

1. Introduction

No man is an island (John Donne, Meditation XVII, *Devotions Upon Emergent Occasions*)

1 AIM OF THE TEXT

This book seeks to examine whether, and, if so, to what extent, UK Company Law has been affected by those processes of globalisation that have increasingly had a bearing on the course of our modern lives. This evaluation will involve both a study of the characteristics of modern UK corporate law and some comparison with the models adopted in other jurisdictions to regulate companies. The reasons for this mutation, if indeed any such metamorphosis has occurred, will also require analysis. Finally, it will be necessary to speculate on where this process will lead to in the medium term.

Globalisation is a phenomenon that has become widely discussed in popular discourse in the past two decades.¹ Although not a new concept, it arouses fierce emotions depending upon one's political perspective. Its influence has been felt in many areas of national law, particularly revenue law, employment law and trade law. Clearly, it rests heavily upon the convergence of *economies* and *markets*. However, it is a much wider manifestation than that. It is no exaggeration to state that it involves the global/regional bonding of *cultures* and *societies*. The convergence of legal cultures through transnational legal measures forms part of the equation and hence part of our study.

Very often, of course, globalisation involves a combination of economic and legal integratory forces; the emergence of the European 'Project' encompassing both EU law and the fundamental protections afforded by the European Convention on Human Rights and Fundamental Freedoms (hereafter 'ECHR') best testifies to that phenomenon. In that context, let us offer

¹ There is a vast literature on the phenomenon of globalisation and its merits/demerits – see, for example, J. Stiglitz, *Globalization and its Discontents* (2001) (Penguin/Allen Lane) and his follow-up text *Making Globalization Work* (2006) (Penguin/Allen Lane). R. Cranston, chapter 1 in S. Worthington (ed) *Commercial Law and Commercial Practice* (2003) (Hart Publishing) is also recommended. Note also W. Twining, *Globalisation and Legal Theory* (2002) (Butterworths).

one example of how globalisation in this wider sense has worked change on UK corporate law. In the 1980s, a headline financial scandal was the so-called ‘Guinness Affair’² in which the shares in a party to a contested takeover (a public company) were allegedly propped up by illegal means in order to promote their attractiveness as an exchange for shares in the target company. When this alleged abuse came to light, the Department of Trade and Industry conducted an investigation³ which resulted in the prosecution of certain leading City figures. That prosecution rested heavily upon evidence gleaned from interrogations by DTI inspectors, which were carried out without the benefit of the interviewee enjoying ‘the right of silence’.⁴ After convictions were obtained, one of the defendants, Ernest Saunders, challenged his conviction by arguing that to base a prosecution largely on compelled evidence involved an infringement of his civil rights under the European Convention on Human Rights, in particular Art 6 ECHR. The right to remain silent was cited as being allegedly infringed. The European Court of Human Rights, having concurred with this contention,⁵ the offending statutory provisions in the Companies Act 1985 had to be changed⁶ to reflect this new perception. Thus, ‘how’ this form

² For an insider’s account, see J. Guinness, *Requiem for a Family Business* (1997) (Pan Books). Also see G. McCormack (1994) 15 Co Law 40.

³ The DTI investigation was carried out under the aegis of what is now the Companies Act (CA) 1985, ss. 432(2) and 442 (both provisions are largely unaffected by the Companies Act 2006).

⁴ The English courts had denied the existence of such a right in DTI investigations – *Re London United Investment plc* [1992] BCLC 285.

⁵ *Saunders v UK* [1997] BCC 872. Followed in *IJL* [2002] BCC 380. Notwithstanding any breach of ECHR rights (which were compensatable) the convictions could not be said to be unsafe – *R v Lyons* [2002] 3 WLR 1562.

⁶ See now Companies Act 1985, s. 434(5A), s. 434(5B), s. 447 (all largely unaffected by the Companies Act 2006). For comment on these enforced changes, see R. Mitchell and M. Stockdale (2002) 23 Co Law 232. In this context, one could also cite *Davies v UK* (42007/98) [2005] BCC 401, where the European Court of Human Rights ruled that excessive delay in prosecuting director disqualification proceedings might breach ECHR. See also *DC, HS and AD v UK* [2000] BCC 710. In *Eastaway v UK* (74976/01) [2006] 2 BCLC 361, excessive delay in disqualification processes was again held by the Strasbourg court to infringe Art 6, but in *Re Blackspur Group (No. 4)* [2006] 2 BCLC 489, the English courts made the point that a breach of Art 6 did not necessarily undermine any resulting disqualification. Having said that, these rulings have had an impact and may well explain why the undertakings procedure is used so extensively these days. The ruling of the ECHR in *GJ v Luxembourg* [2000] BPIR 1021 that protracted delay in completing liquidation may breach Art 6 is also beginning to exercise the minds of practitioners. Not all ECHR challenges have proved as successful – witness *Fayed v UK* (1994) 18 EHRR 393, where it was held that rights under Art 6 were not affected by the process of investigation itself, as the investigation process did not determine rights.

of legal globalisation has worked change is exemplified in one particular respect.

When evaluating the ‘why?’ question, *two* reasons become apparent immediately. Firstly, European harmonisation processes have *forced* corporate law change on the UK (and in fairness on the other 26 EU Member States). Secondly, our understanding of (and respect for) different cultures has increased immeasurably over the past 30 years. This is partly due to the power of the media, the popularity of foreign travel, the rise of the internet, but also as a result of a growing willingness to engage in commerce across foreign borders on an arm’s length basis (as opposed to crude imperialistic exploitation). Potentially profitable markets have to be tapped, no matter where located. That willingness has been boosted by technological advances, particularly with regard to communications methods, transport innovations and money transfer systems. This trend towards opening up our perspective on global commercial life in turn has given impetus to comparative studies of law. It is fair to say that no self-respecting law reform body would produce a report for the adaptation of its national corporate law without recourse to some comparative analysis. During the course of the following study, other influences will become evident.

2 COMPANY LAW IN SOCIETY

Most developed jurisdictions find room for a legal institution known as Company (or Corporate⁷) Law, with the pivotal foundation being the artificial legal person known as the company. This is not surprising because even so-called primitive jurisdictions would feel at home with the idea of an artificial entity (such as a temple or an idol) being treated as a legal person. The company has become *the* prime exemplar of an artificial legal person existing in modern society. Hundreds of millions of such ‘persons’ now inhabit the globe. They provide the main employment prospects for much of the world’s population of natural persons, and some corporations are so large as to rival (and even supplant) many national governments of developing countries in terms of their economic muscle.⁸ The company has become the pivotal

⁷ As far as I am concerned, these terms are interchangeable. The fact that this branch of law is more usually labelled as ‘Corporate’ rather than ‘Company’ is an indicator of a growing US influence on discourse – see Chapter 9 below.

⁸ For instance, Janet Dine, quoting published data, tells us in *Company Law* (6th edition, 2007) (Palgrave Macmillan) at 353 that 51 of the top 100 economies in the world are operated by corporations rather than by nation states. Having said that, it is sometimes easy to overstate the case for the power of multinationals – see S. Wheeler, *Corporations and The Third Way* (2002) (Hart) at 9–10.

economic player in Western-style capitalist societies. That socio-economic model now dominates the globe, but it is not above criticism.⁹ Corporations are an everyday feature of modern life, but are not always regarded as fully fledged citizens (see, for example, their treatment under Indian constitutional law¹⁰). It is not part of this study to examine whether the corporation is a force for good or an instrument of the devil. This is a fruitless exercise often coloured by one's own political prejudices. We merely accept the corporation's ubiquity and recognise the corresponding need to regulate it.

In Chapter 3, we shall attempt to define the fundamental components necessary to make a Company Law model operate effectively.

3 CORPORATE LAW HISTORY

Companies have long been associated with commercial venturing in far-flung territories. The earliest form of company recognised in English law, the chartered company, was almost exclusively preoccupied with this sphere of commercial activity. One could cite here the Muscovy (or Russia) Company (1555), the Levant Company (1581), East India Company (1600), the Hudson's Bay Company (1670) and the Royal Africa Company (1672).¹¹ Many of these chartered companies lasted for hundreds of years; some are still with us today.¹² In 1688, the power to charter corporations passed effectively from the Crown to Parliament, but it was still exercised, with the British South Africa Company (1889) being a good example of the latter genre.

It should never be forgotten that one of the seminal events in the history of UK company law was tied up indirectly with the forces of 'mercantil-

⁹ The classic exposé was presented in A. Sampson's *The Seven Sisters* (1975) (Hodder and Stoughton). Note also P. Muchlinski, *Multinational Enterprises and the Law* (1979) (Blackwell). See also Joel Bakan, *The Corporation* (2004) (Constable), Noreen Hertz, *The Silent Takeover* (2002) (Arrow), Janet Dine, *International Trade and Human Rights* (2005) (CUP). There is an excellent selection of essays in M.K. Addo, *Human Rights Standards and Responsibilities of Transnational Corporations* (1999) (Kluwer). See also D. Kinley (2004) 25 Co Law 298. The piece by R. McCorquodale and P. Simons in (2007) 70 MLR 598 is also recommended.

¹⁰ In the UK, clearly little thought was given as to whether corporations qualified for protection under the Human Rights Act 1998.

