

## Shareholder Remedies Against the Management of a Company: An Appraisal Relating to Annual General Meeting

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### Abstract

The Companies and Allied Matters Act 1990 provides specific remedies to shareholders in the event the company violates any of their personal right. This includes the right to receive notice and vote at the meeting. Personal action as a remedy entitled the shareholders to either an injunction or declaration against the company in addition to the monetary fine. However, enforcement of shareholder remedy in Nigeria takes very long time in court and the monetary fine is grossly inadequate. This questioned the adequacy and enforcement of shareholder remedies under Nigerian corporate law. The objective of this study is to examine various remedies available to shareholders about annual general meeting. This concerns legal provisions, decided cases and opinion of experts in order to introduce reforms that will sanction the violation of shareholder's right. The study employed a doctrinal method which is library based and field work, in the form of a qualitative interview. The findings indicate that the court are reluctant to interfere in the enforcement of shareholder remedies due to the recognition of corporate personality principle which states that only the company has the right to seek for enforcement of remedies in court. Additionally, shareholders are not enlightened about their remedies. The study suggests for an upward review of all the monetary fines pertaining to AGM as well as the introduction of other avenues that will facilitate quick enforcement of shareholder remedies. Similarly, the regulators in Nigeria should be responsible for educating shareholders about their right and the enforcement of remedies.

**Keywords:** Enforcement of remedies; Fine; Shareholder remedy.



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### 1. Introduction

Shares being personal property (Wong, 2017) as well as a component of individual wealth confers the right to seek redress for injury to such right (Bridgely *et al.*, 2013; Sterling, 1987). Accordingly, violation of the right conferred some remedies to the aggrieved party (Aderibigbe, 2012; Hudson, 2016). The Companies and Allied Matters Act 1990 (CAMA 1990) is the principal law governing companies in Nigeria. There are other rules, regulations and decided cases that compliment the principal law. In this study, reference will be made to other jurisdictions, notably, Malaysia due to reforms made to the Companies Act 1965 now Companies Act 2016 (CA 2016). Thus, section 81 of the CAMA 1990 recognised the right of shareholders to participate and vote at the annual general meeting (AGM) subject to receiving adequate notice as provided by section 220 CAMA, 1990 (Bhadmus, 2009). Notice of meeting allows shareholders to know about the AGM and make a proper plan for it Atte (2015). According to respondent 3, "Notice is a fundamental requirement for attendance at AGM, without the notice, shareholders will not be able to attend and exercise their powers or right. Notice is a very fundamental, very critical right of a shareholder" (Respondent 3, Interview, 2016). The right to receive notice of meeting is a legal requirement and must be complied with by the company (Amupitan, 2006; Du and Saenger, 2017; Frank *et al.*, 2015). However, failure to serve notice of shareholder's meeting invalidates all the proceedings at the meeting (Young, 1920) 2 KB 523; (Onwuka, 1965). In the Malaysian cases of *Mahesan & Ors v. Ponnusamy & Ors* 1994 3 MLJ 312 and *Jerry et al.* (2003), the court held that where proper service of notice is not given, the meeting remains invalid.

In Nigeria, the CAMA 1990 provides various remedies to shareholders that were not served with the notice of AGM or shareholders that were prevented from exercising their votes at the AGM. However, enforcement of shareholder remedies in Nigeria is not effective (Respondent 2, Interview, 2016). One of the challenges relates to the recognition of the principle of majority rule laid down in the case of *Foss v. Harbottle* (1843) 2 Hare 461 which stipulates that only the majority shareholders and not individual shareholders can institute an action in a court. This principle has been statutorily recognised under section 299 of the CAMA, 1990 and has become a hurdle to the successful enforcement of shareholder remedy in Nigeria (Nwafor, 2010). In another word, the principle of majority rule prevents shareholders particularly the minority from instituting actions in court (Aderibigbe, 2012). In this regard, one of the respondents states, "You know the enforcement is one of the legal problems we have in corporate

law in Nigeria. Cases do not go to court because of the ruling in *Foss v. Harbottle* which says the company should be responsible to remedy any wrong against it” (Respondent 1, Interview, 2016). In one of the decisions of the court, it was held, “The dividing line between personal and corporate right is very hard to draw (Graziadei, 2017). Perhaps the court will incline to treat a provision in the memorandum or article as conferring a personal right on a member only if he has an interest in its observance distinct from the general interest which every member has in the company” (*Globe Fishing Industries Ltd v. Coker* [1990] 7 NWLR (Pt. 162) 265). Although this study concerns the enforcement of shareholder personal right recognised by section 301 of the CAMA 1990, it has become difficult to distinguish between personal and corporate right.

