



COMPANIES ACT AND ARTICLES OF ASSOCIATION GUIDANCE

Preamble

A company's Articles of Association are a key element of corporate governance and consequently of considerable interest to investors. This guidance outlines the ABI Investment Committee's views on current best practice in relation to Articles of Association and associated areas.

Auditor Liability

On the issue of Auditor Liability Limitation agreements, the ABI's members support the Institutional Shareholders Committee's statement. The statement says -

- Agreements should be proportionate, and provide a limit for liability that is fair and reasonable.
- Companies should recognise that they are not obliged to enter into agreements if they are not suitable.
- Companies should justify to shareholders the benefits of concluding agreements in advance of putting them to a general meeting vote.
- When audit committees discuss these agreements with auditors, they should seek to assure themselves that audit quality will be preserved and enhanced.
- Shareholders will not want to see their preference for proportionate liability agreed at holding company level undermined by other forms of agreement lower down the group structure.
- Companies should use the specimen principle terms for agreements which have been laid out by the FRC.

Further details on investor views on Auditors Liability Agreements are available on the Institutional Shareholder Committee's website: <http://www.institutionalshareholderscommittee.org.uk/>

Borrowing Powers

All companies should have Articles that include a limit on the level of borrowings of the Company/group. The inclusion of such a limit is an important shareholder protection.

Normally the model formulation has been a multiple of capital and reserves as taken from a company's published report and accounts. A broad figure for the limit to borrowing in the Articles is twice capital and reserves, but there may be wide variation depending on the Company and sector.

Goodwill and intangible assets may be included in capital and reserves, subject to the provisions of FRS10 or the equivalent international reporting standard requirements would be acceptable.

Netting off cash may be acceptable, but shareholders should be consulted before any change is proposed.

Fixed limits to borrowing powers should be kept under review.

The ABI Investment Committee has stated that simply excluding pension scheme deficits or surpluses is unlikely to be the most appropriate way of treating the impact of their volatility under their accounting standard.

Communications

Approval may be sought for the company to use the website as a means of communicating with shareholders (as the default position) who do not request documentation in paper form. If approved, the Company should consult individually with shareholders to establish by which means they wish to receive information. Those that opt for electronic communication should be informed when certain key information is available upon the website.

Conflicts of Interest

In accordance with the interpretation of the requirements in the Companies Act 2006, the Company is likely to include provisions relating to directors' conflicts of interest. The Company should undertake to follow emerging best practice in line with the General Counsel 100's guidance paper. The board should report annually that there are procedures in place to deal with conflicts of interest and that they have operated effectively.

Corporate Representatives

Following the final implementation of the Companies Act and certain associated clarifications, the ABI members no longer consider it necessary for companies to provide the Designated Corporate Representatives option at meetings. Corporate Representatives should now be allowed normal access to the meeting and have associated rights as understood under the Act.

In any jurisdictions where the law has not been suitably clarified companies should take steps to ensure that the Corporate Representatives can still be appointed and participate by adopting the ICSA guidance on Designated Corporate Representatives.

Directors' Fees

The Articles should contain a monetary cap on the amount of aggregate fees payable to Directors.

Dispute Resolution & Exclusive Jurisdiction

Some companies believe that it is appropriate to provide for a dispute resolution procedure and governing law in their Articles. In general terms these provide that arbitration should be in accordance with the Rules of

Arbitration of the International Chamber of Commerce. Where a court determines that arbitration cannot be used in a particular dispute, or where a derivative claim is being brought under the Companies Act 2006, the courts of England and Wales would have exclusive jurisdiction.

However, ABI members remain concerned about such dispute resolution provisions being codified in the articles of association. If a Company considers that such provision may be appropriate in their case, it is advised that careful consultation with shareholders is necessary.

Section 793

Penalties for non-disclosure of interest should comply with and take regard of Listing Rule 9.3.9 and the DTR Rule 5, including the minimum of 14 days notice to disenfranchise.

Other Matters

- **EU Political Expenditure**
Due to the broad classification of "donation" under Part 14 of the Companies Act 2006 this authority is sought by companies to cover political donations and/or political expenditure within the EU. The Company should affirm that it is their policy not to make political donations and that they have no intention of using the authority for that purpose. Authorities may be made under law for up to four years; however best practice is that approval should be sought on an annual basis.
- **Reincorporating outside the UK**
Where a Company is considering reincorporating outside the UK it should consult its major shareholders. Investors will expect that if a Company does decide to reincorporate outside the UK it will provide a clear rationale for the decision to all shareholders and will commit to continue to abide by UK corporate governance best practice standards.

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