

Shareholder activism in Bermuda

Briefing Summary: Shareholder activism has been on the rise globally over the past decade. Bermuda has not been immune from that trend. Shareholder activism in Bermuda often involves differing considerations unique to offshore jurisdictions. The vast majority of companies in Bermuda are exempted companies incorporated by non-Bermudians for the purpose of conducting business outside of Bermuda. A shareholder activism scenario therefore often requires a clear understanding of both Bermuda law and the laws of the foreign jurisdiction where the Bermuda-registered company may actually be listed, operate, and trade.

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There are thousands of companies registered in Bermuda. Many of those are exempted companies which conduct business outside of Bermuda and are publicly listed on foreign stock exchanges, such as the New York Stock Exchange, the London Stock Exchange, or the Stock Exchange of Hong Kong. It is therefore often the case that Bermuda shareholder activism scenarios emerge in relation to publicly traded companies which are subject to Bermuda law in addition to foreign securities laws and listing rules. This can create an occasionally confusing interplay between the more familiar laws and rules of the foreign jurisdiction and the requirements of Bermuda law.

Legal issues that may arise under Bermuda law in a cross-border shareholder activism scenario include, for example, the lack of rights accorded to beneficial shareholders, the unsettled validity of shareholder rights plans (also known as “poison pills”), and the differing interpretation under Bermuda law of certain bye-law provisions which may not be anticipated by a company operating solely in a foreign jurisdiction. It is therefore critical that interested parties, whether the company or an activist shareholder, properly understand the legal implications of a cross-border shareholder dispute which may ultimately be litigated in the Bermuda courts. A proper understanding of Bermuda law can be the critical difference between success and failure in such a scenario.

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Bermuda's company law framework

An important early consideration in a shareholder activism scenario is evaluating the company's constitutional documents and corporate governance practices to understand the management of the company, its internal governance mechanisms, and its institutional strengths and vulnerabilities. That all requires a proper understanding of Bermuda's company law framework.

Bermuda's company law is primarily governed by the *Companies Act 1981 (Act)* and the common law, which together set out the rights and obligations of a company, its directors, and its "*members*." A company's members are its registered shareholders whose names are listed on the company's register of members. Bermuda law primarily recognises the rights of registered shareholders (rather than the rights of beneficial shareholders). With certain important exceptions, Bermuda company law will generally not look beyond legal ownership of shares when determining whether a shareholder can exercise share rights.

The duties of directors under Bermuda law are governed by the *Act* and the common law. Those duties include requiring a director to act honestly and in good faith with a view to the best interests of the company. Under Bermuda law, a director's duties are owed to the company (rather than to its shareholders directly). That means, except in certain special circumstances (such as if the company becomes insolvent), a director must act to promote the success of the company for the benefit of its registered shareholders generally. This distinction limits a shareholder's ability to bring a legal claim against directors personally.

It is a general principle of Bermuda company law that the registered shareholders are entitled to adopt bye-laws (and other shareholders' agreements) which impose whatever rules and regulations they wish for the governance of the company. However, that power is subject to the company's bye-laws (or other agreements) remaining consistent with: (1) the explicit requirements of the *Act* and any other applicable legislation, (2) the Bermuda courts' interpretation of the meaning of any relevant provisions, and (3) whatever public policy considerations the courts deem appropriate in the circumstances. The Bermuda courts accordingly have the power to, for example, hold a company's bye-laws to be invalid to the extent the bye-laws conflict with the applicable legislation or are contrary to public policy.

Given the foregoing, it is important to determine whether the company's bye-laws or other shareholders' agreements have modified the applicable Bermuda company law framework (and whether those modifications are valid), who can exercise the relevant share rights, and what legal remedies may be available to the company and its shareholders if a dispute arises.

General meetings and statutory shareholder requisitions

Another key consideration in a shareholder activism scenario can be the activist shareholder's ability to propose resolutions, including resolutions related to the election or removal of directors. Successfully proposing (and passing) such resolutions necessitates an understanding of the applicable requirements set out in the *Act*, as well as any applicable provisions in the bye-laws or other shareholders' agreements.

The *Act* requires a company's directors to convene an annual general meeting of shareholders at least once every calendar year (subject to certain exceptions). Additional special general meetings may be convened to put resolutions to a vote by shareholders in between annual general meetings. The *Act* further permits shareholders to pass written resolutions which generally have the same effect as if passed at a general meeting. General meetings are usually convened by a company's board of directors to consider business proposed by the board and are conducted in accordance with the procedures set out in the bye-laws.

The *Act* imposes a default simple majority voting threshold for approving most resolutions at general meetings. However, shareholder voting can also be modified through the company's bye-laws to, for example, allow for plurality voting. A company's bye-laws may also increase the voting majority needed to approve certain types of resolutions, such as proposals to amend the bye-laws.

