

# INTERNATIONAL REGIME OF COMMERCIAL COMPANIES IN ARGENTINA AND MERCOSUR\*

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## *I. INTERNATIONAL ACTIVITIES OF COMMERCIAL COMPANIES*<sup>1</sup>

Increasing economic globalization, as well as the phenomenon of the formation of integrated regional areas, constitutes a legal and commercial field composed of a multitude of elements that affect business development. In this process of economic globalization, commercial companies<sup>2</sup> can influence, with particular intensity, the industrial and commercial aspects of many different countries and the concentration of capital. The concentration of capital facilitates the appearance of business groups that play an important role at both regional and world levels.

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\* Editors' Note: Because of the many citations to foreign, unpublished materials, some of the statements in this Article could not be verified through the due diligence of the *Law Review* staff.

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1. "An international business transaction involves some aspect of commerce between persons, firms, organizations [such as corporations] and/or the governments of two or more countries. Such transactions are 'international' because they involve the movement of goods, people, services, technology, or money across national borders." W. Gary Vause, *Introduction to International Business Transactions: The Legal Environment for International Trade and Investment in the Post-Cold War Era* 9-10 (BookWorld Publications 1997).

2. The term "commercial company," as used in this Article, will encompass not only corporations but also limited-liability companies, limited partnerships, etc. (not sole proprietorships) unless otherwise stated. The corporation, known as a "sociedad anonima" in Latin America is the most common business organization in Argentina. *Doing Business in Argentina* § 2.122 (Juris Publg., Inc. 1998).

In this climate of economic globalization, the international activities of commercial companies can raise diverse legal questions, which can be examined from very different points of view. When we consider the economic and political rise of international commercial companies, the importance of determining the legal systems applicable to these commercial companies becomes clear. In other words, we must identify the legal system that will govern the constitution, life, dissolution, and liquidation of a commercial company subject to diverse legal rules. In identifying the applicable legal system, it is also necessary to address issues associated with each country's efforts to control the activities of foreign commercial companies.

Commercial companies can become subject to different legal systems in various ways. For example, commercial companies can be established in one country, have administrative bodies in another, corporate assemblies in a third, and place the auditor's office in a fourth country. Therefore, such a commercial company could be subject to the laws and regulations of four different countries. A commercial company also can become subject to various countries' laws and regulations through agencies, subsidiaries, or branches established in countries other than the one in which the commercial company was established. In addition, foreign commercial companies may subject themselves to different legal systems by way of mergers and dissolutions. The possibility exists that overseas and local companies may merge into new entities. Such a merger may make it necessary to contend with both foreign and local legislation. On a related note, local law should not control exclusively a foreign commercial company's dissolution because dissolution may produce effects in the foreign commercial company's country of origin and in the receiving country. The receiving country is the country in which the commercial company seeks to act.

Analysis of the legal systems currently governing an international commercial company requires, in part, laying out the legal system's distinct elements. The answers to issues regarding control of international commercial companies lie within different countries' legal systems. When a commercial company is merely local according to its constitution and activities, the local commercial system is sufficient in addressing the company's legal issues. When a commercial company acts internationally, however, it is necessary to consider not only the law of the commercial com-

pany's country of origin, but also the law where the commercial company attempts to act, i.e., the law of the commercial company's receiving country.

To begin analyzing the laws and regulations affecting a commercial company, we must examine the recognition of foreign commercial companies and other entities within the receiving country's legal system. Specifically, we should examine recognition of a foreign commercial company's legal existence as an autonomous entity under foreign law. Merely existing as a legal entity, however, must not be confused with the legal right of establishment. The right of establishment allows the legal entity to engage permanently in commercial activity in the foreign country if it establishes either its principal place of business or secondary establishments such as agencies, subsidiaries, or branches<sup>3</sup> in that foreign country. A country can recognize a commercial company without granting it the benefits of the right of establishment. On the other hand, a legal entity cannot benefit from the right of establishment if it has not been recognized previously.

The recognition of a commercial company, however, not only serves as the basis for the right of establishment. The right of recognition, in itself, implies certain immediate rights, such as the ability of a commercial company to invoke its legal existence. By invoking its legal existence, a commercial company may (1) act as the possessor of rights and obligations, (2) be on trial in other jurisdictions, and (3) qualify as a party to international contracts. At the same time, a country's recognition of a foreign commercial company raises the problem of determining the legal system under which the commercial company will exist, its country of establishment, or the receiving country.

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3. Professors Ralph H. Folsom and Michael W. Gordon distinguish between a corporate branch and a corporate subsidiary as follows:

A branch operation is the simplest form of foreign direct investment by a multinational. The branch has no independent juridical status. It is recognized for legal purposes as a mere extension of the foreign parent company. A foreign subsidiary, contrastingly, is incorporated under the laws of a foreign nation, and for most purposes is subject to the laws of that foreign nation. The word "subsidiary" implies that the parent holds a controlling interest in the foreign corporation. Either wholly or majority owned by the parent, subsidiaries are generally treated as distinct legal personalities, separate from their parent.

Ralph H. Folsom & Michael W. Gordon, *International Business Transactions* 513 (West 1995) (footnotes omitted).

For a receiving country to recognize a foreign commercial company, the receiving country's private international law must contain provisions that allow for validation of a foreign commercial company's constitution. Depending on the laws of the receiving country as compared to the country of establishment, recognition of the commercial company's constitution may be subject to more or less stringent regulation.<sup>4</sup> Comparative commercial law offers varying solutions for identifying the law applicable to the foreign commercial company's constitution and establishment.<sup>5</sup> Accordingly, we must consider the diverse solutions comparative law provides regarding a foreign commercial company's ability to act internationally and establish subsidiaries, agencies, representation, and branches.<sup>6</sup> Both legal material and international competence will be necessary to illustrate the legal system in which the analysis of these issues should occur.

## II. REGULATING THE ACTIVITIES OF FOREIGN COMMERCIAL COMPANIES

Analysis of the possible activities of foreign commercial companies subject to regulation starts from the premise that these entities want to broaden the scope of their activities and their markets. If a foreign company that possesses the capital, technology, and other resources necessary for expansion attempts to penetrate a foreign market, it will find that there is an indispensable element, without which its possibility of success is considerably reduced. This indispensable element is knowledge of that foreign market. This knowledge presupposes comprehension of the laws governing the commercial company's activities in that market. Therefore, the foreign commercial company must be familiar with the legislation governing its activities, including administrative regulations, costs derived from labor laws, and formalities to which foreign commercial companies must adhere.

Once the commercial company obtains the knowledge of the applicable law, the foreign company can choose between contractual and other commercial measures to resolve problems associated with activity abroad. The foreign company can either execute

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4. *E.g. infra* §§ VI, VII.

5. *Infra* §§ VI, VII.

6. *Infra* §§ VI, VII.

a contract or associate itself with another entity to penetrate the foreign market. The foreign company also may consider intermediate structures that would allow it to undertake its foreign venture with a local company. A good example of this is an international joint venture from Anglo-Saxon law.<sup>7</sup>

The regulation of a foreign commercial company's international activity varies substantially based on whether the company adopts a contractual form or a corporate one. General principles of contractual law reserve a great deal of autonomy for each party — even allowing the parties to choose the forum. Because forum selection is left up to the parties, the parties are also left with many possibilities regarding applicable law. In contrast, when a foreign commercial company adopts a corporate form, there is much less autonomy. Corporate activity is regulated much more heavily than contractual activity. This is because corporate legislation, containing distinct national laws, is shaped by each country's policies of commercial expansion or restriction. The influence of growing commercial globalization also cannot be ignored. Integrated regional blocs implicate elements of a completely different nature, which also play into present commercial development.

Large international enterprises perceive commercial companies as the most convenient way to do business, whether they are producing, selling, distributing, consuming, or transporting goods

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7. Professors John Child and Suzana Braga Rodrigues explain the complexities of international joint ventures as follows:

IJVs [international joint ventures] contrast with most unitary firms in being organizations with a small number of participating owners (principals) who have non-identical interests and competencies. The principals' level of commitment to the joint business may also vary. IJVs often rely on agents of a different nationality to at least one of the principals, and the agents themselves may differ in nationality. The hybrid nature of IJVs gives rise to complex structures of power and management. Consequently, IJVs are liable to experience problems of agency, and conflicts of interests between national owners, between these owners and their managers, and between staff of different nationality.

