THE ROLE OF SPECIALIZED COURTS IN RESOLVING CORPORATE GOVERNANCE DISPUTES IN THE UNITED STATES AND IN THE EU: An American Judge's Perspective

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I. INTRODUCTION

I am greatly honored to be invited to speak at this important conference on corporate governance dispute resolution, co-sponsored by the OECD, the Stockholm Centre for Commercial Law, and the Government of Japan. To be included in this highly distinguished international group of policymakers, scholars, lawyers and judges is especially flattering.

I have been asked to speak on the role of specialized courts in resolving corporate governance-related disputes. In the interest of candor, I should disclose to you at the outset what expertise I do—and do not—bring to the table on this subject. Before my appointment to the Delaware Supreme Court, where I have served for almost three years, I served for eighteen years as a Vice Chancellor on the Delaware Court of Chancery, a specialized court with an expertise in corporate and business law matters, including issues involving corporate governance. I also have taught, and currently lecture, on corporate governance matters at various law schools in my own country.

From that somewhat narrow platform, I have been able to develop with modest confidence a few insights into this subject, at least as far as the American experience is concerned. But, what insights that experience may offer those of you who are pondering whether specialized courts are a useful tool to resolve corporate governance-related disputes in the EU, is a topic on which I can speak with

somewhat less confidence. Indeed, on that important question, I view myself as more of a student than a professor, but for what they may be worth, I will share my views on that issue as well.

In the few minutes allotted to me, what I propose to do is discuss three related topics. First, I start with the historical experience of the Delaware courts in the area of corporate governance. That experience shows, I submit, that specialized courts have proved themselves capable of influencing the direction of corporate governance in the United States, although such courts are not the only or even the most important factor in shaping that highly complex enterprise. Second, I turn to the EU, and discuss one of its premier specialized courts that has come to influence corporate governance on a national level: the Enterprise Chamber of the Amsterdam Court of Appeals. Third, and finally, I ask whether the success of the Delaware and Dutch experience might prompt other EU member nations to create their own indigenous tribunals that specialize in corporate governance-related disputes, and conclude with some speculations about the prospects of that happening on the supranational EU level.

II. THE AMERICAN EXPERIENCE: THE DELAWARE COURT OF CHANCERY

The experience with which I am most knowledgeable is that of American business courts. Viewed from a nationwide perspective, even that experience base is relatively thin, because to date only a handful of American States have

established courts that specialize in business and corporate related matters. Except for Delaware, these courts are administratively created, specialized divisions of already-existing courts of general jurisdiction, which must be distinguished from independent courts of specialized jurisdiction.[1] The few States that have created specialized business courts did so because their business communities were dissatisfied by the inability of their local courts of general jurisdiction to resolve business disputes in an expeditious manner, due largely to those courts' large backlogs of criminal and other non-business cases. I am informed that in some of those states the specialized courts have performed quite satisfactorily, but not in all. In all those communities, though, the judges of those specialized courts have been afforded the opportunity to develop expertise in business and corporate governance issues, and to create processes for resolving complex business disputes more quickly and knowledgeably.

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[1] In New York, for example, the Chief Judge of New York's highest court, the Court of Appeals, created a Commercial Division of the New York Supreme Court, which is New York's trial court of general jurisdiction. New Jersey assigns to its Chancery Division cases that are denominated as "complex litigation." North Carolina has created a Business Court for complex business cases, whose presiding judge is a separate Superior Court Judge. Maryland has created a Business and Technology Court Management Program, to which currently sitting trial judges are specially assigned. Massachusetts has created a Business Litigation Session of the Massachusetts Superior Court, which hears complex commercial and business cases including cases involving governance issues. *Business and Technology Courts: A Survey of Existing State Business and Technology Courts*, University of Maryland School of Law (March 2005), available at http://www.law.umaryland.edu.journal.jbtl/documents/bus_tech_courts.doc; see Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 Wm. Mitchell L. Rev. 315 (1998); Report of ABA Ad Hoc Committee on Business Courts, *Business Courts: Toward A More Efficient Judiciary*, 52 Bus. Lwyr. 949 (May 1992).

