



Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

20 November 2013

SEC-OGC Opinion No. 13-11
Quorum; Election of Directors

MR. JAMES CU UNJIENG
Our Offices Building
157 EDSA, Mandaluyong City

Sir:

This refers to your letter dated 05 May 2011 presenting the following queries to the Commission:

- "1. For purpose of election of the Board of Directors, what constitutes a "QUORUM".
2. Legality of the Act of Hold-Over Directors appointing another director to fill-in vacancy caused by the resignation of a hold-over director."

You likewise mentioned that William Cu Unjieng previously asked these queries from Atty. Lucila De Casa, who is a Corporation Law author. Atty. De Casa rendered her opinion in a letter dated 25 March 2011.

Section 52 of the Corporation Code¹ provides the following:

"Section 52. Quorum in meetings. - Unless otherwise provided for in this Code or in the by-laws, a quorum shall consist of the stockholders representing a majority of the outstanding capital stock or a majority of the members in the case of non-stock corporations."

On the other hand, Section 24 of the Corporation Code provides the following:

"Section 24. Election of directors or trustees. - At all elections of directors or trustees, there must be present, either in person or by representative authorized to act by written proxy, the owners of a majority of the outstanding capital stock, or if there be no capital stock, a majority of the members entitled to vote. x x x In stock corporations, every stockholder entitled to vote shall have the right to vote in person or by proxy the number of shares of stock standing, at the time fixed in the by-laws, in his own name on the stock books of the corporation, or where the by-laws are silent, at the time of the election"

¹ Batas Pambansa 68 (1980).

To answer your first question of what constitutes a quorum for purposes of election of directors or trustees, we must look at Section 24 that requires presence in person or by proxy of "*the owners of a majority of the outstanding capital stock, or if there be no capital stock, a majority of the members entitled to vote.*" Section 24, not Section 52, of the Corporation Code governs because it is the provision made specifically applicable to quorum of election of directors/trustees.

The question now is whether or not the provision means majority of the outstanding capital stock entitled to vote, for stock corporations, and majority of members entitled to vote, for non-stock corporations, OR the majority of outstanding capital stock, for stock corporations, and majority of members entitled to vote, for non-stock corporations. To simplify, the question is whether or not the phrase "*entitled to vote*" should be applied to both the "*majority of outstanding capital stock*" in stock corporations and "*majority of the members*" of non-stock corporations, or only to the latter.

We agree with the opinion of Atty. De Casa that the phrase "entitled to vote" should be interpreted to apply to both stock and non-stock corporations.

If one uses the doctrine of last antecedent, that is, "restrict or modify only the words or phrases to which they are immediately associated"², it may indeed be argued that the phrase "entitled to vote" applies only to the members of non-stock corporations. However, it is also a well-settled principle in statutory construction that provisions that are apparently conflicting should be harmonized to give effect to the statute in its entirety.³

Section 6 of the Corporation Code provides that:

"Section 6. Classification of shares. - The shares of stock of stock corporations may be divided into classes or series of shares, or both, any of which classes or series of shares may have such rights, privileges or restrictions as may be stated in the articles of incorporation: Provided, That no share may be deprived of voting rights except those classified and issued as "preferred" or "redeemable" shares, unless otherwise provided in this Code: Provided, further, That there shall always be a class or series of shares which have complete voting rights.

x x x

Where the articles of incorporation provide for non-voting shares in the cases allowed by this Code, the holders of such shares shall nevertheless be entitled to vote on the following matters:

1. Amendment of the articles of incorporation;
2. Adoption and amendment of by-laws;

² R. Agpalo, STATUTORY CONSTRUCTION, 337 (6th ed., 2009).

³ *Id.* at p. 361, citing *People v. Jui Pio*, 102 Phil. 679 (1957).

3. Sale, lease, exchange, mortgage, pledge or other disposition of all or substantially all of the corporate property;
4. Incurring, creating or increasing bonded indebtedness;
5. Increase or decrease of capital stock;
6. Merger or consolidation of the corporation with another corporation or other corporations;
7. Investment of corporate funds in another corporation or business in accordance with this Code; and
8. Dissolution of the corporation.

Except as provided in the immediately preceding paragraph, the vote necessary to approve a particular corporate act as provided in this Code shall be deemed to refer only to stocks with voting rights.”

On the other hand, Section 137 defines the term “outstanding capital stock” to mean “the total shares issued under binding subscription agreements to subscribers or stockholders, whether or not fully or partially paid, except treasury shares.

It is only logical to reason out that for the special rule on quorum for election of officers (Section 24), the quorum is based on outstanding voting stocks. We agree that “to construe it to be applicable only to non-stock corporation is illogical and unreasonable if non-voting shares are also allowed to be represented and voted in the elections of directors.”⁴

Had it been the intention of the legislature to give non-voting shares the right to vote in the election of directors, it should have included this in the enumeration of voting rights given to non-voting shares as provided in Section 6, quoted above.

However, it is not entirely accurate to say that “*quorum shall consist of stockholders representing majority of the outstanding capital stock entitled to vote which will not include shares under litigation,*” as you have stated in your letter. While there is indeed a previous SEC opinion⁵ which stated that “shares of a deceased stockholder where the estate of the deceased is still undivided” are not allowed to be voted in the election of directors, this does not mean that *all* shares under litigation are disallowed to be voted in an election of directors. For example, stock owned by the estate of a decedent may be voted by the estate’s executor or administrator.

