

PARTICIPATION IN BOARD MEETING THROUGH VIDEO CONFERENCING—WHETHER RIGHT OF A DIRECTOR OR SUBJECT TO AVAILABILITY OF FACILITY BY COMPANY ?

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Introduction to meetings of the board of directors and directors' participation

Section 173 of the Companies Act, 2013 (the "Act") relates to the "Meetings of the board". Sub-section (1) of section 173 of the Act relates to the frequency of the meetings of the board of directors and exemptions/exceptions to certain class or description of companies.

Sub-section (2) of section 173 of the Act states that the participation of directors in a meeting of the board may be either : (i) in person or (ii) through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, provides for a detailed procedure for convening and conducting the board meetings through video conferencing or other audio visual means.

The provisions of section 173 of the Act further state that the Central Government may, by notification, specify such matters which shall not be dealt with in a meeting through video conferencing or other audio visual means. Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014, relates to the "Matters not to be dealt with in a meeting through video conferencing or other audio visual means, which includes : (i) Approval of the annual financial statements, (ii) Approval of the board's report, (iii) Approval of the prospectus, (iv) Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by the board of directors, and (v) Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

The Companies (Amendment) Act, 2017 introduced a provision in relation to certain specified matters which shall not be dealt with in a meeting through video conferencing or other audio visual means. According to the amendment, where there is quorum in a meeting through physical presence of directors, any other director may participate through video

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conferencing or other audio visual means in such meeting for the above five matters.

**Participation in board meetings through video conferencing—
Whether right of a director or subject to availability of facility by the
company ?**

The critical issue in a recent case was about the participation of directors in meeting of the board of the directors through video conferencing—Whether it is the right of a director to participate in such meetings through video conferencing or whether the participation of the directors is subject to the availability and providing the video conferencing facility by the company ?

Facts of the case : In an interesting case¹, one of the directors moved an application before the National Company Law Tribunal (Guwahati Bench) seeking facility of attending the board meetings through video-conferencing. The National Company Law Tribunal directed non-applicants to provide the facilities as provided in sub-section (2) of section 173 of the Act subject to fulfilling the requirements of rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014. Other directors appealed against the order of the National Company Law Tribunal. The other directors were aggrieved as they had apprehension that when the original petitioner participates in the meetings through video-conferencing, it would not be possible to ensure that nobody else was present from where the original petitioner would be participating. The other directors contended that the secretarial standards on meetings of the board of directors have considered this aspect and they have prescribed that such option under the provisions of the Act and the Rules should be restored to only when the facilities were provided by the company to its directors.

National Company Law Tribunal's conclusion : The National Company Law Tribunal noted that the company had the necessary infrastructure available and found that the company had no reason not to provide the concerned facility. Accordingly, the National Company Law Tribunal concluded that the provisions of sub-section (2) of section 173 of the Companies Act, 2013, are mandatory and the companies cannot be permitted to make any deviations therefrom. The National Company Law Tribunal directed non-applicants to provide the facilities in accordance with the Act and Rules made thereunder.

National Company Law Appellate Tribunal's interpretation and conclusion : On appeal, the National Company Law Appellate Tribunal (*Achintya*

1. *Ranjit Borthakur v. W. G. Resorts Assam P. Ltd.*, October 27, 2017.

Kumar Barua alias Manju Baruah v. Ranjit Barthkur [2018] 207 Comp Cas 47 (NCLAT)) noted the provisions of sub-section (2) of section 173 of the Act (i.e., the participation of directors in a meeting of the board "may" be either in person or through video conferencing or other audio visual means). The National Company Law Appellate Tribunal interpreted the provisions and stated that (page 50 of 207 Comp Cas) : "The word 'may' which has been used in this sub-section (2) of section 173 only gives an option to the director to choose whether he would be participating in person or the other option which he can choose is participation through video conferencing or other audio visual means". The National Company Law Appellate Tribunal observed that the word "may" does not give option to the company to deny this right given to the directors for participation through video conferencing or other audio visual means, if they so desire. The National Company Law Appellate Tribunal appreciated the provisions in the Act and the Rules with respect to the meetings of the board of directors through video conferencing or other audio visual means, termed it as "progressive step".

The National Company Law Appellate Tribunal concluded by stating that the sub-section (2) of section 173 of the Act gives right to a director to participate in the meeting through video conferencing or other audio visual means and the Central Government has notified Rules to enforce this right. The National Company Law Appellate Tribunal stated that it would be in the interest of the companies to comply with the provisions in public interest.

The National Company Law Appellate Tribunal rejected the other directors' defense that secretarial standard allows participation by a director in the board meetings through video conferencing only if the company provides such facility. The Appellate Tribunal ruled that "Such guidelines cannot override the provisions under the Rules. The mandate of section 173(2) read with Rules mentioned above cannot be avoided by the companies".

National Company Law Tribunal's observation on board meetings through video-conferencing in different case : In a different case (*Rupak Gupta v. U. P. Hotels Ltd.* [2016] 198 Comp Cas 346 (NCLT), the National Company Law Tribunal (New Delhi Bench) interpreted the provisions relating to board meetings. It was held that rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, is meant for providing video conferencing and indeed it is the duty of the directors convening the board meetings to inform the other directors regarding the options available to them to participate in the video conferencing mode or other audio video mode or other options available to them to participate through video con-

ferencing or other audio video means. Interestingly, it was held that it is the obligation upon the directors convening the meeting to provide every facility to the directors asking video conference and enable them to participate in the board meetings.

The National Company Law Tribunal (New Delhi Bench) interpreted sub-rule (3)(e) of rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 and noted that if intimation is given at the beginning of the calendar year that will remain valid for the entire calendar year. However, the National Company Law Tribunal opined that (page 351 of 198 Comp Cas) : "It is not said anywhere that if it is not given at the beginning of the year, video conference is not to be provided in that calendar year, therefore, it does not mean that the directors are not entitled to video conferencing if intimation is not given at the beginning of the calendar year. It is needless to say when a provision is read, it has to be read wholly and not in pieces, therefore, no merit is found in the argument of the respondent saying that video conferencing is not provided because no intimation is given at the beginning of the calendar year".

Conclusion

The National Company Law Appellate Tribunal's order has now cleared the air with respect to the provisions relating to conducting board meetings through video conferencing. Also, relying on the National Company Law Tribunal's order (in *Rupak Gupta v. U. P. Hotels Ltd.* [2016] 198 Comp Cas 346 (NCLT)), it can be concluded that the participation in board meetings through video conferencing is a right of the director. The company shall provide the necessary facility to enable a director to participate in the board meetings through video conferencing. This facility cannot be denied by the company in anyway. These rulings, though clarifies with respect to the rights of the directors to participate in the board meetings through video conferencing, it also ensures that the directors attend board meetings and are part of the entire broad process.
