THE REAL DIFFERENCE IN CORPORATE LAW BETWEEN THE UNITED STATES AND CONTINENTAL EUROPE: DISTRIBUTION OF POWERS

BY SOFIE COOLS*

ABSTRACT

This article challenges some common assumptions in comparative corporate law. It argues that differences in the degree of shareholder protection between common law and civil law countries are often overestimated, while some more fundamental corporate law differences remain overlooked. A milestone publication in this regard is the article by La Porta et al. entitled Law and Finance. *The authors introduced an index to measure investor protection statistically and found that common law countries performed better on average than civil law countries. A broad array of legal sources, however, reveal many mechanisms that interfere with, or substitute for, the mechanisms for shareholder protection used to construct the index. A recoding of the index to include these sources yields no significant differences between common law and civil law jurisdictions. This finding casts doubt on the received premise of recent research that common law jurisdictions offer better shareholder protection than civil law jurisdictions. It highlights instead the existence of a fundamentally different distribution of legal powers between U.S. and Continental European corporations. This article shows that this difference shapes the functioning of the shareholder protection mechanisms that comprise the index of La Porta et al. Furthermore, the difference in power distribution undermines the relationship they allege between shareholder protection and ownership structures and better explains the differences in ownership structures, as well as many other aspects of corporate life.*

---

*LL.M. Harvard Law School, Licentiaat rechten University Leuven. An earlier draft of this paper was awarded the Irving Oberman Memorial Award at Harvard Law School and the Ius Commune Prize at the Universities of Maastricht, Leuven and Utrecht. I thank Professor Mark Roe, Professor Detlev Vagts, Jeroen Delvoie, Martin Gelter, Akio Hoshi, Masaru Itatani, Mathias Siems, Matteo Trapani, Dirk Zetzsche, and especially Jane Fair Bestor for their helpful comments and the Belgian American Educational Foundation for its support. Comments are very welcome at slcools@post.harvard.edu.

Some sources cited in this article were unable for review by the Delaware Journal of Corporate Law but have been verified by the author.

I. INTRODUCTION

The Berle and Means corporation, with many dispersed shareholders and control in the hands of management,[1] is not a worldwide phenomenon. Outside Anglo-Saxon jurisdictions, different corporate ownership structures in which controlling shareholders have a large stake in the company's equity predominate.[2] Within Continental Europe, distinctions are made among the French tradition, where the dominant stockholder is usually a family or a company; the German tradition, characterized by a "universal bank" that holds a considerable share; and the Nordic countries, where families play an important role.

The differences in ownership structures are no longer news. The question over which many minds have been pondering—and differing—during the last decade is what exactly causes them.[3] A

---

[1] ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 2-3 (1933).

[2] Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

[3] Several explanations and correlations have been put forward. *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE (2003) (pointing to situation on the political left-right continuum); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS (1994); Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999) (discussing structure driven and rule driven path dependencies); Lucian A. Bebchuk, *A Rent Protection Theory of Corporate Ownership and Control*, (Nat'l Bureau of Econ. Research, Working Paper No. 7203, 1999) (suggesting that private benefits of control influences ownership structure); Sea Jin Chang, *Ownership Structure, Expropriation, and Performance of Group-Affiliated Companies in Korea*, 46 ACAD. MGMT. J. 238 (2003) (arguing that performance is a cause of ownership structure rather than a consequence); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Role of Law in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001) (examining self-regulation); Ergun Dogan & Russell Smyth, *Board Remuneration, Company Performance, and Ownership Concentration: Evidence from Publicly Listed Malaysian Companies*, 19 ASEAN ECON. BULL. 319 (2002) (discussing the relationship between level of board remuneration and corporate performance); Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537 (2004) (analyzing size of private benefits of control); Peter A. Gourevitch, *The Politics of Corporate Governance Regulation*, 113 YALE L.J. 1829, 1867-69 (2003) (reviewing ROE, POLITICAL DETERMINANTS, *supra*) (discussing likelihood of political swings); Amir N. Licht, *The Mother of all Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147 (2001); Amir N. Licht et al., *Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Laws* (2001), *at* http://ssrn.com/abstract=267190 (last visited Dec. 2, 2003) (culture); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503 (2001) (discussing security of property and contract rights); Luigi Zingales, *The Value of the Voting Right: A Study of the Milan Stock Exchange Experience*, 7 REV. FIN. STUD. 125 (1994). *See also* John C. Coffee, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151 (2001) (arguing that corporate behavior is affected by social norms particularly where law is weak); Raghuram Rajan & Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the Twentieth Century*, 69 J. FIN. ECON. 5, 43 (2003) (suggesting strength of favorable political forces as key to financial development).

milestone was set by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny (LLSV) in their seminal paper *Law and Finance* in 1996.[4] In 1998, a modified article bearing the same title was published.[5] In both publications LLSV assert that ownership structures are determined by the degree of investor protection against expropriation by insiders. The authors demonstrate their thesis using what at that time was a particularly innovative technique: an index to measure the quality of investor protection. Common law countries, which typically have dispersed ownership, scored well on the index. Civil law countries, characterized by concentrated ownership, did not. The authors conclude that legal origin, in part through a difference in the degree of ownership protection, influences ownership structures.[6]

Even though in their further elaboration of the "law matters" thesis LLSV themselves seem to attach greater importance to private enforcement of securities law than to corporate law,[7] the LLSV study has been, and still is, extremely influential. The index used in *Law and Finance* to measure investor protection is still being relied upon extensively as a quantitative measure of investor protection. It is used in regressions to establish the existence or non-existence of relationships between shareholder protection and several other variables. Scholars have found that investor protection

---

[4]Rafael La Porta et al., *Law and Finance* (Nat'l Bureau of Econ. Research, Working Paper No. 5661, 1996).

[5]Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

[6]*Id.* at 1151. The authors also note the quality of law enforcement, which also (albeit somewhat differently) corresponds with legal origin. *Id.* at 1140-45.

[7]La Porta, Lopez-de-Silanes, and Shleifer recently showed that "private enforcement" variables in securities laws knock out anti-director rights as a significant predictor of market development: Rafael La Porta et al., *What Works in Securities Laws?*, *available at* http://ssrn.com/abstract=430596 (last visited Mar. 28, 2004). Other authors also raised critiques against the claim that investor protection produces certain ownership structures. In addition to the above-mentioned theories on ownership structures (see *supra* note 3); see also Mike Burkart & Fausto Panunzi, *Agency Conflicts, Ownership Concentration, and Legal Shareholder Protection* (CEPR Discussion Paper No. 2708, 2001), *available at* http://ssrn.com/abstract=264361 (last visited Apr. 5, 2004) (noting that high quality investor protection may also have adverse effects); Coffee, *The Rise of Dispersed Ownership*, *supra* note 3, at 80 (also pointing out that strong markets may have created a demand for a sound legal framework); Curtis J. Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals*, *in* CURTIS J. MILHAUPT, GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS (2004) (suggesting that ownership concentration may be a consequence of too much protection of minority shareholders); Rajan & Zingales, *supra* note 3, at 7 (arguing that a historical analysis, as opposed to a cross-sectional analysis, refutes LLSV's findings).

correlates with broad and deep capital markets,[8] higher dividend payouts,[9] higher corporate valuation,[10] better access to external finance,[11] more efficient capital allocation,[12] and the extent of exchange rate depreciation and stock market collapse during a crisis.[13] They have uncovered correlations with a country's cultural profile,[14] the value of control benefits,[15] and many other factors, or used the index as a control variable.[16] One can say that *Law and Finance* is a standard reference in comparative corporate and financial law.[17]

Only a few authors, mostly from civil law countries,[18] have questioned the index and in particular, the sub-index measuring shareholder protection. Of the three main issues investigated by LLSV—shareholder rights, creditor rights, and law enforcement—it was the shareholder rights, as measured by the "anti-director index," that had the strongest explanatory

---

[8]Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Ross Levine, *Bank-Based or Market-Based Financial Systems: Which is Better?*, 11 J. FIN. INTERMED. 398 (2003).

[9]Rafael La Porta et al., *Agency Problems and Dividend Policies Around the World*, 55 J. FIN. 1, 27 (2000).

[10]Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147, 1166-69 (2002).

[11]*See* Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3, 13-17 (2000) (explaining consequences attributed to low investor protection).

[12]Jeffrey Wurgler, *Financial Markets and the Allocation of Capital*, 58 J. FIN. ECON. 187 (2000).

[13]Simon Johnson et al., *Corporate Governance in the Asian Financial Crisis*, 58 J. FIN. ECON. 141 (2000).

[14]Amir N. Licht et al., *Culture, Law, and Corporate Governance* (2004), *at* http://ssrn.com/abstract=508402 (last visited Mar. 28, 2004).

[15]Bebchuk, *supra* note 3; Tatiana Nenova, *The Value of Corporate Votes and Control Benefits: A Cross-Country Analysis*, Harvard University Working Paper, 3-4 (2000), *available at* http://ssrn.com/abstract=237809 (last visited May 3, 2005).

[16]Thorsten Beck & Ross Levine, *Industry Growth and Capital Allocation: Does Having a Market- or Bank-based System Matter?*, 64 J. FIN. ECON. 147, 161-64 (2002); Randall Morck et al., *The Information Content of Stock Markets: Why Do Emerging Markets Have Synchronous Stock Price Movements?*, 58 J. FIN. ECON. 215, 255-58 (2000).

[17]*See* Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS (Mary Shirley & Claude Ménard eds., 2004), *available at* http://www.econ.worldbank.org/files/29888_wps3136.pdf (last visited Aug. 21, 2004) (surveying the law and finance literature).

[18]For common law countries, reference can be made to John C. Coffee who, along with "many [unnamed] legal commentators," briefly notes that although not unimportant, the anti-director rights "seem to supply only partial and sometimes easily outflanked safeguards, which have little to do with the protection of control and the entitlement to a control premium." Coffee, *The Rise of Dispersed Ownership*, *supra* note 3, at 8 & n.6). *See also* Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741, 765-67 (2000) (briefly raising a similar critique on the value of the scores as statistical data).

power. The anti-director index was the only sub-index to correlate completely with the division between common law and civil law, and the only one to correlate significantly with the degree of ownership dispersion.[19] Detlev Vagts raises short critiques against the scores given to Germany and against the relevance of some of the anti-director rights for the German system.[20] Moreover, Markus Berndt presents an "Alternative Minority Protection Index," where the "shares not blocked" and the "oppressed minorities mechanism" rights are replaced by "minority protection regarding authorized capital" and "minority protection regarding share repurchases." On Berndt's index, civil law countries, especially France, perform better than common law countries, in particular the United Kingdom.[21] Finally, Alain François and Jeroen Delvoie formulate interesting technical remarks from the Belgian point of view.[22]

Is the reaction of civil lawyers one of self-defense against the weak scores given civil law countries, or are there factors at work that would render the index less appropriate for civil law jurisdictions? The latter would have severe consequences. If civil law countries perform poorly on the index because it has a common law bias, we no longer know whether investor protection is actually weaker or whether it has any bearing on ownership structures. To put it more bluntly, if the index merely reflects whether a given corporate legal system belongs to the common law or civil law tradition, the only thing it demonstrates is that in common law countries ownership is dispersed, and in civil law countries it is concentrated.

