

KLUWER LAW INTERNATIONAL

# CORPORATIONS AND PARTNERSHIPS IN IRELAND

IRENE LYNCH FANNON & KAROLE CUDDIHY



Wolters Kluwer

Law & Business

KLUWER LAW INTERNATIONAL

# **Corporations and Partnerships in Ireland**

**Irene Lynch Fannon & Karole Cuddihy**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Corporations and Partnerships.

General Editor: Roger Blanpain

Associate General Editor: Michele Colucci

Volume Editor: Koen Geens



**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

**DISCLAIMER:** The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

*Printed on acid-free paper.*

ISBN 978-90-411-3315-1

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and bound in Great Britain by

CPI Antony Rowe, Chippenham and Eastbourne

# Table of Contents

The Authors	3
List of Abbreviations	13
General Introduction	15
§1. THE GENERAL BACKGROUND OF THE COUNTRY	15
I. Geography	15
II. Population and Vital Statistics	15
III. Cultural Composition	16
IV. Political System	16
A. The Constitutional Framework	16
B. Political Parties	17
V. Economy	18
§2. THE HISTORICAL BACKGROUND TO CORPORATIONS AND PARTNERSHIPS	20
I. The Development of the Common Law	20
II. The Genesis of Company Law	20
A. The Common Law Period	20
B. Post-1937 Constitution	23
III. Development of Irish Company Law and Membership of the EU	23
A. Introduction	23
B. Choice of Law	25
IV. The Modern Period	25
V. Reform Proposals for Irish Company Law	26
VI. The Role of Partnership Law	26
§3. DEFINITIONS OF CORPORATIONS, COMPANIES AND PARTNERSHIPS	27
I. Different Forms of Companies	27
A. Limited Company	27
B. Unlimited Company	28
II. Other Forms of Business Organization	29
A. Undertakings for Collective Investment in Transferable Securities (UCITS)	29
B. European Economic Interest Grouping	29
C. Societas Europaea	29
D. Registration of a Business Name	29

**Table of Contents**

III. Partnerships	30
A. Traditional Partnerships	30
B. Limited Partnerships	30
IV. Statistics	30
§4. SOURCES AND HIERARCHY OF LAWS	31
I. The Development of the Common Law Approach	31
II. The Court System in Ireland	32
III. The Role of Legislation	33
IV. The Constitution: Bunreacht Na Héireann	34
V. European Sources	34
VI. International Sources	35
§5. PRIVATE INTERNATIONAL LAW (CONFLICT OF LAWS)	35
I. The General Rules	35
II. EC Regulation 44/2001	35
III. Choice of Law	37
IV. Overseas Companies	38
§6. THE LABOUR LAW CONNECTION	38
Selected Bibliography	41
Part I. Corporations	43
Chapter 1. The Public Company	43
§1. INTRODUCTION	43
§2. FORMATION OF A PLC	44
I. Incorporation: An Introduction	44
A. Incorporation and Registration	44
B. Limited Liability and Corporate Personality	44
II. Registration Requirements	45
III. Publicity	46
IV. Establishing the Members and Their Contribution	47
A. Numbers of Members Required, Minimum Capital Requirements	47
B. Consideration for Shares; Valuation; Fraudulent and Worthless Consideration	48
V. Formal Incorporation Documents	49
A. Incorporation Documents: An Introduction	49
B. Memorandum of Association: Three Clauses	49
1. Reform	51
C. Articles of Association: Legal Status, Content and Alteration	52

