BY NEILL MAY

Dissent dat!

To those less familiar with the highly technical aspects of shareholder rights (I probably belong to that group, but I don't advertise it in my web bio), the phrase "dissent gives appraisal" probably does not mean much. If you take a step back, it sort of sounds like the punch line of a Yiddish joke, such as "What is the opposite of dat uncle gives a big insult?" But there has been a notable increase in the volume and sophistication of dissent and appraisal litigation south of the border, and the concepts seem poised to become an increasingly visible and significant element of corporate transactions in the Great North as well.

The logic of dissent rights is intuitive and appealing. Corporations operate in some ways like political democracies in that, for matters requiring shareholder approval, majority (and sometimes special majority) rules. The system cannot operate, as a general matter, on a principle of unanimity (excluding privately held companies where the principle of unanimity is deliberately embraced), because unanimity would be practically impossible to achieve and a requirement for unanimity would result in limitless opportunities for gamesmanship.

However, the analogy starts to weaken for the displeased minority. In a political democracy there will be other elections to fight, and those unhappy with the outcome can theoretically vote with their feet. In a corporate environment, a significant transaction may fundamentally and permanently vary the nature and value of a shareholder's interest (despite his or her opposition), and though for some corporations there may be viable means to exit for many there may not. All of which leads to dissent rights, which permit a shareholder who votes against a fundamental transaction — such as an amendment to the articles, an amalgamation, a sale of all or substantially all of the corporation's assets, a going private transaction, and other ground-shifting changes — to initiate a process to receive "fair value" for the shareholder's shares. Expressed more simply, an unhappy minority shareholder cannot frustrate the will of the majority but is protected by the right to receive "fair value."

My own scientific-as-usual observations have been the exercise of dissent rights (which may lead to an "appraisal" of fair value through a court process) has been relatively rare in Canada. Dissent rights have, in my experience, been the subject of most attention where the transaction terms proposed provide an opportunity for strategic dissent.

For example, in an M&A transaction where the acquirer is offering alternative forms of consideration (shares or cash or both), the right to dissent may provide a hedging or arbitrage opportunity to a sophisticated shareholder. Another example would be a corporate transaction that is highly structured to address tax considerations where the exercise by holders of a significant proportion of the shares would undermine the tax planning, in which case the threat of dissent may provide tactical leverage. I believe those instances have been relatively rare, in part due to the fact in private corporations shareholder agreements have become more sophisticated and tend to address the outcomes of fundamental transactions. And in transactions involving publicly traded companies, the disclosure and procedural requirements have become more elaborate in a way that (hopefully) flattens any big gaps between transaction value and fair value.

So what is leading to the apparently increasing incidence of dissent and appraisal litigation in the U.S. (to the point where some hedge funds now include appraisal litigation in their stated investment strategy)? It may be due in meaningful part to the experiences of dissenting shareholders in the U.S., with some statistics showing fair value has been determined to be in excess of transaction value in a substantial majority of litigated cases. It also may be due in part to structural reasons.

Under Delaware law, judgments of fair value are subject to interest at a rate of five per cent above the Federal Reserve discount rate, which in the current environment is not a bad return. In American shareholder litigation, shareholders who lose have often not borne the cost of the litigation, though U.S. issuers have started to include fee-shifting provisions in their bylaws to shift litigation costs onto unsuccessful shareholder plaintiffs, the enforceability of which was recently upheld by the Delaware Supreme Court.

The framework in Canada is different, of course. Among other differences, shareholder plaintiffs up here are exposed to the risk of cost awards in the event their claims are unsuccessful (though the processes are fairly streamlined and judges may be reluctant to impose significant costs on good-faith shareholder claims). More generally, the growing litigation of dissent rights may be yet another reflection of the increasing assertiveness and tactical behaviour of many shareholders, which certainly is evident in Canada.

The result, therefore, may be that appraisal litigation becomes more commonplace in Canada in the near future. That is an uncomfortable prediction for many corporations, which brings to mind a dissent-related line from the movie *Annie Hall*, where Woody Allen's character (I yearn for the days when I didn't hesitate before quoting Woody Allen) said, "commentary" and "dissent" merged and formed "dysentery." There are probably some Yiddish jokes about that as well but none fit to print.

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