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The Organization and Functions of the Board of Directors of Corporations in Argentina and the United States

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I. INTRODUCTION

Corporations have performed a fundamental role in contemporary industrial development and are presently the most important form of business enterprise in the United States as well as in Argentina.

One of the main characteristics of the modern corporate organization is the accumulation of great amounts of capital resulting from the savings of the general public. An exception is the "close corporation" where the voting stock is held by a single shareholder or a small, close group of shareholders. This apportionment of the corporate ownership among large segments of undetermined individuals has contributed to the marked separation between those who own the enterprise and those who manage it. Although the owners of the corporation, i.e., the shareholders retain the powers of overall supervision and government of the entity through the medium of the shareholders' meeting, it is a reality that the managers (board of directors, and officers appointed by such board to carry out its decisions) actually govern the corporation. Therefore, the analysis of the organization and functions of the board of directors is extremely important in current corporate theory and practice.

The subject will be discussed comparatively with the laws of Argentina and the United States as a basis. The applicable Argentine legal provisions are contained in the Commercial Code (C.C.); with respect to the laws of the United States, the present study will deal with the provisions of the new Business Corporation Law (B.C.L.) of the State of New York. The latter is, for our purposes, highly convenient because it represents the latest trend in the corporate law of the United States and is operative in one of the most important commercial states of the Union.

Both the Argentine and the New York laws provide for a board of directors. Although the need for a board of directors has been questioned...
by some writers, there remain compelling reasons for its existence. For example, the large number of shareholders, the frequent changes in the corporate ownership caused by the easy negotiability of shares, and the need of stability and permanency in the management of the enterprise. Evidently, the efficient and economic management of the corporate business requires the centralization of control in a small group.

In Part II of this study the following aspects of the organization of the board of directors are discussed — the number, qualifications, election, tenure, compensation, managerial functions, and meetings. Part III deals with the legal nature of the functions of the board, the scope of its powers, its duties and obligations, and the delegation of its authority. Part IV contains the conclusions.

II. ORGANIZATION OF THE BOARD OF DIRECTORS

Number of directors

The Argentine Commercial Code has very flexible rules concerning the number of directors. It simply states that there shall be “one or more directors” [C.C. Art. 335 (para. 1)], and that the articles of incorporation (escritura de sociedad) must set forth their number [C.C. Art. 292 (clause 5)]. Furthermore, the Inspección General de Justicia (a federal agency with no equivalent in the United States whose function is to supervise the operations of corporations and their compliance with pertinent legal regulations) has interpreted the latter rule as requiring that the certificate of incorporation merely establish the minimum and the maximum number of directors that the corporation may have. The exact number shall be fixed in the by-laws, or by the shareholders’ meeting, but under no circumstances by the board of directors itself.

Although the Code allows corporations to have only one director, in practice, this is very rare, if not non-existent. Usually Argentine corporations have an odd number of directors, fixed in the by-laws within the limits stated in the certificate of incorporation.

The New York law [B.C.L. §702 (a)] requires a minimum of three directors; only in those corporations which have less than three shareholders may the number of directors be less than three but not less than the number of shareholders. Aside from this minimum requirement, the number of directors may be freely fixed in the by-laws by action of the shareholders or of the board, if specifically authorized in the by-laws. If the number is not fixed by any of these means, the law provides that the number shall be three.
The Argentine Code does not have any provision about the procedure to increase or to decrease the number of directors, so it is understood that this should be accomplished by amendment of the by-laws, or of the articles of incorporation, or at the shareholders' meeting, depending upon how the number was originally fixed.

In New York such a change should be carried out by amendment of the by-laws or by action of the shareholders or of the board itself, if specifically authorized in the by-laws, and in case it is effected by action of the board, it is subject to two limitations: (1) the action has to be approved by a majority of the entire board, and (2) a decrease in the number may not shorten the term of an incumbent director. [B.C.L. §702 (b)].

**Qualifications of Directors**

In Argentina, the Code requires: (1) that the candidate be a shareholder, and (2) that he be legally competent to engage in commercial activities. The first qualification is found in C.C. Art. 336 (para. 1), which provides that directors shall be elected "from among the shareholders"—a provision common in statutes of the past, and one whose inconvenience has been pointed out repeatedly. The shareholders can easily circumvent this requirement and elect a non-shareholder to the board by transferring to him a nominal amount of shares prior to his election. With respect to the question as to whether the person elected director must be a shareholder at the time of his election, or whether it is sufficient that he attain such status upon taking office, or subsequently, it is generally understood that he must be a shareholder at the time of the election. The election of a non-shareholder to the office of director is legally void.

The second qualification mentioned above, i.e., the legal capacity to engage in commercial activities (capacidad para ejercer el comercio) is required by Art. 132. Considering Art. 9 of the Commercial Code and Art. 53 of the Civil Code, it appears that all natural persons (whatever their citizenship) have legal capacity to engage in commercial activities, except those who are specifically declared by law as lacking such capacity. According to Arts. 54 and 55 of the Civil Code (as amended by Law 11,357) and Arts. 22 and 23 of the Commercial Code, the following persons are in the latter category: (1) unborn children in being (who are natural persons under Argentine law), (2) minors (under age 22), (3) the insane, (4) the illiterate deaf-mutes, (5) persons judicially declared dead, (6) clergymen of any order, and (7) judges, within the territory
where they have permanent jurisdiction. Therefore, all natural persons except those listed above, may be elected directors of corporation. Moreover, regarding the disability of lack of age, C.C. Arts. 10, 131 and 133 provide that any person above 18 may engage in commercial activities, if properly authorized by his father or emancipated by marriage. Accordingly, if such authorization has been granted, a minor may also be elected to the board of directors of a corporation.

