Book Reviews

Maren Heidemann considers two leading works in the commercial and company law fields which both provide a deep insight into their subject

Dalhuisen's Transnational Comparative, Commercial, Financial and Trade Law

Jan Dalhuisen
Hart Publishing, Fourth edition
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The late Thomas Wälde suggested when reviewing the 2004 edition of this work in the ICLQ that it could easily make three books. Dalhuisen (or his publishers) seem to have taken this advice to heart, and we now have three volumes of this fine book on an important current subject. Wälde's review was certainly the most in-depth among the voices commenting fondly on previous editions. It is therefore interesting to follow up on his thoughts when reviewing the fourth edition.

Starting with the first point of splitting the subject into three separate volumes, prospective readers will want to know if this has brought any benefits. Dalhuisen surely had a reason for writing one comprehensive volume in the first place, and I would assume that this decision reflected his holistic conception of his subject. He successfully presents the whole range of issues that the modern trader encounters in his dealings, and thereby also explains the knowledge which the modern lawyer ought to have at his fingertips. Sadly, this is not the case with most current practitioners, and this is why Dalhuisen's book still remains unique. It is still the only work presenting knowledge that flows from the modern legal environment following the expanded European market in a comprehensive way on each page.

Dalhuisen offers an effortless comparative report on international commercial contract law and regulation of our day. The text consistently uses a fluent, well-formulated narrative which makes it enjoyable to read – it does not aim to be merely a collection of case law or legislative materials in the form of a reference work such as a commentary or manual. It does not want to confine itself giving an account of what is there, but seeks to explain the motivations and background for a whole development of law.

Take as an example the short paragraph about the EU legislative efforts to regulate mortgage credit (s 3.2. in volume three). It explains the whole time span of activity and what became of it in practice (ie not much). This way of covering the subject may not replace a more specialised study from other sources for a student or practitioner, but it prevents a more futile way of familiarising oneself with a subject by focusing on facts which easily clutter the view on the necessary conclusions and evaluations. This is the general attitude and contribution of this author to the subject as far as I understand and appreciate it. Because the work is not a collection of highly specialised essays like so many others on the subject it does not induce a fragmented view but on the contrary insists on keeping the wider context in mind on every page. In particular, Dalhuisen bridges the gap between civil law and common law jurisdictions and traditions with determination and the necessary skills that only a scholar combining his profound knowledge and professional experience can have. Modern European legal science needs many scholars like this in the new post-Lisbon European Union and its "Area of freedom, security and justice" as well as for theory and daily practice outside the immediate framework of the EU legal services. This work is therefore an important reference for the making of European private law.

In order to reorganise the book in three volumes, some sections have been moved, rearranged and expanded. The latter applies to large sections of the first volume which is generally structured in the same way as before, but has been reworked in large parts, starting with the introductory sections. The section on payment methods has moved from the contract law section into the finance law volume, and has been partly rewritten and reorganised. In his concluding remarks on the transnationalisation of this area of law Dalhuisen recommends keeping an open mind to both the EU regulative efforts and traditional customs and industry practice – part of the overall approach to sustain the balance between public interest and private legal evolution. This touches on more fundamental theoretical foundations of modern trade law which are obviously subject to a much discussed redefinition of the boundaries between public and private rule making.

The section on money laundering, a much celebrated new branch of international financial regulation (and also heroically comprising terrorist finance) is still very brief but gives a very well-illustrated account in its first paragraph of the why and what of money laundering combating legislation, remarking briefly on the impact on

the fiduciary duties of banks and hence on traditional values of contract law and the private legal sphere. The following section explains in a very integrated way international and European developments in the field of money laundering prevention laws – an excellent contribution to the financial law volume, much of which is possibly best understood by readers with an existing knowledge and background of the subject, be it as a banking practitioner or as a lawyer. Clearly, in this volume speaks the banking professional in Professor Dalhuisen. The sense of an "urge to finish" that Wälde observed in the 2004 edition of the work surely has been counteracted by the inclusion of new developments such as tax avoidance legislation and banking capitalisation developments in parts II and III of the third volume.

