

SPI Newsletter

ELECTRONIC CONFERENCING: A SMALL RESPITE FOR THAI COMPANIES AMIDST THE COVID-19 PANDEMIC

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Like many governments across the globe, the Thai government has recently implemented strict precautionary measures to contain the spread of COVID-19, including adopting social distancing and restrictions on domestic and international travel (among others). In this new era of social distancing and travel restrictions, Thai companies – particularly those with overseas-based directors – have faced significant challenges in holding board of directors’ and shareholders’ meetings, due to rigid and impractical requirements under existing laws.

To rectify previous limitations in the legal requirements for conducting board of directors’ meetings and shareholders’ meetings via electronic means, the Thai government has recently enacted the Emergency Decree on Meetings via Electronic Means B.E. 2563 (2020) (“**Emergency Decree**”), which became effective on and from 19 April 2020.

This article considers the key provisions of the Emergency Decree and what it means for Thai companies.



Background

Since Supreme Court decision no. 3362/2532, the Ministry of Commerce (“**MOC**”) has for some three decades adopted a precedent that directors of a Thai company must attend a board of directors’ meeting in person to form a quorum, where circular resolutions in lieu of holding a board of directors’ meeting are not permitted. Certain requirements were partially relaxed in 2014 by the Announcement of the National Council for Peace and Order No. 74/2557 (2014) Re: Teleconferences through Electronic Devices (“**NCPO Announcement**”), which stipulated that any meetings required by law may be held via electronic means, provided that:

- (a) at least 1/3 of the quorum of the meeting must physically attend the meeting at the same venue; and
- (b) all participants in the meeting must physically be in Thailand at the time of the meeting.

However, these requirements not only imposed significant burdens on Thai companies with overseas-based directors (given directors could not appoint alternates or vote by proxy), but also recently hindered attempts by Thai companies to implement social distancing measures. Recent measures allowing the extension of the period for holding mandatory meetings – while welcomed – have also failed to effectively address the issues faced by many Thai companies with respect to holding mandatory meetings.

As the limitations of the requirements under the NCPO Announcement and existing laws became more profound during the COVID-19 outbreak, the Thai government responded by enacting the Emergency Decree in April 2019, which also repeals and replaces the NCPO Announcement.

The new solution to electronic conferencing

Most importantly, the Emergency Decree removes the impractical requirements previously imposed by the NCPO Announcement. In this regard, the new Emergency Decree stipulates that “*Meeting Conducted via Electronic Means refers to a meeting that is required to be held by laws and is held via electronic means, whereby the attendees are not present at the same place and are able to discuss and exchange opinions through electronic means.*”¹

Summary of the Emergency Decree

Applicable Meetings

As was the case with the NCPO Announcement, the Emergency Decree does not expressly state that it applies to shareholders’ meetings. However, as the definition of “*the attendees*” includes the words “*other juristic bodies prescribed by the law*”², and one of the rationales behind its enactment is to tackle the issue of the indefinite postponement of annual general meetings of shareholders, it can be interpreted that the Emergency Decree shall apply to both board of directors’ meetings and shareholders’ meetings. However, the meetings which are excluded from the Emergency Decree remain unclear at this stage as the applicable Ministerial Regulations have not yet been announced.³

In summary, under the Emergency Decree, any meeting required by laws may now be held via electronic means (unless it falls under the prohibited lists to be prescribed by Ministerial Regulations) **without** requiring: (i) 1/3 of the attendees to be present at the same place; and (ii) all other attendees to be in Thailand during the meeting.

Requirements of the Meeting

Similar to the NCPO Announcement, the Emergency Decree provides that:

- (1) the meeting by electronic means shall be conducted in accordance with the standards for electronic conferencing security imposed by the Ministry of Information and Communication Technology and as published in the Government Gazette;⁴
- (2) an invitation notice of the meeting and supporting documents may be sent by e-mail, and the meeting organizer must keep a copy of the notice and supporting documents as evidence, which may be kept in electronic data format;⁵
- (3) In conducting the meeting, the meeting organizer is required to⁶:
 - (i) arrange for all attendees to identify themselves through electronic means before joining the meeting;
 - (ii) prepare the minutes of meeting in writing; and
 - (iii) make an audio record or both visual and audio record, as the case may be, of all attendees for the whole session of the meeting in electronic data format, except in case of confidential meeting.

¹Section 4 of the Emergency Decree.

²Section 4 of the Emergency Decree.

³Section 5 of the Emergency Decree.

