

VIRTUAL SHAREHOLDER MEETINGS

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ABSTRACT

Electronic communication impacts how widely-held corporations conduct shareholder meetings. For example, technology has facilitated such options as electronic proxy voting, remote electronic voting, and “virtual meetings.” This iBrief examines the idea of “virtual meetings” and argues that they should not entirely replace physical meetings unless an electronic solution can be devised which replicates the face-to-face accountability of management to retail shareholders.

INTRODUCTION

¶1 This iBrief examines the impact of electronic communication on the way in which corporations conduct shareholder meetings. Specifically, it focuses on widely-held public corporations because it is with respect to these entities that e-commerce techniques could have the greatest impact on shareholder participation.

AREAS OF IMPACT

¶2 Electronic communication has impacted shareholder meetings in three realms, namely:

- *Electronic proxy voting*: the electronic authentication and submission of proxy appointments to the corporation;
- *Remote (direct) electronic voting*: shareholders voting in their own name, although not physically attending the meeting; and
- *Virtual meetings*: “meetings” that do not involve a physical gathering, but which take place in an electronic form, such as via a remote ballot or a corporation-sponsored electronic bulletin board.

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A. Electronic Proxy Voting

¶3 Electronic proxy voting is the least controversial of these three issues. As noted above, the electronic component of electronic proxy voting relates both to the *authentication* of the appointment (which generally involves entering a PIN into a telephone keypad or web-based form, rather than a handwritten signature) and to the *submission* of that appointment to the corporation (via telephone or the Internet). Electronic proxy voting raises generic e-commerce issues—the meanings of “signature” and “delivery”—rather than corporate law issues. This method raises little controversy, provided it is offered as an option to shareholders, and does not raise the prospect of depriving shareholders of the opportunity to participate because of differential access to technology. However, a corporation may be concerned that electronically-submitted votes are invalid, thereby opening corporate resolutions to challenge.

¶4 Commentators, such as Verdun Edgton, have argued that the law would have been able to cope with this new “challenge” without statutory changes because corporations are able to make their own provisions for the authentication and submission of proxy appointments in their articles of incorporation, or equivalent constitutional documents.² In the same way that courts have adjusted to accommodate the telegraph, the fax machine, the telephone conference, and the video conference, courts would also, over time, be able to assimilate electronic signature and electronic delivery as those concepts become readily accepted in the community.³ However, perhaps partly because of wider concerns about the effectiveness of electronic modes of “signature,” and partly because of the business community’s desire for certainty, many countries have resorted to legislation to clarify the validity of electronic proxy votes.⁴

² Verdun Edgton, *Appointment of Proxies by Electronic Communication: Do Companies Have to Wait for Enabling Legislation?*, 21 COMPANY LAWYER 294, 298 (2000).

³ *Id.*

⁴ See, e.g., Elizabeth Boros, *Corporate Governance in Cyberspace: Who Stands to Gain What from the Virtual Meeting?*, 3 JOURNAL OF CORPORATE LAW STUDIES 149, 150-55 (2003) (detailing UK, Australian and US reforms); Eddy Wymeersch, *The Use of ICT in Company Law Matters*, FINANCIAL LAW INSTITUTE WORKING PAPER SERIES 2000-11, at 20-21 (Nov. 2000) (detailing European developments); JESPER LAU HANSEN, FOCUS: THE LISTED COMPANIES AND THE ELECTRONIC COMMUNICATION 1 (Copenhagen Stock Exchange, Focus No. 62, Sept. 9, 2003), available at http://www.cse.dk/kf/kf_pressemeddelelser?languageID=1&c=Page&cid=1034698850162&contentid=1062141824343 (last visited July 14, 2004) (detailing Danish developments).

B. Remote Electronic Voting

¶5 Remote electronic voting is more difficult to categorize than electronic proxy voting because it can take a number of different forms. Many corporations now webcast their annual meetings in real time, and some offer remotely-located shareholders the opportunity to “participate” in the meeting by submitting questions via email.⁵ Where this is combined with proxy voting it poses little challenge to the traditional concept of a meeting. The issue becomes more complicated where shareholders who are not “present”—in person or by proxy—are able to vote. At this point, remote electronic voting merges with virtual meetings.

C. Virtual Meetings

¶6 There are multiple issues that arise with “virtual meetings,” namely what is meant by the term “virtual meeting,” what a “meeting” really is, and why corporations hold them.