Generally, the whole work has been thoroughly reworked, headlines reworded and new information fully integrated into the smoothly flowing text. Dalhuisen has produced a genuinely new edition, expanded by 139 pages in total.

Also of great benefit is the new layout and better print that the publishers have given the books. The headlining has been improved in relation to the previous edition, and chapters replaced by parts so that it is easier to find one's place in the overall structure of the books while reading, even though there is still room for improvement in this respect. For example, a short summary would be of use to precede the long table of contents.

The heart of the book to my mind is still the first two volumes of the work. These offer a first class comparative analysis of commercial contract and – indispensible for the trader – of movable property law and chattels in the second volume and an in-depth account of transnational law in the first. I share Wälde's experience of deriving the greatest benefit from this volume as it is the most unique of the three. It is also the one that has grown the most (by 80 pages) compared to the previous edition, even though the financial law volume is the largest of the three and one would think at first sight that most of the new knowledge has gone into that one. Surprisingly, though, the third volume has "only" grown by 51 pages despite the enormous attention given to the financial sector and the perceived volume of law reform that has taken place there. To complete the record, the second volume with its splendid comparative account of contract law and movable property law has grown by eight pages, so the subject matter seems to have remained steady.

Much of so-called transnational law suffers from the fact that law makers and practitioners still hesitate to make the law truly transnational in both law making and its application, ie the method of the application. This is the problem that Dalhuisen addresses in his first volume. He explains what truly transnational law there is for international trade and how it should be used. He deals with legitimacy, identification and the *raison d'être* of transnational commercial contract law. He is also one of a few who expressly refers to a phenomenon that mostly remains buried in the legal European subconscious – our deeply engrained legal beliefs stemming from 19th century legal theory and political system and carried forward to the present day without proper acknowledgement and revaluation. Wälde picked up on this in his 2004 review and illustrated it in a very eloquent paragraph quoting Karl Marx and Lord Keynes as reinforcements (ICLQ vol 53, part 2, p 522). It is indeed astonishing what a mark this era in continental European history has made, and to my mind it is more the political history that is significant as promoted by Savigny (cf vol 1, p 231 et seq and also p 281: "political objective connected with the emergence of the modern state as motor of modernity") rather than the legal one. It has cemented the idea of unity of law and state – or in terms of private international law "the underlying concept... that all legal relationships have a basis or seat (*Sitz*) in a *national* law and are thus all domestic in nature" (ibid, p 231) – into an inescapable axiom and thereby stands firmly in the way of true progress in terms of creating a borderless European Union or even world trade system. This is why we seem to need a "top-down-approach" again of a common frame of reference imposed by a formal legislative process at EU level (cf vol 1, p 281). The option of operating an "optional instrument" does not have a role model and therefore will be a route that most practitioners will avoid, as they have been avoiding the Vienna Sales Convention.

The problem lies in the theory of private international law which favours state law choices over soft law choices and forces the latter into the realm of arbitration tribunals and the so-called international community of traders or the illusive *lex mercatoria*. Dalhuisen gives a very thoughtful account of this complex problem of suggesting a place for the so called soft law or new *lex mercatoria*. It gives not only the author's own opinion about the transnational legal order and his own expanded elaboration of the appropriate hierarchy of norms in this area (s 3.2 in vol1) but lets the reader view the subject through the eyes of many different contributors. A very interesting line of thought relates to the identity-creating function of law in the US (vol 1, pp 201–02, s 1.5.4) which is why this process could be mistaken for the continental European way of recognising the unity of law and state. Dalhuisen then explains how this axiom might be broken up by recognising that:

> *"...the key is that in a modern society, under the rule of law, law enforcement, but not the law-creating function is monopolised by states. It means that states have to recognise all law and enforce decisions legitimately based on it, unless there are overriding public policy issues at stake" (vol 1, p 205).*

The following sentence seems to suggest the recognition of an independent legal order, ie resembling a solution of public international law:

"To repeat, the question then is which communities function as legal orders, are therefore likely to produce their own law, and are entitled to have their laws recognised and respected by other legal systems or orders, therefore also by states, which will have to give their sanction to it, much as they do to sister state laws and judgements…" .

