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INSIDE THIS EDITION	Page
Practical considerations for holding virtual and hybrid shareholders' meetings of Hong Kong companies *George Tong & Ada Luk*	**2-4**
Use of After The Event insurance as security for costs *Eddy So & Jody Luk*	**5-6**
First cartel settlement decision in Hong Kong with lessons learnt in competition investigations and litigations *Steven Yip & Holly Lau*	**7-8**

Welcome to our latest bulletin featuring various legal and market updates

- Practical considerations for holding virtual and hybrid shareholders' meetings of Hong Kong companies;
- Use of After The Event insurance as security for costs; and
- First cartel settlement decision in Hong Kong with lessons learnt in competition investigations and litigations.

We hope that you find this edition informative and we welcome your comments and suggestions for future topics.

If you have any questions regarding matters in this publication, please refer to the contact details of the contributing authors.

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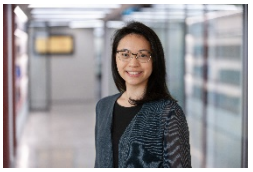

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Practical considerations for holding virtual and hybrid shareholders' meetings of Hong Kong companies

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Whether a shareholders' meeting of a Hong Kong company can be held as a hybrid meeting (that is, a meeting which allows electronic participation in addition to the 'in-person' physical meeting) or virtually (that is, a meeting held purely electronically with no physical element) has been a recent topic of interest. Given the outbreak of COVID-19 and restrictions on group gatherings, companies are starting to appreciate the importance of having the flexibility to hold electronic meetings. However, even without COVID-19, there may be other events which may disrupt physical meetings, such as bad weather, social movements, or simply because shareholders are located in different geographical locations.

Given modern technological advances in today's society, Hong Kong companies should consider updating their articles of association in order to put in place mechanisms for the use of technology and electronic means of communication efficiently in dealing with their corporate affairs.

We set out below some of the key legal issues with regards to holding a virtual or hybrid shareholders' meeting by a Hong Kong company.

What is the 'place' of a virtual meeting or hybrid meeting?

Traditionally, a shareholders' meeting is held at a physical place. However, given the range of electronic communication tools available nowadays, such as telephone conferencing, web conferencing and other electronic platforms with audio-visual functions, the use of technology to hold shareholders' meetings is likely to become increasingly common.

Under section 584 of the Companies Ordinance (Cap. 622) ('**Companies Ordinance**'), subject to the company's articles, a company may hold a general meeting at two or more places using any technology that enables shareholders who are not together at the same place to listen, speak and vote at the meeting. This is consistent with common law principles that a "meeting" concerns a "*meeting of the minds*", and does not necessarily require physical presence of all participants in the same physical space. It is possible to hold a general meeting in different venues as long as there is adequate technology arranged to enable shareholders in all venues to see and hear what is going on in the other venues (*Byng v London Life Association Ltd. and Another* [1990] Ch 170).

Further, section 584 of the Companies Ordinance suggests that, as long as the shareholders are able to "*listen, speak and vote*" at the meeting, the visual element of the meeting may not be necessary.

In any event, it is always important to check whether the company's articles allow a shareholders' meeting to be held at two or more than two places through the use of technology. If it does not, then the meeting would still be required to be held at a physical place, unless the articles are amended. If it does, then the company can take the benefit of a hybrid meeting as contemplated under its articles and section 584 of the Companies Ordinance.

Further, under section 576 of the Companies Ordinance, subject to the company's articles, a notice of meeting must specify the place of the meeting (and if the meeting is to be held in two or more places, the principal place of the meeting and the other place or places of the meeting). In the context of a hybrid meeting, the "*principal place*" of the meeting may be stated as where the chairperson of the meeting is located, and the "*other place or places*" of the meeting may be stated each other physical location that offer online participation. The notice should also specify the electronic platform that will be used for the meeting and information about the login and other participation details.

The validity of a Hong Kong company holding a general meeting entirely in a virtual space (without any physical meeting place) is less certain. This is because the legislative requirement of holding a general meeting at two or more places contemplates that such meeting will be at physical places. The uncertainty is further exemplified by the difficulty of a virtual general meeting in satisfying a statutory requirement with respect to the content of a meeting notice, that such notice must specify the place of the meeting.

Can a notice of a general meeting be delivered electronically?

Yes, under section 572(1)(a) of the Companies Ordinance, a notice of a general meeting (which generally specifies the date, time and place of the meeting, the general nature of business to be dealt with at the meeting, and the resolutions intended to be moved at the meeting) must be given in hard copy form or in electronic form.

However, under sections 831 and 837 of the Companies Ordinance, communications in electronic form can only be made by a company to a recipient with that recipient's consent. This is also in line with the requirements under sections 5A and 15 of the Electronic Transactions Ordinance (Cap. 553), where the service of a document to a recipient may be in electronic form if the recipient consents to this method of communication. A recipient must also be given the right to revoke his consent to electronic communication, in which case the company must then provide the notice of meeting in hard copy form to that recipient.

The quorum requirement

Quorum must be met for all shareholders' meetings, regardless of whether the meeting is held physically or as a hybrid meeting.

