

Corporate Governance and the Impact of COVID-19

Factsheet 2

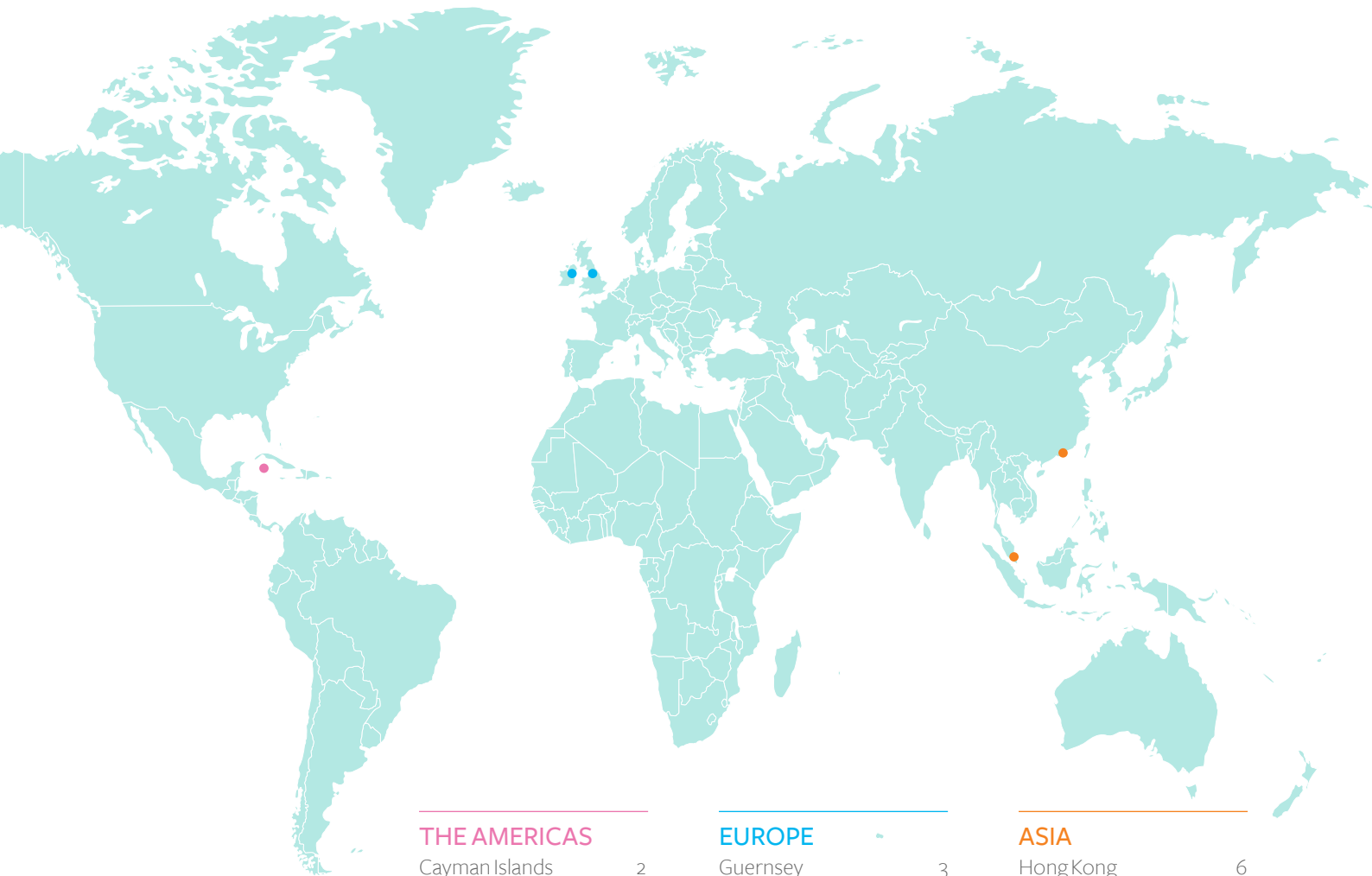
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Introduction

The COVID-19 pandemic has seen business risks and challenges evolving at an unprecedented pace, making the significance of timely communication between directors and senior management more important than ever before – even though worldwide travel restrictions and physical distancing measures have made it much tougher, if not impossible, to touch base in person.

