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The Law of Latin American Business Associations: A Survey

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THE LAW OF LATIN AMERICAN BUSINESS ASSOCIATIONS: A SURVEY

by

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As part of the law of contracts, the Latin American civil codes contain titles or chapters regulating "civil" associations generally.[1] The rules set forth therein are also applicable to commercial associations when the commercial legislation or the commercial customs do

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Abbreviations are as follows:

Art.	Article
C.C.	Civil Code
C.Co.	Code of Commerce
D.	Decree (Regulatory)
D-L	Decree-Law (or equivalent)
L.	Law (Statute)
LGSM	Ley General de Sociedades Mercantiles, Mexico. (General Law of Commercial Associations).
LSRL	Ley de Sociedades de Responsabilidad Limitada (Law of Limited Liability Associations).

The word "association" is used herein as a generic term to include corporations and all types of partnerships. This is an attempt to translate the Spanish word *sociedad* which has that general, broad meaning. It must be noted, however, that the Spanish term *asociación*, which could also be translated into the English word "association," is not the equivalent of *sociedad* but, in accordance with the terminology used by several civil codes, refers to a particular type of civil association characterized by the absence of a *profit-making purpose* (*non-profit making organization*). The bibliography of English-language materials on Latin American associations, or for that matter, on associations in any civil law jurisdiction, is quite limited. In connection with Latin American associations in general, the following material in English may be found useful: (a) The pamphlets issued by the Organization of American States (Washington, D.C.) under the name of "A Statement of the Laws of [name of the country] in Matters Affecting Business." (See, for example, the pamphlet on Colombia, 1953, pp. 22 ff.; Argentina, 1951, pp. 33 ff. (and supplements); Mexico, 1955, pp. 29 ff.); (b) Somewhat similar pamphlets are also published by the U.S. Department of Commerce, under the name of "Investments in [name of country]." However, these emphasize the economic aspects of doing business in the particular country, rather than the legal incidents of operations abroad; and (c) Butte, Methods of Doing Business in Latin America, 8 Law & Contem. Prob. 752 (1941).

The continental European treatises and articles on the law of commercial associations are basic for the proper understanding and interpretation of the Latin American laws on this point, not only on account of the substantial unity of principles between European and Latin American legislation, but also because of the decisive influence that those treatises and articles have exercised on the Latin American courts and on the legal writers. The following is a brief bibliography of Italian and French materials on commercial associations in general.

Italy: Ascarelli, Sociedades y Asociaciones Comerciales (Spanish translation), Buenos Aires, 1947; De Gregorio, Corso di Diritto Commerciale, Imprenditori—Società, Roma, Napoli 1952; Brunnetti, Trattato del Diritto delle Società, 3 vols., Milano, 1948-1950; Ferrara, Jr., Gli imprenditore e le società, Milano, 1952; Graziani, Diritto delle Società, Napoli, 1951; 5 Messineo, Manual de Derecho Civil y Comercial, Buenos Aires, 1955, pp. 295 ff.; 2 Vivante, Trattato di Diritto Commerciale, Milano, 3rd ed.

France: see 1 Hamel-Lagarde, Traité de Droit Commercial, Paris, 1954, Nos. 379 ff.; 2 Ripert, Tratado Elemental de Derecho Comercial (Spanish Translation), Buenos Aires,

not have any rules in point.[2] The codes of commerce provide the regulations applicable to commercial associations in general and to the several specific types of these associations.[3] During the course of this century, several countries have enacted new statutes governing the entire field of commercial associations (such is the case of the *Ley General de Sociedades Mercantiles* of Mexico,[4] for example) or certain specific types of business associations, particularly the *Sociedades de Responsabilidad Limitada*[5] and the *Sociedades Anónimas*[6] (corporations).

Finally, it must be pointed out that in all Latin American coun-

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1954; Escarra et Rault, Les Sociétés Commerciales, 2 vols., Paris (1950-1951); Pic-Kheher, Des Sociétés Commerciales, 2 vols., Paris, 1940-1948; Lyon-Caen, Renault et Amiaud, t. II and II bis, Paris, 1926-1927; Houpin-Bosvieux, Traité Géneral Théorique et Pratique Des Sociétés, 3 vols., Paris, 1918.

The legal literature on commercial associations is abundant in many of the Latin American countries. The following is a general indication of a few of the most important treatises on commercial associations in general: Argentina: Fernández, Codigo de Comercio Comentado, t. I, vols. 1 and 2, Buenos Aires, 1951; 1 Malagarriga, Tratado Elemental de Derecho Commercial, Buenos Aires, 1951, pp. 165 ff.; 2 Rivarola, Tratado de Derecho Comercial Argentino, Buenos Aires, 1938, pp. 109 ff. Bolivia: Urquidi, Régimen Legal Boliviano, La Paz, 1947, pp. 121 ff. Brazil: Carvalho de Mendonca, Tratado de Direito Comercial Brasileiro, Vols. III and IV, Rio, 1934-1945 (somewhat out of date, particularly in the part on corporations); 1 Ferreira, Instituiçoes de Direito Comercial, Rio, 1951, Nos. 194 ff. Colombia: Pinzon, Curso de Derecho Comercial, Sociedades, Bogotá (mimeograph) 1953-1954; Zuleta, Conferencias de Derecho Comercial (mimeograph), Bogotá, without date. Mexico: Rodriguez, Tratado de Sociedades Mercantiles, 2 vols., Mexico City, 1947; Rodriguez, Curso de Derecho Mercantil, t. I, Mexico City, 1957, pp. 43 ff.; Mantilla Molina, Derecho Mercantil, Mexico City, 1956; Cormack & Barker, Mexican Mercantile Organization under the New Law, 8 So. Cal. L. Rev. 197 (1935); Cormack & Barker, Mexican Civil Organization under the New Code, 7 So. Cal. L. Rev. 195 (1934). Peru: Boesen, Rights and Duties of Foreign Business under Peruvian Law, Lima, 1953, pp. 215 ff. Uruguay: 2 Mezzera, Curso de Derecho Comercial, Montevideo, 1952. Venezuela: Loreto-Arismendi, Tratado de las Sociedades Civiles y Mercantiles, Caracas, 1950; Pineda, Principios de Derecho Mercantil, Mérida, 1952; Benson, Venezuelan Tax, Labor, Corporation Law (loose-leaf service), pp. 461 ff.; Crawford, The Corporation Law of Venezuela, 12 Tul. L. Rev. 200 (1938).

The above citations are edited when appearing in subsequent footnotes; "ed. cit." will be used to indicate this deviation from ordinary citation form.

[1] References are to articles of the Civil Code. Argentina and Paraguay, 1648-1788; Brazil, 1363-1409; Bolivia, 1200-1237; Chile, 2053-2115; Colombia, 2079-2141; Cuba, 1665-1708; Costa Rica, 1196-1207; Dominican Rep., 1832-1873; Ecuador, 2076-2138; Guatemala, 1776-1828; Haiti, 1601-1664; Honduras, 1782-1887; Mexico, 2688-2738; Nicaragua, 3175-3292; Peru, 1686-1748; Uruguay, 1875-1937; Venezuela, 1649-1683.

[2] It is a general principle of commercial law that if there are no rules in the codes of commerce or in the commercial laws and there is no custom on a particular point, the standards of the Civil Code will control. In so far as commercial associations are concerned, this general principle is expressly set forth by some of the Latin American codes. Cf., e.g., Dominican Republic, C.C., Art. 1873; Guatemala, C.C., Art. 1828; Bolivia, C.C., Art. 1237 (does not mention commercial customs).

[3] References are to articles of the Codes of Commerce: Argentina, 282 ff.; Bolivia, 225 ff.; Brazil, 287 ff.; Chile, 348 ff.; Colombia, 463 ff.; Ecuador, 261 ff.; Honduras, 13 ff.; Panama, 249 ff.; Peru, 124 ff.; Uruguay, 387 ff.; Venezuela, 200 ff.

[4] Promulgated on July 28, 1934, in force since its publication in Aug. 4, 1934 (Diario Oficial of that date). Also in Costa Rica a Ley de Sociedades Mercantiles (Law of Commercial Associations) was enacted by Law No. 6, of Nov. 24, 1909.

[5] See pp. 176-93 infra.

[6] See pp. 194-220 infra.

tries there is a large number of statutes regulating in detail certain kinds of commercial associations such as insurance companies and credit institutions.[7] These specific regulations are beyond the scope of the present general survey and will not be examined.

As a source of the law of commercial associations, the *jurisprudencia*[8] and the decisions of the administrative agencies which exercise control over certain types of commercial associations must be mentioned.[9] Finally, the customs of trade have a special importance in accounting matters and in other subjects.[10]

I. Associations

A. *Distinction Between Civil and Commercial Associations*

It is very important in practice to distinguish between civil and commercial associations, among other things, in order to know whether the civil or the commercial code controls and to determine whether or not a particular association is subject to the proceedings of bankruptcy.[11]

Two criteria have been used in order to decide whether an association is commercial.[12] The first is the "objective" test, *i.e.*, commercial associations are those the actual purpose or object of which is the professional and habitual execution of commercial transactions.[13] On

[7] In Mexico, for example, there is a large number of these special statutes. Among them we may cite the following: Ley de Sociedades de Responsabilidad Limitada de Interés Publico, Ley de las Sociedades de Invrsión, Ley General e Sociedades Cooperativas, Ley de Asociaciones de Productores, Nueva Ley General de Instituciones de Crédito.

[8] The body of court decisions or case law.

[9] See pp. 204-05 infra.

[10] See p. 196 infra.

[11] In the civil law jurisdictions bankruptcy is a proceeding reserved for merchants, either individual or collective (associations). Other persons are subject to the "concurso de acreedores" or some other proceeding set forth in the civil codes for insolvency of persons who are not merchants.

[12] See in this connection, 1 Hamel-Lagarde, Traité, ed. cit., Nos. 432 ff. (1954); 1 Rodriguez, Sociedades, ed. cit., pp. 8 ff.

[13] A full discussion of what is meant by "commercial transactions" in the civil law jurisdictions is beyond the scope of this paper. In Latin America, as a general rule, the following are commercial transactions:

(a) Buying of goods for the purpose of reselling them at a profit, either in their original state or after a process of manufacturing; banking operations; exchange of currencies; corretage, i.e., the bringing together of seller and buyer of chattels or securities;

(b) If performed by an enterprise organized for that purpose, the following are commercial transactions: transportation of persons or cargo; services rendered by public utility companies or enterprises organized for the purpose of periodic services to a large number of customers; acts performed by commercial agents; auction sales; insurance operations; warehouse transactions; and

(c) Finally, in each country statutes have been enacted declaring to be commercial certain transactions which are not usually regarded as such.

On the other hand, the following are not commercial transactions:

(a) Farming operations;

(b) Transactions relating to immovables (real property); and

(c) Mining and oil and gas transactions.

the other hand, civil associations are those engaged in non-commercial ("civil") transactions. It must be emphasized that it is the transactions actually conducted which are controlling, although they may be different from the object or purpose stated in the contract of association.[14]

The objective test is the criterion generally followed by the Latin American countries,[15] subject to the following exceptions and qualifications: (a) The laws of some countries such as Argentina provide that the *Sociedades de Responsabilidad Limitada* and the *Sociedades Anónimas* (corporations) are always regarded as commercial concerns without taking into consideration their aim or purpose.[16] This is also the French approach to this problem,[17] and it constitutes the better and modern view. However, many Latin American countries such as Chile and Colombia apply the test of the object or purpose to the *Sociedades de Responsabilidad Limitada* and to the *Sociedades Anónimas* (corporations). Therefore under the laws of these two countries the *Sociedad de Responsabilidad Limitada* and the *Sociedad Anónima* may be either commercial or civil, depending upon their object or purposes;[18] and (b) The laws of several Latin American countries authorize civil associations to be organized not in pursuance of the rules of the civil code but in accordance with the norms of the code of commerce. In other words, it is possible in several countries to organize a civil association under one of the forms or types

[14] Argentina, 1 Camara de Apelaciones en lo Comercial, Criminal y Correccional (Fallos, p. 139). Contra, 1 Camara 2a. de Apelaciones de Cordoba, June 10, 1940 ("Justicia," Cordoba, p. 198). See also 1 Malagarriga, Tratado, pp. 185 ff.

[15] Argentina, C.Co., Art. 282 except that the Sociedades de Responsabilidad Limitada and the Sociedades Anónimas are always commercial, regardless of their object. See note 17 infra. Bolivia, see discussion in Urquidi, Régimen, p. 123. The author appears to assume the application in Bolivia of this general rule. Brazil, 1 Ferreira, Instituiçoes, ed. cit., Nos. 203 ff. Chile, C.C., Art. 2059. Colombia, C.C., Art. 2085. Cuba, C.C., Art. 1670 (by implication). Ecuador, C.C., Art. 2082; C.Co., Art. 261. Panamá, C.C., Art. 1361 (by implication); C.Co., Art. 249. Venezuela, C.C., Art. 1651 (by implication, see proceedings of the Camara de Diputados, Session of October 7, 1942, intervention of the Hon. Ramírez MacGregor (D. de D. No. 51), C.Co., Art. 200. Costa Rica, C.C., Arts. 1206 and 1207 (by implication). Nicaragua, C.C., Arts. 3191, 3192. Uruguay, C.C., Art. 1886 (by implication). Cf. 2 Mezzera Alvarez, Curso, ed. cit., No. 178. (This general rule is not applied to the Sociedades de Responsabilidad Limitada, the Sociedades Anónimas, and the Cooperatives, which are always commercial.)

[16] Argentina, L. 11645, Art. 3 (Sociedades de Responsabilidad Limitada); C.Co., Arts. 8(6), 282(2) and 313 (Sociedades Anónimas); Uruguay, C.Co., Art. 403 (Sociedades Anónimas); Decreto Legislativo No. 8992, April 26, 1933, Art. 2 (Sociedades de Responsabilidad Limitada); Panama, C.Co., Art. 249 (Sociedades Anónimas). On the other hand the Sociedad de Responsabilidad Limitada may be either civil or commercial, depending upon its object or purpose, in Colombia (L. 124 of 1937, Art. 1) and in Chile. Also in these two countries and in Ecuador, although the Sociedades Anónimas are subject to the regulations of the Code of Commerce (Colombia, C.C., Art. 2090; Chile, C.C., Art. 2064; Ecuador, C.C., Art. 2087), they maintain their status of Civil Associations if their object is not commercial.

[17] 1 Hamel-Lagarde, Traité, ed. cit., No. 434.

[18] Hamel-Lagarde, supra note 17.

of commercial associations.[19] It is the writer's opinion that even in this case the association will remain a "civil" one and will not become commercial. However, it must be observed that in this hypothesis the commercial law is applicable to "civil" associations in matters which are not contrary to the civil code and also that in Brazil a civil association organized under a commercial form is subject to the commercial legislation for all purposes, except jurisdiction and registration.[20]

The second test to determine whether a particular association is commercial is a "formal" test. All associations which assume a commercial form, *i.e.*, one of the forms or structures regulated by the commercial laws, will be regarded as commercial associations whatever their purpose or object of exploitation might be. Under this formal test the following associations will be commercial: (a) the associations which have a commercial purpose or object, because they *must* be organized in accordance with the commercial laws; and (b) the associations which have a "civil" object of exploitation but which have been organized in pursuance to the commercial laws. The formal test is applied by the Mexican General Law of Commercial Associations[21] and by the Peruvian[22] and Hondurian[23] Codes of Commerce.

This analysis will be confined to commercial associations, but as stated previously, most of the rules relating to commercial associations may be or are applicable to civil associations as well.

B. *Types of Commercial Associations Generally Recognized by the Latin American Statutes*

The following are the types of commercial associations usually recognized by the Latin American statutes:[24]

(1) *Sociedad Colectiva*

[19] Brazil, C.C., Art. 1364; Chile, C.C., Art. 2060 (by implication); Colombia, C.C., Art. 2086 (by implication); Costa Rica, C.C., Art. 1207 (by implication); Cuba, C.C., Art. 1670; Ecuador, C.C., Art. 2083 (by implication); Uruguay, C.C., Art. 1886 (by implication); Venezuela, C.C., Art. 1651(2); Nicaragua, C.C., Art. 3192 (by implication); Panamá, C.C., Art. 1361.

[20] C.C., Art. 1364.

[21] Art. 4.

[22] Arts. 124 and 1(2).

[23] Art. 13.

[24] In Argentina, Brazil, Uruguay, and other countries the law of commercial associations does not list associations by specific types. However, the types I have listed are recognized and carefully regulated. In other countries the laws enumerate the different types of commercial associations which may be organized. Most of the codes of commerce do not mention the Sociedades de Responsabilidad Limitada, which have been the object of subsequent regulation by special statutes, as will be seen later. The Codes of Commerce of Honduras and Venezuela and the LGSM of Mexico do mention and regulate the Sociedad de Responsabilidad Limitada. Below are cited the articles of several Latin American Commercial Codes where the different types of commercial associations are listed: Bolivia, 225; Chile, 348; Colombia, 463; Ecuador, 262; Honduras, 13; Mexico, LGSM, 1; Peru, 130; Venezuela, 201.

