

## **2.3 CASE STUDY – Converting existing articles of association to the constitution of an LTD (Members)**

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### **INTRODUCTION**

The methodology below is a regulation-by-regulation comparison between a sample set of articles of association (“sample articles”) [see [document 5.2](#)] and the draft model constitution [see [document 2.2](#)]. Part I discusses the sample provisions carried over to the draft model constitution. Part II discusses the sample provisions not referred to in the draft model constitution. In general, the deleted sample provisions are as a result of the Act now reflecting the standard position. There are, however, a number of points made with respect to the deleted provisions that solicitors should consider when drafting to suit the requirements of individual companies.

We have included information on the relevant sections of the Act and the relevant sections of Table A for the purpose of cross-referral.

### **PART I – PROVISIONS CARRIED OVER TO DRAFT MODEL CONSTITUTION**

#### **Regulations 1-4**

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The prescribed content of these regulations is contained in s.19 and Schedule 1 of the Act.

#### **Regulation 4 (Sample Article 3)**

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Where the Company wishes to dispense with the limitations of having an authorised share capital after its conversion to a LTD, the Company must adopt a special resolution in accordance with s. 32 of the Act and amend its constitution in accordance with s. 19(3).

#### **Regulation 5 (Sample Article 2)**

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This is a statement that the “optional provisions” as defined in s. 54(1) of the Act apply to the Company. Some companies may consider it appropriate to list in this regulation the section references of optional provisions that they are dis-applying, particularly where there is a bulk dis-application of optional provisions.

#### **Regulation 6 (Sample Articles 4, 5 and 6)**

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Act: 66(4), 69(1)-(4), (6)-(12) 70(2), (3), 83, 106(1) and 109 | Table A: 2, 5

Allotment of shares: The Act states that a company shall allot no shares unless authorised by specific or general authority in an ordinary resolution or by the

constitution of the company. The draft constitution now includes a general authority for the company to allot shares.

Where the company has an authorised share capital the shares may only be issued up to the value of the authorised but unissued share capital. This provision is contained at s. 69(2) of the Act and therefore the similar provision in the sample articles has been removed from the draft constitution.

S. 20(3) of the Companies Act, 1983, placed a limitation period of five years on a general authority to allot shares. This provision has not been retained in the Act. The draft constitution does not include a limitation period, but some companies may wish to adopt a limitation period based on their own particular circumstances.

Pre-emption rights: The Act contains provisions relating to pre-emption rights whereby shares may not be allotted on any terms to a member or non-member unless an offer for an appropriate proportion of those shares has been made to each person who holds relevant shares of the class concerned on the same terms (or the same or more favourable terms in the case of an allotment to a non-member). "Relevant Shares" means all shares other than shares which in respect of dividend and capital carry a right to participate only to a specified amount in a distribution (s. 69(7)). There are a number of provisions within s. 69 that allow the statutory pre-emption right to be dis-applied in general or relating to specific allotments. S. 69(12), in addition, dis-applies the statutory pre-emption right in relation to a number of specific types of allotment (non-cash consideration, subscriber shares on incorporation, employee share schemes and bonus shares).

The sample articles availed of a facility under the Companies (Amendment) Act, 1983 to dis-apply the statutory pre-emption rights on allotment of shares. This is a common feature of many existing standard form articles of association. The draft constitution has accordingly been drafted to achieve this result (without the time restriction) by relying on s. 69(12)(a) of the Act. It is important to note, however, that such a provision gives a very substantial discretion to the directors and would not be appropriate in many cases. Solicitors should in each case consider whether it is appropriate to dis-apply the statutory pre-emption rights, to allow them stand or to insert specific provisions designed for the company's requirements.

Where it is considered appropriate to retain pre-emption rights, please consult s. 69(6)-(12) and s. 70 of the Act which contain further provisions relating to pre-emption rights and share allotments.

Variation of capital: The rules governing redeemable and treasury shares were contained in Part XI of the Companies Act, 1990. The historical restriction that non-redeemable shares should be at least one-tenth the nominal value of total shares issued no longer applies. This restriction continues to apply to treasury shares under s. 109(1).

The Act provides for the re-designation of shares following purchase as treasury shares and the cancellation or re-issue of treasury shares.

S. 83(3) of the Act permits a company to convert its shares into redeemable shares by way of special resolution, subject to the provisions of the Act governing the variation of rights attaching to shares. The company, pursuant to s. 66(4), may allot redeemable shares.

