#### TABLE OF CONTENTS

	page
Authors	XVII
Preface, by Maurizio Irrera	XIX
Preface to the English edition, by Maurizio Irrera	XXI
Presentation, by Oreste Cagnasso	XXIII

Introduction Commercial law, between heavenly bodies and startrails, by Maurizio Irrera

1. Foreword, I.-2. The trajectory of financial intermediation in the exchange of goods and services, from the dawn of commercial law to the present day, I.-3. The evolutionary arc of the sources of commercial law. The paradigm of the regulation of financial statements, 3.-4. Productive activity and profit motive in the context of commercial law, 4.-5. Contractualism and institutionalism: the contrast between old and new, 5.-6. The public company and its transformations over time, 7.-7. The transition from regulated markets to investment funds: new trends in company law, 8.-8. Limited liability, from privilege to indispensable requirement of limited companies, 9.-9. Limiting and organisational functions of share capital, 10.-10. From the principle of 'one share, one vote' to multiple voting shares and loyalty shares, 11.-11. Having multiple shareholders is no longer an essential requirement for company incorporation, 12.-12. The transfer of company sovereignty from the shareholders' meeting to the management body, 13.-13. Profiles of interdisciplinarity in commercial law, 14.

#### PART ONE – THE ENTREPRENEUR

## Chapter 1. The entrepreneur, by Giulia Garesio

1. Foreword, 19. - 2. The definition of entrepreneur: between law and economics, 20. - 2.1. Productive activity, 21. - 2.2. The requirement of economic efficiency, 22. - 2.3. The requirement of organisation, 23. - 2.4. The requirement of professionalism, 26. - 3. Entrepreneurs and intellectual professionals, 26.

VIII Table of Contents

#### Chapter. 2. Categories of entrepreneurs, by Giulia Garesio

1. Foreword, 28. - 2. Distinction according to the activity, 29. - 2.1. The agricultural entrepreneur, 29. - 2.2. The commercial entrepreneur, 31. - 3. Distinction according to the organisation and size of the enterprise, 32. - 3.1. The small entrepreneur as defined by the Civil Code, 32. - 3.2. Application of the Crisis and Insolvency Code to the small business, 35. - 3.3. European categories and their introduction into the Italian legal system, 36. - 4. Distinction according to the owner of the enterprise, 38. - 4.1. The public enterprise, 39. - 4.2. The corporate enterprise: focus on innovative enterprises, 40. - 4.3. Third Sector enterprises, 41.

#### Chapter 3. Acquiring the status of entrepreneur, by Irene Pollastro

- 1. Attribution of business activity, 44. 1.1. Covert partner and underlying business, 45. –
- 1.2. Incapacity and incompatibility, 46. 2. The beginning and end of the business, 47. –
- 2.1. Special rules in the case of insolvency proceedings, 47.

# Chapter 4. The statue of the commercial (and non-commercial) entrepreneur, by Bianca Maria Scarabelli

1. The statue of the commercial (and non-commercial) entrepreneur, 49. - 2. Registration in the Italian Companies Register: foreword, 50. - 2.1. The Italian Companies Register, 50. - 2.2. Commercial publication, 52. - 3. Accounting records, 53. - 4. Commercial representation and the entrepreneur's auxiliary personnel, 55.

## Chapter 5. The business undertaking, by Maria Di Sarli

1. The business undertaking: definition and relationship with the enterprise, 59. - 2. Rules governing the transfer of a business undertaking. Application requirements, 60. - 3. Form and publication of the deed, 61. - 4. The non-competition clause, 62. - 5. Succession in contracts, 64. - 6. Receivables and debts, 65. - 7. Usufruct and business lease, 67.

# Chapter 6. Distinctive marks: company name, trademark, sign, by Giuseppe Antonio Policaro

1. Industrial property and distinctive marks, 69. - 2. The company name, 70. - 3. The trademark and its economic value, 71. - 4. The sign, 78.

