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BOOK REVIEW

Corporate Practice (3d ed.). By Carlos L. Israels, Revised by Alan M. Hoffman. New York: Practising Law Institute. 1974. Pp. xxiv, 923. \$35.

I have grown up with the various editions of Carlos Israels' book, *Corporate Practice*. As a law student, I used the old paperback, co-authored by Mr. Israels and Raymond J. Gorman.¹ More recently, I had the privilege of reviewing the second edition of the expanded hardcover version, published shortly before Mr. Israels' death. Accordingly, I regard the book as an old friend, and I am very happy that, thanks to PLI, this fine work will continue to serve the Bar in the new updated revision by Mr. Alan M. Hoffman.

Law books fall into two general categories: "texts" and "how to do it" books. All too frequently, the texts, although giving detailed summaries of the law, do not give any concrete advice on how that law can be used to meet the needs of clients (the "real world," as today's law students say). On the other hand, "how to do it" books are frequently merely collections of forms with no analysis of the reasons behind, or legal consequences of, particular provisions.

Writing a book of the first kind is, of course, easier than producing a good one in the second category. Combining both types in a single one volume work is an almost impossible task. Yet, it was one which Carlos Israels did admirably in the previous editions of this book.

In the Preface to the new edition Mr. Hoffman states: "The basic theme of *Corporate Practice* is the role of the legal practitioner as architect of a corporate structure in which statutory and case law and legal draftsmanship serve as building blocks to carry out the business bargain."² This practical union between law and draftsmanship, with the goal of serving the needs of clients, was, of course, Mr. Israels' design in writing the original version of this book, and fortunately remains the aim of the new edition.

In line with this functional approach, Mr. Israels, in the previous edition, first discussed the legal and practical considerations in the decision to incorporate (Chapters II through V), then the process of setting up the entity (including the drafting of the necessary documents) (Chapters VI through IX), the later problems involved in the operation of the corporation (including shareholder litigation) (Chapters X and XI), and finally the more complex problems of changes, combinations, termination, and transition to public ownership (Chapters XII through XVI).³ After this propaedeutic treatment interrelating statute (New York and Delaware) and practice, about a quarter of the book was devoted to forms fleshing out a living corporation in terms of the law and advice given. A tabular comparison of the New York, Delaware and A.B.A. Model Business Corporation Acts rounded out the treatment.

1. C. Israels and R. Gorman, *Corporate Practice* (1951).

2. Preface to C. Israels, *Corporate Practice* at v (3d ed. A. Hoffman 1974) [hereinafter cited as Israels].

3. The chapter headings remain essentially the same as in the earlier editions. Israels ix; C. Israels, *Corporate Practice* ix-xxi (2d ed. 1969); C. Israels, *Corporate Practice* ix-xix (1963).

Wisely, Mr. Hoffman has retained not only Israel's format, but also most of his text and carefully drafted forms. Generally, modifications have been made only where changes in the law necessitated them.

In the textual treatment, the section headings, too, have been largely retained, although some new ones have been added where changes in the law made them desirable for clearer presentation of the new material.⁴ A notable addition, occasioned by modern accounting practice,⁵ demonstrates the omniscience of the treatment.

Obviously, however, numerous changes were needed within various sections. A prime example is found in Chapter XVI, dealing with the impact of the Securities Act of 1933. Naturally, as a result of the recent promulgation of Rules 144, 146 and 147, the text of this chapter had to be almost completely rewritten. Although the necessity for brevity has resulted in some oversimplification,⁶ I am rather embarrassed to concede that this brief chapter (33 pages) probably gives the reader as good an outline of the structure of the Act as the average law school securities regulation course.

The new edition provides additional practical answers to problems either not dealt with or not clearly resolved in the New York statute, or changed by recent amendments thereto. Examples are found in note 9 to section 6.07 concerning reservation to shareholders of the power to fix consideration for par shares, section 7.26 regarding executive committee procedures, section 9.02 changing the advice as to counsel's acting as corporate secretary, section 9.19 interpreting amended New York Business Corporation Law § 713,⁷ section 11.03 giving new information on settlement of derivative actions, and sections 11.05 and 11.13 as to insurance for indemnification expenses, together with a discussion of the coverage available. Section 13.04 (noted above) shows the modern accounting treatment afforded to business combinations.

