

Topic 7

THE COMPANY'S CONSTITUTION

THE MEMORANDUM AND ARTICLES OF ASSOCIATION

公司章程

章程大纲与章程细则

What is the constitution?

何谓公司章程？

The two documents lodged at the time of incorporation are the memorandum of association and the articles of association. They are collectively referred to as the company's constitution. The promoters and later the members control the contents of the constitution.

在公司成立之时呈请备案的两份文件是章程大纲与章程细则。它们合称为公司章程。公司发起人和其后的成员支配该章程的内容。

The memorandum of association defines the objects, aims and structure of the company.

The company's governance or the internal affairs of the company is regulated by the articles of association.

公司章程大纲定义公司的经营范围、经营目标和组织结构。公司的管理或其内部事务由其章程细则进行调整。

A memorandum of association filed with the Registry of Companies has to contain *inter alia* details like the approved name of the company, amount of the share capital, division of the share capital into shares measured in monetary terms (usually \$1 per share or even 1 cent per share).¹

¹ See s.22(1) of the Singapore Company Act. In Canada, it is possible to have shares denominated at 1 cent per share.

在公司登记处归档的章程大纲必须包括其它一些细节，比如经批准的公司名称、股本额、每股的货币价值（通常是每股一美元，甚或是一美分）。

Bowen L.J. in *Guinness v. Land Corp of Ireland* provided the distinction between the two legal documents in the following manner:

Bowen L.J. in *Guinness v. Land Corp of Ireland* 一案以如下方式指出了这两份法律文件的区别：

*The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are the internal regulations of the company.*²

章程大纲包含了公司只需将其满足便可以成立的基本条件。这些条件是为了公司股东、债权人和外部公众的利益而引入的。公司章程细则是调整公司内部事务的规范。

If there is any inconsistency between the memorandum of association and the articles of association, the memorandum will prevail.³

如果章程大纲与章程细则之间存在矛盾之处，则章程大纲优先。

It is up to the promoters to include the objects of the company in the memorandum of association. Subject to the company law legislations of most common law jurisdictions, it is unnecessary to give an exhaustive list of objects as the company is now able to carry out or undertake any business or activity.⁴

是否将公司的经营对象写入章程大纲取决于发起人。在大多数普通法辖区的公司法立法例之下，没有必要列出详尽无遗的经营范围，因为公司如今可以经营任何生意或实施任何行为。

The two document constitution may soon be replaced by just the constitution. The Company Law Review recommended that the constitution would comprise only the

² (1882) 22 Ch 349.

³ *Ibid.*

⁴ S.23(1) of the Singapore Company Act.

articles of association. The compulsory contents of the memorandum might have to be lodged at the Registry of Company.⁵

基于两份文件的公司章程可能很快会被单一章程取代。公司法评论提倡公司章程只包括章程细则。章程大纲的强制性记载内容必须在公司登记处备案。

The preliminary steps **预备步骤**

Table A of the Companies Act prescribe the model articles for a company, public or private. A company does not have to register its articles. Its articles come into force upon the issuance of the certificate of incorporation.

公司法案的 Table A 规定了公众公司或私人公司章程细则的范本。公司不必登记其章程细则。公司成立许可证颁发之时章程细则生效。

Promoters form a company. The drafters have to ascertain the following requisites from the promoters:

发起人设立公司。章程起草人必须确认发起人具备以下要件。

- (1) The object clauses of the memorandum: They will reflect the nature of the business.
 - (2) The amount of the nominal capital and the types of shares: These material facts will form part of both the articles and the memorandum. If a company has more than one category of shares, the special rights attached to such shares have to be spelt out in the articles.
 - (3) Additional information: Facts may include quorum, rights and the size of the board of directors and any other articles different from Table A.
- (1) 章程大纲的经营范围条款：它们应当反映生意的性质。

⁵ Final Report 1, Ch.9 and Final Report II, Ch.16, Part 1

- (2) 名义股本数额和股份的种类：这些实质内容构成章程细则和章程大纲的一部分。如果公司有超过一种以上的股份，附于这些股份之上的特殊权利必须在细则中加以明确说明。
- (3) 附加信息：包括董事会的法定人数、权利、规模 and 任何区别于 Table A 之规定的条款。

The restrictions provided under Table A are useful to both the company and its directors. The directors have the right to refuse registration of shares that are not fully paid or when there is a lien on them.

