

COMMENTARY

Darco Water: Chairman's dissenting opinion raises questions

Offer not fair and not reasonable, says IFA, and advises independent directors to recommend that shareholders reject it

By Mak Yuen Teen

ON June 23, the mandatory general offer (MGO) for Darco Water Technologies will close. The offeror is Wang Zhi, who is the non-executive deputy chairman of Darco. The MGO was triggered when Mr Wang bought a 14.27 per cent stake at S\$0.17 per share in May this year, bringing his total stake from 29.5 per cent to 43.8 per cent.

The independent financial adviser (IFA), RHT Capital, has issued an opinion that the offer is not fair and not reasonable, and has advised the independent directors (IDs) to recommend that shareholders reject the offer.

Darco has a board of seven directors. In addition to Mr Wang, there are executive chairman Wang Yaoyu; executive director (ED) and CEO Poh Kok Hong; and four other IDs, including a lead ID.

For the purpose of the MGO, the Securities Industry Council (SIC) has determined that all the directors other than Mr Wang are deemed to be independent and can participate in making the recommendation to shareholders.

In the highly controversial voluntary delisting of Vard Holdings in 2018, the CEO was deemed to be independent. This caused a great deal of consternation to minority shareholders, and rightly so in my view. The CEO has to work under the direction of a board that is essentially appointed by the controlling shareholder, so it is difficult to see how he or she can be in a position to express an independent opinion when the controlling shareholder (or anyone else for that matter) is making an offer.

We are now seeing a replay of this at Darco because both the executive chairman and the CEO have been deemed to be independent. But this case is even

more contentious. This is because, according to footnote 1 in the circular, the executive chairman Wang Yaoyu had a 36.32 per cent interest in the 14.27 per cent Darco stake that was sold to the offeror and that triggered the MGO.

In the case of an IFA, a financial connection with the offeror would result in the IFA being deemed non-independent. In this case, however, an executive chairman who clearly has a financial connection with the offeror through the sale of the stake is deemed independent. I find it very puzzling.

I would think that the determination of independence would be based on spirit and not just letter, but even if it is just letter I cannot see how Wang Yaoyu can be considered independent for the offer.

This has become an issue of practical importance in the case

of Darco. The independent directors concur with the IFA and recommend that shareholders reject the offer, take no action and let the offer lapse. The exception is Wang Yaoyu, who has dissented in the circular and recommended that shareholders accept the offer.

There is no intention to delist the company. There are several significant shareholders who are opposed to the offer. Wang Yaoyu's dissenting opinion may nudge other minority shareholders to accept. Once Mr Wang's stake crosses 50 per cent – and he is already very close – he will be able to pass all ordinary resolutions other than interested person transactions. This includes resolutions to elect or remove directors, including IDs.

If this transaction is discussed by the board, I believe Wang Yaoyu should be recusing himself given his financial connec-

tion with the offeror. This would be in the spirit of good corporate governance even if our rules do not require recusal.

While minority shareholders need to make their own decision as to whether to accept the offer, they should bear in mind that the IFA's opinion is that the offer is not fair and not reasonable and it has advised the IDs that they should recommend to shareholders to reject the offer. With regards to Wang Yaoyu's dissenting opinion, they should be aware of his connection with the offeror.

I would urge the SIC to consider clarifying the criteria for determining independence of directors for the purpose of the Singapore Code on Take-overs and Mergers, like it has done for the IFA.

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