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## Variations on a Theme: Corporate Law in Latin America, Continental Europe, and the United States

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# Variations on a Theme: Corporate Law in Latin America, Continental Europe, and the United States

Ángel R. Oquendo\*

*The regulation of incorporated companies in Latin America and Continental Europe appears to distance itself from that in the United States. It differs in how it structures itself and handles incorporation, incorporators, piercing, governance, discipline, and shareholders. In their regulatory exertions, both regimes rely, certainly, on legislation and adjudication yet do so differently, qualitatively in addition to quantitatively.*

*Apparently, civil and common law continue to specialize respectively though not exclusively in statutes and binding precedents. Still, they ever more frequently intrude into each other's apparent specialty, while leaving their own imprint on it. The tendency to converge coexists with that to diverge.*

*This general difference, in tandem with the correlative concurrence, has evolved immemorially, growing in nuances*

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*and exceptions. Absent unexpected cataclysms, it should persist down this path into the future. So will its more specific counterparts, highlighted throughout the following discussion. They equally insinuate a somewhat tentative, simplistic, distortive picture of contrasts and similarities.*

*So depicted, the Latin American and Continental Europe scheme seems to foment jurisdictional diversity, concentrate on compliance, enthrone an ever-present state, evoke the concept of the collective good, and dedicate itself to stakeholders. On the other hand, the U.S. model appears to compel convergence among competing jurisdictions, focus on flexibility or user-friendliness, kowtow to an all-powerful corporation (or directorate), wave the flag of individualism or efficiency, and consecrate itself to stockholders. Expectedly, this seeming opposition on specifics will likewise endure and modulate alongside any collateral overlap.*

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## PROLOGUE

Corporate law seems to operate differently in Latin America and Continental Europe compared to the United States. It appears to possess one set of institutions and procedures on one side of the divide and another one on the other. Surely, these appearances may ultimately amount to nothing but deception. They may deceptively

rest on an overplay of the dissimilarities between and an underplay of those within the juxtaposed realms. Nevertheless, this work will attempt to show the apparent contrast between the two as real and as partly based on their contrasting traditional heritages.

In all, the underlying traditions seem to diverge most conspicuously in their approach to legislation and adjudication. Certainly, they appear not to differ as they (supposedly) did over a century ago. The civil- and common-law systems do not seem anymore to derive all their legal precepts from, respectively, statutory and case law. Notwithstanding, they do appear to treat these two sources somewhat dissimilarly.

In Latin American and Continental European jurisdictions, the statute seems to play a prominent though not solitary role as an all-encompassing norm. It ordinarily contains jam-packed sections that seemingly suggest the different parts of a complex rule and that commentators or adjudicators might break down into subsections for purposes of interpretation. The whole arrangement appears to aspire to arrive in advance at specific solutions for concrete cases.

In the United States, an enactment may govern at the forefront yet in a fairly fragmented fashion. It seems to consist of various disconnected components that neither mesh fully nor cover the entire field. They appear to be waiting for the judiciary to step in as an interpreter who might contribute some coherence.

Furthermore, reasoned judgments generally seem not to set binding precedents, particularly for the supreme adjudicative organ, within the so-called Romano-Germanic universe. Nonetheless, they come across as carrying more than persuasive weight, inching toward their counterparts from the Anglo-American ambit. Their persuasiveness appears to grow in the slightly technical area presently at stake. Of course, their compulsion apparently attaches to the final resolution rather than the opinion as an entirety and does not imply a shift toward *stare decisis*.

The present discussion will traverse several subtopics. It will submit that they seem to illustrate the mentioned divergences, albeit imperfectly. Concurrently, other differences will rise to the fore.

For instance, the U.S. corporative scene features a family of federally compartmentalized and substantively overlapping schemes. It pushes them to compete against each other either to

favor the incorporator as much as possible or, depending on the analytical perspective, to enable her to run her corporation efficiently to the utmost. The Delawarean alternative appears to have triumphed in the competition.<sup>1</sup>

The nations in Latin America and Continental Europe can hardly foster a comparable contest. They traditionally proffer only one regime and do not invite businesses headquartered extraterritorially to incorporate nationally. Still, the overall model could cultivate diversity as opposed to convergence. Simultaneously, it should continue to permit concerns to remain competitive internationally.

On a separate front, the Latin American or Continental European paradigm seems to involve the state more, whether directly through judges or comptrollers or indirectly through a lawyerly notary who assures compliance with the law. It also appears to allow greater representation of stakeholders, such as creditors or workers, through the internal-control bodies within the enterprise.

The analysis will alternatively focus on Argentina and Germany, with occasional references to France and other countries, and mostly though not exclusively on Delaware. It will paint a general picture alongside a detailed juxtaposition of the Argentine, German, and Delawarean configuration of companies. Hopefully, the pictorial details will not cloud but instead illuminate the landscape behind.

## STRUCTURE

Throughout Latin America and Continental Europe, individuals may set up a business and render themselves but restrictedly responsible.<sup>2</sup> In other words, they may invest in an enterprise and

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<sup>1</sup> See *SFF-TIR, LLC v. Stephenson*, 264 F. Supp. 3d 1148, 1236 (N.D. Okla. 2017) (“Delaware is the prevailing corporate domicile of choice.”) (quoting E. Norman Veasey, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1408 (2005)).

<sup>2</sup> See, e.g., Ley [L.] 19550 art. 163 (Arg.) (1984) (“El capital [en la sociedad anónima] se representa por acciones y los socios limitan su responsabilidad a la integración de las acciones suscriptas.”); CÓDIGO DE COMERCIO [CD. COM.] art. 122(3) (Cuba) (“[En la compañía mercantil] anónima . . . forman[] el fondo común los asociados por parte o porciones ciertas, figuradas por acciones o de

risk solely the capital that they contribute. Their personal assets usually remain immune from claims or judgments against the undertaking.

To achieve such investment and immunity, an investor must launch either an “anonymous” or a “limitedly liable” “society.”<sup>3</sup> The former formula prevails in romance-language cultures to denominate what U.S. lawyers call “corporations.”<sup>4</sup> The latter, three-term formulation refers to what state lawmakers in the United States designate “limited liability companies,”<sup>5</sup> maybe under Continental European influence.

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otra manera indubitada, [y] encargan su manejo a mandatarios o administradores amovibles que representen a la Compañía bajo una denominación apropiada al objeto o empresa a que se destine sus fondos.”); Aktiengesetz [AktG] [Stock Law] § 1(1) (Ger.) (1965) (“Die Aktiengesellschaft ist eine Gesellschaft mit eigener Rechtspersönlichkeit. Für die Verbindlichkeiten der Gesellschaft haftet den Gläubigern nur das Gesellschaftsvermögen.”); AktG § 1 (Austria) (1965) (“Die Aktiengesellschaft ist eine Gesellschaft mit eigener Rechtspersönlichkeit, deren Gesellschafter mit Einlagen auf das in Aktien zerlegte Grundkapital beteiligt sind, ohne persönlich für die Verbindlichkeiten der Gesellschaft zu haften”).

<sup>3</sup> L. 19550 ch. II, § IV (“DE LA SOCIEDAD DE RESPONSABILIDAD LIMITADA”) & § V (“DE LA SOCIEDAD ANÓNIMA”) (Arg.) (1984).

<sup>4</sup> See CODE DE COMMERCE [CD. COM.] art. L225-1 (Fr.) (Modified by LOI 2016-563 art. 2 (2016)) (“La société anonyme est la société dont le capital est divisé en actions et qui est constituée entre des associés qui ne supportent les pertes qu’à concurrence de leurs apports.”); REAL DECRETO LEGISLATIVO 1/2010 art. 1(1) (Spain) (2010) (“Son sociedades de capital la sociedad de responsabilidad limitada, la sociedad anónima y la sociedad comanditaria por acciones.”); CÓDIGO DAS SOCIEDADES COMERCIAIS [CD. SCDS, COMS.], Decreto-Lei 262/86 art. 271 (Port.) (1986) (“Na sociedade anónima o capital é dividido em acções e cada sócio limita a sua responsabilidade ao valor das acções que subscreveu.”). Cf. AktG § 1 (Ger.) (1965) (“Die Aktiengesellschaft ist eine Gesellschaft mit eigener Rechtspersönlichkeit.”); AktG § 1 (Austria) (1965) (“Die Aktiengesellschaft ist eine Gesellschaft mit eigener Rechtspersönlichkeit . . . .”); DEL. CODE ANN. tit. 8, ch. 1 [Del. Gen. Corp. L.], §§ 1-619 (2018) (“Delaware General Corporation Law”).

<sup>5</sup> See, e.g., DEL. CODE ANN. tit. 6, ch. 8, §§ 18-101-1208 (2018) (“Limited Liability Company Act”). See generally JESSE H. CHOPER, JOHN C. COFFEE, & RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 804-05 (8th ed. 2013) (“The first statute authorizing a limited liability company (LLC) was adopted in Wyoming in 1977 . . . . By 1999 all 50 states had adopted LLC statutes.”).

Before the development of such second category, the first seems to have encompassed all U.S. firms of restricted responsibility, regardless of size or style. Frequently, it ended up itself bifurcating into two: one for larger more complex concerns, one for smaller simpler ones.<sup>6</sup> Perhaps prototypically, Delaware devotes "Subchapter XIV" of its corporate statute to "Close Corporations."<sup>7</sup> It targets establishments avowing themselves as such, featuring fewer than thirty shareholders, constraining share transfers, and abstaining from public offerings.<sup>8</sup>

Pursuant to the pertinent provisions, stockholders may manage the venture themselves, operate it as a partnership, or agree to empower each other to dissolve it.<sup>9</sup> Moreover, they may curb directorial discretion.<sup>10</sup> In this jurisdiction, the bench has passed on election agreements,<sup>11</sup> in addition to voting trusts.<sup>12</sup> In others, it has debated restrictions on transferring stock,<sup>13</sup> as well as on the board's leeway,<sup>14</sup> and dissolutions upon a deadlock.<sup>15</sup>

Like many civil-law societies, Argentina prescribes a single structure for all incorporated enterprises. It does not supply a separate statutory scheme for closed ones.<sup>16</sup> Yet its legislation does treat them differently now and then.

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<sup>6</sup> See CHOPER, COFFEE, & GILSON, *supra* note 5, at 725 ("[M]ore than half enacted statutory provisions designed specifically to authorize certain control mechanisms for close corporations.").

<sup>7</sup> Del. Gen. Corp. L., Subchapter XIV ("Close Corporations; Special Provisions"), §§ 341-56. *See id.* § 341 ("This subchapter applies to all close corporations.").

<sup>8</sup> *Id.* §§ 343(a), 342(a). *See also id.* §§ 344-46.

<sup>9</sup> *Id.* §§ 351, 354-55.

<sup>10</sup> *Id.* § 350.

<sup>11</sup> *See, e.g.,* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A.2d 441 (Del. 1947); E. K. Buck Retail Stores v. Harkert, 62 N.W.2d 288 (Neb. 1954).

<sup>12</sup> *See, e.g.,* Abercrombie v. Davies, 130 A.2d 338 (Del. 1957); Lehrman v. Cohen, 222 A.2d 800 (Del. 1966).

<sup>13</sup> *See, e.g.,* Allen v. Biltmore Tissue Corp., 141 N.E.2d 812 (N.Y. 1957); Rafe v. Hindin, 288 N.Y.S.2d 662 (1968).

<sup>14</sup> *See, e.g.,* McQuade v. Stoneham, 189 N.E. 234 (N.Y. 1934); Clark v. Dodge, 199 N.E. 641 (N.Y. 1936).

<sup>15</sup> *See, e.g.,* Strong v. Fromm Laboratories, Inc., 77 N.W.2d 389 (Wis. 1956).

<sup>16</sup> *See* ANA MARÍA MEIROVICH DE AGUINIS, EMPRESAS E INVERSIONES EN EL MERCOSUR: SOCIEDADES Y JOINT VENTURES: ESTABLECIMIENTO DE SUCURSAL Y

Concretely, The Comptroller does not ordinarily oversee such entities,<sup>17</sup> in contradistinction to their bigger brothers, except for their “constitutive contract” and their amendments to it.<sup>18</sup> Still, she may police them more comprehensively upon a demand by an investor “with ten percent of” their stock or by a “trustee,”<sup>19</sup> or when she justifiably resolves that she must do so “in defense of the public interest.”<sup>20</sup> Close corporations (as opposed to open ones) must not deliver documentation to the National Securities Commission or announce all their shareholder meetings and preferential purchase-rights in a major newspaper.<sup>21</sup> They may not “distribute anticipated or provisional interests or dividends” or unlimitedly

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FILIAL: INVERSIONES EXTRANJERAS: IMPUESTOS 278 (1992) (“La sociedad anónima no admite subtipos, esto es, no responde a diferentes regímenes legales según fuere abierta o cerrada, de familia u otras variantes que ofrece el derecho extranjero.”).

<sup>17</sup> L. 19550 art. 299(1) (Arg.) (1984) (“Las asociaciones anónimas . . . quedan sujetas a la fiscalización de la autoridad de contralor . . . en cualquiera de los siguientes casos: (1) Hagan oferta pública de sus acciones o debentures . . .”).

<sup>18</sup> *Id.* art. 300 (“La fiscalización por la autoridad de contralor de las sociedades anónimas no incluidas en el artículo 299, se limitará al contrato constitutivo, sus reformas y variaciones del capital . . .”).

<sup>19</sup> *Id.* art. 301(1) (“La autoridad de contralor podrá ejercer funciones de vigilancia en las sociedades anónimas no incluidas en el artículo 299 . . . : (1) Cuando lo soliciten accionistas que representen el diez por ciento (10 %) del capital suscrito o lo requiera cualquier síndico.”).

<sup>20</sup> *Id.* art. 301(2) (“La autoridad de contralor podrá ejercer funciones de vigilancia en las sociedades anónimas no incluidas en el artículo 299 . . . : (2) Cuando lo considere necesario, según resolución fundada, en resguardo del interés público.”).

<sup>21</sup> *See id.* art. 62 (“La Comisión Nacional de Valores, otras autoridades de contralor y las bolsas, podrán exigir a las sociedades incluidas en el artículo 299, la presentación de un estado de origen y aplicación de fondos por el ejercicio terminado, y otros documentos de análisis de los estados contables.”); *id.* art. 237 (“Las asambleas serán convocadas por publicaciones . . . en el diario de publicaciones legales. Además, para las sociedades a que se refiere el artículo 299, en uno de los diarios de mayor circulación general de la República.”); *id.* art. 194 (“La sociedad hará el ofrecimiento [de nuevas acciones de la misma clase en proporción a las que poseen] a los accionistas mediante avisos por tres (3) días en el diario de publicaciones legales y además en uno de los diarios de mayor circulación general en toda la República cuando se tratare de sociedades comprendidas en el artículo 299.”).



“augment” their total “capital” without amending their bylaws.<sup>22</sup> Lastly, their stockholders need not appoint a minimum of three directors nor a collegial trustee-panel or a supervisory council.<sup>23</sup>

Likewise, German nonpublic corporate firms may require of their councilors only one “yearly session” instead of the usual two.<sup>24</sup> They enjoy a tad wider wiggle-room in scheduling their shareholder assemblies and normally need not notarize the approved regular resolutions.<sup>25</sup> Finally, an “organization” that knows its investors “by name” may convoke them simply “by registered mail.”<sup>26</sup>

Argentine and German authorities may believe that such exemptions or prohibitions suffice. They may have never felt a burning desire for a specialized codification anyway. After all, their overarching Romano-Germanic realm has offered from time (seemingly) immemorial the option of simpler and cozier unincorporated companies that afford abridged answerability. So, it ap-

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<sup>22</sup> *Id.* art. 224 (“Está prohibido distribuir intereses o dividendos anticipados o provisionales o resultantes de balances especiales, excepto en las sociedades comprendidas en el artículo 299.”) & 188 (“En las sociedades anónimas autorizadas a hacer oferta pública de sus acciones, la asamblea puede aumentar el capital sin límite alguno ni necesidad de modificar el estatuto.”).