It has long been disputed by Argentine legal authorities whether legal entities (mainly other corporations), as well as natural persons may be directors of a corporation. The Code does not have any provision regarding this matter, but the Inspección General de Justicia, in an unusual decision, held that one corporation may be a director of another. There are no restrictions on the number of corporations in which a person may be a director concurrently.

Finally, it appears to be illegal for a director to be an officer of the same corporation. This follows from the prohibition imposed on directors by C.C. Art. 338, not to negotiate or to contract with the corporation in their own behalf. However, if the employment contract exists prior to the election of the officer as a director, such employment contract may remain in effect. And, at least in some jurisdictions, the corporation may retain one of the directors as its attorney; such relationship has been considered excluded from the above-mentioned prohibition of Art. 338.

The New York statute (B.C.L. §701) requires only one qualification—that each director be at least 21 years of age. However, the statute also provides that the certificate of incorporation or the by-laws may prescribe other qualifications for directors.

_Election of Directors_

In Argentine law there is a distinction between the election of the first board of directors and the election of subsequent directors. The initial group is elected by: (1) the incorporators of a close corporation when drafting the articles of incorporation which must contain the name of the initial directors [C.C. Art. 291, (clause 3) and Art. 319]; (2) the promoters of a public-issue corporation when provisionally organizing the corporation, i.e., before stock is issued to the public [C.C. Art. 320 (clause 4)]; if the promoters have failed to act as indicated above, then the shareholders must hold the election at the initial organizational shareholders' meeting [C.C. Art. 323 (para. 1)].

Subsequent members of the board of directors must be elected at the regular shareholders' meeting (C.C. Arts. 335 and 347). According to
C.C. Art. 336 (para. 3), by-laws may provide the procedure for the filling of vacancies which may occur on the board during the period between two shareholders’ meetings (which are usually held once a year). In the event the by-laws do not contain this provision, the Code provides that the controllers (sindicos) shall appoint interim directors, who will serve until the next shareholders’ meeting [C.C. Art. 336 (para. 3)].

The Argentine Commercial Code does not provide for cumulative voting for the election of directors, nor for the election of the board by classes, although by-laws frequently provide for boards apportioned in two or three classes to be elected at subsequent shareholders’ meetings. However, it has been considered that C.C. Art. 350 (para. 1) in providing that “Decisions at the shareholders’ meetings always shall be taken by majority of the votes present (the number of voting shares present and represented) except when the by-laws require a larger number” precludes the election of minority directors. This seems to be a rather far fetched conclusion, and it is more reasonable to assert that by-laws providing for cumulative voting do not violate the above-mentioned statutory provision, and therefore such by-laws should stand.

According to the New York law [B.C.L. §404 (a)], the original directors are elected by the incorporators at the organizational meeting which is held after the corporate existence has commenced (upon the filing of the certificate of incorporation by the Department of State). The original directors hold office until the first annual shareholders’ meeting, except when directors are divided into classes, in which case the tenure of the directors initially classified expires at the first shareholders’ meeting or at subsequent meetings, pursuant to the classification [B.C.L. §704 (a)].

Subsequent directors must be elected at each annual shareholders’ meeting [B.C.L. §703 (a)]. Cumulative voting for the election of directors is authorized [B.C.L. §618.]

B.C.L. §705(a) provides that the board of directors may, by majority vote of those in office, fill any newly created directorship resulting from an increase in the number of directors. The board may also, by majority vote of those in office, fill any vacancy on the board which was not created by the removal of a director without cause. B.C.L. §705 (b) provides that vacancies on the board created by a removal without cause shall be filled only by vote of the shareholders, unless the certificate of incorporation or a by-law adopted by the shareholders provide otherwise.

The New York law authorizes the by-laws to provide for the election of one or more directors by the holders of shares of any class or series, or
by the holders of bonds entitled to vote at the election of directors, voting as a class [B.C.L. §703 (a)]. It also authorizes the classification of directors in two, three or four classes, all of whom must be as nearly equal in number as possible, and may not include less than three directors [B.C.L. §704 (a)]. The latter provision is intended to prevent serious attenuations of cumulative voting rights through the device of classification.

Tenure of Directors

In Argentina the term of directors is fixed in the by-laws, but such term must be “certain” and “determined”, and may not be longer than three years [C. C. Art. 336 (par. 1)]. Should the term of a director expire before the next shareholders’ meeting, the law is not clear as to whether said director holds office until his successor is elected or the Comptroller appoints an interim director to replace him. Either of these two approaches, if included in the by-laws is valid. Directors may be re-elected only if the by-laws expressly authorize their re-election [C. C. Art. 336 (para. 2)].

