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ALTERNATIVE DISPUTE RESOLUTION – HOW EFFECTIVE IS IT LIKELY TO BE?

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Introduction

In order to establish how one might enforce effective corporate governance, we should first consider the nature of the disputes that might arise. These can best be categorized as follows:

a) Transparency – directors or managers are not acting in a transparent or lawful manner;
b) Abuse of dominant shareholder power;
c) Government interference.

How these might be best dealt with will differ between listed, non-listed and state-owned enterprises.

The next step is to consider the various methods that could possibly be made available to interested parties to resolve disputes. 'Interested parties' would be stakeholders and would naturally include shareholders but could, in some circumstances, also include creditors, suppliers, and employees. These include:

a) The courts;
b) Decisions by quasi-judicial state or non-state bodies (e.g. corporate registrar, stock exchange);
c) Arbitration;
d) Mediation;
e) Ombudsman, auditor or determination by other independent party.

This short paper examines these issues in outline and tries to give some tentative solutions.

Dispute resolution – the courts and the alternatives

A discussion of dispute resolution pre-supposes that a stakeholder is troubled by some aspect of corporate governance. In other words, an issue has arisen of alleged poor governance and it has been publicly or privately made known. Nevertheless, whether a request for dispute resolution is made to the courts or to some alternative tribunal or body still requires evidence to be available. Obtaining that evidence often proves an insuperable problem.

In developed legal systems, there is usually some power invested in the courts to order the disclosure or 'discovery' of documents. Common law jurisdictions generally give applicants broad rights to demand the disclosure of relevant documents. Civil law jurisdictions will often present the court with much greater discretion to order the disclosure of documents. In any event, depending on the rules and law applicable to the arbitration tribunal's procedures it may have broad or very restrictive powers to order disclosure. In this regard, then, a court is often a better venue to hear the complaint than an arbitration tribunal.

Developed legal systems are also usually better served by regulatory authorities. These generally have the power to fine companies and directors for wrongdoing. But successful application of the law here generally follows some time after a breach has taken place and damage potentially done. And, whilst an over-stretched regulatory authority may be able to deal with the most spectacular or egregious cases of listed company disputes, they are often either not concerned with unlisted companies or just not well-enough equipped to deal with them.

In Eurasia's developing legal systems, the courts are simply not an option – they are erratic in procedure, variable in quality and open to extraneous influences. Historically, courts almost universally have been criticized as being too slow and expensive but the usual alternative to the courts, independent arbitration tribunals, are generally no solution to the conundrum either. A skills-starved judiciary is hardly likely to be better-placed than an arbitration tribunal which draws its arbitrators from the same stream of ill-trained lawyers that flows through the judiciary. And enforcing an arbitral award is likely to be more problematic and strife-filled than enforcing a court judgement.

In any event, both the courts and arbitral tribunals are not particularly suitable for resolving corporate governance disputes.

As more and more companies are listed on Eurasian stock exchanges, a public body with a regulatory function will have a role to play, whether this is the stock exchange itself or some registration body. However, all such bodies have their limitations, not least of which is that they are not always independent of the same outside influences that taint the judicial system. Stock exchanges in many Eurasian territories are still evolving but in any event will probably only supply effective mechanisms for supervision of corporate governance where large, regularly traded companies with diverse shareholders are concerned. Also, stock exchanges and regulators are usually primarily concerned with shareholder-related matters. This leaves other stakeholders without an obvious dispute-settlement route other than the courts.

Turning elsewhere, one might turn to mediation of some sort. Mediation is, unlike arbitration, not a legally enforceable dispute resolution mechanism. But for this reason alone, it might find acceptance from all sides. However, although mediation is often successful in resolving a dispute, it will not have much relevance where a fraudulent or negligent act has taken place which has deprived a shareholder or other stakeholder of some right.

A form of dispute resolution that is often akin to mediation is through the referral of disputes and complaints to an ombudsman. This could be a state-appointed individual to whom disputes could be notified and who has power to investigate. S/he need not have the power to impose a penalty but this might be desirable. This form of 'mediation' might have a useful role to play in relatively minor governance matters but could also be a valuable resource to resolve larger disputes.

An alternative to appointing an ombudsman is for each company itself to be required to appoint an independent person to hear disputes. This could be a person who carries on the business of a mediator/arbitrator and whose fees are paid jointly by the parties.

Finally, there is the auditor. At least in respect of companies required to have independent audits, the law could require the auditor to (a) review corporate governance issues; (b) do so independently of its financial audit (a process which could be conducted throughout, or at any time in, the financial year); (c) consider complaints directed to it from any stakeholder to the extent that it relates to corporate governance. The auditor's fees for this could be charged to the company as part of its overall auditing procedures.

In recent years, auditors have had a host of onerous responsibilities heaped upon them. Corporate governance dispute resolution would be yet one more responsibility but the auditor, often independent of the company, seems the ideal person to police and enforce good corporate governance practice.

Conclusion

There are many permutations that can be employed in dealing with corporate governance-related disputes. All of them present problems in implementation, primarily issues of independence, the power to apply and enforce penalties, and who will pay for the chosen dispute resolution method.

My personal preference is to empower independent company auditors to take care of policing. No doubt, not all auditors will feel comfortable in having the skills to do this themselves but there is nothing to prevent them hiring in these skills specifically for the purpose. Certainly, many of the biggest auditors are already required by law or auditing procedures to look at certain aspects of corporate governance and broadening this role is likely to be the most effective method of dealing with disputes speedily and effectively in Eurasia. The reasoning is that, an auditor looking at corporate governance issues in, say, mid-year may well discover problems before the financial statements are ready. They would also be looking not just at compliance with the law but at compliance with best practice codes. And, finally, they could deal quickly with complaints that they considered worthy of attention. Their fees would be paid by the company. As long as the scope of their investigations was clearly specified (by law, or regulatory agency), this seems to me to be the easiest and most effective solution to the resolution of corporate governance disputes.