

The Trajectory of American Corporate Governance: Shareholder Power

Session III – Firms: Shareholder Activism

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- › Shareholder power, rights and activism - enormous current interest, including India.
- › Attitudes to shareholder participation in corporate governance – eg UK and India *cf* US.
- › Trajectory of US corporate governance and legal history.



Shareholder Image, Power and Corporate Regulation

- › Different images of the shareholder across time and jurisdictions.
- › Power and shareholder image.
- › Economic and legal power – theoretically distinct, but interrelated.
- › The regulatory spectrum:-
- › ‘Regulatory strategies’ (protection) versus ‘governance strategies (participation) (Armour et al, *The Anatomy of Corporate Law* (2nd ed, 2009)).
- › Shareholder empowerment - context-specific (Lan & Varottil 2015; Kim 2015).

The Rise of Agency Capitalism

- › Major shift in profile of shareholders.
- › Institutional investors now hold over 70% of shares in top 1,000 US companies (Thompson 2015; Conference Board 2014).
- › In the UK, financial institutional investors (approximately half of which are non-UK institutions) now hold almost 90% of listed UK equities (Davies 2015).
- › ‘Agency capitalism’ (Gilson & Gordon 2015) – ‘sophisticated but reticent’ institutions.

Opposing Images of Shareholders in the Post- Financial Crisis Era

Since the global financial crisis, there have been two diametrically opposed images of institutional investors:-

- Image of quasi-regulator/ governance steward (eg UK Stewardship Code; Japanese Stewardship Code; EU Shareholder Rights Directive); SEBI – mutual funds (2010) (accords with Gilson/Gordon view);
- Predatory image - disloyal agent to ultimate beneficiaries (Mitchell 2009; Strine 2015).

Divergent regulatory implications re shareholder rights.

Shift from protecting shareholders to protecting the corporation *from* shareholders? (Lipton 2015)

Recent US Developments – Proxy Access and Self-Help by Shareholders

- › Proxy access and the shareholder empowerment debate.
- › Dodd-Frank Act of 2010 and *Business Roundtable v SEC* (2011).
- › Current self-help/ private ordering by institutional investors eg:-

Proxy access – By the end of 2015, a total of 80 US corporations had adopted proxy access rules & by mid-2016, figure had risen to 240 (39% of all S&P companies).

Other changes to governance rights– eg S&P 500 companies
- >80% have majority voting requirements; 60% permit shareholders to call special meetings; <7% have staggered boards. Impact of globalization of investment?

Private Ordering Combat – The Whole Foods Saga

- › Bank of America, Citigroup and General Electric *cf* the Whole Foods saga (*SEC Act* Rule 14(a)-8(i)(9)).
- › Whole Foods – modern governance example of Eisenberg’s concept of “impoverished consent” (Eisenberg 1989).
- › The continuation of private ordering combat in 2016 – H&R Block and Microsoft (*SEC Act* Rule 14(a)-8(i)(10)).

Has There Been a Sea-Change in US Corporate Governance? Martin Lipton as Bellwether

- › 2015 shift from ‘take no prisoners’ approach:-
- › ‘Triam Fund Management and its founder, Nelson Peltz, have clearly established credibility and acceptability...They have become respected members of the financial community’.
- › ‘In most cases a corporation will be well-advised to meet with the activist and discuss the activist’s criticisms and proposals’.
- › ‘Major institutional investors like Blackrock and Vanguard want direct contact with the independent directors of a corporation’.
- › ‘Sophisticated, but reticent’ institutional investors as the new swing voters of the corporate world.



- › Is it even appropriate to call current US shareholder private ordering ‘activism’?
- › Controversial shareholder rights in US are available to shareholders in many other common law jurisdictions + UK Stewardship Code 2012.
- › What explains this divergence?
- › Different organizational starting points and trajectories of US and UK law – chartered corporations *versus* unincorporated joint stock companies – reflected in terminology.
- › Trajectory of corporate law in US *cf* UK and how it affected shareholder protection vs participation rights.