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# Competition between legislative systems and judicial infrastructures in the US system. Effects and differences compared to the European scene

*Competencia entre los sistemas legislativos y las infraestructuras judiciales en el sistema estadounidense. Efectos y diferencias respecto a la escena europea*

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**ABSTRACT** The present investigation focuses on the analysis of competition between US laws, where the competitive system among the 50 States has been in force for more than a century, and aims to highlight areas of uniformity and differences with respect to the European model. Among the latter, particular weight is given to the absence of US federal corporate models, which goes hand in hand with the constant choice of specific states historically "favorable" to the establishment of corporate entities, such as Delaware, which are particularly appealing to individuals, also thanks to the establishment of sophisticated judicial infrastructures that see the presence of highly specialized courts, competent to settle disputes only in corporate matters.

**KEYWORDS** American corporations, European commercial law, competition law, Uniform Partnership Act, Federal corporate models.

**RESUMEN** La presente investigación se centra en el análisis de la competencia entre las leyes de los Estados Unidos, donde el sistema competitivo entre los cincuenta estados ha estado vigente durante más de un siglo, y tiene como objetivo resaltar áreas de uniformidad y diferencias con respecto al modelo europeo. Entre estos últimos, se da particular importancia a la ausencia de modelos corporativos federales de los Estados Unidos, que va de la mano con la elección constante de estados específicos históricamente "favorables" al establecimiento de entidades corporativas, como Delaware, que son particularmente atractivas para los individuos, también gracias al establecimiento de sofisticadas infraestructuras judiciales que ven la presencia de tribunales altamente especializados, competentes para resolver disputas solo en asuntos corporativos.

**PALABRAS CLAVE** Corporaciones estadounidenses, derecho comercial europeo, derecho de la competencia, Ley de asociación uniforme, modelos corporativos federales.

## Introductory remarks: the development of a "market" of corporate rules. Private autonomy and disparity between legislation

Article I, section 8 of the Constitution limits and enumerates the powers of the Congress, attributing to the latter the competence to regulate specific matters and to adopt all the laws necessary and opportune for the exercise of such power. As stated in the tenth constitutional amendment,[1] any power not assigned to the federal government must be understood as responsibility of the individual states. Since the Constitution does not assign powers to federal government in corporate matters, the powers in place for the adoption of laws and regulations and the resolution of disputes in this area have traditionally been considered to be state competence. To this rule, however, some exceptions are counterposed, including, principally, the principle expressed in the so-called commerce constitutional clause, which authorizes the Congress to regulate matters that possess a "substantial influence" on interstate commerce ("affecting interstate commerce").[2]

Nevertheless, the laws concerning the constitution, governance and procedures for the dissolution of corporate bodies remain typically under the responsibility of individual federal states.[3]

In a system characterized by substantially homogeneous corporate law principles, the companies have historically evaluated and still evaluate in which state they for-

1. The present work is updated until January 2019. Under the Tenth Amendment, "The powers that the Constitution does not attribute to the United States or inhibit States are reserved for individual States or the people". Regarding the "dual" system of division of powers between the Government and the States, he specifies that, by delegating to the United States issues requiring national regulation, the Constitution has prevented local majorities from controlling national interests and, leaving to individual States the management of local issues, the Constitution prevented national majorities from dictating policies at the local level. As emphasized by the Author "although the Founders did not directly invoke the principle of subsidiarity, their theoretical approach reflected it: the national government had to exercise authority only on the issues that the States and the people were not able to deal adequately with; but the States and the people had to exercise exclusive authority over the issues they were able to face ". Consequently, to the extent that the powers of Congress correspond to what the national interest requires, they are in accord with subsidiarity, but where the congressional powers are insufficient to protect the national interest, or exclude what is necessary to protect it, they can not result in agreement with the principle of subsidiarity.

2. With this power, in reality, Congress has legislated on many other matters that strictly speaking do not constitute "trade" -such as the content and modalities of labor contracts, environmental issues and civil rights -but which exert a "substantial influence" on interstate commerce.

3. Ibidem, "large, publicly held corporations that transact business in all fifty states may choose any state in which to incorporate. As a practical manner, many choose Delaware for its well established and comprehensive statutory scheme [...] small corporations have the same ability to incorporate in any state, but the normal practice is that small corporations generally incorporate in the jurisdiction in which they are principally doing business".

malize their constitution, set the registered office and define their own bylaws, going to evaluate the rules that best fit related needs and minimize business costs (Romano, 1993).[4] This feature has brought with it profound reasoning about the potential of corporate law development at the state level in the absence of an intervention by the federal government and of advantageous or distortive consequences resulting from such a division of power (Hill & Mcdonnell, 2012).

The scope of federal law in an ideal corporate governance regime should have been limited to a range of circumstances, such as the introduction and imposition of conduct and transparency obligations on managerial bodies and the issuing and marketing of securities.[5] In fact, a system of subdividing powers between individual states would allow individuals to be protected from problems related to a power placed exclusively in the hands of federal government, allocating public goods and services more efficiently, increasing the well-being of each individual and creating, in fact, a competitive system in which states compete with each other so that citizens choose the jurisdiction that offers them the best system of rules, goods and services (Romano, 1993: 5).[6]

We try to understand whether the codicistic forecasts adopted by individual states in the light of competition dynamics existing between them would bring an effective benefit to investors. This concern has arisen from the moment that Delaware, however smaller in terms of population, territory, and production levels, has been able, since the '20s, to reach and take a long position unchallenged in the US corporate panorama (Cary, 1974; Armour, Black & Cheffins, 2012; French, Mayson & Ryan, 2014: 23 ss.; Bainbridge, Anabtawi & Hui Kim, 2018: 256 ss).

## Competition among jurisdictions in US: the race to the top and race to the bottom theories

First, Cary considered the phenomenon of competition between jurisdictions in US, developed not at federal but at state level, as a progressively destructive practice of the level of protection and guarantee to members, comparing it to a "race to the bottom" theory.

4. For which such rules vary from rules regarding the company name to duties by the directors, from the voting rights of the shareholders to the taking of decisions by directors and members. Each State, therefore, provides its own normative body according to the entity considered ("corporation codes"). The variety of such codes, therefore, soon adapts to the diversity of organization, capital, structure and business line of each company.

5. In addition to the state codification, the shareholders-directors' relations in public companies are also subject to a wide range of controls carried out at national level under the federal securities legislation, which regulates their issue and commercialization.

6. "Federalism spurs innovation in public policy because of the incremental experimentation afforded by fifty laboratories of states competing for citizens and firms".

According to this theory, the states motivated primarily by the prospect of increasing the revenues of their respective tax administrations mainly through the collection of the so-called franchise taxes by the corporate bodies incorporated in them,[7] had developed a competitive system focused essentially on provisions favorable to the interests of directors. States had offered their own normative, tax and jurisdictional corpus, dashed in order to meet the expectations and needs of directors. In this context, states ended up competing with one another, at the same time causing a decrease in the level of protection of members and, consequently, a "race to the bottom".[8]

The conclusion reached by Cary has not received universal consensus on the part of the doctrine, provoking, on the contrary, numerous criticisms and observations, among which the one expressed by prof. Ralph Winter in 1977 (Winter, 1977). The latter, while agreeing with Cary's vision on the origins and essence of the structure of competition between jurisdictions developed in US, as a system mainly aimed at favoring the category of directors to encourage the choice of certain states as a place of constitution in fact, of his own society, he arrived at a conclusion of opposite sign ("race to the top" theory) (Winter, 1989).[9] The latter moves from the assumption that the directors, being called to guarantee the existence and survival of sometimes small capital within the vast corporate market, would not be inclined to behave contrary to the interests of shareholders. Consequently, considering in a different perspective this attitude of the directors within the company, the competition between states would not entail any negative consequences for the members (Abramowicz, 2003: 139ss; Robbins, 2015: 170 ss).

From a structural point of view, this "horizontal" competition between individual federated states has arisen from the combination of the so-called doctrine of internal affairs and the restrictions dictated by the Constitution, which limit the possibility for individual states to exclude companies under foreign law from carrying out activities within their own borders (Bainbridge, 2012: 22ss).[10] Moreover, as described

7. These are taxes that some states (not all) provide for legal entities, which do not take into account the income produced by them, but the "net worth" of the taxpayer. As a rule, the system for calculating the tax takes into consideration the number of shares that the company is authorized to issue, or, in some cases, also the number of assets owned by the company.

8. This syllogism, however, was expressly denied by other items, for which a decline in the degree of consumer protection would not necessarily lead to a race to the bottom. For some, in fact, the progressive reduction of the constraints on administrators during the foundation phase and during the life of the company would be fully congruent with an increase in shareholder welfare.

9. "I am far more confident that Professor Cary's argument about the race to the bottom is wrong than I am that my argument that Delaware is leading a race to the top is right".

10. That, by way of example, it mentions the possibility for a company incorporated in New Jersey to re-establish itself in another State, while continuing to conduct business in New Jersey, if this State adopts particularly restrictive corporate legislation and the Second State's legislation is more attractive.

by an illustrious doctrine in 90s (Romano, 1993), federalist system and inter-state competition have assumed the role of "critical determinants", ie decisive factors, for the construction of relations between shareholders and managers. With this in mind, the same doctrine has defined the US federalist structure and the consequent competition among states as the "genius of American corporate law" (Romano, 1993).

Since the adoption of the first federal legislation in corporate sector, namely the issuing of Federal Securities Act in 1933, regulating the issue of stocks and other securities,[11] and the Securities Exchange Act the following year on the subject of trading in the following securities at their first issue,[12] the federal government played a significant role in the formation of rules concerning corporate information, auditing, assembly proceedings and governance. This range of intervention, however, has gradually expanded over time, becoming particularly incisive in 2002 and 2010, with the adoption of two important legislative instruments, the Sarbanes-Oxley Act (Dine & Koutsias, 2013: 140 ss.; Ahdieh, 2005; Romano, 2005: 15 ss)[13] and the Dodd-Frank Act (Bordo & Duca, 2018).

11. This law introduced, in particular, the need for registration of the securities, so that potential investors were assured full transparency of all circumstances relating to them. This law also required extensive transparency requirements for financial and managerial information. Securities are defined in a very broad sense by the law in question. These include, in particular, the stocks, stocks (stocks), bonds and debentures (bonds) and warrants (derivative financial instruments similar to the options).

12. By means of these laws, the marketing of securities and the relative valuation of the markets was regulated. In the period before 1933, US capital markets and listed companies were, for the most part, unregulated. This had entailed particularly serious abuses, with particular reference to the use of undisclosed information by the insiders of the companies, to the detriment of the members of the same.

13. As is well known, the Sarbanes-Oxley Act (SOX) is a federal law passed by Congress during 2002 following the political pressure created by the wave of corporate scandals culminated with the Enron crack and is considered as the most radical instrument of intervention of the Federal Government in the corporate area. The SOX law applies mainly to companies subject to the Securities Exchange Act of 1934, with the primary objective of combating fraudulent behavior in the corporate sphere. In particular, SOX envisaged the inclusion of independent directors within the board of directors, the presence of an audit committee composed entirely of independent directors, able to supervise and approve the activities and audits of independent public auditors, the appointment of a remuneration committee made up entirely of independent directors with respect to the officials for whom it must determine the remuneration, the obligation of an attestation by an external auditor of the effectiveness of internal controls on accounting and financial reporting. Moreover, by means of this law, the aim was to redefine the tasks of the SEC-guaranteeing the same additional resources and specific powers to enforce the application of the current legislation-and to increase the responsibilities of the CEOs and CFOs, requiring them to certify personally (under penalty of criminal sanctions) the compliance of all financial statements with the real financial conditions of the respective companies, through a system of mandatory certifications on financial and balance sheet reports. The SOX law also envisaged the establishment of a new body, the Public Company Accounting Oversight Board, called to monitor the financial statements of listed companies, in addition to a special protection and protection regime for CDs. whistle-blowers, ie employees who report negligent behavior occurring within the company, providing for criminal sanctions for any retaliation taken against them.

