# The Shareholder Rights and Activism Review

Fourth Edition

**Editor**
Francis J Aquila

The LawReviews

THE

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# CONTENTS

# PREFACE

In the years since the last financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines not only in North America but also in Europe, Australia and Asia. Although shareholder activism is still most prevalent in North America, and particularly in the United States, almost half of the publicly announced activism campaigns in 2018 targeted non-US companies. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists and the companies they target have become more geographically diverse, it is increasingly important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this fourth edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

**Francis J Aquila**
Sullivan & Cromwell LLP
New York
August 2019

Chapter 5

# INDIA

*Nikhil Narayanan*[1]

## I OVERVIEW

India's corporate and regulatory environment has traditionally not been conducive to shareholder activism. First, there is little separation of ownership and management in India. Many Indian listed companies are controlled by 'promoters' (i.e., their original founders). The advent of listing often has little effect on their management and they often continue to be run as family businesses, with the interests of public (or non-promoter) shareholders being secondary to those of the promoters. Second, although India has a public mergers and acquisitions (M&A) market and a supporting regulatory framework, until recently, Indian market dynamics meant that most promoters historically did not fear the loss of control (even if their businesses did not perform). Third, the institutional investor base in India is not as organised as in the United States or the United Kingdom and has traditionally been passive. Finally, previous laws and the historic judicial approach has not been supportive of classical shareholder activism.

However, these historic dynamics are changing. The Companies Act 2013 (CA 2013), and certain regulations issued by India's securities markets regulator, the Securities and Exchange Board of India (SEBI), has, apart from raising the bar on governance matters, improved minority shareholder rights, created new shareholder remedies and codified directors' duties. Various proxy firms are now active in the Indian market and investors have become more adept at using the media.

Consequently, investors have been increasingly more willing to make their voices heard. Much of this dissent has been event-driven (opposing related party transactions, share repurchases and acquisitions) and limited to the larger listed companies. However, since the last quarter of 2016, there has been a broadening of shareholder engagement to cover other areas such as executive remuneration, strategy, succession planning and business underperformance. This period has seen Tata Group and Infosys, two of India's better governed groups, undergo changes in management; the CEO of ICICI Bank face investigations; a director of Fortis Healthcare being removed by its shareholders; and the chair of one of India's leading financial groups and one of the leading promoters in India have faced significant opposition to their reappointment as directors. There have been recent instances of investors seeking board positions and challenging transactions that are perceived to have enriched promoters. Also, though long-term institutional investors historically led shareholder engagement, certain

1 Nikhil Narayanan is a partner at Khaitan & Co.

recent activist campaigns have been led by other funds. In addition, there have been two recent high-profile contested and hostile public M&A transactions. Finally, international activist funds have started to invest in various Indian listed companies.

These dynamics have chipped away at the general position of strength of controlling shareholders in the Indian market, which does, nevertheless, remain. Therefore, although shareholder activism is nascent in comparison with the United States and the United Kingdom, it is clear that promoters can no longer take their shareholders for granted.

## II LEGAL AND REGULATORY FRAMEWORK

### i The ability of shareholders to appoint and remove directors

In India, directors are appointed by shareholders, just as they are in many other common law jurisdictions. However, there is no mandatory annual re-election requirement for directors of public companies (whether listed or otherwise). Independent directors are appointed for a term of up to five years,[2] and, absent any special provisions in the articles (which are uncommon), one-third of all non-independent directors are subject to retirement and re-election by rotation every year.[3] This contrasts with the position in England and Wales, where the requirement under the UK Corporate Governance Code on a 'comply or explain' basis for all FTSE 350-listed companies to annually reappoint directors serves as a powerful governance tool to keep directors in check. Historically, investors have not sought board access outside situations such as private equity investments but recently various funds have sought board appointments (see Section IV).

In addition to the traditional board appointment route discussed above, investors do have access to board representation in Indian listed companies in a manner that is not possible in England and Wales. An investor can seek board representation as a 'small shareholder' by acquiring a very small number of shares and then petitioning the company with the support of the lower of 1,000 other small shareholders or 10 per cent of the total number of small shareholders.[4] There has been one recent attempt by activist investors to use this provision. In August 2017, Alembic (a pharmaceutical company) received a proposal from over 1,000 small shareholders, led by Unifi Capital, seeking the appointment of a small shareholder director.[5] Although the board successfully resisted this (as the small shareholders were allegedly clients of Unifi Capital), this attempt illustrates that activists are thinking creatively about gaining access to board seats.

