

Company Law Guidance Note (Seventh Issue) – Convening general meetings with disputing shareholders

1. Introduction

Few people will want to be caught in a situation where the shareholders are in dispute. When that happens there is need to be careful with the compliance requirements in light of potential scrutiny of the courts. In the context, this guidance note relates to the convening of general meetings by Hong Kong incorporated companies with disputing shareholders¹. There will need to be careful compliance with applicable rules and procedures under the Companies Ordinance (Cap. 622) (CO) which will be summarized under this guidance. The desensitised application to several case studies will also be provided for enhancing the knowledge of governance professionals in dealing with dispute situations.

2. Convening a General Meeting

The governance professional needs to get back to basics of convening meetings when there are disputing shareholders. In this connection, the statutory rules and procedures for convening a general meeting are set out under Part 12 - Division 1, Subdivision 4 of the CO. In many cases, general meeting will be called by different camps of a dispute seeking to oust the other's directors.

2.1 Who may call a general meeting

To recap, general meetings may be called by:

- (1) **Directors.** Under S.565 CO directors may call a general meeting of the company. A notice sent by the company secretary without the authority of the directors is invalid albeit this may subsequently be ratified by the board of directors before the

¹ The term "shareholder(s)" is being used interchangeably with "member(s)" in this guidance note and has the meaning ascribed to it under the CO

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meeting is held. The governance professional should be mindful to have proper authorisation from the board before sending out a notice to call a general meeting. This can be easier said than done, as in certain cases, whether there is an effective board will be called into question. The governance professional will need to obtain proper legal advice, and may in the worst-case scenario consider to resign as company secretary of the disputing company where there is a stalemate in the running of the company concerned.

- (2) **Members.** Under S.566 CO members representing at least 5% of the total voting rights may call general meetings by way of a request to the company. The general nature of the business to be dealt with and, where appropriate, the text of the resolution to be moved at the meeting could be provided. The governance professional should be mindful of this right which could be used by disputing shareholders and ensure that there is proper compliance with the CO requirements discussed under 2.2 and 2.3 below.

2.2 Directors' duty on members' request to call a general meeting

The governance professional will specifically need to advise the directors that under S.567 CO if the directors receive a request under S.566 CO from a member to call a general meeting:

- (1) The directors must convene the general meeting within 21 days after the request is received, and
- (2) The general meeting must be held on a date not more than 28 days after the date of the notice convening the general meeting.

The directors are obliged to call a general meeting except where the proposed resolutions are ineffective or the object of a requisition to call a meeting could not be legally carried into effect. The governance professional should therefore advise the directors to

properly scrutinize the proposed resolutions in case of a dispute situation.

2.3 Members' rights to convene a general meeting consequent on directors' failure

The governance professional may also, depending on the circumstances, need to advise the directors of the following matters.

- (1) **Directors' failure to convene a general meeting.**

S.568 CO provides that if the directors do not convene the general meeting as required under S.567 CO:

- a. the members who requested the general meeting, or any of them representing more than 50% of the total voting rights of them (effectively at least 2.5% of the total voting rights of all members), may themselves call a general meeting, and
- b. the general meeting must be called for a date not more than 3 months after the date on which the directors become subject to the requirement to call a meeting.

