

Private company articles
of association and the
Companies Act 2006

SLAUGHTER AND MAY

November 2007

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PRIVATE COMPANY ARTICLES OF ASSOCIATION AND THE COMPANIES ACT 2006

Given the staged implementation of the Companies Act 2006 (CA 2006), private companies need to consider what changes, if any, should be made to their memorandum and articles of association and when those changes should be made. Private companies also need to understand other changes to company law which will impact on how their articles of association will operate in practice.

In considering these matters, different considerations may apply depending on the circumstances of the private company in question. For example, shareholders looking at a joint venture company which has articles tailored to the particular circumstances of the joint venture will need to ensure that none of the changes cut across the way in which the joint venture is set up, while those dealing with a wholly owned subsidiary in a larger group will be more focussed on ensuring consistency and administrative convenience across the group as a whole.

At some point, it is likely that private companies will want to carry out a wholesale update of their articles, to take full advantage of the changes brought in and to avoid confusion where the new statute overrides the provisions of the existing articles. However, the question is whether such updating is better done in stages as the relevant provisions of CA 2006 come into force or alternatively as one package at a later date.

CHANGES TO BE MADE NOW

The changes already introduced by CA 2006 which impact most directly on private company articles of association relate to resolutions and meetings.

To cater for these changes, Table A has been amended with effect from 1 October 2007. However, the revised Table A will only apply as default articles to companies incorporated from 1 October 2007 onwards or to any other company that amends its articles to adopt this new version of Table A.

So should an existing private company make any amendments to its articles now? In short, the answer is that (absent particular circumstances) no changes should be necessary. The following changes, which could be made, should at least be borne in mind when administering the company.

> ***General meetings***

Much of the detail relating to the holding of general meetings can now be found in CA 2006. This is likely to result in differences arising between the position under CA 2006 and a company's existing articles.

In some cases, the result is that a company will not be able to rely upon the more relaxed provisions set out in CA 2006. For example, section 307 CA 2006 now enables a company to hold a general meeting (other than an AGM) on 14 days' notice. A company that adopted regulation 38 of Table A (as in force prior to 1 October 2007) would continue to be bound by a 21 day notice period for certain general meetings.

In other areas, CA 2006 will override a company's articles. For example, Table A (as in force prior to 1 October 2007) did not permit proxies to vote on a show of hands. Section 324(1) CA 2006 has changed the position on this issue so that, irrespective of what the articles may say, a proxy is guaranteed a right to vote on a show of hands.

Whether it is worth a company amending its articles to deal with these inconsistencies will depend on the circumstances, but for a company unlikely to hold a shareholder meeting it does not seem necessary. For practical purposes, however, a note should be made of those provisions of the articles that are overridden by the new law. For further details on this area please refer to *Practitioner Alert: Private Company Meetings and Written Resolutions – Key Changes (Aug 2007)*.

> ***Written resolutions***

There is now a new regime for written resolutions under sections 288-300 CA 2006. A significant change is that a written resolution can be passed by a simple majority (for an ordinary resolution) or by a 75% majority (for a special resolution). However, the effect of sections 288-300 CA 2006 is that any procedure in the articles of association for a written resolution is no longer valid. This means that, in order to pass a written resolution, a private company must follow the procedure set out in CA 2006. Table A has been amended to

remove regulation 50 which previously set out a written resolution procedure. Existing companies do not specifically need to amend their articles to deal with this point, as the relevant provisions of CA 2006 override the articles, but the relevant provisions should be removed at the next opportunity in order to avoid confusion.

> ***Chairman's casting vote***

The manner in which section 282 CA 2006 defines an ordinary resolution means that it is no longer possible for a chairman to have a casting vote at a general meeting. Up until 1 October 2007, Table A provided for the chairman to have a casting vote, so many companies' articles will contain this provision. For most private companies, absent specific circumstances, it will not be a provision which was ever used in practice.

It is not necessary to delete this provision, since CA 2006 will override the articles, but at the next opportunity the relevant provision should be removed to avoid any confusion.

