

THE PROPER AND EFFECTIVE EXERCISE OF APPRAISAL RIGHTS UNDER

THE SOUTH AFRICAN COMPANIES ACT, 2008:

Developing a strategic approach through a study of comparable foreign law

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PLAGIARISM DECLARATION

I hereby declare that this thesis, presented for examination for the degree of Doctor of Philosophy at the University of Cape Town, has not been previously submitted for a degree at this or any other university, that it is my own unaided work both in concept and execution and that all the materials contained herein have been duly acknowledged.

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Date

ABSTRACT

THE PROPER AND EFFECTIVE EXERCISE OF APPRAISAL RIGHTS UNDER THE SOUTH AFRICAN COMPANIES ACT, 2008:

Developing a strategic approach through a study of comparable foreign law

This thesis seeks to identify how the appraisal rights remedy, which was introduced into South African company law for the first time by section 164 of the Companies Act 71 of 2008 ('the South African Act'), should be interpreted and applied in order to facilitate its effective and proper exercise. When the draft version of the South African Act was initially published for public comment, critics raised concerns that the inclusion of the appraisal remedy was undesirable and unnecessary. These concerns were largely motivated by the fact that at the time appraisal rights were a novel concept and thus a completely unknown quantity in South African law. As a result there was much uncertainty in the legal and commercial sector as to how these rights would be interpreted, how they would function and how frequently they would be used.

However, since the commencement date of the South African Act (being 1 May 2011) to date no appraisal rights matter has come before our courts and it could therefore be argued that the initial concerns of the critics were unfounded. The 'lack of use' phenomenon is in line with the general trend experienced in foreign jurisdictions where the appraisal remedy has been on the statute books for decades, such as the United States of America ('USA or US'), Canada and New Zealand. Due to the fact that appraisal rights are notoriously

underutilised they have often been dismissed as an ineffective remedy for minority shareholders. Clearly it could not have been the intention of the drafters of the South African Act to include an ineffective or useless remedy. My research indicates that the lack of use of the appraisal remedy in comparable jurisdictions is due to a number of factors but can be broadly attributed to the complexity, uncertainty and expense associated with the exercise of appraisal rights. The thesis therefore seeks to identify the various causes of the lack of effectiveness apparent in the USA, Canada and New Zealand, to examine the relevance of these in the South African context and to consider possible ways of addressing these challenges. The ultimate objective of the thesis is to devise measures which may be taken so that the appraisal remedy can function more *effectively* (author's emphasis), or at least as effectively as possible, in South Africa.

Allied to the objective of effective use is the *proper* (author's emphasis) use of appraisal rights. One of the concerns which has been raised against appraisal rights in the past is that they have the potential to be used improperly or abused and may thus have an effect which is at odds with their intended purpose. Turning again to foreign comparative law of the USA, Canada and New Zealand for guidance, the thesis suggests measures to curtail the potential danger of improper use of appraisal rights in South Africa. Recent controversial developments in Delaware with respect to the practice of appraisal rights arbitrage are also examined and considered in the South African context.

Finally I make concrete recommendations as to possible actions that should be taken by the South African legislature and companies to avoid or circumvent the well-documented, anticipated pitfalls of ineffective and improper use of the appraisal remedy.

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CONTENTS.

PLAGISARISM DECLARATION.....2

ABSTRACT.....3

ACKNOWLEDGEMENTS.....6

CONTENTS.....7

INTRODUCTION.....15

1. HOW CAN WE PROMOTE THE EFFECTIVE USE OF APPRAISAL RIGHTS IN SOUTH AFRICA?15

2. RESEARCH METHODOLOGY17

3. OVERVIEW OF THE CHAPTERS.....19

3.1 Chapter 119

3.2 Chapter 2.....19

3.3 Chapter 3.....20

3.4 Chapter 4.....21

3.5 Chapter 5.....22

3.6 Chapter 6.....23

3.7 Chapter 7.....24

3.8 Chapter 8	25
CHAPTER 1.....	27
INTRODUCING THE APPRAISAL REMEDY.....	27
CHAPTER 2.....	40
COMPARABLE FOREIGN LAW.....	40
CHAPTER 3.....	47
APPRAISAL RIGHTS IN THE UNITED STATES OF AMERICA.....	47
3.1 BACKGROUND.....	47
3.2 THE MODEL BUSINESS CORPORATIONS ACT, THE DELAWARE GENERAL CORPORATION LAW AND THE NEW YORK CODE.....	48
3.2.1 Trigger events.....	51
3.2.2. Payment of offer amount.....	52
3.2.3 Costs and expenses.....	53
3.2.4 Market-out exception.....	54
3.2.5 Comment.....	56
3.2.6 The New York Code.....	58

3.3 APPRAISAL RIGHTS AND THE UNITED STATES COURTS.....	64
3.4 RECENT DEVELOPMENTS: SELECTED CASES, FAIR VALUE AND APPRAISAL RIGHTS ARBITRAGE.....	66
CHAPTER 4.....	91
APPRAISAL RIGHTS IN CANADA.....	91
4.1 THE CANADA BUSINESS CORPORATIONS ACT.....	91
4.1.1 Trigger events.....	93
4.1.2 Notification.....	95
4.1.3 Suspension of rights.....	97
4.1.4 Offer by the company.....	98
4.1.5 Offer on the same terms.....	99
4.1.6 Payment of offer amount.....	100
4.1.7 Jurisdiction.....	101
4.1.8 Security for costs.....	102
4.1.9 Joinder.....	102
4.1.10 Court order.....	103
4.1.11 Financial position of the company.....	104

4.2	SELECTED CASE LAW	107
4.2.1	General issues.....	107
4.2.2	Determination of fair value.....	108
4.2.3	Registered and beneficial shareholders.....	114
4.2.4	Comment.....	118
CHAPTER 5.....		122
APPRAISAL RIGHTS IN NEW ZEALAND.....		122
5.1	THE NEW ZEALAND COMPANIES ACT, 1993.....	122
5.2	THE MINORITY BUY-OUT RIGHTS AMENDMENT ACT, 2008.....	125
5.3	SELECTED CASE LAW AND LEGAL ISSUES.....	127
5.3.1	Determination of fair value.....	127
5.3.2	Arbitration.....	128
5.3.3	Amount payable, interest, costs and expenses.....	132
5.3.4	Comment.....	136
CHAPTER 6.....		139
APPRAISAL RIGHTS IN SOUTH AFRICA.....		139

6.1 SECTION 164 OF THE ACT.....	139
6.2 OTHER RELEVANT SECTIONS OF THE ACT.....	146
6.2.1 General interpretation of the Act.....	147
6.2.2 Anti-avoidance.....	150
6.2.3 Amendment of the Memorandum of Incorporation.....	151
6.2.4 Purpose of the Act.....	155
CHAPTER 7.....	157
CHALLENGES TO THE EFFECTIVE AND PROPER USE OF APPRAISAL RIGHTS.....	157
7.1 GENERAL.....	157
7.2 CHALLENGES IN SOUTH AFRICA.....	164
7.3 SELECTED ISSUES IN THE ACT.....	168
7.3.1 Determination of fair value.....	168
7.3.2 Registered and beneficial shareholders.....	177
7.3.3 Appraisal rights arbitrage in South Africa.....	183
7.3.4 Waiver.....	186
7.4 DEALING WITH THE CHALLENGES.....	186

7.5	LEGISLATIVE INTERVENTION.....	189
7.5.1	Complexity.....	189
7.5.1.1	<i>Partial dissent</i>	191
7.5.1.2	<i>Registered and beneficial shareholders</i>	192
7.5.1.3	<i>Trigger events</i>	193
7.5.1.4	<i>Non-compliance with procedural requirements</i>	196
7.5.1.5	<i>The notice anomaly</i>	197
7.5.1.6	<i>Solvency and liquidity requirements</i>	200
7.5.1.7	<i>Withdrawal of demand</i>	201
7.5.2	Expense.....	202
7.5.3	Timing and delays.....	203
7.5.4	Uncertainty.....	204
7.5.5	Abuse.....	205
7.6	CORPORATE INTERVENTION.....	207
7.7	ALTERNATIVE DISPUTE RESOLUTION.....	214
7.7.1	Introduction.....	216
7.7.2	The Act.....	219
7.7.3	The effect of King III.....	224

7.7.4 Application to section 164.....	229
7.7.5 Comment.....	236
CHAPTER 8.....	237
CONCLUSION.....	237
8.1 THE CURRENT STATE AND THE FUTURE OF APPRAISAL RIGHTS IN SOUTH AFRICA.....	237
8.2 RECOMMENDATIONS.....	240
BIBLIOGRAPHY.....	243
BOOKS AND CHAPTERS IN BOOKS.....	243
JOURNALS AND OTHER ARTICLES.....	245
THESES.....	250
WEBSITES AND INTERNET RESOURCES.....	251
LEGISLATION AND LEGISLATIVE INSTRUMENTS.....	258

APPENDICES	260
APPENDIX A – Delaware General Corporation law (Section 262).....	260
APPENDIX B – Model Business Corporation Act (Chapter 13).....	271
APPENDIX C – New York Code (Section 910).....	294
APPENDIX D – Canada Business Corporations Act (Section 190).....	306
APPENDIX E – New Zealand Companies Act, 1993 (Section 110-115).....	314
APPENDIX F – New Zealand Arbitration Act, 1996 (Schedule 2, Clause 6).....	324
APPENDIX G – South African Companies Act, 2008 (Section 164).....	327

INTRODUCTION

1. HOW CAN WE PROMOTE THE EFFECTIVE USE OF APPRAISAL RIGHTS IN SOUTH AFRICA?

Although there is ample evidence to suggest that in jurisdictions such as the USA, Canada and New Zealand the appraisal remedy has sometimes been used contrary to its intended purpose, more commonly the evidence suggests that it has been used far too infrequently. The impediments and barriers to use may differ from one legal system to another, but the main restrictions are the same: cost, complexity, delay and the risk of an uncertain outcome. In order to avoid this result in South Africa, it is necessary to examine where and how the South African legislature and companies can intervene to ensure and promote the effective and proper use of the remedy. The lessons and information which can be gleaned from a study of the law in the comparative foreign jurisdictions referred to above are invaluable in this regard. However, to the extent that use of successful interventions in foreign jurisdictions is proposed, these need to be tested in the South African legal context in order to determine whether they will be legally and practically appropriate and whether they are likely to succeed.

The objective of the thesis is therefore to identify, consider and devise possible interventions to promote the effective and proper use of appraisal rights. The objective is not to provide a detailed commentary on the appraisal rights provisions in the South African Act generally; this has already been done by other authors. However, where it is

necessary to analyse or critique specific aspects or subsections of section 164 to address the principal research question, I have done so.

2. RESEARCH METHODOLOGY

The research for this thesis has been conducted by way of desktop research and literature review. Due to the wealth of electronic sources available through the library of the University of Cape Town (as well its interlibrary loan facility) my access to both South African and foreign statutes and other legislative documentation, case law, books and journal articles has been unrestricted. I was particularly reliant on the electronic databases which afforded me access to foreign case law as it was from this material that I was able to source much of the comparative material required. This facility enabled me to draw freely upon any cases, statutes or texts required from, particularly, the USA, Canada and New Zealand. Furthermore, due to the recent development in appraisal rights arbitrage in Delaware and the volatile nature of this debate, I was fortunate to have instant access to a range of informative online resources including articles from law firms, news and media reports, investor communications, websites and blogs which enabled me to stay abreast of events as they unfolded.

My modus operandi in addressing the research question was first to identify the most appropriate comparable jurisdictions. I then reviewed the primary and secondary legal sources in these jurisdictions and then identified, contrasted and compared the problems as well as solutions and interventions in these jurisdictions with respect to appraisal rights. Finally I considered these findings and conclusions in the South African context in relation to section 164 of the South African Act and, based on these results, make concrete suggestions and proposals regarding steps that can be taken (by both the State legislature

and the private sector) to avoid and curtail the appraisal remedy challenges experienced in the foreign jurisdictions.

3. OVERVIEW OF THE CHAPTERS

3.1 Chapter 1

The first chapter sets out the background to the inclusion of appraisal rights in the South African Act by describing the process of the wholesale revision of South African company law which took place from 2003 to 2011. This is important because it facilitates an understanding of the legislative objectives of the revision process, how the law of other jurisdictions came to influence the South African statute through the input of foreign advisors and the significant changes to the common law effected by the adoption of the appraisal remedy in section 164 of the South African Act.

3.2 Chapter 2

In the second chapter I explain why a study of comparative foreign law is not only useful but essential in light of the fact that South Africa has no existing jurisprudence in relation to the specific appraisal rights construction. Furthermore, the South African Act empowers the court to consider foreign law, where appropriate, when considering and applying the South African Act. The most relevant common law jurisdictions for comparative research purposes with respect to appraisal rights are identified in this chapter as being the USA, Canada and New Zealand.

3.3 Chapter 3

In the third chapter I explain the history and development of appraisal rights in the primary source jurisdiction, the USA. I also distinguish between the provisions of the Model Business Corporation Act, the Delaware General Corporation Law and the statutes of various US states, which all differ considerably with respect to their appraisal rights legislation. By relying primarily on the work of Siegel, I identify the four fundamental respects in which the Model Business Corporation Act and the Delaware General Corporation Law differ from one another in regard to their statutory appraisal provisions. According to Siegel these pivotal differences are based on differences in legislative policy and, as each of the state legislatures in the USA tends to align itself with either the Model Business Corporation Act or the Delaware General Corporation Law approach (and a small minority adopt a hybrid approach), I test the South African provisions against both models to establish the version with which section 164 has been most closely aligned.

In this chapter I reach the conclusion that South Africa has adopted a hybrid approach. This implies that ostensibly relevant foreign case law will need to be approached with caution when South African courts place reliance on it in order to interpret section 164. First, the court will need to take into account the fact that the South African appraisal remedy has a hybrid nature and, accordingly, some parts of a foreign judgment in relation to the appraisal rights provision in a particular statute may be relevant while others may not be relevant at all. This can occur when, as explained earlier, section 164 corresponds to a statutory provision in some fundamental policy respects but differs in others. Secondly, the court will need to be satisfied that any foreign judgment relied upon is based on a statute or

policy principle which is in harmony with (or at least does not conflict with) one of the pivotal principles contained in the South African Act.

Finally, although this is not immediately apparent from a first reading of the two statutes, I identify the New York Code as being the individual state statute *in the USA* (generally speaking it is the Canadian statute that most closely corresponds with section 164) which most closely resembles the appraisal rights provision as contained in the South African Act. Chapter 3 ends with a general overview of the attitude of courts in the USA towards appraisal rights litigation followed by a detailed analysis and discussion of recent case law developments, especially insofar as these relate to the controversial phenomenon of appraisal rights arbitration. I point out in this chapter that the decisions handed down in Delaware with respect to appraisal rights litigation cannot be directly applied in South Africa due to the differences (both with respect to appraisal rights and other provisions) in the underlying statutes and must be carefully considered.

3.4 Chapter 4

The fourth chapter focuses on the way in which appraisal rights have developed and are legislated in Canada. I make the observation that section 164 is nearly identical to section 190 of the Canada Business Corporations Act which has obvious implications for the use of comparative case law from that jurisdiction. Like the South African Act the Canadian statute is also a hybrid when considered in the light of the USA policy differences identified by Siegel and discussed in chapter 3. In order to illustrate the degree of similarity between

the Canadian and South African legislation, I undertake a section-by-section comparative analysis of the two statutes and identify any differences, accompanied by a discussion of the possible rationale for the distinction, where relevant.

The chapter concludes with a discussion of selected Canadian cases which raise contentious or problematic issues that may pose similar problems when applied to section 164. The advantage of identifying potential problems is to anticipate and possibly address these in the South African context before they arise. Again I point out that, notwithstanding the large degree of similarity between the appraisal rights provisions in the two jurisdictions, Canadian cases cannot be directly applied in South Africa without careful consideration as there are other provisions in the statutes which may have a bearing on the court's decision and which are not identical nor even similar to one another.

3.5 Chapter 5

The fifth chapter focuses on the development and regulation of appraisal rights in the New Zealand company statute. I indicate in this chapter that, partly due to the way in which the remedy developed in New Zealand, the provisions are very different to those in the South African Act. However, the inclusion of a default arbitration procedure in the New Zealand statute once a value dispute has arisen between the company and a dissenting shareholder is a tool which may prove particularly useful in the South African procedure and special attention is therefore focused on this aspect.

3.6 Chapter 6

This chapter deals with the substance of appraisal rights in South Africa and section 164 generally. As I stated at the outset in the introduction section, the focus of this thesis is not a detailed analysis of the appraisal section itself. In order to answer my research question, namely how to achieve the effective and proper use of appraisal rights in South Africa, it is neither necessary nor helpful to scrutinise every subsection of the appraisal rights provisions. However, in this chapter 6 I do identify and comment on those provisions in section 164 and other related sections of the South African Act which are relevant when identifying potential problems with the exercise of appraisal rights. The sections discussed in this chapter in addition to section 164 include section 5 (general interpretation), section 6 (the anti-avoidance section), section 7 (purpose) and section 15 (amendment of the Memorandum of Incorporation of the company). To the extent that any part of the specific provisions of section 164 contribute to the challenges associated with effective and proper exercise of appraisal rights these are addressed in this chapter and in chapter 7.

3.7 Chapter 7

Chapter 7 deals with the problems and challenges relating to the effective and proper exercise of appraisal rights as identified across the comparable jurisdictions. Each of the common challenges (complexity, cost, delays, shortcomings and uncertainty) is examined in greater depth and then specifically considered in the South African context. Furthermore, additional issues in the South African Act which may pose a challenge to the interpretation and application of section 164 are identified and considered. These include the concept of 'fair value' as determined by the courts, the distinction between registered

and beneficial shareholders and the waiver of appraisal rights. These are all important issues with potentially serious consequences for the future of the appraisal remedy in South Africa. The challenges and complexities associated with the determination of ‘fair value’ are legion, both in the appraisal context in foreign jurisdictions and in other legal contexts in South Africa. Furthermore, the distinction between registered and beneficial shareholders may impact directly on a shareholder’s entitlement to exercise his appraisal rights and the question whether an appraisal right may legally be waived or not may have an enormous impact on the availability of the appraisal remedy in South Africa. The strategies employed in the USA, Canada and New Zealand to deal with the identified challenges in those jurisdictions are evaluated and discussed.

In order to create a coherent structure for the proposed strategies I devised the terms ‘legislative intervention’ and ‘corporate intervention’ to distinguish whether the suggested interventions are most appropriately applied (or are in fact currently applied) through State or private action. Finally, against this background I then distinguish between the specific ways in which each of the challenges should or could possibly be addressed through legislative or corporate intervention, as the case may be.

One of the most potentially valuable mechanisms I have identified for addressing the challenges (specifically complexity, cost and delay) in South Africa is Alternative Dispute Resolution, particularly arbitration. Arbitration has not been widely utilised internationally for appraisal rights purposes, but because I regard it as such a potentially useful mechanism

in this context and because the use of ADR is promoted in both the Act and in King III, I have dealt with the concept and its application to section 164 separately in paragraph 7.7

3.8 Chapter 8

In the final part of the thesis I summarise the current status of the appraisal remedy as a tool for minority shareholder protection in South Africa. The *status quo* is that, although initially hailed as a promising new remedy, it has not been utilised. There has been no appraisal rights application to determine fair value brought before the South African courts to date. It is not possible to identify a definitive reason for this lack of use of the appraisal remedy. It is likely to be attributable to a host of factors and some possible explanations are proffered and discussed in the conclusion. However, it is safe to assume that at least some of the reluctance to utilise the remedy will be attributable to the same challenges as those that have consistently been identified in the USA, Canada and New Zealand.

Unless the South African legislature seeks to intervene where possible and appropriate (or, alternatively, mandates and permits corporate intervention as suggested in chapter 7) it is likely that the appraisal remedy will be a remedy for minority shareholders in theory and not in practice. This could not have been what the legislature envisaged when section 164 was included in the South African Act. The thesis proposes a range of theoretical and practical interventions which may be implemented, both by the legislature and private enterprise, to promote and optimise the effective and proper use of appraisal rights in South

Africa. Some of these interventions have adapted from the experiences and initiatives in other jurisdictions whilst other are new suggestions conceptualised specifically for the South African context.

As part and parcel of the optimisation exercise, where legal uncertainties and anomalies exist in section 164 these have been identified, discussed and earmarked for possible legislative attention and amendment. I submit that implementing or at least investigating some of these amendments and interventions will improve the understanding and application of appraisal rights and so give effect to the objectives of the South African Act.

CHAPTER 1

INTRODUCING THE APPRAISAL REMEDY

In 2003 the South African Department of Trade and Industry ('the DTI') formally announced that it was undertaking a large scale, fundamental revision of South African company law.¹ The stated objectives of the DTI in initiating this project were to, *inter alia*, modernise the statute in order to align it with national and international developments, simplify the legislation, make company law more flexible and accessible to the public and promote entrepreneurship and economic growth.² Ultimately this process culminated in the repeal of the existing legislation and the promulgation of an entirely new statute governing corporate companies, namely the Companies Act, 71 of 2008 (hereafter 'the South African Act'). The South African Act came into effect on 1 May 2011.

The South African Act introduced a host of radical changes to the South African company law regime which have been variously, praised, analysed and criticised by South African academics as well as the legal and commercial sectors.³ One of the most novel changes has been the introduction of appraisal rights as they exist in the corporate law of the United

¹ *Company Law for the Twenty-first Century: Guidelines for Corporate Law Reform*, the policy paper, was published in *Government Gazette* 26493, General Notice 1183 dated 23 June 2004.

² *Ibid.*

³ See, for example, FHI Cassim MF Cassim R Cassim R Jooste J Shev & J Yeats *Contemporary Company Law* 2 ed (2011) at 1-25. See also T Mongalo et al 'Modern Company Law for a Competitive South African Economy' (2010) *Acta Juridica* 3-479, C Stein *The New Companies Act Unlocked* (2011) 304 and P Delpont & Q Vorster *Henochsberg on the Companies Act, 71 of 2008* (2011).

States of America (hereafter ‘US or USA’), Canada and New Zealand which are available to dissenting minority shareholders who do not support and thus dissent from certain corporate actions. These corporate actions (which are also often referred to as ‘trigger events’) are enumerated in section 164(2) of the South African Act.⁴ In effect, dissenting shareholders, provided that they follow the procedures prescribed in the South African Act, are afforded the right to liquidate their investment in the company by relinquishing their shareholding in exchange for the ‘fair value’ of their shares, which must then be paid to them by the company. This is an entirely new concept in South African company law and did not exist under the previous company law statute.⁵

A shareholder will potentially be able to exercise his appraisal rights in a number of situations, namely if the company of which he is a shareholder:

- (a) amends its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of shares in a manner which is materially adverse to him as a shareholder of that class of shares in terms of section 37(8);
- (b) resolves to dispose of all (or the greater part of) its assets or undertaking in terms of section 112;
- (c) resolves to enter into an amalgamation or merger with another company (or companies) in terms of section 113; or

⁴ The trigger events set out in s 164(2) include materially adverse changes to the Memorandum of Incorporation of a company and the fundamental transactions regulated by Chapter 5 of the Act.

⁵ Companies Act 61 of 1973. See also J Yeats Putting ‘Appraisal Rights into Perspective’ (2014) *Stell LR* 328.

(d) resolves to enter into a scheme of arrangement in terms of section 114.

Although the appraisal remedy does require shareholders to comply with a number of procedural requirements, its ultimate effect is to afford shareholders a way to liquidate their investment (at fair value) in the event of a fundamental or structural change pertaining to the company in which they initially invested. The determination of fair value is undertaken by the directors of the company who are required, in terms of section 164(11), to provide a statement showing how the value was determined. If a shareholder does not consider the valuation adequate, or if the company fails to make an offer as required by the section, the shareholder may apply to have the shares valued by a court which can either determine the value itself or may appoint appraisers to assist with the process.

Until 1 May 2011⁶ the types of corporate actions to which appraisal rights now apply⁷ were regulated in terms of the traditional principles of majority rule. Dissenting minority shareholders, provided that they were treated fairly in accordance with other legislative provisions and the common law, had no recourse vis-à-vis the company. Thus, Trollip JA in *Sammel v President Brand Gold Mining Co Ltd*⁸ summed up the common law position which applied in South Africa as follows:

⁶ The date on which the South African Act came into force.

⁷ As stated above these would be mergers and amalgamations, disposals of all or the greater part of an undertaking, schemes of arrangement and changes to the constitution of a company affecting the rights of shareholders as contemplated in the South African Act.

⁸ 1969 (3) SA 629 (A) 678.

“By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder. The principle of the supremacy of the majority is essential to the proper functioning of companies.”⁹

Previously, unless he could prove that he was entitled to relief under the oppression remedy,¹⁰ the only real exit option available to a disgruntled shareholder in these circumstances was to find a willing purchaser and dispose of his shareholding in the ordinary course through a sale of his shares, for which there was often no ready market.¹¹ It is therefore not unreasonable to state that appraisal rights have considerably changed the ‘traditional’ South African company law landscape: a shareholder now has the right to opt out of the company by ‘cashing in’ his shareholding and so the appraisal right has created a firm statutory exit opportunity for a minority shareholder where previously none existed. This right does not depend on the existence or averment of any oppression, unfair prejudice or unfair disregard of the shareholder’s interests. Not only is the shareholder afforded a ‘no fault’ exit right, but instead of having to find a willing purchaser the company becomes the

⁹ Bear in mind that appraisal rights apply not only in the context of fundamental transactions but also to any change to the Memorandum of Incorporation which may materially affect the rights of the relevant shareholders.

¹⁰ S 252 of the Companies Act 61 of 1973 provided that if, upon application by a member of the company, a court found that a particular act or omission of the company was unfairly prejudicial, unjust or inequitable, or that the company’s affairs were being conducted in such a manner, the court (if it considered such action to be just and equitable) could make such order it deemed fit, including an order for the purchase of the shares of any members by other members or the company. S 163 of the South African Act now provides for similar relief but it does not refer to an order to purchase the shares of a shareholder. It is submitted that this does not preclude the court from making such an order, however, as the list of orders under s 163(2) is not intended to constitute a *numerus clausus* because it is prefaced by the word ‘including’.

¹¹ Especially if the shares were held in a private company.

purchaser and, even more fortuitously for the dissenting shareholder, he does not have to be satisfied with whatever price he would have been prepared to accept from a third party purchaser to facilitate his exit, but can insist on an objective ‘fair price’ as determined by a court.

Accordingly the introduction of appraisal rights constitutes a definite paradigm shift in the company law philosophy of ‘majority rule’ which is a pivotal feature of the common law in the United Kingdom, on which much of South African company law is founded.¹² The company law of the United Kingdom does not make provision for appraisal rights. Instead minority shareholders are ostensibly protected against unfair prejudice in the context of fundamental changes to the business or structure of the company by section 994 of the UK Companies Act, 2006.¹³

Under section 994(1) a shareholder may petition the court for an order protecting him from unfair prejudice on the grounds that:

(a) the company’s affairs are being or have been conducted in some manner that is unfairly prejudicial to the interests of shareholders generally or some part of its members (including, at least, the shareholder himself), or

¹²*Foss v Harbottle* (1843), 2 Hare 461: 67 E.R. 189 (Ch.) *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 678; *Karoo Valley Farms Bpk v Klein Karoo Kooperasie Bpk* 1998 (4) SA 226 (C) 235.

¹³ *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26; [2007] Bus LR 1521. The same is true in Australia where the remedy in this context would be s 232 of the Corporations Act 2001.

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is, or would be, so prejudicial.

The remedy that is most often sought in section 994 proceedings is apparently that the other shareholders purchase the petitioner-shareholder's shares for fair value.¹⁴ This remedy would yield the same result for a dissenting shareholder as section 164 of the South African Act, but it would be far more difficult to enforce because he would have to prove the prejudicial effect of the proposed fundamental change.

In 1997 the United Kingdom Law Commission, in its report on shareholder remedies, recommended that companies be permitted to grant an 'exit right' for shareholders by way of ordinary resolution (incorporated in the articles of the company) in terms whereof shareholders could insist that their shares be repurchased in the event of certain pre-identified fundamental changes notwithstanding the fact that they would not suffer any prejudice as a result of such changes. This recommendation was not adopted by the Company Law Steering Group in its Final Report¹⁵ and is not included in the United Kingdom Companies Act 2006. No reason was provided for the fact that the recommendation was not adopted, nor is there any mention of the 'exit right' in the Final Report of the Steering Group. However, the Steering Group did state that in relation to shareholder protection it had elected to maintain the effect of the decision in *O'Neill v Phillips and Others*,¹⁶ clarifying the circumstances under which members can take action for unfair prejudice.

¹⁴ <http://www.lees.co.uk/news/protection-protection-for-minority-shareholders> (accessed 2/9/15).

¹⁵ See *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) at xviii.

¹⁶ (1999) UKHL 24.

This implies that the Steering Group must have been of the opinion that the unfair prejudice remedy offered sufficient protection to minority shareholders and that no additional protection needed to be legislated.

Since appraisal rights constitute such a distinct departure from the previous common law position regarding minority rights, there has been considerable academic and commercial interest and debate around the manner in which they will operate in practice and impact on the companies–shareholder dynamic in South Africa.¹⁷ The first and most obvious question which presents itself is whether appraisal rights should have been included in the Act at all. Whilst this is an interesting theoretical debate, I specifically did not frame my research question around this enquiry. This question seems to me to be a moot point which may have constituted a relevant line of enquiry before the South African Act formally came into effect. However, as the legislature (unlike the United Kingdom) clearly deliberately elected to include the appraisal remedy, the research question as I have framed it (i.e. how to ensure the proper and effective exercise of appraisal rights) seems to me to be more relevant and useful in the circumstances.

¹⁷ Cassim et al op cit 719-737. See also K Cron ‘Shareholder appraisal rights under the new Companies Act: Boon or Bust?’ Available at <http://www.nortonrose.com/news/45534/shareholder-appraisal-rights-under-the-new-companies-act-boon-or-bust> (accessed 1 November 2011). Also MF Cassim ‘The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)’ (2008) 20 *SA Merc LJ* 19, MF Cassim ‘The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part II)’ (2008) 20 *SA Merc LJ* 147 as well as HGJ Beukes ‘An Introduction to the Appraisal Remedy in the Companies Act 2008: Standing and the Appraisal Procedure’ (2010) 22 *SA Merc LJ* 176 and HGJ Beukes ‘An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies’ (2008) 20 *SA Merc LJ* 479.

Those commentators who were initially opposed to the introduction of appraisal rights into the South African Act argued that the position of minority or dissenting shareholders in situations where these rights apply would be unduly strengthened, possibly at a cost to the majority, in that healthy corporate action could be stymied by a fear of the anticipated uncertainty, complications and delay which often accompany the exercise of appraisal rights.¹⁸ They argued further that this potential effect would be exacerbated in the South African environment because appraisal rights were (and remain) a completely unknown quantity. The fact that they have not been considered or interpreted by our courts at all compounds this uncertainty and associated commercial risk.¹⁹

International supporters of the appraisal rights remedy, on the other hand, tout its potential as a justifiable form of minority protection and lament the fact that it is underutilized due to the complexity, expense and uncertainty associated with the remedy.²⁰ Nigel Boardman²¹ of Slaughter and May has proposed the following as a possible rationale for the inclusion of appraisal rights in the South African Act:

¹⁸ In US law the fact that appraisal rights exist, and that the boards of merging companies are well aware of the implications should dissenting shareholders exercise these rights, and make corporate decisions accordingly is sometimes referred to as the *ex ante* effect.

¹⁹ In South Africa there have been no judgments on appraisal rights since these came into effect in 2011. E Davids, T Norwitz & D Yuill 'A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008' (2010) *Acta Juridica* 360, point out that the South African courts will have to develop a consistent, accurate and fair methodology to deal with cases where they are required to determine the fair value of shares. This is not an easy task and the Act provides no guidance in this regard. The authors note that the Delaware courts have "grappled with this thorny issue for years" and that these judgments may provide valuable guidance.

²⁰ M Siegel 'Back to the Future: Appraisal rights in the Twenty-First Century' (1995) 32 *Harvard Law Journal* 79. Robert B. Thomson 'The Case for Iterative Statutory Reform: Appraisal and the Model Business Corporation Act' (2011) 74 *Duke Journal of Law and Contemporary Problems* 253.

²¹ Boardman was one of the legal experts from the United Kingdom who was consulted by the DTI with respect to the South African company law reform process.

‘South Africa’s tortured history, the resulting imbalance in distribution of education, wealth and status and its only very recent emergence from a comprehensive apartheid-based sanctions regime onto the world economic stage, means that a large proportion of South Africa’s shareholder base is relatively unsophisticated. It was therefore particularly important for the Act to include adequate shareholder protection measures. In addition to the usual common law and statutory remedies available under English law, the Act introduces a new appraisal rights remedy (which has its roots in American jurisprudence and borrows from various laws in force in different American jurisdictions)...’

Whilst this statement may very well be true, it will be demonstrated later in this thesis that, in my opinion, the processes and procedures prescribed for the exercise of appraisal rights are so rigorous and complex that they are no more suitable for effective use by an unsophisticated shareholder body or more accessible than any of the other existing common law and statutory remedies.

A third group of international commentators regard the appraisal right as a defunct anachronism and a useless remedy which neither adds to, nor detracts from, the power balance between majorities and minority shareholders. Proponents of this version would (presumably) argue that the appraisal remedy should have been omitted from the South African Act for the sake of simplicity because it is legally irrelevant and thus its inclusion serves no purpose.²² However, given recent international legal and commercial developments it would appear that this view is no longer defensible.²³ The last number of

²² B Manning ‘The Shareholders Appraisal Remedy, an essay for Frank Coker’ (1962) 72 *Yale Law Journal* 223.

²³ M Myers & C Korsmo ‘Appraisal Arbitrage and the Future of Public Company M&A’ *Brooklyn Law School Legal Studies Research Papers (Accepted Paper Series)* 388 (2014).

years have seen a significant rise in appraisal rights litigation and the general exercise of appraisal rights for commercial purposes.²⁴

Notwithstanding these widely differing opinions, the legislature clearly came to the conclusion that appraisal rights have a role to play in South African company law and thus they were duly included in the new statute. It is at present not clear whether the fact that there has been no appraisal rights litigation in South Africa to date can be ascribed to current market conditions, a dearth of sufficiently disgruntled shareholders, effective alternative forms of shareholder protection, the traditional barriers to enforcement of appraisal rights²⁵ or the drafting mechanisms currently employed by merging parties (and their attorneys) to neutralise appraisal rights by, for example, making the offer subject to the condition that no shareholders exercise appraisal rights,²⁶ or a combination of these factors.

As previously stated, since no domestic legal precedent exists for the appraisal rights mechanism, it is essential to look to foreign jurisdictions to determine how appraisal rights are likely to be interpreted, developed and applied in South Africa. The thesis initially seeks to identify specifically which foreign jurisdictions are most suitable and relevant for comparative purposes, and then to apply directly selected foreign insights to the South African appraisal rights regime. It is important to distinguish between the twin challenges

²⁴ This aspect is discussed in detail in paragraph 3.4 which examines the practice of appraisal rights arbitration. As is also pointed out in paragraph 3.4, appraisal rights arbitration is controversial and regarded by some commentators as an abuse of the remedy.

²⁵ Which are discussed in Chapter 7.

²⁶ See paragraph 7.6 for a discussion of this mechanism.

of effective exercise (i.e. how to ensure that the appraisal remedy is accessible and readily available) and proper exercise (i.e. how to ensure that the appraisal remedy is used for its intended purpose and is not abused).

The first challenge in foreign jurisdictions which is examined in the thesis relates to the *effective* exercise of appraisal rights. This is the primary area of concern and legal commentary in relation to appraisal rights in countries where these rights have existed for many years.²⁷ Depending to some extent on the specific structure and wording of the legislative provisions, appraisal rights have proved to be extremely complex, time-consuming and expensive to enforce.²⁸ This has meant that, until fairly recently,²⁹ appraisal rights have been infrequently utilised in other jurisdictions. Needless to say this is not ideal. The thesis therefore examines the main reasons why appraisal rights were not (and are not) effectively exercised in comparable foreign jurisdictions³⁰ and identifies the ways in which other jurisdictions and foreign companies have sought to resolve these problems. Against this backdrop the thesis also considers whether the South African appraisal rights have been optimally drafted to ensure effective enforcement and, in instances where this appears not to be the case, proposes improvements in this regard.³¹

²⁷ Primarily the USA and Canada. See further Chapters 3 and 4.

²⁸ M Siegel 'Back to the Future: Appraisal rights in the Twenty-First Century' (1995) 32 *Harvard Law Journal* 79. M Siegel 'An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions (2011) *Law and Contemporary Problems* Vol 74:231. B Manning 'The Shareholders Appraisal Remedy, an essay for Frank Coker' (1962) 72 *Yale Law Journal* 223.

²⁹ Daniel E. Wolf, Kirkland Ellis LLP 'Appraisal Rights – The Next Frontier in Deal Litigation?' available at <http://blogs.law.harvard.edu/corpgov/2013/05/16/> (posted on 16 May 2013).

³⁰ Chapter 7.

³¹ Paragraphs 7.2 -7.5.

Finally, possible interventions by the legislature or by individual companies in the arrangement of their own affairs (to the extent that this is sanctioned by the legislature and permitted by law) which may prove to be helpful (some of which are drawn from foreign comparative study and adapted for South African law) are proposed.³²

As explained above, the second facet of the challenge in relation to appraisal rights relates to their *proper* exercise. Put differently, concerns are often raised regarding the potential for the abuse of appraisal rights through their improper use and the potentially negative commercial consequences for a company or for the economy if this is possible or if it is permitted.³³ The thesis considers whether South African appraisal rights have been optimally designed to deal with potential abuse (such as the improper thwarting of the will of the majority by the minority) and, if not, how this may be improved. It also examines the recent instances of appraisal arbitrage, an extremely controversial commercial investment strategy which has become increasingly prevalent of late and is viewed by critics of the practice as a form of abuse.³⁴ As is the case with respect to promoting the effective exercise of appraisal rights, proposals to curb potential abuse are developed by extrapolating and applying, to the extent possible, solutions or strategies devised in other jurisdictions.³⁵

³² Paragraph 7.5.

³³ Cron at note 17.

³⁴ Myers and Korsmo at 388 and see also paragraph 7.5 *infra*.

³⁵ It is submitted that the proper exercise of appraisal rights is inextricably linked to the effective exercise of appraisal rights. Where effective exercise is not a real option, abuse will pose less of a threat. However, as the possibility for the effective exercise of appraisal rights increases, so too does the threat of improper use

A most promising mechanism to achieve the objectives identified above in South Africa appears to be the use of Alternative Dispute Resolution (hereafter ‘ADR’), particularly arbitration.³⁶ The thesis specifically examines its potential application to the appraisal rights regime within the confines of the South African Act, as this constitutes a novel approach to dealing with these issues. Once again, to the extent that it is legally permissible and possible, the thesis makes proposals and suggestions for both legislative and private corporate intervention in South Africa with a view to incorporating ADR in the exercise of appraisal rights.³⁷

and legislative measures to curb improper exercise become increasingly important. The tension between the two issues necessitates a balancing act and South Africa can draw extensively on the wealth of international experience in this regard.

³⁶ Paragraph 7.7.

³⁷ Ibid.

CHAPTER 2

COMPARABLE FOREIGN LAW

Any study or attempted interpretation of the appraisal rights section in the South African Act would be incomplete and lack academic depth without an understanding of the jurisdictions from which the drafters sourced the concept and the way in which appraisal rights function (or fail to function) in those jurisdictions.³⁸ It is equally important to appreciate the background to the drafting and adoption of the South African Act in order to properly grasp the policies underpinning the South African Act as these have informed the inclusion and drafting of many provisions, including the appraisal rights sections.³⁹

The lengthy process of deliberation, drafting, public comment and redrafting which commenced 10 years ago with the DTI initiative to update and reform South African corporate law was based on a particular drafting process.⁴⁰ This process is both interesting and illuminating as far as appraisal rights are concerned. As part of the conceptualisation

³⁸ See Cassim et al at 719.

³⁹ In relation to the corporate law reform process generally, see Tshepo H Mongalo 'An overview of company law reform in South Africa : From Guidelines to the Companies Act, 2008' *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) pp xii to xxv. Mongalo was the project manager for company law reform in South Africa. See also Philip Knight 'Keep it simple and set it free: The new ethos of corporate formation' *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) pp 3-42 at 6.

⁴⁰ 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' (DTI policy document published in May 2004).

and drafting of the South African Act an international reference team was appointed.⁴¹ This team was a key component of the reform project from the outset. Its members participated in the initial deliberations which recommended broad principles for the drafting of the new legislation. Thereafter the international members (together with local reference team members) formed discrete working groups, each group dealing with priority areas of company law which had been identified for consideration.

The main function of the working groups was to recommend principles for drafting the provisions in the South African Act dealing with their allocated subject matter. Once the drafting principles and guidelines had been formulated, they were referred to both a local reference team and an international reference team of specialists for discussion, debate and comment. The final stage, being the actual drafting of the provisions of the South African Act, involved a number of parties, including the international reference team members. Philip Knight, a Canadian lawyer and ‘plain language’ drafting expert was appointed as the chief drafter. Part of Knight’s brief was to draft the South African Act in a clear, simple manner which could be readily understood and was thus accessible to all commercial participants.⁴²

⁴¹ The team included experienced specialist attorneys, academics, accountants, regulators and judges from the USA, UK and Australia. The original participants were Ms Astrid Ludin (SA), Mr James J Hanks Jnr (USA), Prof Samuel C Thomson Jnr (USA), Mr Nigel Boardman (UK), Mr Dines Gihwala (SA), Judge Basheer Waglay (SA), Ms Nicky Newton-King (SA), Judge Lucy Mailula (SA), Mr Tshepo H Mongalo (SA), Mr Norman Manoim (SA) and Dr Alistair Ruiters (SA). The team later grew exponentially to include additional members such as Prof Michael Katz (SA), Judge Dennis Davis (SA), Mr Nicolaas van Wyk (SA), Prof Michael Larkin (SA), Mr Ignatius Schoole (SA), Mr Bernard Aghulhus (SA), Mr Trevor S Norwitz (USA) and Mr Philip Knight (Canada).

⁴² In relation to the corporate law reform process generally, see Tshepo H Mongalo ‘An overview of company law reform in South Africa : From Guidelines to the Companies Act, 2008’ *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) pp xii to xxv. Mongalo was the project manager

This background regarding the drafting process and the drafters is relevant because it illustrates, from a practical and logistical perspective, how US appraisal rights came to be included in an Act which was (and in many respects remains) based on the philosophies underpinning English company law. It also underscores the important role that the international reference team members played in the South African corporate law reform process from its initial conceptualisation to the final drafting stage. As a result the drafters (and the law of the various jurisdictions which they represented) had a fundamental and profound influence on the final product.⁴³

Section 5(2) of the South African Act empowers a court to consider foreign company law ‘to the extent appropriate’ when interpreting or applying the South African Act. Since no South African legislative or judicial precedent for the appraisal right currently exists, it will therefore arguably, or at least initially, until a body of legal precedent has been established,⁴⁴ always be appropriate for a court to consider foreign company law when dealing with an action concerned with the nature, meaning or application of appraisal rights.

for Company Law Reform in South Africa. See also Philip Knight ‘Keep it simple and set it free: The new ethos of corporate formation’ *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) pp 3-42 at 6.

⁴³ See PJ Sutherland ‘The State of Company Law in South Africa’ (2012) 24 *Stell LR* 157 and Yeats at 329.

⁴⁴ Given the fact that, to date, there has been no judgment dealing either directly or indirectly with appraisal rights this may take some time.

One may conclude, therefore, that a proper understanding of South African appraisal rights demands a proper acquaintance with appraisal rights in comparable foreign jurisdictions. Furthermore, an understanding of the way in which appraisal rights operate in their source jurisdictions should be extremely helpful to assist in predicting or identifying potentially problematic or contentious issues, with a view to either learning from the solutions devised by other jurisdictions (and pre-empting problems by applying these solutions) or devising South African alternatives.⁴⁵

By far the richest and oldest source of appraisal rights jurisprudence is the USA where appraisal rights were first created and have existed, in one form or another, for more than a century. One American commentator opines that ‘appraisal may be the Model Business Corporation Act’s most distinctive and creative corporate law product.’⁴⁶ To a lesser extent certain other common law jurisdictions such as Canada,⁴⁷ Australia⁴⁸ and New Zealand⁴⁹ can provide useful comparative guidance.

Canadian appraisal rights jurisprudence primarily reflects legislative and case law developments in the USA⁵⁰ but is particularly relevant because section 164 of the South

⁴⁵ Paragraphs 3.4, 4.2 and 5.3 *infra*.

⁴⁶ Robert B. Thomson ‘The Case for Iterative Statutory Reform: Appraisal and the Model Business Corporation Act’ (2011) 74 *Duke Journal of Law and Contemporary Problems* 253.

⁴⁷ In Canada appraisal rights are known as dissenters’ rights.

⁴⁸ Australian legislation does not contain a formal appraisal rights provision but courts are empowered to order that a company purchase an oppressed shareholder’s shares pursuant to section 233 of the Corporations Act, 2001. See paragraph 7.3.1.

⁴⁹ In New Zealand appraisal rights are known as ‘buy out rights’.

⁵⁰ Anders Bruun and Michael Lansky ‘The Appraisal Remedy for Dissenting Shareholders in Canada: Is it effective?’ *Man L. J.* Vol 8 1977-1978 at p 683.

African Act is practically identical to the corresponding provision in the Canada Business Corporations Act.⁵¹

In New Zealand⁵² the appraisal rights provisions differ considerably from those in the other identified jurisdictions (including South Africa) and therefore offer a far more limited source of comparative research. Nevertheless, to the extent that the law in other (arguably less directly relevant for present purposes) jurisdictions such as New Zealand or Australia does offer insights or solutions, these have been included and discussed.⁵³

As indicated in the previous chapter, the appraisal remedy has never been a feature of company law in the UK. Instead, shareholders in private companies who are unable to sell their shares because there is no ready market for these, must seek legal action in terms of section 994 of the United Kingdom Companies Act, 2006 against wrongdoers in order to obtain redress or relief. Section 996 confers on the court a broad discretion in terms of the remedies available as, in terms of section 996(1) the court ‘may make such order as it thinks fit for giving relief in respect of the matters complained of’ including, in terms of section 996(2)(e), an order providing for ‘the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s share capital accordingly.’ Note, however, that unlike section 164 of the South African Act, in order to achieve the purchase of his

⁵¹ (R.S.C., 1985, c. C-44). A section-by-section comparison is contained in paragraph 4.1 *infra*.

⁵² New Zealand Companies Act 1993, Act No 105 ss 110-115.

