Article 39

6–119 **39. Compliance with transfer provisions**

39.1 For the purpose of ensuring compliance with the provisions of Articles 34 to 38 (inclusive), the Directors may require any Leaver or Shareholder to procure (to the extent he is able) that:

39.1.1 he;
39.1.2 any proposed transferee of any Shares; or
39.1.3 such other person as is reasonably believed to have information and/or evidence relevant to that purpose;

provides to the Directors any information and/or evidence relevant to that purpose and until that information and/or evidence is provided, the Directors shall refuse to register any relevant transfer of Shares (except with Shareholder Consent).

39.2 Each Shareholder unconditionally and irrevocably authorises the Company to appoint any person as his agent to give effect to the provisions of these articles.

General

6–120 The purpose of this article is to give the directors the power to ensure that the transfer provisions are being complied with.

Article 39.2

6–121 Part of the purpose of article 39.2 is to back up the provisions of articles 34.1.5, 35.10 and 37.5. However, it goes further by giving the company wide powers to give effect to the provisions of the SHA Articles. While this would include executing a stock transfer form, it could also potentially include executing other documents such as a share sale agreement under article 37. This can be contentious as giving effect to the provisions of the SHA Articles can be a matter of interpretation and so it may be necessary to narrow the provisions to limit them to solely giving effect to articles 34 to 38.

Article 40

6–122 **40. Transmission of Shares**

40.1 If title to a Share passes to a Transmittee, the Company may only recognise that Transmittee as having any title to that Share.

40.2 Subject to the other provisions of these articles and pending any transfer of Shares to another person, a Transmittee has the same rights as the Holder had but, except as provided by Article 20.2 a Transmittee does not have the right to attend or vote at a general meeting or agree to a proposed written resolution, in respect of any Shares to which he

is entitled by reason of the Holder's death or bankruptcy or otherwise, unless that Transmittee becomes the Holder of those Shares.

General

6–123 As the SHA Articles are currently drafted a transmittee is included in the definition of a "Leaver" and any transmittee will be subject to the provisions of article 36. Particular regard should be had to the provisions of article 36.2.8.

Article 40.2

6–124 Given that a transmittee will automatically be a leaver, he will not be able to be registered as the holder of the shares in question until those shares have been offered under the mandatory transfer provisions.

Article 43

6–125 **43. Procedure for declaring dividends**

43.1 The Company may by Ordinary Resolution declare dividends and the Directors may decide to pay interim dividends.

43.2 A dividend must not be declared unless the Directors have made a recommendation as to its amount. Such a dividend must not exceed the amount recommended by the Directors.

43.3 No dividend may be declared or paid unless it is in accordance with Shareholders' respective rights.

43.4 Unless:

43.4.1 the Shareholders' resolution to declare, or Directors' decision to pay, a dividend; or
43.4.2 the terms on which Shares are issued;

specify otherwise, each dividend must be paid by reference to each Shareholder's holding of Shares on the date of the resolution or decision to declare or pay it.

General

6–126 Payment of any dividend will be subject to the provisions of Pt 23 of the 2006 Act.

Article 43.1

6–127 It is important to include this wording as otherwise article 4 would give the directors the power to declare final dividends rather than the power merely to pay interim dividends.

Note the difference in terminology. Final dividends are "declared" whereas

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interim dividends are "paid". A final dividend will usually be recommended by the directors and declared by the shareholders. A final dividend becomes a debt of the company when it is declared (*Leclerc Ltd v Pouliot* [1924] 1 DLR 36). It is usually for the directors to decide whether an interim dividend should be paid and it will only become a debt of the company when it is (as opposed to when the directors resolve to pay it) (*Potel v CIR* [1971] All ER 504).

Article 43.4

6–128 If article 28 is amended to allow the issue of shares which are not fully paid it may also be advisable to amend this article so that dividends are paid according to the amount paid up on each share held as opposed to the number of shares held.

Article 45

6–129 **45. No interest on distributions**

The Company may not pay interest on any dividend or other sum payable in respect of a Share unless otherwise provided by:

45.1 the terms on which that Share was issued; or
45.2 the provisions of another agreement between the Holder of that Share and the Company.

There is no restriction on companies paying interest on dividends, but this article is included to reflect general practice whereby dividends will not carry interest. This article could be amended to allow for interest to be paid on dividends, however, merely deleting it will not imply an obligation to pay interest.

