The Protection of Shareholder Rights and the Equitable Treatment of Shareholders

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The law relating to fundamental rights of shareholders is predominantly statute based and can be found in a variety of statutes across the region, the most important being the various Companies Acts (and regulations made thereunder) and the various Securities Acts (and regulations made thereunder) of the various jurisdictions.

The equitable treatment of shareholders is fundamental to the maintenance of public confidence in corporations and in the securities market in general and is achieved by the establishment of a minimum set of industry standards applicable across the board against which all corporate action and behavior can be tested. The failure to maintain the confidence of investors could result in a decline in share purchases and in a general lethargy in investment due to the uncertainty and unpredictability of corporate behaviour. It can be argued that the establishment and enforcement of fundamental rights of shareholders are just as, if not more important, for our countries where, perhaps especially in the smaller islands, there may still be (and let me say that this certainly is changing) (a) a less sophisticated level of investors who traditionally until now, have been less prone to question corporate action and to accept as immutable, even if not proper, standards of behaviour that can be described as discriminatory as best, and (b) less media coverage, analysis and scrutiny of corporate activity and behaviour. This underscores the idea, that good corporate governance not only requires the conferring of clear rights which entitles shareholders to receive certain information and take certain action, but further requires the imposition of positive duties and obligations on corporations, substantial shareholders and insiders, to make full, frank, timely and continuous disclosure and laws which prohibit abusive and discriminatory activity such as insider trading, and market manipulation.

Apart from the strict requirement of fairness as an immutable standard of behaviour, studies have demonstrated a strong connection between corporate governance and corporate performance. Said studies have discovered that corporations with weak shareholder rights have demonstrated in many cases lower performance and growth, suggesting that there is a high correlation between both.
Throughout the region legislation has given recognition to these basic but fundamental rights of shareholders. The protection provided in the legislation of some countries is stronger than that provided in others. One would recognize that although the various sub-principles enunciated earlier are definitely principles unto themselves, it can be argued that there is a substantial overlap between them and that the full realization of each sub-principle depends upon the others, that is to say that the principles are “inextricably intertwined”, resulting in what should be a comprehensive web of protection for all shareholders, and providing special recognition for those shareholders with the smallest voice, the minority shareholders. So, for example, the right to participate and vote at general meetings may be only as good as, and be partially dependent upon, the right of the shareholder to obtain relevant and material information on his or her company in a timely manner and on a regular basis. And the right to participate in and make decisions on matters concerning fundamental material corporate change may only be as good as the right of a dissenting shareholder to be bought out in the case of a proposed amalgamation or substantial sale of corporate assets other than in the course of business of which he or she disapproves. And these rights as enshrined in the various Acts are only as powerful and effective as the ability of a dissatisfied shareholder to access the courts if necessary in a speedy and cost effective manner.

Perhaps it would be appropriate at this stage to address from a regional perspective some of the basic principles contained in Principles I and II in an attempt to demonstrate how we in the region are addressing shareholder protection, and to prompt from the audience comments and discussion on whether we are doing enough (as far as the legislative framework is concerned) to achieve our goals, and what we may be able to do to further corporate governance and bolster if necessary existing rights.

The first set of principles:

Obtaining relevant and material information on the entity on a timely and regular basis and the right of shareholders to participate and vote in general meetings of shareholders

This is perhaps one of the most fundamental rights of shareholders as it allows shareholders to
make informed decisions in a timely manner. To achieve this end the various Acts have imposed various disclosure obligations on the company and the company’s officers:

If we take the St. Lucia Companies Act No. 19 of 1996 for example:

**Disclosure of information by the Company**

- Under section 149 of the Act directors are required to place before the shareholders at every annual meeting of the shareholders comparative financial statements (present year and previous year), and the report of the auditor, if any. Under section 153 the company is required to send these documents to each shareholder not less than 21 days before each annual meeting of the shareholders. Under section 151 a company is required to keep at its registered office the financial statements of each of its subsidiaries the accounts of which are consolidated in its own financial statements and shareholders and their agents and legal representatives are given the right to examine those records.