¹¹ For the advent of chartered companies, see chapter 2 in J. Micklethwait and A. Wooldridge, *The Company* (2003) (Weidenfeld and Nicholson), W.E. Minchinton in chapter 7 in T. Orhnlial, *Limited Liability and the Corporation* (1982) (Croom Helm) and M.B. Likosky, *The Silicon Empire* (2005) (Ashgate) at 61–8. For an illuminating history of the Russia Company, see R. Griffith (1994) 15 Co Law 105.

¹² See *DTI Annual Companies Report 2005–06* for further details.

ism',¹³ in some senses a precursor to the modern phenomenon of globalisation, but in reality a crude vision of economic trade/global resources as a finite cake to be divided between those exerting the greatest political/military might. In effect we are talking about a zero-sum game in world trade. Developed in France in the 17th century, mercantilism expostulated that export trade was to be encouraged at all costs by opening up new markets through dubious means. In England, it is arguable that this philosophy set in train the events that ultimately led to the infamous South Sea Bubble Affair in 1720.¹⁴ The origins of the company (which had been incorporated in 1711) that was later to achieve notoriety in that context lay in the desire to trade across national barriers, in particular the intention to dominate the slave trade with South America. The collapse of that company, which by that stage had redesigned itself into a domestic speculator in the National Debt, led to a dead hand being placed on the development of UK corporate law for over a century by the enactment of the Bubble Act¹⁵ (with its draconian, but little used,¹⁶ criminal enforcement procedure), a piece of legislation which remained on the statute book until 1825.¹⁷

General incorporation¹⁸ was introduced in English law in 1844. The introduction a decade later of limited liability in English law was undoubtedly influenced by events elsewhere, as will become clear in Chapter 2.

In later times, the influence of transnational corporate venturing on the shape of English corporate law was apparent. Many of the great prospectus frauds in the late 19th century were carried out in the context of companies said to be operating in the more remote corners of the globe.¹⁹ A general

¹³ For discussion of this economic theory of mercantilism and its impact on English law see D. Hughes Parry (1931) 47 LQR 183 at 198. The theory itself clearly has its limitations and was at the time rejected by influential thinkers such as Adam Smith in *The Wealth of Nations* (1776) (Penguin Classics, 1968), where free trade was preferred.

¹⁴ For studies of the Bubble, see Viscount Erleigh, *The South Sea Bubble* (1933) (Peter Davies Ltd), V. Cowles, *The Great Swindle* (1960) (Collins), M. Balen, *A Very English Deceit* (2002) (Fourth Estate) and R. Dale, *The First Crash: Lessons of the South Sea Bubble* (2004) (Princeton University Press). The periodical literature is also extensive: L.C.B. Gower (1952) 68 LQR 214, M. Patterson and D. Reiffen (1990) 50 Jo of Econ Hist 163, A. Santuari (1993) 14 Jo of Leg Hist 39.

¹⁵ 6 Geo I c. 18.

¹⁶ Prosecutions were rare – see the comments of LCJ Ellenborough in *R v Dodd* (1808) 9 East 516.

¹⁷ 6 Geo IV c. 91.

¹⁸ See H.N. Butler (1986) 6 Int Rev of Law and Econ 169.

¹⁹ See R. Cranston, chapter 1 in S. Worthington, *Commercial Law and Commercial Practice* (2003) (Hart). On the fictional front, see A. Trollope, *The Way We Live Now* (1875) (OUP edition, 1982), where a central plot line involved a fraud connected with the incorporation of 'The South Central Pacific and Mexican Railway'.

perusal of the case law of the period throws up some delightful and exotic corporate names.²⁰ Public outcry at prospectus frauds led to corrective legislation in the form of the Directors Liability Act 1890. Another element in the jigsaw was the issue of foreign seizure of assets held by UK companies engaged in global commerce and in particular seizures effected in the wake of the Russian Revolution in 1917. This caused many difficulties for the English courts.²¹

Bringing us through to modern times, we can clearly see how the collapse of the US-based energy giant Enron in 2001 has shaped the development of corporate law not merely in the US (through the Sarbanes-Oxley Act 2001²²), but also in many jurisdictions where Enron subsidiaries were incorporated and operated.²³ Foreign issuers in the US have been forced to comply with new tougher US standards on disclosure and corporate governance, thereby promoting a greater degree of convergence in these areas. In the UK, the Companies (Audit, Investigations and Community Enterprise) Act 2004 contained a number of elements influenced by a desire to combat an Enron-style fraud.²⁴ There is a growing consensus that there has been an overreaction to the Enron débâcle²⁵ and parallels have been drawn with the misguided Bubble Act. On a European level, the Parmalat scandal²⁶ will have compara-

²⁰ See *Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, *Erlanger v New Sombbrero Phosphate Co* (1878) 3 App Cas 1218, *Re Cape Breton Co* (1885) 29 Ch D 795, *Re Ambrose Lake Tin and Copper Mining Co* (1890) 14 Ch D 390, *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392. Generally, note *Re German Date Coffee Co* (1882) 20 Ch D 169, *Ooregum Gold Mining Co of India v Roper* [1892] AC 125, *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656, *Moseley v Koffyfontein Mines* [1911] AC 409.

²¹ See, for example, *Re Baku Consolidated Oilfields* [1994] 1 BCLC 173.

²² On SOX see M.G. Lunt [2006] JBL 247, J. Friedland (2002) 23 Co Law 384 and E. Wymeersch (2003) 3 JCLS 283. The stringent requirements imposed by this Act on directors signing up to public share offers issued by their companies has led to a decline in placings in New York and a corresponding boost for the London market. For the impact on foreign issuers, see S. Harter-Bachmann (2006) 27 Co Law 35

²³ For European reactions to Enron, see K.J. Hopt (2003) 3 JCLS 211. For the French response to Enron, see S. Hebert [2004] JBL 656.

²⁴ See The Companies (Audit, Investigations and Community Enterprises) Act 2004, ss. 8 and 9 (CA 1985, ss. 389A, 389B) (provisions improving auditors' access to information and increasing the potential liability of directors for information provided to auditors) – replaced by CA 2006, ss. 499–501.

²⁵ On Enron and its consequences, see P. Davies, chapter 8 in J. Lowry and L. Mistelis, *Commercial Law: Practice and Perspectives* (2006) (Butterworths), J. Armour and J.A. McCahery (eds), *After Enron: Reforming Corporate Governance and Capital Markets in Europe and the US* (2006) (Hart Publishing), W. Bratton (2002) 76 Tul L Lev 1275, S. Griffin [2003] Ins Law 214, T.R. Hurst (2006) 27 Co Law 41.

²⁶ For background on the Parmalat collapse (which occurred in December

ble effect. It certainly appears to have influenced the adoption of EC Directive 2006/43 on Accounts.

Most recently of all, the sub-prime lending crisis in the US has caused perturbation throughout the financial sector in Western Europe, placing more than one banking corporation in jeopardy.²⁷ This has led to the nationalisation of one UK bank, the downgrading of many financial institutions and the rethinking of banking regulation in many countries. The ensuing credit crunch has spread from financial institutions to the retail and manufacturing sectors of many economies by restricting access to capital and through reduced consumer expenditure.

4 CORPORATE LAW 'FAMILIES'²⁸

It is possible to produce an ethnography of corporate law systems. Legal scholars like Wood²⁹ have done much to open our eyes to this phenomenon and other academics have intervened in the debate. Here is my suggested preliminary breakdown:

4.1 Systems Based on English Law

This group consists of jurisdictions which formerly were part of the British Empire or territories that fell under the British mandate after the First World War (for example, Palestine³⁰/Israel). Reflecting the massive extent of that political entity, one finds systems of corporate law dotted across the globe that are reassuringly familiar. This similarity arose out of the wholesale export of

2003), see A. Melis (2005) 13 *Corp Gov: An International Review* 478. The Parmalat case has not had a great impact in the UK, but it was problematical in Ireland hence the fiercely contested *Eurofoods* litigation – see Chapter 8.

²⁷ On the implications of Northern Rock for the European Single Market, see C. Bamford (2007) 29 *Co Law* 65.

²⁸ See J.H. Farrar and B.M. Hannigan, *Farrar's Company Law* (4th edition, 1998) (Butterworths) by at 748. Note also K. Pistor et al. (2003) 31 *Jo of Compar Econ* 676 and K. Pistor et al. (2003) 23 *Univ of Penn Jo of Int Econ Law* 791.

²⁹ See *Maps of World Financial Law* (3rd edition, 1997) (Allen & Overy Global Law Maps), and P. Wood (2003) 24 *Co Law* 34 for an unusual classification. Geographers have shown scholarly interest in the distribution of governance models – see G.L. Clark and D. Wojcik, *Geography of Finance: Corporate Governance in a Global Marketplace* (2007) (OUP).

³⁰ For a recent study that suggests that the transplantation of English company law into post-Ottoman Palestine was not as simple a process as it might appear to be, see R. Harris and M. Crystal – http://works.bepress.com/ron_harris/13. This article will appear in (2009) *Th Inq Law*.

