Roman business associations

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Roman businessmen could choose between three legal forms for joint business ventures: the *societas*, the *societas publicanorum*, and the *peculium* of a commonly held slave. None of these forms led to larger firms with publicly traded shares. The high level of instability is one of the key explanations: it was difficult under Roman law to commit capital in the long term and finance capital-intensive enterprises. The *societas* was inevitably liquidated following numerous dissolution events. Members could withdraw their money at any time; their private creditors were not barred from seizing common assets. The *peculium* was even more unstable: in addition to the dissolution events of the *societas*, the joint venture came to an end and all items reverted back to the masters if the common slave died. It is true that the *societas publicanorum* developed into a more stable entity over time. However, during the same period, the business the *societas publicanorum* was limited to almost disappeared. Why did Roman law fail to provide organizational forms that allowed businessmen to commit capital in the long term? A closer analysis of Roman society suggests that the economic demand for more stable business associations was not great enough to overcome reservations in the social and political setting. This is an important lesson from history, both for the theory of the firm and for the role law plays in it.

Keywords: corporate law, theory of the firm, Roman law, level of stability, dissolution, entity shielding, *societas*, *societas publicanorum*, *peculium*

JEL Classification: D23, K22, L22, N20, N23, N40, N43

[*] Chapter prepared for "Roman Law and Economics" (ed. by Giuseppe Dari-Mattiacci, forthcoming). For many valuable comments and suggestions, the author is indebted to ... . The usual disclaimers apply. The chapter draws on Fleckner (2010) and Fleckner (2011a).

I. Introduction. Corporate law and the theory of the firm

A well-known literature explores why firms exist and why they assume certain sizes (Coase 1937; Williamson 1971; Alchian and Demsetz 1972; Jensen and Meckling 1976; Fama 1980; Hart and Moore 1990; Aghion and Bolton 1992; Hart 1995; Hart 2008). In recent years, scholars have become increasingly interested in how corporate law helps understand the existence and structure of firms. Some have mulled over the minimum set of rules, if any, that jurisdictions must

provide for firms to flourish (Easterbrook and Fischel 1991; Hansmann and Kraakman 2000; Armour and Whincop 2007; Armour et al. 2009). Others have tried to link a nation's corporate law with the maturity of its capital market (LLSV 1997; LLSV 1998, but Spamann 2010; LLS 1999; LLS 2006; DLLS 2008). A third group has turned to the social and political environment to explain persisting differences around the world (Roe 1994; Licht 2001; Roe 2003; Stulz and Williamson 2003; Pagano and Volpin 2005; Roe 2006).

While theories have been formulated, models developed, and empirical data collected, one great source of knowledge and wisdom has received little attention so far: *history* (exceptions in recent years: Blair 2003; Hansmann et al. 2006; Malmendier 2009). This is the motivation for the present chapter and for the book the chapter draws on (Fleckner 2010).

The remainder of the chapter proceeds as follows. Part II gives an overview of the lessons that Ancient Rome teaches us about corporate law and the theory of the firm. Part III focuses on one central feature of Roman law that helps explain the picture we find in the sources: the high level of instability that Roman business associations faced due to mandatory dissolution rules and similar provisions. Here and elsewhere, Roman law appears to be very restrictive toward joint business ventures. However, and this will be a recurring theme throughout the chapter, it seems that the law merely reflects reservations in the social and political setting rather than an oddity of Roman legal doctrine. Part IV summarizes the main findings and positions.

II. Overview. Lessons from Ancient Rome

How did the Romans finance capital-intensive endeavors such as the erection of temples, the

pavement of roads, or the trading of goods from foreign countries? This problem has fascinated generations of classical readers and scholars. It is, however, also of interest to the modern lawyer and economist. Ancient sources will not directly answer our present-day questions about the functions of corporate law, about its role within the broader economic, social, political, and legal setting, or about the factors that determine the rise and structure of firms—history just differs too much from the present. But the past will teach us lessons that can help find answers for contemporary questions and, equally important, history will often point us to new questions and aspects that have escaped our attention thus far.

Three key observations from Ancient Rome will be presented here: there were no shareholder companies in antiquity (sub 1), Roman businessmen could choose between three legal forms for joint business ventures (sub 2), and public attitudes were unfavorable toward private capital accumulation (sub 3).

1. First observation: no shareholder companies

For more than 175 years now, classicists, historians, lawyers, and economists have speculated or even claimed that, as early as the Roman Republic (6th to 1st century BC), businessmen formed large firms with publicly traded shares similar to modern stock corporations (since Orelli 1835:10-1).[1] Most recently, a longer *Journal of Economic Literature* article argued that there was evidence of "an early form of shareholder company, the *societas publicanorum*" (Malmendier

[1] Orelli's note is reproduced in Fleckner (2010:451).

2009:1076).[2]

Two new books have come to the conclusion that such claims are unwarranted (Fleckner 2010; Dufour 2012). The first (Fleckner 2010) considers all legal and literary sources, both in Latin and classical Greek, that have come down to us, such as the works of Polybius (2nd century BC), Cicero (1st century BC), Livy (around the time of Christ's birth), Pliny the Elder (1st century AD), or Plutarch (2nd century AD), as well as great collections like the New Testament (1st/2nd century AD) or the Digest (6th century AD). None of these sources brings to light evidence of larger "capital associations" (i.e., entities that help finance projects that, on account of their scope, duration, or risk, exceed the capacity of single individuals), let alone stock corporations with publicly traded shares.[3]

The mere lack of evidence obviously does not suffice to conclude that such institutions did not exist in Ancient Rome. *Absence of evidence is not evidence of absence*. Theoretically, all evidence of larger capital associations could be buried in the countless sources that have been de-

[2] Malmendier (2009) makes a number of very bold statements, such as "I propose that, contrary to widespread belief, the earliest predecessor of the modern business corporation was not the English East India Company nor the medieval *commenda*, but the Roman *societas publicanorum*, i.e., the 'society of government leaseholders.' " (ibid:1077), "I argue that, at the height of its development, the *societas publicanorum* resembled the modern shareholder company along several core dimensions: its existence was not affected by the departure of partners ... and it could issue traded, limited-liability shares ..." (ibid) or "We also know that the shares were traded and had fluctuating prices. For instance, Cicero writes about 'shares that had a very high price at that time.' The statement also implies that the shares could be bought either from another shareholder or directly from the company, suggesting secondary offerings." (ibid:1089). Similar quotes could be added (esp. from ibid:1089, 1090, 1095, 1096, 1104). Malmendier (2009) draws on Malmendier (2002), an excellent book that is much more cautious, and Malmendier (2005), an article that is subject to the same criticism as Malmendier (2009).