IJVs are one of the main vehicles for foreign direct investment [FDI]. The question arises whether FDI is a vehicle for introducing so-called "global standards" of corporate governance (based on Anglo-Saxon practice) or whether alternatively it continues to bring with it practices that are embedded in different national governance traditions.

John Child & Suzana Braga Rodrigues, *Corporate Governance and International Joint Ventures: Insights from Brazil and China* 4–5 (Birmingham Bus. Sch. Group Working Paper 2000) (available at <<http://www.business.bham.ac.uk/business/papers/international.pdf>> (Feb. 2000)) (citations omitted).

and services. Commercial companies can assist in the concentration of capital. Therefore, states that need capital will establish measures favoring commercial expansion. On the other hand, large foreign entities directly or indirectly may threaten the power structure of the receiving country. In this case, the threatened country will intervene, subjecting the entities to regulations that ensure the protection of particular state goals.

Because each country autonomously organizes its commercial-law system, there are different ways in which each state may treat a foreign commercial company. One possibility is that the receiving country may refuse to recognize the foreign commercial company and demand the establishment of a new one in its place, conforming the commercial company to the receiving country's local norms of commercial law. These local norms would be entirely and exclusively applicable. Such a territorial solution would go against commercial and legal traffic. Nevertheless, vestiges of this type of regulation are found within comparative law for activities in certain strategic areas.

On the contrary, a receiving country may demand that the foreign commercial company conduct itself solely in conformance with the foreign legal rules under which the commercial company was formed. The law of the receiving country would not contain a "defense rule" to subordinate and make possible regulation of some aspects of the commercial company's activities. While the first scenario opposes the free circulation of goods and wealth, the second leaves the receiving country with foreign commercial companies that could establish themselves with minimal prerequisites. In evaluating these two possibilities, it must be understood that every country's legal system, when extending or restricting the rights of foreign commercial companies, demonstrates that country's adopted commercial and economic policies. In its commercial laws, each country projects its fundamental principles of political, economic, and social order.

### *III. INTERNATIONAL CORPORATE LAW*

A legal system involves different levels of regulation: national, international, and supranational. In other words, a legal system is composed of internally rooted norms, internationally rooted norms, and norms emanating from supranational bodies. First, we consider the norms derived from supranational bodies.

Argentina is currently part of a process of integration called Mercosur.<sup>8</sup> Leaving aside the intergovernmental nature of the decision-making organs of Mercosur,<sup>9</sup> the truth is that, up to this date, Mercosur has not produced any laws attempting to regulate commercial matters. As a result, the application of commercial laws in force in Argentina does not vary substantially in a national or international commercial case.

Next, from an international perspective, three members of Mercosur — Argentina, Uruguay, and Paraguay — are parties to the Treaty on International Commercial Law of Montevideo (1940).<sup>10</sup> In addition, these three countries, as well as Brazil, ratified the text of the “Convencion Interamericana sobre Conflicto de Leyes en Materia de Sociedades Mercantiles” (Inter-American Convention on Conflicts of Laws Concerning Commercial Companies) [Convention on Commercial Companies].<sup>11</sup>

Considering that the Argentinean commercial system is based on the performance of norms, it becomes necessary to spend some time analyzing the sources of these norms and their scope of application.

#### IV. RELATIONSHIPS AMONG DIFFERENT LEGAL SYSTEMS

Taking into account the pre-eminence of international law over internal law in certain situations, we must examine the scope of application of international treaties to which a country has subscribed. Only when a situation does not fall within any of

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8. Mercosur is a “Spanish acronym for ‘market of the south.’” Hunter R. Clark & Amanda Velazquez, *Foreign Direct Investment in Latin America: Nicaragua: A Case Study*, 16 Am. U. Intl. L. Rev. 743, 750 (2001). Mercosur “comprises South America’s main trading bloc (Argentina, Brazil, Paraguay, Uruguay, and associate members Bolivia and Chile).” *Id.* at 750–751. Further, “[i]f Mercosur were a single country, it would be the world’s second in land mass with 7 million square miles, fourth in population with 190 million people, and seventh in gross domestic product (“GDP”) with \$746 billion.” *Id.* at 751.

9. Article 2 of Mercosur states, “The following are inter-governmental organs with decision-making powers: The Council of the Common Market, the Common Market Group and The Mercosul Trade Commission.” SICE (Foreign Trade Info. Sys.), *Southern Common Market: Protocol of Ouro Preto* <<http://www.sice.oas.org>> (Dec. 17, 1994).

10. J. Irizarry y Puente, *Treaties of Private International Law*, 37 Am. J. Intl. L. Supp. 95, 97 (1943).

11. *Second Inter-American Specialties Conference on Private International Law (CIDIP II)*, 18 I.L.M. 1211, 1213 (1979). For the text of the *Convencion Americana sobre Conflicto de Leyes en Materia Societaria*, see the Inter-American Convention on Conflicts of Laws Concerning Commercial Companies, May 8, 1979, 18 I.L.M. 1211, 1222–1224 [hereinafter Convention on Commercial Companies].

the current treaties should we apply solutions based on internal law sources. This is a result of the legal modifications the Vienna Convention on the Law of Treaties (1969) introduced into the Argentinean system in 1970.<sup>12</sup> This convention sets forth, in article 26, the international law principle *pacta sunt servanda*, which provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>13</sup> Article 27 complements this provision by placing the international regulation above that of internal regulation, and states, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>14</sup>

This later provision has been accepted by the Argentinean Supreme Court, which, referring to article 27, said,

[T]he necessity of application of this article imposes on the Argentinean state organs — once the principles of constitutional law are secured — the burden of giving pre-eminence to the treaties in case they are in conflict with any internal regulation. This conclusion is in accordance with the modern exigencies of international cooperation, harmonization and integration of the República Argentina and eliminates the eventual liability of the state for acts of its internal organs.

Identical reasoning was expressed in the cases *Cafés La Virginia S.A. s/Apelación por denegación de repetición del 13/10/1994*,<sup>15</sup> *Hagelin, Regmer c/Poder Ejecutivo Nacional s/juicio de conocimiento*, and *Ekmekdjian, Miguel Angel c/Sofovich, Gerardo y otros*,<sup>16</sup> consistent with the provisions of the Vienna Convention on the Law of Treaties (1969).

In conclusion, the private international law from internal sources will be applied only when no international treaty regarding that subject exists. If such a treaty does exist, its norms will prevail over the law of internal sources. Consequently, it is necessary to define the scope of application of international treaties.

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12. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679.

13. *Id.* art. 26, at 690.

14. *Id.* art. 27, at 690.

15. *Cafés La Virginia S.A.*, CSJN [1995-A], 277.

16. *Ekmekdjian, Miguel A.C. Sofovich, Gerardo y otros*, CSJN [1992-C], 543.



### V. TREATIES' SCOPE OF APPLICATION

The question of scope basically refers to the question of the place where the convention's provisions are applied.<sup>17</sup> The question of scope also involves exploring who applies these provisions (active territorial scope) and to which cases (passive territorial scope).

The administrative or judicial authorities of the state party to the treaty apply the provisions of the treaty. In reference to the question of in which cases the provisions will be applied, a new distinction is necessary. We must differentiate between common and universal treaties. Universal treaties, once they have been ratified, must be applied to every case without regard to which countries have ratified the treaty. Therefore, integrating the provisions of a universal treaty with a legal system entails displacing the internal rules that regulate the same subject matter as the international convention. A common treaty, on the other hand, applies only to cases originating in the countries that have ratified the convention. In this situation, the internal rules are not displaced, and the domestic legal solutions are applied to cases that come from countries that are not linked to the treaty.

The territorial limits of a treaty's application must be defined in conjunction with the stipulations already included in the treaty. Examining the scope of application does not solve the problem, as there are diverse relationships between the different legal systems related to a specific subject that must be explained. These diverse relationships raise the dilemma of describing the relationships between the numerous treaties about the same subject that a state may have ratified.

### VI. THE COMMERCIAL QUESTION IN COMPARATIVE LAW

The existence of the commercial company is subject to the fulfilment of the receiving country's formal and substantial requirements. This comparative law matter can be summarized in two

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17. Some treaties will define a geographic scope. For example, Article 4 of the Treaty for the Prohibition of Nuclear Weapons in Latin America defines its geographical scope as encompassing the land south of Mexico and excluding any territory of the United States or its territorial waters. *Treaty for the Prohibition of Nuclear Weapons in Latin America: Its Status and the Status of Additional Protocols I and II*, 28 I.L.M. 1400 (1989) (introductory note by Carol M. Schwab).

positions: the so-called thesis of the incorporation and the so-called thesis of the place of business.

