Review of the Development of Mexican Law on Shareholders Rights from Roman Law Origins to Recent Times

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INTRODUCTION: THE ORIGINS OF THE MODERN CORPORATION

Commercial trade as a social and economic phenomenon has been with us for a long, long time. Even in some ancient cultures we can find regulations regarding commercial trade, i.e. Babylon, Egypt, Greece, Phoenicia, Carthage. The Island of Rhodas developed such detailed and advanced trade legislation that the Roman Emperor Antoninus used to say that he ruled over land, but Rhodas ruled over the sea. These regulations legislated institutions like salvage (the proportional sharing among all interested parties in the destiny of a sailing ship of the value of the objects that were thrown into the sea to save such ship).

This principle is included in almost all modern mercantile laws. It is accepted in the Article 115 of the modern Mexican Law of Navigation\(^1\), which establishes the concept of "loss" as all damages and lost profit suffered by the vessel during the voyage or in port, or has any impact in the cargo from the instant it is put on board until the moment that it is unloaded in the port of destiny, as well as all extraordinary cost incurred during the voyage for the conservation of the vessel, or the cargo or both. This is, that all interested parties in proportion to their respective interest would share all accidental damage or loss. The aforementioned example has a direct relation to the origins of the trading company or corporation because the traders involved in the venture participated in its risks in proportion to the amount of their respective interest.

The author Roberto Mantilla Molina said that some people found the corporation's historical precedents in the Roman "societates publicanorum" organized to lease the taxes from the City, and taking charge of tax collection. In these societies, the partners' responsibilities were limited and transferable\(^2\). Other writers mention the existence since the XIII century of corporations dedicated to the exploitation of wheat mills whose capital was divided by bags and easily transferable. Also we find a historical precedent for the corporation in the "colonna" (a society organized for the commercial exploitation of a mercantile vessel). In the colonna, the partners' responsibility was limited to their share of capital apportioned. Similar institutions existed in the Code of Business Practice of Tortosa and in the Consulate of the Sea\(^3\). According to Professor Boris Kozolchyk there

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3. The Consulate of the Sea, a unified system of internationally acceptable maritime law, was codified, published, and generally accepted in the fifteenth century. It originated in the region of Catalonia, Spain. The text of the Consulate, translated into English, can be found at http://iibr.uca.edu/consulate/consulate.htm.
were so-called "formal friends," who were Arabs and Jews closely bound together by religious fraternity that made investment in money or merchandise through middle men to be invested or sold in foreign markets.

The mercantile legislation helped to validate these Middle Eastern "formal friends" societies when permitting that the will of its participants, reflected in their negotiations and joint ventures, by decreeing the different forms of mercantile association and the kind of documentation was needed for these merchants to operate. Some of these fraternal associations were intended to avoid injustices to members for reasons of inexperience or economic need. Some of these associations are still with us, e.g., general and limited partnerships.

The creation of the modern European states gave rise to the fact that the legislative function, before left to the will and power of corporation, was now a state responsibility. We can cite examples such as the regulations of Colbert regarding the terrestrial (1673) and maritime (1681) trade in France. Also, in Spain we can cite the regulations of Burgos (1495, 1538) Sevilla (1554) and Bilbao (1531, 1560, 1737).

Mantilla Molina said that the mercantile corporation emerged, in the modern form, after the discovery and colonization of America, with its intended new and large enterprises of colonization and exploitation of the new lands available. For these purposes, trading companies were organized such as the Dutch Company of the Oriental Indies (1602) and the Dutch Company of the Occidental Indies (1621) the Swedish Meridianal Company (1626). They were not only organized for financial objectives, but also for political purposes. The origins of the legal structure of the modern "sociedad anonima," with its important role in our contemporary economy, come from these associations.

