ACC Association of Corporate Counsel

Shareholders' rights in private and public companies in Argentina: overview

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TYPES OF LIMITED COMPANIES AND SHARES

1. What are the main types of companies with limited liability and shareholders? Which is the most common? Which type do foreign investors most commonly use?

The most common types of companies that enjoy limited liability are the *Sociedad Anónima* (SAs) and the *Sociedad de Responsabilidad Limitada* (SRLs), and these are the main types of companies with limited liability. Joint stock companies (*Sociedad en Comandita por Acciones*) are also common. In joint stock companies only the non-managing partner (*socio comanditario*) has limited liability up to the capital he subscribes.

Foreign companies doing business in Argentina usually choose between an SA and an SRL. SAs are more common. However, US investors tend to prefer SRLs for tax reasons.

In SAs capital stock is represented by shares and in SRLs it is represented by quotas. Only shares can either be represented in physical certificates or kept as book-entry stock. Quotas are registered with the General Inspection of Corporations (GIC). GIC is the supervisory authority for companies incorporated in the City of Buenos Aires. The majority of limited liability companies incorporated in Argentina are incorporated in Buenos Aires. Other jurisdictions usually follow the GIC criteria; however, each case is assessed on an individual basis.

Both shares and quotas are freely transferable unless the company's bye-laws provide otherwise. However, provisions in the company's bye-laws can only limit transfers and cannot prohibit transfers.

Foreign companies commonly operate in Argentina through a branch, instead of a subsidiary. Branches are easier to operate and require only a power of attorney. They also have less bookkeeping requirements than SAs and SRLs. Argentine law considers branches one and the same person with their head offices, and because of this the head office can be held jointly liable with its Argentine branch. However, if an Argentine subsidiary is incorporated, the liability of the head office will generally be limited to the assets contributed to that subsidiary (that is, the subsidiary's equity capital).

As from 1 August 2015 companies with one shareholder can be registered with the GIC (*Business Association Law (BAL) 19,550 (as amended)*). This only applies for SAs and does not apply for SRLs. Additionally, companies with one shareholder cannot participate in other companies organised with only one shareholder. The BAL also establishes that one shareholder companies are treated as SAs that are permanently controlled by the state. Therefore, these companies require, among other things, a minimum of three directors and three syndics (a syndic is a controller, a person that controls the company in order to protect the interests of shareholders) and must inform the GIC before holding shareholder meetings.

2. What are the minimum share capital requirements for companies?

To incorporate a company (*Sociedad Anónima*) (SA), the Business Association Law (BAL) requires a minimum capital stock of AR$100,000. Limited liability companies (*Sociedad de Responsabilidad Limitada*) (SRLs) do not have a minimum capital requirement.

However, SAs and SRLs must have a capital that the General Inspection of Corporations (GIC) considers sufficient to allow them to attain their corporate purpose. Therefore, the minimum capital requirements are assessed on a case-by-case basis, depending on the corporate purpose.

Highly regulated businesses, such as banks and insurance companies, have specific regulations providing for significantly higher minimum capital requirements.

3. Briefly set out the main types of shares typically issued by a company and the main rights they provide. Set out the other main financial instruments (for example, bonds) and participation instruments that can be issued by a company.

Companies (*Sociedad Anónima*) (SAs) can issue common shares or preferred shares.

Common shares are voting shares. As a general rule, each common share has a right to one vote. The company's bye-laws can create classes of shares entitled to up to five votes each. The Business Association Law (BAL) does not regulate the issuance of different types of quotas (*see Question 1*). However, legal authors and judicial precedents have authorised the issuance of different types of quotas for SAs.

Preferred stock usually has a priority right to receive the profits of the company with preference over common stock. Preferred stock may not have voting rights, except for some special matters (for example, if there is a default in the payment of dividends, decisions related to the transformation or dissolution of the company, change of its corporate purpose and so on). Preferred stock cannot be multi-voting stock.

An irrevocable capital contribution can be recorded in a special account within the net worth of the company during a specific time period. After some time, the contribution will have to be either capitalised into shares or repaid, or it will have to be recorded as a liability.

Another common form of debt is commercial bonds, which can be convertible or non-convertible into shares and, if placed through a public offering procedure, may grant certain tax benefits.

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Additionally, participation bonds (*bonos de participación*) can be issued in exchange for a consideration that is not a contribution of capital. They only give the right to participate in the profits of the fiscal year. The participation bonds can also be given to company personnel. The profits from bonds are calculated as expenses. They are non-transferable and are forfeited when the employment relationship is terminated, for whatever cause.

The other financial instruments that can be issued by a company are notes (*obligaciones negociables*), which are regulated by Obligaciones Negociables Law 23.576. Notes are private debt instruments that give a credit to its owner with respect to the issuing company. Investors who acquire this title are established as bondholders or creditors of the company and are entitled to repayment of the principal and the agreed interest during a specified period of time.

Notes can be issued by joint stock companies, co-operatives, civil associations established in the country and branches of the joint stock companies established abroad under the terms of section 118 of the BAL.

4. What is the minimum number of shareholders in a company?

In principle, companies in Argentina must have at least two shareholders.

However, from 1 August 2015 due of an amendment to our Argentine Civil Code (ACL) companies (*Sociedad Anónima*) (SAs) can have only one shareholder (*see Question 1*).

If the number of shareholders is reduced to one (due to buyout, death, or for any reason whatsoever) the remaining shareholder can transform the company to this new type of SA. If the company is not transformed it becomes unlimitedly liable, and has three months to find another shareholder or the company is forcibly dissolved and liquidated. This rule also applies for limited liability companies (*Sociedad de Responsabilidad Limitada*) (SRLs) as it is mandatory to have at least two quotaholders.

GENERAL SHAREHOLDERS' RIGHTS

5. What are the general rights of all shareholders? How can shareholders' rights be varied (for example, additional rights attaching to a class of shares, or limitations on shareholders' rights)? Are such variations generally provided in the company's bye-laws and shareholders' agreements?

The basic rights of any shareholder can be classified as political and economic rights.

The main political right is the right to vote at the company's general meetings. Other political rights include the right to request a shareholders' meeting, the right to control and review the books and records of the company (this right is only available in companies (*Sociedad Anónima*) (SAs) when they have not appointed syndics (persons who control companies to protect the interests of shareholders) and the right to withdraw from the company if certain decisions are enforced (for example, early liquidation of the company, merger, spin-off and so on).

The main economic right is to receive the profits of the company in the same proportion as the contribution made or as provided in the company's bye-laws. The following provisions are void, where one or some of the members:

- Receive all the profits.
- Are excluded from them.
- Are exempted from contributing to the losses.

Economic and political rights can be modified, and the latter may even be suppressed. For example, preferred stock grants its holder a special economic right, and for these shares the law considers it legitimate to restrain their voting rights.

Additionally, certain rights can be waived, whereas others cannot. As a general rule all partners can share profits and liabilities alike (*Business Association Law (BAL)*). Therefore, the right to collect dividends and afford liabilities cannot be waived before they are vested; however, this right can be waived once they are vested.

Voting rights can be waived only for preferred stock, and in a general way (that is, for all preferred shares of the same class, not for an individual partner). The remaining political and economic rights can also be waived within a certain class of stock. Individual partners can only waive their rights after they are vested, but not before.

These variations are generally provided in the company's bye-laws and they are in such cases enforceable against third parties. If the rights are provided in the shareholders' agreement, they will not be enforceable against third parties as these private agreements are not registered with the General Inspection of Corporations. Shareholders' agreements are usually used for those rights and obligations that the partners do not want to disclose to third parties.

