A Reassessment of the Owner - Manager "Class Conflict": the Unintended Private Consequence of Some Public Regulations

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Abstract

Traditional literature regarding "corporate governance" finds the "tension between ownership and management" (as it was shaped by the agency theory) to be a node in the logic of what should be the answer to the question "how the structure of the corporation's property can be designated and, in this way, achieve its organizational architectural efficiency on the more developed financial markets, populated by publicly listed firms and owned by «diffuse» shareholders?". In such modern capital markets, that are more dynamic due to a more liberal corporatist law (although uneven across jurisdictions), a phenomenon as "unprecedented" as "ambiguously" theorized by Berle and Means (1932) has been identified: the classic problem of the "separation of ownership from control". This article makes a brief survey on a part of the corporate governance literature that is mostly neglected and in the ignorance of which lies the melting down in the same pot of the "separation of ownership from control" reality and the "managerial omnipotence" fatality, both associated to modern multinational corporation, and, more or less, misled by Berle and Means (1932). The Austrian School's treatment within the theory of the firm has the potential to mitigate bad explanations and poor policy prescriptions that undeservedly hamper the very capacity of corporate structures to adapt themselves to changes, the need turning more stringent in times of worldwide spread crises.

Keywords: *agency, Austrian School, corporate governance, entrepreneurship, management, ownership, praxeology, theory of the firm*

JEL classification: B53, L22, L51, M16

Introduction

In the literature of corporate governance, there was great career made by Berle & Means (1932) criticism on the fundamental harm for the modern capitalist practice from property and control separation observed inside the modern dispersed-shareholding business corporation. Both before and after, some nuances had been espoused on the same topic, by economists such as Knight (1921) and Mises (1949,), revisited by Padilla & Kreptul (2004): if Berle & Means had put the

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nature of managerial discretionary exercise in regard to the shareholders (epitomized by the higher costs for shareholders to exercise control over their owned capital) in the "market's failure" realm, Knight and Mises placed it within the frame of the "failure of institutional statist and interventionist policies". In our article, we will recollect the rationales why the accurate problematizing remains with the latter.

We state clear, from the beginning, our analytical option – sanitary in dealing with the issues implying recourse to the "property rights economics" – for a useful discrimination between two types of mutual exclusive ways to appropriate scarce and valuable resources, anytime and anywhere: contract and coercion. No matter how much ideological polemics this assertion might raise, an undeniable fact is that State's actions are by their nature coercive (regardless of "noble" goals they allegedly serve). Coercive property transfer can be physically done, through expropriation, and virtually, through regulation, although owners use it peacefully. Government intervention in the form of regulations can be defined as a set of authoritarian orders and prohibitions that seek to restrict private owners' actions, even if those actions do not harm the private propriety of others (Mises 1977, 15-6). Before scrutinizing the meddling-with-private-property policies feeding the ownership and control "agency problems", we will make some necessary remarks.

First of all, we understand by the "separation of ownership and control" a fact related to the mutual search of efficiency (from the part of both shareholders and managers), through which each of them takes a seat in the division of labour. We witness here, on one hand, the saving-making capitalist and in the same time risk-taking entrepreneur, treating uncertainty with patience, and, on the other, the technician manager entrusted by the former to organize business within the general framework set by the former. In the same time, we understand by "managerial omnipotence" the manager's abuse of the shareholders' trust, because, due to some external constraints (of public policy nature), they can't contract in the terms that would satisfy them both; or, put it otherwise, the shareholders have limited access to institutional mechanisms within the market, which could improve the convergence of interests with the managers, thus being left in an quite weakened position in relation to them.

Secondly, we have to note that the absolute reference under which we claim the existence of these phenomena is the unbounded capacity to contract, according to the natural definition of the contract as a mutual transfer of propriety rights (over a finite commodity or the results of a performance that transforms the characteristics of a material good). Between two parties, the contract is the element to which there should be explicitly related both the obligations and rights of the parties. Once contracted, the parties' behaviour should be analysed in respect of the contract, the only instance under which abuses can be understood consistently (as opposed to various "subjective hints" of a party or another).

