

WORLD SAILING CONSTITUTION COMMITTEE MEMORANDUM 2020 ANNUAL GENERAL MEETING

1. Background

- 1.1 The 2020 World Sailing Annual General Meeting (“**AGM**”) is scheduled to be held in person on Sunday 1 November 2020 in Abu Dhabi, United Arab Emirates, as decided by the AGM in 2018 further to Regulation 39. The Constitution Committee understands that conference contracts have been entered into accordingly.
- 1.2 The World Sailing Board (“**Board**”) on 7 April asked the Constitution Committee to consider what options may be available in the event the AGM is not able to proceed in its normal form as planned due to the ongoing Covid-19 outbreak.

2. Position under the Constitution

- 2.1 The necessary starting point is the World Sailing Constitution (“**Constitution**”). Further to Article 21, the company must hold an AGM in every calendar year. This is also a requirement under section 111 of the Isle of Man *Companies Act 1931* (“**Companies Act**”) under which World Sailing Limited is incorporated.
- 2.2 It is therefore not possible to cancel the AGM, or postpone it beyond the 2020 calendar year as the directors have a constitutional and legislative obligation to call an AGM in 2020.
- 2.3 The current Constitution also does not provide for meetings of members (“**MNAs**”) to be held by any means other than in person. It is therefore not possible for the AGM to be held by electronic means under the Constitution.
- 2.4 Article 30 the Constitution defines this year’s AGM as a “General Assembly” as it is in its fourth year cycle. Article 32 of the Constitution requires the agenda for the General Assembly to include both ordinary business of an AGM and the election of the directors. It is not possible to separate out and have different AGM and election meetings on different occasions under the current wording.

3. Other options

- 3.1 From provisional legal advice obtained, there are two options for proceeding with the AGM in 2020:
 - i. seek consent from MNAs to amend the Constitution to allow for an electronic AGM; or
 - ii. seek a court order under section 114(2) of the Companies Act to allow for an electronic AGM (further details of which are set out below).

- 3.2 Both options should involve early consultation with MNAs. This could be done by way of town hall meetings, or emails from the Board.
- 3.3 If the initial consultation is positive, the Board can then circulate a resolution to MNAs to change the Constitution to allow for an electronic AGM and voting (which can be restricted to the 2020 AGM if necessary).
- 3.4 Further to Article 102 of the Constitution, the company would only require 75% of the MNAs who actually cast a vote to vote in favour of the resolution (not 75% of the total number of MNAs). I.e. the resolution would not require 75% of all ~146 MNAs to vote in favour, only 75% of the MNAs who cast a vote.
- 3.5 Per Article 102, if certain criteria are met, the voting process can be conducted in writing and a meeting is not required.

Voting: 102(j): a resolution may be passed in writing (which includes in counterparts and via any electronic means such as email or fax) if:

(i) it has been sent to all delegates or members who are entitled to receive notice of a meeting of the relevant body; and

(ii) the required majority of them have signified their agreement to it within the time period determined by the relevant chairman (which shall not be less than five days).

- 3.6 Written resolutions shall be valid and effective as if they had been passed at a duly convened and held meeting of the company.
- 3.7 There are obvious practical difficulties in consulting with all MNAs (as there are ~146), and undoubtedly there will be a broad range of views.
- 3.8 If the initial consultation is not positive, the Board may, in the alternative, seek a court order under section 114(2) of the Companies Act.
- 3.9 Section 114(2) of the Companies Act provides that:

If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles or this Act, the court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.

Practical considerations

- 3.10 An application for a court order may be made by any director of the company or any MNA ordinarily entitled to vote at the meeting. It is logical for the directors to make such application if this option is considered.
- 3.11 An Isle of Man law firm has been provisionally consulted as to the likely process and timeframe involved in obtaining the court order. They advise that in ordinary circumstances and assuming the application is not opposed, the process is likely to take around 3 – 4 months and cost between £6,500 - £10,000 (depending on whether the application is opposed).
- 3.12 However, that time frame may be impacted by ongoing disruptions and case backlogs created by the Covid-19 outbreak. Further, if an MNA sought to oppose the application, multiple hearings are likely to be required and the process will therefore take more time.
- 3.13 It may be possible to apply for expedited proceedings to ensure the matter is considered as soon as possible, however, there is still a risk that those proceedings could be delayed due to the same factors identified above. Ultimately it is up to the court to grant consideration on an expedited basis.

Case law considerations

- 3.14 As the Isle of Man is a common law jurisdiction, the courts will rely on previous cases to determine the nature and scope of the power they have under section 114(2).
- 3.15 As far as the Constitution Committee is aware, there has only been one case in the Isle of Man in respect of section 114(2) of the Companies Act – *DRGN Limited v No Defendant (CHP 2012/117)* (“**DRGN**”). However, section 114(2) is very similar to section 306 of the England and Wales *Companies Act 2006*, so case law in that jurisdiction is also relevant.
- 3.16 The key principles from the England and Wales Companies Act 2006 cases, which the High Court in the Isle of Man upheld in the DRGN case, is that section 114(2) can be used to overcome ‘procedural issues’, but it cannot be used in a way that would affect an MNA’s substantial rights or be inconsistent with the protections intentionally granted to the MNAs under the Constitution or at law.
- 3.17 Although none of the cases are similar to the factual circumstances at issue here (they involve disputes or deadlocks between shareholders, or the inability to form a quorum), the DRGN case in the Isle of Man is nevertheless useful because there were no ‘respondents’ or ‘defendants’ in the case. The matter was determined by the court based on the application of one of the shareholders alone and the court did not consider there to be any prejudice to the other shareholders in granting the order without them being represented.

