



## **Business Continuity in Challenging Times Meeting electronically; Circular resolutions**

### **A. Recommendations Summary**

1. Remove the requirement for one third to be in one place
2. Participants can be anywhere in the world, not just Thailand.
3. Entities (with the possible exception of listed companies) should not need to amend their constitutions to allow for electronic meetings
4. End the onerous security requirement and replace them with more simple rules which support fairness closer to those for in-person meetings (eg for other than listed companies, record of minute, but not both)
5. Reduce the liability of public officers for certifying compliance
6. Allow circular resolutions, with e Signatures.

### **B. JFCCT and enabling business / business continuity**

The Joint Foreign Chambers of Commerce in Thailand (JFCCT) has been serving the foreign business community for over 40 years. Our members have typically made long term commitments to the economy and society of the Kingdom of Thailand. We aim to contribute to the economy in positive ways, transfer knowhow and will avoid threats to the economy. With 34 chamber members covering some 9,000 companies, JFCCT is a respected voice.

Consistent with enhanced 'doing business' standings and aspirations for a Thailand 4.0, we also note the importance of ease of administration. Recent developments with a 'Guillotine project' also bring a higher standard of law making, a requirement for ease of use, practicality and economic value without inappropriate burdensome regulations. We see these as positive developments.

### **C. Background**

For a long time JFCCT has recommended the ability to meet electronically rather than requiring in-person meetings for boards and general meetings. The 2014 changes which partially relaxed the 'in-person only' rule were a step in the right direction but are unclear, not adequate to support Thailand's regional leadership aspirations and are out of step with regional best practice which does not have similar restrictions.

The advent of COVID 19 now makes electronic meetings an imperative. Sound health advice about social distancing and avoiding in-person meetings; and travel restrictions which are an effective bar on travel cause a dilemma (at best) for companies, trade associations, partnerships, chambers of commerce and others. If meetings are potentially invalid or if



businesses believe they cannot hold meetings due to these restrictions, a serious barrier to business will continue.

In addition, due to uncertainty about the situation, many AGMs of businesses, clubs, chambers of commerce etc have been deferred which, in the absence of some kind of cover, places them at risk of not being compliant and also exposes officers.

JFCCCT considers this to be a good opportunity to bring Thailand into world class standards, and, which is now brought into sharp focus due to the COVID 19 phenomenon.

## **D. Recommendations**

### **1..As an immediate step, we seek :**

a cabinet resolution (pending change to the law) allowing (a) director (or equivalent) meetings and general meetings of members to be conducted electronically (audio or audio/visual), for all organisation types, subject only to the safeguard that audio quality (if audio only) is adequate to allow all to hear. Participants may be located outside Thailand and no minimum number of people need be in the same location. For SET listed entities but not others, audio or audio/visual recording should be mandated. (b) written circular resolutions (c) recognition of eSignatures as good as wet signatures for any purpose associated with board or general meetings.

- (i) Examination of the best means available to give legal efficacy to this cabinet resolution.
- (ii) A cabinet resolution or Decree that the consequences of deferred General Meetings of any organisation will not cause the entity to be in breach of any law of other requirement such as to expose the entity, its officers or members to penalty or any other negative consequence. The 'social distancing' and barriers to entry policies may be treated as force majeure events, for example, or there may be some other simple means to achieve the desired result. The 4 March 2020 announcements of the Department of Business Development about postponement of AGMs goes most of the way to these ends.

**2.Change to the law** by change to primary legislation or Administrative action based on delegated powers (if that exists) or by Decree.

- (i) For all organisations in the private sector – private companies, listed companies, trade associations, chambers of commerce, partnerships, board (or equivalent) and general meetings may be held by electronic means (audio or audio/visual) no matter where the participants are situated and without the need (other than possibly for SET listed companies) to amend constitutive terms or operational rules, although organisations should be allowed to prescribe their own rules.



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- (ii) Technical or security standards should be scrapped and replaced by an operational requirement that all participants can hear and be heard and if the meeting is audio and if audio/video, also that two-way participation is possible via video. There should not be a recording requirement other than possibly for listed company general meetings, which could be an SET listing rule, and for other entities either a minute keeping requirement or recording but not both. The 'security' requirements are burdensome; most can be left to self-regulation as it would be in companies' interests to have secure meetings.
- (iii) The onus of ensuring compliance with procedural standards provided by an organisation's rules (Articles of Association, Constitution, ByLaws etc) should primarily be on the organisation. While government officials may have to check compliance with reporting and filing requirements, they should not be responsible for checking compliance with internal procedures, or be liable for any claim by the organization or any party related to it or a third party, if the filing or reporting is accepted in good faith and the government official is not aware of any defect.
- (iv) Recognition of a written circular resolution as means of making decisions or resolutions at board and general meetings. This could require:
- Information to be provided to all members of the relevant organ (board, or members)
  - Absolute majority – ie 50% + 1 (or some super majority eg 2/3) – ie not just those present and voting (termed 'simple majority') but a majority of all members of the organ entitled to vote.
  - Minority protection if a minority consider that a discussion is needed (eg 10% of the members of the organ could object).
  - In addition, some response requirement (ie in favour/ against/ abstain/ got it but don't want to vote) could be considered from say 60% of members of the organ entitled to vote.
- (v) Recognition of eSignatures being as good as wet signatures for any purpose associated with board or general meetings.
- (vi) A Decree followed by an omnibus change to the primary law could be the most effective way to make the change.