- Under section 124 the right is given to shareholders to examine the list of shareholders

- Companies are required to prepare and to maintain specified documents (articles and by-laws and all amendments thereto and a copy of any unanimous shareholder agreement and any amendment thereto, minutes of all meetings and resolutions of shareholders and copies of specified notices, a register of members) at their registered office.

**Disclosure of Directors’ Interests and Holdings**

- Section 91 places an obligation on a director or officer of a company who is a party to a material or proposed material contract with the company (or who is a director or officer of any body or has a material interest in any body that is a party to a material contract or a proposed material contract with the company) to disclose in writing to the company the nature and extent of his interest.

- Under section 177 the company is required to keep a register of directors with particulars including particulars of other directorships held by directors and under section 179 a public company is required to keep a register showing the required particulars with respect to any interest in shares in or debentures of the company or an affiliate or associate of the company that
is vested in a director. Importantly the Act defines “liberally” what constitutes an interest vested in a director and includes in that term cases where shares or debentures are held by a director and another person jointly, or are held in the name of a nominee, where the director has a right to subscribe for those shares or debentures, or where those shares or debentures are the subject of a voting arrangement in favour of the director.

Shareholder Meetings
- With regard to shareholder meetings, under section 111 a company must give notice to each shareholder, director and auditor of the time and place for meetings not less than 7 days nor more than 30 days before the proposed meeting. To demonstrate the control that may be exercised by minority shareholders under section 131 the holders of not less than 5 per cent of the issued shares of that company that carry the right to vote at meeting sought to be held by them are given the right to requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.

- Under section 112 (2) all business transacted at a special meeting or annual meeting is deemed special business (except (a) consideration of the financial statements (b) the directors report if any (c) the auditors report if any (d) the sanction of dividends (e) the election of directors (f) the re-appointment of the incumbent auditor). Under section 112 (2) the disclosure obligation is buttressed by the requirement that notice of meeting at which special business is to be transacted must state (a) the nature of the business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; (b) the text of any special resolution to be submitted to the meeting. Consequently in this manner (other than in the exceptions noted above) shareholders must be given sufficient information prior to the meeting to permit them to understand the matters to be discussed and to actively participate.

- Under section 114 shareholder participation is further strengthened by giving the right to any shareholder entitled to vote at an annual meeting to submit to the company notice of any matter that that shareholder proposes to raise at the meeting and, further gives the shareholder the right to discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal.
-Under section 116 and in relation to the rights of shareholders to select or nominate directors, a proposal may include the nominations for the elections of directors if the proposal is signed by one or more holders of shares who represent in the aggregate not less than 5 per cent of the shares of the company.

The disclosure obligations contained in the draft principles have been enshrined in various provisions in the various Securities Acts of the Eastern Caribbean Currency Union territories—Looking at the St. Vincent Act under section 97 a company which proposes to issue securities to the public is required to register with the Commission as a reporting issuer and to file a registration statement in the form and within the period specified by the Commission. Apart from the requirement to forward to the holders of its securities such financial statements as the Commission may specify within 120 days of its financial year end, a reporting issuer must, where a material change occurs in its affairs, issue a press release (to be filed with the Commission) authorized by a director of the issuer that discloses the nature and substance of the change. Again supporting the principle of full and timely disclosure of relevant information to investors.

In the same vein, under the Securities (Continuing Disclosure Obligations of Issuers) Regulations 2001 (St. Kitts) certain disclosure requirements are imposed upon companies that issue securities which are publicly offered or publicly traded. The general and all embracing obligation is contained in section 3 which casts an obligation on issuers to notify the Exchange on which their securities are listed, the Commission, the issuers’ members and other holders of the issuers securities without delay of any material information that has not been previously disclosed by the issuer and which information (a) is necessary to enable them and the public to appraise the financial position of the issuer and its subsidiaries, (b) is necessary to avoid the establishment of a false market in its securities, or (c) or would be likely to bring about a material change in the price of its securities.

