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Companies Bill 2012 Analysis

Company Contracts: Goodbye Ultra Vires, Hello Unlimited Capacity

[This note is based on the version of the Companies Bill 2012, as initiated]

Key points

- *New private limited companies are not required to have an objects clause*
- *Doctrine of ultra vires has no application to new private limited companies*
- *Persons who are authorised to bind the company in contract may be registered in the Companies Registration Office and are deemed to have authority to exercise any power of the company*
- *The requirement for a common seal is continued but if the constitution is silent there is a statutory default as to who may authorise and witness its use*
- *Powers of attorney are permitted*
- *Personal liability can arise for misstating company name in cheques, invoices, etc*

Corporate capacity – no objects clause

Unquestionably, one of the most significant reforms to the law of private limited companies is that the new model private company will not be required to have an *objects clause* (i.e. a clause which states the purposes or objectives of the company).

Existing private companies limited by shares which convert to the new model private company and new private companies formed under Part 2 of the Companies Bill will no longer be subject to the doctrine of *ultra vires* because they will no longer be required to have an objects clause, and they will by law have full and unlimited contractual capacity.

Currently, all companies are required to have an objects clause, the purpose of which is to set out the business which a company is permitted to transact. Where a company has an objects clause, anything done by it, such as entering into contracts, that is not permitted by its objects clause is void and unenforceable because it is *ultra vires* (outside the powers of) the company. The fear that companies might fall foul of the ultra vires rule led to the drafting of very extensive clauses, which list every conceivable object and which also provide that each object can be pursued independently.

What was intended to protect shareholders investing in, and creditors trading with, companies, became a trap for the unwary and has created more harm than good. Until now, the mischief created by the doctrine has been addressed by providing that persons who were not actually aware of any lack of capacity or who dealt with the company in good faith would not be prejudiced even if the act was *ultra vires*. On the Company Law Review Group's recommendations, the Companies Bill proposes to address the cause rather than the symptoms by providing that the model private limited company has full unlimited capacity to carry on *any* business or activity, so that nothing it does can be beyond its capacity.

Section 38 of the Companies Bill 2012 provides that a private company limited by shares to which Parts 1 to 15 apply (i.e. an existing private company limited by shares which converts to the new model private company or a new company formed under Part 2 of the Companies Bill), shall have, notwithstanding anything in its constitution, "*full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction*" and full powers, rights and privileges for those purposes. Even where a company includes a limitation on its capacity in its constitution, it will be ineffective.

Nothing, obviously, in this provision relieves a company from any legal duty or obligation to comply with the laws of the land or permits it to engage in any activity that requires a licence or authorisation.

Corporate authority

While the new model private company will have unlimited capacity, the question remains, do the people who purport to *act* for the company, have the authority to do so? The default position is that the board of directors, acting by majority, have the authority to bind a company in contract. Part 2 of the Companies Bill contains a number of provisions relating to corporate authority.

Registered persons

Section 39 of the Companies Bill 2012 provides that where a company appoints persons who are authorised to bind the company it must notify the Registrar in the CRO who will register them as "*registered persons*". Not everyone who is entitled to bind the company needs to be so registered, however, or else every teller at every cash register in a company operating a supermarket would require to be registered! The persons who need not be registered are–

- Persons whose entitlement to bind the company is expressly or impliedly restricted to a particular transaction (e.g. a person authorised to enter into a specified contract in a particular transaction);
- Persons whose entitlement to bind the company is expressly or impliedly restricted to a class of transactions (e.g. retail sales, contracts with a value of up to a particular amount etc);
- Persons who are directors or other officers (e.g. company secretary).

Persons authorised to bind companies

Section 40 provides that the board of directors of a company and any registered persons are deemed to have authority to exercise any power of the company and to authorise others to do so too, regardless of any limitations in its constitution. Contracts between a company and 'insiders' – e.g. directors of the company and of its holding company and persons connected with them, registered persons and persons connected with them – will not, however, bind the company where it is entered into in breach of any limitations in the constitution.

A company may still be bound by contracts entered into by persons with apparent or *ostensible authority* to bind the company, save that in determining whether a person had such authority, no reference may be made to the provisions of a company's constitution.

Powers of attorney

Section 41 of the Companies Bill 2012 expressly provides that a company may by writing under its common seal empower anyone to be its attorney to do anything for the company whether in Ireland or abroad.

Common seal

One controversial provision of the Companies Bill is the retention, in section 43 of the Companies Bill 2012, of the requirement that companies have a common seal. One important change, however, is that unless a company's constitution provides otherwise, it will be implied that its seal may only be used by the authority of its directors (or a board committee) and that any instrument to which it is affixed must be signed by a director, or an authorised person, and countersigned by the secretary, a second director, or an authorised person. Companies can, if they want, provide otherwise e.g. that one director can sign and that nobody need countersign.

Companies can also have separate seals for use abroad or for signing securities (sections 44 and 45 of the Bill).

Liability for use of incorrect company name

Where an officer of a company or any person on behalf of a company issues or authorises the issue of a cheque, promissory note, etc. in which the company's name is misstated, he or she shall be guilty of a category 4 offence (i.e. an offence carrying a class A fine, being currently a fine of up to €5,000) Section 48 of the Companies Bill 2012 goes on to provide that such a person can be made personally liable unless the company pays what is due or it appears to the court that no injustice is done by imposing liability on the company.

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