

17TH NATIONAL CONFERENCE  
ITALIAN ASSOCIATION OF  
COMMERCIAL LAW'S SCHOLARS  
HORIZONS OF COMMERCIAL LAW

***“COMMERCIAL LAW FROM A  
EUROPEAN PERSPECTIVE:  
BETWEEN OVERREGULATION AND DEREGULATION,  
MANDATORY RULES AND PRIVATE ORDERING,  
HARMONIZATION AND FLEXIBILITY”***

Rome, 27-28 February 2026

PETER AGSTNER

Associate Professor – Free University of Bozen-Bolzano

**The role of mandatory rules in the law of closed corporations**

SUMMARY: 1. Introduction. – 2. Research trajectories. – 3. Default rules vs. mandatory rules. – 4. Comparative insights. – 4.1. German company law between statutory rigidity and freedom of contract. – 4.2. Delaware corporate law between *anti-contractarian* and *contractarian* pressures. – 5. Areas of potential hard paternalistic intervention. – 6. Conclusions.

***1. Introduction***

A fundamental topic across all scientific disciplines is the dialectical relationship between freedom and authority. In the field of corporate law, a distinguished exponent of modern commercial law described this vexed question as the “wohl schwierigste Frage des Gesellschaftsrechts” (the most difficult question in company law).<sup>1</sup> Within the framework of the dominant

---

<sup>1</sup> Wieland

neoliberal school of thought and the so-called New Institutional Economics, this issue has gained particular vigour and interest, especially in U.S. scholarship, where, since the late 1980s, we have witnessed the emergence of the well-known contrast between contractarian and anti-contractarian views.

In general, the idea of absolute private autonomy has been rightly compared to a *Traumschloss* (= dream castle)<sup>2</sup> or *mystifizierendes Leuchtfeuer* (= mystifying beacon).<sup>3</sup> Clearly, this does imply a denial of the primary value of statutory autonomy in the organization of corporate entities (*in dubio pro libertate*). The reason, according to established legal-economic doctrines, lies, *on the one hand*, in the assumption that, under conditions of perfect competition, contractual autonomy determines a Pareto-efficient state of general economic equilibrium—a state that cannot be achieved through regulatory interventions that limit such freedom; *on the other hand*, according to Coase's theorem, any intervention by a social planner would be futile, as parties will always agree on a distribution of resources that ensures maximum overall welfare in the absence of transaction costs, regardless of the original allocation.

However, it has been correctly observed that it is unrealistic to assume perfect competition or a world without transaction costs populated by fully informed and rational economic agents (REMM). Furthermore, given the proven behavioral failures of statutory freedom, there is no doubt about the need for adequate governance of contractual discretion. Indeed, despite the 2003 reform's focus on contractual freedom, unrestricted self-determination has ultimately resulted – in a kind of heterogeneity of ends – in weakened protections for vulnerable groups, specifically minority shareholders, creditors, and stakeholders). This is particularly true for closed companies, the exclusive subject of this investigation, where agency problems differ significantly from those in open or listed companies.

## ***2. Research trajectories***

The primary challenge lies in achieving – through the “visible hand of the law” – an effective balance between respect for self-determination and

---

<sup>2</sup> Wagner

<sup>3</sup> Röthel

the protection of relevant interest groups from prejudicial self-incapacitation. The crucial issue becomes filling the gaps left by inefficient private ordering.

This line of inquiry involves paying special attention to the instruments of regulatory intervention, specifically the dichotomous relationship between default rules and mandatory rules. In fact, even though the subject of this paper is the protective function of mandatory rules in company law, this cannot be separated from an in-depth analysis of the competing function performed by default rules. Precisely their interaction in the “space-time continuum” of company law determines their respective positions. In this perspective, it is commonly believed that the default rule represents the norm, while the mandatory rule represents the exception – described as “islands in a sea of dispositive law” (Gambaro).

Having mapped the protective functions and the interplay between default and mandatory rules, the next question concerns the legitimacy of recalibrating – though certainly not reversing – the aforementioned rule-exception relationship. Specifically, we must pinpoint paradigmatic cases where mandatory rules operate more effectively than default rules, as well as the criteria that justify such hard paternalistic intervention.