<sup>23</sup> *Id.* art. 255 (“En las sociedades anónimas del artículo 299, salvo en las previstas en el inciso (7), el directorio se integrará por lo menos con tres directores.”); *id.* art. 280 (“El estatuto podrá organizar un consejo de vigilancia . . .”); *id.* art. 284 (“Cuando la sociedad estuviere comprendida en el artículo 299 — excepto su inciso (2.)— la sindicatura debe ser colegiada en número impar.”).

<sup>24</sup> *See* AktG § 110(3) (Ger.) (1965) (“Der Aufsichtsrat muss zwei Sitzungen im Kalenderhalbjahr abhalten. In nichtbörsennotierten Gesellschaften kann der Aufsichtsrat beschließen, dass eine Sitzung im Kalenderhalbjahr abzuhalten ist.”).

<sup>25</sup> *Id.* § 121 (7) (“Bei Fristen und Terminen, die von der Versammlung zurückberechnet werden, ist der Tag der Versammlung nicht mitzurechnen . . . Bei nichtbörsennotierten Gesellschaften kann die Satzung eine andere Berechnung der Frist bestimmen.”); *id.* § 130(1) (“Jeder Beschluß der Hauptversammlung ist durch eine über die Verhandlung notariell aufgenommene Niederschrift zu beurkunden . . . Bei nichtbörsennotierten Gesellschaften reicht eine vom Vorsitzenden des Aufsichtsrats zu unterzeichnende Niederschrift aus, soweit keine Beschlüsse gefaßt werden, für die das Gesetz eine Dreiviertel- oder größere Mehrheit bestimmt.”).

<sup>26</sup> *Id.* § 121 (4) (“Sind die Aktionäre der Gesellschaft namentlich bekannt, so kann die Hauptversammlung mit eingeschriebenem Brief einberufen werden, wenn die Satzung nichts anderes bestimmt; der Tag der Absendung gilt als Tag der Bekanntmachung.”).

pears to have separately structured compact concerns all along. On this entire front, formal discrepancies evidently overlie substantive resemblances, which may themselves demand an explanation too.

In fact, broadly shared needs, whether real or perceived, may have similarly shaped this field in different zones around the globe. They may have, in conjunction with bi- or multilateral collaboration or coercion, generated the general convergences to which this Section has been alluding from the outset. In parallel, material divergences seem to have instantly developed and gradually steadied, perchance because of the underlying cultural differences.

For sure, sometimes superficial similarities reveal deeper dissimilarities. For instance, Argentina, like the United States, constitutes a federal polity. Nevertheless, it has merely one Business Organizations Act.<sup>27</sup> Unlike U.S. states, Argentine provinces do not pass their own enactments in this domain. Accordingly, enterprises in Argentina must follow the same basic norms independently of their provincial location.

The other federated nations in the regions under comparison (to wit, Austria, Belgium, Brazil, Germany, Mexico, and Venezuela) approach these matters analogously.<sup>28</sup> They do not tender a corporate customer a range of regimes from which it may pick. It must put up with the parameters legislated countrywide.

Europe's Union, for its part, inhabits a federative universe of its own. On the one hand, it provides a legal framework within which companies active in two or more of its constituent countries and based in one of them may turn into a *Societas Europea*.<sup>29</sup> On the other hand, its national units such as Italy, France, Poland, or Spain possess their own arrangements. They appear to boast more legislative and adjudicative engagement in this terrain than the mother ship.

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<sup>27</sup> L. 19550 arts. 163-307 (Arg.) (1984).

<sup>28</sup> See AktG (Austria) (1965); CODE DES SOCIETES (Belg.) (2019); Lei 6404 (Braz.) (1976); AktG (Ger.) (1965); Ley General de Sociedades Mercantiles, ch. V ("De la sociedad anónima"), arts. 87-206 (Mex.) (1934); CD. COM. § V ("De la Compañía Anónima"), arts. 242-244 (Venez.).

<sup>29</sup> See Council Regulation (EC) 2157/2001 of Oct. 8, 2001, On the Statute for a European Company (SE), 2001 O.J. L 294/1 art. 1 ("A company may be set up within the territory of the Community in the form of a European public limited-liability company (Societas Europaea or SE)").

This whole configuration may come across as an invitation for incorporators to help themselves to any one of the nationally or continentally proffered paradigms. However, it might not permit such flexibility along U.S. lines. Apparently, organizations with their headquarters in one jurisdiction often may not be easily chartered in another one. For example, they must take up “domicile” in a German “locality,” as well as specify which in their “bylaws,” to incorporate in Germany.<sup>30</sup> Of course, the European Court of Justice has commanded the “registration,” upon request, of commercial concerns from any “member State” in any other one.<sup>31</sup> The command holds even if they “conduct” none of their “business” in the former and all in the latter.<sup>32</sup>

Arguably, the two sorts of vertically aligned sovereigns within U.S. federalism also rule side by side. They do so *sub silentio*, though. Once again, one of them—namely, the federation—has neither enacted its own code of commerce nor authorized entrepreneurs federally to promote prospective or existing corporations. Nonetheless, it has heavily regulated such entities since the 1930s through the backdoor of its securities laws and rules.<sup>33</sup> Slowly but surely, this regulation might be relegating that through chartering.

In sum, the nations on one or the other coast of the Rio Grande or the North Atlantic Ocean purportedly pursue a roughly identical end in this area. Notwithstanding, those that dwell within the civil-law tradition present promoters with one model, or two in the case of Europe. In contrast, the United States parades fifty. Indeed, it seems to have facilitated headquartering, as well as founding,

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<sup>30</sup> See AktG § 5 (Ger.) (1965) (“Sitz”) (“Sitz der Gesellschaft ist der Ort im Inland, den die Satzung bestimmt.”).

<sup>31</sup> Centros Ltd. v Erhvervs- og Selskabsstyrelsen, Case C-212/97, [1999] E.C.R. I-01459, ¶ 30 (“[T]he refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment . . .”). See also *id.* ¶ 38, Operative Part.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. § 77a *et seq.* (2018); Securities Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78a *et seq.* (2018).

businesses anywhere on its territory through its social and economic homogenization from the turn of the twentieth century on.

Under these circumstances, U.S. states appear to have been competing against each other in a cutthroat market ever since. They might have driven many a corporation away if they had insisted, in the manner of the German system today, that it reside in reality within their borders to incorporate. In 1933, Louis D. Brandeis observed a widespread removal of “safeguards” in an “eager [quest] for the revenue derived from the traffic in charters.”<sup>34</sup> He deplored a “race . . . not of diligence but of laxity.”<sup>35</sup> Starting around the 1980s, a number of “scholars” have openly objected to his observation or his lamentation. They have commended such “competition” as conducive to “efficient changes that eliminated anachronistic elements of state . . . statutes without harming investors.”<sup>36</sup>

At a distance from this debate, the Latin American and European Continents might want at some point to embrace diversity at an international or a transnational level. Upon each becoming more homogeneous socially and economically, they might seek to enable any mobile company to choose among the available alternatives the one that best suits its particular necessities. In response, it might base its choice, if legally incited to do so, on an ample array of principles and values, not just efficiency. Ultimately, the United States might itself learn from such an effort.

#### INCORPORATION

The discussed dialectic of convergences and divergences permeates not only the structure but also the particulars of common- and civil-law corporate regulation. Therefore, it lies at the heart of the setup solemnities. The Argentine, German, and U.S. experiences will continue to guide the discussion.

Throughout Latin American and Continental European territories, the corporation’s foundation seems to transpire typically

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<sup>34</sup> *Liggett Co. v. Lee*, 288 U.S. 517, 557 (1933).

<sup>35</sup> *Id.* at 559.

<sup>36</sup> *See* CHOPER, COFFEE, & GILSON, *supra* note 5, at 26.

through a notarized instrument.<sup>37</sup> Argentina provides a case in point.<sup>38</sup> So does Germany.<sup>39</sup>

Contrary to her U.S. counterparts, the Romano-Germanic notary appears to play the role of an impartial attorney, beyond impartially witnessing signatures.<sup>40</sup> She may “draft” and “authenticate” as well as “receive” the documentation within her purview and must ensure their “conformity with the law.”<sup>41</sup> Her engagement

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<sup>37</sup> See, e.g., AktG § 16(1) (Austria) (1965) (“Feststellung der Satzung”) (“Die Satzung muß in Form eines Notariatsakts festgestellt werden.”).

<sup>38</sup> L. 19550 art. 165 (Arg.) (1984) (“La sociedad se constituye por instrumento público . . .”). See also *id.* art. 4 (“El contrato por el cual se constituya o modifique una sociedad, se otorgará por instrumento público o privado.”).

<sup>39</sup> AktG § 23(1) (Ger.) (1965) (“Feststellung der Satzung”) (“Die Satzung muß durch notarielle Beurkundung festgestellt werden. Bevollmächtigte bedürfen einer notariell beglaubigten Vollmacht.”). See also *id.* § 30(1) (“Die Gründer haben den ersten Aufsichtsrat der Gesellschaft und den Abschlußprüfer für das erste Voll- oder Rumpfgeschäftsjahr zu bestellen. Die Bestellung bedarf notarieller Beurkundung.”).

<sup>40</sup> See generally L. 12.990 art. 1(c) (Arg.) (1947) (“Para ejercer el notariado se requiere: . . . c) Tener título de escribano expedido por universidad nacional, provincial o privada, debidamente habilitado en el caso de estos dos últimos, con tal que su otorgamiento requiera estudios completos de la enseñanza media previos a los de carácter universitario, los que deberán abarcar la totalidad de las materias y disciplinas análogas a las que se cursen para la carrera de abogacía . . .”); BUNDESNOTARORDNUNG (BNotO) § 5 (Ger.) (1937) (“Zum Notar darf nur bestellt werden, wer die Befähigung zum Richteramt nach dem Deutschen Richterergesetz erlangt hat.”); *id.* § 14(1) (“Der Notar . . . ist nicht Vertreter einer Partei, sondern unabhängiger und unparteiischer Betreuer der Beteiligten.”). Cf. DEL. CODE ANN. tit. 29, ch. 43 (“Notaries Public”), § 4323 (2018) (“A notarial act may be performed within this State by the following persons: (1) A notary public of this State; (2) A judge, clerk or deputy clerk of any court of this State; (3) A person licensed to practice law in this State; (4) A person authorized by the law of this State to administer oaths; and (5) Any other person authorized to perform the specific act by the law of this State.”).

<sup>41</sup> L. 12.990 art. 10 (Arg.) (1947) (“El escribano de registro es el funcionario público instituido para recibir y redactar y dar autenticidad, conforme a las leyes y en los casos que ellas autorizan, los actos y contratos que le fueran encomendados. Sólo a él compete el ejercicio del notariado.”). Cf. DEL. CODE ANN. tit. 29, ch. 43 (“Notaries Public”), § 4322(b) (2018) (“In taking a verification upon oath or affirmation, the notarial officer must determine, either from personal knowledge of identity or from satisfactory evidence of identity, that the person appearing before the officer and making the verification is the person whose true signature is on the statement verified.”).

evidently enhances the extent of official control over the private transactions before her.

The United States seems to stage a simpler process without any notarization. For instance, the latter concept features nowhere in the 119 pages of the applicable Delawarean code.<sup>42</sup> Incorporators may simply sign “the certificate of incorporation, . . . under penalties of perjury,” and file it.<sup>43</sup> The Secretary of State, who collects, stores, but probably seldom peruses the documents, may “refuse[] [them] [for] error, omission or [any] other imperfection.”<sup>44</sup> Not surprisingly, she faces “no liability” for “inaccurately, defectively, or erroneously”<sup>45</sup> executed filings.

Within governing regimes in Latin America and Europe, the mandatory notarial participation on substance seemingly signals the presence of the state. It appears to aim at assuring that citizens abide by the governmental mandate embodied in the enactments. In the U.S. model, individuals seem to embark upon a straightforward albeit somewhat bureaucratic operation pretty much on their own.

These dual diametrically dissimilar standpoints confront each other. In the first, the authorities apparently define each civic right before them and oversee its enforcement. In the second, they outwardly recognize it as stemming from an extra- or a pre-political source, whether liberty or efficiency, and as calling for vindication through self-help or -service.

The civil law seems to set itself apart on the rest of the formation formalities too. The Argentine Congress has distinguished two main routes to incorporate a business.<sup>46</sup> It has demanded a choice between them.<sup>47</sup>

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<sup>42</sup> See Del. Gen. Corp. L., §§ 1-619.

<sup>43</sup> *Id.* § 101(a) (“Any person, . . . may incorporate . . . a corporation . . . by filing . . . a certificate of incorporation which shall be executed, acknowledged and filed . . . .”); 103 (For execution, “[t]he certificate of incorporation . . . shall be signed by the incorporator.”); *id.* (The acknowledgement “requirement is satisfied by [t]he signature.”).

<sup>44</sup> *Id.* § 103 (g).

<sup>45</sup> *Id.*

<sup>46</sup> L. 19550 art. 165 (Arg.) (1984) (“La sociedad se constituye por instrumento público y por acto único o por suscripción pública.”).

<sup>47</sup> *Id.*

Most cleanly, the creation of the company and the acquisition of all the stock may occur at once though a “single act.”<sup>48</sup> The “founders,” “the signatories [before a notary] of the constitutive contract,”<sup>49</sup> must specify in it the terms, the classes and specific entitlements of shares, and the mechanics for the election of the directorial board and trustee panel.<sup>50</sup> They must include the legislatively indicated information—such as the identity of the shareholders, the organizational “denomination” and “domicile,” the “object,” the amount of capital, the “duration” of the venture, and diverse details on management, monitoring, and meetings—in the same “instrument,”<sup>51</sup> the equivalent of the U.S. “charter,” “certificate,” or “articles of incorporation.”<sup>52</sup>

The incorporators may or may not attach the bylaws,<sup>53</sup> known locally in Spanish as “the statute.”<sup>54</sup> To consummate the “constitution,”<sup>55</sup> they must docket the relevant documentation with the

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<sup>48</sup> *Id.* art. 166 (“[S]e constituye por acto único . . .”).

<sup>49</sup> *Id.* (“Todos los firmantes del contrato constitutivo se consideran fundadores.”) ; *id.* art. 165 (“La sociedad se constituye por instrumento público y por acto único . . .”).

<sup>50</sup> *Id.* arts. 166(1) (“Si se constituye por acto único, el instrumento de constitución contendrá . . . Respecto del capital social: la naturaleza, clases, modalidades de emisión y demás características de las acciones . . .”), 166(3) (“Si se constituye por acto único, el instrumento de constitución contendrá . . . La elección de los integrantes de los órganos de administración y de fiscalización, fijándose el término de duración en los cargos.”).