Table A 项下的限制对于公司和其董事都是有用的。董事有权拒绝登记尚未完全偿付或是留置的股份

Registration of company name

公司名称登记

The functions of a Registrar of Companies are mainly administrative.

公司登记员的作用主要是行政性的。

Normally, the registration of a company upon issuance of the certificate of incorporation cannot be challenged. There are exceptions on grounds of public policy.

通常公司以成立许可证进行的登记是毋庸置疑的。但存在基于公共政策的例外。

See *R. v. Registrar of Companies*⁶

参见 *R. v. Registrar of Companies* 一案

A prostitute succeeded in incorporating her business under “Lindi St Claire (Personal Services) Ltd after the Registrar rejected other names, such as “Prostitutes Limited”, “Hookers Ltd” or “Lindi St Claire (French Lessons) Ltd.

⁶ [1991]BCLC 476

一个妓女成功地将她的公司登记为“Lindi St Claire (Personal Services) Ltd”，在这之前登记机关拒绝登记“Prostitutes Limited”，“Hookers Ltd”或“Lindi St Claire (French Lessons) Ltd”等名称。

The Court, on judicial review by the Attorney General, revoked the registration on the ground that the stated business was unlawful as contrary to public policy.

经首席检察官提起司法审查后，法院撤回了该登记，原因是该生意违背公共政策因而违法。

In England, registration of trade unions under the Companies Act is null and void as it is an infringement under section 10(3) of the Trade Union and Labour Relations (Consolidation) Act 1992.

在英格兰，贸易联盟根据公司法案进行的登记是无效的，因为这违反了1992年贸易联盟与劳动关系（联合）法案 section 10(3)的规定。

Alteration of the constitution

章程变更

The articles in the memorandum of association can be amended with a special resolution. Members can pass such a resolution to alter the object clauses, to alter the share capital, to change the company's name or to convert a private limited company into a public limited company and vice versa.

章程大纲中的条款可以通过特殊决议修改。

成员们可以通过一项决议，以修改目标条款，变更股份资本，变更公司名称，或把私人有限公司转变成公众有限公司，反之亦然。

Likewise, the articles of association can also be amended. It is the duty of every member to vote for an alteration in good faith and for the benefit of the company.

同样地，公司的章程细则也可以被修改。在就变更进行投票时，秉承善意和有益于公司的原则是每个成员的义务。

Lindley, MR said:

Lindley, MR 说道:

The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association....It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded...⁷

公司被授予修改其章程细则中规定的权力，这种权力仅在法令和章程大纲的限制性条款下受到约束……这种权力的行使不仅必须以法律要求的方式进行，还必须在总体上忠实于公司的利益，而且不得被超越……

It is for the members to decide what is in the best interest of the company and it is for an alteration which a reasonable man will not object to.⁸ An alteration must not be for the benefit of the majority who uses this amendment for the purpose of oppressing the minority.

应由股东来决定如何对公司最有利，并且这样的变更不会受到一个有理性的人的反对。一项变更不得为了多数股东的利益而进行，如果该多数股东利用此变更对少数股东施压。

There is some protection for the minority if the majority tries to oppress to treat them unfairly. There is a need to get an individual member's consent if the effect of an alteration will result in him subscribing for more shares or an increase in his liability to contribute to the company's share capital.⁹

存在一定的保护机制，以防止多数派对少数派不公平的压迫。如果一项变更将导致个别成员认购更多的股份或承担更多的向公司注资的责任，那么这项变更需要征得他的同意。

The company cannot insert an article in the articles of association that some of its articles cannot be amended. This amounts to contracting out its power to amend. It is not enforceable as it amounts to contracting out of statutory requirements.¹⁰

公司不得在其章程细则中加入“不得修改部分条款”这样的条款。这相当于保证不行使修改权。该保证等于放弃了法令要求行使的权力，因而不可执行。

There can be no alteration of the articles of association if there is a restriction in the memorandum of association. It is easy to circumvent this prohibition by removing the restriction in the memorandum of association by a special resolution and then move to amend the articles of association.

