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## THE CONTINUING EVOLUTION OF SHAREHOLDER GOVERNANCE

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### I. INTRODUCTION

THE law which governs decision-making by the shareholders (or, strictly speaking, members) of a company is an area in which there is a great emphasis on regulation. This emphasis has tended to obscure the basic principles of law around which that regulation has developed. It has also distracted attention away from an appreciation of how those principles are applied and developed in practice.<sup>1</sup>

For many years, this did not seem to matter very much. Understanding the mechanisms by which shareholders made decisions was largely unnecessary when running any “standard” general meeting of a company. Common practice for such meetings was so well established that there seemed to be little need to do anything other than ensure compliance with current regulation. A small number of highly knowledgeable specialist practitioners could deal with anything marginal, or unusual, or contestable connected with a purported meeting of shareholders. So legal writing about decision-making by shareholders was largely limited to practitioner works.<sup>2</sup> What, then, if anything, has changed, so as to warrant any

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<sup>1</sup> The Company Law Review produced a useful set of documents about the law regulating corporate decision-making, but it did not examine the principles onto which such regulation is grafted, nor the practice built on them. The Review only obliquely acknowledged the principles in *Developing the Framework* (London 2000), at §4.19. The Government’s approach followed the Review’s: *Modernising Company Law* (Cm. 5553 (2002)), at §2.8.

<sup>2</sup> See D. Impey *et al.*, *The Modern Law of Meetings* (Bristol 2005); I. Shearman, *Shackleton on the Law and Practice of Meetings* (London 2006); A. Hamer and A. Robertson, *Running Company Meetings* (Hemel Hempstead 1997). Academic articles published in the UK have tended to examine aspects of positive law concerned with decision-making by shareholders, rather than consensual corporate structures: see, *e.g.*, R. Grantham, “The Unanimous Consent Rule in Company Law” [1993] C.L.J. 245, and, most recently, Watts, “Informal Unanimous Assent of Beneficial Shareholders” (2006) 122 L.Q.R. 15.

wider interest in this area of law?<sup>3</sup> Three developments of recent times stand out in particular.

The first is the impact of new communication technologies. There are now more and faster ways for groups to communicate and to take collective decisions.<sup>4</sup> Until recently, groups could meet physically in order to debate and decide an issue; they could decide (but could rarely easily debate) an issue by post, telegram or fax; and, if they were small enough in number for the technology to cope, they could debate and decide an issue by telephone. Now, there are all the possibilities of videoconferencing, e-mail and the web for debate and decision. The recent past also strongly suggests there will be many more new developments before long. Companies may well want to press these all these new—and future—technologies into service.

The second development is the current emphasis on so-called “shareholder activism”. Policy-makers increasingly regard it as important that shareholders, particularly the financial institutions who hold large portfolios of shares, should participate in corporate governance.<sup>5</sup> If such participation is important, it follows that the means of participation are also important, and deserve attention.<sup>6</sup> There are now various proposals for reform of the law relating to shareholder rights and, more generally, the participation of investors in companies.<sup>7</sup> All of these proposals merit careful scrutiny in due course; but any reasoned assessment of the proposals first requires an understanding of the legal and commercial context in which they will operate.

A third trend is the concern to make it easier for investors in a company to engage in the governance of that company even where

<sup>3</sup> As regards practitioner interest, see Company Law Review, *Company General Meetings and Shareholder Communication* (London 1999), §14. As regards academic interest, mostly abroad, see, e.g., S. Bottomley, “From Contractualism to Constitutionalism: A Framework for Corporate Governance” (1997) 19 *Sydney Law Review* 277 and *The Role of Shareholders’ Meetings in Improving Corporate Governance* (Canberra 2003); R. Simmonds, “Why Must we Meet? Thinking about why Shareholders’ Meetings are Required” (2001) 19 *Company and Securities Law Journal* 506; F. Bonollo, “Electronic Meetings” (2002) 14 *Australian Journal of Corporate Law* 95; E. Boros, “Corporate Governance in Cyberspace: Who Stands to Gain What From the Virtual Meeting?” [2003] *Journal of Corporate Law Studies* 149 and “Virtual Shareholder Meetings: Who Decides How Companies Make Decisions?” (2004) 28 *Melbourne University Law Review* 265.

<sup>4</sup> See in particular *The Strategic Framework* (London 1999), §5.7.18 and *Company General Meetings and Shareholder Communication* (note 3 above), §14.

<sup>5</sup> Company Law Review, *Final Report* (London 2001), §§1.52 and 1.56–1.57, chapters 3 and 7; P. Myners, *Institutional Investment in the UK: A Review* (London 2001); *Combined Code on Corporate Governance* (London 2003), Principle E3.

<sup>6</sup> See P. Myners, *Review of the Impediments to Voting UK Shares: Report by Paul Myners to the Shareholder Voting Working Group* (London 2004), particularly at §1.2.

<sup>7</sup> See *Company Law Reform* (Cm. 6456 (2005)), §§3, 3.1, 3.2 and the *Company Law Reform Bill* clauses 136–137, 258–334. Note also the developments at European Union level: see ([http://europa.eu.int/comm/internal\\_market/company/shareholders/index\\_en.htm](http://europa.eu.int/comm/internal_market/company/shareholders/index_en.htm)).

they hold their shares through one or more nominees. For a variety of reasons, large numbers of shares are held in the names of nominees or other financial intermediaries, and such widespread use of intermediaries makes it more difficult to achieve the objective of responsible shareholder activism.<sup>8</sup> This is because the power to act as a responsible shareholder and the economic incentive to act as such are divided when shares are vested in an intermediary. The registered, non-beneficial, owner of shares (the intermediary) has all the powers and privileges attaching to those shares as against the company which issued them: the registered owner is entitled to those powers and privileges simply by being a member of the company,<sup>9</sup> and, as against the company, any trust affecting the shares does not alter that fact.<sup>10</sup> Yet an intermediary has little economic incentive to use those powers and privileges, and to engage in the governance of the company, because any advantage from doing so will accrue to the investor who is the ultimate beneficiary of the shares. Consequently, there is currently great interest in mechanisms that might make it easier for the investor to engage in the governance of the company.<sup>11</sup>

The response to these developments depends, however, on the goals to be achieved. The arguments presented here rest on the basic premise that British company law manifests deliberate policy choices in favor of allowing shareholders to exercise residual and ultimate control in companies,<sup>12</sup> and that these choices have been

<sup>8</sup> See, generally, R.C. Nolan, "Indirect Investors: A Greater Say in the Company?" [2003] *Journal of Corporate Law Studies* 73; G.P. Stapledon and J.J. Bates, "Reducing the Costs of Proxy Voting", chapter 24 in J. McCahery *et al.*, *Corporate Governance Regimes* (Oxford 2002) and P. Myners, "Review of the Impediments to Voting UK Shares" (note 6 above).

<sup>9</sup> Companies Act 1985, sections 14 and 22, read together with the company's memorandum and articles of association.

<sup>10</sup> Companies Act 1985, s. 360, as supplemented by the company's articles of association, for example reg. 5 of Table A ("Table A (1985)") in the Companies (Tables A–F) Regulations 1985 (S.I. 1985/805).

<sup>11</sup> The DTI has now brought forward proposals in this regard: see *Company Law Reform* (note 7 above), §3.2 and the Company Law Reform Bill clauses 136–137. The EU is currently looking at the issues in the context of cross-border voting as part of its review of shareholder rights: see note 7 above.

<sup>12</sup> There is a vast and ever-growing body of literature which seeks to establish the most appropriate basis on which companies should be organised: the so-called "stakeholder debate". In July 1999, Cook and Deakin prepared a very comprehensive review of the literature for the Company Law Review Steering Group, available at (<http://www.dti.gov.uk/cld/esrc1.pdf>). See also E. Ferran's critical summary of the debate about stakeholders in companies: *Company Law and Corporate Finance* (Oxford 1999), chapter 4. Other recent contributions to the debate include R. Grantham, "The Doctrinal Basis of the Right of Company Shareholders" [1998] C.L.J. 554; P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 M.L.R. 32; J. Parkinson *et al.*, *The Political Economy of the Company* (Oxford 2001), chapter 6; A. Gamble and G. Kelly, "Shareholder Value and the Stakeholder Debate in the UK" (2001) 9 *Corporate Governance International Review* 110; S. Worthington, "Shares and Shareholders: Property, Power and Entitlement" (2001) 22 *Company Lawyer* 258 and 307; Wedderburn, "Employees, Partnership and Company Law" (2002) 31 *Industrial Law Journal* 99, and Lynch Fannon, *Working Within Two Kinds of Capitalism* (Oxford 2003). Professor Farrar has also published a useful work for comparative purposes, *Corporate Governance in Australia and New Zealand* (Oxford 2001).

confirmed for the foreseeable future at least.<sup>13</sup> The doctrinal rights of shareholders—the positive law manifested in the companies legislation—follow deductively from that political choice. (Shareholders’ rights are not primarily the inductive inference from judicial decisions: cases about shareholders’ rights have only an interstitial function, clarifying and fleshing out the relevant legislation and corporate documentation.) Any discussion of shareholders’ rights should be clear about this, in order to avoid confusion.<sup>14</sup>

From this premise of political and economic policy, the article turns to address positive law. It first seeks to show that English company law has at its core a simple—but very flexible—empowering, facultative principle, through which shareholders can establish in a company’s articles of association (or sometimes in its memorandum of association) how they will interact with each other, and with other participants in the company.<sup>15</sup> This principle is presently embodied in section 14 of the Companies Act 1985, which gives effect to the consensual arrangements established between shareholders and embodied in a company’s articles. Section 14 is the subject of much unsatisfactory glossing and interpretation, and it has a rather poor reputation amongst lawyers as a result.<sup>16</sup> However, its basic principle—giving enduring legal effect to shareholders’ bargains as to how their company is to be run—is vital, flexible and powerful.

Those involved in a company, and, crucially, their legal advisers, are consequently at the very center of developments in how

<sup>13</sup> The question of altering the model of the company was squarely posed for the Company Law Review: *Modern Company Law for a Competitive Economy* (London 1998), § 3.7. The Review gave an equally clear answer to the question in favor of retaining the present, shareholder-focussed model: see *The Strategic Framework* (note 4 above), chapter 5.1; *Developing the Framework* (note 1 above), chapter 3; *Completing the Structure* (London 2000), chapter 3.5. The UK Government adopted the conclusions of the Reviews: *Modernising Company Law* (note 1 above), §3.3. None of this means that any other model of associative enterprise must necessarily be rejected: it simply means that the Companies Acts embody one model and will continue to do so. Other models, such as friendly societies and community interest companies, are provided by other statutes for use in other, appropriate, contexts.

<sup>14</sup> The impact on meetings, and other collective action by shareholders, of the general policy debates about the role of shareholders in a company are well considered by Justice Simmonds: see “Why Must we Meet?” (note 3 above), pp. 508–514.

<sup>15</sup> The rest of this article will refer only to articles of association, because the overwhelmingly standard practice is to establish shareholders’ governance arrangements in a company’s articles rather than its memorandum. For the purposes of this article, the author surveyed the memoranda and articles as at 16th January 2004 of all the companies comprised in the FTSE 100 Index at that date. That survey showed all such arrangements to be in the respective companies’ articles.

