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9. Shareholders' rights and corporate meetings post COVID-19

Christopher Chen²⁵⁷

Introduction

This short paper reflects on corporate governance and shareholders' rights during and following the COVID-19 pandemic. The lockdown has affected the way companies' organs operate. It is unfortunate that the pandemic took place around the critical time of year when most companies hold annual shareholders' meetings (or general meetings). How, then, can shareholders exercise their rights? How can the board of directors and senior management function during the lockdown period? Technology naturally provides a solution, similar to online teaching and working from home. However, do virtual and remote meetings serve the purpose of having those meetings? Even when we get over the pandemic, what will the 'new normal' be in the future for corporate meetings? This paper seeks to explore some of these issues by using some examples from the Asian market. In the remainder of the paper, we first illustrate the traditional model of corporate decision-making by way of board and general meetings. We consider the costs of holding physical meetings and their benefits. We then briefly examine the feasibility of using electronic meetings on a normal day, and how the pandemic may shape the future use of electronic corporate meetings. We then offer some reflections for policymakers to consider.

Traditional model of corporate decision-making

In most (if not all) countries, the power of a company (as a legal person) to make a decision depends on the company's organs. For certain major decisions, company law in a given country might assign the decision-making power to shareholders. In contrast, for daily management decisions, the power may lie with the board of directors or can be delegated to senior management. How the decision-making power is allocated varies from country to country. It also depends on a company's constitution (or charter).

How can shareholders and the board of directors make decisions? The traditional model is to have physical meetings: shareholders' meetings (by shareholders, who are considered a company's owners) and board meetings (by the board of directors of a company). During those meetings, shareholders or the director can pass resolutions, forming the will of a company.

There are associated costs and benefits to calling shareholders' meetings. First, it may be relatively easy if a company has only a handful of shareholders. But modern large corporations can have

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many shareholders. For example, the 2018–19 annual report of Singapore Telecommunication Ltd (SingTel) shows that the company had a total of 328,719 shareholders at the time of the report.²⁵⁸ The number of shareholders warrants that shareholders' meetings are not suitable for more daily and timely decisions. One might also wonder how likely it is to find a place to host a meeting that can accommodate so many shareholders (though, in practice, the chance of having more than a few hundred shareholders attending is low). The greater the number of shareholders, the more it costs to convene a shareholders' meeting (e.g. the costs to send notices or hire a venue). However, since the shareholders are a company's owners (and the residual claimants), the trade-off is to assign shareholders' meetings for more important decisions (e.g. changing the corporate constitution, or electing directors, etc.).

Regarding the board of directors, unless the board comprises of only one person, the board also has to convene to make decisions. However, corporate law is often more flexible with regard to board meetings. Under the Anglo-American model of corporate law, how a board meeting should be convened largely depends on a company's constitution. In contrast, there are usually more formal or procedural requirements for shareholders' meetings (e.g. a minimum prior notice period, as seen in Singapore's *Companies Act* s 184).

There could be some additional costs for physical shareholders' meetings. First, in some markets, companies have to compete for a few days (and for the availability of suitable venues on those dates) during spring and early summer because those few days are considered good and fortunate days. While it may sound superstitious, it is common practice in some places (e.g. Taiwan). Hence, there could be costs when competing for suitable venues. Second, especially in countries with some quorum requirements for general meetings (e.g. Taiwan), it is essential to entice shareholders either to attend meetings or to appoint proxies to attend meetings. This is perhaps less of a problem in markets dominated by institutional shareholders. However, it may be a challenging task at times in many East Asian markets (e.g. China, Taiwan and Hong Kong) where individual investors contribute to a significant proportion of trading activities. Otherwise, a meeting (and resolutions passed in the meeting) may be invalid or vacated by the courts, depending on applicable laws in the market. This also in turn would affect the choice of venue. To incentivise shareholders, companies sometimes have to provide some incentives. In some markets, companies might offer good food in the meeting venue (e.g. Singapore). In some markets, it is common for companies to offer some gifts in return for attendance or proxy appointment (e.g. Taiwan). These contribute to the costs.

²⁵⁸ Singapore Telecommunication Ltd Annual Report 2019 (27 May 2019) <https://cdn.aws.singtel.com/annualreport/2019/files/Shareholder_Information.pdf>.

Despite the costs of holding a physical meeting, there are tangible benefits. In a face-to-face setting, discontented shareholders may provide different opinions in the meeting. Verbal challenges in a physical meeting may provide some restraints on the company's management (who usually hope the meeting will end as soon as possible without drama). Whenever the media or reporters are in the meeting, a challenge by a discontented shareholder may provide some news coverage that the management does not want. In one extraordinary incident in Taiwan in 2013, the chairwoman of HTC (then still a mobile phone manufacturer) personally promised to give every individual shareholder who was present at the general meeting a new high-end Android mobile phone produced by HTC after facing heavy criticism during the meeting for the company's lacklustre share-price performance.²⁵⁹ A couple of hundred individual shareholders were lucky winners of a top-end new phone on the day.

