

Corporate Law in Practice

Second Edition

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12. United States: Corporations

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INTRODUCTION

In the area of general corporate practice, the law of the United States is not completely uniform since each of the 50 states has enacted its own corporations law. However, because of the great number of corporations formed under the laws of the State of Delaware and because of the number of significant Delaware state court corporate governance decisions, there exist, nonetheless, certain common themes across all of the states. In this section, all questions are answered in accordance with Delaware law,¹ with references to New York law when significant differences exist.

A. INCORPORATION, NAME AND OBJECTIVES

A.1 Representation

Neither the shareholders nor any officer of the company need be domiciled or reside in the United States.

A.2 Unrestricted capacity?

Corporations are restricted in their power to engage in specified acts. For example, no general corporation may possess banking powers, ie, the power of issuing bills, notes or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits as money. In general, a corporation is restricted to the acts it has specified in its articles of incorporation. However, it shall be sufficient for the corporation to state that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organised under the General Corporation Law of Delaware.²

A.3 Acts not in compliance with objects clause

In general, an act not in compliance with a corporation's objects clause is, nonetheless, valid. No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact

¹ Del. Code Anu., title B, sections 101 *et seq.* (1997).

² New York law places additional restrictions on the right of a corporation to engage in the establishment or maintenance of a hospital or day care centre, unless additional requirements have been fulfilled. In addition, New York requires the approval of the superintendent of insurance or banking before a corporation is authorised to conduct insurance or banking activities in the state.

that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, except in certain limited circumstances.

A.4 Choice of business name

The name of the corporation must include one of the words 'association', 'company', 'corporation', 'club', 'foundation', 'fund', 'incorporated', 'institute', 'society', 'union', 'syndicate', or 'limited' or one of the abbreviations 'Co.', 'Corp.', 'Inc.', or 'Ltd.' or words or abbreviations of like import in other languages (provided they are written in roman characters or letters) subject to waiver by the Division of Corporations of the Secretary of State. The name of the corporation must also be such as to distinguish it from the names of other corporations or limited partnerships organised, reserved or registered in Delaware, unless the written consent of that corporation has been obtained.

Further, no corporation shall use the word 'trust' as part of its name, except a corporation reporting to and under the supervision of the State Bank Commissioner of Delaware or a corporation regulated under the Bank Holding Company Act of 1956³.

A.5 Language of articles of incorporation

No particular language is required for the articles of incorporation. In fact, the Delaware statute specifically mentions the possibility that another language will be used, tailoring its requirements for the name of the corporation to the possibility of a language other than English. However, if the articles of authority for a foreign corporation are in a foreign language, a translation thereof, under oath of the translator, must be attached thereto.⁴

A.6 Number of founders

One. Any person, partnership, association or corporation, singly or jointly with others, and without regard to his or their residence, domicile, or state of incorporation, may incorporate in Delaware.

A.7 Registration in place of seat and incomplete registration

Every corporation must have and maintain in Delaware a registered office which may, but need not be, the same as its place of business.⁵ Every corporation must also have and maintain in Delaware a registered agent, which agent may be either an individual resident whose business office is identical with the corporation's registered office, or a domestic corporation (which may be itself), or a foreign corporation authorised to transact business in Delaware, having

³ See note 2 above.

⁴ Every articles or other instrument relating to a domestic or foreign corporation which are delivered to the Secretary of State for filing in New York must be in the English language, except that the corporate name may be in another language if written in English letters or characters.

⁵ New York requires a corporation, in its articles of incorporation, to include the name of the county within New York state in which the office of the corporation is to be located.

a business office identical with such registered office.⁶ Registration is a requirement for the granting of corporate status. Without registration, the corporation does not exist.

There are financial consequences for a corporation that does business in Delaware without complying with Delaware law. Any foreign corporation doing business of any kind in Delaware without first having complied with any section of Delaware law applicable to it shall be fined not less than US\$200 nor more than US\$500 for each such offence. Agents of such corporations are also subject to financial penalties.

A.8 Registration in place of office

As stated in A.7, every corporation must have and maintain in Delaware (the place of statutory seat) a registered office which may, but need not be, the same as its place of business. In addition, a foreign corporation must have articles of authority to conduct business in a state in which it is not incorporated. The articles must be issued by an authorised officer of the jurisdiction of its incorporation evidencing its corporate existence.

A.9 Non-registration and incomplete registration

A company must register and maintain registration in Delaware in order to continue its corporate existence (as mentioned in A.7 above). Any foreign corporation doing business of any kind in Delaware without first having complied with any section of Delaware law applicable to it shall be fined not less than US\$200 nor more than US\$500 for each such offence. Agents of such corporations are also subject to financial penalties.⁷

A.10 Acts before incorporation

A corporation may adopt a contract made by promoters for its benefit, even if such contract was made prior to incorporation. However, a corporation is not bound by a promoter's contract which it has not adopted.⁸

A.11 Surety for managing director/shareholder and remittance

Any corporation may lend money to, or guarantee any obligation of, or otherwise assist any officer or other employee of, the corporation or of its subsidiary, including any officer or employee who is a director of the corporation or its subsidiary, whenever, in the judgment of the directors, such loan, guarantee, or

⁶ New York law allows, but does not require, the designation of a registered agent for a corporation in New York upon whom process against such corporation may be served. Instead, New York requires every domestic corporation and every authorised foreign corporation to designate the Secretary of State as its agent upon whom process against the corporation may be served. No domestic or foreign corporation may be formed or authorised to do business in New York unless in its articles of incorporation or application for authority it designates the Secretary of State as such agent.