Muşetescu (2009, p. 55) is tackling the typical example in corporatist governing, in which some managers pursue interests and initiate actions which might not maximize stakeholders' satisfaction. But such cases must be supplementary discriminated: (1) Do they violate the contract between parts? or

(2) Do they imply an unspecified behaviour? In the first case, the owner has the right to retrieve the lost holdings. In the second, to the extent that the incriminated behaviour is unspecified, even though it should be qualified, does it involve a violation of owners' rights or not? If the answer is "no", the case is closed. "Potential benefits" of business cannot be subject to property rights whatsoever.

Thirdly, choices made by managers may be "inefficient" comparing to the best possible action course in terms of aggressive non-interference in contractual relationships. (interference defined coming from third parties of the contract). Thus, we are not talking about inefficiency in comparison with the world of perfect knowledge or of the uniformly distributed information, but about inefficiency in comparison with the world in which legitimate contract can be phrased with all the provisions which the parties consider feasible to follow and implement (such as the keeping of the usufructs, determining their destination or the opportunity of remising a part or even all of the attached rights, etc.).

The incentives of using efficiently the owned property are maximized when the rights are well defined and applied, i.e. when individuals (ex. Corporation's owners / stakeholders) believe that they will satisfactorily take advantage of it. Government intervention diminishes the *ex-ante* efficiency (the *ex-post* one, even accidentally improvable, is not a teleological basis of human action nor of behaviour norming), embezzling the action's course from the most satisfactory (contractual) allotment. Even if individuals are regrouping in the new area of the possible efficiency (choosing "efficiently" in the new limited conditions), the individual loss and social miscoordination remain ineluctable. And the economists' concerns remain legitimate in finding the "ultimate causes" of ownership usurpations.

1. Brief literature review on the "shareholder - manager schism"

Summing up: we've just separated the "separation" from "abuse", by relating them to contractual institution. Further on, we hold that the analysis remains valid careless if we start from the assumption (whatsoever "charitable") that the government actions are emerging from its structural benevolence for correcting market failures. Of great support is the idea that anchoring in the rational ethics of private property – as in Rothbard's (1982) or Hoppe's (1989) definitions – is a far stronger position than relying on the consequentialist-utilitarian or emotional-egalitarian ethics, in as much as it leaves no room for the wondering for what is unfair and / or corrigible. An ethical position is paramount in and prior to economically assessing the problem of "shareholders - managers failed relationship", as it is seen in mapping it under the moral hazard format – defined as the expropriation of a contracting part by another, not necessary due to hidden knowledge, by due to poor property rights protection (Hülsmann 2006). And we will see bellow how even good-intended governmental policies, by means of their coercive nature, turn out to be "moral hazard" enhancers, even in the case of stakeholdership - management misalignment of interests. Anyway, we will show that the

willing or ignorant encroach of property rights logic has "unintended consequences", that are, by all means, bad for property accumulation and allocation.

Before pointing out some of the technical elements (which are dependent on legal-institutional architecture and the political instruments in its context) from which the stakeholder - manager schism emerges in modern corporations, we will abide on two systemic explanatory endeavours.

On one hand, Roe (1990; 1994; 2002), as well as Mises (1949), see the political climate from which corporation emerges as crucial, making distinction between states with "capitalist mentality" (USA) – with regulations dedicated for protection of stakeholders in huge capital markets –, and the ones with "anti-capitalist mentality" (France, Germany, Italy) – where the pressure of the interest groups privileged workers' social protection against entrepreneurial class, the property concentration degree is bigger, the power of the great stakeholders and managers is ample and the capital markets less developed.