<sup>51</sup> *Id.* art. 11 (“El instrumento de constitución debe contener . . . : 1) El nombre, edad, estado civil, nacionalidad, profesión, domicilio y número de documento de identidad de los socios. 2) La razón social o la denominación, y el domicilio de la sociedad . . . 3) La designación de su objeto, que debe ser preciso y determinado; 4) El capital social, que deberá ser expresado en moneda argentina, y la mención del aporte de cada socio . . . 5) El plazo de duración, que debe ser determinado; 6) La organización de la administración, de su fiscalización y de las reuniones de socios . . .”).

<sup>52</sup> CHOPER, COFFEE, & GILSON, *supra* note 5, at 234 n.34.

<sup>53</sup> AGUINIS, *supra* note 16, at 280 (“Los estatutos de la sociedad anónima pueden o no integrar formalmente el acto fundacional . . .”).

<sup>54</sup> L. 19550 art. 68 (Arg.) (1984) (“el estatuto”).

<sup>55</sup> *Id.* art. 167 (Se “[c]onforma . . . la constitución” después de la inscripción por el “Juez de Registro.”).

Comptroller.<sup>56</sup> The latter verifies it and forwards it to the “Registry Judge.”<sup>57</sup>

Secondly, Argentina permits promoters to launch their concern by public subscription over a relatively prolonged period. To embark upon this journey, they must draft a signed and notarized “foundational program” and submit it to the aforementioned officeholders.<sup>58</sup> It should basically identify the promoting businesspersons, spell out the “basis of the bylaws,” inventory the sorts of stock, and reveal “the possible benefits and advantages that [the adventurers] have reserved for themselves.”<sup>59</sup> The legislation delineates the minimum requirements for the subscribers agreement,<sup>60</sup> as well as the duties of the bank placing the shares.<sup>61</sup>

The “deadline” for subscribing may not “exceed three months.”<sup>62</sup> If the effort fails due to insufficient committing investors, the banking institution must “immediately return” the deposited funds.<sup>63</sup> In case of success, the new corporation springs into existence with those who assumed a commitment as its stockholders. In the event of oversubscription, it must either “prorate,” or

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<sup>56</sup> *Id.* art. 167 (“El contrato constitutivo será presentado a la autoridad de contralor para verificar el cumplimiento de los requisitos legales y fiscales.”).

<sup>57</sup> *Id.* art. 167 (“Conformada la constitución, el expediente pasará al Juez de Registro, quien dispondrá la inscripción si la juzgara procedente.”).

<sup>58</sup> *Id.* art. 168 (“En la constitución por suscripción pública los promotores redactarán un programa de fundación por instrumento público o privado, que se someterá a la aprobación de la autoridad de contralor . . . .Aprobado el programa, deberá presentarse para su inscripción en el Registro Público de Comercio . . . .”); *id.* art. 170(5) (“Las firmas de los otorgantes deben ser autenticadas por escribano público u otro funcionario competente.”).

<sup>59</sup> *Id.* art. 170 (“El programa de fundación debe contener: 1) Nombre, edad, estado civil, nacionalidad, profesión, número de documento de identidad y domicilio de los promotores; 2) Bases del estatuto; 3) Naturaleza de las acciones: monto de las emisiones programadas, condiciones del contrato de suscripción y anticipos de pago a que obligan; . . . 5) Ventajas o beneficios eventuales que los promotores proyecten reservarse.”).

<sup>60</sup> *Id.* art. 172.

<sup>61</sup> *Id.* arts. 170(4), 178.

<sup>62</sup> *Id.* art. 171 (“El plazo de suscripción, no excederá de tres (3) meses . . . .”).

<sup>63</sup> *Id.* art. 173. (“No cubierta la suscripción en el término establecido, los contratos se resolverán de pleno derecho y el banco restituirá de inmediato a cada interesado, el total entregado, sin descuento alguno.”).



“increase” its capital, to accept all offers when it organizationally meets.<sup>64</sup>

Upon subscription, a comptrollership representative must chair the formative assembly with the “intervening bank” in attendance.<sup>65</sup> Shareholders collectively holding more than fifty percent of the stock must show up.<sup>66</sup> They must decide by majority, with the support of at least a third of total capital.<sup>67</sup> Though the bylaws may allow shares with up to fivefold the voting weight of ordinary stock,<sup>68</sup> each share entitles its holder to one ballot during this opening gathering.<sup>69</sup> Then, the investors officially “constitute the organization,” approve the promotion, as well as the “bylaws,” consider the value of in-kind payments, install the “directors” and “trustees,” or supervisory council, and so forth.<sup>70</sup>

Germany, in turn, boasts its own version of the first procedural path. The charter must supply information on the “founders,” “stock,” and “paid capital.” The bylaws must inform about the corporation’s “name,” “domicile,” “object,” and “managing board.”<sup>71</sup>

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<sup>64</sup> *Id.* art. 174 (“Cuando las suscripciones excedan . . . el monto previsto, la asamblea constitutiva decidirá su reducción a prorrata o aumentará el capital hasta el monto de las suscripciones.”).

<sup>65</sup> *Id.* art. 176 (“La asamblea constitutiva debe celebrarse con presencia del banco interviniente y será presidida por un funcionario de la autoridad de contralor . . .”).

<sup>66</sup> *Id.* art. 176 (“La asamblea constitutiva . . . quedará constituida con la mitad más una de las acciones suscriptas.”).

<sup>67</sup> *Id.* art. 177 (“Las decisiones se adoptarán por la mayoría de los suscriptores presentes que representen no menos de la tercera parte del capital suscrito con derecho a voto . . .”).

<sup>68</sup> *Id.* art. 216 (“Cada acción ordinaria da derecho a un voto. El estatuto puede crear clases que reconozcan hasta cinco votos por acción ordinaria.”).

<sup>69</sup> *Id.* art. 177 (“Cada suscriptor tiene derecho a tantos votos como acciones haya suscrito . . .”).

<sup>70</sup> *Id.* art. 179 (“La asamblea resolverá . . . sobre los siguientes temas que deben formar parte del orden del día: 1) Gestión de los promotores 2) Estatuto social 3) Valuación provisional de los aportes no dinerarios, en caso de existir . . . 4) Designación de directores y síndicos o consejo de vigilancia en su caso; 5) Determinación del plazo de integración del saldo de los aportes en dinero; 6) Cualquier otro asunto que el banco considere de interés incluir en el orden del día . . .”).

<sup>71</sup> AktG § 23(2) (Ger.) (1965) (“Feststellung der Satzung”) (“In der Urkunde sind anzugeben 1. die Gründer; 2. bei Nennbetragsaktien der Nennbetrag, bei Stückaktien die Zahl, der Ausgabebetrag . . . ; 3. der eingezahlte

They must break down the various shares authorized yet may not accord any of them more than one vote.<sup>72</sup>

After chartering the venture, the incorporators “establish” it through their “assumption of all shares.”<sup>73</sup> They must additionally craft a “foundational report.”<sup>74</sup> The document must account for “the appropriateness of the contributions in kind and of those in exchange for assets.”<sup>75</sup> It must disclose any advantaging of managers or councilors.<sup>76</sup>

Coincidentally, these corporate officials “must review the execution of the foundation.”<sup>77</sup> Moreover, they must, in concomitance with whoever founded the company, judicially “report” it “for inscription in the commercial register.”<sup>78</sup> The registering “Court” must corroborate that “the organization’s establishment and registration unfolded appropriately.”<sup>79</sup>

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Betrag des Grundkapitals.”). *See also id.* § 23(3) (“Die Satzung muß bestimmen 1. die Firma und den Sitz der Gesellschaft; 2. den Gegenstand des Unternehmens; . . . 3. die Höhe des Grundkapitals; 4. die Zerlegung des Grundkapitals entweder in Nennbetragsaktien oder in Stückaktien . . . ; 6. die Zahl der Mitglieder des Vorstands . . .”).

<sup>72</sup> *Id.* § 12(2) (“Mehrstimmrechte sind unzulässig.”).

<sup>73</sup> *Id.* § 29 (“Mit der Übernahme aller Aktien durch die Gründer ist die Gesellschaft errichtet.”).

<sup>74</sup> *Id.* § 32(1) (“Die Gründer haben einen schriftlichen Bericht über den Hergang der Gründung zu erstatten (Gründungsbericht).”).

<sup>75</sup> *Id.* § 32(2) (“Im Gründungsbericht sind die wesentlichen Umstände darzulegen, von denen die Angemessenheit der Leistungen für Sacheinlagen oder Sachübernahmen abhängt.”).

<sup>76</sup> *Id.* § 32(3) (“Im Gründungsbericht ist ferner anzugeben, ob und in welchem Umfang bei der Gründung für Rechnung eines Mitglieds des Vorstands oder des Aufsichtsrats Aktien übernommen worden sind und ob und in welcher Weise ein Mitglied des Vorstands oder des Aufsichtsrats sich einen besonderen Vorteil oder für die Gründung oder ihre Vorbereitung eine Entschädigung oder Belohnung ausbedungen hat.”).

<sup>77</sup> *Id.* § 33(1) (“Die Mitglieder des Vorstands und des Aufsichtsrats haben den Hergang der Gründung zu prüfen.”).

<sup>78</sup> *Id.* § 36(1) (“Die Gesellschaft ist bei dem Gericht von allen Gründern und Mitgliedern des Vorstands und des Aufsichtsrats zur Eintragung in das Handelsregister anzumelden.”).

<sup>79</sup> *Id.* § 38(1) (“Das Gericht hat zu prüfen, ob die Gesellschaft ordnungsgemäß errichtet und angemeldet ist.”).

German promoters “must appoint the supervisory council . . . and the annual auditor” for the first year.<sup>80</sup> They must do so with “notarial authentication.”<sup>81</sup> The councilors designate “the directorate.”<sup>82</sup>

Expectedly, Delaware streamlines the whole routine: “Any [natural or juridical] person, . . . singly or jointly with others, . . . may incorporate or organize a corporation . . . by filing” the charter.<sup>83</sup> This instrument must mainly contain the enterprise’s “name,” its “address,” the “nature of [its] business or purposes,” the types and numbers of its “stock,” and the contact information of its founders.<sup>84</sup>

“After the filing of the certificate . . . , a majority of the incorporators” of the board must “call” an organizational “meeting.”<sup>85</sup> It must notify everybody who may attend, except whoever has waived notification. The attendees must “adopt[] bylaws, elect[] directors” and “officers” to any vacancies, “do[] any . . . further acts to perfect the organization,” “and transact[]” any other matter that “may [crop]” up.<sup>86</sup> Likewise, “most states” require promoters to meet to these ends.<sup>87</sup>

German and the U.S. lawmakers appear not to have legislated the second procedure. Their French colleagues have, though.<sup>88</sup> They may have influenced the Argentine approach. Of course, a company in Germany or the United States might want to solicit and capitalize investments from subscribers. In all probability, it would do so on its own rather than under the watch of the administration.

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<sup>80</sup> *Id.* § 30(1) (“Die Gründer haben den ersten Aufsichtsrat der Gesellschaft und den Abschlußprüfer für das erste Voll- oder Rumpfgeschäftsjahr zu bestellen.”).

<sup>81</sup> *Id.* (“Die Bestellung bedarf notarieller Beurkundung.”).

<sup>82</sup> *Id.* § 30(4) (“Der Aufsichtsrat bestellt den ersten Vorstand.”).

<sup>83</sup> *See, e.g.,* Del. Gen. Corp. L., § 101(a).

<sup>84</sup> *Id.* § 102(a)(3).

<sup>85</sup> *See, e.g., id.* § 108(a).

<sup>86</sup> *Id.*

<sup>87</sup> CHOPER, COFFEE, & GILSON, *supra* note 5, at 237.

<sup>88</sup> *See* CD. COM. Legislative Part, bk. II, tit. II, ch. V, § 1, Subsection 1 (“De la constitution avec offre au public”), arts. L225-2-L225-11-1 (Fr.) (“Il peut être stipulé par les statuts de toute société anonyme que celle-ci est régie par les dispositions de la présente sous-section.”).

To wrap up: The Latin American and Continental European paradigm, as opposed to its U.S. counterpart, engages functionaries, whether from the Comptroller's Office or the judiciary, in the foundational exertions, as well as notarization attorneys. In addition, it rests on a detailed codification instead of an open-ended one waiting for judicial interpretation. By and large, the state intervenes itself, in flesh and soul, not through intermediaries.

#### INCORPORATORS

In Argentina, incorporators must attach the label "*sociedad anónima*" (literally "anonymous society") or "S.A." to their selected name.<sup>89</sup> In Germany, they must write in the expression "'*Aktiengesellschaft* [stock organization]' or any generally understandable abbreviation."<sup>90</sup> Somewhat similarly, their U.S. counterparts must typically append a word such as "incorporated" at the end when naming the enterprise.<sup>91</sup>

Omitting the reference formerly exposed Argentine shareholders to collective liability without limits.<sup>92</sup> In all likelihood, the notarial control would have caught and prevented any such mishap in the first place. With the passage of the 2016 Civil Code, the legislature amended the relevant specialized Article and withdrew the mention of a sanction for the omission.<sup>93</sup> It thus retreated from its earlier formalistic and draconian stance, tacitly encouraging a case-by-case approach.

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<sup>89</sup> L. 19550 art. 164 (Arg.) (1984) ("La denominación social . . . debe contener la expresión 'sociedad anónima', su abreviatura o la sigla S.A.").

<sup>90</sup> AktG § 4 (Ger.) (1965) ("Firma") ("Die Firma der Aktiengesellschaft muß . . . die Bezeichnung 'Aktiengesellschaft' oder eine allgemein verständliche Abkürzung dieser Bezeichnung enthalten.").

<sup>91</sup> See, e.g., Del. Gen. Corp. L., § 102(1) ("The name of the corporation . . . shall contain one of the words 'association,' 'company,' 'corporation,' 'club,' 'foundation,' 'fund,' 'incorporated,' 'institute,' 'society,' 'union,' 'syndicate,' or 'limited,' or one of the abbreviations . . .").

<sup>92</sup> L. 19550 art. 164 (Arg.) (1984) (as originally enacted) ("La omisión de esta mención hará responsables ilimitada y solidariamente a los representantes de la sociedad juntamente con ésta, por los actos que celebren en esas condiciones.").

<sup>93</sup> See CD. CIV. (Arg.) (2016), Annex II, § 2.22.

Prior to the completion of a single-act foundation in Argentina, the directorial officials may only obligate their company on undertakings either needed for “its constitution” or linked to the “organizational object” and “expressly” contemplated in the “constitutive act.”<sup>94</sup> Nevertheless, they must sustain joint and unlimited responsibility, along with the “founders” and the prospective business, for such exertions.<sup>95</sup> So must all these parties, together with anyone else implicated, for any other actions in connection with the incorporation effort.<sup>96</sup>

Upon registering the constituting “contract,” the concern responds all by itself for “necessary” and contractually consented-to promotional dealings.<sup>97</sup> Moreover, the directorate may resolve that the corporation embrace any other engagements “up to three months after registration.”<sup>98</sup> Any such embracement does not, however, exempt the engagers, founders, or “directors” from their own answerability.<sup>99</sup>

Correlatively, the applicable Argentine statute pronounces “promoters jointly and unlimitedly liable” for any transaction prior

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<sup>94</sup> L. 19550 art. 183 (Arg.) (1984) (“Los directores solo tienen facultades para obligar a la sociedad respecto de los actos necesarios para su constitución y los relativos al objeto social cuya ejecución durante el período fundacional haya sido expresamente autorizada en el acto constitutivo.”).

<sup>95</sup> *Id.* art. 183 (“Los directores, los fundadores y la sociedad en formación son solidaria e ilimitadamente responsables por estos actos mientras la sociedad no esté inscripta.”).

