

UPDATE

What Practical Measures can you take to mitigate the impact of COVID-19 on your transactions – 2021 Update

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The impact of Coronavirus (COVID-19) has sparked uncertainty with completing complex cross border transactions. With containment measures prevalent, including quarantine and travel restrictions, clients with Jersey or Guernsey companies have been taking some practical steps to overcome barriers during these disrupted times.

Adopting practical measures to mitigate the impact of COVID-19

COVID-19 has created an unprecedented set of challenges globally which are likely to subsist well into 2021. Yet many businesses with Jersey and Guernsey companies have successfully continued with their transactions by adopting practical measures to mitigate the impact of COVID-19 on their transactions.

How can I hold board meetings if we cannot meet face-to-face?

Under Jersey and Guernsey law, subject to a company's memorandum and articles of association/incorporation (the **Constitutional Documents**), there are no restrictions on where a meeting of the board can be held. With current travel restrictions and imposed remote working becoming more prevalent, having face-to-face meetings may not always be possible and a great benefit of Jersey and Guernsey law is that both can permit meetings of directors to be held by telephone or by other electronic means – so long as all persons attending can hear each other communicate (for example, conference calls, Skype, Teams, WebEx or Zoom calls).

Whilst telephone or video meetings might be helpful, it is still important for you to check your Constitutional Documents to see what other restrictions exist. For example, your Constitutional Documents may require that the majority of directors must attend a board meeting physically in Jersey or Guernsey (as the case may be) to form the necessary quorum. This can be for a number of reasons, for example, to maintain the company's local tax residency or to meet Jersey or Guernsey's economic 'substance' requirements.¹ It follows that if your non-resident directors are unable to fly to Jersey or Guernsey (and your board cannot form a quorum), then you may need to consider:

- appointing more directors locally; or
- arrangements to appoint local directors as alternates,

to form the appropriate quorum. These new arrangements will likely take time to consider and implement. In such cases, it is best to discuss your situation with us and we will help find a solution. It is also worth bearing in mind that if your company is regulated locally, the appointment of a new director or alternate director may require advance consent and vetting by the local regulator. This should be considered early as part of your transaction timetable.

In some cases, we have helped clients who found that their Constitutional Documents were outdated and unduly restrictive about where directors should be located during board meetings. There are of course many circumstances where geographic restrictions are necessary; but where this is not the case we can

¹ Please see our updates and guides on economic 'substance' requirements at: <https://www.mourant.com/services/economic-substance.aspx>

help you update your Constitutional Documents so that they reflect a flexible regime for meetings which is suitable for your company.

Subject to a company's Constitutional Documents, written resolutions of the directors may also be passed. In such case, the written resolutions can be executed in counterpart, and may be executed by electronic signature (see below for more discussion on electronic signing).

Helpfully, Jersey's Comptroller of Revenue has recognised the disruption that COVID-19 has caused to Jersey companies and has offered some re-assurance to those companies having to make adjustments to compensate for the COVID-19 outbreak. On 11 March 2020, Jersey's Comptroller of Revenue has confirmed that where a Jersey company's operating practices have to be adjusted to compensate for the COVID-19 outbreak, the Comptroller will not determine under Article 6 of the *Taxation (Companies- Economic Substance) (Jersey) Law 2019*, that a company has failed the economic substance test. This treatment will only apply to adjustments to a company's normal operating practices and to the extent required to mitigate the threats from the outbreak. The illustration given by Jersey's Comptroller of Revenue is as follows:

'... where a company would normally hold directors' meetings in Jersey but, to avoid travel or because individuals are self-isolating, these meetings are temporarily held virtually to allow those individuals – or alternatives - to attend. The Comptroller would not regard this as failing to meet the economic substance test.'