⁵³ Chapter 5 and paragraph 7.3.1.

shares and thus exit the company, a shareholder is required to establish 'unfair prejudice'. In the application of this term the English courts have held that the conduct complained of must be 'both prejudicial ... and also unfairly so'⁵⁴ and also that 'conduct may be lawful but unfairly prejudicial.'⁵⁵

It is therefore theoretically possible that one of the (perfectly legitimate) trigger events such as those named in section 164(2) of the South African Act may unfairly prejudice a shareholder in a UK company and, if this is the case, he is entitled under English law to apply for relief including the purchase of his shares by the company. This would place him in the same position as a dissenting shareholder who has exercised his appraisal rights in terms of section 164 of the South African Act. However, it may be problematic to prove the 'unfair prejudice' requirement in circumstances where, for example, the majority of shareholders have voted in favour of a merger whereas in terms of section 164 there is no 'unfair prejudice' requirement. Thus the case law precedent in the United Kingdom, which usually provides very fertile ground for comparative study with respect to South African company law, does not assist with respect to the appraisal remedy.

Australia is another Commonwealth jurisdiction where useful company law comparisons may normally be drawn with the South African position. However, like the United Kingdom, the Australian Corporations Act 2001 does not contain an appraisal rights provision. Instead section 232 provides that:

⁵⁴ *Re a Company, ex parte Schwartz* (No. 2) [1989] BCLC 427.

⁵⁵ *Re Ringtower Holdings plc* (1988) 5 BCC 82.

The Court may make an order under section 233 if:

- ‘(a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;
is either:
- (d) contrary to the interests of the members as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.’

Section 233 of the Australian Corporations Act provides that the court can make any order that it considers appropriate in relation to the company, including an order for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law (subsection d) or for the purchase of shares with an appropriate reduction of the company's share capital (subsection e).

The legal remedy for a minority shareholder is thus on par with the protection afforded in terms of the United Kingdom legislation and thus Australian company law does not offer any real guidance with respect to the specific interpretation of appraisal rights provisions in South Africa.⁵⁶

⁵⁶ Again, this is due to the fact that shareholder will have to prove that there has been oppressive or unfairly prejudicial conduct in order to rely on section 233 of the Australian statute, whereas under section 164 of the South African Act there is no unfair prejudice requirement.

CHAPTER 3

APPRAISAL RIGHTS IN THE USA

3.1 Background

Appraisal rights have been part of corporation law in the USA for more than one hundred years and today all US business corporation statutes confer some type of appraisal right on dissenting shareholders which enables them to have their shares purchased at an appraised price by the company, subject to certain procedures and qualifications.⁵⁷ It is beyond the scope and objective of this thesis to describe in detail the development of the appraisal remedy in the USA over the last century, but it is widely accepted that the introduction of the appraisal right arose there as a reaction to the abolition of the requirement of unanimous consent for merger activity. In other words it was a *quid pro quo* to minority shareholders for the expropriation of their veto rights.⁵⁸ This was clearly not the basis for inclusion of appraisal rights under South African law⁵⁹ where no ‘unanimous consent’ requirement previously existed in company law in this context.⁶⁰ Instead, appraisal rights constitute a

⁵⁷ M Siegel ‘Back to the Future: Appraisal Rights in the Twenty-First Century (1995) 32 *Harvard Journal on Legislation* 79, 91. See also BM Wertheimer ‘The Shareholders’ Appraisal Remedy and How Courts Determine Fair Value’ (1998) 47 *Duke LJ* 613, 618.

⁵⁸ Barry M Wertheimer ‘The Shareholders’ Appraisal Remedy and How Courts Determine Fair Value’ *Duke LJ* Vol 47 February 1998 number 4 at 613-615. See also Bayless Manning ‘The Shareholder’s Appraisal Remedy: An Essay for Frank Coker’ *The Yale LJ* Vol 72 December 1962 number 2 at 226 where he expresses the courts’ attitude towards potential relief for the oppressed minority shareholder by way of injunction versus the appraisal remedy as follows: ‘A solicitous judiciary will use the injunction to protect the minority against the most heinous acts of the majority. Where the majority is not heinous but merely obnoxious, the dissenter is given a lesser remedy – the option to force the corporation to pay him off and let him go his way.’

⁵⁹ Nor was it the basis for inclusion in Canada or New Zealand. See Chapters 4 and 5.

⁶⁰ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 678.

new form of shareholder protection under the Act⁶¹ and were most likely included in accordance with the stated objectives of enhanced minority protection and aligning South African corporation law with best international practice.⁶²

3.2 The Model Business Corporation Act, the Delaware General Corporation Law and the New York Code

The historical reason behind the adoption of the appraisal remedy has influenced its acceptance and development in the USA generally as well as in the various states which all have different individual appraisal statutes. The appraisal provisions as contained in the statutes of the different states can differ considerably from one another as well as from those contained in the Model Business Corporation Act⁶³ or Delaware Corporation Law on which most state statutes are based.⁶⁴ Since any court or academic grappling with section 164 will, for comparative purposes, inevitably need to look to the USA as the *fons et origo* of the appraisal remedy it is crucial to determine which of the US statutes are most relevant and appropriate in this context.

For comparative purposes the laws of certain states are, in this case, more relevant than others. The Model Business Corporation Act is an extremely influential piece of legislation

⁶¹ And to prevent shareholders from being locked into inefficient companies, one of the DTI's drafting objectives. See Stein at 298.

⁶² See Cassim et al at 22 and Yeats at 330-332.

⁶³ A model set of laws, first published in 1950, which was drafted by the Committee on Corporate Laws of the American Bar Association and which has been regularly amended since. See Model Business Corporation Act sections 13.01 to 13.31 (2008).

⁶⁴ Chapter 13 of the Model Business Corporation Act which contains the appraisal rights provisions, has been included as Appendix B for ease of reference.

and has been adopted by twenty-four states; accordingly its appraisal rights provisions constitute an obvious point of departure.⁶⁵ The laws of the state of Delaware are also particularly relevant as, in matters of corporate law, it is traditionally seen as the most influential of the states; more than half of the listed public companies in the USA and nearly two-thirds of the Fortune 500 companies are incorporated under the laws of Delaware and this state has pioneered much of the appraisal rights development in the USA.⁶⁶ The Model Business Corporation Act and the Delaware statute are very different in both form and content. Therefore, in relation to appraisal rights it is necessary to have regard to the relevant provisions of both statutes. The corporate laws of some of the larger states⁶⁷ may also be deserving of comparative judicial scrutiny as they tend to be influential and important from a commercial perspective.⁶⁸

Professor Mary Siegel, a respected academic author in this area of corporate law, points out that the differences between the appraisal rights statutes of the various states are a result of both developmental and ideological (policy) differences. In an article⁶⁹ which deals specifically with this issue and which is based on extensive comparative inter-state research, Siegel draws a distinction between the way in which the Model Business

⁶⁵ Siegel (1995) 79.

⁶⁶ See Jeffrey M. Gorris, Lawrence A. Hamermesh and Leo E. Strine, Jr. 'Delaware Corporate Law and the Model Business Corporation Act: A study in Symbiosis' 74 (2011) *Law and Contemporary Problems* 107. See also Chapter 3.

⁶⁷ Such as New York and California. These states combine MBCA and Delaware influences with local rules and typically have large, influential bar associations which can address issues independently rather than simply following the views of the American Bar Association.

⁶⁸ Where the appraisal rights laws of other states offer unique insights or exceptional provisions, these have been taken into account as well.

⁶⁹ Siegel (2011) 79.

Corporation Act and the Delaware General Corporation Law deal with appraisal rights,⁷⁰ arguing that the difference can be attributed to the competing policy considerations which underpin the two statutes. States in the USA have the option to align themselves with one or the other of these approaches.⁷¹ To distinguish and illustrate the different policy approaches, Siegel identified four pivotal differences underpinning the two statutes and how these are incorporated into the appraisal remedy provisions.

The Model Business Corporation Act differs from the Delaware General Corporation Law in the following four fundamental respects:

- (a) The events that will trigger a shareholder's right to demand appraisal,
- (b) The timing of the corporation's payment to shareholders demanding appraisal rights,
- (c) The allocation of court costs and shareholder expenses, and

⁷⁰ See Del. Code Ann. Tit, sections 253, 262 and 263 (2001). An extract from the statute has been included as Appendix A hereto.

⁷¹ Siegel observes that Delaware's market-out exception (i.e. the fact that in Delaware if a company is publicly traded its shares do not qualify for appraisal rights) and single appraisal trigger (i.e. that there is only one type of event that will trigger appraisal rights where these do apply, namely qualifying mergers) clearly decrease the frequency of the potential for exercising appraisal rights. Moreover, in those instances where shareholders do have appraisal rights, Delaware treats appraisal litigation like all other litigation; because no litigation is shareholder-friendly, only shareholders with large amounts of stock normally demand appraisal rights in Delaware. See, however, paragraph 3.4 for a discussion of increased appraisal rights litigation in Delaware notwithstanding these factors, due to the phenomenon of appraisal rights arbitrage. The Model Business Corporation Act's appraisal provisions, by contrast, are more shareholder-friendly: there are numerous appraisal triggers, the market-out exception is available in more limited circumstances and shareholders benefit from the statute's provisions on prepayment and allocation of costs. In terms of paragraph 8.60 of the Model Business Corporation Act, a conflicting interest transaction is one where a director of the corporation has a conflict of interest respecting a transaction effected or proposed to be effected by the corporation (for example in the case of a proposed management buy-out) because he (or a related person) has a beneficial financial interest in the transaction of such financial significance that it would reasonably be expected to exert an influence on his judgment if he were called upon to vote on the transaction. The market-out exception would not be available in such a transaction. The vast majority of jurisdictions have supported most of the Model Business Corporation Act's key appraisal provisions, thereby making the remedy both available to, and viable for, shareholders. Siegel at 231.

(d) Whether the market-out exception to appraisal rights is limited only to appraisal-triggering transactions that are not conflict-of-interest transactions.

Each of these aspects is now explained and elaborated upon.

3.2.1 Trigger events

According to Siegel⁷² the vast majority of state legislatures have elected to follow the lead of the Model Business Corporation Act on the first three issues. However, with respect to the fourth issue, the majority of states that have adopted a market-out exception in their appraisal legislation have followed the Delaware model.⁷³ A comparison of the provisions of the Model Business Corporation Act, Delaware General Corporation Law and the South African Act in each of these four categories reveals that in relation to events that trigger a shareholder's right to demand appraisal, the Model Business Corporation Act recognizes five trigger events namely mergers, share exchanges, dispositions of assets, amendments to the articles and conversion and domestication.⁷⁴ The Delaware General Corporation Law, on the other hand, recognises only one type of corporate event which triggers the appraisal remedy, namely certain mergers. The South African Act more closely resembles the Model Business Corporation Act than the Delaware General Corporation Law in this regard as it also recognizes multiple trigger events, namely mergers, dispositions of assets

⁷² Ibid.

⁷³ Ibid. See paragraph 3.2.4. for a discussion of the market-out exception.

⁷⁴ Model Business Corporation Act ss 13.02(a)(1)-(4), (6)-(8) (2008). Domestication is the change of the state of incorporation of a corporation. Conversion is the change of the structure of a business from one form of a corporation to another.

or the undertaking, amendments to the Memorandum of Incorporation and schemes of arrangement.⁷⁵

3.2.2 Payment of offer amount

In relation to the timing of payment to a dissenting shareholder, the Model Business Corporation Act provides for early payment; the corporation is bound to pay the amount which it estimates to be the fair value of the shares (together with interest) early on in the appraisal proceedings.⁷⁶ The Delaware statute, on the other hand, only provides for payment at the end of the appraisal proceedings⁷⁷ and in this regard the position in South Africa is more like that in the Delaware General Corporation Law than the Model Business Corporation Act.

The South African Act provides that, when a dissenting shareholder has made an application to court to determine a fair value in respect of his shares, the court must do so with respect to the shares of all dissenting shareholders and must further make an order requiring the company to pay the fair value to each dissenting shareholder.⁷⁸ Thus dissenting shareholders, under both the Delaware General Corporation Law and South African Act, will only receive payment once the appraisal rights litigation proceedings have been concluded unless they reach a settlement agreement with the company in the interim and do not proceed to litigation.

⁷⁵ S 164(2).

⁷⁶ Model Business Corporation Act s 13.24(a) (2008).

⁷⁷ Del. Code Ann. Tit. 8, ss 262(h)-(i) (2008).

⁷⁸ S 164(15)(b).

3.2.3 Costs and expenses

In relation to the allocation of litigation costs and shareholder expenses, the Model Business Corporation Act appraisal provisions are predicated on an assumption that the corporation *will* pay the costs of going to court (court costs) and *may* have to pay the parties' legal costs. Court costs are confined to the expenses charged in a law suit as determined by the court whereas legal costs include attorneys fees and the parties' respective expenses with respect to counsel and experts.

Section 13.31(a) of the Model Business Corporation Act requires the court to determine the cost of the appraisal rights proceedings and then to assess these costs against the corporation. This statutory provision ensures that the costs are for the account of the corporation and these costs may include court costs as well as costs of the court-appointed appraisers. In relation to each of the parties' legal costs, however, a different rule applies – the presumption is that each party will bear their own expenses unless the court finds that either party acted in bad faith. The Delaware courts, like the South African courts, have a general discretion in appraisal proceedings as to how to allocate responsibility for the costs of suit.⁷⁹

In this regard the South African Act provides that 'the court may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of

⁷⁹ Del. Code Ann. Tit, section 262(j) (2001).

the fair value by the court'⁸⁰ and, once again, is more closely aligned with the Delaware General Corporation Law than the Model Business Corporation Act provisions.⁸¹

3.2.4 Market-out exception

The stock market exception (often referred to as the 'market-out' exception) provides that if a company's shares are publicly traded, its dissenting shareholders do not have an appraisal right and must sell their shares in the company on the open market.⁸² The market-out exception applies in thirty-five states including Delaware,⁸³ New York and California. In terms of the Delaware General Corporation Law the market-out exception applies to all triggering transactions. However, there are certain exceptions to this rule. For example, under Delaware law appraisal rights are permitted in transactions where the shares are those of a publicly traded company (i.e. in a transaction which would ordinarily have been subject to the market-out exception) if the shareholders are required to accept cash for their shares.⁸⁴

⁸⁰ S 164(15)(iv). The court therefore has a wide discretion to allocate costs as it sees fit. This includes the allocation of party-and-party costs (akin to court costs in Delaware) as well as attorney-and-client costs or attorney-and-own-client costs (akin to legal costs in Delaware).

⁸¹ Some states, such as Alaska and New York, presume that each party will be responsible for their own litigation costs but the court has a discretion to award costs against a party which has displayed specified poor conduct or acted in bad faith. Another cost allocation mechanism, something the South African legislature could possibly consider, is found in the California appraisal rights statute – if the price awarded as fair value by the court exceeds the price originally offered by the company, the court may allocate such expenses and costs to the company as it considers equitable. Presumably this is intended to encourage corporations to make their best 'fair value' offer at the outset and to avoid unnecessary litigation. See further Siegel at 244-245.

⁸² See Jeff Goetz 'A Dissent Dampened by Timing: How the Stock Market Exception Systematically Deprives Public Shareholders of Fair Value' *Fordham Journal of Corporate & Financial Law*, Volume 15, Issue 6 2009 Article 6 771-806. Goetz discusses the rationale behind and application of the market-out exception and concludes that in certain circumstances it unfairly prejudices minority shareholders of companies in the states where it is applicable.

⁸³ S 262(b)(2).

⁸⁴ Ibid. See *Kruger v. Wesco Financial Corp.*, 2011 WL 4916910 (Del. Ch.) where it was held that a shareholder may not exercise appraisal rights if he is given a choice with respect to different types of

Under the Model Business Corporation Act, on the other hand, the market-out exception does not find general application. It is limited to transactions where there is no potential conflict of interest i.e. arms-length transactions. Accordingly in an arms-length transaction involving a company with publicly traded shares, the market-out exception applies and appraisal rights may not be exercised. It does not apply, and thus appraisal rights may be exercised, if the transaction is an ‘interested transaction’.⁸⁵ The underlying rationale is that such a transaction would limit the liquidity of the market and thus the dissenting shareholder’s ability to dispose of his shares and the market’s ability to serve as a reliable indicator of fair value. In these circumstances the minority shareholder is theoretically not protected by market forces and requires the additional protection or remedy offered by the appraisal rights.

The South African Act contains no market-out exception whatsoever and therefore appraisal rights apply equally to the shares of private and publicly traded companies. In theory this means that there is a far wider range of transactions which may trigger appraisal rights for dissenting shareholders because appraisal rights apply also to companies listed on the JSE. Limited.⁸⁶ However, notwithstanding this extended application, there has still not been a single instance of appraisal rights litigation to date.

merger consideration and the merger agreement states that a failure to make the election by a specific date will result in the receipt of cash only.

⁸⁵ That is, it is not a true arm’s length transaction. Rather, it is a transaction in which one of the parties related to the company has a potential conflict of interest, for example, in the event of a management buyout of the company.

⁸⁶ This is possibly because the drafters of the Act took their lead from the Canada Business Corporations Act which does not contain a market-out exception either. See further Chapter 4.

3.2.5 Comment

If one considers and compares the four fundamental differences between the appraisal rights provisions in the Model Business Corporation Act and the Delaware General Corporation Law as identified by Siegel⁸⁷ with the version in the South African Act, one of the fundamental differences is reconcilable with the Model Business Corporation Act, two are reconcilable with the Delaware General Corporation Law and one is irreconcilable with either piece of legislation. It seems therefore that South Africa has not chosen to align itself outright and entirely with the appraisal rights ideology or policy underpinning either the Model Business Corporation Act or the Delaware General Corporation Law. Rather, the appraisal rights provisions of the South African Act are a hybrid of the provisions as contained in the two statutes and, furthermore, omit a significant provision which appears in both.⁸⁸ Nor does the South African Act appear to adhere precisely to the legislative construct of any other particular state in the USA. This is essential for South African courts to bear in mind when interpreting and applying US case law in relation to section 164, as the judgment which is being applied or relied upon may have been influenced by, or reflective of, the ideology underpinning a particular statute which differs from that of the South African Act and may thus not be directly applicable.

The mere fact that the South African appraisal rights provisions do not mirror those of any specific state raises questions as to why the legislature made particular elections and what the intended outcomes of these choices are for our legal system. Unfortunately the drafters

⁸⁷ Siegel at 231.

⁸⁸ Namely the market-out exception.

of the South African Act provided no information or detailed memorandum in this regard.⁸⁹ Potentially this means that where there are conflicting US judgments in different states with respect to a foundational principle (or affiliated issue), a South African court may first need to identify which judgment corresponds most closely with the South African Act. In other words, the court should examine which jurisdiction most effectively reflects the philosophy underpinning the South African provision under consideration to ascertain which judgment is most appropriately applied. It is submitted that, at the very least, this is an onerous task which means that a fair amount of international statutory and jurisprudential research and cross-referencing may be required to flesh out and correctly interpret particular sections of the South African Act.

One of the particular complexities of conducting research or comparative judicial analysis with respect to the law that applies to appraisal rights in the USA is the fact that there are more than fifty (sometimes slightly, often substantially) different versions of an appraisal rights statute as legislated by each of the individual North American States.⁹⁰ When section 164 of the Act is compared sub-section by sub-section with the appraisal rights provisions of all the individual states in the USA, the South African provisions appear to be most closely aligned with the New York statute (hereafter ‘the New York Code’).⁹¹

⁸⁹ Sutherland at 158.

⁹⁰ Furthermore, supporters of the rights have been divided for decades as to its proper scope, application and objectives. This is borne out by the fact that the differences between the Model Business Corporation Act (which, incidentally, has itself been amended many times as far as this particular provision is concerned) and the statutes of the various states are many and varied. Siegel (op cit note 22) usefully tables the differences between the various state statutes (which in turn reflect differing policy objectives and effects) with reference to four main principles of appraisal.

⁹¹ The relevant sections of the New York Code are annexed as Appendix C.

However, as has already been pointed out,⁹² when compared to the appraisal rights provisions of other countries, the appraisal rights section in the South African Act is almost identical to that contained in the Canada Business Corporations Act.⁹³ The similarities between the New York Code, the Canada Business Corporations Act and the South African Act are probably attributable to the fact that the Canadian drafter of the South African Act based the wording on the Canada Business Corporations Act which, in turn, was originally based on the New York statute.⁹⁴ Whatever the reason for the distinct parallels, the very fact that they are so numerous means that, from a comparative analysis perspective, the New York Code merits further consideration.

3.2.6 The New York Code

Although the wording used in the New York Code and the South African Act are quite different (as the text of the sections in the South African Act are simpler and less verbose), there is a high level of correlation between both the form and substance of the appraisal sections. By way of illustration, and in support of this research conclusion, the following comparative observations can be made:

⁹² Chapter 2.

⁹³ Chapter 4.

⁹⁴ R Dickerson, J Howard & L Getz *Proposals for a New Business Corporations Law for Canada* (1971).

The New York Code deals with a shareholder's right to receive payment for shares in article 9, section 910, which sets out the trigger events for enforcement of those rights⁹⁵ and article 6, section 623, which sets out the procedure to be followed if a shareholder wishes to enforce his right to receive payment for his shares. As far as the prescribed procedure is concerned, a shareholder intending to enforce his rights must file a written objection with the corporation before the shareholders' meeting at which voting on the matter is to take place. It is also possible for the shareholder to file the objection at the meeting, but then he must do so before voting takes place. Section 164(3) of the South African Act provides that 'at any time' before a resolution which relates to an event that triggers the shareholders' appraisal rights 'is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.' The practical effect is thus the same.

In terms of the New York Code, 'within ten days after the authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken...the corporation shall give written notice of such authorization ... to each shareholder who filed written objection...excepting that any shareholder who voted for or consented in writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares'.⁹⁶

⁹⁵ These are, broadly speaking, mergers or consolidations, sale, lease, exchange or other disposition of all or substantially all the assets of the corporation and certain share exchanges in which the corporation is a participant. See clauses (A), (B) and (C) of Section 910 in Appendix C.

⁹⁶ S 623 (b).

The corresponding section in the South African Act reads as follows:

‘Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who-

(a) gave the company a written notice of objection in terms of subsection (3); and

(b) has neither –

(i) withdrawn that notice; or

(ii) voted in support of the resolution.’

The tenor and effect of these two provisions is therefore the same.

The New York Code determines that, within fifteen days after the expiry of the period within which shareholders may file their notices of election to dissent (or within fifteen days after the proposed corporate action is consummated, whichever is later), the corporation shall make a written offer to each shareholder who has filed such a notice of election, to pay for his shares at a specified price which the corporation considers to be their fair value.⁹⁷ Section 164(7)(a) of the South African Act determines that, once a shareholder (who lodged a written objection) has received a notice from the company informing him that the resolution has been adopted, he then has twenty business days to deliver a written demand to the company that the company pay him the fair value of all the shares of the company held by him. The company must, within five business days after

⁹⁷ S 623 (g).

the later of: the day on which the action approved by resolution is effective, the last day for receipt of demands (i.e. twenty-five business days after the company notified dissenting shareholders that the resolution was adopted) or the day on which the company received the demand for payment referred to above, make a written offer to pay an amount which is considered by the company's directors to be the fair value of the relevant shares.⁹⁸ Thus, aside from the difference in timing, the provisions are substantially the same. It is also telling that the term 'fair value' is used in both instances.⁹⁹

The New York Code requires the fair value offer to be accompanied by a statement setting out the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares. If the corporate action in question has been consummated, the offer must also be accompanied by advance payment to each shareholder, who has submitted his share certificates to the corporation, an amount equal to eighty percent of the fair value offer.¹⁰⁰ (If the shareholder has not yet submitted his share certificates, the statement should specify that the eighty percent advance payment will be made promptly upon the submission of such certificates.) Advance payment is not required if the corporate action has not been consummated at the time of the making of the offer, but the advance payment or statement as to advance payment must be sent to the shareholder entitled to this forthwith once consummation of

⁹⁸ S 164(5) – (11).

⁹⁹ Paragraph 7.3.1.

¹⁰⁰ In this regard see further paragraph 7.5.

the corporate action takes place.¹⁰¹ The offer must be made at the same price per share to all dissenting shareholders of the same class. By way of comparison, section 164(11)(d) of the South African Act does not require the fair value to be accompanied by a statement setting out the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares as the New York Code does, but it must be accompanied by a statement showing how that fair value was determined. Section 164(12)(a) of the South African Act, like the New York Code, also requires every fair value offer in respect of shares of the same class to be made on the same terms.

These sections of the New York Code contain one of the most significant differences between these two pieces of legislation, namely the issue of advance payments. The South African Act does not make provision for this mechanism at all and it is, in my view, one of the most significant lacunae in this part of the South African Act. If the legislature were to adopt a similar type of provision it would significantly improve the likelihood that minority shareholders would possess the necessary funds to pursue an appraisal rights action.¹⁰²

¹⁰¹ This is a sensible arrangement because it means that the payment is not made until the corporate action is final (for example, no longer subject to any suspensive conditions) and therefore the risk that the corporate action is not ultimately consummated and the initial payment must be repaid to the company is avoided. If the South African Act is ultimately amended to make provision for a partial advance payment procedure (see paragraph 7.5) it is submitted that a similar provision should be included.

¹⁰² See Chapter 7.

Under section 623(h) of the New York Code if the corporation fails to make a fair value offer, or if any dissenting shareholders fail to agree to the offer, the corporation shall institute special proceedings in the Supreme Court in the judicial district in which the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. In terms of section 164(14) of the South African Act, if the company has failed to make a 'fair value' offer or made an offer that the shareholder considers to be inadequate, a dissenting shareholder may apply to a court to determine a fair value in respect of the shares and an order requiring the company to pay the fair value so determined.

Although these two provisions are similar in the New York Code and the South African Act, there are also significant differences between the two: under the New York Code it is the corporation which must approach the court and it appears (from the use of the word 'shall') that this is a peremptory provision; under the South African Act it is the shareholder who must initiate court intervention and it appears (from the use of the word 'may' in section 164(14)) that he has an election at this point as to whether he wishes to do so or not. In the event that the corporation does not, as required by section 623(h) of the New York Code, institute proceedings within the prescribed period, any dissenting shareholder may do so. There is, however, a limited time period within which the shareholder may institute action where the corporation has failed to take the necessary steps and, if action is not instituted within that period, all the dissenters' rights are lost, unless the court, on good cause shown, directs otherwise.

On the basis of the above analysis it is therefore submitted that in South Africa, for comparative purposes and when considering, interpreting and applying section 164, the most judicially relevant statutes *in the USA* are the Model Business Corporation Act, the Delaware General Corporation Law and the New York Code and the cases decided in terms of these statutes.

3.3 Appraisal rights and the United States courts

There is a wealth of American case law dealing with appraisal rights exercised in terms of the Model Business Corporation Act, the Delaware General Corporation Law and the New York Code (as well as in terms of the statutes of other states) and thus a substantive body of jurisprudence is available for comparative study and identification of developed and established principles.¹⁰³ Obviously these cases cannot all be discussed here. Rather, the objective is to identify the most likely and most appropriate comparative sources for South African courts, academics and practitioners to consider when interpreting or applying the South African Act.

It is interesting to note Manning's¹⁰⁴ observations regarding the way in which the very existence of the appraisal remedy has influenced the US courts' attitude towards appropriate relief for minority shareholders generally. He observes that, where a dissenting

¹⁰³ Chapter 3.

¹⁰⁴ At 227-229.

shareholder approaches the court to challenge a particular transaction, the court tends to turn him away if (and presumably because) he has the appraisal remedy available to him. Thus, Manning argues, the general effect and impact of the appraisal statutes in the USA have been somewhat different from what was initially intended. Instead of offering the minority shareholder an additional layer of protection in the form of another remedy, they have effectively given ‘greater mobility of action to the majority – that is, to corporate managements speaking in the name of the majority’.¹⁰⁵

These cases in the USA¹⁰⁶ are worth noting from a South African judicial perspective – if the rationale behind including the appraisal remedy in the South African Act is to protect and empower minority shareholders in certain corporate actions sanctioned by the majority, our courts should be wary of entertaining the argument that the appraisal remedy offers alternative (as opposed to additional) protection in these circumstances. Thus shareholders should clearly still be able to seek and obtain relief in terms of an interdict or the specific remedies provided for in the Act such as section 162 (application to protect rights of securities holders) or section 163 (relief from oppressive or prejudicial conduct) in circumstances where appraisal rights also apply. It is submitted that, in the interests of legal certainty, the legislature should consider including such a statement in the South African Act.

¹⁰⁵ Ibid.

¹⁰⁶ *Federal United Corp. v Havender*, 24 Del. Ch. 318, 11 A.2d 331 (1940), *Hottenstein v. York Ice Mach. Corp.*, 136 F.2d 944 (3d Cir. 1943), *Mc Nulty v. W. & J. Sloane*, 184 Misc. *35, 844, 54 N.Y.S.2d 253, 262 (Sup. Ct. 1945).

3.4 Recent developments: selected cases, fair value and appraisal rights arbitration

Despite the legitimate concerns which have been raised around the continued relevance and existence of appraisal rights by Manning and others¹⁰⁷ there has been an increase in appraisal rights litigation in the USA during the last decade and this growth has become progressively more pronounced in the last five years.¹⁰⁸ By the middle of 2014 more than twenty appraisal claims had been filed in Delaware. This is an enormous increase from the position in previous years. From 2004 to 2010 appraisal rights were asserted in approximately 5% of Delaware transactions in which they were available, in 2011 this rate more than doubled to 10% and in 2013 it rose to 17%.¹⁰⁹

It appears that this trend and burgeoning awareness of the potential for financial gain offered by appraisal rights litigation was initiated by the case of *In re Emerging Communications, Inc. Shareholders Litigation*¹¹⁰ In this matter the Delaware Chancery court held two of the directors of Emerging Communications Inc. liable for a breach of fiduciary duties owed to the minority shareholders of the company in an appraisal rights

¹⁰⁷ Op cit note 22.

¹⁰⁸ See *In re Emerging Communications Inc. Shareholders Litigation*, 2004 DE Ch Ct 55; *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action No. 1554-N (Del. Ch. 5/10/2006); *Huff Fund Investment Partnership v CKx, Inc.* No. 384, 2014 (Del. Feb. 12, 2015); *Merion Capital v 3M Cogent, Inc.*, 2013 WL 3833763 (Del. Ch. July 8, 2013), *Global GT LP v. Golden Telekom, Inc.*, 993 A.2d 497, 507 (Del. Ch. 2010), aff'd, 11 A.3d 214 (Del. 2010); *In re Orchard Enterprises, Inc.*, 2012 WL 2923305 (Del. Ch. July 18, 2012); *LongPath Capital v Ramtron International Corp.* C.A. No. 8094-VCP (Del. Ch. June 30, 2015); *Re Appraisal of Ancestry.com, Inc.*, C. A. No. 8173-VCG. (Del. Ch. Jan 5, 2015; *Owen v Cannon* C.A. No. 8860-CP (Del. Ch. June 17, 2015)

¹⁰⁹ Myers & Korsmo at 14-22.

¹¹⁰ 2004 WL 1305745 (Del.). See also the article by David H. Cook entitled 'The Emergence of Delaware's Good Faith Fiduciary Duty: In re Emerging Communications, Inc. Shareholders Litigation'. (Fall 2004) 43 *Duq. L. Rev.* 91

action.¹¹¹ It also determined that the value of the shares at the time of the offer was more than three times that which was initially offered to the minority shareholders of Emerging Communications.¹¹² Coupled with the trend of the increased exercise of appraisal rights, and especially in the context of appraisal arbitrage, the argument that appraisal rights are open to abuse by the minority at the expense of the majority, and may in fact stifle legitimate deal activity, has once again become topical.¹¹³

It has also been suggested¹¹⁴ that a further contributing factor to the appraisal rights renaissance in Delaware was the opinion issued by the Delaware Chancery Court in the case of *Transkaryotic Therapies, Inc.* in 2006.¹¹⁵ This matter involved the acquisition of Transkaryotic Therapies by Shire Pharmaceuticals and the crisp issue was whether approximately ten million Transkaryotic shares, which had been acquired by hedge funds and arbitrageurs after the record date for voting but before the actual date of the vote, qualified for appraisal rights or not. The beneficial owners of the shares could not prove

¹¹¹ The court held that if a transaction is being generally reviewed (as it was in this case) for fairness, a director with ‘specialised financial expertise’ must vote against the transaction if he knows or ought reasonably to have known that it is unfair. If he does not do so, he has breached his duty of good faith. The court also found that, on the facts of this matter, neither the price nor the process the board followed was fair and that the directors had thus breached their duty of care.

¹¹² The court found a price of \$38.05 per share to be more indicative of the company’s value than the \$10.25 which had been offered.

¹¹³ See “The Companies Act 71 of 2008: dissenting shareholders appraisal rights - are companies going to be held to ransom?” at <http://www.cliffedekkerhofmeyr.com/news/files/CDH-Dispute-Resolution-Matters-Spring-2010.pdf>. (accessed 10-10-13); K Cron “Shareholder appraisal rights under the new Companies Act: Boon or Bust?” Available at <http://www.nortonrose.com/news/45534/shareholder-appraisal-rights-under-the-new-companies-act-boon-or-bust> (accessed 10-10-13). See also “Appraisal Rights-The Next Frontier in Deal Litigation” a Merger & Acquisition current developments update from law firm Kirkland & Ellis <http://blogs.harvard.edu/corpgov/2013/05/16>. (accessed 10-10-13).

¹¹⁴ See “Appraisal Rights-The Next Frontier in Deal Litigation” an M&A update from law firm Kirkland & Ellis <http://blogs.harvard.edu/corpgov/2013/05/16>. (accessed 10-10-13).

¹¹⁵ *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action No. 1554-N (Del. Ch. 5/10/2006).

that the specific shares had been voted against the transaction (or had been voted at all). The court held that, notwithstanding their inability to show how those shares had been voted, shareholders who acquired shares during that period were in fact entitled to exercise their appraisal rights. This statement was made subject to the proviso that the total number of shares seeking appraisal could not exceed the total number of shares which were voted against the transaction, together with the number of abstentions.

The Delaware General Corporation Law does not stipulate that the dissenting shareholder must have held the shares at the time that the trigger event (merger) was announced. The *Transkaryotic* decision therefore made it possible for investors who were not shareholders at the time of the record date of a particular transaction to purchase shares in the company subsequently and exercise appraisal rights with respect to those shares, provided that the aggregate number of shares for which appraisal was sought was the same as or less than the aggregate number of shares that had been voted against or abstained from voting on the proposed merger. Accordingly, if an investor correctly identifies shares in a company of which he is not a shareholder and for which he regards an offer or deal price as being below the fair value of the shares, he can purchase those shares and exercise the appraisal rights. If this tactic ultimately results in a higher price per share (whether as a result of litigation or an out-of-court settlement with the company) than the initial offer price, he obviously stands to make a profit. This is precisely how investors engaged in appraisal rights arbitrage operate.

The manner in which fair value determinations are dealt with by the courts is one of the most challenging facets of appraisal rights litigation. It is also inextricably linked to the decision of investors (especially investors engaged in appraisal rights arbitration) whether to engage in appraisal rights litigation or not. In a number of recent decisions the Delaware courts have ultimately relied on the merger price to determine fair value.¹¹⁶

In *Huff Fund Investment Partnership v. CKx Inc.*¹¹⁷ the court held that a merger price which has been produced by a ‘thorough, effective’ sales process, free from any spectre of self-interest or disloyalty¹¹⁸ can be the most reliable indicator of the value of shares in appraisal rights proceedings. Some US law firms have interpreted this decision as a reminder to shareholders considering appraisal action that this carries a risk that, after funding expensive litigation, they ‘may be left with nothing more (or potentially even less) than the deal consideration.’¹¹⁹ The Delaware Supreme Court affirmed the decision of the Chancery Court in *Huff Fund Investment Partnership v CKx, Inc.* in February 2015.¹²⁰ The Supreme Court upheld the finding of the court of first instance that, whilst the court cannot automatically presume that the merger price is the best indicator of fair value, it may well find that the merger price is the most reliable indicator thereof. Furthermore, the Supreme

¹¹⁶ These cases may, to some extent, have laid to rest the fears that arose in regard to the abuse of appraisal rights.

¹¹⁷ Civil Action No. 6844-VCG.

¹¹⁸ *Memorandum Opinion: Huff Fund Investment Partnership v CKx Inc* 2013 WL 5878807 (Del Ch Nov 1, 2013) 32.

¹¹⁹ See <http://blogs.law.harvard.edu/corpgov/2013/11/05/court-holds-merger-price-is-reliable-indicator-of-fair-value/> (accessed 25-11-13). However, this is not a novel idea. See also Myers and Korsmo at 32 where they indicate that, for the decade covered by their study, 15% of the appraisal opinions gave petitioners a lower price than they would have received in the merger, with the biggest discrepancy being an award which was 19.8% lower than the merger price.

¹²⁰ *Huff Fund Investment Partnership v. CKx, Inc.*, No. 384, 2014 (Del. Feb. 12, 2015).

Court found that this is especially true where the results from the other valuation methodologies put forward (*in casu* by both parties' experts) are considered to be inappropriate or unreliable in the circumstances.¹²¹ However, the court is still required to 'evaluate "all relevant factors" and arrive at a going-concern value inclusive of any assets not properly accounted for in the sale, but exclusive of synergy value that may have been captured by the seller.'¹²² In order to do so the court typically relies on expert valuation techniques and methods. Vice Chancellor Glasscock stressed that if a particular market value has been 'reliably derived' it is one of the relevant factors to be taken into account.¹²³ The court opined that in this case the different valuation methods relied upon by the expert witnesses did not assist it in arriving at a definitive fair value. Due to the fact that the valuation methods adopted¹²⁴ were either unreliable or inappropriate when applied to the specific facts of the case and the company in question, the court, in the absence of other reliable evidence, relied on the merger price as constituting the most dependable indicator of the fair value of the CKx shares. In this regard the court referred to previous judicial confirmation of the principle that 'an arms-length merger price resulting from an effective market check is entitled to great weight in an appraisal.'¹²⁵

¹²¹ Case No 348, 2014 (Delaware Supreme Court of Appeal).

¹²² At 3.

¹²³ The petitioners argued that the decisions in *Golden Telecom, Inc. v Global GT LP*, 11 A.3d 214 (Del. Ch. 2010) and *Merion Capital v 3M Cogent, Inc.*, 2013 WL 3833763 (Del Ch. July 8, 2013) rendered the merger price irrelevant in a fair value determination and that the court was not permitted to take it into account when making its determination. The court did not agree with this interpretation. See further pp 30-32 of the Memorandum Opinion.

¹²⁴ These were the discounted cash flow method, a 'guideline' method for publicly traded shares and a 'guideline' method for merged and acquired companies. See further paragraph E of Part I and paragraphs Band C of Part II of the Memorandum Opinion.

¹²⁵ At p 29 of the Memorandum Opinion where court quotes from *Global GT LP v Golden Telecom, Inc.*, 993 A. 2d 497, 507 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).

In the Delaware appraisal decision of *LongPath Capital v. Ramtron International Corp.*¹²⁶ the court once again adopted the transaction consideration as its appraisal valuation benchmark in the absence of other appropriate and reliable valuation methods. In order to place reliance on the merger price the court first satisfied itself that the process leading up to the agreed merger consideration was proper, thorough and effective but also acknowledged that the merger price ‘does not necessarily represent the fair value of the company’. However, in the present case it was the only reliable means of valuation. The court found that the fair value (being \$3.07 per share) was in fact lower than the deal price (being \$3.10 per share).

In the latest Delaware fair value decision, *Merion Capital LP & Merion Capital II LP v BMC Software, Inc.*,¹²⁷ the Court of Chancery also regarded the merger price as being the most reliable indicator of the fair value of the shares. In this case the expert witnesses called by the company and the dissenting shareholders had both utilised the discounted cash flow valuation method, but had nevertheless reached very different conclusions with respect to the fair value of the shares. The court referred to these as ‘dismayingly divergent’¹²⁸ and reiterated the requirement that the court was not permitted to presume the appropriateness of any particular valuation method. Instead it was bound to ‘examine all relevant methodologies and factors, consistent with the appraisal statute.’¹²⁹

¹²⁶ C.A. No. 8094-VCP (Del. Ch. June. 30, 2015).

¹²⁷ C.A. No. 8900-VCG, 2015 WL 67586 at 1-51 (Del. Ch. Oct. 21, 2015).

¹²⁸ At p 2.

¹²⁹ At p 2.

After consideration of the acceptable financial valuation techniques in this case¹³⁰ (including deal price as a factor for calculating fair value) the court concluded that the projections adopted by the dissenting shareholder as part of its calculations were too optimistic and rejected these. Furthermore, the court stated that when considering the merger price as a factor in calculating fair value it must determine that ‘the price was generated by a process that likely provided market value, and is thus a useful factor to consider in arriving at fair value.’¹³¹ In considering all the relevant factors which had a bearing on fair value (such as, in this case, a merger price resulting from an arm’s- length transaction and a discounted cash flow valuation based on management’s projections and expert analysis) the court found the merger price to be the most persuasive indicator of fair value.¹³²

It is apparent from these cases that the merger price is certainly one of the factors which a Delaware court will take into account when determining the fair value of shares in an appraisal action. Furthermore, if there are no other appropriate or reliable indicators of value, the court may well rely heavily on the merger price as a good indicator of fair value.

The commercial impact of the exercise of appraisal rights was illustrated in a real sense in 2013 by the Dell buyout transaction. Billionaire investor, Carl Icahn, demanded appraisal on 150 million shares as part of his opposition strategy to Dell Inc.’s 25 billion dollar

¹³⁰ The Court identified the various methodologies acceptable in the relevant financial community (i.e. Delaware) as discounted cash flow (DCF), comparable transactions, merger price and comparable companies as relevant in determining fair value. See page 31.

¹³¹ At p 48.

¹³² At p 50.

buyout and encouraged other investors to do likewise. On 4 October 2013 Icahn dropped his demand for appraisal and agreed to take the merger price. However, it appears that this strategy was one of the factors that resulted in the other shareholders ultimately receiving a higher price for their shares.¹³³ During the transaction the Shareholder Forum (a shareholder activist organization) established a trust vehicle which enabled dissenting Dell shareholders to exchange their shares for trust units. These shares would then be listed on an exchange and could be sold in the market at any time at the election of the shareholder.¹³⁴

There can be no doubt that appraisal arbitrage has dramatically changed the legal landscape and relevance of appraisal rights in Delaware. The exercise of appraisal rights has evolved into a distinct investment strategy for hedge funds seeking increased returns on investment and has also become a source of some concern for corporations entering into mergers or acquisitions. In an intensive recent empirical study¹³⁵ of this emerging trend Myers and Korsmo¹³⁶ have found that:

- (a) Appraisal activity has increased substantially since 2011. From 2004 to 2010 approximately 5% of transactions eligible for appraisal rights exercise attracted at least one appraisal petition. However, in 2011 this rate more than doubled, rising

¹³³ Yeats at 340.

¹³⁴ David A. Katz ‘Shareholder Activism in the M&A Context’ (27-03-2014) *Harvard Law Review*. See also Yeats at 340-341.

¹³⁵ The collected data is based on all appraisal petitions filed in the Delaware Court of Chancery from January 2004 to December 2013. Additional data was collated with respect to dissenters and their specific claims.

¹³⁶ At 14-22.

to approximately 12%, and this increase has continued. By 2013 more than 15% of appraisal rights transactions attracted an appraisal petition.

(b) The values at stake in appraisal proceedings have also increased significantly¹³⁷. In 2013 the amount of money involved was nearly ten times the 2004 value of dissenting shares. The appraisal rights petition with the largest total monetary value contained in the study was that of the Dell transaction in 2013 where \$654 million worth of shares dissented, followed by the Transkaryotic Therapies transaction which involved \$520 million worth of dissenting shareholders seeking appraisal of their shares.

(c) Petitioners in appraisal rights proceedings have become increasingly sophisticated and specialised and there are significant numbers of repeat petitioners (that is petitioners who have filed more than one appraisal petition in Delaware between 2004 and 2013). Myers and Korsmo established that since 2011 more than 80% of these appraisal rights proceedings involved a repeat petitioner and three groups of related funds appeared more than ten times each as petitioners over the ten year investigation period. Significantly, the study also reveals that the repeat petitioners are practically all economically significant entities and the mean value of repeat dissenters is considerable. The largest repeat dissenter for the period was Merion Capital which has over \$700 million invested in appraisal claims. This is a completely different landscape to that which existed before 2010, when appraisal

¹³⁷ This increase goes well beyond any rise attributable to the impact of inflation of deal value.

litigation in Delaware appears to have been limited to once-off actions by aggrieved shareholders. During 2012 and 2013 Merion Capital was involved in a number of appraisal rights actions with an average value of \$50 million dollars and in 2013 reportedly raised \$1 billion dollars for a dedicated appraisal fund.¹³⁸ There are a number of major hedge fund repeat appraisal petitioners¹³⁹ but there are also a number of smaller hedge funds which have become increasingly active in this area. However, all are sophisticated financial entities acting in terms of what appear to be carefully considered appraisal arbitrage investment strategies.

- (d) The manner in which appraisal rights litigation is conducted has become increasingly competitive which indicates increased levels of competition amongst appraisal petitioners. The authors base this conclusion on the decrease in the number of days between the merger date and the date on which the petition demanding judicial appraisal is filed in court. In terms of the Delaware General Corporation Law¹⁴⁰ dissenting shareholders have 120 days after the effective date of the merger to file a petition. This period can be a productive time for negotiation regarding fair value and possible pre-litigation settlement. However, whilst the entire 120-day period was often utilised (presumably whilst negotiations were underway) from 2004 to 2010, this has changed significantly. Since 2011 appraisal petitions are being filed far sooner, often long before the 120 day period has elapsed. Myers and Korsmo speculate that this

¹³⁸ Miles Weiss 'Dell Value Dispute Spotlights Rise in Appraisal Arbitrage' *Bloomberg News*, 3 October, 2013.

¹³⁹ Myers and Korsmo (at p 21) also make specific mention of the Verition Fund, Fortress Investment Group, Hudson Bay Capital Management as well as major mutual funds and insurance companies.

¹⁴⁰ Del. Code Ann. Tit. 8, s 262(e).

movement towards speedier filing may be attributable to competition amongst dissenting shareholders.¹⁴¹ Once filing has occurred the company must identify all the other shareholders seeking to exercise appraisal rights and thus an earlier filing may make it more difficult for other shareholders to enter into a settlement with the company without including the filing shareholder. Furthermore, an earlier filing may apparently give the filing party preferential access to selection of counsel and control over the management of the various appraisal claims.