<sup>96</sup> *Id.* art. 183 (“Por los demás actos cumplidos antes de la inscripción serán responsables ilimitada y solidariamente las personas que los hubieran realizado y los directores y fundadores que los hubieren consentido.”).

<sup>97</sup> *Id.* art. 184 (“Inscripto el contrato constitutivo, los actos necesarios para la constitución y los realizados en virtud de expresa facultad conferida en el acto constitutivo, se tendrán como originariamente cumplidos por la sociedad. Los promotores, fundadores y directores quedan liberados frente a terceros de las obligaciones emergentes de estos actos.”).

<sup>98</sup> *Id.* art. 184 (“El directorio podrá resolver, dentro de los tres (3) meses de realizada la inscripción, la asunción por la sociedad [de] las obligaciones resultantes de los demás actos cumplidos antes de la inscripción, dando cuenta a la asamblea ordinaria.”).

<sup>99</sup> *Id.* art. 184 (“La asunción de estas obligaciones por la sociedad, no libera de responsabilidad a quienes las contrajeron, ni a los directores y fundadores que los consintieron.”).

to a promotion by subscription.<sup>100</sup> Thereafter, the company may “assume any obligation legitimately undertaken” by them and “reimburse them” for any essential expenditure.<sup>101</sup> It may repay them for the rest upon obtaining authorization when the investors first meet.<sup>102</sup>

Likewise, “whoever acts on behalf of [a stock issuing German business] before” it registers renders herself personally accountable.<sup>103</sup> Nonetheless, it may accept any ensuing charges and step in her shoes up to ninety days after its registration.<sup>104</sup> All the same, the bylaws must integrate, for adoption, any “contract on special advantages, formation outlay, contribution in kind, or asset acquisition.”<sup>105</sup>

In Delaware, the “the . . . incorporators . . . manage the affairs of the corporation and may do whatever is necessary and proper to perfect the organization [until] the election of” the board.<sup>106</sup> In light of this language, they could plausibly recover their expenses even without corporate consent. Presumably, the incorporated entity may voluntarily agree to pay them back for reasonably related though unnecessary payments. On the other hand, it could face legitimate resistance on disbursements enjoying no such reasona-

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<sup>100</sup> *Id.* 182 (“En la constitución sucesiva, los promotores responden ilimitada y solidariamente por las obligaciones contraídas para la constitución de la sociedad . . .”).

<sup>101</sup> *Id.* (“Una vez inscripta, la sociedad asumirá las obligaciones contraídas legítimamente por los promotores y les reembolsará los gastos realizados, si su gestión ha sido aprobada por la asamblea constitutiva o si los gastos han sido necesarios para la constitución.”).

<sup>102</sup> *Id.*

<sup>103</sup> AktG § 41(1) (Ger.) (1965) (“Wer vor der Eintragung der Gesellschaft in ihrem Namen handelt, haftet persönlich; handeln mehrere, so haften sie als Gesamtschuldner.”).

<sup>104</sup> *Id.* § 41(2) (“Übernimmt die Gesellschaft eine vor ihrer Eintragung in ihrem Namen eingegangene Verpflichtung durch Vertrag mit dem Schuldner in der Weise, daß sie an die Stelle des bisherigen Schuldners tritt, so bedarf es zur Wirksamkeit der Schuldübernahme der Zustimmung des Gläubigers nicht, wenn die Schuldübernahme binnen drei Monaten nach der Eintragung der Gesellschaft vereinbart und dem Gläubiger von der Gesellschaft oder dem Schuldner mitgeteilt wird.”).

<sup>105</sup> *Id.* § 41(3) (“Verpflichtungen aus nicht in der Satzung festgesetzten Verträgen über Sondervorteile, Gründungsaufwand, Sacheinlagen oder Sachübernahmen kann die Gesellschaft nicht übernehmen.”).

<sup>106</sup> *See, e.g., Del. Gen. Corp. L., § 107.*

ble relationship and therefore coming across as ultra vires, or against its powers.

If unable to persuade her fellows with arguments, a stockholder resisting along these lines could sue and “enjoin” the enterprise.<sup>107</sup> She could so proceed despite an authorizing agreement.<sup>108</sup> The concern itself could lodge a complaint against the responsible officers or board members “for loss or damage.”<sup>109</sup> Ultimately, the “Attorney General” could request a forced dissolution or an injunction against any transacted yet “unauthorized business.”<sup>110</sup>

The details differ between and within the traditions on how to reimburse costs connected to the promotion. U.S. jurisdictions seem to stand alone in allowing the concern implicitly to adopt promotional commitments.<sup>111</sup> Iowa’s top tribunal has insisted that “[t]he adoption or ratification . . . need not be shown by express acts, but it may be established by implication.”<sup>112</sup> Coincidentally, conceptualizing the juridical person as a ratifier under agency theory entails complications in this context. Since the company, the putative principal, “was not in existence at the time of the promoter’s [(or agent’s)] contract . . . , it could not [have] then authorize[d]” the contractual pledge.<sup>113</sup> One should perhaps portray it instead as an adopter.

Apparently universally, an incorporator who has not adequately accomplished the process of incorporation may normally not use

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<sup>107</sup> See, e.g., *id.* § 124(1) (“[L]ack of capacity or power may be asserted [i]n a proceeding by a stockholder against the corporation to enjoin the doing of any act . . . by or to the corporation.”).

<sup>108</sup> See, e.g., *id.* § 124(1) (“If the unauthorized acts . . . sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may [equitably] set aside and enjoin the performance of such contract . . .”).

<sup>109</sup> See, e.g., *id.* § 124(2) (“[L]ack of capacity or power may be asserted [i]n a proceeding by the corporation, . . . against an incumbent or former officer or director of the corporation, for loss or damage . . .”).

<sup>110</sup> See, e.g., *id.* § 124(3) (“[L]ack of capacity or power may be asserted [i]n a proceeding by the Attorney General to dissolve the corporation, or to enjoin the corporation from the transaction of unauthorized business.”).

<sup>111</sup> See, e.g., *Kridelbaugh v. Aldrehn Theatres Co.*, 191 N.W. 803, 804 (Iowa 1923) (“[T]he ratification or adoption of a contract by a corporation through its board of directors may be implied.”).

<sup>112</sup> *Id.*

<sup>113</sup> CHOPER, COFFEE, & GILSON, *supra* note 5, at 283.

the corporate form on pain of full accountability. In the United States (maybe uniquely), she might get off the hook by vesting her venture with “de jure” or “de facto” status through, respectively, “substantial” or attempted, good-faith “compliance.”<sup>114</sup> In the former scenario, “courts will recognize [the organization] for all purposes.”<sup>115</sup> In the latter, they will do as much “except [against] the state,” which may have the enterprise terminated in a “quo warranto proceeding.”<sup>116</sup>

Nevertheless, U.S. state legislators have bent over backward to abolish this doctrinal legacy.<sup>117</sup> In the next breath, they have occasionally reclaimed the notion “of corporation by estoppel.”<sup>118</sup> Accordingly, the legitimacy of an entity “claiming a charter under color of law . . . cannot be collaterally attacked by persons who have dealt with it as” such.<sup>119</sup>

Such looseness might reflect the flexibility or user-friendliness supposedly characteristic of the common law. More likely, it might show the ability and willingness of U.S. judges to adjudicate equitably, whether against the mandate or with the encouragement of lawmakers. In contrast, Latin America and Europe appear to rely religiously on the statutory particulars and to keep the bench on a short leash.

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<sup>114</sup> *Id.* at 238-39.

<sup>115</sup> *Id.* at 238.

<sup>116</sup> *Id.* at 239.

<sup>117</sup> *Sherwood & Roberts-Oregon, Inc. v. Alexander* 525 P.2d 135, 138 (Or. 1974) (“[T]he statute [in force] was intended to abolish the common-law doctrine of de facto corporations.”); *Don Swann Sales Corp. v. Echols*, 287 S.E.2d 577, 578 (Ga. 1981) (“The Business Corporation Code of Georgia has eliminated the doctrine of de facto corporations as applied to defectively organized corporations . . . .”); *Thompson & Green Machinery Co. v. Music City Lumber Co.*, 683 S.W.2d 340, 344 (Tenn. 1984) (“[T]he Tennessee General Assembly, by passage of the Tennessee General Corporations Act of 1968, abolished the concept of de facto incorporation . . . .”).

<sup>118</sup> *Don Swann*, 287 S.E.2d at 578 (“However, Code Ann. § 22-5103 has retained the doctrine of corporation by estoppel.”). *But cf. Thompson & Green Machinery*, 683 S.W.2d at 345 (“We are of the opinion that the doctrine of corporation by estoppel met its demise by the enactment of the Tennessee General Corporations Act of 1968.”).

<sup>119</sup> *Don Swann*, 287 S.E.2d at 578 (quoting Business Corporation Code of Georgia Ann. § 22-5103).



## PIERCING

An Argentine adjudicator must sometimes refuse to restrict responsibility even though the incorporators have fully fulfilled the foundation formalities.<sup>120</sup> She must then (in U.S. jargon) “pierce the corporate veil.”<sup>121</sup> Accordingly, investors become entirely liable for their firm’s debts.

The relevant statute renders “shareholders and controllers” jointly and unlimitedly responsible for running their venture inconsistently with the stated business “purposes,” “the law,” “the public order” or “good faith,” “or” to the detriment of “third parties.”<sup>122</sup> Perhaps it should have hooked up the finishing phrase with the conjunction ‘and’ instead. After all, the damage to others should amount to not a separate justification to disregard the corporative form but an essential element to stake a claim. Otherwise, the bench could confront countless complaints. In the Connecticut top tribunal’s phrasing of the “instrumentality rule” in this area, the plaintiff must prove “[c]ontrol,” a “wrong or fraud,” “and” an “unjust loss.”<sup>123</sup>

The German code, for its part, does not contemplate these causes. It leaves them and their treatment to the judicial branch. The latter has enunciated, expectedly in the context of relatively cozy limited-liability companies, that “the prospect of personal accountability surfaces whenever the demarcation between organizational and private wealth blurs through nontransparent bookkeeping or other means.”<sup>124</sup> It has elaborated that in the midst

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<sup>120</sup> See generally L. 19550 art. 54 (Arg.) (1984).

<sup>121</sup> See, e.g., *Peacock v. Thomas*, 516 U.S. 349, 352 (1996) (“The District Court ultimately agreed to pierce the corporate veil and entered judgment . . .”).

<sup>122</sup> L. 19550 art. 54 (Arg.) (1984) (“La actuación de la sociedad que encubra la consecución de fines extrasocietarios, constituya un mero recurso para violar la ley, el orden público o la buena fe o para frustrar derechos de terceros, se imputará directamente a los socios o a los controlantes que la hicieron posible, quienes responderán solidaria e ilimitadamente por los perjuicios causados.”).

<sup>123</sup> *Zaist v. Olson*, 227 A.2d 552, 558 (Conn. 1967)

<sup>124</sup> Bundesgerichtshof [BGH] [Highest Federal Ordinary Court], Nov. 14, 2005, II ZR 178/03, ¶ 14 (“Nach der Rechtsprechung des Senates kommt eine persönliche Haftung . . . in Betracht, wenn die Abgrenzung zwischen Gesellschafts- und Privatvermögen durch eine undurchsichtige Buchführung oder auf andere Weise verschleiert worden ist . . .”).

of such blur, “the capital-protection prescriptions, whose observance constitutes an indispensable quid pro quo for the limitation of liability to the organization’s assets, cannot function.”<sup>125</sup>

Consequently, the judiciary in Germany has sided with aspirant piercers “on account of misuse of the [concern’s] juridical form.”<sup>126</sup> It has focused primordially on “cases of commingling of income.”<sup>127</sup> The precedents do not seem to extrapolate to a condemnation of any stockholder who fraudulently or illegally misuses the institution.

Already in 1906, the Circuit Court for the Eastern District of Wisconsin did not itself shy away from a generalized formulation, famous throughout the United States:

If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity . . . until sufficient reason to the contrary appears; but, when the [corporate structure] is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.<sup>128</sup>

Hence, the passage opens with a presumption against piercing and ends up formulating the rebuttal in terms that recall those of Argentina’s legislation. On the flip side of the coin and as pronounced by New York’s forum of last resort, investors “clearly

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<sup>125</sup> *Id.* (“[D]eshalb [können] die Kapitalerhaltungsvorschriften, deren Einhaltung ein unverzichtbarer Ausgleich für die Haftungsbeschränkung auf das Gesellschaftsvermögen . . . ist, nicht funktionieren . . .”).

<sup>126</sup> BGH, July 16, 2007, Trihotel, II ZR 3/04, ¶ 27 (“Durchgriffshaftung wegen Missbrauchs der Rechtsform der GmbH”) (citing BGH, July 24, 2002, II ZR 300/00).

<sup>127</sup> *Id.* (“Rechtsfolge wäre nämlich . . . eine grundsätzlich unbeschränkte Durchgriffs-Außenhaftung gegenüber den Gläubigern . . . wie sie der Senat im Übrigen weiterhin für die Fälle der Vermögensvermischung bejaht . . .”).

<sup>128</sup> *United States v. Milwaukee Refrigerator Trans. Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (“The veil separating corporations and their shareholders may be pierced in some circumstances . . . The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances.”)

[stay] within the limits of . . . public policy” in the absence of “fraud, misrepresentation [or] illegality.”<sup>129</sup>

Consistently, Delawarean triers will yield to a would-be piercer “in the interest of justice, [vis-à-vis] such matters as fraud, contravention of law or contract, public wrong, or [favorable] equitable consideration[s]”<sup>130</sup> Nonetheless, they will presumptively block her attempt. Indeed, “persuading” them on this front generally boils down to “a difficult task.”<sup>131</sup> It demands bearing a bit of a burden.<sup>132</sup>

The Argentine and German enactments do not explicitly presume limited liability in this domain. Still, they do so implicitly through their respective inaugural assertions: One, “[T]he shareholders limit their responsibility upon paying for the subscribed shares.”<sup>133</sup> Two, “Creditors may only hold organizational assets accountable for the organization’s commitments.”<sup>134</sup>

Pertinently, the ordinarily highest organ of adjudication in Germany has worried about overextending a “fundamentally unrestricted external accountability.”<sup>135</sup> It has warned that doing so “would risk missing the mark and, against the legislative intent, pulling the rug out from under the [juridical] formation.”<sup>136</sup> Therefore, the quoted decision (*Trihotel*) addresses an “impairment of the enterprise’s income”—namely, a misappropriation—as a fault-based tort in order to “attenuate the consequences” and “avoid

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<sup>129</sup> *Bartle v. Home Owners Cooperative, Inc.*, 127 N.E.2d 832 (N.Y. 1955).

<sup>130</sup> *Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 632 (Del. 1968).

<sup>131</sup> *Harco Nat’l Ins. Co. v. Green Farms, Inc.*, 1989 Del. Ch. LEXIS 114, No. Civ. A. 1131, at 10 (Del. Ch. Sept. 19, 1989).

<sup>132</sup> *Id.*

<sup>133</sup> L. 19550 art. 163 (Arg.) (1984) (“Los socios limitan su responsabilidad a la integración de las acciones suscriptas.”).

<sup>134</sup> AktG § 1(1) (Ger.) (1965) (“Für die Verbindlichkeiten der Gesellschaft haftet den Gläubigern nur das Gesellschaftsvermögen.”).