The removal of a director prior to expiry of his or her term normally requires an ordinary shareholders' resolution (i.e., approval by a simple majority), and the director must

2 Section 149(10) of CA 2013.

3 Section 152(6)(c) of CA 2013. There is also a rarely used alternative in Section 163 of CA 2013, which allows for the concept of proportionate representation for at least two-thirds of the board.

4 Section 151 of CA 2013 and Rule 7 of the Companies (Appointment of Directors) Rules 2014. For these purposes, a 'small shareholder' is one who holds shares in a listed company, the nominal value of which is less than 20,000 rupees or any other government-prescribed sum.

5 Ingovern, India Proxy Season 2017.

first have been given an opportunity to be heard.[6] In May 2018, institutional investors and certain funds removed a director of Fortis Healthcare in this manner (see Section IV). This is perhaps the first example of an activist campaign leading to changes on the board.

There is also currently no impediment to companies removing additional responsibilities or designations conferred upon directors. This issue attracted attention in the recent corporate leadership tussle in Tata Sons (see Sections III and IV), where the company's articles did not require shareholder approval for the removal of the incumbent from his role as chair of the board (although the removal of his directorship did need shareholder approval).

### ii Control over executive remuneration

Control over executive compensation has recently emerged as a topical area. In September 2018, shareholders voted down the compensation of Neeraj Kanwar (managing director and promoter of the Apollo Group). A revised proposal resulting in a 30 per cent reduction in his compensation was subsequently approved. There have also been other instances in India of shareholders voting down executive remuneration packages, such as the rejection of executive remuneration resolutions in Tata Motors' annual general meeting in 2014 and the withdrawal of executive remuneration resolutions by Seamac and ARSS Infrastructure in 2011.[7] Also, in early 2017, Infosys, one of India's leading IT companies, was criticised by its founders for the levels of severance payments made to exiting executives (see Section IV).[8]

Also, due to the distress in the financial sector in India, the alignment of incentives and compensation in financial institutions has also become an area of regulatory focus. In February 2019, the Reserve Bank of India published a discussion paper (that would apply to private and foreign banks) recommending minimum levels of variable pay and caps on aggregate compensation, and recommendations that banks put in place clawback provisions. There has also been one instance of a private bank (ICICI Bank) seeking to claw back past compensation from a former CEO following allegations of wrongdoing.

### iii The ability to requisition shareholders' meetings and postal ballots

In certain circumstances, shareholders have the ability to 'go over the heads of the board'. Shareholders holding at least one-tenth of voting paid-up share capital can notify the board to requisition an extraordinary general meeting (EGM),[9] and if the board does not call the EGM within 21 days of the requisition notice, the shareholders may themselves call the EGM (to be held within three months).[10] If the directors fail to convene an EGM following a valid requisition notice, they become liable for any requisition-related expenses.[11] Although this right provides shareholders with a useful tool, its successful use by activist shareholders in the Indian context may be challenging. Indeed, the requisitioning of an EGM was used in the recent Tata Sons affair to strengthen the promoter's position.

6 Section 169(1) of CA 2013. The reference to 'normally' is because this does not apply to directors appointed by proportional representation (which is very uncommon).

7 Allirajan Muthsamy, 'Shareholder Activism stalls promoter moves', *The Economic Times*, 5 July 2014.

8 With regard to shareholder controls, Section 197 of CA 2013 and Regulation 17(6)(c) of the Listing Regulations both require compensation to be approved by shareholders if they exceed certain thresholds.

9 Section 100(2)(a) of CA 2013.

10 Section 100(4) of CA 2013.

11 Section 100 (6) of CA 2013.

Indian company law does not expressly provide shareholders the ability to pass written resolutions, but there are provisions permitting postal ballots.[12] In 2017, a public shareholder sought appointment as a non-executive director unsuccessfully through electronic voting (see Section IV.iv).