The *Act* permits directors to be elected at a company's annual general meeting and removed/replaced at a special general meeting (with replacement directors elected or appointed at the same meeting to fill any vacancies created). However, those powers are subject to the bye-laws, which means the shareholders may vary the power to elect and remove directors by, for example, permitting directors to be elected and removed at any general meeting based on specific bye-law procedures.

Shareholders have the statutory right to compel the company's directors to put requisitioned resolutions to a vote at a general meeting. Section 79 of the *Act* allows registered shareholders holding 5% of the shares in the company with a right to vote, or 100 separate registered shareholders, to requisition resolutions to be voted on at an annual general meeting. Section 74 of the *Act* allows registered shareholders holding 10% of the shares in the company with a right to vote to requisition a special general meeting and specific resolutions to be voted on by the shareholders at that meeting. A company's bye-laws cannot eliminate or reduce such shareholder statutory rights, although the bye-laws may still impact what types of resolutions can be properly moved at a general meeting (and thereby what resolutions can be validly requisitioned).

Statutory shareholder requisitions are often used by activist shareholders to nominate or remove and replace directors, regardless of objections from the existing board of directors. However, successfully doing that requires an understanding of the requirements applicable to statutory requisitions, as well as the impact (if any) of the bye-laws, which may impose separate notice periods, resolution proposal procedures, and due diligence requirements for the nomination of director candidates.

Shareholder activism defence mechanisms

Bermuda law allows for many of the same types of anti-takeover defence mechanisms that may be familiar in foreign jurisdictions such as the United States. The limits of many of those mechanisms remain unsettled under Bermuda law due to limited judicial guidance. As a result, while certain mechanisms may be *prima facie* valid if included in a company's bye-laws or other shareholders' agreements, there remains some uncertainty regarding how the Bermuda courts will interpret those mechanisms if a dispute is litigated.

One example of an anti-takeover mechanism available in Bermuda is the staggered (or classified) board of directors. A staggered board generally includes directors elected to overlapping multi-year terms who do not come up for election at the same time. A staggered board is designed to prevent an activist shareholder from gaining a majority of seats on the board at a single general meeting. In response, an activist shareholder may look to the company's bye-laws to determine alternative procedures for electing or removing and replacing the entire board of directors as quickly as possible. That may involve utilising a statutory requisition to propose resolutions at an annual general meeting or to convene a special general meeting for removing/replacing existing directors.

Another example of an anti-takeover mechanism available under Bermuda law is the shareholder rights plan or a "**poison pill**." Poison pills are usually enacted by a company's board of directors through the bye-laws or a shareholders' agreement in response to an activist shareholder accumulating a significant position in the company without first engaging or negotiating with the board. Once the activist shareholder acquires a certain percentage of the company's shares, the poison pill may authorise the directors to issue new shares at a discount to the other shareholders in order to dilute the activist's shareholder's position.

The Bermuda courts have confirmed the availability of poison pills under Bermuda law. However, there is limited case law interpreting the requirements for a valid poison pill. The general requirements are threefold: (1) the directors must have the power to implement the poison pill under the bye-laws or shareholders' agreement, (2) the directors must implement the poison pill for a bona fide proper purpose (e.g., not for the purpose of entrenching the existing management); and (3) the poison pill when exercised must be fair as between shareholders. The key to the validity of a poison pill is therefore likely to be identifying which provisions of what agreement permit the type of poison pill implemented by the directors and then determining whether the directors have implemented or exercised the poison pill in accordance with their duties to the company.

Shareholder activism litigation

There are various statutory remedies available to shareholders and directors in a shareholder activism scenario. The Bermuda common law has also adopted many of the same types of remedies that are available under the English common law. The following are the most common remedies used in Bermuda.

Regulation of a company's general meeting

Section 76 of the *Act* allows registered shareholders and directors to apply to the courts for an order which calls and/or regulates a general meeting of a company. The Bermuda courts have broad statutory power to "*order a meeting of the company to be called, held and conducted in such manner as the court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient.*"

Shareholder rights and director exclusion claims

The common law allows registered shareholders and directors to apply to the Bermuda courts for declarations confirming their legal rights, as well for injunctions restraining the breach of those rights. Such claims are often brought by shareholders seeking to enforce their statutory requisition rights or by directors seeking to end their unlawful exclusion from the management of the company.

Shareholder oppression remedy

Section 111 of the *Act* allows registered shareholders to apply to the Bermuda courts when their interests as shareholders have been unfairly prejudiced. The oppressed shareholders can seek relief against the company, its directors personally, other shareholders, and even third parties.