在章程大纲有相应的限制时，章程细则不得修改。以一项特别决议删除章程大纲中的限制后，便可轻易地规避限制性规定以达到修改章程细则的目的。

⁷ *Allen v. Cold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 671

⁸ *Peter's American Delicacy Co Ltd v Health* (1939) 61 CLR 457

⁹ S.16, Companies Act 1985.

¹⁰ *Re Greene* [1949] Ch 333, CA

Contractual effect of the constitution 章程的契约性效力

Only parties to a contract can enforce it. The constitution is a contract between members and the company. Directors, employees and third parties cannot enforce any provisions under the articles of association.

只有契约各成员方才能执行契约。公司章程即成员与公司之间的契约。董事、雇员和第三方都不能执行章程细则中的任何规定。

Prof Bruce Welling on *Corporate Law in Canada – the Governing Principles* summarized the legal principles of the company's constitution:

Prof Bruce Welling 在 *Corporate Law in Canada – the Governing Principles* 一案中总结了公司章程的法律原则:

...the statute makes the corporate constitution a contract among the shareholders and between each shareholder and the corporation. The details of the corporate constitution are contractual terms among those parties. A violation of a constitutional infringes contractual rights and may give rise to an action for breach of contract.¹¹

法令将公司章程作为股东之间和各股东与公司之间的一项契约。公司章程中的详细内容，是各成员方之间的合同条款。对公司章程的违反是对合同权利的破坏，并可能引发违约诉讼。

This is even the case with a director, who is also a member of the company. He cannot enforce any benefits or rights conferred on him as a director of the company. English cases have repeatedly affirmed the principle that only members can enforce their contractual rights under the articles of association.

在董事同时是公司成员的情况下这尤其是事实。他作为公司董事不能行使任何授予他的利益和权利。英国的案例反复确认了这样的原则，即只有成员才能根据章程细则行使他们的合同权利。

This principle was aptly enunciated by Astbury J in the *Hickman's case*¹²:
Astbury J 在 *Hickman's case* 一案中适当地阐明了这项原则:

An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles, treating them as contracts between himself and the company, to enforce those rights.

声称是公司章程细则赋予其外部人行为能力的外部人，不管他原先就是或者后来成为公司成员，都不能将条规则视为他与公司之间的契约，从而基于条规中的权利提起诉讼，以行使这些权利。

It is advisable for directors holding managerial positions in the company or executive directors to have separate contracts with the company. They may even incorporate some of the provisions in the articles and their agreements will be enforceable.

拥有管理者位置或者执行董事与公司单独签订合同，都是可取的做法。他们甚至可以包括条规中的一些规定，他们的协议就可以实施了。

¹¹ 2nd edition, p.60.

¹² [1915] 1 Ch.881 at p.897.

The articles of association also constitute a contract among the members *inter se*.
章程细则在成员之间同样构成一项契约。

There is a contractual obligation on the part of every member that he has to observe all the provisions of the memorandum and articles of association.¹³ Thus, a member can take up court injunctions to restrain another member from acting in breach of his contractual obligations under the articles of association.¹⁴

每一个成员方都必须遵守章程大纲和章程细则中的所有规定，这是一项契约义务。因此，成员可以取得法院的禁令以制止其他成员违反章程细则中规定的合同义务的行为。

See *Rayfields v. Hands*¹⁵

参看 *Rayfields v. Hands* 一案。

A member wanted to sell his shares in accordance with the articles of association, which provided for purchase by directors (and members) in equal shares at fair price. The member gave notice, but the directors refused to buy. The member brought an action to enforce his contractual rights under the articles of association. The Court held that the provision was a contractual relationship between a member and the directors as members and ordered them to purchase.

一个成员希望根据章程细则的规定出售自己的股份，章程细则对此的规定是董事们（和成员们）以公平的价格购买相等的股份。但董事们在成员发出通知后拒绝购买。该成员提起诉讼以行使章程细则赋予的合同权利。法院认为，该条款确立了成员和作为成员的董事之间的合同关系，并命令后者购买前者的股份。

The articles must relate only to contractual rights and obligations of a member *qua* member. The situation is the same for rights conferred on an outsider under the articles. He cannot enforce such rights when he becomes a member.

