影印版法学基础系列

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ESSENTIAL COMPANY LAW

尼科拉斯·波恩
Nicholas Bourne

（第三版）

（Third Edition）

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本书导读

公司是现代市场经济不可或缺的基本组织形态，作为规范公司组织和行为的基本法律——公司法，其地位的重要性不言而喻。公司法是民商法的重要分支，在不同的国家和地区有着不同的历史传统和社会背景，彼此风格差异明显。其中，英国公司法是我们所不能忽视的一个范本。英国公司法是英美法系的典型代表，其产生历史悠久，发展至今已形成非常丰富的理论体系，许多现代基本规则诞生于其中。早期的英国公司法渊源主要集中在判例法（普通法和衡平法），但后来出现成文化的趋势，制定法已成为英国现代公司法的重要组成部分。

本书是英国公司法的精要读本，主要介绍了公司法中最为基本的概念、规则与原理。对公司的认知始于公司的法人本质，因此书中所探讨的第一个问题就是公司的本质及其相关的法人本质问题。公司的内在精神体现在公司章程上，通过章程的约束，公司的各个要素成为一个有机的整体，从这一意义上讲，公司章程是公司成为法律上实体的标志。公司资本是公司从事经营活动的物质基础，也是联系公司及其成员的利益纽带；在实践中则是纠纷集中的焦点，是公司法无法回避的问题。公司作为一个相对复杂的组织体，其有效的运作有赖于对内部结构的科学制衡，公司治理自然成为公司法规范的必要环节。公司治理很大程度上是通过公司会议这一活动形式来展开的，而会议是资本（股份）力量的角逐，因此对会议制度的明确规定以及强调对小股东利益的保护，是实现公司各方利益主体公平正义的重要途径。效率是公司的目标所在，如何通过重组和收购来挽救困境中的公司，则是保证公司活力的重要步骤。本书通过对以上最为核心的问题作针对性的介绍，从纷繁芜杂的公司法规定和判例中抽出清晰的线索，有助于读者在短时间内获得一个精确、分明的概观，把握公司法的精髓。

全书结构完整清晰，内容丰富而重点突出，是一本非常实用的法律读物，可为有兴趣了解这一领域专业知识的读者提供权威的资料。同时，该书文字生动简练，用语精确恰当，表述流畅紧凑、浅显易懂，又是一本非常地道的英语读物，可为苦于找寻专业英语范本的读者提供原始的素材。但值得注意的是，由于我国与英国分属不同的法系，大至制度体系、风格、思维方式，小至规则、概念、用语，均存在较大的差异，甚至有些概念根本无法找到

对应的内容，因此在学习比较之时，切不可有先入为主的立场，否则容易误读误解。这一点希望读者明鉴。

本书目录和索引部分由徐亮翻译。不当之处敬请读者专家指正。

译　　者

2004 年 5 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential series is now in its third edition and is a well established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne
General Editor, Essential Series
Swansea
Autumn 2000

Preface

Essential Company Law provides an attack on the typical company law syllabus for the busy law student. Each chapter sets out, in detail, important areas of company law – areas that are likely to arise in the examination. It also covers other areas in less depth.

Nicholas Bourne
Autumn 2000

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1 The Nature of a Company and Lifting the Veil

You should be familiar with the following areas:

- the distinctions between the company and the partnership
- the various classifications of companies, especially the difference between a private and a public company
- the separate personality of the company – the *Salomon* principle
- the statutory exceptions to the *Salomon* principle
- the judicial exceptions to the *Salomon* principle
- a company's responsibility for crimes and torts

Introduction

In this first chapter, the aim is to set the scene on key areas of company law. Much of this chapter may not be the subject of a specific examination question, but the information contained in the essential notes is vital to an understanding of much of company law. Key issues are dealt with in some detail.

The company and the partnership

When businesspeople set up in business, they will need to consider whether to operate as a partnership or as a company. The two types of business could not, in some ways, be more different. The company is a separate person in law (see *Salomon v A Salomon & Co Ltd* (1897)). The company can own property, commit crimes and conclude contracts. The partnership, on the other hand, is no more than a convenient term

for describing the sum total of the partners who make up the partnership or firm. The partnership is not a separate person in law. The partnership cannot commit crimes or torts. These can only be committed by the partners, its agents.

A further consequence of the distinction between the company and the partnership is that the company pays corporation tax as a separate entity on its profits, whilst the partnership does not pay tax as such, although a tax assessment may be raised against it. The tax is, in fact, paid under the schedular income tax system by the individual partners in the firm.

In 1998, the Government decided that the time was right for a fundamental review of the framework of core company law. Many of the features of the existing law were put in place some considerable time ago and it was about 40 years since the last broad review of company law.

