

FILING OF SHAREHOLDERS' AGREEMENTS AND EXTERNAL DOCUMENTS: JERSEY LAW AND PRACTICE

James Willmott

This article examines Jersey law around the filing of shareholders' agreements and external documents referred to in a Jersey company's articles of association. It then considers the established local and relevant foreign practice that has developed in this area to conclude that, if such practice is followed, in all but exceptional circumstances Jersey practitioners may properly and robustly advise their clients that the risk that such a filing is required is very low (if such risk exists).

Background

1 It is common for the shareholders of a Jersey company to enter into an agreement to govern their relationship as shareholders. This may take various forms, for example a shareholders', investment or joint venture agreement. For simplicity, I shall refer to them as a "shareholders' agreement". Provided that the terms of the shareholders' agreement do not constitute an unlawful fetter on the company's statutory powers, the company may also be party to, and bound by, the shareholders' agreement. Current practice is that the company often is party to the shareholders' agreement.

2 It is also common for the articles of association of a Jersey company to refer to definitions from, or substantive provisions of, external documents without embodying their provisions in full within the articles. The documents so referred to, which I shall call "relevant external documents", are most often shareholders' agreements, but may include documents such as facility or other financing agreements and non-Jersey statutes such as the English Companies Act 2006 (the "CA 2006") or the UK model company articles.

3 For the purpose of this article I shall assume that (a) all of the shareholders are party to the shareholders' agreement (as would typically be the case) and (b) there is no dispute as to the existence or enforceability of that agreement or any relevant external document or the applicability of the shareholders' agreement to the relevant company. I would also note that it is typical that a shareholders' agreement and the company's articles are designed to "interlock", such that the shareholders' agreement does not conflict with the provisions

of the articles and *vice versa*. As will become evident when I explore the law in this area, this is an important factor when quantifying the risk that a shareholders' agreement may be subject to a filing requirement, and having the shareholders' agreement and articles "interlock" is part of the practice that has evolved in this area precisely to mitigate that risk. Moreover, such practice is well-established, relatively simple, and has, to a large extent, come to form part of the "boilerplate" provisions included in shareholders' agreements and articles. As I shall go on to explain, if such practice is followed, it results in a position where the risk that a shareholders' agreement or relevant external document may be subject to a filing requirement is, in all but exceptional cases, *de minimis*.

4 The reasons why shareholders may wish to enter into shareholders' agreements or refer to relevant external documents in a company's articles vary, but generally one of the principal motivations is to keep commercially sensitive arrangements relating to the manner in which the company is to be managed, controlled or financed out of the public domain.

5 Most jurisdictions require that a company's constitutional documents are publicly available in its place of incorporation. This (a) ensures that shareholders, who (in a jurisdiction such as Jersey) are party to a statutory contract the terms of which are set out in a company's constitutional documents, have access to them, and (b) enables third parties (for example creditors), or even shareholders or directors who find their access to company documents blocked, to view the company's constitution and understand what the company can or cannot do and how it must reach decisions. Similarly, many jurisdictions (including Jersey) require that important decisions of a company which change its constitution must be registered and publicly available. There is thus an immediate potential for tension between the wish of shareholders to keep commercially sensitive arrangements confidential, and the public interest in accessibility to a company's key constitutional documents, although, as I shall go on to explain, such tension is not as acute as it may first appear. This is because the principal public interest consideration in terms of the availability of a company's constitutional documents to the public is in ensuring that creditors are aware of the limited liability status of its shareholders, being a matter which, under Jersey companies law, is dealt with in a company's memorandum of association rather than its articles. That said, how a jurisdiction such as Jersey deals with this tension, and where it finds a balance between the competing interests, can have a bearing on how attractive a jurisdiction it is to use for corporate structures.

6 There is a lack of consensus amongst local practitioners as to the circumstances in which it is necessary to file shareholders' agreements

or relevant external documents with the Jersey Companies Registry, including disagreement as to the extent to which it is appropriate to take into account English practice in this area (which appears to be a robust interpretation of the relevant English statutory provisions to conclude that such filings are rarely required as a matter of English law). That lack of consensus may arise out of a misunderstanding as to the purpose of the relevant filing requirements, the manner in which the relevant local statute should be interpreted, the extent of the differences between Jersey law and that of comparable jurisdictions (principally England and Wales) or a combination of the foregoing. Consequently, there may be a false assumption that the risk of a filing requirement arising in Jersey, and the penalty for a failure to make such a filing, is greater than that in other comparable jurisdictions. This lack of consensus is unhelpful.

7 This article comprehensively explores the law and practice applicable to the question of when such filings are required in the context of a Jersey limited liability company to conclude that (a) there is no reason for practice in Jersey to depart from the well-established practice that has evolved in England and Wales and other Commonwealth jurisdictions, and (b) if such practice is followed, there are extremely limited circumstances in which a shareholders' agreement or relevant external document is required to be filed under Jersey law. It is hoped that this may go some way to creating a consensus amongst practitioners in the Island that, in all but exceptional cases, they may properly and robustly advise their clients that the risk that a shareholders' agreement or relevant external document has to be filed in Jersey is non-existent or *de minimis* at most.

The Companies (Jersey) Law 1991

8 The relevant Jersey statutory provisions are set out in the Companies (Jersey) Law 1991, as amended (the "CJL"). In summary, the CJL provides as follows—

Effect of articles

A company's articles bind the company and its members (shareholders) as if they were an agreement entered into by them containing covenants on the part of the company and each member to observe their provisions (art 10(1) CJL).

Alteration of articles

A company's articles may only be amended by special resolution (art 11(1) CJL).

Filing of resolutions etc generally

A company is required to file with the Companies Registry copies of the following types of documents that are relevant to its articles:

- (a) special resolutions;
- (b) resolutions or agreements that have been agreed to by all the shareholders but which, if not agreed to by all the shareholders, would not have been effective for their purpose unless they had been passed as a special resolution;
- (c) resolutions or agreements that have been agreed to by all the members of a class but which, if not agreed to by all the members of that class, would not have been effective for their purpose unless they had been passed or agreed to by some particular majority or otherwise in some particular manner; and
- (d) all resolutions or agreements which effectively bind all of the members of a class though not agreed to by all those members (art 100(1) and (3) CJL),

and the company is liable to a late filing fee if such a filing is not made within the applicable statutory deadline (art 100(4) CJL).

