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Corporate Caveat Emptor: Minority Shareholder Rights in Mexico, Chile, Brazil, Venezuela and Argentina

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ARTICLE

CORPORATE CAVEAT EMPTOR: MINORITY SHAREHOLDER RIGHTS IN MEXICO, CHILE, BRAZIL, VENEZUELA AND ARGENTINA*

**JOSE W. FERNANDEZ, ANTONIO DELPINO,
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I. INTRODUCTION

This article examines, in summary fashion, the rights of minority shareholders in *sociedades anónimas* in Mexico, Chile, Brazil (*anônimas*), Venezuela and Argentina. At the risk of oversimplification, its message may be distilled into a basic principle and a corollary: with few exceptions, majority shareholders in Latin American corporations can, as a matter of statutory right, impose their will on the minority. Their dominant position when convening a shareholder's meeting, adopting resolutions or distributing dividends has been bolstered by the lack of shareholder's derivative suits or class action mechanisms analogous to those available in the United States, although certain "abuse of right" concepts have appeared in recent legislation. Further, the appraisal rights granted by law to minority shareholders are generally unsatisfactory, since the price received by the dissident shareholder for his stock will be based ordinarily on the book value that appears on the last corporate balance sheet, which is prepared by accountants appointed by the majority. In sum, minority shareholders are in a weak position.

Originally, the dominance of the majority shareholders allowed governments and local financial and business groups in Latin America to secure minority equity investments while limiting the investors' ability to interfere in the management of local business ventures. In the past decade, minority shareholders rights have become a more sensitive issue, especially with ever-increasing foreign investment from mutual funds and other foreign entities, which are wary of investing in companies without certain basic rights that minority

shareholders expect in the United States and other jurisdictions.¹ As a result, over the past few months several countries in Latin America have enacted or initiated legislation to afford greater protections for minority shareholders of publicly traded companies. For the most part, the recent legislation has sought to ensure that minority shareholders of publicly traded companies share in control premiums paid by acquirers of controlling stakes in such companies, but in certain circumstances, these "OPA laws" have provided additional protection to minority shareholders (even in privately held companies). Although at times this article mentions the principal rights granted to minority shareholders of publicly traded companies under the OPA laws, it focuses on the rights of minority shareholders in privately held companies. In most cases, the OPA laws have not substantially modified the rights of minority shareholders in privately held companies.

Since minority shareholders in privately held companies for the most part cannot expect much protection in the laws of the jurisdictions surveyed, they must focus their attention on the corporate charter.² Depending on the minority shareholder's bargaining power and negotiating skill, the most oppressive legislative rules often may be alleviated by careful drafting of the bylaws. At the very least, a well-structured charter or private agreement may permit a dissident shareholder to force a favorable settlement by threatening to file suit or actually commencing legal proceedings. In some instances, charter provisions requiring international arbitration and private agreements among shareholders will also prove useful.

Our study in each country begins with (A) a citation of the applicable law and the types of corporate entities available. It continues with a statement of (B) minority shareholder's rights at shareholder's meetings; (C) the right to dissent from resolutions adopted at shareholder's meetings; (D) the voice of the minority in the internal management of the corporation; (E) the economic rights of minority stockholders; and (F) the possibility of amending the corporate bylaws or executing private

1. See generally, *La Revuelta de los Minoritarios*, AMERICA ECONOMIA, Feb. 1998. See also, *Getting Brazil to Clean Up its Act*, LATIN FINANCE, Dec. 2000 (declaring "[i]f corporate governance means shareholder value then it does not exist in Brazil.").

2. These laws are often referred to as "OPA laws." OPA stands for *oferta pública de acciones*. One exception to this is the Chilean OPA law, which is discussed *infra*.

shareholder's agreements in favor of the minority.³

We have necessarily focused our survey on the corporate law of each country addressing the position of minority shareholders generally. However, when counseling clients concerning a specific investment, it is also important to review the law on foreign investments, capital markets, arbitration, foreign banking operations, taxation, and other regulations applicable to the particular venture. In addition, investors should keep in mind important recent legislative efforts, discussed *infra*, in most of the surveyed countries, which seek to ensure that minority stockholders share in the control premiums paid by acquirers of a controlling stake in public corporations.

II. MEXICO

A. Introduction

The rights of corporate shareholders in Mexico are governed by the General Law of Commercial Companies ("LGSM").⁴ The Mexican limited liability entity most analogous to a corporation in the Anglo-American system is the *sociedad anónima* ("S.A."), which may have a fixed or variable capital. In a fixed capital corporation a sum certain is stated as the capital, while in a variable capital entity ("S.A. de C.V.") the variable portion of the capital stock may be increased or decreased without amending the corporate charter as long as it is expressly permitted by the Charter and the fixed portion of the stock does not fall below a stated minimum. The following comments are applicable to both types of corporations.⁵

3. For purposes of this article, the words "charter" and "bylaws" will be used interchangeably to translate the term "*estatutos*." With few exceptions, we have avoided extensive scholarly discussions or footnotes. Nevertheless, the reader accustomed to a discussion of U.S. law will be struck by the relative absence of case law discussion. Apart from the summary nature of this study, the primary reason for such absence is the dominant position of legislation in Latin American jurisdictions, and to a lesser extent, legal commentary. In principle, at least, the courts in the countries surveyed are not bound by judicial precedent to the same extent as their U.S. counterparts, and are more apt to focus on the codified law and legal treatises discussing the legislation. While we have considered various judicial decisions in preparing this article, we have omitted mention of most of them.

4. "Ley General de Sociedades Mercantiles", D.O., 4 de agosto de 1934. [hereinafter, the "LGSM"].

5. In recent years limited liability companies called *sociedades de responsabilidad*

In addition to the LGSM, foreign minority shareholders must consider the Foreign Investment Law, which restricts majority foreign investment in certain activities.⁶ In some circumstances, the Securities Market Law (which was recently modified to include broader minority protection rights) must also be kept in mind.⁷ Except as otherwise noted, all references in this section will be to the LGSM.

B. Rights at a Shareholder's Meetings

1. Generally

As in most Latin American jurisdictions, the shareholders of a Mexican corporation generally exert a greater influence on directors than their U.S. counterparts. Article 178 states that the "general meeting of shareholders is the supreme organ of the corporation, it may decide and ratify all the acts and operations of the corporation, and its resolutions shall be complied with . . ."⁸ Another distinction from U.S. corporations is that the LGSM accords considerably more rights to majorities, thereby limiting the minority shareholder's influence over management of the corporation unless the latter is granted additional protection by the company's bylaws.

limitada (abbreviated as S.R.L) in Mexico (and some variation of that name in other jurisdictions) have also become a common form of entity used in many jurisdictions in Latin America, primarily due to their pass through tax treatment under most tax codes. Much like limited liability companies in the United States, another advantage in using these entities is that the laws of most countries generally allow more flexibility for the members participating in the equity of these entities to determine their own management structure and procedure in the charter document. In some jurisdictions the statutory rights afforded to minority shareholders explicitly apply to S.R.L.'s, while in others it is not clear which, if any, protections apply, making it all the more important for minority participants to have such rights included in the charter. See LGSM, ch. 4, *supra* note 4. See also *Ley de Sociedades Comerciales de Argentina*, ch. 2, § 4 Law No. 19.550; *Código de Comercio de Costa Rica*, ch. 6, 93 OFFICIAL GAZETTE, May 16, 1995; *Código de Comercio de Bolivia*, ch. 4, 14379 OFFICIAL GAZETTE, Feb. 25, 1977; *Ley General de Sociedades de Peru*, arts. 131-134, No. 003-85-JUS, Jan. 14, 1985.

6. "Ley de Inversión Extranjera", D.O. December 27, 1993.

7. "Ley del Mercado de Valores", D.O. January 2, 1975, as amended (latest amendments were published in the D.O. on June 1, 2001).

8. As a corollary to Article 178, all corporate management matters not reserved for the Board of Directors fall within the jurisdiction of the shareholders. Cf. *Código de Comercio de Costa Rica*, *supra* note 5, art. 152; *Código de Comercio de Bolivia*, *supra* note 5, art. 283.

Meetings of the shareholders of a Mexican company may be either "ordinary" or "extraordinary."⁹ The former must be held annually and will address matters not specifically reserved for "extraordinary" meetings.¹⁰ "Extraordinary" meetings, on the other hand, are called to discuss any question which the LGSM or the bylaws of the company specifically reserve for these meetings, including structural issues such as liquidation, increase or decrease of the corporate capital (in a fixed capital corporation, and in some instances variable capital corporations), merger and issuance of bonds.¹¹

2. Calling a Shareholder's Meeting

Shareholders comprising less than one-third of the capital of the corporation can call a shareholder's meeting only if one has not been held during the prior two years, or if such meetings have been convened, the shareholders have not had an opportunity to approve the balance sheet, or name or fix the remuneration of the members of the board.¹² On the other hand, when the minority stockholders represent at least one-third of the capital, they may demand a general meeting of stockholders at any time.¹³ In both instances, if the board of directors does not call the requested meeting within fifteen days of the petition, the minority shareholders may ask the appropriate judicial authorities in the jurisdiction where the corporation has its principal domicile to do so.¹⁴

9. LGSM, *supra* note 4, arts. 179-82. Cf. *Código de Comercio de Bolivia*, *supra* note 5, arts. 284-86; *Código de Comercio de Costa Rica*, *supra* note 5, arts. 153-56; *Ley General de Sociedades de Peru*, *supra* note 5, arts. 121-23.

10. *Id.*

11. *Id.*

12. See LGSM, *supra* note 4, art. 185.

13. See LGSM, *supra* note 4, art. 184. In Bolivia and Costa Rica, however, minority stockholders that represent at least one-fourth of the capital may demand a general meeting of stockholders at any time. See *Código de Comercio de Costa Rica*, *supra* note 5, art. 159; *Código de Comercio de Bolivia*, *supra* note 5, art. 290. In Nicaragua and Peru one-fifth of the capital suffices to demand a meeting. *Código de Comercio de Nicaragua*, 144 OFFICIAL GAZETTE, 8 de julio de 1938; *Ley General de Sociedades de Peru*, *supra* note 5, art. 124.

14. *Id.* Minority shareholders have similar rights in other jurisdictions. See *Código de Comercio de Bolivia*, *supra* note 5, art. 290; *Código de Comercio de Costa Rica*, *supra* note 5, art. 161; *Código de Comercio de Nicaragua*, *supra* note 13, art. 252; *Ley General de Sociedades de Peru*, *supra* note 5, art. 125. As to publicly-traded companies in Mexico, recent modifications to the Securities Market Law provide that shareholders comprising at least ten percent of voting stock (even if their voting rights are limited or restricted)

3. Quorums

While under the LGSM, minority shareholders may not prevent the company from holding “ordinary” general shareholder’s meetings by failing to attend, such a tactic may be used to prevent “extraordinary” meetings from taking place effectively. Under Article 189, a quorum at a general ordinary shareholder’s meeting requires the presence of at least fifty percent of the capital. If no quorum is reached at first call, those present at the second call, regardless of their number, will constitute a quorum. However, for an “extraordinary” meeting to be convened properly upon first call, three quarters of the company’s capital must attend.¹⁵ In practice, charters of companies with foreign minority shareholders often require the presence of sixty percent of the capital at “ordinary” meetings, and eighty-five percent at “extraordinary” sessions, held upon first or subsequent calls.

4. Voting

Mexican law zealously protects the voting rights of all shareholders, including those in the minority. Under Article 113 of the LGSM, each share is entitled to one vote, except when voting rights are restricted in return for preferential dividends as described *infra* Part II(E)(1).¹⁶ Under no circumstances are shares with more than one vote permitted, and for similar reasons, agreements among shareholders to vote in a specific

are also entitled to demand a general meeting of shareholders.

15. See LGSM, *supra* note 4, art. 190. Cf. *Código de Comercio de Bolivia*, *supra* note 5, art. 295; *Código de Comercio de Costa Rica*, *supra* note 5, arts. 169-70 (also requiring fifty percent of the capital to have a quorum in an ordinary shareholder’s meeting and seventy-five percent of the capital for an extraordinary shareholder’s meeting). In Nicaragua and Peru fifty percent of the capital is enough to properly convene ordinary and extraordinary meetings, except that the approval of resolutions on certain matters require the presence of special majorities. See *Código de Comercio de Nicaragua* *supra* note 13, arts. 253, 263; *Ley General de Sociedades de Peru*, *supra* note 5, arts. 133-134.

16. Even shares with limited voting privileges cannot waive the right to vote on decisions involving dissolution or merger, changes in the purpose or nationality of the company, or its transformation into another type of legal entity. See LGSM, art. 113, *supra* note 4. It should be noted that under Article 113, holders of limited voting shares acquire many of the rights of minority stockholders. In other jurisdictions, the charter may restrict the voting rights of certain shares, subject to these same type of restrictions. Cf. *Código de Comercio de Bolivia*, *supra* note 5, arts. 272, 277; *Código de Comercio de Costa Rica*, *supra* note 5, arts. 139, 145.

manner are unenforceable.¹⁷

The requisite majority of votes to approve a resolution at an "ordinary" shareholder's meeting consists of the majority of those present, while at "extraordinary" meetings the favorable vote of at least one-half of the total voting stock of the company is required, unless the company charter requires the vote of a qualified majority.¹⁸ In practice, Mexican companies with foreign minority stockholders increase the requisite voting percentage.

