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Corporate governance ranking improves for Singapore

But there's no place for complacency and it should consider incorporating director duties into listing rules and the law to enable SGX Regco and MAS to act against breaches of director duties. BY MAK YUEN TEEN

The report noted many areas of improvement in enforcement, including the potential increase in SGX Regco's enforcement powers that it proposed in an August 2020 consultation. BT FILE PHOTO

CORPORATE Singapore must be well pleased with the latest CG Watch 2020 released by the Asian Corporate Governance Association (ACGA) on May 20 titled *Future promise: Aligning governance and ESG in Asia*. Singapore is ranked joint second with Hong Kong, both behind Australia.

Encouragingly, the absolute score for Singapore increased from 59 in 2018 to 63.2, although it is still more than 10 points less than Australia's.

Some years ago, I described the biennial ACGA ranking as being like a contest to be the tallest dwarf, since even the top-ranked countries of Hong Kong and Singapore seemed to come up short. Then Australia joined the ranking and stood above all the other countries, including Hong Kong and Singapore.

The CG Watch report runs to more than 500 pages and is by far the most thorough assessment of corporate governance not only from a regional perspective – its sections on individual markets are full of detailed insights into each market.

Once every two years or so, I look forward to this comprehensive corporate governance health screening of individual markets in Asia, even though there are always areas where I would somewhat disagree with in the report.

The "future promise" subtitle of the latest report is apt for Singapore because there is always hope that things will be better. However, over the past 20 years, I have been disappointed with how Singapore has stagnated or even gone backwards in a number of areas.

In 2018, Singapore was described as a falling market but this time, as a rising one. It is difficult for me to see it as a rising market, since I feel that our market has been in the midst of a long death spiral in terms of market quality and corporate conduct. Complacency is certainly to be avoided.

COMPANIES AND INVESTORS MUST STEP UP

When it comes to individual categories, there was improvement across all of them, except the "listed companies" category has fallen from 63 to 60. I often hear from investors, consultants and directors about the poor culture and complacency of many companies here, so I would say this assessment is by no means harsh.

The "investors" category improved – but from an abysmal 32 to a still pathetic 39. The lack of local pension fund investors – a major source of domestic institutional activism and engagement in a number of other markets – coupled with lackadaisical local asset managers, is one reason why we fare badly in this area.

It gives me no joy to be mentioned in the report as a "maverick" who has helped Singapore from an even worse fate in this area, as I would rather see more concerted investor activism than be one of the lone voices.

REGULATORS PROMISING MORE

This time round, Singapore has fared particularly well on "regulation", which improved from 54 to 63, with the sub-categories of "funding, capacity, reform" improving from 48 to 56 and enforcement from 59 to 70.

Singapore is now ranked joint second for enforcement together with Taiwan but is still six points behind top-ranked Hong Kong. The report noted many areas of improvement in enforcement, including more detailed disclosure of enforcement activities by the Monetary Authority of Singapore (MAS); better enforcement outcomes by both MAS and Singapore Exchange (SGX); tougher stance taken by both MAS and SGX Regco on corporate conduct; the establishment of a whistleblowing office by SGX Regco; a significant increase in continuous disclosure queries by SGX Regco; and the potential increase in SGX Regco's enforcement powers that it proposed in an August 2020 consultation.

There is a bit of conflation between surveillance and enforcement, and promise and reality, in the report in my view. That being said, the report found that Singapore still comes up short on enforcement results, particularly with the Listings Disciplinary Committee (LDC) proving to be a bottleneck in enforcement actions.

SGX Regco's queries have become visibly better in some recent cases but I consider queries as part of SGX Regco's surveillance activities and not enforcement actions. As someone who reviews issuers' announcements and responses to queries on an almost daily basis, I have yet to observe consistently vigorous queries or follow-up enforcement actions.

SGX Regco and MAS are trying hard to improve enforcement outcomes but I am not surprised by the six-point deficit in enforcement compared to Hong Kong. In fact, I believe the current gap is wider. I am also surprised that Singapore is rated two points better than Australia when it comes to enforcement. In fact, I believe that when it comes to enforcement actions relating to listed issuers, even Malaysia (which has seen its enforcement score fall from 59 in 2018 to 54 this time around) is currently doing better than Singapore.

OTHER MARKETS FARE BETTER IN ENFORCEMENT OUTCOMES

It is true that when it comes to enforcement, the Australian Securities Exchange (ASX) has been rather toothless. ASX cannot even fine listed entities for breaching its listing rules. Until recently, its ultimate sanction was to suspend trading, terminate the listing or take legal action to obtain a court order requiring an entity to comply with the listing rules.

Where there is a significant contravention of the listing rules, or a significant contravention of the Corporations Act – such as a breach of the continuous disclosure requirement – ASX is required to notify the Australian Securities and Investments Commission (ASIC).

From late 2019, ASX grew sharper teeth when amendments to the listing rules allow it to request any information, document or explanation to be verified under oath.

