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.
Different images of the shareholder across time and jurisdictions.

Power and shareholder image.

Economic and legal power – theoretically distinct, but interrelated.

The regulatory spectrum:-


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

- **Image of quasi-regulator/governance steward** (e.g., 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.


- 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?
› 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:-

› ‘Trian 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.