<sup>16</sup> There is a very great deal of detailed learning on—and glossing of—section 14 and its various predecessor provisions. See generally *Buckley on the Companies Acts* (15th ed. by Dame Mary Arden *et al.*, London 2000), at [14.5]–[14.10], and P.L. Davies, *Gower and Davies’ Principles of Modern Company Law* (London 2003), pp. 58–65. None of that unsatisfactory detail, or glossing, is relevant for present purposes. What is relevant is the basic principle of statute giving legal effect to consensual arrangements.

shareholders interact with each other and with the officers of the company. These internal participants in companies, and their respective advisers, design the corporate structures through which shareholders' rights are expressed, and they drive the innovative development of such structures. These facts are often overlooked. This article seeks to remedy such neglect. It draws heavily on evidence of legal practice in order to demonstrate the central importance of legal practice to the evolution of English company law.

Equally, the article shows how a very large raft of regulation came to overlie, and to an extent obscure, the fundamental principles of law which underpin shareholders' governance of companies. This regulation limited the shareholders' freedom to organise their affairs because they could use that freedom to the detriment of others: a company's articles can be amended by a weighted majority of votes cast by its members, acting in good faith,<sup>17</sup> contrary to the wishes and interests of the minority. Furthermore, lawyers instructed by a company's directors usually draft its articles (and subsequent amendments to, or replacements of, them) in terms which reflect what the directors want, tempered by the directors' good faith to shareholders and, in some cases, by their appreciation of what the shareholders will accept.

Notwithstanding such good reasons for limiting the shareholders' freedom to establish a company's articles, the relevant regulatory rules are premised on assumptions that have become outmoded and inaccurate, as will be made clear. Consequently, they now form a barrier to entirely unobjectionable developments in corporate governance. Nevertheless, legal practitioners have used, and can still use, these basic principles to adapt corporate communication and decision-making to new circumstances and the challenges of change. A survey of the techniques currently used by listed companies for such purposes will make that quite plain.<sup>18</sup>

All this, in turn, has significant normative implications for the future development of the law within its current, basic policy framework. This article seeks to establish those implications as a matter of general policy. Its conclusions can then form the necessary foundations of further work to examine and assess both

<sup>17</sup> Companies Act 1985, s. 9. A special resolution, required by section 9, is now defined in section 378 of the Act as carried by at least 75% of the votes cast. As to the requirement of good faith, see *Allen v. Gold Reef of West Africa* [1900] 1 Ch. 656 and, generally, *Buckley on the Companies Acts* (*op. cit.* note 16), at [9.24]–[9.32].

<sup>18</sup> For the purposes of this article, as indicated at note 15 above, the author surveyed the articles as at 16th January 2004 of all the companies comprised in the FTSE 100 Index at that date. References to the articles of a particular FTSE 100 company are therefore references to its most recent articles available at Companies House on that date.

current practice and proposals for reform of the law. These conclusions are, essentially, as follows.

First, and most importantly, there are good reasons for a continued adherence to the law's present, basic facultative structure so far as the "internal participants" of a company—its members—are concerned. English company law is a system in which innovation largely was, and still is, driven by participants in companies and their advisers, who make full use of its basic, facultative rules. This has generally been beneficial and efficient. Consequently, the law should continue to prefer a system which accommodates such innovation: in other words, changes to corporate decision-making processes both can and should, to a great extent, be accommodated within the existing facultative structure.<sup>19</sup> This does not, however, mean that there is no role for the state in regulating corporate governance structures. What it does mean is that the various techniques of regulation require careful thought and justification.

This is, then, the second implication for the future development of the law. If regulation is to set boundaries to a regime that is essentially facultative, open and innovative, operating in a fast changing world, then policy-makers should establish in the light of experience what goals they wish to achieve, and then seek to regulate by reference to those goals, not the means used at any one time to achieve them. Only if there is one particular means to secure the desired end should regulation be directed towards the use of such means. Even here, caution is in order, as new, hitherto unimagined, ways of achieving a goal may quickly upset the assumption that some particular means are necessary to achieve a particular result.

The reasons why policy-makers should adopt such an approach are relatively easy to discern. The basic goals of corporate activity—to raise capital, to deploy it in running a business, to make profits and ultimately to distribute them—have changed relatively little over the last 150 years.<sup>20</sup> In such broad, goal-oriented outline, most of modern business would be very easily recognisable to, and comprehensible by, our Victorian forebears who first created modern company law. However, the methods used to achieve those goals have changed radically over the same period.

<sup>19</sup> Modifications to the structure (but only modifications) are needed if anyone currently outside it (such as indirect investors) is to be brought directly within it. These matters are addressed at length in Nolan, "Indirect Investors" (note 8 above). They are consequently not addressed further in this article. See now clauses 136–137 of the Company Law Reform Bill.

<sup>20</sup> This is certainly not to say that these goals have remained unchallenged over that time: see note 12 above. Nevertheless, in the United Kingdom at least, they continue to command the support of policy-makers: see note 13 above.

Companies raise capital and run businesses in a social and regulatory environment that is utterly unlike the high Victorian era of full-blooded *laissez faire*.<sup>21</sup> Crucially, and as noted earlier, the technology available to companies nowadays is totally different from the technology of earlier days. In short, the goals of business have remained much more stable than the means used to achieve those goals. Consequently, it makes sense to regulate goals rather than means, as regulation of means is very much more likely to become swiftly out-dated, and even counter-productive, than regulation of goals. Unfortunately, as will be seen, that is not the path regulation has taken so far.

In order to reach these conclusions, it is useful first to turn to history. Many things then become much clearer.

## II. THE HISTORICAL EVOLUTION OF SHAREHOLDER GOVERNANCE

### *A. Basic Principles: 1862–1900*

The first modern companies legislation in the United Kingdom, the Companies Act 1862, said nothing about the rights of control shareholders were to have in a company. Indeed, the 1862 Act contained just five sections which specifically concerned how shareholders were generally to run their affairs within a company.

Section 49 of the 1862 Act, the opening section in a division headed “Provisions for Protection of Members”, required that a company was to have a general meeting each year.<sup>22</sup> Section 52 laid down four default rules to regulate the calling and conduct of general meetings, though these rules only applied so far as a company’s articles of association made no other relevant provision.<sup>23</sup> Sections 53–54 required the registration and publication of “special resolutions”,<sup>24</sup> as defined in section 51.<sup>25</sup> Finally, section 67 required minutes of any meetings to be kept; provided for such minutes to be admissible as evidence in legal proceedings, and raised a presumption that the meeting and its proceedings were

<sup>21</sup> As regards financial regulation, see *The Report of the Committee to Review the Functioning of Financial Institutions* (Cmnd. 7937 (1980)); Rider, Abrams and Ashe, *Guide to Financial Services Regulation* (Bicester 1997) chapter 1; Ferran, (note 12 above), chapter 17. As regards the regulation of business activity generally, its current extent and ubiquity are immediately apparent from the Department of Trade and Industry’s website at ([http://www.dti.gov.uk/regulatory\\_guidance.html](http://www.dti.gov.uk/regulatory_guidance.html)). Its continued growth is reported by the Institute of Chartered Accountants in England and Wales, “Red tape costing UK business an extra £1 billion a year”, available at (<http://www.icaew.co.uk>).

<sup>22</sup> Section 49 followed Joint Stock Companies Act 1856, s. 32. The more familiar term “annual general meeting” made its first statutory appearance in Companies Act 1947, s. 1, shortly afterwards consolidated as Companies Act 1948, s. 131.

<sup>23</sup> Section 52 had no precursor in the Joint Stock Companies Act 1856.

<sup>24</sup> Elements of these sections drew on Joint Stock Companies Act 1856, ss. 35–36.

<sup>25</sup> This section followed Joint Stock Companies Act 1856, s. 34.

regular.<sup>26</sup> That was it. All the rest of the rules about what rights of governance shareholders were to have, and how they were to exercise them, were to be found in the company's articles of association. So, for example, regulations 29–51 of the standard, default form of articles (contained in the First Schedule to the 1862 Act)<sup>27</sup> provided for the calling of general meetings, the form of their proceedings, the votes of members and the methods of voting.<sup>28</sup>

In terms of principle, this necessarily meant that, subject to any statutory regulation, governance rights in a company were allocated by its articles of association, which themselves were given effect by section 16 of the Companies Act 1862.<sup>29</sup> (Section 16 of the 1862 Act, after much re-enactment, now forms section 14 of the Companies Act 1985.) Most fundamentally, therefore, and subject only to very limited intervention by the 1862 Act, those who formed a company were given freedom by statute to order its governance as they saw fit. As Bowen L.J. put it, in *Harben v. Phillips*,

[W]hen persons agree to act together in the conduct of a business, the way in which that business is to be carried on must depend in each case on the contract, express or implied, which exists between them as to the way of carrying it on. . . . When you come to statutory corporations you must look at the statute itself, and the rules which are created under it . . .<sup>30</sup>

A registered company limited by shares is indeed the creature of statute;<sup>31</sup> but statute itself grants shareholders in the company a general freedom to organise their affairs as they see fit, subject to any applicable regulation. That regulation may be (and predominantly is) statutory, but it might also arise under listing rules applicable to companies whose shares are traded on public markets.

The case of *Harben v. Phillips* itself provides a good example of this freedom and its use—the early law relating to proxy voting. The case shows that there is no right to appoint a proxy at common law, nor was there any such right in the Companies Act 1862. Rights to appoint a proxy to attend, vote (and possibly

<sup>26</sup> This section followed Joint Stock Companies Act 1856, s. 40.

<sup>27</sup> Hereafter, “Table A (1862)”.

<sup>28</sup> These regulations drew largely on regs. 22–43 of Table B in the Schedule to the Joint Stock Companies Act 1856. They broadly presage what are now regs. 36–63 of Table A (1985), though they are neither so full nor so sophisticated as the modern form of articles.

<sup>29</sup> Section 16 drew largely on Joint Stock Companies Act 1856, s. 10.

<sup>30</sup> (1882) 23 Ch.D. 14, 35–36.

<sup>31</sup> See, recently, *Halifax plc v. Halifax Repossessions Ltd.* [2004] EWCA Civ 331, [2004] 2 B.C.L.C. 455, at [13], per Arden L.J., and also *Welton v. Saffery* [1897] A.C. 299, 305, per Lord Halsbury L.C..

speak) at a meeting of a company's members originally existed only by virtue of an express provision in the company's articles of association, given effect by what was then section 16 of the 1862 Act and is now section 14 of the Companies Act 1985.<sup>32</sup> Correspondingly, a proxy could be appointed in any manner permitted by the company's articles of association.<sup>33</sup> There were initially no general legal requirements as to the means for appointing a proxy though a company's articles could impose such requirements. So, while it is not necessary to validate a proxy as a matter of positive law,<sup>34</sup> the articles of association of a particular company may (and very commonly do) impose such a requirement.<sup>35</sup>

Nowadays, by contrast, the right of a member to appoint a proxy to attend and vote at a general meeting on his behalf is perceived as a statutory right, set out in section 372 of the Companies Act 1985. This, however, obscures the origins of the right to appoint a proxy and, more generally, the legal means of organising governance in a company, namely the arrangements adopted by its shareholders as given effect by statute. Granted, mandatory statute law has taken some of the space formerly occupied by that bargain, embodied in a company's articles, but two points must be made. First, section 372 does not apply to companies limited by guarantee.<sup>36</sup> The basic principles of *Harben v. Phillips* still govern whether and how a member can participate by proxy in the affairs of a company limited by guarantee. Second, and more importantly, the manner of appointing a proxy, and some of the proxy's rights, remain a matter of the particular company's articles, though regulated to an extent by section 372.<sup>37</sup> As is

<sup>32</sup> For examples of the right to appoint proxies conferred by articles of association, see regs. 48–51 in Table A (1862), and now regs. 59–63 in Table A (1985).

