Basics of

ENGLISH COMPANY AND EMPLOYMENT LAW

by

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Vorwort

Liebe Leserinnen und Leser,

Dieses Skript soll Euch, die Ihr ohnehin schon auf Deutsch sicher genug zu lesen habt, einen schnellen Überblick über das englische Gesellschafts- und Arbeitsrecht geben. Es gibt den Stoff zusammenfassend in der Tiefe wieder, wie er in der fachspezifischen Fremdsprachenausbildung „Introduction to English Law and Legal English“ an der Fakultät für Rechtswissenschaft der Universität Bielefeld gelehrt wird.
Um den Umfang gering zu halten, beschränkt sich die Darstellung auf das ganz Wesentliche und ist damit wohl am besten zur Nachbereitung entsprechender Vorlesungen bzw. zur Vorbereitung auf FFA-Abschlußprüfungen geeignet. Einzelne Begriffe wie z.B. „debentures“ werden deshalb nicht weiter erläutert, und zum besseren Verständnis sollte man mit einigen Grundzügen des englischen Rechts vertraut sein. Die wesentlichen (Rechts-) begriffe werden jedoch definiert, was mit einem := gekennzeichnet ist.
Ich hoffe, das Skript hilft Euch und begleitet Euch ggf. zu einem erfolgreichen Englisch-Examen.

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Company Law

Companies are corporations:

corporation := a corporation is an artificial person, a legal entity, with a distinctive name, perpetual succession and a common seal.

I. Corporate personality

Corporations have corporate personality:
⇨ corporate legal existence completely separate from the human beings who created and administer the corporation = independent legal personality

⇨ Consequences:

1. Generally, there is **no personal liability of the corporation´s members!**

cf. Salomon v. A. Salomon Ltd 1897:
Salamon formed a company with 20,007 shares. Each of six members of his family held one share as his nominees; he held the rest. He sold his existing business to the company in return for the shares and debentures issued to him for £ 10,000, thereby making him a secured creditor for that sum. The company quickly went into liquidation and its unsecured creditors, whose claims could not be met in full, tried to press their claims against Salomon himself on the basis that the company was his alter ego or agent. Those claims failed: The requirements of the legislation for setting up the company had been complied with and it was immaterial that Salomon held all the shares beneficially. The company had been established as a separate legal entity and it was that, not Salomon, with which the creditors had contracted.

but: As an exception to Salomon v. Salomon**,** the courts will ***"lift the veil"*** [= establish personal liability of the members]

- to avoid clear injustice or improper conduct
- if the members fall below the statutory minimum
- if persons are found guilty of fraudulent trading
- to establish personal liability of directors wrongfully trading during impending insolvency (⇨ see also

2. Corporations have **own legal capacity:** as a legal person a company may sue and be sued, hold and dispose of land and other property. It acts through its organs (directors, shareholder meetings), whose acts are identified with acts of the company itself.

A **distinction** is made **between** *corporations sole*, e.g. Queen, bishops... in their legal capacity **and** *corporations aggregate* = a group of people (as a principle). The following corporations which we are interested in -in particular companies registered under the Companies Acts- are all corporations aggregate.

II. Types of companies and other forms of business media

1. Corporation by Royal Charta (e.g. Universities, BBC...) are created at royal pleasure.

2. Corporation by Statute (e.g. nationalized boards, county councils) are created by Act of Parliament.

3. Corporations registered under the Companies Acts (1985/89):

They come into existence by registration under the Companies Acts (details ⇨ see III.). The following are the various types of registered company. Companies under the Companies Acts are formed to carry on business. Apart from these, a business may be set up as a sole trader (self-employed person carrying on business or trade) or as a partnership (⇨ see 4.). These are not, strictly speaking, 'companies' but other forms of business media.

a) Companies limited by shares:

Each member in a company limited by shares is liable to the amount unpaid on his shares only.

aa) Private companies limited by shares (Ltd)

The vast majority of trading companies are private companies limited by shares. There are over one million such companies registered at Companies House. Such a company must have the word 'Limited' or 'Ltd' at the end of its name.

