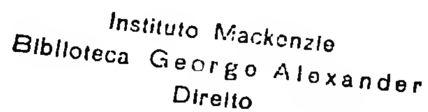
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DOUTRINA

MINORITY WITHDRAWAL RIGHTS AND THE ILLIQUIDITY PROBLEM A COMPARATIVE STUDY BETWEEN NEW YORK AND BRAZILIAN LAW ON CLOSE CORPORATIONS

FLÁVIO R. BETTEGA

1. Introdução ao Leitor Brasileiro — 2. The Illiquidity Problem — 3. New York Law — 4. Brazilian Law: 4.1 Introductory Note; 4.2 The Civil Law Rationale for the Withdrawal Rights — 4.3 Minority Withdrawal in the Corporation; 4.4 Minority Withdrawal in the *Limitada* — 5. Conclusion.

1. Introdução ao Leitor Brasileiro

A fisionomia particular da sociedade fechada não é um tema original na doutrina jurídica. Comentaristas e órgãos judiciais americanos referem-se com freqüência aos hoje familiares conceitos de "iliquidez", "proteção das expectativas", "potencial de opressão", e "analogia com a *partnership*" quando tratam dos conflitos que têm como pano de fundo uma companhia fechada.

Em última análise existem duas abordagens diametralmente opostas a este assunto. Uma corrente da doutrina reconhece a sociedade fechada como fundamentalmente diferente de sua congênere de capital negociado publicamente. Assim fazendo, estes comentaristas asseveram ser a relação entre sócios de uma empresa fechada basicamente fundada sobre laços pessoais e confiança mútua, ou seja, uma forma de negócio que na realidade se assemelha à *partnership*. Em conseqüência, propõem a adoção, pela sociedade de capital fechado, de algumas regras de controle peculiares a *partnership*.[1]

A outra tendência denuncia a analogia da *corporation* fechada com a *partnership*, realizada por Hetherington e Dooley, entre outros, como uma construção artificial que negligencia o fato de que os sócios podem ter racional e deliberadamente escolhido constituir uma *corporation*, em lugar de formar uma *partnership*. Não haveria como validamente sustentar o pressuposto de que os sócios não conheciam suficientemente as implicações da legislação societária de forma a merecerem proteção legal adicional, além daquelas pelas quais barganharam no contrato. Preconizam, ao contrário, uma abordagem norteada por um ideal de eficiência. Cortes tratando do assunto deveriam indagar o

1. A *partnership* é uma forma de organização negocial comum no direito americano cujas características fundamentais são: a) responsabilidade ilimitada dos sócios, b) deliberação apenas pela unanimidade de todos os membros, c) direito de retirada irrestrito. Representativo desta posição é o histórico artigo dos Profs. Hetherington e Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1-63 (1977). Ver também, genericamente Charles Blackmar, *Partnerships Precedents in a Corporate Setting — Exit from the Close Corporation*, 7 J. Corp. L. 237-263 (1982).

que teriam as partes disposto no contrato, caso tivessem a alternativa de negociar indefinidamente a custo zero. Em outras palavras, a analogia com a *partnership* seria totalmente inoportuna. Um remédio legislado, ao estilo *partnership*, para os conflitos dentro de sociedades fechadas jamais seria capaz de oferecer uma solução ideal. Conclui esta corrente que uma solução *ex post*, típica da *common law*, é a melhor resposta, desde que as cortes a que competir a solução destes conflitos não ignorem o ideal de eficiência econômica.[2]

Desenvolvimentos e variações destas duas análises serão mencionados no decorrer do texto. O assunto tem sido, com efeito, tratado exaustivamente e muitas são as interpretações originais e propostas imaginativas para dotar o quotista ou acionista de uma proteção mais significativa.

Em seguida à discussão de algumas das diferentes percepções do problema, seguirá uma análise do tratamento dispensado pela lei do Estado de Nova York, tanto do ponto de vista das construções jurisprudenciais (*common law* propriamente dita) quanto do direito positivo (*statutory law*). A apreciação dos remédios concebidos pelas Cortes de Nova York é um meio conveniente de se avaliar o mérito das diferentes conclusões dos comentaristas. Por outro lado, esta justaposição também revelará as idéias e o raciocínio que orientaram as atividades judicial e legislativa, contribuindo para uma noção mais precisa do que realmente dispõe a lei novaiorquina.

Finalmente uma panorâmica do direito brasileiro pertinente oferecerá um exemplo útil de como funciona um sistema minuciosamente regulamentado, característico de uma abordagem típica da *civil law* aos problemas societários. A natureza paternalista do direito societário brasileiro pode fornecer uma boa noção da rigidez a que pode conduzir uma massiva intervenção legislativa na autonomia das partes para contratar.

2. The Illiquidity Problem

In their classic analysis of the modern corporation Berle and Means asserted the true revolution caused by widespread ownership of the public companies.[3] The binomium ownership and control could not subsist a reality where giant companies starving for huge capital inputs resorted to the public to fulfill this need. Investors, for their turn, rationally chose to remain apathetic, i.e. without a decisive word in corporate governance.[4] Berle and Means acknowledged the key role played by the securities market in this process recognizing the need of liquidity as an essential element to draw in passive investors.[5] They further underscored this purpose of the stock market noting that "one of the primary functions of these markets has been from the first to secure

2. Para uma articulação eminente deste ponto de vista ver Esterbrook e Fischel, *Close Corporations and Agency Costs*, 38 Stan. L. Rev. 271 (1986).

3. Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* (Transaction ed. 1991).

4. Berle and Means must be read as the classic it is. Written in the 30's, its interpretations no longer describe accurately the corporate reality especially in the context of the surge of institutional ownership. Notwithstanding, the work offers this immensely valuable account of the power equation in the corporation and its relation with the market. For subsequent developments that present a more up to date view of the publicly traded firm see generally Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle & Means*, 22 U. Mich. J. L. Ref. 19 (1988).