[3] Fleckner (2010) uses *Kapitalvereinigung* ("capital association") throughout the book to shield the historical analysis from the modern ideas that the more common terms (such as "company," "corporation," or "business firm") unconsciously entail.

stroyed. However, a closer look at the structural features that would have supported capital associations and an analysis of the general economic, social, political, and legal setting indicate that the absence of evidence is not an irony of fate but rather a reflection of the fact that Ancient Rome never witnessed something similar to the modern stock corporation. Part III will give an example of arguments that help corroborate this impression from the sources.

The best reason, though, for doubting the idea that larger capital associations *did* exist in Ancient Rome, while their sources have been lost, is that there is plenty of evidence of other—smaller—business entities.

2. Second observation: three legal forms for joint business ventures

Roman businessmen could choose between three legal forms for joint business ventures: the *societas* (Fleckner 2010:119-43), the *societas publicanorum* (ibid:145-215), and the *peculium* of a commonly held slave (ibid:217-37).[4]

(a) *Societas* (association to pursue any purpose)

The *societas* allowed two or more individuals to team up and pursue any goal, ranging from personal affairs under one roof to for-profit trading overseas. Examples of businesses organized as a *societas* include the provision of financial services (as so-called *argentarius*), maritime transport (as so-called *exercitor*), cattle breeding (*pecus*), the cultivation of land (*ager*), the construction and sale of tombs (*monumentum*), the operation of sales shops (*taberna*), the rental of

[4] Not covered are family business ventures because they are based on status rather than contract (for references, see Fleckner 2011b:677-78).

apartment buildings (*insula*), grammar lessons (*ut grammaticam docerent*), the training and education of slaves (*puerum docendum/nutriendum*), as well as joint trading in oil (*oleum*), wine (*vinum*), grain (*frumentum*), slaves (*mancipium*), pearls (*margarita*), or clothes (*sagaria*).

To the surprise of the modern observer, all sources about the *societas* have one thing in common: despite the astonishing diversity of business objectives, no *societas* seems to have consisted of more than a few partners, and most sources provide evidence of only two partners (Fleckner 2010:135-43).

(b) *Societas publicanorum* (association to carry out state contracts)

The *societas publicanorum* was a modification of the *societas* formed to carry out state contracts. Such contracts covered an impressive range of activities, as wide as the tasks and items that the government put out to tender: the collection of taxes (*vectigalia*); the lease of mines and quarries for gold (*aurum*), silver (*argentum*), iron (*ferrum*), lead (*plumbum*), tin (*minium*), salt (*sal*), chalk (*creta*), or pitch (*pix*); the lease of public lands (*ager publicus*), fisheries (*lacus*), water pipes (*aqua*), or channels (*rivus*); the erection and maintenance of public infrastructure like temples (*templum*), wells (*lacus*), water pipes (*aqua*), channels (*rivus*), sewers (*cloaca*), urinals (*forica*), roads (*via*), bridges (*pons*), walls (*murus*), colonnades (*portico*), sea lanes (*flumen*), harbors (*portus*), theaters (*theatrum*), retail shops (*taberna*), or markets (*macellum*); the support of the army (*exercitus*); or the import of grain (*frumentum*).

Of all ancient institutions that modern scholarship knows about, the *societas publicanorum* would be best suited to finance capital-intensive projects, and many observers have considered the *societas publicanorum* an early form or predecessor of the stock corporation (as seen above).

However, it is again remarkable that there is hardly any evidence of a *societas publicanorum* consisting of a larger number of capital providers. Among the many sources that touch upon the *societas publicanorum*, there is only one concrete figure: Livy, writing at the time of Christ's birth, mentions a group of *nineteen* state contractors who had formed, together or separately, three associations to support the Roman armies in the Second Punic War (3rd century BC).[5] Overall, it appears from the sources that the *societas publicanorum* was typically not much larger than the standard *societas* (Fleckner 2010:207-15).

(c) *Peculium* (joint business ventures organized through a common slave)

The *peculium* was a separate estate of slaves and other persons who were subject to the authority of someone else (usually the *pater familias*, the head of the family). The *peculium* had two distinct facets: for those who were subject to another's authority, the receipt of a *peculium* gave some degree of financial independence and autonomy, while for those who exerted authority, granting a *peculium* offered the prospect of participating indirectly, and therefore at lower risk, in business ventures that the recipient may elect to conduct. If several *patres familias* had combined their funds and vested a common slave with the capital, they could have mitigated some of the structural disadvantages of the *societas*.

Contrary to widespread speculation, the sources do not support the assumption that the *peculium* of common slaves was indeed used to fund larger enterprises: first, no traces of larger business ventures based on *peculia* have come down to us, and second, those sources that have

[5] Liv. 23.49.1: *ubi ea dies venit, ad conducendum tres societates aderant hominum undeviginti*.

survived suggest that the *peculium*'s legal regime was ill-suited to fund such enterprises (Fleckner 2010:229-37). As a result, the *peculium*'s role, if any, in ancient society remains a puzzle (Fleckner 2014).

3. Third observation: obstacles in the social and political setting

At first glance, the second observation seems to be incompatible with the first one: Romans knew, as the *societas*, the *societas publicanorum*, and the *peculium* demonstrate, how to combine capital and share risks; they also had a basic understanding of the structural features that help further the idea of capital associations; and they were aware of projects that demanded greater sums of capital. But why, the modern observer wonders, did Roman businessmen refrain from establishing shareholder companies or other large capital associations? A comprehensive analysis of Roman society suggests that the answer to this question lies in the social and political rather than in the economic and legal environment (Fleckner 2010:497-623).

Ancient Rome gave rise to numerous capital-intensive endeavors, such as maritime trading or large state contracts, that exceeded the financial capacity of single individuals and thus called for the formation of larger capital associations. How many of these associations were needed, and how capital-intensive their business was, heavily depends on the centuries-old controversy over the shape of the ancient economy. Yet, that there was *some* form of economic demand for large capital associations is difficult to deny, even under the most pessimistic assumptions about the Roman economy. The real reasons for the absence of large capital associations must be elsewhere.

Was the legal regime too restrictive? It is true that Roman law could have made capital associations more attractive to entrepreneurs, for instance by a statutory protection of their private assets ("limited liability"), and more appealing to third parties, such as by reserving common assets for business creditors ("entity shielding"). However, the large number of special rules for trade and commerce (such as on the *merx peculiaris*, the *institor*, or the *magister navis*) suggests that Roman law usually did not fail to respond to new business needs or to broader changes in society. And given the complex design of the *peculium*, there are no grounds to believe that certain rules, for instance about the separation of assets, were too sophisticated for that period.[6]

Instead, the fact that no such rules have come down to us indicates that the obstacles in the social and political environment were so huge that they stifled the economic demand for capital associations. A close reading of the most influential ancient authors, among them Homer (8th century BC), Plato (4th century BC), Aristotle (4th century BC), Cicero (1st century BC), Livy (around the time of Christ's birth), Pliny the Elder (1st century AD), Seneca (1st century AD), Plutarch (1st century AD), and the Evangelists (1st century AD), shows that businessmen, especially the public contractors who formed the *societas publicanorum*, had no good standing in society. Military, political, or artistic activities brought more prestige and recognition than running a business or participating in a joint venture.