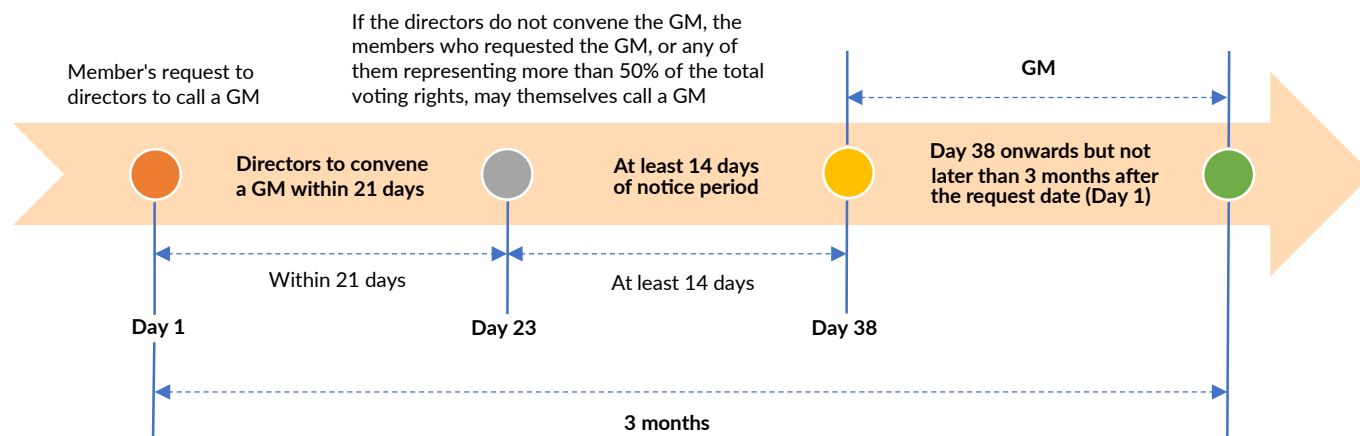
- (2) **Insufficient directors to act.** S.569 CO provides that subject to the articles of the company, if at any time a company does not have any director or does not have sufficient directors capable of acting to form a quorum, any director, or any two or more members of the company representing at least 10% of the total voting rights of all members having a right to vote at general meetings, may call a general meeting in the same manner, as nearly as possible, as that in which general meetings may be called by the directors of the company.

The governance professional should understand that the members' right is considered "a ministerial right passed on them as quasi officials of the company, to act in convening a meeting in place of the directors."² Accordingly, if the directors failed to convene the

general meeting when requisitioned but subsequently decided to convene the general meeting, an application by the members requisitioning the convening of the general meeting to restrain the directors from calling the meeting was invalid.³ Further, the board of directors may postpone the meeting convened by the

members although the postponement cannot exceed the statutory 3-month period from the date of the member's first request to convene a general meeting.

The following illustrates the matters set out under 2.2 and 2.3 above:



Notes:

- reference to GM in the above timeline means a general meeting
- days means calendar days
- the timeline is prepared based on the assumption that the company adopted the model articles prescribed under the Companies Ordinance which provides that the notice period for a general meeting is 14 days.

In practice, this means that if the directors fail to convene a general meeting upon members' requisition, and the members forthwith proceed to convene a general meeting, the proposed resolution may be validly passed at a general meeting held at least 38 days from the date of the member's request, up to a maximum of 3 months.

2.4 Power of Court to order meeting

The governance professional is reminded that the Court may, either of its motion or on application by a director or a member of the company, order a

general meeting to be held under S.570 CO where it is impracticable:

- (1) To call a general meeting in any manner in which general meetings of that company may be called, or
- (2) To conduct the meeting in the manner prescribed by the company's articles or the CO.

The Court's powers may include any directions that it thinks expedient and may include a direction that one member of the company present at the meeting in person or by proxy is to be regarded as constituting a quorum.

An application under S.570 CO may be brought by a member or a director of the company, which includes a legal representative of a deceased member as well as an applicant for pending letters of administration of a deceased member.

In some recent cases, the court applied a two-stage test towards an application made under S.570 CO:

- (1) an applicant must show that it is impracticable for a meeting to be called, and
- (2) if it is established that it is impracticable to call a meeting, the Court then has the discretion, after taking into all circumstances, whether to order a meeting.

The governance professional should note that the Court is generally reluctant to interfere in a company's decision making-process unless, in the circumstances, it is impracticable to call a meeting. In *Re Universal Horizon Investment Ltd (2001)*⁴, the Court of Appeal ordered a meeting as the company was in a frozen state and cannot operate properly because of its failure to hold a meeting or the failure of its directors to call a meeting.

3. Notice of a General Meeting

The governance professional should consider the rules regarding notice of meetings as these would be relevant in a dispute situation. These are provided under Part 12 - Division 1, Subdivision 5 of the CO.

3.1 Period of Notice

S.571 CO lays down the general provisions as to the length of notice to members required. A general meeting (other than an adjourned meeting) must be called by:

- (1) For limited companies, 21 days' notice for an annual general meeting and 14 days for all other meetings, and
- (2) For unlimited companies, 7 days' notice.

If the company's articles require a longer period of notice than that prescribed under S.571 CO, then such a longer period must be complied with. A shorter notice period than that prescribed under S.571 CO or the articles is void unless it is so agreed by at least

95% of representing members who are entitled to vote at the meeting, except for an annual general meeting, where the agreement of all members is required.