6. Briefly set out the rights of minority shareholders and the shareholding required to exercise such rights.

The Business Association Law (BAL) has several mechanisms to protect the right of minority shareholders, among which is a right of first refusal and a right of accrual every time there is a capital increase (both, widespread anti-dilution mechanisms). Additionally, in companies (*Sociedad Anónima*) (SAs) minority shareholders can force the appointment of board members through the "cumulative voting system", which basically works as follows:

- Each shareholder that votes by cumulating his votes has a number of votes equal to that which results from multiplying the votes that he normally possesses by the number of directors to be elected. He can distribute or accumulate his votes in a number of candidates not exceeding one third of the position to be elected.
- The shareholders that vote using the regular or plural system and those that vote by cumulating their votes compete in the election of one third of the vacancies to be filled. The remaining two thirds are filled by the regular or plural method. The shareholders that do not use the cumulative voting system vote for all of the vacancies to be filled and give to each of the candidates all of the votes that correspond to these shareholders in accordance with their shares that have voting rights.

Through classes of shares, the company's bye-laws can provide for the appointment, on behalf of the minority, of one or more directors and one or more syndics (*see Question 1*).

The shareholding required for minority shareholders to exercise some of their rights varies, for example:

- A general meeting can only be called by shareholders representing at least 5% of the capital stock, provided the company's bye-laws do not fix a lesser percentage.
- Shareholders who represent no less than 2% of the capital stock of an SA have the right to require syndics to investigate the written submissions (of the alleged behaviour) that are made by them. Syndics must also provide information if required by shareholders representing such percentage.

- Actions for liability against directors can also be filed by shareholders who opposed the approval of the directors' performance at the shareholders' meeting and who represent at least 5% of the company's capital stock.

There are no minimum shareholdings required in limited liability companies (*Sociedad de Responsabilidad Limitada*) (SRLs).

The public offering regime (*section 70, Capital Markets Law (CML) 26.831 (as amended)*) also establishes a special mechanism to protect the rights of minority shareholders. Shareholders representing not less than 2% of the capital stock can submit to the company's principal offices any comments or proposals relating to the conduct of the corporate business during the fiscal year (*section 70, CML*). This can be done up to five calendar days before the date the annual shareholders' meeting to consider the documents for the fiscal year is to be held. The board of directors must inform shareholders that these comments or proposals are available at the company's principal offices or can be accessed by electronic means.

Where the rights of minority shareholders may be affected and on an adequately substantiated request by shareholders accounting for a percentage of not less than 5% of the listed companies, the Securities and Exchange Commission (CNV) may request the appointment of an external auditor proposed by them to carry out one or several particular tasks (which can be limited in time), at the expense of those requesting it (*section 108(e), CML*). This must be done with the prior opinion of the supervisory and audit committee of the company and provided there is notice of the alleged damage likelihood to shareholders. If the auditors determine the existence of irregularities, requesting shareholders can repeat the requested service costs against the company and the members of their management boards and/or supervisory bodies liable through its acts or omissions in respect of illicit transactions.

7. How influential are institutional investors and other shareholder groups in monitoring the company's actions (for example, corporate governance compliance)? List any such groups with significant influence in this area.

On 20 November 2008, the Congress enacted Law 26.425 that ordered the creation of the *Sistema Integrado Previsional Argentino* (SIPA) as the only public pension regime, funded by a supportive system of sharing. In turn, it established the elimination of the capitalisation regime by the Retirement and Pension Funds (AFJP) and transferred in kind to the National Administration of Social Security (ANSES) the resources that integrated individual capitalisation accounts of members of the capitalisation regime.

Law 26,425, which eliminated the capitalisation regime established by Law 24,241 and ordered its absorption by the AFJP, ordered the transfer of all resources managed by the AFJP to the ANSES, where it became part of the *Fondo de Garantía de Sustentabilidad del Sistema Integrado Previsional Argentino*; included in those assets were shares in public companies (*Sociedad Anónima*) (SAs) in Argentina. ANSES became shareholder (minority) of more than 40 public companies, which includes the leading companies in the country. Through ANSES, the Government intervenes in these companies as a minority shareholder and as an institutional investor.

GENERAL MEETING OF SHAREHOLDERS

Calling a general meeting

8. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved? Which decisions must be approved by the shareholders in a general meeting?

There are two classes of general meetings for companies (*Sociedad Anónima*) (SAs): ordinary general meetings (OGMs) and extraordinary general meetings (EGMs) (*Business Association Law (BAL)*).

Decisions reserved for OGMs include:

- Consideration and approval of the general balance sheet, profit and loss statement, distribution of profits, management report, syndic's opinion and all other measures relating to the management of the company that it is competent to decide in accordance with the law and the company's bye-laws or that are submitted for its decision by the board, the supervisory council or the syndics.
- Appointment and removal of directors, syndics or members of the supervisory council and determination of their remunerations.
- Responsibilities of the directors and syndics and members of the supervisory council.
- Increases of capital, in accordance with section 188 of the BAL (that is, when the increase of the capital stock is up to five times its amount and the company's bye-laws provide that such an increase can be decided by the OGM).

An OGM will be called to discuss the first two items above within four months of the closing of the financial year.

The EGM has authority over all those matters that are not within the authority of the OGM and with respect to the modifications of the company's bye-laws.

Shareholders can also incorporate into the company's bye-laws or shareholders' agreement that other matters must be approved in a general meeting.

9. Can a general meeting be held by telecommunication means or written/electronic approval?

The bye-laws of limited liability companies (*Sociedad de Responsabilidad Limitada*) (SRLs) must provide for the form of deliberation and adoption of social resolutions (*Business Association Law (BAL)*). If there are no rules, the resolutions adopted in response to a simultaneous and authentic consultation will be valid, taken through a vote of the partners within ten days of the consultation and made known to the management through any method that assures its authenticity; or those resolutions resulting from a written statement in which all partners express how they vote. If the SRL has a capital of more than AR$10,000,000 the partners will cast their vote at a general meeting on the yearly financial statements. The partners are notified of the general meeting, which must take place within four months of the financial year closing.

The BAL does not foresee these possibilities for companies (*Sociedad Anónima*) (SAs). Additionally, the General Inspection of Corporations considers them forbidden in the case of SAs.

Companies' corporate bye-laws can provide that remote shareholders' meetings are held (*Capital Markets Law*). For this purpose the Securities and Exchange Commission (CNV) will establish rules concerning the necessary means and conditions to

ensure the safety and transparency of these remote shareholders' meetings. However, the CNV has not established these rules yet.

10. What are the notice, information, and quorum requirements for holding general meetings and passing resolutions?

To attend a general meeting, shareholders must notify the company in order to be registered in the Ledger of Attendance at Shareholders' Meetings. Notification must be not less than three working days before the date of the meeting. The company will send receipt notices, which serve as admission to the general meeting.

Shareholders must receive the relevant information, for example, annual financial statements, that will be delivered at the general meeting 15 days before the meeting.