With the promulgation of the French Code of Commerce (Napoleonic Code)\(^4\) in 1807, the so-called mercantile codification epoch began. The Napoleonic Code changed the system of mercantile law. From then on, the mercantile rights were no longer exclusively the rights of a special class, that of the merchants. Mercantile rights became regulatory rights of special actions: commercial actions. This French Code was a code of exportation. In France, the Commercial Code of 1807 is still in force with several reforms and complementary regulations. Here and now, we should made special reference to the new law regarding mercantile corporations that took effect in February 1, 1967.

The Mexico City Consulate (1592) held great importance in the formation of the Mexican mercantile law. At the beginning, it was regulated by the Ordenanzas de Burgos y de Sevilla. Then, in 1604 Phillip II approved the Consulate of the University of Mercaderes of New Spain. In 1795, the Consulates of Veracruz and Guadalajara were created. At present, Mexico's business relations are regulated by

\(^{4}\) Between 1804 and 1810, the French *Conseil d'État* drafted the five great Napoleonic Codes. The purpose of the codification was to create a single unified corpus of rules that expressly stated the new organizing principles for modern society under the Napoleonic Empire. The Code of Mercantile Law was published in 1807. See, http://www.napoleonica.org/us/ce/ce_mission.html
the *Codigo de Comercio* (Code of Commerce) of 1889\(^5\) and the *Ley General de Sociedades Mercantiles*, or LGSM, (General Law of Corporation) of 1934\(^6\).

**LEGAL NATURE OF CORPORATIONS**

The corporation emerged as a consequence of a contract. That is to say, the corporation is the result of a declaration of contractual volition (Mexican Civil Code Article 2688 and LGSM Articles 2, 7, and 26). In fact our LGSM makes constant reference to the concepts of contract of corporation and to the social contract. Some modern legislation concerning mercantile corporations choose not to consider the corporation as a contract, which is the tradition since Roman law, but to consider the corporation as an institution, and subsequently admit that some corporations may be organized and operated by only one person.

However, in Mexico the legal concept of “sociedad” tends to consider the corporation not only as a contract, but also as a plan or model of institutional paradigm, in which we can accommodate the legal affairs of a plurality of partners as well as singular person. The corporation is regulated both by the rules and principles that had been taking shape during the last four centuries around the type of society more evolved and more in accord with modern capitalism: the “Sociedad Anonima,” the Corporation.

The legal texts, in effect, show that the corporation is initially a contract, but one that creates a legal entity or institution that once created is no longer dependent on the original contract but is regulated by its by-laws, and can be modified without the advice and consent of the original creators. This created doubt in both the ancient and modern doctrines regarding whether a true contract exists. Professor Joaquin Garrigues expresses in his book *Curso de Derecho Mercantil*\(^7\) (Course of Mercantile Legislation) that corporations emerge from a contract. That is, they emerge from a legal affair in which we have the essential conditions of a contract. The Mexican Civil Code\(^8\) described the corporation mainly as a contract indicating the elements that distinguish the mercantile company. This concept qualifies the corporation as a contract of collaboration or of organization in contrast to other contracts.

After the creation or organization of the corporation, the contract disappeared and opened the way to what had been called a “legal mechanism.” The idea of a contract disappears at the very moment of creation, at the moment in which the legal personality is acquired and the original contractual relationship is converted into a corporate relationship. In the origin of the corporation, there is an agreement of

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8. The Mexican Civil Code regulates many of the same areas as the LGSM, but with respect to associations and civil societies. While these civil organizations are not mercantile corporations, they are subject to the same obligations imposed upon mercantile or commercial entities. See, Jorge A. Vargas, *Mexican Law: A Treatise for Legal Practitioners and International Investors*, (West Group, 1998 and 2001).
volition between the parties that we call a contract. However, all the actions taking place immediately thereafter and during the lifetime of the corporation are not actions executing that original contract, but a complex activity taking place to accomplish the social objective, mentioned only in a generic form in the original contract. These ulterior activities are not, and could not be, regulated by contractual norms. These activities are regulated by the corporation’s own by-laws and conform to a peculiar system which does not allow a particular partner to arbitrarily oppose the acquisition of the social objective (regime of mayoralty). The majority are not acting based on contractual volition, but are representing the will of the legal entity (person) created by the contract. The majority will make the decisions about the important affairs during the lifetime of the corporation; for example, the possibility of modification of the original by-laws without the advice and consent of the contract’s creator.