The low public esteem of commercial activities went hand in hand with an unfavorable political environment. In accordance with social attitudes, members of the upper class, i.e., those

[6] For an illustration of the *peculium*'s complexity, see the two charts in Fleckner (2010) on the liability regime (ibid:303) and the separation of assets (ibid:423).

who would have had the means to provide significant amounts of capital, were often barred from capital-intensive businesses such as maritime trading or state contracting. Another impediment was the increasing share of the government in the gross domestic product. To the extent that the government decided to carry out capital-intensive projects on its own, there remained no room for private capital associations. This is why the *societas publicanorum* began to disappear in the Principate. Although those in power were interested in a thriving economy, they either did not appreciate the benefits of larger capital associations or feared that private capital accumulation might lead to unwanted political power.

On balance, blaming Roman law as the main reason for the small size of Roman business associations seems premature, to say the least. The law merely reflects the social and political skepticism. Ancient Rome would not have seen larger capital associations if only the legal framework had been different.

This historic insight is grist to the mill of those who feel that today's scholarship overestimates economic and legal factors and fails to appreciate how much corporate law and practice are shaped by their social and political environment. While the situation today obviously differs from classical antiquity, Ancient Rome at least provides anecdotal evidence that the social and political setting *can* be decisive.

III. Focus. Level of stability

Following the introduction in Part I and the overview in Part II, the chapter now turns to one of the key factors that help explain why Roman business associations remained small: the high

level of instability or uncertainty that surrounded their very existence.

The more stable a legal form, the easier it is to carry out long-term business projects. Entrepreneurs are more likely to launch a joint venture if they can rest assured that it will not get shut down before they have had a chance to accomplish their goals. The same applies to investors willing to commit capital to the business project, given the large discrepancy between liquidation and going-concern values.

A survey of the sources shows that, while the level of stability varied from the *societas* to the *societas publicanorum* to the *peculium*, overall Roman business associations were quite unstable (sub 1 and 2). Why did Roman law maintain such a high level of instability and uncertainty? Once again, it seems that the law merely reflects the public skepticism about joint business ventures rather than an oddity of Roman legal doctrine (sub 3).

1. *Societas* and *societas publicanorum*: mandatory dissolution, withdrawal, seizure

Societas and *societas publicanorum* were more alike than earlier scholarship has made us believe (this is a key result of Fleckner 2010). The level of stability is the main exception: the *societas* (ibid:342-46) was considerably less stable than the *societas publicanorum* (ibid:372-86). Yet, even where they differ, *societas* and *societas publicanorum* are still united by a common legal regime: the *societas publicanorum*'s increased stability is the result of exceptions from the standard *societas* rules and not the result of a distinct legal nature.

That the *societas publicanorum* was more stable than the *societas* has always been well known among scholars of Roman law. One of the best comparisons appeared as early as four hundred

years ago (Matthaeus 1653:428-32). However, those interested in the history and theory of the firm have missed some of the legal nuances so far, leading to over-optimistic assumptions about the stability of Roman business associations. The following paragraphs will revise this picture and give a more accurate account.

(a) General Principles

Nulla societatis in aeternum coitio est—no *societas* is established for eternity.[7] The colorful bouquet of events triggering the dissolution of the *societas* is testament to this principle.[8] The most concise synopsis is given by Ulpian: *societas solvitur ex personis, ex rebus, ex voluntate, ex actione*—the *societas* is dissolved following changes in personal or material matters, when the consensus among the *socii* has come to an end, or in the case that a *socius* files a lawsuit.[9]

From the perspective of capital commitment, some dissolution events pose no problems because they are in line with the *socii*'s initial contract or subject to each *socius'* consent: the *societas* will come to an end when the contract has run its predetermined term,[10] when the *societas* has

[7] D. 17.2.70 (Paul. 33 [32?] *ad ed.*); see also D. 17.2.1 pr. (Paul. 32 *ad ed.*): *societas coiri potest vel in perpetuum, id est dum vivunt, vel ad tempus vel ex tempore vel sub condicione*.

[8] The central reference points are D. 17.2.4.1 (Mod. 3 *reg.*): *dissociamur renuntiatione morte capitis minutione et egestate* as well as D. 17.2.63.10 (Ulp. 31 *ad ed.*): *societas solvitur ex personis, ex rebus, ex voluntate, ex actione. ideoque sive homines sive res sive voluntas sive actio interierit, distrahi videtur societas. intereunt autem homines quidem maxima aut media capitis deminutione aut morte: res vero, cum aut nullae relinquantur aut condicionem mutaverint, neque enim eius rei quae iam nulla sit quisquam socius est neque eius quae consecrata publicatave sit. voluntate distrahitur societas renuntiatione.*

[9] D. 17.2.63.10 (Ulp. 31 *ad ed.*); for a slightly different synopsis, see D. 17.2.4.1 (Mod. 3 *reg.*). Both fragments are reproduced supra (fn. 8).

[10] D. 17.2.1 pr. (Paul. 32 *ad ed.*); D. 17.2.70 (Paul. 33 [32?] *ad ed.*).

reached or missed its goal,[11] or when the *socii* unanimously decide to dissolve the *societas*.[12] Both the *socii* and, to some extent, third parties can anticipate these situations and plan accordingly.

The other dissolution events are more difficult to control. They will be examined in greater detail below (sub b, c, d).[13] Not an event that causes dissolution, but nonetheless a serious threat to the long-term financing of business ventures is the withdrawal or seizure of the common assets. This source of uncertainty will be discussed subsequent to the causes for dissolution (sub e).

The dissolution rules under Roman law were mandatory. If, for example, a *socius* died, the *societas* he had been a member of was dissolved, no matter what the initial contract said or the *socii* agreed upon later on. In a two-member *societas*, the second *socius* wound up the joint business venture or invited others to launch a new *societas*. In a multi-member *societas*, the remaining *socii* could decide to carry on the business among them. But because the old *societas* was irreversibly dissolved, they too had to set up a new *societas*.[14] This discontinuity is frustrating, at least from the perspective of committing capital to long-term business projects. Dissolution and liquidation alter the allocation of assets and the priority of claims. Even if all *socii* and third parties agreed to the establishment of an identical copy of the old *societas*, it is unlikely that the allo-

[11] D. 17.2.58 pr. (Ulp. 31 *ad ed.*); D. 17.2.63.10 (Ulp. 31 *ad ed.*); D. 17.2.65.10 (Paul. 32 *ad ed.*). I. 3.25.6.

[12] D. 17.2.65.3 (Paul. 32 *ad ed.*), perhaps D. 17.2.64 (Call. 1 quaest.); see generally (without explicit reference to the *societas*) I. 3.29.4 (contrary agreements terminate contractual relationships that are formed by consent alone).