The quorum requirements for holding meetings and passing resolutions vary as follows depending on the type of general meeting:

- Ordinary general meetings (OMGs):
  - quorum: at the first call stockholders representing a majority of the voting stock must be in attendance. At the second call, the general meeting is considered in order irrespective of the number of stockholders present;
  - majority: in both cases, resolutions will be adopted by an absolute majority of votes present that may be issued on the respective decision, except when the bye-laws demand a higher number.
- Extraordinary general meetings (EGMs):
  - quorum: at the first call stockholders representing 60% of the shares entitled to vote must be in attendance, provided the company's bye-laws do not require a higher quorum. Stockholders representing 30% of shares entitled to vote must be present for the second call, unless the company's bye-laws fix a higher or lower quorum;
  - majority: resolutions in both cases will be adopted by an absolute majority of votes present that may be cast on the respective decision, except when the company's bye-laws demand a higher number.
- Special cases: for corporate transformations both at the first and the second call, resolutions will be adopted by the approving vote of the majority of shares entitled to vote, without application of the multiple vote, in the following:
  - extensions or renewals, except for companies that make public offerings or list their shares on the stock exchange;
  - a company's anticipated dissolution;
  - the transfer of domicile abroad;
  - a fundamental change in the corporate purpose and total or partial repayment of capital.
- This provision is applied to decide to mergers and spin-offs, except for the surviving company, which is ruled by regulations governing capital increases.

The company's bye-laws and/or shareholders' agreements may require a major quorum or majority to adopt resolutions; except for the quorum to OGMs that cannot be increased.

For public companies, the Securities and Exchange Commission (CNV) establishes that the companies must inform the holding of general meetings as a significant event, through the financial information system (*Autopista de la Información Financiera*) (*section 4, Chapter II, Title II, CNV rules*). This financial information system is a website provided by the CNV in which every company under the public offer regime must inform different situations that are established in the rules of such entity.

Voting

11. What are the voting requirements for passing resolutions at general meetings?

Voting is conducted by a poll vote as the number of votes per share may vary depending on the rights granted to each share.

Shareholders may have themselves represented at a general meeting. However, directors, syndics, members of the supervisory council, managers and other company employees cannot be their representatives. It is sufficient to grant the proxy via a private instrument, with the affixed signature certified judicially, by notary public or by a bank, except where provisions to the contrary are contained in the company's bye-laws.

Written resolutions are not allowed and it is mandatory to attend the meeting in order to vote.

If shareholders desire to aggregate their shares to exercise their voting rights (for example, by trust, or shareholders' agreement) one person may attend the meeting with a proxy granted on behalf of the trust or parties of the shareholders' agreement.

For SRLs (*Sociedad de Responsabilidad Limitada*), see *Question 9*.

The Capital Markets Law (CML) establishes that any shareholders wishing to publicly request the granting of a proxy must submit the relevant request under the regulations established by the Securities and Exchange Commission (CNV) (*section 69, CML*). To submit such a request, a given shareholder will hold not less than 2% of the capital stock represented by any voting shares and have been a shareholder for not less than one year. Additionally, any formal requirements established by the CNV must be complied with. A proxy must always be revocable and must be granted for a specific shareholders' meeting. Any shareholders submitting such requests will be held liable for the information contained in the proxy form to be registered with the CNV, and for any information that may be disclosed while the request is pending. This information must be sufficient to enable shareholders to make a fully informed decision. Any intermediaries taking part in the above request must diligently check the accuracy of the information. A failure to comply with any of the duties and regulations will be penalised by the CNV, in addition to any statutory applicable liability that infringers may incur.

12. Are specific shareholder approvals/resolutions required by statute for certain corporate actions? What voting requirements and majorities apply?

See *Questions 8* and *10*.

Shareholder rights relating to general meetings

13. Can a shareholder require a general meeting to be called? What level of shareholding is required to do this? Can a shareholder ask a court or government body to call or intervene in a general meeting?

Ordinary general meetings and extraordinary general meetings are called by the board of directors or the syndics where:

- Where it is required under law that they must take place.
- Whenever either the board of directors or the syndics may deem it necessary.

- When required by shareholders representing at least 5% of the capital stock, provided the company's bye-laws do not fix a lesser percentage.

If the board of directors or syndic fails to do so, the meeting may be called by the corporate supervisory authority or by court order, on request of a shareholder.

See *Question 9*.

14. Can a shareholder require an issue to be included and voted on at a general meeting? What level of shareholding is required to do this? Can a shareholder require information from the board about the meeting's agenda?

Shareholders representing at least 5% of the capital stock, provided the company's bye-laws do not fix a lesser percentage, may require an issue to be included and voted on at a general meeting.

See *Question 28*.

15. Do shareholders have a right to resolve in a general meeting on matters which are not on the agenda?

All decisions on matters other than those included on the agenda are null and void, except:

- When the entire capital is present and decisions are adopted unanimously by the shares vested with voting rights.
- The exceptions expressly authorised by the Business Association Law.
- The appointment of those parties to sign the minutes.

16. Can a shareholder challenge a resolution adopted by a general meeting? Is a certain shareholding level required to do this? What is the time limit and procedure to challenge a general meeting resolution?

Every resolution of the general meeting adopted in violation of the law or the company's bye-laws can be challenged within three months as a nullity by:

- The shareholders that did not vote in favour of the respective decision.
- Those absent that are able to demonstrate that at the time the decision was taken they held the requisite qualification to be considered shareholders.

Those who voted in favour may also object to the decision if their votes are voidable for defects in their consent.

There are no thresholds concerning the stock interest owned to be able to bring such a claim.

The action is brought against the company, before the judge of its domicile, within three months of the closing of the meeting. However, some courts may permit filing a claim even after the three months period has elapsed, as long as there is a clear violation of public policy.

SHAREHOLDERS' RIGHTS AGAINST DIRECTORS

17. What is the procedure to appoint and remove a director?

The appointment of directors is made at a shareholders' meeting. In some cases, the appointment of directors can be done by the supervisory council.

Directors may be removed without cause.

18. Can shareholders challenge a resolution of the board of directors? Is there a minimum shareholding required to do this?

The Business Association Law does not establish a regime to challenge the resolutions of the board of directors, which has caused some debate among judges and scholars.

In this sense, the latest commercial court decisions on the matter and the great majority of authors on the subject consider the possibility of having the shareholders challenge a decision of the board before the court, as is the case, for example, regarding decisions made at shareholders' meetings. Additionally, the courts do not request a minimum percentage of capital to pursue these challenges in court.

19. Briefly set out the main directors' duties to the company and its shareholders. What is the potential liability of directors to the shareholders? Can their liability be limited or excluded? On what grounds can shareholders bring legal action against the directors?

The directors are in charge of the administration of the company and must perform their duties with loyalty and with the diligence of a good businessman.

The directors have unlimited, joint and several liability to the company, the shareholders and third parties for mismanagement, under the duties of loyalty and the performance of a good businessman. Additionally, they are liable for any infringements of the law, of the company's bye-laws or their regulations, and for any other damage produced by fraud, abuse of authority and gross negligence.

A director will be held liable considering the individual performance whenever duties were assigned in accordance with the company's bye-laws, the regulations or a shareholders' meeting resolution.

However, a director who participated in the deliberation or resolution or who acknowledged it, is exempt from liability if he puts his protests in writing and on the record, and gives notice to the syndic before his liability is reported to the board, the syndic, the shareholders' meeting, the competent authority or before judicial action is exercised.

The claim for liability against the directors pertains to the company, following a resolution at the shareholders' meeting. The resolution may be adopted if it is the direct consequence of the resolution of a matter that is included in the agenda even if it is not itself on the agenda for the meeting. The resolution may result in the removal of the director or directors affected and if so, it will make their replacement mandatory.

However, the resolution (action) may also be filed by the shareholders who opposed the approval of the directors' performance at the shareholders' meeting and who represent at least 5% of the company's capital stock.