## Chapter 7. Original works, by Giuseppe Antonio Policaro

1. Intellectual creations, 79. - 2. Copyright, 80. - 3. Transfer of the right of economic exploitation, 82. - 4. Industrial inventions, 83. - 4.1. The patented invention and its economic significance, 83. - 4.2. Subject matter of the patent and validity requirements, 84. - 4.3. The unpatented invention, 87. - 5. Utility models, 89. - 6. Designs, 89.

## Chapter 8. Competition regulations, by Giuseppe Antonio Policaro

1. Perfect competition and monopoly, 90. - 2. Antitrust legislation - Italian and EU regula-

Table of Contents IX

tions, 91. - 3. Individual cases and limitations, 92. - 4. Freedom of competition and unfair competition, 95.

Chapter 9. Consortia and other forms of cooperation between enterprises, by Giuseppe Antonio Policaro

1. Concept, 98. - 2. Types of consortia, 100. - 3. Consortia with external activities and consortium companies, 101. - 4. EEIG, temporary joint ventures, network contracts, 103.

#### PART TWO – THE CORPORATE ENTERPRISE

#### SECTION I – GENERAL PROFILES

Chapter 10. The concept of the company and the classification of company types, by Elena Fregonara

1. Companies and company law, 109. - 2. The company contract, 110. - 2.1. Contributions, 111. - 2.2. Economic activity, 112. - 2.3. Profit-making purpose, 113. - 3. Company and common ownership, 114. - 4. Types of companies, 115. - 4.1. Criteria for classifying types of companies, 117. - 4.2. Legal personality and financial autonomy, 118. - 5. The economic reasons for operators' choices, 119.

#### SECTION II – PARTNERSHIPS

Chapter 11. The simple partnership. The general partnership, by Elena Fregonara

1. Legal framework and economic rationale, 121. - 2. Incorporation. Specificities of a simple partnership, 124. – 2.1. Rules of form and content in the formation of a general partnership, 125. - 2.2. Non-registration: irregular, concealed and apparent companies, 127. - 2.3. Invalidity of the agreement, 128. – 3. Relationships between members: contributions, 129. – 3.1. Share capital and company assets, 130. - 3.2. Profit and loss sharing, 131. - 3.3. Reporting system, 132. – 4. Relationships with third parties: liability for company debts, 133. - 4.1. Liability of members towards particular creditors, 134. - 5. Management: system and models, 135. - 5.1. Disjunctive management and the right of veto, 136. - 5.2. Joint management and urgent acts, 138. - 5.3. Conventional models of management, 139. - 5.4. Appointment, removal and requirements of directors, 139. - 5.5. Rights, obligations and responsibilities of directors, 141. – 5.6. Representation, 141. – 5.7. Non-competition clause, 142. – 5.8. Control over the management, 143. – 6. Systems for expressing corporate will, 143. - 7. Dissolution of the relationship between the partnership and the partner, 144. - 7.1. Death of a partner, 145. - 7.2. Withdrawal of a partner, 146. - 7.3. Exclusion of a partner, 148. – 7.4. Liability of the departing partner and liquidation of their participation, 150. – 8. Winding up of the partnership, 152.

X Table of Contents

#### Chapter 12. The limited partnership, by Elena Fregonara

1. Characteristics of the type, 155. - 2. Incorporatioon, 156. - 3. Administration, 156. - 4. Prohibition on interfering in management, right to control management of the limited partners and right to profits, 156. - 5. Transfer of shares, 158. - 6. Dissolution, 158. - 7. Irregular limited partnerships, 159.

#### SECTION III – CORPORATIONS. THE JOINT-STOCK COMPANY

#### Chapter 13. The joint-stock company, by Irene Pollastro

1. The joint-stock company: general features, 161. - 1.1. Regulation profiles, 162. - 2. The joint-stock company from the perspective of an economic analysis of law, 163.

