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Corporate Governance in Cyberspace

– A Blueprint for Virtual Shareholder Meetings

Dirk Zetzsche[*]

This paper analyses the rules regarding the internet-based exercise of shareholder rights for public corporations incorporated in Canada, France, Germany, the U.S. (DelGCL & RMBCA), the UK and Switzerland. The traditional doctrine associates information, communication and voting with shareholder meetings. In addition, shareholder meetings regularly prompt reviews of management's activities exercised on behalf of shareholders by accountants or the judiciary. The analysis reveals that the current regimes of shareholder meetings merely provide for voting and information in the context of a digital environment, while communication and review is usually not replicated.

The lack of all functions of traditional shareholder meetings is one reason of why exclusively virtual shareholder meetings have not gained widely spread acceptance across jurisdictions. Another reason is that a well-fitting design for the web-based exercise of shareholder rights does not yet exist. Thus, the paper develops an advisable design of Virtual Shareholder Meetings that replicates all for functions of traditional shareholder meetings, while it is likely to reduce shareholder apathy at the same time.

It argues that enabling more frequent opportunities for voting is the logical consequence of the developments of continuous disclosure requirements and continuous buy/hold/sell-decisions by market participants. Therefore, the virtual exercise of shareholder rights should be achieved through (1) liberalizing currently existing legislative and practical barriers, and in particular, time and place restrictions on shareholder meetings; (2) re-integrating analyst and institutional investor meetings in the process of shareholder meetings, and (3) substituting for the traditional face-to-face accountability of managers to shareholders through specific electronic means. The latter involves, specifically, the use of RSS-Feed and XBRL-technologies for gathering and evaluating information, the use of the company's website as the central communication platform for management to shareholders and shareholders to shareholders, and the election of an independent shareholder rights manager (firm) by the shareholder body with procedural, technical, and organizational authority for organizing the exercise of shareholder rights. Ideally, the blueprint presented herein achieves the harmonization of voting behavior and market reactions, thereby furthering market efficiency.

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I. Introduction

Every year in late spring / early summer, thousands of public corporations all around the world send hundreds of thousand of pages of annual accounts, proxy materials, and proxy forms to millions of shareholders. Shareholders are expected to send their ballots / proxy forms back to the firm, but few, in fact, do so. This process imposes significant costs on corporations, intermediaries, and shareholders. While many papers elaborate on the *function* of shareholder voting, in theory, and its inherent weaknesses there is – relatively speaking – little research that analyses the *process* of shareholder meetings. This lack of research is probably due to the fact that with respect to procedural rules, theory and practice are disconnected: theory is seldom familiar with procedural details, while practice is unlikely to invest time in theoretical considerations.

Thus, this paper undertakes to analyze one aspect of the procedural rules - the use of the internet in shareholder meetings, for public corporations in Canada, France, Germany, the UK, the U.S. and Switzerland, from a comparative perspective. Further, on the basis of this comparative view, it suggests the direction in which the rules on virtual shareholder meetings *should* develop. Three good reasons account for such a study.

First: To the same extent that the internet has lost its fashionable aura[1] in the aftermath of the tech bubble in 1999/2000, academic interest in the convergence of traditional and new methods of exercising shareholder rights has lost its steam. Nowadays, few experts examine the topic systematically.[2] A cross-border approach

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[1] As an example for the net-based enthusiasm, see e.g. Bernhard Grossfeld, "CyberCorporation Law - Comparative Legal Semiotics/Comparative Legal Logistics", 35 Int'l L. 1405 (2001).

[2] **Australia**: Richard Alcock & Andrew Daly, "Electronic Proxy Voting in Australia" (9/2003), online http://www.aar.com.au/corpgov/pubs/pdf/onlinevoting.pdf; Elizabeth Boros, "Virtual Shareholder Meetings" 2004 Duke l. & Tech. Rev. 8, online http://www.law.duke.edu/journals/dltr/articles/2004dltr0008.html, and *Corporate Governance in Cyberspace: Who Stands to Gain What from the Virtual Meeting?,* 3 Journal of Corporate Law Studies 149, 150-55 (2003) (detailing UK, Australian and US reforms), and "Corporations Online", (2001) Company & Securities Law Journal 19, 492; **Denmark**: Jesper Lau Hansen, "IT og selskabsretten", Ugeskrift for Rettsvaesen 2000, p. 143, and "Focus: The listed companies and the electronic communication 1" (2003), Copenhagen Stock Exchange, Focus No. 62, online http://www.cse.dk/kf/kf_pressemeddelelser?languageID=1&c=Page&cid=1034698850162&

might thus well be justified in order to overcome the isolation which academics experience in their national ivory towers.

Second: Shareholder meetings have long been the pariah in comparative corporate governance studies. Comparing the details of the rules on Virtual Shareholder Meetings might change this fact. Further, it might provide interesting insights that can

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contentid=1062141824343; **France:** Association Nationale des Sociétés par Actions (ANSA), *Proxy Voting Reform in France: A Guide for Non-Residence Shareholders* (Paris, January 2003), online <www.ansa.asso.fr/site/ACV_ANGLAIS_janvier2003.pdf>; **Germany**: Ulrich Noack, "Hauptversammlung und Internet: Information – Kommunikation – Entscheidung" (transl.: Shareholders' Meeting and the Internet: Information - Communication – Decision), CBC-RPS 0005 (12/2004), online: http://ssrn.com/abstract=646723, and "Neue Entwicklungen im Aktienrecht und moderne Informationstechnologie 2003 – 2005", NEUE ZEITSCHRIFT FUER GESELLSCHAFTSRECHT 2004, 297-303, and **"**Zukunft der Hauptversammlung - Hauptversammlung der Zukunft" (transl.: Future of the shareholder meeting – shareholder meeting of the future?), in: Zetzsche (ed.), *Die virtuelle Hauptversammlung* ("The Virtual Shareholder Meeting"), 2002, pp. 13 et seq., "Modern communications methods and company law", European Business Law Review, March-April 1998, pp. 100-106, and, co-authored with Michael Beurskens "Internet-Influence on Corporate Governance", EBOR 2002, 129; Dirk Zetzsche, "Die Virtuelle Hauptversammlung – Momentaufnahme und Ausblick" (Transl.: "The Virtual Shareholder Meeting – Snapshot and Look Forward"), ZEITSCHRIFT FUER BANK- UND KAPITALMARKTRECHT 2003, 736, and Dirk Zetzsche (ed.), *Die Virtuelle Hauptversammlung* (Transl.: *The Virtual Shareholder Meeting*), Erich-Schmidt-Verlag, Berlin: 2002 [Zetzsche, *Virtual Shareholder Meeting*]; for further works in German language see http://www.jura.uni-duesseldorf.de/service/hv/; **Sweden:** Rolf Skog "The institution of the general meeting and new communication technology – a few considerations de lege lata and de lege ferenda" (2000), online: http://www.jura.uni-duesseldorf.de/service/hv/, and in JT 1/1999-2000; **Switzerland**: Hans Caspar von der Crone, "Die Internet-Generalversammlung", in: Festschrift Forstmoser (2003), pp. 155-167 [Von der Crone, "Internet-Generalversammlung"]; **United Kingdom [UK]**: Verdun Edgtton, "Appointment of Proxies by Electronic Communication: Do Companies Have to Wait for Enabling Legislation?", 21 Company Lawyer 294, 298 (2000); Rebecca Strätling, "General Meetings: a dispensable tool for corporate governance of listed companies?" (2003) Corporate Governance – An International Review 11:1, 74; **United States [U.S.]**: Mentioned as side-issues of corporate law by e.g. Richard J. Agnich & Steven F. Goldstone, "What Business Will Look for in Corporate Law in the Twenty-First Century", 25 Del. J. Corp. L. 6, at 24 (2000); Robert Brown, Jr., "The Irrelevance of State Corporate Law in the Governance of Public Companies", 38 U. Rich. L. Rev. 317, at 328, 380 (2003-2004); M.D. Goldman & E.M. Filliben, "Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century" (2000) 25 Delaware J. of Corp. L. 683, 394. The few authors that focus on online-issues include Daniel Adam Birnhak, "Online Shareholder Meetings: Corporate Law Anomalies or the Future of Governance?", 29 Rutgers Computer & Tech. L.J. 423, 445-46 (2003); T. Burns, "Implications of Information Technology on Corporate Governance" (2001) 9 Int. J. of L. and Inf. Techn. 21; Douglas R. Cole, "E-Proxies for Sale--Corporate Vote-Buying in the Internet Age", 76 Wash. L. Rev. 793, at 797, 812 (2001); Howard M. Friedman, *Securities Regulation in Cyberspace* (New York, Bowne & Co Inc, 3rd edn: 2001), with supplements 2004 & 2005: Chapters 11, 12; George Ponds Kobler, "Shareholder Voting Over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance", 49 Ala L. Rev. 673 (1997-1998); Mark Latham, "The Internet will drive corporate monitoring", Corporate Governance International 3, 4-11; Ronald O. Mueller & Stephanie Tsacoumis, "Proxy Solicitation and Stockholder Voting Using Electronic Media", and Gavin A. Beske, **"**Shareholder Meetings Online", in: John F. Olson & Carmen J. Lawrence (eds.), *Securities in the Electronic Age: A Practical Guide to the Law and Regulation*.

constitute the foundation for the more general questions encountered by convergence theorists.[3] In particular, those questions regarding the perennially repeated, but nevertheless doubtful[4] thesis by *La Porta, Lopez-De-Silanes, Shleifer*

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[3] One can basically distinguish three strands of thought in the international convergence debate. The **formal convergenists** believe that convergence at the level of formal legal rules is already largely complete, f.e. Brian R Cheffins, "Current Trends in Corporate Governance: Going from London to Milan via Toronto", (1999) 10 Duke J. Comp. & Int'l. L. 5, 6; Jeffrey N Gordon, "Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany", (1999) 5 Columb.J. Eur. L. 219; Jeffrey N Gordon "An International Relations Perspective on the Convergence of Corporate Governance: German Shareholder Capitalism and the European Union, 1990-2000", (2003) ECGI Law Working Paper No. 06/2003 (from SSRN) [Gordon, "International Relations"]; Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law", (2001) Geo. L. J. 89, 439; Edward B Rock, "America's Shifting Fascination with Comparative Corporate Governance", (1996) 74 Wash. U. L. Q. 367; Mathias M Siems, *Die Konvergenz Im Rechtssystem der Aktionäre* (transl. *The Convergence of Legal Systems in the Law on Shareholders – A Study on Comparative Corporate Governance in the Era of Globalisation* (Tübingen, Mohr: 2005) at §11 [Siems, *Convergence*].
The **divergenists** suggest that political forces and path dependence will limit the extent of convergence, e.g. Lucian A Bebchuck & Mark J Roe, "A Theory of Path Dependence in Corporate Ownership and Governance", (1999) 52 Stan. L. Rev. 127, at 132 et seq.; Douglas M Branson, "The Very Uncertain Prospect of "Global" Convergence in Corporate Governance", (2001) 34 Cornell Int'l L.J. 321, at p. 325 et seq.; William W Bratton & Joseph McCahery, "Comparative Corporate Governance and the Theory of the Firm: The Case against Global Cross-Reference", (1999) Columb. J. Tran'l L. 213; David Charny, "The German Corporate Governance System", (1998) Co. Bu. L. Rev. 145; Roberta Romano, "A Cautionary Note on Drawing Lessons from Comparative Corporate Law", (1993) 102 Yale L.J. 2021, 2036; Mark J Roe, *Political Determinants of Corporate Governance,* (Oxford Univ. Press, New York, 2003), at 199-200 [Roe, *Political Determinants*].
The **functional convergenists** put forth that different formal rules could produce similar outcomes with respect to the function, rather than the form of the rules, see Bernard S Black, "The Legal and Institutional Preconditions for Strong Securities Markets", (2000-2001) 48 UCLA L. Rev. 781, at 846 (but restrictions apply, see 838: if the jurisdiction is not caught in a "downsizing, self-reinforcing equilibrium"); John C Coffee, Jr., "The Rise of Dispersed Ownership: The Role of Law and the State in the Separation of Ownership and Control", (2001) 111 Yale L.J. 1, at p. 77 [Coffee, "The Rise"]; Ronald J Gilson, "Globalizing Corporate Governance: Convergence of Form or Function", (2001) 49 Am. J. Comp. Law 329, at p. 333 et seq.

4 Re the legal assumptions, e.g. Markus Berndt, "Global Differences in Corporate Governance Systems", in Peter Behrens et al. (eds.), Ökonomische Analyse des Rechts (transl. Economic Analysis of Law) (2002), at 17-18. Sofie Cools, "The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers", Harvard John M. Olin Discussion Paper Series No. 490, Del. J. of Corp. Law (2005), online: www.law.harvard.edu/programs/olin_center/corporate_governance/papers/Cools_4901.pdf; Ronald J Gilson, "Complicating the Controlling Shareholder Taxonomy" (3/2003), online: www.uni-bocconi.it/doc_mime_view.php?doc_id=24692&doc_seg_id=1; Detlev Vagts, "Comparative company law – the new wave", in Festschrift für Jean Nicolas Druey (2002), at 600; Dirk A Zetzsche, "Explicit and Implicit System of Corporate Control – A Convergence Theory of Shareholder Rights", CBC-RPS 0001 (8/2004), online: http://ssrn.com/abstract=600722 [Zetzsche, "Explicit and Implicit System"], and "Shareholder Interaction Preceding Shareholder Meetings of Public Corporations – A Six Country Comparison", ECFR 1/2005, pp. 105 [Zetzsche, "Shareholder Interaction"]). Re the methods, e.g. Mathias M Siems, "Numerical Comparative Law - Do we Need Statistical Evidence in Law in Order to Reduce Complexity?" (2/2005), http://ssrn.com/abstract=514142 and "What Does not Work in Comparing Securities Laws: A Critique on La Porta et al.'s Methodology" (10/2004), http://ssrn.com/abstract=608644 .

and Vishny [LLSV][5] of weak shareholder rights as an explanation for higher ownership concentration, and a relatively lower market valuation of firms in jurisdictions other than the U.S. and the UK.