However, under Article 195 of the LGSM and in most other Latin American jurisdictions, any shareholder resolution which negatively affects the rights of a particular class must be approved by the majority of votes in that class when a corporation has more than one class of shares.¹⁹ Based on the class voting requirement of Article 195, foreign minority investors will often seek to exercise a "negative veto" power over the acts of the corporation by issuing one class of shares to the local majority stockholders and another class to themselves. When voting on a resolution that prejudices the rights of the class of shares held by foreign shareholders, such measure must be approved by a majority of that class of shares by means of a separate and "special" meeting of such class.²⁰

17. See LGSM, *supra* note 4, art. 198. See also Creel Carrera & del Campo y Souza, *A Public Stock Offering in Mexico*, 16 INT. LAW & POLITICS 305, 314 (1984).

18. See LGSM, *supra* note 4, arts. 189-90. In Bolivia and Costa Rica a majority of those present is sufficient to approve a resolution at ordinary and extraordinary shareholder's meetings. See *Código de Comercio de Bolivia*, *supra* note 5, art. 296; *Código de Comercio de Costa Rica*, *supra* note 5, art. 169. In Peru a majority of those present is sufficient in ordinary and extraordinary meetings, except for resolutions concerning certain matters such as increasing or decreasing the authorized capital, issuance of debt, transformation of the legal form, merger, dissolution or any amendment to the charter. These matters require a majority of the total capital of the Company. See *Ley General de Sociedades de Peru*, *supra* note 5, arts. 133-34.

19. Cf. *Código de Comercio de Bolivia*, *supra* note 5, art. 277; *Código de Comercio de Costa Rica*, *supra* note 5, art. 147; *Ley General de Sociedades de Peru*, *supra* note 5, art. 138 (also requiring the approval of a majority of the affected class).

20. See LGSM, *supra* note 4, art. 195.

C. *Right to Dissent from Majority Resolutions*

1. Dissenting shareholders comprising less than thirty-three percent of the capital

Minority shareholders unwilling to heed the majority's vote in Mexican *sociedades anónimas* and the courses of action available to them, depend on the number of fellow dissident stockholders. For example, any shareholder may register with the *comisarios* (examiners) an objection to an act of the Board. Examiners must include such objections in their annual reports to the shareholders and deal with them appropriately.²¹ Similarly, under Article 168, any shareholder may ask the judicial authorities to call a shareholder's meeting if the board fails to name a substitute for an absent examiner within three days. Any stockholder may also request the corporate directors "to pay any amounts which should have been set aside in the corporation's 'legal reserve' account."²² This right may also be judicially enforced by any shareholder.

A shareholder may sue a director or another shareholder in cases involving allegations that the defendant should have abstained from voting because of a conflict of interest and that the resolution would not have been approved without the vote of the compromised shareholder or director.²³

21. See LGSM, *supra* note 4, art. 167. Mexican companies must have at least one statutory examiner, or *comisario*, to safeguard the interests of shareholders. The examiner's duties include, in addition to reviewing the management of the company, obtaining a monthly balance sheet from management reflecting the results of operations, inspecting the company's books each month, and preparing the annual balance sheet of the company.

22. See LGSM, *supra* note 4, arts. 20-22. Article 20 requires the corporation to set aside five percent of net earnings every year until the legal reserve amount reaches twenty percent of the company's stated capital.

23. See LGSM, *supra* note 4, arts. 156-57, 196. Cf. *Ley General de Sociedades de Peru*, *supra* note 5, art. 139. In connection with publicly-traded companies, the new provisions of the Securities Market Law establish that the holder of at least twenty percent of shares with voting rights, even if such rights are limited or restricted, may judicially challenge the resolutions adopted by any general meeting of shareholders in which they are entitled to cast their vote. Furthermore, the holders of at least fifteen percent of voting shares may file a claim against the directors of the corporation for violations of their duties, provided such holders comply with the requirements of LGSM Article 163. In essence, Article 163 provides that the plaintiff must also seek redress on behalf of the corporation, and must have voted against any shareholder resolution seeking to exonerate such directors.

2. Dissenting shareholders exceeding thirty-three percent of the capital

Filing a complaint with the corporation's *comisario* or even forcing the appointment of one, are unlikely to ease a minority shareholders apprehensions about the management of the company, especially if the examiner has been appointed by the majority. More meaningful remedies, however, require a larger minority. LGSM Article 201 provides that any judicial challenge to corporate resolutions must be presented by the owners of at least one-third of the capital stock of the corporation, none of which may have voted in favor of the resolution in question.²⁴ Owners of at least one-third of the capital stock may also bring an action on behalf of the corporation against its directors.²⁵ In either case, as well as under Articles 157 and 196, plaintiffs will not be entitled to attorneys' fees except in exceptional circumstances.²⁶

3. Withdrawal Rights

Under Article 206, any shareholder voting against a resolution to modify the purpose or nationality of the company, or to transform its legal form, such as a transformation from a S.A. to an S.R.L., may withdraw from the corporation if the request to do so is filed within fifteen days from the date of approval of the objectionable resolution.²⁷ In such cases, the dissenting shareholder is entitled to receive the book value of his shares, based on the last annual financial statements of the company. By contrast, a shareholder in a *sociedad anónima de capital variable* may withdraw from the corporation and receive the book value of his shares if the separation does not reduce the

24. In addition, any claim has to be presented within fifteen days of the shareholder's meeting and must specify the legal or bylaw provision which has been contravened. See LGSM, art. 201, *supra* note 4. Mexican judges have the discretion to grant injunctive relief to the plaintiff stockholders if they post a bond. See LGSM, *supra* note 4, art. 202. In Bolivia and Peru any dissenting or absent shareholder may challenge corporate resolutions in the local courts if they allegedly violate the law or the corporate charter. See *Código de Comercio de Bolivia*, *supra* note 5, art. 302; *Ley General de Sociedades de Peru*, *supra* note 5, arts. 143-44.

25. See LGSM, *supra* note 4, art. 163.

26. See *Código de Comercio*, arts. 1081-1082, OFFICIAL GAZETTE, Oct. 7-13, 1889.

27. Cf. *Ley General de Sociedades de Peru*, *supra* note 5, arts. 210, 349 (also allowing shareholders to withdraw from the corporation for similar reasons).

corporation's capital below the stated minimum.²⁸

D. Internal Corporate Management

1. Naming Directors and Examiners

Despite the prominent role of shareholders in Mexican corporations, the LGSM does not take up the minority's banner at the board level. Among the few rights expressly granted to minorities on the board, Article 144 provides that shareholders comprising at least twenty-five percent (or at least ten percent if the company is publicly-traded) of the corporate capital may name at least one director when the board is composed of at least three members, although the corporate bylaws may stipulate a lower threshold percentage.²⁹ *Comisarios* may also be appointed by the minority in accordance with the above rules.

2. Examining Books and Records

The LGSM grants all stockholders a limited right to inspect the company's books and records. Article 173 compels disclosure of the balance sheet and other financial information, prepared in accordance with Article 172, to the shareholders fifteen days prior to the date that a meeting is convened to discuss such information. The failure of the Board of a *comisario* to so disclose may subject them to dismissal.³⁰

On the other hand, Mexican law does not go as far as U.S. law in granting shareholders the right to personally examine the books and records of a company. As long as the Board and the *comisarios'* reports meet the conditions of Article 172 and are presented as required by Article 173, minority shareholders in a Mexican corporation may not properly demand additional

28. Pursuant to Article 16 of the *Ley de Mercado de Valores* and Circular 11-12 of the Comisión Nacional Bancaria y de Valores, public issuers are required to include in their bylaws a provision stating that if the public shares are to be de-registered, the issuer's controlling shareholders must make a tender offer to purchase the remaining shares held by the public.

29. See *Código de Comercio de Bolivia*, *supra* note 5, art. 316 (also giving minority shareholders with more than twenty-five percent of the shares a right to elect a director when the board is composed of at least three members).

30. See LGSM, *supra* note 4, art. 176.

information or even inspect the books and records of a company at other times. Of course, a minority shareholder with a representative on the board will have access to financial data concerning the company, and if the minority investor can secure the appointment of a friendly examiner, she should be able to obtain sufficient information on the financial affairs of the company.

E. Economic Rights of Minority Shareholders

1. Dividends

Mexican law states that dividends must be paid to stockholders in proportion to their shares.³¹ While this basic rule may be modified in the case of limited voting shares, no agreement by a shareholder waiving dividend rights is enforceable.³² Similarly, dividends may not be declared until previous losses have been compensated.³³ No provision in the LGSM requires the corporation to pay a minimum dividend.³⁴

Under Article 113, shareholders with limited voting rights receive preferential rights to a five percent annual cumulative dividend, payable before any dividend to the ordinary shares, and they also have preferential rights in liquidation.³⁵ As noted, voting rights may be relinquished only in return for preferential dividend rights.

2. Preemptive Rights and Rights of First Refusal

LGSM Article 132 grants shareholders a preferential right to subscribe to new shares.³⁶ While this right need not be exercised,

31. See LGSM, *supra* note 4, art. 16.

32. See LGSM, *supra* note 4, art. 17.

33. See LGSM, *supra* note 4, art. 19.

34. Pursuant to Article 79 of the Chilean LSA, the company must make a distribution of annual profits in the form of dividends unless otherwise unanimously agreed by the shareholders. See *supra* Part II(E)(1).

35. The charter may provide for an even higher dividend to the preferred stockholders.

36. Cf. *Código de Comercio de Bolivia*, art. 345, *supra* note 5; *Ley General de Sociedades de Peru*, *supra* note 5, art. 216 (also granting shareholders a similar preferential right to subscribe to new shares).

it cannot be waived in advance by a shareholder's agreement. On the other hand, if the shareholders wish to restrict the right of sale of existing shares, they must do so pursuant to a provision in the bylaws permitting the board of directors to approve any sale.³⁷ To deny a shareholder the necessary authorization for a transfer, Article 130 requires the board of directors or the shareholders, if provided in the bylaws, to designate a purchaser for the stock at market prices.³⁸

The bylaws may contain detailed provisions regarding the transfer of existing shares. In particular, minority shareholders often ensure that their right to sell will not be impaired by, for example, negotiating the inclusion of time limits for the Board's approval, or providing that no authorization will be required for transfers to a subsidiary or a related party.

3. Liquidation

Under LGSM Article 132, all shareholders receive a proportionate part of the company's net worth upon final liquidation. As with the right to dividends, this right may not be waived.

Minority shareholders have other rights with respect to the liquidation of the company. Under Article 232 of the LGSM, any shareholder may demand in court the dissolution and liquidation of the corporation where a legal cause exists. In addition, Article 236 of the LGSM permits any shareholder to request a court to appoint a liquidator if none has been appointed at the shareholder's meeting that approved the dissolution and liquidation. Lastly, under Article 243, any shareholder may force the liquidator to deliver a portion of the corporate capital, as long as the payment in question is consistent with the rights of third-party creditors.

37. See LGSM, *supra* note 4, art. 130.

38. *Id.*

F. *Modifying Statutory Rights to Protect Minority Shareholders*

1. Modifying Certain Rights

Certain provisions in the LGSM are mandatory and their effect may not be modified by the charter. Among those already noted are provisions which deprive shareholders of any dividends (Article 17), or of their preemptive rights (Article 132), and the prohibition against shareholders voting agreements (Article 198).³⁹

In other instances, the rights of minority shareholders under the LGSM may be altered. For example, the corporate bylaws may permit shareholders to name a director without the requisite twenty-five percent or ten percent shareholding.⁴⁰ Similarly, the required quorum at an "extraordinary" stockholders meeting can be increased, and additional corporate matters may be reserved for such meetings under Article 182.

2. In Practice

The special quorum and voting requirements set forth in the LGSM for specific situations provide minority shareholders, local or otherwise, with certain veto rights over the affairs of the corporation. Nevertheless, foreign minority shareholders in Mexico generally seek to protect their rights by inserting provisions in the *estatutos* requiring even higher quorums at "ordinary" and "extraordinary" shareholder's meetings and adding certain matters to those that must be resolved therein under the LGSM.

Below are some sample items often considered by investors in Mexico for the requirement of a higher shareholder's vote in the corporate bylaws:

1. Increase or reduction of the capital stock of the company;
2. Any amendment to the articles of incorporation and

39. See LGSM, *supra* note 4, arts. 14, 19, 21.

40. See LGSM, *supra* note 4, art. 144.

bylaws of the company;

3. Merger or consolidation;
4. Dissolution or liquidation;
5. Issue of preferred stock;
6. Issue of bonds, debentures and any other securities;
7. Variation of pre-established dividends policy;
8. Purchase, sale, transfer, exchange, or any other disposition of real estate or fixed assets, whose value per item exceeds certain limits;
9. Mortgage or encumbrance of real estate;
10. Obtaining credits, loans or other financing in excess of certain limits;
11. Granting credits other than in the ordinary course of business;
12. Acting as guarantor or surety for third parties;
13. The execution, amendment, termination or assignment of contracts or agreements for obtaining or rendering administrative, financial and other management services, technical assistance, or for the use and exploitation of copyrights, patents, trademarks or commercial names, other than in the ordinary course of business;
14. Remuneration of directors, officers and executives;
15. Determination of product lines and scope of business activities;
16. The waiver of any real or personal rights of the company;
17. The appointment and removal of general attorneys-in-fact;
18. Investment in other Mexican entities; and
19. Transactions with persons or entities related to or controlled by shareholders, directors or employees.