- 3.18 As applied to the current situation, the MNA's as a group would not need to be represented.
- 3.19 However, other cases in England and Wales have also confirmed that even if an application is opposed by shareholders, it does not restrict the powers of the court.
- 3.20 That is not to say that MNAs should not / need not be consulted. It is a matter for the Board to decide whether it wishes to consult members. However, it is more likely that a court order could be obtained (and more quickly) if the application evidenced the support of at least some MNAs (for example, if a majority of the MNAs indicated their support for an electronic vote but the Board was not confident in obtaining the 75% required to amend the Constitution).
- 3.21 The key point is that it is possible for a court order to be granted without notice to, and participation of, MNAs (as long as the order being sought does not prejudice the MNAs legal rights as voting members).
- 3.22 From a practical perspective, and especially given the AGM will also constitute a General Assembly (see further below), the key consideration for the court is likely to be whether the proposed alternative to the in-person AGM preserves MNA's rights to participate in and vote at the meeting (and to elect the directors in particular). As matters currently stand, it is either impossible or there are significant government mandated travel restrictions that would affect MNAs representatives attending the AGM. Thus, in this exceptional situation, providing an alternative may be viewed as preserving such rights.

The application

- 3.23 Any application for a court order will need to set out clearly what the company is seeking as the alternative to the in-person meeting.
- 3.24 If the alternative is for the company to be able to hold the meeting electronically, further thought is needed to the practicalities of doing so (ie. what technology would be utilised, how voting will be conducted).
- 3.25 Per Article 30 of the Constitution, the 2020 AGM is also required to constitute a General Assembly meaning in addition to ordinary business, the agenda must also include the election of the President, Vice-Presidents and Officers of Honour.
- 3.26 As the conduct of the election (including the voting process) is a matter for the Election Committee further to Article 76 of the Constitution, the Constitution Committee has not considered this issue. However the Constitution Committee would be happy to assist the Election Committee if requested, noting that the voting procedure is likely to form a crucial part of the application for the court order.

4. Conclusion

- 4.1 Under the current Constitution, it is not permissible to cancel the AGM, or postpone it beyond the 2020 calendar year. The 2020 AGM dates and Abu Dhabi location have been determined with reference to Regulation 39. It is also not permissible for the AGM to be held by electronic means under the Constitution.
- 4.2 The Board may seek consent from MNAs to amend the Constitution to allow for an electronic AGM. A written resolution is considered passed only if 75% of all MNAs that cast a vote, vote to support the resolution. If this approach is adopted, consultation with MNAs and preparation of the draft resolution should commence as soon as possible.
- 4.3 Alternatively, section 114(2) of the Companies Act may provide a possible solution if the Board is not able, or considers it unlikely it will be able, to pass the resolution to amend the Constitution.
- 4.4 Before a court order can be sought, the processes and procedures for the electronic meeting would need to be developed.
- 4.5 The decision of whether to seek a court order is a matter for the Board. However, to ensure the court order process is able to be concluded in time and to give all parties (MNAs, World Sailing and electoral candidates included) certainty as to the approach to be adopted, a draft application should be prepared within the next four weeks.
- 4.6 It will then be possible to make the application in the coming weeks, but if the global pandemic circumstances change and an in-person meeting becomes possible, the Board can withdraw its application before any final orders are made to allow the normal in-person meeting to proceed as planned.
- 4.7 The conduct of the election is a matter for the Election Committee however, the procedures are likely to form a crucial part of the application for the court order and may therefore need to be developed before any application is lodged.
- 4.8 A summary of the possible steps and timeframes is set out below.
 - i. As soon as possible: Board decides whether it wishes to take no action, seek consent from MNAs to amend the Constitution to allow an electronic meeting or seek a court order.
 - ii. As soon as possible following Board decision: if the Board decides to seek consent to amend Constitution or seek a court order, processes and procedures for conducting the meeting in an alternative form are developed, including election procedures. The Constitution Committee understands the Election Committee intends to publish the Election Rules by mid-May. At the same time, consultation with MNAs begins (eg. through town hall meetings / by email).

- iii. Within the next 4 four weeks: To ensure the company is prepared for both options, a draft resolution to amend the Constitution is prepared, as well as a draft application for the court order. The Board will need to determine the deadline for submitting a court order. Taking into account the possible 3 – 4 month timeframe for the court process, the deadline would likely be in early to mid-June at the latest.
- iv. If the Board decides to seek consent to amend the Constitution, the resolution is circulated to members and a date by which members must respond is set (which will need to be before the deadline by which the application for the court order needs to be submitted).
- v. If the Board decides to seek a court order, the application for the court order is submitted by no later than the deadline discussed in paragraph (iii) above.

**Constitution Committee
World Sailing**

20 April 2020