Til Knut Martin Tande
Fra administrasjonen/JOSP
Dato: 2012 12 10

Fullmaktsvedtak: JUS274-2-A Comparative Company Law and Economics I: Theory and Structure - Litteratur

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Vedtak:

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Comparative Company Law with Law and Economics

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Seminars and Questions

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Seminar I

The Theory of the Firm and the Corporation

Questions

1. What caused the rising of a firm under a free economy with price mechanism, i.e. what are the pros of having a firm in relation to frequent independent transactions, long term contracts, tax purposes? If the organization of a firm is that efficient, then why have the growth of it been limited historically?

2. What is meant by the "corporation as a nexus of contracts". How to understand the agency cost attached to the corporation?

3. Describe the major characteristics of a corporation and the efficiency arguments/economic rationales behind them.

4. In the context of enabling and mandatory rules of corporation law, what are the justifications for a combination of both? If necessary, draw a line between each.

Reading:

Bearle Adolf A./ Means Gardiner C., The Modern Corporation and Private Property (1932), abstracts (pages 304-313)

Coase, Ronald H, The Nature of the Firm, Economica n.s. 4 (November 1937), abstracts (pages 386-398).

Easterbrook Frank H./Fischel Daniel R., The Corporate Contract, 89 Columbia Law Rev. 1416-1448 (1989).

Gordon Jeffrey N., The Mandatory Structure of Corporate Law, 89 Colum L Rev 1549 [1989]

Hansmann Henry/Kraakman Reinier, What is Corporate Law?, in Kraakman/Davies/Hansmann/Hertig/Hopt/Kanda/Rock, The Anatomy of Corporate Law (2009).

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Seminar II

Harmonisation of Company Law — Why and how?

Part I: European Union, Harmonisation of Company Law and the Delaware effect in the US

1. A topic which more occasionally is discussed in Europe or in the different member states of the European Union is if, and if so by what means, harmonisation of company law within the European Union is necessary.

Discuss to what extent a harmonisation is necessary to achieve the objects with the European Union and for instance the preamble to the first and second company law directive). Is it necessary only because the EU says so? Or does it fulfil a necessary purpose?

Also discuss harmonisation of company law as necessary from a economical point of view, i.e. as a mean to achieve economic efficiency.

Furthermore, is the SE and the proposed SPE necessary for the integration of the EU economy and to facilitate entrepreneurship? What is the legal and empirical basis for them?

2. The European Union has at least in the past been indirectly influenced by the "Delaware-effect" and the "race to the bottom". What does this mean and implies? What are the logical consequences of it?

3. The "Delaware-effect" might, however, been seen as a "race to the top". What does this mean and implies? What are the logical consequences of it?

Reading:

Articles and books:

Cary, William L., Federalism and Corporate Law: Reflections upon Delaware, 88 Yale L. J. 663-707

Cheffins, Brian R, Company Law, Theory, Structure and Operation; careful reading: chapter 9;

Hamilton, Robert W, The Law of Corporations, 5th edition 2000, p 62-68.

Kraakman, Reinier, Armour, John, Davies, Paul, Enriques, Luca, Hansmann, Henry B., Hertig, Gerard, Hopt, Klaus J., Kanda, Hideki and Rock, Edward B, The Anatomy of Corporate Law, A Comparative and Functional Approach, Second Edition 2009, part on Delaware effect.

Winter, Ralph K., State Law, Shareholder Protection and the Theory of the Corporation, 6 Journal of Legal Studies 251-292.

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Seminar II

Harmonisation of Company Law — Why and how?

Part I (continue): European Union, Harmonisation of Company Law and the Delaware effect in the US

4. Is there any empirical support for the argument that Delaware Corporation Law does increase shareholder value? If so, do you accept the "race to the top" argument?

5. On the other hand: Are there any empirical support for the "race to the bottom" theory? Conclusion: A race to the top and a race to the bottom — a logical meltdown? Any suggestions?