## **Regulation 7 (Sample Article 6)**

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Act: 82 and 105(1)-(4), | Table A: N/A

Financial assistance: Please see s. 82 of the Act for the limitations on and procedures to be followed with respect to financial assistance for acquisition of shares.

Acquisition of own shares: It is important to note that, in accordance with the provisions of s. 105(4), a company is not permitted to acquire its own shares unless authorised by its constitution, the rights attaching to the shares in question or a special resolution. The draft constitution provides such authorisation.

## **Regulation 8 (Sample Article 6)**

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Act: 69(4) and 158(1) | Table A: N/A

Directors have the power under s. 69(4)) to allot shares where the company is authorised to allot shares. The Act does not make provision for allotment of shares by a committee of directors. The power for a committee of directors to allot shares was not contained in the sample articles. This power, however, is commonly granted in the case of modern companies. Accordingly, reference to allotment of shares by a committee of directors (or a person authorised by the directors or the relevant committee) has been inserted in regulation 8.

## **Regulation 9 (Sample Article 15)**

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Act: 144(3)(b)-(c) | Table A: 98

Appointment of a director by the directors: s. 144(3)(b) of the Act allows the directors to appoint a person to be a director either to fill a casual vacancy or as an addition to the existing directors. This power may be dis-applied, and it may be appropriate to do so. In most private companies the power is left stand.

S. 144(3)(c) of the Act provides that a director appointed to fill a casual vacancy or as an addition to the existing directors will hold office only until the next annual general meeting where they may then be re-elected into the position. As was contained in the sample articles, the draft constitution excludes this limitation on such appointments.

## **Regulation 10 (Sample Article 18)**

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Act: 165 | Table A: 9 (Part II)

Alternates: The Act contains details relating to the appointment of alternates that can be varied by the constitution as required. The provisions relating to alternates contained in the draft constitution are optional and merely reflect common provisions adopted prior to the commencement of the Act. The draft constitution contains more detailed provisions than contained in the sample articles. Please note that consideration should be given as to whether an alternate counts towards

the quorum in director's meetings, particularly where the alternate is already a director of the company.

### **Regulation 11 (Sample Article 19)**

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Act: 161(1), 160(4) and 165 | Table A: 109 and 101

Written resolutions: The general provisions relating to written resolutions are contained in s. 161(1) of the Act.

Director's temporary absence from the State: S. 160(4) of the Act states that where the directors so resolve, it shall not be necessary to give notice of a meeting to any director who, being resident in the State is for the time being absent from the State. This should be given careful consideration when preparing a constitution. Where the number of directors of a company exceeds the quorum, there is a possibility that this provision could be used to resolve that it is not required to give notice to a director temporarily absent from the State and consequently a meeting could be held or written resolution could be passed (s. 161(1)) without notice to the absent director. The draft constitution is silent on this issue but in certain circumstances it may be considered prudent to vary s. 160(4) by making provision of notice of directors meetings mandatory, despite a director's temporary absence from the State.

Signature of alternate on written resolutions: The powers of an alternate contained at s. 165 of the Act do not specifically include the power to sign written resolutions on behalf of the alternate's appointing director. The draft constitution makes provision for this power in line with the provisions of the sample articles. It is important to note that s. 157 of the Act states that ss. 158-165 of the Act (relating to proceedings of directors) apply save to the extent that the company's constitution provides otherwise.

### **Regulation 12 (Sample Article 21)**

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Act: 158(4), 160 | Table A: 54, 55 and 56

Committees: The directors of a company may delegate their powers to committees and impose any regulations they think fit on such committees. The draft constitution retains the restriction on the ability of non-director members of the committee to vote at committee meetings in the sample articles. There is no such limitation in the Act. Note that there are some provisions included in the Act at s. 160(9)-(12) which may need to be varied or excluded depending on a company's circumstances.

### **Regulation 13 (Sample Article N/A)**

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Act: 228(d)

This provision has been inserted in order to avoid the situation where a director is in technical breach of his or her statutory fiduciary duty not to use company property unless permitted by the constitution. This is not a standard text. Indeed, there may be an argument that such a clause is not required. Having regard to the fact, however, that for the first time there is a specific provision in company legislation prohibiting the use by a director of any property of the company, it was considered useful to suggest a form of wording to deal with the potential breach. It was considered appropriate to limit the permission to property rather than including

information or opportunities. The particular terms of this regulation should be carefully considered with respect to the requirements of each company.

Under the Act, it is also possible to approve a director's use of company property by way of resolution of the company in general meeting.

The clause as drafted provides that the permission is subject to restrictions imposed by way of contract or otherwise.

