Comparative Company Law

A Case-Based Approach

2nd edition

Edited by
Mathias Siems
and
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Preface

As attention moves rapidly towards comparative approaches, the research and teaching of company law has somehow lagged behind. Existing books on comparative company law tend to focus on the institutional structure of the corporation, but this approach risks overlooking specific cases and how the issues arising from disputes are resolved in different jurisdictions. For example, topics related to directors' duties and liability, creditor protection and shareholders' rights may best be understood by analysing how selected hypothetical cases would be solved in different countries. It is the purpose of this book to fill this gap.

The book covers 12 legal systems from different legal traditions and from different parts of the world. In alphabetical order, those countries are: Finland, France, Germany, Italy, Japan, Latvia, the Netherlands, Poland, South Africa, Spain, the UK, and the US. The strong focus on European countries aims to reflect the ongoing debate about the impact of EU harmonisation in company law. In addition, the laws of the US, Japan, and South Africa are included for the purposes of wider comparison. From a comparative perspective, the US is the most important 'exporter' of corporate governance theories and ideas, while Japan and South Africa are good examples of legal systems shaped by diverse foreign models.

This book is primarily directed at anyone interested in company law and, in particular, in its international and comparative context. Thus, the audience may be academics, researchers and students in company law from any one of the countries covered, and possibly further afield as well. Since the book provides a case-based introduction to the company laws of different countries, it may also amount to a valuable resource for legal practitioners. Furthermore, general comparative lawyers may be interested in the results of the case-based studies as they serve to shed light on whether there are clear differences between different legal families or whether functionally similar solutions are prevalent across a wide variety of jurisdictions.

We owe an immense debt of gratitude to each of the authors and country experts who so generously and effortlessly gave of their time, namely Sonja Siggberg, Jesse Collin and Lena Nordman (Finland), Pierre-Henri Conac (France), Marco Ventoruzzo and Corrado Malberti (Italy), Hisaei Ito and Hiroyuki Watanabe (Japan), Theis Klauberg (Latvia), Mieke Olaerts and Bastiaan Kemp (the Netherlands), Michał Żurek and Kamil Szmid (Poland), Irene-marié Esser and Piet Delport (South Africa) Pablo Iglesias-Rodríguez (Spain), Martin Gelter, Nemika Jha and D Gordon Smith (US). Without their sustained input, industry and patience, this project would never have come to fruition. Although each of these contributors between them can lay claim to have supplied the detailed raw material on which many of the conclusions and findings of this study were reached, they bear no responsibility for any of the shortcomings of this book.

The first edition of this book was published in 2013. We are grateful for both the positive reception of the first edition and constructive comments by friends and

colleagues. We also thank Hart Publishing for their ongoing support. The main structure of the book has remained unchanged in the second edition. However, the following changes have been made: (i) some of the case scenarios have been modified, in particular clarifying some previous ambiguities; (ii) two jurisdictions, the Netherlands and South Africa, have been added to all of the case studies; (iii) the general conclusion of this book has been expanded, now with two concluding chapters adopting different methodologies; and (iv) we have sought to bring the law in our work up to date to 1 November 2017, but some subsequent developments have been included where possible.

Mathias Siems
David Cabrelli
Durham/Edinburgh
2 March 2018

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1

A Case-Based Approach to Comparative Company Law

DAVID CABRELLI AND MATHIAS SIEMS

I. Introduction

Two developments in recent years inspired the editors and country experts to come together to write this book on comparative company law. First, it reflects the extensive policy debate about the need to improve company law as well as other areas of commercial and financial law. The global financial crisis of 2008 generated a great deal of soul-searching within the wider commercial and regulatory community with regard to the effectiveness of existing laws and the general acceptability of corporate behaviour. For example, the 2015 revision of the G20/OECD Principles of Corporate Governance was justified as a 'a means to support economic efficiency, sustainable growth and financial stability'.[1] In the European Union, a 2017 consultation on 'EU Company law upgraded' followed on from various other recent initiatives that re-visited questions of company law and corporate governance,[2] and there are also examples of recent reforms and proposals in many domestic legal systems.[3]

The second driver of this project was the exponential growth in interest in comparative company law in the academic world and the community of legal practitioners. Since the early 2000s, many monographs and edited collections were published exploring this field of enquiry.[4] The burgeoning literature was mirrored by an increase in university

[1] See www.oecd.org/corporate/principles-corporate-governance.htm.

[2] For the consultation on 'EU Company law upgraded: Rules on digital solutions and efficient cross-border operations', see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=58190. For previous initiatives, see http://ec.europa.eu/justice/civil/company-law/index_en.htm.

[3] eg, in Japan: Companies Act Reform 2014 (enacted on 20 June 2014). For the 2016 consultation in the UK, see www.gov.uk/government/consultations/corporate-governance-reform.

[4] The main general books published in English are (in chronological order): R Kraakman et al, *The Anatomy of Corporate Law* (3rd edn, Oxford, Oxford University Press, 2017); V Magnier, *Comparative Corporate Governance: Legal Perspectives* (Cheltenham, Edward Elgar, 2017); M Ventoruzzo et al, *Comparative Corporate Law* (St Paul, MN, West Academic, 2015); JJ du Plessis, A Hargovan, M Bagaric and J Harris,

postgraduate courses or programmes in comparative company law.[5] Moreover, the dissolution of trade barriers and mass cross-border capital flows engendered by the forces of competition and globalisation have also necessitated legal practitioners to be conversant with the company laws of jurisdictions other than their own. As corporate clients expand their interests across a broad portfolio of jurisdictions in a drive for ever greater global efficiency, their legal advisers are required to have some knowledge of each of the legal systems within which they operate.