For the thesis of incorporation — utilized in the United States and Great Britain — the commercial company is domiciled in the place where it registers. The law in force is the place of incorporation, no matter where the administration or the decision-making organs are located. The main consequence of this thesis is that a commercial company may change the location of its administration — its place of business — without modifying the applicable law.

The second standpoint is reflected in the majority of legislations in European countries. The archetype is French law. According to this position, the place of registration and the localization of the real place of business determine the law in force. The corollary is that a change in the place of business affects the *lex societatis* and threatens the existence of the corporation.

Although in the internal ambit the commercial laws are self-sufficient to rule the constitution and activity of commercial companies, in the international field, there are obstacles to recognizing the existence of commercial companies established in foreign countries and their capacity to trade internationally. The solution to this obstacle cannot be derived from just one legal system, but instead, the solution must be derived from the legislation of the place of constitution and the places where the commercial company expects to deal.

Subjecting the existence of a commercial company created abroad to the requirements of the private law of the receiving country that recognizes it may mean, in many cases, denying the personality of the commercial company when it comes from a country with laxer criteria. This might be the case when a commercial company comes from a country that adopts the thesis of incorporation but does business in a country that utilizes the thesis of place of business, and therefore, does not exist as an entity in that country. This dichotomy may cause severe consequences for the shareholder of a commercial company, such as shareholders' unlimited liability or the possibility of shareholders asking for the dissolution of the company at anytime.

VII. COMMERCIAL LAW IN THE COUNTRIES  
OF MERCOSUR

A. Brazil

The Federal Republic of Brazil regulates commercial companies and, specifically, anonymous corporations in Law Number 6.404.<sup>18</sup> Limited companies are regulated in Law Number 3708.<sup>19</sup> The legislation controlling limited companies is old and, consequently, requires complementary and supplementary rules to adapt its provisions to modern commercial exigencies. For that reason, Law Number 6.404 and, less frequently, the Commercial Code are applied as complementary or supplementary rules. Decree Law Number 2.627, from Articles 64 to 73, sets forth the procedures to establish a branch or subsidiary of a foreign company in Brazil.<sup>20</sup>

Before August 15, 1995, when Brazil's Constitution was amended, Article 171 of the Constitution stated that "a Brazilian company is one organized under the laws of Brazil and that has its headquarters and management in the country."<sup>21</sup> The commercial company established abroad is governed by the law of the place of its constitution, but if it wants to enjoy the benefits of the local laws of Brazil, it must situate its place of business in Brazil and establish itself in accordance with Brazilian legislation.

Now, this constitutional provision has been abrogated.<sup>22</sup> The current criterion in force provides that the company is subject to the law of the place of constitution. To perform isolated acts of business in Brazil, the foreign society is not required to do anything. Its mere existence in accordance with the law of the country of constitution is enough to carry out single acts of business and be on trial in Brazil. However, to carry out acts included in its social object either by locating its place of business in Brazil or

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18. Law No. 6.404, de 15 de diciembre de 1976 (Dec. 15, 1976).

19. Decree No. 3708, de 10 de enero de 1919 (Jan. 10, 1919).

20. Decree No. 2.627, de 26 de septiembre de 1940 (Sep. 26, 1940). "The setting up of a foreign branch to operate in Brazil is [also] subject to the . . . [n]ormative ruling DNRC No. 81 of 5 January 1999." Trade Partners UK, *Brazil, Setting Up* <[www.tradepartners.gov.uk/brazil/settingup/09\\_settingup/investments.shtml](http://www.tradepartners.gov.uk/brazil/settingup/09_settingup/investments.shtml)> (accessed Jan. 29, 2003).

21. Keith S. Rosenn, *Constitutions of the Countries of the World: Federal Republic of Brazil* 116 n. 152 (Gisbert H. Flanz ed., Oceana Publications, Inc. 2002).

22. *Id.* (The Constitution of Brazil was amended on August 15, 1995 to "revoke" Article 171).

with the help of a national branch, subsidiary, agency, or representation in Brazil, Brazilian law demands the authorization of the federal government. The company that locates its place of business in Brazil must fulfill all of the formal and substantial requisites set forth in the Brazilian law for companies established in Brazil.

Article 64 of Decree Law Number 2.627 clearly enunciates that a corporation that wishes to establish a national branch, agency, or representation in Brazil must

- prove that it has been regularly constituted in accordance with the law of the country of constitution;
- present its complete statutes (articles of incorporation and bylaws);
- present a list of shareholders;
- present the record of the assembly that authorized the constitution of the branch or agency;
- present the last balance sheet;
- designate the person who will represent the company for the purpose of liability (this person does not need to be a Brazilian citizen but must reside in Brazil and be invested with the power to bind the commercial company); and
- indicate the amount of capital assigned for the functioning of the company.<sup>23</sup>

The governmental authorization requires approval by presidential decree.

Once the requirements have been met, the company must be registered in the Register of Commerce. This public organ will ensure the requirements are fulfilled and that no clauses contravene principles of public order, morals, or good customs. Within thirty days, the registration is published in the official bulletin and a copy is stored in the Junta Comercial. This process of approval and registration obviously generates a restriction contrary to the spirit of integration because it subjects the establishment of branches, agencies, or representations of a commercial company to an arbitrary act of the Brazilian authority, which is able to deny authorization without reasonable justification.

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23. Decree No. 2.627, art. 64.

### B. Paraguay

The Republic of Paraguay has promulgated a Civil Code based on the Argentinean text. This code, dated 1986, is the law that rules corporate matters. When determining the law governing commercial companies, the influence of the Montevideo Treaty cannot be ignored. Paraguayan law subjects the existence and capacity of commercial companies constituted abroad to the law of the domicile. The Paraguayan Civil Code acknowledges the capacity of commercial companies to act and defend their rights in the country as long as these acts are not habitual. If the acts are habitual, the company must fulfil certain requirements.

Articles 1196 and 1197 of Paraguay's Commercial Code provide that branches, agencies, or representations of foreign commercial companies constituted in the Republic are considered to be domiciled in it, and consequently, subject to the provisions of Paraguayan law for that type of corporation.<sup>24</sup>

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24. Para. Cód. Com. arts. 1196 & 1197. Article 1196 of the Paraguay Commercial Code provides as follows:

Companies established abroad shall be governed by the laws of the county of their domicile, insofar as their existence and capacity is concerned.

The status by which they are inspected shall fully enable them to exercise the actions and maintain the rights which correspond to them in the Republic.

They shall also be adjusted to the prescriptions established in the Republic for the normal exercise of the acts included in the special object of their institution.

Companies established abroad shall have their domicile in the place where the principal seat of their business lies. The establishments, agencies or branches constituted in the Republic shall be considered domiciled therein insofar as concerns the acts which are carried out therein, duly complying with the obligations and formalities provided for the type of company most similar to that of their constitution.

*Id.* art. 1196 (reprinted in English in *Commercial Laws of the World: Paraguay* 71 (Foreign Tax Law, Inc. 1995) [hereinafter *Paraguay Commercial Laws*]). Article 1197 of the Paraguay Commercial Code states as follows:

For the purposes of fulfilling the formalities mentioned above, every company formed abroad which desires to carry out its activity in the national territory must:

- (a) establish a representation with a domicile in the county, in addition to the particular domiciles which result from other legal causes;
- (b) accredit that the company has been formed in agreement with the laws of its country; and
- (c) justify in like manner, the resolution or decision to create the branch or representation, the capital which has been assigned to it, as the case may be, and the appointment of the representatives.

*Id.* art. 1197 (reprinted in English in *Paraguay Commercial Laws, supra*).

Similar to Brazilian law, Paraguayan law demands evidence of

- the corporation's constitution in accordance with the law of its country of origin;
- the amount of assigned capital;
- the agreement that resolved to create the branch, agency, or representation; and
- the designation of its representatives.

The Civil Code does not provide any requirements related to the principal object, but refers to a commercial company that transfers its place of business to the Paraguayan territory.<sup>25</sup> These companies are subject to the Paraguayan regulation under Articles 1196 and 1199.<sup>26</sup> However, the transfer of a Paraguayan company abroad is not a cause for dissolution.<sup>27</sup>

### C. Uruguay

In the Republic of Uruguay, the corporate matters are regulated by Law Number 16.060, whose terms are similar to the ones of Argentinean law.<sup>28</sup> Article 192 provides that the law of the place of constitution regulates foreign commercial companies.<sup>29</sup> This provision is identical to Argentinean law and coincides with the Convention on Commercial Companies.<sup>30</sup> Article 192 also at-

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25. Para. Cód. Com. arts. 1196 & 1199.