Section 4 imposes an obligation on an issuer to deliver accounts, an auditor’s report and a directors’ report to the shareholders within a specified time of the issuer’s proposed Annual
General Meeting. Section 5 specifies in great detail (actually by listing 16 separate items) the various heads of information that must be included in a director’s report.

Under section 6 an obligation is imposed on issuers to issue interim reports in respect of the first 3 months of each financial year, to publish same in a newspaper, and to send a copy to the Exchange and to each shareholder. Where the issuer proposes to dispose of or acquire assets above a certain threshold (15% of the value of its assets) certain additional disclosure requirements must also be complied with (as set out in section 7(2)). Under section 9 a wide and general disclosure obligation is imposed – “an issuer shall ensure that all necessary facilities and information are available to enable shareholders of its listed securities to exercise their rights.”

A contravention of any of these regulations is in fact a criminal offense under section 16. The Commission’s rights of sanction include imposing a fine, censure, suspension of trading in the issuer’s securities.

The principle of full and timely dissemination of information to shareholders and the public is mirrored by the fundamental principle prohibiting the use by “insiders” of non-public price sensitive information—that is the rules prohibiting and criminalizing “insider trading”. It is insufficient to require full disclosure by itself, if avenues are left for insiders to use such information to their benefit prior to dissemination without any sanctions or penalties.

Under the Securities Act 2001-12 of St. Christopher and Nevis insider dealing is criminalized under section 115(1). Other market abuses such as false trading, price rigging and market manipulation are all criminalized. The use of deceptive statements and fraudulent transactions are also covered. The Act goes further and requires the disclosure by a director of the fact of his entering into contracts to buy or sell any securities of his company. The maintenance of fairness and of market confidence clearly dictates that parties should have equal opportunities in the market and there should be no abuse or discrimination due to the regulated or manipulated release or non release or use of information.
Sub -Principle B- Shareholders should have the right to participate in and to be sufficiently informed on decisions concerning fundamental/material corporate changes.

Shareholders invest in companies as going concerns for profit and have a reasonable expectation that their companies will continue to trade in the normal manner, and carry on normal business activities. In recognition of this legitimate expectation, the legislation imposes on the directors or management of the company certain limits on the activities that they may carry out in relation to their companies without first obtaining shareholder approval. These limitations exist in most Companies Acts, and can be seen in section 138 of the Trinidad Companies Act which states in sub-section 1 that “a sale lease or exchange of all or substantially all the property of a company other than in the ordinary course of business of the company requires the approval of the shareholders in accordance with this section”. The St. Lucia Companies Act also recognizes the fundamental importance of shareholder participation in matters concerning “material corporate change”. Like the Trinidad Act the St. Lucia Act states under section 136, a sale lease or exchange of all or substantially all of the property of a company other than in the ordinary course of business of the company requires the approval of the shareholders in accordance with the section. Under the section a notice must be sent to each shareholder to be accompanied by a copy or summary of the agreement of sale lease or exchange lease and (very important) stating that a dissenting shareholder is entitled to be paid the fair value of his shares in accordance with section 226. The section also automatically attaches to each share the right to vote whether or not it otherwise carries the right to vote. The buy-out provision is fundamental as it is really one of the ways in which minority protection is ensured (by giving the dissenting shareholder a way out) as it may sometimes be easy for a pool of controlling shareholders to obtain the votes necessary under the section. Similar provisions apply in relation to amalgamations where under section 221 shareholder approval at a meeting is required for any proposed amalgamation. Similarly this meeting must be preceded by a notice which must include or be accompanied by a copy of the proposed amalgamation agreement and a statement that a dissenting shareholder will have a right to be paid the fair value of his shares in accordance with section 226.

