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# Economy and Commercial Law – Selected Issues

Edited by

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## Introduction

*David A. Frenkel*

As diverse as the articles that are offered to the reader – they all deal with issues of law that have current significance. It is the beauty of the law that we do not think in closed categories but transcend boundaries to arrive at solutions.

This book offers a collection of articles that seek to shed light on several topical issues from economy and commercial law.

The essays in this book are based on presentations at the International Conferences on Law, organised by the Athens Institute for Educational and Research (ATINER) held in Athens, Greece.

The book is divided into three parts: 1) Economy and the Law, 2) Public expense, and 3) Commercial law.

The first part is divided into: a) Taxation, and b) Financial Crisis. The second part is divided into: a) budgeting, and b) Energy resources. The third part is divided into: a) Indigenous corporate governance, b) principles in commercial law, and c) international investments.

### Economy and the Law

#### *Taxation*

The book commences with Elfriede Sangkuhl's on *The impact of the Major Economic Theories, Classical Liberal, Social Liberal and Neo-Liberal, on the Taxation of Corporations*. In her essay, Sangkuhl examines and evaluates the applications of various theories of equity and justice developed by economists and philosophers to the question of what constitutes an ethically fair tax contribution by corporations. The examination of these theories and their influence on taxation policies is mainly about reflecting on the powerful influence that economic theories have in nation state policy making, especially with regard to tax policy.

#### *Financial Crisis*

The second contribution is Michael Malloy's essay on *Governing Foolishness: A Comparative Analysis of Executive Compensation Rules*. The author explores three approaches to limits on executive compensation as responses to the current financial crisis – 1) the executive compensation provision of the Dodd-Frank Act, 2) the European Commissioner's Green

Paper on executive compensation, and 3) the guidelines issued by the Basel Committee on Banking Supervision. According to Malloy, current empirical data on executive compensation strongly suggest that these limitations on executive compensation are of a negligible effect. Malloy argues that these limits are a distraction from the real issues in the financial markets like fraud, manipulation, gross negligence during the run-up to the crisis.

The third essay is Nicholas Georgeakopoulos on *Pyres, Haircuts, and CACs: Lessons from Greece's Restructuring*. The author analyses the questions of Sovereign insolvency, banking, financial and Eurozone crises. The essay discusses the powerlessness of sovereign creditors, Greece's predicament and the resolution of insolvency. Georgeakopoulos suggests that a sovereign insolvency regime should grant priority to post-insolvency creditors over pre-insolvency ones, should allow voting by classes and should be conditional on the debtor's continued compliance with reform and supervision.

## **Public Expense**

### *Budgeting*

José Mauricio Conti, André Castro Carvallho and Gabriel Loretto Lochagin, in their essay, which is the first in this section *A Brief Review of the Legal Qualification of Public Expenditure in Brazil*, analyse the legal qualification of public expenditure in the Brazilian budgetary system. They identify the important aspects of the legal qualification of public expenditure and show how this budgetary rigidity does not allow discretionary decisions by elected officials.

### *Energy Sources*

The next essay is of Jana Dudová and Helena Doležalová. Their essay *Biodiversity Protection related to Renewable Energy Sources: Precautionary Principle*, deals with the use of renewable energy. The main obstacle to the development of some renewable energy sources is the environmental one. Biomass cultivation could entail negative effect on biodiversity. Several international instruments have been adopted in order to prevent the introduction of alien species which threaten ecosystems, habitats or species. This aim should be fulfilled through the application of precautionary principle, which is controversial of environment law. This concept related to the lack of full scientific certainty in relation to measures to prevent environmental damage. The authors call to put in legislation an emphasis on balancing of interests.

## Commercial Law

### *Indigenous Corporate Governance*

One of the rights acknowledged by the United Nations Declaration on the Rights of Indigenous Peoples relates to the economic freedom that should be given to indigenous peoples. This is the subject of Marina Nehme's essay *Indigenous Corporate Governance in Australia and Beyond*. The authoress considers the rights of Indigenous Australians under the Australian law and compares it with the steps taken in other countries allowing indigenous peoples to run their business based on their own cultures and traditions.

### *Principles in Commercial Law*

Christian Sahb Batista Lopes and Luciana Helena Gonçalves, in their essay *The Construction of pre-contractual Liability as a Link between Social Contact and Objective Good Faith in the Brazilian Legal System*, demonstrate the possibility of the application of the German social contact theory in the Brazilian and other legal systems. They demonstrate how the social contact plays a role in the expansion of the legal protection of the individuals.

### *International Investments*

The final article in this book deals with International Investment and the field of international economic law. Stefan Mandelbaum, in his essay *A Dialectical Critique of Methods and the Status of Customs in International Investment Law*, shows that emphasising either state sovereignty or contractual obligation leads to uncertainty with regard to the uniformity underlying the concept of legal legitimacy. Mandelbaum proposes, therefore, a dialectical method. He demonstrates that the advantage of such an approach lies in the fact that it treats different sources of substantive law or strands of legal tradition not as mere constituent components, but rather as constituting moments within the legal system itself. The author argues that, although customary international law is the primary and somewhat objective criterion in arbitral tribunals, it remains a perpetual process of being posited through the recognising application in the resolution of investment disputes, while also positing recognised standards for the treatment and obligations of foreign investors or the duties and rights of host-states. His conclusion is that a dialectical analysis can serve to create normativity from within, which might provide a sound basis for the system's conceptual legitimacy as well as for the public understanding of international investment law.

I hope that this collection of essays will stimulate and insight reading. Many of the debates analysed in this volume are on-going, and the policy and interpretation suggestions offered will contribute to the future course of the debates.