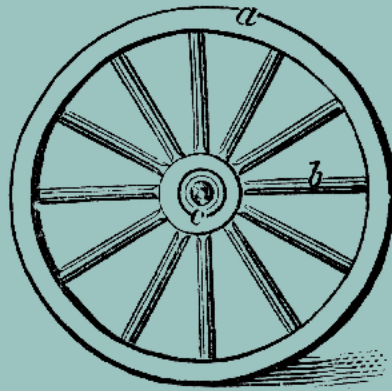
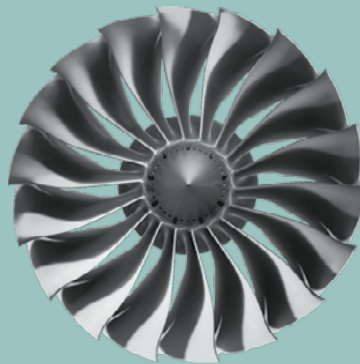
ICAEW MARKET FOUNDATIONS





Evolution of British business forms: a historical perspective

Alexander Fallis

Preface

This paper has been commissioned by ICAEW as background for its thought leadership paper *Future enterprise: assessing forms of business.*

In this latest paper we explore how business organisational structures have evolved in a somewhat haphazard fashion to meet the needs and character of society over the ages.

For instance, trusts developed in medieval times to protect the interests of absent landowners during the crusades and joint stock companies evolved to provide capital for expensive and risky voyages in the age of exploration.

Changes in society's power structures have also driven development of forms. The paper notes how power and wealth passed from the church, to Crown and aristocracy, to merchants, to industrialists and, ultimately, to the population at large and how this was reflected in certain forms of business, from monasteries to multinational corporations.

While forms of business have changed over the ages, many of the underlying concerns for government and for enterprise endure.

For instance, in 1776, decades before the advent of the modern limited liability company, Adam Smith identified concerns arising where management is separated from ownership. Much current debate about executive pay, shareholder rights and corporate governance stems from this. The concerns may apply similarly to other forms of business with diffuse ownership such as large mutual societies or the state.

The role of the state is itself a matter of general ongoing interest in relation to forms of business. It may no longer grant extensive monopolies to private enterprises like the East India Company but it still licenses certain activities and, through its exclusive power to legislate, may create conditions which are more, or less, conducive to private enterprise. The history of forms of business and their regulation is punctuated with investment bubbles and banking failures, which continue to haunt us today.

Accounting for entities and their transactions has evolved alongside forms of business, from the early use of double-entry bookkeeping to detailed financial statements required of today's large companies. The formal accounting profession emerged with the development of limited liability companies and related insolvency and audit requirements, and ICAEW was established as a Royal Charter company in 1880. While this paper does not focus on accounting matters, you may find it useful to read this brief timeline outlining the development of the accountancy profession in the UK.

It is striking that no radically new forms of business have evolved in Britain since the 19th century, with newer forms such as limited liability partnerships being, in effect, variants of existing forms. Yet economic and social progress since then has been immense. We explore possible alternatives in our paper on future enterprise.

Contents

1. Overview of principles behind business forms....2
2. Key principles of English law....3
3. Early business organisations....4
4. Development of main business forms before the Bubble Act (1720)....7
5. The South Sea Company and the Bubble Act....11
6. Industrial Revolution....12
7. Emergence of the modern company form....15
8. Further development of the company form....21
9. Further development of partnership forms....24
10. Other contemporary business forms....27
11. Conclusion....31

Bibliography....32

About the author....34

1. Overview of principles behind business forms

The evolution of business forms is a story of individuals choosing to act together and seeking structures that best allow them to thrive.

The 'theory of the firm' is a label applied to multiple theories regarding the questions of why people form firms and structure them the way they do. One of these theories suggests that individuals form firms when the transaction costs associated with doing business are less when acting in concert than they are when trading individually. Other theories suggest that individuals act together to achieve more efficient production or to maximise knowledge. The history of English, and later British, business forms shows that all three factors have influenced their evolution. Another reason for doing business in firms is the ability to share risks, thereby minimising individual exposure. It also may allow those involved to more easily protect assets used in production from reach by an individual's creditors, benefiting both the individual and reducing costs of capital to the firm using those assets.

Doing business in organisations presents potential problems for owners, however. The further ownership of assets is separated from control of those assets, the greater the risk that the party in control will misappropriate them. Adam Smith identified this problem in *The Wealth of Nations* and assumed it would always result in inefficiencies for owners:

> 'The directors of such companies however being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance which the partners in private co-partnerships frequently watch over their own … Negligence and profusion, therefore, must always prevail, more or less; in the management of the affairs of such a company.'

Smith was criticising the joint stock company but the **agency problem** he identifies, and managing its associated risks and costs, have guided both the choice of business forms and attempts to regulate them ever since.

The nature of business, society and politics has changed tremendously since the foundation of the English kingdom. The institutions and economies that dominated medieval society differ greatly from those that govern contemporary life, but several themes in Britain's economic history may have guided the evolution of business organisations and the forms they employ. Secular authority (the state), and its attempt to profit from and regulate commerce, has shaped the choices made by traders forming firms. Over the centuries these forms have sprung up, adapted or simply fallen into disuse in response to major economic shifts, including the transition to a secular economy, the mercantile era and the Industrial Revolution. Each of these shifts changed the way many businesses interacted within society, and as the British nation state expanded in global influence, British business grew in scale. Increasing scale brought new capital demands, forcing further developments in business forms.

2. *Key principles of English law*

This paper outlines forms of business widely used in Britain as a whole, but it is important to note that diverse sources of law apply in Britain. In particular, even before devolution, Scotland had a distinct legal regime and there are differences between some forms of business subject to Scottish law and those subject to English law. Some statutes apply to the UK and so cover Northern Ireland as well as Britain. In the interests of brevity, we focus on the position under English law.

MEDIEVAL PERIOD

Before the reign of Henry II the sources of law in England were myriad. In the 9th century Alfred the Great compiled a body of laws of various Anglo-Saxon kingdoms, combining them with Judeo-Christian principles and Germanic customs. Canon law of the Roman Catholic Church was another source of authority and affected many aspects of daily life during a time when spiritual and secular domains overlapped. The most important body of law to medieval merchants was the Law Merchant, a system of commercial customs and rules enforced among traders across Europe. The Law Merchant favoured property rights and best market practices. A unique aspect of the Law Merchant was that it was administered in special courts that allowed parties to settle disputes quickly and without having to wait for the general courts to process their claims. In England these tribunals often took the form of piepowder courts that met during fairs and markets.

COMMON LAW

Henry II, seeking to stabilise England following the civil wars of Stephen and Matilda, established a centralised royal court with judges dispatched to try disputes across the realm. The 'common law' established by these courts eliminated conflicting rulings made by courts under the previous, shire-based system and required judges to give precedence to previously decided cases. The principle of 'stare decisis' meant that a judge was bound to follow a prior decision if the facts in his case were similar to those of the precedent case. Henry sought the dominance of his common law over church law in secular matters and to elevate local traditions and customs to legal status. The Law Merchant was eventually incorporated into the common law, making it the primary source of business law for several centuries. The Courts of Equity, established to allow remedies that the sometimes complex common law system did not, operated separately from common law courts until 1873. Equitable principles still exist today and are the underlying source of trust law.

STATUTE LAW

Statute law is a system of codified law created by a legislature. The English Parliament enacted statutes beginning in the 13th century but it was events in the 17th century – the execution of Charles I, the restoration and the Glorious Revolution – that established parliament as the supreme source of authority in the kingdom. Parliament has gradually become the primary source of business law. Before the Victorian era common law applied to business forms, with statutes governing only specific aspects such as chartered companies and bankruptcy. Following the passage of the Companies Act of 1862 statutes have been enacted governing company, partnership and other forms as a whole.

3. Early business organisations

The roots of the business form in Europe can be traced back to ancient Roman partnerships called societas, but with the beginning of the second millennium came the themes that still guide the discussion of the nature and role of business forms, such as the influence of political power over business and the concept of an entity having a separate identity from its members. It is also where we see the development of practices that appear in English business forms in later centuries.

In the years following the Norman Conquest there were two primary sources of power in England, as well as in most of Europe: the church and the nobility. The clash between these two institutions for political and economic power would be a constant theme in the next 500 years of English history and impacted the development of early business forms. At first sight monastic orders, which were at their height during this period, may not seem to meet the modern definition of a business entity. They were not formed for profit making and did not have shareholders in the traditional sense. However, these orders represented the largest 'businesses' as they existed in medieval England and had structures and practices familiar to the modern observer.

Monasteries held large tracts of land, typically controlling their own property while paying annual fees to the local bishop. The largest orders, the Benedictines and the Cistercians, adopted forms that laid the foundation for subsequent generations. The Benedictines were a hierarchal order, with the abbot or abbess of each house operating independently of other houses, and having full authority over the monks or nuns who resided in them. The abbot assigned production responsibilities and reviewed reports and accounts that were prepared by the various operating units within the abbey. The Cistercians could be described in today's terms as some of the earliest franchisers. Unlike the Benedictines, who acquired estates in exchange for offering prayers for their patrons, the Cistercians did not rely on donated land. Instead they colonised forests and moors, converting them to productive use. The order expanded by adapting a pyramid structure, whereby each monastery would found subsidiaries. The daughter house would rely on the father house for support and eventually form its own subsidiaries. This structure encouraged innovation and entrepreneurship.

Meanwhile another religious order, the Knights Templar, developed into what has been called the world's first multinational corporation. Though better known for their military exploits during the crusades, a large majority of members were employed in the Knights' vast financial services organisation. Crusading noblemen and pilgrims would deposit assets with the Knights before travelling and were issued letters of credit representing the value of their deposits. These letters could be exchanged for cash during their travels, making the journeys safer and more convenient. This network covered all of Christendom and its earnings were used to acquire large estates, fleets of ships and even the island of Cyprus. Though not a company in the modern sense, the Knights Templar was a corporate entity with perpetual existence and identity separate from its members. This concept of a religious society holding a corporate form would play a role in the early development of business law.

TRUSTS

The Crusade period saw the development of a form that would play a large role in business over the centuries. When leaving for crusade, land owners would trust their estates to friends or other family members. The custodians were not, however, always willing to return the land upon the crusader's return. Common law courts had no redress for the owners, who took their cases directly to the king.

The Crown appointed chancellors to hear cases in equity that otherwise fell outside the scope of common law. These courts created the notion of trust property. A property owner would give legal title to that property to a fiduciary trustee who held it for one or more beneficiaries. This clarification of rights among parties served an important precedent in the evolution of business.