Directors of public companies must comply with section 78 of the Capital Markets Law (CML). This means that for companies that publicly offer their shares, the directors' duty of loyalty is deemed to expressly include the following rules:

- A director is not permitted to make use of any corporate assets or confidential information for his own private purposes.
- A director is not allowed to profit or permit a third party to profit, whether by an action or an omission to act, from any business opportunities available to the company.
- Directors are required to exercise any powers conferred to them solely for the purposes for which they were conferred under the law or the company's bye-laws or by a shareholders' meeting or the board of directors.
- A director must meticulously ensure that no conflict of interest, whether direct or indirect, will under any circumstances arise between his actions and the company's interests.

In case of doubt as to a director's compliance with his duty of loyalty, the burden of proof will be borne by the director.

CML differs from the Business Association Law regarding the legal actions that shareholders can have against the directors. CML establishes that for companies that publicly offer their shares, civil liability actions under section 276 of the Companies Law 19,550 (codified text 1984), as amended, may, if they are brought by individual shareholders, be filed to either:

- Claim compensation on behalf of the company for the total damages sustained by it.
- Claim compensation for a partial damage indirectly sustained by the shareholder pro rata to its respective holding, in which case the compensation amount will be paid to and owned by the shareholder.

20. Are directors subject to specific rules when they have a conflict of interest relating to the company? Are there restrictions on particular transactions between a company and its directors? Do shareholders have specific rights to bring an action against directors if they breach these rules?

When a director has an interest adverse to that of the company, he must inform the board of directors and the syndics. He must also refrain from participating in the deliberation, under penalty of incurring the responsibility of mismanagement.

A director can only enter into contracts with the company that are in the company's ordinary course of business whenever such agreements are entered into under market conditions. Agreements that do not conform to these requisites can only be entered into after the board's approval or consent of the syndics if there is no quorum. Likewise, these transactions must be reported to the shareholders' meeting.

If the shareholders' meeting disapproves the agreements already entered into, the directors, or the syndics in their case, will be joint and severally liable for the damages caused to the company.

Contracts entered in violation of the rules (*see Question 19*) and which were not ratified by the shareholders' meeting are null and void without impairment of the liability for the directors or syndics.

Additionally, the Capital Markets Law (CML) establishes restrictions on particular transactions between a company and its directors. It also contains one specific section (*section 72*) that establishes that for companies that publicly offer their shares, any acts performed or contracts executed between the company and a related party and involving a significant amount must be performed or executed under a certain procedure (the procedure is set out in section 73 of the CML).

This procedure states that if the board of directors approve any acts or contracts referred to in section 72 these acts or contracts must be publicised with a statement from the audit committee or, if applicable, from an independent evaluation companies. The audit committee's report, or independent evaluation companies' reports as applicable, must be made available by the board of directors to the shareholders at the company's principal offices. The reports must be made available on the business day following the adoption of the relevant resolution by the board of directors and notice must be given to the shareholders through the relevant market newsletter.

The controlling entity or related person that is the counterparty to the transaction must, if applicable and before the transaction is approved by the board of directors, make available to the board all background information, reports, documents and disclosures referring to the transaction and which have been previously submitted to foreign supervisory or regulatory entities of competent jurisdiction or to foreign stock exchanges. The affirmative or negative vote cast by each director must be recorded in the minutes of the board meeting at which the transaction was approved. The transaction is subject to prior approval by a shareholders' meeting if the terms of the transaction have not been qualified as reasonably adapted to market conditions by the audit committee or both evaluation companies.

Regarding section 72 of the CML, "related party" means any of the following persons with respect to the issuer:

- Directors.
- Members of the supervisory body or surveillance committee.
- Chief executive officers or special managers of the issuing company appointed under section 270 of Argentine Companies Law 19,550 (codified text 1984), as amended.
- Natural persons or legal entities controlling or holding a substantial interest, as determined by the Securities and Exchange Commission (CNV) in the capital stock of the issuer or the issuer's controlling entity.
- Any other company under the common control of the same controlling entity.
- The relatives in the ascending and descending line, spouses or siblings of any of the natural persons referred to above.
- Companies in which any of the persons above hold a significant direct or indirect interest.

Provided none of the circumstances described above is present, a subsidiary of the issuer will not be deemed a "related party".

A "significant amount" is deemed involved in an act or contract when such amount exceeds 1% of the company's shareholders' equity as shown in the most recently approved balance sheet.

If a claim for compensation of damages is filed by a shareholder as a result of an infringement of section 73 of the CML, the defendant bears the burden of proving that the act or contract was executed under market conditions or that no harm was sustained by the company as a result of those terms. Such reversal of the burden of proof is not applicable for transactions approved by the board of directors on a positive opinion expressed by the audit committee or both evaluation companies, or transactions approved by an annual shareholders' meeting without the shareholder that is a related party or has an interest in the act or contract in question having cast a deciding vote.

See *Question 19*.

21. Does the board have to include a certain number of non-executive, supervisory or independent directors?

The Securities and Exchange Commission (CNV) requires listed companies to have a minimum of independent directors. These companies must establish an audit committee to work in a collegiate manner with three or more members of the board, the majority of which must necessarily retain an independent status, according to the criteria set by the CNV. This criterion determines that for a director to be considered as independent he must have that status both for the company and the controlling shareholders, and should not perform executive duties in the company.

22. Do directors' remuneration and service contracts have to be disclosed? Is shareholder approval of directors' remuneration required?

The director's remuneration must be approved by the shareholders. The Business Association Law establishes that the maximum amount to be paid to members of the board of directors and of the controlling council, if applicable, for any item, including salaries and other remuneration for discharging permanent technical and administrative duties, cannot exceed 25% of profits earned.

This maximum is limited to 5% when no dividends are distributed to shareholders and is increased pro rata the distribution until it reaches the 25% limit when aggregate profits are distributed. When applying this provision, the reduction in the distribution of dividends resulting from the deduction of the board of directors' and controlling council's remuneration is not taken into account.

When the performance of special commissions or technical and administrative duties by one or more directors makes it necessary, in view of limited or non-existent profits, to exceed these limits, such excess remunerations can only be paid if expressly approved by the shareholders' meeting. If this is to be done the matter must be included as one of the items on the agenda.

Public companies must report individually the directors' remuneration to the Securities and Exchange Commission (CNV), which is considered restricted access information created by for this purpose. This means that the general public cannot access this information.

The total remuneration must be reported and this information is available for public access (*CNV rules*).

See *Question 20*.

SHAREHOLDERS' RIGHTS AGAINST THE COMPANY'S AUDITORS

23. What is the procedure to appoint and remove the company's auditors? What restrictions and requirements apply to who can be the company's auditors?

Regarding private companies, there are no specific procedures established by law.

Under the Capital Markets Law (CML) the regular shareholders' meeting on the approval of the financial statements must appoint independent certified public accountants in accordance with the criteria established by the Securities and Exchange Commission (CNV) through regulation to perform the external audit functions for the new fiscal year. The meeting must revoke the engagement if an adequately substantiated reason occurs. Although CML does not explain what a substantiated reason is, one example for that may be the penalty applied by a Professional Association of Economic Sciences. Whenever the appointment or its revocation is decided at the initiative of the management board it must be supported with the audit committee's prior opinion.

The CNV also has powers over the controller of the external auditors and it can, among other things:

- Request expert accountants or companies, associations or firms forming part of, or professional councils to communicate regularly or occasionally, as determined by the CNV data and information relating to acts or facts regarding their activity in connection with companies making public offers of its negotiable securities.
- Conduct inspections and request clarifications.
- Recommend principles and criteria to be adopted for the accounting audit.
- Determine criteria for independence.

24. What is the potential liability of auditors to the company and its shareholders if the audited accounts are inaccurate? Can their liability be limited or excluded?