In contrast with shareholders' meetings, board meetings illustrate a completely different picture. On the one hand, there are usually not too many directors: a company rarely has more than 20 directors on the board. Depending on market practices, an average size of 10–15 directors is probably quite normal in the Far East. On the other hand, a primary responsibility of the directors is to participate in board meetings. It is part of their job. Hence, cost-wise, a company only needs to find a large-enough internal boardroom or meeting room to host a meeting. There is also no need to provide incentives to entice people to attend meetings. Unless board members are scattered around the world, the costs to hold and attend board meetings should generally be low. Therefore, physical meetings should not be a huge problem.

Electronic corporate meetings

Before the pandemic of 2020

Even before the pandemic, there were already plenty of tools for holding remote and electronic meetings. It is a matter of choice whether a company can and wants to use electronic meetings. But it may not be a technological problem.

Meeting via video-conferencing software has perhaps been more popularly used for board meetings. For example, Taiwan allows directors to attend a board meeting via video-conferencing software and it is deemed as if the director is present at the physical meeting.²⁶⁰ Taiwanese law also allows a board meeting to be conducted entirely via video-conferencing (though the video and

²⁵⁹ Wang Yi-Hong, (*The Liberty Times*, 21 June 2013) <<https://ec.ltn.com.tw/article/breakingnews/825812>>.

²⁶⁰ *Regulations Governing Procedure for Board of Directors Meetings of Public Companies*, Article 9 (as amended Jan. 15, 2020) <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400127>>.

recordings have to be kept permanently).²⁶¹ In Singapore, the law does not prescribe that board meetings have to be conducted physically, and it is generally left to companies' constitutions to decide. In a litigation, it has happened that a board meeting was conducted via a tele-conference.²⁶² Therefore, calling an electronic board meeting is probably legally allowed in many countries. It may also suit multinational companies where the board of directors might be in different parts of the world. However, it is one thing that an electronic board meeting is possible; it is harder to predict how many companies actively adopt electronic board meetings as common practice.

In contrast to board meetings, it was perhaps far less common to hold a general meeting via tele- or video-conferencing methods before the COVID-19 pandemic. There were some genuine concerns about electronic general meetings. Sometimes, the challenge comes from the law. In Taiwan, for example, public companies are not allowed by law to hold a video-conference general meeting.²⁶³ Leaving legal restrictions aside, an electronic general meeting could face technical issues. For example, how can a company calculate a quorum? The task becomes more challenging if the quorum has to be decided not only at the outset of a meeting but also at the time when a resolution is required. In this situation, should attendance be counted based on the log-in record in a meeting? However, if only log-in records are used, it may happen that a shareholder is counted but that he or she is either not in front of the screen or is not paying attention at all (as has happened with many virtual classes or seminars).

Moreover, even if we can solve the quorum problem, how shareholders vote also presents a significant challenge. Unlike a board meeting, where manually counting votes does not cause a problem (due to smaller size), it is probably unthinkable to count votes from several hundred participants (if there are that many shareholders attending) if a general meeting is conducted electronically. Is it possible to conduct a real-time vote that a company can do in a physical meeting (whether by a show of hands, voting by ballot or with a device)? In theory a company might use some online polling tools to allow shareholders to vote remotely. However, doing so might invite other legal and technical issues for companies to overcome. For example, how can a company ascertain that it is a shareholder that actually votes remotely and electronically (rather than somebody else who happens to be in front of the screen)? There could also be technical issues, such as the stability of the internet connection, cyber security, etc.

²⁶¹ *Regulations Governing Procedure for Board of Directors Meetings of Public Companies*, Article 18 (as amended Jan. 15, 2020) <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0400127>>.

²⁶² *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940.

²⁶³ Taiwan Company Act, Article 172-2 (promulgated Dec. 26, 1929, effective Jul. 1, 1931, as amended Aug. 1, 2018) <<https://gcis.nat.gov.tw/elaw/English/lawEnDtlAction.do?method=viewLaw&pk=163>>.

These issues may well be resolved with better technology. However, it is questionable whether it is worth the money and efforts to do so. This might explain the relative lack of interest in holding electronic shareholders' meetings before the COVID-19 pandemic.

