

# **NON-BINDING SHAREHOLDER RESOLUTIONS IN A COMPARATIVE PERSPECTIVE**

**M. Sadik Capa**

PhD candidate at the University of Marburg, Germany

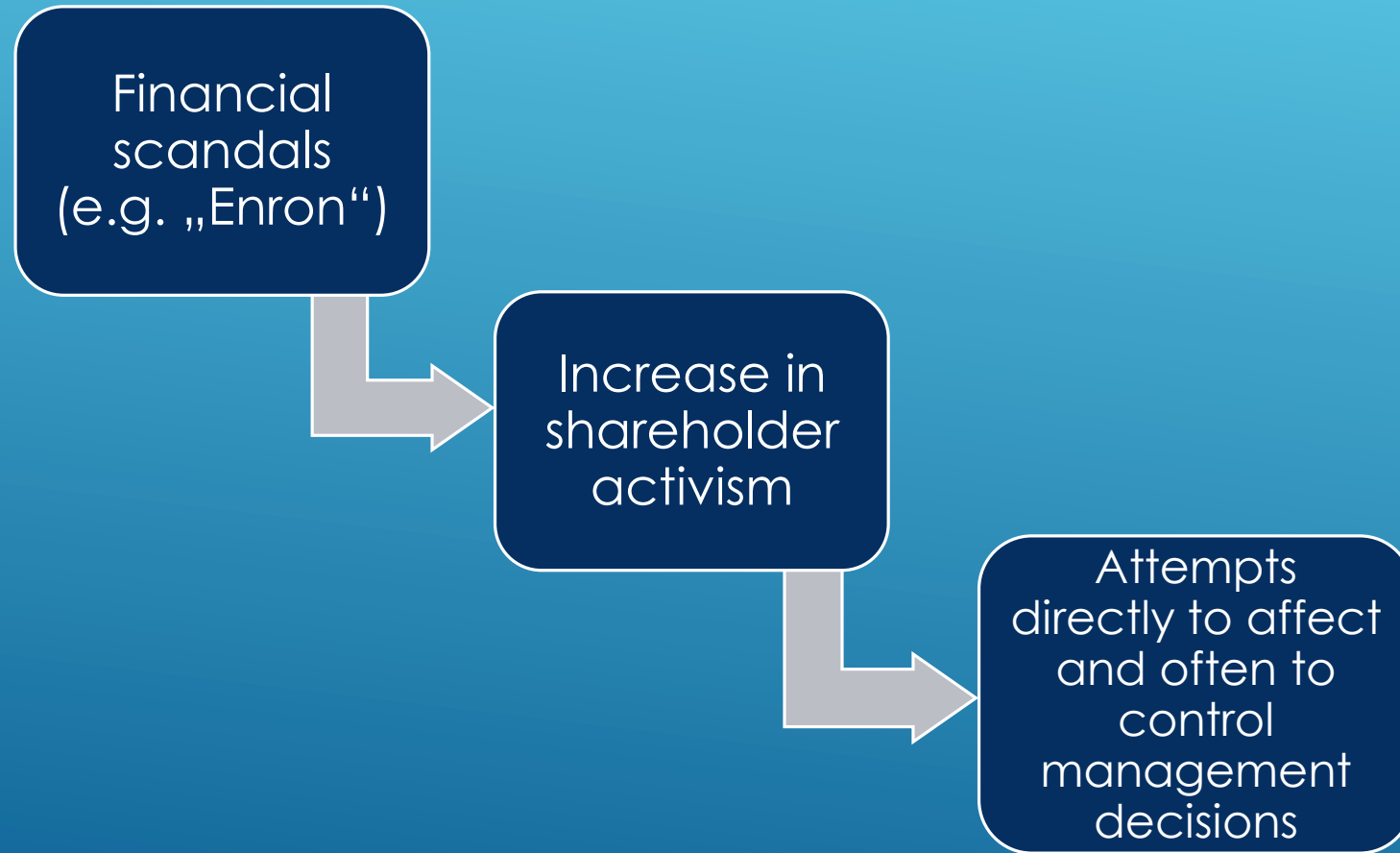
sadikcapa@gmail.com

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# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **Introduction**

## ...Introduction (1)



### ...Introduction (2)

- ▶ Non-binding shareholder resolutions are a form of shareholder activism and engagement.
- ▶ These resolutions have been an important part of activist campaigns in several cases. For example, investments in apartheid South Africa.

