UNLIMITED COMPANIES: COMPANIES ACT 2014 (IRELAND)

On 1 June 2015 the vast majority of the Companies Act (CA 2014) came into force in Ireland, consolidating and reforming Irish company law. This article sets out the main differences between limited and unlimited companies and the principal amendments to the law governing unlimited companies brought in by CA 2014.

This article is part of a collection of articles on the CA 2014. For a full list of articles visit www.practicallaw.com/6-621-2173.

Kieran Trant and Dorothy Hargaden, Matheson

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UNLIMITED COMPANIES: COMPANIES ACT 2014

On 1 June 2015 the vast majority of the Companies Act 2014 (CA 2014) came into force in Ireland, replacing the previous Irish company law regime. The law governing unlimited companies has, to a great extent, been carried over into the new regime, although there have been a number of significant changes.

The rules governing Irish unlimited companies are contained in Part 19 of the CA 2014. The provisions of the CA 2014 governing the new form of private limited company (LTD) (Parts 1 to 14 of the CA 2014) apply generally to unlimited companies, save where disapplied or modified by Part 19 (section 1230, CA 2014).

The primary characteristic distinguishing unlimited companies from limited companies is the potential for the members of an unlimited company to be held liable on an unlimited basis for the debts of the company in the event of it entering insolvent liquidation.

Unlimited companies do however have certain advantages (see box, Benefits of unlimited companies).

This article sets out the main differences between limited and unlimited companies and the principal amendments to the law governing unlimited companies brought about by the CA 2014.
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**TYPES OF UNLIMITED COMPANY**

The CA 2014 provides for three types of unlimited company:

- Private unlimited company with share capital (ULC).
- Public unlimited company with share capital (PUC).
- Public unlimited company without share capital (PULC).

(*Section 1228, CA 2014.*)

All existing unlimited companies registered under previous legislation will automatically continue as one of these three forms of unlimited company (*section 1246*).

**CHARACTERISTICS OF UNLIMITED COMPANIES**

There are certain key characteristics of unlimited companies.

**UNLIMITED LIABILITY OF MEMBERS**

The defining characteristic of an unlimited company is the absence of limited liability protection for its members (*section 1278(1), CA 2014*). The members of an unlimited company are not however directly liable to creditors for the debts of the company. When operating as a going concern, the members of an unlimited company are only liable to contribute any amount that is unpaid on the share capital that they have subscribed for in the company. On the liquidation of an unlimited company however, its members are liable on an unlimited basis for any debts of the company that cannot be discharged from the company’s assets. In other words, the unlimited liability of the members effectively crystallises only when the unlimited company enters insolvent liquidation.

While there is no limit on the liability of present members, a past member will not be liable to contribute:

- If he has ceased to be a member for one year or more before the commencement of the winding up.
- In respect of any debt or liability of the unlimited company contracted after he ceased to be a member.
- Unless it appears to the court that the existing members of the company are unable to satisfy the contributions required to be made by them.

(*Section 1278(2).*)

**DIRECTORS AND SECRETARY**

As was the case under previous legislation, unlimited companies must have a minimum of two directors (*section 1257, CA 2014*). In contrast, an LTD may have a single director (*section 128*). A body corporate cannot serve as a director of any form of company under the CA 2014, including an unlimited company (*section 130*). Directors of unlimited companies are subject to the same fiduciary duties as directors of other companies (*section 228*). Directors of unlimited companies are not however subject to a new requirement introduced by the CA 2014 to prepare annual compliance statements, which applies to directors of all public companies and private limited companies meeting certain financial thresholds (*section 225*) (see Article, *Overview: Companies Act 2014 (Ireland)*).

Unlimited companies must continue to have a company secretary. A director may also serve as company secretary. A body corporate may be appointed as secretary of an unlimited company (*section 149(5)*).

**MEMORANDUM AND ARTICLES**

The memorandum and articles of association of an unlimited company are now referred to collectively as the company’s constitution (see *Constitution*). Depending on the company type, an unlimited company must, on incorporation, adopt a constitution in one of the forms prescribed by Schedule 11, 12 or 13 to the CA 2014 (*section 1233(3)(b), CA 2014*).

The memorandum and articles of association of an existing unlimited company incorporated under earlier legislation continue in force under the CA 2014, save to the extent that they contain provisions that are inconsistent with a mandatory provision of the CA 2014 (*section 1235*).

**LEGAL CAPACITY**

The legal capacity of an unlimited company is limited to the objects stated in its constitution, including acts or things that appear to it to be requisite, advantageous, incidental to or to facilitate the attainment of those objects (unless contrary to law) (*section 1239, CA 2014*). A third party dealing in good faith with the company will not however be prejudiced if the company acts outside its corporate capacity (*section 1240(5)*). The directors of the company are subject to a duty to carry on the business of the company in accordance with any limitations set out in its constitution (*section 1240(3)*).