---

[19]La Porta et al., *supra* note 5, at 1149-50. The scores correlate with the distinction between common law and civil law only with respect to the shareholder—anti-director—rights. For creditor rights, there is no correlation with legal origin and for law enforcement, common law countries fall in between the Scandinavian and German civil law family, on the one hand, and the French civil law tradition, on the other. *Id.*

[20]Detlev Vagts, *Comparative Company Law—The New Wave*, *in* FESTSCHRIFT FÜR JEAN NICOLAS DRUEY [MEMORIAL BOOK FOR JEAN NICOLAS DRUEY] 600 (Rainer J. Schweizer et al. eds., 2002).

[21]Markus Berndt, *Global Differences in Corporate Governance Systems*, *in* ÖKONOMISCHE ANALYSE DES RECHTS [ECONOMIC ANALYSIS OF LAW] 3 (Peter Behrens et al. eds., 2002). He points out that both Germany and the United Kingdom have preemptive rights as a default rule and that in both countries those rights can be waived. The difference is that Germany has stricter requirements for a waiver, which would rather lead to a better score for Germany than for the United Kingdom than otherwise. *Id.*

[22]Alain François & Jeroen Delvoie, *De Wet Corporate Governance in het Licht van het Ruimere Corporate Governance Debat [The Corporate Governance Act in Light of the Broader Corporate Governance Debate]*, *in* DE WET CORPORATE GOVERNANCE ONT(K)LEED [THE CORPORATE GOVERNANCE ACT ANALYZED] 29-33 (Koen Byttebier et al. eds., 2004) (suggesting briefly that the selection of rules in the index is flawed and may not be the most crucial investor protection rights, that there may be substitute rules, and that investor protection may lead to ownership concentration rather than dispersion).

This study investigates differences between common law and civil law countries that affect the relevance of the anti-director index. It starts from a U.S. law perspective and extends the research of Vagts and Berndt to other countries. Since these authors have revealed some problems with the index for the German law family, this article focuses on the French civil law family, which according to the LLSV study is the worst at protecting investors overall. Specifically, the jurisdictions examined most closely are France, the center of the French family of civil law countries, and Belgium, which received a score of zero, the worst performance recorded under the anti-director index.

In Part II the anti-director index is used to illustrate the importance of seemingly unrelated or otherwise unnoticed technical elements of a legal system. In particular, Part II explores examples where, despite a score of zero, a country's law does provide for an anti-director right, but by means of case law or in practice rather than by explicit statutory provision. Depending on the legal framework, statutory silence can mean that a specific right is permitted, rather than banned. An example of this phenomenon that is valid for both France and Belgium is proportional representation on the board of directors.[23] Sometimes the law of a country provides for an institution listed in the anti-director index, only it bears a different name. Under Belgian corporate law, "preemptive rights," literally translated, means "preferential rights." Another important finding is that different institutions can have similar effects. For instance, sending a straight vote by mail—which is allowed in France but, admittedly, not frequently used—is very much the same as sending a proxy vote by mail. More important here is the finding that similar institutions can have a different effect as a consequence of other rules. For instance, in France sending the proxy by mail to the firm is indeed allowed, but only to *support* the incumbents.[24]

On the basis of observations like these, one could wonder whether quantification is possible at all in the field of law, especially when the scoring mechanisms are so narrow. Leaving this question aside,[25] this study re-codes the anti-director index for France or Belgium on the basis of the above-summarized investigation. The results are astonishing: under a re-coded index Belgium would be attributed a score of four instead of zero on a scale ranging from zero to six. France, which had a score of three in *Law*

---

[23]*See infra* notes 110 and 103, respectively, and accompanying text.

[24]*See infra* note 59 and accompanying text.

[25]Another question that will not be examined here is whether the six anti-director rights are the most crucial elements of investor protection.

and Finance, would have received a four or five at that time. Today it would have a score of five or even six.

Similar institutions may also have different effects because of a different factual background or a difference in the fundamentals of corporate law. This difference in background is the subject of Part III. Not only do the United States and Continental Europe differ in the extent of ownership concentration, something else has a pervasive influence on the functioning of technical rules and should always be considered in comparative law studies: *the fundamental choices of a legal system.* An extraordinarily important but almost continually overlooked concept underlying corporate law provisions concerns the respective roles of a corporation's constituents. Thus, Part III unveils the different distribution of legal powers between U.S. corporations and those in Continental Europe. This may well be a stronger distinguishing characteristic than the extent of investor protection. In a U.S. corporation, the center of power lies within the board, or better, management. It can act autonomously in matters where a Continental European board or management would depend on its shareholders. This fundamental difference is supported by two other differences. First, it is easier for shareholders to set the agenda of the shareholders' meeting in Continental Europe than it is in the United States. Second, the enabling approach of the Delaware legislature allows the board to assume several powers of the shareholders' meeting. In contrast, in Continental Europe, the statutory allocation of powers is mandatory, and even with the permission of the shareholders, the board cannot appropriate most of their powers.

In several innovative publications, Lucian Bebchuk calls attention to the relative powerlessness of shareholders in the United States and recommends that shareholder power be increased.[26] The comparison between the United States and Continental Europe supports and extends Bebchuk's arguments. It underscores just how few legal powers shareholders have in the United States and how fundamental the distribution of legal powers is in shaping the character of corporate life. Part IV shows how recognition of the different distribution of legal powers requires a revision of several theories in corporate law scholarship. The distribution of legal powers affects the bearing of most of the anti-director rights, but its impact goes far beyond that. Most importantly, it is a crucial element in understanding why ownership structures are so different in the

---

[26]Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003); Lucian A. Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002).

United States and Continental Europe, the question that initially led to the development of the anti-director index. In the United States, the board can act relatively independently from the shareholders. Conversely, in Continental Europe, the board needs the permission of the shareholders for a range of decisions, and it can be replaced at any moment if a simple majority of shareholders wishes to do so. Thus, in Continental Europe, the stable situation is one in which the board and the majority shareholder cooperate extensively, whereas in the United States, a majority stake does not impart significant control over the company and therefore does not outweigh the costs that such a stake would entail.

The difference in the typical distribution of legal powers in a corporation arguably has many of the consequences that have so far been attributed to differences in investor protection. Thus, firm growth, firm size, private benefits of control, stock options incentives, and many other aspects of corporate life could become more intelligible when seen against this background. Finally, a consideration of the difference in allocation of legal powers may have important consequences for initiatives in international corporate governance. This article invites new research on these and other fascinating aspects of corporate life.

II. SMALL DIFFERENCES IN SHAREHOLDER PROTECTION

A. *Introduction*

1. Methodology

LLSV do not give many details on the anti-director index or on the reasoning behind a particular score. They define the index as a tool for "measur[ing] how strongly the legal system favors minority shareholders against managers or dominant shareholders in the corporate decision-making process, including the voting process."[27] In the 1996 paper, the index consisted of five shareholder rights. Countries were assigned one point for every right for which their laws provided. LLSV explicitly excluded any information from security exchange regulations from their research.[28] By 1998, LLSV had revised their index to include six rights. As a result, the scale now ranges from zero to six. Common law countries

[27]La Porta et al., *supra* note 5, at 1127.

[28]*Id.* at 1120.

generally obtain high scores, with an average of 4.00.[29] Civil law countries, on the other hand, apparently do not offer much protection for minority shareholders. The average score for both French-origin and German-origin countries is 2.33.[30]

This part critically investigates each of the anti-director rights in light of Delaware law and French and Belgian law, with a few references to other jurisdictions as well.[31] The focus is on the interrelation among different rules and their importance in comparative law. Unlike the LLSV article, this article also examines case law and regulations in addition to statutory law where they prove relevant. Discussion regarding fundamental differences in legal and economic background are left for Part III.

2. Introduction to the French and Belgian Corporate Law

France, the center of the French origin family,[32] received a score of three in the LLSV publication, which is better than the average in the French family, at 2.33.[33] The most common corporate form for public corporations in France is the *Société Anonyme* (SA),[34] which is mainly governed by the Commercial Code of 2000. This code codified the provisions of a 1966 Act[35] without major changes in content.[36] The Commercial Code was amended significantly by the New Economic

---

[29]The United States, for which LLSV sensibly chose to investigate Delaware law, no longer has a perfect score on the new scale, remaining instead at five. In addition, some countries' scores were modified, so that only Belgium was left with a score of zero. Originally, also Indonesia and Mexico scored zero. La Porta et al., *supra* note 5, at 1130-31. In La Porta et al., *supra* note 8, at 1138, these original scores were used. In the 1998 version of *Law and Finance*, the scores were slightly modified.

[30]France is a bit above the average with a score of three, which is also the average of Scandinavian countries. La Porta et al., *supra* note 5, at 1130.

[31]Like the LLSV study, this description confines itself to the law applicable to listed companies.

[32]The French family within the civil law tradition stems from the Napoleonic Code of 1807 and was brought by conquest to Belgium, the Netherlands, part of Poland, Italy, and western regions of Germany. During the colonial era, French legal influence extended to the Near East, Northern and sub-Saharan Africa, Indochina, Oceana, and French Carribean Islands and has been significant among others in Luxembourg, Portugal, Spain, and some of the Swiss Cantons. La Porta et al., *supra* note 5, at 1118.

[33]*Id.* at 1130-31.

[34]A less complicated form, the *Société par Actions Simplifiée [Simplified Stock Company]* is having increasing success.

[35]Loi No. 66-537 of July 24, 1966, J.O., July 26, 1966, p. 6402, executed by Decree No. 67-236.

[36]Ordonnance No. 2000-912 of Sept. 18, 2000, J.O., Sept. 21, 2000, p. 14783, which entered into force immediately. The provisions of the 1966 Act can be found in Book II.

Regulations Act of 2001 (NER Act).[37] This act, among other things, reinforced the rights of non-associated minority shareholders. Recently, the Financial Markets Board (*Conseil des Marchés Financiers*) merged with two other institutions[38] into the Financial Markets Authority (*L'Autorité des Marchés Financiers*) (FMA).[39] Its regulations are now part of the general regulations of the FMA, which is now competent to supervise and regulate financial markets. Hereafter, the regulations of the former Financial Markets Board will be referred to as FMA regulations. In addition, the corporation's own foundational provisions and bylaws are laid down in its constitution (*statuts*), which encompasses both charter and bylaw provisions.

The constitution can provide that the board of directors (*conseil d'administration*) includes directors elected by the personnel of the firm or affiliated firms.[40] The board generally functions according to a monistic system.[41] Nevertheless, the board can decide to delegate the general administration to a *directeur général*, who can be the president of the board.[42] It is also possible to establish a two-tier system in which the firm's management board (*directoire*) is controlled by a supervisory board (*conseil de surveillance*).[43] Membership in these bodies is mutually exclusive.[44]

As mentioned in the introduction, Belgium is the only country that received a score of zero in the 1998 version of *Law and Finance*.[45] The corporate form in which a Belgian company's shares can be listed is the *Naamloze Vennootschap* (NV) or *Société Anonyme* (SA). In 1999, the Companies Code was promulgated.[46] This is a codification of the old Companies Act, the relevant articles of the Civil Code, and some other

---

[37]Loi No. 2001-420 of May 15, 2001, J.O., May 16, 2001, p. 7776.