UK statutory law (including the Companies Act) as part of a policy ultimately tied up with imperialism and bolstering the position of British traders.³¹ One result, according to Gower, was that the Companies Act 1948 acquired the status of a Commonwealth statute!³² The application of common law principles had both a similar motivation and effect. Some of these imported legal standards were specifically retained by post-independence legislation to operate in default of new lawmaking. The Privy Council undoubtedly played its part in this process through the instrumentality of its Judicial Committee.³³ A survey of corporate law models found in Africa, the Indian subcontinent, Asia, the Caribbean and in the old dominions would produce strong evidence of the impact of the English corporate law model. In some of these countries, the model is more advanced than that operating in the home country, as some jurisdictions have been adept at implementing company law reform proposals more quickly than English law.³⁴ As that Empire has fragmented, so have these 'subordinate' jurisdictions looked for sources of inspiration other than English law, a process exacerbated by the move of English company law into the EU tradition. Typically, corporate systems based upon the increasingly dominant North American model have filled the void. This has been noticeable in the Pacific rim jurisdictions, especially in New Zealand and Australia. The Caribbean countries show a similar pattern. Israel moved in that direction in 1999.

³¹ On this, see R. McQueen (1995) 5 Aust Jo of Corp Law 187 and his more recent piece in (2008) 17 Griff L Rev 383. Note also R.S. Rungta, *The Rise of the Business Corporation in India* (1970) (CUP).

³² (1962) 4 Mal L Rev 36.

³³ See, for example, *North West Transportation Co v Beatty* (1887) 12 App Cas 589 (shareholder voting obligations), *Natal Land v Pauline Colliery* [1904] AC 120 (pre-incorporation contracts), *Cook v Deeks* [1916] 1 AC 554 (fiduciary duties of directors), *Lee v Lee's Air Farming* [1961] AC 12 (corporate personality) *Howard Smith v Ampol Petroleum* [1974] AC 821 (directors' duties on a takeover), *Taupo Totara v Rowe* [1978] AC 537 (directors' payoffs), *Downsview Nominees v First City Corporation* [1993] AC 295 (liability of receivers in negligence), *Agnew v IRC (Brumark)* [2001] UKPC 28 (fixed or floating charge?), *Citico Banking Corp v Pusser's Ltd* [2007] UKPC 13 (alteration of articles), *Gamlestaden* [2007] UKPC 26 (unfair prejudice jurisdiction), *Benichou v Mauritius Commercial Bank* [2007] UKPC 36 (floating charge crystallisation). Most former British colonies have discarded the Privy Council and we are left with a number of small independent Commonwealth countries plus a few Crown dependencies. Canada ceased sending cases to the Privy Council in 1949. Malaysia followed suit in 1985, as did Australia in the following year. In more recent years, Singapore (1994), Hong Kong (1997) and New Zealand (2003) have gone down the route of deciding not to send appeals to the Privy Council.

³⁴ The prime example here is Ghana, which for many years had one of the most advanced corporate law models in the Commonwealth. Jamaica implemented the recommendations of the Jenkins Committee (1962) in 1965, some time before the UK legislated – see S.J. Leacock [1975] JBL 252.

4.2 US-inspired Models

Originally a British colony, the USA became an imperialist power in the old sense of the concept (witness its conquest of the Philippines³⁵ and other Spanish colonies) and that political status enabled its models of corporate law to penetrate the furthest corners of the globe from the Caribbean³⁶ across the Pacific. The military victory of the US over Japan in 1945 also had profound effects upon Japanese corporate law.³⁷ In more modern times, the overwhelming economic power of the USA (and US-based multinationals) has led to an even wider dissemination of US corporate law influence. Thus, today, much of the Caribbean and many Central/South American states now take their corporate law lead from the US.³⁸ The influence has spread to Canada, New Zealand and other Pacific rim jurisdictions. Even within Continental Europe (where latent hostility to US cultural dominance is strong), it is not uncommon to find corporate law concepts and reforms being inspired by American ideas. The idea of a group of companies is indisputably American in origin and is now used as a primary business vehicle across the developed world. Certainly, a perusal of reforms in the area of corporate rescue across many nations will find the pervasive influence of the iconic Chapter 11 of the US Bankruptcy Code.³⁹ The same could be said of the development of rules regulating insider trading/market abuse, the evolution of codes of corporate governance practice and the emergence of the corporate social responsibility philosophy. The role of US-based institutional investors (such as CalPERS, the Californian public service employees' retirement services pension fund) also cannot be underestimated in the spreading of US corporate law hegemony, as a significant percentage of its holdings are in foreign securities. US vulture funds dealing in distressed debt are making their presence felt in many economies (and legal systems). The media has also played its part by elevating to cult status certain American law corporate practices. Popular discourse in corporate law matters is dominated by 'Americanisms' – terms such as 'insider trading', 'Chinese walls', 'poison pills', 'raiders', 'greenmail', 'junk bonds', 'prepacks' and, most recent of all, 'sub-prime lending' are now universally recognised.

³⁵ For the Philippines, see P. Herrera-Davila (1981) 2 Co Law 139.

³⁶ For the Canadian influence in the Caribbean, see S.F. Goldson (2003) 24 Co Law 378.

³⁷ For a clear account of Japanese corporate law, see S. Bottomley in chapter 3 of R. Tomasic (ed.), *Company Law in East Asia* (1999) (Dartmouth).

³⁸ On Barbados, see J. Purvis (1983) 4 Co Law 280.

³⁹ This is certainly true of Germany, which reformed its law of corporate rescue in 1999 with Chapter 11 very much in mind.

4.3 Civil/Continental Law Jurisdictions

The paradigm here is France, which of course built up an impressive imperial portfolio in competition with the British Empire. The influence of French corporate law is found in the wider Europe,⁴⁰ Africa,⁴¹ in certain parts of the Caribbean and South America, in South Asia and in Quebec. Louisiana corporate law has a strong French flavour to it. The Middle East is also an area where French corporate law ideals have penetrated. Other continental legal systems have left some imprint on global corporate law. The Dutch have shaped corporate law developments in their former colonies (such as Indonesia⁴²) and also South Africa. The German influence is less marked across the globe, mainly because of the loss of its imperial territories in the wake of its defeat at the end of the First World War. Having said that, ideas can prove more robust than political entities and German corporate law influences can be detected in countries such as Cameroon⁴³ and Japan pre-1945. China has flirted with the two-tier board model. Within Central Europe there is a strong and continuing German law influence, with Austrian Company Law being the prime manifestation. The new accession Member States, based in Eastern Europe with their transitional economies, will naturally look to Germany for inspiration because of the geographical proximity of this economic powerhouse. A perusal of the enterprise laws in the now defunct state of Yugoslavia will attest to that.⁴⁴ Rather like English law, this continental tradition is under threat from the American hegemony. Argentina moved very much into the Anglo-Saxon camp with its corporate law reforms in 1983 and China appears to be heading in the same direction.

4.4 Other Families

This residual category is diverse. One could certainly assert that there is now an EU family of corporate law spanning some 27 jurisdictions. That 'family' is best viewed as second generation, drawing upon traditions from the discrete categories outlined above. The US influence on EU law is clearly present (particularly in the area of business rescue), though until recently there has been a marked reluctance to concede the fact.

⁴⁰ There is a definite French corporate law influence in Turkey (see M. Yavasi (2000) 21 Co Law 225) and Greece.

⁴¹ For the Ivory Coast, see V.B. Dumonteil and J.J. Bartagna (1984) 5 Co Law 47.

⁴² See A.I. Pulle (1996) 17 Co Law 122.

⁴³ Cameroon was a former German colony transferred to a French mandate.

⁴⁴ See J. Dine, M. Koutsias and M. Blecher, *Company Law in the New Europe* (2007) (Edward Elgar) for discussion of the Yugoslav Enterprise Law 1996.

There is also a dwindling band of jurisdictions that locate a system of corporate law (if they have one) within a strong socialist tradition. At present, these countries, led by China, Russia and various non-EU Eastern European states, are very much in the market for importing corporate law models. The process of change here has been remarkable,⁴⁵ though the net effect on diversity has been negative.

The Islamic view on corporate law is interesting. Although usury is banned by the Sharia, there is no fundamental objection to the idea of a company with separate legal personality nor to the economic consequence of limited liability. Corporate law systems in Egypt, Jordan and Saudi Arabia have much in common with Western models. There is a growing and accessible body of literature on corporate law systems in these traditions.⁴⁶

Other jurisdictions are difficult to fit into any model – South Africa is perhaps the best example of this genus.⁴⁷ Although the impact of Roman/Dutch law generally was marked in pre-Boer War days, the corporate law system was for many years influenced by English law. Influence must not be read as dominance; witness the South African hostility to the floating charge for proof of that qualification. Increasingly, in recent years this jurisdiction has moved towards the orbit of US corporate law. This has caused problems in certain areas (such as business rescue), where the US influence is at odds with underlying cultural traditions.

5 UNITARY AND FEDERAL MODELS

In categorising systems of corporate law, the political structure of jurisdictions can create difficulties. In a unitary state, the relevant corporate law applies generally. However, many large modern states are organised constitutionally along federal lines. The obvious example is the USA, but the same problem

⁴⁵ On corporate law developments in Russia, see W.G. Frenkel (1996) 7 ICCLR 175, S. Lucas and Y. Maltsev (1996) 45 ICLQ 365, O. Markova (1998) 8 ICCLR 334. Note also the essay by K. Pistor, chapter 9 in J. Sachs and K. Pistor (eds), *The Rule of Law and Economic Reform in Russia* (1997) (Westview Press). More generally, the work of R. Dragneva (ed.), *Investor Protection in the CIS: Legal Reform and Voluntary Harmonization* (2007) (Martinus Nijhoff) is recommended.

⁴⁶ See, for example, the pieces by L.M. Al-Rimawi, looking at corporate law in various Arab countries, in particular Jordan – (1998) 19 Co Law 28, (1998) 19 Co Law 89, (1998) 9 EBLR 30.

