THE DELAWARE-INSPIRED NEXT STEP TOWARD BRAZIL BECOMING THE SOUTH AMERICAN LEADER IN CORPORATE LAW: MAKING PUBLIC COMPANY ARBITRATIONS A MATTER OF PUBLIC RECORD

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Brazil is South America's leading domicile for listed public companies and has enjoyed substantial economic growth in the last generation. But it remains a nation constrained by limited resources to address all of its challenges and opportunities. Because of this reality, Brazil has chosen to use arbitration as the method to resolve disputes between the stockholders of public companies about critical issues such as the fairness of interested transactions and other claims for breach of fiduciary duty or compliance with statutory law and securities laws.

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Likewise, important commercial disputes involving public companies are also resolved in arbitration. This is problematic in one hugely important way: Brazil has not yet recognized that arbitration of this kind that affects public companies, their stockholders, and other stakeholders is distinct from purely private arbitration. As a result, the arbitration process for public companies lacks the accountability and integrity that accompanies public adjudication and also fails to create a body of decisional law that provides a basis for the evolution of sound corporate governance best practices and that encourages arbitrators to base their decision on principled and coherent interpretations of commercial, corporate, and securities law. Recognizing that one of the primary reasons Delaware has emerged as an international leader in corporate and commercial law is that its system of adjudication resolves cases promptly, expertly, and publicly, and provides practitioners, academics, regulators, stockholders, corporate leaders, and the public with reasoned decisions about important determinations affecting public companies, we argue that features of Delaware's approach could be usefully employed within Brazil's system of public company arbitration. We thus support and encourage recent reforms in Brazil to open up the system of public company arbitration and provide specific suggestions for making the new movement toward public arbitration in public company cases effective. By capitalizing on the speed and expertise that can be brought to bear by arbitration, but combining it with credibility- and consistency-enhancing features, Brazil can further its ambitions to be an international leader in the market for incorporation and better encourage investment in its economy.

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I. INTRODUCTION

Brazil has made great strides in making itself a leader in regional and international commerce, and in seeking to be the South American leader in corporate formation and the listing of shares of public corporations.[1] To that end, Brazil has taken great care to craft and maintain a high-quality Corporations Act,[2] to empower a respected securities regulator, the Comissão de Valores Mobiliários (CVM), to oversee a system of quality disclosure[3] and to use the expertise and speed of arbitrators to resolve public company disputes with the dispatch the real world of commerce demands.[4] But it has failed to take the logical next step necessary to secure

1. According to the Latin America & Caribbean Market capitalization of Listed Domestic Companies Ranking, compiled by the World Bank (with data from 2020), Brazil is by far the leading market in South and Central America, and the value of its listed companies outstrip the value of its closest rivals, Mexico, Chile, Colombia, Peru, and Argentina, THE WORLD BANK, *Market Capitalization of Listed Domestic Companies - Latin America Caribbean*, https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=ZJ&most_recent_value_desc=true [https://perma.cc/UW2T-G62R] (last visited Feb. 20, 2024).

2. Lei No. 6.404/76, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

3. Several articles of Law No. 6.385/76 (Article 4, VI; Article 8, III; Article 9, IV; Article 19, paragraph 5, II; Article 21, paragraph 6, II; Article 21-A; Article 22, paragraph 1, I, V and VIII) empower the CVM to establish a mandatory framework for the regular reporting of material information by publicly traded joint-stock corporations, as well as to ensure compliance with those requirements and to impose serious sanctions for non-compliance, Lei No. 6.385/76, de 7 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976. In this manner, the CVM plays a role in Brazil similar to the Securities and Exchange Commission in the United States, *see* José Alexandre Tavares Guerreiro, *Sobre o Poder Disciplinar da CVM,* 43 REVISTA DE DIREITO MERCANTIL, INDUSTRIAL, ECONÔMICO, FINANCEIRO 64 (Jul./Set. 1981).

4. By rules of the B3 Stock Exchange, corporations with shares listed on the Novo Mercado segment must commit to resolve disputes with stockholders over corporate law matters by arbitration under the rules of its Arbitration Chamber, *see* BRASIL, BOLSA, BALÇÃO, *Regulamento do Novo Mercado*, art. 39 (Feb. 17, 2023), https://www.b3.com.br/data/files/ED/C4/C1/2D/F99068101BBF1068AC094EA8/Regulamento%20do%20Novo%20Mercado%20_Versao%202023_.pdf, *translated in* BRASIL, BOLSA, BALÇÃO, *Regulamento do Novo Mercado*, art. 39 (Oct. 3, 2017), https://www.b3.com.br/data/files/DD/A3/90/A2/8C066810DE2C7168AC094EA8/Novo%20Mercado%20Listing%20Regulation%20_Versao%202023_.pdf ("The bylaws must include an arbitration clause stating that the company, its shareholders and executive officers, as well as the members of its fiscal council and their alternates, if any, undertake to seek arbitration by the Market Arbitration Chamber and to abide by its rules in order to resolve any disputes that may arise relating to their status as issuer, shareholders, management and fiscal council members, especially in light of the provisions of Law 6.385/76, Law 6.404/76, the company's bylaws, the rules issued by the National Monetary Council (CMN), the Central Bank of Brazil (BCB) and CVM, as well as other rules applicable to the securities market in general, the rules herein,

Brazil's place as the best place to incorporate and invest in South America — providing investors and corporate managers with a body of corporate law decisions, with assurances that Brazilian companies obey high standards of fiduciary responsibility and honor the Corporations Act and, as important, with guidance that encourages the adoption of best practices by companies and that facilitates improvements in the Corporations Act itself. The promise that reform of this kind may come to pass is now more realistic than ever, as we shall explain, and positions Brazil to make important strides forward as a leading corporate domicile.

In several respects, Brazil has built its move toward market leadership on the same foundational attributes as the leading corporate law jurisdiction in the United States — the State of Delaware, which is the home of a large percentage of the world's most important companies[5] and of a supermajority of American public companies.[6] Brazil's strong commitment to modern, up-to-date securities and corporate laws matches the Delaware approach.[7] Brazil's deployment of expert arbitrators

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other rules and regulations established by B3, and the Novo Mercado participation agreement."). The Sole Arbitrator or the President of the Arbitral Panel, as the case may be, must be drawn out from a list approved by the B3 as having the qualifications to skillfully and impartially resolve corporate law disputes, *see* BRASIL, BOLSA, BALÇÃO, *Regulamento da Câmara de Arbitragem do Mercado* § 3.2.1, https://cbar.org.br/site/wp-content/uploads/2018/04/regulamento-da-camara-de-arbitragem-do-mercado.pdf (last visited Nov. 3, 2023). When a panel is employed, the rules require that at least one of the other arbitrators *have legal training and be chosen from the members of the Arbitrator Body of the Arbitration Chamber*, *id.* § 3.4.1. And when the parties cannot agree on the other panel members, the President of the Arbitration Chamber selects the other arbitrators, *id.* § 3.2.1. In accord with these rules, typically arbitrators in public company arbitrators are experienced corporate lawyers or professors or have other relevant corporate law expertise.

5. By way of example, Amazon, Walmart, General Motors, and Alphabet are incorporated in Delaware. When you think of an internationally known American corporation, it is likely to be domiciled in Delaware.

6. *E.g.*, DEL. DIV. CORPS., *Delaware Division of Corporations: 2021 Annual Report* (2022), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2021-Annual-Report.pdf (showing that in 2021 66.8% of the Fortune 500 was incorporated in Delaware and 93% of U.S. IPOs were of Delaware corporations). For citations to the historical predominance of Delaware in the U.S. incorporation market, and particularly for large public companies, *see, e.g.*, Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law,* 42 U. RICH. L. REV. 1129, 1129 n.3 (2008).

7. In the early 2000s, a doctrinal and legislative reform movement took place in Brazil with the aim to enhance the country's capital market by providing a more suitable framework for investor protection. The Corporations Act underwent reform through Law No. 10.303/2001, which introduced, among other innovations, the provision that Brazilian companies could include an arbitration clause in their bylaws, thus consolidating the prevailing case law on the matter, Lei No. 10.303/2001, de 31 de

expected to decide cases with dispatch is also a hallmark of the Delaware way. But Brazil has, to date, failed to follow Delaware in an essential, integrity-assuring way.

In Delaware, decisions in all corporate law cases — not just ones involving public companies — are public.[8] These decisions provide a reliable source of guidance for corporations and a critical assurance of accountability to investors. The body of respected and impartial decisional law that the Delaware courts provide is widely considered to be the most important reason for that small state's dominance in the United States and its status as the world's most influential corporate law jurisdiction.

In this article, we briefly explain the Delaware system and highlight the ways in which the Brazilian system is similar. We pivot from there to explaining how Brazil could evolve its use of arbitration to strengthen the efficiency, reliability, accountability, and thus integrity of its corporate law system by requiring arbitration proceedings to be matters of public record and arbitral decisions to be publicly available so all stockholders, corporate law scholars, lawmakers and regulators, and the Brazilian public have the benefit of their reasoning. Our long-standing support for this evolution[9] is

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Outubro de 2001, Diário Oficial da União [D.O.U.] de 01.11.2001 (Braz.). The new Article 109, paragraph 3, of the Corporations Act establishes that "the corporation's bylaws may establish that any disputes between the shareholders and the corporation, or between the majority shareholders and the minority shareholders may be resolved by arbitration under the terms specified by it," Lei No. 6.404/76, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976, art. 109 ¶ 3, English translation available at https://www.gov.br/cvm/en/foreign-investors/regulation-files/law-6-404-ing.pdf. In 2000, the Brazilian stock market known as B3 (formerly known as BM&FBOVESPA) established distinct corporate governance segments, making arbitration mandatory for resolving conflicts involving shareholders, executives, and companies within the two segments with the highest levels of governance among listed companies as provided for in Article 39 of the Novo Mercado Listing Regulation and in Section 13 of the Nivel 2 Listing Regulation, *Regulamento do Novo Mercado*, *supra* note 4, art. 39; BRASIL, BOLSA, BALÇAO, *Nível 2 de Governança Corporativa*, § 13 (May 5, 2011), https://www.b3.com.br/data/files/1B/B5/A5/87/46E3861012FFCD76AC094EA8/Regulamento%20de%20Listagem%20do%20N%C3%ADvel%202%20(San%C3%A7%C3%B5es%202019).pdf. Brazil's use of arbitration to resolve disputes involving public companies is rare among leading market economies.

