2 The OECD's Work Programme on Corporate Governance and Dispute Resolution

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Corporate governance is fairly new as a public policy area, and experience with how to best design, implement and evaluate the regulatory framework is still limited. This also applies to corporate governance related dispute resolution. Corporate governance related dispute resolution covers those disputes that involve shareholders on the one hand, and the various company organs – typically the board and the executive management – on the other hand. Policymakers should consider what market participants request from dispute resolution mechanisms. Moreover, policymakers need information about the available range of different dispute resolution mechanisms, their respective pros and cons, and how they can complement each other in serving market participants. There is a demand from policymakers for a perspective on rules and practices, for them to understand the relative costs and benefits of different policy options, as well as to identify, assess, promote or re-direct existing policies in the field of corporate governance related dispute resolution.

This paper reports on the OECD work programme in the field of corporate governance and dispute resolution. Part I describes the background to the programme and Part II contains the synthesis note of a recent expert meeting which focused on specialized courts and arbitration as alternative mechanisms for resolution of corporate governance related disputes.

2.1 Part I - Background

2.1.1 Introduction

When the OECD Principles of Corporate Governance were revised in 2004, a new chapter on the structure and quality of the regulatory framework was added. An important reason for introducing this chapter was to stress the need for effective enforcement, which increasingly is seen as an important element for a well-functioning corporate governance system. A crucial prerequisite for successful civil enforcement is the availability of efficient mechanisms for dispute resolution, be it through the regular court system, specialised courts, mediation, panel rulings or arbitration. (Administrative enforcement, in particular, by securities regulators, and criminal enforcement are also important elements of enforcement in the area of corporate governance, but usually less so in the field of dispute resolution.) The pre-

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ferred form of dispute resolution will depend on a variety of factors, including the character of the dispute, the parties involved and the importance that the parties attach to issues such as speed, cost and transparency.

2.1.2 Civil Enforcement – Context

Participants in the debate on corporate governance generally agree that enforcement is a crucial component of good corporate governance. Research on the external factors conductive to good governance (implementation, policy approach, enforcement culture, quality of courts) is growing fast worldwide. There are substantial variations in enforcement practices and the rules designed to enforce governance measures across countries. Effectiveness in enforcement tends to vary depending on: (1) ownership structure; (2) management entrenchment; (3) legal infrastructure. There are a number of challenges in evaluating the enforcement and dispute resolution environment:

a) A well developed corporate governance system does not necessarily ensure effective enforcement;
b) There may be a number of regulatory institutions necessary to ensure effective enforcement; and
c) An effective enforcement regime needs to facilitate civil actions by shareholders, supported by an adequate legal infrastructure that supplies sufficient incentives for parties to bring civil actions.

In relation to enforcement the OECD Principles state that

> 'The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.'

The annotations to this principle point out that,

> ' …a distinction can usefully be made between ex-ante and ex-post shareholder rights. Ex-ante rights are, for example, preemptive rights and qualified majorities for certain decisions. Ex-post rights allow the seeking of redress once rights have been violated. In jurisdictions where the enforcement of the legal and regulatory framework is weak, some countries have found it desirable to strengthen the ex-ante rights of shareholders such as by low share ownership thresholds for placing items on the agenda of the shareholders meeting or by requiring a supermajority of shareholders for certain important decisions.
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> One of the ways in which shareholders can enforce their rights is to be able to initiate legal and administrative proceedings against management and board members. Experience has

> shown that an important determinant of the degree to which shareholder rights are protected is whether effective methods exist to obtain redress for grievances at a reasonable cost and without excessive delay. The confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated. The provision of such enforcement mechanisms is a key responsibility of legislators and regulators.'
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> 'There is some risk that a legal system, which enables any investor to challenge corporate activity in the courts, can become prone to excessive litigation. […] In the end, a balance must be struck between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation. Many countries have found that alternative adjudication procedures, such as administrative hearings or arbitration procedures organised by the securities regulators or other regulatory bodies, are an efficient method for dispute settlement, at least at the first instance level.'