On the other hand, La Porta (et al. 1997; 1998; 1999; 2000) is connecting the dispersion of corporative property to the legal environment in which the company is mobilizing the capital, so the financial markets will be more ample in the countries with "common law"-type systems where the legal system is more protective with the property rights and defends the interest of the small stakeholders, than in the "civil law" countries (France) where the (small) property is less protected, the great stakeholders and managers having the possibility of taking advantage of the small stakeholders. Beny (1999), Maug (1999) and Bris (2000) have extended La Porta's studies and they've applied basis regarding transitioning on confidential information (insider trading). They are showing that, where the loss regarding insider trading (interpreted as legal protection for minority stakeholders, less informed comparing with the great insiders) are drastic, the property is more dispersed. (Somehow, the modern corporation would be the result of quite a property "structural failure".)

Padilla (2002) is trying to reconcile (where it is possible, and to increase the precision degree of observation from) the two positions, showing that the fundamental difference between the corporative governing structures can be more consistently explained through causal relationship identification between property rights - incentives - governmental regulations, context in which perspective regarding rights or political culture gains some more rigorous connotation.

Hence, Padilla considers studies like La Porta unhappily tending to spread Mises-Roe thesis.

Firstly, Padilla (2002) is setting up that the relevant issue is not "property structure" *per se* (focused or dispersed), but "expropriation of stakeholders by managers" and is not necessary following the first. The property can be concentrated and, even so, the stakeholders can be prejudiced.

Secondly, the Mises-Roe argument is irrefragable if we are showing that, in the states with their own capital markets more ample, the protection of the small shareholders rights is done simultaneously by harming other property rights (ex. "great shareholders").

Thirdly, this kind of studies show that, in the civil rights states (with more "social" and less ownership models), insider trading scandals are often connected with ubiquitous political power.

In the following part of the paper, we undertake a survey of basic regulations with redistribution potential of ultimate control on property from stakeholders to managers. We have mapped them in two broad categories: the first is legislation designed to improve the competitive macro-climate ("the obsession for perfect competition"); the second is legislation designed to improve the micro-corporate governance ("the obsession of social protection in organization"), illustrated by iconic US and EU law and policy making examples.

2. Legislation designed to improve the competitive character at the macroeconomic level ("the obsession for perfect competition")

- Antitrust legislation (limitation of financial institutions to hold stocks and / or to exercise their attributes as stockholders)

Legal restrictions against financial institutions to have important position in corporation stockholding are considered to be one of the key elements in impairing the control that the shareholders could apply upon managers. These laws favour the fragmentation of corporation ownership, being responsible for the occurrence and consecration in modern markets of the said "Berle-Means modern corporation". Only from this fragmentation (we argue, doubled with other forms of limitation of owners' actions) spur the so-invoked relative advantages obtained by managers in controlling those companies, whose diffused shareholders can exercise only sparsely disciplinary measures against the firm administrators' decisions. Logically, the higher the percentage / amount of stock held by an investor in a business association format (for example a corporation), the stronger they are, among others, as are their incentives to ensure that the appointed managers are taking efficient decisions for the business whose co-owner is: that is to maximize the corporate profits.

In the USA, but not limited to, the large corporations at the beginning of last century had relatively few stakeholders, some of them holding large volumes of stocks and serving on the administrative boards of companies, fact that allowed them a better control of their shareholdings and thus determine a more efficient use of it. But government have contended that such "too close" links between large owners and corporate administration would have been double-detrimental: they would be contrary to the interest of the small stakeholders and would impede the formation of new business firms in a business environment controlled by "big investors". Consequently, certain ultra-potent investors categories – like banks, mutual funds, pension funds – have been blocked to get involved in the field of shared transactions or stockholdings were limited in their portfolios or have been prevented to be part of the corporate management structures in which they held stocks. And this relatively increased the power of managers in the corporate realm with a dispersed ownership.

Historically speaking, the new stream of opinion was to be installed in the 1890s, with the Standard Oil case, when there were put to work regulations dedicated to block the "trusts" from holding controlling stock packages in various corporations. The famous *Sherman Antitrust Act* of 1890 was to be used not only to block Standard Oil, but also other American giants of the time, like American Tobacco or DuPont, in acquiring or merging with other companies to obtain dominant positions in the markets, considering that by this the individual investors power and their participation in the capital market would have been limited (see, among others, DiLorenzo (2006) persuasive account on the idea that one of the most harmful effects on economic science and competition policies – that is the "antitrust logic" – was the consecration of the perfect market theoretical model). A consequence of this vision on "the dangers of business concentration" was the removal, in the first decades of the twentieth century, of the American investment banks from the position of membership of corporation managements and, thus, from the management monitoring positions.

