

1

Introduction

1.1 Aims

The manner in which the governing law of companies is determined has attracted much attention from academics and practitioners alike since the European Court of Justice began to receive references for preliminary rulings concerning the compatibility of protective conflict of corporate law norms with the EC Treaty provisions concerning freedom of establishment.¹ Although recent jurisprudential and legislative developments have been less controversial than the groundbreaking judgment in *Centros*,² 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. The most recent of these developments include amendments to the European constitutional order enshrined in the Lisbon Treaty,³ European legislation on cross-border mergers,⁴ the proposed statute for a European Private Company,⁵ the judgment of the ECJ in *Cartesio*,⁶ and a Commission communication that considers the introduction of legislation on the governing law of companies.⁷

¹ See eg A Looijestijn-Clearie, 'Centros Ltd – A Complete U-Turn in the Right of Establishment for Companies?' (2000) *International and Comparative Law Quarterly* 621, 621–42; E Micheler, 'Recognition of Companies Incorporated in Other EU Member States' (2003) *International and Comparative Law Quarterly* 521, 521–34; WF Eicke, 'The European Conflict-of-Corporate-Laws Revolution: Uberseering, Inspire Art and Beyond' (2004) *International Lawyer* 813, 813–53; WG Ringe, 'No Freedom of Emigration for Companies?' (2005) *European Business Law Review* 621, 621–42; B Angelette, 'The Revolution that Never Came and the Revolution Coming – *De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems* and the Changing Corporate Law in Europe' (2006) *Virginia Law Review* 1189, 1189–1223; V Korom and P Metzinger, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its *Daily Mail* Decision in the *Cartesio* Case C-210/06' (2009) *European Company and Financial Law Review* 147, 147–60; J Borg-Barthet, 'A New Approach to the Governing Law of Companies in the EU: A Legislative Proposal' (2010) *Journal of Private International Law* 589, 589–621; J Armour and WG Ringe, 'European Company Law 1999–2010: Renaissance and Crisis' (2011) *Common Market Law Review* 125, 125–74.

² Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-01459.

³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1.

⁴ Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1.

⁵ Commission (EC), 'Proposal for a Council Regulation on the statute for a European private company' COM (2008) 396/3.

⁶ Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

⁷ Commission (EC), 'An area of freedom, security and justice serving the citizen' (Communication) COM (09) 262 final, 14.

This book accounts for 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 consideration of the present and foreseeable state of EU law, the book develops new theoretical analyses and proposes novel solutions to some long-standing dilemmas. In particular, it is suggested that the use of information technology may render possible the previously impossible compromises between party autonomy and the proper locus of prescriptive sovereignty.

The central thesis is that the argument for private ordering serves to be qualified because both the existing legal basis and the theory underpinning party autonomy are imperfect. It is therefore proposed that European legislation should be introduced to provide a sound and certain legal basis for corporate mobility. Under current conditions, this should account for the competing claims of private ordering and the political peculiarities of each Member State. To this end, chapter 6 articulates a legislative proposal which strikes a balance between the integrationist agenda of the European Union and the ability of Member States to safeguard the interests of various stakeholders in corporate law.

The legislative proposal is based on a number of logical steps which are established in the book's earlier chapters. This chapter introduces relevant issues through an appraisal of the historical development of the law, as well as an overview of relevant corporate law and conflicts theory. Chapter 2 evaluates the cogency of the principle of party autonomy in the conflict of corporate laws through analogies with contractual choice of law and reference to corporate legal theory; Chapter 3 highlights interests which the private international laws of some states protect in preference to party autonomy. Having identified that private autonomy in choice of corporate law is a matter of legislative choice rather than dogma, Chapter 4 addresses the place of autonomy in the European Union's legal order. Chapter 5 appraises the jurisprudential evolution of conflict norms in the EU and illustrates that a failure to legislate coherently and comprehensively has vested the task of harmonisation in the wrong hands, namely those of the judicial branch of the Union. It is argued in that chapter that negative harmonisation has occurred against the express wishes of Member States that intended a more controlled and refined process of liberalisation. In addition, the present state of the law is internally incoherent and requires rationalisation. Chapter 6 then analyses options that are open to European legislators. An alternative to the current thrust of liberalisation is proposed in a manner that accounts for the genuine concerns of both protectionist and liberal policies. It is suggested that the use of information technology could facilitate a workable solution to replace the zero-sum conflict between the predominant choice of corporate law doctrines. Finally, Chapter 7 includes brief concluding remarks.