The terms of office of directors may be cut short for any one of the following reasons: (1) death or disability (physical, legal or adjudicated bankrupt); (2) dissolution of the corporation which puts an end to the corporate existence except for the purpose of liquidating the entity (C. C. Art. 435). In case of dissolution, the directors cease in their functions as such, although they may remain in office to wind up the business unless otherwise provided in the certificate of incorporation or determined by the shareholders (C. C. Art. 434); (3) appointment by a court of a receiver for the corporation (intervención judicial). This judicial action is based on Art. 1685 of the Civil Code. It is decreed only in extreme situations, as for example, when some abnormal event prevents the operation of the board of directors or when the board refuses to convene the shareholders’ meeting when it is due; (4) resignation; a director may resign at any time and he need not give the reasons for his resignation, but he may be liable to the corporation if he resigns unseasonably and in bad faith with resultant loss to the corporation. There are no provisions in the Argentine law regarding the time when the resignation of a director becomes effective. It is generally thought that this occurs when the resignation is accepted at a shareholders’ meeting, but in case the resignation is submitted to the shareholders and they do not act on it within a reasonable time, the resigning director might consider himself relieved from his duties and the Comptroller could appoint an interim director to replace him; (5) removal in accordance with C. C. Arts. 336 and 346 under which directors may be re-
moved without cause by a majority vote at a shareholders' meeting. This right of the shareholders to remove directors at any time is considered a matter of public policy and therefore may not be impaired or limited in any manner by the by-laws. However, the enforcement of this right by the shareholders presents some difficulties. C. C. Art. 347 (clause 3) requires that subjects to be discussed at a regular shareholders' meeting be included in the agenda which is prepared by the directors. It is most unlikely that the agenda will ever include a motion to remove from office those who prepared the agenda. And, the convening of a special shareholders' meeting in which the above requirement does not apply is not easily arranged since it must be requested by shareholders representing at least one twentieth of the capital stock (C. C. Art. 348). In view of the above it has been held that, in spite of the requirement of C. C. Art. 347, the shareholders may remove directors at a regular meeting without having the subject matter included in the agenda and, further, that such removal may be implied if a new director is elected to replace another one who is still in office.

Pursuant to the New York law, directors are elected for a one-year term except when the certificate of incorporation or the by-laws establish a classified board, in which case the directors are elected for a term equal to the number of classes composing the board [B. C. L. §703(a) and §704]. In the event that the term of a director expires before the election of his successor, the statute provides that he shall hold office until the successor has been elected and qualified [B. C. L. §703(b)]. The B.C.L. does not contain any specific provision regarding the reelection of directors, but it authorizes courts to bar from re-election for a period of time fixed by the court any director removed for cause through judicial proceedings [B.C.L. §706 (d)].

Under the New York law, the terms of office of directors may terminate, as under the Argentine law, for the following reasons: (1) death or disability of the director; (2) dissolution of the corporation. The corporation is dissolved upon the filing of the certificate of dissolution by the Department of State [B.C.L. §1004], but its directors may continue to function until they wind up the affairs of the corporation [B.C.L. §1006 (a)]; (3) appointment by a court of a receiver of the corporation. The statute provides that such appointment can be made only in case of (a) dissolution of the corporation, (b) action by judgment creditor for sequestration, (c) an action brought by the Attorney General or by a shareholder to preserve the assets of the corporation, which has no officer within the State of New York qualified to administer them, and (d) an action to preserve the assets in the State of
New York of a foreign corporation which has been dissolved, nationalized or its authority or existence otherwise terminated or cancelled in the jurisdiction of its incorporation [B.C.L. §1202 (a)]; (4) resignation; a director may resign, and it has been held that his resignation need not be accepted to be effective unless its effectiveness is made dependent upon acceptance. In addition, the resignation of a director to be valid does not require reasons or notice to the public or creditors; (5) removal; the New York statute sets forth a distinction between the removal of directors for cause and their removal without cause. They may be removed for cause by (a) vote of the shareholders, (b) action of the board of directors, if the certificate of incorporation or the by-laws (adopted by the shareholders) so provide [B.C.L. §706 (a)], and (c) court judgment upon an action brought by the Attorney General or by the holders of ten percent of the outstanding shares, whether or not entitled to vote [B.C.L. §706 (d)]. Removal of directors without cause may be accomplished only by vote of the shareholders, provided that the certificate of incorporation or the by-laws authorize them to do so [B.C.L. §706 (b)].

In addition, the New York statute provides that directors elected by (1) cumulative voting, or (2) the holders of shares of any class or series, or (3) the holders of bonds, voting as a class (when so entitled by the provisions of the certificate of incorporation), may not be removed in any case by action of the Board of directors [B.C.L. §706 (a)]. Furthermore, the statute sets forth the following conditions for the removal with or without cause of the directors described therein: (1) “in the case of a corporation having cumulative voting, no director may be removed when the votes cast against his removal would be sufficient to elect him if voted cumulatively at an election at which the same total number of votes were cast and the entire board, or the entire class of directors of which he is a member, were then being elected”; and (2) “when by the provisions of the certificate of incorporation the holders of the shares of any class or series, or holders of bonds voting one or more directors, any director so elected may be removed only by the applicable vote of the holders of the shares of that class or series, or the holders of such bonds, voting as a class” [B.C.L. §706 (c)].

Compensation of Directors

The Argentine Commercial Code prescribes that directors shall receive compensation, unless otherwise provided in the by-laws and that such compensation shall be fixed in the by-laws, or by resolution of the shareholders, if it has not been set forth in the by-laws (C.C. Art. 341).
The board of directors does not have authority to determine its own compensation, and neither the certificate of incorporation nor the by-laws may grant the board such authority in view of the prohibition against directors to negotiate with the corporation in their own behalf [C.C. Art. 338 (para. 2)]. Pursuant to C.C. Art. 341, the by-laws or the shareholders may freely determine the type and amount of the compensation due to directors. If neither does so, the directors may call a special shareholders' meeting to have the compensation established. If the shareholders fail to do so, the directors may request a court to fix their compensation. The following types of remuneration are typical:

1. A fixed amount per annum to each director;
2. A fixed amount per annum to each director, plus a certain percentage of the profits, if any;
3. A fixed amount to each director for each meeting of the board he attends;
4. A fixed amount to the board for each meeting held, the amount to be distributed among the directors attending;
5. A percentage of the net profits, to be distributed among the directors after the annual balance sheet has been approved by the shareholders. This is the most usual form of compensation in Argentine corporations, and a Federal agency, the Comisión de Valores del Banco Central, limits the maximum percentage to 25% of the net profits of the corporation.