At IQ-EQ, we firmly believe that the current inability of directors to meet in person should not hinder effective corporate governance. In this factsheet series, we bring to you the rules and regulations from a selection of leading international financial centres to help directors and shareholders across geographies proactively keep in

close contact with senior management and advisors, while understanding the challenges posed to business by COVID-19. With information on the Cayman Islands, Guernsey, United Kingdom, Hong Kong and Singapore, this is the second in a series of factsheets covering all of the key jurisdictions in which IQ-EQ operates. (To read our first factsheet, please click [here](#)).



Cayman Islands

The Government of the Cayman Islands passed the Public Health (Prevention, Control and Suppression of COVID-19) (Ticket) Regulations on 27 March 2020 that, among other things, restrict public meetings until further notice, with the exception of essential travel to healthcare facilities, supermarkets, convenience stores and minimarts, pharmacies, retail banks, building societies, credit unions, gas or refiling stations, and such other public places as may be specified by the Competent Authority and notified in the Gazette.

Each person in a public space must maintain a distance of at least six feet or two metres from any other person. Additionally, as of 28 March 2020 at 5am, the Cayman Islands has been following a 'soft curfew' from 5am to 7pm followed by a 'hard curfew' from 7pm to 5am daily.

Residents are not to leave their homes during hard curfew times unless the Commissioner of Police has exempted them. Under the rules of the soft curfew regarding essential travel, persons whose last names begin with the letters A to K shall only do so on Mondays, Wednesdays and Fridays, while persons whose last names begin with the letters L to Z shall only do so on Tuesdays, Thursdays and Saturdays. Others must remain in their place of residence, inclusive of their yard space.

As of Sunday 5 April, Sundays are under a 24-hour hard curfew, with soft curfew resuming at 5am on Monday morning. The hard and soft curfews were renewed on 17 April for a period of two weeks until 1 May.

While the Sunday hard curfew remains in force at the time of writing, the soft curfew hours have been extended slightly. The aforementioned regulations of 27 March have been repealed and replaced by the Prevention, Control and Suppression of COVID-19 Regulations, 2020, which came into force on 4 May for two weeks. Within these regulations, the soft curfew timings have been extended by one hour, to 5am-8pm daily Monday to Saturday. The hard curfew or full lockdown, save for exempted essential services personnel, is in operation each night between the hours of 8pm and 5am and all day on Sundays.

I. General meetings

If matters arise during a board meeting that need to be taken up at an EGM, constitutional documents should be consulted as to whether that is the case and, if so, whether the requirements for an EGM can be complied with given the current restrictions.

While modern Cayman constitutional documents usually offer considerable flexibility, it cannot be assumed that a provision that may be applicable to a majority of entities is in fact universal. Thus, companies should check their articles of association to ensure that there are no 'place' restrictions.

In a useful intervention, when it comes to matters requiring a shareholders' resolution, the Cayman courts have recently confirmed the applicability of the Duomatic principle to Cayman investment funds. The principle can be applied to mean that where a decision is taken with the informal but unanimous assent of the shareholders it will be legally effective notwithstanding any formal deficiencies.

II. Board meetings

When it comes to board meetings, directors and advisors who would ordinarily travel to Cayman in order to participate in meetings are being prevented from doing so for at least the next few weeks. However, meetings should continue to be held by audio or video conferencing. Notice of meetings should be given to all directors, and other formalities observed, in the usual way. In addition, directors of Cayman companies are advised to examine their constitutional documents to determine if meetings may be held by telephone or video conference.