Third: All legislatures within the focus of this study have recently taken, or are actually considering, legislative action to alter the rules on shareholder meetings, in general, and virtual shareholder meetings, in particular.[6] Furthermore, the European

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[5] Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, in “Legal Determinants of External Finance”, (1997) J. of Finance 52, 1131; “Law and Finance”, (1998) J. of Polit. Econ. 106, 1113; “Corporate Ownership Around the World”, (1999) J. of Finance 54, 471.

[6] **Canada**: CBCA amended by Bill S-11 (adopted 14 June 2001, assented to 24 November 2001); **France**: Act N 2001-420 Dated 15 May 2001 Relating to New Economic Controls modernised the French Code de Commerce (C.com); Decree dated March 23, 1967, as amended by the "NRE" decree n°2002-803 (May 3, 2002), implementing part III of the Act dated May 15, 2001 on New Economic Controls [Decree] regulates details by means of delegated legislature, see Association Nationale des Sociétés par Actions (ANSA), *Proxy Voting Reform in France: A Guide for Non-Residence Shareholders* (Paris, January 2003), online <www.ansa.asso.fr/site/ACV_ANGLAIS_janvier2003.pdf>; **Germany**: KontraG (1998), NaStraG (2001), TransPuG (2002); further reform steps present the recently proposed Draft-“Law on the Improvement of Corporate Integrity and on the Modernization of the Regime governing Decision-Directed Suits” of 17 November 2004 (transl. by the author) [UMAG] by the Federal Government, which is likely to come into force in 2005, online <www.bmj.bund.de/enid/jt.html>, see Ulrich Noack & Dirk A Zetzsche, “Corporate Governance Reform in Germany: The Second Decade,” CBC-RPS 0010 (6_2005) online: < http://ssrn.com/abstract=646761 >, published in (2005) EBLJ 16:5 (forthcoming) [Noack/Zetzsche, “Corporate Governance Reform in Germany”]; Ulrich Seibert, “UMAG und Hauptversammlung” (transl.: UMAG and shareholder meetings) WM 2005, 157; **England**: Step 1: S. 8 of the Electronic Communications Act 2000 with Companies Act 1985 (Electronic Communications) Order 2000, SI 2000/3373 and the best practice guidelines by the Institute of Company Secretaries and Administrators (ICSA), “Electronic Communications with Shareholders” (12/2000); Step 2: Department of Trade and Industry [DTI], *Company Law Reform - March 2005*, at 16 et seq. and Parts D through F of the Company Law Reform Bill [UK Draft Bill (2005)]. This advanced reform proposal is based on the preparatory works by the Company Law Steering Group, *Modern Company Law for a Competitive Economy: Final Report: Vols I and II* (London: DTI, 2001) [Steering Group, *Final Report*], and the Secretary of State and Industry’s White Paper “Modernising Company Law – Draft Clauses” (July 2002), Cm 5553-I and II, Pt. 7, Chp. 3, and Pt. 8; all three documents can be downloaded from < www.dti.gov.uk/>; **U.S.**: Federal level: SEC releases permitting electronic delivery of proxy materials from corporations to shareholders, and from broker-dealers, transfer agents and investment advisers to their clients (cited by Mueller & Tsacoumis, supra note 2, at 7-11 et seq., and the Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 106 Pub L No. 229; 114 Stat 464, effective October 1, 2000; State level: Delaware, “AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW”, Senate Bill No. 363/2000, effective July 1, 2000; for other state laws see Mueller & Tsacoumis, supra note 2, at 7-33 et seq.; **Switzerland**: Partial Revision of Corporate Law Proposal 2003, see Hans Caspar von der Crone, „Bericht zu einer Teilrevision des Aktienrechts: Teil 4: Stimmrechtsvertretung / Dispoaktien“, (2003) online <www.rwi.unizh.ch/vdc/team/Publikationen_HC/Bericht%20Teilrevision%20Aktienrecht%20Teil%204.pdf> [von der Crone, “Bericht”].

Commission intends to harmonize shareholder rights across Europe.[7] Given that shareholder meetings belong to the everyday-business of public corporations[8] and that more and more firms offer means of electronic participation in corporate decision-making,[9] it is particularly important to have a clear understanding of the different approaches of internet-based shareholder participation across jurisdictions.

Based on a comparative method this paper asserts that the transition from the traditional shareholder meeting, which is based on physical attendance of shareholders, towards a virtual shareholder meeting that fits the needs of the digital age is still incomplete. Under the traditional doctrine, shareholder meetings fulfil three purposes: Dissemination of information; communication between shareholders and management and among shareholders; voting.[10] In addition, shareholder meetings often trigger a review of management's activities, exercised on behalf of

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[7] See the first and the second consultation undertaken by the Directorate General Internal Market of the European Commission, "Fostering an appropriate regime for shareholders' rights", and the summary of the results of the first consultation, issued April 2005, online: < http://europa.eu.int/comm/internal_market/company/shareholders/index_en.htm >.

[8] See OECD principles of Corporate Governance, Pt. II. With respect to the jurisdictions of this study, see ss. 132 et seq. Canadian Business Corporations Act [CBCA]; Section 3 of the French "Code de Commerce" (transl.: Commercial Code) [C.com]; s. 119 (1) German "Aktiengesetz" (transl.: Stock Corporation Act) [AktG]; Art. 698, 704 Swiss "Obligationenrecht" (transl.: Law of Obligations) [OR]; ss. 366 et seq. CA 1985 and Pt. D UK Draft Bill (2005); ss. 211 et seq., Title 8, Delaware Code [Delaware General Corporation Law - DelGCL].

[9] UK: CrestCo, Press Release 14 March 2005, online: http://www.crestco.co.uk/news/press_releases/press-04-05.pdf , for UK: more than one-third of issued capital voted electronically; in 2004 (2003) 88% of the FTSE 100, and 41% of the FTSE 250 issuers announced a total of 273 meetings for which electronic proxy-voting was offered. Germany: German Secretary of Justice, Report to the Federal Parliament, see Ulrich Seibert, "Die Stimmrechtsausübung in deutschen Aktiengesellschaften – ein Bericht an den Deutschen Bundestag" (transl.: Exercising voting rights in German corporations –a report to the German Federal Parliament), on file with author, summary published in DIE AKTIENGESELLSCHAFT 2004, 529. I estimate that, in 2005, app. 80% among the DAX 30 companies offer some form of electronic proxy voting, and 40% of the DAX 100 issuers. Since electronic proxy voting is primarily used by retail shareholders, electronic proxies represented merely between 0.7% and 4.4% of all shares entiitled to vote.

[10] Eilis Ferran, "The Role of the Shareholder in Internal Corporate Governance: Enabling Shareholders to make better informed decisions", EBOR 2003, 491; Ulrich Noack, "Information, Kommunikation, Entscheidung – Zur Corporate Governance der Hauptversammlung europäischer Aktiengesellschaften" (transl.: Information, Communication, Decision – The Corporate Governance Function of Shareholder Meetings of Corporations in Europe"), Center of European Business Law (ed.), Bonn 2003; Strätling, supra note 2, at 74-75.

shareholders through special investigations by auditors or the judiciary. As this study unveils, however, the current regimes of the internet-based exercise of shareholder rights merely replicate some of the above functions of traditional shareholder meetings. Consequently, shareholders hesitate to rely exclusively on web-based exercise of shareholder rights for purposes of monitoring and advising management. At the same time, management has few incentives to offer efficient electronic means for the web-based exercise of shareholder rights.

Achieving an efficient regime on virtual shareholder participation requires adjustments to traditional procedures. This paper argues in favor of a virtual shareholder meeting that (1) is freed from the time and place restrictions provided by traditional corporate law doctrine, (2) integrates the functions of analyst and institutional investor meetings, and (3) replicates the face-to-face accountability of managers, which is associated with traditional shareholder meetings. The latter involves the use of RSS-Feed and XBRL-technologies for gathering and evaluating of information, the use of the company's website as the central communication facility for *all* shareholders who are not represented in the board, and the election of a shareholder rights manager by the shareholder body with financial, technical, and organizational responsibility for designing and monitor the exercise of web-based shareholder rights. This shareholder rights manager should replace the organizational authority re shareholder meetings (which corporate laws assign to the board / the chairman), as well as the review authority re the procedures (which is traditionally vested in notary publics, inspectors or corporate secretaries).

The paper presents a blueprint for an efficient VSM, predicated on the following rationale. In a world of continuous disclosure and continuous buy/hold/sell decisions of market participants, more frequent opportunities for voting – a *quasi-continuous* *voting* - will bring management's activities more in line with shareholder interests and with market reactions, and thus improve market efficiency. Thereby, *information* from management will be given in quarterly-held virtual shareholder conferences; *communication* with management and among shareholders, organized over an independently organized, publicly accessible chat-board on the company's website, will take place all-year-long; and *voting* will be exercised in the period *after* management has informed *all* shareholders in the shareholder conference. This design of internet-based exercise of shareholder rights will (1) improve corporate decision-making, (2) require management to follow shareholder interests to a greater extent than today, and (3) help align capital-market reactions with shareholder decision-making (i.e. voting).

The paper is organized as follows. Section II pinpoints the topic of the analysis. Section III examines the law on internet-based shareholder participation from a comparative perspective. Section IV analyses the potential of the web as a tool for improving corporate governance, and analyses why – after a decade of some form of web-based exercise of shareholder rights – the full potential of the net has not been realized. Section V presents a blueprint for methods of shareholder participation in the digital age that integrates the lessons learned from the previous section. Section VI concludes.

II. Scope of the analysis

After having been widely neglected for many years, two factors are primarily driving the recent renaissance of interest in shareholder meetings: *Globalization* and

Digitalization.[11] While Globalization initiates changes in national laws, thereby allowing shareholders to exercise their participation rights in shareholder meetings worldwide, Digitalization offers previously unavailable solutions for logistical and cost problems. Both aspects together culminate in the 2004 revision of the OECD principles of corporate governance that require companies to furthering cross-border voting through enabling electronic voting in absentia.[12] Like a Sleeping Beauty suddenly waking, shareholder meetings found their way back into the awareness of corporate scholarship.

Despite this recent legislative activism, the law of shareholder meetings remains confusing worldwide. Shareholder meetings are subject to provisions of federal and/or state corporate law, securities regulations, official and unofficial corporate governance codes, and a plethora of listing rules issued by stock exchanges. Furthermore, in the European Union, the Transparency Directive[13] (and, in future, probably the Shareholder Rights Directive)[14] coexists with national laws.

[11] Claudia Huberle & Dirk A Zetzsche, „Die Hauptversammlung zwischen Globalisierung und Digitalisierung“ (transl.: Shareholder Meetings under the Influence of Globalisation and Digitalisation), Handelsblatt, 21 March 2002, No. 57, at p. 41; Dirk A Zetzsche,”Die Virtuelle Hauptversammlung“ (transl.: The Virtual Shareholder Meeting), BKR 2003, 736, at 742 [Zetzsche, “Virtual Shareholder Meeting”].

[12] OECD, Principles of Corporate Governance 2004, at II.C.4., online www.oecd.org/dataoecd/32/18/31557724.pdf .

[13] Directive 2004/09/EC of 15 Dec 2004, O.J. L 390/38 (31.12.2004).

[14] With regard to the harmonization of shareholder rights in Europe, see *supra* note 7.

Table 1: Regulatory Levels of the Codified Law on Shareholder Meetings

Legislation	Canada	France	Germany	UK	U.S.	Switzerland
Corporate Law Statute	ss. 132 – 154 Canadian Business Corporations Act [*CBCA*]	Section 3 (Article L.225-96 - L.225-126) Code de Commerce [*FrCC.*]	ss. 118, 241 et seq. Stock Corporation Act [*SCA*]	ss. 352-382, 459 Companies Act of 1985 [*CA 1985*] Parts D-F UK Draft Bill (2005)	ss. 211-233, Title 8, Delaware Code [*DelGCL]*; § 7.01 – 7.47 Revised Model Business Corporation Act [RMBCA]	ss. 691- 706b Law of Obligations [*OR*]
Corporate Law Regulation	ss. 43 – 69 Canadian Business Corporations Regulations [*CBCR*]	Pt. IV of the Decree dated March 23, 1967; "NRE" decree of n°2002-803, dated May 23, 2002		Companies (Table A) Regulations 1985 [*Table A*]		
Corporate Governance Code[15]		AFEP/MEDEF, The Corporate Governance of Listed Corporations, No. 5	Pt. 2, 6 of the German Corporate Governance Code [*GCGC*]	Section D & E of the Combined Code on Corporate Governance	Inofficial CG codes[16]	Pt. I of the Swiss Code of Best Practice on Corporate Governance
Securities Law Directive		Art.13 Transparency Directive [*TP*]	Art.13 TP	Art.13 TP		
Securities Law Statutes	ss. 84-88 Ontario Securities Act [*OSA*]		s. 39 Stock Exchange Act [*BörsG*]		15 U.S.C. 2B, s. 78n (Securities Exchange Act of 1934)	
Other Securities Regulation	ss. 176-181 Ont. Reg. 1015/ NI 51-102/ NI 54-101/ NP 11-20		ss. 63 et seq. Regulation concerning stock exchange listings [*BörsZulVO*]	UK Listing Authority's Listing Rules: Guidance Man. App. 3 "The Contin. Obligat. Guide"	SEC Regulation 14A under the SEA 1934, 17 C.F.R. at § 240.14a [*Rule 14a-X*] + other rules	
Listing Requirements	TSX (Venture) Company Manual, f.e. s. 423.12, 455-469		Frankfurt Stock Exchange Listing Rules [*BörsO FWB*]		f.e., ss. 401-2 NYSE's Listed Company Manual [*NYSE-M*]	ss. 1 – 8 Swiss Code of Best Practice on Corp.Gov,

This study willfully disregards these different regulatory levels in order to provide a coherent description of the law on shareholder meetings. Further, though there exist a variety of corporate laws in Canada and the United States, this paper concentrates on the most influential regimes within each jurisdiction: in Canada, the Canadian

[15] All Corporate Governance Codes are available online: www.ecgi.org .

