Duties and Liabilities of Corporate Managers under Argentine Law

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I. The obligation cycle

1. Introduction

Every individual participates, in a biggest or smaller way, on the commercial traffic. For this reason we all conclude every day many different contracts and incur in many duties, even without realizing it.1 Some of these contracts are not very important, such as buying a newspaper, a bouquet of flowers, a refreshing drink, etc. Instead, other agreements are more significant, like buying a house, an apartment, a car, etc. In most cases, and frequently without any interruption, after the contract is agreed the arranged duties are satisfied on time and form. When this happens, the so-called "obligation cycle" is closed, the relationship between those who celebrated the contract concludes and duties we mentioned before are extinguished. However, the duties agreed in the concluded contract sometimes are not satisfied in time or as pacted. In these cases appears situations of retardation, delay, or quite and simply default.2 These vicissitudes can affect all types of duties agreed in any contract, and obviously they also concern, as a sort of that kind, the duties that must be met by corporate managers.

2. The vicissitudes of the corporate managers´ duties

As explained the corporate managers´ duties run through the referred path from its birth to its extinction, and may also experiment situations of retardation, delay, or quite and simply default.

When a simple situation of retardation or delay appears, there are different tools to achieve the satisfaction of the debit which, although belatedly met it stills useful.3 When instead it appears a breach of a corporate manager’s duty, the issue is more

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1 Cf. MARTIN E. ABDALA, EL DEBER DE INFORMACIÓN, 17-18 (2007).

2 We must remember that the Argentinean doctrine defines the delay as an abnormal situation of retardation in complying a duty, that affects an enforceable obligation, when the debtor does not comply on time the creditor's expectations because of a cause attributable to him, and that situation subsist as long as the execution of the feature, even of late, it stills possible and useful. Cf. ERNESTO C. WAYAR, OBLIGACIONES, 2, 2-3 (2002); See RENÉ A. PADILLA, LA MORA EN LAS OBLIGACIONES, 1 (1983); ERNESTO C. WAYAR, TRATADO DE LA MORA, 1 (1981).

3 In order just to give some examples, when the chairman of the board of a corporation not duly calls a shareholders' meeting, or a case in which the manager of a limited liability company does not render adequate economic management accounts.
complex. On one hand, because this failure could affect the company, damaging the shareholders' interest, deteriorating the fiduciary relationship that links corporate managers with the firm and it opens the possibility of imposing sanctions to the officer. And, on the other hand, because this failure means that the obligation relationship "of debit" shall finish, giving a way to a new relationship, of liability, according of which the corporate manager has no longer to fulfill the duties originally committed, but will have to pay a compensation for the damages that these breach had caused.

This new liability relationship is very different from the original obligation relationship. The first one provides the creditor the right to require the debtor a specific action or omission, but this single right to require him would now be nonsense. Instead, the liability relationship allows the creditor a kind of penetration in the area of the debtor, and offers, if necessary, the opportunity to execute that right on his assets.

3. Consequences of duty's breach

As mentioned, the breach of corporate managers' duties may have two types of consequences: the imposition of sanctions and the allocation of liability for damages. The first group represents a kind of correctional regime of Argentine corporation law. Those sanctions may be called disciplinary measures and may be imposed to all administrators that fail to comply with his obligations. Those measures are related to the severity of the offense, and may include a warning, a suspension, and even the loss of the function, i.e. the exclusion or removal from office. These sanctions have a dual function: punishment and prevention. The punitive purpose is evident considering that they are penalties for the misconduct of the manager. The preventive purpose, meanwhile, comes from the fact that they serve as a warning and discourages a new misconduct. And in cases even where the administrator is exonerated, they are useful to prevent that it continues to perform acts in detriment of the society, shareholders or third parties.

The second consequence of the breach of corporate managers' duties is the attribution of liability for the damages caused. It may appear as an additional sequel to the first consequence (the disciplinary measures), or it may arise independently from it. For example, the breach of the corporate managers' duties can lead to the imposition of a disciplinary sanction (as for instance the removal of an administrator) and the attribution of responsibility for damages caused; but it may also be claimed the repair of the damages regardless of the removal, for instance because the administrator has resigned, died or simply because there is no interest in the other types of sanctions.

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4 That German law call Schuld, and Argentinean law call Denda.
5 That Germany law call Haftung, and Argentinean law call Responsabilidad.
6 This explains the renowned sentence of Karl Larenz: "Die Haftung verleiht der Schuld ihre irdische Schwere" (The liability gives or grants the debt its weight or earthly power).
Now well, as the liability is the immediate consequence of an unfulfilled or unsatisfied obligation, to study the manager’s responsibilities we must necessarily first consider their duties, then the liability follows the debit as a shadow, as masterfully taught the German master Karl Larenz. For that reason, on the next section we will analyze those corporate managers’ duties in order to understand later their liabilities.

