

THE ICSA
COMPANY
SECRETARY'S
HANDBOOK

THE ICSA COMPANY SECRETARY'S HANDBOOK

Sixth edition

Douglas Armour FCIS



Published by
ICSA Publishing Ltd
16 Park Crescent
London W1B 1AH

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Typeset in Syntax and Schneidler by
Hands Fotoset, Woodthorpe, Nottingham

Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library.

ISBN10: 1-86072-319-5

ISBN13: 978-1-86072-319-3

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Preface

The object of writing this book is to provide a practical guide to company secretarial procedures undertaken by company secretaries, solicitors and accountants. The book will also help students preparing for the corporate secretaryship examination of the Institute of Chartered Secretaries and Administrators (ICSA).

Rather than following the sections and groupings of the Companies Act, the *Handbook* is organised according to core company secretarial tasks, as outlined in the ICSA's guide to the *Core Duties of the Company Secretary*. The commentary is illustrated by precedents for all key transactions and additional reference material organised into appendices. As well as a detailed contents list and index, each chapter opens with an overview of what it comprises, and the text is fully cross-referenced. Key terms are highlighted in bold on first use, and defined in an end of book glossary. Commentary and procedures relevant only for listed companies are highlighted with a marginal rule. Company forms that can be completed online are identified with the symbol [e]. The *Handbook* is also accompanied by a free CD-ROM, which includes the text of all precedents, plus related company forms.

The sixth edition incorporates all relevant changes in legislation and regulation, including the restructuring and reissuing of the Listing Rules as the Listing, Disclosure and Prospectus Rules, the advent of International Accounting Standards, the implementation of the Companies (Audit, Investigation and Community Enterprise) Act 2004 and the revision of the Turnbull Guidance on Internal Control. The changes to company law proposed by the Company Law Reform Bill are looked at in detail in a separate section in the Introduction.

In common with previous editions, this book is intended to be a *practical* guide to the legislation governing companies and company secretarial procedure. Where a more detailed analysis of the legislation is required, or an obscure procedural matter is being considered, readers should refer to the ICSA's more detailed information service, *Company Secretarial Practice (CSP)* (see www.icsapublishing.co.uk or call 020 7612 7020 for details). As with all legislation, the provisions of the Companies Acts and related legislation are open to interpretation and must be assessed in the context of the circumstances at hand, the Memorandum and Articles of Association of the company in question and any relevant shareholders' agreement or other ancillary agreements.

Whilst every effort has been made to ensure the accuracy of the content of this book, neither the author nor the publisher can accept responsibility for any loss arising to anyone relying solely on the information contained herein.

Douglas Armour
January 2006

Introduction

Although this *Handbook* is aimed primarily at readers who already have a working knowledge of companies and company law, there will be some who are less familiar with the concept of the company as established in the United Kingdom.

For UK businesses, there are a number of different forms of entity available through which that business can trade. These include:

- sole traders;
- partnerships;
- limited liability partnerships;
- limited partnerships;
- friendly and provident companies;
- European Economic Interest Groupings;
- companies incorporated under the Companies Act 1985.

This book is written for managers and administrators, and their advisers, of incorporated companies. The vast majority of trading entities established in the UK are companies of one type or another, incorporated under the Companies Act 1985, as amended. Unless stated otherwise, a reference to a 'company' will mean to a company incorporated under the Companies Act 1985 and not to any other trading entity, whether known as a 'company' or not.

It is important to be aware that there are two very similar statutes governing companies: the Companies Act 1985, as amended, which relates to companies registered in either England and Wales or Scotland, and the Companies (Northern Ireland) Order 1986, which relates to companies registered in Northern Ireland. This book is relevant to those companies incorporated under the Companies Act 1985.

Although there are three different types of company – companies limited by shares, limited by guarantee and unlimited companies – they all have certain basic characteristics. The majority of companies are limited by shares.

