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# The treatment of old-style memorandum clauses

The memorandum of association of a company incorporated under the Companies Act 2006 must be in the relevant prescribed form (s. 8). The new-style memorandum basically comprises a formal subscription clause (see box below). No other provisions are allowed to be included. No provision is made to allow anything in the memorandum to be amended, except for a consequential administrative update of the company's name following a change of name.

Companies incorporated under previous Acts were required to include additional clauses in their memorandum covering matters such as the company's name, its status as a public company (where applicable), the situation of the registered office, the company's objects, the liability of the members, the authorised share capital and, in the case of a guarantee company, the nature of that guarantee.

The 1985 Act made specific provision allowing most of these clauses to be amended. The 2006 Act no longer does so. Instead, s. 28 of the Act provides that all clauses in the memorandum of a company already in existence on 1st October 2009 which are not included in the new short prescribed form (i.e. all the clauses listed above plus any other special clauses) are now automatically treated as being provisions of the company's articles of association.

It is important to understand that s. 28 of the Act did not physically amend the wording of a company's memorandum or articles. It merely changed the status of most of the clauses found in the old-style memorandum. From 1st October 2009, a company already in existence could be said to have its original articles of association and an additional set of separately numbered articles in a document called the memorandum of association.

Existing companies did not need to

do anything to effect the change of treatment. It happened automatically on 1st October 2009 by virtue of s. 28.

Further, the Government adopted a transitional rule clarifying that companies already in existence were not required to file an amended copy of their articles at Companies House merely by virtue of the changes brought about by s. 28 (see the 8th Companies Act 2006 Commencement Order (SI 2008/2860), Sch. 2, para. 8).

Indeed, if you take into account the fact that the old-style memorandum clauses operate as articles in pretty much the same way as they used to, you could argue that the two million-plus companies to whom this change applies, do not really need to know that it has happened. Or, at least, they don't until they want to change something in one of these clauses or someone asks for a copy of the articles of association.

## Presentation of articles

Under the Companies Act 1985, a company had to provide a copy of its memorandum and articles of association free of charge to members on request. Under the 2006 Act, members are only given the right to request a copy of the articles of

association, not the memorandum.

This is presumably because there is nothing of any great interest in the memorandum of a company incorporated under the 2006 Act and that what there is will never change.

Not surprisingly, there are slightly different rules for companies incorporated under a pre-2006 Act that may have memorandum clauses that are treated as article provisions. For so long as the memorandum of an existing company includes clauses that are treated as article provisions, it is obvious that we also need to provide members these clauses when we provide them with a copy of the articles. The 8th Companies Act Commencement Order (SI 2008/2860, Sch. 2, para. 9) provides that a company whose articles are deemed by virtue of s. 28 of the 2006 Act to contain provisions formerly in its memorandum may comply with any obligation to send a 'person' a copy of its articles:

- (a) by appending to a copy of the other provisions of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles, or
- (b) by sending together with a copy

## Prescribed form of memorandum under the 2006 Act

### COMPANY HAVING A SHARE CAPITAL

#### Memorandum of association of .....[Limited / PLC]

Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company and to take at least one share.

Name of each subscriber

Authentication by each subscriber

Dated

### COMPANY NOT HAVING A SHARE CAPITAL

#### Memorandum of association of .....[Limited]

Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company.

Name of each subscriber

Authentication by each subscriber

Dated

of the other provisions of the articles a copy of its old-style memorandum indicating the provisions that are deemed to be provisions of the articles.

References to an existing company's "old-style memorandum" are to its memorandum of association as it stood immediately before 1st October 2009.

It should also be noted that according to guidance issued by the Department for Business, Innovation and Skills (BIS) one of these methods should also be used when filing a copy of the articles at Companies House, presumably on the basis that the registrar of companies is 'person' to whom the company may have an obligation to send a copy of its articles (e.g. following an amendment).

