

HAS THE WORLDWIDE CONVERGENCE ON THE ANGLO-AMERICAN STYLE SHAREHOLDER MODEL OF CORPORATE LAW YET BEEN ASSURED?

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ABSTRACT

It has become increasingly mainstream for corporate law scholars to recognise that the world has dichotomised itself into two patterns of share ownership: dispersed ownership of shares and concentrated ownership of shares. In substance, the differences in ownership patterns beget different background systems of corporate governance. In general, the US and UK corporate governance system adopts the former which is more aligned with a shareholder-oriented model, whereas the corporate governance systems of most European and Asian countries adopt the latter which is more in alignment with a stakeholder-oriented model. Over time, the academic debate has revolved round the question of whether there can or will be global convergence on a single type of share ownership and resultant global convergence in corporate governance. This debate has simmered concomitantly with Hansmann and Kraakman's hypothesis put forward in their seminal scholarship of 2001 that it is only a matter of time that the emergent consensus on the supremacy of the shareholder-oriented model might propel judiciaries in countries with a non-shareholder-oriented model to make corresponding changes in their corporate laws towards a shareholder-model. Influenced by the above discussion, this article enquires into the soundness of their hypothesis. This article ultimately shows that the worldwide convergence is not necessarily a straightforward exercise in practice due not only to the persistent differences in the world's corporate ownership structures, also to several other reasons.

Introduction

There has been a debate touching on the question of whether one system of corporate governance could be qualified as inherently superior to other models of corporate law. Some commentators are of the view that there has been the worldwide ideological convergence towards the Anglo-American shareholder-centred model which is generally characterised as 'market-oriented or "short-term" shareholder-oriented' (Tae-Min Cha, 2010, 2), representing its supremacy over other models of corporate law and, perhaps, its influence might condition the reform of alternative corporate governance systems towards a shareholder-oriented model in the relatively short run (Hansmann and Kraakman, 2000-2001, 439). Coupled with the recent internalisation of financial, stock and capital markets and the consequential increasing role of multinational companies in world markets, the worldwide equity market boom and the evident successes of equity holdings in fostering the share ownership in widely dispersed corporations of both the US and the UK at the turn of the twentieth-century have led to a reassessment of any other alternative models and a certain ascendancy of the shareholder-oriented model of corporate governance (Hansmann and Kraakman, 2000-2001, 452-468).

That said, it is apparent that from 2001 onwards, practical convergence has yet emerged to a much lesser extent than Hansmann and Kraakman had predicted. The conspicuous example of partial convergence is that the architecture of corporate governance systems of the US, the UK, and most European and Asian countries still differs significantly. Indeed, persistent differences in the world's ownership structures in the form of dispersed and concentrated are still patently observed. With respect, also, the panoply of blatant differences in corporate laws, financing techniques and capital markets which possibly result in the existence of different corporate governance structures amongst countries (Bebchuk and Roe, 1999, 35-37) still persist, and we therefore have to be at loggerheads with Hansmann and Kraakman over their assertion that such differences have vanished over the last two decades (Hansmann and Kraakman, 56). Along the similar lines, we remain agnostic on the likelihood that the worldwide convergence on the shareholder-oriented model will emerge (in practice) at some close point in time, owing, mainly, to a variety of economic, social, legal, cultural and institutional differences amongst countries, over and above stakeholder and political apathy. As will be seen, there is, moreover, a considerable climate of opinion in

favour of stakeholder theory amongst academics, suggesting that the shareholder-oriented model has not yet gained full acceptance even in literature. This article tends to expostulate with any statement or assertion that the ideological consensus on the supremacy of the shareholder-driven model (if any) have or would be translated into kick-starting the worldwide reform activities for the purposes of transforming other alternative models such as a stakeholder-model into a shareholder-model as the things stand, and suggests that the stakeholder-model will continue to subsist alongside the shareholder-model, at least for a considerable amount of time (if not for good).

