

CHAPTER 2

LITERATURE REVIEW

The literature review used is to widen the basis of the study to encompass the role of company secretaries in jurisdiction other than Malaysia. This will provide the opportunity to compare the roles and responsibilities of the Malaysian company secretary with those in the jurisdictions selected. The comparison, however, has been restricted to those jurisdictions whose countries constitute the present Commonwealth. There are sound reasons for pursuing this course of action, as all owe the genesis of their company law to United Kingdom.

In this chapter, special reference is given to those aspects dealing with company secretary and their duties. The study divides the jurisdictions in two separate categories covering mandatory and voluntary appointment of company secretary. With this in mind, the jurisdictions selected for comparison with Malaysia were Australia, Canada, Hong Kong, New Zealand and United Kingdom.

2.1 COMPARISON BETWEEN JURISDICTIONS

For comparison purposes, this section will be divided into two parts.

Part one will concentrate on comparison between Malaysia and three other jurisdictions, namely Australia, United Kingdom and Hong Kong in which the mandatory appointment of a company secretary is specifically provided for in their company legislation.

Part two will concentrate on those jurisdictions that specifically excludes the appointment of a company secretary in their legislation. The countries selected were Canada and New Zealand in which the appointment of a company secretary is voluntarily.

2.1.1 Mandatory Appointment of The Company Secretary

AUSTRALIA

The Australia Corporations Law 1989 requires that each company to appoint a company secretary, who must be a natural person aged 18 and resident in the state of incorporation and such appointment being made by the directors of the company. Under the new amendment to the Corporations Law 1989 in early 2000, there is a new development whereby proprietary companies have the option of not appointing company secretary. Apart from the responsibilities imposed on the secretary by the board of directors or the company's articles of association, there are also responsibilities imposed under the Corporation Law.

In this connection, it is interesting to see that the future role of company secretaries will become more complex and "legalistic" due to the increasing stream of legislation with which companies are required to comply (Lumsden and Simmonds, 1994)

Stubington (1998) expressed his view that the company secretary of an Australian corporation has an important role in adding strategic value by providing advice on how the board can assess its own performance and promote continuous improvement. The secretary's contribution to the strategic adding value role in four principal areas, are : 1) advising the managing director and chairman on board performance processes; 2) developing the annual board agenda to ensure that the critical success factors necessary to ensure sustainable competitive advantage are addressed in a logical manner in the agenda; 3) ensuring that clear delegations are provided to management from the board; and 4) ensuring the terms of reference for the board committees reflect the necessary performance outcomes as required by the board.

UNITED KINGDOM (UK)

The need for companies to have a company secretary was only introduced into the Companies Act 1948 (UK). Section 177 of that Act provided that every company must have a company secretary and that sole director could not also hold the office of company secretary.

The promulgation of the Companies Act 1980 (UK) to replace 1948 Act introduced a new section on dealing with qualifications of company secretary. Under the new section 79, the Act requires directors of a public company to appoint a person having the requisite knowledge and experience to discharge the functions of a secretary of a company and must be a member of a professional body as prescribed in the Act. In 1985, a new Companies Act was promulgated, however, there were no significant changes as far as the company secretary's qualifications were concerned.

The Cadbury Committee (1992), in its report, gave explicit recognition to the important role of the company secretary in improving corporate governance in listed companies. The report states that the company secretary has a key role in ensuring that board procedures are both followed and regularly reviewed. The Committee also expected that the company secretary would be a source of advice to the chairperson and to the board on the implementation of the Code of Best Practices laid down in the report.

The Code of Best Practices was a recommendation put to the Committee by the Companies Secretaries Group, to ensure that the role of the company secretary in corporate governance was clearly enunciated. To further enhance the role of the company secretary, the Committee recognised that the directors had a duty to appoint as company secretary, someone who was capable of carrying out the duties, which the post entailed. The responsibility for ensuring that the company secretary remained capable was a matter for the board to determine as a whole.

