MEDIATING ACTIVIST SHAREHOLDER-MANAGEMENT DISPUTES: PROMISE OR CHIMERA?

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ABSTRACT

The rise of shareholder activism provides an opportunity to develop alternative approaches to the resolution of disputes between shareholders and management of corporations. Although mediation would likely face fundamental interest-based barriers preventing parties from reaching a negotiated settlement, it nonetheless offers key advantages which could empower these two actors to efficiently resolve conflict. Novel approaches to public and private corporate policy could present avenues to test this proposition.
... the conclave [until the new pope is chosen] is to be completely locked, so that no one can enter or leave.... It is not lawful for anyone to send a messenger or a written message to the cardinals or to any one of them.... Whoever acts otherwise, sending a messenger or a written message, or speaking secretly to one of the cardinals, is to incur automatic excommunication. In the conclave some suitable window is to be left open through which the necessary food may be served conveniently to the cardinals, but no entry for anyone is to be possible through this way.... Without any constraint on their judgment other than God, they are to seek purely and freely the public good, with the election alone in mind.

– II. 2(8-9), *Ubi periculum*

The expansion of judicial mediation cannot simply be blind empire building, but nor should expansion be limited simply because mediation is unfamiliar or untried in a given area.


1. Introduction

This paper argues mediation can realistically compel management and an activist shareholder to successfully resolve disputes confidentially before a costly full-fledged conflict takes form. Management and activists have a shared interest in continuing their relationship, in reducing reputational risks and financial costs, in gaining negotiation flexibility through confidentiality, and in exchanging information arising from asymmetries inherent to the shareholder-management divide. On this common ground, they can develop constructive agreement options. However, faith in mediation must be attenuated by the likelihood that (i) the negotiating parties will have incentives to abuse the mediation process itself by using it as a bargaining tool, and that (ii) it could easily
be in the vested interest of shareholders and management to employ high-powered threats at the expense of mediation. This paper closes by suggesting a potential framework to encourage mediation despite these obstacles so that mediation may become a useful alternative dispute resolution method.

2. Defining the Conflict between Activist Shareholders and Management

The conflict between an activist shareholder and management can take many forms. The essence of the conflict itself, however, is as follows: activists are interventionist shareholders of a business entity—typically a publicly-traded corporation—who seek to maximize the value of their equity position by (i) soliciting management to make one or a series of decisions, or (ii) requesting management or directorship changes. Some activists tend to be cooperative, others more aggressive, but management of targeted companies often resist change and perceive activists to be threats.¹

The conflict may be fundamental (e.g. sweeping change of management is desired²), ancillary (e.g. company assets are under-exploited and parties have divergent business plans³), litigious (e.g. a shareholder threatens litigation⁴), or may take some other form. Most activist investors first attempt to bridge the underlying difference through a private engagement with management and a great many cases find a mutually satisfactory resolution. In many instances, however, the shareholder’s position is contested by management, at which point, litigation, a proxy battle for control of the company, and/or public relations campaigns may break out. An analysis by McKinsey & Co. observing 400 activist campaigns (out of 1,400 launched against US companies between 2004 and 2014) found that 73% of campaigns are initially collaborative but that 60% of campaigns ultimately become hostile.