
Briefing

Board Decision-Making: Can we not meet?



INSTITUTE OF DIRECTORS
IN IRELAND

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In circumstances in which it is inconvenient or impossible for the directors of a company to hold a directors' meeting, and where all of the directors agree about the proposed action, it may be possible for the directors to act by way of a written resolution instead of holding a meeting.

Unanimous Written Resolution

General

Under the Companies Act 2014 (the "Act"), unless the company's constitution provides otherwise, a resolution signed by all the directors entitled to receive notice of a meeting of directors will be as valid as if it had been passed at a directors' meeting duly convened and held. The Act similarly provides that, if the directors agree, it may not be necessary to give notice to any director who (being resident in the State) is absent from the State. Provided the constitution allows for use of the written resolution procedure, a resolution in writing signed by every director will be effective.

Written resolutions give the directors greater flexibility in making decisions, as they don't have to be present at a board meeting. This is convenient where the business to be transacted is purely formal, the directors are likely to agree to the proposed action and it would be difficult for the directors to meet.

The Requirements

Directors' decisions made by written resolution must be unanimous so that all eligible directors (being those entitled to vote on the relevant matter) must vote on it in the same way. So, unlike at a board meeting, the chairperson does not have a second or casting vote on any proposed action. It also will be necessary to consider quorum requirements (discussed below).

The written resolution can consist of several documents in like form each signed by one or more directors and will take effect from the time it was signed by the last director. This is to facilitate the passing of written resolutions where one or more directors is unable to sign the same piece of paper. The date of the resolution will be the date on which the last director signed. The document may be circulated electronically for signing but the original will need to be retained by the company with the board minutes, in the manner required by the Act.

Quorum

The company's constitution usually fixes whatever quorum is deemed necessary for the transaction of business of the directors. Even if every director who holds office is in a position to sign, no business can be transacted if the number of directors holding office is less than the prescribed quorum; however, such a sub-quorum meeting / written resolution is permitted if the company's constitution provides that the directors may act notwithstanding any vacancy in their number. The Act provides for a quorum of two as a default (this is despite the fact that an LTD can have a single director).

It will be necessary to check whether, under the constitution, a director is prohibited from voting (by reason, for example, of his or her interests) on a proposed action or cannot be taken into account for the purposes of ascertaining whether a quorum is present. It may be that a director can count as forming part of a quorum if the director's interest is not likely to give rise to a conflict of interest for the purposes of the proposed action.

The written resolution procedure can be used even if one or more of the directors (but not in aggregate being a majority of all directors) is not permitted to vote on a directors' resolution (for example, by reason of a conflict). In this instance the remaining directors sign the resolution and note the names of the directors who are not entitled to vote and the reason for that position.

In a UK case¹ it was held that the equivalent English law provision that allowed directors' written resolutions was intended to be used on occasions where a directors' meeting was not necessary. It was further held that the provision was not intended to allow directors to avoid the requirements of a quorum by passing resolutions when other directors had left the country and were therefore not (under English company law) entitled to notice of a meeting. It was held in that instance that the purported written resolutions were invalid.

¹ *Hood Sailmakers Ltd v Axford and Bainbridge* [1996] 4 All E.

Can all Company Directors use Written Resolutions?

Under the Act, the written resolution procedure may be used for both private and public companies. However, given that the management of private companies can sometimes be less formal, written resolutions are more commonly adopted in private companies. Additional considerations for the use of written resolutions instead of meetings may apply to directors of a company that is regulated by the Central Bank of Ireland.

An actual directors' meeting should be held where the business to be transacted is contentious or if, for any reason, it is anticipated that a matter will not be supported unanimously. Directors should always meet in cases in which they are making a declaration of the company's solvency as part of the summary approval procedure for restricted activities². However, if the company's constitution permits, electronic participation (audio-conference or video-conference) in the directors' meeting may be possible. The deemed location of these meetings may need to be considered for tax purposes.

Conclusion

While the directors' written resolution procedure is a valuable and efficient way of permitting the board to make decisions, it remains the case that directors must inform themselves fully and carefully when transacting all business on behalf of the company. Even if adopting the written resolution procedure from time to time, directors will need to hold a number of board meetings in which to conduct business (and the frequency of these meetings will also depend on whether the company is, for example, regulated by the Central Bank of Ireland). It is good corporate governance practice for a company to hold directors' meeting at which directors can debate, consider and challenge, as necessary, proposed actions.

Further information is available from



Garreth O'Brien
Partner
+353 1 607 1489
garreth.obrien
@mccannfitzgerald.com



Frances Bleahene
Senior Associate
+353 1 607 1466
frances.bleahene
@mccannfitzgerald.com

Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.



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Institute of Directors in Ireland, Europa House, Harcourt Street, Dublin 2
01 411 0010 | info@iodireland.ie | www.iodireland.ie

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