The authors sum up their findings as follows:

‘Our data reveal Delaware is in the midst of a sea-change in appraisal litigation. While appraisal may once have been a quiet corner of corporate law, it is now an area of active litigation undergoing a period of explosive growth. Furthermore, the parties driving that growth are a new group of sophisticated investors who appear to specialize in pursuing appraisal claims. In short, we have documented the rise of appraisal arbitrage.’¹⁴²

The precise origins of this trend are not clear. As has been pointed out above, there has been speculation that the revolutionary use of appraisal rights is a result of the decision in the *Transkaryotic* case and (or alternatively) is a product of the statutory interest rate set by the Delaware General Corporation Law on amounts recovered as a result of the exercise of appraisal rights. This interest rate is set at the Federal Reserve discount rate plus 5%,

¹⁴¹ At 22.

¹⁴² At 14.

compounded quarterly, and is payable from the effective date of the merger to the date of payment of the judgment.¹⁴³

The *Transkaryotic* decision, so the argument goes, enables hedge funds or aggressive investors to scrutinize transactions which trigger appraisal rights and then to invest in those companies with a view to either negotiating a settlement of the claims (post-merger approval) or litigating and persuading the court that the fair value of the shares in question is higher than the price offered in the merger. The statutory interest rate theory holds that, whilst US interest rates are low, if funds are invested in an appraisal claim and the court ultimately determines that the merger price did represent fair value, they would receive at least an above-market return on their investment.¹⁴⁴

Myers and Korsmo reject both these theories, arguing that the *Transkaryotic* decision only affects appraisal rights transactions which require a shareholder vote (as opposed to other forms of approval) and that, in fact, the rise in appraisal rights litigation has not been in relation to such transactions, but primarily in relation to transactions which do not require a shareholder vote and which were thus not affected by the judgment in *Transkaryotic*. As far as the interest rate theory is concerned, the authors opine that this cannot be the explanation for the sharp rise in appraisal litigation either. Firstly, the time lapse between the drop in interest rates and the increase in appraisal rights litigation (being a period of nearly two years) does not support this theory. Secondly, the risks and uncertainty

¹⁴³ Del. Code Ann. Tit. 8, s 262(h).

¹⁴⁴ Myers and Korsmo 24-25.

associated with appraisal rights litigation make it an unlikely and dubious investment strategy for sophisticated investors for the benefit of an uncertain return of 5% over federal funds.¹⁴⁵

Commercial media, law firms and shareholder investment groups have observed and commented on this growing trend quite extensively and it has refocused attention on what was once considered to be a defunct and archaic mechanism. Those who oppose appraisal rights arbitrage liken it to an abuse of the right or protection¹⁴⁶ but, again, Myers and Korsmo hold a contrary view. Whilst it may be fair to state that the protagonists in the arbitrage arena are not the ‘ordinary’ minority shareholders,¹⁴⁷ the fact that the appraisal rights are being exercised at all benefits those minority shareholders who choose not to exercise their appraisal rights. The mere threat of appraisal rights arbitrage may act as a deterrent to opportunistic or negligent price-setting by managers and controlling shareholders, thereby exerting a positive, upward *ex ante* influence when the offer price per share is initially determined.¹⁴⁸

Appraisal rights arbitrage and the associated issues which have been discussed above came before the Delaware courts again in two recent matters. On 5 January 2015 Vice Chancellor

¹⁴⁵ Myers and Korsmo 25.

¹⁴⁶ Some attorneys view the actions of appraisal arbitrageurs as ‘taking advantage of the flexibility of *Transkaryotic*.’ See Miles Weiss ‘Dell Value Dispute Spotlights Rise in Appraisal Arbitrage’ *Bloomberg News*, 3 October, 2013.

¹⁴⁷ Bear in mind that these individuals are still hampered by the traditional barriers to exercising appraisal rights which have existed since these rights were first introduced. The barriers to entry have not changed, but the institutions exercising those rights do not experience these in the same way as an individual shareholder might – they have the sophistication and funds necessary to readily overcome these challenges.

¹⁴⁸ Myers and Korsmo at 56.

Glasscock handed down two judgments in the Delaware Court of Chancery. The cases are discussed independently hereunder as their impact and effect may be far-reaching.

In the matter of *In Re Appraisal of Ancestry.com, Inc.*¹⁴⁹ the target firm, Ancestry, was acquired in December 2012 by a private equity firm in a cash-out transaction for \$32 per share. One of the petitioners in the appraisal action was Merion Capital L.P., a hedge fund which purchased its shares after the record date for the transaction, a common strategy in appraisal rights arbitration actions. The record owner (or registered owner) was a company called Cede & Co. Merion caused Cede & Co. to file an appraisal demand within the required time limits with respect to 1 255 000 Ancestry shares of which Merion was now the beneficial owner. Thereafter Merion filed the petition for appraisal which formed the subject of the subsequent litigation.

As was pointed out above in the discussion of the *Transkaryotic* case, a stockholder is only entitled to seek the appraisal remedy in respect of shares which it has not voted in favour of the merger. It appears from the facts that Cede held a sufficient number of shares not voted in favour of the merger which could be linked to (Merion's) appraisal demand. The crisp legal question was whether the Delaware statute required Merion, which (as the beneficial owner of the shares it was entitled to do) to file the petition in its own name, to show that it did not vote in favour of the merger or whether it was sufficient for Cede, as the record owner, to do so. Vice Chancellor Glasscock summarises the issue as follows:

¹⁴⁹ Civil Action No. 8173-VCG. (Del. Ch. Jan 5, 2015).

‘The question before me on this Motion for Summary Judgment, therefore, is whether a beneficial owner is required to show that the specific shares for which it seeks appraisal have not been voted in favour of the merger... Summary judgment is appropriate when the moving party demonstrates that “there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.” The parties here agree that no genuine issue of material fact exists; the only issue is whether, as a matter of law, Merion has met the statutory requirements of Section 262.’

Ancestry argued that, because Merion had only purchased its shares after the record date, it had to show that its predecessors in title had not voted in favour of the merger. Ancestry further argued that, since Merion was not able to provide evidence of this, it had no standing to bring the petition because it had not complied with the requirements of the statute. As Merion had purchased all its shares on the open market after the record date it did not know who the previous owners of the shares were and it had not acquired proxies from any previous owners to vote the shares. It was on this basis that Ancestry brought the motion for summary judgment.

The court recognised the controversy surrounding the ‘wholesomeness’ or desirability of appraisal rights arbitration but stressed that, because appraisal rights are a legislative creation and not ‘judge-made law’ the role of the court was to determine whether the statutory requirements had been met, and not to have regard to the shareholders’ purpose or motive. If the requirements have been met the function of the court is to determine the fair value of the Ancestry shares.

The specific wording of section 262 of the Delaware General Corporation Law provides that, in order to be entitled to enforce his appraisal rights, a stockholder must hold shares on the date of the making of the demand, must continuously hold the shares through the effective date of the merger or consolidation, must comply with the procedural requirements and time limits prescribed in the section and must not vote in favour of the transaction. The term 'stockholder' is defined, for purposes of the section, as 'a holder of record of stock in a corporation'. Thus it is the record holder of the stock who must meet the requirements set out above. Similarly, it is the record holder of stock who must receive notice of the merger, may perfect the rights by way of written demand and may file the petition. The record holder of stock is entitled, in terms of section 262(e) of the Delaware General Corporation Law, to request a statement from the company setting out the aggregate number of shares not voted in favour of the merger or consolidation and with respect to which appraisal demands have been received and the aggregate number of holders of such shares.

However, the subsection then specifically provides that, notwithstanding the other provisions of the section which refer to the record holder of stock, a beneficial owner of stock may, in their own name, file a petition or request from the corporation the information statement referred to in section 262(e). Thus, the Court stated, whereas it is the holder of record that must make the written demand for appraisal, thereafter either the holder of record or the beneficial owner may demand information or file the appraisal petition. If this statement is applied to the facts of the matter it means that Cede had the standing to make a written demand, as it in fact did, and Merion had standing to file the petition in its own

name, as it in fact did. Ancestry argued that it was Merion (as petitioner) and not Cede that had to show that it did not vote the shares in favour of the transaction but that Merion must also show that the previous owners did not do so either - it is not sufficient to show that the voting reflects that more shares than are held by Cede and beneficially owned by Merion were not voted in favour of the merger.

This is similar to the question that the Delaware Court of Chancery had previously considered in *Transkaryotic*.¹⁵⁰ The crisp issue in that matter (as it relates to this case) was whether a beneficial shareholder who purchased shares after the record date but before voting on the merger took place was obliged to prove, by means of documentary evidence, that each specific share in respect of which it sought to exercise appraisal rights had not been voted in favour of the merger. The court decided that it was not obliged to do so and that it was only the actions of the record holder that were relevant in regard to meeting the requirements for claiming and perfecting appraisal rights; the actions of the beneficial holder were irrelevant.¹⁵¹

The court in *Transkaryotic* also considered the manner in which shares listed on the NYSE and NASDAQ exchanges are held and ownership is recorded in terms of the electronic trading and settlement system. The operation of the system reflected the name of the nominee as the holder of record for a large number of securities held in an undifferentiated

¹⁵⁰ *In re Appraisal of Transkaryotic Therapies, Inc.*, Civil Action No. 1554-N (Del. Ch. 5/10/2006).

¹⁵¹ It was subsequent to, and as a result of, this decision that s 262 (e) of the Delaware General Corporation Law was amended to enable a beneficial owner to request the voting information statement and file the appraisal petition in its own name as was the situation in the case under discussion.

manner known as ‘fungible bulk’. Thus the Court found that it was incorrect to assume that the nominee’s aggregate vote on the merger could be traced to specific shares attributable to specific beneficial owners. It was therefore adequate for the nominee or holder of record (being Cede & Co. in both the *Transkaryotic* and *Ancestry* cases) to show that the voting record reflects that the number of shares which it did not vote in favour of the merger exceeds the number of shares in respect of which it has made an appraisal demand on behalf of the beneficial owner. No specific ‘share tracing’ is necessary or, indeed, normally possible.

It has already been pointed out¹⁵² that, as a result of the decision in *Transkaryotic*, section 262 of the Delaware appraisal statute was amended to make provision for beneficial owners to participate in their own name in some aspects of the appraisal rights perfection process. *Ancestry* argued that the amendment implied that the requirements set out in the remainder of section 262 (notably the voting requirement) which applied to the holder of record were by implication extended to the beneficial owner as well, even though the legislative amendments did not afford the beneficial owner the capacity to participate in all the perfection steps of the appraisal process. The court did not agree. It based this part of its decision on two Delaware principles of statutory interpretation namely:

1) that if a statute is found to be clear and unambiguous then the court must give effect to the plain meaning of the statutory language;¹⁵³ and

¹⁵² See the previous footnote.

¹⁵³ *In re Krafft-Murphy Co., Inc.*, 62 A.3d 94, 100 (Del. Ch. 2013), *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem’l Hosp., Inc.*, 36 A. 3d 336, 342-43 (Del. 2012).

2) where a provision is expressly included in one section of a statute but omitted from another it is reasonable to assume that the legislature was aware of the omission and intended it.¹⁵⁴

The court held that, given the (presumably intentional) restricted amendment of section 262 by the General Assembly and the fact that section 262 was unambiguous, effect should be given to its plain meaning.¹⁵⁵ Accordingly it is the record holder that must comply with the statutory requirements in order for the appraisal petition to be viable. The beneficial owner's participation (and compliance) is limited to the specific amendments catered for in section 262 (e). Merion (and Cede) had thus met the requirements of the section and Merion had the necessary standing to bring the petition. The Motion for Summary Judgment was accordingly denied.

In the other matter in which Vice Chancellor Glasscock handed down judgment on 5 January 2015, *Merion Capital LP & Merion Capital II LP v. BMC Software, Inc.*,¹⁵⁶ the facts and issues before the court were very similar. The appraisal rights action arose from a merger in a going-private transaction between BMC Software, Inc and two private Delaware corporations which had been formed specifically for this purpose. Just as it did in the Ancestry case, Merion had acquired 7 629 100 BMC shares on the public market

¹⁵⁴ *Giuricich v. Emtrol Corp.*, 449 A. 2d 232, 238 (Del. 1982).

¹⁵⁵ Ancestry also raised ancillary arguments such as that giving the statute its plain meaning could lead to absurd results (at 17), the potential for 'over-appraisal' (at 18) and that s 262(e) contains an explicit share tracing requirement (at 20-21). All these arguments were rejected by the court, but it is notable that the court stated (at 20-22) that, to the extent that the section in its current form may be problematic and could lead to unwholesome results, addressing these concerns is a legislative and not a judicial function.

¹⁵⁶ No. 8900-VCG, 2015 BL 579 (Del. Ch. Jan. 5, 2015).

with a view to exercising appraisal rights. It is interesting to note from the case that Merion describes itself as an ‘event-driven’ fund whereas the Respondent describes it as a ‘hedge fund that specializes in appraisal arbitrage’.¹⁵⁷ It seems that Merion wished to avoid the controversial and possibly negative connotations which have developed with regards to appraisal arbitrage as an investment strategy.

Merion directed its broker to instruct the record holder of the shares (Cede & Co.) to make the appraisal demand to BMC on behalf of Merion as the beneficial owner. According to Merion this was standard practice in such situations. However, the broker refused to do so on the basis that there had been an internal policy change in this regard within the brokerage firm. Merion thereupon set out to transfer the BMC shares of which it was the beneficial owner from Cede to Computershare so that it could become the record holder of the shares as well as the beneficial owner. This step would enable Merion to make the demand for appraisal in respect of its shareholding directly to BMC in terms of section 262 and it did so on 24 July 2013. At the shareholders meeting held shortly thereafter the merger was approved by more than two thirds of the stockholders at a price of \$ 46.25 per share.

Once again the legal issue turned on Merion’s standing to file the appraisal action. In this instance, however, the Respondent averred that because Merion had replaced Cede as the record holder of the shares in order to make the appraisal demand, it was obliged to prove that each share that it held and in respect of which it demanded appraisal, was not voted in favour of the merger by the previous shareholder. Merion argued that it was only obliged

¹⁵⁷ At 2.

to show that Merion itself had not voted any of its shares in favour of the merger. Turning to the specific wording of section 262, the court noted that there was no ‘explicit requirement in the section that the stockholder seeking appraisal had to prove that the *specific shares* it seeks to have appraised were not voted in favor of the merger.’¹⁵⁸ In other words, the legislation contained no explicit share-tracing requirement. However, the Respondent company argued that in light of the objective of the appraisal statute such a requirement was implied. As support for its argument BMC cited the legislative purpose behind section 262, based on the original reasons for the enactment of an appraisal remedy.¹⁵⁹ This implied share-tracing requirement, BMC argued, was supported by the wording of the 2007 amendment which indicated the intention that only shares which could be shown not to have been voted against the merger were eligible for appraisal.¹⁶⁰

The final part of BMC’s argument was based on the contention that policy concerns required a share-tracing requirement. BMC argued that if no such requirement exists, it is theoretically possible that an appraisal rights arbitrageur could purchase many shares after the record date and then seek appraisal even in respect of those shares which had been voted in favour of the transaction, which was contrary to public policy.¹⁶¹

The court, again citing *In re Appraisal of Transkaryotic Therapies Inc.*,¹⁶² reiterated that on the plain language of section 262 a beneficial shareholder did not need to prove the

¹⁵⁸ At 8.

¹⁵⁹ At 9.

¹⁶⁰ At 10.

¹⁶¹ See note 141.

¹⁶² 2007 WL 1378345

share's voting history. All that the record holder was required to show was it held a number of shares on behalf of the beneficial owner in respect of which the beneficial owner intended to exercise appraisal rights, and that the number of shares so held either equaled or exceeded the number of shares which were not voted against the merger at the meeting.¹⁶³ The Court held that Merion had perfected its right to appraisal as required in terms of the explicit standing requirements contained in section 262¹⁶⁴ and denied the Motion for Summary Judgment.

What is clear from these developments is that appraisal rights can no longer be summarily dismissed as being commercially irrelevant. Shareholders in the USA clearly can, and do, make use of this remedy under the right circumstances and the courts are still required to grapple with various aspects of the remedy. However, what also seems clear is that the resurgence in popularity of the remedy is quite case- and shareholder-specific.

The challenges and disadvantages which led to the underutilisation of the appraisal remedy by 'ordinary' disgruntled minority shareholders have not vanished. In fact, it seems that these shareholders are not utilising the right any more than they have done in the past. The difference is that hedge funds, arbitrageurs and sophisticated investors with extensive funds

¹⁶³ The inherent risk in this approach, as argued by BMC, is that it is possible that the number of shares presented for appraisal may exceed the number of shares voted against the transaction which triggered the appraisal rights, causing an oversubscription for appraisal rights. Vice Chancellor Glasscock refused to make a ruling on how the court would have to deal with such a situation as this was not the case in either of the matters before it.

¹⁶⁴ Merion had made a written demand, the demand was timely and contained sufficient information, it continued to hold the shares post-demand and until the effective date of the merger and it did not vote any of the shares in favour of the merger.

at their disposal have identified an investment arbitrage opportunity. These institutions are using appraisal rights as a tool to leverage a profit for themselves.

It is indicative of what a real concern appraisal rights arbitrage has recently become to large corporations that law firms have recently begun to specifically advise their clients as to how to anticipate and deal with this new strategic risk.¹⁶⁵ In March 2015 a proposal was brought by the Corporation Law Council of the Delaware State Bar Association ('the Council') to amend various sections of Delaware's General Corporation Law. The proposed amendments included two changes to section 262 of the Delaware statute, presumably triggered (at least in part) by the aforementioned decisions. According to a report explaining the background to the proposals, a subcommittee of the Council had considered whether section 262 should be amended so as to eliminate or restrict the practice of appraisal arbitrage but had concluded that this was not desirable.¹⁶⁶

¹⁶⁵ Wachtell, Lipton, Rosen & Katz *'Dealing with Activist Hedge Funds'*, firm communication to clients dated November 5, 2014. On file with author.

¹⁶⁶ The reasons for this conclusion are set out at pp 2-3 of the Corporation Council of Delaware White Paper. In summary the Council stated that 'Several considerations led the subcommittee to recommend and Council to conclude that the statute should not limit appraisal rights to shares held before the public announcement of a proposed transaction. Council does not believe appraisal arbitrage upsets a proper balance between the ability of corporations to engage in desirable value enhancing transactions and the ability of dissenting stockholders to receive fair value for their holdings.' The specific reasons as included in the White Paper read as follows:

• Delaware law since at least 1989 explicitly has recognized the right of a stockholder who has otherwise perfected his appraisal rights to pursue appraisal of shares purchased after the terms of the merger were announced.

• Recent case law has suggested that a market test of a transaction will serve as a proxy for fair value in appraisal suits, so that arm's-length deals with adequate market checks do not create appraisal risks for buyers.

• Where transactions cannot be subject to a market check for structural reasons (such as buy outs by controlling stockholders who are unwilling to sell), fiduciary duties and litigation may not be sufficient to ensure that the merger price reflects the fair value of the acquired shares.

• To the extent that the appraisal remedy is necessary to protect stockholders, its effectiveness would be curtailed if the statute were amended to limit the ability to transfer the right. The assignment and acquisition of financial claims (in contrast to tort claims) generally has been accepted historically and presently as lawful and consistent with public policy.

In the event the Council proposed ‘two modifications to Section 262 to improve its operation’.¹⁶⁷ The first proposal (which the Council referred to as the ‘*De Minimis Exception*’)¹⁶⁸ was that if dissenting shareholders held less than one percent of the shares in a public company and those shares (calculated in accordance with the merger consideration) were worth less than one million US dollars, the said shareholders would not be entitled to exercise their appraisal rights.

The second amendment proposal was that companies should be permitted to arrest the accumulation of statutory interest payable on the disputed amount (or at least a portion of it) by the prepayment of a portion (or the whole) of the disputed sum in cash.¹⁶⁹ This recommendation is a result of the fact that, as previously pointed out, a number of critics have averred that the interest award generally prescribed by section 262(h), being the Federal Reserve discount rate plus five percent, was attractive enough to actually

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- Studies of appraisal arbitrage do not suggest that it encourages frivolous litigation. Unlike the case of representative litigation, which occurs in more than 90% of the public mergers and consolidations, only 17% of the appraisal eligible transactions during 2013 resulted in appraisal litigation in Delaware.
 - Appraisal cases seem to be self-selecting, attacking primarily conflict transactions or transactions involving questionable pricing. Such transactions, which have a greater potential for unfairness [and] frequently result in appraisal awards at a premium to the merger price, sometimes a very significant premium.
 - Appraisal cases attacking the merger consideration in non-conflict transactions are fewer in number and often result in appraisal results below or near the merger consideration.
 - To the extent that the buyer in a merger has concern about an increased number of merger claimants and the overall cost of the transaction, the buyer can negotiate an appraisal out condition (e.g. a right not to close the merger if more than a specified percentage of shareholders dissent and demand appraisal). The fact that such appraisal-out conditions remain fairly rare suggests that the availability of appraisal arbitrage is not a significant factor in the market.’

¹⁶⁷ At 3.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

encourage appraisal arbitrage.¹⁷⁰ The Council explained in its report that the incentive for appraisal interest rate arbitrage would be minimized in this way because no appraisal interest would be payable in respect of pre-paid amounts. However, the interest would accrue on any unpaid amounts as well as on any amount in excess of the prepaid amounts where the fair value as ultimately determined by the court exceeded the initial payment.¹⁷¹

The Council's decision not to propose that appraisal arbitrage be banned or restricted has been strongly criticised both with respect to the result and the rationale for the decision. This criticism was voiced at a recent international conference by panelists drawn from the ranks of judges, Securities and Exchange Commission delegates and lawyers.¹⁷² However, Chief Justice Strine of the Delaware Supreme Court, who also attended the panel discussions, expressed his view that concern over appraisal rights arbitrage was exaggerated and that the practice would become naturally less prevalent as arbitrageur hedge funds which did not manage to achieve a premium to the transaction price failed to recoup their litigation costs. At the time of writing no further amendments had been made to section 262.

¹⁷⁰ However, this theory is not supported by the empirical studies conducted by Myers and Korsmo. See Myers and Korsmo (2014) at 2, 24-26.

¹⁷¹ Report at 5.

¹⁷² At the 27th Annual Tulane Corporate Law Institute Panel Discussion held in March 2015 and at which Delaware corporate law and deal making is analysed and discussed

CHAPTER 4

APPRAISAL RIGHTS IN CANADA

4.1 The Canada Business Corporations Act

The Canada Business Corporations Act, 1985¹⁷³ contains the provisions which regulate a shareholder's right to dissent and the procedure which must be followed in order to perfect this right and to ultimately be paid a fair value for the shares by the company.¹⁷⁴ The historical position in Canada¹⁷⁵ prior to the adoption of the appraisal rights provisions was similar to that which prevailed in South Africa before 1 May 2011 i.e. the principle of majority rule applied¹⁷⁶ subject to a limited number of common law and statutory exceptions. However, the strict application of the majority rule principle could, and often did, result in injustice to minority shareholders (especially minority shareholders in private companies who had no ready market for the sale of their shares).

¹⁷³ Canada Business Corporations Act S.C. 1974-1975. c. 73. The appraisal provisions are contained in s 190 which is attached as Appendix D.

¹⁷⁴ This statute applies to companies which are incorporated under federal law, which can then operate and conduct business in any province, subject to provincial licensing and other regulations. All the Canadian provinces also have specific laws permitting and governing the incorporation of provincial corporations. The decision whether to incorporate on a federal or provincial level may be based on business considerations or the desire for particular rules (which may be available under one corporate statute but not another) to apply to a particular business.

¹⁷⁵ See generally Bruun and Lansky 'The Appraisal Remedy for Dissenting Shareholders in Canada: Is It Effective?' 8. *Man L. J.* 683 1977-1978.

¹⁷⁶ *Foss v Harbottle* (1843), 2 Hare 461 67 E.R. 189 (Ch.). See also Chapter 1.

Prior to the adoption of appraisal rights in the Canada Business Corporations Act their function was explained as follows: ‘...if the majority seeks to change fundamentally the nature of the business in which the shareholders invested, and if the shareholder dissents from the change, he may demand that the corporation pay him the fair value of his shares as determined by an outside appraiser.’¹⁷⁷ Thus, explained the legislative advisers, appraisal rights assisted minority shareholders in instances where the company in which shareholders had originally elected to invest had legitimately undergone a fundamental change which they did not support but were powerless to effectively oppose.

As a result of various proposals drafted in this regard,¹⁷⁸ the Canadian legislature adopted the appraisal remedy at a national level in the Canada Business Corporations Act in 1975.¹⁷⁹ The Canadian appraisal rights provisions of the Canada Business Corporations Act bear a remarkable resemblance to the provisions of section 164 of the South African Act.¹⁸⁰ It has already been stated that this is most likely attributable to Philip Knight’s employment by the DTI (as legislative counsel to the corporate law reform project and principal drafter) from 2003 to 2008.¹⁸¹

¹⁷⁷ R Dickerson, J Howard & L Getz *Proposals for a New Business Corporations Law for Canada*. (1971) 347.

¹⁷⁸ *Ibid* at 114.

¹⁷⁹ However, appraisal rights have been a feature of Ontario’s company law since 1953. See Corporations Act 1953, S.O. 1953, c. 19, s 99.

¹⁸⁰ The appraisal provisions are contained in section 164 which is attached as Appendix G.

¹⁸¹ Mongalo at 3. See also Chapter 2 *infra* - the New Zealand appraisal rights provisions are also apparently based on those in the Canada Business Corporations Act.

To illustrate the degree of similarity between section 164 and its Canadian counterpart, the following parallels and comparisons may be drawn between the specific appraisal rights provisions of the South African Act and the Canada Business Corporations Act:

4.1.1 Trigger events

The circumstances or corporate actions which trigger the shareholders' right to dissent are comparable (substantially similar) to those contained in s 164(2) of the South African Act.

In terms of section 190 of the Canadian statute a holder of shares of any class of a corporation may dissent if:

(a) the corporation is subject to an order under paragraph 192(4)(d) that affects the holder of the shares¹⁸²;

or if the corporation resolves to

(b) amend its articles to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class;

(c) amend its articles to add, change or remove any restriction on the business or businesses that the corporation may carry on;

¹⁸² An order under paragraph 192(4)(d) is a court order specifically permitting a shareholder to dissent in circumstances where a corporation has applied for court approval of an arrangement (fundamental change) proposed by the corporation itself.

- (d) amalgamate;
- (e) be continued under section 188¹⁸³;
- (f) sell, lease or exchange all or substantially all its property; or
- (g) carry out a going-private transaction or a squeeze-out transaction.

The trigger events for dissenting shareholder appraisal rights listed in sections 164(2) of the South African Act are where a company has given notice to shareholders of a meeting to consider adopting a resolution to:

- (a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of shares in any manner materially adverse to the rights or interests of holders of that class of shares;
- (b) dispose of all or the greater part of its assets or undertaking;
- (c) amalgamate or merge; or
- (d) implement a scheme of arrangement.

There is a clear correlation between the two sets of trigger events.

¹⁸³ This is the legal process whereby a corporation is recognised and made subject to the laws of another jurisdiction even though it was not originally incorporated in that jurisdiction.

Section 190(5) of the Canada Business Corporations Act provides that a dissenting shareholder must send to the corporation, at or before any meeting of shareholders at which a resolution in connection with an event which triggers the appraisal rights is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting and of their right to dissent.

This provision is, for all intents and purposes, identical to section 164(3), as read with section 164(6), of the South African Act which provides that that a dissenting shareholder must send to the corporation, at any time before a meeting of shareholders at which a resolution in connection with an event which triggers the appraisal rights is to be voted on, a written notice objecting to the resolution, unless the corporation failed to give notice of the meeting or failed to include in the notice a statement of the shareholders' right to dissent.

4.1.2 Notification

Section 190(6) of the Canada Business Corporations Act provides that, within ten days after the shareholders adopt the resolution, the corporation must send to each shareholder who has filed a written objection with the company a notice stating that the resolution has been adopted. However, such a notice is not required to be sent to any shareholder who voted in favour of the resolution or who has subsequently withdrawn their objection.

The effect of section 164(4) of the South African Act is, for all intents and purposes, identical as it makes no mention of shareholders other than those who gave a notice of objection.

Section 190(7) of the Canada Business Corporations Act provides that within twenty days after receiving the notice that the resolution has been adopted (or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted) a dissenting shareholder shall send to the corporation a written notice containing the following:

- (a) the shareholder's name and address;
- (b) the number and class of shares in respect of which the shareholder dissents; and
- (c) a demand for payment of the fair value of such shares.

Sections 164(7) and (8) of the South African Act are, for all intents and purposes, identical to this provision.¹⁸⁴ These sections provide that a dissenting shareholder may, within twenty business days after receiving the notice that the resolution has been adopted (or, if the shareholder does not receive such notice, within twenty business days after learning

¹⁸⁴ The Act does, however, contain an additional requirement in that the demand must also be delivered to the Takeover Regulation Panel, a South African regulatory body established by section 96 of the South African Act.

that the resolution has been adopted) make a demand by delivering a written notice to the company stating the following:

- (a) the shareholder's name and address;
- (b) the number and class of shares in respect of which the shareholder seeks payment;
and
- (c) a demand for payment of the fair value of those shares.

4.1.3 Suspension of rights

Section 190(11) of the Canada Business Corporations Act deals with the suspension of a dissenting shareholder's rights and provides that, once he has sent the notice referred to above, a dissenting shareholder ceases to have any rights as a shareholder other than to be paid the fair value of their shares as determined under this section except where

- (a) the shareholder withdraws that notice before the corporation makes an offer for the fair value of his shares,
- (b) the corporation fails to make an offer in accordance with the Canada Business Corporations Act and the shareholder withdraws the notice, or
- (c) the directors revoke a resolution to amend the articles, terminate an amalgamation agreement or an application for continuance or abandon a sale, lease or exchange (the trigger events for an exercise of appraisal rights under the Canada Business Corporations Act),

in which case the shareholder's rights are reinstated as of the date on which the notice was sent.

Section 164(9) of the South African Act contains almost identical provisions. A shareholder who has sent a demand has no further rights in respect of those shares, other than to be paid their fair value, unless:

- (a) the shareholder withdraws that demand before the company makes an offer or if the shareholder allows an offer made by the company to lapse,
- (b) the company fails to make an offer in accordance with the Act and the shareholder withdraws the demand, or
- (c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder's appraisal rights.

If any of the events referred to in (a) to (c) above occur, section 164(10) of the South African Act provides that all of the shareholder's rights in respect of the shares are reinstated without interruption.¹⁸⁵

4.1.4 Offer by company

Section 190(12) of the Canada Business Corporations Act provides that a corporation shall, not later than seven days after the later of the day on which the action approved by the

¹⁸⁵ The same provision is contained in s 190(11) of the Canada Business Corporations Act.

resolution is effective or the day the corporation received the requisite notice, send to each dissenting shareholder who has sent such a notice:

- (a) a written offer to pay for their shares in an amount considered by the directors of the corporation to be the fair value, accompanied by a statement showing how the fair value was determined; or
- (b) a notification that it is unable lawfully to pay dissenting shareholders for their shares because it would become illiquid or insolvent should it proceed with such payment.

By way of contrast, section 164(11) reduces the offer period to five business days. The company must, in terms of section 164(11) of the South African Act, send (to each shareholder who has sent a demand) a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, accompanied by a statement showing how that fair value was determined. Once again the section is virtually identical to the corresponding provision in the Canada Business Corporations Act.

4.1.5 Offer on same terms

Section 190(13) of the Canada Business Corporations Act further provides that every offer for shares of the same class or series shall be on the same terms. This corresponds very closely with section 164(12) of the Act which states that every offer made to a dissenting shareholder in respect of shares of the same class or series must be on the same terms.

4.1.6 Payment of offer amount

Section 190(4) of the Canada Business Corporations Act provides that, where an offer of payment has been made to a dissenting shareholder and has been accepted by the shareholder, the agreed amount must be paid within 10 days. If no acceptance is received within 30 days of the offer being made, the offer lapses. Similarly every offer made in terms of section 164(11) of the South African Act must be paid within 10 days after the shareholder has accepted the offer.¹⁸⁶ If the offer has not been accepted within 30 business days after it was made, the offer lapses.¹⁸⁷ Once again the Canadian and South African statutes contain virtually identical provisions, including the number of days prescribed for each procedural step.

Where a company fails to make an offer to a dissenting shareholder in terms of the Canada Business Corporations Act or the shareholder fails to accept it, the company may, within 50 days after the action approved by the resolution is effective or within such further period as a court may allow, apply to court to fix a fair value for the shares of any dissenting shareholder.¹⁸⁸ In this respect the South African Act is different. It does not provide for an application to court by the company but instead gives the shareholder the right to apply to court for a determination of fair value in terms of section 164 and an order requiring the

¹⁸⁶ S 164(13)(b). The Act also stipulates that the shareholder must tender the share certificates or, if the shares are uncertificated, direct transfer to the company in order to qualify for payment.

¹⁸⁷ S 164(12)(b).

¹⁸⁸ S 190(15).

company to pay the shareholder the value determined by the court.¹⁸⁹ This option is also available to the shareholder under the Canada Business Corporations Act¹⁹⁰ but must be exercised within a further period of 20 days (i.e. after the time period permitted for the company to bring a court application, a total of 70 days after the resolution is effective).¹⁹¹

4.1.7 Jurisdiction

Section 190(17) of the Canada Business Corporations Act identifies the court having jurisdiction to hear an application as the court in the place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province. The South African Act contains no such provision but, in terms of South African law, the court in the area where the company has its registered office should have jurisdiction.¹⁹² Consequently it would seem that, in this regard, the South African Act is more restrictive than the Canada Business Corporations Act.

¹⁸⁹ S 164(14).

¹⁹⁰ S 190(16).

¹⁹¹ Or such further period as the court may allow.

¹⁹² Previously, in terms of the 1973 Act, the court in the place where the company had its principal place of business also had jurisdiction, but it seems that this is no longer the case. *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Intervening)* 2013 (1) SA 191 WCC.

4.1.8 Security for costs

The Canada Business Corporations Act, in section 190(18), specifically provides that a dissenting shareholder is not required to give security for costs in an appraisal rights application. Although the South African Act does give the court the discretion to ‘make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court’¹⁹³ it does not pertinently relieve the dissenting shareholder of the burden of furnishing security for costs. However, this should not generally pose a problem to an appraisal rights applicant because security for costs is only required in South Africa in exceptional circumstances.¹⁹⁴

4.1.9 Joinder

As to the parties before the court in an appraisal rights application, sections 190(19) and 190(20) of the Canada Business Corporations Act, like sections 164(15)(a) to (c) of the South African Act, state that all dissenting shareholders whose shares have not been

¹⁹³ S 164(15)(c)(iv)

¹⁹⁴ Previously, in terms of s 13 of the Companies Act 61 of 1973, the court had the discretion to order a plaintiff company to furnish security for costs if there was a reason to believe that the company would be unable to pay the defendant’s costs. In *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd 2013 (1) SA 65 (GNP)* the court held that its inherent power to regulate its own process does not allow it to extend the common law grounds on which security for costs could be granted and that, accordingly (even if a company embarked on vexatious or speculative action) it could not be ordered to provide security for costs. This ruling is advantageous for dissenting shareholders and has the same effect as the s 190(18) of the Canada Business Corporations Act. In terms of the common law natural persons cannot be asked to furnish security for costs except in extremely limited circumstances, such as if the individual is a *peregrinus* or an unrehabilitated insolvent litigating without the support of his trustee. See the *Siemens* case supra at 70. Subsequently, in *Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd [2015] ZASCA*, the SCA held that, in light of the repeal of s 13, in terms of the common law security for costs can only be ordered against an *incola* plaintiff where the claim is shown to be vexatious or reckless or involve an element of abuse. This also applies where the plaintiff is a company.

purchased by the corporation¹⁹⁵ shall be joined as parties and are bound by the decision of the court. The company is obliged to inform each affected dissenting shareholder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.¹⁹⁶ The court has the power to determine whether any other person is a dissenting shareholder who should be joined as a party and the court must then fix a fair value for the shares of all the dissenting shareholders.¹⁹⁷

4.1.10 Court order

In order to assist it in determining a fair value for the shares, the court has the discretion to appoint one or more appraisers for this purpose.¹⁹⁸ The South African Act, in section 164(15)(c)(iii)(bb), specifically affords the court the discretion to allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date on which the action approved by the resolution becomes effective, until the date of payment. The Canada Business Corporations Act contains an identical provision.¹⁹⁹

Ultimately the South African Act requires that the court must make an order requiring each dissenting shareholder to either withdraw their demands, alternatively to tender their share

¹⁹⁵ S 164(15)(a) actually used the words ‘all dissenting shareholders who have not accepted an offer from the company as at the date of application’ but it is submitted that the practical effect is the same.

¹⁹⁶ The Act refers to ‘their right to participate in court proceedings’ but it is submitted that this implies both personal participation and representation by counsel.

¹⁹⁷ Canada Business Corporations Act s 190(20) and s 164(15)(c) of the Act.

¹⁹⁸ Canada Business Corporations Act s 190(21) and Companies Act s 164(15)(c)(iii)(aa). The appraiser is apparently *sui generis*, being neither a referee appointed in terms of s 38 of the Superior Courts Act 10 of 2013, nor the equivalent of an assessor used in the criminal justice system.

¹⁹⁹ S 190(23).

certificates or direct the transfer of their shares to the company, as the case may be, and that the company pays the fair value of their shares to each dissenting shareholder who does so.²⁰⁰ The Canada Business Corporations Act, in a similar vein, states that the final order of a court shall be rendered against the corporation in favor of every dissenting shareholder and for the amount of the shares as determined by the court.²⁰¹

4.1.11 Financial position of the company

If there are reasonable grounds for believing that payment to a dissenting shareholder would result in the company becoming illiquid or insolvent, section 190(26) of the Canada Business Corporations Act provides that the company must not make the payment. Instead, the company must (within 10 days after the court has pronounced its order) notify each dissenting shareholder that it is lawfully unable to pay dissenting shareholders for their shares.²⁰² If this is the case a dissenting shareholder may, within 30 days of receiving the aforementioned notice from the company, withdraw their notice of dissent or retain their status as a claimant. Should the shareholder opt to withdraw his notice of dissent, the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to their full rights as a shareholder.²⁰³ If, on the other hand, the shareholder elects to retain his status as a claimant against the corporation, he is to be paid as soon as the corporation is

²⁰⁰ S 190(15)(c)(v). The court may make this order subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section. See, however, paragraph 7.5.1.6 where the uncertainty with respect to the possible meaning of this section is discussed.

²⁰¹ S 190(22).

²⁰² S 190(24).

²⁰³ S 190(25)(a).

lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of the creditors of the corporation but in priority to its shareholders.²⁰⁴

The same situation is treated rather differently in the South African Act. Section 164(17) provides that if there are reasonable grounds to believe that compliance by a company with the agreement to pay a dissenting shareholder for his shares or with a court order which compels it to do so would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months (i.e. if it would result in the company becoming illiquid) then the company may apply to court for an order varying the company's obligations in terms of the agreement or order.²⁰⁵ In such an event the court may make an order that is just and equitable, having regard to the financial circumstances of the company and which ensures that the person to whom the company owes money is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.²⁰⁶

It is interesting to note that section 164(19) of the South African Act specifically provides that a payment by a company to a shareholder in terms of section 164 does not constitute a distribution or an acquisition of shares by the company within the meaning of sections 46 and 48 of the South African Act and, accordingly, is not subject to the provisions of that

²⁰⁴ S 190(25)(b).

²⁰⁵ S 164(17).

²⁰⁶ S 164(17).

section or the liquidity and solvency test set out in section 4 of the South African Act.²⁰⁷ If section 164(19) is read with section 164(17), the curious effect seems to be that a company may (but is not obliged to) approach the court to defer payment to dissenting shareholders until it is able to meet the requirements of the section 4 liquidity test. However, if it is insolvent because it does not meet the requirements of the section 4 insolvency test, it does not have that option, nor can it refuse to pay if the payment would render it insolvent. This is rather baffling.

It is arguably possible that the insolvency test was omitted here specifically in order to assist minority shareholders to exit companies by removing factual insolvency as a possible basis for companies to avoid or delay appraisal rights payments.²⁰⁸ However, since this omission is an exception which deviates from the standard protection afforded to both shareholders and creditors of the company by the twin liquidity and solvency requirement when distributions are ordinarily made, it is unfortunate that the legislature did not provide further details or an explanation for this approach. One can only surmise that in these limited circumstances the South African legislature deemed it more important to safeguard

²⁰⁷ In terms of s 4(1)(a) of the South African Act a company satisfies the solvency test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time, the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued, equal or exceed the liabilities of the company or, if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued. In terms of s 4(1)(b) a company satisfies the liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of (i) 12 months after the date on which the liquidity test is considered; or (ii) in the case of a distribution contemplated in paragraph (a) of the definition of 'distribution' in section 1, 12 months following that distribution.

²⁰⁸ See further my comments at paragraph 7.5.1.6 *infra*.

the interests of the dissenting minority shareholders in preference to the interests of the creditors of the company.²⁰⁹

4.2 Selected case law

4.2.1 General issues

From this comparison it is abundantly clear that our appraisal rights provisions were directly drawn from or, at the very least, largely based on the provisions of the Canada Business Corporations Act. The fact that the wording of the South African Act corresponds so closely with the wording of the Canadian legislation means that this jurisdiction should provide fertile ground for comparative research and the interpretation of certain terms or sections by practitioners and courts.

In addition, many of the challenges faced in Canada are common to the international experience and, to the extent that the Act mirrors the Model Business Corporation Act and the Delaware General Corporation Law, South Africa will also be affected by those selfsame challenges. So, for example, with respect to the complexity and the technicality of the procedure to be followed in Canada in order to exercise appraisal rights, the Canadian

²⁰⁹ Note that s 190 (25)(b) of the CBCA specifically provides that in the event of the liquidation of the company a dissenting shareholder who has not yet been paid ranks subordinate to creditors but in priority to shareholders in the *concursum creditorum*. This must have therefore been a conscious departure from the corresponding Canadian section on the part of the South African legislature. Note also that in terms of s 115 of the New Zealand Act the company must apply to the court for an exemption if purchasing appraised shares would result in the company failing the solvency test - there is no mention of the liquidity test. See further Chapter 5 *infra*.

courts have remarked that the statute ‘... prescribes a remarkably rigid procedure which, moreover, seems to be slanted in favour of the amalgamated corporation and against a dissenting shareholder...I am left to wonder at the legislative policy which produced this procedural morass.’²¹⁰

4.2.2 Determination of fair value

Equally, the determination of the fair value of dissenters’ shares has proved to be as challenging and complex in Canada as it is in the USA.²¹¹ The phrase ‘fair value’ was adopted in 1971 by the Dickerson Committee without further elaboration or explanation.²¹² At that time most statutes used the term ‘fair market value’ in their appraisal rights statutes and in company legislation that contained ‘squeeze-out’ provisions. Krishna²¹³ is of the opinion that this election was not intended to create a different concept of valuation in Canadian law than that which already existed in similar USA statutes. Rather, by omitting the term ‘market’ from the familiar phrase ‘fair market value’, the intention of the drafters

²¹⁰ *Jepson v Canadian Salt Co.* (1979) 99 DLR (3d) 513 at 520.

²¹¹ See generally Clarke Hunter Q.C. and Clarissa Pearce ‘Fair Value’ – A Common Issue With Surprisingly Sparse Canadian Authority, *Annual Review of Civil Litigation*, 2011, 25-72 and the discussion of *Paulson & Co. Ltd. v. Deer Creek Energy Ltd.*, 2008 ABQB 326; affirmed 2009 ABCA 280; additional reasons re costs at 2008 ABQB 326. At the time of publication of that article the *Deer Creek* decision was the most recent case on fair value determination in the context of dissenter’s rights. It has since been superseded by *Nixon v Trace* 2012 BCCA 48.

²¹² This notwithstanding the fact that the term ‘fair value’ as opposed to ‘fair market value’ had already been used in British Columbia corporate legislation and in the appraisal rights statutes of some of the US states including Delaware, Del Code, Tit 8, Chapter 1, section 262. By way of background, the Dickerson Committee was established in order to suggest proposals for the drafting of the Canada Business Corporation Act in 1971 and it did so in the Dickerson Report which was released in 1971.

²¹³ V. Krishna Determining the ‘Fair Value’ of Corporate Shares, (1987-8) *Cdn. Bus. L.J.* 132 at 139-47.

was apparently to distinguish the fair value from the stock market price and thus ‘reflected a decision to exclude stock market prices as the sole determinant of value’.²¹⁴

However, a contrary view was later taken by the Supreme Court of Quebec in *Domglas Inc. v Jarislowsky*²¹⁵ where the court suggested that the very fact that the term chosen was different implied that it was intended to mean something different. In *Domglas* the court made the point that, since the passing of the Canadian Business Corporation Act, a body of jurisprudence has developed in Canada which has the effect of taking all relevant factors into account when ‘fair value’ is determined in this context. The judicial determination is not tied to market value at all and share valuation is approached on a case-by-case basis.

The court in *Nixon v Trace*²¹⁶ quoted directly from the judgment in the case of *Re Cyprus Anvil Mining Corp. and Dickson*²¹⁷ as providing the best illustration of the approach adopted by the Canadian courts with respect to share valuations:

‘... the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own

²¹⁴ At 145.

²¹⁵ (1980) 13 B.L.R. 135 (Que. S. C.).

²¹⁶ 2012 BCCA 48.

²¹⁷ 1986 811 (BC CA), (1987) 33 D.L.R. (4th) 641 (B.C.C.A). In relation to the determination of fair value see also the following cases cited in *Nixon v Trace: Re Brant Investments Ltd. v Keeprite Inc. et al. reflex*, (1987) 60 O.R. (2d) 737 (H.C.), at 773-5, 780-1; *Nunachiaq Inc v. Chow reflex*, (1993), 8 B.L.R. (2d) 109 (B.C.S.C.) at paragraphs 12-3, 20-3; affirmed [1994] B.C.J. No. 608 (C.A.); *Grandison v. Novagold Resources Inc.* 2007 BCSC 1780, 2007 BSSC 1780 at paragraphs 150-155.

difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock. The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by some formula that can be stated in the legislation...In summary, it is my opinion that no method of determining value which might provide guidance should be rejected. Each formula that might prove useful should be worked out, using evidence, mathematics, assessment, judgment or whatever is required. But when all that has been done, the judge is still left only with a mixture of raw material and processed material on which he must exercise his judgment to determine fair value.²¹⁸

The judgment in *Nixon v Trace*²¹⁹ was handed down on 31 January 2012 in the British Columbia Court of Appeal. It is one of the most recent Canadian appraisal rights judgments on record and, in addition to providing a useful and valuable summation of the Canadian courts' approach to valuation methodologies generally,²²⁰ it also deals with a more esoteric aspect of appraisal rights valuation, namely the extent to which tax consequences should be taken into account when valuing dissenters' shares. In the *Nixon* case the court was called upon to determine the fair market value of the dissenting shareholders' shares. The

²¹⁸ At 652.