A Steering Group was appointed to oversee the management of the project and ensure the outcome of the review was clear in concept, internally coherent, well articulated, well expressed and workable.

On 29 October 1999, the Steering Group for the Department of Trade and Industry's review of company law issued three consultation documents on:

(a) General Meetings and Shareholder Communication;

(b) Company Formation and Capital Maintenance;

(c) Overseas Companies.

A fourth consultation document entitled *Modern Company Law for a Competitive Economy – Developing the Framework* was published in March 2000.

A further consultation document is expected in the autumn of 2000, with a final report from the Government due in the spring of 2001. Features of these consultation documents are referred to in the text.

Advantages of incorporation

The company has access to limited liability. Not all companies are limited. Indeed, there are many unlimited companies where liability of the members is not limited. The advantage of such companies is that they do not need to file annual accounts. By contrast, although there is such a thing as a limited partnership, in practice partnerships are unable to limit the liability of all of the partners. The Limited Liability

Partnerships Act 2000 permits firms the flexibility of limited liability whilst remaining partnerships internally.

A limited liability partnership will constitute a separate legal person. The firm itself and negligent members will, however, be liable to the full extent of their assets. The liability of other members will be limited.

The company can separate ownership from control. The people who subscribe for the shares do not necessarily have any hand in the running of the business. This will be particularly true of a large quoted company, for example, Lloyds Bank plc. In the case of the partnership, the partners of the firm are agents and are able to act to bind the firm and are bound by the actions of the other partners.

Since the company is a separate entity, in theory, it could go on for ever. Many companies have a long pedigree, for example, the Tenby & County Club Ltd, set up in 1876. Partnerships have to be reformed and reconstituted upon the death or bankruptcy of individual partners.

Where a person wishes to invest money and needs the investment to be readily realisable, the company is the appropriate vehicle. This is particularly true if the company is quoted, since there is then a market mechanism for disposing of the shares of the business. In a partnership, it is likely that a partnership share will be much less easily realisable than shares in a company.

A further advantage for the company is in the context of raising finance. A company, again as it is a separate entity, is able to mortgage all of its assets by way of a floating charge to secure a borrowing from, for example, a bank. This means of securing a loan and raising finance is not available to the partnership.

The costs of incorporation are minimal. On the other hand, there are certain hidden costs involved in incorporation. These costs would include the legal costs of setting the company up and the annual ongoing costs of preparing company accounts; there are also many formalities connected with setting up and running a company. In addition to the constitution of the company, there is a plethora of company forms that have to be filed in relation to the management of the company, shares issued by the company, debentures issued by the company and charges created by the company. The annual return has to be filed every year. Furthermore, the company is obliged to keep a series of company books at the company's registered office or some other appropriate place. These registers would include the register of members, register of directors and register of charges.

An important consideration for the entrepreneurs who are setting up in business is what the tax consequences of setting up as a company or as a partnership will be. It is not possible to say that the balance of

advantage always lies with one form of business rather than another, but it will certainly be a powerful consideration when the entrepreneurs are weighing the relative advantages and disadvantages of each form of business medium.

The information set out above in relation to different types of business is extremely important background information in tackling company law questions and understanding why people set up as companies, rather than operating a business through the medium of a partnership. Before concluding this particular point, it is worth noting that s 716 of the Companies Act 1985 provides that, in relation to trading businesses, the maximum number of partners that may be involved in the firm is set at 20, so that if it is desired to involve in excess of 20 people in the management of the business, it is appropriate to form a company. The section does not apply to a large number of professional businesses which are exempted from it, for example, solicitors.

Public companies and private companies

Another key area which permeates the whole of company law is the distinction between the public company and the private company. The vast majority of companies are private companies. Those that hit the news headlines tend, however, to be public and this may give a distorted view of the numerical significance of public companies.

The surprising feature of British company law is that, with relatively few exceptions, the same rules apply to public companies as to private companies.

The second EC Directive on company law did, however, lead to a re-writing of the distinction in British company law and entail some new distinctions to be drawn in the Companies Act 1980 (now consolidated into the Companies Act 1985).

A public company must have a minimum subscribed share capital of at least £50,000 paid up to at least 25% before it can be incorporated. This was a requirement of the Second EC Directive which set the minimum subscribed share capital for public companies within the European Community at 25,000 ECU. In addition to the payment of the minimum subscribed share capital to at least 25% on initial allotment of shares, the whole of any premium must be paid up (for example, if a company issues 50,000 £1 par shares at £1.50, the minimum subscribed share capital would be £37,500, that is, one-quarter of £50,000 plus £25,000 premium) (s 101(2) and s 118).