Guarantee companies are best suited for use with charitable enterprises and sporting or social associations particularly where the membership is to be subject to an annual subscription. Unlimited companies will normally be utilised in the case of a professional company where limited liability is not permitted or where, for reasons of secrecy, the owners do not wish to publicise their accounting information.

Corporate persona

A company is a legal entity in its own right, separate from that of its owners (members/shareholders) or managers (directors). Accordingly, a company can enter into contracts and own assets in its own name, unlike a sole trader or a partnership, which does not have a legal identity separate from the owner in whose name(s) all contracts and assets are made/held.

Like a natural person, a company has a 'home' address where legal documents and notices may be served. This address is known as its registered office and, among other things, determines the company's VAT and corporation tax office and the tax office dealing with any PAYE. This is the official address for serving of official notices, including notice of court action against the company to recover monies owed.

When a company is formed, there is an obligation to register information with the Registrar of Companies, and subsequently to register changes to this information. This will include the names and addresses of the persons forming the company and the company's registered office.

Ownership

All companies are owned by their members. In companies limited by shares this will be the shareholders; companies limited by guarantee will be owned by their guarantors; and unlimited companies can have shareholders or some other method of determining the proportion in which the company is owned. The majority of companies are limited by shares, either as private limited companies, usually referred to as 'limited companies', or public limited companies, more usually referred to as 'public' or 'Plc' companies.

Liability

The phrase 'limited' refers to the liability of the owners (the members/shareholders) for the debts of the company. Members of limited companies, whether limited by shares or guarantee, have limited liability for the debts of the company. The amount of their liability is limited to the amount agreed to be paid for the shares on their issue by the company. Accordingly, once shares are fully paid, members have no further liability. The majority of shares are issued as fully paid shares and accordingly there is no liability on the part of the owners for any trading or other debt of the company.

The liability of a guarantor of a company limited by guarantee is limited to the amount of their guarantee and is usually some nominal amount such as £1.

Members of unlimited companies, as the name implies, have no limit on their liability to meet the debts of the company should it fail.

Management

The management of all companies, regardless of type, is undertaken on behalf of the members by the directors. Directors need not be members, although in the majority of private companies the members and the directors will be the same group of individuals.

Even where they are members, the directors have a duty to manage the affairs of the company for the benefit of the membership as a whole and not just some part of the membership.

Although certain individuals cannot be appointed as directors of companies, including bankrupts and disqualified directors, there are no qualifications required to act as a director of a company and no need to show any previous management experience.

Failure to act properly as a director may lead to serious consequences, including disqualification from acting as a director.

Company secretary

All companies are required to have a company secretary. Other than the company secretaries of public companies, the company secretary need have no qualifications or previous experience. Company secretaries of public companies are required to be a member of one of a group of professional bodies or to have appropriate experience.

Memorandum and Articles of Association

These are two documents: the Memorandum of Association and the Articles of Association. The Memorandum details the powers of the company, the purpose for which it was formed (the objects) and, if the company has a share capital, details of that share capital. The Articles of Association detail the provisions relating to the regulation of the company in terms of the rights of its members and the authority of the directors.

In most instances these two documents are printed and bound together as one document and as a result are usually referred to as the Memorandum and Articles of Association.

The Companies Act 1985 provides a model set of Articles, which is contained in a separate legislative document, a statutory instrument (SI). This SI contains a number of tables of model Memorandum and Articles. The model Articles for private companies is the first of these tables (Table A) and as a consequence is often referred to as Table A. Although there are very many regulations in Table A setting out the rights of members and their relationship to the company, there are very few details concerning the rights and duties of directors. Accordingly, whilst there are strict time-scales for giving notice to shareholders to convene shareholders' meetings, directors' meetings are convened on reasonable notice, which can vary not only from company to company but also on the matter to be considered.

Share dealing, mergers and acquisitions

A company raises capital by issuing shares in the company to investors in return for money. These shares may subsequently be sold by the shareholders. Shares in public limited companies may be quoted on the Stock Exchange, where they are freely traded.