Filing of resolutions etc generally—saving provision for failure to file

A resolution or agreement which is required to be filed as described under the heading *Filing of resolutions etc generally* above has effect notwithstanding a failure to file it (art 100(6) CJL).

Filing of resolutions etc generally—obligation to include alterations to articles in copies of articles provided to third parties

Copies of all resolutions or agreements which are required to be filed as described under the heading *Filing of resolutions etc generally* above must be embodied in or annexed to every copy of the company's articles issued after the relevant resolution is passed or the relevant agreement is made (art 100(2) CJL), and the company commits an offence if it fails to do so (art 100(4) and (5) CJL).

Registration of particulars of special rights¹

Particulars of special rights or restrictions attaching to the shares of a public company not contained in its articles must be filed with the Companies Registry (art 54(1) CJL), and the company and every officer of the company who is in default commits an offence if such a filing is not made within the applicable statutory deadline (art 54(5) CJL).

Provision of copies of articles to members

A company is required to send a copy of its articles to shareholders on request (art 12(1) CJL), and the company commits an offence if it fails to do so (art 12(2) CJL).

9 In the context of the issues considered in this article, the key point to draw from the provisions of the CJL referred to above is that there is no general express obligation to file shareholders' agreements and relevant external documents. It is also important to note that, by the express wording of the CJL, (a) share rights can be embodied in a document other than a company's articles, (b) in addition to special resolutions that amend a company's articles, it is necessary to file documents which would only be effective for their purpose if they had been passed as a special resolution or with some special class approval/consent, and (c) a failure to file a resolution or agreement that falls within the scope of the filing requirement does not prevent it from being effective as a matter of Jersey companies law.

10 It is also of key importance in considering the proper interpretation of those provisions to understand their purpose. As I shall go on to explain, Jersey's companies laws have historically been based on the Companies Acts of England and Wales. The first such Act to make provision for a company's articles was the Joint Stock Companies Act 1856 (the "1856 Act"). The English legislature, in considering drafts of the 1856 Act, turned its mind to public interest considerations applicable to the making of a company's constitutional documents available to the public. The focus of that debate (and indeed parliamentary debate in connection with the predecessor to the 1856 Act, the Limited Liability Act, 1855) was not on the terms of a company's internal management (*i.e.* its articles), but rather on ensuring that creditors dealing with a company were aware of the limited liability status of its shareholders.² In terms of a company's articles, as stated by Mr Robert Lowe (later 1st Viscount Sherbrooke) when explaining the rationale behind a draft of the 1856 Act to the House of Commons:

¹ Note, materially similar provisions apply where share rights are varied.

² See, *e.g.*, *Hansard*, HC Deb, 01 February 1856, vol 140, cc 110–147.

“We leave companies to form their constitutions [referring here to a company’s articles rather than its memorandum] as they please.”³

11 Under the 1856 Act, the English Companies Acts prior to the CA 2006 and the CJL, limited liability status is set out in a company’s memorandum of association, not its articles, and accordingly the CJL is highly prescriptive as to that document’s content. The CJL does not, on the other hand, prescribe the content of a company’s articles.⁴

12 It is therefore submitted that the principal purpose of the provisions of the CJL referred to above as they apply to a company’s articles is not to ensure that all rules governing the internal management of a company are publicly available; if that had been the intention, the CJL would have expressly provided to that effect. Rather, it is submitted that their purpose is to ensure that those persons who are bound by the statutory contract created by art 10(1) CJL are able to access the terms of that contract as it exists from time to time, such as it may be, but without prescribing the terms of that contract. This in itself is a public interest consideration, but should be distinguished from the principal public interest consideration in connection with the publication of company’s constitutional documents, which is to ensure that creditors are aware of the limited liability status of its shareholders (being, in Jersey, a matter for a company’s memorandum of association, not its articles). In addition to being consistent with the express wording of the CJL, such an interpretation is consistent with the principles evident from the jurisprudence in this area.

Guidance from the Jersey courts

Status and effect of shareholders’ agreements

13 The Jersey courts have not had cause to consider the specific question of when a shareholders’ agreement or relevant external document is required to be filed with the Jersey Companies Registry under the relevant provisions of the CJL. However, in the 2015 case *Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd*,⁵ in an *obiter* comment, the Jersey Court of Appeal stated the following, at para 52—

³ *Hansard*, HC Deb, 01 February 1856, vol 140, cc 110–47, at para 133.

⁴ Cf the CA 2006, where limited liability status is dealt with by s3(1) and s3(4), the combined effect of which is that shareholders will only enjoy limited liability status if the “constitution” of the company (which, by s17(a) CA 2006, includes its articles) provides for such a limitation, otherwise their liability is unlimited.

⁵ 2015 (1) JLR 309.

“Most of the contracts which have been described above are expressly New York law agreements. This includes indeed the shareholders’ agreement, an agreement to which the company is a party and which is to be as amongst the company and its shareholders the principal instrument governing the company’s constitution.”

14 The foregoing is recognition by the Jersey courts that (a) provisions relating to a Jersey company’s constitution can be validly set out in a document other than its articles, and (b) a shareholders’ agreement may constitute the principal instrument governing the constitution of a Jersey company as amongst the company and its shareholders (as opposed to its articles). This is consistent with the English law principles summarised below.

Interpretation of articles

15 In *Trilogy Management v YT*,⁶ the Jersey Court of Appeal confirmed, at para 59, that, when interpreting articles, the Jersey courts are entitled to prefer an interpretation that “is more commercially sensible or consistent with business common sense” based on admissible background evidence. This is consistent with the position taken by the English courts and, as I shall go on to explain, it should be expected that the Jersey courts would interpret articles in a manner consistent with the well-established English law principles in that area.