Where board meetings are required to be held virtually due to the measures put in place to combat COVID-19, the Cayman Department for International Tax Cooperation (DITC) will take this into consideration when determining whether an entity has passed or failed the economic substance test in its reporting due in 2021. However, it is noted that the requirement to be directed and managed in Cayman is only one element of the economic substance test and that an in-scope entity is also required to conduct core income generating activities in relation to its relevant activity.



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Guernsey

The Guernsey International Business Association (GIBA) released a statement on 16 March 2020, confirming that they and the Guernsey Society of Chartered and Certified Accountants have been in discussions with the Guernsey Revenue Service (GRS).

GIBA confirmed that, where economic substance rules might ordinarily require control of a company to be undertaken from within Guernsey, it is their understanding that the GRS will take a similarly pragmatic approach to that of their Jersey counterparts – a view that has been endorsed by the island's Chief Minister.

While this will permit meetings to be held without a physical presence or majority in Guernsey, there are some additional points that will be dealt with below. It should also be noted that compliance with The Income Tax (Substance Requirements) (Implementation) Regulations, 2018, (as amended) will be expected to resume once the travel restrictions necessitated by the current COVID-19 outbreak are relaxed.

I. General meetings

Subject to any specific requirements or prohibitions in a company's constitutional documents, shareholder meetings for Guernsey companies can be held remotely through telephone, video conferencing or other platforms. It is also permissible to hold a meeting by a combination of these tools, provided that all participants in the meeting are able to be heard and to listen to each other. A shareholder can also, subject to any specific requirements or prohibitions in the constitutional documents, appoint a proxy to attend a meeting on his/her behalf.

II. Board meetings

Telephonic or electronic attendance

The constitutional documents of Guernsey companies usually allow meetings to be held via telephone or other electronic means (such as video conference) as long as every director can hear what is being said by each of the other directors. However, the constitutional documents should always be checked to ensure that board meetings may be held other than in person and confirm what the requirements are (if there are any).

Location

In the absence of anything contrary in the company's constitutional documents, the place of a board meeting will be deemed to be the location of the chairperson. If meetings are required to be held in Guernsey, for economic substance purposes or otherwise, a director who is physically present in Guernsey should be appointed as the chairperson. If all of the company's directors are located outside of Guernsey and are unable to travel during the COVID-19 pandemic, consideration should be given to appointing an additional or alternate director who is physically present in the island or amending

any provision of the articles that compels the location of the meeting to be held in Guernsey.

Written resolutions

As an alternative to holding a meeting, subject to the provisions of a company's constitutional documents, written resolutions can be passed by both the shareholders and directors. The articles of association should be checked to ascertain whether there are any prohibitions, restrictions or minimum signatory requirements for the type of resolution involved.

III . Specific Additional Requirements During COVID-19 Travel Restrictions

Each Guernsey company should note in its minutes or written resolutions that an amended policy in respect of attendance at meetings is in place due to general travel restrictions imposed during the COVID-19 pandemic. This will ensure that it can demonstrate contemporaneous evidence of why it has not been able to hold an adequate number of director or shareholder meetings in Guernsey or why such meetings were required temporarily be held virtually, such as by conference call or video conferencing.

IV. Conclusion

Guernsey's modern and flexible corporate governance regime should ensure minimal disruption to the running of Guernsey companies during the COVID-19 pandemic. However, in every case, constitutional and other governance documents should be reviewed to ensure that a meeting can, if necessary, be held remotely. If constitutional documents do not allow for this, an amendment to these documents may be required.



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United Kingdom

England and Wales

On 23 March 2020, the United Kingdom (UK) Government imposed a ban on public gatherings of more than two people, referred to as the 'Stay at Home' measures, which were passed into law in England and Wales with immediate effect under statutory instrument (2020/350 in England and 2020/353 in Wales) pursuant to the Public (Control of Disease) Act 1984. The Coronavirus Act 2020 was passed by UK Parliament on 25 March.

Scotland

On 6 April 2020, the Scottish Government passed the Coronavirus (Scotland) Act 2020 – part 1 of which is set to expire on 30 September 2020 – setting out Scotland's own measures around public gatherings and the UK 'Stay at Home' measures.