II. The duties of corporate managers

To achieve our goal we must begin remembering that the corporate managers play an extremely important society role, which has an enormous impact on the lives and assets of a plurality of persons. The activities of these managers go far beyond the shareholder’s interests of the company they lead, and can affect the entire community, and even transcend the geographical boundaries of the country where the firm is located. There is not much effort needed to realize that the decision of the corporate managers to pay or not to pay taxes owed by a corporation affects not only the company itself and its shareholders, but it also affects the entire community. And even more, when the managers overlook the satisfaction of environmental security legislation it can cause damages that may affect the entire region where the company is established.

With that starting point it is easy to deduce promptly that managers must satisfy a plurality of duties. Some of them come from the corporation law, and other emerges from all other rules that form the Argentinean legal system. Precisely for this reason it should not be surprising, as it seems to be to a particular group of Argentinean scholars, that there are many cases where liability is directly imputed to corporation managers. This imputation of liability is the obvious consequence of the breach of some of the many manager corporations’ duties, whose violation can lead to an imputation of civil liability, environmental liability, tax liability, customs liability, employment liability, insolvency liability, etc.

However, in a legal and economic organization such as the one currently in Argentina, the existence of these duties must inevitably have a concrete and specific source or origin. It is clear that the law can not specify what kinds of decisions must be taken by the corporation managers in every situation presented to them in the exercise of their functions. Then the correct behavior of these managers will depend on a number of circumstances, some related to the type of the company in question, with the activity or purpose of the firm, etc.

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7 Cf. Karl Larenz, Lehrbuch des Schuldbuchs, 21 (1979). While it is true that normally the "Haftung" follows the "Schuld", it is known that there are also cases where both concepts are disassociated. Thus, in the guarantee contract there's Haftung of the guarantor without any Schuld. And it is also possible the opposite situation in which there is a duty and no one to be held liable. This is what happens with the so-called natural obligations (unvollkommenen Verbindlichkeiten), although the modern German law says that in such cases, strictly speaking, there is not even a duty in the technical sense of the word.

Nevertheless, the legislators, as the doctrine and jurisprudence, have made strenuous efforts to specify the duties to be met by corporate managers. Even when the task is not completed we may sort these duties, in a systematizing attempt—which will later need some precisions—, in two groups, distinguishing the so-called generic obligations and the specific obligations of behavior.

The first group is composed by those standard duties that represent a kind of framework or "bevel" (using a metaphorical expression widespread in the vernacular doctrine), and serving at least as perimeter of reference on how managers should behave. Within this group it can be distinguish those duties that correspond to all foreign asset managers (the duty to act with the loyalty and diligence of a good businessman) and those that are specific or typical of corporation managers (the duty to reach the corporation's object and to protect the corporation's interest). The second group includes the so-called specific obligations of behaviors, it includes all those concrete duties required to the corporate managers by the kind of company in question, by the activity that is done, etc. In the coming headings will refer to both groups in detail.

III. Standard duties

Under Argentinean law the corporations are considered legal persons with all it resulting consequences, including that this entities have a separate and distinct assets from their members, which is led by their managers. Therefore the corporate managers (even if they were also corporate shareholders), administer an asset that may well be described as foreign because it belongs to a different person, the company.

For these reasons, and whatever the thesis that is supported regarding the legal nature of the relationship between administrators and companies, corporate managers must satisfy two standard duties: on one hand they must observe certain canons of conduct that apply to all foreign asset managers and, on the other hand they must also satisfy certain behavior duties that are specific and characteristics of the role they play as managers of a corporation.

1. Duties that correspond to all foreign asset managers

The corporation managers govern foreign capital and, as all foreign asset managers, they must act with the loyalty and diligence of a good businessman. This duties are not recent at all. We find their backgrounds in the legal regime applied to the fiduciary by Roman law. That law imposed many obligations on all those who managed businesses that were not their own in a relationship based on trust.9

The duties to act with the loyalty and diligence of a good businessman were also known in common law, which demands on all trustees the satisfaction of the so-

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called "duty of care" and "duty of loyalty". The first of them compelled the trustees to exercise their functions with the same caution as an ordinary businessman would leading its own affairs. And the second one required the trustees to avoid conflicts of interest and, when they could not to do so, to postpone their own or those of third parties linked.\(^\text{10}\) Until our days both duties play a significant role in common law. They are the bases and the justification for different and very significant legal institutions.\(^\text{11}\)

Argentine law also requires foreign asset managers to observe certain conducts or behaviors. These expected conducts constitute a framework of how these administrators should act. Then the performance of a manager can be judged taking into account, how would act in a similar case a "good businessman" or a "good father". In other words: since the Argentine law cannot require foreign asset managers that all decisions made are correct, and cannot even specify what to do in each individual case on which they act, it conforms to set a framework to judge their behavior, and to be able to evaluate whether or not they acted lawfully.