16 In terms of the evidence that is admissible to assist with such an interpretation, the Court in *Trilogy Management* stated, at para 60—

“Other than that which is apparent from the Articles themselves, and evidence admitted to explain matters referred to in them, the admissible evidence is restricted to that which every reader of the Articles would reasonably be expected to know.”

17 Based on the foregoing, *prima facie* an external document would not be admissible in evidence when interpreting a company’s articles because it would fall outside of “that which is apparent from the Articles themselves” and “that which every reader of the Articles would reasonably be expected to know”.⁷ However, the Court of Appeal made

⁶ [2012] JCA 152, noted at 2012 (2) JLR N [19].

⁷ It is possible that, where an external document that is not referred to in a company’s articles has been entered into by all of the shareholders, it could properly be adduced as evidence in connection with the interpretation of the articles as amongst the shareholders (and the company, if the company is also party to it) on the basis that all shareholders could reasonably be assumed to know its contents, although such an argument would require the court to accept

it clear that “evidence admitted to explain matters referred to in [articles]” can be properly adduced in order to assist with their interpretation. In other words, it is proper and permissible to refer to external documents referred to in a company’s articles when interpreting those articles. This ensures that the fact that a relevant external document is not filed together with a company’s articles does not *prima facie* render the articles meaningless or void for lack of certainty, which would cause significant difficulties in the context of a statutory contract.

18 By extension, the decision in *Trilogy Management* supports the assertion that there is no general principle of Jersey law to the effect that relevant external documents must *always* be filed with the Companies Registry pursuant to art 100(1) and (3) CJL; if that were the case, there would never be any need to look to documents “referred to in” articles in order to assist with their interpretation.

What might one draw from other jurisdictions?

Case law

19 The Jersey courts have accepted that it may be necessary to look to non-Jersey sources of law where Jersey customary law has not been declared by judicial decision⁸ or is unclear or out-of-date.⁹

20 When choosing a source for the purposes of a comparative law analysis, it is necessary to show similarity between the foreign law and Jersey law in the relevant area¹⁰ but the Jersey courts are not required to follow any particular source or the source to which they first look.¹¹

21 Where Jersey law is based on a foreign statute, “close regard” should be had to judgments in the relevant jurisdiction under that

that “every reader” in such circumstances means “every reader seeking to place reliance on the articles” or similar.

⁸ *Cannon v Nicol* 2006 JLR 299, at para 109.

⁹ *Carpenter v Constable of St Clement* 1972 JJ 2109. The court accepted the submission that—

“The duty of the Court was to ascertain what was the correct test of obscenity under the customary law of Jersey and it should not turn to the English common law unless the Jersey law was unclear or out of date.”

This was accepted by the Court of Appeal in *Foster v Att Gen* 1992 JLR 6.

¹⁰ *Vaudin v Hamon* [1974] AC 569.

¹¹ *Cannon v Nicol*, at para 109.

statute,¹² although such judgments are not binding in Jersey.¹³ When considering such judgments, differences between the relevant statutes should be assumed to be deliberate and effectual,¹⁴ and statutory amendments made to the foreign statute but not made to the equivalent Jersey statute should not be imported into Jersey law.¹⁵

22 English companies law and jurisprudence has historically been of significant importance in a Jersey companies law context. In the 1985 report prepared by HW Higginson¹⁶ (the “Higginson Report”), which was commissioned by the States of Jersey Finance and Economics Committee in connection with the then-proposed reforms to the Companies (Jersey) Law 1861 to 1968¹⁷ (that would ultimately lead to the adoption of the CJL), it was observed, at para 4, that—

“the Royal Court applies the common law of England for the purposes of interpreting the [Companies (Jersey) Law 1861 to 1968] but it is not free to apply English company law generally.”

23 This observation is supported by the decision in *In re TSB Bank Channel Islands Ltd*¹⁸ in which it was stated that, in a companies law context—

“it would . . . be a cause for some surprise if, with identical provisions in our Law, [the Jersey courts] did not have the fullest regard to the very strong persuasive effects of interpretation given by the English courts.”¹⁹

24 The CJL itself is based on the English Companies Acts,²⁰ and the *projet de loi* in relation to the CJL (the “CJL States Proposal”) makes

¹² *Att Gen v Contractors Plant Service Ltd* 1967 JJ 785.

¹³ *State of Qatar v Al Thani* 1999 JLR 118.

¹⁴ *Att Gen v Jones* 1976 JJ 399.

¹⁵ *Veizer v Bellagio* 1994 JLR 75.

¹⁶ The report of HW Higginson addressed to Senator RR Jeune, OBE, President of the Finance and Economics Committee, dated 20 June 1985.

¹⁷ Technically the *Loi (1861) sur les Sociétés à Responsabilité Limitée* as amended in 1886, 1888, 1921 and 1965, but principally amended by the Companies (Supplemental Provisions) (Jersey) Law 1968, together commonly referred to as the Companies (Jersey) Law 1861 to 1968.

¹⁸ 1992 JLR 160.

¹⁹ *Ibid*, at 162

²⁰ See the third sub-paragraph of para 16 of the minutes of the Finance and Economics Committee meeting of 9 July 1990, where it was noted that “the draft Law was based on United Kingdom legislation”.

various references to “British Law” and the position in the “United Kingdom”²¹ when describing the principles that underpin the CJL.

25 Moreover, the CJL was not intended to cause the companies laws of Jersey significantly to diverge from English principles, it being stated in the Higginson Report, at para 7(c), that—

“the existing company law and practice in Jersey is closely related to that of Great Britain, so that it would be undesirable [in revising / replacing the Companies (Jersey) Law 1861 to 1968] to make changes which depart radically from the existing system.”

26 That said, the differences between the CJL and the English Companies Acts are deliberate and are intended to be effectual;²² the CJL is not simply a re-working of the English Companies Acts and should not be read as such. In fact, the CJL and the English Companies Acts have become less closely aligned over time, both through the amendments that have been made to the CJL since its original enactment and the replacement of the Companies Act 1985 (the “CA 1985”) by the CA 2006.²³

27 In summary, it is reasonable to take the view that the CJL will be interpreted by the Jersey courts in a manner that is consistent with the interpretation by the English courts of equivalent provisions of the English Companies Acts, save where there are differences between the CJL and the English Companies Acts, which differences should be assumed to be deliberate and effectual. By extension, in the absence of judicial determination, it is reasonable to assume that, save where there are substantive differences in the underlying statutory framework, Jersey practice would, in general, closely follow English practice in a company law context.