Northern Ireland

On 24 April 2020, the Northern Irish Government passed The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, which sets out Northern Ireland's own measures around public gatherings and the UK 'Stay at Home' measures.

Please note that the UK Government, Scottish Parliament and the Northern Irish Parliament will continue to update measures during the pandemic.

The Chartered Governance Institute, along with several leading law firms, and with the support of the Financial Reporting Council and the Association of General Counsel and Company Secretaries, has prepared guidance for annual general meetings and the impact of COVID-19, which outlines how listed companies incorporated under the Companies Act 2006 might implement contingency measures.

UK boards are facing difficulties with physical board meetings due to the Stay at Home measures but there are alternate solutions to allow for decisions to be made to enable business continuity. Therefore, where possible, companies should avoid holding an annual general meeting (AGM) or extraordinary general meeting (EGM) until the restrictions introduced by the Government have been lifted.

Some considerations for UK boards:

I. General meetings

Where general meetings cannot be postponed or delayed, virtual AGMs are permitted by law but are subject to the company constitution. It is recommended that the following options should be considered:

Teleconference facilities

s360A of the Companies Act 2006 states that:

- 1) Nothing in this Part is to be taken to preclude the holding and conducting of a meeting in such a way that persons who are not present together at the same place may by electronic means attend and speak and vote at it
- 2) In the case of a traded company the use of electronic means for the purpose of enabling members to participate in a general meeting may be made subject only to such requirements and restrictions as are—
 - (a) necessary to ensure the identification of those taking part and the security of the electronic communication, and
 - (b) proportionate to the achievement of those objectives
- 3) Nothing in subsection (2) affects any power of a company to require reasonable evidence of the entitlement of any person who is not a member to participate in the meeting

An AGM or EGM may be held at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate. The provision allows for members to attend the meeting using individual teleconference facilities. However, it is important to note that:

- If the company's constitution references a 'place', then this will not allow for virtual meetings, therefore appropriate wording to facilitate virtual meetings may need to be applied
- The details of the teleconferencing arrangements should be sent out with notice of the meeting

Proxy forms

Another option is encouraging shareholders to vote by proxy and appoint the chairman as their elected representative to circumvent them or a third party having to attend in person.

When drafting a notice for the general meeting, the following commentary should be included:

- An explicit encouragement of proxy voting to reduce physical attendance at the meeting
- Reference to the Government's Stay at Home measures, e.g. social distancing and the Chartered Governance AGM guidelines
- Reference to a dedicated webpage where updates on the arrangements for the AGM can be found

It is important to note that a single-member company or limited company may dispense with the requirement to hold an AGM in any year where, before the latest date for the holding of that meeting, all members entitled to attend and vote at the AGM sign a unanimous written resolution approving the business of the AGM.

II. Board meetings

In general, but only if allowed by the company's constitution, board meetings can be held via teleconference, video conference or by other electronic communications.

The Companies Act 2006 allows for directors to act by way of a unanimous written resolution in lieu of holding a meeting – a written board resolution can be circulated electronically and signed in counterpart, thereby being an efficient means for obtaining board approval where a physically or electronic meeting cannot be convened.

In those rare cases where these provisions have been disapplied in the company's constitution, companies should consider changing their constitution to allow it.

III. Alternate directors and proxies

In the event that there is a preference for not holding board meetings by way of teleconference, then a company may appoint an alternate director to attend meetings. The director will need to send a signed letter to the directors of the company to notify the board of the appointment of the alternate director and the duration of the appointment.

At the next board meeting, the directors will approve the appointment of the alternate director. A director may also consider granting a power of proxy as to how particular matters should be voted upon. It is important to note that in the event a meeting is held it must be done in compliance with the Stay at Home measures, and would only be applicable to companies that do not require more than two to form a quorum.

The company may appoint further directors to ensure that they have sufficient heads to form a quorum when meetings are required. The company should also consider whether a board meeting is necessary at this time and whether scheduled meetings should be postponed until a later date.