Dalhuisen goes on to consider the notion of community (vol 1, p 206) and whether it would be conceivable that the community can "compete" with states. While I have always been sceptical of the concept of deriving legitimacy for international substantive commercial contract law from the idea that traders form a community and give this law to themselves. I certainly agree with the following statement: "The notion of community in this sense could not be left to state recognition alone as that would deny all autonomy of other legal orders and could not explain international legal orders" (vol 1, p 206).

The author then outlines various models of explanation for the existence and sustainability of international non-state legal orders and introduces a wide range of contributions from legal literature to the discussion. To my mind one convincing approach arises from the model of observing "*flows* of professionals, goods..." (ibid, p 207) across borders. This leads to the recognition of a special need to regulate something that is beyond the scope of domestic law: "Local law, whether statist or not, is unlikely to have been developed for them [the international flows], and may be deficient, parochial and atavistic or make no sense in international commercial transactions" (ibid, p 207). This keeps the discussion as close as possible to the practical application of black letter law and firmly away from highly disputed philosophical foundations and the need to resolve paradoxical self-validating models based on the "international community" as a quasi-legislator. Even though brilliant models exist to explain such problems (cf eg ibid, p 212) the model attempted here may provide an easier access route for the modern legislator such as the EU, or UNCITRAL or other institutions that may be called upon.

Moving on to explain the wider setting of transnational contract law in private international law, Dalhuisen takes the reader through the all the historical and geographical influences which have helped to form current legal rules. The overarching structure of the books thereby distinguishes it from other treaties on private international law because Dalhuisen never sees any of his subject areas in isolation but in a wider context of explaining the general legal framework of contemporary trade law – which can only be properly understood and developed when its historical and philosophical background and identity are perceived, together with the present day expression and shape of those rules.

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European Comparative Company Law

Mads Andenas and Frank Wooldridge
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INTRODUCTORY REMARKS: GENERAL SETTING, AIMS AND SCOPE OF THE BOOK

A book on "European comparative company law" presupposes a definition of the scope of company law. Upon a closer look, this might well extend beyond the traditional content of any national textbook on the subject and indeed beyond the content of much existing literature on European company law. Looking at the life of a company in the internal market one might be inclined to consider whether taxation law is not inseparably related to companies, just as are ownership, the distribution of profits and the control of its board? And what about register law (as demonstrated by the case of *Centros,* C-212/97)? Accounting standards? Employment law?

Extending the meaning of the term company law in this way beyond its traditional legal meaning one might expect to find all these aspects covered in a modern contribution to European company law. Indeed, with the exception of register laws, this new book covers a remarkable proportion of these, albeit with a varying degree of intensity. International taxation and accounting standards are both mentioned as they have of course been subject to European legislative activity (see pp 24/25, 31, and 504, although these issues are not covered as a separate subject in this book), and employees play a role in participation rules across Europe (pp 417–46). With its emphasis on the comparison of the national company laws as they stand within the framework of the European Union the book reflects the state of the current law relating to this topic.

European Comparative Company Law by Mads Andenas and Frank Wooldridge is therefore an important new addition to the lawyer's library. Why is this? Companies in Europe currently benefit from unlimited new rewards flowing from an increasingly well-organised internal market and an increasingly borderless society within the expanded EU, but at the same time they face major challenges flowing from the very same sources. One example is the movement of head offices, shareholders, business activities and registered offices across borders within the EU. In *Cartesio,* Case C-210/06, the ECJ eventually reconfirmed the boundaries to any migration activities of European companies. It ruled that it is acceptable under EU law for national legislation to provide that a company could not leave one jurisdiction and settle in another by way of moving the registered office and retain the same identity. Instead it has to dissolve and reincorporate itself in the new jurisdiction – at potentially prohibitive cost. This is the accepted state of affairs regarding exit taxes (see *Daily Mail,* Case 81/87, and p 48 of this book).