[38]These are the *Commission des Opérations de Bourse* [*Commission of Stock Exchange Operations*] and the *Conseil de Discipline de la Gestion Financière* [*Board of Discipline of Financial Management*].

[39]Loi No. 2003-706 of Aug. 1, 2003, J.O., Aug. 2, 2003, p. 13220, art. 46, V(1°)-(2°). *See* http://www.amf.france.org (last visited Apr. 9, 2004).

[40]Commercial Code, art. L. 225-27.

[41]*Id.* L. 225-17 to L. 225-56.

[42]*Id.* L. 225-51-1.

[43]*Id.* L. 225-57 to L. 225-93.

[44]Commercial Code, art. L. 225-74.

[45]La Porta et al., *supra* note 5, at 1130.

[46]Act of May 7, 1999 containing the Companies Code, Belgian Official Gazette, Aug. 6, 1999, at 29,440.

statutes. Since then, the Companies Code has been significantly amended by the Corporate Governance Act 2002.[47]

As in France, Belgian companies are further governed by a single constitution (the *statuten* or *statuts*). Traditionally, the board of directors (*raad van bestuur*, *conseil d'administration*) in a Belgian company worked in a single-tier system. Since the Corporate Governance Act 2002, a company's constitution can allow the board to delegate management to a Managing Committee (*directiecomité*, *comité de direction*).[48]

B. *The First Right: Proxy by Mail Allowed*

The first right in the anti-director index is that of shareholders to mail their proxy vote, rather than to show up in person or send an authorized representative to the shareholders' meeting.[49] A country scores "one [point] if the company law or commercial code allows shareholders to mail their proxy vote to the firm, and zero otherwise."[50] LLSV granted the United States and France a score of one, and Belgium a score of zero. When considered from the standpoint of the "indexer," Belgium should have received a point. But there are also some problems with the indexer approach. These are: the importance of surrounding legal provisions, the existence of alternatives, and the desirability of sending a proxy vote by mail.

Delaware law rightly deserves a score of one with regard to the right to send a proxy by mail to the firm; proxy solicitation by the incumbents is an allowed and even widespread practice, particularly for the election of directors. Delaware law does not impose requirements as to the form of proxy[51] save that "to be effective as a proxy, a document must identify the shares that are to be voted by the agent and include some indication of authenticity, such as the stockholder's signature or a facsimile of the signature."[52]

In contrast, it is surprising that Belgium was given a zero on the first anti-director right. Already at the time of the LLSV article, the Companies Code unequivocally stated that a shareholder may vote in person or by

---

[47]Act of Aug. 2, 2002.

[48]Companies Code, art. 524bis.

[49]La Porta et al., *supra* note 5, at 1127.

[50]*Id.* at 1122.

[51]Lobato v. Health Concepts IV, Inc., 606 A.2d 1343, 1347 (Del. Ch. 1991).

[52]Eliason v. Englehart, 733 A.2d 944, 946 (Del. 1999).

proxy.[53] The Companies Code does not explicitly state that shareholders can mail their proxy to the firm, but there is no doubt that they can. Why otherwise would the Code include provisions with regard to proxy solicitations by the firm?[54] Admittedly, the proxy system is different from that in the United States in that it is based on the concept of power of attorney. Nevertheless, this Belgian version of the proxy system is used frequently[55]—although less than in the United States—and proxies are often given to the chairman unless otherwise stated.[56] Accordingly, the score for Belgium should be amended to a score of one.

In France, it is a lawful and frequent practice for large firms to solicit so-called *mandats en blanc*. For this purpose, the corporation mostly asks the banks to send proxy solicitations to their clients, or to keep them at their disposal in case of bearer shares.[57] The shareholder then signs the proxy form and sends it to the company.[58]

A close reader will have detected a first qualification to the value of the first anti-director right as provided under French law: shareholders can send only *blank* proxies to the firm. In other words, the incumbent directors have full discretion in the exercise of their proxy mandate. It goes without saying that such a mechanism does not provide much protection to minority shareholders against the incumbent directors. In fact, it even reinforces the position of the latter—or rather, of the controlling shareholder who appoints the directors. This becomes even clearer if one reads what the Commercial Code itself provides when no particular person is appointed in the proxy form: the president of the shareholders' meeting will vote in favor of the resolutions proposed by the board (the *conseil d'administration* or the *directoire*) and against all other resolutions.[59]

---

[53]Companies Code, art. 547. This provision also existed at the time the LLSV paper was published (in Companies Act, art. 74, § 2).

[54]Companies Code, arts. 548-549.

[55]Eddy Wymeersch & Christoph Van der Elst, *De Werking van de Algemene Vergadering in de Belgische Beursgenoteerde Vennootschappen: Een Empirisch Onderzoek* [*The Functioning of the General Meeting in the Belgian Listed Companies. An Empirical Investigation*], 1997 TIJDSCHRIFT VOOR BELGISCH HANDELSRECHT (TBH) 72, 75.

[56]SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE US 43 (Theodor Baums & Eddy Wymeersch eds., 1999).

[57]The practice of bearer shares is described in more detail under the discussion of the second anti-director right.

[58]The fact that this proxy form does not mention the name of the person who will exercise the proxy does not render the practice illegal, since there is no prohibition on signing a blank document. 2 GEORGES RIPERT & RENÉ ROBLOT, TRAITÉ DE DROIT COMMERCIAL [TREATISE OF COMMERCIAL LAW] 342 (18th ed. 2002).

[59]Commercial Code, art. L. 225-106, al 7. In its proxy solicitation, the corporation has to inform the shareholder of this rule: Decree No. 67-236, art. 133.

The protective value of the first anti-director right thus largely depends on the shareholders' equal opportunity to mandate their proxy to vote for *or against* any resolution. In the United States, a similar debate is going on for corporations that are not governed by Securities and Exchange Commission (SEC) rules. It is a common critique that when the board sends out notices of a shareholders' meeting, it usually includes a proxy form soliciting shareholders' signatures and provides postage, all at the expense of the company. These are ordinarily blank proxies, which are exercised by a proxy committee selected by the board or by management and expected to vote in favor of the incumbents. In this manner, "proxy voting has operated to enable the management in office to perpetuate itself and control the corporation."[60] This argument does not hold true—at least, not to the same extent[61]—for companies subject to SEC rules. These rules require that the form of proxy afford the stockholder an opportunity not only to approve, but also to disapprove or abstain with respect to each separate matter.[62] Similarly, shareholders in Belgian public companies cannot give blank proxies; they must instruct the proxy on how to vote. Proxy solicitations, which include the actual proxy form,[63] must state the agenda, the proposed resolutions and the way the proxy holder will vote in the absence of instructions.[64]

These considerations lead us one step further. Even if shareholders can withhold their vote or vote against a proposal or a nominee, this possibility is valuable only if they can propose an alternative. This is a weak point under U.S. law. Although the "town meeting rule" in principle entitles shareholders to have their proposal included in the company's proxy materials, corporations can invoke a wide range of grounds to exclude the matter from the proxy materials.[65] Civil law countries generally do better in this respect. This, however, is a matter closely related to the fundamental difference between U.S. law and civil law, and will therefore be elaborated on in Part III.

---

[60]JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS 781 (2d ed. 2003).

[61]See Part III.C.5 for the rules with regard to reimbursement of the expenses by the corporation.

[62]Rule 14a-4(b), 17 C.F.R. § 240.14a-4(b) (2004).

[63]1 FRANS BOUCKAERT, NOTARIEEL VENNOOTSCHAPSRECHT [NOTARIAL COMPANY LAW] 406 (2000); FRANK HELLEMANS, DE ALGEMENE VERGADERING. EEN ONDERZOEK NAAR HAAR GRONDSLAGEN, HAAR BESTAANSREDEN EN DE GELDIGHEID VAN HAAR BESLUITEN [THE SHAREHOLDERS' MEETING. AN INVESTIGATION INTO ITS FOUNDATIONS, ITS REASON FOR EXISTENCE AND THE VALIDITY OF ITS RESOLUTIONS] 491 (2001).

[64]Companies Code, art. 548.

[65]Rule 14a-8, 17 C.F.R. § 240.14a-8 (2004).

Many other surrounding provisions have an impact on the protective effect of the right to mail a proxy. For example, directors or management should not be able to "bundle" proposals. Otherwise, they could obtain a positive vote for unpopular proposals by tying them to more attractive proposals, nicely named "sweeteners."[66] Also, it should not be possible to deprive or restrict shareholders' rights as summed up in the company's bylaws or constitution; the authority conferred by a proxy should be limited in time; proxy solicitation should include adequate information about the proposed resolutions; outright vote buying should be prohibited, etc.[67]

The weakness of a proxy system, if some of those provisions are not—or not sufficiently—applied in a particular jurisdiction, could be counterbalanced by the existence of alternatives to the described proxy mechanisms. In France, a shareholder can grant a non-discretionary proxy to another shareholder or to her spouse.[68] Obviously, the limitation of the persons to whom such a proxy can be given prevents it from being a fully developed alternative, but it at least mitigates to some extent the shortcoming of the *mandat en blanc*.[69] More important are some other and better substitutes. In Germany, for instance, many shareholders have deposited their shares with German banking institutions. These shareholders usually have their votes cast at the meeting according to the instructions they give. Thus, deposition of shares functions as a sensible substitute to the proxy system.[70] Another option is a more direct solution than mailing proxy forms, namely, sending a vote by mail or by means of

---

[66]In the United States, bundling has not been allowed since 1992. 17 C.F.R. § 240.14a-4(b)(1) (2004).

[67]Some of these provisions exist in the investigated jurisdictions, but a close examination falls outside the scope of this article. See, for instance, Rule 14a-4(d) for the United States and arts. 548-549 for Belgium.

[68]The rationale for this restriction is the legislature's distrust of agitators, blackmailers, and enterprises specializing in representing shareholders. PHILIPPE MERLE, DROIT COMMERCIAL. SOCIÉTÉS COMMERCIALES [COMMERCIAL LAW. COMMERCIAL COMPANIES] 509 (9th ed. 2003); 2 RIPERT & ROBLOT, *supra* note 58, at 341. Since this is too rigid by international standards, the NER Act has introduced an additional possibility for the representation of non-resident shareholders. Under this regime, shareholders hold their shares in accounts in the name of a financial intermediary that can represent the shareholders. The intermediary has to disclose the fact that it is acting as intermediary and, upon request of the issuer, the identity of the owner of the shares. Commercial Code, arts. L. 225-107-1, L. 228-1, al 7-8, L. 228-2, al II; *see also* Commercial Code, art. L. 228-1, al 3.

[69]A shareholder who intends to vote against the incumbents' proposals or in favor of insurgents' proposals but who is not able to attend the shareholders' meeting has to find another proxy who is willing to vote as directed. Commercial Code, art. L. 225-106, al 7.

