

# Practical tips on holding board and shareholder meetings during the pandemic restrictions

UPDATE

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With containment measures, including compulsory measures prohibiting gatherings and meetings of more than two persons (subject to maintaining social distancing) and travel restrictions, this guide sets out the practical considerations that Guernsey companies should consider when holding meetings of their shareholders and directors during these disrupted times.

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The spread of Coronavirus (COVID-19) has had a significant impact on, and sparked uncertainty in, the global economy. With containment measures, including compulsory measures prohibiting gatherings and meetings of more than two persons (subject to maintaining social distancing) and travel restrictions, we are being asked how companies can continue to hold meetings of their shareholders and directors during these disrupted times.

While there are no restrictions on where meetings can be held under Guernsey law, the provisions of the company's memorandum and articles of incorporation (the **Constitutional Documents**) need to be carefully checked. In particular, the Constitutional Documents should be reviewed to determine whether there are any specific requirements for a meeting to be valid, and to identify any restrictions that may be applicable. The board of directors should also consider the implications of where its meetings are held in relation to economic substance requirements (if applicable), and any tax considerations.

## What options are available to shareholders with regards to statutory AGMs?

### Postpone

If the notice of the general meeting has been despatched and the Constitutional Documents permit it, another option is to postpone the general meeting in accordance with the process set out in the Constitutional Documents until the restrictions are relaxed and/or lifted. From a practical perspective, it is important that shareholders are kept up-to-date and are given as much notice as possible if alternative arrangements are made.

This option may be considered as a last resort, if circumstances change between the date of the notice and the date of the general meeting such that the meeting cannot go ahead as planned.

It is important to note that Guernsey law provides that no more than 15 months may elapse between one annual general meeting and the next (and no more than 18 months from the date of incorporation in respect of the company's first annual general meeting).

### Delay sending out the notice convening the general meeting

The board may decide to delay the general meeting itself or, alternatively, to give notice convening the general meeting at the latest time permissible. This would allow the board to consider what plans to put in place to hold the general meeting nearer the time. Careful consideration would need to be given to this option as a company will have a number of deadlines to meet in its corporate calendar and also to ensure that any existing authorities do not expire in the meantime.

## Venue for a physical meeting

If a company has already convened a general meeting for a venue that has since become unavailable it will need to find an alternative venue provided the provisions of the company's Constitutional Documents and Guernsey law are complied with. If a company's Constitutional Documents allow for the venue to be changed, the directors should consider moving the meeting to a more suitable and accessible venue for example, the chairperson's home.

## Adjourn

Where the Constitutional Documents do not contain provisions allowing a company to postpone its general meeting and/or switch to an alternative venue and the notice has already been issued, a company may consider adjourning the general meeting to a later date. However, this would require a quorate meeting to be held. If this is not practicable due to the lockdown being extended and/or tightened, companies should take advice on the best course of action in the circumstances.

## Proxies

For general meetings, subject to the Constitutional Documents, the ability for shareholders to appoint a local proxy or a corporate representative will be of assistance to those unable to travel, attend or vote at a shareholder meeting.

## Proceed via electronic or telephonic means of communication

Guernsey law facilitates e-communications and therefore, if face-to-face meetings are not possible due to the current lockdown rules, a company can hold its general meeting by telephone or other electronic means, eg conference calls, Skype, WebEx or Zoom (although consideration should be given as to whether this is practicable given the likely number of participants). While telephone or video meetings may be an option, it is still important to check the Constitutional Documents to see what other restrictions exist (if any).

If a company is not restricted from holding its general meeting by telephone or other electronic means, it is important to consider the key legal and practical requirements, including:

- ensure that each shareholder participating at the meeting can hear and speak to each other, and
- the notice of the general meeting must include all information necessary for shareholders to participate via the chosen electronic platform

## Written resolutions

If face-to-face meetings are not possible, as is the case presently, or proceeding via e-communications is not practicable, written resolutions of the shareholders may also be passed subject to the Constitutional Documents. In such case, the written resolutions can be executed in counterpart, and may be executed electronically.

