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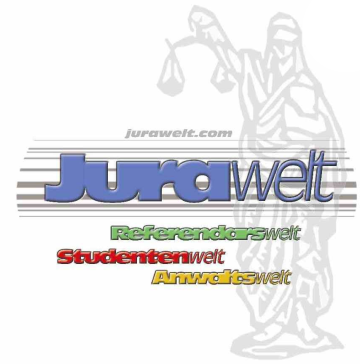

FRANK FELGENTRÄGER

ENGLISH COMPANY LAW

Das folgende Skript ist als Mitschrift im Rahmen der Fachfremdsprachenausbildung (FFA) zur Englischen Rechtssprache an der Universität Bielefeld entstanden. Es erhebt keinen Anspruch auf Vollständigkeit, sondern soll als Anregung dienen, was zur Prüfung über das Englische Gesellschaftsrecht gelernt werden kann.

COMPANY LAW

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A. Ways to Run a Business

- Sole Trader
- Partnership
- Company
  - limited
    - by shares
      - private
      - public (plc)
    - by guarantee
  - unlimited

I. Not a Company

1. Sole Trader

- one person trades
- personally liable

2. Partnership

- two persons trade
- each one is personally liable
  - **good:**
    - financial trouble: **two** settle the **debts** off
  - **bad:**
    - liability also for **partner's mistakes**

3. Advantages

- people are Sole Trader/Partnership **rather than companies** b/c:
  - easy way to set up a business
  - not every person can be a limited company

  (they are not wanted to be able to limit their liability – not allowed to hide behind a company)
    - i.e.:
      - lawyers (solicitors, barristers)
      - doctors
      - accountants

II. Company

1. Forming a Company

- "forming" > separate legal person is formed
  - company has existence of its own (can be sued, can sue on its own)
  - can only act through certain representatives

2. History

- **≈ 1850**: First Companies Acts
  - time of **industrialization**
    - many people got ruined, when i.e. the railway business got into trouble

        - b/c they were **sole traders**
            - they lost their personal fortune
        - idea: How can we limit our liability?

- the idea of limiting the liability was **very unpopular** at that time
    - government wanted to warn people that there are liability-limits: ("companies are dangerous, dreadful!")
        - s.th. in company's name had to be there which shows that there is a limit on liability
            - otherwise: danger of fraud

- **history has turned** in the past: Now people are not suspicious any more against companies
    - quite the opposite: **sole traders** appear odd/strange

3. Types of Companies

- **Limited**
    - limit of personal liability of the people involved in company - (for debts of the **company**)
    - advantage: you know beforehand how much you will pay at the highest

    - **By shares**
        - most common type
        - people give money to company, company gives back shares (dividents etc.)
        - it is also possible **not** to put in the **whole amount** of money up front
            - company makes **"call"** (when money is needed)
              date of issue of shares counts (doesn't matter whether value has changed)
        - reasons for this type: company needs **money to invest** at the beginning

        - **Public (plc)**
            - company whose shares can be bought on the Stock Exchange
            - company can **advertise** to the public and ask/invite them to buy shares
            - more money possible (at the beginning)
            - much money, lots of people in company
            - general rule: big companies = plc.s
            - name of companies needs to have "plc" in it

        - **Private**
            - company with a small number of shareholders
            - shares are not traded at the Stock Exchange

    - **By guarantee**
        - very uncommon type
        - people **promise** to put money in (when company needs it)
        - only for companies in regulatory situations – in financial service sector (i.e.: organisations which regulate the stock market)

- **Unlimited**
  - “good”: tax advantages
  - “bad”: you are liable to full extent
  - there are almost **no unlimited** companies in practice!

4. Special Rules for Public Companies

- when you want to form a public company (to “float” a company), you are regulated by a stock exchange organisation
  - normally it is not possible to become a “plc” from “day one”
- stock exchange wants records/proofs etc.

- there are **extra rules for “plc.s”** because they are opened for the public
  - the minimum of how many shares you have to (actually) **sell** at the beginning:
    - £ 50,000
  - the minimum of how many have to be paid up front:
    - 25% of £ 50,000 = £ 12,500
      - 75% can be “on call”

5. Change Company Form

- possible to **change** from **public > private** and **private > public**
  - special regulations for “public > private”
    - to protect the small shareholders
      - they can be easier pushed around in private companies!

- often: **change** from **private > public**
  - procedure:
    - suggestions by directors
    - vote by shareholders
    - special resulotion required (>75%)
      - but: other <25% can apply to court
      - **court can stop the change**

6. Registration

- documents have to be delivered to the Registrar of Companies **(s. 10 of Companies Act 1985)**:

  - **Memorandum of Association**
    - constitution of the company
    - stating:
      - name of company
        - end: “plc” or “ltd.”
        - every company shall have a different name
        - forbidden names:
          - which constitutes criminal offence
          - which is offensive
          - which gives impression of connection to government

        - i.e.:
            - "royal"
            - "British"
            - "International"
            - "Sheffield" (best steel from there – best product from this comp.?)
    - in case of a conflict: ask for permission from Secretary of State
- name of initial subscribers
- whether registered office is in England/Wales or Scotland
- articles of association
    - document which regulates the way in which a company's affairs are managed (Gesellschaftsvertrag, Satzung)
- objects (aims)
    - technically the company is only allowed to do these objects (that is why there are sometimes several pages of objects in the MofA)
- whether company is limited or unlimited
- maximum share capital that company is entitled to raise
    - actual amount can be lower, but **not higher**
        - Problem: Why not write in the maximum of £ 1,000,000,000,000,000…?
            - b/c sometimes you do not want other people to buy your shares (i.e. competitors)
            - but if these people want to answer your offer of 1,000,000… shares, then it might be the case that you are not allowed to refuse (because you said so in the MofA)