Through these laws, issued by the federal government following the well-known accounting cracks of some American giants[14] and the deep financial crisis of the last decade, and the enforcement apparatus set up for the purposes of effective compliance with these laws, the impact of intervention of the federal office on corporate governance profiles has crystallized all intents and purposes, creating a "vertical" competition system, which traditionally indicates the relationship of verticality between the level of central government and the level of individual states, in this context (Ahdieh, 2005: 730 ss.).[15]

The separation of competences in the field of company law tout court (in the hands of individual states) and in regulation of securities (in the hands of federal government) in light of respectively, private and public nature of these sectors, did not get full consensus: the same collapse of Enron, for example, would suggest the need to adopt a "public" conception of company law, not limited to the relationships between shareholders and the management body, but extended to the interaction between the "controlling" subjects of the company and the external world, represented by the subjects who do not exercise control over it (Hill, McDonnell, 2012:384ss; Schapiro, 2005).[16]

State company law remains the predominant source in the landscape of the matter that deals with it (Bainbridge, 2012).[17] This conclusion would also be based on the consideration that a state-level company law would allow the competent authorities to implement innovative regulatory instruments considered appropriate to offer competitive advantages to companies, in order to attract the highest number of operators within their borders. Vice versa, universally applicable federal regulations would repress the drive towards experimentation and innovation (not establishing any competitive mechanism with them), characteristic elements of an efficient market (Moore, 2013: 107 ss).

14. As for example: Enron, World Com, Global Crossing, Adelphia, Tyco.

15. The author traces the positions taken by the major exponents of the American doctrine in the criticism of the "federalization of corporate law" that the SOX law would have entailed.

16. Which also emphasizes another theory that would traditionally justify the division of competences into corporate matters: there would indeed be a differentiation between corporate state law and federal law relating to securities, since the former would focus on "substance" profiles and the latter on "procedural" aspects. On the positive aspects of the federalist system

17. See, CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987), in which the court affirmed that: "it is the law of the state of incorporation that determines the rights of shareholders, for example, including the voting rights of shareholders". Or Burks v. Lasker, 441 U.S. 471, 478 (1979), "the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law. Corporations are creatures of state law and it is state law which is the font of corporate directors' powers".

## The absence of federal corporate models

In US a system has gradually been developed in which every entrepreneur is free to choose the state where he establishes his own corporate body and in which the "chosen" state, consequently, manages any procedure related to this constitution according to the company forms existing within it, without having common reference models available.

From a point of view that considers the legal system itself, in US the regulation of certain matters has been delegated, by express constitutional provision,[18] to the competence of individual states, each of which has therefore approved its own constitution and own corpus of internal laws in the corresponding sectors.

On the other hand, in EU, by virtue of the principles of division of powers between the Union itself and the member states consecrated in the treaties, the Union can legislate and adopt binding acts in certain sectors exclusively or concurrently with individual states (Hartkamp, Siburgh & Devroe, 2017: 282 ss; Lenaerts, Maselis & Gutman, 2014: 133 ss; Wierzbowski & Gubrynowicz, 2015; Türk, 2010; Woods & Watson, 2017: 37 ss; Barnard & Peers, 2017: 788 ss; Berry, Homewood & Bogusz, 2013; Conway, 2015; Nicola & Davies, 2017; Usherwood & Pinder, 2018; Da Cruz Vilaça, 2014; Folsom, 2017: 278 ss).[19] Among the areas of shared competence, firstly, it refers to the internal market (article 4 TFEU), which "entails an area without internal frontiers, in which the free movement of goods, persons, services and capital according to provisions of the treaties "and for which" the Union shall adopt the measures intended to be set up or operational [...] in accordance with the relevant provisions of the treaties" (Geiger, Khan & Kotzur, 2016; Decheva, 2018; Barnard & Peers, 2017: 586 ss; Foster, 2016; Thies, 2013; Edward & Lane, 2013; Nowak, 2011; Chalmers, Davies & Monti, 2014; Tillotson & Foster, 2013; Horspool & Humphreys, 2012: 552 ss; Oppermann, Classen & Nettesheim, 2016; Schütze & Tridimas, 2018; barnard & S. Peers, 2017: 788 ss; Tietje, 2008).[20]

It must be considered that, in US, the sweeping of competences between federal and individual states has led to the natural establishment of horizontal competition mechanisms between the individual states, translated, for corporate matters, into the adoption of pluriform rules, more or less less attractive to operators in the sector, and in the wide range of corporate forms, also in a certain sense in competition with each other, to be adapted almost totally to the needs of the individual entrepreneur.

18. The Tenth Amendment to the Constitution of the United States provides that any power not expressly mentioned in the Constitution under the Congress is reserved for the jurisdiction of the individual States.

19. See art. 5 TFUE.

20. See, art. 26 TUE.

One thinks, first of all, of corporations, limited liability companies and partnerships (Moore, 2013).[21]

This mechanism has not had a similar genesis and ramification in EU, or has had a development in the opposite direction: the Union, in fact, has properly legislated in the corporate sector by virtue of the attribution of competences referred to in the treaties, introducing the individual common models and, prima facie, also a competitive phenomenon that would however be placed on a vertical plane, between European models and national company forms, and not at the level of individual states (Enriques, 2004: 1265 ss; Paschalidis, 2012).

At the base of the absence of common models in US it would also find itself a more properly cultural and political factor. It is true that in US the need to introduce common models of reference has not been historically perceived, but it is equally evident as, for purposes that are similar to those highlighted by the community institutions in the adoption of the normative body enacted in the field of company law, however, has come to adopt uniform models of discipline and codification for this sector, made available to individual confederate states, as explained below.

## The internal affairs doctrine

Within the framework of competition between jurisdictions in US, it played a particularly important role, also in light of the absence of uniform corporate models, the "internal affairs doctrine", well rooted in the doctrinal and jurisprudential fabric developed on the subject.

The State where a corporate body has been set up has exclusive competence in the regulation of this entity and its activities, including, of course, the rights and powers guaranteed to shareholders, directors and managers of the entities themselves. As a consequence, investors both in the start-up phase and during the re-establishment phase enjoy a faculty not limited by law to choose between different legal systems in which to establish the domicile of their company, within a real "common market" of the corporate rules produced by the competition existing between the single national laws. Furthermore, the rules of company law applicable to these entities, unlike other civil or criminal law profiles (for which it would be necessary to carry out further reasoning, which however are outside the scope of this work), are established exclusively

21. The author emphasizes the scope of federal law (that is, the rules dictated by the Congress, the SEC and the power of the judiciary), confirming that the latter has an important role in the regulation of American companies, especially listed companies, so much so that even in the USA we have come to talk about a phenomenon of vertical competition between legal systems. The competitive character, even in a vertical sense, is identified by the. as an essential element of the company law of the State of Delaware (taken as a reference for the examination of the company law of the state), together with legislative flexibility and the ex post correctness check carried out by the U.S.

by the state of incorporation entity from time to time considered, without setting application limits on the place where the activities and commercial operations of such entity are subsequently carried out. In fact, it allows an institution constituted in a state to carry out its activity even within another State (Moore, 2013).

The choice of the place of incorporation of a company represents, to all intents and purposes, a choice of the law applicable to the life and functioning of the company, with the consequent tendency to compare from the beginning the different rules offered in the individual states to identify the most favorable ones.

In reconstructing the system of competition between jurisdictions, it is worth noting that the attractiveness of individual states is not overestimated for the purpose of setting up corporate bodies, since, in a post-establishment phase, the commercial activities of these entities can be legitimately conducted. Also elsewhere and, on the other hand, not to underestimate the economic benefits deriving from the states from this regime of choice of law, since thanks to the system of establishment of corporate bodies, the states are able to significantly increase their internal income.

Furthermore, by involving the establishment of a company in a given state the subjection of the company itself to the legislation of that state under the internal affairs doctrine, the legislative and judicial systems adopted in the constitution are also a source of high interest for professionals and investors. In fact, in order to settle the disputes concerning the "internal affairs" of the companies, that is the relationships between the shareholders and the corporate governance bodies, the states usually adopt the law of the state of incorporation.

The internal affairs doctrine arose at a time when companies did not have a wide margin of choice regarding the place where to perfect their constitution (Tung, 2006; Daily, Scott Kieff & Wilmarth, 2014; Ribstein & O'Hara, 2008).[22] The companies, in fact, were traditionally established in their own "home country", in the state that is where the main commercial operations would have been conducted and where the

22. Which is stated that: "While examining the corporate law market, scholars have largely ignored the fact that this market for law coexists with markets for many other types of law. The corporate law market seems unique because its source is found in a special rule, the internal affairs doctrine (IAD), which holds that the law of the state of incorporation governs the relationship between the managers, the shareholders, and the corporation. Corporations can choose their place of incorporation without having any other connection with the state of incorporation. This contrasts with the rule applicable to other contracts, as summarized in the Restatement (Second) of Conflicts, which conditions enforcement of contractual choice-of-law clauses on the parties' connection to the state whose law is chosen. Because of the IAD, states can compete to supply corporate law separate from tax law, regulatory law, or other benefits. To obtain tax and other benefits in a particular state, a corporation might need to locate a plant or other assets in that particular state. By incorporating in a different state, the corporation can choose among the particular beneficial aspects of each state's laws. Without the IAD, the corporation would be forced to choose a single state's bundle of laws, including corporate, tax, and regulatory law".

members resided. The preference for the state of constitution, proper to the internal affairs doctrine, was essentially enumerated in the recognition of the territorial sovereignty of each state over the societies of domestic law. The internal affairs doctrine, in this context, did not therefore bring with it a real choice of a "private" nature, on the part of individual operators, on constituting itself in a particular state.

In particular, the state of New Jersey and not, as is generally believed, the Delaware presented itself as a state with a particularly "pioneering" role in the point of offering norms more favorable to enterprises, having introduced, for example, the right of corporations to hold shares of other corporations, to accept contributions in kind and to approve different classes of actions, practices, conversely, totally prohibited or particularly limited by other states (Enriques, 2004: 1268 ss).[23]

The path taken by the internal affairs doctrine in facilitating interstate competition has depended on a series of "events, ideologies, influences of interest groups and institutions' inertia" (Tung, 2006). Moreover, with reference to the origins of the doctrine on internal affairs, the jurisprudence of US Supreme Court developed in the mid-1800s through the commerce clause referred to in the US Constitution (Tung, 2006)[24] which has come to make its corporate law rules more flexible,[25] to maintain

23. The author notes that the pre-eminence of New Jersey on the corporate market between 1875 and 1913, with an important liberalization program in 1888 aimed at attracting even more corporate bodies. Firstly, it was possible for public limited companies to hold shares in other companies. It was also legalized the presence of different classes of shares with equally different voting rights and, thirdly, it was made possible for joint-stock companies to accept contributions in kind, without particular safeguards for shareholders and creditors. In those years, the majority of other states, in addition to prohibiting such practices, was directed to limiting the growth of companies, placing a ceiling on the relative capitalization and requiring that the majority of directors be resident in the Reference State. These innovations, as pointed out by the A., were introduced by Delaware a few years to follow. Delaware, moreover, was not particularly attractive to companies until New Jersey abolished some of its own norms in 1912, causing a progressive decrease in the "trust" placed by the companies in New Jersey.

24. Reference is made to art. I, section 8, clause 3 of the Constitution, pursuant to which the Congress has the power "to regulate Commerce with the United Nations, and with the United States". The Constitution of the United States lists certain powers reserved to the jurisdiction of the Federal Government. The tenth amendment to the same, moreover, prescribes that any power not expressly mentioned in the Constitution under the Congress is reserved for the jurisdiction of the States. In light of the aforementioned article, the Congress has often used the Commerce Clause to justify the exercise of legislative power over the activities of States and citizens, opening the door to numerous controversies regarding the balancing of power by the Government and individuals States. In any case, the Commerce Clause has historically been considered as a means of guaranteeing the power of the Congress and of limiting the state legislative power. More specifically, this clause contains the implicit principle that would prohibit States from adopting legislation that discriminates or entails excessive burdens on interstate commerce.

25. "This sort of charter competition I call "weak-form" competition - states' adjustments to territorial corporate law as part of a general effort to attract capital and labor by offering an hospitable business environment". Specifically, the classic restrictions conventionally imposed on corporate bodies, with

internal levels of employment and, at the same time, income levels, thus favoring the birth and growth of the system of competition in the corporate sphere.

The supreme court was called upon to settle some controversies at the point of commerce clause, with the enunciation of principles that facilitated, from then onwards, the growth of interstate markets. The court declared, for example, the illegitimacy of discriminatory taxation schemes depending on "nationality" or "non-nationality" of certain products.

