



# Takeovers and proxy appointment – time for change

**A**S the tussle for EON Capital moves into another dimension, the debate had shifted subtly to one of “process”. Namely, where a takeover of a company centres on the sale of its assets and liabilities under the Companies Act, whether amendments need to be made to raise the bar from a simple majority to 75% of shareholder approval.

In Hong Kong, after a rule change in 2008 (previously the law allowed privatisation by simple majority through the Companies Act) the Take-Over Code required transactions involving significant asset disposals coupled with a proposal to withdraw the company’s listing status be subjected to 75% approval of disinterested shareholders, and not more than 10% voted against the delisting.

Any debate on amending the Companies Act to accommodate this anomaly would miss the point. This is because the Companies Act was fashioned primarily as legislation to guide the conduct of all companies – or generally smaller ones not publicly traded – which may not otherwise provide shareholders an exit option.

Regulators and legislators need

to urgently step in to close this loophole. Fortunately, there are means to do this, one of which is provided under Practice Note 1.1 of the Code on Takeovers & Mergers (Code) where regulators can issue rulings in the form of Practice Notes in the interpretation of the Code, including conduct of persons affected by a takeover or merger.

The Code governs takeover activities, as the spirit is for minority shareholder protection. It prevents them from being forced out by the majority and offers them the option of remaining in the business if the price offered wasn’t good enough for them to accept.

Therefore, bulldozing a deal is not in the spirit of the Code in whatever manner.

Over and above all this should sit the good of the greater market. Lest one forgets, as in the case of EON Capital, it grew to where it is today by asking for, and getting, its funds from the general public – including the minority shareholder.

Another issue which surfaced through the recently adjourned EGM of EON Capital and became

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the object of scrutiny was on the appointment of proxies. According to Section 149(1)(b) of the Companies Act, a shareholder cannot appoint any person to be his/her proxy unless he/she is a shareholder of the company, an advocate, an approved company auditor or a person approved by the Registrar of Companies.

Most companies, fortunately, have done away with this limitation by specifying in their Memorandum and Articles of Association (M&A) that that provision does not apply, thus allowing anyone to be a proxy.

However, there are still some companies which prefer such a limitation, and EON Capital is one of them, which ironically had led to the adjournment of the EGM on technicalities.

It was argued that the independent chairman who so happened not to own a single share in the company was not qualified to act as a proxy for the thousands of shareholders who had appointed him, as he was neither a shareholder, nor was he any of categories of persons qualified to be a proxy.

It is pretty standard content in the Proxy Form that a shareholder has the option to appoint the chairman of the meeting to vote on his/her behalf.

And it is also commonly provided in the M&A that the chairman of the board preside as the chairman at every general meeting unless he is unable to conduct himself independently. The question is whether the chairman, when appointed as proxy, needs to also meet the stated requirements to qualify as a proxy. Otherwise, chairmen of PLCs are well advised to own at least one share to qualify.

We urge the regulators to look into the removal of this categorical limitations on proxy appointment for PLCs. While the reasoning behind the provision on proxy appointment may have its merits back then when the Companies Act was enacted in 1965, the rule now appears archaic given the passage of time as people are generally better educated now.

Even the Corporate Law Reform Committee, in its final report released end-2008, had recommended the removal of this limitation.

Yet, no change has come. In the mean time, companies having such limitations on proxy appointment are encouraged to change their M&A, which is easily done as opposed to amending the Companies Act.

Times have changed. We should be open enough to allow vibrant discussions at general meetings among members and proxies, without undue preference towards any profession or individuals.

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