



## General Meeting: Notice Requirement

For meetings convened under the Companies Ordinance (Cap 622) (the “CO”) or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (the “CWUMPO”) such as meetings of members and meetings of creditors and contributories, a sufficient length of notice is required to be given under the CO or the CWUMPO. Failing to give sufficient length of notice to convene a meeting may lead to the meeting being invalidly constituted, which means that anything transacted in such meeting including any adjournment thereof would also be rendered invalid (*Woolf v East Nigel Gold Mining Co Limited* (1905) 21 TLR 660).

Correctly calculating the length of notice that must be given for a meeting is one of the most important requirements and one that can give rise to problems in practice. The starkness of this rule and its grave consequence, with the current Covid-19 pandemic in mind, give rise to an important question: how to count the number of days in fulfilling the statutory requirement under the CO and the CWUMPO?

### Notice Period

For a limited company, there are usually two kinds of meeting that the statute prescribes for a minimum period of notice, i.e., notice of general meeting and notice of creditors and contributories.

The articles of association of companies incorporated under the CO will often contain a clause provided by Section 571 of the CO and Section 241 of the CWUMPO. The former sets out notice required of general meeting:-

- "(1) A general meeting of a company (other than an adjourned meeting) must be called by notice of–*
- (a) in the case of an annual general meeting, at least 21 days; and*
  - (b) in any other case–*
    - (i) if the company is a limited company, at least 14 days; and*
    - (ii) if the company is an unlimited company, at least 7 days.*
- (2) If the company's articles require a longer period of notice than that specified in subsection (1), a general meeting of a company (other than an adjourned meeting) must be called by notice of that longer period.*
- (3) A general meeting of a company is to be regarded, despite the fact that it is called by shorter notice than that specified in subsection (1) or in the company's articles, as having been duly called if it is so agreed–*
- (a) in the case of an annual general meeting, by all the members entitled to attend and vote at the meeting; and*
  - (b) in any other case, by a majority in number of the members having the right to attend and vote at the meeting, being a majority together representing at least 95% of the total voting rights at the meeting of all the members."*

The latter sets out notice required of meeting of creditors:-

- (1) The company shall–*
- (a) cause a meeting of the creditors of the company to be summoned for a date not later than 14 days after the day on which there is to be held the meeting of the company at which the resolution for voluntary winding up is to be proposed; and*
  - (b) cause notices of the meeting of creditors to be sent by post to the creditors at least 7 days before the day on which the meeting is to be held."*



## Computation of time for the Notice Period

The general rule of law in the computation of time for notice period under the CO and the CWUMPO is that fractions of a day are not reckoned (*Re Railway Sleepers Supply Co* (1885) 29 Ch D 204; *Re Lympne Investments Ltd* [1972] 2 All ER 385).

The issue then comes to mind is how one interprets the statutory provision “at least 14 days” in the CO and CWUMPO.

A plain reading would be in counting the 14 days, the date of giving the notice is included whereas the date of the meeting is not considered as one of the 14 days. For instance, the meeting is held on 24 September 2021, one day before the meeting on 23 September 2021. Counting back, in this manner, 9 September 2021 was the fourteenth day before the meeting.

However, interestingly, the Court decided otherwise in the case of *the Securities and Futures Commission v the Stock Exchange of Hong Kong Limited* [1992] 1 HKLR 135, and held that, following the long line of English authorities, the required number of days a notice should give must be clear days, exclusive of the days of service and the day on which the meeting is to be held.

The SFC issued restriction notices requiring the Stock Exchange to amend its Memorandum and Articles of Association (“**M&A**”) and its Rules at or before midnight, 30 October 1991. If the Stock Exchange failed to do so, the restriction notices shall take effect. The Stock Exchange decided to convene an EGM to put to its members the amendments and the notice to convene the EGM was sent on 8 October 1991. The timeline of the events is set out in the table below:

| Date                 | Description                       | Days         |
|----------------------|-----------------------------------|--------------|
| 8 October 1991       | Date of posting the notice of EGM | Not included |
| 9 October 1991       | Date of deemed receipt            | Not included |
| <b>20 clear days</b> |                                   |              |
| 30 October 1991      | Date of EGM                       |              |

The issues are as follows:-

- (1) Whether the notice given to its members by the Exchange of the intention to propose a special resolution at the EGM on 30 October 1991 is less than the time prescribed under section 116(1) of the old Companies Ordinance (Cap 32) (the “**old CO**”);
- (2) Whether, by reason of such inadequate notice, any special resolution proposed and passed in the EGM to alter the M&A would be ineffective, in the absence of agreement by the members holding 95% of the shares given the right to attend and vote at the EGM.

Section 116(1) of the old CO provides that “a resolution shall be a special resolution when it has been passed ... at a general meeting of which not less than 21 days’ notice specifying the intention to propose the resolution as special resolution, has been duly given ...”

It is accepted by the parties that the 21-day period does not include both the 8th (date of posting) or 9th (date of deemed receipt), and the Stock Exchange accepts that the 21-day period is only complied with, if the day of the meeting, namely the 30th is included. There are only 20 clear days between the 9th and 30th October. The paramount question is whether the day of the meeting can be included.



The court first set out the principle that the statutory minimum requirement as set out in the old CO (which it follows that the CO and the CWUMPO are included) could not be overridden by any provision in the M&A to the contrary. Insofar as the M&A may provide for a lesser period for other notices apart from special resolution then it may well be ineffective.