The duty of the foreign asset managers to behave with loyalty and diligence of a good business man comes from a harmonious interpretation of arts. 512, 902 and 1198 of the Argentine Civil Code. The art. 512 of the Argentine Civil Code\(^\text{12}\) states that the debtor's fault in fulfilling a duty is the omission of those proceedings that are required by the nature of the obligation, and that corresponded to the conditions of people, time and place. On the other hand, the art. 902 of the Argentine Civil Code provides that the greater the duty to act with caution and full knowledge of things, the greater the obligation arising from the possible consequences of the facts. Finally, the art. 1198 of the Argentine Civil Code establishes the duty to act within the framework of good faith,\(^\text{13}\) and provides that the contracts must be concluded, interpreted and implemented in good faith and in accordance with what the parties credibly understood or could understand, working with care and welfare.\(^\text{14}\)

These duties to act with loyalty and diligence also arise from different rules of Argentine commercial law;\(^\text{15}\) among them we can mention the art. 59 of Ley de Sociedades Comerciales (Corporations Law Act), which states -with crystal clarity- that the corporation managers must act with the loyalty and diligence of a good businessman.


\(^{11}\) For example in corporate law and capital market law, the rules of insider trading and corporate governance.

\(^{12}\) That the civilian doctrine considers an original creation of Velez Sarsfield in the legislative arena. See Luis Moisset de Españos, Codificación Civil y Derecho Comparado, 187-188 (1994).

\(^{13}\) This duty could already be inferred from the original writing of art. 1198 of the Argentine Civil Code, which stated that contracts reach not only to what is stated in them, but also to all the consequences that may be considered that would have been virtually covered by the convention.

\(^{14}\) The significance of this principle is such that some authors argue that it dominates the area of contracts, and impregnates the entire law. See, Fernando J. López de Zavalía, Teoría de los Contratos, 1, 263 (1991).

\(^{15}\) That duty was imposed, for example, in the original writing of art. 337 of the Argentine Commercial Code. See Martín Arecha, Sociedades Comerciales, 59-60 (1981).
and, in the second part, foresees the sanctions for noncompliance and states that when those managers fail on their duties they are liable, in solidarity, for all the damages caused by their action or omission.\textsuperscript{16}

2. The standard duties of corporate managers

In addition to the standard duties that correspond to all foreign asset managers -as well as corporate managers as a kind of them- there are other obligations which are also standard, but are typical of such officers: the duty to reach the corporation's object and to protect the corporation's interest, which we examine in the following paragraphs.

a) The duty to reach the corporation's object

The first of the typical generic duties of corporation managers is linked to the purpose of the company. We must remember that the Argentine corporate law requires all corporations to have an specific object (inc. 3 of art. 11 of the Ley de Sociedades Comerciales -Corporation Act-), which shall consist in acts, or category of acts which the company may execute.\textsuperscript{17}

Managers must reach the corporation's object of the company where they serve. As an obvious consequence of this, the object of the corporation is not only useful to define the activity to be undertaken by the company, but also to specify the duties and obligations of those who lead the firm, thereby delimiting the competence of its managers.\textsuperscript{18}

Moreover, the corporation's object will also serve the interests of shareholders, who are ensure that the company's asset will not be deflected to other acts that are unreasonable or extravagant to that purpose, and that the performance of the corporation managers will be directed and framed within those limits.\textsuperscript{19}

\textsuperscript{16} Undoubtedly the legislative technique and language of this article is inappropriate, because it is absolutely unnecessary to clarify that the violations of these duties will have as consequence that the manager must respond for any damages caused. As already explained, under Argentine law the breach of a duty causes the conversion of the relationship of debit in a relationship of liability, without needing a rule that provides expressly so.
\textsuperscript{17} See Ricardo A. Nissen, Curso de Derecho Societario, 117-118 (2000).
\textsuperscript{18} The object referred to in the statute will be useful to clarify what is the interest of the company, which we refer in the following section.
\textsuperscript{19} See art. 58 de la Ley de Sociedades Comerciales (Corporation Act). See also Mariano Gagliardo, El objeto social y responsabilidad de los directores de sociedades anónimas, El Derecho, (2003), 205-278.
b) The duty to protect the corporation's interest

The corporate managers should guide their actions exclusively to protect the corporation's interest. This interest becomes in that way a framework that will allow judging the behavior of managers that lead the firm. Nevertheless the issue of the corporation's interest has caused deep differences, which are not only object of academic concern, but a central element in order to define the activity of the company and to judge the work of the corporation managers. In Argentine law these issue is hardly discussed. A sector researches in Argentina argue that corporation's interests are identical to the shareholder's interest and some scholars have even denied the existence of a corporation's interest as an independent concept to shareholder's interest.