28 In terms of which of the English Companies Acts is the most appropriate comparator, whilst the process of replacing the Companies (Jersey) Law 1861 to 1968 substantively began in 1981,²⁴ it was not until after the CA 1985 came into force on 1 July 1985 that the drafting

²¹ See for example at 9–11 and 16.

²² Higginson Report, at para 8 (with further detail set out in the subsequent paragraphs).

²³ For example, the rules around capital maintenance under the CJL are now materially different from those under both the CA 1985 and the CA 2006; certain developments to English law made through the enactment of the CA 2006 have not been accompanied by equivalent amendments to the CJL.

²⁴ See the introductory paragraphs of the memorandum from RCA Syvret, Commercial Relations Officer, to the President and Members of the Finance and Economics Committee dated 1 July 1985.

of the CJL began,²⁵ with the CJL States Proposal being lodged *au Greffe* on 7 August 1990.

29 By the time the CJL itself came into force on 30 March 1992,²⁶ the CA 1985 had been amended by the those parts of the Companies Act 1989 (the “CA 1989”) that were then in force,²⁷ but none of the amendments made to the CA 1985 by the CA 1989 (whether or not in force at the time the CJL came into force) are relevant to the issues considered in this article. The CA 1985, as originally enacted, is therefore the principal piece of legislation relevant to the interpretation of the CJL on a comparative law basis.

30 However, this article considers *current* as well as historic English practice, and the CA 1985 has been replaced by the CA 2006. The CA 2006 made changes to the provisions of the CA 1985 relating to the filing of shareholders’ agreements and relevant external documents and so caution must be exercised when looking to the jurisprudence of the English courts and English practice under the CA 2006, with particular attention being given to the extent to which any comparison is appropriate (or permitted) due to the differences between the various statutes. That said, English jurisprudence and practice under the CA 2006 remains relevant, as the substance of the relevant provisions in the CA 2006 are, to a large extent, consistent with the substance of the equivalent provisions of the CA 1985 and the CJL, which is discussed in further detail below.

31 Finally, it is noted that it is also possible that, in interpreting the CJL, the Jersey courts would take into account jurisprudence and practice in other jurisdictions whose companies laws broadly follow English principles and use similar statutory wording. A good example of the manner in which such jurisprudence can influence the development of Jersey customary law in relation to companies is the prohibition on a company fettering its statutory powers, it being widely accepted by practitioners in Jersey that the Jersey courts would follow

²⁵ See the Report set out in the CJL States Proposal, at 3, which makes reference to HW Higginson being engaged by the Finance and Economics Committee to prepare the Higginson Report in 1985, with a consultation in relation to the CJL taking place in 1986 and various public documents making reference to drafts of the CJL being in circulation from c1987 onwards. Further, it is noted that the Higginson Report pre-dated the coming into force of the CA 1985 by less than two weeks, and merely outlined the broad structure proposals for the CJL (see the appendix to the Higginson Report).

²⁶ R&O.8308, save for certain provisions that came into force later (and are not relevant to the issues considered in this article).

²⁷ The CA 1989 was brought into force by various orders.

the principle set out in *Russell v Northern Bank Development Corp Ltd*,²⁸ which is a decision of the House of Lords on appeal from Northern Ireland. Further, in the CJL States Proposal²⁹ reference is made to the laws of Canada, Australia and New Zealand as other potentially comparable jurisdictions.

Comparison of the CJL and the English Companies Acts

32 A detailed analysis of the relevant provisions of the CA 1985, CA 2006 and CJL is set out in the Appendix to this article. In summary, whilst none of the provisions of the CA 1985 or the CA 2006 could be said to be “identical” to the equivalent provisions of the CJL, many of them are substantively the same in the present context. The relevant provisions of the CJL that are substantively different to the equivalent provisions of the CA 1985 and/or the CA 2006 in the present context are as follows:

Filing of resolutions etc generally—sanction for failing to file

Both the CA 1985 and the CA 2006 create an offence for failure to file relevant resolutions and agreements. The CJL does not create an offence for the equivalent failure, but instead imposes a late filing fee on the company. The CJL is therefore less onerous in this regard than either the CA 1985 or the CA 2006.

Filing of resolutions etc generally—saving provision for failure to file

The CJL includes a saving provision to the effect that, where resolutions or agreements should have been filed but have not, they still have effect. Neither the CA 1985 nor the CA 2006 includes such a saving provision.

Filing of resolutions etc generally—sanction for failing to include alterations to articles in articles provided to third parties

The position under the CJL, when read together with art 2 of the Criminal Offences (Jersey) Law 2009, as amended, (the “Criminal Offences Law”) is similar to that under the CA 1985, in that both the company and its officers may be criminally liable for a breach. Under the CA 2006 only the company’s officers in default are guilty of an offence.

²⁸ [1992] 1 WLR 588.

²⁹ See the Report set out in CJL States Proposal, at 5.

*Registration of particulars of special rights*³⁰

The position under the CJL is materially the same as that under the CA 1985, save that the CJL provisions only apply to public companies (the CA 1985 obligation applies to all companies). Whilst the provisions of the CA 2006 are materially different from both the CA 1985 and the CJL, they still result in particulars of rights being available on a public registry. Overall, therefore, the obligation to file special rights under the CJL is narrower than the equivalent provisions of the CA 1985 and CA 2006 (in that the CJL obligation only applies to public companies).

Sanction for failing to provide a copy of articles to members when required

The position under the CJL, when read together with art 2 of the Criminal Offences Law is similar to that under the CA 1985, in that both the company and its officers may be criminally liable for a breach. Under the CA 2006 only the company's officers in default are guilty of an offence. The CJL is therefore more onerous than the CA 2006 in this regard, but materially similar to the CA 1985.