In producing this work, the general editors and country experts intended to add to the existing academic literature, albeit by adopting a novel methodological approach to the subject. The existing academic literature on comparative company law tends to focus on the institutional structure of the corporation. For instance, discussions[6] centre around whether companies have only one board of directors ('one-tier systems') or whether there is a distinction between the management and supervisory board ('two-tier systems'), whether companies should establish committees (remuneration, appointment, audit committees etc), the identity of persons who can be appointed as a company's auditor (independence, qualification etc) and the division of powers between the board of directors and the shareholders in general meeting. Whilst this approach is important, it overlooks the dimension of specific cases in company law matters and how the issues arising from disputes are resolved in different jurisdictions. For example, topics related to directors' duties and liability, creditor protection and shareholders' rights may best be understood by analysing how carefully designed hypothetical cases would be solved in different countries. An influential case-based comparative methodology is already used by the Common Core project.[7] However, the Common Core only examines private law in a narrow sense (contract, tort etc). Therefore, the principal purpose of this book is to fill a gap in the literature by adopting a related approach in the field of company law.

Principles of Contemporary Corporate Governance (3rd edn, Cambridge, Cambridge University Press, 2015); GH Roth and P Kindler, *The Spirit of Corporate Law: Core Principles of Corporate Law in Continental Europe* (Munich, CH Beck-Hart-Nomos, 2013); AM Fleckner and KJ Hopt (eds), *Comparative Corporate Governance: A Functional and International Analysis* (Cambridge, Cambridge University Press, 2013); R Bohinc, *Comparative Company Law: An Overview on US and Some EU Countries' Company Legislation on Corporate Governance* (Saarbrücken, Müller, 2011); A Cahn and DC Donald, *Comparative Company Law* (Cambridge, Cambridge University Press, 2010); M Andenas and F Wooldridge, *European Comparative Company Law* (Cambridge, Cambridge University Press, 2009); A Dignam and M Galanis, *The Globalization of Corporate Governance* (Farnham, Ashgate, 2009); M Siems, *Convergence in Shareholder Law* (Cambridge, Cambridge University Press, 2008); P Mäntysaari, *Comparative Corporate Governance* (Berlin, Springer, 2005); KJ Hopt, E Wymeersch, H Kanda and H Baum (eds), *Corporate Governance in Context* (Oxford, Oxford University Press, 2005); JN Gordon and MJ Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge, Cambridge University Press, 2004); JA McCahery, P Moerland, T Raaijmakers and L Renneboog (eds), *Corporate Governance Regimes – Convergence and Diversity* (Oxford, Oxford University Press, 2002).

[5] For example, in the UK, there are postgraduate modules on Comparative Corporate Law at the University of Oxford, the University of Leicester, Aston University, Queen Mary University of London, SOAS and King's College London.

[6] See eg P Davies, K Hopt, R Nowak and G van Solinge (eds), *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* (Oxford, Oxford University Press, 2013); P Davies and KJ Hopt, 'Boards in Europe – Accountability and Convergence' (2013) 61 *American Journal of Comparative Law* 301.

[7] See II A, below.

More specifically, this approach may enable us to identify whether conceptual differences exist between countries in terms of the form or substance of the legal rules which comprise their company laws. Therefore, it may be possible to challenge arguments developed in the academic literature which posit that the existence of fundamental differences in the protection of shareholders across countries reduces the scope for convergence in company law systems.[8] Furthermore, this research has a public policy dimension since the existence or absence of differences matters for the question of whether formal harmonisation of company law in the EU or further afield is necessary, desirable, or at all possible.[9]

To set the scene, section II of this introductory chapter considers the method and practicalities of adopting a comparative case-based approach, including the mechanics of the process, how the relevant jurisdictions were selected and some of the difficulties encountered by the editors and country experts in designing the cases and furnishing the country solutions and comparative conclusions. Section III explains the themes of the ten hypothetical cases of this book that cover directors' duties and liability, creditor protection and shareholder protection in chapters 2 to 11 of this book. Section IV concludes with an outlook on the analysis provided in chapters 12 and 13 of this book.

II. The Method and Practicalities of a Comparative and Case-Based Approach

It is trite to claim that a comparative analysis that starts with a particular legal rule, concept or institution soon encounters difficulties if one of the legal systems under observation does not have that particular rule, concept or institution. Thus, many comparatists suggest that one should not start with a particular legal topic but with a functional question, such as a particular socio-economic problem. In the words of Ernst Rabel, it means that 'rather than comparing fixed data and isolated paragraphs, we compare the solutions produced by one state for a specific factual situation, and then we ask why they were produced and what success they had'.[10] The most striking example of such an approach is the Common Core project, though this has also had its

[8] See eg, LA Bebchuk and MJ Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127; MJ Roe, *Political Determinants of Corporate Governance* (Oxford, Oxford University Press, 2003). See also D Cabrelli and M Siems, 'Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis' (2015) 63 *American Journal of Comparative* Law 109.

[9] For the EU debate, see eg L Enriques, 'A Harmonized European Company Law: Are We There Already?' (2017) 66 *International and Comparative Law Quarterly* 763; M Gelter, 'EU Company Law Harmonization Between Convergence and Varieties of Capitalism' in H Wells (ed), *Research Handbook on the History of Corporate and Company Law* (Cheltenham, Edward Elgar, 2018) 323; J Mukwiri and M Siems, 'The Financial Crisis: A Reason to Improve Shareholder Protection in the EU?' (2014) 41 *Journal of Law and Society* 51.

[10] As translated in DJ Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in A Riles (ed), *Rethinking the Masters of Comparative Law* (Oxford, Hart Publishing, 2001) 190, 199. See also K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, Oxford, Clarendon Press, 1998) 34; Sir B Markesinis and J Fedtke, *Engaging with Foreign Law* (Oxford, Hart Publishing, 2009)

critics, who have challenged the assumptions of the functionalist method. This will be discussed in the first section below. Subsequently, we move on to address the practicalities of our own project, in particular the choice of countries and the procedure applied.

