

Contents

<i>Preface</i>	vii
<i>List of Abbreviations and Symbols</i>	xv

1. Introduction.....	1
1.1. From New York to Bangladesh: The Changing Societal Role of Companies.....	1
1.2. Corporate Social Responsibility and the Law.....	3
1.2.1. The Past: Corporate Social Responsibility and Legal Obligations	4
1.2.2. Recent Transformations: Globalisation and the Rise of Transnational Corporations.....	9
1.2.3. Evolving Global Regulation: Public and Private Codes of Conduct	13
1.2.3.1. Public Codes of Conduct.....	14
1.2.3.2. Private Codes of Conduct.....	21
1.3. Taking Corporate Codes Seriously: Unfolding the Argument.....	30

Part I: Linking Corporate Codes and National Private Law

2. Comparative Sociological Jurisprudence: A Method for Linking Global Self-regulation and National Private Law	39
2.1. Global Self-regulation and Functionally Differentiated Private Law	39
2.2. Global Self-regulation and Territorially Fragmented Private Law	41
3. Enforcing Corporate Codes by Private Law: The Role of National Contract Law.....	47
3.1. Corporate Codes as Enforceable Obligations	47
3.1.1. The <i>Easy</i> Case: Incorporation into Contracts.....	48
3.1.1.1. Supplier Contracts	48
3.1.1.2. Customer Contracts.....	49
3.1.1.3. Contracts on Social and Environmental Compliance.....	51
3.1.2. The <i>Comparably Easy</i> Case: The Ancillary Documents.....	52
3.1.2.1. General Terms and Conditions.....	53
3.1.2.2. Umbrella Agreements	55
3.1.2.3. Conclusion.....	58

3.1.3.	The <i>Difficult</i> Case: Public Declarations as Contract Terms	58
3.1.3.1.	A Controversial Case: <i>Doe v Wal-Mart Stores</i>	59
3.1.3.2.	Public Declarations in Contract Interpretation and Supplementation	63
3.1.4.	Taking the Debate to the Next Level: Enforcing Publicly Declared Codes.....	81
3.1.4.1.	Public Declarations as Contracts	82
3.1.4.2.	Public Declarations as Relied-upon Unilateral Promises	98
3.1.5.	Conclusion	106
3.2.	The Enforceable Obligation and Applicable Remedies.....	107
3.2.1.	Setting the Scene: <i>University of Wisconsin Madison v Adidas</i>	108
3.2.2.	The Default Rules on Sales Contracts	110
3.2.2.1.	Corporate Codes and Product Characteristics	112
3.2.2.2.	Applicable Sales Law Remedies	121
3.2.2.3.	Conclusion: Corporate Codes and Sales Law	126
3.2.3.	Third Party Rights in Contracts.....	126
3.2.3.1.	Corporate Codes and Third Party Benefits	129
3.2.3.2.	Applicable Remedies for Contracts with Third Party Benefits.....	142
3.2.3.3.	Conclusion: Corporate Codes and Contractual Third Party Rights	143
3.2.4.	Corporate Codes as Regulatory Contracts.....	144
3.2.5.	Conclusion	145
3.3.	Overall Conclusion: Corporate Codes Under Contract Law.....	146
3.3.1.	The Status of Publicly Declared Codes.....	146
3.3.2.	The Code Obligation and Applicable Remedies	147
4.	Liability for Breaching Corporate Codes: The Role of National Civil Liability Rules	149
4.1.	The Influence of Corporate Codes on Legal Liability.....	149
4.1.1.	Contractually Enforceable Corporate Codes	150
4.1.1.1.	English Law: Negligent Performance of a Service	151
4.1.1.2.	German Law: Contracts with Protective Effect Towards Third Parties	153
4.1.1.3.	Interim Conclusion.....	155
4.1.2.	Publicly Declared Corporate Codes.....	156
4.1.2.1.	The Public Declaration as the Basis of Liability	157

