Case Note

THE IMPACT OF LEGISLATIVE CHANGES ON ARTICLES OF ASSOCIATION AND THE ISSUE OF SHARES

Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd
[2009] 2 SLR(R) 624

Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd [2009] 2 SLR(R) 624 addressed two issues which have significant impact. The first pertains to how a company's articles of association are to be interpreted where there has been a change to corporate legislation. The second relates to the company's power to issue shares and the interaction between the company's articles and s 161 of the Companies Act (Cap 50, 2006 Rev Ed) in governing this power. This note highlights some implications of the Court of Appeal's decision and suggests an alternative point of view as to how these two issues may be addressed.

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I. Maxz Universal

1 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd*[1] ("*Maxz Universal*") concerned the determination of a preliminary issue brought before the court regarding whether a share issuance resolution passed at an extraordinary general meeting of a company, Maxz Universal Development Group Pte Ltd ("the Company"), contravened its articles of association. At the centre of the dispute was the question of how changes made to the then Companies Act[2] ("CA 1994") by the Companies (Amendment) Act 2005[3] ("C(A)A 2005"), which, *inter alia*, abolished the concept of par value and the requirement for companies to have an authorised share capital, affected

1 [2009] 2 SLR(R) 624.
2 Cap 50, 1994 Rev Ed.
3 Act 21 of 2005.

the interpretation of Art 32 of the Company's articles of association. Article 32 stated that "(t)he Company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, *as the resolution shall prescribe*" [emphasis added].

2 The appellants in the case were shareholders whose stakes in the Company were diluted from 18.18% each to 2.77% as a result of shares having been issued by the directors to other parties pursuant to a share issuance resolution. The appellants' complaint was that the issuance was made under a resolution which did not prescribe or specify the quantum of new shares which could be issued by the directors. Such a resolution, they contended, was consequently in contravention of the Company's Art 32 which they asserted required all resolutions pertaining to an increase in share capital to prescribe a limit to the sum of any such increase. The respondents argued that the phrase "share capital" in Art 32 was to be taken to refer only to the *authorised* share capital of the company and that it therefore did not apply to the resolution in question.

3 The Court of Appeal ruled in favour of the respondents. The decision has a twofold significance. First, the court discussed how a company's articles of association should be interpreted where there has been a change in legislation that impacts the articles in question. Corporate law reform and consequent changes to corporate legislation is not an uncommon exercise having regard to the need for the law to remain relevant to evolving commercial practice. It is therefore important for there to be clear guidance as to how such changes may impact the operation of a company's constitutional documents so as to assist legal practitioners in advising corporations on whether or not there may be a need to amend these constitutional documents following any such change in legislation.

4 Secondly, the court also discussed the purpose and intent of Art 32 of the Company's articles of association (the wording of which is commonly adopted by companies in Singapore in their articles of association), the interaction between such an article and s 161 of the Companies Act[4] and the proper interpretation to be given to the article and its effect on share issuance resolutions giving company directors' the general mandate to issue shares. Article 32 is *in pari materia* with Art 40(*a*) of Table A in the Fourth Schedule to the Companies Act 1994[5] ("Table A (1994)"). It is common practice for companies limited by shares to have, as a standard resolution at their annual general meetings, a resolution authorising their directors to issue shares of the company to

4 Cap 50, 2006 Rev Ed.
5 Cap 50, 1994 Rev Ed.

such persons and on such terms and conditions and with such rights or restrictions as they may think fit. The resolution will also usually provide that the authority to issue shares will continue until the conclusion of the next annual general meeting or the expiration of the period within which the next annual general meeting of the company is required by law to be held, whichever is the earlier. In practice, the majority of such resolutions for unlisted companies do not impose any limit on the number of shares which directors may issue pursuant to the resolution.[6]

II. Interpretation of articles of association where there have been changes to legislation

5 The appellants in *Maxz Universal*[7] conceded that the phrase "share capital" in Art 32 of the Company's articles of association, at the time the company was incorporated, referred to the company's *authorised* share capital. They contended, however, that Art 32 should have been interpreted in light of the legislative amendments which abolished the concept of authorised share capital, and that on a plain reading of Art 32 in light of the legislative change, every resolution of the shareholders which is passed to approve the issue of new shares must satisfy the requirements prescribed in that article and that the resolution must prescribe the quantum of the new shares to be issued.[8]