Many private companies are very small. There is **no minimum capital requirement** in respect of a private limited company and it is commonly less than £ 100. To reduce their financial risk, most persons/firms/companies dealing with the company obtain where possible parental guarantees (from a holding company) or personal guarantees from the directors.

Approximately 90% of private companies are small or medium sized companies which means that they can file modified (i.e. simplified) accounts at Companies House, rather than full accounts.

A private company **may not offer shares or debentures to the public,** CA 1985, sec 81. Only a public company (PLC) may do so.

The **minimum number of shareholders** in a Ltd **is 1,** the **minimum number of directors** is **1,** too**.**

bb) Public Limited Companies (PLC)

A small proportion of companies are public companies. Such a company must have a **name ending in the words 'public limited company' or 'PLC'**. This type of company is appropriate for larger businesses where **shares are intended to be available to the general public**. Most public companies are not set up as such but are converted from private ones.

A public company **must have and maintain a minimum authorised share capital of £ 50,000**, of which at least one-quarter plus any share premium must be paid up before the company starts trading: CA 1985, sec11, sec118, sec101.

This is **the only type of company which may raise capital by offering securities (shares or debentures) to the public**. This is usually done by obtaining a listing on the Stock Exchange.

Public companies are subject to more stringent legal requirements than private companies on a wide range of matters, but especially in relation to share capital, directors and accounts.

The **minimum number of shareholders** in a plc **is 2,** the **min.number of directors is 2,** too**.**

b) Companies Limited by Guarantee

A company limited by guarantee is private company, very like a private company limited by shares, but it does not have a share capital.

It is widely used for charities, clubs, community enterprises and some co-operatives. The vast majority of such companies are non-profit distributing, but they do not have to be.

A company limited by guarantee is registered at Companies House, has a set of memorandum and articles, directors, etc and is subject to the requirements of the Companies Acts (except those relating to shares). There are no shares and so no shareholders, but such a company does have members, who meet and control the company through general meetings. The directors are often called a management committee or council of management, etc but in law are still company directors and subject to all the rules that affect other directors.

A company limited by guarantee **confers limited liability** as effectively as a company limited by shares. **The memorandum states that the members of the company guarantee to pay its debts, but only up to a fixed amount each**. Usually that sum is £1, and no member can be liable for more than that amount if the company fails.

⇨ Companies limited by guarantee are ***now*** (acc.to Companies Act 1985) classed as public or private limited company, depending on if they have a share capital or not.

c) Unlimited companies

Many people refer to a sole trader's business or a partnership as an unlimited company, but such businesses are **not** in fact companies. It is possible to register at Companies House a private company which is unlimited, that is the members accept complete liability for the company's debts. If the company needs money to pay its debts a call can be made on each of the shareholders to contribute a fixed amount on each share held by them.

An unlimited company has all the other features of a private company limited by shares. It is registered at Companies House, has members, directors, memorandum and articles, etc. Its one major advantage is that it is not required to register annual accounts at Companies House.

4. Other forms of business media (NOT companies!): Partnership, sole-trader

a) Partnership

partnership := relationship which subsists between persons carrying on business in common with a view of profit (= deutsche OHG)

aa) Formation

A partnership may come into existence without formal agreement, whereby partnership has to be the common intention of all partners “in spe” (if there is no clear expression of such intention, there is a rebuttable legal presumption that people acting together as if they were partners are in fact partners), though it will usually be constituted by the conclusion of formal “articles of partnership”.

According to Companies Act 1985 the max. number of members in trading partnership- firms is 20, but there are exceptions for "professional", e.g. solicitors´, firms.

bb) No legal person!

Unlike a company registered under the Companies Acts, a partnership has no corporate personality and is not recognised in law as an independent legal personality.

