

# Protection of Outsider rights in context of Companies Act 2006

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## INTRODUCTION

There is no doubt that the wording of the 2006 Companies Act is more suitable than the Acts before it, unlike s. 14 of the companies Act 1985, both the company and the members are bound by the articles of association; a statutory recognition that a company has a separate legal identity and personality. The articles of affiliation are the terms that make up an organization's constitution, and despite the fact that these "agreements" unquestionably frame an agreement between the individuals (investors) and the organization, and between the individuals themselves, the degree and power of this agreement has dependably been a disputable point among lawful specialists practically speaking, scholastics and the legal. This article will investigate why some of these level headed discussions require a late change of s. 33.

### **What kind of agreement does s.33 make?**

As Atiyah has contended through his numerous works, there isn't one solitary model that all agreements must take after. Out of the numerous specific parts of a "normal contract" which an organization's constitution sticks to and all of which feature the vagueness of s.33, one specifically has pulled in much scholarly and legal level headed discussion. As indicated by Professor Atiyah, all gatherings to an agreement ought to have the capacity to uphold the legally binding terms against the other party. [1] The articles of affiliation however make a participation get, a legitimately restricting instrument that neglects to distinguish itself in accordance with Atiyah's "universal" contract. The instance of *Hickman v Kent* [1915] 1 Ch 881, (the specialist that the House of Lord proposed to implement through the redrafting of s.14 into s.33), held that lone individuals (investors) acting in their ability as a part can sue in case of a break against the rights and commitments of the articles and not "pariahs." In *Hickman* the "untouchable" was both a part and an executive, and he couldn't authorize his chief rights expressed in the articles since he was attesting his claim as an executive and not as a part.

Gideon Shirazi attracts our regard for the contention of this verbal confrontation as he analyzes *Hickman* to *Salmon v Quin and Axten Ltd* [1909] A.C 442. For this situation, *Salmon* was additionally a chief and a part, and the articles gave him the great executive to veto specific undertakings with respect to the organization, a power which in actuality he was denied of. He sued the organization by getting together the investors and disclosing to them how his energy of veto was fundamental for the working of the organization. In doing as such, he got the investor's to help his case and he effectively sued the organization by making a claim through these individuals (investors). Gideon Shirazi says that these two cases may however not strife; as indicated by him *Hickman* may have overruled *Salmon*. [2] Nonetheless, this view has not been tended to and finished up by means of consequent case law and it has absolutely not been cleared up by s.33, so right up 'til today, the contention with respect to the legally binding structure and substance of this enrollment contract remains. As it were, s.33 does not illuminate what rights are enforceable and not exclusively does this not fit in with Atiyah's vision of a standard contract, it additionally makes vague the correct frame and lawful impact of an organization's constitution.

### **As per s.33 who can sue for what?**

Section 33 is quiet on precisely what articles a part can authorize and who can uphold them: Is a part authoritatively restricted to implement particular arrangements? Or on the other hand is the power and extent of the agreement sufficiently wide to empower a part to bring a claim with respect to one side or commitment sketched out in the articles?

Roger Gregory contends that the degree to which it can be contended that the organization's articles go about as an agreement between an organization and its individuals is indistinct, and completely subject to the actualities of the individual case. He reaches this determination as an outcome of the endlessly clashing case law and scholastic productions with respect to s. 33. For example, Professor Gower trusts that the articles of affiliation shape an agreement that must be authorized by individuals if the issue concerns participation rights and obligations. Master Wedderburn then again, contends that the agreement empowers individuals to sue the organization or different individuals concerning any rights in the articles, not simply participation rights/commitments, a view that was acknowledged through the Salmon case (contingent on the way that the petitioner demonstrations through their ability as a part).

Anthony O. Nwafo trusts that despite the fact that Lord Wedderburn expands the power and impact of the organization contract with its individuals, by and by this exclusive begins to expose what's underneath of what change is really required. Nwafo trusts that the ramifications of s.33 are constrained and unreasonable by and by in light of the fact that the executives are as he calls them, the "columns" of an organization. They have an entirely authorized weight to maintain their guardian obligations, numerous have been investors since the introduction of the organization, and it isn't abnormal for executives to word the articles of relationship for the organization's constitution. It is along these lines economically doubtful and unfeasible as indicated by Nwafo, that the individuals (investors) alone have a sacred contract with the organization, and chiefs don't. [3]

