

**Towards ‘Virtual’ Corporate Governance: An Analysis of the Legal  
Framework Governing Virtual Shareholder Meetings in Kenya**

By

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### Approval

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## Abstract

The COVID-19 pandemic caused substantial transformations in traditional corporate governance practices worldwide, notably in the conduct and execution of company meetings. As a result of travel restrictions and prohibitions on physical gatherings, commonly known as lockdowns, companies faced the challenge of meeting statutory requirements within a legal framework that had not envisaged these far-reaching effects of the pandemic. The main legislation in Kenya governing companies, the Companies Act 2015, did not provide for virtual meetings. Various legal interventions were thus implemented to address the altered circumstances. With the pandemic officially over, this study sought to critically assess the adequacy of the current legal framework regulating virtual shareholder meetings. This is important as corporations have continued to hold virtual meetings even after the lifting of lockdowns and the resumption of in-person gatherings. Anchored on the agency theory, this doctrinal legal research examined the existing legislative framework with regard to virtual shareholder meetings and assessed the extent to which they ensure the effective exercise of shareholders' rights during these meetings. The study also interrogated the legal and regulatory framework in Australia to determine if there are any lessons Kenya can borrow.

The study established that shareholder meetings are a fundamental component of corporate governance, facilitating the core principles of transparency, accountability and fairness. The study further found that the COVID-19 pandemic accelerated the adoption of virtual shareholder meetings, enhancing accessibility while also posing challenges such as technological barriers and reduced accountability. The findings of the study highlight the shortcomings in the legal framework governing virtual shareholders' meetings in Kenya. Based on the findings, the study recommends that the Companies Act should be amended to explicitly mandate that all shareholders attending virtual meetings be provided with a reasonable opportunity to participate. Additionally, the Act should provide clear guidelines on the scope and implementation of this requirement. These amendments would strengthen Kenya's corporate governance framework by ensuring that virtual meetings uphold the core corporate governance principles.

Key words: *corporate governance, COVID-19, virtual meetings, shareholders rights.*

## List of Abbreviations

<b><u>Acronym</u></b>	<b><u>Definition</u></b>
<b>AGM</b>	Annual General Meeting
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASX</b>	Australia Securities Exchange
<b>CAMA</b>	Companies and Allied Matters Act (Nigeria)
<b>CMA</b>	Capital Markets Authority
<b>COVID-19</b>	Coronavirus Disease
<b>EGM</b>	Extraordinary General Meeting
<b>NSE</b>	Nairobi Securities Exchange
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>WHO</b>	World Health Organisation



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## **List of Legal Instruments**

### **Kenyan Legislation**

1. Business Laws (Amendment) (No.2) Act (Act No.1 of 2021)
2. Capital Markets Act Cap 485A.
3. Companies Act Cap 486.
4. Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules,2020(Legal Notice Number 50 of 2020).
5. Societies Act Cap 108.
6. The Companies (General) Regulations,2015.

### **Non-Kenyan Legislation**

1. Companies and Allied Matters Act, 2020(Nigeria)
2. Corporations Act 2001(Australia)
3. Corporations Amendment (Meetings and Documents) Act 2022(Australia)
4. Treasury Laws Amendment (2021 Measures No.1) Act 2021(Australia)



## **List of Cases**

1. Bernard M. Ngore v Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development & Attorney General; Betty C. Maina & Francis O. Owino (Alleged Contemnors)
2. Frank K. Mwangera (on behalf of Members of the Kenya Hospital Association) v Board of Management Kenya Hospital Association t/a the Nairobi Hospital & 2 others; Kenya Hospital Association t/a Nairobi Hospital (Interested Party) [2020] eKLR
3. Gheewala v Associated Securities Limited & 2 others (Miscellaneous Application E357 of 2023) [2024] KEHC 848 (KLR)
4. Humm Group Limited, in the matter of Humm Group Limited
5. In re Application for Leave to hold the postponed Law Society of Kenya Annual General Meeting Virtually [2020] eKLR
6. In the matter of AGL Limited [2022] NSWSC 576
7. In the matter of Victoria Commercial Bank High Court Miscellaneous Application No. E756 of 2020 Limited (Unreported)
8. In the matter of WPP Scangroup PLC (Bharat Kumar Thakrar and Capital Markets Authority) Miscellaneous Application No. E680 of 2020 at the High Court of Kenya, Nairobi (Unreported)
9. Keybridge Capital Limited v WAM Active Limited [2023] FCA 339
10. Nearmap Ltd, in the matter of Nearmap Ltd [2022] FCA 1291
11. Nicholas Alexander Nesbitt and Registrar of Companies, at the High Court of Kenya, Nairobi HC Comm. Misc. E721 of 2020 (Unreported)
12. Radio Frequency Systems (EA) Limited & Another vs. Simon Horner & 2 Others [2020] eKLR

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## Dedication

This thesis is dedicated to my children Amara, Zawadi and Neema. May you achieve even greater heights than I have.



## Chapter 1: Introduction

### 1.1. Background

On 31<sup>st</sup> December 2019, the World Health Organisation (WHO) reported the first case of the COVID-19 (Coronavirus disease) virus, in Wuhan, China.<sup>1</sup> On 11<sup>th</sup> March 2020, in response to the rapid escalation of infections globally, WHO declared that COVID-19 was a pandemic.<sup>2</sup> In a bid to curb the spread of the pandemic, and relying on guidance from WHO, governments around the world imposed various measures, including restrictions on travel and in-person gatherings, popularly called lockdowns.<sup>3</sup> In addition to government-imposed restrictions, many companies also imposed internal travel sanctions and work-from-home orders.<sup>4</sup> The restrictions left many companies unable to comply with the mandatory statutory requirements for holding their Annual General Meetings (AGMs).

The unexpected impact of COVID-19 led to precautionary measures, including restrictions on gatherings and movement.<sup>5</sup> These measures significantly affected corporate governance mechanisms, such as AGMs, board of directors' meetings, and board committee meetings, many of which were either cancelled or postponed indefinitely.<sup>6</sup> Despite stringent restrictions on public gatherings, the legal obligation to convene these meetings remained in effect.<sup>7</sup> The COVID-19 pandemic thus presented substantial challenges to the usual organization and conduct of annual shareholder meetings.<sup>8</sup>

The most notable effect of the pandemic was that company laws as drafted at the time, were incompatible with the measures implemented to contain the pandemic, most importantly, the

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<sup>1</sup> 'Timeline of WHO's Response to COVID-19' <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#>> accessed 3 March 2025.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> Nili and Shaner, "Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement" 63 *Boston College Law Review*, 2022, 125.

<sup>5</sup> Mohammad Q Alshhadat and Krayyem Al-Hajaya, 'Corporate Governance in the COVID-19 Pandemic: Current Practices and Potential Improvement' (2023) 23 *Corporate Governance: The International Journal of Business in Society* 1607.

<sup>6</sup> *ibid.*

<sup>7</sup> Jordan Delev And Milena Najdova, 'Legal Aspects Of The Manners Of Holding Shareholders' Assemblies In The Conditions Of Covid 19 Pandemic' (2021) 18 *Balkan Social Science Review* 49.

<sup>8</sup> *ibid.*

provisions for in-person meetings of shareholders.<sup>9</sup> In several jurisdictions around the world, new laws and amendments were passed to enable the continuation of normal company practices.<sup>10</sup> These laws were intended to legalise virtual meetings and electronic signatures and to relax other rigid requirements around board and shareholder meetings.<sup>11</sup>

Key shareholder rights are usually exercised during AGMs. Shareholder rights refer to the rights that accrue to a shareholder upon the purchase of shares in a company and include information rights, voting rights and financial rights.<sup>12</sup> Each shareholder is thus entitled to participate in and vote at the general shareholders' meeting, including on matters such as the election of directors.<sup>13</sup> Historically, shareholders have exercised these rights by attending meetings in person, presenting and discussing proposals, and facilitating voting on these proposals by their fellow shareholders.<sup>14</sup> Undoubtedly, the pandemic disrupted the fundamental operations of companies, impacting the organization of shareholder meetings and the exercise of shareholder rights.<sup>15</sup> Shareholder participation in general meetings is facilitated through various mechanisms, including in-person attendance, the right to pose questions, active participation in meetings, and procedures for determining voting outcomes.<sup>16</sup> These rights still accrued to shareholders, regardless of the pandemic restrictions.

The Organisation for Economic Co-operation and Development (OECD) principles reaffirm that a core right of shareholders is to vote and participate in general meetings.<sup>17</sup> They also emphasize the importance of ensuring that virtual meetings do not hinder shareholders' ability to engage with the board and management, in comparison to physical meetings.<sup>18</sup> This study will thus critically analyze the legal framework around virtual AGMs with regard to ensuring that shareholder rights can still be exercised as effectively as they were in the past.

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<sup>9</sup> Zetzsche et al, "Enhancing Virtual Governance: comparative lessons from COVID-19 company laws" *Journal of Corporate Law Studies* 2022,115.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> CMA, 'Code of Corporate Governance for Issuers of Securities to the Public' <<https://www.cma.or.ke/downloads/>> accessed 3 March 2025.

<sup>13</sup> *ibid.*

<sup>14</sup> Nili and Shaner (n 4).

<sup>15</sup> Delev and Najdova (n 7).

<sup>16</sup> *ibid.*

<sup>17</sup> OECD, *G20/OECD Principles of Corporate Governance 2023* (OECD 2023) <[https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2023\\_ed750b30-en](https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en)> accessed 26 May 2024.

<sup>18</sup> *ibid.*

## 1.2. Statement of the problem

Shareholders' meetings provide a platform through which shareholders can control and hold the directors and managers accountable. Covid 19 pandemic brought restrictions on how these meetings were conducted. This led to the adoption of virtual shareholders' meetings. Although the physical restrictions associated with COVID-19 have ended, companies have continued to hold virtual meetings, and this has now become the 'new normal'. This new normal may however hinder the ability of shareholders to effectively exercise their rights during virtual meetings. For instance, participants attending remotely may not have the same opportunities for engagement as those physically present, such as voting or asking questions.<sup>19</sup> Voting, which traditionally took place in physical meetings by a show of hands can potentially marginalize certain members, a risk that is further heightened in a virtual setting and technological challenges.<sup>20</sup>

This study, therefore, examines the current legislative framework in Kenya to ascertain whether shareholder's rights during virtual meetings are adequately protected and exercised.

## 1.3. Research Objectives

The overall objective of the study is to assess the adequacy of the current legislative framework in Kenya in safeguarding and facilitating the effective exercise of shareholders' rights during virtual meetings.

The specific objectives of this study are to:

- a. Analyze the link between shareholders' meetings and corporate governance.
- b. Analyze the current legal framework in Kenya for virtual shareholders' meetings and assess its appropriateness for the protection of shareholder rights.
- c. Ascertain whether there are lessons Kenya can borrow from Australia with respect to the regulation of virtual shareholder meetings.

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<sup>19</sup> Lloyd Freeburn and Ian Ramsay, 'Virtual Shareholder Meetings in Australia' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3762255>> accessed 23 July 2024.

<sup>20</sup> Australian Securities and Investments Commission, 'ASIC Guidelines for Investor Meetings Using Virtual Technology' <<https://asic.gov.au/about-asic/news-centre/news-items/asic-guidelines-for-investor-meetings-using-virtual-technology/>> accessed 29 September 2024.

#### **1.4. Research Questions**

To achieve these objectives, this research will be guided by the following questions:

- a. What is the link between shareholders' meetings and corporate governance?
- b. To what extent does the current legal framework in Kenya for virtual meetings ensure the protection of shareholders' rights?
- c. What lessons can be learnt from the comparative analysis of the legal framework in Australia for the regulation of virtual shareholders' meetings?

#### **1.5. Significance of the study**

This study is important as the pandemic resulted in major changes in the conduct of shareholders' meetings, transitioning from in-person gatherings to largely online forums. This development appears to have been unforeseen by both legislators and companies. The study will, therefore, benefit legislators, first and foremost, by providing recommendations for reform to the current company laws. It will critically examine the interventions passed during the pandemic, draw lessons from the chosen jurisdiction of Australia and propose suitable law reforms.

The study will also benefit owners of companies, namely the shareholders. Shareholders who establish and start a company have the right to exercise oversight over its affairs. One of the key avenues for exercising these rights and ensuring value for their investments is active participation and voting at shareholders' meetings. This participation is a foundational aspect of corporate governance and this study will aid company owners to ensure their effective participation and voting in company meetings.

#### **1.6. Hypothesis**

The hypothesis of this study is that the current legislative framework in Kenya with regard to virtual shareholder meetings is inadequate to ensure the effective exercise of shareholder rights during these meetings.

## 1.7. Theoretical Framework

### Agency Theory

This theory defines the relationship between two parties, that features, on one hand, the principal, who delegates work to the other party, the agent.<sup>21</sup> The most common iteration of the agency relationship in corporate governance is the one which states that the managers of the company are the agents, while the shareholders or owners of the company are the principal.<sup>22</sup> One key characteristic of this theory is the separation of ownership and control.<sup>23</sup> The basis of this separation is the fact that a company corporation is a legal construct endowed with separate legal personality, independent of its shareholders or owners.<sup>24</sup> The possible problem caused by this separation is that since the directors are handling other people's money and not their own, they cannot take care of it with the same diligence as compared to if it were theirs.<sup>25</sup> Agency theory underscores the importance of shareholders actively participating in governance and effective shareholder engagement is therefore fundamental for reducing agency problems.

The division between ownership and management can result in managers making decisions that do not necessarily maximize shareholder wealth. Instead, managers might utilize their specialized knowledge and expertise for personal gain rather than the benefit of the owners.<sup>26</sup> Thus, there is a cost incurred by the principal (investors or shareholders) to ensure that decisions made by the agent are those that maximize the returns of the principal.<sup>27</sup> This is referred to as the agency cost. Managers may also be privy to information that the owners may not have access to, thus creating information asymmetry. Virtual meetings can deepen information asymmetry as compared to in-person meetings which traditionally provide more opportunities for shareholders to engage and ask questions.

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<sup>21</sup> 'Corporate Governance - Christine A. Mallin\_. Pdf'

<<https://kaloleni.su.ezproxy.library.strathmore.edu/read/5284/pdf>> accessed 8 June 2024.

<sup>22</sup> 'Corporate Governance - Christine A. Mallin\_. Pdf' (n 23).

<sup>23</sup> 'Corporate Governance - Christine A. Mallin\_. Pdf' (n 23).

<sup>24</sup> Colley J, Stettinius W, Logan G and Doyle J, *Corporate Governance: Business, Legal, and Ethical Challenges Faced by Boards of Directors* (McGraw-Hill, 2003).

<sup>25</sup> 'Corporate Governance - Christine A. Mallin\_. Pdf' (n 23).

<sup>26</sup> C Jensen And H Meckling, 'Theory Of The Firm: Managerial Behavior, Agency Costs And Ownership Structure'.

<sup>27</sup> *ibid.*

Another key feature of the agency theory is that important decision-makers in a corporation are not directly affected by the wealth effects of their decisions.<sup>28</sup> Thus, in the absence of effective control, such decision-makers or agents are likely to make decisions that are not aligned with the interests of the owners or principals.<sup>29</sup> This leads to a conflict of interest between the owners and the managers. Virtual meetings might offer managers more control over meetings, such as selecting the platform or technology to be utilized, as well as the format, duration and length of presentation, potentially allowing them to avoid scrutiny. Without adequate regulation, virtual meetings may thus enhance this self-serving behaviour among management.

The key challenge for the principal is identifying a control mechanism that enhances transparency and ensures continuous oversight in the principal-agent relationship.<sup>30</sup> Greater transparency enables principals to align individual self-interest with collective goals, thereby reducing improper managerial practices.<sup>31</sup> This study will show that the meaningful participation of shareholders in decision-making via the annual general meeting is one such control mechanism.

The annual meeting is theoretically intended to serve as a check on the power of directors and to evaluate corporate performance, direction, and vision, which helps to mitigate the agency costs inherent in the corporate structure and functions as a key mechanism of corporate governance.<sup>32</sup> During virtual meetings, shareholders may find it harder to hold management accountable due to reduced direct interaction. Proper regulation will enhance the ability of shareholders to meaningfully participate in AGMs and exercise their rights.

'Meaningful participation' in AGMs encompasses more than just the ability to attend meetings or cast votes. It includes the right for shareholders to speak and, consequently, to be heard both by their fellow shareholders and by the company's management.<sup>33</sup> It involves enabling shareholders to engage directly with management through face-to-face interactions, which may encompass the posing of critical and

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<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> Zahid Riaz, Pradeep Ray and Sangeeta Ray, 'The Impact of Digitalisation on Corporate Governance in Australia' (2022) 152 *Journal of Business Research* 410.

<sup>31</sup> *ibid.*

<sup>32</sup> Nili and Shaner (n 4).

<sup>33</sup> Zetzsche and others (n 9).

probing questions about the company's performance.<sup>34</sup> Another aspect of meaningful participation is the facilitation of communication among shareholders themselves, providing a forum for the exchange of ideas and allowing investors to rally support for specific proposals from their fellow shareholders.<sup>35</sup> According to the OECD, the principles of transparency, accountability and inclusivity underpin meaningful shareholder participation in AGMs.<sup>36</sup>

In virtual settings, this concept becomes even more critical, as technological barriers and the lack of physical presence can impede genuine interaction. In virtual settings, company management have the ability to disregard shareholder questions, as the absence of physical presence limits shareholders' ability to raise objections in real time, an interaction that might otherwise galvanize support from fellow shareholders.<sup>37</sup> Management should therefore provide protocols for mitigating technological disruptions that could hinder shareholder access and participation.<sup>38</sup> Technology providers must implement robust technical and organizational measures and maintain the integrity and fairness of the meeting process.<sup>39</sup>

Meaningful participation can be facilitated by ensuring that virtual AGMs are designed to replicate the dynamics of physical AGMs as closely as possible by providing shareholders with sufficient opportunities to pose questions and request clarifications regarding the company's performance and other pertinent issues.<sup>40</sup> Use of appropriate technology that enables voting, observation of proceedings, and effective connectivity supports meaningful participation in virtual meetings.<sup>41</sup> Meaningful participation also involves guaranteeing equitable access to relevant information to all stakeholders as well as ensuring the opportunity to pose questions to management and receive substantive responses.<sup>42</sup>

This theory is relevant to the study as shareholders' meetings represent a crucial mechanism that the owners of the company can utilize to exercise oversight over the activities of the directors through

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<sup>34</sup> Nili and Shaner (n 4).

<sup>35</sup> *ibid.*

<sup>36</sup> OECD (n 17).

<sup>37</sup> Zetzsche and others (n 9).

<sup>38</sup> OECD (n 17).

<sup>39</sup> *ibid.*

<sup>40</sup> Capital Markets Authority, 'The Report On The State Of Corporate Governance Of Issuers Of Securities To The Public In Kenya 2022' (Capital Markets Authority) <<https://www.cma.or.ke/downloads/>> accessed 12 April 2025.

<sup>41</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021.

<sup>42</sup> OECD (n 17).

discussion of financial statements and other reports, as well as casting votes on various decisions. The effectiveness of corporate governance largely depends on regulatory measures to align the agents' actions with the principals' interests. Inadequate regulations for virtual meetings could mean that companies lack specific rules or mechanisms to ensure alignment. Thus it is essential to evaluate the legal framework governing virtual shareholder meetings to determine if the existing laws impede or promote this mechanism and, consequently, minimize the agency costs inherent in the separation of ownership and control.

### **1.8. Literature Review**

The OECD Principles of Corporate Governance is the cornerstone best practice guideline for modern and sound corporate governance practice globally. The latest version was released in 2023, which provided for virtual and hybrid meetings for the first time.<sup>43</sup> The principles reiterate that one of the fundamental rights of shareholders is to vote and participate in general meetings and emphasize the need to ensure that virtual meetings do not interfere with the ability of the shareholders to engage with the board and management as contrasted with physical meetings.<sup>44</sup> While recognizing that some countries had promulgated guidelines for the conduct of such meetings, the guidelines emphasize the need for additional requirements to ensure mechanisms are in place to ensure effective virtual participation.<sup>45</sup> Thus a definitive recognition of the virtual participation of shareholders in meetings has been entrenched in corporate governance practice courtesy of the 2023 OECD principles. The guidelines recommend the enactment of additional requirements for participation in virtual meetings, which this study will also address by identifying specific areas of law reform in this regard.

Gelter and Puaschunder opined that the pandemic would have a long-term effect on corporate governance globally; companies would be operated differently, and the interactions between corporations and their shareholders and other stakeholders would be altered.<sup>46</sup> The study noted that previous historical crises had caused changes in the corporate governance of institutions, with COVID-

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<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> Martin Gelter and Julia M Puaschunder, 'COVID-19 and Comparative Corporate Governance' [2021] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3772965>> accessed 24 February 2024.

19 likely to have the same effect.<sup>47</sup>The authors, however, did not delve into the matter of virtual shareholders' meetings in the study, neither did they examine the legal framework relating to the same. This study hopes to address this aspect by examining the deficiencies in the current framework in Kenya and recommending law reform, drawing lessons from best practices in the chosen jurisdiction.

Zetzsche et al argued that the response to the COVID-19 crisis paved the way for entirely virtual shareholder meetings, opining that prior to this, the right to attend shareholders' meetings was exercised in person.<sup>48</sup> This paper pointed out the right of shareholders to make decisions in meetings through voting as one of the main rights that were affected by the pandemic, as this was, in the past, exercised at in-person gatherings.<sup>49</sup> These authors further argued that company laws at the time contained requirements that were misaligned with the measures put in to control the pandemic, mainly the provisions for in-person meetings.<sup>50</sup> This study is also premised on this view. The paper further argues, rightly so, that the notion of a meeting as a physical gathering is completely outdated and inapplicable in the modern era.<sup>51</sup>

However, it is worth noting that Zetzsche et al studied company laws passed in Australia, Austria, Belgium, Canada, China, France, Germany, Hong Kong, India, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, South Korea, Spain, Switzerland, Thailand, the United Kingdom, and the United States<sup>52</sup>, but did not examine any jurisdictions on the African continent. This study will thus attempt to fill this gap by critically examining the legal interventions put in place in Kenya with a view to recommending areas of law reform to catch up with the best practices internationally.

Nili and Shaner propounded that the main avenue for shareholders to engage is the annual shareholders meeting and further, correctly asserted that the widespread adoption of virtual shareholder meetings may be the most long-lasting effect of the COVID-19 response measures.<sup>53</sup> The annual meeting is theoretically intended to serve as a check on the power of directors and to evaluate corporate

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<sup>47</sup> *ibid.*

<sup>48</sup> Zetzsche and others (n 9).