<sup>33</sup> *Harben v. Phillips* (1882) 23 Ch.D. 14, 32, per Cotton L.J., and 35–36, per Bowen L.J.. In so far as *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch. 385, 395, per Vaughan-Williams J., suggests otherwise, it must be wrong. Vaughan-Williams J. was dealing with votes cast under a scheme of arrangement: he was not discussing proxies granted under the terms of a company's articles. To the extent that the judge's words appear wider, they are both obiter and contrary to Court of Appeal authority in *Harben v. Phillips*. On the unsuccessful appeal from the decision of Vaughan-Williams J., the Court of Appeal expressed no opinion about the form of a proxy.

<sup>34</sup> *Re English, Scottish & Australian Bank* [1893] 3 Ch. 385.

<sup>35</sup> See, e.g., Table A (1985), reg. 62.

<sup>36</sup> Companies Act 1985, s. 372(2)(a).

<sup>37</sup> Companies Act 1985, s. 372(1) (the rights of a proxy for a member in a private, but not a public, company include the right to speak at the meeting); s. 372(2)(b) (the statutory right is to appoint one proxy only); s. 372(2)(c) (the statutory right of a proxy to vote exists only on a poll, not a show of hands); s. 372(3) (the notice of a company general meeting must state the right to appoint a proxy or (where allowed by the articles) several proxies); s. 372(5) (lodgment of proxies may not be more than 48 hours in advance of the meeting in question or its adjournment); s. 372(6) (proxy solicitations must be sent to all or none of the members, not just some of them).

immediately visible from the articles of any company,<sup>38</sup> particularly those of a large and sophisticated company,<sup>39</sup> there is still a large amount for the articles to do, in relation to proxies, notwithstanding section 372: for example, rules about the validation of proxies, as noted above;<sup>40</sup> rules about the termination and revocation of proxies,<sup>41</sup> and rules governing the rights of proxies—in particular, the right (if any) to speak at a general meeting.<sup>42</sup>

Another simple example of this basic freedom for shareholders to organise their own affairs, later limited by statute, but not entirely abrogated, is the means by which a company may properly give notice of a general meeting. The Act of 1862 had nothing to say about notice of meetings. At common law, if an organization's constitution does not provide how notice shall be given, it is one of the functions of the organization's governing body to prescribe how such notice shall be given on any particular occasion.<sup>43</sup> The general effect of section 16 of the 1862 Act on shareholders' voluntary arrangements, embodied in a company's articles of association, meant that those articles could prescribe how notice would be given to its members,<sup>44</sup> and Table A (1862) made appropriate provision in regulations 35 and 95–97. The 1862 Act, however, saw fit to make some default provision for general meetings of companies. These default rules were set out in section 52 of the Act, the distant precursor to section 370 of the Companies Act 1985. Still, even today, a company's articles, given effect by section 14 of the 1985 Act, deal with many aspects of calling a general meeting, though mandatory statute law has now become important, as will be seen.<sup>45</sup>

Of course, notwithstanding this great legal freedom to organise the internal governance structures of a company, the means of communication available in the nineteenth century significantly constrained how the members of a company could interact with each other and take decisions. Face-to-face meetings were the most practical way for members of a company to participate its affairs,

<sup>38</sup> See, e.g., Table A (1985), regs. 59–62.

<sup>39</sup> See, e.g., BP plc, arts. 81, 86.

<sup>40</sup> See, above n. 35 and also examples such as BP plc, arts. 83–84.

<sup>41</sup> See, e.g., Table A (1985), reg. 63; BP plc, art. 85.

<sup>42</sup> See, e.g., Table A (1985), reg. 46; BP plc, arts. 81, 85.

<sup>43</sup> *Labouchere v. Earl of Wharnclyffe* (1879) 13 Ch.D. 346, 352.

<sup>44</sup> The corresponding Australian provisions, Corporations Act 2001 (Cth.), s. 140 and its various precursors, have the same effect. So, in Australia, notice of a general meeting given to a company's members by fax was assumed to be good, so long as the company's articles allowed for such notice, even before the addition to the 2001 Act of section 243J(3), which explicitly provides for such notice: *Jenashare Pty. Ltd. v. Lemrib Pty. Ltd.* (1993) 11 A.C.S.R. 345 (Supreme Court of New South Wales).

<sup>45</sup> See, for example, Table A (1985), regs. 37–39 (convening of meetings; form of notice; saving of meetings where the company accidentally fails to give notice to a person entitled to receive it). See also "Growing Statutory Regulation: 1900–1985," below. As might be imagined, much more sophisticated provision is often made by larger companies: see below, "The Modern Evolution of Shareholder Governance".

given the technologies available at the time. There was the possibility of voting by post,<sup>46</sup> and later through a proxy deposited by telegraph,<sup>47</sup> but these never displaced the significance of meetings.

This meant, of course, that questions about the constitution and proceedings of company meetings came to be litigated, and such litigation was often resolved by application of principles established in cases which concerned meetings in other contexts, such as public meetings or the meetings of chartered corporations.<sup>48</sup> Some of those principles were default rules, which could be ousted or modified by a company's articles: for example, the principle that failure to give due notice of a meeting to all those entitled to such notice vitiates the meeting,<sup>49</sup> a principle which is now generally modified by a company's articles,<sup>50</sup> as well as rules governing the adjournment of meetings.<sup>51</sup> Others of those principles might well be mandatory, drawing their force from considerations of public policy, such as the rule that requires notices of meetings to be fair, accurate and comprehensible, particularly as regards decisions which concern directors' own interests relating to the company.<sup>52</sup> Cases also elucidated terms used in the statute, or in a company's articles, such as the question of what actually amounted to a "meeting".<sup>53</sup>

Still, none of this law demanded any particular form of corporate decision-making by shareholders: it regulated general meetings which originally were only required by section 49 of the Companies Act 1862 and by any relevant provisions of a company's own articles. The key to shareholders' rights within a company, and the key to the exercise of those rights, were the governance structures adopted by the shareholders themselves, embodied in the company's articles of association and given effect by section 16 of the 1862 Act, the precursor to section 14 of the Companies Act 1985.

The matter did not rest there, of course. Over time, mandatory statute law came increasingly to regulate how shareholders in a

<sup>46</sup> *McMillan v. Le Roi Mining Company Ltd.* [1906] 1 Ch. 331 adverts to this possibility, though the High Court in fact struck down a postal ballot held by the company, because it could not hold postal ballots consistently with its articles. However, the implication is that had the articles been different, so too might have been the result.

<sup>47</sup> *Re English, Scottish & Australian Bank* [1893] 3 Ch. 385 illustrates this possibility, though the case itself concerned a statutory meeting to approve a scheme of arrangement.

<sup>48</sup> See the treatment of "general principles" of meetings by the works cited in note 2 above.

<sup>49</sup> *Smyth v. Darley* (1849) 2 H.L. Cas. 789, 9 E.R. 1293; *Muskelwhite v. C.H. Muskelwhite & Son Ltd.* [1962] Ch. 964; *Royal Mutual Benefit B.S. v. Sharman* [1963] 1 W.L.R. 581.

<sup>50</sup> See, e.g., Table A (1985), reg. 39. Such an article is vitally important in practice, because English statute law contains no provision mitigating the common law consequences of failure to give due notice. Contrast, e.g., Corporations Act 2001 (Cth.), s. 1322, and Companies Act (Singapore), s. 392.

<sup>51</sup> See, e.g., *Byng v. London Life* [1990] Ch. 170.

<sup>52</sup> *Kaye v. Croydon Tramways* [1898] 1 Ch. 358.

<sup>53</sup> See again *Byng v. London Life* [1990] Ch. 170.

company were to participate in its affairs. This regulation assumed that shareholders would make decisions at face-to-face meetings. These assumptions were reflected in the statutory drafting; and statute, drawing on those assumptions, all too often entrenched them.

### *B. Growing Statutory Regulation: 1900–1985*

The Companies Act 1900 began to increase the statutory regulation of general meetings. Section 12 of the Act introduced the requirement that a company should hold a “statutory meeting” in the period between one month and three months after its registration. The main purpose of the meeting was to review the basic affairs of the company—its capital and its management. Since the statutory meeting was abolished by section 82 of the Companies Act 1980, there is no need to dwell on it further. Section 13 of the 1900 Act introduced the statutory right of members holding 10% of the issued capital of a company to requisition a general meeting of the company.<sup>54</sup> This right meant that the shareholders could require a meeting whether or not they had power to do so under the company’s articles, and whether or not the company’s directors were willing to use their powers to call a meeting.<sup>55</sup>

After that, the Companies Act 1907 introduced further amendments to the law of company general meetings. Section 24(1) and (2) of the 1907 Act tightened up the requirement for an annual general meeting. These provisions replaced section 49 of the 1862 Act, and they also empowered the court to call an annual general meeting when the company failed to do so.<sup>56</sup> Section 24(3) introduced the right of a corporation to appoint a representative who could act for it as its *alter ego* at any meeting of a company in which the corporation held shares.<sup>57</sup> These changes were then consolidated with the 1900 reforms, and the remaining relevant portions of the 1862 Act, to form sections 64–71 of the Companies (Consolidation) Act 1908.

Then came sections 21–27 of the Companies Act 1928. Some of these changes were enacted to give effect to recommendations of

<sup>54</sup> This provision, in an amended form, survives as Companies Act 1985, s. 368.

<sup>55</sup> Art. 30 of Table A (1862) allowed the company’s members to set the timetable for “Ordinary Meetings” (today known as annual general meetings). Art. 32 gave the company’s directors a power to call extraordinary general meetings. Art. 32, together with Art. 33, also allowed one fifth (or more) of the company’s members to require that the directors call an extraordinary general meeting. Art. 34 allowed the same number of members to convene the meeting themselves if the directors failed to do so within the requisite time. In the light of Companies Act 1900, s. 13, it is safe to infer that a significant number of companies did not adopt Arts. 32–34 of Table A (1862) or equivalent provisions.

<sup>56</sup> See, presently, Companies Act 1985, s. 367, vesting the power in the Secretary of State for Trade and Industry, rather than the court.

<sup>57</sup> This provision, somewhat amended, survives as Companies Act 1985, s. 375.

the Greene Committee.<sup>58</sup> Section 21 of the 1928 Act made some amendments to the now defunct “statutory meeting”. Section 22 revised the requirements for a company’s members to call a general meeting, bringing them towards their modern form.<sup>59</sup> Section 23 reformed the default rules for general meetings, such as minimum notice, votes *per* share, quorum and so on.<sup>60</sup> It also introduced the power of the court to order a general meeting.<sup>61</sup> Section 24 of the 1928 Act reformed the right of a corporation to appoint someone to represent it at meetings.<sup>62</sup> The remaining changes were directed towards reforming special and extraordinary resolutions,<sup>63</sup> and administrative matters such as the keeping and inspection of records. Importantly, section 27 gave members of a company the right to inspect minutes of its general meetings.<sup>64</sup> Finally, section 30 of the 1928 Act enacted the rule that resolutions of adjourned meetings are treated as passed at the adjourned meeting, and not at the original meeting.<sup>65</sup> All these changes were consolidated with the remaining parts of the 1908 Act into sections 112–121 of the Companies Act 1929.