Master Wedderburn was a persuasive figure pulling for the change of s.14 and his attributions are obvious, however case law undermines his endeavors to clear up s. 33 and limit its requirement for change. A case of this is the situation of Eley v Positive Government Security Assurance Co. [1976] 1 Ex D 88. The inquirer was the organization's specialist and as indicated by the articles of affiliation he would dependably keep on being so. He later turned into a part and it was not long after that the organization expelled him from his specialist obligations. Salmon looked to depend on the legally restricting impact of the articles, yet at trial the court held that he was bringing his case as a specialist, upholding an "individual case" and not a participation guarantee and in this manner he couldn't depend on s.33. In the event that, as Lord Wedderburn has emphatically contended, individuals can bring a case with respect to every one of the articles of affiliation, at that point the lawful thinking behind this case would be switched. [4] Eley (an outcast) would have possessed the capacity to make an "individual claim" against the organization through his ability as a part if as for this situation the individual claim is expressed in the articles. The courts held that this issue can practically speaking to some degree be settled and Nwafo additionally concurs; as individuals who are likewise "untouchables" as in they are likewise i.e. executives or specialists, can in any case sue an organization in the event that they have a different contract with that organization, and the terms don't straightforwardly site the articles of affiliation. Notwithstanding, in spite of the fact that in given conditions the restricted extent of s.33 can't constrain these "untouchables", it doesn't make it passable for s.33 to be uncertain and for all intents and purposes unreasonable concerning who ought to have the capacity to uphold the rights and commitments which they are bound to by ideals of their enrollment status.

All the more confusingly, Dr Prentice refines Lord Wedderburn's view significantly further, and contends that the articles of affiliation make an agreement that can be upheld by its individuals if the issue – which is alluded to in the constitution – hinders the working of the organization. What makes s. 33 so clashing and in requirement for change, is that great and legitimate case law supporting each view just clarified. Adding validity to Prentice's view for instance, is the Salmon v Quin and Axtens Ltd case, as Salmon could shoot two winged animals with one stone and authorize his rights as a chief by influencing the investors that his rights as a part ought to be upheld for the working of the organization.

This article has talked about a portion of the issues around s.33 by investigating cases dated as far back as 1915, which are all still connected in our courts today, thus frustrating the accomplishment behind any of the statutory changes that have been made in regards to part rights through the articles of affiliation. As contended, it is befuddling why a gathering to a such an agreement who is both a chief and a part (investor), is liable to similar articles of affiliation, can uphold the articles if an issue impacts their position as a part, however not have an agreement to fall back on if the organization ruptures similar articles and impacts their part as an untouchable. As ever the law isn't impeccable, however there has been a time of discussion debating the degree and impact of s. 33, and it is sensible to presume that s.33 needs some change to give illumination with reference to what kind of agreement the organization constitution is and the extent of its legally binding personality.

## TYPES OF COMPANIES

Sections 3 to 6 of CA 2006 provide for the establishment of different types of companies.

### Section 3: Limited and unlimited companies

This section restates Section 1(2) of the 1985 Act; as previously, a company may be limited by shares or by guarantee as follows:

- If the liability of shareholders is limited to the amount, if any, unpaid on the shares held then it is a limited company.
- If the liability is limited to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up, the company is 'limited by guarantee'. Companies limited by guarantee are specifically prohibited from registering with share capital (s5).
- If there is no limit on the liability of its members, it is an unlimited company.

#### **Section 4: Private and public companies**

Section 4 merely restates the provisions of Section 1(3) of the 1985 Act. Thus a 'private company' is defined as any company that is not a public company, and one that may not offer shares to the public. A 'public company', on the other hand, is a company whose certificate of incorporation states that it is a public company. Section 4 does refer to Part 20 of the Act, which sets out the key differences between public and private companies; for example, before it can begin to start its business activities, a public company must secure a trading certificate from the Companies Registry (s761). To obtain the necessary certificate, the public company must meet the minimum share capital requirement (the 'authorised minimum'), which is currently set at £50,000 (as stated in s763) and which remains unchanged under CA 2006. The authorised minimum can be stated in sterling or the euro equivalent to the prescribed sterling amount. In addition, any shares issued must be paid-up to at least one quarter of their nominal value (s586).

#### **Section 6: Community interest companies**

Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 established a new company form, the 'community interest company' or CIC. Such enterprises were designed for use by social enterprises, and although registered under the Companies Act, they have to complete certain additional formalities and are subject to certain additional elements of regulation. As they are not business forms as such, they will not be considered in any detail.

### **COMPANY FORMATION**

Section 7 sets out the method for forming a company, which is that one or more persons must subscribe their name to a memorandum of association and comply with the requirements of the provisions of the Act as to registration. It ought to be noticed that the Act enables a solitary individual to shape any sort of organization, either open or private. Subsection (2) essentially repeats the prerequisite that an organization may not be shaped for an unlawful reason. Under Section 9, two archives must be conveyed to the recorder: the update of affiliation and the application for enlistment.