Under section 585 of the Companies Ordinance, subject to the company's articles, two members present in person or by proxy is a quorum of a general meeting. That being said, the company's articles would usually further stipulate the requisite number of shareholders to constitute a quorum.

The Companies Ordinance does not define the meaning of *'presence'* or *'attendance'* at a meeting. However, if we make reference to the Model Articles for Private Companies Limited by Shares as set out in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) ('**Model Articles**'), Article 38 states that two or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have the rights to speak and vote at the meeting, they are able to exercise them. A person is able to exercise the right to speak at a general meeting when the person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions that the person has on the business of the meeting. Section 584 of the Companies Ordinance also contemplates a general meeting that enables the shareholders of the company at different places to listen, speak and vote of the meeting. As such, as long as the requisite number of shareholders are able to listen to and exercise their right to speak and vote throughout the hybrid meeting, a quorum will have been maintained.

As a matter of good practice, the chairperson should also ensure that he is able to monitor and control the meeting when using technology, and that the shareholders can be identified and called upon when they wish to exercise their rights to speak or vote at the meeting.

How can a shareholder vote at a hybrid meeting?

Shareholders may attend in person or by proxy at a shareholders' meeting. Under section 599 of the Companies Ordinance, documents relating to appointment of proxies may be sent by electronic means to the company if a company has given an electronic address to receive an instrument or invitation to appoint a proxy.

Under Article 38(2) of the Model Articles, a person is able to exercise the right to vote at a general meeting when (i) the person is able to vote, during the meeting, on resolutions put to the vote at the meeting; and (ii) the person's vote can be taken into account in determining whether or not those resolutions are passed at the same time as the votes of all the other persons attending the meeting.

In a hybrid meeting, a shareholder can participate through physical attendance at one or more meeting place(s) or through electronic attendance via the electronic platform. If there is more than one physical meeting place, both meeting places will also be connected by electronic means. From a practical point of view, it would seem that voting on a show of hands (as it literally means) is not practicable for hybrid meetings, as some electronic platforms may give its user a choice in disabling the visual function, and it may be difficult for the chairperson to assess through the electronic platforms as to whether a motion has been carried or lost. This is especially the case where there is a large number of participants. As such, voting during electronic meetings should be carried out by way of poll. Since a shareholder is free to exercise part of his votes for and part of his votes against a particular resolution in a voting by poll, the company should check with the relevant service provider about the capability of the electronic platform in supporting such a method of voting.

The company should also ensure that all participants using electronic platforms to attend the meeting should have unique and secure logins in order for the chairperson to identify the shareholders who are eligible to vote, to create an attendance list and to record the voting results where required.

Next steps

In view of potential disruptions that a company may face, Hong Kong companies are encouraged to update their articles of association to ensure proper procedures are in place to allow hybrid general meetings to be held. Companies should also bear in mind that, if amendments are required to be made to their articles, such amendments will need to be approved by way of special resolution of the shareholders and the amended articles will need to be registered with the Companies Registry

in accordance with section 88 of the Companies Ordinance.

Companies must also ensure that proper security measures should be in place to ascertain the eligibility of the participants to attend and vote at hybrid meetings, and ensure confidentiality of the meeting is preserved. Companies should also have protocols to deal with technological failures or communication breakdowns.

Care should be taken to ensure that hybrid meetings comply with the articles of association of the company and all applicable laws and are held in a fair and open manner to minimise the risk of any subsequent challenges or disputes.

Use of After The Event insurance as security for costs

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What is After The Event ("ATE") insurance?

ATE insurance is a type of legal expense insurance which provides coverage for legal costs, and can be used by parties in litigation to protect themselves from the potential liability of having to pay for costs awarded in favour of the opposing party. ATE insurance is purchased after a legal dispute arises, and is a relatively new product in Hong Kong in comparison to other jurisdictions, such as the UK and Australia.

There have been debates on the interplay between ATE insurance and applications for security for costs. Applications for security for costs are applications brought by defendants to protect their cost position, particularly where the defendants are forced to expend legal fees defending themselves in proceedings which turn out to be unsuccessful for the plaintiff or claimant. In some cases, a plaintiff may attempt to defeat an application for security for costs by arguing that its ATE insurance coverage ought to provide sufficient protection to a defendant.

Recent development in Hong Kong

This debate was recently introduced to the Hong Kong courts for the first time in the case of *Natural Dairy (NZ) Holdings Ltd (In provisional liquidation) v Chen Keen (Alias Jack Chen) and others*[1]. In this case, the 3rd defendant took out a security for costs application under section 905 of the Companies Ordinance (Cap 622). The plaintiff contended that (i) its claim had a high degree of probability of success against the 3rd defendant and (ii) the plaintiff's ATE insurance was sufficient to protect the 3rd defendant's cost position. The ATE insurance was subject to a limit of indemnity of approximately HK$14,040,000 and the security sought was HK$6,000,000.