[16] In the U.S., public companies must file a corporate governance statement. The content of this statement is predicated upon recommendations of private organizations, in particular The Business Roundtable, **“**Principles of Corporate Governance” (May 2002); Council of Institutional Investors, “Core Policies, General Principles, Positions & Explanatory Notes” (Mar 2002); American Law Institute, Principles of Corporate Governance: Analysis & Recommendations (2002). Further, the listing requirements establish minimum standards: NYSE, Final NYSE Corporate Governance Rules (Nov 2003); NASDAQ, Frequently Asked Questions on Corporate Governance.

Business Corporations Act [CBCA]; and in the U.S., the Delaware General Corporation Law [DelGCL] as well as the Revised Model Business Corporation Act [RMBCA]. Other state or provincial rules are not the subject of this study.

Furthermore, the study focuses on the minimum standards of shareholder rights, as provided by law. It does not take into account the difference between enabling and mandatory provisions, i.e. that under some provisions management *can* act in a more shareholder-friendly fashion, though it is not obliged to do so.[17] Another aspect that is willfully disregarded under this legal perspective is to what extent firms use opportunities with which the law provides them.[18]

Eventually, this paper presupposes that - particularly in a cross-border context - the problem of identifying the shareholder in indirect securities holding systems is solved, either through direct communication between the company and its shareholder, or through an efficient flow-through structure integrating the intermediaries in multi-tier securities deposit holding systems. This problem, which stems from the insufficient harmonization of corporate, banking and securities laws and that is currently

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[17] In particular, management of British companies has traditionally had significant discretion, due to a mere handful of mandatory provisions in the British Companies Acts of 1985 [CA 1985] and 1989 [CA 1989]. With respect to the current state of the law, the analysis is based on the model constitution for corporations as published in Table A to the Companies Act of 1985 [Table A], with effect from December 23, 2000, as amended by the Companies Act 1985 (Electronic Communications) Order 2000 and related secondary level legislation (supra note 6). However, the new Draft Bill issued in March 2005 by the British Department of Trade and Industry limits managerial discretion with respect to meeting procedures in several respects.

[18] It is recognized that an empirical analysis would be particularly helpful, given the few empirical studies that are currently available. See, with respect to Australia, Stephen Bottomley, “The Role of Shareholders’ Meetings in Improving Corporate Governance” (2003) Centre for Commercial Law – Faculyt fo Law – The Australian National University; on Belgium, see Christoph Van der Elst, Christoph Van Der Elst, “Attendance of Shareholders and the Impact of Regulatory Corporate Governance Reforms: An Empirical Assessment of the Situation in Belgium”, (2004) EBOR 5: 472, 489; on Germany and the U.S., see Zetzsche, “Explicit and Implicit System”, supra note 4; on the U.S. Jennifer E. Bethel & Stuart L. Gillan,“ The Impact of the Institutional and Regulatory Environment on Shareholder Voting” (2002) Financial Management 31, 29.

addressed by European legislators[19] as well as the European Commission,[20] causes particularly dire consequences with respect to cross-border voting in Europe. The American system has encountered problems with integrating the rights of beneficial owners within the meeting procedure, as well. The underlying complicacies cannot be described here in detail.[21]

III. Incomplete transition – virtual exercise of shareholder rights from a comparative perspective

Traditionally, a shareholder meeting fulfills three functions: shareholder information, communication and voting.[22] Further, shareholder meetings often prompt reviews of

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[19] France, see Michel Storck, "Corporate Governance à la Francaise – Current Trends" ECFR 2004, 37, 54 on the reforms of Artt. L228-1 et seq. C.com by Ordonnance nº 2004-604 (June 24, 2004), Official Gazette of June 26, 2004, Art. 24; Germany, see supra note 6 [s. 123 AktG reformed by the UMAG (2005), and s. 67 AktG reformed by NaStraG (2001)]; UK, pp. 36 et seq. & Pt. E of the UK Draft Bill (2005), supra note 6; Ferran, supra note 10, at 509; Paul Myners, "Review of the impediments to voting UK shares – report to the Shareholder Voting Working Group" (1/2004), online: http://www.manifest.co.uk/myners/myners.htm; at pp. 14 et seq.; Switzerland: von der Crone, "Bericht", supra note 6, at 12 et seq. The same problems exist(ed) in the U.S.

[20] European Commission, supra note 7. The report relies on the recommendations by the Expert Group on Cross-Border Voting, "REPORT ON CROSS-BORDER VOTING BY SHAREHOLDERS" (Sept 2002), online: <www.jura.uni-duesseldorf.de/dozenten/noack/texte/normen/amsterdam/ >; the report primarily concerns corporate law issues. Some securities law issues are discussed in the First and Second Report on EU cross-border clearing and settlement arrangements (Giovaninni-Reports), commissioned on behalf of the European Commission, online http://europa.eu.int/comm/economy_finance/giovannini/clearing_settlement_en.htm; thereon, e.g.: The Bank of New York, European Clearing and Settlement Handbook, online: http://www.bankofny.com/htmlpages/ain_1056.htm . Further, the Unidroit- and The Hague-Initiatives seek to harmonize national laws with respect indirect securities depository systems, see special edition 1/2005, in Common* Law Review.

[21] See Maria-Teresa Marchica & Roberta Mura, "Direct and Ultimate Ownership Structures in the UK: an intertemporal perspective over the last decade", (2005) Corporate Governance: An International Review 13:1, 26; Mueller & Tsacoumis, supra note 2, at 7-7 et seq.; Andreas Rahmatian, "The issue and transfer of shares under English and German law: an outline", *The Company Lawyer*, Vol. 23, 2002, 252-260; Teo Tsu Min Cynthia, „The multi-tier contest – competing priorities in an indirect holding system" (2003) 21 Company & Securities Law Journal 168; Ulrich Noack, "Aktionärsrechte im EU-Kapitalbinnenmarkt" (transl.: Shareholder Rights within the EU Common Market"), ZEITSCHRIFT FUER WIRTSCHAFTSRECHT (ZIP) 2005, 325, 327; Ulrich Noack & Dirk Zetzsche, "Die Legitimation des Aktionärs" (transl.: Identification of Shareholders), DIE AKTIENGESELLSCHAFT 2002, p. 651 et seq., und "Aktionärslegitimation bei sammelverwahrten Inhaberaktien", (transl.: The Identification of Shareholders of Companies Issuing Bearer Shares hold in Custody of a Central Depository System), WERTPAPIERMITTEILUNGEN 2004, p. 1 et seq.

[22] Supra note 10.

whether the directors and officers - in two-tier jurisdictions, the board of management and the supervisory board [herein "management"][23] -, the controlling shareholders, or the shareholder meeting itself violated statutes, charters, bylaws, or other corporate rules in the conduct or the exercise of voting power at the meeting. This review is commonly exercised by auditors on behalf of shareholders, or the judiciary. This categorization provides a good measurement of the degree to which the law on shareholder meetings has completed the transition into the digital age.

1. Information

The company may provide information to shareholders via two different methods, which will be referred to as the "pull" and the "push" method.

a) Pull

First, a company may make information available to shareholders who may access the information at the pre-determined place ("pull" method). Traditionally, these places were the company headquarters or company registers. Shareholders could come to these places and take a look at the stored documents. Meanwhile, quoted companies are either required to disclose corporate information on their website, or to send it to regulators, stock exchanges or commercial information providers for disclosure through the storage and retrieval systems or electronic official gazettes run by these entities.[24] This is also true with respect to meeting-related information,

[23] For reasons of simplicity, I generally refrain from distinguishing between directors and officers, and the board of management and the supervisory board, respectively.

[24] The specific media for disclosure of company data differ. See e.g. with regard to Germany Ulrich Noack, "Digital Disclosure of Company Data in Germany and Europe - Regarding the Implementation of the Disclosure Directive (2003) and the Transparency Directive in Germany", AZW Working Paper No. 2004_10_01 (from SSRN). Across Europe, some harmonization will result from the implementation of Artt. 19-22 of the Transparency Directive (supra note 13).

such as the annual account and related reports,[25] the notice of the meeting and the proxy-related materials,[26] shareholders' requisitions,[27] a web-cast of the meeting,[28] the voting results,[29] and a variety of other information.[30] Active investors who look for meeting-related information will be able to find and download this information easily.

b) Push

Alternatively, a company may be obliged to send or supply information to the recipient ("push" method). The underlying rationale for utilizing such a method is that under the pull-method, *passive* shareholders will not receive any information, and are

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[25] Canada: National Instrument No. 51-102 "Continuous Disclosure Obligations" [NI 51-102], Pt. 4 –6, requiring disclosure on SEDAR (Ontario securities act); France: L225-115 & Art. 124 (1) Decree; Germany: ss. 39 (1) No. 3, (2) BörsG, 65 (1) BörsZulVO, No. 71 BörsO FWB (website stockexchanges) and No. 6.8 DCGK (corporate website); Switzerland: Art. 697h (1) (if not send to any person requiring the company to do so); UK: No. 1.24, 1.25 and Chapters 8-14 of the UK Listing rules; U.S.: SEC Regulation S-X, requiring disclosure on EDGAR, and S. 203.01A of the NYSE-M.

[26] Canada: s. 134 (3) CBCA & NI 51-102, Pt. 9; France: Art. L225-108 C.com & Art. 130 Decree; Germany: ss. 121, 25 sent. 1 AktG (official gazette), ss. 63 (1), 66 (1) BörsZulVO, 71 BörsO FWB (stock exchange) and No. 2.3.1 GCGC (corporate website); Switzerland: subject to the articles and listing requirements of the stock exchanges, see Anhang I des Rundschreibens Nr.1, issued by the SWX, online http://www.swx.com/download/admission/regulation/circulars/abcircular_001_de.pdf ; UK: CA 1985: No. 115 of Table A (as amended by Schedule 1 to the Companies Act 1985 (Electronic Communications) Order 2000, referring to the best practice guidelines issued by the Institute of Company Secretaries and Administrators (ICSA), Electronic Communications with Shareholders (12_2000) and *ibid*; UK Draft Bill (2005): ss. D26, Schedule F3, Pt. 3,4; U.S.: Rule 14a-6(e) and s. 401.01-02, 402.00-03 NYSE-M.

[27] In Canada, the U.S. and Switzerland, as well as currently in the UK, requisitions must not be filed after the notice of the meeting. Consequently, they are either disclosed in the management's circular or filed as proxy materials issued by the petitioner, see Zetzsche, "Shareholder Interaction", supra note 4, at III 2. In the other countries, petitions may be filed as response to a management proposal. France: L225-115 No. 3 & Art. 130 Decree; Germany: ss. 126 (1), 127 AktG; UK: ss. D58 (1) (a) UK Draft Bill (2005).

[28] E.g. recommended by No. 2.3.4 GCGC, as permitted under s. 118 (3) AktG (if the articles so provide).

[29] E.g. Canada: NI 51-102, Pt. 11.3 (SEDAR); UK: No. 4.25 b) (ii) Continuing Obligations Guide; the same disclosure will be mandatory under the new British law, see DTI, *White Paper* (March 2005), supra note 6, at 17.

[30] German companies sometimes disclose a summary of the Question & Answer session of the shareholder meeting, see Zetzsche, "Explicit and Implicit System", supra note 4.

even less likely to exercise their rights than if they received some information and the proxy forms, as a “reminder” of their rights. Thus, corporate law requires the company to send (at least) the notice of the meeting with the proxy-related materials to their shareholders.[31] In *ancient* times of paper-based distribution, push-information required major logistical efforts and imposed high process costs on companies. In the digital age, however, “push” may easily and inexpensively take place through forwarding the link to the relevant information disclosed on the company’s website to the shareholder’s email account.[32]

With regard to push-information, the transition is, however, still incomplete. Three kinds of hurdles hamper the smooth transition towards digital exercise of shareholder rights.

First, under some laws, the **shareholders** of the company **must resolve** that the company may send documents or other information to members. The reason for this requirement is unclear. The information is publicly available in digital form under the pull-provision. The method of how a shareholder likes to receive corporate information thus merely concerns the individual shareholder. Furthermore, this

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[31] Canada: s. 135 (1), 253 CBCA; France: Art. L225.108 C.com and Art. 120-1, 124 (registered shares), 125 Decree; Germany: s. 125 (1), (2) AktG for shareholders of record, s. 128 (1) AktG for beneficial owners holding registered shares and shareholders holding bearer shares; Switzerland: Art. 696 (2) OR (registered shareholders); UK: CA 1985: s. 370 (2) & No. 111 et seq. Table A & D.2.4 Combined Code on CG (2003); UK Draft Bill (2005): ss. D26, D27, D 42 (1); U.S.: Rule 14a-3 for record shareholders; Rule 14b-1/2 and Rule 14a-13(c) for non-objecting and consenting beneficial owners (NOBO and COBO-lists); Rule 14a-13(d) for certain employee-shareholders; depositories are required to forward information to other shareholders according to Rules 14a-13(a) (preparation) and 14b-1(b) and 14b-2(b) (execution); ss. 222 (b), 229, 230 DelGCL; ss. § 7.05-06 RMBCA.

[32] Expressly stipulated in Canada: No. 7 (2) CBC Regulations; UK: s. 369 (4B) – (4C) CA 1985; No. 1.24 UK Listing Rules; Schedule F3, Pt 4, No. 10, 15 UK Draft Bill (2005); U.S.: s. 232 (b) (3) DelGCL; the SEC Electronic Media Release (April 26, 2000) clarifies that a hyperlink embedded within any document required to be filed or delivered under the federal securities laws causes the hyperlinked information to be a part of that document, see online http://www.sec.gov/news/press/2000-53.txt.

requirement might hamper efficient exercise of shareholder rights since one (let's say: local, controlling, institutional) shareholder group might utilize it in order to keep another (international, retail etc.) shareholder group from organizing itself efficiently. This can occur, because postal delivery takes precious time in the short period preceding the shareholder meeting.

