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Maria Fernanda Mierez
fmierez@ebv.com.ar
+54 11 4379 6842


Constanza Paula Connolly
cconnolly@ebv.com.ar
+54 11 4379 6884


Soledad Noel
snoel@ebv.com.ar
+54 11 4379 4727


Carolina Inés Gherghi
cgherghi@ebv.com.ar
+54 11 4379 6898 / 6842

B Corporations: Can The Trading Company Of The Future Be Fitted Into Our Current Company Law?

By Maria Fernanda Mierez, Constanza Paula Connolly, Soledad Noel & Carolina Inés Gherghi

ESTUDIO BECCAR VARELA

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SUMMARY

The presently existing sustainability issues demand a shift in paradigm which affects the core of private enterprises directly. This spirit of change proposes developing the current segmentation system into a holistic system. To that end, organisations must abandon prioritising short-term profitability and focus on creating long-term economic value, while simultaneously generating social and environmental value.

In this context, and confronted with the exhaustion of the current capitalist business model, a new business model combined with social and environmental purposes is born.

This presentation deals specifically with the organisational model of B Corporations, a business type that combines profit with social and environmental solutions (whereby it must be taken into account that these objectives are now enforceable and no longer voluntary), and analysis the possibility of its implementation in Argentina, considering the legal regulations currently in force.

Following our analysis, these are our conclusions: a) The B Corporation's purposes do not stand in contradiction with the provisions of Article 1 of the Company Law (LSC, for its acronym in Spanish) and a trade company subject to the provisions of the LSC can become a B Corporation. Since various definitions of company interests exist, stakeholders could be included in the scope of said concept by amending the corporate purposes or including a specific article defining such purpose in the bylaws; b) Since Article 260 of the LSC grants a certain freedom in order to regulate the functioning of the board of directors, the specific role and responsibilities of the managing directors of a B Corporation regarding their duty to ensure the company's interests and the compliance with the corporate purposes could be established in a regulation issued by the board of directors or in the bylaws; and c) The principle of freedom of will, which applies to trading companies, would allow shareholders to freely agree upon necessary rules and obligations in order to run the company.

Ideally, a special law should be enacted or the LSC should be amended so as to define what a B Corporation is, its requirements, etc. Generally speaking, a suitable legal framework for its development should be created.

We are aware that the Argentinean businessman is more concerned at present by the current juncture and satisfying immediate needs rather than working towards sustainability. For this reason we believe that in the transition process towards the development of this new sustainable business model, the State will have to take an active role in order to help businesses redirect their organisations and prepare them for the economy of the future (by means of incentives, access to credit, among others).

B Corporations: can the trading company of the future be fitted into our current Company Law?

"Let us choose to unite the power of markets with the strength of universal ideals. Let us choose to reconcile the creative forces of private entrepreneurship with the needs of the disadvantaged and the requirements of future generations."
Kofi Annan, former Secretary-General of the UN (1999).

The Need for a Change towards a Sustainable Business Model

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Over the past few years, the academic, social, economic and environmental spheres pointed out that commerce caused various sustainability issues currently affecting the planet and that the main role fell on companies. At the same time, the trust in the business world diminished.

With the United Nations Global Compact, subscribed in 1999 by the United Nations and the business world, companies were asked to apply to their activities a set of fundamental values regarding human rights, labor standards, the environment and the fight against corruption. The purpose hereof is to ensure that all people share the benefits arising from globalisation and to introduce fundamental values and practices that satisfy socioeconomic needs into the market.

"Our times demand a new definition of leadership. They demand a new constellation of international cooperation - governments, civil society and the private sector, working together for a collective global good. Some might say such a vision is naïve. That it is wishful thinking. Yet we have inspiring examples proving the contrary. Think of the Green Revolution in the 1960s that lifted hundreds of millions out of poverty in Asia. Think of the global vaccination campaign that eradicated smallpox by 1979."[1]

It is not about philanthropy or Corporate Social Responsibility ("CSR")[2] but about a shift in paradigm that affects the core of private enterprises directly. This spirit of change suggests developing the current segmentation system into a holistic system. To that end, organisations must abandon prioritising short-term profitability and focus on creating long-term economic value, while simultaneously generating social and environmental value.