**COMPANY NAME**

The registered name of all unlimited companies must end with the words “Unlimited Company” (or the equivalent in the Irish language “Cuideachta Neamhtheoranta”), which may then be abbreviated to “UC” or “U.C.” in subsequent use (*section 1237, CA 2014*). This is a new requirement introduced by the CA 2014. The Minister for Jobs, Enterprise and Innovation may, on application being made, grant an unlimited company an exemption from this requirement (*section 1237*). An unlimited company in existence on 1 June 2015 may omit the new suffix until the end of an 18-month transition period ending on 30 November 2016 (*section 1247*).
If an unlimited company does not make the required change or obtain an exemption from the requirement to do so, its registered name will change by default on 30 November 2016 and a new certificate of incorporation on change of name will be issued by the Companies Registration Office (CRO) to the company (section 1247). This name change requirement will have a number of consequences for existing unlimited companies, including the need to update registrations, product labelling and packaging and company letterheads to reflect the new company name.

An unlimited company that carries on business using a name other than its full registered company name must register such name (or names) with the CRO under the Registration of Business Names Act 1963.

**FILING REQUIREMENTS**

Certain types of unlimited companies currently fall outside the requirement to publicly file their annual audited financial statements at the CRO (see box, Benefits of unlimited companies (section 1274, CA 2014)).

The obligation to make a public return to the CRO on the allotment of additional shares (requiring the disclosure of such details as consideration paid) by way of a CRO Form B5 does not apply to the allotment of shares by unlimited companies (section 1230).

**SHARE TRANSFER FORM**

A share transfer form in respect of the transfer of shares in an unlimited company must be executed on behalf of both the transferor and the transferee (section 1253, CA 2014). For transfers of fully paid shares in limited companies, it is possible for a share transfer form to be validly executed by a transferor only (section 94).

**SECURITIES AND DEBT**

A PUC or PULC may, in certain circumstances, admit debt securities to trading or listing on any market (section 1248, CA 2014). A ULC may not list such securities under any circumstances (section 68).

No form of unlimited company may offer shares or other securities to the public (section 68).

**CONVERSION OF COMPANIES**

Unlike private limited companies (which must either convert to an LTD or a designated activity company (DAC) under Part 2 of the CA 2014), no conversion is required for existing unlimited companies that wish to remain as unlimited (section 1246, CA 2014).

Part 20 of the CA 2014 sets out the process by which a limited company can convert to (or re-register as) an unlimited company and vice versa. In each case the following documents must be filed at the CRO:

- A CRO Form D20 containing a statement confirming that a special resolution of the members authorising the re-registration has been passed and that the requirements of Part 20 of the CA 2014 as to re-registration have been complied with.
- A CRO Form G1 notifying the CRO that a special resolution has been passed to approve the re-registration and the related amendments to the company’s constitution.
- A copy of the company’s new constitution (in one of the forms prescribed for an unlimited company).

An unlimited company can typically be formed within five working days of filing the application at the CRO.

Unlimited companies can now be formed with a single member (section 1231(1), CA 2014). Previously, a minimum of two members was required to form a ULC and seven in the case of PUCs and PULCs. The fact that an unlimited company can now have a single member means that it is no longer necessary to put in place arrangements where one or more shares are held by other group companies as nominees for a beneficial shareholder.

**CONSTITUTION**

Unlimited companies formed under the CA 2014 must register a two-part constitution consisting of a memorandum and articles of association (sections 1233 and 1234, CA 2014). The memorandum and articles of existing unlimited companies (including those that have adopted the standard unlimited company regulations under previous legislation) continue in force, save to the extent that they conflict with a mandatory provision of the CA 2014 (section 1235).

While it is now possible for an unlimited company to adopt the default provisions set out in the CA 2014 as its articles of association (in a similar way to the adoption of the default memorandum and articles of association in Table E of Schedule 1 to the Companies Act 1963 previously), most unlimited companies are likely to adopt bespoke articles to meet specific governance requirements. To the extent that optional provisions in the CA 2014 are not modified or excluded, those provisions apply (section 1235(4)).
LIMITED COMPANY TO UNLIMITED COMPANY

Re-registration of a limited company (being an LTD, a DAC, an existing private company under previous legislation or a public limited company) as an unlimited company requires, in addition to a special resolution, the unanimous consent of the company’s members (section 1296, CA 2014). The prescribed form of consent to the company being re-registered as an unlimited company is the CRO Form D6, which incorporates the required statement of compliance to be signed by a director or secretary of the company confirming that those who signed the form constitute all the members of the company. The CRO Form D6 must be filed in addition to CRO Forms D20, G1 and the new constitution (section 1296(1)).

The application to re-register as an unlimited company must be accompanied by a copy of the company’s audited financial statements covering a period that ends not more than three months before the date of the application to re-register and which must be of at least 12 months’ duration (section 1296(7)). This is a new requirement introduced by the CA 2014 and was designed to prevent limited companies from converting to unlimited companies shortly before the deadline for filing their financial statements and thereafter converting back to a limited company. Financial statements are not required if the company has already delivered an annual return with financial statements to the CRO within the three-month period before the date of the application to re-register or where the company was incorporated within that same period (section 1296(2)).