Important consequences:

(1) Internal management, decisions

⇨ In the absence of contrary agreement, *all* partners are entitled to share in **managing** the firm (whereas in a company generally only the directors do the day-to-day-business). Disagreements in the ordinary course of partnership business are decided by a majority of the partners (generally regardless of their actual share in the business). Disagreements of extraordinary matters and amendments to the partnership agreement require the consent of all partners.

(2) External working, agency

⇨ As a general rule, all partners are taken to be each other´s agents in respect of all acts done in or about the partnership business - a partner is presumed in law to have **authority** to enter into contracts on behalf of the firm in the course of its business.

⇨ Generally, any act done in furtherance of the business by one partner binds the rest; but where a person knows about certain restrictions of one partner´s power to bind the firm, the firm will not be bound by agreements beyond these powers.

(3) For convenience *the partners* may **sue** and be sued *in the name of* the firm.

cc) False Representation

Wherever a man holds himself out as a partner by acting as if he were one, although he is not – for example by permitting his name appear upon the firm´s note-paper- he may generally be held liable to anyone who gives the firm credit in reliance upon his false representation, just as if he really were a partner.

dd) Mutual obligations

The law requires all partners to observe the utmost good faith;

1890 Partnership Act:

- Profits and losses are shared equally.
- Partners are not entitled to salaries.
- Loans made to the partnership by partners receive 5% interest.
- There is no interest awarded on the capital invested by the partners.

The act does not provide a solution to the numerous disputes and problems that can arise and that is why most partnerships enter into a written contractual deed of partnership agreement.

ee) limited partnership (LLP) = deutsche KG => is a special type of partnership:

The **liability** of limited partners in a LLP is limited to the amount of their capital investment, whereas general partners (min. 1!) are liable for the debts to the full extent of their private estate. A LLP must be registered under the Limited Partnerships Act 1907.

ff) Termination

Unlike a company, which is recognised in law as a legal person independent from its members, the partnership must generally be dissolved on the death, resignation and/or bankruptcy of a partner.

gg) Advantages/Disadvantages (Alternatives: Ltd/sole trader/company)

- Easy and cheap to set up
- The financial base is greater than that of a sole trader
- Costs are shared
- Increased business prospects with greater experience (expertise)
- Shared responsibility for running the business, therefore partners have more time to devote to their particular area of expertise
- Division of labour allows for specialisation
- No need for external audit. The only finances that have to be disclosed are those related to income tax and VAT (where applicable)
- Risks and losses are shared => creditworthness
- On a daily basis there is continuity as the partners can cover for each other when necessary
- More people in the business provides a broader base from which to generate profitable ideas
- Not having to publish full financial details means that there is a measure of privacy for the partners
- BUT: A partnership, unlike a limited company, cannot be taken over by another partnership
- BUT: you are not in charge and it is more difficult to set up a partnership than just beginning to trade as a sole trader

b) Sole-trader = (*dt.* Einzel- “Kaufmann“ unter seiner Firma)

III. Incorporation

Registration of a company is effected by depositing the **Memorandum of Association** and the **Articles of Association** with the Registrar of Companies, who issues a **s.117 certificate** which allows the "now-born" company to trade and borrow.

1. Memorandum of Association
This document is in effect the charter of the company defining its constitution and the scope of its powers. It governs the **external working** of a company. Compulsory contents:

a) Name + ltd/plc
b) location of registered office
c) objects of the company
d) that liability is limited
e) amount and division of share capital

2. Articles of Association
= regulations governing the **internal management** of the company, they define the duties of directors and the mode or form in which the business will be carried on.
If no Articles are deposited with the Registrar, model sets of Articles (described in the Companies Act, Table A.) will apply.

contents (e.g.): procedure for appointment of directors, procedure for shareholder meetings, rights and liabilities attached to shares.