## Table of Contents

VI. Legal Personality and Constitutional Structures	53
A. Corporate Personality: Judicial Doctrine and Judicially Defined Exceptions to the Principle	53
B. Attribution of Human Characteristics	55
C. Corporate Personality: Statutory Exceptions	60
1. Fraudulent and Reckless Trading	60
2. Other Insolvency-Related Provisions	62
D. Corporate Personality: Groups	64
1. Introduction	64
2. Pooling and Contribution Orders	64
3. Conclusion	64
VII. Pre-incorporation Contracts	65
VIII. Promoters	65
IX. Prospectuses	67
§3. CAPITAL AND SHARES	69
I. Concepts of Share Capital, Raising of Capital, Flotation of a PLC and Capital Maintenance	69
A. Ordinary Shares	69
B. Preference Shares	69
C. Redeemable Shares	70
D. Bonus Shares	70
II. Capital Movements: Increase, Reduction and Redemption of Shares	70
III. Capital Maintenance	72
A. Ensuring Value is Maintained in the Company by Ensuring that the Company Receives Value for Its Shares	73
1. Issuing of Shares at a Discount	73
2. The Share Premium Account	73
3. Payment for Shares in Non-cash Consideration	73
B. Ensuring that a Stated Capital Structure is not Changed without the Consent or Authorization of Shareholders and without the Knowledge of Creditors	74
1. Purchase by a Company of Its Own Shares	74
2. Reduction of Share Capital	76
C. The Provision of Financial Assistance for the Purchase of Its Own Shares	77
D. Provisions Regarding the Protection of the Company's Working Capital	78
IV. Shares and Share Transfer	78
A. Transfer of Shares	78
B. Form of Transfer of Shares	79
C. Directors' Decision to Accept or Refuse Registration	80
D. Transmission of Shares	80
E. Mortgages	80
F. Trusts	81
G. Liens	81

## Table of Contents

V. Loan Capital and Debentures	81
A. Introduction: Equity and Loan Capital	81
B. Issuing Debentures	82
C. Charging the Assets	82
D. Transferring Debentures	83
E. Convertible Debentures	83
F. Remedies of a Debenture Holder	83
§4. SHAREHOLDERS, MANAGEMENT AND CONTROL	83
I. Introduction	83
II. Shareholder Meetings	84
A. Introduction	84
B. Types of Meetings	84
1. Annual General Meeting (AGM)	84
2. Extraordinary General Meeting (EGM)	85
3. Shareholders' Power to Requisition a Meeting	85
4. Meetings of Particular Classes of Shareholders	86
5. Court-Conducted Meetings	86
C. Types of Resolution	86
D. Procedure: Quorum	87
E. Procedure: Notice of Meetings	87
F. Procedure: Voting and Proxy Voting	88
1. Polls	88
2. Proxies	89
G. Procedure: Business at Meetings	89
II. Shareholder Rights	90
A. Introduction	90
B. Alteration of Rights	90
C. Voting Rights	91
D. Dividends	91
IV. Classes of Shareholders: Classes of Shares	92
A. The Balance of Power	93
V. Shareholders' Remedies	93
VI. Directors and Other Executive Officers	96
A. Introduction	96
B. Board of Directors	96
C. The Managing Director	97
D. The Chairman of the Board	98
E. Authority to Act	98
VII. Obligations of Directors	99
A. To Whom are the Duties Owed?	99
B. Fiduciary Duties	100
C. No Secret Profits	100
D. Corporate Opportunity Doctrine	101
E. Involvement with a Competitor	103
F. Abuse of Power Doctrine	103