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> Nili and Shaner (n 4).

performance, direction, and vision, which helps to mitigate the agency costs inherent in the corporate structure and functions as a key mechanism of corporate governance.<sup>54</sup> This view aligns with the conclusions drawn in the theoretical framework section and the study will thus further examine how the laws in Kenya can be reformed to further strengthen shareholders' oversight and reduce the agency cost.

Brochet argued that the number of virtual shareholder meetings surged in 2020, caused by restrictions put in place due to the COVID-19 pandemic, with most market participants holding the view that virtual meetings will be the main type of shareholder meetings in future.<sup>55</sup> This study is critical as it offered the first evidence of the nature of direct interactions between management and shareholders at virtual annual meetings following the outbreak of the pandemic. The proponents of virtual meetings suggested that virtual meetings would allow more shareholders to attend and would save time and money, both for the firm and the shareholders.<sup>56</sup> The authors examined in depth the formats of virtual meetings, for example, the length of management presentations and question and answer sessions, among others. The authors did not, however, examine the legal frameworks around this in-depth, which this study proposes to do.

Magaji noted the existence of a gap in the AGMs in Nigeria as the amendment to the Companies and Allied Matters Act (CAMA) legalized electronic voting only for private companies.<sup>57</sup> The study thus concluded that there was significant potential for e-voting and virtual meetings for public companies, in light of COVID-19, which rendered physical meetings nearly impossible and these amendments would go a long way in facilitating effective participation of shareholders in AGMs.<sup>58</sup> This research is important as it collected data through face-to-face interviews with respondents with positions and experience in corporate law and practice before recommending law reform. Due to the limitations of time, this author will not collect data from the field but will utilize the doctrinal research methodology

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<sup>54</sup> *ibid.*

<sup>55</sup> Francois Brochet, Roman Chychyla and Fabrizio Ferri, 'Virtual Shareholder Meetings' [2023] *Management Science* mns.2023.4946.

<sup>56</sup> *ibid.*

<sup>57</sup> Shamsuddeen Magaji, 'The Aftermath of COVID-19 Pandemic and the Imperative of Electronic Meeting for Public Companies under Companies and Allied Matters Act 2020' (2024) 7 *International Journal of Intellectual Discourse* 502.

<sup>58</sup> *ibid.*

to examine the deficiencies in the Kenyan legal framework and recommend law reform from the study of the chosen jurisdiction.

In the Kenyan context, there was difficulty in finding academic-level and peer-reviewed literature on this specific topic. Therefore, this author was limited to analyzing lower-level commentary material, which is one of the gaps that this study seeks to fill and further justifies the need for the study.

An article in the Standard newspaper highlighted a push by the Capital Markets Authority(CMA) for regulatory reforms to ensure shareholder inclusivity and accountability in virtual AGMs.<sup>59</sup> The CMA voiced concerns that virtual meetings could create unequal power dynamics by excluding certain shareholders, particularly those unfamiliar with digital platforms, such as older retail investors.<sup>60</sup> This exclusion also raised concerns about transparency, as virtual AGMs can limit spontaneous interactions and allow companies to selectively respond to questions, which could stifle shareholder oversight.<sup>61</sup>

Similar to the discussions in the theoretical framework section about the risk of virtual meetings deepening information asymmetry, the CMA insisted that companies implement strategies to ensure meaningful participation of all shareholders.<sup>62</sup> The article further noted that as companies continued to favour virtual AGMs concerns remain that these may reduce accountability, further underlining the importance of regulatory guidance to safeguard shareholder rights.<sup>63</sup> A key limitation of this media report is that the writer did not examine the question of how the law addresses these issues or can be reformed to address the concerns.

Another article in the same newspaper similarly reported that listed companies were facing increasing scrutiny from shareholders regarding the ongoing use of virtual AGMs, with concerns being raised about transparency and investor engagement, including the disregard of important shareholder

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<sup>59</sup> Brian Ngugi, 'CMA Warns of Unequal Power Dynamics during Virtual AGMs' (*The Standard*) <<https://www.standardmedia.co.ke/business/business/article/2001488350/cma-warns-of-unequal-power-dynamics-during-virtual-agms>> accessed 16 March 2024.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

questions.<sup>64</sup>The article included interviews carried out with shareholders of various companies who claimed that virtual AGMs restricted their ability to directly question executives and effectively exercise oversight.<sup>65</sup> Some of the risks mentioned were the risk of shareholder disenfranchisement and the ability to participate face-to-face and have their voices heard, which is more challenging virtually.<sup>66</sup>The CMA consequently urged listed companies issuers to ensure that, moving forward, virtual AGMs closely replicate the experience of physical AGMs by affording shareholders adequate time to raise questions and seek clarifications on matters relating to the company's performance or other relevant issues.<sup>67</sup>Companies were further encouraged to publish, on their respective websites, a detailed record of all shareholder questions raised during the AGMs, along with the corresponding responses provided by the Board or Management.<sup>68</sup>This mirrors the arguments in the theoretical framework section. A key limitation of this report is that the writer did not examine the question of how the legal framework can be deployed to address these concerns.

A major gap noted in the literature is that most of the studies were carried out outside the African context, with notable difficulty in obtaining academic studies on the topic carried out in the Kenyan context. Rightly so, Koutoupis concluded that the majority of studies on corporate governance in the wake of COVID-19 had been carried out in developed countries, with Africa being underrepresented and concluded that more research is required in all countries, including in emerging economies.<sup>69</sup> The study noted the opportunity for additional study on the effects of the pandemic in Africa, with the USA being heavily studied, followed by Europe.<sup>70</sup> Jibrán and Chen concurred with this view, suggesting that more studies need to be undertaken in emerging economies.<sup>71</sup> This author also concurs with these

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<sup>64</sup>'Shareholder Jitters as Leading Listed Firms Cling to Virtual AGMs Post-Pandemic' <<https://www.standardmedia.co.ke/business/business/article/2001498361/shareholders-demand-in-person-meetings-as-listed-firms-stick-to-virtual-agms>> accessed 4 March 2025.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> Capital Markets Authority, 'The Report On The State Of Corporate Governance of Issuers Of Securities To The Public In Kenya 2023' (2023) <<https://www.cma.or.ke/downloads/>> Accessed 14 April 2025.

<sup>68</sup> Capital Markets Authority (N 67).

<sup>69</sup> Andreas Koutoupis, Panagiotis Kyriakogkonas, Michail Pazarskis and Leonidas Davidopoulos 'Corporate Governance and COVID-19: A Literature Review' (2021) 21 *Corporate Governance: The International Journal of Business in Society* 969.

<sup>70</sup> *ibid.*

<sup>71</sup> Khalil Jebran and Shihua Chen, 'Can We Learn Lessons from the Past? COVID-19 Crisis and Corporate Governance Responses' (2023) 28 *International Journal of Finance & Economics* 421.

findings and will attempt to address this gap by critically examining the legal and regulatory framework in Kenya.

The review of the literature exposes a gap that this thesis attempts to contribute to filling, that is, the lack of academic studies on the legal framework around virtual shareholders' meetings in Kenya.

## 1.9. Research Methodology

The study will employ the doctrinal legal research approach which will include the review of both primary and secondary legal material. Primary legal material to be reviewed will consist of legal instruments and case law. Secondary materials will consist of journal articles, guidelines, textbooks, reports and other relevant documents.

The study will also include a comparative analysis of the legal framework in Australia. This jurisdiction was chosen because it is a member of the Commonwealth and thus shares a similar Anglo-American model of corporate governance with Kenya. In addition, Australia passed substantive changes in its company law in 2022, post the COVID-19 pandemic, that served to entrench detailed provisions on virtual meetings and their conduct into the regulatory framework.<sup>72</sup> Australia also has advanced corporate governance standards, as shareholders possess more extensive rights than their counterparts in many other jurisdictions.<sup>73</sup> From a global standpoint, Australia has been at the forefront of corporate governance reform.<sup>74</sup> Notably, its initial corporate governance code was established prior to the release of the Cadbury Report.<sup>75</sup> Furthermore, Australia is among the limited number of nations worldwide that experienced only minimal impact from the recession following the Global Financial Crisis.<sup>76</sup> Consequently, this thesis will center on Australia as it has a well-developed corporate governance framework

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<sup>72</sup> 'Finally – Permanent Green Light for Electronic Meetings and Execution...' (*Hall & Wilcox*) <<https://hallandwilcox.com.au/news/finally-permanent-green-light-for-electronic-meetings-and-execution-of-company-documents/>> accessed 27 October 2024.

<sup>73</sup> Freeburn and Ramsay (n 19).

<sup>74</sup> Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30 *British Journal of Management* 75.

<sup>75</sup> *ibid.* This demonstrates Australia's proactive and independent approach to corporate governance. Early adoption reflects a mature, domestically driven framework rather than one shaped by international influence and indicates a long-standing culture of accountability and shareholder protection.

<sup>76</sup> *ibid.*

## 1.10. Chapter Breakdown

This thesis has five chapters.

Chapter One outlines the subject matter of the thesis. It includes the introduction and background of the study, outlines the statement of the problem, the objectives of the study, the research questions, and the theoretical framework grounding the study.

Chapter Two investigates the link between shareholder meetings and corporate governance. It will examine the role that these meetings play in ensuring that the core principles of an effective corporate governance framework are upheld and that shareholders' rights are protected.

Chapter Three examines the existing legal framework in Kenya, including statutes, regulations and judicial decisions and assess their appropriateness for the protection of the exercise of shareholder rights.

Chapter Four conducts a comparative analysis by reviewing the available legal mechanisms from the chosen jurisdiction of Australia for the conduct of virtual shareholder meetings to identify any gaps in the Kenyan legal framework.

Chapter Five outlines recommendations for law reform in Kenya based on the lessons drawn from the comparative study with Australia. The chapter shall summarize the study's findings, recommendations on the way forward and suggestions for future research.

## Chapter 2: The Link Between Shareholders' Meetings and Corporate Governance

### 2.1. Introduction

This chapter examines the significance of shareholder meetings as a cornerstone of corporate governance, highlighting their role in fostering the core corporate governance principles of accountability, transparency and disclosure as well as ensuring the fair and equal exercise of shareholders' rights. It begins by briefly presenting a definition of corporate governance as well as an overview of the core principles of corporate governance that are relevant to this thesis. The chapter also touches on the types of shareholder meetings, distinguishing between annual general meetings and extraordinary general meetings, and their respective functions. The chapter also delves into the critical role these meetings play in addressing the agency problem and enhancing effective corporate governance frameworks.

Additionally, it analyzes the effects of the COVID-19 pandemic, which accelerated the adoption of virtual shareholder meetings, reshaping how corporations and shareholders interact. By exploring these aspects, the chapter aims to demonstrate that shareholder meetings contribute to aligning the interests of management and shareholders, thereby reducing agency costs and performing a critical function within the corporate governance framework. The conclusion will highlight the need for an effective legal framework to ensure that the shift to virtual formats does not dilute the crucial functions of shareholder meetings.

### 2.2. Definition of Corporate Governance

Corporate governance is a broad and engaging discipline, applicable to all types of organizations, whether profit-making or not. It is a multidisciplinary concept that spans various fields, including law, economics, accounting, sociology, and political science.<sup>77</sup> As a result, it has been defined in diverse ways across different disciplines.<sup>78</sup> Several definitions of the term have been put forward throughout the years. However, the most enduring has been that corporate governance refers to the system by

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<sup>77</sup> Misbau Alamu Lateef and Adedoyin Olusegun Akinsulore, 'Covid-19: Implications for Corporate Governance and Corporate Social Responsibility (CSR) in Africa' (2021) 12 Beijing Law Review 139.

<sup>78</sup> *ibid.*

which companies are directed and controlled.<sup>79</sup>This notable definition was put forward by the Committee on Financial Aspects of Corporate Governance, now commonly referred to as the Cadbury Committee in the United Kingdom in 1992.<sup>80</sup>The report remains one of the cornerstone documents in the realm of corporate governance.

The OECD broadened the meaning of the term. It provides that corporate governance encompasses the relationships among a company's management, directors, shareholders, and stakeholders.<sup>81</sup> It establishes the frameworks and systems that guide the company's direction, defines its objectives, and outlines the mechanisms for achieving those objectives and monitoring performance.<sup>82</sup>Indeed, researchers across various disciplines have long acknowledged the central role of corporate governance in regulating the actions of the board.<sup>83</sup> Governance serves as an incentive and control system where shareholders, as owners, seek to ensure that the board of directors exerts substantial efforts to maximize shareholder value as opposed to pursuing their own self-interests.<sup>84</sup>The board is responsible for upholding high standards of performance and accountability by implementing practices that promote effective corporate governance.<sup>85</sup>This contributes towards alleviating the agency problem.

Lacher and Tayan define corporate governance as a system of control mechanisms implemented by an organization to deter or prevent self-serving management behaviour that could harm the interests of shareholders and other stakeholders.<sup>86</sup> Bob Tricker highlights that corporate governance focuses on how power is exercised within corporate entities, encompassing the activities of the board and its interactions with shareholders, management, and other stakeholders.<sup>87</sup>Together, these perspectives propose that corporate governance serves as a structured framework for oversight and accountability,

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<sup>79</sup> Adrian Cadbury, 'Report of the Committee on the Financial Aspects of Corporate Governance.' (Gee 1992).

<sup>80</sup> *ibid.*

<sup>81</sup> OECD (n 17).

<sup>82</sup> *ibid.*

<sup>83</sup> Jebran and Chen (n 71).

<sup>84</sup> *ibid.*

<sup>85</sup> Cs Divyesh Patel and Dr Naresh K Patel Dr. Naresh K. Patel, 'COVID-19 and Corporate Governance (India): Practical Issues, Implications and New Relief Measures' (11 September 2020) <<https://papers.ssrn.com/abstract=3690805>> accessed 24 February 2024.

<sup>86</sup> Larcker D and Tayan B, *Corporate Governance Matters: A closer look at organizational choices*, 3<sup>rd</sup> edition, Pearson, 2020.

<sup>87</sup> Tricker B, *Corporate Governance. Principles, Policies and Practices*, 4<sup>th</sup> Edition, Oxford University Press, 2019.

ensuring that corporate decisions align with the interests of shareholders rather than just management's personal gains.

Scholars across various disciplines have long acknowledged the pivotal role of corporate governance in overseeing the actions of the board of directors.<sup>88</sup> Corporate governance functions as a system of incentives and controls through which shareholders seek to ensure that the board exerts significant effort to maximize shareholder value.<sup>89</sup> This governance framework comprises both internal monitoring, carried out by board members, and external oversight, exercised by shareholders.<sup>90</sup> Corporate governance is therefore the mechanisms for oversight, encompassing the processes, structures, and information used to guide and supervise a company's management.<sup>91</sup> This comprehensive definition highlights the accountability of board members and senior executives while emphasizing the establishment and execution of oversight functions and processes.<sup>92</sup>

In summary, these definitions emphasize that corporate governance involves the exercise of power in managing corporations.<sup>93</sup> These definitions, though not exhaustive, lay the foundation for the subject of this chapter, particularly with regard to the agency problem and the relationship between the shareholders of the company and those charged with governance, that is, the board of directors.

### **2.3. Core Principles of Corporate Governance**

An examination of the foundational principles of corporate governance can be initiated by revisiting the seminal Cadbury Report and the subsequent Cadbury Code. The Cadbury Code was underpinned by the principles of openness, integrity, and accountability, which are interconnected.<sup>94</sup> Corporate openness, within the bounds of competitive and confidentiality considerations, fosters the essential trust between businesses and their stakeholders.<sup>95</sup> Transparent disclosure of information enhances

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<sup>88</sup> Jebran and Chen (n 71).

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> Ifeanyi Onuka Onwuka, 'COVID-19 and Corporate Governance Performance: Beyond the Financial Metrics' in Okechukwu Lawrence Emeagwali and Feyza Bhatti (eds), *Corporate Governance - Recent Advances and Perspectives* (IntechOpen 2022) <<https://www.intechopen.com/chapters/79665>> accessed 24 February 2024.

<sup>92</sup> *ibid.*

<sup>93</sup> Lateef and Akinsulore (n 77).

<sup>94</sup> Cadbury (n 79).

<sup>95</sup> *ibid.*

market efficiency, encourages boards to act effectively, and enables shareholders to conduct more thorough scrutiny of companies.<sup>96</sup> A strong disclosure regime and transparency are central to shareholders' ability to exercise their rights on an informed basis.

The Cadbury report pointed out that integrity is a key cornerstone for the long-term success of any corporation. Integrity entails both honesty and thoroughness.<sup>97</sup> Financial reporting must accordingly be truthful and provide a fair and balanced representation of the company's condition.<sup>98</sup> The reliability of such reports is directly tied to the integrity of those responsible for their preparation and presentation.<sup>99</sup> Boards fulfil their role by providing high-quality information, while shareholders must actively engage in exercising their responsibilities as owners.<sup>100</sup> Effective governance is crucial to the long-term success of commercial enterprises, as evidenced by businesses with enduring performance and well-functioning boards.<sup>101</sup>

The OECD further improved and expanded on the corporate governance principles set out in the Cadbury Code and the following key principles are relevant to this study.

### **2.3.1 Fairness or equality**

An investor or shareholder who acquires equity in a company does so with the legitimate expectation of equitable treatment comparable to that of other equity holders, including the ability to exercise their rights on an equal footing. An effective corporate governance framework should safeguard and support the exercise of shareholders' rights.<sup>102</sup> Additionally, it must ensure the fair treatment of all shareholders, including minority and foreign shareholders, including by ensuring that all shareholders have the opportunity to seek effective remedies in the event of rights violations.<sup>103</sup>

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<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> Colley J, Stettinius W, Logan G and Doyle J (n 24).

<sup>102</sup> OECD (n 17).

<sup>103</sup> *ibid.*

The corporate governance framework should safeguard and promote the effective exercise of shareholder rights while ensuring equitable treatment for all shareholders, including minority and foreign investors, regardless of whether the company operates under normal circumstances or during crises such as the COVID-19 pandemic.<sup>104</sup> Additionally, all shareholders must have access to adequate protection in cases where their rights are violated.<sup>105</sup> This framework outlines fundamental shareholder rights, including the right to access information and participate in key corporate decision-making through the general assembly.

Fundamental shareholder rights thus encompass, among others, the right to receive relevant and timely information about the corporation, participate and vote in shareholder meetings, elect and remove board members, share in the corporation's profits, and approve the external auditor.<sup>106</sup> All shareholders should also be adequately informed and have the right to approve or participate in decisions related to significant corporate changes.<sup>107</sup> These core rights are legally recognized in most jurisdictions.<sup>108</sup> These decisions are typically deliberated and voted upon during shareholders' meetings.

The Board of Directors must ensure that these meetings are conducted appropriately, with due regard for the rights that shareholders are entitled to exercise during the proceedings. Consequently, all shareholders should be provided with the opportunity to participate meaningfully and vote in general shareholder meetings.<sup>109</sup> Accordingly, they should receive adequate and timely information about the date, format, location, and agenda of the meetings, along with comprehensive and timely details on the issues to be addressed.<sup>110</sup> The format and procedures for general meetings should ensure the fair treatment of all shareholders, and should not impose unnecessary difficulty or expense in exercising voting rights.<sup>111</sup> It is the responsibility of the Board of Directors to ensure strict adherence to these requirements.

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<sup>104</sup> Delev and Najdova (n 7).

<sup>105</sup> *ibid.*

<sup>106</sup> OECD (n 17).

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

### 2.3.2 Disclosure and transparency

In this context, transparency refers to the practice of promoting clarity in the organization's activities, eliminating any room for secrecy or ambiguity. Disclosure, a fundamental aspect of corporate governance, serves as the foundation for any governance framework.<sup>112</sup> The corporate governance framework must ensure the timely and accurate disclosure of all material information related to the corporation, including its financial status, performance and governance.<sup>113</sup> The Principles also emphasize the need for simultaneous reporting of material information to all shareholders, ensuring their equitable treatment, which is a fundamental principle that companies must uphold as expounded above.<sup>114</sup> For regulated entities and publicly listed companies subject to laws and regulations designed to protect investors, timely and adequate disclosure of relevant information to the public should be a top priority.<sup>115</sup> Shareholders have the right to receive regular updates on business performance and potential future risks.<sup>116</sup>

As a component of good corporate governance, the fulfilment of duties and responsibilities among the company, its directors, commissioners, and shareholders should be guided by transparent and accountable management in accordance with the company's articles of association.<sup>117</sup> Transparency is crucial at all levels in an organization, particularly at the senior management level where major decisions are made.

The Board of Directors has a moral responsibility to keep all stakeholders informed with material information relating to changes in the internal control of a business and has an obligation to maintain constant monitoring of the development of all material aspects of business conditions.<sup>118</sup> Incomplete information or a lack of transparency, as a key institutional void, prevents principals (shareholders)

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<sup>112</sup> Patel and Dr. Naresh K. Patel (n 85).

<sup>113</sup> OECD (n 17).

<sup>114</sup> *ibid.*

<sup>115</sup> Patel and Dr. Naresh K. Patel (n 85).

<sup>116</sup> Alshhadat and Al-Hajaya (n 5).

<sup>117</sup> Ikhyari Fatuti Nurudin, Agus Nurudin and Fifiana Wisnaeni, 'The Role of Video Conference During Pandemic Times: A Case of General Meeting of Shareholders (GMS) to Reduce the Spread of the Covid-19 Virus' (2021) 18 *Webology* 963.

<sup>118</sup> Alshhadat and Al-Hajaya (n 5).

from assessing whether agents are acting in the organization's best interests, potentially leading to a moral hazard situation.<sup>119</sup>

A robust disclosure regime that fosters genuine transparency is central to enabling shareholders to exercise their rights with an informed perspective.<sup>120</sup> Shareholders utilize information from meetings not only to inform their voting decisions but also to assess the soundness of their investments and the credibility of management.<sup>121</sup> Shareholders and prospective investors need access to consistent, timely, and reliable information presented in sufficient detail.<sup>122</sup> However, disclosure is not meant to impose unreasonable costs on the company, nor should the company be required to reveal confidential or commercially sensitive information.

Transparency is essential for the proper functioning of capital markets, as it mitigates information asymmetry.<sup>123</sup> High-quality information and transparent systems help regulate managerial opportunism, enabling market stakeholders to assess risk and make informed decisions.<sup>124</sup> Ultimately, this contributes to the positive growth of a country's economy.

### **2.3.3 Accountability**

Accountability represents a fundamental pillar of corporate governance and it is the obligation or willingness to accept responsibility for actions or even inactions taken. The board of directors should be accountable to the shareholders and the company, always acting in their best interests, and in turn, management should be accountable to the board.<sup>125</sup> In other words, accountability requires the board to provide justification for its decisions and actions to shareholders and other stakeholders who may demand such explanations.<sup>126</sup>

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<sup>119</sup> Riaz, Ray and Ray (n 30).