You should be aware that many American states have declined to create business courts, primarily for two reasons. First, specialized courts are perceived as elitist, *i.e.*, as affording superior justice to business than to ordinary individual citizens. Second, it was feared that specialized courts would further burden the budget of state governments that are experiencing significant financial crises. Because all but one of the specialized business courts are relatively new, and because their jurisdiction encompasses more than corporate governance matters, the data is insufficient, as least as far as those courts are concerned, to generalize broadly about the impact of specialized courts upon corporate governance in America nationally. Indeed, the only specialized court whose experience is extensive enough to be reliable is the Delaware Court of Chancery. That court, ironically, was created over 200 years ago not as a business court, but as a traditional, constitutionally separate court of equity in what was then a small rural state. Only during the 20th century did that court develop an expertise in business and corporate law matters, including governance issues. That was not because any formal decision was made to specialize, but rather because of the convergence of two circumstances: (1) a very significant number of public U.S. companies (over half of the NYSE-listed and of the Fortune 500 companies) were and still are incorporated in Delaware, and hence are subject to the application of Delaware

law, and (2) over time the Delaware Court of Chancery came to be the tribunal of choice for resolving intra-corporate disputes in those public companies.[2]

Underlying the first of these circumstances is the critical fact that almost all U.S. courts observe the internal affairs doctrine, which requires that the law of the state where the company is incorporated be applied to resolve internal governance disputes. I am aware that in the EU that is not necessarily the case: some member states apply their equivalent of the American internal affairs doctrine, but other states apply the "real seat" doctrine, under which corporations whose activities are centered in a member state are subject to the laws of that state, even if the company is incorporated elsewhere.[3] In my country, however, because of the internal affairs doctrine, governance disputes involving Delaware corporations are governed by Delaware corporate and fiduciary law. Over time, each Delaware court decision in that area becomes a part of what is now the most developed body of corporate and business law precedent in the United States. Because over half of the major public companies are incorporated in Delaware but do business nationally and in many cases multinationally, the effect of Delaware court precedents extends far beyond the borders of that state. For these reasons, in the area of corporate and business

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[2] 52 Bus. Lwyr. at 956.

[3] Joseph A. McCahery and Erik P.M. Vermeuien, *The Changing Landscape of EU Company Law*, TILEC Discussion Paper DP2004-023(2004), at 9 (available at http://www.tilburguniversity.nl/tilec/publications/discussionpapers/2004-023.pdf) (cited herein as "McCahery and Vermeuien").

law, the Delaware Court of Chancery, and the Delaware Supreme Court (which is the appellate court that reviews Chancery decisions) became influential in developing corporate governance law not only in Delaware, but also in other American jurisdictions whose courts have chosen to follow Delaware case law in resolving governance disputes in companies incorporated in those states.

I recite this as background solely to make a single point, which is that the decisions of Delaware's Court of Chancery and the Delaware Supreme Court in resolving corporate governance disputes, have been influential in shaping the development of corporate governance law and policy in my country. The evidentiary support for that proposition may be found in some of the more important Delaware cases decided over the past two decades, and the impact those cases have had on corporate practices outside the courtroom.

One of the more controversial Delaware governance cases was the 1985 Delaware Supreme Court decision in *Smith v. Van Gorkom.*[4] There, the board of a publicly held Delaware corporation was found liable for money damages for approving a sale of their company, which was arranged by the CEO without board knowledge or authorization, at a price that was never negotiated or validated by a reliable financial valuation of the company. The board approved the acquisition at a short meeting at which no documents were provided to the directors, and at

[4] 488 A.2d 858 (Del. 1985).

which the directors made no critical inquiry about the merits of the transaction, relying instead upon a brief oral presentation by the CEO. The Supreme Court held the directors liable for breaching their fiduciary duty of care.