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Hong Kong

With a view to combating the COVID-19 pandemic, the Hong Kong Government has introduced measures to implement social distancing. This includes the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, which came into operation on 29 March 2020.

The Government has since lifted, on 5 May, certain social distancing measures under the Prevention and Control of Disease Ordinance and declared that the number of persons allowed in group gatherings in public places will be relaxed from four to eight. This measure came into effect on 8 May 2020 for 14 days until 21 May 2020. The term ‘public place’, under Section 2 of the Regulation, means “a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or otherwise”.

If a general meeting is not held at a public place as defined in the Regulation, the Regulation does not apply. For example, where general meetings of private companies are held at a place to which the public does not have access, such meetings will generally not be subject to the restrictions under the Regulation.

I. General meetings

Item 11 of Schedule 1 of the Regulation provides an exemption for holding general meetings that require a group gathering to be held within a specific period to comply with any ordinance or regulation. As such, AGMs as required under the Companies Ordinance (CO) should generally be exempted under Item 11.

Under the CO, there are some provisions that require certain resolutions of members to be made within a specified period. For cases where resolutions of members have to be passed at a general meeting other than an AGM within a specified period, the exemption under Item 11 may also apply to such a meeting. Whether other types of general meetings fall within the exemption will have to be determined on a case by case basis with reference to any specific requirements under the relevant ordinance or other regulatory instruments governing the holding of such meeting.

Physical meetings

Companies are urged to consider the possibility of deferring or adjourning their general meetings until after the expiration of the specified period, taking into account whether:

- The timing of holding the general meeting is subject to any statutory requirement
- Any such requirement is capable of extension, waiver or similar
- Any business to be dealt with at the meeting is of such urgency and importance that it necessitates the holding of the meeting

Hybrid meetings

The CO facilitates a hybrid meeting; in other words, a physical meeting together with a form of electronic participation using tele-conferencing, video-conferencing or other electronic means.

By virtue of Section 584, a company is expressly permitted to hold a general meeting at two or more places by using technology that enables members who are not in the same place to listen, speak and vote, subject to the provisions of the company’s articles of association. In this connection, companies may review their articles to see if a hybrid general meeting is permissible.

Companies may consider making necessary arrangements to segregate attendees across different venues. For example, the meeting may be held in separate meeting rooms, with video links provided to allow attendees at each venue to participate fully.

Pursuant to Section 576 of the CO, if a general meeting is to be held at two or more places, the principal place of the meeting and the other place(s) of the meeting must be specified in the notice of meeting.

Pre-registration and proxy voting

In order to better manage the number of members that may attend the meeting, companies may consider requesting members to pre-register if they (or their proxies) wish to attend the meeting in person. Companies may also encourage members to vote by proxy, or, if practicable, by electronic modes of voting, and to submit their questions to management in writing before the meeting.

Under Section 585(3) of the CO, where a company has more than one member, subject to the provisions of the company’s articles, two members present in person or by proxy is a quorum of a general meeting of the company.

Restriction on the number of attendees

In the interest of public health, companies are strongly advised to restrict the physical attendance of attendees of a general meeting at any one venue as far as practicable and to implement the precautionary measures set out below to achieve social distancing.

Other precautionary measures

Companies are also strongly advised to implement appropriate precautionary measures at the venue where a general meeting is to be held. These measures include, for example:

- Arrange for body temperature to be taken for all attendees, with entry denied to those displaying high body temperatures
- Everyone must wear a face mask

- Provide hand sanitiser
- Provide sanitising mats at the venue entrance
- Arrange for appropriate physical distancing between seats

Companies are further advised to provide notice of the meeting arrangements, including the precautionary measures to be adopted, as far in advance as possible to keep their members informed

II. Board meetings

For private companies, regular meetings are not mandatory unless required by a shareholders agreement and/or the articles of association. However, it is recommended to convene board meetings to approve corporate changes and significant transactions. It may be possible to hold electronic meetings, subject to the shareholders agreement and/or articles of association. However, Exemption 4 in the Regulation allows group gatherings at a place of work for the purposes of work. While it is not entirely clear, and depends on the facts of the case, this exemption may be applicable to board meetings held at a place of work for the purposes of work. Please note that the exemption is only applicable to the place of work, and not to any outside venue.



