

Insights

HOW HONG KONG SAR COMPANIES MAY CONDUCT MEETINGS AMIDST THE COVID-19 OUTBREAK

MAKING MEETINGS HAPPEN AGAINST ALL ODDS

Apr 03, 2020

SUMMARY

In light of the impacts of COVID-19, the Hong Kong government has followed the footsteps of other countries to implement laws and regulations to limit the size of gatherings. A company should now rethink whether options other than physical meetings are available to validate its corporate actions. In this article, we aim to refresh the requirements on corporate meetings and explore how a company may tackle the challenges.

Introduction

With the ever-changing public health and regulatory environment due to the COVID-19 outbreak, it may become difficult for companies to hold their usual physical meetings which involve gathering of groups of people. In Hong Kong SAR, group gatherings in public places are currently subject to restrictions under the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G) (the “**Regulation**”). It is expressly provided in Schedule 1 of the Regulation that “[g]roup gatherings at a place of work for the purposes of work” are exempted, which means board meetings in offices are exempted. However, it is not clear if annual general meetings or general meetings that are held elsewhere, for example in hotel function rooms, are to be regarded as exempted, due to the ambiguous meaning and uncertain scope of “a place of work” and “the purposes of work” which are not elaborated in detail under the Regulations. It is, therefore, important for companies to be aware of the issues associated with conducting meetings and ensuring that any alternative options are legally permissible.

Below, we will walk you through a brief summary of the law on companies’ meetings and how a company may conduct meetings within the challenging situation presented by COVID-19.

Types of meeting

A company conducts its business by holding various meetings, including:

- annual general meetings of the shareholders of the company;
- general meetings of the shareholders of the company; and
- meetings of the board of directors (and committees).

Annual General Meetings

A company is required to hold an annual general meeting (“**AGM**”) in respect of each financial year, unless it is a dormant company (section 610 of the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (“**CO**”).

For a private company limited by shares or guarantee, the AGM should be held either (i) nine months after the end of its accounting reference period; or (ii) if it is the first AGM, nine months after the first anniversary of the company’s incorporation or three months after the end of the first accounting reference period.

A company may be exempted from holding an AGM if:

- everything intended to be done at the meeting is done by a written resolution and a copy of each document required to be laid before the company at the meeting is produced to each shareholder on or before the date of the written resolution;
- the company only has one shareholder; or
- the company has by resolution of all shareholders dispensed with the holding of the AGM; the company has not revoked such resolution; and no shareholder has required the holding of the AGM.

Note that while all companies may be exempted from holding an AGM upon satisfying one of the above requirements under the CO, it will be almost impossible for a listed issuer to pass a written resolution with all shareholders agreeing on certain matters or a resolution with all shareholders agreeing to dispense with the holding of the AGM.

General Meetings

A meeting of the shareholders other than an AGM of a company is a general meeting or an extraordinary general meeting. A general meeting can be called by the directors with or without being requested by the shareholders. The directors are required to call a general meeting if the company has received requests from shareholders with 5% or more voting rights. A general meeting can also be ordered by a court, either of its own motion or on application.

Resolutions in a general meeting may be passed as ordinary resolutions (i.e. simple majority) or special resolutions (i.e. at least 75%). Anything that may be done by an ordinary resolution may also be done by a special resolution.

Board Meetings

The directors are usually granted the authority to oversee the day-to-day management of a company under the articles of association. Board meetings are usually held amongst the directors to approve matters that are within their powers. For instance, most companies would allow the directors to approve transfer of shares or entry into business contracts.

The procedures and quorum of a board meeting are often set out in a company's articles of association. However, the CO specifically provides that a company must hold records of resolutions of the directors which are passed without a meeting, indicating written resolutions are contemplated, especially in the case where the company only has one director. If a meeting is held, the minutes of a meeting recorded in accordance with section 481 signed by the chairperson are evidence of the duly convened and valid meeting until the contrary is proved.

What constitutes a valid meeting?

A valid meeting must be properly convened, which means:

- it must be called by a person having authority to do so;
- notice of the meeting must be given in accordance with the prescribed notice periods under the CO;
- it must be constituted by the presence of the quorum throughout the meeting and a properly appointed chairperson; and
- it must comply with any other specific requirements under the company's articles of association, the CO and the Listing Rules (if applicable).

Written Resolutions as an alternative?

As mentioned, holding face-to-face meetings of the shareholders will no doubt be difficult for most companies right now. Under the CO, anything that may be done by a resolution passed at a general meeting may be done, without a meeting and without any previous notice being required, by a written resolution of the shareholders of the company (section 548).

We set out below some key points to note when passing written resolutions:

- The directors or a shareholder of the company can propose a resolution as a written resolution.