The discussion about effective enforcement and efficient means of dispute resolution has been particularly prominent in the Regional Corporate Governance Roundtables that the OECD organises around the world with the support of the World Bank Group and the Global Corporate Governance Forum. The prime task of the Regional Roundtables is to raise awareness, provide an exchange of experiences and to formulate concrete policy recommendations for reform. Based on these discussions it appears that regarding civil enforcement in non-OECD countries there is a particular need to address some key institutional weaknesses, i.e.:

a) an insufficient number of judges,
b) a judiciary lacking the necessary skills, and
c) the need for more expeditious decision taking by judges.

In order to accomplish effective law enforcement, the deterrence function of reputational damage for board members and senior management through media coverage is recognised by policymakers to be important. Therefore, and apart from arbitration, specialised courts or mediation, the role of the media also needs to be considered in this context. Through their extensive coverage of law suits brought against management and boards over the past few years, the media in many countries have proven to be very powerful in exercising their deterrence function.

2.1.3 Civil Enforcement – Costs and Benefits

While enforcement can occur via criminal enforcement, administrative enforcement (including regulatory action) or by civil enforcement, the quality of enforcement will depend

largely on certain common factors, such as the level of political will, the resources available to prosecute cases, the (level of) incentives and the quality of the legal infrastructure. These different enforcement mechanisms have their respective costs and benefits. When policymakers consider different enforcement mechanisms, a distinction can be made between five main types of costs:

a) policy design costs,
b) policy implementation costs,
c) enforcement costs,
d) compliance costs, and
e) disclosure costs.

Regarding the benefits of enforcement mechanisms, a number of factors have to be considered by policymakers in their analysis, such as speed, quality, transparency or predictability.

As regards civil enforcement, different dispute resolution mechanisms have also their own typical costs and benefits. For example, in voluntary dispute resolution mechanisms such as arbitration or mediation the state does not bear surveillance nor investigation costs, only the policy design and implementation costs, and to a limited extent enforcement costs. For companies there are in particular compliance and disclosure costs.

2.1.4 Arbitration of Company Law Disputes

In 2003 the OECD, together with the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC), organised two exploratory meetings in Vienna and Paris on arbitration of company law disputes. The meeting in Vienna focused on arbitration as a specific civil enforcement option. The conclusions can be summarised in five points:

a) arbitration of company law disputes is commonplace in many jurisdictions;
b) procedural and technical requirements can represent a trap for the unwary;
c) notwithstanding a clear trend favouring arbitration of company law disputes, its acceptance varies across countries;
d) arbitration of company law disputes involving publicly traded companies faces many more hurdles than arbitration of company law disputes involving privately held companies; and
e) notwithstanding the legal, policy and practical difficulties, a nascent trend supports wider use of arbitration of company law disputes, involving public companies and their shareholders.

The Vienna meeting also noted that the consensual/contractual basis for arbitration may require that a potentially very large and geographically dispersed group of shareholders would have to give binding consent. This group must also receive sufficient notice when the arbitration begins. Typically, shareholders in markets with a well developed, effective and reliable court system therefore prefer to litigate company-law disputes in courts rather than demand private arbitration. For company directors, the position is usually the opposite; the company directors would prefer to arbitrate. This preference on the part of company managers for arbitration can result in consent procedures that may be considered unconscionable because

they: (i) are coercive; (ii) represent contracts of adhesion; and/or (iii) entail costs and inconvenience for retail investors or consumer that effectively deny them access to a dispute-resolution mechanism. In markets where the judicial system is less advanced or reliable, on the other hand, shareholders may prefer arbitral proceedings to national courts for reasons of capacity, competence and even-handedness. In such event, it may be sufficient for the company to commit itself to arbitration unilaterally, while providing shareholders with the option of choosing court adjudication.

But arbitration of company law disputes is not only a matter for the parties immediately involved. It can also be seen as a public policy matter where some commentators would argue that traditional judicial enforcement has an intrinsic value. Since it is unlikely that all shareholders in a widely held listed company will join an arbitral proceeding, questions also may arise about the legality of awards, particularly injunctive orders which affect non-parties.

Finally, on a practical level, there may be questions about the adequacy of arbitration for complex cases and the incentives of the plaintiffs' attorneys to pursue claims before an arbitral tribunal.