During the COVID-19 pandemic

The COVID-19 pandemic has provided an impetus to adopt electronic meetings during some forms of lockdown and social distancing requirements. Even in countries without a large-scale lockdown (e.g. Taiwan), it is generally not advisable (or in some cases even prohibited) to have mass gatherings of hundreds of shareholders. Thus, companies have either had to delay general meetings (and deal with the potential consequences) or find other ways to convene shareholders' meetings.

The urgency to have electronic shareholders' meetings certainly varies country by country depending on how bad the pandemic has affected a society. In Taiwan, for example, there was no enforced lockdown of society except for some restrictions (e.g. no gatherings of over 100 people or wearing face masks on public transport). Life has otherwise been pretty normal. Technically, companies can still hold general meetings. However, the Financial Supervisory Commission, the financial regulator, advised companies to comply with social distancing rules (e.g. a minimum of 1 metre apart and no adjacent seating) and has issued guidelines regarding some logistic requirements for a shareholders' meeting (e.g. temperature-checking, improving queuing systems to avoid over-crowding, etc.).²⁶⁴ In addition, since over 95% of companies have fewer than 100 shareholders attending a shareholders' meeting, pursuant to data from the Taiwan Depository & Clearing Corporation,²⁶⁵ there has not been much of a problem with complying with restrictions regarding gatherings of more than 100 people. The regulator also encouraged shareholders to vote via electronic means (with an electronic device issued in the meeting) during the meeting, rather than casting a vote on a ballot (in order to reduce contact).

In contrast, in Singapore the circuit-breaker mechanism between April and early June has meant that companies could not physically hold a shareholders' meeting as planned. Based on the *COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020* ('the Order'), issued by the Ministry of Law on 27 March 2020, Singapore has allowed companies to have alternative arrangements for general meetings (despite requirement by company law). The Order provides much legal certainties and protection in relation to general meetings. The

²⁶⁴ Financial Supervisory Commission R.O.C (Taiwan), (9 April 2020) <https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=202004090002&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&dtable=News>.

²⁶⁵ *ibid.*

alternative arrangements mean that companies can hold shareholders' meetings in whole or in part by electronic means.²⁶⁶ The list of general meeting schedules (before 12 June 2020) published on the Singapore Exchange website showed that the meetings held in June continued to be held by electronic means, though with some relaxation from the circuit-breaker.

To address any problems with quorum, the Order clarifies that attendance is counted if a shareholder attends a meeting by observing and listening to the process of the meeting electronically.²⁶⁷ To resolve the difficulty of voting, a shrewd solution is to allow shareholders (who really want to vote) to appoint the chairman of the meeting to be their proxy (better still with specific instructions on how to vote for resolutions).²⁶⁸ The shareholder has to deliver the proxy form by email to a designated email address stated in the general meeting notice. This arrangement temporarily addresses the apparent difficulties regarding voting (no matter by raise of hands or by a poll) via video-conferencing software.

Last, it is worth noting that the pandemic has presented fewer challenges to board meetings. While the board most likely cannot meet physically if there is lockdown in a country, it was shown before the pandemic that electronic meetings with a smaller group presented less problems.

Post COVID-19: will electronic meetings be the new normal?

Following the COVID-19 pandemic, will electronic meetings become the new normal? Much may depend on how the pandemic has developed over time and people's mindfulness and awareness of future pandemics or significant public-health events. At least, the pandemic has shown that electronic shareholders' meetings are not impossible, as they may have sounded before 2020. Singapore has shown that electronic general meetings can be conducted, with some technical issues being sorted out (e.g. quorum and voting) within the existing corporate law framework (e.g. the use of proxy). However, it is one thing to address a problem temporarily; a further question is whether electronic meetings provide a viable option for companies in the future, alongside physical meetings.

This paper argues that virtual and electronic meetings may become more common at the board level. Since the board meets regularly only a few times a year (in addition to meetings for board committees), and the size of the board involves no more than 20 people in most cases, it is not too costly to arrange electronic meetings where necessary. In a smaller group, perhaps the quality of

²⁶⁶ COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020 ("the Order") (No S 269/2020), First Schedule, first column, item 1.

²⁶⁷ The Order (n 266), first column, items 2 and 5.

²⁶⁸ The Order (n 266), first column, item 6.

discussion need not be compromised due to the remote nature of electronic means, as long as the company can still provide sufficient information to board members in a timely and comprehensive manner.

Moreover, the availability of electronic board meetings might reduce the need for long-distance travel by some board members in some multinational companies. On the one hand, this might save the company some costs if the travel expenses are incurred by the company. On the other hand, it might also help to attract international talent if physical presence is not necessarily required. This paper does not suggest that electronic board meetings can perfectly replace traditional board meetings in a room. There is still value in meeting other people in person. Some directors might have to be local to provide some physical monitoring. What we suggest is that, in a relatively small group of people, electronic meetings might be more efficient at times.