<sup>120</sup> OECD (n 17).

<sup>121</sup> Masaki Iwasaki, 'Are In-Person Shareholder Meetings Outdated? The Value of Implicit Communication' (2020) 11 Asian Journal of Law and Economics <<https://www.degruyter.com/document/doi/10.1515/ajle-2020-0045/html>> accessed 24 February 2024.

<sup>122</sup> OECD (n 17).

<sup>123</sup> Riaz, Ray and Ray (n 30).

<sup>124</sup> *ibid.*

<sup>125</sup> OECD (n 17).

<sup>126</sup> Section 5.1.1(b) CMA (n 12).

The management or board of a company has the capacity to make decisions that can be either beneficial or detrimental to the corporation. Regardless of the decisions made, a board must be capable of providing justifiable reasoning to support its actions.<sup>127</sup> Significant corporate decisions will naturally prompt inquiries, which should be viewed positively as indicators of engagement and due diligence.<sup>128</sup> Board members should anticipate these questions and must respond with clarity and transparency, reinforcing accountability and fostering stakeholder trust.<sup>129</sup> This should be a fundamental consideration during the planning and execution of shareholders' meetings

Accountability is an essential corporate governance mechanism for mitigating self-interest and preventing opportunistic corporate actions.<sup>130</sup> Boards of directors are accountable to shareholders, and both parties must contribute to ensuring this accountability is effective.<sup>131</sup> Ultimately, shareholder meetings serve as a platform for directors to be held accountable, enabling shareholders to exercise their voting rights to oversee and evaluate the actions of the board, thus enhancing their accountability.<sup>132</sup>

Shareholder engagement also enhances accountability. It is widely understood as the act of shareholders expressing their concerns about the company's performance, without seeking control over the company.<sup>133</sup> By fostering dialogue between shareholders and companies, engagement can serve as a vital accountability mechanism.<sup>134</sup> The importance of these meetings within the broader corporate governance framework can thus not be overstated or underestimated.

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<sup>127</sup> 'What Are the Five Principles of Corporate Governance?' - The Corporate Governance Institute' <<https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-are-the-five-principles-of-corporate-governance/>> accessed 4 March 2025.

<sup>128</sup> - The Corporate Governance Institute, 'What Are the Five Principles of Corporate Governance?' <<https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-are-the-five-principles-of-corporate-governance/>> accessed 4 March 2025.

<sup>129</sup> *ibid.*

<sup>130</sup> Lateef and Akinsulore (n 77).

<sup>131</sup> Report of the Committee on the Financial Aspects of Corporate Governance, n1.

<sup>132</sup> Syed Naveed Shah, 'An Empirical Study of Shareholders Rights in Australia: Theory and Practice | VU Research Repository | Victoria University | Melbourne Australia' <<https://vuir.vu.edu.au/42039/>> accessed 5 March 2025.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

The adoption of the key corporate governance principles, including disclosure, shareholder rights protection, and equitable treatment of shareholders, helps safeguard investments.<sup>135</sup> Effective corporate governance enhances company valuation, increases profitability and sales growth, and reduces capital expenditure.<sup>136</sup> This has a positive effect on the company's performance as well as that of the overall economy.

## **2.4. Types of Shareholder Meetings**

### **2.4.1 Annual General Meetings (AGM)**

An AGM is generally understood to refer to an annual assembly where members of an organization convene to deliberate and vote on significant matters.<sup>137</sup> Companies organize AGMs for their shareholders, during which directors present reports and address shareholder questions.<sup>138</sup> Historically, the AGM was established as a mechanism for shareholders to engage directly with their companies.<sup>139</sup> Initially, it served as the sole means for shareholders to physically interact with companies at a designated location.<sup>140</sup> In numerous jurisdictions globally, public companies are legally obligated to hold an AGM.<sup>141</sup> Their legal underpinning further highlights their critical role in fostering effective corporate governance.

### **2.4.2 Extraordinary General Meetings (EGMs)**

An EGM is a special meeting convened by a company to address urgent matters requiring the immediate attention of senior executives, the board of directors, and shareholders.<sup>142</sup> Unlike an AGM, an EGM is held at an unscheduled time, typically in response to a pressing issue or crisis.<sup>143</sup> EGMs are convened on a needs basis to address specific urgent issues and consequently, do not offer the same breadth of insight into ongoing corporate governance as compared to AGMs.

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<sup>135</sup> Patel and Dr. Naresh K. Patel (n 85).

<sup>136</sup> *ibid.*

<sup>137</sup> 'Annual General Meeting (AGM) - Definition, Purpose'

<<https://corporatefinanceinstitute.com/resources/management/annual-general-meeting-agm/>> accessed 4 March 2025.

<sup>138</sup> *ibid.*

<sup>139</sup> Shah (n 132).

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> 'Annual General Meeting (AGM) - Definition, Purpose' (n 137).

This study will, therefore, focus on AGMs. This is advantageous because AGMs are legally mandated and address a broad range of essential matters, including financial performance reviews, director elections, as well as strategic decision-making, thereby providing a comprehensive overview of a company's governance practices. Therefore, concentrating on AGMs will allow for a more thorough analysis of corporate governance mechanisms and shareholder participation.

### 2.4.3 Importance of Shareholder Meetings in Corporate Governance

The AGM serves three primary purposes. First, to inform shareholders about the company's financial performance and key management decisions; second, to obtain shareholders' approval for these management decisions; and third, to offer a platform for shareholders and directors to engage in discussions regarding the company's performance and future policies.<sup>144</sup> Thus, generally speaking, it encompasses the functions of legal formality, communication, and accountability.<sup>145</sup> During these meetings, shareholders typically vote on critical matters that influence the company's strategic direction and leadership.<sup>146</sup>

One objective of modern corporations should be to promote shareholder participation in governance by encouraging shareholder activism.<sup>147</sup> AGMs serve as a platform for members to engage in discussions on the corporation's development, directly interact with management, pose relevant questions to governing bodies, and propose matters for deliberation.<sup>148</sup> As such, general meetings play a crucial role in fostering corporate democracy.<sup>149</sup> In most jurisdictions, the general meeting of members serves as the highest governing authority within a corporation.<sup>150</sup> As a collegial body, it enables all members to participate in corporate management and exercise their governance rights.<sup>151</sup>

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<sup>144</sup> Shah (n 132).

<sup>145</sup> *ibid.*

<sup>146</sup> Corporate Finance Institute, 'Annual General Meeting (AGM)': 'Annual General Meeting (AGM) - Definition, Purpose' (n 137).

<sup>147</sup> MA Tokmakov, AN Stolyarova and OV Knyazeva, 'Virtual General Meeting: World Experience And Prospects In The Covid-19 Conditions' (2021) *Global Challenges and Prospects of The Modern Economic Development European Proceedings of Social and Behavioural Sciences* <<https://www.europeanproceedings.com/article/10.15405/epsbs.2021.04.02.194>> accessed 24 February 2024.

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

Further, the AGM serves as a crucial, and probably the only, platform where key company stakeholders can interact in person, allowing members to hold those in control accountable for their performance.<sup>152</sup> Consequently, the AGM acts as a public forum for holding directors accountable and provides a voice for minority shareholders.<sup>153</sup> The AGM is also utilized as a governance tool through the election of directors, while the board should remain the central decision-making body, thereby balancing shareholder interests with the board's interests.<sup>154</sup> Decision-making authority lies with the directors, but there must also be a balance of power between shareholders and directors to ensure effective governance and reduce the agency cost.<sup>155</sup> This helps to alleviate the agency problem that arises due to the separation of ownership and management in companies.

At this juncture, it would be helpful to revisit the text of the Cadbury Report and its provisions concerning shareholders' meetings. The Cadbury report noted that it is one of the main conduits of communication between the company and its shareholders.<sup>156</sup> This means that shareholders can directly communicate with their boards by participating in general meetings.<sup>157</sup> Notably, the AGM grants all shareholders, regardless of the size of their holdings, direct and public access to the company's board.<sup>158</sup> At these meetings, the rights of minority shareholders are therefore upheld and safeguarded.

AGMs play a crucial role as a mandatory component of the corporate governance process, providing a platform for company management and directors to present an annual report detailing the company's performance and strategic direction to shareholders.<sup>159</sup> At the AGM, various reports are laid before the shareholders, providing them with an opportunity to offer feedback and pose questions.

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<sup>152</sup> Shah (n 132).

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> Cadbury (n 79).

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> Alshhadat and Al-Hajaya (n 5).

Given the pivotal role of shareholder voting in corporate theory, it is not surprising that the annual meeting is one of the few mandatory provisions in corporate law.<sup>160</sup> The courts have also underscored the significance of the annual meeting to corporate operations by strictly interpreting the relevant statutory requirements.<sup>161</sup> Furthermore, these courts have affirmed that the right to an annual meeting is considered "virtually absolute."<sup>162</sup>

## **2.5. Exercise of Shareholder Rights during Shareholders Meetings**

As established earlier in this study, the agency theory of corporate governance will serve as the predominant framework for examining shareholders' rights during company meetings. This is because the separation of ownership and control invariably causes tension between shareholders and management.<sup>163</sup> This is commonly referred to as the agency problem and corporate governance attempts to reduce the costs associated with this within an organisation, commonly referred to as the agency costs.

Shareholders have rights that accrue to them upon the purchase of shares in a company and these include information rights, voting rights and financial rights.<sup>164</sup> Each shareholder is entitled to participate in and vote at the general shareholders' meeting, including on matters such as the election of directors.<sup>165</sup> Traditionally, shareholders exercised and protected these rights by attending meetings in person, where they could raise issues, present and deliberate on proposals, and mobilize support from fellow shareholders for voting.<sup>166</sup> Consequently, physical AGMs demonstrated superiority over virtual formats in these specific respects. Shareholders' rights are typically safeguarded and firmly established within legal frameworks, unlike those of other stakeholders.<sup>167</sup> Corporate governance seeks to ensure that these rights are protected and exercised as required, as this helps to alleviate the agency problem.

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<sup>160</sup> Nili and Shaner (n 4).

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*

<sup>164</sup> CMA (n 12).

<sup>165</sup> *ibid.*

<sup>166</sup> Nili and Shaner (n 4).

<sup>167</sup> 'Corporate Governance - Christine A. Mallin\_.Pdf' (n 21).

There are several key shareholder rights. Among these rights, the right to vote is fundamental to corporate governance, serving as the foundation that legitimizes the authority of the directors over the company's assets in which they hold no ownership interest.<sup>168</sup> The right to vote is widely regarded as the most effective mechanism for holding management accountable and shaping corporate governance.<sup>169</sup> The right to vote is the most fundamental and influential privilege granted to shareholders.<sup>170</sup> The shareholder vote serves as a fundamental mechanism through which shareholders actively participate in corporate governance by influencing the decisions of the boards of directors in the companies they have invested in.<sup>171</sup> Physical attendance at AGMs enabled shareholders to more easily rally support from other shareholders present at the meeting to vote for or support their proposals.

In this context, the shareholder vote serves as a critical tool for oversight, accountability, and a check on the board's management of the corporation.<sup>172</sup> The annual meeting serves as the primary platform through which shareholders exercise their voting rights.<sup>173</sup> Shareholder meetings should thus ensure that this voting right is upheld and exercised without unreasonable restrictions during the meetings.

Shareholders' meetings are pivotal elements in corporate governance, as they provide a structured forum where shareholders can exercise their rights, discuss the company's performance, and participate in crucial decision-making processes by voting.<sup>174</sup> In principle, the annual meeting, particularly the election of directors, a central feature of the proceedings, serves as a mechanism to both limit director power and evaluate the corporation's performance, strategic direction, and vision.<sup>175</sup> The annual election of directors legitimizes the separation of ownership and control within the corporation, thereby fulfilling a broader role in monitoring and ensuring accountability.<sup>176</sup> This

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<sup>168</sup> Nili and Shaner (n 4).

<sup>169</sup> *ibid.*

<sup>170</sup> Amy Borrus and others, 'Report on Practices for Virtual Shareholder Meetings' (*The Harvard Law School Forum on Corporate Governance*, 11 January 2021) <<https://corpgov.law.harvard.edu/2021/01/11/report-on-practices-for-virtual-shareholder-meetings/>> accessed 21 July 2024.

<sup>171</sup> Sonia Abdennadher and Walid Cheffi, 'The Effectiveness of E-Corporate Governance: An Exploratory Study of Internet Voting at Shareholders' Annual Meetings in France' (2020) 20 *Corporate Governance: The International Journal of Business in Society* 673.

<sup>172</sup> Nili and Shaner (n 4).

<sup>173</sup> *ibid.*

<sup>174</sup> OECD (n 17).

<sup>175</sup> Nili and Shaner (n 4).

<sup>176</sup> *ibid.*

ensures the upholding of the core principles of corporate governance, which increases the likelihood of long-term sustainable success for the enterprise. The annual election of directors during physical AGMs provides a structured and focused forum for evaluating corporate performance.<sup>177</sup> The anticipation of this in-person scrutiny may exert a positive influence on managerial attentiveness and accountability, in a way that virtual formats may not replicate as effectively.<sup>178</sup>

For many shareholders, in-person attendance at the annual meeting represents their sole opportunity to directly pose questions and provide comments to the board of directors and management in the presence of fellow shareholders.<sup>179</sup> As such, it serves as a crucial forum for shareholder engagement, facilitating direct interaction with company leadership and fostering dialogue among shareholders.<sup>180</sup>

Shareholders can drive the company's growth agenda during these meetings. During this meeting, shareholders deliberate and decide on a range of issues, thereby reinforcing accountability.<sup>181</sup> Furthermore, management and its advisors present reports on the company's performance and strategic direction, with shareholders having the opportunity to pose questions, thereby promoting transparency and disclosure.<sup>182</sup> In the case of *Algeran, Inc. v. Connolly*, Court emphasized that the annual meeting of stockholders, specifically for electing directors, is one of the few opportunities for a corporate stockholder to influence the future of their corporation.<sup>183</sup> Shareholder participation in corporate decision-making is thus a fundamental aspect of sound corporate governance, recognized and enforced by the courts.

## **2.6. Impact of COVID-19 on Shareholders Meetings**

### **2.6.1 Pre-COVID-19 Landscape: Dominance of in-person meetings**

Having established the importance of shareholder meetings, it is essential to examine the evolution of their format over the years within the context of this study. Historically, shareholders exercised their

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<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

<sup>179</sup> Borrus and others (n 170).

<sup>180</sup> *ibid.*

<sup>181</sup> Nili and Shaner (n 4).

<sup>182</sup> *ibid.*

<sup>183</sup> *ibid.*

rights by attending meetings in person, presenting proposals, engaging in discussions, and facilitating voting on these proposals by fellow shareholders.<sup>184</sup> Accordingly, AGMs were originally envisaged solely as a physical meeting at a designated location and as the sole method for shareholders to engage and discuss matters pertinent to their company.<sup>185</sup>

In person attendance at AGMs enabled easier exercise of shareholder rights. Physical meetings offer a unique forum for direct, face-to-face engagement, enabling shareholders to question management with greater immediacy and scrutiny.<sup>186</sup> For retail shareholders in particular, such meetings often represent the sole occasion to personally address management and articulate their views and concerns.<sup>187</sup> The AGM serves as a vital platform for facilitating communication both among shareholders themselves and between shareholders and management.<sup>188</sup> Physical AGMs provide shareholders with the opportunity to easily advocate for their positions with other shareholders, while also enabling management to cultivate shareholder confidence and support.<sup>189</sup>

The Cadbury report was published in 1992, which was before the advent of widespread digital and technological meeting solutions. However, it is noteworthy that the report made provision for boards to experiment with different ways of enhancing their communication and engagement with shareholders.<sup>190</sup> This aligns with the trend of virtual meetings which was observed over the following years. For the purposes of this study, the term ‘virtual meetings’ will refer to both fully virtual meetings and hybrid meetings, where some participants attend online while others are physically present.

Traditionally, companies showed little opposition to the concept of virtual shareholder meetings despite a strong preference for in-person annual meetings.<sup>191</sup> Many viewed them as a viable alternative if circumstances required such a format.<sup>192</sup> Before the COVID-19 pandemic, companies that adopted virtual meetings highlighted their environmental benefits, increased accessibility for a broader

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<sup>184</sup> *ibid.*

<sup>185</sup> Freeburn and Ramsay (n 19).

<sup>186</sup> Nili and Shaner (n 4).

<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.*

<sup>190</sup> Cadbury (n 79).

<sup>191</sup> Borrus and others (n 170).

<sup>192</sup> *ibid.*

shareholder base, and the ability to provide a more uniform and consistent experience for all participants.<sup>193</sup>

The growth of the Internet significantly transformed the way corporations communicated and engaged with their shareholders.<sup>194</sup> Starting in the mid-1990s, some companies began adopting technological tools to supplement traditional in-person meetings.<sup>195</sup> Satellite broadcasts of annual meetings eventually transitioned to online "webcast" meetings and shareholders participating remotely were also allowed to email questions to management during the meeting.<sup>196</sup> In the year 2000, in the United States, Delaware became the first state to amend its statute, allowing virtual shareholder meetings "if authorized by the board of directors."<sup>197</sup> Virtual meetings became relatively widespread in the United States in the early 2000s, with companies like Microsoft and Ford adopting them.<sup>198</sup>

Several factors, however, hindered the widespread adoption of virtual annual meetings, including legal restrictions, shareholder opposition, and technological challenges.<sup>199</sup> The response to virtual meetings was divided, with many large institutional shareholders and activist groups opposing the elimination of in-person meetings.<sup>200</sup> The limited adoption of virtual shareholder meetings could be attributed to resistance from stakeholders, negative perceptions, and concerns regarding the inadequate protection of shareholder rights.<sup>201</sup> There was a lack of consensus over the matter, including among legislators, which led to the slow growth of the same.

There were, however, some jurisdictions that had already made provision for virtual meetings in their laws even during this period. Before the COVID-19 crisis, several jurisdictions allowed companies to hold virtual meetings.<sup>202</sup> These included Canada, Denmark, Hong Kong, Ireland, Liechtenstein, Luxembourg, New Zealand, Norway, Portugal, South Africa, Spain, the United Kingdom, and the

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<sup>193</sup> *ibid.*

<sup>194</sup> Nili and Shaner (n 4).

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> Freeburn and Ramsay (n 19).

<sup>199</sup> Nili and Shaner (n 4).

<sup>200</sup> Freeburn and Ramsay (n 19).

<sup>201</sup> Abdennadher and Cheffi (n 171).

<sup>202</sup> Freeburn and Ramsay (n 19).

United States.<sup>203</sup> However, while virtual meetings were permitted in these regions, they were not commonly held under normal circumstances.<sup>204</sup>

The adoption of virtual meetings outside the United States was relatively limited.<sup>205</sup> Companies across Europe typically held traditional in-person meetings.<sup>206</sup> In the UK, when some companies attempted to amend their articles of association to allow for virtual AGMs, these proposals were rejected due to concerns that meetings would become entirely virtual.<sup>207</sup> This meant that the development and evolution of the same was fairly slow, and with no real incentive or legislative backing for the meetings, they were not widely utilized.

Until 2020, many corporations were still obligated by legislation to include an in-person component in their annual meetings or the directors simply chose not to incorporate technological tools into their meetings.<sup>208</sup> Virtual meetings were generally disfavored by many companies, who regarded them as an insufficient substitute for in-person meetings.<sup>209</sup> Some shareholders also opposed virtual shareholder meetings, arguing that they hindered their ability to exercise rights and directly engage with directors.<sup>210</sup> Their primary concern was that the virtual format, whether intentionally or not, reduced shareholder interaction and limited management accountability compared to in-person meetings.<sup>211</sup>

In conclusion, prior to COVID-19, although some jurisdictions had provisions for remote shareholder meetings, their adoption remained limited—even with advantages like lower transaction costs and increased shareholder engagement.<sup>212</sup> While various legal frameworks allowed for remote shareholder meetings before COVID-19, their adoption remained limited despite benefits such as lower transaction costs and increased shareholder activism.<sup>213</sup> Concerns over digital technology, including fears of restricted communication and potential voting irregularities, discouraged a shift away from physical

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<sup>203</sup> *ibid.*

<sup>204</sup> *ibid.*

<sup>205</sup> *ibid.*

<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.*

<sup>208</sup> *ibid.*

<sup>209</sup> Nili and Shaner (n 4).

<sup>210</sup> Borrus and others (n 170).

<sup>211</sup> *ibid.*

<sup>212</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>213</sup> *ibid.*

meetings.<sup>214</sup> However, the COVID-19 pandemic compelled corporations to overcome these reservations and embrace virtual meetings as a necessity.<sup>215</sup> The pandemic in 2020 marked a significant milestone in the development of virtual meetings.

### **2.6.2 COVID-19 as a Catalyst for Change**

Corporate governance, like other disciplines, is not static but continually evolves and adapts to changing circumstances. Historically, while corporate governance evolves incrementally during periods of stability, it tends to undergo significant transformations during times of severe social and economic upheaval.<sup>216</sup> The pandemic was, however, unique in that the upheaval did not stem from corporate misconduct or deficiencies in control systems.<sup>217</sup> The year 2020 came to represent one such turning point.

The events commenced on 31<sup>st</sup> December 2019, when the World Health Organisation (WHO) reported the first case of the COVID-19 virus, in Wuhan, China.<sup>218</sup> The virus spread rapidly globally and on 11<sup>th</sup> March 2020, in response to the rapid escalation of infections, WHO officially declared that COVID-19 was a pandemic.<sup>219</sup> Following this announcement, in a bid to curb the spread of the pandemic, and relying on guidance from WHO, governments around the world imposed various measures, including restrictions on travel and in-person gatherings, popularly called lockdowns.<sup>220</sup>

In addition to government-imposed restrictions, many companies also imposed internal travel sanctions and work-from-home orders.<sup>221</sup> The COVID-19 pandemic posed a severe threat to both public health and economic activities on a global scale.<sup>222</sup> However, these measures had a significant negative impact on economic activities, leading to a crisis that was considered more devastating than

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<sup>214</sup> *ibid.*

<sup>215</sup> *ibid.*

<sup>216</sup> Gelter and Puaschunder (n 46).

<sup>217</sup> Delev and Najdova (n 7).

<sup>218</sup> 'Timeline of WHO's Response to COVID-19' (n 1).

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*

<sup>221</sup> Nili and Shaner (n 4).

<sup>222</sup> Jebran and Chen (n 71).

previous economic downturns.<sup>223</sup> The upheaval caused across global economies by the pandemic was largely unprecedented.