[13] With the exception of dissolution following "changes in things" (D. 17.2.63.10, Ulp. 31 *ad ed.*: *societas solvitur ... ex rebus*; supra fn. 21), which has been covered above (since it does not pose any problems in the context of this chapter). Note that dissolution upon legal action (ibid: *societas solvitur ... ex actione*) will be treated earlier because there is an explicit exception for the *societas publicanorum*.

[14] Death: D. 17.2.37 (Pomp. 13 *ad Sab.*); individual insolvency: I. 3.25.8; *capitis deminutio*: G. 3.153.

cation of debit and credit would remain unaffected, given the many uncertainties surrounding the winding up of the old and the setup of the new *societas*. Mandatory discontinuity is hard to contract around.

Subject to the exceptions below, all that has been said so far also applies to the *societas publicanorum*. This would be different if one believed that the *societas publicanorum* at some point in history assumed the status of a corporation or could apply for corporate rights. In that case, the point of departure would no longer be the law of the standard *societas* but of the various corporate forms that Roman law began to recognize, such as municipalities, crafts, guilds, clubs, or churches. However, the idea that the *societas publicanorum* became a corporation is a myth that lacks any sound basis in the sources (Fleckner 2010:386-413). The present context supports this position: as a corporation, the *societas publicanorum* would have been very stable anyway, rendering superfluous all the exceptions from the *societas* regime that the chapter now turns to.

(b) *societas solvitur ex personis* (dissolution following changes in personal matters)

The *societas* did not survive changes in personal matters, that is when a *socius* died, when a *socius* became insolvent, or when a *socius* lost his personal freedom or his civil rights.

Death. The *societas* was dissolved when one of its members passed away.[15] The remaining *socii* could neither continue the *societas* among themselves nor with the heir of the deceased

[15] G. 3.152: *solvitur adhuc societas etiam morte socii* = I. 3.25.5; GE 2.9.17. D. 17.2.65.9 (Paul. 32 *ad ed.*): *morte unius societas dissolvitur*. Additional evidence: G. 3.153. D. 3.2.6.6 (Ulp. 6 *ad ed.*); D. 17.2.4.1 (Mod. 3 *reg.*); D. 17.2.35 (Ulp. 30 *ad Sab.*); D. 17.2.36 (Paul. 6 *ad Sab.*); D. 17.2.37 (Pomp. 13 *ad Sab.*); D. 17.2.40 (Pomp. 17 *ad Sab.*); D. 17.2.52.9 (Ulp. 31 *ad ed.*); D. 17.2.59 pr. (Pomp. 12 *ad Sab.*); D. 17.2.60 pr. (Pomp. 13 *ad Sab.*); D. 17.2.62 (Pomp. 13 *ad Sab.*); D. 17.2.63.8 (Ulp. 31 *ad ed.*); D. 17.2.63.10 (Ulp. 31 *ad ed.*); D. 17.2.65.10 (Paul. 32 *ad ed.*); D. 17.2.65.11 (Paul. 32 *ad ed.*).

socius.[16] Post-classical law let the *socii* of multi-member *societates* include a provision in the initial contract to avoid mandatory dissolution,[17] but it is doubtful that this option was available in earlier periods.[18]

Unlike the standard *societas*, it appears that the *societas publicanorum* survived the death of its members.[19] The details rank among the most difficult questions in the law of the *societas publicanorum* and would easily fill an entire chapter in this handbook. On balance, it seems highly likely that a *societas publicanorum* even lived on if one of its main partners or the person who concluded the state contract died (Fleckner 2010:373-83).

Individual insolvency. The *societas* was dissolved when one of its members became "insolvent" (in a broader sense).[20] Although many legal details have remained in the dark, there is no

[16] D. 17.2.35 (Ulp. 30 *ad Sab.*); D. 17.2.52.9 (Ulp. 31 *ad ed.*).

[17] I. 3.25.5: *etsi plures supersint, nisi si in coeunda societate aliter convenerit*.

[18] As indicated by the lack of any exception in G. 3.152. For more references, see Fleckner (2010:344-45).

[19] The two main sources are D. 17.2.59 pr. (Pomp. 12 *ad Sab.*): *adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut heres etiam succedat societati. haec ita in privatis societatibus ait: in societate vectigalium nihilo minus manet societas et post mortem alicuius, sed ita demum, si pars defuncti ad personam heredis eius adscripta sit, ut heredi quoque conferri oporteat: quod ipsum ex causa aestimandum est. quid enim, si is mortuus sit, propter cuius operam maxime societas coita sit aut sine quo societas administrari non possit?* and D. 17.2.63.8 (Ulp. 31 *ad ed.*): *in heredem quoque socii pro socio actio competit, quamvis heres socius non sit: licet enim socius non sit, attamen emolumenti successor est. et circa societates vectigalium ceterorumque idem observamus, ut heres socius non sit nisi fuerit adscitus, verumtamen omne emolumentum societatis ad eum pertineat, simili modo et damnum adgnoscat quod contingit, sive adhuc vivo socio vectigalis sive postea: quod non similiter in voluntaria societate observatur.*

[20] G. 3.154: *item si cuius ex sociis bona publice aut privatim venierint, solvitur societas*. D. 17.2.4.1 (Mod. 3 *reg.*): *dissociamur ... egestate* (supra fn. 8); D. 17.2.65.1 (Paul. *32 ad ed.*): *item bonis a creditoribus venditis unius socii distrahi societatem Labeo ait*; D. 17.2.65.12 (Paul. 32 *ad ed.*): *publicatione quoque distrahi societatem diximus*. I. 3.25.7: *publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur: nam cum in eius locum alius succedit, pro mortuo habetur*; I. 3.25.8: *item si quis ex sociis mole debiti praegravatus bonis suis cesserit et ideo propter publica aut propter privata debita substantia eius veneat, solvitur societas*.

doubt as to the main consequence: mandatory dissolution (Fleckner 2010:369-71).

No explicit rule has come down to us that would save the *societas publicanorum* from dissolution upon individual insolvency. However, two provisions in the Customs Law of Asia (*lex portorii Asiae* = νόμος τέλους Ἀσίας) and a cryptic remark by Paulus suggest that the *societas publicanorum* also survived cases of individual insolvency (Fleckner 2010:384, 486-88).

Capitis deminutio. The *societas* was dissolved when one of its members lost his personal freedom (*capitis deminutio maxima*) or his civil rights (*capitis deminutio media*),[21] but remained in place when merely the family membership changed (*capitis deminutio minima*).[22]

Following the special provision for deceased *socii* and the indirect evidence of individual insolvency, it is very likely (*argumentum a maiore ad minus*) that a *societas publicanorum* survived all three types of *capitis deminutio* for any of its members (who probably lost their membership position), even though there is neither an explicit exception nor any indirect hint in the sources (Fleckner 2010:385; ditto Wieacker 1936:162, 290).

