Shareholder Activism – Shareholder Rights And Its Effectiveness

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Introduction

Shareholder rights and responsibilities have always occupied a separate section in the Singapore Code of Corporate Governance when it was first issued in 2001. In the most recent revised Code of Corporate Governance 2012 ("Code 2012"), shareholder rights and responsibilities continue to have prominence. The Code 2012 reminds that "companies should treat all shareholders fairly and equitably, and should recognise, protect and facilitate the exercise of shareholder rights…". Amongst the two key rights highlighted are the need to actively engage shareholders and put in place investor relations policy to "promote regular, effective and fair communication with shareholders" and to encourage greater shareholder participation at general meetings and "to allow shareholders the opportunity to communicate their views on various matters affecting the company".

Clearly the emphasis is on giving the shareholders, regardless of how small or how big, a voice. The question always remains as to whether the mere voice is sufficient as this in itself cannot necessarily directly influence the decisions made by the company.

To this end then, is the shareholder now better equipped then he was say 20 years ago or even 10 years ago? Whilst on paper, this writer takes the view that there has been no real change, save for allowing proxy voting, at least in practice there appears to be more listening going on. This is perhaps the more important aspect that has been borne out by the ever increasing shareholder activism.

This article revisits old ground in

looking at some of the basic rights of shareholders, reviews the state of shareholder activism, and concludes that perhaps the better approach is to promote shareholder engagement, which has over the years achieved small wns. As Mahatma Gandhi allegedly said, "whatever you do will be insignificant, but it is very important that you do it." We all must start somewhere.

Basic Shareholder Rights

The Companies Act, Cap 50, prescribes certain fundamental rights that a shareholder will have. These include the following:

- Adequate and secure methods for registration of shares to ensure protection of ownership.
- Ability to transfer the shares of the company freely, subject only to such pre-emption rights, or requisite approvals being obtained as the shareholder has agreed to. This is typically more a private company concern rather than a listed company issue.
- Ability to obtain relevant information on the company in a timely manner and on a regular basis.
- Ability to attend and participate in general meetings
  - Ability to receive such information as is adequate to enable one to make an informed decision before actually exercising one's right to vote.
  - Ability to requisition a resolution to be discussed and if possible to be carried at general meetings, subject only to compliance with the procedural requirements necessary to requisition such a resolution.
- Ability to vote at the meetings.
  - Ability to appoint up to two proxies to attend and vote on its behalf. This is being further evolved.
- Ability to elect the board of directors, the external auditors, and to modify the articles of association as the need arises.
  - Ability to demand for a poll on any question or matter other than the election of the Chairman of the meeting or the adjournment of the meeting.
  - Ability to inspect the minute books of the company and to make copies thereof without charge, or alternatively, entitlement to be furnished, within 14 days after he has made a request in writing to the company, with a copy of any shareholder meeting minutes of the company at a charge not exceeding S$1 per page.
  - Ability to inspect the register of members at no charge and various other registers.
- Ability to participate in dividend distribution and generally to share in the profits of the company.

Amongst the various rights spelt out above, perhaps the strongest right that a shareholder has is the ability to exercise voting rights. The right to vote is a fundamental proprietary right and has been recognised in many cases, including from as long ago as in 1992 in *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors*. A shareholder who is deprived of his right to vote can commence proceedings to declare the resolution passed invalid. It is no defence that the right to vote, if not deprived, would not have made a difference to the outcome of a meeting. In the old English case of *Pender v Lushington* (1877), the court observed as follows:

> But there is another ground on which the action may be maintained. This is an action by Mr Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded an individual right in respect of which he has a right to sue. … He has a right to say, 'Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you.' What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.

The right to vote has been tweaked from time to time, with amendments made to the Companies Act in May 2003 allowing companies some flexibility in the way they structure their share capital. Shareholders could since then be provided with more than one vote per share. Specifically, private companies and private company subsidiaries of public companies could also have non-voting or multiple voting equity shares. However, for public companies, as a matter of good corporate governance and to ensure that all investors are treated equally, the one-share-one vote principle will continue to prevail. More recent tweaks do recognise electronic voting, for example.