We would like to mention some facts: The planet's regeneration capacity has been surpassed[3]. According to the Gini index - which measures the income distribution (or consumer spending) among individuals in an economy, where 0 represents perfect equality and 100 perfect inequality -, Argentina´s coefficient amounts to 44.49[4]. According to a study conducted applying the Genuine Progress Indicator (GPI), general welfare, unlike GDP growth, has not improved since the late 70s. This means that globally the external costs of economic growth surpassed the benefits obtained since 1978, year in which the GPI reached its maximum peak[5]. New demands from the employees, who want their jobs to connect with higher purposes[6], also play an important role. A significant part of society is not only aligning their consumption with their values but also demanding social responsibility from corporations.

What Is Happening Around The World? Comparative Legislation

The conclusiveness of the aforementioned facts highlights the urgent challenge to achieve sustainable and equitable growth and the need to find scalable solutions to the problems we face. In this context, the efforts of the State and the third sector have proven to be insufficient while companies have yet to assume their leadership in this matter; even though their role in the challenging mission to achieve sustainability has been discussed at length[7] in recent times.

We therefore observe that the current capitalist business model has been exhausted and that simultaneously to the consolidation of CSR, a new business model integrating social and environmental purposes is born.

Worldwide, different countries provided a legal framework for this type of businesses: a) In 2005, the United Kingdom created the legal framework for the so-called "*Community Interest Companies*"; about 68,000 corporations of this type exist nowadays; b) In 2005, Italy passed Law No. 118 which sets a legal framework for social enterprises and defines them as "*non-profit private organizations, which carry out a stable and main economic activity with the aim of production of goods and services of social utility for the common interest.*"; c) In 2007, Spain passed Law No. 44, which establishes the regulatory regime of integration enterprises for those trading com-

panies that carry out an economic activity whose main purpose is the integration, and social and labor training of socially excluded people. d) In 2010, the State of Maryland in the USA passed the first legislation that regulates the "Benefit Corporation". Up to today, 28 states have either amended corporation law in order to incorporate the concept of benefit corporations or approved a special law for Benefit Corporations (B Corp)[8].

Our analysis for this presentation is based on these so-called "B Corporations" with the aim of determining Argentina´s need to participate in this change regarding the notion of "business" as such which is being developed worldwide.

What are B Corporations?

B Corporations stand out due to their reason for existence, their policies and practices. They operate under high social, environmental and transparency standards and they are legally bound to make decisions that do not only contemplate their shareholders interests, but also the interests of their stakeholders: workers, communities, suppliers, among others. Beyond corporate social responsibility, B Corporations thoroughly rethink their business model to offer new and innovative production and consumption systems. "*B Corporations do not have a specific line of business. A big financial corporation with over one thousand employees and an eco-friendly SME of ten can both be certified as B Corporations provided that the legal base of the company complies with the obligations of B Corporations and that this is stated in the bylaws.*"[9]

B Corporations are companies that **combine profit with social and environmental solutions; consider financial performance as an essential tool in order to achieve their objectives, but not the only reasons for their existence; their social and environmental objectives are incorporated into their bylaws (mission statement) whereby it must be taken into account that these objectives are now enforceable and no longer voluntary**.

At present, the community of B Corporations amounts to 798 businesses (64 in South America) spread over 27 countries and over 160 companies are undergoing the certification process[10]. Moreover, 50 investment funds certified by the "*Global Impact Investing Rating System*" (GIIRS) with investments in 30 countries and 2 trillion dollars in impact investment[11] exist worldwide.

In South America specifically, B Corporations are being promoted by the foundation Sistema B[12], "a global platform that facilitates and gives companies the possibility to redefine success in business and our societies, using the force of the market to solve environmental and social issues."[13]

Sistema B currently operates in Chile, Brazil, Colombia and Argentina. In 2011, the Fundación Sistema B was created in Chile in order to promote the evolution of the economy, the sense of success of trading companies and the creation of B Corporations[14]. Nowadays, a commission exists in Chile, designated by the Ministry of Economy that has been entrusted with drafting a national law that regulates B Corporations in that jurisdiction. In Colombia, the legal requirement in order to become a B Corporation is amending the bylaws in order to expand the fiduciary duty of the managing directors so that they are able to look after the interests of all interest groups (and not just those of the shareholders) and be subject to the highest standards of transparency regarding social and environmental management[15]. To this day, over 10 B Corporations exist in Colombia[16].

Sistema B is in the process of establishing an agency in Argentina and is also participating in different legal forums. Businessmen are contacting academic and opinion leaders in order to introduce the concept of B Corporation. Currently 18 B Corporations, which we will analyse further below, exist in Argentina.