This was supplemented by another listing rule amendment which gives ASX the power to censure listed companies that breach the listing rules or a condition imposed under the listing rules.

ASIC, despite being the target of periodic criticism Down Under for weak enforcement, has a relatively enviable record on enforcement and transparency of its actions compared to Singapore.

For example, every quarter it publishes the number of corporate governance enforcement actions both in terms of results and progress, broken down into auditor misconduct, liquidator misconduct, director misconduct, insolvency misconduct and other corporate governance misconduct.

For director misconduct, there have been more than 100 enforcement outcomes between 2012 and 2019. These outcomes are for listed and unlisted entities. It also gives a breakdown of type of sanction classified into criminal, civil, administrative, court-enforceable undertaking and negotiated outcome.

HONG KONG TAKES THE CROWN

In Hong Kong, the Securities and Futures Commission (SFC) is active in taking enforcement actions and is transparent about these actions. It publishes enforcement outcomes by quarters, classified into categories such as corporate disclosure and corporate misgovernance.

It also publishes statistics on ongoing and concluded enforcement proceedings by type of enforcement, such as prosecutions and civil proceedings.

Under section 214 of the Securities and Futures Ordinance, the SFC may apply for a court order restraining or requiring certain acts; ordering that the corporation bring an action against certain persons, or appoint a receiver or manager; and disqualifying a person from being a director, liquidator, receiver or manager or taking part directly or indirectly in the management of any corporation for up to 15 years.

The SFC can apply for such a court order under a wide range of circumstances and its powers under the section have been interpreted very broadly by the Hong Kong courts. This includes enabling the SFC to pursue actions that may involve a breach of director duties.

For instance, in October 2019, the SFC obtained disqualification orders against the former chairman and three former executive directors of a listed company called Inno-Tech Holdings, for a period of three years. The directors admitted that they were in breach of their duty to exercise due and reasonable skill, care and diligence by failing to carry out adequate investigation into or due diligence prior to the acquisition of the interests in three hotels, and to negotiate the consideration for these acquisitions.

This is even though the court accepted that there was no dishonesty, bad faith, illicit gain or conflict of interest involved.

Directors of SGX-listed companies failing to exercise due diligence in making acquisitions and investments sound all too familiar and I have not seen any action taken against them.

The Hong Kong Exchange (HKEX) also publishes enforcement statistics on a six-monthly basis. Between 2014 and 2020, it concluded 620 investigations. It gives an extensive breakdown regarding sanctions imposed, average time taken (which are consistently less than 10 months), the core themes of the investigations, and number of executive, non-executive and independent directors who have been sanctioned.

Of particular note is that the single most common theme is directors' duties, which have also been incorporated into the HK listing rules. It is also interesting that more than 400 directors have been sanctioned over the seven-year period, including more than 150 independent directors.

In comparison, Singapore fares poorly, with SGX having issued public reprimands involving 28 issuers over an 11-year period from April 2010 to April 2021, with just 65 directors and officers publicly reprimanded, including a mere nine independent directors in three issuers.

SGX Regco has recently provided more information on its website about notices of charges and cases heard by the disciplinary committee, which shows 15 notices of charges up to the previous financial year, with nine cases heard by the LDC in FY2021 and pending appeals.

Interestingly, all nine cases were heard in Q2 FY2021 (which is October to December 2020 since SGX has a June year-end), which would suggest that LDC may have finally received the memo to get its act together.

As an aside, I think it is less confusing if SGX Regco presents these statistics on a calendar year basis rather than follow the financial year of its parent.

MALAYSIA DESERVES BETTER

Malaysia has done quite well when it comes to enforcement for listed issuers, with Bursa Malaysia both publicly reprimanding and imposing fines on 179 directors between 2014 and 2020, and publicly reprimanding another 42 directors without a fine.

Among the four exchanges that I have discussed, Bursa Malaysia is the only one that has the power to impose fines on both issuers and directors. Over the last seven years, it has not fined any issuer because that would be penalising shareholders – but it has fined the 179 directors a total of RM32.4 million (S$10.4 million).

In July last year, new guidelines came into force in Malaysia enabling the Securities Commission Malaysia (SCM) to take action against directors for breach of fiduciary duties.

Prior to this, enforcement of director duties was under the sole purview of the Companies Commission of Malaysia and actions for breaches have been rare. This will no longer be the case and the SCM can now take action against directors who fail to act in the best interests of the company, and this includes failing to ensure that financial statements of publicly-listed companies are properly audited.

I have previously argued that with many listed companies here that are incorporated overseas – coupled with the paucity of action for breaches of director duties – Singapore should consider incorporating director duties into the listing rules and the Securities and Futures Act to enable both SGX Regco and MAS to take action for breaches of director duties.

Even though Singapore has been assessed to have improved considerably in enforcement in the latest CG Watch, there is certainly no place for complacency. Failure to deliver on the promise may well see Singapore tumbling in future rankings.

The writer is an associate professor of accounting at the NUS Business School where he specialises in corporate governance.

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