KPMG Law

KPMG Law Guide To... Conducting a Board Meeting in Ireland

A Practice Note outlining how to run an effective board meeting for a private limited company in Ireland.

August 2023

Contents

KPMG Law Guide To... Conducting a Board Meeting in Ireland

A Practice Note outlining how to run an effective board meeting for a private limited company in Ireland.

by Practical Law Corporate Ireland and John Given and Daragh Connolly, KPMG Law LLP

In Ireland, the management of a company is invariably delegated, under a company's constitution, to the board of directors. This Note sets out how the board may take decisions, in particular the requirements for a properly constituted board meeting of a private limited company incorporated in Ireland (LTD).

The Note considers how the management of a company is delegated to the board of directors in Ireland and how these meetings are regulated by the *Companies Act 2014* (CA 2014). It considers the alternative to board meetings, directors' resolutions in writing, and how these resolutions can be used. How sole director companies are managed is also looked at, together with the rules about virtual meetings. The issue of whether parent and subsidiary board meetings can be held together is also addressed.

The process of calling a board meeting is then explored, looking at the notice required, to whom it must be given, the period of notice, its form and content and what happens if it is defective in some way.

The role of the chairperson is also examined, as well as how voting is conducted at a board meeting, and the quorum needed to hold one. The rules regarding directors' conflicts of interests are also briefly considered.

Finally, the note looks at what record of a board meeting must be kept, who must keep it, the form it must take, retention periods, evidential value, and rights of inspection.

Subscribers will note the references to many UK cases in this note. These are of persuasive authority in an Irish context.

For more on the status of such cases,

see *Practice Note, The relationship between Irish and English law: English case law in Ireland after 1922: persuasive authority.*

Unless otherwise stated all section references are to the CA 2014.

Directors' Decisions

Directors usually manage a company by:

- Holding board meetings in person, virtually, by telephone, or a combination of these.
- Passing resolutions in writing.
- A combination of the above.

Except if disapplied by the company's constitution (which would be highly unusual), *section 158* of the CA 2014 provides that the business of the company is to be managed by the directors, who are empowered to exercise all the powers of the company not required to be exercised by the members, such as under the summary approval procedure. For more on when the summary approval procedure is required, see *Practice Note, Summary Approval Procedure: What is the Summary Approval Procedure?*.

The directors are also free to delegate any of their powers to such person or persons as they think fit, including committees (*section 158*(4)). Although it is technically possible to adopt a two-tier board system with a supervisory board sitting on top, this would be very rare and is not required under Irish law, in contrast to many civil law jurisdictions.

Unless the directors make decisions by resolution in writing (section 161(1)), the directors' powers must usually be exercised by the board collectively at a properly convened board meeting (see

for example, *D'Arcy v The Tamar, Kit Hill, and Callington Railway Company (1866-67) LR 2 Ex 158)*.

In circumstances where directors pass resolutions at a meeting that was earlier adjourned, the directors should, for the avoidance of doubt, confirm that the resolutions are passed on the date to which the meeting was adjourned.

Written Resolution of Directors

If the directors are likely to agree to a proposed resolution, it may be convenient to pass a written resolution, instead of convening a board meeting. This is possible under section 161(1) of the CA 2014, unless this provision has been excluded by a company's constitution. Typically, most companies would not exclude section 161. The resolution in writing can be signed in counterparts (section 161(5), CA 2014).

Unlike a shareholders' resolution, which can be passed by a majority, directors' resolutions in writing must be unanimous (section 161(1), CA 2014). However, the CA 2014 does allow directors' resolutions to be validly passed if, for example, a minority of directors could not sign the resolution because of a conflict of interest or other provision in a company's constitution which might preclude a director from voting on a particular matter (section 161(2), CA 2014). Should that arise, the resolution must state the name of each director who did not sign it and the basis on which they did not sign (section 161(3), CA 2014).

Obligation to Meet

There is no minimum number of board meetings prescribed by law: directors must meet sufficiently often to ensure that they are discharging their duties as directors. The CA 2014 simply states that directors of a company may meet for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit (*section 160*(1)).

What is a Meeting?

Formal Board Meetings

This is a board meeting which has been properly called and held under a company's constitution or under the default provisions in the CA 2014. Most companies manage their affairs through regular properly called board meetings.

Informal Board Meetings

Provided the constitution does not preclude it, boards may act informally if they are unanimous *(Re Bonelli's Telegraph Co (Collie's Claim) (1871) LR 12 Eq 246; Charterhouse Investment Trust Ltd v Tempest Diesels Ltd (1985) 1 BCC 99544; Runciman v Walter Runciman plc [1993] BCC 223)*. For example, in Collie's Claim, the court regarded an agreement signed by all the directors of the company on different dates, and not as a board, as a contract binding the company.

