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To file, or not to file? That is the question: filing shareholders agreements under Jersey law

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We are often asked whether shareholders agreements and similar documents such as investment, joint venture agreements etc. should be filed with the Companies Registry.

The short answer is almost always "no", provided the well-established practice in this area is followed.

Applicability of English case law and practice

The relevant provisions of the Jersey companies law are based on the UK Companies Act 1985, and are similar to the equivalent provisions in the UK Companies Act 2006.

To the extent there are substantive differences, the Jersey provisions are less onerous, particularly for private companies (where there is no obligation to file special share rights on the public register unless they are within a company's constitutional documents or adopted by special resolution or some other document having equivalent effect).

Where the Jersey courts have had to consider questions around the interpretation of articles of association and their interaction with shareholders agreements etc., their decisions have been consistent with English case law. In addition, the very similar statutory regimes ought to produce very similar practice, meaning Jersey lawyers can look directly to English practice in this area.

Filing shareholders agreements, etc. generally

An argument people make that shareholders agreements, etc. should be filed is that they amend the company's articles of association and therefore take effect as special resolutions (which are fileable).

This view is based on a principle from a 1960s English case called *Re Duomatic*. The *Re Duomatic* principle is that (in summary), where all shareholders who have a right to vote at a general meeting of a company agree to something that could be done in general meeting, it takes effect as if they have passed a valid shareholder resolution.

However, there is long-established English practice that, if followed, stops the *Re Duomatic* principle from being engaged:

- First, the English courts have developed the *Re Duomatic* principle since the 1960s, and there now needs to be some evidence from which an external observer could objectively infer an agreement to pass a shareholder resolution:
  - Standard practice is that shareholders agreements include a clause to the effect that, to the extent there is an inconsistency between that document and the articles, that document prevails as between the parties, and the shareholders will amend the articles to eliminate the inconsistency.
    - This is clear evidence that the shareholders do not intend to pass a resolution to amend the articles by signing the shareholders agreement.
    - Even if that clause is not included, it would normally be necessary for there to be some other factor to evidence an intention to amend the articles.
- Second, whether as a contractual obligation in the shareholders agreement, etc. or simply done at the same time as it is entered into, it is also standard practice that the articles of association will be amended to remove inconsistencies between them and the shareholders agreement.
  - This provides additional evidence that the shareholders

agreement, etc. was not intended to amend the articles, and negates the need to amend the articles further to achieve consistency with the shareholders agreement.

Another argument sometimes made is that the shareholders agreement, etc. contains share rights (as opposed to contractual rights which supplement share rights). This can be avoided by careful drafting.

That said, sometimes it is intended that share rights are contained in the shareholders agreement rather than the company's articles, and in Jersey it is possible to achieve this without the requirement to file the shareholders agreement either as a whole (for public companies) or at all (for private companies).

The position where the shareholders agreement, etc. is referred to in the articles

Another argument made in favour of filing is where provisions of a shareholders agreement (or some other external document) are referred to in a company's articles, whether by way of cross-reference or through provisions which say (in effect) that parts of the articles are subject to the shareholders agreement. The argument runs that these provisions are part of the articles, and must be filed on the public register. In practice, this is almost never done.

Nothing under Jersey (or English) law states that these types of references require the external document to be filed on the public register in general, nor is there any general legal principle or public policy reason for them to be filed, and so again the filing risk (or lack thereof) comes down to drafting.

The key points to bear in mind are as follows:

- Ideally the extent and nature of the cross-references should not be such that they render the articles unclear or uncertain in some fundamental respect; so, for example, a general statement that the articles are to be read subject to the shareholders agreement creates a greater filing risk than specific references and cross-references and should normally be avoided.
- If the company is a public company all share rights have to be filed on the public register, so care must be taken to ensure that the cross-references do not contain what can properly and objectively be considered share rights (and are instead limited to personal rights and obligations).
- Where there is doubt:
  - Extracts from the shareholders agreement, etc. could be annexed to the articles to avoid an argument that the document should be filed in its entirety (although this is rarely done).
  - The articles could include a right for shareholders to obtain a copy of the shareholders agreement etc. (or the relevant provisions of it), which (whilst again rarely done) tends to be the preferred option where not all shareholders are party to the shareholders agreement.

A more detailed analysis of the points covered above is available here.

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