#### Chapter 14. Incorporation, by Irene Pollastro

1. Incorporation of the company: introduction, 167. – 1.1. Methods of incorporation, 167. – 1.2. Conclusion of the agreement, 168. – 1.2.1. Contents of the instrument of incorporation and of the articles of association, 168. – 1.2.2. The other conditions for incorporation, 170. – 1.3. Subsequent formalities, 171. – 1.4. Single-member company, 172. – 2. Invalidity of the company, 173. – 3. Shareholders' agreements, 174. – 4. Assets intended for a specific business activity, 175.

### Chapter 15. Contributions, by Irene Pollastro

1. Capital and assets of the joint-stock company, 177. - 2. Capital formation, 178. - 2.1. Contributions in cash, 178. - 2.1.1. What happens when a shareholder defaults, 179. - 2.2. Contributions in kind, 180. - 2.2.1. Exemptions from the appraisal procedure, 181. - 2.2.2. Rules on risky acquisitions, 182. - 3. Shares with ancillary services, 182.

## Chapter 16. Shares, by Irene Pollastro

1. Shares: general characteristics, 184. – 1.1. Company rights, 187. – 1.1.1. Financial rights, 188. – 1.1.2. Administrative rights, 188. – 1.2. Special classes of shares, 189. – 1.2.1. Special financial rights, 191. – 1.2.2. Special administrative rights, 191. – 1.3. Minority rights, 193. – 1.4. Constraints on shares, 194. – 2. Shares and participating financial instruments, 194. – 3. Circulation of shares, 195. – 3.1. Circulation restrictions, 196. – 4. Company transactions on its own shares, 198.

## Chapter 17. Significant shareholdings, by Alessandro Monteverde

1. Foreword, 201. – 2. Freedom of subscription and acquisition, 202. – 3. Limits to subscription and acquisition, 202. – 4. Duty to inform, 204. – 5. Regulations on takeover bids and public exchange share offers (outline), 205. – 6. Control, affiliation, unified management, group, 207. – 7. Group regulations, 209. – 7.1. Transparency, 210. – 7.2. Liability, 211. – 7.3. Financing, 213. – 7.4. Right of withdrawal, 213.

Table of Contents XI

Chapter 18. The shareholders' meeting, by Maurizio Irrera and Bianca Maria Scarabelli

1. Shareholders' meeting and alternative systems of management and control, 215.-1.1. Definition and the powers of shareholders' meeting in companies adopting the traditional or the one-tier system, 216.-1.2. Delegation of functions to the management body, 217.-2. Special meetings, 217.-3. Shareholders' meeting procedure, 218.-3.1. Summoning a meeting, 218.-3.2. General meeting and postponement of the meeting, 220.-3.3. Chair and secretary, 220.-3.4. Quorum for meeting constitution and quorum for resolutions, 221.-3.5. Attendance of a shareholders' meeting: right to participate, 222.-3.6. Setting out and discussing the agenda items, 224.-3.7. Voting in the shareholders' meeting, 225.-3.8. Minutes of the meeting, 226.-4. Invalid shareholders' meeting resolutions, 227.-4.1. Voidability, 227.-4.2. Nullity, 228.-4.3. Compensation for damages, 230.

#### Chapter 19. Administration, by Maurizio Irrera and Bianca Maria Scarabelli

1. Role of directors and the administration and supervision systems, 231. – 2. Appointment, 233. – 3. Requirements, 234. – 4. Termination, 235. – 5. Replacement, 236. – 6. Remuneration, 237. – 7. Structure of the administrative body, 238. – 7.1. Board of directors and principle of collegiate responsibility, 238. – 7.2. Delegated bodies, 238. – 8. Meetings of the board of directors, 240. – 9. Directors' duties, 242. – 10. Representation, 244. – 11. Liability, 245. – 11.1. General rules, 245. – 11.2. Liability vis-à-vis the company, 246. – 11.3. Liability vis-à-vis creditors., 248. – 11.4. Liability vis-à-vis any directly harmed shareholders and third parties, 249. – 11.5. The *de facto* director, 249. – 12. General Manager, 249.

