Explaining Financial Scandals
Explaining Financial Scandals: Corporate Governance, Structured Finance and the Enlightened Sovereign Control Paradigm

By

Vincenzo Bavoso
This work is dedicated to my family.
For having taught me to think out of the box.
# TABLE OF CONTENTS

List of Cases ............................................................................................................. xi

List of Statutes ......................................................................................................... xiii

List of Charts ........................................................................................................... xv

Preface ...................................................................................................................... xvi

List of Abbreviations .............................................................................................. xix

Chapter One .............................................................................................................. 1

Introduction
1.1 – Research Background
1.2 – Current Status of Research
1.3 – Aim of the Research
1.4 – Methodology
1.5 – Structure of the Book

Part I – The Theory

Chapter Two .......................................................................................................... 14

Providing a Theoretical Background to Financial Scandals
2.1 – Introduction
2.2 – Identifying the Corporate Governance Themes
   2.2.1 – Corporate Governance Classifications
   2.2.2 – The Historical Development of the Corporate Governance Debate
   2.2.3 – Corporate Structure: The separation of Ownership and Control
   2.2.4 – Defining in Whose Interest the Company Should Be Run:
           Shareholder Value vs. Stakeholder Theory
2.3 – Identifying the Corporate Finance Themes
   2.3.1 – Analysing Different Patterns of Financial Development
   2.3.2 – The Role of Financial Regulation
2.4 – Conclusion
# Table of Contents

## Part II – The legal Issues

Chapter Three

Corporate Governance Issues: The Control of Managerial Behaviour

3.1 – Introduction
3.2 – Background
3.3 – Delegation and the Issue of Fiduciary Duties
   3.3.1 – The Problem of Directors’ Duties and the Enlightened Shareholder Value
   3.3.2 – The New Act
3.4 – Compensation Structures as Alignment of Interests
   3.4.1 – The Problem of Stock Options
   3.4.2 – Recent Regulatory Reactions
3.5 – Conclusion

Chapter Four

Corporate Finance Issues: Financial Innovation, Securitisation and Credit Rating Agencies

4.1 – Introduction
4.2 – The Development of Securitisation as Main Structured Finance Device
   4.2.1 – The Securitisation Structure
   4.2.2 – The Advantages and Pitfalls of Securitisation
   4.2.3 – Financial Innovation: From Securitisation to CDO and CDS
   4.2.4 – Securitisation Legal Issues
   4.2.5 – Recent Regulatory Initiatives
4.3 – The Role of Credit Rating Agencies as Gatekeepers
   4.3.1 – CRAs’ Business Model
   4.3.2 – The Regulatory “Paradox” of CRAs
   4.3.3 – The Current EU and US Framework
4.4 – Conclusion

## Part III – The Case Studies

Chapter Five

Beyond Enron and Parmalat: The Legal Engineering that Made the Frauds Possible

5.1 – Introduction
5.2 – Reasons Behind Corporate Scandals: Why and How they have been Committed
5.3 – The Enron Bankruptcy
   5.3.1 – The Background
   5.3.2 – The Governance Failure
   5.3.3 – The Gatekeepers’ Failure
   5.3.4 – The Financial Engineering
5.4 – Parmalat: Enron Made in Italy
   5.4.1 – The Background
   5.4.2 – The Governance Failure
   5.4.3 – The Creative Finance
5.5 – What to Learn from the Scandals
5.6 – Conclusion

Chapter Six .............................................................................................. 200
The Global Financial Crisis, Northern Rock and Lehman Brothers: Déjà vu?
  6.1 – Introduction
  6.2 – Background to the 2007-08 Crisis
    6.2.1 – Chronology of the Crisis
  6.3 – The Banks Go Bust
    6.3.1 – Northern Rock
    6.3.2 – Lehman Brothers
    6.3.3 – Themes Underlying the Global Crisis
  6.4 – Lessons to Learn from the 2007-08 Crisis
  6.5 – Conclusion

