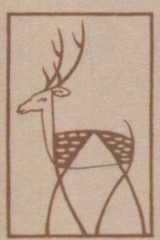
STUDIES IN PRIVATE INTERNATIONAL LAW

THE GOVERNING LAW OF COMPANIES IN EU LAW

Justin Borg-Barthet



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THE GOVERNING LAW OF COMPANIES IN EU LAW

The manner in which the governing law of companies is determined has attracted much attention from academics and practitioners alike ever since the European Court of Justice began receiving references for preliminary rulings regarding the compatibility of protective conflict of corporate law norms with the EC Treaty provisions concerning freedom of establishment. Although recent developments have been less controversial than the ground-breaking judgment in *Centros*, they have not only consolidated the general thrust of liberalisation occasioned by the Court of Justice, but have added new dimensions to the regulatory landscape. These developments include amendments to the European constitutional order enshrined in the Lisbon Treaty, European legislation on cross-border mergers, the proposed statute for a European Private Company, the judgment of the Court of Justice in *Cartesio* and a Commission communication that contemplates the introduction of legislation on the governing law of companies.

This book examines these recent developments and appraises the current law, as well as the foreseeable trajectory of the law, within a theoretical setting that addresses the socio-economic and legal-theoretical concerns associated with choices of the governing law of companies. In addition to considering the present and probable future state of EU law, the book also develops new theoretical perspectives and proposes novel solutions to long-standing dilemmas. In particular, it suggests that the use of information technology may render possible previously impossible compromises between party autonomy and the proper locus of prescriptive sovereignty.

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SERIES EDITORS' PREFACE

Private international law of companies is an important topic that is in danger of being neglected by private international lawyers – witness its omission from the latest edition of *Cheshire, North and Fawcett, Private International Law* 14th edn (Oxford, Oxford University Press, 2008) by James Fawcett and Janeen Carruthers. Justin Borg-Barthet's book helps to avoid this neglect. It does so not by writing a doctrinal work but rather by writing a more theoretical, yet practical, book. The author immersed himself in theories of corporate governance in order to be able to analyse how far it is appropriate to extend the principle of party autonomy in the field of private international law of corporations. Not surprisingly he rejects a simplistic unlimited party autonomy model in favour of a more nuanced and limited application of that principle.

The practical outworking of the author's theoretical analysis of what private international law of companies should be is set in the particular context of the European Union. The author does not make the mistake of confusing the 'is' and the 'ought'. Instead he devotes the second part of the book to a careful explanation of the current law on private international law of companies at the European Union level. The author skilfully guides the reader through the relevant secondary legislation affecting companies in the EU, including optional supranational business vehicles. He then provides a pathway through the Court of Justice of the European Union's case law on the freedom of establishment of companies and how this limits the room for manoeuvre of national private international law of companies in the EU. The Court's case law is divided into three parts: (1) the conservatism of the Daily Mail case (ie little or no interference with national private international law); (2) the radical case law from Centros to Sevic Systems that seemed to be moving towards the Court of Justice occupying the field of private international law of companies by its deregulatory case law on the Treaty right to freedom of establishment; and (3) the acknowledgment in the Cartesio case that there are limits to what the Court of Justice is willing to regulate through its case law on freedom of establishment in relation to private international law of companies.

In the last part of the book Justin invites the various branches of the EU legislature to consider a series of ideas rooted in the theoretical analysis from the first part of the book as to appropriate EU legislation on private international law of companies. Given that the Stockholm programme acknowledges the 'need to explore whether common rules determining the law applicable to matters of company law . . . could be devised' it is a good time to be offering constructive and detailed ideas for new EU legislation on the private international law of companies.

This book should be of interest to a wide range of people. Apart from specialists in private international law it should be read by company lawyers, those with an interest in corporate governance, and European Union lawyers and policy makers with an interest in freedom of establishment, civil justice, the internal market and company law.

Paul Beaumont
Jonathan Harris

PREFACE

The laws that regulate companies, both nationally and transnationally, require technical analysis. This book engages with this need and sets out to diagnose the current state of EU law concerning the governing law of companies. However, there is a lot more to corporate law and the governing law of companies. The way that societies organise companies says much about how they wish to organise power and wealth. This is especially challenging in a transnational context. European company law also concerns questions about the balance to be struck between the rights of states and the polities within those states on the one hand, and the economic freedoms upon which the internal market is built on the other.

The writing of this book began prior to the financial crisis. It is tempting to suggest that the crisis vindicates the book's challenge to contractarian approaches to transnational company law; but that temptation must be resisted. The history of corporate law suggests that current economic conditions are often used as a pretext to justify given approaches to the corporate form. Still, the financial crisis invites us to reconsider the basis upon which we organise our social and economic life through the law. This book suggests alternatives to unbridled economic liberalism.

The book is based on a PhD thesis that was completed at the University of Aberdeen in 2011. I am thankful to Aude Fiorini (University of Dundee) who supervised me in the earlier stages, when guidance was paramount and confidence was realistically low. Aude continues to read much of my work and to offer intellectual rigour, and I am thankful for her selfless guidance and support. Professor Paul Beaumont took over as lead supervisor when Aude moved to the University of Dundee, and Professor John Paterson provided continuity as second supervisor. Their insight and varied expertise helped me to develop ideas and to communicate them better.

Professor Beaumont's confidence in the thesis enabled me to think of the work as a publishable monograph. I am thankful to him and his co-editor, Professor Jonathan Harris (King's College London), for the opportunity to present this work to a wider audience, as well as for the helpful conversations about aspects of the thesis. Mel Hamill, Tom Adams, Richard Hart (Hart Publishing) and two anonymous reviewers have also been tremendously helpful and patient.

The examiners of my PhD, Professor Janet Dine (Queen Mary, University of London) and Dr Sophia Tang (University of Aberdeen) made helpful suggestions regarding changes that could be made between PhD and monograph. They also made the day of my viva voce examination memorable for all the right reasons. Professor Janet McLean (University of Auckland), Dr Daniel Carr (University of

Edinburgh) and Professor Peter McEleavy (University of Dundee) also read parts of this work. Their encouraging comments and advice about style and substance were invaluable.

My fiancée Catriona Mallia proofread several chapters of the thesis. Her attention to detail was particularly helpful, as was her boundless patience, care and encouragement during the completion of my PhD and this book. The book is dedicated to her, with thanks and love.

Dr Adrian Mallia's authoritative instruction on the classification of property in corporate restructuring provided unexpected, extensive ideas – *kollox ghallimtni.*

Finally, I am also thankful to my parents, Carmen and Tony Borg Barthet, and family. 'Last but not least' is a clichéd phrase, but certainly a pertinent addition to the previous sentence. They endured and encouraged throughout the long gestation of an unlikely academic career.

Justin Borg-Barthet

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