### *3. Default rules vs. mandatory rules*

The boundary between these two regulatory instruments is often blurred rather than binary. Nevertheless, it is possible to identify the policy strategies involved in each.

#### *(a) Default rules*

These rules possess a dual nature, simultaneously enabling private autonomy via opt-in/opt-out mechanisms and asserting heteronomous regulatory power. As Sunstein famously noted, “default rules are canonical nudges”. They fulfil both an informative function (signaling established practices) and an integrative function (filling contractual gaps), thereby reducing ex-ante transaction costs without burdening shareholders with higher ex-post governance costs. The prevailing view is that default rules should mimic the hypothetical bargain that most shareholders would have reached through arms-length negotiation (the so-called majoritarian default

rule). This leads to a shift in behavioral equilibrium without, however, infringing upon formal contractual freedom.

Yet, some may argue that despite the underlying rationales of nudging and soft paternalism,<sup>4</sup> default rules are largely ineffective as tools for correcting the cognitive biases that frequently distort opt-in or opt-out decisions. Indeed, since such cognitive limitations are often persistent, shareholders exercising their contractual freedom may simply replicate their initial errors. In doing so, they reject the default framework even when it offers a more efficient paternalistic safeguard ex-ante.<sup>5</sup>

Such concerns are likely unfounded when considering the structural nature of default rules—specifically, their 'stickiness.' This quality stems from several competing factors, notably the transaction costs of contracting around the rule, and, more significantly, the endowment effect and status quo bias, both of which diminish the likelihood of a voluntary opt-out. Stickiness, therefore, ensures the preservation of the default rule by shareholders exhibiting rational apathy or inertia, while simultaneously allowing more sophisticated parties to tailor different regulations to their needs.<sup>6</sup> In other words, it is entirely plausible that the provision of a majoritarian default rule nudges boundedly rational shareholders towards a regulatory option that remains, in any event, non-mandatory. On the other hand, such a policy choice does not disproportionately distort the contractual conduct of rational, well-informed parties, who remain free to contract around the provision at relatively low cost.

Taking this perspective a step further, it has been prominently proposed to selectively discourage opt-outs by making them artificially more difficult. This is achieved through so-called “impeding” altering rules, which occupy a middle ground between traditional default and mandatory rules, effectively acting as quasi-mandatory provisions (Ayres).

---

<sup>4</sup> For the distinction between soft and hard paternalism, see, among the exponents of modern political philosophy, in particular Feinberg and Dworkin.

<sup>5</sup> On this point, it is important to bear in mind the fundamental research findings of modern cognitive neuroscience, which has shown that most mental activity takes place automatically and unconsciously in the so-called System 1 (fast) and, therefore, independently of the conscious will, which presupposes the activation of the so-called System 2 (slow).

<sup>6</sup> I. AYRES, *Regulating Opt-Out*, 2088: (“... block the more socially problematic opt-outs, while not blocking the less socially problematic opt-outs”) and 2093 (“... to hinder opt-out by those contractors where the paternalism concern is high while allowing opt-out by those contractors where the paternalism concern is low”).

Nevertheless, where default rules fail to effectively mitigate cognitive biases, the limitations of soft paternalism may render hard paternalistic interventions necessary.

(b) *Mandatory rules*

The rationale for mandatory rules – operating through procedural safeguards or substantive mandates – lies in the need to protect people inside (paternalism) or outside (externalities) the contract. Specifically, procedural mandates driven by hard paternalism are appropriate when they aim to ensure that decision-making is more rational, voluntary, and well-informed; on the other hand, if the goal is to curb negative externalities, these measures are appropriate insofar as they serve to discourage detrimental opt-outs. Conversely, substantive mandatory provisions are useful when market failures cannot be corrected through procedural interventions. More precisely, such rules are necessary to protect third-party interests and/or when procedural safeguards are insufficient to guarantee self-protection due to insurmountable information gaps, cognitive distortions, or significantly unequal bargaining power.