Regulations such as the famous *Glass-Steagall Act* or the *McFadden Act* and the *National Bank Act* in the USA have gradually reduced banks' participation, a large archetypical stakeholder (although "second order", if we think that the banks have their own stockholdings), in the American corporation governing. They were, despite the stated goal of the "improvement of the competitive climate", just some other biased measures for preventing non-aggressive exercise of the investors' property rights. A consequence: the consecration of the stockholding is limiting the *proxy fight* mechanism (the mechanism through which a company's stakeholders are convinced by their fellow stakeholders to join forces in the management council in order to gather enough votes to counteract quickly an undesirable activity initiated and implemented by the in-office corporation management – e.g.: blocking of a takeover or making an acquisition – or to dismiss the management for "malpractice". In the conditions of ownership dispersion, the costs of organizing a proxy fight are increasing along with the capacity of directors and managers to delay (bracing the management council operation by hoards of statutory amendments).

- Inter-firm mergers and acquisitions legislation (limitation for "hostile takeovers" that might displace underperforming management teams)

Laws regarding the inter-firms mergers and acquisitions (m&a) added to the limitation of shareholders' possibilities to fully control and discipline (indirectly) the quality of the appointed managers' activities in that it interferes with the shareholders' right of selling without "artificial procedural hardships" the shares to potentially interested persons. Because anti-takeover norms are making more expensive for potential buyers the purchase of a target companies majority / control package, managers of the latter (being in the case of a takeover under the spectrum of replacement by the new management team from the purchaser-company, penalized for not having obtained higher benefits, a fact revealed by the

current small share price) become, now, less tempted not to adopt behaviours that do not maximize corporate profitability, since they cannot be penalized for the fact that they drive company shares / value so low, thus tempting current shareholders to sell them.

Manne (1965) considered hostile takeovers as being the most powerful disciplinary mechanism against those management teams tempted to adopt non-maximizing behaviours for shareholders, speculating inefficient internal mechanism – management council, direct action of large stakeholders or stakeholders conscription by proxy fight. Despite the name meant to highlight "hostility" in their conduct, they have no aggressive note, but they are an expression of market competition between management teams for controlling and reallocating resources whose value is perceived as not being completely exploited: raiders perceive a lack of competence or diligence in the target company. Stakeholders may voluntarily subscribe, through corporation chart (either through its preparing / amending, or implicitly, by the very act of buying shared), to precautions / response measures against unfavourable takeovers, but these should not be confused with "legally", though arbitrarily, "precaution / response" measures, that don't quite protect their stakes.

Therefore, an analytical distinction becomes paramount, from the outset: that between the defensive measures adopted by managers with shareholders' consent and those unilaterally adopted by managers without shareholders' consent, although encouraged by the legislation in use (by corporative statutes provisions legally formatted but not necessarily targeted to protect genuine property rights). Although matured, these laws are by no means the expression of a natural sense of righteousness. Briefly put: on one hand, we find five anti-takeover voluntary amendments – *the supermajority amendments, fair-price amendments, dual-class recapitalizations, changes of the state of incorporation* and *reduction in cumulative voting rights*; on the other hand, we have four types of actions to which management is entitled to skip over shareholders – *litigation by target management, targeted block stock repurchases (greenmail), poison pills* and *state-antitakeover amendments*. Such artificialities, politically motivated, have unintended consequences on shareholders and on deterrent effect of takeovers on mismanagement.