## The Delaware case. Measures taken by other states to counter the Delaware phenomenon

In fact, individual states have traditionally modeled their own regulatory body in response to the most favorable provisions introduced from time to time in other states (market competition phenomenon), in order to increase their income through, among other things, taxes burdening the bodies incorporated in them (franchise).

Within the debate on the phenomenon of state competition, Delaware, since the early 1900s, has generally been considered the state with greater success within the corporate regulation market (Romano, 2010: 114 ss).[26]

If the choice of a specific state regulation by the competent corporate bodies is

reference to capitalization, limit of the activities exercisable and territorial extension, had become an obstacle to the growth and expansion of the entities themselves. The States, already in competition with each other for economic development, responded to the new corporate needs by loosening some of the previously binding constraints, without however eliminating them completely. In any case, the States continued to require the companies they set up to maintain economic connections with the States themselves.

26. In point of franchise taxes, the author has emphasized how such taxes represent "a powerful incentive for the legislature to implement corporations that will maintain the number of domiciled corporations, if not new firms incorporated into their state [...] he also noted that there is a positive linear relationship between the percentage of total income arising for the States from the franchise taxes and the ability of States to respond to the needs of companies in their corporate laws. In this regard, the author pointed out that as much as 15.8% of the total income of Delaware, in the twenty years 1960-1980 was represented by income from franchise taxes [...] I am frequently asked why so many corporations are formed in Delaware. Why indeed? It is apparent that Delaware continues to be the favored state of incorporation for U.S. businesses. Delaware has been preeminent as the place for businesses to incorporate since the early 1900s, and its incorporation business, supplemented by the growth in numbers of such "alternative entities" as limited liability companies, limited partnerships and statutory trusts, continues to grow smartly. Close to a million business entities have made Delaware their legal home. Furthermore, while the sheer number of corporations organized in Delaware is significant, more significant still is the fact that so many large and important corporations are incorporated in Delaware. Of the corporations that make up the Fortune 500, more than one-half are incorporated in Delaware. It is no wonder that Delaware has become almost a brand name for the "business" of serving as the official home for corporations".

able to lead to an effective maximization of company's value (race to the top or race to the bottom), it should be noted that Delaware has traditionally occupied a dominant position of the response to the needs of businesses. This primacy derives in a certain way from the nature of Delaware as a state particularly linked to the corporate taxation system (Romano, 1987; Bainbridge, 2012: 21 ss). Delaware, in fact, unlike other states whose income level depends to a lesser extent on the corporate taxation system, has put in place considerable efforts to adopt a particularly favorable legislation for the corporate bodies,[27] in order to guarantee a constant level of revenue from the tax system on businesses.

In addition to the absence of minimum social capital, which is typical of all US corporate law, Delaware, with regard to relations between shareholders and members and administrators, imposes very few mandatory rules, which are limited to allocating some powers for the shareholders or (much more often) for the administrative body, to which the management powers of the company are entitled, exclusively and imperatively. Traditionally, three rights are attributed to members: voting, selling and promoting legal action against directors, in the name of the company.

The predominance of Delaware is, in any case, justifiable also in light of further factors highlighted by the doctrine (Ribstein & O'Hara, 2008),[28] such as the mecha-

27. The law on commercial law in force in Delaware ("Delaware's General Corporation Law") is the most evolved and the most flexible existing in the whole country. It was conceived in order to respond to the multiple needs expressed by companies, allowing them to take advantage of extremely simple and rapid procedures for the establishment of their corporate structure and also providing maximum versatility in the definition and discipline of the rights and duties attributed to each member and their directors. The main objective pursued by the legislator was not to create a code of conduct aimed at regulating every single aspect of corporate life, but to simplify as much as possible the conduct and management of business and related activities by members and managers.

28. Which highlights three main classes of factors underlying the dominance of Delaware, with particular regard to the legislative infrastructure of the state itself and to the "dependence" of that state from the franchise taxes, which involves a state commitment-unique in the US landscape - aimed at do not change the internal discipline, avoiding to harm the well being of companies: "several possible reasons have been given for Delaware's dominance. First, Delaware may have the sort of "network" advantages that have been attributed to, for example, computer operating systems. The many Delaware corporations produce cases and common practices, and those practices help to clarify contract terms over time. Second, Delaware offers a legal "infrastructure" consisting of the country's most expert corporate court and bar. A would-be competitor would have to make a large investment in developing such an infrastructure. Meanwhile, Delaware could quickly respond to any other state's attempt to actively compete with it. Third, a competitor state also would have to provide assurances as to its future lawmaking and adjudication. An important function of corporate law is its ability to change over time. Because amending a public corporation's charter is a costly and cumbersome process, it may be hard for corporations to change their contracts to efficiently account for changing circumstances that a firm will face over its long life. Firms, therefore, must trust the state to make necessary changes. At the same time, corporations must hope that the state's politicians do not change the corporation laws in ways that

nism prescribed by the relevant constitution, which requires that any change to corporate law (corporation code) be approved by two thirds of both rooms.[29] As can be understood, this procedure has generally made it difficult to modify the current legislation, which is already particularly favorable and flexible, requiring, in fact, a continuous basis of responsiveness on the part of Delaware to the needs of companies.

Delaware has paid particular attention to the creation and development of a precise and articulated system of guidelines and precedents of jurisprudence, of sound judicial practice in the corporate sector, of advice provided by experts in the sector and of a streamlined administrative structure in proceedings relating to corporate practices (Ribstein & O'Hara, 2008: 121 ss; Tröger, 2005: 13 ss),[30] factors that have had a decisive influence on the preference given to Delaware by operators in the business world.

The combination of the above mentioned factors, particularly favorable substantive law, specific forum for the composition of corporate disputes and ad hoc administrative procedures and services, with the consequent possibility of quantifying ex ante the costs to be incurred (Fershee, 2008),[31] is therefore considered and weighed very carefully by the companies at the moment of the choice of the state of incorporation.

The system triggered by Delaware has not only come down from the Delaware confrontation with other states, but has also been due to the role played by the federal authorities: Congress, SEC, NYSE, courts of appeal (Roe, 2003)[32] in corporate sector regulation. Delaware would have built a comparison with the central government authorities and would have built its own space of action, considering that the intervention of these authorities is mostly discontinuous, either for reasons related to the relative competence (generally limited to certain subjects), for the characteris-

reduce corporate wealth-as New Jersey did when it enacted its antitrust law at the beginning of the 20th century. Delaware's dependence on franchise taxes uniquely "bonds" its commitment to avoid similar compromises".

29. See, Delaware Constitution, art. IX: "No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly".

30. The author emphasizes a further advantage inherent in the Delaware system: the system of previous jurisprudential and expertise of the related Courts has also benefited the legal operators, with a consequent reduction in costs associated with legal advice to be provided to companies. These characteristics are taken from Tröger, which highlights how such network externalities explain the domain of Delaware per se, even wanting to admit that the relative body of laws is not entirely optimal.

31. "The fact that so many corporations are formed in Delaware provides companies with more advisors, legal and financial, who are well versed in the risk and rewards of transactions under Delaware law".

32. The author goes so far as to state that even if Delaware did not act to oppose an intervention by the federal government or to prevent it, its body of corporate law would still be largely conditioned by a federal component.

tic features of the authorities themselves (think of the courts, whose intervention is intimately connected to the emergence of possible disputes) and, therefore, can only leave a wide margin of maneuver to the single states. Consequently, these considerations made it possible for the states to consider their corporate law as a "product" (Romano, 1985) made available to companies, modeling it according to the choices made in the individual regulations on fiscal and economic matters.

The genesis of the predominance of Delaware has traditionally been traced back to the adoption by New Jersey of particularly contiguous and inflexible rules of corporate law. This policy, in fact, has meant that many companies established in New Jersey proceeded with a re-incorporation in Delaware, while continuing to carry out their business in New Jersey, making full use of the jurisprudential interpretation of the commerce clause mentioned above (Tröger, 2005: 13 ss).[33]

Hence, other factors, such as population and small economic systems of Delaware, have contributed to the growth of the role of this state in the matter that deals with it: these elements, in fact, have further increased the relationship of strict dependence between internal income and corporate tax system, through which Delaware has traditionally funded a substantial portion of its revenue (Bainbridge, 2012: 24 ss).

Some studies have highlighted all the advantages related to Delaware legislation, as in the case of re-incorporation in that state of corporate bodies established elsewhere, a situation in which there has been an increase in the value of the company and, consequently, the value of shares held by their respective shareholders (Romano, 2002). Other studies, such as an examination of Tobin's Q variable (Subramanian, 2004), which represents the relationship between the market value of a company asset and the cost of the relative repurchase on the asset market, have also highlighted the positive nature of Delaware legislation, noting as such variable (a company's well-being index) was higher for companies established in Delaware than changes in the economic and political structure of the latter state paved the way for the Delaware explosion.

The "forced" regulatory adjustment of Delaware to business needs for the purpose of maintaining the level of income from the franchise was well known to the authorities of other confederate states. In fact, in order to counter the Delaware domain, some states, first of all Nevada and Maryland, have implemented a series of measures aimed at offering alternative levels compared to the first.

With reference to Nevada, defined by some items as "Western Delaware" and commonly considered as the main competitor of this state (Bainbridge, 2012).[34] It is noted that this state has gradually attracted a greater number of corporate constitutions. As explained by the same site of the Secretary of State of Nevada (Kahan & Ka-

33. "Delaware [...] which had in large portions copied New Jersey's corporate statutes and from the part of the Chancery Court of Delaware".

34. "Hostile takeovers increase shareholder wealth".

mar, 2002), different measures have been adopted by Nevada in order to favor entrepreneurial activities, among which the flexibility of corporate taxation system plays a very strong role. Nevada, in fact, in addition to the non-imposition of franchise taxes, estate taxes and inherit taxes, does not apply corporate income taxes and shares and, as we will see below, has developed, in light of the Delaware model, a sound and solid system of resolution of disputes in the corporate area.[35]

With respect to Maryland, the attractiveness of this state to the establishment of investment firms was highlighted. Specifically, the attractiveness of Maryland for investment funds derives from a series of regulatory provisions "designed" and issued specifically for them, including provisions aimed at ensuring that funds meet the federal tax requirements, exemptions to the obligation to hold shareholders' meetings on an annual basis and rights of the management body aimed at allowing the increase in the number of shares without prior authorization from the shareholders. In addition, in the wake of Nevada, Maryland provides franchise taxes significantly reduced for the corporate bodies incorporated in it.

The investment firms market differs from that of joint companies, in particular due to the legal nature of the companies themselves, which in most cases take the form of trusts and not of companies tout court. In this case, therefore, the choice of the place of incorporation did not depend on the attractiveness of a certain state regulation or on the quality of the structures prepared in Maryland in the corporate area (eg, the system of the Courts), but almost exclusively that state to minimize the tax burden on investment institutions and to be able to avoid the adoption of a state regulation further than the one issued at federal level on the matter (Kahan & Kamar, 2002).[36]

Similar considerations have also been developed with reference to North Dakota, which in July 2007 deliberately intended to enter the corporate competition market through the adoption of the Law on listed companies (Publicly Traded Corporations Act) (Fershee, 2008; Pinto, 2010: 260),[37] an initiative defined by its promoter as fun-

35. "Developed on the Delaware model, the Business Court in Nevada minimizes the time, cost and risks of commercial litigation by: early, comprehensive case management, active judicial participation in settlement, priority for hearing settings to avoid business disruption, predictability of legal decisions in commercial matters".

36. "Even if Maryland does compete for investment companies, that competition is meaningless for regular public corporations".

37. The author points out that this law has placed the State of North Dakota in direct competition with Delaware, while at the same time observing the uncertainty regarding the choice of the State in question to become part of the market of corporate rules, especially in consideration the absence of significant experience of this state in terms of public companies. In this regard, the A. notes that some company operators outside the state have pushed for the introduction of such a law for the purpose of merely promoting their ideas on "good corporate governance" and that at the same time they have promoted the Act in order to to encourage companies to enter the state.

damentally pro-business, built to reinforce state's corporate democracy base and to increase the performance of listed companies.