Two Patterns of Share Ownership and Two Systems of Corporate Governance

Over the course of the 1990s, there egressed in the US a majestic sequel to Berle and Mean's thesis of separation of ownership and control, dispersed ownership, and passivity, a focus of novel study which stands the test of time (Ben Pettet et al. 2009, 62). It had become quite evident that share ownership seemed to have been segmented by the world nations into two patterns (Ben Pettet et al. 2009, 62). The first of these is dispersed ownership of shares, where there are too many dispersed shareholders who hold small stakes in the company which leave them with little power and therefore little incentive to police management (Ben Pettet et al. 2009, 62).¹ However, it is emphasised in some quarters that the presence of highly developed and liquid equity markets tend to counterbalance this drawback of dispersed ownership structures by way of enabling the minority shareholder to quit the company (Ben Pettet et al. 2009, 62). Likewise, some argue that highly fragmented ownership provides much in the way of controls upon management via takeover offers, the fruitful result of which is that management be disciplined (Ben Pettet et al. 2009, 62). The second pattern of share ownership is concentrated ownership of shares², where strong families, banks or other companies hold large blocks of shares in the company under cross-holding arrangements and, thereby, wrest quite direct controls upon management (Ben Pettet et al. 2009, 62). Such systems which are usually characterised by considerably undeveloped stock markets and little likelihood of effective takeover bids suffer from the fundamental drawback, that is, such stock markets prove little in disciplining management by failing to have the company succumb to the threat of takeover offers (Ben Pettet et al. 2009, 62).

The presence of these two patterns of share ownership has tempted corporate law scholars to recognise that this begs two questions: what are the catalysts for the existence of the world's different ownership structures and for resultant systems of corporate governance? And whether there will be global convergence in the sense that the former will become the sole pattern, the bottom line of which the latter will change accordingly (Ben Pettet et al. 2009, 62). Pettet's *Company Law* (2009, 62) heralds the three trends of thought as being closely relevant to the causes of dispersed share ownership and having interesting angles on the convergence question too.

The first is the 'efficiency approach' coined by Easterbrook and Fischel (1991). The point of departure for this approach is traditional economic theory that 'corporate structures will come to assume the form which is most efficient in the sense of producing the greatest profit for the shareholders' (Ben Pettet et al. 2009, 62). Pursuant to this approach, the large corporation with fragmented ownership evolved as 'an efficient response to the needs of the industry for large-scale organisations which could only be created by the aggregation of share capital from very many shareholders' (Ben Pettet et al. 2009, 63). Of the convergence question, John Coffee (1999)'s analysis is that the efficiency approach tends to throw the proposition that since the advent of globalisation, the rival systems of corporate governance have been driven to compete with one another, and this follows that the winner of this competition will ultimately be the one that is the most efficient. By way of example, it is sometimes argued that due to an undeveloped and illiquid market for corporate control which precludes companies from making share for share takeover offers and growing in size, European systems of corporate governance are less efficient than the US/UK system (Ben Pettet et al. 2009, 64). Notwithstanding this, the shareholder-oriented

¹ Countries like the US and the UK are typically characterised by having such ownership structures.

² Most Asian and European countries' corporate governance systems are denoted by the stakeholder-oriented model in which concentrated ownership structures are highly common.

model is often considered to be suffering from the detrimental 'short-termism' induced by pressures coming from the stock market (Eldomiaty and Choi, 2006, 20).

The second is the 'politics and path dependency approach' propounded by Mark Roe (1991). He argued that politicians felt required to introduce legal constraints with the dominant purpose of prohibiting or increasing the costs of banks and other institutions which could otherwise mine a rich seam of concentrated control in the company via large blocks of shares, paving the way towards confinement of the terrain on which large-scale companies with concentrated institutional ownership evolved (Mark Roe, 1991). As a result, the evolution and survival of the corporation with dispersed share ownership has been assured (Mark Roe, 1991). In his later work, Mark Roe (1996) sought to explain the continued presence of the two patterns of share ownership and developed a theory of 'path dependency'. The idea of 'path dependency' is that present circumstances are ascribed in part to the circumstances which subsisted in foretimes (Mark Roe, 1996). Bebchuk and Roe (1999) therefore argue that initial ownership structures are the antecedents of subsequent ownership structures and, legal rules can be shaped by initial ownership structures, an event which borders on influential in the way subsequent structures are chosen (Ben Pettet et al. 2009, 63). This approach stresses that politics and path dependency factors stand in the way of convergence and hence, broadly, the two distinct patterns of share ownership prevalent in the world and consequential systems of corporate governance will continue to remain extant (Ben Pettet et al. 2009, 64). The third is the 'legal protection of minority approach' (Ben Pettet et al. 2009, 62). Under this approach, John Coffee (1999) argues that in an environment where strong legal protections are provided to minority shareholders of a company with fragmented share ownership, they can safeguard their rights or interests against expropriation risk by the majority shareholders, thereby encouraging them to retain their small fractional shareholdings in the company; as a result, two systems of corporate governance (namely, shareholder-and stakeholder-oriented models) continue to be in existence. This approach seems to have gained remarkable currency in the doctrine.