Thus, while mandatory rules may be “islands in a sea of default law”, their protective role – at least in a subsidiary capacity – cannot be ignored or underestimated a priori. Indeed, in the absence of a minimum level of protection, nothing prevents overly confident and optimistic shareholders – particularly minority ones – from being induced to renounce, from the outset, the soft paternalistic protection offered by majoritarian default nudges.<sup>7</sup> This would result in a 'short circuit' of protection, where the weaker party is left shielded neither by mandatory rules (which are absent in this case) nor by default rules, whose application has been erroneously deactivated.

Especially in the context of closely held companies, these deficits are exacerbated by the fact that such corporations are quintessential relational contracts. They establish what Eisenberg calls a “thick relationship” between shareholders, in which high transaction costs and bounded rationality prevent the parties from anticipating every future contingency

---

<sup>7</sup> In these terms, A. MEANS, *A Contractual Approach to Shareholder Oppression Law*, in 79 *Fordham L. Rev.*, 2011, 1161, 1184 ff. (“... Unless some level of protection is mandatory, trusting and optimistic shareholders may be induced to abandon it at the outset of the venture”).

or adopting the private ordering measures necessary to mitigate post-contractual opportunism.

At this juncture, the dual function of mandatory law becomes evident: it provides a standardized, uniform structural framework—lowering negotiation costs for subsequent private ordering—while simultaneously fulfilling its inherent protective purpose in the strict sense. In any case, mandatory law may encounter limits to its effectiveness. This occurs when (i) regulatory objectives are not met – for instance, in the disclosure model, where the beneficiary often suffers from information overload or fails to process data correctly, ultimately resorting to heuristic strategies known as satisficing (Simon); (ii) the mandatory regulation has secondary consequences that undermine or even preclude the achievement of the intended regulatory objective; and, finally, (iii) the policy objective could be achieved with substantially equivalent effectiveness through alternative regulatory instruments, such as optional models (*Optionsmodelle*).

#### ***4. Comparative insights***

Before examining specific cases, it is useful to engage in a comparative assessment. Valuable insights can be drawn from the discourse surrounding the Satzungsstrenge (statutory rigidity) principle in German company law, as well as from the recent—and, according to many, controversially disruptive—reforms enacted by the Delaware legislature through the Senate Bill 21<sup>8</sup> and Senate Bill 313<sup>9</sup>.

##### ***4.1. German company law between statutory rigidity and freedom of contract***

German company law is characterized by an inherent dualism: on the one hand, the law governing limited liability companies (*GmbH*) is based on broad, though not unlimited, flexibility in internal corporate affairs (§ 45(1) *GmbHG*); on the other hand, the law governing joint-stock companies (*AG*) is defined by the principle of statutory rigidity (§ 23(5) *AktG*). In this

---

<sup>8</sup> This refers to amendments made to Sections 144 (transactions with related parties) and 220 (right to inspect company books) DGCL.

<sup>9</sup> See *West Palm Beach Firefighters' Pension Fund v. Moelis & Company* [311 A.3d 809, 820 (*Del. Ch.* 2024)]; and the legislative response with the enactment of new § 122(18) DGCL.

regard, one of the most prominent scholars (Lutter) vividly contrasted the “state-distant” nature of GmbH law (*staatsfernes GmbH-Recht*) with the “state-aligned” character of AG law (*staatsnahes Aktienrecht*).

Here, it is interesting to take a closer look at the principle of statutory rigidity, which constitutes a true peculiarity of German law, unparalleled in the comparative landscape. According to this principle, the articles of association may derogate from the provisions of the *AktG* only if this is expressly permitted; however, supplementary statutory rules are admissible unless the law contains exhaustive provisions.<sup>10</sup>

This rigid regulatory framework aligns perfectly with a political and legislative tradition historically characterized by a deep-seated distrust of the “invisible hand” of the market. This stance emerged forcefully as early as the *Aktienrechtsnovelle* of 1884, which sought to curb the then-pervasive and pernicious phenomenon of *Gründungsschwindel* (promoter fraud). The principle of *Satzungsstrenge* itself was forged by the jurisprudence of the *Reichsgericht* (RG), which repeatedly affirmed the mandatory nature of corporate law rules. In terms of black-letter law, while the 1937 reform remained silent on the explicit relationship between statutory law and freedom of contract, formal legislative recognition of *Satzungsstrenge* was only codified with the 1965 *AktG* amendment.