<sup>135</sup> BGH, July 16, 2007, *Trihotel*, II ZR 3/04, ¶ 21 (“Versagen die[] Grundregeln des Kapitalschutzes . . . , so kommt erst dann eine durchgriffsrechtlich strukturierte, grundsätzlich unbeschränkte Außenhaftung wegen Verlustes des Haftungsprivilegs . . . zum Zuge.”).

<sup>136</sup> *Id.* ¶ 27 (“[E]ine derartige uneingeschränkte Erfolgshaftung . . . liefe [Gefahr], in einer Vielzahl von Fällen weit über das Ziel hinauszuschießen und der Gesellschaftsform der GmbH - entgegen den Zielen des Gesetzgebers - den Boden zu entziehen.”).

overreactions.”<sup>137</sup> It posits the possibility of evidencing that “a proper deportment” by the defendant would have produced “a slighter harm” and charging her merely with the restitution of the difference.<sup>138</sup>

The approach in Argentina itself diverge from its U.S. counterpart in further respects. Concretely, it treats inconsistency with the declared institutional objective as a ground for ignoring the organizational form. Surely, this divergence derives to a significant extent from the fact that such declaration plays a prominent role on Argentine soil, as opposed to the United States. On the former, founders must define a “precise and definite” corporative goal.<sup>139</sup> In the latter, they must no longer definitively deliver a definition of the sort.<sup>140</sup> Articulating the aim “to engage in any lawful act or activity for which corporations may be organized” suffices.<sup>141</sup> Delaware started accepting such an ample articulation in 1967.<sup>142</sup> Thus, it set a trend that has spread across the nation.<sup>143</sup>

On this ultimate point, the German system resembles that of Argentina. It commands “the bylaws [to] determine . . . the enter-

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<sup>137</sup> *Id.* ¶ 21 (“[D]ie eingriffsbedingte Schädigung des Gesellschaftsvermögens . . . kann aber schließlich in eine verschuldensabhängige Schadensersatzhaftung [zur Abmilderung . . . und zur Vermeidung von Überreaktionen] einmünden . . .”).

<sup>138</sup> *Id.* (“[D]em Gesellschafter [wird] die Möglichkeit eröffnet . . . , den Nachweis zu führen, dass bei ordnungsgemäßigem Vorgehen ein geringerer Schaden entstanden wäre, der dann nur in diesem Umfang auszugleichen ist.”).

<sup>139</sup> L. 19550 art. 11(3) (Arg.) (1984) (“La designación de su objeto, que debe ser preciso y determinado . . .”).

<sup>140</sup> *See* *Liggett Co. v. Lee*, 288 U.S. 517, 555 (1933) (“Permission to incorporate for ‘any lawful purpose’ was not common until 1875.”). The Model Business Corporation Act requires a purpose clause only when the corporation decides to impose limits. *See* MODEL BUS. CORP. ACT § 3.01(a) (2016) (“Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.”).

<sup>141</sup> Del. Gen. Corp. L., § 102(3).

<sup>142</sup> CHOPER, COFFEE, & GILSON, *supra* note 5, at 65.

<sup>143</sup> *Id.* *See also id.* at 239 n.35 (“A large majority of states permit such an ‘all-purpose’ clause, but about one-sixth still require a reasonably definite statement of purposes although probably allowing it to be followed by a general ‘all-purpose’ provision.”).

prise's object."<sup>144</sup> "For industrial and commercial" companies, its command continues, "the types of manufactured and traded products and goods should be more closely specified."<sup>145</sup>

However, Germany's scheme appears not to envisage a termination of investors' immunity as a penalty for operating outside the determination or specification. It barely bids "any stockholder or member of the directorate or supervisory council to sue to invalidate" organizations that proclaim no end at all or do so invalidly.<sup>146</sup> Presumably, the suitor may parallelly proceed against managers and councilors for lack of prudence and conscientiousness in directing, instigating, or condoning the invalidities.

In conclusion, Argentine lawmakers have characteristically codified the action to dismantle a corporate façade. Their German colleagues seem to have shunned such codification. As a result, they have inadvertently or intentionally invited the judge to do the honors. In the face of the main divide between civil and common law, Argentina and the U.S. jurisdictions have aligned as expected. Germany has not.

#### GOVERNANCE

The Argentine regime exhibits its civil-law face most conspicuously in the hierarchical structure it prescribes for companies. It contemplates, generally along German lines, not a unitary but instead a two-tier corporate governance. Publicly incorporated entities must institute a directorate and either a supervisory council or a panel of trustees. They must avoid any overlap in membership between the directorial and the control contingent. To boot, the

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<sup>144</sup> AktG § 23(3) (Ger.) (1965) ("Die Satzung muß bestimmen . . . 2. den Gegenstand des Unternehmens . . .").

<sup>145</sup> *Id.* § 23(3) ("[N]amentlich ist bei Industrie- und Handelsunternehmen die Art der Erzeugnisse und Waren, die hergestellt und gehandelt werden sollen, näher anzugeben . . .").

<sup>146</sup> *Id.* § 275(1) ("Enthält die Satzung keine Bestimmungen . . . über den Gegenstand des Unternehmens oder sind die Bestimmungen der Satzung über den Gegenstand des Unternehmens nichtig, so kann jeder Aktionär und jedes Mitglied des Vorstands und des Aufsichtsrats darauf klagen, daß die Gesellschaft für nichtig erklärt werde.").

latter may not sit directors, administrators or employees of the establishment.<sup>147</sup>

Article 255 of the applicable statute enunciates that the board will run the venture. It reads, “A directorate of one or more members [inducted] by the shareholders or by the [councilors] shall manage” the concern.<sup>148</sup> Besides, the directorial chairperson speaks for the enterprise with exclusivity, except when the bylaws authorize her codirectors too.<sup>149</sup>

Almost identically, Germany’s statutory framers have obliged the directorate, composed “of one or various persons,”<sup>150</sup> to “administer [its] organization under its own responsibility.”<sup>151</sup> Somewhat differently, however, they have charged it, as a unit, with representing the firm “in and out of court.”<sup>152</sup> In particular, its members, when they surpass two in number, must assume the representation collectively, “unless the bylaws declare otherwise.”<sup>153</sup>

Delaware equally entrusts the directorial board, which “shall consist of 1 or more members,”<sup>154</sup> with the direction of the “business and affairs of [the] corporation.”<sup>155</sup> It seems not to posit a default rule on the representative role. Presumably the charter must settle the matter. Other U.S. jurisdictions have held that the occu-

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<sup>147</sup> L. 19550 arts. 286, 280 (Arg.) (1984) (“No pueden ser síndicos: . . . (2) Los directores, gerentes y empleados de la misma sociedad o de otra controlada o controlante . . . .”) (“El estatuto podrá organizar un consejo de vigilancia . . . . Se aplicará[] [el] artículo[] 286 . . . .”).

<sup>148</sup> *Id.* art. 255 (“La administración está a cargo de un directorio compuesto de uno o más directores designados por la asamblea de accionistas o el consejo de vigilancia, en su caso.”).

<sup>149</sup> *Id.* art. 268 (“La representación de la sociedad corresponde al presidente del directorio.”).

<sup>150</sup> AktG § 76(2) (Ger.) (1965) (“Der Vorstand kann aus einer oder mehreren Personen bestehen.”).

<sup>151</sup> *Id.* § 76(1) (“Der Vorstand hat unter eigener Verantwortung die Gesellschaft zu leiten.”).

<sup>152</sup> *Id.* § 78(1) (“Der Vorstand vertritt die Gesellschaft gerichtlich und außergerichtlich.”).

<sup>153</sup> *Id.* § 78(2) (“Besteht der Vorstand aus mehreren Personen, so sind, wenn die Satzung nichts anderes bestimmt, sämtliche Vorstandsmitglieder nur gemeinschaftlich zur Vertretung der Gesellschaft befugt.”).

<sup>154</sup> Del. Gen. Corp. L., § 141(b).

<sup>155</sup> *Id.* § 141(a).

pier of the directorial presidency may “act in behalf of” the undertaking only with “authorization” from her fellows.<sup>156</sup>

The constituency of holders of stock in Argentina may instate “between three and fifteen members” into a supervisory council.<sup>157</sup> It may reelect them, or remove them at will.<sup>158</sup> A candidate for office must herself own shares in the enterprise.<sup>159</sup> She thus differs evidently from her German counterparts as well as definitely from Delawarean directors, who “need not be stockholders.”<sup>160</sup>

Argentine councilors mainly “supervise the directorate’s performance” and may appoint its membership.<sup>161</sup> They “may examine the organizational accounting, goods, and bookkeeping whether directly or through” external expertise.<sup>162</sup> Beyond reporting at least “every trimester,”<sup>163</sup> the oversight organ must arrange for an “annual audit” and “submit” the results to the investors.<sup>164</sup> It may “convene” the latter and form a committee to explore “any issue” raised by them or by itself.<sup>165</sup>

Germany’s version of this institution might have influenced its equivalent in Argentina given its similarities: It must feature a trio

<sup>156</sup> *Lloydona Peters Enters. v. Dorius*, 658 P.2d 1209, 1211 (Utah 1983).

<sup>157</sup> See L. 19550 art. 280 (Arg.) (1984) (“El estatuto podrá organizar un consejo de vigilancia, integrado por tres a quince accionistas designados por la asamblea . . .”).

<sup>158</sup> *Id.* (“El . . . consejo de vigilancia [estará] integrado por . . . accionistas designados por la asamblea . . . , reelegibles y libremente revocables.”).

<sup>159</sup> *Id.* (“El . . . consejo de vigilancia [estará] integrado por accionistas . . .”).

<sup>160</sup> Del. Gen. Corp. L., § 141(b).

<sup>161</sup> L. 19550 arts. 281(a), 281(d) (Arg.) (1984) (“Son funciones del consejo de vigilancia: (a) Fiscalizar la gestión del directorio . . . (d) La elección de los integrantes del directorio, cuando lo establezca el estatuto, sin perjuicio de su revocabilidad por la asamblea.”).

<sup>162</sup> *Id.* art. 281(a) (“Puede examinar la contabilidad social, los bienes sociales, realizar arquezos de caja, sea directamente o por peritos que designe . . .”).

<sup>163</sup> *Id.* art. 281(a) (“Por lo menos trimestralmente, el directorio presentará al consejo informe escrito acerca de la gestión social . . .”).

<sup>164</sup> *Id.* art. 283 (“[Habrà] auditoría anual, contratada por el consejo de vigilancia, y su informe sobre estados contables se someterá a la asamblea . . .”).

<sup>165</sup> *Id.* art. 281(b), 281(f) (“(b) Convocará la asamblea cuando estime conveniente o lo requieran accionistas.”) (“(f) Designar una o más comisiones para investigar o examinar cuestiones o denuncias de accionistas o para vigilar la ejecución de sus decisiones.”).

of members as a minimum.<sup>166</sup> Its duties boil down to the supervision of “management.”<sup>167</sup> They extend to hiring an “auditor” annually and convening “a shareholder meeting” whenever “the organization’s well-being so demands.”<sup>168</sup>

Likewise, the council may “review and proof the [corporation’s] books, writings, and assets” as well as recruit individuals within its ranks “or special experts for specific tasks.”<sup>169</sup> It may “at any time” requisition from the directors “a report on” the entity’s doings.<sup>170</sup> Its “members” may not belong to the directorate.<sup>171</sup> Nor may they, as a group, undertake “managerial activities.”<sup>172</sup>

Nonetheless, the German model differentiates itself fundamentally by necessitating corporate councilors. It compels the appointment of half or a third of them by the workforce when the latter comprises, respectively, (1) at least two thousand or (2) be-

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<sup>166</sup> AktG § 95 (Ger.) (1965) (“Der Aufsichtsrat besteht aus drei Mitgliedern. Die Satzung kann eine bestimmte höhere Zahl festsetzen.”).

<sup>167</sup> *Id.* § 111(1) (“Der Aufsichtsrat hat die Geschäftsführung zu überwachen.”).

<sup>168</sup> *Id.* § 111(2) (“Er erteilt dem Abschlußprüfer den Prüfungsauftrag . . .”); *id.* § 111(3) (“Der Aufsichtsrat hat eine Hauptversammlung einzuberufen, wenn das Wohl der Gesellschaft es fordert.”).

<sup>169</sup> *Id.* § 111(2) (“Der Aufsichtsrat kann die Bücher und Schriften der Gesellschaft sowie die Vermögensgegenstände . . . einsehen und prüfen.”); *id.* (“Er kann damit auch einzelne Mitglieder oder für bestimmte Aufgaben besondere Sachverständige beauftragen.”).

<sup>170</sup> *Id.* § 90 (3) (“Der Aufsichtsrat kann vom Vorstand jederzeit einen Bericht verlangen über Angelegenheiten der Gesellschaft . . .”).

<sup>171</sup> *Id.* § 105(1) (“Ein Aufsichtsratsmitglied kann nicht zugleich Vorstandsmitglied . . . sein.”).

<sup>172</sup> *Id.* § 111(4) (“Maßnahmen der Geschäftsführung können dem Aufsichtsrat nicht übertragen werden.”).



tween five hundred and two thousand employees.<sup>173</sup> The selection of the rest of the membership falls upon investors.<sup>174</sup>

In fact, France's council resembles its Argentine namesake precisely in its non-obligatory character.<sup>175</sup> As in the couple of conciliar systems surveyed so far, it "permanently" controls "the management of the organization" by the directorial board and may not overlap with the latter in its "members."<sup>176</sup> As in Germany rather than Argentina, French councilors must name the directors.<sup>177</sup> Still, they may count solely "up to four" labor delegates, if any, among themselves and no more than "a third" of the total.<sup>178</sup>

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<sup>173</sup> Mitbestimmungsgesetz [MitbestG] [Codetermination Law] § 1(1) (Ger.) (1976) ("In Unternehmen, die . . . in der Rechtsform einer Aktiengesellschaft . . . und . . . in der Regel mehr als 2.000 Arbeitnehmer beschäftigen, haben die Arbeitnehmer ein Mitbestimmungsrecht nach Maßgabe dieses Gesetzes."); Drittelbeteiligungsgesetz [DrittelbG] [One-Third Participation Law] § 1(1) (Ger.) (1976) ("Die Arbeitnehmer haben ein Mitbestimmungsrecht im Aufsichtsrat nach Maßgabe dieses Gesetzes in . . . einer Aktiengesellschaft mit in der Regel mehr als 500 Arbeitnehmern . . ."); *id.* § 4(1) ("Der Aufsichtsrat eines in § 1 Abs. 1 bezeichneten Unternehmens muss zu einem Drittel aus Arbeitnehmervertretern bestehen.").

<sup>174</sup> See AktG § 96(1) (Ger.) (1965) ("Der Aufsichtsrat setzt sich zusammen bei Gesellschaften, für die das Mitbestimmungsgesetz gilt, aus Aufsichtsratsmitgliedern der Aktionäre und der Arbeitnehmer . . .") ("Der Aufsichtsrat setzt sich zusammen . . . bei Gesellschaften, für die das Drittelbeteiligungsgesetz gilt, aus Aufsichtsratsmitgliedern der Aktionäre und der Arbeitnehmer . . .").

<sup>175</sup> See CD. COM. Legislative Part, bk. II, tit. II, ch. V, § 2, Subsection 2 art. L225-57 (Fr.) ("Du directoire et du conseil de surveillance"), ("Il peut être stipulé par les statuts de toute société anonyme que celle-ci est régie par les dispositions de la présente sous-section.").