In contrast, for shareholders' meetings, it is harder to predict whether electronic general meetings will become the norm (in countries where the law allows) after the pandemic. Similar to board meetings, holding an electronic general meeting of a company with a few shareholders should not cause much disruption. In some countries (e.g. Singapore), private companies can already waive the requirement of general meetings and can pass a resolution by written means. Hence, electronic general meetings shall not cause a problem for those small and private companies. The real question is for larger ones. The discussion below will proceed on the basis that a company is a large company with thousands of shareholders.

On the bright side, it could be cheaper to hold an electronic general meeting, saving costs on hiring a venue, personnel and attendance, though it might cost money to purchase suitable software and to have cyber security checks in place. However, there could be obvious downsides to the effectiveness of shareholders' meetings when they are conducted online. First, shareholders may lose the essential ability to speak up in front of corporate management. In an electronic meeting, shareholders can mostly listen to the proceedings of the shareholders' meeting. There could also be security or personal data concerns (e.g. sharing shareholders' data via the meeting, or non-shareholders hacking into a meeting and voting). From a company's angle, video-conferencing all but guarantees that there might be video recordings of the proceedings of the general meeting floating on the internet.

Second, it remains questionable as to how shareholders can vote in an electronic general meeting. Ideally, shareholders may be able to remotely vote in real-time for a resolution. But this depends on the availability (and costs) of technological solutions to verify a shareholder, to ensure security and confidentiality as well as accuracy. Singapore provided a fairly smart solution by asking shareholders to vote early with proxies. However, this means shareholders have to make decisions

on paper before the meeting is even convened (so as to allow them to dispatch the proxy form). The solution might suit some shareholders who would never attend anyway, but it may not be suitable for those who want to take the time to attend a meeting before deciding on their votes. In addition, an electronic general meeting in combination with early voting by proxies might make shareholders' meetings more of a formality rather than being a forum for shareholders to meet and make decisions. There will be no need to convene a meeting if all resolutions can be voted for remotely by mail or by proxy.

It is not that shareholders' meetings always have a lot of noise from shareholders. Many shareholders' meetings are adjourned fairly quickly. Even for companies with millions of shareholders, the meeting can be fairly quiet and can be attended by no more than a couple of hundred shareholders. Hence, participation does not necessarily present a problem in practice for most firms. However, from a policymaker's angle, the law should design rules to maximise the benefits of shareholders' meetings rather than prescribing rules that may compromise their function. Policymakers have to consider whether this is what the law wants general meetings to be in the future.

In countries where corporate law is generally more flexible (e.g. Singapore), the decision to normalise electronic general meetings could be decided by a company's constitution. Even if there is no difficulty or urgency to have electronic meetings, companies might still consider putting some provision into the constitution in order to meet future contingencies. COVID-19 took place 17 years after SARS and only a few years after MERS in some Asian jurisdictions. It may only be a matter of time before another pandemic or significant event disrupts the market and economy. Thus, having some contingency plans might be a good idea.

However, in countries where corporate law is more command-and-control in style (e.g. Taiwan), it is arguable that policymakers should deal with the prospect of electronic general meetings in the future as a matter of law. It may be too late if lawmakers only consider changing the law when a pandemic has overshadowed a country. This paper generally argues that a simple prohibition of electronic meetings (even if only for larger corporations) should not be the best option. When facing potential uncertainties (e.g. a second or third wave of infections), a legal regime should not be purely based on luck and probabilities. In the worst-case scenario, there is little doubt that holding electronic meetings is the only viable alternative to having no meeting at all for an unknown period. Thus, this paper argues that corporate law should generally be more accommodating to the use of electronic corporate meetings.

What this paper proposes is that corporate law should be more flexible in letting companies choose ways to meet and for them to have contingency plans for corporate decision-making. For board

meetings, we argue that the law should give the company full liberty to choose the methods and venue of the meetings. For shareholders' meetings, this paper suggests that there are merits of having a physical meeting, but electronic general meetings should be recognised and allowed at least as a contingency plan. It might also open the door to a more hybrid type of meeting, combining physical and virtual attendance (as Hong Kong law so allows). We accept that general meetings of companies with thousands of shareholders have already lost their practical sense of a 'meeting' of shareholders when the meeting is largely attended only by a small percentage of them. Nevertheless, we argue that shareholders' meetings still have some symbolic values. It is not just because the law requires shareholders to make important decisions. Without general meetings, shareholders (especially minority ones) may not be able to exercise their rights and play their roles in corporate governance effectively. If electronic shareholders' meetings should be allowed (even as a back-up plan), regulators should consider further how to improve shareholders' participation and exercise of voting power more effectively and meaningfully in a virtual meeting.