⁷ The consequence in New York for non-registration, or of conducting business without the proper authority, is a restriction on the ability of the foreign corporation to sue in New York courts.

⁸ Under New York law, a corporation must be managed by its board of directors, and incorporators do not have authority to initiate a suit on behalf of an unorganised corporation.

assistance may reasonably be expected to benefit the corporation. As to whether the corporation may forgive the debt of a managing supervisory director or shareholder, such a decision is within the discretion of the board of directors, acting without the vote of the borrower/director.

A.12 Legal entity as managing director

A legal entity may not be a managing or supervisory director of a company. A director must be a physical person, not just a legal person. However, any corporation may be an incorporator, promoter or manager of other corporations of any type or kind.

A.13 Corporate seal

A corporation can contract without the use of a corporate seal.

B. CAPITAL AND SHARES

B.1 Stock issue

The board of directors of the corporation is empowered to issue stock, and in fact must manage all of the business and affairs of the corporation, unless otherwise provided in the articles of incorporation.

B.2 Stock held by non-nationals/non-residents?

There are no restrictions on the extent to which stock may be held by non-nationals or non-residents.

B.3 Preference of shareholders at issuance of stock

Shareholders only have a legal right of claim at the issuance of new stock or at the sale by the company of shares in its own capital when the corporation has granted pre-emptive rights to its shareholders. The directors *may*, at any time and from time to time, if all of the shares of capital stock which the corporation is authorised by its articles of incorporation to issue have not been issued, subscribed for, or otherwise committed to be issued, issue or take subscriptions for additional shares of its capital stock up to the amount authorised in its articles of incorporation. In addition, subject to any provisions in the articles of incorporation, every corporation may create and issue, whether in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to purchase from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.⁹

⁹ In New York, the holders of equity or voting shares of any class, in case of the proposed issuance by the corporation of, or the proposed granting by the corporation of rights or options to purchase, its equity or voting shares of any class shall, if the issuance of the equity or voting shares proposed to be issued or issuable upon exercise of such rights or options or upon conversion of such other securities would adversely affect the unlimited dividend rights of such holders, have the right during a reasonable

B.4 Issuance of stock by group of shareholders at special price

The articles of incorporation may provide different classes of stock, which classes may have such voting powers, full or limited, or no voting powers, and such designations, preferences and participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the articles of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its articles of incorporation. However, the majority of shareholders owe a duty of fairness to the minority; such duty might restrict the ability of shareholders to act in a manner detrimental to other shareholders.

B.5 Right to alienate and encumber shares

The shares of stock in every corporation shall be deemed personal property and freely transferable subject to any restrictions contained in the articles of incorporation or by-laws.¹⁰

B.6 Separation of voting rights from shares

It is possible to create a voting trust, whereby a designated person or persons has the right to vote on behalf of the shareholder in the manner determined by the trust. In addition, a shareholder may effectively confer his voting rights upon others while retaining various other rights.

B.7 Voting rights of encumbered shares

The pledgor shall be entitled to vote, unless in the transfer by the pledgor on the books of the corporation he has expressly empowered the pledgee to vote thereon, in which case only the pledgee, or his proxy, may represent such stock and vote thereon.

B.8 Limitation on dividend by class of shares

Every corporation may issue one or more classes of stock or one or more series of stock with whatever nominal or par value it so determines, as long as this is in accordance with its articles of incorporation, and may adjust the payment of dividends according to such different classes of stock.

B.9 Dividends in other currency

Dividends may be declared in kind or in a currency different from the currency of the nominal amount of shares, if the articles of incorporation so provide.

time and on reasonable conditions, both to be fixed by the board, to purchase such shares or other securities in such proportions as shall be determined. Therefore, in certain circumstances, shareholders have a legal right of claim at the issuance of new stock or at the sale by the company of shares in its own capital.¹⁰ The general rule in New York is that shares are freely transferable. However, a corporation may include provisions that restrict the right of a shareholder to transfer his stock. However, provisions which restrict a shareholder's right to sell or transfer his stock, particularly those which require that he give the corporation or the other shareholders first opportunity to purchase stock which he desires to transfer are regarded with disfavour and are strictly construed.

In addition, the regulations state clearly that dividends may be paid in cash, in property or in shares of the corporation's capital stock. The statute does not specifically provide for alternative forms of dividend distribution.¹¹

B.10 Creation and transfer of priority rights

Subject to any provisions in the articles of incorporation, every corporation may create and issue, whether in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to purchase from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.

Further, as stated in B.5, the shares of stock in every corporation shall be deemed personal property and transferable subject to any restrictions contained in the articles of incorporation or by-laws.¹²

B.11 Voting/dividend rights of shares held by the company

Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares, subject to certain restrictions. However, shares which have been called for redemption shall not be deemed to be outstanding shares for the purpose of voting or determining the total number of shares entitled to vote on any matter.¹³

B.12 Forced alienation of shares

The stock of any class or series may be made subject to redemption by the corporation at its option or at the option of the holders of such stock or upon the happening of a specified event.¹⁴

¹¹ There is no provision in New York law that prohibits the declaration of dividends in kind or in a currency different from the currency of the nominal amount of the shares.