- after registration a company has its own legal personality

7. Register of the Company

- every company has to have a register of members:
    - content:
        - names, addresses
        - number of share held by the certain member
        - amount of money that is paid for the shares (financial contribution has to be recorded)
        - date of entry of a member on to register
        - as and when members seize to be members (either die or sell/give up shareholdings) > **date**

- register must be a written document
    - but can and often is on a computer, too

- register must be kept at the **registered company office** – central data base
    - if not kept there, then the **registrar of companies in Cardiff** needs to know where it is held

- purpose of the records:
    - they must be open to the general public
        - so:
            - they must be allowed to inspect this record
            - at least two hours a day during normal business hours

B. Company Meetings

I. General Information

- two main bodies in a company:
  - members
  - directors

- when do those two play their part?
  - **Meetings!**

II. Types of Meetings

1. AGM

- **A**nnual **G**eneral **M**eeting **(AGM)**
- once a year (does not matter when, but no more than **15 month** apart)

- regular meeting when decisions can be taken

- **private companies** can dispense with *(verzichten auf)* the need to hold AGMs
  - resolution has to be passed

- articles determine the necessary period of notice
  - 21 days' for an AGM

2. EGM

- **E**xtraordinary **G**eneral **M**eeting **(EGM)**
  - any General Meeting which is not an AGM

- requires 14 days' notice

III. Types of Resolutions

- decisions are taken on meetings by passing a **resolution**

- who can vote?
  - people who are **entitled** to vote and **present**

1. Ordinary Resolution

- decision which is taken by the majority vote of the shareholders
  - requires a simple majority of votes ("more in favour than against")
  - > 50%

- **"casting vote":**
  - in the articles of Association can be agreed on a casting vote

- definition: a vote used by the chairman in a case where the votes for and against a proposal are equal
  - “to use the casting vote to block the motion”
- very powerful tool

2. Extraordinary Resolution

- decision which requires the holders of **75 %** of the shares to vote in favour

- requires **14 days’ notice**

3. Special Resolution

- decision which requires the holders of **75 %** of the shares to vote in favour

- requires **21 days’ notice**

4. Elective Resolution

- a private company may dispense with certain internal requirements of the Companies Act
- resolution is revocable by ordinary resolution or when company becoms a plc

IV. Quorum, Agenda

- **Quorum** to be present:
  - certain amount of members to be personally present at a meeting
    - so that decisions can validly be taken
  - usually two, but articles of association usually say a number higher than that depending on the size of the company

- **Agenda:**
  - list of things (items) to be disussed at a meeting
  - the notices that go out telling the members that there will be a meeting contain an agenda (list of subjects) and whether it is an AGM, EGM, whether they want to pass a special or extraordinary resolution

C. Members

I. Definition, Companies Act 1985

“Every person who agrees to become a member of a company and whose name is entered in the **register of members** is a member of the company.”

- agree
- enter in register of members

- right to become a member
  - i.e.:
    - may result from a contract with the members of the company
    - a member transfers its shares to s.o. else on the open market etc.
    - when a member dies and

    - their shares pass to its family etc. **and** the family agrees to become a member and the name is entered
  - an existing member goes bankrupt
    - any shareholding that he has transfers to the person called "**trustee** in bankruptcy"

II. Duties and Rights of Members of a Company

- in most cases: directors run the company (they usually have more than 50 % of the share capital)

1. Rights

- often there is a conflict between directors and shareholders
- rights of the shareholders protected by legislation (examples):
  - change the company name
  - change the objects of the company in the Memorandum of Association
  - change the articles of association
  - change the nominal capital (quantity of funds against which shares are issued)
  - power in certain circumstances to change the directors themselves

  - **most powers are written down in the articles** of the company (Articles of Association)

  - in ordinary votes members can even make a decision if they reach more than 50% of the total number of votes
  - regardless of what the directors think!

- certain **powers** are given to the member by the **Companies Act** (cannot be taken away by the articles of association):
  - elect new directors
  - declare dividents
  - control by exercising the right to vote
  - ultimately remove or threaten to remove the directors

  - often smaller shareholders cannot really make decisions independently (when they have less than 50%)
    - but:
      - their position is protected in legislation:
        - if they have **between 25% and 50%**:
          - they have the **power to block resolutions**
          - they can deny > **negative control**

- s.o., who is absent from a meeting, can still vote, if he uses a "**proxy**" (written authority)

2. Duties

- basic rule:
  - members can exercise their right to vote as they wish
    - reflected on the proportion/percentage of the votes/share capital they have

- what they **cannot** do:
  - when directors have done a breach of their duty, the members cannot vote in their favour (backing up the naughty decision of the directors)

- "committing a fraud on the minority"
  - meaning: they cannot do s.th. which discriminates against the minority of the shareholders
  - they can of course carry out decisions, but nothing which really discriminates

    - case: "**Clemens and Clemens Brothers Ltd." (1976)**
      - company tried to pass a resolution which increases the role of the majority shareholders
        - they tried to "boost their powers"
      - minority went to court and the court said: This resolution is unlawful!
      - **Court:** protected the minority shareholders b/c the resolution discriminated against the minority – abuse of power!