6. Is there really a market for corporations in the US? Is the large amount of publicly traded corporations incorporated in Delaware explainable partly/fully by other factors than the argument that the corporation law in Delaware is the "best of the best"?

7. Neither of the two forementioned schools of thought concerning the "Delaware-effect" can be said to have the upper hand in the discussion. But what are the implications of this discussion for the European Union and the future of the harmonisation work in company law? Does it add another dimension to question 1 and 2 supra, and, if so, in what way and to what extent?

8. Can a company within the European Union (EEA) move to another country within EU (EEA) by means of an international merger, a reincorporation or change of the real seat?

9. Can a company formed in one state within the European Union establish a branch in another country legally under the Treaty of Rome even if it have never been carrying on business in the first state (but is a legally valid company in that state) and if this means that the real seat of the company is in the second state?

Reading:

EU-material:

10th Company Law Directive concerning cross-border mergers (2005/56/EC)

Proposal for the 14th Company Law Directive on the transfer of the registered office of a company from one member state to another with a change of applicable law

Regulation on the European Company

Proposal for the SPE (European private company)

Daily Mail (Case 81/87, 27 September 1988)

Centros Ltd v Ehvervs- og Selskabsstyrelsen, Case C-212/97 [1999] ECR I-1459

Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00 [2002] ECR I-9919

Cartesio (Case C-210/06, 16 December 2008)

VALE Építési Kft (Case C-378/10, 12th of July 2012)

Articles and books:

Andenas, Mads, and Wooldridge, Frank, European Comparative Company Law, 2009, chapter 2.

Bhagat, Sanjai, Romano, Roberta, Event Studies and the Law: Part II: Empirical Studies of Corporate Law, 4 Americal Law and Economics L. R. 380-423 (NB: pages 382-394).

Carney, William J., Shepherd, George B., The Mystery of Delaware Law's Continuing Success, 2009 U. ILL. L. REV. 1.

Kahan, Marcel, Ehud, Kamar, The Myth of Competition in Corporate Law, 55 Stanford L. R. 679-749.

Sorensen, Karsten Engsig, Neville, Mette, Corporate Migration in the European Union, 6 Columbia J. of European Law 181-208.

Subramanian, Guhan, The Disappearing Delaware Effect, 20 J.L. Econ & Org. 32

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Seminar II

Harmonisation of Company Law — Why and how?

Part II: Harmonisation by federal/EU Law (directives), Model Act or competition between the states/member states?

1. Discuss why no harmonisation of company law in US has taken place by federal legislation. Reasons? Compare this with the situation within EU. Can the reason for the different approach in US versus EU be explained only by reason of economic, social, cultural, political and language similarities? Or can it not? Why either?

(It should be noted that the US constitution do confer the right to the federal legislator to legislate in the area of company law. This right has, however, not been exercised in the strict field of company law except for — more or less — the Sarbanes-Oxley Act.)

2. Delaware aside the work done by the ABA on the Model Business Corporation Act (MBCA) since the early fifties has been very successful. More then 40 states in the US have to a larger or smaller extent been influenced by this (but perhaps not Delaware). Discuss why you think this has been the case.

There is work going on with a European Model Company Act (EMCA), but note it is focused on public companies. See:
http://law.au.dk/forskning/forskningscentre/europeanmodelcompanyactemca/overview-over-the-emca-project/

What is your opinion of this project and its potential success? Does Europe need it?

3. From a theoretical point of view there are three ways by which harmonisation of company law can be achieved. Those are:

(i) Mandatory federal/EU rules (as for instance in the form of EU directives),

(ii) Model Act (model legislation which the individual states/member states may or may not implement; cf. the MBCA), or

(iii) Competition between the member states (which in theory leads to harmonisation).

(a) Analyse the advantages and disadvantages with harmonisation of European company law in the form of company law directives.

