Shareholder Activism & Engagement in Hong Kong

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September 2021

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A. GENERAL

I. Primary sources

1. What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

The primary source of laws and regulations are the Companies Ordinance, the Securities and Futures Ordinance ("**SFO**"), the Main Board Listing Rules and the GEM Board Listing Rules, and the Codes on Takeovers and Mergers and Share Buy-backs (the "**Takeovers Code**"). Unless otherwise specified, the "Listing Rules" refers to the Main Board Listing Rules.

The current version of the Companies Ordinance came into force on 3 March 2014. The SFO came into force on 1 April 2003 and is enforced by the Securities and Futures Commission ("**SFC**"). The Listing Rules and the Takeovers Code are made and enacted by the Hong Kong Exchanges and Clearing Limited and the SFC respectively. The Listing Rules are administered and enforced by the Stock Exchange of Hong Kong Limited (the "**Exchange**") primarily and the SFC. The Takeovers Code is regulated by the Takeovers Panel, a committee of the SFC.

The legislation relating to shareholder activism and engagement is supplemented by the Corporate Governance Code and Corporate Governance Report (the "**CG Code**") set out in Appendix 14 of the Listing Rules. The provisions in the CG Code are not mandatory and deviations from the provisions are acceptable if listed companies consider there are more suitable ways to

comply with the principles of the CG Code. Nevertheless, listed companies are expected to comply with the CG Code and must state whether they have complied with it and the reasons for non-compliance (if any) in their interim reports and annual reports.

II. Shareholder activism

2. How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Despite an increasing prevalence of activist campaigns, there is no sufficient data to deduce the frequency of activist campaigns in Hong Kong and the chance of success of the campaigns. To date, the successful activist campaigns in Hong Kong known to the public include the campaign instituted by Passport Special Opportunities Master Fund ("**Passport**") to prohibit a listed company, eSun Holdings Ltd ("**eSun**"), from proceeding with its private placement.

With regard to unsuccessful campaigns, BlackRock Inc failed to block G-Resources Group Limited ("**G-Resources**") from selling its crown-jewel gold mine at near book value. PAG Limited's campaign to buy Spring REIT also failed since it only obtained support from 41.5 per cent of Spring REIT's shareholders, falling below the required threshold of 50 per cent.

3. How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

There has been continuing growth in shareholder activism and awareness of minority shareholders' protection over the past few years in Hong Kong. Long-term shareholders and institutional investors are becoming increasingly concerned about the operation and governance of their investee companies. In July 2018, the Exchange tightened the Listing Rules on capital raising activities by listed issuers that create unfairness for the minority shareholders. Following the amendments, all open offers require prior approval from the minority shareholders unless the shares are issued under an existing general mandate.

Shareholder activism appears to have become more widespread in all industries. Some companies that have recently been subject to a public activist campaign include the Bank of East Asia, G-Resources (a mining company), China Motor Bus (a property developer) and Spring REIT (a real estate investment trust). There is no traceable pattern showing that activists are targeting a specific industry. It is anticipated that shareholder activism will become a feature of the corporate landscape in Hong Kong.

4. What are the typical characteristics of shareholder activists in your jurisdiction?

In Hong Kong, the shareholder activists instituting campaigns publicly are mainly institutional shareholders and short-seller activists.

Institutional shareholders, which are mainly asset management companies focusing on long-term investment, often put pressure on the corporation to achieve corporate governance change, including but not limited to BlackRock, Argyle Street Management Limited ("**Argyle Street**") and Passport. With a view to successfully launching an activist campaign, the institutional investors will normally identify and align with other minority shareholders and hedge funds. Hedge fund activists may also institute a campaign by themselves, such as Elliott Management Corporation ("**Elliott**").

In rare cases, investment vehicles of family offices may also be shareholder activists. North Point Talent Limited ("**North Point**"), an investment vehicle of a descendant of the family that founded the Vitasoy business, requested Esprit Holdings Limited ("**Esprit**") to hold a special general meeting to remove certain directors and appoint new directors as nominated by North Point in July 2020. Within two weeks thereafter, following the appointment of the directors as nominated by North Point in Esprit, North Point withdrew its requisition to convene a special general meeting.