SECULAR ECONOMY AND GUILDS

The scale of business of the religious orders was to a certain extent due to the scope of church authority during the Middle Ages. Commoners answered to their lords and kings, and all answered to the Pope who had the authority to circumvent secular authority (Pope Innocent II gave the Knights Templar immunity from local laws). Religious institutions provided the templates and managerial know-how for developing secular businesses and organisations in the first centuries of the second millennium, but as religious worship moved into the public realm (as opposed to taking place in the monasteries, where access was restricted), the influence of the orders declined. Religious institutions found themselves at odds with the increasing political power of the nobility.

The downfall of the Knights Templar is a well-documented example of the secular authorities expropriating church-controlled wealth, while in England the Statutes of Mortmain, enacted in 1279 and 1290, represented an early legislative attempt at curtailing church power and regulating commerce. Continuing a Norman trend toward separation of church and state authority, the statutes sought to prevent the transfer of estates to a corporate body – the church – without the monarch's permission. The state's concern lay with the fact that feudal fees on land were levied upon death of the owner and transfer to an heir. Since a corporate body never died, these taxes were never collected. The statutes attempted to both limit land holdings by the church and prohibit the use of corporate forms to avoid tax. They also acknowledged a unique aspect of the corporate form, as represented by the church: it exists in perpetuity, separate from any individual member of the entity. This concept of separate legal personality would become a central distinguishing feature among differing business forms.

As the central role of the church in everyday life waned, secular trade grew through the guilds. The guilds had their origins in religious societies and grew into consortia of craftsmen and professionals. Unlike religious orders and later developing business forms, the guilds were not legal entities. Instead they operated as associations of individual traders, working under rigorous, self-imposed regimes and acting with monopoly power granted by the local nobleman. They enabled traders to acquire knowledge of production and profit from their skill. Nonetheless the guilds represent an important stage in the evolution of business forms in England. The guilds were organised along the lines of specific crafts or trades and operated under letters patent issued by an earl. These letters gave the guild exclusive power to conduct specific trade within the earl's jurisdiction (letters patent later served as the basis for intellectual property law). Each guild tightly controlled trade within its locality by establishing minimum standards for practitioners of the guild's craft, which served to restrict entry into crafts and thereby carefully guarded knowledge of production methods. The standards required anyone entering a craft to first serve as an apprentice where he was taught only basic skills at first, until master craftsmen decided the apprentice could be trusted not to reveal the guild's production secrets.

A successful apprentice would graduate to craftsman status working for a master and, after he had fully learned the trade, become a journeyman. He would be accepted as a master craftsman only after completing a 'master piece' and making a donation to the guild. In this way each craftsman had to not only prove his abilities but buy his way into the highest levels of his profession. An example of the strength of the guilds lay in Chester where the earl granted them exclusive licence for all retail trade.

The guilds became so central to town life that they eventually acted as a local government. Chester guilds also established early forms of what would later be called mutual benefit societies – institutions for the social welfare of guild members and their families. These forms were also found in London, where the Corporation of London, officially chartered by William the Conqueror in 1075, controlled all manner of life within the City's wall – from government to schooling to commerce.

The Corporation of London continues these roles today and is one of the few local authorities in the world where traders, who outnumber actual residents within the city limit, directly vote in municipal elections. Also existing today are the worshipful, or livery, companies. Initially formed as guild-like organisations in the Middle Ages, the livery companies came to act as both commercial regulators and mutual benefit societies for their members.

The history of the Corporation of London bears noting because it represents an early example of the occasionally blurred lines between commerce and politics. While landed interests would continue to control parliament and the English political process until the Industrial Revolution, from an early stage governing the City was essentially done by the traders who operated there. In many ways left to its own devices, the City became the hub of British commerce and eventually a global banking and financial centre.

The guilds successfully controlled commerce for several centuries and in many ways were a positive influence on the development of business and industry, and they created a sort of 'social capital' among their members centred on knowledge management. Best practices and business norms were shared among members, as the guilds managed information about skills and customs. They relied on a set of mutual sanctions for members who operated outside the norms. Guilds provided a structure for traders to act collectively within markets and politics. The negative economic impact of this structure, however, was that it harmed those outside the guilds while benefiting those within them, and eventually the guilds' tight control of markets hastened their decline. Monopolies are potentially inefficient, and the guild system came to stifle innovation and skill development rather than foster it. By their very nature guilds impeded free trade and business development. They became outlets for rent-seeking behaviour where, as Adam Smith later pointed out, guilds paid the nobility for the privilege of artificially maintaining prices while powerful guild members redirected resources towards themselves.

These inefficiencies led to territorial squabbles by guild members and ultimately a state where members simply ignored rules. This was a cause of the downfall of the Chester guilds. The guilds could no longer police themselves and lost political power to the developing nation state and centralised authority of the monarch. Meanwhile, competitors outside the guild system began to flourish. Independent traders from outside a guild's jurisdiction had often been allowed to ply their wares in guild towns on certain market days. Free from guild restrictions, rural craftsmen developed more innovative techniques in 'cottage industries', precursors of the factory system. Industry required knowledge to be freely and easily transferable, something the guild system prohibited. The increased scale of manufacturing during the early industrial period ultimately caused the end of the guilds' monopolies.

As noted above, guilds and similar organisations continue to exist in modern times serving some of the basic functions they did during the Middle Ages. They allow skilled craftsmen and certain professionals a channel for maintaining standards. Though the guilds were not corporate bodies and did not have a legal personality, they did have a sort of 'market personality' with respect to their crafts. This identity was separate from the craftsmen who made up the guild. They also demonstrated the benefits of cooperative action and formalised networks that would be prevalent as corporate business forms began to develop.

The organisations that largely dominated trade in medieval England declined in stature during the following few centuries as other forms developed. However, this period in economic history illustrates themes that dominate contemporary discussions of the role of business. Chief among these is the friction between the state and commerce and the resulting issue of public versus private interests. The centre of political authority shifted greatly during this period from the church, to the nobles and, as the renaissance progressed, to the English throne. The state possessed monopoly power to regulate business and guarded it jealousy.

4. Development of main business forms before the Bubble Act (1720)

PARTNERSHIPS

Structures resembling modern business forms began to flourish in England toward the end of the Middle Ages. One of the oldest falls under the category of an unincorporated association, being a voluntary association of individuals coming together for a common purpose. An unincorporated association formed for profit making is labelled a partnership, a form the common law began to recognise during this period. Before reviewing the early history of the partnership it is useful to identify the features of partnership that distinguish it from both earlier types of business organisations, including traders acting solely and in guilds, and those that would also begin to develop contemporaneously.

Common law viewed a partnership as a relationship between two or more people joining together to pursue a business venture. One of the key business features of a partnership was that the partners traded on a joint account. This joint account status would be important in the development of corporate forms that later evolved out of partnerships. Legally the members of a partnership were considered jointly and severally liable both for the partnership's debts and any actions taken by an individual member on behalf of the partnership. This liability would be described by the noted 19th century judge Lord Eldon as being down to the partner's 'last shilling and last acre'.

Another defining legal aspect of the English partnership was its lack of separate legal personality. Unlike corporate forms, a partnership had a legal status no greater than the sum of its parts. The common law partnership could not sue or be sued in its own name and, more significantly, dissolved upon the death or involuntary withdrawal of any of its members. This was because common law viewed partners as agents of each other and agency is traditionally a non-assignable, personal obligation. This meant that shares in partnerships were not freely transferable, an important aspect that would make it ideal for some traders and unsuitable for others.

The partnership as a legal concept existed under Roman law and the Medieval Law Merchant before being adopted by common law courts, but the dominance of the guilds prevented the form from being widely used in England in the Middle Ages. Guilds did not favour the free association of capital, instead channelling it up the hierarchy of masters and grand masters. The apprenticeship system developed craftsmen who traded on their own accounts, and partnerships were rare and only existed between blood relatives. Historians have argued that these artificial

restrictions on capital flow caused English industry to lag behind continental Europe during the Middle Ages.

It is perhaps unsurprising, given the lingering influence of the guilds, that early partnerships were formed in trading and land-based rather than manufacturing ventures. Partnerships were formed during the Tudor period for purposes such as purchasing agricultural goods and bringing them to market in the cities, mining operations in highland counties and occasionally property speculation in reselling of monastic lands. These partnerships were usually based on family and other personal relationships and were no larger than two or three members. Another factor preventing the partnership's spread was that it required a level of education and business sophistication sufficient for keeping joint accounts. Accounting practices were still very primitive during the Tudor era and business practices could not keep up with the growing scale of commerce.

The partnership's prospects changed with several important legal developments in the 16th and 17th centuries. A primary benefit to traders in acting in concert is risk sharing. They form partnerships in part to protect the assets of a business venture from the creditors of individual members. This concept called entity shielding did not exist during the Middle Ages. Imprisonment was the most common method of coaxing repayment of debts and bankruptcy was administered on a first-come-first-served basis. Whichever creditor was best positioned to seize a debtor's assets would receive a windfall, to the detriment of other creditors. Reforms to bankruptcy law would make the partnership form more cost effective for traders and creditors alike.

The period from 1542 through 1623 saw limited bankruptcy reform by parliament. It set up a system of appointed commissions to administer bankruptcy. The Statute of Bankrupts in 1542 also introduced the concept of 'pari passu' distribution of assets to creditors. Gradually the courts began to adopt weak forms of entity shielding. The court in *Craven v Knight* in 1683 held that the assets of a bankrupt partnership should be applied first to repay creditors of the partnership and then to creditors of individual partners only after partnership creditors had been repaid in full. This made partnership creditors senior to individual member's creditors with respect to the firm's assets. Because firm assets were thereby shielded from members' creditors, credit was offered to partnerships on better terms than were available to sole traders. This is an example of a business form's legal structure directly impacting its ability to be used to raise capital. As England's economy evolved from feudalism to capitalism, this relationship would play a central role.

The concept of weak entity shielding evolved further with the 1715 decision in *Ex Parte Crowder*, which held that a partner's personal creditors had first priority over his personal assets, and that partnership creditors could only attach those after personal creditors had been fully paid. This firmly established the framework of creditors' rights with respect to partnership and individual members' assets.

UNINCORPORATED JOINT STOCK COMPANIES

While legal developments made the partnership form more attractive, its inherent restriction on tradability of shares limited its usefulness to ventures requiring larger scales of capital. The ability to alienate a membership stake in a firm gives that firm liquidity, a feature which was found in another form of unincorporated association that developed alongside the partnership, the unincorporated joint stock company. The term 'joint stock company', a form which serves as the basis for the modern company form, warrants a brief introduction. The concept first appeared in 13th century France and Sweden, where shares in firms were freely traded and profits divided based on number of shares held. The phrase itself was probably coined in early mercantile England when investors in explorative ventures had to determine how to allocate the fruits of their journeys, being the 'stock'. For ease of accounting it was decided that the stock should be held 'jointly' and profits and losses allocated pro rata.