This regulatory framework is generally justified by the need to ensure adequate protection for current and future investors. This is achieved through the standardization of the corporate form, which facilitates the marketability and negotiability of shares. Over time, the protection of creditors’ interests has also gained increasing prominence. Furthermore, the principle of *Satzungsstrenge* aims to foster legal certainty and predictability by reducing litigation over the interpretation of (“standard”) articles of association.

Nevertheless, there is a broad consensus among scholars that the principle of statutory rigidity is primarily functional to the protection of shareholders in *listed* companies. Conversely, a greater degree of statutory flexibility is deemed desirable for closed joint-stock companies, especially given their clear typological similarity to the *GmbH*. The latter, as we have

---

<sup>10</sup> Similar developments can be found in Austrian company law. However, the principle of so-called *materielle Satzungsstrenge* is not enshrined in an express provision of law (OGH, 8 May 2013, 6 Ob 28/13f, in *GesRZ*, 2013, 212).

seen, is governed by a fundamentally different normative logic, centered on the principle of maximum freedom of contract.

#### ***4.2. Delaware corporate law between anti-contractarian and contractarian pressures***

U.S. corporate law is also characterized by a classic contrast between contractarian and anti-contractarian views. Starting from the regulatory framework, unlike the *Delaware Revised Uniform Limited Partnership Act* (DRULPA) and the *Delaware Limited Liability Company Act* (LLC Act), the *Delaware General Corporation Law* (DGCL) has never explicitly adopted a statement aimed at giving maximum effect to the principle of freedom of contract.<sup>11</sup> Nevertheless, the legislation on corporations also moves in the same direction, establishing very broad – but not unconditional – statutory autonomy when it provides that the articles of association may contain “[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders ... if such provisions are not contrary to the laws of this State”<sup>12</sup>. In this vein, leading scholarship noted over half a century ago that “the Delaware corporation enjoys the broadest grant of power in the English-speaking world to establish the most appropriate internal organisation and structure for the enterprise” (Folk III).

Today, the debate on these issues has been reignited by two legislative interventions that have changed the substance of Delaware corporate law. The corporate law of this state – considered the most advanced at federal level – has historically evolved thanks to a thoughtful balance between flexible regulatory provisions and measured judicial activism. This delicate

---

<sup>11</sup> See, however, Del. Code Ann. tit. 6, § 17-1101(c) (2024) for the LP; and Del. Code Ann. tit. 6, § 18-1101(b) (2024) for the LLC; in case law, see *In re Grupo Dos Chiles, LLC*, No. 1447-N, 2006 Del. Ch. Lexis 45, at \*5–6 (Del. Ch. Mar. 10, 2006).

<sup>12</sup> Del. Code Ann. tit. 8, § 102(b)(1) (2024). However, certain mandatory rules persist in corporate law, notably the right of shareholders to appoint directors [Del. Code Ann. tit. 8, § 211 (2024)]; the right to inspect company books [Del. Code Ann. tit. 8, § 220 (2024)]; and, albeit not in a definitive manner [the reference is to the possibility of waiving the so-called corporate opportunity doctrine pursuant to § 122(17) DGCL], the duty of loyalty incumbent upon directors, which can be waived under LLC law [Del. Code Ann. tit. 6, § 18-1101(c)], without, however, eliminating the implied contractual covenant of good faith and fair dealing.

balance is now being undermined by the latest reforms which, following a highly unorthodox legislative process,<sup>13</sup> appear to be chasing the “siren call” of the market for incorporations.<sup>14</sup> The result is a race to the bottom fueled by the pressures of influential interest groups.