(c) *societas solvitur ex actione* (dissolution upon legal action)

One of the most controversial issues among modern scholars is whether the *societas* was inevitably dissolved if one *socius* filed the *actio pro socio*, the legal remedy tailored to members of a *societas*. Some fragments in the Digest clearly point toward mandatory dissolution in these cas-

[21] G. 3.153: *dicitur etiam capitis deminutione solvi societatem, quia civili ratione capitis deminutio morti coaequatur*; GE 2.9.17. D. 17.2.4.1 (Mod. 3 *reg.*): *dissociamur ... capitis minutione* (supra fn. 8); D. 17.2.63.10 (Ulp. 31 *ad ed.*): *... distrahi videtur societas. intereunt autem homines quidem maxima aut media capitis deminutione aut morte* (supra fn. 8).

[22] D. 17.2.63.10 (Ulp. 31 *ad ed.*) (supra fn. 21, *argumentum e contrario*); also D. 17.2.58.2 (Ulp. 31 *ad ed.*) and D. 17.2.65.11 (Paul. 32 *ad ed.*).

es.[23] If true, it would have been impossible to bring conflicts among the *socii* before a judge without discontinuing the joint venture, obviously an odd result to the modern observer. The discussion about possible limitations and qualifications is therefore still in full swing.[24]

Interestingly, it seems that the *societas publicanorum* survived legal disputes among its members. Paulus writes in his commentary on the Edict (at least according to the Digest) that it was sometimes necessary to file an action during ongoing business operations (*manente societate agi pro socio*), and mentions the example of a *societas* that has been founded for the lease of taxes (*societas vectigalium causa coita est*).[25] This exception makes the *societas publicanorum* more stable because it allows the external review of internal conflicts without dissolution.[26]

(d) *societas solvitur ex voluntate* (dissolution when the consensus comes to an end)

Manet autem societas eo usque, donec in eodem ‹con›*sensu perseverant*—the *societas* continues to exist as long as its members remain in agreement.[27] Put negatively, if there is no longer a con-

[23] D. 17.2.63.10 (Ulp. 31 *ad ed.*): *societas solvitur ... ex actione* (supra fn. 8); D. 17.2.65 pr. (Paul. 32 *ad ed.*): *actione distrahitur, cum aut stipulatione aut iudicio mutata sit causa societatis. Proculus enim ait hoc ipso quod iudicium ideo dictatum est, ut societas distrahatur, renuntiatam societatem, sive totorum bonorum sive unius rei societas coita sit*. Additional evidence: D. 17.2.52.14 (Ulp. 31 *ad ed.*) as well as (less restrictive) D. 17.2.65.15 (Paul. 32 *ad ed.*) and (unclear) C. 4.37.5 (Diocl./Max., AD 294).

[24] Meissel (2004:24-5, 38-9, 41-5, 284-86). Important earlier accounts include Matthaeus (1653:431), Wieacker (1936:9-12, 166-69), and Arangio-Ruiz (1950:172-82).

[25] D. 17.2.65.15 (Paul. 32 *ad ed.*): *nonnumquam necessarium est et manente societate agi pro socio, veluti cum societas vectigalium causa coita est propterque varios contractus neutri expediat recedere a societate nec refertur in medium quod ad alterum pervenerit.*

[26] The general controversies surrounding this fragment can be ignored here because the exception for the *societas publicanorum* is widely recognized (Kniep 1896:297-305; Cimma 1981:221-25; Malmendier 2002:245-47; Meissel 2004:44-5, 211-12; Fleckner 2010:383-84).

[27] G. 3.151 ≈ GE 2.9.17 ≈ I. 3.25.4. C. 4.37.5 (Diocl./Max., AD 294): *tamdiu societas durat, quamdiu consensus partium integer perseverat*.

sensus among the *socii*, the *societas* comes to an end.[28] The key consequence of this principle is that each *socius* could unilaterally terminate the *societas* at any time.[29] This included cases of bad faith and fraud: the other *socii* may claim for damages, but the *societas* was still dissolved.[30] Under certain circumstances, a termination was effective even when the *socii* had excluded it.[31] The details are very controversial (Fleckner 2010:343).

Could the members of a *societas publicanorum* unilaterally terminate their joint venture? There is no indication in the sources, despite the importance of the issue. However, given the time lag between the peak of the *societas publicanorum* (1st century BC) and the zenith of legal reasoning (2nd century AD), and allowing for the uncertainties surrounding the compilation of the Corpus Iuris Civilis (6th century AD), the silence of the sources is no conclusive evidence that the standard regime—allowing unilateral termination—applied without modifications. Given the *societas publicanorum*'s public function and the explicit exceptions for other dissolution events, it is quite likely that the *societas publicanorum* was protected against unilateral dissolution (Fleckner 2010:385; ditto Kniep 1896:254, 269-70, 298, 300).

[28] GE 2.9.17: *sicut consensu contrahitur, etiam dissensu dissolvitur*.

[29] G. 3.151: *at cum aliquis renuntiaverit societati, societas solvitur* ≈ I. 3.25.4; GE 2.9.17. D. 17.2.4.1 (Mod. 3 *reg.*): *dissociamur renuntiatione* (supra fn. 8). The key source is D. 17.2.65.3-8 (Paul. 32 *ad ed.*). Additional evidence: D. 17.2.14 (Ulp. 30 *ad Sab.*); D. 17.2.15 (Pomp. 13 *ad Sab.*); D. 17.2.16 pr. (Ulp. 30 *ad Sab.*); D. 17.2.17.1/2 (Paul. 6 *ad Sab.*); D. 17.2.18 (Pomp. 13 *ad Sab.*); D. 17.2.63.10 (Ulp. 31 *ad ed.*); D. 17.2.65 pr. (Paul. 32 *ad ed.*). C. 3.37.5 (Diocl./Max., AD 294); C. 4.37.5 (Diocl./Max., AD 294).

[30] I. 3.25.4.

[31] Most instructive are (in direct sequence) D. 17.2.14 (Ulp. 30 *ad Sab.*); D. 17.2.15 (Pomp. 13 *ad Sab.*); D. 17.2.16 pr. (Ulp. 30 *ad Sab.*). Additional evidence: D. 10.3.14.2-4 (Paul. 3 *ad Plaut.*); D. 17.2.17.2 (Paul. 6 *ad Sab.*); D. 17.2.65.6 (Paul. 32 *ad ed.*).

(e) Protection of common assets

A fundamental threat to joint business ventures is that the *socii* withdraw money or that their private creditors (whose claims are unrelated to the joint business venture) seize common assets. No sources have come down to us that directly address the issue. As a result, the protection of common assets is one of the most ambiguous features of Roman business associations (Fleckner 2010:339-442).

