

## Companies Act 2006 – review of changes to companies' articles of association in light of delayed implementation

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## Relevant implementation timetable

- Electronic communication provisions (January 2007)
- Age limits on directors (April 2007)
- Meetings, resolutions, voting and proxies (October 2007)
- Directors' indemnities (October 2007)
- No need for company secretaries for private companies (April 2008)
- Directors' conflicts of interest (October 2008)
- Simplified constitution of companies (October 2009)
- Share capital (October 2009)

## When to change the articles?

- No need for immediate implementation of new provisions except:
  - > Directors' conflicts of interest: Must change articles before October 2008 to deal with this – otherwise practical problem
- Therefore at the next AGM:
  - > adopt new articles reflecting CA 2006 provisions already in force and give directors power to authorise directors' conflicts of interest
  - > one resolution with one set of changes
- Changes to reflect provisions coming into force in October 2009 can be adopted after 2009, but no immediacy for these

## Electronic communications

- Apply statutory regime to all company communications
- Change articles to override unsatisfactory CA 2006 provisions, for example on:
  - > deemed notice and
  - > non-receipt
- Reflect new terminology

## General meetings

- 14 days' notice for special resolutions (AGM: still 21 days' notice)
- Replace reference to "extraordinary" resolution with "special" resolution
- Proxies
  - > right to vote on show of hands
  - > right to speak at general meetings
  - > multiple proxies
  - > proxy return date
- Corporate representatives
  - > multiple corporate representatives

## Directors

- Indemnities
  - > pension trustee companies
- Defence funding
  - > regulatory investigation and enforcement actions
- Directors' age limit

## Directors' conflicts of interest

- Give the directors wide power to authorise any matter which would involve a breach of the duty to avoid conflicts
- Set out procedure for seeking authorisation
- Use of section 180(4) CA 2006 – safe harbour
- Consideration to be given as to how power will be exercised in practice
- GC100
- ABI

## Dispute resolution article

- Objective to avoid expensive and time-consuming shareholder litigation outside England, particularly in the US
- Arbitration (International Chamber of Commerce) first choice, with a fall back to exclusive jurisdiction in English courts where submission to arbitration is invalid or unenforceable
- US advice that exclusive jurisdiction article not effective in the US courts in relation to claims based on violations of US federal securities laws
- However, submission to arbitration effective, even where a claim is based on such laws
- Directors also have benefit of the article, except Part 11 claims subject to jurisdiction in English courts
- ABI is still considering provisions

## Proforma circular

- Group of city law firms met to agree common approach to changes to listed plc articles
- Common approach summarised in circular
- Circular submitted to UKLA
  - > generic statement of UKLA in "List!" issue no. 17
  - > UKLA has confirmed that companies making the types of changes summarised in the proforma do not need to have their circulars approved – CLLS to include circular on their website
- Proforma circular available for use by all listed companies

## Practical issues with general meetings

- Can a proxy for more than one member have more than one vote on a show of hands?
- What is the position of multiple proxies for the same member voting on a show of hands?
- How to deal with multiple corporate representatives?
  - > "fix" in ICSA guidance on proxies and corporate representatives, endorsed short term by ABI
- Can multiple proxies or multiple corporate representatives individually count towards the quorum?
- Notices when post not available
- Casting vote of chairman
  - > BERR is considering a saving provision for articles in force before 1 October 2007

## Private company articles

- Following changes are relevant for private companies and should be considered
  - > Directors' conflicts of interests – amend articles or pass resolution (before October 2008)
  - > Reduce notice period for general meetings to 14 days
  - > Replace reference to "extraordinary" resolution with "special" resolution
  - > Remove references to "extraordinary" general meetings

## Private company articles

- > Remove any references that directly require or assume the requirement for a company secretary (April 2008)
  - BERR indication: no need to make changes to Table A
- > Remove written resolution procedure from articles as private companies must use statutory written resolution procedure
- > Provide right for proxy to vote on a show of hands
- > Article giving chairman casting vote – review when BERR clarifies its position on saving provision

## Private company articles

- Changes to deal with AGMs
  - > Express obligation in articles to hold AGM remains effective (Third Commencement Order) – obligation to hold AGM now arises under the articles, not under statute
  - > Articles that contain an express obligation to hold an AGM should be amended before the end of the year to avoid holding AGM in 2008 or subsequent years
  - > No provision made for effect of subsisting elective resolutions
  - > Watch out for 1948 Table A companies – express obligation to hold AGMs

## Model articles

- Public Company Model not suitable for listed companies
  - > do not comply with UKLA/ABI requirements
- Private Company Model
  - > not suitable for wholly owned subsidiaries
  - > for other private companies: Model articles or retain Table A?
    - decision yet to be taken, no consensus reached