

The Virtual Shareholders Meeting: How to make it work?*

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Abstract:

A Virtual General Meeting (“VGM”) of Shareholders allows shareholders to communicate quickly, efficiently and cost-effectively with each other and the Board. Shareholders receive a code that enables them to log on to a heavily secured VGM platform where they can observe the agenda, reports, proposals and other discussion papers. Furthermore, a VGM- platform can retain a bulletin board, which allows shareholders to set up a constructive dialogue with each other and the Board and hereby increase their information supply. Although most jurisdictions require a physical shareholders’ meeting, since 2000 Delaware (USA) allows corporations to hold their meeting solely online. Even though several corporations have held their shareholders meetings solely online, they have not been a resounding success. The author attributes the limited success to three factors: (1) The rights of shareholders are not sufficiently safeguarded, (2) negative publicity and (3) cold feet. The introduction of a new corporate figure, the Shareholders Rights Manager, could help to solve these problems so that the VGM will become the future of the corporate decision-making process.

Keywords: Virtual General Meeting, Virtual Shareholders Meeting, Shareholders Rights Manager, Shareholders’ Meeting, Shareholders’ Rights, Internet.

1. Modern Means of Communication

During the last few decades, the rights of shareholders and the exercise of these rights have been widely discussed by legislators, practitioners and academics. (Nolan, 2006)

These parties are trying to establish a better system of checks and balances. This requires that the role played by shareholders in this system is strengthened. This can be accomplished by providing shareholders with more rights *and* by enticing them to make better use of their current rights by removing disincentives. The main disincentives are rational apathy and asymmetric information. The use of modern means of communication may remove or reduce these disincentives and increase the involvement of shareholders in the corporation. (Natale, Vol.1, No.1) Modern means of communication allow shareholders to communicate quickly, efficiently and cost-effectively with each other and the Board. (Burns, IJLIT Vol.9). Especially corporations with (world) wide spread stock, may modern ways of communication remove or decrease current disincentives and result in an increase in participation at the Annual General Meeting (“AGM”).

Most Western jurisdictions allow shareholders to discuss via videoconferences and to vote via e-mail. Both possibilities nevertheless have some disadvantages. The limited number of participants restricts the application of videoconferencing. If the number of participants increases, the survey ability decreases and the meeting may end in disorder. The idea behind the shareholders’ meeting is that it should be a place of deliberation and discussion by shareholders and the Board. If a shareholder votes by e-mail, his voting decision is not the result of deliberations and discussion, but is based solely on other considerations. This is far from ideal. Considering these disadvantages, I would like to introduce a new model, namely the Virtual General Meeting (“VGM”).

2. The Virtual Shareholders Meeting

If a corporation organizes its shareholders meeting on a virtual basis, there will no longer be a physical get-together of shareholders. Shareholders receive a code, which gives them access to a heavily secured VGM platform. (Boros, 2004) At this platform, they can observe the agenda, annual or periodic reports, proposals by the board and other discussion papers. The Board will be able to present the company strategy by posting video or PowerPoint presentations. The VGM platform could also contain a bulletin board. This bulletin board

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should be divided into agenda points, which allows shareholders to set up a constructive dialogue with each other and the Board. Via the bulletin board, shareholders can inform each other and cite other sources of information. This will result in a growth in the available information and help to solve the asymmetric information distribution. (Noack, 2004).

Once shareholders have decided how they will vote, the votes can be submitted in the virtual ballot box. Once the voting period has ended the Chairman will announce the voting results and officially close the Meeting.

The virtual shareholders meeting can stimulate the participation of shareholders, since shareholders, in whatever country they may be located, are able to join the meeting in a relatively inexpensive way. It will no longer be a requirement that every shareholder is online at the same moment for the reason that a VGM can last for several days or even a week. In order to view and to participate in the discussion, shareholders can log in regularly.

As a result of the low cost of the distribution of electronic information, the information distribution to shareholders will increase. The bulletin board offers shareholders a new possibility to unite in order to have certain topics discussed or other effects that an individual shareholder cannot achieve. A VGM gives shareholders no new rights, but allows them, by the increased distribution of information and the stronger possibilities for collective action, to improve the exercise of existing rights.