(2) *Sociedad en Comandita*
(3) *Sociedad de Responsabilidad Limitada*
(4) *Sociedades Anónimas*
(5) *Sociedad Accidental o de Cuentas en Participatción* [25]
(6) The commercial laws of some of the Latin American countries regulate also certain other types of associations which are not very frequently used in practice, such as the *Sociedad de Capital e Industria.*[26] Also *cooperativas* are regarded in some countries and by some legal writers as commercial associations.[27]

In accordance with the civil law classification of commercial associations the *Sociedades Colectivas* and the *Sociedades en Comandita Simple* are "associations of persons" *(sociedades de personas)*. On the other hand the *Sociedades Anónimas* (corporations) and the *Socidades en Comandita por Acciones* are referred to as "associations of capital" (*sociedades de capital*). The *Sociedad de Responsabilidad Limitada* is considered as an intermediate type of association which has some of the characteristics of the "associations of capital" and some of the characteristics of the "associations of persons." The classification of associations into associations of persons and associations of capital is based to a large extent upon whether the persons who are the members of the association, or the capital which is contributed, is the factor which controls the characteristics and the regulation of the particular type of association.[28]

This paper is concerned primarily with the *Sociedades de Responsabilidad Limitada*[29] and the *Sociedades Anónimas*[30] (corporations) which are the two most important types of business associations. As to *Sociedades Colectivas* and *Sociedades en Comandita* we shall say just a few words here.[31] The other types of commercial associations will not be discussed in this paper.

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[25] The following countries have established the sociedad de cuentas en participación (references are to the codes of commerce.): Argentina, 395 ff.; Bolivia, 229 and 288 ff.; Brazil, 325 ff.; Chile, 507 ff.; Colombia, 629 ff.; Panamá, 489 ff.; Peru, 232 ff.; Uruguay, 444 ff.; Venezuela, 359 ff.

[26] Argentina, 383 ff.; Brazil, 317 ff.; Uruguay, 435 ff. (references are to the codes of commerce).

[27] See, e.g., the LGSM of Mexico, Art. I (VI). See also commentaries and comparative remarks in connection with this precept in 2 Rodriguez, Sociedades, ed. cit., p. 519; Honduras, C.Co., Art. 13 (VI).

[28] 1 Hamel-Lagarde, Traité, ed. cit., No. 436.

[29] See pp. 176-93 infra.

[30] See pp. 194-210 infra.

[31] See pp. 175-76 infra.

C. *The Sociedad Colectiva*[32]

The *Sociedad Colectiva* is the civil law counterpart of the general partnership of the Anglo-American law. Its regulation in Latin America is strikingly similar to the regulation of general partnerships contained in the Uniform Partnership Act of the United States. There are, however, several differences between them, both as to essential points and as to matters of detail, of which only two will be mentioned. First, the *Sociedad Colectiva* must practically always be created by a private writing or by a notarial contract, and an abstract of the contract must be recorded in the Public Register of Commerce (*Registro Publico de Comercio*).[33] Secondly, the *Sociedad Colectiva*, unlike the general partnership, has juristic personality.[34] Therefore, it possesses a domicile and a capital separate from the capital of the partners; it has title to the assets of the association, and it may sell those assets and buy new assets in its own name; and finally, the association may sue and be sued as such.

D. *Sociedades en Comandita (Limited Partnerships)*

The *Sociedades en Comandita* are of two different kinds: *simple* (without shares) and *por acciones* (with shares of stock).

The *Sociedad en Comandita Simple* (without shares of stock)[35] is almost identical in regulation and characteristics with the limited

[32] The following articles of the codes of commerce regulate the sociedades colectivas in the countries listed. Argentina, 301-312; Bolivia, 226, 237 ff.; Brazil, 315 ff.; Chile, 349 ff.; Colombia, 464 ff.; Ecuador, 267 ff.; Honduras, 38 ff.; Mexico (LGSM), 25 ff.; Panama, 297 ff.; Peru, 133 ff.; Venezuela, 227 ff.

[33] Not only the sociedades colectivas but also all other commercial associations, except the cuentas en participación, must be generally created in writing, which in certain cases must be a "notarial" contract, and an abstract of the articles of association must be recorded in the Public Register of Commerce. Only very limited exceptions are made to this general rule. In Argentina, for example, the sociedades colectivas may be created by an oral contract only when their capital is less than 1.000 pesos. A list of the articles of codes of commerce which refer to the problem of formalities for the organization of associations generally and of sociedades colectivas in particular is given below: Argentina, 289-96, 39, 41; Bolivia, 231 ff. and D.L. of April 28, 1937, particularly arts. 6-12; Brazil, 300 ff.; Chile, 350 ff.; Colombia, 465 ff.; Eucador, 337 ff.; Honduras, 14 ff.; Mexico, LGSM, 5 & 2; Panama, 287 ff.; Peru, 127, 133; Uruguay, 393 ff.; Venezuela, 212 ff.

[34] In Latin America all commercial associations, except the cuentas en participación, have juristic personality, independent and separate from the partners or shareholders. This is a very well-known principle, universally accepted by the writers and by the courts, even when not specifically expressed in the codes. Argentina, 1 Fernández, Código, ed. cit., pp. 384 ff.; Bolivia, Urquidi, Régimen, ed. cit., pp. 121 ff.; Brazil, 1 Ferreira, Instituiçoes, ed. cit., Nos. 216 ff.; Chile, C.C. 2053; Colombia, C.C. 2079 and 633. See also Pinzón, Curso (sociedades), ed. cit., pp. 42 ff.; Ecuador, 262 and 2076; Honduras, 15; Mexico, LGSM 2; Panama, 251; Peru, 124 (2); Venezuela, 201 to the contrary, and C.C., Art. 1651.

[35] The following articles of codes of commerce refer to the sociedad en comandita simple: Argentina, 372 ff.; Bolivia, 227, 245 ff.; Brazil, 331 ff.; Chile, 470-490; Colombia, 596-612; Ecuador, 275 ff.; Honduras, 58 ff.; Mexico, LGSM, 51 ff.; Panama, 330 ff.; Peru, 153 ff.; Uruguay, 426 ff.; Venezuela, 235 ff.

partnership of the U.S., the only important difference being that the *Sociedad en Comandita Simple* has separate juristic personality.[36] The *Sociedad en Comandita por Acciones* (with shares)[37] is a limited partnership in which the interest or part of the limited partners is represented in shares of stock, easily negotiable. This type of association is not very popular at the present time because the *Sociedad Anónima* (corporation) offers more advantages than the *Sociedad en Comandita por Acciones*. The rules applicable to the *Sociedad en Comandita por Acciones* (with shares) have many similarities with the rules applicable to corporations.

II. Sociedades de Responsabilidad Limitada[38]

A. *General Considerations*

First a word of caution in connection with the terminology used in this Article. A *Sociedad de Responsabilidad Limitada* is a type of business association different from the "limited partnership." As stated, the civil law counterpart of the limited partnership is the *Sociedad en Comandita,* which differs basically from the *Sociedad de Responsabilidad Limitada.*[39] Because of the fact that there is no English term into which the Spanish term *Sociedad de Responsabilidad Limitada* can be translated adequately, the Spanish original is used for discussional purposes.

In the U.S., prior to the enactment of more liberal laws regulating the incorporation and operation of corporations, several states passed statutes allowing the creation of "limited liability associations," in which the liability of all partners was limited.[40] Today, as a result of the modern corporations acts, the "limited liability association"

[36] Authorities cited note 34 supra.

[37] The sociedad en comandita por acciones is regulated by the following articles of the codes of commerce: Argentina, 380 ff.; Bolovia, 244; Brazil, D.L. 2627 of Sept. 26, 1940, arts. 163 ff.; Chile, 470-473, 491-506; Colombia, 597, 613 ff.; Ecuador, 282 ff.; Honduras, 271 ff.; Mexico, LGSM, 207 ff.; Panama, 347 ff.; Uruguay, 433 ff.; Venezuela, 201 (2) and 245 ff.

[38] See generally Solá Cañizares-Aztiria, Sociedades de Responsabilidad Limitada, 2 vols., 1950-1954. This book is basic for the study of the Sociedad de Responsabilidad Limitada in Latin America, and it has proved very useful in the preparation of this paper. An extensive bibliography on the Sociedades de Responsabilidad Limitada in Europe and in Latin America is found beginning at page 71 of that book. See also the general bibliography on associations in Latin America at beginning of this article. The English literature on this point is very limited. See, among others, Crawford, The Argentine Limited Liability Company, 14 Tul. L. Rev. 232 (1940); Crawford, The Mexican Limited Liability Company, 13 Tul. L. Rev. 258 (1939); Eder, Limited Liability Firms Abroad, 13 U. Pitt. L. Rev. 193 (1952); Eder, Venezuela Commercial Code; Limited Liability Firms, 5 Am. J. Comp. L. 628 (1956).

[39] See p. 175 supra.

[40] Crane, Partnership 118-20 (1952).

is seldom used, except to some extent in Pennsylvania[41] and in Michigan.[42]

In England the "private companies" offer some points of similarity with the *Sociedad de Responsabilidad Limitada;* apparently they were taken as a pattern by the German law which first allowed and regulated the establishment of *Sociedades de Responsabilidad Limitada* in the civil law world.[43] However, between the *Sociedad de Responsabilidad Limitada* and the English "private company" there are now many basic differences which render any analogy between them quite remote.

The *Sociedad de Responsabilidad Limitada* is a fairly recent development in the civil law system. The French, Spanish, and Latin American commercial codes of the 19th century did not mention it. A German law of April 1892 introduced the *Sociedad de Responsabilidad Limitada* (Gesellschaft mit beschränkter Haftung, abbreviated G.m.b.H.) in a general manner. The German idea of regulating a *Sociedad de Responsabilidad Limitada* was followed by Portugal (1901), France (1925), Belgium (1935), Switzerland (1936), and more recently by Italy (1942) and Spain (1953).[44]

In Latin America the first country to adopt the *Sociedad de Responsabilidad Limitada* was Brazil in 1919, and the last one was Venezuela in 1955. At the present time all Latin American countries have authorized and regulated the *Sociedad de Responsabilidad Limitada*[45] with the exception of Peru,[46] the Dominican Republic,[47] Ecua-

[41] 59 P.S. § 341; Warren, Corporate Advantages without Incorporation, 508-25 (1929).

[42] Mich. Stat. Ann. § 20.92 (1959); other examples are found in N.J. Stat. Ann. 42: 3—1-14 (1937); 17 Pages Ohio Rev. Code Ann. § 1783.12 (1953).

[43] 1 Solá-Aztiria, Sociedades de Responsabilidad Limitada, pp. 4 ff.

[44] It must be noted that in Spain, prior to the Law of 1953, the Sociedad de Responsabilidad Limitada had been recognized and authorized by the courts.

[45] Argentina, Law 11645 of Oct. 8, 1932; Bolivia, Law of March 12, 1941; Brazil, Decree 3708 of Jan. 10, 1919; Chile, Law of March 14, 1923; Colombia, Law 124 of Nov. 24, 1937; Cuba, Law of April 17, 1929; Costa Rica, Law of Aug. 25, 1942; Guatemala, Code of Commerce (1942), Arts. 445 ff.; Honduras, Code of Commerce (Decree No. 73 of Feb. 16, 1950), Arts. 66 ff.; Mexico, Ley General de Sociedades Mercantiles (LGSM), July 28, 1934, Arts. 58 ff.; Nicaragua, Code of Commerce, Art. 137; Paraguay, Law 10268 of Dec. 29, 1941; Panamá, Code of Commerce, Art. 327; Uruguay, Decree-Law 8.992 of April 26, 1933; Venezuela, Code of Commerce (1955), Arts. 312 ff. In connection with Nicaragua, article 137 of the Code of Commerce authorizes the general partner in a sociedad en comandita (limited partnership) to limit his liability by an appropriate clause to this effect in the contract of partnership. Although some authors have doubted whether such a clause may be effective against third parties, I am inclined to believe it is. Article 137 provides that if the clause of limited liability is included in the contract, then the word "limited" must be added to the name of the partnership. This indicates that the limited liability of the partners is something which may affect third persons. Assuming that this is the proper construction of article 137, it in effect authorizes the creation of Sociedades de Responsabilidad Limitada by providing that the general partner or partners in a sociedad en comandita (limited partnership) may limit their liability.

[46] However, in Peru, article 1726 of the Civil Code allows the creation of "civil" Sociedades de Responsabilidad Limitada.

dor,[48] El Salvador, and Haiti.

Because of the fact that the *Sociedad de Responsabilidad Limitada* is of recent origin, there is no uniformity among the civil law countries in its regulation, and the rules adopted by some nations in connection with this type of association are deficient.

B. *General Characteristics*[49]

The *Sociedad de Responsabilidad Limitada* is a type of business association intermediate between the partnership and the corporation, its fundamental characteristic being the limited liability of *all* the partners. It was established in order to suit the needs of the enterprises of medium size by offering limited liability to the partners in order to attract capital and, at the same time, by reducing the expenses and difficulties which the organization and operation of a corporation entail in Latin America. However, due to its deficient regulation, it may be, and in fact often is, used in most countries by large enterprises as well.

The *Sociedad de Responsabilidad Limitada* constitutes an excellent device for doing business in Latin America, and it seems amazing that it has not been used more extensively by American investors in their operations abroad. It is the writer's suggestion that whenever an American investor contemplates the organization of an association in one of the Latin American countries, he should consider the possibility of establishing a *Sociedad de Responsabilidad Limitada*, weighing the advantages and the disadvantages that this type of association offers when compared with other business devices such as the corporation.

As compared with a corporation the *Sociedad de Responsabilidad Limitada* presents the following general advantages. In the first place its organization is less difficult and less expensive than that of a corporation. In particular, no governmental authorization is required, at least in most Latin American countries.[50] In the second place, it may be more closely held and controlled than a corporation and its operation is less complicated. Finally, in some countries the taxes imposed upon the *Sociedad de Responsabilidad Limitada* are

[47] The draft for the new Code of Commerce of the Dominican Republic authorizes and regulates the Sociedad de Responsabilidad Limitada (Ducoudray, Proyecto de Código de Comercio, Ciudad Trujillo (1947)).

[48] See Romero, Las Compañias de Comercio en el Ecuador 218 ff. (1958), in which the author strongly advocates the adoption of this type of association in Ecuador. He also presents a draft of a statute regulating the Sociedad de Responsabilidad Limitada. This draft follows the general lines of the Chilean and Colombian laws.

[49] See 1 Solá-Aztiria, op. cit. supra note 43, pp. 29 ff.

[50] See p. 183 infra.

lower than those imposed upon a corporation.[51] On the other hand, the *Sociedad de Responsabilidad Limitada* has a few disadvantages, mainly in two respects. Because of defects in its regulation, the *Sociedad de Responsabilidad Limitada* does not offer, in some countries, sufficient security to potential creditors.[52] In the second place, the conveyance of the right or interest that a partner has in a *Sociedad de Responsabilidad Limitada* is subject to certain requirements which do not exist in connection with the negotiation of shares of stock.

C. *Different Systems of Regulation*

The regulation of the *Sociedad de Responsabilidad Limitada* is not uniform in Latin America. For the purposes of discussion the statutes may be divided into three groups.

(1) In some countries, *e.g.*, Panamá[53] and Nicaragua,[54] the codes of commerce merely provide that it is possible for the partners in a general partnership or in a limited partnership to agree that their liability will be limited. This limitation on the liability of the partners will be operative as to third persons, although there is some doubt in this respect in Nicaragua.[55] A somewhat similar situation exists in Chile, where, although there is a special statute on *Sociedades de Responsabilidad Limitada,* it deals mainly with the formal organizational requisites and provides that in all other matters the *Sociedad de Responsabilidad Limitada* will be subject to the regulations and principles of the *Sociedad Colectiva.*[56] The defects of this system are clear: the partnership is a form of business association based upon the unlimited liability of at least some of the partners and it may not satisfactorily be utilized as an association (such as the *Sociedad de Responsabilidad Limitada*) in which the liability of all the partners is limited, without greatly endangering the position of potential

[51] This is the case in Colombia where the Sociedades de Responsabilidad Limitada are subject to a tax of only 3% of the taxable income (Art. 10, Decreto Legislativo 3211 of 1953), whereas corporations are taxed according to a progressive tariff of up to 31¾% (Decreto Legislativo 2317 of 1953, Art. 15). Only corporations with less than 5.000 pesos (U.S. $633 approximately) are subject to a tax lower than the 3% with which the Sociedades de Responsabilidad Limitada are taxed.

[52] This is particularly true in countries like Panamá and Nicaragua where the rules of the Sociedad Colectiva (general partnership) are applied to the Sociedades de Responsabilidad Limitada, because the whole regulation of the Sociedades Colectivas is based upon the assumption that the partners will be unlimitedly liable to the creditors for the acts and transactions of the partnership and therefore not many limitations are imposed for the protection of the capital of the partnership.

[53] C.Co., Art. 327.

[54] C.Co., Art. 137.

[55] Authorities cited note 45 supra.

[56] LSRL, Art. 4(2).

creditors. Furthermore, the partnership form is useful primarily in connection with small enterprises and its structure is not adequate for the larger enterprises which are frequently organized as *Sociedades de Responsabilidad Limitada.*

(2) The statutes of Argentina, Bolivia, Brazil, Honduras, Mexico, Uruguay, and Venezuela set up a fairly detailed scheme for the organization, operation, and other incidents of the *Sociedad de Responsabilidad Limitada.* The scheme provided for is intermediate between the rigid and simple set-up of the partnership and the more elastic but also more complex regulation of the corporate form.[57]

(3) The Colombian statute is an example of a middle-road between the two systems discussed above. It bases the regulation of the *Sociedad de Responsabilidad Limitada* on the principles, rules, and ideas governing the partnership, but has also introduced a few amendments and modifications to those principles, rules, and ideas. The result is a better system than the one followed by the countries mentioned in the first group, but still affected by many deficiencies and inconveniences.