5. Id at 255-263.

ready convertibility of securities into cash".[6]

Complementarily, the notion that dissatisfied investors could always seek redress on the markets has been familiar to US courts since the early decades of the century.[7] Insofar as the close corporation is concerned, however, the cannons of majority rule and permanence, as opposed to the partnership concepts of dissolution at will and unanimous decision making process, create the potential for opportunistic behavior on the part of the controlling faction. Due to the very nature of the close corporation there is no market readily available for its shares. The investor frustrated on his expectation cannot rely on the "wall street rule" as a remedy to mitigate his dissatisfaction. For this reason, the functional nature of the closely held firm bears a significant resemblance to the partnership. It is not uncommon for all small joint undertakers, minorities included, to expect and actually take an active role in the management of business. Shareholders, like partners, rely heavily on personal relationship and rationally expect that the business will be run with some degree of consensus.

Even though commentators may differ on their evaluation of the need for different legal treatment of the close company, there is little disagreement that "taking a minority position in a close corporation often leave themselves (the shareholders) vulnerable to a squeeze out or oppression".[8] Dissent arises as to which kind of shield against this vulnerability, if any, is desirable.

Prof. Hetherington, joined by Prof. Dooley, noticed that the recognition of the special needs of the close corporation led to a flexibilization of corporate law. Progressively, courts began to enforce agreements individually tailored that contracted around particular structures of corporate law.[9] Contracting around, however, is qualified as inefficient for: a) it is not realistic to expect from the minority that they foresee the possibility of exploitation by the controlling faction, even if they are aware of the potential for squeeze-out situations, simply because the close corporation by definition is a form of business strongly founded upon personal ties and mutual trust; b) transactional costs are high; c) there are natural limitations to human foresight; d) it is not logical to expect complex organizational schemes for the simplest form of business ventures.

Additional reasons to condemn the contracting around solution are offered by Prof. F. Hodge O'Neal. Some shareholders may be simply unaware of the vulnerability of their position. Or their bargaining situation is so weak that does not allow them to negotiate for their protection. The oppressed shareholder might have inherited his interest. In such case obviously there was no opportunity to bargain. Other reasons, though rather paternalistic, are still worth quoting. The shareholder may fail to get expert advice, or the lawyer was not knowledgeable enough to draft an adequate protective device.[10]

6. Id at 258.

7. See *Geddes v. Anaconda Copper Mining Co.*, 254 US 590-598 (1921) and *Venner v. Southern Pacific Co.*, 279 F. 832 (1922).

8. O'Neal & Thompson, *O'Neal's Close Corporations*, Sec. 10:03.

9. Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1,2 (1977). For an interesting study of the court's construction of a shareholder's agreement, further limiting board's discretion in close corporations, see also Richard A. Kaplan, *Close Corporation Shareholder's Agreements and the Signal of Zion v. Kurtz: Frustration of the Statutory Notice Requirement*, 46 Alb. L. Rev. 198-228 (1981).

10. O'Neal and Thompson, *O'Neal's Close Corporation*, Sec. 10:03. For a comprehensive

Another statutory solution does not deserve a better rating. The involuntary dissolution of the corporation on the grounds of oppressive behavior, which is originally a common law remedy, is dismissed as too costly. Throughout a comprehensive survey of cases Hetherington & Dooley find that for profitable companies the equitable powers of the courts make the dissolution procedure actually work as a price fixing mechanism for a buyout.[11] If this proposition is true there is no way to disagree from their conclusion that is hard to conceive "a more cumbersome, inefficient, and costly means of achieving that end".[12] Indeed, dissolutions is ordered only upon the finding of fault, denominated oppression by statutory language.[13] The determination of this wrongdoings on the part of the controlling faction will always be conflictful and time consuming.

Given all this assumptions, a mandatory unencumbered buy-out provision arises as a solution of many merits. Among the alleged advantages of this system would be the minority's ability to use the threat to withdraw as a tool to level the playing field, increasing managerial efficiency. The need for complex private arrangements or costly judicial intervention would be significantly reduced. A systemic evolution would also occur since liquidity would promote a more efficient allocation os resources in the market.[14]

Different commentators developed a variety of possible approaches to the subject. Traditional and heavily embodied principles of corporate law such as the business judgement rule had their suppression advocated in order to provide more effective protection to the minority shareholders.[15] Different business forms, such as the limited liability company, were described as possessing some comparative advantages since agency costs for small business ventures would be reduced.[16]

Some other points of view try to focus on the previously noticed peculiar functional feature of the close firm. Undeniably personal in nature, the relationship between shareholders of

analysis on the process of opting out default rules see Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 Seton Hall L. Rev. 705-708 (1992).

11. Hetherington & Dooley, *Illiquidity & Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 26-35 (1977).

12. Id at 35.

13. See as a reference the language of the New York Business Corporation Law:

Sec. 1104-a. Petition for Judicial Dissolution under Special Circumtances

a) The holders of twenty percent or more of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of wich are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, who are entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

1) The directors or those in control of the corporation have been "guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders". (Bus. Corp. sec. 1104-a).

14. Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 46-50 (1977).

15. See generally Krisnan S. Chittur, *Resolving Close Corporations Conflicts: A Fresh Approach*, 10 Harv. J. L. & Pub. Pol's 129-172 (1987).

16. James W. Lovely, *Agency Costs, Liquidity, and the Limited Liability Company as an Alternative to the Close Corporation*, 21 Stetson L. Rev. 377-421 (1992).

close corporation could have its harmony restored by the resort to alternative means of dispute resolution, such as mediation or even arbitration. There may be some truth also in the proposition that a provision of this nature would reduce the likelihood of any conflict.[17]

A very much original approach to the problem is provided by Prof.ª Terry A. O'Neill.[18] She criticizes the traditional notion that self-interest is the exclusive driving force behind business decisions. Caring, understood as "receptivity to the other's reality, and willingness to respond to the other's needs", is also a fundamental motivation of human behavior.[19] This is specially true in the reality of the owner-managed firm where all participants are personally related, and expect to actively take part in the management. The ideal rule, thus should rather provide the opportunities for shareholders to talk to each other, maximizing the chances of a compromise.

