

# Contents

Table of abbreviations	xv
Table of Cases	xxiii
Table of Legislation	xxxii
Introduction	xlvi
1. Overview of the Book	xlvi
2. Terminology	xlvi

## PART I — COMPANY LAW THEORY

I. ECONOMICS AND THE STUDY OF COMPANY LAW	3
1. The Promotion of Efficiency as a Justification for Government Intervention	4
<i>Economic theory and the rational actor</i>	4
<i>Exchanges, markets, and allocative efficiency</i>	5
<i>Market failure as a justification for regulation</i>	6
<i>Clarification of the meaning of efficiency</i>	14
2. Regulation Can Give Rise to Costs as Well as Benefits	16
3. The Economics of Government Regulation	19
4. The Impact of Legal Rules on Private Transactions	24
<i>Professor Ronald Coase and 'The Problem of Social Cost'</i>	24
<i>Examples of the limited role law can play in companies</i>	26
<i>Situations where the law matters</i>	28
5. The Company as a Nexus of Contracts	31
<i>The role of the firm in economic activity</i>	32
<i>The company and other types of business enterprises: common characteristics</i>	36
<i>Basic elements in bargains between company participants</i>	41
2. KEY PARTICIPANTS IN COMPANIES	47
1. Shareholders	48
<i>Duration</i>	49
<i>Return</i>	54
<i>Risk</i>	58
<i>Control</i>	61
<i>Conflicts of interest</i>	64
<i>Bargaining</i>	65

2. Creditors	69
<i>Duration</i>	69
<i>Return</i>	71
<i>Risk</i>	73
<i>Control</i>	75
<i>Conflicts of interest</i>	79
<i>Bargaining</i>	81
3. Employees	82
<i>Duration</i>	84
<i>Return</i>	87
<i>Risk</i>	91
<i>Control</i>	91
<i>Conflicts of interest</i>	92
<i>Bargaining</i>	94
4. Directors	95
<i>Duration</i>	98
<i>Return</i>	100
<i>Risk</i>	102
<i>Control</i>	105
<i>Conflicts of interest</i>	106
<i>Bargaining</i>	107
5. Management	108
<i>Duration</i>	109
<i>Return</i>	112
<i>Risk</i>	115
<i>Control</i>	117
<i>Conflicts of interest</i>	123
<i>Bargaining</i>	124
3. JUSTIFICATIONS FOR STATE INTERVENTION IN COMPANY AFFAIRS	126
1. Justifications for Intervention Based on Efficiency Considerations	126
<i>Imperfect information</i>	127
<i>Costs of contracting</i>	132
<i>Judgement problems</i>	134
<i>Negative externalities</i>	138
<i>Collection action problems and related types of strategic         behaviour</i>	140
2. Arguments for Intervention Based on Considerations Other Than Efficiency	142
<i>Fairness</i>	142

<i>Participation</i>	151
<i>Protection of community ideals</i>	153
<i>Preservation of morality in the market system</i>	156
3. Efficiency Revisited	158
4. PROBLEMS WITH STATE INTERVENTION	163
1. Private Ordering, Market Forces and the Law	163
<i>Regulation may replicate steps company participants take</i>	163
<i>Undermining incentives which private actors have to solve problems</i>	171
<i>Market protection for transactors</i>	174
2. Problems Associated with the Formulation and Enforcement of Laws	178
<i>The role of interest groups</i>	178
<i>Time constraints</i>	183
<i>Inappropriate incentives</i>	187
<i>Lack of familiarity with the marketplace</i>	196
<i>Enforcement and implementation problems</i>	199
<i>Costs generated by regulation</i>	203
3. Freedom and Autonomy	211
4. Conclusion	213

## PART II — STRUCTURE OF COMPANY LAW

5. THE CLASSIFICATION OF COMPANY LAW RULES	216
1. A Typology of Company Law Rules	218
2. Complexities Associated with the Classification Process	221
3. Mandatory Rules	227
<i>Problems with mandatory rules</i>	227
<i>Arguments for mandatory rules</i>	
(i) <i>self-defeating waivers and shareholder voting</i>	237
<i>Arguments for mandatory rules</i>	
(ii) <i>regulation of third-party effects</i>	244
<i>Arguments for mandatory rules</i>	
(iii) <i>achievement of goals not linked to efficiency concerns</i>	247
<i>Concluding comments</i>	249
4. Permissive Rules	250
<i>The role of permissive rules</i>	250
<i>Drawbacks with permissive rules</i>	253