2.1.5 Beyond Arbitration – Specialised Courts

Research has concluded that also other 'alternative' dispute resolution mechanisms than arbitration can be effective and, as set out above, that arbitration sometimes can have certain disadvantages. This also explains why disputes involving joint venture agreements and closed companies are more suitable for arbitration than those involving listed companies. Therefore in considering the different policy options for corporate governance and dispute resolution it may be fruitful to extend the analysis beyond arbitration. In particular the role of specialised company (or business) courts could be considered as a means of establishing a well functioning corporate governance system. Also in an era with a growing amount of national corporate governance codes it will be important to understand the remit, role and judicial powers of various 'committees', 'panels' and 'chambers' monitoring interpretation and compliance with these codes.

2.1.6 Future Work Programme

The OECD's future work on corporate governance and dispute resolution focuses on how various forms of dispute resolution can complement each other in contributing to effective redress and enforcement. The objective is to make an 'inventory' that identifies the merits of various approaches to dispute resolution in corporate governance related disputes. Such an inventory could usefully be complemented by commentaries about applications and practical experiences. The inventory was one of the topics discussed during the recently organised expert meeting on corporate governance related dispute resolution, a summary of which is included in Part II.

2.2 Part II - Exploratory Meeting on Resolution of Corporate Governance Related Disputes Stockholm, 20 March 2006 – Synthesis Note

2.2.1 Introduction

On 20 March 2006 the OECD together with the Stockholm Center for Commercial Law, and with the support of the Government of Japan, organised the 'Exploratory Meeting on Corporate Governance Related Dispute Resolution'. The meeting brought together 25 experts from around the world, representing both OECD and non-OECD countries, public and private sector, as well as (non governmental) international organisations. The meeting was organised to explore the policy options, including the trade-offs, for policymakers in non-OECD countries who will have to design a dispute resolution framework for corporate governance related disputes in listed companies. Identifying and comparing the merits of different dispute resolution options in the areas of company law and corporate governance beyond the traditional mainstream judiciary system is one way of doing this. The need for non-traditional (or specialised) means of dispute resolution and interpretation has also announced itself with the emergence of various types of corporate governance codes, whose 'ownership' and enforcement may sometimes be unclear. Fundamental questions regarding these sources of corporate governance regulation remains: what happens if they are being breached by market parties? Is (or should) there (be) a body that takes care thereof? What judicial redress have shareholders in such case? The meeting focused on two alternative mechanisms, i.e. (i) specialised courts, and (ii) arbitration.

One of the reasons why the topic has become more important today is the rise of shareholder activism. In particular institutional shareholders are now common all over the world; often they represent individuals whose pensions and savings amongst other depend on structural corporate governance reforms. That is the reason why there is a need to consider the regulatory framework regarding this topic. In the search for better regulation, rather than more regulation, the prevailing question from an economic perspective should be who should bear the costs. From a legal perspective other considerations may play a role.

In the morning sessions first the topic of specialised courts was introduced by representatives from two jurisdictions having successful specialized enterprise courts, i.e. Delaware with its Chancery Court and the Netherlands with its Enterprise Chamber. Subsequently arbitration as a means of resolving corporate governance related disputes was discussed by representatives from the international organizations setting the standards and framework on this specific topic, i.e. UNCITRAL and the ICC. Participants engaged in a true debate on the pros and cons of both specialised courts and arbitration, but also discussed alternatives beyond the two mechanisms. They explored for example the role of mediation and moreover the media in corporate governance related dispute resolution.

2.2.2 Session 1: Setting the scope of the topic; Corporate Governance and Dispute Resolution – a Public Policy Perspective

Background

The Programme was originally designed as a response to the OECD's Regional Corporate Governance Roundtables (which bring together (mostly) non-OECD countries) that underscored the central role of enforcement in corporate governance. Participants in Roundtable discussions have emphasized that although much has been achieved in raising awareness and in putting in place improved rules and procedures, real progress remains frustrated by poor regulatory and judicial enforcement.