Second, the regimes require the companies (or the intermediary between the company and the shareholder) to obtain the prior consent of the addressees before the company may send information by electronic means. Without the shareholder providing his email-address or other access-points, the company cannot fulfil its sending-/delivery-requirement by electronic means. Thus, the shareholder's consent is a natural barrier which does not need any regulatory activity. Simple data storage requirements that document that the shareholder provided his electronic address to the company suffice. Many regimes nevertheless require that a shareholder must consent *in writing*, and some set even more burdensome formal requirements as a precondition for the use of electronic communication facilities.

Finally, many shareholders are chronically passive. For example, truly passive shareholders may not send back declarations of consent to the use of electronic communication methods, even if corporations provide free envelopes, or lure shareholders to send back the declarations with small gifts. "Deemed Consent" provisions may help to overcome this problem, such as that provided by the new British Draft Bill. Under this draft, a person is taken to have agreed that the company may send information to him / her electronically if

> (a) he has been asked individually by the company to agree that the company may send or supply documents or information generally, or the documents or information in question, to him in that manner, and

(b) he has failed to respond within the period of 28 days beginning with the date on which the company's request was sent.[33]

Such a "deemed consent" provision may increase the level of participation in methods of electronic communications significantly and thereby reduce costs imposed on the company / all shareholders. At the same time, "deemed consent" provisions do not impose unjust requirements on old, non-internet skilled shareholders, since (1) these shareholders either do not have an email account, and, hence, a company cannot fulfil its supply requirements vis-à-vis these shareholders electronically, or (2) if these shareholders have given their email account to the corporation, they may always revoke their consent to the electronic supply of corporate information. A "deemed consent" provision thus merely operates to deem consent to be given by "lazy", but technically proficient, shareholders.

Table 2: Requirements for "Push"-information by electronic means

Jurisdiction	**Shareholder Resolution required**	**Formal requirements with regard to Individual Shareholder's Consent**	**"Deemed / Implied Consent" provision**
Canada[34]	- (unless by-laws / articles provide otherwise)	In writing	-
France[35]	-	In writing; if *shareholder* requires email communication, registered mail with return receipt	-
Germany[36]	-	-	-
Switzerland[37]	no regulation	no regulation	no regulation
UK[38]	CA 1985: -; UK Draft Bill (2005): yes	CA 1985: In writing UK Draft Bill (2005): -	CA 1985: -; UK Draft Bill (2005): yes

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[33] UK Draft Bill (2005): Schedule F3, Pt 4, No. 1 (4).

[34] Ss. 252.3 (2), 252.4 CBCA & No. 7 (1) CBC Regulations.

[35] Art. L225.108 C.com and Art. 120-1 Decree (referred to by Att. 124 (2), 125 (1), 129 (1), 131 (1), 138 Decree).

[36] Ss. 125 (1), (2) and 128 AktG, No. 2.3.2 GCGC.

[37] The Swiss regulation on these issues is very basic.

U.S.[39]	-	SEC: - RMBCA: no regulation; DelGCL: -, written notice for revocation	SEC: (for employee shareholders only) -

[38] S. 369 (4A) – (4F) CA 1985, Regulation 115 of Table A under the CA 1985, as amended by Schedule 1 to the Companies Act 1985 (Electronic Communications) Order 2000, refers to the best practice guidelines by the Institute of Company Secretaries and Administrators (ICSA), Electronic Communications with Shareholders (12_2000), which recommends at ¶4.4 that the initial invitation to receive documents electronically should be send by post; Schedule F3, No. 6, 7 UK Draft Bill (2005).

[39] SEC, "Use of Electronic Media for Delivery Purposes," Securities Act Release No. 33-7233, 60 Fed. Reg. 53, 458 (October 6, 1995), as clarified through "Use of Electronic Media," Securities Act Release No. 33-7856 (May 4, 2000), footnote 106; s. 232 (a) DelGCL. Practice, in particularly during proxy fights, distinguishes between the proxy statements to which no deemed consent provision applies and other materials, such as additional information, see Mueller & Tsacoumis, supra note 2, at 7-24.

c) Information sent to a company

Finally, some laws specify time periods during which shareholders may send information to the company by electronic means. These provisions concern shareholder requisitions, demands for polls and proxies. Generally speaking, the laws studied here impose some or all of the following requirements:

(1) the shareholder confirms his identity and authenticates his shareholding, if applicable, through an intermediary;[40]

(2) the information is sent to the address and in that manner specified for that purpose by the company;[41]

(3) the firm agrees that the document may be sent in this specific electronic form (e.g. filling in a form provided on website, email, electronic data transfer).[42] Only some laws mandate that companies receive information electronically.[43]

Requirements (1) and (2) are necessary in order to create certainty. The third requirement, however, is only justified with respect to the use *of the specific electronic form*. This is because a company must ensure that they can register and

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[40] E.g. Canada: s. 252.7 CBCA; France: Art. 131-3 No. 3, 132, 134, 136, 145-3 Decree; U.S.: s. 212 (c) DelGCL; UK: Schedule F1, Pt. 3 No. 6 (1) UK Draft Bill.

[41] E.g. Canada: s. 252.3.(2) (b) CBCA; Germany; s. 123 (3) 3 AktG for authentications of shareholders issued by depository banks (bearer shares); s. 126 (1) for counter-proposals; UK: s. 253 (2A) CA 1985.

[42] E.g. Canada: s. 132 (4) CBCA (if company makes available ...) & s. 252.3.(2) (a) CBCA; UK: D50 (1), (2) ("where a company has given an electronic address"), Schedule F1, Pt. 3 No. 6 (1) UK Draft Bill.

[43] The most extensive access-requirements are set up by the U.S. Federal "Electronic Signatures in Global and National Commerce Act [*E-Sign Act*]", 106 Pub L No 229; 114 Stat 464, but some questions as to its scope and consequences remain, see Mueller & Tsacoumis, supra note 2, at 7-27 et seq. For some, but not all, shareholder activities: France: Art. 128 Decree (shareholder requisitions); Art. 131-1 (requesting ballot form); Germany, see supra note 41.

process all of the proxies, requisitions, poll demands etc. sent by – sometimes - hundreds of thousands of national and international shareholders.

Requiring the company's consent to the use of electronic media, *in general*, however, is anachronistic. Further, it is biased against shareholders abroad who will hardly be able to send their requisitions or proxies in a traditional way to the company within the narrow timeframe specified by some corporate laws. For example, in some of the largest German (DAX30-) companies, foreign shareholders hold more than 50% of the shares.[44] Under these circumstances, denying foreign shareholders electronic access is analogous to doubling the value of local shareholder's votes. Due to this, I submit that *German* companies with a significant share of international shareholders must not deny electronic access in the period preceding the meeting.[45] The same fairness-principle on which this statement is founded is also relevant to the laws of other jurisdictions, e.g. with respect to the U.S. in s. 7.08 (c) RMBCA.[46]

2. Voting

The last statement leads into to the topic of *electronic voting*. This may take place through a) Electronic Proxy Voting [EPV], b) Electronic Direct Voting [EDV], and in some jurisdictions, through c) Virtual Shareholder Meetings [VSM]. In all jurisdictions, all three models are always legitimate with the shareholders' unanimous consent. The following section thus merely regards shareholder meetings of companies in which the use of technology is a contentious issue among shareholders.

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[44] Zetzsche, "Explicit and Implicit System", supra note 4.

[45] Zetzsche, BKR 2003, 736 et seq.

[46] Stating: "Any rules adopted for, and the conduct of, the meeting shall be fair to shareholders."

a) Electronic Proxy Voting [EPV]

EPV refers to the electronic *issuing*, *authentication* and *submission* of proxy appointments to the corporation. EPV is probably the least controversial of the internet-based methods of exercising shareholder rights.[47] All jurisdictions within the purview of this study allow for some form of EPV. When EPV first became a real possibility at the beginning of the 21st century, most jurisdictions merely changed the formal requirements of assigning proxies to a private or corporate-sponsored representative. Specifically, there was a move from requiring a proxy solely in writing to mandating some type of digital equivalent, such as email, fax, or even a proxy saved on disk in addition to the written proxy. Accompanying this switch, generic e-commerce issues[48] were widely discussed, such as the meaning of “signature”, “authentication”, “delivery” and “access”/”storage”, in the context of web-based systems. Meanwhile, these issues have been settled, for the most part, with regulatory support.[49]

An advanced model of EPV combines modern methods of information dissemination (web-cast) with EPV. Under this model, which is, for example, common in Germany and specifically provided for under French law,[50] shareholders may direct their representative through the use of the internet until the ballots are cast within the

[47] *Elizabeth Boros*, “Virtual Shareholder Meetings”, 2004 Duke L. & Tech. Rev. No. 8, at A.

[48] *Beske*, supra note 2, at 8-17; *Boros*, “Virtual Shareholder Meetings”, supra note 2, at A.

[49] Canada: ss. 252.5-252.7 CBCA & CBC Regulations, No. 6 et seq.; France: Artt. 131-133 Decree; Germany: ss. 126a, 126b Bürgerliches Gesetzbuch (German Civil Code); Switzerland: Art. 14 OR; UK: Statutory Instrument 2000/3373 [The Companies Act 1985 (Electronic Communications) Order 2000] and best practice guidelines by the Institute of Company Secretaries and Administrators (ICSA), Electronic Communications with Shareholders (12_2000), ¶10.4; UK Draft Bill (2005): s. F5; U.S.: E-Sign Act, supra note 43, for details see *Friedman*, supra note 2, ¶ 11.05; ss. 211 (b), 212 (c) (3) DelGCL; less specific § 7.22 (a) RMBCA.

[50] Artt. 145-2 – 145-4 Decree.

physical meeting. Under this model, the proxy's function is limited to that of a messenger.

b) Electronic Direct Voting [EDV]

EDV systems enable shareholders to vote directly over the internet, without a proxy connecting the "web-" and the "physical sphere". With regard to EPV, two different legal relationships exist: on the one hand, the relationship between the shareholder and his representative, a relationship that is primarily governed by agency law; on the other hand, the corporate law-based relationship between the shareholder and the corporation.[51] In contrast, no intermediary/ representative is involved in EDV. Merely one legal relationship exists between the corporation and its shareholders. Similar to EPV, the voting may take place in advance of the meeting, or simultaneously if the meeting is web-cast.

This advanced form of internet-based shareholder participation has not yet achieved general acceptance across the jurisdictions, for two primary reasons. First, under the laws of Germany and Switzerland, formal mistakes or procedural failures in holding the meeting may affect the validity of the meeting decision itself. The two distinct legal relationships under the EPV-model (agency / corporate) may assist in reducing the risk that technological errors[52] affect the validity of the meeting decision.[53]

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[51] If the shareholder's representative, however, is an agent, the management or a director of the corporation, corporate and securities laws regulate the mandatory content of information provided to the shareholder, as well as the content and design of the form of proxy, in order to mitigate potential conflicts of interests and the risk of fraud. On details, see *Zetzsche*, "Shareholder Interaction", supra note 4, at III 3, with further references. The Canada and the U.S. even impose extensive mandatory requirements on proxies solicited *by dissidents*, which is due to an extensive interpretation of the capital markets-oriented disclosure approach.

[52] The firms frequently fear hacker attacks.

[53] The statement that this formal distinction, in fact, reduces risk is contentious. See, for Germany, e.g. Pikò/Preissler, in Zetzsche, *Virtual Shareholder Meeting*, supra note 2, No. 365 et seq.; Zetzsche,

Second. EDV requires an expansion of the meaning of the expression “meeting” from a traditional physical understanding to an understanding that regards the internet-attendant (who is physically an absentee) as “present” in the meeting. The prevailing opinion in Germany, the UK and Switzerland[54] suspects that this understanding is beyond the limits of the statutory definition of “meeting”. A hint in the opposite direction, however, might be found in the British Department of Trade and Industry’s statement in its new Draft Bill that there is no need for new regulation in this area, because market practice and case law will continue to evolve.[55]

Some jurisdictions, however, have mastered the methodological challenges provided by more dispersed forms of a “meeting”. For example, the by-laws of a French SA may provide that

> shareholders participating in a meeting by video-conferencing or means of telecommunication that enable them to be identified […] shall be deemed to be present at the said meeting for the purposes of calculating the quorum and majority.[56]

It further contains provisions regarding the necessary technical features and procedural arrangements for such meetings.[57] The French law nevertheless requires

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supra note 2, BKR 2003, 736, 740: distinction equivalent to sphere of influence. For Switzerland: *Hans-Peter Schaad*, in: Basler Kommentar zum Schweizerischen Privatrecht, 2. Aufl. 2002, Art. 689b OR No. 23 (lower risk); Von der Crone, supra note 2, at 161 (no lower risk).

[54] Germany: e.g. Uwe Hüffer, *Aktiengesetz* (transl. Commentary to the Aktiengesetz), 6th edn, Beck, München: 2005, § 118 Rn. 17 [Hüffer]; UK: Boros, “CG in Cyberspace”, supra note 2, at 156-164 (unclear with respect to her own opinion); Switzerland: Von der Crone, “Internet-Generalversammlung”, supra note 2, at 161.

[55] DTI, *White Paper* (March 2005), supra note 6, at 32.

[56] Art. L225-107 (II) C.com.