She posits that to a certain extent courts are inclined to understand the different reality of the closely held corporation. Indeed, a link has been forged between the meaning of fiduciary duties owed to the minority in the close firm and the fair expectations entertained by these vulnerable shareholders. Insofar as dissolution is concerned remarkable differences also arise with regard to the owner-managed firm. The business judgement rule which traditionally has determined the measure of fiduciary duties is weakened to the advantage of the reasonable expectation of the participant. Additionally, an enhancement of fiduciary duties inside the close firm has caused a liberalization on the grouds for dissolution since these matters are today inextricably related.[20]

It is eventually asserted that the instituition of a rule authorizing voluntary dissolution of the venture at the will of any participant would offer the best balance between the simultaneous needs for stability and liquidity in the firm.[21] Opportunistic strategic behavior on the part of the controlling faction, namely the squeeze-out of the minority, would be severely discouraged. Also this power equivalence would increase "the likelihood that the participants will directly confront their problems by talking and listening to each other".[22] This approach furnishes a solution more compatible with the predominantly personal relationships characteristic of the owner-managed firm.

Prof. Robert B. Thompson develops an exhaustive study of the plight of the minority in a closely held firm.[23] He addresses the modern treatment dispensed by courts to the close corporation dilemma. First, Prof. Thompson asserts that legislatures expanded the grounds for dissolution of the corporation initiated by a minority shareholder. Then he says that courts, for the turn, are inclined to utilize the standard of reasonable expectations of shareholders to ascertain whether relief is needed. In performing this task courts are likely to fashion alternative remedies, such as mandatory buyouts, even in the absence of explicit statutory authorization. On the other

17. Lewis D. Salomon & Janet S. Salomon, *Using Alternative Dispute Resolution Techniques to Settle Conflicts Among Shareholders of Closely Held Corporations*, 22 Wake Forest L. Rev. 105-126 (1987).

18. Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligations in Close Corporations*, 22 Seton Hall L. Rev. 646-708 (1992).

19. Id at 652.

20. Id at 649, 662, 677-689.

21. Id at 702.

22. Id at 703.

23. Robert B. Thompson, *The Shareholders Cause of Action for Oppression*, 48 Bus. Law. 699-745 (1993).

hand the ability to bring individual actions for breach of fiduciary duty has been significantly expanded. Here he comes to a conclusion similar to that spoused by Prof. Terry A. O'Neill in her forementioned article. They both note the connection that presently exists between the standards courts use to determine a breach of fiduciary duty and to define oppression, a ground for judicial dissolution.[24] This line of reasoning leads to the conclusion that either legal remedy (suit for breach of duty or suit for dissolution) have "similar purposes and effects", making "sense to think of them as two manifestations of a minority shareholder cause of action for oppression".[25]

It is not incorrect to phrase Prof. Thompson's conclusion as if legislative remedies which broad the grounds for dissolution and court fashioned remedies that enhance the fiduciary duties of the majority had substantially similar effects. In this case, another much commented polemic involving corporate law seems to loose considerable importance, at least as far as the minority termination rights in close corporations are concerned. Judge Posner assumption that common law rules governing corporations tend to be more efficient, as opposed to the position of Judges Winter and Easterbrook, that corporate statutes enact efficient law, due to competition among legislature, seems to be kind of preposterous.[26]

Back to Prof. Thompson studies, it is further postulated that even though the evolving cause of action for shareholders oppression can be characterized either as an action for dissolution or an action for breach of fiduciary duty, fundamental practical differences may arise. When both remedies are available shareholders will choose that which is best suited to the factual circumstances of the case. E.g. "If the coffers of the company are empty, often because of misconduct of the majority shareholders" dissolution will hardly bring a satisfactory compensation.[27] Procedural differences also exist. Generally lawyers fees cannot be recovered in a direct cause of action, that is a suit for breach of duty. Punitive damages, the availability of a jury trial are also among the issues where differences are likely to arise.[28]

3. New York Law

Whatever interpretation is the more accurate to describe the plight of minority shareholders in the close firm, the New York legislature recognized as a general proposition their vulnerable status. The enactment in 1979 of what has been called the "oppressed minority shareholder relief act" (Business Corporation Law Sec. 1104-a) complemented the then existing common law remedies.[29]

Relief for oppressed shareholders has been provided by the common law of the State of New York since 1963, when the Court of Appeals decided *Leibert v. Clapp*.[30] Confronted with a situation where majority's misconduct went further than "waste, misappropriation and ilegal accumulations of surplus, which might be cured by a derivate action for injunctive relief and an accounting",[31] the *Leibert* court ordered the dissolution of the corporation even absent explicit statutory authority. The facts of the case involved reiterative "looting" of the corporate assets for the benefit of the

24. Id at 700. See note 20 *supra*.

25. Id at 701.

26. See generally Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 Wash. U. L. Q. 367-397 (1992).

27. Robert B. Thompson, *supra* at 738-747.

28. Id at 739-740.

29. See note 13 *supra*.

30. 196 N. E. 2d 540 (N. Y., 1963).

31. *Leibert v. Clapp*, *supra* at 540.

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controlling faction at the expenses of minority shareholders.

In any event the amendment of the Business Corporate Law created another ground for the oppressed minority to seek relief. It is fair to say that both remedies are available to New York petitioners. The common law right for dissolution, when management breaches its fiduciary duties coexist with the subsequently enacted statutory ground.[32]

The legislative action brought more precise guidelines of what should be the judicial approach to the problem, providing an specific mechanism meant to "preserve and protect the interests of minority shareholders".[33] The Court of Appeals set in the *Matter of Kemp & Batley*[34] what remains the binding construction of the statute. The case involved a change in the policy pursued by the corporation that severed the so far forthcoming distribution of the earnings throughout dividends or extra compensations calculated according to the stockholdings. The court distinguished two "special circumstances" that would give rise to dissolution, provided that complaining shareholders held at least 20% of the outstanding shares of a non-publicly traded conpany.[35] First, mistreatment of complaining shareholders (subd. [a], par. [1]).[36] Second, misappropriation of corporate assets (subd. [a], par. [2]).[37] The question thus turned to be whether the conduct of the majority in the case constituted mistreatment or, more precisely, oppresion within the meaning of the act.