> ***Annual general meetings***

There is no obligation under CA 2006 for private companies to hold an annual general meeting. However, the Third Commencement Order provides that where the articles contain an express requirement to hold an annual general meeting, that requirement remains effective. It is only an express requirement that triggers the obligation and indirect references can be ignored. The Third Commencement Order helpfully states that any provision specifying that one or more directors are to retire at an annual general meeting of the company is not an express requirement. Companies with 1948 Table A articles will find that they do contain an express requirement to hold an annual general meeting. Such companies should amend their articles before the end of the year to avoid holding an annual general meeting in 2007 and in subsequent years.

Companies that have subsisting elective resolutions in respect of annual general meetings will not be protected by those elective resolutions. This is because the effect of the Third Commencement Order is to repeal the provisions in CA 1985 dealing with elective resolutions in respect of annual general meetings without any saving provisions. Such elective resolutions therefore ceased to have effect from 1 October 2007. Therefore, such companies which have articles containing an express requirement to hold an annual general meeting should still amend those articles to avoid the necessity to hold the meeting.

Despite a company avoiding the obligation to hold an annual general meeting, it may still need to hold a general meeting for the purpose of laying accounts under section 241 CA 1985. The Third Commencement Order repeals this section but it still applies in respect of accounts for financial years ending before 1 October 2007. So a company with a financial year ending prior to 1 October 2007 will still be subject to the requirement under section 241 CA 1985 to lay its accounts before its shareholders. Going forward no such meeting will be required as section 423 CA 2006 (which is due to come into force on 6 April 2008) requires all companies to send copies of its accounts to its members. Only public

companies will be required to lay their accounts before the company in general meeting (section 437 CA 2006 which comes into force on 6 April 2008). However, where a private company has passed an elective resolution under section 252 CA 1985 (to dispense with the laying of accounts) the Third Commencement Order does specifically provide that such elective resolutions shall continue to have effect for financial years ending before 1 October 2007.

> ***Extraordinary resolutions***

The concept of an extraordinary resolution has been abandoned under CA 2006. However, the Third Commencement Order [SI 2007/2194] provides that references in the memorandum or articles (or in any contract) to an extraordinary resolution continue to have effect and are to be construed as if section 378 CA 1985 had not been repealed. Where the articles do contain a reference to an extraordinary resolution, the resolution should still be proposed as such, and the filing obligations in respect of extraordinary resolutions still remain (by virtue of the Fourth Commencement Order [SI 2007/2607]). In due course, it would be sensible to change references to extraordinary resolutions to special resolutions.

> ***Extraordinary general meetings***

Under CA 2006, meetings are treated as being either annual general meetings or other general meetings. The concept of an extraordinary general meeting has been dropped. Although no real consequences arise from this, where articles still contain references to extraordinary general meetings this terminology should still be used. In due course, such references can be removed from the articles.

> ***Electronic communications***

The relevant provisions in CA 2006 came into force in January 2007 and enable a company to use electronic communications irrespective of its articles. As a housekeeping matter, it may in due course be useful to update some articles so that they reflect the new electronic communications provisions on their face.

> ***Age limits***

The age limit for directors that previously applied to public companies (and subsidiaries of public companies) under section 293 CA 1985 has now been repealed. Many articles will continue to exclude the operation of the repealed age limit, but it is not necessary to remove such a reference except for housekeeping purposes. However, if articles do contain an age limit for directors, or require the age of a director to be disclosed, it would be advisable to delete these provisions as they could now fall foul of the Employment Equality (Age) Regulations 2006.

> ***Company secretary***

Whilst the provisions in CA 2006 relating to company secretaries do not come into force until April 2008, it is possible to make changes to the articles now to cater for the new provisions. Under section 270 CA 2006, a private company will no longer be required by statute to have a company secretary. The Government has announced that any references in articles that directly require or assume the requirement for a company secretary will continue to have effect. In order for a private company to take advantage of the relaxation contained in section 270, it will therefore need to amend its articles if they require the company to have a secretary or specify tasks that the secretary is to perform. This is likely to be the case with most private companies, as regulation 99 of 1985 Table A contains a requirement to appoint a secretary. For further information on company secretaries please refer to the *Practitioner Alert: Company Secretaries (Oct 2007)*.