Van Gorkom sent shock waves throughout the American corporate community, and profoundly affected American corporate governance practices. At that point in time, corporate boards were regarded as essentially passive advisors, with the CEO being completely dominant and the board having no prescribed role other than to give advice when asked and to approve executive proposals when made. *Van Gorkom* changed the corporate culture of American public company boards, by sending a strong message that corporate boards, including non-employee, outside directors, had an affirmative duty to be skeptical, to act with due care, and to make an careful, informed decision, independent of management, that any transaction to which they commit their company, is in the best interests of the company and its stockholders.

A later, similarly influential, case was the 1996 *Caremark*[5] decision, in which the Delaware Court of Chancery announced that Delaware corporate boards must exercise their duty of care not only in making decisions affecting the corporation, but also in overseeing decisions made by management. *Caremark* was a settlement of a derivative action brought against the board of a public

[5] *In re Caremark Intern., Inc. Derivative Litigation*, 658 A.2d 959 (Del. Ch. 1996).

company. A multimillion dollar criminal fine had been assessed against the company for violating certain federal laws, and a derivative suit on behalf of the company was brought against the directors for damages. The claim was that the directors failed to exercise proper oversight over management, and had they done so, management's illegal behavior would have been uncovered in a timely way. The Chancellor held that although corporate boards are not required to micromanage decisions made by corporate managers, they must attempt in good faith to implement a system that will keep the directors informed about whether management's decisions and practices are in compliance with the laws—criminal and civil—that regulate the company's business.

Caremark, like *Van Gorkom,* also profoundly affected the governance of American corporations far beyond the borders of Delaware. Almost immediately after *Caremark* was decided, many public companies began taking steps, including hiring expert consultants, to institute compliance systems to assure that their boards would be properly informed about the risks created by their managements' decisions in running the business. So pervasive was this reaction that many large American law firms developed subspecialties in this field. Six years later, the *Caremark* doctrine became part of federal law in the Sarbanes-Oxley Act of 2002, which was enacted in response to the recent scandals involving companies such as Enron, Global Crossing, and Worldcom. Sarbanes Oxley requires (among other

things) that companies covered by the Act must put in place risk management systems, and that the CEO must publicly certify whether those control systems are properly functioning and if not, why not. Thus, the board's duty of oversight, first recognized in the *Caremark* case, has now become a permanent statutory fixture in the American corporate governance landscape.

Perhaps the most publicized area of corporate governance shaped by Delaware decisions has been the area of corporate takeovers. In the U.S., it was the Delaware courts that first developed the legal standards that dictate what corporate boards can and cannot do in response to a hostile bid for control. Until the mid-1980s, those standards were not well developed in our law. To fill that gap, the Delaware courts developed new standards in a series of decisions, including *Unocal*,[6] *Revlon*,[7] and its progeny,[8] including *Macmillan*.[9] The doctrine announced in those cases has been adopted by courts of many other States, and have been followed even by boards of many companies that are not incorporated in Delaware. It is noteworthy that in 2005, a significant body of the Delaware jurisprudence governing what corporate directors may permissibly do to take defensive measures against a hostile takeover bid, was adopted by the Japanese

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[6] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[7] *MacAndrews & Forbes v. Revlon, Inc.*, 506 A.2d 173 (Del. 1986).

[8] *QVC Network v. Paramount Communications, Inc.*, 637 A.2d 34 (Del. 1994).

[9] *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988).

Ministry of Justice and the Japanese Ministry of Economy, Trade and Industry, in fashioning Takeover Guidelines for corporations in Japan, where hostile takeovers have recently become a phenomenon.

For those of you who may not be familiar with the Delaware takeover jurisprudence, in *Unocal*, the Delaware Supreme Court held that a target company board may lawfully oppose a hostile takeover bid, but only if the board concludes in good faith and after a reasonable investigation that the hostile bid poses a threat to corporate interests and policy, and only if the board implements defensive measures that are not disproportionate to the threat. In *Revlon* and its progeny, the Delaware Supreme Court held that once a target company board commits the company to a sale or a change of control transaction, the board's duty is to obtain the maximum available value for the shareholders, and not to interpose any obstacles to their receiving that value, even if the result is that the company is sold to a bidder the directors personally oppose. In the *MacMillan Publishing* takeover case, which involved the target company board resisting a takeover attempt by Sir Robert Maxwell, the Delaware Supreme Court held that in conducting an auction to sell the company for the highest available value, the board had a fiduciary duty to oversee actively the fairness of that auction—a duty that the MacMillan board was found to have violated by abdicating that responsibility to a senior officer whose personal interests were in conflict with that objective.