**Requirement of Public Order**

As established by Ignacio Galindo Garfias the freedom to establish conditions, and or stipulations that the law guarantees to the contractual parties should be recognized by all parties. This is why the legislation should ensure that no one has right to that liberty to the detriment of other parties. As a consequence of the philosophical individualism of XVII century we consider the contract and legal affairs in general as instruments of the economic struggle in the human relationship. We have forgotten that legal affairs are explained and justified as tools of cooperation and to the equilibrium of personal interest. In legal affairs, individual volition should not oppose the collective interest and should not impose to the obligator behavioral limitations not founded in just cause. On the other hand, the public order and the good customs and manners should also limit private autonomy. Private autonomy should only be invoked when its exercise produces a juridical relationship in which the obligations and rights that emerge from it meet a reciprocal equivalent. We should accept that the public order imposes the need that objective law should protect and guarantee that contractual balance.

Beside the public order norms the autonomy of individual volition has other important limitations. The individual volition limits itself in conformity to Article 6 of the Mexican Code of Commerce that reads: “The individual will do not excuses of the observance of the law, not to alter it not to modify it. The private rights not affecting the public interest may be waived only when waiving it does not injure the rights of a third party.” Article 6 does not forbid the waiver of rights given by law, but it intends that the will of the private individuals to exempt themselves from compliance with the law may be modified or altered by private actions. At the same time Article 6 provides a sense sufficiently clear to understand its reference to: 1) imperative of the law whose writ of mandamus can not be ignored by the will of the private individuals, and 2) to the waiver of rights, which

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10. *Supra* note 5 above.
can not be enunciated when the renunciation damages the public interest or affects the rights of third party. Also, Article 6 prohibits the law from being applicable by pact between private parties. It also prohibits the waiver of rights that affect or damage the public order and the good customs and manners.

In the field of mercantile law, there is a trend toward an autonomous contractual right in gestation, at the margin and over the legislation promulgated by the Nation in support of the private autonomy and the freedom to negotiate. In an effort to clarify in the best way possible the nature and limitations of the private autonomy we could say that the power of the individuals, recognized by the legal order is exercised taking into consideration the following principles enunciated in the Civil Code:

1) The contracting parties can establish all clauses considered convenient to their interest if they are not in opposition to the nature of the contract, to the public order, and to the good customs and manners. Article 1839 of the Civil Code for the Federal District\(^\text{11}\) (Mexico City).

2) No person can be exempted from the observance of the law due to will of the private individual (Article 6 of the aforementioned Civil Code).

3) Personal rights cannot be waived if the waiver will harm the public order or the rights of a third party (Article 6 of the same Civil Code).

4) No person can use or dispose of their assets or rights to the detriment of the community. (Article 16 of the Civil Code).

The evolution of individual rights in the current century will depend a great deal on the perspective used to resolve the problem presented by individual autonomy.

SHARES

The following discusses the definition of shares in the corporation and the rights incorporated in the share. The rights of the partners in the corporation are described in a document called a share. Without this document, the rights cannot be exercised and can be easily transferred. The obligations are also closely connected to the document resulting in the central point in the study of the partner's status in the corporation.

According to the law, there are two main patrimonial rights that the corporation should grant to the shareholder: rights to the dividend and the rights to his quota of liquidation. The first right is a universal right of all shareholders, so a pact eliminating one or more shareholders' rights to participate in the corporation's profits will have no legal effect. The distribution of profits among the partners is proportioned to his participation in the capital. It is evidenced in the document we call share and should not have any arbitrary order or priority, except in the case of preferred shares, to which the law assigns one minimum and accumulated dividend.