LOOKING AHEAD TO OCTOBER 2008

October 2008 will see the final stage of the implementation of CA 2006, with the remainder of the provisions coming into force – including those relating to share capital and company constitution. Set out below are some of the changes that a company may want to make in preparation for October 2008. However, private companies with greater flexibility regarding the timing of those changes may wish to wait until the relevant commencement orders containing the transitional provisions have been published before updating its articles.

> *Simplifying the constitution*

Under CA 2006, the memorandum of association of a newly incorporated company will be an extremely short document, effectively recording only the identity of the initial subscribers and, if relevant, the share capital subscribed by them.

As a consequence, Section 28 CA 2006 has the effect of moving certain provisions from the memorandum of an existing company into its articles of association, including the objects clause. Section 31 CA 2006 provides that, unless a company's articles specifically restrict objects, a company's objects are unrestricted. Therefore, existing companies that wish to have unrestricted objects should amend their articles to remove the objects clause which is treated as part of their articles by virtue of section 28 CA 2006.

> *Limited liability*

At present, from 1 October 2008, the liability of members of a limited company will no longer necessarily be limited. Under CA 1985, a company limited by shares was defined as "a company having the liability of its members limited by the memorandum of association to the amount, if any, unpaid on the shares respectively held by them". This has not been carried through into section 3 CA 2006. Unless any change is made to the statute before next year, this means that the articles of an existing company will (notwithstanding section 28 CA 2006) need to be amended specifically to limit the liability of its members to the amount unpaid on any shares held by them.

> *Share capital*

With effect from 1 October 2008, there will no longer be a concept of authorised share capital under CA 2006. However, for existing companies the Government has announced that the authorised share capital should continue to operate as a deemed restriction in the company's articles. To provide greater flexibility, the Government has announced that if an existing company wishes to remove this restriction it may do so by ordinary resolution.

Currently a company requires specific enabling provisions in its articles to purchase its own shares, to consolidate or sub-divide its shares and to reduce its share capital or other undistributable reserves, as well as shareholder authority to undertake the relevant action. Under CA 2006, a company will only require shareholder authority to do any of these things and it will no longer be necessary for articles to contain enabling provisions. Accordingly, a company may wish to remove the relevant enabling provisions from its articles with effect from 1 October 2008 on the basis that they are no longer necessary.

In addition the Government has said that transitional arrangements will maintain the status quo for existing companies whose articles immediately prior to 1 October 2008 do not contain the relevant enabling provisions. Currently, the absence of such provisions effectively amounts to a prohibition on the power of such a company to undertake the relevant alteration to its share capital. It is intended that the transitional provisions will maintain this position by the absence of such provisions being treated as a deemed restriction on the ability of the company to undertake such action – but the detail will be clearer once the relevant commencement order has been published. After 1 October 2008, such companies may wish to amend their articles to remove this deemed restriction. For further information on this area please refer to *Practitioner Alert: Share Capital (May 2007)*.

> ***Change of name***

Under section 77(1)(b) CA 2006, a company will be able to change its name by other means provided for by its articles. To take advantage of this provision, a company would need to amend its articles to enable the directors to pass a resolution to change the company's name. For further information on this area please refer to *Practitioner Alert: Company Names (Jul 2007)*.

> ***Directors' duties and conflicts of interest***

The new provisions relating to directors' conflicts of interest come into force in October 2008. Section 175 CA 2006 provides that a director is under a duty to avoid a situation in which he has, or can have an interest that conflicts, or possibly may conflict, with the interests of the company. Section 175(4) provides that this duty is not infringed if the matter has been authorised by the directors. Section 175(5) provides how that authorisation may be given. For a private company, authorisation may generally be given by the directors, provided there is nothing in the company's constitution to invalidate such authorisation. (This contrasts with the position of a public company where the constitution must positively enable the directors to provide such authorisation).