Part IV – The Enlightened Sovereign Control

Chapter Seven.......................................................................................... 236
Defining the Enlightened Sovereign Control Paradigm
  7.1 – Introduction
  7.2 – Theoretical Foundation of Enlightened Sovereign Control
    7.2.1 – Corporate Governance
    7.2.2 – Corporate Finance
  7.3 – The Institutional Framework
    7.3.1 – The Problem of Democratic Legitimacy and Accountability
    7.3.2 – The Proposed Body
  7.4 – The Substantive Framework
    7.4.1 – Corporate Law
    7.4.2 – Financial Law
  7.5 – Conclusion
Chapter Eight........................................................................................................ 276
Conclusion and Proposals
  8.1 – Summing up the Main Themes of the Research
  8.2 – Proposals under the Enlightened Sovereign Control

Bibliography ........................................................................................................ 281

Index ................................................................................................................... 306
LIST OF CASES

Australia


New Zealand

Fletcher v. National Mutual Life Nominees Ltd [1990] 3 NZLR97

UK

Aberdeen Railway Co v. Blaikie Brothers (1854) 1 Macq 461
Automatic Self-Cleansing Filter Syndicate Co. Ltd v. Cuninghame [1906]
  2 Ch. 42 (C.A.)
Bligh v. Brent (1836) 2 Y. & C. 268
Bristol and West Building Society v. Mothew (1998) Ch 1, CA, 18
Borland’s Trustees v. Steel Brothers & Co. Ltd [1901] 1 Ch. 279, 288
Imperial Hydropathic Hotel Co., Blackpool v. Hampson (1882) 23 ChD 1
Marquis of Bute’s Case [1892] 2 Ch 100
Myers v. Perigal (1852) 2 De G.M. & G. 599
Overend & Gurney v. Gibb (1872) LR 5 HL 480
Re Barings Plc (No5) [2000] 1BCLC 523, CA
Re Brazilian Rubber Plantation and Estates Ltd [1911] 1 Ch 425
Re City Equitable Ltd [1925] Ch 407
Re D’Jan of London Ltd [1993] BCC 646
Regal (Hastings) Ltd v. Gulliver [1967] 2 AC 134 (HL)
Regentcrest plc v. Cohen [2001] 2 BCLC 80
List of Cases

Re Southern Counties Fresh Foods Ltd, [2008] EWHC 2810
Salmon v. Quinn & Axtens Ltd [1909] 1 Ch. 311 (C.A.)
Salomon v. Salomon & Co. Ltd [1897], A.C. 22
Scottish Co-operative Wholesale Society Ltd v. Meyer [1959] AC 324
Shaw & Sons (Salford) Ltd v. Shaw [1935] 2KB 113 CA
Short v. Treasury Commissioners [1948] 1 K.B. 122
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, 1996, 1 AC 669

USA

County of Orange v. McGraw-Hill Cos., 245 BR 151, 157 (CD Cal. 1999)
DiLeo v. Ernst & Young 901 F.2d 624 (7th Cir. 1990)
Francis v. United Jersey Bank 432 A(2d) 814 (1981)
Irwin v. Williar, 110 US 499 (1884)
Santa Clara County v. Southern Pacific Railroad 118 US 394 (1886)
LIST OF STATUTES

Australia

Corporations Act 2001

UK

City Code on Takeovers and Mergers 2009
Combined Code 2003
Companies Act 1985
Companies Act 2006
Corporate Governance Code 2010
FSA Handbook
Financial Services and Markets Act 2000
Financial Services Act 2010
Joint Stock Companies Act 1844
Joint Stock Companies Act 1856
Joint Stock Companies Act 1862
Insolvency Act 1986
Royal Exchange and London Assurance Corporation Act 1719 (Bubble Act 1720)
Stewardship Code 2010

USA

Banking Act 1933 Pub.L. 73-66 48 Stat 162 (Glass-Steagall)
Company Accounting Reform and Investor Protection Act in the Senate and Corporate and
Commodities Futures Modernization Act 2000, Pub L No 106-554, 114 Stat 2763
Credit Rating Agency Reform Act 2006
Securities Act 1933
Securities Exchange Act 1934
SEC Rules