5. Presumptive Rules	257
<i>The role and significance of presumptive rules</i>	257
<i>Pros and cons of presumptive rules</i>	259
6. Conclusion	262
 6. COMPANY LAW AND THE HYPOTHETICAL BARGAINING MODEL	264
1. How to Apply the Hypothetical Bargaining Model — An Introduction	264
2. Generalized Approach to Hypothetical Bargaining Analysis	265
<i>Ascertaining which categories of company participants are involved</i>	265
<i>Isolating the dynamics likely to influence the relevant company participants</i>	266
<i>Ascertaining how company participants would deal with an issue under hypothetical bargaining conditions</i>	268
<i>Difficulties associated with formulating rules</i>	277
<i>Rule types and the hypothetical bargaining model</i>	285
3. The Individualized Approach to Hypothetical Bargaining Analysis	291
4. Contracting and the Hypothetical Bargaining Model	295
<i>Should there be deference to contractual terms?</i>	295
<i>The hypothetical bargaining model and information-forcing rules</i>	298
5. Conclusion: An Evaluation of the Hypothetical Bargaining Approach	302
<i>The hypothetical bargaining model and efficiency</i>	302
<i>The hypothetical bargaining model and autonomy</i>	305
<i>The hypothetical bargaining model as an intellectual construct</i>	306
 7. THE JUDICIARY AND COMPANY LAW	308
1. Company Participants and the Judiciary	309
<i>Expertise</i>	309
<i>How judges define company participants' rights and obligations</i>	321
<i>Predictability</i>	332
<i>Costs</i>	339
2. Parliament and the Courts	349
<i>Interpretation of legislation — what is at stake</i>	349
<i>Using statutory drafting to send signals to the judiciary</i>	350
<i>Interpretation of legislation in company law cases</i>	353
<i>Statutory measures and judicial law-making</i>	358
<i>Detailed legislation and judicial expertise</i>	361

8. SELF-REGULATION IN THE UNITED KINGDOM: AN EVALUATION	364
1. Overview of the United Kingdom's Self-Regulatory System	365
2. Advantages of Self-Regulation	378
<i>Flexibility</i>	378
<i>Expertise</i>	386
<i>Cost</i>	391
3. The Disadvantages of Self-Regulation	397
<i>Bias</i>	397
<i>Insufficient co-ordination of government policy</i>	405
<i>Enforcement problems</i>	412
4. Conclusion	418
9. THE EUROPEAN UNION AND UK COMPANY LAW	421
1. Overview	422
2. Can There Be a Market for Incorporations in the European Union?	426
<i>Legal framework</i>	427
<i>Nature of demand and supply in a market for incorporations</i>	431
<i>Demand in the EU</i>	432
<i>Supply — will the United Kingdom compete?</i>	435
3. How Would the Law Change if There Were a Market for Incorporations?	440
4. Merits of a Market for Incorporations	443
5. Conclusion	450
PART III — OPERATION OF COMPANY LAW	
10. SHAREHOLDERS: CONTRACTING, REMEDIES AND EQUALITY	455
1. Section 14 of the Companies Act 1985 as the Basis for Litigation by Shareholders	455
<i>Judicial interpretation of section 14</i>	456
<i>Restricted enforcement of section 14 — a rationale</i>	458
<i>Is reform of section 14 justified?</i>	461
2. Shareholders' Remedies in Closely Held and Publicly Traded Companies — A Rationale for a Different Approach	463
<i>The law on shareholders' remedies</i>	463
<i>Is the difference in approach for closely held and public companies justified?</i>	466