5. What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

The focus of shareholder activism in Hong Kong is making demands in relation to major strategic transactions of the company, which is normally triggered by the underperformance of the corporation or a transaction that will unfairly prejudice the interests of minority shareholders. For instance, Elliott and Passport raised an activist campaign to oppose a placement agreement proposed by the investee listed company, whereas minority shareholders of Power Asset Holdings Limited ("**Power Asset**") raised an activist campaign to oppose the proposed merger with Power Asset raised by Cheung Kong Infrastructure Holdings Limited ("**Cheung Kong**"). In 2016, BlackRock also urged the minority shareholders of G-Resources to vote against the company's sale of a gold mine at an undervalue as the sale price was unreasonably low and the proposal would completely alter the nature of G-Resources' business. The reason behind these shareholder activist campaigns was the prejudicial effects caused by the management's proposal to the minority shareholders' interests.

Another focus of shareholder activism is a demand for a higher shareholder yield. On 19 October 2016, Mr David Webb, a well-known shareholder activist in Hong Kong, demanded that Ming Fai International Holdings Ltd distribute a special dividend out of the proceeds of a proposed asset disposal by publishing an open letter. In

2017, Argyle Street urged the board of China Motor Bus to distribute more dividends since the stocks had been undervalued.

Operational demand, such as a demand for a change to board composition and management structure, is less common in Hong Kong. For instance, Global Allocation Fund requested South Shore Holdings Limited to convene a special general meeting to pass a resolution to remove a director in July 2020. The director in question resigned in the same month.

B. SHAREHOLDER ACTIVIST STRATEGIES

I. Strategies

6. What common strategies do activist shareholders use to pursue their objectives?

The common strategies adopted by the activists may be divided into three non-mutually exclusive categories, namely, informal strategies, voting strategies and legal strategies.

Informal strategies comprise private engagement, open letters or publications and website campaigns, with private engagement being the most common and preferred form. Preliminarily, activists will enter a private dialogue and attend meetings with the company management to pursue their objectives and press for a change. Thereafter, activists may write to other shareholders detailing their proposals and persuade them to vote in favour of the proposals or resolution in private.

In the case of private negotiation breakdown, activists may resort to public intervention. The activists may publish an open letter stating their demand to draw the public's attention and exert pressure on the controlling shareholders. Noster Capital LLP ("**Noster**") issued a public letter to Tsui Wah Holdings Limited ("**Tsui Wah**"), in which Noster opposed the proposed acquisition of a property holding company as announced by Tsui Wah in January 2017 and alleged that Tsui Wah had been mismanaged and the funds of the company had been misused. Subsequently,

in April 2017, the proposed acquisition was terminated. H Partners Management LLC also wrote a public letter to the Hong Kong Economic Times seeking support from other shareholders to vote in favour of its proposal for distributing special dividends. The letter was published in various newspapers on 11 July 2011.

Shareholder activists, such as David Webb and Argyle Asset, will also institute website campaigns and publish their demands against the company. Nevertheless, shareholder activists generally would not resort to website campaigns or public announcements unless there were sufficient evidence to substantiate a reasonably articulable suspicion.

Besides informal strategies, shareholder activists will also avail the voting rights accorded to them under the Listing Rules and the Takeovers Code. For instance, Cheung Kong, a shareholder holding a 38.87 per cent stake in Power Asset Holdings Limited, proposed to merge with Power Asset. In this, 49.23 per cent of the independent minority shareholders exercised their veto right and successfully opposed the proposed merger.

If activists do not receive a positive response after using informal strategies, they may escalate their engagement activity and employ legal tactics – for instance, applying for an inspection order and an injunction order to exert pressure on the company and the management. However, inspection orders can be an essential but not effective legal strategy. For instance, Elliott applied for an inspection order for documents relating to the private placement. Within one month of the application for an inspection order and before

the grant of such order, the private placement was approved. Nevertheless, Elliott launched an action against the Bank of East Asia upon obtaining and inspecting the documents relating to the private placement.

An injunction order, as compared to an inspection order, would be a more effective and preferable legal tactic in the eyes of activists. Passport instituted a campaign against the private placement by eSun and applied for an ex parte injunction order to prohibit eSun from proceeding with the private placement. The application succeeded and the proposed placement agreement was eventually terminated.

Besides interim legal measures, activists may also commence legal proceedings against a company, such as an unfair prejudice claim, shareholder derivative actions and a winding-up petition. Passport and Elliott also filed an unfair prejudice claim with a view to terminating the placement agreement and releasing the shareholders from the obligation under the private placement agreement respectively. In 2020, KVB Holdings Limited (as a shareholder of CLSA Premium Limited ("**CLSA**")) requested for an extraordinary general meeting to pass a resolution to wind up CLSA; and Global Allocation Fund (as a shareholder of South Shore Holdings Limited ("**South Shore**")) also requested for a special general meeting to pass a resolution to wind up South Shore, but both resolutions were not passed owing to insufficient support from the other shareholders.