Fortunately, as in the previous edition, the emphasis is always practical, rather than academic. Notable are sections 7.05, advising on when the date for the annual meeting should be set, and against fixing the exact hour, and sections 9.08 to 9.13, showing how to "fill in the blanks" in the stock book and effectuate the share transfers (a perennial problem even for the experienced lawyer the first time he is faced with a form with blanks is what to put in those puzzling spaces), and most importantly, the forms in Appendices A through J. A new form, the affidavit of mailing of notice of shareholders'

4. See, e.g., Israel's § 9.23 ("Meetings of Directors by Conference Telephone Call; Delaware").

5. *Id.* § 13.04 ("The Proposed Combination; A Checklist of Considerations—Accounting Aspects").

6. The treatment of Rule 146 (*id.* at 469-72) seems oversimplified, since it omits a requirement of (e)(2) (offeree or his representative must be afforded an opportunity to ask questions and receive answers concerning the terms and conditions of the offering (39 Fed. Reg. 15266, 15268 (1974))) and the definition of "access" in the Note to (3). Also, § 16.13 of the book should have mentioned the exemptions the New York Attorney General has promulgated under authority granted to him under N.Y. Gen. Bus. Law § 359-ff(3) (McKinney Supp. 1974). Despite these omissions the chapter provides an excellent introduction to the Securities Laws.

7. N.Y. Bus. Corp. Law § 713 (McKinney Supp. 1974) (interested directors).

meeting, has been added.⁸ The other forms, which, like the text, cover every aspect of the corporation's life, have been updated.⁹ Along with their helpful annotations and alternative language for the blanks, they continue to be the most valuable part of the book.

Interestingly enough, here as elsewhere in the book where revision has taken place, one cannot notice any difference in style between what was written by Israels and what was inserted by Mr. Hoffman. In his Preface, Mr. Hoffman mentions his ten year association with Mr. Israels—perhaps this accounts for the inability of the reader, without proofreading, to discern where Israels leaves off and Hoffman begins. Mr. Hoffman has the same masterful ability, so characteristic of his mentor, to express himself clearly and simply on a complex subject.

Thus, text and forms combine to provide an excellent blueprint for the solution of both the organizational and operational problems of New York and Delaware corporations. Furthermore, the Appendix comparing New York and Delaware statutory provisions with the Model Act gives the book a national significance, although, needless to say, a careful check of a state's law will be necessary before any of the forms can be relied upon in a particular state, even though listed as a Model Act jurisdiction, because local deviations are frequently significant.

No book, however, is without some deficiencies, and it is, of course, the reviewer's obligation to point them out if for no better reason than as proof that he has read the work.

The ones I found were minor,¹⁰ and do not materially detract from the

8. Israels 669-70 (Appendix F).

9. Very few changes were necessary since Mr. Israels' original forms were so carefully drawn. In at least one case where the form was amended, I am not completely sure that the alternatives represent improvements over the original text. See the share repurchase provisions of the shareholder agreement, discussed at note 20 *infra*. The new decimal paragraph numbering is, of course, an improvement.

10. Generally typographical errors present in the previous edition have been corrected. However, a few have been carried over. See, e.g., Israels § 6.06, at 163 ("good wares"); *id.* § 6.06, at 164 (citation to "N.Y. BCL § 402(3)"); *id.* at 697 (Appendix H) (reference to "two-thirds," rather than "majority," of outstanding preferred shares). A few new typographical errors have been introduced. See, e.g., *id.* § 6.14, at 178 n.30 (error in cross-reference); *id.* § 11.09, at 373 n.18 (case name, and "food faith"); *id.* § 10.10, at 343 ("effect" rather than "affect"); *id.* § 11.12, at 379 (citation to "N.Y. BCL § 714(a)" rather than § 724(a)); *id.* at 628 (Appendix D) (word omitted); *id.* at 661 n.2 (Appendix F) ("use" rather than "rise").