A company may wish to expand its business or avoid competition by merging with or acquiring another company.

Accounts and auditors

Incorporation as a limited company brings with it responsibilities to prepare and publish annual accounts, and in many cases to have the accounts approved by an auditor.

Dissolving the company

A company may have a limited life span and may eventually be wound up. If the company is unable to pay its debts it may go into liquidation, administration or receivership.

Company Law Reform Bill 2005

The Company Law Reform Bill ('the Bill') was introduced to the House of Lords on 1 November 2005. The Bill is the product of a seven-year review of existing company law carried out by the Company Law Review Steering Group and is the result of extensive consultations on draft clauses issued in March, July, September and October 2005.

The Bill has 37 parts and 15 schedules. It will repeal approximately two-thirds of the Companies Act 1985, amend other parts and pave the way for future changes through secondary legislation. The Bill is expected to receive Royal Assent by September 2006, with changes being brought in by commencement orders to be made between April 2007 and April 2008.

The expressed aim of the Bill is to provide an effective framework of company law and corporate governance to promote enterprise and investment in the UK and to introduce deregulation, to simplify the administrative burden on smaller private companies and to facilitate shareholder engagement.

The general arrangement of the Bill is as follows:

<i>Part</i>	<i>Summary</i>
Parts 1 to 7	Company formation, registration, company names, etc.
Parts 8 to 12	The members and officers of a company.
Parts 13 & 14	How companies may take decisions.
Parts 15 & 16	Safeguards for ensuring that the officers of a company are accountable to its members.
Parts 17 to 28	Share capital issues and takeovers.
Parts 23 to 30	The regulatory framework.
Part 31	Company law reform power.
Parts 32 & 33	Business names and statutory auditors.
Parts 34 to 37	Miscellaneous and general.

An outline of the most important changes that will affect all companies, their directors and shareholders is set out below under the following headings:

- Simplification of the private company regime
- Directors, secretary and corporate governance

- Auditors' liabilities and accounts
- Meetings, voting and share transfers
- The Registrar.

Simplification of the private company regime

- The Bill has simplified decision-making for private companies, e.g. by making it easier for decisions to be taken by written resolution and by making the holding of Annual General Meetings a matter of 'opt in' rather than 'opt out'. It also provides for separate and better adapted default Articles of Association ('Table A') for private companies and simplifies the share capital rules for private companies. It will be possible to have single member public companies as well as private ones.
- The Memorandum of Association will be a brief document stating that the subscribers have agreed to become members and to take at least one share each in the company. Other matters currently contained in the Memorandum such as the company's objects can instead be incorporated in the Articles. There will be default Articles for all types of company, not just those limited by shares. Such model Articles are likely to be set out in secondary legislation and are therefore not included in the Bill itself. When the new model Articles are introduced, they will apply automatically to companies that are incorporated after that date but not to companies incorporated before.
- In keeping with the 'think small first' approach, written resolutions may be passed by a majority of all eligible votes rather than the unanimity currently required. As under current law, a resolution to remove a director or an auditor may not be passed as a written resolution. Also, the current general requirement that all written resolutions be sent to the Auditors is removed.
- New provisions will enable a person to object to a company's name if that name is the same as or confusingly similar to a name in which the objector has goodwill. The Business Names Act 1985 will be repealed and replaced with similar provisions.
- A private company that is intending to re-register as a public company will be able to offer shares to the public without waiting for the re-registration certificate to be issued.
- The concept of authorised share capital is abolished. However, the existing requirements for public limited companies to have a minimum share capital will be kept.
- Private companies will be able to give financial assistance for the acquisition of their own shares or those of their (private company) parent without having to go through the 'whitewash' procedure.
- Private companies will be able to reduce their share capital by passing a special resolution supported by a directors' solvency statement signed by all the directors. No longer will a court order be required.
- A simplified procedure will allow limited companies to convert their share capital from one currency to another and to re-denominate their shares after conversion to achieve round share values, without the necessity of court approval, buy back shares out of capital, or the issue of new shares.