Unless otherwise provided in the by-laws or by the shareholders, each director is entitled to the same compensation. If a director performs special services for the corporation, outside of his regular duties, he is entitled to special remuneration.

The New York statute states that, unless otherwise provided in the certificate of incorporation or the by-laws, the board of directors has authority to fix the compensation of its members for services rendered in any capacity [B.C.L.§713 (c)]. This provision constitutes a change in the law of New York, as prior to the enactment of the B.C.L., directors had no authority to fix their own compensation, unless authorized by the certificate of incorporation or the by-laws. Furthermore, the previous law was interpreted as providing that directors served without any compensation for performing the ordinary duties of their offices, unless express provision was made therefor either by statute, charter, by-laws or agreement between the corporation and the directors. However, it was understood that directors might recover for services rendered in addition
to their usual duties, provided that such recovery was contemplated in an expressed or implied contract.

This approach was in accordance with the traditional view that directors were representative shareholders whose stock holdings and dividends therefrom justified their special attention to corporate affairs without further reward. But later on, the increasing prevalence of directors with little or no stock ownership led to the modern practice of compensating directors for their regular services. This is reflected in the above mentioned provisions of the B.C.L.

Managerial Functions

The Argentine Code does not contain a specific provision as to whether directors may exercise their management functions individually or only when convened as a board. However, in view of C.C. Arts. 337 (para.2) and 345, it has been considered that directors may not act individually, unless the by-laws expressly so provide or, obviously, when the board is composed of only one director. Courts have held that “the board of directors is a collective body, which acts in council; outside of it, the members of the board neither represent the corporation nor may act in its behalf” [Miranda v. Ram. S.A. (Cam.Nac.Com.Sala B, 1957), 90 LA LEY 243]. Furthermore, it has been decided that the meeting of the board is a prerequisite to action and that omission of the meeting makes any action by directors voidable.

Usually the board elects its chairman, except when the by-laws provide that the chairman shall be elected at the shareholders' meeting. The chairman has the following functions: (1) to represent the corporation in court and in its relations with third parties but he has no authority to bind the corporation, unless the board has given him such authority; (2) to carry out the resolutions of the board, except when this task is assigned to a general manager (gerente), as provided in C.C.Art.344; (3) to exercise all the powers granted to him in the by-laws; (4) to preside over the meetings of the board with the right to vote, and to cast a double vote in case of deadlock; (5) to preside over the shareholders' meetings, unless the shareholders elect a president ad hoc.

In order to take void action, the board of directors must meet the quorum requirement stated in the by-laws. If the by-laws do not indicate the quorum, it is understood that a majority of the directors must be present. The time of the meetings shall be set forth in the by-laws or fixed by the board at its first meeting. Each director and the Comptroller must be given notice of the meetings, the agenda, and the place of the
meetings if not at the offices of the corporation, in accordance with the formalities indicated for such notification in the by-laws. Non-compliance with this last requirement makes decisions taken at the meetings invalid.

Decisions shall be made by vote of a majority of the directors present at the time of the vote, provided that a quorum is present at such time. However, the by-laws may require a vote greater than majority for any particular act. Minutes of every meeting must be recorded in a registered minute book and must be signed by the Chairman and the Secretary of the board. Further, the minutes must be read and approved by the board at its next meeting; if not, they are not valid. Minutes must contain a list of the directors who were present at the meeting, the text of the decisions adopted and the votes for and against them, and a summary of the debates.

The New York law, like the Argentine law, indicates that directors can exercise their management functions only when duly convened as a board. The statute states that action by the board is understood to be action taken at a meeting of the board [B.C.L.§708]. With regard to quorum, the B.C.L. provides that a majority of the entire board constitutes the quorum for the transaction of any business, although the certificate of incorporation may require a greater proportion of directors present, or a smaller one but not less than one-third of the board, unless it is a close corporation with less than three directors [B.C.L.§702,§707 and §709 (a)(1)]. The by-laws may also authorize a quorum of less than a majority of the entire board.

The statute authorizes the holding of meetings of the board at any place within or outside the state of New York, although the certificate of incorporation or the by-laws may provide otherwise; the time and place of these meetings may be fixed in the by-laws of the board [B.C.L.§710]. In addition, the B.C.L. authorizes a majority of the directors present (even if not constituting a quorum) to adjourn any meeting to another time and place [B.C.L. §711 (d)]. A distinction is made between regular and special meetings of the board; the former may be held without notice to the directors, provided that the time and place of such meetings are fixed by the by-laws of the board, unless the by-laws provide otherwise. Special meetings must be held upon notice to the directors, with the exception of a director who submits a signed waiver of notice either before or after the meeting, or who attends the meeting without protesting the lack of notice. [B.C.L.§711 (a), (c)].

Decisions of the board can be made by a vote of a majority of directors present at the time of the vote, provided that a quorum is
present at such time [B.C.L. §708]. The certificate of incorporation may prescribe a larger than majority vote for the transaction of any item of business [B.C.L.§709 (a) (2)]. However, if such a provision is in the certificate, or there is a provision which requires a quorum greater than the majority of the board, this fact must be “conspicuously” noted on every share certificate issued by the corporation [B.C.L.§709 (c)]. In case that this prescription is added to or stricken from the certificate of incorporation, the amendment thereof must be approved at a shareholders’ meeting by vote of the holders of two-thirds of the shares entitled to vote, or a greater proportion of shares if required specifically by the certificate of incorporation [B.C.L.§709 (b)].