Chapter 20. Supervisory bodies: board of statutory auditors and statutory audit, by Luciano Quattrocchio

1. Board of statutory auditors, 250. – 1.1. Composition, 251. – 1.2. Causes of ineligibility or disqualification, 252. – 1.3. Appointment and termination, 252. – 1.4. Duties of the board of auditors, 253. – 1.4.1. Supervision of compliance with the law and the articles of association, 254. – 1.4.2. Supervision of compliance with the principles of proper management, 254. – 1.4.3. Supervision of the adequacy of the organisational, administrative and accounting structure and its actual functioning, 255. – 1.4.4. Rules of conduct of the board of auditors of unlisted companies, 257. – 1.4.5. Rules of conduct of the board of auditors of listed companies, 257. – 1.4.6. Report to the shareholders' meeting, 258. – 1.4.7. Accounting supervision, 258. – 1.4.8. Single report, 258. – 1.5. Powers of the board of auditors, 259 – 1.5.1. Reporting of reprehensible actions, 260. – 1.5.2. Reporting of serious irregularities, 260. – 1.6. Meetings and resolutions, 261. – 1.7. Liability of the auditors, 261. – 2. Statutory audit, 262. – 2.1. Functions of the statutory audit, 263. – 2.2. Appointment and removal, 263. – 2.3. Audit activities, 264. – 2.4. Report on the financial statements, 265. – 2.5. Auditing Standards, 266. – 2.6. Code of professional ethics, 266. – 2.7. Liability of statutory auditors, 267.

XII Table of Contents

#### Chapter 21. Alternative systems, by Bianca Maria Scarabelli

1. Private autonomy in the choice of the management and control system, 268. - 2. The two-tier system, 270. - 2.1. The management board, 271. - 2.2. The supervisory board, 272. - 3. The one-tier system, 275. - 3.1. The board of directors, 275. - 3.2. The management control committee, 276.

### Chapter 22. External oversight, by Marco Sergio Catalano

1. Reporting of serious irregularities to the court. General profiles, 278. - 1.1. Requirements and entitlement, 278. - 1.2. Procedure, 280. - 1.3. Insolvency practitioner, 282. - 2. Reporting of serious wrongdoings in listed companies. Overview, 283.

#### Chapter 23. The financial statements, by Luciano Quattrocchio

1. The annual financial statements, 284. – 1.1. Content and principles, 285. – 1.1.1. Statutory provisions, 285. - 1.1.2. National accounting standards, 285. - 1.1.3. International accounting standards, 287. – 1.1.4. General principles, 288. – 1.1.5. Principles for preparing the statements, 288. - 1.1.6. Valuation criteria and preparation standards, 289. -1.1.6.1. Provisions relating to individual balance sheet items and valuation criteria, 289. 1.1.6.2. Recording of revenues, income, expenses and charges, 292. - 1.1.6.3. Provisions relating to the cash flow statement, 293. – 1.1.6.4. Content of the explanatory notes, 293. - 1.2. Procedure for drafting and approval of the financial statements, 293. - 1.3. Reserves, 295. - 1.3.1. Legal reserve, 295. - 1.3.2. Share premium account, 295. - 1.4. Distribution of profits to shareholders, 295. – 1.5. Invalidity of resolutions approving the financial statements, 296. - 1.6. Abridged financial statements, 296. - 1.7. Financial statements of micro-enterprises, 297. – 2. Consolidated financial statements, 297. – 2.1. Composition and conditions, 297. - 2.2. Exemptions from the preparation obligation, 298. -2.2.1. Small groups, 298. - 2.2.2. Sub-groups or sub-holdings, 299. - 2.2.3. Groups with insignificant controlling interests, 299. – 2.2.4. Control of companies that may be optionally excluded from full consolidation, 299. - 2.3. General criteria, 299. - 2.4. Preparation criteria, 300. – 2.5. Full consolidation method, 301. – 2.6. Valuation of unconsolidated subsidiaries and associated companies, 301. - 2.7. Proportionate consolidation method, 302.