4.1.2.2.	Non-compliance as the Basis of Liability	167
4.1.2.3.	Conclusion: Liability for Publicly Declared Codes	175
4.1.3.	Conclusion	176
4.2.	The Code Obligation and the Applicable Remedies.....	176
4.2.1.	Corporate Codes as a Duty of Care.....	177
4.2.1.1.	The Standard of Taking Reasonable Care	178
4.2.1.2.	Individual Components.....	179
4.2.1.3.	Industry Self-regulation and Practice	180
4.2.1.4.	Interim Conclusion.....	182
4.2.2.	Applicable Remedies.....	182
4.3.	Overall Conclusion: Corporate Codes Under Civil Liability Rules.....	184
5.	Corporate Codes and Unfair Trading Behaviour: The Role of Unfair Commercial Practices Law	186
5.1.	The Comparative Approach to Unfair Commercial Practices Law	187
5.2.	The Scope of Unfair Commercial Practices Law	189
5.2.1.	Setting the Scene: From <i>Kasky v Nike</i> to Europe	189
5.2.2.	The Environmental and Social Content of Corporate Codes	191
5.2.3.	Corporate Codes as Commercial Practices	192
5.2.3.1.	Public Communication on Corporate Codes	192
5.2.3.2.	Non-compliance with Corporate Codes.....	193
5.3.	Corporate Codes as Unfair Commercial Practices: From <i>Kasky v Nike</i> to <i>Verbraucherzentrale Hamburg v Lidl</i>	194
5.3.1.	Regulating Communication on Corporate Codes	196
5.3.1.1.	Communication on Products and Corporate Performance.....	196
5.3.1.2.	Communication on Social and Environmental Engagement	198
5.3.1.3.	Interim Conclusion.....	200
5.3.2.	Taking <i>Lidl</i> Further: Regulating Non-compliance with a Corporate Code.....	201
5.3.2.1.	Codes of Conduct in European Unfair Commercial Practices Law	201
5.3.2.2.	German Law: Controversy Over Codes of Conduct	202
5.3.2.3.	English Law: Self-regulation as Specifying the Fairness Standard	205
5.3.3.	Conclusion	207
5.4.	Applicable Remedies.....	208
5.4.1.	Collective Enforcement.....	208

5.4.2. Individual Enforcement.....	210
5.4.2.1. English Law: Misrepresentation and Recent Reform	210
5.4.2.2. German Law: Private Law Remedies	212
5.5. Overall Conclusion: Corporate Codes Under Unfair Commercial Practices Law	212

Part II: Theorising Corporate Codes and National Private Law

6. Comparative Sociological Jurisprudence: A Normative Method for Theorising Global Self-regulation and National Private Law	217
6.1. A Need for Theory on Corporate Codes in National Private Law	218
6.1.1. The Status of Public Declarations in Private Law	219
6.1.2. The Status of Corporate Regulation in Private Law	220
6.2. Comparative Sociological Jurisprudence and Corporate Codes	221
6.2.1. The Social Responsiveness of the Law	222
6.2.2. The Eigen-normativity of the Law	224
7. Firm Commitments: Theorising Public Declarations in National Private Law	226
7.1. Elements to Create a Binding Effect	226
7.1.1. Revisiting the Debate on Intention, Declaration and Reliance	226
7.1.2. Towards a Combined Approach.....	229
7.1.2.1. The Intention Component	229
7.1.2.2. The Reliance Component	231
7.2. The Socially Binding Effect of Publicly Declared Codes.....	233
7.2.1. The Declaration: Corporate Codes as Binding Promises.....	233
7.2.1.1. Observing the Content of Corporate Codes	233
7.2.1.2. Theorising the Content as Promissory Language.....	237
7.2.2. The Intention: Corporate Codes as Deliberate and Strategic Promises.....	248
7.2.2.1. Observing Motives behind Adopting and Publishing Codes	248
7.2.2.2. Theorising the Motives as an Interaction Between Intention and Language	250
7.2.3. Reliance: Social Effects of Code Promises Contextualised	251
7.2.3.1. Observing the Social Context of Corporate Codes	252
7.2.3.2. Theorising Corporate Codes as Differentiated Social Communication	254
7.2.4. Conclusion	265

