COVID-19 – The Law Un-Masked: Practical Means of Holding Extraordinary General Meetings During the Coronavirus Outbreak

In our tenth article in the series "COVID 19 – The Law Un-Masked", Richard Yip and Tara Liao discuss practical means to conduct extraordinary general meetings while the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap. 599G is in force, and how to avoid or address procedural irregularities in company meetings.

Can a company hold extraordinary general meetings ("**EGM**") despite the ban on social gathering under the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap. 599G (the "**PCDR**") which came into effect on 19 March 2020 to contain the spread of COVID-19 in the community?

According to the Joint Statement of the Hong Kong Stock Exchange and the Securities and Futures Commission dated 1 April 2020, annual general meetings required under the Companies Ordinance and the relevant listing rules, as well as EGMs required under any Ordinance, other regulatory instrument such as the Listing Rules, Takeovers Code or articles of association ("**Exempted EGMs**") may be held when the PCDR is in force.

What about EGMs which are not Exempted EGMs but which are nonetheless commercially important? The Joint Statement provides no clear answer. In our opinion, upon close examination of the law, there are in fact practical (albeit unconventional) means of conducting an EGM whether for listed or private companies without breaching the PCDR, such as restricting entry by shareholders/proxy holders and other necessary personnel (such as directors, company secretary and support staff of the company) only, and restricting the number of persons physically present in each conference room.

Restriction of Entry by Shareholders/Proxy Holders & Other Necessary Personnel Only

Restriction of entry by shareholders and proxy holders and other necessary personnel only is important, because:

(1) The PCDR prohibits the gathering of more than four persons in a "public place" during the specified period. Gatherings which do not take place in a public place are allowed.

(2) Section 2 of the PCDR defines "public place" (公眾地方) as "a place to which **the public or a section of the public** may or are permitted to have access from time to time, whether by payment or otherwise".

(3) Corporate general meetings are typically held in hotel conference rooms. A hotel conference room is a privately-owned premise and would not generally qualify as a "public place".

(4) Case law which concern the same definition of "public place" under the Public Order Ordinance, Cap. 245 suggests that, if only **a particular class of persons** are given access to a place, that place may not be classified as a public place (**Kwok Cheuk Kin v Commissioner of Police** [2017] 6 HKC 93).

Therefore, where there is strict restriction of entry by shareholders and proxy holders and other necessary personnel only, it significantly reduces the risk of the EGM venue being classified as a "public place" and the risk of the EGM being classified as a prohibited gathering under the PCDR.

Restricting the Number of Persons Physically Present in Each Conference Room

Having said that, the definition of "public place" in the context of the PCDR has not been tested. Given the unprecedented public health concerns caused by the coronavirus, it is not impossible that the Court may take a wider view as to what constitutes a "public place" under the PCDR.

As such, one extra precautionary step is to use multiple meeting rooms and restrict the number of persons to no more than four in each room and conduct the EGM via video conferencing facilities in each room. We note that this was what Starlite Holdings Limited (Stock Code 403) did in a special general meeting held on 8 April 2020.

Other Precautionary Measures Taken by Listed Issuers

We note that certain listed issuers have proceeded with their EGMs which do not appear to be Exempted EGMs. These include conducting compulsory body temperature check and preventing those with a temperature of over 37.3 degrees Celsius from entering, requiring all participants to wear surgical facial masks throughout the meeting and keep a distance between one another at all times, and obtaining health declarations from the participants, etc. (In addition to Starlite Holdings Limited, see also Dafy Holdings Limited which convened an EGM to change the name of the company).

How to Avoid/Deal with Irregularities in Company Meetings?

Lastly, companies should ensure that the measures adopted comply with relevant provisions in their articles of association – for example, they should ensure that the articles of association do

not prohibit conducting general meetings by way of electronic or telecommunications facilities, and that requirements of quorum are satisfied even though not all the attending shareholders are physically present in one location.

Having said that, minor irregularities do not necessarily render an EGM void. The Court has consistently held that mere irregularities may be cured by what is called the "irregularity principle" – the lawfulness of a decision taken by a meeting of members or board cannot be questioned if the only fact alleged to make it unlawful is a mere irregularity and the intention of the meeting is clear (See for example **Re Hong Kong Sailing Federation** [2010] 1 HKLRD 801 and **Re Dalny Estates Limited** [2018] 1 HKLRD 409).

Often considered in conjunction with the irregularity principle is the *Duomatic* principle – where the articles of a company require a course to be approved by a group of shareholders at a general meeting or by the board of directors, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval.

Both of these principles may come into play when considering whether certain irregularities render decisions taken at a company or board meeting invalid. For an illustration of the application of these principles see our recent case **WHC Limited trading as Wine High Club & others v Hong Kong Wine Chamber of Commerce Limited & another** [2019] HKCFI 2548, which we discussed in our case commentary. Ultimately, whether an irregularity can be cured turns on the facts of each case and depends on a variety of factors including the nature of the irregularity, the past practice of the company and the conduct of the company's affairs subsequent to the irregularity.

This article was produced by Richard Yip and Tara Liao.

Richard Yip

Richard has a broad civil practice with a focus on shareholder disputes, commercial litigation, financial regulation, competition law and personal injuries. Prior to joining the Bar, he was a corporate finance solicitor at Herbert Smith Freehills. Cases which Richard have dealt with include a number of substantial shareholder disputes, details of which can be found in his biography.

Tara Liao

Tara's practice embraces a wide range of matters including shareholders' disputes, commercial injunctions, arbitration, competition, and regulatory cases. Prior to being called in 2015, Tara worked as a trainee solicitor at Herbert Smith and assistant solicitor at Kennedys. A Peking University law graduate, she also passed the PRC National Judicial Examination. Find out more about Tara's practice.

To find out more information concerning this article or any within our series, please contact our Practice Development Managers, Taylor Goodwin (**tgoodwin@dcc.law**) or Sonia Chan (**soniachan@dcc.law**)

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