According to the local case law and most of the legal literature, auditors have subjective liability, that is, the auditors will only be held accountable if they act under fault. This means that the auditors will not be liable if they comply diligently with all the processes under their charge. If audited accounts contain false information, the auditors have the burden to prove their innocence and to clear themselves of any responsibility.

In this sense, if an auditor acting diligently was not able to detect the presence of fraud, he will not be liable. However, it is hard to find a case where the auditor had acted properly and, at the same time, failed to detect a commercial fraud, without connivance.

In one court case, the National Chamber of Appeals for Criminal and Correctional Matters prosecuted the auditor of a company who acting within the procedure of a stock purchase acquisition was held liable for being part of a fraudulent manoeuvre (false accounting documents were found to reducing the company's liabilities) (*Exxel Group s/ sobreseimiento" CNA en lo Criminal y Correccional Sala IV, 12/29/2010, see www.bc-consultores.com.ar/articulos/fallos/ADJ-0.501203001294320134.pdf*). The court determined that there was connivance between the auditor's and the forgers' actions.

The new Argentine Civil and Commercial Code, which will come into force on 1 August 2015, establishes that the auditor always has the responsibility of acting properly and taking adequate measures, but not of achieving certain concrete results (unless they commit to do so).

The Securities and Exchange Commission (CNV) is the enforcement and controlling authority under the Capital Markets Law (CML) for the potential liability of auditors. The CNV, among other things, directly and closely monitors, regulates, inspects, supervises and imposes penalties on any natural persons and/or legal entities that for any reason or cause or under any circumstances perform activities in relation to the public offering of securities, and which on account of their business are subject to the CNV's competent jurisdiction. This includes other instruments, transactions and activities within the scope of the CML and other applicable regulations. The CNV can also therefore impose penalties on auditors.

DISCLOSURE OF INFORMATION TO SHAREHOLDERS

25. What information about the company do the directors have to provide and disclose to its shareholders? What information and documents are shareholders entitled to receive?

Before each general meeting, the shareholders must be provided with the necessary information in order to be able to vote the points included in the agenda. In the particular where the financial statements are considered, the shareholders must be provided with the balance sheet and its complementary documentation 15 days before the general meeting. Copies of the financial documents to be considered at the general meeting must also be kept at the company headquarters.

In order to participate and vote at a general meeting, shareholders have the right to receive the relevant documentation related to the items on the general meeting's agenda.

See *Question 6*.

26. What information about the company do the directors have to disclose under securities laws (where applicable)?

In public companies none of the following can rely on any non-public or insider information to obtain, for himself or for others, benefits of any kind, resulting both from the purchase or sale of securities or any other transaction relating to the public offer regime:

- The company's directors, supervisory board members, shareholders, shareholder representatives and anyone who by their work, profession or duties within an issuer company or registered entity, per se or through an intermediary.
- Public officials and those managers, officers and employees of risk rating agents.
- Public or private control agencies, including the Securities and Exchange Commission (CNV), markets and deposit agents.
- Any other person who, by reason of their duties have access to similar information.

These provisions also apply to those persons referred to under section 35 of Law 24.083, as amended: these persons include principals, administrators, trustees, directors and managers. In these cases, the positive price differential obtained by those who have unduly availed of insider information resulting from any trading operation made within a six-month period, relating to any securities of issuers with whom they are related to, will be deemed for, and be recoverable by, the issuer without prejudice to the penalties that may correspond to the offender. If the issuer fails to initiate the appropriate action or to act consequently within 60 days of being notified to do so, or if it will not drive the action diligently after notification, those actions can be performed by any shareholder.

However, the following people must inform the CNV directly, accurately, sufficiently and timely, with the formalities and within the time schedule the CNV may provide, the facts and circumstances established in section 99 of the Capital Markets Law, without prejudice to other circumstances established in accordance with the law. The registered entity managers of listed companies and the members of its supervisory body, the latter in area of its competence, must inform on any event or situation that is suitable for its importance to materially affect the placement of securities or the course of trading. This obligation exists from the time the application is filed for public offer of securities and must be made known to the CNV immediately.

27. Is there a corporate governance code in your jurisdiction? Do directors have to explain to shareholders in the company's annual report if they have not complied with it (comply or explain approach)?

There is no corporate governance code in Argentina. However, the Securities and Exchange Commission (CNV) establishes that public companies and those who are seeking authorisation to enter the public offering regime must submit, among other things, to the CNV a report explaining if they comply with all the principals and recommendations included in the principals of the corporate governance of the CNV. If they only partially comply with these principals and recommendations, they must explain the reasons why they comply partially and they must indicate whether they will consider incorporating what they do not comply with in the future.

Public companies, annually and for public dissemination, must include in the annual report, as a separate annex, a report on the compliance of the principals of corporate governance of the CNV.

28. What information can shareholders request from the board about the company? On what grounds can disclosure of company information be refused? Are shareholders entitled to inspect the company's books and similar company documents?

Shareholders can examine the company's books and records, and obtain on request the reports that they think are relevant. They can also obtain, at their cost, a signed copy of the minutes. In SAs (*Sociedad Anónima*) and SRLs (*Sociedad de Responsabilidad Limitada*) this individual control by the shareholders is excluded whenever the company has a syndic (that is a controller, a person that controls the company in order to protect the interests of shareholders). Syndics will only investigate written accusations that are made by shareholders who represent not less than 2% of the capital stock of the company and provide information if required by shareholders representing such percentage.

Although the Business Association Law remains silent regarding this point, extension of these inspections will be reasonable and cannot hinder the ordinary course of business of the company.

Additionally, the National Civil and Commercial Procedural Code establishes that only shareholders who apply to the court have the possibility of inspecting the company's books.

See *Question 25*.

SHAREHOLDERS' AGREEMENTS

29. Briefly set out the main provisions of a typical shareholders' agreement.

Some typical content of shareholders' agreements includes:

- Corporate governance (management policies).
- Voting syndicates.
- Resolution of conflicts.
- Appointment of directors, syndics and auditors.
- Supermajorities (which may be increased but never decreased).
- Limitations to the transferability of the shares (right of first refusal, tag- and drag-along rights and so on).
- Options on the capital stock (put and call).

The content of shareholders' agreements varies on a case-by-case basis according to the number of shareholders and percentage of shares they hold.

Regarding the term of duration, there seems to be no limitation on this subject. Although there are some authors that believe that this kind of agreement should be specific in terms of time and content.

Shareholders' agreements are not enforceable against third parties, this includes the company itself, although *bona fide* principles will also apply.

30. Are there circumstances where shareholders' agreements can be enforceable against third parties?

Shareholders' agreements are not regulated in the Business Association Law (BAL) due to the fact that they are private agreements that fall outside the scope of the BAL. However, the courts, and the authors, can agree on holding these kinds of agreements valid under Argentine law, as long as they do not violate public policy regulations.

31. Do shareholders' agreements have to be publicly disclosed or registered?

There are some public institutions that compel the disclosure of the shareholders' agreements such as the Securities and Exchange Commission (CNV) for listed companies. However, the Business Association Law (BAL) does not foresee this obligation for non-listed companies.

Under the Capital Markets Law (CML), agreements entered into by individuals or legal persons who covenant or agree with shareholders seeking to exercise the voting rights in a publicly traded company or in any controlling company thereof, whichever its form, must be disclosed (*section 99, CML*). These agreements include, without limitation, covenants that:

- Create a mandatory prior obligation to consult to exercise the vote.
- Restrict transfer of the relevant shares or securities, conferring purchase (pre-emptive) or subscription rights for the same, or that provide for the purchase of such securities.
- The purpose or object of which is focused on a joint exercise of a dominant influence over such companies.
- The purpose or object of which is significant changes in the structure or in the relations of power in the government of the company, against such covenants or agreements.

