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USE OF DIGITAL MEANS IN GOVERNANCE BODIES OF COMMERCIAL COMPANIES

by

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Among the first measures to be introduced when the state of alarm was declared in Spain at the beginning of the Covid-19 crisis was a relaxation of the rules governing the adoption of corporate decisions by the organs of administration of commercial companies, generalising the use of digital means for the holding of board and shareholder meetings, at least for the duration of the state of alarm.

Whereas the original measures eventually expired at the end of that period, in the following lines we briefly analyse the possible use of digital means in corporate discussions and decision-taking.

A recent Royal Decree-Law 34/2020 of November 17th has introduced some new temporary exceptions to the strict rules on the functioning shareholder and board meetings that will apply during the year 2021 to all types of commercial companies, which are discussed at the end of this note.

1. BOARD OF DIRECTORS' MEETINGS

(a) Calling of the meeting

The law does not specify the form in which board meetings must be called. Article 246 of the Capital Companies Act ("CCA") requires that they can be called by the chairman or by one third of its members.

Therefore, the corporate bylaws (or, failing that, the board itself in its own regulations) of each company have wide leeway in regulating the functioning of the Board.

With regard to private limited companies ("Sociedad Limitada" or "SL"[2]) it is required that the corporate bylaws expressly set out the rules of convocation as well as the way of deliberating and of adopting resolutions by the board.

Therefore, each company tends to use different ways of calling board meetings and many times it is made by individual communication means, principally e-mail (with confirmation of receipt), at the address communicated to the chairman for such purposes.

In very specific cases, such as in contentious companies, other more formal ways should be used, such as burofax[3] or registered letter return receipt requested.

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[2] SLs are private limited companies. This type of company is more suited for closely held companies, with fewer shareholders and less investment is required (threshold of 3,000 euros). The legal status of SAs is more suited to larger companies with a larger shareholder base and larger equity (at least 60,000 euros share capital).

(b) <u>Calling to order and holding the board meeting</u>

The CCA does not have any provision on the holding of the board meetings by digital means or distance voting, whereas it does expressly allow the use of such means for general shareholder meetings (articles 182 and 189 CCA).

However, the use of such digital means is widely recognised by reason of the Board's right to self-regulate (article 245 CCA) and it is recommended that this possibility, if recognised at all, be expressly contemplated by the corporate bylaws or in the Board's internal regulations. In the case of SL the corporate bylaws must by all means include all matters related to the board's convocation, constitution and manner of deliberating.

The following issues have been identified in digital board meetings:

(a) **Security leaks.** Under article 228 b) of CCA board members must ensure secrecy of information, data, reports or background information to which he has access in the performance of his duties. However, where digital devices are used it is more difficult to control unauthorised access by third parties (e.g. advisors, lawyers, family members, managers, competitors, suppliers, etc.) This is one of the reasons why physical meetings should be privileged in contentious companies and Board members should be warned beforehand of the prohibition to do this.

(b) **Unauthorised recordings.** Meetings are easy to record, but permission should be requested beforehand from all attendees or at least make sure there are no objections. However, it can be difficult to prevent unauthorised recordings, particularly if offline devices are used.

(c) **Conflict of interest.** Those members who are prohibited from participating in discussions and voting in those matters in which they are subject of conflict of interest (article 228 (c) of CCA) must be prevented from participating in discussions and voting on them. The connection system selected should therefore have a function which can block any board member who is subject to such conflict of interest and prevent him from deliberating, voting and hearing discussions. This can be difficult if this person happens to be the administrator of the system.

(d) **Remuneration.** Whenever any part of board member compensation is linked to attendance to meetings (article 217.2 of CCA) remote-access meetings must be subject to remuneration as well as in-person ones. Of course, any compensation for travel, lodging, meals, etc. must be replaced for costs of connection itself (including wi-fi, telephone, conference charges, etc.)

(e) **Personal involvement.** There is the danger that, being connected outside of the boardroom from their homes or offices, attendees may be distracted by day-to-day office or domestic tasks or interruption, such as replying to e-mails or calls while at the meeting, to the detriment of their involvement and contribution to meetings. Therefore, here lies one of the many advantages of in-person meetings.

As a result of the foregoing, even if a voice-only telephone connexion may be sufficient to guarantee the standards of the law, it is recommended to use more sophisticated means that will permit in addition video connection, the exchange and signing of documents, etc.