6 In the High Court, Justice Andrew Ang held that "it is trite law that in the interpretation of any term of a contract, the proper approach is to examine its meaning in the light of circumstances existing at the time the contract was made, and not through the prism of subsequent events" and that a company's articles should generally be interpreted in accordance with the ordinary canons of interpretation relating to contracts.[9] The Court of Appeal agreed with the learned judge and held that since a company's articles of association constituted a contract between the company and its members, and among the members *inter se*,[10] the general rule of interpretation that a contract should be

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6 This may be contrasted with companies listed on the Singapore Exchange Securities Trading Ltd ("the Exchange") which are required to comply with the Exchange's listing manual. Rule 806(2) of the Exchange's listing manual provides that a general mandate for the issue of shares must limit the aggregate number of shares and convertible securities that may be issued pursuant to it and also prescribes a maximum limit which may be set.

7 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

8 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [6].

9 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2008] 4 SLR(R) 265 at [15].

10 See Companies Act (Cap 50, 2006 Rev Ed) s 39.

interpreted in light of the circumstances surrounding the date it was made (the "date of agreement rule") should apply when interpreting a company's articles.[11]

A. *Should the "date of agreement rule" apply fully to corporate constitutional documents?*

7 It is apparent from the decisions in both the High Court and the Court of Appeal that the learned judges were of the view that it was appropriate, in the case at hand, to apply the rules governing the interpretation of contracts generally to the interpretation of a company's memorandum and articles of association ("constitutional documents"). The rationale for this appears to stem from reliance on s 39 of the Companies Act[12] which establishes what is often referred to as a "statutory contract". The section provides that the constitutional documents "bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles".

8 It has already been recognised, however, that while the binding nature of corporate constitutional documents is similar to that of contracts, it does not necessarily follow that the former should be treated in exactly the same manner as commercial contracts.[13] One example of such difference in treatment is the manner in which rights created pursuant to corporate constitutional documents may be varied. Any rights and obligations created pursuant to corporate constitutional documents may be altered pursuant to specified procedures.[14] Unlike commercial contracts, such variations do not require unanimous consent of all concerned.[15] There are also other recognised differences which relate to the availability of damages for breach, the inability to defeat the articles on the grounds of misrepresentation, undue influence or duress and the inability to rectify them on the grounds of mistake.[16]

9 A commercial contract is in essence a bargain between the contracting parties. The purpose of contractual interpretation is thus to determine the intention of the parties. It is submitted that the premise

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11 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [11].

12 Cap 50, 2006 Rev Ed.

13 *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693; *Scott v Frank Scott (London) Ltd* [1940] Ch 794.

14 In the case of local companies, pursuant to ss 26, 33 and 37 of the Companies Act (Cap 50, 2006 Rev Ed).

15 *British Equitable Assurance Co Ltd v Baily* [1906] AC 35.

16 See *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 at 698, *per* Steyn LJ.

underlying this is that contractual terms are finalised between contracting parties at the time that the bargain is struck and when the legal relationship between the parties comes into existence. The parties to the agreement remain unchanged (in the absence of any assignment or novation agreement) and the understanding between the parties is that the obligations so undertaken cannot be altered without the consent of all the parties to the bargain. In other words, the parties to a contract agree to be bound by terms as they understood them to be at the date they entered the bargain. The "date of agreement" rule is therefore logical and appropriate when applied to the interpretation of commercial contracts.

10 Corporate constitutional documents are, however, different in nature to commercial contracts. They are not merely reflective of bargains struck by associations of persons and do not only define legal relationships, rights and obligations *vis-à-vis* members *inter se* and the company.[17] Corporate constitutional documents also define the structure of the entity created, the procedures governing its operations and may also define the powers and capacity of the legal entity that is created.[18] Directors may be taken to task for breach of duties if they fail to comply with provisions in the articles. Also, some of the rights which articles of association confer are subject to the governing corporate legislation which provides for certain rights to subsist notwithstanding anything stated in the companies' constitutional documents.[19] Parties are thus not completely free to determine all of their rights under a company's constitutional documents. It may thus be argued that companies, being entities that are created pursuant to a statute, should have their constitutional documents interpreted in the light of the procedures, relationships, rights and obligations envisaged by the governing statute at any given point in time. Consequently, where there has been a change in the governing legislation, the constitutional documents should, at least at first instance, be interpreted in light of the amended legislation.