Under section 724(1) of the Companies Ordinance, a shareholder of the company, including a non-Hong Kong company, may bring an unfair prejudice action if the affairs

of the company are being or have been conducted in a manner that is unfairly prejudicial to the interest of the members in general or one or more members.

Examples of unfair prejudicial conduct include:

- breach of the Companies Ordinance (such as failure to obtain members' approval for non-pro rata allotment of shares);
- breach of the Listing Rules (for instance, the minority shareholders' effort in blocking the resolution to amend the articles of association of a listed company when the provisions therein contravened the Listing Rules);
- breach of fiduciary duties (such as misappropriation of company assets); and
- a long-term policy of not paying dividends or paying low dividends without commercial reasons.

The remedies for a successful unfair prejudice claim include:

- an order restraining the continuance of the unfair prejudicial conduct of the company;
- an order regulating the conduct of the company's affairs in future;
- an order to purchase the shares of any member of the company by the company or another member of the company; and
- an order to pay damages by the company or any other person.

Further, or as an alternative to an unfair prejudice claim, shareholders may also apply for a winding-up of a Hong Kong company on just and equitable grounds, for instance mutual breakdown of trust and confidence, and frustration of the company's objects (such as a final and conclusive abandonment of the original business of the company).

Nevertheless, it should be noted that a winding-up application cannot be made as a matter of course where there is also an unfair prejudice claim made by the shareholders. Shareholders must explain in detail why a winding-up order is an appropriate relief for the unfair prejudice claim.

The above case law relating to unfair prejudice and winding-up on just and equitable grounds largely concerns private limited companies. As a matter of general principle, it is equally applicable to listed companies; however, a listed corporation may have a large number of shareholders involved and may also be subject to the regulation of the Hong Kong Exchanges and Clearing Limited ("**HKEX**"), which could introduce a certain degree of uncertainty as to the extent to which these principles are applicable to listed corporations.

Regardless of which strategies shareholder activists have adopted, they will increase their stakes in the company simultaneously to exert further pressure on the investee companies. Should the campaign raised by the activists fail, they will usually sell their stake in the company to minimise loss.

II. Processes and guidelines

7. What are the general processes and guidelines for shareholders' proposals?

First, shareholders should identify the nature of subject matter of their demand, namely whether they are demanding distribution of dividends, a change to board composition and governance structure, a change to the business model or termination of a proposed transaction.

Second, shareholders should familiarise themselves with the requirement for convening a general meeting. Pursuant to section 566 of the Companies Ordinance, 5 per cent of the total voting rights of all members with a right to vote at general meetings could request the board of directors to hold a general meeting. The content of the request shall specify the general nature of the business to be dealt with at the meeting and may include the text of a resolution intended to be moved at the meeting.

Directors must convene a general meeting within 21 days of receipt of the request and the meeting must take place within 28 days of the notice convening the meeting. If the directors fail to do this, the members who requested the general meeting, or any of the shareholders that represent more than half of the voting rights of all the shareholders, may themselves convene a meeting at the company's expense.

An annual general meeting ("**AGM**") is convened by directors, although shareholders of a company can apply to the court for an order calling an AGM according to section 610(7) of the Companies Ordinance. Unlike an

extraordinary general meeting ("**EGM**"), there is no provision for a specified number of shareholders to requisition an AGM.

Third, notice of general meetings shall be sent by the company to its shareholders in hardcopy or electronic form. The length of notice for AGMs and EGMs are 21 clear days and 14 clear days respectively.

If shareholders are unclear about the procedure to nominate a candidate for election as a director, they may refer to the procedures published by the subject listed company on its website.

Fourth, shareholders should satisfy the threshold required for passing their proposed resolution (namely ordinary resolution or special resolution), which is normally stated in the Companies Ordinance and the company's articles. Each company is free to draft its own customised set of articles and set a different threshold for different resolutions.

If shareholders' demands relate to distribution of dividends, regardless of whether they are interim or final, shareholders shall be bound by the maximum limit of the amount of dividends recommended by the directors according to article 91 of the Model Articles (if adopted). Furthermore, certain transactions specifically require the approval of minority shareholders according to the Listing Rules, such as right issues and open offers.