Not only shareholders benefit from a VGM. Especially corporations with geographically widespread shareholders may profit from a virtual meeting by increasing shareholders' participation. (Kobler, 1997). Increased shareholders' participation can result in improved corporate governance (Boros, 2003), which can lead to better financial performance. (Diacon and Sullivan, 1995).

3. Application in Delaware

The Delaware (USA) legislator also recognized the advantages of a virtual shareholders meeting and decided to allow corporations to hold their annual meeting solely electronically. (Note: Delaware is, so far as my knowledge concerns, together with Denmark the only state which allows the virtual general meeting. See also: Dirk Zetsche, *Shareholder Interaction Preceding Shareholder Meetings of Public Corporations – A Six Country Comparison*, European Corporate & Finance Law Review, 2005, Vol. 2:1.)

Although Delaware is the smallest state but one in the USA, it has the most important corporate legislation. Over 50 % of the American corporations listed on the stock exchanges and over 60% of the Fortune 500 corporations are incorporated in Delaware. The reasons for the attraction of Delaware are the flexible and progressive Delaware General Corporation Law, the relatively low state taxes, the modern and service-directed approach of the Office of the Secretary of State and the fact that Delaware's highly specialized courts are part of the Delaware judiciary.

Preceding the 2000 amendment, Delaware's statute on shareholders meetings provided that meetings *"may be held at such place, either within or without this State, as may be designated by or in the manner provided in the bylaws or, if not so designated, at the registered office of the corporation in this State."* (Delaware General Corporation Law, Title 8, Article 211a (1999). Although corporations could hold meetings in any state, they were consequently required to do so at a *"place"*. The statute does not describe this term, but presumably, however, the legislature used "place" in the traditional sense of the term, meaning a physical location. The Internet consequently did not meet the criteria, as it is not a place as such.

The new statute on shareholders meetings retains the old statutory language that permitted corporations to conduct meetings in any state (Delaware General Corporation Law, Title 8, Article 211a (1) (2002))

However, directly following that text the provision states: *If, pursuant to this paragraph or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a) (2) of this section* (Delaware General Corporation Law, Title 8, Article 211a (1) (2002)

The Delaware legislation no longer obliges corporations to hold their shareholders meetings in a physical location, but currently permits them to occur entirely on the Internet. It is striking that the board, independently and without any intervention or consultation, may decide to hold the meeting online. It is not required that shareholders are consulted.

In order to maintain equality between virtual meetings and physical meetings, the Delaware statute provides the following:

If authorized by the board of directors in its sole discretion, and subject to such guidelines and procedures as the board of directors may adopt, stockholders and proxy holders not physically present at a meeting of stockholders may, by means of remote communication:

- a. Participate in a meeting of stockholders; and
- b. Be deemed present in person and vote at a meeting of stockholders, whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxy holder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxy holders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxy holder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

According to this article, shareholders participating online are seen as physically present shareholders. The statute establishes certain requirements for online shareholders meetings to protect their integrity. First, corporations must “implement reasonable measures” to ensure that individuals “deemed present and permitted to vote at the meeting by means of remote communication” are actually stockholders or proxy holders. This provision ensures compliance with the traditional requirement that restricts participation in shareholders meetings to stockholders and proxy holders, absent a vote to the contrary by the stockholders in attendance. Secondly, the statute requires corporations to take reasonable steps to ensure that participants have “a reasonable opportunity to participate” and to vote. Thirdly, the statute imposes a duty on corporations to keep records of shareholders' and proxy holders' votes and actions at meetings taking place through remote communication. This requirement prevents shareholders from perpetrating fraud against the corporation by unregulated voting. In addition, this condition will be a guarantee for stockholders that their contributions and votes are documented and can be referred to in a case of technical failure.

The American literature points to the compatibility of the technical means available to corporations and shareholders. (Birnback, 2003). Corporations need to examine whether their shareholders have, in general, sufficient hardware and Internet infrastructure in order to make the step to the virtual meeting a useful and rewarding one. What strikes me as problematic is the great freedom available to corporations to fill in certain terms like “reasonable opportunity”. The legislator does not define these terms and has not enacted extra legislation to create more clarity. The classification of these terms will be done by corporations that hold their meetings virtually and conceivably by the Delaware Court of Chancery.