The next set of developments was enacted as sections 1–8 of the Companies Act 1947, in preparation for consolidation into the Companies Act 1948. Again, the report of a review committee lay behind many of the developments, this time the Cohen Committee.<sup>66</sup> Section 1 of the 1947 Act introduced some amendments to the regulation of annual general meetings. In particular, the court’s power to order an annual general meeting was transferred to the Board of Trade, nowadays the Secretary of State for Trade and Industry. Section 2 amended the provisions as to notice of the “statutory meeting”, general meetings, special resolutions and resolutions on special notice. (The latter was itself a concept introduced by the 1947 Act.) It also dealt with the laying of accounts and the appointment of auditors. Importantly, section 2 turned the rules about the length of notice for general meetings from pure default rules into mandatory minima which could only be increased by a company’s articles. Section 3 introduced the right

<sup>58</sup> W.A. Greene *et al.*, *The Report of the Company Law Amendment Committee* (London 1926), §§34–37, and Part II, pp. 54–55.

<sup>59</sup> See note 54 above and its accompanying text.

<sup>60</sup> See Companies Act 1985, sections 369, 370, though the rules in section 369 now form a mandatory minimum, subject to disapplication in accordance with the section.

<sup>61</sup> See, presently, Companies Act 1985, s. 371.

<sup>62</sup> See, presently, Companies Act 1985, s. 375.

<sup>63</sup> See, presently, Companies Act 1985, s. 378.

<sup>64</sup> This right is now found in Companies Act 1985, s. 383.

<sup>65</sup> The position at common law was that a resolution passed at an adjourned meeting was treated in law as passed at the original meeting: see, *e.g.*, *Neuschild v. British Equatorial Oil Co.* [1925] Ch. 346. See now Companies Act 1985, s. 381.

<sup>66</sup> Sir Lionel Cohen *et al.*, *The Report of the Committee on Company Law Amendment* (Cmd. 6659 (1945)), §§124–129, 132–136.

of members to have a company circulate notice of resolutions to be proposed by those members at the company's general meeting, as well as their statements about business to be transacted at the meeting.<sup>67</sup> Section 4 of the 1947 Act introduced the mandatory right of members to demand a poll.<sup>68</sup> Section 5 of the 1947 Act introduced the last of the main changes. First, it laid down the mandatory right of a member to appoint a proxy.<sup>69</sup> Second, it made clear that a member who has more than one vote need not cast them all the same way on a poll.<sup>70</sup> This clarification was very important for nominees who held parcels of shares to the order of different beneficiaries, and it had been made necessary by the unfortunate definition of special resolutions and extraordinary resolutions in section 117 of the 1929 Act.<sup>71</sup> In conclusion, sections 6–8 of the 1947 Act made other minor amendments to the provisions concerning the court's (and, then, the Board of Trade's) power to order meetings, as well as to the provisions on record-keeping. These changes, together with the unamended portions of the 1929 Act, were consolidated into sections 130–146 of the Companies Act 1948. In due course, and after very slight modification in the intervening years,<sup>72</sup> these sections were re-enacted as sections 366–383 of the Companies Act 1985.

There has been no change, however, to the basic legal mechanisms through which shareholders in a company establish and regulate their rights in the company. These mechanisms still consist in the arrangements adopted by the shareholders themselves, embodied in the company's articles of association, and given effect by section 14 of the Companies Act 1985. What changed over time was the extent and impact mandatory statute law which sought to regulate the shareholders' freedom to organise their own affairs within the company.

<sup>67</sup> See, presently, Companies Act 1985, ss. 376 and 377.

<sup>68</sup> See, presently, Companies Act 1985, s. 373. According to the common law of public meetings, any qualified person may demand a poll, but this right was commonly regulated, before the commencement of the Companies Act 1948, by companies' own articles of association. See, generally, *Buckley on the Companies Acts* (note 16 above), at [373.4].

<sup>69</sup> See, presently, Companies Act 1985, s. 372.

<sup>70</sup> See, presently, Companies Act 1985, s. 374.

<sup>71</sup> Section 117(5) of the 1929 Act required the calculation of votes according to the number of votes to which each member was entitled, which implied that his vote could not be split. This wording ultimately reflected Companies Act 1862, s. 51. Similarly, Joint Stock Companies Act 1856, s. 34 required a three quarters majority in number and value of shareholders in order to pass a special resolution, which also implied that a single shareholder's votes could not be split.

<sup>72</sup> See *Buckley on the Companies Acts* (note 16 above), Derivation Table at [0.33], concerning what are now Companies Act 1985, sections 370, 380 and 382.

*C. Some Relaxation: 1985—Present*

The period since the last consolidation of the companies legislation has seen relaxation of the regulation affecting private companies, albeit through the enactment of lengthy new exceptions to regulatory rules, rather than by repeal or comprehensive restatement of the rules themselves. Other reforms have affected all companies, both public and private. In total, there have been four sets of relevant amendments since 1985.

The first set was in 1989. Sections 113–114 of the Companies Act 1989 introduced what are now sections 381A–381C and 382A, and Schedule 15A, of the Companies Act 1985. These provisions dealt with written resolutions. They were designed to ensure that private companies could pass resolutions by unanimous written assent, whether or not the company's articles permitted this.<sup>73</sup> Section 116 of the 1989 Act also introduced section 379A of the 1985 Act, containing the concept of the “elective resolution”, by which private companies could dispense with certain regulatory requirements. Two of those requirements in fact concerned general meetings of companies. So, section 366A of the Companies Act 1985 was introduced to allow a private company to dispense with holding an annual general meeting; and amendments to section 369 of the 1985 Act made it easier for private companies to hold meetings and pass resolutions on short notice. Finally, section 143(9) of the 1989 Act made minor changes to section 383 of the 1985 Act (record-keeping).

The second set of amendments comprised consequential changes made necessary by the introduction of single member private companies in 1992. Thus, section 370A (quorum at meetings of the sole member) and section 382B (recording of decisions of the sole member) were inserted into the Companies Act 1985.<sup>74</sup>

The advent of electronic communications resulted in a third, much more substantial set of changes to the legislation dealing with shareholders' governance rights within a company. The same reforms also amended Table A (1985), but that is irrelevant for the present purpose of describing how regulation developed.

<sup>73</sup> It was in fact so common for a company's articles to make provision to this effect that it even appears in Table A (1985) as reg. 53. Such a provision, like reg. 53 itself, is usually much simpler than Companies Act 1985, sections 381A–381C. Companies with older, less comprehensive articles might find they had to rely on the statutory powers, though a specific power could always be inserted into a company's articles pursuant to Companies Act 1985, s. 9. See generally C. Mercer, “Sections 113–114—Written Resolutions: What about Table A?” (1991) 12 *Company Lawyer* 220, but compare H.W. Higginson, “Written Resolutions of Private Companies” (1993) 109 *L.Q.R.* 16.

<sup>74</sup> Companies (Single Member Private Limited Companies) Regulations 1992 (S.I. 1992/1699), r. 2 and Schedule paras. 5 and 6.

By the late 1990's, statutory regulation of decision-making by shareholders effectively prevented companies from using new technology—electronic communications—to organise general meetings. Vitally important non-statutory regulation, in the form of the Listing Rules, also stood in the way. Two particular problems stood out: the regulation of how a company might give notice of its general meetings, and the regulation of how a member of the company might appoint a proxy to act for him at such meetings.

Before the advent of Companies Act 1985 (Electronic Communications) Order 2000,<sup>75</sup> section 369 of the Companies Act 1985 did not explicitly require notice of a company's general meetings to be in tangible form, but it may well have done so by implication.<sup>76</sup> The contrary was arguable, however,<sup>77</sup> principally on the grounds that the statutory requirement of notice “in writing” included notice given by non-tangible text, applying the extended statutory definition of “writing”.<sup>78</sup> Even if that were true, however, it was not the end to the problems of listed companies in this connection. The Listing Rules, as they then stood,<sup>79</sup> also assumed tangible notices of meetings,<sup>80</sup> and a tangible accompanying circular.<sup>81</sup> Furthermore, the requirement in the Rules, that shareholders in a similar position be treated equally,<sup>82</sup> cast doubt on the propriety of sending written notices to some shareholders and electronic notices to others. In the result, regulation cast sufficient doubt on the validity of using electronic communications to give notice of general meetings that companies generally stuck to tangible notices. The 2000 Order intervened to alter this situation, but the form of this legislation, and its underlying assumptions, are not necessarily ideal, as will be seen.<sup>83</sup>

There were very similar problems in relation to the appointment of proxies. It was suggested that section 372(5) of the Companies Act 1985, before the amendments introduced in 2000, required that proxies must be appointed by an “instrument”, in other words, by tangible writing.<sup>84</sup> Again, there were counter-arguments, that

<sup>75</sup> S.I. 2000/3373.

<sup>76</sup> See Department of Trade and Industry, *Electronic Communication: Change to the Companies Act 1985* (London 1999).

<sup>77</sup> See V. Edgton, “Appointment of Proxies by Electronic Communication: Do Companies Have to Wait for Enabling Legislation?” (2000) 21 *Company Lawyer* 294.

<sup>78</sup> Schedule to the Interpretation Act 1979, given force by section 5 of that Act.

<sup>79</sup> Listing Rules as at 31st December 1999.

<sup>80</sup> *Ibid.*, rr. 14.17–14.19, though compare *ibid.*, Appendix 1 to Chapter 13, para. 18, which envisaged notices by advertisement.

<sup>81</sup> *Ibid.*, rr. 14.3–14.6; 14.14; 14.16.

<sup>82</sup> *Ibid.*, r. 9.16, implementing Council Directive 79/279/EEC, Schedule C, para. 2(a).

<sup>83</sup> See note 169 below and its accompanying text.

<sup>84</sup> Department of Trade and Industry, note 76 above.

section 372(5) (as it then stood) merely limited the conditions which might be attached to the use of an “instrument” in connection with the appointment of a proxy.<sup>85</sup> Still, fears that section 372 did invalidate the use of electronic communications to appoint proxies were sufficient that companies would not take the risk of allowing proxies to be appointed other than by tangible writing. Similarly, the Listing Rules at the time seemed to indicate that a form of proxy to be sent with a notice of meeting should be a tangible document.<sup>86</sup> This constituted another reason for listed companies to stick to established practice for appointing proxies.

The problem was that regulation, both in statute and in the Listing Rules, assumed (rather than clearly mandated) that the way to give clear notice of a meeting in permanent form, and the way to appoint a proxy with less risk of confusion or fraud, was to use a tangible document. That may have been true in 1947,<sup>87</sup> but it was certainly no longer true by 1999. Old fashioned regulation of the means to achieve an end started to look highly inappropriate with the development of new means to the same ends, means that were unanticipated when the regulation was first introduced.

In response to these problems, various provisions of the Companies Act 1985 were amended by the Companies Act 1985 (Electronic Communications) Order 2000.<sup>88</sup> Section 366A of the 1985 Act was amended so that a member of a private company could use electronic communications to demand an annual general meeting and terminate the company’s election to dispense with an AGM.<sup>89</sup> Section 369 of the 1985 Act was amended so that companies could use electronic communications to call general meetings.<sup>90</sup> Sections 372 and 373 of the 1985 Act were amended to make it clear that members of a company could appoint proxies using electronic communications.<sup>91</sup> Finally, section 379A of the 1985 Act was amended so that a private company could use electronic communications to give notice of a meeting to pass an elective resolution.<sup>92</sup>

The last set of relevant amendments were consequential changes to the law made necessary by the introduction of “treasury shares” in 2003.<sup>93</sup> These amendments were designed to ensure that any

<sup>85</sup> Edgton, note 77 above.

<sup>86</sup> Listing Rules (as at 31st December 1999), rr. 9.26; 13.1(f); 13.2; 13.28; 13.29; Appendix to Chapter 13, paragraph 12.

<sup>87</sup> See the text following note 68 above.

<sup>88</sup> S.I. 2000/3373.

<sup>89</sup> *Ibid.*, r. 17.

<sup>90</sup> *Ibid.*, r. 18.