8. May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Shareholders are entitled to nominate a candidate to stand for election as a director. Assuming the company adopts the model articles, shareholders may require a shareholder meeting to be convened or a resolution to appoint a director to be tabled at the meeting. The listed company shall then publish, normally at its own expense, a notice of the general meeting together with the proxy on its website and HKEX's website in relation to the shareholders' proposal for nominating directors for election. If the director fails to convene a general meeting, a shareholder may do so at the company's expense. Moreover, a shareholder shall send the company notice of his or her intention to propose the person to be appointed as a director and that person shall also send the company notice of his or her willingness to be appointed at least seven days before the general meeting.

Shareholders may also refer to the procedures published by the subject listed company on its website.

9. May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

In Hong Kong, a special general meeting of the shareholders is also known as extraordinary general meeting or special shareholders' meeting. Regarding Hong Kong incorporated companies, 5 per cent of the total voting rights of all the members with a right to vote at the general meeting have a statutory right to request an extraordinary general meeting and anything that may be done by a resolution passed at a general meeting may be done, without a meeting and without any previous notice being required, by a written resolution of the members of the company.

III. Litigation

10. What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

The main types of litigation shareholders may institute against corporations and directors are statutory derivative actions and claims for unfair prejudice.

In Hong Kong, shareholders have a statutory right to bring

a derivative action for and on behalf of a Hong Kong company, a non-Hong Kong company and an associated company of the company, in respect of misconduct (which is defined as “fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law" under section 731 of the Companies Ordinance) committed against the corporation according to sections 731 and 732 of the Companies Ordinance. It is, however, not appropriate for an individual shareholder to take a derivative action if he or she has a personal grievance against the company and if the wrong complained of was not done to the company.

Prior to bringing a statutory derivative action, shareholders should first obtain leave from court and the court will consider, among other things, whether the proposed action appears to be in the company’s interests and whether there is a serious question to be tried and the company itself has not brought the proceedings.

The remedies of statutory derivative action are set out in section 737 of the Companies Ordinance, which include:

- an interim order pending the determination of the derivative action;
- an order directing the company or its officer to provide or not to provide information, or to do or not to do any act; and
- an order appointing an independent person to conduct an investigation and report to the court.

Shareholders cannot commence class actions on behalf of all shareholders as there is currently no class action regime

in Hong Kong. Nevertheless, the Securities and Futures Commission indicated in the Consultation Conclusions on the Principles of Responsible Ownership published in March 2016 that it will consider the introduction of class action rights in the future and when appropriate.

Shareholders can gain access to company information online free of charge. Rule 13.90 of the Listing Rules requires that listed companies publish their announcements and their up-to-date by-laws on the Stock Exchange of Hong Kong Limited's website and its own website.

In addition to the online public information, shareholders holding at least 2.5 per cent of the voting rights at the general meeting or five shareholders collectively are entitled to apply to the court to inspect any record or document of the company pursuant to section 740 of the Companies Ordinance. Moreover, under section 631 of the Companies Ordinance, shareholders may make a request for inspection of the Register of Members free of charge and for inspection of any other register, index, agreement, minutes or other documents that a company is required to keep upon the payment of an inspection fee.

C. SHAREHOLDERS' DUTIES

I. Fiduciary duties

11. Do shareholder activists owe fiduciary duties to the company?

Shareholders in Hong Kong, regardless of whether they are majority, minority or significant shareholders, do not owe a fiduciary duty to the company. Instead, the directors owe a fiduciary duty to the company.

II. Compensation

12. May directors accept compensation from shareholders who appoint them?

Directors shall not accept direct compensation from shareholders who nominate them if there is a conflict of interest. Directors owe a fiduciary duty to the company and must act in good faith in the interests of the company as a whole. In addition, a director must not make any secret profits in relation to his or her fiduciary capacity to the company. Accepting such direct compensation is likely to be regarded as a breach of fiduciary duty.

III. Mandatory bids

13. Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

First, "acting in concert" is defined under the Takeovers Code as "persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate, to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company". Unless the contrary is established, certain classes of persons or corporations are presumed to be acting in concert with others in the same class, including but not limited to its parent company, its subsidiaries, its directors and its financial or professional advisers. The Takeovers Panel will consider all circumstances when deciding whether parties are acting in concert.