The introduction of C Corporations in Argentina under the *Current State* of *Law*

Traditionally, legal entities have been grouped in three sectors in Argentina: a) the private sector, which refers to trading companies or for-profit organisations; b) the public sector; and c) the third sector[17], which refers to NGOs legally organised as civil associations or foundations.

We can see that the current system is fragmented since private organisations can only choose to be incorporated as an NGO or as a trading company. This fragmentation can also be observed in the legal requirements establishing that private organisations must choose to be governed either by the Company Law or by the laws applicable to non-profit organisations (Argentine Civil Code and Law No. 19.836).

However, reality shows us that private enterprises have been incorporating social, ethical and environmental approaches such as CSR, while NGOs tend to develop an economically efficient and profitable management in order to reach sustainability.

Consequently, the need for a new form of trading organisation for this new type of company, the so called B Corporations, becomes apparent. Hence, it ought to be analysed whether it is essential to amend the Company Law to incorporate B Corporations, which would not happen immediately, or whether a trading company would be able to undergo a transformation and become a B Corporation under the current legislation. If so, what would the benefits of B Corporations be?

Article 1 of the LSC establishes that "*a trading company will exist when two or more persons organise themselves in accordance with one of the legally established forms, and commit themselves to make contributions to be applied to the production or the exchange of goods or services, while participating in the profits and bearing the losses*." The main goal of any trading company is to obtain profits so much that shareholders assume, as to achieve that common aim, a risk that results in bearing the losses and the right to participate in the profits.

In our opinion, the corporate purposes of B Corporations do not stand in contradiction with the provisions of Article 1 of the LSC and a trading company subject to the provisions of the LSC could become a B Corporation.

Notwithstanding the aforementioned, and in order to arrive at this conclusion, we have to analyse whether the deferral of profit distribution in favour of "the creation of social and environmental values" might not stand in contradiction with the company's interests. The concept of company's interests is "*vague and every dissenting assembly member could artificially argue that the adopted resolution impairs what this vague notion encompasses*"[18]. However, the idea of company's interests was included in several provisions of the LSC (Articles 70, 248, 270, 271, 273, etc.) and most recently in Decree No. 677/01, which regulates the regime of transparency of public offering (recitals, Paragraph 27 and Article 8).

In the leading case "Sánchez v. Banco Avellaneda", the court adopted Halperín's position in that the company's interests "*are the common interests of all shareholders*"[19] and although he affirms that in any company there is a "merger of interests", all of them converge towards the common interests, which are the company's interests. In this regard, the Chamber B of the Commercial Court of Appeal in the case "De Carabassa, Isidoro v. Canale" claimed that the company's interests "*can be interpreted as the objective common interest of the partners according to the company's purposes*"[20].

However, the uncertainty regarding this notion was defined in Decree No. 677/01 which established in relation to the duty of loyalty and diligence of those who participate in the market (shareholders and issuers) that the "company's interests *act as a guiding principle for the per-*

formance of the managing directors of the issuers". Said interests were defined explicitly as *"the interests common to all shareholders", which includes a notion found in other laws and in international capital markets referred to as* ***"the creation of value for [all] shareholders"*** *for those companies that attend the capital market* (what we have added is written in brackets). Moreover, Article 8 of Decree No. 677/01 establishes that "*the company interests of the issuer shall prevail without exception… and the common interest of all its partners shall prevail over any other interest, even over the interest of one or more parent companies.*" Decree No. 677/01 acknowledges that the company's interests do not necessarily converge with the interests of the parent company and that the issuers are bound to let the common interest of the partners prevail over any other interests.

In the case at hand, redefining the notion of company's interests will be necessary in order to include other role players (the stakeholders). Quite possibly, the shareholders' interests will not necessarily be identical to those of the stakeholders and the B Corporation will have to consider this while running its business.

Let's remember that Halperín pointed out that "an opposite interest shall exist not only when the company has a current or future loss, but also when it loses the chance of gaining or experiences a lesser profit than what it could have gained with a different solution".[21]

Since various definitions of company interests exist, stakeholders could be included in the scope of said concept by amending the corporate purposes or including a specific article defining such purpose in the bylaws. We believe that more than generating a social and environmental impact on the company, the "economic success of business" should be redefined not only so that success is no longer defined by short-term but by long-term profit but also in such a way that the needs of the company in general and those of its participants (providers, clients, lenders, government, employees, etc.) are also satisfied[22]. Thereby, **economic value is created while simultaneously creating social and environmental value.**

The New Role and Responsibilities of the Managing Directors of a B Corporation

In the process of decision-making, the managing director of a trading company certified as a B Corporation ought to consider not only the interests of the shareholders / partners, but also those of the other interest groups or stakeholders, as well as the company's social and environmental goals and purposes[23]. This means that the shareholders / partners cannot request from the managing directors that decisions which contravene said interests be taken, nor can the latter be held responsible for putting the fulfillment of these duties before the maximisation of profit.