However, in respect of existing private companies, the Government has announced that the absence of a provision in the constitution which would invalidate such directors' authorisation is not sufficient. Instead, the Government intends to introduce transitional arrangements that will require existing companies to seek shareholder approval if they want to permit directors to authorise such conflicts. Shareholder approval can either be obtained by amending the articles or by passing an ordinary resolution on this specific issue.

WHAT DOES IT ALL MEAN?

For a private company to continue to operate in the same way as before CA 2006, in the absence of particular circumstances (e.g. the particular structuring of a joint venture and, say, its use of written resolutions), there is very little that it needs to do immediately. It may need to take action to avoid holding an AGM and it will need to ensure that it uses the new written resolution procedure.

Looking forward to October 2008, there are some actions that will have to be taken by an existing company. It will need to obtain shareholder approval to authorise conflicts of interest otherwise practical problems are likely to arise and it will need to amend its articles to deal with the technical drafting issue under section 3 CA 2006. More generally, other amendments may be desirable at that stage to deal with all of the changes that will then have been introduced.

FORM OF UPDATING

A company wishing to update its articles at that stage will need to consider the best way of going about the task.

From 1 October 2008, Table A will be replaced by new model form articles, with different forms for public companies and private companies. The model articles will be the default articles for a company incorporated on or after 1 October 2008. However, any company adopting new articles from that date (including an existing company amending its articles) could choose to base its articles on either of the public or private model form articles or indeed the pre-October 2008 version of Table A. Adopting articles after 1 October 2008 based on Table A may seem anachronistic but there may be reasons to do so (e.g. ensuring consistency of articles amongst group companies). In addition, both of the forms of model articles will need amending to make them suitable. The private company model articles are more ideally suited to a family run company, but the public company model articles are also not ideal for a wholly owned subsidiary. A consensus is yet to develop as to which of the model form articles is likely to be the starting point.

PRACTITIONER ALERT : PRIVATE COMPANY MEETINGS AND WRITTEN RESOLUTIONS – KEY CHANGES

New provisions

Part 13 of CA 06: ss281-283, 288-303, 307, 502

When in force

1 October 2007 (s502 is in force 6 April 2008; s390 CA 85 as amended by transitional provisions will apply in the intervening period.)

Companies affected

Private companies

Summary of changes

- > There is no longer a statutory requirement for a private company to hold an AGM. Private companies should review their articles of association.
- > Resolutions may be passed either at a members' meeting or by a new, more detailed, written resolution procedure (s281). A private company will not be able to opt-out of this statutory regime (s300) and will have no ability to pass a written resolution in accordance with any procedure (e.g. in articles) that does not meet the requirements of the regime (s288).
- > The new written resolution procedure (ss288–300, 502):
 - requires a simple majority of eligible votes (an ordinary written resolution) or 75 per cent of eligible votes (a special written resolution), rather than unanimity
 - as now, cannot be used for removing a director or auditor
 - “written” includes electronic form, including for the purpose of signifying agreement
 - requires the company to circulate the resolution accompanied by a statement informing members how to signify agreement and the date by which the resolution must be passed
 - specifies that a resolution lapses if not passed before the end of the period specified in the articles (or, absent such provision, 28 days from the circulation date)
 - specifies that if the company is authorised to use electronic communications under CA 06 and sends a written resolution via its website, the resolution must be available on the website throughout the period from the circulation date to the date on which it will lapse if not passed

- specifies that a resolution is passed when the required majority has signified agreement and that a member’s agreement cannot, once signified, be revoked
 - a written resolution will still need to be sent to auditors (although the requirement for it to be sent at or before the time the resolution is sent to members is abolished) together with any accompanying statement required to be sent to members under s288-300.
- > Companies will still be able to hold general meetings if they wish to. Meetings can be called:
 - by the directors at any time (s302), or
 - by members representing 10% of voting shares (or 5% if more than 12 months have elapsed since the last general meeting requisitioned by members – the drafting in s303(3) means that accessing this right may prove difficult in practice).
 - > Unless articles provide a longer period, the notice period for general meetings is 14 days (s307).
 - > A general meeting can be called on short notice if 90% (currently 95%) of members agree (s307).