The Court held that the plaintiff's claim had some degree of probability of success but not to an extent capable of dismissing an application for security for costs. Although the ATE insurance appeared to cover the 3rd defendant's costs *in principle*, the Court found that the terms of the policy provided ample grounds for the insurer to avoid the policy, leaving the 3rd defendant at an unacceptable risk that her costs would not be paid if she won.

Firstly, the terms of the policy provided that the policy could be terminated if the plaintiff changed its solicitors, which was a risk that could not be regarded as entirely fanciful given the unpredictable nature of litigation.

Further, there was also no anti-avoidance provision in the policy, which was an important point considered by the Court. An anti-avoidance provision is aimed at making it more difficult for insurers to avoid policies and may provide for terms such as "*the insurer shall not be entitled to avoid this policy for non-disclosure or misrepresentation at the time of placement except where such non-disclosure was fraudulent on your part*". An insurer under such an anti-avoidance provision can therefore only avoid the policy in the event that the non-disclosure was fraudulent. On the contrary, the ATE insurance in *Natural Dairy* expressly provided for the insurer's right to cancel the policy if the insured made any misrepresentation or non-disclosure at the time of taking out the policy, and had no anti-avoidance provision.

In the context of an application for security for costs, the insurer's right to avoid an ATE insurance based on non-disclosure can be a significant risk to the insured and the defendant. As Lord Drummond Young put it in the case of *Monarch Energy Ltd v Powergen Retail Ltd*[2], "*it is very difficult for even the most conscientious of solicitors to be certain that they have unearthed all material facts about the action before applying for ATE insurance*". In *Natural Dairy*, even though the plaintiff submitted that all relevant information had been provided by the provisional liquidators of the plaintiff to the insurer, and the information provided was unlikely to be inaccurate and incomplete, the Court did not think that the plaintiff's assurance could entirely alleviate the 3rd defendant's concerns.

Lastly, the Court noted that it was odd that in one of the clauses of the policy, it assumed that the plaintiff was solvent at the time when the policy was taken out, but in the schedule of the policy, the insured was described as a company in provisional liquidation, i.e. "Natural Dairy (NZ) Holdings Limited (In Provisional Liquidation)".

Based on the reasons mentioned above, the Court concluded that the terms of the policy provided ample grounds for the insurer to avoid

[1] [2020] HKCU 3402

[2] 2006 SLT 743

the policy, and made an order for security for costs in favour of the 3rd defendant. In this case, therefore, the fact that the plaintiff had taken out ATE insurance did not prevent the Court from awarding security for costs to the 3rd defendant.

Approach in the UK and Australia

In *Natural Dairy*, the Court adopted an approach similar to that of the UK courts. The essence of these arguments revolves around two aspects: (i) significance of anti-avoidance provisions and (ii) coverage of the terms.

For an ATE insurance to be considered an adequate alternative to payment into court, the defendant should be entitled to some assurance that the policy will not be avoided due to reasons not within the control or responsibility of the defendant. For example, conditions where insurer can cancel the policy if they believe there is no reasonable prospect of success or insurers can refuse to pay if any of the conditions are breached.

In the UK, courts have shown their willingness to regard ATE insurance with anti-avoidance provisions to constitute adequate security for the defendant's costs. In *Geophysical Service Centre v Dowell Schlumberger (ME) Inc*[3], the court held that, depending on the terms of the policy, a properly drafted ATE insurance with an anti-avoidance provision may suffice because it will not be difficult for a judge to assess the likelihood of avoidance with such provision in place.

ATE insurance has also been considered by the Australian courts. In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited*[4], the Supreme Court of Queensland rejected an ATE insurance as a form of security for costs for, amongst other things:

- the respondents were not identified as insureds under the policy and no obligations were owed to them;
- insurers were able to reduce liability or cancel the policy under non-disclosure; and
- the grounds for exclusions from liability were not within control of the respondents.

The ATE insurance was found to be deficient as security for costs due to the lack of assurance to protect the respondent's costs. However, the court noted that an appropriately worded ATE insurance might be able to provide the needed assurance.

Practical considerations on taking out ATE insurance

ATE insurance may contain a list of exclusions which you should review with utmost care. Sample exclusions may include:

- misrepresentation or non-disclosure;
- likelihood of success falls below the insurer's minimum percentage (e.g. 60%); and
- insolvency of the opposing party.

If you decide to take out an ATE insurance, negotiate the terms with caution because issues such as lack of anti-avoidance provisions may lead to failure in satisfying a security for costs application. You should always obtain legal advice before entering into an ATE insurance.

[3] 147 Con LR 240

[4] [2017] FCA 699

First cartel settlement decision in Hong Kong with lessons learnt in competition investigations and litigations

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Whilst COVID-19 has slowed down court services and lengthened the court waiting times, some positive new development and progress have been made in the competition law area arising out of a construction related matter. In July 2020, the Competition Tribunal (the '**Tribunal**') issued its first decision on cartel settlement in the case of *Competition Commission v Kam Kwong Engineering Company Ltd & Ors* [2020] HKCT 3 (the '**Decision**'), laying down important principles that the Tribunal will follow in competition proceedings.