# Chapter 24. Amendments to the articles of association. Right of withdrawal. Changes to the share capital, by Maria Di Sarli

1. Amendments to the articles of association, 303. - 2. Procedure, 304. - 3. Shareholder protection. Right of withdrawal, 304. - 4. Criteria for determining share value and redemption procedure, 307. - 5. Changes in share capital, 309. - 6. Increase in share capital: common rules, 309. - 7. Real increase in share capital, 310. - 8. Option rights, 312. - 8.1. Limits and exclusion of option rights, 313. - 9. Shareholders' payments, 314. - 10. Nominal increase in share capital, 314. - 11. Real reduction in share capital, 315. - 12. Reduction in share capital due to losses, 316.

Table of Contents XIII

#### Chapter 25. Bonds, by Alessandro Monteverde

1. Foreword, 319. - 2. Concept and types, 320. - 3. Issue: authority, form and limits, 321. - 4. Regulatory profiles, 322. - 5. Organisation of bondholders, 323. - 6. Convertible bonds, 324.

#### Chapter 26. Dissolution, by Giulia Garesio

1. Foreword, 326. - 2. The causes of dissolution, 326. - 3. The winding up procedure, 328. - 4. Balance left after the winding up procedure, 330. - 5. Deregistration of the company, 331.

#### SECTION IV – CORPORTIONS. OTHER COMPANIES

#### Chapter 27. The limited liability company, by Giulia Garesio

1. Foreword, 333. - 2. Incorporation, 335. - 3. Contributions, 337. - 4. Quotaholders' financings and debt securities, 339. - 5. Company quotas: characteristics and transferability, 341. - 6. Withdrawal and exclusion of a quotaholder, 344. - 7. Governance, 346. - 7.1. Quotaholders' decisions, 346. - 7.2. Administrative body, 349. - 7.3. Supervision, 352. - 8. Financial statements and company books, 354. - 9. Amendments to the instrument of incorporation, 356. - 10. Changes to limited liability companies, 358.

### Chapter 28. Limited join-stock partnerships, by Giulia Garesio

1. Foreword, 361. - 2. Instrument of incorporation, 362. - 3. General partners, 362. - 4. Limited partners, 364. - 5. Corporate governance, 364. - 6. Dissolution of the company, 365.

## Chapter 29. Cooperatives, by Giuseppe Antonio Policaro

1. The economic phenomenon in Italy, 367. - 2. Historical background, 368. - 3. Mutual and profit purpose, 369. - 4. Structural characteristics and liability regime, 370. - 5. Incorporation and contributions, 372. - 6. Corporate bodies (shareholders' meetings, management, audits), 373. - 7. Financial statements, profits and returns, 378. - 8. Changes in shareholders and share capital, 380.

#### SECTION V – SPECIAL COMPANIES

Chapter 30. Listed companies. Supervised companies. Overview, by Irene Pollastro

1. Listed companies: general features, 381. - 2. Rules governing issuers, 382. - 3. 'Special' rules of company law, 383. - 3.1. Composition of the shareholding and the functioning of the shareholders' meeting, 384. - 3.2. Management and supervisory bodies, 386. - 4. Other supervised companies. Overview, 388.