⁴⁷ For South African Company Law and its history, see S. Girvin (1992) 13 Jo of Leg Hist 63 and J.J. du Plessis (1993) 14 Co Law 224. Sri Lanka also has a Roman-Dutch law heritage in its Company Law model – see D. Jayasuriya (2008) 29 Co Law 250.

arises in major corporate law players such as Canada and Australia. In these countries, corporate law is restricted by internal 'state' boundaries. This has the potential to generate much confusion and economic dislocation. 'Uniform'⁴⁸ companies legislation seems to be the preferred solution, but constitutional difficulties abound. Thus, in Australia in 1990, a bizarre legal power battle over the soul of corporate law was played out. In *NSW v The Commonwealth*,⁴⁹ the High Court of Australia confirmed that the Commonwealth of Australia lacked the constitutional power to enact a mandatory statute governing corporations. A pragmatic settlement then had to be brokered which involved the states themselves opting into a new Uniform model statute.⁵⁰

The solutions to the problem of federal states here are varied. One way out is to make corporate law the exclusive subject of federal legislation, but political sensitivities need to be borne in mind. Another, more subtle, model is to start from the premise that corporate law is the province of the local states, but to provide a standard model into which such states can contract. This is now the favoured approach. One could note here the Model Business Corporations Act⁵¹ in the US and the Canadian Business Corporations Act⁵² as exemplars of this methodology. This was also the solution worked out in Australia in the wake of the constitutional litigation mentioned above. In addition, one could identify certain strategic areas of corporate law that are to be governed by federal law: for example, the Securities and Exchange Acts and more recently the Sarbanes-Oxley Act 2001 in the USA.⁵³ The US Bankruptcy Code of 1978 also exemplifies the federal perspective.

6 THE PICTURE IN THE UK AND BRITISH ISLES

The United Kingdom presents an interesting conundrum. Although, superficially, we have a unitary political entity, the forces of devolution are growing.

⁴⁸ See R.W. Parsons [1962] JBL 235.

⁴⁹ (1990) 169 CLR 482.

⁵⁰ For discussion, see R. McQueen (1990) 19 Fed L Rev 245.

⁵¹ For information on the MBCA, which was produced by the American Bar Association in 1950, see the ABA website.

⁵² On the Model Business Corporations Act and the Canadian Business Corporations Act 1975, see L. Getz (1971) 5 Ottawa L Rev 154. The changes in Canada can be traced back to the Dickerson Report of 1971.

⁵³ On Sarbanes-Oxley, see M.G. Lunt [2006] JBL 249, J. Friedland (2002) 23 Co Law 384. Part 1 of this Act boosts the powers of supervisory bodies and upgrades directors' responsibilities.

Indeed, in the realm of corporate law, we have always had several distinct systems operating alongside each other for some 150 years. Thus corporate law is administered in England and Wales separately from the regimes operating in Scotland and Northern Ireland. Each of the latter jurisdictions has its own Companies Registry, based in Edinburgh and Belfast respectively. The significance of this multiplicity of company law administrative units was reflected by the extraordinary case of *Re Baby Moon (UK) Ltd*,⁵⁴ where it was held by Harman J that an English company, which had erroneously located its registered office to Scotland, could be wound up in England as the English jurisdiction applied, but leave would need to be granted by the English courts to serve the petition out of the jurisdiction at its registered office.

Although the administration of UK corporate law is devolved, the fundamental substantive core has much in common. Many of the provisions of the Companies Act 1985 apply automatically in Scotland, though that Act did contain discrete provisions designed solely for Scotland (for example, Part XVIII on floating charges). These provisions have since been superseded by Part 2 of the Bankruptcy and Distress (Scotland) Act 2007 (ss. 37–49). The same is, however, still true of the Insolvency Act 1986 – one could note here the different approaches taken towards preferences in ss. 239 and 242 respectively. Section 239 requires the person giving the alleged preference to be influenced by a desire to prefer; no such motivation requirement is found in s. 242, which focuses on the effect of the alleged preference. Under the Scotland Act 1998, company law is a reserved matter outside the competence of the Scottish Parliament and therefore notwithstanding the fact of devolution, the power to legislate in company law matters is reserved by Westminster.⁵⁵ Notwithstanding these trends towards a harmonised approach, the courts of the two jurisdictions have in the past indicated a propensity for divergence and there is no reason to doubt that this healthy diversity of judicial attitudes will continue and become more marked in the future.⁵⁶

The position is somewhat different for Northern Ireland,⁵⁷ which had its own statutory code prescribed by the Companies Order (Northern Ireland)

⁵⁴ (1984) 1 BCC 99, 298. The distinct nature of the two systems is also apparent on reading *Arthur Little v Ableco Finance* [2003] Ch 217, though that case illustrates how blurred the boundaries can become. Note also *Re Brownridge Plastics Ltd* (unreported) (2005), where the question before Hart J was the appropriate court to file notice with when putting a Scottish company into administration.

⁵⁵ Under the Scotland Act 1998.

⁵⁶ See, for example, the difference of opinion reflected in *Dimbula Valley (Ceylon) Tea Co v Laurie* [1961] Ch 353 and *ex parte Westburn Sugar Refineries* [1951] AC 625 (on dividend payments), and *Jesner v Jarrad Properties* [1993] BCLC 1032 and *Re Guidezone Ltd* [2000] 2 BCLC 321 (unfair prejudice jurisdiction).

⁵⁷ Under CA 1985, s. 745, Northern Ireland generally fell outwith the scope of the Companies Act.

1986 (SI 1986/1032, NI 6) (as amended), which usually mirrors legislation enacted by the Westminster Parliament. There can, however, be a significant time lag, which may work to the disadvantage of Northern Irish businesses. That position is likely to change as s. 1284 of the Companies Act 2006 is now largely fully implemented (with effect from October 2008), in that Northern Ireland will be covered by the Companies Acts. This principle is further developed by ss. 1285–7 of the Companies Act 2006. This change has been brought about to enable businesses in the Province to get the immediate benefit of corporate law reforms enacted in Great Britain.⁵⁸ This is particularly important where deregulation is now often the prime mover behind company law reform.

We must not forget other territories within the British Isles but technically outside the UK (and the EU). The Crown Dependency of the Isle of Man has its own distinct corporate law 'brand' (based upon the 1931 Companies Act⁵⁹), as does Jersey⁶⁰ and Guernsey.⁶¹ These jurisdictions can be quite flexible as they compete for offshore business, the main driver of their respective economies. The Companies Acts do not for the most part apply to the Channel Islands or the Isle of Man, apart from Part 28 of Companies Act 2006, which regulates takeovers. This exception is justified because the jurisdiction of the Takeover Panel used to extend to a comparable degree. Other constituencies of the Channel Islands, such as Sark, do not appear to have any discrete corporate regulations.⁶²

⁵⁸ See the summer 2005 consultation carried out by Angela Smith MP acting on behalf of the Department of Enterprise, Trade and Investment in Northern Ireland.

⁵⁹ For Isle of Man Company Law, see J. Bates, *The Isle of Man Companies Act 1992* (1992) (Sweet & Maxwell). The basic legislation is the 1931 Act as amended. Note the Isle of Man Companies Act 2006, which was driven by the need to attract offshore business – see (2007) 28 Co Law 46. As a result of the 2006 Act, companies incorporated under the 1931 regime can re-register and take advantage of new facilities (such as corporate directors and deregulated share capital maintenance rules). Foreign companies can simply continue their personality by adopting the 2006 Act. Protected cell companies are envisaged by Part VII of the 2006 Act.

⁶⁰ A major source of Jersey Company Law is the Companies (Jersey) Law 1991 as amended.

⁶¹ See the Companies (Guernsey) Law 1994 as amended. For aspects of Company Law in Guernsey, see A. Walters and A. Sarchet (1997) 18 Co Law 219 (protected cell company novelty). See also G. Moss [2001] 14 Ins Intell 73 and the news item noted in (2006) 27 Co Law 21 which refers to the Protected Cell Companies Regulations 2005. See N. Carey and A. Sarchet (2006) 27 Co Law 252 generally. The protected cell idea has been adopted in jurisdictions such as Bermuda and the Cayman Islands.

⁶² On this lacuna and its implications for English law see *Official Receiver v Vass* [1999] BCC 516.

7 HARMONISATION OF CORPORATE LAW

7.1 The EEC Programme

Since 1972 the UK has been locked into the EEC Company Law harmonisation project.⁶³ That project is carried out largely through the medium of directives authorised under Art 44(3)(g) of the EEC Treaty. That article forms part of the regulatory matrix concerned with achieving the goal of freedom of establishment. This right of establishment is protected by Art 43 of the Treaty and the philosophy behind it is reinforced by the European Charter on Fundamental Rights (Art 16). The prohibition on new incorporation taxes also reflects the same mindset.⁶⁴ Without a doubt, this harmonisation process has proved to be the prime driver behind company law reform in the UK for the past 35 years. That programme has advanced on many fronts and has experienced the full range of ups and downs, with these setbacks often related to general political problems within Europe rather than being due to inherent problems with the proposed harmonisation measure. Looking at the picture today, we can see the influence of harmonisation in most fields of corporate law through adopted directives in the following fields:

- incorporation and disclosure (First Directive 1968/151);⁶⁵
- share capital (Second Directive 1977/91 as amended by Directive 2006/68);
- company contracts (First Directive 1968/151);
- company accounts and audits (Fourth Directive 1978/660, Seventh Directive 1983/349, Eighth Directive 1984/253) (soon to be replaced by Directive 2006/43) and Accounts Modernisation Directive (2003/51). The International Accounting Standards Regulation 2002/1606 completes the picture;
- branches (Eleventh Directive 1989/666);

⁶³ There is an impressive literature base here – J. Dine (1988) 13 ELR 322, V. Edwards [2000] CFILR 342, C. Barnard (2000) 25 ELRRev 57, P. Cabral and P. Cunha (2000) 25 ELRRev 157, M. Andenas (2006) 27 Co Law 1, R. Drury [2005] JBL 709, T.C. Hartley (2005) 54 ICLQ 813, E. Werlauff (1992) 17 ELR 207, M. Andenas, K. Hopt and E. Wymeersch, *Free Movement of Companies in EC Law* (2003) (OUP).

