MINORITY SHAREHOLDERS WATCH GROUP
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INDEPENDENT DIRECTORS

WHEN TO LEAVE A TROUBLED COMPANY

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"I wondered should I go, or should I stay" is the opening line from the song, *The Last Waltz*, made famous by Engelbert Humperdinck in 1967.

That line may very well be what some independent directors of troubled public-listed companies (PLCs) are probably contemplating.

Much is expected of independent directors as they are considered the last bastion of vigilance and protection at the corporate board level when it comes to minority shareholder protection and safeguarding of their interests.

Independent directors are the ones who are expected to speak out against practices that may destroy value and practices that may be oppressive to minority shareholders.

Their roles and responsibilities are becoming increasingly important. The listing requirements have gone to great pains to define who can and cannot hold the hallowed mantle of an independent director.

The rule-based listing requirements require at least a third of the board to comprise independent directors.

The principle-based Malaysian Code on Corporate Governance pushes the bar even higher by advocating that at least half of the board comprise independent directors.

Independent directors are required to form the majority of the membership of the audit committees, nomination committees and remuneration committees.

And when trouble brews in a company, regulators have private sessions with just the independent directors.

Better PLCs have at least one meeting a year comprised solely of independent directors. Tenure rules have been changed to ensure that independent directors have their tenure limited to 12 years to safeguard their independence and objectivity (though they may continue to serve on the board after that, but only as a non-independent director).

Much is indeed expected of independent directors.

The fact that they are supposed to be independent, and devoid of the vestiges of conflict, make them increasingly accountable. They bear a heavy onerous burden; indeed, a role not to be taken lightly.

As such, we often find that potential candidates to a board do their own due diligence of a PLC and fellow board members, management and major shareholders, before joining the PLC as an independent director.

This creates a conundrum of sorts; the better independent directors tend to stay away from the smaller or troubled companies — when it is the smaller or troubled companies that are in need of the better independent directors.

Independent directors often resign according to their risk appetites.

Troubles at a company are often a continuum. They simmer and brew over time before coming to a boil; they fester like an open wound before they harm the host, sometimes with disastrous consequences and, at other times, irreparably.

Some independent directors resign at the first sign of trouble — eager to dissociate themselves from the possible stigma to avoid possible sanctions.

Others put up a valiant effort to hold the fort and only resign when they find themselves starved of information or being utterly ignored — when they feel that they can no longer add value.

Resignation can be seen as an act of self-preservation.

Resignation sends out the message that self-preservation is more important than trying to set right the issues within the company.

But then again, such resignations may be a justified last-resort move.

Resignations by independent directors along with the reasons for their resignation send out a clear message as to their concerns.

Such reasons are useful for minority shareholders to make informed investment decisions.

Sometimes, independent directors resign, stating boilerplate reasons such as pursuing other interests. Maybe they are pursuing other interests but such reasons are often met with much scepticism.

When directors who are perceived as good and reputable resign, it is taken as a tell-tale sign that all may not be well.

Governance failures that may prompt a resignation include serious allegations like non-sharing of information with the board, the chief executive officer taking key decisions without board consultation, negative forensic reports, boards being starved of relevant information and manipulation of information.

On a more serious level, there may be corruption or fraud involved along with breaches of laws and rules.

Incidentally, serious lapses will almost always require a review of the allegations (fraud, corruption allegations and serious governance issues).

Sometimes, the review is done by an independent body within the company. That body may be deemed independent within the company but it will never be independent of the company.

When such a body clears an allegation, the minority shareholders will generally meet such clearance with scepticism — perception is important.

It is preferable to contract an external third party, which is independent of the company, as this will add credence to the conclusions.

This will restore the faith of minority shareholders in the board and by extension, the PLC.

There are other options available to the independent directors prior to resigning, given that their fiduciary duty is to the shareholders.

Putting it bluntly, shareholders did not appoint independent directors to resign when there are issues but to stay and resolve the issues to protect their interests, as such is the call of their fiduciary duty.

To be fair, the better independent directors only resign when they have exhausted all avenues available to them and when any potential effort on their part has been deemed futile.

Better independent directors stay to protect the interests of shareholders till they realise that their continued presence cannot add value to the PLC — only then will they walk away.

The better independent directors will also state the true reason why they are walking away. That is the least they can do for the shareholders who appoint them.

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