The corporate governance jurisprudence of the Delaware courts continues both to evolve and to be an important factor in shaping American corporate governance practices. I briefly mention three more recent examples: the *Hollinger International,*[10] *Walt Disney Company,*[11] and *News Corporation*[12] cases.

Hollinger involved a dispute between Hollinger International ("Hollinger") and its ultimate controlling stockholder, Lord Conrad Black. The Company owned, among other things, *The London Daily Telegraph* and *The Jerusalem Post.* The dispute concerned over who—the Company's board or Lord Black—would control Hollinger and the opportunity to sell one of its major assets, *The Daily Telegraph.* After an expedited trial, the Court of Chancery invalidated certain by-laws that Lord Black had caused to be adopted, which would have given Lord Black a veto power over any merger involving Hollinger and any sale of its assets. The Court found that the by-laws were inequitable and violated a prior agreement by Lord Black to cooperate with the board and management of Hollinger, who were engaged in a strategic process to develop a value-maximizing transaction for the Company. The Court also upheld a poison pill that the Hollinger board had adopted, in a highly unusual step, to prevent the Company's controlling

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[10] *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004); *aff'd*, 872 A.2d 559 (Del. 2005).

[11] *In re The Walt Disney Co. Derivative Litig.*, 2005 WL 2056651 (Del. Ch.); 2005 Del. Ch. LEXIS 113, *appeal pending*, No. 411, 2005 (Del.).

[12] *Unisuper, Ltd. v. News Corporation*, 2005 WL 3529317 (Del. Ch.).

stockholder (Lord Black) from selling control of the Company to the Barclay Brothers over the opposition of the board.

Putting to one side the publicity generated because of the prominence of the businesses and persons involved, the corporate governance rulings of the Court of Chancery in *Hollinger* have helped clarify several corporate governance issues involving companies that do business worldwide and that are controlled by a single person or cohesive small group.

A second recent case that attained "celebrity" status is the *Disney* case, that was the subject of a two month long trial in 2005. There, a shareholder of the Walt Disney Company filed a derivative action against the Disney board for breaching its fiduciary duties for having agreed to an executive compensation arrangement with Michael Ovitz, and then permitting that agreement to be terminated without cause after only one year, resulting in a severance payment to Ovitz of $130 million. In a 170 page post-trial opinion, the Chancellor held that the Disney directors had breached no fiduciary duty for which they could be found liable. Equally important, the court pointedly criticized the Disney board for engaging in executive compensation processes that fell far short of the best practices expected of the board of an American public company. Because that decision is currently on appeal before my Court, I am constrained in what I can say about it, but I am able to report that whatever may be the ultimate outcome of the case, the Chancery

opinion has been widely discussed as a roadmap for guiding how executive compensation decisions in U.S. companies should—and should not—be made.

The third, and most recent, governance decision, which also involved a corporation having multinational business operations, is *Unisuper, Ltd. v. News Corporation.*[13] In that case, News Corporation, then an Australian corporation controlled by Rupert Murdoch, announced that the company would be reorganized and reincorporated in Delaware. That reorganization would be contingent upon obtaining the approval of each class of shareholders. Because the shares owned by the Murdoch family voted as their own class, the public shareholders, which included several institutions including Australian pension funds, could veto the reorganization if they voted against it. Those institutions were concerned that their shareholder rights could be adversely affected if the company were reincorporated in Delaware. More specifically, they were concerned that under Delaware law, the board of directors could institute a poison pill without shareholder approval, whereas under Australian law shareholder approval would be required.