Increasing scale and the need for liquidity drove the development of unincorporated joint stock companies, with the trust providing the legal framework for those firms. The unincorporated joint stock company was managed as a partnership, with the key structural difference being that firm assets were held by a trustee for the benefit of the members, rather than jointly by the members themselves. This third-party ownership broke the personal nature of the partnership arrangement, providing the basis for transferability of shares. It also gave the unincorporated joint stock company a degree of separate legal personality; the firm could sue and be sued in the name of its trustee. These features earned the form the label 'proto corporation' from later scholars.

The convenience of the trust form resulted from two important common law developments during the 1600s. The first was that a trustee's personal creditors could not levy trust assets held in the trustee's name for the benefit of others. The second development was the ruling that a trust beneficiary's creditors could only seize trust assets up to the amount of the beneficiary's share of income distribution. The entity was shielded from outside creditors, allowing it greater ability to obtain credit on its own account.

CHARTERED JOINT STOCK COMPANIES

The chartered joint stock company has its roots in Genoese state-backed companies that sold shares in modest-sized mining and import ventures. The form was adopted on a wide basis in the Netherlands to take advantage of trading opportunities in the New World. These early chartered companies were set up on a venture-by-venture basis, with cargo divided among investors after each journey. In 1623 the Dutch parliament granted the Dutch East India Company perpetual existence to avoid the need to constantly liquidate assets in order to distribute profits. The form was also adopted in England, where charters for trading ventures were granted by both the throne and parliament. This came against a backdrop of parliament taking increasing authority over foreign trade, particularly following the Glorious Revolution in 1688. Like the unincorporated form, chartered joint stock companies featured jointly held stock and freely transferable shares. Shares could be sold and resold without the consent of other owners, and a member's death, rather than dissolving the firm, simply caused the member's shares to pass to his heirs.

Speculative voyages to the New World were too risky and expensive for merchants to finance on their own. Share transferability helped the joint stock company balance requirements for fixed capital with the liquidity required by providers of that type of capital. Commensurate with this was a stronger type of entity shielding available only to corporate forms: a shareholder or his creditors could not force liquidation of the firm in order to pay the shareholder's debts. This feature was entwined with an aspect of the chartered joint stock company that unincorporated associations lacked, namely a legal personality truly separate from its members. This key feature of the corporate form was confirmed by the court in the 1612 *Case of Sutton's Hospital*, which held that a corporate entity had a separate legal personality and could accept a transfer of land in its own name. The chartered company could also access courts in its own name, carry on in perpetuity regardless of changes among its owners, and have state-granted rights that in some ways mirrored but in other ways exceeded those granted to individual persons.

One right rarely granted to individuals was monopoly power. The state viewed exploration and global trade as crucial to the national interest and recognised that the scale of capital required for this type of enterprise was beyond what could be provided by an individual merchant or partnership. A charter would grant a company exclusive rights within a defined geographic market, including not only the right to trade but to also establish colonies and local authorities in new territories. The potential revenue streams enhanced by these monopoly powers were necessary to attract investment in these large-scale ventures.

The English East India Company was a commercially successful and enduring example of a chartered company. Building on the Dutch form, the East India Company developed a two-tiered corporate structure. The Court of Directors oversaw operations and appointed committees to manage daily business. It in turn answered to shareholders in the General Court of Proprietors. The creation of a management class within the East India Company started to foster the development of business practices that are still used. For example, the company employed confidential appraisals of staff and measured performance against statistical averages. However, in a classic example of the conflict between best practices and market reality, the company also appointed sons of crucial shareholders to important management roles.

Chartered companies such as the East India Company and its North American counterparts the Virginia Companies and Hudson's Bay Company were the key instruments in development of the mercantile economy. The difference in scale of operations between the mercantile companies and the shopkeepers and local traders is indicative of the key distinctions between the joint stock company and partnership forms at the time. While both types of entities engaged in concerted trading on joint account, the degree of separate legal personality ranged from limited, in the case of the partnership, to partial, for unincorporated joint stock companies and full for chartered companies. The notion of full separate legal personality would not be made available to smaller, non-chartered firms until the middle of the 19th century.

Transferability of shares was largely related to the scale of operations. A smaller firm had a lesser need for share liquidity and, where ownership and management were joined in the same class, restrictions on share alienation were less important. Convenience to the scale of business was not the only distinguishing aspect of chartered companies. Endowed with state authority, chartered companies were seen as agents of state policy in the area of foreign trade. In a manner not entirely dissimilar to modern day public-private partnerships and quangos, parliament granted ease of investment and profit-making potential to enterprises it deemed necessary for the national interest. The line between private benefit and public interest was blurred and would become increasingly so as the state granted authority to varying forms of entities in later centuries. Nonetheless, chartered companies and smaller business forms did not operate independently of each other. Chartered companies carried tea, tobacco and spirits back to England where partnerships of traders distributed it to merchants. As explored further in this paper, the later Industrial Revolution would see factories, typically operated as partnerships, enjoying wider distribution through the development of railway and other transport networks by chartered companies.

An example of the historical interplay between the corporate form and partnership form is found in colonial North America. Many of the merchant elite who first came to North America were motivated by short-term profit. They traded with native populations in search of goods to export back to England. They did not see the benefit of investing in production and waiting for returns. The colonists, many of whom came from non-landed merchant classes, were interested in long-term profit making. They developed production methods and partnered with exporters to trade with England. Merchants found places to invest excess capital and by entering into partnerships they mitigated agency risks by partnering with planters who had an interest in importing supplies and slaves, and in exporting their produce back to England.

The larger corporate form, the chartered company, established a network that the smaller, perhaps more entrepreneurial, partnership form used to create new markets. By 1700 the East India Company controlled 50% of British foreign trade. Its success helped spur the development of capital markets in London, the chartered Bank of England, and other companies who sought to mimic the company's success by copying its form. One such imitator would cause London's first great stock market crash and influence the development of company forms for over a century.

5. The South Sea Company and the Bubble Act

THE SOUTH SEA COMPANY

By the early 18th century unincorporated joint stock companies were being used for all sorts of speculative ventures, including for example, importing German broomsticks and a venture aimed at extracting silver from lead. These companies found investors in the burgeoning London capital markets which at the time were still informally structured in City coffee houses. Many companies were formed in hopes of obtaining a charter and investors were often lured by the prospect of stock-jobbing: buying shares with a view not towards long-term profits from the firm but instead towards short-term gain from rapidly increasing share prices.

A crown charter was granted in 1711 to the South Sea Company and its founders Lord Treasurer Robert Harley and company promoter John Blunt. The object of the venture was trade with South America, but with adverse conditions for this the company was re-crafted as a vehicle for financing government debt. By 1719 it had acquired half of all outstanding national debt. The result was that illiquid government notes were converted into marketable shares in the South Sea Company. A year later the company was driving up its share value with rumours of new potential South American trade and investors' moods were also buoyed by successful war with France. The South Sea Company's share price rose from £175 in January of that year to £550 in May.

Meanwhile the company was building a substantial investor base among Britain's political elite. The company published names of shareholders to lend an air of both legitimacy and status. By 1720, 578 members of both Houses of Parliament held £3.5m in company subscriptions and Blunt had successfully cultivated a relationship with King George I. Eventually George himself agreed to serve as governor of the company and made Blunt a baronet.

THE BUBBLE ACT AND COLLAPSE OF THE SOUTH SEA COMPANY

By early 1720 unincorporated joint stock companies, many founded with fraudulent intent, were springing up to take advantage of the market frenzy caused by the South Sea Company. This competition for capital was impacting the large chartered companies who wanted investment focused on their enterprises and feared that bubbles created by these unincorporated companies would negatively impact the value of their own shares. The South Sea Company used its political influence to have an Act introduced in the spring of that year aimed at preventing the formation of other joint stock companies and thus easing its own access to investment capital. The so-called 'Bubble Act' was created:

> 'for better securing certain Powers and Privileges, intended to be granted by His Majesty by Two Charters … and for restraining several extravagant and unwarrantable Practices therein mentioned.'

Clause 18 of the Bill sought to ban businesses acting as a corporate body raising transferable stock or transferring shares in stock without charter from parliament or the Crown. This made the joint stock company form the exclusive property of the state to permit as it pleased. Additional clauses specifically protected the interests of the South Sea Company, East India Company, the Bank of England and two newly established insurance companies. The government was anxious to tender another round of debt to the company before the king left to spend the summer in Hanover and the Bill was rushed through parliament, receiving royal assent on 11 June 1720.

Sir Isaac Newton was said to have described the South Sea market hysteria saying, 'I can calculate the movement of the stars, but not the madness of men.' South Sea Company share prices rose to £1,000 by August with foreign capital now flooding in, but by late summer trading levels could no longer support these high share prices. John Law's similar Mississippi Company scheme was collapsing in France, unnerving London investors, and when instalment payments fell due on share subscriptions, a sudden liquidity crisis meant subscribers could not sell their existing shares to finance new payments. The share price fell to £150 in September and margin buyers and short sellers were bankrupted. The bubble burst rapidly and violently. Later parliamentary investigation revealed widespread fraud.

The direct impact of both the Bubble Act and the market crash on British economic development is uncertain. Some argue that markets recovered fairly quickly and that, despite parliament's assertion of its authority over the joint stock company form, the number of companies seeking charters did not significantly increase after the Act's passage. Hundreds of unincorporated companies operated in Britain between the date of the Bubble Act and the passing of the Joint Stock Companies Act in 1844. Nonetheless, the legal significance of the Bubble Act was important. Parliament had asserted its right to allow formation of a joint stock company with tradeable shares and, in the name of protecting the public from the potential abuse of the corporate form, would carefully guard its prerogative for decades to come. British business continued to grow and thrive as the Industrial Revolution dawned but it was only until the scale of economic growth demanded its widespread adaptation that parliament would begin to loosen its grip on the joint stock company form.

6. Industrial Revolution

The British Industrial Revolution was the result of many factors. The enclosure of the land caused mass migration to cities and created large pools of cheap labour. Technological innovations, including coal-fuelled steam power and new production techniques, made manufacturing more efficient and hastened the development of the factory system.

In contrast to the guilds, where knowledge was carefully guarded, the factory system required the ability to easily transfer knowledge of production methods. As methods became more uniform they combined with new technologies to stimulate the spread of manufacturing.

The Industrial Revolution created a new demand for innovative forms of power and transport. James Watt's steam engine in 1775 quickly replaced water as the preferred power source for factories. However, expanding consumer markets pressed the need for better ways of getting goods from mills to shops across Britain, and in the early 19th century rail transport was rapidly developed. The first practical steam railway was built in 1811 and by 1840, 2,000 miles of track had been laid by 29 chartered railway companies. Similar to exploratory ventures that preceded it two centuries earlier, railway construction was very capital intensive, requiring corporate form to raise investment.

Each railway company required a charter from the state to adopt a joint stock company structure and develop rails in specific regions. Between 1840 and 1847 an additional 640 railway companies were chartered as 'railway mania' swept Britain and many of them failed.