¹² As noted above, in New York the holders of equity or voting shares of any class, in the case of the proposed issuance by the corporation of, or the proposed granting by the corporation of rights or options to purchase, its equity or voting shares of any class shall, if the issuance of the equity or voting shares proposed to be issued or issuable upon exercise of such rights or options or upon conversion of such other securities would adversely affect the unlimited dividend rights of such holders, have the right during a reasonable time and on reasonable conditions, both to be fixed by the board, to purchase such shares or other securities in such proportions as shall be determined. Therefore, it is not only possible to create priority rights for existing shareholders in case of issuance of new shares, it is mandatory in some cases. Further, a corporation may create and issue rights or options entitling the holders thereof to purchase from the corporation shares of any class or series in other circumstances as long as this is in conformance with its articles of incorporation.

¹³ In New York, treasury shares are not entitled to vote or to be counted in determining the total number of outstanding shares.

¹⁴ New York law permits a corporation to compel a shareholder to alienate his shares, but only if such compelled alienation is reasonable. An option agreement requiring a shareholder to offer his shares to a corporation before he can sell them to a third party if not unreasonable and oppressive is valid, but where the prohibition against the transfer of the stock is unreasonable and is such as to render the stock unmarketable, such restriction has been held invalid as against public policy.

B.13 Issuance of shares without payment in full

Any corporation may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor.¹⁵

B.14 Transfer of shares not paid up in full

The shares of stock in every corporation shall be deemed personal property and transferable subject to any restrictions contained in the articles of incorporation or by-laws. Provided that the articles allow for it, shares can be transferred even if they have not been paid up in full.¹⁶

Further, any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable for any unpaid portion of such consideration, but the transferor shall remain liable therefor.

B.15 Minimum amount to be paid up at issue

As discussed in B.13, any corporation may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor. The minimum amount that has to be paid up at the issue of shares is within the discretion of the board of directors, unless otherwise provided in the articles of incorporation. However, upon the declaration of any dividend on fully paid shares, the corporation shall declare a dividend upon partly paid shares of the same class, but only upon the basis of the percentage of the consideration actually paid thereon.¹⁷

B.16 Transfer to an Anglo-Saxon trust

The shares of stock in every corporation shall be deemed personal property and transferable subject to any restrictions contained in the articles of incorporation or by-laws. Provided that the articles of incorporation do not prohibit such a transfer, transfer to an Anglo-Saxon trust would be allowable.

B.17 Issuance of share certificates

Every holder of uncertificated shares shall be entitled to have a certificate signed by or in the name of the corporation by the chairman or vice-chairman of the

¹⁵ In general, New York law requires full payment for shares before share articles will be issued. However, with plans adopted by the shareholders for the issue of rights or options to directors, officers or employees, consideration for shares may be paid in instalments, provided that no articles for shares shall be issued to a shareholder, prior to full payment therefor, unless the fact that the shares are partly paid is noted conspicuously on the face or back of such articles.

¹⁶ As noted above, New York law generally will not even issue share articles until the full consideration for such shares has been paid. It follows that shares not paid in full generally cannot be transferred. Only when the consideration has been paid in full is the subscriber entitled to all the rights and privileges of a holder of such shares. However, because New York law allows issuance of share articles after only partial payment, it may be possible to transfer such shares prior to complete payment.

¹⁷ Normally, the full amount of consideration for shares must be paid before share articles will be issued in New York. Only when the consideration has been paid in full is the subscriber entitled to all the rights and privileges of a holder of such shares. However, as noted above, in certain circumstances, as determined by the board of directors, shares can be issued after only partial payment.

board of directors, or the president or vice-president, and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of such corporation representing the number of shares registered in certificate form. Any or all signatures on the certificate may be a facsimile.¹⁸

B.18 Replacement of share certificates

A corporation may issue a new certificate of stock or uncertificated shares in place of any certificate therefor issued by it, alleged to have been lost, stolen or destroyed. The corporation may require the owner of such certificates or his legal representative to give the corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction.

B.19 Printing and signing certificates

Share certificates need not be printed or signed in the country of establishment.

B.20 Whose signature? By facsimile?

Holders of stock are entitled to have a certificate signed by or in the name of the corporation by the chairman or vice-chairman of the board of directors, or the president or vice-president, and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of such corporation. Any or all the signatures on the certificate may be a facsimile.

B.21 Nominal or par value of shares

There is no minimum nominal or par value for shares. Rather, shares of stock with par value may be issued for such consideration, having a value not less than the par value thereof, as determined from time to time by the board of directors, or by the shareholders if the articles of incorporation so provide. Shares of stock without par value may be issued for such consideration as is determined from time to time by the board of directors, or by the shareholders if the articles of incorporation so provide. Thus, determining the par value of stock, or the consideration required for the purchase of stock without par value, is within the discretion of the board of directors or the shareholders.

B.22 Shares without a nominal value

As discussed in B.21, the determination of the par value and consideration required for the purchase of stock with or without par value is within the discretion of the board of directors or shareholders.

B.23 Recollection of capital surplus

The surplus over and above the nominal value paid for a share forms part of the funds of the company, and cannot therefore be recollected by the shareholder who contributed it.

¹⁸ New York law does not provide for the issuance of share certificates for uncertificated shares.

B.24 Shares paid up in kind or foreign currency

Shares can be paid up in kind or in a foreign currency, if the articles of incorporation so provide.¹⁹

B.25 Decrease of foreign currency and additional funding

Where suit is brought to ascertain the amount due on non-commodity obligations expressed in a foreign currency in the articles of incorporation, values are determined in terms of United States legal tender money and the rate of exchange is that existing at the time the demand is made. Therefore, if values are determined in terms of United States legal tender money and the rate of exchange is that existing at the time the demand is made, it is questionable whether additional funding would be necessary should the rate of exchange decrease between the moment of incorporation and the moment of capital contribution in a foreign currency. If the shareholders paid for their shares in a foreign currency, but at the time of payment, the amount paid was equivalent to the nominal value in United States legal tender money, perhaps the shareholders would not be required to remit additional funds.²⁰

B.26 Shares without voting rights?