Beyond Arbitration

Research has concluded that also other dispute resolution methods than arbitration can be effective and that arbitration sometimes can have certain disadvantages, in particular the fact that arbitration is contractual in nature. Arbitration in company law disputes therefore requires parties to the arbitration to have signed up for arbitration in advance. This also explains why disputes involving joint venture agreements and closed companies are more suitable for arbitration than those involving listed companies. Therefore in considering the different policy options for corporate governance and alternative dispute resolution it may be fruitful to include, but not limit, the analysis to arbitration. In particular the role of specialised company (or business) courts should be considered as a means of establishing a well functioning corporate governance system. Also in an era with a growing amount of national corporate governance codes it will be important to understand the remit, role and judicial powers of various 'committees', 'panels' and 'chambers' monitoring interpretation and compliance with these codes.

Categories of Disputes and Qualities of Dispute Resolution Mechanisms

Dispute resolution in corporate governance is an element of corporate governance enforcement and thus fits in the 2004 OECD Principles. The focus of the meeting has been on corporate governance related disputes between shareholders on the one side and other corporate bodies (e.g. boards) and stakeholders (including creditors) on the other side.

Issues discussed included the spectrum of judicial redress possibilities, the categories of disputes as well as the qualities of the dispute resolution mechanism sought for in case of corporate governance related disputes. Further issues include the costs versus benefits consideration, the problem of lawmakers also being law enforcers and the fact that a corporate governance *problem* is not the same as a corporate governance *dispute*. In order to assess the wide variety on possible alternatives presenters and discussants were invited from different legal traditions (Anglo-Saxon versus civil law) and different jurisdictions, both from OECD and non-OECD countries, as well as from different international institutions.

2.2.3 Session II: Corporate Governance and Dispute Resolution - the role of specialised courts in settling corporate governance disputes

The Chancery Court of Delaware

The first presentation was about the role of specialized courts in resolving corporate governance disputes in the United States and the European Union and primarily dealt with three issues: (i) the historical experience of the Delaware Chancery Court in dealing with corporate governance related issues and the wide impact of its decisions within the US and beyond, (ii) developments within the EU regarding specialized courts, and (iii) the possible lessons to be learned by EU policymakers from the Delaware and Netherlands' experiences with specialized courts. The presentation also addressed some of the recent high profile decisions, such as the Disney case and the Hollinger case. As a concluding remark it was stressed that the ability to make quick decisions and to to express its reasoning in appellate quality opinions are the key qualities of the Delaware Chancery Court. The two reasons why it can do so are: (a) its limited jurisdiction leads to a relative lower case load than other courts, and (b) the culture or 'esprit de corps' of opining in an expedited manner.

The Netherlands' Enterprise Chamber (Ondernemingskamer)

Subsequently the role and functioning of the Netherlands' equivalent of the Delaware Chancery Court, i.e. the Enterprise Chamber, was discussed. Three questions were dealt with, (i) which corporate governance cases are assigned to the Enterprise Chamber? (ii) why has the Enterprise Chamber become so popular?, and (iii) how did the Enterprise Chamber help develop the Dutch corporate governance policy framework? The presentation underlined the reasons for the success of the Enterprise Chamber (such as expedience and less formalism), however, also reference was made to the threat that specialization of courts may seclude them from society and developments in other areas of law.

Observations

In immediate response to the two presentations participants raised several relevant considerations. Experiences from Russia and Ukraine show that procedural rules still often prevail. The judiciary still works very formalistic. Although there is a tendency to specialisation within courts, there is not yet a focus on corporate governance related disputes in either Russia or Ukraine, but indeed a related topic such as tax is now specifically being focused on by courts. In relation thereto it was mentioned that there is a risk for transition economies when focusing on specialized courts since this may shift attention away from other, probably bigger, problems such as corruption. Also within such transition economies special interest groups may have too big an influence on specialised judges which may increase the threat of corruption. Moreover it was mentioned that transition economies have to address the question of what to spend their limited resources on. Therefore there will be a need to further explain the incentives for, and benefits of, setting up specialized courts. A comment was also made on Japan where some district courts allot certain types of cases to specialized divisions within the courts, which might be an example of *de facto* specialized courts as opposed to statutory specialized courts. Moreover it was stated that transition economies will likely

have some difficulty in justifying a separate specialised court to deal with corporate governance disputes; however, these countries might benefit from the establishment of a commercial division of the general courts in the major commercial centres. Such special division could timely handle commercial matters important to that locality including corporate governance disputes.