The directors, administrators, trustees and members of the supervisory board and the controlling shareholders of these companies are equally liable to report whenever they are part, or are aware of such covenants, agreements or changes, as well as the controlling shareholders of these companies about the execution and enforcement of these agreements. These covenants or agreements must be submitted to the CNV. Compliance with the reporting and presentation of these covenants or agreements to the CNV does not imply recognition of their validity.

Failure to comply with the reporting obligation will cause covenants or agreements to become of no value whatsoever.

For the purposes of the CML, statements made by the persons above to the CNV are deemed affidavits.

DIVIDENDS

32. How can dividends be paid to shareholders and what procedures and restrictions apply? Is it possible to exclude or limit the right of certain shareholders to dividends? Is the payment of interim dividends allowed?

The distribution of dividends to shareholders is only lawful if it is the result of realised and liquidated profits (meaning after the payment of pending losses) corresponding to a balance sheet of the fiscal year regularly drawn up and approved. It is prohibited to distribute interest or dividends in advance or provisional or resulting from special balance sheets except in the case of companies included in section 299 of the Business Association Law (BAL) (that is, those companies that are regularly and continuously monitored by the state).

It is not possible to exclude certain shareholders from their right to dividends. However, it is possible to limit that right by subordinating it to preferred shares or by stating in the company's bye-laws that, for example, dividends will not be distributed for a certain term (*see Question 5*).

Additionally, the BAL foresees that limited liability companies and stock companies must create a reserve of not less than 5% of the liquid and realised profits shown in the profit and loss statement of the fiscal year, until the aggregate reaches 20% of the company's capital. When this reserve is diminished for any reason, profits may not be distributed until it has been refunded.

Apart from the legal reserve, other reserves may be established, provided that they are reasonable and appropriate to prudent management (voluntary reserves). Additionally, the company's bye-laws may set out the constitution of statutory reserves. These reserves, voluntary and statutory, may also limit the right to dividends.

In any event, the amount of dividends to be distributed will be determined by majority vote at the shareholders' meeting, provided that shareholders will not continuously and repeatedly vote to refuse to distribute any dividends.

It is prohibited to distribute dividends in advance or provisional or resulting from special balance sheets, except in the case of companies included in section 299 of the BAL (that is, those with regular and continuous monitoring of the state). In all these cases the directors, the members of the supervisory council and the syndics will have unlimited and joint and several liability for such payments and distributions.

Dividends received in good faith are not reimbursable by the company.

The Securities and Exchange Commission (CNV) rules foresee the distribution of anticipated, interim and financial statements result dividends. These dividends should be determined by the board on the basis of special or quarterly financial statements that have opinions of the external auditor and the supervisory body. The distribution must be announced for one business day in the bulletin of the market where the company negotiates its shares and in the information centre of the CNV. Copies of that documentation must be submitted to the CNV together with the minutes of the board of directors within five business days of the published announcement.

FINANCING AND SHARE INTERESTS

33. Can shareholders grant security interests over their shares?

The Business Association Law (BAL) authorises shareholders to grant security interests over their shares. The creation and cancellation of pledges, attachments or other restraining measures set up on the shares (*Sociedad Anónima* (SAs)) must be registered

in the Stock Ledger book and in the case of quotas (*Sociedad de Responsabilidad Limitada* (SRLs)) must be registered with the GIC (*BAL*).

In the event a pledge is set up or a court attachment ordered, the rights over the shares pertain to the owner of the shares. In these circumstances, the party vested with the right in rem or attachment must assist the owner to exercise his rights over the shares (that is, by depositing the shares so the owner can vote or any other procedure that guarantees the shareholders' rights). The owner will pay the respective expenses incurred.

34. Are there restrictions on financial assistance for the purchase of a company's shares?

There are no legal restrictions on financial assistance for the purchase of a company's shares. However, nowadays, considering the low level of the Argentine financial market, there are less financial operations than before.

SHARE TRANSFERS AND EXIT

35. Are there any restrictions on the transfer of shares by law? Can the transfer of shares be restricted? What are the rights of shareholders in the case of an issue of new shares (pre-emption rights)?

The rule fixed by the Business Association Law (BAL) is that stock is freely transferable. However, the company's bye-laws may limit the transferability of nominative or book-entry shares, provided such limitation does not mean to prohibit their transference. The limitation, whenever it exists, must be evidenced on the share certificate and in the accounting registration.

Apart from a specific limitation that may be stated in the company's bye-laws, the restriction in the transferability of stock may arise from an agreement or from a law. Certain specific industries provide for a prior authorisation of the relevant regulatory authority in order to become a shareholder of the regulated company. Additionally, section 1.277 of the Civil Code requires a spouse's consent in order to transfer recordable assets owned by a married person (for example, in order to transfer the stock owned by a married person).

Regarding contractual limitations, the typical clauses foreseen to limit the transferability of the stock are: the right of first refusal, the prohibition to transfer the stock during a certain term, put and call options and tag- and drag-along rights.

Common shares with single or plural votes, grant their holders the first refusal right to subscribe for new shares of the same class in proportion to those that they possess. They also entitle their holders to the right to increase pro rata the shares subscribed for on each occasion (accrual right). Regarding the first refusal right, the extraordinary shareholders' meeting, with qualified majorities, may resolve in special and exceptional cases, when required by the interests of the company, to limit or suspend the preferential right for the subscription of new shares, under the following conditions:

- That the discussion about this decision is included in the agenda of the meeting.
- That the stock in question is to be paid for by contributions in kind or is given in payment for pre-existing liabilities.

For issues of new shares, shareholders are vested with a pre-emptive right to subscribe additional stock offerings of the same class pro rata the number of shares held; they are also entitled to accrue pro rata the shares they subscribe on each occasion.

36. Can minority shareholders alter or restrict changes to the company's share capital structure?

In principle, minority shareholders are not able to ban or limit the company's capital structure in any manner. However, whenever a general meeting must adopt resolutions that affect the rights of a class of stock, provided that the company's stock is divided in classes, the consent or ratification of that class is required. This consent will be given in a special shareholders' meeting governed by the rules applicable to the regular shareholders' meeting.

37. When are shareholders required to notify changes to their shareholding to a regulatory authority?

Certain specific industries provide for a prior authorisation of the relevant regulatory authority in order to become shareholder of such regulated company (for example, the media industry).

Even though shareholders are not obliged to obtain any authorisation from or provide information to a public authority about events that have an impact on their stock interest in the company, there are some resolutions that require either the company or some representatives to do so.

In this sense, General Resolution (GR) 1375 (GR 1375), GR 3293 and GR 4120, as amended) issued by the National Tax Authority, establish a registration and information regime applicable to companies and to local representatives of foreign individuals and entities.

Under GR 1375, all economic transactions between Argentine residents and representatives of foreign counterparties must be reported to the local tax authorities. GR 1375 also establishes an official registry where all representatives of foreign entities must be registered before the closing of the economic transaction to be informed. Information concerning the transaction, if any, must be filed every four months.

GR 3293 requires that any changes to the shareholding of a company are reported by the seller, buyer and the company.

Under GR 4120, every 31 December, all the stock companies, such as SAs (*Sociedad Anónima*) and SRLs (*Sociedad de Responsabilidad Limitada*), must submit to the National Tax Authority certain information about the owners of their capital stock. The information requested varies on a case-by-case basis, depending on the nature of the owner (for example, if it is an individual, a company and so on).