In addition, the system selected should have the following features:

[3] A "burofax" is a service offered by the Spanish post office which provides proof of service as well as of the contents and it is widely used in legal communications. They can be hand delivered or electronic.

(a) Allow recognition of the persons interconnected. Each attendee and, at the very least, the chairman and secretary should be able to recognise and identify each person connected. The system should also feature security mechanisms, preventing connection or access to any unauthorised persons who are not entitled to attend the meeting, in order to safeguard confidentiality;
(b) Must enable multiple and simultaneous connection with interaction, allowing full participation and mutual discussion and exchange of views, not only listening or voting.

Beyond these requirements it is also recommended for any selected communication systems (by themselves or in combination with others) to feature the possibility of sharing documents in real-time and also to enable the possibility of distance casting of votes (e.g. by e-mail) as well as signing remotely documents such as the annual accounts, board reports/memos, interim balance sheets, minutes of the meeting. For these purposes, the corresponding e-signature software (DocuSign, etc.) can also be useful.

(c) The adoption of board written or circular resolutions

The law continues to contemplate this option, which is particularly suited to those cases where there is no need to discuss a subject, but rather to adopt a decision which does not need deep discussion or has been discussed beforehand (e.g. convening a shareholders meeting, granting ad-hoc powers of attorney, authorising specific transactions, etc.).

This way of adopting decisions is only expressly recognised for SA companies under article 248 CCA (provided that no Board member objects to this procedure of voting and also it needs to be contemplated in the corporate bylaws) but there is general consensus that it is applicable to SL companies as well.

Of course, whereas the use this procedure does require the unanimous consent of all board members, the specific decisions proposed to be adopted hereunder do not need to be backed by all members and reaching the necessary voting majorities for the approval of each specific decision shall suffice. The letter of vote can be sent in by e-mail or fax or any other means of communication and it must be received within at most 10 days since receipt of the request for a vote from the Chairman (article 100.3 of the Commercial Registry Regulation).

Written resolutions can be adopted by means of a draft minutes including the draft decisions to be circulated to board members for successive signature or by their sending in of a letter with an identical contents, on whose basis the secretary will draw up the minutes.

However it is important to note that, to the extent that this type of decision-taking does not require a meeting, they do not count towards the minimum of four Board meetings that must be held annually, in accordance with article 245.3 of the CCA.

2. GENERAL SHAREHOLDER MEETINGS

(a) The calling of meetings

They are called by the board meeting or the administration organ, without possible delegation (article 166 and 249 bis CCA).

There are three different possibilities: (a) publication in the corporate website (unusual, given that corporate websites are only compulsory for listed companies and rare in non-listed companies); (b) publication on the Official Gazette of the Commercial Registry and/or a newspaper with wide circulation in the province of the company; or (c) more usually, written

and individual communication (e.g. "burofax"[4], registered letter return receipt requested, telegram, hand delivery, notarial requirement or even e-mail).

Sending of calling notices via e-mail is expressly permitted under a resolution of the General Directorate of Notaries and Registrars[5] for both types of company, SA and SL. However, shareholders should be asked to designate an e-mail address for such purposes, to be entered in the company's shareholder registry book and any such e-mailed notice should be complemented at least with confirmation of receipt.

(b) Holding of shareholder meetings

Article 182 CCA expressly permits the use of digital means to attend remotely general assemblies in SA, provided that this possibility is expressly contemplated in the corporate bylaws. Even if it is not expressly contemplated for SL, a resolution of the General Directorate of Notaries and Registrars[6] expressly allows it for them, subject to the same requirements.

The general requirements are these:

(i) Expressly contemplated and regulated in the corporate bylaws.

(ii) The system used must allow to recognise the persons connected and permit everyone's interaction with other attendees: "Remote attendees must have real-time knowledge of what is occurring and (...) shareholders must be able to intervene"[7].

(iii) A physical venue must exist to hold the meeting. Except where the corporate bylaws specify otherwise the meeting must be held in the location where the company has its registered office (article 175 CCA). Therefore in spite that all shareholders connect via digital means there must still exist a physical venue, which shall be the one set forth in the convening notice in accordance with the corporate bylaws (normally the registered office or the city it is in). In this way the personal attendance of those who prefer the in-person option is guaranteed.

