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Book Review, J.O. Haley's Antitrust in Germany and Japan, The First Fifty Years, 1947-1998

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Book Reviews

JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN, THE FIRST FIFTY YEARS, 1947-1998, Copyright, 2001, Univ. of Washington Press, pp. 249.

*Reviewed by David J. Gerber**

John Haley's comparative study of competition law in Germany and Japan is in many ways a pioneering work.[1] It uses comparative analysis to provide insights into the development and operation of competition law in the two countries, and, as the author notes, there has been very little serious scholarly work of this kind, despite its potential benefits. This is all the more remarkable because of the intense interest during recent years in the "internationalization" of competition law. The book takes comparison seriously and shows some of the ways in which it can produce valuable insights that cannot be easily discerned, if at all, through other methods. For this reason alone, the book is of much value.

Haley's main objective is to compare the process by which competition law was "imposed" after World War II on two countries (Japan and Germany) and how it has developed since then. The story is intriguing. Before the Second World War, Japan and Germany had highly regulated economies with significant cartelization and dominance by large enterprises and groups of enterprises. In both cases, private and public controls on the economy were widely seen as contributing to militarism and to the resulting incentives to go to war. Both countries were than occupied by the victors in that war, and in both cases antitrust laws were either imposed or supported by the occupying forces (basically, the US). In one case, Germany, this competition law became a central factor in the legal and economic development of the country.[2] In the other, Japan, it remained a marginal factor until recently. Haley sets out to examine the differences between the two patterns of evolution.

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1. "Competition law" is the usual term for this form of law in many legal systems. In the U.S., it is known as "antitrust law."

2. For further discussion of this story, see DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 115-53 & 232-333 (Oxford: Clarendon, 1998; pbk. 2001) and *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New Europe,'* 41 AM. J. COMP. L. 25 (1994).

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He concludes that the differences with regard to competition law between Japan and Germany prior to the Second World War were greater than generally acknowledged, and that the two systems have become increasingly similar since the war. The book describes the steadily increasing influence of competition law in Japanese policy and the increasing intensity of enforcement of Japanese competition law, and the author argues that the Japanese system should no longer be considered a "weak cousin" of the German system.

The book is organized into two almost independent parts. One is entitled "The origins and development of antitrust legislation in Germany and Japan" (60 pps.). It contains two chapters: one on the origins of competition law in the two countries and the other on the subsequent evolution of the competition law regimes. Part II is entitled "Antitrust Regulation and Its Enforcement in Germany and Japan." (112 pps.). It includes chapters on prohibitions and approvals, processes and procedures, remedies and sanctions. The author does not provide separate chapters for Japan and Germany, but masterfully interweaves the German and Japanese elements, both in the developmental chapters and in the contemporary operations chapters. This is a more difficult procedure than separating the two, but if done skillfully, as here, it can yield important benefits.

The title is somewhat misleading as to the book's scope. The focus of part one is on the events and thinking surrounding the introduction of competition law in the two countries and on the early years of competition law development. It does not treat the evolution of the two systems after the 1960s in any depth. The enforcement material in part two was current as of the book's publication and shows developments in this specific area, but this material is not integrated into the narrative of development.

Another scope issue that deserves mention relates to the relative depth of coverage of the German and Japan experiences. The coverage of Japanese competition law reflects more analytical depth and significantly stronger command of information and of relevant literature than does the treatment of German law. This is not surprising, given that Haley is one of the world's foremost scholars of Japanese law (he is even referred to on occasion as the "father" of Japanese legal scholarship in the U.S.). Although he did extensive work on German sources in preparing the book, he is more comfortable with the Japanese material, and his knowledge of the secondary literature is deeper.

In addition to its "trailblazing" value and general comparative insights, the book is particularly valuable in three additional respects. First, it provides a useful and insightful account of the efforts and actions of US occupation officials relating to competition law in Japan and Germany. Here the comparison between Japan and Germany is fascinating, and it clearly fascinates the author. Second, the book provides a brief but valuable account of the evolution of the Japanese antitrust system, particularly the early attitudes toward antitrust in Japan and their relationship to other aspects of Japanese

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economic policy. And, finally, the book's attention to the enforcement of antitrust law in the two systems provides material that is difficult to obtain, and the author presents it effectively and from a comparative perspective that is often enlightening.