Shares can be issued without voting rights.²¹

B.27 Unequal voting rights for equal participation

The articles of incorporation may provide different classes of stock, which classes or series may have such voting powers, full or limited, or no voting powers, and such designations, preferences, and relative, participating, optional or other special rights, and qualifications, limitations, or restrictions thereof, as shall be stated and expressed in the articles of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its articles of incorporation. Therefore, unless the articles of incorporation otherwise provide, it may be possible for unequal voting rights to be attributed to shares where there is equal participation in the issued share capital.²²

¹⁹ New York law does not specifically prohibit the payment for shares in kind or in foreign currency. The articles of incorporation probably therefore could allow for the payment of shares in kind or in foreign currency, as long as such consideration was deemed appropriate.

²⁰ As New York law makes no provision for capital contribution in foreign currency, whether additional funding would be necessary probably depends on the relevant provisions in the articles of incorporation.

²¹ New York law allows shares to be issued without voting rights. However, no denial, limitation or definition of voting rights shall be effective unless at least one or more classes of outstanding shares or bonds, either singly or in the aggregate, are entitled to full voting rights.

²² In New York, each share must be considered and treated as equal to every other share of the same class. Therefore, it may not be possible to attribute unequal voting rights to shares where there is equal participation in the issued share capital, unless such shares are designated as belonging to different classes.

B.28 Relation between number of shares and voting rights

As stated in B.27, the articles of incorporation may establish different classes of shares with various voting rights. Therefore, the fixed relation between the number of shares held and the voting rights could be broken if the articles of incorporation provide for different classes of stock with different voting rights.²³

B.29 Shares temporarily held to cast more votes

Every corporation may issue one or more classes of stock or one or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series may have such voting powers, full or limited, or no voting powers as expressed in the articles of incorporation or any amendments thereto. Therefore, a company can secure risk bearing capital, at least in part, by issuing classes or series of shares without voting rights.²⁴

B.30 Securing risk-bearing capital

A corporation may obtain capital without giving voting rights to the participants by issuing a class or classes of non-voting stock, so long as the articles of incorporation so permit.

C. SHAREHOLDERS AND THE GENERAL MEETING OF SHAREHOLDERS

C.1 Place of general meeting compulsory at place of seat?

Unless the by-laws provide to the contrary, the general meeting of shareholders may be held anywhere. The place of the meeting must be stated in the written notice of the meeting if the shareholders are required or permitted to take action at the meeting.

C.2 Place of general meeting possible outside country?

No limitation exists on the location of the general meeting of shareholders. If the place of meeting is designated in the by-laws, the meeting may be held in or outside of Delaware.

C.3 Decision of general meeting to meet in place other than mentioned in articles

The meeting can be held at the place fixed by the board in a notice to the shareholders. In addition, the meeting may be held at the place designated in the by-laws. If the by-laws do not specify a location, the meeting shall be held at the office of the registered agent of the corporation in Delaware.

²³ New York law demands that each share be considered and treated as equal to every other share of the same class. Therefore, the fixed relation between the number of shares held and the voting rights may not be able to be broken.

²⁴ New York law allows shares to be issued without voting rights. However, no denial, limitation or definition of voting rights shall be effective unless at least one or more classes of outstanding shares or bonds, either singly or in the aggregate, are entitled to full voting rights.

C.4 General meeting outside country in presence of all shareholders

The general meeting of shareholders may take place within or without the state of Delaware only if so designated in the by-laws. The meeting may be held outside the United States.

C.5 Voting right for managing director as a proxy of shareholder

A shareholder may authorise another person or persons (including a managing or supervisory director or any other person working for the corporation) to act as a proxy for him at a meeting. The statute imposes no limitation on who may act as a proxy.

C.6 Quorum requirements for general meeting

If the articles of incorporation and by-laws are silent as to quorum requirements, a majority of shares entitled to vote shall constitute a quorum. The articles of incorporation or by-laws may provide for a quorum of not less than one-third of the shares entitled to vote at the meeting.²⁵

C.7 Majority for passing a resolution

The articles of incorporation or the by-laws may specify what vote is needed to constitute shareholder action. If both are silent as to voting requirements, valid shareholder action may be effected by a vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter.²⁶ If the vote concerns the election of directors, a plurality of the shares present in person or represented by proxy at the meeting and entitled to vote thereon shall constitute valid shareholder action.

C.8 Actions to be taken by shareholders to convoke meeting

If the board of directors fails to hold the annual meeting within 30 days after the designated date, or if no date is designated for a period of 13 months after the organisation of the corporation or after its last annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any shareholder. The shares of stock represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the articles of incorporation or by-laws to the contrary.

C.9 Decisions made by sham shareholders

Any shareholder or any member of a corporation without capital stock may make an application to the Court of Chancery to hear and determine the validity

²⁵ In New York, an increase in the quorum requirements can only be effectuated by the articles of incorporation.