As previously stated, another common technique consists of issuing a class of shares to be held by the Mexican majority and another class for the foreign minority, thereby taking advantage of the class voting requirements of Article 195. Thus, although it

is advisable to include such clauses in the bylaws, the foreign investor should remember that most of the provisions discussed, while common, have not been scrutinized by the courts, and should be relied upon with caution.

III. CHILE

A. *Introduction*

Chilean corporate law was substantially modified in 1981 by the Law of Corporations [hereinafter, the "LSA"], as implemented by the Regulations of Corporations [hereinafter, the "Regulations"].⁴¹ In addition, Chilean public corporations are subject to the Capital Markets Law (hereinafter, the "CML").⁴² In December 2000, Chile enacted a new law on tender offers and corporate governance⁴³ (hereinafter the "Chilean OPA Law"), which included significant amendments to the rules applicable to take-overs and governance for public companies under the LSA and the CML.

The LSA imposes several different requirements for public and closed companies (*sociedades anónimas abiertas o cerradas*). Pursuant to the recently amended LSA, public companies are those entities (i) with at least 500 shareholders (ii) in which ten percent of the paid-in capital is held by at least 100 persons, excluding those owning ten percent or more or (iii) that are registered in the Registry of Securities.⁴⁴ Closed corporations are those that do not meet these guidelines.⁴⁵ Nevertheless, under Article 2 of the LSA closed corporations may choose to be governed by the rules for public corporations by including a provision in the bylaws to that effect. Certain closed companies may be required to abide by the rules for public companies in order to be allowed to conduct certain activities in Chile such as

41. *Ley Sobre Sociedades Anonimas*, No. 18.046, OFFICIAL GAZETTE, Oct. 22, 1981. [hereinafter, the "LSA"]; *Reglamento de Sociedades Anónimas*, OFFICIAL GAZETTE, Nov. 13, 1982. [hereinafter, "Regulations"].

42. *Ley de Mercado de Valores*, No. 18.045, OFFICIAL GAZETTE, Nov. 13, 1982.

43. *Ley sobre Oferta Pública de Adquisición de Acciones y Gobiernos Corporativos*, No. 19705, Official Gazette, December 20, 2000.

44. See LSA, *supra* note 41, art. 2.

45. *Id.*

the provision of long distance telecommunication services.⁴⁶

In general, the LSA imposes fewer legal restrictions on closed corporations than on public companies. Until the recent amendments to the LSA enacted in December of last year, the law had been largely silent on the rights of minority shareholders, preferring to leave to the shareholders the task of delineating their respective rights and obligations in the corporate charter in accordance with the classical liberal economic policy followed by the Chilean government since 1973. However, the amendments to the LSA and CML introduced by the Chilean OPA Law included a number of provisions intended to protect the rights of the minority shareholders. Among these was the new Article 133 bis of the LSA, which expressly provides for the right to bring a derivative action against directors and other shareholders.⁴⁷ In fact, many practitioners believe the Chilean OPA Law went too far in protecting the rights of minority shareholders in public companies.

B. Rights at a Shareholder's Meetings

1. Generally

The distinction between "extraordinary" and "ordinary" shareholder's meetings is not as sharply drawn in Chile as in other Latin American jurisdictions. The reason lies in that, as will be discussed *infra*, both types of meetings may be called by the same percentage of shareholders, and qualified majorities may be necessary at either meeting.

The intention of the drafters of the LSA was for important corporate issues to be treated at "extraordinary" shareholder's meetings, while annual and other routine sessions were to be "ordinary." Under Article 57 "extraordinary" meetings must be

46. Pursuant to the *Ley General de Telecomunicaciones*, all corporations owning a license or concession to provide certain telecommunication services must abide by the rules governing public corporations, even if they are closed corporations.

47. The Chilean OPA Law also revamped the procedures applicable in the event a potential purchaser makes an offer to acquire a controlling stake in a public company, in an effort to ensure that the minority shareholders have an opportunity to share in the control premium for such acquisition. In addition, the Chilean OPA Law provides new rules for related party transactions involving public companies, which are intended to ensure that such transactions are done on an arm's-length basis.

called to discuss the dissolution, merger or division of the company, its transformation into a different type of legal entity, the amendment of the bylaws, the issuance of convertible bonds or debentures, guarantees of third-party obligations (other than affiliated entities), and the sale of the assets and liabilities of the company or all of its assets.⁴⁸ Additional matters reserved for shareholder meetings in the LSA or inserted in the bylaws may be discussed at "extraordinary" meetings.

2. Calling a Shareholder's Meeting

Compared to other Latin American jurisdictions, minority shareholders of Chilean corporations need little support in order to call an "ordinary" or "extraordinary" shareholder's meeting, since only ten percent of all voting shares will suffice.⁴⁹ The request must specify the subjects to be dealt with at the meeting.⁵⁰

3. Quorums

Although the bylaws may stipulate a higher number, an absolute majority of the corporation's voting shares will constitute a quorum on the first call of an "ordinary" or "extraordinary" shareholder's meeting.⁵¹ The quorum on second call will be made up of the number of shares present, regardless of their number, thereby making it impossible for the minority to prevent a quorum in the absence of a higher required percentage in the bylaws.⁵²

48. See LSA, *supra* note 41, art. 119. The LSA does not discuss whether the sale of "any" asset or liability requires an extraordinary meeting, or if such requirement is limited to "substantial" sales. Most corporate practitioners believe the latter to be the correct position, but there have been no cases or commentaries addressing the issue.

49. See LSA, *supra* note 41, art. 58.

50. *Id.*

51. Under the LSA, non-voting shares are not counted for purposes of a quorum. See LSA, *supra* note 41, arts. 41, 61.

52. See LSA, *supra* note 41, art. 61. It is unclear under Article 61 whether a qualified majority is permitted at a second call. In practice, the bylaws of companies with foreign minority shareholders provide for a higher quorum at second call.

4. Voting

a. Restrictions

The LSA provides that each share shall have one vote, but permits the bylaws to limit voting rights in return for preferential dividend rights.⁵³ Unlike its counterpart in the Mexican LGSM, however, Article 21 grants the parties total freedom to negotiate the voting restrictions in the bylaws as well as the preferential amounts to be received.⁵⁴ Chilean shareholders, then, may waive their right to vote on even the most crucial issues, and receive but a minimal preferential dividend in return.⁵⁵

b. Majorities

Pursuant to Article 61, resolutions taken at “ordinary” and “extraordinary” shareholder’s meetings must be approved by a simple majority of the voting shares present unless a higher percentage is mandated in the bylaws of the corporation.⁵⁶

Nevertheless, Article 67 includes a number of exceptions to the general rule stated in Article 61. Article 67 requires that resolutions concerning certain matters be approved by a qualified majority. In fact, most of the matters reserved for “extraordinary” meetings in Article 57 require the approval of a qualified majority under Article 67.

Although Article 67 is not clearly drafted, it seems to imply that certain matters to be decided at “extraordinary” shareholder meetings may be approved by a qualified majority. For instance, it provides that any amendment to the bylaws must be adopted by the majority of votes specified in the bylaws, which in closed corporations may not be less than the absolute majority of shares entitled to vote. Therefore, while Article 67 leaves clear the rule with respect to closed corporations — no less than an absolute

53. See LSA, *supra* note 41, art. 21.

54. *Id.*

55. Even limited voting shares regain their full voting powers in the event that their preferential dividends are not forthcoming. See LSA, *supra* note 41, art. 21.

56. See LSA, *supra* note 41, art. 67.

majority — it suggests that the required majority in “extraordinary” shareholder meetings of public corporations may be a majority of those present at the shareholder’s meeting. In practice, the Superintendent of Securities generally requires public companies to abide by the rules on this matter applicable to closed companies.

Article 67 requires that two-thirds of the voting shares of the corporation approve the following acts, whether such decisions are taken at an “ordinary” or “extraordinary” meeting:

- i) transformation, division or merger of the company;
- ii) altering the time specified for the corporate existence;
- iii) premature liquidation;
- iv) change of domicile;
- v) decrease in stated capital;
- vi) approval of non-cash contributions (and the valuation thereof);
- vii) altering the powers reserved for the shareholders, or the limitations imposed on the directors;
- viii) decrease in the number of directors;
- ix) alienation of 50% of the company’s assets in one or more transactions during the course of the year;
- x) changing the method of distributing dividends;
- xi) all other matters requiring a two-thirds vote under the bylaws;
- xii) grant of any guaranties of third party obligations that exceed 50% of the company’s assets, except with respect to subsidiaries;
- xiii) under certain circumstances specified in the law, the acquisition of its own shares; and
- xiv) curing any formal errors in the formation of the company, or any amendment to the bylaws to provide for any of the foregoing actions.

In short, the distinction in the LSA between “ordinary” and “extraordinary” meetings is not helpful. We have found no commentaries or case law in Chile addressing this point. In view of the existing uncertainty, the approach most commonly adopted

in Chile by minority shareholders is to specify in the bylaws that the policy decisions listed in Article 67 and other major matters require an “extraordinary” meeting of shareholders and the vote of at least two-thirds of the shares. Otherwise, the LSA would permit a simple majority to impose its will at an “ordinary” shareholder’s meeting on the items not singled out in the bylaws for special treatment and not enumerated in Article 67, unless, of course, the bylaws also mandate a greater majority at “ordinary” shareholder’s meetings.

The LSA provides for class voting rights, but these are limited. Changes in the bylaws designed to modify, create or eliminate the preferential rights of a class must be approved by two-thirds of the shares of the affected class.⁵⁷ Where the proposed measure does not affect special class rights, however, but merely seeks to impose amendments common to all classes, no class voting is required.

C. Right to Dissent from Majority Resolutions

1. Majority Rule and Shareholder Derivation Suits

The LSA strongly supports majority stockholder control over the corporation, unless the bylaws provide otherwise. According to Article 22, “the acquisition of corporate shares implies the acceptance of the bylaws, of the resolutions adopted at the shareholders meetings. . . .”

The LSA, however, also requires shareholders, in exercising their corporate rights, to respect those of the corporation and the other shareholders.⁵⁸ Nevertheless, prior to the amendments introduced by the Chilean OPA Law, the concept of shareholder derivative suits was virtually unknown in Chile. Although Article 30 of the LSA appeared broad enough to include a

57. *Id.* Also, pursuant to the Chilean OPA Law, preferential rights granting any shareholder or group of shareholders control in a public company can be valid only for a period of five years. This period may be extended for additional terms of up to 5 years at an “extraordinary” meeting of the shareholders. The Chilean OPA Law includes a clause, whereby public companies that had granted such preferential rights prior to the date of the OPA Law are exempt from such restrictions. However, if such rights expire, any renewal thereof will be subject to the period restrictions provided in the Chilean OPA Law.

58. See LSA, *supra* note 41, art. 30.

possible action under a theory similar to the "abuse of right" doctrine found in the civil codes of Argentina and other Latin American jurisdictions, and Articles 116 and 117 of the Brazilian LSA, *infra*, to our knowledge no case explored this possibility. However, the Chilean OPA Law included a unique provision in Latin America, which grants any shareholder or group of shareholders holding at least five percent of the shares in a public or private company, or any director of such a company, the express right to bring a claim against the directors or shareholders of the company for approving actions that have prejudiced the company.⁵⁹

2. Appraisal Rights

Stockholders dissenting from resolutions taken at a shareholder's meeting and who confirm their opposition in writing within 30 days, are entitled to withdraw from the corporation if the contested resolution involves (i) a change in the legal personality of the entity; (ii) merger; (iii) sale of 50% or more of the companies' assets and liabilities or of all its assets; (iv) grant of guaranties in accordance with Article 67(11); (v) the creation of preferential rights for a class of shares, or the increase or elimination of preferential rights already created; and (vi) the cure of any formal errors in the formation of the company or amendment of the bylaws to provide for any of the foregoing matters, (vii) other instances established in the bylaws.⁶⁰

In a closed corporation, the shares of the withdrawing shareholder will be appraised at book value by dividing the paid-in capital, legal reserves, and net profits by the number of totally or partially paid-in shares.⁶¹ For public corporations, the shares will be appraised at market value.⁶²

59. See Article 113 bis of the amended LSA.

60. In the case of the creation of preferential rights for a class of shares, or the increase or elimination of preferential rights already created, only those dissident shareholders who were issued or had limited voting shares, and voted against the resolution, are entitled to withdraw.

61. See Regulations, *supra* note 41, art. 77.

62. See Regulations, *supra* note 41, art. 79.

D. Internal Corporate Management

1. Naming Directors and Examiners

If the bylaws provide for a sufficient number of directors, minority shareholders of Chilean corporations are assured of representation on the board by the cumulative voting rights set forth in Article 66 of the LSA. Under Article 31 of the recently amended LSA, if a publicly traded company has a net worth over a certain threshold (approximately US\$41 million at present), such company will be required to appoint at least seven directors. Article 50 bis of the recently amended LSA also provides that publicly traded companies with a net worth exceeding the threshold mentioned above are required to appoint an audit committee, which will include at least three members. A majority of such members must be independent of the controlling shareholders. This committee will have significant auditing powers, including the right to review the reports of internal and external auditors, propose the external auditors (which shall be the auditors of the company unless the full board disagrees, in which case the shareholders will decide), review related party transactions, and review compensation of directors, officers and managers of the company.