<sup>91</sup> *Ibid.*, rr. 19, 20.

<sup>92</sup> *Ibid.*, r. 21.

<sup>93</sup> Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (S.I. 2003/1116).

shares held in treasury (*i.e.*, issued and owned by the same company) were effectively disenfranchised, and that valid decisions could be taken without regard to treasury shares.<sup>94</sup>

Yet these developments since the commencement of the Companies Act 1985 have not changed the basic legal principles which establish shareholders' governance rights within a company and underpin the expression of those rights: that is, the company's articles of association as adopted by the shareholders and given effect by section 14 of the 1985 Act. Some of the regulation to which these principles were subject has been relaxed or altered, for a variety of reasons. Nevertheless, the principles endure to this day, notwithstanding the growth of the simple, basic rules of the Companies Act 1862 into the much more complex provisions of Part IX, Chapter IV of the Companies Act 1985.

#### *D. The Business to be Done*

As well as the growth of regulation outlined above, the very business to be done by members of a company may dictate its form and so limit the extent to which those members can, through the company's articles of association, determine how they order their affairs within the company. Statutory definitions are the key issue here.

Very often, a decision must be taken by special resolution,<sup>95</sup> and occasionally by extraordinary resolution.<sup>96</sup> The definitions of "special resolution" and "extraordinary resolution" are both currently found in section 378 of the Companies Act 1985. Both definitions require that votes be cast "at a general meeting" in order for the resolution in question to be carried. (This surely includes votes on a poll called at the general meeting.)<sup>97</sup> Both definitions also require a 75% majority of those voting *in person or by proxy* (not, for example, by post),<sup>98</sup> and it is unlikely that this

<sup>94</sup> *Ibid.*, Schedule paras. 19–25, amending Companies Act 1985, sections 368 (meetings on members' requisition), 369 (length of notice for meetings), 370 (general default rules as to meetings), 373 (rights to a poll), 376 (resolutions proposed by members), 378 (definitions of extraordinary and special resolutions) and 380 (registration of certain resolutions).

<sup>95</sup> Business requiring a special resolution, which might commonly be encountered at a company's general meeting, includes various alterations to the company's memorandum (Companies Act 1985, sections 4–6, 17, 28, 43, 53), alterations to its articles (*ibid.*, s. 9), disapplication of pre-emption rights over unissued capital (*ibid.*, sections 89, 95), reduction of capital (*ibid.*, s. 135) and authorisation to buy-back shares off-market, or under a contingent purchase contract (*ibid.*, sections 164, 165).

<sup>96</sup> For example, the alteration of class rights under Companies Act 1985, s. 125, or voluntary winding up under Insolvency Act 1986, s. 84(1)(c).

<sup>97</sup> See *Shaw v. Tati Concessions Ltd.* [1913] 1 Ch. 292; *Spiller v. Mayo (Rhodesia) Development Co. (1908) Ltd.* [1926] W.N. 78 and *Holmes v. Keyes* [1959] Ch. 199.

<sup>98</sup> The High Court has held that the concept of voting "personally or by proxy", used in a particular company's articles, necessitated physical presence by either the shareholder in question or his valid proxy: *McMillan v. LeRoi Mining Co. Ltd.* [1906] 1 Ch. 331. It is difficult to see why the same words in section 378 would be construed any differently. The

mandatory requirement of statute could be “deemed away” by a company’s memorandum or articles. Consequently, if a company wishes to pass a special resolution or an extraordinary resolution, it will have to hold a meeting, unless valid unanimous consent (whether written or informal) can be obtained from all those entitled to vote.<sup>99</sup> So for practical purposes, the definitions of a “special resolution” and an “extraordinary resolution” also set limits on how members can organise the means through which they take decisions.

Over time, the constraints which flow from these definitions, as to how shareholders in a company participate in its affairs, have grown in their importance: the regulatory impact of the definitions has increased through the years. This is so even though special resolutions have formed a part of United Kingdom companies legislation since 1856, and extraordinary resolutions since 1862.<sup>100</sup> Under the Companies Act 1862, special resolutions were used only to change a company’s articles,<sup>101</sup> and extraordinary resolutions were only used to begin the voluntary winding up of a company.<sup>102</sup> (The Joint Stock Companies Act 1856 had used special resolutions for both purposes.)<sup>103</sup> Consequently, a company rarely needed to convene a meeting in order to pass a special or an extraordinary resolution. Correspondingly, the definitions of such resolutions rarely constrained the form of a decision by the members of a company. Nowadays, special resolutions are needed for many more purposes.<sup>104</sup> The definitions of special and extraordinary resolutions therefore constitute a much greater practical limitation on how shareholders may effectively take decisions.

The definition of an elective resolution likewise anticipates a meeting of the (private) company in question,<sup>105</sup> unless there is unanimous consent of the company’s members in lieu of a

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requirement of voting “personally or by proxy” goes right back to the definition of a special resolution in Companies Act 1862, s. 51 (following Joint Stock Companies Act 1856, s. 34), and to the definition of an extraordinary resolution in section 129 of the 1862 Act.

<sup>99</sup> Such consent might be (i) pursuant to the company’s articles, such as Table A (1985), reg. 53; (ii) in the case of a private company, pursuant to Companies Act 1985, sections 381A–381C and Schedule 15A, or (iii) pursuant to the common law principle of informal unanimous consent (see, e.g., *Re Express Engineering Works Ltd.* [1920] 1 Ch. 466; *Re Duomatic Ltd.* [1969] 2 Ch. 365; *Cane v. Jones* [1980] 1 W.L.R. 1451; *Wright v. Atlas Wright (Europe) Ltd.* [1999] 2 B.C.L.C. 301; *Re Torvale Group Ltd.* [1999] 2 B.C.L.C. 605; *Euro Brokers Holdings Ltd. v. Monecor (London) Ltd.* [2003] EWCA Civ 105, [2003] 1 B.C.L.C. 506, at [61]–[63], per Leslie Kosmin Q.C., [2003] EWCA Civ 105, [2003] 1 B.C.L.C. 506, at [57]–[63], per Mummery L.J., and *EIC Services Ltd. v. Phipps* [2003] EWHC 1507 (Ch), [2003] B.C.C. 931, at [121]–[122], per Neuberger J.). See notes 107–110 below, and their accompanying text, as regards limitations on the principle of unanimous informal consent.

<sup>100</sup> See note 98 above.

<sup>101</sup> Companies Act 1862, s. 50.

<sup>102</sup> *ibid.*, s. 129. See *MacConnell v. E. Prill & Co. Ltd.* [1916] 2 Ch. 57, 62, per Sargant J..

<sup>103</sup> Joint Stock Companies Act 1856, sections 33 (alteration of articles) and 102 (winding up).

<sup>104</sup> See note 95 above.

<sup>105</sup> Companies Act 1985, s. 379A.

meeting.<sup>106</sup> However, such resolutions are quite explicitly designed to simplify the administration of closely held private companies, and allow such companies to be run with less need for meetings so long as the resolutions remain in force. The form of elective resolutions does not, therefore, constitute an enduring restraint on the mechanisms of shareholder governance.

As well as the means of taking a decision, the subject matter of the decision can limit how the decision is made. For example, a resolution to dismiss a director under section 303 of the Companies Act 1985 will involve a formal meeting, because of the director's right under section 304 to make a statement about his proposed removal to the general meeting which may remove him from office.<sup>107</sup> Similarly, removal of auditors under section 391 of the 1985 Act will be impossible without a meeting, because of the auditors' rights under sections 391(4) and 390 of the Act to address the meeting which may sack them.<sup>108</sup> In all these cases, the requirement for a meeting arises from a statutory determination that the meeting is to constitute a forum for more than just the members of the company concerned, with the consequence that the non-members cannot be deprived of their voice by the members' arrangements between themselves.

Other statutory provisions may necessitate that members of a company make a decision at a physical general meeting, or else by means of some other device approved by statute, such as a statutory written resolution, even though the relevant provisions do not give rights to anyone who is not a member of the company. For example, statute may require that members of a company "pass a resolution" if they wish to achieve a certain result; and such language may then implicitly forbid other forms of decision-making by the members, unless other provisions of statute explicitly authorise such conduct.<sup>109</sup> Again, a formal meeting may be necessary to persuade a court to exercise some discretion,<sup>110</sup> though perhaps a valid statutory written resolution would now suffice. Interestingly, all the provisions of this nature which have come to court concern decisions by members of a company which can directly prejudice the interests of those who are not members of a company, such as the company's creditors. In such cases, the courts are, perhaps, particularly concerned to see strict adherence

<sup>106</sup> Companies Act 1985, s. 381A(6).

<sup>107</sup> In this regard, note Companies Act 1985, Schedule 15A, para. 1.

<sup>108</sup> *ibid.*, para. 2.

<sup>109</sup> See *Re R.W. Peak (Kings Lynn) Ltd.* [1998] 1 B.C.L.C. 193. Note also the various statutory provisions which require a decision of "the general meeting" or "the company in general meeting".

<sup>110</sup> See the possibility raised, though not the result reached, in *Re Barry Artist Ltd.* [1985] 1 W.L.R. 1305.

procedure as a safeguard for those who are directly affected by the decision but cannot formally participate in it.

In short, when “outsiders” to a decision by members of a company have rights to participate in the process which leads to decision, or when the courts consider that statute has prescribed particular forms of decision-making at least in part for the benefit of such “outsiders”, then the members must adhere to the relevant form of decision-making prescribed by statute. That will either make a meeting strictly necessary, or else make it practically unavoidable unless another form of decision-making, such as a written resolution, is both authorised by statute and practically feasible. Nevertheless, where statute merely requires a decision by the members “in general meeting”, that has generally been construed as a procedural requirement capable of waiver by the members so long as the interests of non-members are not thereby prejudiced.<sup>111</sup>

A further example of business which must be done at a general meeting, and not otherwise, is the laying of the company’s annual report and accounts before the meeting,<sup>112</sup> unless the company is private and has taken advantage of the ability to dispense with this requirement.<sup>113</sup> A listed company must also lay its directors’ remuneration report and its operating and financial review before a general meeting, and seek approval of the directors’ remuneration report.<sup>114</sup> Such requirements are relatively uncommon, however.

#### *E. Listed Companies and Listing Requirements*

The Listing Rules have also affected the freedom of a listed company to establish structures for participation by its shareholders in the company’s affairs. Some tangential effects of the listing rules, such as the effect of rules regarding proxies, have already been addressed.<sup>115</sup> However, the Listing Rules, until recently, had a much more direct effect on the terms of a listed company’s articles of association. For a long time, the Listing Rules required the articles to contain certain terms, some of which were relevant to participation by shareholders in the company,<sup>116</sup> though the Stock Exchange (then the listing authority) could always, in its discretion,

<sup>111</sup> See the cases cited in note 99, part (iii), above.

<sup>112</sup> Companies Act 1985, s. 241.

<sup>113</sup> Companies Act 1985, sections 252 and 379A (elective resolution procedure).

<sup>114</sup> Companies Act 1985, sections 241, 241A.

<sup>115</sup> See the text to note 79 above, and following.