Additionally it was held that the definition of "oppressive action" must take into account the peculiarities of the close corporation.[38] Fur this purpose, the court resorted to the lesson of F. Hodge O'Neal, among other commentators, asserting that participants of close corporations reasonably expect to actively participate in the management of the business, and to enjoy a share of corporate earnings. This shareholders "would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment".[39]

Therefore the reasonable expectations of the shareholders is explicitly said to be the appropriate standard to measure conduct alleged to be oppressive. Nevertheless the court warned that a mere disappointment with the results of the enterprise does not amount to oppression. The broken expectation must had been reasonable and central to the decision of joining the venture.[40]

32. See *Matter of Dubonnet Scarfs, Inc.*, 484 N. Y. S. 2d at 543 (N.Y. App. Div., 1985).

33. See *Matter of Pace Photographers, Ltd.*, 525 N.E. 2d at 716 (N.Y., 1988).

34. 473 N.E. 2d 1173 (N.Y., 1984).

35. Id at 1178.

36. Sec. 1104-a. Petition for Judicial Dissolution under Special Circumstances:

a) The holders of twenty percent or more of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, who are entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

1) The directors or those in control of the corporation have been "guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders"; (Bus. Corp. sec. 1104-a).

37. 2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation. (Bus. Corp. sec. 1104-a).

38. *Matter of Kemp & Batley, supra* note 34 at 1178.

39. Id at 1179.

40. Id at 1179.

It was further established that, due to the gravity of the remedy, courts would enjoy a sound discretion to consider whether to decree dissolution. It should be weighted whether dissolution was the "only feasible means" and "reasonable necessary" to protect shareholders interest.[41]

Moreover, a condition applies to the judicial decree of dissolution. Any shareholder must have the chance to purchase the interest of the complaining parties at a fair value.[42] Eventually the Court of Appeals upheld the Supreme court decison to order the dissolution of the corporation, subject to an opportunity for a buy-out of petitioners shares.

The Supreme Court of New York, Appellate Division, had the occasion to underscore the broad latitude of discretion enjoyed by the tribunals to fashion an alternative remedy to dissolution. Upon the finding of oppressive conduct against minority shareholders, the court in the *Matter of the Dissolution of Wiedy's Furniture Clearance Center Company, Inc.* ordered a mandatory buyout of petitioner's interest even absent respondent's election to do so.[43]

A less predictable aspect of New York law arises from the analysis of the court's decision in *Gimpel v. Bolstein*.[44] The facts of the case involved the longtime exclusion of petitioner from management of corporate affairs as well as from participation in profits. This alienation was motivated by plaintiff's own wrongful conduct. While employed in an important managerial position he embezzled some $ 85,000.00 from the firm.

Attempting to ascertain whether petitioner was untitled to any remedy under NY law, the *Gimpel* court resorts to the familiar standard of oppression as a ground for dissolution. Discarding the "reasonable expectations" test as inadequate where all shareholders had inherited their interests, the court asks whether the conduct engaged by the majority was "inherently oppressive".[45] Considering the facts before it the court eloquently finds the majority's conduct not to be oppressive, that is burdensome, harsh and wrongful: "It was clear not wrongful for the corporate victim of a theft to exclude the thief from the councils of power".[46] The plaintiff's assertion that failure to declare dividends constituted oppressive conduct was also promptly dismissed. The long-standing policy of the company was to distribute its earning in the form of salaries.[47]

Accordingly, the *Gimpel* court rejected the contention that the majority's conduct towards plaintiff was oppressive and denied dissolution. Nevertheless the

41. Id at 1180. See also Business Corporation Law, sec. 1104-a, subd. (b), pars. (1), (2).

42. Sec. 1118. Purchase of Petitioner's Shares; Valuation:

a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph (c) herein. An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such an election be revocable. (Bus. Corp. sec. 1118).

43. 487 N.Y.S. 2d 901 (N.Y. App. Div., 1985).

44. 477 N.Y.S. 2d 1014 (N.Y. Sup. Ct., 1984).

45. *Gimpel v. Bolstein*, *supra* note 44 at 1020.

46. Id at 1020.

47. Id at 1021.

court found that petitioner could not remain for ever exiled from corporate proceeds. Construing BCL sec. 1104-a[b][1], [2][48] in a very broad way, the court grants itself a wide range of discretion to fashion an appropriate remedy. "The court is not without jurisdiction to fashion a remedy here. While the statute itself makes explicit mention of only one remedy, that being liquidation, the court is also charged to consider whether that is the only means available to protect the rights of the petitioning shareholder. Clearly, this gives the court discretion in a proper case, Oto fashion an appropriate remedy".[49] Eventually they order the majority to elect either to initiate payment of dividends or to offer in good faith to buyout plaintiff at a reasonable price.

The *Gimpel* case is striking because the court designed a remedy to protect the minority shareholder despite the fact that the grounds for dissolution were absent. In other words a buyout was ordered even though no oppressive conduct, according to the court's rationale, ever took place. Whether this decision amounts to the adoption of a mandatory buyout provision of the sort advocated by Professors Hetherington & Dooley,[50] or is only as isolated solution justified solely by the peculiar features of this particular case is a question that remains open for speculation.

Another judicial opinion is representative of the trend enlarging grounds for redress that minority shareholders will find in the state of New York. In the *Matter of Dubonnet Scarfs, Inc.* the facts comprehended petitioners (owners of 50% of the stock) pressed by financial problems unrelated to the corporation, and a company with substantial liquid assets.[51]

A majority of the court dismissed the petition asserting that it failed to state a cause of action either under sections 1104 or 1104-a of the Business Corporation Law,[52] or at common law. Justice Asch dissents, however, stating that controlling shareholder refusal to purchase petitioner's interests at fair value, as well as his refusal to agree to the dissolution of the company, thus enabling investors in urgent need for cash to get value for their stake, would warrant dissolution under section 1104-a of the act. The division among shareholders with respect to whether the corporation should be dissolved was also deemed to constitute itself a proper cause of action for dissolution.[53] The dissent concludes, quoting par. 3 of section 1104-a, that dissolution would be beneficial for shareholders.[54]

This interpretation purpots to grant shareholders of close firms another cause of action in addition to those rooted in the common law and those which arise from "harsh, burdensome or oppressive conduct" by the controlling faction.