[70]This "voting right of nominee shareholder," or *Depotstimmrecht* is exercised in accordance with the conditions laid down in §§ 128 & 135 AktG. *See* Vagts, *supra* note 20, at 600.

telecommunication. Very often, however, jurisdictions that allow this mechanism do not facilitate its use, because they impose too many administrative burdens.[71] In light of the development of new technologies, several jurisdictions have introduced or are considering the introduction of new possibilities, such as webcast shareholder meetings, or voting over the phone, by e-mail or other means of communication.[72] These methods are convenient for the shareholders, cheaper for the corporation than paper-based voting and can be processed easily and quickly. The *OECD Principles of Corporate Governance* (both 1999 and 2004) encourage the enlarged use of information technology in voting.[73]

The question remains whether, even if all supporting provisions do exist, the possibility of mailing a proxy to the firm is desirable as a protective mechanism. In several countries, this question has received a negative answer. They have introduced or are considering introducing the possibility of an "independent proxy" or an independent person to receive and collate proxy votes.[74] In the same line of reasoning, the solicitation of

---

[71]In France, vote by mail (*par correspondence*) is a mechanism which cannot be excluded by the constitution. Commercial Code, art. L. 225-107, al 1. From the calling of the shareholders' meeting and until six days before the meeting is held, a shareholder can ask the firm to send him a form for vote by mail. Decree No. 67-236, art. 131-1 of Mar. 23, 1967, J.O., Mar. 24, 1967, p. 2843. With this form, the shareholder must be able to vote on all of the resolutions in the order of their presentation at the meeting. Decree No. 67-236, art. 131-2. Since voting by mail does not enable the shareholder to express an opinion in case the resolution is amended during the meeting, this method is not used frequently. PATRICK LEDOUX, LE DROIT DE VOTE DES ACTIONNAIRES [THE VOTING RIGHT OF SHAREHOLDERS] 266 (2002). In Belgium, a shareholder can vote directly by mail if the company's constitution so permits. Upon a shareholder's request, the board will then deliver the requisite form. The content of this form is prescribed by the constitution. Blank votes are not allowed. Companies Code, art. 550; HELLEMANS, *supra* note 63, at 500. Again, this method is not frequently used. SHAREHOLDER VOTING RIGHTS, *supra* note 56, at 39.

[72]This is allowed in Delaware (DEL. CODE ANN. tit. 8, § 212(c)(2) (2001)), where it seems to have become a success. Theodor Baums & Johann Wolfgang, *General Meetings in Listed Companies—New Challenges and Opportunities*, OECD Study 6 (2000), *available at* http://www.oecd.org/dataoecd/61/15/1931816.pdf (last visited Apr. 5, 2004). In France, the legislature recently provided for voting through telecommunication, primarily video conferences. This is only possible, however, if permitted by the constitution. Commercial Code, art. L. 225-107, al II, as implemented by the NER Decree No. 2002-803 of May 3, 2002, J.O., May 5, 2002, p. 8781.

[73]*OECD Principles of Corporate Governance*, Ann. C.4, at 35 (2004); *OECD Principles of Corporate Governance*, Ann. C.3, at 28 (1999).

[74]*E.g.*, Swiss Code of Obligations, art. 689c315. In France, proxies to fellow shareholders have sometimes been misused by these shareholders, since they are not bound by the instructions of the owner unless she gives an "imperative proxy." This produced a critique in legal doctrine. LEDOUX, *supra* note 71, at 108-09; 2 RIPERT & ROBLOT, *supra* note 58, at 343. For these reasons, the Marini report, which was drafted in 1996 with the goal of reforming the former 1966 Loi but which was not implemented, proposed to introduce the possibility of appointing an independent proxy. PHILIPPE MARINI, LA MODERNISATION DU DROIT DES SOCIÉTÉS: RAPPORT DU

proxies at the company's expense is sometimes prohibited.[75] Indeed, as will be shown in Parts III and IV, proxy solicitation works to the advantage of incumbent managers. In addition to concerns about the independence of the proxy, in many jurisdictions, especially civil law jurisdictions, concerns have been raised about the possibility of holding a real debate at the shareholders' meeting.[76]

The above considerations make clear how difficult it is to determine which of the three countries—France, Belgium and the United States—has the best rule when only one technical feature is considered. When the assessment is limited to a score of either zero or one, the result is even more problematic. As Part III shows, the fundamental choice of a legal system can have an even more important impact on the significance of a specific rule in that system than the working of other such features. For the reader who wants to see concrete numbers, leaving aside the more fundamental considerations that follow, the scores in the first anti-director right should be amended as follows:

Table 1: Scores on the First Anti-Director Right

	LLSV score	Revised score*
United States	1	1
France	1	1
Belgium	0	1

*The revised score contained in each table in this article is from the strict "indexer" point of view and cannot reflect all of the complexities noted.

PREMIER MINISTRE (MARINI REPORT) § 87. Arguably, in the United States, the role of an independent proxy is taken up by institutional investors.

[75]In Italy, for instance, the expenses are borne not by the company, but by he who solicits the proxies. Art. 134, at 11 Consob regulation 11971/1999, adopted pursuant to Legislative Decree 58/1998. A similar prohibition is being considered by Sweden.

[76]LEDOUX, *supra* note 71, at 264-68; 2 RIPERT & ROBLOT, *supra* note 58, at 343. Merle is skeptical, however, and notes that most of the time there is not a true deliberation anyway. MERLE, *supra* note 68, at 552. The possibility of holding a real discussion is a concern in common law countries as well. See the New Zealand case *In re* South British Ins. Co. Ltd., [1981] 1 N.Z.C.L.C. 95-004, at 98,064, where the court observed that "[a]n annual meeting of the shareholders of a company is an important event. . . . It is the one occasion in the year when the shareholders have a right to meet the directors or their representatives and to question them on the company's accounts, the director's report and the company's position and prospects."

C. *The Second Right: Shares Not Blocked Before Meeting*

The second variable in the anti-director index concerns whether or not shares are blocked before a shareholders' meeting. The score "equals one if the company law or commercial code does not allow firms to require that shareholders deposit their shares prior to a general shareholder meeting, thus preventing them from selling those shares for a number of days, and zero otherwise."[77] Although it remains true that Delaware law was the only legal system to deserve a point at the time *Law and Finance* appeared, the following discussions show how much this provision is intertwined with other legal provisions and the general framework.

A Delaware corporation cannot block the shares before the shareholders' meeting.[78] The most the board can do is to establish a record date. If it does not do so, the record date is determined by the statute.[79] As a rule, only registered stockholders—those who own stock on the record date—have the right to vote.[80] In a post-record date sale of stock, however, the buyer can compel the seller to grant him proxies to vote the transferred stock.[81] Conversely, in Belgian public companies, owners of *bearer* shares who wish to exercise their voting right are required to deposit their shares several days before the meeting.[82] Combined with a criminal sanction on exercising the voting rights attached to shares that are no longer one's property at the date of the shareholders' meeting, those shareholders see their shares blocked in the time period between the deposition and the meeting. Ironically, the legislature's intention was to promote participation in the shareholders' meeting by facilitating public proxy solicitation.[83] In a new attempt to promote institutional shareholder participation, the Corporate Governance Act 2002 introduced an optional record-date system

---

[77]La Porta et al., *supra* note 5, at 1122.

[78]The Delaware Code only permits the board to fix a record date. DEL. CODE ANN. tit. 8, § 213 (2001).

[79]The board can only set this date at some point not more than sixty days nor less than ten days before the shareholders' meeting. If the board does not fix a date, then the record date is automatically at the close of business on the day next preceding the day on which notice is given, or, in case of waiver of notice, at the day next preceding the day on which the meeting is held. DEL. CODE ANN. tit. 8, § 213(a) (2001).

[80]DEL. CODE ANN. tit. 8, §§ 212(a), 213 (2001).

[81]Commonwealth Assocs. v. Providence Health Care, Inc., 641 A.2d 155, 158 (Del. Ch. 1993). This case confirms what has been held in several cases handed down under the old Delaware Corporation Law, e.g. *In re* Canal Constr. Co., 182 A. 545 (Del. Ch. 1936).

[82]The term in which this must be done is to be determined by the constitution and can range from three to six working days before the meeting. Companies Code, art. 536.

[83]HELLEMANS, *supra* note 63, at 474.

for listed companies.[84] Under this system, shareholders who are registered at midnight on the registration day can participate in the shareholders' meeting and cast their vote, regardless of whether they are still shareholders at the moment the meeting is held. This implies that the shares will still be blocked during an "overnight deposit."[85] Indeed, shareholders will ordinarily be required to deposit their shares at the seat of the corporation or at the bank before closing time, and they will be released the next morning.[86]

In the past, Delaware law did allow for blockage of the stock before the meeting, through the closing of the stock transfer books.[87] Why has Belgium not yet taken the same step towards no blockage as Delaware? The answer may very well lie in the difference between registered or nominative shares, the ownership of which is proven by registration in the company's register, and bearer shares, which are the property of the person who presents the paper in which they are materialized. As a result of stock exchange requirements in the United States, listed stock is always registered stock.[88] In such a system, deposition is not needed for identification purposes.[89] In Belgium, bearer shares have traditionally

---

[84]Companies Code, art. 536, al 3. The system can be applied only if it is authorized in the constitution. It is contested whether in the latter circumstance the board retains the power to decide whether or not to apply the system. Some authors argue that art. 536 should be read as an authorization for the board. *See* Christel Haverans & Hendrik Van Driessche, *De Wet Corporate Governance en de Algemene Vergadering van Aandeelhouders* [*The Corporate Governance Act and the General Shareholders' Meeting*], 2003 TIJDSCHRIFT VOOR RECHTSPERSOON EN VENNOOTSCHAP (TRV) 207, 221-22. The opposite position is taken in Frank Hellemans, *De Algemene Vergadering en de Wet Corporate Governance* [*The General Meeting and the Corporate Governance Act*], *in* NIEUW VENNOOTSCHAPSRECHT 2002: WET CORPORATE GOVERNANCE [NEW COMPANY LAW 2002: CORPORATE GOVERNANCE ACT] 234-35 (Jan Ronse Instituut ed., 2003). It is not clear whether the application of the new record date system renders the traditional deposit requirement inoperative for public companies. Most probably it does. Hellemans, *supra*, at 241. So far, the companies that have adopted the record-date system are few. Companies, however, may soon adopt it if it is preferred or even required by institutional investors. *Id.* at 242.

[85]In practice, ownership is proven by means of a certificate delivered by the bank that evidences the number of shares deposited in the name of the shareholder. SHAREHOLDER VOTING RIGHTS *supra* note 56, at 24.

[86]Hellemans, *supra* note 84, at 239.

[87]Old Section 17 of the Delaware Corporation Law, REV. CODE OF DEL. § 2049 (1935).

[88]The New York Stock Exchange Listed Company Manual requires that each stock certificate on its face indicates ownership and that the company maintains registrar facilities for all NYSE listed stock. NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL §§ 501.01, 601.01(A) (2002). Bearer securities are not popular in common law countries in general. In Australia, *all* shares are registered to an owner since Australian companies are by statute forbidden to issue bearer shares. Corporations Act § 254F (2001).