## Table of Contents

G. The Duty of Skill and Care	105
H. Nominal Director	106
VIII. Enforcement of Obligations and Duties	108
A. Derivative Actions	108
IX. Obligations of Directors under Modern Legislation and Public Enforcement	111
X. Conclusion	115
XI. Auditors	116
XII. Company Secretary	118
§5. LIQUIDATION OF THE COMPANY	118
I. Types of Winding Up	118
A. Voluntary and Compulsory Liquidations	118
II. Grounds for Winding Up	119
III. Effects of Winding Up: Creditors' Rights	119
A. Fixed Charges	121
B. Floating Charges	121
C. Preferential Creditors	122
D. The Extension of Classes of Assets Which Could be Subject to a Fixed Charge	122
E. The Unsecured Creditor	124
F. Unsecured Creditor Protection: Retention of Title Clauses; Liens	124
G. Unsecured Creditor Protection: Trust Devices	125
H. Transfer of Undertakings Regulations	125
I. Powers and Duties of the Liquidator	126
IV. Pre-insolvency Remedies	126
A. Receiverships	126
B. Examinerships	127
C. Issues Surrounding Examinerships	128
D. Outcome of Examinership	128
§6. RECONSTRUCTIONS, MERGERS AND TAKEOVERS	129
I. Compromises and Arrangements	129
A. Introduction	129
B. Constructing and Approving a Scheme	130
C. Acquisition of a Minority	131
II. Reconstruction by Voluntary Liquidation	131
III. Takeovers and Mergers	132
A. Public Law Regulation of Takeovers and Mergers	132
1. Notification	133
2. Appeal	134
3. Special Circumstances	134
B. EU-Wide Mergers: The Role of the European Commission	135
C. The Role of the Irish Takeover Panel	135



## Table of Contents

§7. HOLDING COMPANIES AND SUBSIDIARIES	137
I. Groups and the Agency Question	140
II. Groups and Liability for Debts	140
III. Groups and Accounts and Taxation	142
§8. TAXATION	142
I. Introduction	142
II. Corporate Income and Capital Gains	142
III. Dividends and Other Distributions	143
Chapter 2. The Private Company	145
§1. INTRODUCTION	145
§2. FORMATION	145
I. Incorporation	145
II. Establishing the Members and Their Contribution	145
A. Numbers of Members Required, Minimum Capital Requirements	145
B. Consideration for Shares; Valuation; Fraudulent and Worthless Consideration	146
III. Formal Incorporation Documents	146
A. The Objects Clause and the Ultra Vires Doctrine	146
B. Articles of Association	147
IV. Legal Personality and Constitutional Structures	147
V. Promoters	147
§3. CAPITAL AND SHARES	148
I. Concepts of Share Capital	148
II. Capital Movement	148
III. Capital Maintenance	148
A. Introduction	148
B. Financial Assistance Transactions	149
IV. Shares and Share Transfer	150
A. Directors' Refusal to Accept Registration	151
B. Pre-emption Rights	151
§4. SHAREHOLDERS, MANAGEMENT AND CONTROL	151
I. Shareholder Meetings	151
II. Shareholder Rights	152
A. Shareholder Agreements	152
B. Shareholders' Remedies	152
III. Directors and Other Executive Officers	154
A. The Board of Directors	154
B. Life Directors	154

## Table of Contents

§5. LIQUIDATIONS	154
§6. RECONSTRUCTIONS	155
§7. TAX	155
Part II. Partnerships	157
Chapter 1. General Partnerships	157
§1. INTRODUCTION	157
I. Definition of a Partnership	158
A. Relation Subsisting between Persons	159
B. Carrying on a Business	160
C. In Common	161
D. With a View to Profit	162
E. Maximum Number of Partners	164
§2. RELATIONS BETWEEN PARTNERS INTER SE	164
I. Fiduciary Duties	165
II. Duty of Care	166
III. Management of the Firm	166
IV. Finances	167
V. Partnership Property	167
§3. LIABILITY OF PARTNERS TO THIRD PARTIES	168
I. Other Instances of Agency	169
§4. DISSOLUTION AND WINDING UP	170
I. Occurrence of Dissolution	170
§5. CONSEQUENCES OF DISSOLUTION	171
I. Outsiders	172
II. Retirement	172
§6. TAXATION	173
Chapter 2. Limited Partnerships	175
§1. LIMITED PARTNERSHIPS ACT 1907	175
I. Definition and Constitution; Management and Liability	175
II. Registration	176
III. Dissolution	176
IV. Taxation	177
§2. INVESTMENT LIMITED PARTNERSHIPS ACT 1994	177
Index	179

KLUWER LAW INTERNATIONAL

# **Corporations and Partnerships in Ireland**

**Irene Lynch Fannon & Karole Cuddihy**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Corporations and Partnerships.