7.3.	Private Law Enforcement of Code Promises	265
7.3.1.	From Socially to Legally Binding Effect	266
7.3.2.	Corporate Codes in Market Relations	269
7.3.2.1.	Corporate Codes as Enforceable Contracts?	270
7.3.2.2.	Corporate Codes as Enforceable Terms in Contracts.....	283
7.3.2.3.	Corporate Codes as Enforceable Promises	290
7.3.2.4.	Conclusion: Enforcement of Publicly Declared Codes in Market Relations.....	299
7.3.3.	Public Trust in Code Promises	299
7.3.3.1.	Protecting Public Trust in Promises by Enforcement?.....	300
7.3.3.2.	Reliance Liability in Tort and Unfair Commercial Practices Law	302
7.3.4.	Towards Conceptualising Publicly Declared Codes in Private Law	304
8.	Corporate Efforts to Do Just Business: Theorising Public/ Private Regulation in Private Law	306
8.1.	Corporate Codes as Regulatory Contracts and Commitments.....	307
8.2.	Political Regulation by Economic Relations	309
8.2.1.	Economic Sociology: Corporate Codes as Re-embedding Economic Relations	310
8.2.1.1.	The 'Embeddedness' of Markets in Society	311
8.2.1.2.	Civil Society and Market Pressure as Counter-movements.....	314
8.2.1.3.	The Process of Re-embedding.....	316
8.2.1.4.	Conclusion	318
8.2.2.	Social Differentiation: The Political Difference in Corporate Codes	318
8.2.2.1.	Political Regulation Under Conditions of Social Differentiation.....	319
8.2.2.2.	Corporate Codes and Politics	321
8.2.2.3.	A New Understanding of the Political	328
8.2.3.	Conclusion	334
8.3.	Private Law Enforcement of Political Regulation by Corporate Codes	335
8.3.1.	Re-conceptualising the Public/Private Divide.....	335
8.3.1.1.	The 'Traditional' Autonomy of Private Law.....	335
8.3.1.2.	Public Policy in Private Law	338
8.3.1.3.	Corporate Codes: Neither Intervention nor Autonomy	341
8.3.1.4.	A New 'Publicness' in Private Law	344
8.3.2.	Consequences for Contractual and Promissory Enforcement.....	348
8.3.2.1.	Towards a Duty to Regulate.....	348

8.3.2.2.	Enforcement Architecture.....	351
8.3.2.3.	Third Party Rights	356
8.3.2.4.	Conclusion	360
8.3.3.	Consequences for Legal Liability	361
9.	Conclusion: The Prospects and Limits of Enforcing Corporate Social Responsibility Codes.....	364
9.1.	Realising Private Law Enforcement	364
9.2.	Towards Private Law Enforcement of Corporate Codes: Legal Policy Proposals	366
9.2.1.	Contract Law	366
9.2.1.1.	Towards the Enforcement of Publicly Declared Corporate Codes	366
9.2.1.2.	Corporate Regulation in Contract Law Doctrine	374
9.2.2.	Civil Liability Rules	382
9.2.2.1.	Reliance Liability	382
9.2.2.2.	Individual Standards of Reasonable Care.....	385
9.2.3.	Unfair Commercial Practices Law.....	386
9.2.3.1.	Regulating Corporate Code Marketing.....	386
9.2.3.2.	Regulating Non-complying Behaviour	387
9.3.	Enforcement of Corporate Codes in Perspective	388
9.3.1.	Social and Legal Prerequisites	389
9.3.2.	Global Self-regulation and Fragmented National Legal Systems	391
9.3.3.	Future Challenges.....	392
	<i>Bibliography</i>	394
	<i>Index</i>	419