The management and administration of smaller private companies, in particular, are often relatively informal. For example, in the English case of *Re Mumtaz Properties Ltd [2011] EWCA Civ 610*, Arden LJ found it unsurprising that the company was run with a high degree of informality, with decisions not necessarily being taken at board meetings but whenever relevant family members were in communication with each other. However, too much informality can be dangerous. In the Irish case of *Re Aston Colour Print Ltd [1997]* IEHC 33, Kelly J held that a board meeting had not been held as not all the directors present at the meeting in question appreciated that it was a board meeting. The absence of formality did not help in that case.

Companies that are in a highly regulated sector, such as financial services or insurance services regulated by the Central Bank of Ireland (CBI), will have regular board meetings (many larger companies would have one a month) to evidence resolutions passed to approve certain activities to ensure compliance with CBI governance requirements.

Virtual Meetings

Board meetings can be held virtually in Ireland. Unlike shareholder meetings, virtual board meetings are specifically catered for by the CA 2014. It provides that a directors' meeting, or a meeting of a committee of directors, may consist of a conference between some or all of the directors or, as the case may be, members of the committee who are not all in one place, but each of whom is able (directly or by means of telephonic, video or other electronic communication) to speak to each of the others and to be heard by each of the others and:

- A director or member of the committee taking part in such a conference shall be deemed to be present in person at the meeting and shall be entitled to vote and be counted in a quorum accordingly.
- Such a meeting shall be deemed to take place:
  - *where the largest group of those participating in the conference is assembled;*
  - *if there is no such group, where the chairperson of the meeting is; or*
  - *if neither applies, in such location as the meeting itself decides.*

  (*Section 161*(6), CA 2014.)

Unless specifically excluded or modified by a company's constitution, this provision will apply.

Sole Director

LTDs in Ireland can have just one director (*section 128*(1), CA 2014). However, unlike the UK, a company secretary (which can be a body corporate) is required for all companies, so even if the company is a sole director company it must still have a designated company secretary (*section 129*(6), CA 2014). A sole director may also act as the company secretary of a LTD in Ireland.

In Ireland a valid meeting can be held by a sole director. This is clear from *section 160*(6) of the CA 2014, which specifically states that where a company has just one director, one is a valid quorum. Therefore, sole director companies in Ireland can either hold board meetings, pass directors' resolutions, or use a combination of both.

Calling a Board Meeting

A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors (section 160(3), CA 2014). This provision can be excluded or modified by a company's constitution.

Notice of Meetings

Notice to all Directors

All directors are entitled to reasonable notice of any meeting of the directors but, if the directors so resolve, it is not necessary to give notice to any director who, being resident in Ireland, is for the time being absent from Ireland (section 160(4), CA 2014). This provision can be excluded or modified by a company's constitution.

A director must be given notice even if they have previously said they would not be able to attend at that time *(Re Portuguese Consolidated Copper Mines Ltd (1889) 42 Ch D 160)* or would be unable to attend meetings generally *(Young v Ladies' Imperial Club Ltd [1920] 2 KB 523)*.

Formal notice of specific meetings probably need not be given where meetings of directors are held at stated periods, for example, on a particular day in every week or every month *(La Compagnie de Mayville v Whitley [1896] 1 Ch 788, Lindley LJ at page 797 and Kay LJ at page 805)*. But again, the safest course would be to give directors formal written notice of every meeting.

Directors may not waive their right to notice in advance *(Re Portuguese Consolidated Copper Mines Ltd and Young v Ladies' Imperial Club Ltd)*. Many constitutions, however, provide that a director may waive their entitlement to notice of a particular meeting by giving notice to that effect to the company not more than seven days after the date on which the meeting is held.

Period of Notice

There is no prescribed notice period for board meetings in the CA 2014. Unless the company's constitution prescribes a period of notice, the period must be reasonable (section 160(4), CA 2014). What is reasonable will depend on the facts of the case, including:

- The significance of what is being considered.
- How urgent the matter is.
- The practice of the board.

(*Browne v La Trinidad (1887) 37 Ch D 1* and the Australian case of *Toole v Flexihire Pty Ltd (1991) 6 ACSR 455.)*

Most constitutions do not specify a period of notice, to allow maximum flexibility to the directors who may need to meet at very short notice.

In some cases, where the business is particularly urgent, it may be reasonable to give no notice, but those occasions will be exceptional, given that regard must be had to modern means of communication *(Australian case of Mitropoulos and Summerdowns Rail Ltd v Stevens [2015] NSWSC 321, Robb J at paragraphs 175-176)*.

Form of Notice

As a matter of good practice, the notice should be written, although verbal notice may technically suffice. If the constitution is silent, whether verbal notice is valid may depend on the practice of the board.