### **Regulation 14 (Sample Article 23)**

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Act: 148(2) | Table A: 91(d)-(g)

The Act provides that a director vacates office as director where he or she: -

- resigns by providing written notice,
- lacks decision making capacity for health reasons,
- is subject to a restriction order and the other directors resolve that the office be vacated,
- is imprisoned (including suspended sentence) for an indictable offence; or
- for more than six months, is absent from directors' meetings without the permission of the other directors.

These provisions may be varied in a company's constitution unlike the mandatory provisions at s. 148(1) (where the director is bankrupt or disqualified). The provisions in the Act are a slight extension and modernisation of Table A provisions.

As was contained in the sample articles, the draft constitution excludes the provision relating to vacation of office where the director is absent for more than 6 months from directors' meetings held during that period.

### **Regulation 15 (Sample Article 24)**

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Act: 235 | Table A: 138

Many memoranda and articles of association excluded the Table A officer indemnity in favour of including a stronger indemnity.

Under the Act, the Company is permitted to enter into an agreement to indemnify an officer of the company or include such a provision in its constitution. The content of any indemnity provided by a company is restricted by the Act (the provision is similar in content to s. 200 of the 1963 Act). The Act makes void any indemnity of officers encompassing instances of negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company. Please note that under s. 235(4) it is possible for the company to purchase insurance for its officers to cover such risks.

The regulation as drafted includes the permitted indemnity from the Act at s. 247(3). The regulation then proceeds to provide a broad indemnity subject to the restrictions contained in s. 235(1).

NB: Please note that as the constitution is a contract between the members, the constitution will not be directly enforceable by a director. Indemnities should be

included in contracts with individual directors in addition to their inclusion in the constitution.

## **PART II – PRE-EXISTING PROVISIONS NOT CARRIED OVER TO DRAFT MODEL CONSTITUTION**

### **Sample Article 1**

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Act: Various | Table A: Part II

The provisions that were included in Part II of Table A are included in the Act.

### **Sample Article 2**

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Act: 158(3), 68(1), (2) and 353(1) | Table A: 79 and 138

This provision excluded the above Table A regulations. These regulations are dealt with in more detail at the comments for sample article 22 below and with respect to the indemnity at draft constitution regulation 15 above.

### **Sample Article 7**

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Act: 80 | Table A: 11-14

Lien: Deleted. The sample articles varied the Table A articles by extending the lien on shares to all shares including fully paid up shares. This is not uncommon in private companies. Forde and Kennedy's Company Law (4<sup>th</sup> Ed) suggests that the "validity of articles purporting to grant a lien of the company's fully paid-up shares in respect of all kinds of debts to the company must be doubted, especially where there is no ready market for those shares". The effectiveness of such a provision does not appear to be improved or dis-improved as a result of any change in the Act. The draft constitution varies from the sample articles and does not contain provisions to extend the lien to fully paid-up shares. Solicitors should consider whether this is appropriate for a particular company. The provisions relating to liens are contained in the Act at s. 80.

### **Sample Article 8**

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Act: 176(1), (2) | Table A: 47, 50

Location of annual general meetings and extraordinary general meetings: Deleted. The sample articles prohibited holding the annual general meeting outside of Ireland without consent of all members. In current times, such a restriction is not necessary and would be contrary to the express provisions of s. 176(1). Under the Act, where the company does not have the consent of all its members for meetings held abroad, it must, at the company's expense, make all necessary arrangements to ensure that members can by technological means participate in annual general or extraordinary meetings held outside the State without leaving the State.

### **Sample Article 9**

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Act: 178, 401 | Table: 50

Requisition of extraordinary general meeting: Mandatory provisions relating to the ability of members with certain voting powers to requisition and convene an extraordinary general meeting are contained at s. 178(3)-(8). The ability of the auditors to requisition an extraordinary general meeting is provided for in the Act and there is no need to refer to this in the draft constitution. The Act's new optional provision relating to the ability of the holder(s) of 50% of the paid up share capital of the company to convene an extraordinary general meeting (s. 178(2)) has not been dis-applied. A company may dis-apply this provision where considered appropriate.

## **Sample Article 10**

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Act: 186(d),(f), 144(3)(a) | Table A: 53

Business of the annual general meeting: The sample articles made provision for the remuneration of directors to be part of the business of the annual general meeting (now see s. 186(f)). Regulation 53 of Table A included provision for the election or re-election of directors (now s. 186(d)) to also be part of the business of the annual general meeting. If it is required that the business of the annual general meeting should include election and re-election of the directors or remuneration of the directors, the model constitution would need to be amended so to provide. Many of the provisions relating to the business of an annual general meeting may, however, be varied or excluded as required (see s. 186 generally).