Finally, it must be mentioned that in some countries, such as Chile,[58] Columbia,[59] Uruguay,[60] Panama,[61] and Nicaragua[62] the rules of the *Sociedad Colectiva* are applicable to the *Sociedad de Responsabilidad Limitada* in the absence of a special provision to the contrary. On the other hand, in Brazil the rules of the *Sociedad Anónima* are applicable;[63] in Venezuela, the rules concerning the *Sociedad Anónima* and the *Sociedad Colectiva*; [64] and in Argentina[65] and Bolivia,[66] the commercial and civil laws, in general.

D. *Liability of the Partners*

The basic characteristic of a *Sociedad de Responsabilidad Limitada* is the limited liability of the partners. In Latin America, as a general rule, the liability of each partner is limited to the payment of the

[57] It must be noted, however, that in Argentina, if the Sociedad de Responsabilidad Limitada does not have more than 5 partners, its regulation is similar in some respects to that of a Sociedad Colectiva.
[58] LSRL, Art. 4(2).
[59] LSRL, Art. 11.
[60] LSRL, Art. 18.
[61] C.Co., Art. 327.
[62] C.Co., Art. 137.
[63] LSRL, Art. 18.
[64] C.Co., Art. 336.
[65] LSRL, Art. 24.
[66] LSRL, Art. 18.

amount which he subscribed.[67] There are, however, several exceptions to this general rule in the various countries. For example, in Colombia the partners may agree to additional liability;[68] in Brazil, in case of bankruptcy of the association, the partners are jointly liable for the amount of the parts or interests not yet fully paid;[69] and in Argentina, Bolivia, Colombia, and Venezuela the founding partners are jointly liable for the effective contribution and proper valuation of that part of the capital which was not paid in cash.[70] Finally, it must be mentioned that in Argentina, Mexico, and Honduras, the partners may promise additional contributions to a *Sociedad de Responsabilidad Limitada,* but generally this obligation is not enforceable by third persons, until the association has decided and formally announced the "integration" of the additional contributions.[71]

E. *Organization—Substantive and Formal Requirements: Juristic Personality*

The general rule in Latin America is that two partners are sufficient to create a *Sociedad de Responsabilidad Limitada.*[72] The only exception is found in Bolivia, which requires at least three partners.[73]

In order to prevent the *Sociedad de Responsabilidad Limitada* from being used by large enterprises, most Latin American statutes have limited the maximum number of partners.[74] In Chile the maximum is 50; in Mexico, Bolivia, and Paraguay, 25; in Colombia, 20; in Argentina and Uruguay, 20 plus 5 employees;[75] and in Cuba, 10.[76]

In Brazil, Chile, Colombia, Guatemala, Nicaragua, and Panama the law has not determined either a maximum or a minimum capital.

[67] Argentina, LSRL, Art. 11 (1st); Bolivia, LSRL, Art. 2; Chile, LSRL, Art. 1; Colombia, LSRL, Art. 1; Honduras, C.Co., Art. 66; Mexico, LGSM, Art. 58; Uruguay, LSRL, Art. 4; Venezuela, C.Co., Art. 312. In some other countries, such as Brazil, for example, this principle was not expressly set forth by the legislature, probably because it is too well known and generally accepted.

[68] LSRL, Art. 1.

[69] LSRL, Art. 9.

[70] Argentina, LSRL, Art. 10(3); Bolivia, LSRL, Art. 8; Colombia, LSRL, Art. 2(3); Venezuela, C.Co., Art. 313(4).

[71] This is the Argentinian rule (LSRL, Art. 11, 2nd and 3rd). Similar provisions are found in Mexico (LGSM, Art. 70) and Honduras (C.Co., Art. 75).

[72] This principle has not been expressly set forth in connection with the Sociedad de Responsabilidad Limitada, but there is a general rule in the law of associations that two persons are enough to organize a company, unless otherwise provided by the legislature.

[73] LSRL, Art. 3.

[74] The exceptions to this general rule are: Brazil, Costa Rica, Nicaragua, Panamá, and Venezuela.

[75] Argentina, LSRL, Art. 8; Bolivia, LSRL, Art. 3; Chile, LSRL, Art. 2; Colombia, LSRL, Art. 5; Guatemala, C.Co., Art. 445; Honduras, C.Co., Art. 69 (maximum of 25 partners); Mexico, LGSM, Art. 61; Paraguay, Art. 25; Uruguay, LSRL, Art. 7.

[76] LSRL, Art. 1(a). Also, if the number of partners exceeds 5, a supervisory committee must be appointed by the partners in order to check the activities of the managers (LSRL, Art. 1 LL).

On the other hand, Uruguay and Venezuela have limited both the minimum and the maximum capital.[77] In Venezuela the minimum capital is 20,000 Bolivars (about $6,000) and the maximum is 2,000,000 Bolivars (about $600,000). In Argentina, Bolivia, Cuba, Honduras, Mexico, and Paraguay the law has not established a maximum capital but it has provided for a minimum capital.[78] In Argentina and Mexico the minimum capital is 5,000 pesos. Due to inflationary factors this amount has become almost nominal in Argentina ($55) and very low in Mexico ($400).

The general rule is that the capital must be entirely subscribed.[79] In some countries the subscription of capital must always be private, public offering being forbidden by law.[80] Some countries, *e.g.*, Bolivia, Colombia, and Guatemala, require also the payment of the entire capital which is subscribed.[81] This, however, is not the general rule. In most countries the law simply requires that at least 50% of the subscription made by each one of the partners be paid before final organization.[82]

Cash and practically any kind of tangible or intangible property may be agreed upon as consideration under a subscription agreement. However, in most countries services to be rendered in the future may not be the object of a valid contribution.[83]

[77] Uruguay, LSRL, Art. 8 (not less than 5.000 and no more than 1.000.000 pesos); Venezuela, C.Co., Art. 315.

[78] Argentina, LSRL, Art. 9; Mexico, LGSM, Art. 62; Bolivia, LSRL, Art. 5 (50.000 bolivianos); Cuba, Law of Dec. 13, 1929 (5.000 pesos); Honduras, C.Co., Art. 70 (5.000 lempiras); Paraguay, LSRL, Art. 7 (500.000 pesos).

[79] Argentina, LSRL. Art. 10; Bolivia, LSRL, Art. 7; Colombia, LSRL, Art. 2(2), 3; Honduras, C.Co., Art. 71; Mexico, LGSM, Art. 64; Venezuela, C.Co., Art. 313; Brazil, D-L. 2627, Art. 38(1); Chile, C.Co., Art. 375 (by implication).

[80] Honduras, C.Co., Art. 72; Mexico, LGSM, Art. 63.

[81] Bolivia, LSRL, Art. 7; Colombia, LSRL, Art. 2(2), 3; Guatemala, C.Co., Art. 446. According to Solá-Aztiria, this is also the rule in Cuba. Sociedades de Responsabilidad Limitada, vol. I, p. 347 (1950-1954).

[82] Argentina, LSRL, Art. 10 (but subscriptions other than in cash must be fully paid); Honduras, C.Co., Art. 71; Mexico, LGSM, Art. 64; Paraguay, LSRL, Art. 8; Uruguay, LSRL, Art. 9 (but subscriptions other than in cash must be fully paid); Venezuela, C.Co., Art. 313. In Brazil, the D-L 2627 (1940), article 38(2) which must be applied by analogy to the Sociedad de Responsabilidad Limitada requires the payment of only 10% of the subscribed capital. In Chile, Panamá, and Nicaragua, no minimum paid-in capital is set forth by the law.

[83] Expressly: Brazil, LSRL, Art. 4. By implication: Argentina, LSRL, Art. 10; Bolivia, LSRL, Art. 8; Guatemala, C.Co., Art. 446; Mexico 1 Solá-Aztiria, Sociedades de Responsabilidad Limitada, pp. 389 ff.; Uruguay, LSRI, Art. 9. The situation in Colombia is doubtful. Art. 6 of the LSRL seems to authorize the existence of "industrial partners" in a Sociedad de Responsabilidad Limitada but restricts their right to participate in the dividends of the association. On the other hand the supreme court has put in doubt the possibility of having industrial partners in a Sociedad de Responsabilidad Limitada (Sentencia, 28 abril, 1952, LXXI, 776). Among the legal writers there is a split of authority in this connection. Dr. Zuleta is against and Dr. Villa Uribe favors the possibility of having "industrial partners" in a Sociedad de Responsabilidad Limitada (Ortega-Torres, Código de Comercio Terrestre, 550 ff., 1953). In Chile, Panamá, and Nicaragua, the contribution of work or services is apparently allowed.

The *Sociedad de Responsabilidad Limitada* must always be created by a written instrument. In Argentina, Brazil, Uruguay, and Venezuela[84] a private document is enough, but this is not so in Bolivia, Chile, Colombia, Cuba, Honduras, Mexico, and other countries where a notarial contract is required.[85] In all countries an abstract of the document of association must be recorded in the Public Register of Commerce,[86] and in some countries, *e.g.*, Chile, this abstract must also be published in a newspaper, ordinarily in the official newspaper.[87]

As a general rule the authorization of the government is not necessary in order to create a *Sociedad de Responsabilidad Limitada.* However, in Brazil foreign *Sociedades de Responsabilidad Limitada* must have such authorization[88] and in Mexico it is required not only for the legal operation of foreign *Sociedades de Responsabilidad Limitada,* but also for any such association if there are foreign partners.[89]

Once the requirements stated above have been fulfilled, the *Sociedad de Responsabilidad Limitada* emerges as a juristic person.[90] In most countries it will be regarded always as a commercial association; in Colombia and Chile the association will be commercial only if its purposes are commercial.[91]

The object or purpose of a *Sociedad de Responsabilidad Limitada* may be any legal purpose or object not expressly forbidden by the law. In some statutes there are several kinds of business which may not be carried on in this form. In Argentina, for example, insurance, capitalization, and savings institutions may not adopt the form of *Sociedades de Responsabilidad Limitada.*[92]

F. *Partners—Their Interest in the Association*

There is no provision relating to the *Sociedad de Responsabilidad Limitada* prohibiting foreigners from being partners. However, in Mexico and some other countries, there are general rules forbidding

[84] Argentina, LSRL, Art. 4; Brazil, LSRL, Art. 2 and C.Co., Arts. 300 and 302; Uruguay, LSRL, Art. 5; Venezuela, C.Co., Arts. 211 and 214.

[85] Bolivia, LSRL, Art. 2 and C.Co., Art. 231; Chile, LSRL, Art. 2 and C.Co., Art. 352; Colombia, LSRL, Art. 2 & C.Co., Art. 467; Honduras, C.Co., Art. 14; Mexico, LGSM, Art. 5.

[86] Argentina, LSRL, Arts. 5, 6; Brazil, LSRL, Art. 2 & C.Co. Art. 301; Chile, LSRL, Art. 3 & C.Co. Art. 354; Colombia, LSRL, Art. & C.Co. Art. 469; Honduras, C.Co., Art. 77; Uruguay, LSRL, Art. 6; Venezuela, C.Co., Art. 212. See also supra, note 33.

[87] Chile, LSRL. Art. 3(2). See also Argentina, LSRL, Arts. 5, 6; Colombia, LSRL, Art. 3; Uruguay, LSRL, Art. 6; Venezuela, C.Co., Art. 212.

[88] D-L 2627 (1940), Art. 63, by analogy.

[89] 1 Solá-Aztiria, Sociedades de Responsabilidad Limitada, p. 492 (1950-54).

[90] Authorities cited note 34 supra.

[91] See p. 172 supra.

[92] Argentina, LSRL, Art. 3 as amended by law 12156. See similar provisions in Chile, LSRL, Art. 2(2); Bolivia, LSRL, Art. 3; Uruguay, LSRL, Art. 3(2).

associations in which there are foreigners to engage in certain types of operations. These will be discussed later.[93]

Under most statutes, the interest of a partner in a *Sociedad de Responsabilidad Limitada* must be of a certain minimum par value (in Argentina[94] and Mexico,[95] 100 pesos; in Venezuela,[96] 1,000 bolivars) and if the par value is higher, it must be a multiple of the minimum legal par value.[97]

The interest or part in a *Sociedad de Responsabilidad Limitada* may not be represented by shares of stock[98] and its conveyance is subject to certain limitations. In Panama,[99] Nicaragua,[100] and Chile,[101] where the *Sociedad de Responsabilidad Limitada* is subject entirely or partially to the rules of the *Sociedad Colectiva* (general partnership), the unanimous consent of the partners is necessary in order to transfer an interest or part in the association. This rule is also applied in Mexico and Honduras, but in these countries it is possible to provide in the contract of partnership that conveyances of parts or interests in the association are subject only to the vote of a majority of partners who represent at least three-fourths of the capital of the association (Mexico) or by simple majority (Honduras).[102] In Argentina, if the number of partners is more than five, and in Colombia, Uruguay, and Venezuela in any case,[103] the following principles are applied: if the transferee is a partner no authorization is required, but if the transferee is an outsider the authorization of a majority of the partners, representing three-fourths of the capital of the association, is required. A similar system is applied in Bolivia, but in this country approval must be given by a majority of the votes of partners representing 80% of the capital of the association.[104] Several Latin American statutes have established pre-emptive rights on behalf of the other partners.[105]

[93] See p. 198 infra.

[94] LSRL, Art. 9.

[95] LGSM, Art. 62.

[96] C.Co., Art. 316. Similar provisions are in force in Bolivia, LSRL, Art. 5 (100 bolivianos); Honduras, C.Co., Art. 70 (100 lempiras); Uruguay, LSRL, Art. 8 (100 pesos).

[97] Argentina, LSRL, Art. 9; Bolivia, LSRL, Art. 5; Honduras, C.Co., Art. 70; Mexico, LGSM, Art. 62; Venezuela, C.Co., Art. 316.

[98] Argentina, LSRL, Art. 9; Bolivia, LSRL, Art. 5; Colombia, LSRL, Art. 7; Honduras, C.Co., Art. 66; Mexico, LGSM, Art. 58; Uruguay, LSRL, Art. 10(1).

[99] C.Co., Art. 325.

[100] C.Co., Art. 169(3).

[101] C.Co., Art. 404(3).

[102] Mexico, LGSM, Art. 65; Honduras, C.Co., Arts. 89, 43.

[103] Argentina, LSRL, Art. 12 (but if the Sociedad de Responsabilidad Limitada has no more than five partners, then the unanimous consent of all of them is required); Colombia, LSRL, Art. 7(2); Uruguay, LSRL, Art. 10(2); Venezuela, C.Co., Art. 317(b).

[104] Bolivia, LSRL, Art. 6.

[105] Argentina, LSRL, Art. 12(2); Honduras, C.Co., Arts. 89 and 43(3); Mexico, LGSM, Art. 66; Uruguay, LSRL, Art. 10(4); Venezuela, C.Co., Art. 317(a).

Usually the conveyance of the interest of a partner in a *Sociedad de Responsabilidad Limitada* requires the execution of an instrument which must be recorded in the Register of Commerce.[106] The transaction must also be recorded in a book of the association devoted to that purpose.

The passing of the part or interest to the heirs of one of the partners is subject to requirements similar to the ones just discussed,[107] but it is possible to avoid them by a clause in the articles of association stating that the association will continue with the heirs of the deceased,[108] and in some countries, such as Colombia and Mexico, there is a presumption that this was the intent of the partners, unless otherwise provided for in the articles of association.[109]

G. *Management*

There are basic differences among the laws of the several Latin American states in connection with the management of the *Sociedad de Responsabilidad Limitada,* and the systems provided for by some codes and statutes are incomplete and inadequate. Fortunately, commercial customs have cured some of these deficiencies through the general use of appropriate provisions in the contracts of association regulating in detail the matter of administration. Finally, as a general rule, the Latin American laws, to a greater or lesser extent, give ample freedom to the partners in choosing and determining the details of the system of management.

Taking into account the general traits of the several legislative schemes, the Latin American countries may be classified into three groups, insofar as administration of the *Sociedad de Responsabilidad Limitada* is concerned. However, it must be noted that among the countries belonging to each one of the three groups, there are wide divergencies. Those groups are:

(1) Countries which have provided, in a more or less detailed manner, a special system of management for the *Sociedad de Responsabilidad Limitada*: They are Argentina, Bolivia, Honduras, Mexico, Uruguay, and Venezuela. It must be noted, however, that the Uruguayan law is quite incomplete and that it provides that in matters not regulated by the law or by the contract of association, the

[106] Argentina, LSRL, Art. 12(3); Colombia, LSRL, Art. 7(2), but recording is necessary only if there is a change in the management; Uruguay, LSRL, Art. 10(1); Venezuela, C.Co., Art. 318.

[107] Argentina, LSRL, Art. 12(4).

[108] Argentina, LSRL, Art. 12(4).