(b) Analyse the second company law directive from a technical point of view as regards the following: complexity, flexibility and level of protection for creditors.

(c) Discuss the advantages and disadvantages with Model Act legislation as a mean to achieve harmonisation of company law.

(d) Competition between states/member states as a mean to attract businesses do exist and has always existed (cp. tax law and labour law). Discuss advantages and disadvantages with such competition as a mean to achieve harmonisation.

(e) Sum up advantages and disadvantages with respective form of harmonisation. Your conclusion for Europe and for US?

4. One important aspect of harmonisation of company law is who develops the legislation. Discuss this from the point of view of your country. Also discuss if your legislator has as an objective of attracting companies (or just keeping them: *defensive competition*) to use your state as a domicile.

Reading:

See previous material plus the following articles:

The High Level Group and the Issue of European Company Law Harmonisation – Europe Stumbles Along?, i The Regulation of Companies, , A tribute to Paul Krüger Andersen, Mette Neville & Karsten Engsig Sørensen, s 183-199, 2003.

Blackburn, Terence L., The Unification of Corporate Laws: The United States, The European Community and the Race to Laxity, 3 George Mason Independent Law R. 1-95.

Report of the Reflection Group On the Future of EU Company Law
See:
http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

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Seminar III

Part I: General Principles of Civil Law and Common Law

Part II: Practical lawmaking — types of companies, purpose with legislation and the question of predictability

Part I: General Principles of Civil Law and Common Law

1. One basic problem with comparative legal studies is the differences between the civil law countries and the common law countries.

(a) Try to identify the main differences between the common law system and the civil law system within your **work group** based on your own legal experience with a focus on the legal sources and the structure of the legal system.

(b) Discuss the difference between the common law system and the civil law system as regards legislative technique and interpretation of statutes. Use section 197-214, 677-682 CA 2006 (UK), chapter 8 sections 7-11 in the Norwegian CA/ACA and chapter 21 in the Swedish CA 2005 as a case study, but do not focus on the material differences between them.

(c) Discuss advantages/disadvantages with the legal systems respectively.

Reading:

See supra and Zweigert, K & Kötz, H; Introduction to Comparative Law, 2 ed., Oxford 1997, p 149-162 and 284.

Part II: Practical lawmaking — types of companies, purpose with legislation and the question of predictability

2. One main issue for a legislator who is considering a company law reform is how the law should be structured — should it be extensive or short, should it be one Act for both the public company (AG) and the private company (GmbH) or should be divided into two Acts? (For instance for the Swedish and the Norwegian legislator this was an actual problem from 1992 and the following years; the legislator in the two countries took a different view in the end. Denmark has tried both approaches since 1973.)

The legal situation in a few European countries is as follows:

Denmark: From 2010 the Danish Act on Public and Private Limited Companies (the Danish Companies Act; lov om aktie- og anpartsselskaber (selskabsloven)). Between 1973-2009: One extensive Act concerning public companies and one short concerning private companies (originally a copy of the Act concerning public companies, but later – 1996 - transformed into a short one). Before 1973: One Companies Act.
Germany: One extensive Act concerning public companies and one short Act concerning private companies.
Great Britain: One extensive Act covering both public and private companies.
Norway: One extensive Act concerning public companies and one extensive Act concerning private companies.
Sweden: One extensive Act covering both public and private companies.
Finland: On average size Act covering both public and private companies.

(a) Divide the above mentioned solutions into different categories. Which and how many can you identify?

(b) One colleague of mine argues that the UK CA 2006 is one of the worst company's legislations ever because of its length and complexity. My opinion is that the Swedish CA 2005 is even worse even if it seems to be shorter (850 §§ compared with 1300 sections in CA 2006). Who is "right" and why? [Disregard the fact that I am responsible for the course!] In your evaluation take into account the different statutory draft technique in England as a common law country and Sweden as a representative for the Scandinavian legal tradition.