11 It is further submitted that it would not be appropriate to extend and apply the premise underlying the "date of agreement" rule (taken in the context of constitutional documents to be the date of the company's incorporation or the date when the relevant articles became

17 This is notwithstanding that the long-standing debate on whether the principle in *Hickman v Kent or Romney Marsh Sheep-Breeders Association* [1915] 1 Ch 881 on the type of provisions in a company's articles which members may enforce should apply in Singapore has yet to be conclusively resolved.

18 *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653. Even the "full capacity" granted by s 23 of the Companies Act (Cap 50, 2006 Rev Ed) is subject to the company's memorandum and articles of association and may be limited by provisions in the constitutional documents.

19 See, *eg*, Companies Act (Cap 50, 2006 Rev Ed) ss 25A, 39(3), 64(1), 76D and 153.

part of the constitutional documents) for commercial contracts to corporate constitutional documents. The "statutory contract" is not entered into by all the members at the same point in time. Members may join the company many years after its constitutional documents have been drafted and after numerous changes to corporate legislation. It is submitted that, as the binding effect of the constitutional documents affects such members only upon the date of their joining the company, they should be permitted to assume that the company's constitutional documents would be interpreted in light of existing legislation at the time of their joining and not in light of the existing legislation as at the date of the company's incorporation. It is further suggested that, where legislation has been passed which may impact a company's constitutional documents, it should be the responsibility of the company (through its board and legal advisers) to make whatever amendments necessary for the legislative changes to be taken into account when interpreting the constitutional documents and that anyone joining the company subsequent to such changes taking place should be entitled to assume that this has been done.

B. What is the approach to take when interpreting constitutional documents where there has been a legislative change?

12 It is suggested that it is more appropriate to take the position that the objective intent to be ascribed to corporate constitutional documents is one which acknowledges that they reflect a dynamic, on-going set of relationships as they exist within the framework of the legal entity created and which may be altered as a result of changes in corporate legislation. The need to take into account the dynamic and long-term nature of the obligations created by corporate constitutional documents and the existence of circumstances whereby subsequent changes to legislation may affect the way that they may be interpreted was in fact recognised by the Court of Appeal in *Maxz Universal*.[20] The court was of the view that the approach to be taken when considering the impact of legislative changes on a company's articles was to first carefully determine the original intent of the relevant article as at the time of the company's incorporation by dissecting the purposes and values embedded in the relevant article, and then considering how that article can be interpreted in a way which promotes its purposes and values in the light of the subsequent legislative changes.[21]

13 There is much merit to such an approach as the purpose and values embedded in the relevant article are clearly important

20 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [15].

21 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [14] and [15].

considerations in its interpretation. Having regard to the arguments proffered in the earlier section of this article, however, it is suggested that, instead of focusing on the original intent of the relevant article as at the time of the company's incorporation in determining its purpose and values, it may be more appropriate to, as a starting point, attempt to see if a valid purpose may be ascribed to the relevant article by interpreting it in the light of the existing corporate legislation at the time which the dispute arises. The burden should then be on the party arguing for an alternative interpretation of the article to show that such an approach would be inappropriate as it would result either in absurdity or impracticality or that there is a clear indication, to be garnered from any relevant amendment to corporate legislation, showing that an alternative interpretation should be adopted.

14 This approach is more consistent with the dynamic nature of the relationships being governed by a set of articles of association as it recognises that members can become parties to the "statutory contract" at different points in time, some before, and others after, changes in circumstances (and corporate legislation), which may have affected the original rights of the parties, have taken place. It would also be more practical for corporations and their legal advisers. When corporations and their legal advisers consider the impact of legislative changes on a company's constitutional documents, they can focus on how the provisions in these documents are likely to be interpreted having regard to the legislative change and can choose to leave the provisions unchanged or make whatever necessary amendments they deem necessary. There will not be a need to worry that an article, which on its face appears to be applicable and which serves a valid purpose having regard to the new legislation, may subsequently be given a different interpretation because it may have originally been intended to serve some other purpose.

