Legal Update

Practical Difficulties Experienced by Shareholders in the Calling of Meetings under §177 of the Companies Act 1967

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In this legal update, we set out to examine §177 of the Companies Act 1967 (the "**CA**"), one of two statutory provisions enshrining the right of members to convene general meetings of a company, subject to minimum shareholding requirements. While the calling of a meeting under §177 of the CA ("**§177 meeting**") is a statutory right, members often run into practical difficulties when attempting to exercise their right to call such a meeting. This legal update will examine some of these practical difficulties which requisitioners ("the **Requisitioning Shareholders**") of a §177 meeting may face, especially in the context of a listed company (the "**Listco**").

Some of these difficulties include: (i) a dearth of statutory law compelling the Listco to publish the notice of a shareholder meeting ("**Notice**"), which could potentially result in the meeting being delayed or invalidated owing to a failure to satisfy the minimum notice period requirements; and (ii) the Requisitioning Shareholders obtaining a full listing of the Listco's shareholders, including those who hold shares via nominee / intermediary accounts (such as banks and brokerages) and the Central Depository ("**CDP**").

Further, the purpose of shareholders requisitioning for a general meeting is almost always to vote against and overturn the decisions of the board, or for the removal of the directors themselves. This creates an inherent conundrum and conflict of interest scenario which brings into question the willingness of the directors to assist in or to facilitate the calling of such general meeting (even if they are compelled by law to do so) whereat their own decisions or appointments may be overridden or revoked.

This bulletin will therefore identify and discuss the various barriers that may prevent the smooth convention of a §177 meeting, as well as our proposed amendments to remedy these matters.

Practical Difficulties in Requisitioning a §177 Meeting

Statutory Right of Members to Requisition for General Meetings

While most general meetings are convened and administered by a company's Board of Directors, the Companies Act empowers two or more members holding at least 10% of the total number of issued shares of the company to call for a meeting of the company. The members may either requisition the directors of the company to hold the general meeting (under §176 of the CA) or directly call a general meeting themselves (under §177 of the CA).

While satisfying the procedural requirements of convening a general meeting under §177 of the CA appears non-controversial, the directors of the company, should they choose to, may well put on roadblocks that may impede or delay the calling of the general meeting, such that the general meeting may even be deemed to have been invalidly convened.

Publication of Notice of General Meeting on SGXNet

In the context of a Listco, under Rule 704(15) of the SGX-ST Listing Manual (the "**Listing Manual**"), the date, time and place of any general meeting must be immediately announced. All notices convening meetings must also be sent to shareholders at least 14 calendar days before the meeting (excluding the date of notice and the date of meeting). "Sent" is usually a function of what the constitution of the Listco states. In the normal course of events, such notices are announced on the SGXNet portal, with the notice of general meeting also sent by post to all shareholders, where it is usually appended to the letter to shareholders.

However, the publication of such announcement (of the Notice) requires the cooperation of the Listco's directors and the company secretary, who control access to the Listco's SGXNet token as well as the Listco's website. No Requisitioning Shareholders can hope to upload or publish any material onto the SGXNet portal or the Listco's website without the directors' cooperation.

Hence, should the Listco simply refuse to publish the Notice on SGXNet by the required cut-off date (such that the statutory minimum notice period required for the calling of a general meeting cannot be met), there is little legal recourse for the Requisitioning Shareholders to compel the Listco to do so. The result of such delay or demurment may mean that the minimum notice requirement cannot be satisfied, and the general meeting thus cannot be validly convened.

This problem is compounded when faced with a Listco that is uncooperative, or if there is hostility between the shareholders and the Listco's directors. Often, the Listco's directors may seek to delay or demur by indicating that they are in the process of verifying the details of the Notice received or that they are otherwise seeking legal advice with respect to the Notice. If the Listco persistently refuses to or delays announcing the Notice on SGXNet and on its own website, the Requisitioning Shareholders have few avenues of recourse as they can neither compel the Listco to make such announcements nor access SGXNet themselves. In such a scenario, the Notice may never be "sent" at all.

Difficulties in Effecting Postal Service

Again, in order to "send" the Notice by way of postal mail, the Requisitioning Members would need access to the official and updated registered addresses of all the shareholders ("**shareholding listing**").

While §190 of the CA requires a Listco to maintain a public register and index of all members holding scrip shares (the "**§190 Register**"), access to a Listco's §190 Register alone is insufficient for the purposes of effecting postal service to members of a publicly listed company. Under §81SJ(3)(a) of the Securities and Futures Act, a Listco is exempted from including in a §190 Register the names and particulars of its CDP depositors. The §190 Register would simply reflect "CDP" as the member holding the scripless shares, thereby leaving the Requisitioning Members unaware of the registered addresses of the Listco's scripless shareholders. Therefore, the Requisitioning Members will require access to both the Listco's §190 Register, as well as the Listco's CDP Register.

Without a direction from the board to the share registrar of the issuer, the Requisitioning Members would not be able to have access to the aforementioned shareholding listings, and would therefore not able to "send" the Notice.

Even if the Requisitioning Shareholders were to obtain access to both shareholding listings, there is no assurance that the listings are complete, or that the relevant intermediaries or nominees, as well as CDP, may acknowledge the Notice or forward the Notice to the beneficial owners of the shares – who may then be disenfranchised from voting or participating at the general meeting. Under the current regime, shareholders of the Listco are empowered to exercise their voting rights so long as the Notice is announced on SGXNet.