²⁶ In New York, unless the articles of incorporation specify otherwise, for shareholder action other than the election of directors, a vote of the majority of votes cast at a meeting of shareholders by the holders of shares entitled to vote thereon is required. If the shareholder action concerns the election of directors, directors shall be elected by a plurality of the votes cast at a meeting of shareholders by the holders of shares entitled to vote in the election.

of any election of any director, member of the governing body or officer of any corporation. In addition, any shareholder or any member of a corporation without capital stock may make an application to the Court of Chancery to hear and determine the result of any vote of shareholders or members upon matters other than election of directors, officers or members of the governing body.

Furthermore, if the number of real shareholders present at the meeting or represented at the meeting did not satisfy the quorum requirements, any action taken at that meeting would not be valid.

C.10 Acceptance of motion when votes equally divided

Typically, the articles of incorporation will provide that a majority of shareholder votes is required to approve certain measures. When there is an equal division of votes at any meeting for the election of directors, the Court of Chancery may appoint one or more persons to be custodians, and if the corporation is insolvent, to be receivers, of and for any corporation.²⁷

C.11 Measures to resolve an impasse in event of deadlock

A provision may be included in the articles of incorporation which increases the vote required for a particular action. Any provision may be included in the articles of incorporation so long as it is not contrary to the laws of Delaware. Similarly, any provision may be included in the by-laws so long as it is not contrary to the articles of incorporation or the laws of Delaware. For instance, a provision in either the articles of incorporation or by-laws could provide for a specific person to make a decision when there is an equal division of votes among shareholders.

C.12 Exclusion of certain nationals as holders of bearer shares

The corporation cannot exclude residents of a particular country from being shareholders if the company has issued bearer shares.

C.13 Consent to general meeting, mergers, co-optation etc.

The board of directors must adopt the resolution for a merger and then a majority vote of the shareholders is required. The articles of incorporation will govern the approvals necessary for the formation of a subsidiary or for cooperation with other companies.²⁸

²⁷ In New York, except as otherwise provided in the articles of incorporation, the holders of one-half of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution based on the shareholders vote being so divided that the votes required for the election of directors cannot be obtained or because the shareholders, being so divided, have failed for a period of at least two consecutive annual meeting dates to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors.

²⁸ In New York, the board of directors also initiates a merger. However, a vote of two-thirds of all outstanding shares entitled to vote is required. If a parent corporation is merging with a subsidiary, and the parent corporation owns at least 90 per cent of the outstanding shares of the subsidiary, only the shareholders of the parent corporation are required to vote for the merger.

C.14 Suspension of shareholders' rights

If the shareholders are holders of common stock, their rights generally may not be suspended or taken away by the corporation. However, if the shareholders are holders of preferred stock, it is possible for the corporation to suspend voting rights so long as preferred dividends continue to be paid.

C.15 Voting trusts

Delaware law provides that shareholders may enter into voting trusts or other voting agreements. Such agreements must be in writing and signed by the parties. The agreement may provide that in exercising any voting rights, the parties agree that the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them.

C.16 Casting votes in conflict of interest

An interested shareholder may vote. However, he must disclose to the board and the other shareholders that he has an interest in the subject matter to be voted on. However, if the interested shareholder's vote would be the deciding factor in the vote, then his vote will not be counted for purposes of calculating a majority.

C.17 Publication of names of shareholders

For a private corporation, the names of shareholders do not have to be revealed. However, the names of shareholders of a public corporation must be recorded as public information.²⁹

C.18 Share register kept in the place of the statutory seat

Delaware General Corporation Law does not specifically address where a stock register, if there must be one, must be kept.³⁰

C.19 Requirements for structuring the share register

Delaware General Corporation Law does not address the structuring of the share register.³¹

C.20 Convocation when all shareholders are non-residents

General meetings of shareholders can be convened through notice as determined by the by-laws when none of the shareholders are residents of the country of establishment.

²⁹ In New York, a corporation is required to keep, at the office of the corporation in New York or at the office of its transfer agent or registrar in New York, a record containing the names of all shareholders.

³⁰ The stock register may be kept at the office of the corporation in New York or at the office of its transfer agent or registrar in New York.

³¹ In New York, the share register must contain the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record thereof. The share register may be in written form or in any other form capable of being converted into written form within a reasonable time.

Unless otherwise provided in the articles of incorporation, any action required to be taken at an annual or special meeting of shareholders, or any action which may be taken at an annual meeting or special meeting of shareholders, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, is signed by the holders of outstanding stock. The holders of the outstanding stock must have not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. The writing thereof shall be delivered to the corporation by delivery to its registered office in Delaware, its principal place of business, or an officer or agent of the corporation having custody of the book in which proceedings of meetings of shareholders are recorded. Every written consent shall bear the date of signature of each shareholder who signs the consent and no written consent is effective to take the corporate action unless within 60 days of the earliest dated delivered written consents signed by a sufficient number of holders to take action are delivered to the corporation. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those shareholders who have not consented in writing and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for such meeting had been the date that written consents signed by a sufficient number of holders to take the action were delivered to the corporation.

Each shareholder entitled to vote at a meeting of shareholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy.³²

D. MANAGING AND SUPERVISORY DIRECTORS

D.1 Decision of managing board to hold general meeting in place other than mentioned in articles

If the by-laws allow the board to determine the place of meeting, the board can hold the general meeting of shareholders at a place in the country of establishment other than that mentioned in the articles of incorporation.