²¹⁹ 2012 BCCA 48.

²²⁰ In relation to the general valuation principles which can be extracted from Canadian case law as well as discussion of the various valuation methodologies (including stock market valuation evidence, negotiated transaction valuation evidence and discounted cash flow analysis) adopted by the Canadian courts see Hunter and Pearce at 167.

transaction in question amounted to a sale of substantially all the assets of the company. The argument put forward by the dissenters turned on the fact that, because they would be obliged to pay tax on any amounts which they received as a result of the exercise of their appraisal rights *in casu*, and would not have had to pay tax had they accepted the original offer (due to the way in which the transaction was structured), this should be taken into account in determining the fair market value of the shares so that they would not be out of pocket as result of their dissent. In other words, they wanted the tax liability to be taken into account when determining the market value, to ensure that what they ultimately received as a net gain (after payment of any taxation) would equate to the fair market value.

This argument was rejected by the Court of Appeal. In the court a quo the trial judge was also not persuaded by the argument that the tax consequences of the transaction were relevant in determining the fair value of the shares pursuant to the statute. The court a quo held that, while it was normal practice to consider the tax attributes of a company and its shares when determining the value of shares, this cannot be extended to a particular shareholder's personal tax attributes. Thus corporate share value is determined without having regard to or considering the individual shareholders' tax position.

The Court of Appeal expanded on this point and provided a more nuanced explanation. It reiterated that previous Canadian cases had focused on the circumstances of the company as opposed to the personal characteristics of dissenting shareholders. Thus, no 'minority

discount²²¹ is factored into a valuation and any special conditions or purchaser conditions are disregarded. Instead ‘the focus is the determination of the en bloc value of all shares in the company, and the allocation of a proportionate share thereof to the dissenter.’²²²

Note that, in terms of section 245(2) of the British Columbia Business Corporation Act,²²³ if no agreement is reached regarding the fair value of the shares, a dissenting shareholder may apply to court either for a value to be attributed by the court or for an order that the value be established by arbitration or by reference to a referee. This option is not available to the applicant in terms of section 164 of the South African Act. It is submitted that this would have been a potentially more helpful version of the section to be incorporated into the South African Act, enabling the shareholder, in terms of a statutory mandate to opt for a non-litigious resolution to the dispute.

Note further that, like section 163 of the South African Act,²²⁴ the Canada Business Corporations Act also provides for other shareholder remedies. These remedies, which may apply to a specific set of facts in addition to the appraisal remedy, include a statutory derivative action (section 239), an application to court for relief on the grounds of oppression (section 241), an application to court to rectify records (section 243) and an application to court for a restraining or compliance order (section 247).

²²¹ That is, the fact that the shares represent a minority stake in the company is not taken into account in the valuation of those shares.

²²² *Grandison v. Novagold Resources Inc.* 2007 BCSC 1780, 2007 BCSC 1780 at paragraph 152.

²²³ SBC 2002.

²²⁴ The other remedies potentially available to minority shareholders in terms of the South African Act are discussed in Chapter 6.

If the requirements of section 241 are met, one of the available remedies which the court may entertain in terms of section 241(3)(f) is an order directing the corporation or any other person to purchase the wronged shareholders' shares. Interestingly, for the purposes of section 241 a shareholder includes a beneficial owner whereas for the purposes of the appraisal sections it does not.²²⁵

It is not entirely clear, either in Canada or South Africa whether or to what extent reliance can be placed on judgments in which the courts have established principles regarding the fair value of shares, other than in the context of appraisal rights and, specifically, whether it is appropriate to rely on 'fair value' judgments in relation to the oppression section²²⁶ to flesh out the appraisal section.²²⁷

Cassim²²⁸ et al argue that it is not appropriate to do so because the judgments that required determination of fair value in the context of the oppression remedy or compulsory acquisitions are not based on a 'willing seller' scenario as they would be in appraisal rights valuation and therefore different considerations apply. However, there is a contrary argument²²⁹ that there is no blanket bar to relying on such cases as there are certain parallels to be drawn between the 'fair value' cases based on the oppression remedy and compulsory

²²⁵ See paragraph 7.5.1.2 *infra*.

²²⁶ Ss 241 and 163 of the Canadian and South African statutes respectively.

²²⁷ In South Africa the existing jurisprudence in this regard relates to judgments in legal proceedings based on ss 252 and 440K of the Companies Act 61 of 1973. See further Chapter 7 *infra*.

²²⁸ Cassim et al at 808.

²²⁹ Kevin Ross Hillis 'The Appraisal Remedy and the Determination of Fair Value by the Courts' Unpublished LLM dissertation, UNISA (2014).

acquisition and those arising from the appraisal remedy. This seems to be a sensible approach. It is submitted that, rather than completely disregarding all South African precedent in which the fair value of shares has been considered in the context of the oppression remedy and compulsory acquisitions, these cases should be selectively and carefully scrutinized. The objective of the relief or remedy sought in each instance should be considered and if the objective and effect in granting the relief is commensurate with the nature of the relief contemplated by the appraisal remedy, then (and only then) judicial precedent may be illuminating and appropriate.

This seems to be the approach that has been adopted by the Canadian courts; it recognises that there is often a degree of interaction and overlap between fair value claims based on oppression and those based on dissent. In fact, potentially both an oppression and/or an appraisal claim may arise from the same set of facts²³⁰ and therefore the Canadian courts apply valuation precedents where this is appropriate but differentiate between the different contexts (and apply different principles) when it is not.²³¹ It is submitted that South African courts should adopt a similar approach.

4.2.3 Registered and beneficial shareholders

A further contentious and problematic issue in Canadian appraisal rights jurisprudence has been whether dissent rights are limited to registered shareholders or whether beneficial shareholders can exercise these rights as well. The first case to deal directly with this issue

²³⁰ *Alberta Treasury Branches v. SevenWay Capital Corp* 1999 ABQB 859.

²³¹ Clarke Hunter Q.C. and Clarissa Pearce 'Fair Value – A Common Issue with Surprisingly Sparse Canadian Authority', *Annual Review of Civil Litigation*, 2011, 54-57.

was *Manitoba (Securities Commission) v. Versatile Cornat Corporation*.²³² At the time that the dissenting shareholder in this case submitted the notice of dissent, he was a beneficial owner whose shares were held in trust by an intermediary as the registered shareholder, a common commercial practice in practically all jurisdictions. The Corporations Act (Manitoba) referred to the right to dissent by a ‘holder of shares’. The court held that, given the jurisprudence which existed with respect to the meaning of the term ‘shareholder’, it was only the registered shareholder who was entitled to exercise a dissent right.

However, in 2011, in the matter of *In Matre et al. v. Crew Gold Corporation*²³³ the Supreme Court of Yukon extended appraisal rights triggered by a plan of arrangement²³⁴ to the beneficial shareholders²³⁵ of the company. The dissenting shareholders in question had purported to exercise their appraisal rights by delivering dissent notices to the company as required in terms of the Canada Business Corporations Act.²³⁶ However, it transpired that

²³² 97 D.L.R. (3d) 45, 1979 2 W.W.W. 714 (M.B.Q.B).

²³³ 2011 YKSC 75.

²³⁴ In South Africa this type of fundamental transaction (which is, of course, also a trigger event for the exercise of appraisal rights) is known as a scheme of arrangement and regulated in s 114 of the South African Act.

²³⁵ The Yukon Business Corporations Act R.S.Y. 2002, c. 20 defines ‘beneficial ownership’ as including ‘ownership through a trustee, legal representative, agent or other intermediary’.

²³⁶ In South Africa the term ‘shareholder’ is defined in s 1 of the Act as ‘the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be’ but this definition is made subject to s 57. S 57, in turn, defines ‘shareholder’ (with respect to Part F of the Act only) to include a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached. Part F of the Act deals with the governance of companies and regulates, *inter alia*, proxies, record dates, shareholder meetings and shareholder resolutions. It would appear therefore that, for the purposes of notice, meeting and voting on the fundamental transaction in question a beneficial owner is included under the term shareholder but whether this then automatically extends and applies this expanded meaning to the right to the appraisal remedy (which does not fall within Part F) is unclear. For a more detailed discussion of this anomaly see paragraph 7.5.1.2 *infra*.

the shareholders were not in fact the registered shareholders. The definitions in the Canada Business Corporations Act of the terms ‘share’ and ‘holder’ did not assist, and accordingly it was left to the courts to apply and develop these terms *in casu* to establish who was entitled to exercise dissent rights.²³⁷

The shareholders in the *Crew Gold* case were merely beneficial shareholders; the shares were registered in the name of an intermediary banking institution which held the shares for their benefit and on their behalf. However, the court extended the pool of persons who are legally entitled to enforce appraisal rights to these beneficial owners as well and held that they had the right to dissent notwithstanding the fact that they were not registered shareholders. The relevant facts in *Crew Gold* were that the company had clearly instructed its shareholders on the registration requirements for valid dissent but that the dissenting shareholders (for various reasons not attributable to the company) had failed to become registered shareholders. Although the company was aware of the shareholders’ wish to exercise their dissent rights, it did not take steps to expressly outline the registration process.

The court did, however, point out that this was an exceptional case and was largely based on the particular behaviour and actions of the company. The court also found that in the circumstances management owed a duty of fairness to the dissenting shareholders. According to the court, on the facts of the matter it appeared that the shareholders were

²³⁷ As was done in *Manitoba v Cornat Corporation* 97 D.L.R. (3d) 45, 1979 2 W.W.W. 714 (M.B.Q.B).

confused about their status but that it was the company which had in fact caused or substantially contributed to their confusion.

However, in *Certain Shareholders of Crew Gold Corporation v. Crew Gold Corporation*²³⁸ the British Columbia Court of Appeal sitting as the Yukon Court of Appeal overturned this decision and restored the traditional rule that only registered shareholders are entitled to exercise dissent rights.²³⁹ The Court reiterated that, although the right of dissent could only be exercised by a registered shareholder, the common law recognized two limited categories of exception to this rule. The first was a judicial exception where the company has made material misrepresentations to its shareholders²⁴⁰ and the second where the conduct of the company has amounted to an estoppel.²⁴¹ Neither of these exceptions applied in the circumstances of the *Crew Gold* case and the Appeal Court found that the Supreme Court had erred in extending the judicial exception to the matter. Madam Justice Smith stated that it was ‘not a technicality but a legislative requirement’²⁴² that only registered shareholders could exercise their dissent rights and, where the rule had been deviated from in Canadian case law on the basis of misrepresentation or estoppel, this was done firstly to prevent uncertainty and secondly to avoid placing an undue burden on companies which would otherwise be unable to rely on their share register in order to determine who is able to exercise dissent rights.

²³⁸ 2012 YKCA 9 on appeal from Supreme Court of Yukon, October 14, 2011 (*Matre et al. v. Crew Gold Corporation*, 2011 YKSC 75).

²³⁹ See Craig A.B. Ferris of Lawson Lundell LLP ‘Order is restored – only registered shareholders can exercise dissent rights’ <http://www.lexology.com/library> (accessed 5 August 2014).

²⁴⁰ *Lake & Co. v Caltex Resources Ltd.* (1996), 187 A.R. 128, 139 D.L.R. (4th) 35 (C.A.).

²⁴¹ *Lay v. Genevest Inc.*, 2005 ABQB 140, 49 Alta. L. R. (4th) 40.

²⁴² Paragraph 35.

Importantly, the Court held that it was not the duty of the company to advise each shareholder precisely how to become the registered shareholder or specifically assist them in this regard. The duty of the company did not extend beyond furnishing the shareholder with the information that they would need to be the registered shareholder in order to vote and exercise their dissent rights and to advise them to seek legal advice in this regard. The company did both in the *Crew Gold* case.

4.2.4 Comment

The *Nixon* and *Crew Gold* cases illustrate the types of issues and complexities which arise in the context of appraisal rights litigation, even in jurisdictions where they have been in existence for decades.²⁴³ Furthermore, both cases have obvious potential ramifications for South African shareholders and companies. It is quite likely that a South African court will need to have regard to these judgments (and possibly rely on them) in the absence of facts or legislative provisions in the South African Act which provide guidance to the contrary.

The distinction and relationship between a registered shareholder and a beneficial shareholder with respect to appraisal rights in the South African Act is complex and this particular issue is addressed in paragraph 7.3.1.²⁴⁴ In fact, this complexity and the existing

²⁴³ In this regard see <http://www.canadianlawyermag.com/4101/What-in-house-counsel-need-to-know-about-shareholder-dissent-rights> (accessed 3 August 2014).

²⁴⁴ This was briefly explained in footnote 223. For further discussion of this aspect see Chapter 7 and particularly paragraph 7.5 *infra*.

case law in Canada raises ancillary questions as to the obligations of any South African company entering into an appraisal rights-triggering transaction vis-à-vis its shareholders. To what extent does a company have an implied obligation to remove any confusion which may exist with respect to who is eligible to exercise appraisal rights in a particular transaction as evidenced by the judgment of the court a quo in the *Crew Gold* case? At the very least it would seem that there is a duty on the company not to contribute to the confusion and it is submitted that therefore information documents and circulars despatched to shareholders should be carefully vetted by the board of directors and the legal advisors of the company to avoid creating confusion and attracting potential liability on this basis. It is suggested that South African companies and their legal advisors would be well advised to take note and keep abreast of international case law developments abroad in anticipation of encountering similar difficulties.

It also appears, however, that the burgeoning appraisal rights litigation trend (largely caused by the rise in appraisal rights arbitration) which has taken place in the USA²⁴⁵ has not been replicated in Canada. This may be attributable to the Canadian courts' attitude to appraisal arbitration and fair value determination as illustrated by the case of *Deer Creek Energy Ltd. v. Paulson & Co. Inc.*²⁴⁶ The case arose from a takeover of the Deer Creek corporation initiated by two competing bidders, Total E&P Canada Ltd. ('Total') and Shell Canada Limited ('Shell'). Throughout the competitive bidding process both offeror companies were involved in negotiations with Deer Creek and ultimately Total acquired

²⁴⁵ As discussed in paragraph 3.4.

²⁴⁶ 2009 ABCA 280. See further the discussion of fair value in the Canadian context at 4.2.2.

more than 80% of the Deer Creek shares at a price of \$31 per share by 11 October 2005. Thereafter Total caused Deer Creek to enter into an amalgamation with it in order to make it a wholly-owned subsidiary.

An American hedge fund, Paulson & Co. Inc., had begun purchasing Deer Creek shares after the initial offer had been announced and in this manner had acquired a 16% stake in the company. Paulson & Co (together with a handful of individual shareholders) dissented from the amalgamation transaction during which the price per share offered had been the same as in the initial offer, namely \$31. The dissenters maintained that the Deer Creek shares had been undervalued and were worth between \$110 and \$200 per share. The matter went to trial for a valuation hearing.

The trial judge, using the ‘fair market value’ approach²⁴⁷ (which she confirmed by applying the ‘net asset value’ valuation methodology²⁴⁸) held that the price of \$ 31 was reasonable and represented a fair value for the shares. She did not agree with the dissenters’ contention that the value of the shares had increased in the period between the takeover date and the valuation date by virtue of, inter alia, the synergies created by Total’s takeover of Deer Creek. The dissenting shareholders appealed the decision.

²⁴⁷ The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. *United States v. Cartwright*, 411 U. S. 546, 93 S. Ct. 1713, 1716-17, 36 L. Ed. 2d 528, 73-1 U.S. Tax Case (CCH) 12,926 (1973).

²⁴⁸ This is a method in terms of which the value of the company’s shares is calculated by subtracting any liabilities from the market value of the firm's assets and dividing the difference by the number of issued shares.

In a judgment handed down on 31 August 2009, the Alberta Court of Appeal found that the trial judge's use of market value methodology to determine the fair value of the shares was appropriate in the circumstances and confirmed all the findings of the trial court except the cost order which had been made against the appellants.²⁴⁹

Although the Canadian statute and precedent permits the court to use and apply a whole range of valuation methodologies, this decision seems to imply that where the shares of the company trade actively it is likely that the market value represents a fair value for the shares.

This approach is likely to discourage appraisal arbitrage - it runs contrary to the line of US decisions where the fair value has been pegged at a premium to the merger price.²⁵⁰ Furthermore, where a merger or amalgamation is the result of a friendly transaction, Canadian parties to the transaction may make use of a plan of arrangement in terms of section 192 of the Canada Business Corporations Act and appraisal rights will not apply.²⁵¹

²⁴⁹ At 3-5.

²⁵⁰ See Fried Frank M&A Briefing (New Activist Weapon, The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications); K Kastiel, Why Delaware Appraisal Awards Exceed the Merger Price) <http://blogs.law.harvard.edu/corpgov/2014/11/10/> (Accessed 11/10/14).

²⁵¹ This plan of arrangement involves applications to court and can be likened to the scheme of arrangement which existed in South Africa under section 311 of the Companies Act 61 of 1973. The scheme of arrangement contained in section 114 of the 2008 Act is very different to its predecessor and, as it is a fundamental transaction within the meaning of the statute, appraisal rights will apply.

CHAPTER 5

APPRAISAL RIGHTS IN NEW ZEALAND

5.1 New Zealand Companies Act, 1993

Appraisal rights (referred to as ‘minority buy-out rights’ in New Zealand) are contained in sections 110 to 115 of the New Zealand Companies Act, 1993.²⁵² Appraisal rights were first introduced into the statute as a result of a recommendation made by the New Zealand Law Commission in 1990.²⁵³ The Law Commission, as part of a wider process of corporate reform, recommended that appraisal be introduced as a solution to the problem of ‘latecomer terms’. This phrase refers to the situation where there are unexpected or unanticipated changes with respect to the company in which a shareholder has invested, and which change the risk or expected return of the shareholder’s original investment i.e. a fundamental change to the structure or business of a company.²⁵⁴ According to a later report compiled by the Law Commission of New Zealand (hereafter ‘the New Zealand

²⁵² Attached hereto as Appendix E.

²⁵³ Law Commission Company Law: Reform and Restatement: NZLC R9 (Wellington, 1989) paras 202–213, pp 49–51 and cls 81–86 of “The Draft Companies Act”, pp 230–234; and Law Commission Company Law Reform: Transition and Revision: NZLC R16 (Wellington, 1990) cls 81–86 of “Appendix, Draft Companies Act: Recommended Modifications” pp 185–189. For a detailed discussion and comparison of the New Zealand buy-out provisions with the US and Canadian appraisal rights statutes see L Taylor ‘Minority Buy-Out Rights in the Companies Act 1993’ *Canterbury Law Review* 6 (1997) 539. Only the most relevant and unique aspects of the New Zealand legislation are discussed here.

²⁵⁴ See FN Easterbrook and DR Fischel ‘*The Economic Structure of Corporate Law*’ (Harvard University Press, Cambridge, Massachusetts 1991) at 32 and Chapter 6.

Report')²⁵⁵ in 2001, the substantive content and pedigree of the appraisal rights provisions in the New Zealand Act can be traced back through the Delaware General Corporation Law in section 262, the New York Code in section 623 and the Canada Business Corporations Act in section 190.

The New Zealand Report was the result of focused consideration of appraisal rights by a number of experts. It was aimed at the further legal reform and refinement of (specifically) the appraisal rights provisions in sections 110-115 of the statute. The catalyst for the drafting and adoption of the amendments and additions to sections 110-115 was the decision handed down by Doogue J in the case of *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd*²⁵⁶ in which he strongly criticised the appraisal rights provisions then contained in the New Zealand Companies Act 1993. This judicial criticism was so vehement that the Law Commission of New Zealand responded by producing a comprehensive report dealing with appraisal rights which ultimately resulted in the specific legislative amendments. The Court criticised the lack of detail in the statute, stating that it was 'common ground that the minority buy-out sections are defective', referred to a 'statutory vacuum' and stated that if the rights were to be effective and beneficial 'they should be urgently reconsidered'.²⁵⁷ The most important issues identified and debated in the New Zealand Report centered around notice of appraisal rights, particulars of the

²⁵⁵ *New Zealand Law Commission Report 74 'Minority Buy-Outs'*, August 2001.

²⁵⁶ [2000] 3 NZLR 727.

²⁵⁷ *Ibid.*

company's valuation of appraisal rights, the basis of the valuation of appraisal rights, the contract (between the company and the shareholder) and conveyance of the ownership of the shares in question, compensation for costs and delay and ancillary orders in respect of the completion of the transaction.²⁵⁸ Thus, the challenges and hurdles which were relevant to the (then) fledgling New Zealand appraisal rights regime and which were addressed in the report are the same type of issues which have arisen, and continue to arise, in the appraisal rights context in other jurisdictions.²⁵⁹

In the *Natural Gas* case the plaintiff, Natural Gas Corporation Holdings, (hereafter 'NGC') wanted to acquire the majority shareholding in a target company. Infratil, a minority shareholder of the plaintiff (and the defendant) dissented from NGC's approval of the acquisition. Accordingly Infratil gave notice to NGC to purchase its shares, as it was entitled to do in terms of the minority buy-out provisions of the Companies Act 1993 which were in effect at the time. NGC then duly nominated a price which Infratil rejected. In terms of the previous provisions of the New Zealand Companies Act, the plaintiff was required to provisionally pay the nominated price pending arbitration. However, as Infratil was unwilling to transfer title to its shares at that juncture, NGC paid the provisional price to a trustee instead. The parties sought declarations in the High Court, Wellington, as to transfer of title of the shares. The court held that Infratil was required to transfer title to its

²⁵⁸ See the *New Zealand Law Commission Report 74 'Minority Buy-Outs'* August 2001 at 5-18.

²⁵⁹ See Chapters 3 and 4 *supra*.

shares to NGC on receipt of the provisional price and based its findings on the fact that the legislation could not have intended a dissenting shareholder to retain the shares (and receive payment) until an arbitration had been determined. The court noted that the provisions of the Act protected the dissenting shareholder with timetables, arbitration and interest provisions which ensured that the company would meet its obligations.

5.2 Minority Buy-Out Rights Amendment Act, 2008

The decision in *Natural Gas* and the subsequent report ultimately culminated in the changes to the law brought about by the Companies (Minority Buy-out Rights) Amendment Act 2008. The complete minority buy-out rights provisions of the New Zealand Companies Act as amended by the Minority Buy-Out Rights Amendment Act are contained in sections 110-115.²⁶⁰

The amending statute repealed the existing section 112 and replaced it with sections 112 to 112C. In summary these sections provide that where shares are to be repurchased by a company in terms of the section, the board must give the shareholder written notice of the price offered for the shares and how that price, which must be fair and reasonable, was calculated in terms of the Act. A specific valuation methodology is prescribed in the Act with respect to the timing of the valuation, fluctuation of value and the allocation of value to a class of shares. In the event that this methodology would produce an unfair result, the

²⁶⁰ Appendix E.

company must give the shareholder written notice explaining why it did not adhere to the prescribed methodology.

If it receives no objection to the price within ten working days, the company is bound to purchase all the shares at the stipulated price within the period prescribed in the Act. Time periods with respect to purchase dates may be changed by written agreement between the company and a shareholder. If, however, the company receives an objection to the price offered, the statute automatically refers the dispute to arbitration in terms of section 112A and, in addition the company must pay a provisional price (equal to the price initially offered) to the objecting shareholder(s) within five working days. In the event that the price eventually determined for the shares by the arbitral tribunal exceeds the provisional price paid, the company must pay the balance to the shareholder, together with interest on the balance. Conversely, if the price determined by the arbitral tribunal is less than the provisional price, the shareholder must repay the excess to the company, together with the interest thereon and, possibly, damages for loss attributable to the shortfall in the initial payment.

The provisions of the New Zealand Arbitration Act, 1996²⁶¹ apply and the costs and expenses of the arbitration proceedings are also regulated in terms of the company and arbitration statutes. Those facets of the New Zealand statute which are most relevant to the

²⁶¹ The relevant sections of the statute are attached as Appendix F for ease of reference.

thesis for comparative purposes, namely fair value, arbitration and costs, are discussed in more detail below.

5.3 Selected case law and legal issues

5.3.1 Determination of fair value

The New Zealand Act provides that the board must offer to pay a ‘fair and reasonable’ price for the shares and must give the holder of the shares written notice of how the fair and reasonable value of the shares was calculated. Taylor proposes that the term ‘fair and reasonable’ does not suggest two different measures as regards price determination. It is a composite term which implies that a ‘fair’ price will also be reasonable and vice versa.²⁶² In terms of section 112(2), the price must be calculated as the fair and reasonable value of the total shares in the whole class of shares to which the shares in question belong, the total value of that class must be adjusted to exclude fluctuations in value related to the event which gave rise to the application of section 112 and a portion of the (adjusted) class value must be allocated to the shareholder pro rata to his shareholding in that class. This is the default valuation methodology prescribed by the statute.

It is, however, possible for the company to use a different valuation methodology to calculate the ‘fair and reasonable’ price for the shares, but only if using the prescribed methodology would be *clearly* unfair to the shareholder and the company. It appears, therefore, that the company may only deviate from the statutorily prescribed methodology

²⁶² Taylor at 558.

in exceptional circumstances and where it is readily evident that a failure to do so would result in unfairness to one or both of the parties.²⁶³

As has been the case in other countries, the New Zealand legislature has also grappled with the various share valuation methodologies, how a court or arbitrator may best determine ‘a fair and reasonable price’ for shares and to what extent the methodologies and principles for this process should be prescribed. So, for example, the New Zealand Law Commission, in considering this aspect of the statute, recommended that the valuation date should not be specified but that instead it should be made clear that fluctuations in value related to the trigger event should be disregarded for valuation purposes.²⁶⁴ In relation to the question whether a fixed rule regarding valuation technique was preferable to identifying the proper valuation technique to be utilised on a case-by-case basis, the Law Commission opted for the certainty of a fixed rule over the flexibility of an ad hoc approach.²⁶⁵ Based on this rationale the rule that requires a valuation of the total class of shares followed by allocation on a prorated basis was adopted in the statute.

5.3.2 Arbitration

In the event that the shareholder objects in writing²⁶⁶ to the price offered by the board, the determination of the ‘fair and reasonable’ price must be submitted to arbitration.²⁶⁷ Not

²⁶³ I did not come across an example of circumstances where this exception was applied in the literature or cases reviewed.

²⁶⁴ Law Commission Report 74 at 7. In this regard they followed the principle in s 262(h) of the Delaware General Corporation Law that the value should be assessed ‘exclusive of any element of value arising from the accomplishment or expectation of the triggering event.’

²⁶⁵ Law Commission Report at 10.

²⁶⁶ In accordance with s 112(4).

²⁶⁷ S 112(A)(1)(a)(i).

only the price aspect, but also the remedies available to the shareholder or company in respect of any price for the shares that differs from the price determined by the company, must be submitted to arbitration.²⁶⁸ Furthermore, within 5 working days of receiving the notice of objection to the price determined by the board, the company must pay the shareholder a provisional price in respect of each share which is equal to the price which was initially offered by the board.²⁶⁹

Arguably the most valuable lesson to be taken from the New Zealand Act is the default route to arbitration proceedings once it has become clear that a dispute has arisen with respect to the value of the shares. However, the parties may still have recourse to the New Zealand courts should they elect to do so. This is made possible by clause 5 of the Second Schedule to the New Zealand Arbitration Act 1996 which ‘reserves the right for all parties to an arbitration to appeal questions of law arising out of an arbitrator’s award to the High Court.’²⁷⁰ It may be argued that an arbitration of this nature will not necessarily be any cheaper than litigation.²⁷¹ However, arbitration as an alternative procedure to litigation also has other potential advantages.²⁷²

As regards the best approach to be adopted in the determination of a fair and reasonable price it appears that it is accepted that, as in the Canada and USA, there is no ‘one size fits

²⁶⁸ S 112(A)(1)(a)(ii).

²⁶⁹ S 112A(1)(b).

²⁷⁰ L Taylor ‘Minority Buy-Out Rights in the Companies Act 1993’ (1997) *Canterbury Law Review* 6 (1997) 539 at 556.

²⁷¹ *Ibid.*

²⁷² See paragraph 7.7 *infra*.

all' methodology and each valuation exercise must be undertaken and considered on its own merits. The New Zealand Act provides in section 112(2)(c) that a portion of each adjusted class value as calculated must be allocated to the shareholder in proportion to the number of shares he, she, or it holds in the relevant class. The implication is that (unlike the South African Act and the Canada Business Corporations Act) the default method of calculation appears to exclude a minority discount. However, Taylor is of the opinion that whether a minority discount should be applied or not depends on what is fair and reasonable in the circumstances.²⁷³

As regards the question how readily and effectively appraisal rights may be exercised in New Zealand, it is illuminating that in 1997 (when Taylor's article was published) she states that 'some three and a half years after the coming into force of the Companies Act 1993 such rights have attracted little comment and have generated no case law. Rather than suggesting that all is working well it seems that a more appropriate explanation is that buy-out rights have, as yet, had little impact in New Zealand.'²⁷⁴ Regarding Taylor's observation, however, one should not lose sight of the fact that the arbitration route prescribed in the New Zealand legislation has the effect that payouts to dissenting

²⁷³ Taylor at 562.

²⁷⁴ At 563. In South Africa, apart from the academic articles by Cassim and Beukes referred to herein and general academic company law textbooks, appraisal rights have also not been widely addressed or commented on. Nor, at this time – some three and a half years after the Act came into effect – have they generated any case law. It is tempting to arrive at the same conclusion as Taylor did at that point, namely that they have had little impact in South Africa to date. See further the discussion for possible reasons for this in Chapter 8.

shareholders will inevitably attract less publicity than if these were the subject of litigation in an open court.

This is illustrated by a recent transaction which required a special resolution from the shareholders of King Country Energy ('KCE') to effect a sale of KCE's fifty percent stake in Mangahao Power Station to Todd Energy.²⁷⁵ The purchase price was 33.8 million New Zealand dollars in cash and 7.7 million KCE shares issued at 4.75 New Zealand dollars each, amounting to a transaction value of approximately 70 million New Zealand dollars. The transaction resulted in Todd Energy being able to lift its interest in KCE to 54 percent from 35.4 percent. The share price reflected a 44 percent premium to the trading price (on an illiquid unlisted platform) but reflected a discount of between 12 and 26 percent of the underlying value of the shares as assessed by the financial advisors in its report to KCE's independent directors.

Despite the valuation both the financial advisors and the independent directors recommended the deal. However, the dissenting shareholders exercised their minority buy-out rights and, while objecting to being paid the same price per share as that at which the shares had been issued to Todd Energy, which they regarded as too low. After taking the issue to arbitration, they were awarded a significantly higher price per, together with interest and costs.

²⁷⁵ Jonathan Underhill 'King Country Energy minorities extracted higher price from Mangahao than Todd got paid' *The National Business Review*, 12 August 2013.

It should be noted that the background to the transaction probably raised suspicions about the value allocated to the shares – the transaction had the effect of giving the purchaser, Todd energy, control of KCE, raising its shareholding from 35.4 to 54 percent. Furthermore, although there were sound business reasons for the transaction, Todd Energy had unsuccessfully tried to obtain control of KCE on two previous occasions since 2006. The shareholders’ arbitration costs were funded by a financial institution that had taken the case to arbitration on behalf of clients which made use of its custodial services together with other individual dissenting shareholders. These increased payouts were calculated by the columnist concerned using financial information contained in the KCE annual report because the details of the arbitration had to remain confidential. The only comment given by the KCE independent directors was they were ‘very, very comfortable with the price.’²⁷⁶ Thus the arbitration default provision seems to hold significant advantages for the company as well in the form of reduced publicity where dissenting shareholders’ claims are successful.

5.3.3. Amount payable, interest, costs and expenses

In terms of section 112A(2), once the arbitration has been finalized and a price determined, if the price which the arbitrator has determined exceeds the provisional price that the company originally nominated, the company must forthwith pay the balance to the

²⁷⁶ Ibid.

shareholder.²⁷⁷ If, however, the price determined by the arbitrator is less than the price nominated by the company, the excess must be repaid by the shareholder.²⁷⁸ Unless there are exceptional circumstances, the arbitration tribunal must award interest on the excess or balance payable, as the case may be. Furthermore, if the result of the price determination is that a balance is owing to the shareholder, an arbitral tribunal may award to the shareholder (either in addition to or instead of interest), damages for loss attributable to the shortfall in the initial payment.²⁷⁹

It is important to note that a submission to arbitration under section 112A is deemed to be an arbitration agreement for the purposes of the New Zealand Arbitration Act, 1996 and its provisions apply accordingly.²⁸⁰ Section 112A(2) specifically provides that clause 6 of Schedule 2 of the Arbitration Act 1996²⁸¹ may not be excluded from the arbitration agreement.²⁸² The costs and expenses of an arbitration are dealt with as follows in the relevant schedule: unless the parties agree otherwise, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the

²⁷⁷ S 112(7).

²⁷⁸ S 112A(2)(b).

²⁷⁹ S 112A(4). I did not come across an example of circumstances where damages attributable to the shortfall was payable in the literature or cases reviewed. Presumably this provision is intended to be remedial in nature but also to discourage overly conservative initial price determinations by the company.

²⁸⁰ S 112A(6) read with the New Zealand Arbitration Act s 9(2). This is a practical and effective arrangement as it ensures that there is immediately an established framework of rules and enforcement mechanisms in place.

²⁸¹ The relevant provision is attached hereto as Appendix F.

²⁸² The stipulation that it is not possible to exclude clause 6 is a direct result of a specific recommendation that this provision be included in the statute. *New Zealand Law Commission Report* at 20.

arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award.

In the absence of an award fixing and allocating the costs and expenses of the arbitration, each party is responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. In terms of clause 6(3) of Schedule 2, a party to the arbitration may apply to the High Court for an order varying the amount or allocation (or both) of an award or allocation of costs and expenses made by the arbitral tribunal. The High Court may make such an order if it is satisfied that the amount or allocation of the costs and expenses is unreasonable in all the circumstances.

Prior to the amendment of the New Zealand Companies Act in 2008, the relevant sections gave the arbitrator a far wider discretion. Previously section 112(8) provided that:

‘The arbitrator may—

- (a) Award interest on any balance payable or excess to be repaid under subsection (7) of this section at such rate as he or she thinks fit having regard to whether the provisional price paid or the reference to arbitration, as the case may be, was reasonable; and
- (b) Provide for interest to be paid to or by the shareholder whose shares are to be purchased.’

Commenting on that provision, Jones originally suggested that, instead of leaving the discretion with respect to payments, interest and costs wholly in the hands of the arbitrator, the legislature should include a provision along the following lines in the statute:

‘...if the amount so paid is materially less than the amount ultimately determined by the [arbitrator] to constitute fair value, the corporation should be required to pay all costs and expenses of the appraisal proceeding, including such dissenting holder’s reasonable attorney’s and experts fees. In all other circumstances, the costs and expenses of the action shall be assessed or apportioned as the court deems equitable, except that the corporations attorney’s fees may be assessed or apportioned against a shareholder only when the [arbitrator] finds that the shareholder’s action to have been arbitrary, vexatious or not in good faith.’²⁸³

Such a provision, stated the author, would impress upon the company the potentially damaging consequences of setting the provisional price unreasonably low. The company would be well aware that, given the costs, effort and expense involved in the procedure, only the largest shareholders with the deepest pockets (and access to the best advisors) would be able or willing to challenge the price and that their legal and experts costs would therefore be considerable. By the same token shareholders would be dissuaded from abusing the appraisal rights process where their motives are not bona fide.²⁸⁴ The gist of

²⁸³ D.O. Jones, *Company Law in New Zealand: A Guide to the Companies Act 1993* (1993) 80 quoted in L Taylor ‘Minority Buy-Out Rights in the Companies Act 1993’ (1997) *Canterbury Law Review* 6 (1997) at 557. It was not specifically stated where and by whom this provision was to be included, but logic dictates that Taylor and Jones seem to be suggesting that the legislature should include such a provision in the statute. If so, the term ‘materially’ would probably need to be defined elsewhere in the legislation.

²⁸⁴ Taylor at 557.

the suggested provision is that companies which (intentionally or negligently) propose a provisional price which is substantially less than what is fair and reasonable will ultimately bear the legal costs of both parties. It is almost akin to a type of punitive costs order. If there is no substantial discrepancy the court retains the discretion to make an appropriate costs order but such an order may never attribute liability for any of the costs of the company to a bona fide dissenting shareholder. This drafting suggestion is clearly skewed in favour of the dissenting shareholder and it is interesting to note that the legislature ultimately adopted a more even handed approach and also elected to retain the wide(r) discretion of the arbitrator.

5.3.4 Comment

Whilst the principles prescribed as regards the timing of, and approach to, judicial valuation in New Zealand are helpful and provide some degree of certainty, it is submitted that they cannot solve the complexities associated with selecting and applying the correct valuation methodology. However, they provide guidelines on some limited issues. Inserting guidance provisions into the South African Act may assist the South African courts in determining, for example, whether a minority discount should be applied when determining the fair value of the shares or not or not. The concept of a provisional payment which must be made to the shareholder would also prove useful in South Africa. The rationale for provisional payment is to compensate the dissenting shareholder for his shares. In terms of s 112C of the New Zealand Act the legal title to the shares passes to the company on the day that the board agrees to purchase the shares. It seems unfair to expect a shareholder to forfeit all his rights as a shareholder and wait (for what could amount to a considerable

period) before he receives any payment at all for his shares as is the case in terms of s 190(11) of the CBCA and s 164(9) of the South African Act.

Furthermore, a provisional payment arrangement would certainly go some way towards addressing the restrictions on shareholders who wish to exercise their appraisal rights but do not have access to the necessary funds to institute legal proceedings.²⁸⁵ The referral to arbitration (and the fact that the arbitration, including costs thereof, is then regulated by the relevant arbitration statute) is another possible option for consideration²⁸⁶ in South Africa to alleviate the costs, delay and uncertainty associated with litigation. However, it is submitted that referral to arbitration (or indeed, any form of pre-litigation alternative dispute resolution procedure) should be optional and subject to agreement between the parties rather than mandatory.²⁸⁷

Finally, the guidance and clear principles introduced into the New Zealand Act with regard to costs, expenses and payment of interest are useful. It would reduce the risk and uncertainty associated with costs (for both the company and the dissenting shareholders) if the South African Act had set out some guidelines rather than leaving this determination entirely to the courts.²⁸⁸ The ‘punitive’ costs provisions to encourage good faith in making initial offers and to discourage unnecessary litigation as proposed by Jones are also found

²⁸⁵ See paragraph 7.5.2. Note that the CBCA spells out the status of a dissenting shareholder in s 190(11) as having no further rights as does s 164(9) of the South African Act.

²⁸⁶ See paragraph 7.7.

²⁸⁷ Ibid.

²⁸⁸ S164(15)(v).

in other jurisdictions²⁸⁹ and, depending on the way in which appraisal rights litigation develops in South Africa may be usefully applied by the courts.

²⁸⁹ The Californian appraisal rights statute provides that, in the event of a discrepancy between the price originally offered by the company and the fair value as determined by the court, the court may allocate such expenses and costs to the company as it considers equitable. This is similar to the wording of s 164(15)(v) and a South African court could use this provision to achieve the same effect.

CHAPTER 6

APPRAISAL RIGHTS IN SOUTH AFRICA

6.1 Section 164 of the Act

The objective of this chapter is to provide an overview of the appraisal rights provisions in the South African Act and the circumstances in which they apply. As the thesis is not a general commentary or critique on the contents of the appraisal rights provisions in the South African Act *per se*,²⁹⁰ my observations are limited to those provisions in the South African Act which are directly relevant to identifying and encouraging the proper and effective use of appraisal rights. Chapter 5 of the South African Act is entitled ‘Fundamental Transactions, Takeovers and Offers’.²⁹¹ A fundamental transaction is one which constitutes a fundamental alteration of (or material change to) the assets, securities or shareholders of a company. Fundamental transactions include the disposal of all or the greater part of the assets or undertaking of a company,²⁹² amalgamations or mergers²⁹³ and schemes of arrangement.²⁹⁴ I have already briefly alluded to the fact that the appraisal rights provisions are contained within Chapter 5, in section 164 of the Act,²⁹⁵ and are

²⁹⁰ Except in those instances where submissions are made in relation to the amendment of specific sections in order to facilitate the proper and effective use of appraisal rights.

²⁹¹ Ss 112 to 127.

²⁹² S 112.

²⁹³ S 113.

²⁹⁴ S 114.

²⁹⁵ See Cassim et al at 755 and Stein at 363. S 164 is a long and detailed section and therefore only the most relevant provisions have been set out here. See paragraphs 7.3 and 7.5 for critical commentary on some selected content of the section.

triggered when a company has given notice to its shareholders of a meeting to consider adopting a resolution to enter into any of the fundamental transactions referred to above or to amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in a manner materially adverse to the rights or interests of holders of that class of shares.²⁹⁶

It must be noted that the section 164 appraisal rights remedy is only one of a number of remedies potentially available to shareholders in terms of the South African Act. Other shareholder remedies include the right to institute a derivative action in terms of section 165, the right to bring a court application for an order declaring a director of a company to be delinquent director or to place him under probation in terms of section 162 and the right to apply to the court for relief in terms of section 163 if any act or omission of the company or of a related person is oppressive or unfairly prejudicial to the applicant or unfairly disregards his interests. In addition a shareholder or securities holder may, in terms of section 161, apply to court for a declaratory order determining his rights, protecting his rights or rectifying any harm done to him and an interested person may apply to court to disregard the separate legal personality of the company in terms of section 20(9) where there has been an ‘unconscionable abuse’ of the juristic personality of a company.

It is possible that, depending on the specific facts, one or more of the remedies referred to above overlap and may be available to a shareholder in addition to the section 164 appraisal

²⁹⁶ S 164(2)(b).

remedy. The appraisal remedy is, however, distinguishable from most of the other remedies in that it is a ‘no fault’ remedy; provided that one of the trigger events has occurred and the shareholder has met the procedural requirements of the section, it is not necessary for there to have been any wrongdoing, oppressive or prejudicial conduct or abuse on the part of the directors or the company for the shareholder to rely on section 164. In addition, the appraisal remedy is distinguishable from the other remedies because it is only appropriate in circumstances where a shareholder no longer wishes to remain a shareholder of the company and not in situations where the shareholder requires relief but wishes to retain his investment in the company.

Section 164 is a lengthy provision consisting of some twenty subsections and it sets out, in detail, the scope of the appraisal rights of dissenting shareholders and the procedures which must be followed in order to exercise these rights.²⁹⁷ The section commences with an exclusion; it does not apply in any circumstances relating to a transaction, agreement or offer pursuant to a business rescue plan approved by the shareholders of a company in terms of section 152.²⁹⁸ This is a logical exception as the exercise of appraisal rights (or even the potential threat of the exercise of appraisal rights) could well have a negative impact on the potential to restructure a company in order to achieve the business rescue objectives of the South African Act.

²⁹⁷ S 164 is attached as Appendix G.

²⁹⁸ S 164(1). The business rescue provisions are contained in Chapter 6 of the Act.

Where a company has given notice to shareholders of a meeting to consider a resolution with respect to one of the trigger events referred to above, the notice must include a statement informing shareholders of their appraisal rights under section 164.²⁹⁹

At any time before voting takes place, a dissenting shareholder may give the company written notice objecting to the resolution.³⁰⁰ If the company adopts the resolution, a notice stating this fact must, within 10 business days, be sent to any shareholder who initially gave a written notice of objection, provided that the objection notice has not been withdrawn and that the shareholder did not ultimately vote in favour of the resolution.³⁰¹ If all the procedural requirements of section 164(5) have been met, the shareholder may demand that the company pay him the fair value of his shares.³⁰² The demand for payment must be in writing and must be made within the time periods stipulated in section 164(7). The demand must also be delivered to the Takeover Regulation Panel ('TRP') and must state the shareholder's name and address, the number and class of shares in respect of which he seeks payment as well as a demand for payment of the fair value of those shares.³⁰³ A

²⁹⁹ If the company has not given the requisite notice of the meeting, by virtue of s 164(6) the shareholder need not send the notice of objection which would ordinarily be required by s 164(5)(a)(i) to enforce his right. The rationale for this is clear- it would be extremely unfair to deny a shareholder the opportunity to enforce a right on a point of procedure (i.e. not objecting to the resolution timeously) if he was not informed that there was anything to object to.

³⁰⁰ S 164(3).

³⁰¹ S 164(4).

³⁰² S 164 (5). According to s 164(6) the shareholder need not have sent a notice of objection if the company failed to give notice of the meeting or failed to include a statement of shareholders rights under s 164 in the notice.

³⁰³ S 164(8). This requirement is peculiar to the South African statute. Presumably the reason for its inclusion is that the TRP, in its role as the regulator of affected transactions and offers as determined in s 118, needs to remain apprised of developments during the course of the transaction so that it can perform its functions in terms of s 119 of the Act. However, the Act does not restrict the requirement to deliver a demand to the TRP to companies or transactions which are subject to the jurisdiction of the TRP. It appears

shareholder who has sent a demand has no further rights in respect of those shares other than to be paid their fair value, subject to the limited exceptions set out in section 164(9). The company must, within the time limits set by section 164(11), send to each dissenting shareholder a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, accompanied by a statement showing how that fair value was determined.³⁰⁴

Once the company makes an offer for the shares at fair value the shareholder can either accept or reject the offer. If the shareholder accepts the offer he must tender the relevant share certificates (or take the necessary steps to direct transfer of uncertificated shares to the company if the shares have been dematerialised in terms of STRATE) and the company is obliged to pay him the agreed amount within 10 business days thereafter.³⁰⁵ If, however, the shareholder is not satisfied with the offer made by the company because he considers it to be inadequate,³⁰⁶ or if the company failed to make an offer, the shareholder may apply to court to determine a fair value for the shares and an order requiring the company to pay him the value so determined.³⁰⁷ On application to court all dissenting shareholders must be joined as parties³⁰⁸ and all are bound by the decision of the court and the company must

to be a blanket requirement even in the (admittedly) limited appraisal rights situations where the TRP does not have jurisdiction.

³⁰⁴ S 164(11). Note that, in terms of s 164(16) the fair value must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under the section.

³⁰⁵ S 164(13).

³⁰⁶ Provided that the offer has not lapsed. An offer lapses if it has not been accepted within 30 days after it was made.

³⁰⁷ S 164(14).

³⁰⁸ The dissenting parties that need to be joined in the action may be identified through the written notices of objection filed with the company in terms of s 164(3) and the written demand for payment of the fair value in terms of s 164(7). Presumably the company is obliged to make this information available to the

notify each affected dissenting shareholder of the date, place and consequences of the court proceedings and their right to participate.

The court *may* (emphasis added):

- (i) determine whether any other person should be joined as a dissenting shareholder;
- (ii) appoint an appraiser(s) to assist it in determining the fair value of the shares;
or³⁰⁹
- (iii) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date on which the action approved by the resolution is effective until the date of payment.³¹⁰

The court *must* (emphasis added):

- (i) determine a fair value in respect of the shares of all dissenting shareholders;
- (ii) make an order requiring the dissenting shareholders to either withdraw their demands or tender their shares to the company as required by section 164(13)(a); and

dissenting shareholder applicant to enable him to comply with the joinder obligations in s 164(15)(a) of the Act.