Directors, secretary and corporate governance

Directors

- The Bill includes a code of conduct, which clarifies a director's responsibilities and improves the law regulating directors' conflicts of interest. More particularly, the duties address:
 - the possibility that a director may put his own or other interests ahead of those of the Company;
 - the possibility that he may be negligent.
- These statutory duties do not cover all the duties that a director may owe to the Company. Many duties are imposed elsewhere in legislation, such as the duty to deliver accounts and reports to the Registrar of Companies. Other duties remain uncodified, such as an overriding duty to consider the interests of creditors in times of threatened insolvency.
- The statutory statement of directors' duties promotes the concept of enlightened shareholder value by making clear that directors must promote the success of the Company for the benefit of its shareholders and that this can only be achieved by taking into account the long term and wider factors such as employees, the environment, suppliers and customers.
- A director must act within his powers under the Company's constitution and only exercise the powers for the purposes for which they are conferred.
- Important changes have been made to the rules on conflicts of interest and derivative actions initiated by shareholders. As a general rule if a wrong is done to a company only the company itself (and not a shareholder) can bring an action for damages or some other remedy. In practice, the directors must decide whether or not to bring a claim. However, if the wrong was done by the directors themselves or a majority of them, no claims are likely to be pursued unless shareholders are able to force the board to bring a claim either by passing an ordinary resolution to replace the existing directors with new appointees or by giving a direction to the board by means of a special resolution. The Company Law Review recommended that the derivative action be put onto a statutory footing and this is now included in the Bill.
- The Bill reflects the current position in s. 317 CA 1985 and in the Articles of most companies with regard to conflict of interest. Therefore an interested director is obliged to disclose the nature of his interest to the rest of the board before a transaction is approved. However, non-conflicted directors will be allowed to authorise a director to consider a matter in which he has an interest notwithstanding his conflict of interest. Directors of public companies will only be able to authorise such conflicts if the Articles allow it.
- Various changes are made to the rules on substantial property transactions between companies and their directors, on loans to directors, payments to directors for loss of office and on long-term service contracts. These are designed to make the rules more accessible and consistent, e.g. all companies will be able to make loans to

directors if the loans are approved by shareholders. Also, companies will be able to enter into transactions that currently fall within s. 320 CA 1985 before shareholder approval has been obtained, as long as the transaction is made conditional on such approval.

- With regard to appointment and eligibility, the 70-year age limit for directors of public companies and subsidiaries of public companies will be abolished but a new 16 years minimum age for directors of all companies will be introduced.
- At least one director of each company will have to be a natural person and all directors will be able to provide a service address for public record not just those at serious risk of violence or intimidation.

Secretary

- The Bill implements the Company Law Reform recommendation that the office of secretary for a private company be optional. However, it retains the requirement that a public company must have a secretary and makes it a duty of the directors of a public company to ensure that the secretary has both the necessary knowledge and experience and also one of the specified qualifications as set out in the Companies Act 1985.

Corporate governance

- As part of the Government implementation of the Transparency Obligations Directive, it is intended to repeal the current continuing shareholder disclosure obligations and replace them with a power for the FSA to make rules under the Financial Services and Markets Act 2000.
- The ability of public companies under s. 212 to investigate who has an interest in their shares will remain broadly in its current form and its right will not be extended to private companies.
- Additional clauses have been included which are applicable only to quoted companies to enhance the timeliness and transparency of company information and proceedings. They require quoted companies to disclose on their website the results of polls at general meetings.
- Shareholders who hold at least 5% of the voting rights or who number at least 100 will be able to require the directors to obtain an independent report on any polled vote. The requirement to disclose the results of polls will apply only to polls conducted after the section comes into force. Once the new provisions become law, failure to comply will be an offence by officers of the company in default.
- The Bill also implements the EU Takeover Directive and places the work of the Takeover Panel on a statutory footing. Since 1968, takeover regulation in the UK has been overseen by the Takeover Panel administering rules and principles contained in the Code, essentially on a non-statutory basis. The draft legislation envisages that the Panel will be the competent authority to supervise takeover activity and similar types of transactions. Additionally, the Panel will be placed under an obligation to make statutory rules giving effect to certain articles of the Directive and be given a statutory rule-making power to make rules in relation to takeover activity.

