

INTRODUCING COMPARATIVE LAW INTO THE BASIC CORPORATE LAW COURSE

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I. GOALS FOR INTRODUCING COMPARATIVE LAW INTO THE BASIC CORPORATE LAW COURSE

A. Familiarizing Students with Foreign Corporate Laws

In a global economy, in which corporations formed under laws of other nations are key players, it is helpful for future lawyers to have some familiarity with the corporate laws under which such firms operate. I try to demonstrate this to my students by having them read cases decided by courts in the United States, in which United States nationals, who were shareholders or creditors of corporations formed outside of the United States, found their rights governed by foreign corporate laws. Of course, one cannot expect law students to learn all of the variations in corporate laws around the world – any more than one can expect students to learn all of the corporate laws among the 50 states in the United States. We can, however, seek to give the students a conceptual framework in which they can work as issues arise.

B. Clarify Corporate Law within the United States

Many times, the best way to understand a particularly difficult area of law is to step back and examine how other systems address the same concerns. For example, looking at the various doctrines employed around the world to protect creditors from possible abuses of limited liability can clarify the doctrine of piercing the corporate veil in ways that can take years to distill from reading just United States source material.

C. Challenge the Students' Unquestioning Assumption that the Present Law in the United States Is, by Definition, the Best Law

Showing students that other nations somehow function with corporate laws at odds with those in the United States---such as the European Union insider trading and takeover directives or the German system of co-determination---helps create law school graduates with the openness of mind and imagination necessary for quality lawyering.

D. Predict the Direction of Corporate Law in the Future

While legal education examines the law in the past and present, in the end, our graduates will deal with the law in the future. The history of corporate law is a history of migration of structures and rules from one nation to another---whether that is the spread of the European idea of a governing board, the German idea of the limited liability company, or the United States' idea of prohibiting insider trading. Examination of other nations' corporate laws will better enable future

lawyers to anticipate where corporate law in the United States might go during the course of their careers.

II. PLACES TO INTRODUCE COMPARATIVE LAW INTO THE BASIC CORPORATE LAW COURSE

A. Overview of Business Forms

Providing an overview of business forms on a worldwide blueprint allows students to see where forms like the LLC came from and to understand the concepts underlying the forms.

B. Choice of Law

Instead of discussing the “race to the bottom” thesis and rebuttal through theoretical articles, students can use the Delaware Supreme Court’s holding that the internal affairs rule required application of Panama law in *McDermott*, and the European Court of Justice’s refusal to allow the Netherlands to apply its minimum capital rules to Dutch persons conducting business through English companies in *Inspire Art*, to explore the issue in concrete situations involving shareholder and creditor rights. Add in a Japanese statute requiring companies doing most of their business in Japan to incorporate there, and students see that free choice of law is not the only approach states can take.

C. Creditor Protection: Piercing the Corporate Veil

An opinion from the Southern District of New York, which discusses the application of both Lebanese and New York law to a case in which creditors of a Lebanese limited liability company sought to pierce the corporate veil, allows students to compare how civil law creditor protection rules and U.S. piercing the corporate veil doctrine seek to protect creditors from abuses of limited liability by controlling shareholders. A U.S. and an English court opinion, which address efforts to pierce the corporate veil of the same affiliated group of English companies selling asbestos into the United States, allow students to see different approaches to dealing with the ability of tort claimants to pierce the veil of subsidiary corporations; which one can complement by tracing the history of German law dealing with the liability for the debts of controlled corporations.

D. Basic Corporate Governance

An overview of various fundamental convergences and divergences in corporate governance structures around the world can lead students to ask key questions about these structures: Why is it that corporate laws worldwide call for governance under the direction of a board? Why should shareholders elect this board, as opposed to having employees elect some directors (as under co-determination in some European countries)? Looking at the German two-tier board allows students to see where the idea of a monitoring board with outside directors originated. Looking at the more concentrated pattern of share ownership even of public companies found in most of the world provides an important contrast to the Berle-Means thesis.

E. Fiduciary Duties

By reading cases from other nations dealing with potential liability of directors for careless, illegal or self-interested conduct, students further develop their ability to analyze such claims. In instances such as Japanese and English cases dealing with inattentive directors, rogue traders and illegal activities, students see results and analysis not that much different than one might expect from a court in the U.S. In a pair of German cases seemingly applying the business judgment rule to decisions to sue and executive compensation, students see how similar doctrines can yield different results by virtue of different judicial attitudes in different nations. A case from Canada dealing with creditors' claims against directors and cases from several European countries dealing with claims against controlling shareholders illustrate outcomes under different doctrines than generally applied in the United States. These materials also form the basis for students to consider alternative remedies beyond the derivative suit to enforce fiduciary duties.

F. Insider Trading

The worldwide spread of laws against trading on inside information provides an additional framework against which to consider the U.S. academic debate on the wisdom of such a prohibition, while the European Union insider trading directives allow students to see the viability of the result had the Supreme Court come out the other way in *Chiarella* and *Dirks*.

G. Takeovers

Depending upon the available time for covering takeovers in the basic course, the European Union takeover directive provides a useful example of roads not taken in the United States with respect to sale of control at a premium and the ability of directors to employ takeover defenses.

III. CHALLENGES TO INTRODUCING COMPARATIVE LAW INTO THE BASIC CORPORATE LAW COURSE

A. Lack of Time

While the tradeoff is worthwhile, one can minimize the loss of coverage by using materials that introduce comparative law at the same time as they cover key domestic law and concepts. For example, I cover piercing the corporate veil entirely through cases dealing with non-U.S. corporations. Foreign director liability cases can be substituted for additional U.S. cases finding liability for inattentive directors, holding illegal conduct violates directors' duties, discussing the duty of directors toward creditors, and considering liability for waste.

B. Student Reactions

Students generally have not objected to the introduction of comparative materials. On student evaluations from several different law schools, about equal numbers have expressed positive and negative comments on the use of these materials, with the vast majority of students having expressed no opinion.

C. Lack of Knowledge

How many professors teaching corporate law classes lack formal training in economics and yet add economic materials to the class? As in the case of most of what we teach, the key is to have materials available that will allow professors to master enough of what they need to know.

D. Lack of Materials

Several books are available.