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Virtual Meetings

Good Practice Considerations

Abstract

As a result of the COVID-19 pandemic, remote working arrangements have become the new norm. Most boards and shareholders will be used to teleconference/telephone meetings to deal with urgent business or where it is not practical to hold physical meetings due to parties being spread across multiple jurisdictions. Popular virtual meeting applications are gaining popularity, but each have their relative advantages and drawbacks, as well as security risks.

This briefing summarises some of the legal and practical considerations that organisers and participants should take into account when holding virtual meetings. It is particularly aimed at board members and shareholders, but the principles can also be applied to general remote working considerations which employers may find particularly useful.

Preliminary considerations: validity

The Companies Act 2014 (the "Act") does not seek to interfere with how directors and shareholders manage their business. The topic of 'Meetings and proceedings' is covered in Chapter 1 of Part VI of the Act. Certain notice requirements are prescribed, as well as provisions relating to voting and quorum to such extent as the memorandum and articles of the company do not make other provision in that behalf.

The starting point should therefore be to consider the articles of association, but companies should also consider the

prescriptive requirements under part VI of the Act where there is any doubt or the articles are silent. For example, publication of notice of meetings on a website is covered in detail under s.197 of the Act.

Many companies will have taken advantage of the available model memoranda and articles prescribed under the Companies (Model Memoranda and Articles) Regulations 2014. Virtual meetings are envisaged in such model documents and therefore have validity. Historic common law debate surrounding the validity of virtual/telephone meetings has now settled and although there is no specific authority, English courts appear to have accepted that board meetings can take place provided the articles do not preclude it and that directors are in agreement^[1]. Such jurisprudence is likely to be followed by Gibraltar courts.

Taking the most popular form of company as an example, the model articles for a private company limited by shares prescribe in Parts 2 and 4, respectively, decision-making by directors and shareholders. For director (i.e. board) meetings, it is vital that participants are able to effectively communicate any information or opinions they have, and it is irrelevant where any director is or how they communicate with each other.

Similarly, for shareholder meetings, participants must be able to exercise the right to speak and communicate any information or opinions to all those attending. Equally, they must be able to exercise the right to vote, and the

directors have flexibility to make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak or vote at it. Again, it is immaterial whether two or more attendees are in the same place as each other, provided they have the chance to speak and vote.

Many companies will have tailored articles, which may take inspiration from the model articles, but with deliberate omissions/replacements. It is therefore important for note that the individual circumstances of each company will likely differ.

Given the 2014 versions of the model memoranda and articles replace the older "Table A" style articles contained in the previous Companies Act 1930, companies established prior to November 2014 may therefore need to revisit their constitutional documents to ensure virtual meetings are valid.

Although this briefing is not meant to offer legal or tax advice, companies are encouraged to seek appropriate professional advice on 'substance' and tax implications that could arise where meetings are conducted outside of Gibraltar. Regard may be had to where the majority of directors are located, or where the Chairman is located for example. Certain articles may also contain prescriptive requirements in this regard. In any event, adequate records should be kept, including minutes, covering where directors were located and the means of communication used.



Preliminary considerations: choosing the right communication channel

- Presently, the most popular platforms appear to be.
 - Zoom
 - Skype
 - Google Hangouts
 - Microsoft Teams
 - Citrix GoToMeeting
 - Cisco WebEx
- Some platforms require pre-installation (requiring IT input), and others are browser or cloud-based allowing instant access.
- Some platforms are more intuitive and easy to use than others.
- Additional features, such as functionality for hosting webinars, screen-sharing, live 'annotation' and 'whiteboarding', virtual backgrounds/camera effects, and live (written) chat. Note many of these 'premium' features will likely involve additional cost.
- Some platforms have time limits on meetings.
- Security should be the primary consideration. All meetings should be password protected or have confidential 'meeting ID' codes.

Preliminary considerations: preparation is key

- Given that notice is such an important element, this should be meticulously checked in the articles/applicable law to ensure the meeting is not nullified. Note that email notice may not always be

permissible, and in any event, it is prone to phishing/cyberattack.

