



UNIT 7
BUSINESS
LAW AND
PRACTICE



**SOLICITORS LEGAL KNOWLEDGE MODULE
MANUAL 2021/22**

EXCERPT FROM BUSINESS LAW AND PRACTICE

7.4 INCORPORATION OF A COMPANY

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7.4 INCORPORATION OF A COMPANY

Relevant SRA SQE Assessment specification

Functioning Legal Knowledge:

Procedures and documentation required to incorporate a company/form a partnership/LLP and other steps required under companies and partnerships legislation to enable the entity to commence operating:

- constitutional documents
- Companies House filing requirements.

7.4.1 Introduction

This chapter will introduce you to fundamental principles that will underpin your knowledge of how to set up a company in England and Wales. You will learn about the statutory requirements of the *Companies Act 2006* (Companies Act) for incorporating a company. This includes knowledge about the requirements to file certain documents with Companies House. You will learn about the purpose and content of the articles of association, which are a company's key constitutional documents. All legislative provisions referred to in this chapter are part of Companies Act.

The chapter will also address the SRA legal knowledge by examining, step-by-step, the process of setting up a company and the option to purchase a shelf company. We will examine the documentation that must be filed at Companies House to successfully incorporate a private limited company.

7.4.2 Memorandum of association

The memorandum of association is a very simple document. It is a snapshot of the company and its promoter(s) at the time the company is formed. It does not form part of the company's constitution. At least one person must be willing to subscribe to the memorandum: s 3.

7.4.3 Articles of association

Articles of association are the company's internal rules governing how the company will operate, in effect, the company's constitution. Articles are therefore an important document for companies and every company must have them.

The promoters of a company (those planning to incorporate it) are free to write their own articles to suit the needs of their business, but the Companies Act provides for default articles of association, called the Model Articles.

The Model Articles for private companies limited by shares are set out in Sch 1 to the *Companies (Model Articles) Regulations 2008* and are divided into five parts:

- the limited liability of shareholders
- directors' powers

- shares and distribution of dividends
- decision-making by shareholders, and
- administrative arrangements.

A company must register its articles at Companies House, unless the company adopts the Model Articles in full and without amendment.

7.4.3.1 Types of articles of association

A company can adopt one of the following approaches to its articles of association:

Type of articles	Description
Model Articles	Unless a company expressly includes amended articles, the default will be the Model Articles: s 20.
Amended Model Articles	A company can amend and/or delete particular Model Articles: see below. Provided the Companies Act does not say otherwise, amendments can be made to the Model Articles.
Bespoke articles	A company can adopt entirely bespoke articles, although this unusual.

7.4.3.2 Common amendments to the Model Articles

The Model Articles are commonly altered to:

- limit a company's objects
- increase quorum for board meetings to more than two people
- remove the chairman's right to a casting vote
- allow directors to vote on issues in which they have an interest
- alter directors' duties to make them more or less onerous
- remove the requirement for a company to change its name by way of a special resolution (ss 77(1)(b) and 79)
- alter the directors' authority to allot and issue shares; and
- alter the statutory pre-emption rights of shareholders.

7.4.4 Statutory requirements

In addition to the memorandum of association (see 7.4.2), the documentation and information that must be submitted to the Registrar at Companies House to form a private company limited by shares comprises the following:

- articles of association
- Form IN01 and a fee
- name of the company
- registered address
- statement of intended business activity
- register of persons having significant control
- statement of proposed officers

- statement of capital, and
- statement of compliance.

7.4.4.1 Articles of association

As mentioned above, a company must register its articles at Companies House unless the company adopts the Model Articles in full, that is, without any amendments.

7.4.4.2 Form IN01 and fee

Form IN01 is the application form to register a company and must be submitted with the relevant fee. Electronic filing is £12 (or £30 for same-day registration) and paper filing is £40 (or £100 for same-day registration). The Form IN01 supplies the information set out below at 7.4.4.3–7.4.4.9 inclusive to the Registrar of Companies.

7.4.4.3 Name of the company

The promoters of the company must choose a name for the company which cannot:

- be offensive (s 53)
- imply an association with government/public authority (without relevant consent) (s 54)
- use particular sensitive words (without relevant consent) (s 55) , or
- be the same as another company's name (s 66). Additionally:
 - if another company has goodwill in its name, it can object to others infringing use of that name (s 69), and
 - if a name is the same or too similar (s 67) or misleading (ss 75 and 76) the offending company can be required to change it (s 67).

In addition, the name of a private limited company must also end with “Limited” or “Ltd”: s 59.

7.4.4.4 Registered address

Form IN01 requires the promoters to state the place of registration of the company, that is, England and Wales.