A. The Common Core Approach, its Critics and its Limitations

The term 'common core' originates from a project organised by Rudolf Schlesinger at Cornell University dealing with the formation of contracts from a comparative perspective.[11] In the mid-1990s this approach was taken up by European academics interested in contract, tort and property law (now called the 'Common Core project'). A number of comparative books deriving from this project have been published.[12] In addition, the Common Core website and further books provide explanations and reflections on the method used.[13]

The main idea behind the Common Core project is to draw up hypothetical cases and have country experts describe how these cases would be solved in their legal system. In addition, the organisers of the project explain that they are not only interested in the actual results but also (i) the manner in which different elements of statutory law, case law and scholarly writings interact with and potentially contradict each other in particular legal systems, and (ii) how policy considerations, values, economic and social factors, and the structure of legal processes may affect the solution to the case.[14] In some of the books published under the auspices of the project, these two elements appear under separate headings in the solutions.[15] However, most case solutions of the Common Core project are focused on the positive law. Thus, the overall approach of the Common Core project is fairly 'legal' and 'practical', which is apparent from the fact that the publisher promotes the series as 'assist[ing] lawyers in the journey beyond their own locality'.[16]

Short chapter conclusions and separate chapters in the final parts of the books compare the national solutions. This is done in the spirit of functionalism and universalism. The title 'Common Core' is also an overt reference to this aim. Moreover, on the project website it is stipulated that

> in very simple terms, we are seeking to unearth the common core of the bulk of European private law, i.e., of what is already common, if anything, among the different legal systems

37–42 (defending Rabel's method). For an interdisciplinary overview of functionalism, see R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 339–82.

[11] RB Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Dobbs Ferry, NY, Oceana, 1968).

[12] See the list at www.cambridge.org/core/series/common-core-of-european-private-law/9A1F0195629A3C0607233F14029C3A25.

[13] See www.common-core.org as well as M Bussani and U Mattei (eds), *Opening Up European Law*, *The Common Core Project* (Bern, Staempfli, 2007).

[14] On legal formants, see also R Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1–34 and 343–401.

[15] See eg G Brüggemeier, A Colombi Ciacchi and P O'Callaghan (eds), *Personality Rights in European Tort Law* (Cambridge, Cambridge University Press, 2010).

[16] See the website, above n 12.

> of European Union member states' and that 'common core research is a very promising hunt for analogies hidden by formal differences.[17]

The project website also states that the Common Core approach has an important policy dimension, namely that 'this kind of research should be very useful for and deserve more attention from official institutions that are encharged to draft European legislation' and that part of the Common Core's contribution entails 'building a common European legal culture'.[18]

According to David Gerber '[t]he value and importance of the Common Core project may well place it among the defining achievements in the history of comparative law'.[19] However, this enthusiasm is not shared by everyone; for example, the arch-sceptic Pierre Legrand has dismissed the Common Core publications as 'snippety compilations' that accumulate 'selected titbits extracted largely from legislative texts and appellate judicial decisions'.[20]

Moving beyond such a polemic, the main criticism of the Common Core concerns the suitability of applying the functional method of comparative law. Critics regard the assumption that all societies face the same social problems as unacceptable.[21] It is argued that human needs are not universal but are conditioned by their environments. This is obvious if one thinks about different natural environments, but it also applies more broadly. The factual situation may be identical in two countries, but this does not imply that the law-makers of both societies will necessarily feel the need to promulgate legal rules on the same issue. Thus, it is said that societies have distinct priorities and that it is unacceptable to impose an external measure on them, such as expecting them all to deal with a particular problem.[22]

Moreover, the very idea that law serves particular functions is challenged. A strict version of functionalism assumes that there is a clear sequential order: a social problem arises, courts or legislators respond to it, which in turn has the effect of solving the problem. Yet, such a view fails to consider the possibility that legal rules often arise in a complex process of historical path-dependencies, cultural preconditions and legal transplants, and that legal rules also shape the problems of society. It is also not at all untypical that law operates to serve more than one explicit function alone. Law-makers may have responded to conflicting aims or they may simply strive to offer a clear legal framework, being largely indifferent as to how it is used.[23]

[17] See the website, above n 13.

[18] Ibid.

[19] DJ Gerber, 'The Common Core of European Private Law: The Project and its Books' (2004) 52 *American Journal of Comparative Law* 995, 1001.

[20] P Legrand, 'Paradoxically, Derrida: For a Comparative Legal Studies' (2005) 27 *Cardozo Law Review* 631, fn 159.

[21] D Nelken, 'Comparative Law and Comparative Legal Studies' in E Örücü and D Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) 3, 22–23; J De Coninck, 'The Functional Method of Comparative Law: Quo Vadis?' (2010) 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 318, 327; J Husa, 'Farewell to Functionalism or Methodological Tolerance?' (2003) 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 419, 438.

[22] HP Glenn, 'Com-paring' in E Örücü and D Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) 91, 95; T Ruskola, 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179, 190.

[23] J Husa, 'Comparative Law, Legal Linguistics, and Methodology of Legal Doctrine' in M Van Hoecke (ed), *Methodologies of Legal Research* (Oxford, Hart Publishing, 2011) 209, 220; M Graziadei,

Where does this leave functionalism? Some of these points raise important objections: for instance, functionalism may not work well in all areas of law or with respect to legal systems where we cannot say that the law has a well-defined purpose.[24] Nevertheless, it is also submitted that these objections do not discredit functionalism as a whole. Indeed, we hope that this book shows that using hypothetical cases offers important insights into the field of comparative company law.[25] It may also be seen as providing evidence that practical problems in company law are not so diverse across the 12 countries selected to make a case-based comparison worthless.

Nevertheless, we do not deny that the case-based approach adopted in this work possesses certain inherent limitations. For example, it is unlikely that such an approach will be useful in evaluating technical issues of company law such as the content and design of the rules on the composition of board membership, the drafting of prospectuses or the transparency of securities markets. The same applies for topics of transnational company law, such as the operations of cross-border and transnational corporations, corporate group structures and cross-border mergers and acquisitions, since a case-based approach is typically focused on the laws of a selected number of countries.