2. Examining Books and Records⁶³

Public companies must name two certified public accountants at every annual meeting to inspect the financial statements and other financial information of the corporation.⁶⁴ Closed corporations, subject to similar requirements under LSA Article 51, may choose between Certified Public Accountants and account inspectors. In either case, the accountants or inspectors must file their report at the annual shareholder's meeting.⁶⁵

63. It should be noted that the Chilean Superintendency of Securities and Insurance (Superintendencia de Valores y Seguros) follows an aggressive policy of disclosure with respect to public companies. The books and records of such corporations are often examined by the *Superintendencia* and are available to the public. See No. 3.538, art. 4(d), OFFICIAL GAZETTE, Dec. 23, 1980.

64. See LSA, *supra* note 41, art. 52.

65. Under Article 53, auditors, but not account inspectors, are liable even for slight negligence. Therefore, the minority investor in a closed corporation will generally wish to

All of the company's balance sheets, financial statements, minutes and other relevant documents must be placed at the disposal of all shareholders at the corporation's administrative offices, for fifteen days prior to the shareholder's meeting.⁶⁶ The LSA does not permit the shareholders to review such documents at any other time of the year.⁶⁷ Nevertheless, a resourceful minority shareholder with a representative on the board through cumulative voting, and who has chosen one of the auditors of the company, will not confront many difficulties in obtaining financial information at any other time.⁶⁸

Public companies face additional disclosure requirements. After publishing the first call for a shareholder's meeting, a public company must send copies of its balance sheet and other documents to all shareholders.⁶⁹ In addition, public corporations must publish their audited financial reports no later than ten days before the date set for the general shareholder's meeting. A closed company, on the other hand, need only mail its balance sheet and related documents to shareholders upon their request.⁷⁰

E. Economic Rights of Minority Shareholders

1. Dividends

Unless otherwise unanimously agreed to by all voting shares, public companies must make an annual distribution of profits in the form of dividends.⁷¹ The distribution is to be prorated in accordance with the number of shares held by each

appoint a certified public accountant. See LSA, *supra* note 41, art. 53.

66. See LSA, *supra* note 41, art. 54.

67. *Id.*

68. Minority shareholders of closed companies (or public companies below the net worth threshold mentioned above) without board representation may find it difficult to learn about on-going deals in the face of management's silence. Under Article 54, a vote by seventy-five percent of the directors empowers management to resist disclosing documents referring to pending negotiations, if the directors determine that disclosure would prejudice the company. If a court later rules that no such danger existed, however, the directors voting for secrecy will be jointly and severally liable to the shareholders.

69. See LSA, *supra* note 41, art. 75.

70. *Id.*

71. Shareholders may also agree in a separate shareholder's agreement to reinvest all or a portion of dividends which are distributed.

shareholder, or as prescribed in the bylaws if such shares are preferred stock. The dividend must consist of at least thirty percent of the public company's liquid earnings.⁷²

Closed corporations may deviate from this minimum percentage. In the rare instance in which the bylaws are silent on the percentage of profits to be distributed, the LSA will imply the thirty percent minimum.⁷³

2. Subscription Rights and Rights of First Refusal

Although rights of first refusal may be the subject of a shareholder's agreement, or may be included in the bylaws, they are not treated in the LSA.

By contrast, preemptive rights receive much attention. Companies offering new shares, options, convertible bonds, debentures or other convertible instruments, must first offer them to existing shareholders as prescribed by Article 29 of the Regulations.⁷⁴ The length of the offering differs for closed and public corporations.⁷⁵ Furthermore, while offers to third parties of the shares of closed companies must be at prices identical to those communicated to the shareholders, new shares of a public company may be offered at lower prices and better terms if the offering is made through the stock market.⁷⁶

3. Liquidation

Dissolution may be commenced under the LSA by a resolution taken at an "extraordinary" meeting of shareholders.⁷⁷ In addition, dissolution may begin when the company is not subject to the jurisdiction of the Superintendent of Securities and Insurance, by a judicial decree issued at the request of twenty percent of the corporate capital.⁷⁸ Moreover, dissolution will take

72. See LSA, *supra* note 41, art. 79.

73. *Id.*

74. See LSA, *supra* note 41, art. 25.

75. See Regulations, *supra* note 41, art. 29.

76. *Id.*

77. See *supra* Part III(B)(4)(b).

78. The shareholders bear the burden of proving the causes of dissolution provided by law. See LSA, *supra* note 41, arts. 103, 105.

place when provided for in the bylaws.⁷⁹

Once dissolved, the corporation is liquidated under the aegis of a liquidation committee. The manner of choosing or replacing members of the committee, or the shareholder's right to receive information concerning the liquidation, depends on the method used to commence the proceedings. In the case of a dissolution begun by the decision of the "extraordinary" shareholder's meeting, the liquidation commission will be elected by the shareholders.⁸⁰ The balloting takes place by simple majority, or by cumulative voting if chosen by the shareholders.⁸¹ In dissolutions brought about by judicial decree, the liquidation process normally is entrusted to one person elected at a shareholder's meeting from a court-prepared list of liquidators.⁸²

During a liquidation process conducted by the Superintendent of Securities and Insurance, stockholders representing ten percent of the issued shares can request a shareholder's meeting.⁸³ A similar number of stockholders of a company within the jurisdiction of the Superintendent may request that a shareholder's meeting be called to modify the liquidation process and designate a sole liquidator from a list submitted by the Superintendent.⁸⁴ In closed companies, the petition must be made to a court.⁸⁵ In either case, only "grave circumstances" will prompt the Superintendent or the court to grant the shareholders' request.⁸⁶

F. Modifying Statutory Rights to Protect Minority Stockholders

Chilean corporate law imposes few limitations on the right of shareholders to deviate from the LSA by private agreements or bylaw provisions. Among the few restrictions is the prohibition against including in the bylaws of public companies restraints on the alienability of shares, which nevertheless may be the subject

79. *Id.*

80. *Id.*

81. *Id.*; See LSA, *supra* note 41, art. 66.

82. See LSA, *supra* note 41, art. 110.

83. See LSA, *supra* note 41, art. 115.

84. See *Ley de Mercado de Valores*, *supra* note 42, art. 1; See LSA, *supra* note 41, art. 119.

85. See LSA, *supra* note 41, art. 119.

86. *Id.*

of a private agreement among shareholders.⁸⁷ In order to enforce sales restrictions against good faith purchasers for value, however, such restrictions must be filed at the Shareholders' Registry.⁸⁸

Because of the freedom granted by the LSA to shareholders, U.S. investors will be familiar with the methods used by minority shareholders to maintain some control over the affairs of the corporation. Among these are increasing the quorums and majorities necessary to carry resolutions at both "ordinary" and "extraordinary" shareholder meetings. Additionally, adding matters to the list of those that require a two-thirds vote and perhaps the most commonly seen tactic, amending the bylaws to add to the type of shareholder resolutions that will entitle dissident shareholders to withdraw from the corporation. Lastly, foreign investors may wish to include an arbitration clause in the bylaws obligating all shareholders to resolve their disputes before a recognized arbitration body instead of the courts of Chile.

IV. BRAZIL

A. Introduction

Brazilian law provides for several different forms of organizing a business venture. Most foreign investors doing business in Brazil invest in either a *sociedade por quotas, de responsabilidade limitada* or a *sociedade anônima*.

The quotaholders of a *sociedade por quotas, de responsabilidade limitada* [hereinafter, "SRL"] have ample flexibility to draft provisions into the corporate charter that would elaborate on or modify the otherwise simple structure of an SRL.⁸⁹ Indeed, quotaholders can make the company more like a partnership or a corporation, or something in between. Therefore, the charter document of an SRL permits minority quotaholders to obtain extensive protection on a negotiated basis.⁹⁰

87. See LSA, *supra* note 41, art. 14.

88. *Id.*

89. *Sociedades por quotas, de responsabilidade limitada* are governed by Decree No. 3.708, Jan. 10, 1919. [hereinafter, the "LSRL"].

90. This memorandum will not address the rights that may be secured by minority

The basic statute regulating *sociedades anônimas* is the Brazilian Law of Corporations, *Lei das Sociedades por Ações* [hereinafter, the "LSA"], which significantly extended the protection afforded to minority shareholders of both closed and public corporations ("companhias abertas").⁹¹ Under the LSA, public corporations are those with securities authorized to be publicly traded through the Stock Exchange Commission or in other alternative exchange markets, such as *Mercado de Balcão*. In addition, Law 9,457 dated May 5, 1997, further enhanced and gave more efficacy to certain rights of minority shareholders.

B. Rights at a Shareholder's Meetings

1. Generally

Similar to its Chilean counterpart, the Brazilian LSA grants minority shareholders some protection at the shareholder's meeting level, and generally deems agreements between minority and majority stockholders to be valid and enforceable, except provisions that waive certain basic rights granted by the LSA to minority shareholders.

As with all of the corporate legislation surveyed in this memorandum, the LSA contemplates both "extraordinary" and "ordinary" shareholder meetings. "Ordinary" meetings must be held within the first four months of each calendar year to review the company's financial statements, receive the accounts

quotaholders pursuant to the LSRL, since such rights will depend largely on the results of their negotiations with the majority.

91. Law of Corporations, No. 6,404, Dec. 15, 1976. On March 28, 2001, the Brazilian lower house in Congress (*Camara dos Deputados*) approved a draft bill to amend the LSA and Law No. 6.385 (the Brazilian Securities Law). The draft bill must be approved by the Senate, and if amended at that time, will have to be approved again by the *Camara*.

The draft legislation would bring about significant changes to the rights afforded to minority shareholders in Brazilian corporations. These changes affect (i) the right to dissenting shareholders to withdraw from the corporation, (ii) the approval of share redemptions, (iii) the appointment of directors by minority holders of preferred and common stock, (iv) the enforcement of arbitration clauses in the charter to resolve disputes between the company and its shareholders, or between controlling and minority shareholders, and (v) the enforceability of shareholders agreements. In addition, the draft bill obligates a prospective purchaser of a controlling stake to undertake a public offering for the purchase of common shares held by minority shareholders at not less than 80% of the price paid for each voting share which forms an integral part of the controlling block.

rendered by the officers, determine the intended use of profits, distribute dividends, elect officers, directors or the members of the fiscal council and decide on the appropriate monetary correction figures.⁹² "Extraordinary" meetings are those which deal with matters other than this list.⁹³

The LSA provides that the management of a closed corporation may be composed either of both the board of directors and the board of executive officers (*diretoria*) or solely of the *diretoria*. However, public corporations and corporations with authorized capital are required to have a board of directors. In cases where the corporation includes both boards, the shareholders appoint the board of directors, which is responsible for appointing the *diretoria*. The *diretoria* of corporations without a board of directors is directly named by the shareholders.

2. Calling a Shareholder's Meeting

The board of directors of a Brazilian corporation has the authority to call a shareholder's meeting in accordance with the bylaws. In corporations without board of directors such authority remains with the *diretoria*. However, any shareholder is entitled to request a meeting if the board has failed to do so within a sixty day period from the date determined either in the LSA or in the bylaws.⁹⁴ In the event a meeting is requested by shareholders representing at least five percent of the corporate capital and is not convened within eight days of the request, the requesting shareholders are entitled to call the meeting without the consent of the board.⁹⁵

3. Quorums

Quorum requirements in Brazil are quite liberal. A shareholder's meeting may be held on first call with only twenty-five percent of the voting capital.⁹⁶ On second call the meeting will be valid regardless of the number of shareholders present.

92. See LSA, *supra* note 91, art. 132.

93. See LSA, *supra* note 91, art. 131.

94. See LSA, *supra* note 91, art. 123(b).

95. See LSA, *supra* note 91, art. 123.

96. See LSA, *supra* note 91, art. 125.

However, "extraordinary" meetings called to amend the corporate bylaws require the presence of two-thirds of the voting capital at first call, while on second call any number will suffice.⁹⁷ Therefore, minority shareholders cannot prevent a shareholder's meeting from being convened.⁹⁸

4. Voting; Veto Rights

Brazilian law adheres to the general principle that each share is entitled to one vote except in limited circumstances.⁹⁹ Consequently, multiple votes per share are prohibited.¹⁰⁰ Voting rights may only be circumscribed in return for preferred shares entitled to preferential dividends.¹⁰¹ Pursuant to Law 9,457, preferred shareholders are entitled to dividends at least ten percent higher than the dividends attributable to common shares, except for preferred shares with either fixed or minimum dividends. Preferred shareholders also have a priority in the distribution of dividends and in the redemption of capital.

Except for approval of the matters listed in the following paragraph, all other resolutions adopted at a shareholder's meeting require the affirmative vote of an absolute majority of the shares present.¹⁰² Closed corporations may increase the voting requirements for certain resolutions, provided that such requirements are established in the bylaws.

Under Article 136 of the LSA, certain resolutions, including the following, are reserved for extraordinary meetings require the approval of at least one-half of the company's total voting shares, unless (for closed corporations only) a higher majority is stated in the bylaws: (i) the approval of either the creation of preferred shares or the increase of the number of the existing

97. See LSA, *supra* note 91, art. 135.

98. As will be seen, however, most decisions taken at extraordinary meetings require the approval of at least fifty percent of the total voting capital. See LSA, *supra* note 91, art. 136. Furthermore, under the LSA closed corporations may provide for higher quorum requirements for shareholder resolutions regarding the approval of certain matters. See LSA, *supra* note 91, art. 129 § 1. Therefore, while the minority may not be able to prevent a quorum at these meetings, in some instances it may be able to block a resolution taken by the majority shareholder.

