

CORPORATE ACTIONS IN A PANDEMIC

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CLIENT ALERT: COVID-19 CORPORATE ACTIONS IN A PANDEMIC

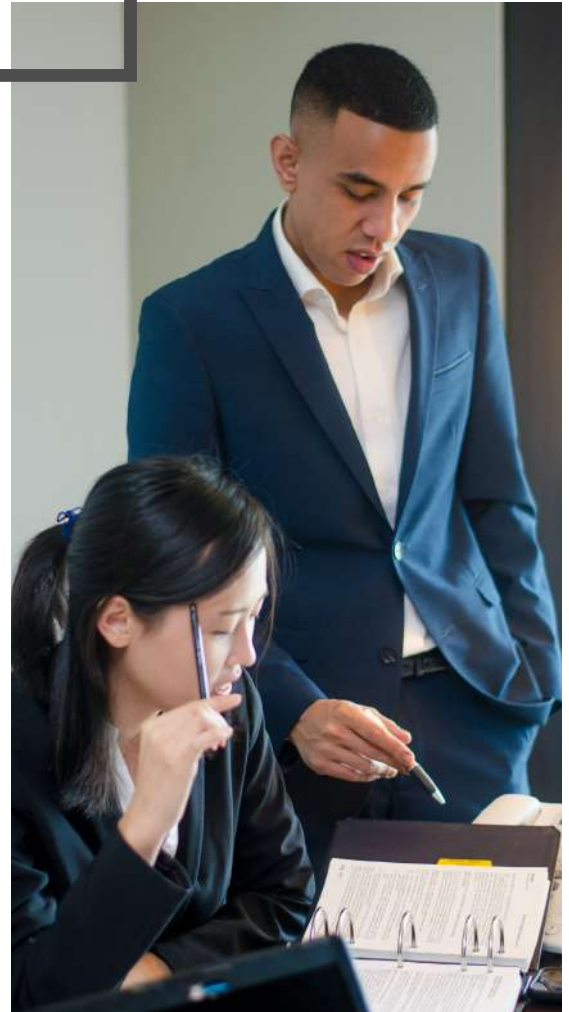
COVID-19 is changing the way the world does business, including in Malaysia. With the Movement Control Order (“MCO”) in place, companies that do not provide “essential services” must be closed, rendering physical meetings between shareholders and directors impossible. This poses challenges for companies as their obligations under contracts still need to be performed, and financial obligations to suppliers and financiers still persist. Needless to say, companies would still need to comply with requirements under their constitutions or the Companies Act when executing corporate actions.

Company personnel are turning to technology with applications like Zoom, Microsoft Teams and Google’s Hangouts Meet to meet with its employees and directors. Recently, the Companies Commission of Malaysia (“CCM”) on 16 March 2020 issued a press release asking all companies to consider other available options for meetings including electronic meetings at multiple venues. We look into how companies can be run and managed during this period:

1) PASSING A DIRECTOR'S RESOLUTION

For the directors to transact any business and enter into any obligation to bind the company, or authorise any payment to a third party, the constitution requires a board resolution.

A common hiccup companies are facing now is the signing of cheques – since companies usually require 2 or more directors approving payments of a certain threshold by having their signatures on a chequebook. With the restriction of movement even stricter now, this is a challenge. To avoid such inconvenience, companies could consider passing a directors’ resolution to authorise cheque signing by an appointed director for all transactions within threshold limits during the MCO period.



Passing a directors' resolution during the MCO – Is it possible?

Unlike shareholders' resolution, proceedings of the board of directors ("BOD") are governed entirely by the constitution of the company. The BOD resolution can be via a written resolution or by conventional BOD meetings. Can BOD resolutions be passed by holding a video conference meeting? If the constitution allows general meetings to be held via video calls, resolutions can be passed by the same way provided it complies with the requirements on quorum, notice, reserved matters, if any, and by its required majority. Provisions on meetings typically now contain these provisions, since many BOD members may be based overseas.

Written resolutions

For passing of written resolutions, the difficulty of obtaining signatures presents itself again. It has been common practice for directors' resolutions to be signed in counterparts, with the company secretary collating all duly signed resolutions. This would save valuable time as each assenting director can affix his or her signature in counterpart at the same time and have it mailed to the company secretary for collation and minuting.