Cartesio confirmed that companies are essentially creatures of the jurisdiction in which they are formed. They derive their legal existence and status from national company law and do not necessarily otherwise exist. For this reason, national rules relating to reporting, accounting and auditing, taxation and registration still govern companies exclusively in all 27 Member States while efforts to harmonise them remain rudimentary.

We therefore still maintain and need national company laws, and on a European level we need the comparative viewpoint to keep on top of them. This is why this book covers an important area of law and responds to a need in international legal research, practice and teaching. It summarises the current status quo of national and European company law along with recent extensive law reforms in the jurisdictions covered within the context of current debates, but without the judgmental flavour that usually flows from national lawyers' perspectives (for a more subtle and possibly even unintentional example of a side kick towards European efforts in company law see K J Hopt, "Modern Company Law Problems: A European Perspective Keynote Speech" (Company Law Reform in OECD Countries: a Comparative Outlook of Current Trends 2000) <http://www.oecd.org/dataoecd/21/28/1857275.pdf>, accessed 17 January 2011, 13). The book also avoids considering what ought to be rather than what is.

Further issues facing companies in today's internal market include taxation, accounting and registration. For example, in the area of taxation, topics discussed at European level include exit taxes, as well as the admission of a common tax base for groups of companies across the EU (A project still in the planning stage – information can be obtained from the GD TAXUD website http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm#practical). These are being discussed in an effort to simplify procedures for groups of companies or "concerns" who, due to the national divergences of company law, are still usually forced to maintain a multitude of differently structured enterprises and file separate reports and accounts in all jurisdictions in which they operate. This does not only create considerable extra costs but also contributes to a related problem, that of international auditing. Due to the complexity of the task at hand, and the fact that only a handful of auditing firms have the resources to undertake what is required, it has become necessary to work on legislation to reduce the risk of incorrect information being at the heart of economic crises following large scandals such as the one surrounding Enron and Worldcom (see p 33 of this book and cf W Doralt et al, "Max Planck Institute Working Group on Auditor Independence – Comments on the European Commission Green Paper: Audit Policy – Lessons from the Crisis" (Max Planck Private Law Research Paper No 10/24, Max Planck Institute for Comparative and International Private Law, Hamburg 2010)).

In terms of taxation, but also when foreign takeovers are involved, companies are regarded as assets comparable to real estate, albeit virtual. In international taxation expressed by double taxation conventions they are regarded as located where they were formed or where they operate by way of so-called permanent establishments and PEs. International tax law applies similar principles to them as it does to immovable property. In the case of takeovers and acquisitions, activities of sovereign wealth funds and generally foreign investors have been eyed with a degree of unease in the recent years in some host states. This controversial aspect remains unmentioned by Andenas and Wooldridge in the present book. However, it goes to show that companies, despite their private law origin and nature, are regarded as important public assets and sources of income if not downright expressions of national identity – as demonstrated by the Golden Share cases and also illustrated strongly by the takeover of Mannesmann by Vodafone in Germany. The issue was also vigorously discussed at the XXIV FIDE Congress in Madrid (3–6 Nov 2010). All this explains the possessive attitude of the European states towards "their" companies and the continued importance of comparative company law. European law adds a considerable degree of tension to the interplay of national laws and international trade in that it increases the gravitational force towards a transnational approach to company law.

Individual states may consider that where they nurture a company to become successful under their tax regime – for instance by granting depreciation, allowances and bonuses across the balance sheet – that company should contribute in the form of an exit tax on leaving (*Daily Mail* case). Compromise has been considered in the form of deferral of such a tax on dissolution or sale, but discussions have not so far yielded tangible proposals or legislation. Andenas and Wooldridge comment on the preferential treatment of takeovers over mergers in terms of taxation at p 504.