1.2 Scope

This book analyses the law and theory concerning the governing law of companies in Europe. It does not set out to define companies with precision, but addresses companies with a profit-making purpose, since it is only these companies that enjoy the right to freedom of establishment as defined in article 54 TFEU (article 48 EC). Excluded from this work is the law of insolvency, which is a discipline that merits analysis in its own right. Similarly, the tax implications of corporate freedom of establishment are only addressed where they are directly relevant to a study which is concerned with the implications of corporate mobility for the mechanics of corporate law itself. The problems are addressed principally from the perspective of European Union law, in particular with regard to its limiting effects on the laws of the Member States. Occasional references are also made to other jurisdictions where the law is illustrative of a broadly applicable principle, or a potential legislative concern.

The norms of EU law pertaining to the governing law of companies do not emanate from a private international law instrument that stands alone, but from the Treaty itself,⁸ as well as the regulations and the directives of the Union that harmonise the private international law of companies in specific circumstances.⁹ The Treaty basis for harmonisation therefore adds a constitutional dimension to the present study. In particular, it is pertinent to address the constitutional value of party autonomy. In addition, the harmonisation of substantive company law reduces the scope for conflicts of laws since the said conflicts are, in some respects, as between laws that have been transposed with a common purpose. Because the harmonisation of laws has a direct impact on the extent to which the determination of the governing law is of practical consequence, harmonisation may reduce the policy motivations for protective conflict of laws mechanisms. Accordingly, an analysis of the conflict of corporate laws must necessarily refer to constitutional foundations of EU company law and the laws of the Union that harmonise the company laws of the Member States. Thus, while the principal focus of this book remains the private international law of the Union, it is also necessary to address European law norms which have no direct bearing on the manner in which the governing law of companies is determined.

⁸ Arts 49, 50 and 54 TFEU (arts 43, 44 and 48 EC). Art 293 of the EC Treaty, which has now been repealed, is addressed in view of its influence on the judgments of the ECJ which have shaped EU law in its present state.

⁹ Council Directive (EC) 1994/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254; Council Regulation (EC) 2157/2001 on the statute for a European company (SE) [2001] OJ L294/1; Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1; Directive (EC) 2007/36 of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L184/17.

In order to further inform discussion concerning the dichotomy between liberal and protective conflict of corporate laws, this work analyses the underlying corporate law values that inform private international law theory and practice. Conflicts of corporate laws, arguably more than any other commercial area of private international law, must account for the fact that the corporate form is intended to serve both private and public goods.¹⁰ The balance that is struck as between those goods, or indeed the manner in which the aggregate of those goods is best served, is subject to a value judgment by the legislators of each state. Indeed, corporate law is a highly regulated area of private law in any jurisdiction, and the selection of the governing law of companies therefore affects the full spectrum of matters that are regulated by corporate law. An understanding of corporate legal theory is therefore required if one is to properly devise a broadly acceptable system for the determination of the governing law of companies. Accordingly, this book also addresses discussions that are more commonly associated with corporate legal theory in order to better inform the discussion of concerns associated with the extent of states' prescriptive jurisdiction over corporations.

1.3 A History in Brief

Prior to the judgments of the Court of Justice, the vast majority of Member States adopted the real seat theory, which prescribes that a company is to be established under the law of the state in which its operational headquarters is situated. A minority of Member States adopted the incorporation theory, which dictates that a company is governed by the law of the state in which it is formally incorporated, regardless of whether it is connected thereto in any manner other than by virtue of the act of incorporation.¹¹

The crux of the theoretical controversy between the real seat and incorporation theories stems from a disagreement regarding the extent to which a company is an expression of individual autonomy, or whether it is a result of the concession of the legal fiction of separate juridical personality by a state.¹² This is redolent of the debate between contractarians and concession theorists in the corporate law camp.¹³ While

¹⁰ J Dine, *The Governance of Corporate Groups* (Cambridge, Cambridge University Press, 2000) 3–29.