8. On rare occasions, a decision will have specific redactions if it refers to sensitive, privileged non-public information such as a trade secret. But the reasoning of the court is always made public and redactions are very rare.

9. Each of us has long believed that making critical aspects of the Brazilian system of public company arbitration public — in particular, the decisions of the arbitrators — would improve the system's credibility, accountability, and effectiveness, and have conveyed that view in discussions with key regulators and other members of Brazil's corporate legal community.

consistent with recent, potentially transformational action by the CVM in this direction. In a recent rule, the CVM has embraced the utility of opening up the public company arbitration process to require greater public access to decisions and other information about those cases.[10] A learned commentator well described the importance of this development:

> The choice of the legislator and both state and private regulators, supported by mainstream doctrine, to designate arbitration as the preferred method for resolving corporate disputes has led to these conflicts being generally adjudicated through confidential lawsuits. The consequence of this is that the market and even parties directly involved in such disputes (i) either do not know they exist or have only superficial knowledge, (ii) are unable to intervene in the process, and (iii) lack insight into how the law is being applied. If there is a need to lessen the strictness of confidentiality in corporate arbitrations, this assertion applies even more strongly to collective corporate arbitrations: in these cases, the fact that such demands involve a collective of individuals amplifies the need for transparency and a departure from confidentiality. Collective corporate arbitrations, for the most part, cannot be confidential or, at most, should be subject to a regime of diminished confidentiality. Thus, the initiative of the CVM (Securities and Exchange Commission) to establish a new disclosure requirement for certain publicly traded companies regarding corporate claims is commendable.[11]

By this evolutionary means, arbitration could be adapted in a way that is more appropriate to the resolution of cases involving public companies, thus giving the stakeholders of Brazilian corporations the same benefits as the Delaware system of dispute resolution but using means that better fit the unique cultural context of Brazil.[12] Given that key market participants,

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10. *See infra* note 55 (discussing CVM Resolution No. 80).

11. Amanda Kalil Soares Leite & Guilherme Setoguti J. Pereira, *Confidencialidade e Transparência nas Arbitragens Coletivas Societárias*, 69 REVISTA DE ARBITRAGEM E MEDIAÇÃO 145 (Abr./Jun. 2021) (quotation translated by authors).

12. Because of the burdens on and limited capacity of the Brazilian judiciary to address all classes of cases in a timely manner, the employment of expert arbitrators to address corporate law and commercial matters has sensibly been thought to best meet the need for prompt and specialized resolution of those disputes, without imposing undue burden on the courts and impeding their ability to address other important cases affecting the Brazilian people. This move, as we discuss, enables, under the right conditions, for greater consistency in decision-making, higher quality, and faster speed than dispersing corporate and commercial cases through the judiciary of a very large nation. Pivoting off our primary argument, if the arbitration process is enhanced in the manner we propose, some of the same efficiency- and consistency-enforcing benefits that American corporations and their investors get from the Delaware Chancery system can be delivered by Brazilian public company arbitration. And with the improvements

like leading institutional investors, are increasingly looking for high levels of integrity in corporate governance as a condition for entrusting their capital, eliminating the Star Chamber nature of decisions involving Brazilian public companies is a long-overdue and measured method to instill confidence in Brazil's corporate governance system. Indeed, the very fact that Brazil uses a quasi-secret system of decisional law to hold corporate fiduciaries accountable makes it an outlier internationally, and naturally creates a perception that there is something to hide.[13] By simply opening the window and letting the sunshine in on the way that corporate law cases are decided, Brazil can better show that its markets are ones to be trusted and that its corporate law holds corporate managers to high standards of accountability that investors can rely upon. To the worthy end of helping Brazil in its efforts to become a world leader in corporate law and entity formation, we thus conclude with practical suggestions about how the current stock exchange corporate law arbitration rule could be adapted to provide for public corporate law decisions and the creation of a

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we propose, the role of Brazilian courts in reviewing arbitration rulings will be made more efficient and accountable, as it will occur on a fuller public information base.

13. Although confidentiality is a common practice in Brazilian arbitrations, and in particular in public company arbitration, it is not actually mandatory under the terms of the Arbitration Law. In fact, in 2015, the Arbitration Law was amended to explicitly state that arbitrations involving public entities (like regulatory agencies, and federal, state, and municipal governments, but not including publicly traded companies) could not be confidential. But, as respected commentators note, the Brazilian system has generally inclined toward confidentiality:

> Confidentiality serves the legitimate interests of the parties in disputes of this nature because they may wish to (i) safeguard business secrets and sensitive, confidential information; (ii) create an environment of reduced exposure to facilitate arriving at an amicable solution; (iii) protect the reputation of the parties who may prefer not to be exposed; and (iv) focus efforts on resolving the controversy through a private and informal method, as opposed to a formal and public procedure that often unnecessarily exacerbates the contentious situation. However, confidentiality, contrary to common belief, is not an inherent and inseparable characteristic of arbitration, but it can be adjusted and tailored through legal provisions, regulations, or the parties' intentions. In Brazil, the duty of confidentiality is not explicitly provided for in the Arbitration Law, except concerning arbitrators, where it establishes that they must act discreetly. Nevertheless, in line with other international arbitration bodies, virtually all arbitration chambers in Brazil include explicit provisions in their regulations stipulating the confidentiality of arbitration proceedings.

Viviane Muller Prado & Antonio Deccache, *Revista de Arbitragem e Mediação*, 52 REVISTA DOS TRIBUNAIS 99 (Jan./Mar. 2017) (quotation translated by authors).

valuable body of precedent that can propel Brazil's market leadership in this important area critical to the nation's economic development.

II. UNDERSTANDING WHY DELAWARE IN THE UNITED STATES IS THE WORLD'S MOST RESPECTED CORPORATE LAW JURISDICTION

The most trusted jurisdiction within the United States for the incorporation of business entities is the state of Delaware.[14] Although Delaware is one of the smallest states in the United States, it has long been the chosen domicile for a super-majority of the public companies in the United States.[15]

Learned commentators largely agree on the attributes that have made Delaware the leader in American corporate law. We can fairly summarize them as follows: Delaware's political system is committed to maintaining a fair, efficient and balanced corporate system of corporate law that enables managerial innovation but provides investors with strong voting rights to elect the board and approve key transactions and protects them from self-dealing and fraud by insiders through the enforcement of fiduciary duties.

That commitment is manifested in two key ways:

(1) The state employs an expert, representative group of private sector corporate law experts who help the Delaware General Assembly (its legislative body) and governor (its executive who has the ability to veto legislation) keep current its corporate law, known as the Delaware General Corporate Law ("DGCL").[16] Delaware also crafts its corporate law statute in a manner that synchronizes with the securities laws promulgated by the national government, and facilitates the ability of stockholders in Delaware corporations to use the disclosures required of public companies by national securities laws to trigger enforcement of their rights under Delaware corporate law;[17]

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14. Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMPAR. L. 329, 350 (2001) ("The aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on Delaware General Corporation Law as a de facto national corporate law."). For what remains the leading academic explanation of how the American system, and Delaware's corporate law in particular, facilitates good corporate governance, *see* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

15. *E.g.*, Simmons, *supra* note 6, at 1129–30; Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749–50 (2006).

16. The careful and expert way in which the DGCL is maintained is perhaps best explained in Hamermesh, *supra* note 15, at 1752–59.

17. For interesting considerations of the symbiotic relation between Delaware corporate law and the U.S. national securities laws, *see generally* Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L.

(2) The state has a merit-selected court, the Delaware Court of Chancery, act as the judicial tribunal that hears cases enforcing the DGCL and claims by stockholders that corporate managers have breached their fiduciary duties, with a direct right of appeal to Delaware's highest court, its Supreme Court, which is also selected on a merit basis.[18]

The interaction of these two factors is important to Delaware's success. The DGCL is kept up to date to address evolving technology (think of the ability to have remote meetings) and new issues arising out of market developments (for example, greater rapidity in share trading), and provides a balanced framework for governing corporations. The DGCL is considered enabling in the sense that it gives directors broad power to manage the corporation, subject only to the requirement to have annual elections of directors and to subject certain key transactions such as mergers to a vote of the stockholders.[19] But it is another integrity-assuring feature of Delaware corporation law that is most relevant to Brazil and its current context.

The DGCL can be written in flexible terms because it is understood that compliance alone with the DGCL is not enough to make corporate action proper. In American corporate law, as was discussed by the famous corporate law scholar (and U.S. Ambassador to Brazil under President Franklin D. Roosevelt) Adolf Berle, everything is "twice tested."[20]

REV. 1573 (2005); Hamermesh, *supra* note 15, at 1770–72; David Friedman, Note, *The Regulator in Robes: Examining the SEC and the Delaware Court of Chancery's Parallel Disclosure Regimes*, 113 COLUM. L. REV. 1543 (2013).

18. *E.g.*, Simmons, *supra* note 6, at 1163–66; Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 777 (2009); William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1437–38 (2020) (summarizing the advantages of Delaware's Court of Chancery as involving judges (i) with corporate law expertise to resolve disputes without juries; (ii) selected on the basis of their merits; and (iii) who steadily produce case law reducing uncertainty in the application of corporate law).

19. DEL. CODE ANN. tit. 8, § 211 (2023) (requiring annual meetings for the election of directors); DEL. CODE ANN. tit. 8, § 251 (2023) (requiring votes on mergers); DEL. CODE ANN. tit. 8, § 271 (2023) (requiring stockholder votes on major asset sales); *see also* Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) (describing the DGCL as "enabling" and facilitating discretion in management); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674–79 (2005) (same).

20. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) ("[I]n every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary."); Sample v. Morgan, 914 A.2d 647, 664 n.54

Corporate action must be within the authority of the corporation under the DGCL and carried out in accordance with the statute. But even if a corporate action is legal in the sense of being statutorily authorized — think of a board entering into a supply contract — it might be inequitable, and thus improper if it were entered into in breach of the board's fiduciary duties[21] — think of the counterpart supplier being a company controlled by the family of the CEO's spouse and the terms being unfair to the company.

This is where the courts play perhaps their most critical role in Delaware corporate law. Investors depend on the enforcement of their statutory and fiduciary rights to protect them and to allow them to safely invest in Delaware corporations. The investors need to know that corporate managers have to respect their voting rights and avoid self-interested behavior that extracts value at their expense. For their part, corporate managers wish not to be subject to unfair liability for good-faith business decisions and to have courts that understand the complexity that attends running a corporation and does not second-guess difficult judgments when made by corporate managers without a conflict of interest. And companies and their investors both require that disputes are resolved with real world speed, so that uncertainty does not impede the ability of the corporation to operate efficiently.

Likewise, both corporate managers and investors like to be able to plan their affairs and understand the rules of the game.[22] Courts that provide

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(2007) (citing to Berle's appellation as describing Delaware's approach to corporate law).

21. The most famous Delaware case standing for the proposition that conduct compliant with the DGCL but inequitable can be set aside is *Schnell* v. *Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971); *see also* Hollinger Int'l Inc. v. Black, 844 A.2d 1022, 1078 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005) ("The DGCL is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation. That capacious [authority] is policed in large part by the common law of equity, in the form of fiduciary duty principles.").

22. As former Chancellor of the Delaware Court of Chancery, and later Professor, William T. Allen put it:

> My speculation is that the entrepreneurs and venture capitalists that choose Delaware have it right. The IPO market and secondary market trust the system of the Delaware corporation law to be systematically fair. That, of course, does not mean that all market participants will approve each element of the system — or each court ruling or statutory amendment. Any particular decision may generate disagreement, disapproval, or dissent, but year upon year the system taken as a whole plausibly balances deference to management's need for broad discretion in deploying the firm's capital with protection of shareholder basic interest . . . . In doing

written decisions help corporate planners avoid past mistakes and encourage corporate directors to engage in better practices that are more respectful of the best interests of stockholders.[23] As important, judicial decisions in specific cases give policymakers a track record to consider whether there are aspects of corporate behavior, or of the corporate code itself, that seem to require legislative response, either because market practices have evolved to create a best practice that warrants adoption as a firm legislative standard, or because cases have revealed ambiguities or flaws in the corporate code that should be fixed.[24] Put simply, the guidance and informational function of judicial decisions in corporate law cases facilitate better corporate planning, encourage more ethical conduct, and create accountability on the part of corporate managers that encourages investment in Delaware companies.[25] Notably, this accountability arises even when, as is often the case, the Delaware courts do not impose personal liability on directors. Corporate managers are reputationally-sensitive and

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> so, Delaware law provides an outstanding service to the nation.

William T. Allen, *Whence the Value-Added in Delaware Incorporation?*, CORP. EDGE 3, 3 (Fall 1997) (on file with authors).

23. Public decisions also make those who issue the decisions more accountable and help them learn when to recognize that past decisions have not been optimal:

> [E]quitable review is situationally-specific and proceeds in the common law fashion. The case at hand is decided and the law is thereby evolved incrementally. Although that can lead to what some scholars like to call indeterminacy — i.e., some residual uncertainty — it also allows for the judiciary to pull back in future cases if a prior decision turns out, in the wake of experience, to have been unwise.

Strine, *supra* note 19, at 683; William Savitt, *The Genius of the Modern Chancery System*, 2 COLUM. BUS. L. REV. 571, 592 (2012) ("The professional and scholarly network that evaluates Chancery's work permits early consideration and fine-tuning of doctrinal developments.").

24. *E.g.*, Hamermesh, *supra* note 15, at 1773–82 (documenting the care with which the makers of the DGCL consider case law developments and instances where they have amended the DGCL in response to case law highlighting ambiguities or room for improvement).

25. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 5 (2007), https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf ("Many experienced lawyers believe that the principal reason to recommend to their clients that they incorporate in Delaware is the Delaware courts and the body of case law those courts have developed. They point, in particular to the national reputation and importance of the Court of Chancery."); *see also id.* at 8 ("[T]he wealth of Delaware corporation law is also a boon to corporate planning. Corporate executives can cope with known problems. What they can't cope with is the unknown. The likelihood that a particular issue will have been addressed by the courts and there is law on the subject is greater for Delaware corporations than for corporations incorporated elsewhere.").

take seriously judicial decisions that identify gaps between conduct and best practice, and thus create an incentive for better behavior.[26] This reality is manifest in Brazil itself,[27] where important decisions by, for example, the

26. The important role that Delaware judicial decisions have in encouraging high-integrity behavior and best practices in corporate governance are covered in many excellent treatises and articles. Among the best include Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1789–99, 1807–09 (2001); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 207–12 (2007). A feature of Delaware corporate law that scholars have remarked upon is that the normative standard of fiduciary behavior (e.g., that directors should act with due care under the business circumstances) is typically more exacting than the standard used for the imposition of damages (e.g., monetary liability may be imposed only if directors act with gross negligence, not simple negligence). This "acoustic separation," a term created in an important article by Meir Dan-Cohen and applied by Professor Eisenberg in the specific context of corporate law, is a tool that encourages good behavior while recognizing that the overuse of monetary liability could deter corporate managers from taking good-faith business risks that might benefit their companies and stockholders, *see generally* Meir Dan-Cohen, *Decision Rules & Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993). This separation is a core tool of Delaware corporate law, *see generally* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002). One of the best examples of this separation is Chancellor Allen's famous decision in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), where Chancellor Allen held that corporate directors had a normative fiduciary duty of loyalty and care to oversee an active system of monitoring for corporate compliance with law and ethics, but set the liability bar at the very high level of bad faith (i.e., a loyalty violation for knowingly failing to even try to meet this duty or having consciously breached it). Despite the high liability bar, *Caremark* inspired and continues to stimulate deep director involvement in compliance oversight programs. This is an example of how public decisions in Brazilian arbitrations can encourage better corporate governance practices, even in decisions in cases where fiduciaries are not held personally liable. For a learned discussion of how *Caremark* has encouraged better corporate behavior despite not exposing corporate directors to great threat of monetary liability, *see, e.g.*, Claire A. Hill, Caremark *as Soft Law*, 90 TEMP. L. REV. 681 (2018).

27. Brazilian corporate law encourages fiduciaries to act with reasonable care under the duty of diligence in Brazilian corporate law and uses an objective approach like American law to assess whether that standard has been met. As explained by Luiz Antônio de Sampaio Campos: "When assessing culpability, it is necessary to revisit the concept of the duty of diligence imposed on the administrator, as it determines whether fault exists or not, thereby establishing the administrator's civil liability," Luiz Antônio de Sampaio Campos, *Deveres e Responsabilidades*, *in* DIREITO DAS

CVM regarding certain corporate conduct have been detrimental to the reputations of corporate directors and sent a signal to other directors that they should heed the lessons, or face a similar loss in confidence.[28]

COMPANHIAS 790, 875 (Alfredo Lamy Filho & José Luiz Bulhões Pedreira eds., 2009) (quotation translated by authors). Similarly to Delaware corporate law, when impartial fiduciaries of a Brazilian corporation have made an informed judgment based on adequate process, their decision is accorded deference similar to that given by the business judgment rule in Delaware and the CVM and arbitrators have often looked to American corporate law in articulating Brazil's approach to the business judgment rule. Among the various precedents of the CVM on the subject, the opinion of former commissioner Pedro Marcilio in the context of CVM Administrative Sanctioning Proceeding stands out as the leading case on the matter, CVM No. RJ2005/1443, Administrative Sanctioning Proceeding No. RJ2005/1443, Relator: Marcelo Fernandez Trindade, 10.05.2006. Likewise, Brazil applies tighter scrutiny conflict of interest transactions in a way similar to the entire fairness standard in Delaware corporate law. As expressed in a recent case ruled by the CVM:

> The two main review standards used to assess the actions of administrators are (i) the business judgment rule, which advocates for an analysis of decisions from a procedural perspective, and (ii) the entire fairness rule, which suggests that the judge, in certain situations deemed to have a higher potential for abuse, should evaluate whether the transaction was fair both in terms of fair dealing and fair price.

Opinion of Gustavo Machado Gonzalez in CVM, Administrative Sanctioning Proceeding No. 05/2016, Relator: Henrique Machado, 03.11.2020. Law 6.404/76 establishes that it is a case of abusive exercise of control power (under article 117, subparagraph "f") to contract with the company, directly or through others, or with a company in which one has an interest, under conditions of favoritism or non-equitable terms. Lei No. 6.404/76, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.). Regarding administrators, article 156, paragraph 1, dictates that the administrator can only contract with the company under reasonable or equitable conditions, identical to those prevailing in the market or under which the company would contract with third parties, *id.* In this sense, the Brazilian Corporations Act, and regulations of the CVM such as the CVM Guidance Opinion 34 (published in the Official Federal Gazette on August 22, 2006), expect high standards of fiduciary behavior from directors, managers, and controlling stockholders of Brazilian companies, *Parecer de Orientação CVM 34*, 18 de Agosto de 2006, Diário Oficial da União [D.O.U.] de 22.08.2006. This makes it more, not less important, that the arbitration system by which these duties can be enforced by stockholders operate with integrity, openness, and efficiency.