In *Paul Lee Tan, et al. vs. Paul Sycip, et al.*⁶, the Supreme Court said:

⁴ Letter of Atty. Lucila M. De Casa, p. 2.

⁵ SEC opinion addressed to Ms. Noemi Cruz, dated 21 September 2001.

⁶ G.R. No. 153468, 17 August 2006.

"In stock corporations, shareholders may generally transfer their shares. Thus, on the death of a shareholder, the executor or administrator duly appointed by the Court is vested with the legal title to the stock and entitled to vote it. Until a settlement and division of the estate is affected, the stocks of the decedent are held by the administrator or executor."⁷

The situation contemplated in *Paul Lee Tan, et al. vs. Paul Sycip, et al.* is where there is already an administrator or executor of the decedent's estate. If no one is appointed, there is no one allowed to vote the shares.

For other cases, however, where the shares are the subject of litigation, it does not necessarily mean that these shares cannot be voted. If there is a dispute as to who owns certain shares, and thus who has the right to vote those shares, the general rule is that "the registered owner of the shares of a corporation exercises the right and the privilege of voting."⁸

The Supreme Court has said in the case of *Batangas Laguna Tayabas Bus Company, Inc. vs. Bitanga* that:

"Indeed, until registration is accomplished, the transfer, though valid between the parties, cannot be effective as against the corporation. Thus, the unrecorded transferee, the Bitanga group in this case, cannot vote nor be voted for. The purpose of registration, therefore, is two-fold: to enable the transferee to exercise all the rights of a stockholder, including the right to vote and to be voted for, and to inform the corporation of any change in share ownership so that it can ascertain the persons entitled to the rights and subject to the liabilities of a stockholder. Until challenged in a proper proceeding, a stockholder of record has a right to participate in any meeting; his vote can be properly counted to determine whether a stockholders' resolution was approved, despite the claim of the alleged transferee. On the other hand, a person who has purchased stock, and who desires to be recognized as a stockholder for the purpose of voting, must secure such a standing by having the transfer recorded on the corporate books. Until the transfer is registered, the transferee is not a stockholder but an outsider."⁹

We now come to the second issue presented in your letter, that is, the legality of the act of hold-over directors appointing another director to fill a vacancy caused by the resignation of a hold-over director.

The hold-over principle is derived from Section 23 of the Corporation Code, providing that the board of directors or trustees shall **hold office for one year and until their successors are elected and qualified.**

⁷ Op, cit., citing SEC Letter-Opinion to Ms. Rosevelinda E. Calingasan, et al., (R. Lopez) May 14, 1993; Corporation Code, Sec. 55.

⁸ Republic of the Philippines vs. COCOFED, et al. G.R. No. 147062-64, 14 December 2001, citing Section 24 of the Corporation Code.

⁹ G.R. Nos. 137934 & 137936, 10 August 2001.

While acting as directors in a hold-over capacity is not legally infirm, the act of the hold-over directors of appointing someone to fill the position left by another hold-over director is a different matter. We opine that this act is not valid. Section 29 of the Corporation Code states that:

“Any vacancy occurring in the board of directors or trustees other than by removal by the stockholders or members or by expiration of term, may be filled by the vote of at least a majority of the remaining directors or trustees, if still constituting a quorum; otherwise, said **vacancies must be filled by the stockholders in a regular or special meeting called for that purpose.** A director or trustee so elected to fill a vacancy shall be elected only or the unexpired term of his predecessor in office.”

In the case of *Valle Verde Country Club, Inc., et al. vs. Victor Africa*¹⁰, where the issue was “*whether the remaining directors of the corporation’s Board, still constituting a quorum, can elect another director to fill in a vacancy caused by the resignation of a hold-over director*”, the Supreme Court ruled that in a situation where directors/trustees are acting on a hold-over capacity, there are actually vacancies caused by expiration of terms, and the resignation of a hold-over director/trustee cannot change the nature of the vacancy. Hence, a vacancy caused by resignation of a hold-over director/trustee cannot be filled by the vote of the directors/trustees, but rather, by the vote of stockholders/members in a regular or special meeting called for the purpose, as it is provided in Section 29 of the Corporation Code.

Lastly, you have stated that Kenram Phils., Inc., of which you are a stockholder, has not conducted the election of its Board of Directors for more than three years, and that there have been several failed attempts to obtain the required quorum for stockholders to conduct an election. Thus, you have requested the intervention of the Commission to remedy the situation.

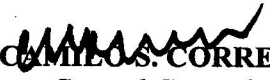
Please be advised that the Commission cannot intervene to remedy this situation. It may ripen into an intra-corporate controversy if the required quorum in the election of the Board of Directors of Kenram Phils., Inc. needs to be determined. Moreover, the conduct of an election is likewise an intra-corporate matter. Originally, the Commission had the power to resolve intra-corporate controversies but such power has been transferred to the regular courts on 8 August 2000 under Section 5.2 of the Securities Regulation Code (SRC). It is a matter that can only be resolved by the Regional Trial Court (RTC), acting as a commercial court, and not by Commission. That being the case you may opt to initiate the proper action before the appropriate RTC.

This Opinion is based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the

¹⁰ G.R. No. 151969, 04 September 2009.

Commission in other cases or upon the courts. If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.


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