[57] Art. 145-2 Decree: "The video-conferencing means […] must satisfy technical features in order to guarantee the actual participation in the meeting, if the proceedings are continuously broadcast.” Art. 145-3 Decree: "Shareholders exercising their votes during the meeting by electronic means in the manner provided for under Article 119 may access the site dedicated for such purpose only after providing identification, by means of a code issued prior to the meeting". Art. 145-4 Decree:

each shareholder to ask *in writing* that the company send him an absentee ballot. Then, the company may send the absentee ballot per email, if appropriate.[58] The Canadian approach is more liberal:

> Unless the by-laws otherwise provide, any person entitled to attend a meeting of shareholders may participate in the meeting, in accordance with the regulations, if any, by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the corporation makes available such a communication facility. A person participating in a meeting by such means is deemed for the purposes of this Act to be present at the meeting.[59]

The DelGCL allows stockholder meetings to be held entirely by remote communication, without a venue for physical attendance, if so determined by the board of directors *in its sole discretion*. This discretion is subject to the requirement that the corporation implements (i) verification procedures, (ii) measures to ensure that all stockholders have an opportunity to participate in the meeting and vote, and (iii) means to record the votes of such stockholders:

> If authorized by the board of directors in its sole discretion […] stockholders and proxyholders not physically present at a meeting of stockholders may, by means of remote communication: a. Participate in a meeting of stockholders; and b. Be deemed present in person and vote at a meeting of stockholders, whether such meeting is to be held at a designated place or solely by means of remote communication.[60]

"The minutes of meeting's proceedings referred to in Art. 149 [of the Decree] must report any occurrence of technical hitches in relation with video-conferencing or electronic communications in the case the occurrence disrupted the meeting."

[58] Michel Storck, "Corporate Governance à la Francaise – Current Trends" ECFR 2004, 37, 53.

[59] S. 132 (4) CBCA.

[60] S. 211 (a) (2) DelGCL, subject to the following requirements: (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the

c) Virtual Shareholder Meetings [VSMs]

While both EPV and EDV are "add-ons" to a physical shareholder meeting, a virtual shareholder meeting does not take place at any physical place. Rather, it takes place in "the web" – wherever this is. Shareholders would not be able to attend the meeting physically. There are two types of virtual shareholder meetings.

Under the first type, which is common across the jurisdictions for *closed* corporations, shareholders may resolve on an issue without a physical meeting taking place. This type of decision-making assumes that shareholders in closed corporations will communicate independently among one and other and make decisions without management necessarily being involved in the decision-making process. This type of decision-making is often permitted by a statute declaring written resolutions of shareholders to substitute for traditional shareholder meetings,[61] with the "written resolution" also being a resolution that documents shareholder consent by electronic means.[62] Only in Delaware can shareholders of *public corporations* substitute for meetings with written shareholder consent.[63] Even there, this provision is usually waived in the certificate of incorporation (interestingly, due to concerns that such a

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meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

[61] The Delaware and future British law a decision in which the majority of voting rights entitled to vote at the meeting participates may substitute for the meeting itself [s. 228 (a) DelGCL; ss. D7 et seq. UK Draft Bill (excluding resolutions removing directors and auditors)]; the other laws require either a written resolution signed by all the shareholders entitled to vote on that resolution [RMBCA § 7.04 (a), (c), but see (d); Canada: ss. 142 CBCA; UK: s. 366 A (1) CA 1985] or all shareholders or all shareholders' consent to decide in written form [Germany: s. 121 (6) AktG, s. 48 (2) GmbHG].

[62] UK: S. D14 (2) UK Draft Bill; U.S.: s. 228 (d) DelGCL.

[63] Requiring consent by the majority of *all shares entitled to vote on the meeting*. This threshold is likely to be more difficult to reach than a majority of shareholders present at a meeting.

provision may benefit insurgents in a control contest!).[64] Consequently, this alternative will not be considered in the following section.

Under the second model – the truly Virtual Shareholder Meeting [VSM] - the physical meeting is replaced by a web-based procedure. Shareholders and directors deliberate and communicate specifically and exclusively through the web. With respect to quoted corporations, VSMs are only permitted in Canada and the U.S. The CBCA states:

> If the directors or the shareholders of a corporation call a meeting of shareholders pursuant to this Act, those directors or shareholders, as the case may be, may determine that the meeting shall be held, in accordance with the regulations, if any, entirely by means of a telephonic, electronic or other communication facility that permits all participants to communicate adequately with each other during the meeting, if the by-laws so provide.[65]

The DelGCL stipulates:

> If […] the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this section.[66]

[64] David A. Drexler, Lewis S. Black, Jr. & A. Gilchrist Sparks, III, *Del. Corp. Law and Practice* § 31.01, at 2-31 (2003); Charles R. T. O`Kelley & Robert B. Thompson, *Corporations and Other Business Associations: Cases and Materials* (Aspen, 4th ed. 2003), at 151.

[65] S. 132 (5) CBCA.

[66] S. 211 (a) (1) sent. 2, Title 8 DelGCL.

Table 3: Electronic Voting

Jurisdiction	Electronic Proxy Voting	Electronic Direct Voting	Virtual Shareholder Meeting
Canada[67]	Permitted	Unless by-laws otherwise provide & if corporation makes available such a communication facility.	If the by-laws so provide
France[68]	Permitted	If the by-laws so provide	-
Germany[69]	Vis-à-vis company: if the by-laws so provide or if shareholder uses qualified digital signature / Vis-à-vis intermediary: permitted	Not permitted (prevailing view)	-
Switzerland[70]	Written proxy or electronic proxy signed with a qualified digital signature; electronic directions to proxy subject to managerial discretion	Not permitted (prevailing view)	-
UK[71]	CA 1985: permitted, unless articles provide otherwise & where this is provided for in notice / electronic communication or instrument of proxy sent out by the company; UK Draft Bill (2005): permitted, if company provides for electronic address in proxy statement	Case law unclear; legislature passive	-
U.S.[72]	E-Sign Act: permitted (cont.); DelGCL: subject to managerial discretion; RMBCA: permitted	DelGCL: subject to managerial discretion; RMBCA: not permitted	DelGCL: if board is authorized to determine place of meeting: subject to managerial discretion; RMBCA: not permitted

[67] EPV: argumentum ex No. 54 (9) CBC Regulations; EDV: ss. 132 (4), (5) & 141 (3), (4) CBCA and No. 45 CBC Regulations.

[68] EPV: Art. 225.106 C.Com & Artt. 131 – 134 Decree; EDV: Art. L225.107 (II) C.com, and Art. 119 Decree & Artt. 131 – 134 Decree.

[69] EPV: Ss. 134 (3) 1, 135 (2) 3, (4) AktG and ss. 126 (3), 126a BGB; against EDV: prevailing opinion, e.g. Hüffer, supra note 54, § 118 Rn. 12; against VSM: argumentum ex ss. 118 (1), 121 (3), (5) AktG.

[70] Art. 689a OR and Art. 14 (2bis), in force since January 1st, 2005; Von der Crone, “Internet-Generalversammlung”, supra note 2, at 160 et seq., holds that EPV is nevertheless legitimate.

[71] EPV: S. 372 (2A) – (2B), (6A) CA 1985, No. 60-63 of Table A; ss. D50 (2), (3) and Schedule F1, Pt. 3 No. 6, 7 UK Draft Bill (2005); EDV & VSM: see Boros, “CG in Cyberspace”, supra note 2, at 155 et seq.

[72] EPV: Ss. 212 (c) DelGCL; § 7.22 RMBCA; EDV & VSM: s. 211 (a), (e) DelGCL.

3. Communication

The information methods described so far herein are one-way methods. *Efficient* information, in contrast, requires communication with regard to its content, hence the mutual exchange of ideas and facts in which both sides approach the "truth" in an act of togetherness. The famous Swiss corporate law scholar *Jean Nicolas Druey* compared this process with the legendary Native-American way to deliberate, the *powwow*.[73] Few provisions undertake to achieve an online *powwow*.

a) Management as Addressee: Q & A

Besides shareholder meetings, the privilege to ask management questions personally is reserved for controlling and institutional shareholders. Only a few laws undertake to transfer the Q & A sessions into the web-forum.

Outside of analyst / investor and shareholder meetings, North-American corporations typically refrain from answering investors' questions, while European standards understand frequent contacts between management and shareholders in between the meetings to be part of good governance.[74] To justify this restrictive practice, U.S. corporations refer to capital market laws that require that equal information be given to all investors.[75] This does not, however, explain why corporations do not offer web-based question and answer sessions, e.g. through a moderated chat-board with

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[73] Jean Nicolas Druey, *Information als Gegenstand des Rechts* (transl. Information as substance of law) (Zürich, Baden-Baden: 1995), at 190.

[74] F.e. the *Swiss Code of Best Practice for Corporate Governance* (at I.8.) states: "The Board of Directors should inform shareholders on the progress of the company also during the course of the financial year. The Baord of Directors should appoint a position for shareholders relations. In the dissemination of information, the statutory principle of equal treatment should be respected."

[75] F.e.: U.S.: Regulation Fair Disclosure (F-D).

management. Presumably, they refuse to hold such sessions because they would be an inconvenience to management and would not provide a significant benefit to the important investors – the controlling and institutional shareholders.

Such an argument, however, does not explain why, with respect to **shareholder meetings**, efficient large-scale Q&A-sessions over the web have not been utilized. While we see the meeting itself being webcasted all around the world,[76] a procedure enabling shareholders to ask questions via webcam seems still unlikely for public corporations even though it is legally[77] and technically feasible. The few examples of web-based Q&A-sessions[78] are statistically irrelevant. Email question & answer tools do not seem to be widely accepted by shareholders, which is partly due to the fact that shareholders need a proxy who is willing to read the questions asked,[79] and partly due to the fact that it is boring to sit in front of the screen and wait for management to answer the one question that the shareholder asked. The boredom increases proportionately with the length of the meeting. In Germany, where shareholder meetings frequently take 6 hours or more, the aforementioned model is out of touch with the reality of shareholder meetings.

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[76] E.g., for the U.S. Friedman, supra note 2, at ¶11-40 et seq.

[77] E.g. ss. 132 (4) & 132 (5) CBCA require “adequate methods of electronic communication” to meeting participants as a precondition for the use of the internet which is commonly understood to be fulfilled if management enables shareholders to send emails to management that answers them by talking to the physically present audience, being transmitted to the virtually present shareholders. The same criterion stipulates the DelGCL, s. 211 (a) DelGCL. Under the proxy models typically used in Europe, the proxy is theoretically entitled to ask questions (some exceptions apply to the current British law), though he rarely does so.

[78] Friedman, supra note 2, at ¶11.41 et seq. (2004 supplement) summarizes the experiences of U.S. firms.

[79] See below.

Thus, the German government is looking for alternatives. It recently proposed a provision which has the potential to increase the incentives to enter into a digital dialogue and mitigate the information problems of retail shareholders both inside and outside of shareholder meetings. Pursuant to this provision, information that is published on the corporate website may not be the subject of Q&A in the shareholder meeting.[80] On the one hand, this provision is intended to reduce the exposure of German companies to nuisance-claims based on failures to adequately answer shareholder questions within the strict timeframe of shareholder meetings.[81] On the other hand, the proposal opens the gate for efficient, all-year long virtual Q&A-sessions. Given a well-organized Question & Answer catalogue on the corporate website (in addition to regular disclosure), supplemented by a corporate-sponsored chat-board, there will be few questions left to ask for during the shareholder meeting. This "permanent" investor / shareholder information suggests the future path of internet-based exercise of shareholder rights which will be considered below.

Finally, the European Commission is furthering electronic communication among management and shareholders. Under the current proposal for a shareholder rights directive, "[s]hareholders shall have the right to ask questions at least in writing ahead of the General Meeting and obtain responses to their questions. Responses to shareholders' questions in General Meetings shall be made available to all shareholders."[82] While I criticize the formal requirement ("in writing"), and the fact that only questions being asked in shareholder meetings shall be made available to all

[80] S. 131 (7) AktG, as introduced by UMAG, *supra* note 6.

[81] On details, see Noack/Zetzsche, "Corporate Governance Reform in Germany", supra note 8.

[82]

shareholders (on the firm's website) – this distinction is subject to concerns with respect to equal information for all investors -, the proposal generally tends into the right direction, which is replicating the communication function into the web-era.

b) Management as Information Intermediary

Some provisions utilize the corporation as an information intermediary, and as a respondent at the same time. Shareholder petitions are typically distributed through (at least) the corporation as an information intermediary that forwards the petition into the notice of the meeting or the proxy statement, respectively.[83] If this is the case, the internet merely fulfills the function of a digital rather than postal messenger.

The information intermediation by the corporation, however, has some flaws from the shareholder perspective. This is because management learns about the requisition at the same time that the requisition is supplied to the corporation. In this very moment, management may consider its value, prepare an appropriate answer and begin lobbying for its own position. All these actions will be paid out of the corporation's pockets, hence, by the shareholders. Thus, management has a strategic advantage which may hamper the efficiency of shareholder activism in contentious situations.[84] This situation is neither new, nor does it specifically arise from the use of the internet. Even in the digital age, the strategic advantage of management functioning as an information intermediary remains.

c) Management as opponent

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[83] On details, see Zetzsche, "Shareholder Interaction", supra note 4, at III 3. Exceptions apply to proxy fights with regard to director elections under North American laws.

[84] On details, see Zetzsche, "Shareholder Interaction", supra note 4, at III 3.

The web has the potential, however, to facilitate direct shareholder-to-shareholder communication, hence communication independent from the management as an information intermediary. This type of communication may become crucial if management is opposed to a shareholder petition. For example, the North American proxy regulations, which rigidly limit shareholder communication that involves seeking the authority to exercise voting rights on behalf of other shareholders,[85] clarify that the definition of proxy solicitation does not extend to

> a public announcement […] by a shareholder of how the shareholder intends to vote and the reasons for that decision [that is made by] a press release, an opinion, a statement or an advertisement provided through a broadcast medium or by a telephonic, electronic or other communication facility, or appearing in a newspaper, a magazine or other publication generally available to the public.[86]

Under these provisions, shareholders can (1) discuss management proposals, (2) lobby for their own position with respect to certain polls moved at the meeting (in so called "vote no campaigns"), and (3) disclose how they intend to vote and their reasons, publicly on the internet. However, if shareholders together holding 5% or more of the voting rights agree on a voting strategy they will run the risk of being deemed to be a group of shareholders for the purposes of s. 13d of the U.S.