28. A paradigmatic case (CVM, Administrative Sanctioning Proceeding No. 18/08, Relator: Alexsandro Broedel Lopes, 14.12.2010) involved the trial of directors from Sadia, one of the country's largest food companies at that time (recently merged with Perdigão, another giant in the food sector, giving rise to BRF, a public company listed on the Brazilian stock exchange). The proceeding before the CVM focused on the accountability of the board for substantial losses the company suffered from conducting trades in derivatives. The company's finance department had begun investing company funds in derivatives, but the board had not ensured that there was a sufficiently robust system to monitor the prudence of these riskier trades and whether they were in accord with a sensible risk allocation plan for use of its capital. Although these trades were

The Delaware Court of Chancery and Supreme Court have distinguished themselves in these ways in the area of corporate law for many generations now. There are many reasons for this, but the following are central:

(1) First, the judges of both courts are selected on a merits-based, bipartisan basis where both major political parties are equally represented and where experience in corporate and commercial law are primary considerations for selection.[29]

(2) Second, the courts are committed to working with real world speed, so that cases are resolved in a timely manner, befitting what is at stake, and decisions in major cases addressing pending transactions or matters, can be made within weeks or months, including review on appeal, if need be.[30]

(3) Finally, and perhaps most importantly, all decisions of Chancery are public and explained by the judge, and it is a tradition that the opinions provide a candid, authentic, and reasoned basis for the result, providing guidance not just for the parties in the current case, but for all corporate planners and stockholders to consider in ordering their affairs in future

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profitable for a period of time, they eventually resulted in serious losses and a decline in the company's market price. The CVM convicted the members of Sadia's board of directors for failures in establishing efficient risk management and internal control systems. Since the CVM's judgment, the boards of directors of publicly traded companies have adopted more efficient structures to manage internal risks and conduct investigations accordingly when red flags are detected. As expressed in Commissioner Otavio Yazbek's opinion:

> It is not reasonable to presume that directors who often lack financial expertise would even recognize, in some cases, red flags that would be evident to experts. However, these directors must, on the other hand, be concerned with the adequacy of internal controls, their ability to prevent certain situations, or generate warning signals. In other words, diligence also involves ensuring the structuring of internal controls, those mechanisms used to deal with the complexity of the company's operating environment. And, truth be told, this is not a novelty: it is simply an interpretation of the duties of 'good management' and 'oversight,' which have always been at the core of the broader duty of diligence. It is the same diligence, but applied to a more complex situation.

Opinion of Otavio Yazbek in CVM, Administrative Sanctioning Proceeding No. 18/08, Relator: Alexsandro Broedel Lopes, 14.12.2010 (quotation translated by authors).

29. *E.g.*, Simmons, *supra* note 6, at 1163–66; Holland, *supra* note 18, at 777; Moon, *supra* note 18, at 1437–38 (summarizing the advantages of Delaware's Court of Chancery as involving judges (i) with corporate law expertise to resolve disputes without juries; (ii) selected on the basis of their merits; and (iii) who steadily produce case law reducing uncertainty in the application of corporate law).

30. Holland, *supra* note 18, at 777–78; Savitt, *supra* note 23, at 582–83 (highlighting Chancery's consistent willingness to expedite litigation).

matters.[31] Consistent with this accountability mechanism, the record in cases is public, absent a need to protect a true trade secret or some right of genuine personal privacy.[32] That is, not only are the judges accountable for facing public scrutiny for the soundness of their reasoning, the factual backdrop for the decision is also understood.[33]

III. BRAZIL HAS MANY OF THE STRENGTHS OF THE DELAWARE SYSTEM, BUT LACKS ONE CRITICAL TO INTEGRITY AND EFFICIENCY: A BODY OF PUBLICLY AVAILABLE CASE LAW RESOLVING CORPORATE LAW DISPUTES

These attributes of the leading system of American corporate law (in fact, arguably the world's leading system) provide a valuable framework for considering how Brazil can build on and accelerate its leading status in corporate law in South America and internationally. Notably, Brazil already has some of the most important positive characteristics of the Delaware system, but with one key, and odd, gap — its failure to provide a

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31. As former Justice Holland well summarized:

> The decisions of the Delaware Supreme Court and the Court of Chancery establish precedents that provide the predictability needed for businesses to act with confidence. [United States Supreme Court] Chief Justice William Rehnquist noted that since 1899 Delaware "has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state court [system] can make such a claim." Chief Justice Rehnquist continued, "Perhaps more importantly practitioners recognize that outside the takeover process . . . most Delaware corporations do not find themselves in litigation. The process of decision making in the litigated case has so refined the [Delaware] law that business may usually order their affairs to avoid law suits." Chief Justice Rehnquist concluded that this is one of the highest forms of praise the judiciary can receive.

Holland, *supra* note 18, at 778–89 (quoting William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992)).

32. DEL. CT. CH. R. 5.1; *see also* Kronenberg v. Katz, 872 A.2d 568, 606–10 (Del. Ch. 2004) (summarizing the requirement that proceedings in Delaware courts be open except to the limited extent necessary to protect a trade secret or some other recognized privilege).

33. In fact, because of the guidance function provided by Delaware courts, many commentators have pointed out that its courts combine some of the best attributes of courts and administrative agencies, by providing timely and predictable guidance to corporations and their stockholders, facilitating market movements toward best practices, while avoiding the need to have overly rigid statutory rules. For thoughtful discussions to this effect, *see, e.g.*, Savitt, *supra* note 23; Simmons, *supra* note 6; Friedman, *supra* note 17.

body of corporate law jurisprudence that provides accountability for corporate managers and instills trust in investors, that enables corporate planners to adapt and shape their behavior based on lessons from specific cases, and that helps Brazil's policymakers better consider whether updates to the Corporations Act itself would be optimal in light of the developments exemplified in concrete disputes between investors and corporate managers.

Before focusing on this key difference, though, it is useful to accentuate the positive and real position of strength from which Brazil can proceed to encourage even greater use of its market to form business corporations and encourage investment by foreign stockholders.

We recognize, of course, that the United States is said to have a predominately common law tradition rather than a civil law tradition. But the distinction between those traditions can be overplayed. In the U.S., code law in the form of statute plays a major role in corporate and securities law. The regular reporting obligations of listed companies in the United States are a matter of national statutory law, a regulatory agency, the Securities and Exchange Commission, is the primary enforcer of that law, and the judicial role involves interpreting and enforcing the statute in discrete cases authorized by statute. Likewise, in Delaware and other states in the United States, statutes establish the baseline rules of corporate law, and courts enforce those statutes as written. As we have explained, fiduciary duties are imposed on corporate officials, and the explication of these duties and their enforcement are entrusted to the courts on a case-by-case basis. Within this system, precedent in the form of judicial (e.g., by the Delaware Court of Chancery) and regulatory rulings (e.g., by the SEC) has two purposes, which are related but different. Precedent helps provide guidance and set forth principles for interpreting and applying statutes, and articulating what the concept of fiduciary duty involves and how that concept applies in particular circumstances. This precedent is not necessarily binding. By way of example, a decision by one member of the Delaware Court of Chancery does not bind another, although that prior decision may be cited, frequently is, and members of the Court seek to be consistent and to develop principles that are sensible and fair, and that can be applied in like cases to produce consistently reasonable results. In this sense, precedent is persuasive (or not) in the sense that a judge deciding an active case can cite to that decision in explaining why she is resolving a case in the way she is. And because cases arise against the backdrop of prior decisions, the judges must explain themselves if they choose to deviate from prior decisions and explain why their approach is preferable. The resulting guidance gives corporate planners useful information and generally also results in the articulation of best practices that, if followed,

protect stockholders against overreaching and correspondingly limit the company's exposure to litigation. Precedent can have another effect when it is the result of a judgment by an appellate court. Thus, in Delaware, the Delaware Supreme Court — Delaware's highest court — has the final say and if it interprets the corporate law, then the Court of Chancery must follow its interpretation until the legislature takes a different view by statute.

Brazil, of course, is more affiliated with the civil law tradition, which can be traced back to the European continental legal system, based in the study of Roman law. The main characteristic of this system is the prevalence of written legislation, generally embodied in codes, which provide for more rigidity than in systems, as in the United States and the United Kingdom, where the possibility for judicial relief in the courts if the statutory flexibility is abused is thought to allow for less specificity in crafting the statute's requirements. This difference in approach has been argued by some to be of special advantage to common law nations in better facilitating commerce in a sensible but still fair fashion, because it better takes into account the dynamism of markets and the need to keep pace with them in a flexible, adaptive, and current manner that code-writing is poorly positioned to do.[34] The use of the equitable overlay of fiduciary duties is the most pertinent example, because it allows for the use of broadly enabling corporate law statutes that facilitate corporate adaptation to technological and market developments, while protecting investors. This flexible but fairness-assuring approach is arguably the reason why merchants and entrepreneurs in the United States and the United Kingdom were able to adopt more efficient practices for their transactions, which

34. A group of scholars — Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny — have been in the vanguard of sponsoring this idea, *see* Rafael La Porta et al., *The Quality of Government*, 15 J.L. Econ. & Org. 222 (1999); Rafael La Porta et al., *Law and Finance*, 106 J. Pol. Econ. 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. Fin. 1131 (1997). Our own view is that there is no distinct divide between civil and common law nations, and that what is most important is that commercial law, like corporate law, function in a way that is both efficient (not unduly tied down by rigid rules that can't keep pace with market dynamics) and fair (providing means like disclosure and enforcement), to encourage a win-win approach to transactions and governance that encourages an alignment of interest and sharply disincentivizes and penalizes opportunism and self-dealing. In our experience, the backbone role of civil law institutions like the SEC and CVM work best when paired with the ability for affected parties like stockholders to act on information required by those institutions and enforce their rights in common law courts or before arbitrators. That is, it is the interaction of these approaches in a sensible way that allows for dynamism, but in a context that discourages untrustworthy behavior.

ultimately led to a persistent growth of companies and corporations.