## Contingency planning and practical considerations

Subject to the Constitutional Documents:

- if a company has already issued its notice confirming the venue for a physical meeting, the directors could issue a supplementary notice and/or an announcement notifying the shareholders that the format of the meeting has changed for example, the meeting will now be held via telephone or video conference
- the company could establish a dedicated area on the company's website to include details of arrangements for the meeting and to update the shareholders of any developments and/or market announcements. The shareholders should be encouraged to monitor the company's website
- shareholders should be discouraged from attending a physical meeting and should be encouraged to submit their proxies as soon as possible ahead of the general meeting and within the prescribed time set out in the Constitutional Documents
- ensure that the general meeting will be quorate
- make shareholders feel involved where they are unable to attend, for example live stream the general meeting (if possible) and/or give the shareholders the opportunity to post questions related to the business of the general meeting

## Considerations to make before holding a remote board meeting

As noted above, there are no restrictions on where meetings, including those of the board of directors, can be held or the manner in which it can held under the Law, subject to a company's Constitutional Documents.

*Do the Constitutional Documents permit a 'remote' board meeting where all directors attend virtually through telephone, video link or other web hosted or telecom method?*

A thorough review of the Constitutional Documents of the company should be conducted. In particular, in relation to the proceedings of the directors and how they should conduct board meetings. If the Constitutional Documents are silent, or expressly restrict a remote board meeting, an alternative route must be explored, including either amending the Constitutional Documents or alternatively a written resolution of the board.

*Do the Constitutional Documents allow directors to attend from a location outside of Guernsey?*

The Law does not restrict the location of a director attending a board meeting electronically or physically however this may be a concern for some companies with regards to their economic substance requirements (if applicable), ie in relation to director attendance at meetings from outside of Guernsey.

It is important to note that economic substance will not be impacted if Guernsey based directors are attending virtually by telephone or video link.

The Guernsey Revenue Service has confirmed that it will be making allowances in light of the global pandemic with regards to substance requirements. Notwithstanding, it is imperative that well documented records are maintained to show what travel policies and restrictions were in place and for how long, meaning that strict substance requirements could not be maintained during the time in question. Further information can be found in the GIBA industry briefing [here](#).

Our full update on complying with economic substance requirements, including additional considerations for regulated companies, can be found [here](#).

Where non-Guernsey resident directors that would normally travel to Guernsey to attend a board meeting are unable to do so, the Company should consider:

- is this a one off? Substance requirements state that there are times when meetings may need to be held overseas and this will not alone breach the requirements
- is it possible to appoint alternate directors on island who can attend from a Guernsey address?

The Constitutional Documents may require that the majority of directors attend a board meeting physically in Guernsey to form the necessary quorum. In this instance, it may be necessary to appoint more directors locally or make arrangements to appoint local directors as alternates. If however, a company is regulated locally, the appointment of an alternate director will require the prior consent of the local regulator, the Guernsey Financial Services Commission (the **Commission**). This option needs to be considered as early as possible, particularly if the proposed director is not already known to the Commission (as the consent process will take longer). That being said, in view of the current situation resulting from COVID-19 and the possible need to appoint alternate directors to Guernsey licensees at short notice, the Commission has indicated that it will expedite the process in relation to individuals already known to it.

*Does a video recording of the meeting constitute a minute of the meeting?*

No. ICSA has recently released guidance and has strongly suggested that the technology to record meetings should **not** be adopted as a convenient alternative to properly minuted, in the moment minutes. It is imperative that if you are holding a meeting virtually, minutes are made and written up in a timely manner. This may well mean adapting the timing and format of a board meeting. Full guidance can be found [here](#).

*Could the business of a meeting be better dealt with by a written resolution of the board?*

Provided that the Constitutional Documents permit it, directors can pass the same resolutions that can be passed at a board meeting, by written resolution. If the Constitutional Documents are silent, then all

directors will need to sign the written resolution. Written resolutions should also be circulated to all directors even if only a majority are required to sign under the Constitutional Documents.

The Law requires that a director disclose the nature and extent of any interest in a (proposed) transaction with the company. Applying this to a written resolution, each director must have disclosed to each other any interest, direct or indirect before circulating the execution version of the written resolution. If a director has an interest which has not already been declared, the director in question should provide the requisite information to complete a disclosure notice a copy of which is attached to the written resolution. If the Constitutional Documents do not permit the director to vote (as a result of his interest) but require all directors to sign the written resolution (or are silent), then a meeting should be convened instead as the written resolution may not be valid unless all directors sign it.

Moreover, to ensure good governance, certain factors should be considered as to whether a board meeting may however be more appropriate.