15 In addition, the approach proffered in this note would avoid the peculiar situation, which may otherwise arise, where similarly worded articles may be given different meanings purely because the companies having those articles were incorporated at different points in time. This may come about under the *Maxz Universal*[22] approach because it is premised on the application of the "date of agreement" rule to the interpretation of a company's articles. Thus, a company which was incorporated prior to a legislative enactment which directly impacts a particular article may have that article interpreted according to its "original intent" apart from the possible impact of the change in legislation whereas a company which is incorporated after the relevant

22 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

legislative enactment will have a similarly worded article interpreted in light of the change in legislation.

III. Interpretation of Art 32 and the issue of shares

16 We now turn our attention to the second key issue brought out in *Maxz Universal*.[23] To determine the purpose of Art 32 of the Company's articles of association and the interpretation of the article in relation to the Company's power to issue shares, the court traced the genealogy of Art 40(*a*) of Table A (1994).[24] The court found that Art 40(*a*) was derived from s 61(1)(a) of the UK Companies Act 1948[25] which, it held, was intended to regulate issuance of shares beyond a company's authorised (or registered) share capital.[26] It went on to hold that Art 32 was (therefore) "meant to provide a mechanism to facilitate the increase of a company's authorised share capital pursuant to the then existing s 71(1)(*a*) of CA 1994, our equivalent of s 61(1)(a) of the UK CA 1948. It was not meant to apply to a resolution to increase the *issued* or *paid up* capital"[27] [emphasis in original]. The court thus concluded that the term "share capital" in the Table A articles on which Art 32 had been based "had always been understood to refer *specifically* to authorised share capital"[28] [emphasis in original]. The court, however, agreed in principle with the proposition that it should be slow to imply a term into the articles of association from extrinsic circumstances but held that that was not what it was doing in the case at hand.[29]

17 This author agrees with the court's exposition of the original intent of Art 40(*a*) of Table A (1994).[30] As things stand now (and as alluded to earlier), all companies which were incorporated prior to the coming into operation of the C(A)A 2005[31] are to treat articles which are *in pari materia* with Art 32 as being otiose on the authority established

23 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.
24 Companies Act (Cap 50, 1994 Rev Ed) Fourth Schedule.
25 UK Companies Act 1948 (c 38). This is the predecessor of s 71 of the Companies Act (Cap 50, 1994 Rev Ed). In doing so, the court relied on statements to that effect found in *Halsbury's Laws of England* vol 6 (Butterworth & Co (Publishers) Ltd, 3rd Ed, 1954) at para 311.
26 See the works cited by the court in *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [24].
27 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [24].
28 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [19].
29 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [19].
30 Companies Act (Cap 50, 1994 Rev Ed) Fourth Schedule.
31 Companies (Amendment) Act 2005 (Act 21 of 2005).

by *Maxz Universal*.[32] But what of companies which have similar articles but which were incorporated after the coming into operation of the C(A)A 2005 or companies which amended their articles after such date and which incorporated Art 40(*a*) of the 2006 Revised Edition of Table A ("Table A (2006)") of the Companies Act[33] ("the new Art 40(*a*)")[34] which is largely similar to Art 40(*a*) of Table A (1994) save for the absence of the reference to par value? While the court in *Maxz Universal* found it "anomalous for Singapore to retain Art 40(*a*) of Table A (1994) when s 71(1)(a) of CA 1994 has been repealed",[35] the court observed that "the fact remains that the Legislature had seen it fit to retain Art 40(*a*) by even specifically amending its terms to remove the reference to par value". On the basis of the "date of agreement" rule, the new Art 40(*a*) cannot be interpreted as referring to authorised share capital in companies incorporated after the coming into operation of the C(A)A 2005. A similar argument may be made for companies which amended their articles to adopt the new Art 40(*a*) on the basis that the new article should be interpreted to determine the company's and its members intent at the time it was adopted, which was after the coming into operation of the new legislation. The articles of such companies must therefore be interpreted in light of the change in the law.