IV. Share structure

1. Preference shares := holders are entitled to a dividend at a fixed rate out of profits in priority to holders of any of the company´s other shares (=> comparable with debentures)

2. Ordinary Shares := the dividend paid is not fixed but fluctuates with the profits of the company

3. Deferred shares := shares which may receive a higher dividend after the payment of preference and ordinary share dividends

V. Debentures and charges

1. A **debenture**-holder may sue for an injunction to restrain members from changing the articles (Foss v.Harbottle applies to shareholders only)

2. Charge = is a "secured debuenture" which must be registered. There are 2 types of charges:

a) fixed charge over certain of the company´s property for the amount of the loan
– but: the company´s freedom to dispose of this part of its property is excluded

b) floating :
- charge floats over the whole or a part of the company´s assets, which may fluctuate as disposals and acquisitions are made free of charge
and
- crystallises on the occurence of a specified event (automatically on a winding-up), in which case it becomes a fixed charge over assets actually in the company´s possession

VI. Ultra vires-rule

At *common law* a company is limited to acting within the objects set out in its memorandum of association. Anything purported to be done by a company which is beyond those objects would be 'ultra vires' and **void at common law**, and the **directors could be personally liable** for such acts.

The old common law rule is now subject to *CA 1985, sec35*: **The validity of an act by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.**

In favour of a person dealing with a company in good faith it is provided that the power of the board of directors to bind the company is deemed to be free of any limitation under the company´s constitution (CA 1985, s.35A(1)-(3).

It is still possible for the directors of a company to be liable for ultra vires acts. Now the CA 1989 distinguishes between the capacity of the company on the one hand and the power of the directors to bind it on the other.

In practice, the problem can be avoided by specifying in the memorandum that the company is a 'general commercial company' which, by CA 1985, sec3A, can carry on any trade or business and has power to do all such things as are incidental or conducive thereto. Nearly all modern trading companies are set up with general commercial company objects, and many older companies have now had their objects changed to this provision.

VII. Promoters

:= one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose

- liability before incorporation:
- **company:** (-), not yet in existence
- **promoters:** (+), to third parties for misrepresentation or under agency principles in partnership law (cf. german Vorgründungsgesellschaft); promoter is in principle personally liable on pre-incorporation contracts

VIII. Directors

1. Tasks
=> responsible for the general control and management of the company´s affairs ("day-to-day-business")

2. Duties => owed to the company
- **fiduciary duty** not to do, or omit to do, anything which may give rise to a conflict between its interests and their own

- **must refrain from** using any of the company´s money or other property, from using any information, and from taking advantage of any opportunity acquired or arising in the course of their employment **for the purpose of personal gain** => if they do so gain, the gain must be refunded to the company (general rule)

- standard of care: directors must **use such care** in the performance of their duties as might reasonably be expected of a person of their own particular knowledge and experience

=> *effects of breach:*
- director may be liable to summary dismissal
- director is liable to account for benefits received, may have to pay compensation or damages
- company may be able to rescind contracts entered into owing to his breach of duty
(unless the GM validly ratifies the breach)

IX. Insider Dealing

1. Common Law:
At common law, directors have **no general duty to the shareholders to disclose** price-sensitive information to them
but: such duty arises in special circumstances (e.g. options to buy member´s shares granted prior to a merger / in a small family company)

2. Criminal Justice Act 1993:

If an individual knowingly has information which is
- "insider information" (i.e. non-public, specific, price-sensitive information about partiular securities) and he has that information
- as an insider (i.e. knowingly, being a director, shareholder, employee...),

then (according to the Criminal Justice Act 1993) he commits an offence if

- he deals price-affected securities or
- encourages another person to deal in such securities or
- discloses the information unjustifiable to another person

=> because insider dealing is therefore a criminal offence, possible contracts may be held unenforceable at common law

X. Shareholder meetings and resolutions

1. Meetings

a) Annual General Meeting (AGM): Compulsory held once a year. Unless otherwise agreed in the articles, the company´s affairs are reviewed and the directors (re-) elected at an AGM

b) Extraordinary General Meetings *may* be held by the company if necessary

2. Resolutions

Depending on the type of meeting and the matter dealt with, there may be various resolutions:

a) ordinary: AGM: 50 % majority required for decisions; 21 days notice period before the meeting required
b) extraordinary: 75 % majority; 14 days notice period (change of name...)
c) special: 75 % majority; 21 days notice period
d) elective: unanimous (e.g.: dispense with AGM)

3. Proceedings, majority rule

M**ajority rule** => the members decide by majority; special requirements => see 2.)