2.2.4 Session III: Corporate Governance and Dispute Resolution – the role of arbitration in settling corporate governance disputes

UNCITRAL

The role of United Nations Commission on International Trade Law (UNCITRAL) in the area of arbitration was the next topic of a presentation. UNCITRAL is well known for the model arbitration law and standards it develops in different areas of law. Active participation of the private sector is characteristic of the work of UNCITRAL. Standards developed by UNCITRAL are non-binding.

In itself it is not clear whether corporate governance fits in the mandate of UNCITRAL. If UNCITRAL would embark on a corporate governance effort on dispute resolution, its previous work should be considered, in particular the 1958 New York Convention and the 1961 European Arbitration Convention. Moreover the 1976 Arbitration Rules have proven to be useful since a number of arbitration centers around the world function on the basis of these rules.

The specific challenge with corporate governance related disputes is the question of arbitrability. Why are such disputes often not readily arbitrable? The Model Law might need to be amended (in order to broaden its scope) to facilitate the specific needs for corporate governance related dispute resolution. UNCITRAL may wish to play a more important role on specialized courts by developing guidance on this topic for its member countries.

ICC International Court of Arbitration

The ICC International Court of Arbitration subseqeuntly first addressed the issue of why parties are interested in private dispute resolution instead of genuine courts. Some of the arguments include: (i) impartiality and neutrality; (ii) speed; although arbitration tends to become more lengthy, the limited number of instances before a final opinion is granted, remains a strong advantage; (iii) costs (control over fees); (iv) confidentiality; (v) flexibility of proceedings (in particular the informality and scope); and (vi) the opportunity for parties to appoint the arbitrators. The enforcement of arbitration awards often remains a challenge.

The ICC is a not for profit organization set up to promote international trade. Over the past five years 20% of company law related disputes settled within the ICC context concerned corporate governance related disputes. Example cases include (i) valuation of shares; (ii) disputes between shareholders; (iii) remuneration of boards; (iv) bankruptcy related disputes; (v) shareholder participation in decision making processes; and (vi) takeovers.

Alternatives to arbitration may be: (i) specialized dispute boards, (ii) expert appointments, or (iii) alternative dispute resolution such as pre-arbitration referee decisions. In the end arbitration leads to a binding decision as opposed to some of the aforementioned alternatives. It should be noted that there is also a distinction between institutional and *ad hoc* arbitration. Institutional arbitration is perceived as giving parties more guarantees, in particular in the field of confidential treatment of disclosed information. Fraudulent schemes are in general easier to detect in institutional arbitration than in *ad hoc* arbitration. In each form transparency of proceedings is of the essence.

Finally, the issue of multiparty arbitration was addressed. This has shown still to be a challenge: how to arbitrate in case of multiple parties; in this context reference was made to the recent adoption of arbitration by Shell in its articles of association as the exclusive dispute resolution mechanism. It was mentioned that in cases such as the Shell example one will also have to deal with how various jurisdictions treat articles of association of a company; is it a binding compact only on incorporators or is it binding on all original plus any new shareholders by transfer of title? Or is there another treatment in a particular jurisdiction.

Observations

Participants noted that arbitrability of corporate governance related disputes remains the key challenge. In particular how to obtain an arbitration agreement in case of a corporate governance related dispute seems to be difficult. It appears that for example either in Japan or East-Asia no corporate governance related dispute, or notable one, at least, has until now been decided upon by arbitration. Indeed arbitration may only succeed in case parties already agreed thereto prior to the rise of a corporate governance dispute. In practice this prior agreement still remains a problem; also because of poor drafting of arbitration clauses, as experience from the Stockholm Arbitration Centre has shown.

Recently some interesting concepts in the field of arbitration have been developed. In the US the concept of class action in arbitration is now introduced; moreover interim measures during the arbitration proceedings are also being developed by the ICC in order to make the arbitration process more attractive. In general it should be noted that although arbitration is rapid, it is not rapid enough at the outset of a case; in courts judges are ready to start proceedings while in arbitration the proceedings leading to the actual arbitration often take a lot of time. Arbitration institutes should acknowledge this issue and find a solution. In this context reference was made to the Canadian example where some courts are designed to specifically facilitate rapid decision making by the judiciary.