III. FUNCTIONS OF THE BOARD OF DIRECTORS

Legal nature of the functions of the Board

In Argentina, directors of corporation have been traditionally considered agents of the shareholders. The Commercial Code qualifies the nature of their functions as “agency” (mandato) in Arts. 336, 337 and 338; and in Art. 346 provides that “in everything that has not been provided for in the present title [Title III of Book II of the Code], in the by-laws, or resolutions at the shareholders’ meeting, the rights and obligations of directors and comptrollers shall be regulated by the rules of agency”. Likewise, courts have held that “directors are agents and representatives of the shareholders and must carry out their will” [Cie.D'Assurance Generales v. Sonuluz S.A.(Cam.Com.Cap.1942), 27 LA LEY 600] and that “directors are agents . . . [and] the rules of agency apply to them” [Casa Escasany S.A. v. Escasany, Sue. (Cam.Nac.Civil,Sala.A, 1959), 1959-VI J.A.488]. However, this point of view has been increasingly contested. A review of the functions of directors reveals important differences in Argentine law between their functions and those of ordinary agents. Furthermore, in Argentina, corporations are legal entities (personas juridicas) [Civil Code Art. 33 (para. 5)], and legal entities can act only through their legal representatives (representates legales) [Civil Code Arts. 35 and 36]. The Code creates a board of directors for each corporation as its managing organ and legal representative in dealings with outside parties; thus, the management functions, as well as the representation of the company are vested in the board by the Code and not by the shareholders. Therefore, the shareholders neither may decide to run the corporation without a board of directors nor may abolish the statutory management functions of the board. Of course, the board must exercise these functions in accordance with the provisions of the certifi-
cate of incorporation, the by-laws, and resolutions at the shareholders' meetings.

Some commentators draw a distinction between the decision-making functions of the board and the functions of the board relating to the carrying out of its own decisions and those made by the shareholders. In the former, the board is acting as managing organ; in the latter, as representative of the entity, in which case the law of agency may accessory apply, as provided in C.C. Art. 346, complementing what has not been set forth in the by-laws and the resolutions of the shareholders.

It may be concluded that the nature of the functions of directors is not that of ordinary "agency" as the Code apparently states. The better legal view, therefore, holds that directors, although elected and removed by the shareholders, are not merely their agents but are officials of the corporation, empowered by law to manage and represent the entity.

In the United States, although the board of directors of corporations has been regarded as actually representing the body of shareholders and as exercising authority derived from them, the prevailing view seems to be that directors are not the agents of the shareholders, and that the board of directors is the supreme and original authority in matters of regular business management.

In New York, as in most other jurisdictions, the management functions are vested in the board of directors by statute [B.C.L.§701]. The New York courts have repeatedly discussed the issue of the legal nature of the functions of the board, refusing to consider directors as ordinary agents. It has been held that "the board of directors of a corporation does not stand in the same relation to the corporate body as a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived from the former, and if the power of substitution is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense that they are received from the State in the act of incorporation" [Hoyt v. Thompson's Executor (N.Y.Ct.App.1859), 19 N.Y. 207, 216]. It also has been held that "directors are not ordinary agents in the immediate control of the shareholders", but that they are the agents of the corporation "as to third persons" [Continental Securities Co. v. Belmont (N.Y.Ct.App., 1912), 206 N.Y.7, 16]. Furthermore, it has been stated that "in spite of casual language in many opinions, a director of a corporation is not an agent either of the corporation or of its stock-
holders, except in a convenient rhetorical sense, though he may sometimes act in the nature of an agent in dealing with third parties" [N.Y.Dock Co. v. McCollom (N.Y.Supr.Ct.,1939), 16 N.Y.S 2d 844,847].

In several decisions the courts of the State have characterized directors as *trustees*. "The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it. They are trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance. As to third persons they are its agents, but as to the corporation itself, equity holds them liable as trustees" [Continental Securities v. Belmont, supra]. "While courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to a strict account of any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct [Bosworth v. Allen (N.Y.Ct.App.,1901), 168 N.Y. 157, 165]. "The relation of the directors to the stockholders is essentially that of a trustee and *cestui que trust*" [Kavanaugh v. Kavanaugh Knitting Co. (N.Y.Ct.App., 1919), 226 N.Y. 185, 193]. However, it is also argued that, in the strict sense, directors are not trustees, but act *sui generis* in a fiduciary relationship with the corporation [New York Dock v. McCollom, supra]. Finally, in some cases the courts have described the nature of directors' functions as that of *executive representatives*. "Directors are the exclusive, executive representatives of its internal affairs and the management, and use of its assets" [Pollitz v. Wabash R.R.Co., (N.Y.Ct. App., 1912), 207, N.Y. 113, 124].

**Scope of powers**

The Argentine Code does not clearly set forth the powers of the board of directors. Therefore, the scope of these powers has been construed by court decisions and commentators. Also, very often the by-laws contain a detailed enumeration thereof. C.C. Art. 338 (para.1) states that the directors may not carry out transactions unrelated to the corporate purpose. This article has been interpreted as providing that the board of directors is empowered with full management authority for the carrying out of the corporate purposes, subject only to the limitations prescribed in the Code and to those that may have been imposed by the by-laws.

