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DEVANESAN EVANSON

INDEPENDENT DIRECTORS

SOME COMMON CHALLENGES

INDEPENDENT directors play a crucial role in corporate governance by providing unbiased judgment, bringing diverse perspectives and safeguarding the interests of stakeholders.

However, there can be several issues associated with independent directors. Here are some of the common challenges.

Lack of independence

Independent directors are expected to be free from conflicts of interest that may compromise their objectivity. However, in some cases, they may have close ties with the company, management or major shareholders, which can undermine their independence. The main issue is being independent of major shareholders. Major shareholders can vote in independent directors.

Major shareholders tend to vote in “friendly” parties as opposed to those whom they do not know, regardless of their qualifications and expertise, and independence. So, very often, the role of an independent director is met with the cynical remark as to how independent the director is.

Overboarding

Independent directors may serve on the boards of multiple companies simultaneously, leading to concerns about their ability to dedicate sufficient time and attention to each board. This can dilute their effectiveness and limit their ability to fulfil their responsibilities. Currently, the listing requirements limit directorships to five listed companies

in Malaysia.

Directorships in foreign-listed companies are not included. Though, for a Malaysian director, a foreign public-listed company (PLC) may incur more time commitment compared to a local PLC.

Previous listing requirements had a limit on board positions in unlisted organisations, but this has been done away with.

Technically, a director can now sit on five Malaysian PLCs and an unlimited number of organisations. Having said that, directors are required to ensure that they are in a position to commit sufficient time to discharge their fiduciary duties to the PLC satisfactorily.

Limited expertise

Independent directors are often chosen for their diverse backgrounds and expertise, but there can be instances where their skills may not align with the needs of the company. This can lead to a lack of understanding of the industry, business model, or specific challenges faced by the organisation, hampering their ability to provide valuable insights and guidance.

Every appointment to a board must be accompanied by a narration by the incumbent board on what the director brings to the table. A new director must bring value and must be able to move the proverbial needle. That should be the only basis for a board appointment.

Tokenism and rubber-stamping

In some cases, independent di-

rectors may be appointed merely to meet regulatory requirements or to project an image of good governance.

And the gender diversity agenda can fall prey to this.

If they are not actively involved in decision-making processes or their opinions are consistently disregarded, their role becomes more symbolic than substantive, leading to tokenism and rubber-stamping of management decisions.

Limited liability

While independent directors are expected to exercise their independent judgment, they may face challenges when it comes to personal liability for corporate misconduct or failures.

Legal protection and indemnification may exist, but without accountability or strong legal frameworks, independent directors may hesitate to challenge management decisions or take proactive steps.

In Malaysia, under Section 347 of the Companies Act 2016, a complainant may initiate derivative proceedings on behalf of the company in the company’s name against directors.

Both Bursa Malaysia, under the rules of the listing requirements, and the Securities Commission, under the Capital Markets Services Act 2007, can bring action against directors of PLCs.

Board dynamics and power dynamics

Independent directors may face challenges in asserting their views or challenging the status quo, especially if there are dom-

inant personalities or power dynamics within the boardroom.

This can lead to a lack of effective dissent and critical thinking, undermining the purpose of having independent directors in the first place.

This is especially so in Malaysia where there is a number of family-owned PLCs.

Often, these PLCs have dominant and overbearing major shareholders who can vote in and vote out independent directors.

In such instances, it is challenging for independent directors to act without fear or favour, for to do so may incur the wrath of the major shareholder and the consequent demise of their directorship.

Speaking truth to power is easier said than done. Throw in an attractive remuneration package and there is a real risk of having the independent directors eat out of the hands of the major shareholder. Such risks can be mitigated with strong regulatory sanctions when independent directors have been found wanton of their fiduciary duties and compliance.

Addressing these issues requires a combination of factors, including careful selection and nomination processes, strong regulatory frameworks, effective board evaluations, and a commitment to fostering a culture of transparency, accountability, and inclusiveness within organisations.

The writer is chief-executive officer of Minority Shareholders Watch Group

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