18 While the court in *Maxz Universal*[36] did not deal directly with how the new Art 40(*a*)[37] is to operate in the context of companies incorporated after the coming into operation of the C(A)A 2005,[38] the court did put forward an approach as to how the new Art 40(*a*) should be interpreted generally. The court examined the relationship between the new Art 40(*a*) and s 161 of the current Companies Act[39] and held that the article was not to be construed as prohibiting the ability of the

32 While the court did not expressly make this finding, this may be implied from the court's decision that Art 32 of the Company's articles of association in *Maxz Universal* [2009] 2 SLR(R) 624 should be interpreted as applying only in relation to the Company's authorised share capital having regard to the original intent behind the article. As the concept of authorised share capital is no longer applicable to companies in Singapore, the implication of the court's finding is that such an article, if present in the articles of association of a company (at least where such company was incorporated prior to the coming into operation of the Companies (Amendment) Act 2005 (Act 21 of 2005)), would now be otiose.

33 Cap 50, 2006 Rev Ed.

34 Section 12 of the Statutes (Miscellaneous Amendments) (No 2) Act 2005 (Act 42 of 2005) substituted Art 40(*a*) with a new article which removed the reference to par value while retaining the rest of the old Art 40(*a*) (Companies Act (Cap 50, 1994 Rev Ed)).

35 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [29].

36 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

37 Companies Act (Cap 50, 2006 RevEd) Fourth Schedule Table A.

38 Companies (Amendment) Act 2005 (Act 21 of 2005).

39 Cap 50, 2006 Rev Ed.

shareholders of a company from giving its board blanket approval to carry out share issuances as s 161 expressly empowered shareholders to do just that.[40] The court appeared to accept the respondent's contention that Art 32 of the Company's articles of association was merely a provision empowering the shareholders in a general meeting to set the limit or the price at which new shares should be issued and that a resolution passed with no such limit set could constitute the approval under s 161 upon which the directors could then carry out a share issue exercise.[41] The basis of the court's decision was that to do otherwise was to allow "an article in a schedule to an Act to circumscribe a provision in the main body of the Act".[42]

19 The conclusion reached by the court on the effect of the new Art 40(*a*)[43] is correct in that the article does not prohibit the shareholders from giving blanket approval to carry out share issuances. With the greatest respect, however, this author would like to proffer a slightly different perspective on the legal basis of the company's power to issue shares and the approach which should be taken with regard to how this power may be exercised. Contrary to what the case (as well as the common practice of citing s 161 of the Companies Act[44] in resolutions to issue shares) suggests, s 161 is not an empowering provision but one which restricts the directors' ability to exercise the *company's* power to issue shares. Section 161(1) states that "(n)otwithstanding anything in a company's memorandum or articles, the directors *shall not*, without the prior approval of the company in general meeting, exercise any power of the company to issue shares" [emphasis added]. The focus is on what the directors cannot do as opposed to whether or not the company has the power to issue shares.[45] The section also provides that any approval for the issue of shares

40 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [36].

41 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [35].

42 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624at [32].

43 Companies Act (Cap 50, 2006 RevEd) Fourth Schedule Table A.

44 Cap 50, 2006 Rev Ed.

45 Such a view is consistent with the statements made in Parliament in relation to keeping the statutory requirement for shareholder approval for the issuance of shares when introducing s 161 in 1974. See the statements made by the then Minister for Finance, Mr Hon Sui Sen (*Singapore Parliamentary Debates, Official Report* (27 March 1974) vol 33 at col 957) iterated by the court in *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [34] highlighting that s 161 was proposed as a form of control on the directors. It is also interesting to note that s 161 is found under Div 2 of Pt V of the Companies Act which relates to directors and officers and not Pt III Div 2 – Powers or Part IV Shares, Debentures and Charges, which would have been more appropriate had it been meant as a provision relating specifically to the company's power to issue shares.

should be confined to either a particular exercise of the company's power to issue shares or may extend to the exercise of that power generally and that such approval may be unconditional or subject to conditions,[46] but does not deal with *how* any such approval is to be obtained. The section is a governance safeguard to ensure that directors do not exercise the company's power to issue shares without the members' approval, rendering any such issue void and holding errant directors personally liable for losses, damages or costs which parties may sustain as a result of the issue of shares in contravention of the section.