Implications for practice

- > Where a private company has an express provision for holding AGMs in its articles, the articles should be amended if the company wishes to cease holding AGMs. The DTI has indicated that indirect references to the AGM in a private company’s articles will be disregarded. Where the articles provide for the directors or officers to retire by rotation at the AGM, their appointments will continue until terminated in accordance with CA 06 or other provisions of the articles.
- > CA 06 is drafted on the basis that most decision making in private companies will be by written resolution, rather than by general meeting. CA 06 does not require unanimity on written resolutions, making it easier to pass a written resolution, but the price for this is the mandatory additional, albeit limited, formality regarding circulation and timing.
- > Other written resolution procedures set out in a company’s articles will not be valid under CA 06.
- > The common law unanimous consent rule is expressly preserved (s281(4)).

August 2007

PRACTITIONER ALERT : COMPANY SECRETARIES

New provisions

Part 12 CA 06: ss270-280

When in force

6 April 2008

Companies affected

s270 applies to all private companies,
ss271-273 apply to all public companies,
ss274-280 apply to all public companies and those private companies with a secretary.

Summary of changes

- > A private company will no longer be required to have a secretary (s270).
- > A public company will still be required to have a secretary (s271) and the Secretary of State has a new power to direct a public company, in breach of its obligation to have a company secretary, to appoint a secretary (s272). The company must comply with the direction (by making the appointment and giving notice of it) within the period specified in the direction. Failure to do so is an offence.
- > The appointment and resignation of secretaries still needs to be notified to the registrar (s276) but details of residential addresses need no longer be disclosed (s277(5)).

If the office of secretary is vacant or there is no secretary capable of acting, the directors may authorise any person to fulfil the role (previously it had to be a director).

Implications for practice

- > The Government has announced that any references in articles that directly require or assume the requirement for a company secretary will continue to have effect and that this will not require transitional arrangements. In order to take advantage of the removal of the statutory requirement to have a secretary, private companies will need to check their articles and, if the articles require the company to have a secretary or specify tasks that the secretary is to perform, amend them.
- > Private companies with standard Table A articles will need to amend them if they no longer wish to appoint a secretary.
- > Private companies should consider passing a board resolution recording the fact that the company has decided not to have a secretary.

- > If a private company decides not to have a secretary, it will need to amend its standard execution clauses to refer to execution by two directors or by a director in the presence of a witness.
- > Where a private company does not have a secretary, third parties will be able to serve a document on the company directly and a director or another person authorised by the directors may perform the functions previously undertaken by the secretary.
- > Large groups with numerous private company subsidiaries may be able to reduce the burden of appointing a secretary to each company. However, the tasks undertaken by the company secretary will remain to be performed (either by a director or by a person authorised by the directors). Under current proposals Companies House is continuing to require all filings to be authenticated by directors and secretaries (i.e. there is no flexibility to allow authentication by other authorised persons). This means it may not be practicable for many companies to discontinue the position of company secretary.

October 2007

PRACTITIONER ALERT : SHARE CAPITAL

New provisions

Part 17 of CA 06: ss10, 540-548, 617-621

When in force

1 October 2008

Companies affected

Part 17 generally applies to all companies, although some provisions are only relevant to private companies.

Summary of Changes

- > The concept of authorised share capital has been abolished. There is no longer a requirement for a company to include its authorised share capital in its memorandum, and directors may increase share capital by simply allotting new shares. For existing companies, the government has announced that it intends to make transitional provisions to the effect that the authorised share capital currently stated in a company's memorandum will constitute a restriction in its articles of association which may be removed by ordinary resolution.
- > A new provision under s542 CA 06 makes it clear that shares in a limited company having a share capital must still have a fixed nominal value.
- > CA 06 places in statute the common law rule that share capital may be denominated in any currency and that different classes of shares may be denominated in different currencies. However, the initial authorised minimum share capital requirement for a public company must be £50,000 or its euro equivalent, although this may subsequently be redenominated.
- > A "statement of capital" ("Statement of Capital") must be filed upon incorporation and within 1 month after any alteration of share capital. A Statement of Capital must reflect the company's share capital following the adjustment and should include the following information:
 - the total number of shares of the company
 - the aggregate nominal value of those shares
 - for each class of shares, the prescribed particulars of their rights, the total number and the aggregate nominal value
 - terms and conditions of redeemable shares if directors are authorised to determine them
 - the amount paid up on each share.