[109] Colombia, LSRL, Art. 9; Mexico, LGSM, Art. 67. A similar effect may be given to Art. 14 of the Uruguayan law.

principles of the *Sociedad Colectiva* (general partnership) will be applied.[110]

(2) Countries which have not established a special system of management for the *Sociedad de Responsabilidad Limitada* but have merely provided that rules for the management of the *Sociedades Colectivas* (general partnerships) are applicable to the *Sociedad de Responsabilidad Limitada.* These are Chile, Colombia, Nicaragua, and Panama.

(3) Finally, in Brazil, the statute contains a few provisions in regard to liability of managers and other topics, but does not provide a coherent and complete regulation for the management of the *Sociedad de Responsabilidad Limitada.*

The regulation by these three groups of countries will now be examined in detail.

1. *Countries Which Have a Special System of Administration*

In the countries belonging to this group, the supreme authority of the *Sociedad de Responsabilidad Limitada* is the meeting of partners. This principle has been expressly embodied in the laws of Mexico[111] and Honduras[112] and it impliedly flows from several provisions of the laws of other countries.[113]

As a general rule, the manner in which the meetings are to be held is a matter left to the partners, who will provide the necessary principles in the contract of association.[114] However, in several countries some limitations to this freedom of regulation have been imposed by the laws. In Bolivia[115] and Uruguay[116] at least one meeting must be held each year; in Honduras[117] and Mexico[118] the same rule has been established but it is possible for the partners to provide in the contract of association that certain action may be taken by mail. However, in this latter case, a meeting must be held if it is so decided by a certain majority.[119] Finally, it must be mentioned that the laws of Mexico[120] and Honduras[121] provide that the annual meet-

[110] Uruguay, LSRL, Art. 18.
[111] LGSM, Art. 77.
[112] C. Co., Art. 82.
[113] See pp. 188-89 infra.
[114] See, e.g., Argentina, LSRL, Art. 17. In this country the meetings of partners are not mandatory, but merely optional. Venezuela, C.Co., Art. 330.
[115] LSRL, Art. 13.
[116] LSRL, Art. 12.
[117] C.Co., Art. 83.
[118] LGSM, Arts. 80 and 82.
[119] In Mexico by partners representing ¾ of the capital of the association (LGSM, Art. 82) and in Honduras by partners representing ⅓ of the capital (C.Co., Art. 83).
[120] LGSM, Art. 80.
[121] C.Co., Art. 83.

ing of partners must be held in the domicile of the association.

a. *Voting requirements.*—In most of the countries no special quorum is required by law for meetings of the partners. An exception to this rule is found in the Code of Commerce of the Republic of Honduras which provides that a quorum of partners representing one-half of the capital of the *Sociedad de Responsabilidad Limitada* must be present at the meetings. However, if this quorum is not obtained in the first meeting, then a second meeting may be called and for this meeting no quorum is required.[122]

As a general rule, in the countries belonging to this first group the voting is determined in proportion to the amount of capital which each partner holds in the association. In Argentina[123] and Venezuela[124] a partner will have as many votes as parts or shares he has in the *Sociedad de Responsabilidad Limitada;* in Bolivia each partner will have a vote for each part that he had subscribed and paid for, but no partner may represent more than 35% of the total capital of the association.[125] In Mexico each partner will have one vote for each 100 pesos, but "preferred interests with higher voting rights are allowed."[126] Similar rules are applied in Honduras.[127]

There are substantial differences among the laws of the several countries belonging to this group as to the majority which is needed for the approval of motions or resolutions by the partners. In Argentina[128] and Venezuela[129] this point has been left to the discretion of the partners, except in some respects that will be considered later. In Venezuela the code of commerce also provides that if nothing is said in the contract of association, the approval of ordinary resolutions requires a majority of partners who represent at least one-half of the capital of the association.[130] In Mexico ordinary resolutions must be adopted by a majority of partners who represent at least one-half of the capital of the association, but the contract of association may require a higher majority. If a majority is not obtained in the first casting then the decision may be adopted by a majority of the partners, without taking into consideration what fraction of the capital they represent.[131] In Honduras resolutions must be approved by a

[122] C.Co., Art. 85.
[123] LSRL, Art. 19.
[124] C.Co., Art. 333.
[125] LSRL, Art. 13.
[126] LGSM, Art. 79.
[127] One vote for every 100 lempiras (LSRL, Art. 86).
[128] If nothing is provided for in the contract, ordinary motions will be approved by a majority of votes. Halperin, Sociedades de Responsabilidad Limitada, pp. 218 ff. (1951).
[129] C.Co., Art. 330.
[130] Art. 330.
[131] Mexico, LGSM, Art. 77.

majority of votes and the voting power is determined in the proportion of one vote for every 100 lempiras.[132] Finally, in Bolivia ordinary resolutions are adopted by a majority of at least 50% of the capital.[133]

As a result of the foregoing analysis it is apparent that voting power is calculated in Honduras and Bolivia upon the basis of capital. On the other hand, in Mexico and Venezuela it is determined both upon the basis of capital and upon the basis of number of partners.

There are certain decisions which must be unanimously approved by the partners. In Argentina, Bolivia, Mexico, and Honduras a change of the object of exploitation or the imposition of additional liability upon the partners must be unanimously adopted.[134] In Venezuela any modification of the contract of association which will impose additional liability upon the partners must be also approved by all the partners,[135] and in Argentina any amendment to the contract of association must be approved by all partners when the number of partners is not higher than five.[136]

A special majority of votes is requred in all countries belonging to this first group in order to modify the contract of association. In Argentina, where the number of partners is more than five, a quorum of partners representing three-fourths of the capital and approval by partners representing one-half of the capital is necessary;[137] in Mexico the approval of a majority of partners representing three-fourths of the capital is required;[138] and in Honduras[139] and Venezuela[140] the approval of three-fourths of the capital of the association.

b. *Powers of partnership meetings.*—As mentioned previously, the meeting of partners is the supreme organ of the *Sociedad de Responsabilidad Limitada.* The laws of Mexico[141] and Honduras[142] contain detailed lists of the powers which the meeting of partners has. In the other countries essentially the same authority is granted to it by several articles expressed in the respective title, chapter, or statute. The most important powers of the meeting of partners are: appointment and removal of managers and supervisors; power to amend the

[132] C.Co., Arts. 86, 87.
[133] Bolivia, LSRL, Art. 13.
[134] Argentina, LSRL, Art. 18; Bolivia, LSRL, Art. 16; Mexico, LGSM, Art. 83; Honduras, C.Co., Art. 87.
[135] C.Co., Art. 332.
[136] LSRL, Art. 18.
[137] C.Co., Art. 354, which is applicable to the Sociedad de Responsabilidad Limitada.
[138] LGSM, Art. 83.
[139] C.Co., Art. 87.
[140] C.Co., Art. 332.
[141] LGSM, Art. 78.
[142] C.Co., Art. 82.

contract of association and to impose additional liability upon the partners; power to limit the authority of the managers through the inclusion of appropriate provisions in the contract of association; power to make effective the eventual liability of the managers and, in some countries, to waive such liability; power to declare dividends; and power to disapprove the conveyance of the interest of a partner to a third person who is not a partner.

c. *Managers.*—A common characteristic of the laws of the countries belonging to the first group is a provision for the appointment of a manager or managers who will have the administration of the *Sociedad de Responsabilidad Limitada.* The appointment of managers is mandatory in Argentina (with some qualifications),[143] Bolivia,[144] Uruguay,[145] and Venezuela,[146] but it is optional in Mexico[147] and Honduras,[148] in the sense that if no managers are appointed in the contract of association *all* the partners will manage the concern.

As a general rule, the managers may be partners or third persons, and no specific prohibitions exist against foreigners being appointed managers.

It is possible to appoint one or more managers and in this latter case the contract will provide how their decisions must be made. The law of Mexico[149] and the Code of Commerce of Honduras[150] provide in this connection that decisions will be made by majority of votes of the managers, unless the contract had established that they must act unanimously.

The appointment of the manager or managers is accomplished by the partners by majority vote, the requisite majority being determined by the general rules discussed above for ordinary motions. However, in Argentina the number of votes of each partner will be determined by dividing his interest in the association by the amount of the interest of the partner who possesses the smaller part or share in the association,[151] and in Bolivia the unanimous consent of all the partners is required if the candidate for the management is a third person who is not a partner in the *sociedad.*[152]

[143] Argentina, LSRL, Art. 13. However, if the partners are five or less than five, I believe that it is not necessary to appoint managers. This is the position adopted by 1 Fernández, Código de Comercio Commentado, ed. cit., p. 440. However, a contrary view seems to be found in 2 Solá-Aztiria, Sociedades de Responsabilidad Limitada 88.

[144] LSRL, Art. 9.

[145] LSRL, Arts. 5(4), 11.

[146] C.Co., Art. 322.

[147] LGSM, Art. 74.

[148] C.Co., Art. 78.

[149] LGSM, Art. 74.

[150] C.Co., Art. 78.

[151] LSRL, Art. 13(2), C.Co., Art. 412.

[152] LSRL, Art. 9.

The general rule is that managers may be removed by the partners at any time, with or without cause, in the same manner in which they were appointed. In Venezuela, however, a special majority of partners representing three-fourths of the capital of the association is required.[153]

The manager or managers have all powers granted to them in the contract of association. They may engage in any acts or transactions which are in the ordinary course of business of the association, unless their authority to do so was limited in the contract of association.[154] As a general rule, these limitations are good against third persons if the contract was properly recorded and published. However, even in this case, the association may be liable for the acts of the managers made in violation of limitations imposed in the contract under certain circumstances as, for instance, where the association has accepted the benefits of the transaction.[155]

The laws of the countries now under consideration contain several provisions concerning the liability of the managers. In Argentina,[156] Bolivia,[157] and Venezuela[158] the legislature has expressly provided that it is unlawful for the managers to engage, directly or indirectly, in the same type of business in which the association is engaged, without securing appropriate permission from the partners. In Argentina[159] and Bolivia[160] the managers are declared to be jointly liable in case of illegal distribution of dividends. In Argentina[161] and Venezuela[162] they are expressly subject to liability in case of violation of their duties, the laws, or the contract of association, and in these two countries, Mexico[163] and Honduras,[164] an action may be directed against the managers for the "rebuilding" or "reintegration" of the capital of the association when it has been improperly managed.

The liability of the managers may be enforced by the association;[165]

[153] C.Co., Art. 323.

[154] See express formulations of this general rule in Argentina, LSRL, Art. 16 and Venezuela, C.Co., Art. 325.

[155] The subject of the liability of commercial associations for transactions made by the managers in excess of their powers is extremely complex and detailed. A close analysis of this point is beyond the scope of this paper.

[156] LSRL, Art. 14.

[157] LSRL, Art. 9.

[158] C.Co., Art. 326.

[159] LSRL, Art. 21.

[160] LSRL, Art. 9 (action to recover dividends illegally paid is subject to a short term statute of limitations of 5 years).

[161] LSRL, Art. 14.

[162] C.Co., Art. 324.

[163] LGSM, Art. 76.

[164] C.Co., Arts. 80-81.

[165] Argentina, LSRL, Art. 15; Mexico, LGSM, Art. 76; Honduras, C.Co., Arts. 80-81.

in Argentina,[166] Mexico,[167] and Honduras[168] it may also be enforced by the partners in a derivative suit. In Venezuela derivative suits are allowed when the claimants represent at least 10% of the capital of the association.[169] In Argentina and Mexico the liability of the managers may be waived by the partners by a vote of three-fourths of the capital of the association.[170]

Creditors may also enforce the liability of the directors. This right is unqualified in Honduras. In Argentina it may be exercised only in case of liquidation or bankruptcy, and in Mexico, only in this latter case by the trustee.[171]

Finally, it must be added that managers will not be liable if they did not know of the illegal motion, or if they voted against it.[172] In Venezuela it is also required that in order to avoid liability, notice of the illegal action must have been given to the supervisors.[173]

2. *Countries Having No Special System of Administration*

The second group of countries, in so far as administration is concerned, is composed of those whose laws do not provide a special system of administration for the *Sociedad de Responsabilidad Limitada,* but merely state that the rules of the *Sociedad Colectiva* (general partnership) are applicable. These countries are Chile,[174] Colombia,[175] Nicaragua,[176] and Panama.[177]

Under the system adopted by these four countries, each and every one of the partners is a manager and has authority to act for and to bind the association.[178] However, it is possible for the partners to agree upon a different system of administration in the contract of association.[179] In particular they may give to one or more partners the authority to represent the association,[180] and may provide in the

[166] LSRL, Art. 15.
[167] LGSM, Art. 76.
[168] C.Co., Arts. 80-81.
[169] C.Co., Art. 324.
[170] Argentina, LSRL, Art. 15(2); Mexico, LGSM, Art. 76(2).
[171] See articles cited note 165 supra.
[172] See articles cited note 165 supra.
[173] C.Co., Art. 324.
[174] LSRL, Art. 4(2).
[175] LSRL, Arts. 1, 11.
[176] C.Co., Art. 137(2) (by implication).
[177] C.Co., Art. 327(3) (by implication).
[178] Chile, C.Co., Arts. 371(2), 385, 386, 387; Colombia, LSRL, Art. 1; C.Co., Arts. 489(2), 510, 511, 512; Nicaragua, C.Co., Art. 138(2), 149, 150, 151; Panamá, C.Co., Art. 302.
[179] Chile, C.Co., Arts. 371(1), 384; Colombia, C.Co., Arts. 489(1), 509; Nicaragua, C.Co., Arts. 138(1), 148; Panamá, C.Co., Art. 302.
[180] Chile, C.Co., Art. 392; Colombia, C.Co., Art. 517; Nicaragua, C.Co., Art. 156; Panamá, C.Co., Art. 302.

contract the system for adoption of motions by the partners-managers. Also (and this is especially important) the partners may delegate the management to third persons who are not partners.[181] The system of delegating the administration of the *Sociedad de Responsabilidad Limitada* to one or more managers is convenient and in practice is the one used in Colombia.[182]

3. *Brazil*

The Brazilian statute contains only a few articles in connection with managers and their liability.[183] It provides that the use of the firm name may be delegated to one or more partners who will manage the association, that the unauthorized or abusive use of the firm name will give rise to civil and criminal liability, and that the managers will be jointly and unlimitedly liable for violations of the law, their authority, or the contract of association. Other aspects of the management of the *Sociedad de Responsabilidad Limitada* are not set forth in the special statute and therefore they must be regulated in the contract of association. If nothing is said in the contract, then the rules of the *Sociedad Anónima* (corporation) are applied.[184]

H. *Supervision*

As a general rule the *Sociedades de Responsabilidad Limitada* are not subject to the supervision of the government, except in Uruguay where the *Oficina de Recaudación de Impuestos a los Ganancias Elevadas* (Excess Profits Tax Collector's Office) has supervisory powers over the *Sociedades de Responsabilidad Limitada*,[185] and in Colombia where the *Sociedades de Responsabilidad Limitada* are subject to the control and supervision of the *Superintendencia de Sociedades Anonimas* when 33% or more of their capital is held by a *Sociedad Anónima* (corporation).[186]

In all countries of Latin America, either by express provision of the statutes or by application of general principles, the partners have the right of direct supervision over the acts of the managers and, generally speaking, over the running of the association. In Argentina, Mexico, and Honduras the partners may also appoint one or more supervisors *(comisarios)* for checking on the operations of the man-

[181] Chile, C.Co., Art. 385; Colombia, C.Co., Art. 510; Nicaragua, C.Co., Art. 149; Panamá, C.Co., Art. 315 (the unanimous consent of the partners is required).
[182] Pinzón, Sociedades, ed. cit., pp. 83 ff.
[183] LSRL, Arts. 10-14.
[184] LSRL, Art. 18.
[185] LSRL, Art. 19; L. 11418 of April 29, 1950 and D. of Dec. 4, 1950.
[186] D-L, 2831 of Nov. 8, 1952, Art. 1.

agers.[187] In Colombia, Chile, Nicaragua, and several other countries there is no express provision authorizing the appointment of supervisors. However, in at least one of these countries (Colombia) a supervisor or a council of supervisors is customarily appointed for the *Sociedades de Responsabilidad Limitada* of larger and medium size.[188] In Venezuela, the system of supervision is obligatory if the capital of the *Sociedad de Responsabilidad Limitada* is higher than Bls 500,000;[189] in other cases, it is optional.

I. *Dividends and Reserve Funds*

Most of the Latin American statutes do not contain any provision concerning declaration and distribution of dividends and creation of reserve funds. This deficiency greatly endangers the position of creditors to the extent that it permits distribution of dividends out of funds other than earned surplus. In Argentina and Bolivia, on the other hand, the statutes provide that dividends may be paid only out of net earned surplus.[190] A similar rule may be inferred from the words of article 85 of the Mexican LGSM which provides that during the period in which the *Sociedad de Responsabilidad Limitada* is being organized it is possible to give to the partners interest of up to 9% per annum on their investments in the association and that this amount may be taken from funds other than earnings *(beneficios)*. This seems to imply that once the organization of the enterprise is completed, dividends may be paid only out of earnings.

Insofar as reserve funds are concerned, the laws of Argentina, Bolivia, and Uruguay require the creation of a reserve fund by devoting to that purpose at least 5% of the annual earnings. The amount of the fund must be at least 10% of the capital of the association in Argentina[191] and 50% in Uruguay.[192] The Brazilian law has not established a limit.[193]

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[187] Argentina, LSRL, Art. 4(4), see also, 2 Solá-Aztiria, Sociedades de Responsabilidad Limitada, No. 422 Mexico, LGSM, Art. 84; Honduras, C.Co., Art 88. In Bolivia this system of supervision is expressly authorized when the partners are ten or more (LSRL, Art. 10).