Railway mania helped fuel a boom in capital markets, driven by an emerging middle class that possessed a broad demand for new investment opportunities.

These opportunities presented themselves in railway companies as well as companies that sought to acquire the natural resources to power factories and trains. Latin America, with abundant resources and emerging republics, was home to many sovereign and private issuers and helped contribute to the £372m of capital floated on London markets in 1824. This market expansion occurred against a backdrop of economic liberalisation during the first half of the 19th century – the free conversion of currency to gold in 1819, the relaxation of labour combination laws in 1824, the opening of the East India Company to competition in 1834 and the repeal of the Corn Laws in 1846. Liberalisation was itself the result of major political changes during this period. Voting reform meant that parliament was no longer dominated by landed aristocracy, and power shifted to the merchant-controlled cities. Coalitions developed between capitalists and the industrialists, on whose fortunes they were increasingly relying, creating a 'vigorous web of private interests' that would heavily influence statutory developments in company law.

REPEAL OF THE BUBBLE ACT

The boom in market speculation during 1824 and 1825 led to demand for reform of company law. In 1825 Peter Moore, a company promoter and MP, introduced a Bill repealing the Bubble Act. Moore was open about his business role, insisting the companies he promoted were as sound as the Bank of England. He also argued that allowing share transference could generate revenue via stamp duties. The Repealing Act of 1825 removed the Bubble Act's statutory ban on partnerships with transferable shares but had somewhat limited effect. Parliament still closely guarded its charter-granting ability and Lord Chancellor Eldon indicated that unincorporated joint stock companies were still illegal under common law. Lord Eldon was motivated by legal precedence and the idea of an autonomous legal regime that existed in contrast to parliament's more influential legislative ability. He valued legal principles over political pressure and saw the Repealing Act as clearly driven by the latter. Lord Eldon and his followers believed that it was the state's prerogative to grant powers of incorporation, and that forming a corporation without the state's approval was in violation of the common law.

DEVELOPMENT OF JOINT STOCK COMPANIES

While chartered joint stock companies continued to be formed before the repeal of the Bubble Act, applying for the requisite charter was expensive and cumbersome and the form was mostly confined to insurance companies and infrastructure projects, ventures that required large-scale capital investment. For instance, between 1790 and 1794 in a manifestation of 'canal mania', 81 Acts of Parliament were passed for the development of canals. The Royal Africa Company (RAC) had been formed to engage in the slave trade but was a financial failure. A trade consortium, the Company of Merchants Trading to Africa, took over RAC facilities and did business through small partnerships, often based on family relations.

As economic expansion continued into the 19th century, some sought again to reap the benefits of the corporate form without having to obtain a charter from parliament. Some growing partnerships attempted to use contractual arbitration to address disputes between members, many of whom, in contrast to earlier partnerships, were not related to each other. Businesses also revisited the trust forms as a means of obtaining transferable shares, but although the Bubble Act had been nearly forgotten by the first decade of the 19th century, legal uncertainties around unincorporated joint stock companies remained.

Unincorporated joint stock companies engaged in banking, insurance and canal projects and became increasing popular during a market boom in 1805. As had occurred during the South Sea era, this popularity attracted the ire of competitors for capital. By 1810, common law courts, hostile to the unincorporated joint stock company, revisited the Bubble Act and broadly interpreted it to declare several unincorporated joint stock companies in criminal violation of the Act. Meanwhile, many feared that the joint stock company was still being used as a vehicle for fraud, as later lampooned by the fictional 'Anglo-Bengalee Disinterested Loan and Life Assurance Company' in Charles Dickens' *Martin Chuzzlewit*.

In order to avoid the legal ambiguities of the unincorporated joint stock company, companies began petitioning parliament for special powers to sue and be sued. These special Private Acts, passed on individual bases, did not grant charters, monopoly powers or full corporate powers. However, they allowed unincorporated joint stock companies to sue and be sued in the company's name, an element of separate legal personality. These special private companies were a third form of legally recognised entity lying on the spectrum between partnerships and chartered companies.

In the 1810 case of *Metcalf v Bruin*, the court held that the trustee of an unincorporated joint stock company with Private Act powers could sue on a bond despite the fact that transferable shares meant the ownership of the company shifted. It reasoned that the obligor on the bond must have known the nature of the company and intended that the trustees would represent the company's interests. Though the Private Act status was important to the ruling, the case is seen as a development in the common law's shifting attitudes towards joint stock companies.

Parliament eventually extended special private companies' power to the monarchy in 1834, allowing a royal letters patent that granted some privileges of incorporation but parliament had firmly established itself as the monopoly holder over corporate powers and guardian of the nexus between commerce and the state. As Britain reached the peak of its world economic dominion in the 19th century, the pressures of growth would force parliament to loosen its grip on those powers.

In 1843 then President of the Board of Trade William Gladstone chaired a commission to review the limits of the current law of partnerships. The committee's report identified three key problems with the legal status of partnerships – difficulty in access to courts, difficulties in resolving legal disputes arising within the partnership, and the rule that anyone taking an interest in the profits of the partnership became liable as a partner. Several factors that combined to impede reformation of an 'unsuitable body of law' were identified. These primarily revolved around the conservatism of the common law and the spectre of Lord Eldon. Courts suggested that the common law prohibited share transference, while the legislature that focused on selling privileges via special Acts and charters was indifferent to reform.

The common law's hostility towards the joint stock company was tempered with two important decisions in 1843 – *Garrard v Hardey* and *Harrison v Heathorn*. Judge Tindal held that raising and transferring shares in a joint stock company was not an offence at common law. This reformist approach reasoned that the joint stock company, being a fairly new development when the Bubble Act was passed in 1720, was not contemplated by ancient notions of common law. Instead it was a form specifically referenced by parliament and when parliament lifted the ban, the form became legally valid. Despite these developments within the common law, the enforceability of the unincorporated joint stock company form was greatly unsettled during the years following the repeal of the Bubble Act. A court case's outcome often turned on the philosophy of the presiding judge and economic liberals began to realise that only a legislative solution could provide the legal stability needed for British business. They turned to parliament, which was becoming the vehicle for social and economic reform during the 19th century.

PARTNERSHIPS

With constraints on development of the joint stock company, the partnership became the favoured form for many activities, despite its limitations outlined above. Its use in the slave trade (an important part of the economy until its abolition became a reality) illustrates some of its strengths as a form. The slave trade involved established routes and networks not requiring new exploration. It was much less of a speculative type of venture, for instance, than those carried on by the East India Company, and working capital was provided by turnover – slaves were purchased in Africa and resold in the West Indies and North America. Moreover, the partnership form, with its union of ownership and management, allowed traders to maintain strict control over their enterprises. This remains an important aspect of the partnership form to many businesses.

Early industrialists preferred the partnership form for several reasons. The first was a philosophical trend away from the joint stock company concept. The dominant individualistic view of the day disfavoured speculative investment and many industrialists sought long-term growth over short-term profit.

The partnership form often suited the nature of early Industrial Revolution businesses. A small group of investors could pool their resources to open a factory that, once operational, was self-funding through turnover on goods produced. Factories turned out commoditised products, such as textiles, made with cheaply obtained labour and materials. They were not the normal subjects of speculative investment. Limitation of liability was not deemed as necessary where partnerships were based on close, personal relationships where partners were bound by more than business concerns.

The partnership form also allowed owners to maintain tight control over operations, as many industrialists believed that factories could only be managed by supervisors who had a stake in the business. As with the slave trade, the capital requirements of early industrialists were more limited, labour and materials were cheap and the sale of goods provided enough revenue for growth. Many industrialists neither needed the benefit of tradeable shares nor were willing to yield operational control in order to achieve it.

7. Emergence of the modern company form

REGISTRATION AND THE 1844 ACT

Parliament responded to reform pressures with the Joint Stock Companies Act of 1844. It marked perhaps the first time in English legislative history that parliament enabled a new business form, rather than proscribed it. The business entity created was an extension of the partnership form, incorporating many of the features sought by reformers while adding requirements that would protect the 'public interest'. The 1844 Act defined a joint stock company as any commercial partnership that either had 25 or more members or featured capital divided into freely transferable shares. Anyone could create a joint stock company upon filing, eliminating the need for the state to grant a charter or special legislation. The Act created the Registrar of Joint Stock Companies and a two-step filing process. The first stage involved filing and payment of a £5 fee and conferred only provisional status. Only after completing

the second filing and paying an additional £5 fee was corporate status conferred. Subsequent legislation did away with the two-step process but the principle of registration has endured.

The 1844 Act also imposed on companies requirements to:

- issue a prospectus identifying promoters and their interest in the company;
- prepare basic, audited financial statements (that were made publicly available) and maintain financial information on a current basis;
- incorporate regulations for internal company affairs into the articles of association; and
- restrict insider trading.

In exchange, business interests could form a corporate body with separate legal personality, including fully transferable shares and access to courts.

The ability to form a corporate body by incorporation was not new. The 1597 Hospitals for the Poor statute allowed individuals to incorporate charitable hospitals by registering a deed with the Court of Chancery. The joint stock company form created by the 1844 Act carried unlimited liability that continued to apply to a member three years following a share transfer by that member. However, 120 years after its passage and 19 years after its repeal, the Bubble Act was officially dead. The mounting pressure of economic growth, and its resultant need for wide-scale investment capital, meant parliament could no longer suppress the joint stock company form. So it claimed the entity for itself, dispensing the right to form a corporate body while prescribing accompanying responsibilities.

LIMITED LIABILITY

Gilbert & Sullivan's *Utopia, Limited*, a send-up of the previous 50 years of company law evolution and simultaneous economic boom, describes the notion of limited liability as follows:

> 'That's called their Capital; if they are wary
>
> They will not quote it at a sum immense.
>
> The figure's immaterial – it may vary
>
> From eighteen million down to eighteen pence.
>
> … They then proceed to trade with all who'll trust 'em
>
> Quite irrespective of their capital.
>
> … You can't embark on trading too tremendous--
>
> It's strictly fair, and based on common sense--
>
> If you succeed, your profits are stupendous--
>
> And if you fail, pop goes your eighteen pence.'

In many ways the development of limited liability was the final stage of the Industrial Revolution – another major paradigm shift in the way people did business. Where did this notion come from and how did it make such an impact in only half a century? English partnership law, from which company law evolved, was based on the antithesis: unlimited liability. As agents of each other, members were responsible

for partnership debts incurred by other members. By allowing a partner, with whom a voluntary business relationship existed, to act on his or her behalf, that member was presumed to accept liability for those actions. Liability down to Lord Eldon's 'last shilling and last acre' was the legal consequence of the benefit of acting in partnership but was no different from the liability a sole trader would incur.