⁴Section 7 of the Emergency Decree - the Standards for Electronic Conferencing Security B.E. 2557 (2014) issued by virtue of the National Council for Peace and Order No. 74/2557 (2014) is still applicable to the extent it is not in contrary to the Emergency Decree until a new standard is issued by virtue of the Emergency Decree under Section 12 of the Emergency Decree.

⁵Section 8 of the Emergency Decree.

⁶Section 9 of the Emergency Decree.

- (iv) arrange for the attendees to be able to vote either by public or poll; and
- (v) keep all electronic traffic data of all attendees as evidence.

Effect

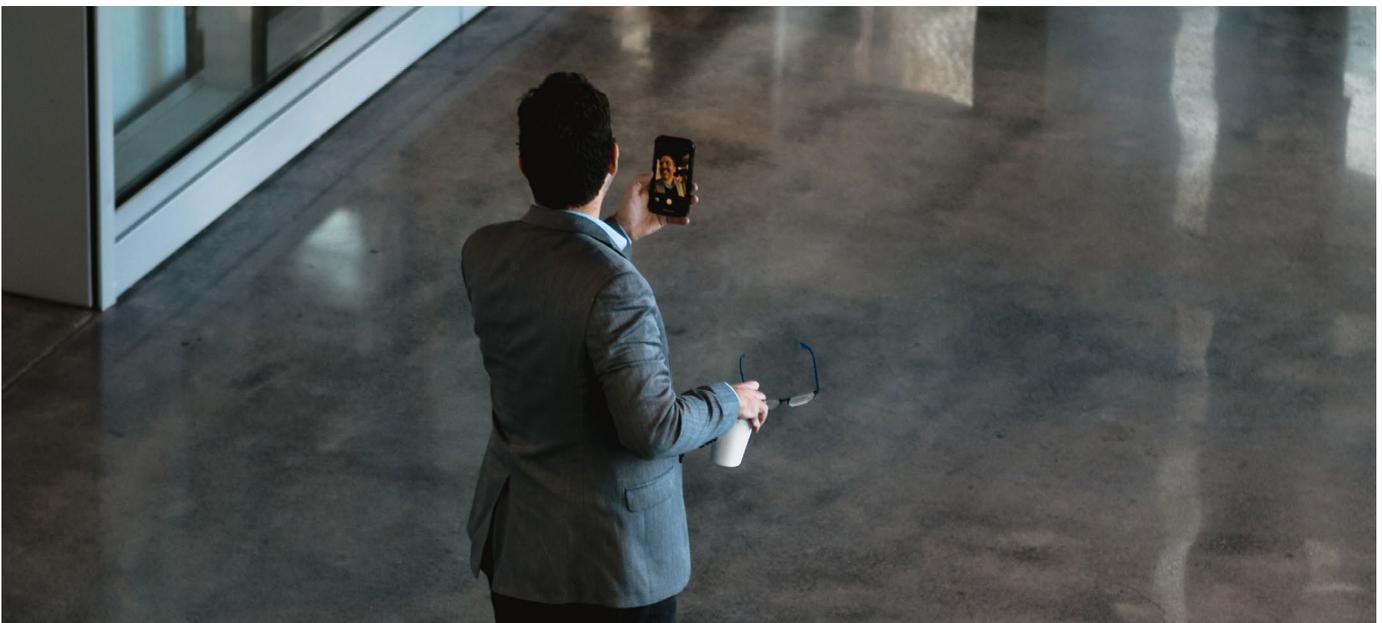
Meetings held via electronic means in accordance with the Emergency Decree, and meetings previously held in accordance with the NCPO Announcement, are deemed as legitimate meetings. To that end, the admissibility of electronic data under the Emergency Decree as evidence in legal proceedings (either civil, criminal or any other cases) shall not be denied solely on the grounds that it is electronic data.

The future of electronic conferencing

There remains some uncertainties regarding the newly passed Emergency Decree, including what meetings will be excluded from the Emergency Decree when the Ministerial Regulations are eventually enacted, and whether the Emergency Decree will remain in effect permanently or be repealed once the COVID-19 pandemic has dissipated.

At least for now it is safe to say that the Emergency Decree offers a small respite for Thai companies amidst the COVID-19 pandemic – let's hope the MOC will see the importance of electronic conferencing for Thai companies (considering that we are moving towards Thailand 4.0) so that it is here to stay.

If you require any assistance or advice with respect to your company's corporate compliance obligations under Thai law, please contact us at spi-info@siampremier.com



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