As with any pioneering effort, especially one that takes on such large themes and immense and sometimes uncharted material, the book has some rough edges. These are in themselves, however, instructive for those of us who pursue this type of scholarship. They do not detract from the merit of the book, but reflect the immensity of the subject and the state of the available analytical tools.

Three areas in my view warrant further exploration and development. One relates to the dynamics of legal institutions. In his magisterial *Authority without Power,* Haley carefully and brilliantly analyzes the operation of law in Japan, capturing the ways in which power is exercised outside legal institutions, often conditioning the effectiveness of the formal legal mechanism or filling in vacuums left by ineffective institutional operations.[3] This kind of analysis is more difficult in a comparative context, but it needs to be done, and I wish Professor Haley had paid more attention to it in this book. Perhaps that is his next book, and he is tantalizing us.

A second involves the dynamics of change. Another valuable feature of *Authority without Power* was its analysis of the evolution of practices and institutions. This form of analysis is less evident in the current book. For example, one way of developing robust explanations for some of the developments Haley describes is to analyze the points at which the ideas were tied into existing intellectual projects, value structures and political dynamics. One factor in the differing trajectories of competition law development between Germany and Japan was that certain ideas and values (relating, e.g., to political and economic freedom and to the role of law in society) were more firmly rooted in particular groups within Germany that acquired power after the Second World War. Although my knowledge of Japanese developments is too limited to justify firm conclusions, my understanding is that the imbeddedness of those ideas and values was far more precarious among Japanese ruling elites and that there was no analogous mechanism by which they could have acquired similar political support in postwar Japan.[4] Haley's book does some of this, but there would have been much value in applying it throughout the book.

Finally, Haley includes relatively little material that relates his project and insights to more general theoretical and methodological considerations. There is certainly no obligation that he do that, but, given the importance of material and insights, it would have been of

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3. John O. Haley, Authority Without Power: Law and the Japanese Paradox (Oxford, 1991).

4. For further discussion of the intellectual, political and ideological background in Japan, see Bai Gao, Economic Ideology and Japanese Industrial Policy: Developments from 1931 to 1965 (Cambridge, 1997) and Japan's Economic Dilemma: The Institutional Origins of Prosperity and Stagnation (Cambridge, 2001).

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much value in developing and refining the intellectual tools available for use in comparative legal analysis. I hope that Professor Haley will add more of this in the future.

Haley's project in this book is to use comparative insights and methods to probe how and why legal regimes have taken particular forms and operate in particular ways. The book is a valuable example of how this can be done. It is particularly valuable because it applies this methodology to the area of competition law, where there has been relatively little careful scholarship of this kind. Economic globalization and the concomitant efforts to develop competition law for global markets call for more of it.

HERBERT KRONKE, CAPITAL MARKETS AND THE CONFLICT OF LAWS, RECEUIL DES COURS 2000, VOLUME 286.

*Reviewed by J.H. Dalhuisen**

The choice of this topic by the Hague Academy is timely and significant. It has long been neglected and a comprehensive, coherent study of this field has hardly been attempted. The difficulties are obvious. A study of this nature requires an intimate knowledge of the operation of the financial markets, its services, products and regulation. Together they cover an enormous field and reach from commercial banking into investment banking activities and even into investment funds and life insurance products.

All have to do with the recycling and investment of money, either via the banking system – in essence arranged around the deposit, lending and payment activities – or via the capital markets – in essence arranged around issuers and investors and their service providers who may also provide an underwriting facility and some market infra structure. If they do, this is likely to result in over-the-counter or OTC market activity, off-exchange clearing, settlement and custody functions.

Although some of these activities remain concentrated in single organizations like the more regular domestic stock exchanges, one of the more important modern developments has been the extraordinary expansion in these OTC markets and the separation therein of the various market functions (like trading, clearing, settlement and information supply) amongst different organizations or participants. In this environment, the traditional national stock exchanges lost their erstwhile monopolies and multiple functions and have in many respects become peripheral to capital market operations except in the

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U.S. whilst competition between the participants in these various activities has become an important issue.

This decentralization has acquired special significance when combined with the internationalization or globalization of the financial service industry. That has perhaps nowhere become as visible as in Europe where much of the financial activity in all its forms is substantially offshore. It allowed the euro-market as an informal mostly unregulated market to become the largest capital market in the world with an immense infrastructure propelled by the world's major investment banks in terms of underwriting and trading and by independent companies (like Euroclear and Clearstream) as custodians and clearing and settlement institutions. This market does not have a location in any particular country whilst business is normally conducted on the telephone or through cross border electronic transmission systems. Even where international offerings have tranches that are issued in domestic markets, the essence of these offerings is also truly transnational and meant to be so.