Although the literature is stating that a lot of m&a may spontaneously fail because of opportunistic behaviours of some shareholders (who would like to keep the shares, betting on the change of management following takeover that will improve profitability), a blockage resulting from asymmetric perception of individual / investors on the possible configurations of future reality (natural and ubiquitous), we see that status quo in markets, granted by law-making, hardly has providential consequences. Authorities can make m&a phenomenon more difficult, invoking different pretexts (pro competition vigilance or avoiding damaging the yields of stocks) using different delaying-and-hardening-intended legal instruments (notifications, limitations or prohibitions, etc.). We will give some examples of this kind from USA and EU legislations that have the unfortunate (as well as

unintended consequence) of delaying m&a procedures, to the advantage of the "managerial class".

In the USA, the Williams Amendment to *Securities Exchange Act* from 1934 regulates the way a tender offer is ensued, by restricting what buyers can do in this respect: buyers must notify their intention to the regulatory authority (Securities and Exchange Commission) together with any information considered to be of public interest (in order "to protect the interests of existing investors") after having purchased more than 5% of the shares on market; concomitantly, it is specified the minimum time in which an offer must remain open; moreover, the rule 14(e)-3 makes illegal the share-trading of a company involved in a buying offer if the person is in a privileged position in terms of possession of relevant confidential information (in this case, blocking the process of "arbitration" that could facilitate the acquisition). The Williams Law's logic is to slow down the process until the stakeholders can make a good assessment of the offer, but the unintended consequence is that it is trapping shareholders in an induced blockade, so fuelling managerial *status quo*.

In the EU, law requires that any person or legal entity has to declare within seven calendar days to the entitled company or to the regulatory agency of the member state in which the company is placed any acquisition or disposal, in a company whereas following the acquisition or disposal the proportion of voting rights held by that person or legal entity reaches, exceeds or falls below one of the thresholds 10%, 20%, 1/3, 50% and 2/3. The EU law adds that member states may provide in their legislation that a company must also be informed regarding the capital proportion owned by a person or entity. The effect is the same as in the Williams Act case, provided that such legislation helps managers to adopt anti-takeover actions in cases when the purchasing of a massive share package would foreshadow the takeover. So the common point of mergers and acquisitions regulations is, beyond the goal of transparency of competition, an, "unintentional" as it may be, significant advantage to the managers and, symmetrically, a burden for the rightful owners.

3. Legislation designed to improve the corporate microeconomic governance ("the obsession for social fairness in organizations")

- Insider trading legislation (against "private information gurus")

"Insider trading", defined as the abuse of market positions by using privileged information, is a term coming from the US stock market jargon which designates unlawful practice of stockbrokers by using confidential information for their self-interested endeavours, information shared with them by their clients. The insider trading refers generally to the sale or purchase of securities with the violation of some trusted relationships through possession of confidential information concerning the securities. The concept covers both the act of transmitting confidential information, but also the transactions themselves undertaken by parties who benefit from those leaks.

Insider trading is not, unequivocally, identified as a fraud: some might consider it as some ferment for entrepreneurial innovation in organizations, the privileged information becoming automatically the reward of the maximizing efforts by the insiders (Manne 1966); others see it as a source of moral hazard because users of this privileged information can gain "whether there are good or bad news" – managers can start risky projects, which can bring benefit to them, and if not, bring losses to shareholders (Easterbrook 1981), or can encourage, through media intoxication, the stock exchange quotations fluctuations, winning from the speculation (Posner 1977), or can block the hierarchical circulation of information, taking advantage of the "severed" info (Haft 1982).

Padilla (2002) discriminates realistically, in the spirit already mentioned, among the feasible resolution mechanisms which the ("imperfect") market can still develop and pseudo-mechanisms (and unintended inhibitors) provided by regulatory interventionism. The contractual design without arbitrary legal limitations and strictly enforcement of contracts, as incomplete / imperfect as they are, may bring sufficiently satisfactory mechanisms: Kinsella (2001) talks about how, simply, contracts containing an obligation "to do", naturally weaker, can be converted into stronger contracts of "to give" nature, stipulating that the agent has to pay compensation in case of failing to fulfil the task, thus managing to deter and sanction properly those really costly "insider trading habits".