This law, which is particularly "shareholder-friendly", provides for broader rights for shareholders, such as majority voting rights for the appointment of directors in place of the cumulative voting mechanism, the possibility for shareholders to access the proxy-system, limitations on the obligation to vote by qualified majority and limitation of anti-takeover provisions.[38] The legislation of North Dakota also provides for a very advantageous tax treatment: the rate established for franchise taxes, in fact, is equal to half of the rate provided in the Delaware for the same entities.

Notwithstanding the aforementioned provisions of particular favor for listed entities, there has been no decisive push towards the use of Publicly Traded Corporations Act by entities established in North Dakota following the related issuance. On the contrary, some companies established in other states have taken into consideration this law in order to adapt their practice and the authorities of other states have considered the possibility of modifying their legislation in order to introduce more flexible provisions towards the members.

## The "persuasive" and "inspirational" character of Delaware courts

The division of competence in corporate matters between individual states has meant that each of them developed their own judicial infrastructure and their own system of precedents, considered with great attention not only by the business realities present in the relative territory, but also outside itself, making it possible to identify a real "legislative" capacity (so-called lawmaking role) for the courts themselves, with examples of particular relevance.[39]

38. The United States (including both federal legislation and national legislation) is characterized by the presence of two mechanisms aimed at facilitating the presence of minorities in the administrative bodies of large stock companies with securities widely distributed on the market. This is the cumulative voting, which has origins dating back in time, and a more recent discipline that, in implementation of the Dodd-Frank Act, should provide a special mechanism that facilitates (even in economic terms) the access of shareholders to the proxy system. The cumulative voting is nothing more than an election system that gives each member: a) a number of votes equal to the multiplication between the number of shares held and the number of directors to be elected and b) the right to distribute such votes on one or more candidates, that is assigning a vote to each candidate or concentrating the votes available on some candidates, to the extreme, all the votes on a single candidate. The other mechanism present in the United States to favor the presence of minorities in the management body consists of rules that facilitate the access of shareholders to the proxy system used by their company, ie the (expensive) system of sending to shareholders, by of the company and before the shareholders' meeting, all the necessary documentation to exercise their voting rights by way of delegation (ie without directly participating in the meeting and using a proxy statement)".

39. The principle of separate sovereignty between the Federation and the States is also found in the

Such a complex system was of fundamental importance, having created significant benefits for entrepreneurs and, at the same time, increased the benefits for the states themselves: the presence of particularly valid infrastructures and professional services, in fact, has led some states to achieve huge economic rewards, thanks to a higher demand and to networks of commercial activities developed gradually in their respective territory (Fisch, 2000: 1.072 ss; Pacces, 2013: 441 ss).

The main reason for the re-incorporation practices in Delaware should be found, on the one hand, in the awareness of institutions to be established in a state by legislation favorable to business needs and, on the other, in the possibility of using particularly efficient judicial services, awareness "that reduction uncertainty concerning the consequences of actions and the transaction costs of doing business" (Moore, 2013: 99 ss). The State of Delaware has traditionally carried out a practice of constant improvement of its infrastructure in terms of specialization in the sector and receptivity to the practical needs related to governance and the management of company disputes, thus investing on the quality of its judicial system (Kahan & Kamar, 2002),[40] purpose of attracting the establishment and permanence of new businesses.

Delaware offers litigants a forum with a solid structure and a broad base on previous jurisprudential cases in the corporate area, which has allowed to reach a high degree of predictability of the outcome of disputes and speed in the composition of the same, facilitating involved bodies, an efficient planning of times and costs (Holland, 2009). Delaware, as well as each of the other confederate states, has an independent judiciary system, specifically set up by express indication of its Constitutional Charter.[41] In case of disputes concerning commercial law, the decisions are at

organization of the judicial system of the U.S. As is known, in fact, each state has its own system of state courts. In fact, being in all the States, the federal courts of first and second degree (Federal District Courts, U.S. Courts of Appeals) are not the only holes available to those wishing to promote an action. The vast majority of the disputes brought before the US courts are held, in fact, in the state courts, established in each of the 50 States, competent for a wider variety of cases than the federal courts. State court systems are generally structured in courts of first instance with general jurisdiction (District Courts, County Courts), Intermediate Courts of Appeal (Appellate Courts, Superior Courts) and a Supreme Court of the State (State Supreme Court). The organization of state courts varies, however, from state to state, as does the denomination of the courts

40. "The Delaware chancery court combines several features. First, it has limited jurisdiction, its docket consists mainly of corporate cases, and it hears all cases without a jury. These features result in corporate disputes being decided by judges who have developed expertise in corporate law. Second, Delaware chancery court judges are selected based on merit by a nominating commission and receive financial support from the state-for law clerks, support staff, office space, courtroom facilities and the like - that is necessary to dispose of cases expeditiously".

41. The Constitution of Delaware preserves the historical separation typical of common law systems between "law" disputes, referred to the Supreme Court, and "equity" disputes, the jurisdiction of the Court of Chancery. The appeals brought by these courts are then dealt with directly by the Delaware Supreme Court. For a detailed examination of the historical roots of these Courts

sole responsibility of the judges of the court of Chancery (Thompson, 2005; Kunz, 2017),[42] a court with "limited jurisdiction", competent only for corporate matters,[43] which does not include popular juries, as happens instead in the courts of numerous other states of confederation,[44] largely reproduce the structure of the New York State Commercial Courts, best described below, and not that of the Court of Chancery of Delaware which is considered among the most important courts of US and, in commercial matters, it is called second, in terms of prestige, even to the US Supreme Court (Bainbridge, 2012: 26).[45] The judges of the court of Chancery are often called upon to comment on issues that can affect the delicate balances that regulate the life of a company and that, in some cases, could potentially affect the economic and financial interests of thousands of investors. It is quite evident, then, how it is extremely important to be able to count on a judging body in possession of many years of experience in the matter, rather than relying on the judgment of subjects lacking a specific juridical-commercial training, as happens in the courts using intervention of popular judges (Fisch, 2000: 1074 ss). The principles contained in the decisions adopted by them are an important orientation, which the companies operating in Delaware, but also in other countries, tend to comply (Heller, 2015).[46] The presence

42. On this point, the expression used by one of the major American commentators is reported with the intention of highlighting the predominance of Delaware in the field of controversies in the matter of fiduciary duty, that is, in disputes relating to fiduciary duties of the corporate bodies, typically to directors: "most American law on fiduciary duty is made in Delaware by a group of just ten judges. Five are on the Court of Chancery and five sit on the Delaware Supreme Court which hears appeals from the Court of Chancery. For these chancery court judges their experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law".

43. In fact, the scope of the jurisdiction of the Court of Chancery has progressively expanded over the years 2000, including the disputes relating to technology (10 Delaware Code, Article 346), commercial disputes relating exclusively to compensation for monetary damages (10 Delaware Code, Article 347) and, as will be seen below, has expanded its scope of action also in the field of alternative dispute resolution, in the commercial sector, through the use of mediation, arbitration and agreements on the inappellability of decisions (voluntary waiver of appeal).

44. This refers to the courts of Nevada and North Carolina, where we tried to re-propose the model of the courts of Delaware. It should be noted that in some States the creation of ad hoc courts has been created for the corporate matter due to the inability of courts of general jurisdiction to resolve commercial disputes quickly due to the large amount of pending judgments, which had created a certain degree of discontent among the business community. Nevertheless, some states have refused to create ad hoc courts for the corporate sector, thereby perceiving an elite "justice" compared to simple citizens and fearing an excessive cost burden on state budgets.

45. Which that means: "The Chancellors have great expertise in corporate law matters, making their court a highly sophisticated forum for resolving disputes. They also tend to render decisions quite quickly; facilitating transactions that are often time sensitive".

46. "It seems likely that California will do so, given that California courts have historically been persuaded by and often follow Delaware corporate case law. Grosset itself illustrates a circumstance in

of an ever increasing number of judgments made accessible to third parties through their publication in special collections allows to contain the number of corporate disputes, following the practice, now widespread, to entrust the negotiation and the subsequent drafting of the main documents and agreements companies to professionals who scrupulously comply with the principles established by the judges of the court of Chancery.[47]

The judges of Delaware have demonstrated that they are able to resolve the disputes they have submitted to them in a much more efficient and effective manner than in other states,[48] the Delaware judiciary has always been placed in the first position among all the states in point of "fair" and reasonable litigation environment", of "consolidation suits and judges' competence". Within this analysis, particular attention was paid to the level of fairness and impartiality of the judicial body, to the speed of the process and to the system of precedents.[49]

In practice, the sentence of Smith v. Van Gorkom case of 1985 (Moore, 2013: 102ss; Bird, 2008),[50] for example, is traditionally considered a landmark decision in terms of responsibility and duties of the management body, having established the principle of board primacy, profoundly modifying the setting of the boards of public companies in which, prior to the ruling in question, the board was essentially considered a

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which the action of the California Supreme Court could be interpreted as desiring to parallel Delaware law." See, Grosset v. Wenaas, 42 Cal. 4Th 1100 (2008), in which the Californian judges took over the Delaware legislation regarding derivative suits: "Like Delaware, California has a statute that imposes stock ownership requirements for standing to pursue a shareholder's derivative suit [...] what it believed to be Delaware law".

47. See, U.S. Chamber Institute for Legal Reform, 2012 U.S. Chamber of Commerce State Liability Systems Ranking Study, "a state's litigation environment is likely to impact important business decisions".

48. It is also noted that the Court of Chancery provides litigants with a mediation procedure in commercial disputes that meet certain requirements (being able to access the mediation procedure, in fact, "only business disputes where one of the parties is a business entity") formed in Delaware or having its principal place of business in Delaware, and at the request of the parties themselves. In this case, the role of mediator is assigned to a judge different from the one in charge of resolving the dispute.

49. Smith and Gosselin v. Van Gorkom et al. 488 A 2d 858 (Del. 1985).

50. The author firstly highlights how the principle of the supremacy of the management body (board primacy) in the allocation of decision-making power within corporate bodies, consecrated in the corporate law of Delaware, constitutes the main corporate doctrine "of Delaware, and, by implication, US corporate law". Later, the author specifies how such a forecast, widely invoked by industry players, was introduced in the Delaware General Corporation Law during the 1980s in response to the Delaware Supreme Court ruling in Smith v. Van Gorkom. It is also noted that the decision taken by the court went in the opposite direction to the traditional liberal approach of the courts of Delaware in determining the adequacy of internal decisions to companies, especially in the case of decisions taken in good faith by the directors, as in the case word. The decrease in the jurisdictional protection previously granted to the boards by the judges was perceived negatively by the US business community, causing at the same time a tightening by insurance companies, which, from Van Gorkom onwards, increased the costs.

"passive" consultation body of the delegated bodies and profoundly influencing the state corporate governance.[51] About the Caremark sentence of 1996,[52] concerning the duties of care (more precisely, the duties of care and oversight) for the directors, the Court of Chancery established that, although the directors should not carry out an overly pervasive control of the decisions taken by the bodies delegates, they must be equipped with specific control systems for these decisions, to ensure compliance with the laws applicable to social activities and to prevent the imposition of significant sanctions (as happened in this case).

The internal organization structures of many American companies and the corporate law of the entire country have been profoundly modified in light of the principles expressed by the court of Chancery. Close to the Caremark sentence, in fact, many institutions have launched programs and implemented compliance tools aimed at encouraging control by the boards on the work of managers and the principles set out in this precedent were taken a few years later by the federal authorities in the already cited Sarbanes-Oxley Act (Kling, Nugent & Van Dyke, 2018; Steinberg, 2017).[53] The jurisprudence of Delaware courts is constantly evolving, while remaining steadily as a benchmark for corporate governance profiles in US. In the cases most recently submitted to the judgment of the court of Chancery and the supreme court of the state (Maynard, 2014)[54] in addition to having re-framed and crystallized some issues related to the relationship between members and administrative body and the duties of the same,[55] they again stood out for the ability to resolve disputes with de-

51. In re Caremark International, Inc. Derivative Litigation, 698 A 2d 959 (Del. Ch. 1996).

52. Nominated also: "Public Company Accounting Reform and Investor Protection Act" o "Corporate and Auditing Accountability and Responsibility Act".