<sup>116</sup> Listing Rules (1966 ed.) r. 1 and Appendix, Section A; r. II(a)(iv) and Schedule VII, Part A, paras. F, H and L; (1973 ed.) r. 159 and Appendix 34, Schedule VII, Part A, paras. F, H, L; (1979 ed.) rr. 1, 6 and Schedule VII, Part A, paras. F, H, L; (1984 ed.) Section 2, Chapter 1, r. 2.5 and Section 9, Chapter 1, paras. 6, 8, 12, 14; (1993 ed.) rr. 13.8, 13.28, 13.29 and Appendix 1 to Chapter 13, paras. 12, 13, 18, 19, 22; (2000 ed.) rr. 9.26, 9.43, 13.28, 13.29; (2005 ed.) rr. 9.3.6, 9.3.7, 9.3.9.

waive compliance, either fully or in part.<sup>117</sup> Later editions of the Listing Rules removed nearly all the requirements for articles to contain such terms, though the Stock Exchange, and then the United Kingdom Listing Authority, still required a listed company to submit its articles to scrutiny and control if they contained unusual provisions.<sup>118</sup> More recently still, however, the United Kingdom Listing Authority has removed even this requirement of submission and control.<sup>119</sup> As a result, the current edition of the Listing Rules only controls the provisions (if any) of a listed company's articles which govern the form in which a member of the company may appoint a proxy, or which impose sanctions on a member of the company for failure to comply with section 212 of the Companies Act 1985 (disclosure to a company of interests in its shares).<sup>120</sup>

So the Listing Rules have, in their time, formed a constraint on the freedom of a listed company to establish the terms on which its shareholders will participate in the company's affairs. They have never been a major constraint on that freedom, however, as they never concerned more than a few aspects of these structures. Still, the Listing Rules have driven the creation of those terms of engagement between a listed company and its shareholders, and inertia—perhaps more accurately, path dependence—may mean that such terms still are common today, even though the Listing Rules are much less relevant for present purposes than was once the case.

#### *F. Summary*

A survey of history demonstrates some fundamental points. Most importantly, it establishes that the foundations of shareholder decision-making and shareholder governance in a company are the arrangements between those shareholders (and the company) given effect by section 14 of the Companies Act 1985. The legal core of shareholder governance is the existence and use of a statutory freedom. This basic structure was established by the Companies Act 1862, drawing on the Joint Stock Companies Act 1856, and none of the subsequent changes to the law have altered it. It may have become obscured by subsequent statutory regulation; but it still exists, and it is still important, as will shortly be made clearer. Consequently, there is no need, when designing innovative decision-

<sup>117</sup> Listing Rules (1966 ed.) Appendix, para. 1; (1973 ed.) Appendix 34, para. 2; (1979 ed.) Appendix, para. 1; (1984 ed.) Section 1, Chapter 1, para. 2; (1993 ed.) r. 13.3; (2000 ed.) rr. 1.11–1.14; (2005 ed.) r. 1.2.1.

<sup>118</sup> Listing Rules (1993 ed.) rr. 13.1 and 13.3; (2000 ed.) r. 13.3 (which followed the language of Amendment 14 of January 2000 to the 1993 ed.).

<sup>119</sup> See the Listing Rules (2005 ed.).

<sup>120</sup> Listing Rules (2005 ed.) rr. 9.3.6, 9.3.7, 9.3.9.

making structures for shareholders, to require the specific authorisation of statute to ensure their efficacy: there already is a basis for giving effect to shareholders' arrangements *inter se*, namely the general effect of section 14 on a company's articles of association.<sup>121</sup>

Nevertheless, regulation has had a large impact on the basic freedom of shareholders in a company to arrange their rights of governance within the company. Statute sometimes explicitly requires that a company should hold a meeting—for example, an annual general meeting, or a meeting on the requisition of shareholders. More often, however, statutory rules (and, where applicable, non-statutory regulation, such as the Listing Rules) have *assumed* that general meetings are the means through which shareholders take decisions. Statute has therefore sought to regulate shareholder decision-making by reference to the holding of meetings. Good examples of this tacit assumption are to be found in the definitions of special and extraordinary resolutions: those definitions assume that shareholders will use general meetings to take corporate decisions. Unfortunately, an assumption that was broadly valid when it was first made has limited shareholders' ability to order their affairs in defiance of that assumption now it no longer holds good. Also, Parliament has very occasionally enacted specific requirements that business be done at a meeting.

The overall consequence of increased regulation has been to make it very difficult for shareholders to use any means other than general meetings to take corporate decisions, unless the company concerned has sufficiently few members that they can realistically avoid the need for general meetings by using either written resolutions (whether under the company's articles or pursuant to statute) or the principle of unanimous informal consent. Admittedly, one old English case,<sup>122</sup> and some Australian cases on companies limited by guarantee,<sup>123</sup> all assume that shareholders in a company could take a decision by postal ballot—that is, otherwise than at a meeting—if the company's articles so provided. The cases correctly reflect the underlying ability of the members in a company to order their own decision-making processes. However, none of those cases addresses regulatory limitations on the members' freedom—for example, the limitations on the decision-making process inherent in seeking to pass a special or an extraordinary

<sup>121</sup> Indirect investors' participation in the affairs of a company is another matter: see note 19 above.

<sup>122</sup> *McMillan v. LeRoi Mining Co. Ltd.* [1906] 1 Ch. 331. See note 46 above.

<sup>123</sup> *Scullion v. Family Planning Association of Queensland* (1985) 10 A.C.L.R. 249, *Rivers v. Bondi Junction-Waverley RSL Sub-Branch Ltd.* (1986) 5 N.S.W.L.R. 362, *NRMA v. Parker* (1986) 6 N.S.W.L.R. 517.

resolution. Given that the members of a company may often need to pass a special resolution, and will then need to hold a general meeting (rather than using a postal ballot, for example), the freedom recognised in the cases is rather more limited in practice than their language might suggest. So regulation has greatly circumscribed shareholders' freedom to organise their own affairs. However, as the next section will show, that freedom is very far from irrelevant.

### III. THE MODERN EVOLUTION OF SHAREHOLDER GOVERNANCE

The freedom of shareholders in a company to organise how they exercise their rights in the company can be seen even in standard form, unsophisticated articles of association, such as Table A (1985). However, it is even more evident, and practically more important, in the articles of large, listed companies. The articles of Amersham plc, Astrazeneca plc, BHP Billiton plc, BP plc and Carnival plc all contain prominent examples of the use, and consequent importance, of this freedom.<sup>124</sup> They are far from the only examples. They do, however, give a flavour of relevant current practice: they demonstrate qualitatively what can and has been done. This is all that need be done to show the continuing importance of arrangements ordained by shareholders themselves, rather than by legislation: an exhaustive quantitative report on such practice is a project for another time.

Articles often set out in much greater detail than Table A (1985)<sup>125</sup> the information which is to be given to shareholders by way of notice for a general meeting.<sup>126</sup> Advance warning can be given of multi-site meetings,<sup>127</sup> and so ensure that such meetings are not held invalid for want of notice. Particular items of business, or particular procedures attaching to particular items of business, can be highlighted, so that particularly important decisions—or the manner in which they are taken—are emphasised. All these things go to the good governance of a company. Articles also generally provide that accidental failures in the provision of notices for a meeting will not invalidate that meeting or the business done at it.<sup>128</sup> They can also make provision for unanticipated changes to the time or location of meetings, while preserving the validity of the meeting.<sup>129</sup>

<sup>124</sup> See note 18 above.

<sup>125</sup> Table A (1985), reg. 38.

<sup>126</sup> Amersham plc, art. 50; Astrazeneca plc, art. 33; BP plc, arts. 59,60; Carnival plc, arts. 100–102. Contrast BHP Billiton plc, art. 47, giving huge discretion to the company's board.

<sup>127</sup> See the text to note 151 below.

<sup>128</sup> See note 50 above.

<sup>129</sup> Amersham plc, art. 51.5; Astrazeneca plc, art. 34.5; Carnival plc, art. 107.

Articles can control where meetings are to be held.<sup>130</sup> This might seem a minor matter, but it is rather less so in companies which are the result of cross-border mergers, where the company has to accommodate shareholder bases in more than one country, as well as the sensitivities of those shareholders.

Articles facilitate the administration of general meetings. They may provide that the entitlement to vote is established at a particular record time before the meeting.<sup>131</sup> This facilitates verification of votes tendered at the meeting, by allowing the company to use records for that purpose which it will actually have in its possession at the meeting. (Precisely up-to-date records will not be available to a company whose shares are traded continuously.) Articles can provide protection from errors in the voting process, which (in small measure, at least) are almost inevitable when casting and counting the many millions of votes held by the various shareholders of a large, listed company.<sup>132</sup> Articles also commonly give many powers given to the chairman of a company's general meeting, most of them administrative (such as powers of adjournment, powers to call a poll, and powers to maintain good order), some of them substantive (such as a casting vote).<sup>133</sup>

Articles can categorise items of business or resolutions to be addressed at general meetings. Commonly, business is categorised as "special business" or other ("ordinary") business for the purposes of giving notice of that business:<sup>134</sup> often, only general notice is required of "ordinary" business, rather than the much more detailed notice required for "special" business. In addition, the Listing Rules require a listed company to provide its members with a full explanation of "special business".<sup>135</sup> However, in recent times, companies have drawn and used distinctions between "substantive" and "procedural" resolutions, in order to control how business is done at a general meeting.<sup>136</sup> Articles provide that a "substantive resolution" (as defined) can only validly be considered or passed at a meeting if the text of the resolution was

<sup>130</sup> BP plc, art. 55.

<sup>131</sup> BP plc, art. 60(D).

<sup>132</sup> See the different techniques adopted by Amersham plc, art. 74; Astrazeneca, arts. 43, 55; BHP Billiton plc, arts. 55(4), 55(1); BP plc, arts. 71, 80; Carnival plc, arts. 135, 144, 153.

<sup>133</sup> See, e.g., Table A (1985), regs. 45, 46(a), 47–51, 58; Amersham plc, arts. 55, 57–58, 59(a), 60–64; Astrazeneca plc, arts. 38, 40–41, 42(a), 43–47; BHP Billiton plc, arts. 48, 50–56; BP plc, arts. 64, 66–67, 70(i), 71–74, 80; Carnival plc, arts. 110, 114–115, 117–119, 133(a), 135, 137–139, 141, 144.

<sup>134</sup> Amersham plc, art. 50; Astrazeneca plc, art. 33; BP plc, arts. 60–61.

<sup>135</sup> Listing Rules (2005 ed.) rr. 13.3.1 and 13.8.9.

<sup>136</sup> BHP Billiton plc, arts. 2, 54; BP plc, arts. 2, 69. To similar effect are Amersham plc, art. 58 and Astrazeneca plc, art. 41. Carnival plc, art. 117 envisages amendments to substantive resolutions, but enables the chairman to adjourn consideration of an amended substantive resolution.

set out exactly in the notice by which the meeting was convened. Thus, no amendment to a substantive resolution can be taken at the meeting without thereby making it impossible to pass the resolution.<sup>137</sup> This control over amendments might seem to advance the interests of directors over shareholders, enabling the directors to exert a tighter grip on the agenda of a meeting. In fact, the opposite is true. It enables shareholders who do not attend a meeting to know exactly what business will be done at the meeting, so they can appoint and instruct proxies accordingly.

Categorisation of business within a company's articles of association is sometimes used in very subtle ways to facilitate the creation of parallel corporate structures, where two entities incorporated in different jurisdictions are established to own common operating subsidiaries.<sup>138</sup> So, a company incorporated in England can, through its articles, ensure that a shareholder representing the interests of a foreign company has an influence over the English company on certain items of business proportionate to the foreign company's share of the combined capital of the two companies.<sup>139</sup>

Another issue which companies' articles of association nowadays address in growing detail is security at general meetings. Articles therefore often contain explicit provision for directors (and management generally) to put in place security arrangements at general meetings; and shareholders' rights are subjected to those arrangements.<sup>140</sup> While a company most likely has an implied default power at common law, exercisable through its board, to institute security arrangements at its general meetings,<sup>141</sup> specific articles are much clearer and often more wide-ranging. The exercise of these powers can be a very sensitive indeed, particularly where protesters against the company's business or activities are shareholders, and make a scene at the company's general meeting in a manner which may be threatening to others present.