=> **cf. Foss v. Harbottle 1843 (FvH):**
The directors were alleged to have misapplied company property. Two shareholders wished to bring an action to make them account to the company. But they could not: The company, as the victim of the alleged misconduct, was the proper person to decide wether to sue, and the majority of its shareholders decided to refrain from legal action.

Personal action may only be taken by the members if their personal rights are infringed (e.g. right to vote); derivative action is possible (actio pro socii – "Prozeßstandschaft") if the majority of shareholders is de facto in favour of such action.

but exceptions to the majority rule in Edwards v. Halliwell 1950, in particular:

a) FvH does not apply to **ultra vires acts -** which by their nature could not be ratified by the majority
b) minority shareholders can complain of a **fraud on the minority** :
(1) a shareholder may be injuncted against voting manifestly contrary to the interests of the company – minority shareholders can restrain the majority from depriving the company
(2) the general meeting cannot generally relieve directors of liability for impending or past breaches of duty
(3) the majority can be restrained from altering the articles to buy out the minority where they are merely acting to further their own capricious interests

XI. Member´s rights

A company´s members

1. may vote at meetings
2. are entitled to dividends
3. are entitled to distributions (which may only be made out of profits)
4. = to share surplus capital
5. have pre-emption rights on the issue of new shares
6. have the right to **bring proceedings to restrain** the doing of an act which falls outside the company´s memorandum or the powers of the directors

XII. Termination, winding-up

The existence of a company may be ended either by

1. The Registrar striking the name of the company off the register after satisfying himself that it is defunct.

2. The winding up (liquidation) of the company which may be voluntary or compulsory:

a) voluntary – when the members of the company resolve to do so

b) compulsory

– *following* an order of a court on a petition presented by a member, a creditor or the Department of Trade (*dt*. "Antragsberechtigte")

- *grounds*: e.g.: inability to pay its debts; failure to commence business within a year; failure to maintain the minimum number of members; that it is just and equitable to wind up (*dt*. "Eröffnungsgründe").

c) procedure and effect of winding up

- upon the presentation of a successful petition the company´s assets fall into the control and custody of an officer called "official receiver", who becomes provisional liquidator
until
- the permanent liquidator is appointed by the court for the sake of **control and custody of the company.**

The permanent liquidator´s duties are:
- to do everything which may be necessary for winding up the company´s affairs, including the realisation and the distribution of its assets
- as far as possible to satisfy the company´s liabilities and divide any surplus assets among the shareholders:

Order of creditors in the case of a winding up:
1. fixed charges
2. costs/fees

3. preferential creditors/taxes
4. floating charges => "first come, first get"
5. ordinary creditors => acc. to the proportion of their owe
... shareholders get anything that is left

⇨ when the entire affairs of the company have thus been settled the court (normally HC Chancery Division) will make an order for its **dissolution** => "death" of the company

3. Alternatives to liquidation: (by petition to the HC Chancery Division)

a) Administration order: is a court order => an *administrator* comes in charge of the company, with a view of saving it – no legal proceedings can start, no debts can be claimed ("relax"), unless the proceedings come to an end

b) voluntary arrangement between the creditors and the company members

c) Administrative receivership: an *administrative receiver* will be appointed by **1** creditor to control the company in order to get the sum (esp. this specific creditor´s money) back

XIII. Employment Law

1. Employer- employee relationship

Definition in the Employment Protection Act 1978, s. 149:

contract of employment := contract *of* service or apprenticeship

[<=> contract *for* services]:

To assess if there is a contract of services or apprenticeship, the "**control test**" is applied – the employer- employee- relationship is settled by looking at

- employee´s integration in the business
- multiple test (does the person also work for several other persons?)
- entrepeneurial test (who takes the risk?)