Padilla (2002, 7 et seq.) shows, for example, that on an unhampered (by arbitrary regulations) market, there can be initiated hostile takeovers or proxy fights against undesirable insiders: by their relatively passive nature, small shareholders would be quite likely tempted to follow the more informed and motivated major shareholders' active stance (a rationale that can counteract the accuse that the passivity of small shareholders is a market failure in the realm of protecting interests in big ownership dispersed corporation). This becomes more difficult only when in the equation there appear artificial hurdles, allowed for by the law, harassing and hampering rightful owners from conducting self-protecting actions: i.e., litigation by target management, targeted block stock repurchases (greenmail), poison pills, State-imposed antitakeover amendments, etc.

Regulations prohibiting insider trading have thus greatly contributed to the deepening of "the separation of ownership from control". Securities and Exchange Act (1934) defines, next to the managers and the directors of the corporation, an insider as any owner who owns more than 10% of the company. The result of such an extensive definition of "insiders" was to undermine motivation of the shareholders and, in particular, of the institutional investors to hold large packages of shares: the logic behind protecting the liquidity of their shares is that these investors refuse to hold large packages because this would fall under the SEC definition of insiders, and they cannot make transactions based on inside information acquired, eventually from being members in boards. Because their interest as owners in the corporation is reduced, the refusal of smaller investors (institutional or not) to hold large packages of shares further reduces their incentives to properly monitor and exercise full control over management

decisions. And if managers are less monitored, they have more freedom to engage in discretionary behaviour or to violate their contracts (including abusing from their position as camouflage insiders). Another consequence is that such rules increase the cost of a takeover, because they augment the cost of acquiring a majority of shares in a potential target since ownership is highly dispersed.

- The legislation of corporate status (one size fits… rather nobody)

If restrictions to the m&a-type operations directly distort the relationship between the shareholders of the target company and third parties interested in the acquisition or merger (and indirectly the one between shareholders and managers of the target company), corporate law that "dictates" the format of the statutes of corporations (including the "due" behaviour in case of m&a) have the express potential to deteriorate ownership - management relations. Ironically, this happens much more as those laws openly aim to protect the "best service" of shareholders by managers.

An iconic example is the legal literature from the US state of Delaware. Section 14 (a) from the status of corporations registered there gives broad statutory power to the board of directors. To ensure that directors will operate for the interests expressed by shareholders, the Delaware courts have developed a corpus of jurisprudential law about "fiduciary duty" – loyalty, care and good faith – from the directors to shareholders, which once proven in court, may waive them of any charges of mismanagement – this is known under the name of Business Judgment Rule.

In mid-9th decade of 20th century, appreciating that the problem of implementing such default rulings strengthened the position of management to shareholders, it was considered appropriate to provide a new standard for assessing the quality of management (the "Unocal" precedent). From then on, the burden of proof falls over to the directors who must show that acting in some way they perceived, in good faith and reasonable, a threat to the company and that the measures taken were appropriate response perceived to the threat. If they succeed, shareholders are causeless.

But the new precedent only prolonged the credit given to the management judgment in the vast majority of disputes on anti-takeover defences. Literature witnessed the installation of a "sacred space" of managerial action, due to how the courts have often embraced the interpretation given by managers to what "threat to shareholders" signify (given the "silence" of diffuse shareholders), and the inability of the courts in making an a posteriori parallel assessment based on a solid a priori distinction between what is good for shareholders and what is good for managers.

However, beyond the powers that managers receive in their dealings with shareholders, the tense relationship between the two categories of stakeholders in the corporation may appear, also through the "legal" channel, by other favouring factors allowing for what is popularly known as "managerial omnipotence": for example, tensions resulting from statutory limits (artificial established) set upon the

exercise of voting rights or on the sale of these stocks – the reason being that these are not set (only) by simple contractual agreement, but legally "preformatted".

Again, in the case of Delaware law: although nominally the shareholders enjoy their necessary rights to corporate control, these are not sufficient: most corporate charters require the existence of so-called "staggered boards", with three classes of directors from where only one can be chosen on the occasion of the annual meetings; moreover, the law says that directors may be replaced only with a "reason". Corporate managers use their position, so that beneficial provisions (allowed / created by virtue of positive law) are widely present in the corporations' charts.