General Editor: Roger Blanpain

Associate General Editor: Michele Colucci

Volume Editor: Koen Geens



**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

*Published by:*

Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*

Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*

Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

**DISCLAIMER:** The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

*Printed on acid-free paper.*

ISBN 978-90-411-3315-1

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and bound in Great Britain by  
CPI Antony Rowe, Chippenham and Eastbourne

## The Authors



Professor Irene Lynch Fannon is a graduate of *University College Dublin*; *Oxford University* and the *University of Virginia*. She is qualified to practise as a *Solicitor* in Ireland. She has taught Company Law and Employment Law in the Department and Faculty of Law at *University College Cork* since 1987. She was appointed Head of the Department of Law for the period 1999–2002. She was elected Dean of the Faculty of Law 2000–2002. She has published over 60 research pieces (the majority sole authored), including books, articles and chapters both in Ireland and internationally on Company Law, Corporate Insolvency and Employment and Labour Law, most recently in the area of comparative EU–US corporate governance models. She is a member of the editorial board of *The*

*Insolvency Lawyer* (Sweet and Maxwell, London). She served on the *Audit Review Committee* established by the Irish Government in 2000 following the Public Accounts Committee Enquiry into DIRT and other financial irregularities. This Committee issued its report in 2000, which led, *inter alia*, to the passing of the *Companies (Auditing and Accounts) Act 2003*. She continues to be involved in research on transatlantic corporate regulation and cooperation; she was a Visiting Professor at Cleveland Marshall College of Law at Cleveland State University in 2002 and held the Baker Hostetler Chair at that law school for the academic year 2003/2004. She is an Extern Examiner in Company Law and other legal subjects for Dublin City University and was an internal examiner in Company Law for the Honourable Society of the Kings Inns. She was an expert evaluator appointed by the *European Commission for the Marie Curie Actions under FP6* and has also acted as an external reviewer for the *Finnish Academy of Social Sciences*. She was a member of the *Business Regulation Forum* established by the Irish Minister for Enterprise and Employment in 2005, which issued its report in April 2007, and she is currently a member of *The High Level Group on Business Regulation* established by the Minister in July 2007. She currently occupies a senior management position as the Head of the College of Business and Law at *University College Cork*. The College includes the Faculties of Law and Commerce.

## The Authors



Karole Cuddihy is a practising barrister based in Dublin. He graduated in 2006 with a first class honours BCL degree from University College Cork (UCC), where he won several academic awards. In 2007, having graduated from the Honourable Society of King's Inns in Dublin, he was called to the Bar of Ireland. In 2008, he completed an LLM research thesis at UCC, entitled 'A Statutory Derivative Action for Ireland'. He has previously done work placements at the Office of the Director Enforcement and the Office of the Attorney General, both in Dublin. He has also worked as research assistant to Prof.

Lynch-Fannon on several company law and insolvency projects, and has worked as a part-time tutor at UCC.

# Table of Contents

The Authors	3
List of Abbreviations	13
General Introduction	15
§1. THE GENERAL BACKGROUND OF THE COUNTRY	15
I. Geography	15
II. Population and Vital Statistics	15
III. Cultural Composition	16
IV. Political System	16
A. The Constitutional Framework	16
B. Political Parties	17
V. Economy	18
§2. THE HISTORICAL BACKGROUND TO CORPORATIONS AND PARTNERSHIPS	20
I. The Development of the Common Law	20
II. The Genesis of Company Law	20
A. The Common Law Period	20
B. Post-1937 Constitution	23
III. Development of Irish Company Law and Membership of the EU	23
A. Introduction	23
B. Choice of Law	25
IV. The Modern Period	25
V. Reform Proposals for Irish Company Law	26
VI. The Role of Partnership Law	26
§3. DEFINITIONS OF CORPORATIONS, COMPANIES AND PARTNERSHIPS	27
I. Different Forms of Companies	27
A. Limited Company	27
B. Unlimited Company	28
II. Other Forms of Business Organization	29
A. Undertakings for Collective Investment in Transferable Securities (UCITS)	29
B. European Economic Interest Grouping	29
C. Societas Europaea	29
D. Registration of a Business Name	29

