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ALP COMPLIANCE MEMO

Corporate Governance: Providing for Virtual Meetings by Companies in
Articles of Association

A. Background

The COVID-19 pandemic has fundamentally disrupted “business as usual” with government guidelines prohibiting physical gatherings. It has become impossible to engage in in-person physical interaction and this has affected several companies that have to comply with statutory requirements under the *Companies Act, 2012* to convene meetings.

In that regard, several companies made applications to courts to avail them a way forward. In the wake of COVID-19 lockdown restrictions in 2020, the High Court addressed this matter in the rulings issued in several landmark cases between June and December—from *In the Matter of British American Tobacco (Uganda) Limited*, Misc. Cause No 107/2020 [2020] UGHCCD 133, *In the Matter of Stanbic Uganda Holdings Limited*, Misc. Cause No 108/2020 [2020] UGHCCD 134; *In the matter of Uganda Institute of Banking and Financial Services*, Misc. Cause No 120/2020 [2020] UGHCCD 152, *In the Matter of Uganda Clays Limited*, Company Cause No 16/2020 [2020] UGHCCD 187, *In the Matter of Uganda Baati*, Misc. Cause No 228/2020 [2020] UGHCCD 192 to *In the Matter of Igara Growers Tea Factory Limited*, Misc. Cause No 32/2020.

The applications brought forward the impracticability of in-person meetings given that, in the wake of the COVID-19 pandemic, there was a ban on public gatherings and meetings under the *Public Health (Control of COVID-19) Rules 2020* (gazetted on March 24, 2020). The said *Rules* were subsequently amended to extend the ban until May 5, 2020, May 19, 2020, and June 9, 2020. In the *Uganda Institute of Banking and Financial Services case*, the prohibition of entry into Uganda under the *Public Health (Prohibition of Entry into Uganda) Order 2020* further meant that foreign members abroad could not come into the country for meetings.

Within that context, the companies brought applications seeking court orders to hold meetings by electronic means or virtual platforms, since it was impracticable to hold them in the “usual” way involving in-person attendance as provided under the articles of association.

Ssekaana, J. granted applications and ordered five companies to hold their annual general meetings by electronic means or virtual platforms subject, in the case of publicly-listed companies, to obtaining prior no-objection from the Uganda Securities Exchange and compliance with all the applicable notices issued under the *Uganda Securities Exchange Listing Rules 2003* and the law. As regards the sixth company, he granted leave to convene the AGM at a time when COVID-19 guidelines can permit in-person meeting.

B. Company Meetings

The *Companies Act, 2012* provides for different types of meetings, namely:

- (a) Statutory Meetings (section 137)
- (b) Annual General Meeting (section 138)
- (c) Extra-ordinary Meetings (section 139)

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The statutory meeting is mandatory for companies that have just been incorporated and are commencing business. It is held by a company limited by shares and every company limited by guarantee and having a share capital, within a period of not less than one month and not more than three months from the date at which the company is entitled to commence business.

The Annual General Meeting (AGM) is mandatory for Public companies. The need for public companies to hold a general meeting is provided under section 138(1) of the *Companies Act*, 2012. Such a general meeting is held once a year and the law requires that not more than 15 months should elapse between the date of one general meeting and that of the next. A monetary default fine of twenty-five currency points (UGX 500,000/=) is imposed on the company and every officer of the company who defaults in complying with the requirement under section 138(1) of the Act.

A private company may also hold an AGM at the requisition of a member. It is not legally mandatory for private companies to hold AGMs. However, if a member requests that an AGM be held, then a private company is required to oblige. In circumstances where the private company refuses to oblige to member's request, an aggrieved member may apply to the registrar of companies who may call or direct the calling of a meeting. Where there is non-compliance with the decision of the registrar, the company, together with every officer of the company who is in default, is liable to a fine of five currency points (UGX 100,000/=) (under section 138(2), (4) and (8) of the Act).

An extraordinary general meeting is convened by the directors of a company upon the requisition of the members holding not less than one tenth of paid-up capital of the company or not less than one tenth of total voting rights of all the members. The one tenth of paid-up capital or voting rights is at the date of right to vote at general meetings of the company. It is meant to address urgent and unplanned situations within the company.

Meetings are a method of corporate governance and therefore it is important for companies to hold meetings in order to effectively exercise their right to the control and direction of the company. *In the matter of Igara Growers Tea Factory Limited*, Misc. Cause No 32/2020, in referring to the case of *Byng v London Life Association* [1990] Ch. 170 where it was held that the rationale behind meetings is that members should be able to hear and be heard at the meeting, the High Court held that all members attending should be able to participate together in the proceedings as one meeting and, consequently, no business can be validly conducted at any meeting that does not meet these requirements.

Therefore, in order to practice good standards of corporate governance, companies be able to convene periodic meetings whether as a public or private company.

C. Impracticability of holding meetings during the COVID-19 pandemic

In the event that it is not practicable to hold a meeting in the way stipulated under a public or private company's articles of association, the company can apply to court under section 142 of the *Companies Act*, 2012 for an order to hold the annual general meeting in the most practical way.

Section 142(1) of the Act provides that:

“Where for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or conduct the meeting of the company in the manner prescribed by the articles or this Act, the court may of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting order a meeting of the company to be called, held and conducted in the manner the court thinks fit.”

In *Stanbic Uganda Holdings Limited case*, the High Court granted the company leave to convene AGM for the year ended December 31, 2019 by electronic means for the reason that given then existing COVID-19 circumstances and legal regime, with the ban on public gatherings and meetings, the company could not convene a physical meeting due to a large membership of about 22,500. In the *Igara Growers Tea Factory case*, the court granted leave to convene the AGM at a time when COVID-19 guidelines can allow for in-person meeting

given that majority of the company's 6,310 members were *bona fide* tea farmers and were "not likely to take benefit of the current technological advancement of holding a virtual meeting". Notably, in the applications in five of the six matters, the court granted leave to four public companies and one company limited by guarantee to hold meetings virtually.

The dilemma faced by the six companies the 2020 cases in complying with section 138(1) of the Act was that their articles of association required *physical attendance* for meetings. This same dilemma affects several companies, whose articles of association only provide for physical attendance, and on a similar basis, they are unable to hold company meetings.

In the past over 9 months, since the last of the rulings on December 22, 2020, the country has undergone a relaxation of the ban on public gatherings and meetings—at some point, gatherings of 70 people was allowed, that was increased to 200. Given the somewhat vague and fluid legal regime in the recent 42 days' lockdown in June-July 2021, companies should take benefit of the current technological advancement of holding virtual meetings.

D. Way Forward: Amending Companies' Articles of Association

Section 16 of the *Companies Act*, 2012 provides that a company may, by special resolution, alter its articles.

Therefore any company, whose articles of association require physical in-person attendance for general meetings, should amend the articles of association to create a provision for virtual meetings to suit attendance where members request for a general meeting or where the directors of the company find the need to hold a meeting to ensure the smooth running of company activities.

E. Conclusion

In light of the foregoing, we advise Private Companies to amend their articles of association to provide for holding of virtual meetings and the form and procedure to govern these meetings.

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