条规只能涉及基于成员身份的合同权利和义务。这与条规授予外部人权利的情况是一样的。当他成为公司成员时，他不能行使这些权利。

See *Quinn & Axtens Ltd v. Salmon*¹⁶

A managing director sued the company in his capacity as a member. He succeeded in getting an injunction from the Court in restraining the company to act in breach of its articles. It was a requirement under the articles that the consent of two managing directors would be required under articles for contractual transactions.

参看 *Quinn & Axtens Ltd v. Salmon* 一案。

¹³ For example, see 39(1) Singapore Company Act.

¹⁴ See *Rayfield v Hands* [1960] Ch 1

¹⁵ *Ibid*

¹⁶ [1909] A.C.442, HL

一名常务董事基于其成员地位起诉公司。他成功地获得了法院的禁令，阻止了公司违反条规行事的行为。章程细则中的合同交易条款要求必须要有两位常务董事的同意。

Therefore, a member has a membership right to require the company to adhere to the provisions of the articles of association. The end result may be the protection of a right or benefit given to him as a director under the articles of association.¹⁷

因此，成员享有要求公司坚守章程细则的规定的成员权利。最终的局面也许是对章程细则中规定赋予董事的权利或利益的保护。

Sometimes, it may be awkward to treat a director as an outsider. A director can be in breach of his fiduciary duty to the company if his actions tantamount to a derogation from the company's constitution.

有时，将董事视为外部人是难以处理的。当董事做出相当于破坏公司章程的行为时，将违背他对公司的受托义务。

In *Hickman's case*, there was a provision in the articles of association to refer any dispute between the company and a member to adjudication by arbitration and this was enforced by the Court.¹⁸

Hickman's case 一案中，章程细则规定，公司与成员之间的任何纠纷将交由仲裁裁决并由法院执行。

There was a similar provision in the articles of association in the case of *Beattie v. Beattie Ltd.*¹⁹ Here, the Court of Appeal decided differently as it was a dispute between the company and a director, who was also a member. The contract under the articles of association could not be enforced as it involved a dispute relating to a director in his position as a director. A director is considered an outsider.

¹⁷ Lord Wedderburn's article on *Shareholders' rights and the Rule in Foss v. Harbottle* in [1957] C.L.J.193

¹⁸ [1915] 1 Ch. 881.

¹⁹ [1938] Ch. 708, CA.

在 *Beattie v. Beattie Ltd* 一案中的章程细则有着相似的规定。此案中，上诉法院作出了不同的判决，因为案件涉及的是公司与一名同为成员的董事之间的纠纷。此时，条规规定的契约不能被执行，因为纠纷涉及的是公司和基于董事地位的董事，而董事是被视为外部人的。

The best illustration of an outsider trying to enforce his contractual rights under the articles of association surfaced four decades ago in Singapore.

外部人试图行使章程细则规定的契约权利的最佳例证出现在 40 年前的新加坡。

See *Raffles Hotel Ltd v. Malayan Banking Bhd (No 2)*²⁰

参看 *Raffles Hotel Ltd v. Malayan Banking Bhd (No 2)* 一案。

There was a provision for the appointment of a director from the lessor in the articles of association of the company. Malayan Banking Bhd, currently one of the largest banking institutions in Malaysia, was the lessor of the piece of land where the Raffles Hotel was located. The company applied for a court declaration that such a provision in its articles of association would be unenforceable. The Court of Appeal concurred with the decision of the High Court and held that the articles could not constitute a contract between the company and an outsider.

公司的章程细则中有一项关于任命来自出租方的董事的规定。作为如今马来群岛最大的银行机构之一，*Malayan Banking Bhd* 是 *Raffles Hotel* 所在地的土地出租者。该公司向法院申请宣告其章程细则中的这一规定是不可执行的。上诉法院认可了高级法院的判决，认为条规并不构成公司和外部人之间的契约。

²⁰ [1966] 1 MLJ 206