Clemens v. Clemens Brothers Ltd. [1976]:

In a dispute between the aunt who was a director holding 55 % of shares and her niece who held the balance shares of the company, it was held that though the resolution passed by a majority for the issue of shares was legal, it ought to be set aside as it was considered oppressive because the issue of shares resulted in further reduction of the shareholding of the niece.

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3. Foss v. Harbottle (1843)

Foss v. Harbottle (1843) demonstrates majority rule of company members/shareholders: They have absolute power if they have 50%/75% of the votes (depending on what resolutions are concerned). The individual members of the company are distinct from the company; they are separate legal entities. Shareholders/members are usually not allowed to take legal action on behalf of the company. It is the company that acts as a legal person and sues others. **The company is the proper plaintiff if a wrong has been done to the company.** The decision to sue s.o. is usually taken by the directors of the company or by the members at a general meeting. Courts do not interfere with the decision-making process.

There are a few exceptions from that rule in Foss v. Harbottle: an individual member/members can sue on behalf of the company/the company itself in certain cases:

- if the majority votes so as to defraud the minority; **fraud on the minority;** being unfair to minor part (not fraud as an offence)

- if the board of directors has proposed to act illegally or has made an illegal decision; members can sue directors for compensation on behalf of company; they can also try to get an injunction *(a court order compelling someone to stop doing something or not to do something – einstweilige Verfügung)* to prevent the illegal action from taking place; if the injunction is ignored, they are in breach of that court order, for which they may be punished (apart from punishment for illegal action)

- if the company wants to act on the authority of a resolution passed by the members/by the directors which is defective because there has not been sufficient notice to the members

- "where it is in the interest of justice": very wide scope/category

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This rule comes from the case of the same name, reported at (1843) 2 Hare 461. **Stated simply, the rule is that if a wrong is done to the company, the company is the proper plaintiff.** The proper decision-making body within the company should decide whether the company should sue and an individual shareholder has no right to interfere with this decision.

An individual shareholder has not been wronged, if for example a director makes a secret profit in breach of fiduciary duties. An individual shareholder cannot therefore sue the director personally. The action must be brought in the company's name.

At the time of this case, the way to decide whether the company should sue someone was to call a General Meeting and put the question to the shareholders, who should decide whether to sue, or whether to ratify the wrongful act. If the act was ratified, then no legal action could be brought against the wrongdoers. However, if the majority shareholders were always allowed to have the final decision, sometimes minority shareholders may be prejudiced. For example, the wrongdoers may well be the majority shareholders, who obviously would not vote to sue themselves!
Nowadays, most companies leave the decision as to whether the company should sue someone or not to the board of directors. However, similar worries apply. Accordingly, exceptions to the rule in Foss v. Harbottle have been developed which prevent this, and allow the decision to sue to revert to someone else.

D. Company Finance

- ways to use profits:
  - retain it in the business, keep it, use it to finance the company
  - pay dividends

- pay interest on debentures (loans to the company; usually by a bank)
- fee their directors; their contract specifies what fees they are entitled to

- **Retaining** money benefits shareholders in the long run
  - if money is invested in the company, it is likely to improve the long-term prospects of the company
  - capital value of the company increases

- **Payment of interest** on debentures reduces the profits available for distribution elsewhere
  - shareholders are often concerned about this
  - nevertheless, loans are needed

- **Dividends** are usually paid every six months
  - can be paid only from profits available for that purpose
  - there is a ceiling on how much the company can hand out as dividends
  - must be in a special account
  - it is often unwise for a company, even if substantial profits have been made, to give them all away as dividends
  - better retain some money for future investments, contingency fund/ contingency reserve *(money set aside in case it is needed urgently – Not-, Sonderfonds)* (contingency – unvorhergesehenes Ereignis, Eventualität), and for general expansion
  - usually directors decide on dividends

I. Starting a Company

- goal: set up a business:
- means: money
  - i.e.: stocks, payment of staff, advertising, building of a plant
  - capital = money a company needs to start its business

II. Raise Money

- Capital is raised by investment
  - by the shareholders
  - by loans

- company may eventually increase its capital if it has made profit.

III. Shares

1. Value

- value of shares depends on:
  - the particular contractual rights of the holder (rights attached to share)
  - the profitability of the company (how well it does, how much its assets are worth etc.)

- value of the shares reflects the rights they give to the owner

- rights are obtained either when the shares are bought from the company or if they are transferred by s.o. else (i.e. by a will, sale etc.)

- shares have a nominal value **(par value** or **face value)**
  - value written on the share
  - not necessarily what shareholders pay when they buy them
  - not the real value; shares can be issued for more than their nominal value
  - value fluctuates according to demand on the market (usu. more than par value).

2. Issue

- How can a company issue shares?
  - (to issue, the issue – Emission, Ausgabe) (to allot, the allotment – Zuteilung von Aktien); the articles of the company can authorize the directors to issue shares.

- shares can only be issued to the extent of the nominal capital of the company

- directors must not issue shares **in breach of their fiduciary duty** (for any **purpose other than raising capital**, they need **approval** of the members, i.e. to give friends/politicians a shareholding)

- **Companies Act:**
  - if new shares are issued, they must first be offered to existing shareholders in the proportion to their existing holdings (**pre-emption rights** *(Vorkaufsrechte)* are given to existing shareholders)
  - have to be offered on the same terms to existing members as to all other people
  - existing members **must be given 21 days to consider the offer**/to exercise the right to buy the shares
  - pre-emption rights can be varied (removed or altered) by articles of the company or by special resolution of the members.