Before serving notice by email, any provisions in the constitution for deemed receipt of any written notice should be checked. Given that there may be, in the case of notice served by email, an increased risk of a director who failed to receive the message claiming that notice had not been properly served and the meeting therefore not properly convened, the sender may wish to take steps to satisfy themselves that the notice has been received by the intended addressee. These steps might include requesting a personal return email acknowledging receipt, sending the email to more than one address of the addressee, ensuring that automatically generated delivery and read receipts are received, and sending a hard copy by post as confirmation of the email.

Contents of Notice

The notice must set out where and when the meeting is to be held.

There is no general legal requirement that a notice convening a board meeting must state the business proposed to be transacted (*La Compagnie de Mayville v Whitley*). The general principle is that directors should come together whenever called on notice of reasonable length and without any expectation of being told why they are being summoned to *a meeting (see the Australian case of Dhami v Martin [2010] NSWSC 770)*.

As a matter of good practice however, the notice should contain an agenda of matters to be discussed.

Where the director summoning the meeting chooses to state what is proposed to be done at the meeting, even though there is no requirement to do so, the statement must be a fair description of the purpose on which a decision to attend or not may reliably be based: it must not be a tricky notice artfully framed (*Dhami v Martin*).

Typically, a constitution will state that notice of any directors' meeting must indicate:

- The proposed date and time.
- Where it is to take place.
- If it is anticipated that directors participating in the meeting will not be in the same place, how it is proposed that they should communicate with each other during the meeting.

Defective Notice

Business that is done at a meeting of which some directors have no or insufficient notice has been held to be invalid *(Re Portuguese Consolidated Copper Mines Ltd; see also Baker v London Bar Co Ltd [2011] EWHC 3398* (Ch) and *Minmar (929) Ltd v Khalatschi [2011] EWHC 1159* (Ch)).

If a director wants to object to a meeting that has been called on short notice or where they have not received formal notice, they must object at once *(Browne v La Trinidad)*.

Directors may bring an action in their own name against the other directors if they are wrongfully excluded by them from acting as director, including a claim for an injunction to restrain that exclusion (see *Practice Note, Appointment of Directors (Ireland): Right to act as a Director*).

Chairperson

The directors may elect a chairperson of their meetings and determine the period for which they are to hold office, but if no such chairperson is elected, or, if at any meeting the chairperson is not present within 15 minutes after the time

appointed for holding it, the directors present may choose one of their number to be chairperson of the meeting (*section 160*(8), CA 2014). Again, this provision can be excluded or modified. Typically, it is not excluded and simply applies by default.

The chairperson does not have a casting vote unless the constitution provides for it (*R v Chapman (1704) 6 Mod 152; Nell v Longbottom [1894] 1 QB 767*).

Usually, the constitution will provide for the appointment of a chairperson. A bespoke constitution will usually provide that:

- The directors may appoint a director to chair their meetings.
- The directors may terminate the chairperson's appointment at any time.
- If the chairperson is not participating in a directors' meeting within ten minutes of the time at which it was to start, the participating directors must appoint one of their number to chair it.

The essence of being chairperson is exercising procedural control over the meeting *(Woonda Nominees Pty Ltd and others v Chng and others [2000] WASC 173*). For example, the chairperson:

- Must ensure that there is a quorum present.
- Must keep order.
- Must ensure the business of the meeting is dealt with.
- May be responsible for determining whether a director has a right to vote.

Quorum

The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two but, where the company has a sole director, the quorum shall be one (*section 160*(6), CA 2014). Companies are free to set a different quorum. A meeting is validly held with just one director if the company has one director only (*see Sole Director*).

Most companies will adopt in their constitutions a disinterested quorum approach whereby directors are not counted in the quorum if they have a personal interest in the contract or matter being discussed. Interestingly the default position in *section 161*(7) (which applies unless excluded by the company's constitution) allows a director to vote in respect of any matter or contract in which they are interested and be counted in the quorum.

A quorum must be present at the start of, and throughout, the meeting. In the absence of a quorum, no business should be transacted and any resolutions purporting to be passed will be invalid (except as specifically permitted under the constitution) (see *Re Greymouth Point Elizabeth Railway and Coal Co Ltd [1904] 1 Ch 32*). Subject to the company's constitution, the board meeting should be adjourned until a quorum can be formed.

The chairperson is responsible for determining whether there is a quorum (*see Chairperson*).

Resolutions at Inquorate Board Meetings: Ratification and Validity

The constitution of a company will often set out what will happen if the number of directors has fallen below that required for a quorum. If it does not, the default provisions in *section 160*(7) will apply. This states that the continuing directors may act notwithstanding any vacancy in their number but, if and so long as their number is reduced below the number fixed by or under the CA 2014 as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the company, but for no other purpose.

The common law position is that decisions taken at an improperly constituted board meeting are invalid. However, a decision made at an inquorate board meeting may be ratified by a resolution duly passed at a quorate board meeting: at common law, unless a company's constitution otherwise provides, a board of directors can, within a reasonable time, ratify the acts of a director or directors who, when they acted, had no authority to bind the company, but which acts were within the power of the board *(see Municipal Mutual Insurance Ltd v Harrop and others [1998] 2 BCLC 540* and *Re Portuguese Consolidated Copper Mines Ltd*).