Regardless of whether or not such a scheme would be fit for an internally and externally expanded EU, it definitely forms part of the complex setting in which European companies operate. The national nature of company law gives rise to some problems and also to privileges for national jurisdictions which are being balanced by way of EU-level discussions about potential areas of reform, and also by some achievements – notably new forms of truly European companies, the SE and the EEIG (see pp 377–416).

STRUCTURE AND CONTENT

Mads Andenas and Frank Wooldridge have contributed a valuable tool: a very accessible handbook for practitioners, students and academics alike where they can find an up-to-date overview of the different elements of company law in selected European jurisdictions (the UK, Germany, France, Italy, Spain, Belgium and the Netherlands and occasional reference to other jurisdictions where appropriate), European law that had been enacted under the Treaty of

Rome to the publication date, and draft legislation (s 2.E). Over 535 pages, the authors set out 10 subject areas which form the most important components of company law, and present the status quo of the law in the aforementioned jurisdictions governing those issues. The first subject following the Introduction is entitled "European and comparative company law" (pp 7–51), which set out what makes the comparative element indispensable in company law. This section starts (A) by referring to the sources and enabling legislation in the Treaty of Rome which give the Community (now Union) the power to enact rules which directly or indirectly affect national company law, or indeed create company law at EU level.

The authors then move on (B-C) to give an overview of European legislation and case law arising from free movement provisions in the Treaty concerning capital and the freedom of establishment. This covers case law dealing with the so-called Golden Share agreements as well as moving a company's seat or registered office across borders. Sections D-F then focus on the most "hands-on" examples of modern European legislation activity which directly seek to transform national company law in order to facilitate the smooth functioning of the internal market and address specific problems that trade encounters due to the fragmented traditional law. In these sections, the authors brilliantly explain to the reader where the problems of harmonisation in the area of company law lie. They do this by including all the relevant areas of reform and harmonisation in which companies operate, as explained above, and also by outlining important contributions and debates in the literature. In this way, the reader is able not only to understand the dimension and complexity of the subject but is also taken through the most important cornerstones and answers.

The following sections are entitled Formation of companies (52–98), Types of business organisation (99–167), Share (or equity) capital and loan capital (168–264), Management and control of companies (265–376), Business entities governed by Community law, and Employee participation (377–447), Groups of companies (448–90), Cross-border mergers and acquisitions (491–515) and, to conclude, Investor protection (516–35). This method of structuring the subject matter is expressly distinct from other authors' treatment of the same subject (p 7) and clearly offers a new and compact way of introducing the details of each area of company law in its national and European context.

This method of structuring offers readers from different jurisdictions the possibility of finding familiar angle to start looking at how an issue is treated in other Member States. The details of how each national law deals with the formation and organisation of companies differs tremendously through European countries, so understanding a foreign jurisdiction's company law is not a straightforward exercise for national lawyers, judges and academics. And yet, day-to-day legal practice requires recourse to foreign company law to the extent that the internal market expand's and the Union provides a growing body of harmonising and regulating legislation (see p 2 and K J Hopt, "Modern Company Law Problems: A European Perspective Keynote Speech" above, p 12).

Understandably, the considerable differences among the company laws of different countries cause confusion among practitioners and even national judges and authorities. The most notable differences are to be found in the formation process. Here, the major legal traditions are formed by the German and French law based systems and the Anglo-Saxon traditions. Andenas and Wooldridge have therefore chosen the jurisdictions they analyse based on this division in order to help the understanding of those different approaches and their underlying motivations and practices. Major clashes have occurred over the legal recognition of companies formed abroad when they are deemed to have moved the real seat or their registered office to the host country. Germany and Denmark famously believe in the "real seat theory" according to which in such a case a company does not have legal personality in the host state once it moves its real seat from the country of origin. This was the secenario in *Centros* and *Ueberseering* where companies either did not do business in the state of incorporation but only in the host state (*Centros*) or where they subsequently moved their set up to the host state in such a way that it was regarded as moving the "real seat" (*Ueberseering*).