<sup>176</sup> *Id.* art. L225-68, Subsection 2 ("Le conseil de surveillance exerce le contrôle permanent de la gestion de la société par le directoire."); *id.* art. L225-74 ("Aucun membre du conseil de surveillance ne peut faire partie du directoire.").

<sup>177</sup> *Id.* art. L225-59 ("Les membres du directoire sont nommés par le conseil de surveillance . . ."); AktG § 96(1) (Ger.) (1965) ("Vorstandsmitglieder bestellt der Aufsichtsrat . . .").

<sup>178</sup> CD. COM. art. L225-79 (Fr.) ("Il peut être stipulé dans les statuts que le conseil de surveillance comprend . . . des membres élus . . . par le personnel de la société . . .") ("Le nombre des membres du conseil de surveillance élus par les salariés ne peut être supérieur à quatre ni excéder le tiers du nombre des autres membres.").

Argentine investors may dispense with such supervision in favor of “private monitoring,”<sup>179</sup> in one of a trinity of forms. Roughly, if nonpublic and small (worth under ten million *pesos*), a corporation may have its stockholders serve as monitors empowered to inspect its “[files] and papers and entreat managers for reports.”<sup>180</sup> If organized non-publicly and at a large scale (with over ten million *pesos* in capital), it may engage “one or more trustees” and an “equal number” of substitutes to monitor.<sup>181</sup>

Thirdly, public companies may assign the trusteeing to a collegial panel of an unevenly numbered membership.<sup>182</sup> They may have their “administration” watchdogged in this manner.<sup>183</sup> Whether institutional as in this case or individual as in the previous one, the watchdog must peruse “the organizational records and documentation . . . at least every three months”<sup>184</sup> and prepare “a written and well-founded account of the economic and financial situation of the organization for each ordinary shareholder-assembly.”<sup>185</sup>

This “overseeing commission”<sup>186</sup> must “deliver” relevant “information” requested—as well as “investigate grievances formulated in writing”—by anyone possessing no less than two per cen-

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<sup>179</sup> L. 19550 ch. II, § V(8) (“DE LA FISCALIZACIÓN PRIVADA”) (Arg.) (1984).

<sup>180</sup> *Id.* arts. 55, 284 (“Los socios pueden examinar los libros y papeles sociales y recabar del administrador los informes que estimen pertinentes.”) (“Las sociedades que no estén comprendidas en ninguno de los supuestos a que se refiere el artículo 299 . . . podrán prescindir de la sindicatura cuando así esté previsto en el estatuto. En tal caso los socios poseen el derecho de contralor que confiere el artículo 55.”).

<sup>181</sup> *Id.* art. 284 (“Está a cargo de uno o más síndicos designados por la asamblea de accionistas. Se elegirá igual número de síndicos suplentes.”).

<sup>182</sup> *Id.* art. 284 (“Cuando la sociedad estuviere comprendida en el artículo 299 —excepto su inciso (2.)— la sindicatura debe ser colegiada en número impar.”).

<sup>183</sup> *Id.* art. 294(1) (“Son atribuciones y deberes del síndico . . . : (1) Fiscalizar la administración de la sociedad . . .”).

<sup>184</sup> *Id.* art. 294(1) (“[E]l síndico . . . : (1) . . . examinará los libros y documentación . . . , por lo menos, una vez cada tres (3) meses.”).

<sup>185</sup> *Id.* art. 294(5) (“Son atribuciones y deberes del síndico . . . : (5) . . . Presentar a la asamblea ordinaria un informe escrito y fundado sobre la situación económica y financiera de la sociedad . . .”).

<sup>186</sup> *Id.* art. 290 (“Cuando la sindicatura fuere plural, actuará como cuerpo colegiado, y se denominará ‘Comisión Fiscalizadora.’”).

tum of the stock.<sup>187</sup> It must ensure the concern's "compliance with laws, bylaws, regulations, and investor resolutions."<sup>188</sup> The commissioners must "attend, with voice but no vote, meetings of the directorate, executive committee, and stockholders."<sup>189</sup> They may "convoke" the latter to meet extraordinarily, ordinarily, or specially.<sup>190</sup>

Shareholders may oust the appointees without cause, except when "five percent" of the ownership objects.<sup>191</sup> They enjoy barely one ballot per share for the designation or dismissal of trustees.<sup>192</sup> The voters may also determine "the remuneration" and any particular "responsibilities" of the members of not merely the trustee panel but additionally the board and "the supervisory council."<sup>193</sup>

Seemingly, councilors conduct themselves less intrusively than trustees. On first impression, they appear not to show up at the main corporate gatherings or to report on or scrutinize the corporation as frequently. Appearances notwithstanding, their collective

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<sup>187</sup> *Id.* arts. 294(6), 294(11) ("Son atribuciones y deberes del síndico . . . : (6) Suministrar a accionistas que representen no menos del Dos por Ciento (2 %) del capital, en cualquier momento que éstos se lo requieran, información sobre las materias que son de su competencia; . . . (11) Investigar las denuncias que le formulen por escrito accionistas que representen no menos del Dos por Ciento (2 %) del capital . . .").

<sup>188</sup> *Id.* art. 294(9) ("Son atribuciones y deberes del síndico . . . : (9) Vigilar que los órganos sociales den debido cumplimiento a la ley, estatuto, reglamento y decisiones asamblearias . . .").

<sup>189</sup> *Id.* art. 294(3) ("Son atribuciones y deberes del síndico . . . : (3) Asistir con voz, pero sin voto, a las reuniones del directorio, del comité ejecutivo y de la asamblea . . ."). *See also id.* art. 240 ("Los . . . síndicos . . . tienen derecho y obligación de asistir con voz a todas las asambleas. Sólo tendrán voto en la medida que les corresponda como accionistas . . .").

<sup>190</sup> *Id.* art. 294(7) ("Son atribuciones y deberes del síndico . . . : (7) Convocar a asamblea extraordinaria, cuando lo juzgue necesario y a asamblea ordinaria o asambleas especiales, cuando omitiere hacerlo el directorio . . .").

<sup>191</sup> *Id.* art. 287 ("Su designación es revocable solamente por la asamblea de accionistas, que podrá disponerla sin causa siempre que no medie oposición del cinco por ciento (5 %) del capital social.").

<sup>192</sup> *Id.* art. 284 ("Cada acción dará en todos los casos derechos a un sólo voto para la elección y remoción de los síndicos . . .").

<sup>193</sup> *Id.* arts. 234(2), 234(3) ("Corresponde a la asamblea ordinaria considerar y resolver los siguientes asuntos: . . . (2) Designación y remoción de directores y síndicos y miembros del consejo de vigilancia y fijación de su retribución; (3) Responsabilidad de los directores y síndicos y miembros del consejo de vigilancia . . .").

should not distinguish itself on this whole front from that of overseers. After all, it must exercise, “the functions and faculties [statutorily] attributed” to the latter, in addition to its own.<sup>194</sup>

Argentina apparently shifts to a common-law mode on all these questions. It invites an incorporator to a range of alternatives. She may choose according to her preferences or particularities. For instance, her choice for the supervisory council might itself derive from her desire to allow for (1) the removal of corporate controllers against the objections of a five percent faction or (2) the conciliar determination of directorial board.<sup>195</sup> Needless to say, it would have to abide by the countless conditions imposed, in an apparent shift back to a civil-law approach, on its execution.

In any event, investors designate and discharge their “directors, trustees, and councilors” during their regular meetings.<sup>196</sup> They must do so “by absolute majority of the ballots present.”<sup>197</sup> Upon their request, the entity must adopt cumulative voting for up to a third of the directorate, supervisory-council, or trustee-panel.<sup>198</sup> It may thereby grant minority stockholders a voice on any such body through a concentration of “their votes on a limited number of nominees.”<sup>199</sup>

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<sup>194</sup> *Id.* art. 281(g) (“Son funciones del consejo de vigilancia: . . . (g) Las demás funciones y facultades atribuidas en esta ley a los síndicos.”).

<sup>195</sup> *Id.* art. 281(d) (“Son funciones del consejo de vigilancia: . . . (d) La elección de los integrantes del directorio, cuando lo establezca el estatuto, sin perjuicio de su revocabilidad por la asamblea.”).

<sup>196</sup> *Id.* arts. 234(2) (“Corresponde a la asamblea ordinaria considerar y resolver los siguientes asuntos: . . . (2) Designación y remoción de directores y síndicos y miembros del consejo de vigilancia y fijación de su retribución . . .”).

<sup>197</sup> *Id.* arts. 243 (“Las resoluciones [de la asamblea ordinaria] serán tomadas por mayoría absoluta de los votos presentes que puedan emitirse en la respectiva decisión, salvo cuando el estatuto exija mayor número.”).

<sup>198</sup> *Id.* art. 263 (“Los accionistas tienen derecho a elegir hasta Un Tercio (1/3) de las vacantes a llenar en el directorio por el sistema de voto acumulativo.”); *id.* art. 280 (“El estatuto podrá organizar un consejo de vigilancia, integrado por tres a quince accionistas designados por la asamblea conforme a los artículos 262 o 263, reelegibles y libremente revocables.”); *id.* art. 289 (“Los accionistas pueden ejercer el derecho reconocido por el artículo 263, en las condiciones fijadas por éste, [en la elección de los síndicos].”).

<sup>199</sup> *See* CHOPER, COFFEE, & GILSON, *supra* note 5, at 587 (“Cumulative voting is a system of voting for the election of directors that is intended to give minority shareholders representation on the board by allowing them to concentrate their votes on a limited number of nominees.”).

Vis-à-vis a hypothetical twelve-member board, shareholders could cumulatively install a maximum of four members. They would receive a quartet of ballots per share if they all partook in the cumulation.<sup>200</sup> In this scenario, a voter holding three of twelve shares could guarantee the installation of one of her candidates by concentrating minimally ten of her sixteen votes behind him. In a straight contest, she would not get a single representative if no one else backed her. A majority owner could handpick the totality of the directors.<sup>201</sup>

The German enactment does not envision shareholders cumulating their suffrages. In contrast, Delaware does offer the option:

The certificate of incorporation of any corporation may provide that at [directorial] elections, each holder of stock . . . shall be entitled to as many votes as . . . [his] shares . . . multiplied by the number of directors to be elected . . . [He] may cast all [his ballots] for a single [candidacy] or may distribute them among [the various at stake].<sup>202</sup>

The Argentine scheme deviates from the Delawarean largely inconsequentially, as in permitting some investors to participate while others do not.<sup>203</sup> Nevertheless, it diverges importantly in that it announces the following about cumulative balloting: “The by-laws cannot repeal this right, nor regulate it in a way that hinders its exercise . . . .”<sup>204</sup>

U.S. statutes mostly make such cumulation “optional.”<sup>205</sup> A few of them mandate it, “unless the certificate . . . expressly can-

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<sup>200</sup> L. 19550 art. 263(4) (Arg.) (1984) (“Cada accionista que vote acumulativamente tendrá un número de votos igual al que resulte de multiplicar los que normalmente le hubieren correspondido por el número de directores a elegir.”).

<sup>201</sup> See generally *id.* art. 263.

<sup>202</sup> Del. Gen. Corp. L., § 214.

<sup>203</sup> See L. 19550 art. 263(5) (Arg.) (1984) (“Los accionistas que voten por el sistema ordinario o plural y los que voten acumulativamente competirán en la elección del tercio de las vacantes a llenar . . . .”).

<sup>204</sup> See *id.* art. 263(4) (“El estatuto no puede derogar este derecho, ni reglamentarlo de manera que dificulte su ejercicio . . . .”).

<sup>205</sup> CHOPER, COFFEE, & GILSON, *supra* note 5, at 588.

cels it.”<sup>206</sup> To prevent its negation, they often “require a minimum number of directors in each class.”<sup>207</sup>

By and large, Argentina has lined up with Germany and France in establishing a dually headed corporate government. Hence, it has countenanced, though to a lesser extent than this dyad of European countries, additional checks on the board along with representation of stakeholders, like creditors or workers. Perhaps under U.S. influence, Argentine authorities have opened the door to voting cumulatively for all leadership positions. Even so, they have ostensibly imparted to it a civil-law flavor by rendering it compulsory.

#### DISCIPLINE

In Argentina, “administrators” or “representatives” of any commercial concern must “act loyally and as diligently as a good businessperson. If they neglect their obligations, they [must] bear unlimited and joint liability for any [injury] or prejudice that may result from their acts or omissions.”<sup>208</sup>

Hence, the inducted managerial leadership fiducially obligates itself toward its shareholders and corporation. It may not favor itself or anyone else over them. On this front, the leaders must meet a high benchmark. They must deport themselves as an experienced rather than a regular undertaker.

“[T]he organization, its investors, and [even] third parties” may hold the directorate accountable for performing its functions poorly.<sup>209</sup> They may sue “for violations of the law, the bylaws, or any [corporate] regulation as well as for any other [harm] stemming

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 600.

<sup>208</sup> L. 19550 art. 59 (Arg.) (1984) (“Los administradores y los representantes de la sociedad deben obrar con lealtad y con la diligencia de un buen hombre de negocios. Los que faltaren a sus obligaciones son responsables, ilimitada y solidariamente, por los daños y perjuicios que resultaren de su acción u omisión.”).

<sup>209</sup> *Id.* art. 274 (“Los directores responden ilimitada y solidariamente hacia la sociedad, los accionistas y los terceros, por el mal desempeño de su cargo . . .”).

from fraud, abuse of power, or grave fault.”<sup>210</sup> Nonetheless, a director responds on the basis of her individual participation.<sup>211</sup> She may exempt herself from accountability if she objects to the directorial dereliction beforehand in writing and alerts the trustees,<sup>212</sup> or presumably the councilors.

As a token of their loyalty, “directors” must “divulge to the directorate” and the overseeing commission, or the conciliar organ, “any contrary interest, while abstaining from participating in every interconnected deliberation.”<sup>213</sup> Moreover, they may not compete with their company directly or indirectly unless they obtain stockholder authorization in advance.<sup>214</sup> Finally, a director may contract with the corporation if she does so as part of her professional activity and at the market rate. Otherwise she must procure the blessing “of the directorate” or “trustee panel” (or the council) and notify the shareholders.<sup>215</sup>

The investors may exonerate the directorial board by endorsing its engagement, refusing to challenge it in court, or settling with

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<sup>210</sup> *Id.* art. 274 (“Los directores responden . . . por la violación de la ley, el estatuto o el reglamento y por cualquier otro daño producido por dolo, abuso de facultades o culpa grave.”).

<sup>211</sup> *Id.* art. 274 (“[L]a imputación de responsabilidad se hará atendiendo a la actuación individual cuando se hubieren asignado funciones en forma personal de acuerdo con lo establecido en el estatuto, el reglamento o decisión asamblearia.”).

<sup>212</sup> *Id.* art. 274 (“Queda exento de responsabilidad el director que participó en la deliberación o resolución o que la conoció, si deja constancia escrita de su protesta y diera noticia al síndico antes que su responsabilidad se denuncie al directorio, al síndico, a la asamblea, a la autoridad competente, o se ejerza la acción judicial.”).

<sup>213</sup> *Id.* art. 272 (“Cuando el director tuviere un interés contrario al de la sociedad, deberá hacerlo saber al directorio y a los síndicos y abstenerse de intervenir en la deliberación . . .”).

<sup>214</sup> *Id.* art. 273 (“El director no puede participar por cuenta propia o de terceros, en actividades en competencia con la sociedad, salvo autorización expresa de la asamblea . . .”).