99. See LSA, *supra* note 91, art. 110.

100. *Id.*

101. See LSA, *supra* note 91, arts. 17, 109, 111.

102. See LSA, *supra* note 91, art. 129.

preferred shares on a basis not proportionate with the other existing species or classes of shares; (ii) the amendment of the preferences, rights and conditions to the redemption or payment of one or more of the existing preferred shares or the creation of a new class of preferred shares with rights greater than those of existing preferred shares; (iii) the payment of dividends in amounts below the figure for compulsory dividends; (iv) the merger or consolidation of the company; (v) the participation in a group of companies; (vi) the change of the corporate purpose; (vii) the creation of negotiable bonds of the company (*partes beneficiárias*), which confer on their holders the right to participate in up to one-tenth of the company's annual profits; and (viii) the spin-off or dissolution of the company.¹⁰³ In a few other cases, such as the transformation of a *sociedade anônima* into another form of company, the vote of all shareholders is necessary, unless otherwise provided in the bylaws.¹⁰⁴

In the events outlined in items (i) and (ii) of the above paragraph, the shareholders' approval must be ratified within one year by shareholders of each class of the preferred shares adversely affected by the resolution.

C. *Right to Dissent from Majority Resolutions*

1. Judicial Remedies

Under the LSA the controlling shareholders and managers of a corporation must always act and vote in the best interest of the company, and not for their own benefit or for the benefit of a third party to the detriment of other stockholders.¹⁰⁵ In the past, these general principles have served to restrain the majority to

103. See LSA, *supra* note 91, art. 136. The Brazilian Securities and Exchange Commission [hereinafter, the "CVM"] may authorize a reduction of the necessary quorum in the case of a public company, if the shares of the company are widely traded and its last three general shareholder meetings have been attended by fewer than half of the shares with a right to vote. In this event, the authorization of the CVM must be cited in call notices and the reduced quorum may only be adopted on the third call.

104. See LSA, *supra* note 91, art. 221.

105. See LSA, *supra* note 91, arts. 115, 158. The controlling shareholders are required to use their power to cause the corporation to perform its corporate purposes. The managers of a corporation have a duty of loyalty to the corporation and, therefore, cannot participate in any act in which their interests are in conflict with the company's. See Fran Martins, *CURSO DE DIREITO COMERCIAL* 368, 382 (Editora Forense 1998).

an extent not often seen in other Latin American corporate regimes.

Brazilian law permits dissenting shareholders to file a lawsuit against the corporation's management (either directors or officers), the majority shareholders, or even a single shareholder. Under Article 159, the corporation is entitled to sue its managers for the damages and losses that their actions have caused to the net worth of the corporation, if such actions were contrary to the interests of the corporation and if so resolved at an "ordinary" or "extraordinary" shareholder's meeting.¹⁰⁶ If the corporation has not filed a claim after three months of the date of resolution, any shareholder may sponsor a resolution at a shareholder's meeting requesting directors to commence legal proceedings on behalf of the company.¹⁰⁷ Even if the corporation decides not to pursue the claim in court, shareholders representing at least five percent of the corporate capital may do so.¹⁰⁸

In addition to its legal recourse against the company's managers, a minority shareholder of a Brazilian corporation may recover from the "controlling shareholder(s)" any damages caused by "abuse" of his dominant position.¹⁰⁹ A controlling shareholder is defined as a person who controls, on a permanent basis, the majority of the votes in the general shareholder meetings, has the power to elect the majority of the company's managers (either directors or officers) and in fact uses his authority to conduct the activities and operations of the company.¹¹⁰ Under the LSA, abuses of power include malversation of funds, favoritism towards certain parties, and other acts or omissions tending to favor a group of shareholders.¹¹¹ Also listed as abuses of power is the modification of the bylaws or the adoption of policies which run against the interests of the company, and are carried out for

106. The LSA follows the "business judgment" rule. Therefore, an action cannot be brought against a manager if this manager has acted in good faith and in pursuit of the best interests of the company. However, the manager shall be liable for acts performed contrary to the bylaws of the corporation or applicable law and acts performed in bad faith ("dolo" or "culpa"). See LSA, *supra* note 91, arts. 158-59(6).

107. *Id.*

108. *Id.* Under Article 159, a judgment against the directors becomes the property of the corporation, although the plaintiff shareholders are reimbursed for their costs and expenses.

109. See LSA, *supra* note 91, art. 117.

110. See LSA, *supra* note 91, art. 116.

111. See LSA, *supra* note 91, art. 117.

the purpose of prejudicing minority shareholders.¹¹²

The LSA extends to minority shareholders not only the right to sue directors and controlling shareholders, but also the right to claim damages from other minority shareholders. Article 115 requires all shareholders to exercise their voting rights in the best interest of the company and not in order to damage other stockholders, or obtain an "unfair" advantage. A shareholder violating this principle is liable to the others for the damages such shareholder may have caused, even when the actionable vote did not prevail.¹¹³

2. Appraisal Rights

The LSA allows shareholders voting against major corporate decisions to withdraw from the corporation. As with other legal systems in Latin America, however, the exercise of this right may not bring the dissenting stockholder the most favorable return on his shares. Article 45 of the LSA provides that the price for the stock shall be proportionate to the net worth value of the corporation, as determined by the balance sheet approved at the most recent shareholder's meeting. The bylaws, however, can stipulate a different appraisal method, which may not result in a lower price than the formula set forth in Article 45.

Appraisal rights may be exercised by those shareholders who did not approve, or abstained from, the following resolutions: (i) the approval of either the creation of preferred shares or the increase of the number of the existing preferred shares on a basis not proportionate with the other existing classes of shares, except if otherwise authorized in the bylaws; (ii) the amendment of the preferences, rights and conditions to the redemption or payment of one or more of the existing preferred shares or the creation of a new class of preferred shares with greater rights than those of existing preferred shares; (iii) the reduction of compulsory dividends; (iv) the merger or consolidation of the company; (v) the participation in a group of companies; and (vi) the change of the corporate purpose.¹¹⁴

112. *Id.* See Case RES No. 113.446 (Rio de Janeiro); Case RES No. 1174-87 (Rio de Janeiro), for cases involving "abuses of power" under the LSA.

113. See LSA, *supra* note 91, art. 115(3).

114. See LSA, *supra* note 91, art. 137.

D. *Internal Corporate Management*

1. Naming the Directors

As with the Mexican LGSM, Brazilian law allows minority shareholders to appoint at least one director to the board in certain circumstances. Unlike the Mexican statute, however, the LSA achieves its objective through cumulative voting. Even if not provided in the corporate bylaws, shareholders representing at least ten percent of the voting capital may demand the adoption of cumulative voting no later than forty-eight hours prior to the general shareholder's meeting.¹¹⁵ If cumulative voting is requested by twenty percent of the voting capital, the majority may not nullify this right by naming fewer than five directors to the board, for in such instance the minority stockholders are granted one board member.¹¹⁶ However, when the shareholders requesting cumulative voting are fewer than twenty percent of the voting capital, the majority shareholders may provide for fewer than five directors without having to reserve one for the requesting stockholders.¹¹⁷

In reality, foreign minority shareholders in Brazil often obtain a majority of directors by dividing the shares into two classes and allotting to their class the right to appoint most members of the board.

2. Naming the Fiscal Council

In addition to the board of directors, the LSA requires the creation of another corporate body termed a "fiscal council" (*conselho fiscal*) to oversee the management and financial affairs of the corporation, and generally to exercise the powers of *comisarios* in other jurisdictions.¹¹⁸ In reality, however, the fiscal

115. See LSA, *supra* note 91, art. 141.

116. See LSA, *supra* note 91, art. 141(4).

117. *Id.*

118. Under Article 163 of the LSA, the duties of the fiscal council include filing the annual financial report of the board, verifying the board's compliance with obligations imposed by law and the bylaws, analyzing, at least every three months, the balance sheet and other financial information issued by the board of directors, and in general reviewing the books and records of the corporation on an ongoing basis. At the request of the fiscal council, the board must allow the council to examine copies of the minutes of their

council is seldom used and its installation is not permanent. Instead, the bylaws normally do not name any of its members and merely provide that the fiscal council will be called in any cases "required by law." In such cases, the fiscal council, once elected, performs its functions until the following "ordinary" shareholder's meeting held by the corporation, when it is then dissolved.

The fiscal council must be comprised of a minimum of three and a maximum of five persons, elected at the general shareholder's meeting.¹¹⁹ Of these, one is reserved for holders of limited voting shares, and another for minority shareholders representing at least ten percent of voting shares. However, under no circumstances may the number of fiscal *conselheiros* allotted to the majority be less than or equal to those held by the minority shareholders and holders of limited voting shares.¹²⁰

Under Law 9,457 shareholders representing at least five percent of either the voting capital or the non-voting capital may call a shareholder's meeting to elect the fiscal council. If the meeting is not called within eight days following such a request, shareholders representing at least five percent of either the capital eligible to vote or the capital not eligible to vote are entitled to call the meeting without the consent of the board of directors or the *diretoria*, as applicable.¹²¹ Nonetheless, the LSA still requires the affirmative vote of at least either ten percent of the voting capital or five percent of the non-voting capital to approve the appointment of the fiscal council.

Shareholders holding non-voting preferred shares or preferred shares with restricted voting rights and minority shareholders that jointly represent at least ten percent of the voting shares are each entitled to elect one member of the fiscal council.¹²²

meetings, copies of the corporation's balance sheet and other financial information.

119. See LSA, *supra* note 91, art. 161(1).

120. *Id.*

121. See LSA, *supra* note 91, art. 123(d). Shareholders representing five percent or more of the corporate capital in closed companies also may request notification of the meeting by telegram or registered mail. See LSA, *supra* note 91, art. 124.

122. See LSA, *supra* note 91, art. 141(4)(a).

3. Examining Books and Records

While Brazilian corporate law grants shareholders the right to certain official information on the company, minority shareholders must also rely on the member of the board of directors appointed by them and, if one is named, the fiscal council. Under Article 133 of the LSA, the board of directors is obligated to place at the disposal of all shareholders its evaluation of the affairs and major administrative acts of the company during the last fiscal year, copies of financial statements, and any opinion rendered by the independent auditors of the company. Any shareholder may receive copies of these documents at his domicile upon written request, subject to the conditions provided in Article 124(3).¹²³

In addition to the foregoing, shareholders with five percent of the corporate capital may obtain a judicial order compelling the board to turn over for examination all of the books and the records of the corporation. Such order will be granted only if there is evidence of illegal or seriously irregular actions.¹²⁴

E. Economic Rights of Minority Shareholders

1. Dividends

The right to participate in the corporate profits is guaranteed to all shareholders of a Brazilian corporation by the compulsory dividend provisions of the LSA, except in certain extreme and limited circumstances in which the directors determine that the financial condition of the corporation does not warrant such payment.¹²⁵ In a closed corporation, pursuant to the exception set forth in Article 202(4), the shareholders may determine by unanimity the payment of less than the compulsory dividends.

If there is no provision on compulsory dividends in the

123. *Id.*

124. See LSA, *supra* note 91, art. 105; *cf.* Brazilian Commercial Code, art. 18, Law 556, Jun. 25, 1850.

125. See LSA, *supra* note 91, art. 202(4). In the case of a public company, the directors must inform the CVM of the reasons for their determination.

bylaws of the company, half of the adjusted net profits for any fiscal year must be distributed as dividends, subject to certain adjustments.¹²⁶ In such a case and except as provided in Article 202(4), the shareholders may only amend the bylaws of the corporation to reduce the above compulsory dividends to no less than twenty-five percent of the company's adjusted net profit.¹²⁷ Nonetheless, the shareholders may determine a lower percentage at the time of incorporation.¹²⁸

2. Preemptive Rights and Rights of First Refusal

Preemptive rights are among the essential rights of shareholders singled out by Article 109 of the LSA.¹²⁹ Under Article 171, shareholders have the right, which may be assigned to subscribe to newly-issued shares of the corporation, as well as its convertible debentures and other instruments convertible into shares.¹³⁰

Rights of first refusal in the case of existing shares are not treated by the LSA, and should be addressed in the bylaws or in a shareholder's agreement. In practice, such provisions constitute one of the favorite methods of minority shareholders in Brazil to maintain a degree of control over the identity of their partners.

3. Liquidation

Brazilian corporate law prescribes two situations in which a corporation will be dissolved: automatic dissolution or dissolution by judicial decree.

Automatic dissolution takes place (i) at the end of the corporate term; (ii) where provided for in the bylaws; (iii) by resolution of a general shareholder's meeting; and (iv) generally, by the continued existence of only one shareholder.¹³¹ In cases of automatic dissolution and in the absence of a provision in the

126. See LSA, *supra* note 91, art. 202.

127. See LSA, *supra* note 91, art. 202(2) (to be confirmed).

128. To be confirmed.

129. See *infra* Part IV(F).

130. The sale of the shares of a public company or a stock-for-stock transfer is exempt from the rights set forth in Article 109.