³⁰⁹ The use of the word 'or' in this context is curious. It implies that the court has the discretion to either appoint an assessor or to award interest to the dissenting shareholder. Logic dictates that this cannot have been the intention of the legislature and the exercise of one of these discretions by the court does not preclude the exercise of the other. However, this can easily be remedied by an amendment substituting the 'or' with 'and'. It is respectfully submitted that this change should be effected.

³¹⁰ Ss 164(15)(c)(ii),(iv) and(v).

- (iii) make an order requiring the company to pay the fair value to dissenting shareholders who tender their shares as required, subject to any conditions the court considers necessary to ensure that the company fulfils its obligations.³¹¹

At any time before the court makes the order referred to above, the dissenting shareholder may still accept the initial offer and tender his shares to the company which is then bound to pay the agreed amount.³¹²

The fair value of the shares must be determined as at the date on which, and at the time immediately before, the company adopted the resolution that gave rise to the appraisal rights.³¹³ Section 164(17) sets out the procedure to be followed if there are reasonable grounds to believe that payment for the shares in question would result in the company breaching the liquidity requirements of the Act. Essentially the company may apply to the court for an order varying its obligations in these circumstances and the court may make any order that is just and equitable and ensures payment at the earliest possible date which is compatible with the company satisfying its other financial obligations.³¹⁴ Section 164(18) provides that if, as a result of the merger or amalgamation which gave rise to the

³¹¹ Ibid.

³¹² S 164(15A).

³¹³ S 164(16).

³¹⁴ For further discussion and comment on this aspect see paragraph 7.5.1.5 *infra*. The Canada Business Corporations Act contains similar provisions in ss 24-26.

appraisal rights, the company whose shares are the subject of the appraisal rights ceases to exist its (appraisal rights) obligations become obligations of its successor company.³¹⁵

Finally, section 164(19) provides that demands, share tenders and payments in terms of section 164 do not constitute a distribution by the company nor an acquisition of its shares³¹⁶ and section 164(20) provides that an appraisal rights payment to a shareholder does not obligate any person to make a comparable offer under section 125 to any other person.³¹⁷

6.2 Other relevant sections of the Act

There are a number of sections contained in the Act which are not obviously and directly linked to section 164 but nevertheless do have an impact on the potential application of the section. These other relevant sections must also be considered when interpreting the provisions of section 164, because they influence the potential applicability of foreign cases or legal mechanisms. They are identified and discussed below.

³¹⁵ S 164(18). This prevents the avoidance of appraisal rights obligations (and the loss of the appraisal rights remedy by dissenting shareholders) by structuring a transaction so that the company against which these rights may be exercised is legally dissolved in terms of the transaction.

³¹⁶ Thus obviating compliance with the requirements of ss 46 and 48 or the solvency and liquidity test. See paragraph 7.5.1.5.

³¹⁷ Except to the extent that s 164 expressly provides otherwise, or if the Takeover Regulation Panel rules otherwise in a particular case. S 125 regulates the obligation of the offeror in an affected transaction that is making a partial offer for the securities of a company to make a comparable offer to all the holders of that class of securities.

6.2.1 General interpretation of South African Act

Section 5 sets out the general principles of interpretation which apply to the South African Act. First, the South African Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7. Section 7 states that the purposes of the South African Act are, *inter alia*, to:

- (a) promote the development of the South African economy by –
 - (i) encouraging entrepreneurship and efficiency;
 - (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
 - (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- (b) promote innovation and investment in the South African markets;
- (c) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
- (d) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;

- (e) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- (f) balance the rights and obligations of shareholders and directors within the companies;
- (g) encourage the efficient and responsible management of companies; and
- (h) provide a predictable and effective environment for the efficient regulation of companies.

Thus any court dealing with a dispute involving appraisal rights will need to interpret and apply the relevant provisions in the Act in a manner that gives effect to the purposes set out above.³¹⁸ This is no mean feat given the wide and vague nature of these guidelines.³¹⁹

Secondly, and significantly for the purposes of this thesis, to the extent appropriate, a court interpreting or applying the South African Act *may* (my emphasis) consider foreign law.³²⁰

This provision and the potential effect thereof has been alluded to previously in earlier

³¹⁸ These provisions are also relevant in light of the judgment handed down by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2102 (4) SA 593 (SCA). The SCA reiterated that the proper approach to statutory interpretation is to read the particular words used in the context of the document as a whole and in light of the relevant circumstances. The court, at paragraph 18, states that ‘the ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ It is submitted that s 7 will, to some extent, assist the courts with this process in the event of an ambiguous or uncertain interpretation of any aspect of s 164 because it sets out the purposes of the South African Act.

³¹⁹ Cassim et al at 4. See also Sutherland (2012) *Stell LR* 157 at 161.

³²⁰ S 5(2).

chapters.³²¹ It is clear that, when courts are eventually called upon to interpret and apply aspects of the section 164 appraisal rights provisions and need to consult foreign law, as they will inevitably need to do, the cases and academic writings in the USA and Canada are the most appropriate.³²² Due to the substantial similarity between the South African and Canadian sections, any pertinent differences should be particularly scrutinised as there is no doubt a rationale for such a deviation. In respect of any dichotomy which exists between the Model Business Corporation Act and the Delaware statute, when applying case law, South African courts should note that from a doctrinal point of view the South African Act is not wholly aligned with the core principles of either statute.³²³

Needless to say, as with all foreign comparative law exercises, comparisons should only be drawn if the history and context of a comparable foreign provision is also taken into account. Finally, the courts should remain alive to the fact that this is a remedy which is completely new to our law. As it is also foreign in nature and effect to the ‘supremacy of the majority’ principle which has always characterised our common law,³²⁴ it would be prudent to initially interpret its provisions strictly in order to limit its reach to the parameters set by the section itself. There are some differences between the South African Act and other legislation, such as the arbitration provisions in the New Zealand Act, which can be used to good effect in South Africa by the legislature and possibly corporations in

³²¹ See Chapters 1 and 2.

³²² See Chapters 3 and 4.

³²³ Siegel (2011) 79 and see paragraph 3.2 *infra*.

³²⁴ *Sammel v President Brand Gold Mining* 1969(3) SA 629 (A). See further MF Cassim ‘The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part I)’ (2008) 20 *SA Merc LJ* 19, MF Cassim ‘The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part II)’ (2008) 20 *SA Merc LJ* 147.

the structuring of their own affairs.³²⁵ There are also anomalies and complexities which have arisen in foreign case law and which can be remedied by amending the South African Act and thus reduce commercial uncertainty and potentially unnecessary litigation. The suggestions made in this regard are set out in paragraph 7.5.

6.2.2 Anti-avoidance

It is important to bear in mind that the South African Act contains a provision which is not found in the corporate laws (and thus does not apply to the appraisal rights provisions) of the other jurisdictions under investigation. Section 6(1), also known as the anti-avoidance provision, states that:

a court, on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules-

(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and

(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

³²⁵ This aspect is addressed in more detail in paragraphs 7.5 – 7.7.

It is possible that measures taken by companies and merger parties in other jurisdictions to ameliorate the potentially deleterious effects of appraisal rights may be declared void by a South African court. All potential foreign solutions therefore need to be assessed against this backdrop and tested in this context.³²⁶

6.2.3 Amendment of the Memorandum of Incorporation

The simplest and most logical way for companies to ‘customise’ the appraisal rights provisions in the South African Act,³²⁷ and then to make the customized provisions applicable to the company, its shareholders and its directors would be to specifically include them in the Memorandum of Incorporation of the company.³²⁸ The Memorandum of Incorporation is binding between the company and each shareholder, the shareholders inter se and between the company and its directors, prescribed officers and board members.³²⁹ However, each provision of the Memorandum of Incorporation must be consistent with the South African Act and is void to the extent that it is inconsistent with or contravenes the South African Act.³³⁰

³²⁶ See further paragraph 7.2. Although it has not been formally published anywhere, I have heard the view expressed that the anti-avoidance provisions only apply to the unalterable provisions of the South African Act and that the provisions of s 164 are not unalterable provisions because unalterable provisions are limited to provisions which may appropriately be incorporated into the Memorandum of Incorporation of a company in terms of s 15(6). However, there is no published authority or precedent to support this view.

³²⁷ By, for example, introducing an arbitration option or stipulating a preferred valuation methodology in the event of a dispute into the Memorandum of Incorporation.

³²⁸ The other alternative is to use a shareholders’ agreement, but as this constitutes an agreement between the shareholders in terms of s 15(7) it will not serve to bind the company. The rules of a company are not applicable as, in terms of s 15(3), the rules relate to the governance of the company in respect of matters not addressed in the Act or Memorandum of Incorporation. Appraisal rights do not fall into this category.

³²⁹ S 15(6).

³³⁰ S 15(1).

All provisions of the South African Act can be classified as either ‘alterable’ or ‘unalterable’. Section 1 defines an alterable definition as ‘a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s Memorandum of Incorporation’. An ‘unalterable provision’, on the other hand, is also defined in s 1 as ‘a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s Memorandum of Incorporation or rules’. The Memorandum of Incorporation may not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision except to the extent that it raises the standard of the requirements set by the original provision as described above.³³¹ The distinction between alterable and unalterable provisions thus impacts on the manner in, and the extent to which, legislative provisions can be amended by the Memorandum of Incorporation of a company.³³² Since section 164 contains no express wording to indicate that its effect may be ‘negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by the Memorandum of Incorporation’³³³ it is an unalterable provision.

³³¹ S 15(2)(d).

³³² Cassim et al 128.

³³³ S 1.

Section 15(2)(d), however, provides that a company's Memorandum of Incorporation may not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision except to the extent that it raises the standard of the requirements set by the original provision by imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act.³³⁴ Thus anything contained in a company's Memorandum of Incorporation which relates to or impacts on section 164 is only permissible in terms of the South African Act to the extent that it places a greater burden on the company or makes the appraisal rights provisions more onerous from the perspective of the company than those currently contained in section 164. The Memorandum of Incorporation may include any provision dealing with a matter that the South African Act does not address or altering the effect of any alterable provision of the South African Act.³³⁵

In this context it is interesting to have regard to the guidelines for corporate reform³³⁶ which served as a doctrinal roadmap for the drafters of the South African Act and which provide that:

³³⁴ S 15(2)(d).

³³⁵ S 15(2)(a).

³³⁶ See The Policy Framework for Company Law Reform published on 23 June 2004 as 'South African Company Law for the 21st Century: Guidelines for Corporate Reform' in *Government Gazette* 26493, vol 468, Notice 1183 of 2004. See also TH Mongalo 'An overview of Company Law Reform in South Africa' 2010 *Acta Juridica* xiii at xx.

(a) South Africa's company law should keep prescriptive statutory rules to a minimum and, in addition, some of the mandatory terms should be subject to being overridden through the Memorandum of Incorporation and company rules.

(b) By the same token, the law should give corporate promoters greater power to use the company constitution i.e. the Memorandum of Incorporation, to vary otherwise mandatory terms.

(c) The efficiency and the flexibility brought about by the statute should not only serve the interests of corporate directors, but should also protect the interests of shareholders and, where appropriate, those of other relevant stakeholders.

(d) Consequently, shareholders should have the freedom to devise provisions in the company that address the specific needs of their company.³³⁷

It seems clear, therefore that, at least at the outset, the drafters' intention was to follow a policy of maximum flexibility as far as the customisation of the Memorandum of Incorporation is concerned. This is further borne out by s 6(2) which promotes this flexibility by permitting the Companies Tribunal to exempt any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation from complying with the unalterable provisions of the South African Act provided that it can be shown that the transgressing provision or scheme serves a reasonable purpose and is reasonable and justifiable having regard to the purposes of the South African Act and all

³³⁷ Ibid.

relevant factors.³³⁸ Relevant factors include the purpose and policy served by the relevant prohibition or requirement and the extent to which the transgressing element or instrument infringes or would infringe the relevant (unalterable) prohibition or requirement. These provisions (and the aforementioned drafting guidelines) become relevant when considering to what extent a court could or should permit a company to modify the standard appraisal rights provisions.

6.2.4. Purpose of the South African Act

Chapter 7 of the South African Act contains another interesting and relevant provision in the form of section 158. This section, which deals with remedies to promote the purpose of the South African Act, provides that, when determining a matter brought before it in terms of the South African Act or making an order contemplated in the South African Act, a court must develop the common law as necessary to improve the realization and enjoyment of rights established by the South African Act.³³⁹ Whilst appraisal rights do not form part of our common law, they are ‘rights established by the Act’ within the meaning of section 158 read with section 164. Therefore, if a matter before the court involves appraisal rights the court is bound to interpret and develop (i.e. a positive duty rests on the court) the common law in such a way that it gives effect to the enjoyment of appraisal rights. In this way this relatively novel import into our company law has been inextricably linked with our existing and future common law.³⁴⁰

³³⁸ S 6(3)(a) and (b).

³³⁹ S 158(a).

³⁴⁰ S 158(b)(i).

Furthermore, the Commission, the Panel and the Companies Tribunal must promote the spirit, purpose and objects of the South African Act.³⁴¹ Where any provision of the South African Act or document in terms of the South African Act, read in its context, can be reasonably construed to have more than one meaning, these bodies must prefer the meaning that best promotes the spirit and purpose of the South African Act and will best improve the realization of rights (including, of course, appraisal rights).

The obligations placed on the courts, the Commission, the Panel and the Companies Tribunal in this section are not discretionary but mandatory. It follows that where, for example, the Panel becomes aware that appraisal rights are being routinely and easily circumvented in transactions which fall within its jurisdiction³⁴² it is duty bound to put a stop to such practices. This flows from the Panel's duty to promote the spirit, purpose and objects of the Act – the purpose, spirit and object of the appraisal rights provisions is primarily the protection of minority shareholders.³⁴³ Thus, it is arguable that a transaction involving regulated companies which circumvents section 164 and, in so doing, completely denudes shareholders of their appraisal rights and the protection the South African Act which intended to offer them is not only contrary to the general spirit, purpose and objects of the South African Act but also the specific purpose and object of section 164.³⁴⁴

³⁴¹ S 158(b)(ii).

³⁴² S 119 read with s 121 and the definitions of 'affected transaction' and 'offer' in s 117(1)(c) and (f).

³⁴³ Op cit note 267.

³⁴⁴ See paragraphs 7.5 and 7.6 infra for a discussion of the current practice of making a transaction subject to the condition that no appraisal rights are exercised.

CHAPTER 7

THE CHALLENGES TO EFFECTIVE AND PROPER USE OF APPRAISAL RIGHTS

7.1 General

Generally, and across all jurisdictions, it appears that the problems and challenges related to both the effective and the proper use of appraisal rights arise from four main concerns.

These are:

- (a) the complexity and technicalities of the procedure involved,
- (b) the costs associated with the process of enforcement,
- (c) the time and delays occasioned by the process together with the uncertainty inherent in the process and its outcome; and
- (d) the potential for abuse of the appraisal remedy.

These factors may either inhibit shareholders from effectively enforcing their appraisal rights or, alternatively, restrict healthy corporate action if companies are concerned about

the cost, time and uncertainty associated with defending possible appraisal rights actions.³⁴⁵ As a result appraisal rights have not, until recently, been used as often or as effectively as might have been expected.³⁴⁶ As illustrated in Chapter 3, this has certainly been the case in the United States³⁴⁷ notwithstanding the fact that in the US shareholders are notoriously litigious to the extent that ‘virtually all transactions involving controlling shareholders are challenged, typically in the Delaware courts which are known for their efficient and sophisticated handling of complex corporate matters’.³⁴⁸

Members of the South African and international team of expert practitioners, consultants and academics who participated in conceptualising and drafting the South African Act recognised and described the challenges attached to the appraisal remedy for dissenting shareholders as follows:

‘It is clear, however, that the process is a potentially complicated, costly and time-consuming one. The shareholder is required to take a variety of steps in order to exercise

³⁴⁵ The time, cost and uncertainty associated with defending appraisal rights actions may enable unscrupulous (usually commercially sophisticated) shareholders to abuse the appraisal rights remedy by holding companies to ransom or thwarting company actions by merely raising the specter of appraisal rights action.

³⁴⁶ M Siegel ‘Back to the Future: Appraisal rights in the Twenty-First Century’ (1995) 32 *Harvard Law Journal* 79. M Siegel ‘An Appraisal of the Model Business Corporation Act’s Appraisal Rights Provisions (2011) *Law and Contemporary Problems* Vol 74:231. J Thomas Curry and Usman Sheikh ‘Dissent and Appraisal Rights: a right with no remedy?’ Threats and Opportunities: litigating under OBCA/Canada Business Corporations Act, 2006, Ontario Bar Association Continuing Legal Education. Anders Bruun and Michael Lansky ‘The Appraisal Remedy for Dissenting Shareholders in Canada: Is it effective?’ *Man L. J.* Vol 8 1977-1978 at p 683. B Manning ‘The Shareholders Appraisal Remedy, an essay for Frank Coker’ (1962) 72 *Yale Law Journal* 223.

³⁴⁷ Davids, Norwitz and Yuill ‘A Microscopic Analysis of the New Merger and Amalgamation Provisions in the Companies Act 71 of 2008’ (2010) *Acta Juridica*, 337 at 360, note 75.

³⁴⁸ *Ibid* at 358. However, there has been renewed interest and a spate of activity in appraisal rights litigation in the last two years. The possible driving forces behind this trend and the associated cases are discussed in more detail in paragraph 3.4 above.

its rights, and is entitled to exercise its appraisal rights only if it follows the procedure correctly. To the extent that it is required to approach the court in order to have the fair

value of its shares determined, there may be a considerable delay before it is compensated for its shares, bearing in mind that once it has demanded fair value for its shares from the company, it has no further rights in respect of its shares, other than to receive payment. There is also the cost involved in litigating, which may often be prohibitive. All of this may discourage a shareholder from exercising its appraisal rights, particularly small shareholders with limited funds...³⁴⁹

The various criticisms of the appraisal remedy as an effective tool are well-documented in other academic writings as well. According to Siegel ‘the remedy has long been viewed as useless except to shareholders with a large number of shares.’³⁵⁰ The US Courts have opined that individual minority shareholders with small claims would find the appraisal right as a remedy economically unattractive due to the legal costs of discovery and expert witnesses³⁵¹ and Manning, one of the most widely-cited authors on this topic, is particularly unforgiving in his assessment of the appraisal remedy. Commenting on the complexity, length and expense of the procedure he poses the following questions:

‘How long will the procedure take to collect on a claim under the appraisal statute? Who is to pay for the expenses of appraisal? What are the ground rules on judicial review,

³⁴⁹ Davids, Norwitz and Yuill at 360. The authors have the benefit of an ‘insider’ perspective as they participated in the process of drafting the Act at various stages alongside other local and international experts. This makes the cited article particularly helpful and insightful.

³⁵⁰ Siegel (2011) at 80.

³⁵¹ *Pellman v. Cinemara, Inc.* 503 F. Supp. 107, 110 (S.N.D.Y. 1980).

appeals, delaying tactics? When does the dissenter have to make up his mind about filing the claim and does he forfeit other remedies if he files? When does the dissenter cease to be a 'shareholder' for purposes of dividends, notices, suit and other matters? Once he has undertaken the route of dissent and claim, may he change his mind and rejoin the majority? These questions, and many more, are relevant and important. In seeking to provide for them in advance, the modern statutes have become long and intricate. And the procedure has grown long and expensive. As could be confidently predicted, the courts have tended to be increasingly stringent in enforcing the procedural letter as the statutes have grown more complex in their procedural nicety'.³⁵²

In relation to the uncertainty inherent in a judicial determination of value of a dissenting shareholder's shares, Manning remarks:

'Where there is no continuous active market, the courts have had to pull out of the air a single figure as 'the value'. They have tried all the usual textbook techniques for valuation. They have capitalized earnings, inventoried break-up value, gone after the going-concern value, totted up replacement costs, and compared other corporations said to be comparable. In the absence of a solid market, share evaluation has proved no easier and no more predictable for purposes of dissenters' appraisal rights than for other purposes. No one can be faulted for this unreliability. It is inherent in the process.'³⁵³

³⁵² Manning at 231.

³⁵³ Ibid.

As stated at the outset, opponents of the appraisal right raise concerns about its potential for abuse. Ironically many of the same factors which limit the usefulness of the appraisal right from a shareholder's perspective make it particularly unattractive, from the perspective of a board of directors, to become embroiled in appraisal rights proceedings. In other words, the company (as respondent) will also experience appraisal rights proceedings as complex, expensive and time-consuming and the outcome of the process as being uncertain and unpredictable. By necessary implication companies usually want to avoid appraisal rights litigation, making such litigation (or even the threat of litigation) a potential tool for abuse in the hands of a sophisticated and unscrupulous shareholder.³⁵⁴ The official statutory comment on Chapter 13 of the Model Business Corporation Act puts it thus: 'From the viewpoint of the corporate leadership, the appraisal process is criticized because it fails to protect the corporation from demands that are motivated by the hope of a nuisance settlement or by fanciful conceptions of value'.³⁵⁵

When Manning states that 'from the perspective of the company, these statutes can be a frightful drain and burden',³⁵⁶ he also points out that the company cannot know in advance how many dissenters there will be with respect to a particular transaction or trigger event and therefore the company cannot plan its cash flow requirements accordingly. As a result

³⁵⁴ This reluctance to become embroiled in appraisal rights litigation does, however, have positive consequences as well. It often exerts an *ex ante* effect on decisions made by the board who will want to avoid appraisal rights litigation resulting in the offer of a higher price per share from the outset. See further paragraph 3.4 above.

³⁵⁵ Official Comment to Chapter 13 of Revised Model Business Corporations Act, 1984.

³⁵⁶ Manning at 238.

even a small number of dissenters can have a dramatic effect on the economic health of a company which may already be in a commercially vulnerable position because it will be

in the throes of a fundamental transaction. It is imperative that a company embarking on a fundamental transaction is able to determine, as soon and as accurately as possible, what its total exposure to dissenting shareholders' appraisal claims may be. However, whether this is possible or not depends largely on the procedure prescribed in the appraisal rights statute.

In terms of the procedures prescribed in many of the American state statutes claimants are not required to file their claims until sometime after the merger. Manning³⁵⁷ regards this situation as 'both circular and dangerous.' Fortunately the South African appraisal remedy provisions have avoided this particular uncertainty. Section 164(3) requires a shareholder to send the company a notice of objection if he intends to object to the resolution before the resolution is voted on. This should give companies a reliable indication of the level of dissent and, because shareholders who do not submit a notice of objection may not exercise their appraisal rights,³⁵⁸ this will also give the board a 'high water mark' for the calculation of potential appraisal rights which are to be exercised. (It is of course possible that shareholders who dispatched a notice of objection change their minds and withdraw their

³⁵⁷ Ibid at 235.

³⁵⁸ S 164(5).

notice or else vote in support of the resolution in terms of section 164(4), thereby removing themselves from the pool of dissenting shareholders.)

The recent spate of appraisal arbitrage litigation in Delaware³⁵⁹ underscores rather than negates the validity of the criticisms with respect to the exercise of appraisal rights. The hedge funds and sophisticated arbitrageurs who have used appraisal rights to extract a higher price per share are not subject to the same restrictions as an ordinary shareholder - they have the benefit of access to ongoing intensive market research, funding and financial and legal advisors to negotiate the successful exercise of the rights. In addition, they can rely on the uncertainty, delays, negative publicity and legal complexities inherent in appraisal rights litigation to induce the company in question to settle before the matter comes before a court.³⁶⁰

To sum up the legislative challenge, if South Africa is to realise the ambitions of the drafters of the South African Act - that appraisal rights should constitute a real and effective remedy - it is essential that any shareholder who wants to enforce those rights must have access to speedy, cost-effective relief which is not predicated on complex procedural requirements. It is, however, equally important that minority shareholders should not be

³⁵⁹ Paragraph 3.4 *infra*.

³⁶⁰ *Ibid*.

able to wrongfully thwart the will of the company or hold the company to ransom through a threat of exercising the appraisal rights or that the appraisal remedy is capable of being abused by unscrupulous shareholders. These cannot have been the intended outcomes and objectives of the legislature.³⁶¹

7.2 Challenges in South Africa

There is no reason to anticipate that the problems faced with respect to the effective exercise of appraisal rights in South Africa will be vastly different from those which have arisen in foreign jurisdictions,³⁶² although some may be more pronounced or aggravated in the South African context. As was illustrated in chapters 3 and 4, since even the legally sophisticated and experienced commercial courts in Delaware and the other courts in the USA and Canada have consistently grappled with the correct valuation methodology to ascertain the fair value of shares in appraisal rights actions,³⁶³ this is likely to be even more problematic in South Africa where courts will be dealing with the valuation issue in this context for the first time and where we do not have a specialised commercial court system. Furthermore, the delays occasioned by appraisal rights litigation experienced in the USA are likely to be as severe, if not worse, in South Africa given the fact that our court system

³⁶¹ See 'The Companies Act 71 of 2008: dissenting shareholders appraisal rights - are companies going to be held to ransom?' <http://www.cliffedekkerhofmeyr.com/news/files/CDH-Dispute-Resolution-Matters-Spring-2010.pdf> (accessed 30 November 2011).

³⁶² Obviously this presupposes that the legislative provisions are very similar. Where this is not the case, the differences will be highlighted.

³⁶³ See, for example, *Weinberger v UOP*, 457 A. 2d 701 (Del. 1983) and, more recently, *Golden Telecom, Inc. v. Global GT LP*, 2010 WL 5387589 (Del. Supr.)(Dec. 29, 2010), *Berger v. Pubco Corp., et al.*, Del. Supr., No. 509, 2008 (July 9, 2009) and *In re Sunbelt Beverage Corporation Shareholder Litigation* Del. Ch. Consol C.A. No. 16089-CC, February 15, 2010. See also the reference at note 79.

is already indisputably overloaded.³⁶⁴ The concerns of the legal fraternity in South Africa have been expressed as follows³⁶⁵:

‘It is feared that granting appraisal rights triggered by the conclusion of a fundamental transaction could severely inhibit corporate activity. The risk of having to pay minority shareholders an undefined amount of money on the entering into of a transaction makes the planning of a fundamental transaction extremely difficult. Unless the risk of appraisal rights being exercised can be clearly quantified, a company will be uncertain in many instances whether it will be called upon in terms of Section 164 of the Act and, if so, the amount of its financial obligations which will arise as a result thereof. This makes the evaluation of a transaction, and the raising of the requisite amount of finance in order to fund a transaction, extremely difficult. In many instances, standby funding will have to be arranged in the event of appraisal rights being exercised, adding to the cost of the transaction. The uncertainty as to what may constitute fair value adds to the difficulty and makes the evaluation of the financial consequences of a transaction difficult, if not impossible, to properly quantify.’

This aspect is discussed in detail in 7.3.1 below.

A further point of criticism commonly levelled against appraisal rights is the fact that they are technically complex to enforce. They contain onerous time constraints and complicated

³⁶⁴ See, for example, *Socratous v Grindstone Investments* (149/10) [2011] SCA 8 (10 March 2011) at paragraph 16 where the court stated (in the context of a civil dispute) that ‘the Courts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.’

³⁶⁵ See K Cron ‘Shareholder appraisal rights under the new Companies Act: Boon or Bust?’ Available at <http://www.nortonrose.com/news/45534/shareholder-appraisal-rights-under-the-new-companies-act-boon-or-bust> (accessed 1 November 2011). See further the comments by S Teichner as quoted in <http://www.sowetanlive.co.za/news/business/2012/01/06/minority-shareholders-could-disrupt-deals> (accessed 16 April 2012).

procedural steps which must be followed in order to exercise the right, failing which a dissenting shareholder stands to lose his appraisal right. In South Africa where we do not have a history of shareholder activism and where many shareholders are new, commercially unsophisticated investors entering the market for the first time (for example, in terms of transactions driven by Broad-Based Black Economic Empowerment³⁶⁶ imperatives), the substantial compliance sections may offer some relief. So, for example, in terms of section 6(10) notices which the dissenting shareholder is required to send to the company or the Panel in terms of section 164 may be transmitted electronically (and need not be formally served in hard copy). Furthermore, as long as it does not negatively affect the substance of the notice or would reasonably mislead a person reading the notice a dissenting shareholder will not need to comply strictly with the requirements in section 6(8) relating to the prescribed content of the demand to be delivered to the Panel.³⁶⁷

It remains to be seen to what extent the courts will apply the substantial compliance concessions of section 6, but it is submitted that it would be appropriate to apply these where a minority shareholder would otherwise be deprived of his appraisal rights on the basis of technical non-compliance with one of the many complex requirements of section 164.

³⁶⁶ In terms of the Broad-Based Black Economic Empowerment Act 53 of 2003.

³⁶⁷ S 6(8)(b).

It has already been pointed out that it may be possible for shareholders to stifle corporate action merely by threatening to exercise their appraisal rights, thus giving them a level of power which exceeds their power as shareholders in terms of the 'traditional' allocation of power within a company, that is, as reflected by their shareholding. South African law firms have already started to advise corporate clients to either protect themselves from this contingency by, for example, including conditions in their transactions documentation which give the company a right to withdraw from a proposed transaction if more than a stipulated number of shareholders (or shareholders holding more than a stipulated percentage of the shareholding) give notice of their intention to exercise their appraisal rights.

Much of the perceived threat with respect to the impact of appraisal rights on a transaction is attributable to the uncertainty which currently surrounds this new mechanism in South Africa. Not only is it uncertain what kind of delays could be occasioned by the exercise of appraisal rights, but courts will need to make determinations in relation to litigation costs and determine share value. In fact, some companies may elect to avoid this uncertainty by structuring a transaction as a general offer as opposed to a scheme of arrangement or merger where this is possible.³⁶⁸ If a general offer to shareholders to purchase their shares at a specified price does not qualify as a scheme of arrangement, merger or amalgamation, it does not constitute one of the events contemplated by section 164 and accordingly does not trigger appraisal rights.

³⁶⁸ Teichner op cit note 296.

Furthermore, given the realities of minority shareholding in South Africa, minority shareholders in some of the large, listed entities are often BEE shareholders who have been funded by major banks or have had cash advanced against their equity. Arguably the potential for possible abuse of appraisal rights is exacerbated in South Africa where these shareholders are eager to exit the company at the best available price and they are supported by their sophisticated funders who want to recoup the loan. They may use the appraisal remedy to facilitate an exit if, for example, there is an adverse change made to the Memorandum of Incorporation in terms of section 37(8). This situation becomes even more threatening to a vulnerable company which, if ordered to make an appraisal payment, must do so notwithstanding the fact that the payment may render it insolvent.³⁶⁹

7.3 Selected issues in the South African Act

7.3.1 Determination of fair value

Determining the ‘fair value’ of a share constitutes a challenge both because of the innate complexities of different valuation methodologies and the uncertain result which this brings to the process. There are no clear and immutable rules as to which valuation

³⁶⁹ See paragraph 7.5.1.5. This is not the case in the Canada Business Corporations Act which enables a company to defer any appraisal rights payment which will have the effect of making it either illiquid or insolvent.

methodology will be applied by the court in a particular case, both in the foreign jurisdictions and certainly in South Africa at present.³⁷⁰

If the dissenting shareholder applies to court to determine a fair value, the court ‘must determine a fair value in respect of the shares of all dissenting shareholders’³⁷¹ and ‘the fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to the shareholder’s rights under (the) section’.³⁷² In order to determine the fair value the court has the discretion to ‘appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or³⁷³ to allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment’.³⁷⁴ The term ‘fair value’ is not defined in section 164 or anywhere else in the South African Act and no other legislative guidance is provided as to the meaning, application or content of the term.

The lack of legislative guidance in the South African Act for determining what constitutes fair value in this context means that courts will need to look to foreign jurisdictions³⁷⁵ for

³⁷⁰ Regarding the generally accepted principles of valuation and the multiple methods of share valuation see chapter 3 of *The Appraisal remedy and the Determination of Fair Value by the Courts*, KR Hillis (unpublished LLM dissertation, UNISA, 2014). See also *Gold Coast Selection Trust Ltd v Humphrey (Inspector of Taxes)* [1948] All ER 379 at 384; *Borland’s Trustees v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 288; *Warren v Baltimore Transit Co* 220 Md. 478 at 482; *Holt v Inland Revenue Commission* [1953] All ER 1499 (Ch. D) at 1501; *Weinberger v UOP Inc* 457 A.2d 701.

³⁷¹ S 164(15)(c)(ii).

³⁷² S 164(16).

³⁷³ See my previous comments regarding the questionable use of the word ‘of’. I submit that it is the word ‘and’ which should have been used here instead. The appointment of appraisers and the allocation of interest should not be mutually exclusive discretions.

³⁷⁴ S 164(c)(iii).

³⁷⁵ See s 5(2).

precedents and direction. It seems logical that the courts should turn first to Canada and the USA for foreign guidance. However, the strong common law influence of English law on our company law should not be underestimated and it is possible that courts will also have regard to cases emanating from the United Kingdom as authority for how to best determine the fair value of a share – as they have done in the past - notwithstanding the fact that the United Kingdom company law regime does not contain appraisal rights. It is submitted that a comparison with that law may be helpful in certain circumstances but will not always be appropriate or desirable, primarily because the law does not contain a comparable legislative provision.³⁷⁶

In the past South African courts have primarily relied on UK judgments when called upon to determine a fair price or value for shares in the context of section 252 of the 1973 Act³⁷⁷ and, to a lesser extent, section 440K of the 1973 Act.³⁷⁸ In legal proceedings based on section 252 a minority shareholder could approach the court for relief in the event that a particular act or omission of a company, or the affairs of the company were being conducted in a manner which was unfairly prejudicial, unjust or inequitable to him or to some of the shareholders of the company. If the court found this to be the case, it could make any order it deemed fit, including an order that the shares of the affected shareholders be purchased by the other shareholders or the company.³⁷⁹ In doing so the court by

³⁷⁶ The UK legislation has always relied on the oppression remedy to protect minority shareholders in these circumstances. See Chapter 2 *infra*.

³⁷⁷ Now these provisions are contained in section 163 of the Act.

³⁷⁸ In the UK the comparable sections were contained in Part 13A of the 1985 Act and are now contained in sections 974-991 of the Companies Act, 2006.

³⁷⁹ S 252(3) of the 1973 Act.

necessary implication had to determine a fair purchase price for the shares in question. The UK legislation contained a substantially similar section, namely section 459 of the Companies Act, 1985.³⁸⁰ Consequently the South African courts used UK judicial precedent to develop the ‘fair price’ valuation jurisprudence in this context.³⁸¹

For example, the courts have made an order appointing an expert valuer to determine the value of the shares by following the directions in the court order,³⁸² the objective of the section (to provide relief from oppression or prejudice) is taken into account and this impacts on the valuation methodologies used,³⁸³ the circumstances of each case dictate the appropriate valuation methodology, minority discounts do not apply to quasi-partnerships and any contractual valuation terms and methodologies contained in the articles or shareholders agreements are not necessarily applicable to a valuation by the court.³⁸⁴

The position in Australia is similar to that in the UK, as Australian company law does not contain appraisal rights in the form of a dedicated, separate provision with specific requirements and prescribed procedures. Rather, section 233 of the Australian Corporations Act, 2001 specifies that a court may order that the company repurchases the

³⁸⁰ These provisions are now contained in s 994 of the United Kingdom Companies Act, 2006.

³⁸¹ MF Cassim (2008) at 168 and Hillis at 9.

³⁸² *Hickman v Oban Infrastructure (Pty) Ltd & others* 2010 JOL 25176 (GSJ). See also *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) where the court appointed a chartered accountant to determine the value of the minority shareholder’s shares taking into account the effect of a breach by the directors of their fiduciary duty under s 75 of the Act.

³⁸³ *Benjamin v Elysium Investments Ltd* 1960 3 SA 467 (E); *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society* [1979] 4 All SA 361 (W) 383.

³⁸⁴ *Ibid.*

shares of a qualifying minority shareholder under the general banner of the oppression remedy. This is akin to the powers of the court under section 163 of the South African Act and section 459 of the UK Act in relation to oppressive and prejudicial conduct and therefore any guidance which may be taken from the Australian case law on this subject must be thoroughly tested for applicability and context in relation to appraisal rights.

Through the mechanism of section 233 the Australian legislature sought to provide protection to shareholders from the controllers of a company where said controllers have ostracised, oppressed, or purposefully excluded the views of minority shareholders. Thus the section often functions as an exit mechanism for wronged minority shareholders. As is the case in other jurisdictions,³⁸⁵ it is the court that must determine the value of the shares which are to be bought. According to Brockett,³⁸⁶ despite the fact that there is extensive case law on the remedy, very few clearly defined judicial principles can be extracted from the judgments. Accordingly ‘the absence of clear guidance makes this area of law difficult for practitioners to offer advice with any degree of certainty. Arguably, this is consequential upon the many and varied circumstances in which minority protection is sought and the valuation process itself...The corollary of this is that it is not possible, or prudent, for the courts and legislatures to attempt to enumerate the relevant approaches and therefore restrict a court’s discretion.’³⁸⁷ This statement also holds true for legislation which regulates the appraisal remedy and it is fortunate that the drafters of the Act did not

³⁸⁵ Such as the UK, South Africa and Canada with respect to the corresponding sections.

³⁸⁶ R Brockett ‘The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review’ 24.2 (2012) *Bond Law Review* 101.

³⁸⁷ At 105.

attempt to prescribe the specific valuation processes and methodologies to be applied by the courts. However, it does serve to emphasise the complexity and potential unpredictability of the valuation exercise.

In his review of the Australian case law, Brockett distinguishes between valuation in a non-oppression context³⁸⁸ and the valuation in an oppression context. The gist of the distinction appears to be that in the latter context the court is vested with a broad and unrestricted discretion in making its determination to do what is fair in the circumstances. Brockett also makes the point that it is becoming more common for Australian courts making judicial valuations to ignore or alter normal commercial valuation principles³⁸⁹ and even to apply different rules depending on the circumstances of the case.³⁹⁰ He concludes that the broad discretion of the courts is in fact the only constant consistent principle of interpretation that can be gleaned from the oppression judgments of the Australian and UK courts. This conclusion is relevant to the debate around the applicability of existing South African case law to the judicial valuation aspect of the appraisal rights because it implies that the contexts differ and thus the approaches of the courts should also differ.³⁹¹

³⁸⁸ At 109.

³⁸⁹ Brockett at 113. See also Wayne Lonergan 'Commercial Law: The Changing Nature of Discount for Minorities' (1999) 37 *Law Society of NSW* 66 67.

³⁹⁰ In *Smith Martis Cork & Rajan Pty Ltd and Others v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136 the Full Court of the Federal Court of Australia cited three fundamental components of valuation in the context of the oppression remedy: to fix a price which represents fair value in all the circumstances of the case, the purpose of the order is to compensate the oppressed shareholder for the oppression which has occurred and the court is only to be restricted by the requirement that the valuation be a proper exercise of the court's judicial discretion.

³⁹¹ See paragraph 4.2.2 where this was discussed in relation to Canadian law.

As has been pointed out previously,³⁹² the South African courts have had occasion to consider the notion of a ‘fair price’ for shares in the context of the compulsory acquisition of minorities in affected transactions³⁹³ and oppressive or unfairly prejudicial conduct.³⁹⁴ Thus, case law, principle and precedent for valuation methodology and the court’s approach to the determination of a fair price already exist.³⁹⁵ The difficult question is whether (and if so, to what extent) this precedent can be applied in the context of appraisal rights.³⁹⁶ It is my submission that it may not be necessary to discount these judgments completely, but that they certainly cannot be followed blindly. Courts will need to be selective as to when and how they are followed to ensure that they are in fact applicable and appropriate in the unique context of appraisal rights.

It is further apparent from the jurisprudence that appraisers and experts do not necessarily make the court’s task easier. As one American judge so eloquently put it:

‘In coming to my valuation, I have had to stagger through a sandstorm of contending arguments, on all points great and small. Many of these playground tussles involve issues that emerge in the actual application of broad corporate finance principles that are commonly taught in academic institutions. The real world nitty-gritty use of those

³⁹² Ibid.

³⁹³ In terms of s 440K(1)(b)(iii) of the Companies Act 61 of 1973 the court may be called upon to order that it is satisfied that the consideration offered to minority shareholders whose shares are being compulsorily acquired in terms of the section is ‘fair and reasonable’ which implies that the court must place a value on the shares.

³⁹⁴ S 252 of the Companies Act 61 of 1973.

³⁹⁵ *Re Grierson Oldham & Adams Ltd* 1968 CH 17 at 32; *Re Press Caps Ltd* 1949 1 All ER 1013 at 1018 and *Mia v Anglo-Alpha Cement Ltd* (1970) All SA 11 (W) at 37.

³⁹⁶ Cassim et al at 809, maintain that the established principles of court valuation with respect to ss 252 and 440K of the 1973 Act cannot be applied in the appraisal rights context because they do not contemplate a willing seller and thus the same valuation factors and considerations do not necessarily apply.

principles brings to the fore problems of measurement and theory that academics, and frankly, even real world business people, have no rational reason to solve because they seek to use corporate finance principles to reach a reliable approximation of a range of values from which rational investment decisions can be made. The process of appraisal calling for the court to derive a single best estimate of value based on the ‘expert input’ of diametrically opposite objectives tends, regrettably to surface minor, granular issues of this kind, which are not well addressed in the academic literature. The trial record in this case has more than its share of these minute disputes and the literature cited to me has done little to convince me that there are clear-cut answers to most of them.’³⁹⁷

Furthermore, the court should guard against placing too much reliance on the testimony of independent experts.³⁹⁸ It cannot delegate its responsibility to determine fair value. Moreover, the court should remain mindful of the fact that appointed experts may prolong the duration and will increase the cost of legal proceedings.³⁹⁹ Accordingly it may not always be necessary for a court to appoint a valuation expert in terms of section 164 even though it has the discretion to do so. It is submitted, however, that where a judge has no particular accounting expertise or experience it will be advisable to appoint an accountant or similar financial expert to assist the court in this regard.

There is possibly a useful comparison to be drawn here between the position of the court in an appraisal rights action and the position of an arbitrator in a commercial arbitration.

³⁹⁷ *Andaloro v. PFPC Worldwide Inc. et al*, 2005 Del. Ch. LEXIS at p. 2 (Del. Ct. Ch.).

³⁹⁸ Wertheimer BM ‘The shareholder’s appraisal remedy and how courts determine fair value’ (1998) 4 *Duke Law Journal* 613 at 701. The experts referred to here are of course the expert witnesses which may be called by a party to the litigation to bolster their case with respect to determining share value and not independent appraisers appointed by the court.

³⁹⁹ *Ibid.*

In the first instance the arbitrator is not entitled to delegate his responsibility either. In *Total Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*⁴⁰⁰ the court held that:

‘When selecting an arbitrator the parties to the arbitration agree to someone in whom, by dint of his (or her) experience and ability, they can repose the necessary confidence and trust to determine their dispute. What they seek is a judgment from the person chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise.’⁴⁰¹

Secondly, in terms of modern arbitration rules the arbitrator may appoint an independent expert witness. This power is restricted by procedural safeguards.⁴⁰² It may be useful for the legislature to provide some clarity on the position of the appraiser in section 164 and it would be able to draw on international arbitration instruments in order to do so. The clarifying amendment could take a similar form to the provision contained in the UNCITRAL Model Law on International Commercial Arbitration of 1985⁴⁰³ which stipulates that:

‘(1) Unless otherwise agreed by the parties, the arbitral tribunal

⁴⁰⁰ 2002(4) SA 661 (SCA).

⁴⁰¹ Ibid at paragraph 41.

⁴⁰² See, for example, article 29 of the UNCITRAL Arbitration Rules (2010).

⁴⁰³ Article 26.

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.’

The inclusion of a similar provision in the statute, amended so that the appraiser appointed in terms of section 164 has the function and powers of the expert in article 26 quoted above, would make the position of the appraiser perfectly clear. I am of the opinion that, in the interests of legal certainty, the section should be amended accordingly.

In the case of *Hickman v Oban Infrastructure (Pty) Ltd*⁴⁰⁴ the court was called upon to determine a fair price for the shares of a minority shareholder in terms of a personal action brought under section 252(3) of the 1973 Companies Act. The court ordered that the shares of the applicant be purchased at ‘fair market value’ but did not stipulate how this was to be determined. Furthermore, it ordered that a valuer be appointed to determine the ‘fair market value’ and that this result would be binding on the parties without further recourse to the

⁴⁰⁴ 2010 JOL 25176 (GSJ).

court once a result had been reached, arguably improperly delegating its valuation responsibility in this case.⁴⁰⁵ South African courts will need to be alive to such pitfalls in the context of section 164 valuations.

7.3.2 Registered and beneficial shareholders

A shareholder is defined in the South African Act as ‘the holder of a share issued by the company and who is entered as such in the certificated or uncertificated securities register, as the case may be’. This definition is made subject to section 57. Section 57 provides that for the purposes of Part F of the South African Act, which comprises sections 57 to 75 and deals with the governance of companies, the term ‘shareholder’ also includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached. Thus, in this context a beneficial owner entitled to exercise the voting rights attached to a share and the registered shareholder in whose name the shares are registered⁴⁰⁶ both qualify as shareholders with respect to the shares in question.⁴⁰⁷ The term ‘shareholders meeting’ is defined as ‘a meeting of those holders of that company’s issued securities who are entitled to exercise voting rights in relation to that matter’.⁴⁰⁸ In South Africa, as in other international capital markets, it is common practice for shareholding in a public listed company to be registered in the name of an intermediary such as a brokerage, bank or trust

⁴⁰⁵ In the subsequent case of *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) the court again appointed a valuer in the context of s 163, but this matter is distinguishable from *Hickman* in that the parties had agreed to this method in a pre-existing shareholders’ agreement.

⁴⁰⁶ Cassim et al at 357. See Financial Markets Act 19 of 2012. See also Rules of Strate (Pty) Ltd updated as per Government Gazette Number 37344 dated 14/2/2014.

⁴⁰⁷ Assuming, of course, that these are two different individuals or entities.

⁴⁰⁸ S 1.

or (in terms of the electronic transfer STRATE system which is utilised on the JSE Securities Exchange) in the name of a Central Securities Depository Participant.⁴⁰⁹ This registered shareholder then acts as the intermediary between the beneficial owner and the company with respect to communication and voting matters.