Articles can also place restrictions or limitations on shareholders' voting rights. Such restrictions are very commonly

<sup>137</sup> Amendments to correct clerical or manifest error are commonly permitted: *ibid.*. See also *Re Moorgate Mercantile Holdings Ltd.* [1980] 1 W.L.R. 227 as regards the amendment of a resolution requiring exact notice (in that case, a special resolution).

<sup>138</sup> These structures are sometimes created on mergers so that there can be two parent companies, incorporated and listed in two jurisdictions. Examples (*inter alia*) are BHP Billiton plc / BHP Billiton Ltd. (a UK/Australian structure) and Carnival plc / Carnival Corporation (a UK/Panamanian structure).

<sup>139</sup> See, e.g., BHP Billiton plc, arts. 59–62; Carnival plc, arts. 124–160.

<sup>140</sup> Amersham plc, art. 52.2; Astrazeneca plc, art. 35.2; BHP Billiton plc, art. 53(2); BP plc, arts. 63, 74–75; Carnival plc, art. 110.

<sup>141</sup> Hamer and Robertson, *Running Company Meetings*, (note 2 above), p. 86, paras. 10.2, 10.4. Note also *John v. Rees* [1969] 2 W.L.R. 1294 and *Barton v. Taylor* (1886) 11 App. Cas. 197, 204, per Lord Selborne, which concern meetings, but not company general meetings, and also *Byng v. London Life* [1990] Ch. 170, 187, per Sir Nicolas Browne-Wilkinson V.-C.

used as a means of putting practical pressure on shareholders to comply with other obligations. So, for example, shares are commonly disenfranchised while calls made on their holder remain unpaid.<sup>142</sup> Again, shares are very often disenfranchised where a public company serves a notice pursuant to section 212 of the Companies Act 1985 to discover who is beneficially interested in its shares, and there is a failure to comply with the notice.<sup>143</sup> Indeed, articles often impose even more onerous restrictions on shares which are the subject of an unanswered Section 212 Notice: the company may refuse to pay dividends otherwise payable on the shares, and it may in certain circumstances refuse to register transfers of the shares.<sup>144</sup>

There are many other examples of the various ways in which a company's articles of association can determine how shareholders will exercise their rights within a company. (Indeed, it should not be forgotten that a company's articles primarily establish what rights attach to particular shares in any event, even in the case of a listed company.)<sup>145</sup> For the present, it is worth mentioning the extent to which articles deal govern the appointment of proxies;<sup>146</sup> the way in which articles can be used effectively to enfranchise those with interests in shares who are not, however, the legal owner of the shares;<sup>147</sup> the provision which can be made for purely consultative meetings,<sup>148</sup> or for interested non-shareholders to view meetings without participating in them,<sup>149</sup> and the additional provision which can be made for a single corporate shareholder to appoint several representatives at a company's general meeting.<sup>150</sup>

<sup>142</sup> Amersham plc, art. 70; BP plc, art. 79; Carnival plc, art. 151. Forfeiture for non-payment of calls does not amount to an unlawful reduction of capital (*Trevor v. Whitworth* (1887) 12 App. Cas. 409, 417, per Lord Herschell, 429, per Lord Watson and 438, per Lord Macnaughten), and so it can be authorised by a company's articles irrespective of the statutory procedures for the reduction of capital or the redemption or repurchase of shares.

<sup>143</sup> Amersham plc, arts. 71–72; Astrazeneca plc, arts. 53–54; BHP Billiton plc, art. 64; BP plc, art. 87; Carnival plc, arts. 155–156. See also note 120 above and its accompanying text.

<sup>144</sup> *Ibid.*

<sup>145</sup> See, e.g., Table A (1985), reg. 54; Amersham plc, art. 67; Astrazeneca plc, art. 50; BHP Billiton plc, arts. 61–62; BP plc, art. 76; Carnival plc, arts. 147–148. Companies Act 1985, s. 370 provides default rules for voting if the company's articles make no relevant provision: see the text to note 45 above.

<sup>146</sup> See, e.g., Table A (1985), regs. 60–63; Amersham plc, arts. 76–79, 81; Astrazeneca plc, arts. 58–61, 63; BHP Billiton plc, arts. 68–71; BP plc, arts. 81–86; Carnival plc, arts. 161–167, 169. See also the text following note 30 above.

<sup>147</sup> See, e.g., Amersham plc, art. 80; Astrazeneca plc, arts. 135–142; BP plc, arts. 157–170. See also Nolan, above note 8.

<sup>148</sup> BAE plc, art. 105(B).

<sup>149</sup> See, e.g., BP plc, art. 62(C).

<sup>150</sup> See, e.g., Amersham plc, art. 80. It is at least arguable that, on its true construction, Companies Act 1985, s. 375 only allows a corporate shareholder to appoint one representative: see Myners, *Review of the Impediments to Voting UK Shares: Report by Paul Myners to the Shareholder Voting Working Group* (note 6 above), p. 27. The ability to for a single corporate shareholder to appoint more than one representative is vitally important where the shareholder is a nominee for many different beneficiaries: *ibid.*

Finally, the expansion of what is meant by a “meeting” has itself allowed innovative, constructive provisions in a company’s articles to harness modern communications technology and so increase shareholders’ opportunities to participate in the company. For reasons explained in the previous section, it is necessary for public companies, at least, to hold meetings within the meaning of the Companies Act 1985. Whether or not a gathering or other interaction constitutes a “meeting” for the purposes of the Act, or for the purposes of any other applicable regulation, is determined by the relevant definition of what amounts to a “meeting”. However, the Act itself does not define a “meeting”: the Act leaves the definition to the common law. (A company’s articles can define what amounts to a “meeting” for their own purposes; but the articles obviously cannot define what constitutes a “meeting” for other purposes.) In *Byng v. London Life*,<sup>151</sup> the Court of Appeal gave a wide meaning to the word “meeting” so that it would encompass people, or groups, who were not in the same place but who could communicate as if they were, using modern technology. Companies have since then, through their articles, taken advantage of this broad definition, and provided not only for the use of multi-site “meetings” in this modern sense, but also for many of the problems which might result, such as what would happen if the technology were to fail at an inopportune moment.<sup>152</sup>

This recent development of “multi-site meetings” is an example of companies working constructively within the constraints of regulation, by acknowledging the necessity for general meetings but exploiting an expansive definition of “meetings”. It is not an example of companies determining the mechanisms for shareholder participation wholly unconstrained by regulation. Nevertheless, it still shows the vitality and innovation of private solutions—solutions adopted by the members of companies themselves—to the difficulties of involving shareholders in the governance of their company. Such innovation, and the many other examples of innovative practice described above, form a vital, if often neglected, part of the context for any law reform.

#### IV. THE FUTURE EVOLUTION OF SHAREHOLDER GOVERNANCE

The foregoing survey of history and current practice shows that the rules which govern shareholders’ exercise of their rights in a company—and, indeed, those rights themselves—have evolved,

<sup>151</sup> [1990] Ch. 170.

<sup>152</sup> *Amersham plc*, art. 51; *Astrazeneca plc*, art. 34; *BHP Billiton plc*, art. 53(5); *BP plc*, art. 62; *Carnival plc*, arts. 103–105.

through the repeated, iterative interaction of various parties. Shareholders and companies—or, more accurately, the legal practitioners who draft the internal corporate arrangements that the shareholders ultimately adopt—have devised various structures through which shareholders—and others—can participate in the governance of a company. They have done so to the extent admitted by changing companies legislation, though regulation, both statutory and non-statutory, may sometimes limit what they can do. They have learnt from each others' work, and they have in turn adapted their practice accordingly. They have also interacted with, and reacted in response to, the courts when the structures they devised came to be challenged. Much less frequently, they have lobbied for changes in the law and so brought the process of legal evolution back to focus on legislation.

In these interactions, this area of company law resembles many other areas of commercial law, such as the law relating to the sale of goods, bills of exchange and floating charges.<sup>153</sup> Unlike those branches of the law, however, modern company law is fundamentally a creation of statute, and it was Parliament that first established the freedom for those who form a company to order its affairs through its articles of association, though Parliament drew on the prior experience of unincorporated joint stock companies.<sup>154</sup> Since then, however, lawyers acting for companies or their shareholders have generally been much more innovative than the state, as witness the foregoing survey of both history and current practice. But what of the future?

#### *A. The Principles of Policy*

The first and most general question of policy for present purposes is whether Parliament should continue the present approach to decision-making by shareholders, establishing broad, general, facultative principles, such as section 14 of the Companies Act 1985, moderated by specific regulation, within which the participants in companies can order their own affairs. The alternative is for Parliament to provide a specific number of specific mechanisms through which shareholders could express themselves. There are two main grounds for continuing to prefer the present approach: liberalism and efficiency.

Why liberalism? The fact is, British company law manifests deliberate choices in favor of allowing shareholders to exercise residual and ultimate control in companies, and these choices have

<sup>153</sup> See R.M. Goode, *Commercial Law* (London 2004) and R.C. Nolan, "Property in a Fund" (2004) 120 L.Q.R. 108.

<sup>154</sup> Davies, *Gower and Davies' Principles of Modern Company Law* (note 16 above), p. 58.

been confirmed for the foreseeable future at least.<sup>155</sup> This choice has very substantial support, at least outside the academy.<sup>156</sup> So long as Parliament continues to accept that companies are, so far as their shareholders are concerned, voluntary associations in which the shareholders exercise residual and ultimate control, then it should continue to legislate from a presumptive premise that those shareholders should be allowed to order their own affairs. (Of course, very different considerations come into play when considering the “proprietary” aspects of company law, such as rules on capital and limited liability, where the interests of non-consenting parties are affected by the rules chosen).<sup>157</sup> None of this, however, denies the possibility of regulating even the internal structures of companies. It simply establishes a presumption in favor of free association, and demands reasons to depart from that presumption.

Why efficiency? In order to answer the question, it is necessary to recall that efficiency is a instrumental good: it assumes a desired goal. In the present case, that goal is, for reasons just noted, to facilitate the creation of voluntary associations, companies, in which the members of those companies can, at least presumptively, order their own affairs. So what is efficient in that context? Law which allows companies and their lawyers to devise the internal structures of companies is much more likely to evolve into useful, efficient forms, with variations that reflect different circumstances, than rules made by Parliament, which often form a single set of rules, or at most one set of rules for private companies and another for public companies.<sup>158</sup> The approach of the Company Law Review to reform appears, however, to focus on legislation, rather than innovation by companies, shareholders and their advisers.<sup>159</sup> Now, legislation could very helpfully provide default rules for companies, so that small companies are not necessarily put to the expense of changing their articles in order to take advantage of new developments. Nevertheless, legislation should not set a certain practice in stone and thereby freeze innovation, as has happened in

<sup>155</sup> See note 13 above and its accompanying text.

<sup>156</sup> Ferran, note 12 above, p. 132.

<sup>157</sup> As to the “proprietary” aspects of corporate law, see J. Armour and M.J. Whincop, “The Proprietary Foundations of Corporate Law”, University of Cambridge CBR Working Paper 299, available at ([http://www.econ.cam.ac.uk/cgi-bin/cbr\\_wpfull3.pl?series=cbrwps&filename=cbr2005&paperid=WP299](http://www.econ.cam.ac.uk/cgi-bin/cbr_wpfull3.pl?series=cbrwps&filename=cbr2005&paperid=WP299)).