Auditors and accounts

Auditors

- There are two changes to the procedure for the appointment of auditors of private companies. Firstly, an auditor's term of office will typically run from the end of the 28-day period following circulation of the accounts until the end of the corresponding period the following year. This will apply even if the auditor is appointed at a meeting where the company's accounts are laid. The second change is that an auditor is now deemed to be reappointed unless the shareholders determine otherwise.
- A firm which ceases to hold office as auditor of a quoted company will be obliged to make a statement about the circumstances of its departure. The statement will have to be circulated to the company's shareholders unless a court is persuaded that the auditor is abusing his rights. A copy must also be sent to Companies House and the Financial Reporting Council.
- There is also a new criminal offence in relation to inaccurate auditors' reports. The offence is committed by any individual eligible to be a statutory auditor who knowingly or recklessly causes a report to include anything that is misleading, false or deceptive or to not include a statement of any problem with the accounts.
- The audit report will have to be signed by the lead auditor as well as the audit firm. However, the Bill ensures that for an individual to be nominated as a senior statutory auditor is not effective exposure to liability in any way.

Accounts

- Private companies will have to file annual reports and accounts at Companies House within seven months of the year-end; currently they have ten months from the year-end. Public companies will now have to file within six months, down from seven.
- Subject to annual shareholder approval, all companies will be allowed to limit the liability of their auditors to amounts considered by a court to be 'fair and reasonable in all circumstances'. When the Act comes into force, companies can expect their auditors to propose such limitations in their audit engagement letters. A company that has entered into a liability limitation agreement with its auditors must disclose this in its annual financial statement.
- Quoted companies will have to publish their annual accounts and reports and preliminary results on their website.

Meetings, voting and share transfers

Meetings

- The Bill sets out the additional requirements for AGMs for public companies. The main change to the current law is that the AGM must be held within six months of the end of its financial year. Unlike the current position, the holding of the AGM will be specifically linked to the accounting period, thus making it easier for members to hold directors to account.

Voting and share transfers

- To make it easy for beneficial owners to exercise voting rights held by the registered holders, all companies will be able to change their articles to allow registered holders to nominate some other person to exercise some or all of their statutory rights as a member, including the right to receive notices of meetings and to appoint proxies.
- The Government will have the power to specify the classes of institutional investor required to disclose voting. The Government's objective in taking this power is to change behaviour in order to improve disclosure. However, given the levels of voluntary disclosure already achieved, the Government believes it may be possible to develop a voluntary disclosure regime. If a voluntary disclosure regime fails to deliver progress, the Government will consider using its legislative power.
- The Government will also have the power to make regulations for enabling the transfer of securities without a written instrument. Currently de-materialised shares in quoted companies are transferred to the electronic CREST system. Consultation has suggested that it should be made compulsory for all transfer of shares in quoted companies to be made paperless to remove the burden of dealing with the remaining 10,000 or so paper transfers each day.
- Directors will have a statutory obligation to give reasons for any refusal to register a transfer of shares.

The Registrar

The Bill makes a number of changes to ensure that the system for companies to file information at Companies House is kept efficient and business-friendly. The new sections focus on encouraging and exploiting new forms of e-communication. For example:

- The Registrar will have greater powers to specify the form and manner in which companies must submit information. These new measures are coupled with new offences making unlawful knowingly or recklessly to deliver to the Registrar material which is misleading, false or deceptive in a material particular.
- The Registrar will also be given limited powers to accept informal corrections to, or replacements for, documents that have been filed. At present the formal position of Companies House is that corrections or replacements can only be effected pursuant to a court order.