It is argued that corporate governance is susceptible to the legal system in which corporate governance is embedded (Luo, 2007, 37). As a matter of fact, not only laws associated with corporate governance impact on the choice of corporate governance paradigm in a jurisdiction, but also other laws very much influence such choice (Luo, 2007, 38). It is also stated that the extent to which a country affords protections to shareholders still differs from country to country (Luo, 2007, 38). Indeed, civil law countries adhering to a stakeholder-oriented model offer lower protections to minority shareholders and outsiders than do Anglo-Saxon countries adhering to a shareholder-oriented model (Luo, 2007, 38). This would strongly imply that the world countries have not yet largely converged to the shareholder-driven model. But, John Coffee (1999) emphasises, *inter alia*, that non-shareholder-oriented companies will elect to list their shares in the US markets and therefore adjust to the US corporate governance system, on the coattails of which they will bring some degree of convergence. However, this hypothesis might be open to argue in the light of opprobrium raised by many foreign private issuers (FPIs) at the time the Sarbanes-Oxley Act came into being in 2002, with the aim of allaying foreigners' concerns about the fraught crisis following the scandals of improper accounting, conduct and fraud in Corporate America which broke out circa 2002 (Matthew Graham Lunt, 2006, 1) that the Act forced FPIs with concentrated ownership structure to comply with rules unique to US-style dispersed ownership (Larry E. Ribstein, 2005, 16-17). Chief outcry amongst FPIs was that corporate governance in civil and common law jurisdictions demonstrated differences in the legal protection of shareholders (e.g. civil law countries offer lower protections to outsiders than do Anglo-Saxon countries) (Luo, 2007, 38). They signalled that without exemptions, most of FPIs would eschew listing or move their listings out of the US markets by delisting or deregistering (Larry E. Ribstein, 2005, 16-17).

A Look at the Convergence Question through the Prisms of Hansmann and Kraakman

Hansmann and Kraakman are the pioneers to argue not only that corporate convergence on the shareholder-oriented model is both desirable and inevitable, but also that corporate governance has already largely ideologically converged to this kind, positing that 'the triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured' (Hansmann and Kraakman, 2000-2001, 468). They establish three competitors: the manager-oriented model, the labour-oriented model and the state-oriented model (Hansmann and Kraakman, 2000-2001, 443). They have gone as far as stating

that the failure of these models has established the primacy of the shareholder-oriented model (Hansmann and Kraakman, 2000-2001, 443).

The bedrock of the manager-driven model, associated with the US in the 1950s and the 1960s, was that 'professional corporate managers could serve as disinterested fiduciaries who would guide business corporations to perform in ways that would serve the general public interest' (Hansmann and Kraakman, 2000-2001, 444). After the collapse of conglomerate movement in the 1970s and the 1980s, this model has lost much of its attraction (Hansmann and Kraakman, 2000-2001, 444). Besides, pursuant to a present overwhelming orthodoxy, untethered corporate managers furnished with ample discretion to handle the investment policy of a company may have a proclivity to manipulate the investment policy by concealing from shareholders information about core details regarding investments made by the company, or diverting to themselves a disproportionate income from investments (Hansmann and Kraakman, 2000-2001, 444).

The labour-driven model, crested in the 1950s, was exemplified most explicitly by German codetermination, but most nations, namely European States and the US came around the German's celebration of enthusiasm for direct employee participation on board in the 1970s (Hansmann and Kraakman, 2000-2001, 445). This model is premised on the notion that direct representation on the corporate board is provided for employees (Hansmann and Kraakman, 2000-2001, 445). Notwithstanding a German defence of employee participation, it can be argued that rather than employee participation obviates some of the problems arising out of labour contracting, it magnifies them in that the heterogeneity of interests among employees themselves and between employees and shareholders alike gives rise to 'inefficient decisions, paralysis, or weak boards' (Hansmann and Kraakman, 2000-2001, 445).