Limited liability means that members of a business are not fully responsible for debts incurred in pursuit of firm ventures. Instead their losses are limited to the value of their shares. It was not a new concept. In the 15th century limited liability was granted to certain favoured institutions, namely monasteries and guilds that held common property. Some chartered companies, including the East India Company, also benefited from the provision but there was a general distrust of more mainstream businesses attempting to limit their own liability to creditors. This distrust was incorporated into the 1844 Registration Act. Scholars have argued that parliament's unwillingness to grant limited liability was consistent with its monopoly over special interest legislation, though a key loophole in the Act represented a development in the concept. This was a requirement that a creditor seeking recourse from a registered company file individual suits against each shareholder. This resulted in de facto limited liability for all but the wealthiest shareholders since creditors tended to only sue the most high profile holders with the deepest pockets. It also meant that shareholders were generally not jointly liable for each other's debts unless hauled into court to answer for them. This differed from a partnership where members would be expected to answer for partnership debts on a going concern basis.

Though the Joint Stock Companies Winding Up Act of 1848 ring-fenced the de facto limited liability of the 1844 Act, public attitudes towards the concept were changing. A depression lasting from 1845 to 1848 emphasised the need for limited liability and the liberalism of the day began to view the denial of a commercial tool as contravening economic freedom. The scope and scale of business was growing. It has been estimated that the UK's aggregate gross domestic product doubled between 1818 and 1850 and a rapidly accumulating capital base among Britain's emerging middle class was seeking outlets for investment. France and several US states were allowing companies to form with limited liability, and there was a fear that British business would incorporate in foreign jurisdictions, costing the country potential tax revenues.

Some businesses had attempted to achieve limited liability to creditors via contractual means by writing it into their articles of association. The common law of partnerships did not allow this, but the 1852 case of *Hallet v Dowdell* held that a company could directly contract with third parties for limited liability, meaning that those voluntary creditors could only look to company stock and not to shareholders for recourse of debts. This ruling finally forced parliament's hand: statutorily created registered joint stock companies did not provide for limited liability, while unincorporated joint stock companies could achieve it by contract. In response, parliament relinquished its monopoly over the concept and passed the Limited Liability Act of 1855. It allowed any company of 25 or more members that met the registration requirements of the 1844 Act and met minimum share and paid-in-capital tests to operate with limited liability by adding 'Limited' to their company name. This limited liability related to both voluntary, contractual creditors and all involuntary creditors who might have a claim against the company.

THE JOINT STOCK COMPANIES ACT 1856 AND COMPANIES ACT 1862

Robert Lowe, a key figure in Gladstone's Liberal Party, has been called 'Father of the Modern Company.' Lowe spent the formative years of his career in Australia, where his negative experiences with strong labour unions and exposure to a relaxed class system made him an ardent opponent of social democracy and universal male suffrage. Lowe's interest was the company and freeing it from state control. He rejected the notion that the joint stock company's form made it inherently subject to fraudulent abuse and sought to transform company registration from a privilege

granted by the state to a right available to all who engaged in commerce.
It was Lowe who proposed the addition of the suffix 'Limited' to companies to make creditors aware of the existence of limited liability.

As Vice President of the Board of Trade (then a cabinet position), Lowe introduced a new Joint Stock Companies Bill in 1856, arguing on the basis of economic liberty:

> 'The principle we should adopt is this, – not to throw the slightest obstacle in the way of limited companies being formed – because the effect of that would be to arrest ninety-nine good schemes in order that the bad hundredth might be prevented; but to allow them all to come into existence, and when difficulties arise, to arm the courts of justice with sufficient powers to check extravagance or roguery in the management of companies, and to save them from the wreck in which they may be involved.'

The Joint Stock Companies Act of 1856 is considered the progenitor of the current Companies Act passed in 2006. While the 1844 Act is viewed as having been enacted to regulate an existing form of joint stock company, the 1856 Act is seen as creating a new kind of entity. It combined the principles of the 1844 Act with the Limited Liability Act to allow seven or more members to form a registered joint stock company with limited liability. An association of 20 or more members (10 for banking companies) was required to be registered. The Act created the company limited by shares, with a member's additional liability limited to the unpaid amount of the member's subscription. Minimum share capital, a principle of the Limited Liability Act was, to the surprise of some, omitted when it was consolidated into the 1856 statute.

Several amendments to the 1856 Act were consolidated into the 1862 Companies Act, the first company law statute to take that title.

The consolidated 1862 Act included the following requirements:

- separate memoranda and articles of association (forms of which were provided in the statute) to state the purpose of the company and provide for director and shareholder rights and responsibilities;
- accounts and disclosure requirements;
- financial statements (following statutory forms) audited by Board of Trade approved auditors;
- provisions regarding shareholder meetings and rights of shareholders to inspect books; and
- procedures for the appointment of directors.

Common law, for many decades hostile to the joint stock company, fully recognised the statutory form and the separate legal personality it created in the 1897 case of *Saloman v Saloman Ltd.*, which went to Britain's then highest court, the House of Lords. Aaron Saloman had long operated a successful shoe company as a sole trader but as he neared retirement he decided to make his sons members of the company. He converted the business into a registered company under the 1862 Act, issuing 20,007 shares of stock, retaining 20,001 for himself and transferring the other 6 to his wife and 5 sons.

Saloman lent money to the new company, taking a floating charge over inventory. When the business suffered difficulty, he assigned his claim to a third-party creditor but eventually the company went into administration. The liquidator sought to have Saloman indemnify the company on the basis that the joint stock company structure

was a sham and that the business was essentially a sole proprietorship as it had been prior to registration. The six 'uninterested' shareholders were there merely to allow Saloman to carry on business as he had for years but with the benefit of limited liability. The Court of Appeal agreed, setting aside the separate legal personality of Saloman Ltd. as a mere scheme to defraud creditors. However, the House of Lords unanimously reversed the lower court, holding that the validity of the company registration was unquestioned.

> 'Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.'

The Lords ruled that the courts had no right to impose additional restrictions, such as the requirement that minority shareholders be independent of the majority, that were not set forth in the Act. Though later courts would allow setting aside the separate legal personality (sometimes called 'lifting the corporate veil') in cases of fraud, the *Saloman* court affirmed the notion that the company is at law a different person altogether from the subscribers to the memorandum. With these words at the close of the 19th century, the registered joint stock company – a creature descended from the several entities that had developed before it and spawned by rapid economic growth and political liberalism of its age – stood evolved on the economic landscape. The state had largely yielded its monopoly on the corporate form and limited liability and would spend the next century attempting to balance both the needs of those inside the corporation with those outside, and the needs of owners with those of managers of corporations.

IMPACT OF THE ACTS

The 1862 Act was a product of many pressures, not the least of which was the demand for wider capital bases brought on by the increasing scale of British business. The volume of new share issuances averaged £120m per year in the three years following the 1862 Act's passage. Some argue that these statistics prove that the lack of limited liability had stunted economic growth in the years leading up to the Act, but some of the issuances are accounted for by businesses which sprang up in order to take advantage of the speculative aspects of the limited company. More than 30% of registered companies formed between 1856 and 1883 went bankrupt, many within the first five years.

One notorious example concerned Overend, Gurney which led to a run on banks and further reforms of company law. For over half a century Overend, Gurney had been a respected dealer in discounted bills of exchange (eg, bank cheques). Under Samuel Gurney it rose to prominence through short-term loans to other London banks and became known as the 'banker's banker'. However, the generation of management that succeeded Gurney took a more speculative approach and began investing in long-term assets such as railway shares. The bank quickly fell into the liquidity trap presented by a balance sheet of long-term assets and short-term liabilities. In 1865 it sought to shore up capital by converting from a partnership to a limited company and floating its shares at the height of a market boom. The boom quickly went bust, significantly affecting the value of Overend, Gurney's own shares and the railway shares on its balance sheet.

When the Bank of England refused to provide liquidity Overend, Gurney suspended payments, initiating runs at its branches across England. Overend, Gurney's failure led to a crisis among the many banks to whom it owed money and caused the failure of over 200 companies, including other financial institutions. The banks' directors were tried for fraudulent disclosure at the Old Bailey, and while they were found to have committed only grievous error and not a criminal act, public confidence in the new limited liability company quickly eroded. Calls for reform of the 1862 Act followed but the changes ultimately enacted in the Companies Act in 1867 (allowing

companies to reduce capital and share value so as to enable a greater percentage of capital to be fully paid) did nothing to undermine the principles of limited liability.

Despite its flaws and potential for abuse, the registered company became the dominant business form in Britain. Company law had allowed the creation of what have been described as 'Little Republics' and allowed development of power centres within society that were largely independent of the national state. Companies became small societies within the larger society, answering to shareholders (and later a growing list of additional stakeholders) rather than the public at large, and they began to exhibit many of the characteristics of larger society. Among these was the desire to expand and ultimately cross borders.

The registered company gave rise to the development of multinational companies operating on an international scale such as Cable and Wireless (so named in 1934 following a succession of amalgamations of telegraph and other companies), BP (formerly Anglo-Persian Oil Company established in 1909) and Unilever (as successor company to Lever Brothers which was founded in Victorian times). The scale and complexities of these businesses helped provide a catalyst to evolving social phenomena such as organised labour and the increased role of women in the workplace.

Some companies attempted to use their increasing power to affect societal change, at least for their workers. In 1899 Lever Brothers began building Port Sunlight, near their new factory in Merseyside, as a model residence village for the company's workers. William Lever, who personally supervised planning and construction, sought to remove working classes from urban squalor and 'to socialise and Christianise business relations and get back to that close family brotherhood that existed in the good old days of hand labour'. Lever claimed to use the profit-making ability of the company form to create a society more similar to that which he felt had existed prior to the rise of large-scale industrialisation. He also saw this as an attempt to share the company's wealth with workers without providing additional remuneration. In a form of profit-minded paternalism, Lever told employees that rather than 'send profits down your throats in the form of bottles of whisky, bags of sweets, or fat geese at Christmas … if you leave the money with me, I shall use it to provide for you everything that makes life pleasant – nice houses, comfortable homes, and healthy recreation'.

By 1920, 57% of British profits came from companies listed on the London Stock Exchange. That number had increased to 71% by 1951. Over this period public companies evolved from closely held firms, where founders and their relatives and heirs retained large percentages of shares and participated in management, to companies with widely dispersed shareholding and a clear separation between owners and the professional managers who controlled operations. As noted by Berle and Means in a seminal study of managerial capitalism in the 1930s, companies with dispersed ownership often present continued agency problems with potential misalignment of the interests of owners and management. Addressing the balance of power between these two classes would be a key aspect of the development of company law in the 20th century, an issue reviewed by ICAEW's Audit Quality Forum in *Agency theory and the role of audit*.

8. Further development of the company form

Reforms to company legislation that followed the 1856 Act have several common themes: their evolutionary process; their attempts to expand the nature and types of English companies; and their increasing concern with 'the public interest' and widening scope from shareholder protection to stakeholder protection.