As established in the foregoing sections, the disruption caused by the COVID-19 pandemic was unprecedented and unforeseeable.<sup>224</sup> Company practices were not left unaffected by these changes. The most notable effect was that company laws as drafted at the time, were incompatible with the measures implemented to contain the pandemic, most importantly, the provisions for in-person meetings of shareholders.<sup>225</sup> The laws at the time simply did not anticipate that an AGM could be impeded by a global instance of force majeure.<sup>226</sup> This necessitated the adoption of a different approach.

AGMs still needed to be held during the lockdowns because while the board of directors of a company can make key corporate decisions, certain critical matters require shareholder approval, including the appointment or reappointment of directors, significant related-party and inter-corporate transactions, issuance of securities, and schemes of arrangement.<sup>227</sup> Failure to secure timely shareholder approval may result in legal noncompliance or unsuccessful transactions.<sup>228</sup>

Technology played a crucial role at this juncture as many companies had to adopt technological solutions to conduct their meetings. Corporations adopted virtual meetings as the safest alternative, marking a significant shift from conventional in-person gatherings to predominantly virtual formats.<sup>229</sup> COVID-19 created a unique opportunity to test the viability of virtual meetings across diverse corporate sectors, accelerating the adoption of this technological approach far beyond what would have been its natural pace of development.<sup>230</sup>

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<sup>223</sup> *ibid.*

<sup>224</sup> ‘Miscellaneous Application 181 of 2020 (O.S.) - Kenya Law’ <<https://kenyalaw.org/caselaw/cases/view/197036>> accessed 29 September 2024.

<sup>225</sup> Zetzsche and others (n 9).

<sup>226</sup> ‘Miscellaneous Application 181 of 2020 (O.S.) - Kenya Law’ (n 224).

<sup>227</sup> Patel and Dr. Naresh K. Patel (n 85).

<sup>228</sup> *ibid.*

<sup>229</sup> Nili and Shaner (n 4).

<sup>230</sup> Gelter and Puaschunder (n 46).

The pandemic compelled corporations worldwide to abandon in-person meetings, accelerating the shift to virtual formats.<sup>231</sup> In response, many jurisdictions adopted regulations to accommodate virtual meetings. This transformation signified a lasting change in corporate governance, with virtual meetings now firmly embedded as a standard practice.<sup>232</sup> Virtual meetings are now integral to modern corporate governance and are likely to remain a lasting legacy of the pandemic.<sup>233</sup>

### **2.6.3 Virtual meetings during the COVID-19 pandemic**

The COVID-19 pandemic revealed that many companies had neither initially planned for nor previously conducted virtual meetings.<sup>234</sup> With limited notice, boards, executives, and legal advisors had to swiftly transition from pre-scheduled in-person meetings to virtual platforms.<sup>235</sup> Shareholders faced the challenge of adapting quickly to the virtual format, which presented unforeseen obstacles to meeting attendance and participation.<sup>236</sup> The adoption of virtual shareholder meetings surged significantly in 2020, as companies in the United States and other regions were unable to hold in-person meetings due to the COVID-19 pandemic.<sup>237</sup> Many market participants anticipate that virtual meetings will become the dominant format for shareholder meetings in the future.<sup>238</sup>

As a result, virtual meetings are positioned to become a significant and enduring aspect of corporate practice.<sup>239</sup> The extent to which virtual meetings fulfill or impede the functions of shareholder meetings as enumerated earlier in this chapter, depends on their design and structure.<sup>240</sup> That notwithstanding, virtual meetings have the potential to respond to increasing public demands for corporate governance reform, particularly in areas such as enhanced shareholder engagement.<sup>241</sup> This suggests that if well-implemented and regulated virtual meetings can enhance transparency, participation, and accountability in corporate decision-making.

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<sup>231</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

<sup>234</sup> Nili and Shaner (n 4).

<sup>235</sup> *ibid.*

<sup>236</sup> *ibid.*

<sup>237</sup> Brochet, Chychyla and Ferri (n 55).

<sup>238</sup> *ibid.*

<sup>239</sup> Nili and Shaner (n 4).

<sup>240</sup> *ibid.*

<sup>241</sup> *ibid.*

#### 2.6.4 Legal Reforms During the Pandemic: Adapting to the Transition

As the pandemic raged on and interfered with statutory requirements including the attendance of meetings, legislators around the world moved to take action. Consequently, in several jurisdictions, new laws and amendments to existing laws were enacted to enable the continuation of normal company practices.<sup>242</sup> These laws were intended to legalise virtual meetings and to relax other rigid requirements around shareholder meetings.<sup>243</sup> The focus was on implementing measures to ensure the efficient and seamless operation of corporate governance within the context of the COVID-19 pandemic.<sup>244</sup>

Crisis-related corporate law legislation was introduced in countries including Australia, Austria, Belgium, Canada, China, France, Germany, Hong Kong, India, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, South Korea, Spain, Switzerland, Thailand, the United Kingdom, and the United States.<sup>245</sup> Similar legislative interventions were also implemented in Kenya.<sup>246</sup> The pandemic also prompted significant policy adjustments in many Asian countries concerning annual shareholder meetings.<sup>247</sup> The primary changes included extensions of statutory deadlines and the promotion of virtual shareholder meetings.<sup>248</sup> The pandemic thus acted as a catalyst for legal reforms in corporate governance and also established the premise that virtual meetings would continue to play a major role in the future.

Several governments, including those in the USA, the UK, and Australia, relaxed regulations governing shareholder participation.<sup>249</sup> This allowed companies to conduct AGMs virtually or in a hybrid format, where a physical meeting takes place alongside a live broadcast for remote shareholders.<sup>250</sup> This approach ensured broader participation and was poised to continue as a long-term governance model.

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<sup>242</sup> Zetzsche and others (n 9).

<sup>243</sup> *ibid.*

<sup>244</sup> Delev and Najdova (n 7).

<sup>245</sup> Zetzsche and others (n 9).

<sup>246</sup> Business Laws Amendment Act No.1of2021.

<sup>247</sup> Iwasaki (n 121).

<sup>248</sup> *ibid.*

<sup>249</sup> Alshhadat and Al-Hajaya (n 5).

<sup>250</sup> *ibid.*

The adaptability of corporate laws varied across jurisdictions. Some jurisdictions' existing laws were sufficiently flexible to facilitate a smooth transition to digitalization without requiring significant adjustments.<sup>251</sup> Notable examples of such jurisdictions include the corporate laws of the state of Delaware in the United States, Ontario in Canada, and Liechtenstein.<sup>252</sup> Pre-existing legal adaptability, therefore, played a crucial role in successfully navigating unforeseen disruptions, such as the shift to virtual meetings.

The legislative response to the crisis aimed to facilitate business continuity and enable adherence to statutory requirements. The legislation thus enacted primarily focused on areas such as the transition from in-person to virtual shareholder meetings, as well as the introduction of various forms of absentee voting.<sup>253</sup> However, the legislation, particularly with respect to the right to ask questions and facilitate direct shareholder communication, failed to strike an appropriate balance between ensuring an efficient meeting from management's perspective and safeguarding the rights of shareholders, particularly in relation to minority shareholders.<sup>254</sup> There is a risk that the legal and regulatory frameworks from the pandemic period may lead to suboptimal regulation of shareholder meetings in future.<sup>255</sup> This implies a need for further legal refinements to ensure that virtual meeting regulation protects shareholder rights.

#### **2.6.5 Benefits of Virtual Meetings: A Platform to Increase Shareholder Engagement**

The transition to virtual meetings offered several benefits. The introduction of virtual meetings offered companies and shareholders a unique opportunity to rethink the boundaries of shareholder engagement and enhance opportunities for their involvement.<sup>256</sup> Virtual meetings have significant potential to complement traditional in-person gatherings.<sup>257</sup> The comprehensive integration of information and communication technology (ICT) into corporate governance enhances information accessibility for investors, mitigates information asymmetries between corporations and investors,

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<sup>251</sup> Zetzsche and others (n 9).

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*

<sup>255</sup> *ibid.*

<sup>256</sup> Nili and Shaner (n 4).

<sup>257</sup> Abdennadher and Cheffi (n 171).

and consequently reduces investor risk while lowering capital costs.<sup>258</sup> A virtual-only format would enable a significantly larger number of shareholders to participate while reducing costs for both the company and participants in terms of time and financial resources.<sup>259</sup>

In fact, the primary advantage of virtual meetings often cited is their ability to re-engage shareholders, both in terms of increased participation and deeper involvement in corporate governance.<sup>260</sup> This can help in upholding the corporate governance principles. Conversely, the expanded use of electronic means in organizing shareholder meetings enhances corporate transparency while fostering greater shareholder interest and engagement in the proceedings.<sup>261</sup> The associated costs are also generally lower in comparison to in-person and hybrid meetings that require procurement of physical venues, security, catering, and other accommodations.<sup>262</sup>

As discussed earlier, fair treatment and equality of shareholders are crucial pillars of an effective corporate governance framework. This is especially crucial for minority shareholders. Minority shareholders do not have equal access to the company outside of the annual meeting.<sup>263</sup> As a result, the annual meeting remains the primary opportunity for minority shareholders to influence corporate decision-making.<sup>264</sup> Virtual meetings offer minority shareholders a more accessible and cost-effective way to participate.<sup>265</sup> Offering all investors a meaningful opportunity to engage in the annual meeting helps preserve the legitimacy of shareholder voting by reducing agency costs and maintaining director accountability.<sup>266</sup>

Virtual shareholder meetings can contribute to the advancement of contemporary corporate governance by enhancing the protection of minority shareholders' rights and reinforcing their impact on controlling entities.<sup>267</sup> Notably, internet-based voting platforms can help address challenges related

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<sup>258</sup> *ibid.*

<sup>259</sup> Brochet, Chychyla and Ferri (n 55).

<sup>260</sup> Nili and Shaner (n 4).

<sup>261</sup> Delev and Najdova (n 7).

<sup>262</sup> Borrus and others (n 170).

<sup>263</sup> Nili and Shaner (n 4).

<sup>264</sup> *ibid.*

<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*

<sup>267</sup> Abdennadher and Cheffi (n 171).

to cross-border voting, thereby increasing the participation of international shareholders.<sup>268</sup> This, in turn, can reduce information asymmetry and lower agency costs.<sup>269</sup> Ensuring the protection of minority shareholders' rights must be a fundamental consideration in board deliberations and shareholder meetings

A well-structured and effectively conducted virtual shareholder meeting can enhance shareholder participation while reducing organizational costs.<sup>270</sup> The primary benefits for shareholders include savings in time and travel expenses, making virtual attendance an attractive option.<sup>271</sup> This is particularly advantageous for global corporations with shareholders spread across multiple countries, as virtual meetings provide an opportunity for participation that would otherwise be impractical for many shareholders to attend in person.<sup>272</sup>

Virtual meetings, which ensure that members receive equivalent rights regardless of whether they attend in person or remotely, are recognized as an enhancement to the functionality of member meetings.<sup>273</sup> They are regarded as an advancement that complements the advantages of physical meetings by enabling greater participation and attendance, particularly for members who are geographically distant or face challenges in attending in person.<sup>274</sup> Internet-based voting platforms offer a more efficient and reliable solution to the challenges associated with cross-border voting, thereby enhancing shareholder participation in international corporate governance.<sup>275</sup>

When designed effectively, virtual meetings can consequently enhance shareholder democracy.<sup>276</sup> This implies that companies and legislators must carefully implement and regulate virtual meeting technologies to maximize their benefits and uphold shareholder rights.

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<sup>268</sup> *ibid.*

<sup>269</sup> *ibid.*

<sup>270</sup> Delev and Najdova (n 7).

<sup>271</sup> *ibid.*

<sup>272</sup> *ibid.*

<sup>273</sup> 'Statutory Review of the Meetings and Documents Amendments | Treasury. Gov. Au'

<<https://treasury.gov.au/review/statutory-review-meetings-and-documents-amendments>> accessed 16 September 2024.

<sup>274</sup> 'Statutory Review of the Meetings and Documents Amendments | Treasury. Gov. Au' (n 257).

<sup>275</sup> Abdennadher and Cheffi (n 171).

<sup>276</sup> Nili and Shaner (n 4).

### **2.6.7 Challenges in the Exercise of Shareholder Rights in Virtual Meetings**

While virtual meetings have the potential to empower shareholders, they have also presented challenges. Rather than enhancing participation for all shareholders, some have been disenfranchised.<sup>277</sup> Analyses of virtual meetings have highlighted problems with access, format, and participation in virtual meetings, leading many to believe that shareholder involvement had either been unintentionally overlooked or intentionally marginalized.<sup>278</sup> This problem has manifested itself in multiple forms.

#### **Access to the meetings and technological barriers**

Some of the issues encountered were the result of the rapid shift to virtual meetings and the inevitable growing pains that accompany significant changes.<sup>279</sup> The pandemic revealed that many companies were not technologically prepared, and both managers and shareholders faced uncertainty and confusion about navigating virtual platforms.<sup>280</sup> A significant concern raised by shareholders during the 2020 AGM season was the difficulty of accessing the virtual meetings.<sup>281</sup>

While some challenges can be mitigated with better planning and communication, others, such as issues of access, voting rights, and discourse, require more robust consideration in legislation as they are integral to the core functions of the annual meeting.<sup>282</sup> These challenges can often be more pronounced in jurisdictions like Kenya, caused by issues like internet or power disruptions, as well as elderly shareholders who may not have the means or technological prowess to navigate virtual gatherings. As with any virtual meeting or webcast, technical difficulties may hinder attendee access. Many of these issues can however be prevented through prior testing of the platform's capabilities.<sup>283</sup>

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<sup>277</sup> *ibid.*

<sup>278</sup> *ibid.*

<sup>279</sup> *ibid.*

<sup>280</sup> *ibid.*

<sup>281</sup> Borrus and others (n 170).

<sup>282</sup> Nili and Shaner (n 4).

<sup>283</sup> Borrus and others (n 170).

### **Absence of face-to-face accountability**

The historical concept of a meeting was a face-to-face interaction with direct questioning and answers. Virtual meetings may cause shareholders to lose the opportunity to confront management directly and ask challenging questions.<sup>284</sup> Furthermore, a virtual format gives management near-total control over interactions during the meeting, which is not possible in in-person settings.<sup>285</sup> Concerns about management interference include the possibility of selectively choosing questions or rephrasing them to make them more management-friendly.<sup>286</sup> The importance of direct, in-person accountability of management to shareholders, as well as the opportunity for meaningful deliberation usually facilitated by physical shareholder meetings may risk being lost during virtual meetings.<sup>287</sup>

Conversely, critics argue that in-person meetings provide the only opportunity for investors to directly engage with managers and directors, expressing concerns that a virtual-only format may enable firms to selectively filter out potentially challenging or unfavourable questions, thereby restricting shareholder influence.<sup>288</sup> Specifically, in virtual-only meetings, shareholders may be required to submit questions online directly to management, without other shareholders having visibility into the submitted inquiries.<sup>289</sup> Consequently, management retains discretion over whether to address these questions during the meeting.<sup>290</sup> The inability to view questions in real-time or identify who was asking them further detracts from transparency.<sup>291</sup>

Critics have argued that the absence of interpersonal interactions in virtual meetings is particularly significant during contested meetings, for example, where shareholders attempt to replace board members.<sup>292</sup> The concern remains that virtual meetings may become one-sided webinars, where shareholders passively watch and listen to management without meaningful interaction, and this must be addressed by legislators and regulators.<sup>293</sup>

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<sup>284</sup> Nili and Shaner (n 4).

<sup>285</sup> *ibid.*

<sup>286</sup> *ibid.*

<sup>287</sup> Abdennadher and Cheffi (n 171).

<sup>288</sup> Brochet, Chychyla and Ferri (n 55).

<sup>289</sup> *ibid.*

<sup>290</sup> *ibid.*

<sup>291</sup> Nili and Shaner (n 4).

<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.*

Discussions and inquiries during physical meetings serve not only to influence corporate resolutions but also to inform shareholders' broader assessments of the company.<sup>294</sup> Attending shareholders observe both the responses of management and the reactions of fellow shareholders, contributing to their overall evaluation.<sup>295</sup> Conversely, some members and their representatives view hybrid meetings with skepticism, fearing that companies may leverage them to evade scrutiny or weaken members' rights to question decisions and influence the company's direction.<sup>296</sup>

Procedural transparency is crucial in shareholder meetings.<sup>297</sup> In in-person meetings, shareholders can observe the selection process for questions and the level of participation.<sup>298</sup> However, in virtual meetings, companies may filter questions off-screen, preventing shareholders from knowing how many participants wish to speak or how questions are chosen.<sup>299</sup> This allows companies to selectively address less challenging inquiries, reducing the meeting's informativeness and limiting shareholder oversight.<sup>300</sup>

Shareholders can gain valuable insights by observing the reactions of fellow shareholders during meetings, as expressions of disagreement or anger may inform their understanding of the issues discussed.<sup>301</sup> Retail investors, with limited resources, may rely on such observations to reduce information-gathering costs.<sup>302</sup> Shareholders utilize information from meetings not only to inform their voting decisions but also to assess the soundness of their investments and the credibility of management.<sup>303</sup>

In Kenya, the capital markets regulator raised concerns around virtual meetings, urging listed companies to ensure that virtual AGMs replicate the experience of physical AGMs as closely as possible, providing shareholders with sufficient time to pose questions and seek clarifications on the

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<sup>294</sup> Iwasaki (n 121).

<sup>295</sup> *ibid.*

<sup>296</sup> 'Statutory Review of the Meetings and Documents Amendments | Treasury.Gov.Au' (n 273).

<sup>297</sup> Iwasaki (n 121).

<sup>298</sup> *ibid.*

<sup>299</sup> *ibid.*

<sup>300</sup> *ibid.*

<sup>301</sup> *ibid.*

<sup>302</sup> *ibid.*

<sup>303</sup> *ibid.*

company's performance or any pertinent matters.<sup>304</sup>The regulator advocated for reforms to safeguard shareholder participation in virtual meetings, aiming to ensure that shareholders can hold companies accountable in both online and offline settings.<sup>305</sup>This was a result of concern that virtual AGMs may result in unequal power dynamics, potentially marginalizing certain shareholders within a digital context.<sup>306</sup>The need for law reform in this area is apparent.

### **Cybersecurity concerns**

As corporations transitioned to virtual meetings, hitherto unknown risks to meetings became apparent, including cybersecurity concerns. While the benefits of virtual forums are significant, fully realizing them requires addressing a critical vulnerability in today's digital landscape, that is, cybersecurity threats.<sup>307</sup> While cybersecurity issues did not surface prominently during the pandemic annual meeting seasons, they remain a significant consideration whenever corporations move operations online.<sup>308</sup> Virtual meetings are vulnerable to cyberattacks and data security risks, and these platforms can be more easily disrupted.<sup>309</sup> Recent studies indicate a rise in cyber risks, including phishing, denial-of-service attacks, email scams, and SMS scams, during 2020 and 2021, with some directly linked to pandemic-related conditions.<sup>310</sup>

Ensuring the protection of shareholder and investor data is a fundamental priority for organizations, particularly regarding the technology used to facilitate AGMs and investor relations meetings.<sup>311</sup> This requires adopting a robust security framework to maintain data confidentiality and integrity.<sup>312</sup>To prevent disruptions from denial-of-service attacks, technological safeguards should monitor and block

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<sup>304</sup> Capital Markets Authority (n 67).

<sup>305</sup> *ibid.*

<sup>306</sup> *ibid.*

<sup>307</sup> 'As Virtual AGM Attendance Soars, How Does Technology Safeguard Against Cyber Threats? - KBI.Media' (<https://kbi.media/>) <<https://kbi.media/as-virtual-agm-attendance-soars-how-does-technology-safeguard-against-cyber-threats/>> accessed 8 February 2025.

<sup>308</sup> Nili and Shaner (n 4).

<sup>309</sup> *ibid.*

<sup>310</sup> Alshhadat and Al-Hajaya (n 5).

<sup>311</sup> 'As Virtual AGM Attendance Soars, How Does Technology Safeguard Against Cyber Threats? - KBI.Media' (n 307).

<sup>312</sup> *ibid.*

abnormal activities, ensuring uninterrupted shareholder participation and voting.<sup>313</sup>Secure voting mechanisms are essential to uphold the democratic principles of AGMs.<sup>314</sup>

As cybersecurity becomes increasingly central to corporate governance, companies must not only secure AGMs but also engage and protect their shareholders in the digital space.<sup>315</sup>Virtual AGMs offer enhanced inclusivity and participation, but organizations must first ensure their technology provides the necessary safeguards to maintain trust and security.<sup>316</sup>Corporations must, therefore, prioritize cybersecurity in their virtual governance strategies to ensure the integrity of virtual shareholder meetings.

### **Vague Language in Legislation**

The language used in laws and regulation must be clear so as to minimize ambiguity and aid in enforcement. The COVID-19 crisis accelerated the adoption of virtual meetings but the rules designed to ensure meaningful shareholder participation and engagement are often vague.<sup>317</sup> In cases where broad terms like "two-way communication" or "reasonable participation" are used, the lack of specificity grants wide discretion to management.<sup>318</sup> This procedural loophole may allow management to dominate in disputes with dissenting shareholders.<sup>319</sup> Therefore, legislative clarity and detailed guidelines are necessary to ensure virtual meetings promote genuine shareholder engagement.

Additionally, it is likely that companies are able to disregard shareholder questions, as the absence of in-person interactions means that shareholders cannot rally support from others, with participants effectively "muted" in virtual meetings.<sup>320</sup> This lack of transparency can enable non-compliance and procedural irregularities, such as in shareholder identification and vote tabulation.<sup>321</sup> Among other measures, ensuring clarity and providing the necessary details and contextual explanations in relevant legislation will be instrumental in safeguarding shareholder rights during virtual meetings.

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<sup>313</sup> *ibid.*

<sup>314</sup> *ibid.*

<sup>315</sup> *ibid.*

<sup>316</sup> *ibid.*

<sup>317</sup> Zetzsche and others (n 9).

<sup>318</sup> *ibid.*

<sup>319</sup> *ibid.*

<sup>320</sup> *ibid.*

<sup>321</sup> *ibid.*

## 2.7 The Necessity of Legal Safeguards to Uphold Shareholder Rights in Virtual Meetings

The limitations in enforcing shareholder rights during virtual meetings can be addressed through the implementation of a robust legal framework, achieved by amending existing laws. The increasing reliance on technology in shareholder meetings, especially during the preparatory stages, voting and question-and-answer sessions, will accordingly necessitate a shift in legislative thinking.<sup>322</sup> To ensure these organizations can effectively utilize technology, legislators must implement structures that address technology-related risks.<sup>323</sup> This demands a technologically savvy and forward-looking legislature, with deep awareness of technology.

