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National Corporate Law In A Globalised Market By David Milman

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Introduction

"No man is an island."[1] Globalisation and the growth of communications and dealings of all kinds between actors across the world bring this truth home in a very palpable way. *National Corporate Law In A Globalised Market* looks at how British corporate law has been shaped by the need to reflect the presence of foreign shareholders in domestic

[1] John Donne, *Devotions upon emergent occasions and several steps in my sickness – Meditation XVII* (1624).

corporations and the operation of foreign corporations in the United Kingdom. It also looks at how British corporate law has responded to the competitive pressures implied by capital's ability to move to jurisdictions that offer it a friendly reception.

As the book's title suggests, it has its own distinctive perspective. It is a study of the UK's national law system but in an international context; it is sensitive to the great themes of comparative corporate law. The book is timely in that the UK and the EU now have a great deal of experience in addressing the international dimension of corporate law, in deciding on the areas where collaboration is needed and in developing the tools needed to make national corporate law responsive to the international context.

Comparative corporate law is now a very important area of study. As the author demonstrates, corporate law and corporate governance scholars now need to combine a detailed knowledge of the corporate law of their own system, an awareness of how it can usefully be compared with other national systems and a theoretical framework that allows some kind of sense to be made of the mass of detailed rules.

David Milman was a professor at the University of Manchester for a long time and he is currently the Dean of the School of Law at the University of Lancaster. He brings to bear a masterly grasp of the details of UK corporate law derived from a career devoted to its study and the knowledge and ability to put an exposition of national law into comparative perspective. His analysis explains and applies the theories that dominate comparative corporate law. The author acknowledges that his substantial experience of teaching corporate law to very many advanced students from all parts of the globe has been one of the forces compelling him to find a way of making sense of a very complex picture and of communicating the resulting understanding to others.

Why it matters

Corporate law in general, and its international dimension in particular, matter for a range of reasons. Corporate law determines the conditions under which businesses can enjoy the obvious benefits of incorporation. Corporate law and corporate governance affect in many ways relations within businesses and the way that firms operate. It is important, then, to have a business-friendly system of corporate law. At the same time, corporate law has to meet the reasonable expectations of other groups such as creditors. The freedom of capital and of businesses to move across national boundaries adds a new dimension, and a new level of complexity, to the task of shaping a reasonable corporate law. It also paves the way for the view that corporate law is a product or service in its own right and one for which there is an international marketplace.

What is corporate law?

"Corporate law" means different things according to the jurisdiction under consideration. It obviously includes the rules that govern the process of incorporation, the internal governance of companies and the circumstances under which the corporation is bound by contracts with third parties (for example). But it can also include the rules concerning insolvency, securities law and relations with employees or their representatives. The UK's tendency is to use corporate law to focus on core themes and to hive off into separate legislation matters related to insolvency, securities regulation and employee relations. The task of comparing corporate law systems is made more difficult because

some jurisdictions differ from the UK in their view as to which matters fall within the province of corporate law.

The process of consultation leading up to the UK's Companies Act 2006 shows that, so far as the UK was concerned, there was no appetite for a fundamental reappraisal of the underlying themes of corporate law. Rather, it was a case of fine-tuning and modernising the existing system. Chapter 2 of *National Corporate Law* makes the point neatly in its section on 'Critical Regulatory Goals'. Here the author, drawing on the UK experience, indentifies a number of central issues in corporate law regulation. They include: ensuring an effective and customer-driven incorporation process, preventing creditors from the abuse of limited liability, curbing misuse of managerial powers, protecting shareholders, developing a user-friendly regime and adapting to new technologies.[2] This list shows that the emphasis has been on improving the administrative machinery of the UK's pre-existing corporate law system.

The international dimension of domestic corporate law

The UK's corporate law system has long had an international dimension. In chapter 3, the author shows the efforts made to encourage foreign shareholders to invest in British companies. For example, it is possible to create classes of shares denominated in foreign currencies.[3] At the same time, the UK has attempted to prevent foreign shareholders from incorporating locally where it was feared that this would cut across specific national policies. Where, however, the foreign investment emanates from another EU member state then there is little scope for such discrimination since they are incompatible with the freedom of establishment and free movement of capital provisions of the EC Treaty.[4] The same considerations have meant that the golden share provisions in privatised companies are generally unlawful.

National Corporate Law also discusses the sometimes difficult relationship between overseas companies and domestic corporate law. The UK has adopted a welcoming stance towards foreign companies in that it is prepared to recognise them as separate legal entities. The author notes, however, that there has been a lack of clarity as to which provisions of the Companies Act apply to overseas companies. He suggests that this is an area where the law could be more explicit and that it would be useful to identify more clearly those provisions of the Act that apply to overseas companies.[5]

Regulatory competition

National Corporate Law is a study of the impact of globalisation on the UK's system of corporate law. It invites the reader to think about the consequences of the fact that there are in the world, and even within the EU, many national systems of corporate law rather than a single global system. This diversity of systems, if combined with rules that make it possible for businesses to choose the system that will apply to them, creates the possibility of regulatory competition. That is, it is possible for states to decide to compete with each other to attract incorporations. Other things being equal, senior managers and

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[2] Milman, Ch. 2, at 45 – 59.
[3] *Re Scandinavian Bank plc* [1988] 1 Ch 87.
[4] *Factortame* (C221/89) [1991] ECR I-3905.
[5] Milman, Ch. 5 at 103.

investors can decide to incorporate in the state that offers them incorporation on the terms that are most satisfactory to them.

