

(d) Limitation of Liability Clause

If members' liability is to be limited, memorandum must have a clause to this effect.

(e) Capital Clause

Limited company with share capital must have a clause stating the total amount of share capital with which it proposes to be registered and the division of that capital into shares of a fixed amount.

No minimum capital for private companies; £50,000 minimum for public companies.

(f) Association Clause

This is a clause stating that the subscribers are desirous of being formed into a company in pursuance of the memorandum. This is followed by signatures of subscribers (attested by one witness) and the number of shares each has agreed to take.

(g) Other Clauses

Public company must have clause stating it is to be a public company.

No other clauses are necessary but it is possible to have others.

(h) Alteration of Memorandum

CA 1985, s.2(7) - a company cannot change its memorandum except in the circumstances and manner expressly provided for in the Act.

Memorandum can be altered to change company from public to private and vice versa - requires special resolution of shareholders.

Company can be changed from unlimited company to limited by special resolution - change from limited to unlimited requires written consent of all the members.

Reduction of share capital requires special resolution.

CA 1985, s.17 - any provision in the memorandum which could have been contained in the articles can be altered by special resolution.

CA 1985, s.16 - no member of a company can be bound to an alteration which makes him liable to take more shares or which increases his liability in any other way unless he consents in writing.

When company resolves to alter its memorandum, a copy of the resolution, and the amended memorandum, must be sent to the Registrar within 15 days - failure to do this is a criminal offence punishable by a fine.

2. Articles of Association

(a) Articles Generally

The articles govern the internal management and organisation of the company.

The articles are secondary to the memorandum - if there is conflict between the articles and the memorandum, the memorandum prevails.

Re Duncan Gilmore & Co Ltd (Case 40)

Companies (Tables A - F) Regulations 1985 provides a model set of articles for a company limited by shares.

A company has three options:

- (i) It may adopt Table A in full.
- (ii) It may adopt Table A with modifications.
- (iii) It can exclude Table A entirely and write its own articles.

(Table A has existed in various forms since 1862 - a company which adopts Table A will be bound by the Table A existing at the time it was incorporated, not a later version).

Articles must be: (i) Printed
(ii) Set out in numbered paragraphs
(iii) Signed by the subscribers to the
memorandum

(b) Alteration of Articles

CA 1985, s.9 - articles can be altered by special resolution, which must be notified to the Registrar of Companies within 15 days.

Any provision in the articles which would have the effect of making them unalterable is void.

There are certain restrictions on the company's power to alter its articles:

(i) Express Statutory Restrictions

s.16 - cannot alter articles to increase a member's liability without his consent.

s.369(1) sets out notice periods for calling meetings and states this cannot be shortened by a provision in the articles.

(ii) General Law and Public Policy

A provision in the articles which is contrary to public policy is void.

St Johnstone Football Club Ltd v SFA (Case 41)

The same would apply to any provision which was inconsistent with the companies legislation.

(iii) Court Order

Certain sections of the 1985 Act give the court power to order that no alteration be made to the articles.

(iv) Memorandum

An alteration to the articles which conflicts with the memorandum would be effectively void.

(v) Improper Use of Power to Alter Articles

The Power to alter the articles must be exercised bona fide for the benefit of the company as a whole.

A member cannot challenge an alteration carried out in good faith for the benefit of the company, even if the alteration adversely affects his own rights.

Allen v Gold Reefs of West Africa Ltd (Case 42)

Greenhalgh v Arderne Cinemas Ltd (Case 43)

The courts will usually allow the alteration, but have sometimes found that it is not bona fide for the benefit of the company as a whole:

Brown v British Abrasive Wheel (Case 44)

Dafen Tinplate Co Ltd v Llanelly Steel Co (Case 45)

3. Legal Effect of Memorandum and Articles

The legal effect is described in s.14 CA 1985. The memorandum and articles operate as a contract between the company and its members, which both parties are bound to honour.

The effect of this is:

(a) Each member, in his capacity as a member, is bound to the company as if he personally had signed the memorandum and articles.

Hickman v Kent or Romney Marsh Sheep Breeders Association (Case 46)

(b) The company is bound to each member in his capacity as a member.

Wood v Odessa Waterworks Co (Case 47)

(c) The memorandum and articles do not constitute a contract binding the company or any member to an outsider - or to a shareholder in any other capacity than as a member.

Eley v Positive Government Life Assurance Co Ltd (Case 48)

Beattie v E & F Beattie Ltd (Case 49)

(d) Provisions of the memorandum or articles can sometimes form part of an extrinsic contract between the company and an outsider. This can happen in one of three ways:

(i) Where provisions of the memorandum or articles are expressly incorporated into an express contract between the company and the outsider.

(ii) Where there is no express contract but a provision in the memorandum/articles is incorporated by implication from the conduct of the parties.

(iii) Where there is an express contract which is silent on a particular matter, and relevant provisions in the articles or memorandum are used to fill in any gaps.

The company is not actually liable to the outsider on the basis of the articles, but under the extrinsic contract.

Re New British Iron Co, ex parte Beckwith (Case 50)

(e) A member has a right to compel the company to act according to the articles even if not enforcing a right which is personal to himself as a member.

Salmon v Quinn & Axtens Ltd (Case 51)

(f) The memorandum and articles constitute a contract between each member and every other member.

Rayfield v Hands (Case 52)

VI. CAPITAL AND SHARES

1. Nature of Shares and Share Capital

(a) What is a Share?

A share is the unit of measure for determining a member's interest in the company.

The memorandum states the nominal value for each share - members must contribute at least this amount.

(b) Share Capital

There are different aspects to this:

Authorised Share Capital

Total value of shares the company is allowed to allot - also known as nominal or registered capital.