As a result of negotiations between the company and the institutions' representatives, most of the institutions' governance concerns were worked out by agreement to add protective provisions to the company's Delaware certificate of

[13] See, *supra*, n.12.

incorporation.[14] The poison pill issue was not the subject of an agreed-upon charter provision, however, because there was insufficient time to draft a provision of such complexity. News Corp.'s board did agree—and approved a policy that was announced in a press release and in a letter to shareholders—that if a poison pill were adopted following reincorporation, the rights plan would expire after one year unless the shareholders approved an extension. Based on that agreement, the institutions voted for the reincorporation and did not oppose the reorganization.

One month later, Liberty Media acquired 17% of News Corporation's outstanding stock. Fearing a hostile takeover, News Corp. adopted a poison pill in response. One year expired, and the board extended the pill but without obtaining shareholder approval. Moreover, the board announced that in the future, it might or might not implement its policy of obtaining shareholder approval of further extensions of the pill.

The Australian institutional investors sued the company in the Delaware Court of Chancery for an order declaring the pill invalid. Denying a motion to dismiss, and rejecting the Company's argument that the board policy was not binding as a matter of law, the Court of Chancery found that the complaint stated a claim for breach of contract. The Court stated that "[I]f a board enters into a

[14] For example, News Corp. agreed to insert a provision into its Delaware charter that the company would not issue new shares having more than one vote per share, and would retain a listing on the Australian Stock Exchange; and Murdoch agreed not to sell his stock if after the sale the purchaser owned more than 19.9% of the stock, unless the purchaser agreed to purchase all the remaining shares of the company on the same terms.

contract to adopt and keep in place a resolution (or a policy) that others justifiably rely on to their detriment, that contract may be enforceable, without regard to whether resolutions (or policies) are typically revocable by the word at will."[15]

I submit that these decisions, emanating from one American jurisdiction—Delaware—demonstrate that a specialized tribunal that is capable of resolving internal governance disputes competently and quickly can play an important role in fostering good corporate governance. In this connection I underscore the word "quickly," because the experience has shown that in addition to having expertise in the subject matter, it is important that the tribunal be capable and willing to reach a decision, and to express that decision in a well-reasoned written opinion within a relatively short time frame. In many of the hostile takeover cases, for example, litigation that would ordinarily require one or two years is customarily compressed into a matter of weeks, and the Court of Chancery (and on appeal the Supreme Court) will typically issue a decision, often lengthy and complex, within a week to ten days from the date the case is submitted. The reason is that hostile takeover cases usually arise on motions for preliminary injunction that must be decided quickly, while the financing for the contested transaction is still in place. Even in those cases that required a live trial (putting the *Disney* case to one side), the trial

[15] *News Corp.*, *supra*, 2005 WL 3529317 at *5.

was expedited, and the opinion deciding the governance disputes was issued within days or weeks after the completion of briefing.[16]

Two factors have contributed to the Court of Chancery's ability to decide complex corporate governance disputes quickly. The first is that Chancery is a court of limited jurisdiction: there are no juries, it hears no criminal, personal injury, or traditional family law cases. As a consequence, the number of cases per judge is considerably less than in the Superior Court, which is Delaware's trial court of general jurisdiction. That enables the Chancery Court judges to move a particular case to the proverbial "head of the line" if the circumstances so require. The second factor is, for want of a better term, I call culture, or *esprit de corps*. Over the decades a tradition has developed where it is expected that the Chancery Court judges will hear and decide matters on an expedited basis, when necessary, and express their decision in an opinion that is typically of appellate quality. The value system that generates that kind of professional pride and work ethic is a psychic reward for a public position that does not and cannot offer the level of remuneration that is available in private practice.

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[16] The Court of Chancery also has a formal program in which it will mediate corporate, business and even technology-related disputes, upon request of the parties. To avoid issues of disqualification, when mediation is requested, the mediator is a Court of Chancery judge other than the judge who is presiding over the case.

Having discussed how Delaware's specialized tribunal has influenced the development of good corporate governance practices in the United States, I turn to the next question, which is whether that experience has lessons for the member states in the EU. In my view, the Dutch Enterprise Chamber is a specialized court that promises to have a similar influence in the Netherlands.