26. *Id.* Article 1199 of Paraguay's Commercial Code states as follows:

A company constituted in abroad that has its domicile in the Republic, or whose principle object is intended to be fulfilled therein, shall be considered as a local company for the purposes of compliance with the formalities of constitution, or of its reform and audit, as the case may be.

*Id.* art. 1199 (reprinted in English in *Paraguay Commercial Laws*, *supra* n. 24).

27. *Id.* arts. 1003 & 1004. Article 1003 of the Paraguay Commercial Code, "Causes," enumerates the circumstances that will extinguish the life of a corporation. *Id.* art. 1003. This list does not include reincorporating in another nation. *Id.* Article 1004 of the Paraguay Commercial Code dictates that "[t]he company may be dissolved upon the request of any of the partners." *Id.* art. 1004.

28. Uruguay Law No. 16.060 of November 1, 1989.

29. *Id.* art. 192.

30. Arg. Cód. Com. art. 118 (reprinted in English in *Commercial Laws of the World: Argentina* 60 (Foreign Tax Law, Inc. 1998) [hereinafter *Argentina Commercial Laws*]) (providing, "A company constituted abroad is governed, as far as its existence and form, by the laws of its place of constitution"); *Convention on Commercial Companies*, *supra* n. 11, at 1222 (providing that "[t]he existence, capacity, operation and dissolution of commercial companies shall be governed by the law of the place where they are constituted").

tests that the place of constitution is the guiding law unless it is contrary to the international public order of the Republic.<sup>31</sup>

Uruguayan corporate law also provides that companies constituted abroad do not have to be registered to perform isolated acts or to be on trial in Uruguay, but it demands proof of the corporation's existence and the capacity of the representative to bind it for the representative's isolated acts or actions on behalf of the corporation. However, to trade habitually by establishing branches, agencies, or representations, Uruguayan law requires

- the registration of the contract that gave birth to the corporation (the evidence of its mere existence is not enough, the registration is needed);
- the registration of the resolution of the company to establish a branch, agency, or representation in the country;
- the mention of domicile in Uruguay;
- the registration of the designation of the representatives or administrators; and
- the determination of the amount of capital if applicable by special law.

Once the registration is complete, it must be published, if applicable, according to the type of commercial company. Limited companies and anonymous corporations necessitate publication in the Official Diary of an extract containing the most relevant data. This publication must be done sixty days after the registration in the Registro Público de Comercio (Public Register of Commerce).

Article 194 states that commercial companies must have a separate register of accounts and be submitted to state control.<sup>32</sup> Article 198 contains a rule, analogous with Article 124 of Argentina Law Number 19.550, that subjects the company with its place of business or object in the Republic to Uruguayan legislation, even though the company has been constituted abroad.<sup>33</sup> For the attainment of personality, Article 198 also contains requirements oriented to the principle of the domicile or place of busi-

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31. Uruguay Law No. 16.060, art. 192, D.O. 1° nov/989-N° 22977.

32. *Id.* art. 194. Article 120 of Argentina Law Number 19.550 contains a similar requirement. *Infra* n. 115 and accompanying text.

33. Uruguay Law No. 16.060, art. 192. Article 124 of Argentina Law Number 19.550, as stated, contains a similar requirement. *Infra* n. 90 (containing the text of article 124).

ness.<sup>34</sup> On the other hand, the adoption of a system based on the thesis of the place of constitution is reinforced because the transfer of the corporation's domicile or place of business abroad is not considered to be a cause of dissolution for an Uruguayan corporation.

## VII. ARGENTINEAN PRIVATE INTERNATIONAL CORPORATE LAW

### A. International Treaties

Argentina has signed and ratified the following three international treaties related to commercial companies:

- (1) *Tratado de Derecho Comercial Internacional de Montevideo de 1889* (TM89) (Treaty on International Commercial Law, Montevideo, 1889)<sup>35</sup> (also ratified by Bolivia, Colombia, Uruguay, Peru and Paraguay);
- (2) *Tratado de Derecho Comercial Terrestre Internacional de 1940* (TM40) (Treaty on International Commercial Terrestrial Law, Montevideo, 1940)<sup>36</sup> (also ratified by Uruguay and Paraguay); and
- (3) *Covención Interamericana sobre Conflictos de Leyes en Materia de Sociedades Mercantiles* (Convention on Commercial Companies) (also ratified by Guatemala, Mexico, Paraguay, Brazil, Peru, Uruguay and Venezuela).<sup>37</sup>

In the case of the treaties of Montevideo, the conflict arising from the application of them in each country is solved in Article 55 of TM40, which states that TM89 is abrogated in those countries that have ratified TM40.<sup>38</sup> The problem, however, is determining the scope of application when TM89 and TM40 are in conflict with the Convention on Commercial Companies.

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34. Uruguay Law No. 16.060, art. 198.

35. For the text of *Tratado de Derecho Comercial Internacional de Montevideo de 1889* (TM89), see El Secretario Juridico, *Leg. 3192-Aprobacion de los Tratados de Montevideo de 1889* <<http://www.secretjurid.ww5.50megs.com/leyes/3192.htm>> (accessed Apr. 6, 2003) [hereinafter TM89].

36. For the text of *Tratado de Derecho Comercial Terrestre Internacional de 1940* (TM40) see El Secretario Juridico, *Tratado de Derecho Comercial Terrestre Internacional* <[http://www.secretariojuridico.com.ar/leyes/lyscom/dl7771\\_56\\_com.htm](http://www.secretariojuridico.com.ar/leyes/lyscom/dl7771_56_com.htm)> (accessed Apr. 6, 2003) [hereinafter TM40].

37. Convention on Commercial Companies, *supra* n. 11, at 1222–1224.

38. TM40, *supra* n 36, at art. 55.



To solve this problem, it is necessary to observe the laws set forth in the Vienna Convention on the Law of Treaties.<sup>39</sup> Among Uruguay, Paraguay, and Argentina, the Convention on Commercial Companies must be applied. Only when there are either no other rules or when the rules are compatible with the Convention on Commercial Companies provisions can TM40 be applied.<sup>40</sup> Regarding Peru, which also has ratified the Convention on Commercial Companies, the result is exactly the same, but with regard to TM89, not TM40.

*1. Treaty on International Commercial Law of Montevideo, 1889 (TM89)*

TM89 adopts, in Articles 4 and 5, the thesis of the domicile of the corporation.<sup>41</sup> In constructing TM89, it was decided that the law of the country where the basic elements of a company were originated and perfected was the most appropriate to regulate the existence and capacity of a corporation. Article 4 provides that the relationships between the shareholders and the company and third persons, as well as the form of the contract which gives birth to the company, are subject to the law of the corporation's domicile.<sup>42</sup> This includes the requirements of publication and registration, the validity of the form chosen for the corporation and

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39. The Vienna Convention on the Law of Treaties, Article 30, states as follows:
1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
  2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
  3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
  4. When the parties to the later treaty do not include all the parties to the earlier one:
    - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
    - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Vienna Convention on the Law of Treaties, *supra* n. 12, at 691.

40. *Id.*

41. TM89, *supra* n. 35, at arts. 4, 5.

42. *Id.* at art. 4.

its *ad solemnitatem* or *ad probationem* character, and finally, the consequences of failing to accomplish the formal requirements the law demands.

Regarding the generic capacity of the commercial company, Article 5 utilizes the “connection of the domicile” without having any preference for the legal or commercial domicile.<sup>43</sup> In contrast, Article 4 identifies the law applicable to the form of the contract,<sup>44</sup> and Article 7 determines the jurisdiction of the forum, taking into account the legal domicile.<sup>45</sup>

TM89 also establishes, in Article 4, that the companies will be recognized *ipso jure* in other contracting states so that the companies will be able to exercise their civil rights and enforce them with the help of courts.<sup>46</sup> But for isolated acts included in its object, they will be subject to the legislation of the state in which they want to act.<sup>47</sup> Article 4 refers to acts in the plural.<sup>48</sup> Thus, it may be inferred that just one act of the ones included in its object will not subject the commercial company to the internal regulation. The obligation of the foreign commercial company of accomplishing diverse formalities in order to perform acts included in its object is intended to protect persons who want to enter into a contract with the commercial company.