48. Sec. 1104-a. Petition for Judicial Dissolution under Special Circumstances:

b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

2) Whether liquidation of the corporation is reasonably necessary for the protection of rights and interests of any substantial number of shareholders or of the petitioners. (Bus. Corp. sec. 1104-a [b] [1], [2]).

49. *Gimpel, supra* note 44 at 1021.

50. *Hetherington & Dooley, supra* note 1.

51. 484 N.Y.S. 2d 541 (N.Y. App. Div., 1985).

52. Bus. Corp. Sec. 1104, 1104-a.

53. *Matter of Dubunnet Scarfs, Inc., supra* note 51 at 545.

54. Id at 546.

4. Brazilian Law

4.1 Introductory Note

This overview of Brazilian Law will consider the two most important and successful business forms adopted by Brazilian venturers, the corporation (*sociedade anônima*) and the limited liability companies (*sociedade por quotas de responsabilidade limitada*), hereafter simply *limitadas*. The analysis will resort essentially to three statutory sources, the Law of Corporations as amended (Law n. 6404 of Dec. 15th 1976), which subsidiarily regulates *limitadas* as well, the Decree n. 3708 of Jan. 10th 1919, which regulates the constitution and some basic functional aspects of the *limitada*, and finally the old Commercial Code (Law n. 556 of June 25th 1850) that has some few relevant provisions still in force. The references to the language of the statutes will be accompanied whenever possible by allusions to the work of Brazilian Commentators and judicial decisions.

4.2 The Civil Law Rationale for the Withdrawal Rights

In most civil law jurisdictions the right of a shareholder to withdraw from the corporation is unanimously celebrated as a necessary counterbalance to the majority rule of corporate governance.[55] It has been conceived indeed as a fundamental attenuation of the decision making powers of the majority. The idea of an investment locked forever inside an enterprise that might have changed, even against the will of the venturer, has always been repugnant to the civil law. Some appoint the Italian Code of Commerce of 1882 as the historical origin of the formal right to withdraw.[56] Such precise attempt however to track the historical statutory origins of the institute may be deemed a little speculative in nature.

In any event, Brazilian law does not depart from the tradition described above. The fundamental principle that a joint undertaker could not be compelled to remain when facing important changes on corporate life has always governed legislative action. Of course, the original idea has been adapted, with variable degrees of success, to the demands of modern entrepreneurial world.

4.3 Minority Withdrawal in the Corporation

From the very beginning it is important to underscore the mandatory feature of Brazilian law. Art. 109 of the Law of Corporations lists the rights to be bought out in the cases specified by the statute among the essential rights of the shareholder.[57] This has been consistently interpreted as meaning that neither the articles of incorporation nor the general meeting of shareholders can foreclose this statutory right.[58] On the other land commentators have stressed the exceptional character of the mandatory buyout remedy. The situations brought by law are exhaustive. That is to say, factual situations that are merely

55. See generally Konrad Kosak, *Tratado de Derecho Mercantil* 126 (ed. espanhola); Carlos M. Pennaca, *El Derecho de Receso* 18-19 (ed. Astrea, 1978); Fran Martins, *Direito Societário — Estudos e Pareceres* 51-63 (ed. Forense, 1984); Dominique Schimidt, *Les Droits de la Minorite dans la Societe Anonyme* 48 (ed. Sirey, 1970); De Gregorio, *Società* 464 (Torino 1938); Tullio Ascarelli, *Problemas das Sociedades Anônimas e Direito Comparado* 392 (ed. Saraiva, 1969).

56. Tullio Ascarelli note *supra* at 392.

57. Law 6404 of Dec. 15th 1976, art. 109.

58. See Fran Martins, *Comentários a Lei das S.A.*, 30-35 (ed. Forense, 1977).

analogical to the statutory cases don't authorize redress.[59]

The first relevant provision for our purposes, besides the forementioned Art. 109, is the Art. 45 that provides the mechanism throughout which the discontent shareholder will withdraw his investment from the corporation:

Chapter III — Shares — Section X — Redemption, Amortization, and Reimbursement.

Reimbursement:

Art. 45 — Reimbursement is the operation throughout which the corporation pays to the shareholder dissenting from deliberations of the general meeting the value of his interest in the cases specified by law.

Par. 1 — Establishes a default rule for the evaluation of the dissenter's interest giving the articles of incorporation ample freedom, but states that the price cannot be inferior than the net book value of the shares according to the last financial statements approved on a meeting of shareholders.

Par. 2 — Provides that if the fact that gives rise to the exercise of the appraisal right occurs more than 60 (sixty) days after the last financial statement, the dissenter has the right to demand the preparation of a new balance sheet for the purposes of the evaluation of his or her position.

Par. 3 — Provides that the reimbursement value of the dissenter's shares may be paid out of the surplus or the financial reserves, other than those legally required. In these two situations the stock bought will remain in treasury (treasury stock).

Par. 4 — States that in the case the reimbursement price is paid out of the legal capital of the corporation, the company has 120 days to find substitute shareholders or the legal capital will be reduced proportionally.

Par. 5 — If the corporation is rendered insolvent by the exercise of appraisal rights, and bankruptcy follows, the dissenters will remain residual claimants as to the bankruptcy estate, preceding only the remaining shareholders rights.

Par. 6 — Gives third creditors a cause of action to revoke the reimbursement operation if the price of dissenter's interest is paid out of the legal capital, insolvency follows, and the bankruptcy estate doesn't suffice to meet all the liabilities to third parties.[60]

It is worth noticing that this operation under Brazilian law is at least nominally distinguished from a stock redemption, in which the shares are cancelled. Paragraphs 1 and 2 denote Congress concern about the price shareholders would be paid when exercising their reimbursement rights. The net book value is established as the minimum acceptable value. The rule granting the right to demand the elaboration of a new balance sheet is specially valuable within the context of an economy historically plagued by inflationary pressures, such as the Brazilian. The evaluation subject is of course extremely critical for the effectiveness of the remedy but further inquiry in this vast issue would transcend the scope of this study.[61]

59. Egberto L. Teixeira & José Alexandre T. Guerreiro, *Das Sociedades Anônimas no Direito Brasileiro* 257, (ed. José Bushatsky, 1979).