III. THE EXPERIENCE WITH THE DUTCH COMPANIES AND BUSINESS COURT

At least one EU member state, the Netherlands, has a specialized court that, like the Delaware Court of Chancery, has developed a record of success in resolving corporate governance disputes and contributing to corporate governance practices in that nation. I refer to the Enterprise Chamber, which is a division of the Amsterdam Court of Appeals, specializing in corporate and commercial matters related to legal entities incorporated in the Netherlands. The Enterprise Chamber[17] has exclusive jurisdiction over claims arising out of financial reporting, disputes between a company's management and its works council relating to proposed management actions, and disputes respecting the composition of supervisory boards in specified kinds of large companies. In addition, the

[17] Huub Willens, et. al., *The Companies and Business Court From a Comparative Law Perspective, A Report of the Conference Held on 19 March 2003 Organized by the Institute for Corporate Law of the University of Groningen*, 2004 Uitgeverij Kluwer BV, Deventer, ISBN 90-130-0440-7 (cited herein as "Willens et al.").

Enterprise Chamber is authorized to institute "investigation proceedings" to resolve conflicts between a company and its shareholders.[18]

Established in 1971, the Enterprise Chamber initially resolved disputes arising in the context of bankruptcy proceedings, and developed a substantial body of case law with respect to the personal liability of directors based upon improper management resulting in their company's bankruptcy. In recent years, shareholders and Dutch companies have availed themselves of the Court's ability to act quickly and decisively, and as a result the Chamber has become the forum of choice for litigating a growing number of cases outside the bankruptcy area. Included among those areas are contests for corporate control, and in particular, challenges to takeover defenses implemented by Dutch companies.

An important reason for this development is that the Enterprise Chamber is empowered to conduct an investigation proceeding. Upon the written request of shareholders representing at least 10% of a company's share capital, or such lesser amount as is provided by the company's articles of association, the Enterprise Chamber may order an investigation into the management policies and conduct of business at a company, if there are "justified reasons to question the correctness" of the company's management policies. Examples of "justified reasons" include allegations of violations of law, financial reporting or accounting irregularities,

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[18] Scott V. Simpson, *The Dutch Enterprise Chamber: A Review of Recent Takeover Decisions*, 1400 PLI/Corp *1081, *1084 (June 2003) (cited herein as "Simpson").

potential insolvency, insufficient provision of information to shareholders or other stakeholders, and conflicts of interest involving the company, its management and/or its shareholders. This procedure is authorized because no formal discovery procedure (such as under the American Federal Rules of Civil Procedure) is in Enterprise Chamber proceedings.

The investigation is generally carried out by one or more court-appointed investigators, who interview the company's management, review its files and relevant documents, and present their conclusions in a report submitted to the court. If the report establishes that corporate misconduct took place, the court can order permanent measures such as suspending or nullifying board or shareholder resolutions, suspending or dismissing board members, appointing temporary managing directors, deviating from specified provisions of the company's articles of association, and ordering a temporary transfer of shares. The Chamber is also empowered to order temporary measures during the pendency of the investigation proceeding, not unlike the preliminary injunction proceedings conducted in the Delaware Court of Chancery. [19]

The broad power of the Enterprise Chamber to impose remedies has been a major reason why corporate litigants have brought claims and commence investigation proceedings in the Chamber, especially in takeover contests. In

[19] *Id.* at *1085-*1086.

several takeover cases, a bidder requested an investigation into a target company's management practices in order to level the playing field, by obtaining provisional rulings aimed at suspending defensive actions taken by the company. Like the Delaware Court of Chancery, the Enterprise Chamber has been responsive and expeditious in considering requests for provisional relief by convening initial hearings in many cases within days, and ordering provisional measures directly after those hearings are concluded. That is what occurred in the highly publicized Gucci takeover case in 1999, and in the Rodamco and HBG takeover cases in 2001.[20] Because the Enterprise Chamber is not the court of last resort, a party that is aggrieved by its rulings has the right of appeal to the Supreme Court of the Netherlands, which performs appellate review functions analogous to the review of Court of Chancery rulings by the Delaware Supreme Court.[21]

The experience with the Dutch Companies and Business Court, which has existed for only 35 years, evidences that a specialized court that has the expertise, resources, and mandate to resolve corporate governance disputes, can have a

[20] *Id.* at 1086-1096.