(c) Discuss advantages/disadvantages with the different categories baring in mind the differences between the public and the private company (typically).

Furthermore, analyse the hypothetical differences between them from the following points of view as to the character of the legislation:

mandatory and restrictive,
non-mandatory and enabling,
protection of minority shareholders,
management friendly,

stakeholder friendly and protective (for creditors and employees) or the opposite, and transaction costs presumably related to each category.

(d) Discuss the impact of the EEC company law directives depending on which solution you have.

(e) Discuss the legal sources for the European Company, i.e. the regulation, statute of the company, national legislation and so forth. What is the advantages and disadvantages with this type of renvoi technique in EU legislation (or why did it make our beloved political leaders so happy?). Compare it with the legal sources and structure of the proposed regulation on SPE (European private company).

Reading:

See the material for seminar I and II.
Regulation for the European Company
Proposed regulation for the SPE (European private company)
Andenas, Mads, and Wooldridge, Frank, European Comparative Company Law, 2009, chapter 4.

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Seminar IV

Minimum share capital and capital protection as a legal device to achieve protection for the creditors of the company

1. Another issue in company law theory is if, and if so to what extent, company law must include mandatory rules for the protection of creditors. One basic question is, however, which creditors is concerned with such rules and to what extent mandatory rules are necessary (and do provide protection) for them?

Try to identify different categories of creditors in a company and discuss thereafter to what extent they requires a particular protection because of their status as creditors (i.e. because of their relationship with the company) or if the they by contract or otherwise can protect themselves (and in fact do so).

Furthermore: To what extent can an argument based on economic efficiency be relevant in the context of whether company law should include rules for the protection of creditors?

2. One traditional argument in favour of rules which are supposed to protect creditors of a company (such as the minimum capital requirement and the protection of the share capital and other restricted reserves, i.e. the capital maintenance doctrine) is that this is what it cost for the shareholders to achieve the limited liability.

Discuss whether this argument is valid or not. If the argument is valid — to what extent is this the case and in what way?

3. The requirement of a minimum share capital differs between public and private companies and between different countries. Present at the seminar the minimum capital requirement in the following countries as regards both private and public companies:

Sweden:
Denmark:
Norway:
Germany:
UK:

Irland:
Holland (from October 2012):
Belgium:
France (including the SAS):
Italy:
Spain:
Austria:

4. Study article 15-16 of the second EEC company law directive, § 40 of the MBCA 1957 edition, § 45-46 MBCA 1979 edition, § 6.40 and § 8.33 MBCA, § 3-4 and § 8-1 of the Norwegian CA/ACA.

(a) Try to sort out the different legal solutions as a mean to achieve creditor protection in separate categories/types. What is the main difference between them? Discuss also the different kind of sanctions.

(b) The European approach to distribution of profits is very different to the one in the US. Discuss the legal philosophy in the US compared with the one in Europe against the official comment to § 6.40 MBCA and the preamble to the EEC second company law directive and article 15 in this.

Also look at the recent legal reform in the Netherlands concerning distribution of profits in BV-companies.

(c) There are also legal differences between the different company laws in Europe. Study sections 829-853 CA 2006, §§ 57-62 German AktG and §§ 29-32 German GmbHG. Can you identify any particular differences (a suggestion: compare the principle if all shareholders consent/agree to a certain act). Compare also with § 174 Delaware General Corporation Law (together with §§ 154 and 244).

5. Discuss the future development in Europe against the development in USA as regards
(i) the requirement of a minimum share capital (no such requirement in most states in the US), and
(ii) the restrictions which apply to distribution of profits and other types of distributions from a company.

What solution do you want to see in the future in the legislation and why?

Reading:

Andenas, Mads, and Wooldridge, Frank, European Comparative Company Law, 2009, chapter 5.