When analysing the guiding principles established by the LSC for the managing directors, we can conclude that this new role does not stand in contradiction with said principles given the following:

We uphold that the standard or the general guideline as to "*loyalty and diligence of a prudent businessman*", contained in Article 59 would be raised. This general guideline would include a wider scope for this type of company since it would also comprise the duty of acting in accordance with the special goals of the company, the inclusion of stakeholders in the concept of the company's interests and the new notion of "creating value" for the shareholders.[24] These notions may also be useful should it be necessary to determine whether a certain action regarding a B Corporation can be considered diligent or not, and in a particular case, whether to establish or exclude the responsibility of a managing director[25].

Regarding Article 58 of the LSC, by making reference, as we suggest, in the corporate purposes of the B Corporation to the fact that the company shall carry out its activity taking into account its social and environ-

mental objectives, the interests of third parties and of the shareholders / partners would be ensured. At the same time, it would be implicitly established that the managing directors of the B Corporation will have the power to act and conduct the business in order to carry out its social activity in accordance with its social and environmental objectives.

However, it cannot be denied that the introduction of these new roles and responsibilities raises some issues: a) The majority of the Argentine doctrine and jurisprudence equated the idea of company's interests to that of maximising profitability, while the managing director's prime duty is fulfilling said interest; b) Considering the stakeholder's interests and putting them before the shareholder's interests of maximising profitability is mandatory and not voluntary, as is the case where CSR is implemented; c) A way in which shareholders / partners can demand the compliance of said duties should be established. The requirement of Article 274 of the LSC to proof the existence of damages arising from the lack of consideration of the stakeholders' interests may portray difficulties in terms of proof; d) It would be necessary to give to the managing directors a protection and safety framework in order to safeguard their responsibility, for example by limiting the possibility of third parties filing liability claims against them for non-compliance of the social and environmental objectives and goals[26] (which is formally possible given the current Article 279 of the LSC if a direct damage exists)[27].

In conclusion, we believe that since the LSC does not define the concept of company's interests, Article 59 only establishes a general guideline of behavior and Article 260 in particular grants the freedom to regulate the functioning of the board of directors, the specific role and responsibilities of the managing directors of a B Corporation regarding their duty to ensure the company's interests and the compliance with the corporate purposes, could be established in a regulation issued by the board of directors or in the by-laws[28]. Even following the example of Article 8 of Decree No. 677/01, specific guidelines could be established as to guarantee loyal and diligent actions[29].

Therefore, we recommend making use of the power granted by Article 260 of Law No. 19550 and effectively and efficiently regulate the functioning of the board of directors in order to delimit their scope of action and define the limits of their responsibility[30]. Furthermore, this regulation could be registered with the Registry of Commerce as to be upheld against third parties[31].

Regarding the need to conform or amend the bylaws or articles of incorporation as to insure legal certainty. Does an immediate need to amend the LSC exist?

The principle of freedom of will, which applies to trading companies, would allow for the inclusion of the above mentioned amendments to the purposes in order to adapt the current trading company to a B Corporation and combine profit and social and environmental solutions. Moreover, none of these provisions are included among the so-called void stipulations of Article 13 of the LSC and they would not be subject to the nullity rules established by the LSC (Articles 16 and following). This is why we believe that shareholders have the freedom to agree upon the necessary rules and obligations in order to run the company.

Ideally, a special law should be enacted or the LSC should be amended so as to define what a B Corporation is, its requirements, etc. Generally speaking, a suitable legal framework for its development should be created.

Today, 18 B Corporations exist in Argentina. How did they handle the metamorphosis towards this new business model? Some amended their corporate purposes with the approval of the Registry of Commerce (*Inspección General de Justicia*) and others included guidelines in so-called parasocial agreements

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such as regulations and shareholders agreements. There are no precedents that any of these regulations were registered with any Registry of Commerce as to be upheld against third parties but we think it would be a good step towards insuring legal certainty.

