

Table of Contents

Acknowledgements	xi
Introduction	1
Part I: Regulatory Issues of Hybrid Financial Instruments: The Classification Approach	7
CHAPTER 1	
A Historical Perspective	9
§1.01 The Birth and Evolution of Preference Shares in the British Legal System	9
[A] Particular Features of the Preference Shares: The Preferential Dividend	18
[B] Priority to the Repayment of Capital in Event of Liquidation	22
[C] Conversion and Redemption of Preference Shares	27
[1] Failure to Redeem	31
§1.02 Nature of a Debenture	33
[A] The Origin and Evolution of the Subordinated Irredeemable Debentures	37
[B] Elements of Convertible Obligations	40
[C] Debt Holding Restrictive Covenants and Veto Rights	43
CHAPTER 2	
Distinguishing between Equity and Debt	47
§2.01 Does Capital Structure Matter?	48
§2.02 Definition of Equity and Share Capital	50
§2.03 Why Distinguish between Equity and Debt: The Role of Accounting as Control over Regulations	52

Table of Contents

[A]	The Accounting Standards for Classifying Hybrid Financial Instruments	54	
[B]	Classifying Hybrid Financial Instruments for Tax Purposes	63	
[C]	Re-characterization of Financial Claims in Liquidation	68	
§2.04	Classification of Financial Instruments in Different Regulatory Areas	70	
§2.05	Hybrid Financial Instruments' Implications for Corporate Law	73	
CHAPTER 3			
	Setting the Theoretical Framework	75	
§3.01	Transaction Costs and Company Law	76	
§3.02	The Company as a 'Nexus of Contracts' and the Theory of Agency Costs	77	
§3.03	Contract Incompleteness and Ex Post Conflicts	81	
§3.04	The Modern Theory of Property Rights	82	
§3.05	Summary of the Analysis	86	
Part II: Governance Regulation of Hybrid Financial Instruments: The Functional Approach			89
CHAPTER 4			
	From the Classification to the Functional Approach	91	
§4.01	Governance Implications of Issuing Hybrid Instruments	92	
[A]	Large Publicly Traded Companies	94	
[B]	Small Closely Held Start-Up Firms	96	
§4.02	The Structure of Part II	98	
CHAPTER 5			
	Significant Corporate Decisions	101	
§5.01	Contracting for Governance Rights at a Company's Start-Up	101	
[A]	Limits to the Control Power of a Lender	105	
[B]	The Use of Hybrid Instruments to Align the 'Ex Ante' Incentives of Managers: Stage Financing and Contingent Convertible Debt	107	
[1]	Preference Shares as Incentive Contracts	110	
[C]	The Use of Hybrid Instruments to Reduce the 'Ex Post' Hold-Up Problems	111	
§5.02	The Manager-Shareholder Conflict in Charter Amendments: Variation of Class Rights	113	
[A]	The Position of Preference Shareholders and their Protections: A UK-US Comparative Analysis	115	
[B]	What Constitutes a Variation of Class Rights?	119	
[C]	Legal Strategies for Preference Shareholders	121	

§5.03	Shareholder-Convertible Bondholder Agency Problems	124
[A]	The Protection of Convertible Bondholders in Mergers and Acquisitions	125
[B]	The Protection of Convertible Bondholders in Assets Disposal	129
[C]	Other Situations of Potential Dilution: The Distribution of Dividends	131
§5.04	An Evaluation of the Rationale and Protection for Hybrids	135
CHAPTER 6		
	Financing through Hybrid Instruments: Risks Opportunism and Legal Strategies for Mitigation	137
§6.01	The Use of Convertible Bonds to Reorganize and Restructure a Firm	137
§6.02	The Manager-Convertible Bondholder Conflict	139
[A]	The Timing of the Conversion and the Issuer's Call Option	141
[B]	Value Dilution of the Conversion Option	143
[1]	Price-Based Methods of Anti-dilution	145
[2]	Full Ratchet and Weighted Average Ratchet Anti-dilution Provisions	147
§6.03	The Majority-Minority Conflict in Venture Capital Financing: The Investor's Claim Dilution	150
[A]	Existing Legal Remedies in the UK and US	151
[B]	Loan Covenants, Veto Rights and Pay-to-Play Clauses	153
§6.04	An Evaluation of the Rationale and Protections for Hybrids	156
CHAPTER 7		
	Control Transactions	159
§7.01	The Agency Conflict in Control Transactions	160
[A]	The Exit Event in Venture Capital Start-Up Firms	162
[B]	The Use of Convertible Instruments as a Device to Allocate Control	164
§7.02	Existing Legal Strategies for Preference Shareholders Protection	167
[A]	The UK Takeover Panel and the City Code on Takeovers and Mergers	167
[B]	The Standard Strategy: The Duty of Loyalty in a UK-US Comparative Perspective	170
[1]	Do Directors Owe Fiduciary Duties to Preference Shareholders?	173
§7.03	Financial Contract Design for Controlling the Board's Power in Exit Events: Veto Rights, Drag-Along and Tag-Along Clauses	176
§7.04	An Evaluation of Hybrid Financial Instruments' Use and Protection in the UK and US Jurisdictions	179

Table of Contents

Conclusion	181
CHAPTER 8	
Conclusive Considerations	183
§8.01 The Rationale for Hybrids and Implications for Corporate Governance	184
§8.02 Legal Strategies for Protection: The Need for Regulation or More Flexibility?	186
Bibliography	193
Table of Cases	217
Table of Legislation	225
Index	227