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Old-style name, status and objects clauses

Last month we explained that the clauses in the old-style memorandum of a company already in existence before 1st October 2009 are now treated under s. 28 of the Companies Act 2006 as part of the company's articles of association. We also addressed how this change should be reflected in copies of the articles filed at Companies House and sent to the members on request.

This month, we propose to examine in more detail the effect of some of the old-style memorandum clauses, starting with the name clause. We will also try to demonstrate what changes need to be made to the memorandum if any of the clauses are revoked, deleted or no longer have any legal effect.

Company name

Although the old-style memorandum clause setting out the company's name is now treated as an article provision under s. 28, it has almost no legal effect. Under the 2006 Act, the proposed name with which a company is to be incorporated is stated in the incorporation form IN01 filed at Companies House. The memorandum is not permitted to include a clause stating the company's name and the articles are not required to include such a clause.

Under the 2006 Act, a company's name is determined not by its constitutional documents but by the name recorded on the register kept by the Registrar of Companies. The name of the company may be changed by special resolution or by other means provided for in the company's articles, such as a board resolution (ss. 78 and 79); the change of name does not take effect until the Registrar issues a certificate of incorporation on change of name in respect of the new name (s. 81).

A print of the special resolution (if applicable) (and usually a copy of the Registrar's certificate) should be attached to all copies of the articles held in stock; express references to the company's name in the articles should be annotated to indicate the change of name (there is no need to file a new copy of the articles with the Registrar under s. 26 if the print of the articles has been updated merely to show a change of name, since changing a company's name does not, strictly speaking, alter its articles).

If a company, which was in existence on 1 October 2009 (so that the name clause in the company's memorandum of association is under s. 28 now treated as a provision of its articles) changes its name, it is not required to amend that clause in order to effect the change of name. Indeed, the deemed statement of the company name in the company's articles ceases to have effect when the change of name takes effect and the company is not by reason of the name change required to send a copy of its articles to the Registrar in accordance with s.26 (see art. 5 of the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941)). However, art. 5 of SI 2009/1941 requires the company to reflect the change of status of the old-style memorandum clause in any copy of the articles sent to a person in compliance with an obligation under the 2006 Act (e.g. on the request of a member). The way in which this should be done will depend on which method of presentation has been chosen for these purposes.

Paragraph 9 of Schedule 2 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860) requires companies with remaining old-style memorandum clauses that are treated as part of the articles to include those clauses when sending a copy of the articles. It allows companies to do this either by:

(a) appending the clauses that still have effect to the articles or
(b) by sending with the articles the old-style memorandum together with an indication as to which of the clauses in it are now treated as articles.

Art. 5 of SI 2009/1941 provides that if the appending option is chosen (option (a)), the former memorandum clause stating the company's former name must, henceforth be omitted from the appended clauses; and that if the option to send the memorandum is chosen (option (b)), the memorandum must be annotated to indicate that the provision stating the company's former name is no longer effective. Examples 1 and 2 on page 5 show what the memorandum would look like before and after the change of name where presentation option (b) has been chosen.

Objects clause

Prior to 1 October 2009 a company's memorandum of association was required to include an objects clause. Such a clause is no longer required or permitted to be included in the memorandum of association. In the case of companies which were already on the register on 1 October 2009, which will have an 'old style' longer form memorandum, all the clauses which are not included in the new short prescribed form (including the objects clause) are now treated as being instead provisions of the company's articles (s. 28).

Unless a company's articles specifically restrict a company's objects its objects are unrestricted (s. 31). Thus if a company no longer has an objects clause in its articles it will have unlimited capacity, so that questions regarding its 'vires' will not arise. If, however, it does have an objects clause, that clause may impose limits on its capacity. There is some uncertainty here, since objects clauses in the traditional form do not in terms

impose restrictions – they simply state positively what the objects are and it remains to be seen whether with such clauses the courts will imply a restriction for the purposes of s. 31.

To avoid such complications, many companies which were in existence on 1 October 2009 are deleting from their articles the objects clause imported into the articles by s. 28.

At common law and prior to changes made by the Companies Act 1989 it was particularly important that the objects clause should be drawn in sufficiently wide terms to encompass all the activities in which the company was likely to engage, since any activities of the company outside the terms of the clause would be ultra vires (beyond the powers of) the company. While third parties dealing with the company in good faith were protected in the event of a transaction being ultra vires, the directors of the company could incur personal liability to the company for misfeasance in authorising the transaction.

The Act provides that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution (i.e. the articles and certain other resolutions and agreements) (s. 39). In favour of a person dealing with the company in good faith, the power of the board of directors to bind the company is deemed to be free of any limitation under the company's constitution. Knowledge by a third party that an act is beyond the powers of the directors under the company's constitution will not, in itself, cause him to be regarded as acting in bad faith (s. 40).

These provisions are only intended to protect unconnected third parties dealing with the company. The directors may still be liable to shareholders for exceeding their powers (s. 40(5)). The protection for third parties does not extend to directors (or persons connected with them) and transactions with such persons may still be voidable by the company and those persons may be liable to compensate the company (s. 41).