20 It is submitted that a company's power to issue shares is derived, not from s 161 of the Companies Act,[47] but from s 23 of the Act, which is the general provision defining a company's capacity and powers. This, in turn, is subject to the company's memorandum or articles of association.[48] Generally, this power and the manner by which it should be exercised would be reflected in the equivalent of Art 2 of Table A (2006) which provides, *inter alia,* that "shares in the company may be issued by the directors and any such shares may be issued with such preferred, deferred, or other special rights or such restrictions … as the directors, subject to any ordinary resolution of the company, determine".[49]

21 Can and does Art 40(*a*) of Table A (2006)[50] then play a role in determining how shares are to be issued? Using the approach suggested earlier on how articles should be interpreted in light of new legislation, we will need to see if a valid purpose may be attached to Art 40(*a*) in the light of the existing corporate legislation. It is suggested that there is no problem doing so. Article 40(*a*) may be seen as qualifying the procedure which should be followed when directors exercise the power to issue shares given by Art 2. As presently worded, Art 40(*a*) is permissive in nature as opposed to being mandatory. A company, therefore, *may* (as opposed to *shall*) by ordinary resolution increase its capital by such sum as the resolution shall prescribe. Where there is no such prescription in the resolution, it may be taken that Art 40(*a*) has not been invoked and Art 2 will apply without qualification.

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46 Companies Act (Cap 50, 2006 Rev Ed) s 161(2).

47 Cap 50, 2006 Rev Ed.

48 Companies Act (Cap 50, 2006 Rev Ed) s 23(1).

49 It is suggested that, even in the absence of any article specifically providing for such a power, the power to issue shares is an inherent power which companies with share capital possess as a result of the nature of such an entity envisaged by corporate legislation. The Companies Act does not specifically provide for a company to have the power to issue shares nor does it deal with this question at all. Contrast this with s 545 of the UK Companies Act 2006 (c 46) which provides that "references in the Companies Acts to a company having a share capital are to a company that has power under its constitution to issue shares".

50 Companies Act (Cap 50, 2006 Rev Ed).

22 The outcome is the same for the case at hand under the approach suggested here and that taken in *Maxz Universal*.[51] However, this may not be the case when the approaches are applied to deal with the question of the ability of a company to restrict the directors' power to issue shares in other cases. While the court in *Maxz Universal* did not directly address the point, the discussion in the case on the interaction between Art 40(*a*) and s 161 of the Companies Act[52] makes it conceivable for the case to be subsequently interpreted as suggesting that a company cannot, through its articles, *mandate* that any resolution authorising the issue of shares specifies a limit as to the quantum of shares to be issued on the basis that such an article would be incongruous with s 161 itself. While there is no express indication that such an interpretation was what the court intended, subsequent attempts may be made to argue that this may be inferred from the court's finding that s 161 should not be construed as being subject to Art 40(*a*) to prohibit the shareholders of a company from giving the board of the company blanket approval to carry out share issuances.[53] At first glance, this appears to suggest that, even if there is an article which mandates that a limit be set on the number of shares which may be issued in the resolution empowering the issue itself, such an article need not be complied with in light of s 161 which empowers shareholders to grant a general mandate for the issue of shares.

23 It is unlikely, however, that the Court of Appeal intended their decision in *Marz Universal*[54] to be interpreted in such a manner. Companies listed on the Singapore Exchange Securities Trading Ltd are required by the Exchange's listing rules to specify in any general mandate granted for the issues of shares a limit to the number of shares and convertible securities which may be issued. If a listing rule can make such a requirement mandatory in spite of s 161 of the Companies Act,[55] there should be no reason why the same effect cannot be achieved by the articles of an unlisted company.