Allotted Share Capital

Value of shares the company has actually allotted to members.

Paid-up Share Capital

Amount that members have paid on their shares, excluding any premium.

Called-up Share Capital

Paid-up capital + any amount members have been called on to pay.

Uncalled Capital and Reserve Capital

Uncalled capital is the amount owing on partly paid shares which members have not yet been called on to pay.

Reserve capital is uncalled capital the company has resolved not to call unless the company is wound up.

2. Classes of Shares

(a) Typical Rights of Shareholders

Member's rights are detailed in the Articles, but the following are typical:

- right to control company through voting at meetings
- right to participate in distribution of profits
- right to participate in surplus assets in a winding up.

(b) Preference Shares

Give preferential right to a dividend of fixed amount or fixed percentage per share - this dividend is paid before anything is paid to ordinary shareholders. Right to dividend is normally cumulative.

Preference shares usually give a preferential right to repayment of capital on a winding up.

Preference shareholders normally have restrictions placed on their power to vote at general meetings.

(c) Ordinary Shares

Dividend depends on company profits and there is no automatic right to a dividend.

3. Issue and Allotment of Shares

Issuing is the process by which members take shares in the company.

A share is allotted when someone acquires an unconditional right to be entered in the register of members.

(a) Allotment Contracts

Usual rules of contract apply. There must be an offer met by an acceptance. A prospectus is not an offer to sell shares, it is an invitation to treat.

It is possible to have a conditional contract which gives an option to demand the allotment of shares at a later date. These option can be traded like shares.

(b) Authorisation of Allotment

CA 1985, s.80 - Directors cannot allot shares without authority given by the existing shareholders or the articles.

The authority must state the maximum number of shares to be allotted. It is a criminal offence to allot shares without proper authorisation, but the allotment remains valid.

(c) Pre-emption Rights

CA 1985, s.89 - existing shareholders must be offered the opportunity to buy any new issue of shares before they are offered elsewhere. Shareholder must be given 21 days to decide whether to buy. Private companies can avoid pre-emption rights.

4. Transfer of Shares

CA 1985, s.182 - shares must be transferable.

Private companies usually restrict members' rights to transfer shares.

(a) Transfer of Unlisted Shares

- transferor signs stock transfer form
- form is given to transferee with share certificate.
- if only part of shareholding is being transferred, form and certificate are sent to the company instead, for certification.
- transferee sends form and certificate to company, which enters him on register of members. New share certificate is issued after two months.

(b) Transfer of Listed Shares

- can be done as for unlisted shares.
- companies that support CREST can transfer listed shares electronically - records are computerised and no share certificate is issued.

(c) Transmission of Shares

Transmission is the automatic transfer of shares by operation of law. It takes place in a number of circumstances.

(i) Death of Shareholder

Shares of deceased shareholder transmit to his executor to deal with as directed by the will or the rules of intestacy.

(ii) Insanity of Shareholder

If shareholder becomes a patient under the Mental Health Acts and a public guardian is appointed, the shares transmit to the public guardian.

(iii) Bankruptcy of Shareholder

Shares held by a bankrupt transmit to his trustee in bankruptcy.

Holder of shares through transmission has the same rights and benefits as a member even if not registered as a member - but he cannot vote. He can choose to be registered and can then vote.

5. Capital Maintenance

Members are entitled to a dividend out of profits. A company cannot return capital to the members. This provision operates to protect creditors.

CA 1985 sets out some legal methods by which the capital of a company can be returned to the members.

(a) Reduction of Capital

CA 1985 ss.135-141

A company can reduce its capital if this is authorised by the articles and the reduction is confirmed by the court. It also requires alteration of the share capital as stated in the memorandum - this needs a special resolution.

The court will only confirm the reduction if satisfied that the company's creditors have been paid or have consented to the reduction.

(b) Redeemable Shares

CA 1985 s.159(1)

A company can issue redeemable shares if power to do so is given by the articles.

The shares give a temporary membership of the company - the nominal value (and sometimes a premium) is paid to the shareholder at the end of the period.

When shares are redeemed they must be cancelled by the company. The company must make up its capital by issuing new shares or transferring funds from the profit and loss account to the capital redemption reserve account.

Any premium payable on redemption must be paid out of profits.

Private companies can pay for redemption completely out of capital - this needs a special resolution and a declaration from the directors that the assets will exceed liabilities after the payment is made.

(c) Company Purchasing its own Shares

Generally this is prohibited by s.143(1), but s.162 allows a company to buy its own shares in the circumstances provided by the Act and if authority is given in the company's articles.

(i) Market Purchase

Must be authorised by ordinary resolution, which must state maximum number of shares to be purchased and minimum and maximum price to be paid. The authority cannot last more than 18 months.

(ii) Off-Market Purchase

This requires a special resolution approving the specific purchase contract. If the company is a public company, the authority to buy must expire within 18 months.

When a company has bought its own shares it must cancel them and compensate for lost capital by a new share issue or a transfer of profits to the capital redemption reserve.

VII. MEETINGS AND RESOLUTIONS

1. Shareholders and Shares

Day to day management of a company is in the hands of the directors, not the shareholders - but the shareholders retain some important powers - many decisions require a resolution of the shareholders and cannot be decided by the directors alone.

(a) Who is a "Member"

(i) Anyone who subscribes the memorandum.

(ii) Any other person who agrees to become a member and whose name is entered on the register of members.

(b) Register of Members

CA 1985, s.352 requires every company to keep a register of its members. The register must show:

- name and address of each member.
- date person became a member and, where applicable, the date he ceased to be a member.
- the number of shares held by each member and the amount paid on them.

2. Kinds of Meetings