Several major Companies Acts were passed during the 20th and early 21st centuries, significantly in 1908, 1948, 1981, 1985 and 2006. These Acts have been both reforming statutes in their own right as well as a consolidation of interim acts. This process of piece-meal change in between spurts of evolution largely has been the result of political reality. Interim statutes were passed in response to individual crises and demands but often made the previous consolidating Act more difficult to interpret and apply. Drafting and debating new consolidating Acts was a time-consuming process that was not always a high priority for parliament.

PRIVATE AND PUBLIC COMPANIES

The Companies Act of 1908 was the first post-1862 statute to attempt to consolidate the 17 company statutes that had been passed in the interim period. The Board of Trade saw a need to bring these Acts into one governing statute and, though the Act did not represent a major revision of company law, it contained several important developments. Among these was the private company form. Under earlier company law, all registered companies fell into one category – what is now called a public company. The private company limited by shares was created to provide the benefits of limited liability and separate legal personality, with relaxed disclosure requirements for companies that do not sell shares to the public. Private companies are required to file less detailed accounts than public companies and are exempt from minimum share capital requirements.

The Companies Act 1948 created a new class of 'exempt private companies' which were distinct from other private companies and did not have to file public accounts. However, the Companies Act 1967 abolished these and subjected companies to increased accounting and auditing requirements. The Companies Act 1981 created new categories of public company and private company, including 'small' and 'medium' companies with reduced accounting and other disclosure requirements. A further category of 'micro' companies has since been introduced. The categorisation of companies into public and private clearly tapped into public demand, as the private company quickly became the dominant form (by overall numbers of registrations).

DISCLOSURE REQUIREMENTS

This began a 20th century trend towards more public disclosure, particularly by the now separately governed public companies. They were required to maintain certain information in statutory registers which may be inspected by the public and to file accounts in the public domain. Initially companies were only required to file an annual balance sheet (Companies Act of 1907), which did not have to show profits and losses or current trends. The Companies Act of 1929 mandated that directors provide current profit and loss data at the annual shareholders meeting. Directors were not obligated to file these publicly, nor were they required to disclose interim financial developments.

The 1948 Act represented the first major company law revision since the Great Depression and significantly expanded regulation of disclosure by public companies. Public share offerings had to be accompanied by larger and more thorough prospectuses than previously required, and profit and loss statements had to be publicly filed along with balance sheets, both in a detailed form prescribed by the Act. One of its significant provisions was that of requiring consolidated accounts for group companies (this being seen as a delayed response to the Royal Mail shipping company case in the 1930s when failure was disguised through subsidiary companies' nonconsolidated accounts). It has been suggested that the reforms of the 1948 Act resulted in far more takeovers of public companies, as outside investors now had access to data necessary to analyse potential bids. The threat of a takeover of a 'Berle-Means' company is considered to be a motivation for management to focus on shareholder value. Since the Financial Services Act of 1986, disclosure requirements have also fallen within the purview of capital markets regulation.

DIRECTORS AND CORPORATE GOVERNANCE

The development of managerial capitalism carried with it the continued policy debate of how to balance the needs and aims of shareholders with the operational needs of management, represented by the board of directors. Twentieth century company law reform often focused on this balancing act. The Companies Act 1948 ensured that directors could be removed by shareholders with a simple majority vote. In 1975 the UK Government established a Committee of Enquiry into industrial democracy in response to a European Commission directive on harmonising worker participation in management across Europe. The committee worked against a backdrop of ongoing labour unrest and in 1977 published a majority report proposing that Britain follow the European trend of allowing employees to participate in selecting the board of directors.

The most notable example of this was the German Co-determination Act 1976. Reaction to the proposal was largely negative from many sectors. The City Company Law Committee, responding to the report, stated that while greater worker participation in decision-making would lead to greater commitment and efficiency, ultimate authority ownership and control lay with shareholders. A minority report opposing the proposal was issued and the committee's proposals were never adopted in company legislation.

From the late 1970s the discussion on company law reform shifted towards corporate governance. Although making directors more accountable to employees was delayed, the *Cork Report* led to stiffer sanctions in the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 against directors who negligently ran companies at a loss. Through the 1990s the focus in corporate governance turned toward internal control mechanisms, such as auditing, separation of the chief executive position from that of the chair, and remuneration committees as an attempt to place some check on excessive executive pay. These rules applicable to listed companies on a 'comply-or-explain' basis, now found in the *UK Corporate Governance Code*, have been complemented by principles-based regulation of institutional investors' activity in company affairs. At the same time, the UK's integration in the EU meant a steadily growing body of EU Company Law Directives and case law to harmonise some aspects of company law across Europe.

COMPANIES ACT 2006

The Companies Act of 2006 is the current version of company legislation in the UK, at the time of writing, and the first consolidating statute since the Companies Act of 1985. The 2006 Act codified common law provisions on directors duties, implemented EU directives on takeovers, and attempted to simplify requirements for private companies while promoting greater shareholder involvement in public companies.

The codification of directors' duties was among the most controversial elements of the Act. Common law traditionally required directors to act in the interest of the company and its shareholders, and any action taken not in the company interest was void for want of authority.

This approach was replaced with one based more on corporate social responsibility, requiring directors to, among other things:

- Promote the success of the company, acting for the benefit of shareholders but with regard to other factors, including long-term consequences and the interests of employee and other stakeholders.
- Exercise reasonable care, skill and diligence – applying both subjective and objective standards of care.
- Avoid conflicts of interest and disclose related transactions with the company.

The 2006 Act sought to reform the law of private companies using a 'think small first' approach that would make them easier to establish and operate. This process continues, for instance with further reduced accounting requirements for 'micro' companies.

Many features of company law that traditionally applied to both private and public companies were abolished or modified with respect to private forms. This included eliminating the requirement for a company secretary or an annual general meeting, two staples of corporate governance in public company law. The Act also abolished the prohibition on a private company providing financial assistance for the purchase of its shares. This makes financing the acquisition of private companies easier, increasing share liquidity.

A primary goal of changes to public company law was to encourage a focus on long-term performance through shareholder engagement and effective dialogue between business and investors. Directors of listed companies – those public companies offering shares on the London Stock Exchange – became required to disclose their compensation packages to shareholders, and shareholders were allowed a 'say on pay' via non-binding vote on executive remuneration. The impact of the non-binding vote was that shareholders can then vote to dismiss directors whose actions they disagree with. The Act also sought to improve communication between directors and shareholders and allows provisions for indirect investors to more easily exercise their ownership rights. EU directives on transparency of accounts and major transactions and on takeovers were also incorporated into the 2006 Act.

PUBLIC LIMITED COMPANIES

Most of Britain's largest companies typically take the form of a public limited company ('plc'). The plc is governed by the Companies Act of 2006 and is distinguished from private companies on the basis that it offers shares to the public. All plcs are subject to requirements regarding, among other things:

- minimum number of directors;
- a company secretary meeting the qualifications set out in the Companies Act;
- minimum share capital (a plc must have allotted £50,000 in shares before commencing trade, £12,500 of which must be fully paid); and
- accounts and annual returns filed with Companies House.

Although plcs represent only a fraction of the overall number of companies, they typically generate a large percentage of the trading volume in the UK economy. Multinational companies and Britain's large retail, commercial and investment banks generally take the plc form. This is because the plc has greater access to capital than any other form of private enterprise. The ability to publicly offer shares makes growth by acquisition easier by creating a merger currency. Plcs also usually enjoy greater share liquidity and valuation. The trade-off for these businesses is that valuation is determined by the markets, who demand greater transparency of plcs than is required from any other form of registered company. The public (including competition) knows most financial details of a plc, and investors often encourage management to focus on shorter-term goals.

LISTED COMPANIES

Listed companies (which must be plcs) must comply with the Listing Rules of the Financial Conduct Authority (FCA) in addition to the Companies Act. The Listing Rules focus primarily on the issuance of equity and debt securities and the orderly conduct of markets but they also impose additional governance requirements on listed companies. These include rules on related transactions, regulations regarding shareholder conflicts of interest on top of those applicable to other companies, and a requirement that listed companies declare to their shareholders that they have either complied with the *UK Corporate Governance Code*, or explain their non-compliance.

Plcs that do not make shares available to the public are not subject to the Listing Rules. Plcs with smaller market capitalisations (also known as 'quoted' companies) that trade on the Alternative Investment Market (AIM) are subject to the less stringent internal regulations of AIM. The separation of listed and quoted companies recognises that smaller and medium-sized companies may want to avail themselves of capital markets without subjecting themselves to costly requirements applicable to larger companies. It also brings some of these smaller companies outside of the EU directives that form the basis of the Listing Rules.

9. Further development of partnership forms

THE PARTNERSHIP ACT

The rapid ascendancy of the registered company in the decades following the passage of the 1862 Act did not result in the disuse of the partnership form. Partnerships remained the dominant form until the early 20th century and, as the gap between shareholders and management widened, partnerships presented a better way for owners to maintain control over the business. The partnership also lacked the corporate formalities and costs associated with registration as well as the disclosure requirements. Equally as important were the potential tax benefits of partnerships. Because a company was a separate legal entity, it was subject to tax on profits at the entity level (the forms of which have varied significantly over time).

Perhaps in evidence of the trend towards supremacy of statutory law, the common law of partnerships was codified by parliament in the Partnership Act of 1890. The Act reflected the Companies Act of 1862, which stated that an association of greater than 20 members (10 for a banking association) was required under that

Act. The Partnership Act provided that a partnership could have no more than 20 members (with a maximum of 10 for banking). Exceptions were introduced in relation to specified professional firms and the cap was removed in 2002.

The 1890 Act covers:

- The relationship between partners, including the rights and duties of individual partners.
- The relationship between partners and third parties, including the authority of partners to bind the firm, liability of partners in contract (which was originally joint but was made joint and several by the Civil Liability (Contributions) Act of 1978) and tort (which was joint and several under the 1890 Act).
- Dissolution of the partnership, setting out events that automatically dissolve the firm (some of which can be modified by the partnership agreement) and events in which a court can order dissolution.

The Act made no other significant changes to common law except that it provided for courts to grant security over a partner's interests in the partnership for the benefit of a judgment creditor of the partner. The other partners would have the option to redeem the judgment debt or buy the related partner's shares. This modification, which lessens the impact of entity shielding of partnership law, does not apply in Scotland.

LIMITED PARTNERSHIPS

The rapid growth of the registered company with limited liability suggested a demand to combine the benefits of the partnership form with the strong entity shielding presented by limited liability. The Partnership Act of 1890 did not provide for 'sleeping partners.' All members of a partnership were equally liable for firm liabilities and had equal opportunity to participate in management, and courts had long rejected attempts to build them into partnerships via contract. Nonetheless, the notion of a limited partnership, where some partners exchange control for a limit on their exposure to firm debts, dated back to medieval Europe and the commenda. The commenda was a partnership formed of two traders: an active partner who captained a voyage and contributed labour and a passive partner who provided the necessary capital. The passive partner, who had no control over the activities of the venture while the ship was journeying, received limited liability as a form of protection against actions taken by the active partner while at sea that might give rise to liability to creditors.