However, if performing an act included in the commercial company’s object implies compelling the foreign company to fulfil all the requirements of internal legislation, this type of legal requirement may be too rigid, as it does not consider the needs of international commerce. But even if habitual acts were required to justify the application of the local law, too many questions would still be unanswered because the treaty provides no standard for delimiting such a vague notion. TM89 also regulates expressly the establishment of a branch or agency, subjecting such to the law of the state where it functions.<sup>49</sup>

Concerning the regulation of the matter of international jurisdiction, TM89 provides that for conflicts of an internal nature

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43. *Id.* at art. 5.

44. *Id.* at art. 4.

45. *Id.* at art. 7.

46. *Id.* at art. 4.

47. *Id.*

48. *Id.*

49. *Id.* at art. 6.

(i.e., between the shareholders and between the shareholders and the commercial company), the governing jurisdiction corresponds to the legal domicile of the commercial company.<sup>50</sup> As for conflicts with third persons, TM89 provides that there is concurrent jurisdiction between the courts of the legal domicile of the company and the courts of the place where the acts that originated the conflict were performed or must have been performed.<sup>51</sup> The claimant has the right to choose.<sup>52</sup>

Finally, with respect to acts that agencies or branches carry out, Article 6 establishes the jurisdiction of the local authorities, i.e., the courts of the place where they function.<sup>53</sup>

2. *Treaty on International Commercial Terrestrial Law,  
Montevideo, 1940 (TM40)*

TM40 also adopts the criterion of the domicile as a legally relevant connection for the regulation of commercial companies.<sup>54</sup> The definition of commercial domicile, which was absent from TM89, was included in TM40 as the place where the company has its principal place of business.<sup>55</sup> This enunciation, in Article 3, was severely criticized because, according to the records of the II South American Congress, the superiority of the criterion of the *siège*, or place of residence, was clearly noticeable.

The adoption of the principle of the domicile is reflected in Article 6.<sup>56</sup> The systematic interpretation of this article in relation to Articles 7 and 8 allows the conclusion that commercial companies, the contents of the contract of establishment, the quality of this document, the relationships among the shareholders, and the relationships between the shareholders, third persons, and the commercial company are regulated by the law of the commercial domicile of the company.<sup>57</sup> Article 6 also provides that the form of the contract is subject to the law of the place to where it was

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50. *Id.* at tit. XIV.

51. *Id.*

52. *Id.*

53. *Id.* at art. 6.

54. TM40, *supra* n. 36, at art. 3.

55. *Id.*

56. *Id.* at art. 6.

57. *Id.* at arts. 6, 7, 8.

agreed and that the legislation of each state governs the formalities of publicity.<sup>58</sup>

The regulation of certain aspects of the international activity of commercial companies complement the treaties of Montevideo. TM40, like TM89, sets forth the principle of recognition *ipso jure* of the capacity of the company to perform isolated acts and to be on trial.<sup>59</sup> For the habitual performance of acts included in their object in a country that is not the country in which they were recognized, a corporation is subject to the law of the country in which the corporation wishes to act.<sup>60</sup> Branches and agencies are considered to be domiciled in the country where they function.<sup>61</sup> The treaty also declares that the courts of the domicile of the corporation, i.e., the judges of its place of business, have jurisdiction to hear claims.<sup>62</sup>

3. *Inter-American Convention on Conflicts of Laws Concerning Commercial Companies (Approved at the CIDIP II Conference)*

This Convention may not have the tradition of the treaties of Montevideo, but it does have the advantage of being the only international document that links the totality of the members of Mercosur. Argentina ratified the convention on December 1, 1983,<sup>63</sup> Uruguay on May 15, 1980,<sup>64</sup> Paraguay on August 16, 1985,<sup>65</sup> and Brazil in January 1995.<sup>66</sup> Guatemala, Mexico, Peru and Venezuela are also parties to this Convention.<sup>67</sup>

The majority of the rules of the Convention on Commercial Companies are indirect: they unite the criteria to choose the law that will govern a corporation, i.e., the rules that determine which law is applicable, but not the actual legislation itself.<sup>68</sup> Article 1 of the convention regulates the territorial and material scope of application and provides that it shall apply to commercial compa-

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58. *Id.* at art. 6.

59. *Id.* at arts. 8, 11.

60. *Id.* at art. 8.

61. *Id.* at art. 3.

62. *Id.* at art. 11.

63. Org. Am. Sts., *Inter-American Convention on Conflicts of Laws Concerning Commercial Companies* <<http://www.oas.org/juridico/english/Sigs/b-40.html>> (2002).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Convention on Commercial Companies, *supra* n. 11.

nies within any of the state parties.<sup>69</sup> This means that the treaty does not cover civil companies or associations, foundations, and other types of contracts of association. Article 2 establishes that the commercial companies are subject to the law of the place of constitution regarding the matters of existence, capacity, operation, and dissolution.<sup>70</sup> Hence, all phases of the life of a company are regulated by the legislation of the place of constitution, which is then transformed in the personal law of the company.

The Convention on Commercial Companies was written taking into account the different legal systems of the state members of the Organization of American States (OAS), and thus reflects various criteria with an emphasis on the principle of the domicile or place of business (European continental system) and of the principle of the incorporation (Anglo-Saxon system).<sup>71</sup> The convention does not adopt either of those principles but adopts both systems by choosing the principle of the “place of constitution” in the second part of Article 2, defined as the place where the formal and substantial requirements for the establishment of commercial companies are fulfilled.<sup>72</sup> If we consider the diversity of legislation of all the state parties to the Convention on Commercial Companies, this autonomous definition has enough generic elements to embrace all the legal systems, both the ones that utilize the principle of the domicile and the ones that utilize the principle of constitution. Thus, the Convention offers a harmonizing solution.

Because article 2 provides that the place of constitution regulates the existence, capacity, operation, and dissolution of a commercial company, the legislation of the various members determines the consequences of failing to meet the formal requisites of existence, capacity, operation, and dissolution.<sup>73</sup> These same laws also determine if the tardy fulfilment of these requirements transforms the commercial company into a regular company and under what conditions this could happen. Thus, the law of the place of

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69. *Id.* at art. 1.

70. *Id.* at art. 2.

71. *See id.* at art. 2 (stating that “[t]he existence, capacity, operation and dissolution of commercial companies shall be governed by the law of the place where they are constituted”); *id.* at art. 4 (stating that “[f]or the direct and indirect performance of the acts incident to their purpose, commercial companies shall be subject to the law of the State in which they perform them”).

72. *Id.*

73. *Id.*

constitution will determine whether the failure to observe the formal requisites permit the foundation of an irregular society or whether, on the contrary, this lack of fulfilment prevents the creation of an irregular entity. The matters regarding publicity and registration, as well as their effects, are also integrated into the formal question.

The law of the place of constitution, at first glance, regulates proof of constitution of the corporation.<sup>74</sup> The Convention on Commercial Companies, as well as the treaties of Montevideo, adopted this rule,<sup>75</sup> which is a result of the necessary compatibility of the law that governs the constitution of a corporation with the admissibility of the different methods for proving the constitution.

As in all the conventions that have emerged from the CIDIP II Conference, the Convention on Commercial Companies includes an express reservation regarding the inapplicability of foreign law when it violates the public policy of a member state.<sup>76</sup>

Article 3 establishes that commercial companies that are properly constituted in a state will be recognised *ipso jure* in other contracting states, but allows the receiving state to ask for proof of the commercial companies' existence in accordance with the law of the place of their constitution, i.e., the commercial companies must provide the authorities of the state in which they expect to be recognized with the documents of their constitution.<sup>77</sup> The recognized capacity of the commercial company constituted abroad is not limited by Article 3, however, because the foreign corporation cannot have more capacity than local commercial companies.<sup>78</sup> This limited capacity avoids preferences that could be detrimental for local companies. Accordingly, this makes the

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74. *Id.* at art. 3.

75. *Id.*; TM40, *supra* n. 36, at art. 2; TM89, *supra* n. 35, at art. 4.