For quotaholders that transfer their quotas in a SRL, such a transfer must be registered with the General Inspection of Corporations.

For public companies, the following people, among others described in the Capital Markets Law (CML), must inform the Securities and Exchange Commission (CNV) directly, accurately, sufficiently and timely, with the formalities and within the time schedule the CNV may provide, the following facts and circumstances, without prejudice to other established in accordance with the law:

- The directors, administrators, trustees, managers appointed in accordance with section 270 of Law 19.550 (codified text 1984), as amended, and members of the supervisory board, regular and alternates, and also controlling shareholders of issuer institutions making public offers of their negotiable securities. The information must include the number and class of shares, debt securities convertible into shares and purchase and sale options on their securities owned from the entity to which they are linked.

- The qualifications of board members, principals, administrators, managers, trustees or members of the supervisory board, regular and alternates, and of risk rating agents on the amount and class of shares, debt securities or purchase or sale options on shares owned from companies authorised to make a public offer of their securities.

The CML contains a specific rule in section 99 that states that any physical or legal person who acquires or disposes of any type of shares of an issuer whose equity is covered under the public offer system that grant 5% or more of the votes that may be issued for the purpose of forming the corporate in the ordinary shareholders' meetings, must inform the CNV of such transactions when implemented, and the abovementioned limit is exceeded (*section 99, CML*). In addition, any physical or legal person directly or through other physical or legal persons or all those members of any group acting in concert must also inform the CNV of such transactions.

38. Can companies buy back their shares? Which limitations apply?

A company may only acquire its own stock under the following conditions:

- To cancel them subsequent to an agreement to reduce capital.
- In exceptional cases, with realised and liquid profits or free reserves when they are fully paid, in order to prevent serious damage, justifying evidence that must be submitted at the subsequent shareholders' meeting.
- If they form part of the assets of a concern that is acquired or the equity of a company that is absorbed.

The board of directors must dispose of the treasury shares acquired in these cases within a one-year term, unless otherwise extended by the shareholders' meeting; a right of first refusal will apply to these sales. The rights vested in such treasury shares must be suspended until the shares are disposed of and they will not be counted for either quorum or majority purposes.

Additionally, companies may not receive their own shares in guarantee (*BAL*).

Public companies can purchase any shares previously issued by it, provided such shares have been authorised for public offering and are listed on a market under the following conditions and subject to other conditions established by the Securities and Exchange Commission (CNV). Applicable regulations safeguard the principle of equal treatment to all shareholders and the right of investors to be fully informed.

Any purchase of an issuer's own shares must comply with the following conditions:

- Any shares to be purchased must be fully paid.
- The board of directors adopts an adequately substantiated resolution, including a report by the audit committee and by the statutory auditors' committee. The resolution of the board of directors establishes the purpose of the purchase, the maximum amount to be invested in connection to it, the maximum number of shares or maximum equity interest to be purchased and the maximum price to be paid for any shares; the board of directors gives shareholders and investors extensive and detailed information on the purchase.
- The stock purchase is paid from liquid and realised profits or else from free or facultative reserves, and evidence that the company has the necessary liquid funds and that the relevant purchase does not affect the company's creditworthiness are evidenced with the CNV.
- The whole number of shares to be purchased by the company, including any shares previously purchased and retained in the company's possession, must not in any event exceed 10% of the company's capital stock or a smaller percentage to be established by the CNV on the basis of the volume of trading of the shares in question.

39. What are the main ways for a shareholder to exit from the company? Can shareholders require their shares to be repurchased by the company? Can shareholders be required to exit the company in certain circumstances? How are the shares valued in this case?

Shareholders who disagree with decisions relating to the transformation of the company's type can withdraw from the company with reimbursement of the value of the shares they own. Such transformations include:

- Extension of the duration or re-formation of the company.
- Transfer abroad of the corporate domicile.
- Fundamental change of the corporate purpose and the total or partial repayment of capital.

The shareholders of the absorbed company in a merger or a division can also withdraw from the company.

They can also withdraw in the following circumstances:

- If there is an increase of capital when the decision corresponds to the extraordinary shareholders' meeting and implies a disbursement by a shareholder.
- If there is a voluntary withdrawal from the public offering or from the quotation of the stock on a stock exchange.
- If the company continues after it was decided to exclude the company from public offers or from a quotation of its shares on a stock exchange.

The right of withdrawal can only be exercised by those who voted against the resolution, within the fifth day, and by those absent that demonstrate their qualification as shareholders at the time of the shareholders' meeting, within 15 days of the conclusion of the meeting.

The shares must be reimbursed for their value resulting from the last balance sheet made or that must be made in compliance with statutory or regulatory provisions. However, some judicial precedents challenged this solution in cases in which the market value of the shares essentially differs from their book value. As a general principle, the appropriate amount must be paid within one year from the closing of the shareholders' meeting that originated the withdrawal or 60 days from the closing of the shareholder's meeting or publication, as the case may be. The amount of the debt will be adjusted up to the date of payment.

The withdrawal right and the legal action emerging lapse if the resolution that originated them is revoked by a shareholders' meeting held within 60 days after the expiration of the period of time granted for its exercise to the absentees. In this case the withdrawing shareholders reacquire the exercise of their rights, with a retroactive effect for those with an economic nature to the date they notified the exercise of the right of withdrawal.

Shareholders are not permitted to require their shares to be repurchased by the company except if they are the owner of redeemable shares. In such case the value of the acquisition would be previously established.

In an SA (*Sociedad Anónima*) the shareholders cannot be required to exit the company. However, legal authors are accepting the exclusion if it was regulated by the shareholders in the company's bye-laws and for specific cases.

On the contrary, when there is fair cause a shareholder may be excluded. Any covenant to the contrary will be null and void. According to the Business Association Law (BAL), just cause exists when the shareholder incurs in serious breach of his obligations. Likewise in cases of incompetence, disqualification, declaration of bankruptcy or institution of insolvency proceedings, except in the case of limited liability companies. The right of exclusion lapses if it is not exercised within a 90-day term following the date on which the fact justifying the exclusion was made known. When the company resolves to exclude a partner, it must implement its decision with the mediation of its representative or whoever may be appointed by the remaining partners when the exclusion involves a manager. In both cases the courts may order the temporary suspension of the rights of the shareholder whose exclusion is sought. When the exclusion is exercised individually by one of the partners, it must be substantiated by summoning all the partners.

Exclusions have the following effects:

- The excluded shareholder is entitled to a sum of money representing the value of his corporate share as of the date the exclusion is invoked.
- Should operations remain pending, the partner has a share in the profits or sustains the losses.
- The company may withhold the share of the excluded shareholder until operations in process at the time of the separation are concluded.
- The excluded shareholder is answerable towards third parties for corporate obligations until the amendment to the partnership agreement is recorded at the General Inspection of Corporations.

However, when a public company authorised by the Securities and Exchange Commission (CNV) becomes subject to quasi-total control, any minority shareholder may at any time make a formal request to the controlling person for it to make a purchase offer to all minority shareholders. Within six months of the date on which a person became under quasi-total control of another person, the latter may issue a unilateral statement of intent of acquisition of the whole remaining share capital held by third parties.

The unilateral statement of intent to purchase all of the remaining equity held by third parties, named statement of acquisition, must be resolved by the management board of the controlling legal person or made under a public deed or instrument in the case of natural persons. It is a condition for validity of the statement that the acquisition comprises all the outstanding shares, as well as all other securities convertible into shares that are held by third parties.

The statement of acquisition must include setting of the equitable price to be paid by the controlling person for each remaining share held by third parties. Whenever appropriate, the statement of acquisition will also contain the fair price to be paid for each security convertible into shares.