Article 46

6–130 **46. Unclaimed distributions**

46.1 All dividends or other sums which are:

46.1.1 payable in respect of Shares; and
46.1.2 unclaimed after having been declared or become payable;

may be invested or otherwise made use of by the Directors for the benefit of the Company until claimed.

46.2 The payment of any unclaimed dividend or other sum into a separate account does not make the Company a trustee in respect of it.

46.3 If:

46.3.1 12 years have passed from the date on which a dividend or other sum became due for payment; and
46.3.2 the relevant Distribution Recipient has not claimed it;

that Distribution Recipient is no longer entitled to that dividend or other sum and it ceases to remain owing by the Company.

General

6–131 Although it is uncommon for distributions not to be claimed, it does happen where, for example, a shareholder is untraceable.

Article 46.1

6–132 Deletion of article 46.1 should be resisted as it is otherwise arguable that the directors would have to set any unclaimed amounts aside in an inaccessible account.

Article 46.2

6–133 It is important to show that if unclaimed amounts are paid into a separate account, the company does not become a trustee or owe any fiduciary duty in respect of it as this would require it to take control of the money and invest it for the benefit of the beneficiaries. This wording, however, allows the company to wait for the money to be claimed and does not impose any positive obligations on the company.

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Article 46.3

6–134 It is arguable that the 12-year period specified in this article could be reduced down to six years. The 12-year period reflects the historic position previously set out in Table A. However, on the basis that articles of association are now seemingly to be treated as a contract under hand (unlike s.14(1) of the 1985 Act, s.33(1) of the 2006 Act does not refer to the articles of association being "signed and sealed"), it would appear that, in the absence of any other agreement, the Limitation Act 1980 would impose a six year limit on any claim.

Article 48

6–135 **48. Waiver of distributions**

Any Distribution Recipient may waive his entitlement to a dividend or other distribution payable in respect of any Share by giving the Company notice in Writing to that effect, but if:

48.1 that Share has more than one Holder; or
48.2 more than one person is entitled to that Share (whether by reason of the death or bankruptcy of one or more joint Holders or otherwise);

the notice is not effective unless it is expressed to be given and signed, by all the Holders or persons otherwise entitled to that Share.

Interim dividends may be waived up to the date of payment while final dividends must be waived prior to their declaration. Caution should be exercised and tax advice sought when proposing to waive dividends to ensure that there are no adverse tax consequences.

Article 49

6–136 **49. Authority to capitalise and appropriation of Capitalised Sums**

49.1 Subject to the other provisions of these articles, the Directors may, if they are so authorised by an Ordinary Resolution:

49.1.1 decide to capitalise any profits of the Company (whether or not they are available for distribution) which are not required for paying a preferential dividend, or any sum standing to the credit of the Company's share premium account or capital redemption reserve; and

49.1.2 appropriate any sum which they decide to capitalise in accordance with Article 49.1.1 (a "Capitalised Sum") to the persons who would have been entitled to it if it were distributed by way of dividend (the "Persons Entitled") and in the same proportions.

49.2 Capitalised Sums must be applied:

49.2.1 on behalf of the Persons Entitled; and

49.2.2 in the same proportions as a dividend would have been distributed to them.

49.3 Any Capitalised Sum may be applied in paying up new Shares of a nominal amount equal to the Capitalised Sum which are then allotted credited as Fully Paid to the Persons Entitled.

49.4 A Capitalised Sum which was appropriated from profits available for distribution may be applied in paying up new debentures of the Company which are then allotted credited as Fully Paid to the Persons Entitled.

49.5 Subject to the other provisions of these articles, the Directors may:

49.5.1 apply Capitalised Sums in accordance with Articles 49.3 and 49.4 partly in one way and partly in another;

49.5.2 make such arrangements as they think fit to deal with Shares or debentures becoming distributable in fractions under this Article 49 (including the issuing of fractional certificates or the making of cash payments); and

49.5.3 authorise any person to enter into an agreement with the Company on behalf of all the Persons Entitled which is binding on them in respect of the allotment of Shares and debentures to them under this Article 49.

General

6–137 The most common use of the powers given by this article will be to issue bonus shares to the shareholders.

Article 49.3

6–138 If article 28 is modified to permit the issue of partly paid or nil paid shares, this article can also be amended to allow partly paid bonus shares to be issued. It would also be possible to amend the article to allow the company to use its distributable reserves to pay up any unpaid amounts on partly or nil paid shares.