[188] Pinzón, Sociedades, ed. cit., p. 84.

[189] C.Co., Art. 327.

[190] Argentina, LSRL, Art. 21. Dividends must be paid out of utilidades realizadas y liquidas. Otherwise they may be recovered by creditors in an action against the partners, subject to a 5 year statute of limitations. Bolivia, LSRL, Art. 10 (utilidades realizadas).

[191] LSRL, Art. 20.

[192] LSRL, Art. 13.

[193] LSRL, Art. 10(2).

III. CORPORATIONS

A. *Sources and Development*[194]

The Latin American countries have followed in the field of corporate law—as in many other fields—the principles, rules, and institutions of the civil law jurisdictions of Continental Europe, particularly those of France, Spain, and Italy, although some precepts and institutions of domestic origin may be found. The Anglo-American influence is not considerable, but it has increased steadily during this century. An example is the 1927 Law of Corporations of Panama which was patterned on the Florida act on corporations then in force.

The first corporations were created in France by royal charters specially granted to companies engaged in maritime and colonial enterprises. At this very early stage it is not possible to find a general regulation of corporations. The liberal ideas of the Revolution brought about the enactment by the National Convention of the *décret* of March 2, 1791, the consequence of which, in the corporate field, was to open the possibility for establishing corporations without the need of a governmental grant. Unfortunately, no regulation was then enacted, and, as a result, the newly acquired freedom was abused. Against such abuses the French Convention reacted energetically by abolishing the corporate form. The economic needs of the rising capitalism and some basic philosophical principles demanded, however, the re-establishment of this form of business association. Thus, it is not surprising that the Code of Commerce (1807) specifically authorized the organization of *Sociétés Anonymes* (corporations). Nevertheless, the drafters of the Code provided that an authorization from the state was necessary. In this manner they tried to prevent the same type of abuses that had been committed after the promulgation of the decree of 1791. The need for a governmental grant in each case made useless the establishment of a detailed regulation for corpora-

[194] See general bibliography at beginning of Article. The English literature is not very rich in the field of Latin American corporation law, but the following material may be cited: Alyea, Subsidiary Corporations under the Civil and Common Law, 66 Harv. L. Rev. 1227 (1953); Barrancos y Vedia, Dealings between Directors and their Corporations in Argentinan and American Law, 5 Am. J. Comp. L. 497 (1956); Crawford, The 1940 Corporation Law of Brazil, 16 Tul. L. Rev. 228 (1942); Crawford, The Capital Structure of Mexican Corporations, 28 Tul. L. Rev. 45 (1953); Crawford, Promoters Compensation—Domestic and Foreign, 23 U. Cinc. L. Rev. 1 (1954); Eder, Company Law in Latin America, 27 Notre Dame Law. 1-42, 223-43 (1951); Friedman (ed.), Legal Aspects of Foreign Investments (1959) (elementary survey of the laws of various countries, including several Latin American countries, in matters affecting private investments abroad); Inter-American Bar Association, Special Report on the Corporation Laws of various Latin American countries applicable to foreign corporations and their subsidiaries in Inter-American Bar Association, Ninth Conference Proceedings 163 ff. (1956).

tions. This fact explains why only eight articles of the Code of Commerce (29 through 36) dealt specifically with the subject of corporations.

The system of *ad hoc* governmental authorization was somewhat relaxed by the *loi* of May 23, 1863, and was finally abolished by the *loi* of July 24, 1867. This last law regulated corporations in a detailed manner, and although it has been the object of numerous amendments and supplementations, particularly since World War I, it is still, the basic act on this subject in France.[195]

A development, similar to the one just referred to in France, took place in the Iberian Peninsula.[196]

As a general rule the codes of commerce enacted in the several Latin American countries during the nineteenth century and during the first quarter of the present century, many of which are still in force, have great deficiencies so far as corporate regulation is concerned.[197] A surprisingly limited number of articles are found

[195] See generally 1 Hamel-Lagarde, Traité de Droit Commercial, Nos. 516 ff. (1954).

[196] The Code of 1829 allowed the creation of corporations by simple authorization of the Commercial Tribunals, which, in practice, was given as a matter of course. This system was changed by the Law of Jan. 28, 1848, establishing the requirement of governmental authorization. Later the Decree of Oct. 28, 1868 softened to some extent the rigid system set up by the Law of 1848, and the Law of Oct. 19, 1869 substituted for it a most liberal system of incorporation. This same approach was taken by the Code of Commerce of 1885 which contained only 19 articles on the subject of corporations (151-169), thus leaving most of the aspects of the regulation of corporate entities to the free will of the incorporators. After an unsuccessful attempt to modify this system, made in 1926, the Instituto de Estudios Políticos proposed a preliminary draft of a new law of corporations, upon the basis of which the Ministry of Justice prepared a final draft. This final draft became the Law of July 17, 1951, which went into force on Jan. 1, 1952. (See, generally, 1 Garriguez-Uria, Comentarios a la Ley de Sociedades Anónimas, Madrid, 1953, pp. 59 ff.).

[197] The following is an enumeration of the most important provisions on corporations in force in the Latin American countries to which this paper relates: Argentina, C.Co., Arts. 313 ff.; Ley 8875 (Debentures); Regulatory Decree of the Inspección General de Justicia (April 27, 1923). About the history and evolution of the Argentina commercial laws in general and of the corporate law in particular, see 1 Malagarriga, Tratado Elemental de Derecho Comercial, Buenos Aires, 1951, pp. 399 ff.; 1 Garo, Derecho Comercial, Buenos Aires, 1955, Nos. 38 ff. Brazil, The Code of Commerce regulated the field of corporations in just five articles (295-299); later the Law of June 25, 1850 and the Decree No. 3257 of April 10, 1899 were enacted; finally, in 1940 the Decree-Law No. 2627 of Sept. 26, 1940 was promulgated. This decree is still in force and it contains the basic regulation of corporations in 162 articles. After the enactment of the Decree 2627 other decrees and laws have been passed on the subject of corporations, supplementing and modifying in matters of detail the system established by the original decree. The most important are: Decree-Laws 2928 of Dec. 31, 1940; 3391 of July 7, 1941; 4480 of June 15, 1942; 5956 of Nov. 1, 1943; 6464 of May 2, 1944; 8563 of Jan. 5, 1946; 9783 of Sept. 6, 1946. Decrees 781 of Sept. 12, 1938; 149-B of July 20, 1893; 22.456 of Feb. 10, 1933; 2784 of Nov. 20, 1940 and 7583 of May 25, 1945. On the matters of "debentures," the following enactments are relevant: Law 5456 of Feb. 9, 1928; Decrees 177-A of Sept. 15, 1893; 781 of Oct. 12, 1938; 1392 of Sept. 26, 1939. Bolivia, C.Co., Arts. 225, 228, 247-252; Decrees of March 8, 1860; Dec. 26, 1873; Sept. 11, 1877; Law of Nov. 13, 1886; Decree of March 25, 1887; Law of Oct. 13, 1892; Decrees of June 11, 1921; Jan. 28, 1922; Decree-Law of April 28, 1938 and Law of Sept. 27, 1904 (Insurance Companies). Chile, C.Co., Arts. 424 ff.; Decreto con fuerza de Ley (Decree-Law) No. 251 of May 20, 1931; Law No. 6057 of July 16, 1937; Decree 3154 of July 23, 1947; Law No. 4657 of Sept. 25, 1929; Law No. 6156

therein in connection with this important subject and many of the rules set forth are now obsolete. These deficiencies of corporate law have been cured in some jurisdictions to a certain extent through the enactment of new codes of commerce, as in Honduras, through more or less radical amendments to the old codes, through the enactment of general laws on commercial associations, as in Mexico, through the enactment of a corporation act, as in Brazil, or through the promulgation of numerous decrees and laws modifying the old system and filling its gaps. It should be noted that this latter system has created much confusion in some countries, where a vast number of disparate statutes and decrees constituting a "piecemeal" regulation of corporate law, have been passed but have not been collected or codified in an organic and complete manner. It is difficult in these countries to determine whether certain provisions have or have not been overruled and thus to ascertain the applicable law.

In addition to the statutes and codes, custom and usage occupy an outstanding position as sources of the law of corporations in Latin America. Sometimes the gaps of the statutory law have been filled by reference to custom and usage; for example, issuance of preferred stock, although not expressly authorized by the written laws of several countries, has become a common practice among corporations of large size.

Other important sources of corporate law in Latin America are the resolutions and regulations of the governmental bodies which exercise state supervision over corporations. They must be consulted in order to avoid the danger of forced dissolutions and liabilities.

The analysis here will be general and is intended to convey only elementary and basic information about the principles most generally

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of Jan. 13, 1938; Law 10363 of July 10, 1952; Law of Sept. 11, 1878 and Decree No. 4705 of Nov. 30, 1946. Colombia, C.Co., Arts. 550 ff.; Law 42 of 1898; Decree-Laws 2 and 37 of 1906; Law of 105 of 1927; Law 28 of 1931; Law 58 of 1931; Law 73 of 1935; Decrees 1273 of 1936; 2952 of 1936; Decree-Law 1403 of 1940; Law 66 of 1947; Decree 2521 of 1950 and Decree-Law 2831 of 1952. Ecuador, C.Co., Arts. 262 and 285 ff.; Law of Oct. 15, 1909; Decree 230 of May 15, 1936; Decreto-Supremo (Supreme Decree) of March 24, 1936; Executive Decree of Aug. 7, 1946; Decree-Law of July 23, 1957. Mexico, LGSM, Arts. 87 ff.; Law on Investment Companies (published in the Diario Oficial of Dec. 31, 1955); New General Law on Credit Institutions (published in the Diario Oficial of May 31, 1941); New Finance Institutions (published in the Diorio Oficial of Dec. 29, 1950); General Law of Insurance Institutions (published in the Diario Oficial of Aug. 31, 1955); New General Law on Credit Institutions (published in the Diario Oficial of May 31, 1941); New Law on Finance Institutions and the Reglamento de Inscripciones approved by the Supreme Court on Dec. 17, 1936. Uruguay, C.Co., Arts. 403 ff.; Law 2230 of June 2, 1893; Resolution of Dec. 17, 1946; Law 11.073 of June 24, 1949; Regulatory Decrees of Oct. 20, 1948 and Nov. 26, 1949. There are many other laws and regulations concerning corporations, collected by Tassina in Sociedades Anónimas, Montevidéo, 1948. Venezuela, C.Co., Arts. 242 ff.; Laws of July 18, 1938 and Regulation of July 31, 1948.

accepted and followed in this important field in Latin America. The analysis is based primarily upon the laws and regulations of Argentina, Brazil, Colombia, and Mexico, although frequent references will be made to the laws of other South American jurisdictions. The principles set forth are subject to many qualifications and exceptions in connection with each particular country. The Latin American laws present fundamental differences and especially so in this field, which has been so deeply modified by original statutes enacted after the adoption of the codes of commerce. It must be pointed out that in the course of this century special statutes have been enacted in the several Latin American countries regulating in detail the organization and operation of certain types of corporations, such as banks and insurance companies. These special statutes will not be considered in this paper.

B. *Act of Incorporation*

Traditionally, the act of incorporation has been regarded in the civil law jurisdictions as a contract between the incorporators.[198] The Spanish term for the act of incorporation (*i.e.*, articles of incorporation) clearly discloses this fact. That term is *contrato de sociedad*, literally translated, "contract of association or incorporation." In modern times the contractual view has been the object of severe criticism by several outstanding writers who are of the opinion that a corporation is simply a legal institution and not a contract. This new approach is generally referred to as the "doctrine or theory of the institution." But even today a majority of the legal writers believe that the act of incorporation (by articles of incorporation) is a contract, although they do not disregard the fact that as a result of this contract a juristic person arises and with it a vast number of juridical relationships.[199] The act of incorporation is said to be a peculiar type of contract, a "plurilateral contract," according to Ascarelli's terminology.[200] From a practical standpoint the fact that the act of incorporation is not an ordinary contract but a *plurilateral* contract gives rise to many important consequences. Thus, for example, if the act of incorporation is void or voidable in regard to any one of the incorporators, the whole contract will not necessarily fail; it will remain binding as to the other incorporators.

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[198] Similarly, the act which creates an association is regarded as a contract between the partners.

[199] See generally, 1 Hamel-Lagarde, Traité, ed. cit., Nos. 383 ff.

[200] Ascarelli, Saggi de Diritto Commerciale, Milano, 1955, pp. 130 ff. and 325 ff.

C. *Incorporators*

In several Latin America countries, such as Bolivia, Chile, Ecuador, Peru, Uruguay, and Venezuela, the number of incorporators may be *two* or more. This requirement is derived from the general principles of commercial associations and applies in the absence of any specific norms requiring a higher number of incorporators.[201] On the other hand, the codes or statutes of the following countries, among others, require a higher number of incorporators: Argentina, 10; Brazil, 7; Colombia, 5; and Mexico, 5.[202]

In Brazil, Mexico, and some other countries the number of shareholders may not be lower than the minimum number of incorporators during the life of the corporation; otherwise, the corporation is dissolved.[203] In Chile and Colombia, the corporation is dissolved only if all the shares become the property of one person.[204] In some other countries, such as Peru and Uruguay, the codes do not contain any express provision on this point, and thus the question is controversial and doubtful.[205] On the other hand, the Venezuelan Code of Commerce expressly provides that a corporation shall not be dissolved even though all the shares come into the hands of one person.[206]

As a result of the preceding analysis it may be concluded that "one man" or "solely owned" corporations are as a general rule prohibited in Latin America.

The incorporators may be natural or juristic persons. Therefore, other corporations, partnerships, or official entities may become incorporators and shareholders.

As a general rule the incorporators need not be nationals of the particular country. However, it is important to observe that in Mexico certain kinds of corporations must have only Mexican shareholders, for example, corporations engaged in the exploitation of oil[207] or in the operation of commercial radio stations. Also, in Chile there are certain types of corporations in which no more than 40% of the shares may be owned by foreigners.[208]

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[201] Romero, Las Compañias de Comercio en el Ecuador 203 (1959) (Ecuador); 2 Mezzera, Curso de Derecho Comercial, 243 (1952) (Uruguay).

[202] Argentina, C.Co., Art. 318 (1st); Brazil, D-L 2627, Art. 38(1); Colombia, Law 58 (1931), Art. 43; Mexico, LGSM, Art. 89(1).

[203] Brazil, D-L 2627, Art. 137(d); Mexico, LGSM, Art. 229(IV).

[204] Chile, D-L 251 (May 20, 1931), Art. 92; Columbia, Decree 2521 (1950), Art. 187(3rd).

[205] Mezzera, op. cit. supra note 201, at 243. However, in Uruguay, Art. 2 of the Law 2.230 (June 2, 1893) seems to imply that a corporation will not be dissolved even though all its shares become the property of one person.

[206] C.Co., Art. 341.

[207] Law of Petroleum (Dec. 16, 1941), Art. 10 and Regulation of May 2, 1941.

[208] D-L 251 (May 20, 1931), Art. 118.

D. *Capital Requirements for Incorporation*

A minority of the Latin American countries require a minimum stated or authorized capital as a condition precedent for incorporation. Mexico, for example, requires a stated capital of at least 25,000 pesos (approximately $2,000).[209] On the other hand, no minimum stated capital is required by the laws of Argentina, Bolivia, Chile, Colombia, Ecuador, Peru, Uruguay, and Venezuela.

Some countries, such as Brazil, Chile, Ecuador, Mexico, Peru, and Venezuela, demand the full *subscription* of all the stated capital as a requirement for incorporation.[210] This is, perhaps, the general rule in the civil law jurisdictions. However, the laws of some other Latin American countries require only the subscription of a *part* of the stated capital; Argentina and Uruguay, for instance, require the subscription of 20% of the stated capital.[211]

Substantially all the laws of the Latin American countries provide that a certain minimum percentage of the subscribed capital must be *paid* before incorporation. Argentina requires the payment of 10% of the subscribed capital; Brazil, 10% of the par value of each share of stock; Colombia and Venezuela, the payment of 1/5 of each subscribed share. Furthermore, in Argentina and Brazil at least 10% of the subscribed capital must have been paid *in cash* and deposited in a national or state bank.[212]

Perhaps a majority of the Latin American codes and statutes provide that if the actual capital of a corporation goes below a certain limit the corporation must be dissolved. This minimum limit is a question diversely regulated in the several countries.

As a general rule the stated capital may be increased or decreased during the life of a corporation by means of an amendment to the

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[209] LGSM, Art. 89(2).

[210] Brazil, D-L 2627, Art. 38(1); Chile, D-L 251 (May 20, 1931), Art. 89; Ecuador, C.Co., Art. 294; Mexico, LGSM, Art. 89(2); Peru, C.Co., Art. 159 (by implication); Venezuela, C.Co., Art. 249.

[211] Argentina, C.Co., Art. 318(2); Uruguay, Law 2.230 (June 2, 1893), Art. 3.