While activists may solicit support from other minority shareholders of the company on a particular resolution, this will not generally be considered as activists acting in concert with other minority shareholders and would not lead to an offer obligation, although that circumstance may be taken into account as an indication that the shareholders are acting in concert.

The mandatory bid requirement is contained in Rule 26 of the Takeovers Code, which provides that a person and his or her concert parties acquiring 30 per cent or more voting rights of a company are required to make a general offer to all shareholders of the company unless a waiver is granted.

Any additional purchase of 2 per cent voting rights shall also be subject to a mandatory offer obligation.

IV. Disclosure rules

14. Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

Shareholders in Hong Kong must disclose significant shareholdings. Persons holding an interest of 5 per cent or more in a Hong Kong-listed company shall notify the Exchange and the subject listed company pursuant to sections 310(1), 311, 313 and 315 of the SFO. An initial notification shall be made within three business days of the date of acquiring 5 per cent or more voting rights or the date when such person became aware of its occurrence (whichever is later). If voting share capital held by such person falls below 5 per cent or increases, subsequent notifications shall be made within 10 days of its occurrence.

To comply with the duty of disclosure, shareholders must complete and submit Disclosure of Interest forms ("**DI forms**") to the Exchange through the Disclosure of Interest Online System. Shareholders are not required to state their intentions for their significant shareholding in the DI forms.

If a shareholder fails to make a disclosure within the time limit stipulated in the SFO or makes a false or misleading statement, he or she shall be penalised and may subject to a maximum fine of HK$100,000 or a maximum prison sentence of two years for each offence, pursuant to section

328 of the SFO.

15. Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

Disclosure obligations in Part 15 of the SFO do apply to equity derivatives according to section 311 of the SFO. According to section 308 of the SFO, equity derivatives include various derivative instruments, such as rights, options and warrants.

Under section 312 of the SFO, short positions shall be disclosed in accordance with section 310 of the SFO. Sections 336 and 352 of the SFO require all listed companies to keep a register of interests in shares and short positions, and a register of directors' and chief executives' interests and short positions respectively.

Disclosure obligations in Part 15 of the SFO also apply to persons acting in concert. According to section 317 of the SFO, when two or more persons who are a party to an agreement to acquire 5% or more interests in a listed company will be required to disclose such interest and submit the relevant documentation.

V. Insider trading

16. Do insider trading rules apply to activist activity?

Insider dealing rules and the SFO apply to activist activity.

D. COMPANY RESPONSE STRATEGIES

I. Fiduciary duties

17. What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

When considering all resolutions and proposals tabled in front of directors (whether they are an activist proposal or not), directors must act in good faith in the interest of the company, exercise their powers for proper purposes, not enter into ultra vires transactions and avoid conflicts of interest.

It is not mandatory for directors to consider an activist proposal. The standard for considering an activist proposal is the same as other board decisions, namely reasonable care, skill and diligence (section 465 of the Companies Ordinance and Rule 3.08 of the Listing Rules. “Reasonable care, skill and diligence” means the general knowledge and experience that is actually possessed by the director and that may reasonably be expected of a person carrying out a director’s functions.

II. Preparation

18. What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

It is strongly suggested that companies follow the CG Code, in particular sections D.3 and E, to minimise the risk of facing shareholder activism.

Companies should routinely review their shareholder engagement policy and regularly solicit feedback from shareholders on their corporate strategy and governance. Corporate governance guidelines setting out the routes for shareholders to provide feedback on the company's business operation could also be published for the sake of clarity.

Companies may also enhance transparency in their corporate decisions and management structure by publishing the guidelines or code of business conduct they follow. As such, the activists will take this information into account prior to commencing an activist campaign. Companies should also conduct regular strategic reviews to evaluate and compare their performance, cost structure, revenues, management structure, and the independence and expertise of their directors with their counterparts to discourage an activist from raising a campaign because of a company's underperformance.

Unusual trading of a company's stock should also be closely monitored as the larger stakes held by shareholders, the more likely the shareholders will become

activists and exercise their minority veto rights.

Companies should be open-minded towards an activist's proposal and try to understand the activist's point of view. A committee could be formed to analyse the proposal.

III. Defences

19. What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

New listed applicants may consider adopting a weighted voting right structure that satisfies the requirements stated in Rule 8A.06 of the Listing Rules. The companies that have already listed in Hong Kong are not allowed to adopt a weighted voting right structure at this juncture according to Rule 8A.05 of the Listing Rules.