Articles 50 to 60—General meetings

6–139 As the provisions of the 2006 Act regarding the calling of general meetings (ss.301 to 335) are lengthy, these are not repeated in the SHA Articles. The same view has been taken in relation to the provisions dealing with electronic communications which are to be found in Schs 4 and 5 to the 2006 Act. Note, however, that article 61 contains a reference to communication by means of a website which cannot be incorporated by reference.

Article 50

6–140 **50. Attendance and speaking at general meetings**

50.1 A person is able to exercise the right to speak at a general meeting when he is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions which he has on the business of the meeting.

50.2 A person is able to exercise the right to vote at a general meeting when:

50.2.1 he is able to vote, during the meeting, on resolutions put to the vote at the meeting; and

50.2.2 his vote can be taken into account in determining whether or not such resolutions are passed at the same time as the votes of all the other persons attending the meeting.

50.3 The Directors may make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak or vote at it.

50.4 In determining attendance at a general meeting, it is immaterial whether any two or more persons attending it are in the same place as each other.

50.5 Two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have (or were to have) rights to speak and vote at that meeting, they are (or would be) able to exercise them.

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Clause 1.11

12–16 1.11 The terms **"including"**, **"include"**, **"in particular"** or any similar expression, shall not limit the sense or application of any words preceding those terms.

This clause is included to counteract the presumption that where a document contains a list, the intention of the parties was that the list is complete and is not supposed to include other matters which may be similar. It avoids the repeated use of phrases such as "without limitation" and "but not limited to" throughout the agreement.

Clause 1.12

12–17 1.12 A reference to a **"Clause"** or **"Schedule"** is to a clause of or schedule of this agreement and a reference to a **"Paragraph"** is to a paragraph of the relevant Schedule or the relevant part of the relevant Schedule.

The effect of this clause is that it is possible, for example, to say "Clause 1" instead of having to say "Clause 1 of this agreement" or "Clause 1 above" and therefore aids more concise drafting.

Clause 18—Relationship of Parties

12–18 Nothing in this agreement shall be deemed to constitute a partnership between the Parties.

This clause seeks to clarify the intended relationship of the parties and, specifically, to help minimise the risk of creating a partnership. Save of course where the parties are consciously creating a partnership, they will generally wish to avoid doing so given that partners owe each other fiduciary duties and may be liable for each others' acts and omissions (and losses). A partnership may also have unintended tax consequences for the parties.

A partnership is defined under s.1 of PA 1890 as "the relation which subsists between persons carrying on a business in common with a view to profit". Whether a partnership exists between two parties is a question of fact and an express written statement to the contrary may be insufficient to prevent a partnership from being deemed to exist. However, this type of clause provides useful evidence of the intentions of the parties and may operate to prevent fiduciary duties arising between them. Likewise, it excludes the risk of the parties unintentionally creating any form of agency relationship.

Clause 19—Several obligations

12–19 Except as otherwise provided by this agreement, all covenants, warranties and other obligations given or entered into by more than one Party are given or entered into severally.

Where two or more parties (the **"Promisees"**) to an agreement make a promise (for example a warranty, representation, indemnity or some form of undertaking) to another (the **"Recipient"**) they will do so jointly, severally or jointly and severally. In the review that follows we have assumed (save where stated) the provision to be a warranty, the context in which this issue is most relevant.

Joint liability

12–20 There is a presumption (absent an express provision in the agreement to the contrary) that the Promisees are jointly liable in respect of the performance of that warranty (*White v Tyndall* [1888] 13 App. Cas. 263).

If the Promisees are jointly liable, the Recipient must, generally speaking, issue proceedings against all the Promisees to enforce performance of the relevant warranty. The reason for this is that the Promisees are deemed to have made the warranty together and not individually and so can only be sued collectively. This can be inconvenient for the Recipient and is likely to result in increased expense. Usually a Recipient will prefer, for the reasons set out in para.12–21, for the Promisees to be jointly and severally liable.

An additional downside for the Recipient (and to some extent the other Promisees) is that, if one of the Promisees dies, his personal representatives are, generally speaking, released from liability (but see para.12–06), leaving the surviving Promisees with the liability (*White v Tyndall* (above)). An important caveat to this is that when the last surviving Promisee dies, the promise becomes several (see para.12–22) and passes to his personal representatives (*Calder v Rutherford (1822) 3 Brod. & B. 302*).