⁶⁴ See EC Council Directive (1969/335), *Fantask (C188/95)* [1998] 1 CMLR 473 and *Modelo (C56/98)* [2001] STC 1043.

⁶⁵ For contemporary comment, see G.A. Zaphirou [1968] JBL 280. A good insight into the thinking behind this Directive might also be gleaned from *Ubbink Isolatie* (136/87) [1990] BCC 255 – see F. Wooldridge (1990) 11 Co Law 62. The First Directive was amended by Directive 2003/58.

- single member companies (12th Directive 1989/667) (implemented via SI 1992/1699);
- admission of securities to listing, prospectuses (Admissions Directive 1979/279, Listing Particulars Directive 1980/390, Public Offers Directive 1989/298 and Investment Services Directive 1993/22 and new Prospectus Directive 2003/71);
- takeovers (Takeover Directive 2004/25/EC);
- mergers, scissions and cross-border mergers (Third Directive 1978/855, Sixth Directive 1982/891 and Tenth Directive 2005/56);⁶⁶
- disclosure of major shareholdings and disclosure of information by issuers (Directive 1999/627, Transparency Directive 2004/109);
- insider trading and market abuse (Insider Trading Directive 1989/592⁶⁷ and Market Abuse Directive 2003/6);
- shareholder voting rights in listed companies (Shareholder Rights Directive 2007/36).

For the future the most likely possibilities for Company Law Harmonisation Directives relate to small businesses.⁶⁸ The proposal for a Draft Fourteenth Directive on relocation of registered office has now encountered problems and it is not clear whether it will ever come to fruition (see below Chapter 9 for consideration of this issue).

The harmonisation programme has also spawned new corporate entities ranging from the European Economic Interest Grouping (EEIG Regulation 1985/2137⁶⁹), through the ‘single member company’ (Twelfth Directive 1989/667) to the European Company or *Societas Europea* (Regulation 2001/2157⁷⁰ and Directive 2001/86). More specialised organisational structures were harmonised with regard to Open Ended Investment Companies

⁶⁶ Implemented in this country by SI 2007/2974. On the Directive see F. Wooldridge (2006) 27 Co Law 309.

⁶⁷ Considered by the ECJ in *Ipourgos Ikonimikon v Georgakis (C391/04)* [2007] 2 BCLC 692.

⁶⁸ See [2008] 235 SMCLN 1 for details of the proposed statute for a European Private Company (SPE).

⁶⁹ Introduced into English law by SI 1989/638 – see S. Israel (1989) 9 Co Law 14, S. Keegan [1991] JBL 457. At the last count, there were only 186 EEIGs with their principal place of establishment in Great Britain. The EEIG was modelled upon the French GIE – see B. Bott and W. Rosener [1970] JBL 313.

⁷⁰ Official figures for 2005/6 disclose one SE registered in Great Britain. On the SE, see M. Vasseur [1964] JBL 358 and [1965] JBL 73, P. Sanders [1968] JBL 184, J. Wouters (2000) 37 CMLRev 257, V. Edwards (2003) 40 CMLRev 443, F. Wooldridge (2004) 25 Co Law 121, L. Cerioni (2004) 25 Co Law 228 and 259, J. Schmidt (2006) 27 Co Law 99, M.C. di Luigi (2008) 19 ICCLR 58.

(UCITS Directive 1985/611⁷¹). The belated adoption of European Works Councils (see Directives 1994/45 and 1997/54) in this country can also be viewed as a consequence of this harmonisation strategy.⁷²

If harmonisation is viewed in these terms, the areas where no progress has been achieved stand out. In particular, the failure to address the issue of how to regulate groups of companies, which was the subject of the draft Ninth Directive,⁷³ is obvious. Little has been done until recently in the area of shareholder rights, an issue which was addressed in the Draft Fifth Directive.⁷⁴ Private companies have attracted little attention until recent times. Most notably, there has been virtually no harmonisation of the substantive rules governing corporate insolvency law, though some worthwhile advances on the procedural front have been achieved through the medium of the EC Regulation on Insolvency Proceedings (1346/2000) (to be discussed in Chapter 8).

Why was company law harmonisation seen as such a significant element in the EC programme? The answer lies in that other cherished EC goal, namely freedom of establishment, as demanded by Art 43 of the EEC Treaty. If businesses were to be given the freedom to operate and relocate across Europe it was vital to create a level playing field in terms of regulation.⁷⁵ The view was taken that every effort should be made to avoid the possibility of a 'race to the bottom' or Delaware syndrome⁷⁶ developing on the European side of the Atlantic. A Delaware syndrome involves companies incorporating in certain states, not in order to extend market operations in that state, but rather to exploit laxities (or, depending on one's point of view, attractions) in the local corporate law regime. States feel compelled to play this game to secure economic advantage over their neighbours. The European Court of Justice (ECJ) ruling in *Centros*⁷⁷ has shown that freedom of establishment has

⁷¹ Implemented by SI 1996/2827 – see M. Thomas (1998) 19 Co Law 26.

⁷² Introduced into the UK by SI 1999/3323. On works councils generally, see S. Wheeler (1997) 24 JLS 44.

⁷³ For comment on the Draft Ninth Directive, see F. Wooldridge [1982] JBL 182.

⁷⁴ On the Draft Fifth Directive, see M. Clough (1982) 3 Co Law 109, J. Welch (1983) 8 ELR 83, J.J. du Plessis and J. Dine [1997] JBL 23.

⁷⁵ See M. Andenas, K. Hopt and E. Wymeersch, *Free Movement of Companies in EC Law* (2003) (OUP) and V. Edwards, *EC Company Law* (1999) (OUP). Note also M. Gelter (2005) 5 JCLS 247.

⁷⁶ The Delaware syndrome is well-documented and fiercely debated – W. Cary [1974] 83 YLJ 663, R. Drury [1998] 57 CLJ 165 and (2005) 5 JCLS 1, L.A. Bebchuk (1992) 105 Harv LR 1435, R.K. Winter (1989) 89 Col L Rev 1526, M. Roe (2003) 117 Harv LR 588, J. Dean [2003] 14 ICCLR 196, P. Omar [2002] 13 ICCLR 445 and [2005] 16 ICCLR 17.

⁷⁷ Case C212/97 [2000] 2 WLR 1048. See V. Edwards [2000] CFILR 342. For a fuller discussion, see Chapter 7.

outpaced company law harmonisation. Other factors have conspired to reinforce the importance of corporate law harmonisation, namely the drive towards a single capital market; we could note here Art 294 (ex 221) of the Treaty, which seeks to prevent barriers being established to prevent free movement of capital. This in effect has created a right to invest in the shares of companies incorporated in other Member States without fear of discrimination.⁷⁸ The economic and political need to encourage cross-border corporate activity has also been a harmonisation driver.

It is important to reiterate that the programme has been driven entirely by formal measures emanating from the EU institutions. Constitutionally, the European Court of Justice has no residual power to introduce harmonisation through the back door. Witness the case of *Cooperative Rabobank v Minderhoud* (C104/96),⁷⁹ where an attempt to argue that all of the rules governing irregular company contracts should be harmonised along the lines of promoting sanctity of transaction was decisively rejected by the European Court of Justice. This type of deficient company contract (where one of the parties was subject to a conflict of interest) was not specifically addressed by the First Directive and therefore the Court of Justice was impotent when it came to applying its mantra of security of transaction to that particular scenario. However, as will become apparent later in this volume, the European Court of Justice through its rulings can promote harmonisation indirectly. Indeed, it has played a pivotal role through the development of the concept of 'direct effect' with regard to both Treaty provisions⁸⁰ and directives.⁸¹ The evolution of the concept of 'state liability' also is entirely attributable to ECJ jurisprudence.⁸² The Court of Justice has decisively rejected arguments by Member States that their non-implementation of Company Law Harmonisation Directives can be justified by a similar degree of inactivity by other Member States.⁸³

The harmonisation programme is constantly evolving. There is a greater recognition of the attractions of 'subsidiarity'.⁸⁴ The Winter Study Group,⁸⁵

⁷⁸ See, for example, *Factortame* (C221/89) [1991] ECR I-3905, *Manninen* (C319/02) [2005] 2 WLR 670.

⁷⁹ [1998] 1 WLR 1025.

⁸⁰ See *Reyners v Belgium* [1974] ECR 631, *Segers* (C79/85) [1987] 2 CMLR 247 for the direct effect of Treaty provisions in this context.