The continued cross-reference in Appendix H (Proceedings for Merger) from Section 5a to Section 1n continues to puzzle me.

Although there are a few failures to update citations (see, e.g., *id.* § 8.09, at 256 (reference to "N.Y. BCL § 713 (a)(3)"); *id.* at 601 (Appendix D) (reference to "N.Y. BCL § 713(c)" rather than § 713(e))—both of which could be typos, genuine errors of substance are very difficult to find. The author states, for instance, that a certificate of incorporation provision is necessary to impose a "qualified majority" requirement for board action in adopting by-laws. *Id.* § 6.16, at 182. Though this is technically inaccurate (a shareholder by-law may specify the vote even though a super-majority vote is required (N.Y. Bus. Corp. Law § 601(a) (McKinney Supp. 1974))), no attorney will go wrong by inserting the provision in the certificate, especially since this appears to

continued excellence of *Corporate Practice* as an extremely useful handbook for any lawyer—especially a New York practitioner—with a corporate problem. Only two general comments deserve extended treatment.

The new version adds valuable federal tax information, and most notably the necessary form resolutions for qualifying a corporation's shares for section 1244 tax treatment.¹¹ My only criticism is that I would have welcomed more.

We are told in the chapter dealing with the crucial decision of whether or not to incorporate the business that there are three advantages possessed by a corporation: (1) limited liability, (2) perpetual existence, and (3) easy transferability of interests, and that "[u]nless one or more of these elements is necessary or desirable, incorporation probably should not be considered, and the business should be conducted either as an individual proprietorship or as a partnership, general or limited."¹²

Although perhaps not as easy to attain in unincorporated form, virtue 2, so far as anything can be "perpetual," is possible through careful drafting in a partnership, while a corporation with a sole shareholder will probably be no more perpetual than a sole proprietorship. Accordingly, this does not seem to be a very persuasive ground for incorporating.

Virtue 3 is ordinarily not a virtue at all in a newly formed corporation, but an obstacle necessitating careful draftsmanship to avoid. Thus, the Delaware statute, recognizing that free transferability is a vice rather than a virtue for close corporations, *requires* that it *not* be available to them.¹³

Thus, we are left with virtue 1, limited liability. This is always an advantage. It is unavailable to a sole proprietor, and not completely available in either a general or limited partnership. But, then again, it's not completely available even to a corporation in New York.¹⁴

So where are we? Obviously, the decision whether or not to incorporate is, or should be, at least partly dependent on tax considerations. The popular opinion is that the corporate form is less desirable than in the past because of IRC section 1348, which limits to 50 percent the maximum tax on individual "earned income."¹⁵ It seems to me that a corporation may sometimes be more desirable than a partnership simply because of section 1348. Yet, no mention

be the only exception to the general rule that all such high vote provisions must be in the certificate for them to be valid.

Similarly, the statement that an instrument delivered for filing with the Department of State must be verified or acknowledged by each signer, unless the alternative statement under the penalties of perjury is used (Israel's § 6.19, at 186), is technically inaccurate (only one of the signers need do so (N.Y. Bus. Corp. Law § 104(d) (McKinney Supp. (1974))). Again, however, no harm will be done by having all acknowledge or verify, in the infrequent case where the simpler alternative statement is not used.

In short, I hope my own books contain no more "errors" than the new edition of *Corporate Practice*, and I strongly suspect that they do.

11. Israel's 658-60 (Appendix E).

12. *Id.* § 2.01, at 8.

13. Del. Code Ann. tit. 8, § 342(a)(2) (Supp. 1968).

14. N.Y. Bus. Corp. Law § 630 (McKinney 1963 & Supp. 1974).

15. Int. Rev. Code of 1954, § 1348.

is made of this section.¹⁶ In any event, tax considerations are important in the decision of whether or not to incorporate, and, although they are discussed,¹⁷ the discussion could be more complete.

