

COLLAS DAY | COMMERCIAL

Are your Memorandum  
and Articles ready for  
1 January 2010?

September 2009

The Companies (Guernsey) Law, 2008 (2008 Law) is a modern piece of legislation which gives greater flexibility and scope to companies to be more entrepreneurial. Amongst the changes introduced by the 2008 Law are some amendments to the constitutional documents (memorandum and articles of association or, as they are now known, memorandum and articles of incorporation (M&As)) of Guernsey companies.

Guernsey companies in existence prior to 1 July 2008, unless they have updated their M&As, may not be able to take full advantage of the 2008 Law.

Set out below are some of the changes introduced by the 2008 Law.

## ■ Company's objects

The objects of a company as stated in its memorandum may now be unlimited, ensuring that there is no risk of the company acting ultra vires, that is to say, acting beyond the company's powers. This can be a source of uncertainty and a thorny issue for many counterparties and for the law firms instructed to issue legal opinions on the company.

## ■ Share capital

Companies incorporated on or after 1 July 2008 do not require an authorised share capital. Companies incorporated prior to such date may continue to have an authorised share capital until 1 July 2011. Such a company will still need to comply with the old company law in that any increases in share capital will need to be sanctioned by an ordinary resolution of the company.

## ■ Dividends and other distributions

Under the 2008 Law, the procedure for the payment of dividends and making of distributions is more straightforward and certain in that it is based on the satisfaction of a solvency test as defined in the 2008 Law. However, many of the old form articles contain additional hurdles which should be removed so as not to negate the benefits brought about by the simplified procedure.

## ■ Single member companies

A company may have a single member. In practice this will mean that certain provisions in the articles would need to be amended to allow for the operations of such a company.

## ■ Directors' Indemnities

Many of the old form articles currently contain indemnities to directors. The language used in these indemnities may not be consistent with permitted indemnities under the 2008 Law. This inconsistency could lead to the whole or a part of the indemnity being held to be void as of 1 January 2010.

## When to amend?

As stated above, companies wishing to take advantage of the 2008 Law changes, must have suitable M&As for that purpose.

The decision today for many directors and managers of Guernsey companies is *when* to amend their M&As, given that not all provisions of the 2008 Law are in force yet and we are in a transitional phase for a number of provisions. A number of companies have already adopted in their entirety new M&As which are compliant with the 2008 Law.

**1 January 2010 will mark the end of some important transitional provisions and, given the advantages (noted above) of adopting updated M&As, this is the date that many companies will be aiming for.**

Consideration should be given to putting forward to the company the board's recommendations for changes to the M&As either (a) at the next AGM of the company or (b) before the end of 2009, if earlier.

### How to amend M&As or to adopt new M&As?

A special resolution of the members passed either at a general meeting or in writing is required. The procedures in both the existing articles and the 2008 Law will need to be complied with. The resolution will need to be filed at the Companies Registry within 30 days of being passed.

For most asset-holding companies with standard M&As, it may be appropriate to undertake a wholesale replacement of the current articles with articles tailored to meet the requirements of the 2008 Law.

Special care would need to be taken in dealing with regulated companies, companies with off-shore or bespoke articles.

Collas Day has produced standard articles which build upon the articles prescribed by the Registrar of Companies. Collas Day's articles have been drafted with the purpose of enabling the user to have access to provisions relevant to the governance of the company without reference to an external source, namely the weighty tome of the 2008 Law. Our articles can be adapted to incorporate bespoke provisions.

### Collas Day's M&A Services

Our experienced Corporate Team would be happy to review your existing M&As and to recommend the appropriate changes to bring them up to date. For corporate groups, corporate and other professional service providers we can offer a package tailored to your and your clients' requirements which may include a periodic updating service.

If you wish to know more about our M&A Services please contact

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