1. Why Hold Meetings?

¶7 The general meeting of shareholders, as it is currently practiced in widely-held public corporations, leaves a lot to be desired. These meetings (at least in Australia and the UK) are poorly attended by institutional shareholders, most of whom regard visits by analysts and direct contact with management as more effective ways to influence the governance and business direction of corporations in their portfolios.⁶ The concerns of institutional shareholders are usually dealt with before the general meeting, and to the extent that issues do arise for a vote at the meeting, the outcome will generally have been determined by proxy votes lodged by institutional shareholders well in advance of the meeting.⁷ The other main category of shareholders, retail shareholders, is rationally apathetic and very few attend

⁵ SECURITIES IN THE ELECTRONIC AGE: A PRACTICAL GUIDE TO THE LAW AND REGULATION 7-9 (John F. Olson & Harvey L. Pitt eds., Glasser LegalWorks, 1997).

⁶ See *Shareholder Activism Among Fund Managers: Policy and Practice* (Inv. & Fin. Servs. Ass'n Ltd.), July 2003, at 10-12 (regarding Australian shareholders), available at [http://www.ifsa.com.au/IFSAWeb/Attach.nsf/Attachments/Board+Committee+-+Investment~Corporate+Governance~2001_0314_IFSA+Industry+overview%2Epdf/\\$File/2001_0314_IFSA+Industry+overview.pdf](http://www.ifsa.com.au/IFSAWeb/Attach.nsf/Attachments/Board+Committee+-+Investment~Corporate+Governance~2001_0314_IFSA+Industry+overview%2Epdf/$File/2001_0314_IFSA+Industry+overview.pdf) (last visited July 14, 2004); Paul Myners, *Institutional Investment in the UK: A Review*, March 2001, at ¶ 5.84 (regarding UK shareholders), at <http://www.hm-treasury.gov.uk/media/843F0/31.pdf> (last visited July 14, 2004).

⁷ See Graeme James, *When companies incur the wrath of angry shareholders*, COURIER MAIL, Oct. 20, 2001, at 70.

meetings or vote.⁸ Most could not attend even if they wished because meetings are held during business hours and often far from the shareholders' homes. Therefore, the few individuals who do attend are likely to be unrepresentative of the general body of shareholders. Furthermore, the financial cost to the corporation of convening a meeting with a substantial number of shareholders can be very high.⁹

¶8 However, it is not hard to find defenders of the general meeting. Corporate law in most jurisdictions still requires public corporations to hold an annual meeting.¹⁰ Delaware is an exception,¹¹ but even there New York Stock Exchange listing rules require listed corporations to hold annual meetings.¹² Moreover, even in Delaware, shareholders are able to act without a meeting only with the written consent of the same percentage of shareholders as of votes that would have been required to approve the action at an actual meeting.¹³ At first sight this written consent option seems quite "anti-meeting," but considering how few shareholders attend or vote (either in person or by proxy) at a normal meeting, obtaining an absolute majority

⁸ See, e.g., Gabrielle Costa, *Investor Activism on the Rise*, THE AGE, Dec. 16, 2003, at Business 3 (citing findings of a retail shareholder survey, "[T]raditionally, 'the number of shareholders voting at company meetings has barely exceeded 10 percent.'"), available at http://www.theage.com.au/articles/2003/12/15/1071336887971.html?from=story_rh&onclick=true (last visited July 14, 2004). This history of rational apathy has led to efforts by regulators and shareholder associations to encourage greater participation. See, e.g., *Shareholders – have your say* (Australian Securities and Investments Commission and Australian Shareholders Association joint publication), at <http://www.asic.gov.au/fido/fido.nsf/byid/7B41A175B275EDF4CA256B0300835233?opendocument> (last visited July 14, 2004).

⁹ Stephen Bottomley, *The Role of Shareholders' Meetings in Improving Corporate Governance*, AUSTL. NAT'L UNIV. CTR. FOR COMMERCIAL LAW, at 45 (Sept. 2003) (finding that the median cost of holding an annual general meeting in Australia was AU\$15,000, and the average cost was AU\$44,042). The cost in very widely-held corporations may, however, be even higher. See *Nat'l Roads and Motorists' Ass'n Ltd. v. Snodgrass*, (2002) 42 A.C.S.R. 371, 373 (the court accepted an estimate of between AU\$1.4m and AU\$2.6m as a guide to the cost to plaintiff of convening a meeting).

¹⁰ E.g., Corporations Act, 2001, c. 2G, § 250N (Austl.); Companies Act, 1985, c. 6, § 366 (U.K.).