- shares of a **private company** cannot be issued generally to the public
  - **offence** under the **Companies Act** to offer shares or debentures to the general public

3. Allot

- to allot shares = to give a certain number of shares to people who have applied for them *(Aktien zuteilen)*

- **the power to allot** can be given to the **directors** generally
- at any time they like or on a particular occasion
- a certain amount
- it must always be authorized
  - either at a general meeting, or in articles

  - authorization must state maximum number of shares the directors may issue and it should also state when that authorization expires (only for a fixed time, i.e. five years)

- **power to allot** can be varied by the company at a **general meeting**
- those resolutions have to be filed at the **Companies House in Cardiff** (= office which keeps details of incorporated companies *Registerbüro*)

- if directors **issue shares without authority**, they commit an **offence** and can also be sued by the present shareholders whose balance of power has been upset (tipped)

4. Payment for Shares

- Shareholders have a contract with the company that provides for payment (by the shareholder for the shares they receive)
- payment: either in cash or in some other consideration
  - in cash usually the full amount is payable immediately
  - sometimes left outstanding until the company **makes a call** for the money, i.e. if it is in financial difficulties, if it is **wound up**

- shares are usually sold for **more than their nominal value**
  - the excess is called **share premium** (shares whose price is higher than their face value; new shares whose market price is higher than their issue price *mit Aufgeld gekaufte Aktien*)
    - not part of share capital
    - has to be kept in the share premium account

- share capital has to be **maintained** during the life of the company
  - b/c it has to be given back when the company is wound up
  - it is kept in a separate account
  - it cannot be returned to the members (dividends)

- **companies' rights:**
  - companies (if authorized by their articles) may issue **redeemable preference shares**
    - preference shares which the **company may buy back** from the shareholder for cash *(rückkaufbare Vorzugsaktien)*
  - companies (if authorized by their articles) may purchase their own shares
    - sometimes useful for **awkward shareholders** – to get rid of the shareholder
      - has to be approved by special resolution

5. Classes of Shares

In most cases: All shares have same rights attached to them; but rights may also differ

- **preference shares**
  - shares (often with no voting rights) which receive their dividend before all other shares and which are repaid first (at face value) if the company is liquidated
  - shares with a better right to receive a dividend than ordinary shares (more, more regular, greater dividends)

- **voting/non-voting shares**
  - non-voting shares: shares which do not allow the shareholder to vote at company meetings *(stimmrechtslose Aktien)*

E. Loans

- **loan** = money which has been lent *Kredit, Darlehen*

- ordinary businesses generally have the implied power (often: articles even include express power)
  - to borrow for the purpose of their trade
  - to give security for loans

I. Types of Securities

- **securities:**
  - **debentures**
    - most common type
    - **debenture** = a document which creates/acknowledges it owes a debt and that indebtedness arises from a loan; does not necessarily include other securities *Schuldverschreibung, Schuldschein*

  - **charges**
    - **charge over land** or **charge over property** = mortgage or liability on a property which has been used as security for a loan *Grundschuld*
      - **fixed charge** = charge over a particular asset or property *Fixbelastung*
      - **floating charge** = charge over changing assets of a business *variable Belastung*
        - i.e. stock in a warehouse
        - a floating charge **crystallizes** on the particular stock etc.
        - companies are the only legal body allowed to give floating charges as a security
        - company could not give a fixed charge i.e. over stock
          - if a company creates a fixed charge, it guarantees not to devalue the charge, i.e. sell it *(Pons: charge over changing assets of a business)*
        - **advantage** of floating charges
          - company can deal with the charge as it wants to

    - **charges over land need to be registered at the land registry,** usually within 21 days

    - company keeps its own **register of charges** so that people who want to know about the financial status of the company can see
      - open for **public inspection**

- if company cannot pay back interest or capital, the creditor can sue and have it wound up

II. Pros and Cons of Debentures/Shares:

- **debenture** holders are not members – **no rights to vote**
- **shareholders** are members – **rights to vote**

- **debenture** interest is payable out of capital, even without the company having made profit (no profit for shareholders then) – **more secure**
- **shareholders** profit much if the company does very well – **higher dividend**

- **debenture** holders will get their money paid back according to the contract
- **shareholders** do not get the capital back unless the company is wound up

F. Insolvency

- words:
  - **companies: "insolvent"**
  - **individuals: "bankrupt"**

- insolvency:
  - not being able to pay debts *Zahlungsunfähigkeit, Insolvenz*
  - *"the company was in a state of insolvency"*

I. General Information

Usually companies stand for selling goods, **making profits**

- sometimes things go wrong – insolvency

Insolvency threatens when:

- liabilities/debts > greater than assets
- current bills > liquid assets (cash in the bank, current assets)

Development of limited companies (see above)**:**

- **to protect** the individual people inside **from personal bankruptcy**
  - any other form of business (partnership, sole trader – not corporation):
    - high risk of losing own private cash
    - bankruptcy of the business means bankruptcy of the partner, sole trader, too
    - **personally liable**

Personal liability in spite of limitation:

- usually companies are limited, people in them are protected
  - but: sometimes people (members etc.) can also face personal bankruptcy/can be become personally liable
    - i.e.:
      - they have **personally guaranteed a loan** that has been made to the company
      - directors have **traded wrongfully**
- (but generally speaking: in a company you are safer)

II. Legal Procedure of Insolvency

Four ways of legal procedure when a company gets insolvent:

- **administration order**
- **voluntary arrangement**
- **administrative receivership**
- **liquidation** (also known as: "**winding up**")

Start of **all** these administrative procedures:

- **petition** (first paper that goes to the court – usually High Court **(Chancery Division)**, but can be at the County Court (assets of the company < 120,000 Pounds))

1. Administration Order

- the type when a **court gets involved**
- **court** will grant an administration order to **save the company**

- **aims:**
  - get out the best possible value of the company
  - pay off the debts
  - keep the company going

- **means:**
  - best possible realization of all the assets
  - best way in which all the property of the company can be accounted for/sold etc. to generate the money needed (to reach the aims)

- **better way than winding up** (then company dies)

2. Voluntary Arrangement

- done with the agreement of the **company** and its **creditors**

- **aim:**
  - avoid winding up or receivership or
  - to supplement them

3. Administrative Receivership

Situation:

- s.o. has lent money to the company and has a **floating charge** ("we lend you the money on the condition that we have a charge over your stock (i.e., a security)")
- company cannot pay back

Consequences:

- floating charge **cristallizes**

- it fixes solid on the stock on that time
  - then this is sold, debts are paid

Procedure of how the lender gets his money back:

- lender appoints the administrative receiver

Tasks of the administrative receiver:

- main responsibility/function of the administrative receiver:
  - to take control of the company, to enable the lender/creditor to be paid back
    - to do this, the a.r. has a significant effect on the company
      - he can suddenly decide to sell the stock of the company
        - major impact
        - b/c of this significant effect, the law imposes various duties on the a.r. – he is restricted in what he can do

4. Liquidation ("Winding Up")

- liquidation = winding up or closing a company and selling of its assets

- **three ways** in which it is done:

  - first: **court** can order a company to be wound up (company can be wound up by a court's order)
    - usually the High Court

  - second: by the **members**
    - the members' voluntary liquidation

  - third: by the **creditors**

- **aim:**
  - collection and distribution of all the company's assets
    - to pay back the money to i.e.:
      - employees
      - government
      - shareholders
      - etc.

- liquidation is the point of time when a company seizes to exist as a commercial entity
  - cannot operate any longer

- when liquidation is over/finished: this is also an **end of the legal personality** of the company

5. Details

a) Administration Order

What its intention is:

- intended as an alternative to winding up
  - trying to save the company and get the best out for all (creditors, members etc.)

When it is used:

- company gets into financial trouble
- **but it still does not look fatal**

How it starts:

- with a petition
  - by creditors, directors, members etc.

What they have to show in this petition:

- "Company is **unable** to pay its debts or is **likely to become unable**!"
  - petitioner generally with the petition sends in a **report/analysis** of the state of the company
    - giving reasons why he believes that the company cannot pay the debts/is likely to become unable to pay its debts
- "Why can an administration order help?"
  - i.e. b/c it is more advantageous than winding up (where decisions are made quickly and often not right!)

Order is in place – what next?

- doors of the company shut (suddenly!)
  - no creditor can come back and get his loan
  - all debt collection must stop (sometimes court grants exceptions)
  - all legal proceedings (s.o. started to sue the company for his money before the administration order) must stop
  - "breathing space", kind of **"break"**, gives people **time to cool down**, think rationally etc.
- no one can apply for the company to wind up

Court has power to grant order or not to (it is up to the court):

- sometimes order is refused
  - i.e.: b/c court thinks that the financial trouble is only a **temporary problem**

Power of the administrator:

- **administrator** becomes the "manager of the company"
  - all the company business is run by him
- he is appointed by the court
  - he has to be qualified **(officially qualified – "insolvency practitioners")**

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order:

- company gets in difficulties
- I apply for winding up
- you (few hours afterwards) want an administration order
- court grants it
- petition for winding up is automatically dismissed
- company survives

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b) Voluntary Arrangements

- law seeks agreement
  - trying to be sensible
- company – creditors put their heads together and agree
- person running the company at that time (director, administrator) can make proposals (suggestions on how to go on)
  - insolvency practitioner will be appointed and act in relation to these proposals
    - usually there is a meeting between members – creditors – qualified practitioner
      - sensible debate, discussion
        - trying to get general agreement
          - simple majority (>50%) is needed (vote of the shareholders according to their proportion)
          - once they have arrived to the point when a decision can be made, they (members, creditors, practitioner) have to tell the court
            - report goes to the judge (so the court is involved!)
              - he can reject it
                - i.e.: when he thinks that it s.o. is prejudiced unfairly or it is legally not fine
                - if he agrees:
                  - the decisions/proposals will be implemented

- financial problem will be solved (hopefully)

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order:

- company gets into difficulties
- company and creditors make an agreement on how to go on
- insolvency practitioner is appointed
- insolvency practitioner acts in relation to the agreement
- meeting of members – creditors – practitioner
- decision
- decision (report) is given to court

- court rejects it
  - i.e.: when he thinks that s.o. is prejudiced unfairly or it is legally not fine
- court agrees:
  - the decisions/proposals will be implemented
- financial problem will be solved (hopefully)

c) Administrative Receivership

- person appointed: “administrative receiver”
  - qualified insolvency practitioner
  - chosen by the bank/the creditor (he can only be removed by the court)

- appointed by/on behalf of the creditor (debenture holders, persons money is owed to – usually a bank!) **to realize a security** (get cash out of the company) or by a court (very unusual)
  - debenture documents allow this way of getting money back