- Once a written resolution is proposed, it must be circulated to the shareholders in hard copy form or in electronic form or by making copies available on a website.
- A proposed written resolution lapses if it is not passed before the end of the period specified under the company's articles of association or, if none is specified, the period of 28 days beginning on the circulation date.
- There is no prescribed form as to how a shareholder should signify his or her agreement to a proposed written resolution as long as (i) it identifies the resolution to which it relates; and (ii) it indicates the shareholder's agreement to the resolution. The most common way is to simply have the shareholders to sign at the end of the proposed written resolutions.
- After a written resolution is passed, the company must notify its shareholders and auditor that such resolution is passed or else the company and every responsible person commits an offence.

Is a virtual / hybrid meeting permitted under the law?

Under common law principles, the word "meeting" concerns the meeting of the minds and does not necessarily require physical presence of all attendees in the same room and face to face. Of course, the articles of association of a particular company might say expressly that physical meetings must be held. But if there is no such express requirement, can virtual meetings be held?

By use of audio-visual links, telephone or other electronic means, a meeting can be convened which caters for a meeting of the attendees' minds. It is possible to hold a general meeting in different venues as long as adequate audio-visual links are arranged to enable shareholders in all venues to see and hear what is going on in the other venues can be heard and seen (*Byng v London Life Association Ltd. and Another* [1990] Ch 170). In appropriate circumstances, directors may meet by assenting to a document, or by telephone, video link, or other electronic means which caters for a meeting of their minds (dicta of Tadjell J in the Australian case of *Bell & Another v Burton & Others*, quoted in *The Bank of East Asia Ltd v Labour Buildings Ltd and Others* [2008] HKCFI 54). As such, subject to specific requirements in a company's articles of associations, board meetings may be held on a hybrid basis (partly by physical presence at a place and partly by electronic means) or even entirely on a virtual basis.

For general meetings or AGMs, the CO consolidates the common law position and expressly permits a company to "*hold a general meeting at 2 or more places using any technology that enables the members of the company who are not together at the same place to listen, speak and vote at the meeting*" (section 584). The default position is, therefore, that shareholders' presence at a general meeting may be by use of any technology, subject to any contrary provision in the articles. Section 584 further confirms that visual involvement may not be necessary - it is sufficient as long as shareholders are able to "*listen, speak and vote at the meeting*", which may mean that telephone conference is also a permissible means to join a general meeting (assuming that a suitable

mechanism is available to accurately record any votes cast). However, a general meeting or an AGM on entirely virtual basis is not recommended due to the legal uncertainty - since section 584 specifies that a general meeting may be held “at 2 or more places” which seems to suggest that there must be at least one physical venue for the meeting.

In any event, it is always important to check if the articles of a company stipulates physical presence of shareholders or directors or board members as a necessary requirement for the relevant meeting and whether a hybrid general meeting is allowed.

In light of the continuing risks posed by the COVID-19 pandemic, some Hong Kong companies are discouraging shareholders from physical attendance in AGM notices in the following manner.

“We request that you NOT attend the AGM in person. However, you are encouraged to (1) cast your votes by appointing a proxy to vote according to your indicated voting instructions and (2) join the AGM as an observer via a live webcast of the AGM proceedings which will be streamed online. You may send questions relevant to the proposed resolutions to the Company. The Company may not be able to respond to all the questions, but will endeavour, where appropriate, to respond to such questions on the Company’s website prior to, or as soon as practicable after, the AGM. Please note that joining the AGM online will not be counted towards a quorum nor will you be able to cast your vote(s) online. You can log on to the live webcast by entering your username and password.”

Listed issuers whose shares are listed on the Hong Kong Stock Exchange

Meetings of a listed issuer generally follow the same principles as those set out above, but with minor differences such as the time periods applicable. However, an issuer listed in Hong Kong SAR may not be a company incorporated in Hong Kong SAR so the laws of the relevant jurisdictions as well as the foreign constitutional documents should be reviewed to ascertain the position. On top of these, a listed issuer is also required to observe the Listing Rules of the Hong Kong Stock Exchange which include requirements that listed issuers should lay financial statements within six months after financial year end.

The Securities and Futures Commission (“**SFC**”) and The Stock Exchange of Hong Kong Limited (the “**Exchange**”) released a “Further Guidance on the Joint Statement in relation to Results Announcements in light of the COVID-19 Pandemic” dated 16 March 2020 for listed issuers and a set of Frequently Asked Questions (“**FAQ**”) relating to the subject. While the SFC and the Exchange have decided that issuers can defer the publication of their annual report, it was made clear that issuers should ensure compliance with the laws of their jurisdictions of incorporation and their articles of association with regards to the holding of annual general meetings. The FAQ also emphasized that the Listing Rules do not impose requirements on the format for general meetings, but restated the Guide of General Meeting issued by the Exchange that:

“Meetings should be held at [a] place and a time convenient to the largest possible number of shareholders to attend. Issuers should consider the use of technology (e.g. webcast, video

conference) to maximise shareholder participation. They should clearly explain whether or not shareholders attending the general meeting by webcast at a remote site are allowed to vote and if so, how. They should not change the venue or the time of a general meeting without giving sufficient notice to shareholders.” (see section 2.3).