On a fundamental note it was mentioned that in particular developing countries should address the issue of arbitrability in their statute in order to secure that arbitration indeed is permitted as a means of private dispute resolution.

In relation to the procedural difficulties accompanying arbitration reference was made to mediation as a potential alternative. It was stated that although the average length of ICC

arbitration is about two years, mediation until now has proven to be in (the ICC) practice a very complex process. Although in particular share valuation is becoming more often a topic submitted to binding expert advice as alternative to arbitration.

In conclusion it was stated that the issue of arbitrability of corporate governance related disputes should be a topic for UNCITRAL to elaborate on.

2.2.5 Session IV: Specialised Courts or Arbitration? Trade-offs for the Resolution of Corporate Governance Related Disputes

Background

This session dealt with the trade-offs between specialised courts and arbitration for the resolution of corporate governance related disputes. What would be the most effective mechanism to resolve corporate governance related disputes? Identifying the trade-offs can be a useful tool to find an answer. A questionnaire on different categories and qualities of corporate governance related disputes drafted by the OECD Secretariat and circulated among participants prior to the meeting was the focus point for the discussion in this session.

Introductory Presentations

The afternoon session started with two introductory presentations on the issues set out in the questionnaire. Presenters considered the questionnaire as a good basis for approaching the issues related to the resolution of disputes related to corporate governance and in particular for developing an inventory or toolbox of the different options in this field. As to the role of arbitration and specialised courts, it was stated that they should be seen rather as complimentary than exclusive mechanisms, as each of them had advantages but also disadvantages. Reference was made to the positive experiences with specialist courts or quasi-courts in the field of complex corporate governance issues, such as takeover cases, and to the shortcomings in relation to transparency and creation of case law as regards arbitration proceedings. Moreover it was suggested that in the policy-making process consideration should be given to the substantial differences of purely domestic and cross-border disputes, as well as to the different needs of developed and developing countries. Setting up specific corporate governance panels may be a good alternative to each of arbitration and specialised courts, bringing together the goods of each of these mechanisms; such dedicated body might well serve effectively the purpose, which in the end should be the overall driver.

The next presenter stressed that arbitration should not be regarded as a substitute for necessary reforms of the judiciary, which should be an absolute policy priority in particular in emerging markets. Reference was made to some of the supposedly positive characteristics of arbitration (such as speed and the perceived cost-effectiveness), but the numerous shortcomings of arbitration were also stressed, especially in the context of less-developed economies (eg, enforceability of arbitration awards, especially, when the non-prevailing party to a dispute was a state body; multiparty disputes; limited publicity as to bad corporate governance which was crucial for raising awareness on corporate governance issues among small

shareholders). A suggestion was then made to have auditors have a prevalent role in the resolution of corporate governance related disputes, especially in the prevention of such disputes in the first place, by auditing companies as to their compliance with corporate governance rules. Such 'corporate governance audit' could be carried out by lawyers or any person recognised as having sufficient expertise to do it. It would be best to have the corporate governance audit to be done by someone other than the company's financial auditors as this will secure greater independence and it can be carried out mid-year so the findings can be made in time to be followed up by the financial auditor.

Observations

In immediate reactions to the two presentations, it was stated that the OECD Corporate Governance Principles represented internationally accepted best practices and were intended to be benchmarks for both developed and developing countries, however, without either restricting the ways and means how adherence to them is achieved and safeguarded or advocating a one-size-fits-all approach. It was also said that businesses in many of the developing countries needed rapid solutions for effective dispute resolution (such as arbitration or specialised courts), since the reform of courts would take many years to come. In relation to arbitration, the problems related to the application or non-application of anti-trust rules in corporate governance related disputes were highlighted. The important role of auditors in preventing litigation was recognised (for example, in Sweden, corporate governance practices are part of a company's audit). However, many participants thought that auditors had only limited competence to solve disputes on an ex-post basis. Furthermore, the controversial role of auditors in recent accounting and auditing scandals was mentioned. Finally, discussants emphasised the importance of the media and institutional investors regarding corporate governance disputes, the former of which should therefore be the focus of educational efforts in this respect.