The Decision confirms that the *Carecraft* procedure, which is commonly used in the context of settling directors' disqualification proceedings under the Companies Ordinance and the Securities and Futures Ordinance, should be adopted when there is a cartel settlement between the parties in competition proceedings. The procedure enables the Tribunal to settle a case expeditiously, which is in the interest of the public.

However, where not all respondents agree to settle, difficulties may arise if the Tribunal subsequently reaches a different conclusion in favour of the non-settling respondents after discovery of different sets of facts and hearing their evidence at trial. It remains uncertain as to how the Tribunal will deal with such situations.

Background to the Decision

The case was brought by the Competition Commission (the '**Commission**') in 2018 against 3 construction companies (the '**1st Respondent**', the '**2nd Respondent**' and the '**3rd Respondent**') and two individuals, being the director of the 1st Respondent and the person acted on behalf of the 3rd Respondent (the '**4th Respondent**' and the '**5th Respondent**'). It was alleged that the 1st to 3rd Respondents had contravened the First Conduct Rule under the Competition Ordinance (the "**Ordinance**") in their provision of renovation services at one of the Housing Authority's housing estates by (i) agreeing to allocate potential customers between themselves by reference to mutually exclusive floors/units of the estate in question; and (ii) engaging in a concerted practice of exchanging and coordinating the content and price of standard decoration packages on offer; and the 4th and 5th Respondent had been involved in the 1st and 3rd Respondents' contravention of the First Conduct Rule respectively.

Having agreed the facts, the Commission and (i) the 1st and 4th Respondents, and (ii) the 2nd Respondent respectively, jointly applied for the Tribunal's approval to dispose of the proceedings between them by consent under the Competition Tribunal Rules. The Tribunal made a declaration that the 1st and 2nd Respondents had contravened the First Conduct Rule and the 4th Respondent had been involved in the 1st Respondent's contravention based on the agreed facts; and adjourned its determination of the penalties to be imposed to give the parties more time to consider recent judgments in which penalties were imposed for a breach of the Ordinance.

Carecraft Procedure

In the Decision, the Tribunal held that *Carecraft* procedure should be followed when the parties successfully reached a settlement agreement. Under the *Carecraft* procedure, the Tribunal may make a decision with or without a hearing, having regard to the agreed facts. This essentially limits the Tribunal's role to the application of laws as opposed to finding facts concurrently.

The *Carecraft* procedure contains mainly two steps:-

(a) the settling party and the Commission make a joint application to the Tribunal in which the settling party admits to a breach of a competition rule, on the basis of agreed facts. The Commission's recommended sanctions will usually be included in the joint application; and

(b) the Tribunal then considers the joint application and decides whether there was such a breach, and if so what sanctions are to be imposed. Such decisions remain solely with the Tribunal notwithstanding the settlement agreement between the settling party and the Commission.

Consideration of Settlement

The Decision established a precedent for court-sanctioned cartel settlements, bringing legal certainty to companies considering to settle. Early settlement has multiple benefits:-

(a) reduction of legal and other costs – settling a case at an early stage can reduce costs by avoiding expensive and lengthy trials. This is especially attractive to small-to-medium enterprises with relatively insignificant turnover as the costs of a full-blown trial will likely significantly exceed the maximum penalty to be imposed on them, taking into account the cap on the maximum penalties allowable under the Ordinance ie 10 percent of the turnover for each year in which the contravention occurred;

(b) receiving cooperation discount – under the Cooperation and Settlement Policy published by the Commission in April 2019, the Commission may recommend a discount of up to 50 percent to the Tribunal in respect of the pecuniary penalties to be imposed on the settling party if such party has cooperated with it; and

(c) minimising disruption to business - proceedings against the settling party will end once the Tribunal sanctions the consent application. The disruption to business of the settling party, if any, can therefore be minimised.

In addition, companies being investigated should further consider the following issues:-

(a) settlement of other respondents – if other respondents agree to settle with the Commission, their employees may be summoned to appear at trial as the Commission's (the applicant's) witnesses, bringing greater evidential challenge to the non-settling respondent in defending its case;

(b) exposure to private follow-on suits - an order that a party has breached the Ordinance may result in it being exposed to private follow-on suits. Other parties being affected by the alleged anti-trust conduct may commence legal proceedings for loss and damages against the contravening party; and

(c) liability to the Commission's costs – the Commission will likely require the settling party to pay the Commission's costs arising from the investigation and the proceedings as a condition to settlement. In such circumstances, the settling party shall request from the Commission a ballpark figure on the costs incurred so as to obtain greater certainty.

The way forward

The adoption of the *Carecraft* procedure as confirmed by the Decision will likely encourage more cartel settlements in the future, which is consistent with one of the Tribunal's underlying objectives to facilitate the settlement of disputes. In fact, cartel settlements have been widely used in other jurisdictions, for example, about half of the anti-trust decisions adopted by the European Commission were concluded following settlement procedures.

Further, the Decision shows that the Commission welcomes cooperation and settlement at every stage of enforcement. Not only does the Commission accept settlement from companies by way of compliance with the requirements set out in an infringement notice, it also takes settlement in the midst of legal proceedings even when not all respondents allegedly involved in a cartel are willing to compromise. Companies which are alleged to have contravened the Ordinance may consider this alternative to avoid litigation at different stages by weighing the factors as stated above against the available evidence.