#### Option (a): Appending

The first option provided by SI 2008/2860 is to "append" to a copy of the articles a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles. This should not be done, for example, by adding the old-style memorandum clauses at the end of the articles using the next series of available article paragraph numbers. This would give the impression that the company had amended its articles itself. The word "append" could be taken to mean to attach to or to include as an appendix. Either way, in doing so, there should be some indication that these appended clauses were actually contained in the memorandum of association but are now treated by law as article provisions. For example, if the clauses are including in an appendix to the articles, the following wording could be used:

#### APPENDIX TO ARTICLES

The following provisions, which on 1st October 2009 were included in the Company's memorandum of association, are now treated by virtue of s. 28 of the Companies Act 2006 (which came into force on 1st October 2009) as being provisions of the Company's articles of association:

Under this alternative, only the clauses treated as provisions of the articles need to be included (presumably with some note as to their provenance).

Should any such provisions be altered (or deleted) on or after 1st October 2009 (see below), the text of them which is "appended" should reflect such changes and be appropriately annotated (or in the case of deletions, the deletion should be noted).

#### Option (b): Sending both the memorandum and articles

The second option for existing companies is to send the person a copy of both the memorandum and articles of association with the required indications as to the status of the memorandum clauses. All that is required in this case is for an additional page, note or series of notes to be inserted in the memorandum indicating the status of each memorandum clause.

It should be noted that if all the relevant clauses are eventually deleted or replaced, there would in theory be no need to continue doing this, although a person receiving only a copy of the articles would then have difficulty knowing whether any of the remaining old-style memorandum provisions are still in force. Accordingly, even if the original memorandum provisions are no longer still effective, it is probably still sensible for an existing company to continue to provide an annotated copy of its memorandum or some other explanation as to what has happened to the former memorandum clauses.

In view of the fact that different things can happen to each of the old-style memorandum clauses, it may eventually be necessary to add a separate note for each clause that is (or was) deemed to be an article. However, a composite note similar to Example 1 on page 5 would be satisfactory, at least initially. The note could be inserted at the beginning of the memorandum in place of the words "[SEE NOTE A]" in Example 1 (e.g. as in Example 2) or on a separate page (preferably inserted before the memorandum). Subject to the addition of these notes and any subsequent amendments, the memorandum should be left exactly as it stood immediately before 1st October 2009 with all the existing notes left intact (e.g. those relating to the history of the share capital).

All companies that choose this option would be well-advised to prepare a version of the memorandum

with this note in readiness to satisfy a demand for a copy of the articles by a member or a requirement to file an amended copy of the articles at Companies House. The addition of the note(s) does not particularly require any legal knowledge. It is not necessary to obtain shareholder approval in order to make any such editorial annotations. The job can be done by the company secretary. By preparing such a version in advance, it should be clearer what actions need to be taken if the company subsequently decides to amend or delete any of its memorandum clauses which are now treated as part of the articles.

## Amendments

One of the important consequences of the change of status of these old-style memorandum clauses is that, since they are now treated in law as article provisions, they can generally be amended, deleted and replaced in the same way as the articles. This means that they can be amended or deleted by special resolution in accordance with s. 21, unless a higher majority is required because the clause must be treated as an entrenched article provision under s. 22.

It is possible to delete most of the old-style memorandum clauses without bothering to include a replacement in the main body of the articles. This is not the case with regard to the clause which establishes the liability of the members as limited or the guarantee clause of a company limited by guarantee. If either of these clauses is deleted from the memorandum, it must be replaced by a new provision in the articles. It should also be noted that the 8th Commencement Order (SI 2008/2860, Sch. 2, para. 10) provides that nothing in the Companies Act 2006 shall be read as enabling a company to amend or omit provisions of its articles that were formerly in its memorandum so as to change its status as a limited or unlimited company otherwise than in accordance with the relevant provisions of Part 7 of that Act (re-registration).

Both the objects clause and the share capital clause continue to have legal effect (mainly as limitations on the powers of the directors). The other clauses no longer have any great legal significance and can actually be

deleted without changing the status of the company.

I will deal in more detail with the effect of these remaining old-style memorandum clauses and how to amend or delete them next month.

## Share capital clause

In the rest of this month's article, I want to deal with how some of the resolutions I covered in this column last month relating to the share capital clause should be reflected in the memorandum/articles.