#### **The reminder of affiliation**

Despite the fact that CA 2006 holds the past necessity for people wishing to shape an organization to buy in their names to a notice of affiliation, it fundamentally lessens the significance of the notice, and, as an outcome, it won't be conceivable to revise or refresh the notice of an organization framed under CA 2006.

In any case, the notice of affiliation, which must be in the endorsed frame, remains an imperative report to the degree that, as required by Section 8, it gives proof of the aim of the supporters of the reminder to shape an organization and move toward becoming individuals from that organization on arrangement. Additionally, in connection to an organization constrained by shares, the notice gives proof of the individuals' consent to take no less than one offer each in the organization. Under Section 28, arrangements in the notice of existing organizations will be dealt with as arrangements in the articles of the organization in the event that they are of a sort that won't be incorporated into the update of organizations framed under the Act.

#### **Section 9: Registration records**

This Section sets out the data, or 'records', that must be conveyed to the enlistment center when an application for enrollment is made. In all cases, the application for enrollment must express the accompanying:

- The organization's proposed name.
- Whether the organization's enrolled office is to be arranged in England and Wales (or Wales), in Scotland or in Northern Ireland.
- A explanation of the planned address of the organization's enrolled office (that is, its postal deliver instead of the previous articulation affirming the locale in which the organization's enlisted office is to be arranged).
- Whether the risk of the organization's individuals is to be restricted and provided that this is true, regardless of whether it is to be constrained by shares or by ensure.
- Whether the organization is to be a private or an open organization.
- A proclamation of capital and starting shareholdings or an announcement of assurance (ss10 and 11 set out the nitty gritty arrangements in such matters – see beneath).
- A proclamation of the organization's proposed officers (s12 – see underneath).
- A duplicate of any proposed articles to the degree that the organization does not plan to utilize the model articles (this issue is canvassed in the second piece of this article).
- A explanation of consistence (s13 – see beneath).

## **Section 10**

This Section sets out the substance of the announcement of capital and introductory shareholdings.

This announcement basically gives a 'depiction' of an organization's offer capital at the purpose of enrollment. For open organizations, this necessity is connected to the nullification of approved offer capital (see beneath for additional on this). The announcement of capital and beginning shareholdings must contain the accompanying data:

- The add up to number of offers of the organization to be gone up against development by the supporters of the reminder.
- The total ostensible estimation of the offers.
- For each class of offers:

(a) the recommended particulars of the rights joined to those offers

(b) the aggregate number of offers of that class

(c) the total ostensible estimation of offers of that class.

- The add up to be paid up and the sum (assuming any) to be unpaid on each offer (regardless of whether because of the ostensible estimation of the offers or by method for a premium).
- Such data as might be endorsed to identify the supporters of the reminder of affiliation.
- With regard to every supporter of the reminder, it must state:

(a) the number, ostensible esteem (of each offer), and class of offers to be gone up against arrangement

(b) the sum to be paid up and the sum (assuming any) to be unpaid on each offer (regardless of whether because of the ostensible estimation of the offer or by method for premium).

Where a supporter of the update is to take offers of more than one class, the data required under Subsection (4)(a) is required for each class.

## **Section 11**

This Section sets out the substance of the announcement of assurance that must go with the application for enrollment where it is suggested that an organization will be restricted by ensure on arrangement. The announcement of certification must contain the data to recognize the supporters of the reminder.

## **Section 12**

This Section, which identifies with the announcement of the organization's proposed officers, requires the accommodation of particulars identifying with the accompanying:

- The individual or people who is or are to be the main chief or executives of the organization. The points of interest are set out in Sections 163 to 166. The primary change is that an administration address must be accommodated every executive who is a characteristic individual, notwithstanding the prerequisite for the typical private address.
- The individual or people who is, or are, to be the principal secretary.

As privately owned businesses are never again required to delegate organization secretaries (see s270(1)), this data is just required if the organization really designates somebody to that part.

## **Section 13**

This Section concerns the necessity of an announcement of consistence. Such an announcement does not should be seen and might be made in either paper or electronic frame. Under Section 1068, the enlistment center is approved to indicate the standards identifying with, and who may put forth, such an expression. Section 1112 makes it a criminal offense to put forth a bogus expression of consistence, just like the case in connection to all archives conveyed to, or proclamations made to, the recorder.

In the event that the enlistment center is fulfilled that the prerequisites of CA 2006, as to enrollment, are consented to, at that point the archives conveyed might be enrolled and, on enrollment, the recorder should issue a declaration that the organization is appropriately joined.

## **COMPANY RESOLUTIONS**

Under the provisions of CA 2006 there are three types of resolutions: ordinary resolutions, special resolutions, and written resolutions.