In this regard, we have, on the one hand, recent reform packages clearly inspired by anti-contractarian objectives. A prime example is Senate Bill (SB) 21, which amended Sections 144 and 220 of the DGCL.<sup>15</sup>

More specifically, by rejecting the MFW principles established in the Match Group case,<sup>16</sup> the law now provides a safe harbor for controlling-shareholder transactions (excluding going-private deals such as freeze-outs or squeeze-outs). Crucially, these transactions no longer require the joint approval of both an independent committee and a majority of the minority; instead, they may be approved by *either* a committee composed of a majority – rather than all – of independent directors, *or* by a majority of the minority shareholders;<sup>17</sup> while (only) for *going private* transactions, the procedural requirement of double-cleansing has been maintained.<sup>18</sup>

Simultaneously, in pursuit of the same rigid, top-down policy, access to corporate records – essential for investigating and prosecuting derivative suits – has become significantly more restricted. Indeed, according to the

---

<sup>13</sup> M. Kahan-E.B. ROCK, *The New Political Economy*, 5 ff., with the dominant and driving role usually exercised by the (apolitical) *Corporation Law Section of the Delaware Bar Association*.

<sup>14</sup> Emblematic in this regard is the post on the X platform made on 30 January 2024 by Elon Musk, the main 'protagonist' in this battle in the corporate law market, immediately after the *Court of Chancery* (*Tornetta* case) rescinded the \$56 billion remuneration plan (now validated by the Delaware Supreme Court in its decision of 19 December 2025): '*Never incorporate your company in the state of Delaware*'.

<sup>15</sup> E. Talley-S. Sanga-G.V. RAUTERBERG, *Delaware Law's Biggest Overhaul*, where it is stated that '*these new reforms ... might inadvertently sap what truly sets Delaware apart: a flexible, nuanced, judge-made approach that refines fiduciary principles over time. What remains may be a more rigid, top-down code ...*'.

<sup>16</sup> *In re Match Group, Inc. Derivative Litig.*, 315 A.3d 446 (Del. 2024), according to which, in order to apply the more favorable business judgement rule as the standard of review in place of the more rigorous entire fairness standard, the controlling shareholder who is on both sides of the transaction and receives benefits not shared with the minority (*non-ratable benefit*) must submit such transaction *ab initio* to the approval of *both* a special committee composed *entirely* of disinterested directors *and* the majority of minority shareholders [the so-called MFW doctrine, developed in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), with application of the *double-cleansing* mechanism then limited to *squeeze-out mergers* only.

<sup>17</sup> *Del. Code Ann. tit. 8, § 144(b)* (2025).

<sup>18</sup> *Del. Code Ann. tit. 8, § 144(c)* (2025).

new wording of Section 220 DGCL, access is limited to “books and records” as expressly defined by the provision in question (with no longer the possibility of requesting copies of e-mails, informal communications from the board, etc.), some of which (i.e., minutes of shareholders’ meetings, financial statements and general communications from the company to its shareholders) can only be consulted for a period of three years prior to the formal request; furthermore, the relevant request must now be made in good faith and indicate an appropriate purpose, describe the latter with reasonable accuracy and demonstrate that the extracts requested are specifically related to that purpose.

In contrast, the amendment enacted via SB 313 – specifically the newly introduced Section 122(18) DGCL – yields an entirely different conclusion. Indeed, on this occasion, the Delaware legislature – once again in stark contrast to judicial precedent (specifically the Moelis decision) – opted for a decisive contractarian shift. Indeed, it is now permissible, by way of derogation from the default rule of Section 141(a) DGCL,<sup>19</sup> to enter into shareholders’ agreements that delegate substantially all board powers to individual stockholders (current or future), without requiring formal amendments to the certificate of incorporation.<sup>20</sup>

### *5. Areas of potential hard paternalistic intervention*

Building on these observations, we must now examine the role of mandatory rules within the legal framework governing closely held corporations. At the outset, a general reversal of the relationship between default and mandatory rules must be dismissed. Such a radical paradigm shift would undoubtedly incur costs that far outweigh any anticipated benefits, i.e. a loss of statutory flexibility that would not be offset by equal or greater protective effects and increases in legal predictability. This assumption is further supported by a comparative analysis. Even in Germany, despite its emphasis on mandatory provisions, the dualistic

---

<sup>19</sup> Provision stating that “the business and affairs of every corporation ... shall be managed by or under the direction of a board of directors, except as may be otherwise provided ... in its certificate of incorporation”.