EU

Directive 2009/111/EC, CRD II
Directive 2010/76/EU, CRD III
EU Regulation No. 1095/2010 Establishing a European Supervisory Authority (European Securities and Markets Authority)
EU Regulation No. 1095/2010 OJ 2010 L331/84
EU Regulation No 1060/2009 on Credit Rating Agencies
EU Regulation No 513/2011 (amending Regulation on Credit Rating Agencies)
Proposal for a Regulation of the European Parliament and of the Council on “Markets in Financial Instruments and Amending Regulation on OTC Derivatives, Central Counterparties and Trade Repositories” 2011/0296(COD)

Italy

Codice Civile (Civil Code)
CONSOB decision no. 14671 28 July 2004
D.Lg. 6/Sett./05 no.206
LIST OF CHARTS

Chart 4.1: Example of true sale, cash-flow securitisation
Chart 4.2: Example of collateralised debt obligation (cash-flow, true sale)
Chart 4.3: Example of credit default swap
Chart 5.1: Example of “Rhythms” transaction at Enron
Chart 6.1: Securitisation at Northern Rock
The explosion of the global financial crisis in 2007-08 reignited the urgency to reflect on the origins and causes of financial collapses. As events during the above period triggered an economic meltdown that is still ongoing, comparisons with the Great Crash of 1929 started to abound. In particular, the externalities that a broad spectrum of societal groups had to bear as a consequence of various banking failures highlighted the necessity of a more inclusive and balanced regulation of firms whose activities impact on a wide range of stakeholders.

Research on this project started in late 2007, at a time when the “credit crunch” in the UK and US revealed the first stage of a much deeper and broader financial distress that eventually unfolded later in 2008. The following months in fact unveiled the full scale of the downfall of the global financial system and the subsequent economic crisis that we are still witnessing. The events characterising the global crisis progressively became part of the background of this book, linking to what had happened at the beginning of the decade in North America (Enron, WorldCom) and in Europe (Parmalat). Eventually the collapse of Lehman Brothers in September 2008 opened up the floodgates of academic debates on the very topical issue of financial crises and financial regulation.

Beyond these pressing issues, this research originated from the desire to explore the interplay between corporate governance and financial transactions in order to explain the genesis of the scandals that occurred between 2001 and 2003. This angle of enquiry proved to fit very well into the study of the more recent banking failures in the context of the global crisis. More specifically, the breakdown in the control of managerial behaviours, coupled with the very offspring of that managerial freedom, namely the abuse of capital market finance, provided the ideal platform to analyse and explain the financial scandals that occurred over the last decade. As research evolved, and as the initial consequences of the financial catastrophe became clear, the legal analysis conducted throughout the book started to point towards a converging set of conclusions. These eventually contributed to define the concept put forward as “enlightened sovereign control”.

The book is centred on the proposal of this paradigm, the “enlightened sovereign control”, that provides a theoretical, institutional and substantive
framework as a response to the legal issues analysed in the book. These stem primarily from the analysis of two sequences of events (the 2001-03 wave of “accounting frauds” and the 2007-08 global crisis) which, as said, represent the background upon which modern financial scandals are explained. This is done by highlighting a number of common denominators emerging from the case studies (Enron and Parmalat, Northern Rock and Lehman Brothers) which all led to financial instability and scandals and illustrated the legal issues identified in the book. The research is grounded on the initial recognition of theoretical themes in the field of corporate and financial law, which eventually link with the more practical events examined. This parallel enquiry leads to the investigation of two heavily interrelated spheres of law and finally highlights more practical legal issues that emerge from the analysis.

Through this multifaceted approach, the book contends that the occurrence of financial crises during the last decade is essentially rooted in two main problems: a corporate governance one, represented by the lack of effective control systems within large public firms; and a corporate finance one identified with the excesses of financial innovation and related abuses of capital market finance. Research conducted in this book ultimately seeks to contribute to current debates in the areas of corporate and financial law, through the proposals of the “enlightened sovereign control” paradigm.