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法律动态 –2020 年 10 月

2020 年 11 月 3 日

本版内容	页
有关香港公司举办虚拟及混合股东大会的实际考虑 *唐宇平和陆咏琳*	**2-3**
使用事后保险作为讼费保证金 *苏振国和陆正思*	**4-5**
香港首个合谋行为和解判决及其对竞争调查与诉讼的启示 *叶永耀和刘欣欣*	**6-7**

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- 使用事后保险作为讼费保证金；和
- 香港首个合谋行为和解判决及其对竞争调查与诉讼的启示。

我们希望本通讯为您提供有用的资料，并欢迎您对日后通讯的内容提出意见和建议。

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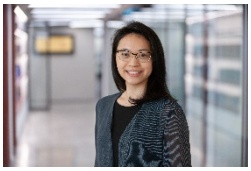

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有关香港公司举办虚拟及混合股东大会的实际考虑

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香港公司的股东大会是否可以通过混合会议（即同时允许通过电子形式及「亲身」出席现场的方式参与的会议）或虚拟会议（即纯粹以电子形式举行、没有实体地点的会议）举行是最近备受关注的议题。由于 2019 新型冠状病毒的爆发及对群体聚会的限制，公司开始认识到灵活地以电子形式举行会议的重要性。然而，即使没有 2019 新型冠状病毒，现场会议亦会受其他原因影响，如恶劣天气、社会运动、或仅仅因为股东处于不同的地理位置，而无法进行。

鉴于当今社会下现代科技的发展，香港公司应考虑更新其组织章程细则，订立使其能够有效地利用科技及电子通讯方式处理公司事务的机制。

我们将于下文阐述香港公司举行虚拟或混合股东大会所涉及的主要法律问题。

虚拟会议或混合会议的「地点」是哪里？

传统来说，股东大会通常在一个实体地点举行。然而，鉴于目前电子通讯工具（如电话会议、网络会议及其他具有视听功能的电子平台）的使用日趋普及，运用科技来召开股东大会的情况可能会越来越普遍。

根据《公司条例》（第 622 章）（以下简称「**《章程细则范本》**」）第 584 条，除公司的章程细则另有规定外，公司可使用令该公司身处不同地方的成员能够在成员大会上聆听、发言及表决的任何科技，在两个或多于两个地方举行成员大会。这与普通法原则一致，即「*会议*」意味着「*思想上的交流*」（"*meeting of the minds*"），这并不一定需要所有与会者都在同一实体空间中出席。只要有充分的科技，使所有地点的股东都能看到并听到其他参会地点的情况，就可以在不同地点召开股东大会 (*Byng v London Life Association Ltd. and Another* [1990] Ch 170)。再者，根据《公司条例》第 584 条，股东只要能在大会上「*聆听、发言及表决*」即可，大会并不一定需要具备视觉元素。

在任何情况下，公司都应查阅其章程细则是否允许公司使用科技在两个或两个以上地点举行股东大会。如果章程细则不允许该等形式，除非章程细则已作修订，则大会仍需在实体地点举行。如果章程细则允许该等形式，公司可根据其章程细则及《公司条例》第 584 条的规定，举行混合会议。

再者，根据《公司条例》第 576 条，除公司的章程细则另有规定外，成员大会的通知须指明举行该成员大会的地点（如该成员大会在两个或多于两个地方举行，则指明举行该成员大会的主要会场及举行该成员大会的其他会场）。就混合会议而言，大会的「*主要地点*」可以是大会主席的所在地，而大会的「*其他地点*」可以是提供在线参与的其他实体地点。该通知亦应指名该会议将使用的电子平台、登录信息及其他参加细节。

香港公司在完全虚拟的空间（没有任何实体会场）召开之股东大会的有效性存在不确定性。这是因为在两个或两个以上地点举行股东大会的法例规定已默认该等会议会在实体地点举行。该不确定性更体现在虚拟股东大会无法满足法例对大会通知内容的要求，即该通知必须指明会议地点。

成员大会的通知可以透过电子形式发出吗？

可以，根据《公司条例》第 572(1)(a)条，公司成员大会的通知（一般指明了举行该成员大会的日期、时间和地点，有待在该成员大会上处理的事项，及在该成员大会拟通过的决议）须采用书面形式或电子形式发出。

但是，根据《公司条例》第 831 条及第 837 条的规定，只有在获得收件人同意的情况下，公司方可与收件人进行电子形式的通讯往来。这亦符合《电子交易条例》（第 533 章）第 5A 及 15 条的规定，即若收件人同意以该等电子形式进行通讯，公司可透过电子形式向收件人送达文件。收件人亦需有权撤销其对电子通讯的同意，在此情况下，公司必须以书面形式向收件人发出大会通知。

法定人数的要求

无论股东大会是以实体会议还是混合会议形式举行，所有股东大会都必须达到法定人数。

根据《公司条例》第 585 条，除公司的章程细则另有规定外，公司成员大会的法定人数由两名亲身出席或委派代表出席的成员构成。尽管如此，公司的章程细则通常会进一步规定构成法定人数的股东人数。