[212] Argentina, C.Co., Art. 318(3); Brazil, D-L 2627, Art. 38(2); Colombia, Law 58 (1931), Art. 34 and Decree 2521 (1950), Art. 14. In Colombia, however, paying in of the minimum capital is not a requirement for a valid incorporation. If 1/5 of the subscribed shares is not paid the only consequence is that the Superintendencia may impose fines. Venezuela, C.Co., Art. 249; Uruguay (25%) Law 2230 (June 2, 1893), Art. 3. In Mexico it is necessary to pay at least 20% of the shares payable in cash and it is required to pay the entire value of those payable otherwise than in cash (LGSM, Art. 89 (II)). In Bolivia the minimum paid in capital is determined in each concrete case by the executive power in the decree authorizing the final organization of a corporation, but the maximum may not exceed 20% of the stated capital (Decree of March 8, 1860, Art. 1176). Apparently a similar rule is applied in Chile, although in this country no maximum paid-in captial has been established by the laws (see, D-L 251 of May 22, 1931, Art. 89). Finally, in Peru,, Art. 159 of the Code of Commerce authorizes the partial payment of the capital but without determining a minimum limit.

bylaws which must comply with certain substantive and formal requirements.[213] In the case of capital reduction, the laws of several countries (Brazil, for example) contain several provisions for the protection of creditors, such as the requirement that the corporation notify them of the prospective action, and their right, under certain circumstances, to oppose it.[214] Insofar as increase of capital is concerned, it must be pointed out that the dissenting shareholders are granted a right of appraisal in Venezuela, Uruguay, and some other countries. In pursuance of this right they may leave the corporation and demand the payment by the corporation of the price of their shares in accordance with the figures contained in the last balance sheet.[215] In Colombia there is a highly restrictive provision prohibiting the diminution of the capital of a corporation, which in practice makes it necessary for a corporation that wants to decrease its capital to dissolve and reorganize with a lower capital.[216]

In Mexico and some other countries the law authorizes so-called "variable capital" corporations. The "variable capital" corporations are those in which only a minimum capital, lower than the stated capital, must be subscribed. The balance will be issued in redeemable stock or in stock subject to amortization. By means of this device and without the need to amend the bylaws a corporation may increase its capital by the sale of unsubscribed shares, or reduce it by redeeming or amortizing stock. It is important to observe, however, that for the security of creditors the law provides that shares representing the minimum capital are not redeemable and are not subject to amortization.

E. *"Successive" and "Instantaneous" Incorporation*

Under the most advanced civil law statutes on this subject, there are two types of incorporation procedure:

(1) "Successive," *i.e.*, by "public subscription," and

(2) "Instantaneous," *i.e.*, by "private subscription."

1. *Successive Incorporation*

The successive type of incorporation makes it possible for the promoters to offer the shares of the prospective corporation to the

[213] Brazil, D-L 2627, Arts. 78(d), 108-115; 1 Ferreira, Instituicoes de Direito Commercial §§71-74 and 76 (1951) (creditors may not oppose reduction of capital due to lower value of assets); Chile, D-L 251 (May 22, 1931), Art. 96 (requires authorization from the state); Ecuador, Romero, op. cit. supra note 201, at 207; Mexico, LGSM, Arts. 9, 82(III), 115, 132, 133, 130, 260-264, Peru, C.Co., Arts. 172, 175; Venezuela, C.Co. Arts. 222, 264, 280, 282.

[214] Authorities cited note 213 supra.

[215] Uruguay, Law 3545 (July 19, 1909), Art. 1; Venezuela, C.Co., Art. 282.

[216] C.Co., Art. 568.

public for subscription before final incorporation. The promoters must comply with certain formal requirements, such as the drafting and publication of a prospectus in accordance with which the public subscription of the shares must be conducted. Once the capital has been subscribed, a meeting of "subscribers" is called, and in this or in subsequent meetings final incorporation is accomplished and the bylaws of the corporation are discussed and approved.

A majority of the civil law countries and several Latin American nations, such as Argentina, Brazil, Mexico, and Venezuela, expressly authorize and regulate the "successive" type of incorporation.[217] This type of incorporation appears to be impliedly authorized by the laws of Chile, Ecuador, and Uruguay.[218] On the other hand, it is not authorized in several other countries such as Colombia, although many outstanding legal writers have advocated its adoption.[219]

The successive type of incorporation is particularly useful in those countries which require the full subscription of the stated capital for the organization of enterprises which need large amounts of capital to begin business. However it is believed that the "succesive" type of incorporation is not really necessary in those countries which do not require the subscription of the entire capital of the corporation. This opinion is backed by the experience of Argentina. Although Argentina accepts the "successive" type of incorporation, this system has very seldom been used in practice, because only 20% of the authorized capital need be subscribed, and thus it is unnecessary to appeal to the complicated system of successive incorporation.[220]

2. *Instantaneous Incorporation*

The "instantaneous" system of incorporation is accepted by all Latin American countries either as the only system of incorporation or as an alternative system to that of successive incorporation and it is the one more commonly used in practice.

Although there are many differences in detail among the several countries in connection with the system of "instantaneous" incorporation, the following are the steps which it usually implies:

a. *Articles of incorporation and bylaws.*—First is the drafting by the incorporators of the articles of incorporation and the bylaws.

[217] Argentina, C.Co., Arts. 320 ff.; Brazil, D-L 2627 (1940), Arts. 40 ff.; Mexico, LGSM, Arts. 91-101; Venezuela, C.Co., Arts. 248-258.

[218] Ecuador, C.Co., Arts. 297-299 and Romero, op. cit. supra note 201, at 202; Chile, D-L 251 (May 22, 1931), Art. 90; Uruguay, Mezzera, op. cit. supra note 201, at 250.

[219] Pinzón, La Sociedad Anónima, pp. 96 ff.

[220] Castillo, Curso de Derecho Comercial 246 (1951).

Although the codes and the statutes, as well as many authors and practicing attorneys, make a distinction between articles of incorporation and bylaws, this distinction is in most countries more theoretical than practical. As a matter of practice the best system in most jurisdictions is to combine in a single document the articles of incorporation and the bylaws. Thus the complete document of incorporation will contain:[221]

(1) The names of the incorporators, their profession, nationality, domicile, and age.
(2) The formal manifestation by the incorporators of their intent to create a corporation.
(3) The bylaws of the corporation, which must state:
  (a) name, nationality, and duration of the corporation.
  (b) purpose.
  (c) amount of the stated capital.
  (d) number of shares, their nature, and the rights that they grant to the shareholders.
  (e) system of administration and supervision.
  (f) rules as to balance sheets and income statements, reserve funds and dividends.
  (g) rules as to dissolution and liquidation.
  (h) system for amending the bylaws.
(4) A statement setting out: what part of the capital was subscribed and the manner in which the subscription was made, including the names of subscribers and the amounts subscribed by each one of them; the amounts actually paid in compliance with the subscription agreement with a statement as to whether said payments were made in cash or in kind, and the manner in which the balance is to be paid. Also, in some countries, a statement that a certain percentage of the capital was paid in cash and deposited in a bank is required.
(5) The appointment of the first board of directors and of the first supervisor or supervisors.
(6) The granting of authority to one of the directors to obtain the authorization from the government for the organization or operation of the corporation, in those jurisdictions in which such authorization is required.

Not all of the statements that the bylaws must contain, if omitted,

[221] See generally, Argentina, C.Co., Arts. 291, 292, 318; Bolivia, Decree of March 8, 1860, Art. 1172; Brazil, D-L 2627, Art. 45; Chile, C.Co., Art. 426; Colombia, C.Co., Art. 552 and Decree 2521 (1950), Art. 9; Mexico, LGSM, Art. 6; Peru, C.Co., Arts. 159, 160; Uruguay, C.Co., Arts. 395 and 406; Venezuela, C.Co., Art. 213.

would nullify the act of incorporation. For instance, if no system of administration is provided for in the bylaws, the corporation nevertheless will be a *de jure* corporation and its system of administration will be the one provided for in the codes or statutes for those cases in which the bylaws are silent in this connection. On the other hand, it is *essential* to state either the period of time for which the corporation is created or a concrete and specific purpose which, once it is achieved, will determine the end of the corporation. This rule is a consequence of the fact that most Latin American countries do not allow the establishment of corporations for an unlimited period of time.[222]

In several Latin American countries the instrument of incorporation must be a notarial document, *i.e.*, a document passed before a Notary Public, the original of which is kept in the office of the Notary Public for inspection by any interested person. This is the rule in Argentina, Bolvia, Brazil, Colombia, Ecuador, Mexico, and Peru.[223] In some other countries such as Uruguay and Venezuela, the document may be a private *or* a notarial instrument, at the election of the incorporators.[224]

b. *Recordation and publication.*—An abstract of the most important provisions contained in the document of incorporation and in the bylaws must be recorded in the Public Register of Commerce, which is kept by the Chambers of Commerce or by the Commercial Courts. If the corporation is planning to do business in different territories, the recording must be made in the Chambers of Commerce or the Commercial Courts of all the territories involved.[225]

The abstract of the articles and bylaws must be published in a newspaper—usually in the official newspaper—within a certain period of time after their formal execution (generally within 15 or 30 days).[226]

c. *Necessity for obtaining state approval.*—In several Latin American nations such as Brazil and Peru, the general rule is that the

[222] See in this connection Argentina, C.Co., Art. 318(4); Chile, C.Co., Art. 431; Colombia, Decree 2521 (1950), Art. 9(6); Uruguay, C.Co., Arts. 405 and 407.

[223] Argentina, C.Co., Art. 289; Bolivia, Decree of March 8, 1860, Art. 1172; Brazil, D-L 2627, Art. 45; Colombia, C.Co., Art. 465, Decree 2521 (1950), Art. 7; Ecuador, C.Co., Art. 337; Mexico, LGSM, Art. 5; Peru, C.Co., Art. 127.

[224] Uruguay, C.Co., Art. 393; Venezuela, C.Co., Art. 211.

[225] As to recording, see generally Argentina, C.Co., Arts. 293, 294, 319; Brazil, D-L 2627, Arts. 50-52; Chile, C.Co., Arts. 440 and 354; Colombia, Decree 2521 (1950), Arts. 10 and 11; Ecuador, C.Co., Arts. 338, 339; Mexico, LGSM, Arts. 260-262; Peru, C.Co., Arts. 7, 127; Uruguay, C.Co., Arts. 47, 397, 398, 407; Venezuela, C.Co., Arts. 215(2) and 216.

[226] Argentina, C.Co., Art. 319 and Decree of Feb. 1, 1917; Brazil, D-L 2627, Art. 54; Chile, C.Co., Art. 440; Colombia, Decree 2521 (1950), Art. 11; Ecuador, C.Co., Arts. 338-340; Uruguay, C.Co., Art. 407; Venezuela, C.Co., Art. 212.

state does not intervene in the organization of corporations. Therefore, it is not necessary to obtain any grant or authorization from the government in order to establish a corporation. It must be observed, however, that there are certain specific types of corporations which require an authorization from the government in these countries. This is the case with regard to banks, insurance institutions, and savings institutions in Peru, and with regard to foreign corporations in Brazil.[227]

In Ecuador, Mexico, Venezuela, and some other jurisdictions the document of incorporation must be presented to the Court of Commerce before recording. The judge will analyze the instrument and, if he finds that it is in accordance with the law, he will order its recording.[228] This act is essentially ministerial and although it may be considered as an act of state supervision, it may not be regarded as a discretionary grant from the state.

A somewhat similar situation exists in Colombia where it is necessary to secure the authorization of the *Superintendencia de Sociedades Anónimas* before starting to do business.[229] The *Superintendencia*, before granting the authorization, will analyze the document of incorporation in order to determine whether it conforms to law, and if the result of this inquiry is satisfactory, it will issue the permit. The Supreme Court of Colombia has decided that this permit is not essential for the existence of a corporaton.[230] However, if it is not obtained before doing business, the corporation may be subject to fines[231] and perhaps it may even be dissolved.

In Argentina, Bolivia, Chile, Uruguay,[232] and some other jurisdictions, the existence of a corporation depends upon an act of the state, in which the executive power grants an authorization for the establishment of each particular corporation. Generally speaking, in these countries the executive power may grant or deny the authorization, taking into account not only whether the document of incorporation was duly executed and conforms to law but also whether the establishment of the corporation is beneficial for the common welfare. This act is truly discretionary, because if the authoriza-

[227] Boesen, Rights and Duties of Foreign Business under Peruvian Law 215 (Lima 1953).

[228] Ecuador, C.Co., Art. 289; Mexico, LGSM, Arts. 260-262; Venezuela, C.Co., Art. 215(2).

[229] Law 58 (1931), Art. 9 and Decree 2521 (1950), Arts. 15, 16, 19.

[230] Corte Suprema de Justicia, Agosto 12 de 1948, Gaceta Judicial No. 2064.

[231] See Pinzón, La Sociedad Anónima, pp. 99 ff.

[232] Argentina, C.Co., Art. 318, and Regulatory Decree of the General Inspection of Justice (Inspeción General de Justicia) of April 27, 1923; Bolivia, Decree of March 8, 1860, Art. 1174; Chile, C.Co., Art. 427 and related provisions, particularly those contained in the D-L 251 of May 20, 1931; Uruguay, C.Co., Art. 405, Decree of May 15, 1949 and Resolution of Dec. 2, 1948.

tion is denied on the basis that the establishment of the corporation is contrary to the common welfare, the denial is not subject to judicial review. In practice, however, the government will always grant the authorization if the act of incorporation is not contrary to law.

The procedure for obtaining a grant from the state is extremely formalistic and full of minor details, and may take several months. Such is the case particularly in Chile where the government must issue two decrees, the decree of "authorization of existence" (*decreto de autorización de existencia)* and the decree of "installation" *(decreto de Instalación).*[233]

Noncompliance with the formal requirements for incorporation may render the incorporators or the directors and executive officers of the corporation, or both, personally liable for damages caused to third persons.[234]

F. *Shares of Stock*

1. *In General*

In several countries, *e.g.,* Bolivia, Ecuador, and Uruguay, the statutory regulation of shares of stock is deficient, not only in the sense that there are only a very limited number of provisions pertaining to shares, but also in the sense that the system lacks flexibility and appears obsolete for modern economic life. Fortunately some of these deficiencies have been remedied, at least in part, by way of customs and usages. In Brazil, Mexico, and several other Latin American countries, on the other hand, the statutory regulation of shares of stock is highly advanced and complete.

Generally speaking, the Latin American codes and statutes start the treatment of this important subject by providing that the capital of corporations shall be divided into shares of stock of an equal value. Although in several of the civil law jurisdictions shares of stock must be of a minimum par value, this principle has not been adopted in Latin America where shares of stock may be of any par value.

2. *Subscription and Payment of Shares*

A subscription for shares made prior to or after incorporaton is binding upon the subscribers and upon the corporation.[235] The Latin

[233] See generally 2 Olavarria, Manual de Derecho Comercial 142 ff. (1950).

[234] Argentina, C.Co., Arts. 228, 304; Bolivia, Decree of March 8, 1860, Art. 1180; Chile, C.Co., Art. 441; Colombia, Decree 2521 (1950), Art. 21(2); Ecuador, C.Co., Arts. 301, 321, 344; Peru, C.Co., Art. 128; Uruguay, C.Co., Art. 424; Venezuela, C.Co., Art. 219.

[235] See an exhaustive discussion of the basis upon which this liability has been rationalized in 1 Hamel-Lagarde, Traité, ed. cit., Nos. 587 ff.

American statutes usually afford a corporation the following elective remedies in case of failure by the subscribers to perform their obligations to subscribe:[236]

(1) a suit for specific performance for the collection of the amounts due under the subscription agreement;
(2) the right to sell the shares of the defaulting subscriber (this sale, under most statutes, must be made in the stock market or at public auction);
(3) if the shares may not be sold, declaration of them as void with retention of the installments already paid by the defaulting subscriber; and
(4) such other remedies as may be set forth in the bylaws of the corporation. Additionally, the Brazilian law provides that the bylaws may impose a fine of no more than 5% of the amount due in case of nonpayment of the amount due in accordance with the subscription agreement.[237]

Diverse types of consideration may be given in exchange for shares of stock. It may be cash, tangible or intangible property, chattels, or realty. Goodwill, a patent, machinery, buildings, and in some countries, even labor to be performed in the future are good consideration.

Taking into account the nature of the consideration given in payment for the stock, shares may be classified in two groups:

(1) shares paid in cash; and
(2) shares paid in tangible or intangible property other than cash.

In connection with this second type of stock it is important to make several observations.

If the consideration is a *note, a bill of exchange,* or other document of credit made by the subscriber or endorsed by him to the corporation, some Latin American statutes, such as the Colombian law, provide that the payment will not be regarded as completed until the instrument is actually paid to the corporation.[238] The statutes of several countries provide that if the consideration given for the shares is other than cash, the price of the shares must be entirely paid.[239]

In order to avoid fraud to the creditors and to the shareholders, the Latin American statutes contain strict and severe standards for

[236] Although there are some differences between the several countries, this is the scheme of remedies usually afforded. Argentina, C.Co., Art. 333; Brazil, D-L 2627, Arts. 74-76; Bolivia, Decree of March 8, 1860, Art. 1186; Chile, C.Co., Art. 440; Colombia, Decree 2521 (1950), Art. 76; Ecuador, C.Co., Art. 30; Mexico, LGSM, Arts. 118-121; Peru, C.Co., Arts. 171, 178; Venezuela, C.Co., Arts. 209, 252 and 295.