It is clear that shareholders' ability to influence management or other decisions taken on behalf of the company varies according to their proportionate shareholdings in the company. To a large degree, such voting power translates into a potential influence over management. Yet, for the average small shareholder, the fact such a shareholder has power under the Companies Act to call for a meeting to have an extraordinary item discussed where the directors fail to requisition the meeting at the request of the shareholders is a reflection of shareholder power to some extent.

Separately, it is essential not to take away the shareholders' right to vote at meetings simply because it is physically difficult to have the shareholders vote. For example, shareholders who do not attend the physical meeting do not have a means of exercising their votes, short of a proxy vote. Allowing for electronic voting and voting in absenteeism can eliminate this. Such voting mechanisms

also increase the sense of participation of shareholders in the general corporate strategy of the company. This is something that has gained traction in recent times especially with listed companies. The Code 2012 provides that apart from companies allowing "corporations which provide nominee or custodial services to appoint more than two proxies", there is also express mention that "companies should … allow for absentia voting at general meetings…".

Shareholder Activism Or Engagement

Having discussed the basic shareholder rights, this article quickly discusses the much bandied concept of shareholder activism. The phrase "shareholder activism" is not a term of art and may broadly be said to refer to shareholders taking a more active role in the affairs of a company. Some quarters like to limit this to small shareholders actively pursuing personal goals and pushing their rights without the interest of the company as a whole in mind. However, the preferred approach is to recognise that it is in fact shareholder engagement at the multiple levels, whether with the small or the institutional or the majority shareholder, that become productive.

With shareholder engagement, it is utilising all of the rights discussed in the preceding section but also a variety of other continuing efforts throughout the year. The process is not always formalised, and if formalised has, until the last decade, had very little bite. Examples of formalised shareholder activism include the growth of proxy advisory companies and the formation of shareholder associations, which have in recent times started getting traction in Singapore. With the greater traction, there has also been more bite.

Shareholders have also been lauded as being the push behind pay policy shifts and "say on pay", for example. On the latter, which forms but a component of the US Dodd-Frank Act 2010, shareholders have managed to get a non-binding vote of executive pay. The verdict is still out as to whether this will indeed improve corporate governance; but the fact remains that the change was brought about through shareholders constructively engaging the corporations and authorities.

Why Increased Shareholder Activism?

The rise in Singapore in shareholder activism is the result of a growing awareness of legal rights, a more financially literate population, and a more demanding financial and political climate. The bottom up approach of corporate governance is also a major impetus for this.

Another possible reason for increased shareholder activism can be attributed to the slow down in the markets. Where revenues and share prices rise in a buoyant economy, the deficiencies of a weak management and inadequate corporate strategic planning are not immediately discernible or even quibbled about. However, in times of economic downturn, such as the prolonged one that the global economy has been facing, concerns about the management and/or corporate policies of companies arise more readily. This is particularly pronounced where the shareholder attempts to use the traditional means for recording his dissatisfaction with a company, i.e. by selling his shares. This means that he could face a substantial loss as a consequence of a depressed market. It is, therefore, often more attractive for shareholders to seek to change the policies or the management of the companies in which they invest in the hope of reviving the value of their shares or forcing a strategy consistent with the purpose of their original investment. The fact of numerous corporate failures in recent times have also fuelled shareholder activism.

Another possible factor is the willingness of the press to report views from not just the company and the majority shareholders, but also the minority shareholders. The press is evidently an effective force in ensuring that the interests of all segments are publicised. All companies want to avoid negative publicity as that has a bearing on shareholder value at the end of the day.

Finally, yet another possible key enhancer of shareholder activism has been the increased call for better corporate governance and transparency in the region, including Singapore. The emergence of corporate governance codes requires more information to be disclosed. This means that shareholders are now appraised of director remuneration and other key facets of corporate decision making, which were closed to them previously. This allows for more intelligent questions to be asked and avoids the concerns of blind voting on corporate decisions which was prevalent previously.