D.2 Decision of managing board to dissolve company, decrease the issued capital or redeem shares held by the company

1. *Amending articles of incorporation:* Before a corporation has received any payment for any of its stock, it may amend its articles of incorporation by a vote of a majority of the incorporators, if directors were not named in the original articles of incorporation or have not yet been elected, or by a majority of the directors, if directors were named in the articles or have been elected. After a corporation has received payment for any of its capital stock, it may amend its articles of incorporation. The board of directors

³² In New York, when shareholders are required or permitted to take any action by vote, such action may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon.

first must adopt a resolution setting forth the proposed amendment, declaring its advisability, and either calling a special meeting of the shareholders entitled to vote in respect thereof or directing that the amendment proposed be considered at the next annual meeting. At the meeting of the shareholders entitled to vote thereon, a vote of the majority of outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class, is needed in order to allow an amendment of the articles of incorporation. If the corporation has no capital stock, the governing body thereof shall adopt a resolution setting forth the amendment proposed and declaring its advisability, and at a subsequent meeting a majority of all the members of the governing body must vote in favour of the amendment. The articles of incorporation may contain a provision requiring any amendment thereto to be approved by a specified number or percentage of the members or of any specified class of members of such corporation.³³

2. *Dissolution of the corporation:* To dissolve the corporation, the board of directors must adopt a resolution by a majority of the whole board at any meeting called for that purpose, and then shall give notice to each shareholder entitled to vote thereon of the adoption of the resolution and of a meeting of shareholders to take action upon the resolution. At the meeting of shareholders entitled to vote thereon, a vote of the majority of the outstanding stock entitled to vote thereon is needed to effect a dissolution of the corporation.³⁴
3. *Decrease of issued capital:* A corporation may reduce its capital by resolution of its board of directors.
4. *Redemption of shares held by the corporation in its own stock:* Every corporation may redeem its own shares, provided that redemption of its own shares of capital stock for cash or other property will not cause impairment of the capital of the corporation, and redemption is authorised by the statute.

D.3 Nationality of managing directors

The Delaware Corporation Law does not require that the directors be nationals or residents of the country of establishment. Delaware law, however, allows for the articles of incorporation or the by-laws to prescribe other qualifications for directors.

D.4 Appointment of managing board by certain group of shareholders

The articles of incorporation may contain a provision limiting and regulating the powers of the shareholder, or any class of shareholder, as long as such provision is not contrary to the laws of Delaware. If there are different classes of stock, the

³³ The holders of the outstanding shares of a class are entitled to vote as a class upon a proposed amendment, whether entitled to vote thereon by the articles of incorporation, if the amendment would increase or decrease the aggregate number of authorised shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences or special rights of the shares of such class so as to affect them adversely.

³⁴ Dissolution of a corporation may also be authorised with action of the directors if all the shareholders entitled to vote thereon consent in writing and file articles of dissolution with the Secretary of State. In New York, dissolution shall be authorised at a meeting of shareholders by the vote of the holders of two-thirds of all outstanding shares entitled to vote thereon, except if otherwise provided in the articles of incorporation.

articles of incorporation may provide that only one or some of the classes will have the right to appoint the board. In addition, even if there is a class of non-voting preferred shareholders, the members of this class will receive voting rights if the board fails to pay out dividends for a number of years.

D.5 Liability of managing directors; exclusion possible?

Directors are personally liable for mismanagement and the articles of incorporation can limit or eliminate the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director. However, liability cannot be limited or eliminated for:

1. breach of duty of loyalty;
2. acts or omissions in bad faith or intentional misconduct;
3. under the General Corporation Law of Delaware section 174; or
4. any transaction from which the director derived an improper personal benefit.

In addition, directors can be shielded from liability by the business judgment rule. In Delaware, the business judgment rule is formulated as a presumption that substantive diligence/care underlies the decision of the board of directors.³⁵

D.6 Supervision over managing board by shareholders

Shareholders have the statutory right, by vote of a majority of the shares then entitled to vote at an election of directors, to remove directors with or without cause. However, this right may be circumscribed by a provision in the articles of incorporation which prohibits shareholders from removing a director without cause. Furthermore, if the corporation has cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against his removal would be sufficient to elect him if cumulatively voted at an election of the entire board of directors, or if there is a class of directors, at an election of the class of directors of which he is a part.³⁶

D.7 Supervisory directors compulsory?

There is no provision in Delaware General Corporation Law which requires a supervisory board. Every corporation, however, shall be managed by or under the direction of a board of directors, except as may be otherwise provided in the articles of incorporation. If the articles of incorporation provide otherwise, the powers and duties conferred or imposed upon the board of directors by Delaware law shall be exercised or performed by such person or persons as set forth in the articles of incorporation.³⁷

³⁵ In New York, the business judgment rule shields the substance of the decision but not the procedures and methodologies used to get there.

³⁶ In New York, directors may be removed for cause by vote of the shareholders. Directors may be removed without cause by vote of the shareholders only if so provided in the articles of incorporation or the by-laws.

³⁷ In New York, the business of a corporation shall be managed under the direction of its board of directors.

D.8 Majority decisions without cooperation of minority

A majority of the total number of directors shall constitute a quorum for the transaction of business unless the articles of incorporation or by-laws require a greater number. Unless the articles of incorporation provide otherwise, the by-laws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than one-third. The vote of the majority of directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the articles of incorporation or the by-laws shall require a vote of a greater number.

D.9 Fixed place of meeting of managing board

Unless the articles of incorporation or by-laws provide otherwise, the board of directors may hold its meetings anywhere.³⁸

D.10 Resolution of the managing board taken outside meeting

Unless the articles of incorporation or by-laws provide otherwise, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the board or committee.