Legal interventions are necessary as mere sensitization of company directors on the need to streamline virtual meeting procedures is insufficient.<sup>324</sup> It is essential to establish regulatory frameworks governing their activities and to designate an oversight authority to ensure the effective functioning of the virtual meetings process.<sup>325</sup> However, companies may deliberately limit interactivity to avoid unfavourable shareholder inquiries, often restricting questions to pre-submission under the guise of technological constraints.<sup>326</sup>

Companies should enable shareholders to ask questions live and in real-time while ensuring all participants can view these inquiries, enhancing interactivity, transparency, and engagement between shareholders and management.<sup>327</sup> Additionally, companies should document shareholder actions, including votes and questions, and make recorded meetings publicly accessible for a specified period to further improve transparency.<sup>328</sup> While other factors may require consideration, these measures are key to addressing the limitations of virtual shareholder meetings.<sup>329</sup> These measures require backing in law to ensure their effectiveness.

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<sup>322</sup> *ibid.*

<sup>323</sup> *ibid.*

<sup>324</sup> Abdennadher and Cheffi (n 171).

<sup>325</sup> *ibid.*

<sup>326</sup> Iwasaki (n 121).

<sup>327</sup> *ibid.*

<sup>328</sup> *ibid.*

<sup>329</sup> *ibid.*

## Conclusion

The chapter has established the link between shareholders' meetings and corporate governance, as they offer a critical platform for shareholders to exercise their rights, hold management accountable, and influence the strategic direction of the corporation. By facilitating transparency, accountability, and active participation, these meetings help address agency problems and ensure alignment between the interests of management and shareholders.

However, the nature of shareholder meetings has evolved, driven partly by advancements in technology and majorly by the shift occasioned by the COVID-19 pandemic. The shift toward virtual platforms redefined how corporations and shareholders interact, presenting new opportunities for broader participation and convenience. At the same time, this transition introduced challenges, such as ensuring inclusivity, managing technological barriers, and safeguarding the integrity and security of the meetings.

The resulting legislative measures laid the foundation for an enhanced framework for virtual corporate governance. However, this legislation may require amendments to guarantee shareholders equivalent rights and opportunities as those enjoyed during physical meetings. This is particularly relevant to shareholder and management communication, including the right to ask and follow up on questions and present proposals.

A robust legal framework is essential to protect shareholder rights in the context of virtual meetings. Such a framework must address issues of access, participation, voting rights, and the accountability of directors, ensuring that the shift toward digital platforms does not undermine the principles of good corporate governance.

This chapter has laid the foundation for the next chapter, which focuses on an in-depth analysis of the regulatory framework governing virtual shareholder meetings in Kenya, with the aim of determining whether it is sufficient in protecting shareholder rights and thereby upholding the core principles of corporate governance.

## **Chapter 3: The Legal and Regulatory Framework for Virtual Shareholders' Meeting In Kenya**

### **3.1. Introduction**

In Kenya, as was the situation globally, the adoption of virtual meetings was significantly accelerated by the COVID-19 pandemic. Prior to this, the legal framework, despite recognizing and enforcing the core tents of corporate governance in various forms, did not explicitly provide for virtual meetings. Africa also generally lagged behind other parts of the world in terms of adopting technological innovations in company meetings. The Kenyan courts and legislators made significant strides in legalizing virtual meetings during the pandemic. Companies and shareholders also adapted to this shift, albeit with certain challenges.

The Chapter will examine the broad corporate governance framework in Kenya to establish whether the relevant provisions encourage the protection of shareholders' rights during virtual meetings. The Chapter also analyses in depth the legal and regulatory framework in Kenya governing virtual shareholders meetings. It investigates the appropriateness of this legal framework in ensuring the protection of the effective exercise of shareholders' rights during virtual meetings. The Chapter also seeks to trace the development of the laws relating to virtual meetings, ranging from before COVID, during COVID and post-COVID.

### **3.2. Overview of the Legal and Regulatory Framework Governing Virtual Shareholders' Meetings**

#### **3.2.1.Pre-COVID**

##### **The Constitution of Kenya 2010**

The Constitution of Kenya, 2010, establishes a framework that has influenced corporate governance frameworks within the country. Article 10 outlines the national values and principles of governance, which include, but are not limited to, good governance, integrity, transparency and accountability.<sup>330</sup>These correspond with the core principles of governance as established earlier in this thesis. In the context of corporate governance, these constitutional values translate into practices that

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<sup>330</sup> Article 10(2)(c) Kenya Law: The Constitution of Kenya 2010.

promote accountability, transparency, integrity, and inclusiveness within corporate entities. The principles are also embedded in the CMA Code of Corporate Governance, which is a key component of the corporate governance framework in Kenya.<sup>331</sup>The Code establishes the right to attend an AGM as one of the key components in encouraging integrity, transparency and accountability in companies.

### **Companies Act Chapter 486 of the Laws of Kenya**

In Kenya, shareholders' meetings are governed by the Companies Act Cap 486, which stipulates the structure and conduct of these gatherings.<sup>332</sup>The legislation mandates public companies to hold AGMs once a year.<sup>333</sup> In addition, companies are also guided in this regard by their Articles of Association.<sup>334</sup> The Act came into effect in September 2015.<sup>335</sup> At the time of enactment, it did not address virtual or hybrid meetings. The Act nevertheless provided that the notice of an AGM must specify, among other items, the place of the meeting.<sup>336</sup>

It can thus be inferred that the Act presumed that the form or nature of the meeting would be a physical gathering, as there is no reference to indicate otherwise. A virtual or hybrid meeting could only be conducted if permitted by the company's articles of association.<sup>337</sup>The law did not provide detailed procedures for conducting meetings not held at a single physical location and accessible to all members.<sup>338</sup> Legally, meetings were required to take place in person at a pre-designated venue.<sup>339</sup>The absence of detailed legal provisions for remote participation created uncertainty and limitations in conducting meetings outside a physical location. The law thus needed reforms to accommodate evolving corporate practices and technological advancements in meeting formats.

### **Companies (General) Regulations 2015**

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<sup>331</sup> CMA (n 12).

<sup>332</sup> *Companies Act* Cap 486.

<sup>333</sup> Section 275A *Companies Act* Cap 486.

<sup>334</sup> 'Convening Public Company General Meetings during the Covid-19 Crisis | Bowmans' <<https://bowmanslaw.com/insights/convening-public-company-general-meetings-during-the-covid-19-crisis/>> accessed 15 February 2025.

<sup>335</sup> *Companies Act* Cap 486.

<sup>336</sup> Section 285(b) *Companies Act* Cap 486.

<sup>337</sup> 'The Business Laws (Amendment) Act 2021' (*MWC Legal*) <<https://mwc.legal/the-business-laws-amendment-act-2021/>> accessed 16 March 2024.

<sup>338</sup> 'Convening Public Company General Meetings during the Covid-19 Crisis | Bowmans' (n 334).

<sup>339</sup> Section 285(b) *Companies Act* Cap 486.

The Companies (General) Regulations were assented in November 2015 as subsidiary legislation to the Companies Act.<sup>340</sup>The Fourth Schedule to the Regulations provides the model Article of Association for private companies limited by shares. The Model Articles acknowledged the possibility of virtual meetings where all directors do not have to be at the same location.<sup>341</sup> In assessing the participation of a director in a directors' meetings, it is immaterial where the directors are located and how they communicate amongst themselves.<sup>342</sup> Further, the meeting so convened may be taken as having taken place in the place wherever any one of the directors is located.<sup>343</sup>These provisions illustrated an early attempt to accommodate the concept of virtual meetings. However, they were focused on directors' meetings rather than shareholders' meetings, limiting their utility for broader scenarios where shareholder participation is crucial, for example, during AGMs.

In contrast to the Articles for private companies, the Model Articles for public companies included several provisions touching on general meetings, including shareholders' attendance, participation and voting rights.<sup>344</sup>An individual may exercise their right to speak at a general meeting when they are able, during the meeting, to communicate their information or opinions regarding the business of the meeting to all attendees.<sup>345</sup>This means that arrangements must be made to ensure that shareholder meetings do not constrain the ability of shareholders to exercise their right to vote and to be heard by all in attendance.<sup>346</sup>However, the provisions did not explicitly recognize or provide detailed guidelines for virtual meetings.

The Articles further provide that when assessing attendance at a general meeting, the physical location of members relative to one another is irrelevant.<sup>347</sup>Two or more individuals are considered present at a general meeting, even if they are not in the same place, provided their circumstances allow them to exercise their rights to speak and vote, should they possess such rights.<sup>348</sup>These provisions, while not

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<sup>340</sup> *The Companies (General) (Amendment) Regulations, 2015*.

<sup>341</sup> *The Companies (General) Regulations (2015)* <<https://new.kenyalaw.org/akn/ke/act/ln/2015/239/eng@2022-12-31>> accessed 10 November 2024.

<sup>342</sup> *ibid.*

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.*

<sup>345</sup> *ibid.*

<sup>346</sup> *ibid.*

<sup>347</sup> *ibid.*

<sup>348</sup> *ibid.*

directly referring to virtual meetings, can be extended to accommodate virtual meetings and can be seen as a move towards virtual meetings by allowing remote attendees to be considered "present" as long as they can effectively exercise their rights to speak and vote. On the other hand, the provisions are limited as they do not specify whether technology facilitates such participation. As a result, it remains unclear whether the law was referring to virtual meetings, thus potentially creating ambiguity in its application. In addition, while they might acknowledge remote participation, they do not specify how shareholders can effectively exercise the right to speak and vote.

### **The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015**

The Code of Corporate Governance Practices (the Code), developed by the CMA, is a key document in the corporate governance regulatory framework in Kenya. It provides additional guidance for companies listed on the Nairobi Securities Exchange (NSE) and encourages issuers to uphold transparency, accountability, and inclusiveness in shareholder engagements.<sup>349</sup> While it does not explicitly provide for virtual meetings, the Code endorses the use of technology to facilitate shareholder participation and safeguard their rights.<sup>350</sup> It provides that companies should utilize modern communication methods, such as teleconferencing, videoconferencing, websites, and emails, to engage with shareholders.<sup>351</sup> The code thus complements the Companies Act by emphasizing the principles of fairness in all shareholder interactions and grants a provision for the use of technology to achieve this.

The limitation in these provisions is that while the Code encourages the use of technology to enhance shareholder participation, it does not explicitly provide for virtual meetings or establish clear guidelines for their implementation. The absence of specific provisions for virtual or hybrid meetings creates ambiguity regarding their legal status and operational framework. Additionally, the Code does not outline safeguards to ensure fair participation and transparency, leaving room for inconsistent application and potential exclusion of certain shareholders.

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<sup>349</sup> CMA (n 12).

<sup>350</sup> *ibid.*

<sup>351</sup> *ibid.*

## 3.2.2. Legal Interventions during the Pandemic

### 3.2.2.1 Key judicial decisions

#### *In the matter of WPP Scangroup PLC (Bharat Kumar Thakrar and Capital Markets Authority)*

In April 2020, when in-person gatherings had been outlawed<sup>352</sup>, WPP Scangroup Limited moved the court for an order allowing it to hold an Extraordinary General Meeting virtually.<sup>353</sup> The resulting court order allowed all publicly traded companies listed on the Nairobi Securities Exchange (NSE) to hold their AGMs) virtually, subject to certain conditions.<sup>354</sup> This was the first judicial pronouncement on the matter of virtual meetings during the pandemic.

The court order provided that public companies, whose articles of association did not allow for virtual meetings, should apply to the CMA for a letter of No Objection at least 14 days prior to issuing the statutory notice of the meeting to its members.<sup>355</sup> The court confirmed that any meeting held under this order would qualify as a validly convened and legal meeting of the company.<sup>356</sup> This paved the way for statutory requirements for general meetings to be complied with during the pandemic.

The court relied on the provisions of Section 280 of the Companies Act in reaching its decision, which empowers the court to order a general meeting to be convened if for any reason it is impracticable to hold a meeting, and further allows the court to order the meeting to be held in the format that the court considers necessary and proper.<sup>357</sup> In the circumstances occasioned by the pandemic, the court ruled that the same qualified as circumstances under which holding meetings was impracticable, due to the ban on in-person gatherings.

#### *In the matter of Victoria Commercial Bank*

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<sup>352</sup> .Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules (2022) <<https://new.kenyalaw.org/akn/ke/act/ln/2020/50/eng@2022-12-31>> accessed 4 March 2025.

<sup>353</sup> Miscellaneous Application No. E680 of 2020 at the High Court of Kenya, Nairobi (*Unreported*) Ruling delivered on 29 April 2020.

<sup>354</sup> Miscellaneous Application No. E680 of 2020(n344).

<sup>355</sup> Miscellaneous Application No. E680 of 2020(n344).

<sup>356</sup> Miscellaneous Application No. E680 of 2020(n344).

<sup>357</sup> Section 280, *Companies Act* (Act No. 17 of 2015).

The court in WPP Scangroup was moved by a publicly listed company, with the CMA enjoined due to its role as a regulator, and therefore it issued orders limited to publicly listed companies.<sup>358</sup> The matter was initiated by Victoria Commercial Bank, an institution with shareholders drawn from the general public, although its shares were neither listed nor traded on the Nairobi Securities Exchange (NSE). Subsequently, the courts, once again relying on the provisions of Section 280 of the Companies Act further permitted banks with public shareholding but not listed on the NSE to hold virtual general meetings.<sup>359</sup> This decision further widened the pool of companies permitted to forego physical meetings due to the pandemic restrictions.

***HC Comm. Misc. E721 of 2020 Nicholas Alexander Nesbitt and Registrar of Companies, at the High Court of Kenya, Nairobi (Unreported)***

The court order in WPP Scangroup was only limited to public companies listed on the NSE, while the order in Victoria Commercial Bank applied exclusively to banks with public shareholding but whose shares were not publicly traded on the NSE. This prompted another application to be filed in court on the same subject matter and on 9<sup>th</sup> June 2020, the High Court allowed all companies in Kenya, whether public or not, to hold virtual or hybrid AGMs.<sup>360</sup> This order established a precedent that facilitated normal company operations in Kenya during the COVID-19 period.<sup>361</sup>

Companies were permitted to conduct general meetings through technological means or other hybrid formats essential for managing the meeting and related business activities, provided that they complied with the Companies Act and its Regulations.<sup>362</sup> This order enabled all companies in Kenya to comply with the statutory requirements as well as the requirements for shareholders' meetings in their own constitutive documents. At the time, however, there was still no proposal to amend the relevant laws,

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<sup>358</sup> 'Summary Guidance For Conducting Virtual And Hybrid Meetings – G & A Advocates' <<https://gallp.co.ke/insights-pt/summary-guidance-for-conducting-virtual-and-hybrid-meetings/>> accessed 16 March 2024.

<sup>359</sup> High Court Miscellaneous Application No.E756 of 2020 In the matter of Victoria Commercial Bank Limited(*Unreported*)

<sup>360</sup> HC Comm. Misc. E721 of 2020 Nicholas Alexander Nesbitt And Registrar of Companies, at the High Court of Kenya, Nairobi(*Unreported*)

<sup>361</sup> Allen Waiyaki Gichuhi C Arb SC, Charles Wamae and Melanie Munyori, 'All Companies Can Now Hold Virtual or Hybrid AGMs: Wamae and Allen Achieves a Feat to Ease the Doing of Business in Kenya during This COVID-19 Period | Wamae & Allen' <<https://wamaeallen.com/all-companies-can-now-hold-virtual-or-hybrid-agms-wamae-and-allen-achieves-a-feat-to-ease-the-doing-of-business-in-kenya-during-this-covid-19-period/>> accessed 16 March 2024.

<sup>362</sup> *ibid.*

and thus, companies complied and held their meetings on the strength of the various judicial pronouncements.

The cases above illustrated the need for new legislation by exposing the piecemeal and reactive nature of judicial interventions in enabling virtual or hybrid meetings. Initially, the court orders in *WPP Scangroup* and *Victoria Commercial Bank* were limited in scope, applying only to specific categories of companies. This lack of uniformity prompted repeated court applications for similar relief, revealing the absence of a clear, comprehensive legal framework.

While the High Court's decision eventually extended permission to all companies to hold virtual or hybrid AGMs, this was still achieved through judicial discretion rather than legislative clarity. Companies had to rely on temporary court orders rather than on a stable, predictable statutory basis. The rulings during this period underscored the need for permanent reforms to codify the use of technology in shareholder meetings.

#### ***In re Application for Leave to hold the postponed Law Society of Kenya AGM Virtually***

While this case related to a society and not a company, it is of import to this study as the court considered at length the definition of a 'venue' in the context of virtual meetings.<sup>363</sup> It goes without saying that for a shareholder to be able to exercise their rights to participate and vote at an AGM, it should be clear where the AGM will be held. The Companies Act provides that the notice of a general meeting should specify the place of the meeting.<sup>364</sup> It was however not clear whether a virtual platform could be considered as the "place" or "venue" of a meeting.

The Society moved the court to interpret the term "venue" and determine whether it encompassed a virtual platform.<sup>365</sup> The court held that a venue is typically defined as a place where multiple individuals may gather or assemble.<sup>366</sup> Since a virtual platform is a defined space where people can simultaneously log in and engage in the same business they would have conducted in a physical space,

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<sup>363</sup> 'Miscellaneous Application 181 of 2020 (O.S.) - Kenya Law' (n 224).

<sup>364</sup> Section 285(b) *Companies Act* Cap 486.

<sup>365</sup> 'Miscellaneous Application 181 of 2020 (O.S.) - Kenya Law' (n 224).

<sup>366</sup> *ibid.*

it was, in the view of the court, considered a "venue".<sup>367</sup>The Court expanded on the definition of a venue from the Black's Law Dictionary as the relevant statutory provisions did not offer comprehensive guidance on the matter. The court further noted that the success of such an AGM would rely heavily on connectivity to the virtual platforms.<sup>368</sup>

The court further noted that the availability of physical infrastructure and financial resources to support members' continuous online participation throughout the AGMs was crucial.<sup>369</sup> Each member must, therefore, be given ample opportunity to make the necessary arrangements to access the virtual platform and fully participate in the meetings.<sup>370</sup> However, the court did not elaborate in detail on the specific procedures that should be followed to ensure compliance with these requirements. Furthermore, it did not address the legal consequences of holding a meeting that fails to guarantee full participation or where connectivity and continuous online engagement are compromised. One such consequence could be that the decisions taken at such a meeting can be invalidated by the court.<sup>371</sup>

Furthermore, the court emphasized the essential role of technology in the success of virtual AGMs. This implies that organizations must invest in secure and accessible virtual platforms that ensure equal participation opportunities for all members, regardless of physical location and the law should ensure that these standards are adhered to and prescribe a remedy for when they are not. Additionally, the court stressed the importance of financial and logistical support to enable members to attend the virtual AGMs.<sup>372</sup> Consequently, the law should establish a comprehensive mechanism to safeguard these requirements and provide appropriate remedies in the event of non-compliance .

### ***Radio Frequency Systems (EA) Limited & another v Simon Horner and 2 others***

This case considered the import of Section 280 of the Companies Act 2015 in relation to the convening of virtual AGMs during the pandemic.<sup>373</sup> The court reiterated that the primary purpose of section 280

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<sup>367</sup> *ibid.*

<sup>368</sup> *ibid.*

<sup>369</sup> *ibid.*

<sup>370</sup> *ibid.*

<sup>371</sup> Section 1322 3B(a) and (b) Corporations Act 2001. The Australian Act provides that a court may invalidate a meeting if it determines that the members, collectively, were not afforded a reasonable opportunity to participate and concludes that significant injustice has occurred, which cannot be rectified through a court order.

<sup>372</sup> 'Miscellaneous Application 181 of 2020 (O.S.) - Kenya Law' (n 224).

<sup>373</sup> 'Miscellaneous Civil Application E 682 of 2020 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/203279/>> accessed 16 September 2024.

is to offer an affordable and efficient procedural remedy to address technical difficulties that may arise in the convening, holding, or conducting of a company meeting.<sup>374</sup> This provision supports the effective management of a company in the face of such technical challenges. The court noted that in response to the challenges posed by the pandemic, the provisions were invoked to facilitate the convening, holding, and conducting of virtual meetings, even in cases where a company's articles did not explicitly provide such meetings.<sup>375</sup> The case further reinforces and supports the decisions made by the courts in *In the Matter of WPP Scangroup PLC* and *In the Matter of Victoria Commercial Bank*.

This case demonstrates how statutory provisions, specifically Section 280 of the Companies Act 2015, were instrumental in enabling virtual AGMs during the pandemic, despite the absence of explicit authorization within company articles. However, it also underscores the insufficiency of relying solely on broad or implied statutory language, reinforcing the need for specific legislative reforms that expressly regulate virtual meetings to ensure legal certainty, uniformity, and enforceability.

### **3.2.2.2 Legislative and Regulatory Interventions**

#### **The Capital Markets Act**

This Act governs companies listed on the NSE, mandating standards of corporate governance and transparency. Prior to the pandemic neither the Act nor guidelines issued by the Authority had provisions for virtual meetings. In April 2020, the High Court allowed issuers of securities to be allowed to hold general meetings through virtual meetings subject to requesting a Notice of No Objection from the CMA.<sup>376</sup> The CMA issued specific guidelines during the pandemic to support virtual AGMs<sup>377</sup>, allowing listed companies to adopt virtual or hybrid meeting formats. This practice is, however, no longer applicable following the amendments to the Companies Act that will be discussed hereunder. Listed companies are now allowed to convene virtual AGMs without necessarily having to obtain clearance from the CMA.

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<sup>374</sup> *ibid.*

<sup>375</sup> *ibid.*

<sup>376</sup> Capital Markets Authority Circular No CMA/MRT/005/2020.

<sup>377</sup> Capital Markets Authority Circular No CMA/MRT/005/2020.

## The Societies Act

The Societies Act primarily addresses non-commercial entities and is commonly used to register charitable associations like children's homes and religious entities like churches and mosques.<sup>378</sup> Recreational clubs and professional bodies can also be registered under the Act.<sup>379</sup> In spite of this, the Act is relevant in this context as an advisory was issued during the COVID-19 pandemic on the conduct of virtual and general meetings under Section 20 of the Act.<sup>380</sup> Therefore, while the Societies Act is typically applied to non-commercial entities, it is relevant in the context of this study as the guidelines highlight the broader applicability of virtual meetings in ensuring governance and compliance in various organizational structures.

Societies are required to notify members of the meeting type (virtual or hybrid) and ensure accessible and secure technology for all.<sup>381</sup> Virtual meeting notices must meet specified timelines, agenda details, meeting type, platform, and participation instructions.<sup>382</sup> Members must be informed of technological requirements and protocols for interaction, voting, and recording.<sup>383</sup> Voting occurs through the platform, with results verified and announced by the Secretary per the society's constitution.<sup>384</sup> Afterward, accurate records, including minutes and recordings, should be kept.<sup>385</sup> Effective virtual meetings thus require well-defined procedures, technological safeguards, and proper documentation following the meeting assist in upholding the core values of fairness, inclusivity, and transparency.

