

"Beyond the myth of Anglo-American corporate governance"

Senate Banking Committee Hearing Room, Washington DC

Tuesday 6th December 2005

Summary – Christopher Beale, Chairman Institute of Directors

Good evening everyone. I'm not certain whether you use the expression on this side of the Atlantic – but I truly have the "graveyard slot"!

All those speaking before me have at least had the advantage of a prepared address – but not I, who by the very nature of this summary session, has had to prepare "on the hoof", conscious of an erudite and informed audience. At least I have some twenty pages of notes from which to draw my comments ...

You may think, quite rightly, that the Corporate Governance debate has been going on for a long time. It has – but perhaps even further than you've imagined. Let me take you back – nine years before the Delaware Constitution of which we heard earlier this morning.

Edward, Lord Thurlow was an English Jurist who became Lord Chancellor in 1778, serving for rather longer than many of his successors. He was also an unlikely, but perhaps one of the very first, contributors to the Corporate Governance debate. Here was his view :

"Corporations have neither bodies to be punished, nor souls to be condemned. They therefore do as they like ..."

Two hundred and twenty-seven years later – some might still agree!

So to today and the last ten hours. Perhaps I can begin, mindful of Ken Lever's comments this afternoon, by quoting a news item from the business pages of the UK Daily Telegraph last month. It suggested that many Boards are "struggling" to focus on business priorities in the face of diversions from scandals on the one hand and ever present short termism on the other. Arguably, the research had a limited base – only forty Directors, but the message was constant and suggested that more and more time and more and more money is devoted to "keeping investors happy", at the expense of maintaining the strategic momentum of their businesses.

This reflects much of that which Bob Herz has just said and certainly, some of us arrived here with a few preconceptions, many of which have been happily dispelled by what we have seen and heard.

On our side of the Atlantic, I hope we may be forgiven fears of a growing trend for the dominance of the US to drive all else from its path. Certainly, there have been

signs at EU level of a tendency to bow before the might of the US in governance terms, often based on the view that the UK is similar in law and practice to the US. We know that Commission proposals on audit committees in the Eighth Directive on accounting had Sarbanes–Oxley as a driver. But in essence, we believe there must be a strong stand for best practice – not for dominant investor practice.

In fact, I have seen no sign today of any such dominance – far from it. The addresses we have heard and discussions in which we have participated have reflected a genuine desire to take the best from each system. Speaker after speaker has acknowledged the complexity of US standards and the desire for their simplification. Again – following the comments of Bob Herz and Tony Cope, the conclusion has been one of necessary adaptation.

Moving to Convergence – have we presupposed that this is a good thing? My view, for what it's worth, is that the jury very much remains out from today's deliberations. We have recognised the main objectives of convergence – to reduce complexity and confusion; to stimulate the creation of internal markets – but in any case, the US began this process in the 1930's as Don reminded us, with the Securities Act and creation of the SEC. The US did not however interfere with State company law and in a sense, the EU is subject to some of the same pressures, but also to more extensive ones as the EU is fundamentally averse to any competitive advantages between Member States. So initiatives are primarily promoted for company administration and not for healthy competition.

That's our problem with convergence, but one might take heart from Pierre's comments on "extension" of our own "comply and explain" principle.

And as for the differences, I tend to go along with the thought that "differences should be regarded as the grit in the oyster of corporate governance ..."

Remember Commissioner Glassman's opening address and her conviction that the role of regulation should not interfere with market forces. And that thought finds further echo in Paul's comments on the highly visible and rapid growth of private equity.

Two personal observations. Firstly, today has confirmed my conviction of major differences in our respective Board structures and make up. We have had more than a few implied references to nepotism, to the US version of the "old boys network" – and also to Larry's apposite reference to the "I-centric not we-centric" authoritarian.

Not so long ago we heard of US research suggesting average age on US Boards well over seventy – and average tenure of twenty years or more. Wearing my executive search hat – yes, we still have a few companies characterised by a dominant and authoritarian Chairman and Chief Executive rolled into one, but for the great mass of UK business, those days are long, long gone.

The second observation is to my mind a lot more important, in that it refers to an important and surprising omission. Although we have spent a great deal of time discussing the structure and operation of Boards, and in comparing our respective practice, there has been little or no – and I think no, reference to the whole area of Board appraisal. The concept – far from new, received a great deal of extra impetus from the Higgs Review – and perhaps not unexpectedly, the message of appraisal to the Chairman and the CEO down, didn't always fall on fertile ground.

