



# Lessons from lockdown

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## Conducting AGMs in Hong Kong

Recent world events have forced us to rethink some of the basics of doing business.

This article provides some practical guidance on the options available for conducting AGMs virtually, and covers the following topics:

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Practices that we previously took for granted, such as running an annual general meeting (AGM), have become difficult, or even potential breaches of government health guidelines. However, going forwards, companies can apply the lessons learned during the period of isolation or lockdown to promote greater efficiencies.

This article focusses chiefly on private companies in Hong Kong but listed companies are discussed briefly below.

### When is an AGM required?

A company formed and registered under the Hong Kong Companies Ordinance (Cap. 622) (CO) or its predecessors must hold an AGM in respect of each financial year of the company (section 610, CO).

A company is not required to hold an AGM in certain circumstances:

- where the company only has one member (section 612(2)(a), CO)
- where everything that is required to be done at the meeting is done by a written resolution (section 612(1), CO)
- where the company has dispensed with the holding of AGMs by a written resolution or a resolution at a general meeting passed by all shareholders (section 613, CO), and
- where the company is dormant (section 611, CO).

The section 610 requirement to hold an AGM does not apply to non-Hong Kong companies registered in Hong Kong. Such companies will need to hold AGMs as required by the laws of their jurisdiction of incorporation and their constitutions.

## Written resolutions

In respect of the second bullet point, if the relevant matter or matters will not require discussion at a meeting, for example where such matters are purely routine or there is prior consensus, a company may circulate a written resolution to all members instead (section 548, CO).

The resolution is passed when all shareholders eligible to vote on the resolution have signified their agreement to it (section 556, CO) and it then has the same effect as a resolution passed at a general meeting. The company should take care to provide each shareholder with copies of the documents which would have been required to be produced at the general meeting (section 612(1), CO), and ensure that the written resolutions are signed appropriately on behalf of the shareholder. Care should be taken in particular with corporate shareholders, and where an electronic signature is used.

## Can an AGM be held virtually?

Traditionally, AGMs tended to have been held in a single physical location. This has been particularly difficult during recent mandatory social distancing measures and travel restrictions. In response, some companies have held AGMs in a “hybrid” format, with the meeting taking place in a physical venue assisted by video conference facilities that allow remote participation to varying extents. Going forwards, companies may wish to conduct meetings entirely virtually or in a “hybrid” format (part physical, part virtual – for example with overseas shareholders/board members attending virtually).

In order to do this, the starting point is to check whether the company’s articles of association (Articles), or any other agreements affecting meetings such as a shareholders’ agreement, require the physical presence of shareholders at a general meeting. If the Articles (or other relevant agreement):

- do not require the physical presence of shareholders, then a company can generally hold an AGM at two or more places at the same time using any technology that enables shareholders to listen, speak and vote at the meeting (section 584, CO). This means the AGM can be conducted via telephone or video-conferencing.
- do require the physical presence of shareholders, a physical AGM must be held unless the company removes such a requirement by passing a special resolution to change the relevant Article (section 88(2), CO) or a written resolution to the same effect (section 548, CO) (or shareholders agree a variation of the terms of the relevant agreement in the case of for example a shareholders’ agreement, pursuant to its terms).

## Notice of AGM

Regardless of whether an AGM is held physically or virtually (or a combination), shareholders must be given at least 21 days’ notice (section 571(1), CO) or longer if this is required by the company’s Articles. If a company wishes to hold an AGM sooner, it can do so if all the members entitled to attend and vote at the meeting agree to such shorter notice (section 571(3)(a), CO). Such agreement may be in any form, including written resolutions or consent letters from the shareholders to the board.

In general, an AGM notice should state (section 576, CO):

- the date and time of the meeting
- the place of the meeting (if the meeting is to be held in 2 or more places, the principal place of the meeting and the other place or places of the meeting)
- the general nature of the business to be dealt with at the meeting
- the fact that the meeting is an AGM
- the resolution(s) intended to be moved at the meeting.

For a partly or fully virtual AGM, the “principal place” of the meeting may be stated as the location of the chairman, and the “other places” of the meeting may be stated as the link to the virtual meeting room, since it may not be practicable to know the location from which each shareholder will be accessing the link.

Notice must be given in hard copy form or in electronic form, or by making the notice available on a website. Given ongoing lockdown measures, we expect to see more electronic notices being issued.

### Can people who attend an AGM virtually be counted in the quorum and vote?

Section 584 of the CO makes it clear that voting enabled by technology is permitted. As a result, something as simple as a show of hands via video conferencing or a verbal response during a phone call would be sufficient to count as a vote provided a suitably robust system is put in place. In short, attendance is attendance, provided the company's procedural requirements are met.

Companies should review the provisions of their Articles relating to convening and voting mechanisms for shareholder meetings and consider making amendments if necessary. In this regard, companies may wish to add a provision to their Articles providing that directors may make whatever arrangements they see fit for general meetings to ensure people attending the meeting can exercise their rights to speak or vote (for an example, see Article 38(3) of the Model Articles for private companies available from the Companies Registry's website).