The Annex is a table of quorum and voting requirements for board and general meetings. The only difference for circular resolutions would be that instead of a simple majority principle (some majority of those present and voting) an absolute majority principle applies (some majority of all members of the organ entitled to vote).



In many jurisdictions (notably in the ASEAN region – eg Singapore, Malaysia), no similar restrictions exist and they have done well in attracting foreign investment and in becoming hubs in some sectors. It is up to the entity to manage the locus of its general management and direction-setting. If the balance is outside Thailand, that may affect its tax residence status. But that is a separate matter for the entity to deal with and such considerations should not impact its ability to hold any particular board or management meeting electronically.

- (vii) We also recommend that consideration be given to supporting electronic meetings for government entities and agencies. The 2014 NCPO Announcement lists state organs to which it does not apply, including meetings of MHR, Senate, of Courts etc. For those not excluded, presumably they can meet electronically but subject to the current rules (see below). Thus we also recommend that the organs or agencies to which the Order did apply also be able to meet in the less restrictive ways recommended here, and a review be made of those which may not meet electronically at all to determine which could do so and under what conditions.

#### **E. The current law as we understand it: an impediment to good business practice**

The current law is based on two Announcements which were one step towards having to hold all meetings in person but place major restrictions on the conduct of meetings. There is also a later clarification.

Announcement of the National Council for Peace and Order No. 74/2557 on Teleconferences through Electronic Devices (Order 74/2557), [AD 2014]

Announcement of the Ministry of Information and Communication Technology [now Ministry of Digital Economy & Society] on Security Standards for Teleconferences through Electronic Devices B.E. 2557. [AD 2014]

And Clarification of 23 September 2016 from Department of Business Development, MoC about the NCPO Announcement.

Our understanding of the effect of these is:

- (1) ***International teleconferences are prohibited.*** All attendees participating in the teleconferences must be located in Thailand. Advice is that a ‘participant’ (at a directors’ meeting for example) may include an advisor or other person who is not a director. Such a person must also be in Thailand and cannot participate from overseas, that doing so could void the entire meetings. Three scenarios were explored to illustrate the restrictions:
- a. the person not in Thailand is recorded as ‘in attendance’ or ‘observer’ because the person is not a director (board meeting) or member (shareholder meeting). For example a personal assistant or marketing advisor.



- b. Is the case different if the person is actually a director (board meeting) or member (shareholder or other member meeting) but is recorded as being 'observer' or 'in attendance'. This may occur where a member has not paid dues and thus cannot participate directly.

Advice is that as all such persons are 'participants', the meeting is subject to being void if any such person is outside Thailand.

- c. A board meeting is held in Thailand with all directors present physically in the one location. It is not intended to be any kind of electronic meeting, as it were. But for one major agenda item, a marketing advisor dials in from outside Thailand, is on a good quality speaker phone and the meeting for this agenda item is recorded. The marketing advisor presents his/her report. Following that presentation, the board members deliberate and pass a resolution

- (i) With the marketing advisor still present.
- (ii) After the marketing advisor disconnects.

Does this one act, regardless of being (i) or (ii) void the entire meeting? Or just the agenda item? And does it make a difference whether one is under (i) or (ii).

Does the entire meeting have to be recorded as a consequence?

Advice is that this such an event under any scenario potentially voids the entire meeting and requires the entire meeting to be recorded.

*Comment:* This is a barrier to the policy intentions of Thailand as a hub – the previous IHQ regime and now the IBC regime. Further, the potential voiding may be an unintended consequence in some scenarios, but brings business uncertainty.

- (2) ***One-third of the quorum number*** of directors (if a board meeting) ***must be situated in the same place*** (within the same meeting room), and they cannot be located in different places. Advice is that the chairman need not be part of the one third.

*Comment:* This may have been an effort to preserve some concept of meeting dynamic. But if so it also potentially disadvantages those not physically present and may allow for small group cabals to sway the meeting. Rather fairness should not prescribe minimal groupings.. In COVID 19 times, this is contrary to social distancing policy.



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It is not clear how this would be measured for general meetings, presumably one third of members would need to be in the one location.

- (3) If a public limited company, trade association, or a chamber of commerce wishes to conduct meetings by electronic means, they must first ***specify the provision for such teleconference call or video conference meetings in their Articles of Association***; not so private companies, which can

*Comment:* not clear why only private companies are exempt from having specific powers stated. Changing the Articles of Association / ByLaws/Constitution means approval at General Meeting (often by a super majority eg 2/3 and approval of DBD).