Societas. The assets of joint business ventures that were organized as a *societas* appear to have been almost unshielded (Fleckner 2010:339-72). Because the *societas* lacks legal capacity to hold assets on its own, there was no "corporate property" or the like. All common assets were owned by the *socii*, either collectively or individually (in the latter case, the *socius* who was the owner allowed the others to use the object without granting them co-ownership).

The *socii* had almost unrestricted access to the common assets. They could unilaterally terminate the *societas* to receive their share in the liquidation proceeds. They could also transfer their property or their co-ownership (though not their membership position) to third parties at any time. Contractual restrictions typically affected only what they *may* do internally, without confining what they *can* do externally. Violations gave fellow *socii* claims for damages, but no remedies to rescind the transaction. There was no protection against seizure by the *socii*'s private creditors.

Societas publicanorum. The *societas publicanorum* offered a slightly better protection of common assets than the standard *societas* (Fleckner 2010:372-420): As seen above, the *societas publicanorum* offered fewer opportunities to terminate the joint venture and withdraw money.

Private creditors, however, probably had unrestricted access to the common assets. In both regards, common assets would have been considerably better protected if the *societas publicanorum* had been granted corporate rights (an option that the sources do not support, as mentioned earlier).

The *societas publicanorum* seems to have been open to investors who did not become full *socii*. These "members" probably lacked the power to advance repayment, and their private creditors most likely could not seize the assets of the joint venture.

2. *Peculium*: internal dissolution, death, withdrawal, seizure

The instability of the *peculium* has been neglected or overlooked by many scholars so far.[32] Otherwise, the myth that Roman businessmen employed the *peculia* of common slaves to fund larger business ventures would never have become so popular.[33]

There are four sources of instability that the individual businessman cannot control: dissolution events resulting from internal relationships (sub a), the death of the common slave who holds the *peculium* (sub b), unilateral withdrawal by one of the fellow business partners (sub c), and seizure by their private creditors (sub d).[34]

[32] Exceptions include Bürge (1988:860; 1999:199; 2010:385) and Fleckner (2010:227-28, 236, 424; 2014: 217, 225-34).

[33] Main monographs: Di Porto (1984); Serrao (1989); Aubert (1994); Cerami and Petrucci (2010). Important journal articles: Földi (1996); Hansmann et al. (2006:1358-60); Abatino et al. (2011). For important predecessors (ignored by many modern scholars), see the references in Fleckner (2010:221-22) and Fleckner (2014:222).

[34] Not covered hereinafter are ransom and manumission (because they are easier to avoid).

(a) Internal dissolution events

If we think along the lines drawn by the proponents of *peculium*-funded businesses, the first source of instability is, ironically, the *societas* between the businessmen that hold the common slave. This requires a brief explanation. There is no doubt that, in theory, the masters of a common slave could use his *peculium* to finance capital-intensive projects without forming a *societas*.[35] However, the *societas* contract does not require a certain form or format; an informal agreement suffices.[36] When several masters teamed up to launch a joint business venture through a common slave, it is not too far-fetched to assume that they regularly founded a *societas*, either explicitly or implicitly, to administer their internal relationships.[37] The common slave who held the *peculium* became an asset that the *socii* jointly managed, governed by the standard *societas* regime. As a by-product of this regime, they also "imported" the dissolution events of the *societas* (such as death of a *socius* or legal action), making their joint venture subject to the same level of instability that any firm organized as a *societas* faced.

(b) Death of the slave

Notwithstanding the fact that the masters transferred all business assets to the *peculium* of the common slave, all *peculium* assets continued to belong to their property. The masters, not

[35] D. 9.4.10 (Paul. 22 *ad ed.*); D. 15.1.19.2 (Ulp. 29 *ad ed.*). I. 3.27.3.

[36] D. 17.2.4 pr. (Mod. 3 *reg.*): *societatem coire et re et verbis et per nuntium posse nos dubium non est*; see generally I. 3.22 (*de consensu obligatione*) with explicit reference to the *societas* (in I. 3.22 pr.).

[37] Fleckner (2010:229). This is even acknowledged (albeit very cautiously) by Di Porto (1984:161-67, 255, 379).

the *peculium* holders, were the owners of the *peculium* assets.[38] The reason is that slaves lacked legal capacity to hold assets in their own name.[39]

If the slave died, all assets belonging to the *peculium* reverted back to his masters because they were still the owners. This result is well documented in the sources.[40] It is also indirectly confirmed by the creation of two *peculium* variants that avoided the reversion: the *peculium castrense* (for sons in military service) and the *peculium quasi castrense* (for sons in civil service).[41] Neither of the two was available for joint business ventures.

(c) Withdrawal by the masters

Another important consequence of the masters' continuing ownership position was that they could reclaim *any* item belonging to the *peculium* at *any* time and for *any* reason.[42] Among scholars of Roman law, this source of instability has always been common knowledge (an early example is Mandry 1876:170). There is even an advanced discussion of possible *social* restrictions

[38] The general principle is succinctly summarized in I. 2.12 pr.: *iure civili omnium qui in potestate parentum sunt peculia perinde in bonis parentum computantur, acsi servorum peculia in bonis dominorum numerantur*.

[39] G. 2.87: *ipse enim, qui in potestate nostra est, nihil suum habere potest* ≈ D. 41.1.10.1 (Gai. 2 *inst.*). See also, e.g., G. 2.96 and D. 50.16.182 (Ulp. 27 *ad ed.*).

[40] D. 15.2.1.3 (Ulp. 29 *ad ed.*): *cum morte vel alienatione extinguitur peculium* and D. 15.2.3 (Pomp. 4 *ad Q. Muc.*): *desiit morte servi vel manumissione esse peculium*, and generally D. 15.2: *quando de peculio actio annalis est*; also D. 15.3.1.1 (Ulp. 29 *ad ed.*): *morte servi exstinctum est peculium*. Indirect I. 3.7.4.

[41] On the long process (fueled by individual measures of Roman emperors and a changing legal doctrine in Roman jurisprudence) that led to more independence of sons in military and civil service, see Fleckner (2014:227-32).

[42] D. 15.1.8 (Paul. 4 *ad Sab.*): *contra autem simul atque noluit* [sc. *dominus*], *peculium servi desinit peculium esse*. Additional evidence: D. 15.1.4 pr. (Pomp. 7 *ad Sab.*); D. 15.3.1.1 (Ulp. 29 *ad ed.*); D. 15.3.5.3 (Ulp. 29 *ad ed.*). The details, including restrictions and limitations, can be ignored here (for the most important example, see Fleckner 2010:306-7).

on the far-reaching *legal* powers (Fleckner 2010:227-28; 2014:225). But those social mechanisms would only (or predominantly) restrain *fathers* (with regard to the *peculia* of sons). Masters of a common slave would not face the same level of social scrutiny when they reclaim business assets.