53. See, Unocal v. Mesa Petroleum Co., 493 A 2d 946 (Del. 1985), Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A 2d 173 (Del. 1986), Mills Acquisition Co. v. Macmillan, Inc., 559 A 2d 1261 (Del. 1988) and QVC Network v. Paramount Communications, Inc., 637 A 2d 34 (Del. 1994) and the influence in society law.

54. Hollinger Intern., Inc. v. Black, 844 A 2d 1022 (Del. Ch. 2004); Black v. Hollinger Intern., Inc., 872 A 2d 559 (Del. 2005); In re Walt Disney Derivative Litigation, 825 A 2d 275 (Del. Ch. 2003); Unisuper, Ltd. v. News Corporation, 2005 WL 3529317 (Del. Ch. 2005); Kalisman, et al. v. Friedman, et al., 2013 WL 1668205 (Del. Ch. 2013); In re Orchard Enterprises, Inc., Stockholder litigation, 88 A 3d 1 (Del. Ch. 2014); In re Comverge, Inc. Shareholders Litigation, 2014 WL 6686570 (Del. Ch. 2014).

55. Significant, among all, the reconstruction made by the judges of the Court of Chancery in Hollinger, for which the corporate law of Delaware: "is intentionally designed to provide directors and stockholders with flexible authority, permitting great discretion for private ordering and adaptation. That capacious grant of power is policed in large part by the common law of equity, in the form of fiduciary duty principles. The judiciary deploys its equitable powers cautiously to avoid intruding on the legitimate scope of action the Delaware General Corporation Law leaves to directors and officers acting in good faith. The business judgment rule embodies that commitment to proper judicial restraint. At the same time, Delaware's public policy interest in vindicating the legitimate expectations stockholders

cidedly rapid timing. If the ordinary timing of the other courts generally took one or two years, the courts of Delaware were able to take their decisions even in a few days or weeks, thanks to the significant specialization of their judges in the departments sector.[56]

The predominance of the Delaware system, which derives from precise tools and systems rooted in the culture of the state itself as a way of managing the life of businesses and the related activities and disputes,[57] is not easily opposed by other states, which therefore they almost always find themselves in the presence of corporate charters competition mechanisms with the first state in all the profiles belonging to the corporate sphere (Paul, 2009).[58]

## The establishment of commercial courts in other confederate states with a view to competition between internal judicial systems

It is observed that a good number of states in particular New York, New Jersey, North Carolina, Pennsylvania, Massachusetts, Maryland, Illinois and Nevada[59] have set up specialized sections for the resolution of corporate disputes, but it is also noted that these divisions, as two of the most important commentators observed (Kahar & Kamar, 2002: 711 ss), were not properly "designed to attract incorporations" (Kahar & Kamar, 2002).

The commercial sections within the courts of first instance, so-called commercial divisions, established in US since the 90s,[60] radically differ from the Delaware Court

have of their corporate fiduciaries requires its courts to act when statutory flexibility is exploited for inequitable ends".

56. "Over the decades a tradition has developed where it is expected that the Chancery Court judges will hear and decide matters on an expedited basis, when necessary, and express their decision in an opinion that is typically of appellate quality".

57. Also from a procedural point of view, Delaware distinguishes itself from other States, having introduced a system of procedural rules that incentivize individuals to exercise their shares, such as, for example, the rules for the payment of the fee award to the non-losing players in the cases.

58. With reference to the trust, the A. reports that Delaware, together with other States such as South Dakota, Nevada and Alaska, have traditionally been considered favorable to the destination of trusts and that, in order to attract these activities, New Hampshire has repeatedly changed its legislation, assimilating it to those in force in the aforementioned States.

59. By way of completeness, ABA mentions the presence of commercial sections in the courts of the following States: New York, Illinois, North Carolina, New Jersey, Pennsylvania, Nevada, Massachusetts, Rhode Island, Maryland, Florida, Ohio, Iowa, Alabama, Maine, New Hampshire, Georgia, Fourth District of Colorado and South Carolina. Other states such as California, Connecticut and Arizona have specialized courts for particularly complex disputes, which include some commercial disputes, albeit generally. See, Aba Section of Business Law's Committee On Business and Corporate Litigation, Chapter. 5, Annual Developments in Business and Corporate Litigation, 2004-2013.

60. More specifically in 1993, New York.

of Chancery. In the first place, they are, in fact, sections created within common courts and not an ad hoc tribunal, as is the court of Chancery, the relevant judges are elected in the context of political elections and make use of juries and therefore not of subjects with specific experience in the sector, for the assumption of their decisions. The jurisdiction of these sections is very wide and the number of cases of a commercial nature represents only a small nucleus compared to the entire number of judgments examined by the courts to which they belong. The commercial sections are generally present only in certain locations of the states concerned, and only at the level of the courts of first instance, without equivalent sections having been placed at the level of the intermediate appeal courts. The territories where these sections were set up, however, highlighted each of the serious problems regarding the timing of the proceedings: the sections, consequently, were set up in an attempt to relieve the courts of first instance from the excessive burden of proceedings and to optimize the related judicial process rather than to compete with the Delaware courts.

All this has made-and still makes rather difficult the development in these states of a large and defined body of precedents in corporate case law. These sections, for the most part, are commonly concerned with contractual and commercial disputes, rather than corporate and governance, and only a few of them publish their decisions and opinions in specific reports that are accessible at any time to interested operators.

### (Follows) The New York experience

A pilot project related to the establishment of a commercial court was initiated in the Supreme Court of New York (Manhattan) in 1993, when there was a gradual loss of confidence in the ability of courts of first instance to resolve disputes of a corporate nature. In some speeches we read how it was considered "unlikely that a business litigant would have been litigated in the state courts in New York. Most such litigants preferred the federal courts, the courts of other states like Delaware, and private (alternative dispute resolution)" (Paul, 2009).

At the basis of a similar task force, in addition to the willingness, so to speak, to encourage the operators of the corporate sector by increasing the degree of experience of the judges in the sector in question, it was also placed the aforementioned attempt to alleviate the pending charges and speed up the timing of proceedings, while reducing court fees.[61] Hand in hand with the establishment of the first true Commercial Division in 1995[62] and the sudden increase in the processing of pro-

61. The Council on Judicial Administration, Report on the Chief Judge's Court restructuring plan, in 52 Record 52, 1997: "the overall objective of the Commercial Division is to concentrate expertise in commercial litigation, so that business disputes can be resolved better and more efficiently."

62. Contee of New York and Monroe.

ceedings by specialized judges, the state authorities did not fail to highlight the need for domestic courts to regain a leadership role in the awarding of the most relevant commercial disputes.

Even the competitive aims, although more vehement than the situation of Delaware, encouraged the community of legal professionals and commercial operators to request the expansion of this experience in other places of the state, something that happened a few years later, together with the introduction of an advanced alternative dispute resolution program, which ensured the composition of the overwhelming majority of the cases submitted to the Commercial Division. The consistency in the progressive advancement of the New York judicial system is found, then, in the same management of the decisions of commercial judges, regularly published and made accessible in electronic form within specific reviews, in a work of constant training of operators on commercial issues that, within the State in question, ranging from securities transactions to industrial secrets, from contractual violations to more specific corporate governance profiles.

Therefore, thanks to a particular efficiency, cost-effectiveness, speed in issuing decisions, use of the body of precedents, technological innovation and opportunities to use ADR procedures, as well as a vast work of publicizing the experience and expertise of the domestic court, the Commercial Division acted as a "engine" and a term for comparison also for other States, being studied and/or emulated in large part also by other jurisdictions, such as Pennsylvania, Massachusetts, Maryland and Florida.[63]

### (Follows) The Illinois experience

Even Illinois (specifically, Cook County, Chicago), in fact, launched a pilot project in the early 90s aimed originally at the reorganization of the calendar of judicial proceedings, which was expected to be achieved through the assignment to judges of the management of entire proceedings (so-called individual calendars), distinguished according to the treatment of disputes of a general nature (general calendar) and of commercial disputes (commercial calendar).

This reorganization was necessary due to the amount of pending judgments, among the highest in the whole country and gradually increasing. If, on the one

63. "Claims arising out of business dealings such as securities transactions, business sales, business agreements, trade secrets and restrictive covenants, breach of contract, breach of fiduciary duty, fraud, misrepresentation, business torts, and statutory violations arising out of business dealings. Other claims within the Commercial Division's parameters include Uniform Commercial Code (U.C.C.) transactions, complicated commercial real estate transactions, shareholder derivative suits, commercial class actions, commercial bank transactions, internal affairs of business organizations or liability to third parties of officials thereof, accountant or actuarial malpractice, and complicated environmental insurance coverage litigation".

hand, the start of this experimental program was therefore to be properly linked to the internal reorganization of justice, the same was also aimed at creating a specific experience "in the area of commercial litigation" in order to "enhance the commercial climate in Cook County".[64]

As for New York, the establishment of the Commercial Calendar and the Chicago Chancery has generated more than positive effects for the state judicial apparatus (Chanen, 1993)[65] making it possible to speed up the management system of commercial causes, indeed realized thanks to the subsequent introduction of systems of alternative composition of disputes, first of all the mediation, and a greater technicality in taking decisions, thanks to the progressively acquired experience of the judges on the subject.[66] Close to the establishment of the specialized section, it was noted, in fact, how the introduction of the individual calendar for corporate cases had been "tremendously well-received by the commercial litigation attorneys", becoming a successful experience and a hole looked at with particular favor by the entire business community, with most of the actions established without requests for jury involvement in the judgments, but with full confidence in the professionalism of the judges specialized for corporate law profiles.

64. Professionals in charge of the New York task force, in fact, as advisor on the matter for other States.

65. This double track is well summarized in the words of Judge O'Connell, who, in 1993, expressly wished "to foster the commercial environment in Cook County and the metropolitan Chicago area by providing the specialized courts for commercial disputes so that commercial cases won't have to wait in line behind medical malpractice, structural work act and product liability cases, and the vast amount of time it takes to prepare those cases for trial. So, commercial cases would be given some priority toward earlier disposition".

66. Currently, the Court of Chancery deals with cases concerning (without limitation) "class actions, arbitration, injunctions, temporary restraining orders, mandamus, quo warranto, declaratory judgments, interpleader, ne exeat, specific performance, rescission and reformation of contracts, creditors rights, complaints for contribution, actions to quiet title and the setting aside of deeds, partition, equitable liens, redemption rights, declarations concerning the constructions of trust and wills (other than during the period of an estate administration), the appointment of trustees, successor trustees and the removal of trustees (other than during the period of an estate administration), receiver ships, accounting cases, dissolution of partnerships and corporations, or other proceedings under the Corporations and Partnership Acts, proceedings under the Illinois Uniform Transfers to Minors Act (760 ILCS 20/1 et seq.), statutory review (except under the Workers' Compensation Act (820 ILCS 305/19), and all administrative review (except tax matters, matters under the Unemployment Insurance Act (820 ILCS 405/1100), and matters concerning vehicle impoundment under ordinances 8-8-060 and 8-20-015 of the Municipal Code of Chicago (1993), and decisions of the Illinois State Toll Highway Authority imposing civil fines pursuant to authority granted under the Toll Highway Act (605 ILCS 10/10), and all other actions or proceedings formerly cognizable in courts of Chancery not otherwise provided for".

## (Follows) The experiences of North Carolina and Nevada

In light contrast to the view of the courts, this was mentioned, the doctrine generally mentions the states of North Carolina and Nevada, for some traits aligned to the peculiarities of the court of Chancery of Delaware.[67] In fact, in these states, the attractive purpose for corporate bodies has undoubtedly played a more important role than the pre-eminent objective linked to the optimization of proceedings.

With reference to North Carolina, the first commercial section was established in 1995 within the domestic superior court in the light of the need to create a system that would provide companies with a certain degree of flexibility and support "to allow businesses to operate successfully" and, indeed, that "will attract businesses to locate and be incorporated in North Carolina".[68] Moreover, unlike other states, the internal commercial court, over time, has delegated the management of disputes to a single judge (so-called Special Superior Court Judge for Complex Business Cases).