## Business Laws Amendments Act

In light of the various changes occasioned by the COVID-19 pandemic, the Business Laws Amendment Act, was passed in March 2021, and a major feature of the same was that it introduced

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<sup>378</sup>Registrar of Societies' (*Office of the Attorney General and Department of Justice*) <<https://www.statelaw.go.ke/departments/registrar-general-division/registration-of-societies/>> accessed 4 March 2025.

<sup>379</sup>ibid.

<sup>380</sup> ibid.

<sup>381</sup> ibid.

<sup>382</sup> 'Gazetted Advisory on Conduct of Meetings' (*Office of the Attorney General and Department of Justice*) <<https://www.statelaw.go.ke/services-to-the-public/register-a-society-in-kenya/gazetted-advisory-on-conduct-of-meetings/>> accessed 16 March 2024.

<sup>383</sup>ibid.

<sup>384</sup> ibid.

<sup>385</sup> ibid.

the terms ‘hybrid’ and ‘virtual’ into the Companies Act.<sup>386</sup> The Act was enacted to facilitate the ease of doing business in Kenya, in response to the changes brought about by the COVID pandemic.<sup>387</sup> Notably, it also included provisions allowing electronic signatures and other digital processes, which have been instrumental in supporting virtual shareholder meetings.<sup>388</sup> The amendment to Section 3 of the Companies Act was significant as it provided statutory recognition of virtual and hybrid shareholder meetings in Kenya. By explicitly including the term "virtual" in the definition of a general meeting, the law acknowledged the legitimacy of meetings conducted entirely through electronic means.

The Business Laws Amendment Act amended Section 3 of the Companies Act to include the word ‘virtual’ in the definition of a general meeting.<sup>389</sup> In addition, a definition of the phrase ‘virtual meeting’ was also included to mean a meeting in which all members attend and participate via electronic means, including video conferencing, audio conferencing, web conferencing, or other digital platforms.<sup>390</sup> The Act also provides for the possibility of a meeting where some members attend electronically while others are in a physical location.<sup>391</sup> The Act played a key role in adapting Kenya's corporate regulatory framework to accommodate virtual meeting formats by enabling companies to convene virtual AGMs.

Similarly, the Act does not specify how the time of a meeting is determined, particularly in relation to virtual participation. In certain jurisdictions, the meeting time is established based on when and where it is deemed to have been held, ensuring consistency in procedural requirements. Voter turnout usually declines when meetings are scheduled at irregular times, especially when firms deviate from the standard morning start time.<sup>392</sup> Furthermore, the Act lacks explicit guidance on what constitutes presence or attendance at a meeting, which is essential in determining quorum. The absence of such

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<sup>386</sup> Highlights of Business Laws (Amendment) (No.2) Act, 2021: Part 1’  
<<https://www.dentonshhm.com/en/insights/articles/2021/april/23/highlights-of-business-laws-amendment-no2-act-2021-part-1>> accessed 4 March 2025.

<sup>387</sup> *ibid.*

<sup>388</sup> *ibid.*

<sup>389</sup> Section 3, *Companies Act*, Cap 486.

<sup>390</sup> Section 3, *Companies Act*, Cap 486.

<sup>391</sup> Section 3, *Companies Act*. “Hybrid meeting” in relation to a company general meeting, means a meeting where some participants are in the same physical location while other participants join the meeting through electronic means including video conference, audio conference, web conference or such other electronic means.

<sup>392</sup> Abdennadher and Cheffi (n 171).

provisions in the Act creates uncertainty regarding the procedural aspects of conducting virtual meetings.

While it may be argued that matters such as venue, time, and quorum in virtual or hybrid meetings are common sense and best addressed on a case-by-case basis, the current provisions nonetheless lack sufficient clarity and detail on these issues. This ambiguity can lead to inconsistent interpretations and uncertainty in practice, underscoring the need for more precise legislative guidance.

The Business Laws Amendment Act also amended Sections 283 and 285 of the Companies Act. Section 283 provides for the publishing of the notice of a general meeting on a company's website and states that in case of a hybrid or virtual meeting, the notice thus published should outline the means of joining and participation thereof.<sup>393</sup> Section 285 provides generally for the contents of the notice of a general meeting and, similarly, provides that the notice shall, in case of a hybrid or virtual meeting, outline and provide for the means of joining and participating in the meeting.<sup>394</sup>

The Act, however, does not specify how to ensure that members have a reasonable opportunity to participate during virtual meetings. The absence of such a provision creates ambiguity regarding how virtual meetings can facilitate full participation, including the ability to ask questions and vote effectively. Additionally, the Act does not specify the potential consequences of failing to ensure reasonable participation. Thus, directors may exercise their discretion in a way that undermines shareholders' interests without being held accountable. Companies are responsible for ensuring that proxy statements and related disclosures contain clear and comprehensive instructions on how shareholders can participate in shareholder meetings.<sup>395</sup>

Similarly, the Act does not address how the time and venue of meetings should be assessed for reasonableness, particularly for virtual where multiple locations or time zones may be relevant. In some jurisdictions, meeting times are evaluated based on the primary physical venue, even for virtual meetings, ensuring that participation is not hindered by an inconvenient schedule. Furthermore,

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<sup>393</sup> Section 283(2), *Companies Act*, Cap 486.

<sup>394</sup> Section 285(ba), *Companies Act*, Cap 486.

<sup>395</sup> Borrus and others (n 170).

blackout periods could also be recommended to prevent meetings from being scheduled at times when shareholder participation is likely to be limited, a concept not covered in the Kenyan Act or regulatory framework.<sup>396</sup>

Likewise, the Kenyan Act does not stipulate requirements for the adequacy of the virtual meeting technology used to facilitate shareholder engagement. In other legal systems, the law requires companies to use technology that enables members to exercise their rights, including asking questions, voting, and interacting with directors. While the Kenyan Act takes a technology-neutral approach, it does not clarify whether certain technological features, such as chat functions or audio-visual capabilities, must be provided to ensure meaningful participation.

Furthermore, the Act does not address the provision of meeting documents prior to virtual meetings, an essential component of ensuring shareholder participation. Some legal frameworks explicitly allow companies to transmit documents electronically, including meeting notices, resolutions, and minutes, regardless of whether the meeting is held physically or virtually. They also grant shareholders the right to elect their preferred mode of receiving documents, with strict liability penalties for non-compliance to emphasize the importance of timely and accessible information. Similarly, provisions requiring the electronic recording and storage of meeting minutes for future reference after virtual meetings are not explicitly outlined in the Kenyan Act, raising concerns about transparency and accessibility of corporate records post-meeting.

The absence of these provisions in the Companies Act 2015 creates uncertainty in the governance of virtual meetings. Addressing these gaps would enhance legal clarity, improve shareholder engagement, and align Kenya's corporate governance framework with international best practices.

### **3.2.3. Post Covid**

***Frank K. Mwangera (on behalf of Members of the Kenya Hospital Association) v Board of Management Kenya Hospital Association t/a the Nairobi Hospital & 2 others***

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<sup>396</sup> 'Corporate Finance Update - Issue 15' <<https://asic.gov.au/about-asic/corporate-publications/newsletters/asic-corporate-finance-update/corporate-finance-update-issue-15/>> accessed 4 March 2025.

In this case, the plaintiffs sought to have shareholders' meetings declared held in 2020 during the pandemic, invalid by virtue of the fact that it was a hybrid meeting. The court in its judgement passed in 2024, began by acknowledging that the amended Companies Act allows for both virtual and hybrid meetings and does not explicitly prohibit such arrangements under extraordinary circumstances, such as a global health crisis.<sup>397</sup> The court further accepted the defendants' explanation that the hybrid format was a practical and necessary response to the COVID-19 pandemic and public health regulations, specifically the limitation of in-person gatherings to 15 persons.<sup>398</sup>

The court thus found that the deviation from a fully virtual meeting to a hybrid one did not invalidate the meeting and further that the plaintiffs failed to provide evidence showing that the hybrid format prejudiced members or interfered with their ability to attend, participate, or vote in the meeting.<sup>399</sup> The court concluded that the hybrid format constituted substantial compliance with the notice requirements in the Act, emphasizing that the primary goal, ensuring full member participation, was met.<sup>400</sup> The court in reaching its decision relied on the provisions of Section 285 of the Companies Act, as amended by the Business Laws Amendment Act 2021. This case further demonstrates the judicial recognition of hybrid meetings as a legally compliant and practical alternative.

***Gheewala v Associated Securities Limited & 2 others (Miscellaneous Application E357 of 2023)***

The court in this case dealt with the issue of notice for virtual meetings. The meeting was scheduled for 17<sup>th</sup> October 2023 and a notice was sent by registered post on 9<sup>th</sup> October 2023.<sup>401</sup> The court found that, given the notice was for a virtual meeting, there was sufficient notice provided to enable the applicant to participate in the meeting under the circumstances.<sup>402</sup> The Companies Act provides for a

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<sup>397</sup> *Mwongera & 2 Others (Suing on Their Behalf and on Behalf Members of the Kenya Hospital Association) v Board of Management of the Kenya Hospital t/a Nairobi Hospital & 2 Others; Kenya Hospital Association t/a Nairobi Hospital (Interested Party) (Civil Case E270 of 2020) [2024] KEHC 11918 (KLR) (Commercial and Tax) (27 September 2024) (Judgment) (2024)* <<https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/11918/eng@2024-09-27>> accessed 4 March 2025.

<sup>398</sup> *ibid.*

<sup>399</sup> *ibid.*

<sup>400</sup> *ibid.*

<sup>401</sup> *Gheewala v Associated Securities Limited & 2 Others; Registrar of Companies (Interested Party); Gheewala & Another (Proposed Interested Parties) (Miscellaneous Application E357 of 2023) [2024] KEHC 848 (KLR) (Commercial and Tax) (30 January 2024) (Ruling) (2024)* <<https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/848/eng@2024-01-30>> accessed 4 March 2025.

<sup>402</sup> *ibid.*

minimum 21-day notice period for AGMs.<sup>403</sup>The Court failed to disclose the legal rationale underpinning its decision to uphold a shortened notice period, in contravention of express statutory requirements

The acceptance of a shorter notice period deemed served within 72 hours after posting, introduces areas for critique, including whether such a short time frame allows shareholders to have ample time to prepare for the meeting and the potential non-compliance with statutory requirements. The court, therefore, risks establishing a precedent where virtual meetings are subject to different, and possibly lower, standards than physical meetings, which could lead to the erosion of shareholder rights. This points to the need for greater legislative or regulatory clarity to specify that the notice periods are applicable to all instances of meetings, whether physical or virtual.

***Bernard M. Ngore v Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development & Attorney General; Betty C. Maina & Francis O. Owino (Alleged Contemnors)***

This case dealt with an individual who claimed that he was locked out of the virtual meeting and was not able to attend as he was not duly admitted.<sup>404</sup>The court placed the burden of proof on the petitioner and stated that he failed to provide evidence of attempting to and failing to join the virtual meeting.<sup>405</sup>The Court did not cite any statutory basis for its orders concerning the individual's attendance at the meeting, nor did it ground the burden of proof on any specific provision. The decision appears to have been based on judicial discretion.

This approach may be untenable and unjust in situations where technical barriers, or procedural issues prevent shareholders from joining, especially if they lack the technical expertise or resources to document failed attempts to join. From a corporate governance perspective, it would be more equitable to enact specific legislation or regulations holding companies accountable for verifying that all registered shareholders have access to the virtual platform and for providing technical assistance where needed.

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<sup>403</sup> *The Companies (General) Regulations* (n 341).

<sup>404</sup> *Bernard M. Ngore v Cabinet Secretary, Ministry of Industrialization, Trade and Enterprise Development & Attorney General; Betty C. Maina & Francis O. Owino (Alleged Contemnors) (Petition E091 of 2020) [2021] KEELRC 1228 (KLR) (Employment and Labour) (16 July 2021) (Ruling) (2021)* <<https://new.kenyalaw.org/akn/ke/judgment/keelrc/2021/1228/eng@2021-07-16>> accessed 3 November 2024.

<sup>405</sup> *ibid.*

***Soet Kenya Limited & Nathaniel K. Tum v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & Co-operatives and Others***

This matter addressed the issue of the type of evidence that can be adduced, to substantiate that a virtual meeting actually occurred. The legal issue raised by the court was the absence of sufficient evidence to confirm that the virtual meeting actually took place.<sup>406</sup> The only document presented was the minutes of the alleged meeting, but there was no supporting evidence, such as authenticated or verified receipts, that could confirm the meeting occurred.<sup>407</sup> The absence of supporting documents such as attendance records, platform confirmation, or meeting recordings created a significant evidentiary gap.<sup>408</sup> Similar to the *Bernard M Ngore* case above, the court did not cite any specific statutory provision on this point.

In the absence of this evidence, the court faced a challenge in verifying the legitimacy of the meeting and, consequently, in confirming whether the resolutions were valid and ruled that the court was unlikely to uphold the resolutions of a meeting that cannot be sufficiently verified.<sup>409</sup> The court's judgment was legally sound in requiring verifiable evidence of the meeting's occurrence before upholding its resolutions. However, the court could have gone further in exploring the nuances of virtual meetings and offering guidance on what would constitute sufficient proof in these circumstances. As concluded in the *Bernard Ngore* matter above, this gap can be addressed by specific legislation.

## **Conclusion**

This chapter examined the regulatory and legal framework governing virtual shareholder meetings in Kenya, highlighting their role in corporate governance by enabling shareholder participation, oversight, and decision-making. While traditional in-person meetings were foundational, they posed accessibility challenges, which virtual meetings have addressed by enhancing inclusivity and cost

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<sup>406</sup> *Soet Kenya Limited & Nathaniel K. Tum v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & Co-Operatives, Attorney General, Kenya Seed Company Limited, Samson Chelule, Elsbeth Naeku Tolu & Muchohi Ruiru Gikonyo (Petition 7 of 2020) [2022] KEHC 2814 (KLR) (25 January 2022) (Judgment) (2022)* <<https://new.kenyalaw.org/akn/ke/judgment/kehc/2022/2814/eng@2022-01-25>> accessed 3 November 2024.

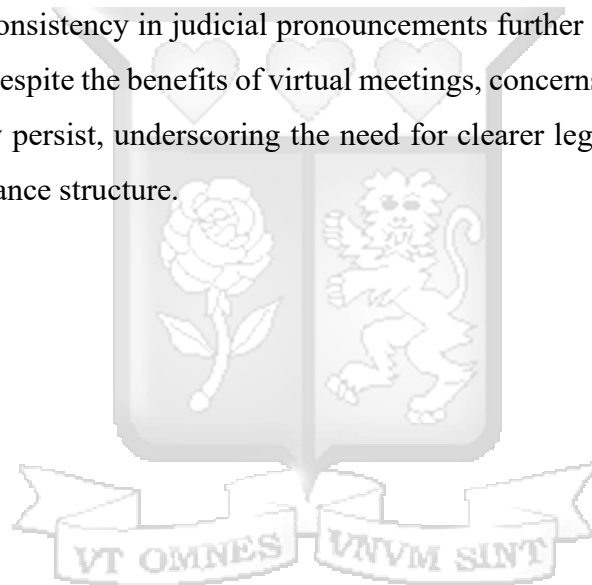
<sup>407</sup> *ibid.*

<sup>408</sup> *ibid.*

<sup>409</sup> *ibid.*

efficiency, particularly following the COVID-19 pandemic. The chapter defined virtual meetings, traced their legal evolution, and analyzed key legislation, including the Companies Act of 2015 and the Business Laws (Amendment) Act of 2021, which adapted regulatory provisions to accommodate virtual formats. It also discussed the Code of Corporate Governance and other sector-specific regulations that shape virtual shareholder engagement.

Judicial decisions have also influenced the interpretation of shareholder rights, with courts emphasizing shareholder participation, although some judgements, like in the case of *Gheewala v Associated Securities Limited* conflicted with statutory provisions. Other judgments appeared to rely on broad judicial discretion, pointing to gaps in legislation which specific enactments or amendments can address. This lack of consistency in judicial pronouncements further points to gaps in legislation that should be addressed. Despite the benefits of virtual meetings, concerns about technological access and shareholder inclusivity persist, underscoring the need for clearer legal frameworks to ensure an inclusive corporate governance structure.



## Chapter 4: Legal and Regulatory Framework for Virtual Shareholders' Meetings in Australia

### 4.1. Introduction

This chapter interrogates the existing legal and regulatory framework governing virtual shareholder meetings in the chosen jurisdiction of Australia, with the aim of identifying potential lessons for Kenya. The Australian legal framework will be interrogated against the OECD Principles of Corporate Governance, as well as the legal and regulatory framework in Kenya, with particular attention to the gaps identified within the Kenyan system.

### 4.2. The Legal and Regulatory Framework Governing Virtual Shareholders Meetings

In Australia, the AGM process for companies is governed by multiple regulatory instruments. The Corporations Act 2001 forms the core of Australia's corporate governance framework, establishing rules for company formation, shareholder rights, board responsibilities, and meeting requirements. Primarily, the Corporations Act 2001 establishes the legal framework for conducting AGMs, outlining the requirements and procedures that companies must adhere to.

The Act mandates public companies to convene an AGM at least once per financial year, within eighteen months of the company's registration, and no later than five months after the conclusion of the financial year.<sup>410</sup> The primary business of an AGM includes reviewing the annual financial reports and auditor's reports, as well as addressing matters such as the election of directors, the appointment of auditors, and the determination of their remuneration.<sup>411</sup> The election of directors will generally be scheduled to take place during the AGM.<sup>412</sup> In addition, members can also table written questions to auditors.<sup>413</sup>

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<sup>410</sup> Section 250N *Corporations Act 2001*.

<sup>411</sup> Section 250R *Corporations Act 2001*.

<sup>412</sup> 'What Companies and Registered Schemes Should Know about Virtual-Only Meetings' <<https://asic.gov.au/about-asic/news-centre/news-items/what-companies-and-registered-schemes-should-know-about-virtual-only-meetings/>> accessed 29 September 2024.

<sup>413</sup> Section 250PA *Corporations Act 2001*.

The Australian Securities Exchange (ASX) Listing Rules regulate the admission of entities to the ASX and set out requirements relating to disclosure and certain aspects of the conduct of listed entities.<sup>414</sup> These rules are legally binding on listed entities and their affiliates pursuant to sections 793C and 1101B of the Corporations Act. Furthermore, a company's constitution plays a crucial role in shaping the specific rules and procedures governing its shareholder meetings.

The OECD Corporate Governance principles are incorporated both in the Corporations Act and the ASX Listing Rules. Pursuant to the Corporations Act, all companies are required to maintain adequate financial records that accurately document and clarify their transactions and financial position, thereby facilitating the preparation and auditing of true and fair financial statements.<sup>415</sup> Large companies, in particular, are obligated to prepare annual financial reports and a directors' report, ensure the financial report is audited, and provide both reports to their shareholders.<sup>416</sup> Additionally, listed entities are required to submit prescribed information and reports to the ASX on both a half-yearly and annual basis.<sup>417</sup> The Listing Rules also mandate that annual reports be distributed to holders of both ordinary and preference securities.<sup>418</sup>

#### 4.2.1.Pre-COVID-19

As earlier established in this study, in several jurisdictions globally, the conception of a meeting referred to a physical gathering, with slow and inconsistent uptake of virtual meetings prior to the year 2020. Likewise, in Australia, before the COVID-19 pandemic, the Corporations Act required members' meetings to take place at a physical location.<sup>419</sup> While technology could be utilized to connect participants at additional sites to the primary venue, fully virtual meetings were not allowed.<sup>420</sup> Furthermore, it was unclear whether individuals could attend a physical meeting remotely via virtual

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<sup>414</sup> 'Australian Securities Exchange (ASX) - Overview, Trading Systems' <<https://corporatefinanceinstitute.com/resources/equities/australian-securities-exchange-asx/>> accessed 4 March 2025.

<sup>415</sup> *Corporations Act 2001* (Cth).Sections 286 to 301 and sections 319 to 320.

<sup>416</sup> *ibid.*

<sup>417</sup> 'Australian Securities Exchange (ASX) - Overview, Trading Systems' (n 414).

<sup>418</sup> *ibid.*

<sup>419</sup> Section 250PA *Corporations Act 2001*.

<sup>420</sup> Section 250PA *Corporations Act 2001*.

technology from an unspecified location.<sup>421</sup> Australia's corporate regulatory framework was thus not fully adapted to accommodate virtual shareholder meetings.

There was thus minimal regulatory focus on virtual or hybrid meetings in Australia prior to the pandemic.<sup>422</sup> However, it is worth noting that Article 249S of the Corporations Act 2001 permitted corporations to hold meetings in multiple locations using technology that provides members with a reasonable opportunity to participate.<sup>423</sup> While this provision broadly allowed for virtual or hybrid meetings, the Australian Securities and Investments Commission (ASIC) expressed uncertainty regarding whether the Act explicitly permitted fully virtual shareholder meetings, though it acknowledged the legitimacy of hybrid meetings.<sup>424</sup> While technology could facilitate remote participation to some extent, legal uncertainties and physical location requirements limited the feasibility of entirely virtual meetings. This suggests that the shift to virtual meetings was largely a reactive development driven by the pandemic.

#### **4.2.2. COVID-19 as a catalyst for change**

In response to the pandemic, the Australian government implemented stay-at-home orders and restrictions on in-person gatherings, significantly impacting the ability of companies to hold traditional shareholder meetings. In response to these circumstances, the Australian Parliament and ASIC introduced temporary measures in 2020 to enable flexible member meetings amidst restrictions on physical gatherings.<sup>425</sup> ASIC is an independent governmental authority responsible for regulating financial services, consumer credit, and licensed financial markets operating within Australia.<sup>426</sup> It carries out most of its functions under the Corporations Act.<sup>427</sup>

During the pandemic, the ASIC adopted a "stance of inaction" regarding virtual shareholder meetings, provided the technology used allowed members to ask questions to auditors and management and vote

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<sup>421</sup> Section 250PA *Corporations Act 2001*.

<sup>422</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>423</sup> *ibid.*

<sup>424</sup> *ibid.*

<sup>425</sup> 'What Companies and Registered Schemes Should Know about Virtual-Only Meetings' (n 412).

<sup>426</sup> 'What We Do | ASIC' <<https://asic.gov.au/about-asic/what-we-do/>> accessed 4 March 2025.

