

A Practical Guide to the Memorandum and Articles of Association

2nd edition

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Preface

This book is intended as a practical resource for anyone wishing to draft, amend or interpret a company's memorandum and articles of association. It will be of interest to company secretaries, company secretarial assistants and anyone with responsibility for or who advises on company secretarial matters, such as finance directors, in-house counsels and other legal advisers.

As the book was being written, much of the Companies Act 2006 had already come into force. The final tranche of provisions is due to be implemented on 1 October 2009 and, where necessary, both the Companies Act 1985 provisions and the Companies Act 2006 provisions yet to be implemented are referred to.

Writing this book in the midst of the most significant revision of company law for two decades and keeping it concise with its focus squarely on providing practical commentary on the memorandum and articles has proved challenging, but it is hoped that the reader finds the book a useful source of reference. Key new areas covered include:

- what action is required to address the change in the status of the memorandum;
- analysis of the new model articles and what they mean for companies;
- guidance on reviewing and revising your articles to take advantage of changes introduced by the Companies Act 2006, such as electronic communications, indemnity clauses, directors' conflicts of interests and provisions relating to the holding of annual general meetings; and
- how to deal with the repeal of authorised share capital requirements.

Many topics of interest and importance relating to the running of a company are referred to in passing as, in practical terms, there are very few matters which can be determined by reference to the articles alone. Forfeiture of shares is one such matter, as it has no statutory basis. However, to ensure the content of the book is considered within context, in addition to the relevant statutory references and model article provisions we have indicated key associated

company law topics that are beyond the scope of the book, which the reader might want to address in more detail.

Chapters 2 and 3 of the book discuss the status and content of the memorandum and articles of association. Chapter 4 provides guidance on the amendments companies might wish to make to their articles in light of the changes of law brought into force by the Companies Act 2006. Chapters 5–8 follow the subject headings used in the model articles: directors, shares and distributions, and decision-making by shareholders. Since the constitutional documents are vital right from the start of a company's life, Chapter 9 looks at the procedures for forming a company insofar as they relate to these constitutional documents and key issues to consider, such as restrictions on choosing a company's name. As the book aims to be of practical application, tips and a significant amount of precedent material have been included to assist the reader. Further reference materials can be found at the end of the book in the Appendices.

Whilst every effort has been made to ensure the accuracy of the content of this book, neither the authors nor the publisher can accept responsibility for any loss arising to anyone relying solely on the information contained herein.

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Both of David Venus & Company Limited

Abbreviations

AGM	Annual general meeting
Articles	Articles of association
CA 1985	Companies Act 1985 (as amended)
CA 2006	Companies Act 2006
DRG	Dematerialisation Reference Group
GC 100	The Association for the General Counsel and Company Secretaries of FTSE 100 companies
ICSA	Institute of Chartered Secretaries and Administrators

Glossary of key terms

Annual general meeting A meeting of the Company's members which must be held in each period of six months beginning with the day following its accounting reference date.

Articles of association A constitutional document setting out the internal regulations of a company. Unless excluded or modified, the default article provisions contained in Table A or the Model Articles, as the case may be, have effect. See also *Table A* and *Model Articles*.

Case law The general term used to describe the principles and rules of law established by judicial opinion and decisions.

Class rights The rights attached to different classes of share.

Companies Acts The Companies Act 1985, the Companies Act 2006 and other companies acts as in force from time to time.

Company secretary An officer of a company who performs a range of duties in relation to the administration and corporate governance of the company, usually with responsibility for legal and sometimes financial compliance. Private companies do not need to have a company secretary unless otherwise stipulated in their articles. The company secretary of a public company must meet specific qualification requirements prescribed by company law.

Corporate representative An individual appointed by a shareholder that is a corporation to act on its behalf at general meetings.

Director An officer of a company responsible for determining policy, supervising the management of the company's business and exercising the powers of the company. Directors must generally carry out their functions collectively as a board.

Dividends Payments made to the members by distributing part of the company's profits in accordance with the members' respective entitlements as determined by the class and number of shares held.

General meeting A meeting which all members are entitled to attend, subject to any restrictions in the articles.

GC 100 A group of senior legal officers of FTSE 100 companies founded in 2005 to provide a forum for members to share ideas on best practice in an increasingly complex regulatory arena and to help influence policy on matters of common interest.

Memorandum of association A constitutional document governing a company's relationship with the outside world. It states a company's name, place of registration, objects, liability, capital and, in the case of a public company, a declaration of that fact.

Model Articles Articles of association in the forms prescribed by the Companies (Model Articles) Regulations 2008 (SI 2008/3229). They replace Table A as the default articles for companies incorporated on or after 1 October 2009 and will automatically apply unless excluded or varied. Table A will continue to apply to limited companies formed before that date until such time as the articles are amended or new articles adopted. We use the term 'Model Articles' when referring to the three sets, whether individually or collectively and where necessary will make clear any distinctions between them.