If the registered shareholder and beneficial owner are not the same person or entity, and the aforementioned definitions in sections 1 and 57 are applied to section 164, it appears that a beneficial owner will be able to vote at the meeting at which the fundamental transaction which triggers appraisal rights is to be considered. However, he will not be entitled to file a notice of objection or demand fair value in terms of the relevant appraisal rights sections.⁴¹⁰ It is only the registered shareholder who will be able to do so. This is due to the fact that the beneficial owner technically qualifies as a shareholder in terms of section 57(1) but not in terms of section 164. A difficult question which arises here is whether the registered shareholder will be able to exercise the appraisal rights by filing the notice of objection and demanding that he be paid fair value for the shares if it was in fact the beneficial owner who attended and voted at the meeting.⁴¹¹

Section 164 clearly provides that ‘a shareholder’⁴¹² may demand that the company pays him the fair value of shares ‘held by that person’⁴¹³ if, *inter alia*, ‘the shareholder’ voted

⁴⁰⁹ Cassim et al at 253.

⁴¹⁰ S 164(5).

⁴¹¹ As to the requirements for a beneficial owner to vote at the meeting see s 56(9).

⁴¹² In the context of this section this can only be the registered shareholder.

⁴¹³ Once again, this refers to the registered shareholder as opposed to the beneficial shareholder where these are not one and the same person.

against the resolution. The problematic issue is whether this reference to the shareholder is restricted to the ‘narrow’ section 164 definition or impliedly includes the ‘wider’ section 57(1) definition which, in turn, includes the beneficial owner. If the reference is restricted to the narrow definition, it means that the registered shareholder must have been the party to vote against the proposal and only then will he be able to exercise the appraisal rights.⁴¹⁴ In other words, the person who voted against the transaction is the only person who can enforce the appraisal rights in respect of those shares. This is also implied because in terms of section 164, it is only the registered shareholder (and not the beneficial owner) who can enforce the rights even if the beneficial owner voted at the meeting.

Consequently, if the beneficial owner did not vote at the meeting but instead left that corporate action to the registered shareholder,⁴¹⁵ he will have to persuade the registered shareholder to enforce the appraisal rights on his behalf, something which the registered shareholder may not be prepared to do.⁴¹⁶ Alternatively, the beneficial owner will need to ensure that he becomes the registered owner before the meeting and then votes at the meeting in that capacity if he anticipates that he may want to exercise his appraisal rights with respect to the transaction.⁴¹⁷

⁴¹⁴ Even if he is doing so for the ultimate benefit of the beneficial shareholder.

⁴¹⁵ Or, as is common practice in terms of STRATE, instructed the CSDP to vote (or how to vote) on his behalf.

⁴¹⁶ See paragraphs 3.4 and 4.2.3 and the cases discussed there for an illustration of the problems this has caused in transactions involving listed companies and dematerialised shareholding in the USA and Canada.

⁴¹⁷ That is if the ‘narrow’ definition of shareholder as described above is followed. In the event that the shareholding is held by an intermediary or CSDP in terms of STRATE the shareholder will need to effect an ‘own name registration’ after share transfer has taken place. This may be problematic as, according to Vermaas ‘Reform of the Law of Uncertificated Securities in South African Company Law’ *Acta Juridica* (2010) 87 at 99, only one of the CSDPs in STRATE offers the ‘own name’ account in the subregister system. Own name registration in this context is comparable to the rights a shareholder would have if he held a share certificated for shares registered in his name. See further JG van der Merwe *South African Corporate*

However, if the wider interpretation of the definitions is followed, it means that whether it was the beneficial owner or the registered shareholder who voted against the resolution, the rights can be enforced by the registered shareholder, whoever that person may be at the time that the demand is made i.e. the person who votes⁴¹⁸ and the person who subsequently makes the demand need not be the same person. The beneficial shareholder will, once again, need to transfer the shares into his own name if the registered shareholder does not want to enforce these rights on his behalf, but at least the wider interpretation makes it possible for him to do so whether he initially voted against the transaction himself or whether he allowed (or instructed) the registered shareholder to do so.

This interpretation also implies that, should a sale and transfer of shares take place after the shareholders meeting, the new registered shareholder/owner will be able to exercise the appraisal rights with respect to the shares even if he did not own them at the time that the meeting took place as long as he can show that the shares in question were in fact voted against the transaction.⁴¹⁹ Beukes points out that it may be difficult (if not impossible) to ascertain how particular shares which can be linked to a specific shareholder were voted unless the company keeps a specific record of this.⁴²⁰ However, there is nothing in the South African Act which obliges the company to do so and it would presumably not be

Business Administration by MK Havenga, IM Esser, WD Geach, N Locke, MR Vermaas, DP Mahoney (1995) paragraph 18.5.1.

⁴¹⁸ Obviously this presupposes that the person who voted at the meeting must have been legally entitled to do so.

⁴¹⁹ By either the registered or beneficial shareholder at the time. This may not be possible if no specific voting record has been compiled. This approach would also offer the potential for appraisal rights arbitrage to take place in South Africa. See further paragraph 7.3.3.

⁴²⁰ At 183 note 31.

made public. These problems are very similar to those regarding ‘evidence’ as to which shares had been voted in favour and which had been voted against the proposed resolution on which the Canadian *Transkaryotic* decision was based.⁴²¹ Furthermore, the real and complex issues which can arise where the distinction between the rights and obligations of registered shareholders vis-à-vis beneficial owners in the context of appraisal rights is unclear is well illustrated by the cases discussed in paragraphs 3.4 and 4.2.3.

The wider interpretation is the more legally curious interpretation of the two possibilities, because it implies that the appraisal rights actually attach to the shares (as opposed to the minority shareholder affected by the appraisal rights-triggering transaction) in question. Furthermore, if a sale of the shares has occurred, the purpose of the appraisal rights remedy has already been achieved – the disgruntled minority shareholder has been able to exit his investment at a price which he was prepared to accept as fair value for his shareholding.

What is clear is that, unless the registered and beneficial owner are the same natural or juristic person throughout, this interaction between the voting requirement and the exercise of the rights potentially presents some problems. At first blush it appears that a potential interpretation of the South African Act in line with the *Transkaryotic* judgment is possible: if a party purchases shares after the shareholders’ meeting at which the transaction was approved, that party, as the (new) registered shareholder, should be able to demand that he be paid the fair value of his acquired shares in terms of section 164(5) if he also meets the requirements of s164(5), including the requirement that the shares were voted against the

⁴²¹ See paragraph 4.2.3.

transaction.⁴²² This, of course, is wholly in line with the *Transkaryotic* decision which, according to some commentators, was the catalyst for the appraisal arbitrage phenomenon.

7.3.3 Appraisal rights arbitrage in South Africa

An ancillary question which naturally arises is whether, given the specific wording of s 164, appraisal rights arbitrage is possible in the South African context and, if so, whether it would give rise to the same types of concerns as have been raised in Delaware. In terms of s 164 it is the ‘shareholder’ of the company which is obliged to give written notice objecting to the resolution, is entitled to receive notice that the resolution has been adopted and may make the demand to be paid fair value if ‘the shareholder’ voted against the

resolution. As the term ‘shareholder’ is defined in s 1 as ‘the holder of a share issued by the company and who is entered as such in the certificated or uncertificated securities register, as the case may be’ it appears that the legal position is comparable in many respects to the position in Delaware. It is the holder of record who must perform the actions required to perfect the appraisal rights; no specific mention is made of the beneficial holder.

⁴²² In terms of the ‘wider’ interpretation which I have alluded to above. See Beukes at 183 note 31 where he points out that it may be difficult (if not impossible) to ascertain how particular shares which can be linked to a specific shareholder were voted unless the company keeps a specific record of this. However, there is nothing in the Act which obliges the company to do so and it would presumably not be made public. This is very similar to the practical problems regarding ‘evidence’ as to which shares had been voted in favour and which had been voted against the proposed resolution on which the *Transkaryotic* decision was based.

Unlike section 262 of the Delaware General Corporation Law, section 164 contains no specific reference to the right of the beneficial owner to request information relating to the voting records, nor is there any concession that the beneficial holder be entitled to bring the appraisal rights action in its own name. In an appraisal arbitrage situation where shares in a company are sold subsequent to the announcement of a transaction by the company, but are held on behalf of the beneficial owner or arbitrageur until after the meeting of shareholders, it therefore seems that (until such time as the shares have been transferred into the name of the new owner and he qualifies as the 'shareholder' contemplated in the South African Act) all the appraisal rights actions would need to be performed by the person whose name appears in the share register.

The sale and transfer of uncertificated securities in terms of the STRATE electronic settlement system presents the same type of problems as were experienced by the dissenting shareholders in the *Ancestry* and *BMC* decisions discussed above.⁴²³ In the event that the registered shareholder⁴²⁴ is prepared to execute these actions as instructed by the shareholder the practicalities alone should not pose a problem. However, if the registered shareholder should refuse to do so (as was the case in *Merion v BMC*)⁴²⁵ then this does pose a risk to the new (beneficial) shareholder that he will not be able to exercise the appraisal rights in respect of the shares recently purchased for this very purpose. It is not clear whether he will be able to force the registered shareholder (CSDP) by, for example,

⁴²³ Paragraph 3.4.

⁴²⁴ Under the STRATE system this would be the CSDP.

⁴²⁵ No. 8900-VCG, 2015 BL 579 (Del. Ch. Jan. 5, 2015).

bringing a court application to take the necessary steps until registration of the shares into his name takes place so that he does not lose his appraisal right completely.

There is also another dimension to the South African position which may further confuse the issue – in terms of section 164 (5)(c)(i) the shareholder must have voted against the resolution. It is not sufficient, as it is under the Delaware statute, that the shares must not have been voted in favour of the resolution. This begs the question whether the test set in the South African Act is a more onerous one than in Delaware in that it contains a share tracing requirement element that is absent in the Delaware statute. Is the shareholder (because it is a positive act that must be proved rather than a negative one or lack of action as in the Delaware statute) required to show that those specific shares were voted against the transaction? It is not clear how a shareholder would prove this when shares have been purchased on the open market.

Alternatively, is it sufficient to show that more shares were voted against the resolution than the number of shares in respect of which appraisal rights are being enforced as is the case in Delaware? Furthermore, is it necessary to show that the shareholder who voted against the resolution and subsequently performed the actions required to perfect the appraisal rights is the same legal or natural person who ultimately brings the appraisal rights application? If so, this is would put paid to any appraisal remedy for a shareholder who purchased shares after an announcement and who does not immediately transfer the shares into his own name and effect all the remaining procedural steps required to enforce appraisal rights in his own name.

This brings us back to the argument that, if share tracing is not required, it is possible that ultimately the number of shares in respect of appraisal rights which may be exercised exceeds the number of shares voted against the transaction. What is clear is that the South African legislature must consider the position both from a legislative and policy perspective, as well as the manner in which the Companies Act provisions interact with the STRATE system and other legislation relating to uncertificated securities⁴²⁶ or the courts will ultimately be called upon to do so. The legal position is currently not clear. Until clarity is provided this may well act as deterrent to the use of appraisal rights in this context. It is therefore submitted that this complex issue requires input from all stakeholders (including the JSE and STRATE participants) in order to be properly and clearly legislated by means of an amendment to the South African Act.

7.3.4 Waiver

The South African Act is silent on whether a shareholder may validly waive his appraisal rights with respect to a particular action or whether he may undertake not to exercise them generally. This aspect is discussed further in paragraphs 7.5 and 7.6 below in the context of legislative and corporate intervention.

7.4 Dealing with the challenges

⁴²⁶ Financial Markets Act 19 of 2012. See also Rules of Strate (Pty) Ltd updated as per Government Gazette Number 37344 dated 14/2/2014.

During the course of my research I identified two basic categories of interventions or attempts to regulate the use of appraisal rights in various international jurisdictions – those devised by the legislature and those devised by corporations in relation to their own affairs. These I have named, and refer to hereafter, as ‘legislative intervention’ and ‘corporate intervention’ respectively. Corporate intervention can take two forms, one is directed at dealing with appraisal rights in relation to a specific transaction or corporate action i.e. it is an *ad hoc* measure designed to deal with the immediate potential that appraisal rights may be exercised. The second potential form of corporate intervention is a considered strategy which finds general long-term application in and to the affairs of the company and is aimed at dealing with the concept of appraisal rights generally. These categories and sub-categories which I have created do not constitute a closed list, nor are they watertight delineations, but they do go some way towards ordering and understanding the approaches which have been utilised internationally, some of which could potentially be adopted in South Africa.

A legislative intervention, such as the introduction of an ADR option (in the form of arbitration) into the South African Act⁴²⁷ to determine share values in an appraisal rights action, may also constitute a potential *ad hoc* corporate intervention (parties agreeing upfront to ADR as a valuation method or agreeing, in their application to court, to ask that the court appoint a specific assessor to assist,⁴²⁸ if appraisal rights should become an issue

⁴²⁷ As is the case in New Zealand.

⁴²⁸ For example, a person satisfactory to both parties who has knowledge of the specific company, industry or market.

in a specific transaction) or a permanent corporate intervention (such as incorporating ADR as the pre-agreed procedure in all matters relating to appraisal rights disputes and enshrining this in agreements or even the constitution of the company as far as possible).⁴²⁹ The case of *Omar v Inhouse Venue Technical Management (Pty) Ltd*⁴³⁰ is instructive in this regard. Although the court appears to recognise that section 66 sanctions the voluntary use of arbitration as opposed to litigation, it must be clear that the parties have consented to this. Accordingly, in the case of a corporate intervention which is based on prior agreement between the parties it is advisable that this arrangement be specifically spelt out in a written document.⁴³¹

All the interventions, initiatives and measures discussed below have been selected and included because they are designed to promote and facilitate either the effective use or the proper use, or both, of appraisal rights in the relevant jurisdiction. However, not all the interventions may be feasible in South Africa due to the unique provisions of the Act. Certain foreign interventions may fall foul of the anti-avoidance prohibition in section 6. As mentioned earlier, however, it is possible to apply to the Companies Tribunal for an administrative order which exempts a transaction or provision from a prohibition or unalterable requirement, subject to certain requirements.⁴³² Companies which attempt to regulate appraisal rights through their Memorandum of Incorporation should exercise

⁴²⁹ In relation to the legality of implementing such measures in South Africa see further paragraphs 7.2 and 7.3.

⁴³⁰ 2015 (3) SA 146 (WCC).

⁴³¹ See paragraphs 71-75 of the judgment.

⁴³² S 6(2) and (3).

caution as they may not have the same amount of legal leeway with respect to changes to the constitution as their foreign counterparts do, due to the provisions restricting the amendment of the Memorandum of Incorporation.⁴³³ This is due to the distinction between ‘alterable’ and ‘unalterable’ provisions.⁴³⁴

7.5 Legislative intervention

The foreign literature refers to a number of strategies which have been employed in the United States, Canada and New Zealand in an attempt to improve the effectiveness of appraisal rights and curb potential abuse of the remedy. These range from drafting improvements and consultation with interested parties by the relevant law society to identifying or developing structures specifically empowered to assist with the implementation of appraisal rights.⁴³⁵ I have discussed and categorised selected strategies below by intervention type and/or in relation to the specific recognized appraisal rights challenges,⁴³⁶ rather than by jurisdiction⁴³⁷ as I am of the opinion that this offers a more practical and coherent delineation for the purposes of the thesis.

⁴³³ S 15.

⁴³⁴ See paragraph 6.2 above.

⁴³⁵ See further the New Zealand Law Commission Report discussed in Chapter 5.

⁴³⁶ Namely complexity, timing and delays, uncertainty and abuse.

⁴³⁷ Although the relevant jurisdiction is identified in each instance.

7.5.1 Complexity

Needless to say, the first step towards reducing the complexity of the appraisal rights provisions would be, as far as possible, to simplify the provisions and the associated procedures. With respect to the various foreign statutes under discussion, it seems that Canada and New Zealand have managed to produce the clearest and least technical version of the appraisal rights provisions, probably because, whilst these are based on the principles enshrined in the much older Model Business Corporation Act and Delaware General Corporation Law which have been subject to periodic amendments, they are drafted in a more modern style using less legalistic and formal language.⁴³⁸ It is submitted that the language and terminology used in the South African Act are no less clear and simple than those used in the Canadian and New Zealand statutes and are often clearer and simpler than those of the USA statutes.

All the statutes under consideration appear to be more or less on a par with respect to the technical hurdles which need to be cleared, time periods to be observed and formalities required to exercise appraisal rights. Thus the South African, Canadian, USA and New Zealand statutes are all rather complex to negotiate and equally so. Generally all the statutes require the company to advise the shareholder who wishes to dissent how to go about exercising such rights. However, it is submitted that the technical requirements as contained in the various provisions, and compliance with these, are a pre-requisite for legal

⁴³⁸ Philip Knight 'Keep it simple and set it free: The new ethos of corporate formation' *Modern Company Law for a Competitive South African Economy*, Juta 2010 (Mongalo ed) pp 3-42.

certainty and the protection of the company. They provide commercial certainty and adequate time for both the company and other interested parties to prepare for the exercise of appraisal rights and it is thus unavoidable that that they should be included. The challenge is to achieve a legislative balance between the need for procedural simplicity and the need for legal certainty.

One of the simplest ways to initially reduce uncertainty with respect to the appraisal provisions in the South African Act would be for the legislature, by way of amendment, to remove any anomalies or to rectify obvious drafting inconsistencies and omissions. I have discussed and made certain proposals below in relation to the way in which the issues of partial dissent, the distinction between registered and beneficial shareholders, triggering actions, non-compliance with procedural requirements and the solvency and liquidity test apply to the appraisal rights sections. Certain of these issues were pointed out⁴³⁹ when the Act was still in the Bill phase and some,⁴⁴⁰ but not all, the suggestions were subsequently incorporated in the South African Act.

7.5.1.1 Partial dissent

Certain authors initially suggested⁴⁴¹ that the statute should make it clear that partial dissent was not possible and that a shareholder had to exercise dissent (appraisal) rights with

⁴³⁹ MF Cassim at 159.

⁴⁴⁰ These include the partial dissent issue discussed above and the no-appraisal threshold which was subsequently deleted from the draft statute. See MF Cassim at 161-164 and Beukes at 484.

⁴⁴¹ Ibid.

respect to all the shares which he held in a particular class. The changes which were subsequently made to section 164 partially address this concern in that section 164(5) states that ‘a shareholder may demand that the company pay the shareholder fair value for *all the shares of the company held by that person*’. This obviously implies that a shareholder may not demand that any number of shares which constitutes less than all the shares which he holds in the company be the subject of an appraisal claim. However, the South African Act is silent on the effect of this provision on the shareholder who holds various classes of shares in a company but only wishes to exercise appraisal rights (albeit with respect to all those shares) in a particular class and not the other classes.

The original proposal by the authors who commented on the draft provisions did cater for this eventuality; the suggestion was that the provision should stipulate that a shareholder must dissent in respect of all the shares which he holds *in a particular class* (emphasis added).⁴⁴² However, this is not the case in the wording of the section in its current form.

It is submitted that this uncertainty can, and should, be rectified by way of amendment to provide clarity. Furthermore, it should be made clear that any registered shareholder who is holding shares on behalf of a number of different beneficial shareholders will be able to exercise appraisal rights with respect to (all) the shares of a particular class of one of the beneficial shareholders.⁴⁴³ It is submitted that this is particularly important in the context of STRATE where the CSDP typically holds shares on behalf of a large number of

⁴⁴² Ibid.

⁴⁴³ Ibid. See also MF Cassim at 159. The Model Business Corporation Act, 1984, as amended (s 13.03(a)) and the Canada Business Corporations Act, 1985 (s 190(4)) contain comparable provisions.

investors but the shareholdings are not differentiated by linking specific shares to specific investors, rather the relevant number of shares of the composite shareholding which constitute his share thereof are attributed to each investor.⁴⁴⁴

7.5.1.2 Registered and beneficial shareholders

The uncertainty which exists with respect to the rights of the registered shareholder vis-à-vis the beneficial shareholder and their respective abilities to exercise appraisal rights was addressed in paragraph 7.3.2. Beukes indirectly discusses this conundrum under the concept of ‘standing’ i.e. identifying the person who has met all the requirements in the South African Act to be entitled to employ the appraisal remedy.⁴⁴⁵ He points out that the general rule in Canada (that the dissenting shareholder must be a registered shareholder and that he must already have been the registered shareholder at the time when the resolution is adopted) is not followed consistently even there.⁴⁴⁶ Delpont is of the opinion that the legal position in Canada is not applicable because the definition of ‘shareholder’ in the Canada Business Corporations Act differs from that in the South African Act.⁴⁴⁷ What is, however, clear is that this issue is far from settled⁴⁴⁸ and it is submitted that the legislature should specifically address this confusion by way of a definitive amendment to the South African Act.

⁴⁴⁴ See paragraph 3.4. See also Financial Markets Act 19 of 2012. See also Rules of Strate (Pty) Ltd updated as per Government Gazette Number 37344 dated 14/2/2014.

⁴⁴⁵ At 178-179. See, for example, the cases discussed in paragraph 4.3.2.

⁴⁴⁶ Ibid.

⁴⁴⁷ At 580(1).

⁴⁴⁸ This is borne out by the recent cases in the USA arising from the interpretation of these terms in appraisal rights arbitration transactions. See paragraph 3.4.

7.5.1.3 Trigger events

Section 164 does not require a shareholder to be present at the meeting at which the proposed resolution is voted on in order to exercise his appraisal rights. Section 165(5)(c)(i) merely states that he must have voted against the resolution in question.⁴⁴⁹ However, if the trigger event for the appraisal rights is a resolution related to an amendment of the Memorandum of Incorporation of the company, section 37(8) requires the shareholder to be present⁴⁵⁰ at the meeting. In respect of any of the other trigger events, section 115(8) requires the presence of ‘the holder’ of the voting rights.⁴⁵¹ It is submitted that the cross-referencing required to identify this attendance requirement may be confusing to shareholders and that it would provide more certainty if section 164 itself made it clear that a shareholder’s presence, as defined, is required if he wishes to exercise these rights. This is particularly important given the confusion which already exists between the rights of the registered shareholder and the beneficial shareholder in these circumstances.⁴⁵²

Furthermore, it appears that appraisal rights may also apply if a company repurchases more than 5% of its issued shares in terms of section 48(8)(b). This section states that, where such a repurchase occurs, the board decision is subject to the requirements of sections 114 and 115. It is questionable whether the appraisal rights provisions incorporated by reference into sections 114 and 115 can be categorized as ‘requirements’ of those sections

⁴⁴⁹ Beukes at paragraph 4.2.

⁴⁵⁰ See the wide definition of ‘present at a meeting’ in s 1.

⁴⁵¹ The term ‘holder’ includes the beneficial shareholder in terms of s 117(1)(e).

⁴⁵² See paragraph 7.3.2.

as opposed to the other provisions which are clearly requirements (such the special resolution requirement). However, section 48(8)(b) does not distinguish between these – it incorporates the entire content of the two sections by a blanket reference thereto. It is submitted that more specific drafting with clearer references to sections can remedy this uncertainty.⁴⁵³

The trigger event with respect to a proposed amendment to the memorandum of incorporation is based on an alteration of preferences, rights, limitations or any other terms of shares ‘in any manner materially adverse to the rights or interests of holders of that class of shares.’⁴⁵⁴ However, section 37(8), which deals with the amendment of the memorandum of incorporation in this way, refers to the situation where the ‘memorandum of incorporation of the company has been amended to materially and adversely alter the preferences, rights, limitations or other terms of a class of shares’.

It is submitted that these two sections may possibly be interpreted differently. In section 164(2)(a) it is the adversity of the change which must be material whereas in section 37(8) the word ‘change’ is qualified by both the adjectives ‘material and adverse’. Thus potentially one could argue that the change needs to be more adverse in terms of section 164(2)(a) than in terms of section 37(8) but it need not also, in and of itself, be a material change whereas in terms of section 37 it would have to meet this requirement as well. If this drafting discrepancy was not intended, it would be sensible and provide clarity if the

⁴⁵³ See Yeats 333.

⁴⁵⁴ S 164(2)(a).

statute was amended so that the wording of the two sections match one another to avoid unnecessary confusion. Further, no indication is given as to what may constitute or qualify either as a ‘material and adverse’ change or a ‘materially adverse’ change. The term ‘material’ is defined in section 1 but, unless it can be extended to include the term ‘materially’,⁴⁵⁵ it is not particularly helpful in this context. The legislature should consider revisiting this issue.

7.5.1.4 Non-compliance with procedural requirements

There is an imbalance between the effect of non-compliance with the procedural requirements of section 164 by the company and the shareholder. The shareholder who does not technically comply with prescribed time periods for sending notices, for example, may forfeit his right to appraisal on the basis of this technical oversight, whilst a company which does not comply suffers no adverse consequences whatsoever.⁴⁵⁶ I support Cassim’s original pre-enactment suggestion that the statute should make allowance for this inherent unfairness by providing that the court has the discretion to accommodate non-compliance with the technical requirements of the section by the shareholder where this is required in the interests of fairness.⁴⁵⁷ It appears that the substantive compliance provisions of sections

⁴⁵⁵ I would submit that it cannot be so extended. S 1 defines the term ‘when used as an adjective’ whereas in both sections 164 and 37 it is used as an adverb.

⁴⁵⁶ Cassim 164-167. This approach was followed in the Canadian case of *Jepson v Canadian Salt Company Ltd* [1979] 4 WWR 35, 99 DLR (3d) 513 (SC, Alta).

⁴⁵⁷ *Ibid.* See, however, *Vlok NO and Others v Sun International South Africa Ltd and Others* (19443/2012) [2013] ZAGPJHC 269; 2014 (1) SA 487 (GSJ) (24 October 2013). In this matter the court refused to condone non-compliance with a prescribed time period specified in s 124(7). The court held that, notwithstanding the fact that this decision would negatively impact upon the rights of the minority

6(8) and 6(9) will not really assist the shareholder here as they are limited to the condonation of non-compliance as regards form and delivery of notices and documents. However, they may assist in limited circumstances, and the legislature could quite simply extend the reach of the non-compliance provisions to assist dissenting shareholders. The imbalance may possibly be further addressed by specifically affording the court the discretion to make an appropriate costs order against the company on the grounds of non-compliance with the prescribed appraisal rights procedures and time periods.⁴⁵⁸

7.5.1.5 The notice anomaly

There is an interpretation issue with respect to the interaction between section 164 and section 62(4) which has been referred to as ‘the notice anomaly’.⁴⁵⁹ In terms of s 164 the company is obliged to give shareholders notice of the meeting at which the resolution which triggers the appraisal rights is to be considered. This notice must include a statement informing shareholders of their appraisal rights (‘the appraisal rights statement’).⁴⁶⁰ In the event that the company failed to give the requisite notice or failed to include the appraisal rights statement in the notice a dissenting shareholder is excused from the requirement to send a notice of objection to the company in order to exercise his appraisal rights.⁴⁶¹

shareholder and that the section did not exclude the court’s inherent power to condone non-compliance with time periods, the exclusion of such a power was implied in the section by way of necessary construction.

⁴⁵⁸ Ibid.

⁴⁵⁹ A Pike and C McIntosh ‘Appraisal Rights and the Notice Anomaly’ (May 2013) *Without Prejudice* 36.

⁴⁶⁰ S 164(2).

⁴⁶¹ S 164(5).

These provisions must be read with section 62(4) which provides that a material defect in the form or manner in which notice of a meeting is given shall render the meeting null and void unless all those persons who were entitled to receive the notice ratify the defective notice. Proper ratification in terms of this section requires that every person entitled to exercise voting rights in respect of any item on the agenda is present and votes to approve ratification of the defective notice.⁴⁶²

However, in the event that the material defect relates only to a particular matter or matters on the agenda, these matters may be severed and the notice will remain valid with respect to the other matters.⁴⁶³ Furthermore, section 62(5)(b) provides that even the severed matter(s) may be considered if the defective notice in respect of that matter has been ratified in terms of subsection 4(d). However, there is no subsection 4(d) in the South African Act. This effectively renders section 62(5)(b) useless. Presumably the intention was to refer to the ratification procedure set out in subsection 4.⁴⁶⁴

It seems therefore that defective notice of a meeting may be ratified in respect of those matters which can be severed from the defective notice provided that the ratification requirements of section 62(4) are met. It is not possible to consider severed matters as the Act contains no procedure for ratification of defective notice of severed matters unless the

⁴⁶² S 62(4).

⁴⁶³ That is those matters in respect of which the notice contained no material defect.

⁴⁶⁴ The confusion may have arisen as a result of the fact that s 62(4) was substituted by s 40(d) of Act 3 of 2011.

reference is construed as a reference to subsection 4. If this is the case, then severed matters may be considered if ratification takes place as prescribed in section 62(4).

In terms of section 62(6) an immaterial defect in the form or manner of giving notice of a shareholders meeting does not invalidate any action taken at the meeting. The term 'material' is defined in section 1 as meaning 'significant in the circumstances of a particular matter, to a degree that is (a) of consequence in determining the matter; or (b) might reasonably affect a person's judgement or decision-making in the matter'. It would seem that a failure to include an appraisal rights statement would qualify as a material defect in the notice of the meeting, as the fact that a shareholder may not be aware of his appraisal rights might reasonably affect his judgment or decision making in the matter with respect to, for example, the exercise of his voting rights.

Accordingly, notice of a meeting to consider an appraisal-rights triggering resolution which does not contain an appraisal rights statement should be null and void unless it is ratified in terms of section 62.⁴⁶⁵ However, this interpretation is at odds with section 164(5) in terms whereof a dissenting shareholder is excused from the requirement to send a notice of objection to the company in order to exercise his appraisal rights. If the shareholders in question had been at the meeting and ratified the omission it is not clear why they should be excused from the written objection requirement.

⁴⁶⁵ Of course, the shareholders would not know in advance whether the omission would be ratified or not.

Thus it seems that sections 164(5) and (6) presuppose that a valid meeting can be held and a valid resolution can be passed notwithstanding the fact that the appraisal rights statement was not included in the notice, without the omission having to be ratified by the affected shareholders. If this were not the supposition, there would be no need to provide the dissenting shareholder with the procedural exception required to exercise his appraisal rights validly as in law there would be nothing (that is no valid corporate action) to object to. The requirement to include an appraisal rights statement is framed in peremptory language. The notice *must* include a statement informing shareholders of their rights under this section⁴⁶⁶ which also indicates that it is a mandatory requirement for a properly convened meeting. I submit that it is important that the legislature clarifies whether the omission of an appraisal rights statement from the notice of a meeting is a material or immaterial defect and accordingly, what the effect (if any) is on the validity of decisions and actions taken at the meeting.

If the company fails to give any notice of the meeting whatsoever (as opposed to merely omitting the appraisal rights statement), the dissenting shareholder is, understandably, also excused by section 164(6) from sending a notice of objection in terms of section 164(5). However, the would-be dissenting shareholder is not excused from the requirement contained in section 164(5)(c) that he must have voted against the resolution in order to ultimately exercise his appraisal rights. This offers no remedy for a shareholder who did not receive notice of the meeting (and consequently of his rights in terms of section 164) and therefore was not aware of the fact that fact that in order to validly exercise his

⁴⁶⁶ S 164(2)(b).

appraisal rights he must vote against the resolution at the meeting. This should be remedied.

7.5.1.6 Solvency and liquidity requirements

It has already been stated⁴⁶⁷ that the discrepancy between the requirement that a company must be both solvent and liquid in order to make a distribution⁴⁶⁸ but need only be liquid⁴⁶⁹ in order to make a payment in terms of an appraisal offer is puzzling. However, section 164(19) makes it abundantly clear that this is in fact the intended position in that it provides that a company must pay the fair value (as agreed or ordered) notwithstanding the fact that it may be insolvent before, or become insolvent subsequent to, making the payment. Furthermore, it appears that the company will still be bound to make an offer in terms of section 164(11) even if it is both illiquid and insolvent at the time.⁴⁷⁰ The potentially deleterious effect of these provisions on the shareholders and creditors of the company was pointed out by SARS in a submission to the Portfolio Committee on Trade and Industry on the Companies Amendment Bill.⁴⁷¹ Van der Linde points out that the disparate regulation of appraisal rights in relation to other distributions has the (unjustifiable) effect of giving the dissenting shareholder the same status as a creditor of the company.⁴⁷² Given the

⁴⁶⁷ See paragraph 6.1. See also Beukes at 188, Cassim et al at 268, Yeats at 337 and K van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) *TSAR* 484.

⁴⁶⁸ S 46(1).

⁴⁶⁹ S 164(17).

⁴⁷⁰ Nothing in s 164 excuses the company from this obligation. However, if the shareholder accepts the offer, the company may invoke the s164(17) exception to avoid payment on the basis that there are reasonable grounds for believing that it will be unable to pay its debts as they fall due and payable.

⁴⁷¹ B40-2010. SARS 'Companies Amendment Bill, 2010 Portfolio Committee on Trade and Industry' (01-12-2010) PMG <http://www.pmg.org.za/files/docs/101201sarspres.pdf> (accessed 10-06-2014).

⁴⁷² K van der Linde 'The Regulation of Distributions to Shareholders in the Companies Act 2008' (2009) *TSAR* 484

interaction between this section, the law of insolvency and even potential directors' liability and the fact that it is such a curious deviation from the requirements in other sections, it would have been extremely helpful if the legislature had provided some public guidance or official commentary regarding this legislative election.

7.5.1.7 Withdrawal of demand

There appears to be some uncertainty as to the position of the dissenting shareholder once the court makes a fair value determination. Section 164(15) stipulates all the mandatory and discretionary determinations required of the court and section 164(15)(v) determines that 'the court must make an order requiring the dissenting shareholders to either withdraw their respective demands or to comply with subsection (13)(a)' i.e. to accept the offer and tender transfer of their shares by handing over share certificates or take the necessary steps if the shares are uncertificated.⁴⁷³ Thus the court must make an order in the alternative, giving the shareholder a choice although, by implication, the shareholder would presumably still have the option of taking the fair value determination on appeal.

If the shareholder does exercise his election in these circumstances and withdraws the demand (i.e. elects to remain a shareholder of the company and not exit the company, whatever the fair value determination may have been) what is the effect on his status *qua* shareholder? Is he retrospectively reinstated as a shareholder with all his rights in respect of the shares intact (as contemplated by the circumstances in section 164(9)) or is he

⁴⁷³ Delpont at 580. This part of the appraisal rights provision in the South African Act differs from the Canada Business Corporations Act. The latter only seems to provide the shareholder with a right of withdrawal if the corporation has given notice under s 190(24) that it is unable to meet the solvency and liquidity test.

reinstated as from the date on which he makes the election to withdraw the demand in terms of section 164(15)(v)? These interpretation uncertainties could be easily remedied by statutory amendment.

7.5.2 Expense

It is widely accepted that the issue of costs is often the major barrier to effective enforcement of appraisal rights.⁴⁷⁴ In other statutes⁴⁷⁵ provision has been made for provisional payment or part-payment of the fair value initially offered by the company to enable a minority shareholder to pursue his appraisal rights. It is submitted that this aspect merits serious consideration by the South African legislature, especially if no appraisal rights proceedings are brought before the courts in South Africa in the foreseeable future.

Although, in terms of section 164(15)(c)(iv), the court has the discretion to award ‘a reasonable rate of interest’ on the amount which is finally paid to the dissenting shareholder as fair value, this may not be sufficient compensation for the loss of investment opportunity and will not cover his legal costs, particularly if he is not awarded costs of suit. Note, however, that the South African Act specifically makes provision for the court to make an ‘appropriate order of costs, having regard to any offer made by the company and the final determination of the fair value by the court’⁴⁷⁶ which adds an additional risk factor for both

⁴⁷⁴ See paragraph 3.2.3 above.

⁴⁷⁵ See s 13.24 of the Model Business Corporation Act, 1984, as amended and S 112(4) of the New Zealand Companies Act, 1993.

⁴⁷⁶ S 164(15)(c)(iv).

parties. A court may conceivably award all the litigation costs to the shareholder if it is of the opinion that the initial offer of the company was inappropriately low. Alternatively, a court may make a cost order against the shareholder in favour of the company if it comes to the conclusion that the proceedings were unwarranted, vexatious or brought in bad faith because the company's offer did in fact reflect the fair value of the shares.

7.5.3 Timing and delays

The time periods with respect to the exercise and payment of appraisal rights claims are specifically determined in the South African Act but the delays inherent in the court process cannot be regulated and, in South Africa, may be substantial. We have no system of specialised commercial courts with specific expertise, special jurisdiction and accelerated processes for obtaining judgments in commercial cases as is the case in the USA.⁴⁷⁷ The reduced delays and waiting periods are one of the major advantages (for both the company and the dissenting shareholder) of introducing an arbitration option into the appraisal rights regime as has been done in New Zealand.⁴⁷⁸

7.5.4 Uncertainty

Obviously companies would like to remove the possibility of appraisal rights being exercised (and the accompanying financial and legal uncertainty) in relation to a potential

⁴⁷⁷ Such as the Chancery Courts of Delaware, Illinois and New Jersey and the commercial and business courts of New York, Maryland, Nevada, North Carolina and Florida. See further Markus B. Zimmer 'Overview of Specialised Courts' *International Journal for Court Administration* (2009) 1 15.

⁴⁷⁸ See paragraph 7.7.

transaction. To this end strategies such as ‘conditional offers’ are commonly employed to protect the parties from the situation where an unanticipated number of dissenting shareholders exercise their rights which may substantially increase the cost of the transaction, so that they are then not legally bound to proceed with the transaction. This is a relatively common and widely utilised device which has already taken root in South Africa. It is not clear whether, and to what extent, this is permissible.⁴⁷⁹

In some jurisdictions the legislature has made it plain that shareholders may, in anticipation of a specific triggering transaction waive their appraisal rights to remove that element of commercial uncertainty from a transaction. So, for example, the British Columbia Corporations Act⁴⁸⁰ provides that, although a shareholder may not generally waive the right to dissent, he may, in writing waive the right to dissent with respect to a specific transaction.⁴⁸¹ A shareholder who wishes to so waive his right must provide the company with separate written waivers for himself (if he is the registered shareholder) as well as any other beneficial holders and in each waiver identify the person on whose behalf the waiver is made.⁴⁸² If the rights of dissent are waived with respect to a particular corporate action as contemplated, the statute further provides that the rights of those persons to dissent terminates and the section ceases to apply to them.⁴⁸³ The South African Act has not made

⁴⁷⁹ See Yeats at 338 and paragraph 7.3.3.

⁴⁸⁰ SBC 2002, Chapter 57.

⁴⁸¹ S 239.

⁴⁸² S 239(2).

⁴⁸³ S 239(3)-(4).

provision for such a device and it is also uncertain whether, and if so to what extent, this is permissible.⁴⁸⁴

7.5.5 Abuse

One of the major concerns around appraisal rights is that they may be subject to abuse by unscrupulous shareholders or opportunistic investors. The latter concern has become far more realistic of late with the advent of appraisal arbitrage as a calculated hedge fund investment strategy.⁴⁸⁵ In the majority of cases it is submitted that our courts (given the wide ambit of the discretion in section 164(15)(c)(iv) in relation to allocating costs) may be able to discourage abuse by means of costs orders against the applicant where this is fair and equitable. This aspect of the Minnesota appraisal statute was clarified by the Minnesota Court of Appeals in *PeopleNet Communications Corporation v. Baillon Ventures, LLC*.⁴⁸⁶

In this case a dissenting shareholder brought an action in terms of the relevant legislation for the district court to determine the fair value of his shares. No appraisers were appointed (by either party or the court) to assist in the valuation process. The district court concluded that the dissenter was not entitled to additional costs. The court determined that the dissenter was ‘misguided’ in bringing the case before the court but that his actions were not ‘arbitrary, vexatious, or in bad faith’. If the dissenter had been found to have acted in

⁴⁸⁴ The potential for adopting a similar approach in South Africa is discussed in paragraph 7.6.

⁴⁸⁵ See paragraph 3.4 for a detailed discussion of recent developments and case law in the US.

⁴⁸⁶ No. 27-CV-08-1328, 2009 WL 3815382 (Minn. Ct. App. May 4, 2010).

this manner he would have been liable for the costs and expenses of the proceedings as well as the reasonable expenses of any appraiser appointed by the court.

It is submitted, however, that where appraisal rights arbitrageurs or investors have legitimately identified an appraisal rights opportunity and where it is ultimately determined that the fair value of the shares is higher than the consideration initially offered by the company, a court should not be able to make a costs order against the applicant based on the fact that their motive was purely the pursuit of profit rather than true shareholder dissent. There is nothing in section 164 which supports such an interpretation, in fact as long as the dissenting shareholder has the requisite standing, the reference in section 164(15)(c)(iv) to an ‘appropriate order’ given the relationship between the offer and award price, implies that it would be inappropriate to make an adverse costs order against such an applicant. It is submitted that, if the claim is legal and it later transpires, by virtue of a higher valuation, justified, then motive is irrelevant.

7.6 Corporate intervention

In other jurisdictions, to the extent that the legislative intervention described has not provided adequate solutions, the parties to a transaction where appraisal rights may be exercised often seek to regulate the position themselves. These arrangements are mostly practical measures to ensure that the potential effect of the exercise of appraisal rights does

not impact on the viability of a proposed transaction or corporate action.⁴⁸⁷ The measures include pre-arranged funding to cover the potential cost of a company which is a party to a transaction having to make an appraisal rights payment to a group of shareholders, obtaining a waiver of shareholders' appraisal rights prior to a transaction and structuring a transaction by making it subject to a suspensive condition that no more than a predetermined number of shareholders exercise their appraisal rights. If more than the stated number do so, then the transaction fails.⁴⁸⁸

South African companies and their legal advisors have wasted no time in adopting some of the established practical measures used to deal with appraisal rights in the US. So, for example, in an offer made to the shareholders of CapeVin Investments (CVI) by its holding company CapeVin Holdings (CVH) to acquire all the ordinary shares that CVH did not already hold, conditions attached to the offer included a condition that 'no CVI shareholders give notice objecting to the scheme as contemplated in section 164(3) of the Companies Act, and vote against the resolution proposed at the general meeting to approve the scheme.'⁴⁸⁹

⁴⁸⁷ In other words they are aimed at curbing the potentially improper use of the appraisal rights by shareholders or, in more extreme cases, restricting the risk to the company in regard to the proper exercise of appraisal rights.

⁴⁸⁸ See Manning at 237. Ironically this strategy may give dissenting shareholders who exceed the suspensive condition threshold even more power. Manning refers to this as the 'jimmy effect' - the word 'jimmy' means to force something open. Potentially dissenting shareholders will be aware that their decision to exercise their appraisal rights may prevent the transaction from occurring at all which gives them greater leeway to negotiate a favourable settlement with the company.

⁴⁸⁹ See Yeats at 338.

According to the legal counsel involved in the transaction, this practice in effect ‘neutralises the threat of uncertainty created by section 164 in relation to potential cash demands made by the shareholders in a target company. As one of the biggest threats to a transaction is uncertainty (in this case the time and costs associated with the exercise of appraisal rights by dissenting shareholders) parties therefore use such conditions to put themselves in a position where they can decide whether to proceed with the transaction or not, depending on the extent of the demands.’⁴⁹⁰

Although this is a common practice in the USA, in the South African context it is important to bear in mind the anti-avoidance provisions of section 6, a section which does not feature in the appraisal rights legislation of the US, Canada or New Zealand. It is not inconceivable that a South African court may, in due course, declare such an agreement or transaction to be primarily intended to defeat the effect of a requirement established by an unalterable provision of the South African Act and thus void to the extent that it reduces or defeats the unalterable provision.⁴⁹¹ As appraisal rights are entrenched in an unalterable provision in the South African Act, and as such a clause is intended to defeat the exercise of those rights,

⁴⁹⁰ See the comments by Gareth Driver of Werksmans Attorneys in a Business Report article dated 3 May 2012 and available at <http://www.iol.co.za/business/business-news/capevin-offer-shows-how-to-netralise-dissenters-rights>.

⁴⁹¹ S 6(2). The South African courts may be able to rely on case law dealing with the anti-avoidance rules in terms of the Income Tax Act 58 of 1962 to the extent the same principles are applicable. See, for example, *SARS v NWK Ltd* 2011 (2) SA 67 (SCA), *CIR v Bobat and Others* 2005 67 SATC 47(N), *CIR v Conhage* 61 SATC 391, *Erf 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue* 1996 3 SA 942 (A), *FCT v Newton* 1958 2 All ER 759, *Kilburn v Estate Kilburn* 1931 AD 510, *SIR v Gallagher* 1978 (2) SA 463 (A) and *Smith v CIR* 1964 (1) SA 324 (A).

a court has power to declare the particular condition or the entire offer agreement void on this basis.⁴⁹²

Note, however, that in terms of section 6(1) an application for a declaration of this kind must be brought by the Commission, Panel or an exchange in respect of a company listed on that exchange.⁴⁹³ Therefore it is not possible for an individual person or company to bring an application for a declaration of voidness under this section. It must be brought by one of the regulatory authorities referred to which considerably limits the potential usefulness of the section to address anti-avoidance practices.

In addition to inserting a suspensive condition as described above, an alternative strategy which could possibly be utilised to give comfort to the parties to a proposed triggering transaction is that the shareholders (or certain of the shareholders) waive their appraisal rights in advance in anticipation of a specific transaction.⁴⁹⁴ The South African Act does not provide for this mechanism and it is not clear whether it is legally permissible in the South African context. A consideration of whether appraisal rights can be waived must be

⁴⁹² Delpont (at 580) opines that an undertaking in the memorandum of incorporation or in an agreement to the effect that a shareholder will not exercise his appraisal rights is void as being contrary to the Act or *contra bonos mores*. This should be distinguished from the situation where an offer is made subject to the suspensive condition that appraisal rights not be exercised. In a suspensive condition scenario the shareholders are not deprived of their appraisal rights. The effect is merely that the offer will not proceed unless the condition is fulfilled or waived by the offeror and this approach is thus less invasive and objectionable than including an undertaking not to exercise appraisal rights in the Memorandum of Incorporation of a company.

⁴⁹³ Furthermore, the inclusion of such a neutralising condition would presumably be limited to a transaction contemplated in s 164(2)(a). It is difficult to imagine that it can be properly utilised to neutralise appraisal rights in respect of the amendment of the Memorandum of Incorporation of a company in terms of s 164(2)(a).

⁴⁹⁴ As is provided for in the British Columbia statute. See paragraph 7.5.4.

based on the law in South Africa as it pertains to the waiver of rights generally. With respect to the nature of a waiver of rights the Appellate Division, per Innes CJ, has stated that:

‘The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances.’⁴⁹⁵

Next, one must consider the circumstances under which the South African courts will allow a person to waive a statutory right. South African courts have consistently applied the principle that if waiving the right would be contrary to public policy or contrary to the rule of law, it cannot be waived.⁴⁹⁶ However, if the statutory right was enacted for the benefit of an individual or a specific group of persons, such right may be waived by those persons.⁴⁹⁷

Importantly, the courts have held⁴⁹⁸ that where the statutory right is for the benefit of an individual or specific group of persons only, the fact that the statutory provision is couched in peremptory terms, is irrelevant. In determining whether or not the waiver of the applicable statutory right would be contrary to public policy, the courts will first consider the relevant provisions of the applicable statute.⁴⁹⁹ If it is unclear as to whether or not the

⁴⁹⁵ *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719.