### iv Shareholders' influence over corporate strategy

Under Indian company law, directors are delegated the authority to manage company affairs, subject to the satisfaction of their duties. Public campaigns by third parties to encourage a change of strategic direction are uncommon, but shareholders do have certain powers to keep management and promoters in check.

Although there is no Indian equivalent as comprehensive as the 'class tests' under the UK Listing Authority's Listing Rules, the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) require shareholders' special resolutions (i.e., a 75 per cent approval threshold) for any disposal of a controlling interest in a 'material subsidiary' or any transfer of a significant portion of the subsidiary's assets.

Also, regardless of listing status, minority shareholders holding more than 25 per cent of a company's voting power can influence a number of transactions that are subject to special resolution approval requirements. These include the issue of new shares[13] by all companies, public or private, on a non-preemptive basis (which will affect non-cash consideration in M&A transactions), any transfer of an undertaking by a public company[14] (which is the most direct statutory control over M&As) and any borrowing by a public company in excess of that company's paid-up share capital, free reserves and securities premium (which will affect the financing of M&A transactions).[15]

In addition, qualifying related party transactions require shareholder approval (simple majority) under both company law[16] and the Listing Regulations.[17] The regimes are overlapping and similar but although the company law rule applies to certain qualifying related party transactions (those satisfying certain threshold tests) the Listing Regulations apply to all related party transactions that are considered 'material' by a listed company (transactions whose value exceeds 10 per cent of annual turnover are deemed material).

Finally, the Listing Regulations do set out certain principles that have relevance in an activist context, including the rights of shareholders to 'participate in, and to be sufficiently informed of, decisions concerning fundamental corporate changes' and a principle requiring the 'protection of minority shareholders from abusive actions by, or in the interest of, controlling shareholdings either directly or indirectly, and effective means of redress'. These principles have not been used by activist shareholders, but boards of listed companies do need to be wary of potential investor complaints to SEBI in the future.

12 Section 110 of CA 2013 and Rule 22 of the Companies (Management and Administration) Rules 2014.

13 Sections 62(1)(b) and 62(1)(c) of CA 2013. Private companies and the International Financial Services Centre public companies offering shares to employees under an employee benefits scheme need only pass an ordinary resolution (and not a special resolution).

14 'Undertaking' is defined as any undertaking in which the company's investment exceeds 20 per cent of the company's net worth (as of the audited balance sheet of the preceding financial year) or that generated at least 20 per cent of the company's total income during the preceding financial year.

15 Section 180(1)(c) of CA 2013.

16 Section 188 of CA 2013.

17 Regulation 23(4) of the Listing Regulations.

### v The position of shareholders and boards in public M&A situations

In theory, Indian law confers considerable power on minority shareholders in public M&A situations. There are restrictions on the board taking frustrating action[18] and so defences such as poison pills are difficult to implement. In addition, although there is no formal obligation under Indian takeover regulations to treat shareholders equally in a bid situation, equality of treatment is a guiding principle under the Listing Regulations, so it would be difficult for a target to provide selective information to certain bidders.[19]

Also, just as in England and Wales, M&A transactions can be structured through court schemes, which need to be approved by 75 per cent in value of the shareholders.[20] In contrast with England and Wales, there is no practice of obtaining irrevocable undertakings in the Indian public M&A market, so there is no further segregation of classes of shares (beyond the classes that already exist). Therefore, shareholders holding just over 25 per cent will be able to block a scheme.

Despite the availability of these rights, hostile takeovers have historically been extremely rare. However, 2018 saw a contested public M&A transaction involving Fortis Healthcare, in which shareholders succeeded in removing a director (see Section IV). More recently, in 2019, Larsen & Toubro completed a hostile offer for Mindtree. It is still too early to draw broad conclusions as to the broader openness of the Indian market to hostile public M&A transactions, but these are encouraging signs.

### vi Legal remedies available to shareholders

The advent of CA 2013 is perceived as having significantly improved shareholders' legal remedies in India. Although it is true that new remedies have been created, the lengthy nature of the litigation process in India and the judicial history of enforcing shareholder rights should temper expectations.