¹¹ For an overview of the two theories, see S Rammeloo, *Corporations in Private International Law: A European Perspective* (Oxford, Oxford University Press, 2001) 11–20; E Rabel, *The Conflict of Laws: A Comparative Study*, vol II, 2nd edn (University of Michigan, 1960) 31–46; FJ Garcimartín Alférez, 'Cross-Border Listed Companies' (2007) 328 *Recueil des Cours de l'Académie de Droit International* 13, 48–55.

¹² Ebke (n 1) 817–18; E Stein, 'Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market' (1970) *Michigan Law Review* 1327, 1333; F Guillaume, 'The Law Governing Companies in Swiss Private International Law' (2004) *Yearbook of Private International Law* 251, 257; A Johnston and P Syrpis, 'Regulatory Competition in European Company Law after *Cartesio*' (2009) *European Law Review* 378, 389–90.

¹³ Dine (n 10) 67.

the truth is quite clearly that companies are the result of both private agreement and the assent of the state, philosophical differences in emphasis have resulted in different approaches to the extent to which incorporators should be free to select a company's governing law.¹⁴ Consequently, both the real seat and incorporation theories have merit, and neither theory is flawless. Rather, the theories are grounded in divergent understandings of some elements of the nature and purpose of companies, and the extent of failure to bridge the gap between the theories lies in a dialogue that is often conducted at cross-purposes.¹⁵

It appears that the incorporation theory predates the real seat theory. As early as the eighteenth century, the United Kingdom recognised the incorporation theory as an instrument to grant free choice of corporate law to promoters of companies.¹⁶ It is uncontroversial in UK company law that the domicile of a limited company is the place of registration or the country in which it was incorporated, and that 'in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality.'¹⁷ Similarly, in the nineteenth century, French promoters of companies are known to have set up companies under foreign laws in order to escape the stricter provisions of French law.¹⁸ The emergence of the real seat theory can probably be traced back to the nineteenth century.¹⁹ The admission of the possibility of the existence of a company outside the jurisdiction that gave it its legal personality led to the problem of recognition of companies and their governing laws in much the same form as the problem persists presently. Whereas companies were previously only allowed to be set up for a specific purpose and limited duration, the emergence of open registers was closely followed by corporate mobility.²⁰ The policy motivations for the emergence of the theory appear to be quite clear: in order to protect against the encroachment of corporate forms that were deemed to be lax, French law adopted the *théorie du siège réel* whereby companies are to be incorporated under the laws of the state in which their real seat, as opposed to their nominal seat, is situated. The theoretical foundations are somewhat more complicated. At a time when nationality was the principal connecting factor in private international law, and states set out to control their nationals, it became the norm that one could only be the subject of one

¹⁴ *ibid*; Y Hadari, 'The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises' (1974) *Yale Law Journal* 1, 19–21.

¹⁵ See RR Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the Delaware Syndrome' (1998) *Cambridge Law Journal* 165, 182–83.

¹⁶ J Dammann, 'A New Approach to Corporate Choice of Law' (2005) *Vanderbilt Journal of Transnational Law* 51, 59; Drury (n 15) 178–88; Hadari (n 14) 19–21.

¹⁷ *Kuenigl v Donnersmarck* [1955] 1 QB 515. See also *Gasque v Inland Revenue Commissioners* [1940] 2 KB 80; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289; *Arab Monetary Fund Appellants v Hashim and Others Respondents (No 3)* [1991] 2 AC 114; *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282.

¹⁸ Dammann (n 16) 59; Drury (n 15) 187–88.

¹⁹ Angelette (n 1) 1193–94.

²⁰ *ibid*.

sovereign, namely the state of which one was a national.²¹ Since companies were considered to be nationals of the state in which they had their operational headquarters, it followed that companies may only be the subject of that state, and incorporation under any other law was therefore precluded.²²

1.3.1 International and Regional Unification

The need to harmonise rules on recognition of companies and to thereby provide a sound legal basis for businesses to operate transnationally was acknowledged at an early stage in the process of European integration. Efforts have been made to unify this area of private international law both globally through the Hague Conference, as well as at the regional level in the European Community. However, none can be said to have successfully bridged the ideological divide between the protective real seat theory and the autonomy-oriented incorporation theory. Two conventions were adopted by varying formations among the founding Member States, but neither mustered sufficient ratifications to enter into force.