The state-driven model, particularly occurred in post-war France and Japan, entails a large state role in corporate affairs of large business corporations, through close bureaucratic engagement with the corporation's managers, to guide private enterprise to serve the public interest (Hansmann and Kraakman, 2000-2001, 446). However, today this model has steadily lost power as a normative ideal (Hansmann and Kraakman, 2000-2001, 447). The demise of state socialism has largely destroyed the normative appeal of the state-oriented model (Hansmann and Kraakman, 2000-2001, 447). Another reason is that communism suddenly lost its monopoly in much of the world in the 1990s (Hansmann and Kraakman, 2000-2001, 447). 'The rise of Thatcherism in England in the 1970s', 'Mitterrand's abandonment of state ownership in France in the 1980s', and economic difficulties of the 1990s, chiefly in Japan and most of the Asian countries are also the reasons lying back of the discrediting of this model (Hansmann and Kraakman, 2000-2001, 447).

Hansmann and Kraakman (2000-2001, 447-448) also state that with regard to the stakeholder model of corporate governance, there are two groups of models: the fiduciary and the representative models. They claim that neither the fiduciary nor the representative model at bottom lends credence as to constitute a normatively appealing alternative to the shareholder model (Hansmann and Kraakman, 2000-2001, 448). In this regard, the fiduciary model bears a strong resemblance to the manager-oriented model, and hence, is subject to the same weaknesses, whereas the representative model repackages the yesterday's labour model with the identical weaknesses (Hansmann and Kraakman, 2000-2001, 448). So, it is not palatable to resurrect both models under the reformulation of stakeholder models of both the fiduciary and the representative types (Hansmann and Kraakman, 2000-2001, 448). Another hard spot in their analysis is that the most efficacious mechanism for non-shareholder constituencies such as customers, employees, creditors and suppliers whom are the embodiments of the stakeholder group (Hansmann and Kraakman, 2000-2001, 447) to have their interests protected lies in regulatory and contractual means, not in participation in corporate governance (Hansmann and Kraakman, 2000-2001, 441).

Apparently, we are of the same opinion with them on the majority of the issues nicely put by them so far, except for their employee representation argument. Some researchers have found that employee participation at board level might promote rather than endanger the business prospects of a company. Gelter (2007, 2) emphasises that because employees have a stake as much as the shareholders of a company in the running of the company, they really do care about 'job security, work conditions, health and retirement benefits.' Similarly, an empirical study conducted in Ohio reveals that the inclusion of

employee representatives on board can advance the corporation further than when all board representatives are independent directors (Werther and Chandler, 2006, 120).

After writing off the alternative models because of their failures, Hansmann and Kraakman (2000-2001, 449) set the second reason for the superiority of the shareholder-oriented model: 'important economic forces have made the virtues of that model increasingly salient.' Like some of their ilk, there possibly lurked at the back of their minds three forces: 'force of logic, force of example, and force of competition', in light of which the principle alternatives have now come to be recognised as inferior (Hansmann and Kraakman, 2000-2001, 449). The rationality of 'force of logic' provides some ostensibly 'persuasive reasons' for believing that a shareholder-centred model of corporate law 'offers greater efficiencies than the principal alternatives' (See Hansmann and Kraakman, 2000-2001, 449). More importantly, they argue that the shareholder-oriented model of corporation promotes better economic performance than do other models (Hansmann and Kraakman, 2000-2001, 450). The outcome of a simple comparison between jurisdictions in which firms are organised and operated under a shareholder-oriented model and jurisdictions in which firms are organised and governed pursuant to different models reveals the main reason why the developed common-law countries which are strongly in alignment with the shareholder-oriented model and the regions such as continental Europe and East Asia which adhere principally to other models differ in terms of economic performance which has been found higher in the former types of countries, and lower in the latter ones (Hansmann and Kraakman, 2000-2001, 450). They claim that the US economy is in the ascendant and still keeps its title as the world's leading economy, far beyond the economies of Japan and Germany known to adhere to a stakeholder model, so that the fact of the superior economic performance of America can be explained with its adoption of a shareholder-oriented model of corporate law (Hansmann and Kraakman, 2000-2001, 450).

