

LEGAL BULLETIN NO. 1

DATE JANUARY 17, 2023

**OFFICIAL NOTICE 220-234527 OF OCTOBER 31, 2022, COMPANY
SUPERINTENDENCE**

**MATTER: POSSIBILITY OF HOLDING BOARD OF DIRECTORS MEETINGS
THROUGH MESSAGING APPLICATIONS.**

**¿Is it possible for the board of directors of a company to hold meetings and
take decisions through a WhatsApp group?**

**¿What is the evidentiary value of the decisions issued through a WhatsApp
group or by WhatsApp?**

According to Law 527 of 1999 (E-Commerce Law) and in the opinion of the Company Superintendence of Colombia, it is legally possible for the board of directors of a corporation to meet, deliberate, and adopt decisions through an electronic messaging application such as WhatsApp subject to compliance to the conditions stated of this law.

Article 2 of this law defines data message as information generated, sent, received, stored or communicated by electronic, optical, or similar means, such as electronic data interchange (EDI), internet, or email, among others, so that data shared in electronic messaging applications, such as WhatsApp, have this particular legal nature.

Article 5 of said law recognizes full legal effects to the information that is in the form of a data message, as is the case of text messages sent through electronic messaging applications such as WhatsApp. The rule provides that no legal effects, validity, or binding force shall be denied to any type of information for the sole reason that it is in the form of a data message.

In addition, Article 19 of Law 222 of 1995 as well as article 19 of Law 1258 of 2008, which is the law that creates the simplified joint stock company (SAS), provides the possibility of meetings of the general assembly or the board of directors may be held in a non-presential manner using technological means, such as WhatsApp, provided that the following can be evidenced:

- (i) the date of the meeting
- (ii) the identity of the participants
- (iii) the simultaneous or successive interventions during the deliberations and decisions of the board of directors or the general assembly.

- (iv) the vote cast on each proposition based on the majorities provided for by law or the company's bylaws
- (v) the rules regarding the calling of meetings
- (vi) the existence of a deliberating and decision-making quorum during the course of the non-presential meeting.
- (vii) the indication of the technological means that will be used to conduct the non-presential meeting, such as the different electronic messaging applications, such as WhatsApp.
- (viii) the application in this case WhatsApp must offer sufficient security measures, i.e. encrypted messages with encryption standards, and security warnings, among others.
- (ix) the warning to the summoned participants about the use of secure connection network.
- (x) the security that the information of the meeting that will support the minutes content must be duly safeguarded.

Finally, and in relation to the evidentiary value of the decisions issued through a WhatsApp group or by WhatsApp, it is worth making some clarifications and mentioning some legal norms and important key rulings of the Supreme Court of Justice and the Constitutional Court related to this matter.

This entails referring to the notion of the integrity of the data message. According to Articles 8 and 9 of Law 527 of 1999, integrity implies that the data message has remained complete and unaltered unless an endorsement or any modification related to the communication process is added to it. The originality of a data message implies that the information contained in the electronic support must be generated in such a way that its integrity is preserved i.e., it has suffered no alteration whatsoever, with the purpose of showing it later to the person to whom it is to be presented. For this reason, it is not possible to exhibit or present an electronic document, in the form of a data message, by means of a physical printout, since the above-mentioned requirements would not be met.

The second paragraph of article 247 of the General Procedural Code refers to the fact that the simple paper printout of a data message will be valued in accordance with the general rules of documents. The Constitutional Court has ruled on this matter and has established that the printouts of a data message are mere copies since it is not possible to apply to electronic documents the criteria of evidentiary appreciation that is applied to those on paper¹.

¹ Constitutional Court, Ruling C-604/16, Presiding Judge Luis Ernesto Vargas Silva.

The Civil Chamber of the Supreme Court of Justice, Civil Chamber made an extensive analysis of the evidentiary nature of the data message, as is the case of WhatsApp. In this regard, it is required to consider the rules of reasoned judgment and states that: "the reliability is determined by the way the data message has been generated, filed or communicated as well as the reliability in which the integrity of the information has been preserved, the way in which its initiator is identified as well as other relevant factors"².

This is reiterated in a constitutional protection action ruling³ in which the debate on electronic evidence is again analyzed and makes a succinct explanation of the evidentiary value of printed WhatsApp screenshots and states that it should be assessed as circumstantial evidence.

This is a very brief and general analysis of the problem of the evidentiary value of data messages, such as WhatsApp.

This is not a legal opinion that can be used, but its purpose is to disseminate knowledge about the Colombian legal regime.

Finally, if you have any questions on the subject, please do not hesitate to contact us at avenegas@venegasmedinaasociados.co or aduran@venegasmedinaasociados.co.

² SUPREME COURT OF JUSTICE. CIVIL CASSATION CHAMBER. Case No. 11001 3110 005 2004 01074 01. (December 16, 2010). Presiding Judge Pedro Octavio Munar Cadena.

³ COLOMBIA. CONSTITUTIONAL COURT. Decision T-043. (February 10, 2020). Presiding Judge: José Fernando Reyes Cuartas.