B. The Choice of Countries – and the Problems to Overcome

In accordance with one of the objectives of the project identified above, ie whether formal harmonisation of company law in the EU, or further afield, is necessary, desirable or at all possible, the main focus of this study is on the Member States of the EU. However, owing to constraints of space, it was not possible to cover the law of all Member States. Therefore, the focus is fixed on the six most populated countries (Germany, France, the UK, Spain, Italy and Poland) as well as three further Member States (Finland, Latvia and the Netherlands). In addition, the laws of the US, Japan and South Africa are included for the purposes of wider comparison. From a comparative perspective, the US is the most important 'exporter' of corporate governance theories and ideas, while Japan and South Africa are good examples of legal systems shaped by diverse foreign models. It should be clarified that the law of the US state of Delaware was used as a proxy for the US. This is attributable to the fact that Delaware corporate law is the most important and

'The Functionalist Heritage' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 100, 118; Michaels, 'The Functional Method of Comparative Law' (n 10) 354.

[24] For further discussion, see also M Siems, *Comparative Law* (2nd edn, Cambridge, Cambridge University Press, 2018) 38–39, 45–47, and specifically for comparative company law, see M Siems, 'The Methods of Comparative Corporate Law' in R Tomasic (ed), *The Routledge Handbook of Corporate Law* (London, Routledge, 2017) 11.

[25] We also feel encouraged by the positive reception of the first edition of this book: see the reviews by RC Nolan, (2014) 130 *Law Quarterly Review* 343; D Maltese, (2013) 72 *Cambridge Law Journal* 768; P Watts, (2013) *New Zealand Law Journal* 318, as well as L LoPucki, 'A Rule-Based Method for Comparing Corporate Laws' (2018) 94 *Notre Dame Law Review* (forthcoming).

influential in the US, with a significant number of public and private companies incorporated in that state.[26]

It would also have been interesting to include further jurisdictions from Asia, America or Africa, for instance, some of the other BRICS countries (ie Brazil, Russia, India, or China) or possibly even 'radically different legal cultures'.[27] However, apart from logistical problems, there are good reasons to focus on relatively similar countries. This is related to the feasibility of a functional approach to comparative law. Insofar as the approaches adopted by countries are relatively similar, it is likely that their law-makers regard the same socio-economic problems as legally relevant. It has also been said that a preference for similar countries has the advantage of controlling for the stage of development, ie making it easier to explore the remaining differences amongst a baseline of similarity in terms of the countries' history, society, economy and ideology.[28]

Nevertheless, some problems have to be overcome. We aimed to have some cases applicable to private limited liability companies (such as the Ltd in the UK and the GmbH in Germany) and others to public companies (such as the plc in the UK and the AG in Germany). However, we encountered the problem[29] that the form a company takes does not always correspond with the way it is used in practice. For example, on the surface, the French SARL resembles the German GmbH, and the French SA the German AG, but in France, even small to medium-sized firms and family firms often use the SA. In addition, French law offers a third legal form, the SAS, which was created to cover the area between the SA and the SARL.[30] A somewhat analogous situation exists in the US. Here, a primary distinction is made between closely and publicly held corporations, but businesses can also establish a limited liability company (LLC). The success of state LLC laws is particularly based on the fact that while LLCs have the legal form of a company, for tax purposes they are treated as a partnership. In 2005, Japan also introduced the LLC based on the US model, but without the advantage of being taxed as partnerships. By contrast, the UK law provides for a Limited Liability Partnership (LLP) which, like US LLCs, is structured similarly to a company but is taxed as a partnership.[31]

The implication of this for the case-based project was that whilst guidance was provided to country experts on the type of company that it was expected would be covered in the individual case studies, some contributors indicated possible

[26] See, eg, O Eldar and L Magnolfi, 'Regulatory Competition and the Market for Corporate Law', Yale Law & Economics Research Paper No 528 (2017), available at https://ssrn.com/abstract=2685969; JC Dammann and M Schündeln, 'Where Are Limited Liability Companies Formed? An Empirical Analysis' (2013) 55 *Journal of Law and Economics* 741; LA Bebchuk and A Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters' (2002) 112 *Yale Law Journal* 553.

[27] JH Barton, J Lowell Gibbs Jr, VH Li and JH Merryman, *Law in Radically Different Cultures* (St Paul, MN, West Publishing, 1983).

[28] M Warrington and M Van Hoecke, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly* 495, 533; NJ Smelser, *Comparative Methods in the Social Sciences* (Englewood Cliffs, NJ, Prentice Hall, 1976) 66.

[29] For the following, see also Siems, *Convergence in Shareholder Law* (n 4) 10–14.

[30] See ch 10 at II D, below.

[31] For a comparative treatment of the LLP, see M Siems, 'Regulatory Competition in Partnership Law' (2009) 58 *International and Comparative Law Quarterly* 767–802.

alternative solutions for different types of companies.[32] On occasion, country experts also mentioned that a particular aim could not be pursued by adopting the form of company prescribed in the scenario in question, but that another form of company would be available.[33]

A more general problem may have been that the solutions received from the contributors often differed considerably in terms of structure and style. For example, some of the solutions provided a precise structure with many headings and subheadings, whereas others provided a more discursive text. Some referred to many cases and statutory provisions in the text, whereas others only referred to them in the footnotes, often more sporadically. There were also marked variations in the extent to which contributors translated certain terms into English or in the frequency of references to international, comparative and European materials.

An attempt was made to approximate the presentation of the solutions in some instances. However, deliberately, a template was not provided as to how it was anticipated that the solutions would be written and structured. Comparative lawyers often emphasise that it is differences in legal style, not substantive rules, which are decisive for the common/civil law divide.[34] Thus, to some extent, this book has the secondary aim of exposing these differences in legal thinking and writing. However, this point should not be stretched too far. For example, if a particular section contains many references to the academic literature, this may be an indicator of the civil law tradition, but it could also be influenced by the individual style adopted by the contributor in question.