<sup>158</sup> Note the distinctions between private and public companies in Companies Act 1985, Part IX, Chapter IV.

<sup>159</sup> Company Law Review, *Final Report*, (note 5 above), §§ 7.7 (statutory provision for multi-site meetings), 7.11 (statutory authority for electronic voting, though this paragraph is ambiguous as to whether the legislation should be mandatory or permissive), 7.13 (statutory rights for proxies), 7.20 (statutory codification of the unanimous informal consent rule).

the past.<sup>160</sup> Again, however, none of this involves rejecting any thought of regulating a company's internal structure: it too raises a presumption in favor of free association, and demands reasons to depart from that presumption.

The reasons for advocating these views have nothing whatsoever to do with the inherent capabilities of those who work in the private or public sectors—far from it. There are, however, other good reasons. The United Kingdom has a large number of highly sophisticated commercial and corporate lawyers. The transactional lawyers amongst them (and that is the very substantial majority of them) deal with vastly more relevant cases through which corporate structures are created or refined than lawyers and policy-makers in the public sector. Transactional lawyers also deal with each case in much greater detail, and with far greater intensity, than Parliament—or any regulator—possibly could. There are far more transactional lawyers, who collectively (and sometimes individually) possess far greater resources (in terms of time, finance and information) than those dealing with internal corporate structures in the public sector. Transactional lawyers also disseminate their expertise swiftly when designing new structures through which shareholders participate in companies, so that evolution of new forms is fast and vigorous. This is partly because the relevant specialist lawyers operate mostly within an interconnected community, the City of London, where new developments spread quickly;<sup>161</sup> but partly also because the results of their work, articles of association, are publicly available from Companies House (and now *via* the internet), so that anyone interested has immediate access to an exact record of new developments for the nominal sum of £1 *per* downloaded copy.<sup>162</sup>

All this adds up to the very vigorous evolution of internal corporate structures through the frequent interaction of private parties, and the rather less frequent interactions of those parties with the state, manifested in the courts and Parliament. This system for creating and developing the internal structures of companies acknowledges that law, and the arrangements made pursuant to law, are necessarily provisional, and will need to evolve, because law, and the arrangements made pursuant to it, are founded on bounded information and rationality deployed in an ever changing context. In other words, the system rests on pragmatic, rather than

<sup>160</sup> See “The Historical Evolution of Shareholder Governance”, above.

<sup>161</sup> A good example of this is the spread of the techniques for enfranchising the holders of depositary receipts backed by shares of companies incorporated in England. From BP plc adopting this technique in December 1998, it spread rapidly to other companies. See Nolan, note 8 above.

<sup>162</sup> See (<http://www.companieshouse.gov.uk>) and (<http://direct.companieshouse.gov.uk>).

idealistic, assumptions about the process of forming legal structures.<sup>163</sup> (The question of how the goals of the law are, and should be, set is another matter, but settled for the moment as regards company law in the United Kingdom.)<sup>164</sup> Consequently, the system allows for trial—and error. It demands a minimum acceptance of risk—there may be undesirable results. That is, however, what exposes it to its critics.

It is always easy to highlight the risk of harm, and to use such risk as an argument against any particular course of action. It is much more difficult to acknowledge such risk and yet still advocate the action, even following an honest, careful attempt at a risk/benefit calculation (or, more accurately, a risk/benefit estimation) which gives reasonable grounds for predicting that any harm will be outweighed by good. The problem is the fear of risk itself. Correspondingly, when something undesirable has happened, it is seductively easy to blame those who took the risk of that unwanted consequence. In turn, fear of blame becomes another reason not to take a risk in the first place. Furthermore, it is much harder to show that the risk-averse course of action could well have produced worse results. Conversely, if risk is allowed, with desirable consequences, those who take the risks, rather than those who allowed them, are likely to get the credit. In short, advocating any system which allows risk has asymmetrical advantages and disadvantages to those who would allow risk: it is hard to argue in favor of risk-taking. Yet would modern corporate law (let alone contract law) exist if such an aversion to risk had always governed the law? It is highly unlikely. Risk is the inescapable cost of innovation.

### *B. The Regulatory Approach*

What, then, of regulation? The arguments just put forward have not sought to deny any role for regulation of a company's internal affairs. Yet those arguments do have implications which concern the incidence, extent and form of any such regulation.

The history of English commercial law, in its broadest sense, provides some useful guidance for the future development of company law: how to accept risk as the price of innovation, but nevertheless manage and mitigate it. Much of modern commercial law, for example, developed as the courts accepted commercial practice. Specific problems were addressed individually and were resolved through litigation, and, much more rarely, through specific

<sup>163</sup> Note D. Goddard, "Company Law Reform—Lessons from the New Zealand Experience" (1998) 16 *Company and Securities Law Journal* 236 at footnote 42.

<sup>164</sup> See note 13 above.

legislative intervention. Only later did Parliament attempt to codify, restate or significantly amend these bodies of law.<sup>165</sup> To put the point in more general terms, there was first an acceptance of innovation, and an acceptance of trial and error. Only later, once a significant corpus of law, practice and experience had built up, did Parliament intervene in any systematic fashion.

More generally still, the point is that inductive, minimally categorising, “bottom up” methods of rule-making were used in the earlier stages of developing a system, when understanding of the system was sketchy; and deductive, generally categorising, “top down” methods were used once a significant body of knowledge had accumulated to form the premises in this process of reasoning.<sup>166</sup> There is much to commend such an approach: it takes account of the varying—let it be hoped expanding—boundaries of knowledge; it accepts that hasty intervention, in ignorance, can stifle innovation and even be counterproductive; but it accepts also that there is a very useful role for legislation and regulation—in clarifying the law and dealing in a principled fashion with the problems revealed by experience, rather than by conjecture (however well informed).

Now these general lessons of history can inform the development of the law and regulation of companies’ internal structures. Companies are regularly amending their articles in response to new technological developments, and in response to new developments of legal practice observed in other companies.<sup>167</sup> General experience suggests that the pace of change is unlikely to slacken. The nature of any relevant change is also very hard to foresee. Twenty years ago, who would have imagined the internet or its present importance? In other words, corporate practice is in the early stages of evolution in response to a continuing series of new stimuli, and is likely to remain so for some time.

The appropriate legislative and regulatory response should therefore accommodate the ongoing evolution of corporate practice, in order to promote the acknowledged goal of corporate law reform in the UK—the facilitation of modern, responsible, competitive business.<sup>168</sup> It should do this first by retaining the basic facultative principles of UK corporate law, derived from our Victorian forebears, who themselves lived in equally fast changing

<sup>165</sup> See generally Goode (note 153 above).

<sup>166</sup> As regards the different types of rule, see H.L.A. Hart, *The Concept of Law* (Oxford 1994), pp. 124–136.

<sup>167</sup> This was immediately apparent from the author’s survey of articles of association (see notes 15 and 18 above): 89% of the articles surveyed had been adopted or amended in the 4 years before the sample date for the survey (16th January, 2004).

<sup>168</sup> See note 4 above.

times. These principles allow participants in a company, and their advisors, to adapt the arrangements they make for their governance of the company to meet new and often unforeseen developments. Unfortunately, legislators have in the past often proceeded by enacting specific solutions, which are often cumbersome, or at least limiting, and can only be adapted by further legislation.<sup>169</sup> That, in a country like the United Kingdom, is not often forthcoming.<sup>170</sup> Equally, regulation should not consist of any general codification of how shareholders in a company, and any indirect investors in the company, should engage with each other and with managers of the company. As has been noted already, the structures through which shareholders (and indirect investors) participate in companies are developing rapidly in response to many new stimuli, and that looks set to continue indefinitely. Consequently, any such project of codification is entirely inappropriate at present and likely to remain so for the foreseeable future.

The response of regulation should also involve specific legislation or regulation where necessary to address problems revealed by experience. In order to avoid creating implicit and often unintended barriers to innovation, it should also be careful that legislation and regulation—and the definitions used in them—do not rest on assumptions that are outmoded, or may quickly become so. In particular, it should be very cautious of regulating the means by which shareholders participate in companies, because those means are now in a such a state of flux.

These, then, are the principles that should guide the formation of policy. The application of that policy to any proposals for reform of the law is, however, another matter for another time.

<sup>169</sup> Consider Companies Act 1985, sections 381A–381C and Schedule 15A (unanimous written resolutions). The amendments to the law governing the use of electronic communications in relation to general meetings (see note 88 above and its accompanying text) also form a specific solution to a problem and may well in time become restrictive, as anticipated by the Company Law Review: see *The Strategic Framework* (note 4 above), §5.7.19; *Completing the Structure* (note 13 above), §5.39; *Final Report* (note 5 above) §7.11. See also note 159 above. The temptation to enact specific legislation is not unique to the United Kingdom: in Australia, see The Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Company: Final Report* (Sydney 2000), pp. 63–74, and, in Delaware, see General Corporations Law, §211.

<sup>170</sup> See “The Historical Evolution of Shareholder Governance”, above, showing two facultative reforms in the past 59 years. The problem of legislative inertia might well be eased by the creation of a “Companies Commission”, empowered to update corporate law through secondary legislation. The Company Law Review recommended this (*Final Report* (note 5 above), chapter 5, esp. at §§5.49–5.58, 5.69), but the Government did not accept the recommendation (*Modernising Company Law* (note 1 above), at §§5.25–5.27). Use of the reform powers proposed in *Company Law: Flexibility and Accessibility* (London 2004) and clauses 774–788 of the Company Law Reform Bill might also alleviate the problem.

## V. CONCLUSION

Sometimes, regulation of an activity can become so prominent that it is easy to forget the mechanisms through which the activity is given legal effect in the first place. So long as the activity proceeds in its accustomed fashion, there are often few practical consequences of such forgetfulness. Those involved simply do what they have always done, adapting occasionally and unreflectively to new regulation. They achieve their ends without any great need to consider how they did so. Such has been the fate of the law which concerns the governance of a company by its shareholders.

Nevertheless, a clear understanding of such law matters a great deal, and for a variety of reasons. First, any informed discussion of shareholder engagement in a company—whether such engagement is called corporate democracy, shareholder activism or anything else—requires a clear understanding of the legal underpinnings for shareholders' participation in the company. Second, such an understanding is the indispensable foundation on which legal practitioners have created—and still do create—innovative structures through which shareholders can participate in companies. Third, a clear understanding of the present law, and, equally importantly, the practice which builds on that law, is vital to any fair evaluation of proposed reforms to that law. Such an understanding also forms the necessary basis for further study of how and why participants in companies, and their advisers, reacted as they did to the freedoms and constraints established by this body of law, as well as the foundation for any comparative study of participation by shareholders in companies from different jurisdictions.

This article has sought to show the existing legal principles which underpin decision-making by shareholders in companies incorporated in Britain. It has also sought to show how regulation has come to restrict those principles, to an undesirable extent. Even so, those involved with companies—directors, shareholders and their advisers, particularly their lawyers—have used these basic principles with great innovative flair, and without the need for frequent legislative intervention. There are good reasons to continue to prefer such an approach, and to modify accordingly the regulatory accretions of the years.

Clearly, however, further work is needed to address other issues. These include an evaluation of specific UK and EU proposals to reform this area of law; a broadly based, quantitative analysis and evaluation of legal practice which builds on the relevant law, and a comparison with the position in various other jurisdictions. Such

work will have to address many interesting theoretical, historical and practical questions which, for reasons of space alone (if nothing else) cannot be answered here. After all, this article itself indicates how long it takes to explore deeply how just one legal system provides for shareholders to participate in companies—and what corresponding indulgence is required of those who read such an article.