Third parties relying on a decision taken at an inquorate board meeting are protected by:

- The rule in Turquand's case, or the internal management rule (as established in *Royal British Bank v Turquand (1856) 6 E & B 327*).
- *Section 40* of the CA 2014, which provides that for the purposes of any question whether a transaction fails to bind a company because of an alleged lack of authority on the part of the person who exercised (or purported to exercise) the company's powers, the following are deemed to have authority to exercise any power of the company and authorise others to do so:
- the board of directors of the company; and
- any registered person.

(Section 40(1), CA 2014.)

This applies regardless of any limitations in the company's constitution on the board's authority or a registered person's authority. Registered person means a person authorised by the directors to bind the company under *section 39* of the CA 2014.

However, this protection to third parties does not operate to validate agreements with the following persons:

- A director or shadow director of the company or of its holding company.
- A person connected with such a director.
- A registered person.
- A person connected with a registered person.

(*Section 40*(6), CA 2014.)

The term connected with a director means any of the following:

- That director's spouse, civil partner, parent, brother, sister or child.
- A person acting in their capacity as the trustee of any trust, the principal beneficiaries of which are that director, the spouse (or civil partner) or any children of that director or any body corporate which that director controls.
- In partnership with that director.

(*Section 220*(1), CA 2014.)

The reference to "child", in relation to a director, includes a child of the director's civil partner who is ordinarily resident with the director and the civil partner (*section 220*(2), CA 2014). A body corporate is connected with a director of a company if it is controlled by that director or by another body corporate that is controlled by that director (*section 220(3)*, CA 2014).

Unlike for example in England and Wales, in determining any question whether a person had ostensible authority to exercise any of a company's powers in a given case, no reference may be made to the company's constitution (section 40(9), CA 2014). This means that in Ireland, only the first three limbs of the classic tests for ostensible authority in

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 apply.

In addition, *section 40(11)* makes it clear that the section is in addition to and not in substitution for the rule in Turquand's case.

Voting

A constitution will usually provide that resolutions will be passed by a majority of those present and voting. The general rule is that each director has one vote at all meetings of directors. The CA 2014 does not expressly preclude directors having more than one vote, however, it is thought that the conferment of weighted voting on directors under a company's constitution is problematic and could be found unlawful.

The constitution may, however, confer a second or casting vote on the chairperson. The chairperson does not have a casting vote unless the constitution provides for it (*R v Chapman [1704] 6 Mod 152; Nell v Longbottom [1894] 1 QB 767*).

It is common practice for board decisions to be reached by consensus, without a formal vote. However, it may be noted that in one Australian decision, the court considered that, where a company's constitution provided that a resolution of the directors must be passed by a majority of the votes cast, it was important for there to be some formality:

> *"the culmination of the process must be such that it possible to see (and to record) that each member, by a process of voting, actively supports the proposition before the meeting or actively opposes that proposition; or that the member refrains from both support and opposition. And it is the responsibility of an individual member to take steps to ensure that his or her will is expressed in one of those ways." (Gillfillan v Australian Securities and Investments Commission [2012] NSWCA 370, Barrett JA at paragraphs 4-11; see also Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3) [2013] FCA 1342, at paragraphs 249-251.)*

It remains to be seen whether an Irish court would take the same view.

Once a proper resolution of the board has been passed, it has been held in England that it is the duty of all the directors, including those who took no part in the deliberations of the board and those who voted against the resolution, to implement it (*Re Equiticorp International plc [1989] 1 WLR 1010, Millett J at page 1013*).

Conflicts of Interest

Directors have a fiduciary duty to avoid conflicts of interests (*section 228*(1)(f), CA 2014). The directors can also be released from the duty to avoid conflicts by the company's constitution. The CA 2014 includes optional governance provisions, which apply as statutory defaults in a company's constitution unless disapplied. These optional provisions include several situations where directors are released from their duty to avoid conflicts of interest, such as allowing directors to:

- Vote in favour of a contract in which they are interested (*section 161*(7)).
- Exercise the voting power attaching to shares owned by the company (*section 161*(8)).
- Hold an executive office in the company (*section 162*).
- Be included in the quorum in relation to a meeting to consider appointing that director to an office and determine the terms and conditions (*section 163*).
- Be an officer of a company promoted by the company (*section 229*(1)).
- Act in a professional capacity for the company (*section 230*).

Companies will usually specifically provide for these issues in their constitutions. For example, the constitution could state that directors may hold additional directorships and do not need to disclose confidential information obtained through those other directorships.

Minutes

Duty to take Board Minutes

Every company is required to take minutes of:

- All appointments of officers made by its directors.
- The names of the directors present at each meeting of its directors and of any committee of the directors.
- All resolutions and proceedings at all meetings of its directors and of committees of directors.