Both systems, however, over the last centuries, have borrowed practices from, and thus, become less distinct from one another, with civil law countries, for example, furthering the strength of jurisprudence — even providing for the creation of "mandatory precedents"[35] — and, on the other hand, common law countries laying out written rules in the form of judge-made case law. By way of example, Delaware's General Assembly annually updates the Delaware General Corporation Law to address new issues, such as making changes to facilitate virtual stockholder meetings, and to address changes in the voting behavior of stockholders that bear on the ability to secure support for charter changes.[36] In this way, Delaware is code-based like a civil system. Moreover, the DGCL has been amended several times to take an approach different from what the courts have, and thus the code, not the judiciary, has the final word. Likewise, Brazil and other civil law nations have embraced concepts like fiduciary duty and taken them into account in being less prescriptive in their approach to writing their corporate and securities law and have used the protective ability of a decision maker — be it the CVM or an arbitrator — to police abuses of more extensive statutory discretion granted to corporations and their managers.[37] Put simply, corporate law in Brazil is a product of the

35. Article 927 of the Civil Procedure Code establishes:

> Judges and courts shall observe:
>
> I - the decisions of the Federal Supreme Court in concentrated control of constitutionality; II - the binding precedent summaries; III - the judgments in competence assumption or repetitive demand resolution incidents and in repetitive extraordinary and special appeals trials; IV - the Federal Supreme Court's precedent summaries on constitutional matters and the Superior Court of Justice's precedent summaries on infraconstitutional matters; V - the guidance of the plenary or special body to which they are linked.

Código de Processo Civil [C.P.C.] [Code of Civil Procedure] art. 927 (quotation translated by authors).

36. *See* S.B. 273, 151st Gen. Assemb. (Del. 2022) (amending Section 222 of the DGCL to address issues such as adjournments to better facilitate virtual stockholder meetings); S.B. 114, 152nd Gen. Assemb. (Del. 2023) (amending Section 242(b) of the DGCL to allow for certain certificate amendments based on a majority of the votes cast).

37. See, for example, former CVM commissioner and rapporteur Eli Loria´s opinion in a CVM Administrative Sanctioning Proceeding:

> [T]he Corporations Act establishes that an administrator is not personally liable due to regular management actions, as provided in its Article 158, and is not liable for any damages arising from well-informed decisions made in good faith. Thus, as long as the administrator has fulfilled their legal, contractual, and statutory

diverse background of the legal regimes of most modern market economies, which draw on both the civil and common law traditions.[38]

Therefore, like Delaware, Brazil has a modern corporate law that is the product of thoughtful input and development by expert practitioners representing a broad swath of stakeholders. It entails a delicate balance between all the competing interests it regulates, including those of the controlling and minority shareholders, of the capital markets as a source of funding, and of the corporations as a wealth-generating enterprise.[39] The

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> duties, they are not accountable for the potential failure of their decision, particularly because failure often results from market situations beyond the administrator's control. This rule, known as the 'Business Judgment Rule,' akin to the U.S. law, is part of the administrator's discretion and indicates that their decisions should not be questioned except in cases of bad faith, error, or illicit acts. It should be discussed solely whether there was a breach of the legal and statutory duties imposed on administrators in the decision-making process. It is understood that any subsequent review of a business decision should be limited to the process that led to it, leaving aside the merit, convenience, or opportunity of the measure.

CVM, Administrative Sanctioning Proceeding No. 08/05, Relator: Eli Loria, 12.12.2007 (quotation translated by authors).

38. As a learned commentator wrote:

> The law took into consideration the desirability of embracing certain innovations, provided it could do so without compromising our traditional principles . . . . Therefore, the law's endeavor was to seek a reconciliation of the two systems, aiming to incorporate the best or most practical aspects of each, adapting them to the Brazilian context for the benefit of domestic businesses and the national economy.

Alfredo Lamy Filho, TEMAS DE S.A. 171–72 (2007) (quotation translated by authors); *see also* Alfredo Lamy Filho & José Luiz Bulhões Pedreira, DIREITO DAS COMPANHIAS 13–14 (Alfredo Lamy Filho & José Luiz Bulhões Pedreira eds., 2009) (quotation translated by authors) ("The Brazilian corporate law has traditionally been aligned with the Romanistic legal system, incorporating the general norms prevailing in Europe. The draft of Law 6.404 of 1976, mindful of the peculiarities of the prevailing circumstances, retained the system while introducing innovations stemming from the assimilation of certain practices and institutions from the common law systems . . . . The objective pursued by the draft, though of significant interest, presented substantial challenges, as it involved integrating into the Romanistic system — grounded in the concept of share capital and the rigidity of legal texts — without distorting it, the institutions and practices developed and adopted in the American realm, namely, the common law system.").

39. Lamy Filho & Pedreira, *supra* note 38, at 17 (quotation translated by authors) ("The Corporation Law is an exceedingly delicate institutional mechanism due to the interaction of regulations that safeguard all these interests – some conflicting among themselves – and in drafting each regulation, it is necessary to assess its effects on the entirety and the manner in which it might impact the equilibrium of the system.").

Corporations Act[40] is kept up to date in a manner that addresses new market developments by the continuous efforts of the legal community, but like the DGCL, within a stable framework that provides durable reliability on its basic principles.[41] This, at least, was the view of the two people who are regarded as the founding fathers of Brazil's Corporations Act, José Luiz Bulhões Pedreira and Alfredo Lamy Filho.[42] Since its enactment, the law has been amended, in material terms, only a few times.[43] Even more than Delaware, because Brazil has a national corporate law and a national

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40. Lei No. 6.404/76, de 15 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

41. Lamy Filho, *supra* note 38, at 177 (quotation translated by authors) ("The conclusion of what we have discussed so far can be summarized: every Corporation Law constitutes, or should constitute, a system, which cannot accommodate sectoral amendments that distort and compromise its overarching objective of ensuring the proper functioning of the company, the basic cell of the modern economy; however, there is no eternal or perfect commercial law, because the economy is a process in constant transformation. Therefore, it is necessary to be attentive to the functioning of the market, its demands, its new creations, in order to address its rightful demands, or at the very least, to remove obstacles to its smooth operation.").

42. As José Luiz Bulhões Pedreira and Alfredo Lamy Filho wrote in the "Motives" of Law No. 6.404/1976:

> The modernization of the legal structure of a large company cannot be imposed suddenly but requires an extended period to be absorbed by entrepreneurs, the market, and investors. Hence, the Project has adopted, whenever possible, the form of options open to the company, which it will adopt when it deems it appropriate (new securities, forms of administration, corporate mergers, and others), even though the minority protection rules have a mandatory character (behavior and responsibility of administrators, public information, intangible shareholder rights, and others).

Exposição de Motivos No. 196, de 24 de Junho de 1976, Ministério da Fazenda, de 06.24.1976, ¶ 5(c) (quotation translated by authors), https://www.gov.br/cvm/pt-br/acesso-a-informacao-cvm/institucional/sobre-a-cvm/EM196Lei6404.pdf.

43. For example, there were amendments in the last decade to address emerging issues such as: permission for the inclusion of an arbitration agreement in company bylaws (article 109, paragraph 3, included by Lei No. 10.303/2001, Diário Oficial da União [D.O.U.] de 01.11.2001), as explained in *supra* note 7; right to withdraw in case of inclusion of an arbitration agreement in the company bylaws (article 136-A, included by Lei No. 13.129/2015, de 26 de Maio de 2015, Diário Oficial da União [D.O.U.] de 27.05.2015); new characteristics of preference shares (article 17, modified by Lei No. 10.303/2001, D.O.U. de 01.11.2001); permission for the adoption of plural voting (article 110-A, included by Lei No. 14.195/2021, de 26 de Agosto de 2021, Diário Oficial da União [D.O.U.] de 27.08.2021); new conditions for the determination of share issuance price (article 170, paragraph 1, included by Lei No. 9.457/1997, de 5 de Maio de 1997, Diário Oficial da União [D.O.U.] de 06.05.1997); and rules for the exercise of the 'tag along' right in the event of a change in control (article 254-A, included by Lei No. 10.303/2001, D.O.U. de 01.11.2001).

securities law,[44] Brazil's Corporations Act harmonizes with requirements for disclosures, and the enforcement and guidance function of the Comissão de Valores Mobiliários, helps Brazilian companies and investors plan their affairs, encourages greater integrity, and thus instills greater trust in investors in Brazilian companies.

In addressing the need for dispute resolution, Brazil has also recognized the value of two attributes of the Delaware system — the need for impartial, expert decisionmakers and the need for speed in decision-making.[45] In the public listing rules, Brazilian public companies are required to use arbitration as the means to resolve any disputes between themselves, their stockholders, and members of the board of directors and fiscal council, not just for disagreements about the listing rules, but for disputes regarding whether corporate action is compliant with the corporate code, with the directors' fiduciary duties or virtually any disputes arising thereof.[46] A very broad range of disputes, therefore, is subject to arbitration under the stock market, known as B3, rules.[47]

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44. The laws 6.404/76 and 6.385/76 are "twin sisters," crafted by the same authors and constitute a system that, although naturally subject to criticism, is widely acknowledged as effective.

45. For a scholarly perspective on why expertise and timeliness make arbitration preferable as a means of resolving corporate disputes in Brazil taking into account the views of stakeholders like institutional investors, *see* Patricia G. Lemstra & Joseph A. McCahery, *Mandatory Arbitration of Intra-Corporate Disputes in Brazil: A Beacon of Light for Shareholder Litigation?*, *in* CAMBRIDGE INT'L HANDBOOK OF CLASS ACTIONS 93 (Brian Fitzpatrick & Randall Thomas eds., 2021).

46. *See supra* note 7. *See generally* CPR CORPORATE COUNSEL, PRACTICAL GUIDE FOR ARBITRATION IN BRAZIL (2022).