《公司条例》并未界定「*出席*」会议的含义。但是，如果我们参考《公司（章程细则范本）公告》（第 622H 章）附表 2 所载的私人股份有限公司的章程细则范本（以下简称「**《章程细则范本》**」），第 38 条指出两人或多于两人虽然身处不同地点，但他们若在成员大会上有发言权及表决权的话，是能够行使该等权利的，则他们均属有出席该大会。凡某人在成员大会举行期间，

能够妥当地向所有出席该大会的人传达自己就大会上的事务所持的资料或对该事务所持的意见，该人即属能够于该大会上行使发言权。《公司条例》第 584 条亦默许了身处不同地方的公司股东能够在大会上聆听、发言及表决的成员大会。因此，只要所需数量的股东能够在混合股东大会期间聆听并行使其发言权和表决权，那么就能够满足法定人数要求。

作为良好的行事方式，大会主席亦应确保他能够在使用科技时监察并控制会议，以及当股东欲在会议上行使其发言权或表决权时，他可以识别该等股东身份并邀请他们发言或表决。

股东可以如何在混合会议上进行表决？

股东可以亲自出席或委任代表出席股东大会。根据《公司条例》第 599 条规定，若公司已提供一个接收委任代表的文书或邀请书的电子地址，则与委任代表有关的文件可透过电子方式送交该公司。

根据《章程细则范本》第 38(2)条规定，凡 (i) 某人在该大会举行期间，能够就交由该大会表决的决议作出表决；且 (ii) 在决定是否通过该决议时，该人所投的票，能够与所有其他出席该大会的人所投的票，同时获点算在内，该人即属能够于成员大会上行使表决权。

在混合会议中，股东可以通过在一个或多个会议地点亲自出席或以电子平台电子出席的方式参与大会。如果有一个以上的实体会议地点，两个会议地点也将通过电子形式连接起来。从实际的角度来看，就混合会议而言，举手表决（以字面意思释解）似乎是不可行的，因为一些电子平台允许用户选择关闭视像功能，而且大会主席很难通过电子平台评估提案是否已获通过或否决。这种情况在与会者众多时尤其如此。因此，电子会议中的表决应以投票方式进行。由于股东可以在投票表决中就某项决议行使部分赞成票和部分反对票，公司应与相关服务提供商确认该电子平台支持此投票方式。

公司亦应确保所有使用电子平台出席会议的与会者应具备独特和安全的登录渠道，以便大会主席识别有资格表决的股东，建立出席名单，并在需要时记录表决结果。

下一步

鉴于公司可能面临的潜在影响，我们鼓励香港公司更新其组织章程细则，以订立适当的程序，从而允许成员大会以混合形式召开。公司亦应谨记，若其章程细则须进行修订，该修订须由股东特别决议予以批准，而经修订的章程细则须按照《公司条例》第 88 条的规定于公司注册处登记。

公司亦须采取适当的保安措施，以确认与会者是否有资格出席混合会议并在会上投票，并确保会议的保密性得到保护。公司亦应有规程处理技术故障或通讯中断。

公司应确保混合会议符合其组织章程细则及所有适用法律的规定，并以公平及公开的方式举行，以减低任何后续质疑或争议的风险。

使用事后保险作为讼费保证金

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什么是事后保险？

事后保险是一种承保诉讼费用的法律费用保险。诉讼各方可以透过购买事后保险使自己免于承担可能需要向对方支付讼费的潜在责任。事后保险是在发生法律纠纷后购买的，与英国及澳洲等其他司法管辖区相比，它在香港是一种相对较新的产品。

事后保险与讼费保证金申请之间的相互作用一直都存在争议。讼费保证金申请是被告为保证其在胜诉时能就其诉讼费用得到补偿而提出的申请，特别是当被告在原告或申索人最终败诉的案件中因迫于为自己辩护而产生的讼费。在某些情况下，原告可尝试以其所投的事后保险的保险范围已为被告提供足够保护为由，来回应被告的讼费保证金申请。

香港的最新发展

香港法院在 *Natural Dairy (NZ) Holdings Ltd (In provisional liquidation) v Chen Keen (Alias Jack Chen) and others*[1]一案首次就上述争议作出裁决。在本案中，第三被告根据《公司条例》（第 622 章）第 905 条提出讼费保证金申请。原告辩称（i）其对第三被告的索赔有很大的成功概率及（ii）其事后保险对第三被告的法律费用提供了足夠保护。该事后保险的赔偿限额约为 1404 万港元，而被告所申请的讼费保证金为 600 万港元。

法院认为原告的索赔有成功的可能性，但程度不足以驳回讼费保证金的申请。虽然该事后保险「*原则上*」似乎涵盖了第三被告的费用，但法院认为该保单的条款为保险公司提供了充分的理由去回避保单，使第三被告面临即使胜诉亦可能收不回已支付的讼费这种不能接受的风险。