[21] Willens, et. al., *supra,* n. 16, at 34-36.

similar impact on corporate governance practices in an EU member state, as the Delaware Court of Chancery has had in the U.S.[22]

One important difference between the Dutch Enterprise Chamber and the Delaware Court of Chancery merits discussion. Although the Delaware Court of Chancery has formal jurisdiction only over Delaware corporations, its influence over corporate governance has been far broader, primarily because of the national operations of many of the companies that are incorporated in Delaware and whose internal governance affairs are, therefore, governed by Delaware corporate law. The Dutch Enterprise Chamber which, it appears, is doing an equally admirable job, also has formal jurisdiction only over Netherlands corporations. Unlike Delaware, however, the Netherlands is not where a majority of the listed companies, or the largest firms in the EU, are incorporated. Therefore, the Dutch Enterprise Chamber does not function, at least at present, as the business court for the EU.[23] Nor, at the present time is any court of any member EU state in a position to assume that role, because of structural barriers.

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[22] Several Dutch legal scholars have reportedly noted the activist role taken by the Enterprise Chamber in recent years. One corporate takeover specialist has observed that that activist role can be contrasted with the approach of the Dutch District Court, which has the ability to hear similar cases but may not have the same background and experience, and generally has not tended to act as quickly or decisively. Simpson, at *1086, and footnote 10.

[23] "[A]lthough one might speculate that the Enterprise Chamber could become Europe's equivalent to the Delaware Chancery Court . . . it is premature to reach any such conclusion about the impact of Enterprise Chamber decisions in European jurisdictions other than the Netherlands." Simpson, at *1098.

A critical reason why a specialized court of one State (Delaware) has come to have influence over corporate governance law and practice in the U.S., is that corporations in the U.S. are free to change their state of incorporation on a comparatively cost-free basis—a fact that has contributed to regulatory competition for corporate charters among the States in the U.S. To this point, Delaware has won that competition. Within the E.U., however, there are legal and procedural barriers to such jurisdictional competition. Those barriers include: (i) imposing exit taxes on companies that are incorporated in one member state and later choose to reincorporate in a different member state, and (ii) uncertainty as to whether the courts of member states will apply to foreign companies litigating in those courts, the corporate governance law of the foreign company's country of incorporation.[24] As a result, the regulatory competition that exists in the U.S., and that has driven the creation of specialized business courts there, is not present (or is far less present) in the E.U. The available literature suggests that without changes that would promote regulatory competition and corporate mobility within the EU, there are fewer incentives to develop specialized business courts within the EU.

Whether that is good or bad is for the E.U. policymakers, not for me, to say. But because this segment of the Conference is devoted to specialized tribunals, I infer a respectable body of opinion makers believe that the E.U. should consider

[24] McCahery and Vermeulen, *supra,* n. 3.

fostering the creation such tribunals. On that assumption, I will conclude on a subject about which I confess being least knowledgeable—the prospect that specialized courts to resolve governance disputes will be created on a more widespread basis within the E.U. On this subject, my comments will be brief.

III. SOME SPECULATIONS ABOUT THE PROSPECTS FOR SPECIALIZED BUSINESS COURTS IN THE E.U.

If it is thought desirable to foster the development of specialized courts along the lines of the Dutch Enterprise Chamber in the E.U., that could occur in one of two ways. The first is by each member state encouraging that development within its own borders. The second is by the centralized E.U. authorities creating s specialized business court at the supranational level. At present I am not aware that the former development has occurred in any member state other than the Netherlands. As for the latter, there are developments, none definitive, that in the view of some scholars, might serve as a framework for developing specialized courts at the E.U. supranational level.