*Are the proposed resolutions part of a wider, already considered transaction or are they a new proposal/transaction?*

Where the business of the meeting has already been discussed at an earlier date by the board and the resolutions required are more of a formality rather than a new proposal, it may be appropriate to deal with the matter by written resolution, referencing previous meetings where the transaction has been discussed at more length.

*Is the matter time sensitive?*

The circulation of a board resolution for signing will only be valid once the last director has signified his agreement by signing and returning the board resolution, and as such there could be delays in receiving back all signatures. Should timing not be critical, written resolutions may be beneficial and more appropriate in the circumstances.

*Is the board located across different time zones?*

If the directors of the board are current in lock down globally and in different time zones, it could be challenging to find a mutually convenient time for all directors to attend. If this is the case, it may be prudent to consider and approve the matter by written resolution.

### **Ensuring decision making capabilities are not disrupted by incapacity**

The unfortunate reality of the global COVID-19 pandemic is that some people may become infected. As part of a robust business continuity plan, it is important to ensure that decisions can still be made in the event an officer of a company, be that an individual director or the officers of a corporate director itself, becomes incapacitated affecting the ability of the company to make key decisions or sign important documentation. Ultimately, each company's circumstances will be different and the Constitutional Documents should be checked for any delegation restrictions that may apply before making any changes to the company's business continuity plan.

Measures that may be considered to mitigate disruption risk include:

- **pass a board resolution now** authorising named individuals to make decisions on behalf of the company, to sign documents or to otherwise have the authority to bind the company regarding certain specified matters
- **grant a generic or limited power of attorney** appointing a specified person or group of people to act as attorneys of the company for a defined period of time, for example, three to six months given how COVID-19 seems to be tracking. A power of attorney is similar to the rationale behind a board resolution but is a more formal measure (which may be required by some counterparties such as lessors and banks) and will almost certainly be required in the event a company needs to execute a document as a deed
- **appoint an alternate director** (as noted above) to enable the board to continue to meet and make decisions and for the company to sign relevant documentation addressing any short-term practical difficulties arising from COVID-19 (and indeed other unforeseen eventualities)

## **Key things to cover in your board meetings and document clearly in your board minutes**

### **Documenting how each director is in attendance**

A point that may seem obvious, but it would be prudent to ensure that on a board minute, where a director is attending by telephone, video link, Zoom or the like, this is clearly marked next to their name.

### **Documenting Quorum**

While this is usually common practice, it is imperative in these times to ensure that not only is quorum considered before a board meeting is declared open but that the consideration of how the quorum has been met is documented in the minutes of a meeting. It is good practice to ensure that as much information as possible as to the decision making and logistics of a virtual meeting is included in the board minutes.

### **Documents to be tabled**

It would be beneficial to include a paragraph in your board minutes to clarify that the documents 'tabled' to a virtual board meeting have been received and read. If sent by email, documenting in the minutes the date of the email, the recipients and asking those present that they have received the documents to be tabled before business is commenced would streamline a virtual meeting.

It may be beneficial for the person circulating board packs or documents to be tabled to request read receipts for the Company's records.

### **Further amendments to tabled documents**

The board and reflective minutes should be clear whether the documents that are being approved are in final form or still in draft form and whether the board would be comfortable to any material or immaterial amendments being made to the drafts that a director signing a document could approve. If this is the case, when authorising a document, the board should specify that not only is a certain person/persons authorised to sign, but that they are also authorised to agree to any amendments to any tabled documents, within such parameters that the board is comfortable.

While this is always good practice, at a time where it may be more challenging to convene board meetings at short notice, it is imperative to deal with as many points in the meeting to conclude matters as possible and ensure that all practicalities are considered.

### **Authorising and directing a named person to update registers, records or Company books, as appropriate**

Whether security is being given to a lender, shares are being issued or a director is making a drawing, it is imperative that at these times the records of the Company are kept up to date.

By ensuring that the board meeting and corresponding minute directs a certain person to undertake this task, there is no ambiguity as to who would be taking the responsibility. This is especially important at a time where boards are disbursed and a company is not conducting business from its registered office or other centralised location where the books of the company may be physically at the meeting.

### **Approving the execution of documents by electronic signatures**

While the Electronic Transactions (Guernsey) Law, 2000 recognise electronic signatures as legally valid, binding and enforceable where the signatory signs relevant document with an intent to authenticate it, it would be prudent to expressly authorise execution of documents by electronic means. This would include the attachment of a signature electronically to the appropriate document.

## Contacts

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