76. Convention on Commercial Companies, *supra* n. 11, at art. 7. Article 7 states, "The law declared applicable under this Convention may be refused application in the territory of any State that considers it manifestly contrary to its public policy (order public)." *Id.*

77. *Id.* at art. 3. Article 3 states, "Commercial companies duly constituted in one State shall be recognized as of course in the other States." *Id.* Article 3 continues, in the next paragraph, "Recognition as of course does not preclude the power of the State in which it is sought to require proof of existence of commercial companies in accordance with the law of the place where they were constituted." *Id.*

78. *Id.* "In no case may the recognized capacity of commercial companies constituted in one State be greater than the capacity granted by the law of the State of recognition to commercial companies constituted under the law of that State." *Id.*

national control organs compare the laws of the country of constitution and of functioning with the laws of the receiving state. In states with a federal structure, it will be necessary to elaborate uniform criteria to harmonize the operation of the system. The absence of this internal harmony will prevent the true integration of international rules.

Article 4 subjects the foreign company to the laws of the states in which the company will perform habitual acts included in its object, either directly or indirectly.<sup>79</sup> The terminology utilized, however, is not clear enough. A reasonable conclusion would be that the expression "direct performance" refers to those acts the corporation carries out *per se*, i.e., without the collaboration of other persons (transferring the place of business or establishing branches). Accordingly, "indirect performance" would be that carried out with the help of third persons (representatives, agents, or subsidiaries). In either case, the corporation is subject to the rules of the legislation of the country in which the corporation wishes to act.<sup>80</sup>

Article 5 regulates the transfer of the effective location of the central administration of the commercial company.<sup>81</sup> In the case of such a transfer, the receiving state is entitled to demand that the commercial company meet the requirements of the local legislation of the country to which the commercial company transfers its headquarters.<sup>82</sup> The entitlement of the country to demand such is discretionary, not mandatory.<sup>83</sup> The law of the state to which the place of business has been transferred provides the requirements for a change in the place of business and inobservance of such requirements. These requirements may imply the necessity of reestablishment of the commercial company, and, consequently, it obliges us to consider the effects of the transfer of the place of business during the time the commercial company is not yet reestablished. The solution will have to be sought in national legal

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79. *Id.* at art. 4. Article 4 states, in relevant part, "For the direct and indirect performance of the acts incident to their purpose, commercial companies shall be subject to the law of the State in which they perform them." *Id.*

80. *Id.*

81. *Id.* at art. 5.

82. *Id.* "Companies constituted in one State that intend to establish the real headquarters of their central administration in another State *may* be required to fulfill the requirements established in the laws of that State." *Id.* (emphasis added).

83. *Id.*

systems, for there are no provisions for cases like this in the Convention on Commercial Companies.

Finally, the acts directly or indirectly performed in accordance with the corporate object of the company constituted abroad are subject to the jurisdiction of the courts in the receiving state, the state where the commercial company performs the acts.<sup>84</sup>

### B. Private International Law of Internal Source

Within the Argentinean legal system, the rules contained in Section XV, Chapter I of the Law Number 19.550 must be taken into account.<sup>85</sup> In contrast with Brazil or Chile, Argentina regulates the entire corporate matter in one law that embraces all the possible corporate commercial types.

#### 1. *Personal Statute of the Society: Applicable Law*

The general rule for identifying the *lex societatis* is contained in the first part of Article 118, which provides that the existence and form of the commercial company constituted abroad is subject to the law of the place of its constitution.<sup>86</sup> Article 118 is the rule that identifies the point of connection with the country whose law is declared applicable to the case.<sup>87</sup>

Argentinean law utilizes the same criteria as the Convention on Commercial Companies. However, the convention has a more analytic formulation because it refers to the existence, capacity, functioning, and dissolution of a commercial company,<sup>88</sup> while Article 118 merely mentions existence and form.<sup>89</sup> The expression "capacity" did appear in Argentinean law in Article 114 of the Law Project that now is Article 118. The exclusion of capacity from current Article 118 was not complemented by other provisions that regulate capacity. Thus, the determination of the ca-

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84. *Id.* at art. 6. "For the performance of acts directly or indirectly incident to their purpose commercial companies constituted in one State shall be subject to the judicial or administrative authorities of the State where they perform such acts." *Id.*

85. Arg. Law No. 19.550 (available in Spanish in *Doing Business in Argentina*, *supra* n. 2, at app. C).

86. *Id.* at ch. I, § XV, art. 118.

87. *Id.*

88. Convention on Commercial Companies, *supra* n. 11, at art. 2.

89. Arg. Law No. 19.550, ch. I, § XV, art. 118. Article 118 states that "[a] corporation established abroad shall be governed, with regards to its existence and form, by the laws of the place of establishment." *Id.* (translated from Spanish to English).



capacity of a commercial company with the Argentinean legal text causes problems that cannot be ignored. The need for integration of this lack of regulation of capacity made Justice Antonio Boggiano of the Supreme Court of Argentina suggest the direct application of Article 124.<sup>90</sup> Consequently, if the commercial company constituted abroad has its place of business or place of exclusive operation in Argentina, Argentinean law governs the capacity of the commercial company.<sup>91</sup>

In the case of a commercial company constituted abroad that neither has its place of business nor its place of exclusive operation in Argentina, the applicable rule is in the first part of Article 118, which states that these commercial companies are regulated by the law of the place of constitution.<sup>92</sup> But a commercial company could not be established without fulfilling the formal and substantial requirements of the country in which the constitution is perfected by incorporation or registration. Therefore, it is necessary to accomplish all the requisites to be considered as an entity with its own personality. No country will consider the commercial company a legal person if it does not meet the legal requirements to exist as a corporation. It is important to know whether, once the legal conditions are fulfilled, other legislation independent from the law of the place of constitution — for example, the law of the place of business or principal place of exploitation — regulates the substantial requirements of the act of constitution and the capacity of the commercial company.

If in Article 118, the “existence” of the commercial company is regulated by the law of the place of constitution, the act of constitution, i.e., its formal and substantial requisites, must be subject to the law that governs the existence of the commercial company. Thus, this law regulates the object of the commercial company because the object is a substantial requisite to the extent the corporate object is the measure of the capacity of the commercial company to perform acts. The obvious conclusion is that the law

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90. Article 124 states that  
[a] corporation established abroad that has its seat of authority in the Republic or whose principle purpose is to be accomplished in the same, shall be considered as a local corporation with regards to its assets, compliance with formalities of establishment, or reform and auditing of performance.

*Id.* at art. 124 (translated from Spanish to English).

91. *Id.*

92. *Id.* at art. 118.

of the place of constitution also governs this matter. The corporate law does not contain any contrary rule and, as a result, the law of the place of constitution regulates the entire act of constitution of the commercial company, its existence or legal personality, and its capacity to perform acts. Hence, it is necessary to ask for the meaning of the expression "place of constitution" because it determines the applicable law.

In contrast with the Convention on Commercial Companies, Argentinean law does not have an autonomous definition of "the place of constitution." The definition of the place of constitution as the place where the society becomes a legal person (acquires legal personality) is a doctrinal construction. An ample definition of the place of constitution, as the place where the company becomes a legal person, requires clarifying this concept in order to contemplate the specific exigencies of the law of the place where the legal personality is acquired. In this sense, the doctrinal construction has defined the place of constitution as the country where the entity has accomplished the legal formalities required to obtain the recognition of the commercial company's legal personality or as the country where the commercial company has been automatically recognized as the result of a previous private act.

a. Commercial Companies Constituted Abroad with  
Object or Place of Business in Argentina

Article 124 states that

a commercial company established abroad that has its seat of authority in the Republic *or* whose principle purpose is to be accomplished in the same, shall be considered a local commercial corporation with regards to its assets, compliance with formalities of establishment, or reform and auditing of performance.<sup>93</sup>

The utilization of the conjunction "or" implies that the law requires only one of the two things to happen: either to have the place of business in Argentina or the principal object to be carried out in Argentina. The corporate legislation neither contains any autonomous definition of the place of business nor has enough elements to construct an analogous one. Moreover, the meaning

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93. *Id.* at art. 124 (emphasis added) (translated from Spanish to English).

cannot be derived from the Commercial Code. Thus, we are obliged to look for the answer in the provisions of the Civil Code, Articles 89 and 90, regarding the legal domicile and the statutory domicile respectively.<sup>94</sup> Taking into account the purpose of the protection of Article 124, the definition of the place of business in Article 89 is preferred because it does not have a mere voluntary ground but a real basis which excludes the possibility of fraud. Hence, the place of business is, according to Article 89, the center of direction or general administration of the commercial company, no matter where the statutory domicile is.<sup>95</sup>

The vagueness of the point of connection utilized in this definition may cause some problems. When the corporate object is not exclusively carried out in the country, but in concurrence with other places, it is not subject to Article 124.<sup>96</sup> On the other hand, Article 188, third paragraph, and concordant provisions, must regulate simultaneous exploitation, which presupposes the existence of branches or representations.<sup>97</sup>

The definition of the points of connection is indispensable to prevent the unjustified expansive application of the rule to cases not included in the legal hypothesis. The interpretation of the expression "principal object" as the exclusive purpose to be carried out in the Republic facilitates the application of Articles 124 and 118, Paragraphs 2 and 3.

