



## Managing Corporate Governance in Irish Subsidiaries Series

### Who can represent a company?

As part of a series of articles providing insights on the management and corporate governance of Irish-incorporated companies and, in particular Irish subsidiaries of international companies, Pat English (Partner, Head of International Business) and Grainne Boyle (Senior Associate, International Business) provide an overview of the key issues to bear in mind and some practical tips when considering who can represent an Irish company with a particular focus on any proposed delegations of authority by the board of directors. Navigating this issue in a commercially pragmatic manner has become more important than ever, in particular in the COVID-19 virtual environment in which businesses are now operating, where companies have an absolute need to operate efficiently while at the same time protecting the business from the risk of the chain of authority being breached.

#### 1. Introduction

- 1.1 It is often not practical for the board of directors to approve each document and action proposed to be taken on behalf of the company. In that context, in order to facilitate the operation of the day-to-day business of the company, delegations of authority can be put in place in favour of named individuals and/or committees to execute certain documentation, and/or take certain actions, on behalf of the company.
- 1.2 Although they are not bound to give continuous attention to a company's affairs and cannot necessarily be held responsible for errors of judgement, it is important to note that the directors continue to have an overriding duty to supervise all actions taken pursuant to any delegations.

#### 2. Board Authority

- 2.1 Irish law creates a statutory default in favour of powers of management being vested in a company's directors, subject to:<sup>1</sup>
  - a company's constitution (to ensure the root of the company's powers rests with its shareholders);
  - powers requiring approval at a general meeting of a company;
  - the provisions of the Companies Act 2014 (the "Act"); and
  - any resolutions or provisions made by a company at a general meeting.
- 2.2 The vast majority of boards of Irish companies are "unitary" (ie, one tier boards). A unitary board can be comprised of both executive and non-executive directors. The board is responsible for both the running of the business and ensuring compliance with strategies, policies and law.

<sup>1</sup> Please note that, for the purposes of this article, we have assumed that no additional limitations or restrictions are imposed (eg, regulatory, banking or other contractually agreed covenants etc).

- 2.3 One important point to note is that typically, it is the board *collectively*, and not the individual directors (save in the case of a sole director company), who have the authority to act on behalf of a company. The board may delegate authority to an individual director in the same way as the board may delegate authority to other individuals.



## Tip

The fact that individual directors of Irish companies do not typically have individual authority to act on behalf of the company should be flagged to the appropriate teams within the business (for example, the commercial contracts team). This can avoid issues later where documents inevitably require execution urgently and there is a need to evidence their signature authority.



## 3. Delegating Board Authority

- 3.1 The board may delegate to any such person(s) or committee(s) as they see fit and may impose regulations on any delegation of their power. However, the board should consider the following matters when putting in place any delegation of authority:

### 3.2 Express / Actual Authority

- The board should evidence the actual authority (ie, express authority) which is to be granted to the delegate (including the terms of the delegation). Where the terms of the delegate's authority are ambiguous, a company may be bound where its delegate acts reasonably and in good faith.
- Where no actual authority is in place, the delegate may seek to rely on the doctrine of ostensible or apparent authority. In *Grenet v Electronic Arts Ireland Limited* (2018) ("EA"), an employee of EA's US parent company

terminated the employment of a director of EA's Irish subsidiary, purportedly on behalf of the Irish subsidiary. While the case was ultimately settled, in the injunctive hearing, the Court was critical of EA's assertion that there was ostensible delegated authority vested in the US-based individual to manage the majority of the employees at EA's Galway site.



#### Tip

Companies should ideally avoid reliance on the doctrine of ostensible authority and instead ensure that express authority has been granted.

### 3.3 Skills and Competency of Delegate

- When considering any delegation of authority, the board of directors should be confident that the proposed delegate is competent to carry out the proposed delegated functions.
- The board of directors should consider the experience and skills of the proposed delegate and impose limits on any delegation of authority as they deem appropriate. Delegated powers can be restricted to a particular function of the business, or monetary limits can be imposed. The limits may require that certain actions require the approval of two or more of the proposed delegates.

### 3.4 Supervisory Obligations

- As mentioned at the outset, although they are not bound to give continuous attention to a company's affairs and cannot necessarily be held responsible for errors of judgement, the directors continue to have an overriding duty to supervise the delegate.



#### Tip

We recommend that an update on any actions taken, or documentation executed, by delegates should be provided to the board at regular intervals (for example at board meetings). We also recommend that the board of directors ensure on an ongoing basis that: (i) the delegations are still required in connection with the proper management of the business; and (ii) the relevant delegate continues to be competent to carry out the delegated actions.

- The board of directors should regularly review, and then revoke or amend (as necessary), any existing delegations.

### 3.5 Fiduciary Director Duties

Directors cannot delegate their fiduciary duties as directors. It is also not appropriate for directors to appoint attorneys to carry out their director duties – the proper procedure is for the director to appoint an alternate director.

### 3.6 Sub-Delegation of Authority

As part of a delegation of authority, the directors may wish to grant the delegate a right to sub-delegate their authority to certain individuals but they need to be mindful of the general rule '*delegatus non potest delegare*' (ie,

a delegate cannot sub-delegate in the absence of an express power). The directors should also ensure that: (i) any such sub-delegation power is required and / or limited accordingly; and (ii) to the extent that the delegate does sub-delegate, an obligation is in place to notify the board of the sub-delegation (and of any actions taken, or documents executed, by the sub-delegate accordingly).

### 3.7 Potential Delegates

Individual directors, employees, committees (e.g. R&D committees), third parties (e.g. the company's service providers (including accountants or legal counsel)) or a "Registered Person" (as defined in the Act) might reasonably be delegated authority to by the board of directors.

### 3.8 Tax, Regulatory and Employment Considerations

Before they are granted, any proposed delegations of authority should be considered from a tax, regulatory and employment perspective.

## 4. Documenting Delegations of Authority

### 4.1 Board Approval

Board approval is the primary means of evidencing an individual's authority to act on behalf of the company. It is best practice for an individual acting on behalf of an Irish company to have, as a basis for doing so, advance board approval. Board approval can be obtained by way of: (i) passing resolutions at a board meeting; or (ii) written board resolutions of the company.



#### Tip

Copies of delegation records (for example, delegation log, delegation framework and committee charters) should be regularly reviewed as part of board meetings.

### 4.2 Powers of Attorney

As part of the board approvals, the directors should consider and approve the execution of the power of attorney instrument. A power of attorney is the most formal way of delegating authority. Both general and specific powers of attorney can be put in place. While not required from an Irish legal perspective to effect a delegation of authority, it may be useful where evidence of the delegation is required to be provided to a third party or authority. Alternatively, a certified copy of the board approvals may be sufficient evidence in this respect.

### 4.3 Delegate Agreement

- For all delegations, it is recommended to: (i) notify the delegate in writing of the delegation; and (ii) obtain the delegate's consent in writing in respect of the delegation. Email communication is sufficient in this respect.
- Particularly for delegations to third parties, a separate agreement may be put in place which clearly sets out the scope, roles, liability and responsibilities of the delegate.
- The delegate should also be provided with the relevant supporting documentation (eg, employee handbook, committee charter, delegation limits).



## 5. Conclusion

Directors should familiarise themselves with the delegation documentation and records in place in their organisations and use board meetings as a useful forum for reviewing the company's existing delegations of authority.

For more information on the above, or for further guidance and insight in respect of the corporate governance of Irish-incorporated companies generally, please contact **Pat English**, **Grainne Boyle** or your usual Matheson contact.

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