It is worth noting that in early January 2021, Jersey's Comptroller of Revenue published a draft statement which has been the subject of industry consultation. The statement is expected to be issued formally in due course and provides further clarification on its approach going forward. In summary:

- the concession will be relevant to the "directed and managed" test and will not apply to other elements of the economic substance tests, such as the conduct of core income-generating activities in Jersey;
- it is expected that the company should continue to have the adequate employees, expenditure and physical assets in Jersey as required by Article 5(2)(b) *Taxation (Companies- Economic Substance) (Jersey) Law 2019*.
- any company seeking to rely on the concession should ensure that it is keeping sufficient records which evidence the changes that have been made to its normal operating practices and evidence the underlying reasons for these changes; and
- companies relying on the concession will be required to disclose this fact in their 2020 tax return.

While this concession offers practical solutions that will help many Jersey companies, it may not solve all of the issues facing those Jersey companies that have specific director quorum and/or attendance restrictions 'hard-wired' into their Constitutional Documents. Any requirements contained in the company's Constitutional Documents must still be complied with. Again, in such cases it would be best to discuss your situation with us and we will help you find a solution.

What about holding shareholder meetings?

In general, the guidance described above in relation to holding director meetings and passing written resolutions applies equally to shareholder meetings and written resolutions. Jersey law provides for a significant degree of flexibility, but the provisions of a company's Constitutional Documents will be crucial and must therefore be carefully checked to ensure compliance with any applicable restrictions.

In practice, a company with a small number of shareholders will rarely (if ever) hold a shareholder meeting as it is more administratively convenient for relevant decisions to be made by written resolution. But where it is necessary or desirable for such a company to hold a physical shareholder meeting in Jersey or Guernsey, 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.

For a company with a wide shareholder base (in particular, the large number of Jersey and Guernsey companies with shares listed on a major shareholder exchange), holding a physical meeting will, in most cases, remain necessary if a shareholder resolution is required. A high degree of shareholder attendance and interaction is normally to be actively encouraged at such meetings but the reverse is true whilst COVID-19 related travel and gathering restrictions remain in force: a responsible company should discourage and restrict physical attendance at a shareholder meeting and encourage shareholders to utilise proxy arrangements to cast their votes instead.

Three important consequences follow from the current state of affairs:

- with most of its shareholders prevented from attending, a company must take steps to ensure that any such shareholder meeting remains duly convened and validly held having regard to relevant provisions of the company's Constitutional Documents and the law (market practice developed over the past year has involved holding a 'closed meeting' with the minimum quorum for the meeting satisfied through the attendance of directors or other senior management of the company, each such person being a shareholder or a proxy for a shareholder);
- if possible, alternative mechanisms for contemporaneous engagement between the board of directors and shareholders should be adopted in lieu of the opportunity for dialogue afforded by a physical meeting; and
- due consideration should be given to whether the immediately contemplated and/or any future meeting might be held wholly or partly using videoconferencing technology (i.e. 'virtual' meeting).

The Constitutional Documents of most companies will not adequately facilitate such arrangements in practice. Should a company wish to consider moving toward holding 'virtual' meetings it will normally be necessary for it to make amendments to its Constitutional Documents and to invest in a robust technology platform that will permit shareholders to participate in the business of the meeting and to cast votes when resolutions are proposed.

If I cannot get to a signing meeting, or my office is closed, or if I am quarantined, how can I execute transaction documents?

Appointment of Attorneys under a Power of Attorney

One issue affecting clients is the availability of having one or more signatories available to sign transaction documents. This can prove challenging due to travel restrictions, flight cancellations, limited access to technology or the unavailability of multiple signatories to attend to sign together. You should consider at the early stages of a transaction whether appointing attorneys would be appropriate. This can help ensure your attorneys are in the right place at the right time to execute the transaction documents for your transaction.

Depending upon the nature of the documents to be executed, any specific execution formalities and the company's Constitutional Documents, a power of attorney may not even be necessary – for instance, both Jersey and Guernsey companies can approve the use of 'authorised signatories' to sign transaction documents on behalf of the company, even if the signatory is not a director or officer of the company.

It is also important to identify early on whether documents need to be notarised, so that an appropriate notary can be located. We have recently experienced delays on transactions because of the inability for signatories to meet face-to-face with notaries, or when notaries have been unable to access their offices where their notarial stamps are stored. Some jurisdictions will permit e-notarisation or notarisation by way of video-conference, which may be beneficial under current circumstances.