The required number of days' notice is in respect of calendar days and must be clear days, exclusive of the day of service and the day on which the meeting is to be held. It should also be noted that as a general rule of law, in computing the time of notice, fractions of a day are not reckoned.⁵

In the case of a listed company, the company must give its members reasonable written notice of its general meetings, which is 21 days for an annual general meeting and at least 14 days for other general meetings, unless it can be demonstrated that reasonable written notice can be given in less time.

3.2 Service of notice

S. 573 CO provides that notice of a general meeting may be given by either of the following means or partly by one and partly by another:

- (1) In hard copy or electronic form, or
- (2) By making the notice available on a website.

Where notice of a general meeting is being published on the website, the company must notify a member of the availability of the notice under S.572(2) CO and the notice must be available on the website throughout the period from the date of the notification to the conclusion of the meeting.

In the case of a listed company, the company must ensure that notice of a general meeting is published in accordance with the listing rules and a circular is dispatched to its shareholders at the same time as the notice is given. Further, the company shall provide its shareholders with any material information on the subject matter to be considered at the general meeting not less than 10 business days, for which a recognized

4 Re Universal Horizon Investment Ltd (CACV 99/2000, [2001] HKEC 437)

5 Re Railway Sleepers Supply Co (1885) 29 Ch D 204

stock market is open for the business of dealing in securities, before the date of the general meeting.

Under Part 18 of the CO, which provides the means of communications that may be used by a company, there are various means by which the notice of a general meeting may be served. In general, it is sufficient that the notice is sent by post to a member to the registered address or such other address provided by the member.

While the company may choose any mode of service as permitted under its articles and the CO, the company must act in good faith and should not deliberately choose a mode such that the notice would not reach the member. Where there are disputing shareholders, it is prudent for the governance professional to consider sending the notice to members simultaneously by email and by post.

3.3 Persons entitled to receive notice of a general meeting

As a reminder to the governance professional, S.574(1) CO provides that notice of a general meeting must be given to:

- (1) Every member of the company, and
- (2) Every director

The notice of a general meeting is required to be given only to every member who is entitled to attend and vote at the meeting except in the case of a listed company, such notice must also be given to every member not entitled to vote at the meeting.

S.575 CO provides that if notice of a general meeting of a company or any other document relating to the general meeting is required to be given to a member, the company must give a copy of it to its auditor (or each of the auditors if there is more than one) at the same time as the notice and/or such documents are given to a member.

4. Special Notice

The governance professional is reminded that under S.578 CO, if special notice is required to be given of a resolution, the resolution is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved, and the company shall give notice of such resolution to members at the same time and in the same manner as it gives notice of the meeting, at least 14 days before the meeting.

A special notice is required to be given for a proposed resolution for:

- (1) Appointing an auditor (as provided under S.400 CO), or removing an auditor before the expiration of the term of office (as provided under S.419 CO), and
- (2) Removal of a director or to appoint somebody in place of a director so removed at the meeting at which the director is removed (as provided under S.462 CO)

A distinction should be drawn between a special notice which should be given to the company by a member whereas notice of a general meeting should be given by the company to its members.

S.578(4) CO further provides that if, after notice of the intention to move the resolution has been given to the company, a meeting is called for a date 28 days or less after the notice has been given, the notice is to be regarded as having been properly given, though not given within the time required.

5. Case Studies

For the benefit of the governance professional, this guidance note turns to a number of case studies summarized from actual cases. They all relate to a disputing member's requisition to propose the passing of a resolution to remove a director. In each of the following cases, it is assumed that the company in

question is a private company and adopted the model articles prescribed under the Companies Ordinance and contains the following provisions in its articles, namely:

- (1) Directors' meeting:
 - a. Notice: no prescribed notice period
 - b. quorum: 2
- (2) Members' meeting:
 - a. notice: 14 days for general meetings
 - b. quorum: 2 (save for where there is only one member, the quorum is one)

It is also assumed that the full 28-day special notice period is complied with notwithstanding S.578(4) CO.