⁴⁹⁶ *Road Accident Fund v Mothupi* 2000 4 SA 38 (SCA).

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) 49G-H.

⁴⁹⁹ *Ibid.*

waiver of the relevant provision would be contrary to public policy, the courts may then have regard to the purpose of the relevant statute and the preamble of the statute, if necessary.⁵⁰⁰

Considering the provisions of section 164 in isolation, it could be argued that the benefits are conferred on an individual or specific group of persons (i.e. the dissenting minority shareholder(s)) and are, in principle, capable of being waived in advance, should the shareholder(s) do so in full appreciation of their rights. However, in making its determination, a court would consider the facts of each case. One significant factor could be whether or not the shareholder is a commercially and legally sophisticated shareholder. Unfortunately, here the general anti-avoidance provisions contained in section 6(1) of the South African Act once again muddy the waters to some extent. The very wide ambit of the section 6 anti-avoidance provision arguably means that it is not clear whether such a waiver would be contrary to public policy and then it becomes necessary to consider the objects and purposes of the Act as set out in section 7.

Section 7 specifically provides that the purpose of the South African Act is, among other things, to:

⁵⁰⁰ Ibid.

- (a) promote the development of the South African economy by encouraging transparency and high standards of corporate governance, as appropriate, given the significant role of enterprises within the social and economic life of the nation, and
- (b) to balance the rights and obligations of shareholders and directors within companies.

This section reinforces the public policy considerations that underscore many of the provisions of the South African Act. The question is whether a waiver of appraisal rights (which are a key component of the minority shareholder protections in the South African Act) can be aligned with these purposes.

Ultimately, two issues need to be considered. First, whether it is, in principle, competent in South African law for anyone to waive the appraisal rights, in any circumstances. This relates to questions of policy and how important the right is deemed to be by a court of law. Secondly, on the facts of the case it must be established whether there was proper consensus. That is, did the shareholder in question know the full implications and potential consequences of his waiver? Questions such as the information made available to the shareholder and his level of sophistication, are relevant to this enquiry. As pointed out by Cassim⁵⁰¹ an ancillary question is raised here in relation to an advance election by the shareholder not to enforce his appraisal rights at all. It is unclear whether this is permissible or at least indirectly achievable where a shareholder undertakes (for example in a shareholders' agreement) not to vote against certain corporate actions. He is then

⁵⁰¹ At 801.

contractually bound by this but, in effect, has waived his appraisal rights in anticipation of a triggering transaction because he cannot exercise the appraisal right if he does not vote against the proposed resolution.

Irrevocable undertakings to vote in favour of a particular transaction are commonplace in commercial practice and there seems to be no real reason why a shareholder should not be able to furnish the company with an irrevocable undertaking not to vote against a particular transaction. There is case law⁵⁰² to support the contention that this is permissible because the shareholder is renouncing a right given for his own benefit. According to Delpont the caveat that renunciation is not possible where it gives effect to something forbidden in terms of legislation or abrogates the mandatory terms of a statute does not apply in this context.⁵⁰³

A question related to the above debate is whether a shareholder can furnish an irrevocable undertaking not to vote against triggering transactions in exchange for consideration, in effect ‘selling’ his appraisal rights at the outset.⁵⁰⁴ Some of the types of interventions

⁵⁰² *Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719; Neugarten and Others v Standard Bank of South Africa Ltd 1989 (1) SA 797. See Delpont at 580.*

⁵⁰³ *Ibid.*

⁵⁰⁴ In the recent decision of *Halpin v Riverstone National Inc.* (C.A. No. 9796 – VCG, 2015 WL 854724 (Del. Ch. Feb. 26, 2015)) the Delaware Court of Chancery accepted as settled law the principle that holders of preferred stock can waive their appraisal rights because the rights are largely contractual in nature. The court distinguished this relationship from the one between common (ordinary) stockholders, controlling stockholders and the board of directors which, the court held, was mainly governed by the law of fiduciary duties. The court did not answer the question whether the common stockholders would be bound by such a waiver i.e. whether they could validly undertake to waive their appraisal right in anticipation of a transaction or not.

referred to above may prove useful in the South African context, but all of them will need to be tested for legal legitimacy against the anti-avoidance provisions of section 6 and the Memorandum of Incorporation amendment restrictions of section 15 of the South African Act, where applicable.⁵⁰⁵ Legal clarity is required in this regard, whether it is ultimately provided by the legislature or the courts.⁵⁰⁶

7.7 Alternative Dispute Resolution

Alternative Dispute Resolution⁵⁰⁷ or ‘ADR’ (and arbitration in particular) offers a potential panacea for a number of the challenges posed by the inclusion of appraisal rights in the Act. I have discussed it under a separate heading rather than reserving its potential application for either the legislative or corporate interventions as it can potentially be used to good effect in various forms by either or both the lawmakers and public or private companies.

However, there are legal issues surrounding the implementation of ADR in both instances of legislative and corporate intervention. Whilst there is sound international precedent for the inclusion of arbitration processes in appraisal rights statutes,⁵⁰⁸ the South African legal paradigm may not permit a wholesale shift of the appraisal rights procedure from the court

⁵⁰⁵ S 15(1) – where it is included in the Memorandum of Incorporation of the company such a provision could be interpreted as being ‘inconsistent with the Act’ and thus void.

⁵⁰⁶ See paragraph 5.2.3.

⁵⁰⁷ In this thesis the term ‘ADR’ is used in its wider sense i.e. as referring to all the alternatives to litigation in state courts and thus including mediation, conciliation and arbitration. See further Blackaby & Partasides *Redfern and Hunter on International Arbitration* (6th ed 2015 OUP) 40.

⁵⁰⁸ See Model Business Corporation Act and the New Zealand Law Commission Report as discussed in Chapters 3 and 5.

to an arbitration forum or other means of dispute resolution. The legislature obviously had the opportunity to include an arbitration option when drafting the South African Act and has elected not to do so.

An alternative approach would be to implement an ADR arrangement by way of corporate intervention (which would tend to be an ad hoc or transaction specific arrangement) or, more usefully, by way of permanent corporate intervention. If the latter approach is adopted by a company, the ADR process would then constitute part of the permanent, formal machinery and procedure of a company in relation to appraisal rights. Although an ADR provision was not included in section 164, there is plenty of general legislative support, both in the Act and in ancillary company regulations, for ADR as an alternative to litigation.⁵⁰⁹

The challenge with respect to either ad hoc or permanent corporate interventions as described above is that they may be construed as a transgression of the section 6 anti-avoidance provision, alternatively an impermissible amendment of a section 164 as an unalterable provision.⁵¹⁰ As has previously been pointed out, an unalterable provision may be changed if it imposes a higher standard, greater restriction, longer period of time or any similarly more onerous requirement on the company than would otherwise apply.⁵¹¹ It is

⁵⁰⁹ See paragraphs 7.7.2 and 7.7.3.

⁵¹⁰ S 15(2)(d). This would be the case where the ADR provision is included in the memorandum of incorporation of the company.

⁵¹¹ S 15(2)(a)(iii).

not clear whether providing an ADR alternative to litigation would constitute a more onerous alternative, even if, for example, the time periods within which shareholders were expected to exercise their appraisal rights were extended as part of the process.

7.7.1 Introduction

Based on the findings from the comparative study of foreign law and practice, it is submitted that the use of ADR, and specifically arbitration, may be extremely useful in addressing the challenges posed by appraisal rights in South Africa. South Africa has a well-developed legislative framework and body of jurisprudence dealing with arbitration and it has become an increasingly popular method of resolving commercial disputes as South African courts have become heavily burdened.⁵¹² There is also foreign precedent for the use of arbitration in various facets and at different stages of the appraisal rights process.⁵¹³

Although the term ADR includes arbitration, mediation and conciliation, these are distinctly different processes with different implications and legal consequences.⁵¹⁴ It is submitted that, of the three, arbitration is best suited to replace litigation as an alternative

⁵¹² See the online article <http://www.cliffedekkerhofmeyr.com/news/files/CDH-Commercial-Litigation-South-Africa.pdf> (accessed 30 November 2011) where Pieter Conradie notes that ‘Commercial arbitration has become a common form of dispute resolution in South Africa. The general advantages of arbitration are that it is confidential and the arbitrator can be selected by the parties. In addition, arbitration is usually a faster way of reaching finality in a dispute than litigation.’

⁵¹³ See, for example, the New Zealand Law Commission Report at 7-14.

⁵¹⁴ See Butler D W & Finsen E *Arbitration in South Africa Law and Practice* (1993) 8-19 for a comparison of mediation and arbitration. See also Butler ‘Arbitration’ in *LAWSA 2* (2015) paragraph 87 on the differences between arbitration and mediation.

way in which to settle disputes around the value of shares in an appraisal rights situation. The reasons for this are chiefly the binding nature of an award, the fact that arbitration is comprehensively regulated by a tried and tested statute⁵¹⁵ and the legal (and commercial) certainty which the process provides.

However, because both the South African Act and King III refer to ADR (and because I do not summarily dismiss mediation and conciliation as potential avenues of first instance for resolving disputes in this context) I will continue to use the composite term ADR where appropriate. Arbitration has some significant potential advantages over litigation in the context of appraisal rights because the parties can choose their own adjudicator (a significant advantage when dealing with complex valuation methodologies) and there is not as much emphasis on formalistic legal proceedings which implies a greater ability to focus on the issues at hand and ultimately results in more efficient, private proceedings.

According to Butler and Finsen⁵¹⁶ ‘arbitration is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision after the arbitrator has first impartially received and considered evidence and submissions from the parties.’ The fact that there is a dispute in existence distinguishes the arbitration process from the mere referral of matters to a third party for determination such as valuation. Butler and Finsen identify five essential characteristics:

⁵¹⁵ The Arbitration Act 42 of 1965. The Arbitration Act applies only to arbitration pursuant to a written arbitration agreement.

⁵¹⁶ At 19.

- 1) Arbitration is a process for resolving a dispute between parties regarding their existing rights;
- 2) The reference to arbitration takes place in terms of an enforceable agreement between the parties (i.e. it has a consensual basis);
- 3) The arbitrator is appointed by the parties (or by somebody designated by them where they are unable to agree on the appointment) and the arbitrator has no formal connection to the courts;
- 4) The arbitration agreement must contemplate that the arbitrator will determine the rights of the parties in an impartial manner and that he will reach his decision after receiving and considering evidence and submissions from the parties by following a procedure which is equally fair to both parties; and
- 5) The arbitrator's decision in the dispute (hereafter 'award') is final and the parties agree in advance to be bound by it. Therefore it is not subject to appeal to the courts.⁵¹⁷

Butler & Finsen⁵¹⁸ point out that it is important to draw a distinction between formal arbitration proceedings and instances where matters are referred to a third party and where the third party acts as a quasi-arbitrator or expert. The Arbitration Act⁵¹⁹ only applies where the arbitration takes place in terms of a written arbitration agreement. Furthermore,

⁵¹⁷ See also Butler 'Arbitration' in *LAWSA 2* (2015) paragraph 75. The courts may enforce or exclude the operation of arbitration agreements and may also sanction the enforcement of an award if one of the parties does not comply with the award voluntarily.

⁵¹⁸ Butler and Finsen at 3-4. See also Butler 'Arbitration' in *LAWSA 2* (2015) paragraphs 86 and 88 where arbitration is distinguished from valuation and expert determination respectively.

⁵¹⁹ Act 42 of 1965.

the courts have more powers (and these powers are more clearly set out) in relation to arbitration than in relation to other forms of reference. The alternatives to arbitration differ in form, substance and consequence from formal arbitration proceedings. These are mediation-type procedures and hybrid forms of arbitration.⁵²⁰

7.7.2 The Act

In the South African Act the general use of alternative dispute resolution to address complaints or secure rights is mandated in Chapter 7 which deals with ‘Remedies and Enforcement’. To this end section 156 provides that:

‘A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company’s Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company’s Memorandum of Incorporation or rules, by –

- (a) *attempting to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of this Chapter; (author’s emphasis)*
- (b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;
- (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
- (d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 219 with –

⁵²⁰ Butler and Finsen at 19.

- (i) The Panel, if the complaint concerns a matter within its jurisdiction; or
- (ii) The Commission in respect of any matter arising in terms of this Act, other than a matter contemplated in subparagraph (i).⁵²¹

Section 157 deals with the extended standing of certain persons to apply for remedies and provides that:

‘(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-

- (a) directly contemplated in the particular provision of this Act;
- (b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;
- (c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
- (d) acting in the public interest, with leave of the court.’

These sections, read together, imply that an aggrieved shareholder (as the person directly contemplated in the particular provision of the South African Act)⁵²¹ who would be able to bring an appraisal application before a court in terms of the South African Act is equally entitled to enforce that appraisal right through the mechanisms of ADR or an application

⁵²¹ S 157(b) read with s 164(14).

to the High Court having jurisdiction over the matter.⁵²² This is important because it lays the foundation for an argument that appraisal rights can be regulated otherwise than as set out in the South African Act and that shareholders will still, in terms of the South African Act, have the specific remedies to enforce those rights.

In terms of section 166 a person who would be entitled to apply for relief to a court in terms of the South African Act may refer a matter that could be the subject of such an application for resolution by mediation, conciliation or arbitration to:

- (a) the Companies Tribunal;
- (b) an accredited entity as defined in s 166(3);⁵²³ or
- (c) any other person.

If parties have resolved a dispute in terms of section 166, the resolution of the matter may be recorded in the form of an order and confirmed by a court as a consent order in terms of its rules.⁵²⁴ A confirmed consent order may include an award of damages.⁵²⁵ This is also an extremely helpful provision as far as the regulation of appraisal rights is concerned because it lends legislative legitimacy to ADR as an alternative to court proceedings in this context. It will be noted, however, that the specific wording of section 166 restricts the

⁵²² S 156(a) and (c).

⁵²³ 'Accredited entity' means a juristic person or an association of persons accredited by the Commission in terms of the Act or an organ of state that is mandated to perform ADR services and has been designated an accredited entity by the Minister. See further s 166(3).

⁵²⁴ S 167.

⁵²⁵ S 167(3)(a).

ADR alternatives to mediation, conciliation or arbitration for the purposes contemplated. This implies that parties in a section 164 appraisal rights dispute may be limited to these processes, apparently excluding other forms of ADR such as, for example, expert determination. Expert determination differs from arbitration in that the person appointed to decide the dispute must act as an expert and not as an arbitrator in the performance of that function. Such an expert is not subject to the Arbitration Act⁵²⁶ and it is not entirely clear whether the court has the power to review the decision.⁵²⁷ The question arises whether sections 164 and 166, read together, preclude the parties from legitimately agreeing to use an ADR process such as expert determination instead of those listed in section 166. I am of the view that this may well be the effect. The specific words ‘mediation, conciliation or arbitration’ as opposed to a more general term such as ‘alternative dispute resolution’ appear in sections 166(1), 166(2), 166(3)(b)(i) and 166(4)(a)(i), arguably indicate that the legislature intended to restrict the reach and application of this section to these three forms of ADR. A possible rationale for this approach could be that these three forms of ADR are well established and there are clear legal rules and precedents which have been established over many years. This lends a degree of certainty to the applicable processes and the legal consequences relating to an applicant’s decision to seek relief or a remedy outside the formal court system.⁵²⁸

⁵²⁶ 42 of 1965.

⁵²⁷ *Schuldes v Compressor Valves Pension Fund* 1980 4 SA 576 (W). See further Butler ‘Arbitration’ in Joubert & Faris *LAWSA* (3rd ed 2015) at paragraph 88.

⁵²⁸ Note, however, that in *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) the court refused to refer the matter to arbitration (notwithstanding the existence of an arbitration clause in the shareholders’ agreement) and instead effectively referred the dispute to a chartered accountant to make an expert determination. The court opined (at paragraph 76) that, given the fact that the matter concerned novel sections of corporate law, there was a concern ‘that any misapplication of the law will not readily afford a party affected thereby relief by way of redress before a court of law, given the limitations on the reviewability of arbitral awards, particularly in regard to errors of law.’

Note, however, that in *Omar v Inhouse Venue Technical Management (Pty) Ltd*⁵²⁹ the court refused to refer the matter to arbitration (notwithstanding the existence of an arbitration clause in the shareholders' agreement) and instead effectively referred the dispute to a chartered accountant to make an expert determination. The court opined (at paragraph 76) that, given the fact that the matter concerned novel sections of corporate law, there was a concern 'that any misapplication of the law will not readily afford a party affected thereby relief by way of redress before a court of law, given the limitations on the reviewability of arbitral awards, particularly in regard to errors of law.' This case may be distinguishable on the basis that the parties did not invoke section 166⁵³⁰ and thus the court's decision was not made, nor restricted, in terms of the section.

The consent order referred to in section 167(1) may only be granted by the Tribunal or an entity accredited in terms of section 166 and, in addition, the order is subject to consent by the disputing parties. The consent order cannot be granted by 'any other person' to which a matter has been referred in terms of section 166(1)(c). Accordingly it seems that a matter which has been settled by, for example, a private mediator in which an agreement has been reached would be enforceable only as a contractual obligation between the parties and not in terms of section 167. Furthermore, an arbitral award may be made an order of court in terms of section 31 of the Arbitration Act⁵³¹ and thus the mechanism created in section 167

⁵²⁹ 2015(3) SA 146 (WCC).

⁵³⁰ See paragraph 75 of the judgement.

⁵³¹ Or a consent award made by the arbitrator which is enforceable by the court. See *Bidoli v Bidoli* 2011 (5) SA 247 (SCA).

is not required in these circumstances. Section 167 could therefore be restricted so as to apply to conciliation and mediation only.

The risks associated with interventions which may fall foul of the section 6 anti-avoidance provisions have already been addressed in this Chapter. To the extent that inclusion of ADR provisions may constitute avoidance measures they are, of course, subject to the same risks. However, as a legislatively mandated and regulated alternative to litigation, ADR is arguably on a different footing to other interventions devised by parties to a transaction. This observation is bolstered by the specific recommendations promoting ADR in the Third King Report on Corporate Governance (hereafter ‘King III’)⁵³² as well as section 166 of the South African Act.⁵³³

7.7.3 The effect of King III

The Third King Report on Corporate Governance in South Africa (‘King III’) was drafted in legislative response to the South African Act as well as changes in international corporate governance trends. An interesting addition to the ADR debate is contained in the provisions of the King III which specifically identifies ADR as an alternative to expensive, time-consuming and often unpredictable litigation. Furthermore, King III promotes ADR as an essential component of good corporate governance and recommends that directors should explore more creative methods of dispute resolution as part of their

⁵³² See paragraph 8.3 below.

⁵³³ See, however, paragraph 71 of the *Omar* case and the approach taken by the court with respect to the ambit of the arbitration clause contained in the shareholders’ agreement.

fiduciary duties.⁵³⁴ In fact, King III is surprisingly prescriptive as to the role of the board in ensuring that disputes are resolved as effectively, efficiently and expeditiously as possible.⁵³⁵

It is noteworthy that ADR is specifically identified as a methodology which has proved to be a ‘most effective and efficient’ alternative to ‘costly and time consuming’ formal litigation.⁵³⁶ Principle 41 of King III places an obligation on the board to adopt formal resolution processes for both internal and external disputes. King III describes the successful resolution of disputes as that which best serves the interests of the company and, in making this determination, considerations such as *inter alia* costs (both executive time costs and financial costs) must be taken into account.⁵³⁷

One of the challenges involved in the ADR process relates to the selection of the appropriate form of ADR, that is, conciliation, mediation or arbitration.⁵³⁸ Item 53 of Principle 8.6 lists the various considerations to be taken into account when determining the most appropriate method, namely: the time available for the resolution of the dispute, principle and precedent, business relationships, expertise, confidentiality and the rights and interests at stake.

⁵³⁴ King III endorses mediation and conciliation and, if that fails, arbitration.

⁵³⁵ See King III Principle 8.6 items 35-57.

⁵³⁶ Principle 8.6 item 39.

⁵³⁷ Principle 8.6 item 47.

⁵³⁸ See paragraphs 7.7.1 and 7.7.3.

It is submitted that preserving ongoing business relationships are not usually a primary concern when dealing with appraisal rights disputes – the shareholder in question is attempting to sever his relationship with the company. However, the preservation of goodwill if a shareholder elects to part ways with a company can be valuable for possible future investment and the enhancement or maintenance of a positive corporate image. It also signifies good corporate governance if stakeholder relationships can be dealt with in an amicable manner. Similarly the fact that ‘creative’ solutions can form part of the ADR process whilst this is not possible in court adjudication is not one of the obvious advantages of applying ADR to appraisal rights disputes, as the solution required is simply a valuation.

When these considerations are applied to a typical appraisal rights dispute, the following observations may be made: time is of the essence when resolving appraisal rights disputes. Strict time frames are prescribed in the South African Act in relation to the service of notices, payments and transfer of shares but cannot, obviously, be prescribed for the timelines associated with litigation, a process which may take years to achieve a final outcome. The interests of both the dissenting shareholders, who desire speedy and effective dispute resolution, and the interests of the company (the remaining shareholders and the board) , who desire legal certainty, closure and finality as well as the minimum investment of valuable executive time, favour ADR over drawn-out litigation.

King III cautions that where principle and precedent are important, in the sense that the company requires a binding resolution that can be applied to similar disputes in the future,

ADR may not be the most appropriate solution. Court proceedings and a judgment would result in the binding principle required. It is, however, submitted that appraisal rights disputes that concern the value of a share at a particular point in time do not fall into this category. They are, by their nature, value determinations limited by their link to a specific event and time and thus not matters of principle or enduring precedent to be applied in future disputes. It is, however, essential that all the appraisal disputes in question linked to a particular event are dealt with in the same ADR proceedings so that each dissenting shareholder achieves the same result.

Expertise is a particularly valuable advantage of ADR for appraisal rights disputes as the valuation of shares is notoriously complex and litigation often results in a battle of the experts.⁵³⁹ The choice of an informed arbiter (or mediator) with experience and expertise in the field of share valuation would considerably reduce the risks, costs and uncertainty associated with litigation in this context. Confidentiality may also prove to be a boon to a company in case, in the course of the valuation arguments made before the court, sensitive commercial and financial information is brought to light which the company would prefer to be kept confidential from competitors in the best interests of the company.

Principle 50 notes that ‘mediation’ (which is not defined in the South African Act) has acquired an accepted meaning in practice in South Africa. King III suggests the following definition for mediation: ‘A process where parties in dispute involve the services of an

⁵³⁹ See the comments of the judge in *Andaloro v. PFPC Worldwide Inc. et al*, 2005 Del. Ch. at page 2.

acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement.⁵⁴⁰ Mediation differs considerably from arbitration or adjudication in the sense that the mediator does not render a decision. The parties retain their decision-making powers and the task of the mediator is to facilitate a structured negotiation process between the parties in order to reach a mutually agreeable verdict.

Conciliation (which is not defined in the South African Act either) is akin to mediation except for the fact that the conciliator will also make a formal recommendation as to the resolution of the dispute. Both mediation and conciliation are entirely voluntary processes.⁵⁴¹ Principle 53 acknowledges that it is no easy task for the board to determine which is the most appropriate form of ADR for the resolution of the disputes of a company and that each case should be decided on its merits, taking into account the time available for the resolution of the disputes, principle and precedent, business relationships, the need for expertise, confidentiality and the rights and interests at stake.⁵⁴²

It would appear that of all the ADR processes available, arbitration is the one which can most sensibly applied to appraisal rights disputes in South Africa. Not only does it bear the most resemblance (in both form and substance) to the court process prescribed in the

⁵⁴⁰ Principle 50.

⁵⁴¹ Principle 51.

⁵⁴² See Principle 53 and paragraph 8.3 where these factors are applied to the nature of appraisal rights disputes.

South African Act for the resolution of such disputes, but it also has all the traditional advantages of ADR over litigation namely, speed, cost-effectiveness, confidentiality and the ability of the parties to appoint an expert arbiter whilst retaining the formal procedural framework and the power of a third party mandated to make a formal, binding, enforceable decision.

7.7.4 Application to section 164

The question which naturally arises is what form the ADR intervention should, could or is likely to take. The law makers no doubt had the opportunity to consider ADR (or arbitration) as a statutory alternative to formal court proceedings when drafting section 164. They obviously elected not to offer or utilise this alternative option.⁵⁴³ This implies that, unless the legislature introduces an amendment to this effect in the near future, if arbitration is to be utilised in this context it will need to take the form of a corporate intervention.

This could, theoretically, happen in at least two ways: either the company and the dissenting shareholder(s) in question enter into a private arbitration agreement once it becomes clear that a fair value dispute has arisen or the company includes an arbitration clause in its Memorandum of Incorporation, thereby binding all shareholders to arbitration proceedings in the event of a dispute regarding the value of the shares. Neither course of action is legally unproblematic. Where the process becomes subject to arbitration after the value dispute arises, it may not be possible to get all the dissenting shareholders to agree

⁵⁴³ As New Zealand did in the reform process of its appraisal rights provisions.

to a private arbitration. The company would then have potentially two sets of processes running in tandem and two sets of dissenting shareholders to deal with, clearly a most undesirable result.

Furthermore, this scenario is complicated by the provisions of section 164(15) which states that, where application is made to court in terms of section 164(14), ‘all dissenting shareholders who have not accepted an offer from the company as at the date of application must be joined as parties and are bound by the decision of the court’. This section appears to negate the effect of any arbitration award in these circumstances. Therefore a private arbitration agreement between the company and shareholders exercising appraisal rights is only a feasible course of action if all the shareholders are willing to enter into such an agreement. A possible solution to this problem would be a corporate intervention whereby any provision in the Memorandum of Incorporation that provides for arbitration of appraisal rights disputes includes a joinder provision. The UNCITRAL Arbitration Rules⁵⁴⁴ contain a provision which can serve as a basis for such an inclusion:

‘The arbitral tribunal may, at the request of any party, allow one or more shareholders entitled to exercise appraisal rights to be joined in the arbitration as a party, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award in respect of all parties so involved in the arbitration’.

⁵⁴⁴ 2010 article 17.5.

All the shareholders who exercise their appraisal rights would be parties to the arbitration agreement (or successors in title to those who were) and can therefore be regarded as having consented to arbitration.

The second option, being the inclusion of an arbitration clause in the event of a value dispute where appraisal rights are exercised is also not devoid of legal issues. The first concern relates to the fact that section 164 is an unalterable provision.⁵⁴⁵ This implies that, unless the arbitration provision in the Memorandum of Incorporation raises the bar with respect to the requirements of the section and makes it more onerous on the company⁵⁴⁶ it will be invalid. It is arguably possible to reconstruct the provision and make it technically more onerous for the company by, for example, extending the time periods in relation to shareholders and truncating them for the company, requiring the disclosure of more information with respect to the manner in which the fair value was arrived at and inserting additional procedural opportunities to facilitate an agreement between the parties by subjecting them to conciliation or mediation before embarking on arbitration.

It should be noted that section 166(1) read with section 156(a) permits the applicant to obtain the remedy which it could obtain from the court in terms of section 164 through arbitration instead.⁵⁴⁷ This implies that the term ‘court’ may be read as including an

⁵⁴⁵ See paragraph 7.2 where the effect of these sections was discussed in detail.

⁵⁴⁶ Ibid.

⁵⁴⁷ This is subject to the restriction that an arbitrator cannot make an order against persons who are not parties to the arbitration agreement and the submission to arbitration.

arbitrator in this context. The case of *Thelo Rolling Stock Leasing (Pty) Limited v Elitheni Coal (Pty) Ltd*⁵⁴⁸ provides support for the interpretation of the term ‘court’ as including an arbitrator. The court held that⁵⁴⁹ the words ‘competent court’ in the Conventional Penalties Act⁵⁵⁰ could be interpreted to include an arbitrator. Similarly the English Court of Appeal has held⁵⁵¹ that disputes relating to unfairly prejudicial conduct in terms of section 994 of the UK Companies Act of 2006⁵⁵² may be referred to arbitration where the parties have agreed to do so in a shareholders’ agreement. However, the usual restrictions applicable to relief which may be granted by the arbitral tribunal would apply. For example, the arbitrator cannot order that the company be wound up. The *Thelo* and *Fulham* cases provide support for an extended meaning of the word ‘court’ and the *Fulham* case in particular strengthens the argument⁵⁵³ that where parties have agreed to arbitrate appraisal (or unfair prejudice) disputes the word ‘court’ should be read as generally including an arbitral tribunal. It would be prudent, however, to bear in mind the remarks of the court in the *Omar*⁵⁵⁴ case with respect to the ambit of arbitration provisions generally⁵⁵⁵ and the consent requirements in terms of section 166(1). In *Omar* the court stated that, had it been called upon to exercise its discretion as to whether to enforce the arbitration agreement or not, it would have elected not to enforce the agreement as this might have set an undesirable precedent. It should be noted that, unlike the approach taken by the Court in *Omar*, the

⁵⁴⁸ 2015 JDR 0998 (ECP)

⁵⁴⁹ Paragraph 31.

⁵⁵⁰ Act 15 of 1962.

⁵⁵¹ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855. See also *Redfern and Hunter* (2015) 123.

⁵⁵² This section is the English equivalent of s 163 of the South African Act.

⁵⁵³ Based on section 166(1) read with ss 163 and 164.

⁵⁵⁴ 2015(3) SA 146 (WCC).

⁵⁵⁵ Paragraphs 71 to 77.

English courts tend to interpret arbitration clauses widely in recognition of the fact that parties require ‘one-stop adjudication’.⁵⁵⁶

The balance to be struck in seeking an alternative to appraisal litigation is that the entire procedure does not become so onerous for the company that it negates the time, cost and efficiency benefits proffered by arbitration. In both the private arbitration agreement route and the Memorandum of Incorporation route described above, the possibility or danger exists that a party will refuse to abide by the terms of the agreement by insisting on litigation in court, alternatively refuse to abide by the terms of the ultimate award and challenge this in court by relying on section 34 of the Constitution.⁵⁵⁷ This aspect has been considered by the courts in the context of a private arbitration award. A private arbitration agreement is based on mutual consent between parties that their disputes will be settled by an arbitrator and, as such, can by further agreement be modified or withdrawn.⁵⁵⁸

The Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*⁵⁵⁹ dismissed an appeal from the SCA⁵⁶⁰ and per O’Regan ADCJ, who delivered the majority judgment, held that section 34 of the Constitution which provides that ‘everyone has the right to have any dispute that can be resolved by the application of law

⁵⁵⁶ *Zhongji Construction v Kamoto Copper Company* [2014] ZASCA 160. 2015 1 SA 345 (SCA) paragraph 59 citing *Fiona Trust & Holding Corporation & others v Privalov* [2007] UKHL 40; [2007] 4 All ER 951. (HL) paragraphs 6, 7 and 27.

⁵⁵⁷ Constitution of the Republic of South Africa, 1996.

⁵⁵⁸ *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another* 2002 (4) SA 661 (SCA).

⁵⁵⁹ 2009 (4) SA 529 (CC).

⁵⁶⁰ 2008 (2) SA 448 (SCA).

decided in a fair and public hearing before a court or, where appropriate, another independent forum’, does not (directly) apply to private arbitration.⁵⁶¹ Further, O’Regan ADCJ stated that the effect of a person choosing private arbitration for the resolution of a dispute is not so much a matter of a waiver of their rights under section 34⁵⁶² but is more correctly construed as an election not to exercise their rights under that section. In reaching this conclusion, the Constitutional Court stated that private arbitration is widely used both domestically and internationally and has many advantages due to its flexibility, cost-effectiveness, privacy and speed.⁵⁶³

Furthermore the court emphasised that, in determining the proper constitutional approach to arbitration, it was to bear in mind that ‘litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.’⁵⁶⁴ Clearly the legal interaction between private arbitration agreements and the Constitution is not a simple one and, it is submitted, the complexities may be further exacerbated in the context of the Act by the existence of the unique anti-avoidance provisions.

⁵⁶¹ Although the court qualified this statement at 188 with the proviso that it is an implied term of every arbitration agreement that it must be procedurally fair. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) which was overruled on the waiver of rights under s 34 point in the *Lufuno* judgment.

⁵⁶² *Ibid.*

⁵⁶³ At 196.

⁵⁶⁴ At 197.

Thus, whilst the South African Act and King III clearly promote ADR as an alternative to litigation and whilst it holds some clear potential advantages for the appraisal rights process, it is questionable whether it will be widely utilised with respect to appraisal rights in the foreseeable future. The drafting of section 164 implies that the legislature has elected, at this juncture, to rely in the first instance on litigation proceedings to settle appraisal rights disputes and to give parties the choice to use ADR⁵⁶⁵ should they wish to do so. However, because (as previously discussed) the potential corporate intervention options contain a number of legal uncertainties, it is unlikely that they will initially be utilised by companies and shareholders.

Given the level of statutory policy support for ADR and its obvious advantages in the context of appraisal rights (which can address many of the major concerns and challenges) it is submitted that the legislature should consider clarifying and strengthening the use of ADR in appraisal proceedings under the South African Act. This would mean that companies and shareholders could pursue this option without fear of falling foul of any of the provisions in the South African Act and secure in the fact that they will be bound by both the elected process and the result.

7.7.5 Comment

⁵⁶⁵ S 166(1).

It would seem that ADR can ultimately be used to good effect to ameliorate at least some of the problems attached to appraisal rights. It is submitted that the exercise (or lack thereof) of appraisal rights should be monitored in future. If they are not utilised at all there is a risk that they will become legally irrelevant if the barriers to effective enforcement are not lowered. If the legislature has no objection to ADR or arbitration being implemented as an alternative to litigation in appraisal rights proceedings by agreement between the company and its shareholders (or by inclusion in the Memorandum of Incorporation), the legislature should amend the South African Act to make this clearer. In the circumstances I therefore recommend that section 164 should deal with private arbitration agreements by specifically clarifying that arbitration may be utilised as an alternative dispute resolution mechanism in the context of appraisal rights.⁵⁶⁶

CHAPTER 8

CONCLUSION

8.1 The current state and the future of appraisal rights in South Africa

The practical impact of the introduction of appraisal rights into South African law to date has been negligible. In the three and a half years since the South African Act came into operation⁵⁶⁷ no appraisal rights actions have been brought before the courts and no exercise

⁵⁶⁶ Such an amendment should be drafted in a manner that indicates that the express reference to ADR in s 164 does not imply that arbitration is unavailable for the other remedies in Part B of Chapter 7 by virtue of s 166(1).

⁵⁶⁷ The Act came into effect on 1 May 2011.

of appraisal rights has been reported in the commercial media. This begs the question whether the debate around appraisal rights is in fact ‘much ado about nothing’ and whether these rights are fated to remain a pointless addition to the South African Act and the arsenal of minority shareholder protections. It is my submission that the situation may not be that simple. It is, of course, almost impossible to state with any certainty why appraisal rights have not been utilised in South Africa to date. This could be attributed to a host of factors.

The first possible factor is that, as dictated by international experience, the process is too complex, time-consuming, expensive and uncertain to be readily available to minority shareholders.

The second factor which can be taken into account is that the market in listed securities is currently (and has been for some time) extremely robust and that, as a result shareholders are receiving high prices for their shares in situations which trigger appraisal rights and therefore have no pressing need or desire to exit their investments via the appraisal route or at all.

Alternatively, and in the third place, it may be argued that astute legal counsel have already embedded the practice of making triggering transactions subject to a maximum⁵⁶⁸ appraisal

⁵⁶⁸ In some cases this is even set at zero. In most cases, however, the parties will draft the condition as being one which is for their benefit and can thus be waived at any time so that they can do this in the event that the

rights exercise threshold, thereby removing the opportunity to exercise appraisal rights in a trigger transaction.

Fourth, because appraisal rights are still a relatively new addition to our company law and an unknown quantity, many shareholders are either not aware that they are entitled to exercise these rights and have no real understanding of the way in which they function whilst more sophisticated shareholders are waiting for others to take the lead and a body of precedent (both legal and procedural) to be established before they venture into this new territory.

The fifth factor which may play a role is arguably that, as a result of our stringent corporate governance regime, (possibly combined with the *ex ante* effect of the existence of the appraisal right) shareholders are in fact routinely offered fair value for their shares and so there is no need to invoke the machinery to ensure that this happens. The crux of the matter is that there is no clear way to determine which (or which combination) of these factors are responsible for the lack of appraisal rights litigation.

It remains to be seen whether appraisal rights will remain an ineffective remedy or whether changes in the South African economy and the listings environment will ultimately create the kind of circumstances which make their exercise worthwhile. It is my submission that

actual exercise of appraisal rights is insignificant. It is submitted that his practice is questionable and may amount to a transgression of the anti-avoidance provisions of section 6 of the Act. See further paragraph 7.6.

in due course, when the shareholder in a particular transaction is large and determined enough, and the stakes are high enough, appraisal rights will be utilised. It also remains to be seen what role appraisal arbitration will play in South Africa in bringing appraisal rights to the fore, but it seems likely that their inclusion in the Act will, at some point, have real commercial and legal consequences.

In fact, one would expect a jurisdiction such as South Africa which has no market out exception in its appraisal provisions to be even more vulnerable to appraisal rights arbitration as there are potentially more transactions which qualify as targets for arbitrageurs. However, in Canada which has no market-out exception⁵⁶⁹ either, appraisal rights arbitration appears not to be a factor, or at least not yet. However, the challenges for an ordinary minority shareholder to be able to assert their appraisal rights remain and should, where possible, be addressed.

8.2 Recommendations

The comparative foreign legal research by way of case law and literature review with respect to appraisal rights undertaken in this thesis reveals that two main themes surface constantly. First, the international experience has been that appraisal rights are not widely used. This is due to a number of factors including the costs of litigation, uncertain outcomes, complex prescribed legislative procedures and the time delays involved in the

⁵⁶⁹ See paragraph 3.2.4.

exercise of the rights. Second, there is a concern that, in the context of fundamental transactions, appraisal rights will be abused and that healthy corporate activity will be inhibited as the legitimate will of the majority is thwarted by minority shareholders who exercise (or even threaten to exercise) their appraisal rights in these circumstances. In South Africa, as elsewhere, the legislative challenge therefore remains to contain the threat of improper use without negating the objective of the appraisal remedy generally. Thus these two areas of concern are inextricably linked. Comparable foreign jurisdictions have addressed these problems in a number of ways including amending legislation to simplify the provisions and making the rights more accessible, recognising alternative dispute resolution procedures and self-regulating measures instituted in relation to trigger event transactions by the companies themselves.

South African law makers and lawyers can learn from this and, to the extent that our Act or its application can be improved, this should be done in order to optimise the effective exercise of appraisal rights. It is respectfully submitted that, as set out in this thesis, the legislature should reconsider the current version of section 164 with a view to:

- (a) Clarifying identified drafting errors and anomalies such as the solvency and liquidity requirements and the notice anomaly;
- (b) Clarifying uncertainties such as the legal position with respect to waivers, irrevocable undertakings, amendments of the Memorandum of Incorporation to facilitate waivers, the inclusion of suspensive conditions in transactions to avoid the exercise of appraisal rights;

- (c) Considering the introduction of basic, flexible guidelines for the courts with respect to the determination of 'fair value' and the appointment of appraisal experts;
- (d) Considering the introduction of an advance provisional payment of a portion of the 'fair value' offered by the company;
- (e) Considering the introduction of additional guidance as to the allocation of costs and expenses by the courts;
- (f) Clarifying the legal position with respect to voting and exercise of appraisal rights by the registered and beneficial shareholders (including the way in which these concepts interact with the STRATE trading system);
- (g) Clarifying the position of an appraiser appointed by the court in terms of the section; and
- (h) Clarifying the position of ADR generally in the context of section 164.

The courts also have a vital role to play in the interpretation and application of section 164 and appraisal rights generally, especially regarding vexed concepts such as 'fair value' and standing. When having regard to foreign jurisprudence, the courts should remain alive to the fact that sections in certain statutes (especially in the US) may be rooted in an appraisal rights ideology which differs from that in the South African Act and which has influenced the judgment in question, even though the statutory provisions are apparently similar to ours.

If the South African legislature does not take steps to optimise the efficiency and proper use of appraisal rights we may find that appraisal rights are not used at all, except by hedge funds and sophisticated investors to take advantage of arbitrage opportunities. Whilst this may not constitute abuse, it was certainly not the legislative objective which informed the adoption of the remedy. The suggestions put forward in this thesis can be considered and applied to increase the likelihood that appraisal rights will be used as intended by the South African Act, to the ultimate benefit of the general body of shareholders and the South African economy as a whole.

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APPENDICES

APPENDIX A: Delaware General Corporation Law

§ 262. Appraisal rights.

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in 1 or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title), § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record

by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in § 251(f) of this title.

(2) Notwithstanding paragraph (b)(1) of this section, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 255, 256, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing paragraphs (b)(2)a. and b. of this section; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing paragraphs (b)(2)a., b. and c. of this section.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 or § 267 of this title is not owned by the parent immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for notice of such meeting (or such members who received notice in accordance with § 255(c) of this title) with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) of this section that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to

the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228, § 253, or § 267 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting

corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) of this section hereof and who is otherwise entitled to appraisal rights, may commence an appraisal proceeding by filing a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders.

Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) of this section hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) of this section hereof, whichever is later. Notwithstanding subsection (a) of this section, a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person may, in such person's own name, file a petition or request from the corporation the statement described in this subsection.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Payment shall be so made to each such stockholder, in the case of holders of

uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such

stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just; provided, however that this provision shall not affect the right of any stockholder who has not commenced an appraisal proceeding or joined that proceeding as a named party to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation within 60 days after the effective date of the merger or consolidation, as set forth in subsection (e) of this section.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

8 Del. C. 1953, § 262; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 24; 57 Del. Laws, c. 148, §§ 27-29; 59 Del. Laws, c. 106, § 12; 60 Del. Laws, c. 371, §§ 3-12; 63 Del. Laws, c. 25, § 14; 63 Del. Laws, c. 152, §§ 1, 2; 64 Del. Laws, c. 112, §§ 46-54; 66 Del. Laws, c. 136, §§ 30-32; 66 Del. Laws, c. 352, § 9; 67 Del. Laws, c. 376, §§ 19, 20; 68 Del. Laws, c. 337, §§ 3, 4; 69 Del. Laws, c. 61, § 10; 69 Del. Laws, c. 262, §§ 1-9; 70 Del. Laws, c. 79, § 16; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 299, §§ 2, 3; 70 Del. Laws, c. 349, § 22; 71 Del. Laws, c. 120, § 15; 71 Del. Laws, c. 339, §§ 49-52; 73 Del. Laws, c. 82, § 21; 76 Del. Laws, c. 145, §§ 11-16; 77 Del. Laws, c. 14, §§ 12, 13; 77 Del. Laws, c. 253, §§ 47-50; 77 Del. Laws, c. 290, §§ 16, 17;

APPENDIX B: Model Business Corporation Act (2006)

[CHAPTER 13 - APPRAISAL RIGHTS]

Subchapter A. RIGHT TO APPRAISAL AND PAYMENT FOR SHARES

§ 13.01 DEFINITIONS

In this chapter:

(1) "Affiliate" means a person that directly or indirectly through one or more

intermediaries controls, is controlled by, or is under common control with another person or is a senior executive thereof. For purposes of section 13.02(b)(4), a person is deemed to be an affiliate of its senior executives.

(2) "Beneficial shareholder" means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's behalf.

(3) "Corporation" means the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in sections 13.22-13.31, includes the surviving entity in a merger.

(4) "Fair value" means the value of the corporation's shares determined:

(i) immediately before the effectuation of the corporate action to which the shareholder objects;

(ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and

(iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).

(5) "Interest" means interest from the effective date of the corporate action until the date

of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.

(5.1) "Interested transaction" means a corporate action described in section 13.02(a), other than a merger pursuant to section 11.05, involving an interested person in which any of the shares or assets of the corporation are being acquired or converted. As used in this definition:

(i) "Interested person" means a person, or an affiliate of a person, who at any time during the one-year period immediately preceding approval by the board of directors of the corporate action:

(A) was the beneficial owner of 20 percent or more of the voting power of the corporation, excluding any shares acquired pursuant to an offer for all shares having voting power if the offer was made within one year prior to the corporate action for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action;

(B) had the power, contractually or otherwise, to cause the appointment or election of 25 percent or more of the directors to the board of directors of the corporation; or

(C) was a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the

corporate action, a financial benefit not generally available to other shareholders as such, other than:

(I) employment, consulting, retirement, or similar benefits established separately and not as part of or in contemplation of the corporate action; or

(II) employment, consulting, retirement, or similar benefits established in contemplation of, or as part of, the corporate action that are not more favorable than those existing before the corporate action or, if more favorable, that have been approved on behalf of the corporation in the same manner as is provided in section 8.62; or

(III) in the case of a director of the corporation who will, in the corporate action, become a director of the acquiring entity in the corporate action or one of its affiliates, rights and benefits as a director that are provided on the same basis as those afforded by the acquiring entity generally to other directors of such entity or such affiliate.

(ii) "Beneficial owner" means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares; except that a member of a national securities exchange is not deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because the member is the record holder of the securities if the member is precluded by the rules of the exchange from voting without instruction on contested matters or matters that may affect substantially

the rights or privileges of the holders of the securities to be voted. When two or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby is deemed to have acquired beneficial ownership, as of the date of the agreement, of all voting shares of the corporation beneficially owned by any member of the group.

(6) "Preferred shares" means a class or series of shares whose holders have preference over any other class or series with respect to distributions.

(7) "Record shareholder" means the person in whose name shares are registered in the records of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with the corporation.

(8) "Senior executive" means the chief executive officer, chief operating officer, chief financial officer, and anyone in charge of a principal business unit or function.

(9) "Shareholder" means both a record shareholder and a beneficial shareholder.

§ 13.02 RIGHT TO APPRAISAL

(a) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:

(1) consummation of a merger to which the corporation is a party (i) if shareholder

approval is required for the merger by section 11.04 and the shareholder is entitled to vote on the merger, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger, or (ii) if the corporation is a subsidiary and the merger is governed by section 11.05;

(2) consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired if the shareholder is entitled to vote on the exchange, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged;

(3) consummation of a disposition of assets pursuant to section 12.02 if the shareholder is entitled to vote on the disposition;

(4) an amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created;

(5) any other amendment to the articles of incorporation, merger, share exchange or disposition of assets to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors;

(6) consummation of a domestication if the shareholder does not receive shares in the foreign corporation resulting from the domestication that have terms as favorable to the shareholder in all material respects, and represent at least the same percentage interest of the total voting rights of the outstanding shares of the corporation, as the shares held by the shareholder before the domestication;

(7) consummation of a conversion of the corporation to nonprofit status pursuant to subchapter 9C; or

(8) consummation of a conversion of the corporation to an unincorporated entity pursuant to subchapter 9E.