Certain procedural safeguards are already in place for the company. Rule 3.08 of the Listing Rules also reflects the rule that it is the board, not the shareholders, that is responsible for the management and the operation of the company. The courts in Hong Kong shall intervene only when the boundaries of discretion are transgressed.

If shareholders would like to reallocate the power between the general meeting and the board, they may take preventive measures to amend the articles of the company. When customising their own articles, companies may or may not grant powers to the directors subject to the control of the shareholders via a decision achieved by a certain

level of majority (e.g., by an ordinary resolution). Nevertheless, the alteration of the articles of association shall not be made unfairly prejudicial to the minority or in contravention of the Companies Ordinance.

The resolution to alter a company's articles may only be passed by special resolution. As such, companies must take prompt action before an activist, together with its alliance, accumulates a total shareholding of 25 per cent. However, even if the resolution to amend the articles is blocked by a minority shareholder holding an interest of more than 25 per cent, the majority shareholder may bring a claim for unfair prejudice if the articles violate the provisions in the Listing Rules.

IV. Proxy votes

20. Do companies receive daily or periodic reports of proxy votes during the voting period?

A proxy form offering two-way voting on all resolutions must be sent together with notice of the general meeting to the shareholders and must be submitted for publication on the Stock Exchange of Hong Kong Limited's website according to Rule 13.38 of the Listing Rules. The time and place for lodging proxy forms must be stated in the proxy form. It is a common practice in Hong Kong for shareholders to lodge a proxy form with the share registrar of a listed company. As such, whether the companies receive daily or periodic reports of proxy votes during the voting period depends on the practice of the share registrar.

Nevertheless, the Securities and Futures Commission imposes an obligation on all share registrars to ensure that all communications between the listed company and its registered shareholders that the share registrar is instructed to distribute are distributed in a timely, accurate and appropriate manner in accordance with paragraph 5.5 of the Code of Conduct for Share Registrars.

V. Settlements

21. Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

It is common for companies in Hong Kong to enter into a private settlement with activists and the types of arrangement commonly agreed between the parties include:

- an agreement to appoint a shareholder activist's designee to the board of the directors;
- an agreement to change the corporate governance of the company, such as modifying the size and composition of the board of directors of the company;
- an agreement not to enter into certain transactions; and
- a non-disparagement agreement.

E. SHAREHOLDER COMMUNICATION AND ENGAGEMENT

I. Shareholder engagement

22. Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

It is more common to have organised shareholder engagement efforts as the CG Code expressly recommends that listed companies must have an ongoing dialogue with shareholders to communicate with them and encourage their participation. The CG Code also suggests that listed companies should formulate a shareholders' communications policy. Many Hong Kong-listed companies have carried out shareholder engagement as a matter of course and complied with the shareholder engagement efforts requirement stated in the CG Code.

The outreach efforts typically entail:

- regular participation in investor conferences and roadshows;
- seminars and workshops for investors and industry associations;
- a specific hotline and email account to answer enquiries from individual shareholders; and
- regular dissimilation of the company's information to shareholders through email and websites.

23. Are directors commonly involved in shareholder engagement efforts?

Directors are expected to be involved in shareholder engagement efforts in Hong Kong. According to the CG Code, the chairman should ensure that appropriate measures have been taken to provide effective communication with shareholders and their views are communicated to the board of directors as a whole. In the general meetings, the chairman of the board is expected to be present and answer shareholders' queries. The board of the listed corporation must maintain an ongoing dialogue with shareholders by, inter alia, communicating with shareholders in general meetings, and must establish a shareholders' communication policy.

II. Disclosure

24. Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

With a view to promoting shareholders' engagement, a listed company is required to disclose the following information in its Corporate Governance Report according to paragraph O of the CG Code:

- the way in which shareholders can convene an extraordinary general meeting;

- the procedure for sending enquiries to the board with sufficient contact details; and
- the procedure for making proposals at a shareholders' meeting with sufficient contact details.

As such, shareholders may refer to the company's Corporate Governance Report and communicate directly with the board through the contact method indicated therein.

The board of directors shall also establish a shareholders' communication policy and review it on a regular basis to ensure its effectiveness according to section E.1.4 of the CG Code. It is mandatory for the listed company to disclose whether this has been done in its interim and annual reports. If there is any deviation from the sections of the CG Code, the reasons for this must be provided in the interim and annual reports.