⁸¹ For the direct effect of directives, see *Karella v Minister of Industry* (C19 and 20/90) [1994] 1 BCLC 774.

⁸² See *Francovich* (C6 and 9/90) [1991] ECR I-5357.

⁸³ *Ministère Public v Blanguernon* (C38/89) [1991] BCLC 635.

⁸⁴ On subsidiarity, see Art 5(2) of the EC Treaty. See also K.J. Hopt [1999] 1 ICCLJ 41.

⁸⁵ For discussion of the Winter Report from the High Level Group of Company

set up in the wake of the débâcle over the initial failure to adopt the Takeover Directive, has made some significant proposals for reform. Reforms in the area of corporate governance seem likely having been spurred on by the Parmalat affair.⁸⁶ Equally, existing harmonisation regimes may be revisited under the SLIM (Simplified Legislation for the Internal Market) initiative.⁸⁷ The Directive 2006/68, which introduces the possibility of deregulation of the notorious Second Directive,⁸⁸ is a perfect example of this new policy direction at work.

7.2 Other Harmonisation Schemes

Europe is not alone in this strategy of seeking to develop a harmonised system of corporate law. We have already seen how in federal jurisdictions, means have been developed via model laws to promote commonality. Looking further afield, in Africa there is the Organisation for the Harmonisation in Africa of Business Law (OHADA) scheme.⁸⁹ In the Caribbean, the CARICOM project⁹⁰ has also achieved some success in bringing together corporate law systems, though the proximity of the US has had a greater impact. Indeed, the highly regarded Canadian model has attracted support in this region (the Barbados Companies Act 1982 being heavily derived from the Canadian Business Corporations Act).

At the truly global level, the United Nations Commission on International Trade Law (UNCITRAL) programme also deserves mention. Its Model Law on Cross-border Insolvency (1997)⁹¹ has proved a significant measure, being adopted in a number of jurisdictions including the US, Japan and Great Britain (through the Cross-Border Insolvency Regulations (SI 2006/1030)). Northern

Law Experts on a Modern Regulatory Framework for Company Law in Europe (November 2002), see B. Pettet (2004) 57 CLP 393 and the editorial note in (2002) 23 Co Law 52.

⁸⁶ See abovenote 26.

⁸⁷ On Simplified Legislation for the Internal Market, see E. Ferran [2005] 6 EBOLR 93 at 96.

⁸⁸ See above.

⁸⁹ There are 16 countries in OHADA (which was established in 1993) and these are mainly French-speaking jurisdictions. For OHADA generally, see P. Omar [2000] Ins Law 257. The dominance of the French language has caused difficulties for Cameroon (which is bilingual) – see N. Enonchong [2007] 51 JAL 95.

⁹⁰ The activities of CARICOM are described at www.caricom.org. For its initiative in the field of Company Law, see B.M. Surya (1982) 3 Co Law 44. See also P. Maynard [1982] JBL 421, K.I.F. Kahn (1985) 6 Co Law 341.

⁹¹ See Chapter 8 for full discussion. The complete text of the Model Law and the Cross-border Insolvency Regulations can be found in Volume 2 of L.S. Sealy and D. Milman, *Annotated Guide to Insolvency Legislation* (11th edition) (2008) (Sweet & Maxwell).

Ireland subsequently enacted the appropriate implementing measure via SR 2007/115 with effect from 12 April 2007.

8 LEGISLATIVE MEASURES

The UK Parliament has always kept one eye on commercial developments occurring in other jurisdictions in the area of business organisation structures, where those developments may threaten the economic stability of the UK. A perusal of the Parliamentary and public debates in the mid-19th century, when the possibility of limited liability companies being introduced into the UK was being considered, clearly attests to that concern.⁹² This is certainly true if one scrutinises the deliberations of the Mercantile Law Commission⁹³ in 1854.

The formal introduction of the private limited company into English law in 1907 offers a good illustration of these convergence forces at work in the legislative process.⁹⁴ However, it should be noted that the private company had in reality been on the scene for a number of years prior to that date, as is clear from a perusal of the works of leading practitioners⁹⁵ and from judicial pronouncements.⁹⁶

The Law Commissions in England/Wales and Scotland certainly undertake comparative research before making recommendations for the reform of UK company law.⁹⁷ Indeed it appears from s. 3(1)(f) of the Law Commissions Act 1965 that they have a statutory obligation to do so. This technique is most recently apparent when one looks at the policy deliberations leading to the introduction of Part 11 of the Companies Act 2006 (statutory derivative claims).

In more modern times, the introduction of the limited liability partnership in April 2001, via the agency of the Limited Liability Partnerships Act 2000,

⁹² Bouverie was concerned about businesses being incorporated in the US and France with limited liability and then trading in this country.

⁹³ For discussion, see R.A. Bryer (1977) 50 *Econ Hist Rev* 37.

⁹⁴ The advent of the private company is analysed in E. Manson (1910) 26 *LQR* 11. The GmbH was formally devised in Germany in 1892. By perverse coincidence, the European idea of the limited partnership was introduced into English law at the same time as the private company, but as an organisational structure it has proved unpopular when set against the virtues of the private company.

⁹⁵ Sir Francis Palmer had noted the phenomenon in 1877 in his treatise *Private Companies and Syndicates*. For an account of Palmer's role in promoting the private company, see the Biographical Note in *Palmer's Company Law* (24th ed) (1987) (Stevens and Sons) at ix.

⁹⁶ See *British Seamless Paper Box* (1881) 17 Ch D 467 at 478 per Cotton LJ and Lord Macnaghten in *Salomon v Salomon & Co Ltd* [1897] AC 22 at 48.

⁹⁷ See, for example, *Shareholder Remedies* (1997) (LC 246) (Cmnd 3769).

shows how concerns that the UK was falling behind commercial competitors in the provision of business structures sought after by the professions, can lead to legislative reform. The Limited Liability Partnerships (LLP) emerged in the US in Texas in 1991 as a response by the professions to the burgeoning risks of professional liability litigation. The recent introduction of the LLP into Jersey⁹⁸ coupled with threats from major accountancy firms that they would 'go offshore' arguably proved a decisive factor in persuading the UK government to act. Since that legislation was enacted, several thousand firms (mainly professional firms) have changed their legal basis from that of partnership to that of limited liability partnership.⁹⁹ The legal model devised in Texas has in the space of a mere decade well and truly crossed a continent and ocean.

9 CONVERGENCE AND THE COURTS

We have already asserted that the European Court of Justice officially has no residual role to play in pursuing a harmonisation policy beyond the scope of measures formally agreed. At national level, however, the national Member State courts are obliged by Art 10 (ex 5) of EC Treaty to facilitate the implementation of directives.¹⁰⁰ More generally, they frequently take into account global trends when formulating jurisprudence. Certainly, in English law, the courts appear very sensitive to the notion that the health of the City of London is vital to the economic well-being of the country. Let us consider a few illustrations of these thought processes at work.

Historically, the work of Lord Mansfield¹⁰¹ in the 18th century in seeking to attune English commercial law with continental traditions is important, though there is no direct impact on company law mainly because it was operating under

⁹⁸ Under the Limited Liability Partnerships (Jersey) Law 1997. See P. Morris and J. Stevenson (1997) 60 MLR 538. For the debate leading to the introduction of the LLP into English Law, see A. Griffiths [1998] CFILR 157, C. Bradley [2001] CLWR 330. On LLPs, see J. Freedman and V. Finch [1997] JBL 387, V. Finch and J. Freedman [2002] JBL 475, E. Deards [2003] JBL 435, M. Lower (2000) 22 Liv L Rev 89, S. Cross [2003] JBL 268. For the leading monograph see *Palmer's Limited Liability Partnership Law* (2002) (Sweet & Maxwell) edited by G. Morse et al.

⁹⁹ A perusal of the *Companies Annual Report for 2005/06* discloses some 16,699 LLPs registered in England and Wales. The irony is that the Companies Act 2006 now allows auditors to cap liability (see ss. 534 et seq.) – one wonders whether some of those firms that have rushed into the LLP may now have had second thoughts.

¹⁰⁰ See *Marleasing* (C106/89) [1990] ECR I-4135.

¹⁰¹ Lord Mansfield was Lord Chief Justice 1756–88. Lord Mansfield had a role in devising the rule against fraudulent preferences, a staple of corporate insolvency law. On Lord Mansfield's influence generally, see C.H.S. Fifoot, *Lord Mansfield* (1936) (Clarendon Press).

the dead hand of the Bubble Act for the entirety of Lord Mansfield's tenure as Lord Chief Justice. What matters was that Lord Mansfield affected the environment in which company law later came to operate.

In *Re Scandinavian Bank*,¹⁰² a case which we discuss in Chapter 4 below, Harman J gave the green light to UK public companies having shares denominated in foreign currencies. The Companies Act 2006 has confirmed this ruling by giving it a statutory imprimatur (see s. 542).