C. The Modus Operandi of the Project

The project was coordinated by the two general editors who appointed country experts for each of the 12 jurisdictions under examination. The topics of each of the 10 hypothetical cases were selected by the two general editors, but the issues to be addressed in each case were loosely configured around the topics of directors' duties, creditor protection, shareholders' rights and the flexibility of company law and its enforcement. Each of the initial ten country experts[35] performed three tasks. First, he or she drafted one hypothetical case and a solution to that case according to the company law of his or her home jurisdiction. The decision to enable each participant to draft one of the cases was predicated on the perceived need to achieve a good mix and balance of cases, possibly reflecting different socio-economic circumstances.[36] Second, each of the country experts then circulated their hypothetical cases and solutions amongst the other country experts and solutions were produced by

[32] See eg the French solutions in chs 7, 10 and 11, below.
[33] See eg the German solutions in chs 3 and 11, below.
[34] See eg Zweigert and Kötz (n 10) 63–73; Siems, *Comparative Law* (n 24) 50–83.
[35] As they were in the first edition. The Netherlands and South Africa were added in the second edition of this book.
[36] But see II pr and A, above, for functionalism and its critics.

each of the country experts to the hypothetical cases under the law of his or her home jurisdiction. Third, each country expert examined the different solutions to his or her hypothetical case and drew up a comparative conclusion. Once again, the two editors were not overly prescriptive of how the country experts should approach the task of writing the case conclusion. The comparative conclusions would identify the differences and similarities between the 12 jurisdictions and would also provide a careful comparative analysis. In particular, the following issues were addressed in the case conclusions and comparative evaluations where this was possible in light of the hypothetical case and the solutions:

1. Is it the case that formally different legal rules in the jurisdictions lead to functionally similar results? Conversely, are the rules in the jurisdictions formally similar (due to legal transplants etc) but applied differently? On a similar note, is there any evidence of increasing formal or functional convergence and is such convergence desirable bearing in mind (i) the ostensible differences in the form of company laws in jurisdictions according to whether they are grounded in the civilian or common law traditions and (ii) the differing shareholding structures in jurisdictions?
2. Is there any evidence that the legal origins theorem (from the viewpoint of the degree of shareholder protection) is relevant and/or applicable, ie is the level of shareholder or creditor protection lower in civil law countries in comparison with common law countries?
3. What are the sources of the legal rules in the jurisdictions examined, ie are they based on case law or statute law (which may or may not relate to the common law/civil law divide) and how is that significant (if at all)?
4. Whether politics or history/path-dependence matters, ie to what extent is there any evidence that politics and/or path-dependence and legal-institutional complementarities influence the form and shape of company laws in different legal systems?
5. To what extent does the nature of the shareholding structure (concentrated versus dispersed and outsider versus insider) in differing countries influence the form which the company laws take?
6. Country experts were asked to reflect on whether the solutions offer any insights into the legal transplantability of company laws, ie to what extent there was evidence of formal or functional transplants having succeeded.
7. Is there any evidence to suggest that the legal systems predominantly favour one constituency over another, eg directors, managers, shareholders, creditors, employees, etc?
8. Policy questions ought to be addressed, for instance, which solution (if any) may be superior and whether the differences may call for substantive/formal legal harmonisation or functional legal harmonisation.
9. If the case related to directors' duties and liabilities (ie a case in chapters 2 to 5 in Part 1), country experts were asked to consider the following factors and address them if they were relevant:
    a. In what circumstances does directors' liability arise?
    b. Which legal tools are used in order to prevent self-dealing transactions of directors?
    c. Does directors' liability lead to a damages or disgorgement of profits remedy? Can third parties dealing with a director in breach of duty to the company be held liable to the company?
    d. Are directors/managers/board members jointly responsible?
    e. Are there different standards of care for different members of the board? Are 'nominee' directors permitted?

f. Can shareholders ratify any action, decision or omission of a director and thus prevent the company from litigating against that director?
g. Can shareholders challenge the remuneration of directors/managers/board members and/or executives?
h. Is there a duty of neutrality in the case of takeovers and, if so, how and when does it arise?

10. If the case related to the relationship between creditors and the company (ie a case in chapters 6 to 7 in Part 2), country experts were asked to consider the following factors and address them if they were relevant:
    a. Do directors owe a direct or indirect (eg via a liquidator, administrator or other insolvency practitioner) duty to the creditors of the company?
    b. Do directors owe 'wrongful trading' obligations to creditors – ie do directors owe a duty not to continue to trade where there is no reasonable prospect of the company avoiding going into insolvent liquidation? If not, are there any circumstances in which the law will impose personal liability on directors whose companies have been dissolved or liquidated?
    c. Is there a concept of 'piercing the corporate veil'? If so, in what circumstances will it be applicable?
    d. Is there a subordination of shareholder loans in the case of a company in crisis?
11. If the case related to the law relating to shareholders and shareholder protection (ie a case in chapters 8 to 11 in Part 3), country experts were asked to address the following factors if relevant:
    a. Can shareholders vote in their self-interest?
    b. Do shareholders have to take the interests of other stakeholders into account?
    c. Do controlling shareholders have special duties? If so, to whom?
    d. Are shareholders' agreements – for instance, on voting rights – possible?
    e. On what grounds (if any) can shareholders challenge a decision or resolution of the general meeting?
    f. Is it necessary that the general meeting decides about 'de facto changes' of the company (eg the sale of substantial assets)?
    g. Is it possible for a shareholder to take action against a director, majority shareholder or other third party to recover a loss sustained by the company? If so, in what circumstances?
    h. Is it possible for a shareholder to sue the company or its managers or controllers where it has been conducted in a manner which is contrary to the interests of that shareholder or the shareholders generally?
    i. Are there any limitations on the ability of shareholders to restrict the free transfer of shares?
    j. Are there any restrictions on convertible corporate bond-holders converting their debt into equity and assuming a controlling interest in the company?