4. Experiences in Delaware

Since the amendment of the General Corporation Law came into force, several corporations incorporated in Delaware have used the Internet for their shareholders meetings. In April 2001, Inforte Corporation (<http://www.inforte.com>) held the world's first entirely virtual shareholders meeting. The registration page of the virtual shareholders meeting offered participants the possibility to ask questions by e-mail preceding and during the meeting. Inforte answered all questions and published several PowerPoint presentations on the web page. The 2001 experiment pleased Inforte and persuaded the Board to continue holding shareholders meetings virtually.

(For more information about this first virtual shareholders meeting see: Tami Kamaraskas, *Case Study: In Forte Corp. Hosts Virtual Shareholder Meeting*, Wallstreetlawyer.com, Oct. 2001, p. 20). In 2002, the Inforte experiment was imitated by Ciber Inc. (<http://www.ciber.com>) as a response to the low participation rate in shareholders meetings and an attempt to increase this rate. (Forgrieve, 2002)).

Although several corporations do hold their meetings solely online, they do not use all the opportunities that online meetings offer. For instance, both Inforte and Ciber did not have a bulletin board where shareholders can communicate with each other. They only allow shareholders to ask questions to the board and thereby miss the opportunity to improve the communication and distribution of information among shareholders. Besides, they do not offer shareholders many guarantees that (critical) questions will be answered and will not be removed which could make shareholders reluctant to exercise their rights. Since it is

solely the board who decides to switch to a virtual meeting and because shareholders' rights are not safeguarded, it is understandable that shareholders may be sceptical of meeting online.

5. So far, not a great success

Even though several corporations have held their shareholders meetings solely online, they have not been a resounding success. Only a few relatively small corporations have so far made use of this legal possibility.

In my opinion, the lack of success of the online shareholders meetings in Delaware can be explained by the following reasons:

1. The rights of shareholders are not sufficiently safeguarded since:
 - a. there is no supervision of the placing and removal of shareholders' contributions;
 - b. there is no guarantee that questions will be answered and;
 - c. the improvement of information distribution is absent or restricted since there is no bulletin board where shareholders can communicate with each other;
 - d. the board can decide, at its sole discretion, to hold the meeting online which might lead to a lack of consensus among shareholders.
2. (This explanation is solely based on a logical analysis of the practice of the Virtual General Meeting. Empirical evidence is required to substantiate these conclusions.)
3. Negative publicity: For the above-mentioned reasons, some shareholders and special interest groups are opposed to online shareholders meetings which have resulted in negative publicity. (For a typical example of a premature and negative conclusion see: Margaret Kane, *Virtual Shareholder Meeting Flops*, Cnet, News.com, 7 September 2001.)
4. In Massachusetts negative publicity has even led to the withdrawal of a proposed bill. This bill authorized corporations incorporated in Massachusetts to hold online shareholders meetings but was heavily criticized by special interest groups. Interest groups condemned it as a "backdoor effort to insulate company executives from unhappy shareholders" and claimed that the bill "institutionalised a lack of corporate accountability." (The Neighborhood Assistance Corporation of America is a provider of housing assistance to low-income families. See: www.naca.com) In my opinion, the criticisms made by these interest groups are understandable, since shareholders' rights are indeed not sufficiently protected.
5. Cold feet: Although advantages may be achieved, corporations are still somewhat reluctant to switch to a virtual shareholders meeting. The unclear and uncertain advantages combined with the negative opinions have resulted in corporations deciding to wait and see which way the wind blows.

6. Solution

Before we start examining a possible solution to the highlighted reasons for this reluctance, it is necessary to look more closely at the state of affairs in a general meeting.