This book is based substantially on the work undertaken in the context of my doctoral degree at the University of Manchester. This long, exciting and at times daunting adventure has been a journey beyond my expectations and an unparalleled learning experience. I have been very fortunate to meet a number of inspiring people at Manchester since my LLM in 2005-06. The willingness to embark on a research degree and on such a committing project stemmed to a high extent from that early experience, from the truly exciting lectures I attended and the joyous study shared with marvellous classmates. Inevitably, such an extended endeavour resulted in a number of intellectual debts. Firstly, I need to thank my PhD supervisor, Dr Pierre Schammo for the guidance he provided over two and half years. I am very thankful for his direction and for the intellectual stimulations that helped me to shape this work. I am indebted to Dr Sarah Wilson, who supervised me for the first two years of my degree and introduced me to the beauty of research work by awakening my motivations and by pushing me to do it full-time. I also thank Dr Rilka Dragneva-Lewers, my second supervisor, for always providing useful comments on my work. I am very thankful to Professor Emilios Avgouleas for the invaluable advice he offered on my research.
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Vincenzo Bavoso, Manchester/London, September 2012
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ABS</td>
<td>Asset Backed Securities</td>
</tr>
<tr>
<td>AMF</td>
<td>Autorité des Marchés Financiers</td>
</tr>
<tr>
<td>ASIC</td>
<td>Australian Securities and Investment Commission</td>
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<tr>
<td>BIS</td>
<td>Bank of International Settlements</td>
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<tr>
<td>CDS</td>
<td>Credit Default Swap</td>
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<tr>
<td>CDO</td>
<td>Collateralised Debt Obligation</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>CESR</td>
<td>Committee of European Securities Regulators</td>
</tr>
<tr>
<td>CFO</td>
<td>Chief Financial Officer</td>
</tr>
<tr>
<td>CFTC</td>
<td>Commodity Futures Trading Commission</td>
</tr>
<tr>
<td>CLRSG</td>
<td>Company Law Review Steering Group</td>
</tr>
<tr>
<td>CONSOB</td>
<td>Commissione Nazionale per le Società e la Borsa</td>
</tr>
<tr>
<td>CRA</td>
<td>Credit Rating Agency</td>
</tr>
<tr>
<td>DCO</td>
<td>Derivatives Clearing Organization</td>
</tr>
<tr>
<td>ESA</td>
<td>European Supervisory Authority</td>
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<tr>
<td>ESC</td>
<td>Enlightened Sovereign Control</td>
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<tr>
<td>ESMA</td>
<td>European Securities and Markets Authority</td>
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<tr>
<td>ESV</td>
<td>Enlightened Shareholder Value</td>
</tr>
<tr>
<td>EMH</td>
<td>Efficient Market Hypothesis</td>
</tr>
<tr>
<td>FSA</td>
<td>Financial Services Authority</td>
</tr>
<tr>
<td>FSB</td>
<td>Financial Stability Board</td>
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<tr>
<td>GAAP</td>
<td>Generally Accepted Accounting Principles</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>IOSCO</td>
<td>International Organization of Securities Commissions</td>
</tr>
<tr>
<td>IPO</td>
<td>Initial Public Offering</td>
</tr>
<tr>
<td>ISDA</td>
<td>International Swap and Derivatives Association</td>
</tr>
<tr>
<td>LSE</td>
<td>London Stock Exchange</td>
</tr>
<tr>
<td>MBS</td>
<td>Mortgage Backed Securities</td>
</tr>
<tr>
<td>NRSRO</td>
<td>Nationally Recognised Statistical Rating Organisation</td>
</tr>
<tr>
<td>NYSE</td>
<td>New York Stock Exchange</td>
</tr>
<tr>
<td>OTC</td>
<td>Over the Counter</td>
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<tr>
<td>SEC</td>
<td>Securities and Exchange Commission</td>
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<tr>
<td>SPV</td>
<td>Special Purpose Vehicle</td>
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<tr>
<td>SPE</td>
<td>Special Purpose Entity</td>
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<tr>
<td>SIV</td>
<td>Special Investment Vehicle</td>
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</table>
CHAPTER ONE

INTRODUCTION

“We make the rules, pal. The news, war, peace, famine, upheaval, the price of a paper clip. We pick that rabbit out of a hat while everybody sits around wondering how the hell we did it. Now you're not naïve enough to think that we're living in a democracy, are you, Buddy? It's the free market, and you're part of it”.

