

SCOTTISH GOLF UNION & SCOTTISH LADIES' GOLFING ASSOCIATION

GOLF CLUB STRUCTURES

FREQUENTLY ASKED QUESTIONS

This guidance has been prepared for the Scottish Golf Union and Scottish Ladies' Golf Union by DLA Piper Solicitors. This guidance is general in nature and is not intended to provide legal advice for any particular situation. Clubs should take their own independent legal and financial advice relevant to their particular circumstances.

1. Most Golf Clubs are unincorporated associations ("UAs"). What does that mean?

A UA involves two or more individuals coming together to pursue a common purpose, which cannot be for the profit for its members. UAs can vary in size, purpose, and degree of formality. At one end of the scale, they may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals coming together for temporary and specific purposes with little or nothing by way of formally agreed rules. Crucially, they have no separate legal personality (unlike, for example, a company limited by shares or guarantee).

Typically, the larger the organisation the more likely it is to have moved away from UA status by incorporating.

2. How do you establish a UA?

As there is no statutory procedure for establishing a UA, it largely depends on the facts and circumstances of each case as to whether or not a UA has been formed. If those involved adopt a set of rules to govern the UA and the relationships between the members then that is certainly indicative of a UA having been established.

3. What are the typical features of a UA?

Usually a UA will have:

- a constitutional document or set of rules;
- office bearers and members; and
- some form of funding, for example subscription or donation.

4. What are the advantages and disadvantages for golf clubs in being a UA?

The key advantages are:

- simple and flexible structure with reasonably low cost to set up and operate
- no real administrative requirements eg retention of certain records; annual accounts requirements
- with a constitution UAs can still hold a bank account and take out insurance for actions brought against the club or its members/officers

Because a UA lacks separate legal personality there are three main disadvantages:

- **UAs cannot own property in their own right.** This means that usually any property (for example, the club building) is held jointly by all the members OR by some or all of the office bearers as trustees for the members of the UA. The composition of a UA's management committee is likely to change more frequently than the location of its premises, and as a result some form of conveyance will be required in favour of incoming office-bearers, or else title to the UA's property (or its interest as tenant under a lease) will come to be held by individuals who are no longer office-bearers and perhaps no longer even members;
- **UAs cannot typically sue or be sued in their own name.** This is a complex legal area. As a rule of thumb, it is the office-bearers (or certain of them) who will pursue and defend actions relating to the UA. However, individual members (including office-bearers) can also be sued. Although members and office-bearers should be indemnified by the UA, in practice this is not always in place and thus members and officers could be carrying unnecessary personal liability. Constitutions of clubs should provide for such indemnification for members and officers through, for example, proper insurance policies, or provide a right of recovery against the UA's funds; and
- **UAs cannot enter into contracts with third parties (including employment contracts with staff).** Where a contract has been entered into in the name of the UA, the members who have expressly or impliedly authorised the entry into of that contract will be liable under it. This typically falls on office-bearers and/or members of the management committee. Such liabilities could be substantial, for example, the costs of statutory repairs to a

building or dilapidations costs on termination of a lease or claims from disgruntled current/former employees.

The law as it currently applies to UAs, its office-bearers and members is complex and, to some extent, uncertain. It is often not well understood by those individuals responsible for operating and managing golf clubs which are UAs.

5. When should a golf club consider incorporation?

Larger clubs with substantial premises, which have long leases, permanent employees and which enter into contract are likely to benefit from incorporation.

NOTE: incorporation would involve a transfer of any assets of the UA (particularly property) which could be deemed to be a disposal under taxation laws and may attract capital gains tax and stamp duty [land tax] and ongoing tax treatment of the club's revenue and surpluses may differ after incorporation [although if the company operates in the same way as the UA, tax treatment is likely to be the same].

Financial/tax advice should be sought before considering incorporation. [While, for most purposes, a UA is treated in the same way as a company for tax purposes, the tax reliefs that are available when a company transfers its business and assets to another company, are generally not available for transfers from a UA to a company. A way to avoid any gains would be to leave these assets behind in the UA but prior to any change the appropriate professional advice should be sought.]

Are there ways around this tax liability and if so, should we refer to this being so. We should point clubs to where they can explore ways around this? We run the risk here of putting every club off incorporation for this sole reason. This might be correct?

For many smaller clubs which do not hold much property, do not employ staff and have little need to contract then there is less benefit in changing status from a UA.

6. What alternative structures are there for golf clubs?

By incorporating as a company limited by guarantee this attributes to the incorporated vehicle a legal personality separate to that of its members and directors. This is to be different from a private company limited by shares. Liability of members in a company limited by guarantee is limited to a predetermined nominal sum (usually £1) which will become due in the event of the company being wound up.

Incorporating would bring the following key advantages:

- the company can own and deal in assets and property directly;
- the company can sue and be sued in its own name; and
- the company can contract in its own right.
- removal of potentially unlimited liability of individual members
- because of legal requirements, companies tend to put in place better and more efficient governance leading to improved decision-making and policy implementation

The main disadvantages associated with incorporating are:

- Ongoing administrative costs for complying with disclosure and regulatory requirements e.g. Companies House filings and internal registers (around £250 per annum for basic administrative reporting requirements);
- Costs associated with its establishment and dissolution (eg at least £500 for very basic set-up costs); and
- Potential tax liability if there is a transfer of assets from any existing UA into the new company.

7. Will the law relating to UAs change soon?

In November 2009, the Scottish Law Commission (which is a body established to promote law reform) published its Report on Unincorporated Associations. The Report recommends that legislation is passed by the Scottish Parliament which automatically confers on UAs separate legal personality (without the need to incorporate) as long as certain statutory conditions are met (for example, the UA must have adopted a constitutive document containing specified minimum provisions). It is also recommended that UAs would have the ability to opt-out of the statutory regime should they prefer to retain their current status.

There is no obligation on the Scottish Government to act on this recommendation, however, it is likely that legislation will be introduced at some stage in the future to deal with the shortcomings identified.

The question for members and/or office-bearers of UAs is whether the costs associated with incorporation are justified at a point in time when legislation (delivering benefits broadly equivalent to that of incorporation) may not be too far

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over the horizon. If UAs decide to 'wait and see', we would recommend that stakeholders familiarise themselves with the issues relating to UAs. The Scottish Law Commission Report on Unincorporated Associations is a very good starting point and a link to that Report follows:

<http://www.scotlawcom.gov.uk/downloads/reps/rep217.pdf>