

BOOK REVIEWS

The Governance of Credit Rating Agencies Regulatory Regimes and Liability Issues by ANDREA MIGLIONICO [Edward Elgar, Cheltenham, 2019, 360pp, ISBN 978178643992, £145 (h/bk) or £22 (ebook)]

Credit ratings are a means by which the financial strength of both business and governments are assessed. They are an essential part of measuring credit risk and impact both on sovereign and private borrowers. In recent years, there has been much academic and public policy debate generated in relation to the agencies that provide these ratings. Criticisms, particularly those levelled at the nationally recognised agencies, concern a lack of transparency and competence, competing incentives and anti-competitive practices. Problems include collusion between debt issuer and credit rating agency (CRA) and immunity from legal challenge and liability. One recurring theme in the debate is that CRAs contributed to the global financial crisis. With this have come questions over governance, gaps in accountability and call for regulatory reform.

Andrea Miglionico's book provides a valuable addition to the discourse in this area, giving a comprehensive and holistic interdisciplinary analysis from a law and policy perspective. As the author states (47), CRAs serve both a 'private and public purpose' underlining the importance of subjecting them to scrutiny. The book, as a central theme, posits that current regulatory schemes are ineffective and that any regulation should be created in the context of the potential systemic risk posed by CRAs' approach to their function. The book highlights inherent dichotomies and tensions that arise in current frameworks. It delves into the regulatory responses to the sometimes problematic nature of the role of the CRA and demonstrates the lacuna in regulation through lack of oversight in relation to poor performance. It provides an overview of potential solutions and recommendations, for example the imposition of professional standards and clear accountability.

The book is well structured, making it easy to read, and is divided into four Parts. The delineation of background and context is contained in Part I providing a detailed summary of how the credit rating industry works and the role CRAs play in financial markets. It introduces, *inter alia*, the importance of investor protection and market confidence, an explanation of the reputational capital of CRAs, and the relationships that arise in the credit rating process. The discussion then moves to rating methodologies and consequential impact on the credit quality of the product being assessed. Conflicts of interest are a particular concern in relation to the 'issuer pays' model and the author provides a detailed analysis of how this can occur, for example in the context of overreliance on credit ratings by both regulators and market participants. Here the author also highlights the importance of a disclosure regime within a governance framework, before moving on in Part II to the detailed discussion of regulation at international and national level. CRA liability is covered in Part III, again with a comparative approach, before finally in Part IV coming to a number of conclusions and recommendations.

Having set out the 'modus operandi' of CRAs and the impact this has, the author provides a thorough and interesting analysis of current regulatory frameworks, both international and more specifically across the European Union (EU), United Kingdom (UK), and United States (US). The book examines how these approaches attempt to address the 'weaknesses' of the CRA market. There is a comprehensive discussion of global soft-law approaches such as the International Organization of Securities Commissions (IOSCO) Codes of Conduct and of problems with the effective implementation of the regulation of External Credit Assessment Institutions (ECAIs) under EU rules. The EU regulation, and its incremental nature is covered in further detail, including the inevitable influence on the UK regime. However, there is also reference to the principles-based approach of the UK regulator. Even though the Dodd Frank Act brought in reforms, remaining gaps in the US approach are also explored.

The book presents arguments surrounding CRA credibility, accountability and liability. Accountability can, of course, be understood in wider terms, and has an integral connection not

only to liability but to questions of duties and responsibility. Here, the author concentrates to some degree on private law remedies, referred to as a 'disciplining technique', thus staying with the theme of investor protection. There is also a comparison with the Australian judicial approach. The detailed navigation of the, often complex, issues that arise is helpful for those readers less familiar with common law and equitable doctrines of estoppel. Whilst the case law around claims in economic loss, and assumption of responsibility in establishing a duty of care in negligence, may be familiar territory for the tort lawyer, for others it may be more difficult to follow. The author guides the reader through, the sometimes controversial, case law, and how these cases influence the possibility of finding a duty of care vis-à-vis CRAs. The exploration of the complicated nexus between common law and that enshrined in regulation and statute is a good one, and the analysis of how the lack of a harmonised liability under EU law and the conclusion (240) that this is a 'missed opportunity' provides a nice juxtaposition. Separately the author addresses recognised arguments for and against around the approach of simply regarding CRAs as 'journalists'. This puts a spotlight on the appropriateness of freedom of speech protection provided by the First Amendment of the US constitution, the author asking whether CRAs really are something more akin to professional intermediaries. Yet, whilst the Dodd Frank Act introduced professional liability for CRAs, the author provides a sound argument for why this measure is not as effective as it could be.

This book provides a fascinating insight into the world of the CRA and the wider impact of the CRA on markets, investors and the economy. It demonstrates the importance of good governance and regulatory structures and provides some potential answers to the important issues that dominate, through its detailed exposition and analysis. It would be of particular interest to those wishing to gain more detailed knowledge about CRAs, their regulation and governance, whether for research or wider reference.

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Judicial Law-Making in English and German Courts by MARTIN BRENNCKE [Intersentia, Cambridge, 2018, 438pp, ISBN 978780682693, £119 (h/bk)]

Dr Brenncke has set himself a difficult task. Producing a full-bodied account of statutory interpretation and judicial law-making across two (ostensibly quite different) legal jurisdictions is no easy feat. In the opinion of this reviewer, however, he has largely succeeded. This is not an abstract philosophical discussion of the properness of judicial activism, but rather a finely detailed and occasionally rather complex work uncovering the empirical reality of modes statutory interpretation in practice. Despite the ambiguity his topic might invite, Brenncke shows a real talent for translating amorphous and fuzzy practices into clear, robustly detailed constituent components. Even the most seemingly straightforward of ideas are deconstructed with precision. Importantly for a comparative project, the work is likely to be accessible to those interested in either jurisdiction, without the need for an expert knowledge of both.

In terms of structure, the book reviews the approach of German and English approaches to legal interpretation across three arenas: in conventional primary legislation, in areas involving constitutional rights and in areas requiring harmonious interpretation with European Union law. It is possible to summarise Brenncke's general findings: there are important idiosyncrasies in each jurisdiction, and yet overall, their respective judges are faced with very similar problems, and both English and German courts both take very similar approaches in practice. These points are demonstrated convincingly throughout the work, alongside discussion of more narrow, specific issues concerning statutory interpretation.

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