—Gordon Gekko, 1987

1.1 – Research Background

Financial crises and scandals have existed for as long as it can probably be recorded, as long at least as a system of money and rudimentary banking can be traced. Events such as the Tulip Mania in mid-1630s and the South Sea Bubble in 1720 awakened very early concerns about the dangers and oscillations of finance, at a time when the success of geographical and industrial enterprises were deemed worth the exploration of innovative commercial models.

From those early days finance has developed into an increasingly complex “science”, one which over the last three decades has come to represent a very substantial slice of the economic system, particularly in certain countries where legal reforms and economic theories have contributed to the flourishing of financial economies as opposed to industrial ones. The progressive globalisation of this economic model

5 L.E. Mitchell “Financialism. A (Very) Brief History”, 2010, available at http://ssrn.com/abstract=1655739. Even though this economic model has become virtually global, it can be said to refer predominantly to Anglo-American economies where financial markets have become the beacon of a new economic order where institutions therein trade to serve their own purposes and do not
over the last fifteen years made societies around the planet increasingly
dependent on (and acceptant of) market fluctuations and cycles, on the
“ups” and “downs” deemed intrinsic features of financially driven
economies.

Over the last decade then, a number of corporate and financial events
have severely shaken the foundations of economic systems based on
financial services industry. The book contends that two sequences of
events (the 2001-03 wave of accounting frauds and the 2007-08 global
crisis) provided the background to analyse and explain modern financial
scandals. It starts with the observation that financial crises from the last
ten years are essentially rooted in two main problems: a corporate
governance one, represented by the lack of effective control systems over
those who run the company, and a corporate finance one identified with
the excesses of financial innovation and related abuses of capital market
finance. In response, the book offers a new paradigm – referred to herein
as “enlightened sovereign control” (ESC) – which encompasses a new
institutional framework for the regulation of certain corporate and
financial activities and substantive solutions to the legal issues emerging in
the research.

The backdrop of the research is, as mentioned, made of a number of
case studies (Enron and Parmalat first, and then Northern Rock and
Lehman Brothers) which, by pointing at a number of common denominators
underscoring the emergence of financial scandals and general instability,
provide evidence to corroborate the book’s hypothesis. The analysis and
explanation of financial scandals is conducted by highlighting the legal
issues that have consistently arisen as main themes from the case studies.
In particular, the study of financial scandals follows the path of the two
main legal strands of the research, that is: corporate law and financial law.
In the context of a legal enquiry into financial crises, these areas provide
an ideal setting to examine theoretical and practical determinants recurred
over the past decade. Moreover, the combination of these two spheres of
law offers a comprehensive perspective into the study and a multifaceted
approach to the understanding of events that have otherwise been often
branded with mono-dimensional slogans.⁶

provide resources to fund industry or society. This development will be further
illustrated in the thesis.

⁶ Arguably most of the works that followed corporate and financial scandals have
concentrated on the analysis of one of these two legal aspects and have therefore
looked at financial scandals from the perspective of either corporate law or
financial law. This approach is probably what led in the aftermath of Enron,
WorldCom and Parmalat, to tag these events as accounting scandals, or as
1.2 – Current Status of Research

The explosion of corporate and financial collapses has over the past decade triggered research and debates on their origin. Some of them have to a substantial degree been employed to validate the theoretical base of this book and are herewith briefly signposted.