Another challenge that hinders the enforcement of shareholder remedies is the inadequacy of the fine. The maximum fine imposed under section 213(5); 218(4); 230(2) of the CAMA, 1990 is N500.00 which is equivalent to RM5.5.00 at an exchange rate of N90 to RM1. The amount of fine is too insignificant to deter management of the company from violating the rights of shareholders. Furthermore, delay in the general administration of justice in Nigeria has equally hindered the successful enforcement remedies in Nigeria (Ishola and Abikan, 2017). In this regard, one of the respondents stated, “To be frank, administration of justice in the country takes very long time and it is always not easy to go by” (Respondent 13, Interview, 2016). In another word, administration of justice in Nigeria takes too long and often expensive. The duration of time from filing of court process to the time of obtaining judgement may take from 7 to 20 years (Doma, 2016; Ekperokun, 1986). For example, in the Nigerian case of *Maja* (2000) it took the court nine years to deliver its judgement. However, in (Obasohan, 2001), it took the court sixteen years to deliver its judgement. This questioned the effectiveness of shareholder remedies considering the duration of time it takes the court to deliver its judgement. In this regard, access to justice is not attained because the justice system does not allow for easy access and enforcement remedies. Justice system must be such that would enable people to know their rights and its enforcement (Van and Van, 2016).

Another challenge that hinders the successful enforcement of shareholder remedies is that shareholders lacked the knowledge of their right and the remedies they have against the company. To support the above view, one of the respondents stated, “Until shareholders are sensitised and know how to exercise their rights, enforcement would be a challenge. Until there is awareness, it will always be a business the way it used to be” (Respondent 1, Interview, 2016). The above challenges prevent shareholders from successfully enforcing their remedies against the management/company. Given that, this study seeks to critically examine the remedies available to shareholders from the legal perspective as well as from the opinion of respondents to strengthen the legal framework in ensuring that shareholder remedies are effectively enforced.

## 2. Literature Review

### 2.1. Overview of Remedy

There is no definition of the term remedy under the CAMA 1990. However, the CAMA 1990 provides some remedies to shareholders in the event their rights are violated. According to the Black’s Law Dictionary, remedy means a process of preventing, redressing or compensating a violation of right. In *Jackson v. Horizon Holidays Ltd* (1975) 1 WLR 1468, the court held that remedy is a crucial point for all legal rules that functions on fact and law (Finch and Fafinski, 2014). In their respective argument, Geoffrey (2000); Lyons (2017) stated that the existence of right entitles a person to some remedies. Accordingly, a remedy was aptly summarised by the maxim *Ubi jus ibi remedium* ‘where there is right there is a remedy’ (Dash, 2017). In other words, remedies remain the principal reason behind going to court, either to redress a wrong or to restrain violation of a right in the future (Hessick, 2012). Accordingly, one of the functions of law is to protect rights and provide remedies where these rights are breached (*Chester v. Afshar* (2004) UKHL 41; (Pearce and Halson, 2008). Remedies may be classified into coercive, declaratory and damages. Coercive remedy makes it mandatory on a party to act or abstain from acting through injunction or specific performance (Contreras, 2017; Laycock, 2012). Injunction is one of the shareholder remedies under section 300 of the CAMA 1990. It is a relief granted by a court directing a party to perform or abstain from doing an act (Anand, 2015). Injunction is available where the applicant is not entitled to damages in most cases (Mohammad, 2011). Declaratory remedy confirms the right of the plaintiff but does not entitle him to damages or specific performance (Bray, 2014;2017; Levy, 2014). A party must specifically request an order of declaration. Otherwise the court is not obliged to grant it (*R. v North Somerset Council* (2013) EWCA Civ 148; (Eliasson and Shameem, 2016). Section 300 of the CAMA 1990 also recognised order for declaration as a remedy. Finally, damages entitle the plaintiff to monetary compensation and may restore the plaintiff to his initial position before the loss Evans *et al.* (2017). However, the above literature does not address the aspect of enforcement of remedies against the management.