(d) Seizure by private creditors

A second threat to the common assets, besides withdrawal by the masters, was seizure by the latter's private creditors. No sources have come down to us that directly address the issue. Nevertheless, those sources that have survived suggest that *peculium* items were *not* protected against seizure by private creditors (Fleckner 2010:420-41).

While the issue is highly controversial, there are two strong arguments that support the view presented here. First, as the death of the *peculium* holder and the withdrawal powers of the masters show (two very well-documented cases), the fact that the masters remained the owners of all *peculium* items continued to be decisive for the allocation of assets in cases of doubt or conflict. If a master defaulted on a debt and his creditors seized his assets, it would be inconsistent with the general property regime to exclude his share in the *peculium* assets from seizure. Second, there are two special rules that provide an *argumentum e contrario* for the standard *peculium* regime: the first protects the traditional *peculium* of sons against confiscations of their fathers' property,[43] the second separates the *peculium castrense* of sons from their fathers' assets.[44] None

[43] D. 4.4.3.4 (Ulp. 11 *ad ed.*): *ut puta si patris eius bona a fisco propter debitum occupata sunt: nam peculium ei ex constitutione Claudii separatur*. On this fragment, see in general, e.g., Brinkhof (1978:175-76), and in the present context Fleckner (2010:228, 236, 423, 425, 426, 428, 436, 437; 2014:226-27).

of these exemptions was available for slaves that held the assets of a joint business venture.

3. Explanations and implications

The first two subsections have surveyed the central sources and described how unstable Roman business associations were. An important follow-up question is to ask what factors help explain the picture we find in the sources (as generally examined by Fleckner 2010:497-623). To structure the analysis, it is handy to distinguish between economic (ibid:499-518), social (ibid:519-88), political (ibid:589-606), and legal influences (ibid:607-23), not ignoring the fact that these fields are overlapping and highly correlated.

At first glance, the unfavorable legal regime may appear as the main reason for the Roman business associations' instability. Is the legendary conservatism of Roman jurists and lawmakers to blame for the lack of more stable entities? Probably not. Even the dissolution regime itself shows that Roman law was more innovative than many modern observers are willing to concede: (1) The *societas* did not survive the death of a *socius* or the filing of an action; the *societas publicanorum* did.[45] (2) Multi-member *societates* were dissolved, even if the remaining *socii* wanted to carry on the joint venture; post-classical law let them deviate from this regime in the initial contract.[46] (3) *Peculium* assets were generally not protected against seizure by the masters' pri-

[44] Maec. (1 fideic.), D. 49.17.18.4: *hoc peculium a patris bonis separetur*. I. 2.12 pr.: *ex hoc intellegere possumus, quod in castris adquisierit miles, qui in potestate patris est, neque ipsum patrem adimere posse neque patris creditores id vendere vel aliter inquietare*. For more information and additional references, see Fleckner (2010:430-37).

[45] D. 17.2.59 pr. (Pomp. 12 *ad Sab.*) and D. 17.2.63.8 (Ulp. 31 *ad ed.*), both reproduced supra (fn. 19).

[46] I. 3.25.5, reproduced in part supra (fn. 17).

vate creditors; the *peculia* of sons increasingly were, thanks to interventions by various emperors and a shift in legal doctrine that made sons more independent of their fathers' influence and fortune.[47] Another rule that could be added is the separation of commercial goods that have been dedicated to different *peculium* stores.[48] All four innovations have in common that they remove some of the uncertainty that surrounded the *societas* and the *peculium*. It is therefore difficult to argue that Roman jurists and lawmakers failed to appreciate the positive effects of more stable business associations. Given the succession provisions for other contract types,[49] it would be equally unconvincing to assume that Roman lawyers did not know how to draft succession rules. The same applies to restrictions on unilateral termination powers.[50] That the law of the *societas*, the *societas publicanorum* and the *peculium* did not provide for a higher level of stability must be the result of additional factors outside the legal sphere.

Curiously enough, the legal sources still provide the best access to these non-legal factors because the latter shine through the jurists' legal reasoning. As frequently mentioned, the *societas* was dissolved when one of its members passed away. It is interesting to note how both Gaius and Justinian justify the rule: *qui societatem contrahit, certam personam sibi eligit*—when someone enters into a *societas* contract, he picks a certain individual as his partner.[51] Continuing a *societas*

[47] D. 4.4.3.4 (Ulp. 11 *ad ed.*) (supra fn. 43) as well as Maec. (1 fideic.), D. 49.17.18.4 and I. 2.12 pr. (both supra fn. 44).

[48] D. 14.4.5.15-16 (Ulp. 29 *ad ed.*), discussed in more detail by Fleckner (2010:437-41). Whether the commercial goods (*merx peculiaris*) were protected against the masters' private creditors is unclear.

[49] Examples include I. 3.19.25 (*stipulationes*) and I. 3.24.6 (*locatio conductio*).

[50] See, e.g., I. 3.26.11 (*mandatum*).

[51] G. 3.152: *solvitur adhuc societas etiam morte socii, quia, qui societatem contrahit, certam personam sibi eligit* = I. 3.25.5. Another consequence of this principle is the lower standard of liability, since *qui parum*

with the heir of a deceased *socius* would run counter to this idea because, as Paulus explains, it could make someone (the remaining partner) a *socius* of an individual (the heir) who he does not want to be affiliated with.[52] It is reasonable to assume that this is also the rationale for dissolving the *societas* upon the occurrence of other changes in personal matters (instead of, e.g., letting the creditors of an insolvent *socius* assume his position).[53] Not allowing membership transfers *inter vivos* (see below) is another logical consequence.

But why did Romans object to the idea of becoming a *socius* of a foreign person? The most convincing explanation combines two closely related factors. The first is that Roman businessmen were generally very reluctant to enter into contractual relationships with their peers. The reason is the legendary—and often overstated—individualism of Roman housefathers (*patres familias*). They valued their freedom above all else, and avoided restricting it through contractual mechanisms. If they were faced with a task that called for the collaboration of several individuals, they would assign it to their fellow family members. If special skills were required, they would buy a slave who had the skills. They would do the same if more manpower was needed—all without sacrificing one iota of freedom. The second element of the explanation is that the *societas* emerged, at least partly, from family relationships, the community of heirs, and has never given up its intimate familial character (Fleckner 2010:123-26).

The most important expression of both—individualism and intimacy—is the fact (discussed

diligentem socium sibi adsumit, de se queri debet (I. 3.25.9).

[52] D. 17.2.65.11 (Paul. 32 *ad ed.*): *societas quemadmodum ad heredes socii non transit ..., ne alioquin invitus quis socius efficiatur cui non vult*. While Wieacker (1936:163) believed this passage to be interpolated, modern scholarship no longer doubts its authenticity.