As originally explained by Tiebout,[6] diversity and regulatory competition are good things. It is helpful that different states have their own distinctive offerings since this would allow each consumer of the regulatory "product" to seek out and choose the state with the offering that suited him best. In the corporate law context, Tiebout's theory suggests that it is good both that corporate law is a matter for individual states and that states differ from each other in terms of the corporate law package that they offer. This diversity allows each business to choose the package that suits it best.

As *National Corporate Law* points out, however, there is a danger that regulatory competition will result in a race to the bottom.[7] This would happen where the legitimate interests of some corporate stakeholders, and of society at large, are sacrificed in an effort to create regulatory packages that pander excessively to the self-interest of the most powerful constituents in the corporate community (senior management and major shareholders). They are also likely to be the most mobile of the corporate constituencies and regulatory competition works best for people and groups who can easily move to the environment that suits them best. This is illustrated by the threats of bankers to leave London and move to regimes with a tax regime that is more favourable to them. Insolvency Law provides another arena for regulatory competition. This is discussed especially in chapter 8 of *National Corporate Law*.

The EU's harmonisation process removed the scope for regulatory competition in the areas of corporate law that were affected. *National corporate law* argues that the harmonisation programme has been the prime driver behind UK corporate law reform for the past thirty five years[8] but points out that there have been some significant failures.[9] Sun and Pelkmans argue that the EU's approach to harmonisation has improved with time and that there has been a shift from a detailed and rigid approach to the use of framework directives that leave greater room for local variation (and so some regulatory competition).[10] This experience and the refining of the regulatory tools is a model that the EU might be able to offer to the rest of the world.

Some member states of the EU have private international law systems which had the effect of making regulatory competition unworkable in the corporate law area. Chapter seven of *National Corporate Law* explains the conflict between real seat and place of incorporation systems. The former insist on incorporation under the law of the jurisdiction in which the real seat of corporate management is based. The national corporate law system of that jurisdiction applies to the corporation. Jurisdictions with a place of incorporation system, by contrast, allow businesses to incorporate under their corporate law regardless of where their central management is located. The real seat system is a barrier to the corporate mobility that would allow regulatory competition to

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[6] C. Tiebout, 'A Pure Theory of Local Expenditures', (1956) 64 Journal of Political Economy 416.
[7] Milman, Ch. 9 at 152.
[8] Milman, Ch. 1. at 15
[9] Milman, Ch. 1. at 17.
[10] J.-M. Sun and J. Pelkmans, 'Regulatory competition in the single market', (1995) 33 Journal of Common Market Studies 68.

take place since it means that the decision to incorporate in a particular jurisdiction is also a decision to locate central management in that jurisdiction.

The *Centros* decision[11] and those that followed it, however, allow for greater corporate mobility. *Centros* makes it much more difficult for member states to rely on the real seat system to prevent businesses from incorporating in the jurisdiction of their choice. A businesses can incorporate in member state A (a place of incorporation jurisdiction) and then set up a branch (and have its controllers) in member state B even if member state B is a real seat jurisdiction. *Centros* is usually thought to favour regulatory competition since it allows businesses to incorporate wherever they like within the EU. *Centros* shows that freedom of establishment has gained the upper hand over harmonisation.[12]

Convergence

Some comparative corporate law theorists argue that a process of convergence is shaping corporate law systems around the world. Hansmann and Kraakman[13] have argued that, like it or not, corporate governance systems worldwide are converging on the US model with its "shareholder-centered ideology". They argue that the consensus view is now that ultimate control should rest with the shareholder class and that this will improve aggregate social welfare (not just the private interests of the shareholder class). It is their contention that this has profound consequences for corporate law. Shareholder-centred corporate governance systems are gaining ground, they say, for several reasons including the superior economic performance of the jurisdictions in which it predominates. This convergence, they suggest is towards a standard model with the following features:-

1. managers owe their duties to shareholders;
2. other groups have their interests protected by contract and regulation;
3. minority shareholders have to be exploited against exploitation;
4. the market value of shares in publicly traded corporations is the principal measure of shareholder interest.

Their contention is that shareholder value is the best model regardless of ownership structure.

National Corporate Law devotes chapter nine to a consideration of the very many forces that are driving convergence. These include a variety of channels by which interested parties across the globe are able to monitor approaches to corporate governance across a range of jurisdictions.

Conclusion

A number of important themes contribute to the narrative. These include; the development of British corporate law culminating in the Companies Act 2006, the EU's harmonisation programme and the impact of important ECJ decisions such as *Centros*. The author also takes a longer historical view and shows how the UK has treated foreign investors in domestic enterprises and foreign corporations operating in the UK. He

[11] *Centros Ltd v Erhverus- og Uberseering Selbsstyrelsen* (C-212 / 97) [2002] E.C.R. I – 9919.
[12] Milman Ch. 1 at 17 – 18.
[13] H. Hansmann and R. Kraakman, "The end of history for corporate law", (2001) 89 Georgetown Law Journal 439.

discusses the prospects for convergence and shows how regulatory competition has been an important driving force in the recent evolution of our national corporate law. The book shows the issues that the UK's corporate law has long had to deal with and that are now more pressing than ever. It will be especially useful for advanced students of corporate law and of comparative corporate law. For them the book will be a friendly guide through the maze of this subject.