal areas and transplantation in other jurisdictions.

1.4 Framework of the Work

The work proceeds as follows. Chapter 2 describes the social context of Chinese securities regulation. It depicts the main features of the transitional and emerging Chinese securities market and the less developed Chinese securities regulation. Chapter 3 discusses the legal transplantation theory, which provides the theoretical lens for analysing the work. Most importantly, the chapter identifies several social factors that are influential in the process of legal transplantation, such as local regulatory needs, institutional capacity, and legal culture. Chapter 4 develops the criteria for evaluating the transplanted Chinese takeover law, namely efficiency and shareholder protection. The author gives more detailed definition of the terms efficiency and shareholder protection. Chapter 5 discusses the mandatory takeover bid rule and its divergence from the law of its origins, which is the most important rule in the Chinese takeover law. The chapter seeks to embrace most recent amendments and reform proposals. Chapter 6 discusses a number of shareholder protection rules provided in Takeover Regulation 2006. The author argues that a major defect of the Chinese shareholder protection rules is the insufficient enforcement of civil liability rules. Chapter 7 examines the regulation of takeover defences through empirical study, comparative study, and cases. The author argues that the

⁶ Most discussions on legal transplantation theory are made in Chap. 3. Chapter 8 provides an overview of the theoretical contributions of the work on legal transplantation theory.

Chinese takeover defence regulation looks similar to the UK model in books while converged with the US model in practice by leaving wide discretion to management in adopting takeover defences. This conclusion is importantly supported by an original empirical study conducted by the author, the subject of which has not been found in existing literature. Chapter 8 evaluates the Chinese takeover law as a whole based on all the divergence identified in previous chapters. It also discusses the possible development of the Chinese takeover regulation.

Regulating the Takeover of Chinese Listed Companies
Divergence from the West

Chen, J.

2014, XVII, 189 p. 9 illus., 1 illus. in color., Hardcover

ISBN: 978-3-642-54507-8