If a commercial company is constituted abroad to carry out its object exclusively in Argentina, it usually locates its place of business in the country. Its reluctance to do so might indicate a desire to avoid the application of the Argentinean law due to tax and fiscal reasons. This avoidance might be considered fraud. In

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94. Arg. Cód. Civ. arts. 89, 90.

95. *Id.* at art. 90.

96. Arg. Law No. 19.550, ch. I, § XV, art. 124.

97. Article 118 states that

[f]or the customary exercise of acts compromising its corporate object, to establish subsidiaries, for bookkeeping or any other kind of permanent representation, it must:

- (1) Prove the existence of the corporation in accordance with the laws of its country;
- (2) Establish a domicile within the Republic, complying with the publication and inscription required by this law for corporations that are established in the Republic;
- (3) Justify the reason for creating this representation and designate a person in charge of it. If a subsidiary is involved, the capital assigned to it shall be determined, when this is appropriate under particular laws.

*Id.* at art. 118 (translated from Spanish to English).

this case of avoidance, the law imposes a sanction, which requires application of the very law that the society wanted to avoid. This implies that the constitution and the reform of the corporation must fulfill the requirements of the Argentinean law.<sup>98</sup> The corporation is thus a local corporation and, therefore, is entirely subject to the Argentinean legislation.<sup>99</sup> Under Argentinean law, this corporation will not be regularly constituted if it does not meet its requirements.<sup>100</sup>

Harmonizing Article 124 with Article 4 and concordant articles, the corporation must

- be constituted by a contract in a private or public document (If the contract is contained in a private document, the judge of the register will have to certify its authenticity.);
- register the contract in the Registro Público de Comercio (Public Register of Commerce) of the respective jurisdiction and, if applicable, in the Registro de Sociedades por Acciones (Register of Societies by Shares);
- publish the registration for a day in the Official Bulletin, if it is a limited liability corporation or an anonymous corporation; and
- fulfill the requirements of the provincial law that complement the federal laws and whose application is controlled by local organs such as *Inspección General de Personas Jurídicas*.<sup>101</sup>

The corporation is also subject to the controls established by the Argentinean legislation if constituted in the territory of Argentina because the corporation is not just considered as local for the purposes of constitution but also for the purposes of control of its activities.

The previously mentioned interpretation of Article 124 may not always be just. The special case of corporations that are regu-

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98. *Supra* n. 90 (text of Article 124 of Argentina Law No. 19.550).

99. Arg. Law No. 19550, ch. I, § XV, art. 124.

100. *See id.* (requiring a corporation establishing its seat of authority in or doing business in accordance with its corporate objective in Argentina to comply with Argentinean laws).

101. Article 4 of Argentinean law requires the contract that established the cooperation to be contained in a public or private document. *Id.* at art. 4; *supra* n. 90 (text of Article 124).

larly constituted abroad and transfer their place of business or principal place of exploitation to Argentina and that show no signs of fraudulent maneuvers must be considered. In other words, we cannot ignore the cases in which the underlying elements of the points of connection provided by the law have had their real location abroad. In such situations, the rule of Article 124 cannot be applied as an excluding provision without infringing the systematic interpretation of substantial law. If Article 118, Paragraph 2, recognizes the capacity of corporations constituted abroad to perform isolated acts and be on trial,<sup>102</sup> a systematic interpretation of this rule would have to conclude that corporations maintain their legal personality in Argentina, although more limited. Applying the sanction of Article 124 would imply denying this situation.

Under these circumstances, Article 124 must be interpreted as a rule for the adaptation of corporations in Argentina, and therefore, the corporations will have to be recognized as regularly constituted entities as long as they have initiated the process of meeting the Argentinean law requirements.

#### b. Functioning

The personal law of the corporation governs the rights and obligations of the shareholders. This private law may contain rules that are incompatible, however, with the provisions of Argentinean legislation and its principles of public order.<sup>103</sup> Thus, the fundamental criteria of Argentinean law must be discovered and compared with concrete solutions of foreign corporate legislation.

Justice Boggiano mentions the importance these principles have regarding the functioning of the system of private international law. As a result, Article 118, Paragraph 1, and the applicable law can only be displaced when it is contrary to the spirit of the principles of Argentinean corporate legislation.<sup>104</sup> Taking this

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102. *Id.* at art. 118.

103. Arg. Cód. Civ. art. 14. Article 14 provides in paragraph 2 that foreign laws will not be applied when the application of such law is incompatible with the legislation of the Civil Code.

104. *Id.* Article 13 of the Argentinean Civil Code establishes the obligations of a corporation to its stock and bond holders. Article 18 provides the procedure and criteria for the forced dissolution of a corporation which has an illegal or illicit object. Article 19 provides for dissolution of an illegal corporation under Article 18 and protects partners who partici-

into account, it is necessary to analyze the regulation of the rights of the commercial company's promoters and founders and the designation of the corporate organs and their faculties and responsibilities.

Regarding the liability of the representatives of a commercial company constituted abroad, Article 121 provides that the representatives are subject to Argentinean law.<sup>105</sup> In the same article, the liability of the organs of atypical corporations is made subject to Argentinean regulation of the liability of directors of anonymous corporations.<sup>106</sup> Article 121 also provides that the representatives of foreign commercial companies have the same responsibilities Argentinean law imposes on administrators.<sup>107</sup> Of course the functioning and immediate application of these rules is limited to the Argentinean jurisdiction. It is important not to ignore this fact because the responsibilities derived from the application of Argentinean law will be effective only if there is Argentinean jurisdiction. When there is no Argentinean jurisdiction, the problem of enforcing the decision of Argentinean courts in foreign tribunals, such as those in the place of constitution, business, or principal exploitation, is an obstacle to the functioning of the Argentinean legal system.

### c. Performing Isolated Acts

Article 118, Paragraph 2, allows the corporation constituted abroad to perform isolated acts in the country.<sup>108</sup> Although the recognition of the commercial company's capacity to perform isolated acts is not a condition,<sup>109</sup> the definition of the expression "isolated act" is problematic. In this sense, Justice Boggiano affirms that the line between the habitual and continued trade and the performance of isolated, occasional acts that are not a substantial part of the commercial activity of the commercial company is fluctuating and should not be strictly interpreted. The

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pate in good faith.

105. Arg. Law. No. 19.550, ch. I, § XV, art. 121. Article 121 states that "[t]he representative of the corporation established abroad has the same responsibilities as administrators under this law, and in the case of corporations of a type not regulated, those of directors in stock corporation." (translated from Spanish to English).

106. *Id.*

107. *Id.*

108. *Id.* at art. 118.

109. *Id.*

case law and doctrine have repeatedly made comments on the question, especially regarding public auctions and real estate purchases.

d. Capacity to Be on Trial in Argentinean Courts

With regard to the capacity of a commercial company to be on trial, Article 118 adopts the principles the Supreme Court established in the case *Potosí S.A. c/ Coccaro, Abel F.* in which the court acknowledged the right of a Venezuelan corporation to be on trial. This right, the court concluded, was grounded in the constitutional guarantee of a defense. This case dealt with the question of the recognition of the capacity of foreign commercial companies to be on trial without that commercial company fulfilling the requisites for the establishment of a branch or subsidiary.

e. Permanent Representation in the Republic

The third Paragraph of Article 118 provides that the commercial company must fulfil certain requisites to establish any kind of permanent representation in Argentina.<sup>110</sup> This rule specifically refers to the habitual performance of acts in Argentina included in the corporate object of the commercial company constituted abroad, as long as this performance implies the existence of a subsidiary, agency, or any other type of permanent representation.<sup>111</sup> In other words, the commercial company is not a new Argentinean entity. Rather, it is a company constituted abroad, whose actions are conditioned by the Argentinean legislation, and it is merely represented in Argentina.