60. Law 6404 of Dec. 15th 1976, art. 45. Notice: all the provisions of Brazilian law reproduced on this paper have been translated by the author.

61. See generally about evaluation of dissenting shareholders interests João Luiz C. da Rocha, "Ainda a Questão do Valor das Ações em Caso de Recesso", 81 *Revista de Direito Mercantil* 113-115 (1991).

A remarkable difference from U.S. law is the attachment of Brazilian legislators to the concept of legal capital. U.S. Standards of an equity cushion to protect third creditors are in reality far looser. Nevertheless, paragraphs 5 and 6 also address, similarly to their U.S. counterparts, the possibility of insolvency of the corporation as a limitation to the right to an appraisal, trying to make a remedy available to third parties.

Article 136 for its turn enumerates highly sensitive matters whose approval by the meeting of shareholders requires qualified quorum:

Chapter XI — Meeting of Shareholders

Section III — Special Meetings

Qualified *Quorum*

Art. 136. The vote of half, at least, of the voting shares will be required for the approval of the following matters, unless the articles of incorporation create a supermajority rule.

I — creation of preferred stock or issuance of new stock of a single class without proportional issues on the other classes, unless this operation had been previosly authorized by the articles of incorporation;

II — any changes in the preferences, priorities, advantages and redemption conditions of any class of preferred stock, or the creation of a more favored class;

III — the creation of "beneficiary parts";[62]

IV — change in the mandatory dividend;[63]

V — change on the business purposes of the corporation;

VI — merger, consolidation or split-up of the corporation;

VII — dissolution of the corporation or termination of the process of corporate liquidation;

VIII — participation of the corporation in a conglomerate as defined in chapter XXI;

§ 1. Establishes that in the cases described by sub-headings I and II approval or ratification by a majority of the preferred stock is required.

§ 2. In the case of publicly traded company the CVM[64] can waive the need for a majority vote.

§ 3. States that Par. 2 doesn't apply to the situations described on § 1.

The following article defines, by the means of alluding to the previous provision, some of the situations that grant dissenting shareholders the right to withdraw:

Withdrawal Right

Art. 137. The approval of the matters listed on the sub-headings I, II, IV, V and VII of art. 136 gives to the dissenting shareholder the right to withdraw from the corporation by means of the reimbursement of the value of his or her shares (art. 45), provided that said shareholder notifies the corporation of his intention to exercise this right within 30 days from the publication of the records of the shareholder's meeting that deliberated the subject.[65]

62. Without equivalent in U.S. law beneficiary parts are negotiable instruments, without face value, that confer to its holders a contingent credit right against the corporation, constituted by a share of the annual profits.

63. Art. 202 establishes mandatory levels of minimum distribution of earnings.

64. *Comissão de Valores Mobiliários*, regulatory body charged with the overview of the securities markets. Brazilian equivalent to the SEC.

65. An amendment of this specific provision brought by the Law 7.958 of Dec. 20/89 apparently excluded mergers, consolidations and split-ups from the situations granting dissenters appraisal rights. A huge polemic, which will be further addressed, among commentators, practitioners, and the courts followed since art. 230, pertaining to the

§ 1. The dissenting shareholder, including the bearer of non-voting preferred stock, can ask the reimbursement of his ou her stock, provided that said stock was owned by shareholder at the date the matter was deliberated by shareholder's meeting. Such appraisal right is available even if the shareholder abstained from voting against the deliberation or was absent from the meeting.

§ 2. The management of the corporation may call, within 10 days from the end of the 30 days period referred to on the caput of this provision, an extraordinary meeting of shareholders in order to reconsider or ratify the deliberation that gave rise to dissent, in the case they consider the payment of the reimbursement price to those exercising their withdrawal rights can put at risk the financial situation of the corporation.

§ 3. Statute of limitation. Expressly states that no shareholder will have a cause of action if they fail to exercise his or her right within the set time period.[66]

Although there are other dispersed provisions concerning our subject, it is correct to affirm that the art. 137 brings the bulk of minority shareholders appraisal rights. Clearly Congress had two main goals in mind when drafted the rule under analysis. First, to prevent undesirable dilution of shareholders stakes. This concern was addressed by sub-heading I. Second, and more blatant, to protect shareholders expectations difficulting important changes that are not consensual. Issues of stock can significantly weaken shareholders original positions. This may be undesirable from the minority point of view, specially in close firms where investor apathy is not the rule. Transformations that are likely to deeply alter the business circumstances such as a change on the business purposes will create the opportunity to withdraw.

One problem insistently focused by commentators before the enactment of the Law 6.404 was the definition of dissent. The question was whether the statute required the shareholder to actually vote against the proposition in other to be entitled to the appraisal. The legislator effectively solved the question stating on § 1 that the absentee or the abstainer may also withdraw.[67]

An issue that demanded further clarification was to what extent a change on the business purposes of the corporation could give rise to appraisal rights. Traditionally the definition of the business purposes has been strictly regarded by Brazilian law. The current statute requires on its art. 2 a precise and complete definition of the sphere of business activities of the firm.[68] It is understood that the delimitation of the scope of corporate activities is essential for agency reasons. To put in another words, management has authority to bind the corporation only when engaging in activities to which shareholders agreed to. Construing the statutory will some commentators posited that a substantial change was required. A simple restriction or addition of one kind of activity to the whole panoply of businesses to which the corporation is dedicated would not suffice to grant the right to withdraw.[69]

chapter regulating mergers, consolidations and split-ups, expressly gives dissenters the appraisal rights. This provision was not explicitly revoked by the Law 7.958/89 that only altered the wording of the caput of art. 137.

