



Argentina: Minority Shareholders' Rights in Mergers

By Pedro Mazer, Alfaro-Abogados
pmazer@alfarolaw.com

1. General Legal Framework Applicable to Listed and Non-Listed Companies.

The Argentine legal framework provides a set of rules aimed at protecting minority shareholders from abuse both from the majority and from management¹. Prior to making any approach to the matter, it is necessary to bear in mind that virtually all Argentine companies, either listed or non-listed, are controlled by a group of majority shareholders and not by management².

As from 2001, several rules and regulations have been enacted and issued in order to better protect minority shareholders both at listed and non-listed companies.

The general legal framework for all listed and non-listed companies is comprised by Federal Law 19,550, as amended (the Argentine Business Companies Law or "ABCL"), which applies to all Argentine jurisdictions.

Furthermore, non-listed companies domiciled in Buenos Aires are regulated by Resolution 7/2005 issued by the General Superintendence of Companies (*Inspección General de Justicia*), and non-listed companies domiciled at other Argentine jurisdictions are regulated by provincial regulations that often follow the trends of the General Superintendence of Companies.

On the other hand, listed companies must abide by Federal Law 17,801, National Decree 677/01 (the "Transparency Decree"), the rules of the Argentine Securities and Exchange Commission (*Comisión Nacional de Valores*), and the regulations of the stock markets where they are listed.

2. Protections for Minority Shareholders under the ABCL (applicable to both Listed and Non-Listed Companies).

A) Tight corporate purpose. By-laws of Argentine companies must contain a clear, specific and precisely defined corporate purpose, which binds the company to not depart substantially from the boundaries of such corporate purpose.

B) Right to demand summoning of shareholders' meetings. Shareholders holding at least 5% of the voting power can demand the board of directors or the supervisory committee to summon shareholders' meetings.

¹ The latter generally being intertwined with the majority shareholders.

² As opposed to Argentina, in the U.S. it is usual to see corporate control of listed companies lying in the management. Another relevant difference between the Argentine and U.S. corporate legal frameworks is that the Argentine legal framework contemplates no such thing as a fiduciary duty of the majority shareholders towards the minority shareholders.

C) Special Quorum and Majority Requirements for Shareholders Meetings. Shareholders may take decisions in ordinary or extraordinary meetings, depending on the meeting's agenda.

Unless otherwise provided within the by-laws: (i) ordinary shareholders' meetings, require a quorum of a majority at the first call and any amount for second call; and (ii) extraordinary meetings require a quorum of 60% at first call and 30% at the second call.

Resolutions may be passed both at ordinary and extraordinary shareholders' meetings upon the favorable vote of a majority of the shares represented at the meeting. However, resolutions on certain essential matters may only be passed in an extraordinary shareholders' meeting upon the favorable vote of a majority of the total voting shares of the corporation.

D) Cumulative voting for the appointment of Directors and members of the Statutory Supervisory Committee. Minority shareholders can choose to use the cumulative voting system for the appointment of up to one third of the board of directors and members of the supervisory committee³.

E) Appointment of Directors and members of the Supervisory Committee by different Classes of Shares. Under the class voting system, the holders of each class of shares have the right to appoint a certain number of directors and members of the supervisory committee. Although shares must have equal rights within each class, the ABCL allows corporations to assign different rights to different classes of shares.

F) Limits to Directors' Fees. Except in certain cases providing specific grounds for an approval of higher fees, the fees payable by the corporation to directors and members of the supervisory committee cannot exceed a 25% of the corporation's profits. Such threshold is reduced to 5% of the corporation's profits if dividends are not distributed to the shareholders (and increased proportionally in case of partial distribution).

G) Restrictions in respect to activities comprising interest conflicts. The ABCL restricts directors from engaging into certain activities comprising interest conflicts⁴.

H) Veto rights in respect to approval of Directors' performance (limits to release of Directors liability). Shareholders representing at least 5% of the capital stock may defeat a resolution to approve the services of a director and make immune such director against claims from shareholders.

I) Surveillance – Information Rights. If the company has a syndic or a supervisory committee, shareholders representing at least 2% of the capital stock are entitled to request information or to compel to conduct an investigation from such supervisory body. If the corporation has no supervisory body, shareholders can request information

³ Neither the by-laws nor the board may restrict this right, except by replacing it with the class voting system.

⁴ Basically: (1) voting on matters in which they have a conflict of interest with the corporation; (2) entering into contracts with the corporation which do not relate to its ordinary business or correspond to existing market conditions; and (3) competing with the corporation.

directly from the board of directors. Also, shareholders representing at least 10% of the capital stock may require supervision of the corporation by the state comptroller⁵.

J) Removal of Statutory Auditor. Shareholders representing at least 5% of the capital stock may defeat a resolution to remove a statutory auditor without cause.

K) Pre-Emptive Rights. Upon the issuance of new capital by a corporation, all ordinary shareholders have preemptive rights to subscribe stock up to their own pro rata equity and to any other unsubscribed stakes⁶.

L) Dissenters' Redemption Rights. Minority shareholders voting against certain extraordinary resolutions have the right to the redemption of their shares at a fair price by the corporation.

M) Enhanced Governmental Scrutiny. Corporations with capital in excess of AR\$ 10,000,000, publicly offered stocks or bonds, majority ownership by the government, public funds, or concessions to render public services are subject to enhanced governmental scrutiny.

N) Piercing of the Corporate Veil. Shareholders or directors that execute actions departing from the corporate purpose, or who use the corporate veil to break the law, infringe public policies, the good faith or rights of third parties, shall be directly liable for damages arising from such conduct.

