

GOWER AND DAVIES'
PRINCIPLES OF
MODERN COMPANY LAW

NINTH EDITION

By

PAUL L. DAVIES, Q.C. (hon), F.B.A.

Allen & Overy
Professor of Corporate Law
University of Oxford
Fellow of Jesus College
Honorary Bencher of Gray's Inn

and

SARAH WORTHINGTON, Q.C. (hon), F.B.A.

Barrister
Downing Professor of the Laws of England
University of Cambridge
Bencher of Middle Temple

with a contribution from

DR. EVA MICHELER
Reader in Law
London School of Economics and
Political Science
Ao Universitatsprofessor
Wirtschaftsuniversitat Wien

CONTENTS

<i>Preface</i>	<i>page</i> v
<i>Table of Cases</i>	xvii
<i>Table of Statutes</i>	lxvii
<i>Table of Statutory Instruments</i>	xcv
<i>Table of E.C. Material</i>	ci
<i>Table of Rules of Takeover Code</i>	cix
<i>Table of Abbreviations</i>	cxi

Part One

INTRODUCTORY

1. Types and Functions of Companies	3
Uses to which the company may be put	3
Different types of registered companies	14
Unregistered companies and other forms of incorporation	22
European Community forms of incorporation	28
Conclusion	33
2. Advantages and Disadvantages of Incorporation	35
Legal entity distinct from its members	35
Limited liability	39
Property	42
Suing and being sued	43
Perpetual succession	44
Transferable shares	46
Management under a board structure	48

Borrowing	50
Taxation	52
Formalities, publicity and expense	52
Conclusion	53
3. Sources of Company Law and the Company's Constitution	55
Sources	55
The Company's Constitution	64
The European Company	79
4. Formation Procedures	83
Formation of different types of company	83
Forming a company by registration	86
Choice of type of registered company	89
Choice of company name	91
Mandatory and elective name changes	95
Choice of appropriate articles	100
Challenging the certificate of incorporation	101
Commencement of business	103
Re-registration of an existing company	104
Conclusion	110
5. Promoters	111
Meaning of "promoter"	111
Duties of Promoters	113
Remedies for breach of promoters' duties	116
Remuneration of promoters	119
Preliminary contracts entered into by promoters	121
Companies' pre-incorporation contracts	121
6. Overseas Companies, Community Law and Corporate Mobility	127
Overseas companies	128
Company law at community level	137
Corporate mobility	146
Conclusion	159

Part Two

? SEPARATE LEGAL PERSONALITY AND LIMITED LIABILITY

7. Corporate Actions	163
Contractual rights and liabilities	165
Tort and crime	191
Conclusion	206
8. Limited Liability and Lifting the Veil	207
The rationale for limited liability	207
Legal responses to limited liability	212
Lifting the veil	214

Conclusion	i	223
9. Personal Liability for Abuses of Limited Liability		225
Premature trading		226
Fraudulent and wrongful trading		227
Phoenix companies and the abuse of company names		237
Misdescription of the company and trading disclosures		242
Company groups		244
Conclusion		249
10. Disqualification of Directors		251
Disqualification orders and undertakings		253
Disqualification on grounds of unfitness		256
Non-mandatory disqualification		264
Bankrupts		266
Impact of disqualifications under foreign law		267
Conclusion		268
11. Legal Capital and Minimum Capital		271
Meaning of capital		271
Nominal value and share premiums		274
Minimum capital		280
Disclosure and verification		284
Capitalisation issues		294
Conclusion		295
12. Dividends and Distributions		297
The basic rules		297
Identifying the amount available for distribution		302
Disguised distributions		306
Consequences of unlawful distributions		310
Reform		314
13. Capital Maintenance		319
Acquisitions of own shares		320
Redemption and Re-purchase		324
Reduction of capital		347
Financial assistance		359
Conclusion		375

Part Three

CORPORATE GOVERNANCE: THE BOARD AND SHAREHOLDERS

14. The Board		383
The role of the board		383
Appointment of directors		397
Remuneration of directors		400
Removal of directors		409