(*Section 166*(1), CA 2014.)

These minutes shall be entered in the minute books of the company as soon as may be after the appointment concerned is made, the meeting concerned has been held or the resolution concerned has been passed (*section 166*(2), CA 2014).

Although the section does not explain what is meant by "proceedings", it should be assumed that, while it is not necessary to ensure that every word said is recorded, at the very least the minutes:

- Record accurately all resolutions and decisions. Bear in mind that once the minutes have been authenticated by the chairperson, it could be very difficult to prove that they are incorrect (see *Minutes as Evidence*).
- Depending on the importance of the resolution, contain the thought process that led to them being made.
- As a general rule, minutes should record "decisions not discussions" and therefore while decisions must be recorded, deliberations may be recorded. There are exceptions to this rule and regulators, such the CBI, are likely to require greater elaboration on proceedings where a company is carrying out certain prescribed activities, such as financial services.

If the company fails to comply with section *166*(1), an offence is committed by every officer of the company who is in default (*section 166*(6), CA 2014). For more information, see *Practice Note, Directors' Internal and External Statutory Liability (Ireland): Duty to Keep and Maintain Statutory Registers and Other Records*.

Contents of Minutes

The minutes must include:

- All resolutions and proceedings at all meetings of its directors and of committees of directors.
- All appointments of officers made by the directors and the names of the directors attending the meeting.
- The names of the directors present at each meeting of its directors and of any committee of the directors.

(Section 166(1), CA 2014.)

It is also usual to include the following in the minutes:

- The name of the company and the date, location and start time of the meeting. It may also be sensible to include the company number in certain circumstances, for example, where the company has a name similar to another company in the group.
- The means of holding the meeting (for example, in person or by telephone).
- The names of directors present at the meeting (including the means by which they attended, and, if necessary (for example, for tax purposes) their location, if not present in person).
- The names of directors who sent apologies.
- The name of the director acting as chairperson.
- The names of any alternate directors present, including their status as alternates.
- Whether a quorum is present.
- The names of any others in attendance, such as the company secretary and any other invitees.
- The time of any breaks in the meeting, and the time at which any person comes into, or leaves, the meeting, if after the start or before the end of the meeting.
- Approval of the minutes of the previous meeting.
- Any declarations of conflicts of interest or authorisations of directors' conflicts (*see Conflicts of Interest*).
- Items discussed or approved at the meeting, including for each item:
  - *the name of the person who presented the matter;*
  - *a reference to any papers presented; and*
  - *a concise description of the key points of any discussion, with enough detail for someone who was not present to have an understanding of the reasons for the decision. This will usually be on a no-names basis, but it may sometimes be appropriate to record names (for example, if the company is, or is about to become, insolvent, or if board members subject to regulatory scrutiny want to document challenge and debate). In the UK, the Chartered Governance Institute suggests that it may also be appropriate to name individuals if they make a recommendation, provide information or answer a question based on their special expertise on the subject; and, depending on the circumstances, if they request that their name be noted in a particular minute, object to or dissent from a decision, ask a specific question or make a particularly important or significant comment (see ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)).*
- The exact text of any resolution (including any agreed actions and delegations of authority to act on behalf of the company) and the results of any vote, including the name of anyone who declared a conflict of interest and abstained from voting, including whether the director left the meeting for, or took no part in, that discussion.

  The minutes will usually record the board's resolutions, rather than the votes of individual directors, but if individual directors so request, it may be recorded that they have dissented or abstained (*see Voting*). (See also *Duty to take Board Minutes*.) The Chartered Governance Institute suggests specimen wording for recording such dissent (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*) and notes that there may be other circumstances in which the chairperson may direct that an individual's dissent is recorded, even if the individual does not make such a request.
- Any instructions to the company's officers (including as regards the execution of any documents and the filing of forms and documents with the Registrar of Companies).
- The time the meeting closed.

Style

Conventionally, minutes have been written in reported speech, that is, in the past tense, and using the conditional tense for future actions (that is, would and should, rather than will and shall). In the UK, the Chartered Governance Institute recommends that that reported speech be used unless there is a good reason not to do so (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*).