Joint and several liability

12–21 This tends to be the preferred option for the Recipient.

The Promisees give the warranty both collectively and individually. The Recipient can therefore issue proceedings against any or all of the Promisees in the event of a breach of the warranty.

Clearly for the Promisees the risk is that any one of them could be sued by the Recipient and, for example, forced to pay damages. This may be of particular concern where one of the Promisees is wealthier or more accessible than the others as he is likely to be the first target for the Recipient.

Where one of the Promisees is forced to pay damages to the Recipient, his payment will (providing the liability has been settled in full) release the other Promisees. However, the Civil Liability (Contribution) Act 1978 may allow

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him to seek a contribution from the others. The amount of the contribution will be the amount considered by the court to be "just and equitable" having regard to the circumstances. Given that this is more than a little vague, where liability is being given on a joint and several liability, it is advisable for the Promisees to agree between themselves (usually by way of a document called a "contribution agreement") that, regardless of which of them the Recipient claims against, they will share the liability in agreed and specified proportions. An alternative is to reach agreement with the Recipient that it will only sue each of the Promisees for a set amount of any claim. However, a Recipient, will not usually want to restrict his freedom to choose from whom to claim and will normally argue that the Promisees can agree this between themselves.

Unlike joint liability, if one of the Promisees dies his estate will not be released from liability.

Several liability

12–22 This may be preferred by the Promisees, although in reality its effect may be little different to joint and several liability.

Each Promisee makes the relevant promise individually and assumes liability for his own performance only.

Whether several liability is, in practical terms, any different to joint and several liability, is down to the nature and wording of the promise given. If the promise is personal to each of the Promisees, for example, they each warrant (on a several basis) that personal information supplied by them is accurate, then a Promisee will only be liable if his information is inaccurate. The position is different if each Promisee warrants that, for example, a business plan they have prepared is accurate. In that case if the warranty proves to be untrue then, although each of them has made the promise to the Recipient individually and separately, they have all breached the promise. Thus, the Recipient can sue any or all of them for any loss it suffers and the result is therefore similar to if they had given the warranty jointly and severally.

12–23 Clause 19 will not be appropriate or necessary where there are not multiple Promisees making promises to a Recipient.

There is no reason why the parties to an agreement cannot agree that certain undertakings or warranties will, for example, be given on a several basis and others on a joint and several basis. In the Investment Agreement the promises that are truly personal (for example, restrictive covenants and promises to ensure that the company does or does not do certain things) are given on a several basis whereas other promises which are more collective in nature (for example, the warranties) are given (or at least sought) on a joint and several basis.

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Clause 20—Further assurance

12–24 The Company and the Managers shall (and shall procure that their respective nominees shall) do, execute and perform all such further deeds, documents, assurances, acts and things as the Investor Majority may require to give effect to the terms of this agreement.

There is a possibility in any transaction that the parties may forget to do certain things or have to take further actions to give full effect to the agreement. The main purpose of a further assurance clause is to provide a mechanism to deal with those types of situations.

These types of clauses are in fact rarely relied on as the parties and their advisers (aided by checklists and timetables) will usually ensure that all relevant documents and acts are completed either before or at the same time as the agreement is signed. However, further assurance clauses can still give rise to negotiating issues. How these issues are settled will, as is often the case, depend on who has the greater bargaining strength.

The first issue is who should give the assurance. This is often governed by the nature of the agreement. In the context of an investment agreement the assurance will usually be given by the managers and the company to the investors and will not be reciprocal. This is on the basis that the managers and the company will have multiple obligations whereas the investors will generally have one (to subscribe for shares) and will usually be the party most affected by an omission in the process. Compare this to a shareholders' agreement where the further assurance clause is normally reciprocal between all the parties (the logic being that all the parties have obligations to each other).

The extent of the assurance may also be an issue. Clause 20 is very wide (essentially, the company and managers have to do whatever the investor requires) and it may be appropriate to limit the obligations to those acts that are required to give the investor the full benefit of the agreement.

Probably the most common negotiating issue is who should bear the cost of any further action that may be required. Logically the cost should be borne by the party who benefits from the action, however, there is no right or wrong answer and it will largely depend on the bargaining strengths of the parties.