131. See LSA, *supra* note 91, art. 206.

bylaws, a majority of the general shareholders may establish the method of liquidation as well as appoint and remove a liquidator and a fiscal council to serve during the period of liquidation.¹³²

Dissolution by judicial decree takes place when (i) a company's incorporation is annulled in a lawsuit filed by any shareholder; (ii) shareholders representing at least five percent of the corporate capital of the company prove in court that the company cannot accomplish its corporate purpose; or (iii) the company is the subject of bankruptcy proceedings.¹³³ Additionally, dissolution may proceed judicially at the request of any shareholder if the officers or a majority of shareholders fail to bring about liquidation or are opposed to it in those cases falling within the automatic dissolution category.¹³⁴ Therefore, it is highly advisable to address in the bylaws the conditions under which a company will be dissolved, since an attempt by the majority to perpetuate a failing company in violation of Brazilian law or the bylaws may be challenged by any shareholder through a judicial proceeding calling for the dissolution of the entity.¹³⁵

After appointment, a liquidator must call a general shareholder's meeting every six months in order to render an accounting of facts and operations performed during the prior period and to present to the shareholders at the meeting a report and a balance sheet.¹³⁶ At such a meeting, all shares have equal voting rights, and all restrictions or limitations, which existed in relation to ordinary or preferred shares are considered null and void.¹³⁷

Once all liabilities of the corporation are paid, the LSA provides that a general shareholder's meeting may approve, by a vote of shareholders representing at least ninety percent of the capital stock, special conditions for the apportionment of remaining assets, attributing property to partners at its accounting value or any other value that the meeting establishes.¹³⁸

132. See LSA, *supra* note 91, arts. 207-08 .

133. See LSA, *supra* note 91, art. 206(2).

134. See LSA, *supra* note 91, art. 209.

135. *Id.*

136. See LSA, *supra* note 91, art. 213.

137. *Id.* When the liquidation process ceases, the validity of such restrictions and limitations are reinstated.

138. See LSA, *supra* note 91, art. 215.

In addition, a minority shareholder may dissent from any method of apportionment approved by a general shareholder's meeting. This right, however, may only be invoked if she demonstrates that the apportionment was carried out to her detriment and for the purpose of favoring a majority of shareholders. In such case, the apportionment will be suspended, if uncompleted, or if complete, the majority shareholders will indemnify the minority shareholders for their losses.¹³⁹

F. Modifying Statutory Rights to Protect Minority Shareholders

The LSA provides substantial guidance for shareholders wishing to grant additional protection in the bylaws to the minority. Article 109 sets out the "essential rights" of shareholders that may not be compromised in the bylaws or in a shareholder's meeting. Among these are (i) the right to participate in corporate profits, as well as in the company's assets in the event of liquidation; (ii) the right to supervise the management of the corporate business; (iii) subscription rights, as described above; and (iv) the right to seek an appraisal under the circumstances delineated in Article 137.¹⁴⁰

Agreements among shareholders are the preferred manner of preserving minority rights in Brazilian corporations. The corporation must heed shareholders' agreements pertaining to the purchase and sale of shares, rights of first refusal to acquire them, and the exercise of voting rights when the appropriate shareholders' agreements are filed in its offices.¹⁴¹ Most importantly, in a striking departure from the norm throughout Latin America, shareholders are granted by the LSA the right to

139. See LSA, *supra* note 91, art. 215(2).

140. The sale of the shares of a public company or a stock-for-stock transfer is exempt from the rights set forth in Article 109.

141. There is some disagreement by at least one author as to whether any contract relating to preemptive rights is enforceable, in light of the general guarantee of this right in Article 109. See Waldirio Bulgarelli, *A Regulamentação Jurídica do Acordo de Acionistas no Brasil*, REVISTA DE DIREITO MERCANTIL, INDUSTRIAL, ECONOMICA E FINANCEIRO #40 79, 89 (1980); See LSA, *supra* note 91, art. 118. Several Brazilian jurists believe that simple notification, along with an acknowledgment by management, is sufficient to enforce the agreement against the company. See Bulgarelli, *supra* note 141, at 99. See also Rubens Malta Campos, ACORDOS DE ACIONISTAS NO BRASIL 98 (1977).

demand specific performance to protect their contractual rights secured under the shareholder's agreement.¹⁴² In addition, any rights arising from such contracts may be enforced against third parties provided that the agreements are registered in the company's books and noted in the share certificates.¹⁴³

On the other hand, contracts with respect to matters other than those listed above need not be filed with the company as a prerequisite to enforcement of the obligations arising therefrom against the company or third parties. Instead, these agreements will be subject to general principles of contract law.

V. VENEZUELA

A. Introduction

Most foreign investors doing business in Venezuela choose to do so through a *sociedad anónima*.¹⁴⁴ Virtually unchanged since 1955, the Code does not significantly address the rights of minority shareholders. As a result, most of the protections to be enjoyed by minority shareholders are derived from the company's charter.

In what may have been a partial response to the absence of protective measures in the Code, the Capital Markets Law [hereinafter, "CML"] was adopted in 1973 and amended substantially in 1998. The CML, however, does not apply to all corporations; it covers only the public offering of shares and other securities.¹⁴⁵

142. *Id.*

143. *Id.*

144. See Title VII, Commercial Code, arts. 200-226, 242-311, 340-352. [hereinafter, the "Code"].

145. Ley de Mercado de Capitales, Official Gazette No. 36.565, October 22, 1998. Public debt bonds and credit bonds created pursuant to the Central Bank Law, General Bank Law and National Systems Law are not covered by the CML. See CML (Chile), art. 1, *supra* note 42. In a recent development, similar to Chile's OPA Law discussed *supra* Part II, Venezuela's *Comisión Nacional de Valores* has decreed that a shareholder that increases its stake in a public company to seventy-five percent of the capital or more, or otherwise acquires an additional ten percent of its capital, must offer to purchase the minority's shares. See Resolution 130-2000, May 29, 2000, OFFICIAL GAZETTE No. 36.961, May 30, 2000.

B. *Rights at a Shareholder's Meeting*

1. Calling a Shareholder's Meeting

Under the Code, the right to call a shareholder's meeting falls within the domain of the company's directors.¹⁴⁶ Shareholders representing twenty percent of the corporate capital may ask the directors to convene an "extraordinary" shareholder's session.¹⁴⁷

In the event that the directors refuse to call an extraordinary meeting after having received a request pursuant to Article 278, shareholders representing at least ten percent of the capital may ask the examiners (*comisarios*) to convene the meeting immediately.¹⁴⁸ The shareholders' request may be filed directly with the court, if they represent twenty percent of the capital, and reasonable grounds exist to believe that the directors have acted improperly and that the examiners have not adequately performed their duties.¹⁴⁹ In any event, the bylaws can provide for a direct call by one or more stockholders.¹⁵⁰

In addition to the Code, Article 9(16) of the CML authorizes the National Securities Commission [hereinafter, the "NSC"], acting either on its own initiative or upon the request of any shareholder, to call an extraordinary shareholder's meeting when:

after conducting a summary investigation of entities under its surveillance. . . [it determines] that the shareholders' meetings have not been held within the terms set forth in the Articles of Incorporation and Bylaws, or when grave administrative irregularities have occurred that should be known or remedied by the shareholders' meeting. To this effect, the call must state the items to be discussed in the shareholders' meeting.

146. See Code, *supra* note 144, art. 277.

147. See Code, *supra* note 144, art. 278.

148. See *infra* Part V(D)(1), a discussion of the functions of a *comisario*. The statutory auditors must find the demand "urgent" and "well founded." See Code, *supra* note 144, art. 310.

149. See Code, *supra* note 144, arts. 290-91.

150. See Code, *supra* note 144, art. 213(10).

Under the Code the first call for an ordinary or extraordinary shareholder's meeting must be published in a local newspaper at least five days before the meeting date.¹⁵¹ If no quorum is present at an ordinary meeting, it may be called three days later without new notice. If no quorum is present at an extraordinary meeting, it must be called again at least five days later. However, if a meeting will discuss one of the matters listed in Article 280 of the Code, such as anticipated dissolution, extension of duration, merger, sale of corporate assets, capital increase, replenishment or reduction, change of corporate purpose, or the amendment of the bylaws for any of the foregoing, the second call must be made at least eight days in advance.¹⁵² Additionally, the Code allows any shareholder to be notified by certified mail at his own expense.¹⁵³

2. Postponing the Meeting

By alleging that they have not been sufficiently informed of the issues to be treated, one-third of the shareholders or one-half of the capital present at a meeting, either "ordinary" or "extraordinary," may postpone the session for a period of three days.¹⁵⁴ At the organizational meeting of the corporation, the Code requires only one quarter of the capital to be represented at the meeting in order to exercise this right.¹⁵⁵

3. Quorums

Unless otherwise stipulated in the bylaws, a minority in a Venezuelan corporation may not prevent the formation of a quorum. The first and second call for an "ordinary" shareholder's meeting, and the first call for "extraordinary" sessions, require

151. See Code, *supra* note 144, art. 277. By contrast, Title VI of the CML requires five days notice before the meeting date. See N:36565, OFFICIAL GAZETTE, Oct. 22, 1998. The compulsory call requirement may be waived if shareholders representing 100% of the capital are present at the meeting. See also R. Goldschmidt, CURSO DE DERECHO MERCANTIL 305 (1964).

152. See Code, *supra* note 144, art. 281.

153. See Code, *supra* note 144, arts. 277, 279.

154. See Code, *supra* note 144, art. 288. The right to postpone meetings can be found in the corporate laws of several other Latin American countries. See *Código de Comercio de Bolivia*, *supra* note 5, art. 298; *Código de Comercio de Costa Rica*, *supra* note 5, art. 172; *Ley General de Sociedades de Peru*, *supra* note 5, art. 136.

155. See Code, *supra* note 144, art. 255.

the presence of shareholders holding more than one-half of the capital.¹⁵⁶ Alternatively, when dealing with a third call for an “ordinary” shareholder’s meeting and a second call for an “extraordinary” shareholder’s meeting, any number of shareholders present will constitute a quorum.¹⁵⁷

Certain meetings require that shareholders owning three-fourths of the capital appear on first call, and any number of shareholders at the second call. Among these are meetings dealing with liquidation, merger, sale of assets, redemption, increase or reduction of capital, change of the corporation’s purpose, or any amendment to the bylaws relating to the foregoing.¹⁵⁸

Under the CML, listed corporations require a quorum equivalent to seventy-five percent of the stated capital and the favorable vote of the majority of the shares represented at such meeting to approve the issuance of debt, unless the bylaws provide otherwise.¹⁵⁹ The issuance of commercial paper, such as debt securities with a maturity of more than fifteen days and less than 360 days, must be approved at a meeting in which at least 50% of the stated capital is represented, and approved by a majority of those present.¹⁶⁰

4. Voting

a. Preferential or Limited Shares

The Code states that all shares have equal rights, unless the bylaws stipulate otherwise.¹⁶¹ Both case law and commentators hold that shares with limited or preferential rights may be established in the charter.¹⁶²

156. See Code, *supra* note 144, arts. 273, 276.

157. See Code, *supra* note 144, arts. 274, 276. As noted above, however, the bylaws may increase or decrease all quorum requirements. See Code, *supra* note 144, art. 213(10).

158. See Code, *supra* note 144, arts. 280-81.

159. See CML, *supra* note 145, art. 34.

160. See CNV Resolution 246-99 of September 13, 1999, published in the OFFICIAL GAZETTE No. 36.813 of October 22, 1999, art. 6.

161. See Code, *supra* note 144, art. 292.

162. See, e.g., Armando Hernandez-Breton, *Codigo de Comercio Venezolano*, 186 n. 2 (14th ed. 1980).

b. Majorities

With the exception of the matters enumerated in Article 280, discussed *supra* section (B)(3), where at least half of the capital represented is needed, the Code sheds no light on the number of votes required to carry a resolution at either the "ordinary" or "extraordinary" level. Consequently, the corporate bylaws must state the required percentages.

Under Article 125 of the CML, minority shareholders must be represented in the Board of Directors of listed companies. To this effect, shareholders comprising twenty percent of the capital stock may form a group to elect a member to the Board of Directors in proportion to their participation. With respect to the election of statutory auditors, the election must be held publicly and separately for each statutory auditor. Shareholders voting in favor of the first statutory auditor may not vote in the election of the second, unless they represent more than eighty percent of the capital stock. The election shall be carried out by simple majority unless otherwise stated in the bylaws, and if the first statutory auditor is elected unanimously, all shareholders may vote in the election of the second statutory auditor.¹⁶³

C. Right to Dissent from Majority Resolutions

1. Right to Oppose

Although all resolutions adopted at a shareholder's meeting of a Venezuelan corporation are generally binding, decisions which are contrary to the bylaws or the Code may be opposed by filing a claim in a court of competent jurisdiction within fifteen days of the resolution.¹⁶⁴ The remedy under the Code, however, is quite limited: a temporary injunction preventing implementation of the resolution, and an order to vote on the matter anew.¹⁶⁵ If confirmed by the shareholders, the resolution will bind all of them, but in certain instances those in opposition will be entitled to appraisal rights.¹⁶⁶

163. CML, *supra* note 145, art. 127.

164. See Code, *supra* note 144, art. 290.

165. *Id.*

166. *Id.* Until 1975, Article 290 was thought by many to set forth the only action

2. Actions by Shareholders Against Directors

Pursuant to the Code, any shareholder has the right to notify the examiners of activities which violate Venezuelan law or the bylaws of the corporation. If the complaint is supported by ten percent of the corporate capital, the examiners must investigate and render a report at the shareholder's meeting.¹⁶⁷ Alternatively, if the complaining shareholders represent twenty percent of the corporate capital, they may challenge the activities directly in court.¹⁶⁸ In both cases, however, the rights granted are severely limited because as with the right to approve majority resolutions noted *supra*, the subject-matter of the complaint is simply put again to the shareholder's meeting, and only the shareholders may take action against the offending directors.