3. Further Regulations providing Protections for Minority Shareholders of Non-Listed Companies.

The General Superintendence of Companies and equivalent controlling authorities from certain provincial jurisdictions provide rules further enhancing the protection of minority shareholders' rights within non-listed companies, among which, it is worthwhile mentioning the following: (i) regulation of the guarantees that according to the ABCL must be granted by directors and managers of companies; (ii) regulation on the restrictive scope of the corporate purpose; (iii) rules aimed at preventing unfair dilution within capital increases⁷; (iv) rules on "irrevocable contributions to future stock subscriptions"; (v) rules providing mandatory capitalization of certain "net worth" items of the financial statements; and (vi) prohibition of squeeze-out maneuvers⁸.

4. Protections for Minority Shareholders of Listed Companies as provided under National Decree No. 677/2001 (the "Transparency Decree") and the Rules of the Argentine Securities and Exchange Commission ("Comisión Nacional de Valores" or "CNV").

The rules of the CNV originally regulated provisions of the ABCL in order to adapt them to listed companies, but the Transparency Decree, which was issued in 2001, provided the CNV with an enhancement of the existing rules and with new rules

⁵ The by-laws may not restrict any of these rights.

⁶ Such rights may be suspended at an extraordinary shareholders meeting provided that certain legal conditions are met.

⁷ Both by providing mandatory subscription bonds for certain capital increases and also by other tools.

⁸ Reductions of the capital to zero with subsequent increase.

required to protect minority shareholders, and within such scenario, introduced the concept of corporate governance to the Argentine capital markets.

The purpose of the Transparency Decree is to strengthen the Argentine stock market and improve investors' confidence. The main provisions protecting minority shareholders under the Transparency Decree are the following:

A) Audit Committee. The Transparency Decree provides for a mandatory audit committee composed by at least 3 non-executive independent directors. The audit committee's main duties are as follows: (i) providing opinion on the selection of external auditors; (ii) providing opinion in cases of conflicts of interest; (iii) providing opinion about underwriting fees and expenses; (iv) providing opinion about transactions with related parties; (v) assessing the corporation's risk management; (vi) supervising the internal control system and the administrative-accounting system related to the company's public information; and (vii) verifying the compliance of conduct rules.

B) External Auditor. Shareholders representing at least 5% of the capital stock can demand the appointment of an external auditor.

C) Board of Directors' Enhanced Duties. The Transparency Decree extends the directors duties, including, among others, reporting, disclosure and confidentiality duties.

D) Confidentiality Duties/ Prohibition of Inside Trading. Controlling shareholders, members of the supervisory committee, directors, managers, shareholders, or any other corporate member that comes into knowledge of non-public information which can affect the negotiation of securities must hold strict confidence.

E) Corporate Interest. The Transparency Decree clarifies that "creating shareholders value" should prevail over any other corporate interest.

F) Negotiation Systems: The Transparency Decree establishes that negotiation systems must be directed by principles such as investors' protection, equity treatment, efficiency, transparency, no segmentation of the market and systemic risk reduction.

G) Mandatory Tender Offers and Residual Shareholdings (De-Listings). The Transparency Decree imposes mandatory tender offers for the acquisition of control once 35% has been acquired, so as to grant to all shareholders fair and equal treatment in connection with corporate takeovers⁹. Minority shareholders can force controlling shareholders who own 95% or more of the company to acquire the residual shares at a fair price. Also, such controlling shareholders owning 95% or more of the company are granted the right to buy the minority shareholders stake at a fair price.

H) Mandatory Arbitration. Arbitration of the Buenos Aires Stock Exchange for the resolution of conflicts is mandatory for issuers and optional for investors.

I) Shareholders Meetings. The Transparency Decree further protects minorities by: (i) making easier their access to information and extending the menu of topics to be treated

⁹ However, an opting out clause is available for companies, through the amendment to their by-laws.

at shareholders meetings; (ii) allowing custodians holding global certificates to represent any holders who do not exercise their rights individually; (iii) allowing those shareholders who represent 2% of the capital stock and who have been shareholders for at least one year to require the public granting of proxies to participate at shareholders' meetings; (iv) establishing a minimum of 20 days and a maximum of 45 days to summon shareholders meetings (previously, it was 10 and 30 days, respectively)¹⁰; and (v) allowing investors to initiate shareholders' derivative suits for indirect damages.

J) Other Transparency Regulations:

_ Companies must appoint an 'investor relations' officer for providing information to the market.

_ Companies must inform the CNV about shareholders agreements whenever these are relevant to investors.

_ Market stabilization is allowed according to CNV regulations.

_ Greater detail is required for financial statements and annual reports.

K) New Forms of Prohibited Practices. The Transparency Decree contemplates penalties for certain illegal practices such as: (i) inside information and insiders' trading; (ii) short-swing profits¹¹; (iii) market manipulation; (iv) participating in the public offering with no authorization from the CNV and/or the relevant stock market; and (v) inserting misleading information within prospectuses¹².

L) Powers of the CNV. The Transparency Decree grants new tools to the CNV to better supervise the securities markets, and allows it to regulate penalties.

¹⁰ This extension allows shareholders to study in greater detail the topics to be treated at the meeting.

¹¹ The Transparency Decree stipulates that companies have the right to recover within a period of six months any profits obtained by management from the purchase or sale of stock using inside information. If the companies do not initiate actions against management within 60 days, any shareholder is allowed to do so.

¹² Companies and brokers are liable for misleading information contained in prospectuses, thus forcing them to diligently review this information.