Business Law: Memorandum and Articles

The Companies Act provides that, as regards each of the various types of company, these documents shall be in the form specified by regulations made by the Secretary of State "or as near to that form as circumstances admit". This, however is treated with considerable latitude and so long as the documents submitted are in the same basic form as that specified and contain what the Act prescribes, the widest variations of content are permitted. Thus, as we shall see, the practice has long been to produce memoranda much lengthier than the prescribed forms because of inflated objects clauses—a practice which conceivable may change as a result of the reforms of the ultra vires doctrine by the Act of 1989.

The present Regulations contain five Tables of which Table A, prescribing model articles for a company (whether public or private) limited by shares, is the most important and differs in its effect from the others. Such a company does not have to register articles (as opposed to the memorandum) and, if it does not, Table A (as in force if it does register articles, in so far as these do not exclude or modify Table A, its provisions will apply. Furthermore, it, and any other type of company (which will have to register articles) may, in them, adopt by reference any provisions of Table A. In contrast, the model articles in Table C (relating to a company limited by guarantee and with a share capital) and Table E (relating to an unlimited company having a share capital) are merely models which cannot be adopted by reference and will not apply to fill lacunae in the registered articles. Tables C and D also include model forms of memoranda for the types of company to which they relate as does Table B (for a private company limited by shares) and Table F (for a public limited company).

Before preparing the memorandum and articles, the draftsmen will need to obtain, from the promoters, information on matters such as the following:

1. The nature of the business. This will be required in connection with the objects clauses of the memorandum unless the promoters are content to adopt the general purpose formula in section 3A.
2. The amount of nominal capital and the denomination of the shares into which it is to be divided (assuming, of course, that it is to have a share capital). These will need to be stated in both the memorandum and articles. For the articles the draftsman will also require to know if the shares are to be all of one class and, if not, what special rights are to be attached to each class, as these should be set out in the articles, but preferably not in the memorandum. The capital of a public company will have to be not less than the authorized minimum.
3. Any other special requirements which deviate from the normal as exemplified by the appropriate Table. The most likely matters are quorums, and the minimum and maximum numbers of directors.

With the aid of this information the draftsman should have no difficulty in preparing drafts based on precedents from his own experience; reference books and the Tables. Moreover, most law stationers have their own standard forms set up in print, adaptation of which will reduce printing charges.

The main question for consideration is the extent to which Table A is to be adopted. The option of not registering any articles, which is permissible when the company is limited by shares, is rarely chosen because most such companies on initial registration will be private ones and the incorporators will wish to include the sort of restrictions on freedom to transfer shares which were a pre-condition for qualifying as a private company prior to the

Companies Act 1980. the restrictions in Table A are limited to giving the directors a right to refuse to register a transfer when the shares are partly paid or the company has a lien upon them. When the incorporation is a partnership or family business what will be wanted is an absolute discretion to reject transfers and, probably, provisions requiring the shares to be offered to the existing shareholders if a member wishes to sell. A common practice is to register articles which substitute alternative provisions for certain Table A provisions but adopt the rest. This reduces the length of the document and the printing costs. But if this is done, care should be taken to specify exactly which provisions of Table A are excluded and not leave this to implication by some such formula as "Table A shall apply except in so far as it is varied by or inconsistent with the following provisions"—a formula which inevitably leads to trouble.

Unless economy is a serious consideration, however, it is far better to exclude Table A completely and to have self-contained articles, even if, as will almost certainly be the case, these in most respect merely duplicate the provisions of the Table. By so doing, the company's officer will not be faced with the task of extracting its regulations from two separate documents, one of which, Table A, may become progressively less accessible—for it will be appreciated that it is the Table extant at the time of incorporation which continues to govern. Adoption of Table A is therefore often a false economy, particularly as the larger firms of company solicitors have their own standard forms which are kept in print by their stationers, thus minimizing the costs to their clients.

In case of a company whose memorandum states that its registration office is to be in Wales it is now permissible for the memorandum and articles (and other documents that have to be delivered for registration) to be in Welsh, but they have to be accompanied by certified English translations when delivered for registration or be translated into English by the Registrar.

The distinction between the memorandum and the articles of association has already been dealt with. The effect of the two documents as between the members and the company will be considered later.