CA 2013 provides for slightly amended versions of remedies under the preceding Companies Act 1956 (CA 1956). For example, the ability of minority shareholders to claim relief against oppression and mismanagement by the majority on the ground that the company's affairs are being conducted in a prejudicial manner, and the ability of shareholders with the support of at least 100 members, or shareholders holding 10 per cent voting power, to apply to the National Company Law Tribunal (NCLT) in certain circumstances to seek an investigation.[21] However, the history of CA 1956 indicates that claimants found success difficult.[22] There is limited experience under CA 2013, but the Tata Sons affair (see Sections III and IV) suggests that utilising these provisions may not be straightforward either.

18 Regulation 26 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

19 In a board meeting of 27 June 2019, SEBI has recently permitted shares with superior voting rights in listed companies. This may open up an avenue for takeover defences, although there are a number of safeguards (such as a five-year sunset provision, limitation on the companies that can issue such shares and also restrictions on the use of superior voting rights in relation to related party contracts and other matters that SEBI may notify), which may limit their application in this context.

20 Section 230(6) of CA 2013.

21 Section 213 of CA 2013.

22 Umakanth Varottil, 'The Advent of Shareholder Activism in India', *Journal on Governance*, Vol 1 No. 6, 2012.

However, CA 2013 has introduced a significant change in that Indian company law now includes a 'class action' concept.[23] Shareholders who hold a threshold level of shareholding[24] can institute class action suits if they believe that the company's management or affairs are being conducted in a manner that is prejudicial to the interests of the company or its shareholders. The NCLT has the power to issue a broad range of directions and can also order damages. This moves Indian company law away from the restraints of the exceptions to the rule in *Foss v. Harbottle*.[25] However, given the state of the litigation process in India, the effectiveness of this remedy in practice remains to be seen.

### vii Other issues

Just as in other jurisdictions, shareholders need to be aware of insider dealing concerns when engaging with a listed company, under the SEBI (Prohibition of Insider Trading) Regulations 2015, as well as the SEBI regulations restricting manipulative, fraudulent and unfair dealings in shares.

With regard to 'concert party' issues, these have been less relevant in India in comparison to other jurisdictions. The test of 'concertness' under Indian takeover regulations is by reference to a common objective to acquire shares or voting rights in, or control over, a listed target and shareholders rarely come together for this purpose in India (they usually cooperate on corporate actions requiring shareholder approval).

Finally, although companies do not have a general obligation to provide investors with details of specific shareholders' holdings, companies do need to maintain a register of members that is available for inspection.[26] As far as listed public companies are concerned, certain significant acquisitions and disposals do need to be reported to the market and there are periodic disclosures of promoter positions. In addition, like other jurisdictions, Indian company law has recently introduced the concept of a register of significant beneficial owners, which shareholders are able to inspect.[27]

## III KEY TRENDS IN SHAREHOLDER ACTIVISM

These are still very early days for shareholder activism in India but some initial trends are summarised below.

### i Most effective strategies

Historically, litigation strategies have proved to be less effective. For instance, the litigation strategy employed by the Children's Investment Fund (TCI) against the directors of Coal India for breach of fiduciary duties between 2012 and 2014 did not meet with success. In 2014, TCI withdrew its court claims and sold its Indian holdings. Equally, recent attempts by

23 Section 245 of CA 2013.

24 The threshold for shareholders to be able to trigger this protection (i.e., a shareholding percentage) is the lower of 100 shareholders or a percentage of shareholders to be prescribed. Draft rules had proposed a 10 per cent threshold for this latter threshold, but this proposal is, at the date of publication, not yet in force.

25 (1843) 2 Har 361. CA 1956 did not recognise derivative action, so claimants needed to establish a case on the basis of common law. Academic studies have shown that this had little success (see note 21).

26 Section 88 of CA 2013.

27 Section 90 of CA 2013.

Cyrus Mistry, the deposed chair of Tata Sons, to seek relief under Sections 241 and 244 of CA 2013 (for oppression and mismanagement) were dismissed by the NCLT,[28] and the Bombay High Court refused to entertain a separate representative suit against Ratan Tata (Cyrus Mistry's predecessor) for damages.[29] Similarly, litigation by minority shareholders of Cadbury in relation to the valuation in a minority squeeze-out scheme failed as the court ruled against the minority shareholder group.[30] A more effective technique that certain shareholders have used is to register complaints with regulatory authorities.