5.1 Case 1 - Where a general meeting could not be convened because of a lack of quorum at the directors' meeting purporting to convene the general meeting

The company in question has the following structure:

Member(s)	<ul style="list-style-type: none"> • ABC Ltd – 100%
Directors	<ul style="list-style-type: none"> • Mr D • Mr E

ABC Ltd, as the sole member, proposed to pass a resolution to remove Mr E as a director.

The procedures adopted to pass the resolution to remove the director:

- (1) On Day 1, ABC Ltd served notice to the company proposing to remove Mr E.
- (2) A directors' meeting was not held as Mr E would not attend the directors' meeting to convene a general meeting.
- (3) On the lapse of 21 days, i.e., on Day 23, ABC Ltd requested for a general meeting to be convened by giving 14 days' notice, i.e., the general meeting would be held on Day 38.

- (4) The general meeting was held on Day 38 and the resolution to remove Mr E duly passed.

Under this scenario, the resolution to remove the director can be passed after 38 days from the date of the member's requisition to pass the proposed resolution. As the company has a sole member, it is possible to expedite the process to appoint an additional director to quorate the board to hold a meeting and pass a resolution to convene the general meeting.

5.2 Case 2 - where a general meeting is convened by the directors but the general meeting held has to be adjourned for the lack of a quorum at the general meeting

The company in question has the following structure:

Member(s)	<ul style="list-style-type: none"> • ABC Ltd – 60% • XYZ Ltd – 40%
Directors	<ul style="list-style-type: none"> • Mr D1 – director nominated by ABC Ltd • Mr D2 – director nominated by ABC Ltd • Mr E – director nominated by XYZ Ltd

ABC Ltd proposed to pass a resolution to remove Mr E as a director.

The procedures adopted to pass the resolution to remove the director:

- (1) On Day 1, ABC Ltd served a notice to the Company proposing to remove Mr E.
- (2) As there is no prescribed notice period, a directors' meeting was held on Day 1 (with Mr D1 and Mr D2 present and Mr E absent). The directors' meeting was duly constituted in the presence of Mr D1 and Mr D2 and the resolution to convene a general meeting was duly passed.
- (3) The notice of the general meeting was issued on

Day 1 and the general meeting was held on Day 30. XYZ Ltd did not send a representative to attend the general meeting.

- (4) According to Article 42 of the model articles as adopted by the company, the general meeting, which was convened by the directors, was adjourned to the same day in the next week, i.e. on Day 37 and the resolution to remove Mr E was duly passed.

Under this scenario, the resolution to remove the director can be passed after 37 days from the date of the member's requisition to pass the proposed resolution.

5.3 Case 3 - where a general meeting is convened by the directors but the general meeting held was not duly constituted for the lack of a quorum and has to be dissolved

The company in question has the following structure:

Member(s)	<ul style="list-style-type: none">• ABC Ltd – 60%• XYZ Ltd – 40%
Directors	<ul style="list-style-type: none">• Mr D – director nominated by ABC Ltd• Mr E – director nominated by XYZ Ltd

ABC Ltd proposed to pass a resolution to remove Mr E as a director.

The procedures adopted to pass the resolution to remove the director:

- (1) On 1 Sep, ABC Ltd served a notice to the Company proposing to remove Mr E.

- (2) A directors' meeting was not held and Mr E did not attend the directors' meeting.

- (3) On the lapse of 21 days, i.e., on Day 23, ABC Ltd requested for a general meeting to be convened on Day 38.

- (4) The general meeting was held on Day 38 but XYZ Ltd did not send a representative to attend the meeting.

- (5) According to Article 42 of the model articles as adopted by the company, the general meeting, which was called on the member's request, dissolved and the resolution to remove Mr E could not be passed.

Under this scenario, since the resolution to remove the director could not be passed, the shareholder proposing to pass the resolution may make an application to the court which has discretion under S.570 CO to order the holding of a general meeting.

6. Conclusion

The governance professional will know that handling a dispute situation is not an easy task. When convening a general meeting, apart from observing the statutory rules and procedures as laid down under the CO, reference should also be made to particular provisions under the company's articles and other relevant documents, such as the shareholders' agreement and service contract where removal of directors is concerned. The disputing parties should also consider other alternative solutions, for example, negotiation, mediation or buyout, which may be a simpler and less costly process where the disputes cannot be resolved at the general meeting and where it is necessary to bring an action to the court.