- Express consent of all participants to a virtual meeting can also be requested in writing (i.e. not merely assuming that they consent via attendance).
- Does everyone have the technological knowhow and expertise required? Not all attendees may be as tech-savvy as the organiser. In any case, it may be wise to issue clear joining instructions.
- Test technology ahead of time and ensure everyone has installed any required software beforehand.
- Consider if lengthy documents can be provided beforehand.
- Consider adoption of 'ground rules' on conduct at virtual meetings.
- Consider time zones.
- Limit the number of non-essential participants.

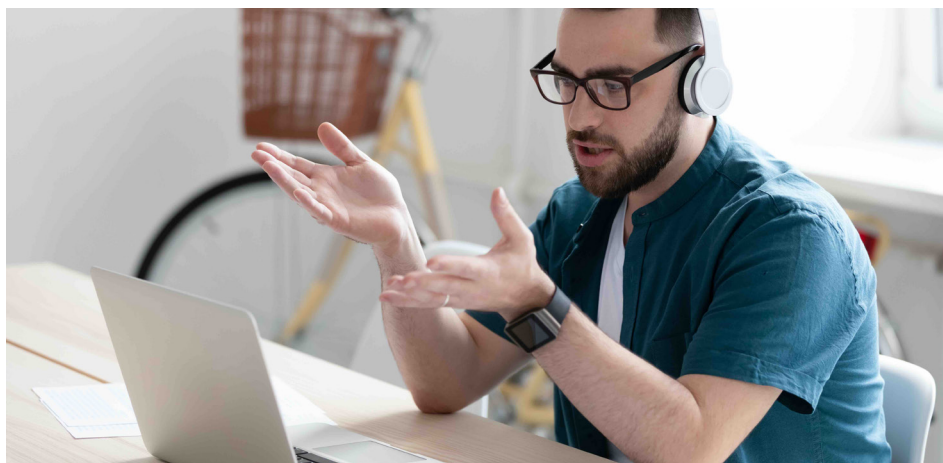
At the meeting: structure

The articles of a company will not usually lay down prescriptive rules for conduct. Instead, it will be crucial that attendees can speak, be heard and vote. The Chairman's role in controlling the meeting, and ensuring all relevant issues are discussed remains just as important (if not more important) as in the case of physical meetings.

- Matters requiring a vote should be clearly identified.
- The correct procedures for voting should be identified and ideally explained before or at the beginning of the meeting. Articles may allow for a poll to be demanded or voting a show of hands, and the Chairman will need to consider how to make a note of votes cast.
- Going 'round the virtual room' with each attendee may be useful practice for the Chairman, to avoid participants speaking over one another or dominant characters to take control of the meeting.
- Allocating timed segments on topics could also accommodate shorter concentration spans and keep everyone engaged.
- The 'seat' of the meeting may be where there is a quorum present in any one location, and this could have substance issues as discussed above. If there is no quorum in any single location, the minutes should clearly state the meeting was conducted 'by teleconference' / 'virtual means' or similar wording, identifying the participants and containing a reference to the relevant article relied on.
- The ability to perceive social cues and body language will be somewhat limited. The Chairman should make others mindful of this and ensure attendees are respectful of others (e.g. not typing or eating snacks while others are talking).

At the meeting: what if things go wrong?

- For board and shareholder meetings, it is essential that each participant is to contribute their opinion and can hear the contributions made by others. Voting capability must also be equal for all participants. Some platforms have an electronic voting process that could be utilised.



- The Chairman's role is crucial in continuously checking if anyone is having issues, but attendees are equally responsible to report problems (e.g. using live chat / text or instant messaging).
- Live chat may be used or the Chairman/secretary may take contemporaneous notes of votes cast to avoid connectivity issues arising during certain key moments.
- Data protection and other considerations should be considered (e.g. sharing participant locations), along with preserving the confidentiality of the company's affairs. Check that participants are alone when participating. Some platforms allow audio/visual recording of meetings, but this must remain compliant with data protection laws. Circulation of sensitive information should be encrypted where possible. Ensure no confidential materials are visible to participants' webcams.
- The importance of good minute taking is also crucial, with post-meeting circulation to all attendees for comment and approval.
- Meetings may be able to proceed where a quorum is present. Consider whether it is possible to have that at the registered office, but also what will happen if the meeting 'host' or Chairman drops out.
- Postponement/adjournment may be inconvenient, but could be a redeeming feature with respect to validity of the meeting. Do not hesitate to postpone if there is risk of loss of quorum and/or breach of the articles.