Another important modern development has been the increase in the types and complexities of financial products, especially in the modern hedge instruments like derivatives, but also in secured transactions, like floating charges, and in finance sales (or title financing) like finance leases, repos, or receivable financing or factoring and in securitization, syndicated loans and project financing, investment products and funds of all kinds. Also here, different formal and especially informal markets have sprung up, often internationalized of which those in repos and derivatives, especially swaps, are major examples. Most importantly in this context, the legal characterization of these operations and even more of the new products is often problematic even under national laws. The difference between the various kinds of secured transactions and the different types of finance sales may be an important illustration, but there are also major legal characterization issues in other areas. In international transactions, the issue that arises here is whether this characterization issue is itself internationalized and based on the understanding and practices of the international market place.

Another fundamental modern aspect may be seen in the effect these developments have had on financial regulation which remains in essence domestic and has had difficulty to cope both with the internationalization and innovation in financial activities.

To deal with the internationalization, in the EU, in regulatory matters a division of labor between host and home regulator had to be devised amongst Member State regulators. That became unavoidable in order to give meaning to the free flow of financial services throughout the EU which were threatened by double regulation. Centralized securities regulation at EU level was here rejected. The home/host divide subsequently required the development of a notion

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of location of these services, therefore a definition of internationality, which was done through case law of the European Court.[1]

Other countries like the U.S. have internally a regime where state law is largely replaced by federal securities legislation operated at that level by federal regulators. Externally there is a unilateral regime under which access of foreign financial products and services into the U.S. is subject to the American securities laws which may sometimes also be extended to protect American investors abroad. So it is in fact also in the EU for each EU Member State in respect of non-Member State financial activities. Here the waiting is for WTO/GATS.

Financial innovation may present even greater difficulty for regulators. It concerns new products and their distribution and the assessment of their inherent risk. In international transactions these risks may be compounded and their assessment by home or host regulator extra complicated.

Another complicating factor is here that financial regulation itself is changing, moving fast from the micro to the macro level. In banking, the emphasis has thus shifted from depositors' concerns (they are now more normally protected by industry deposit compensation schemes) to worries about systemic risk. Also in the area of securities regulation the emphasis is moving, in that case from concern for investors at the micro level (which increasingly excludes the larger ones whilst the smaller ones are protected through investment guarantee funds) to market integrity at the macro level, therefore to concerns about manipulation, competition, insider dealing, and money laundering.

A final point to be made in this connection is that for banks the regulation still concerns mainly institutions as such but for investment services (to which in Europe regulation was extended only during the last 20 years) regulation operates per function. Many of these functions like clearing, settlement, custody, and the organisation of OTC markets remain substantially unregulated. Even for underwriters, traders and brokers who are foremost in line for securities regulation, licensing and prudential supervision are less important than in commercial banking as regulation concentrates here more on conduct of business, issuer and product transparency and had therefore always an altogether different outlook.

It is fair to say that Kronke's study covers only a small part of this scene. It is first limited (p. 261) to capital markets, therefore excluding the banking and fund industries, and is further mostly concerned with the operations of *regular domestic* stock exchanges and their classical products in terms of shares and bonds. Thus the derivative, OTC and international markets are not primarily considered, nor the related services in custody, clearing and settlement, therefore not the way participants in these markets typically operate nor the type of modern financial products they handle and the way they are

1. Probably best summarized in Reinhard Gebhart, v Consiglio dell" Ordine degli Avvocati e Procuratori di Milano, [1995] ECR-I-4165.

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normally sold across border and settled. No major conflict of laws problems are then likely to arise and it follows that the important conflict problems arising in terms of the interaction of regulation and of policies of different countries in this environment remain in this study mostly unexplored as local capital markets activity is largely immune to them. In this manner the dynamics of the globalization are also hardly taken into account and the strain they put on regulation is not evident.

By putting the emphasis on regular domestic markets it is indeed possible to tick off the various domestic financial market functions for their *lack* of international contact (pp. 263 – 266) while it is obvious that the questions of issuing, listing, underwriting and trading in these local stock markets are unlikely to give rise to many conflict situations. Neither is financial regulation, as each country regulates its own market organizations and their participants. Who can trade in what products and the way it is done are also matters of the stock market concerned. As to disclosure, it will for issuers (whether foreign or not) also be under the rules of the domestic stock market they access, even if their own law may still be relevant in determining to what extent they can issue securities of the offered type.

