

Business Law: CIMA Year One

Company Registration

A company is formed after action by its promoters: those people who arrange for the correct documents to be completed and registered, who buy capital for the new company, those who choose appropriate professionals to complete accounts and legal documents, and those who arrange finance.

The promoters owe the company and its shareholders a fiduciary duty to be fair and take reasonable care. In most cases (where companies are small), the promoters will be the new shareholders and employees. If not, the promoters must declare any profit they make from their actions. Any contracts made by promoters on behalf of the company will be deemed invalid if they are formed before the company is incorporated.

Registration documents

When a company is formed, the promoters must arrange for a number of documents to be filed with the Registrar of Companies.

The Memorandum of Association

The Memorandum describes the company and how it is due to interact with other parties. The Memorandum must contain:

- The name of the company. This is chosen by the promoters, but is subject to some limitations – it must include “plc” or “ltd”, must be sufficiently different from other existing companies, and must not be offensive. The name of the company must appear on all business documents and be clearly shown at all premises where business is carried out (under the Business Names Act 1985).
- The registered office of the company. This is where official documents must be kept (available for inspection), and where legal papers must be served.
- A liability clause. It is sufficient for the Memorandum to state that liability is limited – it need not give further detail.
- A capital clause. This gives the nominal (or authorised) capital that a company is allowed to distribute as shares. It does not give details of any share premium.
- An objects clause. This details the aim of the company, and any activities it is intended to carry out. Any activities carried out which are outside the scope of the objects clause are *ultra vires*, and therefore void. It is possible (since the Companies Act 1989) to have an objects clause which states that the purpose is “to carry on business as a general commercial company”.
- An association clause. This must be the last clause in the Memorandum, and gives names and addresses of at least two subscribers (for a public company) who state that they wish to be formed into a company.

The Articles of Association

The Articles detail the internal affairs of a company, including the relationship between its directors and its shareholders. The Articles detail how often a shareholders' meeting must take place, the voting rights of shareholders, how shares can be transferred, powers of directors, and how dividends are to be calculated.

A company may choose to not submit its own Articles. If no Articles are submitted, it is assumed that it is adopting Table A, and its Memorandum must contain a clause to this effect. A company adopting Table A adopts the version in place at the time of formation, and this does not change if Table A is subsequently revised.

Even if Articles are submitted, any area in which specific rules are not laid out will be covered by the rules of Table A.

Statement of Directors, etc (Form G10)

Form G10 sets out the particulars of the company's directors, including any other directorships which those directors hold. It must also give details of the first company secretary, who is responsible for keeping the registers and documents required under the Companies Act.

Other documents

In addition, one of the directors or company secretary must file a statutory declaration that the registration requirements of the Companies Act have been complied with. Also, a registration fee (currently £20) must be paid.

The Certificate of Incorporation

Once the Registrar of Companies receives the documents detailed above, and is satisfied they meet the statutory requirements, he will issue a certificate of incorporation which states the date on which the company was incorporated, and gives the company a registered number which must appear on official documents.

The certificate is held as the final word in disputes over the date of incorporation, the type of company, or the company's name, even if a mistake is made on the certificate.

The Effects of the Memorandum and Articles

The Memorandum and Articles define a relationship between a company and its members. Each of the members has contractual rights and obligations. Shareholders or members may only enforce these rights in their capacity as shareholders.

Eley v Positive Government Security Life Assurance Co (1876)

E was a shareholder of PGSLA, and was named in the Articles of PGSLA as their solicitor 'for life'. PGSLA used another solicitor. E sued for breach of contract. However, the courts held that the Articles of a company are only contractual when looking at ordinary shareholder's rights, and thus E had no contract as an employee. E could not use his shareholder status to resolve the issue.

Re New British Iron Company Limited ex parte Beckwith (1898)

B was a director and a shareholder. The company failed to pay its directors, who sued for their salary (since they had contractual rights to it). However, they did not sue for a breach of the Articles, since there was no direct contract there. Their employment contract did not give an indication of how much they should be paid; the Articles gave a figure of £1000 per annum. The courts implied this sum into their employment contract.

Altering the constitution

The Memorandum and Articles can be considered as a company's written constitution. As long as these documents retain their obligatory clauses, they may be changed by shareholder agreement and reregistration.

However, here are some exceptions when shareholders may not change the Memorandum or Articles to how they desire. This is mainly covered by case law, where the directors of small companies fall out and use the majority voting rules to force changes through. A preemptive shareholders agreement, which requires all shareholders to agree to changes, can prevent this.

The Corporate Capacity to Contract

A company cannot make contracts before the date on its certificate of incorporation.

Kelner v Baxter (1866)

K was a promoter to a company to build and run a hotel. K made a contract as a promoter to buy wine from B. At the time the contract was made, the company had not been formed. K claimed to be an agent for the company. B did not deliver. The company could not sue, even if it ratified the contract. Since K claimed to be acting as an agent, the contract did not exist.

Under the Companies Act 1985, the case of Kelner v Baxter would now result in a contract between K and B. If B was wronged, he would be able to sue K, as if K had personally made

the contract: that is, 'as good as' a contract had been made. However, there would be no contract between the company and B.

Ultra Vires

Any action taken by a company outside the scope of its objects clause can be considered *ultra vires* and therefore void.

Ashbury Railway Carriage & Iron Co v Riche (1875)

ARC's objects clause stated that the company was "to build and supply railway stock". The company made a contract to build a railway system in Belgium for R, but did not perform. R sued and lost, since the company had no power to enter into a contract to build a railway system. R had not read the objects clause of ARC.

This is largely made irrelevant by the Companies Act 1989, which states 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 Memorandum."

Therefore, a company may not cite *ultra vires* as a reason in defence of a legal action, nor may a contracting party use it as defence for non-performance. Instead, it is mostly used to govern internal relationships of a company, and in particular the actions of directors with respect to shareholders.