首先，根据保单条款规定，如果原告更换律师，保单可以终止。鉴于诉讼的不可预测性，这种风险完全有可能发生。

此外，该保单中也没有反回避条款 (anti-avoidance provision)，这是法院考虑的一个重要因素。反回避条款一般旨在使保险公司更难回避保单，类似的规定包括「保险公司无权因为签订保单时的不披露或虚假陈述而回避本保单下的责任，除非该不披露的行为属于您的欺诈行为」。在这种条款下，保险公司只能在因欺诈而不披露某些事情的行为下才可以回避保单责任。相反，*Natural Dairy* 一案中的事后保险不但没有反回避条款，还明确规定如果受保人在投保时作出任何虚假陈述或不披露的行为，保险公司有权取消该保单。

就申请讼费保证金而言，保险公司基于不披露而回避事后保险的权利有可能对受保人和被告构成重大风险。正如 Lord Drummond Young 在 *Monarch Energy Ltd v Powergen Retail Ltd*[2]一案中所述，「即使是最忠诚尽责的律师也很难确定他们在申请事后保险之前已经发掘了所有有关诉讼的重要事实」。在 *Natural Dairy* 一案中，即使原告向法院提出其临时清盘人已将所有相关资料提供予保险公司，且所提供的资料属不准确或不完整的可能性很低，法院也不认为原告的保证能完全缓解第三被告的担忧。

最后，法院指出保单有异常的条款，该条款假定原告在投保时是有偿债能力的，但在保单附表中，受保人被描述为一家处于临时清算中的公司，即「Natural Dairy (NZ) Holdings Limited (In Provisional Liquidation)」。

基于上述理据，法院认为该保单的条款为保险公司提供了充分回避赔偿的理由，并发出有利于第三被告的讼费保证金命令。因此，原告在本案中购买了事后保险的事实并没有阻止法院向第三被告颁予讼费保证金。

英国和澳洲的做法

在 *Natural Dairy* 一案中，香港法院采纳了与英国法院类似的做法。这些争论实质围绕着两方面展开：（i）反回避条款的重要性及（ii）条款的涵盖范围。

若要令一份事后保险被视为是向法院支付讼费保证金的适当替代品，被告应获得一定程度上的保证，使该保单不会因各种不在被告控制范围或责任范围内的原因而被回避。例如，保单中载有条款，允许保险公司在其认为没有合理期望获得成功索偿的情况下取消该保单，或者保险公司可以在任何该等条件被违反的情况下拒绝理赔。

在英国，法院已表明愿意考虑视具有反回避条款的事后保险为对被告讼费的充分保证。在 *Geophysical Service Centre v Dowell Schlumberger (ME) Inc*[3]一案中，法院裁定，根据保单上的条款，一份适当起草并带有反回避条

[1] [2020] HKCU 3402
[2] 2006 SLT 743
[3] 147 Con LR 240

款的事后保险可以提供足够保证，因为法官不难评估在此类条款下回避保单的可能性。

澳洲的法院亦有处理事后保险的有关争议。在*Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited*[4]一案中，昆士兰最高法院驳回了以一项以事后保险作为讼费保证的陈词，其中理由包括：

- 答辩人未被明确为保单下的受保人，而且保险公司对其并不负有任何义务；
- 保险公司能够以不披露为由而减少责任或取消保单；及
- 免除责任的理由不在答辩人的控制范围之内。

由于缺乏保护答辩人讼费的保证，法院判定该事后保险不足以作为讼费保证金的替代。然而，法院指出措辞适当的事后保险条款或许能够提供所需的保证。

购买事后保险的实际考虑

事后保险可能会包含一些不承保事项，您应该格外小心地审阅。该等不承保事项可能包括：

- 虚假陈述或不披露；
- 成功索偿的可能性低于保险公司可接受的最低百分比（例如 60%）；及
- 诉讼对方当事人破产。

如果您决定购买事后保险，请谨慎协商条款，因为诸如缺乏反回避条款等问题可能会导致讼费保证金的申请无法获得成功。您应在购买事后保险之前寻求法律意见。

[4] [2017] FCA 699

香港首个合谋行为和解判决及其对竞争调查与诉讼的启示

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尽管 2019 新型冠状病毒的爆发使法庭服务变慢及轮候时间变长，竞争法领域仍就一宗与建筑相关的案件取得新的发展。2020 年 7 月，竞争事务审裁处（以下简称「**审裁处**」）在 *Competition Commission v Kam Kwong Engineering Company Ltd & Ors* [2020] HKCT 3 一案中作出了其对合谋行为和解的第一个判决（以下简称「**判决**」），确立了审裁处在审理相关的竞争法诉讼时应遵从的重要法律原则。

该判决确认当竞争诉讼程序中的各方达成合谋行为和解时，应采用 *Carecraft* 程序。该程序常用于《公司条例》及《证券及期货条例》下的取消董事资格的法律程序。该程序使审裁处能够快速处理案件，因而符合公众利益。

然而，当一个案件中并非所有答辩人均同意和解，审裁处可能会在之后的审讯阶段，在听取未和解答辩人对事实的不同陈述及其证据后，作出有利于该等答辩人的结论，因而出现困难局面。审裁处将如何处理类似的情形仍具不确定性。