However, minority shareholders may find additional protection outside of the Code. For example, Section 1185 of the Civil Code provides that a person whose intentional, negligent, or imprudent actions damage another, must make the injured party whole.¹⁶⁹ Moreover, Section 1185 also provides that an individual must make retribution in cases in which he exceeds his "rights."¹⁷⁰ Lastly, the Criminal code imposes penalties for fraudulent acts.¹⁷¹ However, despite the available legal remedies in Venezuela, for minority shareholders unwilling to stake their venture on a lawsuit the only palatable solution is to address the replacement of directors in the company's laws.

3. Right to Withdraw

A shareholder in a Venezuelan company has limited appraisal rights. Pursuant to Article 282, a shareholder may

which could be taken by a shareholder against decisions contrary to the bylaws and the law. However, that year the Supreme Court of Venezuela held that a lawsuit by shareholders was permissible even after the matter had been decided for a second time at the shareholder's meeting. See Ramirez y Garay, XLVI *Jurisprudencia* 318.

167. See Code, *supra* note 144, art. 310.

168. See Code, *supra* note 144, art. 291.

169. In theory, Section 1185 of the Civil Code is also available as a basis for an action against shareholders. In practice, however, it is doubtful that a shareholder suing another could succeed on the basis of Section 1185.

170. Cf. The "abuse of right" concept under Mexican law and the duties of "controlling shareholders" under the Brazilian LSA.

171. See, e.g., Venezuelan Criminal Code § 464.

exercise appraisal rights only if he dissents from a resolution to replenish or increase the capital of the company, or change the corporate purpose.¹⁷² The petition must be made within twenty-four hours of the offending resolution if the shareholder was present at the meeting, or fifteen days after publication of the minutes if she was not.¹⁷³

As in most instances in the Code in which minority stockholders are unprotected, additional causes for withdrawal must be included in the bylaws of the corporation. In all cases of withdrawal, the departing shareholder will receive the value of his shares as determined at the last balance sheet approved by a shareholder's meeting.¹⁷⁴ However, the Code does not allow shareholders to withdraw if the objectionable resolution increases the capital of the company through the issuance of new shares.¹⁷⁵

D. Internal Corporate Management

1. Naming Directors and Examiners

The Code does not grant minority shareholders any rights to elect directors. Indeed, minority shareholders wishing to secure cumulative voting rights or the right to elect a director if their capital ownership exceeds a certain percentage as in Mexico, must insert the appropriate provisions in the bylaws.

The Code requires the appointment of one or more statutory auditors (*comisarios*) who receive the "unlimited right to inspect and oversee all of the operations of the corporation." They may examine all the books and correspondence of the corporation and

172. One commentator believes that resolutions approving the extension of the corporate existence or the transformation of the corporation will also give rise to the right of withdrawal. We have not found any cases addressing this issue. See Alfredo Morles Hernandez, *CURSO DE DERECHO MERCANTIL* 900 (1986).

173. *Id.* The right of withdrawal also arises pursuant to Articles 215 and 257 of the Code, during the organization of the corporation if the reasons for incorporation have been modified or the directors have failed to fulfill the requirements mandated by the Code.

174. Although the Code itself is silent as to whether the value of the shares should be determined on the basis of the net corporate assets, it is now generally accepted that this is in fact the case. See, e.g., Enrique Luque, *LA SOCIEDAD ANONIMA* (1987).

175. See Code, *supra* note 144, art. 282.

all of its documents in general.¹⁷⁶ Once again, however, unless the bylaws state otherwise, the majority shareholders in a company not subject to the CML will appoint all of the *comisarios*. In the case of companies governed by the CML, minority shareholders may appoint directors and examiners, as noted *supra* in Part (B)(4)(b).

Excessive reliance on the *comisarios* of a Venezuelan corporation is not advisable despite the broad powers granted to them by Article 309. The effectiveness of the examiners has been widely questioned in Venezuela. Examiners often fail to utilize their inspection powers fully.¹⁷⁷ In practice, foreign minority shareholders in Venezuela choose to rely on external auditors from major international accounting firms and reserve negative veto powers over their substitution.

2. Examining Books and Records

Shareholders have the right to inspect the shareholder's registry and meetings record book at any time. No earlier than fifteen days prior to the ordinary meeting, they may also obtain a copy of the company's balance sheet and the examiner's report, as well as the inventory and shareholder list.¹⁷⁸ A shareholder wanting access to additional information, or hoping to obtain it at other times, must rely on the examiners or on a favorable provision in the bylaws.

E. Economic Rights of Minority Shareholders

1. Dividends

There is no rule in the Code which mandates the periodic distribution of profits. By comparison, the CML provides that corporations must distribute no less than fifty percent of the net results during each financial period after deducting income taxes and depositing legal reserves.¹⁷⁹

176. See Code, *supra* note 144, art. 309.

177. See, e.g., Hernandez, *supra* note 172, at 837; Jose-Loreto Arismendi, TRATADO DE LAS SOCIEDADES CIVILES Y MERCANTILES 377-378 (1979).

178. See Code, *supra* note 144, arts. 261, 284.

179. Banks and insurance companies subject to the CML may be exempt from the

2. Subscription Rights and Rights of First Refusal

The Code grants shareholders neither preemptive rights to newly-issued shares, nor the right of first refusal to existing shares. Both are generally covered in the bylaws of Venezuelan corporations.

3. Liquidation

The Code does not regulate the manner in which assets must be distributed among shareholders in the event of liquidation. The bylaws, however, may stipulate an order of payment. If the bylaws are silent, the Civil Code, which provides for the proportionate distribution to the shareholders, will govern.¹⁸⁰

4. Remuneration of Directors

The Code imposes no restrictions on the director's power to award themselves large salaries or bonuses at the expense of dividends to the shareholders. On the other hand, the CML limits the bonus to be received by the board to ten percent of net profits, calculated after deducting income taxes and legal reserves. A director's bonus may only be paid after dividends have been distributed to the shareholders.¹⁸¹ Therefore, minority shareholders in corporations subject to the Code and the CML should attempt to limit the remuneration of directors through the bylaws.

F. Modifying Statutory Rights to Protect Minority Shareholders

The need for careful drafting of the bylaws of a Venezuelan *sociedad anónima* is noted throughout this discussion, because protective clauses will often prove the only safeguard available to the minority investors under Venezuelan law. Among the points

minimum dividend requirement, as determined by the Superintendent of Banks or Insurance. Furthermore, the NSC can exempt corporations in certain cases. See CML, *supra* note 145, arts. 115, 116.

180. See Venezuela Civil Code, arts. 1680, 1683.

181. See CML, *supra* note 145, art. 119.

to be considered are granting the minority rights to (i) call a shareholder's meeting; (ii) demand that all stockholders receive notice of meetings by certified mail; (iii) prevent the formation of a quorum at ordinary and extraordinary meetings and the creation of the requisite majority of votes; (iv) withdraw if certain important resolutions are adopted without its consent; and (v) name directors and examiners through cumulative voting or otherwise and set their remuneration. Other provisions, which are not directly aimed at minority stockholders, will serve to protect them, and they include (i) preemptive rights and rights of first refusal; (ii) compulsory dividends; (iii) the creation of preferential shares; and (iv) adding other matters to the list of corporate decisions requiring a shareholder's meeting.

Incorporating the aforementioned provisions in the bylaws is preferable to stipulating them in private contracts among shareholders since the validity of such agreements with respect to third parties (including the subject company) is questionable under Venezuelan law.¹⁸² We are not aware of any case law discussing this issue, although many articles by legal commentators address the matter.¹⁸³ Thus, if for reasons of secrecy or otherwise, the minority investor opts for a private agreement, its possible unenforceability under Venezuelan law must be considered.

VI. ARGENTINA

A. Introduction

The Argentine Commercial Code was modified substantially in 1972 by the passage of Law 19,550, entitled the "Law of Commercial Corporations" (*Ley de Sociedades Comerciales*),

182. As in most Latin American jurisdictions, specific performance is not available in Venezuela. Cf. LSA, *supra* note 91, art. 118(3).

183. One commentator, while concluding that private agreements should be valid among the parties thereto, has summarized the situation under Venezuelan law as follows:

Generally, these agreements are intended to produce effects only between the parties. Their validity has been controversial and, in order to argue their validity, commentators have enunciated the general rule that such agreements are valid to the extent that they do not cause damage to the corporation.

Hernandez, *supra* note 172, at 593.

[hereinafter, the "LSC"].¹⁸⁴ The new statute effectively repealed the entire Title Third of Book Two of the Argentine Commercial Code, dealing with corporations.

In addition to the LSC, other laws must be considered in specific cases when discussing minority shareholders' rights in Argentina. Among these are the Securities Market Law (Law 17,811 of 1968), the Law of Financial Entities (Law 21,526 of 1977), the Law of Foreign Investments (Law 21,382 of 1980), the Law of the General Inspection of Justice (Law 22,315 of 1980), and the National Securities Commission Law (Law 22,169 of 1980). Recently enacted Decree 677/2001 sets forth new rules on transparency for public offerings, and introduces several material changes to the Argentine corporate and securities law landscape. Among these are mandatory tender offer provisions in the event that a proposed acquisition will give the acquirer control of a public corporation, if other factors are present.

B. Rights at a Shareholder's Meeting

1. Generally

Under the LSC, a shareholder's meeting remains the basic unit of management of the corporation. As in the other jurisdictions surveyed, such meetings may be "ordinary" or "extraordinary." The powers granted to the ordinary shareholder's meeting include (i) approving the corporate balance sheet, profit and loss statements and other financial accounts of the corporation; (ii) deciding on the distribution of profits; (iii) appointing and removing directors, examiners and members of the inspection committee, and determining their fees; and (iv) increasing the corporate capital.¹⁸⁵ Extraordinary meetings are required to consider all matters that are not within the purview of the ordinary meeting, including the approval of (i) a merger, spin off, transformation or dissolution of the company; (ii)

184. Law 19,500, Apr. 25, 1972, as amended by Laws No. 19,666, Jun. 7, 1972; No. 19,880, Oct. 18, 1972; No. 20,337, No. 20,468, Jun. 6, 1973; No. 21,304, May 6, 1976; No. 21,357, July 26, 1976; No. 22,182, No. 22,686, No. 22,903, Sept. 9, 1983; No. 22,985, 1984; No. 23,576, 1988; No. 24,435, 1995; No. 24,522 published Aug. 9, 1995. [hereinafter, "LSC"].

185. See LSC, *supra* note 184, art. 234.

amendments or modifications of the bylaws; (iii) redemption, reimbursement and amortization of stock; (iv) issuance of debentures and their conversion into stock; (v) issuance of bonds; (vi) reduction and refunding of capital; and (vii) limitation or suspension of preferential rights in the subscription for new stock.¹⁸⁶

2. Calling a Shareholder's Meeting

Argentine law provides that shareholders holding five percent or more of the corporate capital are entitled to request a shareholder's meeting.¹⁸⁷ This right is applicable to both ordinary or extraordinary meetings. The corporate bylaws may afford additional protection to minority shareholders by prescribing a lower percentage.¹⁸⁸ The request for a shareholder's meeting must specify the topics to be discussed at the meeting, and the board of directors must summon the meeting so that it is held no later than forty days after receipt of the request.¹⁸⁹

In the event that the directors or examiners fail to heed a shareholder's request for a meeting, the "control authorities," or alternatively a judge, may compel the meeting to be called.¹⁹⁰ In this case, the intervening authority will appoint a public official to preside over the meeting.¹⁹¹

3. Quorum

At an ordinary shareholder's meeting, the required quorum on first summon is a majority of the shares with voting rights.¹⁹² This quorum may not be increased.¹⁹³ On second call, the meeting is considered to be constituted with any number of shares present.

186. See LSC, *supra* note 184, art. 235.

187. See LSC, *supra* note 184, art. 236.

188. *Id.*

189. *Id.*

190. *Id.* Depending on the specific case, these may be the General Inspection of Justice or the National Securities Commission.

191. See LSC, *supra* note 184, art. 242.

192. See LSC, *supra* note 184, art. 243. When the bylaws or the LSC call for a majority, it is understood under Argentine law that it will be an absolute majority, which is half plus one. See Mascheroni, *SOCIEDADES ANONIMAS* 280 (4th ed. 1980).