Privilege

Board minutes may have sections protected by legal professional privilege. In *Ryanair Ltd v Channel 4 Television and another [2017] IEHC 651* it was held that legal advice privilege applies to communications:

> "'(a) between a client and his lawyer, where the lawyer is acting in the course of their professional relationship and within the scope of his professional duties;
>
> (b) under conditions of confidentiality; and
>
> (c) for the purpose of enabling the client to seek, or the lawyer to give, legal advice or assistance in a relevant legal context' (Passmore, Privilege, 3rd edition, 2013, (Sweet & Maxwell, London) at pp. 127-128." *(Meenan J at paragraph 75.)*

For example, legal advice privilege will apply to documents or parts of documents that evidence the substance of lawyer-client communications. Board minutes may evidence such communications (*Three Rivers District Council and others v Governor and Company of the Bank of England (Three Rivers No 5) [2003] EWCA Civ 474*). Irish law recognises that when legal advice is received, it may need to be recorded or summarised so that the board can go on to take a business decision in the light of such advice, and that such a record of the privileged communication should fall within the privilege (see, for example, Re British & Commonwealth Holdings plc (unreported) (4 July 1990)). However, a board minute which records action to be taken in the light of legal advice received will not be privileged (unless the record reveals the underlying advice on which it is based). Further, if the board minutes record a combination of legal advice mixed with commercial discussions, only the part of the minutes containing the legal advice will be privileged.

In *Ryanair*, Meenan J noted that litigation privilege covers communications and documents produced by the client or a third party insofar as they are:

- Confidential in nature.
- Produced for the "dominant purpose" of the litigation.
- Brought into existence once litigation is contemplated.

(Paragraph 90.)

However, he also went on to say that if there are concerns as to the scope of the legal advice privilege or litigation privilege being claimed over documentation, this would be met by the solicitor claiming the privilege swearing an affidavit stating that they have inspected each of the documents over which legal advice privilege or litigation privilege has been claimed (either on its own or in addition to journalistic privilege) and that in their professional opinion each such document has been properly so categorised.

(Paragraph 96.)

For further information on privilege, including litigation privilege, see generally UK:

- Practice notes, Legal professional privilege in civil litigation: an overview and Privilege: frequently asked questions.
- Checklist for in-house lawyers on maximising legal professional privilege.

If the minutes record discussions which are privileged and discussions which are not, they could be redacted if the minutes become disclosable in subsequent litigation (see GE Capital v Bankers Trust [1995] 1 WLR 172). However, in certain circumstances, for example if the document is not redacted properly, there is a risk that privilege will be deemed to be waived in the whole document.

A company who wishes to claim privilege over its minutes may have to disclose the existence of the document but can refuse to allow inspection of it.

When drafting board minutes, it is therefore advisable, as far as possible, to separate the privileged discussions, for example by putting them in an annex clearly marked privileged and confidential.

Preparation of Minutes

All companies in Ireland are required to keep minute books recording:

- All appointments of officers made by its directors.
- The names of the directors present at each meeting.

(*Section 166*(1), CA 2014.) For more information, see *Practice Note, Company Registers and Minute Books (Ireland): Minute Books (Records of Shareholder and Director Meetings and Resolutions*).

In general, minutes will be prepared by a minute-taker at the meeting, often the company secretary. It is uncommon to electronically record proceedings at board minutes and in the UK it is notable that the Chartered Governance Institute does not, generally, recommend it (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*).

The minutes should be made within a reasonable time *(Toms v Cinema Trust Company Ltd [1915] WN 29)*.

In practice, the text of any draft minutes will usually be agreed with the chairperson, then should be circulated to other directors for comment as soon as possible after the meeting. Parts of the minutes may also be circulated for comment to the other attendees (for example, to a person who made a presentation to the board, to check the use of technical terms describing the presentation). The Chartered Governance Institute recommends that draft minutes be clearly labelled as such (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*). Any comments on the draft should be raised at the next meeting and any approved changes should be reflected in the minutes of the subsequent meeting. If there are no changes, the board should still formally approve the minutes at the next meeting. The chairperson will then sign the minutes, whereupon they will become evidence of the proceedings (see *Minutes as Evidence*).

In some cases, it may not be appropriate for a director who has an ongoing conflict of interest to view the relevant parts of the draft minutes, and they might be redacted before circulation. The Chartered Governance Institute suggests that this will depend on the circumstances in each case (for example, whether the matter is confidential, the nature of the conflict, the applicable law, any terms of the approval of the conflict, and the company's constitution) (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*).

Once the minutes have been signed by the chairperson, they should not be altered (*Re Cawley & Co (1889) 42 Ch D 209, Esher LJ at page 226*), in any circumstances, including to correct any apparent typographical errors in the minutes. The proper way to amend or rescind them is by a further resolution of the board and minuting the original error.

Retention and form of Records

In Ireland, board minutes must be kept for the life of the company plus:

- Six years (if dissolved by way of liquidation).
- 20 years (if dissolved by way of strike off).

Board minutes can be kept in hard copy or electronically. While section *214*(2) specifically precludes the keeping of electronic minutes for members' meetings, there is no similar prohibition on board minutes.

Minutes as Evidence

The minutes, if purporting to be signed by the chairperson of the meeting at which the proceedings were had, or by the chairperson of the next succeeding meeting, are evidence of the proceedings of the directors (*section 166*(3), CA 2014).