Filing of amendments to articles—obligation to file consolidated copy of articles

Unlike the CA 1985 and the CA 2006, the CJL does not oblige a company to file an amended version of its articles of association with the relevant registrar or create an offence for a failure to do so.

33 In terms of the key themes to draw from the above, Jersey law is less onerous than English law in terms of the requirement to file documents affecting a company's articles, in that the CJL (a) does not create an offence for a failure to file, (b) includes a saving provision clarifying that a failure to file does not invalidate the relevant resolution or agreement,³¹ (c) does not require a statement of share rights not contained in a company's articles to be filed where the company is a private company, and (d) does not contain any general obligation to file

³⁰ Note, materially similar provisions apply across the three statutes where share rights are varied.

³¹ This saving provision is a notable and relevant difference between Jersey law and English law in the present context, as it provides an express recognition within the CJL, which is absent from the CA 1985 and CA 2006, that the filing requirement is a mere formality and does not go to the effectiveness of the relevant document or resolution.

consolidated articles containing amendments. Certain of the provisions around offences under the CJL are broader in terms of the scope of who may commit the offence than the CA 2006, but are substantively similar to the position under the CA 1985.

34 It is therefore reasonable to assume that law and practice in Jersey around the filing of shareholders' agreements and relevant external documents should be materially similar to that in England, and certainly no more onerous in terms of when filings are required.

Summary of English and other relevant common law principles

35 In common with the Jersey courts, the English courts have not had cause to consider the specific question of when a shareholders' agreement or relevant external document is required to be filed with Companies House under the relevant provisions of the English Companies Acts. However, the English courts and certain courts of other Commonwealth jurisdictions have considered various matters that are relevant to the interpretation of Jersey law in this area, and the generally accepted position on such matters is summarised below.

Status of shareholders' agreements

36 Shareholders are entitled to deal with their respective rights as shareholders as they see fit, but shareholders' agreements create personal rights and obligations amongst the parties to them *inter se* rather than rights and obligations that attach to shares and which are therefore transferrable to a transferee of shares.³² This is consistent with the submission above as to the public interest consideration concerning the publication of a company's constitutional documents and therefore the purpose of the relevant provisions of the CJL so far as they apply to a company's articles, *i.e.* that the principal public interest consideration is in ensuring that creditors are aware of the limited liability status of shareholders (rather than third parties being aware of the agreements around the internal management of the company, or the personal rights of shareholders).

37 A company cannot fetter its statutory powers by its articles or a shareholders' agreement (or any other agreement or arrangement to which it is a party),³³ although that principle will not necessarily invalidate voting agreements amongst shareholders contained in a

³² *Welton v Saffery* [1897] AC 299 (House of Lords on appeal from the English Court of Appeal).

³³ *Russell v Northern Bank*.

shareholders' agreement (*ibid*, following general principles stated in various earlier cases).

Whether a shareholders' agreement can constitute a shareholder resolution

38 Whilst the general rule is that shareholders may only act *via* the passing of shareholder resolutions,³⁴ it is possible that a shareholders' agreement can constitute a shareholder resolution (including a special resolution amending a company's articles). In order for an informal act of shareholders to constitute a shareholder resolution, the act done must be *intra vires* the company³⁵ and all shareholders must agree or assent to it.³⁶

39 Given that a shareholders' agreement will almost inevitably be in writing, the leading English case in support of the proposition that a shareholders' agreement can constitute a shareholder resolution is *In Re Duomatic Ltd.*,³⁷ in which it was stated by Buckley J that (in the context of shareholders assenting to a matter by signing the company's accounts)—

“where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”³⁸

40 A helpful summary of the *Duomatic* principle as it has developed under English law can be found in Neuberger J's judgment in *Hunt v Edge & Ellison Trustees Ltd.*,³⁹ as follows:

“The essence of the *Duomatic* principle is that, where a statute or the company's articles provide that a course can be taken only with

³⁴ *In re George Newman & Co* [1895] 1 Ch. 674 (English Court of Appeal).

³⁵ Given that the corporate doctrine of *ultra vires* has been abolished in Jersey (art 18(1) CJL) this requirement has very limited application, for example if the act in question were fraudulent, illegal or contrary to public policy.

³⁶ There are various English cases dealing with meetings attended by all shareholders that were not formally held as shareholder meetings, and consent to certain acts being given by all shareholders at various times rather than at a single meeting, where resolutions were upheld as having been validly passed at a shareholder meeting.

³⁷ [1969] 2 Ch 365 (English High Court of Justice, Chancery Division).

³⁸ *Ibid*, at 372

³⁹ [2000] BCC 626 (English High Court of Justice, Chancery Division (Companies Court)), at 635.

the sanction of a certain group, which sanction is to be given in accordance with a prescribed procedure, then, provided that all members of the group agree to that course, the prescribed procedure is not normally treated as being of the essence. This is particularly likely to be the case if (i) the court is satisfied that the sole purpose of the prescribed procedure is for the protection of the members of the relevant group, and (ii) the prescribed procedure enables a majority of that group to bind the minority in relation to the course in question.”

41 The same principle has been applied in various other English cases and is an established principle of English law, including in relation to class meetings, and is consistent with art 95(3) CJL, which provides that, other than a resolution to the removal of an auditor⁴⁰—

“Anything which may be done at a meeting of a company or at a meeting of any class of its members may be done by a resolution in writing passed by all the members of the company who, at the date when the resolution is deemed to be passed, would be entitled to vote on the resolution if it were proposed at a meeting.”

42 It should however be noted that the *Duomatic* principle has been developed by the English High Court of Justice, Chancery Division in *Re Tulse Sense Ltd*,⁴¹ where it was held that, in order for the *Duomatic* principle to be engaged, some further action must be taken to objectively confirm the resolution of the shareholders. This is on the basis that—

“a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough [to constitute a shareholder resolution] would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse . . . it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle.”⁴²

43 The foregoing suggests that merely entering into a shareholders’ agreement that includes terms that *could* constitute an amendment to a company’s articles would not, in and of itself, engage the *Duomatic*

⁴⁰ Article 95(1) CJL.