The 1956 Hague Convention²³ was only ratified by three states, namely Belgium, France and the Netherlands. Luxembourg and Spain were also signatories, but never ratified the agreement. Spain was the only signatory from outside the EC. The Convention provided a somewhat unworkable solution, which did little more than to acknowledge the status quo. Contracting states would have been bound to recognise companies incorporated in other contracting states,²⁴ unless the state in which recognition was sought adopted the real seat theory.²⁵ In the latter case, states could depart from the incorporation theory, and refuse recognition if a company had its seat in a state which adopted the real seat theory.²⁶ Curiously, the Convention did not require states which applied the real seat theory to make a declaration to this effect, or that application of the real seat theory was to be allowed only by way of reservation. Thus little guidance was to be provided to stakeholders. Accordingly, the only bridging which the Convention would have occasioned was that real seat states would have been bound to acknowledge the existence of companies established in states which adopt the incorporation theory, and having their operational headquarters in such states. This was already the case in most real seat states which either legislated indifference to companies having their headquarters in other jurisdictions, or acknowledged the rights of other states to adopt their own rules on recognition of companies.²⁷

²¹ Rammeloo (n 11) 11.

²² *ibid.*

²³ Hague Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions (hereinafter 'Hague Convention').

²⁴ Hague Convention art 1.

²⁵ Hague Convention art 2.

²⁶ *ibid.*

²⁷ By way of example, Italian law adopts the incorporation theory in respect of companies that do not have their seat in Italy: L 31 maggio 1995, n 218 art 25; German law uses *renvoi* to refer the matter of recognition to the state in which the company's seat is situated: Rammeloo (n 11) 12 and 179.

The members of the European Community signed a Convention on the Mutual Recognition of Companies and Bodies Corporate in 1968.²⁸ The Convention was intended to remedy a situation in which it was deduced that freedom of establishment and enjoyment of other market freedoms were precluded by diverse rules on the recognition of companies, and where, despite the apparent liberalism of articles 49 and 54 TFEU (articles 43 and 48 EC), it was not expected that the Treaty itself would directly provide the basis for mutual recognition.²⁹

The Convention required that the legal personality of companies established in a Member State must be recognised throughout the Community.³⁰ However, this was subject to the proviso that Member States could refuse to recognise companies established in the Community but not having a genuine link with the economy of any Member State.³¹ This would guard against the automatic recognition of companies which were formally products of the laws of a Member State, but which were in fact operated from outside the Community. In addition, Member States could apply their own laws to companies having their real seat within their territory but established elsewhere in the Community.³² Accordingly, two laws could be incumbent on the same company, namely the law of the state in which the company was incorporated, and the state in which the company's real seat was situated. The Convention did not prescribe clear limitations concerning which aspects of corporate law could be included in the scope of the mandatory rules that a Member State would apply. Effectively, this would have enabled the state in which a company's real seat was situated to prescribe the conditions under which a pseudo-foreign corporation would operate, a situation not dissimilar to the application of the real seat theory, save to the extent that the law would be formally bifurcated. The Convention did not provide a mechanism for the resolution of any conflicts between the two applicable laws, and it appears that the drafters did not foresee the possibility that the incumbency of two laws might expose the company and its officers to irreducible conflicts of obligations and a concomitant choice between suffering the penalties imposed by one state or another.³³

The Convention was ratified by five of the founding Member States. However, the Netherlands refused to ratify the Convention, motivated by that country's adoption of the incorporation theory in 1959,³⁴ shortly before negotiations towards

²⁸ EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69 7–18 (hereinafter 'EC Convention 1968').

²⁹ M Goldman, 'La nationalité des sociétés dans la Communauté économique européenne' (1969) *Travaux du Comité français de droit internationale privé* 215, 219–26; Stein (n 12) 1329–31.

³⁰ EC Convention 1968 art 1.

³¹ EC Convention 1968 art 3.

