Company law and contractual freedom

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Globalization and choice of company law

Incorporation of subsidiaries
- Tax planning
- Listing
- Bilateral investment treaties
- Customer trust

Cross-border relocation of existing companies
- Direct
- Indirect
  - Group restructuring
  - Reverse takeovers
Implications of choice between systems of company law

Race
- Top or bottom?

Force shaping the development of company law (including listing rules and corporate governance standards)

Research questions
- Market preferences: desirable features of company law?
- Disruption: incomers that challenge the corporate environment of the arrival country
- Policy implications of extended choice: intersection with core debates about corporate purpose
Market preferences
Market preferences: learning from Channel crossings

Relocating from the UK to Jersey

Structure: “holdco” scheme of arrangement

“Business as usual”
- Eligible for admission to listing and trading on London Stock Exchange premium or standard listing segment; or to admission to AIM
- Retain UK Financial Conduct Authority as competent authority
- Corporate governance reporting against UK Code: mandatory (premium listing); voluntary (Standard listing)
- UK Takeover Code applies
- CREST (settlement system) extend to Channel Island securities

Differences
- FTSE Index Series eligibility
- Core company law: function of bespoke articles
Bespoke articles to replicate UK Companies Act 2006 contractually

Filling in gaps in Companies (Jersey) Law 1991
- Pre-emption rights on new share issues
- Shareholder sanction for share allotments
- Shareholder approval for ex gratia payments for loss of office
- Removal of directors by shareholder resolution
- ¾ majority for special resolutions
- Information about, and to, beneficial owners of shares
- Operation of company meetings

Market endorsement of shareholder protections
Bespoke articles: what’s not included

Capital maintenance regime
- Outdated
- Modernisation blocked by EU law

“Say on pay”

Market preferences?
Disruption
Implications of extended choice for arrival countries

New business opportunities

New threats
- Opportunistic conduct misaligned with public interest

Obvious concerns and responses
- Money laundering, tax evasion etc
- UK Small Business, Enterprise and Employment Act 2015

More subtle challenges
- Footloose companies adopting national citizenship when it suits
- May be very different from “home grown” domestic companies
- Can the established system cope with an “invasive species”?
Perna viridis

Asian green mussel: the economically most important mussel in Southeast Asia.

But outside Asia-Pacific region, considered an introduced pest and unwelcome invasive species. Impacts include - causing blockage in intake pipes of industrial plants, clogging crab traps and clam culture bags and impeding commercial harvest.
What type of “invasive species”?  

Standard UK listed company  
- Dispersed shareholders and professional managers

Typical agency problems  
- Weak owners, strong managers

“Invasive” companies  
- Concentrated share ownership

Typical agency problems  
- Strong majority shareholders, weak minority shareholders
Testing the system (1)

ENRC
- UK holdco created by group re-organisation
- Kazakhstan-based; dominant shareholders: 3 Kazakh oligarchs, Kazakh government, Kazakh mining company
- Premium listed 2007-2013; FTSE100 member
- 2 Independent directors voted off board; litigation against another – influence of dominant shareholders
- UK Serious Fraud Office called in during 2013
- Described as a “chronic failure” of governance
Testing the system (2)

Vallar/BUMI/ARMS

- 2010: Jersey cash shell co standard listed on LSE
- Acquired Indonesian based natural resource companies – reverse takeover
- Indonesian family interests became majority shareholders
- UK holdco acquired inserted via organisation
- 2011: Premium listed and FTSE 100 membership
- 2012-13: Emergence of financial irregularities and value-eroding related party transactions
- 2013-15: control of company contested – original founders finally conceding defeat in takeover battle with other Indonesian interests in June 2015
- 2015: UK regulatory fine on company for breaches on requirements on related part transactions; and civil proceedings against connected parties to enforce $173 m arbitration award
Reinforcing the system

New premium listing requirements

- Relationship agreement with controlling (30%+) shareholder; sanction for breach: more say for independent shareholders in approval of related party transactions
- Double-voting for election/re-election of independent directors
- Additional disclosure requirements
- Procedural enhancement, eg, on reverse takeovers
From descriptive to normative: how should extended market choice shape company law policy choices? (1)

Policy with respect to corporate mobility itself
- Fundamental neutrality of company law towards corporate “desertion”
- Intervention inappropriate beyond procedures to ensure properly managed exits
- Contractual freedom to choose the corporate form as a risk allocation/management tool → freedom of choice with respect to location and relocation

Extended choice as a discovery mechanism
- Choices can reveal market preferences

But policy choices are not about simply following the market
- More shareholder engagement → more quarterly capitalism?
- Robust requirements and safeguards are consistent with global competitiveness aspirations attract business that want to bond with high quality regimes
- Market “mimicking” hypothetical bargain
How *should* extended market choice shape company law policy choices? (2)

Is it a problem that businesses and investors can “vote with their feet”?

No, but ...

Ensuring policy effectiveness

◦ Plurality of governance models – safeguards
◦ Plurality of ownership models (departures from proportionality principle) - safeguards
◦ Plurality of corporate purpose
  ◦ Breaking the tyranny of shareholder primacy
THANK YOU!