### 2.2. Default in Service of Notice

Section 220 of the CAMA 1990 sanction the right of shareholders to receive notice of meeting. Today, the internet has facilitated fast and effective service of notice (Chen, 2017). However, there is no provision for the use of internet under the CAMA 1990 which result to a violation of shareholder’s right to receive notice. Accordingly, default in service of notice entitled a shareholder to certain remedies. In the Nigerian case of *Prince Adebayo Ayodele & Anor v. Form Nigeria Ltd.* (1974) 1 FRCLR 174, the Federal High Court of Nigeria declared that the meeting of the company was null and void because no notice was given to the plaintiff. Furthermore, in the Malaysian cases of *Aik et al.* (1995) & *Jerry et al.* (2003) court held that the validity of a meeting depends on proper service of notice. Since there is no evidence to show that notice was served on the plaintiff, the meeting and

all the resolutions taken at the meeting were void. Therefore, failure to serve notice, in this case, is incurable as it is not a mere irregularity. However, in some circumstances, failure to serve notice of meeting would not invalidate the meeting. This could be due to accidental omission. The CAMA 1990 is silent as what amount to accidental omission. In the case of Board of Management of Trim Joint District School v. Kelly (1914) AC 667 the word ‘accident’ should be taken in its ordinary sense and be interpreted according to what an ordinary man in the street would recognise it. Thus, accidental omission to serve notice would absolve the management from liability. The CAMA 1990 provides, “Failure to give notice of any meeting to a person entitled to receive it shall invalidate the meeting unless such failure is an accidental omission on the part of the person or persons giving the notice. Failure to give notice to a person entitled to it due to misrepresentation or misinterpretation of the provisions of this Act, or of the articles, shall not amount to an accidental omission for the purposes of the foregoing subsection” (section 221(1) of the CAMA 1990). This operates as a defence to the management of the company. Furthermore, in Malaysia for example, there is a statutory validation of irregularities under section 582(1) & (2) of the CA 2016. This may be ordered by the court where a company falls short of the requirement of the law, but the court is satisfied that no substantial injustice would be occasioned because of the validation order (Loke, 2011; Thomas and McConnell, 2010). The above literature emphasised on invalidating a meeting without looking at the adequacy or otherwise of the remedies. This study will focus on the adequacy of the remedies, enforcement of remedies as well as some of the constraint face by shareholders.

### 3. Methodology

This study is socio-legal research. It involved doctrinal methodology and fieldwork. The doctrinal methodology is carried out in the library. It is a problem-solving method (Dent, 2017). This enables a researcher to analyse fact, and legal principles systematically (Yaqin, 2007) and recommend ways of improvement (Smits, 2014). On the other hand, fieldwork in this study concerns 17 in-depth interviews that were conducted face to face towards the end of the year 2016, in Nigeria. The interviews were recorded with an audio device which was used to transcribe the data (Henderson, 2018; McLellan *et al.*, 2003) The respondents were chosen from the academic discipline, corporate practice, board of directors and shareholder representatives. The respondents were asked mainly on the adequacy and the enforcement of the remedies.

The analysis of result/data in this study was conducted based on themes and sub themes from the study. This is called thematic analysis (Green and Thorogood, 2018; Lea, 2012). In this regard, Namey *et al.* (2008) explained that thematic analysis is more than counting explicit words or phrases but also focuses on identifying implicit and explicit ideas. Codes can be used on the raw data and help in the analysis. On the one hand, reference was made to the provision of Companies Act 2016 (Malaysia) as well as relevant decided cases. The choice of CA 2016 was because Nigeria and Malaysia are all commonwealth countries and share similarities in their respective law. Moreover, the CA 2016 is quite recent which give room for inference in making important reforms to the CAMA 1990.