This is also true with regard to share transfer restrictions. There is a discussion of the corporate law on the subject,¹⁸ and the form for shareholder agreement¹⁹ contains a brand new arrangement for a corporate option (and mandatory repurchase on death to the extent of insurance) with an alternative cross-option for shareholder repurchase.²⁰ But there is only a brief discussion²¹ of the tax pitfalls which are considerable in all share repurchase arrangements.²²

Finally, the idealized corporation formed by three participants, a "money man," a salesman, and a production man,²³ used as the discussion and drafting framework in the book, is ultimately capitalized with \$60,000 worth of cumulative preferred and \$600 in no-par common.²⁴ Such a structure seems unlikely even in view of the tax advice which is given.²⁵

Recent corporate law conceptualism distinguishes between two types of

16. Compare *Israels* § 2.11.

17. *Id.* §§ 2.10 to 2.16.

18. *Id.* §§ 4.05 to 4.16. Section 4.06, discussing "consent" restrictions, probably should have added that such restraints are invalid in New York as to ordinary business corporations. *Rafe v. Hindin*, 29 App. Div. 2d 481, 288 N.Y.S.2d 662 (2d Dep't), *aff'd*, 23 N.Y.2d 759, 244 N.E.2d 469, 296 N.Y.S.2d 955 (1968).

19. *Israels* 512-29 (Appendix A).

20. Compare the simpler provisions in the previous edition. *C. Israels, Corporate Practice* 474-80 (2d ed. 1969). I am not sure that all of the new provisions represent improvements. I wonder, for instance, if the payment provisions for cases where an individual is the purchaser may not violate N.Y. Gen. Oblig. Law § 5-511 (*McKinney* 1964), where the figure in the blank (10% interest) is used. If the down-payment amounts suggested in the blanks are used, they will frequently prevent installment tax reporting by the shareholder whose shares are being sold. *Int. Rev. Code of 1954*, § 453. At least a caveat as to this should have been added. Furthermore, if the repurchase price for the preferred shares under alternative iii (*Israels* 524 (Appendix A)) exceeds the applicable redemption price (the preferred shares will presumably be redeemable; see *id.* at 523-29), the provision might violate N.Y. Bus. Corp. Law § 513(d) (*McKinney* 1963). A caveat as to the dollar amount to be inserted in the blank would, for this reason, also seem desirable.

21. *Israels* § 4.12.

22. See, e.g., *Rev. Rul.* 74-430, 1974 *Int. Rev. Bull.* No. 36, at 8.

23. *Israels* § 1.01.

24. *Id.* at 511 (Appendix A). This corrects the possible misimpression that the common shares will be issued for nothing. See *id.* § 3.19. At the beginning of the book, the facts indicated a total investment of only \$60,000. *Id.* § 1.01, at 3.

25. *Id.* §§ 2.13, 3.09, 3.10. The use of the no-par shares will increase the New York State Organization Tax by \$20 over what it would have been had par shares been used. N.Y. Tax Law § 180 (*McKinney* 1966). While here the added cost is trivial, it can become very significant. The tax on 20,000 \$1 par shares is only \$10, while for 20,000 no-par shares it is \$1,000. For this reason, and because (as pointed out by Mr. *Israels* himself in *Israels, Problems of Par and No-Par Shares: A Reappraisal*, 47 *Colum. L. Rev.* 1279, 1280 (1947)) no-par may well not give the protection from watered stock liability which was its *raison d'être*, it has become customary today to use low par shares rather than no-par.

corporations, "public issue" and "close," but, like national boundaries in most places throughout the world, the dividing line is difficult to draw. Under Professor O'Neal's definition (" 'close corporation' means a corporation whose shares are not generally traded in the securities markets")²⁶ most corporations are "close."²⁷ The new edition of this book carries over Israel's earlier distinction between the two types:

Corporate statutes and case law have come increasingly to recognize the existence of a distinction between two types of corporations, loosely termed "close" corporations and "public-issue" corporations. At the extreme ends of the scale the distinction is an easy one to draw. The typical one man or family enterprise and the small corporation in which all stock interests are held by comparatively few persons who regard themselves as "partners" and who are active in the business are clearly "close" corporations. The larger enterprise with securities publicly traded on a national securities exchange or in the organized over-the-counter market is, with equal clarity, a "public-issue" corporation. However, there is a large shadowy area between the extremes which is best understood in terms of the degree of identity between ownership and management. Where the personnel of ownership and management are identical or substantially so, the close corporation character is predominant no matter how large the enterprise or how numerous the shareholders. Once that substantial identity is broken, the informal procedures which were accepted without question up to that point may become practically unfeasible and legally dangerous.²⁸

This would require identity of ownership and management for existence of a true close corporation. If there are only two types of corporations, then under this "definition," most would probably fall into the "public issue" category.

These differences in definition suggest that perhaps our categories are wrong. It may be time for us to "rethink" the subject.

Israel's definition, carried over in the current edition, while suggesting a spectrum, rather than a neat trichotomy, necessitates at least three categories of corporation: the "close" at one end, the "public issue," as defined by the Securities Exchange Act at the other, and a large intermediate group, perhaps most appropriately characterized as quasi-public, quasi-private.²⁹

It is for this middle category of corporation that *Corporate Practice* is most appropriate. This is especially apparent in the discussion on drafting by-laws. It is suggested, for instance, that the by-laws fix the minimum and maximum number of directors and allow the shareholders to change the actual number within those limits,³⁰ that a provision for removal of directors without cause is useful,³¹ that the by-laws provide that the officers will serve at the pleasure of the board,³² that the by-laws should empower the board to appoint

26. F. O'Neal, *Close Corporations* § 1.02, at 3-4 (1971).

27. O'Neal's definition has been accepted for certain purposes under some statutes. See, e.g., N.Y. Bus. Corp. Law § 620(c) (McKinney 1963).

28. Israel's § 4.01, at 56-57 (citation omitted).

29. See Israel's 584 (Appendix D) (stating that the alternate by-law provisions are appropriate for a corporation of "moderate size").

30. *Id.* § 7.15.

31. *Id.* § 7.18.

32. *Id.* § 7.28.

additional officers "as it may see fit,"³³ and that the vice-president be given broad powers.³⁴ If they are part of the business bargain, these provisions may be appropriate in certain close corporations. But such provisions will usually be undesirable in those fitting Israel's "identity" definition of the close corporation, *i.e.*, where all financial participants will expect to take an active part in management. The suggested removal provision (mirrored in the form by-laws),³⁵ would, for example, allow removal from the board of the principal financial contributor by the other two shareholders in the paradigm corporation, or of the production ("inside") man by a concurrence of the money man and salesman, eventualities which, if well-advised, the potential "freezees" will not desire.

It should be added that, even here, as with the balance of the work, the careful reader will find appropriate guidance, even for his close corporation clients, at some point in the book. For example, the shareholder agreement³⁶ calls for high vote provisions in the certificate of incorporation which will negate the danger of the by-law provision. The only peril is that the busy lawyer will neglect to make sure that the provisions of all three documents—shareholder agreement, certificate of incorporation and by-laws—"mesh."

On the other hand, the attorney for the "almost-public" corporation can use the form certificate of incorporation, and copy the by-laws (including many of the alternative provisions) and organizational minutes almost without change.

The comment as to the desirability of greater tax information and the caveat as to close corporations merely represent the reviewer's personal opinions of how the book might perhaps in future editions be further improved. They are not meant in any way to discourage you from purchasing the work. Lawyers from many other states as well, and certainly every New York attorney, whether a novice preparing for the bar exam, a general practitioner with only an occasional corporate matter, or an expert specializing in the subject, will find it amply worth his while to buy, read, and use the new edition of *Corporate Practice*. We should all be thankful to PLI for allowing Carlos Israel's work to live on through this excellent revision.

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33. *Id.* § 7.30.

34. *Id.* § 7.31.

35. *Id.* at 598 (Appendix D). Compare by-law § 2.4 (*id.* at 587), which does not incorporate the good advice given under Israel's § 9.16, at 284 that even notice of an annual meeting should specify the purpose of the meeting.

36. *Id.* at 505-07 (Appendix A).

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