In a very thoughtful article,[25] Professor Luca Enriques of the University of Bologna Faculty of Law argues that good corporate law is necessary for the development of financial markets, and that what makes good corporate law are good corporate law judges. The essential prerequisites for a good corporate law

[25] Luca Enriques, *Do Corporate Law Judges Matter? Some Evidence From Milan*, 3 European Business Organization Law Review 765, 766 ((2002) (cited herein as "Enriques").

judge, Professor Enriques argues, are: (1) honesty, rapidity and expertise, (2) no deference to controllers in conflict of interest cases, (3) the ability to identify the real rights and wrongs and to deal with them directly, (4) an unwillingness to be formalistic, and (5) concern for how their decisions mold the behavior of corporate actors.[26] For our purposes the import of the Enriques article is to confirm our intuitive, common sense notion that national legal culture, and how judges are educated and selected, play a major role in determining the quality of a nation's judiciary. Critical to this concept is Professor Enriques' view that changing national legal culture so as to develop a highly qualified judiciary takes time and will most likely be the product of globalization and competitive forces.[27] I personally agree with this view, and would amplify it by suggesting that (i) one of the more important competitive forces will be driven by the need and desire of individual EU member states to attract foreign investment capital for its local firms, and that (ii) foreign investment tends to be attracted to jurisdictions that offer investor protection in the form of enforcement agencies like the S.E.C. in the U.S., and the courts.

What this tells us is that although high quality business courts can be created from the bottom up (*i.e.*, on a member state level), this will happen only if the

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[26] Enriques, at 770-778.

[27] *Id.* at 809-811.

member state has an incentive to do so. Whether or not those incentives exist will be influenced, if not determined by what happens not only at the national, but also at the E.U. level. Some have suggested that barriers would have to be removed to foster the regulatory competition among member E.U. states, as one step towards creating the economic incentives for specialized courts to evolve at the member state level.

What of the prospects for the central E.U. authorities establishing a specialized court or courts to resolve corporate governance disputes on a supranational level? There have been developments that could serve as a framework for this to happen. The first is the SE statute that became effective in 2004, and authorizes the European Company or *Societas Europea.* Some have argued, however, until the problem of uniform taxation is addressed, firms will not choose to incorporate as European Companies in great numbers.[28] A second development are reform measures that have been recommended by a group of experts commissioned by the European Commission to simplify existing rules and improve freedom of choice between alternative forms of organization. A third development are the decisions of the European Court of Justice (ECJ) in *Centros,*

[28] McCahery and Vermeulen, *supra,* n. 3, at 16-18.

Überseering, and *Inspire Art*[29]—decisions that, in the view of some, could eventually trigger the development of competitive lawmaking within the E.U. In *Centros*, the ECJ recognized the right of a Danish firm to incorporate in the United Kingdom to circumvent cumbersome Danish minimum capital rules, without the intention of conducting business operations in the state of incorporation. The European Court held that for Denmark to refuse to register that company to do business there violated the EC Treaty. Some scholars view *Centros* and its progeny as renewing the discussion about regulatory arbitrage in Europe, because those cases enable firms to migrate to countries that offer internal processes and legal regimes that lower their costs, regardless of where the firm's assets, employees and investors are located.[30]

These developments could represent important steps towards creating a framework for fostering the creation of a specialized tribunal at the E.U. level to resolve corporate governance disputes. But whether that will happen, and how long it would take for that to occur, are subjects about which I am not qualified to speculate. What I can say with confidence is that if there develops within the E.U. the economic incentives and political will to foster the creation of national, or

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[29] Case C-212/97 *Centros Ltd. v. Erhvervs-og Selskabsstryelsen* [1999] ECR I-1459; Case C-208/00 *Übersering BV v. Nordic Construction Co. Baumanagement GmbH*; Case C-167/01 *Kamer van Kooophandel en Fabrieken voor Amerstam v. Inspire Art Ltd.*

[30] McCahery and Vermeulen, *supra* n. 3, at 27-28.

supranational, specialized courts, the Delaware Court of Chancery and the Dutch Enterprise Chamber are two tribunals that could serve as useful models.