While SGX RegCo can take private disciplinary action against the Listco for the failure to make an immediate announcement under s704(15) of the Listing Manual[1], the regime is silent on whether SGX RegCo has powers to compel the Listco to announce the meeting or the Notice on SGXNet. There may also be reluctance to do so, especially if such an action may be interpreted as being partial to any one side. In any event, a shareholder meeting is called for by the Company's directors or its shareholders, not by a regulator. The end result is that the shareholders of the Listco may be

[1] Private disciplinary action against Company <https://www.sgx.com/private-discliplinary-actions/private-disciplinary-action-against-company-7>

In this case, SGX privately disciplined against the Listed Company ("**Company"**) for failure to announce the meeting immediately. SGX's investigations revealed that the Company's failure to make the relevant announcement was due to administrative oversight. The Company submitted that notwithstanding that its announcement of the notice of AGM via SGXNet was delayed by several days, it had provided shareholders at least 14 days' notice of the AGM through (i) the dispatch of the Annual Report to all qualifying shareholders; and (ii) a notice of AGM published in a local newspaper.

The advertisement in a local newspaper does not fulfil the requirements under Listing Rule 704(15), which requires the Company to announce its notice of AGM through an SGXNet announcement before the required date.

deprived of or inordinately delayed from attending at a general meeting and exercising their vote.

Conflict of Interest

While the law allows for the requisition of general meetings by shareholders, directors are in these instances placed in a position of conflict of interest which disincentivises them from assisting in or facilitating the calling of a general meeting at which their decisions may be questioned or overturned, or where they might themselves be removed from office. As the saying goes, why would turkeys vote for Christmas?

In such situations, the obvious recommendation is that any director who may be personally interested should abstain from voting on any resolutions thereon. This applies in particular to a director who is proposed to be removed. The threat of disentitlement to future remuneration creates a personal material interest for that subject director, and it is rightful and reasonable that such director should not vote at the board level on his own removal or on matters pertaining to the calling of the general meeting at which he is proposed to be removed due to the inherent conflict of interest. This could, for example, involve the release of announcements or the voting on any resolution to reject/approve (for that matter) any Notice.

However, what is the protocol if Requisitioning Shareholders have called for a general meeting to remove all incumbent directors?

Proposed amendments and changes: Our Views

In light of the limitations in the current regime, we humbly propose the following to address the issues.

First, there must be an independent avenue, besides the Company, for the details of the meeting or the full Notice on SGXNet to be published on SGXNET, in order to remove one of the bigger roadblocks to Requisitioning Shareholders being able to smoothly convene a general meeting. This would provide greater transparency and accountability for companies and would ensure that shareholders can exercise their rights effectively with less disenfranchisement of shareholders (in particular those who are holding their shares through intermediaries / nominees or the CDP).

On the conflict of interest conundrum, particularly where all of the incumbent directors are proposed to be removed, companies should be required to disclose whether an interested director did vote, and if so, the basis for his vote when he is so interested.

Conclusion

While it is often much less costly and time-consuming to resolve disputes in the boardroom than the courtroom, lacuna in the regulations must be plugged and regulations given more bite in order that shareholders who are aggrieved or unfairly disenfranchised do not have to resort to litigation.

In conclusion, we are of the view that the proposed amendments to the Listing Manual are a step in the right direction in addressing the limitations in the current regime for convening meetings under both §176 and §177 of the CA. Furthermore, it is imperative for the regulators to keep an eye on the evolving business environment and to make the necessary amendments to the law should there any lacuna be found which may be exploited to disenfranchise shareholders of their statutory rights.

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APPENDIX A

Relevant Provisions from the Companies Act

§176 – Convening of extraordinary general meeting on requisition

(1) The directors of a company, despite anything in its constitution, must, on the requisition of members holding at the date of the deposit of the requisition not less than 10% of the total number of paid-up shares as at the date of the deposit carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than 10% of the total voting rights of all members having at that date a right to vote at general meetings, immediately proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than 2 months after the receipt by the company of the requisition.

(1A) For the purposes of subsection (1), any of the company's paid-up shares held as treasury shares are to be disregarded.

(2) The requisition must state the objects of the meeting and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

(3) If the directors do not within 21 days after the date of the deposit of the requisition proceed to convene a meeting, the requisitionists, or any of them representing more than 50% of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting, but any meeting so convened must not be held after the expiration of 3 months from that date.

(4) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors to convene a meeting must be paid to the requisitionists by the company, and any sum so paid must be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

§177 – Calling of meetings

(1) Two or more members holding not less than 10% of the total number of issued shares of the company (excluding treasury shares) or, if the company has not a share capital, not less than 5% in number of the members of the company or such lesser number as is provided by the constitution may call a meeting of the company.

(2) A meeting of a company or of a class of members, other than a meeting for the passing of a special resolution, must be called by written notice of not less than 14 days or such longer period as is provided in the constitution.

(3) (a) A meeting is, even though it is called by notice shorter than is required by subsection (2), deemed to be duly called if it is so agreed —

(b) in the case of any other meeting — by a majority in number of the members having a right to attend and vote thereat, being a majority which together holds not less than 95% of the total voting rights of all the members having a right to vote at that meeting.