Written resolutions can also be circulated in electronic form, and be transmitted to the electronic address of the director, if allowed by the constitution. With the advancement of technology, directors can even affix their signature digitally via toolkits like Adobe Sign, provided the electronic signature conforms to the requirements under the Digital Signature Act 1997.

2) PASSING A MEMBERS' RESOLUTION

With the introduction of **Section 327 of the Companies Act 2016 ("CA")**, companies can convene meeting of members at more than one venue using technology, provided this is expressly incorporated into its constitution.

Passing of members' resolution by public company

Although the CA does not limit the technology avenue to only private companies, holding of general meeting for public companies using this avenue would require a greater length of planning due to the shareholder size as members have to be able to exercise the members' right to speak and vote at the meeting.

"Companies Commission of Malaysia (CCM) asking all companies to consider other available options for meetings including electronic meetings at multiple venues."



CCM has recently released a FAQ on annual general meetings (“AGMs”)*, indicating the following:

a) Following the MCO, companies are required to cancel notices of AGMs and AGMs are to be held at a later date.

b) Applications for extension of time to hold its AGM submitted before 17 March 2020 will be processed after CCM offices re-open.

c) New applications for extension of time can be made after CCM offices reopens, despite the application being less than 30 days before the proposed AGM due date, a previous requirement set out under *Practice Note No. 3/2018 - Clarification On Application For Extension Of Time Under The Companies Act 2016*.

d) A moratorium period of two weeks will be given for all statutory filings or notifications when SSM offices re-open.

**The FAQ was published prior to the announcement of extension of the MCO period to 14 April 2020, therefore we assume that any references to 1 April 2020, being the date SSM re-opens would now mean 14 April 2020 or any other extended date thereof.*

Passing of members’ resolution by private company

Section 327 CA provides that the main venue of the meeting shall be in Malaysia and the chairperson “shall be present” at the main venue of the meeting.

How does this work in the new work from home reality?

Some constitutions set out that the place *where the chairman is present shall be deemed to be the main venue of the meeting*. With such wording in place in the constitution, virtual general meetings can be held via Zoom or any other electronic meeting channel provided that the chairperson is physically present in Malaysia.

Notice periods must be observed

In passing members’ resolutions during this MCO period, care should be taken to observe the notice period required under its constitution. As Section 316 requires a minimum 14 day notice period for the passing of ordinary resolutions, the notice requirement may pose a hindrance to matters that require members’ assent during the MCO. On the other hand, if the notice for general meeting has been served prior to the MCO, this avenue offers the flexibility in times like these. Notice of meetings can be given in electronic form by transmitting it to the electronic address provided by the member to the company for such purpose or by publishing on a website, unless this is specifically disallowed by the constitution (**Section 319 CA**).

Written resolutions

Aside from resolutions to remove a director or auditor, a resolution can be proposed as a written resolution by the board or any member. The CA allows for written resolutions to be circulated in electronic form and be transmitted to the electronic address provided by the member to the company for such purpose. The CA does not impose the requirement of signing the written resolution, although companies commonly deem only signed written resolutions as passed. **Section 306(1) CA** provides for a flexible procedure for signifying agreement to written resolution as follows:

A member signifies his agreement to a proposed written resolution when the company receives from him an authenticated document—

(a) identifying the resolution to which it relates; and

(b) indicating his agreement to the resolution

To provide an example of how the section could operate - a member can signify his agreement to a resolution by sending a letter or an email to the company secretary setting out his agreement to a particular resolution circulated. As the Act requires that the written resolution be accompanied by a statement informing a member as to the procedure for signifying agreement, it is good practice for the company to set out in the statement a more flexible procedure to encompass acceptance through emails to signed resolutions in electronic form, in an event like the MCO.

The usage of technology as a means for general meeting is still fairly new to Malaysian corporate environment considering the recently implemented CA. Its application is recently brought into forefront since the conventional avenue of physical meetings has been rendered almost illegal by the MCO. We hope that after the MCO period ends, CCM would consider providing further guidelines to clarify the operation the relevant sections of CA involving technological means.



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