⁴¹ [2010] EWHC 244 (Ch).

⁴² *Ibid*, at para 41 *per* Newey J.

principle and constitute a shareholders resolution; something further is required.

Interpretation of articles

44 In general terms, articles should be considered to be a business document and interpreted so as to give them reasonable business efficacy⁴³ where admissible evidence supports such an interpretation and where an interpretation on some other basis could lead to an absurd or unworkable result.⁴⁴ In the words of Jenkins LJ in *Holmes v Lord Keyes*⁴⁵—

“I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable. In my view, the (view) for which the claimants contend would produce a wholly unreasonable result, and I decline to adopt it unless constrained to do so by the terms of the Act and the articles.”

45 Such an interpretation is limited to determining what the articles would reasonably be understood to mean read against the relevant background, rather than to improve upon them. As stated by Lord Hoffmann in *Att Gen (Belize)*, at paras 16 and 12 respectively:

“The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed . . .”

“. . . in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether

⁴³ See for example *Att Gen (Belize) v Belize Telecom Ltd* [2009] UKPC 10 (Judicial Committee of the Privy Council on appeal from the Court of Appeal of Belize).

⁴⁴ See for example *Folkes Group plc v Alexander* [2002] EWHC 51 (Ch) (English High Court of Justice, High Court of Justice Chancery Division).

⁴⁵ [1958] 2 WLR 772 (English Court of Appeal), at para 2015.

such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.”

46 In terms of what “background information” is “relevant”, the use of purely extrinsic evidence to imply terms in articles is not permitted.⁴⁶ In *Bratton Seymour*, Steyn LJ stated, at para 475, that—

“It is possible to imply a term purely from the language of the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances.

Here, the company puts forward an implication to be derived not from the language of the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of articles of association.”

Summary of English practice: provisions dealing with common law principles

Status of shareholders’ agreements: parties bound

47 Given that shareholders’ agreements only bind (and only create rights in favour of and against) the parties to them, typically shareholders’ agreements will include a provision to the effect that shares can only be transferred (and new shares can only be issued) where the transferee/allottee is already party to the shareholders’ agreement or agrees to be bound by the terms of the shareholders’ agreement. This is frequently accompanied by a restriction on the powers of directors to approve the transfer or issue of shares, unless the same condition has been satisfied and is contained in the company’s articles.

48 Further, where share transfer provisions and other material commercial terms are not contained in full in a company’s articles, it is often the case that the relevant powers of the company or its directors will be stated in the articles to be subject to the shareholders’ agreement, which is itself cross-referenced in the articles.

Status of shareholders’ agreements: fetter on statutory powers

49 To deal with the principle in *Russell v Northern Bank*, where a company is party to a shareholders’ agreement, the shareholders’

⁴⁶ *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCC 471 (English Court of Appeal).

agreement will frequently include a provision to the effect that the company is not bound by the shareholders' agreement to the extent that its obligations would constitute a fetter on its statutory powers; provisions incorporated in or referred to in the company's articles are also carefully checked to ensure that they do not violate this principle and risk causing entire provisions of a company's articles to be unenforceable as against the company.

Status of shareholders' agreements compared to articles

50 Given that shareholders' agreements are often intended to be the principal instrument governing the constitution of a company (*i.e.* rather than the company's articles), it is frequently the case that shareholders' agreements will include a provision to the effect that, if there is any conflict between the shareholders' agreement and the company's articles, the provisions of the shareholders' agreement will prevail. That provision is also frequently combined with an obligation on the shareholders to amend the articles to deal with any such conflict.

The Duomatic principle

51 When a shareholders' agreement is entered into, the company will often adopt new articles of association to incorporate certain of its provisions, or at least to ensure that the articles do not conflict with the shareholders' agreement. This is arguably sufficient evidence to show that the shareholders' agreement was not intended to constitute a shareholder resolution and thus prevent the *Duomatic* principle from being engaged.

52 As noted above, it is frequently the case that the shareholders' agreement will include an obligation on the shareholders to amend the articles to deal with any conflict between the articles and the shareholders' agreement, which is further evidence that the shareholders' agreement is not intended to constitute a shareholder resolution. Such a provision also serves to provide evidence that the shareholders' agreement is not intended to be a document that would only be effective for its purpose had it been passed as a special resolution.

Interpretation of articles

53 To the extent that it is necessary to refer to external documents properly to interpret a company's articles, it is frequently the case that those external documents will be defined and expressly referred to in a company's articles. It is also frequently the case that, by a combination of the articles and associated shareholders' agreement, any shareholder of the company would be party to, or would otherwise have a right to have sight of, all relevant external documents.

Summary of English practice: general position taken in filing

54 Taking into account the English common law principles and practice summarised above, it is the experience of many Jersey practitioners that English counsel tend to take a robust approach to the interpretation of the English Companies Acts to conclude that shareholders' agreements and relevant external documents are very rarely required to be filed on the public register (and such a filing would only be required if there was an exceptional reason to do so).

Conclusion***Overview***

55 It is reasonable to take the view that the CJL will be interpreted by the Jersey courts in a manner that is consistent with the interpretation by the English courts of equivalent provisions of the English Companies Acts, save where there are differences between the CJL and the English Companies Acts. Such differences should be assumed to be deliberate and effectual.

56 To the extent there are differences between the CJL and the English Companies Acts, those differences are generally not substantive in the present context, and to the extent they are substantive, the provisions of the CJL are generally less onerous than the equivalent provisions of the English Companies Acts. In particular (a) the failure to file resolutions affecting a company's constitution is not an offence under the CJL (it is an offence under the CA 1985 and CA 2006), (b) the CJL includes a saving provision that is absent from the CA 1985 and the CA 2006 to the effect that, where resolutions or agreements should have been filed but have not, they still have effect, (c) the CJL only requires special rights not contained in a company's articles to be filed where the company is a public company (the CA 1985 and CA 2006 require such a filing for all companies), and (d) the CJL contains no general obligation to file consolidated articles containing amendments (unlike both the CA 1985 and CA 2006).