In contrast, pro-stakeholder theorists argue that a stakeholder-friendly model brings about a superior degree of economic performance for specific firms and for society as a whole in the long term, although not necessarily always the case (Models of Corporate Social Responsibility Part 2: The Stakeholder Model). Manning and Maslow argue that 'those who respect and invest in their employees experience higher productivity' (Models of Corporate Social Responsibility Part 2: The Stakeholder Model). Similarly, David Batstone points to a company, Johnson and Johnson, to argue that there are, indeed, corporations which on one level practice a stakeholder-friendly model of corporation but on another level, can retain their upward trend in profitability for a considerable time (Models of Corporate Social Responsibility Part 2: The Stakeholder Model). In a similar vein, it is a well-established axiom amongst stakeholder-model defenders that the corporate governance systems of Japan and Germany, (aimed at promoting stakeholder value maximisation) are better at taking a long term perspective (Tae-Min Cha, 2010, 2) and benefit from opportunities that are thus opened up to firms (White, 2007, 1).

With regards to their second argument, it would not be wise to attribute the fact of superior economic performance of a country principally to that country's adhering to a particular corporate governance approach. A distinction must be drawn between "merely being a reason" and "being the main reason." Albeit adherence to a shareholder-oriented model of corporate governance might be only a reason for a country's economic performance being superior, it alone is incapable of justifying the admitted need for transformation of corporate governance systems into a shareholder-oriented model. In view of many empirical studies, the economic performance of a country is normally determined by looking at various major cumulative factors.³ A further support to our counter-argument may come from a UK example which runs counter to their assertion that the economies of the developed common-law countries are better than those of continental European and East Asian countries, merely because they practice a corporate governance model as distinct from the shareholder-oriented model. The UK is known as the second major common law country for sticking firmly with the shareholder-oriented model. If the above assertion was true, it might be argued that the England's economy would have to rank as the second largest economy in the world following the US', not as the sixth behind those of Japan and Germany (The World's Largest Economies) which, as was previously mentioned, are in alignment with a stakeholder-centred model. By the same token, the economies of other developed common-law countries

³ For these factors, see Petrakos, Arvanitidis and Pavleas, 2007, 6-11 below.

such as Canada, Australia, Singapore and Hong Kong must have been listed in the top 10 of the world's largest economies ranking in lieu of those of Russia, France, Brazil and Italy which are in alignment with a stakeholder-oriented policy (See *The World's Largest Economies*).

In order successfully to substantiate their second argument, they have gone as far as to argue that at the times when German and Japanese corporations were winning the competition over US corporations, US corporations were manager-oriented and correspondingly producing relatively poor performance, thereby enabling German and Japanese corporations to be enthroned on a pedestal in international markets (Hansmann and Kraakman, 2000-2001, 450). However, at the back of the 1980s, a watershed in Corporate America was that, with a true interpretation of the nature of the economic competition, it was eventually conventionally understood that the way of seizing the economic competition was through the adoption of a superior form of corporate governance, say, a shareholder-oriented model (Hansmann and Kraakman, 2000-2001, 450). When the whole gamut of its corporate governance was inexorably reformed in line of a shareholder-model, being all the more powerful, the US shareholder-oriented corporations began to reign supreme in international competition by out-competing the state-and labour-oriented Japanese and German corporations (Hansmann and Kraakman, 2000-2001, 450). The question typically arises as to whether Hansmann and Kraakman's assertion in question is sound. The question of its soundness may be addressed by looking at Paddy Ireland's Model Law Review piece that leaves Hansmann and Kraakman's aforesaid remarks unwarranted.