Similar to the characteristics of the commercial sections of other states, the North Carolina business court provides a procedure in the presence of a jury, which also makes an assessment of the admissibility of the citation. In fact, it is assessed whether a specific case may or may not be subject to the judgment of the business court, with a view to developing key decisions in the corporate governance and corporate affairs sector,[69] which are also made available through publication. The court in question, even following the handling of a case of particular importance in the year 2001,[70] was able to achieve its own identity and establish itself at the national level as a solid and deserving structure of appreciation by the operators. It is not by chance that this court has been very successful in the State Bar Association and has been taken as a reference also in other jurisdictions intended to establish business courts, such as Maryland and Georgia.[71]

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67. States which, in any case, from a chronological point of view have followed Delaware and New York in the establishment of their commercial courts.

68. N.C. Super. Ct. R. 2.1 (2004).

69. "This comports with the idea that one key factor in determining assignment to the Business Court is whether the outcome will have implications for business and industry beyond the conflicts of the parties to the litigation. If a written decision on disposition of the case would provide predictability for others in the same business or industry in making their business decisions, the base will more likely be considered for designation". See, North Carolina Business Court, About the North Carolina Business Court: definition of a complex business case.

70. The case concerning the Wachovia/First Union/SunTrust merger (First Union Corp. v. Suntrust Banks, Inc. (NC Super-Aug. 10, 2001) had a major impact on the state's commercial law and was of particular importance because it is was proof of a rapid analysis of complex legal questions.

71. A feasibility study carried out in Georgia has shown that lawyers try to be assigned to the business courts of North Carolina, including attorneys from adjacent states, motivated by the ability of such courts to examine complex legal issues, predictability, fairness and impartiality

With reference, however, to Nevada, it seems useful to make a reflection on the origins of the creation of commercial courts by Professor Jeffrey W. Stempel, who led the year 2000 the subcommittee for the examination of business court and business laws,[72] stressed that the specialized courts in the corporate sector had become a concrete reference point for the management of commercial affairs and the development of modern judicial systems and as the then still limited experience of the most important commercial courts (ie, the Business Court in North Carolina, the Commercial Division in New York and the more sophisticated Court of Chancery in Delaware)[73] was already very positive, although in the absence of empirical studies to support this assumption. The commercial courts located in Reno and Las Vegas have specialized in dealing with issues concerning various sectors related to commercial law, from anti-trust to class actions, from commercial practices related to the application of the uniform commercial code to derivative suits, which have represented the largest number of cases treated. This advancement, of course, has been particularly appreciated by legal professionals such as lawyers and experts who, in general, have confirmed that the opportunity to avail themselves of judges specializing in corporate matters is a valid alternative to the submission of disputes to federal courts.

In light of this, Nevada, although never coming to equal the Delaware as a whole, has entered forcefully in competition with that state in order to establish corporate bodies within its borders. With reference to jurisdictional matters, it should however be noted that a high percentage of public companies incorporated in Nevada subsequently relocated their headquarters to other states, as is often the case in Delaware. The laws of Nevada, unlike those of Delaware, do not provide that the directors of companies initially incorporated in Nevada and subsequently transferred elsewhere, agreed in Nevada even in the absence of sufficient contacts with that state (consent statute) (Kahan & Kamar, 2002, 2002: 715 ss).[74]

72. A legislative sub-committee created to encourage the development of Business Courts in Nevada in the year 2000. The entire speech, Sub-Subcommittee for the Examination of the Business Court and Business Laws, Minutes of the Meeting of the Legislative Commission Subcommittee to Study Methods to Encourage Corporations and Other Business Entities to Organize and Conduct Business in This State, January 7, 2000

73. In more detail, Nevada's Chief Justice Robert E. Rose had pointed out that the example to be adopted for the establishment of business courts in Nevada was not so much represented by the Delaware-State with a different system of appointment of judges-but from New York.

74. In order for the domestic courts to have jurisdiction over the directors of domestic companies, Delaware has adopted a specific law under which it is presumed that they have consented to the establishment of that jurisdiction (as a result of a 1977 ruling by the US Supreme Court in that it was established that the directors of a Delaware company did not have sufficient "minimum contacts" with that State in order to justify the establishment of their personal jurisdiction in relation to them. "Case Shaffer v. Heitner, 422 US 186 (1977)). Similar laws have been adopted by other states, but not by Nevada.

Therefore, it remains uncertain whether the Commercial Divisions of Nevada possess or not a personal jurisdiction against the directors of companies established in Nevada but with their own headquarters relocated elsewhere. Without prejudice to the above considerations with regard to the introduction in other states of increasingly sophisticated systems in the commercial and corporate sector, to ensure that the phenomenon of competition between these states and Delaware fades provided that this is deemed really necessary for a increase in the well-being of companies and, secondly, of individual states it does not seem sufficient to issue regulations that are more favorable to operators of the business market or the organization of judicial systems equally competitive, but, as the following paragraph proposes to highlight, the adoption of uniform acts by the federal government is fundamental or, at least, the drafting of codification tools by private-sector institutions, such as, in some cases, has already occurred. Indeed, these instruments, if used on a large scale within the US, would allow a substantial uniformity to be achieved between the provisions in force in individual states, while maintaining the doctrinal and jurisprudential theories progressively developed in the same states.

## The adoption of Model Business Corporation Act: tools for codification, standardization and alignment of the majority of states

The pluralist character of US corporate law has often been taken as a model both for its positive profiles and for its less encouraging traits: on the first front, for having favored the development of particularly dynamic regulatory "laboratories"[75] (identifiable in individual countries), which led to the creation of different and efficient legislative solutions with respect to the needs of business in progressive evolution; in more "negative" terms for having made available to companies a way of "escape" from laws characterized by a lower favor and/or particular rigidity, an option that, in most cases, could not be configurable or, in any case case, it would be decidedly limited, in a unit order without competitive features.

The experience of Delaware has generally been evaluated in US as evidence of the proper functioning of the drafting and codification of company law carried out by private institutions and the achievement of more positive results from an economic-political point of view compared to those related to the alternative option, represented by the attribution of legislative competence to government authorities located at federal level. The precise origin and the character of effective superiority attributed to Delaware as the order chosen by many commercial operators have

75. This term was coined by the U.S. Supreme Court in the New State Ice Co v. Case Liebmann, 285 U.S. 262 (1932), a case not directly focused on the practices of corporate incorporation, but nevertheless taken up again in the following years precisely in the context that concerns us.

long been debated and questioned, its almost constant primacy with reference to the number of constitutions of new corporate entities is certain. However and according to some rumors, precisely in contrast to the phenomenon of increasingly evident Delaware supremacy, we have tried to develop over time a series of instruments for regulating commercial and corporate law that are alternative to the multiple legislative provisions in force in individual states. A tool that can be united to a "model" of best industry practices emerged, originally aimed at companies willing to establish themselves in countries other than Delaware.

In this regard, the American Bar Association (ABA),[76] which was responsible for proposing some changes to the corporate organizational structure to streamline the structures of closed companies, has constantly carried out specific initiatives, with particular reference to the activity codification of provisions in different regulatory areas, which over time have led to the adoption, by the individual state systems, of rules specifically dedicated to companies.

ABA[77] published the Model Business Corporation Act (MBCA) in 1950, followed in 1984 by its most up-to-date version through the inclusion of "amendments" concerning individual provisions purpose of providing operators with a uniform basis of company law. First, the Act aimed to provide a unique notion of "corporation", which up until that moment was different from state to state.[78]

The need to obtain a uniform, or in any case harmonized, "normative" corpus had emerged in this period clearly due to the increase in commercial activities conducted on a cross-border basis and the consequent impact with different company regulations. The provision of an instrument such as the Model Act has, therefore, allowed the individual States to achieve a sort of harmonization of their own regulations, favoring at the same time the interpretative work of the operators called to deal with different regulations. MBCA does not constitute a real regulatory instrument

76. ABA, with approximately 400,000 members, is one of the largest professional organizations in the world. As the "voice" of the legal professions within the United States, since 1878, the ABA is constantly working to improve the administration of justice, promotes assistance programs for the legal professions, accredits legal academic faculties and provides programs there continuous training.

77. More specifically, the ABA's Banking and Business Law Committee promulgated the MBCA in 1950 as a successor to another, indeed rather unpopular instrument, the Uniform Business Corporation Act, adopted in only three states. Following the publication of the first version of the Act, the Committee adopted amendment texts and provided particularly detailed opinions on the application of the Act itself. The Committee also takes care of all requests for clarification concerning the functioning of private and public companies, and presents programs and texts/reports/related to the Act.

78. The Revised Model Business Corporation Act (RMBCA), published in 1984 by the ABA, took into account the most appropriate legal settings under the laws of the individual Confederate States. The ABA, in fact, has carried out a review of the first act in order to favor and increase its popularity among the real States. The most important revision intervention culminated, in fact, with the new Act of 1984, which was followed by far-reaching revisions.

(Volynkova, 2013),[79] since it does not possess ABA any competence for the enactment of legislative acts, but nevertheless represents a very important "codification", having summarized the numerous currents developed in the various States of confederation in the corporate sphere (including, of course, the fundamental regulatory provisions of Delaware) and touched, in fact, all aspects related to the life of corporate bodies. It is not by chance that the Model Act has been taken over by many states as a basis for the relevant corporate legislation,[80] thus ensuring substantial consistency between the provisions adopted by the states and a rather rapid assimilation of the corporate governance rules considered most appropriate by the same.[81]

MBCA, therefore, can be considered as a "selection" of legal currents that can be adopted, or adaptable, at will by individual states in the construction of its corporate law, not differently from the ways in which investors and managers evaluate the regulations in force in the individual states on the basis of the greater advantages offered by them, thus presenting itself as a third-level source in US corporate law landscape (Bebchuk, 2005; Ebehuk & Hamdani, 2012: 1.218 ss; Ringe, 2016: 12 ss; Cullen, 2014: 212 ss).[82]

The origin of MBCA would hardly be reconciled with the theory that states would enter into competition to attract the largest number of corporate constitutions within their own borders. The editors of the Act, in fact, as members of a committee of forensic extraction (among others coming, for the most part, from states that would then have adhered to the provisions of the Act itself), in their work of drafting could hardly be motivated by the desire to stimulate the number of constitutions within a given state. Rather, the process of drafting the Act would be linked to the willingness of the editors to increase their reputation in a sector of particular importance such as the company. Furthermore, the assignment to this committee of the task of drafting a corporate regulatory base would be indicative of States' effort to simplify the process

79. Which is stated that: "The Model Act was created in 1950 to unify States' definitions of corporations. The initial 1950 version of the Act provided that the business and affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this State or stockholders of the corporation unless the articles of incorporation or by-laws so require. The articles of incorporation or by-laws may prescribe other qualifications for directors".

80. The Act regulates, in fact, the steps necessary to establish a company, the effects of limited liability, the structure of corporate governance, the formalities required to maintain a limited liability regime, voting rights and shareholders. Furthermore, some provisions are so called default provisions, which are applied only if the Articles of Association do not regulate the same subject (for example, at the point of quorum constituting the shareholders' meetings).

81. Indeed, the Act has placed itself as the main competitor of the Delaware General Corporation Act in terms of popularity among the various state legislations.

82. Which highlights with surprise how, despite the pluriformity of the US regulatory system, "the best documented finding in the empirical literature on the U.S. corporate chartering competition is that a high degree of uniformity has emerged in American corporate laws".

of drafting the regulatory framework, rather than interstate competition in the sector in question.

The Committee, prompted by the publication of the first version, promptly updated MBCA in order to authorize the administrative bodies to determine their own remuneration, unless otherwise provided in the deed of association (Volynkova, 2013).[83] This change was necessary because, while at the end of the 1800s and during the early 1900s, it was considered peacefully that the members of the administrative bodies were not entitled to receive any compensation for the services provided to the related companies,[84] in the reason to possess portions of the share capital as shareholders or investors in the light of the evolution of corporate bodies in the post-war US period, as confirmed in some leading cases, had come to the conclusion of an opposition (Volynkova, 2013).[85] Moreover, the need to recognize compensation for directors was closely linked to the need to place corporate governance in the hands of professionals with increasingly higher skills and competences that, unlike the previous era, typically held only small portions of capital, or even no share of the same (since the companies were gradually transformed into large corporations with wide-

83. which is referred that in response to the aforementioned jurisprudential rulings in the matter of directors compensation, the Committee has revised the Model Act in order to authorize the directors to determine their remuneration, through the addition of the provision pursuant to which "the board of directors shall have the authority to fix the compensation of directors unless otherwise provided in the articles of incorporation".