The UK Institute of Directors Guidelines for Directors (1991) which inter alia states that "an efficient company secretary can make a most important contribution to both directors and management by removing from the directors' and manager' shoulders the burden of knowing how to deal with the provisions of company and other legislation". Thus, providing further evidence of the wide role that the company secretary is expected to play in the overall administration of the company.

Green (1994) emphasised the importance of the monitoring and compliance role of a company secretary to ensure that boards of directors are undertaking their responsibilities and duties.

HONG KONG

Under the Companies Ordinance 1984, provision is made that every company registered and operating in Hong Kong shall have a company secretary who must be a resident of the colony. The company secretary may be an employee of the company or an agent providing services to the company, which presumably includes companies. Under the Companies Ordinance, the company secretary is, above all, an "officer" of the company. That means that the secretary owes a fiduciary duty to the company, to act solely in the company's best interest with candour and integrity.

Neither the Companies Ordinance nor common law are specific on the overall responsibilities of the company secretary. Williams and Leifer (1994) see the role as performing "a whole range of administrative tasks which are of a legal or quasi-legal nature it has become the accepted practice for the board to look to the secretary for advice as to the duties and liabilities of the board at law and under the company's articles of association and as to the proper exercise of those duties".

Under section 2(1) of the Ordinance, a company secretary as an officer of the company may be held liable in the same way as company directors for negligence,

default and a breach of duty or trust. The Ordinance prohibits a company from exempting an officer from that liability. Brewer (1994) explained this by affirming that : "There are four separate set of circumstances where legally enforceable duties might arise. These are duties owed to a board of directors; duties owed to third parties; duties owed under the Companies Ordinance and duties owed under certain legislation which covers criminal activity such as the Crime Ordinance and the Theft Ordinance."

A guide produced by the Hong Kong Institute of Company Secretary (HKCIS 1995) draws a distinction between "core duties", which all company secretaries are expected to perform as part of their responsibilities as an officer of the company and additional duties "which some perform depending on the requirements of their job and the nature of the employer organisation." Over and above the core responsibilities, additional work for the company secretary, the HKCIS says, "will generally be dictated by the professional background of the company secretary" and might include legal, accounting and finance, personnel and employer benefits, general administration and general management.

Tricker, Leung and Lee (1995) in a study of the role of the company secretary in the listed companies in Hong Kong, found that listing rules of Hong Kong Stock Exchange (HKSE) and indeed government policy, as enunciated through legislation, did not amplify the role of the company secretary. Public companies participating in the study offered a wide divergence of opinions on the role of the company secretary in their organisation. The spectrum encompassed views which defined the role at one end as being a minutes taker, whilst at the other, being a facilitator to ensure that the requirements of the HKSE and the legislation are carried out. Some opinion believed that company secretaries should be qualified professionals able to provide advice to the board on matters of company law and stock exchange procedures. Other opinion played down the role as they saw dangers in the company secretary being able to check on the activities of executive

directors and hamper their entrepreneurial skills. This is an interesting insight into the opposing views of what role a company secretary should play.

Greenwood (1999) in a survey on current issues facing the company secretary profession in Hong Kong, states that it is the personality of individual company secretaries which will, in the end, define what role he or she plays in a company.

In the same survey, Hopkinson (1999) thinks that the company secretary's increased status and responsibility has not gone far enough. "The role of the company secretary has changed, but not enough. The company secretary is increasingly taking on an advisory role for the board of directors, which is good news. However, there is still a long way to go in turning the company secretary into an advisor of the board. The process has been painfully slow."

MALAYSIA

The Companies Act 1965 and the Companies Regulation 1966 are the basis for legislative control in Malaysia. Under section 139(1) of the Companies Act, 1965, every company is required to have at least one company secretary. The secretary of a company is an officer, as defined under section 4(1) and section 139(1A) requires the first secretary of the company to be named in the Memorandum and Articles of Association. The secretary of a company must be a natural person of full age (21 years) and must provide his or her principal or only place of residence in Malaysia. The secretary, or his or her agent, is required by the Act to be present at the company's registered office during the hours of business.