Paddy Ireland (2005, 28) writes that in the second half of the 1990s, when Hansmann and Kraakman were formulating their theory, equity prices were still on upward threshold and the US economy was still continuing to dynamically flourish vis-à-vis the economies of its major rivals, namely Japan and Germany. Played out in the full glare of American law and economics elites, 'the much hyped, decade-long expansion of the American economy and [...] the stock market boom and supposed emergence of a 'New Economy' were, on the surface, the main motives prompting Hansmann and Kraakman to be too expeditious in concluding that the superiority of the US economy over those of Japan and Germany can be explained through the medium of the fact that the US was practising a shareholder-oriented model of corporate law (Paddy Ireland, 2005, 28). In the mid-1990s, though, there recurred a vexatious surge in dollar, which the US government had effectively devalued in the mid-1980s at the time of Plaza Accord (Paddy Ireland, 2005, 28). The stench of this event was felt in the form of the US economy losing 'the main motor [...] [of] its impressive turnaround' (Paddy Ireland, 2005, 28). Against this backdrop, the stock market continued to evolve notwithstanding a downward spiral in manufacturing profitability that followed, allowing the US economy to move forward (at least for a while) (Paddy Ireland, 2005, 28). Nonetheless, the embryonic development of the US economy appeared to be stifled as a result of a parade of catastrophic incidents such as a sharp descent of the US stock market wrought by the rubble of numerous dot.com companies, followed by an economic recession by early 2001 (Paddy Ireland, 2005, 28-29). To make matters worse, by late 2001, with a wave upon wave of financial scandals in a myriad of US corporations, accounting malpractices, which are labelled by some quarters as malpractices 'endemic to the model of governance which evolved in the US in the 80s and 90s' had inflated, in part, the stock market bubble (Paddy Ireland, 2005, 29). So, the historical conjecture clearly shows that the nearly decade-long financial saga in US history (which lasted with periodical intervals) stands to undercut the credibility of Hansmann and Kraakman's claims (Paddy Ireland, 2005, 29).

Moreover, Paddy Ireland (2005, 30) underscores that 'it now seems clear that for prolonged periods in the 1990s the share prices of many corporations deviated rather radically from the 'real' underlying value of the corporations concerned, confirming that financial markets are not only less than 'efficient' but highly susceptible to fads and manipulation.' A back-up statement to this comes from Robert Brenner, who writes that 'occurring as it did in the face of the downward trend in profitability – and made possible by increases in corporate borrowing and household consumption that were both dependent upon the stock market bubble - much of the growth in investment in the second half of the decade was inevitably misallocated' (Paddy Ireland, 2005, 30). These are the other cardinal reasons why the economic case for

the shareholder-driven model of corporate governance to which Hansmann and Kraakman attach significant weight looks increasingly suspect and extravagant (Paddy Ireland, 2005, 30).⁴

They also predict that the increasing internationalisation of product and financial markets has heightened competition among world corporations (Hansmann and Kraakman, 2000-2001, 450). Firms' increasing need to get 'access to capital at lower cost (including, conspicuously, start-up capital), [to] [...] new product markets' provides competitive advantages to firms adhering to the shareholder-oriented model (See Hansmann and Kraakman, 2000-2001, 450). These advantages encompass 'access to equity capital at lower cost (including, conspicuously, start-up capital), more aggressive development of new product markets, stronger incentives to reorganize along lines that are managerially coherent, and more rapid abandonment of inefficient investments' (Hansmann and Kraakman, 2000-2001, 450-451). Such substantial competitive advantages have enabled them to outflank corporations operating under different models in world's competitive markets and obtained the worldwide infinite success and respect with the result that the new shareholder-oriented firms are growing more rapidly, especially in important product markets in which access to capital is important (Hansmann and Kraakman, 2000-2001, 450-451). So, eventually the world would be on the threshold of a new era in which such firms will come to dominate, if they haven't already (Hansmann and Kraakman, 2000-2001, 451).

Undoubtedly, the globalisation of financial and product markets has made it more common than ever for domestic firms to vie with other firms in the international arena, and there possibly being competitive advantages as represented by Hansmann and Kraakman for shareholder-oriented firms. However, as they admit, notwithstanding these competitive advantages, firms operating under the shareholder-centred model do not necessarily fare better financially than do firms operating under an alternative model in the course of firm-to-firm competition, for two reasons (Hansmann and Kraakman, 2000-2001, 451). Firstly, firms governed by an alternative model may be more efficient than firms governed by the shareholder-centred model.⁵ Secondly, non-shareholder-oriented firms may tend to force the 'cost-conscious' shareholder-oriented firms to exit their respective market by 'overinvesting in capacity or accepting abnormally low returns on their investments in general, and thereby come to dominate a product market by under-pricing their profit-maximizing competitors' (Hansmann and Kraakman, 2000-2001, 451).

The third reason Hansmann and Kraakman set for the superiority of the shareholder-oriented model is that convergence on the shareholder model will be sustained by a concomitant political convergence (Hansmann and Kraakman, 2000-2001, 452). They argue that a public shareholder class will rise and counteract interest groups that might be against the shareholder-oriented model (Hansmann and Kraakman, 2000-2001, 452). The neo-political shareholder class will emerge as such a powerful class in the sense that it can displace managers, employees and state bureaucrats whom seek to protect, or encourage the other models of corporate governance (Hansmann and Kraakman, 2000-2001, 452). Moreover, the new political class will neutralise potential resistance from controlling shareholders of the European style of stakeholder model (Hansmann and Kraakman, 2000-2001, 452).