<sup>427</sup> *ibid.*

by poll rather than by a show of hands. <sup>428</sup>Subsequently, Australia enacted temporary legislative measures to address the crisis. The Corporations (Coronavirus Economic Response) Determination (No. 1) 2020, in effect until 23 September 2020, and later the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020, effective until 21 March 2021, amended the Corporations Act 2001 to permit meetings to be conducted using technology that ensured all eligible participants had a reasonable opportunity to engage without requiring physical presence.<sup>429</sup>

The Corporations Act was thereafter amended by the Treasury Laws Amendment (2021 Measures No.1) Act 2021 and the *Corporations Amendment (Meetings and Documents) Act 2022*, which was passed on 10 February 2022 and permanently empowered companies to hold virtual and hybrid meetings, distribute meeting materials electronically, as well as provided for the electronic execution of company documents.<sup>430</sup> The Act introduced permanent provisions enabling companies to hold hybrid meetings, allowing shareholders to participate either in person or remotely.<sup>431</sup> This aligns with the OECD Principles, which accommodate the option of hybrid shareholder meetings, allowing for the simultaneous participation of shareholders either physically or virtually. <sup>432</sup>It also permitted the use of technology for executing company documents, signing meeting-related materials, and distributing these documents to members.<sup>433</sup>

### **4.2.3. Post COVID-19**

#### **4.2.3.1. Legislative and Regulatory Framework**

##### **The Corporations Act 2001**

##### **Definitions section**

The Definitions section defines virtual meeting technology as any technology that allows a person to participate in a meeting without being physically present at the meeting.<sup>434</sup> The definition is broad, allowing for various technologies, for instance, video conferencing and teleconferencing to qualify as

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<sup>428</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>429</sup> *ibid.*

<sup>430</sup> ‘Finally – Permanent Green Light for Electronic Meetings and Execution...’ (n 72).

<sup>431</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>432</sup> OECD (n 17).

<sup>433</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>434</sup> Section 9, *Corporations Act 2001*.

virtual meeting technology. By explicitly stating that virtual meeting technology encompasses any means, the Act has taken a technology-neutral approach which allows participation without physical presence and ensures that companies have flexibility in choosing appropriate technological solutions for their meetings.

The OECD Principles also support a similar technology-neutral approach, which has the ability to foster an environment conducive to innovation and the integration of alternative technological solutions.<sup>435</sup> The Kenyan Act does not define virtual meeting technology per se; rather, it defines a virtual meeting as one conducted through electronic means, including but not limited to video conferencing, audio conferencing, web conferencing, or any other form of electronic communication.<sup>436</sup>

### **Form of Meetings**

The Act provides that a company may conduct member meetings in physical venues (physically), through a combination of physical venues and virtual technology (hybrid meeting), or exclusively via virtual technology (virtual only).<sup>437</sup> These formats have likewise been acknowledged by the OECD Principles as legitimate and acceptable modes for conducting shareholder meetings. This section does not, however, impose specific requirements on how meetings should be conducted, nor does it dictate a particular format for voting methods such as a show of hands or polling.<sup>438</sup>

This is an acknowledgement of the diversity of companies it governs, ranging from small not-for-profit organizations to large publicly listed entities, and grants each company the flexibility to choose the meeting format that best suits its needs.<sup>439</sup> The Kenyan Act similarly recognizes the legitimacy of physical, virtual and hybrid meetings.

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<sup>435</sup> OECD (n 17).

<sup>436</sup> Section 2 *Companies Act 2015*.

<sup>437</sup> Section 249R, *Corporations Act 2001*.

<sup>438</sup> ‘What Companies and Registered Schemes Should Know about Virtual-Only Meetings’ (n 412).

<sup>439</sup> *ibid*.

## Venue, Time and Quorum of meetings

The Corporations Act makes provisions for definitive explanations of the place, time and presence at meetings. The location of a member meeting is defined as the physical venue, if held at a single location, whether or not virtual technology is utilized.<sup>440</sup> In addition, the primary physical venue will be the one specified in the meeting notice, if the meeting is held across multiple physical venues.<sup>441</sup> If the meeting is conducted exclusively via virtual technology, the venue will be the company's registered office.<sup>442</sup> Regarding venue, the Act defines the physical location of meetings, whether held at a single venue or multiple locations, to enhance transparency and prevent disputes over legitimacy. For virtual meetings, designating the company's registered office as the official venue provides a legal foundation for meetings conducted entirely online.

The Act also makes provision for the 'time' of meetings by providing that the time of the meeting shall be taken to be the time at which the meeting is determined to have been held as per the provisions in the paragraph above.<sup>443</sup> The provisions on time ensure uniformity in determining when a meeting has taken place, particularly in virtual settings where participants may join from different time zones. This clarity is also essential for compliance with statutory deadlines related to filings and decision-making processes.

The Kenyan Companies Act does not provide sufficient detail regarding the venue, time, and quorum of meetings in the context of virtual formats.<sup>444</sup> Similarly, the Act does not specify how the time of a meeting is determined, particularly in relation to virtual participation.<sup>445</sup> The Act merely states that the notice of a general meeting shall indicate the time, date and place of a meeting.<sup>446</sup>

The Corporations Act further defines what constitutes presence or attendance at a meeting. This is a crucial factor in determining quorum. A member who participates in the meeting, either by being

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<sup>440</sup> Section 249RA(1)(a) *Corporations Act 2001*.

<sup>441</sup> Section 249RA(1)(b) *Corporations Act 2001*.

<sup>442</sup> Section 249RA(1)(c) *Corporations Act 2001*.

<sup>443</sup> Section 249RA (2) *Corporations Act 2001*.

<sup>444</sup> Section 285 only provides that a notice of an AGM should specify the time, date, and place of the meeting but does not provide further details.

<sup>445</sup> *Ibid.*

<sup>446</sup> Section 285 *Companies Act 2015*.

physically present at the venue or through virtual meeting technology, is considered to be personally present at the meeting for all purposes during their attendance.<sup>447</sup> This means that all individuals attending virtually at the time the quorum is being determined must be included in the count for assessing whether the relevant quorum requirements have been met.<sup>448</sup> These requirements explicitly ensure that members participating remotely are legally considered present. However, the Kenyan Companies Act lacks specific provisions that recognize virtual attendance as counting towards quorum or as constituting valid participation in virtual meetings.

### **Reasonable opportunity to participate**

The Corporations Act mandates that a company must accord all the members entitled to attend the meeting a reasonable opportunity to participate in the same.<sup>449</sup> This is a critical component when it comes to virtual meetings. This principle aligns with the core objectives of corporate governance, ensuring members' rights to engage meaningfully in decision-making processes, which can help to reduce the agency cost.

This provision carries a penalty, as a meeting where members are not able to reasonably participate can be declared invalid by the court.<sup>450</sup> A court may invalidate a meeting if it determines that the members, collectively, were not afforded a reasonable opportunity to participate and concludes that significant injustice has occurred, which cannot be rectified through a court order.<sup>451</sup> The provision safeguards shareholder rights by ensuring that all members entitled to attend a meeting have a fair opportunity to participate.

This is reflective of the OECD Principles which emphasize that effective shareholder engagement during virtual AGMs should be actively promoted, highlighting that such meetings should be structured to guarantee equitable access to information and equal opportunities for all shareholders to participate.<sup>452</sup> Management should, therefore, ensure that the virtual format does not diminish

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<sup>447</sup> Section 249RA (3) *Corporations Act 2001*.

<sup>448</sup> 'What Companies and Registered Schemes Should Know about Virtual-Only Meetings' (n 412).

<sup>449</sup> Section 249S (1) *Corporations Act 2001*.

<sup>450</sup> Section 1322 3(A)(a)(i) *Corporations Act 2001*.

<sup>451</sup> Section 1322 3B(a) and (b) *Corporations Act 2001*.

<sup>452</sup> OECD (n 17).

shareholders' ability to interact with and pose questions to the board and management relative to what is typically possible in physical meetings.<sup>453</sup>

Sections 283 and 285 of the Kenyan Companies Act, together with the accompanying Regulations, merely require that the notice for a virtual meeting include instructions on how to join and participate in the meeting. However, the legislation does not offer any clarification on the meaning of "participation." It neither defines the parameters of reasonable participation nor elaborates on measures to ensure that virtual attendees are able to engage meaningfully in the proceedings.

One component of a reasonable opportunity to participate is the time during which the meeting is held. The Corporations Act clarifies that the reasonableness of the timing for a physical, hybrid or virtual meeting is assessed by considering the location where the meeting takes place.<sup>454</sup> For meetings at one physical location, the time must be reasonable at that physical venue, whether or not virtual meeting technology is utilized.<sup>455</sup> For meetings held at multiple physical locations, the time must be reasonable as at the physical location indicated in the meeting notice.<sup>456</sup> With regard to wholly virtual meetings, the time should be reasonable at any physical location at which it would have been appropriate to hold the meeting.<sup>457</sup>

In relation to the concept of a reasonable time, ASIC, the regulator, usually prescribes a 'blackout period' for company meetings. This is a time period during which it is recommended that companies should not hold their members' meetings. In 2023, the blackout period was between Monday 18 December 2023 and 12 January 2024 (inclusive).<sup>458</sup> Similarly, the body also recommended that companies refrain from holding company meetings between Monday, 16 December 2024, and 10 January 2025.<sup>459</sup> These recommendations are based on the requirements of Sections 249R and 249S that meetings must be held at a reasonable time and place.

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<sup>453</sup> *ibid.*

<sup>454</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>455</sup> Section 249S(3)(a) *Corporations Act 2001*.

<sup>456</sup> Section 249S(3)(b) *Corporations Act 2001*.

<sup>457</sup> Section 249S(3)(c) *Corporations Act 2001*.

<sup>458</sup> 'Corporate Finance Update - Issue 15' (n 396).

<sup>459</sup> *ibid.*

ASIC has interpreted this to mean that a company should facilitate the participation of the widest possible number of shareholders to deliberate on resolutions and other matters scheduled for discussion at the meeting.<sup>460</sup>Regulatory oversight is strengthened by these ‘blackout periods’, emphasizing that companies must schedule meetings at times that allow the broadest possible participation, thereby reinforcing fairness and effective participation.

The Kenyan Companies Act and the CMA Code do not contain provisions addressing the requirements of a reasonable time and place for meetings. Specifically, Sections 283 and 285 of the Act do not provide guidance on these aspects, lacking sufficient detail. Moreover, the regulator has not issued any supplementary guidelines to clarify or operationalize these requirements in the context of virtual meetings.

An additional aspect of the requirement of reasonable participation revolves around the technology utilized during meetings. For meetings with multiple physical venues, Corporations Act mandates that the technology utilized to connect the venues should be reasonable.<sup>461</sup>This means that appropriate technology must be employed to connect the multiple physical venues or enable virtual attendance.<sup>462</sup>For example, the technology should be adequate to allow members to cast their votes.<sup>463</sup> Additionally, directors should assess whether the technology provides members, collectively, the ability to observe the directors or the primary proceedings.<sup>464</sup>The Act takes a technology-neutral approach, as it does not specifically name the type of technology to be utilized, which enables corporations to choose the most suitable format for themselves.

In addition, the virtual meeting technology must allow members to exercise their rights collectively, both orally and in writing, to pose questions and provide their input and feedback.<sup>465</sup>The Act thus explicitly states that the technology used to facilitate virtual attendance must enable members to exercise any existing rights they may have to ask questions or make comments both verbally and in

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<sup>460</sup> *ibid.*

<sup>461</sup> Section 249S (6) *Corporations Act 2001*.

<sup>462</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>463</sup> *ibid.*

<sup>464</sup> *ibid.*

<sup>465</sup> Section 249S 7(a) and (b) *Corporations Act 2001*.

writing.<sup>466</sup> For instance, the company could fulfil this requirement by allowing members to ask questions orally via a phone connection or by typing their questions into a chat function.<sup>467</sup> By adopting a technology-neutral approach, the Act grants companies the flexibility to select suitable digital platforms while ensuring that technology does not become a barrier to participation. Such provisions are absent from the Kenyan Act.

The OECD recognizes that many jurisdictions advocate for a technology-neutral approach, noting that this encourages innovation and the adoption of diverse technological solutions without prescribing specific tools.<sup>468</sup> This is while being cognizant that as technological advancements continue to emerge, potentially enhancing corporate governance practices, there may be a need to adapt the regulatory frameworks.<sup>469</sup>

It is important to clarify that the provisions in the Corporations Act do not grant any new rights to members to ask questions or make comments but rather, address the method by which pre-existing and established shareholder rights can be exercised.<sup>470</sup> The law thus elucidates that these rights are part of the general shareholder right to participate in the proceedings of the meeting.<sup>471</sup>

These requirements, however, do not constitute an exhaustive list of the factors involved in providing members with a reasonable opportunity to participate collectively in meetings.<sup>472</sup> These are implemented in addition to other company-specific requirements, which may be provided for in the constitutive documents.

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<sup>466</sup> Explanatory memorandum for the Corporations Amendment (Meetings And Documents) Bill 2021. Section 250S provides that the chair of an AGM must allow a reasonable opportunity for members to ask questions and make comments. Any breach of this requirement is an offence of strict liability and is prosecuted under Section 6.1 of the Criminal Code. Section 250T mandates that members must be accorded the opportunity to ask auditors questions. Violation of the same is a strict liability offence as defined under section 6.1 of the Criminal Code. However, auditors may table written responses to questions if appropriate.

<sup>467</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>468</sup> OECD (n 17).

<sup>469</sup> *ibid.*

<sup>470</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>471</sup> *ibid.*

<sup>472</sup> *ibid.*

## Provision of meeting documents to members

Shareholders are typically provided with various documents to facilitate their informed participation and voting during AGMs. The Corporations Act provides that such documents can be transmitted to the members of a company electronically, irrespective of whether the meeting is conducted virtually, physically, or in a hybrid format.<sup>473</sup> This provision applies to any document related to meetings that a company is obligated or authorized to issue, transmit, or otherwise make available to an individual in accordance with the Act.<sup>474</sup>

Examples of such documents include, but are not limited to, meeting notices, notices or records of resolutions, notices of statements pertaining to a meeting or matters to be addressed at a meeting, as well as minute books.<sup>475</sup> This section of the Act adopts a technology-neutral framework, in that it does not prescribe the utilization of any specific type of technology.<sup>476</sup> Clarity as to the mode of provision of these documents aids shareholders in exercising their rights.

The OECD emphasizes that shareholders need information that is consistent, timely, reliable, and comparable, and presented with adequate detail to assess the company's managerial performance and make informed voting decisions.<sup>477</sup> Shareholders should consequently be provided with comprehensive and prompt disclosure of the matters to be deliberated and decided upon during the meeting.<sup>478</sup>

The Corporations Act grants members the right to choose whether to receive documents in physical or electronic form. This election may apply to all documents, specific categories or types of documents, or a single specified document as an ad hoc request.<sup>479</sup> The company is required to take reasonable steps to ensure that the documents are provided in the format requested by the member.<sup>480</sup> Failure to comply with this obligation constitutes a strict liability offence as defined in the Penal Code.<sup>481</sup> The

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<sup>473</sup> Section 110 C-Technology neutral sending of documents provides that this section and its provisions apply to documents that are required and referred to under Chapters 2A to 2M, which includes Chapter 2D which provides for company members' meetings.

<sup>474</sup> Section 110C *Corporations Act 2001*.

<sup>475</sup> Explanatory Memorandum To The Corporations Amendment (Meetings And Documents) Bill 2021 (n 41).

<sup>476</sup> *ibid*.

<sup>477</sup> OECD (n 17).

<sup>478</sup> *ibid*.

<sup>479</sup> Section 110E (2) *Corporations Act 2001*.

<sup>480</sup> Section 110F (2) *Corporations Act 2001*.

<sup>481</sup> Section 110F (3) *Corporations Act 2001*.

imposition of a criminal penalty in this section underscores the importance the legislator has placed on the communication of important information to shareholders.

While the Kenyan Act recognizes that company-related documents and information can be shared electronically, it does not create an opportunity for shareholders to choose the format in which they would prefer to receive documents related to virtual meetings. The implication is that shareholders in Kenya lack the autonomy to select their preferred format for receiving documents related to virtual meetings, potentially limiting accessibility and effective participation.

### **Australian Securities and Investments Commission (ASIC) Guidelines**

ASIC is the primary regulator of corporate conduct and companies in Australia. Pursuant to the aforementioned amendments to the Corporations Act, the Commission issued guidelines governing the conduct of investor meetings through virtual technology.<sup>482</sup> ASIC, as the main corporate regulator, is tasked with enforcing the provisions of the Corporations Act 2001. To fulfil this role, ASIC issues regulatory guidelines and policies that interpret and provide practical guidance on complying with the Act.<sup>483</sup> These guidelines are designed to clarify the expectations for corporate behaviour and ensure consistent application of the law across various entities.<sup>484</sup> While ASIC's guidelines do not possess the same legal authority as the Corporations Act 2001, they are instrumental in shaping corporate practices and are often considered by courts when interpreting the Act's provisions.

These ASIC guidelines emphasize the fundamental principle of ensuring that meeting participants have opportunities equivalent to those available in an in-person setting.<sup>485</sup> The Commission issued guidelines on virtual shareholder meetings to ensure that they comply with the Corporations Act and maintain the protection of shareholder rights.<sup>486</sup> They provide flexibility in selecting virtual technologies based on the specific needs of the company or scheme and encourage tailored, innovative approaches to ensure effective and inclusive member participation.<sup>487</sup>

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<sup>482</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>483</sup> 'What We Do | ASIC' (n 426).

<sup>484</sup> *ibid.*

<sup>485</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>486</sup> Commission (n 20).

<sup>487</sup> *ibid.*

The ASIC also launched a surveillance program for hybrid and virtual meetings held during the COVID-19 restrictions.<sup>488</sup> Thus, Australia today has one of the most progressive systems for regulating virtual meetings of corporation members.<sup>489</sup>

### **Member Participation in Hybrid and Virtual Meetings**

The Regulator mandates safeguards to ensure that virtual meetings do not disadvantage remote attendees. Virtual technology must enable uninterrupted proceedings, preserve meaningful interaction, and provide opportunities for live questions.<sup>490</sup> Questions and comments should be handled transparently, with records maintained for accountability.<sup>491</sup> Members must be able to vote live during the meeting after considering responses to questions and debates, supporting fully informed decision-making.<sup>492</sup> By requiring companies to provide virtual shareholders with an experience equivalent to in-person attendees, the regulator seeks to prevent disenfranchisement, enhance transparency, and uphold shareholder rights, in accordance with the applicable provisions set out by the OECD.

### **Voting and Notice-of-Meeting Content**

Voting is a crucial shareholder right exercised during AGMs. All voting in hybrid or virtual meetings must be conducted via a poll, as a show of hands could disenfranchise members, especially in virtual settings.<sup>493</sup> Voting options prior to the meeting should also be provided.<sup>494</sup> The notice of the meeting must include clear instructions on using virtual technology, voting, and submitting questions or comments.<sup>495</sup> Additionally, pre-meeting voting options, such as proxy and early electronic voting can allow shareholders who cannot attend the meeting to still exercise their rights.

### **Managing Technical Issues**

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<sup>488</sup> Tokmakov, Stolyarova and Knyazeva (n 147).

<sup>489</sup> *ibid.*

<sup>490</sup> Commission (n 20).

<sup>491</sup> *ibid.*

<sup>492</sup> *ibid.*

<sup>493</sup> *ibid.*

<sup>494</sup> *ibid.*

<sup>495</sup> *ibid.*

To address risks associated with virtual technology, companies should assess and test technologies before meetings, consider rehearsals, and prepare backup plans for technical disruptions.<sup>496</sup> If significant technical issues prevent member participation, meetings should be adjourned until the problems are resolved, even if extensions to statutory timeframes are required.<sup>497</sup>

The regulatory guidelines recognize that technical disruptions in virtual and hybrid shareholder meetings can compromise fairness and effectiveness. The OECD guidelines mandate that protocols for managing technological disruptions should be provided to ensure that shareholders' virtual access to meetings is not hindered.<sup>498</sup> However, the CMA in Kenya has not released up to date guidelines on the conduct of virtual meetings.

### **Australian Securities Exchange (ASX) Corporate Governance Principles**

The ASX is a prominent global financial market exchange.<sup>499</sup> Listed companies are required to comply with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations.<sup>500</sup> There are eight principles, key of which is principle six, which prescribes that companies should respect the rights of security holders, which includes ensuring that its security holders are provided with adequate information and resources to enable them to exercise their rights as security holders efficiently and effectively.<sup>501</sup> This reflects the principles of transparency and accountability outlined in the OECD guidelines, which mandate the provision of relevant and reliable information to shareholders.

Effective participation in meetings is one such component of transparency and accountability. The Principles elaborate that this includes promoting and supporting the active participation of shareholders AGMs.<sup>502</sup> The ASX recommends that companies should disclose how they encourage

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<sup>496</sup> *ibid.*

<sup>497</sup> *ibid.*

<sup>498</sup> OECD (n 17).

<sup>499</sup> 'Australian Securities Exchange (ASX) - Overview, Trading Systems' (n 414).

<sup>500</sup> ASX, 'Corporate Governance Principles and Recommendations' <<https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/cgc-principles-and-recommendations-fourth-edn.pdf>>.

<sup>501</sup> *ibid.*

<sup>502</sup> *ibid.*

such participation.<sup>503</sup>Listed entities with large or geographically dispersed shareholder registers are encouraged to leverage technology to enhance security holder participation in meetings.<sup>504</sup> This could include measures such as live webcasting, hosting meetings across multiple venues connected via telecommunication, or hybrid formats that allow attendance and voting in person, by proxy, or online.<sup>505</sup> Similar to the Corporations Act, the guidelines remain technologically neutral and do not prescribe a specific type of technology to be so employed. This mirrors the approach outlined by the OECD. The NSE in Kenya has yet to issue comprehensive guidelines for listed companies regarding the conduct of virtual meetings.

#### 4.2.3.2. Key Judicial Decisions

As virtual shareholder meetings have become entrenched in the legal and regulatory framework, Australian courts have adjudicated on various aspects of their legality and procedural requirements. The judicial interpretation has focused on ensuring that virtual formats do not disadvantage any category of shareholders, particularly concerning timely notice, voting, and a reasonable opportunity to participate. Courts have also clarified that virtual meetings must align with the Corporations Act's overarching principles of fairness and equity, ensuring that shareholder voices are not diluted by technological barriers or restricted participation opportunities.

##### *In the matter of AGL Limited (2022)*

The matter involved an application seeking a court order to allow the convening of a company meeting.<sup>506</sup> The proposed format of the meeting was hybrid with members attending both virtually and in person, in addition to the use of an online platform to follow the proceedings of the meeting, vote and submit questions.<sup>507</sup> The company relied on Sections 249R and 249S of the Act for their application, arguing that they allowed such meetings to be convened and held in the proposed manner.<sup>508</sup>

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<sup>503</sup> *ibid.*

<sup>504</sup> *ibid.*

<sup>505</sup> *ibid.*

<sup>506</sup> *In the matter of AGL Limited* [2022] NSWSC 576 [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220512\\_202200114664-2022-NSWSC-576\\_judgment-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220512_202200114664-2022-NSWSC-576_judgment-1.pdf) accessed 21 Dec 2024.