In the area of corporate law, the work of Berle and Means\(^7\) represents a starting point of the research, especially with regards to their recognition of new ownership patterns appearing in the American corporate world. Empirical data collected over a number of American corporations in the 1930s led to a redefinition of the legal environment within which shareholders and managerial powers were divided. Berle and Means in particular introduced the concept of “managerial power” that had come to dominate US firms, as a consequence of increasing dispersion of share ownership and new legal framework governing shareholders’ rights.\(^8\)

Similarly, Cheffins more recently conducted a parallel enquiry into the changing business environment characterising UK corporations, and he strongly pointed to the role played – within different stages of British history – by widely-held firms in the broader legal and economic environment.\(^9\)

In the attempt to define the causes of different ownership structures and their conduciveness to corporate instability, Coffee investigated the interplay between legal rules and institutional dynamics, such as the development of market-based, self-regulatory institutions, as main determinant, denying therefore a more central role played by the “legal origin”\(^10\) theory.\(^11\) A similar conclusion is reached by Roe, who, defying corporate governance collapses, whereas the corporate finance side of the story proved later to be equally central.


\(^8\) Ibid.


the centrality of “legal origin” explanations, pointed at both historical and political factors influencing corporate and financial environments. A different perspective on the debate is offered by Gilson, who emphasised the importance of good corporate laws rather than ownership structures, as main reason for corporate failures. The argument in particular refers to the different possible strategies to face agency issues and to the trade-off ensuing from either corporate model.

The issue of the corporate goal is a central one within the research as it defines a number of corporate governance issues that permeate the very essence of the theory herein proposed. In this area the work of Keay is fundamental in illustrating the contours and main underpinning of the two main paradigms, namely shareholder value and stakeholder theory. In particular, his research highlighted the links between each theoretical proposition and the resulting legal framework applied in this corporate governance context (more specifically with regards to directorial duties). A very useful approach to the study of corporate powers is provided by Parkinson who referred to the influence of politico-economic theories on legal rules in place. The focus is of particular importance in the context of liability rules and of how regulation in this sense has been frustrated by neoliberal corollaries that advocated reliance on market-based mechanisms.

On the above subject a very valuable American perspective is also offered by Blair who countered a number of assumptions upon which shareholder value theory is premised. Similar arguments are brought

about by Stout whose main criticism against the above theory stemmed from the misguided economic view of shareholders as owners of the company.\textsuperscript{17}

In the area of financial law, an essential contribution to the book’s theoretical background is provided by Mitchell, who highlighted the changes occurred over the past three decades in the financial world and the far-reaching consequences these changes had on the economic system and on society more broadly.\textsuperscript{18} This path is followed by pointing to the role played by stock markets within economies and to the persisting differences and implications between two broad patterns of financial development, namely bank finance on one hand and capital market finance on the other.\textsuperscript{19} These considerations are linked to reflections on the more recent issue of financial innovation, and on the role it had in the context of the global crisis. Avgouleas provided a very useful perspective on the legal and socio-economic mechanisms that led to the creation of the bubble burst in 2008\textsuperscript{20}, while Blair exposed some key legal-economic arguments, pointing specifically to the importance financial innovation had in the growth of the shadow banking system and of leverage.\textsuperscript{21}

In the context of financial regulation, initial reflections on general regulatory functions in the financial industry are grounded on the work conducted by Goodhard and al.\textsuperscript{22}, and also by Wood.\textsuperscript{23} The role played by financial regulation in allowing the formation of a huge bubble and eventually of its burst is explored by Schwarcz whose research represents an ideal point of reference. In particular, a number of essential issues are

\begin{itemize}
\item \textsuperscript{17} L.A. Stout “Bad and Not-So-Bad Arguments for Shareholder Primacy”, 75 \textit{Southern California Law Review} 1189, 2002.
\item \textsuperscript{18} Supra Mitchell 2010.
\item \textsuperscript{23} P.R. Wood “Law and Practice of International Finance”, Sweet and Maxwell London 2008.
\end{itemize}
tackled in his work, namely the complexity that resulted from the innovation of financial products, the failure of disclosure mechanisms in unbundling the obscurity of financial information, and the systemic risk generated by the whole financial system. On the adequateness of different regulatory techniques, a very critical approach is offered by Avgouleas, again with regards to the issue of disclosure and to possible alternatives to it. These debates are also complemented by broader enquiries into different regulatory models and cultures that have been eventually reflected in regulatory policies in place.