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Singapore

The Singapore Government has announced that it would limit gatherings to 10 persons or fewer, and requires that physical distancing of at least one metre is to be maintained between persons in non-transient settings. Such measures have been extended to 1 June 2020.

The Accounting and Corporate Regulatory Authority (ACRA), Monetary Authority of Singapore (MAS) and Singapore Exchange Regulation (SGX RegCo) provided guidance on 31 March 2020 regarding safe distancing for issuers when conducting general meetings such as AGMs and EGMs held under the Companies Act and each company's constitution.

Issuers whose AGMs are due to be held between 16 April and 31 July 2020 may choose to defer these AGMs by up to 60 days. This updated guidance allows issuers that choose to proceed with general meetings to be able to do so by, for example, providing opportunities for shareholders to ask questions, sharing the meeting by live webcast, and allowing proxy voting.

Meetings can still be held in accordance with existing law or legal instrument, as long as doing so would not breach prevailing safe distancing measures. Entities that are unable to comply with the alternative arrangements in the COVID-19 Temporary Measures (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020, or the requirements under existing law or their legal instruments, should consider deferring their meetings.

The below measures incorporate the alternative arrangements prescribed in the Order as well as other alternative practices that non-listed companies should adopt given the inability of shareholders and members to attend in person meetings.

I. General meetings

Notice of meeting

Mode of publication: Companies and entities may send notices by electronic means, but this should only be done if the notice is sent to all the members of the company, to an email address notified by the members to the company, and the notice is published on the website of the company (if available).

Notice period: All notices convening general meetings must be sent to shareholders and members at least 14 calendar days (or 21 calendar days, where special resolutions are proposed) prior to the meeting.

Documents

Companies may continue to send documents in accordance with the Companies Act (CA) and their constitutions. Documents required to be laid or produced before a general meeting of a non-listed company may be done, as long as it has been sent along with the notice of the meeting.

Voting

As shareholders and members are unable to attend the general meeting physically, unless the company's constitutive documents allow for remote electronic voting, shareholders and members (including those attending the meeting physically, e.g. management shareholders or members) must vote by proxy only, and only the chairman of the meeting may be appointed as proxy.

Proxy forms

Companies' shareholders and members must be allowed to submit proxy forms through electronic means (e.g. an email enclosing signed PDF copies of the proxy form) as an alternative to physical delivery of the instrument of proxy.

Conduct of meeting

Issuers and non-listed companies must, if conducting general meetings through electronic means, do so at no cost to shareholders and members.

Director and auditors

Directors and auditors may also attend or be heard at general meetings through electronic means.

II. Board meetings

Generally, board meetings are to be held or conducted in accordance with the company's constitution. Companies can also make alternative arrangements for any meetings where personal attendance is required by changing the company's constitution. Hence, it may be possible for board meetings to be held by electronic communication.



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How IQ-EQ can help?

IQ-EQ is fully operational and available to assist you with any corporate governance queries you may have at this time, including but not limited to:

- Drafting constitution amendments and associated paperwork to permit board meetings to be held by electronic means and unanimous written resolutions in lieu of holding a meeting
- Providing teleconference facilities for board meetings and general meetings
- Procurement of directors, for instance where there is a requirement to appoint an alternate director resident in the jurisdiction to represent an overseas director at a board meeting. IQ-EQ can assist with the appointment process and provide CVs for consideration
- Corporate secretarial services including the drafting of detailed minutes
- Assisting with any ad-hoc corporate governance queries
- Corporate governance sanity check and review

If you have any questions on the information contained within this document, or would like to find out more about how IQ-EQ can help your business, please don't hesitate to contact a member of our international corporate services team.

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