[89]Like the Delaware General Corporate Law, none of the Australian Corporations Act provisions allow the company to require its members to deposit their shares before the annual general meeting if they want to exercise their voting power.

played an important role.[90] Since owners of bearer shares remain anonymous, deposition is inevitable for their proper identification.[91] In addition, because of this anonymity, corporations cannot ascertain whether bearer stockholders are still owners of the declared stock at the date of the meeting, unless they either block the stock until the meeting or require stockholders to present their shares a second time at the opening of the meeting. As long as no exception is made to the rule that shareholders must own the stock at the moment they use the attached voting rights,[92] blockage is almost unavoidable.[93]

In Belgium, shareholders have an inalienable right to have their bearer stock converted into registered stock at any time[94] when blockage does not occur.[95] Why do they not use this right? Or, more drastically, why not eliminate bearer shares? The Belgian government has announced that as of 2007 or 2008 it will no longer be possible to issue bearer securities. For a long time, this move would not have been politically feasible. The very reason why bearer shares exist—and are not converted into nominative shares—is their absolute anonymity. Registration would be a nightmare for many of its owners. Belgium is well-known for its heavy tax burden and its citizens for their creativity in developing techniques to avoid taxes. In this context, the "Belgian dentist" is interested only in bearer shares, the dividend coupons of which she can secretly cash in neighbor Luxembourg or another tax haven. The European Union and international organizations like the OECD, however, are working to abolish this practice. This story shows that although the second anti-director right is good in itself for shareholders, its introduction into

---

[90]Although, many companies have both bearer and registered shares. Wymeersch & Van der Elst, *supra* note 55, at 75.

[91]An exception must be made for dematerialized bearer shares, see *infra* Part II.E. under the explanation for France.

[92]For the newly introduced optional record date system, the Belgian legislature made an exception to this prohibition. Companies Code, art. 651.

[93]As in France (*infra* note 96), there is no reason why the shares could not be sold off-exchange, but delivery and opposability would not be possible until after the meeting.

[94]Companies Code, art. 462.

[95]*See* Companies Code, art. 536, al 2. The registration of nominative shares in the company's register of nominative shares suffices. The company's constitution, however, can require shareholders to declare in advance if and how many shares they intend to vote at the meeting. SHAREHOLDER VOTING RIGHTS, *supra* note 56, at 24. This does not prevent the owner from selling stock and not exercising voting rights. For France, see Decree No. 67-236, art. 136, al 1. For nominative shares the firm can only subject the voting right to the registration of the shareholder—or of the intermediary of a non-resident shareholder—in the register of nominative shares held by the corporation.

Belgium, all else being equal, would not have been welcomed by most shareholders.

In France, the situation has changed since the publication of *Law and Finance*. Before, shares were blocked if the company required identification to take place before the meeting.[96] Now a stockholder is still able to sell her shares after identification, but when doing so, she would not have a right to vote at the meeting.[97] This evolution was facilitated by the fact that bearer stock was strictly limited after 1981,[98] but especially by the fact that nominative and bearer shares were dematerialized about two decades ago.[99] The only materialization now consists of registration in an account with the issuer (for nominative shares) or with a financial intermediary (for bearer shares).[100] This system has ended the anonymity of bearer shares, which in Belgium has so far rendered it difficult to eliminate blockage efficiently.

Table 2: Scores on the Second Anti-Director Right

	LLSV score	Revised score
United States	1	1
France	0	Now 1
Belgium	0	0

[96]The rule was and still is that the holder of nominative shares must demonstrate her identity in order to be admitted to the shareholders' meeting, whereas a holder of bearer shares can prove her capacity as shareholder by means of a certificate issued by the intermediary certifying the unavailability of the shares until the meeting. 2 RIPERT & ROBLOT, *supra* note 58, at 340-41. This identification can take place at the entrance to the meeting, but a corporation can also require that the certificates be filed earlier in order for the shareholder to exercise her voting right. Blockage is not full, however, since the shares can be sold off the exchange. Only delivery and opposability are deferred until the day after the meeting. Yves Guyon, *France*, *in* SHAREHOLDER VOTING RIGHTS, *supra* note 56, at 97-98.

[97]Upon the sale, the stockholder must notify the intermediary where the account is held. She must also provide the intermediary with all information necessary to cancel or adopt the number of votes if she has already requested an "admission card" or if she has already sent her vote by mail. Decree No. 67-236, art. 136 of Mar. 23, 1967, J.O., Mar. 24, 1967, p. 2843, *as modified by* Loi No. 2003-706 of Aug. 1, 2003, J.O., Aug. 2, 2003, p. 13220.

[98]MERLE, *supra* note 68, at 334-35.

[99]Decree No. 83-359 of May 2, 1983, J.O., May 3, 1983, p. 1359. In Belgium, dematerialized shares are a third and distinct category, *in addition to* bearer shares and registered shares.

[100]MERLE, *supra* note 68, at 302-303. *See also* ANSA, *Identification of Shareholders*, *at* http://www.ansa.asso.fr/site/acv_uk_2.asp# (last visited Sept. 7, 2004) (describing shareholder identification methods).

D. *The Third Right: Cumulative Voting or Proportional Representation*

The possibility of cumulative voting or proportional representation constitutes the third anti-director right. A country's score here

> [e]quals one if the company law or commercial code allows shareholders to cast all their votes for one candidate standing for election to the board of directors (cumulative voting) or if the company law or commercial code allows a mechanism of proportional representation in the board by which minority interests may name a proportional number of directors to the board, and zero otherwise.[101]

An investigation of this right in the United States, France, and Belgium highlights the importance of including case law in comparative law research. A consideration of case law requires that the scores for both France and Belgium be amended from zero to one. This section ends with some remarks on the impact of other rules.

Delaware law explicitly allows the charter to provide for cumulative voting.[102] Thus, a point is accorded as soon as the law enables the charter and/or bylaws to provide for this right. The French Commercial Code and the Belgian Companies Code do not explicitly allow the constitution to provide for cumulative voting. Hence, *Law and Finance* awards a point to the United States and not to France or Belgium. Nevertheless, both rights can be validly provided for under Belgian law, and the same is true at least for proportional representation under French law. Because the description by LLSV of the criterion, as well as its application to Delaware law, make it clear that a score of one is given as soon as a company's constitutional documents allow for cumulative voting or proportional representation or both, France and Belgium should both receive a point.

It is true that the Belgian Companies Code does not explicitly permit cumulative voting and proportional representation. Nevertheless, case law and doctrine agree that the constitution may validly provide for cumulative

---

[101]La Porta et al., *supra* note 5, at 1122.

[102]DEL. CODE ANN. tit. 8, § 214 (2001). Proportional representation as a distinct mechanism does not seem an issue in jurisprudence and case law, and the Delaware Corporate Code remains silent on this point. One can assume it is allowed, but that does not change much for the analysis here.

voting and proportional representation.[103] Such a provision may not, of course, go against any provision of the Companies Code and therefore two conditions are considered prerequisite.[104] First, the shareholders' meeting must retain some freedom of choice in appointing directors. That is, there must be a choice between at least two directors per vacancy. Otherwise the method would violate the statutory power of the shareholders' meeting to appoint the directors.[105] Second, the mechanism may not impair "the spirit of cooperation between shareholders," which is deemed an essential characteristic of corporations.[106] Cumulative voting rights are considered not to violate the one share one vote principle as laid down in the Companies Code,[107] since cumulative voting rights are obviously different from multiple voting rights. Hence, the zero score for Belgium is not warranted.

Similarly, the French statute mentions neither cumulative voting nor proportional representation.[108] Nevertheless, the validity of clauses of proportional representation[109] is generally admitted in French case law.[110] Case law commonly sets out two conditions that are similar to those under Belgian law.[111] First, the clause must be in conformity with the social

---

[103]The Companies Code explicitly provides that the constitution can establish the rules governing the shareholders' meetings except where the Companies Code provides otherwise. Companies Code, art. 63. This provision has been interpreted as follows. Cumulative voting rights and proportional representation concern the *manner* in which directors are elected and not the number of votes each shareholder has. In particular, cumulative voting affects the number of rounds in which the directors are elected, while proportional representation boils down to a distribution of the right to nominate (not to elect) directors. Bouckaert bases the validity of cumulative voting on other grounds. He argues that cumulative voting is a deviation from the majority decision, but that it is a lawful deviation. BOUCKAERT, *supra* note 63, at 431.

[104]Eric De Bie, *Het Cumulatief Stemrecht en de Evenredige Vertegenwoordiging van Aandeelhouders in de Raad van Bestuur van een N.V. [Cumulative Voting and Proportional Representation of Shareholders in the Board of Directors of an N.V.]*, 1995 TRV 70-71 (discussing conditions with regard to cumulative voting); Dirk Van Gerven, *De Evenredige en Onevenredige Vertegenwoordiging van Aandeelhouders in de Raad van Bestuur van een N.V. [Proportional and Disproportionate Representation of Shareholders in the Board of Directors of an N.V.]*, 1991 TBH 855-59 (discussing conditions with regard to proportional representation).

[105]*See* Companies Code, art. 518.

[106]De Bie, *supra* note 104, at 70-71; Van Gerven, *supra* note 104, at 857-59.

[107]*Id.* art. 541.

[108]It merely states that the directors are appointed by the shareholders' meeting. Commercial Code, art. L. 225-18.

[109]These clauses are sometimes called "privilèges d'administration." LEDOUX, *supra* note 71, at 340.

[110]It should be noted that case law from before the 1966 Loi is still good law, since the 1966 Loi and the codification of the Commercial Code did not change the developed theory.

[111]MARIE-CHRISTINE MONSALLIER, L'AMÉNAGEMENT CONTRACTUEL DU FONCTIONNEMENT DE LA SOCIÉTÉ ANONYME [THE CONTRACTUAL ORGANIZATION OF THE FUNCTIONING OF THE SOCIÉTÉ ANONYME] 60-71, 73-75 (1998).

interest—the interest of the corporation. This does not usually pose a problem, since it is recognized that proportional representation can also indirectly benefit the corporation.[112] The second requirement is that shareholders preserve their freedom of choice.[113] There should be at least two candidates for each position.[114] Given the rule that every director must also be a shareholder,[115] corporations with only a few shareholders are barred from proportional representation. A clause putting into effect proportional representation would render it impossible for shareholders to revoke the directors' mandate at will (*ad nutum*) and would therefore be void.[116] For firms with a limited number of shareholders, the LLSV score should indeed have been zero. This is, however, not the case for listed firms that have enough shareholders to apply proportional representation.

Cumulative voting is not well-known in France. It is hardly dealt with in case law or legal doctrine. Nonetheless, it appears that there is nothing that would make cumulative voting unlawful.[117] Even if it were unlawful, however, France would be entitled to a point on the third anti-director right, for it allows proportional representation.

Interestingly, this anti-director right presents an example of a case where a specific rule is provided by the statute in a common law country and is judge-and-scholar made in the civil law countries examined. It also shows that comparative research should include all relevant legal sources. Doing so yields the following amended scores:

Table 3: Scores on the Third Anti-Director Right

	LLSV score	Revised score
United States	1	1
France	0	1
Belgium	0	1

[112]Conversely, an *over*representation of the minority may be problematic.

[113]This condition was explicitly stated in a 1937 Decree-Act, but the legislature inadvertently forgot to restate it during one of the corporate law reforms. 2 RIPERT & ROBLOT, *supra* note 58, at 383.

[114]This is because the constitution and shareholders' agreements cannot deviate from mandatory statutory provisions and non-written principles of corporate law. One of those principles is that of the free vote. MONSALLIER, *supra* note 111, at 47-48.