It has been considered that the management functions of the board of directors comprise, in particular, the powers to conserve the assets of the company; file a voluntary petition in bankruptcy *(convocatoria de
acreedores) with the subsequent ratification of the shareholders; represent the entity before all outside parties, governmental authorities and in court; enter into compromise and arbitration agreements; accept mortgages and chattel mortgages; appoint and remove personnel; determine the date of payment of dividends approved by the shareholders' meeting; and, execute all documents necessary for the carrying out of the corporate purposes.

The law specifically prohibits directors from performing the following: (1) acts unrelated to the corporate purposes [C.C.Art. 338 (para.1)]; (2) to deal or contract, directly or indirectly, with the corporation they manage, on their own behalf [C.C.Art. 338 (para.2)]; (3) to reacquire for the corporation the shares it has issued, unless the redemption is made with net profits, the shares are fully paid in, and the transaction has been approved by the shareholders' meeting [C.C. Art. 343 (para.1)]; (4) to make loans to anyone for which the shares of the corporation are used as collateral [C.C.Art. 343 (para 2)]; (5) to bind the corporation as guarantor [Civil Code Art. 2011 (para 2)]; (6) to vote at shareholders' meetings on the approval of the balance sheet and on resolutions concerning their own responsibility (C.C.Art. 356); (7) to represent any shareholder, as his agent, at shareholders' meetings [C.C. Art. 355 (para. 2)].

By-laws may contain regulations and restrictions on the powers of the board. Furthermore, the shareholders may also adopt resolutions on this subject, although such resolutions may not curtail powers given to the board by the by-laws, but only may complement or clarify the latter's provisions. Even in the absence of a specific restriction, it is understood that the board of directors does not have authority to authorize the merger of the corporation, nor the sale of the corporate assets or the reserves (except that the board may sell corporate real estate provided that it is part of the company's business), enter into monopoly agreements, make donations or long-term loans, mortgage the corporate property, issue debentures, and, in general, perform acts that exceed the normal management operations, except in urgent situations when a meeting of the shareholders is impossible. Any action by the board of directors beyond the scope of its powers, that is to say, which violates any of the statutory prohibitions mentioned above, or the restrictions imposed by the by-laws or by resolutions at the shareholders' meetings, is void [C.C.Arts, 317 and 353 (para 1)]. The company is not bound by such action to outside parties, but the directors who made the decision are personally and jointly responsible (except those who voted against it or were absent from the meeting of the board) [C.C. Arts. 337 and 353 (para. 3)]. These
provisions of the Code are subject to strong criticism because they cause insecurity for outside parties who deal with the corporation. Such parties are hardly in a position to know the precise limits set by the by-laws on the powers of the board, and even less the resolutions that the shareholders might have adopted on the subject, yet the outsiders are subject to the consequences of the mistakes or the bad faith of the directors. In order to ameliorate these results, it is accepted that, except in the case of violation of specific legal prohibitions or of the by-laws, the shareholders' meeting may confirm acts taken by the board of directors beyond the scope of its powers, but if the shareholders do not confirm such action, the corporation will be liable in *quasi-contract* up to the amount of the benefit it obtained from the void transaction. Furthermore, it has been held that shareholders who know of action by the board beyond the limits of its powers and who do not object during subsequent meetings (in one case it was three years), impliedly confirm such action. It is customary, therefore, before entering into an important transaction with a corporation, for an outside party to verify the by-laws, the minutes of the shareholders' meetings, and the minutes of the board of directors meeting at which a director or an officer was authorized to execute the transaction.

In the United States, the scope of powers of the board of directors is usually very broad. It is asserted that in the absence of a statute, all authority for business transactions should normally be traced back to the directors. Therefore, the board has the power to borrow money when it is needed for the business of the corporation; secure any debts of the corporation lawfully contracted; pledge or mortgage the real or personal property of the entity; file a voluntary petition in bankruptcy; determine whether the financial condition of the company is such as to warrant the declaration and payment of dividends; select the chief executive and other officers; and, fix policies as to pricing, labor relations, expansion and new products.

In New York, the B.C.L. does not define the scope of powers of the board of directors. It only states that "the business of a corporation shall be managed by its board of directors" [B.C.L.§701]. Such powers should be construed in the light of previous court decisions, which have held that "all powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will and the performance of corporate functions, in the management of a corporation, may originate with its directors, where the law or the by-laws have not expressly restricted their authority and made their action to rest for its validity upon the concurrence of the
stockholders, by previous action or subsequent ratification. Within the
chartered authority they have the fullest power to regulate the concerns
of a corporation, according to their best judgment, and contracts, which
the corporation could legitimately make, come within the scope of the
ordinary power of corporate management” [Beveridge v. N. Y. Elevated

However, it should be noted that a general provision like B.C.L.§701
refers merely to the ordinary business transactions of the corporation,
and does not extend to fundamental changes in the character or organiza-
tion of the entity, such as amendment of the articles of incorporation,
alterations of the authorized stock structure, or to winding up the company.

The New York statute provides that provisions in a certificate of
incorporation which would otherwise be prohibited by law as improperly
restrictive of the discretion or powers of the board may nevertheless be
valid if all of the shareholders, whether or not having voting powers,
have authorized such provisions, and if, subsequent to the adoption of
these provisions, shares are transferred only to persons who have knowl-
edge or notice of such provisions [B.C.L. §620(b)]. Even where these
requirements have been followed, the statute further provides that such
restrictive provisions will be valid only as long as the shares of the
corporation are not listed on a national securities exchange or regularly
quoted in an over-the-counter market [B.C.L.§620(c)].