Nonetheless, it is often not straightforward to lobby for political upheaval favouring a shareholder-driven model of corporate law in countries with strong corporatist values and structures, such as wage-setting coordination, cooperation between labour and management and business centralisation, notably Japan and most of continental Europe (Gelter, 2007, 4), since a few politically connected moguls holding the largest blocks in corporations and extensive economic and political clout would rather retain the existing model of corporate governance favouring large block holdings in the corporation and would rather stave off legal reforms that reinforce investor rights on the one hand, but reduce their private returns on the other hand (Hansmann and Kraakman, 2000-2001, 459-460). Hence, the goal of shareholder primacy is, at best, a second nature to policy-makers who vigorously refuse to entertain allegiance to a shareholder-based model of corporate governance precisely because of the above reasons.

⁴ Paddy Ireland's commentary maxim against Hansmann and Kraakman's thesis at issue is that '...Hansmann and Kraakman's analysis is characterised by the same kind of economic determinism which characterises, or more accurately perhaps characterised, the unsophisticated, economic and reductionist versions of Marxism associated with the base-superstructure metaphor...'

⁵ For more information, see Hansmann and Kraakman, 2000-2001, 451.

Moreover, it is sometimes the case that insiders wish simply to build “Empires” as opposed to maximising their financial returns (Hansmann and Kraakman, 2000-2001, 461-462).⁶ Where non-constituencies shareholders, whose motives are purely financial, and who therefore do not value non-pecuniary returns, must share ownership with insiders, it is more than likely that insiders may simply expropriate minorities by withholding the firm’s earnings, and instead, reinvesting those returns in low-return projects to become at the top of the largest corporate empire possible, and they may, moreover, engage in a set of other costly practices, from placing incompetent relatives in positions of managerial responsibility to ‘preserving quasi-feudal relationships with employees and their local communities’ (Hansmann and Kraakman, 2000-2001, 462). In such scenarios, such corporate insiders would certainly wish to sustain their sympathy with anti-shareholder ideologies rather than abdicate control of their corporation in favour of a shareholder group (Hansmann and Kraakman, 2000-2001, 462).

A Further Analysis of the Global Convergence Question

In another stage of the argument, the assertion of the supremacy of the shareholder-model needs to be reassessed in light of past corporate scandals in the US, such as Enron, World Com and the like (A Global View of Corporate Governance: One Size Doesn’t Fit All). Indeed, regardless of whether in jurisdictions with less strong minority protections, or in jurisdictions with strong minority protections, there is always a red danger that controlling shareholders might tend to serve disproportionately to themselves, stealing and embezzling at the same time.

It is also widely accepted that one global corporate governance system and one underlying corporate and capital market law cannot exist, simply because of many differences among nations and industries (Berghe, 2002, 149). Jurisdictions have, over time, formulated different market systems, factor markets, legal structures and public or private institutions in accordance with their cultural, political, economic, institutional and social traditions (Clarke, 2004, 1853). Today corporate governance is being dominated by an insider-oriented system characterised by a stakeholder-oriented model in major commercial civil law jurisdictions, notably Japan, Germany and France, whereas the corporate governance structure which has been introduced in major commercial common law jurisdictions, most notably the US, the UK, Canada and Australia is an outsider-oriented system based on the shareholder-oriented policy (Luo, 2007, 36). Nevertheless, like in Germany (Boehmer, 1999, 5), in much of the world, a stakeholder-friendly policy has been adopted in that the business sector is typified by a relatively strong concentration of ownership of individual enterprises, preponderantly families in those countries (Clarke, 2004, 1855). Hence, it can be argued that the shareholder-driven model of corporate governance is well-suited merely to those jurisdictions in which publicly traded corporations in which shareholders are widely dispersed, such as the US, the UK, Canada and Australia, whereas a different system, more reflective of a stakeholder-driven system, is appropriate for those jurisdictions in which ownership is more concentrated, such as Japan and the nations of continental Europe, most notably Germany and France.

