

ROUTLEDGE RESEARCH IN CORPORATE LAW

Shareholder Primacy and Corporate Governance

Legal Aspects, Practices and Future
Directions

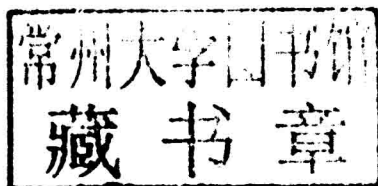
Shuangge Wen



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“The Magnitude of Shareholder Value as the Overriding Objective in the UK – The Post-Crisis Perspective”, (2011) 26(7), *Journal of International Banking Law and Regulation*, 325–338;

“Exploring the Rationale of Enlightened Shareholder Value in the Realm of UK Company Law – The Path Dependence Perspective”, (2011) XIV, *International Trade and Business Law Review*, 153–173;

“Corporate Governance and the Financial Crisis: Did the Theories Stand the Test?”, (2010) 25(10), *Journal of International Banking and Financial Law*, 612–617.

Foreword

I am delighted to have the opportunity to write a brief foreword to this important new monograph. I knew the author when she was a student at Manchester, although I did not have the pleasure of supervising the PhD on which the book is based. I had no hesitation in accepting the invitation from Dr Wen, as I anticipated that the book would be well worth reading, and my expectations were more than fulfilled. Much has, of course, been written about corporate governance in recent years from a range of different perspectives, ranging from the theoretical to the doctrinal. In this context there has been an important debate about the role of company law, whether it should (continue to) adopt an approach that is based on the primacy of shareholder or member interests or take a wider view. Dr Wen makes, in my view, a very important contribution to this debate with the benefit of not just clear expositions of the theoretical debates that have flourished recently in Anglo-American literature but with detailed description and critique of doctrinal law, including, of course, the effect of the UK Companies Act 2006, especially the statutory statement of directors' duties. The contrasts with continental European approaches are explained and important questions raised about the impact that the global financial crisis will ultimately have on corporate governance and company law. The text is refreshingly free of jargon, the content is logically set out and in my view the book will become an important reference point for researchers and postgraduate students.

John Birds
Emeritus Professor, School of Law, University of Manchester.
Honary Professor, School of Law, University of Sheffield.

Abbreviations

ACCA	Association of Chartered Certified Accountants
APEC	Asia-Pacific Economic Cooperation
BERR	Department for Business Enterprise & Regulatory Reform
BIS	Department for Business, Innovation & Skills
CA	Companies Act
CEPS	Centre for European Policy Studies
CLRSG	Company Law Review Steering Group
CSR	Corporate Social Responsibility
DTI	Department of Trade and Industry
EIRIS	Ethical Investment Research Service
ESRIF	European Sustainable Responsible Investment Forum
ESV	Enlightened Shareholder Value
Eurosif	European Social Investment Forum
FRC	Financial Reporting Council
FSA	Financial Services Authority
FSF	Financial Stability Forum
ICGN	International Corporate Governance Network
IOD	Institute of Directors
IOSCO	International Organisation of Securities Commissions
ISC	Institutional Shareholders' Committee
ISS	Institutional Shareholder Services
OECD	Organisation for Economic Co-operation and Development
RIAA	Responsible Investment Association Australia
RSA	Royal Society for the encouragement of Arts, Manufactures and Commerce
SNB	Special Negotiation Body
SRI	Socially Responsible Investment

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Introduction

Background of the research

Corporate governance is an area consisting of a multitude of highly sophisticated national systems, developed over time and overwhelmingly reflecting a variety of distinguishing national historical, cultural and financial traditions.¹ If one were to force a categorisation in this field, two major types defined in the literature can be seen as forming the polar extremes of the corporate governance taxonomy – the Anglo-American “outsider” system represented by the United Kingdom and America, and the Continental “insider” system exemplified by Germany and Japan.² Of these diversities existing between the two dichotomous models, one of the most fundamental lies in the divergence of predominant objectives among public companies, a major factor affecting core corporate strategies and associated performance.³

In recent decades the global economy has seen a major transformation with far-reaching and fundamental changes, most notably improvements in

1 T. Clarke, *International Corporate Governance: A Comparative Approach* (2007, Abingdon: Routledge), at 170; Reflection Group, *Report of the Reflection Group on the Future of EU Company Law* (2011, Brussels: European Commission), at 10–12.