Beyond the above theoretical background, the book as announced culminates with proposals under the ESC. The paradigm is introduced by providing a review of the relevant theories upon which they are grounded and by developing its theoretical framework. This represents the foundation for institutional and substantive proposals linked to legal issues exposed in the thesis.

The research carried out in the book ultimately purports to contribute to the ongoing debate in corporate and financial circles as regard the causes of the global crisis (and of modern financial scandals more generally). This is achieved by presenting a multifaceted analysis of events occurred over the past decade and an original approach to possible solutions, grounded essentially on a revisited “role of law” in the two above areas. The ESC paradigm offers in this respect a different perspective on the regulation of specific corporate and financial activities, whereby the role of state in regulating and supervising such activities and its actors is envisaged as guarantor for the inclusion of broader societal interests within the regulatory process.


1.3 – Aim of the Research

As announced, the book’s fundamental aim is to propose a paradigm, the ESC, as response to the financial crises occurred over the last decade. The paradigm purports to contribute to current policy debates in the areas of corporate and financial law, firstly by constructing a theoretical framework upon which it is grounded, and secondly by presenting both institutional and substantive solutions to the legal issues analysed in the thesis.

In order to come forward with the proposals, a legal analysis of financial scandals will be conducted. This is done by firstly providing a theoretical background which identifies key issues in the areas of corporate and financial law. The theoretical enquiry leads to the more in-depth analysis of legal issues identified as recurring over the last decade. These are examined also in connection with the relevant legislation that ensued the last crisis. This enquiry culminates with case studies which have the function of firstly illustrating the legal issues arisen as common denominators of financial scandals, and secondly of corroborating the hypothesis formulated in this research.

Admittedly, the two areas of law – corporate and financial law – on which the book is centred, could alone provide explanations to financial scandals without imminent necessity to look beyond their confines. However, the case studies herewith selected expose a high degree of interdependence between corporate governance structures and the strategies pursued by those firms on the capital markets. More generally, literature in the field of corporate governance has increasingly focused on the broad interplay between financial markets and corporations, especially insofar as the former can exert pressure and condition corporate behaviours and strategies. 27 This phenomenon progressively developed over the last three decades and reached its apex with the liberalisation and then with the globalisation of financial markets occurred during the 1980s. The expansion of capital markets in other words created the condition for what has been referred to as “financialisation” of corporate law in general, and more specifically for a tighter influence market logics have come to

play on corporate executives. Prominent examples in this sense can be provided by looking at the extent to which corporate remunerations have been increasingly aligned to stock market valuations, and by pointing at the reliance on the market for corporate control in the shape of hostile takeovers to create a means to discipline managerial behaviours.

By looking beyond more classical approaches to the interplay between corporate governance and corporate finance, the book focuses on the impact that corporate structures and corporate objectives have on financial strategies. Abuses of capital market finance transactions (some of which have become predominant corporate finance patterns) are in turn explained by looking at the short-term, rent-extraction effects they have for shareholders and executives.

The way in which corporate governance and structured finance problems are intertwined is above all manifested in the multidimensional reactions that the recent financial meltdown has generated. In particular, a multifaceted approach to the solution of regulatory issues seems to be emerging in the aftermath of the crisis, in contrast with responses that followed the Enron-type scandals almost a decade ago. At that time, as the collapses were labelled mainly as accounting and gatekeepers’ failures, regulatory responses were centred on strengthening accounting and financial reporting standards, leaving outside the scope of that regulation other central issues that had contributed to cause those scandals. The case studies conducted over Enron and Parmalat will expose the relevance of legal issues (the abuse of structured finance transactions), beyond the corporate governance ones, that contributed to cause those corporations’ collapse.

From what has been outlined, interrelations between corporate governance and financial transactions are at the centre stage of the research. This is to a large extent reflected by the ESC paradigm which is conceived to encompass institutional and substantive proposals in both areas of law.

With regards to the corporate law strand, the first enquiry is centred on the relevance of corporate ownership in the context of financial scandals.