The application must also contain a statement of the intended address of the company's registered office where all notices and other communications can be sent: s 86.

A company must also maintain various statutory registers, including the register of its members and directors. The information contained in the registers must be available to the public to inspect. Therefore, the company's registers must be kept either at the company's registered address (where an application can be sent) or, electronically, at Companies House on the public register. It is important to note that, if the company decides to keep the information about its members on the public register at Companies House, those details, including addresses, can be viewed by anyone who wishes to see or make a copy of them.

If the statutory registers are not kept at Companies House and are not going to be kept at the company's registered address, Form AD02 (notification of a single alternative inspection location) must be completed.

7.4.4.5 Statement of intended business activity

A statement of the type of company it is to be and its intended principal business activities, which is a requirement added by the *Small Business, Enterprise and Employment Act 2015* must also be submitted.

7.4.4.6 Register of persons having significant control

Companies must maintain a register of persons having significant control, directly or indirectly, over the company. Significant control being people who, alone or with others, have:

- more than 25% of the shares
- more than 25% of the voting rights
- the right to remove or appoint a majority of directors
- significant control or influence

7.4.4.7 Statement of proposed officers

The statement of proposed officers must include the name(s) of the initial director(s) (there must be at least one (s 541)) of the company and the company secretary (if there is one): s 270. Full details should be given, such as:

- the full name and any former names of each director
- month and year of birth
- country or state of residence
- nationality
- occupation, and
- service and residential address(es) (note the residential address will not appear on the public register).

If the company is opting to have a company secretary (which is not a requirement for private limited companies (s 270)), then similar information must also be supplied in respect of the appointee to that office.

7.4.4.8 Statement of capital

The statement of capital must state:

- the total number of shares taken by the subscribers (the people stated in the memorandum) on formation
- the class(es) of shares and the rights attached to them
- the shares' aggregate nominal (minimum) value, and
- any premium.

If any amount is unpaid on those shares, then that total unpaid amount must also be stated.

7.4.4.9 Statement of compliance

A statement of compliance is also included in Form IN01. This confirms that the requirements of the Companies Act as to the registration of the company have been complied with.

7.4.5 Effect of registration

Provided all of the documents mentioned above are in order, the Registrar will issue the company with a certificate of incorporation which is proof of registration: s 15. The certificate states the company's name, registered number and date of incorporation.

On incorporation, the company can proceed to exercise its powers as a separate legal person. The first shareholder(s) will be the subscriber(s) to the memorandum and the proposed company's director(s) and company secretary, if there is one, are appointed.

The company's accounting reference date will also be set as the last day of the month of incorporation annually.

7.4.6 Shelf company alternative

An alternative to going through the process described above is to acquire a shelf company which has already been incorporated but yet to trade. Shelf companies can be acquired from a company formations agent or from law and accountancy firms who often have shelf companies ready for clients.

7.4.6.1 Advantages of a shelf company

A shelf company has the following advantages:

- It already exists which avoids any delays associated with incorporation.
- A particular incorporation or accounting reference date can be secured.
- Provides an efficient and faster process than undertaking the incorporation steps set out above.

A shelf company can immediately enter into contracts even before it has been fully customised, as it is already a body corporate, thereby avoiding the problem of personal liability under pre-incorporation contracts: s 51.

7.4.6.2 What is received?

A shelf company will include the following:

- A certificate of incorporation
- The statutory company books which contain the registers
- The memorandum and articles of association
- stock transfer form transferring the shares
- letters of resignation from the first director(s) and company secretary (if there is one); and
- a certificate confirming the company has not traded.

7.4.6.3 Next steps

Before acquiring a shelf company, the purchaser be expected to sign forms to appoint the replacement director(s) (Form AP01) and (if there is one) the company secretary (Form AP03) and change the registered office (if required) (Form AD01).

At the first board meeting following the purchase of a shelf company, the following will occur:

- Stock transfer forms executed, issue new share certificate(s) and update the register of members.
- Supply updated information for the register of persons having significant control.
- Appoint further directors (if relevant) and a company secretary (if relevant) and notify Companies House within 14 days using Forms AP01 and AP03 (directors) and AP03 and AP04 (company secretary).
- If necessary, change the registered office and file a Form AD01 at Companies House.
- If required, change the accounting reference date by board resolution and lodge Form AA01 at Companies House.
- If required, change the company's name by shareholders' special resolution and file Form NM01, a copy of the special resolution and requisite fee at Companies House. Note the fee differs according to the method of notification used.
- Allot and issue further shares if required then within one month, notify Companies House of the allotment by filing a Form SH01. Note directors of private companies with only one class of shares should have an automatic authority to allot: s 550.