According to Article 118, Paragraph 3, the commercial company constituted abroad must:

- provide proof of its existence in accordance with the law of the country of constitution;
- be domiciled in Argentina and fulfil the requisites of registration and publication according to the type of commercial company;
- justify the decision of creating the representation;

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110. Arg. Law. No. 19.550, ch. I, § XV, art. 118.

111. *Id.*

- designate the representative (person in charge of the representation); and
- indicate the amount of capital assigned to the representation, if applicable by special laws.<sup>112</sup>

The rule demands proof only of the existence of the commercial company; it does not require the registration of the corporate statutes, like in the case of the constitution of branches of the commercial company.<sup>113</sup>

If the foreign commercial company is not of a typical kind in Argentina, to establish a branch, it will have to meet the requirements that the judge of the register determines for each case, applying the strictest criteria of the Argentinean legislation.<sup>114</sup> Foreign commercial companies also are required to have a separate register of accounts and be subject to state control.<sup>115</sup> Article 121 subjects the liability of the representatives of foreign commercial companies to the Argentinean law.<sup>116</sup>

#### f. Transferring the Place of Business

Although the transfer of the place of business abroad is not considered a cause for dissolution of the corporation, the effects of this change on the international ambit cannot be ignored.<sup>117</sup> The issue must be solved within the scope of the law of the country where the commercial company situates its new place of business.

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112. *Id.*

113. *Id.* at art. 123. Article 123 states that

[t]o establish a corporation in the Republic, there shall exist previous proof before a judge of the registry that it has been established in accordance with the laws of their respective countries in registering its corporate contract, reforms and, also documentation of ability, such as its relation to legal representatives, in the Public Registry of Commerce and in the National Registry of Corporation for Stock, in its case.

(translated from Spanish to English).

114. *Id.* at art. 119. Article 119 states that

Article 118 shall apply to corporations established in another State, of a type not recognized by the laws of the Republic. The judge of the conscription shall determine the formalities to accomplish in each case, with the most stringent restraint for the criterion provided in this law.

(translated from Spanish to English).

115. *Id.* at art. 120. Article 120 states that “[t]he corporation must have separate book-keeping in the Republic and submit to the comptroller [auditor] corresponding to that type of corporation.” (translated from Spanish to English).

116. *Id.* at art. 121.

117. Article 94 of Argentinean law provides for the situations in which a corporation will dissolve.



If the country where the place of business has been transferred follows the criterion of the place of incorporation, the personal statute of the commercial company will not be altered. In contrast, if it follows the criterion of the real and effective place of business, the law of the place of business will determine the survival of the commercial company as a legal person. This implies the adaptation of the corporate statutes to the new legislation.

In the Argentinean legal system, the interpretation of the rule of Article 124 must be softened because the strict understanding of the legal text would entail the eventual irregularity, nullity, or extinction of the foreign commercial company.

#### g. Establishing Subsidiaries

Article 123 provides that to establish commercial companies in Argentina, corporations will have to provide the judge of the register with evidence that they have been constituted in accordance with the law of their respective countries and will have to register their original contract, its reforms, and all the documentation concerning its accreditation, as well as that concerning their legal representatives, in the Public Register of Commerce (Registro Público de Comercio).<sup>118</sup> If applicable, they will also have to be registered in the Register of Societies by Shares (Registro de Sociedades por Acciones).<sup>119</sup> Fulfilling the requirements of Article 123 enables the foreign commercial company to establish a subsidiary in Argentina.<sup>120</sup> In cases like this, Argentinean law demands not only proof of the existence of the commercial company in accordance with the law of the place of constitution, but also the registration of the statutes and their reforms.<sup>121</sup>

This rule was designed to secure the system of liability of the shareholders and the corporate control. For that reason, the requirements of Article 123 are of a substantial nature and purely imposed while taking into account the foreign character of the companies. Only the commercial companies constituted abroad are asked to present all the aforementioned documentation.<sup>122</sup>

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118. *Id.* at art. 123.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

The rule demands registration of the documentation of the legal representatives.<sup>123</sup> The representatives of commercial companies constituted abroad are enabled by contract to establish the company.<sup>124</sup> Therefore, the rules applicable to their mandate are the ones of Argentinean law of the place where the mandate is carried out. Once the object of the mandate has been accomplished, i.e., once the society has been regularly constituted, the commercial company is entirely subject to Argentinean legislation.

It is also necessary to consider the matter of the scope of application of Article 123 because the article literally refers to the constitution of commercial companies in Argentina.<sup>125</sup> As Justice Boggiano says, Article 123 is always applicable to the constitution of a company in the country, no matter whether it is caused by the merger of a foreign and a local company or by the division of a foreign company with the purpose of constitution of a new corporation in Argentina. The participation of foreign companies in previously constituted Argentinean commercial companies must also be included in the provisions of Article 123.

In the case *Hannifin Argentina S.A.*, the Cámara Nacional de Comercio Sala B resolved that the exigency of registration of the commercial company contained in Article 123 must be interpreted with an ample criterion. This will imply considering the real extension of the expression "constitute a commercial company" and the consequences of the lack of registration of the corporate contract of a commercial company that forms part of an Argentinean company. Whether the constitution of a corporation in the sense of Article 123 implies the case of the constitution of a controlled company (Article 33) or also embraces the case of an irrelevant participation must be clarified.

In *A.G. McKee Argentina S.A.*, the Cámara Nacional de Comercio Sala C affirmed that

any corporative participation . . . requires the fulfilment of the requisites of Article 123; especially in the case of anonymous societies when the foreign company cofounds them or purchases shares that give it the control de jure or de facto of

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123. *Id.*

124. *Id.*

125. *Id.*

them; also when they participate actively without being in control of the company . . . It is a question of facts, that must be solved in each case and that could be evidenced in many ways such as the participation in the assemblies.

Subsequently, in the case *Hierro Patagónico Sierra Grande S.A.*, the Cámara Comercial Sala A declared that Article 123 was not applicable to cases of minimum participation.

#### *IX. LIABILITY OF THE REPRESENTATIVES*

Article 121 regulates the application of the provisions of Argentinean law to the liability of the representatives.<sup>126</sup> According to Article 59, representatives must “act with loyalty and the diligence of a good businessman.”<sup>127</sup> If they do not do so, they are unlimitedly liable for the damages they cause with their acts or omissions.<sup>128</sup> Thus, this is a case of subjective liability. Of course, this does not exclude the specific sanctions established in the legislation for each of the types of commercial companies.

#### *X. COMMERCIAL COMPANY OF AN UNKNOWN TYPE*

When the commercial company constituted abroad is of a type unknown in Argentina, Article 119 provides that the judge of the register will determine the formalities that the company will have to meet, applying the strictest criteria of the Argentinean legislation.<sup>129</sup> The strictest case is the one of corporations by shares, so its regulations will be applicable. Regarding the liability of the representatives of such companies, Article 120 states that the rules intended for the liability of the directors of anonymous corporations are to be applied to this case.<sup>130</sup>

#### *XI. DETERMINATION OF THE “PLACE OF CONSTITUTION” FOR MEMBERS OF MERCOSUR*

In the scope of the Convention on Commercial Companies, the law of the place of constitution is the law of the country where

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126. Arg. Law No. 19.550, ch. I, § XV, art. 121.

127. Arg. Cód. Civ. art. 59.

128. *Id.*

129. Arg. Law No. 19.550, ch. I, § XV, art. 119.

130. *Id.* at art. 121.

the formal and substantial requisites for the creation of commercial companies was fulfilled.<sup>131</sup>

The systems of Argentina, Uruguay, and Brazil follow the principle of the place of constitution. Paraguay does not. However, the application of international convention rules may harmonize the rules of the different legal systems. In Argentinean legislation, the application of the law of the place of constitution to a commercial company constituted abroad is displaced by the exclusive application of Argentinean law when the company has its place of business or center of exploitation in the country.<sup>132</sup> Likewise, if a foreign commercial company has its place of business or is domiciled in Uruguay, it will be subject to Uruguayan regulation.<sup>133</sup>

Therefore, determining the existence of a commercial company constituted in any of these states will not be possible if the location of the place of business in their territory is avoided. This rule is similar to Paraguayan law, which requires the commercial company to be domiciled in Paraguay and transforms the domicile in the element that localizes the *lex societatis*.<sup>134</sup>

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131. Convention on Commercial Companies, *supra* n. 11, at art. 2.

132. *Supra* nn. 104–114 and accompanying text.

133. *Supra* § VII(C).

134. *Supra* § VII(B).