[53] I. 3.25.7 suggests this rationale by comparing an insolvent with a dead partner.

above) that a *socius* could unilaterally terminate the *societas* at any time.[54] Diocletian and Maximian coined the underlying reason: *in ... societatem nemo compellitur invitus detineri*—no one should be forced to remain in a *societas* against his will.[55] Because the law of the *societas* kept on assuming intimacy, Romans were reluctant to use it for associations with strangers. Because they would avoid contractual relationships anyway, they had no reason to press for political reforms that made the *societas* less personal, such as by allowing membership transfers or by cutting back on the various dissolution reasons that made it so unstable. Yet, the legally imposed instability seems to exceed what public sentiment called for. It is difficult to understand why dissolution was *mandatory* no matter what the *socii* agreed upon. *Volenti non fit iniuria* is the obvious objection to this regime.[56] In addition, the various safeguards overlap. If the heir of a deceased *socius* had been allowed to assume the latter's membership position, the remaining *socii* would still have had the power to unilaterally terminate the *societas* in case the heir turned out to be unfitting. This mystery is difficult to resolve for the modern observer.

To be sure, stability is just one important aspect among many others that help understand the design of Roman business associations. One strategy to get a complete picture is to identify those structural features that, over various periods and across multiple jurisdictions, seem to have been key for capital associations to accomplish their goals (i.e., to finance projects that, on

[54] That a *socius* could unilaterally terminate the *societas* has been explained both with Roman individualism (Schulz 1936:149-51, 155, 227) and with the traditional intimacy of the *socii* (Wieacker 1936:105). As shown in the text, both explanations complement one another (perhaps too restrictive Fleckner 2010:343-44).

[55] C. 3.37.5 (Diocl./Max., AD 294).

[56] Non-mandatory rules were not unknown in the law of the *societas*; see, e.g., I. 3.25.1/3 (allocation of profits and losses) or I. 3.25.5 (continuance of multi-member *societates*; reproduced in part supra, fn. 17).

account of their scope, duration, or risk, exceed the capacity of single individuals). Four features appear to be critical: (1) the separation of ownership from control, (2) the protection of the capital providers' private assets, (3) the protection of the capital association's common assets,[57] and (4) the transferability of the capital providers' shares in the association (Fleckner 2010:45-62). While a low level of stability is primarily a threat to the protection of common assets, Rome's rationale for instability also affects the other three features.

First, Roman law never developed a general rule of agency. That the use of slaves and their *peculium* led to similar consequences (or even to outcomes that go beyond the effects of modern agency regimes) is probably the main explanation. But it is also plausible that social reservations similar to those that kept Romans from designing more stable business associations let them remain skeptical of hiring peers or acting on behalf of peers (Fleckner 2010:241-94). Closely connected to the agency problem is the protection of the capital providers' private assets, the second structural feature, because the situations in which management may be separated from ownership under Roman law are the same in which the law imposes personal liability on the principals. In other words, both structural features are difficult to implement at the same time (Fleckner 2010:295-337). Finally, membership in a standard *societas* was not transferable. The underlying reason is well known from the stability discussion: since Roman businessmen objected to the idea of letting heirs take the position of deceased *socii*, the transfer of membership *inter vivos* was also a foreign concept to them (Fleckner 2010:444-50). Nevertheless, many ob-

[57] Combined, the second and the third features may be dubbed the *Prinzip beidseitiger Vermögenstrennung* ("principle of both-sided asset separation").

servers believe that the *societas publicanorum* was (partly) funded by investors who, unlike the *socii* of a standard *societas*, could freely transfer their stake in the joint venture. Some have even argued that these "shares" were publicly traded.[58] The sources that have come down to us do not support these claims (Fleckner 2010:462-92). There is only one single sentence that provides evidence of a transfer from one person to another.[59] And this transaction is not a voluntary sale on the open market, but a forced transfer in secrecy (Fleckner 2010:473-80).

The four structural features—separation of ownership from control, limited liability, entity shielding, and transferability—raise a multitude of additional questions that are unrelated to the stability or instability of Roman business associations. For some of these questions, the sources give an almost definitive answer; the liability regime surrounding the employment of slaves comes to mind (Fleckner 2010:301-17). For others, we have ample evidence in the legal sources, but lack information from elsewhere to verify their relevance in practice; the design of larger business ventures based on *peculia* is the best example (as seen earlier). For still other questions, literary sources suggest structural features that are difficult to explain with the legal sources; the management of the *societas publicanorum* is one of these mysteries (Fleckner 2010:262-92).

Legal and economic historians are the most likely addressees of these questions. In their search for answers, they will tremendously profit from the insights of modern economists, as will the latter from taking a look at history in their struggle to refine the theory of the firm.

[58] A recent example is Malmendier 2009 (supra fn. 2). For further references, see Fleckner (2010:451-62).

[59] Cic. Vatin. 12.29: *eripuerisne partis illo tempore carissimas partim a Caesare, partim a publicanis?*

IV. Summary. Main findings and positions

1. To better understand the functions of corporate law and the factors that give rise to firms, scholars may profit from a deeper look at history. *(Part I)*

2. Ancient Rome can teach us various lessons about the theory of the firm and the role that law plays in it. Three important observations are:

a) Roman business associations remained rather small. There were no large capital associations with publicly traded shares. The widespread idea of Roman stock corporations is a modern myth that lacks any basis in the sources. *(Part II/1)*

b) For smaller joint business ventures, Roman businessmen could choose between three legal forms: the *societas*, the *societas publicanorum*, and the *peculium* of a commonly held slave. *(Part II/2)*

c) The lack of larger capital associations was the result of obstacles in the social and political environment. Roman jurists and lawmakers would most likely have responded to the economic demand for larger business associations if public attitudes had been more favorable toward capital accumulation. *(Part II/3)*

3. One factor that helps explain why Ancient Rome did not witness larger business associations is their high level of instability:

a) The *societas* was inevitably dissolved, *inter alia*, following changes in personal matters, upon legal disputes or when the consensus among its members came to an end. The *societas publicanorum* was subject to the same regime but exempted from mandatory dissolution in a number of cases. A mutual threat to long-term capital commitment was that neither the *societas*

nor the *societas publicanorum* were sufficiently protected against withdrawal requests by their members or the seizure of assets by the members' private creditors. *(Part III/1)*

b) Businesses based on the *peculia* of common slaves faced the same level of instability as the *societas*, unless their internal relationships were governed by other than the standard *societas* rules. Additional uncertainty arose from the fact that all assets would revert back to the business partners if the common slave died. At no time were common assets protected against withdrawal by the masters or seizure by private creditors. *(Part III/2)*

c) The instability of Roman business associations confirms one of the more general lessons from Ancient Rome: the paramount importance of the social and political setting. There is no doubt that more stable entities would have been advantageous for business. Nor can we assume that Roman lawyers did not appreciate the benefits of stability, as exemplified by the exemptions for the *societas publicanorum*. But social attitudes and, as a result, public policy remained unfavorable. *(Part III/3)*

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