57 The only relevant provisions of the CJL that are more onerous than the equivalent provisions of the CA 2006 relate to a failure to include alterations to articles in copies of articles provided to third parties, or a failure to provide copies of articles to shareholders when required to do so, where (when read in conjunction with the Criminal Offences Law) both the company and its officers may be criminally liable (which is materially similar to the equivalent position under the CA 1985).

58 It has been suggested that the provisions of the CJL that are more onerous than the equivalent provisions of the CA 2006 mean that the question of when a shareholders' agreement or relevant external document should be filed in Jersey is more acute than in England.

However, this fails to take into account that (a) English practice around the filing of shareholders' agreements and relevant external documents appears (including on the basis of personal experience, having practised as a corporate solicitor in England both before and after the CA 2006 came into force) to have remained unchanged under the CA 2006, and (b) the requirements of the CJL that are more onerous than the CA 2006 only apply to the provision of articles to third parties and shareholders, whereas both the CA 1985 and CA 2006 contain a blanket offence for failure to file relevant documents with Companies House. Such a suggestion does not therefore carry sufficient weight to justify any departure from the general principle that Jersey law and practice is very similar to English law and practice in this area.

59 To the extent that the Jersey courts have considered equivalent questions to those considered by the English and Commonwealth courts in connection with relevant matters, the principles applied by the Jersey courts and the English and Commonwealth courts have been consistent.

60 In conclusion therefore, there are no material differences between English and Jersey law in connection with the question of when shareholders' agreements and relevant external documents should be filed on the public register, and consequentially there is no reason for practice in Jersey to differ from practice in England.

Jersey law position

61 On the basis of the foregoing, Jersey law in connection with the filing of shareholders' agreements and relevant external documents is as follows.

Shareholders' agreements

62 Shareholders of a Jersey company are permitted to enter into a shareholders' agreement governing their relationship as shareholders. Provided that the terms of the shareholders' agreement do not constitute an unlawful fetter on the company's statutory powers, the company may also be party to, and bound by, the shareholders' agreement.

63 A shareholders' agreement can be the principal document governing the constitution of the company (*i.e.* it can take precedence over the company's articles), although it only takes effect amongst the parties to it *inter se* and does not bind non-parties to whom shares in the company are issued or transferred.

64 There is no general obligation to file a shareholders' agreement pursuant to art 100(1) and (3) CJL (or indeed on the incorporation of a company).

65 A shareholders' agreement entered into by all the shareholders of a Jersey company is capable of constituting (but will not necessarily constitute) a shareholder resolution due to the application of the *Duomatic* principle, and to the extent that a shareholders' agreement constitutes a special resolution amending a company's articles (or would not be effective for its purpose had it not been passed as a special resolution or with class approval), it would be required to be filed pursuant to art 100(1) and (3) CJL.

66 However, it is highly unlikely that a shareholders' agreement would be subject to such a filing requirement given that practice has evolved in this area to properly deal with how such agreements, and their integration with a company's articles, are structured.

Relevant external documents

67 Relevant external documents (*i.e.* external documents referred to in a company's articles) are admissible in evidence when interpreting the provisions of a company's articles.

68 There is no general requirement under Jersey law for all rights and restrictions attaching to shares to be embodied in a company's articles. Further, there is no general requirement under Jersey law for a company's articles to embody (in full) external documents that are referred to in it.

69 It follows from the foregoing that there is no general obligation to file relevant external documents pursuant to art 100(1) and (3) CJL (or indeed on the incorporation of a company).

70 It is of course possible that a company's articles could contain a cross-reference to an external document where the extent of that cross-reference, and the content of the articles absent reading them alongside the external document, might render the articles uncertain or meaningless in some fundamental respect. In such circumstances, taking into account the public interest consideration that the parties to the statutory contract formed by the articles should have access to its terms, the argument that the external document should be filed together with the articles may be stronger, although this should be assessed on a case-by-case basis and there will be many circumstances (for example where a foreign statute is incorporated by reference into a company's articles or where the external document is a document to which all of the shareholders are party) where it will be possible to properly conclude that such a filing is not required.

Practice points

71 The following paragraphs set out practice points to be taken into account when drafting or reviewing a company's articles or a

shareholders' agreement with a view to ensuring that a robust position can be taken by Jersey counsel that the shareholders' agreement and any relevant external documents are not required to be filed with the Companies Registry.

Shareholders' agreements

72 If a shareholders' agreement is entered into by all shareholders of a Jersey company, it should include a provision to the effect that, to the extent the shareholders' agreement and the company's articles conflict, the shareholders will amend the articles. Such a provision provides evidence that the shareholders did not intend to amend the articles by entering into the shareholders' agreement and thus the *Duomatic* principle would not be engaged, and it further evidences that it was not the parties' intention that the shareholders' agreement was required to be passed as a special resolution or with class approval in order for it to be effective for its purpose. For further comfort, Jersey counsel could consider including an express statement to the effect that the shareholders' agreement itself is not an amendment to the company's articles, but such a statement is not strictly necessary if the above practice is followed.

73 If the practice summarised above is followed, Jersey counsel can properly give robust advice to their clients that the shareholders' agreement is not a document that is required to be filed with the Companies Registry under the CJL.

74 Further, as a matter of best practice, the articles should be checked against the shareholders' agreement to ensure that there is no direct conflict. That is not to say that the provisions of the two documents should be identical. For example, if the articles state that the directors have the power to appoint and remove directors by resolution and the shareholders' agreement entitles a particular shareholder to appoint and remove a director by notice to the company, the shareholders' agreement and the articles are not *prima facie* in conflict as the right of the shareholder under the shareholders' agreement could be given effect by the directors appointing the relevant person using their powers under the articles. If, on the other hand, the articles set a maximum number of directors but the shareholders' agreement specifies that a greater number of directors must be appointed, the articles would need to be amended.