After the above baseline argument is set, one may observe that value systems would militate against importation of a shareholder-oriented model. To put in place, jurisdictions must amend their laws of corporate governance in line with the developed common-law jurisdictions towards the shareholder-oriented model. Nevertheless, a systematic match with a unique institutional environment in which corporate governance is embedded may have an efficiency advantage for firms of a local jurisdiction because institutions and structures may have already developed to address needs and problems of those firms (Luo, 2007, 37). Thus, replacing the existing system with that of an already adopting country without a better understanding of its corporate culture and the institutions of its environment, or with a corporate governance system developed in places where the corporate culture and institutional systems differ dramatically than those embedded in the replacing country may make the new corporate governance system ill-fitting and thereby non-viable in that country’s firms (Luo, 2007, 37).⁷ Let us assume

⁶ Such corporate empires are mostly found in Europe.

⁷ The attempts of American corporate law elites and financial economists, who, just before the turn of the twentieth-century, had travelled across the oceans towards Russia with the intent to preach the virtues of the shareholder-oriented model and to persuade Russia into inaugurating into its corporate law an Anglo-American style

that countries with high uncertainty avoidance cultures, which by definition tend to have only internal auditing and disfavour strong independent auditing profession sway into a system developed in countries with low uncertainty avoidance culture which does not reflect the existing culture of the replacing country at all (Luo, 2007, 37). In such a case, the new system will not be a strategic system matching corporations' actions to perform better or even sufficiently efficiently (Luo, 2007, 37).

Furthermore, Yadong Luo (2007, 38) submits that 'in social democracy nations committed to private property but whose governments play a large role in the economy, emphasise distributional considerations, and favour employees over capital owners when the two conflict, public policy emphasizes managers' natural agenda and demeans shareholders' agenda.' Obviously, European social democracy seems to have played a large role in promoting a stakeholder model, especially labour as a system of corporate governance (Clarke, 2007, 256). Indeed, many parts of the Commission bureaucracy and perhaps, the larger number of the European body politic are still faithfully espousing their social model of corporate governance as compared with a more Anglo-Saxon shareholder-oriented model (Ali and Gregoriou, 2006, 442) because of a belief that rights for "shareholders and third parties" can be strengthened by reference to a stakeholder-friendly policy (Ali and Gregoriou, 2006, 441).

Conclusion

This article shows that our frames of reference in the arguments of the worldwide convergence on, and the supremacy of, the Anglo-American shareholder-oriented model are different. It is beyond peradventure that the transformation of corporate governance paradigms towards the Anglo-Saxon type of corporate model is an unfinished portrait, even though some nations have recently embarked on a process of change in their corporate laws in the direction of the Anglo-Saxon American shareholder-oriented model, with a view to integrating better into international financial and product markets. Nevertheless, there are signs that the commitment to social democracy will survive this experience in countries with a stakeholder-oriented business climate for a considerable period of time (if not for good). Most European and Asian countries are still wedded to a stakeholder-driven model for a number of its admitted benefits from their perspective, some of which this article has touched on and the rest of which are unnecessary to consider for the purposes of this article, and for the aforesaid reasons.

Although, all in all, the irresistible conclusion is that a significant number of factors slow down or impede the process of transformation of corporate governance systems into the shareholder-oriented system, it remains to be seen whether or when an unfinished portrait of the worldwide convergence in this relevant sense can be finished conclusively. Assuming it is not imminent (if not impossible) that the consensus and worldwide convergence will emerge in the proximate future does not mean that corporate governance systems must be ever-conservative about learning from one another (Luo, 2007, 39). Indeed, each system must transfer some efficient and compatible elements for use to another system without destroying the equilibrium of the system itself (Luo, 2007, 39). For example, the confirmation of the whole history of the Japanese market that "attention to the market and to market values has not been the core of the values defended by corporate Japan" has influenced the willingness to accept the new "Committee board" structure embracing independent directors and board committees (Luo, 2007, 39). Another example would be UK government's proposal in its review of company law encapsulating that the directors must balance all the interests of all the stakeholders in the company when making the decisions in relation to anything which will most benefit shareholders (Does the "Stakeholder Model" further or endanger the business ends of companies?).

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of shareholder-oriented paradigm proved unsuccessful, as the results in respect thereof were acutely disastrous (Paddy Ireland, 2005, 29).

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