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[85] If a petitioner seeks to solicit proxies over the internet, s. 150 (1.2) CBCA & No. 69 CBC regulations set more burdensome requirements with respect to the content of the internet publication. The U.S. law [Rule 14a-3(f)] requires the filing of a definitive proxy statement before a petitioner lobbies for his position over the internet. Even then, he must not provide a form of proxy or means to execute the same in connection with the communication.

[86] Cited from S. 147 (b) (v) CBCA & No. 67 (b) CBC regulations. The U.S. federal regulations contains a similar exception in Rules 14a-1(l)(iv) (exclusion from the definition of "solicitation") and 14a-2(b)(1).

Securities Exchange Act.[87] If this is the case, a costly disclosure statement and filing requirement is triggered.[88]

The Canadian law is less cumbersome than the U.S. law,[89] in that it allows shareholders to pool shares with other shareholders to meet the minimum threshold required for certain minority rights.[90] Over the internet, which is the most popular, most accessible and the least expensive mass media, the petitioner might indirectly gain significant support, without having to file a proxy statement. However, shareholders might experience problems in trying to find the websites of other shareholders who support shareholder activity. This is particularly difficult when the company is in the news on a regular basis and internet-search engines and RSS feed deliver an excessive number of hits. Alternatively, shareholders may create advertisements urging shareholders to access the specific website.[91] However, due to the costs imposed on shareholders, this kind of behavior is rare outside the context of takeover battles.

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[87] Stating: "When two or more persons agree to act together for the purpose of … voting … of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership … as of the date of such agreement …" For details, see Friedman, supra note 2, at ¶12-09 et seq.

[88] In the absence of takeover attempts, the other jurisdictions in the purview of this study refrain from imposing disclosure duties on concerted shareholder actions if shareholders co-ordinate the exercise of voting rights in the absence of *a board control seeking proposal*. See, for example, with respect to the UK, see Simon P. Allport, Leon Ferera, "Shareholder Activism: Takeover Code Consequences" (7/2003), online: http://www1.jonesday.com/pubs/detail.asap?language=English&pubid=898 .

[89] While under Canadian law this pooling may take place over the internet, without constituting a "proxy solicitation", the U.S. case law with respect to inspection rights suggests a stricter approach, see *Studebaker Corp. vs. Gittlin*, 360 F.2d 692 (2d Cir. 1966).

[90] Canada gazette, Part I (Sept 8, 2001), at 3443; s. 147 (b) (vii) CBCA & No. 68 CBC regulations.

[91] For U.S. examples, see Friedman, supra note 2, at ¶12-05/6.

The laws provide solutions to the problem of identifying fellow shareholders **in two different ways**. Either, the law may grant online access to the shareholder list. Shareholders looking for support may be able to address fellow shareholders at lower costs electronically than they could under traditional methods of communication. This alternative choice is, for example, the Delaware legislature's in the case of a meeting of stockholders held without a physical location. However, under Delaware law the corporation is not required to include Email addresses or other electronic contact information in the shareholder list, which hampers the efficiency of the method from the outset.[92] Furthermore, many shareholders would not like to respond to shareholder activists' emails. Finally, regardless of the availability of digital communication, it is nevertheless costly to retrieve and administer the data for sending statements to many shareholders.

Alternatively, the law may determine an easily accessible online address where shareholders can announce their wish to gather support for their activities, and fellow shareholders can join them. The German government chose this alternative. The *UMAG*-proposal issued by the German government introduces a specific section for shareholder co-ordination in the Federal Electronic Bulletin.[93] For minority rights that are contingent on a threshold, a shareholder can send his issue and a contact address and a link to the editor of the Federal Electronic Bulletin, who will in turn publish it in a specifically designated section (at very low costs). Other shareholders can access the special section by electronic means free of cost. The exercise of this minority right is not contingent on the strict timeframe of traditional shareholder

[92] S. 219 (a) DelGCL.

[93] S. 127a AktG, as introduced by UMAG, *supra* note 6, Art.1 No.6. On details, see Noack/Zetzsche, "Corporate Governance Reform in Germany", supra note 8, at III.2.a).

meetings. It may trigger all-year long shareholder communication and help to inspire shareholder activism.

The counter-proposal right of German shareholders fulfills an equivalent function with regard to topics that are announced to become an item on the meeting's agenda.[94] Shareholders may mention to all shareholders their willingness to propose a different position with respect to an agenda topic, and ask other shareholders to support them. The right may be exercised up to 2 weeks before the meeting. Since 2002, management is required to publish the counter-proposal on the corporate website within the section provided for shareholder meeting-related information at a place that shareholders can easily find. Corporate laws of other jurisdictions often require management to distribute counter-proposals to all shareholders, but usually with a less generous space- and timeframe as compared to the German law.[95]

4. Review

Finally, among the jurisdictions analyzed herein, only the German law deals with the review function of shareholder meetings. The scarcity of digital replications of the review function is probably due to the fact that review is generally considered to be an *in camera* act that should not take place in the public sphere that the internet provides. The German legislature nevertheless intends to utilize the potential of the net by enabling shareholders to call for support, therefore utilizing the aforementioned special section in the Federal Electronic Bulletin,[96] with two effects. First; shareholders may assemble a quorum threshold which is necessary under

[94] Ss. 126, 127 AktG.

[95] See Zetzsche, "Shareholder interaction", supra note 4.

[96] Supra note 93.

German law for a special investigation by an auditor on behalf of the shareholders, for requiring the supervisory board to sue the board of management, and for certain derivative actions.[97] Second, shareholders willing to support the action may agree on sharing the litigation costs, which mitigates collective action problems. While in the U.S. the bundling-function that this website fulfills is typically exercised by lawyers chasing clients via commercials and web-advertisements, the use of the internet may help to avoid the excesses that are commonly associated with lawyer-driven corporate monitoring.[98] The current proposal, however, prohibits shareholders from using the website section for assembling support for securities class actions and actions directed against the validity of a shareholder-meeting decision, the type of shareholder actions most often used in Germany.

IV. Reducing Shareholder Apathy

Thus, while all jurisdictions have undertaken some activities in order to support internet-based exercise of shareholder rights, few have undertaken to replicate the four functions of traditional shareholder meetings through web-based procedures; none has fully taken the step into the digital age. Is this observation surprising?

[97] Ss. 142, 147, 148 AktG (UMAG).

[98] Roberta Romano, "The Shareholder Suit: Litigation without Foundation?" (1991) J.L. Econ. & Org. 7, 55, at 84 (1991); Robert B. Thompson & Randall S. Thomas, "The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions", (2004) Vand. L.R. 57, forthcoming, (from SSRN).

1. The Cause of Inefficient Shareholder Participation

In order to answer this question, it is useful to recall the well-documented[99] problems associated with traditional shareholder meetings. Efficient voting is commonly said to be hampered by the high costs of exercising shareholder rights (as compared to the less costly alternative of selling), collective action problems, and limited shareholder influence on certain subject matters. The situation in which shareholders find themselves has been termed picturesquely as the shareholders' "rational apathy".[100] It is one of the driving forces behind the "Wallstreet Rule" – the traditional approach of institutional investors to either vote with management, or sell (earlier than other shareholders!).

a) Costs of Exercising Shareholder Rights

Exercising shareholder rights is costly to investors: Getting and evaluating **information** is costly, since it requires time and money to research, read and process the information. The same is true with respect to **communication**: in addition to the time and money which shareholders need to invest for the purpose of communication itself (of which probably the oldest method is the assembly at one

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[99] The basic piece is Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property*, first ed. 1933, revised ed. (New York: Harcourt, Brace & World, Inc., 1968) [Berle & Means, *The Modern Corporation and Private Property* (1933)], at 64-65, and 244 et seq. More recent works include e.g. Earl Latham, "The Commonwealth of the Corporation" (1960) Nw. U.L.R. 55, 25; Clark, *Corporate Law* (1986), at 390; Henry G. Manne, "Some Theoretical Aspects of Share Voting – An Essay in Honor of Adolf A. Berle", (1964) 64 Colum. L.R. 1427, at 1437, at 1438; Bayless Manning, "Book Review", (1958) Yale L.J. 67, 1477, 1485-1496; Robert Charles Clark, *Corporate Law* (Little, Brown and Company, Boston Toronto 1986) [Clark, *Corporate Law*], at 390 et seq.; Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, MA: 1991), at 84; Henry Hansmann & Reinier Kraakman, in: Kraakman et al. (eds.), *The Anatomy of Corporate Law* (Oxford University Press, Oxford: 2004), at 46 [Kraakman et al., "The Anatomy of Corporate Law"]; Siems, *Convergence*, supra note 3, at §3. Specifically with respect to the gathering of information: Joseph E. Calio & Rafael X. Zahralddin, "The Securities and Exchange Commission's 1992 Proxy Amendments: Questions of Accountability," 14 Pace L. Rev . 459, 521-23 (1994).

[100] Clark, *Corporate Law* , supra note 99, at 390 et seq.

meeting location), it is costly to find out who else holds shares in the company and who is willing to communicate. **Voting** is costly, as well, because it requires time to decide upon one’s voting strategy and to issue the vote on a ballot or a proxy form itself. Finally, prompting **reviews** is costly because – in addition to the time invested - it usually requires the establishment of a certain threshold, consisting of either a minimum number of shareholders / shares, or a minimum content requirement, such as establishing “reasonable doubt” as to the legitimacy of management’s activity that is challenged. These procedures are typically accompanied with lawyer and court fees. Therefore, the individual shareholder’s desire to participate in the governance of the company is obviously mitigated.

b) Collective Action Problems

As a result of these **high costs for investors**, one derives the prevailing opinion that voting may often result in poor decisions since small shareholders have little incentive to inform themselves appropriately before they make a decision. This understanding is based on two observations. First, why should shareholders invest in activities that are likely to be undertaken by other shareholders with a greater interest (share) in the firm’s well-being? The higher the costs and the smaller one’s own share, the greater the incentives to engage in **free-riding** on other’s activities. Consequently, only shareholders with significant shares in the firm strive for informed voting.

Second, even if some altruistic shareholders are willing to engage in informed communication and voting, their ***influence*** on the company ***is limited*** **by the amount of votes** they hold. Unless they are controlling shareholders, they need the co-operation of other shareholders to succeed in a contentious vote. Rallying support for one's proposal is costly, with expenses frequently exceeding a million dollars.[101] Given the uncertain outcome of these activities, it is perfectly reasonable that shareholders abstain from investing in activism altogether, and choose the certain, and probably less costly, alternative of selling the shares if negative information is disclosed.

c) Legally Limited Shareholder Influence

Because voting imposes high process costs not only on investors, but also *on the firm* itself, and the outcome of voting is unclear, another barrier arises - legally limited shareholder influence. In addition to the ordinary business exclusion re shareholder proposals for public corporations,[102] some jurisdictions limit shareholder influence by raising procedural barriers with respect to certain subject matters or restricting shareholder influence on the content of certain corporate documents.[103] In two-tier jurisdictions, management may also be shielded from shareholder influence by the existence of a supervisory board.[104]

This paper addresses only one *procedural* aspect to the still ongoing[105] discussion re the enhancement of *substantive* shareholder rights. If shareholders exercise their

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[101] See Zetzsche, "Shareholder Interaction", supra note 4, with further references.

[102] Against the American exclusionary right Kevin W. Waite, "The Ordinary Business Operations Exception to the Shareholder Proposal Rule: A Return to Predictability," 64 Fordham L. Rev. 1253 (1995).

[103] Such as the lack of American shareholders to initiate mergers and charter amendments, see Henry Hansmann & Reinier Kraakman, in: Kraakman et al. (eds.), The Anatomy of Corporate Law (Oxford University Press, Oxford: 2004), at 47; with respect to the procedural hurdles re director elections, see Zetzsche, "Shareholder Interaction", supra note 4, at III.2.d).

[104] This, at least, is the interpretation of the two –tier board system by Hansmann & Kraakman, ibid.

[105] See, e.g. Lucian A. Bebchuck, "The Case for Increasing Shareholder Power", (2005) Harv. L.R. 118:3, 836.

power merely once a year (due to costs and lack of expertise), shareholder influence on management is necessarily weak. If management organizes the meeting and controls the voting procedure it is unlikely that management will implement shareholder friendly rules,[106] for two reasons. First, the change to efficient voting deprives the beneficiaries of the current voting regime, presumably large and institutional shareholders, of their private benefits of control. These shareholder groups who currently dominate the voting process are unlikely to support change. Second, shareholder decisions upon management's re-election are only influenced to a minor extent by the fact that management organizes the shareholder meeting. The shareholders' prime focus is on the management of the firm's business. Shareholders opposing a specific meeting procedure face a bundling problem when pressuring against management. Unless procedure becomes the prevailing concern – such as during takeover contests - this bundling problem reduces shareholder influence in general. I will return to both aspects shortly.

2. A Better State: Shareholder Influence through Electronic Means

a) Co-relation of Costs and Shareholder Activity

Electronic communication and the multi-input / -output structure of the internet have the potential to reduce the above disincentives. This is due to the fact that the impact of these disincentives on shareholder activism increases proportionally with the costs associated with shareholder activism. To the same extent that information, communication, voting, and review become less expensive, we should expect shareholder activism to rise.

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[106] For examples, see below IV.3.a).

Gathering information is less costly, since web-based search engines enable access to any web-stored data around the globe. Furthermore, in times of RSS-feed technologies, information intermediaries (if they only intermediate information!) become useless, given that shareholders will receive any information they specified in RSS even without extensive research. **Evaluating information** is cheaper as well since (1) Extensible Reporting Business Language (XBRL) enables data-processing through standardized evaluation tools, and (2) webusers may achieve feedback from professionals and amateurs at relatively low costs due to enhanced economies of scale and lower transaction costs in the market for the evaluation of information. Expertise that is commercially and technically available through the internet substitutes for the lack of the shareholder's intellectual capabilities. Admittedly, the quality of this expertise may become an issue, though not more (and, due to easy digital access to quality probes and responses by other users, likely even less) severely than in the ancient times of print-only media.