D.11 Acceptance of motion when votes equally divided

Delaware General Corporation Law does not discuss situations in which directors are equally divided on the motion.

D.12 Representation in case of conflict of interests

Although the Delaware General Corporation Law does not address this issue, the Delaware Supreme Court has stated that directors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness in transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all shareholders generally.

D.13 Restrictions on representation with third-party effect

The articles of incorporation may contain any provision that is not contrary to the laws of Delaware (including restrictions with regard to the power of the directors to represent the corporation towards third parties).

D.14 Managing directors to be shareholders?

Directors are not required to be shareholders unless the articles of incorporation or by-laws provide to the contrary.³⁹

³⁸ In New York, meetings of the board may be held at any place within or outside of New York, unless otherwise provided by the articles of incorporation or the by-laws.

³⁹ In New York, the only qualification required of a director is that he be at least 18 years of age. The articles of incorporation, however, may impose further qualifications.

D.15 Appointment of managing directors

Shareholders are authorised to elect directors by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors, absent a provision setting the voting requirements in the articles of incorporation or by-laws to the contrary. Absent a provision in the articles of incorporation or the by-laws to the contrary, a vacancy or newly created directorship resulting from any increase in the authorised number of directors elected by all of the shareholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director. In addition, whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors by the articles of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected. If at any time a corporation should have no directors in office, then any officer or shareholder or other fiduciary may call a special meeting of the shareholders. Unless otherwise provided by the articles of incorporation or by-laws, when one or more directors resigns from the board, a majority of directors then in office, including those who have so resigned, shall have the power to fill such vacancy or vacancies.⁴⁰

D.16 Issue by managing director of general proxy

Delaware General Corporation Law does not address the giving of a proxy by a director to another person or another director. However, in a Delaware case, the court stated that a director cannot act by proxy.

D.17 Issue by managing director of limited proxy

Delaware General Corporation Law does not address the giving of a limited proxy by a director to another person or another director, however, a Delaware court has stated that a director cannot act by proxy.

D.18 Representation by legal entity

A director must be a physical person. It is not possible for one corporation to act as a director of another corporation.

E. PROFIT DISTRIBUTION AND ASSETS

E.1 Effect of decrease in asset value below issued capital

If the value of assets drops beneath the amount of the issued capital, the board of directors is not obliged to file for bankruptcy or for suspension of payments, or to have capital contributed.

⁴⁰ In New York, shareholders are authorised to elect directors by a plurality of the votes cast at a meeting of shareholders by the holders of shares entitled to vote in the election.

If capital diminishes by depreciation in the value of its property to an amount less than the aggregate amount of capital represented by issued or outstanding stock of all preferred classes, the directors may not pay out dividends upon any shares of any classes of its capital stock until the deficiency is repaired.

E.2 Transfer of right to dividend

It is possible to transfer the right to receive dividends (or to strip the capital part of the share from the dividend part). By paying the dividends to the assignee, the corporation is satisfying an obligation to the shareholder.

E.3 Transfer right to dividend to non-shareholders

Technically, a right to receive dividends cannot be granted to persons other than shareholders. However, a shareholder can assign or transfer his rights to another person. The transferee will then be recognised as the shareholder when the transfer is recorded on the corporation's registry of shareholders.

E.4 Right to receive dividend on pledged shares

A dividend on pledged stock belongs to the pledgee. However, the pledgee must apply the dividend to the reduction of the pledgor's debt.

E.5 Reservation of profits in articles of incorporation

Dividends on common stock are generally left to the board's discretion (and therefore not typically discussed in the articles of incorporation). Dividends on preferred stock depend on the preferred stock's terms. However, the articles of incorporation may determine whether dividends on preferred shares are cumulative or non-cumulative.

E.6 Temporary exclusion of certain shares from dividend

Typically, the board of directors determines whether to declare a dividend and the amount of the dividend. Dividends on preferred stock, however, depend on the preferred stock's terms. Furthermore, cumulative dividends, which entitle preferred shareholders to unpaid dividends for all prior and current financial periods before any dividends can be distributed on shares having subordinate dividend rights, must be authorised by the articles of incorporation.

E.7 Entitlement to dividend deriving from certain business

Conceptually, it seems possible to determine that one group of shareholders is entitled to the profits of one business of the corporation and that another group is entitled to the profits made by another enterprise of the corporation. The corporation could create different classes of stock which give one group of shareholders the profits from one company and another group the profits of another entity. The distribution of dividends is generally left to the board or to the terms of the preferred stock.

E.8 Is it possible to distribute interim dividends?

It is possible to distribute interim dividends (interpreted to mean quarterly). The decision to distribute interim dividends would be left to the board of directors (for common stock) or to the terms of the preferred stock.

E.9 Dividend reserve to equalise yearly dividend

Dividends are paid out of general surplus. There is no such thing as a special reserve in the European sense. A corporation is only required not to distribute all of its net income.

However, the directors may set apart out of any of the funds available for dividends a reserve for any proper purpose and may abolish such a reserve, as they so desire. Yet, it is not the usual practice in the United States to set up dividend reserves.

E.10 Agreement not to collect dividend

An agreement with the corporation stipulating that a shareholder will not collect dividends during a certain period of time is not a proper subject for an agreement between the corporation and the shareholder, but rather, this is typically addressed in a shareholders' agreement as to the dividend payout policy.