The re-registration of a limited liability company as an unlimited company and the related changes to the company’s name and constitution take effect on the issue of the certificate of incorporation on re-registration (section 1285). Following the re-registration, the company will, among other things, need to alter its name displayed at its registered office and other places of business, on its headed notepaper and other documents and adopt a new company seal with its new company name.

Previously, an unlimited company that had changed its status from limited to unlimited was restricted from converting directly back to a limited company. This restriction no longer exists under the CA 2014.

UNLIMITED COMPANY TO LTD

Additional requirements apply in the case of the re-registration of an unlimited company as an LTD (section 1290, CA 2014). The members’ special resolution approving the re-registration must include a statement that the liability of the members of the resultant company is to be limited by shares and must set out the details as to the authorised share capital or, if the company is not to have an authorised share capital following conversion to an LTD, the fixed amount of the shares into which the company’s share capital is to be divided.

The re-registration as a limited company and the related changes to the company’s name and constitution take effect on the issue of the certificate of incorporation on re-registration by the CRO (section 1285). Once again, the company will need to make the necessary changes relating to its new name (see Limited company to unlimited company).

GOVERNANCE

BOARD OF DIRECTORS

The default provisions set out in the CA 2014 (which are likely to be substantially adopted by the constitution of most unlimited companies) provide for the delegation of the power to manage the company’s business to the board of directors as a collective body (section 158, CA 2014). The directors’ powers can be formally exercised by way of resolution passed at a meeting of the board or, if the company’s articles of association permit, by way of written resolution (section 161).

MEMBERS’ RESOLUTIONS

As was the case under earlier legislation, certain functions (such as the appointment or re-appointment of the statutory auditors of the company) are reserved to the members of the company under the CA 2014. Matters requiring the passing of a special resolution of the members (75% majority of the members) include:

- A change of company name.
- An amendment to the company’s constitution.
- A reduction of share capital.

(Sections 30, 32 and 1252, CA 2014.)

Resolutions can be passed at either a general meeting of members or by way of written resolution (section 193). Unlike LTDs and DACs, the majority written resolution procedure introduced by the CA 2014 is not available to unlimited companies (section 1230) (see Article, Meetings and member’s resolutions: Companies Act 2014 (Ireland)). As is the case with DACs, the provisions of the CA 2014 allowing members to pass unanimous written resolutions in writing can be disappplied by the constitution of an unlimited company (section 1263).

ANNUAL GENERAL MEETINGS

Single member unlimited companies may dispense with the requirement to hold an annual general meeting (AGM) and instead deal with the matters normally arising at the AGM (principally reviewing the company’s audited financial statements) by way of a written procedure (section 1753(5), CA 2014). This alternative process involves the members signing a written resolution acknowledging receipt of financial statements and passing other resolutions to deal with...
any matters that would otherwise be dealt with at the AGM (section 175(3)). Unlimited companies with two or more members may not dispense with holding an AGM and must continue to convene meetings (section 1262). AGMs must be held within nine months of the previous financial year end and not more than 15 months following the previous AGM (section 175(1)). The written procedure, if adopted, must also be completed within this timeframe (section 175(3)).

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### BENEFITS OF UNLIMITED COMPANIES

#### NON-DISCLOSURE OF FINANCIAL STATEMENTS

An unlimited company (non-filing ULC) is not subject to the requirement to file a copy of its audited financial statements with its annual return filing at the CRO if that company has at least one member that is:
- An unlimited liability entity (that is, an unlimited company, or partnership whose partners have no limit on their liability) formed under the laws of a jurisdiction outside of the European Economic Area.
- An individual.
- Another non-filing ULC.  

(Section 1274, CA 2014.)

Where the potential risk associated with unlimited liability for the members can either be accepted or (as in most cases) mitigated using a limited company holding structure, a non-filing ULC can keep financial data confidential. This gives it a distinct advantage in that respect over other forms of companies.

However, legislation to be enacted in early 2016 to transpose the provisions of the Accounting Directive (2013/34/EU), and which will come into effect for financial years commencing on or after 1 January 2016, is expected to restrict the ability of unlimited companies to avoid filing audited financial statements at the CRO. Although the legislation has not yet been published, it is expected that non-filing ULCs whose ultimate shareholders have the benefit of limited liability protection will become subject to the requirement to file their audited financial statements.

#### CAPITAL MAINTENANCE AND DISTRIBUTIONS

An unlimited company, where permitted by its articles of association, can make a return of capital to its members without the need for court approval (required under section 84 of the CA 2014 for limited companies) or undertaking the summary approval procedure (Chapter 7, Part 4, CA 2014). If permitted by its articles of association, an unlimited company can effect a return of capital where approved by special resolution of its members (section 1252).

In addition, unlimited companies are no longer subject to any restrictions governing the payment of dividends and the making of other distributions (section 1255). This effectively gives unlimited companies freedom to make distributions of cash or other assets to shareholders without the need to have distributable profits, although solvency rules will remain applicable. While the accounting implications of any such distribution would need to be considered, the removal of the restriction is likely to be of significant benefit to unlimited companies, particularly those within a group structure.