2. Mutual (implied) obligations

a) Employer:
- pay for work + expenses
- safe + healthy working environment
- maintain mutual trust and confidence

b) Employee:
- work
- take reasonable care
- maintain mutual trust and confidence

c) Restraint-of-trade clauses are generally void, but employers are entitled to protect a reasonable interest by imposing them

3. Maternity Leave

There is a general right of maternity leave of 14 weeks and to paid time off for antenatal care.

4. Termination of Employment

The employer is required to give notice to terminate the employment, provided that the employee has been continuously employed for 4 weeks or more.

a) employer: Notice period:
employment < 2yrs = 1 week
employment > 2yrs < 12 yrs = 1 week for each year of employment
employment > 12 yrs = 12 weeks

b) employee: not less than 1 week´s notice

c) No notice required for termination because of a reason which would justify termination at common law, e.g. such conduct as destroys the basis of the contract (fundamental breach)
=> statutory dismissal allowed

There is also no notice required where a *payment in lieu : = payment instead of notice* has been agreed upon.

5. Dismissal and remedies

a) Wrongful dismissal (common law => ordinary courts):
=> "breach of employment contract", e.g. isufficient notice given

REMEDIES:
- Specific Performance
- Damages

b) Unfair Dismissal (statutory; => Industrial Tribunal, Employment Appeal Tribunal)

Unfairness := for an inadmissible reason or by use of an unfair procedure (e.g. without hearing, warnings...):

Fair reasons: reasons related to
- capability of employee
- his qualifications
- his conduct
- redundancy (see below)
- work would contravene an enactment
- any other substantial reason

REMEDIES (only available for people <65 and cont.employed for 2 yrs; claims must be made within 3 mths):

- Reinstatement => return to the old job (identical terms)
- Reengagement => return to a similar job with the employer (different terms)
- Compensation

c) Redundancy

redundancy := closure (temporary/permanent) of a business as a whole or closure of a particular workplace where the employee was employed or a reduction of the size of the workforce

- is only *a reason for dismissal*, but treated separately because the employer has to take certain steps to make sure that the redundancy is carried out *fairly*:

=> Employer´s responsibilities:
a) Planning = organising the dismissal, noticing
b) Consulting the Department of Trade + Industry, unions, each employee concerned
c) accounting the selection procedure
d) offer other work if possible

REMEDIES:

a) if fairly: Redundancy Payment (if employed >2 yrs and aged < 65; claim must be made within 6 mths)

b) if unfairly:
- claim for wrongful dismissal

- claim for unfair dismissal
- redundancy payment

d) Constructive dismissal

constructive dismissal := where the employee leaves his job due to the employer's behaviour

(e.g., the employer has made the employee's life very difficult and the employee feels that they cannot remain in their job. When this happens the employee's resignation is treated as an actual dismissal by the employer, so the employee can claim Unfair Dismissal. The employer's actions must have amounted to a *fundamental breach* of contract.)

An employee can resign over one serious incident or due to the build up of a number of incidents. However, the employee must resign *soon* after the incident in order to be able to rely upon it. Generally the actions of the employer must be a serious breach of contract.

Constructive Dismissal & Unfair Dismissal:
An employee being constructively dismissed only proves that they were dismissed, it does not automatically prove that the dismissal was unfair. The employee has to go on and prove that the dismissal was also unfair.

REMEDY: claim for unfair dismissal

6. Discrimination
There is no minimum service requirement to bring a claim based on discrimination. A claim for discrimination can be made regardless of whether the complainant is an employee (e.g. interview).

REMEDIES:

a) Compensation, the respondent can be ordered to pay compensation, including interest. This does not have any limit stated by the law and so can be quite large. It can include damages for the hurt feelings of the applicant and the loss of the chance of the job.

b) The Tribunal can also recommend that the employer takes action to correct the situation or limit the damage done to the applicant.