For investors there is potentially more room for private international law questions when a foreign investor starts buying and selling on a regular exchange in another country, but he will normally (have to) do so through a local broker who will have access to that exchange (as a member or otherwise) under local laws where he will deal (normally) through an auction system with a(n unknown) broker who represents the seller under similar circumstances. In such situations, the contract between investor and broker will normally also be governed by the law of the country where the trade takes place and the clearing, settlement and delivery will be handled.[2] Between issuer and underwriter a similar situation obtains and both, the way the underwriting is done and the agreement amongst underwriters is handled, are also likely to derive their cue from the regular domestic market in which the underwriting is taking place.

Only in international issuing, trading and investment activity are questions on the applicable domestic laws likely to arise then. Those questions include what the effect of globalization truly is in terms of any applicable domestic private or regulatory laws or whether perhaps transnational instruments and ways of dealing, clearing and settlement prevail. That becomes truly interesting if one realizes that it may soon be the case that all market activity of any substance is absorbed in single counterparty clearing and settlement organizations on the basis of fully dematerialized securities or stan-

2. In the trading of futures and options as standard contracts on regular (domestic) futures and option exchanges, the situation is not different (p. 312). These trades will occur under the exchange rules and as such not give rise to substantial conflict of laws issues either except for brokerage contracts with foreign investors which are no less likely to be concluded and performed under the law of the country of that market.

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dardized or even non-standardized derivative contracts like swaps organized around a bilateral netting facility and types of proprietary entitlements that have (for lack of the notion of trust) hardly an equivalent in any domestic law of the civil law variety but perhaps find their best analogy in Article 8 UCC in the U.S.

Given the limited field of enquiry in the study of Kronke which avoids these newer areas, his study turns unavoidably to more isoteric if important topics: insider dealing, take-over bids; and consumer protection, although modern book-entry systems are also somewhat more broadly covered (p. 318). Kronke's starting point is here the application of the traditional European framework of private international law, even though (with the exception of the operation of the book-entry system), it concerns here in essence issues not of private law but of regulation which do not sit easily with a private international law approach and would in the opinion of many not be typical or certainly not be traditional conflict of laws matters.

In the absence of much guidance from case law, the study opens with cases that strictly speaking have little or nothing to do with capital markets (the Zoelsch v. Arthur Anderson and Lloyds cases), are American and therefore product of a substantially different attitude to international conflicts, no matter the bold statement on p. 271 that the Restatement (Second) Conflict of Laws in Secs. 6, 145, 186 and 188 reflects the traditional (Savigny) inheritance (quite apart from the fact that it hardly represents the dominant conflict of laws approach in the U.S.). The key question becomes here whether the traditional European conflict of laws rules based for business transactions mainly on the place of the contract, of the tort or of the principal place of business of the acting entity can suitably deal with regulatory issues that arise in the operation of the capital market (as limited here to those of the domestic variety).

Bolder still is here the proposition that the securities laws in the U.S. are subject to privatization and therefore becoming amenable to some similar conflicts approach (p. 276). Whatever the voices arguing for privatization, it is far from present day reality in which connection the international de-regulation of the capital flows should be crucially distinguished from the domestic re-regulation of the financial services flows.[3]

To subsequently cast whatever is supposed to remain of public policy in this area more generally in terms of a *unilateral conflicts* rule of *private* law may be satisfactory from the point of view of a more traditional conflicts methodology, but presents at most a triumph for systematic elegance. There is at least nothing objective or neutral *per se* about the law resulting as applicable pursuant to such a rule. This is of course not to say that the Savignian model was not a

3. Somewhat surprising is in this connection also the finding that the reference to the UK Takeover Code in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (1972), was a selection of the applicable take-over regime by the parties (p. 277), which as such would hardly have been effective if it had been any other law.

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beautiful idea but it met a world in which public policy subsequently became far too dominant for this model to prevail.