The issue in the test case of *Acatos & Hutcheson plc v Watson*¹⁰³ was whether there was a breach of the bar on companies acquiring their own shares in a scenario where a company acquires another company which just happens to own shares in the first company. After considering a range of factors, including the stance taken by the Australian courts,¹⁰⁴ Lightman J ruled that this situation (which was not uncommon in practice) should not be deemed a breach of company law. Again, the fact that to hold otherwise would be to frustrate takeovers in the City of London arguably influenced the process of forming the judgment.¹⁰⁵

In *Re Maxwell Communications Corp (No. 2)*,¹⁰⁶ Vinelott J had to decide whether English law should permit a creditor to contractually assent to a deferred or subordination status on liquidation. At first sight, this would appear to offend against the fundamental principle of equality of treatment of non-secured creditors. In deciding this question in the affirmative, the judge was impressed by the fact that contractual subordination was permitted in a number of jurisdictions enjoying developed economies – namely South Africa, Switzerland and the USA. That survey again proved decisive in the final judgment. As Vinelott J stated: 'It would, I think, be a matter of grave concern if, at a time when insolvency increasingly has international ramifications, it were to be found that English law alone refused to give effect to a contractual subordination'.¹⁰⁷

¹⁰² [1988] 1 Ch 87.

¹⁰³ [1995] BCLC 456.

¹⁰⁴ For the Australian jurisprudence, see *Dynason v JC Hutton Pty Ltd* (1935) ALR 419, *August Investments Pty Ltd v Poseidon Ltd and Samin Ltd* [1971] 2 SASR 71, *Trade Practices Commission v Australian Iron and Steel Pty Ltd* (1990) 22 FCR 305

¹⁰⁵ *Ibid* at 451. Although the sentiment was not unequivocally expressed in the judgment, the case typifies the approach of the English courts towards takeover facilitation. Approving devices that frustrate takeovers would be a cardinal sin, because takeovers are major earners for a range of professional repeat players in the City of London.

¹⁰⁶ [1994] 1 BCLC 1 – discussed by M. Fealy [1993] CLJ 396, R. Nolan [1995] JBL 485. See also *Re British and Commonwealth Holdings (No. 3)* [1992] BCLC 322.

¹⁰⁷ [1994] 1 BCLC 1 at 20–21.

A different use of comparative legal material was at the heart of the House of Lords ruling in *Re BCCI (No. 8)*.¹⁰⁸ Here the House of Lords had to determine, amongst other things, whether a bank could take a charge over monies deposited with it by the chargor client, a so-called ‘charge-back’ arrangement. Millett J, as he then was, had indicated in *Re Charge Card Services*¹⁰⁹ that this outcome was a conceptual impossibility. Banking practitioners were disappointed with this analysis and the Legal Risks Review Committee expressed its concerns.¹¹⁰ Subsequently, in *Re BCCI (No. 8)*,¹¹¹ Lord Hoffmann rejected the ‘conceptual impossibility’ thesis by pointing out that a number of legal systems based upon English law had explicitly legislated for charge-backs, thereby proving that the concept was a feasible legal option. This argument could have been countered by the retort that the need for legislation indicated a non-acceptance at common law, but that is not significant to our discussion here; comparative insights informed the conclusion.

This trend (which over the years admittedly has had its setbacks¹¹²) towards ensuring that English law is internationally competitive runs alongside a more established phenomenon reflecting the evolutionary processes of the common law. Although it is true to say that the English courts have always been prepared to give judicial notice to Commonwealth authorities, that willingness to be receptive to new ideas has become more marked in recent decades.¹¹³ This is not exclusively a phenomenon only reflected in corporate law; it is much more pervasive. As far as corporate law is concerned, we could point to Commonwealth authorities playing a pivotal role in the emerging law of directors’ duties to creditors.¹¹⁴ Certainly, a perusal of the judgment of the

¹⁰⁸ [1997] 3 WLR 909.

¹⁰⁹ [1986] 3 WLR 697.

¹¹⁰ See Legal Risks Review Committee, *Reducing Uncertainty: The Way Forward* (1992) – reviewed by D. Capper (1993) 44 NILQ 71.

¹¹¹ *Supra*.

¹¹² Witness the SWAPS affair – *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

¹¹³ This phenomenon, whereby English courts are informed by Commonwealth jurisprudence, is a general practice and not restricted to corporate law. This practice of judicial borrowing is not restricted to common law judicial interaction – see B. Markesinis [2002] CLJ 386.

¹¹⁴ See, for example, *Kinsella v Russell Kinsella Pty Ltd* [1968] NSWLR 722, *Walker v Wimborne* (1976) 137 CLR 1, *Nicholson v Permakraft* [1985] 1 NZLR 242, *Jeffree v NSCC* (1989) 15 ACLR 217. The principle has subsequently been introduced into Ireland – *Re Frederick Inns Ltd* [1994] 1 ILRM 387. The literature mapping this development is impressive – R. Grantham [1991] JBL 1, D. Prentice (1990) 10 OJLS 265, A. Keay [2002] JBL 379, (2003) 66 MLR 665, [2005] CLJ 614, [2005] 18 Ins Intell 65. Professor Keay’s work in this area is also expanded in A. Keay, *Company Directors’ Responsibilities to Creditors* (2006) (Routledge-Cavendish).

Court of Appeal in *West Mercia Safetywear Ltd v Dodd*¹¹⁵ would point to that influence. More recently, in *National Westminster Bank v Spectrum*,¹¹⁶ the House of Lords sided with their judicial brethren from New Zealand¹¹⁷ in deciding that a fixed charge over future book debts based upon the orthodox English *Siebe Gorman*¹¹⁸ precedent created only a floating charge. Thirty years of City of London practice disappeared overnight, much to the angst of the banking community.

10 LEGAL AND OTHER COMMERCIAL TRANSPLANTS¹¹⁹

The process of national systems formally adopting (either by legislation, precedent or evolving social norm) corporate structures and concepts from other jurisdictions, although commonplace, is not without difficulty. Some imported concepts fit in easily alongside existing structures. Others are less successfully adopted. The difficulties of this practice were noted by Kahn-Freund,¹²⁰ who highlighted the importance of context when considering usage of comparative analysis and in particular, in evaluating whether a transplant could be viable.

On the positive side, one could cite the adoption of the informal rescue procedures known as the London Approach to a number of leading Asian economies.¹²¹ The spread of the private company from its genesis in Germany (GmbH, 1892)¹²² to its reception in England (1907) and France (SARL,

¹¹⁵ [1988] BCLC 250. See A. Keay [2002] JBL 379.

¹¹⁶ [2005] UKHL 41. See A. Berg [2006] JBL 22.

¹¹⁷ *Supercool Refrigeration v Hoverd Industries* [1994] 3 NZLR 300.

¹¹⁸ *Siebe Gorman & Co v Barclays Bank* [1979] 2 Lloyds Rep 142.

¹¹⁹ See A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edition, 1993) (University of Georgia Press). See also his work in (1976) 92 LQR 79, [1978] 37 CLJ 313. Note also the essay by P. Legrand in chapter 2 of D. Nelken and J. Feest, *Adapting Legal Cultures* (2001) (Hart). For an outstanding review of 'reception' techniques in the British colonies, see B.H. Macpherson, *The Reception of English Law Abroad* (2007) (Supreme Court of Queensland Library). Note also R. McQueen (2008) 17 Griff L Rev 383. Scholars have also examined the economic efficiency of legal transplants in general – see N. Garoupa and A. Ogus (2006) 35 Jo of Leg Studs 339.

¹²⁰ (1974) 37 MLR 1 (Chorley Lecture).

¹²¹ See N. Segal [2000] 13 Insolv Intell 17.

¹²² This was partly due to a reaction by the business community to over-regulation of public companies – see F. Fabricius [1970] JBL 229.

1925)¹²³ and finally to the Netherlands (BV, 1971)¹²⁴ offers another good illustration of how successful corporate models can migrate. On much the same theme, we could cite the emigration of unit trusts¹²⁵ from the US to the UK in the 1930s, a transition that eventually required a regulatory response.

On the other hand, a good illustration of the difficulties that can arise is provided by the story of the limited partnership in English law. This was a model that had been operated successfully on the Continent for many a year. Accordingly, it was introduced into English Law by the Limited Partnerships Act (LPA) 1907. It proved to be unpopular and even today there are only 13,426 limited partnerships registered in this country.¹²⁶ Compare this statistic to the 17,499 LLPs registered since 2001. Why has the limited partnership registered such a poor performance? The introduction of the private limited company into English law in the same year may offer some explanation in that apart from possible technical tax advantages, the limited partnership has little to offer entrepreneurs over and above that provided by the private company.

The attempt to transplant the South African rescue device of judicial management into Australia in 1961 (albeit under the guise of official management) was a resounding failure.¹²⁷ Another example of a failed transplant is illustrated by the fate of the two-tier board in France. This German corporate governance idea has never really taken off in France,¹²⁸ though it has been adopted successfully in the Netherlands.

Having noted the successes and failures, what one can conclude? As we noted above, there is much in Kahn-Freund's observation that failed transplant may not necessarily be attributed to inherent weaknesses in the trans-

¹²³ The GmbH model arrived in France through the back door. It had been used in Alsace and Lorraine and when these provinces were returned to France at the end of the First World War, this model was allowed to continue, thereby creating pressure to introduce it generally into France – for the fascinating story, see F. Wooldridge [1970] JBL 317.

¹²⁴ See P. Sanders [1973] JBL 194.

¹²⁵ See K.F. Sin, *The Legal Nature of the Unit Trust* (1997) (Clarendon Press) at 27–9.

¹²⁶ On the LPA 1907, see E. Berry [2005] JBL 70 at 85, J. Henning (2000) 21 Co Law 165, S. Sheikh (2002) 23 Co Law 179 and T Prime and G. Scanlan (2007) 28 Co Law 262. For current limited partnership registrations, see *DTI Annual Companies Report 2004–05*, where the figure of 12,377 is reported for Great Britain, with more than a third of these in Scotland (an interesting statistic). The limited partnership has enjoyed a significant boost in popularity in the past five years.

