Matheson

Managing Corporate Governance in Irish Subsidiaries Series

# Privilege in the boardroom

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 (Partner, International Business) provide an overview of common issues which arise when considering whether the minutes of a board meeting (and related materials) are privileged.

## 1 Introduction

While minutes of board meetings are not publicly available, such minutes may be requested by authorities (e.g. tax or other regulatory authorities) as part of audits or investigations, or by third parties pursuant to discovery requests made in the course of litigation. Inevitably and understandably, this can cause sensitivity and can very often lead to a marked reluctance to disclose certain information within minutes. At the same time, from a corporate governance perspective, board meetings should be robust and fulsome and the related minutes should accurately record the discussions held, and decisions made, by directors during meetings. As a result, a delicate balance must be struck in many circumstances, and the contents of minutes should be considered carefully in that context.

## 2 Types of privilege

**Did you know?**

The two primary types of privilege asserted under Irish law are:

- "legal advice privilege" which provides protection where the purpose of the communication is giving, seeking or receiving legal advice; and
- "litigation privilege" which provides protection where the sole or dominant purpose of the communication is to prepare for actual or reasonably contemplated litigation.

There are other forms of privilege which may be asserted including common interest privilege, joint privilege, and without prejudice privilege. Common interest privilege may be of particular interest to Irish subsidiaries of international companies, as it may in certain circumstances allow the Irish subsidiary to share privileged information within the group (and still retain the protection of privilege), where two or more affiliates have a common interest in the outcome of litigation or legal advice.

## 3 Recommended practices

The application of privilege will always depend on the particular details of the matter involved, and the legal advice (if any) provided as part of same.

Privileged information should only be shared with "the client". While specific advice should be sought to determine who constitutes "the client" in each circumstance, this is typically the individuals authorised to obtain legal advice from in-house counsel, or external lawyers, on behalf of the company.

The risk of waiving privilege must be borne in mind not only during the meeting itself, but also in the context of preparing for the meeting, and the drafting and circulation of minutes following the meeting.

In general terms, the following practical points should be implemented with the aim of ensuring that privilege is not inadvertently waived as part of the board meeting process.

### Meeting preparation

- Privileged information, or detail on potentially litigious matters, should not be circulated as part of the general board meeting preparatory and briefing materials. Such material should be circulated as part of a separate email thread, and only to individuals who would constitute "the client" for privilege purposes. The privileged material should be clearly labelled as privileged and confidential. A preferred alternative in many cases (particularly in the virtual board meeting environment) is to "screen share" the material during the meeting itself rather than circulating privileged material in advance.
- To the extent that briefing notes or summaries are to be prepared in respect of privileged matters: (i) approval should be sought from legal counsel that the creation of the document would not constitute a waiver of privilege; and (ii) such document should be prepared by an individual who forms part of "the client".
- Companies should ensure that all directors, including non-executive directors, have a secure company email address, and that all meeting material is sent to such email address. Secure and confidential meeting portals or software may also be utilised in this context.
- In advance of a virtual board meeting, the security settings for the videoconferencing platform being used should be reviewed and confirmed.

### During the meeting

- Meeting attendees should be considered carefully in the context of privilege. While third party advisers (e.g. auditors, tax advisers) attend board meetings, their attendance in certain circumstances may waive privilege. To the extent privileged information is to be discussed at a board meeting, for that portion of the meeting, it is preferable to excuse any third parties and attendees who would not constitute "the client" for privilege purposes. Boards often hold "executive sessions" separate to the meeting itself to discuss privileged matters. Separate minutes should be prepared in respect of such sessions if possible.
- Meeting participants should be frequently reminded of the potential risk of a waiver of privilege during meetings.
- To the extent that any meeting participant proposes to "screen share" privileged information, the meeting (the participants of which should only consist of "the client" at this stage) should be reminded of the risk of screen recording such material in the context of privilege.
- The presence of a lawyer (regardless of whether the individual is an in-house or external lawyer) during a board meeting does not, in itself, attach privilege to the meeting and the related discussions. However privilege may attach to all or a portion of the meeting during which legal advice was provided by such lawyer(s). Irish law recognises advice given by non-Irish qualified lawyers in this respect, provided that the advice itself is privileged.
- When a matter which is potentially litigious is to be discussed during a meeting, the potential litigious nature should be clearly noted at the outset, and it should be clarified that the legal advice is being sought with the dominant purpose of preparing for litigation.
- As the board minutes will be the evidence of the discussions held, and decisions made, during the meeting, generally video or audio recording of meetings is not recommended. To the extent that there is a strong preference to record the meeting, a separate recording should be made in respect of the privileged portion of the meeting.

### Following the meeting

- A draft of the minutes should be prepared as soon as possible after the meeting. Similar to the meeting preparation stage, draft minutes containing any privileged content (which ideally should be documented separately to the "general" board meeting minutes) should only be circulated for review to "the client".
- These minutes should be meaningfully reviewed by the meeting participants. "The client" and, in particular, the individual(s) responsible for managing any privileged matter, should review the relevant content in detail (and share with external lawyers as necessary).
- It is important to note that the drafting of minutes by a lawyer does not, in itself, mean that such minutes are privileged.
- Similar to the meeting preparation stage, to the extent that any participant wishes to retain their own notes in respect of the meeting, approval should be sought from legal counsel that the creation of the document would not constitute a waiver of privilege.
- Once approved and signed, no further revisions should be made to the minutes.
- Both the draft and signed versions of the minutes should be stored securely and their access restricted. Access to privileged content should continue to be restricted to "the client".

## 4 Conclusion

While it is always important for boards of directors to discuss and analyse privileged matters, the board meeting process can present a risk of privilege being waived or lost in certain circumstances. As a result, all meeting participants should be briefed on (and regularly reminded of) the preferred meeting process to ensure continued retention of the protection of privilege where applicable.

The assertion of privilege in the present context is typically used defensively in response to requests for copies of board minutes. However, it should also always be borne in mind that the disclosure of well drafted board minutes (and the waiver of related privilege), can also be utilised as a strategic tool to demonstrate: (i) the effective corporate governance structure of a company; or (ii) a company's decision making process, position and rationale in litigious matters.

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, Gráinne Boyle or your usual Matheson contact.



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