7.4.7 Companies Housing filing requirements and forms

As you can see from the table below, Companies House will need to be informed of various events during the life of the company. The list below is not exhaustive but sets out some of the common events that will require specific forms to be filed with Companies House.

Event	Form
Private company limited by shares adopting the Model Articles in their entirety	IN01
Change of registered office address	AD01
Notification of single alternative inspection location	AD02
Change of location of the company records to the single alternative inspection location	AD03
Appointment of director	AP01
Appointment of corporate entity as director	AP02
Appointment of company secretary	AP03
Confirmation statement	CS01
Return of allotment of shares	SH01
Termination of appointment of director	TM01
Change of director's details	CH01
Change of secretary's details	CH03
Change of accounting reference date	AA01

Event	Form
Dormant company accounts	AA02
Particulars of a charge	MR01
Particulars of a charge subject to which property or undertaking has been acquired	MR02
Statement of satisfaction in full or in part of a charge	MR04
Statement that part or the whole of the property charged: <ul style="list-style-type: none"> • has been released from the charge, and • no longer forms part of the company's property 	MR05

7.4.7.1 Filing resolutions at Companies House

Certain resolutions must also be filed at Companies House. The resolutions form part of the company's constitution in addition to the company's articles. The types of resolutions that must be filed are (ss 29 and 30):

- all special resolutions
- unanimous agreements, that would have required a special resolution had the agreement not been unanimous
- board resolutions
- shareholder agreements that bind a class of shareholders, and
- resolution of all the members of a class of shareholders.

7.4.8 Offences for defaulting on Companies House filings

If a company fails to file statutory information promptly with Companies House, there are specific offences under the Companies Act for each filing requirement. On summary conviction, the penalty is a fine.

These offences include failing to file:

- company resolutions and agreements including all special resolutions and specified ordinary resolutions (ss 29–30)
- annual accounts and related reports
- the confirmation statement
- notice of appointments of or changes in directors' particulars
- notice of appointments or changes in company secretary, and
- return of allotment of shares.

7.4.9 Summary of arrangement of Model Articles for private companies limited by shares

Part	Topic	Sub-topic and article number
Part 1	Interpretation and limitation of liability	1. Defined terms 2. Liability of members
Part 2	Directors	<p>Directors' powers and responsibilities</p> 3. Directors' general authority 4. Shareholders' reserve power 5. Directors may delegate 6. Committees
		<p>Decision-making by directors</p> 7. Directors to take decisions collectively 8. Unanimous decisions 9. Calling a directors' meeting 10. Participation in directors' meetings 11. Quorum for directors' meetings 12. Chairing of directors' meetings 13. Casting vote 14. Conflicts of interest 15. Records of decisions to be kept 16. Directors' discretion to make further rules
		<p>Appointment of directors</p> 17. Methods of appointing directors 18. Termination of director's appointment 19. Directors' remuneration 20. Directors' expenses
Part 3	Shares and distributions	<p>Shares</p> 21. All shares to be fully paid up 22. Powers to issue different classes of share 23. Company not bound by less than absolute interests 24. Share certificates 25. Replacement share certificates 26. Share transfers 27. Transmission of shares 28. Exercise of transmitters' rights

Part	Topic	Sub-topic and article number
		29. Transmittees bound by prior notices Dividends and other distributions 30. Procedure for declaring dividends 31. Payment of dividends and other distributions 32. No interest on distributions 33. Unclaimed distributions 34. Non-cash distributions 35. Waiver of distributions Capitalisation of profits 36. Authority to capitalise and appropriation of capitalised sums
Part 4	Decision-making by shareholders	Organisation of general meetings 37. Attendance and speaking at general meetings 38. Quorum for general meetings 39. Chairing general meetings 40. Attendance and speaking by directors and non-shareholders 41. Adjournment Voting at general meetings 42. Voting: general 43. Errors and disputes 44. Poll votes 45. Content of proxy notices 46. Delivery of proxy notices 47. Amendments to resolutions
Part 5	Administrative arrangements	48. Means of communication to be used 49. Company seals 50. No right to inspect accounts and other records 51. Provision for employees on cessation of business Directors' indemnity and insurance 52. Indemnity 53. Insurance

7.4.10 Summary of key principles

- A company's articles of association form its main constitutional document.
- A company may choose to:

- use unamended Model Articles
 - amend the Model Articles, or
 - draft bespoke articles.
- The process of incorporating a company involves completing and filing various documents and forms with Companies House. Companies House must also be kept informed of certain changes to the company throughout its life.
 - Once a company is registered, it is issued with a certificate of incorporation at which point it is a separate legal person. Shareholders have the right to request copies of the company's constitutional documents. This includes the company's articles, its certificate of incorporation and the latest statement of capital.

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