The final part of the process entailed preparing a general introduction and two concluding chapters setting out the aims, outcomes and implications of the study. These latter chapters were produced with the benefit of the comparative conclusions of each of the country experts. They were also designed to feed into some of the most important ongoing debates in the field of comparative company law and add something to them by offering a novel contribution.

III. The Hypothetical Cases

In this book we consider 10 hypothetical cases. These cases were selected in order to cover topics of directors' duties and liabilities (chapters 2 to 5), creditor protection, including the relationship between creditors and the company (chapters 6 to 7), and the law relating to shares, shareholders, shareholder protection and the flexibility of company law (chapters 8 to 11). Such an approach has the potential to reveal the extent to which the legal systems selected favour the interests of directors, majority shareholders, minority shareholders or creditors. This feeds into the higher-order abstract debates in the wider comparative company law literature on the relevance of legal origins, convergence of laws, the prevalence of the shareholder primacy norm, the significance of differing patterns of shareholder ownership and legal transplants.[37]

The view was also taken that some of these questions ought to be addressed to different types of companies.[38] Thus, the aim was to have a good mix of cases dealing with smaller, medium-sized and more substantial companies. Four of the cases asked for a solution based on the applicable law of private limited liability companies.[39] Meanwhile, the remaining six cases concerned public companies (ie joint-stock companies), some of which had their shares admitted to a stock exchange/regulated market.[40] Furthermore, the point should be made that the main focus of the cases in the project is on the company law rules of the countries selected, rather than a comparative examination of the rules of corporate governance. The connection between company law and corporate governance is particularly close.[41] Hence, although the case-based approach adopted may throw some light on certain aspects of corporate governance in the jurisdictions analysed (eg one-tier or two-tier board and the nature, structure and composition of sub-committees of the board), which is revealing or interesting from a comparative perspective, that is not the primary purpose of the project.

In detail, we deal with the following topics, structured in three parts.

A. Directors' Duties and Liability

Turning first to chapters 2 to 5 in Part 1, which address the position of the 12 jurisdictions in respect of directors' duties and liabilities, the focus of the first case in chapter two was twofold. It sought to understand the source, nature, content and

[37] For these topics see chs 12 and 13, below.
[38] See also II B, above.
[39] See cases in chs 2, 3, 7 and 10, below.
[40] See cases in chs 4, 5, 6, 8, 9 and 11, below. The cases on takeover law in chs 4 and 5 concern companies whose shares have been admitted to trading on a stock exchange.
[41] See also ch 13 at II B, below.

scope of a director's duties of loyalty and care, as well as to evaluate the ability of the shareholders in general meeting to authorise or ratify a breach of director's duty. It is often said that modern jurisdictions adopt the 'shareholder primacy' model, whereby directors owe legal duties to shareholders as a class and are bound to run and manage companies in their interests.[42] However, the law in the US (Delaware) amounts to an exception to this general rule and instead prioritises directors' rights and interests over those of shareholders: this is referred to as the 'director/managerial primacy' model.[43] The primary purpose of this first aspect of this case was to test these theories, in particular against the backdrop of the argument that it is most efficient to design company law with a preference for shareholders' rights and empowerment.[44]

Turning to the second aspect of the first case, namely the extent to which shareholders may *ex ante* authorise, or *ex post facto* ratify, managerial breaches of duty, there is a connection here with the aforementioned 'shareholder primacy' and 'director/managerial primacy' models. The link relates to the balance of constitutional power between the directors and the shareholders which has been struck by company law: the more power, rights and authority wielded by the directors/managers, the less influence the shareholders have over corporate decision-making and, conversely, the more rights and powers reserved to the shareholders, the more that the directors' hands are tied in administering the affairs of the company. Therefore, by enquiring as to whether shareholders have the power to absolve the directors of liability for breaches of their duties of loyalty and care, the second aspect of the first case seeks to identify whether shareholders enjoy a residual power or authority over the directors in the context of managerial wrongdoing.

The next case in chapter 3 moves away from a general consideration of directors' duties and liabilities to investigate the parameters of the legal obligations of nominee directors. Having been appointed by a third party onto the board of the company, for example by a parent company or controlling shareholder of the company, the nominee director is placed in a particularly precarious position. Although the director will be keen to ensure that the company is successful, he or she will also be mindful of the interests of his or her appointer. To that extent, the nominee director's decision-making is compromised by an inexorable division of loyalties, which will be acutely felt in the case of a decision where the interests of the company and those of his or her appointer clearly diverge. The question which arises is how the legal systems of the 12 jurisdictions under consideration strive to resolve this tension. For example, is the vote/decision of the nominee director ignored where it is taken in the interests of the appointer to the detriment of the company, or is it treated as valid as a matter

[42] FH Easterbrook and DR Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA, Harvard University Press, 1991) 91; and SM Bainbridge, *Corporation Law and Economics* (New York, ThomsonWest, 2002) 80–81.

[43] SM Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review* 547; and SM Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119 *Harvard Law Review* 1735.

[44] LA Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118 *Harvard Law Review* 833. For a riposte, see WW Bratton and ML Wachter, 'The Case Against Shareholder Empowerment' (2010) 158 *University of Pennsylvania Law Review* 653.

of course, or valid subject to the satisfaction of certain conditions? These are some of the issues that the first part of this case seeks to address.

In addition, this case addresses further issues. For example, the case in chapter 3 involves an assessment of the legal recognition and validity of convertible promissory notes. Civilian jurisdictions are often portrayed as restrictive of shareholder rights and this aspect of the case seeks to test that assertion in the context of a particular security. This is particularly relevant in light of the fact that the conversion of convertible promissory notes often enables a creditor to assume a controlling interest in a company. The case scenario also asks whether there may be a breach of duty in not having selected the most qualified nominee directors. Thus, this aspect of this case relates to the more general question of whether directors and shareholders must prioritise the best interests of the company.