³² EC Convention 1968 art 4.

³³ See Rammeloo (n 11) 36. For a discussion of conflicts of obligations in corporate law, see DA DeMott, 'Perspectives on Choice of Law for Corporate Internal Affairs' (1985) *Law and Contemporary Problems* 161, 172–79; AE Anton and PR Beaumont, *Private International Law: A treatise from the standpoint of Scots law*, 2nd edn (Edinburgh, W Green, 1990) 703.

³⁴ Drury (n 15) 181–82. T Ballarino, 'Sulla mobilità delle società nella Comunità Europea. Da *Daily Mail* à *Überseering*: norme imperative, norme di conflitto e libertà comunitarie' (2003) *Rivista delle società* 669, 670. In addition to the Netherlands' objections to the content of the Convention, there is

the adoption of the Convention began. The Dutch refusal to ratify the Convention rendered the instrument a dead letter. The absence of harmonisation was perceived as authority for Member States to retain their own conflict rules.³⁵ This view was endorsed by the European Court of Justice in its judgment in *Daily Mail*.³⁶

As noted above, legislation has since been introduced in respect of some areas of the private international law of companies.³⁷ Plans are now afoot to introduce legislation of general application in the European Union.³⁸ However, they remain at an embryonic consultative phase. The most significant developments in the discipline which have led to a degree of unification of private international law have been occasioned by the European Court of Justice.³⁹ The judgments of the Luxembourg Court have gradually articulated limitations to the prescriptive jurisdiction of the Member States whereby companies incorporated under the laws of one Member State must be fully recognised by every other Member State. In addition, the ECJ has suggested that Member States may not impede changes in a company's governing law by requiring dissolution and reincorporation.⁴⁰

1.4 Are Conflicts of Corporate Laws Still Relevant?

Companies have played an essential role in the social and economic organisation of territories ever since early British corporations were established to colonise the empire and to establish fiefdoms by and for the Crown.⁴¹ Enlightened thinking accelerated the privatisation of economic governance.⁴² The consequence of privatisation is that companies play a role that was previously considered to be public. This role grows as the generation and distribution of wealth are entrusted to private actors.⁴³ Nevertheless, private governance is highly regulated, and the

some evidence to suggest that the Netherlands was in no mood to be accommodating, following General De Gaulle's veto of the accession of the United Kingdom to the Community. See Stein (n 12) 1337.

³⁵ A Santa Maria, *European Economic Law* (Netherlands, Kluwer, 2009) 11; Rammeloo (n 11) 36–37; Stein (n 12) 1330.

³⁶ Case 81/87 *The Queen v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust plc* [1988] ECR 5483.

³⁷ See n 9.

³⁸ Commission (EC), 'An area of freedom, security and justice serving the citizen' (Communication) COM (09) 262 final, 14.

³⁹ Centros (n 2); Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* (NCC) [2002] ECR I-9919; Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155; Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805; *Cartesio* (n 6).

⁴⁰ *Cartesio* (n 6) paras 110–12.

⁴¹ J McLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) *Indiana Law Journal* 363, 363–72.

⁴² For an account of the introduction of limited liability in its historical context, see D Loftus, 'Capital and Community: Limited Liability and Attempts to Democratize the Market in Mid-Nineteenth-Century England' (2002) 45 *Victorian Studies* 93, 93–120.

⁴³ See Dine (n 10) 114–16.

approach to regulation is not uniform. The emergence of divergences in corporate law illustrates the fact that legislators are aware that the regulation of enterprise helps to define the social and economic construct of their territories.

However, there exist pressures on the relevance of conflicts of corporate laws, which should be addressed prior to delving deeper into a study of the discipline. First, the above-noted developments in EU law restrict the application of protective norms. Notwithstanding historical differences, there appears to be a significant degree of convergence on a singular, liberal model, insofar as conflicts within the EU are concerned. In this respect, suffice it to note at this juncture that there remain significant theoretical and legal questions to merit attention. However, substantive corporate law itself presents a further challenge. The policy motivations for a protective approach to the governing law of a company are, arguably, being gradually diminished in a related convergence on a singular model of corporate governance.