### Guidelines on virtual attendance

Recently, many of us have experienced the difficulties of attending virtual meetings. To facilitate a smooth virtual general meeting, companies should have a policy document or guidelines with FAQs on virtual attendance and circulate this together with the notice of meeting. This could cover issues such as:

- Connection issues: how shareholders can rejoin the meeting if they have lost connection; whether the meeting remains quorate if too many shareholders lose connection; how a shareholder's vote will be affected if they lose connection when a resolution is put to a vote; how they can indicate their presence when the meeting is called to order.
- Counting and recording votes: how votes can be cast (whether by clicking a button, physical show of hands, sending a message on the online meeting platform or an email to a designated email address); what mechanism the company uses to ensure votes are counted and recorded correctly.
- Speaking and muting: when shareholders will be put on mute to facilitate the conduct of the meeting; procedure to follow when a shareholder would like to speak at the meeting (for example, by using the "raise my hand" button); circumstances under which the chairman has power to mute or even eject an attendee (for example, when an attendee is being disruptive).

Care should be taken that such provisions align with the company's Articles and applicable legal requirements. The chairman of the meeting (or his/her adviser) should be familiar with the guidelines as well as the Articles in order to ensure there is consistent application through the meeting and so avoid any later disputes as regards conduct.

### Future planning

There are a number of measures that Hong Kong companies, both listed and unlisted, might consider for the conduct of meetings in the future. For example:

- reviewing and seeking legal advice on its Articles, bye-laws or other applicable shareholder agreements on quorum and voting requirements and considering whether any amendments should be made to accommodate virtual attendance and voting
- providing live webcast or video conference facilities accessible with a smart phone, tablet device or computer connected to the internet, and clearly explain whether shareholders attending the by webcast are allowed to vote and if so, how
- encouraging shareholders to submit their questions to management in writing prior to the meeting and for the company to publish those questions (anonymised) with answers to all members ahead of the meeting

- if current restrictions on movement and travel persist (and in similar possible circumstances in the future):
  - adjourning or postponing general meetings for a reasonable period in accordance with the company's Articles, provided that such action does not contravene the CO, the Listing Rules or other regulatory instrument governing the company or its business or cause the company to miss any filing deadlines under them
  - if holding a physical meeting, implementing precautionary measures at physical meeting venues, such as setting up mandatory body temperature screening, requiring attendees to wear face masks, deferring distribution of complimentary souvenirs, etc.
- for listed companies:
  - encouraging shareholders to vote by proxy or through HKSSCC Nominees Limited by giving instructions to their brokers and custodians in advance, so that they do not have to physically attend the meeting to cast votes, and
  - working closely with share registrars to keep shareholders informed of meeting arrangements and any precautionary measures to be adopted.

## Listed companies

In addition to the general guidance above, companies listed on the Stock Exchange of Hong Kong (SEHK) (whether incorporated in Hong Kong or elsewhere) must take special care to comply with the body of rules and regulations that govern the conduct of AGMs including the CO, applicable statutes in the jurisdiction of incorporation, the Listing Rules, and any additional guidance published by the SEHK, the Securities and Futures Commission (SFC) and the government, from time to time.

At the time of writing, SEHK and SFC guidance has made clear that there are certain exemptions for listed companies from group gathering restrictions to permit all shareholders' meetings held in accordance with the CO or any other regulatory instrument that governs that operation of a listed company or its business. This includes extraordinary/special general meetings required to be held under Chapter 14 of the Main Board Listing Rules (or Chapter 19 of the GEM Listing Rules) for shareholders to vote on certain categories of notifiable transactions, and/or under Chapter 14A of the Main Board Listing Rules (or Chapter 20 of the GEM Listing Rules) for shareholders to vote on certain categories of connected transactions. At the date of publication of this article, restrictions remain in force on food and drink and limiting each room to no more than 50 persons.

## Cyber security concerns and best practice

Finally, but importantly, whilst virtual meetings can help overcome the challenges of holding a physical meeting, the technology that powers them can give rise to other problems. Companies should be alive to the cyber security and privacy risks that are present when using software to conduct any meetings and ensure that staff maintain good "cyber hygiene" out of the office, as they would in it. We will cover the cybersecurity issues relating to virtual meetings in a later edition of "Lessons from Lockdown".

## Conclusion

The use of technology in the conduct of general meetings is a great example of how businesses can utilise 'lessons from lockdown' to run more efficiently in the future. Care should be taken to ensure that any steps taken to hold virtual meetings comply with all existing constitutional documents of the company and applicable laws. Where using technology, enhanced vigilance will be required in respect of cyber risks.

RPC frequently advises its clients on corporate governance issues – please do get in touch with us if you would like to discuss how we can help.

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