<sup>20</sup> *Del. Code Ann. tit. 8, § 122(18) (2024)*, according to which the company may contractually undertake, for example, not to perform certain operations; and/or to request prior approval from one or more corporate bodies or persons for the purpose of performing certain acts, etc.

approach has historically linked the principle of *Satzungsstrenge* to the legal archetype of the publicly held company (*Publikumsgesellschaft*).

In light of this, hard paternalism—expressed through binding regulations—must be applied in a timely and surgical manner. The primary challenge, thus, lies in identifying and defining with sufficient accuracy the specific areas of potential rigidity within the existing statutory framework. In this regard, the analysis will adopt a line of inquiry centered on the pivotal elements of corporate governance and agency conflicts within closely held corporations.

(i) *The issue of conflicts between shareholders in closed companies*

As is well known, intra-shareholder conflicts constitute the Achilles' heel of corporate governance in closely held companies. These conflicts typically manifest as oppression of the minority, abuse of minority rights, or deadlock in cases of equal shareholding. Without delving into an exhaustive examination of these scenarios, it suffices to note that their management—encompassing both prevention and resolution—relies on the synergistic interplay of statutory safeguards, efficient private ordering, and balanced judicial oversight.

Focusing on the legislature's infrastructural responsibility, a targeted intervention through mandatory provisions could involve the express codification of fiduciary duties among shareholders. While courts in Italy, the U.S.,<sup>21</sup> and Germany<sup>22</sup> have arrived at this conclusion via case law, Switzerland has codified this principle. Specifically, Art. 803(2) *Obligationenrecht* (OR) mandates that “[shareholders] must refrain from any action that could harm the company's interests. Specifically, they shall not

---

<sup>21</sup> In the case law of the Supreme Judicial Court of Massachusetts, see *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 664 (Mass. 1976); and, above all, *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975). In a highly restrictive sense, however, the Delaware Supreme Court in the cases *Nixon v. Blackwell*, 626 A.2d 1366, 1379-80 (Del. 1993); and *Riblet Products Corp. v. Nagy*, 683 A.2d 37, 39-40 (Del. 1996); for openings, however, the Delaware Chancery Court in *Little v. Waters*, C.A. No. 12155, 1992 WL 25758 (Del. Ch. 11 Feb. 1992).

<sup>22</sup> In Germany, the first acknowledgement of the duty of loyalty in *horizontal* relationships between shareholders occurred in relation to limited liability companies as early as 1975 with the *grand arrêt* of the German Federal Supreme Court in the *ITT* case (BGH, 5.6.1975 - II ZR 23/74); for joint-stock companies, on the other hand, with BGH, 1.2.1988 - II ZR 75/87 (*Linotype*); and BGH, 20.03.1995 - II ZR 205/94 (*Girmes/Effecten-Spiegel*, which established the extension of the fiduciary duty to minority shareholders).

undertake any activities that result in a special advantage for themselves and that could prejudice the company's objectives".

Given this interplay between statutory law and case law, one might question the utility of declaratory codification<sup>23</sup> if such principles are already widely recognized by the courts. In response to this fundamental issue, it can be argued that the explicit enactment of a mandatory duty of loyalty produces beneficial effects for both judicial oversight and shareholder conduct.

Under the first profile, such a regulatory approach yields a twofold advantage. On the one hand, it signals to the judiciary an unequivocal and steadfast commitment within corporate law toward the equitable management of intra-corporate relationships. Indeed, the legislative formant of the general clause serves to curb judicial "creativity" and mitigate the resulting interpretative instability. On the other hand, given its nature as a general provision, it ensures sufficient flexibility and adaptability to the peculiarities of individual cases. This effectively mitigates the adverse effects typically associated with the 'statutory freezing' of concepts that originated in case law.

