

Abstract

This research critically examines the different methods that can be used in corporate practice to limit the occurrence and neutralise the enforcement of the appraisal rights remedy in both South Africa and the state of Delaware. The research initially conducts a comparative analysis of the appraisal rights remedy provided in section 164 of the Companies Act 71 of 2008 against the appraisal rights remedy provided in the Model Business Corporation Act and the Delaware General Corporation Law in the United States of America. Thereafter a critical analysis of the concerns of companies in the context of transactions that trigger appraisal rights and the methodologies that can be utilised by companies in both South Africa and the United States, particularly in the state of Delaware, is undertaken. The research then considers the role that shareholder activism has played in counteracting these methods in the United States and how shareholder activism in South Africa is encouraging the utilisation of the appraisal rights remedy. It is submitted that the appraisal rights remedy can be used as a tool of shareholder activism as appraisal rights have a governance aspect inherent in them. It is argued that the development of appraisal arbitrage and appraisal bumpitrag, which is the practice of exercising or threatening to exercise appraisal rights by shareholders, that has arisen in the United States, is beneficial to good corporate governance in the context of appraisal rights triggering transactions. It is further submitted that it is only a matter of time before appraisal right litigation becomes a common feature in the South African legal system as shareholder activism grows. The research also suggests and recommends that certain amendments could be made to the provisions of section 164 in order to assist shareholder activists and minority shareholders alike to exercise and enforcement of their appraisal rights and to fast tracking the process.

Key terms:

Section 164; Companies Act 2008; appraisal remedy; shareholder activism;

Appraisal arbitrage.