Under the amendments introduced in 1992, Malaysia requires a company secretary to hold a professional qualification or to be licensed by the Registrar of Companies (ROC). The amendments to the Act were occasioned by a backlog of documents refused by the ROC for lodgement because of incorrect information being provided. Now, with the introduction of the 1992 amendments, it provides the ROC

with the power to remove incompetent company secretaries who are not professionally qualified (Maltas, 1999).

In Malaysia, the role of a company secretary may differ between the size and organisational structure as well as the experience, additional qualifications and specialisation involved. Further the scope of duties and responsibilities may also differ as to whether the company secretary is employed full time by the company or is providing corporate secretarial services to his or her clients. The Act in its present state also does not distinguish between full time and professional company secretary.

There is certain legal and company related responsibilities imposed under the Companies Act 1965 as well as through the articles of association and by the appointing board itself. The Act makes a company secretary responsible for :

- Maintenance of the company's registered office (section 119);
- The lodgement of returns with the Registrar dealing with the particulars of directors, managers and secretaries (section 141);
- The lodgement of the company's annual return with the Registrar (section 165);

In addition to the above, there are numerous administrative duties covering a broad spectrum of responsibilities such as organising all company meetings and preparing the minutes thereof, administering the various company registers, ensuring compliance with Malaysian laws affecting company operations, supervising the preparation of tax returns, etc. The company secretary is usually the link between the directors and the staff, the shareholders, the press, the public and sometimes the consumers and suppliers. His or her functions are ministerial and administrative (Kang, 1994).

The role of company secretary in corporate affairs has in recent years become more demanding and onerous. This is especially so with companies going global,

entering joint ventures agreements and forming alliances internationally (Cheah, 1995).

Cheah (1999) in another article, viewed that enhancement of professionalism may be achieved only if the company secretary is pro-active in the search for knowledge and understanding of corporate law and other rules and regulations as well as having an interest in other legislation in the business world.

Sharkawi Alis (1999) commented that in this new millennium, perhaps more relevant is the developing of role of company secretary in terms of advising the Chairman and the board of the directors' and companies' compliance obligations under the law. According to him, the advisory role of company secretary is particularly relevant in the context of Securities Commission's (SC) policy shift to a disclosure-based system of regulation. The company secretary, in view of his proximity to the board of directors, is able to advise the board on matters pertaining to the disclosure responsibilities of a company and this in turn encourages compliance with the law.

On this same issue, the Report on Corporate Governance (Feb 1999) by the Finance Committee on Corporate Governance recommended that there should be no codification of the advisorial role of company secretary.

On the issues of company secretary's corporate social responsibility, Abdul Manap (1997) viewed that there is a need for high level of professionalism of the present day company secretaries and their consciousness of social responsibility as the general public places heavy reliance and trust in the management's ability to decide for itself the best "mix" of profitability and social responsibility. The company secretary as an important member of the management team should be in the front-line to effect changes in society through the activities of the corporation in which he or she serves.

Reflecting on the role of company secretary in due diligence, being the official and legal custodian of the company's or organisation's record and statutory documents, company secretary is fully responsible for the accuracy, validity and currency of these records and the information contained therein. He or she may have to conduct on his own "a closed circuit due diligence exercise" every time he receives fresh information and data (Ahmad Shahab, 1999).

The Malaysian Code on Corporate Governance (Amended 2000) highlighted that the company secretary has a key role in ensuring that board procedures are followed regularly and are reviewed. The Cadbury Committee considered it the role of the company secretary to advise the chairman and the board on the implementation of the Code of Best Practices. Company secretaries in Malaysia should similarly equip themselves sufficiently to be able to render advice on matters pertaining to implementation of the Code.