¹¹ See DEL. CODE ANN. tit. 8, § 211 (2003) (amendments adopted in 1997 authorize the use of stockholder consents in lieu of an annual meeting in limited circumstances).

¹² See, e.g., Rule 302.00, New York Stock Exchange Listed Company Manual, available at http://www.nyse.com/lcm/lcm_section.html (last visited July 14, 2004).

¹³ DEL. CODE ANN. tit. 8, § 228 (2003).

of the entire body of shareholders by this written procedure is likely to require gathering many more votes than simply securing a mere majority of those present at a meeting.

¶9 Courts have noted that a physical gathering provides a forum for deliberation and confrontation.¹⁴ Commentators have similarly observed that the feature of confrontation or “face-to-face accountability” is particularly valuable to retail shareholders.¹⁵ Courts and commentators both also note that views expressed at a meeting by minority shareholders can change the course of corporate policy, even if they do not carry the vote.¹⁶ For example, a corporation may be keen to head off potential damage to its reputation stemming from environmental protests or other wider-stakeholder concerns.¹⁷ As a result, the trend in the UK and Australia is not to disband the meeting, but rather to find ways to revive it, by encouraging¹⁸ or requiring¹⁹ institutional shareholders to participate more actively, and by suggesting modest improvements to the way meetings are conducted, such as clearer notices of meeting and better handled shareholder communication.²⁰

¹⁴ *E.g.*, *Hoschett v TSI Int'l Software Ltd*, 683 A.2d 43, 45-46 (Del. Ch. 1996).

¹⁵ See Responses of GLB Pitt, The Institute of Chartered Accountants of Scotland, ICSA and the Association of Investment Trust Companies to The Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Company General Meetings and Shareholder Communication*, Question 1 (URN 99/1144, DTI, Oct. 1999), at 10, available at <http://www.dti.gov.uk/cld/reviews/condocs.htm> (last visited July 14, 2004).

¹⁶ *E.g.*, *Re Compaction Systems Pty Ltd* [1976] 2 NSWLR 477, *Re HR Harmer Ltd* [1959] 1 WLR 62, *Re Duomatic Ltd* [1969] 2 Ch 365; GREG BATEMAN, COMPANY MEETINGS: WHAT YOU NEED TO KNOW V-VI (Butterworths, 2001) (comments of Justice R. P. Austin, Supreme Court of New South Wales).

¹⁷ See, *e.g.*, Boros, *supra* note 4, at 178 n.159. See also Sarah Murray, *Rebel Investors Make Themselves Heard*, FINANCIAL TIMES, Sept. 5, 2003, at 8, available at 2003 WL 71588521.

¹⁸ See Financial Reporting Council, *The Combined Code on Corporate Governance*, at 20, (July 2003), available at http://www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf (last visited July 14, 2004) (for information about the UK); Leon Gettler, *Thumbs Down for Funds Plan*, THE AGE, Mar. 26, 2003, at 2, available at 2003 WL 14780337 (for information about Australia).

¹⁹ Interpretive bulletin relating to statement of investment policy, including proxy voting policy or guidelines, 29 C.F.R. § 2509.94-2 (1994) (US Department of Labor Interpretive Bulletin on the Employee Retirement Income Security Act (ERISA)), available at http://www.dol.gov/dol/allcfr/EBSA/Title_29/Part_2509/29CFR2509.94-2.htm (last visited July 14, 2004). See also Myners, *supra* note 6, at ¶¶ 79, 5.92.

²⁰ Australian Stock Exchange Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations*, at 39-41,

¶10 In an in-depth theoretical analysis of the necessity for meetings, Ralph Simmonds takes the argument in favor of meetings a step further and identifies four interconnected reasons for mandating annual meetings for public corporations:

- the pervasiveness of positional conflicts of interest (i.e., managers' interests in maintaining and enhancing their positions);
- the value of deliberative assemblies, such as annual meetings, in addressing this conflict;
- the unlikelihood that provisions for assemblies would be generally accepted without mandatory rules; and
- the unlikelihood that market effects would properly compensate for the lack of such provisions.²¹

2. *What is a Meeting?*

¶11 If the value of a meeting is the forum it provides for confrontation, debate, and deliberation, must it take the form of a traditional physical gathering?

¶12 The answer is that the meeting probably need not take a traditional form if the corporation has a small number of shareholders, or the shareholders are confined to a small number of venues designated by the corporation. In these cases, it may be possible to connect the venues by video conference and conduct the meeting as if all members were present in one room.