Given that promoters still remain powerful, the more effective strategies are likely to be those that involve investors working with the promoters or seeking to curb obvious abuses, for which there is likely to be greater institutional investor and regulatory support (see Section IV).

### ii Proxy firms

Several proxy advisory firms are now active in India. They regularly issue voting recommendations and maintain high visibility. Proxy advisory firms recommended that shareholders vote against the Tata Motors executive remuneration resolutions in 2014 and claimed credit for the outcome.[31] They have also been vocal on governance matters, such as the leave of absence taken by the CEO of ICICI Bank (while allegations of impropriety are investigated). Although they do not have the same level of influence as in the United States, they are emerging as important market participants in India.

Although regulated by SEBI under the SEBI (Research Analysts) Regulation 2014,[32] these firms have also faced criticism around perceptions of their own conflicts of interest. SEBI has recommended additional safeguards in this regard in a recent report (see Section V).

### iii Role of the media

Although public campaigns by shareholders seeking strategic changes are uncommon,[33] the media has emerged as a key player, for instance, in the engagement that Narayana Murthy, a founder of Infosys, had with its board in 2016 and 2017 (see Section IV.i).

### iv Greater investor participation

In the past, collective action issues held back shareholder activism, with investors preferring to simply exit their investments. However, mutual funds and other long-term investors in the Indian market now more actively engage with promoters (see Section IV). Part of this has

28 *Cyrus Investment Private Limited and others v. Tata Sons Limited and others*, (2017) 2 CompLJ 295; *Cyrus Investment Private Limited and others v. Tata Sons Limited and others*, (2017) 2 CompLJ 332; and *Cyrus Investments Private Limited and another v. Tata Sons Limited and others*, order dated 12 July 2018 of NCLT (Mumbai bench) in CP No. 82 (MB)/2016.

29 *Pramod Premchand Shah and others v. Ratan N Tata and others*, 2018 (1) ALLMR 255.

30 Khushboo Narayan, 'Bombay HC asks Cadbury to pay Rs 2,014.50 per share for buyback', Livemint, 18 July 2014.

31 'Shareholders reject Tata Motors pay plan', *The Business Standard*, 4 July 2014.

32 Proxy firms are required to register with SEBI, although certain foreign proxy firms are not required to do so. However, SEBI has recently recommended that foreign firms also follow a common code of conduct with domestic proxy firms on a 'comply or explain' basis (see Section V).

33 The only real example was in 2012 when CLSA wrote to the then CEO of Infosys, challenging its business model, but that did not result in any meaningful change or shareholder engagement.

been driven by regulation. Indian regulated mutual funds are now required by SEBI to vote on resolutions involving their portfolio companies and provide voting reports on a quarterly and annual basis.[34] Efforts by India's insurance regulator to encourage market engagement by insurance companies (as summarised in Section V) are likely to continue this trend.

In addition to these long-term investors, certain funds have sought to take activist positions in various listed companies, seeking board appointments (albeit unsuccessfully) and successfully removing a director (in the case of Fortis Healthcare).

## IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

### i Fissures in corporate India

Ironically, in two high-profile cases, activism has been used by founders or key shareholders against management.

In late 2016 and 2017, Infosys, a US and Indian listed IT company, faced a period of sustained pressure from its original founder shareholders, which ultimately contributed to the resignation of its CEO. The founders criticised the level of severance payments paid to certain departing executives and the US$200 million Panaya acquisition, which led to an investigation by an international law firm (which reportedly exonerated the management team). Following this, in July 2017, the board of Infosys indicated its willingness to work with its founders. However, on 18 August 2017, Vishal Sikka, the incumbent CEO, resigned. Without naming the founders, he indicated that the criticism he faced made his role untenable.

The Tata conglomerate was also subject to a battle for control in late 2016 and early 2017. Following differences between Cyrus Mistry, then chair of Tata Sons, and Ratan Tata, the former chair, on 24 October 2016, Cyrus Mistry was removed from his position as chair through a board resolution. This was followed by allegations and counter-allegations between the two individuals. Cyrus Mistry was removed as director from the various Tata Group companies between November and December 2016 and, ultimately, removed as a director of Tata Sons pursuant to an EGM held on 6 February 2017. Various legal challenges by Cyrus Mistry did not succeed.

