



BVI Financial Services Commission

Registry of Corporate Affairs

User Guides on the BVI Business Companies Act

User Guide No. 3

The Memorandum and Articles Of Association

This is one of a series of User Guides published by the Registry of Corporate Affairs that are intended to provide general information about different aspects of the BVI Business Companies Act ["the Act"].

The Guide is not intended to provide, and is not a substitute for, legal advice and is not intended to address the circumstances of any individual case. The Act has been summarised to make the Guide easier to read and the Guide should be read together with the Act. You should always consider carefully whether you might benefit from legal, accounting or other professional advice concerning your particular circumstances or the circumstances of your company.

Introduction

Every company must have a memorandum of association that complies with the Act. With the exception of an unlimited company that is not authorised to issue shares, every company must also have articles of association that comply with the Act.

The memorandum and articles (taken together) are the company's constitution. Their principal purpose is to set out any limitations on the activities that may be carried on by the company, to provide for the relationship between the company and its members and between the members themselves and to provide for the company's internal management.

The memorandum is, in effect, the company's charter and, traditionally, it has been the memorandum that defined the company's powers. However, the Act provides that every company has "full capacity", subject to the memorandum and articles. This means that, unless the memorandum and articles provide otherwise, a company has all the powers that a natural person has. The role of the memorandum under the Act, therefore, is to impose any limitations on the company's powers rather than to define them.

The articles, on the other hand, usually specify the more detailed rules for the company's internal management.

The Act provides that the memorandum and articles of a company are binding:

- between the company and each member of the company; and
- between each member of the company.

The effect of this is that if you become a member of a company, you are bound by the memorandum and articles. You should, therefore, read the memorandum and articles carefully before agreeing to become a member in, or a director of, a company. You should also consider obtaining professional advice, particularly if there is anything in the memorandum or articles that you do not understand.

Matters that Must be Provided for in the Memorandum

The BVI Business Companies Act is designed to be extremely flexible so that the memorandum and articles can be tailored to meet the requirements of the company and its members. However, the Act does require the memorandum and articles to provide for certain matters. These requirements are set out in this section.

The Act requires the memorandum of a company to state:

- the company's name
- the company's type (ie whether it is limited by shares, by guarantee etc)
- the address of the first registered office of the company
- the name of the first registered agent of the company
- in the case of a company limited by guarantee, details of the members' guarantees

In the case of a company limited by, or authorised to issue, shares, the memorandum must also state:

- the maximum number of shares that the company may issue (or a statement that the company is authorised to issue an unlimited number of shares)
- details of any classes of shares that the company is authorised to issue
- whether or not the company is authorised to issue bearer shares

The memorandum may, but is not required to, provide for matters other than those set out above. For example, the memorandum may restrict what the company may do by limiting its objects.

Matters Required to be Provided for in the Articles

The Act makes only one requirement with regard to matters that must be stated in the articles. It provides that the articles of a company limited by shares, or authorised to issue shares, must state the circumstances in which share certificates shall be issued.

How do the memorandum and articles relate to the Act

It is important to appreciate that the Act contains many provisions that provide for the relationships between the company and its members and between the members themselves and for the company's internal management. In some cases the Act states that its provisions apply, regardless of the memorandum and articles. For example, although the memorandum of a company may give the directors the power to amend the memorandum or articles, section 12(5) of the Act provides that the directors cannot amend the memorandum or articles to restrict the rights of the

members to amend the memorandum or articles. This provision in the Act cannot be over-ridden by the memorandum or articles.

However, in most cases the provisions in the Act are expressed to be subject to the memorandum and articles. In those cases the memorandum and articles can provide that the provisions in the Act do not apply. However, if the memorandum and articles are silent on these issues they will apply to the company by default.

It is therefore important that the memorandum and articles are drafted so that they are appropriate for your particular business or other needs. This may require the default provisions in the Act to be excluded.

Registered agents usually have one or more standard model memorandum and articles, which are drafted so that they can be easily adapted to fit the needs and requirements of most clients. However, you do not have to use a standard model for your company. You should discuss your needs and circumstances with the proposed registered agent or with your legal or other professional advisor so that you can be properly advised as to the appropriate form of memorandum and articles for your company.

The memorandum and articles of a proposed company, signed by the proposed registered agent as incorporator, must be filed with the application to incorporate a company.

The up to date memorandum and articles of a company must be filed with the Registry and is available for members of the public to inspect.

Amendment of the Memorandum and Articles

In most cases the memorandum of a company may be amended by the members of the company. However, there may be exceptions. Section 12 of the Act permits the memorandum to include what are called “entrenching provisions”. Entrenching provisions restrict the rights of the members to amend the memorandum and articles. They may provide –

- that certain parts of the memorandum and articles cannot be amended at all;
- that a resolution of more than 50% is required to pass an amendment;
- that the memorandum or articles, or certain parts of it, can only be amended if certain conditions are met.

You should be very cautious about using the entrenching provisions as it may make it extremely difficult to amend the memorandum and articles in the future should your needs change.

The directors of a company, if expressly permitted by the memorandum of the company, may amend the memorandum and articles. However, the directors –

- may not restrict the power of the members to amend the memorandum and articles;
- may not change the number of members required to pass a resolution amending the memorandum and articles; and

- may not amend the memorandum and articles if the members could not do so themselves.

These provisions are designed to ensure that the members of the company retain their control over the company.

The Registry must be notified of any amendment of the memorandum or articles and, unless the Court orders otherwise, an amendment to the memorandum or articles does not take effect until the amendments is registered by the Registry.

Restated Memorandum and Articles

Extensive amendments to the memorandum and articles can make it difficult for the members of the company, and others, to know at any one time, what the memorandum and articles provide. The Act therefore permits a company to file a restated memorandum or articles at any time. A restated memorandum or articles is a copy of the memorandum or articles that consolidates the original memorandum or articles together with all amendments that have been registered by the Registry. This consolidated version will be much easier for others to read and follow.

Copy of Memorandum to be Provided to Members

An up to date copy of the memorandum and articles must be provided to any member who requests it provided that the member pays the charge, if any, determined by the directors as reasonably necessary to defray the costs of preparing the copy and providing it to the member.