Next, the right of the liquidation quota cannot be denied to any partner and is also corresponds to his proportion of the capital. Of course, this right is subject to the existence of the social assets to be distributed after collecting all credits and paying

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11. The Civil Code for the Federal District (Mexico City) is available at http://www.asambleadf.gob.mx/princip/informac/legisla/codigos/civil
all debts. In case there are preferred shares, the holders of those will be covered before in the amount of the nominal value of their shares.

The corporate rights of acquisition are based on the right to vote being the way the partner participated in the life of the corporation. The law provides some preparatory rights to the partner in order for him to exercise them. Those preparatory or complementary rights are: 1) the right to convene or assemble for meetings, 2) that the meeting take place in the social domicile, 3) the right to have access to an agenda of business to be discussed, 4) the right to participate in person or through an agent or representative, 5) the right to vote, 6) the right to subscribe new shares, in case of increase in the social capital, in the same proportion owned.

In addition to these individual rights of the partner in the corporation, there are other rights whose exercise requires that the shareholder(s) hold a certain percentage of the social capital. These are known as minority rights, and they are enumerated as follows:

1) The right to name at least one administrator or manager or a receiver in the case hat its number should be three or more (Article 144);
2) The right to solicit the convocation of the shareholder's meeting to discuss any business included in the agenda (Article 184);
3) The right to solicit the suspension of the vote wherever they consider not to have sufficient information (Article 199);
4) The right to legally oppose the resolution of the shareholder meeting, and to obtain the suspension of such resolution when he considers that some particular clause of the social contract or any provision of the law have been violated (Articles 201 and 204); and
5) The right to exercise action against the manager or receiver to demand civil responsibility when their behavior was in contravention of the stipulations of the social contract or the law (Articles 163 and 171).

FOREIGN INVESTMENTS

The law regarding foreign investments is organized to determine the rules that best channel investments toward the welfare of the Nation. These laws are intended to propitiate foreign investment's contribution to the national development and consider the possibility of the emission of "neutral" shares. These neutral shares are valueless in calculating the percentage of foreign investment in the social capital of the Mexican corporations because they are shares without the right to vote. The issue of these neutral shares is required before the authorization of the Secretary of

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13. Id. at Art. 184.
14. Id. at Art. 199.
15. Id. at Arts. 201 and 204.
16. Id. at Arts. 163 and 171.
Economics, according to Article 20 of the Law of Foreign Investments and Article 23 of its regulations and the Registry of Foreign Investments.

CONCLUSION

Based on the aforementioned exposition, the shareholder possesses the right to participate in the corporation’s profits. The possession of a share empowers the holder as a partner. The law attributes to the share document a number of corporate rights and obligations as to the conditions of partnership. Three of these rights are of patrimonial economic character: a) the right to participate in the profits, b) the right to participate in the sharing of capital in case of liquidation, and c) the preferred right of subscription of new shares in case of increase of the social capital. Another right is of a political and personal nature: the right to vote in the general meetings of the corporation.

At the same time, Article 113 of the LGSM established that the by-laws of the corporation may include a provision that a shareholder with a partial number of shares could only exercise the right to vote in special or extraordinary meetings. Also, it is established that no profits will be distributed to the ordinary shares before paying the shares of restricted vote right. In case of liquidation, these shares are paid before the ordinary shares of the corporation. The holders of the share with restricted vote possess the rights that the law gives to minorities to oppose the resolution of corporate meetings and to review the corporate balance and the accountings. Finally, Article 198 of the LGSM regarding its public order dispositions establishes that no stipulation in the corporation’s by-laws that restricts the shareholders’ right to vote will have legal effect.

18. Id. at Article 23.
19. The Registry of Foreign Investments maintains information for the federal government on the development activities of foreign investors’ within Mexico. Information regarding the Registry can be found at: http://www.bancomext.com/Bancomext2001/Templates/Extranjero/ingles/default.html?seccion=1256#5
21. Id. at Art. 198.