[237] Brazil, D-L 2627 (1940), Art. 76 (§ 2).

[238] C.Co., Arts. 497-499, 569.

[239] See, e.g., Mexico, LGSM, Art. 89(2).

the appraisal of property given in payment for shares of stock. The LGSM of Mexico demands that the shares of stock paid other than in cash remain deposited with the corporation for two years. If within this period the value of the property falls 25% or more below the stated value, then the shareholder will be obligated to cover the deficiency.[240] In Colombia the appraisal of property given in payment for shares must be approved by all the subscribers if given prior to incorporation or by at least 75% of the votes of the shareholders present at the meeting if given after incorporation. In both instances the appraisal must be also approved by the governmental body charged with the supervision of corporations *(Superintendencia Nacional de Sociedades Anónimas)*.[241]

In accordance with the better view, either full title (fee simple) to property or a limited right of use and enjoyment of the same, may be given in exchange for shares of stock. If it is not expressly stated whether full title or only a limited right was conveyed, the presumption is that full title (fee simple) was transferred to the association.[242]

3. *"Capital" and "Labor" Shares*

Shares paid in cash or in property are known as "capital" shares. In addition to "capital" shares, several Latin American countries recognize the so-called "labor" or "industry" shares *(acciones de trabajo o industria)*. In Bolivia, Chile, Colombia, and several other countries "labor" shares are those issued for services to be rendered in the future. Labor shares must all belong to a special series; the certificates crediting them may not be issued until the services that were promised have been fully performed. They do not grant any right to the assets of the corporation but only to the dividends.[243]

The Mexican statute also authorizes a type of "shares" known as "labor" or "industry" shares.[244] These are "shares" that a corporation may issue to its employees as an incentive to greater interest and attention to the progress of the business of the particular concern. They are *not* really issued in exchange for future services, but represent a bonus intended to allow participation of the workers in the profits of the corporation.

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[240] LGSM, Art. 141. In Chile, shares paid other than in cash may not be negotiated for a period of two years from the date of their issuance (D-L 251, May 20, 1931, Art. 95).

[241] Decree 2521 (1950), Arts. 33 ff. and L. 66 (1847), Art. 40. See, also, Chile, C.Co., Art. 443; Ecuador, C.Co., Art. 299; Venezuela, C.Co., Art. 256(1).

[242] This is a general principle of the law of associations, applicable to all kinds of business associations.

[243] Bolivia, Decree of March 8, 1860, Arts. 1182-1183 (until the services have been fully rendered, shares of stock shall not be delivered to the stockholders); Chile, C.Co., Arts. 446-447; Columbia, C.Co., Arts. 493, 572-73.

[244] LGSM, Art. 114.

Finally, it must be noted that in Uruguay and in some other countries, labor to be done in the future is not good consideration for the issuance of shares of stock.[245]

4. *Shares Not Fully Paid*

In Latin America, share certificates may be issued even though the subscriber has not yet paid for the share or shares fully, but in this case the certificates must always be nominative,[246] except in Peru where bearer certificates may be issued if at least 50% of the value of the shares was paid.[247] According to some statutes the amounts already paid and the amounts due must appear on the face of the instrument,[248] and in Colombia and other countries, only *provisional* certificates may be issued, and the word "provisional" must clearly appear on the face of the instrument in order to put on inquiry third persons who may want to acquire the shares.

Generally speaking, shares which have not been fully paid may be negotiated. However, the Brazilian statute allows the negotiation of shares not fully paid only after at least 30% of the par value has been paid, and in Ecuador the negotiation of shares not fully paid is possible only after payment of 1/4 of their value.[249]

In most countries the subscriber who has transferred stock not fully paid is jointly liable with the future transferees for the balance of the stock price.[250]

In Mexico, shares which have not been fully paid give to their owners merely a limited right to dividends, proportional to the amount actually paid.[251] This is not, however, the universal rule. Generally speaking, the holders of shares partially paid are entitled to full dividends.[252]

G. *Certificates of Stock*

Technically speaking, in Latin America as in the United States,

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[245] Mezzera, op. cit. supra note 201, at 265.

[246] Argentina, C.Co., Art. 327(2); Bolivia, Decree of March 8, 1860, Art. 1188; Brazil, D-L 2627, Art. 23(1); Chile, Decree 4705, Art. 36; Colombia, Law 58 (1931), Art. 34; Ecuador, C.Co., Art. 296; Mexico, LGSM, Art. 117; Uruguay, C.Co., Art. 412; Venezuela, C.Co., Art. 294.

[247] C.Co., Art. 171.

[248] See, e.g., Argentina, C.Co., Art. 328(3).

[249] Brazil, D-L 2627, Art. 14; Ecuador, C.Co., Art. 318.

[250] Argentina, C.Co., Art. 332; Brazil, D-L 2627 (1940), Art. 75; Bolivia, C.Co., Art. 252 and Decree of March 8, 1860, Art. 1185; Chile, Law of Sept. 6, 1878; Ecuador, C.Co., Art. 319; Colombia, C.Co., Art. 577; Peru, C.Co., Art. 171; Uruguay, C.Co., Art. 415; Venezuela, C.Co., Art. 294; Mexico, LGSM, Art. 117(3).

[251] LGSM, Art. 117(2).

[252] See a discussion of this point in Pinzón, La Sociedad Anónima 110.

shares of stock must be distinguished from the *certificates* of stock which are the instruments issued evidencing the existence of the shares and the extent of the rights the shares embody. These certificates of stock are subject, for most purposes, to the principles and rules controlling negotiable instruments, and they must contain the information and clauses provided for in the codes and statutes.[253]

Contrary to American rule, it is possible in Latin America to issue stock certificates to bearer, although with some limitations. Thus, for instance, in most countries the issuance of bearer certificates is not permitted unless and until the shares have been fully paid.[254] Also, it is not possible to issue bearer certificates in those corporations whose shareholders, in whole or in part, must be nationals of the particular country.[255]

The negotiation of bearer certificates is effected by the delivery *(tradición)* of the documents.[256]

In practice most of the share certificates are not bearer but are *nominative, i.e.,* issued to a particular person whose name appears on the face of the instrument. The conveyance of nominative certificates must be made by recording the transaction in a special book kept by the corporation known as the register of shareholders.[257] Prior to the recording of the conveyance the new owner will be considered as such as against his transferor, but not as against the corporation or third persons. Thus, in so far as the corporation is concerned, the shareholders are only those whose names appear in the record of shareholders.

H. *Non-Par Stock and Preferred Stock*

Generally speaking, the Latin American laws do not authorize the issuance of stock without par value. An exception to this rule is found in the Mexican General Law of Commercial Associations and

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[253] As to statements that stock certificates must contain, cf. Argentina, C.Co., Art. 328; Brazil, Decree 2627 (1940), Art. 20; Chile, Decree 4705, Art. 33; Venezuela, C.Co., Art. 293.

[254] Cf. authorities cited note 246 supra.

[255] 1 Rodriguez, Sociedades, ed. cit., 369 ff. (Mexico); Brazil, D-L 2627 (1940), Art. 60.

[256] Argentina, C.Co., Art. 330 (a contrario); Bolivia, Decree of March 8, 1860, Art. 1187; Brazil, D-L 2627 (1940), Art. 27(6); Chile, C.Co., Art. 451; Colombia, Decree 2521 (1950), Art. 58; Ecuador, C.Co., Art. 317; Uruguay, Mezzera, op. cit. supra note 201, at 262 ff., Venezuela, C.Co., Art. 297.

[257] Argentina, C.Co., Art. 330; Bolivia, Decree of March 8, 1860, Art. 1187 (this article also authorizes negotiation of nominative shares by endorsement without warranty); Brazil, D-L 2627 (1940), Art. 27(a); Chile, C.Co., Art. 451 and L. of Sept. 11, 1878, Art. 3; Colombia, L. 58 (1931), Art. 35 and Decree 2521 (1950), Art. 50; Ecuador, C.Co., Art. 317 and Decree 230 (May 15, 1936); Mexico, LGSM, Arts. 128-129; Peru, C.Co., Art. 169 (by implication) and Ejecutoria of Oct. 25, 1945, "El Derecho," Arequipa, 1947, p. 800; Uruguay, C.Co., Art. 414; Venezuela, C.Co., Art. 296.

in the laws of Panamá and Chile,[258] which expressly allow the emission of non-par stock. In practice, however, non-par stock has seldom been used and it has been unfavorably commented upon by several Latin American legal writers.[259]

The Latin American regulation of preferred stock is generally deficient. Only about ten Latin American countries expressly authorize the issuance of preferred stock.[260] However, in most of the other countries it is common practice to issue preferred stock, and this practice has not been questioned.

Generally speaking, the following types of preferences may be accorded:

(1) preference as to *dividends,* which may be cumulative or non-cumulative. The general rule is that preferred dividend stock is participating, but there seems no reason why a different rule could not be established in the bylaws of the corporation.
(2) preference as to *liquidation.*
(3) preference as to *dividends* and as to *liquidation.*
(4) preference as to *vote, i.e.,* by granting the preferred stock a higher number of votes.

The general rule appears to be that preferred stock and, generally, any kind of stock, may not be deprived of the right to vote,[261] but an exception to this rule is found in the laws of Argentina and Brazil.[262] In Mexico, as a matter of law, the right to vote of the preferred stock may be limited, but it may not be completely abolished, preferred stock being always entitled to vote in the so-called "extraordinary" meetings of shareholders when they are called for the purpose of approving a fundamental change in the organization of the corporation.[263] A somewhat similar rule is found in the laws of Chile and Uruguay.[264] It is also important to observe that in Mexico if a limitation of the right to vote is imposed upon the

[258] Chile, D-L 251 (May 20, 1931), Art. 117(2); Mexico, LGSM, Art. 125 (IV); Panamá, L. 32 (1927), Art. 22.

[259] See, e.g., 1 Rodríguez, Sociedades, ed. cit., 339 (Mexico) and Olavarría Manual de Derecho Comercial, p. 157 (1950).

[260] The laws of the following countries, among others, authorize preferred stock: Argentina, C.Co., Art. 334; Brazil, D-L 2627 (1940), Arts. 9-10; Chile, D-L 251 (May 20, 1931), Arts. 103-104; Colombia, Decree 2521 (1950), Arts. 169-173; D-L 2831 (1952), Art. 12, L. 58 (1931), Art. 36; Mexico, LGSM, Arts. 112-113; Venezuela, C.Co., Arts. 292-293.

[261] Cf. authorities cited note 264 infra.

[262] Argentina, C.Co., Art. 352; Brazil, D-L 2627 (1940), Art. 9.

[263] Mexico, LGSM, Art. 113.

[264] Chile, D-L 251 (May 20, 1931), Art. 103; Uruguay, Mezzera, op. cit. supra note 201 at 269. A similar rule seems to be applied in Venezuela. Cf. Tax Factors in Basing International Business Abroad, Harvard, 1957, p. 175.

preferred stock, it must be compensated for with the following minimum advantages:[265]

(1) a cumulative preferred stock dividend of 5% of the par value of each share; and

(2) liquidation preferences.

The laws of several countries accord *pre-emptive rights* on behalf of the shareholders in case of issues of preferred stock or of prior preferred stock,[266] and the Brazilian statute has further established a *right of appraisal* on behalf of the shareholders who dissented when the vote for the approval of the issue of preferred or of prior stock was taken.[267]

I. *Purchase of Own Shares by Corporation*

Generally, a corporation may purchase its own shares only with funds taken out of earnings.[268] However, there are some exceptions to this rule. So, for example, the LGSM of Mexico prohibits, in so many words, the acquisition of its own shares by a corporation. The only two exceptions are:

(1) amortization of shares by "variable capital" corporations; and

(2) judicial adjudication of shares as a result of debts owed to the corporation.[269]

IV. Corporate Operation

A. *Liability of the Shareholders*

The general rule, accepted by all the Latin American countries, is that the liability of the shareholders is limited to the amount paid to the corporation—or promised to be paid to the corporation—as consideration for the shares of stock. In this connection there is no difference between the American and the Latin American laws. The limited liability of the shareholders is precisely one of the essential elements of the corporate type of business association.

There is, however, an important exception to this universally accepted rule. The "founding" shareholders, *i.e.*, those who incorporated the enterprise, may be personally liable if the corporation was not organized in compliance with the requirements set forth in the statutes, as heretofore noticed in the discussion of the substantive and formal requirements for incorporation.[270]

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[265] Authority cited note 263 supra.

[266] Cf., e.g., Colombia, D-L 2831 (1952), Art. 12.

[267] D-L 2627 (1940), Art. 107.

[268] Colombia, L. 58 (1921), Art. 31; Chile, D-L 251 (May 20, 1931), Art. 103; Peru, C.Co., Art. 173; Venezuela, C.Co., Art. 263.

[269] Mexico, LGSM, Arts. 134 and 138.

[270] See pp. 204-205 supra.

B. *Meetings of the Shareholders*

The laws of some Latin American countries, *e.g.*, Peru,[271] have established only a very limited number of rules concerning the meetings of shareholders; in these countries it is up to the shareholders to determine in detail in the bylaws the rules under which the meetings must be held. However, even in these legal systems, there are some basic mandatory precepts which may not be modified by the shareholders.

The laws of Argentina, Brazil, Colombia, Mexico, and Venezuela[272] contain fairly detailed regulations governing the meeting of shareholders. Some of the regulations are mandatory and may not be modified in the bylaws, but most of them are not mandatory. This analysis will deal mainly with the mandatory regulations, and among them, with those most commonly found in the several codes and statutes.

In Latin America, just as in the United States, the supreme organ of a corporation is the meeting of shareholders. However, the power of this organ is undoubtedly greater south of the Rio Grande. For example, in Latin America the declaration of dividends is within the jurisdiction of the shareholders,[273] and the amendment of the bylaws of the corporation is an exclusive, non-delegable function of the shareholders.[274]

The meetings of shareholders are of two different kinds: ordinary and extraordinary. As a general rule, an ordinary meeting must be held at least once a year for the following purposes:[275]

(1) discussion, approval, or modification of the inventory, balance sheet, and report which the directors are obligated to present every year for the consideration of the shareholders, and discussion, modification, or approval of the report of the supervisors;

(2) appointment or removal of directors and supervisors, if necessary;

(3) discussion and decision about the purposes to which the net

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[271] C.Co., Arts. 161, 166, 177-181.

[272] In connection with these countries, see particularly Argentina, C.Co., Arts. 347 ff.; Brazil, D-L 2627 (1940), Arts. 74 ff.; Colombia, Decree 2521 (1950), Arts. 82 ff.; Mexico, LGSM, Arts. 178 ff.; Venezuela, C.Co., Arts. 271 ff.

[273] Argentina, C.Co., Art. 361 (by implication); Brazil, D-L 2627 (1940), Art. 131 (by implication); Colombia, Decree 2521 (1950), Art. 88(e).

[274] Argentina, C.Co., Art. 354; Brazil, D-L 2627 (1940), Art. 104; Colombia, Decree 2521 (1950), Arts. 87 and 251(2); Mexico, LGSM, Art. 182; Venezuela, C.Co., Art. 280.

[275] Argentina, C.Co., Art. 347(2); Brazil, D-L 2627 (1940), Art. 98; Chile, Decree 4705, Arts. 2(4), 20; Colombia, Decree 2521 (1950), Art. 83; Ecuador, C.Co., Art. 305; Mexico, LGSM, Art. 181; Venezuela, C.Co., Art. 274.

income of the corporation shall be applied and, particularly, if dividends should be declared and how they will be paid; and

(4) any other topics included in the notice calling the meeting.

The board of directors or the manager is obligated to publish notice of the meetings in a newspaper of the domicile of the corporation, with due anticipation (generally 15 days).[276] The notice must state: (1) the place where the meeting will be held; (2) the date and the hour of such meeting; and (3) the subjects to be discussed at the meeting.

As a general rule, the Latin American laws accord a right of inspection to the shareholders during the period between the giving of notice of the meeting and the date of the meeting. In pursuance of this right, the shareholders may inspect books and documents of the corporation which bear some relation to the subjects to be discussed at the meeting. For this purpose the books and documents must be kept in the offices of the corporation at the disposal of the shareholders.[277]

The quorum required to transact any business at a meeting is the one determined in the bylaws of the corporation. If nothing is provided in the bylaws, the quorum usually required by the Latin American laws is one-half of the outstanding shares of the corporation. If the necessary quorum is not obtained in the first meeting, a second meeting may be called, and in this second meeting business can be transacted with the presence of any number of shares.[278]

As a general rule, each outstanding share of stock is entitled to one vote. However, as we have seen, in most countries it is permissible for the corporation to issue "preferred" stock with more than one vote, and in some jurisdictions the voting power of preferred stock may be restricted, all in accordance with the rules discussed previously.[279] Also, in connection with the method of voting, three other principles must be mentioned. First is the rule that directors may not vote for the approval of the balance sheet or report pre-

[276] Cf., e.g., Argentina, C.Co., Arts. 349, 351; Brazil, D-L 2627 (1940), Art. 99; Chile, Decree 4705, Art. 22; Colombia, Decree 2521 (1950), Art. 84; Mexico, LGSM, Art. 186; Uruguay, Decree of Dec. 18, 1947, Arts. 9-11; Venezuela, C.Co., Art. 277.