75 Finally, whilst not directly relevant to the question of filing requirements:

- (a) if it is intended that a shareholders' agreement is to be the principal document governing a Jersey company's constitution as amongst the parties to it, the shareholders' agreement should include a

clause to the effect that, to the extent the shareholders' agreement and the company's articles conflict, the provisions of the shareholders' agreement shall apply;

- (b) Jersey counsel should ensure that the provisions of a shareholders' agreement to which a Jersey company is party do not impose any obligations on the Jersey company that would constitute a fetter on its statutory powers (and, to the extent they would, the shareholders' agreement should ideally include a provision to the effect that the company is not bound by such obligations but the shareholders of the company shall exercise their respective powers as shareholders to procure that the company complies with them); and
- (c) given that shareholders' agreements only bind the parties to them, thought should be given as to how to bind non-party transferees of allottees of shares (for example by including customary adherence requirements in the shareholders' agreement and/or articles).

Relevant external documents

76 Where an external document is referred to in a company's articles, Jersey counsel can properly give robust advice to their clients that, subject to the exceptions set out in the following two paragraphs, such document is not a document that is required to be filed with the Companies Registry under the CJL.

77 The first exception to the above is where the company is a public company and the relevant external document is a statement of rights, where a filing requirement would apply pursuant to art 54(1) CJL. However, in such cases Jersey counsel should carefully assess the extent to which the content of the relevant external document genuinely goes to share rights and obligations (*i.e.* those rights and obligations that attach to the relevant shares and form part of the bundle of rights represented by them) as opposed to personal rights and obligations. It is not the case that all external documents referred to in a public company's articles are required to be filed under art 54(1) CJL. If that were the case, English practice would be different given that such a filing is required under the English Companies Acts for both public and private companies.

78 The second exception to the above is where there is a genuine concern that the extent of a reference to an external document could render the articles uncertain or meaningless in some fundamental respect (even taking into account the ability to adduce relevant external documents in evidence when interpreting a company's articles as discussed above). In such circumstances the public interest consideration that the parties to the statutory contract formed by the

articles should have access to its terms should be taken into account and, in limited circumstances, it may be appropriate to conclude that the document (or at least the relevant provisions of it) should be annexed to the articles as filed. However, in the majority of cases where such a concern may arise it will be possible for shareholders to ascertain the terms of the external document that is referred to, either because it is in the public domain (for example where it is a reference to a statute) or because they are party to it (for example a shareholders' agreement). The public interest consideration in requiring that document to appear on the public register in order for parties to the statutory contract formed by the articles to be aware of its terms will accordingly not be engaged. One situation where this might not be the case is, for example, where certain (but not all) shareholders of a publicly traded company are party to a relationship agreement the terms of which are incorporated into a company's articles in a manner that could render the articles uncertain or meaningless in some fundamental respect *and* that agreement is (or the terms so referred to are) not otherwise available in the public domain.

79 A simple solution to mitigate the risk highlighted in the preceding paragraph, in circumstances where a shareholders' agreement, by its terms, is intended to bind both current and future shareholders (by requiring non-parties to whom shares are issued or transferred to adhere to its terms), is to include a provision in the company's articles to the same effect; in such circumstances, by the company's constitution, a person cannot (other than through a breach of the articles) become a shareholder unless they are party to the shareholders' agreement and therefore in possession of knowledge of its terms. In other cases (*i.e.* where a shareholder will not necessarily be party to a relevant external document), where commercial imperatives permit, a simple solution may be to include a right in the company's articles for shareholders to be provided with a copy of the relevant external document (or the relevant provisions of it) by the company on request or (for example) by publication on a website, so that there can be no argument as to whether shareholders have a right to gain knowledge of its terms. It is not suggested that either of these solutions are, or should be regarded as, common practice, and it is only necessary to consider these types of solutions in exceptional cases where it is not possible to conclude that the filing risk is *de minimis* on some other basis (and in the vast majority of cases it will be possible to properly come to such a conclusion).⁴⁷

⁴⁷ Where such an approach does not meet the commercial needs of the shareholders, the best alternative is likely to be to draft the articles to remove the incorporation by reference but embody such of the terms of the external document as are necessary to ensure that, when the articles are read alongside

80 Further, where an external document is referred to in a company's articles, Jersey counsel can properly give robust advice to their clients that, should that document (or any provision(s) of it) be required in order to properly interpret the company's articles, it (or the relevant provision(s) of it) could be adduced in evidence in order to assist with that interpretation.

81 Consideration should also be given to the manner in which the provisions of an external document are incorporated into a company's articles in the context of the requirement of the CJL that the articles can only be amended by special resolution. It may be necessary or desirable to define the external document as being that document in its form as at a particular date, rather than a reference to that document as varied or amended from time to time, but again this should be assessed on a case-by-case basis and close analysis given to whether an amendment to that document could reasonably be regarded as an amendment to the company's articles (in most cases it will be possible to properly conclude that it will not).

82 Finally, whilst not directly relevant to the question of filing requirements, to the extent that external documents are a necessary reference point for the proper interpretation of a company's articles, they should be expressly referred to in the articles. Otherwise, there is a material risk that they will not be admissible in evidence should the Jersey courts be required to interpret the articles.

Final conclusion

83 There is no reason for practice in Jersey to depart from the well-established practice that has evolved in England and Wales and other Commonwealth jurisdictions concerning shareholders' agreements and relevant external documents and the circumstances in which they are required to be filed on the public register.

84 If such practice is followed, there are extremely limited circumstances in which a shareholders' agreement or relevant external document is required to be filed under Jersey law. In all but exceptional cases, Jersey counsel may properly and robustly advise their clients that the risk that a shareholders' agreement or relevant external document has to be filed in Jersey is non-existent or *de minimis* and, on the rare occasions when such advice cannot properly be given, there are simple solutions available to remove or reduce that risk to an acceptable level.

the external document, the parties' commercial intentions are properly reflected; if that is not acceptable, there may be other mechanisms that can be used, but those should be considered on a case-by-case basis.

Appendix

Comparison table of relevant Companies Acts/Companies Law provisions

The table on the following pages reflects the provisions of the CA 1985 as originally enacted and the CA 2006 and CJL as in force on 30 November 2016.

James Willmott is an advocate of the Royal Court of Jersey and a corporate partner at Carey Olsen, 47 Esplanade, St Helier, Jersey JE1 0BD.