Conclusion

The purpose of this presentation is to introduce the need for a shift in paradigm that supposes an evolution from the current business structure towards a business type with a holistic view that redefines the idea of business success. We believe that today the business world is not immune to disruptive forces: the fragility of the financial system, inequality, environmental degradation, more demanding human resources represented by what we might call the "Y" generation. These challenges require an answer to be provided by the businessman, who will be forced to adapt his business model in order to satisfy each and every one of these role players and to continue achieving business success.

This notwithstanding, we are aware that the Argentinean businessman is more concerned at present by the current juncture and satisfying immediate needs rather than working towards sustainability. For this reason we believe that in the transition process towards the development of this new sustainable business model, the State will have to take an active role in order to help businesses redirect their organisations and prepare them for the economy of the future (by means of incentives, access to credit, among others).

Maria Fernanda Mierez

Born in Buenos Aires, Argentina, on April 28, 1972.

Studies Completed: University of Buenos Aires (Lawyer, 1996).

Areas of Practice:

Corporate Law
Mergers & Acquisitions

Languages: Spanish, English and French.

Constanza Paula Connolly

Born in Buenos Aires, Argentina, on June 28, 1977.

Studies: University of Buenos Aires (Lawyer, 2001). Austral University (Master in Corporate Law, 2003).

Practice Areas:

General advice to companies
Corporate Law

Languages: Spanish and English.

Soledad Noel

Born in Buenos Aires, Argentina, on January 2, 1981.

Studies Completed: Catholic University of Argentina (Lawyer, 2004).

Areas of Practice:

General advice to companies

Languages: Spanish and English.

Carolina Inés Gherghi

Born in Buenos Aires, Argentina, on June 14, 1982.

Studies Completed: Universidad Austral (Lawyer, 2011).

Areas of Practice:

Corporate Law
Advice to civil entities

Languages: Spanish, English and German.

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1 - Plenary speech "The Global Compact: Creating Sustainable Markets" The World Economic Forum Davos, Switzerland (2009).
2 - The European Commission defined in 2011 that CSR is "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis". (Corporate Social Responsability, National Public Policies in the European Union. (2011))
3 - Living Planet Report 2010, World Wildlife Foundation http://assets.wwf.ca/downloads/lpr2010.pdf
4 - Poverty & Equity Data, World Bank http://povertydata.worldbank.org/poverty/home/
5 - "Costos de crecimiento económico superan los beneficios" article published in SCI Dev. Net (July 2013).
6 - According to a report from the Harvard Business Review Millennials, that represents approximately 50% of the labor force worldwide.
7 - Ten years later, the Global Compact is still the biggest global initiative in corporate sustainability. The United Nations Conference on Sustainable Development or Rio + 20 was held in order to renew the political commitment in favor of sustainable development. In 2007, the International Labour Conference of the ILO introduced a program to orient the promotion of sustainable companies. A study conducted by the Sloan School of Management of the MIT and the Boston Consulting Group among American companies of various sectors concludes that 7 out of 10 companies will work decisively on sustainability policies in 2011.
8 - "http://benefitcorp.net/state-by-state-legislative-status
9 - Manuel Antonio Camacho, Executive Director of Sistema B of Colombia in the article "Piensa verde. Empresas verdes, el modelo de negocio del siglo XXI" published in Revista Diners - August 2012".
10 - Information available in http://www.sistemab.org/comunidad-empresas-b
11 - The Global Investing Network defines impact investments as investments made with the intention of solving social or environmental challenges while generating financial gain, whereas impact investors seek to direct capital toward businesses and funds that can benefit from the positive power of commerce.
12 - The movement begins in 2007 in the USA, driven by a non-profit organization called B Lab and that is in charge of granting the B Corp Certification in the US (http://benefitcorp.net/about-b-lab). Jay Coen Gilbert, one of its co-founders explains that B-Lab rates what it is that the business does, how it is done, and how well the company cares for its employees, the environment and the community. In other words, its approach is not only limited to the product or service (as it is the case with those certifications of origin and quality of products) or to the administrative or production process (as with ISO certificates).
13 - Sistema B, Mission statement and vision, available on http://www.sistemab.org/el-movimiento-global/mision-y-desafios.
14 - (http://www.avina.net/esp/4097/sistema-b-cuenta-con-mas-de-90-empresas-comprometidas-a-ser-empresas-b-en-sudamerica-y-15-ya-certificadas/) As to July 2012, 11 B Corporations exist in Chile: Britec, ClanEco, Cerco Constructora, Epullen, Green Libros, Late!, Lumni, Proyecto Huerto, Pegas con Sentido, Route To Green and Triciclos (http://www.avina.net/esp/4097/sistema-b-cuenta-con-mas-de-90-empresas-comprometidas-a-ser-empresas-b-en-sudamerica-y-15-ya-certificadas/).
15 - http://www.revistadiners.com.co/articulo_especial/17_155_empresas-verdes-el-modelo-de-negocio-del-siglo-xxi
16 - "La empresa B: la nueva definición de competitividad y desarrollo revista la RS en el Siglo XXI" Manuel Antonio Camachio.

