

1. The Memorandum of Association

For a company limited by shares, the memorandum must contain the following:

(a) Name Clause

CA 1985, s.25 - the name of a public limited company must end with the words "public limited company", the name of a private limited company must end with the word "Limited". Abbreviations may be used instead: "plc" or "Ltd".

It is an offence to carry on business under a name which uses these words or abbreviations when not entitled to do so - the penalty is a fine.

Under CA s.26, it is not possible to register a company name which includes the words "public limited company", "limited", "unlimited" or their abbreviations anywhere except at the end of the name.

There are also other restrictions on the use of names:

(i) Under s.26, a company cannot be registered under a name which is identical to a name already registered.

(ii) A company cannot be registered under a name which is regarded as offensive or where the use of the name would constitute a criminal offence.

(iii) A company cannot be registered under a name which suggests that the company is connected with the government or a local authority - or under any name including a word listed in the Company and Business Names Regulations 1981 - unless the Secretary of State gives permission for the name to be used.

(iv) s.26 does not prevent the registration of a name very similar to that of another company - but if the similarity is deceptive and likely to lead to confusion, the established business may bring an action to restrain the new company from using the name. This is called a "passing-off" action.

Court will take into account:

- scope of pursuer's reputation

- similarity of kind of business

Ewing v Buttercup Margarine Co Ltd (Case 35)

Dunlop Pneumatic Tyre v Dunlop Motor Co (Case 36)

Aerators Ltd v Tollitt (Case 37)

Exxon Corpn v Exxon Insurance (Case 38)

(v) A company must have its name printed on all business documents and it must be displayed at the registered office and all business premises.

A company which wishes to trade under a name other than its registered name comes within the provisions of the Business Names Act 1985.

(vi) Insolvency Act 1986, s.216 prevents the director of a company which has gone into insolvent liquidation from taking part in the management of any business trading under the same name as the insolvent company.

(vii) A company can change its name by special resolution (requires approval of holders of 75% of the company's shares).

The Secretary of State can order a compulsory name change within 12 months of registration if he discovers the name is the same as or too like one previously registered.

The Secretary of State can order a compulsory name change at any time if he discovers that the name gives a misleading impression of the activities of the company.

(b) Registered Office Clause

CA 1985 s.2 - the memorandum states whether registered office is to be in England and Wales or in Scotland.

This establishes company's nationality and its domicile, but not its residence. Registered office is important because:

- it determines the jurisdiction in which the company can be sued.
- it is the address at which notices and documents must be served on the company.
- it is the address at which the company's registers and records must be kept and made available for inspection by the public.

Address of registered office can be changed by ordinary resolution (simple majority vote of shareholders), provided this does not also change the domicile.

(c) Objects Clause

Company's memorandum must contain an objects clause - a clause which states the purpose or purposes for which the company was incorporated.

(i) The *Ultra Vires* Rule

If the company does something beyond the scope of its objects clause, this is said to be *ultra vires* (beyond the powers of the company).

Previously this was of great importance - transaction entered into beyond the company's powers was void and could not be enforced by or against the company, and it could not be ratified. This was called the *ultra vires* rule.

Ashbury Carriage and Iron Co v Riche (Case 39)

(ii) Abolition of the Rule

The Rule has been abolished by statute as far as third parties are concerned.

s.35(1) CA 1985 - the validity of an act done by a company shall not be called into question on the grounds of lack of capacity by anything in the company's memorandum.

The rule still operates internally of the company - a shareholder can bring an action to restrain the company from carrying out an *ultra vires* act.

(The court will not restrain the company from doing anything it is already under a legal obligation to do)

A director may be liable to the company for any costs incurred by the company on an *ultra vires* transaction.

Potential problems can be avoided: CA 1985 s.3A allows a company to state in its memorandum that its object is to carry on business as a general commercial company. It can then carry on any trade or business whatsoever.

(iii) Change of Objects Clause

Under CA 1985, s.4 a company can change its objects clause by special resolution.

Members (holding at least 15% of the nominal issued share capital) who did not consent to the change can apply to the court to have the alteration set aside. (s.5)

Application must be made within 21 days of the resolution being passed. The alteration will not then come into effect unless it is confirmed by the court.

(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.