Officer Includes a director, managers of sufficient seniority and the secretary of a company.

Ordinary resolution A resolution approved by a simple majority of members (or their proxies) at a general meeting.

Ordinary shares The most common form of share in a company, giving holders the right to a share in the company's profits in proportion to their holdings. Generally, ordinary shares also confer the right to vote at general meetings, although it is possible for ordinary shares to be non-voting.

Preference shares Shares carrying the right to a payment of a fixed dividend out of profits before the payment of an ordinary dividend or the preferential return of capital or both.

Proxy An individual appointed by a member to act on their behalf at a general meeting.

Registered office The address at which legal documents may be served on the company and where the statutory books are normally kept. The registered office need not be where the company carries on its business and may be changed provided it remains within the company's place of registration.

Registrar of Companies A government official who is responsible for maintaining the company records that are filed in compliance with statutory requirements.

Special resolution A resolution that is approved by at least 75% of the members voting at a general meeting.

Statutory books The general term applied to the registers and minute books a company is required to keep by the Companies Acts.

Subscriber A person who subscribes to the memorandum and agrees to take up shares in a company when it is formed.

Table A Specimen articles of association for a company limited by shares as set out in the Companies (Tables A to F) (Amendment) Regulations 2007. Unless excluded or modified the version of Table A in force at the time of incorporation automatically becomes a company's articles. From 1 October 2009 Table A will be replaced by the Model Articles although Table A will continue to apply to companies formed prior to that date until amended. See *Model Articles* above.

Written resolution An alternative to passing resolutions at a general meeting which can be used by private companies to transact all business except the removal of directors and auditors. Written resolutions are passed when signed by the requisite majority but lapse 28 days from date of circulation if not yet passed.

1**Introduction**

As the basic constitutional documents of a company, the memorandum and articles of association provide the framework within which a company must operate.

Every company registered in England and Wales must have a memorandum and the form of that memorandum is prescribed by legislation. Details on the content of the memorandum are provided in Chapter 2, save to mention here that the memorandum is a written document which essentially sets out any restrictions on what the company can do. In addition, importantly, it contains a statement from the subscribers (being the founder members) that they wish to be formed into a company pursuant to the memorandum.

Every company must also have articles of association. The articles are the regulations governing a company's internal management. As such, there is more freedom about what the articles contain and they can, and in most instances should, be tailored to suit a company's particular circumstances.

Importantly, under the Companies Act 1985 (CA 1985) the articles constitute a contract between each of the members and can be enforced as if signed by each individual member. They set out the relationship between the company and its members and the requirements of the articles must be observed. Under the Companies Act 2006 (CA 2006) the constitutional documents will continue to have a similar binding effect, as section 33(1) states:

'The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.'

The memorandum and articles that are put in place when a company is formed remain that company's memorandum and articles unless amended by resolution of the shareholders. This is explained in more detail at 3.4 and 3.5.

Where there is a conflict between the memorandum and the articles the memorandum prevails (s.17 CA 1985). However, the role of the memorandum is set to change under CA 2006. Traditionally a very important document, in future the memorandum will serve a more limited purpose, i.e. to evidence the intention of the subscribers to form a company and become members on formation. In essence it will be reduced to providing a historical picture of the company at a particular point in time, in much the same way as an annual return.

1.1 Model Articles

The Companies (Model Articles) Regulations 2008 (SI 2008/3229) come into force on 1 October 2009. The Regulations prescribe Model Articles for private companies limited by shares, public companies and guarantee companies. The relevant Model Articles will automatically be the articles for companies formed under CA 2006 from 1 October 2009 which do not register their own articles of association, or which register their own articles but do not exclude the Model Articles in whole or in part as was the case with Table A.

Many companies will have adopted some version of Table A and these Regulations will continue to apply to companies formed prior to the introduction of the Model Articles. When reading a company's articles which incorporate Table A it is essential to establish which version of Table A applies, by reference to the date of adoption of the articles currently in force. It will usually be indicated quite clearly at the start of the articles which version of Table A applies. The wording might for example be:

The regulations contained or incorporated in Table A in the Schedule to the Companies (Tables A to F) Regulations 1985 as amended by the Companies (Tables A to F) (Amendment) Regulations 1985, the Companies Act 1985 (Electronic Communications) Order 2000, the Companies (Tables A to F) (Amendment) Regulations 2007 and the Companies (Tables A to F) (Amendment) (No. 2) Regulations 2007 (such Table being hereinafter called 'Table A') shall apply to the Company save in so far as they are excluded or varied hereby and such regulations (save as so excluded or varied) and the Articles hereinafter contained shall be the regulations of the Company.

Alternatively, individual regulations are sometimes excluded, as can be seen from the following example taken from some articles which, although very old, were still in use at time of writing:

Subject as hereinafter provided, the regulations contained in Table A in the First Schedule to the Companies Act 1929 (hereinafter referred to as 'Table A') shall apply to the Company.