Nevertheless, companies must avoid selective disclosure. It is understandable that when an activist has entered into dialogue with the board of the company and certain information is disclosed by the company to the activist, this information may fall under the scope of inside information according to section 307A(1) of the SFO, especially if other shareholders are not provided with the information. As such, any further dealing by the activist in the company's shares may amount to an act of insider dealing pursuant to sections 270(1)(e) and 291(5) of the SFO. In this regard, companies must endeavour to avoid selective disclosure.

III. Communication with shareholders

25. What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

Regarding the method to solicit support from other shareholders, an open letter is a common tool in Hong Kong. Nevertheless, there is an inherent risk in publishing an open letter. If the open letter contains any false or misleading information about securities or futures that is likely to induce investment decisions or have an impact on the price and the activists knowingly, recklessly or negligently disseminate the false and misleading information, activists may be held liable under sections 277 and 298 of the SFO and may have to pay compensation to those who have suffered as a result of the false or misleading information.

For instance, Andrew Left of Citron Research was found criminally liable by Hong Kong's Court of Appeal under section 277 for his false allegation in his research report that Evergrande Real Estate Group Limited ("**Evergrande**") was insolvent and had consistently presented fraudulent information to the public. The share price of Evergrande fell sharply on the day following the publication of the report. As such, Andrew Left was banned from trading for five years and ordered to disgorge his profit of HK$1,596,240 from shorting shares of Evergrande and to reimburse the Securities and Futures Commission for its investigation and

legal costs.

It is noteworthy that the Court of Appeal specifically indicates that, when considering whether an unlicensed individual, namely Andrew Left, negligently disseminated the false and misleading information, the standard of care should be one that is comparable to a market commentator or analyst. Section 277 of the SFO creates a duty of care on any and all persons who choose to disseminate information that is likely to impact the market with a view to maintaining the integrity of the market and protecting the investing public. In view of the above, both individual activists and institutional activists must carry out reasonable steps to ensure that the information in relation to their investee company is true and not misleading before it is published.

IV. Access to the share register

26. Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

According to section 366 of the SFO, all listed companies must allow shareholders' to inspect the register of interests in shares (including both registered interests and beneficial interests) and record any change made therein with a view to enabling members of the public to ascertain the identity and the particulars of persons who are the true owners of voting shares in the listed corporation.

Under section 340 of the SFO, any shareholder may inspect the register for free and the investing public may inspect the register upon payment of HK$10. If the inspection request is rejected, the Court of First Instance may order and compel an immediate inspection.

F. UPDATE AND TRENDS

I. Recent activist campaigns

27. Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

The current hot topic in shareholder activism is the public letter issued by Third Point LLC ("**Third Point**") to Prudential plc ("**Prudential**"), requesting for a split of its Asian and US businesses (namely Prudential Corporation Asia ("**PruAsia**") and Jackson National Life ("**Jackson**")) and thereafter pivoting from dividend growth to long-term value creation as the main priority. Third Point also requested that Prudential equip PruAsia with local leadership at management and board level and ensure each board has intellectual diversity, local market knowledge and relevant industry expertise. In January 2021, Prudential announced its plan to separate Jackson from Prudential's group through a demerger and a change in the leadership team of Jackson.

Another recent hot topic in shareholder activism is the high-profile shareholder activist campaigns instituted by Elliott. The primary aim of Elliott's campaign is to oppose a placement agreement proposed by the Bank of East Asia ("**BEA**"). Elliott filed an unfair prejudice petition against the BEA on 18 July 2016 (*Elliott International LP v Bank of East Asia Ltd (No 2)* HCMP 1812/2016) and successfully sought an order for discovery of documents in relation to the private placement on 28 August 2018. In 2020, the BEA agreed to

carry out a comprehensive review of its portfolio of businesses and assets and Elliot thereafter applied for a pause of the unfair prejudice proceedings, putting an end to the five-year legal battle. In September 2020, Elliott also supported the BEA's sale of its insurance arm to focus on its core banking operations in Hong Kong and mainland China.

28. What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In November 2020, the Hong Kong government tabled the Companies (Corporate Rescue) Bill to implement a statutory corporate rescue procedure and insolvent trading provisions in Hong Kong. In summary, the proposed corporate rescue procedure aims to facilitate distressed companies' attempts to rescue themselves from insolvency by introducing a moratorium. When a company is placed into a moratorium, it cannot be wound up in the same period. The Bill is expected to be presented to the Legislative Council in early 2021.