[115]Commercial Code, art. L. 225-25. This is not the case in Delaware. DEL. CODE ANN. tit. 8, § 141(b) (2001 & Supp. 2004).

[116]Commercial Code, art. L. 225-18, al 2; LEDOUX, *supra* note 71, at 342.

[117]*See* RIPERT & ROBLOT, *supra* note 58, at 403-04.

The account above is written from the point of view of an indexer. Several objections, however, may be raised against the relevance of this anti-director right. First, in all three jurisdictions, cumulative voting and proportional representation only exist if they are authorized by the corporation's constitutional documents. In Delaware, this must be done in the charter,[118] over which shareholders have even less control than the bylaws. It is being debated whether cumulative voting should be mandatory for public companies, on the ground that a protective mechanism for the minority should not merely be permissible at the option of the controller(s).[119] Indeed, since cumulative voting is merely an option, it does not play a significant role in U.S. public corporations.[120] It has also been argued that cumulative voting is an ambiguous right, as it ensures that directors who are either shareholders themselves or who hold proxy rights of other shareholders will be able to influence the outcome of board elections.[121]

A second objection is related to a previous comment. Cumulative voting does not have much value where shareholders cannot easily nominate candidates, as in the United States. It will be been shown below that even under the provision of the pending SEC proposal on director nominations, shareholder access to the company's ballot is severely restricted.[122] A company's charter, therefore, should not just make a provision for cumulative voting, but should also contain the necessary guarantees concerning the nomination of candidates. This point again touches upon those matters discussed under the heading of corporate law fundamentals in Part III.

E. *The Fourth Right: Oppressed Minorities Mechanism*

The anti-director index contains a variable for the existence of an oppressed minorities mechanism. A point is given if

> the company law or commercial code grants minority shareholders either a judicial venue to challenge the decisions of management or of the assembly or the right to step out of

---

[118]DEL. CODE ANN. tit. 8, § 214 (2001).

[119]COX & HAZEN, *supra* note 60, at 767.

[120]Vagts, *supra* note 20.

[121]*See, e.g.*, Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 142-60 (1994) (discussing the pros and cons of cumulative voting).

[122]*See infra* notes 265-74 and accompanying text.

> the company by requiring the company to purchase their shares when they object to certain fundamental changes, such as mergers, asset dispositions, and changes in the articles of incorporation. The variable equals zero otherwise. Minority shareholders are defined as those shareholders who own 10 percent of share capital or less.[123]

Thus, there are two prongs to this anti-director right: the right of action and the right of appraisal—the presence of either being sufficient to confer a point. The United States was the only country of the three investigated to receive a point on this fourth anti-director right. Nevertheless, the following investigation makes it clear that all three have similar features, together with mechanisms tailored to the environment in which they operate.

The first prong of the fourth anti-director right is the right of action. Procedurally, each of the three legal systems distinguishes between individual actions and actions by or on behalf of the corporation. Roughly speaking, in each jurisdiction the first category of suits is available to one or more stockholders who sustained a special injury that was not inflicted upon all stockholders or not in proportion to their stakes.[124] All three jurisdictions allow shareholders to institute this action individually or to be represented as a group. Nonetheless, in France and Belgium this representation is limited to the classical mandate mechanism of contract law. Thus, shareholders need to *appoint* a representative. This mechanism is not as efficient as the class action in Delaware, where the chronological sequence is reversed. The initiative is taken by a (candidate) "class representative," who asks the court to "certify the class" or, in other words, to state that the party's claims are representative of that of the class as a whole. If the court agrees, it orders notice to be given to the members of

---

[123]La Porta et al., *supra* note 5, at 1122.

[124]In the United States, "special injury" has been defined in several ways. *See* Lipton v. News Int'l PLC, 514 A.2d 1075, 1078 (Del. 1986) (defining "special injury" as an injury suffered by a shareholder that is distinct from the wrongs suffered by other shareholders); Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186-88 (Del. 1988) (discussing individual remedies for a dissenting shareholder from a cash-out merger, and subsequent individual action for recissory damages on later-discovered fraud); Moran v. Household Int'l, Inc., 490 A.2d 1059, 1070 (Del. Ch. 1985) (noting that a claim is an "individual action" where the shareholder's injury is separate and distinct, or relates to contract rights the shareholder holds independently of any right of the corporation). In France, the injury must have been caused by a director and not by the corporation itself. *See* MERLE, *supra* note 68, at 474.

the class, who then decide whether or not to join the proceeding.[125] The crucial difference with the French and the Belgian system is that, in Delaware, shareholders who did not take the initiative are *invited to join*.[126] The most powerful incentive for the frequent use of this mechanism in the United States is probably the rewarding of meritorious claims combined with the possibility for lawyers to share in the proceeds through contingent fees. Although the occurrence of strike suits give rise to much criticism, the frequent use of this mechanism may have a beneficial deterrent effect.[127]

The second category of actions, those by or on behalf of the corporation, can be instituted where a wrong has been inflicted upon the corporation or upon all shareholders in proportion to their holdings. At first glance, these claims seem very different in the United States, as compared to France and Belgium. In the United States, the claim is generally based on a breach of fiduciary duty, primarily the duty of loyalty. In France and Belgium, the basis is civil liability,[128] which is considered in light of the directors' duty to act in the "interest of the corporation." Despite this structural difference, the outcome in both cases is essentially the same. In each country, either the corporation or its shareholders can institute the action, but each differs in what is understood by "the corporation" in this context. Under Delaware law, the directors may act for the corporation in bringing an action.[129] Under Belgian law, the

---

[125]DEL. CH. CT. R. 23. The class representative must prove numerosity, commonality, typicality, and adequacy of representation. In addition, the representative must demonstrate that separate actions would entail a risk of inconsistency, or that the party opposing the class has acted or refused to act on grounds generally applicable to the class, or that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Id.*

[126]It should be noted that this invitation could not be organized as efficiently where bearer shares exist. See *supra* Part II.C in the explanation of the second anti-director right.

[127]The lack of success of the derivative action in Belgium is often attributed to the fact that in the case of a successful claim, damages are awarded to the corporation, whereas in the case of dismissal, the plaintiff *can* be ordered to pay the costs of the proceedings and even damages to the directors. Companies Code, art. 567. This rule, however, is similar to the American sanction for frivolous action. The main reason seems to be that lawyers are prohibited from making their fees dependent on the proceeds of the client's claim.

[128]The general provision for civil liability in both France and Belgium is Article 1382 of their respective Civil Codes. This is rendered applicable and supplemented by the Belgian Companies Code, arts. 527-530. In France, directors are subject to civil liability for facts that constitute criminal offenses, for violations of statutory or regulatory provisions or provisions in the company's constitution, and for mis-management of the enterprise due to imprudence or negligence. Commercial Code, art. L. 225-251; 2 RIPERT & ROBLOT, *supra* note 58, at 510.

[129]DEL. CODE ANN. tit. 8, § 141(a) (2001) (pursuant to its general powers to manage the corporation).

shareholders' meeting brings the action.[130] As shown *infra* Part III, this difference is significant. It is archetypal of the difference in fundamental choices between the corporate laws of Delaware, on the one hand, and those of France and Belgium, on the other.

In each of the three jurisdictions investigated, the action may also be instituted by shareholders on behalf of the corporation. In the United States, stockholders must pass several procedural hurdles before the court will consider the substance of this derivative claim. These hurdles are essentially standing requirements, demand requirements, and after the proceedings have begun, the possibility of dismissal after a special litigation committee of disinterested directors has been set up. Whereas standing requirements refer to the quality of shareholder interests and the absence of conflicts and do not usually pose any serious problem, the demand requirements can be real impediments. Unless demand is excused, a stockholder must demand that the board initiate the claim. If the board refuses and its refusal survives a business judgment review, shareholders cannot sue derivatively.[131] Where demand would be "futile," the requirement does not exist, and the stockholder can bring the action himself. The test for demand futility is whether reasonable doubt exists that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[132] Once the proceeding is initiated, and the court has determined that demand is excused or that the board illegitimately refused to bring suit after demand was made, the "special litigation committee" of the corporation may still stop the proceeding. If this committee is independent and recommends in good faith that the litigation be dismissed, the court may accept this decision using its own business judgment.[133]

---

[130]Companies Code, art. 561. Pursuant to the general rule of Companies Code, art. 63, the meeting decides this with a simple majority.

[131]Levine v. Smith, 591 A.2d 194 (Del. 1991).

[132]The court used the word "and" in *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). Later cases made it clear, however, that the test is disjunctive. *See* Levine v. Smith, 591 A.2d 194, 200 (Del. 1991); Grobow v. Perot, 539 A.2d 180, 186 (Del. 1988). In case of a "double derivative suit," only the first prong should be applied. *See* Rales v. Blasband, 634 A.2d 927, 932-34 (Del. 1993). In Delaware, making a demand entails a risk. The Delaware Supreme Court has held that the making of a demand implies a concession that the board is independent and disinterested. Spiegel v. Buntrock, 571 A.2d 767, 777 (Del. 1990). The rule has thus become one of "universal nondemand." WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 367 (2003).

[133]Zapata Corp. v. Maldonado, 430 A.2d 779, 788-89 (Del. 1981).

Demand and special litigation committees do not exist in France and Belgium, where a quantitative rather than a qualitative test is applied.[134] In France, there are three ways to bring a derivative suit.[135] As a general rule, shareholders bring the suit individually.[136] They can, however, appoint one or some among them to represent them if they form 0.5 percent to five percent of the social capital, depending on whether the corporation's capital exceeds certain thresholds.[137] The derivative action may also be commenced by any association of shareholders that fulfills certain conditions.[138] In Belgium, only a minority of shareholders or an individual shareholder is entitled to introduce a derivative claim if they possess shares that represent at least € 1,250,000 of the company's capital[139] or at least one percent of the votes.[140] Unlike in France,[141] under Belgian law shareholders who voted for a discharge are precluded from bringing this suit.[142]

To end the discussion of the first prong of the oppressed minorities mechanism here would be too hasty a comparative analysis. A derivative action challenges decisions and actions that cause harm for *all shareholders in proportion to their holdings*. This mechanism is important in a system such as the United States, where the board controls the company and does not own a large stake in the company. In France and Belgium, corporations are controlled by large shareholders.[143] In this setting, harm obviously is not inflicted upon every shareholder in proportion to her stake. A majority shareholder who does not want to shoot himself in the foot will employ other mechanisms to obtain private benefits. Thus, the "oppressed minorities mechanism" must be different to adequately address situations

---

[134]This is subject to the general rule of civil procedure that a plaintiff must have a legitimate interest in bringing the suit. Code of Civil Procedure, arts. 17-18 (Belgium).

[135]Commercial Code, art. L. 225-253.

[136]Commercial Code, art. L. 225-252.

[137]Commercial Code, art. L. 225-252; Decree No. 67-236, art. 200, *as amended by* Decree No. 2002-803, art. 6 of May 3, 2002, J.O., May 5, 2002, p. 8781.

[138]Only shareholders whose shares have been registered for at least two years and who hold at least five percent of the voting rights are able to form associations in order to represent their interests within the company. Where the company's capital exceeds certain thresholds, the share of voting rights to be represented is reduced gradually until one percent. In order to exercise the rights to which shareholders' associations are entitled, they must have notified the company and the FMA of their legal status. A second condition is that the company's shares are admitted to trading on a regulated stock market. Commercial Code, art. L. 225-120.