The court then reviewed a line of English cases, which the common law approach has always been to ignore fractions of a day. *"The general rule in the computation of periods of time is that unless there is sufficient indication to the contrary, fractions of a day should be ignored, at all events when a period is expressed in days or longer units and not in hours or shorter units, and that the day on which the initial event occurs is to be excluded."* (Re Lympne Investment Ltd [1972] 1 WLR 523 per Megarry J)

Amongst the cases, the case of *Re Railway Sleepers Supply Co* (1885) 29 Ch D 204 is relevant, the case concerns the effect of section 51 of the Companies Act 1862 which requires special resolutions to be in a two tier stage and there had to be an interval of not less than 14 days, nor more than one month between the meetings. The court held that the general rule of law is that *"the computation of time is that fractions of a day are not reckoned ... the effect is to render the day a sort of indivisible point; so that any act done in the compass of it, is no more referable to anyone, than to any other, portion of it."* The case of *Re Hector Whaling Ltd* [1936] 1 Ch 2018 which concerns section 117 of the Companies Act 1929, the equivalent of section 116 of the old CO, the court held that the phrase means 21 clear days exclusive of the day of service and exclusive of the day on which the meeting is to be held. Thus, the court held that the English approach is to be followed.

The court also considered the effect of section 71(1)(a) of the Interpretation and General Clauses Ordinance (Cap 1) which provides that *"in computing time for the purposes of any Ordinance a period of days from the happening of any event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"*. At plain reading, the section suggests that the day on which the act or thing from which time runs is expressly excluded from the computation of time, the day on which the event may take place following a specified period should be included in the computation. The court held that the Interpretation and General Clauses Ordinance (Cap 1) supplements and does not override other ordinances, and gives way where the substantive ordinance provides otherwise (see section 2(1) of the Interpretation and General Clauses Ordinance).

The court held that the words used in section 116 of the old CO (which the CO and CWUMPO are based upon) are intended to ensure that 21 clear days' notice is given. There is no difference in construction between *"not less than 21 days"* and *"21 clear days"*. The common law rule that fractions of a day are not taken into account prevails.

The court rejected the argument that since the legislation did not use the expression *"clear days"*, the legislature could not have intended that clear days are required. The court held that there is no difference in meaning between the expressions *"clear days"*, *"not less than number of days"* and *"at least number of days"*.

In *Goal Upward Investment Ltd v Osman Mohammed Arab & others* [2016] 5 HKLRD 158, the Court held that the case of *the Securities and Futures Commission v the Stock Exchange of Hong Kong Limited* [1992] 1 HKLR 135 established the proposition that when calculating the number of days for a notice to be effective, fractions of a day are not generally taken into account and not less than should be construed in such a way that one of the days (either the day of giving the notice or the day of the event) should not be included.

Thus, it is clear from the judgment that (1) the notice given to its members by the Exchange of the intention to propose a special resolution at the EGM on 30 October 1991 is less than the time prescribed and (2) by reason of such inadequate notice, any special resolution proposed and passed in the EGM to alter the M&A would be ineffective, in the absence of agreement by the members holding 95% of the shares given the right to attend and vote at the EGM.

Thus, the case taught an important lesson that, by reason of inadequate notice, any special resolution if passed in the meeting, may be opened to attack or challenge.





## Conclusion

Sufficient notice period is of paramount importance. Reference to "not less than 21 or 14 days" in the CO or the CWUMPO is interpreted by the courts to "21 or 14 clear days", exclusive of the day on which the notice is served and the day on which the meeting is held. To avoid any doubt, "the day on which the notice is served" means the day the notice is served on the relevant parties and so it includes the day the notice is received. Especially when the notice of the meeting is dispatched by post, the Articles of Association of the company usually contains a deeming receipt provision regulating the date on which a notice is deemed to be served.

The common law rule that fractions of a day are not reckoned is acknowledged and accepted by the courts to be applicable in the context of meetings of companies, presumably, to give effect to the legislative intention that sufficient time should be given to members or creditors for deliberation of the meetings.

Section 307 of the Companies Act 2006 in the UK sets out what is known as the clear day rules, which state, rather clearly, that any reference in section 307 to a period of notice is to be calculated by excluding (a) the date of the meeting and (b) the day on which the notice is given. Such express provision has codified the common law rule. Yet, the CO has not followed suit and we have to rely on the common law for the calculation of days.

Calculating the number of days' notice required for a meeting is an essential and sometimes daunting task for the company secretary and the company's legal advisers.

Despite the above, it is always prudent and advisable to allow a few more days in giving the notice of meeting so as to avoid unnecessary disputes and any resolution passed be open to attack or challenge. Kaplan J's words should be borne in mind when giving sufficient notice period, *"there is nothing to stop more than 21 days' notice being given, and I find it difficult to see why there is always an attempt to produce a notice which gives the very minimum amount of time with no leeway and in this case results in short notice"*.

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## Reference

- (1) *The Securities and Futures Commission v The Stock Exchange of Hong Kong Limited* [1992] 1 HKLR 135
- (2) *Goal Upward Investment Ltd v Osman Mohammed Arab & others* [2016] 5 HKLRD 158
- (3) *Re Lympe Investments Ltd* [1972] 1 WLR 523
- (4) *Re Railway Sleepers Supply Co* (1885) 29 Ch D 204
- (5) *Re Hector Whaling Ltd* [1936] 1 Ch 2018
- (6) Kosmin, L., & Roberts, C. (2008). *Company Meetings and Resolutions: Law, Practice, and Procedure* (3rd ed.). Oxford University Press.
- (7) Shackleton, F., Cordes, M., & Caulfield, G. (2011). *Shackleton on the Law and Practice of Meetings*. Sweet & Maxwell.
- (8) Lawton, P. (1993). *Meetings in Hong Kong their Law and Practice*. Longman.