As far as the right of shareholders to sell the shares, although assumed as automatically granted, laws like the Williams Act or anti-takeover rules violate it severely, making it costly for buyers to lead a takeover bid and, therefore, also for shareholders of the target company to be able to easily dispose of their shares. I.e., Delaware law allows, as fully legitimate, the practice of target's management to adopt the defensive strategies – such as the "poison pill" – to block both the "dangerous" purchasers' intentions, favoured by the "reckless" cooperation of the target's shareholders.

Logically, without this whole bunch of impediments imposed by the management class (speculating an unfortunate format of legislation in terms of voting rights or disposition of shares owned already), the shareholders of target corporations presumably would benefit more from natural freedom to contract, of course, with all the errors associated to the asymmetry of knowledge on events and on their causes. It may be plausible that many of the protections unsolicited be removed, but markets are still dominated by legal decree that often serve political vested aims.

- Contract legislation (manager's benefit of the doubt)

Among the factors that limit the disciplinary power of shareholders over managers stands the way contracts are treated in courts of justice and especially the weakening of penalty clauses related to breach of contract and the fact that parties cannot agree *ex ante* contract as they see mutually fit, through accurate stipulation of clauses, but many interpretations are set *ex post*, by courts. The common ground of this interpretations is that courts propose a "calculus of reasonableness", which includes: identifying the damage caused by breach of contract, the difficulties of proving the suffered loss and the difficulty or non-feasibility of obtaining, otherwise, an appropriate remedy; and, quite often, terms that would be proposed and agreed by the parties from the very beginning for the liquidation of damages, but are perceived by justice as "unreasonable", become null (see, for instance, the provisions in the US Uniform Commercial Code). A "justification" for non-application of penalty clauses is that the parties are unable to establish, easily, the compensation in agreement, since this would rather be the role of public law, not of the private contractual one! Direct consequence of this utilitarian logic is that

through this legal public system intervention in free private contracting – such as claiming damages in a "reasonable manner" – offers relative incentives to management to breach contracts (and to take *de facto* control over the resources belonging to and entrusted by the shareholders).

- Labour legislation

Not least, limiting the conditions of layoffs among the employees of a firm, especially when they underperform, this because of a proven or not particular employee operation (otherwise knowing that even suspicion can be "fatal" in markets with less rigid contracting formats), has the potential to simulate opportunistic behaviour. The reasoning is all the more relevant when applied to top management hierarchy. Such "tolerant" laws impair freedom of "internal" contract (by dictating "external" standards that structurally protect the employee at the expense of the employer, and not both from the abuse of the other one), an unfortunate feature within the "modernization" of societal relations.

Conclusion

The way the representatives of free market stream of economics understand the nature of property rights properly notifies the importance of these rights for the motivation problem within a socialist organization or any type of organization in general, so the analysis undertaken by them supersedes both the "new" and the "old" approaches on property rights. In addition to the criticism on the "economic socialist calculation", following Mises, the Austrian School has discovered the source of the "bureaucratization of organizations". But Mises distinguished himself arguing that the problems of economic calculation and incentives are not separate problems within a company: both are based on the existence or absence of solid private ownership of means of production, and this insight is a key one in grasping the behaviour of corporations that sometimes are driven on false roots by discretionary managers.

The artificial omnipotence of corporate management – made possible by antitrust law (restricting financial institutions to hold shares and / or to act as shareholders), acquisitions and mergers law, "insider trading" law, status corporate law, contract law, employment law, all of them immunizing the managers' positions in corporations – and the privatization of profits and externalization of their loses might explain, partly, the hazardous way of conducting businesses, whose result is the "modern boom-bust economy". The fluctuating nature of capitalistic economy is (also) an offshoot not of a natural degeneration of the market-type ownership - management relationship, but, among others, of the privileges that non-owners receive by governmental policies, making the moral hazard a *modus-operandi* in economies, so weakening the capacity of organizations to adjust their capital and workforce.

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