[139]This may be voting or nonvoting stock. In the latter case, however, the claim can only concern matters in which nonvoting stock has a voting right. Companies Code, art. 481.

[140]Companies Code, art. 562, al 1-2.

[141]2 RIPERT & ROBLOT, *supra* note 58, at 519.

[142]Companies Code, art. 562, al 3.

[143]Part III will expound on this crucial difference between the United States and France and Belgium.

where the majority shareholder abuses her influence. This could arguably be done by facilitating individual claims and class actions, but it may also be achieved through another mechanism.

Such a mechanism exists both in France and in Belgium, in addition to the above-described individual and derivative claims. There is, however, no single reference to it in the French Commercial Code and it is only partially codified in the Belgian Companies Code.[144] It is the courts that have developed a similar, indeed almost identical, theory of "abuse of majority power" in both countries—to be understood as abuse by stockholders of their power ensuing from a majority stake.[145] The claim can be instituted by any person who has a personal and legitimate interest.[146] If the claim is successful, the court will nullify the abusive decision and/or award damages to be paid by the majority.[147]

The definitions of abuse of majority power in both countries refer to decisions of the board or shareholders' meeting where the major shareholder has used her influence in furtherance of interests other than those of the corporation.[148] In this assessment, courts apply a sort of

---

[144]The French Commercial Code stipulates that a decision to modify the constitution can only be nullified pursuant to an explicit statutory provision of Book II of the Commercial Code, or from the statutes governing nullity of contracts. Commercial Code, art. L. 235-1, al 1. Other acts or meetings are only null and void where they violate a mandatory provision of Book II of the Commercial Code or of the statutes governing nullity of contracts. Commercial Code, art. L. 235-1, al 2. There is no legal provision in Book II providing for nullity as a remedy specifically for minority shareholders. The Belgian Companies Code provides for nullification of the decisions of the shareholders' meeting not only in case of non-compliance with procedural requirements or lack of authority, but also for "abuse of power." Companies Code, art. 64. This latter ground especially covers abuse of majority power. Bernard Tilleman, *De Nietigheid van Besluiten van de Algemene Vergadering: Het Nieuwe Artikel 190bis Venn. W.* [*The Nullity of Resolutions of the General Meeting: The New Article 190bis of the Companies Act*], 1994 TBH 987, 997-98.

[145]For France: Société des Anciens Etablissements Piquard, Com. Apr. 18, 1961, Bull. III, No. 175, D. 1961, at 661. For Belgium: e.g., President Commercial Court Brussels, Aug. 16, 2000, 2000 TRV 384; Court of Appeals Brussels, Jan. 21, 2003, 2004 TRV 606.

[146]Companies Code, art. 178; Code of Civil Procedure, arts. 17-18.

[147]MERLE, *supra* note 68, at 682. In Belgium, the remedy is in principle nullification of the decision of the board or assembly. If that is necessary to protect vested interests of good faith third parties, the court can decide that the assembly's decision is not null and void towards them. In that case the court can grant damages to the claimant. Companies Code, art. 180.

[148]In France, the standard definition is that the decision can be shown to have been made "against the general interest of the corporation and with the unique intention of favoring the majority to the detriment of the minority." *Société des Anciens Etablissements Piquard*, Com. Apr. 18, 1961, Bull. III, No. 175, *D.* 1961, at 661. In Belgium, abuse of majority power is mostly defined as the situation where the board uses its competences or a majority employs its power in the shareholders' meeting for private purposes outside the corporation rather than for the interests of the corporation. JAN RONSE, PREADVIES OVER NIETIGHEID VAN BESLUITEN VAN ORGANEN VAN DE NAAMLOZE VENNOOTSCHAP [PRELIMINARY ADVICE REGARDING THE NULLITY OF DECISIONS BY ORGANS OF THE NAAMLOZE VENNOOTSCHAP] 25 (1966).

business judgment rule. For there to be an abuse of majority power, there must be an unjustifiable breach of equality among shareholders or diversion of power in an illegitimate interest, and not merely poor management or pursuit of a policy that displeases the minority.[149] Frequent examples of abuse of majority power are tunneling and excessive director remuneration. Certainly, the notion of interest of the corporation leaves the courts substantial room for interpretation,[150] and their use of this liberty will determine whether or not the claim of abuse of majority power is a real protection for minority shareholders. The same holds true for the concept of fiduciary duties for which American corporate law is so well-known, and in fact for all legal provisions that do not prescribe clear-cut rules for every imaginable situation.

Based on the first prong of the oppressed minorities mechanism—the right of action—all three countries should have received a point. As mentioned above, there is a second prong to the oppressed minorities mechanism, namely, the right of a dissenting shareholder to receive "fair value" for her shares, called appraisal in the United States. If one of the three investigated countries was not entitled to a point on the basis of the first prong, it could not really claim a point on the basis of the second prong either.

For the United States, the appraisal remedy is well-known. Because of its limitations, however, appraisal would not in itself warrant a score of one. As for charter amendments or sale of all assets, appraisal is merely permissive and thus exists only if provided for in the charter.[151] It is mandatory only for mergers, but the "market-out rule" in principle denies the remedy if the company is listed.[152] Therefore, appraisal is relevant here only in the exception to the market-out rule, namely, when the consideration for target shareholders is anything other than stock in the surviving corporation, other stock in a listed company and/or cash in lieu of fractional shares.[153] Nonetheless, even in these rather exceptional circumstances, merging corporations can avoid appraisal by structuring the

---

[149]For France, see MERLE, *supra* note 68, at 681; 2 RIPERT & ROBLOT, *supra* note 58, at 337, 369. The standard of scrutiny will be more stringent vis-à-vis board decisions since the board's power only serves the interests of the company. Conversely, shareholders' voting rights have a mixed functionality: shareholders are allowed to take into account their private interest as well. Lucien Simont, *L'égalité des Actionnaires de la Société Anonyme* [*The Equality of Shareholders of the Société Anonyme*], 1997 R.P.S. 235, 246-47. In both cases, the court's intervention is limited to cases where the "range of reasonableness" has been exceeded.

[150]*See* LEDOUX, *supra* note 71, at 171.

[151]DEL. CODE ANN. tit. 8, § 262(c) (2001).

[152]*Id.* § 262(b)(1).

[153]*Id.* § 262(b)(2).

transaction as a sale of assets in exchange for stock of the buying company.[154] Although the economic consequences are identical to those of a formal merger, the protections of appraisal do not apply.[155] Similarly, in Belgium the right to step out with appraisal exists upon proof of well-founded reasons,[156] but not for listed companies.[157] In France, as well, the statute does not provide for an appraisal right.

Many other legal rules mitigate the absence of appraisal. In the United States, for instance, courts have held that appraisal proceedings do not exclude claims that controlling shareholders owe a fiduciary duty to the public shareholders.[158] The court will then apply a non-bifurcated test of "fair dealing" and "fair price."[159] Thus, in controlled mergers, such as freeze-out mergers, fiduciary duty claims can set off the shortcomings of the appraisal remedy. For France and Belgium, the theory of abuse of majority power and some other rules come into play. In the case of a merger, for instance, one of the parties often acquires a large stake before the actual merger takes place. In such cases, rules from the non-merger context may provide some relief.[160] Where the block of stock (together with the stock already owned) confers control, the acquirer must commit to buying shares offered by the remaining shareholders at the same price.[161] In this respect, shareholders have a limited exit right before the merger. Another rule in France that may alleviate the absence of appraisal is the ability for minority shareholders to request the Financial Markets Authority (FMA) to order a ninety-five percent plus shareholder to buy their stake. The FMA will assess the fairness of the price.[162] Likewise, in the cases of a sale of all or substantially all of the corporation's assets and changes in

---

[154]Subsequently, the seller dissolves and distributes the buyer's stock to its shareholders. ALLEN & KRAAKMAN, *supra* note 132, at 459-60.

[155]Delaware courts do not accept the de facto merger argument put forward by dissenting shareholders. Hariton v. Arco Elecs., Inc., 182 A.2d 22 (Del. Ch. 1962), *aff'd*, 188 A.2d 123 (Del. 1963).

[156]Stockholders do not have this right merely because they disagree with certain fundamental decisions. Companies Code, art. 636.

[157]Companies Code, art. 635.

[158]*See* Cede v. Technicolor, Inc., 684 A.2d 289 (Del. 1996); Rabkin v. Phillip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985).

[159]Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

[160]James A. Fanto, *France*, *in* THE LEGAL BASIS OF CORPORATE GOVERNANCE IN PUBLICLY HELD CORPORATIONS. A COMPARATIVE APPROACH 32-34 (Arthur R. Pinto & Gustavo Visentini eds., 1998).

[161]For France, see CMF Réglement Général, arts. 5-4-1, 5-4-2. For Belgium, see Royal Decree of Nov. 8, 1989, art. 41.

[162]Decree No. 88-603 of May 7, 1988, J.O., May 8, 1988, p. 6606, arts. 5-5-1 to 5-5-6.

the articles of incorporation,[163] appraisal will often be available on the basis of the FMA regulations.[164]

All these considerations underscore the need to review all relevant legal provisions when engaging in comparative law. They also demonstrate the difficulties in quantitatively scoring protecting rights across borders and legal systems. Although such scoring cannot perfectly reflect all of the above considerations, the most representative scoring would be the revised score in the table below.

Table 4: Scores on the Fourth Anti-Director Right

	LLSV score	Revised score
United States	1	1
France	0	1
Belgium	0	1

F. *The Fifth Right: Preemptive Rights*

The fifth anti-director right is termed "preemptive rights." In the original paper of 1996, this right was not yet included in the index. It "[e]quals one when the company law or commercial code grants shareholders the first opportunity to buy new issues of stock, and this right can be waived only by a shareholders' vote; equals zero otherwise."[165] In *Law and Finance*, France was the only jurisdiction of the three investigated here to receive a point for this anti-director right. Again, the question arises whether the scores for these countries were correct.[166]

Contrary to what was the case for cumulative voting or proportional representation, the law of a country must provide for, and not merely allow,

---

[163]In the French system, the latter category can be understood to include major changes in the *statuts*, since these also encompass bylaws.

[164]CMF Règlement Général, art. 5-6-6, *available at* http://www.amf-france.org/styles/default/documents/general/5241_1.pdf (last visited Apr. 9, 2004). This will soon be available as an FMA regulation. These regulations provide that a controller must inform the FMA when she will propose significant modifications of the constitution to an extraordinary shareholders' meeting or when they decide upon some major transactions, including disposition of the entirety or the main part of the assets. The FMA will evaluate the consequences for the shareholders and decide whether or not the controlling shareholder must repurchase the minority's shares.

[165]La Porta et al., *supra* note 5, at 1123.