This evidential provenance of board minutes is copper-fastened by *section 166*(4), which states that where minutes have been made in accordance with *section 166*, then, until the contrary is proved:

- The meeting shall be deemed to have been duly held and convened.
- All proceedings had at the meeting shall be deemed to have been duly had.
- All appointments of officers made by its directors at the meeting shall be deemed to be valid.
- If a matter has not been validly recorded in the minutes or if the minutes fail to adhere to the requirements of section 166, the proceedings of the directors may be proved by other means, i.e., a person present at that meeting may aver to the proceedings in the course of litigation.

Right to Inspect Minutes

Directors

A director, while in office, has the right to be informed about the company's affairs and to inspect all the company's books and records (*Oxford Legal Group Ltd v Sibbasbridge Services plc and another [2008] EWCA Civ 387*).

This right of access is not absolute and the right must be exercised for a proper purpose, to enable directors to discharge their personal obligations to the company and their statutory obligations. A court will assume that right will be exercised for a proper purpose; the burden is on those opposing inspection to demonstrate the contrary. Where it is clearly shown that a director is using the right for an improper purpose, the court has no power to assist the director, but the court may not refuse to assist a director where it has no reason to think that the director is using the right to inspect for an improper purpose (*Oxford Legal Group Ltd*). Different considerations may apply in a case where the director seeks an order for inspection by way of interim relief. In such a case, it is for those opposing inspection to satisfy the court that there is a serious question as to improper purpose that cannot be resolved without a trial (*Oxford Legal Group Ltd*). The right of inspection carries with it a right to take copies (*Edman v Ross (1922) 22 SR (NSW) 351*).

In the English case of *Waldron v Waldron [2019] EWHC 115 (Ch)* (not a case concerning access to board minutes), Judge Eyre QC accepted that company directors were entitled to the information they needed to properly undertake their duties (at paragraph 130) but did not accept this meant that directors were entitled to see all documents generated in the course of the company's business. In particular, he envisaged circumstances in which a managing director or chairperson may need to deal with matters confidentially from another director or have conduct of matters with which another director had no reason to be concerned. In addition, as noted above (see *Preparation of Minutes*), in the UK the Chartered Governance Institute considers that the question whether conflicted directors should nonetheless be able to review or access board minutes is one that

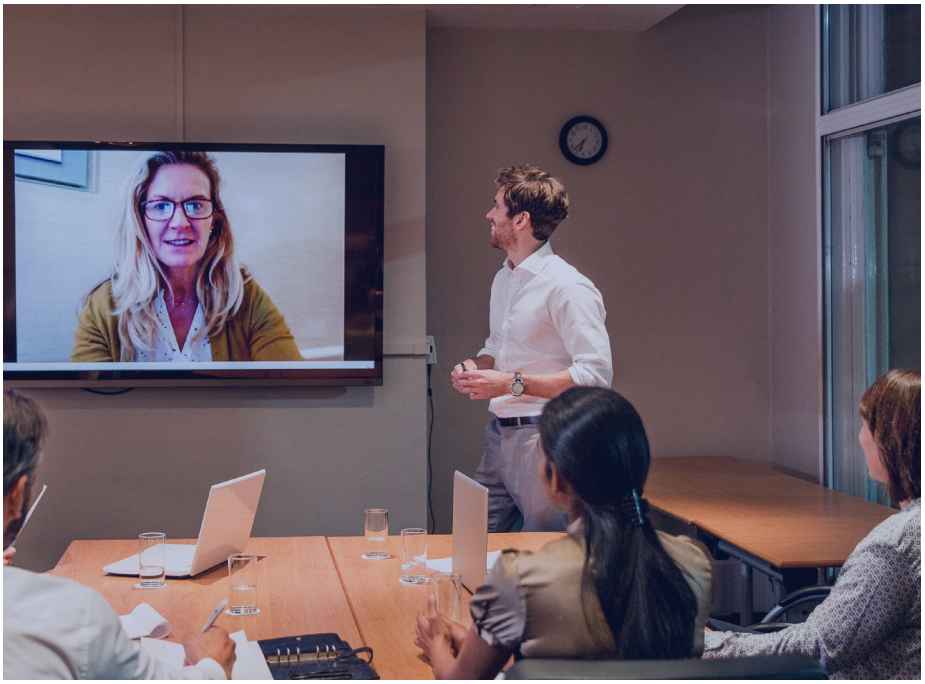
ultimately needs to be assessed on a case-by-case basis (see *ICSA: The Governance Institute: Guidance note: Minute taking (April 2017)*). Relevant factors include the nature of the conflict, any terms of the approval of that conflict, the organisation's constitution and any relevant regulation.