47. For example, Article 39 of the Novo Mercado Listing Regulation states:

> The bylaws must include an arbitration clause stating that the company, its shareholders and executive officers, as well as the members of its fiscal council and their alternates, if any, undertake to seek arbitration by the Market Arbitration Chamber and to abide by its rules in order to resolve any disputes that may arise relating to their status as issuer, shareholders, management and fiscal council members, especially in light of the provisions of Law 6.385/76, Law 6.404/76, the company's bylaws, the rules issued by the National Monetary Council (CMN), the Central Bank of Brazil (BCB) and CVM, as well as other rules applicable to the securities market in general, the rules herein, other rules and regulations established by B3, and the Novo Mercado participation agreement.

BRASIL, BOLSA, BALÇÃO, *Regulamento do Novo Mercado*, art. 39 (Feb. 17, 2023), https://www.b3.com.br/data/files/ED/C4/C1/2D/F99068101BBF1068AC094EA8/Regulamento%20do%20Novo%20Mercado%20_Versao%202023_.pdf (quotation translated by authors). Furthermore, Law 13.129/2015 amended Law 6.404/76 with the explicit provision that shareholders will not have the right of withdrawal in the event of a

Arbitration was chosen as the method for resolving corporate law disputes precisely because it was the best way in the Brazilian context to attain these two attributes. Because of the challenges facing Brazil's judiciary, and the inability to command the resources to create a specialized court that would have the capacity and expertise to resolve corporate cases predictably and expeditiously, arbitration was rightly seen as an innovative answer.[48] The B3 has a list of highly qualified, impartial experts in corporate law that can be appointed as arbitrators, in whom parties can rely to resolve corporate law disputes.[49] By this means, the same sort of expertise that is available in the Delaware Court of Chancery is brought to bear in Brazil, so that corporate cases are decided in a more reliable and efficient manner. Overall, the key corporate stakeholders — corporate managers and investors — seem to be generally pleased by the quality and impartiality of the arbitrators available in corporate cases and their expertise, especially considering the alternative, which is a Brazilian Judiciary that faces the challenge of timely addressing a diverse and growing load of other important types of cases.

Likewise, because these arbitrators are experts and not as intensely

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change to the bylaws to include an arbitration clause when such inclusion of the arbitration agreement in the bylaws is a condition for the securities issued by the company to be listed for trading in a stock exchange listing segment, Lei No. 13.129/2015, art. 136-A, ¶ 2, II.

48. Eduardo Secchi Munhoz, *Arbitragem e Novo Mercado*, *in* ARBITRAGEM NO BRASIL 27, 38–39 (2010) ("In countries like Brazil, where the efficiency of the Judiciary is at the very least questionable, arbitration emerges as the best response to this demand. Thus, the best corporate governance guidelines, including those of Brazil's own market regulatory authority (CVM), recommend the adoption of arbitration as the means of conflict resolution for publicly traded companies. Moreover, the mandatory adoption of arbitration within the scope of the Novo Mercado of B3 has played a decisive role in the expansion of this institution. The development of the Brazilian capital market has primarily taken place within the Novo Mercado segment, precisely where arbitration is compulsory.").

49. As the B3 summarizes:

> The Chamber has a Body of Arbitrators composed of 139 individuals, including a President and two Vice-Presidents who are elected. All arbitrators of the Chamber are chosen by the board of directors of B3, with the possibility of reappointment. Among the members are lawyers, economists, business administrators, accountants, university professors, and entrepreneurs, with proven professional experience in both the private and public sectors — some of them having served as directors and presidents of the Brazilian Securities and Exchange Commission (CVM).

CÂMARA DO MERCADO, *Corpo de Árbitros*, (quotation translated by authors), https://www.camaradomercado.com.br/pt-br/arbitragem--corpo-de-arbitros.html (last visited Nov. 3, 2023).

burdened by the large dockets of sitting judges, they can be and are expected to act faster, and to resolve cases in a manner more consistent with the needs of a dynamic business world, where answers are required, so that businesses are not tied down by uncertainty. To date, the intuition that arbitration would work faster than traditional judicial cases has been borne out. Based on the experience of two of us with these proceedings, and our discussions with other experienced practitioners, arbitral proceedings in Brazil, despite all their differences and specificities, generally last between two to four years.[50] The Judiciary, by contrast, takes almost twice as long to render a decision on the merits.[51] Although the speed of Brazilian arbitration is perhaps not as ideal as the speed of the Delaware Court of Chancery, it compares favorably to the domestic Brazilian alternative and is quite respectable in terms of overall international competitiveness.[52]

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50. According to the study titled "Arbitration in Numbers" (*Arbitragem em Números*), conducted by professor and lawyer Selma Ferreira Lemes most recently in 2023, encompassing data from 2021 and 2022, it was found that the average duration of arbitration cases in the researched institutions was just over 19 months, Selma Ferreira Lemes, *Arbitragem em Números – Pesquisa 2021-2022* (2023), https://canalarbitragem.com.br/wp-content/uploads/2023/10/Arbitragem-em-Numeros-2023-VF.pdf.

51. A recent edition of the report "Justice in Numbers" (*Justiça em Números*), published in 2023, indicates that over 81.4 million cases were awaiting a decision, showing the aforementioned slowness seen in the Brazilian Judiciary System. Cases have an average duration of 3 and a half years, CONSELHO NACIONAL DE JUSTIÇA, *Justiça em Números 2022* (2023), https://www.cnj.jus.br/wp-content/uploads/2022/09/justica-em-numeros-2022-1.pdf. The available data demonstrate the relative speed of arbitration over litigation in Brazil. According to the National Council of Justice (CNJ), the average processing time of a case within the Judicial Branch's caseload as of the 2018 reference date was four years and ten months. On the other hand, during that same period, data collected by the Brazil-Canada Chamber of Commerce indicates that the average duration of arbitral proceedings was only one year and one month, Luciano Benedetti Timm & Ana Paula Ribeiro Nani, *Arbitragem vs. Judiciário: Uma Análise Econômica e Econômica-Comportamental*, *in* COMITÊ BRASILEIRO DE ARBITRAGEM E A ARBITRAGEM NO BRASIL: OBRA COMEMORATIVA AO 20º ANIVERSÁRIO DO CBAR. 477, 482 (Giovanni Ettore Nanni et al. eds., 2022).

52. According to a survey carried out in 2020 by the International Chamber of Commerce (ICC), the average duration of an arbitral proceeding, from the start of a case to the issuance of the final award, is 22 months, as follows:

> The average duration of proceedings in cases that reached a final award in 2020 was 26 months, and is calculated on the basis of all said cases, including those where the proceedings were suspended by the parties for any length of time. The median duration of proceedings was 22 months.

INT'L CHAMBER OF COM., *ICC Dispute Resolution Statistics: 2020*, at 19 (Aug. 3, 2021), https://iccwbo.org/publication/icc-dispute-resolution-statistics/.

But on perhaps the most important attribute of the Delaware judicial system — providing public decisions that act as a reliable source of guidance, accountability, and thus predictability and integrity for the stakeholders of Delaware corporate law — the Brazilian system of arbitration fails entirely and is, to be candid, just strange and the opposite of confidence-inspiring. Perhaps because of arbitration's traditional role as a system of private dispute resolution between private parties,[53] perhaps because certain stakeholders (e.g., controllers of publicly listed companies) do not wish the accountability or public disclosure that comes from public rulings, Brazil's system of public company corporate law arbitration has, as a general rule, traditionally maintained the proceedings and the decisions in those proceedings confidential. To us, this involves category error and creates suspicions about Brazilian corporate governance that give investors just cause for concern.[54]

It should be clear that we are not asserting that public rulings will lead Brazil towards an identical model as practiced in Delaware, where the binding precedents established by judgments from the Delaware Supreme Court must be adhered to by the Court of Chancery. The decisions of Brazilian arbitrators are final and thus are not subject to appellate review like decisions of Chancery. Just as decisions on corporate law from a Brazilian superior court don't bind the arbitral tribunal, the publication of past arbitral rulings will not generate binding precedent that must be followed in later binding arbitral proceedings. Because there is no hierarchal system of appellate review overseeing arbitrators, different arbitrators are just like peers on a trial court in the United States where

53. This was part of the origin of arbitration — for two private parties to resolve a dispute in private, *e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2855–57, 2894–96 (2015) (demonstrating that claims for keeping arbitration proceedings confidential arise out of the argument that the claims are resolving private disputes between two parties that have contractually agreed to private resolution of their dispute, especially in contract disputes); AM. BAR ASS'N., *Arbitration,* https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/arbitration/ (last visited Nov. 3, 2023) ("Arbitration is a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.").

54. Although we wish it were otherwise, it cannot be ignored that the recent tumultuous period in Brazilian politics, where public officials were subject to criminal and civil investigations and sometimes successful prosecutions, several of which emerged out of dealings with the business sector, was not helpful to Brazil's efforts to instill confidence in its economic system. Given that sad reality, being open in decision-making that affects investors and other corporate stakeholders is even more important.

there is no appellate precedent on a subject. They are free to rule as they think best, provided, of course, they do so with adequate reasoning, as any sitting judge would have to do in the same situation. But that does not mean that non-binding precedent is not important. In Delaware, decisions by one member of Chancery are taken very seriously by the others and are frequently looked to and cited as persuasive. Importantly, when several trial court decisions coalesce on a principle of law, those decisions tend to be followed by judges addressing later cases where that principle is relevant to the case-specific dispute before them. Academics, practitioners, and stakeholders comment on trial court rulings and provide a basis for assessing whether prior decisions were wise and efficient, or whether they perhaps took a counterproductive direction. That is, the very fact that the full reasoning of trial court decisions is made public facilitates reasoned deliberation about the best path for the law to take and puts pressure on judges to rationalize their decisions in a clear, sensible, and high-integrity manner.