On 1 April 2020, the SFC and the Exchange have issued a “Joint Statement in relation to General Meetings in light of the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation” (the “**Joint Statement**”) and have confirmed that (i) AGMs and (i) extraordinary general meetings or special general meetings of Hong Kong-listed issuers held in order to comply with the law, Listing Rules, The Codes on Takeovers and Mergers and Share Buy-backs, the relevant issuer’s own memorandum or articles of association or other regulatory instrument, are generally exempted under the Regulation as each is considered “any group gathering at a meeting of a body that must be held within a specified period in order to comply with any Ordinance or other regulatory instrument that governs the operation of the body or its business”. The Joint Statement also provided guidelines that, notwithstanding the fact that these meetings are exempted, listed issuers should consider, amongst others:

- To adjourn or delay the meetings for a reasonable period;
- The use of other means such as the use of technology to enable non-physical attendance;
- To encourage the shareholders to vote by proxy;
- To take practicable precautions to ensure the safety of attendees; and
- To adopt measures to reduce headcount at a single venue (e.g. use of multiple meetings rooms linked by telecommunication facilities).

If the listed issuers are facing any difficulties on holding physical meetings, holding hybrid meetings may potentially be viable but these will require sophisticated programs and IT support to ensure attendance and voting are duly recorded. We recommend listed issuers to consider other options above and to seek advice as to how such can be done within the regulatory framework.

Is there a need to amend the articles of association?

Further to the above, private companies or listed issuers may wish to review their articles of association and decide if amendments are necessary to permit virtual or hybrid meetings as well as setting out how they are conducted.

These companies should be mindful that special resolutions by the shareholders are required to alter the articles of association under the CO. Given the difficulties in holding meetings, a company or a listed issuer may look through these at the next opportunity when a shareholders’ meeting can be called upon to pass these resolutions.

Practical checklist for holding meetings

- When is the meeting going to be held?
- Are there any new social distancing or quarantine regulations applicable to the meeting?
 - If, for example, the prohibition of group gatherings of more than a certain number of people under the Regulation continues to be effective and the particular meeting does not fall into any of the exemptions, companies may need to consider adjourning the relevant meeting or conducting a virtual/ hybrid meeting.
- Where is the meeting going to be held? Is using the venue for the purpose of a company's meeting permitted under the applicable social distancing or quarantine regulations?
- What are the likely impacts of the COVID-19 outbreak on the meeting? For example, are any key personnel under quarantine or are large gatherings allowed? Are there any subsequent events dependent on the meeting taking place?
- What additional information needs to be included in the notice of meeting?
 - Consider: provide details of the venues/ attendance methods (the principal place of the meeting, other place(s) of the meeting and use of electronic means); encourage use of proxy votes; and outline the additional health and safety measures which will be implemented.
- To safeguard the health and safety of all attendees, listed issuers may consider notifying attendees that they should carefully consider the risks of physically attending the AGM, taking into account their own personal circumstances notwithstanding the precautionary measures which will be implemented at the AGM such as those measures listed below:
 - There will be compulsory body temperature screenings/ checks for all attendees;
 - Attendees will be required to submit a health declaration form;
 - Surgical face masks must be worn;
Attendees who are subject to health quarantine requirements will not be admitted;
 - Each attendee will be assigned a designated seat at the time of entrance to ensure social distancing; and
 - No food or drinks will be provided.
- Do additional health and safety measures need to be announced and implemented?

- Consider: require history of close contact with confirmed cases; provide hand sanitizer; split attendees into different rooms connected by audio-visual links or other electronic means.
- What is the contingency plan if the meeting cannot be held as planned?
- Is adjournment of meeting or virtual/ hybrid meeting permissible under the articles of association, the CO and/ or the Listing Rules? Does the company have the necessary IT infrastructure and equipment to implement virtual/ hybrid meeting? Does the company need to seek legal advice to ensure its contingency plan is legally and practicably feasible, so that the meeting would not subsequently be challenged as invalid?
- If the articles of association do not currently permit other forms of meetings, what amendments are necessary? When making available virtual or hybrid meetings, does the board have sufficient powers to make arrangements and decide the conduct of the same?
- Consider other consequential amendments to the articles of association in order to enable virtual or hybrid meetings, such as:
 - setting out information to be included in a notice for a meeting to take into account details of facilities for attendance and participation by electronic means;
 - applying a broader definition to a 'signed document' so it includes a document signed by electronic signature and stored in any other digital or electronic form;
 - applying a broader definition for an item that is 'in writing' to include the electronic display of any words or figures; and
 - providing the power to the board to interrupt or adjourn the meeting should there be any failure of the electronic facilities.

RELATED CAPABILITIES

- Corporate
- M&A & Corporate Finance
- Securities & Corporate Governance
- Regulation, Compliance & Advisory
- Business & Commercial Disputes

MEET THE TEAM



Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com

[+852 3143 8450](tel:+85231438450)



Phill Smith

Co-Author, Hong Kong SAR

phill.smith@bclplaw.com

[+852 3143 8452](tel:+85231438452)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.