84. Lofland v. Cahall, 118 A. 1, 2 (Del. 1922), in which the court established that the administrators "were presumed to serve without compensation", in the absence of a provision to that effect in the articles of association or in the deed of incorporation. The Supreme Court of Delaware, in the last instance, established that the directors could be remunerated for the services rendered in relation to the office of directors only if the social acts authorized such remuneration. On the contrary, for services rendered outside the office of director, remuneration was possible only in the presence of an "express contract providing for such a payment for such services" and if the contract had been stipulated with the directors themselves. See also Nat'l Loan & Inv. Co. v. Rockland Co., 94 F. 335, 337, 8th Circuit, 1899 ("Directors of corporations (...) serve without wages or salary). They are generally financially interested in the success of the corporation they represent, and their service as directors secures its reward in the benefit which it confers upon the stock which they own"), or even, Finch v. Warrior Cement Corp., 141 A. 54, 63, Del Ch. 1928.

85. Which observes how the phenomenon of growth of the American economy has radically transformed the corporate economy. The companies, in fact, no longer appeared as simple local law bodies, but as large national or transnational bodies, no longer owned by a few investors, but by thousands of subjects scattered throughout the country. In this vein, the directors previously in office, traditionally appointed within the (reduced) circle of members, were replaced by new members, managers and professionals who typically held small shares of the capital, or no portion thereof. Since the latter could not have an intrinsic interest for the realization of social profits thanks to the performance of their service, in the absence of the holding of shares/shares, the need was made to introduce the remuneration as the sole source of incentive for the candidates for the office of directors.

spread shareholding) and that, consequently, could be pushed to the best achievement of corporate objectives only on the basis of a right to remuneration (and no more than participation to dividends).

It can not be overlooked that the provision in question (article 33), which allows the payment of remuneration to directors in the absence of a contrary provision in the deed of incorporation, has been fully taken over and endorsed by the majority of confederate states (Welch, Turezyn & Saunders, 2014; Bebchuk, 2005: 844 ss.),[86] remaining virtually intact even in the current version of the Act, after more than sixty years. Numerous changes in the corporate regulations issued by the states have been made on the basis of the Model Act, as updated from time to time by the ABA Committee and, at the same time, as numerous doctrinal items have often invoked an alignment of the most "independent" regulations to some provisions of the Act itself (Heller, 2015).[87]

It is noted that the majority of US States have adopted the Act as the basis for their internal corporate regulations, sometimes fully resuming their forecasts, sometimes modeling and integrating them in the light of the majority of jurisprudential and doctrinal currents emerged in individual states (Kahar & Kamar, 2002),[88] thus mak-

86. Which highlights the alignment of the Delaware legislation (Article 141 (h) of the General Corporate Law "Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors"), occurred in 1969, to change the MBCA in relation to the remuneration of directors, despite a previous national jurisprudence expressed with the opposite sign. In any case, the authors point out that it is at least sustainable that the resolution by which the right to receive compensation is attributed to the directors must be submitted to the forms of safeguard provided for in the internal regulations with regard to the conflict of interests. This interpretation, in fact, would be compatible (if not made compulsory) by the requirement established by the jurisprudence, under which the compensation for company management services should not be excessive or lacking in reasonableness. numerous doubts have arisen over time, in fact, with regard to "excess" fees attributed to directors. For a comparative examination of the legislation of the Delaware and the MBCA, indeed with reference to the powers of the shareholders and the directors.

87. Which highlights how the Californian State, compared to the CD. double derivative theory (relating to the establishment of court cases by parent company members in favor of subsidiaries) evolved over time in many jurisdictions, including Delaware and New York, and also applied in the Model Business Corporations Act, has not yet aligned. THERE. hopes that the Californian courts will carry out a work of adjustment in this regard, also considering the traditional inspiration that the courts of Delaware have provided to the judges of California.

88. The authors in an examination about the competitive aspects between the various States, show, in any case, that the state regulations are not, however, to be confined to replicas of the Model Act. As noted in the previous note, in fact, "many states do not follow the Model Act. The AA also underline the fact that states generally do not provide explanations about the rationale for enacting the relevant laws, and as a result, a historical analysis of each revision made by the states to the relevant corporate laws is necessary. The internal political economy and the incentive structure at the base of the revisions to the corporate laws would suggest, in any case, to the opinion of the authors, that the desire to attract

ing it evident how the adoption of unitary regulatory instruments that do not depend on more or less competitive between states represent a significant advancement of the whole system, both for legal and commercial operators.

## The Uniform Partnership Act

In addition to the Model Business Corporation Act and the activity carried out by ABA in this sense, a digression on the codification work conducted by the National Conference of Commissioners for the Standardization of State Legislations (National Conference of Commissioners on Uniform State Laws-NCCUSL)[89] is required in corporate area. As for ABA, in fact, even the contribution provided over time by NCCUSL[90] was particularly significant, considering that a large number of states generally took ownership of legal texts proposed by this Commission.[91]

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corporate constitutions procedures is not the real objective of the states themselves.

89. The NCCUSL is a commission established in 1892 and composed of lawyers, state and federal judges and law professors generally nominated by state governors, charged with drafting laws on different areas of law, to be proposed later for the promulgation in each State. The NCCUSL, as a private association, has no legislative power. The uniform acts deriving from it can take the form of laws only to the extent that they are adopted by individual state legislator

90. In truth, also with the contribution of advisor belonging to the ABA.

91. Indeed, other corporate forms can be found in the U.S. Consider for example only the proprietor ships, the cooperatives and the cd. "S" corporations. The three corporate forms listed, however, corporations (INC.), Limited liability companies (LLC) and partnerships, are the most widespread forms, each with distinct advantages and disadvantages. As you know, a corporation is a legal entity owned by a specific shareholder, with limitation of liability in favor of the shareholders, whose assets are protected against corporate debts, and a more complex business structure compared to other corporate forms, with particularly high administrative costs and tax obligations and particularly complex legal requirements. From a fiscal point of view, corporations are generally taxed separately from their members. Members are taxed on the basis of the profits paid to them through salaries, bonuses and dividends. Any further profit, however, is subject to a tax rate for business income, generally lower than that applicable to personal income. An LLC, on the other hand, presents itself as a "hybrid" legal form, which allows to enjoy the limited liability typical of corporations and, at the same time, of certain tax benefits (LLC is generally not recognized as a separate entity for tax purposes. and every tax is applied to the personal income of the members, in fact, while the federal government does not tax the income of the LLCs, some states do so) and a certain operational flexibility typical of the partnerships. Depending on the state, an LLC may be held by one or more individuals, corporations, or other LLCs. With a partnership, however - in its various subspecies of general partnerships, limited partnerships or joint ventures-two or more individuals share ownership and contribute to all aspects of the business, such as economic resources, assets, or workforce, and, in last analysis, also the profits and losses produced by it. As partnerships involve more stakeholders in the decision-making process, it is important that the partnership agreements are set up to set any aspect of decision-making, including those on profit sharing, the resolution of disputes, the exchange of ownership and the termination of the partnership. These agreements, however, are not mandatory, but strongly recommendable.

NCCUSL in an era in which the number of corporate bodies interested in the establishment of partnerships, was constantly growing, proposed a uniform law model, progressively updated, in order to mitigate the differences between individual states in point of constitution and governance of these corporate forms.[92] The need to adopt a uniform text in this regard was to be linked not only to the lack of uniformity between the practices of individual states in this area, but also to the absence of a specific consolidation of the legal theory in this area and a reduced degree of experience "on matters of considerable importance in the daily conduct and in the winding up of partnership affairs".[93]

UPA and its most up-to-date version were designed to regulate the relations between partners in circumstances where the aforementioned aspects of the life of institution were not specifically agreed in partnership agreements[94] (a situation, however, traditionally only in partnership of reduced size), thus providing a stable legal basis and an interpretive uniformity, regardless of the state of establishment of each partnership. Also in this case, as for MBCA, almost the entire group of states has reproduced in internal laws the text, before UPA and then RUPA, sometimes introducing some variations on certain provisions of the same (Smith, 1995).[95]

92. In the preparatory works and in the preamble to the text of the law, in fact, it is expressly mentioned that; "Uniformity of the law of partnerships is constantly becoming more important, as the number of firms increases which not only carry on business in more than one state, but have among the members residents of different states".

93. "It is however, proper here to emphasize the fact that there are other reasons, in addition to the advantages which will result from uniformity, for the adoption of the act now issued by the Commissioners. There is probably no other subject connected with our business law in which a greater number of instances can be found where, in matters of almost daily occurrence, the law is uncertain. This uncertainty is due, not only to conflict between the decisions of different states, but more to the general lack of consistency in legal theory. In several of the sections, but especially in those which relate to the rights of the partner and his separate creditors in partnership property, and to the rights of firm creditors where the personnel of the partnership has been changed without liquidation of partnership affairs, there exists an almost hopeless confusion of theory and practice, making the actual administration of the law difficult and often inequitable. Another difficulty of the present partnership law is the scarcity of authority on matters of considerable importance in the daily conduct and in the winding up of partnership affairs. In any one state it is often impossible to find an authority on a matter of comparatively frequent occurrence, while not infrequently an exhaustive research of the reports of the decisions of all the states and the federal courts fails to reveal a single authority throwing light on the question. The existence of a statute stating in detail the rights of the partners inter se during the carrying on of the partnership business, and on the winding up of partnership affairs, will be a real practical advantage of moment to the business world".

94. The RUPA revises the fundamental provisions of the partnership law aimed at reflecting modern commercial practices and provides for some provisions in addition to those of the UPA, such as the dissociation of the partners, in contexts other than liquidation, and the transformation procedures. and merger, as well as regulating the processing of foreign LLPs operating in a US State

95. According to art. 18: "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules ".

Only the state of Louisiana, whose partnership rules are similar to UPA's forecasts, has not adopted either of the Acts.[96] NCCUSL paid particular attention to the great flexibility guaranteed by UPA, which can be found in its being "optional" compared to agreements established in previous partnership agreements and, above all, to RUPA provisions, characterized by a certain openness and favor towards the form of partnerships (consider, for example, the possibility of converting into limited partnerships more than examined and merging with other bodies or, again, to the continuity of life of the partnership even in the exit phase of partners). Consider the evaluation conducted by the courts on the profiles of partners' responsibilities with respect to third parties in the light of provisions contained in UPA in order to protect the interests of third parties and assert the responsibility of partners or the partnership body (Smith, 1995). In this regard, a decision line of judges was observed aimed at protecting the interests of third parties linked to the company from commercial or economic relationships, extending on a constant basis the responsibility to all partners even in situations where negligent conduct was attributable to a only among the same.[97] Now, as a result of substantially unequivocal judgments in this respect, most states, in the early 1990s, approved laws by which domestic companies were allowed to form partnerships with limited liability (limited liability partnerships, LLP), thus

96. The adoption of the Uniform Partnership Act (UPA) in 1914 and its most recent updated version, the Revised Uniform Partnership Act (RUPA), in 1997.529 therefore fits into this context, and regulates some of the main aspects of the life of partnerships-on the basis of precise prerequisites to establish whether a partnership can be considered to all intents and purposes-such as the constitutive procedures, ownership structures, relations between partners and the rights owed to them, the partners' burdens third parties, the composition of disputes related to the life of the company and the procedures for liquidation and dissolution of the same.

97. Thus, in FDIC v. Braemoor Assocs., 686 F.2d 550 (7th Cir. 1982), in which only one of the members was guilty due to the execution of numerous illegal operations and loans. In this circumstance, the judges, underlining how the law imposed higher duties on members in the event of unlawful conduct by the related shareholders, compared to possible unlawful conduct by third parties, confirmed the responsibility of the other shareholders, in light of the inspiring principles of the partnerships. This principle reappears in Georgou v. Fritzshall 145 B.R. 36 (Bankr. N.D. Ill. 1992), in which, in a case of bankruptcy, non-guilty shareholders had found that the serious fault of the relevant partner had taken place not in the ordinary course of business, thus exempting them from any liability. The court, however, noted that Article 13 of the UPA was not intended to protect the partners exempt from guilt, but rather to expose the partnership to liability. The purpose of third party protection was also applied by the courts with respect to the limited partners with respect to the conduct of the general partners. In the Kazanjian case v. Rancho Estate, 1 Cal. RPTR. 2d 534 (Cal. Ct. App. 1991), for example, the court ruled according to the principle that the limited partners are, in some ways, comparable to the creditors of the partnership.

raising the degree of protection of individual members[98] and avoiding, in this way, the attribution of a responsibility in a broad sense.