<sup>507</sup> *ibid.*

<sup>508</sup> *ibid.*

The court concluded that there was no reason to prevent the convening of the meeting and found that the proposed hybrid meeting format, allowing both in-person and online participation, was consistent with the relevant provisions of the Corporations Act.<sup>509</sup> The procedures for voting and participation were deemed appropriate and compliant with the legal requirements.<sup>510</sup> The court thus upheld the holding of virtual meetings and electronic distribution of documents.<sup>511</sup>

The court's ruling in the AGL Limited case affirmed the legality of hybrid meetings, clarifying that companies can lawfully conduct meetings with both in-person and virtual participation under the Corporations Act 2001. By interpreting Sections 249R and 249S, the decision confirmed that virtual meeting technology is legally supported. Additionally, the judgment established that shareholders attending virtually are considered present for quorum and voting purposes.

### ***Keybridge Capital Limited v WAM Active Limited (2023)***

Keybridge Capital Limited, a shareholder of WAM Active Limited, convened a physical shareholders' meeting in Melbourne scheduled for March 2022, with no provision for virtual attendance.<sup>512</sup> Subsequently, WAM Active's directors issued a revised notice, altering the meeting's format to a wholly online event.<sup>513</sup> Keybridge challenged the board's authority to make such a change, arguing that the decision was either beyond their powers or improperly exercised.<sup>514</sup> They contended that the failure to adopt a hybrid meeting format demonstrated improper use of power and rendered the resolutions passed at the meeting invalid.<sup>515</sup>

The court, however, determined that the board's decision to change the meeting venue was not an improper exercise of power and did not infringe upon the statutory right of Keybridge, as a shareholder, to convene a general meeting.<sup>516</sup> The court accepted that the directors acted reasonably,

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<sup>509</sup> *ibid.*

<sup>510</sup> *ibid.*

<sup>511</sup> *ibid.*

<sup>512</sup> 'Keybridge Capital Limited v WAM Active Limited [2023] FCA 339'

<<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca0339>> accessed 4 March 2025.

<sup>513</sup> *ibid.*

<sup>514</sup> *ibid.*

<sup>515</sup> *ibid.*

<sup>516</sup> *ibid.*

particularly given the COVID-19 restrictions in Melbourne at the time, which necessitated an online format to ensure broader participation.<sup>517</sup>

Furthermore, the court clarified that the term "venue" was not confined to a physical location, allowing the directors to transition the meeting to an entirely virtual setting.<sup>518</sup> The court also found that the change enhanced shareholder participation rather than undermining it, reaffirming that decisions made by corporate directors in alignment with public health guidelines and aimed at maximizing engagement during extraordinary circumstances do not constitute improper purposes under corporate law.<sup>519</sup> The court affirmed that a company meeting does not require a physical venue, enabling directors to adopt fully virtual meetings when necessary.

### ***Nearmap Limited, in the matter of Nearmap Limited(2022)***

Nearmap sought to conduct a Scheme Meeting in a hybrid format, allowing shareholders to attend either physically or electronically via an online platform.<sup>520</sup> The court, exercising its broad powers under the Corporations Act, as well as section 249R(b), which permits meetings to be held at one or more physical locations and through virtual meeting technology, granted orders approving the hybrid format.<sup>521</sup> The court's decision aligned with Nearmap's proposal and the provisions of Sections 249R and 249S of the Corporations Act 2001, authorizing the convening and holding of the meeting in a manner that accommodated both in-person and virtual participation.<sup>522</sup>

The Nearmap case reaffirmed the legality of hybrid shareholder meetings under the amended Corporations Act providing legal certainty for companies adopting this format. By validating the use of virtual meeting technology, the decision aligned with the Corporations Act's technology-neutral approach.

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<sup>517</sup> *ibid.*

<sup>518</sup> *ibid.*

<sup>519</sup> *ibid.*

<sup>520</sup> Nearmap Ltd, in the Matter of Nearmap Ltd [2022] FCA 1291

<<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca1291>> accessed 4 March 2025.

<sup>521</sup> *ibid.*

<sup>522</sup> *ibid.*

### ***Humm Group Limited, in the matter of Humm Group Limited(2022)***

Humm proposed to conduct a hybrid meeting, combining a physical venue with an online platform to facilitate remote participation.<sup>523</sup> The company relied on section 249R(b) of the Corporations Act which permits meetings to be held using such a format.<sup>524</sup> Additionally, section 249S(1) requires companies to provide members with a reasonable opportunity to participate in meetings, while section 249S(7) mandates that virtual meeting technology must be reasonable and enable members to exercise their rights to ask questions and make comments both orally and in writing.<sup>525</sup>

To support its proposal, Humm presented an affidavit from the company engaged to provide share registry services and host the online platform for the meeting, detailing the functionality of the platform, which ensures compliance with the statutory requirements for virtual meeting technology.<sup>526</sup> Companies should similarly document and demonstrate compliance with virtual meeting standards, as evidenced by the affidavit from the technology service provider.

The court found that the proposed hybrid meeting complied with the requirements of section 249S of the Corporations Act.<sup>527</sup> The evidence provided confirmed that the online platform's functionality meets the statutory standards for reasonable virtual meeting technology, allowing members to participate, ask questions, and make comments both orally and in writing.<sup>528</sup> The court reaffirmed the legality of hybrid meetings under the Corporations Act and confirmed that companies may hold hybrid meetings if they comply with statutory provisions.

### **Conclusion**

This chapter has examined the legal and regulatory framework governing virtual shareholder meetings in Australia. In response to the pandemic, Australian regulators implemented temporary relief measures to allow virtual AGMs, setting a legal precedent for these gatherings and highlighting the

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<sup>523</sup> 'Humm Group Limited, in the Matter of Humm Group Limited [2022] FCA 614' <<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0614>> accessed 4 March 2025.

<sup>524</sup> *ibid.*

<sup>525</sup> *ibid.*

<sup>526</sup> *ibid.*

<sup>527</sup> *ibid.*

<sup>528</sup> *ibid.*

need for permanent amendments to the law. This chapter reviewed significant legislative changes, including the Corporations Amendment (Meetings and Documents) Act 2022, which provided companies with the flexibility to conduct hybrid or fully virtual meetings, provided that they complied with various provisions designed to protect shareholder rights.

The Act allowed virtual or hybrid meetings, specified requirements around venue and time for meetings and allowed electronic distribution of documents. The new provisions in the Act and the associated regulatory guidelines largely align with the overarching corporate governance principles outlined in the 2023 OECD Principles, including the fair and equal treatment of shareholders, as well as disclosure and transparency.

Case law on virtual meetings in Australia has highlighted judicial support for the convening of virtual meetings and the protection of shareholder rights in these formats. The courts, largely relying on the provisions of the amended Corporations Act, have affirmed the principle that virtual meetings must meet the same standards of accessibility, notice, and participation as in-person gatherings. The judiciary has reinforced that technological platforms used for virtual meetings should not impose undue limitations on shareholder participation.

In summary, the Australian legal and regulatory framework has made substantial strides in adapting to the shift towards virtual shareholder meetings. The relevant provisions of the Corporations Act 2001 represent progress toward modernizing corporate governance in Australia. In contrast to the Kenyan legal framework, an examination of the Australian framework reveals several provisions that are absent in Kenyan law but which present valuable benchmarks for potential legislative reform. Notably, the Australian framework includes specific requirements aimed at facilitating reasonable shareholder participation, particularly in relation to the timing, venue, quorum, and the technology to be employed in virtual meetings, elements that are currently underdeveloped in the Kenyan context.

## **Chapter 5: Conclusion and Recommendations**

### **5.1. Introduction**

The primary objective of this study was to analyze the legal framework governing virtual shareholder meetings in Kenya, with a focus on its effectiveness in safeguarding shareholder rights and upholding the fundamental corporate governance principles. This concluding chapter synthesizes the key findings from each objective, highlighting findings from the comparative study with Australia, and offering recommendations for legal reform and future research.

### **5.2. Summary of Key Findings**

#### **5.2.1 The link between shareholders' meetings and corporate governance**

The study found that shareholders meetings play a key role in corporate governance, by ensuring that the core principles of fairness or equality, transparency, disclosure and accountability are upheld. This objective explored the role of shareholder meetings as a cornerstone of corporate governance and found that they play an important role in fostering accountability, transparency, and the equitable exercise of shareholder rights. It began by defining corporate governance, referencing the Cadbury Committee's 1992 definition and the OECD's broader interpretation, which highlights the relationships between management, directors, shareholders, and other stakeholders. Thus, finding that corporate governance is a system of control mechanisms aimed at aligning management actions with shareholder interests, addressing the agency problem, and ensuring oversight and accountability.

The core principles of corporate governance, namely, fairness, transparency, and accountability were examined, with a focus on how shareholder meetings, particularly AGMs, facilitate these principles. The study found that AGMs serve as platforms for shareholders to engage with management, vote on critical matters, and hold directors accountable, thereby mitigating agency costs. The chapter also distinguished between AGMs and EGMs, noting that AGMs provide a more comprehensive view of corporate governance practices due to their annual, legally mandated nature.

Further, it was established that the COVID-19 pandemic accelerated the adoption of virtual shareholder meetings globally, reshaping corporate-shareholder interactions. While virtual meetings offer benefits such as increased accessibility and participation, they also present challenges, including technological barriers, reduced face-to-face accountability, and cybersecurity risks. The chapter highlighted the need for a robust legal framework to ensure that virtual formats uphold shareholder rights and do not dilute the essential functions of shareholder meetings. It concluded by emphasizing the importance of legislative clarity to safeguard shareholder engagement and corporate governance in the post-pandemic era.

### **5.2.1 An analysis of the current legal framework in Kenya for virtual shareholders' meetings and its appropriateness for the protection of shareholder rights**

This objective assessed the legal and regulatory framework governing shareholder meetings in Kenya, with a focus on its appropriateness in protecting shareholder rights during virtual meetings. Prior to the COVID-19 pandemic, Kenya's legal framework, including the Companies Act 2015 and the CMA Code of Corporate Governance, did not explicitly provide for virtual shareholder meetings. However, the Constitution of Kenya 2010 and other statutes emphasized principles such as transparency, accountability, and fairness, which are foundational to corporate governance. The pandemic acted as a catalyst for change, prompting judicial and legislative interventions to accommodate virtual meetings.

Key judicial rulings, such as *WPP Scangroup PLC* and *Victoria Commercial Bank*, allowed public and private companies to hold virtual and hybrid meetings during the pandemic. These decisions were reinforced by amendments to the Companies Act through the Business Laws Amendment Act 2021, which formally recognized virtual and hybrid meetings. Despite these advancements, the framework lacks detailed provisions on critical aspects such as reasonable participation, quorum, venue, time and technological requirements for virtual meetings. This creates ambiguity and risks undermining shareholder participation and rights.

Post-pandemic cases, such as *Gheewala v Associated Securities Limited* and *Bernard M. Ngore v Cabinet Secretary*, highlight ongoing challenges, including inadequate notice periods, technical barriers, and evidentiary gaps in proving the occurrence of virtual meetings. These issues underscore

the need for a more robust legal framework to ensure meaningful shareholder participation, transparency, and accountability in virtual meetings.

In conclusion, while Kenya's legal and regulatory framework has made significant strides in recognizing virtual shareholder meetings, it remains inadequate in fully protecting shareholder rights. The absence of detailed procedural guidelines, technological safeguards, and remedies for non-compliance poses risks to shareholder engagement and corporate governance. To align with international best practices, Kenya's framework requires further refinement to address these gaps and ensure that virtual meetings uphold the principles of fairness, transparency, and accountability.

### **5.2.3 Comparative Analysis of the Legal Framework in Australia**

This objective focused on assessing the legal and regulatory framework governing shareholder meetings in Australia, focusing on its appropriateness in protecting shareholder rights during virtual meetings. The study gathered valuable insights from Australia's legal framework. First, legislative reforms around virtual meetings should prioritize ensuring shareholders have a reasonable opportunity to participate. Second, company members should have the flexibility to receive meeting-related documents in their preferred format, whether electronic or physical. Third, legislation should clearly define the venue, time, and quorum requirements for virtual meetings, as these directly influence participation. Lastly, appropriate provisions for meeting technology should be established, focusing on minimum acceptable standards rather than prescribing specific tools. This serves to ensure the effectiveness of virtual meetings.

The Corporations Act 2001, alongside ASIC guidelines and the ASX Listing Rules, forms the core of Australia's corporate governance framework. Prior to the COVID-19 pandemic, the framework did not explicitly provide for virtual meetings, requiring physical attendance. However, the pandemic accelerated the adoption of virtual and hybrid meeting formats, leading to significant legislative amendments, including the Treasury Laws Amendment (2021 Measures No. 1) Act 2021 and the Corporations Amendment (Meetings and Documents) Act 2022. These amendments permanently enabled virtual meetings.

The framework emphasizes key principles such as fairness, transparency, and accountability. It ensures that shareholders have a reasonable opportunity to participate in meetings and mandates the use of appropriate technology to facilitate meaningful engagement. The Act also requires companies to provide meeting documents electronically, allowing shareholders to choose their preferred format, and imposes strict liability for non-compliance. Judicial decisions, such as *AGL Limited* and *Keybridge Capital Limited v WAM Active Limited*, have reinforced the legality of virtual and hybrid meetings, affirming that they align with the Corporations Act's principles and enhance shareholder participation.

In conclusion, Australia's legal and regulatory framework has made significant progress in accommodating virtual shareholder meetings, ensuring that shareholder rights are protected through robust participation mechanisms, technological safeguards, and judicial oversight. These lessons offer valuable insights for Kenya as it seeks to strengthen its own framework for virtual shareholder meetings.

#### **5.2.4 Areas for Future Research**

Artificial Intelligence (AI) has become an integral component of modern technological advancements, transforming various sectors, including corporate governance. The integration of AI into corporate governance, particularly in the context of virtual shareholder meetings, presents numerous opportunities and challenges that warrant further research. AI has the potential to enhance decision-making, transparency, and efficiency within corporate structures.<sup>529</sup> However, it also raises compliance issues, such as the incorporation of bias and lack of transparency, which may lead to concerns about equity and accountability. Additionally, AI systems are heavily reliant on data and often implicate privacy and data protection regulations.<sup>530</sup>

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<sup>529</sup> .Holly Gregory, 'AI and the Role of the Board of Directors' (*The Harvard Law School Forum on Corporate Governance*, 7 October 2023) <<https://corpgov.law.harvard.edu/2023/10/07/ai-and-the-role-of-the-board-of-directors/>> accessed 4 March 2025.

<sup>530</sup> *ibid.*

AI can play a pivotal role in automating compliance processes and flagging potential legal issues before they escalate, thereby ensuring accuracy and timeliness in regulatory reporting.<sup>531</sup> Furthermore, AI-powered tools can facilitate real-time interaction during virtual meetings, such as chatbots addressing shareholder inquiries or sentiment analysis to gauge participant reactions.<sup>532</sup> This personalization of shareholder experience has the potential to increase participation. By delving into these areas, future research can unlock the full potential of AI in virtual shareholder meetings and contribute to the evolution of virtual corporate governance.

Blockchain technology is also essential for the modernization of corporate governance, as it reduces costs for both corporations and shareholders while enhancing shareholder participation and engagement.<sup>533</sup> Additionally, further research into the legal implications of blockchain adoption is recommended.<sup>534</sup>

### **5.3 Recommendations for Law Reform in Kenya**

The comparative study of Australia demonstrated the importance of a legal framework that ensures the protection of the exercise of shareholders' rights during virtual meetings. This would require targeted amendments to the Companies Act. Additionally, the CMA could develop and issue comprehensive guidelines similar to those provided by ASIC to support and clarify the interpretation of the more technical provisions of the Act, particularly those relating to the operations of the technological platforms. This would significantly contribute to reducing contradictory judicial pronouncements and could be complemented by the sensitization of judicial officers. The study therefore proposes that the following aspects be considered for legal reform in the Kenyan framework.

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<sup>531</sup> 'AI and Boardroom Decision-Making - The Corporate Governance Institute' <<https://www.thecorporategovernanceinstitute.com/insights/guides/ai-and-boardroom-decision-making/?srsltid=AfmBOoraOFKHDlxAYiERBlmKsOByaKo9iWHYhYcVQhjzsVPU5-6gcwSQ&utm>> accessed 4 March 2025.

<sup>532</sup> *ibid.*

<sup>533</sup> Abdennadher and Cheffi (n 171).

<sup>534</sup> *ibid.*

### **5.3.1 Venue, Time and Quorum For Meetings**

Chapter Three of this study established that although the Kenyan Companies Act provides for virtual and hybrid meetings, it does not make definitive pronouncements as to what constitutes the venue, time and quorum for such meetings. Consequently, the Companies Act should be amended to delineate clear provisions for venue, time and quorum for virtual meetings, given their unique nature as compared to physical meetings.

Similarly, the Companies Act does not delve into the details of what would constitute attendance at a general meeting conducted virtually. This is a crucial factor in determining quorum. Consequently, the Act should be amended to specify that a member who participates in the meeting through virtual meeting technology, should rightfully be considered to be personally present at the meeting for all purposes.

### **5.3.2 Reasonable opportunity to participate**

Chapter Three established that the Companies Act does not elaborate on how to safeguard the meaningful participation of shareholders in virtual meetings. To remedy this situation, the Act can be amended to mandate that a company must accord all the members entitled to attend the meeting with a reasonable opportunity to participate in the same.

The corresponding section in the Australian Act prescribes a penalty, as a meeting where members are not able to reasonably participate can be declared invalid by the court.<sup>535</sup> This enables the court to invalidate a meeting if it determines that the members, collectively, were not afforded a reasonable opportunity to participate and thereby resulting in a significant injustice occurring.<sup>536</sup> This can also be adapted in the Kenyan Act.

The Act should also be amended to ensure that just because a meeting is virtual it does not mean that the Company can prescribe any time it chooses to hold the meeting. The Act should be amended to require that companies convene virtual meetings at a reasonable time to ensure equitable access and effective shareholder participation.

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<sup>535</sup> Section 1322 3(A)(a)(i) *Corporations Act 2001*.

<sup>536</sup> Section 1322 3B(a) and (b) *Corporations Act 2001*.

An additional aspect of this requirement revolves around the fact that the technology to be employed by the company during virtual meetings should be reasonable. For example, the technology facilitating virtual participation should be adequate to allow members to raise questions, receive answers and cast their votes.<sup>537</sup> Additionally, directors should assess whether the technology provides members, collectively, the ability to observe the directors or the primary proceedings.<sup>538</sup> This concept can also be adapted in the Kenyan Act, while being cognizant of the unique circumstances in the Kenyan context.

In addition, the Act should be amended to provide that the virtual meeting technology must allow the participants to exercise their existing rights, both orally and in writing, to pose questions and provide their input and feedback.<sup>539</sup> More technical aspects concerning the operation and practical implementation of technological platforms can be addressed through detailed guidelines issued by the CMA, thereby complementing the broader legislative framework.

### **5.3.3 Provision of meeting documents to members**

The Kenyan Act does not go into details as to how documents for virtual meetings should be availed to members. The requirements therein for publishing financial statements and other documents on the company websites largely relate only to quoted companies and are not tailored to the virtual meeting experience.

Shareholders may have individual preferences as to the manner in which the said documents are distributed to them. The Act should be amended to grant members the right to choose whether to receive documents in physical or electronic form. The company should be required to take reasonable steps to ensure that the documents are provided in the format requested by the member.<sup>540</sup> Failure to comply with this obligation should constitute an offence.<sup>541</sup> The imposition of a criminal

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<sup>537</sup> Corporations Act 2001 Section 249S(3)(c) *Corporations Act 2001*.

<sup>538</sup> Corporations Act 2001 Section 249S(3)(c) *Corporations Act 2001*.

<sup>539</sup> Section 249S 7(a) and (b) *Corporations Act 2001*.

<sup>540</sup> Section 110F (2), *Corporations Act 2001*.

<sup>541</sup> Section 110F (3), *Corporations Act 2001*.

penalty in this section will underscore the importance of the communication of important information to shareholders.

### **5.3.5 Managing Technical Issues**

The CMA can develop specific guidelines to address the technical aspects of conducting virtual meetings. For example, to address risks associated with virtual technology, companies should be required to assess and test technologies before meetings, consider rehearsals, and prepare backup plans for technical disruptions.<sup>542</sup> If significant technical issues prevent member participation, meetings should be adjourned until the problems are resolved.<sup>543</sup>

The proposed amendments to the Companies Act should be implemented in addition to other company specific requirements which may be provided for in the company's constitutive documents. This may be accomplished by revising the Model Articles of Association appropriately, which can serve as a reference framework for companies' own constitutive documents. The Act can be amended to allow companies to include their further specific requirements for virtual meetings in their constitutive documents, provided the same are not in conflict with the provisions in the Companies Act.

Virtual shareholder meetings represent a notable shift in corporate governance, driven by technological innovation and further catalyzed by the COVID-19 pandemic. By learning from international best practices, such as those implemented in Australia, Kenya can improve adherence to the core principles of corporate governance while safeguarding the rights and interests of its shareholders.

This research underscores the need for Kenya to reform its legal framework governing virtual shareholder meetings. The shift towards virtual governance presents an opportunity to enhance corporate accountability, inclusivity, and efficiency. However, for this potential to be realized, legal reforms must address the challenges associated with technological access and shareholder participation.

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<sup>542</sup> Section 110F (3) *Corporations Act 2001*.

<sup>543</sup> Section 110F (3) *Corporations Act 2001*.

By learning from other jurisdictions, such as Australia, Kenya can develop a forward-looking legal framework that supports virtual governance while safeguarding shareholder interests. Ultimately, embracing virtual AGMs is not merely a response to technological trends but a strategic imperative for fostering sustainable corporate governance in the current digital age.



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# Appendices

## Appendix A: Similarity Report



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**Nancy Gathua**

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## Appendix B: Ethical Clearance Confirmation



13<sup>th</sup> November 2024

Ms Gathua Nancy,  
nancy.gathua@strathmore.edu

Dear Ms Gathua,

**RE: Towards 'Virtual' Corporate Governance: An Analysis of the Existing Laws Governing Virtual Shareholder Meetings in Kenya**

This is to inform you that SU-ISERC has reviewed and approved your above SU-masters proposal. Your application reference number is SU-ISERC2437/24. The approval period is from 13<sup>th</sup> November 2024 to 12<sup>th</sup> November 2025.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
- iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
- v. Clearance for the export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ambrose Rachier".

Mr Ambrose Rachier,  
Chairperson; SU-ISERC