Additionally and continuing the recognition of the shareholders right to participate in major corporate decisions section 213 (1) requires that a special resolution be utilized to amend the
articles of association for the purposes set out in paragraphs (a) to (m). This includes a change in
the maximum number of shares the company can issue, the creation of a new class of shares, to
add, change or remove any rights privileges restrictions and conditions in respect of any shares,
to increase or decrease the number of directors, and to add, change or remove any rights,
privileges, restrictions and conditions in respect of any shares, and to add, change or remove
restrictions on the transfer of shares. Under section 214 the right is given to both shareholders
and directors to make proposals for amending the articles. Again the protection given to a
dissenting shareholder is his right to have his shares bought out at a fair value. Similar provisions
exist in the Companies Ordinance of Nevis 1999, section 213.

In the exercise of ultimate control by the shareholders, shareholders are given the right by
ordinary resolution at a special meeting, to remove any director from office under section 73.

**Sub –Principle C- All Shareholders should have the opportunity to participate effectively
and vote in meetings of shareholders and should be informed of the rules, including voting
procedures that govern shareholder meetings.**

We have discussed before the requirements placed on the company to give notice to shareholders
within a specified time, the contents of notices, the rights to raise and discuss issues at the
meetings, the right to receive in a timely manner relevant and complete information about the
company, and the right to obtain copies of the constituent documents of the company. Absent or
foreign shareholders are recognized and their rights preserved by use of proxies. This is covered
in section 138. Under section 141 the management of the company is mandated to include a
proxy form with every notice of meeting that it sends out. Under section 145 a proxy holder is
given the same rights as the shareholder who appointed him.
Remedies- the rights given are only as good as the right to enforce same.

The actual enforcement rights are enshrined in the legislation and provide powerful remedies to shareholders.

-Section 238 of the St. Lucia Companies Act (contained in Division L –Headed Civil Remedies) gives a statutory right to a complainant (defined as a present or past shareholder or debenture holder, present or past director, Registrar or other person who in the discretion of the court is a proper person to make an application) to make an application under this part. Under section 239 derivative actions are addressed and a complainant is given the right to apply for the purpose of prosecuting, defending or discontinuing an action on behalf of the company, apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which such company or any of its subsidiaries is a party.

Under section 240 in connection with an action brought or intervened in under section 239 the court may at any time make any order it thinks fit including:
- an order authorizing the complainant to control the action;
- an order giving directions for the conduct of the action;
- an order directing that any amount adjudged payable by a defendant in the action be paid in whole or in part directly to former or present shareholders, instead of to the company or its subsidiary;
- an order requiring the company or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

Under section 241 which is headed (Restraining Oppression) a complainant may apply to the court for an order under this section. If the court is satisfied that in respect of the company or its affiliates (a) any act or omission of the company or its affiliates effects a result (b) the business affairs of the company or any of its affiliates are or have been carried on or conducted in a manner or (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner- (in each case) that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director, or officer of the company the court may make an order to rectify the matters complained of. The orders the
court may make are wide and varied ranging from an order restraining the conduct complained of, an order appointing a receiver or manager, to an order winding up a dissolving the company, an order requiring the trial of any issue. Importantly under section 242, an application made or brought or intervened in under this Part may not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company or its subsidiary has been or might be approved by the shareholders of the company or its subsidiary; but evidence of approval by the shareholders may be taken into account by the court in making the order. Additionally the application may also not be stayed, dismissed, discontinued settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit. These obviously seek to take into account some of the difficulties that a minority shareholder may encounter in normal litigation and seek to ensure that minority actions are not easily thwarted.

Under section 248 a complainant may apply to the court to compel compliance by any director, officer, trustee, receiver, receiver –manager or liquidator with the Act or regulations.

Section 322 deals with insider trading. Under section 324 the act of insider trading is criminalized and a cause of action is given- the culprit is liable to compensate any person for any direct loss incurred by that person as a result of the transaction.