¶13 The limited case law on this topic suggests that such an approach would not expose the meetings to a legal challenge. For example, the case law regarding directors' meetings illustrates an acceptance by some courts that any forum constituting a meeting of the minds will count as a meeting, even if it takes place using technology (such as a telephone or video conference).²² This position was formalized by statute in many states, such

http://www.asx.com.au/about/CorporateGovernance_AA2.shtm (last visited July 14, 2004).

²¹ Ralph Simmonds, *Why must we meet? Thinking about why shareholders meetings are required*, 19 COMPANY & SECURITIES LAW JOURNAL 506, 515-16 (2001).

²² See, e.g., *Freedom Oil Co. v. Ill. Pollution Control Board*, 655 N.E.2d 1184 (Ill. App. Ct. 1995) (holding that administrative agencies have wide latitude to accomplish their official duties, and that meeting by telephone conference call did not violate Illinois open meetings laws); cf., e.g., *Swiss Screens (Austl.) Pty Ltd & Anor v. Burgess & Ors* (1987) 11 ACLR 756 (holding that "any event, even most fleeting, in which two directors . . . reach concurrence in taking some

as Delaware.²³ Furthermore, the English Court of Appeal has also accepted the validity of shareholder meetings held in several rooms connected by audio/visual links that enable attendees to see and hear what takes place in each room,²⁴ and the Delaware General Corporation Law clarifies the common law position that meetings held in multiple venues are valid.²⁵

¶14 It is legally possible in Delaware to go a step further and hold a shareholder meeting without a physical venue.²⁶ But, practically, it is much more difficult to conceive of a way to replicate the elements of confrontation, debate, and deliberation in an electronic environment where there is a large number of shareholders and the corporation has no control over their location. The few meetings held in Delaware under the above-cited provision do not appear to have involved real time participation by large numbers of widely-dispersed shareholders.²⁷

¶15 To date, only two corporations have reportedly taken advantage of the ability to hold a virtual meeting: Inforte Corp., in 2001, and Ciber Inc., in 2002. In the case of Inforte Corp., no voting took place at the meeting,²⁸ and it is not clear whether any questions were asked (although the corporation was prepared to answer questions emailed to its investor relations address).²⁹ Although Inforte Corp. repeated this experiment the following year, there are no press reports on how that meeting was conducted. Similarly, there are no reports regarding the conduct of Ciber Inc.'s virtual meeting. However, in a report written in advance of the Ciber meeting, the corporation expressed the hope that more than 10 of its 28,000-plus shareholders would attend.³⁰

course in the company's affairs can be part of their management of the business of the company, and can be described with accuracy as a meeting of the directors and as a proceeding at such a meeting").

²³ *E.g.*, DEL. CODE ANN. tit. 8, § 141(i) (2003).

²⁴ *E.g.*, *Byng v London Life Ass'n Ltd.*, 1990 Ch. 170, 183 (C.A.).

²⁵ DEL. CODE ANN. tit. 8, § 211(a)(2).

²⁶ *Id.*

²⁷ *See infra* text accompanying notes 28-30.

²⁸ Tami Kamarauskas, *Inforte Corporation Hosts Virtual Shareholder Meeting*, 5 No. 5 WALLSTREETLAWYER.COM: SECURITIES IN THE ELECTRONIC AGE 20 (Oct. 2001) (97% of the shares were voted by fax before the meeting).

²⁹ *Compare id.*, with Broc Romanek, *Technology Trends for 2002*, 5 No 8 WALLSTREETLAWYER.COM: SECURITIES IN THE ELECTRONIC AGE 25, Jan. 2002, and Broc Romanek, *Electronic-Only Shareholders' Meetings: Examining the Considerations*, 4 No 2 E-SECURITIES 3, Oct. 2001.

³⁰ Janet Forgrieve, *Ciber to Hold Virtual Shareholder Meeting; Greenwood Village Company Looks to Cyberspace to Draw Interest in Meeting*, ROCKY MOUNTAIN NEWS, Apr. 5, 2002, at 5B (according to the CEO, "[o]urs have never been attended by more than 10 people who were not either employees or accounting or legal advisors to us").

¶16 The limited number of shareholders involved in these two examples suggests that they do not provide a template for an electronic forum offering the opportunity for confrontation, debate, and deliberation in a widely-held corporation. Nor do these examples provide a basis for drawing any conclusions regarding the likely extent of the use of such provisions in the future. They do, however, suggest that practical issues, such as satisfactorily identifying shareholders and providing for real time participation on a mass scale, are likely to deter corporations with a large number of shareholders from experimenting with virtual meetings.