## 4. Results and Findings

### 4.1. Default Relating to Calling of Annual General Meeting

Section 213 CAMA 1990 made provision for calling of AGM. Similarly, the right of shareholders to participate at the AGM is well recognised (section 81 CAMA, 1990). The right to attend AGM remain a vital right of the shareholders since the AGM is a forum where discussion and resolution on matters having a direct effect on the company are made (Hague, 2011; Jones, 2017). The reality is that shareholder participation in the AGM now includes online participation (Jones, 2017) which is lacking under the CAMA 1990. Notwithstanding the significance of shareholder participation in the AGM, the CAMA 1990 provides, “If default is made in holding a meeting of the company in accordance with subsection (1) of this section, or in complying with any directions of the Commission under subsection (2) thereof, the company and every officer of the company who is in default, shall be guilty of an offence and be liable to a fine of N500. If default is made in complying with subsection (4) of this section, the company and every officer of the company who is in default shall be liable to a fine of N25” (section 213(5) CAMA 1990). The penalty of N500 is the maximum fine under the above provision, and it appears to be very insignificant as a fine. This is equivalent to Five Malaysian Ringgit and Fifty Cent (RM5.5) at the exchange of N90 to RM1.

### 4.2. Shareholder Remedy Regarding Default in the Appointment of a Proxy

Section 230 CAMA 1990 sanctioned the right of a shareholder to appoint someone to represent him at a meeting. The notice calling the meeting must state the right of a shareholder to appoint a proxy. However, “If default is made in complying with this subsection in respect of any meeting, every officer of the company who is in default shall be guilty of an offence and liable to a fine not exceeding N500” (section 218(4) CAMA 1990). Thus, where notice of meeting does not state the right of a shareholder to appoint a proxy, the company is only liable to pay a fine of N500.00 which is equivalent to RM5.5. The above fine is too inconsequential as a penalty and will hardly deter the management from violating the right of shareholders. Another provision for penalty in case of non-compliance with right of a shareholder to appoint a proxy states, “If default is made in complying with this subsection as respects any meeting, every officer of the company who is in default shall be guilty of an offence and liable to a fine of N250” (section 230(2) CAMA 1990). In essence, section 230(2) above stipulates a penalty of N250.00 which is equivalent to RM2.75 while section 218(4) on the one provides a penalty of N500.00 equivalent to

RM5.5. These are the kind of monetary fines still applicable in 2018 under the CAMA 1990. In Malaysia for example, section 335(1) CA 2016 provides that where notice of meeting fails to state the right of a shareholder to appoint a proxy, the officer in default shall be liable to a fine not exceeding RM10, 000.00 which is equivalent to N900,000.00 at N90/RM1. This cannot be compared with RM5.5 equivalent under the CAMA 1990.

All the 17 respondents in this study unanimously agreed that the penalty of N500.00 under the CAMA 1990 should be reviewed upward. From the excerpt, some of the opinions of respondents will be presented below: one of the respondents opined, “The penalty of N500.00 is too small. I will recommend for a higher penalty” (Respondent 12, Interview, 2016). Another respondent added, “The amount is too small as of today, it should be reviewed upward to go in line with what is obtainable in other jurisdictions. As it is, it can never serve any deterrent” (Respondent 13, Interview, 2016). In the same vein, respondent 14 argued, “The penalty is not in line with present reality. As it is, it would certainly encourage abuse by corporate managers particularly those that are not prudent. The law should be reviewed to make a heavy penalty on any officer involved, and the penalty should be ‘personal’ to be borne by the officer concerned and not the company” (Respondent 14, Interview, 2016). Similarly, Respondent 17 added, “This penalty of N500 is insignificant. I may decide not to hold the AGM and at the end of the day, may be there are ten directors, we can pay N5, 000.00.” (Respondent 14, Interview, 2016). In his view, respondent 10 stated, “The penalty under CAMA, 1990 would not serve a deterrent at all. That is why continuously, corporate organisations especially public companies in Nigeria violates this provision of the law because they know that the amount of fine is very minimal. There is a need for improvement on this particular amount” (Respondent 10, Interview, 2016). Respondent 2 equally argued that, “The penalty should be increased. Legislation in Nigeria can take 20 years without review” (Respondent 3, Interview, 2016).