## Reflections on the growth of mobility capacity of corporate bodies by virtue of the introduction of common corporate models in EU context

The full recognition by the community judicature of the cases of cross-border transfer of registered office as effective modalities for exercising the principle of freedom of establishment has only recently occurred and (Mäntysaari, 2010: 254 ss; Borg-Barthet, 2012: 136, 143 ss; Behrens, 2002: 503 ss; Wymeersch, 2000: 629 ss; Lauterfeld, 2001: 79 ss; Looijenstijn-Clearie, 2000: 636 ss; Omar, 2004: 404 ss; Rehberg, 2004: 4 ss)[99] nevertheless, numerous difficulties with regard to the actual implementation of this operation, mainly due to the absence of uniform legislation and the firm will of states to determine the law applicable to companies through the choice of connection criteria, continue to persist, it should be noted that the cross-border transfer of the registered office has, in reality, received express discipline within some community acts.

The practice of cross-border transfer of headquarters was specifically regulated within the regulations concerning common corporate vehicles: in the founding regulation of European Economic Interest Grouping (EEIG),[100] European Society (Gutman, 2014: 332 ss; Liakopoulos, 2010, 2017)[101] and European Cooperative Society (ECS) prior to its withdrawal. Even in the proposed regulation relating to SPE[102] spe-

98. See, art. 306(c) RUPA: "An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner".

99. CJEU, C-212/97, Centros v. Ltyd v. Erberevs-og Selskabsstyrelsen of 9 March 1999, ECLI:EU:C:1999:126, I-01459. C-81/87, Daily Mail of 27 September 1988, ECLI:EU:C:1988:456, I-05483. C-411/03, SEVIC Systems of 13 December 2005, ECLI:EU:C:2005:762, I-10805.

100. See art. 8 of the Regulation (CE) n. 2157/2001 provides for the possibility of transferring the SE's registered office from one Member State to another without this having any negative consequences on the continuity of the legal personality of the SE problem which, as we have seen, is the main one in the context of the transfer tout court of the headquarters of national companies. It should be remembered, however, that the SE regulations coincide with the registered office and the registered office and, consequently, any movement of the registered office must take place according to the provisions of art. 8 and therefore also include the parallel transfer of the actual site.

101. See the art. 7 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.8.2003, p. 1-24.

102. Article 35 of the proposal for a Council regulation of 25 June 2008 on the statute of the European private company. Please note that the SPE has the obligation to have both the registered office and the central administration in the territory of the Union, but not also to make them coincide. The SPE may therefore transfer its registered office to another Member State, retaining its legal personality and

cific provisions on cross-border transfer are found.

Therefore, there is no doubt that, by expressly regulating this mode of cross-border mobility and making it possible, in general, to transfer the registered office to other member states without the prior dissolution and the consequent loss of legal personality of common corporate vehicles, EU legislator has taken a step forward in order to allow the implementation of operations which, while fully falling within the scope of the principle of freedom of establishment which has always been guaranteed to companies by community law, were and still remain difficult to be "accessible and exploitable" by national companies.

However, in spite of this intuition by the European legislator and the conviction expressed by some Community institutions for which common corporate vehicles, "intended to replace the existing forms envisaged by individual national laws, have a high potential and should therefore be further developed and promoted",[103] it has already been pointed out how the limits are found in the capacity of such models to make the transfer operations of the headquarters actually possible (Frada de Sousa, 2009).[104]

The obstacles derive, in particular, from the difficult reading and the complex coordination of the system of sources relating to common models, which often does not facilitate its use, and from the links that they still maintain with national laws. Moreover, this difficulty can be clearly understood considering that the Treaties assign to EU a specific competence for the adoption of regulatory harmonization measures in a large number of areas, such as procedures for the training of institutions, dividend distributions to shareholders, the issuance of new shares, the execution of extraordinary operations, with a ray of EU intervention, prima facie, pervasive in the sector.

Despite this pervasiveness (Enriques, 2006: 1 ss; Davies & Lyndon Davies, 2010: 294 ss)[105] it has been highlighted that European company law currently has a limited

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without the need for liquidation.

103. Conviction reaffirmed by the European Parliament in the Resolution of 14 June 2012 on the future of European company law (2012/2669 (RSP)), in which Parliament again urged the Commission to define measures to facilitate cross-border mobility of the Union.

104. "The possibility of cross-border transfer of a company's registered office, either through a cross border merger, or on the basis of the SE regulation, presently faces significant pitfalls and uncertainties which render untenable the Commission's current no-action strategy regarding the adoption of the 14th company law directive on the cross-border transfer of registered office. In particular, a cross-border transfer of registered office alone from one Member State to another through a cross-border merger with a company incorporated in the Member State of destination is actually unavailable, at least for companies wishing to relocate their registered office to a real seat Member State while keeping their central headquarters elsewhere".

105. Who, after having carried out an analysis of the European corporate law landscape, with specific reference to the acts of secondary standardization, and the active role played by the Community institutions, concludes with the inability of the European company law to actually affect life of the companies,

impact on the ways in which medium-large companies, are managed and controlled: this, firstly, because law does not regulate matters such as the fiduciary duties of the directors and the remedies available to shareholders; furthermore, since full enforcement of the legislation in force is problematic and, finally, because court's intervention in this sector remains rather sporadic. In light of this, European law tends to be implemented and interpreted differently from state to state, in line with the approach, doctrinal and normative, developed in each. Furthermore, according to this doctrine, most of European company law rules can be classified as optional and derogable. As a result, European directives and regulations play no role in solving problems related to corporate forms. On the other hand, the relevant national laws contain the key rules, which certainly have consequences on the governance and management of companies. As highlighted by some voices, the sentence in C-210/06, Descartes case of 16 December 2008 (Johnston & Syrpis, 2009: 386 ss)[106] represented an important incentive for the community legislator to adopt a directive on the cross-border transfer of the seat which, even if it went to regulate only the possibility of transferring the registered office and the actual office would, in any case, prove more efficient, also from a cost-benefit point of view, of the trans-frontier transfer possibilities offered by the regulation on the European Company and the directive on cross-border mergers (Frada de Sousa, 2009).

Consequently, it can only be welcomed by the intervention of EC which, in Action Plan on the European company law and corporate governance of 2012[107], after having highlighted, in fact, the lack of uniform legislation allowing companies to transfer the seat in other member states maintaining its own legal personality with the exception of SE, SCE and GEIE statutes, has highlighted the need to start from a more solid information of economic operators and a greater dissemination of knowledge of models in the European territory before being able to proceed with the adoption of any initiatives in this area.[108]

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and how they are governed, since the position of the Member States is much more relevant, naturally with every distinction in the case ("Member States interact with EC institutions in order to affect the outcome of its harmonization efforts and, in the process, alter their company laws to this purpose", or "First of all, in some jurisdictions rules implementing trivial EC corporate law provisions are nontrivial, simply because their policymakers, lawyers, and judges take them seriously. For instance, this is the case for rules on contributions in kind in Germany").

106. CJEU: C-210/06, Cartesio of 16 December 2008, ECLI:EU:C:2008:723, I-09641.

107. COM (2012) 740 of 12.12.2012; "Action Plan: European Company Law and Corporate Governance-a modern legal framework in favor of more committed shareholders and sustainable companies".

108. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 December 2012, "Action Plan: European Company Law and Corporate Governance - a modern legal framework in favor of more committed shareholders and sustainable societies "COM/2012/0740 final, parr. 4.1-4.4.

## Concluding remarks

In an American and European society, two legal worlds are very far from each other, in some ways at the antipodes, and are destined, at least in the foreseeable future, to remain such.[109] On the basis of the investigations carried out and in light of the peculiarities of European and US corporate system[110] it is possible to extend the application scope of the aforementioned statement to the European world, in comparison with that of US.

The two systems differ, in particular, due to a substantial regulatory flexibility that broadly permeates the corporate structure of individual US states which, by tradition and by the very legal nature of the American world, have acted on separate tracks and in general loose by constraints of uniformity and, on the other, for a tendential rigidity of the European legislative model (not necessarily to be understood in negative meaning).

We have also seen how, in US, we are faced with a high degree of jurisprudential sophistication and specific experience gained in the sector by the judicial bodies, which allowed the courts, especially for those of Delaware and other "pioneers" states, to introduce their principles in the community of commercial operators, judging on individual cases almost for training and didactic purposes.

As in the US system, it is allowed to companies, generally without particular impediments, to proceed to regulatory arbitrage in order to evaluate the nice points of the laws of individual states, with possible "exit" from the original constitution; and subsequent establishment in a different state, an aspect that contributes to keeping alive the phenomenon of competition between corporate systems and, at the same time, maintaining a high level of attractiveness of the laws of individual states and the corporate models made available by each of them; in order to retain within the national borders the largest number of institutions (with consequent taxation imposed on them). The attempt of some associations and private vocation to reach a certain level of standardization, through the drafting and publication of some models of law transposed into the legislation of almost all states with specific variants aimed at aligning as much as possible models to the traditions and corporate principles developed in each system.

Government and of the federal authorities intervention, although intensified in more recent times in the light of crisis and scandals that have hit the banking and financial sector, favoring the establishment of a mechanism of competition that is also

109. As we have seen, we preferred to refer to "company law" in a broad meaning, without regard to the more or less coherent facets within the individual national systems.

110. Very often, the U.S. they have limited to the utmost the imposition of mandatory rules, using them exclusively for the most important issues, such as the powers held by members and directors.

"vertical" between legal systems, it is wholly substituted for the law of single states, but it is, if anything, flanked by it to regulate issues of crucial importance, such as, in particular, the regulation of listed companies and investments (Tröger, 2005: 11 ss).[111]

On this front there is no evidence of the actual existence of a competitive system, in a vertical or horizontal sense. In EU, in fact, except for a few states, there has not been a "rush" to the use of common models, with some states that, at the time of writing, have left even empty the box relating to the number of constitutions of community vehicles. It would not have been easy for different reasons, such as the obstacles to regulatory arbitrage, the uniqueness of institutional conditions in US when competition began, the lack of incentives for politicians to promote their own state as a paradise company and the costs to be incurred for the re-incorporation proceedings (Tröger, 2005: 11 ss).

Rather, the advances that have been seen in European company law, rather than tend to attract constituent phenomena, even by means of transfers from third countries, have basically aimed to introduce good governance rules for the corporate bodies established in EU, limiting itself to strictly purely "procedural" moments in corporate life and ignoring some aspects of crucial importance for governance, such as the duties of directors or the discipline of groups of companies.[112] In addition, the US jurisdictional system, on the subject of corporate law submitted to the court of justice, as discussed in the previous chapter, is not as extensive (although it has led to significant judgments), which does not favor full absorption on the part of the business community of the jurisprudential principles expressed therein.

The role that the legal professions play in the two systems: in US, in addition to the courts, the advocacy, moved mostly by personal interests, has been quite able to influence the content of laws of individual states: the opt-out themes for the responsibility of administrators in Delaware and the trust discipline adopted in New Jersey, arisen thanks to the work carried out by the main law firms. In Europe, on the contrary, it is at least doubtful that the professional categories of each member state are able to exert such pressure on the legislator, influencing their choices decisively.

It describes a particularly complex process of evaluation of choices regarding the

111. In this regard, however, other items are reported, according to which the influence of federal intervention should not be identified solely in the regulatory work of Congress, SEC, NYSE, but in reality should also be traced back to a part of legislation promulgated in order to supplement or overcome state law. According to this opinion, the legislative action carried out on an ongoing basis by individual states in corporate matters would find a reason in the "ever-present threat of federal regulation", which would also "confine" state action to a "considered tolerable" level. in Washington". As a result, much of the content of US corporate law could be explained in light of this particular "verticality" of the U.S.

112. Unlike, for example, the banking and financial sector, whose discipline issued at Community level and subsequently transposed in the individual Member States, especially recently, in the framework of the Banking Union, is very dense and highly detailed.

state to set up its corporate body and the legal form to be assigned to it, which therefore cannot disregard an examination of the multiple profiles that each organization and each company form make available of business operators.

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