Activism At AGMs

Activism at the annual general meeting ("AGM"') is typically thought of as being perhaps the most common form of engagement. If properly focused, even a single shareholder can arguably put adequate pressure on the board of directors to act properly in the interest of the company. In essence, the AGM is meant to be the forum where directors are held accountable to all shareholders for their stewardship. The AGM should be a discussive debating, information exchanging and decision making body. Yet, there is a real concern about how shareholder activism can disrupt the AGMs of companies. Some shareholders sometimes acquire a few shares for a specific purpose and attempt to use the AGM as a forum for private causes. On occasion, pressure or lobby groups use the meetings to draw media interest to social or environmental issues that have only a tangential bearing on a company's business. The noted objectives of such groups are disruption rather than

enlightenment, and self-advertising rather than company promotion. There is essentially no real interest in the active monitoring of the company's financial performance and work operations.

This in turn has called into question the very basis for holding AGMs since many of these meetings appear to be positioned in terms of activity at opposite ends of the behavourial spectrum. Indeed in the United Kingdom in 1999, a consultation document circulated by the Company Law Review Steering Group queried whether AGMs should be dispensed with altogether as being anachronistic. Notwithstanding unpleasant or torpid AGMs, the investing public, the professional bodies and the financial community of the United Kingdom were genuinely outraged that such a move was even contemplated. Not surprisingly, the proposal was immediately dropped.

Given the ineffectiveness of a number of AGMs in providing members with the opportunity to debate and to receive answers on the limited number of matters that are mandated to be placed before them, it is not surprising that AGMs have not always been treated with the respect they should be accorded both by management and shareholders. Yet, with the changes over the last few years bringing about greater transparency, more disclosure and increased opportunities for various quarters of shareholders to participate, the AGM can be used as a positive means of exchanging views, receiving feedback and engaging in fruitful discussions on next steps. To this end, even the Singapore Exchange has been taking positive steps to educate shareholders to better engage the companies at AGMs through collateral made available on their website in easy to understand manner.

As the barriers for participation by ALL shareholders are lowered, be it through electronic voting, proxy voting or any other means, but with reasonably low costs, shareholder engagement can and will become more effective. It goes without saying that entrenched and or majority ownership will remain a hurdle; but at least the communication would have started.

Shareholder Activities Must Stop At Matters Traditionally Reserved For The Board

Whilst shareholder engagement is a positive thing given that shareholders are often the forgotten guardians of corporate governance, any activity by shareholders must nevertheless be tempered. Engagement and discussions on corporate policies and business strategies should be welcomed. Yet, there must be a "no-go" zone when it comes to management of the company and its affairs; and importantly, when it comes to setting the corporate strategy. Shareholders must not be allowed to interfere with management and board matters. This is a fundamental separation of powers that even the Companies Act recognises.

The issues associated with the point made in the preceding paragraph are of course plentiful and complex, and are certainly not ones that can be resolved in an article of this length. The assumption if of course that there is no fraud or other misdeeds involved within the board or amongst individual directors. Whilst there may be instances to vote against the sale of a company or for opposing a major transaction, those are rights that could be exercised as valid shareholder rights when the matter is put to the vote at a general meeting. Short of this, to the extent that the matters do not go to the capitalisation of the company and, hence, not to the shareholder values as such, this writer maintains the view that corporate strategies and business direction must remain within the purview of the management and the board. If shareholders are not happy with particular board decisions, they have the right to use their voting power to replace directors.

Conclusion

The end game must be that shareholders should take advantage of the increasing number of avenues open to them to actively engage the company to positively steer it in the interest of the company as a whole. Despite the fact that shareholders need only act in their own personal interest, doing the right thing calls for a certain degree of social responsibility on the part of shareholders as well. They should use their rights for improving corporate governance within the company which can only translate over time to better shareholder value. ■

The views expressed in this article are entirely that of the writer and does not reflect the views of any organization that she may be working with or associated with.