Special provision is made by the 8th Commencement Order (SI 2008/2860, Sch. 2, para. 42) to enable the share capital clause, which still operates as a limit on the amount of capital that may be issued by a company, to be amended or revoked by ordinary resolution. In order to increase the amount of the share capital stated in a share capital clause similar to clause 5 in Example 1, an ordinary resolution amending the clause to read something like "The share capital of the company is £2,000." It should be noted that it is no longer necessary to specify how the share capital is divided up and that the above amendment would eliminate this information. Such division can, however, still be included if that is desired.

As para. 42 of SI 2008/2860 requires any ordinary resolution amending or revoking the share capital clause to be filed at Companies House, the resolution must (under s. 36) either be incorporated in the articles by amendment or attached as a copy. If our resolution to increase the share capital is drafted as an amendment, it can obviously be incorporated by amendment, as in Example 2. We have also included a voluntary note explaining what change we made, and when, as is traditional with the share capital clause.

Example 3 demonstrates how a resolution to revoke the share capital clause by ordinary resolution pursuant to SI 2008/2860, Sch. 2, para. 42 should be reflected in the memorandum. In this case the resolution must be reproduced in full as it cannot be incorporated solely by amendment.

Similar notes and entries could be made in the relevant places if the old-style memorandum clauses have been appended to the articles.

## Examples of notes required in old-style memoranda

### Example 1: A note indicating the status of old-style memorandum clauses

THE COMPANIES ACT 1985  
COMPANY LIMITED BY SHARES  
MEMORANDUM OF ASSOCIATION  
OF  
[COMPANY NAME]  
[SEE NOTE A]

1. The Company's name is "[Company Name]".
2. The Company's registered office is to be situated in England and Wales.
3. The objects of the Company are:-  
[Objects . . .]
4. The liability of the members is limited.
5. The Company's share capital is £1,000 divided into 1,000 shares of £1 each.

WE, the Subscribers to this Memorandum of Association, wish to be formed into a Company pursuant to this Memorandum, and we agree to take the number of shares shown opposite our respective names.

NAMES AND ADDRESSES OF SUBSCRIBERS	Number of shares taken by each subscriber
[Name & address 1]	[No. x]
[Name & address 2]	[No. y]
Total shares taken	[No x + y]

#### NOTE A

Clauses 1 to 5 of the company's memorandum of association are treated as provisions of the company's articles of association by virtue of s. 28 of the Companies Act 2006 (which came into force on 1st October 2009).

### Example 2: Note explaining amendment of the share capital clause

COMPANY LIMITED BY SHARES  
MEMORANDUM OF ASSOCIATION  
OF  
[COMPANY NAME]

[NOTE: Clauses 1 to 5 of the company's memorandum of association are treated as provisions of the company's articles of association by virtue of s. 28 of the Companies Act 2006 (which came into force on 1st October 2009).]

[Clauses 1 to 4]

5. The Company's share capital is £2,000.<sup>1</sup>

[Subscribers' statement]

#### NOTES

1. The amount stated as the Company's share capital in clause 5 was increased from £1,000 to £2,000 by an ordinary resolution passed [at a general meeting held/by written resolution\*] on [date]; the clause is stated as amended by that resolution

### Example 3: Note explaining revocation of the share capital clause

COMPANY LIMITED BY SHARES  
MEMORANDUM OF ASSOCIATION  
OF  
[COMPANY NAME]

[NOTE: Clauses 1 to 4 of the company's memorandum of association are treated as provisions of the company's articles of association by virtue of s. 28 of the Companies Act 2006 (which came into force on 1st October 2009).]

[Clauses 1 to 4]

5. . . . [See Note 1]

[Subscribers' statement]

#### NOTES

1. Clause 5 of the memorandum was revoked by the following ordinary resolution passed [at a general meeting/by written resolution] on [date]: "THAT clause 5 of the Company's memorandum of association setting out the share capital of the Company, which was in force immediately before 1st October 2009 and which is now treated as part of the Company's articles by virtue of Section 28 of the Companies Act 2006, be revoked pursuant to paragraph 42 of Schedule 2 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860)."