24 Also, as submitted earlier, it is not s 161 of the Companies Act[56] which governs the company's power to issue shares but s 23 which is the source of such a power. As powers given to the company under s 23 are expressly stated to be subject to its memorandum and articles of association, a company should be able to place restrictions on the

51 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.
52 Cap 50, 2006 Rev Ed.
53 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624 at [36].
54 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.
55 Cap 50, 2006 Rev Ed.
56 Cap 50, 2006 Rev Ed.

manner by which its power to issue shares is to be exercised in its articles. Consequently, any article which provides that resolutions for the issuance of shares *must* prescribe the limit of the number of shares which may be issued has to be complied with and should be valid and enforceable by the company's members.

25 Such an approach is consistent with good governance as it gives the option to members to place limits on the extent to which directors can raise additional equity capital while still allowing them the flexibility to give the directors the ability to do so by giving the directors a general mandate to issue shares subject to any such limit.[57] Members can thus decide how much exposure they may potentially face without dilution of control, and prevent a situation similar to that faced by the appellants in *Maxz Universal*[58] from occurring.

IV. Conclusion

26 As mentioned by the Court of Appeal, the issue in *Maxz Universal*[59] is of importance to companies in general because Art 32 of the Company's articles of association (which is *in pari materia* with Art 40(*a*) of Table A (1994))[60] is a common provision which is found in the articles of association of a large number of companies. It is clear from the decision that articles with wording similar to Art 40(*a*) of Table A (2006)[61] should not be construed as prohibiting the shareholders of a company from giving the board of the company blanket approval to carry out share issuances. It is also clear that members may, through an appropriate resolution, place limits on the number of shares which directors may issue. Whether the Court of Appeal's approach in the case or the view proffered in this note on the legal basis of the company's power to issue shares is adopted will not affect the outcome of these matters.[62]

57 It is suggested that this is the reason why such limits are required for listed companies in Singapore. (Companies listed on the Singapore Exchange Securities Trading Ltd ("the Exchange") are required to comply with the Exchange's listing manual. Rule 806(2) of the Exchange's listing manual provides that a general mandate for the issue of shares must limit the aggregate number of shares and convertible securities that may be issued pursuant to it and also prescribes a maximum limit which may be set.)

58 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

59 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

60 Companies Act (Cap 50, 1994 Rev Ed) Fourth Schedule.

61 Companies Act (Cap 50, 2006 Rev Ed) Fourth Schedule.

62 Under the approach taken in *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624, the limits may take the form of "conditions" specified pursuant to s 161(2) of the Companies Act (Cap 50, 2006 Rev Ed). Under the approach proffered, the limit may be set pursuant to the Art 40(*a*) equivalent.

27 What is still unclear, however, is the question of whether or not it is open for unlisted companies to have articles which mandate that members, when passing the resolution to authorise the directors to issue shares, *must* prescribe the limit on the number of shares to be issued in the resolution itself. Notwithstanding that *Maxz Universal*,[63] at first glance, appears to suggest that this may not be possible, it is submitted that it is unlikely that such an interpretation was intended by the court. It is suggested that neither s 161 of the Companies Act[64] nor any other legal principle prohibits such an article from being valid and enforceable. Companies should also consider having such articles as a matter of good governance practice.

28 Another (and in this author's view, a more significant) aspect of the decision in *Maxz Universal*[65] is the approach put forward by the court in relation to how articles should be interpreted in light of changes to corporate legislation. The need to examine the purpose and values imbedded in an article is clearly an indispensible step in any attempt to interpret its meaning and operation. This needs to be balanced against the intended effect of any relevant change to corporate legislation. The expectation is for legal advisers to fully appreciate the relevant changes, to assess the impact which this may have on a company's existing articles of association, and to propose appropriate amendments where necessary. In doing so, the legal advisers have to, as a result of *Maxz Universal*, ensure that they not only look at whether the articles fit well with the legislative changes but to also consider whether the *original intent* of the articles fits well with these changes and then decide whether, and if so how, the relevant articles should be amended.

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63 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.

64 Cap 50, 2006 Rev Ed.

65 *Lian Hwee Choo Phebe v Maxz Universal Development Group Pte Ltd* [2009] 2 SLR(R) 624.