Andersson, Jan., Creditors and Company Law: Do We Discuss One Area of the Law and Pretend to be Ignorant of Another. In *Company law and finance*. Copenhagen: Thomson, 2008.

Armour John, Legal Capital: An Outdated Concept?, 7 European Business Organization Law Review [2006] 5.

Cheffins, Brian R, Company Law, Theory, Structure and Operation; careful reading: chapter 5 and 11; summary reading; chapters 1-4 and 6 .

Kraakman, Reinier, Armour, John, Davies, Paul, Enriques, Luca, Hansmann, Henry B., Hertig, Gerard, Hopt, Klaus J., Kanda, Hideki and Rock, Edward B, The Anatomy of Corporate Law, A Comparative and Functional Approach, Second Edition 2009, chapter 4.

Rickford J., Approaches to Restricting Distributions to Shareholders: Balance Sheet Test and Solvency Tests, European Business Organization Law Review 7: 135-179, T.M.C Asser Press, 2006.

Rickford J., Reforming Capital, Report of the Interdisciplinary Group on Capital Maintanance, EBLR, 2004, p 920 ff

Legislation

Preamble to the second company law directive
Article 15-16 of the second EEC company law directive

§ 40 of the MBCA 1957 edition
§ 45-46 MBCA 1979 edition
§ 6.40 and § 8.33 MBCA
Official comment to § 6.40 MBCA pages 495-501

§§ 154, 170, 172, 174, 244 Delaware General Corporation Law
California Corp Code § 500 before 2012

§ 3-4 and § 8-1 of the Norwegian CA/ACA
Sections 829-853 CA 2006
§§ 57-62 German AktG
§§ 29-32 German GmbHG

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SEMINAR V

Part I: Corporate Organisation: Corporate 'Organs' and Theories
Part II: Company organs and their ability to bind the company

Part I: Corporate Organisation: Corporate 'Organs' and Theories

1. Is there any definition of the concept of corporate organs under EC law (cf. the first EEC Company Law Directive)? Should the following legal concepts **in your opinion** be considered as organs and, if so, why (if necessary, construe your own definition of a company "organ")?

a) The English board of directors (Table A), the Norwegian selskapsstyre (Chapter 6 Norwegian CA/ACA), or the German Geschäftsführer (Part III GmbHG).

b) An agent of a company (eg a Norwegian fullmakt/firmategningsrett for a particular person or a Swedish särskild firmatecknare) with actual authority under a resolution of the directors, comparable to that of the board of directors or a Norwegian prokurist.

c) The general meeting, and the auditors (or equivalent) of any jurisdiction.

2. In some jurisdictions – notably German Aktienrecht and in the European Company (may!), but also in Norway – the board structure of a company consists of two organs – a 'two tier board'. This being typically a supervisory board (Aufsichtsrat) and a management board (Vorstand). Compare this with the `on tier system` in Swedish company law (chapter 8 CA 2005). Compare thereafter with the organizational structure for the SE and the proposed SPE. Result?

Restate the functions of the supervisory board and the management board in German public company law (cf in particular §§ 76, 111 AktG) and in Norwegian public company law (cf. In particular §§ 6-12-13 and § 6-37 Norwegian ACA).

3. The British Company Law Reform Steering Group published some years ago a consultation document in which different ways to regulate the management functions of a closely held private company have been put down. Prepare an evaluation of these

proposals from an economic efficiency point of view, as well as from a public policy point of view.

4. The last 20 years every European country has introduced "soft corporate laws" in the form of corporate governance codes (CGC) for public companies which are noted on a domestic stock market.

a) What differentiate "soft law" from "hard law"?
b) What is the meaning of "comply or explain" and how does it work?
c) What is the sanction if a company violates a CGC?
d) Compare the UK CGC, the German CGC with the Swedish CGC – similarities and differences?

   See: http://www.corporategovernanceboard.se/
   http://www.corporate-governance-code.de/eng/kodex/index.html
   http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx

e) Discuss the appointment of the nomination committee in Sweden versus UK and Germany. Any differences?