Derivative claim

Derivative claims can be commenced by registered shareholders to seek damages against third parties for a loss suffered by the company. Once a derivative claim is commenced, the applicant shareholders must apply to the Bermuda courts for leave to continue the claim in accordance with Order 15, rule 12A of the *Rules of the Supreme Court 1985*.

For more details on some of the key shareholder and director remedies available under Bermuda law, please see our previous briefing found [here](#).

Conclusion

Shareholder activism scenarios are often legally complex and can involve important cross-border considerations, especially if the company is publicly traded on a foreign stock exchange. It is therefore important for interested parties, whether a company or an activist shareholder, to seek Bermuda legal advice as early as possible. An experienced legal advisor is key to obtaining a proper understanding of the applicable legal framework, developing a coherent campaign strategy, preparing for the possibility of shareholder litigation, and ultimately achieving a successful outcome.

FAQs

1. Why is shareholder activism relevant in Bermuda?

Shareholder activism has increased globally, and Bermuda companies, many of which are listed on overseas exchanges and operate in overseas jurisdictions, are experiencing the same trend. Many Bermuda-registered companies are traded on foreign exchanges such as the NYSE, LSE, or HKEX, meaning activism often involves navigating both Bermuda law and foreign securities regimes.

2. How does Bermuda's company law framework impact shareholder activism?

Bermuda's company law is grounded in the Companies Act 1981 and common law. Only registered shareholders (not beneficial owners) are generally recognised as having legal rights. Directors owe duties to the company – not directly to shareholders – and must act in the company's best interests. Company bye-laws can modify governance structures, but they must remain consistent with the Act, court interpretations, and public policy.

3. What rights do shareholders have to propose or compel resolutions?

Shareholders can propose resolutions at annual or special general meetings, subject to statutory and bye-law requirements. Under sections 79 and 74 of the Act, registered shareholders can compel directors to present resolutions or convene meetings if they meet certain shareholding thresholds (e.g., 5% for AGM resolutions; 10% for requisitioning SGMs). These statutory rights are often used in shareholder activist campaigns, particularly to elect or remove directors.

4. What shareholder activism defence mechanisms exist under Bermuda law?

Bermuda law allows several defence mechanisms, including:

- **Staggered boards of directors**, which limit an activist shareholder's ability to elect a majority of directors at a single AGM.
- **Shareholder rights plans ("poison pills")**, which can dilute an activist shareholder's stake in the company if they acquire shares beyond a certain threshold.

While poison pills are recognised under Bermuda law, their validity depends on them being:

- Authorised under the bye-laws or shareholder agreements,
- Implemented and exercised for a proper purpose, and
- Fair as between shareholders.

Judicial guidance in Bermuda remains limited, creating some uncertainty.

5. What legal remedies are available in shareholder activism disputes?

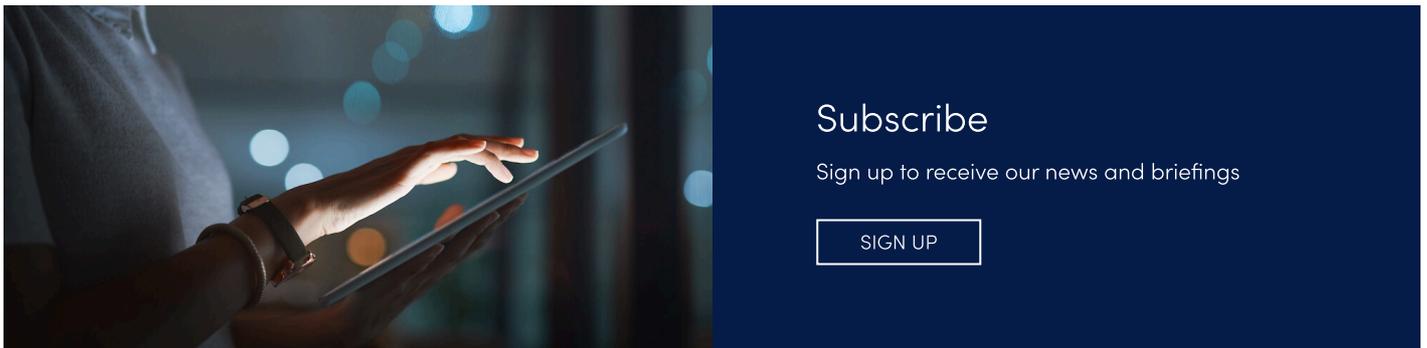
Shareholders and directors can access several statutory and common law remedies, including:

- **Court-ordered regulation of general meetings** (s.76 of the Act)
- **Declarations and injunctions** to enforce shareholder rights
- **Oppression remedy** (s.111) for unfair prejudice
- **Derivative claims** (subject to court leave) for wrongs done to the company

These remedies are central to resolving disputes when activism escalates to litigation.

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