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29 Preeminent example was the Sarbanes-Oxley Act enacted in the USA in 2002 as a response to Enron, WorldCom, Adelphia, Tyco International, otherwise known as “Company Accounting Reform and Investor Protection Act” in the Senate and “Corporate and Auditing Accountability and Responsibility Act” in the House. See http://www.soxlaw.com/.
and the extent to which the ensuing agency problem can be seen as a cause of concern. The second enquiry revolves around the difficulty of establishing in whose interest corporations should be run. While this theoretical discussion can shed light on the principles underpinning corporate culture over the last three decades, it also triggers more practical questions as to the legal mechanisms in place to monitor those in control of the firm and to make sure that they act in accordance to their duties. These theoretical enquiries flow into the questions addressed in chapter three where legal issues related to the control of managerial behaviours are tackled.

The financial law research strand follows a parallel approach by firstly exploring different patterns of financial development, whereby the chief demarcation is between bank finance and capital market finance. Ultimately, the intrinsic question within this enquiry is the extent to which financial models over-reliant on innovative and complex structures are needed at all to sustain economy and society. This leads to a second enquiry within this strand, namely that related to the regulatory models available to discipline financial markets and set constraints on the activities therein. A theoretical overview of this issue addresses the recurring question related to the regulatory culture from which the current global crisis underpinned and from which the complexity inherent to certain transactions generated. The above theoretical investigations are completed by a practical examination conducted in chapter four, on the way in which structured transactions developed in the context of capital market finance.

Addressing the above legal issues, and critically appraising post-crisis reactions, paves the way for the presentation of more substantial contribution of this research, reflected in the measures proposed in the paradigm to establish long-term solutions to different institutional and substantial problems exposed in the analysis.

1.4 – Methodology

Research in this book is conducted using chiefly a qualitative literature-based approach, which is complemented by legal resources (both

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30 See S.L. Schwarcz “Markets, Systemic Risk, and the Subprime Mortgage Crisis”, 209 SMU Law Review 61 2008, p.211. The prevailing trend has seen over the last decade an increasing disintermediation from banks, with corporations resorting to capital markets finance, through the employment of structured finance transactions like securitisations and derivatives.
primary and secondary sources). The project is to a large extent concerned with the analysis of the legal and socio-economic literature that serves firstly to illustrate the theoretical framework of the work and secondly to substantiate the critical review of legal issues. Similarly the case studies conducted to expose the emergence of certain theoretical and legal issues, are based on literature or reports reviewing different aspects of the highlighted events.

It is worth pointing out here that while the main point of reference for legal analyses carried out in the thesis is English law, some aspects of the research involve areas of law that are to a substantial degree practice-driven and do not necessarily attach to a particular legal system (straightforward examples could be that of some corporate governance arrangements that reflect cross-border similarities, or the way in which some financial transactions are structured, which results in rather converging international practices). Beyond this, reference to relevant laws in the research is made with regards American laws, EU laws and also Italian laws. This phase of the analysis also seeks to explain that much of the literature available relates to the USA and the UK, and that writings relating to corporate and financial developments beyond this are more limited.

To the extent that the study involves a parallel examination of different legal systems, a comparative research methodology is employed whereby literature and norms from appropriate sources are examined to expose the relevant dichotomies (for instance that between Anglo-American and continental European corporate governance, or between bank-centred financial systems and capital market driven ones).

Finally, it also needs to be pointed out that the research has followed in some chapters a selective approach to the issues analysed. In particular, chapter three and four take under consideration a number of legal matters

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31 The former consisting of both statutes (UK, EU or US when relevant) and common law, the latter represented also by reports, journal articles and reviews of events and legal reforms.

32 R.K. Yin “Case Study Research: Design and Methods”, Sage Publications 2003, p.13, where a case study is defined as “...an empirical enquiry that investigates a contemporary phenomenon within its real life context...”.

33 This is due to the wider development of the Anglo-American literature in the field, which indeed reflects the impact on society of an economy characterised by large public corporations and deep and liquid financial markets, which are two common factors emerging from the research.