Of late, eminent corporate law scholars have proclaimed the end of history of corporate law.⁴⁴ They claim that there is a growing international consensus in favour of the shareholder primacy model which suggests that corporations are established for the benefit of shareholders, and that all other interests in the corporate form are ancillary to those of shareholders: 'just as there was rapid crystallization of the core features of the corporate form in the late nineteenth century, at the beginning of the twenty-first century we are witnessing a rapid convergence on the standard shareholder-oriented model as a normative view of corporate structure and governance'.⁴⁵ The impact of the predicted end of history of corporate law could be particularly significant for the discipline of the conflict of corporate laws. Although differences will remain in terms of specific substantive issues and private international law questions will therefore remain relevant, as indeed is the case in the United States, where conflicts of corporate laws have not been eliminated, notwithstanding significant convergence on the nature and purpose of the corporation,⁴⁶ the global acceptance of one broad model of corporate governance would have the net effect of reducing the policy justifications for protective conflicts norms. Accordingly, if the thesis that further corporate law reform will bring forth further substantive convergence is correct,⁴⁷ competition for incorporations would likely be the chief remaining policy motivation of any great consequence in choice of corporate law.

Proponents of the end of history thesis cite the failure of alternative models of corporate governance, legal competition, the emergence of an influential and organised shareholding class, and the influence of academia as reasons for the dominance of the shareholder model.⁴⁸ They take the view that it is unlikely that

⁴⁴ H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2001) *Georgetown Law Journal* 439.

⁴⁵ *ibid* 443.

⁴⁶ See generally DeMott (n 33) 161–98.

⁴⁷ See generally Hansmann and Kraakman (n 44).

⁴⁸ *ibid* 443–53.

the development will be reversed.⁴⁹ Recent amendments to corporate laws in a plurality of European states lend credence to the view that there is an increased international consensus on the nature and purpose of the corporate form. Notable developments include the reform of the German GmbH, the French *société à responsabilité limitée* (SARL) and the Dutch BV.⁵⁰ Those civilian systems are fast approaching a model that is more akin to the United Kingdom's private company, that is a model that defers matters of corporate governance to the will of the shareholders. In addition to the national developments, the nascent European Private Company also closely follows the shareholder-primacy model and makes express reference to the contractual covenants of the shareholders.⁵¹

Despite a significant degree of convergence on the shareholder primacy model, and despite liberalisation in the conflict of laws camp, much like Fukuyama's political end of history, Hansmann and Kraakman's proclamation of the 'end of history for corporate law' was premature at best. It is conceded that the prevalent debate regarding corporate governance has been steered in the direction of the maximisation of shareholder value. However, there is also compelling evidence that the end of history is not nigh. In Europe there remain several states that include workers in the governance of firms to varying degrees.⁵² At a supranational level there are harmonising and unifying measures that account for the place of workers in the firm, as well as the protection of other non-shareholder constituencies.⁵³ Indeed, Hansmann and Kraakman acknowledge the fact that European harmonisation of corporate law has been driven by a desire to stave off the shareholder primacy model.⁵⁴ Moreover, the continuing deference to non-shareholder constituencies is not merely an old-world phenomenon. Twenty-nine states in the USA have adopted constituency statutes which allow or oblige managers to consider the interests of non-shareholder constituencies in their decisions.⁵⁵ Even in

⁴⁹ *ibid* 443.

⁵⁰ Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG); Loi n°2003-721 du 1 août 2003 pour l'initiative économique art 1; Dutch Ministry of Justice <http://english.justitie.nl/currenttopics/pressreleases/archives2006/-Simplified-Formation-of-BVs-for-Smaller-companies-and-Start-up-Businesses.aspx>. For academic commentary see: J Armour, 'Legal Capital: An Outdated Concept?' (2006) *European Business Organization Law Review* 5, 26; M Miola, 'Legal Capital and Limited Liability Companies: The European Perspective' (2005) *European Company and Financial Law Review* 413, 445; M Becht, C Mayer and F Wagner, 'Where do firms incorporate? Deregulation and the cost of entry' (2008) *Journal of Corporate Finance* 241, 252.

⁵¹ Commission (EC), 'Proposal for a Council Regulation on the statute for a European private company' COM (2008) 396/3 recital 4.