## Table of Contents

III. Partnerships	30
A. Traditional Partnerships	30
B. Limited Partnerships	30
IV. Statistics	30
§4. SOURCES AND HIERARCHY OF LAWS	31
I. The Development of the Common Law Approach	31
II. The Court System in Ireland	32
III. The Role of Legislation	33
IV. The Constitution: Bunreacht Na Héireann	34
V. European Sources	34
VI. International Sources	35
§5. PRIVATE INTERNATIONAL LAW (CONFLICT OF LAWS)	35
I. The General Rules	35
II. EC Regulation 44/2001	35
III. Choice of Law	37
IV. Overseas Companies	38
§6. THE LABOUR LAW CONNECTION	38
Selected Bibliography	41
Part I. Corporations	43
Chapter 1. The Public Company	43
§1. INTRODUCTION	43
§2. FORMATION OF A PLC	44
I. Incorporation: An Introduction	44
A. Incorporation and Registration	44
B. Limited Liability and Corporate Personality	44
II. Registration Requirements	45
III. Publicity	46
IV. Establishing the Members and Their Contribution	47
A. Numbers of Members Required, Minimum Capital Requirements	47
B. Consideration for Shares; Valuation; Fraudulent and Worthless Consideration	48
V. Formal Incorporation Documents	49
A. Incorporation Documents: An Introduction	49
B. Memorandum of Association: Three Clauses	49
1. Reform	51
C. Articles of Association: Legal Status, Content and Alteration	52



## Table of Contents

VI. Legal Personality and Constitutional Structures	53
A. Corporate Personality: Judicial Doctrine and Judicially Defined Exceptions to the Principle	53
B. Attribution of Human Characteristics	55
C. Corporate Personality: Statutory Exceptions	60
1. Fraudulent and Reckless Trading	60
2. Other Insolvency-Related Provisions	62
D. Corporate Personality: Groups	64
1. Introduction	64
2. Pooling and Contribution Orders	64
3. Conclusion	64
VII. Pre-incorporation Contracts	65
VIII. Promoters	65
IX. Prospectuses	67
§3. CAPITAL AND SHARES	69
I. Concepts of Share Capital, Raising of Capital, Flotation of a PLC and Capital Maintenance	69
A. Ordinary Shares	69
B. Preference Shares	69
C. Redeemable Shares	70
D. Bonus Shares	70
II. Capital Movements: Increase, Reduction and Redemption of Shares	70
III. Capital Maintenance	72
A. Ensuring Value is Maintained in the Company by Ensuring that the Company Receives Value for Its Shares	73
1. Issuing of Shares at a Discount	73
2. The Share Premium Account	73
3. Payment for Shares in Non-cash Consideration	73
B. Ensuring that a Stated Capital Structure is not Changed without the Consent or Authorization of Shareholders and without the Knowledge of Creditors	74
1. Purchase by a Company of Its Own Shares	74
2. Reduction of Share Capital	76
C. The Provision of Financial Assistance for the Purchase of Its Own Shares	77
D. Provisions Regarding the Protection of the Company's Working Capital	78
IV. Shares and Share Transfer	78
A. Transfer of Shares	78
B. Form of Transfer of Shares	79
C. Directors' Decision to Accept or Refuse Registration	80
D. Transmission of Shares	80
E. Mortgages	80
F. Trusts	81
G. Liens	81