- administrative receiver tries to get the money by i.e. selling the asset
  - bank is also likely to have a charge over the land owned by the company

- for the duration of his employment, the administrative receiver replaces the directors
  - great power!
    - law recognizes that he can make big changes
      - powers and duties regulated in law **(Insolvency Act)**
        - he can do:
          - **powers in debenture** (rights which are listed in the debenture document itself)
          - **powers in statute/law** – to deal with the asset of the company, to take legal proceedings, to carry on the business of the company

          - **often:** administrative receiver goes to the court and gets an order to sell all the stock in order to get the money to pay the debts

- administrative receiver in law is called **“agent for the company”**
  - anything he does can **bind** the company (he can act on behalf of the company, he represents the company)
  - his appointment ends, once the company gets into winding up
  - once money is collected, creditors have to be paid in certain order

d) Liquidation

- two types of winding up:

  - **compulsory**
    - liquidation is started by petition to court

  - **voluntary**
    - is started by the members (can (rarely!) be done by the creditors)

        - "We finish, we apply for it to be wound up."

    - both have the aim to kill the company

- when is it treated as **"unable to pay its debts"**? – how can we prove that the company cannot pay its debts?
    - there is a demand left at the company's registered office (> **£** 750) and it is being neglected/ignored – company did not pay or
    - there is a court order against the company – and it is returned unsatisfied

- who can **apply for the petition**?
    - company itself
    - any creditor (most!)
    - any member (voluntary liquidation, see above)
    - department of trade and industries (very rare!)

- court can refuse to grant
    - he decides if it is sensible to wind up the company
    - what does he take into account?
        - amount of money that's owed (only a few pounds?)
        - the number of creditors that want to wind the company up (just for the sake of one or more?)

- what happens on liquidation?, how is the money distributed?
    - certain winding up order!
    - **official receiver** is appointed by the court (he is the **"liquidator"**)
        - has to be a qualified insolvency practitioner
        - what is his job?

            - power:
                - to pay the creditors in full (what they are owed)
                - to negotiate and enter into agreements with the creditors (to compromise)
                - to bring and defend legal proceedings
                - to sign documents on behalf of the company
                - to borrow money on the security of the company's assets
                - he can do anything necessary!

            - not entitled:
                - to deal with any assets which the company holds **on trust** for anyone else
                - same for anything else that does not really belong to the company (i.e.: reservation of title clauses *(Eigentumsvorbehalt)*)

            - collecting all the money and pay it to the creditors (if there is any surplus left after paying everyone: money goes to the members (shareholders))

- **certain winding up order:**
    - **First:** people with fixed charges!

    - charges which are over fixed items (i.e.: land, machinery etc.)
      - they are sold, the money goes to the creditor
        - if this is not enough they "join the cue" (müssen sich mit den anderen hinten anstellen)
        - if this is more than enough than this goes into pool for everyone else
  - **Second:** the costs, the expenses of winding up the company
    - i.e.: fee of the liquidator
  - **Third:** preferantial creditors
    - creditors who must be paid first if a company is in liquidation
      - i.e.
        - inland revenue, government (tax, income tax etc.)
        - employees (wages)
          - but only for the previous four months!
  - **Fourth:** floating charges (order: date – first registration is the first…)
  - **Fifth:** ordinary creditors (any other debts) – no order in this category, they will paid out equally according to the proportion
  - **Sixth** interests (all the people which are owed money to (everybody from above): they are entitled to get interest on it **from the date of liquidation**)
  - **Seven:** any surplus goes to the members according to their shares

G. Partnerships

- important legislation: **Partnership Act 1890**

- **Definition of a partnership in s. 1:**
  - "The relation which exists between persons carrying on a business in common with a view to profit."
  - Dictionary: an unregistered business where two or more people share the risks and profits equally
  - what it actually means:
    - group of people with common trading business goal – "make money!"

- **quite common in UK** – rather than having companies
  - i.e. doctors, accountants, lawyers (see above – are not allowed to become limited companies)

- **advantage** (over a limited company)**:**
  - main: do not have to publicly declare accounts

- **disadvantage:**
  - main: liability

- **"partnership at will"** – most common kind
  - carries on until people stop it

- **"partnership until certain time"**
  - for a specified business objective or period of time

- **how is it formed?**
  - doesn't need formal agreement

- but: for most there is one
- anybody can become a partner, even minors (< 18)
- partnership = often called **“firm”**
- maximum of 20 members (Partnership Act)
  - but: exceptions allowed **(big law firms i.e.)**
    - but usually 20 is maximum

- **how do they operate?**
  - a partnership is **not a separate legal entity** (not like company!)
    - if a partnerships is sued, it is actually the **individuals within it** who are sued – maybe under the partnership name

- **liability:**
  - **not limited**
  - **big disadvantage**
  - you are also liable for **your partner’s mistakes**
    - own house etc…
  - normally: enourmous **insurance** cover

- **authority:**
  - acts of one person on behalf of the company bind the other persons
  - as long as the person has authority to enter into agreements
    - usually all partners have same authority
    - you have to pick your partners carefully

- **how are partnerships managed?**
  - usually: decisions are taken on majority bases
    - but partnership agreement may contain another rule

- **s.24, subs. 5 of Partnership Act:**
  - partners have to take part in the management of the partnership
    - but agreement can say s.th. else

    - “**sleeping partners**” = who tend to invest but do not take active part in the management **(often in smaller family firms)** (partner who has shares in a business, but does not work in it *stiller Teilhaber)*
      - no say in the management!
      - = being an **investor**
      - but you still remain **liable**
      - but also **equal share of the profits**