Questionnaire Outcomes - Categories and Qualities

The OECD gave a brief summary of the responses received to the questionnaire, in which 15 categories of corporate governance related disputes (Categories) and 15 qualities for the resolution of such disputes (Qualities) were set out. Each respondent had given a ranking among Categories and Qualities. The overall results were as follows:

a) as regards the Categories (see Box 1.), (i) self-interested transactions, (ii) minority-shareholder rights, (iii) takeover procedures, (iv) mismanagement, as well as (v) share valuation and (vi) nomination of board members, were considered as most important;

Box 1. Categories of Corporate Governance Related Disputes

Self-interested transactions; typical examples include: related party transactions, insider trading, conflicts of interest by board members, executives and senior management

Annual accounts; typical examples include: disputes between shareholders and the board and/or auditor over the (withholding of) shareholder approval

Nomination / appointment of board members; typical examples include: disputes between shareholders and the nomination committee and/or the board over nomination and/or appointment of board members/executives, as well as regarding the criteria for nomination/appointment

Remuneration / bonuses board members; typical examples include: disputes between shareholders and the remuneration committee and/or the board over remuneration and/or bonuses of board members/executives, as well as regarding the criteria for remuneration/bonuses

Share valuation; typical examples include: disputes between shareholders and the board and/or auditors on the valuation method in case of (a) squeeze out, and (b) share/bond issues

Takeover procedures; typical examples include: disputes between shareholders and boards regarding terms and conditions of a proposed takeover, and/or compliance with internal (articles of association) and/or external (listing rules, securities legislation etc.) rules

Disclosure requirements; typical examples include: disputes between shareholders and boards regarding compliance with (non-) financial disclosure requirements
Corporate control (in M&A transactions); typical examples include: disputes between shareholders and boards regarding a proposed acquisition or disposal of a substantial part of the company's assets

Minority shareholders rights; typical examples include: disputes between majority shareholders and minority shareholders in squeeze out scenarios or on nomination / appointment of board members

Bankruptcy / suspension of payments; typical examples include: disputes between shareholders and/or bondholders and boards and/or receivers in corporate restructuring
Share / bond issues; typical examples include: disputes between shareholders / bondholders and boards on dilution issues

Discharge of individual board members / executives; typical examples include: disputes between shareholders and board members / executives on individual discharge regarding their performance in the past fiscal year

Mismanagement; typical examples include: disputes between shareholders and boards on supposedly mismanagement of the company

(Non-)compliance with corporate governance codes; typical examples include: disputes between shareholders and boards on the application of 'comply or explain' principles as provided in corporate governance codes

Works' council; typical examples include: disputes between shareholders / boards and works' councils on the interpretation and applicability of works' council legal corporate governance related rights

Source: OECD 2006

b) as to the ranking of Qualities (see Box 2.), (i) speed, (ii) quality, (iii) costs, (iv) enforceability and (v) effectiveness, were rated the most relevant by the respondents.

Box 2. Qualities for Corporate Governance Related Disputes Resolution Mechanisms

Speed
Quality
Transparency
Predictability
Costs
Consistency
Enforceability
Formalities
Clarity
Accessibility
Legitimacy
Effectiveness
Pro active
Appeal possibilities
Scope of judgment

Source: OECD 2006

Tour de Table

In the subsequent *tour de table*, participants had the opportunity to comment the questionnaire as such and to provide the reasoning behind their ranking. More general comments referred to the need for clarification of some of the categories and qualities, the possible adding of further categories and qualities (eg, deterrent effect), and the need for a flexible approach, since ADR mechanisms would not permit a clear-cut categorisation.

It was proposed that the experience gained in ADR in other areas, such as environment, should be taken into account, as well. It was also explained that arbitration was hardly used in Japan, whereas mediation, also by judges, proved very popular in the resolution of commercial disputes. Participants suggested that the assessment of the different dispute resolution mechanisms would have to take into consideration not only the legal framework but also the overall infrastructure in place (eg, efficiency, experience, impartiality, costs). In

this respect, shortcomings as to the correct application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 in a country were considered as having a damaging effect on this country's reputation and business environment, and should be brought to the attention of UNCITRAL. It was moreover discussed in how far the effectiveness of ADR mechanisms in developing countries could depend on the fact whether such a mechanism was demand-driven in that country or not. As to mediation, it was stressed that it could serve as a means for reducing tensions at an early stage and also that it could be particularly suitable for complex disputes.