Travel and other restrictions that have arisen in connection with the covid-19 pandemic may disrupt the reporting or audit processes of certain listed companies. As failure by a listed company to publish its results and annual report in a

timely manner may lead to a suspension of trading, the SFC and the Exchange issued a joint statement, a set of frequently asked questions and further guidance in February and March 2020 to provide guidance on the publication of preliminary results announcements and annual reports, and the circumstances under which the Exchange will not require a suspension of trading. Following delays in the publication of results announcements and annual reports, annual general meetings of shareholders will also be postponed accordingly.

The Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Chapter 599G) became effective on 29 March 2020 and would last for a period of 14 days subject to extension (the "specified period"), under which group gatherings at public places are prohibited, subject to certain exemptions, which includes a shareholders' meeting of a company listed on the Exchange that is held in accordance with the Listing Rules. Annual general meetings are generally exempted under the Regulation, whereas extraordinary general meetings and shareholders' general meetings will only be exempted if they are held within the specified period to comply with:

- any law or regulation in Hong Kong or overseas that is applicable to the listed company or its subsidiary;
- the Listing Rules or the Takeovers Code;
- the listed company's own constitutional documents; or
- other regulatory instruments.

The SFC and the Exchange published a joint statement in April 2020 encouraging listed companies to reduce the need for physical attendance in meetings by, for example, using videoconference and encouraging shareholders to vote by proxy.

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Contact us

For enquiries, please contact members of our Litigation & Dispute Resolution Department:

Sherman Yan | Managing Partner

Head of Litigation & Dispute Resolution Department

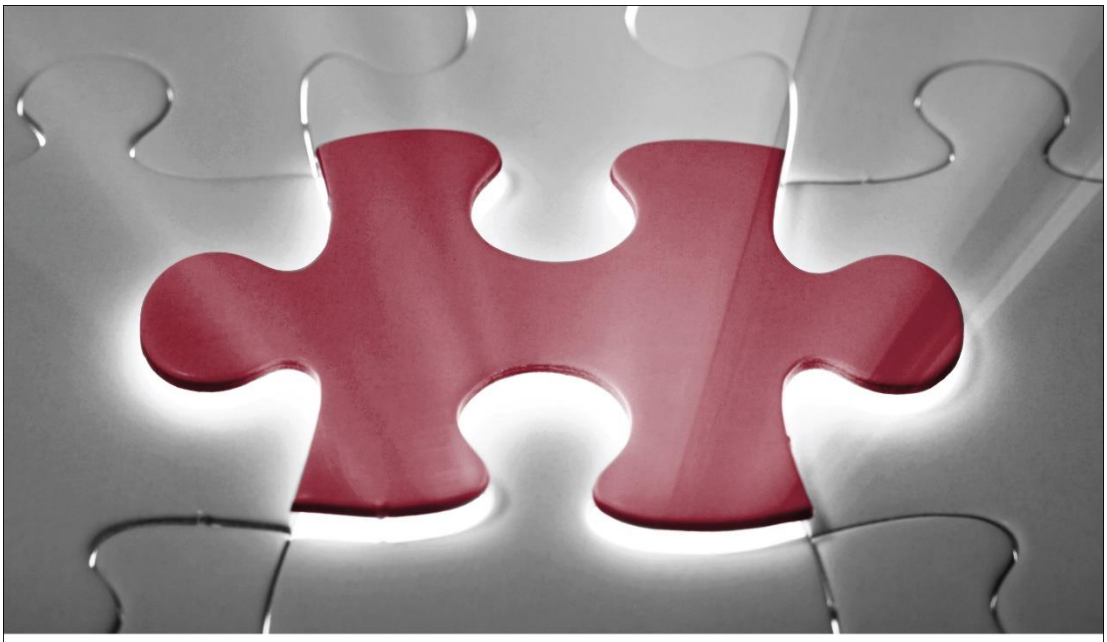
Direct line: (852) 2107 0343

Email: sherman.yan@onc.hk

Dominic Wai | Partner

Direct line: (852) 3906 9649

Email: dominic.wai@onc.hk



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19th Floor, Three Exchange Square,
8 Connaught Place, Central, Hong Kong
香港中環康樂廣場8號交易廣場第三期19樓

Main 電話 (852) 2810 1212
Fax 傳真 (852) 2804 6311
E-mail 電郵 onc@onc.hk

www.onc.hk