Electronic Signatures

With containment measures being implemented globally, an unprecedented number of people are working remotely – often with limited access to print execution documents. This poses a challenge to directors of companies who may be required to execute transaction documents or board resolutions in anticipation of closing a transaction. Using electronic signatures to sign documents (whether transaction documents or board resolutions) can help overcome some of these difficulties. Electronic signing typically involves either affixing an electronic signature to a contract, which is then emailed to the other contracting parties, or the use of encrypted e-signature platforms such as DocuSign.

The Electronic Communications (Jersey) Law 2000 and the Electronic Transactions (Guernsey) Law, 2000 recognise electronic signatures as legally valid, binding and enforceable where the signatory signs the relevant document with an intent to authenticate it. In Jersey, other rules apply if contracting with a States of Jersey entity.

Generally, agreements and written resolutions of directors or shareholders can all be executed and witnessed electronically (provided that the terms of the agreement and the Constitutional Documents do not prohibit it). A witness should, however, be physically present (ie at the same computer terminal) with the signatory when the signatory signs the document and it is recommended that the form of attestation

reflects this (eg by stating 'signed by [name of individual] in the physical presence of'). The witness must also sign the same counterpart of the document as the signatory. Where a document requires the affixing of a common seal, an electronic seal of a Jersey and Guernsey company can be affixed if permitted by the governing law of the document and the Constitutional Documents. However, in the case of Jersey or Guernsey law governed agreements it is not recommended that sealing is used as a method of execution unless the statute imposing the sealing requirement has been amended to permit electronic sealing.

It is recommended that the practice of an individual authorising someone else to affix the individual's electronic signature to a document should be avoided as it may, in certain circumstances, invalidate the execution (particularly if the signature must be witnessed). Similarly, it is recommended that where a contract is being formed by exchange of emails (ie where the terms of the contract are set out in an email chain rather than in an agreement), the persons exchanging the emails personally type their name at the bottom of each email even where their name is inserted as part of a standard sign off. Failure to do so might result in the contract not being binding.

Traditional wet-ink signatures

Early on in a transaction, it is recommended that you check if any documents require traditional wet-ink signatures. These may still be required for a limited number of Jersey or Guernsey documents with special execution formalities e.g. wills and for contracts for the transfer of interest in real estate, certain powers of attorney, documents that need to be notarised (depending on the laws of the relevant jurisdiction) and any other agreement that is specifically required by law to be made under hand. Tax and enforcement considerations and filing requirements may also mean that it is prudent or necessary to use wet-ink signatures and in certain cases, non-Jersey or Guernsey documents with banks and financiers may also still require wet-ink signatures. If that is the case, additional time should be factored in to ensure that signatories are able to receive and send back original documents.

What other factors might delay the closing of my transaction?

Due Diligence

Physical data-rooms and on-site inspections of records are still sometimes used for conducting due diligence in connection with a potential transaction or financing. Corporate entities, investment funds and services providers (particularly corporate and fund administrators) should be alive to the difficulties of conducting physical due diligence, inspection or file hand-overs under current circumstances, and the impact this may have on the timing of a potential transaction. It may now be more practical to upload documents into a virtual data-room to ensure access and to agree the delivery of physical documents post-transaction.

Original Documents

Where the closing of a transaction is subject to receipt of certain original conditions precedent (for example, original share certificates pursuant to a share security), parties need to be mindful of, and prepare for, potential delays caused by not being able to access couriers in a timely fashion or not having counterparties in their offices to receive documents.

Out of Adversity Comes Opportunity

COVID-19 has created an unprecedented set of challenges globally, but by taking some simple practical measures, businesses with Jersey and Guernsey companies can mitigate the impact on their transactions.

This crisis presents opportunities for legislators and businesses to embrace technology to improve business continuity – perhaps by better enabling remote working and creating further efficiencies in transactions (eg even greater use of electronic data rooms and efficient e-signing platforms). Indeed, some of the measures increasingly being adopted by the business community may catalyse the evolution of best working practices for the future.

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