XIV Table of Contents

#### Chapter 31. Public companies, by Marco Sergio Catalano

1. Consolidated Law on Public Companies: background and scope, 390. – 1.1. Corporate form as an instrument for the pursuit of public purposes, 390. – 1.2. Consolidated Law on Public Companies and its aims, 391. – 1.3. Scope of the Consolidated Law on Public Companies, 391. – 2. Establishment of public companies; acquisition, management and disposal of shareholdings, 392. – 2.1. Types of companies and permitted objectives, 393. – 2.2. Establishment of public companies, 393. – 2.3. Acquisition, management and disposal of shareholdings; listing of public companies, 395. – 3. Organisation and governance of public companies, 396. – 3.1. Organisational principles of publicly controlled companies, 396. – 3.2. Corporate governance, 396. – 3.2.1. Publicly controlled companies, 397. – 3.2.2. Investee companies, 398. – 4. In-house companies and public-private joint ventures, 398. – 4.1. Inhouse companies, 399. – 4.2. Public-private joint ventures, 399. – 5. Liability of participating entities and corporate bodies, 400. – 5.1. Civil and accounting liability of members of corporate bodies, 401. – 5.2. Accounting liability of representatives of the public partner, 401.

#### Chapter 32. European companies, by Bianca Maria Scarabelli

1. Historical background and legislative framework, 402. - 1.1. Employee involvement, 402. - 2. European companies, 403. - 2.1. Incorporation, 403. - 2.2. Corporate bodies, 404. - 2.3. Other aspects, 405. - 3. European cooperative societies, 405. - 3.1. Incorporation, 406. - 3.2. Corporate bodies, 407. - 3.3. Other aspects, 407. - 3.3.

#### SECTION VI – EXTRAORDINARY OPERATIONS. CONVERSION

## Chapter 33. Conversion, by Maria Di Sarli

1. Extraordinary operations: introductory notes, 409. – 2. Conversion. General characteristics, 410. – 3. Scope, 411. – 4. Common rules applicable to all cases of conversion, 412. – 5. Homogeneous conversions, 414. – 5.1. Transformation of partnerships, 414. – 5.2. Transformation of limited companies, 416. – 6. Heterogeneous conversions, 417. – 6.1. Framework, 418.

# Chapter 34. Mergers, divisions and other extraordinary operations, by Maria Di Sarli

1. Merger, 420. – 2. Scope, 421. – 3. Stages in the procedure, 422. – 4. Draft terms of the merger, 423. – 5. Additional document accompanying the draft terms of merger, 424. – 6. Merger decision, 425. – 7. Protection of creditors and bondholders, 425. – 8. Deed of merger, 426. – 9. Simplified merger procedures. Absortion of wholly-owned companies and companies that are at least ninety per cent owned, 427. – 10. Complex merger proceedings. Leveraged buy-out merger and cross-border merger (referral), 428. – 11. Division, 429. – 12. Forms, 429. – 13. Procedure, 431. – 14. Transfer of a business undertaking, 432. – 15. Transfer of a controlling interest, 433.

Table of Contents XV

Chapter 35. Cross-border conversions, mergers and divisions, by Maria Di Sarli

1. Foreword, 435. – 2. Cross-border conversion. General types, 437. – 2.1. Cross-border conversion of a company under Italian law, 438. – 2.2. Protections, 440. – 2.3. Cross-border conversion into a company under Italian law, 440. – 3. Cross-border merger, 441. – 4. Cross-border division, 442.

### PART THREE – TYPES OF PROCEEDINGS. NOTES

### Chapter 36. Civil action, by Marco Sergio Catalano

1. Judicial protection of rights, 445. - 2. Jurisdiction and competence, 445. - 3. Ordinary proceedings, 446. - 4. Non-adversarial cases, 447. - 5. Precautionary protection, 447.

#### Chapter 37. Corporate arbitration, by Marco Sergio Catalano

1. Corporate arbitration, 449. - 2. Statutory arbitration clause, 449. - 3. Disputes subject to arbitration, 450. - 4. Procedural types, 451. - 5. Choice between arbitration and the ordinary court system, 452.

Bibliography	453
Analytical Index, edited by Marta Favaretto and Irene Pollastro	459
Glossarv	479