Shareholder Activism Spreads Globally

Cartica Capital, a U.S. hedge fund that owns just over 3% of the stock of CorpBanca SA, a Chilean bank, is publicly pressuring CorpBanca to abandon its merger deal with Itau Unibanco Holding SA, a Brazilian bank. The deal, announced January 29, would be the largest banking merger in Latin America since 2008, with the resulting company having a market value of about $8 billion. Cartica’s letter to the CorpBanca board, delivered late Monday and released publicly on Tuesday, attacked the deal based on the special benefits it provides to CorpBanca’s 55% controlling shareholder. The letter demands that CorpBanca “run a full and transparent process to maximize shareholder value”.

Key Take-away:

Shareholder activism has intensified in the U.S., has become more prevalent through North America and Europe, and is now beginning to appear in Latin America. As developing countries try to create well-functioning markets with the free flow of capital and investment, and as corporate law systems internationally continue to converge (as part of the larger globalization of the world economy), the spread of shareholder activism is likely to accelerate a more shareholder-centric focus in the regulatory, corporate, and legal systems in emerging markets. It is not possible to predict what effect the Cartica letter to the CorpBanca board will have on that transaction, nor what further (if any) actions Cartica may take. In addition, there are significant structural challenges to shareholder activism in less developed countries. Nonetheless, it appears that shareholder activism will continue to be an expanding global phenomenon. As part of structuring a strategic transaction, companies both in and outside the U.S. should anticipate shareholder response, and, specifically, possible actions by activist investors.

Practical Points:

- **Boards should expect that shareholder activism will continue to expand globally.** There has so far been very little shareholder activism outside the U.S., Canada, and Europe. It is uncertain what effect, if any, Cartica’s challenge will have on the CorpBanca deal in Chile. Moreover, it is considerably more difficult to engage in shareholder activism in an emerging market, because the regulatory, corporate, and legal systems are less developed, offering less precedent and transparency. However, activism has spread quickly through the EU in the last few years despite such difficulties as a lack of EU-wide proxy rules, and, in many jurisdictions, sparse regulatory precedent and concentrated ownership of companies. In many EU

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1 For example, in most other jurisdictions, proxy advisory firms do not have a large presence; company share ownership is concentrated, frequently in the hands of controlling families or oligarchs through cross-shareholding blocks; it can be difficult to communicate directly with shareholders because of the use of bearer shares; local institutional shareholders may not be inclined, for political and cultural reasons, to challenge controlling shareholders and incumbent management; and shareholder litigation is minimal, as the court system tends to be slow and (due to lack of precedent and other factors) unpredictable.
jurisdictions, the proxy and corporate governance rules that do exist favor companies and incumbent boards. Nonetheless, increasing ownership of EU companies by U.S. institutional investors, and increasing support for activism by European institutional investors, has spurred shareholder activism in these jurisdictions. Accordingly, while it is not possible to predict the timing or scope of shareholder activism in Latin America or elsewhere, global macroeconomic, political, and legal trends all lend force to the global expansion of shareholder activism.

- **Boards should expect that controlling shareholder deals will attract extra scrutiny (especially when special benefits are provided).** The CorpBanca deal includes significant special benefits for the controlling shareholder of CorpBanca (who would continue to have a large stake in the post-merger combined entity). The heart of Cartica’s challenge is that the company enriched its controlling shareholder, at the expense of a lower value for the minority shareholders. The details of CorpBanca’s process are not yet known (for example, there were at least two other interested bidders, but neither the specifics of their interest nor the extent to which the board considered them has been disclosed). However, special benefits to a controlling shareholder will always raise the level of scrutiny of a deal, in terms of both the legal review and the level of interest of activist shareholders. Even without special benefits to a controlling shareholder, the mere presence of a controlling shareholder is likely to attract activist attention to a deal.

- **Boards should anticipate activist shareholder interest and have a plan to deal with it.** The CorpBanca deal involves a major strategic transaction, a controlling shareholder, special benefits for the controlling shareholder, and no transparent process or procedural protections. The day the CorpBanca deal was announced, CorpBanca’s stock price dropped 13.5%. Cartica, which has generally attempted to influence companies through behind-the-scenes approaches, attempted numerous times to engage in discussions with CorpBanca about the deal before making its public attack. Companies should anticipate the likely reaction of shareholders to announced deals, evaluate the likelihood of interest by activists, and carefully consider what actions to take, both proactively and in response to shareholder activism. As in the past, a company will be advantaged by an effective communication plan to get the company’s story out, and by reaching out to major shareholders. In addition, companies should have a plan in place for how to respond to shareholder activists.

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2 Another factor in the expansion of shareholder activism has been the tremendous growth of U.S. activist hedge funds, which have significantly outperformed traditional hedge funds.

3 The benefits include $329 million to be paid for post-merger acquisition of the controlling shareholder’s resulting interest in one of the combined company’s businesses; $565 million for the controlling shareholder’s co-investors’ interest in illiquid entities; and a $950 million credit line to be provided by the acquiring bank.
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