- (4) In the case where the meeting's resolutions registration application was not signed by the authorized person, or there is a challenge against the registration of the resolutions, the registrant must deliver ***all relevant evidence*** to show compliance with all the procedural requirements.

*Comment:* this creates avenues for challenge on technical grounds (where in some respects the purpose is not clear), whereas the meeting may have been fair and transparent.

- (5) There is ***no specific limitation on the platform*** – eg dial in; audio conferencing platform; video conferencing platform; meeting platform. However the security of the platform has to the prescribed legal standard, i.e., the Notification of the Ministry of Communication and Information Technology [now Ministry of Digital Economy & Society] re: Security Policy and Standards of the Meeting via Electronic Media B.E. 2557 (2014), (i) the entire meeting duration shall be voice-recorded or videotaped; (ii) appropriate measures to prevent such meeting recording tampering shall be in place; and (iii) all computer data transmissions from such meeting shall be recorded.

*Comment:* The platform is not the cause of restriction, but the other requirements are surely not all necessary.

### **(6) Meeting must be recorded**

*“Record of such meeting, either by a voice or a video recording of all the attendees throughout the entire meeting, as well as the records of the computer traffic that occurs from such records. The above recording shall be kept/recorded on the meeting controlling system, or another system...”*



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*Comment:* There is no such requirement for in-person meetings. This may be appropriate for listed company general meetings held electronically, but is questionable for others. Electronic meeting platforms typically have a record function but that would not cover recording voting, although some other third party platform could. It seems that meta data is also required to be kept.

- (7) Assuming no change to the law – ***what should be included in Articles of Association?***  
For example for board meetings of a trade association or chamber of commerce, a flexible clause in case of change to the law, such as:

*“The Board of Directors may meet by electronic means, including by phone or video call subject to the requirements of any relevant law.”*

Advice is that BDB may not agree to register this (perhaps in the same way that the DBD has refused to register a flexible change of address clause [eg ‘X’ address or as may be determined from time to time by the Board of Directors via a simple super majority of 2/3’].

One clause which a major law firm advises has been successfully registered is:

*“The Board of Directors’ Meeting can be held via teleconference through electronic devices, in accordance with the Announcement of the National Council for Peace and Order No. 74/2557 Subject: Teleconferences through Electronic Devices, and the Announcement of the Ministry of Information and Communication Technology Re: Standards of Security for teleconferences through Electronic Devices B.E. 2557, and other laws related to teleconferences, including any amendments thereof.”*

*Comment:* this would mean that if a legal change were made which was not an amendment, the constitutive document would need to be changed at a General Meeting. Better would be:

*“The Board of Directors’ Meeting can be held via teleconference through electronic devices, in accordance with relevant laws including the Announcement of the National Council for Peace and Order No. 74/2557 Subject: Teleconferences through Electronic Devices, and the Announcement of the Ministry of Information and Communication Technology Re: Standards of Security for teleconferences through Electronic Devices B.E. 2557, including any amendment, repeal and replacement thereof, and other relevant laws related to teleconferences”*

- (8) **Security standards are onerous.** See MICT (now MDES) Announcement of 2014.  
(9) **Informal interim solution**



One informal solution which may work for smaller organisations' board meeting is to hold meetings by electronic means which are compliant with technical aspects but allow overseas participation and allow all to be connected remotely (thus complying with COVID19 mandates as well as the MDES regulation – ie complying as much as possible). Then ratify the informal decisions made at the next board meeting, with effect from the informal meeting.

**Annex: Quorum and Voting Requirements for Company Meetings**

Type of Meeting	Quorum and Resolution	Private Company	Law	PCL	Law
BOD meeting	Quorum	As agreed in AOA or 3 directors if there are more than 3 directors	1160, CCC	Not less than one half of total members of the Board	80, PCA
	Resolution	Majority votes of the directors present and voting	1161, CCC	Majority votes of the directors present and voting	80, PCA
AGM/ EGM	Quorum	One-fourth of the share capital (25%)	1178, CCC	Not less than 25 persons or not less than one half of shareholders holding not less than one-third of the share capital	103, PCA
	Resolution	(1) Majority of votes of shareholders present and having voting rights (2) Not less than ¾ of total votes of shareholders present at the meeting and entitled to vote	1193, CCC 1194, CCC	(1) Majority of votes of shareholders present and having voting rights (normal case) (2) Not less than Three-Fourth of shareholders who attend the meeting and having voting rights (for M&A deal, other important deals) (3) Higher than (1) or (3) if so specified in AOA	107, PCA

**(table above provided by Law Plus Ltd, with thanks)**



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CCC = the Civil and Commercial Code of Thailand  
PCA = the Public Companies Act B.E. 2535 of Thailand  
AOA = Articles of Association

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