¶17 Admittedly, the Delaware law does not preserve all elements of the common law concept of “meeting.” By referring to “proceedings of the meeting,” the statute arguably requires some kind of debate and deliberation. This might, for example, be satisfied by a “meeting” held via a company-sponsored bulletin board. On the other hand, it would appear not to be satisfied by a ballot held without any exchange of views.

¶18 However, Delaware law does not appear to require the forum to provide an electronic analogy of confrontation. A bulletin board, for example, would not be able to convey the body language of the person answering the question.³¹ As a consequence, the Delaware provision permitting virtual meetings has drawn a hostile response from those concerned that it removes the element of face-to-face accountability so valued by retail shareholders.³² Such sentiments also resulted in the abandonment of a legislative proposal which would have permitted virtual meetings in Massachusetts.³³

3. *Reaching Decisions Without a Meeting?*

¶19 As noted above, Delaware law contains a written consent option to allow stockholders to reach decisions without a meeting in limited situations, requiring the same percentage of votes necessary to approve the action at an actual meeting.³⁴ Although this procedure does not involve electronic communications directly, it is relevant to this discussion because it provides a mechanism for reaching a corporate decision by means other than a traditional physical gathering.

¶20 The procedure is qualitatively different from the common law concept of a meeting, which offers the potential for both deliberation and face-to-face accountability, except in cases of unanimous agreement.³⁵ The

³¹ See Simmonds, *supra* note 21, at 517 n.116.

³² See, e.g., Forgive, *supra* note 30.

³³ Ralph Ranalli, *Corporate Meetings Bill is Shelved, Shareholder Group Raps Online Forums*, THE BOSTON GLOBE, August 24, 2001, at B.1.

³⁴ See DEL. CODE ANN. tit. 8, § 228 (2003).

³⁵ See *Hoschett v TSI Int'l Software Ltd*, 683 A.2d 43, 45-46 (Del. Ch. 1996).

editors of *Delaware Corporation Law and Practice* note that it was originally intended as a procedural reform to remove red tape, but had the unintended consequence of potentially disadvantaging management in control contests.³⁶ As a result, corporations often change this default rule in their articles of incorporation, resulting in the paradoxical consequence that physical gatherings will generally be held, even in Delaware.³⁷

CONCLUSION

¶21 There is great potential for electronic communication to enhance the traditional physical gathering by providing a low-cost and geographically unlimited means for many more shareholders to participate. Such means may also have the incidental benefit of providing an auditable trail of how voting rights are exercised, which may be particularly valuable to institutional shareholders. However, these benefits can be achieved by means short of a completely virtual meeting, such as through a combination of webcasting the physical gathering and enabling remote observers to participate by emailing questions, and/or voting electronically in real time.

¶22 There is also potential for both the virtual meeting and the written consent option to be detrimental to retail shareholders because both procedures remove the face-to-face accountability of management to shareholders. Additionally, the written consent procedure also removes the element of deliberation that carries with it the small, but nevertheless important, possibility that sentiments expressed by shareholders will influence corporate plans even if overridden by the proxy votes.

¶23 The time and cost savings of these options may seem attractive, particularly where the items on the agenda are not contentious, but corporations considering employing these procedures should weigh the benefits against the potentially adverse consequences of shareholder hostility.³⁸ In the end, the pitfalls are not a reason to flatly reject the potential benefits that virtual meetings can offer, particularly in terms of greater levels of shareholder participation, but they serve as arguments that virtual meetings should not entirely replace physical meetings in widely-held public corporations until an electronic equivalent can be devised for the face-to-face accountability of management to retail shareholders and the opportunity for deliberation currently offered by physical gatherings.

³⁶ 2-31 DEL. CORP. LAW AND PRACTICE § 31.01 (2003) (“ . . . Section 228 permits insurgent groups to establish the time frame for a control contest, and such a group, by choosing its time propitiously, may obtain the upper hand.”).

³⁷ Charles R. T. O’Kelley & Robert B. Thompson, *Corporations and Other Business Associations: Cases and Materials* 151 (4th ed. 2003).

³⁸ See Daniel Adam Birnhak, *Online Shareholder Meetings: Corporate Law Anomalies or the Future of Governance?*, 29 RUTGERS COMPUTER & TECH. L.J. 423, 445-46 (2003).