- Adequate notice may also need to be reissued in case of adjournment/postponing.
- Some platforms have a 'dial-in' option, providing a useful backup in case internet connection is unstable.
- Meetings may need to end where security is compromised, as evidenced by recent cases of a new phenomenon known as 'Zoom bombing'.

Other technical considerations and alternatives

- Be wary of audio/feedback and background noise issues, which can be easily avoided by asking participants to mute their microphones when not speaking.
- If the meeting is partially virtual, be mindful that virtual participants may not be aware of discussions between persons in the same room.
- A big challenge in virtual meetings is getting everyone actively involved. The Chairman, or a facilitator, should encourage this as much as possible.
- Park questions if need be for later in the meeting, but ensure they are noted (perhaps in the live chat or any question or 'raise hand' features of a platform) and addressed.
- If virtual technology fails, a telephone meeting may provide a suitable alternative, provided the articles allow this. Articles may also allow for written resolution processes. Avoid uncertainty of 'email meetings', which arguably are not meetings.

Key takeaways

- Check the articles first, but also check the Companies Act for prescriptive requirements. Meetings should be called in accordance with the articles, and the importance of valid notice cannot be overstated. Older articles may be in need of review and updating where necessary to allow for virtual meetings.
- Choose a communication channel you can trust, but also see if the technical capabilities/features are sufficient (e.g. screen sharing). Avoid overly complex platforms and always ensure security of the meeting is not compromised.
- Being prepared is key. Ensure there is a clear agenda and pre-meeting information is supplied on conduct or 'ground rules', covering FAQs on accessing the meeting, speaking, voting, losing connection etc. Perform a dry run before hosting your first virtual meeting.
- Note certain substance requirements and take professional advice on these where necessary.
- Even where articles envisage virtual meetings, it is important to evidence proceedings and either record the meeting or take contemporaneous notes in case future doubt or confusion arises.
- Monitor data protection requirements, and preserve confidentiality of proceedings by ensuring participants are alone when they participate.
- Those who wish to read further may refer to recent guidance published by The Chartered Governance Institute, containing further recommendations and model documentation[2].

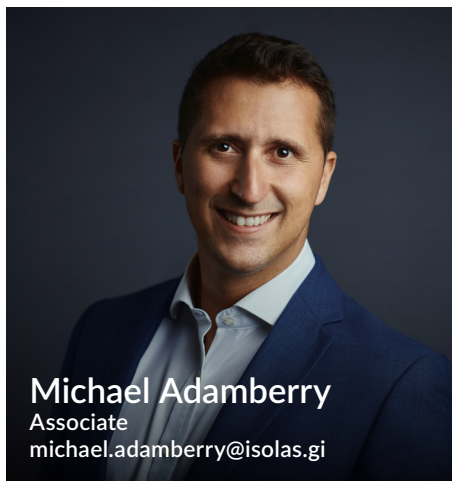
Here to help

If you are in doubt as to how whether your company can conduct valid virtual meetings, or how best to do so, ISOLAS is on hand to assist with any general queries you may have. Please contact the authors below for further information.

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[1] See *Re Equiticorp International plc* [1989] 1 WLR 1010, *Hunter v Senate Support Services Ltd* [2004] EWHC 1085, *Byng v London Life Association Ltd* [1990] Ch 170, and *Sneddon and another v MacCallum and others* [2011] CSOH 59, as well as Australian authority such as *Re Giga Investments Pty Ltd* [1995] FCA 1351.

[2] 'Good practice for virtual board and committee meetings: Guidance Note' (March 2020) – available at www.icsa.org.uk



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