Maintaining order at the meeting and adhering to the procedural rules is a typical task for the Chairman of the meeting. In continental Europe this is nearly always the chairman of the non-executive Directors. If law and order is not sufficiently maintained, a cluttered meeting will be the result. In a virtual organized meeting, the Chairman's function will alter. To maintain order, the Chairman may decide no longer to reveal the contributions of certain persons or even to deny these individuals entry to the meeting by blocking their login code. By these possibilities, indecent or unreasonable remarks can effectively be deleted. The danger of this possibility is that censorship will be applied. Especially when remarks are made about the Board, the risk of the removal of these remarks is present. In a physical meeting, critical questioners may be put off, but the entire meeting (including any journalists present) will see if the chairman/ board treats such shareholders with contempt. In a virtual meeting the contributions of challenging questioners can be noiselessly removed and no other shareholder will be able to see the specific contribution. It is crucial that the balance of interests is maintained in an objective and transparent way in order to avoid legal proceedings if the questioner is manhandled while asserting his shareholders' rights.

To avoid these conflicts of interest, corporations may decide to appoint a "shareholders rights manager" ("SRM"). This person can be made responsible for all technical, legal and organizational procedures of the virtual meeting. (See also: Dirk Zetzsche, *Corporate Governance in Cyberspace*, Centre for Business and Corporate Law Research Paper Series, nr. 11.)

The SRM will ensure that a level playing field is maintained and will decide on the admissibility of contributions. Furthermore, he will make sure that the proceedings of the meeting are efficient and remain, to a

certain extent, entertaining. The SRM will pay attention to subjects that are important to shareholders like system security, data protection and that questions are actually answered by the board. Besides, the SRM can organize road shows or investor meetings so that directors can informally retain face-to-face contact with shareholders as well. Shareholders can periodically appoint the SRM while the corporation will cover his remuneration and expenses. A SRM should only be appointed if he has the required knowledge and experience with the AGM and VGM. Moreover, it is essential that all parties will see the SRM as independent or at least impartial.

The SRM can (help to) supervise all questions and answers given. In this context, the SRM actually safeguards shareholders' rights. The SRM can solve the problems described in I A and I B. If a corporation adds a bulletin board on the VGM platform, the communication and distribution of information among shareholders can radically improve. (Latham, 2000). If the bulletin board functions become an essential source of information for both shareholders and the board, the problem described under I C will vanish as well. The legislator can resolve the problem mentioned under I D by giving shareholders the right to approve or at least be consulted about the VGM. This will amplify consensus and enthusiasm among shareholders and avoid situations in which a shareholder is trapped in a corporation that holds a virtual AGM. (For instance, in Denmark, the only other country where a VGM is legally possible, public companies need a voting majority of 2/3 and a quorum of 2/3 at the specific AGM where the issue is discussed. Furthermore, the Danish legislator requires that at this specific meeting, no more than 25 % vote against. See: LOV no. 303, §78 stk.1-2 and §65a stk. 2.)

Once shareholders' rights are safeguarded and positive experiences are gained, the image of the online shareholders meeting will recover and become positive. When positive experiences are gained and both shareholders and the board acknowledge the benefits of the VGM, cold feet will disappear.

7. Conclusion

Organizing shareholders meetings entirely online does have enormous potential. Shareholders are better able to exercise their rights as a result of the increased length of time, the absence of travelling time and the improved distribution of information and communication among shareholders. Especially corporations with geographically widespread shareholders may profit from a virtual meeting by increasing shareholders' participation. Increased shareholders' participation can result in improved corporate governance, which can lead to better financial results.

We have seen how the State of Delaware offers their corporations the opportunity to achieve these advantages. Several corporations have used this possibility to hold their shareholders meetings electronically. Taking into account the way these corporations set up their meetings and the small amount of firms, which make use of this possibility, the solely online meeting has not been a resounding success. We passed a few possible reasons in review in order to explain the reluctance towards the virtual general meeting. The main reason could be that shareholders' rights are not sufficiently safeguarded since there is no supervision of the VGM platform and the information distribution is not improved. This main reason has led to negative publicity and cold feet.

In order to safeguard shareholders' rights a new figure has been introduced namely the Shareholders Rights Manager. The independent SRM ensures a level playing field and avoids undesired conflicts of interest. To improve the communication and the distribution of information among shareholders it is advisable that the participating firms set up a bulletin board at the VGM platform. Only if a VGM platform contains such a bulletin board and if shareholders' rights are thoroughly safeguarded, can the VGM become the future of the corporate decision-making process.

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