(b) Notwithstanding subsection (a), the availability of appraisal rights under subsections (a)(1), (2), (3), (4), (6) and (8) shall be limited in accordance with the following provisions:

(1) Appraisal rights shall not be available for the holders of shares of any class or series of shares which is:

(i) a covered security under Section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended; or

(ii) traded in an organized market and has at least 2,000 shareholders and a market value of at least \$20 million (exclusive of the value of such shares held by the corporation's subsidiaries, senior executives, directors and beneficial shareholders owning more than 10 percent of such shares); or

(iii) issued by an open end management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 and may be redeemed at the option of the holder at net asset value.

(2) The applicability of subsection (b)(1) shall be determined as of:

(i) the record date fixed to determine the shareholders entitled to receive notice of, and to vote at, the meeting of shareholders to act upon the corporate action requiring appraisal rights; or

(ii) the day before the effective date of such corporate action if there is no meeting of shareholders.

(3) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity, that satisfies the standards set forth in

subsection (b)(1) at the time the corporate action becomes effective.

(4) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares where the corporate action is an interested transaction.

§ 13.03. ASSERTION OF RIGHTS BY NOMINEES AND BENEFICIAL OWNERS

(a) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder only if the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

(b) A beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:

(1) submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in section 13.22(b)(2)(ii); and

(2) does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder.

Subchapter B. PROCEDURE FOR EXERCISE OF APPRAISAL RIGHTS

§ 13.20 NOTICE OF APPRAISAL RIGHTS

(a) Where any corporate action specified in section 13.02(a) is to be submitted to a vote at a shareholders' meeting, the meeting notice must state that the corporation has concluded that shareholders are, are not or may be entitled to assert appraisal rights under this chapter. If the corporation concludes that appraisal rights are or may be available, a copy of this chapter must accompany the meeting notice sent to those record shareholders entitled to exercise appraisal rights.

(b) In a merger pursuant to section 11.05, the parent corporation must notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice must be sent within 10 days after the corporate action became effective and include the materials described in section 13.22.

(c) Where any corporate action specified in section 13.02(a) is to be approved by written consent of the shareholders pursuant to section 7.04:

(1) written notice that appraisal rights are, are not or may be available must be

given to each record shareholder from whom a consent is solicited at the time consent of such shareholder is first solicited and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this chapter; and

(2) written notice that appraisal rights are, are not or may be available must be delivered together with the notice to nonconsenting and nonvoting shareholders required by sections 7.04(e) and (f), may include the materials described in section 13.22 and, if the corporation has concluded that appraisal rights are or may be available, must be accompanied by a copy of this chapter.

(d) Where corporate action described in Section 13.02(a) is proposed, or a merger pursuant to Section 11.05 is effected, the notice referred to in subsection (a) or (c), if the corporation concludes that appraisal rights are or may be available, and in subsection (b) of this Section 13.20 shall be accompanied by:

(1) the annual financial statements specified in section 16.20(a) of the corporation that issued the shares that may be subject to appraisal, which shall be as of a date ending not more than 16 months before the date of the notice and shall comply with section 16.20(b); provided that, if such annual financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information; and

(2) the latest available quarterly financial statements of such corporation, if any.

(e) The right to receive the information described in subsection (d) may be waived in writing by a shareholder before or after the corporate action.

§ 13.21 NOTICE OF INTENT TO DEMAND PAYMENT

(a) If a corporate action specified in section 13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(1) must deliver to the corporation, before the vote is taken, written notice of the shareholder's intent to demand payment if the proposed action is effectuated; and

(2) must not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action.

(b) If a corporate action specified in section 13.02(a) is to be approved by less than unanimous written consent, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares must not execute a consent in favor of the proposed action with respect to that class or series of shares.

(c) A shareholder who fails to satisfy the requirements of subsection (a) or (b) is not entitled to payment under this chapter.

§ 13.22 APPRAISAL NOTICE AND FORM

(a) If proposed corporate action requiring appraisal rights under section 13.02(a) becomes effective, the corporation must deliver a written appraisal notice and form required by subsection (b)(1) to all shareholders who satisfied the requirements of section 13.21. In the case of a merger under section 11.05, the parent must deliver a written appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights.

(b) The appraisal notice must be sent no earlier than the date the corporate action became effective and no later than 10 days after such date and must:

(1) supply a form that (i) specifies the first date of any announcement to shareholders made prior to the date the corporate action became effective of the principal terms of the proposed corporate action, (ii) if such announcement was made, requires the shareholder asserting appraisal rights to certify whether beneficial ownership of those shares for which appraisal rights are asserted was acquired before that date, and (iii) requires the shareholder asserting appraisal rights to certify that such shareholder did not vote for or consent to the transaction;

(2) state:

(i) where the form must be sent and where certificates for certificated shares (c)

Within ten days after receiving the shareholder's acceptance pursuant to must be deposited and the date by which those certificates must be deposited, subsection (b), the corporation must pay in cash the amount it offered under which date may not be earlier than the date for receiving the required form subsection (b)(2) to each shareholder who agreed to accept the corporation's offer under subsection (2)(ii);

(ii) a date by which the corporation must receive the form which date may (d) Within 40 days after sending the notice described in subsection (b), the not be fewer than 40 nor more than 60 days after the date the subsection (a) corporation must pay in cash the amount it offered to pay under subsection (b)(2) appraisal notice and form are sent, and state that the shareholder shall have waived the right to demand appraisal with respect to the shares unless the form is received by the corporation by such specified date;

(iii) the corporation's estimate of the fair value of the shares;

(iv) that, if requested in writing, the corporation will provide, to the shareholder so requesting, within 10 days after the date specified in subsection (2)(ii) the number of shareholders who return the forms by the specified date and the total number of shares owned by them; and

(v) the date by which the notice to withdraw under section 13.23 must be

received, which date must be within 20 days after the date specified in subsection (2)(ii); and (3) be accompanied by a copy of this chapter.

§ 13.23 PERFECTION OF RIGHTS; RIGHT TO WITHDRAW

(a) A shareholder who receives notice pursuant to section 13.22 and who wishes to exercise appraisal rights must sign and return the form sent by the corporation and, in the case of certificated shares, deposit the shareholder's certificates in accordance with the terms of the notice by the date referred to in the notice pursuant to section 13.22 (b)(2)(ii). In addition, if applicable, the shareholder must certify on the form whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 13.22(b)(1). If a shareholder fails to make this certification, the corporation may elect to treat the shareholder's shares as after-acquired shares under section 13.25. Once a shareholder deposits that shareholder's certificates or, in the case of uncertificated shares, returns the signed forms, that shareholder loses all rights as a shareholder, unless the shareholder withdraws pursuant to subsection (b).

(b) A shareholder who has complied with subsection (a) may nevertheless decline to exercise appraisal rights and withdraw from the appraisal process by so notifying the corporation in writing by the date set forth in the appraisal notice pursuant to section 13.22(b)(2)(v). A shareholder who fails to so withdraw from the appraisal process may not thereafter withdraw without the corporation's written consent.

(c) A shareholder who does not sign and return the form and, in the case of certificated shares, deposit that shareholder's share certificates where required, each by the date set forth in the notice described in section 13.22(b), shall not be entitled to payment under this chapter.

§ 13.24 PAYMENT

(a) Except as provided in section 13.25, within 30 days after the form required by section 13.22(b)(2)(ii) is due, the corporation shall pay in cash to those shareholders who complied with section 13.23(a) the amount the corporation estimates to be the fair value of their shares, plus interest. (b) The payment to each shareholder pursuant to subsection (a) must be accompanied by:

(1) (i) annual financial statements specified in section 16.20(a) of the corporation that issued the shares to be appraised, which shall be as of a date ending not more than 16 months before the date of payment and shall comply with section 16.20(b); provided that, if such annual financial statements are not reasonably available, the corporation shall provide reasonably equivalent financial information, and (ii) the latest available quarterly financial statements of such corporation, if any;

(2) a statement of the corporation's estimate of the fair value of the shares, which estimate must equal or exceed the corporation's estimate given pursuant to section

13.22(b)(2)(iii);

(3) a statement that shareholders described in subsection (a) have the right to demand further payment under section 13.26 and that if any such shareholder does not do so within the time period specified therein, such shareholder shall be deemed to have accepted such payment in full satisfaction of the corporation's obligations under this chapter.

§ 13.25 AFTER-ACQUIRED SHARES

(a) A corporation may elect to withhold payment required by section 13.24 from any shareholder who was required to, but did not certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was rights provided by this chapter acquired before the date set forth in the appraisal notice sent pursuant to section 13.22(b)(1).

(b) If the corporation elected to withhold payment under subsection (a), it must, within 30 days after the form required by section 13.22(b)(2)(ii) is due, notify all shareholders

who are described in subsection (a):

(1) of the information required by section 13.24(b)(1);

(2) of the corporation's estimate of fair value pursuant to section 13.24(b)(2);

(3) that they may accept the corporation's estimate of fair value, plus interest, in full satisfaction of their demands or demand appraisal under section 13.26;

(4) that those shareholders who wish to accept such offer must so notify the corporation of their acceptance of the corporation's offer within 30 days after receiving the offer; and

(5) that those shareholders who do not satisfy the requirements for demanding appraisal under section 13.26 shall be deemed to have accepted the corporation's offer.

(c) Within ten days after receiving the shareholder's acceptance pursuant to subsection (b), the corporation must pay in cash the amount it offered under subsection (b)(2) to each shareholder who agreed to accept the corporation's offer in full satisfaction of the shareholder's demand.

(d) Within 40 days after sending the notice described in subsection (b), the corporation must pay in cash the amount it offered to pay under subsection (b)(2) to each shareholder described in subsection (b)(5).

**§ 13.26 PROCEDURE IF SHAREHOLDER DISSATISFIED WITH PAYMENT
OR OFFER**

(a) A shareholder paid pursuant to section 13.24 who is dissatisfied with the amount of the payment must notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus interest (less any payment under section 13.24). A shareholder offered payment under section 13.25 who is dissatisfied with that offer must reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest.

(b) A shareholder who fails to notify the corporation in writing of that shareholder's demand to be paid the shareholder's stated estimate of the fair value plus interest under subsection (a) within 30 days after receiving the corporation's payment or offer of payment under section 13.24 or section 13.25, respectively, waives the right to demand payment under this section and shall be entitled only to the payment made or offered pursuant to those respective sections.

Subchapter C. JUDICIAL APPRAISAL OF SHARES

§ 13.30 COURT ACTION

(a) If a shareholder makes demand for payment under section 13.26 which remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay in cash to each shareholder the amount the shareholder demanded pursuant to section 13.26 plus interest.

(b) The corporation shall commence the proceeding in the appropriate court of the county where the corporation's principal office (or, if none, its registered office) in this state is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the principal office or registered office of the domestic corporation merged with the foreign corporation was located at the time of the transaction.

(c) The corporation shall make all shareholders (whether or not residents of this state) whose demands remain unsettled parties to the proceeding as in an action against their shares, and all parties must be served with a copy of the petition. Non-residents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under

subsection (b) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have the powers described in the order appointing them, or in any amendment to it. The shareholders demanding appraisal rights are entitled to the same discovery rights as parties in other civil proceedings. There shall be no right to a jury trial.

(e) Each shareholder made a party to the proceeding is entitled to judgment (i) for the amount, if any, by which the court finds the fair value of the shareholder's shares, plus interest, exceeds the amount paid by the corporation to the shareholder for such shares or (ii) for the fair value, plus interest, of the shareholder's shares for which the corporation elected to withhold payment under section 13.25.

§ 13.31 COURT COSTS AND COUNSEL FEES

(a) The court in an appraisal proceeding commenced under section 13.30 shall determine all court costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the court costs against the corporation, except that the court may assess court costs against all or some of the shareholders demanding appraisal, in amounts which the court finds equitable, to the extent the court finds such

shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(b) The court in an appraisal proceeding may also assess the expenses of the respective parties in amounts the court finds equitable:

(1) against the corporation and in favor of any or all shareholders demanding appraisal if the court finds the corporation did not substantially comply with the requirements of sections 13.20, 13.22, 13.24, or 13.25; or

(2) against either the corporation or a shareholder demanding appraisal if the court finds the corporation did not substantially comply with the requirements of sections 13.20, 13.22, 13.24, or 13.25; or

(c) If the court in an appraisal proceeding finds that the expenses incurred by any shareholder were of substantial benefit to other shareholders similarly situated and that such expenses should not be assessed against the corporation, the court may direct that such expenses be paid out of the amounts awarded the shareholders who were benefited.

(d) To the extent the corporation fails to make a required payment pursuant to sections 13.24, 13.25, or 13.26, the shareholder may sue directly for the amount

owed, and to the extent successful, shall be entitled to recover from the corporation all expenses of the suit.

Subchapter D. Other Remedies Limited

§ 13.40 OTHER REMEDIES LIMITED

(a) The legality of a proposed or completed corporate action described in section 13.02

(a) may not be contested, nor may the corporate action be enjoined, set aside or rescinded, in a legal or equitable proceeding by a shareholder after the shareholders have approved the corporate action.

(b) Subsection (a) does not apply to a corporate action that:

(1) was not authorized and approved in accordance with the applicable provisions of:

(i) chapter 9, 10, 11 or 12,

(ii) the articles of incorporation or bylaws, or

(iii) the resolution of the board of directors authorizing the corporate action;

(2) was procured as a result of fraud, a material misrepresentation, or an omission of a material fact necessary to make statements made, in light of the circumstances in which they were made, not misleading;

(3) is an interested transaction, unless it has been recommended by the board of directors in the same manner as is provided in section 8.62 and has been approved by the shareholders in the same manner as is provided in section 8.63 as if the interested transaction were a director's conflicting interest transaction; or

(4) is approved by less than unanimous consent of the voting shareholders pursuant to section 7.04 if:

(i) the challenge to the corporate action is brought by a shareholder who did not consent and as to whom notice of the approval of the corporate action was not effective at least ten days before the corporate action was effected; and

(ii) the proceeding challenging the corporate action is commenced within ten days after notice of the approval of the corporate action is effective as to the shareholder bringing the proceeding.

APPENDIX C: EXTRACTS FROM THE NEW YORK CODE

N.Y.BSC.LAW s910: NY Code – section 910: Right of shareholder to receive payment for shares upon merger or consolidation, or sale, lease, exchange or other disposition of assets, or share exchange

(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:

(1) Any shareholder entitled to vote who does not assent to the taking of an action specified in clauses (A), (B) and (C).

(A) Any plan of merger or consolidation to which the corporation is a party; except that the right to receive payment of the fair value of his shares shall not be available: (i) To a shareholder of the parent corporation in a merger authorized by section 905 (Merger of parent and subsidiary corporations), or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations); or (ii) To a shareholder of the surviving corporation in a merger authorized by this article, other than a merger specified in subclause (i), unless such merger effects one or more of the changes specified in subparagraph (b) (6) of section 806 (Provisions as to certain proceedings) in the rights of the shares held by such shareholder; or (iii) Notwithstanding subclause (ii) of this clause, to a shareholder for the shares of any class or series of stock, which shares or depository receipts in respect thereof, at the record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to vote upon the plan of merger or

consolidation, were listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.

(B) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909 (Sale, lease, exchange or other disposition of assets) other than a transaction wholly for cash where the shareholders' approval thereof is conditioned upon the dissolution of the corporation and the distribution of substantially all of its net assets to the shareholders in accordance with their respective interests within one year after the date of such transaction.

(C) Any share exchange authorized by section 913 in which the corporation is participating as a subject corporation; except that the right to receive payment of the fair value of his shares shall not be available to a shareholder whose shares have not been acquired in the exchange or to a shareholder for the shares of any class or series of stock, which shares or depository receipt in respect thereof, at the record date fixed to determine the shareholders entitled to receive notice of the meeting of shareholders to vote upon the plan of exchange, were listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.

(2) Any shareholder of the subsidiary corporation in a merger authorized by section 905 or paragraph (c) of section 907, or in a share exchange authorized by paragraph (g) of section 913, who files with the corporation a written notice of election to dissent as provided in paragraph (c) of section 623. (3) Any shareholder, not entitled to vote with respect to a plan of merger or consolidation to which the corporation is a party, whose

shares will be cancelled or exchanged in the merger or consolidation for cash or other consideration other than shares of the surviving or consolidated corporation or another corporation.

N.Y. BSC. LAW § 623 : NY Code - Section 623: Procedure to enforce shareholder's right to receive payment for shares

(a) A shareholder intending to enforce his right under a section of this chapter to receive payment for his shares if the proposed corporate action referred to therein is taken shall file with the corporation, before the meeting of shareholders at which the action is submitted to a vote, or at such meeting but before the vote, written objection to the action. The objection shall include a notice of his election to dissent, his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares if the action is taken. Such objection is not required from any shareholder to whom the corporation did not give notice of such meeting in accordance with this chapter or where the proposed action is authorized by written consent of shareholders without a meeting.

(b) Within ten days after the shareholders' authorization date, which term as used in this section means the date on which the shareholders' vote authorizing such action was taken, or the date on which such consent without a meeting was obtained from the requisite shareholders, the corporation shall give written notice of such authorization or consent by registered mail to each shareholder who filed written objection or from whom written objection was not required, excepting any shareholder who voted for or consented in

writing to the proposed action and who thereby is deemed to have elected not to enforce his right to receive payment for his shares.

(c) Within twenty days after the giving of notice to him, any shareholder from whom written objection was not required and who elects to dissent shall file with the corporation a written notice of such election, stating his name and residence address, the number and classes of shares as to which he dissents and a demand for payment of the fair value of his shares. Any shareholder who elects to dissent from a merger under section 905 (Merger of subsidiary corporation) or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations) or from a share exchange under paragraph (g) of section 913 (Share exchanges) shall file a written notice of such election to dissent within twenty days after the giving to him of a copy of the plan of merger or exchange or an outline of the material features thereof under section 905 or 913.

(d) A shareholder may not dissent as to less than all of the shares, as to which he has a right to dissent, held by him of record, that he owns beneficially. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner, as to which such nominee or fiduciary has a right to dissent, held of record by such nominee or fiduciary.

(e) Upon consummation of the corporate action, the shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights under this section. A notice of election may be withdrawn by the shareholder at any time prior to his acceptance in writing of an offer made by the corporation, as provided in paragraph (g), but in no case later than sixty days from the date of consummation of the corporate action except that if the corporation fails to make

a timely offer, as provided in paragraph (g), the time for withdrawing a notice of election shall be extended until sixty days from the date an offer is made. Upon expiration of such time, withdrawal of a notice of election shall require the written consent of the corporation. In order to be effective, withdrawal of a notice of election must be accompanied by the return to the corporation of any advance payment made to the shareholder as provided in paragraph (g). If a notice of election is withdrawn, or the corporate action is rescinded, or a court shall determine that the shareholder is not entitled to receive payment for his shares, or the shareholder shall otherwise lose his dissenters' rights, he shall not have the right to receive payment for his shares and he shall be reinstated to all his rights as a shareholder as of the consummation of the corporate action, including any intervening preemptive rights and the right to payment of any intervening dividend or other distribution or, if any such rights have expired or any such dividend or distribution other than in cash has been completed, in lieu thereof, at the election of the corporation, the fair value thereof in cash as determined by the board as of the time of such expiration or completion, but without prejudice otherwise to any corporate proceedings that may have been taken in the interim.

(f) At the time of filing the notice of election to dissent or within one month thereafter the shareholder of shares represented by certificates shall submit the certificates representing his shares to the corporation, or to its transfer agent, which shall forthwith note conspicuously thereon that a notice of election has been filed and shall return the certificates to the shareholder or other person who submitted them on his behalf. Any shareholder of shares represented by certificates who fails to submit his certificates for such notation as herein specified shall, at the option of the corporation exercised by

written notice to him within forty-five days from the date of filing of such notice of election to dissent, lose his dissenter's rights unless a court, for good cause shown, shall otherwise direct. Upon transfer of a certificate bearing such notation, each new certificate issued therefor shall bear a similar notation together with the name of the original dissenting holder of the shares and a transferee shall acquire no rights in the corporation except those which the original dissenting shareholder had at the time of transfer.

(g) Within fifteen days after the expiration of the period within which shareholders may file their notices of election to dissent, or within fifteen days after the proposed corporate action is consummated, whichever is later (but in no case later than ninety days from the shareholders' authorization date), the corporation or, in the case of a merger or consolidation, the surviving or new corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the corporation considers to be their fair value. Such offer shall be accompanied by a statement setting forth the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares. If the corporate action has been consummated, such offer shall also be accompanied by (1) advance payment to each such shareholder who has submitted the certificates representing his shares to the corporation, as provided in paragraph (f), of an amount equal to eighty percent of the amount of such offer, or (2) as to each shareholder who has not yet submitted his certificates a statement that advance payment to him of an amount equal to eighty percent of the amount of such offer will be made by the corporation promptly upon submission of his certificates. If the corporate action has not been consummated at the time of the making of the offer, such advance

payment or statement as to advance payment shall be sent to each shareholder entitled thereto forthwith upon consummation of the corporate action. Every advance payment or statement as to advance payment shall include advice to the shareholder to the effect that acceptance of such payment does not constitute a waiver of any dissenters' rights. If the corporate action has not been consummated upon the expiration of the ninety day period after the shareholders' authorization date, the offer may be conditioned upon the consummation of such action. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or if divided into series, of the same series and shall be accompanied by a balance sheet of the corporation whose shares the dissenting shareholder holds as of the latest available date, which shall not be earlier than twelve months before the making of such offer, and a profit and loss statement or statements for not less than a twelve month period ended on the date of such balance sheet or, if the corporation was not in existence throughout such twelve month period, for the portion thereof during which it was in existence. Notwithstanding the foregoing, the corporation shall not be required to furnish a balance sheet or profit and loss statement or statements to any shareholder to whom such balance sheet or profit and loss statement or statements were previously furnished, nor if in connection with obtaining the shareholders' authorization for or consent to the proposed corporate action the shareholders were furnished with a proxy or information statement, which included financial statements, pursuant to Regulation 14A or Regulation 14C of the United States Securities and Exchange Commission. If within thirty days after the making of such offer, the corporation making the offer and any shareholder agree upon the price to be paid for his shares, payment therefor shall be made within sixty days after the making of such offer or

the consummation of the proposed corporate action, whichever is later, upon the surrender of the certificates for any such shares represented by certificates.

(h) The following procedure shall apply if the corporation fails to make such offer within such period of fifteen days, or if it makes the offer and any dissenting shareholder or shareholders fail to agree with it within the period of thirty days thereafter upon the price to be paid for their shares: (1) The corporation shall, within twenty days after the expiration of whichever is applicable of the two periods last mentioned, institute a special proceeding in the supreme court in the judicial district in which the office of the corporation is located to determine the rights of dissenting shareholders and to fix the fair value of their shares. If, in the case of merger or consolidation, the surviving or new corporation is a foreign corporation without an office in this state, such proceeding shall be brought in the county where the office of the domestic corporation, whose shares are to be valued, was located. (2) If the corporation fails to institute such proceeding within such period of twenty days, any dissenting shareholder may institute such proceeding for the same purpose not later than thirty days after the expiration of such twenty day period. If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct. (3) All dissenting shareholders, excepting those who, as provided in paragraph (g), have agreed with the corporation upon the price to be paid for their shares, shall be made parties to such proceeding, which shall have the effect of an action quasi in rem against their shares. The corporation shall serve a copy of the petition in such proceeding upon each dissenting shareholder who is a resident of this state in the manner provided by law for the service of a summons, and upon each nonresident dissenting shareholder either by

registered mail and publication, or in such other manner as is permitted by law. The jurisdiction of the court shall be plenary and exclusive. (4) The court shall determine whether each dissenting shareholder, as to whom the corporation requests the court to make such determination, is entitled to receive payment for his shares. If the corporation does not request any such determination or if the court finds that any dissenting shareholder is so entitled, it shall proceed to fix the value of the shares, which, for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders' authorization date. In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors. The court shall determine the fair value of the shares without a jury and without referral to an appraiser or referee. Upon application by the corporation or by any shareholder who is a party to the proceeding, the court may, in its discretion, permit pretrial disclosure, including, but not limited to, disclosure of any expert's reports relating to the fair value of the shares whether or not intended for use at the trial in the proceeding and notwithstanding subdivision (d) of section 3101 of the civil practice law and rules. (5) The final order in the proceeding shall be entered against the corporation in favor of each dissenting shareholder who is a party to the proceeding and is entitled thereto for the value of his shares so determined. (6) The final order shall include an allowance for interest at such rate as the court finds to be equitable, from the date the corporate action was

consummated to the date of payment. In determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him. (7) Each party to such proceeding shall bear its own costs and expenses, including the fees and expenses of its counsel and of any experts employed by it. Notwithstanding the foregoing, the court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by the corporation against any or all of the dissenting shareholders who are parties to the proceeding, including any who have withdrawn their notices of election as provided in paragraph (e), if the court finds that their refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith. The court may, in its discretion, apportion and assess all or any part of the costs, expenses and fees incurred by any or all of the dissenting shareholders who are parties to the proceeding against the corporation if the court finds any of the following: (A) that the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; (B) that no offer or required advance payment was made by the corporation; (C) that the corporation failed to institute the special proceeding within the period specified therefor; or (D) that the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith. In making any determination as provided in clause (A), the court may consider the dollar amount or the percentage, or both, by which the fair value of the shares as determined exceeds the corporate offer. (8) Within sixty days after final determination of

the proceeding, the corporation shall pay to each dissenting shareholder the amount found to be due him, upon surrender of the certificates for any such shares represented by certificates.

(i) Shares acquired by the corporation upon the payment of the agreed value therefor or of the amount due under the final order, as provided in this section, shall become treasury shares or be cancelled as provided in section 515 (Reacquired shares), except that, in the case of a merger or consolidation, they may be held and disposed of as the plan of merger or consolidation may otherwise provide.

(j) No payment shall be made to a dissenting shareholder under this section at a time when the corporation is insolvent or when such payment would make it insolvent. In such event, the dissenting shareholder shall, at his option: (1) Withdraw his notice of election, which shall in such event be deemed withdrawn with the written consent of the corporation; or (2) Retain his status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the non-dissenting shareholders, and if it is not liquidated, retain his right to be paid for his shares, which right the corporation shall be obliged to satisfy when the restrictions of this paragraph do not apply. (3) The dissenting shareholder shall exercise such option under subparagraph (1) or (2) by written notice filed with the corporation within thirty days after the corporation has given him written notice that payment for his shares cannot be made because of the restrictions of this paragraph. If the dissenting shareholder fails to exercise such option as provided, the corporation shall exercise the option by written notice given to him within twenty days after the expiration of such period of thirty days.

(k) The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.

(l) Except as otherwise expressly provided in this section, any notice to be given by a corporation to a shareholder under this section shall be given in the manner provided in section 605 (Notice of meetings of shareholders).

(m) This section shall not apply to foreign corporations except as provided in subparagraph (e) (2) of section 907 (Merger or consolidation of domestic and foreign corporations).

APPENDIX D: Canada Business Corporations Act

Right to dissent

190. (1) Subject to sections 191 and 241, a holder of shares of any class of a corporation may dissent if the corporation is subject to an order under paragraph 192(4)(d) that affects the holder or if the corporation resolves to

(a) amend its articles under section 173 or 174 to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class;

(b) amend its articles under section 173 to add, change or remove any restriction on the business or businesses that the corporation may carry on;

(c) amalgamate otherwise than under section 184;

(d) be continued under section 188;

(e) sell, lease or exchange all or substantially all its property under subsection 189(3);
or

(f) carry out a going-private transaction or a squeeze-out transaction.

Further right

(2) A holder of shares of any class or series of shares entitled to vote under section 176 may dissent if the corporation resolves to amend its articles in a manner described in that section.

If one class of shares

(2.1) The right to dissent described in subsection (2) applies even if there is only one class of shares

Payment for shares

(3) In addition to any other right the shareholder may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents or an order made under subsection 192(4) becomes effective, to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.

No partial dissent

(4) A dissenting shareholder may only claim under this section with respect to all the shares of a class held on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.

Objection

(5) A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in subsection (1) or (2) is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting and of their right to dissent.

Notice of resolution

(6) The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that

the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn their objection.

Demand for payment

(7) A dissenting shareholder shall, within twenty days after receiving a notice under subsection (6) or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the corporation a written notice containing

- (a) the shareholder's name and address;
- (b) the number and class of shares in respect of which the shareholder dissents; and
- (c) a demand for payment of the fair value of such shares.

Share certificate

(8) A dissenting shareholder shall, within thirty days after sending a notice under subsection (7), send the certificates representing the shares in respect of which the shareholder dissents to the corporation or its transfer agent.

Forfeiture

(9) A dissenting shareholder who fails to comply with subsection (8) has no right to make a claim under this section.

Endorsing certificate

(10) A corporation or its transfer agent shall endorse on any share certificate received under subsection (8) a notice that the holder is a dissenting shareholder under this section and shall forthwith return the share certificates to the dissenting shareholder.

Suspension of rights

(11) On sending a notice under subsection (7), a dissenting shareholder ceases to have any rights as a shareholder other than to be paid the fair value of their shares as determined under this section except where

(a) the shareholder withdraws that notice before the corporation makes an offer under subsection (12),

(b) the corporation fails to make an offer in accordance with subsection (12) and the shareholder withdraws the notice, or

(c) the directors revoke a resolution to amend the articles under subsection 173(2) or 174(5), terminate an amalgamation agreement under subsection 183(6) or an application for continuance under subsection 188(6), or abandon a sale, lease or exchange under subsection 189(9),

in which case the shareholder's rights are reinstated as of the date the notice was sent.

Offer to pay

(12) A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the

notice referred to in subsection (7), send to each dissenting shareholder who has sent such notice

(a) a written offer to pay for their shares in an amount considered by the directors of the corporation to be the fair value, accompanied by a statement showing how the fair value was determined; or

(b) if subsection (26) applies, a notification that it is unable lawfully to pay dissenting shareholders for their shares.

Same terms

(13) Every offer made under subsection (12) for shares of the same class or series shall be on the same terms.

Payment

(14) Subject to subsection (26), a corporation shall pay for the shares of a dissenting shareholder within ten days after an offer made under subsection (12) has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.

Corporation may apply to court

(15) Where a corporation fails to make an offer under subsection (12), or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective or within such further period as a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.

Shareholder application to court

(16) If a corporation fails to apply to a court under subsection (15), a dissenting shareholder may apply to a court for the same purpose within a further period of twenty days or within such further period as a court may allow.

Venue

(17) An application under subsection (15) or (16) shall be made to a court having jurisdiction in the place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province.

No security for costs

(18) A dissenting shareholder is not required to give security for costs in an application made under subsection (15) or (16).

Parties

(19) On an application to a court under subsection (15) or (16),

(a) all dissenting shareholders whose shares have not been purchased by the corporation shall be joined as parties and are bound by the decision of the court; and

(b) the corporation shall notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.

Powers of court

(20) On an application to a court under subsection (15) or (16), the court may determine whether any other person is a dissenting shareholder who should be joined as a party, and the court shall then fix a fair value for the shares of all dissenting shareholders.

Appraisers

(21) A court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders.

Final order

(22) The final order of a court shall be rendered against the corporation in favor of each dissenting shareholder and for the amount of the shares as fixed by the court.

Interest

(23) A court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment.

Notice that subsection (26) applies

(24) If subsection (26) applies, the corporation shall, within ten days after the pronouncement of an order under subsection (22), notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.

Effect where subsection (26) applies

(25) If subsection (26) applies, a dissenting shareholder, by written notice delivered to the corporation within thirty days after receiving a notice under subsection (24), may

(a) withdraw their notice of dissent, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to their full rights as a shareholder; or

(b) retain a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

Limitation

(26) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that

(a) the corporation is or would after the payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.⁵⁷⁰

⁵⁷⁰R.S., 1985, c. C-44, s. 190;1994, c. 24, s. 23;2001, c. 14, ss. 94, 134(F), 135(E);2011, c. 21, s. 60(F).

APPENDIX E – New Zealand Companies Act, 1993

Minority buy-out rights

110 Shareholder may require company to purchase shares

Where—

(a) a shareholder is entitled to vote on the exercise of 1 or more of the powers set out in—

(i) section 106(1)(a), and the proposed alteration imposes or removes a restriction on the activities of the company; or

(ii) section 106(1)(b) or (c); and

(b) the shareholders resolved, pursuant to section 106, to exercise the power; and

(c) the shareholder cast all the votes attached to shares registered in the shareholder's name and having the same beneficial owner against the exercise of the power; or

(d) where the resolution to exercise the power was passed under section 122, the shareholder did not sign the resolution,—

that shareholder is entitled to require the company to purchase those shares in accordance with section 111.

111 Notice requiring purchase

(1) A shareholder of a company who is entitled to require the company to purchase shares by virtue of section 110 or section 118 may,—

(a) within 10 working days of the passing of the resolution at a meeting of shareholders; or

(b) where the resolution was passed under section 122, before the expiration of 10 working days after the date on which notice of the passing of the resolution is given to the shareholder,—

give a written notice to the company requiring the company to purchase those shares.

(2) Within 20 working days of receiving a notice under subsection (1), the board must—

(a) agree to the purchase of the shares by the company; or

(b) arrange for some other person to agree to purchase the shares; or

(c) apply to the court for an order under section 114 or section 115; or

(d) arrange, before taking the action concerned, for the resolution to be rescinded in accordance with section 106 or decide in the appropriate manner not to take the action concerned, as the case may be; and

(e) give written notice to the shareholder of the board's decision under this subsection.

112 Price for shares to be purchased by company determined

(1) Within 5 working days of giving notice under section 111(2)(e) that the board agrees to the purchase of shares by the company, the board must give to the holder of the shares written notice of—

(a) the price it offers to pay for those shares; and

(b) how—

- (i) the matters in subsection (2) were calculated; or
- (ii) the price was calculated under subsection (3) and why calculating the price using the methodology set out in paragraphs (a) to (c) of subsection (2) would be clearly unfair.

(2) That price must be a fair and reasonable price (as at the close of business on the day before the date on which the resolution was passed) for the shares held by the shareholder, calculated as follows:

- (a) first, the fair and reasonable value of the total shares in each class to which the shares belong must be calculated (the **class value**):
- (b) secondly, each class value must be adjusted to exclude any fluctuation (whether positive or negative) in the class value that has occurred (whether before or after the resolution was passed) that was due to, or in expectation of, the event proposed or authorised by the resolution:
- (c) thirdly, a portion of each adjusted class value must be allocated to the shareholder in proportion to the number of shares he, she, or it holds in the relevant class.

(3) However, a different methodology from that set out in paragraphs (a) to (c) of subsection (2) may be used to calculate the fair and reasonable price for the shares if using the methodology set out in those paragraphs would be clearly unfair to the shareholder or the company.

(4) The shareholder may object to the price offered by the board for the shares by giving written notice to the company no later than 10 working days after the

date on which the board gave written notice to the shareholder under subsection (1).

(5) If the company does not receive an objection to the price in accordance with subsection (4), the company must purchase all the shares at the nominated price no later than 10 working days after—

(a) the date on which the board's offer under subsection (1) is accepted;

or

(b) if the board has not received an acceptance, the date that is 10 working days after the date on which the board gave written notice to the shareholder under subsection (1).

(6) The time periods in subsection (5) do not apply if there is a written agreement between the board and the shareholder that specifically sets a different date for purchase of the shares.

(7) In this section, **resolution** means the resolution referred to in section 110 or 118 that, due to it having been passed, entitles the shareholder to require the company to purchase the shareholder's shares in accordance with section 111.

Section 112: replaced, on 17 September 2008, by section 7 of the Companies (Minority Buy-out Rights) Amendment Act 2008 (2008 No 69).

112A Price for shares referred to arbitration if shareholder objects to price

(1) If a company receives an objection to the price offered for shares in accordance with section 112(4),—

(a) the following issues must be submitted to arbitration:

- (i) the fair and reasonable price for the shares, on the basis set out in section 112(2) and (3); and
- (ii) the remedies available to the holder of the shares or the company in respect of any price for the shares that differs from that determined by the board under section 112; and

(b) the company must, within 5 working days of receiving the objection, pay to the shareholder a provisional price in respect of each share equal to the price offered by the board under section 112(1).

(2) If the price determined for the shares—

- (a) exceeds the provisional price paid, the arbitral tribunal must order the company to pay the balance owing to the shareholder:
- (b) is less than the provisional price paid, the arbitral tribunal must order the shareholder to pay the excess to the company.

(3) Except in exceptional circumstances, an arbitral tribunal must award interest on any balance owing or excess to be paid under subsection (2).

(4) If a balance is owing to the shareholder, an arbitral tribunal may award to the shareholder, in addition to or instead of an award of interest, damages for loss attributable to the shortfall in the initial payment.

(5) Any sum that must be paid in accordance with this section must be paid no later than 10 days after the date of the arbitral tribunal's determination, unless the arbitral tribunal specifically orders otherwise.

(6) A submission to arbitration under this section is an arbitration agreement for the purposes of the Arbitration Act 1996, and the provisions of that Act apply accordingly.

(7) Clause 6 of Schedule 2 of the Arbitration Act 1996 may not be excluded from the arbitration agreement, and the term **costs and expenses of an arbitration** in that clause includes, where a balance is owing to the shareholder,—

(a) the reasonable legal costs of the shareholder on a solicitor-and-client basis; and

(b) the reasonable costs of expert witnesses.

Section 112A: inserted, on 17 September 2008, by section 7 of the Companies (Minority Buy-out Rights) Amendment Act 2008 (2008 No 69).

112B Interest payable on outstanding payments

(1) Interest on any sum that must be paid under section 112 or 112A that is outstanding after the date on which it falls due is payable,—

(a) in the case of a share price determined under section 112, at the same rate of interest as the prescribed rate under section 87(3) of the Judicature Act 1908; and

(b) in the case of a share price determined under section 112A, on the basis and at the rate that the arbitral tribunal thinks fit having regard to all of the circumstances.

(2) The sum on which interest is payable under subsection (1)(b) includes any interest or damages for loss awarded under section 112A.

Section 112B: inserted, on 17 September 2008, by section 7 of the Companies (Minority Buy-out Rights) Amendment Act 2008 (2008 No 69).

Section 112B(1): replaced, on 31 August 2012, by section 5(1) of the Companies Amendment Act (No 2) 2012 (2012 No 60).

Section 112B(2): amended, on 31 August 2012, by section 5(2) of the Companies Amendment Act (No 2) 2012 (2012 No 60).

112C Timing of transfer of shares

(1) On the day on which a board gives notice under section 111(2)(e) that the board agrees to the purchase of shares by the company,—

(a) the legal title to those shares passes to the company; and

(b) the rights of the shareholder in relation to those shares end.

(2) However, for the purposes of sections

112 and 112A, **shareholder** and **holder of the shares** means the person who held the legal title to the shares immediately before the board gave notice under section 111(2)(e) that the board agrees to the purchase of those shares by the company.

(3) Subsection (2) applies despite subsection (1).

Section 112C: inserted, on 17 September 2008, by section 7 of the Companies (Minority Buy-out Rights) Amendment Act 2008 (2008 No 69).

113 Purchase of shares by third party

(1) Sections 112 to 112C apply to the purchase of shares by a person with whom the company has entered into an arrangement for purchase in accordance with section 111(2)(b) subject to such modifications as may be necessary, and, in particular, as if references in that section to the board and the company were references to that person.

(2) Every holder of shares that are to be purchased in accordance with the arrangement is indemnified by the company in respect of loss suffered by reason of the failure by the person who has agreed to purchase the shares to purchase them at the price nominated or fixed by arbitration, as the case may be.

Section 113(1): amended, on 17 September 2008, by section 8 of the Companies (Minority Buy-out Rights) Amendment Act 2008 (2008 No 69).

114 Court may grant exemption

(1) A company to which a notice has been given under section 111 may apply to the court for an order exempting it from the obligation to purchase the shares to which the notice relates on the grounds that—

(a) the purchase would be disproportionately damaging to the company;

or

(b) the company cannot reasonably be required to finance the purchase;

or

(c) it would not be just and equitable to require the company to purchase the shares.

(2) On an application under this section, the court may make an order exempting the company from the obligation to purchase the shares, and may make any other order it thinks fit, including an order—

(a) setting aside a resolution of the shareholders:

(b) directing the company to take, or refrain from taking, any action specified in the order:

(c) requiring the company to pay compensation to the shareholders affected:

(d) that the company be put into liquidation.

(3) The court shall not make an order under subsection (2) on either of the grounds set out in paragraph (a) or paragraph (b) of subsection (1) unless it is satisfied that the company has made reasonable efforts to arrange for another person to purchase the shares in accordance with section 111(2)(b).

115 Court may grant exemption if company insolvent

(1) If—

(a) a notice is given to a company under section 111; and

(b) the board has resolved that the purchase by the company of the shares to which the notice relates would result in it failing to satisfy the solvency test; and

(c) the company has, having made reasonable efforts to do so, been unable to arrange for the shares to be purchased by another person in accordance with section 111(2)(b),—

the company must apply to the court for an order exempting it from the obligation to purchase the shares.

(2) The court may, on an application under subsection (1), if it is satisfied that—

(a) the purchase of the shares would result in the company failing to satisfy the solvency test; and

(b) the company has made reasonable efforts to arrange for the shares to be purchased by another person in accordance with section 111(2)(b),—

make—

(c) an order exempting the company from the obligation to purchase the shares:

(d) an order suspending the obligation to purchase the shares:

(e) such other order as it thinks fit, including any order referred to in section 114(2).

APPENDIX F – New Zealand Arbitration Act

New Zealand Arbitration Act, 1996 (Clause 6 of Schedule 2)

Costs and expenses of an arbitration

(1) Unless the parties agree otherwise,—

(a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of Schedule 1, or any additional award under article 33(3) of Schedule 1; or

(b) in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,—

(a) if a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs

and expenses in respect of the period from the making of the offer to the making of the award; and

(b) the fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where—

(a) an arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and

(b) an application has been made under subclause (3),—

the High Court may order the arbitral tribunal to release the award on such conditions as the court sees fit.

(5) An application may not be made under subclause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

APPENDIX G – Section 164 of the Companies Act, 2008

164. Dissenting shareholders appraisal rights. –(1) This section does not apply in any circumstances relating to a transaction, agreement or offer pursuant to a business rescue plan that was approved by shareholders of a company, in terms of section 152.

(2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to -

(a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37(8); or

(b) enter into a transaction contemplated in section 112, 113 or 114,

that notice must include a statement informing shareholders of their rights under this section.

(3) At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.

(4) Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who -

(a) gave the company a written notice of objection in terms of subsection (3); and

(b) has neither -

(i) withdrawn that notice; or

(ii) voted in support of the resolution.

(5) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if-

(a) the shareholder –

(i) sent the company a notice of objection, subject to subsection (6); and

(ii) in the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is materially and adversely affected by the amendment;

(b) the company has adopted the resolution contemplated in subsection (2); and

(c) the shareholder –

(i) voted against that resolution; and

(ii) has complied with all of the procedural requirements of this section.

(6) The requirement of subsection (5)(a)(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section.

(7) A shareholder who satisfies the requirements of subsection (5) may make a demand contemplated in that subsection by delivering a written notice to the company within –

(a) 20 business days after receiving a notice under subsection (4); or

(b) if the shareholder does not receive a notice under subsection (4),
within 20 days after learning that the resolution has been adopted.

(8) A demand delivered in terms of a subsection (5) to (7) must also be delivered to the Panel, and must state –

- (a) the shareholder's name and address;
- (b) the number and class of shares in respect of which the shareholder seeks payment; and
- (c) a demand for payment of the fair value of those shares.

[Sub-s. (8) amended by s. 103(a) of Act No.1 of 2011.]

(9) A shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless –

- (a) the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)(b);
- (b) the company fails to make an offer in accordance with subsection (11) and the shareholder withdraws the demand; or
- (c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder's rights under this section.

[Para. (c) substituted by s. 103(b) of Act No. 3 of 2011.]

(10) If any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.

(11) Within five business days after the later of –

(a) the day on which the action approved by the resolution is effective;

(b) the last day for the receipt of demands in terms of subsection (7)(a); or

(c) the day the company received a demand as contemplated in subsection (7)(b), if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.

(12) Every offer made under subsection (11) –

(a) in respect of shares of the same class or series must be on the same terms; and

(b) lapses if it has not been accepted within 30 business days after it was made.

(13) If a shareholder accepts an offer made under subsection (12) –

(a) the shareholder must either in the case of –

(i) shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or

(ii) uncertificated shares, take the steps required in terms of section 53 to direct the transfer of those shares to the company or the company's transfer agent; and

(b) the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and –

(i) tendered the share certificates; or

(ii) directed the transfer to the company of uncertificated shares.

(14) A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has –

(a) failed to make an offer under subsection (11); or

(b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

(15) On an application to the court under subsection (14) –

(a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the court;

(b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and

(c) the court –

(i) may determine whether any other person is a dissenting shareholder who should be joined as a party;

(ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to subsection (16);

(iii) in its discretion may –

(aa) appoint one or more appraisers to assist it in

determining the fair value in respect of the shares; or

(bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;

(iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and

(v) must make an order requiring –

(aa) the dissenting shareholders to either withdraw their respective demands or to comply with subsection (13)(a); and
[Item (aa) substituted by s. 103 (c) of Act No. 3 of 2011.]

(bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with subsection (13)(a), subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.

(15A) At any time before the court has made an order contemplated in subsection (15)(c)(v), a dissenting shareholder may accept the offer made by the company in terms of subsection (11), in which case –

(a) that shareholder must comply with the requirements of subsection 13(a); and

(b) the company must comply with the requirements of subsection 13(b).

[Sub-s (15A) inserted by s. 103 (d) of Act No. 3 of 2011.]

(16) The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section.

(17) If there are reasonable grounds to believe that compliance by a company with subsection (13)(b), or with a court order in terms of subsection (15)(c)(v)(bb), would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months –

(a) the company may apply to a court for an order varying the company's obligations in terms of the relevant subsection; and

(b) the court may make an order that –

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company owes money in terms of this section is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(18) If the resolution that gave rise to a shareholder's rights under this section authorised the company to amalgamate or merge with one or more other companies, such that the company whose shares are the subject of a demand in terms of this section has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the amalgamation or merger.

(19) For greater certainty, the making of a demand, tendering of shares and payment by a company to a shareholder in terms of this section do not constitute a distribution by the company, or an acquisition of its shares by the company within the meaning of section 48, and therefore are not subject to –

- (a) the provisions of that section; or
- (b) the application by the company of the solvency and liquidity test set out in section 4.

(20) Except to the extent –

- (a) expressly provided in this section; or
 - (b) that the Panel rules otherwise in a particular case,
- a payment by a company to a shareholder in terms of this section does not obligate any person to make a comparable offer under section 125 to any other person.

[Sub-s. (20) inserted by s. 103(e) of Act No. 3 of 2011.]