A Centralised Specialised EU Corporate Governance Court?

Regarding the idea of establishing a centralised specialised EU court adjudicating corporate governance related disputes (or commercial disputes in general) in all Member States, participants referred to the numerous obstacles in this respect (in particular, different legal systems in Member States, ie common and civil law; conflicting approaches to the legal capacity of companies, ie seat and incorporation theory; and, more generally, the opposition from a number of Member States to further centralisation at EU level). A more viable approach for the time being would therefore be enhanced co-operation and exchange of information between (specialised) courts across Member States.

The Swedish Securities Council

The role of the Swedish so-called 'Securities Council' in relation to the promotion of best practices as to corporate governance issues of listed companies (including takeovers) was explained in more detail. On request by a shareholder or company, this self-regulatory body, established in the 1970ies, issues legally non-binding statements – *ex ante* or *ex post* – as to whether a behaviour could be regarded as being in compliance with best practices of corporate governance, however without giving an interpretation of applicable provisions. The Securities Council is composed of a wide range of experts from different sectors (eg, academia, banks, investment firms, law firms). So far, some 350 written statements, which are public if not requested otherwise, have been issued. A statement would not be given in hypothetical cases and in cases already or likely to be in front of courts. The Council has no sanctioning powers, but has a role supporting the Swedish Financial Regulator in sanctioning unlawful behaviour in relation to takeover procedures. In the more than 20 years of its existence the Council has succeeded in avoiding any conflicts of interests. Finland is currently considering the setting up of a Finnish equivalent of the Securities Council.

Policy Considerations

With respect to the trade-offs between arbitration and specialised courts, the following policy considerations were considered relevant for a comprehensive assessment:

a) *Speed* of dispute resolution
b) *Impartiality of judges and arbitrators*: here, problems could arise if a company involved in a dispute is a major player in the country
c) *One case – one court*: all integral parts of a dispute should be dealt with by one court, which

could pose difficulties in arbitration and specialised-court proceedings, where jurisdiction is usually restricted to specific matters

d) *Flexibility*: arbitration is likely to have more flexible procedures, so that arbitration could lose its appeal the more formalised arbitration procedures become

e) *Costs*: are costs to be borne by the non-prevailing party in all circumstances (eg, in share-redemption actions involving small shareholders)?

f) *Consolidation of actions*: this could be regarded as a major drawback of arbitration proceedings, where parties either have to agree, or bylaws of companies have to provide for the possibility to consolidate similar actions into one single action

g) *Transparency*: in principle, full transparency should be the objective, but a more nuanced approach depending on the subject-matter could be advisable

h) *Evidence*: in this respect, powers of arbitrators would be limited, but this is not necessarily an issue of major relevance for the assessment

i) *Enforcement*: experience would show that in cross-border cases enforcement of arbitration awards was a simpler route

j) *Options*: who should decide on either of the options where to submit the corporate governance related dispute, i.e. to a specialised court or to arbitration?

k) *Settlement of cases*: consideration should be given as to whether courts or arbitration proceedings create opportunities for settling a dispute through mediation or other non-contentious mechanisms

l) *Justice, fairness and predictability*: regarding these criteria, courts might have an advantage

2.3 Closing Session; recommendations for next steps

Regarding the follow-up work to this meeting, participants considered further comprehensive analysis of these topics very important, including (i) procedural aspects of ADR mechanisms, (ii) substantive-law issues of company law, including the issue of arbitrability of corporate governance related disputes, and also (iii) constitutional requirements (eg, as to the insertion of mandatory arbitration clauses for corporate governance related disputes into company statutes). In this respect, the regional OECD corporate governance roundtables would provide a useful source of information and could also serve as a sounding board. The OECD work should ultimately result in an inventory of policy options, based on two legs, i.e. the analytical work, and the collection of data (possibly using the Questionnaire).

Finally, participants of the meeting welcomed that the Global Corporate Governance Forum has been active in the field of mediation and would continue its support of the OECD's work on an inventory and toolbox of flexible (informal) solutions.