### ii Blocking transactions

There have been a number of instances where shareholders have been able to block transactions adverse to the shareholders' interests.

Since shareholders with an interest in related party transactions cannot vote to approve them, minority shareholders are sometimes very strongly placed. For instance, in 2018, shareholders of Tata Sponge Iron Limited, holding just 3.77 per cent of the votes, were able to defeat the related party approval resolutions for this reason. Also, in July 2017, the shareholders opposed a related party transaction between Raymond Limited and its promoters (involving the sale of an asset at a significant undervalue). More than 97 per cent of the votes cast were against the transaction.[35]

34 SEBI circulars SEBI/IMD/CIR No. 18/198647/2010 dated 15 March 2010; CR/IMD/DF/05/2014 dated 24 March 2014; and SEBI/HO/IMD/DF2/CIR/P/2016/68 dated 10 August 2016.

35 Ingovern, India Proxy Season 2017.

Similarly, in November 2015, after pressure from its shareholders, Sun Pharma withdrew from a potential US$225 million investment in the United States.[36]

Finally, in 2016, HDFC Standard Life Insuramce Company Limited and Max Life Insurance Company Limited announced a merger to create the largest private insurer in India. One of the deal terms was the payment of a 8.5 billion rupee non-compete fee to one of the promoters. Ultimately, the deal did not complete owing to regulatory concerns, but various proxy firms had recommended that investors oppose the payment of this fee.

### iii Forcing renegotiation of terms

In certain cases, shareholders have been able to force a renegotiation of terms in large transactions.

In 2014, Maruti Suzuki's proposed manufacturing contract with a shareholder, Suzuki, was criticised by public shareholders and proxy firms for failing to seek shareholder approval for the transaction. Some of the largest funds in India, HDFC Asset Management, Reliance Capital Asset Management, ICICI Prudential Asset Management, UTI Asset Management, DSP Blackrock Investment Managers, SBI Funds Management and Axis Asset Management all wrote a letter to Maruti Suzuki challenging the proposed transaction. Even Life Insurance Corporation of India, a state-owned insurer, known to be a passive investor, reportedly engaged with the company in this regard.[37] Press reports suggest that the transaction terms were modified, and the company ultimately did obtain shareholder approval, as a related party transaction matter, in 2015.

Similarly, in August 2014, the shareholders of Siemens India voted down the proposed sale of its metal technologies business to Siemens AG for 8.57 billion rupees. Siemens India amended the terms of the transaction in November 2014, such that the sale price was increased to 10.23 billion rupees,[38] and finally obtained shareholder approval in December 2014.

### iv Changes to board composition

In the past, certain activist funds have sought board seats, but this has proved hard to achieve. For instance, the attempt of a 20 per cent investor to seek board representation in relation to MRO-TEK and the attempt by Florintree Advisors to seek a seat on the board of PTC India did not succeed. Some investors have persisted in unusual ways, such as the provisions for a 'small shareholder' director by Unifi Capital (see Section II).[39]

In certain cases, shareholders have opposed the reappointment of senior incumbent management as directors. For instance, in July 2018, 22.64 per cent[40] of the shareholders of HDFC Limited voted against the reappointment of Deepak Parekh, the group chair, as a director. Similarly, in September 2018, a significant number of investors opposed the

36 'Sun Pharma drops wind energy investment plan', *Business Standard*, 25 November 2015.

37 Himank Sharma and Aradhana Aravindhan, 'Big Indian funds challenge Maruti Suzuki over Indian Suzuki plant', Reuters, 24 February 2014.

38 https://www.vccircle.com/siemens-ups-offer-buy-indian-arms-metals-tech-unit-after-shareholders.

39 Ingovern, India Proxy Season 2017.

40 https://economictimes.indiatimes.com/markets/stocks/news/22-64-hdfc-shareholders-vote-against-deepak-parekh/articleshow/65207077.cms.

re-election of Kumar Mangalam Birla (head of Aditya Birla Group) to the board of UltraTech Cement.[41] Although both reappointments were ultimately approved, this scale of opposition in relation to such senior figures in corporate India is noteworthy.