<i>How far should the courts go in granting relief with closely held companies?</i>	470
3. Equality and the Shareholder	472
<i>Arguments in favour of regulation designed to achieve equality objectives</i>	472
<i>Mechanisms other than company law are better suited to the task of ensuring equal treatment</i>	476
<i>Costs associated with measures designed to ensure equal treatment may be too substantial to justify regulation</i>	479
<i>Adverse impact on welfare-enhancing conduct</i>	486
<i>Arguments in favour of equal treatment are not as compelling as they appear to be</i>	488
<i>Justifying legal rules on grounds other than equality</i>	492
II. CREDITORS: THE LAW'S TREATMENT OF THEIR RELATIONS WITH SHAREHOLDERS AND MANAGERS	496
1. Limited Liability — Asset or Liability	497
<i>The case for reform</i>	497
<i>The positive attributes of limited liability</i>	499
<i>Areas of concern</i>	504
2. Accounting and Auditing Standards in Small Companies	508
<i>Overview of the law</i>	509
<i>Justifications for regulation</i>	512
<i>Those who run small businesses can make appropriate choices</i>	513
<i>Creditors can acquire the information they want without regulation</i>	515
<i>Costs</i>	519
<i>Conclusion</i>	520
3. Regulation of Company Management	521
<i>Nature of agency costs</i>	521
<i>Regulation of transactions which increase the risk of default — an overview of the legal rules</i>	524
<i>Are the legal restrictions on corporate transactions justified?</i>	528
<i>Directors and their liability to creditors</i>	537
<i>Disqualification of directors</i>	548
12. EMPLOYEES: CONTROL AND INFLUENCE	554
1. Worker Ownership	555
<i>Introduction</i>	555
<i>Arguments in favour of worker ownership</i>	557

<i>Worker ownership and its efficiency shortcomings — an introduction</i>	560
<i>Monitoring of managerial conduct</i>	561
<i>Satisfying employee preferences</i>	564
<i>Difficulties with financing</i>	567
<i>Employee reservations concerning firm ownership</i>	569
2. Employee Participation in Corporate Decision-Making	574
<i>Worker participation and success in the marketplace</i>	574
<i>Why do companies not demonstrate greater commitment to the workforce?</i>	578
<i>State regulation of employee participation — an efficiency rationale</i>	580
<i>Is worker participation in fact an efficient regime?</i>	583
<i>Are extra-legal factors present which can stabilize value-maximizing arrangements which employers and workers set up?</i>	586
<i>Role of the law</i>	589
<i>Role of the European Union</i>	597
13. NON-EXECUTIVE DIRECTORS AND THE COMPANY BOARD: THE CASE FOR REFORM	602
1. The Significance of the Board of Directors	603
2. Is the Board of Directors Failing?	609
<i>Structural problems with the board of directors</i>	609
<i>Evidence of problems associated with company boards</i>	611
<i>Is the case in favour of board failure persuasive?</i>	614
3. Will the Cure Be Worse Than the Disease?	621
<i>Suggestions for reform</i>	621
<i>Reasons why reform could be counter-productive</i>	624
4. Shareholders and Reforming the Board of Directors	630
<i>Reasons why changes to the board will not take place</i>	631
<i>Dynamics which will cause changes to the board of directors</i>	637
5. What Type of Intervention?	641
<i>Overview of the Cadbury Report and the Code of Practice</i>	642
<i>Potential strengths and weaknesses of the Cadbury approach</i>	644
<i>Cadbury in practice</i>	647
<i>Conclusion: does Cadbury go far enough?</i>	650
14. EXECUTIVE PAY	653
1. The Case for Reform	655
<i>Executive pay's emergence as a prominent issue</i>	655

<i>Overview of the role directors and shareholders play in setting executive pay</i>	660
<i>Explanations of why executive pay has reached unsatisfactory levels</i>	666
2. Proposed and Recently Implemented Reforms — An Overview	673
3. Executive Pay and Shareholders	678
<i>Shareholders and the ideal executive pay package — an introduction</i>	678
<i>Finding suitable executive pay benchmarks</i>	680
<i>Managerial attitudes toward remuneration schemes</i>	685
<i>Will reform deliver changes which shareholders value?</i>	690
4. Reducing the Level of Executive Pay	698
<i>Will strengthening the position of remuneration committees and shareholders lead to reductions in managerial remuneration?</i>	698
<i>Other means of reducing executive pay</i>	701
5. Conclusion	706
EPILOGUE	
1. Economic Analysis of Company Law: Ways Forward	709
2. Economic Analysis and Its Critics	712
Index	715