Under the Companies Act 1985 express authority was given for the adoption of a short-form object: 'To carry on business of a general commercial company.' Section 3A of the 1985 Act provided that this gave the company power to do all such things as are incidental or conducive to the carrying on of any trade or business of the company. However, s. 3A of the 1985 Act has now been repealed by the 2006 Act and it is not clear how short 'general commercial objects' clauses will be construed by the courts in the absence of that provision, particularly where the clause does not set out supporting powers so that some reliance was being placed on the repealed provision for the implication of supporting powers. The uncertainty here is perhaps another reason for deleting 'heritage' objects clauses and, if necessary, replacing them with more up to date provisions drafted with the 2006 Act provisions in mind.

Alteration of objects

There is no longer any special procedure for altering objects clauses – these are now in the articles and can be altered using the same procedure as for other articles changes.

However, s. 31 imposes an additional new formality in that any additions, alterations or removals of statements of objects must be notified to the Registrar (on form CC04), and the section provides that any such changes do not have effect until that notification has been noted on the Companies House register.

Liability of members

Under the 2006 Act, the articles of a limited company must include a provision limiting the liability of members (s. 3(1)). Old-style memorandum clauses serve this purpose because they are treated as article provisions. They can be deleted as long as they are replaced with a similar clause in the main body of the articles that does not purport to change the status of the company.

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).

The old-style memorandum clause now treated as an articles provision would need to amended as part of the procedures for effecting a change of limited/unlimited status under Part 7.

Public company status

There is no requirement in the 2006 Act for a public company's articles to state the fact that it is a public company. The question as to whether a company is a public company under the Act appears to be determined by the register kept by the Registrar of Companies as evidenced by the certificate of incorporation. Accordingly, it would appear that the statement that the company is a public company in old-style memorandum clauses can be deleted without affecting the status of the company. Paragraph 10 of Schedule 2 to the 8th Commencement Order (SI 2008/2860) does not seem to preclude the deletion of the old-style memorandum clause in this regard.

However, if a company were to convert from public to private, it would be required to delete the relevant old-style memorandum clause in order to comply with s. 97(3).

Situation of registered office

The situation of the registered office determines where the company is registered, e.g. in England and Wales (or Wales only), Scotland or Northern Ireland. For companies incorporated under the 2006 Act, the situation of the registered office must be stated on form IN01 delivered on formation of the company. On registration, the status and registered office of the company are as stated in, or in connection with, the application for registration (s. 16(4)). The Registrar issues a certificate of incorporation which states, amongst other things, the part of the UK in which the registered office is situated (s. 15). However, it is the information recorded by the Registrar in the Companies House register (derived from or comprising form IN01) that establishes the legal jurisdiction of the company. It is not possible to change the part of the UK in which the registered office is situated (i.e. its jurisdiction) except in relation to Welsh companies.

A company whose registered office is situated in Wales may choose to be incorporated either as a Welsh

company or an English and Welsh company. The statement on the Companies House register in this connection may also be altered to the same effect by special resolution if the company has its registered office address in Wales (s. 88(2)) – in this case, as well a filing a copy of the special resolution, notice of the change must be given to the Registrar on form AD05 and the Registrar will then issue a new certificate of incorporation reflecting the change. A 'Welsh company' may also convert back to being an 'English & Welsh company' by following a similar procedure (s. 88(3)). Certain special rules (which are permissive rather than mandatory) apply to companies whose registered office is stated to be situated in Wales (e.g. the name of the company may end with the relevant Welsh alternative for the suffix, e.g. 'Cyfyngedig' instead of 'Limited'.

Under the 1985 Act, whether the registered office was to be situated in England and Wales or Scotland had to be stated in a clause in the memorandum. That clause was not capable of amendment except to convert an English & Welsh company into a Welsh company and vice versa. Under the 2006 Act, the old-style memorandum clause is treated as an article provision but appears to have no legal effect. It can therefore be deleted without replacement if so desired. No special transitional provision is made with regard to the clause, not even for the circumstances where the clause may state that the registered office is to be situated in England & Wales (or Wales) and the company wishes to change the situation under s. 88. When making such a change, it would be sensible to either delete the old clause or to add a note clarifying that it no longer has any legal effect (see example 3).

Other memorandum clauses

Other provisions which are imported into the articles by s. 28 should be reviewed and, if necessary, deleted or amended (see further *Practice Notes*, January 2010 regarding the share capital clause).

If any of the provisions of the memorandum expressly contain entrenchment provisions, these will be regarded as articles provisions subject to entrenchment (s. 28(2)).

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 after a change of name

THE COMPANIES ACT 1985
COMPANY LIMITED BY SHARES
MEMORANDUM OF ASSOCIATION
OF
[COMPANY NAME]
(NOTE A: Clauses 2 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).)

1. . . . (See Note B)
[Clauses 2 to 5]
[Subscribers' statement]

NOTE B
Following a change of name effected by a special resolution of the company dated [date] and registered at Companies House on [date], clause 1 of the company's memorandum of association (which set out the company's former name) is no longer treated under s. 28 as a provision of the company's articles of association by virtue of SI 2009/1941, para. 5. Accordingly, the clause, which stated that 'The Company's name is "[Company Name]".' no longer has any legal effect.

Example 3: Note regarding deletion of former clause connected with status

NOTE C
Clause [x] of the Company's memorandum of association was deleted by a special resolution of the company dated [date]. It formerly stated "[. . . . .]". As a consequence of its deletion, the clause is no longer treated as a provision of the company's articles under s. 28 of the Companies Act 2006 and has no legal effect. [The deletion has not changed the status of the company.]