These substantial benefits would result if Brazilian arbitrators were required to make their reasoned decisions public. Although arbitrators from different arbitration chambers or even from the same chambers, even in B3 proceedings, would not be obligated to follow prior decisions, the parties would obviously cite them where relevant and the failure of an arbitrator to address prior, relevant precedent would have adverse reputational consequences. Arbitrators who address cases in a professional and well-reasoned way by situating their decisions in the context of solid principles of Brazilian corporate and commercial law, grounded in not just statutory and regulatory law, but in well-reasoned past precedent, will distinguish themselves and be recognized for their acumen. Decisions, by contrast, that are not grounded in a careful consideration of relevant prior decisions will come in for justified scrutiny by stockholders, practitioners, regulators, and academics. Put simply, a healthy incentive system will be created to resolve cases in ways that can withstand public scrutiny, because the decisions explain in a convincing way why the claim was resolved. By these means, best practices of corporate and commercial practice will better emerge, and by demonstrating publicly that the arbitration system has integrity and is willing to enforce the fiduciary duties owed by controlling stockholders and corporate directors, will instill confidence in Brazil's system of corporate governance.

For that reason, we applaud the CVM's initiative to make the arbitration system more open and agree with its reasoning why secret arbitrations involving public companies are problematic, "[the] CVM believes that the current communication obligations are not sufficient to provide investors in publicly traded companies with adequate visibility regarding claims

involving the invested company, which often include discussions about matters that may directly or indirectly involve rights important to shareholders."[55]

The new CVM Resolution consolidates and updates the main regulatory norms of the capital market regarding the registration and provision of information by companies.[56] Its most relevant provision for present purposes is that it requires public companies to disclose any demands for arbitral or judicial processes for claims against the corporation, a controlling stockholder, director, or officer based, in whole or in part, on corporate legislation or securities market regulations, or rules issued by the CVM. This obligation requires public companies to provide periodic disclosure regarding confidential arbitral proceedings.[57]

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55. *Resolução CVM 80* [hereinafter CVM Resolution No. 80], de 29 de Março de 2022, Diário Oficial da União [D.O.U.] de 30.03.2022 (quotation translated by authors).

56. *Id.*

57. *Id.* "Article 33. The issuer registered in category A must submit to CVM, through an electronic system available on CVM's webpage on the World Wide Web, the following occasional information: 'XLIII – communication regarding corporate demands, in the terms and deadlines established in Annex I,'" *id.* Annex I of CVM Resolution No. 80 then establishes:

> Article 1 This annex applies to corporate demands in which the issuer, its shareholders, or its administrators appear as parties in such capacity, and: I. – that involve diffuse, collective, or homogeneous individual rights or interests; or II – in which a decision may be rendered whose effects reach the legal sphere of the company or other holders of securities issued by the issuer who are not parties to the proceedings, such as actions to annul a corporate resolution, actions for administrator liability, and actions for controlling shareholder liability.

Paragraph 01 For the purposes of this annex, a corporate demand shall be considered any judicial or arbitral process whose claims are, in whole or in part, based on corporate or securities market legislation or regulations issued by the CVM.

Article 2 The issuer must disclose to the market the main information related to the demand, including:

> I – news regarding its initiation, within 7 (seven) business days from the date of filing of the action or service of process, depending on whether the issuer is the plaintiff or defendant, or in the case of arbitration, from the filing of the request for its initiation or its receipt, indicating: a) parties in the process; b) values, assets, or rights involved; c) key facts; d) the requested relief or provision;
>
> II – in the case of a judicial process, decisions on requests for urgent and evidentiary measures, decisions on jurisdiction and competence, decisions on the inclusion or exclusion of parties, and judgments on

Specifically, the new Resolutions require that the issuer disclose to the market the material information regarding corporate claims (that is, legal or arbitration proceedings whose requests are, wholly or partially, based on corporate legislation or securities market regulations, or rules issued by CVM), in which the issuer, its shareholders, or its administrators are parties and that could affect the corporation or the interests of stockholders who are not parties to the proceeding, and thus include important cases such as actions seeking to annul (that is, invalidate) important corporate decisions on transactions, capitalization, and corporate governance changes, a decision that materially affects the corporations and its stockholders, and actions seeking to hold controlling stockholders or other fiduciaries liable for damages or other remedies. These obligations of disclosure override any arbitration agreements or private contracts and are only subject to confidentiality requirements under provisions of Brazilian statutory law, if any, that might be implicated as part of the proceedings.[58] The new regulation is consistent with our policy recommendations but does not purport to address other relevant and important issues we discuss regarding the extent to which, for example, the evidentiary record should be made a matter of public record but is a landmark move in the right direction.

Of potentially equal or greater importance, depending on the outcome of an ongoing legislative process, is a new bill being proposed to mandate public disclosure of any arbitration proceeds involving publicly traded companies. Bill No. 2.925/2023 proposes reforms to the enforcement system outlined in Law No. 6.404/1976 and Law No. 6.385/1976,

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> the merits or dismissals of the case without judgment on the merits, at any instance, within 7 (seven) business days from their knowledge by the party;
>
> III – in the case of arbitration, submission of a response, execution of an arbitration agreement or an equivalent document representing the stabilization of the demand, decisions on precautionary or urgent measures, decisions on the jurisdiction of the arbitrators, decisions on the inclusion or exclusion of parties, and arbitral awards, whether partial or final, within 7 (seven) business days from their knowledge by the party; and
>
> IV – any agreement reached during the course of the demand, within 7 (seven) business days from its execution, indicating values, parties, and other aspects that may be of interest to the shareholders as a whole.

Id., at Annex I (quotation translated by authors).

58. CÂMARA DOS DEPUTADOS, Projeto de Lei (Bill) No. 2.925/2023 (Feb. 6, 2023) [hereinafter Bill No. 2.925/2023], https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2284015&filename=PL+2925/2023.

introducing changes to the procedures that stockholders can use to seek damages and other remedies when they believe that a controlling stockholder or corporate administrators have breached their duties under Brazilian corporate and securities law.[59] To the present point, the bill would require public disclosure of arbitrations involving disputes among public companies, their shareholders, controlling stockholders, or administrators.[60] Thus, the bill's policy objective aligns with the new CVM[61], and empowers the CVM to develop more detailed procedures to address the requirements for public disclosure of proceedings:

> Paragraph 4: Arbitration proceedings related to publicly-held corporations shall be public, within the limits established by the regulation to be issued by the Securities and Exchange Commission of Brazil.
> Paragraph 5: Arbitral institutes shall publicize their precedents regarding disputes involving publicly-held corporations and shall disclose them on their websites, organized by the legal issues decided.
> Paragraph 6: The Securities and Exchange Commission of Brazil may establish additional requirements for arbitral institutes in actions involving publicly-held corporations, including the need to specify, in their regulations, the procedure for consolidating arbitral proceedings in cases of connection and joinder, as provided in paragraph 4-E of Article 159.[62]

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59. Bill No. 2.925/2023, establishes that actions for civil liability against any officer or the controlling shareholders for losses caused to the corporation's property may be initiated by shareholders who (i) represent at least five percent of the capital in closed corporations; or (ii) represent at least two and a half percent of the capital or have a value equal to or greater than BRL 50,000,000.00 (fifty million Brazilian reals), annually updated by the Broad National Consumer Price Index - IPCA, in publicly held corporations, as established in the new Article 159, paragraph 4 (officers) and Article 246, paragraph 1 (controlling shareholder), as established in the new Article 159, paragraph 4 (officers), and Article 246, paragraph 1 (controlling shareholder) of the Corporations Act proposed by Bill No. 2.925/2023, *id*.

60. *Id.* art. 109, § 4.

61. In describing the purpose for the Bill, the Minister of Finance, Fernando Haddad, remarked:

> The bill also provides for publicity in arbitration proceedings to ensure transparency in cases involving corporate law. This measure is justified as disputes between minority shareholders and administrators or controlling shareholders in corporate matters encompass a distinctly collective dimension, especially concerning the homogeneous individual rights of the company's shareholder community. However, in a broader sense, these disputes can affect the interests of all participants in the securities market.

Motives of Bill No. 2.925/2023, *supra* note 58, at ¶ 5 (quotation translated by authors).

62. *Id.* art. 109, §§ 4–6.

These new rules align with the reality that when a company has issued shares that are owned by public stockholders, it does not have the same basis to expect privacy as a privately owned business in a contract dispute with another private business. That is why, for example, Brazilian listed companies must file periodical disclosures regarding their financial performance and other issues material to their stockholders and the public.[63] Consistent with these required disclosures, public investors in Brazilian companies have a legitimate right to know about the record in, and outcome of, a case affecting their ownership of the shares of a business in which they are invested, and to assess the conduct of the company's officers and directors in the matter. The failure in openness also presents the possibility that litigants making claims as stockholders will use the clout of the many — all the stockholders — for ways that might not be representative of what most stockholders want. The overall lack of candor and transparency also denies legislators, regulators, investors, the general Brazilian public, or even corporate law professors the information necessary to assess whether the arbitration system for Brazilian public companies is functioning to fairly and efficiently resolve corporate law disputes.

Not only that, but the valuable lessons that could aid directors and officers in understanding what is expected of them as fiduciaries in specific contexts are not taught, because the decisions that would provide that instruction are not publicly available. The same value that case law would have for transactional planners to avoid repeating past mistakes has not been obtained. Rather than building up credibility by producing a steady stream of useful corporate decisions, every year that Brazil fails to make

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63. Article 22. A company is considered open if its securities are admitted for trading on the stock exchange or over-the-counter market. . . . § 1. The Securities and Exchange Commission shall issue rules applicable to open companies regarding: I - the nature of the information to be disclosed and the frequency of disclosure; . . . . V - information to be provided by administrators, members of the fiscal council, controlling and minority shareholders, related to the purchase, exchange, or sale of securities issued by the company and by controlled or controlling entities; . . . VII - the holding, by publicly traded companies with shares traded on the stock exchange or organized over-the-counter market, of annual meetings with their shareholders and securities market agents, at the location where the company's securities were most actively traded in the previous year, to disclose information about their respective economic and financial situation, projected results, and responses to inquiries they may request.