In the Companies Act 1996-22 of St. Kitts, the following provisions exist:
Section 128- permits the Minister of Finance to appoint inspectors to investigate the affairs of a company and to report on the affairs if he has prima facie evidence that:
(a) the company was formed or is to be dissolved for an unlawful or fraudulent purpose;
(b) the business or affairs of a company are or have been carried on unlawfully or with intent to defraud any person;
(c) persons connected with the formation, business or affairs of a company have in connection therewith acted fraudulently or dishonestly;
(d) in any case it is in the public interest that an investigation of the company be made.
These provisions given even merely a literal interpretation are certainly wide enough to be utilized for the purpose of investigating cases of fraud on the minority. It is likely that such investigations will find their genesis in the form of shareholder complaints made to the Minister.

The usual power to determine whether to bring actions where damage is alleged to have occurred to the company, reserved to the directors or the majority shareholders is by section 136 of the Act given to the Minister. Under section 136 if from any report made or information obtained under this part it appears to the Minister that civil proceedings ought in the public interest to be brought by a body corporate the Minister may himself bring those proceedings in the name and behalf of the body corporate.

Part 20 of the Act is devoted entirely to the topic of Unfair Prejudice. Instead of relying on the common law rules or exceptions, the Act gives a member of a company the right to make application to the court for an order on the ground that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. The provision is retrospective, current and prospective in its purview.

It would appear that the rights of action are not limited to members in the strict sense (in that their names have been entered on the register) but are given to persons who have a right to have their names so registered, i.e. persons to whom shares have been transferred (though the transfer has not been perfected) and persons entitled to shares by operation of law, for example upon a transmission.

The Powers given to the Minister under section 135 are to some extent replicated by section 142 which states that gives the Minister the right to make applications to the court where the Minister has received a report under section 135 and it appears to the Minister that the company’s affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its
members generally or of some part of its members, or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

The power given to the court upon its making an order pursuant to an application made under section 141 or section 135 is very wide. The provision states that if the court is satisfied with the application that “it may make such order as it thinks fit for giving relief in respect of the matters complained of”.

These orders range from the court making an order regulating the company’s affairs in the future to suspending the exercise of the powers of the directors, or ordering the directors to meet and to consider any matter and to give all necessary directions and orders in relation thereto.

Under section 155 the court also has the power to wind up a company if the court is of the opinion that it is just and equitable that the company should be wound up. An application may be made by the company, a director or member of the company.

Elements of shareholder protection are enshrined in the regional Securities Act that applies (by individual domestic legislation) to the Eastern Caribbean Currency Union territories. Part XI of the Securities Act of St. Christopher and Nevis relates to disclosure of shareholdings of directors and substantial shareholders.

- The Act contains provisions that place a continuing obligation of disclosure on listed companies as well as provisions that require continuing disclosure by directors.

- Section 138 grants the Commission the power, where in its opinion the affairs of the listed company are being carried on or have been carried on in a manner unfairly prejudicial to the interests of its members generally or some part of the members, to make an application to the High Court for an order under this section. In relation thereto the Act gives the court wide powers in terms of remedies which range from granting restraining orders to appointing a receiver or manager.

Having reviewed the above we can conclude that from a legislative standpoint that due regard has been given to the protection of investors, and to the rights of shareholders in general and
minority shareholders in particular. Some of the applicable legislation has been in effect for a number of years. The challenges that still remain for us include the following:

(a) There is still a lack of knowledge on the part of the ordinary shareholders as to the existence of these rights.
(b) The rights in many cases are merely enabling and do not place a positive obligation on corporations.
(c) There is not sufficient enforcement of the existing provisions due to shareholder apathy, lack of information and lack of governmental resources.
(d) There is insufficient media and independent coverage and scrutiny of corporate matters.
(e) The manner of and costs of access to the courts in the “last case scenarios” are still restrictive.
(f) At the same time there is the need to be realize that over regulation will drive costs up and may result in baseless and costly suits.

Having realized this how do we go forward. Having heard the earlier presenters I endorse the approach that seeks to adopt regionally applicable principles. This requires a close examination of our domestic situations, social, legal, and cultural and requires that a regional common foundation be built. In the meantime need to find a way to educate the corporate players on the obligations that presently exist, and the public on the rights that presently exist and bring home to both parties the not immediately apparent connection between good corporate governance and good business performance.

Anthony E. Gonsalves