Another point of negotiation may be whether the assurance is to be qualified or absolute. If acting for the party giving the assurance it may be appropriate to attempt to qualify the obligation by stating that that person will use his "reasonable endeavours" to carry out the act in question.

Time limits may also be an issue. First, the clause may specify how quickly a required action should be carried out (for example, immediately, as soon as reasonably practicable or within a specified time). Clause 20 does not make specific provision in this regard so there is likely to be an assumption that the action will be carried out within a reasonable time. Secondly, the clause could specify that the obligation under it falls away after a specific time (although this would be unusual).

Finally, if there is a concern that the party giving the assurance may be

difficult to find or may even refuse to carry out any necessary acts, it may be appropriate to include an irrevocable power of attorney to allow the act to be carried out in his name. However, it is likely that this will only be acceptable to the party giving the assurance if it only relates to specific actions. Note that due to the provisions of POAA, the agreement would certainly need to be executed as a deed if a power of attorney was included.

Clause 21—Successors

12–25 This agreement shall be binding on and shall continue for the benefit of the successors and assigns, personal representatives and trustees in bankruptcy (as the case may be) of each of the Parties.

This clause ensures that any successors, assigns, personal representatives or trustees in bankruptcy recognise and are bound by the terms of the agreement and that they also have the benefit of it. This clause is not an assignment clause and if the parties wish to prevent assignment of the benefit of the agreement this should be provided for separately (see clause 14.1 of the Investment Agreement).

If the agreement was between two corporate entities only, there would be no need to include reference to personal representatives or trustees in bankruptcy.

Clause 22—Agreement prevails

12–26 Except as otherwise provided by this agreement, if there is a conflict between the terms of this agreement and the provisions of the Articles (or the articles of association of any other Group Company) the terms of this agreement shall prevail on all the Parties (except the Company).

A shareholders' or investment agreement will invariably be drafted to sit alongside either an existing set of articles of association or, as is more often the case, a newly adopted set of articles of association. There may be a degree of overlap between the provisions of the relevant agreement and the articles of association and so it is important to determine, in the event of an inconsistency between the two, which takes priority. Invariably it will be the agreement that takes priority as it will usually contain vital protections for the parties that do not appear in the articles of association. Note that only the parties to the relevant agreement are bound by this clause and therefore care should be taken to the extent there are other shareholders who are not parties to the agreement as they will only be bound by the terms of the articles of association.

Although this type of clause is a useful safety net, the parties should still ensure that all relevant documents are reviewed and any potential inconsistencies specifically dealt with.

Clause 23—Duration and variation of agreement

General

This clause deals with deemed termination of the agreement and also how it can be varied. It is particularly important to deal with these issues in an agreement where there are multiple parties who may cease to be bound by the obligations of the agreement at different times. 12–27

Clause 23.1

12–28 23.1 On a Listing the provisions of this agreement shall cease to have effect except that each Party's accrued rights and obligations shall not be affected.

This clause is peculiar to the Investment Agreement as only the Investment Agreement contains provisions regarding what should happen in the event of a listing (which in this case means the listing of the shares of the company on a recognised stock exchange (being one of the ways in which the shareholders of the company can achieve an exit)).

If a listing were to take place, the shareholders would either cease to hold shares in the company or the shareholdings would be changed to such an extent as to make the Investment Agreement obsolete.

This clause automatically terminates the Investment Agreement without the need for a deed of termination. However, it does preserve, and provide certainty in terms of the survival of, the parties' accrued rights and obligations under the Investment Agreement (although it may be that the parties' choose to waive these at the relevant time).

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Clause 23.2

12–29 23.2 If any Manager ceases to be a Shareholder then, as from the date of that cessation, this agreement may be varied without reference to (or the need for the signature on any relevant document of) that Manager provided that such variation shall not give rise to any new or increased liability of that Manager.

Usually, in order to vary the terms of any agreement the consent of all the parties is required. Unless the provisions of clause 23.3 are triggered, a manager will remain a party to the Investment Agreement even if he no longer holds any shares. This means that although he is not a shareholder, his consent would still be needed in order to vary any provision of the agreement. This clause gets round that problem.

Note that while he remains employed by the relevant company (or another company in its group), there are still advantages from the other parties' perspective in the manager being bound by the terms of the Investment Agreement. For example, he will continue to be bound by the restrictive covenants.