⁵² M Andenas and F Wooldridge, *European Comparative Company Law* (Cambridge, Cambridge University Press, 2009) 417–47.

⁵³ Council Directive (EC) 1994/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [1994] OJ L254; Council Regulation (EC) 2157/2001 on the statute for a European company (SE) [2001] OJ L294/1; Directive (EC) 2005/56 of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1; Directive (EC) 2007/36 of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L184/17.

⁵⁴ Hansmann and Kraakman (n 44) 454.

⁵⁵ A Winkler, 'Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History' (2004) 67 *Law and Contemporary Problems* 109, 123.

Delaware, the standard-bearer of accommodating corporate law, there are situations where directors are entitled to take account of considerations other than shareholder value. The judgment in *Paramount Communications v Time*⁵⁶ is a case in point. The court held that Time's directors were within their rights to refuse to put a tender offer to a shareholder vote, notwithstanding that the acceptance of the tender would increase shareholder value in the short term. The directors opted instead for a merger with Warner Brothers, which had the net effect of rendering Time's shareholders a minority in a company that was heavily burdened by debt. The court reasoned that the directors were entitled to take protective action to safeguard the philosophy and practices of the corporation, notwithstanding that this would have negative short-term repercussions on shareholders. In the United Kingdom, another bastion of shareholder value, recent amendments to the Companies Act provide that the discretion of directors is not to be exercised exclusively for the benefit of shareholders. Whereas the principal duty is 'the success of company for the benefit of members as a whole', directors must also, as far as possible, have regard to other considerations, including: (a) the long-term effects of decisions, (b) the interests of employees, (c) relationships with suppliers and customers, (d) the impact of the company on the community and the environment, (e) the company's goodwill and (f) fairness between members of the company.⁵⁷

In addition to long-standing divergences in corporate law, new divisions are emerging in Europe in respect of gender issues in corporate law. In much the same manner as socialism and conservative values led to divergences in the past, contemporary developments reflect new political sensibilities which provide compelling evidence that new lines will continue to be drawn between corporate legal cultures. France,⁵⁸ Spain⁵⁹ and Norway⁶⁰ have taken the view that the law should prescribe gender balance in the boards of certain companies, and similar developments are in the offing in other European states.⁶¹ In contrast, a Treasury Report in the United Kingdom acknowledges the problem of under-representation of women, but suggests that equality should not be enforced through corporate laws.⁶² This illustrates a continuing division regarding which matters are to be dealt with at the core of corporate law, and which should be left to other laws or to the market. Accordingly, convergence on a particular corporate model will continue to be counterbalanced by the permanence of some old divisions and the emergence of new divisions which reflect diverse approaches to the purpose of companies and the manner in which they are to be regulated.

⁵⁶ *Paramount Communications, Inc v Time, Inc*, Delaware Supreme Court 571 A 2d 1140.

⁵⁷ Companies Act 2006 s 172.

⁵⁸ Proposition de loi (No 2140) relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle.

⁵⁹ Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres art 75.

⁶⁰ See A Belcher, 'Board Diversity: Can Sex Discrimination Law Help?' (2005) *Northern Ireland Legal Quarterly* 356, 359–61.

⁶¹ S Terjesen and V Singh, 'Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context' (2008) *Journal of Business Ethics* 55, 62; C Villiers, 'Achieving Gender Balance in the Board Room: Is it Time for Legislative Action in the UK?' (2010) *Legal Studies* 533, 534.

⁶² Treasury Committee, *Women in the City* (HC 2009–10) 482.

1.5 Provisional Conclusions

In view of the foregoing, it is submitted that the conflict of corporate laws remains a discipline that merits academic and legislative attention. In an environment where broad doctrinal controversies have been replaced by a case-by-case judicial development of European conflicts theory, it is all the more necessary to take stock of the state of development of the law and to determine whether the direction of legislative development is in harmony with the corporate law goals of the Union and its Member States. It is also necessary to evaluate whether the law is normatively and substantively coherent. This exercise will enable the elaboration of legislative solutions which are theoretically sound, widely acceptable and practically effective.

<http://www.pbookshop.com>