Duties and obligations

Article 292 (clause 5) of the Argentine Commercial Code requires
that the duties of directors be stated in the certificate of incorporation.
However, in addition to these duties it is necessary to consider those
duties which are provided for in the Code and other laws and regula-
tions. A general scheme would include the following duties and obliga-
tions.

1. Individual obligations of each director:
   (a) to secure a bond, before assuming office, of the kind and
       in the amount provided for in the by-laws or at the share-
       holders’ meeting, as a guarantee for the director’s per-
       formance of his duties [C.C.Art. 339];
   (b) to attend the meetings of the board and to perform those
       tasks assigned to him by the board;
   (c) to object to any decision of the board that he considers
       in violation of law or the provisions of the by-laws [C.C.
       Art. 337 (para.2)].
2. Obligations of the board of directors:

(a) to carry out the provisions of the by-laws and the resolutions of the shareholders' meetings, and within this framework, to perform all the acts necessary for the operation of the company;

(b) to convene annually the regular shareholders' meeting, within four months after the closing of the previous fiscal year [C.C.Art. 347], and special shareholders' meetings whenever shareholders who represent one-twentieth of the capital stock so require, unless the by-laws authorize the request by a smaller percentage [C.C.Art. 336];

(c) to govern and supervise all of the corporate personnel;

(d) to prepare and submit to the comptrollers, at the end of each fiscal year, a detailed balance sheet, an inventory, a profit and loss statement, and a report about the status and business of the company [C.C.Art. 361]; also to prepare a quarterly balance sheet, submit it to the comptrollers and publish it for a period of three days, after approval by the Comptroller [C.C.Art. 360]. These reports often must be filed with the Inspecci6n General de Justicia as well. Balance sheets must be prepared in accordance with the specifications set forth by Executive Decree 9795/54;

(e) to inform the Commercial Court of the district if the corporation has suffered the loss of at least 50% of its capital stock and to publish the information in the newspapers of the town [C.C.Art. 369 (para.1)]. If the loss amounts to seventy-five per cent or more of the company's capital stock, the entity shall be considered automatically dissolved, and the directors shall be personally and jointly liable to third parties for any commitment they undertook from the time such deficit was or should have been known to them [C.C.Art. 363 (para.1)].

(f) to maintain the books that the corporation is required to keep: (1) journal, (2) inventory, (3) letter copying book, (4) shareholders' register, (5) shareholders' meetings' minute book, (6) board of directors' minute book, (7) register of attendance at shareholders' meetings.

(g) to propose to the shareholders' meeting the distribution of dividends and the establishment of reserves [C.C.Art. 361].
The standard of care that directors must meet in discharging their duties is not provided for in Argentine corporation law. It should be understood that the general rule of the Civil Code regarding fault for the failure to perform obligations applies to directors of corporations. This provision states that such fault "consists of the omission of those measures required by the nature of the obligation, and which correspond to the circumstances of those persons, at that time and place" [Civil Code Art. 512]. Therefore, the standard of care of directors must be appraised in each particular case.

In the United States the specific duties and obligations of directors are usually prescribed in the by-laws rather than in statutes. In general, such duties are: (1) the duty of caring for the shareholders' property, (2) the duty of managing it, and (3) the duty of representing the shareholders in the corporate affairs. Another point of view considers that the duties of a director are (1) to be loyal to his trust, (2) to use ordinary and reasonable care not to exceed the powers of the corporation nor his powers as a director, and (3) to act in good faith.

The New York statute contains a blanket provision applicable to the performance of duties by the directors as stated in the by-laws and in the exercise of their management functions. This provision declares that directors shall discharge the duties of their position "in good faith and with that degree of diligence, care and skill which ordinary prudent men would exercise under similar circumstances in like positions" [B.C.L.§717]. Such a standard of care allows the court to envision the director's duty of care as a relative concept, depending on the particular circumstances involved. This standard of care is different from the one that was developed by the New York courts through several leading decisions, which had held that "when one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trust committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs" [Hun v. Carey (N.Y.Ct.App., 1880), 82 N.Y. 65]; "directors of monetary corporations are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs" [Hannah v. Lyon (N.Y. Ct.App., 1904), 179 N.Y.107]. The standard of care set forth in these decisions is known as that "which men of ordinary prudence exercise in their own affairs". Although this standard had been consistently applied by the courts of the State, more recently they started to take a different
approach. "It has been said that a director is required to conduct the business of the corporation with the same degree of fidelity and care as an ordinary prudent man would exercise in the management of his own affairs of like magnitude and importance. General rules, however, are not altogether helpful. In the last analysis, whether or not a director has discharged his duty, whether or not he has been negligent, depends upon the facts and circumstances of a particular case, the kind of corporation involved, its size and financial resources, the magnitude of the transaction, and the immensity of the problem presented. A director is called upon 'to bestow the care and skill' which the situation demands" [Litwin v. Allen (N.Y. Sup. Ct. 1940), 25 N.Y.S.2d 667, 678]; "they [directors] are bound generally to use every effort that a prudent business man would use in supervising his own affairs . . ." [Kavanaugh v. Gold (N.Y. Sup. Ct. App. Div., 1911), 147 App. Div. 281, 288].

On the other hand the Federal courts, including the United States Supreme Court, as well as the courts of other states, adopted the standard of the "ordinarily prudent man under similar circumstances" which refers to what a reasonably prudent person would himself do if he were a director in the corporation, and which has been considered more fair and satisfactory than the rule that has been discussed above. Federal courts have held that "the true standard is that set by the 'ordinary director', and not the standard of the ordinary man on the street" [Allen v. Roydhouse (Fed. Dist. Ct. E. D. Penn., 1916), 232 Fed. 1010, 1014]; the U. S. Supreme Court has said: "In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances . . ." [Briggs v. Spaulding (U.S.Sup.Ct., 1890), 141 U.S. 132, 152.] The B.C.L. has adopted this latter approach.