We understand that after recognizing corporation's legal personality it must also be recognized the existence of an own company's interest. This particular company's interest should not be confused with those of shareholders, which are subordinated to the common goal pursued by the corporation. In all cases, it is necessary to distinguish clearly between the company's interest and the shareholders' interest, because if it is true that in some cases both may overlap, in many others they are completely divergent and can even become opposites.

IV. Specific behavior duties

In Argentine law the duties of behavior discussed in the preceding paragraphs are contained in wide-ranging rules. They are general clauses that can be used in all cases in which it is intended to state an imputation of liability, and is not possible to identify with precision the specific duty breached in the action of the corporate manager that is deemed improper.

These general clauses act as flexible rules, substituting long enumerations of duties and giving a parameter to determine whether the corporate manager has diligently

20 Precisely for that reason the Reform Project of the Ley de Sociedades Comerciales (Corporation Act), intended to change the art. 59, and enact that the directors of the company should make prevail the interests of the company among all other interests.
22 Those who hold this last position argue that, in fact, there are no other interest than those of the shareholders, because interest is a particular attitude that refers to a human being, associated with the reality of the natural person, See GERVASIO COLOMBRES, CURSO DE DERECHO SOCIETARIO, 17-19 (1972).
24 For example, that the company earns money in a legal transaction is obviously in interest of the company, and may also be in interest of shareholders who will benefit by the appreciation of their shares and the improvement in the company performance. However, it may be that the concretion of a business damages one of the shareholders (for instance because the shareholder competes with the company for the concretion of it), in that case it could hardly be argued that the company's interest includes the interest of shareholders.
fulfilled or not their function. We do not doubt the importance of these general clauses, neither we ignore the possibility of using them residually, in all cases in which there’s not a punctual duty breached and it is intended to impose liability on a corporation manager.

However, we cannot overlook the fact that the indiscriminate use of this general clauses can lead to unjustified charges of liability in situations in which responsibility is attributed to those who, in fact, were not even debtors of a duty or, in cases, had never breached the mentioned obligation. The misuse of these general clauses can lead to imputations of liability based on equity, in situations where the liability's attribution does not find a clear justification. Nevertheless the general clauses serve to establish a framework inside which the action of corporate managers must operate and may be appropriate for solving a lot of particular cases, but they are also inconvenient because they generate a high degree of uncertainty and make the system unpredictable.25

Precisely for these reasons we consider appropriate to investigate the specific duties that the corporation managers must satisfy, whose breach can lead to an attribution of liability. The doctrine and the jurisprudence of Argentina is currently (perhaps inadvertently) doing the effort to define and to specify which are the appropriate corporate manager's behavior in each of the different areas of their activities. The most tangible result of these efforts is the development of the so-called Codes of Good Corporate Governance that, beyond its origins, represent today a sharp effort to define, organize, and systematize the numerous duties that must be satisfied under Argentina law by those who have the responsibility to lead corporations.

V. Conclusions

1. Every individual participates on the commercial traffic, concluding daily different contracts and incurring in many duties, most of which are satisfied correctly on time and form.

2. However, in the cycle from the birth to the extinction of those obligations, it often appears some vicissitudes such as retardation, delay and default.

3. The duties of corporate managers, as a species of that obligation genre, might be obviously affected by such vicissitudes.

4. In Argentine Law the situations of retardation and delay are solved with many tools that come mainly from the Ley de Sociedades Comerciales (Corporation Act).

25 In our opinion and contrary to what many Argentinean scholars think, the creative application of the law made by judges should be extremely limited. Because those matters that are resolved in the name of equity with forced or contrived interpretations of the law, has in Argentina a "multiplier effect" of lawsuits, because it breaks the predictability of the legal system.
5. The cases in which there is a breach of a duty brings up two complex types of consequences: the possibility of imposing the corporate manager a kind of disciplinary sanction -such as, for example his firing- and the conversion of the duty (Schuld) on liability (Haftung).

6. Liability follows the duty as a shadow; therefore, to impute responsibility to a manager it is essential to detect first the breached obligation. To achieve this goal we propose to classify the duties of corporate managers in two large groups: the standard and the specific one.

7. The standard duties of corporate managers are those that are common to all foreign asset managers: the duty to act with loyalty and diligence; and those that are typical of corporation managers: the duty to reach the corporation’s object and to protect the corporation's interest.

8. The specific duties, meanwhile, refer to the various particular behaviors that are expected to be met by corporate managers, according to the type of company in question, the structure of the firm, the peculiar characteristics of the economic activity developed, etc. The task to determine and to systematize these specific duties is yet an unfinished work which, perhaps without realizing it, is currently below the doctrine and the jurisprudence of Argentina.