[166]In addition to the problem set out below with regard to the score of Belgium, a problem arises with regard to the score for Germany. *See* Berndt, *supra* note 21.

preemptive rights in order to be accorded a point. That is why Delaware law scores a zero here. Preemptive rights only exist for those shareholders who have been expressly granted them in the company's charter.[167]

Unlike Delaware, France provides for preemptive rights. The Commercial Code explicitly grants shareholders the right to buy a proportional amount of the stock issued in a capital increase. Any clause contrary to this system of preemptive rights will not be effective.[168] In accordance with the exception provided for in the LLSV index, however, the shareholders' meeting can totally or partially waive the preemptive rights.[169] This can be done in favor of one or more specifically designated persons or without indicating such person(s). It should also be noted that the shareholders' meeting can delegate to the board the right to increase the capital up to a maximum sum and to exclude preemptive rights.[170] Needless to say, a right is not an obligation. This implies a second type of waiver: a shareholder can renounce her preemptive right individually.[171] Although this exception is not explicitly provided for in the LLSV method, it is not a limitation of the protection resulting from preemptive rights and should, therefore, be implicitly assumed.

A translation issue arises with regard to the score for Belgium. Preemptive rights do exist, but under another name: the literal translation is "preferential right" (*voorkeurrecht, droit de préférence*). "Preemptive right" (*voorkooprecht, droit de préemption*) in the Belgian sense is an expression outside the context of the issue of new stock. The term instead refers to the right of first refusal someone may have when a shareholder decides to sell her stock. This right, of course, only exists on the basis of an agreement with the selling shareholder or of a provision in the company's constitution.[172] With regard to "preferential rights," the Companies Code provides that in a capital increase, the new shares that represent cash contributions must first be offered to the existing

---

[167]DEL. CODE ANN. tit. 8, § 102(b)(3) (2001). Preemptive rights used to exist in the United States, but they disappeared over time. ALLEN & KRAAKMAN, *supra* note 132, at 87.

[168]Commercial Code, art. L. 225-132, al 2.

[169]Commercial Code, art. L. 225-135.

[170]The latter requires a separate resolution and a special report of the "auditor of accounts." This special resolution ensures that shareholders have consciously given their approval to the exclusion of preemptive rights. Commercial Code, arts. L. 225-129, al III & L. 225-13.

[171]Commercial Code, art. L. 225-132, al 4.

[172]*See* Companies Code, art. 510.

shareholders in proportion to their existing stake.[173] This is obviously what is covered by the fifth anti-director right.[174]

The LLSV condition that a waiver be possible only with a shareholders' vote is also met. The Companies Code stipulates that the preferential right cannot be restricted or waived in the constitution.[175] This can only be done by the shareholders' meeting, acting with the same quorum and majority requirements as for amendments of the constitution[176] and only in the interest of the company.[177] In fact, this "waiver" could be translated better by "abolition." "Waiver" technically refers to an additional mechanism, available to every shareholder individually for her own preferential right, as in France. Using this mechanism, the shareholders' meeting can unanimously decide immediately after the capital increase that it will not use its preferential rights.[178]

---

[173]Companies Code, art. 592. The restriction on shares issued for cash consideration does not seem to be a reason for denying a score of one, since the same restriction exists in France, where a point was granted. Commercial Code, art. L. 225-132, al 1-2. Non-cash contributions render preferential rights burdensome to realize, if impossible. The holders of shares without voting rights do have preferential rights. If the capital is proportionally increased through shares with and shares without voting rights, then shareholders have a preferential right within their class of shares. Companies Code, art. 592 (Belgium).

[174]See *supra* note 165 and accompanying text for the definition in *Law and Finance*, which makes it clear that the term "preemptive right" is used as a synonym for "subscription privilege," defined in *Black's Law* as "a shareholder's privilege to purchase newly issued stock—before the shares are offered to the public—in an amount proportionate to the shareholder's current oldings in order to prevent dilution of the shareholder's ownership interest." BLACK'S LAW DICTIONARY 1197 (7th ed. 1999).

[175]Companies Code, art. 595.

[176]The company's constitution can authorize the board to increase capital up to a specified amount ("authorized capital"; *toegestaan kapitaal*; *capital autorisé*). Companies Code, art. 603. The translation "authorized capital" may be misleading, since its use is subject to noticeably more restrictions than under Delaware law. In principle, the shareholders' meeting retains power over the decision whether or not to waive preferential rights. The board does not have this power unless its authorization to increase capital explicitly includes an authorization to waive preferential rights. Companies Code, art. 605. In the latter hypothesis, the above described provisions concerning board report and control report apply. Companies Code, art. 603, al 3; 2 BOUCKAERT, *supra* note 63, at 591. A waiver in favor of one or more specific persons is only possible if the board is explicitly authorized by the constitution to do so. Companies Code, art. 605.

[177]Companies Code, art. 596. It also requires an elaborate report from the board and a control report by the statutory auditor, the auditor, or an external accountant. Additional protective provisions apply if the preferential rights are waived in favor of one or more specific persons. Companies Code, art. 598.

[178]2 BOUCKAERT, *supra* note 63, at 606-07.

Table 5: Scores on the Fifth Anti-Director Right

	LLSV score	Revised score
United States	0	0
France	1	1
Belgium	0	1

One could conclude from the above overview that civil law countries perform better on the preemptive rights criterion. Both Belgium and France provide for these rights, as do many other civil law countries.[179] The picture becomes less clear when corporate law fundamentals and a different economic background are considered. That is material for Part III.

G. *The Sixth Right: Percentage of Share Capital to Call an Extraordinary Shareholders' Meeting*

Finally, the index looks at the "minimum percentage of ownership of share capital that entitles a shareholder to call for an extraordinary shareholders' meeting."[180] A point is granted if that percentage is less than or equal to ten percent.[181] In *Law and Finance*, both the United States and France received a point. This section deals with the problems, even from the indexer point of view, that affect these scores. Criticism of the relevance of this last anti-director right is based on more fundamental considerations and will therefore be considered in Part III.

It is surprising that the United States got a score of one on this anti-director right. The Delaware General Corporation Law (DGCL) grants only the board of directors statutory power to convene an extraordinary meeting, though the charter or bylaws can also authorize other persons to do this.[182] This finding led LLSV to the conclusion that because Delaware law leaves the percentage up to the corporation, one, therefore, must look to the practice in other states.[183] The majority of other states and the

---

[179] *E.g.*, Germany: § 186 AktG.

[180] La Porta et al., *supra* note 5, at 1123.

[181] *Id.*

[182] DEL. CODE ANN. tit. 8, § 211(d) (2001). The DGCL consistently uses the term "special meeting."

[183] La Porta et al., *supra* note 5, at 1128 n.6.

Revised Model Business Code Act (RMBCA) indeed provide for a threshold of ten percent.[184] Hence the score of one.

In Delaware, however, companies' charters or bylaws rarely entitle shareholders representing ten percent or less of the stock to call an extraordinary meeting.[185] In addition, there is a more essential problem with the reasoning behind the U.S. score: it would allow every country to receive a score of one on almost every right in the anti-director index. There are not many jurisdictions in which it is forbidden to lower a statutorily provided threshold. In Belgium for instance, there is no doubt that despite the statutorily stipulated threshold of twenty percent, the company's constitution can grant shareholders representing ten percent of the stock to convene an extraordinary meeting. What is important is that Delaware law, like Belgian law, allows corporations to *deny* shareholders representing ten percent of the stock the ability to convene such a meeting, because there is no minimum in a mandatory statutory provision.[186]

An alternative that can radically reduce the need for shareholders' authority to convene a meeting is shareholder action by consent. Unless the charter provides otherwise, shareholders can take any action that normally should be taken at a meeting without a meeting if consents are signed by the holders of no fewer than the minimum number of votes that would be required for such action at a meeting.[187] Insurgents thus do not even need to call a meeting and can just solicit consents if the annual meeting is too far away.

The situation is ambiguous for France too, but in a different way. Although the point awarded France for the sixth anti-director right was not without support, one could make an equally strong argument the other way around. Indeed, shareholders in France do not have authority to convene a meeting themselves. They must instead request the court to appoint a judicial representative who will then convene a meeting.[188] The court has discretionary power in deciding whether the nomination of a representative is in the social interest.[189] Shareholders, therefore, cannot independently "call" a meeting, no matter what percentage of the shares they represent.

---

[184]*Id.*; REV. MODEL BUS. CORP. ACT § 7.02(a)(2) (2002).

[185]Mark J. Roe, *Corporate Law's Limits*, 31 J. LEG. ST. 233, 252 n.28 (2002).

[186]*See* Michael Klausner & Jason Elfenbein, *United States*, *in* SHAREHOLDER VOTING RIGHTS, *supra* note 56, at 355-56.

[187]DEL. CODE ANN. tit. 8, § 228(a) (2001). The threshold could be higher than the ten percent put forward by LLSV for the calling of a meeting, but the same threshold would be required to make a decision at a meeting and because of the general absence at shareholders' meetings the explanation at the meeting itself would not change much anyway.

[188]Commercial Code, art. L. 225-103, al II, 2.

[189]2 RIPERT & ROBLOT, *supra* note 58, at 358.

Clearly, much depends on how the court and the judicial representative exercise their powers. One could argue that the index is directed only to a fair use of the possible power to convene a meeting. If in those cases the courts systematically appoint representatives, the question becomes what percentage of stock shareholders must be represented in order to be able to introduce a request with the court. For France, the principles are as follows: in the event of an emergency, any interested party can apply. Otherwise, an application can be made by one or more shareholders who together hold more than five percent[190] of the share capital, or by an association of shareholders[191] that fulfills certain conditions.[192] For special meetings,[193] shareholders applying for the appointment of a judicial representative must hold at least one-tenth of the shares of the relevant class.[194] For none of these situations is the minimal amount of stock that must be represented above ten percent. Therefore, an equally strong case can be made for a score of one.

Belgium was accorded zero, which in itself cannot be disputed, given the threshold of twenty percent and the fact that even shareholders who meet the threshold cannot call the meeting themselves. The Companies Code only requires the board or the statutory auditor, if there is one, to convene a shareholders' meeting if one-fifth of the shareholders makes a request for it.[195] The board or the statutory auditor, however, has no discretionary power. If they do not convene the shareholders' meeting within three weeks after the request, they are subject to criminal sanctions.[196] In case of refusal, the court can appoint an ad hoc administrator, who will act for the board in convening the meeting.[197] If this strict approach is also applied in countries like France,[198] there is no reason to deny them a point. Most likely however, some of those countries

---

[190]At the time the LLSV article was published, i.e., before the NER Act, it was ten percent. 1966 Act, art. 158, al 2, 2°. Therefore, at that time both arguments were valid.

[191]Commercial Code, art. L. 225-103, II, 2.

[192]Commercial Code, art. L. 225-120.

[193]French corporate law makes a distinction between three types of shareholders' meetings. The "general ordinary meeting" and the "general extraordinary meeting" are covered by the five percent requirement. The ten percent requirement applies to the third type, i.e., the "special meeting." Commercial Code, art. L. 225-103, al IV.

[194]Commercial Code, art. L. 225-103, IV.

[195]Companies Code, art. 532.

[196]Companies Code, art. 647, 1°.

[197]BERNARD TILLEMAN, BESTUUR VAN VENNOOTSCHAPPEN. STATUUT, INTERNE WERKING EN VERTEGENWOORDIGING [BOARD OF CORPORATIONS. STATUS, INTERNAL FUNCTIONING AND REPRESENTATION] 169-71 (1996).

[198]For instance, the Netherlands also received a score of one despite the fact that court approval is required for calling the meeting. La Porta et al., *supra* note 5, at 1131.