Lei No. 6.385/76, de 7 de Dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976

decisions public, it misses an opportunity as a nation to strengthen its corporate law influence, encourage further investment, and promote greater confidence in its national integrity.[64]

Likewise, unlike Delaware judges, whose decisions elicit ongoing feedback and thus accountability, due to the reaction of the national corporate bar, investors, corporate managers, and the press, corporate law arbitrators in Brazil face no accountability for the integrity and quality of their decisions.[65] Sure, by word of mouth among the corporate law elite, reputations develop. And sure, the bigger law firms have private collections of samizdat literature in the form of arbitration decisions in matters in which their clients have been involved from which to develop their arguments in future cases and to try to shape future transactional behavior. But this forbidden literature cannot be cited openly, it cannot be aggregated into a body of useful jurisprudence, inconsistencies cannot be the subject of debate so that policy can move toward the optimal, and legislators cannot consider the reasoning and results of various corporate law disputes in determining whether it is necessary to improve Brazil's

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64. Corporate law scholars and practitioners in Brazil have lamented this lack of guidance, and the inability even to teach case law to students on this important subject. As emphasized by Marcelo Barbosa (former CVM chairman) and Guilherme Melchior da Silva Franco:

> The confidentiality surrounding these decisions hinders the development of a more robust corporate jurisprudence capable of indicating the best interpretation of a specific norm or the expected behavior of an agent in a given situation. Given the confidentiality of arbitral awards, important market-driven values such as predictability and legal certainty become guided solely by the decisions that are disclosed (such as judicial and administrative decisions), leaving a significant void regarding the various disputes (which can be complex and disruptive) brought to arbitration.

Marcelo Barbosa & Guilherme Melchior da Silva Franco, *Dever de Informar e Arbitragens Envolvendo Companhias Abertas*, *in* ARBITRAGEM E OUTROS TEMAS DE DIREITO PRIVADO 327, 339 (Ana Luiza Pinto Moreira & Renato Berger eds., 2019) (quotation translated by authors).

65. Given the current criticism involving arbitration in Brazil, especially with regard to the independence of arbitrators, this also harms the arbitrators themselves because they cannot ground their decisions in a body of prior, well-reasoned precedent, and justify their case-specific record as a reasoned application of relevant statutory and fiduciary principles to a set of facts and rely on previous precedent where valuable to show that they have applied Brazilian law in a principled, consistent, and reasonable manner to the dispute before them. Well-explained decisions that are justifiable on proper grounds tend to quell suspicions that the decision maker was not impartial. For corresponding reasons, the expectation that a decision will be public and must be explained on proper, principled grounds itself limits the opportunity for biased decision making and provides for a more robust accountability system.

corporate law. Naturally, this sort of insider game also creates the suspicion that it is rigged in favor of corporate managers, particularly in controlled companies, and against investors.

It is one thing for Brazil to decide that arbitrators should be trusted to bind companies and public stockholders to their decisions, without any merits-based review. Given the problems Brazil would have in replicating the expertise and speed of appellate review exercised by the Delaware Supreme Court, the decision to make impartial arbitrators' decisions final and binding is rational. But the very fact that these decisions are final and binding makes it even less optimal that they are secret and that their reasoning is not exposed to any public accountability, at least in the form of constructive commentary.[66] And when a company has listed its shares on a public exchange, must make regular public filings, and is not therefore in any bona fide way "private," it is difficult, nay impossible, to understand why the resolution of a dispute between a stockholder and the company about a matter that is necessarily and legitimately of interest to all stockholders should be kept confidential. The very lack of transparency generates a lack of confidence about the integrity of Brazilian public company governance and undermines the case that Brazil should be able to

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66. B3's Market Arbitration Chamber establishes that: "From time to time, the Arbitration Chamber shall publish a Summary of Arbitral Awards. These summaries shall be categorized by the issues involved and may be considered by arbitrators as mere reference material to guide their decisions. Published awards shall exclude any elements that could reveal the identities of the parties involved," CÂMARA DO MERCADO, Arbitration, Rules of the Market Arbitration Chamber, § 7.10, https://www.camaradomercado.com.br/en-us/arbitragem.html (last accessed Oct. 4, 2023). In our view, the well-intended summaries under the Market Arbitration Chamber regulations are not sufficient.

Regarding this, Marcelo Barbosa and Guilherme Melchior da Silva Franco have aptly noted:

> The discussion becomes more complex when it involves the disclosure of the content of the arbitral award, which could prevent the existence of contradictory decisions and assist the decision-making process of the shareholder regarding the measures they will take in response to the award. Recently, the CAM [Brazil's Market Arbitration Chamber] took an important first step towards providing greater transparency to arbitral decisions and creating a body of precedents that reflects the understanding of arbitral tribunals by disclosing summaries of the arbitral awards rendered in proceedings under its administration. However, these summaries are concise and do not provide sufficient elements for the identification of the procedure to which they refer, substantially limiting their usefulness, as it is not possible to securely assess the legal grounds adopted by the arbitrators for the outcome of the case and all its nuances.

Barbosa & Franco, *supra* note 64, at 338–39.

make — that it is the most reliable and fair place for investors to entrust their capital in South America.

III. A MEASURED PROPOSAL TO IMPROVE THE INTEGRITY AND EFFICIENCY OF BRAZILIAN CORPORATE LAW

To help Brazil aspire to become a market leader on the Delaware model — by providing corporate stakeholders with a high-integrity, reliable body of corporate law decisions — we propose the following incremental changes to the current system.

First, the evidentiary record in arbitration proceedings involving public companies should be presumptively a matter of public record. Absent the sort of legitimate reasons for sealing certain aspects of judicial proceedings — because it might reveal a trade secret or a recognized privilege such as attorney-client advice[67] — the evidence and other aspects of the record on which a public company dispute is decided should itself be public or, at least, redacted only so much as is necessary to protect a well-justified privilege, personal information, or trade secret, as is the approach in Chancery in Delaware.[68]

Second, any stockholder bringing a corporate law claim that affects other stockholders should owe a fiduciary obligation not to engage in self-interested behavior inconsistent with the best interests of all stockholders as stockholders, or the use of litigation leverage to extract value for themselves particularly, but instead to act to ensure that the company's duties to all stockholders have been fulfilled, and that all similarly situated stockholders benefit from the litigation. In this sense, stockholders bringing a claim should themselves be regarded as having duties like a fiduciary and the arbitration should bind the company and all its stockholders, so that there is only one definitive answer to a particular transaction or corporate decision alleged to be wrongful, and any challenge

67. The secrecy of the public company arbitration process creates a striking contradiction in Brazilian public policy. While publicly traded companies are bound by law to be transparent by the duty to inform they owe to their investors and the public under the (i) the Corporations Act (*supra* note 2); (ii) the CVM Resolution No. 80 (*supra* note 55); and (iii) CVM Resolution No. 44 (*Resolução CVM 44*, de 23 de Agosto de 2021, Diário Oficial da União [D.O.U.] de 24.08.2022), which ensures timely, regular disclosure of material information to their investors, arbitral confidentiality denies investors and the Brazilian public information about the resolution of important questions of fiduciary and other legal duties relevant to the governance and integrity of these same public companies.

68. *See* Del. Ct. Ch. R. 5.1(g) (spelling out the procedures under which information can be redacted from the judicial public record for proper purposes of this kind).

to the arbitrators' resolution should be by way of proper appeal, and not other collateral attacks.

Finally, and most importantly, the arbitrators' rulings on all matters, both in terms of ruling on applications for interim relief and determining the scope of the proceedings and evidentiary issues, but critically in terms of issuing their decisions and award on the merits, should be public, and the B3 or CVM should create a register of all such rulings that is kept current and easily searchable by the public, and one that will provide a basis for use in future arbitrations, scholarship, and commentary on corporate law, and consideration by lawmakers in the process of evaluating potential amendments to the corporate code and securities laws.

Consistent with these recommendations, arbitrators not only may, but should be encouraged to, cite to prior arbitration rulings where the reasoning and circumstances are relevant to the case before them. This does not mean that a current arbitration panel deciding a specific case is bound to adhere to prior decisions, but the panel should have to take into account prior interpretations of Brazilian statutory and fiduciary duty law and justify their decisions. By means of this explanatory approach, good governance practices will tend to emerge that will promote the best interests of companies and their stockholders, and limit incentives to litigate when corporate managers follow these practices. This richer body of decisional law will not only facilitate better corporate conduct, but it will also provide the CVM and Brazilian legislators a more robust informational basis for determining when they should engage in regulatory reform.

Notably, we do not propose the adoption of any form of appellate review for public company arbitrations involving claims by stockholders or contract disputes with another listed company, although we recognize the absence of such appellate review will continue to distinguish Brazil from other leading economies, including Delaware and the United States generally. Given the limited resources available to Brazil to devote to expedited review of complex corporate and commercial cases, it seems to us that the logical next step is to concentrate right now on improving the accountability and quality of arbitration proceedings and rulings themselves. In general, arbitration in Brazilian public company cases is consistent with best international standards, but because it is confidential in a setting where the outcome affects many who are not privy to the proceedings or the outcome, it generates understandable suspicions. By capturing the advantages of speed and decision-maker expertise of arbitration, but in a way that is more public, that dispels concerns about conflicts of interests, and ensures that all those affected have a chance to understand how and why the controversy was resolved the way it was, Brazil can use arbitration in a more effective and more confidence-

inspiring way. We believe that, with the more measured steps we propose, the very reality of public arbitral decision-making will encourage care, impartiality, and timeliness in that decision-making. To be even more positive, the reality is that arbitrators chosen from the B3 list are in general corporate law experts who endeavor to do a high-quality, fair job, and, in the vast majority of cases, do so. Rather than hide this reality, Brazil should instead celebrate and improve upon it, by demonstrating its commitment to resolving public company disputes in a prompt, expert, and genuinely open and fair way. Brazil should and does have nothing to hide in this important area, and it's time for it to demonstrate that by joining other market leaders in the basic responsibility of requiring that decisions affecting investors in public companies be public too. By doing so, Brazil will best position itself to be the global leader in corporate governance and formation that it should be.