判决的背景

竞争事务委员会（以下简称「**竞委会**」）于 2018 年就此案对三家建筑公司（以下简称「**第一答辩人**」、「**第二答辩人**」及「**第三答辩人**」）及两名个人提出诉讼，其中两名个人分别为第一答辩人的董事以及第三答辩人的代表（以下简称「**第四答辩人**」及「**第五答辩人**」）。竞委会指称第一至第三答辩人在为房屋委员会的某一屋邨提供装修服务时，（一）彼此达成协议按照相关屋邨的独立楼层或单位分配潜在客户，并（二）合谋就要约出售的标准装修套组的内容及价格信息进行交换并统一，因而违反《竞争条例》（以下简称「**《条例》**」）下的第一行为守则；竞委会亦称，第一至第三答辩人上述违反第一行为守则的行为，第四及第五答辩人亦牵涉其中。

在各方就案件事实达成同意后，竞委会分别与（一）第一及第四答辩人及（二）第二答辩人按照《竞争事务审裁处规则》的规定，经同意申请共同向审裁处申请终止法律程序。审裁处依据各方同意的事实宣告第一及第二答辩人违反第一行为守则，且第四答辩人亦牵涉于第一答辩人的违法行为。审裁处亦决定将对该等答辩人的处罚押后裁定，以给其更多时间考虑近期涉及答辩人因违反条例而受处罚的案例。

Carecraft 程序

在判决中，审裁处裁定当双方已成功达成和解协议时，*Carecraft* 程序应获采用。按照 *Carecraft* 程序，审裁处可在考虑双方同意的事实后，决定展开或不展开聆讯，并作出判决。这实质上是将审裁处的职能限制于适用法律而非同时就事实作出判定。

Carecraft 程序主要包含以下两个步骤：

(a) 和解方与竞委会共同向审裁处提出申请，并于其中依据各方同意的事实承认违反竞争规则。竞委会通常会在共同申请中列明其建议作出的处罚；及

(b) 审裁处会考虑该共同申请，并就答辩人有否违反竞争规则，以及若有违反，应对答辩人施加那种处罚作出裁定。审裁处对前述事宜有独立决定权，且不受和解方与竞委会之间的和解协议影响。

对和解的考虑

判决为法庭认可合谋行为和解提供了先例，并为正在考虑和解的公司带来了法律确定性。尽早和解有众多益处：

(a) 降低法律及其他成本 ——在案件早期的和解可避免昂贵且冗长的审讯程序，从而降低成本。考虑到条例对答辩人应承担的罚款规定的上限，即涉事公司在违法行为发生的每一年度营业额的 10%，一次完整的审讯所涉及的费用可能远超该公司可能承担的最高罚款，因此和解对营业额相对不高的中小企业来说尤其具有吸引力；

(b) 获得合作扣减——根据竞委会于 2019 年 4 月发布的《合作及和解政策》，若和解方与竞委会合作，竞委会可向审裁处建议对其应承担的罚款予以最高达 50%的扣减；及

(c) 对商业活动的干扰降至最低——审裁处批准各方的共同申请后，针对和解方的法律程序将即时终止，因此能将诉讼对和解方商业活动的干扰（如有）降至最低。

此外，被竞委会调查的公司还应考虑以下事宜：

(a) 与其他答辩人的和解——若其他答辩人同意与竞委会和解，该等答辩人的雇员可能会以竞委会（申请人）证人的身份被传唤

出庭，因而为未和解答辩人在抗辩及举证时带来更大的挑战；

(b) 卷入后续私人诉讼——当审裁处裁定某一当事方违反条例，该裁决可能导致该当事方卷入后续私人诉讼。其他受反竞争行为影响的当事方可能会向被裁定违法的当事方提出损害赔偿之索偿；及

(c) 承担竞委会的费用——竞委会可能要求和解方支付竞委会在调查及法律程序所衍生的费用，作为和解的条件。在这种情形下，公司应要求竞委会提供相关费用的大致金额，从而获得更高的确定性。

启示与展望

判决对 *Carecraft* 程序的采用有可能会使未来出现更多的合谋行为和解，这与审裁处促进以和解方式解决争议的基本目标一致。事实上，合谋行为和解已于其他司法管辖区获广泛运用，例如，欧盟约有一半的合谋行为判决都基于和解程序。

此外，该判决显示竞委会欢迎公司在调查的各个阶段与其进行合作及和解。竞委会不仅接受公司通过遵守违章通知书中的要求与其和解，同时还接受公司在法律程序过程中提出和解，即使其中并非所有涉嫌参与相关合谋组织的答辩人均愿意作出让步。在不同阶段，涉嫌违反条例的公司应将前文所述的各项因素与当前的证据进行权衡，从而考虑采用此替代争议解决方式以避免诉讼。

铭德及有关办事处：

阿德莱德 奥克兰 北京 布里斯班 堪培拉 达尔文 黄金海岸 香港 伦敦 墨尔本 珀斯 上海 悉尼 乌兰巴托 惠灵顿