### 4.3. Right to Seek Redress for Violation of Shareholder Personal Right

Generally, a company as a legal entity is empowered to seek redress in its own name (Salomon, 1897) 22 AC; (Union, 1992) 228 at 237; (Badagry Petroleum Refinery Limited, 2002) 12174 C.A; (Ubochioma, 2016). Accordingly, the Supreme Court of Nigeria held that, “The power of management and control of a company lies with majority shareholders. They can exercise that power to challenge the authority to bring an action in the name of the company of which they are the majority shareholders. This is because the company itself is the proper Plaintiff in all actions where there is an allegation of injuries done to it” Yalaju (1990) (Pt 145) 422). However, there are exceptions where individual shareholders can institute an action in court. One of the exceptions is where the personal right of a shareholder including his right of notice or voting has been or is likely to be violated by the company (section 300(c) CAMA 1990). In one of the decisions of the court it was held that, “The Rule in Foss v. Harbottle will not apply to an action instituted to protect the invasion of personal right of an individual member, for in such a situation the wrong ceases to be a wrong to the company, and so it goes beyond the authority of the company, union or association or its majority members to rectify or seek redress in court” (CBN, 1994) 75-76 paras H). The above decision recognised the right of individual shareholders to seek redress against the company in his name because violation of right of a shareholder to receive notice of meeting or to vote at the meeting are personal of a shareholder. Regrettably, there are various decisions of court decided after the commencement of CAMA 1990 which emphasised that only the company and not an individual shareholder can institute an action or enforce a remedy in court. These decisions include (Gombe, 1995) 402 SC; (Ejikeme, 1998) NWLR (Pt. 542) 456 C.A.; (Daily, 1998) (Pt. 580) 27 CA. This is a barrier to the enforcement of shareholder remedy in court and has exposed shareholder remedy as virtually worthless.

### 4.4. Enforcement of Remedies in Nigeria

The enforcement of remedies is one important aspect in corporate law. Accordingly, the judicial power is the power of the court to decide a matter between two parties and give effect to the judgement (Doma, 2016). Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 as amended (CFRN 1999) conferred judicial powers on the courts. The Federal High Court, the Court of Appeal and the Supreme Court of Nigeria are the most pertinent to this study. Section 251 of the CFRN 1999 confers exclusive jurisdiction on the Federal High Court on the administration of the provisions of CAMA 1990. Section 240 CFRN 1999 and section 233 CFRN 1999 vested the Court of Appeal and the Supreme Court with appellate jurisdiction to entertain appeals from the Federal High Court, in this regard. Accordingly, a party that seeks to invalidate a meeting under section 221(1) CAMA 1990 must prove to the court that he has suffered substantial injustice (Koh, 2012). It is one thing to have a law that provides for remedies and another thing to enforce the remedies. One of the respondents stated, “Enforceability of remedies in Nigeria is very difficult. Generally, in Nigeria, our court processes are very cumbersome and difficult to go by. As it is, I have not seen cases where shareholders went to court to seek their remedy” (Respondent 14, Interview, 2016). In this regard, the former Chief Judge of the High Court of the Federal Capital Territory at the occasion of 2009/2010 legal year, mentioned that there were 6109 ongoing cases while 9,038 ongoing cases as at 2010/2011 legal year. This is because the administration of justice in Nigeria is very complex and slow (Ladan, 2009). According to respondent 11, “The truth of the matter is that the enforceability aspect is not quite effective for obvious reasons which continue to be a challenge for all the companies. I think until when the law is amended enforceability would be quite low” (Respondent 11, Interview, 2016). There is a need for an alternative avenue that facilitates quick enforcement process.

#### 4.5. Shareholder Enlightenment

Shareholders being conscious and enlightened about their remedies is a key requirement to the effective exercise of remedies (Lombard and Joubert, 2014). All the respondents in this study believed that majority of the shareholders in Nigeria are not aware of their rights and remedies. Some of the excerpt from the interview is reported below. In his response, respondent 13 stated, "Shareholders should be enlightened first because it is only when shareholders know their rights then you talk about enforcing it" (Respondent 13, Interview, 2016). In support of this view, Respondent 1 argued, "Until shareholders are sensitised and know how to exercise their rights, enforcement would be a challenge. Until there is awareness, it will always be a business the way it used to be" (Respondent 1, Interview, 2016). The significance of shareholder enlightenment cannot be overemphasised. In the same vein, respondent 14 added, "Many of the shareholders are not enlightened to go to court and enforce their rights. It is only when shareholders are enlightened then you talk of going to court" (Respondent 14, Interview, 2016). In his view, respondent 15 argued, "There has not been a lot from members and this mainly due to their lack of knowledge on their rights and how to exercise them" (Respondent 15, Interview, 2016). Therefore, shareholder enlightenment should be the priority in the enforcement of remedies. In Malaysia for example, the Malaysian Code of Corporate Governance 2012 (MCCG 2012) tasks the management of the company to ensure that shareholder's right are protected. The management should engage shareholders in proactive ways to see that they informed about their rights. However, to ascertain the level of shareholder enlightenment in Malaysia and Nigeria, there is need to conduct an empirical study on that aspect.