66. Law 6.404 of Dec. 15/76, art. 137.

67. See generally Egberto L. Teixeira & José Alexandre T. Guerreiro, supra note 59 at 429.

68. Law 6.404 of Dec. 15th 1976, art. 2.

69. See Fran Martins, supra note 55 at 78-79; Miranda Valverde, *Sociedades por Ações*, section 551.

The Supreme Court seized an opportunity in 1986 to give an interpretation of this particular question that can be deemed representative. Pursuant to a management proposal the special meeting of shareholders of Ughini S.A. suppressed the activity of clothing industry from the business purposes of the corporation. Some other activities such as commercial representation and stock participation in other companies were added. The Board argued that there was no substantial alteration in the business purposes for all the industrial activity was going to be carried on by Usacon Ltd., a wholly owned subsidiary of Ughini. The Court nevertheless took a very formalistic approach to the subject an held that the Law 6404, as opposed to the previous corporate statute (Decree Law 2.627 of Sept. 26th 1940), brought no requirement of substantiality.[70] This decision has been heavily criticized by commentators. It has been argued, not without reason, that the change in the business purposes should give rise to right to withdraw only when it was potentially detrimental to the interests of the minority. The broad interpretation given by the Court is likely to facilitate opportunistic behavior by the minority and hamper changes that may be of great advantage to the corporation.[71]

The statute further regulates in more specific provisions other relevant operations that give rise to the right to demand an appraisal:

Chapter XVIII — Transformation, merger, consolidation, and split-up

Section I

Art. 221. The transformation requires the unanimous consent of members or shareholders, except when otherwise provided on the articles of incorporation or articles of organization. In this case the dissenting shareholder or member shall have the right to withdraw from the company.

§ 1. The members can waive this prerrogative in the articles of organization.[72]

The law regulates the peculiar situation of an undertaking changing from one business form to another. The so called transformation is of great importance in emerging economies where companies originally constituted under simple business forms decide to resort to the public to raise the capital required for its development. This process of growth inevitably brings fundamental changes in the status quo among the original investors. It is generally acknowledged that growing companies tend to professionalize their managerial structures. This is obviously incompatible with the expectation of running the corporation. Moreover, the rights and prerrogatives of shareholders can be substantially distinct from those of members of a *limitada*. The opportunity to withdraw is therefore available to shareholders that dissent from the decision to "transform" the corporation. It must be emphasized however that shareholders or members can waive this right at the moment they join the venture.

Section II — Merger, Consolidation, and Split-up

Withdrawal Right

Art. 230. The shareholder who dissents from the deliberation approving the merger of the corporation, or its consolidation, or its split-up, shall have the right to withdraw from the corporation throughout the reimbursement of the value of his or her shares (art. 137).

70. Judgement of June 17/86, STF "Supremo Tribunal Federal", RE 104.895-6-RS, *RDM* 66/77-83 (1986).

71. See Mario E. Pinto Jr. *RDM* 66/84-88 (1987).

72. Law 6.404 of Dec. 15/76, art. 221.

§ 1. The period to the exercise of this right shall be counted from the publication of the records of the shareholder's meeting that approved the plan or justification of the operation, remaining the payment of the reimbursement price contingent to the completion of the deal.[73]

Businesses reorganizations stem from the search toward increasing levels of commercial efficiency. This is a worldwide phenomenon and for this reason it is not surprising that as far as mergers are concerned Brazilian law is essentially similar to its U.S. counterparts. The radical transformation in corporate life brought by a business combination, be it a merger or a consolidation, justifies the opportunity dissenting shareholders have to withdraw their investments. Indeed, the structures of the corporation are fundamentally transformed. Business purposes are substantially expanded. Changes in the financial situation are appreciable, and shareholders individual positions within the business are greatly transformed.

In Brazil, shareholders of both corporations involved in the merger or consolidation have the right to approve or reject the deal in a special meeting called for this purpose (arts. 136, 227 and 228 of the Law 6.404). Moreover, dissenting of both surviving and disappearing companies are entitled to an appraisal. The fact that the Law 7.958 of Dec. 20/89 struck out mergers, consolidations and split-ups, among other situations, from the list brought by art. 137 has been interpreted by commentators as irrelevant for the purposes of withdrawal.[74] Nevertheless the question has not been addressed so far by the STJ (Superior Tribunal de Justiça) which has jurisdiction to give a definitive answer to the problem.

Other two situations that may pertain to the closely held companies are pretty much self-explanatory. A mere reproduction of the statutory language sufficies to provide a good overview:

Chapter XIX — State Owned Corporations — Incorporation and Acquisition of Control

Art. 236. The incorporation of a public owned corporation depends on previous statutory authorization.

§ 1. Whenever a public authority, by means of expropriation, acquires the control of a company, the remaining shareholders shall have the right to demand, within 60 days from the publication of the records of the first shareholder's meeting after the acquisition, the reimbursement of their shares, unless the company was already under the direct or indirect control of other public entity, or in the case of concessionaires of public services.[75]

Chapter XX — Related Corporations, Parents, and Subsidiaries

Section V — Wholly-owned Subsidiary

Transfer of Shares

Art. 252. The transfer of all shares to the assets of another Brazilian corporation, in order to convert it into a wholly-owned subsidiary, shall be submitted to shareholders of both corporations, for the purposes of acting on

73. Law 6.404 of Dec. 15/76, art. 230.

74. See supra note 65. Also, for specific accounts on the effects of the amendment made by Law 7.958 see Rubens A. Machado, "Sociedade por Ações — Incorporação, Fusão e Cisão — Direito de Retirada", *RDM* 82/46-61 (1991); and Mauro R. Penteado, "A Lei 7.958/89 e a Pretensa Modificação do Direito de Retirada dos Acionistas: Uma Discussão Inócua", *RDM* 77/29-49 (1990). More recently Waldirio Bulgarelli, "O Direito de Recesso nas Hipóteses de Incorporação, Fusão, Cisão e Participação em Grupos de Sociedades. Exclusão Acarretada pela Lei 7.958 de 20.12.89", *RDM* 95/72-79 (1994).

75. Law 6.404 of Dec. 15/76, art. 236.

the plan of merger, according to arts. 224 and 225.