It has been held in numerous common law jurisdictions that a director has the right to be accompanied by an agent when inspecting the minutes. The position has been summarised in an Australian case as follows:

> "There is a considerable line of authority, suggesting that the right of a person, who owes a fiduciary duty to a corporation, to inspect the documents of that corporation, carries with it a right to conduct that inspection by means of a suitably qualified agent, such as an accountant. See Bevan v Webb (1901) 2 Ch 59 (a partnership), Norey v Keep (1909) 1 Ch 561 (a trade union), Dodd v Amalgamated Marine Workers' Union (1924) 1 Ch 116 (a trade union), Edman v Ross (1922) 22 SR (NSW) 351 (a company) and McCusker v McRae 1966 SC 253 (a company). The courts have recognised some constraints on this right. The agent chosen (generally an accountant) must not be someone to whom the management of the corporation has grounds for objection. The agent may be called upon to give an undertaking that any knowledge which he or she acquires will not be used for any other purpose than that of giving confidential advice to his or her principal." *(McGee v Sanders (No 2) [1991] FCA 554, at paragraph 23.)*

In *Edman*, the court ordered that a company give the director and the accountant of his choice access to its books and records, even though there was a suggestion that the director intended to engage in business in competition with the company. The accountant was required to give an undertaking that the knowledge that he acquired from inspection should not be used for any purpose other than that of giving confidential advice to the plaintiff with regard to his interests. In *McCusker*, the court granted an order that the company make the board minutes available for inspection to the member and his agent, a named chartered accountant.

It is to be expected that Irish courts would also hold that a director has the right to be assisted by an expert and it is likely to be conditioned on there being no reasonable grounds for objecting to the chosen adviser, and to the adviser offering appropriate undertakings.



The right to inspect the minutes terminates when the director leaves office (*Conway v Petronius Clothing Co [1978] 1 WLR 72*). Special considerations may apply where the director seeking to assert the right is about to be removed from office (*Conway v Petronius Clothing Co; but see the discussion in Oxford Legal Group Ltd*).

Company Secretary

The company secretary will usually be permitted to see the minutes for practical reasons.

Members

Shareholders have no general right to inspect board minutes in the absence of an express provision in the constitution (or another agreement to which the company is a party, such as a shareholders' agreement) (*R v Mariquita and New Granada Mining Company (1858) 1 El & El 289*).

In Mariquita and New Granada Mining Company, it was held that a general right of inspection under which "the books wherein the proceedings of the Company are recorded … shall be open to the inspection of the shareholders" was confined to the book containing the proceedings of meetings of the shareholders and did not extend to that containing the proceedings of the directors.

If a member takes legal proceedings against the company, such as an action for oppression or unfair prejudice, the board minutes (and other records) may be required to be disclosed by order of the court. For more information on oppression, see *Practice Note, Shareholder Remedies: Remedy in Case of Oppression Under Section 212 of the Companies Act 2014 (Ireland): Exclusion from Management or Failure to Provide Information.*

Auditors

Statutory auditors of a company shall have a right of access at all reasonable times to the accounting records of the company (*section 386*, CA 2014). They can also require from the officers of the company such information and explanations as appear to the auditors to be within the officers' knowledge or can be procured by them and which the statutory auditors think necessary for the performance of their duties (*section 387*(1), CA 2014). This may include access to board minutes should the auditors look for them. This would be usual.

Failure to provide information to the auditors is a serious matter and is a Category 2 Offence. For more information, see *Practice Note, Directors' Internal and External Statutory Liability (Ireland): Offences.*

Insolvency Office-Holders

Insolvency office-holders, such as liquidators, examiners and receivers, are also entitled to inspect board minutes (for example, using powers under *section 526*(1) of the CA 2014 to produce to the examiner all books and records of the company).

Legal Proceedings and Regulators

Board minutes are often required to be disclosed in litigation on foot of third party discovery requests, as part of regulatory investigations or in connection with statutory inquiries. Similarly, minutes may be introduced as evidence in the course of criminal trials pursuant to the Criminal Evidence Act 1992.

Under *section 653* of the CA 2014, the Corporate Enforcement Authority may on its own application, or if requested by a creditor or contributory, request from the company, its directors, liquidators, receiver or statutory auditor the books and records of the company. This would include board minutes. Failure to comply is a Category 2 Offence. For more information, see *Practice Note, Directors' Internal and External Statutory Liability (Ireland): Offences*.

Regulators, such as the CBI may also be entitled to view board minutes under statutory powers.

Privilege

The right of any person to inspect board minutes may be subject to legal professional privilege (see *Privilege*).

Contact us

John Given
Managing Partner
KPMG Law

E: john.given@kpmglaw.ie
T: +353 1 410 1298

Salvador Nash
Director and
Head of Company Secretarial
KPMG Law

E: salvador.nash@kpmglaw.ie
T: +353 1 410 1226

Aisling Garry
Director
KPMG Law

E: aisling.garry@kpmglaw.ie
T: +353 1 700 4173

Daragh Connolly
Associate Director
KPMG Law

E: daragh.connolly@kpmglaw.ie
T: +353 1 410 1000

kpmglaw.ie

Publication Date: July 2023. (9441)