Determination of the equitable/fair price will be done as provided in section 98(d) of the Capital Markets Law (CML). If the controlling person is a company with its shares already trading, and other conditions satisfied as set out in the CML, it may offer the minority shareholders the share exchange option contemplated (*section 93, paragraph 2, CML*).

Within five business days from the issuance of the statement, the controlling person must notify the quasi-total controlled company about the statement of acquisition, and submit the application for withdrawal of the public offer to the CNV, and to the markets where its shares are listed.

MATERIAL TRANSACTIONS

40. What rights do shareholders have in the case of material transactions, such as a sale of all or substantially all of the company's assets, and a company reorganisation such as a merger or demerger?

Where a company is merged into another, the shareholders of the absorbed company can exercise their withdrawal right (*see Question 39*). The same right is granted to the shareholders of the existing company in spin-offs.

The decision to sell the assets of the company is generally incumbent on the board of directors. Therefore, the shareholders do not have specific rights in such cases. However, in the case of the sale of significant assets of the company it is advisable to have such decision ratified by a shareholders' meeting.

41. What rights do shareholders have if the company is converted into another type of company (consider if applicable, a European Company (SE))?

Where a company is converted into an SE or into another type of company, shareholders can exercise their withdrawal right, in accordance with the relevant terms and conditions (*see Question 39*).

INSOLVENCY

42. What rights do shareholders have if the company is insolvent?

As a general principle, the bankruptcy of a company is not extended to its shareholders. If a company is under bankruptcy, the shareholders have the right to receive their portion of the residual net assets, but only after all the creditors have been paid off (including the syndic's and lawyer's fees). Before bankruptcy, the shareholders can request during an extraordinary general meeting, called to resolve the insolvency situation, to apply for its own bankruptcy or decide on a capital increase in order to resolve the insolvency condition. If the capital increase is made to capitalise liabilities, the prior right to subscribe can be left without effect.

Shareholders that are also creditors have the same rights as any other creditor.

Shareholders are not responsible for a company's bankruptcy. However, during exceptional circumstances, bankruptcy can be extended to the shareholders. The Business Association Law (BAL) establishes three cases in which bankruptcy is extended:

- To any person that, acting as if it were the bankrupt, performed any act in its personal interest and disposed of the assets as if they were its own, to the detriment of creditors (*section 161, paragraph 1, BAL*).
- To "Any person controlling the bankrupted company, whenever it has unduly deviated the corporate interests of the controlled company, subjecting it to unified management in the interest of the controlling party or of the business group to which it belongs".
- In the case of confusion or commingling of assets between two companies or persons. Accordingly, the bankruptcy is extended to "any person in respect of which there is an indivisible confusion of assets and liabilities which prevents a clear discrimination of its assets and liabilities or a large part of them" (*section 161, paragraph 3, BAL*). A precedent stated that "The extension of the bankruptcy by reason of a confusion of estates (*section 161, subsection 3, Law on Insolvency*

Proceedings) entails the existence of a common fund encompassing both assets and liabilities, since the essential idea is the common management of estates (as per the government attorney's opinion upheld by the Court of Appeals)" (*National Commercial Court of Appeals, Panel A, in re "Padul S.A. Bankruptcy Proceedings", published in La Ley, 2001-B, 882. 06/29/2000*).

43. Can shareholders put the company into liquidation? What is the procedure to do this?

Shareholders can cause the liquidation of a company by voting it in the corresponding shareholders' meeting. For such a purpose, the Business Association Law (BAL) is applicable and, therefore, the resolution, in order to be valid, is decided by the favourable vote of those holding the majority of shares with the right to vote, without applying plurality of votes (*section 244, BAL*).

CORPORATE GROUPS

44. Is the concept of a corporate group recognised under specific legislation?

The Business Association Law (BAL) does not refer expressly to the concept of "group". However, the BAL refers to controlled and related companies (*section 33, BAL*). Companies are considered "controlled" whenever another company, directly or through another company in turn controlled:

- Possesses a participation, by any title, that grants to it the votes necessary to form the company's will in social meetings or regular assemblies.
- Exercises a dominant influence as a consequence of the possession of shares, quotas or parts of interest, or as a consequence of the special links existing among the companies.

Companies are considered "related" when one company holds more than 10% of the capital of the other. When a company holds more than 25% of the capital of the other, it must make it known to the other that its next regular assembly takes notice of the fact.

Controlling companies must file with the relevant supervisory authority, as complementary information, annual consolidated financial statements, prepared according to generally accepted accounting principles and to the regulations of the supervisory authority (*section 62, BAL*). There are also technical resolutions issued by the Economic Professional Councils, which establish technical requirements on the matter.

Unlike the BAL, the Executive Order 677/01 of Public Offering Transparency System, and the Capital Markets Law (CML), refer expressly to the concept of "controlling", "controlling group" or "control groups". These are any individual or legal person that holds, either directly or indirectly, individually or jointly, whichever the case may be, a share in the capital stock or voting rights that, *de jure* or *de facto*, in this case, grants enough votes to take a corporate decision in shareholders' general meetings or to choose or remove the majority of the directors or syndics. In this sense, one of the implications for a company of being part of the group may be configured if any individual or legal person or all the persons belonging to groups, acting in a co-ordinated way, purchases or sells shares of stock in a company that makes a public offering of its negotiable securities for an amount that implies changes in the stakes held by the controlling group or groups and therefore affecting the structure. In these cases, the listed company must inform the Securities and Exchange Commission of any transaction or group of transactions made in a co-ordinated way.

45. Does a controlling company have any duties and liability to the shareholders of the company it controls? What are the rights of company shareholders if the controlling company carries out actions that are prejudicial to the shareholders?

Apart from what is stated in this chapter, there are no other essential duties of a holding company *vis-à-vis* its controlled company shareholders.

In addition to the rights concerning the challenge of shareholders' meeting's decisions and board of director's decisions against the law, the bye-laws or any other internal rules of the company, the disapproval of the director's performance and the preventive suspension on petition of a party of the execution of a measure that could cause a damage (injunction), damages caused to the company by fraud or negligence of those who control the company, makes the directors liable to indemnify the company without being able to allege that it has been compensated with profits that their actions have provided in other businesses.

The controlling party that applies the funds or assets of the company to his own use or own business or to that of a third party must hand the resulting profits to the company, and suffer the losses or damages exclusively to his own account.

Additionally, when an action by a company covers the prosecution of objectives beyond those of the company, or constitutes a mere device to violate the law, the public order or good faith or to frustrate third party rights, that action will be directly attributed to the members or controlling parties that made it possible. It will also be imposed on them jointly, severally and with unlimited liability for the damages caused (disregard theory).

46. What are the limitations on owning reciprocal share interests in companies?

Under the Business Association Law regime on the matter, the establishment of companies or the increase of their capital by means of reciprocal participation is void, even if it is through an intermediary person. Breach of this prohibition will impose on the founders, managers, directors and syndics joint, several and unlimited liability. The capital subscribed infringing this prohibition must be reduced within three months and, if it is not, the company will be dissolved as a matter of law.

Additionally, a controlled company will not hold shares in its parent company or in another subsidiary of its parent company for an amount that exceeds, according to the balance sheet, its reserves excluding the legal reserve.

The shares of interest, quotas or stock that exceeds the limits established above must be transferred within six months of the date of approval of the balance sheet from which the infringement results. The non-fulfilment of the transfer of the excess interest causes the loss of voting rights and of the profits that correspond to such excess participation until these provisions are complied with.

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