Communication is less costly and more transparent if exercised over the net, through emails, chat-boards, internet-based audio/video-conferencing systems, internet-notices, announcements, call for supports etc. ***Voting*** requires fewer efforts, given the existence of already common e-voting systems, and the fact that shareholders can rely on voting recommendations by other shareholders or proxy voting services that are accessible through the net, or even better the voting platform provided by the company.[107] Still an issue is the digital authentication of shareholders, but we are positive that this issue will be settled, as e-signatures,

[107] This is an "old" demand by Theodor Baums & Phillip von Randow, "Shareholder Voting and Corporate Governance: The German Experience and a New Approach," in: M. Aoki/H.K. Kim (eds), *Corporate Governance in Transitional Economies. EDI Development Studies* (The World Bank, Washington D.C.: 1995) 435, 451 et seq., and Mark Latham, supra note 2. Some U.S. companies were forced to put such a proposal on the agenda in 2004, see Friedman, supra note 2, at ¶ 11.07.

smart cards, etc. become more widely used. With respect to ***review***, the internet facilitates both the meeting of the (content-based or formal) threshold requirement, and the review itself. The former is facilitated through easier access to other shareholders and information, as described above. The latter is facilitated through easier access to peer-data etc. If, for example, co-ordination among shareholders is highly efficient it may even substitute for the review itself: which management would like to resist an application supported by a clear majority of shareholders? Even more, efficient voting mechanisms could, in theory, achieve the monitoring efficiency of controlling shareholders without their downside, which is the private benefits of control.[108]

Empirically, the aspect of increasing shareholder activity through the spread of web-based technologies has not been sufficiently researched and few data are available. The data that are available are yet incomplete and they do not allow for a distinction between the impact of web-based technologies, and other factors that cause greater shareholder concerns, like the sobriety among investors in the aftermath of the tech-bubble. The data nevertheless suggest that more and more small shareholders exercise their voting rights or participate in shareholder meetings.[109] This observation is, at least, consistent with the logical arguments stated above.

Despite all this optimism, it must be clear that **some costs will remain**. For example, investors may have lower research and information-gathering costs, but evaluating

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[108] See, for example, Craig Dodge, "U.S. Cross-listings and the private benefits of control: evidence from dual-class firms" (2004) J. Fin. Econ. 72, 519, with further references.

[109] See, e.g., Van Der Elst, "Attendance of Shareholders and the Impact of Regulatory Corporate Governance Reforms", supra note 18; Zetzsche, "Explicit and Implicit System", supra note 4; for UK (*) is reported that attendance rates at large UK companes went up in recent years from app. 28% to 46%, for uncertain reasons.

information still requires some shareholder investment. Identifying fellow shareholders will be less costly, but some costs of campaigning for one's dissident proposal will remain. Voting itself may be significantly cheaper, but making good decisions upon the issues at stake will remain costly. A review that is supported by many shareholders may be less expensive, but it will nevertheless require substantial investment.

b) Voting vs. Trading

This should, however, not induce our optimism to vanish, given that we do not need a *costless* voting decision. Instead, the costs of voting must merely be as low as the costs of selling. And, compared to the costs of selling, web-based voting appears promising for the following reasons. First, an informed buy-/sell decision also requires the shareholders to gather and evaluate information. Thus, with regard to the buy-/sell versus voting comparison, information expenses are neutral. In fact, selling possibly imposes higher information costs than voting because the investor does not only need to process the information with regard to the firm in which he has invested, but also with regard to investment alternatives (where do I invest my money now?). Thus, given that all other costs are equal, shareholders should be expected to vote, rather than sell.[110] Second, buying/ selling shares is costly in and of itself. The transaction costs for selling typically increase in proportion to the amount of invested money. Hence, given that all other costs are equal, large investors should be biased towards voting rather than selling. Risk assessment issues and the problem of dispersed control upon management, however, remain a perennial issue. Thus voting, even if efficiently organized, still imposes some costs, particularly on less

[110] This consideration is consistent with behavioral finance works that show a tendency of investors to stick to investments.

influential investors, that selling does not. There is nevertheless reason for optimism that further reforms of procedural rules may bring the transaction costs of voting to a level that is below the transaction costs of selling, and the overall costs to a level that is more attractive for the individual investor than it is currently.

This is particularly true when, from the investors' perspective, trading and voting systems effectively merge. While it is unlikely that we see *Mark Latham*'s model for integrating online voting with Quicken to be realized,[111] it might happen that brokers / banks / intermediaries add an "authenticate" – or more service-friendly – a "voting" / "question" / "communicate" (proposal) / "review" -button to the investors' financial account website. Clicking on one of these buttons will automatically prompt any action required for the exercise of the specific shareholder rights. From a practical point of view, however, the merger of buy-/sell systems and voting platforms requires that the entities running these systems have incentives to offer voting as an alternative to selling. Currently, this is not the case. The jurisdictions examined herein require corporations to reimburse intermediaries for forwarding *information* (proxy statements etc.) to shareholders, but not for forwarding authentication and votes, questions etc. to the companies. If intermediaries would earn a (small) fee for each exercise of shareholder rights forwarded to the corporation, financial institutions would have an incentive to facilitate the exercise of these rights to the same extent as they currently facilitate trading. Then, shareholders managing their accounts would truly have the choice between exit or voice.

c) Some Concerns

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[111] Mark Latham, supra note 2.

The above sections suggest a rise in efficiency with regard to shareholder activity if shareholder meetings are transferred to the internet. Some commentators, however, are critical of a web-based shareholder meeting. While the previously raised concerns regarding data integrity have ceased to be heard as electronic media become more and more common in day-to-day business,[112] it is now argued that a truly virtual shareholder meeting would not provide for sufficient opportunities for informed interactions between the participants, and would negatively affect the deliberation function of shareholder meetings. It is typically agreed among these authors who emphasize the importance of the ability of the participants to fully present their cases and monitor the reactions and cases of others that virtual shareholder meetings should be given a mere "guarded welcome."[113] In the vein of this argument, the influential U.S. Council of Institutional Investors holds:

> Companies should hold shareholder meetings by remote communication (so-called electronic or "cyber"-meetings) only as a supplement to traditional in-person shareholder meetings, not as a substitute.[114]

These admonitions may be countered in two ways. First, the ideal of deliberative assemblies is merely a myth. The larger the meeting and the firm, the less specific are the results that a meeting can achieve. "Formal annual meetings do not lend

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[112] The paradigmatic case of data insecurity is the Vivendi shareholder meeting of 2002, see J. Harding & J. Johnson, "Vivendi to recall AGM after votes "hijacked", Financial Times April 27th /28th, 2002.

[113] See, e.g., Boros, supra note 2; Ralph Simmonds, "Why must we meet? Thinking about why shareholder meetings are required", (2001) Company and Securities Law Journal 19, 506, 517; Strätling, supra note 2, at 79; for references with respect to criticism by U.S. activists see Friedman, supra note 2, at ¶11.08[c] (2004 supplement).

[114] Council of Institutional Investors, *Corporate Governance Policies* (9/2002), at "General Principles, B.6.", online: http://www.cii.org/corp_governance.htm .

themselves to serious, informal discussion."[115] Instead, the public relations functions of shareholder meetings become important, which may also have a disciplining effect, but is due to something other than deliberation.[116] By contrast, management hesitates to discuss problems at public shareholder meetings. Serious deliberation may take place among institutional and large shareholders and management, but hardly in a shareholder meeting that bankers, brokers, journalists, and analysts frequently attend[117] and that competitors can access. Second, the loss of the deliberative character is not due to the *virtuality* of the meeting as such, but due to *the specific design* of virtual shareholder meetings that we currently observe. This perspective on virtual shareholder meetings merely emphasizes the stance that this analysis takes that all of the traditional functions – information, communication, decision-making and review – need full replication in the virtual world.

Even then, "airing issues" may account for the insistence of some commentators on retaining the physical meetings. The physical meeting is required, it is said, due to the fact that shareholder meetings are an opportunity for retail shareholders and the company's directors "to engage with each other, face to face."[118] While this observation is inherent proof for the public relations thesis stated above, the question remains whether and how the same function cannot be fulfilled by a properly designed virtual shareholder meeting. In light of the aim of this paper which is to

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[115] See e.g. Carolyn Kay Brancato, Colin Wilde, "The Future of the Annual General Meeting", The Conference Board Research Report**,** SR-04-02, (12_2004). Consequently, professional investors created alternate forums where investors and corporate management can examine critical, long-term issues, the analyst and investor conferences. With regard to that, see below IV.3.b).

[116] Noack, "Shareholders' Meeting and the Internet", supra note 2; Zetzsche, "Explicit and Implicit System", supra note 4, at B.III.2.c).

[117] See the empirical evidence on Australia by Stephen Bottomley, supra note 18, at 31.

[118] Bottomley, supra note 18, at 51; see also Strätling, supra note 2, at 79.

strive for an overall advantageous state this question will be examined in the next section.

3. The Reform Agenda

a) Remove Legal and Practical Barriers

The comparative analysis revealed some barriers to the use of electronic media. First, with respect to the whole procedure, **any terminology suggesting a requirement for the physical meeting** needs to be removed, or clarified insofar as it also includes virtual shareholder meetings. Second, the aforementioned presumptions in favor of **paper-based communications** need to be removed. This includes any authorization requirement that demands the shareholders' or management's consent with respect to the distribution or reception of electronic documents by the company. These issues need to be left up to the individual shareholder who decides which medium fits his needs. In practice, this will mandate that listed corporations offer electronic access points for information, communication and voting. These will consist of electronic notices of the meetings, proxy statements, webcasts, and voting systems.

Some other legal influences do not seem to hamper the development of such a system. One such example is the **legal design of absentee voting**. As long as there is always a proxy accessible over the net who follows shareholder directions, there is no need for direct virtual voting. Further, there is **no need to reimburse** shareholders for costs incurred by the use of the electronic media. This is because the shareholders can be presumed to have the technologies that are necessary anyway, and the costs incurred by virtual exercise of shareholder rights are low, both in total, and as compared to the transaction costs of selling.

In addition to the legal barriers, some practical barriers hamper the efficiency of shareholder meetings. First, most voting systems replicate **some, but not all, rights** that shareholders have in traditional shareholder meetings. The imperfect harmonization is usually not due to technical or legal barriers. By contrast, it is reasonable to assume that management simply does not want all shareholder rights to be perfectly replicated, partly due to its wish to stay in control over the meeting procedure, and partly due to a fear of unwittingly assisting insurgents. For example, many voting system require that a shareholder cast an "up-or-down" vote for the entire slate of candidates and the management proposals. Abstentions, and withholding of proxy authority and votes in favor of one proposal and against another proposal, cannot be accommodated under some voting systems.[119] Management of some French corporations, for example, explicitly employ financial intermediaries to collect proxies from some, but not all shareholders.[120] Under the current British law, firms sometimes do not grant proxies the same legal position within the meeting that shareholders have. In Germany and Switzerland, minority rights, such as shareholder petition rights or the right to formally declare dissent against a meeting decision, which is the requirement for certain types of judicial review under German and Swiss law,[121] still wait to be replicated without diminishing shareholder choice.

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[119] E.g. Beske, supra note 2, at 8-9 et seq., but also true with respect to some of the voting systems commonly used in Germany.

[120] Typically, due to costs, management uses size criteria in order to determine, from which shareholders proxies will be solicited. However, this practice erects barriers to exercising voting rights for small shareholders.

[121] For example, s. 131 (5) AktG.

Another practical barrier is the yet **imperfect harmonization of (information and deposit) intermediaries** in the procedure of exercising shareholder rights, the details of which are beyond the scope of this paper.[122]

The third, and from my point of view, the most critical aspect, is the fact that web-casting a physical meeting **does not appeal to users of online systems**. In other words, it's boring to sit in front of the web-cast when nothing spectacular happens. No one wants to watch a talk-show that is transmitted live, without any editing and without a talk-master efficiently managing the talk. Talk-masters emphasize certain topics, and disregard others in order to raise, or avoid losing, their audience. If editing and talk-masters didn't exist, people would immediately switch the program, given the huge number of alternatives. In economic terms, the "utility" of any individual shareholder decreases to the same extent as his boredom increases. The same result occurs if the discussion in the meeting gets either too banal or too complicated. For a plethora of reasons, many chairmen fulfill the talk-master function unsatisfactorily since their main job is supervising or managing the business, not being an expert talk-master. In the entertainment market, information intermediaries ("talk-masters") produce information in a standard that appeals to the specific user-group. The fact that information for and out of shareholder meetings is produced by legal, rather than information experts adds to the boredom shareholders experience while preparing for or attending shareholder meetings. Further, the remarkable success of the internet as the probably most efficient de-intermediation instrument

[122] The most practicable way is effectively to by-pass the intermediaries, by mandating that intermediaries grant proxies or declarations of entitlement to the beneficial owners / account holders at the end of the chain, which can in turn log themselves into the voting system. In the digital age, these entitlements do not require a general renunciation of shareholder anonymity vis-à-vis the corporation, because entitlements may be granted on the basis of figure combinations and other forms of digital authentication substituting for names of individuals and legal persons.

currently available requires managers to adjust their communication strategies to the needs of the addressees to a greater extent than a decade ago.[123]

Turning managers into talk-masters, however, is not an advisable solution: they should do the business, and only some of the business is Public and Investor Relations. Further, good managers are not necessarily good talk-masters. But, expertise with respect to presentation skills is available on the market. One may draw two possible conclusions from this observation. First, one could separate the content and the presentation of meetings, hence assigning authority for substantive issues to different persons than those who are assigned authority for procedural issues. Second, one could cut the shareholder meeting into many small, well-prepared and edited portions, thereby enabling shareholders to follow the argumentation, understand the issues at stake, and ask well-informed questions. Given that gathering and evaluating information in a short meeting is obviously impossible and that it is impractical to assign responsibilities for certain topics to some shareholders only (a quasi-horizontal cut through corporate topics), it is necessary to meet more than once a year (a quasi-vertical cut). Both alternatives would appeal to primarily dispersed shareholders, increase their individual utility and, consequently, decrease their apathy (as it would become less rational to be apathetic).

b) Integrate or Abolish Substitutes

Unsurprisingly, the market was faster in recognizing and responding to the shareholder needs discussed in the previous section, as frequently-held analyst and institutional investor conferences demonstrate. However, these conferences

[123] See Keith McArthur, “On-line era leaves media out of loop: PR expert”, The Globe and Mail, 21 March 2005, at B5.

complicate the situation for shareholder meetings insofar as they partially substitute for the shareholder meeting itself. Professional investors rarely attend, or follow the procedure of, the meeting. Besides concerns of equality and fairness, which are not addressed here,[124] the existence of the substitutes rendered the original obsolete.