## **Sample Article 11**

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Act: 189(2) | Table A: 59

Polls: Deleted. The sample articles permitted a poll to be demanded by any member of the company present in person or by proxy. Under the Act, only the chairperson, three members present in person or by proxy and member(s) present in person or by proxy with certain defined voting rights or paid up share capital are permitted to demand a poll. The Act's provisions relating to polls are mandatory provisions that cannot be varied.

It is unclear, however, as to whether a provision in the constitution conferring an additional right to demand a poll on a single member would be regarded as incompatible with the Act. Solicitors should also consider whether the requirement to call for a poll by less than three members is of practical significance. If it is, the safer approach may be to provide in the constitution that in addition to the rights to demand a poll set out in s. 189, that a poll may be demanded by any member present in person or by proxy, but advising the company that the effectiveness of such an insertion is not yet settled.

## **Sample Article 12**

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Act: 183(5), (6) | Table A: 70

Proxies: The Act stipulates that proxies and powers of attorney must be delivered 48 hours before the commencement of the meeting or the time appointed for the

taking of the poll. The sample articles stipulated that the relevant documents were to be delivered by the commencement of the meeting or at the time appointed for taking the poll. The lack of notice in the sample articles may suit smaller companies but is unlikely to suit others. The position in the sample articles has not been carried forward to the model constitution. The timescales may be varied as appropriate for different companies.

If a company wishes to adopt the position in the sample articles, the following text could be adopted: 'Any instrument of proxy or power of attorney in accordance with s. 183(5) shall be deposited no later than at the commencement of the meeting or adjourned meeting at which the person named in the instrument proposes to vote or in the case of a poll no later than at the time appointed for the taking of the poll.'

### **Sample Article 13**

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Act: 193 (1)-(3) | Table A: 6 (Part II)

Members' written resolution: Deleted. The Act now provides for written resolutions to consist of several documents in the like form signed by one or more members. The provisions in the sample articles are no longer required.

### **Sample Article 14**

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Act: 180 | Table A: 136

Notice of general meetings to directors: Deleted. Table A did not compel provision of notice of general meetings to directors. The Act makes provision for mandatory notice to members, personal representatives of members, the assignee in bankruptcy of a bankrupt member and the directors and secretary of the company. The constitution may be amended to provide for notice of general meetings to persons other than those where notice is mandatory.

### **Sample Article 16**

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Act: N/A | Table A: 92-100

Retirement/removal of directors: Deleted. For private companies limited by shares, the Act does not include provisions requiring retirement of directors by rotation. S. 146 of the Act contains a procedure for the removal of directors, other than directors holding office for life. The company may wish to include in its constitution or another agreement a different power or procedure to remove a director as permitted by s. 147(b). The provisions in the sample articles are no longer required.

### **Sample Article 17**

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Act: 144(3)(b) | Table A: 75

Number of directors: The maximum (or minimum) number of directors any company may have is fixed by the constitution of the Company alone. Where the constitution is silent, there is no maximum number of directors and the number of directors may be increased or decreased by ordinary resolution of the Company (s. 144(d)). While the sample articles stipulated the minimum and maximum number of directors, the draft constitution is silent as the usual practice is not to include such



limitations unless specifically required, e.g. in the case of a joint venture. Such provisions may be inserted to suit the requirements of individual companies.

### **Sample Article 20**

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Act: 160(6) | Table A: 50

**Director's Quorum:** The sample articles contained a requirement for two directors to be physically present at meetings and for two individuals to be present (i.e. not one director in dual capacity as director and alternate). The draft model constitution does not replicate the requirements in the sample articles and is silent on this issue. Instead, the provisions of s. 160(6) apply where the quorum is stated to be two directors, or one director in the case of a sole director, unless otherwise fixed by the directors. The constitution can be amended to suit the particular circumstances of the company.

### **Sample Article 22**

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Act: 158(3), 68(1), (2) | Table A: 79

**Director's borrowing powers:** Regulation 79 of Table A only permitted directors to borrow up to an amount equal to the nominal value of the issued share capital unless authorised by general meeting of the company. The sample did not contain the restriction on value and the draft constitution similarly omits this restriction. The provisions in the sample articles are no longer required as the directors' borrowing powers are contained at s. 158(3) of the Act. Please note that s. 68 subsections (1) and (2) contains limitations on the offering of securities to the public.