

A PRACTICAL CHECKLIST FOR THE POST-COVID WORLD

Family governance in the digital age

WHY STRUCTURES NEED TO BE “DIGITAL READY”

The Covid-19 pandemic has had two major implications for family governance structures:

- **Short-term:** travel restrictions and health risks have prevented “business as normal” for the foreseeable future.
- **Long-term:** in some cases the increasing use of digital communication by families and their professional advisors is causing disruption to governance structures. Digital forms of communication (such as video conferencing) are here to stay. Families therefore need to adopt appropriate policies and incorporate them into their governance structures.

Accordingly, families need **short-term** fixes to their structures, but should also ensure their structures are “digital ready” to ensure they work over the **long-term**.

Without these fixes, structures could face paralysis with disastrous effects for family businesses and private assets.

The considerations in this note apply equally to **new** and **existing** structures.

“DIGITAL FORMS OF COMMUNICATION (SUCH AS VIDEO CONFERENCING) ARE HERE TO STAY.”



CHECKLIST

Here are the points that family councils now need to consider with their legal advisors.

- Formulate digital policies:** families need to formulate policies on digital communication. Is the family prepared to embrace (or tolerate) digital communication, or does it frustrate the family ethos?
- Identify immediate defects:** families and their lawyers need to identify defects which require immediate changes. For example, what if board or protector meetings are premised on physical meetings, which cannot currently take place? Some structures may already be in breach, or be unable to function.
- Detailed re-drafting:** core rules on voting and meetings should be reconsidered. The sorts of questions now arising include:
 - **In what circumstances can/should governance be conducted digitally?**
 - **Prohibition on digital?** Should some families prohibit virtual meetings altogether? If so, what should happen in Covid-like situations?
 - **Do the rules allow for decisions to be made virtually and what are the digital voting procedures?**
 - **Should certain decisions be reserved for physical meetings?** For instance, the types of decision which require detailed discussion.

FAMILY GOVERNANCE IN THE DIGITAL AGE

- **Should certain decisions be digital?** For example, should virtual meetings be encouraged for certain business decisions which require quick action?
 - **Psychology and family interactions.** Families need to consider how they can successfully interact digitally and how board members can “read the room” in the absence of body language. Facial expressions become the only means of gauging reactions, which itself is contingent on a reliable internet connection. Should these factors shape decision-making processes? It may depend on the nature and size of the family.
 - **Original documents.** Access to the trust documents themselves may be critical: are they always accessible?
 - **Tax:** how to mitigate the risk of bringing structures onshore when dealing digitally (especially if trustees are grounded onshore in crisis situations).
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- **Re-evaluating core provisions:** the current crisis highlights the ongoing importance of reviewing several core provisions.
 - **Exit strategies:** the current situation may put strain on families who cannot meet, particularly if unresolved issues are allowed to “fester”. Equally, it will put strain on asset values, if family businesses and private assets lose value in the current market.

This reinforces the importance of exit provisions for those families that permit exits. If family members wish to exit, there must be rules to govern how (and whether) this can be done.
 - **Capacity issues:** the pandemic is a reminder to check structures have thorough provisions for incapacity, whether temporary or permanent.
 - **Importance of board appointments:** the boards of many family entities are now dealing with the economic fallout from the pandemic. In some cases, survival will depend on the actions of board members. This underlines the importance of making the right board appointments and ensuring there are effective successor appointment provisions.
 - **Investment advisors and protectors:** similarly, the current challenges show the importance of effective provisions for investment advisors/committees and protectors.
 - **Flee clauses:** flee clauses automatically trigger certain actions (such as transfers of trusteeship) upon crisis situations. Should flee clauses be activated in the event of a future pandemic or similar emergency, to ensure effective governance? If so, how would the new jurisdiction be determined? Equally, how are “trigger events” defined and would a pandemic unwittingly activate a flee clause?
 - **Regulation:** economic substance rules require physical presence in the jurisdiction where the structure is incorporated. Structures need to ensure compliance when operating digitally.
 - **Confidential information:** trustees and other fiduciaries owe duties of confidentiality under statute and common law. Measures are needed to ensure compliance when, for example, conducting video conferences and arranging electronic signatures.

CONCLUSION

In many cases, patriarchs and matriarchs will strongly advocate the status quo on matters such as physical meetings, and for most families this should remain the default option.

However, it can no longer be assumed that structures can always run on the traditional basis. Structures therefore need to be reviewed to ensure they are “digital ready”.

FAMILY GOVERNANCE IN THE DIGITAL AGE



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