- **s.21: general rules regarding relationship between the partners**
  - may be varied by agreement
  - right to be repaid their expenses
  - right to inspect the accounts of the partnership
  - differences in the partnership have to be settled by majority
    - but: s.th. that changes the nature of the ps. you need 100% (**unanimity** (*Einstimmigkeit – pronounced: “junänimiti”*), consent, agreement!)
    - partnership can be resolved and new one can be set up

- **limited companies** can become partners of a partnership

- there are certain **limitations** to majority-rule-provisions because of fiduciary duties
  - you have to **act in absolute good faith** as a partner
    - to the benefit of the partnership
      - if not: partnership can be resolved by the courts

- majority must not **discriminate** the minor partners
  - you have to first consult with them!

- **new partners:**
  - every partner has to agree **(unanimity)**

- **duty of good faith** between the partners:
  - applies in **setting up** of partnership and **operation** of the partnership
  - be extremely honest i.e. on financial situation

  - three specific elements in s. 28-30 of Partnership Act:
    - full information to every partner
    - duty to account for secret profits
      - sometimes not everyone knows what the other has done
      - i.e. if s.o. has been given an **incentive** for signing a contract then he has to give this to the company (at least inform the company)
      - **remedy** if you fail: you will be obliged to pay back the value to the partnership or hold it to the benefit of the partners (no criminal offence)
    - s.30: duty to account for profits from a competing business:
      - if you compete in the same business on your own as the partnership, then you have to give your profits to the partnership

        - i.e.:

          - s.o. was in a partnership involved in ship-broking, he also owned a ship-building yard
          - partners went to court and said: the two types of business were sufficiently linked
            - **court:** no

          - partnership: daily morning newspaper
          - one partner's business: evening newspaper (on his own)
          - **court:** yes: same customers, same nature of business, profits have to go to the partners

I. Partnership's Finances:

- most important part
- you need **assets** in every business

- **start of a partnership:**
- usually **capital investment** of the partners
  - all put in £ 10,000 or so (can put in different amounts)
  - investment is compensated by profits shared in proportion to amount of money put in
  - profit can also be retained in the business
    - can become **working capital** (normal way)

- **difference partner – lender:**
  - sometimes investor lends money without being a partner
    - does not become a partner – not liable!
    - sleeping partner or just investor?

- **general rules in Partnership Act** (may vary in agreement):
    - **share of capital** (capital asset)
      - when s.o. leaves the company, he gets increase of value of his capital etc.
      - at the end of partnership or when s.o. retires
    - **equal share of profits**
      - look in the agreement, whether proportion
    - **equal share of losses**
      - look in the agreement whether proportion (usually the same as in point above)

- **"salaried partners"**
  - in first couple of years when you are a partner
    - to check out the partner and to secure him in case of losses!
    - are not mentioned in the partnership act!
      - but decided in court: it is ok!

- profits are usually shared at the **end of the year**
- but: partners are allowed **to make drawings** on the partnership account for personal reasons (pay your own mortgage etc.)
  - will be taken off from their profit on the end of the year

- **partnership property**
  - what is partnership property?
    - all property and rights and interests that are brought into the partnership
    - acquired on account of the firm or for the purposes and
    - in the course of its business
    - property is not partnership property only b/c the firm uses it
  - partnership property is used first to pay off the creditors!
    - if there are still debts: see "how to share losses": partners!

II. Liability of Partners in a Financial Sense

- once partnership incurrs debts, obligations

- **in terms of contract:**
  - **"joint and several liability"**

    - = situation where s.o. who has a claim against a group of people can sue them separately or together as a group *gesamtschuldnerische Haftung*
    - everyone is usually liable for everyone else

- **in tort:**
    - **"severally liable"** (separate liability)
    - but if a negligent act takes place in the normal way of business of the partnership:
        - all partners are liable (individually!)
            - the partners may be sued in the partnership's name (makes things easier)

III. Authority

- three types of authorities a partner can have
    - **express actual authority**
        - express agreement among the parties
    - **implied actual authority**
        - authority being implied either from the course of dealings of the partnership or because it is a natural consequence of the express authority
    - **apparent authority**
        - if the person the partnership is dealing with is entitled to assume that the partner has authority to bind the firm; s. 5 of Partnership Act states that every partner is an agent of the firm and of his other partners for the purposes of the business; the acts of every partner acting in the **usual way of doing business**/of the type normally done by the firm binds the firm and partners
            - unless he has no authority to act in that particular matter and the person he is dealing with **knows** he does not have that authority or does not know or believe him to be a partner
        - often you have to distinguish between a **sleeping partner** or **apparent authority (case: "Mercantile Credit Company ltd. v. Garrod")**

- **court** has a number of **criteria** to decide if there is authority developed
    - five (+):
        - first: the power to buy and sell goods used in the business (+)
        - second: to hire employee
        - third: to receive payment of debts
        - fourth: to pay debts
        - fifth: engage a lawyer on behalf of the partnership

- s.8: third party is not bound by restrictions which are on the partner, unless he knows

- if you retire: your name has to get off the letter-heading *(Briefkopf)*
    - if not: you can still be liable

- new partners are not liable for what was before them
    - unless agreement says s.th. else
        - can say: you must help us pay the debts