2 R. Aguilera, D. Rupp, C. Williams & J. Ganapathi, “Putting the S Back in Corporate Social Responsibility: A Multi-level Theory of Social Changes in Organisations”, (2007) 32 *Academy of Management Review* 836; R. LaPorta, F. Lopez-De-Silanes & A. Shleifer, “Corporate Ownership Around the World”, (1999) 54 *Journal of Finance* 471; R. Aguilera & G. Jackson, “The Cross-National Diversity of Corporate Governance: Dimensions and Determinants”, (2003) 28 *Academy of Management Review* 447, footnote 1 and accompanying text.

3 In this regard, contemporary commentary has also, by and large, polarised around two major camps: those who consider that the corporate system serves the expectations of shareholders, i.e. proponents of the shareholder primacy paradigm, and those who advocate the satisfaction of the interests of a variety of constituencies, i.e. the stakeholder value approach. Though there are other theories “that can be found somewhere between these two dominant theories... they have attracted relatively little support and have rarely been articulated”. See A. Keay, *The Corporate Objective* (2011, Cheltenham: Edward Elgar), at 10–11; also J. du Plessis, J. McConvill & M. Bagaric, *Principles of Contemporary Corporate Governance* (2005, Cambridge: Cambridge University Press), at 14. For the purpose of this book, other theories outside these two dominant domains will not be explored in detail.

technology, production and trading patterns.⁴ In response to the growth of internationalised business, matching improvements in the governance of corporations have been increasingly called for. In turn, attention has been focused more intensely on the transportability of “best practices” of corporate governance, including diversified definitions of the objective of the corporation.⁵ In the 1990s, much of the discussion seemed to have reached a consensus on the superiority of the Anglo-American regime, observing a greater rhetoric of Anglo-American shareholder primacy in many aspects of Continental European practices; these included the growing implementation of Anglo-American information disclosure standards,⁶ a rising number of hostile takeovers⁷ and developments of stock markets in many Continental European economies.⁸ These changes persuaded many scholars that the Anglo-American corporate governance system featuring shareholder primacy was going to become the ultimate formulation of best corporate governance practices.⁹ However, a sequence of several notorious corporate scandals since the beginning of the new millennium revived the stakeholder-end argument in the corporate objective debate, opposing much of the shareholder-oriented argument that had been prevalent in the 1990s.¹⁰ Recent changes in Anglo-American corporate governance practice, including increasing societal practice by corporations

4 G. Brown, *A Strong and Strengthening Economy: Investing in Britain's Future: Economic and Fiscal Strategy Report and Financial Statement and Budget Report* (2006, London: The Stationery Office), at para 1.3.

5 M. Rubach & T. Sebor, “Comparative Corporate Governance: Competitive Implications of an Emerging Convergence”, (1998) 33 *Journal of World Business* 167; M. Guillén, *Models of Management: Work, Authority and Organisation in Comparative Perspective* (1994, Chicago: University of Chicago Press).

6 G. Jackson, *Regional Integration and the Diversity of Corporate Governance: Some Lessons from European Integration*, A Memo Prepared for the RIETI International Symposium “Asian Economic Integration: Current Status and Future Prospects”, 22–3 April, (2002), at 4.

7 “Europe's New Capitalism: Bidding for the Future”, *The Economist*, 12 February 2002, at 71.

8 J. Coffee, “The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications” (1999) 93 *Northwestern University Law Review* 641.

9 E.g., H. Hansmann & R. Kraakman, “The End of History for Corporate Law”, (2001) 89 *Georgetown Law Journal* 439; D. Denis & J. McConnell, “International Corporate Governance: A Survey”, (2002) 38 *Journal of Financial and Quantitative Analysis* 1; J. Coffee, “Convergence and Its Critics: What are the Preconditions to the Separation of Ownership and Control?”, in J. McCahery, P. Moerland, T. Raaijmakers & L. Renneboog (eds), *Corporate Governance Regimes: Convergence and Diversity* (2004, Oxford: Oxford University Press), at 83.

10 For instance, see C. Williams & J. Conley, “An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct”, (2005) 38 *Cornell International Law Journal* 493; S. Thomsen, “The Convergence of Corporate Governance Systems and European and Anglo-American Standards”, (2003) 4 *European Business Organisation Law Review* 31; C. Strandberg, *The Convergence of Corporate Governance and Corporate Social Responsibility: Thought – Leaders Study* (2005, Burnaby: Strandberg Consulting). This stakeholderism perspective was referred to in the UK Company Law Review as pluralism. CLRSO, *Modern Company Law for a Competitive Economy: the Strategic Framework* (1999, DTI: London), at paras 5.1.13–5.1.16.