## ...Introduction (2)

### ► Overview

- I. Definition of Non-binding Shareholder Resolutions
- II. The Legal Nature of Non-binding Resolutions
- III. The Subject of Non-binding Resolutions
- IV. The Importance and Functions of Non-binding Resolutions
- V. Effects of Non-binding Resolutions
- VI. Shareholders' Duties by Non-binding Voting

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **I. Definition of Non-binding Shareholder Resolutions**

### ...Definition

- ▶ An advisory or a non-binding voting of the shareholders' meeting on different issues, but especially on business matters.
- ▶ Some shareholders like to be a part of business and influence the management.
- ▶ As the shareholders' meeting is not, as a rule, competent and also liable for the subject of this voting but nevertheless they resolve on it, such resolutions are called non-binding or advisory resolutions.

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **III. The Legal Nature of Non-binding Shareholder Resolutions**



### ...Legal Nature

- ▶ Controversy in the jurisprudence over the legal nature of non-binding shareholder resolutions:
  - Expression of opinion of some shareholders (-)
  - Just like the other resolutions of the shareholders' meeting (+)
- ▶ The main difference of non-binding voting from the conventional binding voting is that the non-binding voting does not determine the outcome.

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **III. The Subject of Non-binding Shareholder Resolutions**

## ...Subject (1)

- ▶ Every matter or issue a corporation deals with:
  - Business;
  - Management;
  - Corporate governance;
  - Corporate monitoring;
  - Corporate social liability; such as global warming, and human rights
- ▶ In the USA: human rights, labor relations, nuclear power etc.

## ...Subject (2)

- ▶ The latest example is the remuneration of the managers, so-called say-on-pay.



- ▶ The EU just adopted a new rule and wants Member States to ensure that the vote by the shareholders on the remuneration policy is binding.

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **IV. The Importance and Functions of Non-binding Shareholder Resolutions**

### ...Importance and Functions (1)

- ▶ Why should the shareholders' meeting come to a non-binding resolution on an issue it is not responsible for?
  - Shareholders are the residual claimants on the corporate assets;
  - Corporate governance;
  - Corporate social responsibility;
  - Shareholder activism;
  - Shareholder democracy;
  - Balance of power between management and shareholders.

### ...Importance and Functions (2)

- ▶ The EU wants to facilitate the involvement and engagement of shareholders in management and governance.
- ▶ The objective of the EU is enhancement of transparency, improvement of the corporate governance as well as facilitation of the shareholder engagement.
- ▶ Non-binding shareholder resolutions can make these purposes possible.

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **V. Effects of Non-binding Shareholder Resolutions**



### ...Effects

- ▶ The main difference of non-binding voting from the conventional binding voting mechanism is that the non-binding voting does not
  - determine outcome;
  - bind the management legally.
- ▶ However, a non-binding voting is able to influence the management factually.
- ▶ A non-binding resolution does not mean a ratification of the acts of the members of the management board.

# **NON-BINDING SHAREHOLDER RESOLUTIONS**

## **VI. Shareholders' Duties at the Non-binding Voting**

### ...Shareholders' Duties at the Non-binding Voting (1)

- ▶ Is there any duty or interest which shareholders obey or should/need to consider while a non-binding voting?
- ▶ The root-cause of this question: A non-binding shareholder resolution can also deal with a business matter.
  - ❖ *Duty of care?*
  - ❖ *Business/entrepreneurial discretion? Business judgement?*
  - ❖ *Commercial duty?*
  - ❖ *Voting in the best interests of the corporation?*

### ...Shareholders' Duties at the Non-binding Voting (2)

- ▶ It is questionable for all decisions or resolutions of the shareholders' meeting concerning business matters. For example, the law in many country requires shareholder approval if the entirety or an essential part of the asset of a corporation are sold: e.g.
  - *§ 271 of Delaware General Corporation Law;*
  - *§ 12.01 and § 12.02. of Model Business Corporation Act;*
  - *§ 179a of German Stock Corporation Act (Aktiengesetz) and so-called “Holzmüller Decision” of German Federal Court (BGHZ 83, 122).*
- ▶ In all these cases the decision or resolution of the shareholders' meeting is binding.

### ...Shareholders' Duties at the Non-binding Voting (3)

- ▶ Shareholders need to decide in the best interests of the corporation.
- ▶ It is not be possible to apply duty of care to the resolutions of the shareholders' meeting to the same extent.
- ▶ Thus, at least it should be possible to expect from shareholders to consider the best interests of the corporation and stakeholders.

# Conclusion



**Thank You For Your Kind Attention**