The partnership was dissolved at the end of each voyage and the passive partner was immediately due his share from the ship's stock upon return. In this way the ship's hull acted as a physical barrier against the active partner misappropriating firm assets. The Medici bank would later experiment with a form of limited partnership when it established branches in new cities, forming a limited partnership during a trial period that would evolve into a general partnership if the relationship was successful. However, both the Medici branch banks and the commenda arrangements probably worked only because of the limited term of the arrangements. Outside creditors did not like to lend against fluid assets and in fact an experiment with limited liability by Siena in 1310 hampered banks there so much that Florence displaced its neighbour as Europe's banking centre within three decades.

It is perhaps unsurprising that limited liability was not made available to the English partnership form until the limited liability registered company had been firmly entrenched. The Limited Partnership Act of 1907 allowed for a partnership of no more than 20 members with 2 tiers of membership. General partners, of which there had to be at least one, were responsible for all firm debts and obligations. One or more limited partners, which could be corporate bodies, were liable only to

the amount of capital contributed when they joined the firm but could not participate in management. Any limited partner who took part in managing the firm became liable for debts and obligations as if he or she were a general partner. Other key provisions of the Act included:

- The bankruptcy, death or insanity of a limited partner, which would dissolve a typical partnership, did not automatically dissolve a limited partnership.
- A limited partner could join the firm for a fixed term and assign his or her share with the general partners' consent. Neither of these would act to dissolve the partnership.
- The limited partnership does not have a separate legal personality unless registered in Scotland.
- The limited partnership was required to register and provide its name and other details of the business, a statement that the partnership was limited and the identity of limited partners, and the amounts of paid-in-capital of each limited partner. These statements could be inspected by the public, and failure to comply with registration requirements caused the firm to automatically revert to a general partnership.

The limited partnership form is widely used in the financial services sector, for instance in private equity, and reforms were introduced to facilitate use of the form in that context in 2017.

LIMITED LIABILITY PARTNERSHIPS

In 2000 a new form emerged that combined the tax treatment, control features and flexibility of the partnership with the limited liability and separate legal personality of the limited company. The Limited Liability Partnership Act of 2000 was passed partially in response to a similar statute passed by Jersey in 1996. The Jersey Act had been drafted by British accountants and passed by Jersey in hopes of attracting foreign registrations but it was UK-based professional services companies that drove the adaptation of the British version.

The Limited Liability Partnership ('LLP') differs significantly from other partnership forms. It is not a partnership with limited liability and it is not a limited partnership. It is often said that an LLP acts as a partnership with respect to internal matters and as a company when it interacts with outside parties. An LLP has one class of membership, and all members are entitled to manage the firm and may take actions that bind the firm. However, unlike other partnership forms, there is no joint and several liability among members, all of whose liability is limited by the amount of paid-in capital. Wind-up and insolvency of the LLP are treated in ways similar to limited companies, and the LLP is subject to many of the registration and reporting requirements of the Companies Act.

PROFESSIONAL SERVICES FIRMS

Accountancy and auditing and legal service professions have been in existence for centuries, but it is no coincidence that the dominant firms of today came to prominence in the late 19th century. Law firms experienced significant growth alongside the corporate clients they served and the Law Society (as it later became called) obtained a Royal Charter in 1831 and subsequently had authority to set examinations for solicitors. Samuel Lowell Price and Edwin Waterhouse formed their partnership in 1865, two years after the Companies Act of 1862 began requiring the publishing of audited accounts.

It was during this period that the increasing scale of business transformed accountancy from bookkeeping to a complex system of valuation, depreciation and reporting designed to satisfy the needs of the state and the investing public.

The Institute of Chartered Accountants of England and Wales received a Royal Charter in 1880 for the purpose of establishing a framework of standards in what had been a landscape of greatly varying quality. As the large public companies experienced consolidation, the professional services followed, perhaps to the greatest extent in accountancy, where the number of dominant, global firms halved through consolidation during the 1980s and 1990s. Professional services partnerships were able to grow in size over the decades because they had been exempted from statutory prohibition on partnerships of greater than 20 members.

In some ways the professional services, accountancy and auditing and law are descendants of the guilds and livery companies. These professions are overseen by the state but may be self-governed by a strict set of rules and ethics that regulate admission and continuation in the professions. The career track of a person in one of these professions is not dissimilar from that of the guild era. The professional begins by studying, moves through a training period before becoming qualified and can eventually move up the ranks to become an owner of a firm. Remnants of the guild system still exist within accountancy and legal services, but the role of the guild has now been divided between the professional societies (or other bodies) that set standards and the partnerships that control and profit from professional knowledge.

The LLP Act was enacted largely for the benefit of professional services firms who have long preferred the partnership form and were seeking limited liability from tortuous wrongdoing and malpractice. Professional services have maintained the partnership form because it reduces agency costs surrounding knowledge services and best allows them to maintain control over proprietary knowledge. Scholars suggest that the partnership form exposes members' personal assets to large degrees of liability (even in the LLP version due to the large initial capital contribution required) for negligent action of other partners and professionals in their employ. This heightens the degree of 'mutual monitoring' by partners, lowering risk. The partnership form also provides for easier management of the professional services firm's single most important asset, proprietary knowledge possessed by partners. The partnership form provides tighter control over ownership of that shared knowledge by allowing partners to restrict entry to their ranks, with the default position being that a member cannot enter or exit a partnership without the consent of other partners.

10. Other contemporary business forms

The principal forms in use 100 years ago (the limited company and partnership and, to a lesser extent, trusts) continue to dominate the business horizon. According to Companies House statistics, in 2016 there were over 3m registered UK companies (including private and public whether or listed or unlisted).

As of 2009 there were 440,000 partnerships in the UK, ranging from small and family-held enterprises to large-scale firms in a variety of sectors including retail trade, construction, agriculture, tourism and service industries, with business types ranging from investment funds adopting the limited partnership to farmers and charter operators using the LLP. Whether a corporate or partnership form is

best for a particular business will depend upon a number of factors, including tax considerations and financing needs. Depending on the type, a partnership may offer less regulation, more privacy and greater control than companies. One of the enduring desired aspects of partnership is its perceived ability to grant owners a greater degree of accountability to each other and to the firm, while mitigating agency costs, though questions linger as to the distance between this perception and practical reality.

There are other forms available, some of which have been long established and others of which are relatively new. The discussion below is not intended to be an exhaustive review of current forms but rather presents an overview of significant forms not covered elsewhere in this paper.

MUTUAL SOCIETIES

The concept of citizens forming business organisations for their own mutual aid and benefit is centuries old. Guilds and livery companies served a dual role as market regulator and fraternal society and, while their economic status declined, they continued to hold social importance for their members. The Victorian era saw the rise of a new business form that took this concept to a wider audience – the mutual organisation. Statutes creating mutual benefit society forms, such as industrial and provident societies (now known as co-operative or community benefit societies) and building societies, were based on the realisation that the company form did not work for all types of corporate ventures, especially when the members of the firm are intended to have a different type of relationship to that between shareholders and a company.

A co-operative or community benefit society may be formed for many different business purposes including working men's clubs, friendly societies and social housing associations. The form has its roots in Victorian era notions of thrift and self-help in the absence of state-provided welfare. Many uses of the form are for charitable or other socially oriented enterprises. Companies falling under the legislation are registered by the FCA. Like a company limited by shares, these societies may have share capital but the shares are redeemable only at par, if redeemable at all. Share value is not related to the society's enterprise value and instead profits are common property of the members, each of whom have only one vote – based on their membership status – rather than multiple votes tied to their pro rata share ownership. Community benefit societies may include a statutory 'asset lock' to protect assets for specific, community-oriented purposes which can be broader than those defined under charities law.

Building societies originated in 18th century Birmingham as cooperative vehicles for their members to obtain home construction financings. Members deposited into a fund that was used to make loans to other members. The idea spread across England, and in 1874 the Building Societies Act provided a corporate form for societies who registered under the Act. By the 1980s many building societies felt they could not compete against larger financial institutions and new legislation passed as part of the 'Big Bang' reforms in 1986 allowed building societies to retain their current mutual benefit form while holding assets other than home loans, or transfer to a company status.

This opened the door for widespread demutualisation of building societies, many of whose members traded their membership rights for shares in new listed plcs and resulted in the 'carpet bagging' phenomenon. Opportunistic investors would deposit into mutually organised building societies in hopes of receiving a windfall if the society demutualised and later floated shares. One of the largest examples of demutualisation was the Abbey National Building Society, which converted to a plc in 1989 and grew to acquire other demutualised building and insurance societies.

Meanwhile, Nationwide Building Society barely survived a demutualisation vote by members in 1997 and later adopted 'poison pill' techniques that required new depositors to donate any proceeds from demutualisation to charity (other mutual benefit societies adopted rules that required depositors to wait several years before realising profits from demutualisation).

FORMS USED FOR CHARITY AND SOCIAL ENTERPRISE

Charitable and socially oriented private enterprises can take one of several forms, from partnership or other unincorporated associations to corporate forms. Charities and socially oriented enterprises that choose a company form often register as a company limited by guarantee or guarantee company. This is similar to the private company limited by shares with the primary exception being that liability is limited to a nominal guarantee amount set out in the company memorandum and articles rather than the subscription amount of shares. The practical effect of this distinction is that entering and resigning membership in a guarantee company is less cumbersome than in a share company, as the guarantee company is not subject to the share issuance and transfer provisions of the Companies Act. Members can join the guarantee company as they would any club or voluntary organisation.

The guarantee company form is not suitable for all charitable, quasi-charitable or social enterprises and because there are no shares, working capital needs must be met by member subscriptions or debt. Social enterprises that seek to serve dual purposes of public benefit and profit making will typically prefer to take other forms, including the share company. Guarantee companies that want to establish themselves as charities under UK law (with accompanying tax benefits) are subject to additional regulation under the charities Acts.

The community interest company (CIC), which was the result of government policy to encourage social entrepreneurship, carries the advantage of a degree of community identification without the restrictions of charities regulation. CICs are not a new business form. Instead an existing form, including a guarantee or share company, can become a CIC providing it serves a community purpose and is subject to an asset lock. A CIC cannot be a charity.

A relatively new form, the charitable incorporated organisation (CIO) allows businesses with charitable status to incorporate without dual regulation. CIOs are only registered with the Charity Commission and not Companies House, which parliament hoped would stimulate the involvement of private enterprise in delivering social programmes.