skill, care and diligence	517	20. Unfair Prejudice
Directors' various duties of loyalty	525	Introduction
Directors' powers	527	Independent illegal
Independent judgment	536	Legitimate expectations
Success of the company	540	Unfair prejudice applications
Conflict rules	559	Reducing litigation
5 company (self-dealing)	560	Remedies
Directors in the company and directors requiring		Winding up on the
Directors' members	571	Conclusion
Prohibition on the use of corporate property,		
Opportunity	588	
Benefits from third parties	611	
Duty	613	
Approval of breaches of duty	619	
Empowering directors from liability	627	
	635	21. Annual Accounts and
Cases	636	Introduction
	639	The annual accounts
	641	The directors' reports
Personal Actions against Directors	643	Approval of the
Problem and the potential solutions	643	The auditor's reports
Derivative claim	652	Revision of defective
Claims against directors	662	Filing accounts and
	665	Consideration of
Administrative Remedies	667	Conclusion
	667	22. Audits and Auditors
Disclosure of documents and		The role of the auditor
	669	Audit exemption
By inspectors	673	Auditor independence
Of company ownership	679	Disqualifying persons
Investigations	680	The role of shareholders
Litigations	681	The role of the
	683	Auditor regulation
		Empowering the
		Liability for negligence
		Claims by the auditor

Part Four**CORPORATE GOVERNANCE: MAJORITY AND MINORITY SHAREHOLDERS**

19. Controlling Members' Voting	687
Introduction	687
Review of shareholders' decisions	691
Class rights	701
Self-help	711
Conclusion	717
20. Unfair Prejudice	719
Introduction	719
Independent illegality	723
Legitimate expectations or equitable considerations	724
Unfair prejudice and the derivative action	734
Reducing litigation costs	739
Remedies	741
Winding up on the just and equitable ground	744
Conclusion	746

Part Five**ACCOUNT AND AUDIT**

21. Annual Accounts and Reports	751
Introduction	751
The annual accounts	756
The directors' report	774
Approval of the accounts and reports by the directors	783
The auditor's report	784
Revision of defective accounts and reports	785
Filing accounts and reports with the registrar	787
Consideration of the accounts and reports by the members	794
Conclusion	797
22. Audits and Auditors	799
The role of the auditor	799
Audit exemption	802
Auditor independence and competence	807
Disqualifying persons from acting as auditors	811
The role of shareholders and the audit authorities	817
The role of the audit committee of the board	825
Auditor regulation	830
Empowering the Auditors	832
Liability for negligent audit	835
Claims by the audit client	840

Claims by third parties	847
Conclusions	853

Part Six

EQUITY FINANCE

23. The Nature and Classification of Shares	859
Legal nature of shares	859
The presumption of equality between shareholders	863
Classes of shares	865
24. Share Issues: General Rules	873
Public and non-public offers	874
Directors' authority to allot shares	876
Pre-emptive rights	879
The terms of issue	890
Allotment	891
Registration	893
Conclusion	895
25. Public Offers of Shares	897
Introduction	897
Admission to listing and to trading on a public market	912
The prospectus	916
Sanctions	930
Cross-border offers and admissions	942
De-listing	944
26. Continuing Obligations and Disclosure of Information to the Market	947
Introduction	947
Periodic reporting obligations	950
Episodic or ad hoc reporting requirements	952
Remedies for breaches of the reporting requirements	956
Disclosure of directors' shareholdings	964
Disclosure of major shareholdings	969
Conclusion	979
*27. Transfers of Shares	981
Certificated and uncertificated shares	983
Transfers of certificated shares	985
Transfers of uncertificated shares	997
The register	1001
Transmission of shares by operation of law	1005
28. Takeovers	1009
Introduction	1010
The takeover code and panel	1012
The scope of the city code	1024
The structure of the code	1030

The allocation of the acceptance decision	1033
Target management promotion of an offer	1043
Equality of treatment of target shareholders	1055
The procedure for making a bid	1069
Conclusion	1101
29. Arrangements and Reconstructions	1103
Schemes of arrangement	1105
Reorganisation under sections 110 and 111 of the Insolvency Act 1986	1123
Conclusion	1125
30. Insider Dealing and Market Manipulation	1127
Approaches to regulating insider dealing	1129
The criminal justice act 1993, Part V	1135
Criminal prohibitions on market manipulation	1153
Prohibition of market abuse in Part VIII of FSMA	1154
Sanctions and enforcement	1167
Conclusion	1174

Part Seven

DEBT FINANCE

31. Debentures	1179
Basic concepts	1179
Single and multiple lenders	1187
Issuance of debentures	1192
Transfer of debentures	1199
Protection of debenture holders' rights	1201
Conclusion	1206
32. Company Charges	1207
Introduction	1207
Security interests	1208
The floating charge	1215
Registration of charges	1235
Enforcement of floating charges	1250
Conclusion	1269
33. Winding-up, Dissolution and Restoration	1271
Introduction	1271
Types of winding up	1273
Powers and duties of the liquidator	1284
Collection, realisation and distribution of the company's assets	1285
Dissolution	1295
Resurrection of dissolved companies	1300
Conclusion	1302