Litigation has also occasionally been attempted as a strategy to attempt to force a change in board composition, although these are harder to achieve. For instance, two investors (IDBI Trusteeship Services and Horizon Fund) litigated to prevent a proposal by Religare to invest 5 billion rupees in a loss-making subsidiary, but IDBI exited its investment and the promoters of Religare have raised counter-claims. Investors have had one notable success in removing a director of Fortis Healthcare in May 2018.[42] This was in the context of investor concerns as to the board assessment of certain bids for the company, so this is a significant landmark in relation to shareholder activism in India.

## V REGULATORY DEVELOPMENTS

Four regulatory developments are likely to have a bearing on shareholder activism in India going forward.

First, in March 2017, the Insurance Regulatory and Development Authority of India published its Stewardship Code relating to investments by insurance companies in listed securities. These require insurers to have a clear engagement strategy (of their own choosing) with listed companies. There are also other principles requiring insurers to have a policy governing collaborations with other institutional investors and also to have a clear voting policy. These are likely to encourage insurers, who constitute a significant proportion of the institutional investor community in India, to be more engaged.

Second, SEBI is implementing a number of recommendations of the Kotak Committee (constituted in June 2017, which suggested various reforms to improve the governance of listed companies, among others). It is hoped that these changes will have a positive impact on the corporate governance landscape in India.

Third, the Indian Finance Minister in her budget speech in July 2019 suggested that SEBI consider a public float threshold of 35 per cent (rather than the current 25 per cent). This is just a recommendation and it is unknown whether SEBI will implement it, but if so, this will considerably increase the influence of independent and activist investors.

Fourth, on 29 July 2019, SEBI published recommendations on the further regulation of proxy firms. SEBI appears to be mindful of ensuring accountability without over-regulation. For instance, with regard to conflict situations, the emphasis is on disclosure and self-regulation through 'Chinese Walls'. SEBI has also raised the prospect of a UK-style 'stewardship code' and has recommended a code of conduct for proxy firms, in both cases, on a 'comply or explain' basis. SEBI is also considering making the principles around the fiduciary duties of proxy firms more explicit. The proposed changes, if implemented, will improve transparency as the 'light touch' approach is measured and sophisticated. However, it remains to be seen whether this will be sufficiently robust to address conflicts in the Indian context.

41 https://economictimes.indiatimes.com/markets/stocks/news/institutional-investors-find-their-voice-india-inc-takes-note/articleshow/66310372.cms.

42 www.vccircle.com/fortis-shareholders-vote-out-former-ranbaxy-ceo-brian-tempest-as-director.

## VI OUTLOOK

Although nascent, shareholder activism in India is evolving quickly. The changing shareholder registers of listed companies, with greater participation by financial investors, and the financial distress among a number of promoter groups are driving change. In addition, there is some evidence that international activist investors are starting to engage with some listed companies in India.

That said, this has, so far, been limited to the bigger names in corporate India and activism is less developed than in the United States. Therefore, since these are still early days for activists, it is likely that some adaptation of activist strategies may be necessary in the Indian context. In response to the growth of activism, shareholder engagement by corporate India will also need to evolve. Boards of Indian companies should start considering more meaningful shareholder engagement by setting up investor relations teams, improving their governance systems and providing information to the market to support board strategy, particularly as far as large transactions are concerned. In the years ahead, corporate India will need to adapt accordingly.

**Appendix 1**

# ABOUT THE AUTHORS

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Nikhil Narayanan is a partner in Khaitan and Co's corporate practice. He has extensive international and cross-border experience, having advised corporate clients, financial sponsors and investment banks on high-value and often market-leading public and private merger and acquisition, joint ventures and equity capital markets transactions, in both London and India. He also has extensive public company experience, having advised international listed clients on listing rules and disclosure-related issues, and corporate governance and activist-related issues. Nikhil received his BCL degree from St Catherine's College, Oxford (where he was a Radkhakrishnan/Chevening scholar) and his MBA degree from London Business School (where he was a Merrill Lynch scholar). Nikhil is ranked as a leading lawyer in Asia by *Asialaw*, and *The Legal 500* says that he is 'very commercial' and 'offers immediate solutions'.

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