

Book Review

Martin Berkeley of Corvinus Capital reviews a recent banking law publication

A Bank's Duty of Care (first edition)
 Danny Busch and Cees Van Dam (editors)
 Hart Publishing, UK, 2017
 ISBN 978-1-84946-811-4 (hardback)

In *A Bank's Duty of Care*, the editors Danny Busch and Cees Van Dam have assembled a wide range of legal expertise to consider issues raised by the duties of care owed by banks in both civil and common law jurisdictions. Contributors are predominantly drawn from academia, however, there are also contributing lawyers from private and commercial practice, notably in the American, Dutch and Italian chapters. The catalyst for the book was the ostensible increase in mis-selling claims against banks for poor investment advice and other regulatory failures such as inadequate disclosure or warning of relevant risks.

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The jurisdictions considered are all European; though under common law systems the US is included, providing a contrast to British and Irish law. In terms of the criteria used in selecting jurisdictions in addition to a European focus, the editors looked for countries with significant banking sectors and where illustrative judgments have been given. The editors were not prescriptive as to the structure of each country chapter, so there is variation in terms of scope, but common themes emerge such as the rights of investors and the extent of bank duties. However, the intention was to give contributing authors freedom and this approach has the benefit of allowing authors to address priorities and topical issues in their own jurisdictions.

Due to the predominantly European perspective, there is substantial reference made to the EU Markets in Financial Instruments Directive (MiFID I, implemented in 2007) and its newer manifestation MiFIR/MiFID II, which took effect from 1 January 2018. The book includes a helpful summary of the intention and

effects of both MiFID versions towards the front of the book and its impact in a comparative law fashion in the final chapter. The country specific chapters generally also consider the impact of the EU regulations and how these have been implemented and interpreted at national levels.

The book provides insights into how different countries approach what are essentially the same issues. While MiFID provides the threshold and harmonising criteria, some individual jurisdictions have gone beyond these by mandating higher standards of care, for example in the UK it is possible to sell an investment classified as risky and complex to retail investors without advice, whereas the Dutch *Hoge Raad* (Supreme Court) has ruled banks assume a "special duty of care" (*bijzondere zorgplicht*) for investors and some third parties due to the important role banks play in society.¹

The final chapter focuses on four contested areas:

- bank's duty of care;
- duties to investigate;
- duties to warn or disclose; and
- the duty to refuse.

The chapter also considers more widely the impact of MiFID, role of regulators and the doctrines of error and fraud, finishing with conclusions and recommendations. The comparative law approach is thought provoking and the chapter dedicated to comparisons is instructive, as are the parallels between the chapters on domestic law. The book may also provide stimuli for practitioners attempting to build or refute arguments for litigation. It may assist legislators and regulators in reviewing the practical impact of different legislative approaches. The book is a welcome addition to the comparative study of international banking and financial regulation. ■

¹ For example: HR 9 January 1998. NJ/1999/285 (*Mees Pierson/Ten Bos*).

Biog box

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