E.11 Mortgage to secure loans by shareholders

A corporation's general powers include borrowing money and securing its obligations by mortgages or guarantees. However, there are no specific rules regarding shareholders making loans to the company. Care should be taken in these situations, especially if the shareholder is a director of the corporation. Furthermore, the company can grant loans or guarantee obligations to officers or employees whenever such loan or guarantee may reasonably be expected to benefit the corporation. Such loans or assistance may be with or without interest, and may be secured or unsecured, in a manner approved by the board of directors.

E.12 Amount of own shares to be bought by company

There is no express limit on the number of shares a corporation may buy back from shareholders. A corporation may purchase, redeem or otherwise deal in and with its own shares, provided, however, that the corporation does not purchase or redeem its own shares when the capital of the corporation is impaired or purchase redeemable shares for a price greater than the redemption price.⁴¹

E.13 Purchase price to be paid in kind

In general, consideration for stock shall be paid in such form and in such manner as the board of directors determines. Acceptable consideration consists of cash,

⁴¹ New York's statute restricts stock redemptions, providing that no resident domestic corporation, subject to the provisions of New York Corporation Law section 912 (the section governing business combinations), may purchase more than 10 per cent of its stock from a shareholder for more than the market value, unless that shareholder has been a beneficial owner for more than two years.

services actually rendered, personal property, real property, leases of real property or a combination thereof. Payment in kind is acceptable, though rare in practice.

E.14 Shares with fixed dividend or percentage of nominal value or percentage of profits

There is nothing in the statutes that would restrict a corporation's right to grant fixed dividends. The board is granted wide discretion to issue stock, fix the attributes of stock and declare dividends, subject to the availability of dividend income. Such provisions should be drafted carefully, since they may be construed as giving rise to debt obligations.

E.15 Time limit to reduce issued capital; creditors' protection

By board resolution, the corporation can reduce its capital. However, the corporation cannot reduce its capital if the assets remaining after such reduction are not sufficient to pay its unpaid debts. Reduction of capital also will not release the liability of any shareholder whose shares have not been fully paid.⁴²

F. ACCOUNTS, DISSOLUTION AND EMPLOYEES

F.1 Changing the financial year

Typically, the board of directors is empowered by the articles of incorporation to take many general actions, including to change the financial year of the corporation. However, if the financial year is defined in the articles of incorporation, these must be amended to reflect the new term.

F.2 Time limit for drawing up accounts

There is no set deadline for drawing up the annual financial statements, but a corporation should draw up financial statements promptly after the close of its financial year.

F.3 Obligation to publish annual accounts or consolidated accounts

Typically, private companies do not need to make public their financial statements. However, according to the Securities and Exchange Commission (SEC), public companies are required to make public certain financial information at the close of their financial period. Consolidated financial statements, showing the finances of a company and its affiliates, may be filed in addition to unconsolidated financial statements.

F.4 Obligation to publish an annual report

Public companies must file annual reports and must follow the line of business reporting rules of the SEC. There is no obligation for private companies to file

⁴² In New York, a reduction of capital must be disclosed on the next financial statements covering the period in which the reduction was made or in the first notice of dividend furnished to shareholders. In any event, all shareholders must be notified within six months of the reduction.

annual reports. In Delaware, foreign corporations and professional service corporations must file annual reports with the Delaware Secretary of State.

E.5 Time limit for liquidation; creditors' protection

If the board of directors decides that, in its judgment, the corporation should be dissolved, it shall adopt a resolution by a majority of the whole board at any meeting called for that purpose. Notice shall be sent to each shareholder entitled to vote, of the resolution and the meeting to take action upon the resolution. A certificate of dissolution shall be filed with the Secretary of State if a majority of the outstanding stock of the corporation votes in favour of the resolution. Dissolution also may be accomplished without any director action if all of the shareholders consent in writing and file a certificate of dissolution with the Secretary of State. The certificate of dissolution shall become effective upon its filing date (when the document is delivered and endorsed with the word 'Filed').

Corporations shall continue for three years after their dissolution or expiration, or for a longer period if the court so decides, for the purpose of winding up, ie, defending or prosecuting suits, settling business, disposing of property, discharging liabilities and distributing assets to shareholders. If a suit or action was commenced prior to dissolution or within that three year period, the corporation shall continue beyond the three-year period and until any judgments or decrees are fully executed.

The court may dissolve a corporation if the corporation has misused or abused its corporate powers. In this situation, the court also has the power to wind up the affairs of the corporation.⁴³

E.6 Workers' council mandatory?

There are no workers' councils in the United States. Unions and human resource departments might serve similar functions, although these are not present in or applicable to all corporations.

E.7 Rights of say for employees?

Generally, employees have no rights of say in the management of the corporation. Directors are fiduciaries only in relation to the corporation and its shareholders. However, in certain industries collective bargaining agreements provide that the union will have the right to nominate a member of the board.

⁴³ In New York, dissolution must be authorised at a shareholders meeting by a two-thirds vote of all outstanding shares entitled to vote. A corporation's articles of incorporation may authorise a dissolution upon the shareholders' will or upon the occurrence of a specified event. Or the Attorney-General may bring a judicial action to dissolve the corporation if it has exceeded its powers. The directors and shareholders may also petition for a judicial dissolution if they feel the corporation's assets are not sufficient to discharge its liabilities. The articles of dissolution shall be signed and delivered to the Secretary of State. Upon the filing, the corporation is dissolved. After dissolution, the corporation shall not carry on any business except for winding-up activities. There is no statutory time period within which winding-up activities must occur. The Supreme Court also has the authority to supervise dissolution or winding-up activities.