<sup>215</sup> *Id.* art. 271 (“El director puede celebrar con la sociedad los contratos que sean de la actividad en que éste opere y siempre que se concierten en las condiciones del mercado. Los contratos que no reúnan los requisitos del párrafo anterior sólo podrán celebrarse previa aprobación del directorio o conformidad de la sindicatura si no existiese quórum. De estas operaciones deberá darse cuenta a la asamblea.”).

it.<sup>216</sup> Nevertheless, the exoneration will founder in the face of an encroachment upon legal precepts, the bylaws, or organizational norms.<sup>217</sup> So will it in case of bankruptcy or if the proprietors of at least five percent of the totality of shares object.<sup>218</sup> Any such objector may derivatively process the directorate.<sup>219</sup>

Normally, “the organization” may lodge the litigation.<sup>220</sup> It must first secure the stockholders’ consent, though.<sup>221</sup> The consenting resolution leads automatically to the removal and replacement of the implicated directors.<sup>222</sup>

If the corporation fails to move forward within three months, any shareholder may do so in its stead.<sup>223</sup> Correlatively, she may proceed against the board’s failure.<sup>224</sup> Probably, the two proceedings may unfold together, as in a common-law derivative action,<sup>225</sup> or separately.

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<sup>216</sup> *Id.* art. 275 (“La responsabilidad de los directores y gerentes respecto de la sociedad, se extingue por aprobación de su gestión o por renuncia expresa o transacción, resuelta por la asamblea . . .”).

<sup>217</sup> *Id.* art. 275 (No se extinguirá la “responsabilidad . . . por violación de la ley, del estatuto o reglamento.”).

<sup>218</sup> *Id.* art. 275 (No se extinguirá la “responsabilidad . . . si . . . media oposición del cinco por ciento (5 %) del capital social, por lo menos. La extinción es ineficaz en caso de liquidación coactiva o concursal.”).

<sup>219</sup> *Id.* art. 276 (“La acción social de responsabilidad contra los directores . . . podrá ser ejercida por los accionistas que hubieren efectuado la oposición prevista en el artículo 275.”).

<sup>220</sup> *Id.* art. 276 (“La acción social de responsabilidad contra los directores corresponde a la sociedad . . .”).

<sup>221</sup> *Id.* art. 276 (“La acción social de responsabilidad [requiere una] resolución de la asamblea de accionistas.”).

<sup>222</sup> *Id.* art. 276 (“La resolución producirá la remoción del director o directores afectados y obligará a su reemplazo.”).

<sup>223</sup> *Id.* art. 277 (“Si la acción . . . no fuera iniciada dentro del plazo de tres (3) meses, contados desde la fecha del acuerdo, cualquier accionista puede promoverla . . .”).

<sup>224</sup> *Id.* art. 277 (“[C]ualquier accionista puede promover[] [la acción], sin perjuicio de la responsabilidad que resulte del incumplimiento de la medida ordenada.”).

<sup>225</sup> ROBERT CHARLES CLARK, CORPORATE LAW 639-40 (1986 (“Historically, the derivative suit was conceived of as a double suit, or two suits in one: The plaintiff (1) brought a suit in equity against the corporation seeking an order compelling it (2) to bring a suit for damages or other relief against some third person who had caused legal injury to the corporation.”)).



German “members of the directorate must [likewise] display the caution of an orderly and conscientious . . . manager in their management.”<sup>226</sup> Upon a contravention of their commitments, they will answer “jointly and severally” for any “ensuing” detriment.<sup>227</sup> The main burden of proof will rest on them.<sup>228</sup>

Directors may not themselves practice a trade or work “in the organizational branch of business.”<sup>229</sup> They need conciliar consent to “direct another trading [firm or to] belong to it as a personally liable investor or to its board.”<sup>230</sup> In the event of an infringement upon these constraints, the concern “may demand indemnification.”<sup>231</sup>

Upon a plurality vote by the stockholders, the enterprise may stake its “compensation claims” against promoters or members of the directorate or the council.<sup>232</sup> Shareholders owning one per centum or one-hundred-thousand euros worth of the stock may do the honors instead. As a precondition, they must “show that they requested the [entity] to institute the complaint within a reasonable time period.”<sup>233</sup> Their pleading must additionally adduce “facts

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<sup>226</sup> AktG § 93(1) (Ger.) (1965) (“Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden.”).

<sup>227</sup> *Id.* § 93(2) (“Vorstandsmitglieder, die ihre Pflichten verletzen, sind der Gesellschaft zum Ersatz des daraus entstehenden Schadens als Gesamtschuldner verpflichtet.”).

<sup>228</sup> *Id.* (“Ist streitig, ob sie die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters angewandt haben, so trifft sie die Beweislast.”).

<sup>229</sup> *Id.* § 88(1) (“Die Vorstandsmitglieder dürfen ohne Einwilligung des Aufsichtsrats . . . im Geschäftszweig der Gesellschaft . . . Geschäfte machen.”).

<sup>230</sup> *Id.* (“Sie dürfen ohne Einwilligung auch nicht Mitglied des Vorstands oder Geschäftsführer oder persönlich haftender Gesellschafter einer anderen Handelsgesellschaft sein.”).

<sup>231</sup> *Id.* § 88(2) (“Verstößt ein Vorstandsmitglied gegen dieses Verbot, so kann die Gesellschaft Schadenersatz fordern.”).

<sup>232</sup> *Id.* § 147(1) (“Die Ersatzansprüche der Gesellschaft aus der Gründung gegen die nach den §§ 46 bis 48, 53 verpflichteten Personen oder aus der Geschäftsführung gegen die Mitglieder des Vorstands und des Aufsichtsrats oder aus § 117 müssen geltend gemacht werden, wenn es die Hauptversammlung mit einfacher Stimmenmehrheit beschließt.”).

<sup>233</sup> *Id.* § 148(1)(2) (“Das Gericht lässt die Klage zu, wenn . . . (2) die Aktionäre nachweisen, dass sie die Gesellschaft unter Setzung einer angemessenen Frist vergeblich aufgefordert haben, selbst Klage zu erheben . . .”).

that support the suspicion that the [undertaking] suffered damage through dishonesty or a [crass] violation of a statute or the by-laws.”<sup>234</sup>

The company may itself litigate “anytime” and thereupon render any “pending” derivatively prosecuted lawsuits “inadmissible.”<sup>235</sup> Alternatively, it may take them over.<sup>236</sup> In either scenario, the original filers may remain aboard,<sup>237</sup> perchance as intervenors.

U.S. jurisdictions appear to specify directorial responsibilities judicially rather than legislatively. Somewhat modestly, the New Jersey’s supreme jurisdictional forum has required board members “to discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.”<sup>238</sup> The Delawarean justices have embraced “the concept of gross negligence as . . . the proper standard.”<sup>239</sup> They have defined disloyalty as “preferring the adverse [interest] of the fiduciary or of a related person to [that] of the corporation.”<sup>240</sup>

The Model Business Law Act compels a “conflicted director” to disclose her conflict to her fellows.<sup>241</sup> They must deliberate on their own and authorize “the transaction.”<sup>242</sup> A “majority” of “qualified” investors may also approve after an analogous “disclosure.”<sup>243</sup> Beyond this duo of options,<sup>244</sup> Delaware statutorily offers

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<sup>234</sup> *Id.* § 148(1)(3) (“Das Gericht lässt die Klage zu, wenn . . . (3) Tatsachen vorliegen, die den Verdacht rechtfertigen, dass der Gesellschaft durch Unredlichkeit oder grobe Verletzung des Gesetzes oder der Satzung ein Schaden entstanden ist . . .”).

<sup>235</sup> *Id.* § 148(3) (“Die Gesellschaft ist jederzeit berechtigt, ihren Ersatzanspruch selbst gerichtlich geltend zu machen; mit Klageerhebung durch die Gesellschaft wird ein anhängiges Zulassungs- oder Klageverfahren von Aktionären über diesen Ersatzanspruch unzulässig.”).

<sup>236</sup> *Id.* (“Die Gesellschaft ist nach ihrer Wahl berechtigt, ein anhängiges Klageverfahren über ihren Ersatzanspruch in der Lage zu übernehmen . . .”).

<sup>237</sup> *Id.* (“Die bisherigen Antragsteller oder Kläger sind in den Fällen der Sätze 1 und 2 beizuladen.”).

<sup>238</sup> *Francis v. United Jersey Bank*, 432 A.2d 814, 820 (N.J. 1981).

<sup>239</sup> *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

<sup>240</sup> *Brehm v. Eisner*, 906 A.2d 27, 66 (Del. 2006).

<sup>241</sup> MODEL BUS. CORP. ACT § 8.62(a) (2016).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* § 8.63(a).

<sup>244</sup> Del. Gen. Corp. L., § 144(a)(1-2).

the possibility of establishing fairness to the enterprise and evidencing approval, not necessarily under the described conditions, "by the board . . . , a committee" or the stockholders.<sup>245</sup>

Federal Rule of Civil Procedure 23.1, in turn, presupposes that in the ordinary course, concerns should "properly assert" their own claims.<sup>246</sup> It exceptionally empowers a shareholder to press the latter, including those against board members.<sup>247</sup> When so doing, she must "fairly and adequately represent the interests of . . . similarly situated" investors.<sup>248</sup> The plaintiff must "state with particularity any effort" to urge the entity toward the courthouse or "the reasons for not" exerting herself to that end.<sup>249</sup>

The adjudicator must sign off on any settlement, voluntarily dismissal, or compromise.<sup>250</sup> Besides, the Delawarean top tribunal has declared that: "After an objective and thorough investigation of [any such] derivative suit, an independent [corporate] committee may . . . file a pretrial motion to dismiss . . . ." <sup>251</sup> The trier must "give special consideration to matters of law and public policy in addition to the [enterprise's] best interests."<sup>252</sup>

Expectedly, Argentina and Germany seem to set a stricter prudence-yardstick than the various U.S. states. Thereby, they come across as slightly less friendly to directorates. The Argentine enactment delves into the procedural particulars. Its German equivalent does not, while appearing to outdo the regimes enacted throughout the United States in hindering complainants. Accordingly, the latter must prove a directorial defendant dishonest or grossly in breach of internal or statutory strictures. Furthermore, the organization may readily wrest the cause from the stockholding suitors. These hindrances might reflect serious skepticism in Germany vis-à-vis collective claimants.

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<sup>245</sup> *Id.* § 144(a)(3).

<sup>246</sup> *See* FED. R. CIV. PRO. 23.1(a).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* 23.1(b)(3).

<sup>250</sup> *Id.* 23.1(c).

<sup>251</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788 (Del. 1981).

<sup>252</sup> *Id.* at 789.

## SHAREHOLDERS

(0) Ultimately, shareholders stand as owners of the venture. Still, they must exercise their ownership through or against the directorial mediation. This portion of the discussion will explore a quintet of their essential entitlements.

(1) An Argentine investor—like the “directoriate,” supervisory councilors, or trustees—may convene her fellows to meet, whether ordinarily or extraordinarily. Yet, to do so, her investment must minimally add up to five percent of the total.<sup>253</sup> The shareholding group decides by a majority of all voters or shares, respectively, (a) whatever it may regularly resolve (unless the bylaws mandate a larger margin)<sup>254</sup> or (b) any “transformation,” “dissolution,” “shift to a foreign domicile,” or basic change of the corporate object. It may ratify a “merger” or “breakup” by a plurality of the enfranchised stock.<sup>255</sup> Anyone who disagrees with the determination to undertake such transcendental transactions, excepting that of dissolving, merging, or breaking up the corporation, may return her holdings for a full “reimbursement.”<sup>256</sup>

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<sup>253</sup> L. 19550 arts. 236, 281(b), 294(7) (Arg.) (1984) (“Las asambleas ordinarias y extraordinarias serán convocadas por el directorio o el síndico en los casos previstos por la ley, o cuando cualquiera de ellos lo juzgue necesario o cuando sean requeridas por accionistas que representan por lo menos el cinco por ciento (5 %) del capital social . . .”) (“Son funciones del consejo de vigilancia: . . . (b) Convocará la asamblea cuando estime conveniente o lo requieran accionistas . . .”) (“Son atribuciones y deberes del síndico . . . : (7) Convocar a asamblea extraordinaria, cuando lo juzgue necesario y a asamblea ordinaria o asambleas especiales, cuando omitiere hacerlo el directorio . . .”).

<sup>254</sup> *Id.* arts. 243, 244 (“Las resoluciones [de la asamblea ordinaria] serán tomadas por mayoría absoluta de los votos presentes que puedan emitirse en la respectiva decisión, salvo cuando el estatuto exija mayor número.”) (“Las resoluciones [de la asamblea extraordinaria] serán tomadas por mayoría absoluta de los votos presentes que puedan emitirse en la respectiva decisión, salvo cuando el estatuto exija mayor número.”).

<sup>255</sup> *Id.* art. 244 (“Cuando se tratare de la transformación, . . . de la disolución anticipada de la sociedad; de la transferencia del domicilio al extranjero, del cambio fundamental del objeto . . . , las resoluciones se adoptarán por el voto favorable de la mayoría de acciones con derecho a voto, sin aplicarse la pluralidad de voto. Esta disposición se aplicará para decidir la fusión y la escisión . . .”).

<sup>256</sup> *Id.* art. 245 (“Los accionistas disconformes con las modificaciones incluidas en el último párrafo del artículo anterior, salvo en el caso de disolución anticipada y en el de los accionistas de la sociedad incorporante en fusión y en la

In Germany, the directorate convokes the stockholders.<sup>257</sup> It must, as the supervisory council, show up along with them.<sup>258</sup> They may then plurally pass their own regular "resolutions," unless an enactment establishes otherwise or the bylaws do.<sup>259</sup> An alteration of the latter rides by default on the endorsement of "three-fourths" of the voters.<sup>260</sup> So does a disbandment,<sup>261</sup> as well as a combination.<sup>262</sup>

Similarly, the Delawarean "board" determines the "place" and "the manner" in which the shareholders gather.<sup>263</sup> It also calls specially scheduled meetings.<sup>264</sup> In general, investors "act" by majority.<sup>265</sup> On the other hand, they may usually elect their directorial delegates "by a plurality."<sup>266</sup>

(2) Stockholders in Argentina may seemingly perform their acts by consenting. After all, they need not assemble by publicized convention if they unanimously support whatever they are to re-

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escisión, pueden separarse de la sociedad con reembolso del valor de sus acciones.").

<sup>257</sup> AktG § 121(2) (Ger.) (1965) ("Die Hauptversammlung wird durch den Vorstand einberufen . . .").

<sup>258</sup> *Id.* § 118(3) ("Die Mitglieder des Vorstands und des Aufsichtsrats sollen an der Hauptversammlung teilnehmen.").

<sup>259</sup> *Id.* § 133(1) ("Die Beschlüsse der Hauptversammlung bedürfen der Mehrheit der abgegebenen Stimmen (einfache Stimmenmehrheit), soweit nicht Gesetz oder Satzung eine größere Mehrheit oder weitere Erfordernisse bestimmen.").

<sup>260</sup> *Id.* § 179(2) ("Der Beschluß der Hauptversammlung bedarf [bei Satzungsänderungen] einer Mehrheit, die mindestens drei Viertel des bei der Beschlußfassung vertretenen Grundkapitals umfaßt.").