193. See I. Halperin, 31 *SOCIEDADES ANONIMAS* 604-605.

The requisite quorum at an extraordinary shareholder's meeting is sixty percent of the shares with voting rights, unless a higher quorum is required by the bylaws.¹⁹⁴ On second call, the mandatory quorum falls to thirty percent, unless the bylaws require a greater or lesser quorum.¹⁹⁵

4. Voting

a. Limited Voting Shares

As with the other jurisdictions discussed in this memorandum, Argentine law mandates that all common shares must have one vote.¹⁹⁶ Unlike the other countries, however, the LSA permits the issuance of classes of stock with up to five votes per share.¹⁹⁷ Under no circumstances may a share enjoy both preferential dividends and preferential voting rights. Shares with preferential dividend rights, however, may be issued without voting rights.¹⁹⁸ Such limited voting shares will regain their rights during the period that the benefits received in exchange are not forthcoming.¹⁹⁹ In any event, all shares retain their right to cast a ballot on certain matters subject to a qualified majority at extraordinary meetings set forth in Article 244(4). Among these are early dissolution, transformation, transfer abroad of the corporate domicile, fundamental change in corporate purpose, total or partial redemption of the capital of the company, and a merger or spin-off except with respect to the surviving company, the merger must be approved by shareholders in the same manner as a capital increase.²⁰⁰

b. Majorities

Generally, the LSC will recognize resolutions supported by a majority of the shares entitled to vote present at a duly

194. See LSC, *supra* note 184, art. 244.

195. *Id.*

196. See LSC, *supra* note 184, art. 216.

197. *Id.* Stocks with privileged voting rights may not be issued after the company has been authorized to sell shares to the public. See *id.*

198. See LSC, *supra* note 184, art. 217.

199. *Id.*

200. See LSC, *supra* note 184, art. 244.

constituted shareholder's meeting, with the exception of the corporate decisions enumerated in Article 244(4), which require the affirmative vote of a majority of all shares entitled to vote thereon.²⁰¹ In all cases, however, the bylaws may set a higher majority.²⁰²

Argentine law also requires class voting for resolutions affecting the rights of a particular class of shares. In such instances, the resolution must be "approved or ratified by the class, in a special meeting governed by the rules applicable to an ordinary shareholder's meeting."²⁰³

C. *Right to Dissent From Majority Resolutions*

1. Judicial Remedies

Argentine law permits a dissenting shareholder, or one not present at the meeting, to file suit against the corporation claiming that a resolution taken at a shareholder's meeting was contrary to law or the company's bylaws.²⁰⁴ The action must be commenced within three months from adjournment of the meeting at which the resolution was approved, in a court of competent jurisdiction located in the company's domicile.²⁰⁵ The court is empowered to grant an *ex parte* injunction, upon payment of a bond in an amount sufficient to cover the possible damages to the company arising from the injunction.²⁰⁶ If successful, the plaintiff shareholders will be entitled to execute any judgment against the shareholders who voted for the resolution, as well as the company's directors and examiners.²⁰⁷

Any resolution taken at a shareholder's meeting, which unnecessarily creates preferred shares, approves excessive salaries for management, provides for the sale of company assets for less than a fair price, or causes damage to other shareholders,

201. See LSC, *supra* note 184, arts. 243-44.

202. *Id.*

203. See LSC, *supra* note 184, art. 250.

204. See LSC, *supra* note 184, art. 251.

205. *Id.*

206. See LSC, *supra* note 184, art. 252.

207. See LSC, *supra* note 184, art. 254. Directors who lodge a protest against the offending resolution may not be liable. See LSC, *supra* note 184, art. 274.

may be attacked as an "abuse of power."²⁰⁸ In practice, the specter of an "abuse of power" claim by the minority often acts as a constraint on the actions of controlling stockholders of Argentine companies.

Any shareholder claiming that the acts or omissions of the directors have "seriously endangered" the corporation may request a court to "intervene," for example by appointing an overseer or interim manager of the corporation.²⁰⁹ For such request to be heard, the plaintiff shareholder must have exhausted all remedies afforded by the LSC and commenced legal actions to remove the officers responsible for the alleged danger. Under Article 114, however, only extreme circumstances will lead the court to find that the corporation has been "seriously endangered." Plaintiffs have met this onerous burden of proof in some cases involving the late preparation of financial statements, misplacement of financial records, or the deposit of company funds in a shareholder's account.²¹⁰

2. Appraisal Rights

The LSC permits a shareholder to withdraw from the corporation, and receive consideration for his shares based on the last balance sheet of the company if he was absent from the shareholders' meeting or voted with the minority at an extraordinary meeting against the approval of certain matters provided in Article 244(4).²¹¹ Some capital increases requiring assessments, which also cause separation.²¹²

208. See *Pineda Eliseo v. Ciro, S.A.*, Judgment of Jun. 6, 1977 (Second Commercial Appeals Court of Rosario) in *Ley de Sociedades Comerciales Anotada con Jurisprudencia*, 456-457 (1984); See LSC, *supra* note 184, art. 251; see also Civil Code of Argentina, arts. 953, 1071.

209. See LSC, *supra* note 184 art. 113. As with the injunction remedy noted above, the shareholder seeking intervention must deliver a bond. See LSC, *supra* note 184 art. 116. In addition, the plaintiff must show that he has exhausted all remedies provided by the bylaws, although the courts have proven somewhat flexible on this point. See LSC, *supra* note 184, art. 114. The requirement of exhaustion of internal corporate remedies allows the majority to delay enforcement of the rights granted by Article 113.

210. See, e.g., *Chomik, O. et. al. v. Chomik Muon et. al.*, 1987-C, L.L. 267 (Judgment of the National Commercial Court, Dec. 22, 1977).

211. See LSC, *supra* note 184, arts. 244-45. In most cases, the shareholder must receive the appraised value of the shares, adjusted for inflation, within one year of adjournment of the relevant shareholder meeting. See LSC, *supra* note 184, art. 245.

212. *Id.*

To exercise the right to withdraw, a dissenting shareholder who was present at the meeting must file the petition within five days after the date of the meeting. If the shareholder was not present, the petition must be filed within fifteen days from the adjournment of the meeting.²¹³

D. Internal Corporate Management

1. Naming Directors, Examiners and Inspection Committee

a. Election

In addition to majority voting by the shareholders, the LSC sets forth two other methods of electing directors. Where there are several classes of stock and if so stipulated in the bylaws, directors, examiners and members of the inspection committee may be elected by class voting.²¹⁴ Once in office, those chosen may only be removed by the class that elected them.²¹⁵

Under the LSC all requesting shareholders can employ cumulative voting rights in order to elect up to one-third of all vacancies for directors, examiners and inspectors with the rest being elected by simple majority vote.²¹⁶ This right may not be eliminated in the bylaws or by agreement of the shareholders.²¹⁷ To trigger it, any shareholder must notify the board at least three days prior to a shareholder's meeting.²¹⁸

b. Actions against Directors, Examiners and Inspection Committees

The LSC affords both the corporation and its individual shareholders the opportunity to commence a legal action to remove and file claims against the corporate directors, examiners

213. *Id.*

214. *See* LSC, *supra* note 184, art. 262. *See also infra* Part VI(D)(2).

215. *Id.*

216. *See* LSC, *supra* note 184, art. 263.

217. *Id.*

218. *Id.*

and members of the inspection committee.²¹⁹ This right belongs to the corporation, but ripens only after the shareholder's meeting decides to proceed with such action.²²⁰ If the corporation fails to file a lawsuit three months after the shareholder's meeting has decided to do so, any shareholder may individually commence the action.²²¹ Lastly, all shareholders retain their right to file individual claims against the directors, examiners and members of the inspection committee.²²²

The right of shareholders to proceed against corporate examiners is identical to those available against directors.²²³ However, the law does provide for some additional rights: shareholders holding at least two percent of the corporate capital may request any information concerning matters for which the examiner is responsible. A similar number may, by alleging that a director or examiner has not fulfilled his duties, force the examiners, not including the one charged, to investigate the charges and discuss them at the shareholder's meeting.²²⁴

Under Argentine corporate law, the shareholders are entitled to evaluate the performance of directors and other officials upon their resignation.²²⁵ Stockholders, however, may reserve their rights against those resigning by failing to approve their past performance.²²⁶ Most importantly for minority shareholders, by opposing a corporate resolution concerning such approval, a shareholder or group of shareholders holding five percent or more of the capital stock will preserve the corporation's right to sue directors, examiners and members of the inspection committee.²²⁷

2. Inspection Committee

Similar to Brazil's Fiscal Council, the Inspection Committee is an organ of internal control under Argentine law.²²⁸ It may be

219. See LSC, *supra* note 184, arts. 274, 280, 296.

220. See LSC, *supra* note 184, art. 276.

221. See LSC, *supra* note 184, art. 277.

222. See LSC, *supra* note 184, arts. 279, 280, 298.

223. See LSC, *supra* note 184, art. 298.

224. See LSC, *supra* note 184, art. 294.

225. See LSC, *supra* note 184, arts. 234, 275.

226. *Id.*

227. See LSC, *supra* note 184, art. 275.

228. See LSC, *supra* note 184, art. 280.

created pursuant to a company's bylaws, in which case it can replace the examiners.²²⁹ If so, an annual external auditor's report will replace the annual report to be prepared by the examiners. Any decision taken by the inspection committee with less than two-thirds of the vote entitles the opposing faction to call for a general shareholder's meeting to review the issue.²³⁰

3. External Control

In specific cases, Argentine law also provides for regular and frequent inspections by government authorities.²³¹ These inspections are generally conducted by the National Justice Inspector ("Inspección General de Justicia").²³² The external inspection of corporations not covered by Article 299 may be invoked by a petition of shareholders holding ten percent or more of the capital when the Superintending of Corporations deems it necessary to protect the public interest.²³³

4. Examining Books and Records

Shareholders of Argentine companies have no direct right to examine the company's books. Rather, the right to inspect and review the books belongs to the examiners.²³⁴ Only in the event that the corporation does not have examiners can the shareholders directly examine the books.²³⁵

229. See LSC, *supra* note 184, art. 283. The committee is composed of a number ranging between three and fifteen shareholders. Election for appointment to the committee may be by majority, cumulative or class voting. See LSC, *supra* note 184, art. 280.

230. See LSC, *supra* note 184, art. 282.

231. See LSC, *supra* note 184, art. 299. To be subject to such inspections, a corporation must (i) make public offerings of its shares or debentures; (ii) have a paid-in capital greater than [\$2,100,000] pesos (approximately [US\$2,100,000]); (iii) include the Argentine state as a shareholder; (iv) operate capital or banking institution; (v) exploit concessions for public services; or (vi) control, or be controlled by, a holding company which is subject to any of the foregoing.

232. In specific cases, such inspections are also conducted by the National Securities Commission, the Central Bank of Argentina, the Sub-Secretary of Foreign Investments, or the National Superintendency of Insurance.

233. See LSC, *supra* note 184, art. 301.

234. See LSC, *supra* note 184, art. 55.

235. See LSC, *supra* note 184, art. 284.

E. Economic Rights of Minority Shareholders

1. Subscription Rights and Rights of First Refusal

A shareholder in an Argentine company has the right to subscribe to new shares of the same class, and in the same proportion, as the shares held by him. This privilege cannot be eliminated or conditioned in the bylaws, and the shareholder may seek enforcement in the courts.²³⁶ The bylaws, however, must grant any rights of first refusal to existing shares since the LSC does not regulate this issue.

2. Dividends and Remuneration of Directors

The LSC does not expressly mandate the distribution of dividends. However, it provides shareholders with some control on the earnings that management can place in reserve. Under Article 66, management must inform shareholders of the amount of profits that the company is placing in its reserve in excess of the legal requirement and the reason for such deposit.²³⁷

Directors, examiners and other officers do not have a free rein in allotting themselves the earnings of the corporation. Absent special circumstances, the maximum allowable percentage is twenty-five percent of the company's profits. However, with some exceptions, if dividends have not been distributed to shareholders, the maximum is reduced to five percent.²³⁸

F. Modifying Statutory Rights to Protect Minority Shareholders

Certain rules of "public order" set forth in the LSC may not

236. See LSC, *supra* note 184, art. 194. However, the right may be modified or suspended if the matter is included in the agenda at an extraordinary shareholder's meeting, when the corporation is in financial difficulties and the shares are exchanged for past liabilities or for payments in kind. See LSC, *supra* note 184, arts. 195-97.

237. Under Argentine law, the company must set aside five percent of the company's liquid annual profits until the amount of the reserve reaches twenty percent of the company's capital. See LSC, *supra* note 184, art. 70.

238. See LSC, *supra* note 184, art. 261.

be modified by private agreement. These include prohibiting cumulative voting or an increase in the quorum at an ordinary shareholder's meeting.²³⁹ Minority shareholders in Argentine companies, however, can strengthen their rights by inserting provisions in the bylaws stipulating (i) higher majorities in extraordinary shareholder's meetings, either on first or second call; (ii) specific matters submitted for the approval of the extraordinary shareholder's meeting, including the transfer of shares to third-parties, or certain decisions of the managers involving the use of a substantial portion of the corporate assets; (iii) different classes of shares with the right to appoint directors, examiners and members of the Inspection Committee; (iv) the right of shareholders comprising less than five percent of the capital to call a shareholder's meeting; and (v) minimum dividend payments, subscription and first refusal rights, liquidation rights, and other economic privileges.

Voting trusts bind the company and third-parties if notified to, or registered with, the corporation.²⁴⁰

VII. CONCLUSION

As noted earlier, minority shareholders in the countries surveyed – indeed, in most Latin American jurisdictions – receive few statutory protections. In addition, the absence of binding precedent creates significant uncertainties regarding minority rights. In the age of global capital flows, this situation is likely to change, albeit slowly, and in all of the jurisdictions discussed in this article recent legislative initiatives have sought to provide minority stockholders with some recourse when the majority's shares are transferred to a new controlling party. Nevertheless, in the current Latin American legal environment, minority investors would be well advised to negotiate their rights in advance or, better yet, provide for adequate protections in the bylaws of their *sociedad* or *sociedade*.

239. See LSC, *supra* note 184, arts. 244, 263.

240. See M. Sasot Betes, *SOCIEDADES ANONIMAS Y OBLIGACIONES NEGOCIABLES* 326-327 (1985). See also Halperin, *supra* note 193, at 637.