Reading:

Relevant statutory material

Table A, U.K. CA 1985
§ 76, 111 German AktG
Relevant sections in chapter 6 Norwegian CA/ACA
Relevant sections in chapter 8 Swedish CA 1975
Relevant sections of the Regulation of the EC (SE)

Bhagat, Sanjai, Romano, Roberta, Event Studies and the Law: Part II: Empirical Studies of Corporate Law, 4 Americal Law and Economics L. R. 380-423 (NB: pages 401-405).

Cheffins, Brian R., Company Law, Theory, Structure and Operation, pages 574-602.

Company Law Reform, Consultation Document 5, [2000], pages 257-267.

Hamilton, Robert A., 'Corporate Governance in America...' [2000] JCL 349, pages 349-373

Part II: Company organs and their ability to bind the company

4. Study the doctrine of ultra vires in Davies, P., Gower's Principles of Modern Company Law, 6th edition, 1997, pages 201-233 and sections 39-42 CA 2006 (changed/introduced by CA 1989). What does this classical doctrine mean and what is its implications?

5. Compare this doctrine with the first EEC company law directive, article 9, para 1 and 2. Discuss the importance of article 9 in relation to the ultra vires doctrine.

7. Compare the legal situation in UK with that in Germany. Study for that purpose § 78 and § 82 AktG and §§ 35-37 GmbHG. Similarities/differences? Is there a basic difference in the approach to representation by company organs?

8. Compare the legal situation in UK and Germany with that in Denmark, Norway and Sweden. Study for that purpose §§ 60-61 Danish CA 1973, §§ 6-30-33 Norwegian ACA/CA and 8:42 Swedish CA 2005. Differences/similarities?

Reading:

Sections 39-42 CA 2006 (changed/introduced by CA 1989)
First EEC company law directive, article 9 para 1 and 2.
§ 78 and § 82 AktG
§§ 35-37 GmbHG
§§ 60-61 Danish CA 1973
§§ 8:42 CA 2005
§§ 6-30-33 Norwegian ACA/CA

Davies, P, Gower's Principles of Modern Company Law, 6th edition, 1997, pages 201-233.

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Seminar VI

Shareholder protection, especially for minority shareholder, — by what means?
Mandatory, presumptive or permissive legislation?

1. One issue in company law theory is by what means the protection of shareholders should be achieved. On one hand it can be argued that the protection of shareholders, especially the minority, requires mandatory legislation. On the other it can be argued that the protection of shareholders including the minority is best taken care of by the shareholders themselves — either by presumptive or permissive rule or "no rules" at all. The answer to the question whether the legislation ought to be based on mandatory or no-mandatory rules depends, however, on what the purpose is with the regulation.

What is the purpose with legislation or "no legislation" concerning the protection of shareholders including minority shareholders? To what extent is a argument based on economic efficiency relevant in this context?

2. What is the advantages/disadvantages with mandatory, presumptive, permissive and "no rules" at all concerning shareholders, including the minority, and their protection?

3. The demand for shareholder protection in publicly traded companies (plc, AG, SA, public company etc) and closely held companies (ltd, GmbH, SARL, private company etc.) differs — in what ways? Why is the case for legislative intervention weaker in publicly traded companies than in closely held companies?

Protection of minority shareholders?

4. Cheffins (p 277ff) discusses the difference between (i) simple, categorical type of rules, (ii) detailed, specific and precise set of rules and (iii) broad, catch all stand standard rules (i.e. more or less general provisions/clauses in the strict company law area).

Discussed advantages/disadvantages with the different kind of rules as a way of protecting minority shareholders. Provide some examples from any company law legislation.

Reading:

Cheffins, Brian R, Company Law, Theory, Structure and Operation; careful reading: chapters 5, 10 and pages 277 ff; summary reading; chapters 1-4.