§ 1. The shareholder's meeting of the acquiring corporation, if the operation is approved, will take the necessary steps to authorize an increase of the legal capital that shall be subscribed with the shares of the acquired corporation, and nominate the experts that will evaluate the shares. The existing shareholders will not have a right of first refusal to subscribe the increase on the legal capital, but the dissenters shall have the right to withdraw by means of reimbursement of the value of their shares according to the provisions of art. 230.

§ 2. The meeting of shareholders of the acquired corporation shall approve the proposed operation at least by an absolute majority of the voting shares. Upon approval, the meeting will authorize the management, on behalf of the shareholders, to subscribe the increase on the legal capital of the acquiring corporation. The dissenters shall haver the right to withdraw from the corporation, by means of reimbursement of the value of their shares according to the provisions of art. 230.[76]

4.4 Minority Withdrawal in the Limitada

When it comes to limitadas one must consider two statutory sources in addition to the Law of Corporations which is subsidiarilly applied. First the old Commercial Code, Law 556/1850, that provides on its relevant provision:

Section VII — Dissolution of the company

Art. 335 (Causes for dissolution of the company). The companies are deemed dissolved: By the express will of any member when no definite term is specified.[77]

The second relevant source is the Dec. 3.708 of Jan. 1st, 1919, which regulates the constitution and some functional aspects of the *limitada*. Its art. 15 contains the rule pertaining minority withdrawal rights: Any member that diverges from the amendment of the articles of organization shall have the right to withdraw from the company, by means of the reimbursement of the value of his or her interest according to the last approved balance sheet.[78]

Courts played a major role construing the real meaning of the statutes partially reproduced above and trying to make both dispositions, which apparently overlap, complementary. Practice shows that the source of statutory authority that protects more effectively minority members of *limitadas* is the old provision of the Commercial Code. This choice stems from the distinction made by the High Court between the right to a dissolution and the dissenter's right to an appraisal. The former, according to the wording of the Code is completely unconditioned, while the latter arises only when the member dissents from an ammendment on the articles.

Two major problems were also weighted. On one hand there was the paramount concern that the remedy provided by art. 15, book value of the member's interest, was insufficient. On the other hand, a broad interpretation of art. 335 granting ilimited rights to cause a dissolution, in the manner of a partnership, was considered undesirable. First, the Court was concerned with the disruptive effects that excessive bargaining powers on the hands of the minority (in the case they had the right to dissolute the *limitada*) would cause on the management of the business. Second, worries about constituencies different than the members, such as creditors,

76. Law 6.404 of Dec. 15/76, art. 252.

77. Código Comercial, art. 335 (5).

78. Dec. 3.708 of Jan. 10, 1919, art. 15.

workers, and the community in general also motivated the court. Brazilian courts regard as a guiding principle the need to preserve to the maximum possible extent a profitable business as a going concern. The Court eventually carved a *common law* solution that strikes a balance between these two tensions. A third remedy, the partial dissolution, based on a restrict construction of art. 335 was fashioned. Members, therefore, would be entitled to leave the *limitada* without dissolving a profitable business, and, moreover, receiving their interests evaluated as a share of a going concern, instead of the mere book value.[79]

Some additional aspects of the law must be underscored. First, the notion that the right to cause a dissolution pursuant to art. 335 is waivable. Members can contract around this provision in the articles of organization. They preserve however the right to demand dissolution for "fair motives". This concept is roughly parallel to U.S. notion of dissolution for oppressive conduct.[80] Second, some commentators, resorting to the theory of "abuse of rights", attempt to control opportunistic behavior by the member that demands dissolutions.[81]

The art. 15 of the decree, for its turn, has been consistently interpreted as only regarding companies where a definite term is specified. Indeed members of a *limitada* where no definite term is agreed upon will invariably prefer the more complete remedy provided by the Commercial Code as interpreted by the courts.

5. Conclusion

The study shows an universal tension between two opposing factors. First, the need to protect the interests of those who are in a vulnerable position in the firm. Second, the need to preserve the ability of the enterprise to adapt to changed circumstances. The legislative challenge is to strike the optimum balance between these two concerns. One that would encourage people to invest without fear of seeing their interest diluted. But one that would not overload the deal upfront creating excessive transactional costs.

Diverse legal tradition perceive the same problems on different fashions. The U.S. approach is considerably market oriented, focusing basically into an economic concept, illiquidity, to describe and explain the investor's vulnerability. Brazilian law offers a more rigid, legalistic point of view that attempts to provide arbitrary solutions, hardly addressing the real source of the minority distress. It is the old civil law problem that leads to a fossilization of ancient principles of law whose underlying rationale has been long forgotten. Rare are the Brazilian commentators that go as far as diagnosing and pronouncing illiquidity as the real problem.[82]

U.S. law is more liberal, allowing more room to the parties autonomy to

79. Judgement of Dec. 12, 1978, STF — "Supremo Tribunal Federal", RE 89.464-1-SP, *JB* 39/50. For a detailed distinction of the remedy available to the dissenter, and that provided by the C.Co. see Vera Helena de M. Franco, "Dissolução Parcial e Recesso nas Sociedades por Quotas de Responsabilidade Limitada. Legitimidade e Procedimento. Critério e Momento de Apuração de Haveres", *RDM* 75/21-26, (1989).

80. STF *RT*, 166/845.

81. See generally Rubens Requião, *Direito Comercial*, 274-278, (Ed. Saraiva, 1977).

82. Justice must be made to one of the rare examples that dig deeper. For one opinion that does more than recite the commomplace "right to withdraw as an atenuation of majority rule" see Rachel Sztain, "O Direito de Recesso nas Sociedades Comerciais", *RDM* 71/50-54, (1988).

contract their own rules. This freedom to contract is only tempered by the constraints brought by fiduciary duties. As a result U.S. corporations are more dynamic, able to adapt faster to new business realities. The Brazilian legislator, however, deserves some indulgence. Stock markets are of course less capitalized and less efficient in Brazil than in the U.S. Providing for liquidity alone may not bring the best outcome. But the market already attained a level of the development that one must argue wheter the law should be liberalized not to hamper further advances.

In any event it seems fair to conclude that no statutory solution will ever match the result obtained by a highly liquid and efficient stock market. It is indeed too difficult to artificially mimic the "Wall Street Rule".