Clauses 7, 11, 19, 45, 47, 48, 50, 64, 66, 69, 72, 82, 90, 101 and 104 of Table A shall not apply to the Company, but the clauses hereinafter contained, and the remaining clauses of Table A, subject to the modifications hereinafter expressed, shall constitute the regulations of the Company.

1.2 Relationship between the constitutional documents and statutory provisions

As mentioned in the preface, the constitutional documents can only very rarely be said to constitute the last word on any particular issue. They must generally be viewed against a broader framework of company law. Given that law is always evolving, it is quite usual for the articles to refer to the legislation in force at the time of their adoption, but also to encompass any later changes, as in the following example:

In these Articles the term 'the Act' shall mean the Companies Act 1985, including any statutory modification or re-enactment of it for the time being in force.

Unhappily for those who wish to know what rules apply on a particular point, there is no magic formula for determining whether the constitutional documents or the statutory provisions take precedence. In very broad terms, the articles cannot stipulate requirements or procedures that are less stringent than the statutory position where this would or could result in some loss of rights for the shareholders. Sometimes the Companies Acts permit the articles to contain more detailed or challenging requirements than are prescribed by law, such as allowing the delivery of proxies up to the time scheduled for a general meeting, or requiring longer notice to be given of a general meeting than is required by company law. Sometimes statute does not conceive of this possibility at all. While this may seem a little confusing, the exact position

should become clear by detailed review of the relevant clauses of the Companies Acts.

Further, as will be seen in Chapter 4, many of the statutory provisions which have come into force recently cannot automatically be read into a company's articles. In such cases the articles need to be amended before the new provisions can be made use of.

1.3 Shareholder agreements

Increasingly, companies are putting some rules of internal management into shareholder agreements rather than into articles. Shareholder agreements are simple contracts. As such they are completely distinct from the articles. Articles are automatically a contract between a company and its members. However, a shareholder agreement is merely a contract between those persons who are parties to it. It is therefore essential that any person joining the company as a member agrees to become a party to the shareholder agreement, because failure to do so means that they are neither bound by the agreement, nor can they enforce it against a party to it. Shareholder agreements commonly include a clause which stipulates that allottees, transferees and transmittes agree to be bound by the terms of the agreement. The following example deals with a member wishing to transfer shares:

Before transferring any of its shares in the Company, the Shareholder proposing to make the transfer shall procure that the transferee executes a deed in favour of the other Shareholders by which the transferee agrees to be bound by terms identical, *mutatis mutandis*, to the terms of this agreement (including the terms of this clause as regards any subsequent transfer of the shares).

While articles of association constitute a public document, shareholder agreements are generally viewed as being confidential. It is arguable that certain provisions of a shareholder agreement (such as anything which purports to vary a provision stated in the company's articles) should be filed at Companies House. Sections 29 and 30 of CA 2006 provide that copies of all agreements agreed to by all the members that would not otherwise have been effective unless passed by a special resolution should be filed at Companies House within 15 days of being made. In the absence of any judicial authority on this point it is likely that shareholder agreements will continue to be treated as purely private documents.

While a shareholder agreement may contain a number of provisions that also appear in the articles, there are a number of other matters that shareholders might prefer to include only in the shareholder agreement so that they are not available on the public record. Examples of such matters include: transferability of shares in a range of different circumstances including circumstances that are to be regarded as ‘permitted transfers’, e.g. transfers from or to founder members of the company or their family members; and restrictive covenants on the company and the parties or the company’s distribution policy.

Under section 21(1) of CA 2006, unless the provisions in the articles are more stringent, a company can change its articles by passing a special resolution (see 3.4 for details). A shareholder agreement, however, can only be changed in accordance with the manner set out in the contract itself, or, if the contract is silent, by obtaining the agreement of all parties to it. As hinted at above, a company can choose a higher threshold of approval that needs to be obtained before its articles can be amended, for example by requiring unanimity, but this could be restrictive from a practical perspective on a day-to-day basis, especially if the company’s shareholder base is large. It is also quite common to find provisions in the shareholder agreement that impose some additional requirements with regard to amendment of the articles, for example that approval must be given by a particular shareholder (often an institutional investor) as well as the 75 per cent majority being met.

1.4 Subsequent changes

Sometimes, as in regulation 64 of the 1985 version of Table A, which deals with the number of directors, a requirement begins ‘unless otherwise determined by ordinary resolution . . .’. It is therefore also important to identify whether there have been any amendments to the articles that may not be immediately apparent. Another example of where this could occur is regulation 89 of the 1985 version of Table A, which fixes the quorum for directors’ meetings at two ‘unless so fixed at any other number’. There is an obvious risk of board meetings not being properly convened if a quorum requirement has been increased but no one has picked up on the change.

To minimise confusion it is a good idea for any amending resolutions to be attached to the articles so that anyone looking at them can tell straight away which rules apply.