INVESTMENT COMPANIES

An investment company is a collective investment venture, usually by a large number of small investors who pool their resources to purchase corporate securities and other investments. An investment company is considered open ended when the venture can issue new shares to new investors and repurchase shares from divesting members. The company form was typically challenging to these structures because limited companies are restricted in their ability to buy back existing shares. Because of this these companies often adopted a unit trust form, where assets were held by a trust for the benefit of investors and which was free to make a standing offer to repurchase shares at a price reflecting the market value of assets in the trust.

Though still used, the government felt during the 1990s that the unit trust form could not compete against US and other European open-ended investment companies that could organise in corporate forms. It created the open ended investment company (OEIC) entity, a company form that allows investors to realise their investment in conformity with an FCA-regulated valuation scheme. The OEIC combines the company aspect of management undertaken by a board of directors (headed by an FCA-approved adviser) and the trust feature of assets being held by a depositary (typically a bank).

STATE VENTURES AND MODERN CHARTERED COMPANIES

The chartered joint stock company first developed as a vehicle that combined private and state motivations into a single venture. The state had an interest in exploring new territories and establishing new trade routes, while private investors were motivated by potential profit that could result. The state licensed its claimed sovereign rights to new territories in exchange for private capital that made the voyages feasible. This monopoly grant mitigated many risks to the private sector. This model was revisited in the 19th century for infrastructure with the establishment of chartered railway companies and continued in the 20th century using a new form – the public private partnership (PPP).

While old chartered companies were created in response to new discoveries and technologies, the modern PPP arose in response to macroeconomic pressures brought on by high government deficits. Governments first thought they could greatly reduce the cost of infrastructure by partnering with the private sector to deliver some public projects and services. Private, rather than public capital would be expended initially, avoiding initial charges against public budgets.

PPPs in the UK are sometimes achieved via private finance initiatives (PFI). A PFI is often used to finance and maintain ongoing infrastructure projects. A PFI project is financed with private capital and typically managed and operated by the private sector. Hospitals, waste disposals, railways and social housing projects have been financed using PFIs.

The advent of the registered joint stock company did not mean the end of chartered companies in Britain. Though most trading ventures found it easier to register under the new company laws, Royal Charters, granted on petition to the Privy Council, continue to be used to grant powers of incorporation to charitable and quasi-charitable institutions, such as schools and universities, professional associations and scientific organisations. Royal Charters are also used to elevate towns to city status and allow universities to confer degrees. ICAEW is among a number of accountancy organisations in the UK that operate under a Royal Charter. The BBC is organised under a Royal Charter that must be renewed every 10 years.

A Royal Charter is not necessary to carry on a charitable venture, and only a fraction of such organisations obtain one. However, like their historical predecessors, Royal Chartered companies serve a public purpose and carry with them a high level of prestige and reputation for quality. Chartered companies formed for profit are governed by many provisions of the Companies Act of 2006 but this does not apply to most Royal Charter companies, which are non-profit in nature.

EUROPEAN FORMS

The law of business forms is primarily a matter of local law for member states within the EU but the EU still impacts forms in two main ways. The first is through harmonising directives that have influenced company law since the UK joined the community. The second is through the introduction of two new forms, the European Economic Interest Grouping (EEIG) and the Societas Europea (SE). The EEIG is a specialised structure that allows existing businesses (of any form) in different member states to form a separate entity that provides ancillary services to those businesses. The aim is a form that facilitates cross-border business development, and examples include joint research and marketing ventures. The EEIG is not subject to entity-level tax, and its members have unlimited joint and several liability. UK EEIGs are governed under the Companies Act of 2006.

In contrast to the EEIG, the SE was designed to allow full cross-border mergers of companies within different member states. Though the form is not necessary for such mergers, it attempts to make them easier to execute. It also allows for a greater 'European' identity for merged companies: under traditional law, a cross-border merger would result in one of the parties becoming a subsidiary of the other, with

the parent entity still organised under the laws of its home country. An SE exists as a new company organised under EU law. It can also be formed as a joint venture of 'national companies' (companies organised under member state law), as a subsidiary of a national company or by conversion of a national company to an SE. The SE was initially conceived by the European Community as a method for harmonising company law across member states and creating a separate form of incorporation distinct from the law of member states. However, the European Company Act creating the SE does not regulate tax, competition law or insolvency and leaves many basic aspects of company law to the member state where an SE is located.

11. Conclusion

The development of business forms is driven by wider developments in society. The requirement of the state to regulate commerce for its own ends, including raising taxes, encouraged the development of forms designed to encourage enterprise. With separation of ownership and management resulting from corporate forms, and the subsequent introduction of limited liability, came requirements for controls, such as audit and disclosure requirements and statutory fiduciary duties of directors. Different forms have developed (or been chosen by businesses) to best meet specific business objectives, whether to raise capital, maximise profit or limit risk. In every case, the corporate form is subject to the rule of law, be it common law or statute and the 'rule of law' has been a crucial and positive force in Britain's economic history. Many of the issues giving rise to business law development and reform over the past couple of centuries remain live issues and continue to influence debate to this day.

Bibliography

Baedeker, R. (2008), 'Good Works: Monks build multimillion-dollar business and give the money away', *San Francisco Chronicle*, 24 March 2008.

Black, A. (1984) *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*; Cornell University Press.

Blackett-Ord, M., and Haren, S. (2007) *Partnership Law*, 3rd ed., Bloomsbury Professional.

Bodenhorn, H. (Jan 2011) 'Partnership Law and Credit Availability', NBER Working Paper No 16689.

Bonabeau, E. (June 2004), 'The Perils of the Imitation Age, *Harvard Business Review*.

Butler, H. N. (1986), 'General incorporation in nineteenth century England: Integration of common law and legislative processes', *International Review of Law and Economics*, Elsevier, vol 6, issue 2.

Cheffins, B. (2000), *Does Law Matter: The Separation of Ownership and Control in the United Kingdom*; ESRC Centre for Business Research, University of Cambridge.

Coase, R H. (1937), 'The Nature of the Firm', *Economica* vol 4, no 16, 1937.

Davidson, A.B. (1995), 'The medieval monastery as franchise monopolist'; *Journal of Economic Behavior and Organization*, vol 27.

Gower L.C.B. and Davies, P. (2008), *Gower and Davides: The Principles of Modern Company Law*, Sweet & Maxwell (8th edition).

Greenwood, R. and Empsom, L. (2003), 'The Professional Partnership: Relic or Exemplary Form of Governance?' *Organization Studies*, vol 24, no 6.

Hansman, R., Kraakman, R. and Squire, R. (2003) *Legal Entities, Asset Partitioning and the Evolution of Organisations*; Yale University.

Hansman, R., Kraakman, R. and Squire, R. (2006), 'Law and the Rise of the Firm', *Harvard Law Review*, vol 119:1335.

Harris, R. (1994), 'The Bubble Act: Its Passage and its Effects on Business Organization', *The Journal of Economic History*, vol 54, issue 3.

Harris, R. (1997) 'Political economy, interest groups, legal institutions, and the repeal of the Bubble Act in 1825', *Economic History Review*, vol L, no 4

Harris, R. (2000), *Industrializing English Law: Entrepreneurship and Business Organization*, 1720-1844, Cambridge University Press.

Hinberg, H. editor (1967), *Agrarian History of England and Wales*, Cambridge University Press (London).

Hooper, M. K. (2009), 'International Strategy Management' in Newlands, D.J. and Hooper, *The Global Business Handbook: The Eight Dimensions of International Management*; Gower Publishing Limited.

Lawrence, C. H. (2001), *Medieval Monasticism* (3rd ed.); Harlow: Pearson Education.

Lindgren, K. QC (2011), 'The birth of the trading trust', *Trust Quarterly Review*, May 2011.

Micklethwait, J. and Woolridge, A. (2003), *'The Company: A Short History of a Revolutionary Idea'*, Modern Library (New York).

Rush, J. and Ottley, M. (2006), *Business Law*, Thomson.

Smith, A. (1776), *The Wealth of Nations*, W. Strahan and T. Cadell.

Weatherford, J.M. (1997), *The History of Money: From Sandstone to Cyberspace*; Three Rivers Press (New York).

Williston, S. (Oct 1888), 'History of the Law of Business Corporations before 1800', *Harvard Law Review*, vol 2, no 3.

Wilson, J.F. (1995), *British Business History*, Manchester University Press.

About the author

Alexander Fallis is a qualified lawyer who combines his lifelong love of history with a keen knowledge of legal development and structures. He originally hails from the southern United States and emigrated to the UK in 2010, having previously practised law in New York. Established in London, Alex finds himself constantly fascinated by the ancient yet continuously evolving nature of Britain, its society and its institutions. He studied as an undergraduate at Vanderbilt University, earned a masters in laws at Boston University and most recently was a Sloan Fellow at London Business School.

ICAEW Market foundations

ICAEW's remit is based on its 1880 and 1948 Royal Charters which established that a public interest perspective will be applied in its work.

As a world-leading professional body, ICAEW provides leadership and practical support to over 147,000 members in more than 160 countries, working with governments, regulators and industry to ensure the highest standards are maintained.

ICAEW Chartered Accountants can be found in all sectors of the economy, have a wide range of expertise and work to the highest technical and ethical standards. Breadth and reach underpin ICAEW's power to convene, bringing together those with a relevant interest to discuss matters of common concern and identify how we can make a valued contribution.

ICAEW's thought leadership work involves evidence gathering, forensic analysis and the development of practical policy proposals and professional guidance aimed at improving how markets work. The Market foundations programme is seeking to use these skills to analyse and challenge some of the assumptions and structures surrounding the basic building blocks on which market transactions are based.

We welcome views and comments on this report and the other themes of the Market foundations programme. To contact us, please email marketfoundations@icaew.com. For more information on Market foundations and to download reports, visit icaew.com/marketfoundations.

© ICAEW 2017

All rights reserved. If you want to reproduce or redistribute any of the material in this publication, you should first get ICAEW's permission in writing. ICAEW will not be liable for any reliance you place on the information in this publication. You should seek independent advice.

ISBN: 978-1-78363-195-7

ICAEW connects over 147,000 chartered accountants worldwide, providing this community of professionals with the power to build and sustain strong economies.

Training, developing and supporting accountants throughout their career, we ensure that they have the expertise and values to meet the needs of tomorrow's businesses.

Our profession is right at the heart of the decisions that will define the future, and we contribute by sharing our knowledge, insight and capabilities with others. That way, we can be sure that we are building robust, accountable and fair economies across the globe.

ICAEW is a member of Chartered Accountants Worldwide (CAW), which brings together 11 chartered accountancy bodies, representing over 1.6m members and students globally.

www.charteredaccountantsworldwide.com
www.globalaccountingalliance.com

ICAEW
Chartered Accountants' Hall
Moorgate Place
London
EC2R 6EA
UK

T +44 (0)207 920 8450
E marketfoundations@icaew.com
icaew.com/marketfoundations

© ICAEW 2017 TECPLN15500 04/17