It is better to accept that when there is conduct or effect on the legislator's own territory, and markets or investors require (in its view) the application of its own rules even if it is not directly a party, the Savignian model has been exhausted. We enter here unavoidably into the discussions that led in the 1960's to the American's revival of the older comity notions as reflected also in Art. 7(1) of the EU Rome Convention on the Law Applicable to Contractual Obligations in which notions of fairness or reasonableness, but no less of relevance and remoteness, proportionality and (international) legitimacy of the public policies seeking recognition in the case acquire an important role. Currie thought it a retreat not so much to the older comity approach but rather to what always had been the common law method.[4]

Whatever we think it is, if we still wish to call 'conduct' and 'effect' connecting factors in the more traditional conflict of laws manner, it is clear that traditional private international law cannot block strong public policy claims unless too remote,[5] whilst *substantive* notions of justice rather than choice of law rules must take over to restrain the resulting effect of domestic policy or regulation (in its various guises ranging from administrative law to mandatory rules of private law and self-regulation). In the regulatory aspects, it means a need for a balancing of policies on the basis of international principle, more neutrally perhaps through forum selection or in international commercial arbitrations.

Not privatization is here the issue – which should also not be identified with an enlightened American Supreme Court allowing much greater room for forum selection and international arbitrations even when regulatory issues are to be decided in a response to the internationalization of trade and commerce[6]— but the acceptance of international balancing standards. In financial matters, that may be facilitated by the already mentioned modern, more macro view of financial regulation in which there is a greater communality of purpose at the international level.

4. THE VERDICT OF QUIESCENT YEARS, SELECTED ESSAYS ON THE CONFLICT OF LAWS 627 (1963).

5. Mitsubishi Motors Corp. v. Soler Chrysler-Plymounth, Inc., 473 U.S. 614, Nt. 19. Indeed cases like Simula, Inc. v. Autoliv, 175 F.3d 716 (9th Circ. 1999) and the earlier Lloyd's cases, see e.g., Bonny v. Lloyd's of London, 3 F.3d 156 (7th Circ. 1993), become understandable only when the issue of remoteness and the strength of the public policy issues in the case are considered before more traditional rules of private international law and contractual choice of law provisions can be applied.

6. Thus in international trade, the natural inclination of American courts to test American public policy may be subordinated to other considerations which may favour these issues to be tested in international commercial arbitrations or in courts in other countries selected by the parties, The Bremen et al. v. Zapata Off-shore Co. 407 U.S. 1 (1972) and Scherk v Alberto-Culver Co., 417 U.S. 506 (1974), but this is not the same as privatization and any willingness to have US public policy issues decided by others may come to a premature end if this testing is lost in more traditional private international law considerations.

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Once this internationalization of standards and of the manner of balancing conflicting *public* policies (even in more neutral selected *fora* or in international arbitrations) is better understood, it will quite naturally also have to be considered in *private* law, at least in trade and finance, unavoidably leading to consideration of uniform substantive law in terms of the *lex mercatoria*.

It is submitted that this more than clarifies the picture considerably and also provides a clearer frame work for dealing with the multitude of areas of international financial law. Thus the search for more substantive international norms is on. In the *regulatory* aspects, Art. 7 of the Rome Convention may give here some guidance in Europe whilst Secs. 402, 403 and 416 Restatement (Third) Foreign Relation Laws 1987 provide a fuller picture in the U.S. It concerns here the application of public international law of comity and of reasonableness in that context. In the private law aspects researches into the *lex mercatoria* renewal are no less significant. In this *lex mercatoria* approach, the more traditional conflict method in private law retains a residual function when no solution can be found and as matters now stand, conflicts laws remain not unimportant in financial matters but we must accept that they will be eclipsed by internationalised concepts of competent regulation and by the law creating effects of market forces. This is unlikely to be a tragedy.

There is a welcome recognition of this evolution at the very end of Kronke's study (and in a number of other instances, p. 294, p. 296, and p. 322), but it remains too peripheral to his main argument which is that we remain well served by the traditional European conflict rules, of which (in this view) capital market laws present a good example. Yet there is far too little European case law to make that point convincingly and it can at best be so if the investigation is indeed limited to the operations on domestic exchanges and their traditional products and to the very narrow strand of conflicts that is thus addressed.

Where the focus, at least in Europe, has long shifted to the international markets, one cannot but agree with the last sentence stating that "in order to provide predictable and standard solutions for problems arising on truly transnational capital markets the development of uniform ('hard' and 'soft') solutions will be inevitable". They will have to be embedded (for public policy aspects) in concepts of international comity and (for private law aspects) in the international *lex mercatoria*. It is especially in these areas that more academic guidance is urgently needed and a broader study of this type greatly desirable.

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