2.1.2 Non-Mandatory Appointment of Company Secretary

CANADA

It has been necessary to explore the intricacies of Canadian Corporation Law because company secretary form an integral part of the legislative regime. Appropriate delegation of powers to implement management decisions by directors is also provided under the legislation. Therefore, directors are not bound to appoint a company secretary if they believe the office is unnecessary. The by-laws or articles of Canadian companies normally provide for the appointment of a secretary, and in some cases a treasurer, which in smaller companies tends to be a combined position. This is done under a director's resolution and it is not unusual for a written contract to be provided.

Company secretaries are expected under the terms of their employment to hold some form of legal qualification with an emphasis on corporate administration (Fraser, 1994).

The Canadian corporate legislative regime permits companies to be incorporated at both the federal and provincial levels. As far as the duties of company secretary are concerned, the provincial levels are in essence the same as those found in federal legislation. Each province has their own legislation to regulate companies. It is interesting to note that the provincial legislation of British Columbia is however, significantly different from that of other provinces like Alberta, Ontario, Quebec, Manitoba and Prince Edward Island. The fact that the office of secretary is a mandatory appointment is an indication that the province has followed the thrust of British legislation, whereas other provinces have oriented themselves towards models in the United States (Maltas, 1999).

In the Hong Kong study covered earlier in this chapter, Mr Ermano Pascutto, resident managing partner in Hong Kong of the Canadian law firm Goodman Phillips and Vineberg, has commented that the institution of company secretary is not prominent under Canadian Corporate Law and that it is more usual for the role to be combined with that of corporate counsel. Professional bodies of company secretary have a low profile in Canada. The Canadian federal business corporation law, which is facilitative and flexible, has no specific role of the company secretary. The company's by-law lay down the rules for all officers.

NEW ZEALAND

Until relatively recently, New Zealand had legislation which provided for the mandatory appointment of a company secretary. Under the provisions of the Companies Act 1955, it was incumbent upon directors to appoint a company secretary. The Act also states that a secretary was also an officer of the company.

The thrust of the Companies Act 1993 (N.Z.) however, has been to place the responsibility for all company administration and management on the shoulders of the board of directors. The elimination of the statutory appointment of a company secretary is obviously in line with this philosophy.

Mc Arthur (1997) commented that the weakness of the 1955 legislation was that it did not ascribe any duties or responsibilities to the position. The articles permitted directors to delegate some of their management powers to employees of the company such as the company secretary. But at least according to him, the Companies Act 1955 provided a form of discipline on companies to protect members' interests by having to appoint a company secretary. The fact that there is now no compulsion under the 1993 legislation to appoint a company secretary does leave the door open to inefficient administration, particularly by inexperienced directors promoting new company.

2.2 SUMMARY OF JURISDICTIONS COMPARISON

It is apparent from the research into the jurisdictions covered in this chapter that Malaysia and United Kingdom provide for professional qualifications in their legislation, with others such as Australia, codifying certain statutory duties to be undertaken by company secretaries.

The Report of the Cadbury Committee has played an important role in seeking to strengthen the position of the company secretary. Most of the jurisdictions covered have referred to Cadbury Committee in ongoing changes to their company legislation.

Australia and Hong Kong are unique in that their legislation presently provides for the mandatory appointment of a company secretary for all companies. Both jurisdictions do not insist on professional qualifications, although in the case of Hong Kong, the listing rules of the HKSE make them a listing requirement for public

companies. However, now Australian proprietary companies have the option of not appointing company secretaries by virtue of the new amendments to the Corporations Law.

In contrast, in Canada and New Zealand, it was found that the directors are primarily responsible for the statutory duties normally assigned to a company secretary. In Canada, there is a federal form of government, however, each provincial government has its own company's legislation, which operates in tandem with federal legislation. New Zealand recently completely overhauled its company legislation, after a reviewed by the New Zealand Law Commission. The new legislation makes it optional for the board to appoint a company secretary and the board of directors has been given enhanced duties of care.