From the perspective of *institutional investors*, these institutions provide several advantages. First, they enable **efficient communication** with management, in a highly technical and focused language, without interference by unskilled retailers. Second, they **enable periodic control of management** in intervals that are shorter than only annually, usually in a quarterly interval. This reflects the fact that, in the digital age, a year is a long period. Third, in capital-market dependent economies, the institutional investors functionally **substitute for the controlling shareholders** (formerly existing) in Continental Europe.[125] However, only some of the institutional investors *can* be represented on the firm's board, and only some of the institutional investors *want* board seats, given the costs and a lack of incentives to take on the responsibility for many board meetings with few private benefits of control. Consequently, institutional investors developed the investors' meetings as an intermediate institution between regular board meetings and shareholder meetings.

From the perspective of *management*, the feedback provided by professional investors is crucial in estimating the possible **investors', and thus market's, response** to certain corporate decisions. Furthermore, exchange of knowledge increases management expertise. Finally, investor meetings enable co-ordination

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[124] See Dirk Zetzsche, *Aktionärsinformation in der börsennotierten Aktiengesellschaft* (transl. Shareholder Information in Public Corporations), (Carl-Heymanns-Verlag, Köln: 2005 – forthcoming), at § 14.

[125] Zetzsche, Explicit and Implicit System, supra note 4, at D.V.

with key shareholders in order to protect management's own position. Traditional shareholder meetings, management and professional investors hold, cannot effectively fulfil the above functions.[126]

From the perspective of *retail investors*, the result is mixed. On the one hand, since management and institutional investors exchange information and expectations, securities prices are likely to reflect more, and hopefully better information. On the other hand, these meetings render shareholder meetings themselves a useless formality because the decisions are in most cases, already made in the period between the investor meeting (which is typically held at the time the annual account is published) and the day of the shareholder meeting. Any deliberation on the day of the physical shareholder meeting is façade if all important decisions have, in fact, been made earlier.

In considering the impact of these observations for the digital age, it is important to note that institutional investor meetings developed without any regulatory framework. Apparently, institutional, hence per se influential, investors require opportunities to exercise their influence and exchange ideas with management in, generally speaking, quarterly periods. There is apparently some “market demand” for frequent investor meetings. This observation is connected to the problems of periodical shareholder influence and complicacy / breadth of the annual meeting mentioned above.

Under the current regime, the controlling influence of institutional investors **effectively insulates management** from retail investors. Efficient use of the internet,

[126] Supra note 115.

however, allows all investors to influence management at low costs. If web-based meetings of all classes of shareholders took place at shorter intervals, these meetings would necessarily increase pressure on management to align corporate policy with the interests of all shareholders, with two effects. First, integrating shareholder meetings into the institutional investor meetings framework would balance the power structure within the firm. Second, it may result in greater pressure on management. This direct pressure may even substitute for market pressure insofar as management is affected more directly through voting than indirectly through market response, involving high transaction costs. Under these conditions, it is reasonable to assume that shareholder decision-making and market-reaction would be aligned to a greater extent than it is today.

Thus, traditional shareholder meeting procedures should be adjusted to the requirements which capital market needs have unveiled. This regards, in particular, the need for: (1) efficient communication; (2) more frequent shareholder events (quarterly rather than annually); and (3) a deliberation and testing environment for corporate decision making and forecasts. It remains to be examined how these aims can be achieved, in practice.

c) Adjust Procedures to the Digital Age

Finally, many procedural rules needs to be adjusted to the digital age. With respect to **information**, this requires the integration of modern technologies for gathering and evaluating information into the process of shareholder meetings.[127] For example, the

[127] The following is a non-exclusive list of technologies which need to be integrated: RSS feed enables foregoing any intermediary if there is one centralized source of company information, such as the EDGAR-, SEDAR- or other systems. XBRL-standards will allow for cheap evaluation of information, and better organization of corporate information (e.g. through a link on each data containing additional information provided by the firm to any investor, analyst recommendations etc.).

doubling of information, such as mandatory disclosure on multiple websites or the answering of questions which have been answered electronically on the company's website, is anachronistic, per se. The shareholder meeting of the future may rely on the corporate website as a powerful data gathering and evaluation tool, open to any investor.

The same is true with respect to **communication**. The web enables transparent and well-documented discussions. If participants need to authenticate themselves before they use the system, fraud can be easily detected. Under these conditions, the rationale of the rigid North-American approach towards proxy regulation should be re-considered, as far as it concerns shareholders.

Finally, **voting** rules contain many anachronistic details. For example, the procedural rules on shareholder meetings usually require an inspector or notary public or company secretary to supervise the voting procedures even though these people are hardly able to supervise the procedure given that most procedures involve highly technical issues.[128] The function of the supervisor on behalf of the shareholders involves more and more technical procedures, and less legal and organizational issues. The power of inspectors etc. to ask specialists for technical assistance if necessary merely prevents the worst outcomes of the traditional system, but does not fix the problem itself.

Further, it deems me inefficient that companies usually pay for two kinds of resources: On the one hand, the firm employs resources to organize *shareholder meetings* on behalf of management; on the other hand, it pays for resources that

[128] In particular: the technical infrastructure of the voting process; making sure that management does not editor or censor any of the questions asked by shareholders, etc.

control the organizational structure that was employed by management. Alternatively, shareholders could elect a "shareholder rights manager" who is responsible for all technical, legal and organizational procedures with regard to the meeting, and who is directly accountable to shareholders. The person himself needs to establish himself in the market for shareholder rights managers. Efficient shareholder voting would provide for a shareholder-oriented design of procedural rules. The traditional "double expense"-scheme would vanish. The shareholder rights manager would provide the appropriate level of "face-to-face" accountability, organize entertainment-features in presenting company information, and supervise that other shareholder needs are considered, such as system security or data protection, through electronic means.[129] Management would be deprived of its advantage of determining the procedure to be followed in shareholder meetings. Further, management's conflict of interests in using corporate assets for improving their own position vis-à-vis the shareholders would be reduced.

V. A Blueprint for Virtual Shareholder Meetings

All these measures together result in a shareholder participation scheme that looks substantially different from the structure that we observe today.

General Setting. Ideally, we would see the traditional shareholder meetings split into three distinct events (1) quarterly held "shareholder conferences", for shareholder-to-management information sharing and communication; (2) a permanent

[129] The shareholder rights manager proposed herein needs to be distinguished from the "corporate monitoring firm" proposed in Mark Latham, "Corporate Monitoring: New Shareholder Power Tool", (1998) Financial Analysts Journal 54, 9-15, and "The Corporate Monitoring Firm", (1999) Corporate Governance: An International Review 7, at 12-20. While Latham's key point is informed decision making by shareholders achieved through voting instructions, the shareholder rights manager focuses on procedures, rather than substantive issues.

“communications chat-board” with a well-organized and user-friendly Q&A-database; and (3) “voting periods”. All measures are organized by a professional shareholder rights management firm [SRM], that who is responsible for procedural requirements and that organizes / moderates the events, including the sequel of topics to be discussed. The shareholders would elect the SRM on an annual basis. The corporation would pay the SRM’s salary and expenses, as defined in detail by the shareholders’ decision. Only shareholders (not management) may propose candidates for the SRM.

The Shareholder Conference. The quarterly-held shareholder conferences would be substantially equivalent to traditional institutional investor conferences. However, notices with regard to these conferences would be forwarded in advance to all shareholders. Any other meeting of management with three or more investors must be organized following the same procedural rules as set out below (effectively reducing the number of such extra meetings taking place). The shareholder conference would be held virtually, with all persons interested in the topics being able to watch. Management would participate in the conferences online, sitting in corporate meeting studios being established around the world. Guests may participate in the meeting, either virtually or physically. The SRM would moderate the discussion and Q&A sessions in the shareholders’ best interest.

During the conference, only shareholders authenticated in advance are entitled to ask questions, via web-cam, telephone, email or other communication techniques. Subject to the Articles of Association, other interested persons watching, who were previously authenticated or subject to management’s or the SRM’s discretion may ask questions. All questions would be available online and in real-time, and would be answered by management in person. Rules for wrongful disclosure apply to any answer given in the meeting. If the articles so provide, shareholder questions may be answered in a priority sequence based on classes of shareholders or the number of shares held. For example, questions of shareholders holding a certain number of shares would be answered first in a general Q&A session, before questions of other shareholders would be considered. This sequel would be justified on the grounds that large shareholders have a greater interest in informed voting than do small shareholders who can sell easily and inexpensively. The meeting-manager would assign a topic number and a timeframe to incoming questions. All answers would be available in text format in a well-organized Q&A catalogue. In these shareholder conferences, management would be obliged to answer new questions. Old questions may be answered by reference to the Q&A system. Shareholders may protest that procedure to the SRM. Shortly after the conference, the SRM will provide documentaries with entertainment features (for example, a firm quiz show etc.) to shareholders, which will specifically attract retail shareholders to get informed about the corporation and exercise their voting rights.

The Communications Board. The corporate website offers a link to a chat-board that will be administered / supervised / hosted by the SRM. All information given by management *during the shareholder conference* must be included by reference in the appropriate section. Information given to any person *outside the conference* must expressly be disclosed at the appropriate chat-board section, and included into the Q&A-catalogue. Management may participate in the discussion anytime it likes to do so. Shareholders holding 5% or more, however, may require management to answer a new question, subject to certain restrictions re trade secrets etc. The petitioners may establish the threshold online, using the shareholder authentication issued at the last record date. If management denies the answer, a poll may be taken on that question, as described below.

Voting. Shareholders vote electronically on the corporate website within one month following the quarterly shareholder conference. The voting tool can be accessed from the same section of the website as the Q&A tool and the chat-board. Voting takes place on any matter required by shareholders representing 5% or more of the shares at the day preceding the day of notice, or by management. Any vote may be of on advisory or a mandatory character. Shareholders, however, remain entitled to vote on the issues which are stipulated under corporate law today. Shareholders would vote upon these issues in the “voting period” following the conference disclosing the annual statements.

Given that many securities laws require institutional investors to disclose their voting behavior and that many shareholders are incapable of satisfactorily considering voting proposals, institutional investors may be entitled to disclose their voting behavior in advance of the voting period.[130] If appropriate, the SRM may offer voting schemes of certain institutional investors or certain large shareholders as alternative voting pattern to management’s proposals. This will incentivize institutional and large investors to exercise their rights as soon as possible and thereby reduce information costs for small shareholders.

Review. Efficient voting is likely to substitute for review in many circumstances. If this is not the case, the greater likelihood of greater support for a well-reasoned proposal and, thus, the lower cost risk, will incentivize shareholders to accurately account for

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[130] See Mark Latham, “Democracy and Infomediaries” (2003) Corporate Governance 11:2, 91, at 95.

their review before calling for support by other shareholders. On the other hand, the fact that shareholders refrain from accurately accounting for the action they propose may indicate abuse in itself. At least, it will result in lesser support from other shareholders. Under these conditions it is justified to increase / impose certain thresholds for shareholder actions, particularly for derivative and class actions. Thus, the internet may help to lessen litigation costs as well.

Authentication. Obviously, the above structure requires an accessible, inexpensive and smooth authentication process. Given that shareholders require authentication quasi-permanently, it is likely that intermediaries will restructure their depository business, as a means of reducing costs.

Costs. The **software infrastructure** for the aforementioned procedure is costly in its first implementation, but economies of scale are significant in the market for standard software. **Employing a SRM** will be costly, of course. However, corporations currently pay the expenses for investor relations managers, shareholder meeting organizers, and notary publics / inspectors. Further, they regularly pay for investor conferences, annual and extraordinary general meetings. All of these institutions will become partially useless. Thus, the costs for the SRM are merely shifted – and do not represent new costs. The same is true with other tools proposed herein, for example, the **Q&A catalogue**. This catalogue already exists in the back offices of all major corporations.[131] On an intermediate perspective, the structure proposed herein is, at least, not more expensive than the current scheme.

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[131] This is, on the one hand, the author's practical experience, on the other hand, it is evidenced by anecdotal evidence in Bottomley, supra note 18, at 47.

VI. Conclusion

The transition from the traditional shareholder meeting, which is based on the physical attendance of shareholders, towards a truly virtual shareholder meeting is incomplete worldwide. While some jurisdictions have advanced to the next level of internet-based shareholder participation more progressively than others, none of the jurisdictions have, in fact, replicated all functions of traditional shareholder meetings in a regime for virtual shareholder meetings to a satisfactory extent.

Legislatures willing to finalize the transition towards virtual shareholder meetings need to give up the limits with respect to time and place which the traditional meeting provides, and integrate shareholder meetings in the quarterly held institutional investors' meeting. Therefore, certain legal and practical barriers needs to be removed, and the process needs to be adjusted to the requirements of the digital age. The latter involves, in particular, (1) the use of RSS-Feed and XBRL-technologies for gathering and evaluating information, (2) the use of the company's website as a central communication board for all shareholders, and (3) the election of a shareholder rights manager by the shareholder body, with the financial, technical, and organizational responsibility regarding the means of exercising shareholder rights.

A virtual shareholder meeting as described above offers shareholders and proxyholders "a [truly] reasonable opportunity to participate in the meeting," as theoretically required, but not realized, under Delaware and Canadian law. If these steps are taken, "the death of the "in-person" shareholder meeting"[132] will be close.

[132] Beske, supra note 2, at 8-19.