#### 4.6. Role of the Regulators in the Enforcement of Shareholder Remedies

Section 7 of the CAMA 1990 established the Corporate Affairs Commission (CAC) as a body to regulate the activities of companies. One of its functions is to oversee the operation of the CAMA 1990 which by extension include making shareholders informed about their right and facilitating the enforcement of shareholder remedies. Similarly, the Securities and Exchange Commission (SEC) was established by the Investment and Securities Act 2007 to regulate the activities listed companies among other functions. Whether the CAC and SEC discharge the above functions is subject to examination. From the opinion of the respondents in this study, the majority of the respondents believed that the regulatory bodies are not doing well regarding shareholder enlightenment. From the excerpt, respondent 2 stated, "We have weak regulator infrastructure in Nigeria. The surveillance, monitoring, and the enforcement is zero because the shareholders are docile. If they are up and doing, they will task the regulatory agencies" (Respondent 2, Interview, 2016). Respondent 8 also believed, "The regulatory bodies are not doing enough. They are only concerned about how to raise money. They are expected to regulate, but now they are acting as government revenue collectors" (Respondent 8, Interview, 2016). This is alarming when regulators that are expected to educate shareholders instead gives priority on how to raise revenue. In a related view, respondent 10 added, "The regulators are not doing up to expectation" (Respondent 10, Interview, 2016). All the above views reaffirmed that corporate regulators are not doing well in educating shareholders about their rights in a company. In Malaysia for example, the Companies Commission established by the Companies Commission of Malaysia Act, 2001 and the Securities Commission established under the Securities Commission Act, 1993 are the main corporate regulators. The above regulators are trying their best to see that shareholders are enlightened.

### 5. Conclusion

The right of a shareholder to seek redress in the event of violation of his right is fundamental in corporate management (Fagan and Thompson, 2009). It is argued that liability for violation of laws should be borne personally by the director/officer concern (Nietsch, 2018). Seeking redress against the management aids transparency and gives hope to shareholders that violation of their right will not go unpunished. The CAMA 1990 made several provisions that empowered shareholders to seek for remedies in the event their rights are violated, particularly concerning their personal right to receive notice of meeting and exercise voting at the AGM. Although, violation of personal right as against corporate right only entitled the applicant (shareholder) to an injunction or declaration (section 300 CAMA 1990), in addition to penalty of fine which is N500.00. From the discussion in this study, this study argues that shareholders in Nigeria are put in a disadvantaged position regarding adequacy and enforcement of remedies. While the penalty of N500.00 is very insignificant, inconsequential and not in line with current realities, the enforcement of the remedies through courts in Nigeria is virtually ineffective. At the same time, shareholders lacked basic knowledge of their rights and remedies under the law. Given the above, there is a need for an upward review of the monetary fine under the CAMA 1990 to at least N500, 000. 00 which will be equivalent to about RM5,555 at the exchange rate of N90/RM1. Referring to section 335(1) CA 2016, a penalty of RM10, 000. 00 (equivalent to N900, 000.00) is imposed against the company for violating this right. At least the upward review of the fine under CAMA 1990 to reflect the current fines obtainable in other jurisdictions will be a great deal toward protecting shareholder rights. Moreover, it will serve a deterrent on the management/officers of the company. Similarly, there should be other alternatives that will facilitate speedy enforcement of shareholder remedies in Nigeria. It may be through the application of Alternative Dispute Resolution (ADR) as some jurisdictions applied ADR in corporate disputes (Delgado, 2017). Similarly, regulatory bodies must wake up to its responsibility regarding enlightenment of shareholders through organising workshops, seminars on shareholder right, remedies, and enforcement. This will help shareholder towards successful enforcement of their remedies and will protect shareholder rights against unnecessary violation by the management.

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