(iv) Any information to which shareholders are entitled (article 182 CCA, for example Q&A) shall be delivered to them within 7 days from the meeting. It can also be delivered via digital means.

(v) If any attendee is unable to interact or be recognised or his connection is interrupted at any moment during the meeting, he shall not be considered as being present to the effect of attendance quorums and majority voting.

(c) Distance or mail voting - vote delegation

Other options to participate in the shareholders meeting without a physical presence:

(i) Vote delegation on another shareholder or a third party (this second option is more restricted in the case of SL companies) or even give him written vote instructions. This offers the risk that the representative may not eventually attend the meeting or even fail to abide by voting instructions, in which case the delegatee's vote will have full effect, without prejudice to the possibility for the grantor of the instructions to claim from the representative.

(ii) Distance voting. The best way to ensure the faithful issuance of the vote is the use of distance voting in advance, particularly suitable for minority shareholders who do not normally have influence on the setting of the date and place of the meeting. Article 189.2 CCA allows it for SA companies (extended for SL companies by several

[4] See previous note.

[5] January 13, 2015

[6] Resolution of the General Directorate of Registrars and Notaries, December 19th 2012

[7] Resolution of the General Directorate of Registrar and Notaries, December 19th 2012

GDRN resolutions) subject to express permission in the corporate bylaws. In addition, distance voting is:

- subject to proper guarantee of the voter's identity, in which case the vote can be cast by postal, electronic or any other means of communications, to the extent that they appropriately guarantee the identity of voter;
- The distance voter is considered for all purposes as being present in the meeting for the purposes of counting the attendance quorums, even if the vote has been cast with respect to only some and not all matters in the agenda;
- The vote should be best received at least 24h in advance to make sure that any issues or defaults can be solved beforehand, and results of the voting can be proclaimed during the meeting;
- Special care should be employed in sending to shareholders the post-meeting information contemplated in articles 196 and 197 of the CCA (e.g. Q&A).

(d) Covid-19 special measures for 2021

Exceptionally, during 2021[8], even in the absence of express prevision in the corporate bylaws, an "ad-hoc" Covid-19 exception shall enable SA companies to hold remotely shareholder meetings (by digital means) as well as distance voting, subject to the terms of articles 182 and 189 CCA. Also, shareholder meetings of SA companies can be held anywhere in the Spanish territory, whereas the norm was for the corporate bylaws to require holding them in the location where the registered office is situated.

For SL companies (even in the absence of specific prevision in the corporate bylaws and only during 2021) the same Royal Decree allows the holding of shareholder meetings by video conference or multiple teleconference and subject to extra conditions than SAs, namely that (a) *all shareholders* have the necessary technical means (b) these devices enable personal recognition by the secretary and (c) that minutes be immediately forwarded to all through their e-mail addresses.

3. SIGNING AND CONSERVATION OF MINUTES

With the approval of EU Regulation 910/2014 (eIDAS) in force since 2016, which distinguishes between simple, advanced and qualified signatures (depending on their level of technical sophistication and guarantee of authenticity) the use of the e-signature in corporate documents has increased significantly.

According to article 25 of the Regulation no document signed with either type of signature can "*be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.*"

In most cases, an advanced signature (produced by easy-to-use and widely available software, such as Docusign or similar) will be sufficient for the signing of any documents that do not need to be notarised or filed a public registry[9]. An advanced signature will also be a better option than a scanned signature, which offers little guarantee of authenticity.

An advanced e-signature can be used, for instance, to sign the list of attendance (for signature in real-time) and also after the meeting for the signing of the minutes of the board or shareholder

[8] Royal-Decree Law 34/2020 of november 17th

[9] In spite that notaries can certify the authenticity of electronic "qualified" signatures subject to them being present at the moment of signing (article 261 of the Notarial Regulation 1944), in most cases the "wet ink" signature of the chairman and the secretary (or other officers with capacity to certify) on the certificate of resolutions is still needed on documents that require notarization/registration.

meetings, after they are prepared by the board secretary. It is also an adequate means to sign any attachments to the resolutions, such as annual accounts, balance sheets, board reports, etc.

With the Act 14/2013 for the support of entrepreneurs and their internationalization it became compulsory to legalise electronically minutes books and the use of hard-copy paper binders became outdated for the keeping, conservation or annual legalisation of essential corporate documents, such as minutes books, shareholder registers, books of contracts with the sole shareholder, etc.