<sup>261</sup> *Id.* § 262(1)(2) ("Die Aktiengesellschaft wird aufgelöst durch Beschluß der Hauptversammlung; dieser bedarf einer Mehrheit, die mindestens drei Viertel des bei der Beschlußfassung vertretenen Grundkapitals umfaßt; die Satzung kann eine größere Kapitalmehrheit und weitere Erfordernisse bestimmen . . .").

<sup>262</sup> *Id.* § 319(2) ("Der Beschluß über die Zustimmung [zu einer Eingliederung] bedarf einer Mehrheit, die mindestens drei Viertel des bei der Beschlußfassung vertretenen Grundkapitals umfaßt. Die Satzung kann eine größere Kapitalmehrheit und weitere Erfordernisse bestimmen.").

<sup>263</sup> Del. Gen. Corp. L., § 211(a)(1).

<sup>264</sup> *Id.* § 211(d).

<sup>265</sup> *Id.* § 216(2).

<sup>266</sup> *Id.* § 216(3).

solve.<sup>267</sup> Granted, the regulatory regimen seems to presuppose a face-to-face gathering. Sensibly interpreted, though, it would cohere with shareholders simply voicing their unanimous consensus on paper.

Under the German legislation, “[t]he bylaws may envisage [an investor] casting [her] vote by written or electronic communication.”<sup>268</sup> They might conceivably acquiesce in everyone doing so. Of course, “[t]he directors and councilors must . . . participate in the assembly,” at least by “video- and audio-broadcast.”<sup>269</sup> Regardless, they could all presumably broadcast in this fashion to settle concrete issues or could even skip the pointless ritual altogether whenever none of their constituents would be putting in an appearance anyway.

Delaware, for its part, unequivocally contemplates stockholders playing their active role “without . . . meeting, without prior notice,” “and without” voting.<sup>270</sup> It just necessitates “consents in writing . . . signed by the holders of outstanding stock [with no] less than the minimum number of votes . . . necessary to authorize such action.”<sup>271</sup> The highest jurisdictional forum has proclaimed these options “fundamental . . . rights guaranteed by statute.”<sup>272</sup>

(3) The Argentine paradigm preferentially invites shareholders to buy “new shares of the same class in proportion to the stock that [they] already own.”<sup>273</sup> It does as much regarding “debentures

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<sup>267</sup> L. 19550 art. 237 (Arg.) (1984) (“La asamblea podrá celebrarse sin publicación de la convocatoria cuando se reúnan accionistas que representen la totalidad del capital social y las decisiones . . . se adopten por unanimidad de las acciones con derecho a voto.”).

<sup>268</sup> AktG § 118(2) (Ger.) (1965) (“Die Satzung kann vorsehen . . . , dass Aktionäre ihre Stimmen, auch ohne an der Versammlung teilzunehmen, schriftlich oder im Wege elektronischer Kommunikation abgeben dürfen . . .”).

<sup>269</sup> *Id.* § 118(3) (“Die Mitglieder des Vorstands und des Aufsichtsrats sollen an der Hauptversammlung teilnehmen. Die Satzung kann jedoch bestimmte Fälle vorsehen, in denen die Teilnahme von Mitgliedern des Aufsichtsrats im Wege der Bild- und Tonübertragung erfolgen darf.”).

<sup>270</sup> Del. Gen. Corp. L., § 228.

<sup>271</sup> *Id.*

<sup>272</sup> *Datapoint Corp. v. Plaza Sec. Co.*, 496 A.2d 1031, 1036 (Del. 1985).

<sup>273</sup> L. 19550 art. 194 (Arg.) (1984) (“Las acciones ordinarias, sean de voto simple o plural, otorgan a su titular el derecho preferente a la suscripción de nuevas acciones de la misma clase en proporción a las que posea . . .”).

convertible into shares.”<sup>274</sup> Accordingly, an investor with ten per centum of a stock possesses a prerogative of first refusal with respect to an equivalent percentage of any identically classified shares that the corporation may freshly proffer.

Consequently, corporations must honor the claim to a proportionate partaking in the business. They may limit or eliminate it only on an individual basis, as an exception, under the compulsion of their own well-being, and with regard to stock either “distributed in payment of pre-existing debts” or “to be paid in kind.”<sup>275</sup> Such limitation or elimination would require the approval of a preponderance of the totality of shares during an extraordinary stockholder meeting.<sup>276</sup>

Likewise, German law welcomes shareholders, “upon [their] request,” to purchase any fresh stock in relation to that previously sitting in their portfolio.<sup>277</sup> It affords them “up to two weeks” to request their due.<sup>278</sup> In contrast, an investor in the United States must evidently protect her “personal interest in maintaining the

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<sup>274</sup> *Id.* (“Los accionistas tendrán también derecho preferente a la suscripción de debentures convertibles en acciones.”); *id.* art. 334(1) (“Cuando los debentures sean convertibles en acciones: (1) Los accionistas . . . gozarán de preferencia para su suscripción en proporción a las acciones que posean, con derecho de acrecer . . .”).

<sup>275</sup> *Id.* art. 197 (“La asamblea extraordinaria . . . puede resolver en casos particulares y excepcionales, cuando el interés de la sociedad lo exija, la limitación o suspensión del derecho de preferencia en la suscripción de nuevas acciones, bajo las condiciones siguientes: . . . 2) Que se trate de acciones a integrarse con aportes en especie o que se den en pago de obligaciones preexistentes.”); *id.* art. 194 (“Los derechos [de preferencia] no pueden ser suprimidos o condicionados, salvo lo dispuesto en el artículo 197 . . .”).

<sup>276</sup> *Id.* art. 197 (“La asamblea extraordinaria, con las mayorías del último párrafo del artículo 244, puede resolver . . . la limitación o suspensión del derecho de preferencia en la suscripción de nuevas acciones . . .”); *id.* art. 235(5) (“Corresponden a la asamblea extraordinaria . . . (5) Limitación o suspensión del derecho de preferencia en la suscripción de nuevas acciones conforme al artículo 197 . . .”); *id.* art. 244 (En estos casos, “las resoluciones se adoptarán por el voto favorable de la mayoría de acciones con derecho a voto, sin aplicarse la pluralidad de voto.”).

<sup>277</sup> AktG § 186(1) (Ger.) (1965) (“Jedem Aktionär muß auf sein Verlangen ein seinem Anteil an dem bisherigen Grundkapital entsprechender Teil der neuen Aktien zugeteilt werden.”).

<sup>278</sup> *Id.* (“Für die Ausübung des Bezugsrechts ist eine Frist von mindestens zwei Wochen zu bestimmen.”).

balance of power . . . in [a closely held corporation] by special provisions in the corporate articles or bylaws or in [stockholder] agreements.”<sup>279</sup> Hence, she must contractually coerce the offer of “any shares [on sale] to the corporation or pro rata to all . . . shareholders.”<sup>280</sup>

Nevertheless, the top tribunal in Massachusetts might have signaled an alternative take on the matter by faithfully and reciprocally obliging investors. It enunciated in *Wilkes v. Springside Nursing Home, Inc.* that “stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise [as] partners [do].”<sup>281</sup> In light of this enunciation, maybe they must preserve the ratio of each other’s investment. In the next breath, the opinion acknowledges that elsewhere “courts [have] fairly consistently” rejected its posture out of a disinclination “to interfere in those facets of internal corporate [dealings that] essentially involve management decisions subject to the principle of majority control.”<sup>282</sup>

(4) A shareholder in Argentina statutorily enjoys a right of examination. She may pore over “the organization’s [accounts] and papers and entreat managers for reports that [she deems] relevant.”<sup>283</sup> However, investors appear to benefit from no such guaranty in companies with a supervisory council or trustees.<sup>284</sup> Apparently, they may not access corporate archives on their own in pub-

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<sup>279</sup> See, e.g., *Zidell v. Zidell, Inc.*, 560 P.2d 1091, 1094 (Or. 1977).

<sup>280</sup> *Id.*

<sup>281</sup> *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661 (Mass. 1976) (quoting *Donahue v. Rodd Electrotpe Co. of New England, Inc.*, 328 N.E.2d 505, 515 (Mass. 1975)).

<sup>282</sup> *Id.* at 662.

<sup>283</sup> L. 19550 art. 55 (Arg.) (1984) (“Los socios pueden examinar los libros y papeles sociales y recabar del administrador los informes que estimen pertinentes.”).

<sup>284</sup> *Id.* (“[No] corresponde a los socios de sociedades por acciones [el derecho de contralor], salvo el supuesto del último párrafo del artículo 284.”); *id.* art. 284 (“Las sociedades que no estén comprendidas en ninguno de los supuestos a que se refiere el artículo 299 . . . , podrán prescindir de la sindicatura cuando así esté previsto en el estatuto. En tal caso los socios poseen el derecho de contralor que confiere el artículo 55.”).



lic or large companies, which must internally instate overseers,<sup>285</sup> or in small corporations that opt for such instatement. Problematically, a stockholder perhaps cannot acquire access to pertinent data upon a suspicion that the bodies in charge of oversight are neglecting their function or conspiring with the administration to her detriment. At most, she could sue them.

In Germany, the directorate must deliver "information on organizational affairs to the extent imperative for the appropriate assessment of agenda items" that shareholders plan to discuss upon meeting.<sup>286</sup> It must do so "in accordance with the precepts of conscientious and faithful accountability"<sup>287</sup> but "may refuse [in a managerially reasonable attempt to thwart] considerable disadvantage to the organization."<sup>288</sup> Under the Delawarean regime, an investor may, through a document "under oath," demand "to inspect for any proper purpose . . . [t]he corporation's stock ledger, a list of its stockholders, and its other books and records."<sup>289</sup> Specifically, she must aver an end "reasonably related to [her] interest as a" shareholder.<sup>290</sup> Upon a declination, she may judicially "compel [the] inspection."<sup>291</sup>

(5) An Argentine corporation may issue preferred shares entailing a priority claim to dividend disbursements.<sup>292</sup> It may divest

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<sup>285</sup> *Id.* art. 158 ("La sindicatura o el consejo de vigilancia son obligatorios en la sociedad cuyo capital alcance el importe fijado por el artículo 299, inciso (2).").

<sup>286</sup> AktG § 131(1) (Ger.) (1965) ("Jedem Aktionär ist auf Verlangen in der Hauptversammlung vom Vorstand Auskunft über Angelegenheiten der Gesellschaft zu geben, soweit sie zur sachgemäßen Beurteilung des Gegenstands der Tagesordnung erforderlich ist.").

<sup>287</sup> *Id.* § 131(2) ("Die Auskunft hat den Grundsätzen einer gewissenhaften und getreuen Rechenschaft zu entsprechen.").

<sup>288</sup> *Id.* § 131(3)(1) ("Der Vorstand darf die Auskunft verweigern, (1) soweit die Erteilung der Auskunft nach vernünftiger kaufmännischer Beurteilung geeignet ist, der Gesellschaft . . . einen nicht unerheblichen Nachteil zuzufügen . . .").

<sup>289</sup> Del. Gen. Corp. L., § 220(b)(1).

<sup>290</sup> *Id.* § 220(b).

<sup>291</sup> *Id.* § 220(c).

<sup>292</sup> L. 19550 art. 17 (Arg.) (1984) (Heading: "Acciones preferidas: derecho de voto").

them of the franchise.<sup>293</sup> Notwithstanding, the purchaser may attend ordinary and extraordinary meetings along with everybody else.<sup>294</sup> Furthermore, she may vote exceptionally when her nonpreferred counterparts are deliberating to divide up, combine, or wind down the company or to change cardinally its declared objective, domicile it abroad, or postpone preferences on dividends.<sup>295</sup>

Various German statutory sections equally envision stock preferred on “the distribution of profits.”<sup>296</sup> They allow its issuance without any voting privileges and as a maximum up to “half of the corporate capital.”<sup>297</sup> The shares at stake attain suffrage during nonpayment of “the preferential amount,” while approving additional ones of their sort, or upon revocation of their “preference.”<sup>298</sup>

Delaware, in turn, provides for “preferred . . . stock . . . entitled to receive [preferential] dividends . . . as [defined] in the certificate of incorporation or in [an enabling] resolution . . . by the board of directors.”<sup>299</sup> Therefore, it ostensibly accords corporations plenty of latitude on the definition. Nonetheless, they must permit preferred investors “to vote as a class upon a proposed amendment [that] would [adversely alter] the . . . number [or benefits] of [any] shares [with preference.]”<sup>300</sup>

(1-5) On all five fronts except the third (pertaining to the preservation of proprietary proportionality), Argentina and Germa-

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<sup>293</sup> *Id.* (“Las acciones con preferencia patrimonial pueden carecer de voto, excepto para las materias incluidas en el cuarto párrafo del artículo 244, sin perjuicio de su derecho de asistir a las asambleas con voz.”)

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> AktG § 12(1) (Ger.) (1965) (“Vorzugsaktien können nach den Vorschriften dieses Gesetzes als Aktien ohne Stimmrecht ausgegeben werden.”); *id.* § 139(1) (“Für Aktien, die mit einem Vorzug bei der Verteilung des Gewinns ausgestattet sind, kann das Stimmrecht ausgeschlossen werden (Vorzugsaktien ohne Stimmrecht).”).

<sup>297</sup> *Id.* § 139(2) (“Vorzugsaktien ohne Stimmrecht dürfen nur bis zur Hälfte des Grundkapitals ausgegeben werden.”).

<sup>298</sup> *Id.* § 140(2) (“Ist der Vorzug nachzuzahlen und wird der Vorzugsbetrag in einem Jahr nicht . . . gezahlt . . . , so haben die Aktionäre das Stimmrecht, bis die Rückstände gezahlt sind.”); *id.* § 141(4) (“Ist der Vorzug aufgehoben, so gewähren die Aktien das Stimmrecht.”)

<sup>299</sup> Del. Gen. Corp. L., § 151(c).

<sup>300</sup> *Id.* § 242 (b)(2).

ny seem to treat a stockholder overall as in the United States. Simultaneously, they appear to exhibit less flexibility toward the corporation. Facially, the Delawarean codification countenances companies configuring their shareholder meetings and preferential stock to a greater degree as they see fit. It more clearly releases them from the onus of meeting live, pledging themselves to proportional participation, and opening their files in the absence of an appropriate aim.

#### EPILOGUE

This piece has discerned the Latin American and Continental European from the U.S. regulation of incorporated companies. It has spotlighted how one and the other structure themselves as well as handle incorporation, incorporators, piercing, governance, discipline, and shareholders. They both rely, certainly, on legislation and adjudication in their regulatory exertions yet do so differently, qualitatively in addition to quantitatively.

Apparently, civil and common law continue to specialize respectively though not exclusively in statutes and binding precedents. Still, they ever more frequently intrude into each other's apparent specialty, while leaving their own imprint on it. The tendency to converge coexists with that to diverge.

This general difference, in tandem with the correlative concurrence, has evolved immemorially, growing in nuances and exceptions. Absent unexpected cataclysms, it should persist down this path into the future. So will its more specific counterparts, highlighted throughout the just wrapped-up discussion. They equally insinuate a somewhat tentative, simplistic, distorting picture of contrasts and similarities.

So depicted, Latin America and Continental Europe seem to foment jurisdictional diversity, concentrate on compliance, enthrone an ever-present state, evoke the concept of the collective good, and dedicate themselves to stakeholders. On the other hand, the United States appears to compel convergence among competing jurisdictions, focus on flexibility or user-friendliness, kowtow to an all-powerful corporation (or directorate), wave the flag of individualism or efficiency, and consecrate itself to stockholders.

Expectedly, this seeming opposition on specifics will likewise endure and modulate alongside any collateral conjunction.