The case in chapter 4 also focuses on the duties of directors in a particular context where managerial loyalties may be conflicted, namely that of a takeover bid. Here, the interests of the directors of the company which is the subject of the takeover bid may deviate from the interests of the shareholders. For example, the bidder may be minded to replace the incumbent management post-takeover with its own management team in order to improve the company's commercial performance or its overall efficiency. Although the bid may be beneficial for the existing shareholders, the directors' personal and corporate loyalties diverge and they may tempted to engage in activities which are designed to protect and entrench their position as directors. One of the objectives of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the EU Takeover Directive)[45] was to place constraints on the power of directors to frustrate takeover bids. It does so by empowering Member States to introduce a 'duty of neutrality', namely laws regulating the ability of directors to adopt defensive tactics to a takeover bid within carefully prescribed parameters. Member States were afforded various options in the way they could implement this aspect of the EU Takeover Directive and this case enables a survey to be made of the choices made by the Member States under consideration. It also seeks to identify where the line is drawn between the powers of the directors and the shareholders to take a particular form of defensive action.

Finally, the case in chapter 5 also takes a takeover situation as its focus. It includes a cross-border dimension as the target company is listed in multiple jurisdictions. Moreover, unlike chapter 4, the principal concern is to identify the jurisdictions which apply pre-emption rights on the allotment and issue of shares by a company. In other words, the question is to what extent a company must first offer a fresh issue of shares to the existing shareholders before it is entitled to issue shares to non-shareholder third parties. This is an important issue in light of the provisions of the EU Takeover Directive, since the sanctioning of a rights issue by management is one of the means by which a takeover bid may be resisted. In addition, this case asks the country experts to reflect on the argument that a takeover defence may be justified in the interests of the company as a whole, notably due to the desire to protect the company's employees and the aim not to lose customers as a result of the takeover.

[45] [2004] OJ L142/12.

B. Creditor Protection

In Part 2, we move on to scrutinise the protections afforded to creditors in the company law systems of the various jurisdictions analysed in this work. The case in chapter 6 assesses the ability of a creditor of a bankrupt company to seek recourse against the shareholders or directors of that company. If the country solutions revealed that there was the potential for such liability to arise, the country experts were prompted to identify specifically the juridical basis or bases for that liability. First, the question was posed as to whether a doctrine such as 'piercing the veil of incorporation' or some other similar doctrine would permit the creditor to look behind the façade of the separate legal personality of the company to enable it to enforce against the bankrupt company's directors or shareholders. Moreover, it was intended that the qualifying criteria and conditions for that doctrine to operate be exposed. Second, country experts were asked to consider the potential for creditor recourse against the directors of the bankrupt company via the medium of directors' duties. Here, the issue was whether the law of directors' duties placed directors under an obligation to take into account the interests of creditors prior to the company entering, or once the company had entered, into a formal insolvency procedure or process. The concern was also to understand whether more heightened obligations were imposed on directors by virtue of the fact that the company had entered into bankruptcy and whether that translated into the potential for personal liability. Further, it was crucial to understand whether the creditors' rights could be enforced directly against the director or whether they would have to be enforced by a third party such as an insolvency practitioner appointed over the estate of the bankrupt company when it entered into an insolvency process. In the latter case, the absence of director recourse would mean that the creditor's position is somewhat compromised, since it will be reliant on the goodwill of the third party insolvency practitioner to vindicate and enforce its rights.

In the next case in chapter 7, the focus remains on the rights and powers of creditors instantiated through the rules and doctrines of company law. However, this case concentrates on a technical but important aspect of company law, namely the operation of the rules which together make up the capital maintenance principle. A capital maintenance principle is found in the domestic company law systems of many jurisdictions (as well as EU company law).[46] The principle strives to ensure that creditors' rights are safeguarded by prohibiting companies from returning capital to their shareholders through a variety of direct or indirect means. One of the principal rules encountered in many jurisdictions is that a company may only distribute its profits as a dividend to its shareholders on an annual basis if it has: (i) distributable profits; and/or (ii) its net assets are not less than the aggregate of its called-up share capital and undistributable

[46] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent ([2012] OJ L315/74), previously the Second EU Company Law Directive 77/91/EEC, and now included in Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law ([2017] OJ L169/46).

reserves. Not all jurisdictions require (ii) to be satisfied and there is also a degree of divergence displayed in how (i) and/or (ii) are ascertained. For example, some jurisdictions adopt accounting-based models, whereas others proceed on the basis of a solvency-based regime. In the former case, the distribution may be made out of any surplus (a) when the company's net assets (ie its aggregate assets less its aggregate liabilities) are subtracted from its legal capital as expressed in its distributable reserves or (b) in its accumulated realised profits less its accumulated realised losses. This can be contrasted with solvency-based models where the principal issue is whether the distribution will render the company insolvent in the sense that it is unable to pay its debts as they fall due over an identified sustained period of time. As such, one of the purposes of chapter 7 is to isolate which model the jurisdictions under analysis duly apply and to consider the merits and demerits of each.

Chapter 7 also goes on to address the extent to which the company laws of the jurisdictions concerned prohibit or constrain the capacity of companies to effect 'disguised distributions' of assets to the detriment of creditors, for example by transferring assets to a third party or particular shareholder or shareholders at undervalue or by acquiring assets from a third party or particular shareholder or shareholders in excess of the market value. Once again, country experts were asked to ascertain the doctrinal bases for the imposition or non-imposition of such liability and whether disguised transfers were directly or indirectly precluded or restricted, or whether other legal doctrines operated as functional equivalents and achieved the same result.