- > A company may only exercise the power to sub-divide or consolidate its share capital under s618, or reconvert stock into shares under s620, if the members have passed an ordinary resolution or a resolution requiring a higher majority (as the articles may require).
- > Under CA 06 a company can no longer convert its shares into stock. Existing stock may be converted into shares.

Implications for practice

- > New companies wishing to restrict the number of shares that can be issued should include such a restriction in their articles.
- > Any existing company wishing to remove the deemed authorised capital restriction imported from its memorandum into its articles will need to pass an ordinary resolution. However, the relevant transitional arrangements giving effect to this process are still awaited.
- > Companies will need to arrange appropriate systems to cope with filing a Statement of Capital every time there is a share capital alteration.

May 2007

PRACTITIONER ALERT : COMPANY NAMES

New provisions

Part 5: ss53– 85 CA 06 and Part 31: s1033

When in force

1 October 2008

Companies affected

All companies, although various provisions apply to specific types of company only.

Summary of changes

- > Objections can be made to a company names adjudicator, a new office established by CA 06, where a company's registered name is:
 - the same as one in which the objector has goodwill (defined to include reputation of any description), or
 - where the name is sufficiently similar that its use in the UK is likely to mislead by suggesting a connection between the objector and the company in question.

It is for the registering company to show that one of a number of circumstances applies that raises a presumption that a name was adopted legitimately, although an objection will be upheld if the objector can show that the main purpose of the registration was to obtain money or prevent the objector using the name.

- > A company names adjudicator can require a change of name. Rules about proceedings before adjudicators will be detailed in Regulations. Decisions of the adjudicators are to be made public. An appeal lies to court from an adjudicator's decision.
- > The established method of changing a company name by special resolution remains. CA 06 also allows name changes by whatever means are prescribed in a company's articles of association, for example by way of a board resolution. A name can also be changed by a company names adjudicator if an objection is upheld or by court order following an appeal against an adjudicator's decision.
- > A new provision provides for power to make Regulations specifying what letters, symbols etc. may be used in a company's registered name and may specify a permitted format for a name (for example to prevent the use of superscript (e.g. 1st) or subscript (e.g. H₂O)).
- > A new provision requires the company to provide to the Registrar a notice of change of name when passed by special resolution or alternatively a notice of change of name together with a statement that the change is in accordance with the company's articles.

- > Also new is a requirement that where a change of name by special resolution is conditional, the notice to the Registrar must specify that the change is conditional and whether the event has occurred and, if not, the company must file a second notice when the event has occurred.
- > A company is restored to the register with the name it had before it was dissolved or struck off unless its name is the same as another on the register, in which case the restored company must change its name.
- > Regulations will be released requiring companies to display specified corporate information, particularly the company's name, in locations or on documents specified in the Regulations. It is expected that the Regulations will largely follow the requirements as currently set out in ss348-351 CA 85, as amended by the Companies (Registrar, Languages and Trading Disclosures) Regulations 2006.

Implications for practice

- > When adopting a new name, trade mark infringement and passing off issues should continue to be considered as now.
- > Companies should remain aware of similar company names and note the new statutory procedure for objecting regarding a name that is too similar. These enhanced powers will help protect companies from opportunist registrations.
- > Companies may consider amending their articles to provide for an alternative to a special resolution for changing the company name. One suggestion might be to insert a power for the directors of the company to change the company name by passing a board resolution.
- > It will be possible for companies to pass conditional resolutions to change their name e.g. on completion of an acquisition or merger. However, it will not be possible to reserve a particular name by using a conditional resolution.
- > Companies should review their websites and e-mail footers and include specific corporate information or hypertext links if necessary to comply with trading disclosures.

July 2007

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