But a lot has happened in the last few years and a great many – a vast majority, of UK quoted companies, undertake such assessment, to which they make reference in their Annual Reports. My view is that there are too many where the exercise has been undertaken by the Chairman and the Company Secretary – in-house. One would prefer, much prefer, that Board appraisal is undertaken by a truly independent assessor. But I am not complaining and at least what we have now is a start.

Personally, I can only recommend the process to you – having recently been through it myself in a great deal of detail – and that of course included an assessment of me as Chairman, of each of our non executive Directors, who had a private – one on one, session with the external assessor and at the end of the exercise, a one on one with me. Those sessions proved quite invaluable. With the best will in the world, people are prepared to say things in such circumstances that they may not choose to say in open forum at the Board. The result – a host of wholly positive comments, observations and suggestions upon which we are now working and which will ultimately lead to improved Board operation. Which – after all, is what it's all about in the first place.

What thoughts do we take away from today? In no particular order :

1. David Jackson's point – in the need for an holistic approach to the role of the Board and to its committees.
2. The disappearance – happily, within the context of my earlier comments, of the “imperial Chairman and Chief Executive Officer”.
3. The investors view set out by Tony and Mark – enormously encouraging, in a clear desire to engage in the fullest sense and to acknowledge that both sides, investor and investee, need to exercise their respective obligations.

But – I know too well that some members of our Government, and the vast majority of our Government backbenchers would be nothing less than apoplectic at the suggestion, which we have no option but fully to support, that “the interests of customers, suppliers and employees are a means to an end, not an end in itself”.

I'm afraid there is an alternative agenda from those less aware of what constitutes wealth creation for the benefit of our society as a whole.

4. Independent Chairman or not? Today seems inconclusive as there is no apparent difference in share price value.
5. A key change taking place in the US with the entry of "lead Directors", which has brought about far more questioning of CEO's. And that in turn means that CEO's have become much more reactive with their own Boards.
6. The Nomination Committee – more power, more guts in the proper selection of Board members. Goodbye to the nephew, the family appointments – and to the golf course ...!
7. David Jackson again, in the need for support to and resources for Board members. David's comments struck an immediate chord with me in the experience of a senior lady non executive Director who spoke to me not so long ago. She sat on two Boards. The first could not have been more helpful and more open. The CEO had said quite categorically that all doors would be open and all information would be available to her – otherwise how could she possibly fulfil her responsibilities. The other Board provided the complete antithesis – nothing. Complete lack of support and a level of condescension that suggested it was her responsibility to "earn" the right to information and to access. How sad.
8. An acknowledged need in the UK to tighten up on areas of "business judgement", where one finds greater clarity in the US. Much stems from the fact that the Director's duty of care has been a common law duty, the details of which have never been enshrined in legislation. The Company Law Reform Bill currently before our Parliament now seeks to codify the general duty of care. So perhaps we will see that tightening up in due course.
9. A recognition that the press is becoming far more knowledgeable about the corporate world. In itself – no bad thing, but a clear warning and a message to corporate US and corporate UK for absolute professionalism in communications terms and a need to avoid, at all costs, "trial by press", conscious of the potentially disastrous impact on share value when one gets it wrong.

And finally – a couple of points firmly in the shareholder arena :

10. The effect of the advisory vote on Director's compensation and
11. a need for the US to address Alyssa's contention of the "toothlessness" of US legislation, given the inability of shareholders to vote on individual Directors

in the way that they are able to on our side of the Atlantic. A point well followed up by Paul in the last session.

So, at the end of a long day, I know you will acknowledge the sheer impossibility of covering every single aspect that we have explored – and explored in a great deal of detail. We take from our discussion the conviction that dialogue remains key, but corporate governance was, is and always will be, a means to an end – not governance for governance sake.

And remember this morning reference to corporate governance and its dangers as a “lush creation” and a “great opportunity for corporate governance people ...!”

In closing, let us acknowledge that good governance remains at the heart of the system upon which all modern economies now run. Capitalism has its faults, but it’s the only proven system of wealth creation and economic development – a system that is open and fair.

Its all too tempting to reach for the statute book when there is a disaster – the “something must be done” outcry. It’s not the right response and it’s rather as if every time one passes a traffic accident, one calls for a rewriting of the Highway Code – when the real cause is bad driving.

We know the way we would like the world to be, but we cannot legislate for a perfect world anymore than we can wish it about.

Thank you.

Christopher Beale