Finally, the B. C. L., pursuant to modern corporate practice, authorizes directors, when acting in good faith, to rely upon financial reports represented as accurate by the president or the accountant of the corporation, or by a certified public accountant or firm [B.C.L.§717].

Delegation of authority

The Argentine Code does not contain any provision concerning the delegation of authority (to attend meetings, vote, etc.) by individual directors or by the board. Commentators have considered that in view of the fact that directors are elected by the shareholders because of their personal qualifications, no director may delegate his authority. However, the Inspección General de Justicia has approved a charter containing a
provision permitting an individual director to delegate his authority, pro-
vided that the delegation is made to another director.

It has been said that the board of directors may not delegate its au-
thority either, although it may assign specific tasks to any of its mem-
ers or it may give them powers of attorney for the carrying out of board decisions. Likewise, the board may (and usually does) delegate the execution of its decisions to a president, manager or other officer. In this respect the Code provides that the by-laws or the shareholders’ meeting may assign the executive functions to a manager who, although subject to the authority and control of the board of directors, shall be responsible to the directors, to the shareholders and to third parties, for the performance of his duties [C.C.Art. 344]. In case the general manager, when dealing with third parties, acts beyond his authority or without authorization from the board, it has been held that the corporation is, however, bound by his action, provided that the third party could reasonably consider that the manager’s action was within the scope of his apparent authority.

Finally, it is understood that, even though the Code does not include any reference to executive committees, when the board is too large the by-laws may create such a committee. If this is done, the full board shall be in charge of making the decisions. The executive committee shall be charged with carrying them out and taking care of the internal admin-
istration and routine business of the company.

The New York statute permits the delegation of management author-
ity and duties to the officers of the corporation to the extent provided in the by-laws or by the board of directors [B.C.L.§715 (g)]. It also states that the certificate of incorporation or the by-laws may provide for the appointment of an executive committee and other committees. Each of said committees must consist of at least three directors designated from among the members of the board by resolution of a majority of the entire board. To the extent stated in the certificate of incorporation or the by-laws, each such committee may have all the authority of the board, except concerning the important matters specifically enumerated by the statute, which may not be delegated to any of the committees [B.C.L.§712 (a)].

IV. CONCLUSIONS

The comparison outlined above indicates that despite various techni-
cal differences there is a basic similarity in the organization of the board
of directors under the laws of Argentina and New York. The most relevant differences between the two appear in connection with the legal nature and the scope of powers of the board. In these areas both legal systems reveal an interesting evolution that deserves a brief examination.

Originally, in Argentine corporations (most of them close corporations) the center of power used to be in the hands of the shareholders; the directors usually were some of these same shareholders (the ones who had a greater stake in the enterprise or more time available), and they were actually agents of the total number of shareholders. But the industrial development that started in the 1880's, the appearance of the public-issue corporations and the greater complexity and specialization of the management functions caused a gradual expansion in the scope of powers of the board, at the expense, of course, of the powers of the shareholders. This evolution was carried on through by-laws, since the Code, which was not subject to any alteration, has loopholes that facilitated said evolution. Currently it is quite usual for the by-laws to grant wide powers to the board of directors. Simultaneously, the commentators' approach to the legal nature of the functions of the board has evolved from the original view that the directors are agents of the shareholders to the present view that the board is an organ and legal representative of the corporation.

The New York law, on the other hand, evolved from the traditional concept of unrestricted management authority of the board of directors to the provision contained in §620 of the B.C.L. which allows some corporations to provide in the certificate of incorporation for restrictions on the powers of the board. And the new trend is to consider directors as *sui generis*, rather than trustees, which was usually the case previously.

The above reveals a close resemblance between the two corporate legal systems and a trend towards approximation is discernible. While the New York law has advanced by means of statutory enactment, the evolution of the Argentine corporation law is solely dependent on the by-laws, but even the practice of including new features in by-laws is often obstructed by the Inspección General de Justicia which has to approve the corporate by-laws prior to the concession of corporate personality by the Executive Branch. The bureaucratic approach utilized by the Inspección General de Justicia, like many other governmental agencies, constitutes an unfortunate interference in free enterprise, with consequent damage to the national economy.

The Argentine Commercial Code is outdated and completely inadequate for the needs of modern business, but until now it has been impossible to obtain its substitution by a new Code. In 1959 the Executive
Branch retained professors Carlos Malagarriga and Enrique Aztiria to prepare a draft of a new Business Associations law. This draft was submitted to Congress in 1960, but Congress did not act upon it, due to the customary procrastinations of parliamentary institutions. A revised draft of this project was issued by an Advisory Committee in 1963 but President Arturo Illia and the new Congress that was elected that year failed to take any action on it. The new government of President Juan C. Onganía which took office after the military coup of June 28, 1966 appointed a Committee of five distinguished jurists to draft a new Business Corporation Law. Professor Isaac Halperin was elected chairman, and the Committee submitted a new project in December 1967. The Government requested bar associations, the Buenos Aires Stock Exchange, the Argentine Chamber of Commerce and other institutions to review the project and to offer their views and suggestions. All these entities issued strong objections to many provisions of the project, mainly to its excessively detailed, bureaucratic and unrealistic approach to corporate life and needs. The Committee was directed by the Government to re-draft taking into account said objections. This work is in progress and a final draft of the project is likely to be enacted into law by President Onganía.