Under the second profile, it should be noted that the corporate contract—particularly in closely held corporations—is typically relational in nature. Consequently, not every future contingency can be foreseen or regulated, making it impossible to entirely eliminate the risk of post-contractual opportunism by either majority or minority shareholders. In light of this, only statutory formalization can ensure that such a provision is binding within the certificate of incorporation or shareholders' agreements, thereby rendering any ex-ante waiver of fair treatment between shareholders null and void.

(ii) The conflict between directors and minority shareholders

In closed corporations, corporate governance is often characterized by an additional agency conflict: the tension between directors and minority shareholders. Although often considered an extension of the conflict between majority and minority shareholders, the director-minority tension represents a separate agency problem.

---

<sup>23</sup> Anglo-Saxon doctrine similarly refers to 'statutes in the affirmative' or, metaphorically, 'freezing the concept in a statute'.

Against this backdrop, it is necessary to examine the provisions on directors' liability (Art. 2476 C.C.) and transactions involving a conflict of interest (Art. 2475-ter C.C.). Regarding the first issue, the Business Judgment Rule (BJR) undoubtedly serves as the cornerstone of the liability regime. This principle dictates that a court may not second-guess the merits of a management decision at the time it was made; instead, the judge must evaluate the director's conduct from an ex-ante rather than an ex-post perspective.

Directors thus benefit from a robust safe harbor. The multifaceted rationales for the BJR include: incentivizing managers to undertake reasonable risks; acknowledging the inherent uncertainty of entrepreneurial ventures; and mitigating the risk of hindsight bias during judicial proceedings; and, finally, aligning the risk preferences between shareholders (generally risk neutral) and directors (typically risk-averse). These explanatory models are undoubtedly compelling when applied to directors of public corporations. Regarding the latter, the full application of the BJR is further justified by the fact that shareholders in such contexts benefit from easy exit options and the oversight provided by the capital market as a substitute monitoring mechanism.

The issue becomes more complex when the focus shifts to private limited companies. While the isolated view that the BJR should be entirely inapplicable to such entities is untenable, it is nevertheless legitimate to ask whether the rule's scope should be reassessed or restricted in light of the structural characteristics inherent to this corporate model. In fact, these corporate environments are characterized by several distinctive factors: a more pronounced risk aversion among shareholders, who typically invest a substantial portion of their personal wealth in the enterprise; the absence of a market for corporate control; the inherent illiquidity of the investment; and, most notably, the frequent overlap between the majority shareholder and the director.

Given these factors, one might question whether it is necessary to broaden judicial scrutiny of management decisions, precisely to compensate for the absence of alternative oversight mechanisms. Turning specifically to the *SRL*, it is widely recognized that, in principle, a system of internal checks and balances is already in place. References goes here to the provisions in Art. 2479, paras. 1 and 2, C.C. (namely, the power to reserve any management matter specified in the articles of association for

shareholder approval and/or to take upon themselves the approval of specific matters; as well as the intangible right to decide on certain matters of fundamental importance); and, in addition, the granting of special rights to individual shareholders regarding corporate management, alongside the extensive information and inspection powers typically reserved for non-director shareholders.

However, it is equally undeniable that – particularly when the director serves as, or represents, the majority shareholder – there is a significant risk that these internal control mechanisms will be nullified. In such cases, what are theoretically robust checks can, in practice, easily be circumvented or prove ineffective. This is especially evident in self-dealing transactions involving a conflict of interest between the director (-majority shareholder) and the company. In such cases, the available legal remedy is limited to the annulment of the transaction under the specific conditions of Art. 2475-ter C.C. Notably, however, the *SRL* framework lacks a provision equivalent to Art. 2391, paras. 4 and 5, C.C., which governs joint-stock companies (*SPA*).

Although the prevailing view supports the application of this liability regime to the *SRL*, significant uncertainties remain. There is no consensus, for instance, on whether the claimed damage must be actual or merely potential; the scope of available defenses (such as whether the company must prove the director's negligence in evaluating the conflict); and whether liability extends to cases where the director holds a 'simple' interest that does not strictly conflict with the company's interests. Given these uncertainties, it would be an advisable policy choice to intervene by establishing a mandatory rule on director's responsibility for damages caused to the company.

(iii) The agency conflict between creditors and the company

(...)

## 6. Conclusions

(...)