### **Ordinary resolutions**

Section 282 defines an ordinary resolution of the members (or class of members) of a company as a resolution that is passed by a simple majority.

If the resolution is to be voted on a show of hands, the majority is determined on the basis of those who vote in person or as duly appointed proxies. Where a poll vote is called, the majority is determined in relation to the total voting rights of members who vote in person or by proxy.

### **Special resolutions**

A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75%. This is determined in the same way as for an ordinary resolution (s283). If a resolution is proposed as a special resolution, it must be indicated as such, either in the written resolution text or in the meeting notice. Where a resolution is proposed as a special resolution, it can only be passed as such, although anything that may be done as an ordinary resolution may be passed as a special resolution (s282(5)). There is no longer a requirement for 21 days' notice where a special resolution is to be passed at a meeting.

Where a provision of the Act requires a resolution, but does not specify what kind of resolution is required, the default provision is for an ordinary resolution. However, the company's articles may require a higher majority, or, indeed, may require a unanimous vote to pass the resolution. The articles cannot alter the requisite majority where the Act actually states the required majority, so, if the Act provides for an ordinary resolution, the articles cannot require a higher majority.



### **Written resolutions**

Private limited companies are no longer required to hold meetings and can take decisions by way of written resolutions (s281). The Act no longer requires unanimity to pass a written resolution. It merely requires the appropriate majority of total voting rights, a simple majority for an ordinary resolution (s282(2)) and a 75% majority of the total voting rights for a special resolution (s283(2)).

Section 288(5) states that anything which, in the case of a private company, might be done by resolution in a general meeting, or by a meeting of a class of members of the company, may be done by written resolution with only two exceptions – the removal a director, and the removal of an auditor.

These both require a general meeting of shareholders to be called. A written resolution may be proposed by the directors or the members of the private company (s288(3)). Under Section 291, in the case of a written resolution proposed by the directors, the company must send or submit a copy of the resolution to every eligible member. This may be done either by:

- sending copies to all eligible members in hard copy or electronic form or by means of a website
- submitting the same copy to each eligible member in turn, or different copies to each of a number of eligible members in turn
- by a mixture of the above.

The copy of the resolution must be accompanied by a statement informing the members both how to signify agreement to the resolution and the date by which the resolution must be passed if it is not to lapse (s291(4)). It is a criminal offence not to comply with the above procedure, although the validity of any resolution passed is not affected.

### **CONCLUSION**

The members of a private company may require the company to circulate a resolution if they control 5% of the voting rights (or a lower percentage if specified in the company's articles). They can also require a statement (of not more than 1,000 words) to be circulated with the resolution (s292). However, the members requiring the circulation of the resolution will be required to pay any expenses involved, unless the company resolves otherwise.

Agreement to a proposed written resolution occurs when the company receives an authenticated document, in either hard copy or electronic form, identifying the resolution and indicating agreement to it. Once submitted, agreement cannot be revoked. The resolution and accompanying documents must be sent to all members who are entitled to vote on the circulation date of the resolution. The company's auditor should also receive such documentation

### **REFERENCES**

- [1]. P Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2nd edn, 2007), 316–26; J Dine, *The Governance of Corporate Groups* (Cambridge University Press, 2000), 43–52; Grantham, *supra* n 63, 68–70.
- [2]. 607 F 2d 582, 588 (2d Cir 1979).
- [3]. 333 P 2d 802 (Cal App 1958).
- [4]. 106 Las Palmas Assoc v Las Palmas Center Assoc, 235 Cal App 3d 1220, 1250 (1991).
- [5]. 107 [1990] Ch 433, 532–38 per Slade LJ. However, a limited role continues to exist for this device where a case is on all fours with the facts of *DHN Food Distributors Ltd v Tower Hamlets London BC* [1976] 1 WLR 852.
- [6]. Section 26 of the Partnership Act 1890, *Moss v Elphick* [1910] 1 KB 846 and *Walters v Bingham* (1988) 138 NLJ Law Reports 7.
- [7]. This is different from the joint tenancy in English law.
- [8]. See *Johnson v Agnew* [1980] AC 367; H Beale (ed), *Chitty on Contracts* (London, Sweet & Maxwell, 30th edn, 2008), paras 27-082–27-083.
- [9]. *Hansmann et al*, *supra* n 9, 1339, 1340-43; *Armour and Whincop*, *supra* n 20.
- [10]. The doctrine is criticised for this very reason in *WT Allen, R Kraakman and G Subramanian*, *Commentaries and Cases on the Law of Business Organization* (New York, Aspen, 3rd edn, 2009), 166–67.
- [11]. GG Triantis, "Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises" (2004) 117 *Harvard Law Review* 1103.