17 - We chose to use this terminology because non-profit organizations are generally known and referred to as the "third sector" in the business world.
18 - "Abrecht, Pablo A. y otros v. Cacique Camping S.A." National Commercial Court of Appeals, Chamber D, March 1-996, ED T168, page 546.
19 - "Sánchez v. Banco Avellaneda", ED, T.100, page 671.
20 - "De Carabassa, Isidoro v. Canale S.A. and others" National Commercial Court of Appeals. Chamber B, December 6-982, LL-1983-B, page 357. In the same ruling, the Court affirmed that the company's interests "refer to those elements which can only be specifically valued by its partners, that is the elements which are mentioned in Art. 1 of LSC. The company's interests have to be understood as interests in a common benefit gained through a common activity and relayed to all partners in such a way, that the partner's interests find a legal limit in the observance of the common interest resulting from the majority decision, in terms of the common character of the profitable activities and the return of profits to the partners."
21 - Halperín, Isaac, Otaegui, Julio. "Sociedades Anónimas", page 216. Ed. Depalma, Buenos Aires, 1998.
22 - Newpaper La Nación, Cover story of the supplement Economy "Hacia la metamorfosis de la empresa privada. Sustentabilidad se busca", August 11th, 2013.
23 - Ernesto Martorell raises this issue in his article "Los Directores de Sociedades Anónimas" page 6, Ed. Depalma (1994) and begs the question: "Can we continue talking of the company's management as exclusively oriented towards the achievement of monistic interests of the shareholders or does the director also have to look after other interests (public, sector-related, etc.)?
24 - "In order to appreciate this notion in this particular case, the following will be taken into account: a) the company's dimensions; b) its purpose; c) the general role assigned to a director or manager and the specific tasks that were entrusted to him (…) (Alberto Victor Verón, Sociedades Comerciales Ley 19.550, Comentada, Anotada y Concordada, Volume I, page 549, Ed. Astrea, 2007).
25 - Statement of Purpose, Law No. 19.550, first chapter, section VIII, On the management and representatives.
26 - This issue is explicitly contemplated in article 305 of the Model Benefit Corporation Legislations, annex to "White Paper, The Need and Rationale for the Benefit Corporation: Why is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public" (2013), that says: "Right of action: (a) Limitations: (1) Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to: (i) failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation (...) A benefit corporation shall not be liable for monetary damages under this chapter for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit (...)"
27 - National Commercial Court of Appeals. Chamber E, 05/16/1995, Pecati Nazar R. c/Torres Astigueta S.A: "The individual liability claim provided for in Article 278 of the LSC intends to repair direct damages caused to shareholders and third parties due to acts or omissions of the managing directors, but not the indirect ones, sustained due to damages to the corporate assets."
28 - In the statement of purpose, Law No. 19.550, second chapter, section V, Point IX "On the management and representatives", the following is stated: "The board of directors is in charge of the management of the company according to Article 50 and the provisions of the bylaws (Article 260) (…) The company has a wide discretion to organize the functioning of the board of directors (…) The set of provisions gives a wide spectrum of solutions regarding the organization of the management, that will allow to deal satisfactorily with the management's needs, whatever its complexity and scope.
29 - Duty of loyalty and diligence: While exercising their functions, the people mentioned hereinafter shall have to act loyally and diligently. Especially: a) The directors, managing directors and supervisors of the issuers, the latter must in matters related to their field of action: I) make the interests of the issuer where they carry out their tasks prevail without exception, as well as the common interest of all its partners above all other interests, even the parent company's interests (…) III) organize and implement systems and preventive mechanisms in order to protect the company's interests 8)".
30 - This issue was addressed by María Fernanda Mierez and Ricardo Vicente Seeber in the article "Posibilidad de delimitar la actuación del directorio para acotar los límites de su responsabilidad" published by Sociedades Comerciales Los Administradores y los Socios, Ed. Rubinzal-Culzoni (2005), page 59.
31 - Article 5 of the LSC.

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