¹²⁷ For a critique of judicial management, see H. Rajak and J. Henning (1999) 116 SALJ 262. On the failure of official management in Australia, see J. Farrar [1976] JBL 214.

¹²⁸ For French resistance to the German model, see CLAB survey of national systems of European Corporate Law (1999).

plant but may owe more to underlying cultural differences.¹²⁹ There is a path-dependency¹³⁰ aspect to legal reform that is particularly relevant when contemplating transplants. It is a recognition of this problem that has led the EU to seek to harmonise not merely substantive company law, but also the social and economic environment in which it operates. But, even with this fair wind, transplants do not always succeed because culture is resilient.

11 THE COMPANY LAW REVIEW (1998–2001)¹³¹

For many years prior to 1997, the process of corporate law reform in the UK had been a disgrace.¹³² Clive Schmitthoff famously described a former Companies Act as a ‘repository of historical relics’.¹³³ In our preface, we noted how the Company Law Review process, which produced two White Papers¹³⁴ in response, was largely driven by a desire to ensure that UK corporate law was an internationally competitive model. There is nothing new in this concern.¹³⁵ The Irish Company Law Review Group stressed this as an

¹²⁹ See T. Ruskola (2000) 52 Stan L Rev 1598. See P. Lawton [2007] 49 Manag Law 249 for discussion of how cultural aspects of the Chinese family firm might have an impact upon the enforcement of shareholder rights through standard substantive mechanisms.

¹³⁰ For the convincing path dependency theory in corporate law, see M.J. Roe (1996) 109 HLR 641.

¹³¹ For the *Final Report* see URN 01/942 (2001). See J. Rickford, chapter 1 in J. de Lacy, *The Reform of UK Company Law* (2002) (Cavendish). Note also B. Pettet (1998) 19 Co Law 134 for an early appraisal of the project. See also M. Arden [2002] JBL 579. The UK was not alone in reflecting on the state of its company law. In France in 1998, the Marini Report covered similar ground – see A. Tunc in B. Rider (ed.), *The Realm of Company Law* (1998) (Kluwer) at 161–6, P. Omar (1998) 19 Co Law 62, (1999) 20 Co Law 310.

¹³² A compelling critique of the process of company law reform before 1998 is provided by L.C.B. Gower in (1980) 14 Law Teacher 111 and by J. Freedman, chapter 11 in F. Patfield (ed.) *Perspectives on Company Law (I)* (1995) (Kluwer).

¹³³ [1960] JBL 151 at 151.

¹³⁴ See *Modernising Company Law* (Cm 5553-I, 2002) and *Company Law Reform* (Cm 6456, 2005). For a reaction to the 2002 White Paper, see R. Goddard (2003) 66 MLR 402 and for comment on the 2005 follow-up, see C. Howell (2005) 26 Co Law 203.

¹³⁵ See here the observations of Eve J in *Re Jewish Colonial Trust* [1908] 2 Ch 287 at 295, commenting upon the rationale behind the Companies (Memorandum of Association) Act 1890 which apparently was designed to enable English companies to change their objects to compete more effectively with foreign firms.

important consideration in its first report in December 2001.¹³⁶ The methodology of the UK Company Law Review is, however, interesting. The Steering Group was composed of individuals with a wide range of skills and perspectives. Extensive use was made of comparative research. The University of Manchester Centre for Law and Business survey of European national corporate law systems has already been mentioned.¹³⁷ In addition, the 1997 study by a team led by Cally Jordan of Company Law in Hong Kong¹³⁸ assisted in the process of forming reform proposals for the UK. Academics and practitioners on the Steering Group made use of their extensive knowledge of comparative corporate law models.

12 THE COMPANIES ACT 2006

This new legislation, which represents a potent brew of reform and consolidation contained within the longest Act in English law (all 1300 sections and 16 schedules at the time of initial enactment), does have considerable relevance to our study. Some of the deregulation/modernisation strategy favoured by the Company Law Review in order to make our system of corporate law more competitive is indeed introduced through that legislative mechanism. For example, the rules on share capital maintenance are loosened insofar as that is consistent with the EC Second Company Law Harmonisation Directive (1977/91). The 2006 Act remodels and simplifies the law of overseas companies (Part 34) and introduces a mechanism under which foreign disqualification orders can be recognised and enforced in the UK (Part 40). More of these matters later. In spite of these undoubted changes, much of the 2006 Act is familiar and it is not as radical a measure as has been claimed.¹³⁹

The 2006 Act has been such a massive venture¹⁴⁰ that implementation has been staged over three years, with 1 October 2009 now being set as the final implementation date for all but a very few provisions. Whether that target is

¹³⁶ For discussion of this issue, see para 1.2 of the Report. The point was made that Ireland had updated other regulatory systems to cope with the globalised economy, but that companies regulation had lagged behind. The Irish Company Law Reform Group was established under s. 68 of the Company Law Enforcement Act 2001.

¹³⁷ Centre for Law and Business (University of Manchester). Noted in *Final Report* (URN 01/942) at p. 7

¹³⁸ For this 1997 report (which is available electronically) see C. Jordan [1997] IFLRev (July) 29.

¹³⁹ See J. Birds (2007) 49 *Manag Law* 13.

¹⁴⁰ For the background to the legislative passage, see P. Bovey (2008) 29 *Stat L Rev* 11.

met remains to be seen. Further details on the current state of play with regard to implementation can be found in Appendix 1.

13 DOES CORPORATE LAW MATTER?

One of the underlying themes in this work is that an effective national system of corporate law is a relevant consideration in terms of attracting transnational commerce. This assertion, which has its doubters in terms of general applicability,¹⁴¹ is based in part on intuition. It is, however, supported by a more scientific body of scholarship.¹⁴² John Dunning¹⁴³ has argued that a rational actor in the transnational sector would have regard to the local legal system before investing in that country. It is difficult to argue with that assertion, provided it is not taken too far. A group of scholars headed by La Porta¹⁴⁴ have reached similar conclusions when comparing levels of shareholder protection in a range of jurisdictions. This type of numerical analysis as a comparative tool is very much in vogue.¹⁴⁵ Studies by Perry¹⁴⁶ in Sri Lanka and other South Asian countries suggest that the local legal infrastructure is not the only major consideration taken into account before the decision to invest is made. There is no doubt that other significant considerations may enter the equation – such as language, political stability, robustness of critical institutions,¹⁴⁷

¹⁴¹ See B. Cheffins (2001) 30 *Jo of Legal Studs* 459, where the point was made that the development of corporate law regimes owes more to market forces than legal norms.

¹⁴² For an excellent account of the ‘law matters’ thesis, see B. Cheffins (2001) 1 *JCLS* 71 at 76–7.

¹⁴³ J. Dunning, *Multinational Enterprises and the Global Economy* (1993) (Addison-Wesley).

¹⁴⁴ See R. La Porta, F. Lopez de-Silanes, A. Shliefer and R. Vishny (1998) 106 *Jo of Pol Econ* 1113, and the later work published in (1999) 54 *Jo of Fin* 471, (2000) 58 *Jo of Fin Econ* 3. For a review of the so-called ‘LLSV’ thesis with critique, see A. Pekmezovic [2007] *ICCLR* 97 and 147.

¹⁴⁵ For a compelling critique of this methodology, see M.M. Siems [2005] 16 *ICCLR* 300. An alternative ‘leximetric’ methodology is developed by P. Lele and M.M. Siems in (2007) 7 *JCLS* 17.

¹⁴⁶ A.J. Perry, *Legal Systems as a Determinant of FDI: Lessons from Sri Lanka* (2001) (Kluwer). See also her work in (2003) 23 *Leg Studs* 649, (2002) 29 *Jo of Law and Soc* 282 and (2000) 49 *ICLQ* 779.

¹⁴⁷ On the importance of institutions in a variety of senses, see K. Pistor (2002) 50 *Am Jo of Comp Law* 97. In this context, M. Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001) (Ashgate) is worth reading. K.W. Dam would agree with La Porta that law matters – but what really matters is efficient legal institutions to enforce that law – see *The Law-growth Nexus: The Rule of Law and Economic Development* (2006) (Brookings Institute Press), especially at 230. In

transport facilities, availability of appropriate skilled workers, raw materials, available market, etc., but it would be difficult to persuade a lawyer that the legal system is irrelevant to the decision-making processes of investors and entrepreneurs.¹⁴⁸ Indeed, the whole experience of Delaware corporate law seems to suggest that it may be an important factor. It is vital to the economy of offshore jurisdictions which are constantly seeking to steal a march on each other in developing business-friendly corporate regimes. Even between mainstream jurisdictions, differentials in corporate law are felt – witness the influx of small European businesses into the UK, seeking to exploit our private company format. Even more recently, we have seen distressed businesses desperately seeking to relocate to the UK before insolvency proceedings are commenced, simply in order to take advantage of our flexible insolvency regimes. On the basis that law does matter but is not the only behavioural determinant, we will proceed with our study.

support of this argument, Dam cites the failed attempt to import the highly successful German bankruptcy law into Russia, a failure attributed to inefficient Russian legal institutions.

¹⁴⁸ This point with regard to the positive impact of protection on investors is made by R. La Porta et al. (2002) 57 *Jo of Fin* 1147.