- partnerships disputes
  - settled by majority vote of the partners in a meeting
  - but: may be stated in agreement elsewise
  - remedies in Partnership Act or agreement (minority can ask the **court** to dissolve)
    - three circumstances in which dissolution may be granted by the court:
      - first: if the conduct of the majority is prejudicial to the business
        - majority *schadet* the business (s.35)
      - second: i.e. everyone is nasty to everyone else, then court dissolves the partnership
      - third: expotion of the partner *(Partner einfach 'rausschmeißen)*
        - you cannot fire s.o. b/c you don't like him

IV. Termination of a Partnership

- an individual may cease to be a partner in 3 circumstances:
  - dissolution of the partnership:
    - by notice (very rare)
    - by agreement (set up only for a certain time/a certain goal)
    - ceases to exist automatically in case of:
      - bankruptcy
      - death of a partner
        - in case of death: under the P. A. it is dissolved automatically but it can be stated in the agreement that death is treated the same way as retirement, his estate then gets the money he would have got if he had retired
      - in case of the purpose of the partnership being illegal
    - can be dissolved by court in the cases listed above or if: one of the partners is mentally ill, one is permanently incapably of performing his duties, or if the partnership can no longer make profit
  - retirement/death: partnership continues with the remaining partners; you can retire at any state; the others cannot stop you; you remain liable for debts incurred during your time in the firm; normally there is a retirement agreement, e. g. they retain some of the partners money for five years in order to make sure there are no more debtsa charge on the partnership's assets
  - expulsion of a partner: partnership continues with the remaining partners

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- one: dissolution of partnership
- two: partner retires or dies
- three: partner is expelled

- consequence:
  - remaining assets will be split up/debts will be paid etc.
  - depending on the proportion

- debts after retirement
  - you are not liable provided you put the right notice (see above) – name has to be **off the notepaper** (if not: s. 36 – *vertrauenshaftung*)

H. Taxation

I. Bodies liable to corporation tax

Corporation tax is charged on the profits of 'companies'. A 'company' is any body corporate or unincorporated association, but not a partnership, local authority or local authority association. Health service bodies are also exempt from corporation tax.

A company is within the UK corporation tax charge if it has a **source of income within the corporation tax charge**. A source of income is within the corporation tax charge if that tax is chargeable on the income arising from it. However a non-resident company is only within the corporation tax charge if it trades in the UK through a branch or agency.

A company may come within the corporation tax charge if it:

- acquires an appropriate source of income, not previously having had one or
- becomes UK-resident while having an appropriate source of income

Conversely, a company may cease to be within the corporation tax charge if it:

- ceases to have an appropriate source of income or
- being non-resident, ceases trading in the UK through a branch or agency

II. Residence of companies

A company is resident in the UK for UK taxation purposes if:

- (with certain exceptions) it is incorporated in the UK or
- its central management and control is located in the UK

III. Taxable profits

These comprise its 'income and chargeable gains'. The latter are computed in much the same way as those of individuals, using income tax and capital gains tax principles.

Corporation tax is payable on the total profits (income plus chargeable gains) of a company for each accounting period. The tax is calculated by apportioning the profits of those periods so as to apply the tax rate for the relevant financial year.

- financial year: 1.4. – 31.3. each year

- company chooses **"accounting period"** – what is best for company=
  - can differ from financial year (but it has to be one year (12 months))

I. Insider Dealing

- commercially immoral
  - gives the insider an unfair advantage over other investors
  - insider dealing or trading involves taking financial advantage of information not available to the public

- insider dealing is prevented by various pieces of legislation:
  - Companies Act 1985
  - Criminal Justice Act 1993, Part V
  - Financial Services Act 1986, ss. 61-62A

- law is **"European driven"**
  - EC-Insider-Trading-Directive at the beginning of 1990s
    - came into force in England/Wales on 1st March 1994

I. Insider Dealing

If a person has access to **price-sensitive information** as a consequence of his position in a company, and that position is one which gives rise to **fiduciary duties** to the company, any profit which is derived from **exploitation of the information** must be paid over to the company. Directors are always in a fiduciary relationship with their company. Agents of the company will also owe fiduciary duties. Those who are trusted with confidential information would be expected to account for unauthorised profits. Employees who have access to price-sensitive information would also be liable to account to their employer for benefits which arise from resultant share dealings. It is possible that unauthorised profits from insider dealing may be treated as resulting from a breach of confidence. If an insider dealing offence is committed, it is punishable by **up to seven years in jail** and an unlimited fine.

II. The Offence

The main offence is set out in **s. 52** of the **Companies Act**:
'An individual who has [non-public price-sensitive] information as an insider [or recipient of information from an insider] [because it is from an inside source is guilty of insider dealing if he deals in securities that are price-affected securities in relation to the information [or in derivatives relating to them] [or procures someone else to do so].

III. Defences to insider dealing charges

There is a **wide defence** for dealings on the basis of inside information which qualifies as 'market information'. In addition, an insider will also be able to deal if he does so to 'facilitate' a contemplated transaction in which he is involved. The defence does not extend to allowing the offeror to buy securities of the target company once the target company has disclosed confidential information to it; the rules of the Takeover Code and the Substantial Acquisition Rules must be complied with in any event.

There is also an interesting defence where, although the information has not yet been made public, it has been disclosed to a selected group of people and they deal only with each other. The insider dealing legislation provides what is called the 'restricted circle' defence. The insider will not be guilty if he reasonably believes that the information was disclosed so widely that 'none of those taking part in the dealing would be prejudiced by not having the information'.

The insider also has a defence if he shows that he would have done what he did even if he had not had the information.