C. Shareholder Protection

In Part 3, the cases concentrate on the general rights and protections of shareholders and the flexibility of company law. In particular, chapters 8 and 9 are designed to expose the breadth and limits of shareholders' rights enshrined in law. For example, the case in chapter 8 seeks to establish whether shareholders have an entitlement to challenge the decisions of majority shareholders where the latter have failed consistently to vote in favour of the distribution of an annual dividend over a period of time. If the directors and majority shareholders decide to retain profits in the company, the question is whether there are any legal mechanisms enabling the minority shareholders to overturn that decision. The second matter addressed by the case in chapter 8 is whether the vote of an interested shareholder in favour of merging the company with another company is somehow tainted and can be ignored on the ground that it is null and void. Alternatively, one may consider whether that vote is valid, whilst leaving the shareholder open to liability under some other legal doctrine.

Meanwhile, the case in chapter 9 looks to understand the circumstances in which shareholders have a right to ask questions of management at a general meeting. Whilst this is an area which has been harmonised in the EU by virtue of Article 9 of the Shareholder Rights Directive,[47] a measure of discretion is afforded to Member

[47] Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies ([2007] OJ L184/17) (as amended).

States to shape the limits of that right, for instance by imposing restrictions in order to protect commercial confidentiality and the circumstances in which the shareholder will be deemed to be abusing his or her right to ask questions. Furthermore, this case addresses the legal effect of a purported breach of shareholder rights and whether this operates to invalidate any resolutions passed at a general meeting. In this case, the resolution in question was passed to enable the merger between the company and a third party corporation to proceed. The issue is whether a disgruntled shareholder alleging a procedural violation of company law or the corporation's constitution has the power to prevent such a merger from proceeding by attaining an order from the court that the merger resolution was null and void.

Unlike chapters 8 and 9, which focus on the rights of shareholders, chapter 10 seeks to highlight the legal processes recognised in the various jurisdictions which enable shareholders to enforce those rights. Here, the protections of shareholders, particularly minority shareholders, come to the fore. One of the key issues addressed is whether it is possible for an aggrieved minority shareholder to challenge a breach of directors' duties or the actions of a controlling shareholder through the medium of a derivative action. A derivative action allows a shareholder to attain relief from a director or majority shareholder for the benefit of the company where a corporate decision taken by those directors or the majority shareholders is tainted by self-interest or impropriety, or breaches the company's constitution or mandatory provisions of national company law. Thus, a successful legal challenge does not give rise to a personal remedy in favour of the shareholder. Country experts were asked to identify the restrictions on the power of shareholders to raise derivative actions, for example whether there were any minimum share capital ownership requirements or whether the genuineness of the shareholder in raising the claim would be considered in advance of a full hearing. This particular case provides the opportunity to consider the theory that civilian jurisdictions prioritise the elimination of horizontal agency costs over vertical agency costs and that common law jurisdictions with widely dispersed ownership seek to achieve the opposite.[48] Chapter 10 also seeks to examine the flexibility of the company law regimes of the 12 jurisdictions analysed. Country experts were asked to consider whether it was possible for a decision to be taken informally by the shareholders with unanimous consent where company law rules or the terms of the company's constitution specifically required a formal vote to be taken at a properly convened general meeting.

Finally, we turn to the case in chapter 11 whose purpose is to consider whether any legal constraints are placed on the ability of shareholders to restrict the free transfer of shares in the company's constitution. The possibility of the company conferring pre-emption rights on the transfer of shares in favour of existing shareholders is considered, as well as the ability of the company to restrict a third party from inheriting shares on the occurrence of the death of a shareholder. These two aspects of the case in chapter 11 enable us to address the contention that common law jurisdictions are more flexible than the civil law as regards the structuring and configuration of shareholder rights. Moreover, as this final case includes draft articles of a company,

[48] See the discussion in ch 12, II B and III C.

it provides a practically important – though in academic research often neglected – element of addressing issues of corporate governance.

IV. Conclusion

In this introductory chapter, we explained the method associated with a case-based approach to comparative company law and the practical problems it must overcome. We also outlined the principal topics of the subsequent case studies in chapters 2 to 11. We aim to cover representative themes that are relevant for the company laws of the countries under investigation. However, the case studies of this book can also be used separately and it will also be clarified at the outset of the chapters how they relate to other topics addressed elsewhere in this book.

The structure of the country solutions in the chapters is as follows: in order to achieve consistency, the first solution is always from the contributor who produced the case in question. This is followed by the other countries of the same legal family, starting with the jurisdictions, such as France, Germany and the UK, that may have borne an influence on this.[49] Subsequently, the solutions of the countries of the other legal family are presented. Japan follows as the final solution, since its company law has been both influenced by the civil and common law legal families. Of course, this order does pre-empt the view that there are telling differences between civil and common law jurisdictions in the field of company law; indeed, the chapter conclusions often highlight, and try to explain, unexpected similarities and differences.

Following on from these 10 case studies in chapters 2 to 11, the two concluding chapters provide a general analysis of differences and similarities between legal systems in company law. This will be based, on the one hand, on a ruled-based and conceptual comparative analysis in chapter 12, and on the other, on a quantitative analysis in chapter 13. In substance, chapter 12 uses four prominent claims of the comparative company law literature as a conceptual framework: the 'legal origins claim', the 'shareholder primacy claim', the 'patterns of shareholder ownership claim' and the 'convergence claim'. By contrast, in the quantitative chapter 13 the three levels of analysis are the nature and content of the respective legal rules of company law (the 'form'), the sources of those rules (the 'style') and the results reached on the application of such rules (the 'substance').

These two concluding chapters will challenge some of the established orthodoxies in the field of comparative company law, such as the relevance of 'legal origins' and the alleged superiority of certain models of corporate governance. This is not to deny that our analysis, as well as the prior selection of cases and countries, includes degrees of subjectivity. Nevertheless, we hope that this book will be of interest for readers in this field whether they agree or disagree with some of our choices and findings.

[49] Thus, the default order of countries is France, Germany, Italy, Spain, the Netherlands, Finland, Poland, Latvia (for the civil law countries) and the UK, South Africa and the US (for the common law countries).