The United Kingdom and the Netherlands believe in the incorporation theory according to which the company derives its legal status from the country in which it was incorporated and does not lose this status by mere factual changes as long as it does not get formally dissolved or unregistered. This led to a series of cases before the ECJ. The outcome is history (for an account of the chain of events and the sophisticated German conflict of laws approach, see eg W H Roth, "From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law", 52 ICLQ 177). However it is important to look at the motivation behind those two different approaches. From the Danish and German viewpoints the problem raised by the foreign companies was that limited companies effectively were able to operate in Germany or Denmark without having paid the same amount of share capital as the Danish and German registered limited companies did. This was regarded as an evasion tactic, an abuse and a threat to creditor protection. A lot can be said about this attitude in terms of legal theory and practice, but this is not the place to go into further detail. Here it is interesting to note the suspicion element in this process which is still not entirely resolved and has repeatedly resurfaced in the case law of the ECJ. It is dealt with, among others, under the heading of regulatory competition in the present book (p 33 et seq).

Another connotation of the formation of companies is how the details of each company's legal personality and

status impact on their treatment in international taxation, other than the above mentioned exit taxes and PEs. Double taxation conventions famously struggle with the classification of partnerships, not only because of the question of whether or not the shareholders should be treated as "transparent" or not for tax purposes, but also because the commercial nature of such entities is not self-evident and straightforward to establish in all national European legal systems. In the UK, for instance, the distinction is whether or not companies operate for profit or not, while in the so-called continental jurisdictions – particularly Switzerland, Austria and Germany – the distinction is between merchant and non-merchant companies (as well as persons), with merchant companies forming so-called *Handelsgesellschaften*.

Austria has reformed its Commercial Code and replaced the notion of merchant by that of entrepreneur (*Unternehmer,* §1 UGB (2007)). The previously existing sophisticated classification of merchant in the §§1, 2 and 6 of the old (German) HGB (1938) and its predecessor, the *Allgemeines deutsches Handelsgesetzbuch*, ADHGB (1862), was thereby repealed. The ADHGB of 1861 is still in force in Liechtenstein since 1865 as amended. It still maintains the notion of *Kaufmann*, merchant, as well as the notion of *Handelsgeschaeft.* Details of the German commercial law are concisely summarised by Andenas and Wooldridge (at pp 141–46).

The traditional dichotomy between merchant and non-merchant companies is not easily reconcilable with not only the Anglo-Saxon approach but also with the rather novel concepts emphasised by European legislation introducing the subject of "consumer" and "entrepreneur." While, again, arguments could be exchanged on this topic, here the need is to highlight the driving forces that keep company laws different and distinct and also to illustrate how much the details of each country's company law relate to a score of closely related domestic legal matters that will not be easily harmonised or simplified for the international business world.

CONCLUDING REMARKS

The currently existing examples of harmonised company law, the new forms of company at Union level, and the common uniform regulatory network in the European Union are therefore an all the more remarkable achievement. The authors give an excellent account of the current status of this framework in a consistent and effortlessly clear and straightforward style. This book is compact, accessible and yet not lacking in depth. On the contrary, the task of explaining a broad range of issues in their context far beyond merely reporting the content of the law is well mastered here. *European Comparative Company Law* offers a valuable tool for learning and reviewing the state of the law in the European jurisdictions and at EU level, and how these spheres relate to each other. It also offers food for thought by discussing individual questions from controversial viewpoints and giving the authors' own concerns and views where they apply (see eg pp 47–51 or 514). The combination of two academics of such standing promises much and fulfills expectations. An excellent read and strongly recommended for teaching and reference.

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