[277] Argentina, C.Co., Art. 362; Brazil, D-L 2627 (1940), Art. 99; Chile, Decree 4705, Art. 21; Colombia, Decree 2521 (1950), Art. 57; Mexico, LGSM, Art. 186; Peru, C.Co., Art. 166; Venezuela, C.Co., Art. 284.

[278] Argentina, C.Co., Art. 351 (no quorum was fixed by the code, but it was provided that if in the first meeting the quorum determined in the bylaws is not obtained, then a second meeting may be held, with any quorum); Chile, Decree 4705, Art. 26; Colombia, Decree 2521 (1950), Art. 86 (half plus one of the shares); Ecuador, C.Co., Art. 305; Mexico, LGSM, Art. 189; Venezuela, C.Co., Art. 273.

[279] See p. 212-13 supra.

sented by them or in connection with their potential liability.[280] Secondly, the laws of a few countries provide that if a shareholder has a personal interest which is opposed to the interests of the corporation in a particular matter he may not vote when the issue comes up for decision; if he does vote, the motion will be void if it would not have been approved without his vote.[281] Finally, the laws of Argentina, Colombia, and Uruguay provide that no shareholder shall have more than a certain maximum number of votes.[282] Thus, for example, the Argentina Code of Commerce provides that no shareholder may have more than 10% of the possible votes in a corporation or more than 2/10 of the votes present in a particular meeting.

The general rule in Latin America is to the effect that at any meeting of shareholders, every shareholder having the right to vote may vote by proxy appointed by an instrument in writing addressed to the corporation. However (and on this point the Latin American laws differ from the American laws), no proxies may be given on behalf of members of the board of directors.[283]

The number of votes necessary for the approval of ordinary motions is to be determined in the bylaws of the corporation. In Chile and some other countries, if nothing is said in this respect in the bylaws, ordinary motions may be approved by a majority of the shares present at the meeting.[284] It must be noted that the laws of several countries, *e.g.*, Venezuela, require a higher majority of votes and a higher quorum for the discussion and approval of amendments to the bylaws, particularly if they involve a reorganization or the voluntary dissolution of the corporation prior to the end of the term for which it was organized.[285]

Most of the rules discussed above in connection with the ordinary meetings of shareholders are also applicable to the so-called "extraordinary" meetings of shareholders. In perhaps a majority of the Latin American countries the term "extraordinary meeting" is used to signify those meetings other than the annual meetings, which are called for the discussion of matters requiring speedy action. On the

[280] See, e.g., Argentina, C.Co., Art. 356; Mexico, LGSM, Art. 197.

[281] Mexico, LGSM, Art. 196.

[282] Argentina, C.Co., Art. 350(2); Colombia, L. 58 (1931), Art. 28; Uruguay, C.Co., Art. 420.

[283] Argentina, C.Co., Art. 355; Brazil, D-L 2627 (1940), Art. 91(§1); Chile, Decree 4705, Art. 25 (no restriction against directors); Colombia, Decree 2521 (1950), Art. 106; Ecuador, C.Co., Art. 314; Mexico, LGSM, Art. 192; Uruguay, L. 3545 (July 19, 1909), Art. 2 and Decree of July 16, 1943, Art. 1; Venezuela, C.Co., Art. 285.

[284] Decree 4705, Art. 26; see also, Argentina, C.Co., Art. 350; Mexico, LGSM, Art. 189; Colombia, Decree 2521 (1950), Art. 86.

[285] Venezuela, C.Co., Art. 280; see also, Argentina, C.Co., Art. 354; Colombia, Decree 2521 (1950), Art. 87.

other hand, in some countries such as Mexico and Uruguay, the term "extraordinary meetings" means those special meetings that must be called for the discussion of fundamental changes in organization or other consequential actions. In the countries belonging to the second group, the laws require a special higher quorum for the "extraordinary" meetings and the approval of motions by a higher majority of votes.[286]

C. *Protection of Minority Shareholders*

The laws of several Latin American countries contain rules and principles for the protection of the rights of minority shareholders, of which the following three are perhaps the most significant:

(1) The minority shareholders may appoint one of the members of the board of directors or one of the supervisors. In this connection the LGSM of Mexico provides that minority shareholders shall be entitled to appoint at least one director when they represent at least 25% of the capital of the corporation,[287] and the Decree-Law of Brazil states that minority shareholders representing one-fifth or more of the capital of a corporation are entitled to appoint one of the members of the supervisory council.[288]

(2) If the shareholders adopt a resolution which is contrary to the law or the bylaws of the corporation, the dissenting shareholders, under certain conditions, have the right to challenge the motion in court, and while the suit is pending, they may ask for a decree of the court suspending the resolution until final decision is taken.[289]

(3) The statutes of Argentina, Brazil, Mexico, and some other countries have established a right of appraisal on behalf of dissenting shareholders in case of fundamental changes in organization, such as transformation, merger, and change of the object of exploitation. In pursuance of this right the shareholders who dissented have their shares appraised and paid by the corporation.[290] The nature and requisites of this right of appraisal are similar to those provided under the corporation acts of many American states; however, it must be noticed as an important difference that the price to be paid for the shares is their *book value* in accordance with the last balance sheet. In the United States, on the other hand, the price is usually the "fair" price, which is determined by taking into account not only the book

[286] Mexico, LGSM, Arts. 182, 190; Uruguay, L. 3545 (July 19, 1909), Art. 1.
[287] Mexico, LGSM, Art. 144.
[288] D-L 2627 (1940), Art. 125.
[289] See, e.g., Argentina, C.Co., Art. 353; Mexico, LGSM, Art. 201.
[290] Argentina, C.Co., Art. 354; Brazil, D-L 2627 (1940), Art. 107; Mexico, LGSM, Art. 206.

value of the shares but many other factors as well, such as the market price and the so-called "investment" value of the stock.

D. *Directors*

Most of the Latin American codes and statutes contain a very limited number of provisions concerning directors,[291] and only a few of these provisions are mandatory. Thus, the system of management has been left, for the most part, to the discretion of the incorporators and the shareholders.

Although it is possible in most jurisdictions to appoint just *one* director,[292] the administration of large corporations is customarily put into the hands of a board of directors, known as *junta directiva* or *consejo de administración.* Generally speaking, there are no restrictions based upon nationality for membership on a board of directors, and except in Argentina[293] the directors need not be shareholders.[294] On the other hand, the codes and statutes of several countries prohibit the appointment as directors of persons who have been convicted of certain crimes, *e.g.*, swindling.[295]

Directors are appointed by the shareholders and they can be removed by the shareholders at any time, with or without cause.[296] Usually they may be appointed only for a *limited* period of time (*e.g.*, 6 years in Brazil and 3 years in Argentina), but all laws authorize the re-election of the members of the board.[297]

Before commencing their duties the directors may be required under the bylaws, and sometimes by the statutes, to give bond in order to secure their potential liability.[298] In order to satisfy this requirement shares of stock are usually pledged to the corporation.

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[291] The basic provision generally contained in the Latin American Codes and statutes in connection with directors is framed in these or similar words: "A corporation is managed by one or more directors, elected for a limited period of time (temporales), subject to removal (revocales) and who may or may not be shareholders." (Venezuela, C.Co., Art. 242). See similar provisions in Bolivia, Decree of March 8, 1860, Art. 1193; Chile, C.Co., Art. 457; Uruguay, C.Co., Art. 405.

[292] See, e.g., Argentina, C.Co., Art. 335; Brazil, D-L 2627 (1940), Art. 116.

[293] Argentina, C.Co., Art. 336.

[294] Authorities cited note 291 supra.

[295] See, e.g., Mexico, LGSM, Art. 151.

[296] Argentina, C.Co., Art. 336; Bolivia, Decree of March 8, 1860, Art. 1193; Brazil, D-L 2627 (1940), Art. 116; Chile, C.Co., Art. 457; Colombia, Decree 2521 (1950), Art. 108; Ecuador, C.Co., Art. 286; Mexico, LGSM, Art. 142; Peru, C.Co., Art. 163; Uruguay, C.Co., Art. 405; Venezuela, C.Co., Art. 242.

[297] Argentina, C.Co., Art. 366 (may be re-elected only if re-election was authorized in bylaws); Brazil, D-L 2627 (1940), Art. 116(c); Chile, Decree 4703, Art. 15 (one year, if no term stated in bylaws); Colombia, Decree 2521 (1950), Art. 108 (directors must be appointed for "limited period" but may be re-elected indefinitely); Venezuela, C.Co., Art. 267 (two years unless otherwise provided for in bylaws).

[298] Argentina, C.Co., Art. 339; Brazil, D-L 2627 (1940), Art. 117; Chile, D-L 251 (May 20, 1931), Art. 94; Mexico, LGSM, Art. 152; Venezuela, C.Co., Art. 244.

The directors are agents of the corporation and have the rights and obligations usually granted to and imposed upon agents.[299] The authority of directors is more limited in Latin America than in the United States, mainly because of the fact that in Latin America the shareholders have very broad powers of direction, as previously mentioned.[300] The powers of the board of directors are limited by the object or purpose of the corporation and by the provisions contained in the bylaws; also, in several countries the directors may not convey real estate or establish liens upon real estate without the consent of the shareholders, unless expressly authorized to do so in the bylaws or unless the purpose of the corporation is to deal in real estate. Generally speaking, if the directors act beyond their powers or against the limitations imposed by the law or bylaws, their act will not bind the corporation, but will render them personally and jointly liable to the corporation and third persons.[301]

There are certain acts and transactions which the laws of some countries have specifically forbidden and which automatically determine the liability of the directors. Among others, the following may be quoted as examples:[302] illegal distribution of dividends; purchase of shares with funds which may not be devoted to that purpose; and, under some statutes, the purchase and sale of shares of the corporation by the directors on their own account for purposes of speculation.

In the exercise of their functions the directors are liable not only for willful acts but also for negligence. The standard of care required of a director is that of a reasonable prudent man in the handling of his personal affairs (*"cuidado de un buen padre de familia en el manejo de sus propios negocios."*).

The directors owe a duty of loyalty to the corporation. As a consequence of this duty, the Latin American statutes have established that whenever a director has a personal interest in a particular transaction involving the corporation, he must make disclosure to the other directors and may not vote in connection with the transaction.[303] In case of violation of this rule he will be liable to the corporation and to third persons. Also, some statutes expressly prohibit a director

[299] See discussion in 2 Fernandez, Codigo, ed. cit., p. 486.

[300] See p. 212-15 supra.

[301] Cf. authorities cited note 302 infra.

[302] The following articles make reference to several aspects of the liability of the directors: Argentina, C.Co., Arts. 337, 338, 343, 345, 364; Bolivia, Decree of March 8, 1860, Art. 1178; Brazil, Arts. 119 ff. and 131; Chile, C.Co., Art. 347(2); Colombia, Decree 2521 (1950), Arts. 111, 120, 121; Ecuador, C.Co., Arts. 301, 344; Mexico, LGSM, Art. 156 ff,; Peru, C.Co., Art. 165; Uruguay, C.Co., Arts. 408(3), 417, 418(2); L. 2.230, June 2, 1893, Arts. 7-12 and 76, 77; Venezuela, C.Co., Arts. 243(2) and 268.

[303] Argentina, C.Co., Art. 345; Brazil, D-L 2627 (1940), Art. 120; Chile, D-L 251 (May 20, 1931), Art. 100; Mexico, LGSM, Art. 156 and Venezuela, C.Co., Art. 269.

from contracting directly or indirectly with the corporation. Finally, there are provisions in some codes and statutes forbidding a director to engage or to participate actively in a competitive business.

Generally speaking, the problem of whether the shareholders may sue the directors in case of liability is a matter insufficiently regulated in most of the Latin American countries. There is no doubt that a shareholder has the right to sue the directors if their illegal action has caused him special, individual damage. In this case the shareholder acts in his own name, in pursuance of a personal, individual action. On the other hand, difficult problems arise in connection with the availability of derivative suits. In Brazil if the corporation does not start a lawsuit against the directors within six months after the next meeting of shareholders, any shareholder may enforce the liability of the directors in a derivative suit.[304] In Argentina if the act of the directors is illegal or contrary to the bylaws it may *not* be ratified by the shareholders and any shareholder may sue in a derivative suit.[305] In Mexico derivative suits are not allowed unless shareholders representing at least 33% of the capital of the corporation will join in the action.[306]

In some countries, such as Argentina, a director may avoid liability by merely abstaining from participating in the approval of the illegal motion;[307] in some other countries he must show, in addition to this, that he protested against the motion and that he gave notice of the illegal action to the president, manager, or the shareholders.[308]

E. *Supervision*

The supervision of corporations may be exercised in two different ways: (1) by the government through specialized agencies; or (2) by the shareholders themselves through the appointment of auditors or supervisors. Several Latin American countries, *e.g.*, Argentina, Chile, and Colombia, have combined these two systems by creating specialized governmental agencies (known as *Inspección General de Justicia* in Argentina, and *Superintendencia de Sociedades* in Chile and Colombia) entrusted with the supervision of corporations and by providing, at the same time, that the shareholders must appoint one or more supervisors (*síndicos o revisores fiscales*) to oversee the management. In some other countries, on the other hand,

[304] D-L 2627 (1940), Art. 123.
[305] 2 Fernandez Codigo, ed. cit., commentary to Art. 337.
[306] LGSM, Art. 163.
[307] C.Co., Art. 337(2) and Mexico, LGSM, Art. 159.
[308] See, e.g., Brazil, D-L 2627 (1940), Art. 122; Mexico, LGSM, Art. 160 (notice to supervisors).

only this latter system (private supervision) is required, there being no state supervision.

The powers of the governmental agencies which control corporations in those countries where these agencies have been established by law are very broad and important. In the first place these governmental agencies oversee the organization of the corporation and grant or deny, or determine the granting or denial of, permission for the establishment of a corporation. In the second place, they have broad powers of supervision over the corporation once it is organized, including the authority to examine books and papers, impose fines, and even to revoke permission to operate or ask for the dissolution of the corporation in cases of serious violations of the law and in cases of insolvency.[309]

Private supervision of corporations is done through the appointment by the shareholders of one or more supervisors or auditors *(síndico comisarios, o revisores fiscales)*. If several supervisors are appointed they will constitute a body known as *consejo de vigilancia.* The supervisors or auditors must check on the activities of the directors and managers and must denounce to the shareholders any irregularities they may find. Particularly, the supervisors are obligated to analyze the inventories and the balance sheets and report on them, as well as on the general operation of the corporation, at the annual meeting of shareholders, or at a specially called meeting if the circumstances demand it.

Finally, it should be mentioned that the supervisors may be liable to the association and to third persons for the improper discharge of their functions, under rules similar to those discussed already in connection with directors and managers.[310]

F. *Reserve Funds and Dividends*

The statutes and codes of most Latin American countries provide that a certain percentage of the earnings of the corporation *must* be devoted to the creation of a reserve fund known as "legal reserve fund" *(fondo de reserva legal)*. So, for example, the Code of Commerce of Argentina provides that at least 2% of the net earnings shall

[309] Argentina, Decree of April 27, 1923, Regulatory of the Inspección General de Justicia; Colombia, L. 58 (1931), Decree 2521 (1950), Arts 259 ff. and Decree 2831, 1952; Chile, D-L 251, May 20, 1931, particularly Arts. 1, 2, 83 ff. See also Bolivia, D-L of April 28, 1938 and Uruguay, L. 11.418 of April 29, 1950, Decree of Dec. 4, 1950 and Decree of Dec. 18, 1947 (grants authorization to the Oficina de Recordación del Impuesto a las Ganancias Elevadas for supervising corporations).

[310] In connection with the supervisors, cf. Argentina, C.Co., Art. 340; Brazil, D-L 2627 (1940), Arts. 124 ff.; Colombia, Decree 2521 (1950), Arts. 134 ff.; Uruguay, Resolution of May 6, 1949 (not required to have supervisors); Mexico, LGSM, Arts. 164 ff.; Venezuela, C.Co., Arts 287 and 309-311.

be devoted to the creation of a reserve fund which must be equal to 10% of the subscribed capital. This "legal reserve fund" is a means to increase the margin of security for creditors and it may be used to pay losses.

As a general rule, dividends may be distributed only out of *net earned surplus*.[311] Therefore, capital surplus created by a write-up of the estimated value of the assets of the association, or a devaluation surplus, or any type of surplus other than earned surplus, may not be used for dividends. On the other hand, any kind of earned surplus, whether it is ordinary or extraordinary, is subject to distribution as dividends.

The declaration of dividends is made by the shareholders, not by the board of directors.[312] However, the distribution of illegal dividends may render the directors personally liable.[313] Furthermore, in some countries such as Argentina, dividends illegally paid may be recovered from the shareholders, but the action for recovery is subject to a short statute of limitations (3 years in Argentina, for example).[314]

[311] Argentina, C.Co., Art. 364; Bolivia, Decree of March 8, 1860, Art. 1198; Chile, D-L 251 (May 20, 1931), Art. 108; Colombia, Decree 2521 (1950), Art. 182 and C.Co., Art. 588; Ecuador, C.Co., Art. 303 (makes a limited exception to the general rule); Uruguay, C.Co., Art. 418; Venezuela, C.Co., Art. 307. In Mexico it seems to be possible to declare dividends out of capital surplus. 1 Rodríguez, Sociedades, ed. cit., p. 475.

[312] See p. 212 supra.

[313] See authorities cited note 302 supra.

[314] 2 Fernandéz, Código, ed. cit., pp. 552 ff.